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Historically, much of the litigation filed by poverty law advocates against state agencies has been resolved through negotiations between the parties. These negotiations can result in agreements that do not involve court orders, such as private settlement agreements. A case can also be settled through a consent decree.

Plaintiffs usually prefer consent decrees because they result in orders that are enforceable by the court if defendants fail to comply. However, as I discuss below, state agencies and their attorneys are increasingly likely to oppose the use of consent decrees. And, in a significant area of developing jurisprudence, several states are asking courts to modify or terminate existing decrees.

The states’ antipathy to consent decrees affects all areas of poverty law, but none more so than Medicaid. For this reason, I highlight Medicaid cases in this article. After providing some background, I outline the standards that govern termination and modification of consent decrees. I then discuss issues to consider when negotiating a consent decree, focusing on elements that can assure maximum compliance by the defendant and insulate the decree from future motions to vacate or modify.

Background

A consent decree is a voluntary agreement by the parties to resolve a case, including promises by the parties to take specified actions. The consent decree is reviewed, evaluated for fairness, and accepted by the court, which enters it as a judgment. By consenting to the terms of a decree, the parties forgo litigation and compromise their respective positions.

1Unless the private agreement provides otherwise, the plaintiff will likely need to rely on state contract law if the agreement is breached. See Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 380–81 (1994). Other settlement devices include stipulated dismissal of the case or a conditional stipulation of dismissal once the defendant takes specified steps. See Federal Rule of Civil Procedure 41(a)(1)(A) (2007).

2Parts of this article appeared in a fact sheet, Consent Decrees in Medicaid Cases, that I prepared in March 2007 with a grant from the National Disability Rights Network Training and Advocacy Support Center.
Thus a consent decree has attributes of both a contract and a judicial order. As the U.S. Supreme Court noted, consent decrees have a "dual character that has resulted in different treatment for different purposes."3 The decree "embodies an agreement of the parties and thus in some respects is contractual in nature."4 A consent decree is also "enforceable as a judicial decree" of the court, and the court will play an independent role in any enforcement action.5

Consent decrees also place obligations on the parties that differ from obligations arising under a court order upon summary judgment or following a trial. For example, if the federal court enters summary judgment and an injunction in favor of the plaintiffs, the injunction may address only ongoing violations of federal law. By contrast, in a consent decree, the defendant may agree to broader relief.6

A negotiated settlement has obvious advantages. Its terms are often more specific than the injunctive relief that a court might otherwise award. Negotiation allows the parties to engage in creative problem solving, with each side taking the other's concerns into account. The agreement is voluntary, and thus a defendant may be more committed to attaining the promised remedy. Consent decrees have historically been an effective way for government entities that are violating federal law to resolve disputes with a minimum of unwanted attention, usually without admitting any wrongdoing. Moreover, the negotiated settlement allows both parties to "save themselves the time, expense, and inevitable risk of litigation."7

Unfortunately, consent decrees have become controversial. Some policymakers and executives argue that consent decrees run counter to their concepts of "states' rights" and executive independence. In 2005 some members of Congress attempted to embody these concepts in federal legislation that would have fundamentally altered the use of consent decrees in federal court. The so-called Consent Decree Fairness Act, among other results, would have allowed a government defendant to file a motion to vacate or modify a consent decree four years after the decree was entered or after the election of a new state or local official.8 The consent decree would have lapsed if the federal court overseeing it did not rule on the motion within ninety days. Notably, Sen. Lamar Alexander introduced the legislation. He represents a state—Tennessee—whose governor has balked at complying with existing Medicaid consent decrees.9 While the legislation was not enacted, it serves notice of the onerous conditions that can threaten consent decrees and reminds advocates that national policymakers could significantly change this area of the law.

To further complicate matters, the Supreme Court invited activity in this area at the conclusion of its recent decision in Frew v. Hawkins:

The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State’s obligations is returned promptly to the State and its officials. As public servants, the

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3Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).
5Id. See, e.g., Grier v. Goetz, 424 F. Supp. 2d 1052 (M.D. Tenn. 2006) (both parties’ proposed revisions of a consent decree did not fully implement the court’s prior rulings; parties are ordered to adopt the court’s revisions affecting medical necessity decisions in Medicaid managed care program).
6See, e.g., Local No. 93, 478 U.S. at 525. See also, e.g., Alexander v. Britt, 89 F.3d 194 (4th Cir. 1996) (different obligations of defendants in a case involving problems with the timely processing of Medicaid applications); Komyatti v. Bayh, 96 F.3d 955, 959 (7th Cir. 1996) ("It is well established that consent decrees may embody conditions beyond those imposed directly by [federal law] itself … [when] the condition … is related to elimination of the condition that is alleged to offend …. ").
Not surprisingly, given these developments, remedying government wrongdoing through consent decrees is becoming more difficult. State Medicaid agencies are increasingly wary of entering into them, and judges are more reluctant to order them, particularly where doing so might mean retaining jurisdiction indefinitely. Some states have enacted laws that require state officials to obtain the governor’s or legislature’s permission before entering into a consent decree—a move clearly designed to discourage settling cases in this way.11

These pressures mean that advocates should file cases only where the facts and harm are clear, the legal claims are strong and closely tied to the facts, and the willingness to litigate is readily apparent. Equally critical, plaintiffs’ counsel must clearly understand the desired relief. The stronger a case, the greater the likelihood that it can be resolved through a negotiated settlement. Advocates must avoid the temptation to file a case because a government worker states that the agency “needs to be sued” and intimates that, once sued, the case will be settled. While this might have been an easy path to settlement in the past, such statements today should not lure advocates into a weak lawsuit.

Standards for Terminating or Modifying Consent Decrees

With defendants and some courts souring on the use of consent decrees, state attorneys filing motions to modify existing consent decrees or vacate them altogether comes as no surprise.12 The parties can specify grounds and processes for modification or termination as part of the consent decree. Otherwise, because the consent decree is a judgment of the court, the Federal Rules of Civil Procedure govern modification and termination. Rule 60(b) lists six grounds for obtaining relief from a judgment or order of the court. The rule provides, in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: … (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

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10 Frew v. Hawkins, 540 U.S. 431, 442 (2004), subsequent decision sub nom. Frazar v. Ladd, 457 F.3d 432, 438 (5th Cir. 2006) (rejecting state’s argument on remand, that Frew “ushers in a new standard for consent decree modification. While the Court in Frew II did underscore the federalism mandates in institutional reform litigation, it did not alter the standard for modification of consent decrees”).

11 See, e.g., UTAH CODE ANN. §§ 63-38b-101-202 (2007) (requiring legally binding agreements in excess of $100,000 to be approved by the governor).

it is no longer equitable that the judgment should have prospective application: ....)

According to Moore's Federal Practice, "Rule 60(b) enables a court to grant a party relief from a judgment in circumstances in which the need for truth outweighs the value of finality in litigation." As an exercise of equitable power, the review of a Rule 60(b) motion will be case-specific but will typically consider the provisions of the consent decree (i.e., the four corners of the document), the negotiating history, and the conduct of the parties following entry of the decree. And while the court has discretion when reviewing Rule 60(b) motions, the party seeking to modify or terminate the decree is generally understood to have a heavy burden. The Eleventh Circuit, for example, says that a party seeking to modify a consent decree has a "high hurdle to clear and the wind in its face."2

In Rufo v. Inmates of Suffolk County Jail the Supreme Court announced a flexible standard for modifying consent decrees and explained a two-part test: (1) the party seeking modification must establish that a significant change in facts or law warrants revision of the decree, and (2) the court should determine whether the proposed modification is suitably tailored to the changed circumstances. According to the Rufo Court, this flexible standard is needed because the extended life of the decree increases the likelihood that significant changes will occur, and flexibility serves the public's interest in assuring the sound operation of its institutions.3

With respect to showing significant changes in facts, Rufo offers a nonexhaustive list of conditions sufficient to support modification: (1) the changed circumstances "make compliance with the decree substantially more onerous," (2) the decree "proves to be unworkable because of unforeseen obstacles," or (3) "enforcement of the decree without the modification would be detrimental to the public interest."4

A change in the law can also form the basis for a Rule 60(b)(5) motion.5 In fact, state officials increasingly cite this reason for terminating consent decrees in institutional reform and other public interest litigation.6 In Rufo the Supreme Court discussed the effect of a change in law as follows:

A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal

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1 Federal Rule of Civil Procedure 60(b) (2007). Effective December 1, 2007, the rules were amended as part of a general restyling to make them more easily understood. The changes are intended to be stylistic only.


3 Despite some discussion, courts do not appear to distinguish between modification and dissolution of consent decrees. See, e.g., Alexander, 89 F.3d at 197 (discussing cases); Frew, 401 F. Supp. 2d 619, 632-33 (E.D. Tex. 2005) (discussing cases).

4 Sierra Club v. Meiburg, 296 F.3d 1021, 1034 (11th Cir. 2002).


6 Id. at 382-84.

7 Id. at 384. See also, e.g., Frew v. Hawkins, 401 F. Supp. 2d 619, 628-29 (E.D. Tex. 2005) (discussing Rufo; "a relevant significant change in circumstances is one that is unanticipated and beyond the defendants' control").

8 See Moore, supra n. 14, § 60.47[2][c].

9 E.g., defendants have moved for termination of consent decrees that require Medicaid to be furnished with reasonable promptness; defendants argue that recent circuit court cases establish that the state has responsibility only for prompt payment of claims and not for prompt provision of services. See, e.g., Chisholm v. Cerise, No. 97-3274-CJB-ALC (E.D. La) (denying defendant's motion for relief from 2000 and 2002 consent decrees concerning services for children awaiting home and community-based waiver placements) (on file with Jane Perkins); Brown v. Tennessee Department of Finance, No. 3:00-0665, 2007 WL 2710704 (M.D. Tenn. Sept. 12, 2007) (denying defendant's motion to vacate a 2004 order regarding Medicaid coverage of services for individuals on home and community-based waiver waiting lists). State agencies have also argued a change in law; they cite Gonzaga University v. Doe, 536 U.S. 273 (2002), a case that tightened the test for determining when federal laws may be enforced pursuant to 42 U.S.C. § 1983. For discussion of Section 1983, see Jane Perkins, Using Section 1983 to Enforce Federal Laws, 38 Clearinghouse Review 720 (March–April 2005).
what the decree was designed to prevent.24

The Rufo Court also cautioned, however, that "[t]o hold that a clarification in the law automatically opens the door for re-litigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation."25

In sum, the Supreme Court has established a flexible standard for modifying or terminating consent decrees pursuant to Rule 60(b)(5). As a result, application of the standard will vary somewhat from circuit to circuit. Moreover, while the burden is clearly upon the moving party, the Supreme Court in Frew appeared to invite these motions when it instructed the lower courts on the circumstances for promptly terminating consent decrees involving states and state officials.26

Considerations When Negotiating Settlements

When negotiating a settlement, choose words carefully. As the Supreme Court noted:

[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.27

A judge in a Medicaid case recently put it this way: "A court may not replace the terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree’s goals."28

Careful crafting will ensure the relief needed to address the violation of law and blunt the defendants’ ability to modify the consent decree in the future.29 The Federal Practice Manual for Legal Aid Attorneys describes several factors to consider when negotiating settlements.30 These include:

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22Rufo, 502 U.S. at 388 (emphasis added); id. at 390 (“While a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law.”); see also, e.g., American Horse Protection Association Incorporated v. Watt, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (“When a change in the law authorizes what had previously been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law”).

23Rufo, 502 U.S. at 389. Compare, e.g., Sweeten v. Brown, 27 F.3d 1162, 1166 (6th Cir. 1994) (vacating consent decree because the clarification in law was significant), with United States v. Wayne County, 369 F.3d 508, 515 (6th Cir. 2004) (a clarification of law was insufficient to modify a consent decree if the change did not effectively legalize the decree’s prohibitions), and United States v. Krilich, 303 F.3d 784 (7th Cir. 2002) (denying motion based on change in law).

24Frew, 540 U.S. at 442. To illustrate, Jeff D. v. Kemphorne, No. CV-80-4091-S-BLW, 2007 WL 3256620 (D. Idaho Nov. 2, 2007), involved a 24-year-old consent decree governing the state’s mental health system. The defendants had a history of noncompliance and had been found in violation of the decree earlier in 2007. On a renewed motion to vacate, however, the district court found the defendants in substantial compliance and granted the motion. The court stated that “having federal courts engaged in long-term oversight of state agencies is exceedingly unhealthy to our federal system.” Id. at *5. It reasoned that the Rufo standard was “flexible” and cited language from a previous appellate decision that, while upholding the decree, acknowledged that “state officials labor under significant budgetary and administrative constraints,” so that the district court may appropriately vacate the decree “once the state has made significant efforts to comply....” Id. at *4 (quoting Jeff D., 365 F.3d 844, 851 (9th Cir. 2004)).


26Rosen v. Tennessee Commissioner of Finance and Administration, 288 F.3d 918, 925 (6th Cir. 2002) (quoting United States v International Brotherhood of Teamsters, 998 F.2d 1101, 1107 (2d Cir. 1993)).

27See, e.g., Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985) (“A defendant who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative obligations as were imposed by the decree.”).

Class Actions. If the court has not certified the case as a class action, the plaintiff should weigh the necessity of certification. If the case involves straightforward prospective injunctive or declaratory relief, class certification may be unnecessary. If obtaining compliance will be more complex, however, class certification will ensure that the consent decree can be monitored and enforced as long as individual class representatives act on behalf of the class. Class certification can also prevent future litigants from filing new cases that seek other, conflicting relief. The decree should state the class definition, whether that definition was agreed upon by the parties or was decided by the court in an earlier ruling. Notably, the parties will need to comply with the Federal Rules of Civil Procedure for settling class actions.

Defendants. If the complaint names a state official as a defendant, the terms of the consent decree should explicitly extend to that defendant’s agents, successors, and assigns in order to clarify responsibility for future compliance. If the defendant contracts or may in the future contract with a private entity to undertake one or more of the responsibilities set forth in the agreement, a provision should obligate the defendant to include all or selected provisions of the consent decree into these private contracts (or to incorporate the decree by reference with a copy of the decree attached as an exhibit). In Hernandez v. Medows, for example, the parties agreed to the due process protections that will apply when outpatient prescription drug coverage is denied or terminated by the Florida Medicaid agency. Because the state contracts with private health maintenance organizations to provide Medicaid services, the consent agreement requires the defendant to apply the agreement to its contractors and to incorporate review of the health maintenance organizations’ ongoing compliance with the agreement into its formal compliance monitoring.

Statements of Critical Facts, Considerations, and Goals. The consent decree should list material facts and considerations, as agreed by the parties or stated by the parties separately. The plaintiffs should also take care to include the objects and goals of the litigation and consent decree. Complete statements memorialize the parties’ motivations and considerations when the decree was entered and thus can affect the government’s ability to modify the decree based on arguments that unanticipated changes have occurred.

A recent case shows the importance of such statements. In Doe v. Pataki the Second Circuit ruled that the wording of a consent decree did not prohibit the state from changing its law. The case concerned due process hearings under the New York Sex Offender Registration Act. The decree stated the number of years that sex offenders were subject to the registration requirement. Thereafter the New York legislature amended the Act to lengthen the registration period. The plaintiffs returned to court and argued that the consent decree precluded extending the registration period. In a split decision, the majority acknowledged that there was no dispute as to the meaning of the words used in the decree. However, the issue was whether the parties intended to include those words in the decree “as part of a resolution of disputed matters for which the parties had bargained, or only to illustrate the provisions of then-existing state law.” Although the plaintiffs argued that the duration re-
requirement was a key part of the bargain, the court found no “objective evidence” of their position. While the court did acknowledge that the state could have agreed in the consent decree not to change the state law, “proper regard for state authority requires a federal court to have a clear indication that a state has intended to surrender its normal authority to amend its statutes.”34 The Doe decision shows the need for parties not only to use clear words but also to be clear what provisions are the subject of the bargain.

**Declaratory Relief.** Plaintiffs should consider whether the consent order should declare their rights under the law. A declaratory statement can establish the legal standard for measuring compliance (particularly when, as is likely, the defendant refuses to admit liability). If the defendant is violating the terms of the agreement, a declaration of rights can allow the plaintiff to make a straightforward motion for further relief without having to use contempt or show-cause proceedings.35 Similarly, in any future motion by the defendant to modify or terminate, the declaration will affect an argument that unanticipated changes have occurred.

A declaration of rights could also form the basis for a motion to vacate the decree if the law does change. Thus the decree should be worded carefully to avoid a motion to vacate if, at a later time, an appellate court finds that beneficiaries may not enforce provisions that were cited in the complaint.

**Implementation Plan.** The consent decree should describe the specific actions that the defendant will take to provide relief. For example, if a new regulation is needed, the decree should describe the time frame for promulgating and finalizing the rule and the plaintiffs’ role in determining the content of the rule. The agreement can incorporate the specific wording of the regulation or specify the issues that the regulation will address. For example, in Thompson v. Raiford, the parties agreed that the secretary of the U.S. Department of Health and Human Services would amend the State Medicaid Manual to include provisions requiring lead blood testing for Medicaid-eligible children and youth.36 The parties agreed on the wording of the provisions and the time frame for publishing the revised wording.

If multiple systemic changes are needed, the decree should provide details and time frames for the steps to be taken. It should describe the plaintiffs’ role in monitoring and reacting to implementation. If the issues involved are technical, the parties may agree that designated experts will develop the implementation plan.

The consent decree should also specify the process for involving the court in any future disputes, including the parties’ obligations (e.g., to meet and confer) before involving the court. For example, the agreed order in a Medicaid case in the District of Columbia provides that the plaintiffs will bring before the court only problems with systemic implementation, and not individual medical necessity cases.37 The parties can also agree to language specifying the grounds for modifying the decree; otherwise, as discussed above, Federal Rule of Civil Procedure 60(b) will control modification.38

State attorneys increasingly enter negotiations claiming that any agreement must be “budget neutral.” In these instances the defendant may want a provision that certain changes will occur only if additional state appropriations are obtained and that the defendant will use his “best efforts” to obtain additional funding. Whether to accept a “best efforts”

34Id. at 78.
provision can be a difficult choice for plaintiffs’ counsel, who should consider the agency’s track record in obtaining past appropriations, whether the agency will agree to work with the plaintiffs to assure the funding, the composition of the executive and legislative branches of state government, and the likelihood of the assigned judge ordering the defendant to do more than exert best efforts.

**Defining Compliance.** In recent years defendants seeking dissolution of consent decrees have sometimes argued that, regardless of a decree’s terms, a federal court may require a sovereign state to do no more than to comply with federal law. Although the Supreme Court rejected this argument, state defendants continue to search for ways to terminate existing consent decrees.39

Thus the decree should define compliance as thoroughly as possible at the outset. Provisions should be carefully drafted and explicit. For example, the decree “should not state merely that persons are entitled to timely services, or to treatment in the least restrictive setting, but actually define what ‘timely’ and ‘least restrictive’ mean, in a manner not subject to reasonable dispute.”40

Depending on the case, the parties may be able to agree to interim compliance measures or standards that will allow parts of the consent decree to be lifted as compliance occurs. For example, in a case involving Medicaid coverage of lead blood tests, the parties agreed that 30 percent of children aged 12 months and 24 months would be tested in the first year, 50 percent in the second year, and so forth.41

A decree that is time-limited should specify the period over which sustained compliance will be required before the defendant will be considered to be complying with the law.

**Monitoring Compliance.** If ongoing compliance may be an issue, some form of monitoring and reporting likely will be needed. Reporting provisions should be clear, reliable, and manageable for the attorneys who are monitoring the case.

To ensure that the defendant makes the programmatic, data reporting, and personnel decisions needed to implement the agreement on time, the decree may provide for more frequent reporting in the earlier stages of implementation. The parties may agree to assign responsibility for monitoring compliance to a named employee of the defendant or to a particular defendant agency staff position. In particularly technical cases, the parties may agree that a master will monitor and enforce compliance.42

**Duration and Retention.** The decree can include a permanent injunction and, or instead, specify the period during which the defendant will be subject to the order. If possible, “obtain a permanent injunction concerning the defendant’s overall legal obligations, such as to provide timely service..., even if other provisions of the decree, such as reporting to plaintiffs, expire after a designated time or achievement of specified events.... As long as the decree specifies that it is a permanent order, the defendant has a very heavy burden to meet before the order may be vacated.”43

The parties may also agree to a specific period during which the court will retain jurisdiction. Recently provisions for retained jurisdiction, on the one hand, have met with some resistance from defendants and, in some cases, from the

39See Frew, 540 U.S. at 440 (“[f]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance.”).


41Frew v. Hawkins, 540 U.S. 431, 441 (2004), citing with favor Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114 (3d Cir. 1979). In Shapp the circuit court affirmed modification of a consent decree in a Medicaid case; the court found that defendants had made a good-faith effort to comply, but circumstances beyond the defendants’ control and not contemplated by the court or the parties put achievement beyond reach. 602 F.2d at 1120–21.


courts. On the other hand, establishing the retention time frame can be desirable because it gives the parties and the court predictability and a clear measuring stick. In *Alexander v. Britt*, a Medicaid application processing case, the Fourth Circuit in 1996 refused to accept early termination of a consent order providing for a six-year period of retained jurisdiction. The court reasoned that “[i]t would seem that the six-year term makes it impossible for the administrators to have complied with the 1992 consent order, or for the order to have fulfilled its purpose, in less than six years.”

In sum, while retained jurisdiction is preferable, even without it a party or class member can enforce a consent order that is a permanent injunction. If a class has not been certified, an individual may be able to enforce the order citing Federal Rule of Civil Procedure 71, which states in part that “[w]hen an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order using the same process as if a party ….”

**Attorney Fees.** Plaintiffs’ counsel should avoid the issue of attorney fees until after the substantive terms of the settlement are finalized. If the parties do not agree to an amount of attorney fees in the consent order itself, the agreement should provide that the plaintiffs are prevailing parties for purposes of attorney fees and set forth a process and time frame for resolving the fee award. The parties may also agree that plaintiffs will receive attorney fees for monitoring compliance and, or instead, for enforcement.

**A Word about Enforcing Consent Decrees**

While I have focused on motions to modify or terminate consent decrees, plaintiffs’ counsel may need to enforce an agreement if the defendant fails to comply. Unless a decree’s terms state otherwise, an enforcement action may be filed even after the court has dismissed the case or otherwise removed it from the docket. An enforcement action can take numerous forms, including interpreting the decree, issuing additional injunctions to implement it, granting supplemental relief that achieves the decree’s goals, delegating enforcement authority to a special master, and holding a party in contempt of court.

These enforcement mechanisms have different repercussions. Contempt, for example, involves a motion to show cause and requires the plaintiff to establish a pattern and practice of substantial noncompliance. Federal judges are increasingly reluctant to impose contempt sanctions on states and their officials. Other enforcement mechanisms, such as a motion to enforce due to noncompliance, may be more likely to succeed because they are less threatening to the defendant and the court. However, in response to such a motion, the defendant can argue that it has acted in good faith to comply—a defense that is not acceptable in a contempt action.

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45 Id. at 200.
50 See, e.g., *McComb v. Jacksonville Paper Company*, 336 U.S. 187, 190–91 (1949) (“Civil … contempt is a sanction to enforce compliance with an order of the court…. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.”). Impossibility of compliance is a defense; however, the burden is high as “[d]efendants must show not merely that they tried and failed, but that they have exhausted every reasonable avenue.” Anderson, supra note 49, at 738 (1986).
Regardless of the form of the motion, an enforcement action should be supported by the clearly defined obligations of the consent decree and rigorous evidence that shows the nature and extent of the violations.51 Thereafter narrowly tailored requests for relief will help move the court toward a favorable ruling—and set the stage for future compliance monitoring and, if necessary, escalating orders.

State defendants are increasingly resistant to consent decrees that are at odds with their concepts of federalism and states’ rights. Nevertheless, states are more likely to agree to negotiations when they encounter well-pled complaints with strong facts and plaintiffs’ counsel who are clearly willing to litigate. In these cases, consent decrees remain viable. Advocates should take great care when negotiating decrees. Carefully worded, these agreements can result in effective and efficient programmatic changes, with the parties working together and minimal involvement of the court.

51Courts have permitted plaintiffs to conduct discovery to determine the extent of the government’s compliance with the court’s order. See, e.g., New York State Association for Retarded Children v. Carey, 706 F.2d 956, 960 (2d Cir. 1983) (discovery in a class action case explored state’s compliance with a consent judgment); see also, e.g., Wyatt v. Poundstone, 892 F. Supp. 1410, 1423 (M.D. Ala. 1995) (discovery ordered in a class action concerning state’s failure to comply with a court order concerning the operation of the state’s residential treatment). Attorney fees may be awarded in connection with the discovery. See, e.g., Motley v. Yeldell, 664 F. Supp. 557, 559 (D.D.C. 1987).
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