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Charles F. Phillips, Jr.

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## THE CONSENT DECREE IN ANTITRUST ENFORCEMENT

By CHARLES F. PHILLIPS, JR.\*

During the past ten years, the United States has witnessed what might be called a "revival" of antitrust enforcement. In 1959, for example, the Government filed sixty-three antitrust cases; more than at any time since 1943 when Thurman Arnold brought seventy separate suits. Included were ten anti-merger suits filed under the Clayton Act, a 100 per cent increase over 1958 and half again as many as in any year since the statute was adopted in 1914.<sup>1</sup>

These facts and figures are impressive, but the enforcement of our antitrust laws must involve more than simply the filing of numerous suits. The maintenance of a competitive economy is not an end in itself, but rather a means to an end. That end: efficient resource allocation throughout the economy, a higher standard of living for all, and the preservation of personal freedom.

Historically, the disposition of antitrust cases by consent of the parties, rather than through court trial, has been an outstanding feature of the administration of the antitrust laws by the Department of Justice. Nearly three out of every four of the civil antitrust cases that the Department has started have ended by consent.<sup>2</sup> Recently, several important cases have been disposed of in this manner, including cases involving IBM, AT&T, Eastman Kodak, and United Fruit.

The development and use of the consent decree as the major instrument in the Antitrust Division's program to enforce the antitrust laws has generated substantial controversy. This article will discuss the nature, legal basis, and use of the consent decree, as well as its results. Some suggestions will also be made as to how the consent decree could be made an even more effective instrument in future antitrust enforcement.

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\*Assistant Professor of Economics, Washington and Lee University. B.A. 1956, University of New Hampshire; Ph.D. 1960, Harvard University.

<sup>1</sup>Department of Justice Press Release of January 4, 1960.

<sup>2</sup>Consent Decree Program of the Department of Justice, Report of the Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 86th Cong., January 30, 1959, p. IX. (Hereinafter referred to as "Report.")

## I. NATURE AND USE OF CONSENT DECREES

A consent decree usually emerges from a series of secret, informal negotiations between lawyers representing the Antitrust Division and counsel for the defense. In theory, one of the principal objectives of the consent decree procedure is to eliminate the time and expense involved in trial preparation. Consequently, a compromise is ordinarily reached at a relatively early stage in the litigation. In the majority of civil antitrust actions, the consent decree is entered shortly after the filing of the complaint and before the use of discovery procedures. Similarly, where a criminal action is commenced by the Division and where the defendant wishes to settle, "if agreement is reached, a consent decree will be entered in a civil proceeding instituted for that purpose, and the prosecution terminated by a *nolle pros.*"<sup>3</sup>

In many cases, a number of defendants are involved. Some may agree to terminate the proceedings by accepting the relief demanded by the Division, while, at the same time, other defendants may decide to litigate the legal and factual questions involved. In such circumstances, the Division negotiates such consent judgments with fewer than all defendants even though less drastic relief may be awarded against litigating defendants than against those who entered into a consent decree.

The burden of initiating negotiations and preparing a first draft of the provisions of a consent decree rests upon the defendant. As explained by former Assistant Attorney General Hansen:

"When the defendants wish to settle the case against them without trial, they are instructed to submit a proposed decree to the trial staff; their draft uses the prayer of the complaint as a guide to the Government's desires for relief.

Of course, defendants' counsel may discuss with the trial staff their views on relief terms before they submit the initial proposal, but the Division adheres to the practice of defendant-initiated consent-settlement drafts to avoid any implication of coercion occasioned by an accompanying criminal action and to retain flexibility until actual negotiations begin."<sup>4</sup>

In 1954 the Antitrust Division revealed an innovation in its consent decree procedure when it announced a settlement accepted by

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<sup>3</sup>Katz, *The Consent Decree—Antitrust Administration*, 53 Harv. L. Rev. 415, 423 (1940).

<sup>4</sup>Consent Decree Program of the Department of Justice, Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 85th Cong., serial No. 9, p. 11. (Hereinafter referred to as "Hearings.")

the Eastman Kodak Company on the day the case was filed with the court.<sup>5</sup> Here, the terms of the settlement were negotiated before bringing suit and the costs of litigation were saved. In such a situation the Division first approaches the defendants to notify them in advance about the contemplated action and to outline in general terms the grievance. "If the prospective defendants care to start negotiations toward a possible decree in advance of the filing of our complaint, we are ready to meet them at the conference table."<sup>6</sup> Since 1954, this method has been used in settling a growing number of civil suits.

Whichever method is used, after the defendants have submitted a draft of their proposals, a period of extensive negotiations begins with the lawyers of the Antitrust Division over the final provisions of the decree. On occasion outsiders may be consulted by the Division. Nevertheless, the negotiations are secret, the public is excluded from the negotiating process, and the information that is exchanged between the parties is strictly confidential.<sup>7</sup> After agreement has been reached on the terms of the decree, the final arrangements for its submission for court approval are kept confidential. Only after the decree has been filed in court does the public become aware of what has transpired.

Generally, consent decrees are accepted and signed by the court as a routine matter. If the court, after a brief presentation by defendant's counsel and the Division's lawyers, is satisfied that the parties are in agreement, the requested order is entered with but a cursory examination. Findings of fact or conclusions of law are not made, nor are they required.<sup>8</sup> "Current procedure contains no provision to require the Department of Justice to prepare a written statement that sets forth the facts on which the Government based its case, what the terms of the decree are expected to accomplish, or the reasons for the Government's acceptance of the particular compromise. Similarly, the court is not requested or required to render a written opinion."<sup>9</sup> As will be discussed below, these procedures for the entry and acceptance of consent decrees represent a departure from litigated antitrust actions.

Such, then, is the nature of a consent decree. In 1940 the Tempor-

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<sup>5</sup>United States v. Eastman Kodak Co., CCH 1954 Trade Cas. ¶ 67,920.

<sup>6</sup>Hearings, p.12.

<sup>7</sup>The Antitrust Division refused to supply the Antitrust Subcommittee with details concerning consent decree negotiations in the AT&T and oil pipeline cases. See Hearings, pp. XI-XIV.

<sup>8</sup>United States v. Institute of Carpet Manufacturers of America, 1 F.R.D. 636 (1941).

<sup>9</sup>Report, p. 14.

ary National Economic Committee reported that over one-half of the antitrust civil actions instituted by the Division had resulted in negotiated settlements.<sup>10</sup> Since that time the proportion has been even higher. In the 5-year period 1950-54, 97 cases, or 65 per cent of the 150 civil cases terminated were disposed of by consent judgments. In the 5-year period 1955-59, 121 cases, or 79 per cent of the 154 civil cases terminated ended by consent.<sup>11</sup> As a form of antitrust enforcement, consent decrees today are fully as important as are court decisions.

## II. LEGAL ASPECTS AND DIFFERENCES BETWEEN DECREES AND LITIGATED CASES

The Sherman Act does not provide for the settlement of antitrust suits through consent decrees; nor is there any reference to such a procedure in the congressional debates. The only reference to consent decrees is contained in section 5 of the Clayton Act. That section provides that consent decrees cannot be used as evidence of antitrust violations in private actions against the defendant.<sup>12</sup> By this provision, Congress recognized by implication the Attorney General's authority to use consent decrees in terminating antitrust litigation.

While the legal authority to dispose of litigation by consent of the parties does not rest upon express statutory provision, there is an implied power derived from the historical right of the prosecutor to initiate and conclude legal proceedings. "It emerges out of the very process of litigation; settlement out of court is one of the oldest of legal usages."<sup>13</sup> Its use dates from 1906,<sup>14</sup> and has largely been unquestioned since the early case of *Swift & Co. v. United States*.<sup>15</sup>

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<sup>10</sup>Hamilton and Till, TNEC Monograph No. 16, p. 88 (1940).

<sup>11</sup>Information supplied by Antitrust Division.

<sup>12</sup>38 Stat. 731 (1914), 15 U.S.C. § 16 (1952). Section 5(a), as amended in 1955, reads as follows:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A."

<sup>13</sup>Hamilton and Till, op. cit. supra note 10, at 88.

<sup>14</sup>*United States v. Otis Elevator Co.*, 1 D. & J. 101 (9th Cir. 1906).

<sup>15</sup>The courts have frequently recognized the existence of this implied power. See *Crysler Corp. v. United States*, 316 U.S. 556 (1942); *Aluminum Co. of America v. United States*, 302 U.S. 230 (1937); *United States v. Swift & Co.*, 286 U.S. 106 (1932);

In the latter case, it was argued on appeal to the Supreme Court that a prior consent decree was void for six specific reasons, two of which were as follows: (1) that jurisdiction under the antitrust laws cannot be conferred upon the courts by consent, and (2) that the Attorney General had no power to assent to the decree entered in this instance.

Mr. Justice Brandeis, delivering the opinion of the Supreme Court, rejected these contentions and sustained the validity of the earlier decree. With respect to the decree complained of, the Court held that there was clearly no lack of judicial power to enter the decree. The Court further held that decrees could be challenged on the basis of clerical errors in their composition, fraud in their procurement, the absence of actual consent to the decree when entered, or the lack of federal jurisdiction because of the citizenship of the parties. Barring these, however, the Court quoted with approval a previous decision which stated: "a decree which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause."<sup>16</sup>

As a consequence of *Swift*, as well as subsequent decisions, the legal basis of consent decrees is now firmly established. Since such decrees evolve through a process of negotiation rather than litigation, they have several other important legal features. First, only two issues are determined in such settlements: that the court in which the decree is entered has jurisdiction of the subject matter and of the parties, and that the complaint upon which the decree is based states a valid claim upon which relief may be granted.<sup>17</sup> Normally in a consent decree, the defendants deny the substantive allegations of the Government's complaint but agree to the entry of the decree "without trial or adjudication of any issue of fact or law . . . and without any admission by plaintiff or defendant in respect to any issue. . . ."<sup>18</sup>

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*Swift & Co. v. United States*, 276 U.S. 311 (1928); *United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. Radio Corp. of America*, 46 F. Supp. 654 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943). The Attorney General, in a formal opinion, has upheld the authority to compromise litigation in which the United States is a party as an inherent power of his office. 38 Ops. Att'y Gen. 98.

<sup>16</sup>*Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885).

<sup>17</sup>"This Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a claim upon which relief may be granted against each of the defendants under Sections 1, 2, and 3 of the Act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly known as the Sherman Act, as amended." *United States v. Western Electric Co.* CCH 1956 Trade Cas. ¶ 68,246.

<sup>18</sup>*Ibid.*

Second, a consent settlement is unlike a private agreement in that once it has been accepted by a court, it has the same legal effect as a judgment in a fully litigated action. As the Supreme Court put it in the *Swift* case: "We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act." The effect, the Court continued, "is all one whether the decree has been entered after litigation or by consent."<sup>19</sup> As a judicial act, therefore, a consent decree constitutes determination by the court that its content is equitable and in the public interest. The parties are bound and confined by the terms of the decree insofar as equitable relief is obtainable under the state of facts alleged in the complaint.<sup>20</sup>

Third, a consent decree often establishes the standard of conduct for an entire industry. Companies that are not parties to the decree may be affected in their competitive relationships by its terms. As described in the 1940 TNEC investigation:

"The instrument has a sweep which no process of law could ever impart. It can go beyond sheer prohibition; it can attempt to shape remedies to the requirements of industrial order. If the demand is for adjustment within an intricate scheme of trade practices, at least it supplies the instrument. It can reach beyond the persons in legal combat to comprehend all the parties to the industry. It can accord some protection to weaker groups and safeguard to some extent the rights of the public. It can, unlike a decree emerging from litigation, take into account the potential consequences of its terms."<sup>21</sup>

Finally, to "effectuate . . . the basic purposes of the original consent decree," courts may approve modifications after entry.<sup>22</sup> In the *Swift* case, the Supreme Court declared: "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." The Court recognized that this power existed "by force of principles inherent in the jurisdiction of the chancery."<sup>23</sup>

Some cases seem to preclude the Government from modifying a consent decree in the absence of changed industry conditions. Thus in the *International Harvester* case, it was held that the United States may not petition for additional relief that is not contained in the con-

<sup>19</sup>United States v. Swift & Co., 286 U.S. 106, 114-15 (1932).

<sup>20</sup>See *Swift & Co. v. United States*, 276 U.S. 311, 331, 332 (1928); *United States v. Radio Corp. of America*, 46 F. Supp. 654, 655-56 (D. Del. 1942).

<sup>21</sup>Hamilton and Till, op. cit. supra note 10, at 88.

<sup>22</sup>*Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1924).

<sup>23</sup>United States v. Swift & Co., 286 U.S. 106, 114 (1932).

sent decree on the ground that it feels the remedies already provided are inadequate.<sup>24</sup> And in the *RCA* case, Judge Maris declared:

“Since these consent decrees are based upon agreement made by the Attorney General which is binding upon the Government the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decree.”<sup>25</sup>

At the same time, the court held that the Division may not institute a wholly new proceeding involving a situation already covered by a consent decree unless based upon additional facts that did not form the basis of the original proceedings.<sup>26</sup>

Recent Supreme Court decisions indicate that there has been a relaxation in the test which must be met when the Division attempts to obtain a modification of a consent decree.<sup>27</sup> It now appears that a consent decree may be changed so as to afford the additional relief that is needed to preserve competition. The Antitrust Division thus analyzed the *Hughes* case:

“[I]t appears that the Supreme Court recognized, as it would seem it must, that (in a Sherman Act case at least) a consent decree could not constitute a license to a defendant to continue in violation of the law if the Government could show in a hearing that additional different relief (in this instance divestiture) was absolutely necessary to preserve competition and prevent monopoly.”<sup>28</sup>

Defendants also have the right to obtain modifications of consent decrees. In the opinion of the Division, defendants must show as conditions precedent that: (1) since entry of the decree there has occurred an unexpected and unforeseen change in the controlling facts upon which the decree was based; (2) as a result of such change in circumstances the decree has been turned into an instrument of wrong and would, if continued to be applied to the defendant, impose an undue and unreasonable competitive or financial hardship; and (3) as a result of such change in circumstances the dangers contemplated by the decree no longer exist and, therefore, modification would not be inconsistent with the public interest.<sup>29</sup>

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<sup>24</sup>United States v. International Harvester Co., 274 U.S. 693 (1927).

<sup>25</sup>United States v. Radio Corp. of America, 46 F. Supp. 654, 656 (D. Del. 1942).

<sup>26</sup>See Aluminum Co. of America v. United States, 302 U.S. 230 (1937).

<sup>27</sup>Liquid Carbonic Corp. v. United States, 350 U.S. 869 (1954); *Hughes v. United States*, 342 U.S. 353 (1952); *United States v. Chrysler Corp.*, 316 U.S. 556 (1941).

<sup>28</sup>Hearings, p. 3749.

<sup>29</sup>Hearings, p. 3748.

One further legal aspect deserves consideration: the differences between consent decrees and litigated cases. Stated broadly, consent decree procedures almost entirely eliminate independent judicial determination of the legal and factual issues involved.<sup>30</sup> This is true despite the fact, as pointed out above, that the final order is treated as any other judicial mandate. In contrast, the basic issues are carefully spelled out in a trial. Challenged industry practices are examined at length and in public. The trial judge is required to make findings of fact and conclusions of law to support his judgment. The court's final order must carefully outline the practices considered illegal and disclose the reasons that justify injunctive relief. Moreover, since direct appeal to the Supreme Court is permitted in antitrust cases brought by the Government, the litigated case often provides the Court with the opportunity to establish precedent.

These differences between consent decrees and litigated cases have caused many observers to feel that the judicial function has been superseded by an administrative procedure in the enforcement of the Sherman Act. In large part, such a result is due to economy—antitrust cases which are litigated are expensive. The result is also due to the growing complexity of antitrust enforcement. As a consequence, litigation and negotiation have become alternative means to the same end.

### III. ADVANTAGES AND DISADVANTAGES OF THE CONSENT DECREE PROCEDURE

Consent settlements have important advantages to both the Government and defendants, as well as to the public. Yet, their widespread use in the postwar period has resulted in considerable controversy.

The consent decree procedure has the advantage of brevity. For the fiscal years 1951 through 1957, the average time lapse from complaint to final disposition for 74 litigated cases was 59.27 months; the comparable time for 139 consent cases was 32.86 months.<sup>31</sup> Thus on the average two more years are required to try a case than to obtain relief by means of consent settlement. If the Government obtains the same or similar relief by means of a consent settlement, not only can time and funds be saved by all concerned, including the public, but undesirable practices in an industry can be quickly curtailed.

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<sup>30</sup>Hearings, p. 46. See Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 *Harv. L. Rev.* 386, 408 (1940).

<sup>31</sup>Hearings, p. 430.

Beyond the saving of time and funds, a consent settlement avoids difficulties of court proof. In litigation involving economic issues, proof is often onerous. The consent decree in the *Swift* case has been analyzed in this way:

"The defendants accepted a provision prohibiting them from using or permitting others to use their distributive facilities for the handling of 114 food products. In view of the extensiveness and variety of the distributive facilities in question . . . as well as the number of the products, immense amounts of data would have been necessary to support either side had the case been contested . . . determining what part of the overhead of these facilities should be allocated to the cost of each product would lead to interminable argument with little prospect of reaching satisfactory conclusion. But painstaking demonstration is not necessary for informal compromise. Through the consent decree, issues on which proof would be almost impossible in a contested suit may be settled by stipulation."<sup>32</sup>

If properly used, consent settlements provide an economical and prompt procedure for terminating antitrust cases and promoting competition. "In consent decree negotiations, no formalized procedures stand between the parties and the economic and legal problems before them. As a result, the possibility of more practicable solutions is greatly enhanced."<sup>33</sup> Indeed, it may even be true that decree terms are more stringent than those which might have been obtained by litigation.<sup>34</sup>

Another advantage of consent settlements is that they permit consultation with other interested parties. In the past, the lack of consultation has been a major objection to the use of decrees. More recently, however, the Division had indicated a willingness to confer with those in industry. As explained by former Assistant Attorney General Hansen:

"Negotiating the IBM judgment, for example, we met with others in the industry to secure, first, a full understanding of industry problems, and industry views on effective relief, and, second, aid in understanding technical complications of tabulating and electronic data processing machines. Indeed, in one recent judgment (*R. L. Polk & Co., CCH Trade cases*, par. 67,993) the court declined entry until the Division could offer assurance we had obtained the views of complainants as to the effectiveness of proposed judgment provisions. Carrying this process one step further, in the various Paramount judg-

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<sup>32</sup>Isenbergh and Rubin, *op. cit. supra* note 30, at 390-91.

<sup>33</sup>*Ibid.*

<sup>34</sup>See Comment, 55 *Mich. Law Rev.* 92, 111 (1956).

ments specifying divestiture details, the Division publicly announced judgment provisions well in advance of submission to court."<sup>35</sup>

Under the provisions of section 4 of the Clayton Act, any person who has been injured in his business by reason of anything forbidden in the antitrust laws may sue to recover three times the damages he has sustained, plus the cost of the suit and reasonable attorneys' fees. Under section 5 of the same act, a final judgment in a case brought by the United States may be used in private treble damage suits as prima facie evidence against the defendant. A consent decree cannot be used for this purpose.

Treble damage suits were relatively unimportant during the first 50 years of antitrust enforcement, when only 13 suits were won by private parties. The postwar period, however, has witnessed the emergence of the private litigant as a significant adjunct of antitrust enforcement. Damages have been assessed both frequently and in substantial amounts. From 1951 to 1957, there were 220 public and 1,280 private suits. Although the maximum penalty that may be imposed upon conviction of an antitrust violation is \$50,000 for each count in the indictment, the recovery in some private actions has exceeded the million dollar figure.<sup>36</sup>

Complete or even partial immunity from private treble damage suits is a primary incentive in defendants' willingness to negotiate consent settlements. In major cases, where the issues in fact or law are uncertain, consent settlements would in all probability be impossible to negotiate if the defendants did not thereby secure protection from treble damage suits.

A final advantage is that consent proceedings permit defendants to avoid some of the unfavorable publicity usually associated with litigated cases. While the filing of a complaint against a company is accompanied by the announcement of a settlement, coverage in the press is often minimal compared with the publicity that surrounds a lengthy trial.

Against these advantages, however, must be weighed the disadvantages. In the first place, while negotiation may save time and funds thereby allowing the Division to initiate more cases, quality

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<sup>35</sup>Hearings, pp. 431-32.

<sup>36</sup>Brookside Theater Corp. v. 20th Century Fox Film Corp., 193 F.2d 896 (4th Cir. 1952) (\$1,125,000). See also Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); (\$360,000); Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1931) (\$195,000); Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952) (\$941,574); Kiefer-Stewart Co. v. Seagram & Sons, 182 F.2d 228 (7th Cir. 1950), reversed, 340 U.S. 441 (1951) (\$975,000).

is more important than quantity. The termination of any antitrust action should represent a legal and economic victory. Far too often the dominant objective of antitrust prosecution has been only legal victory and the consent decree has been merely one way of closing a case. Enforcement becomes all important.

Secondly, some critics maintain that treble damage actions by private parties were intended by Congress to constitute an important auxiliary enforcement measure in antitrust administration. The fact that consent decrees cannot be used as *prima facie* evidence in such cases means that a private action becomes more difficult. "The almost inevitable consequence of the acceptance of a consent decree by the Department of Justice in an antitrust action, therefore, is to reduce the effectiveness of section 5 of the Clayton Act and to deprive private suitors, who have been injured by unlawful conduct, of their statutory remedies under the antitrust laws."<sup>37</sup> This becomes even more important, critics maintain, when it is realized that nearly 90 per cent of all treble damage suits have followed in the wake of victorious Government actions in fully litigated cases.<sup>38</sup>

The Division is well aware of this problem. Testifying before the Antitrust Subcommittee in 1957, Assistant Attorney General Hansen stated:

"The Division is aware that private suit serves the double function of making businessmen the allies of the Government in enforcing antitrust policy and of giving compensatory relief to injured parties. No set rule may be adopted for balancing the functions of private suits with the Division's need for maximum antitrust enforcement. The efficacy of each method must depend upon the facts of each case."<sup>39</sup>

Even more recently, the Antitrust Division announced a further policy change. Assistant Attorney General Bicks said that unless a company admits its guilt, the Division intends to refuse to enter into a consent decree with a company accused of breaking the antitrust laws in dealing with local and state agencies. Reportedly, the new policy is designed primarily to help local and state governments recover all or part of the losses they feel they have sustained because of an antitrust violation. Moreover, the new policy might also open up a new era of private treble damage suits.<sup>40</sup>

Finally, critics maintain that once the Division has entered into

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<sup>37</sup>Report, p. 24.

<sup>38</sup>Report, p. 23 n.73. See *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suits*, 61 *Yale L.J.* 1010, 1060 (1952).

<sup>39</sup>Hearings, p. 432.

<sup>40</sup>*Wall Street Journal*, March 14, 1960, p. 26.

a consent decree, it turns its attention to other business and neglects the industry. "As a consequence, failure of the Department to enforce the provisions of consent decrees rendered them virtually a license for further antitrust violation."<sup>41</sup> Of crucial significance, therefore, is the enforcement and results of consent decrees.

#### IV. RESULTS AND ENFORCEMENT OF CONSENT DECREES

Whether the termination of antitrust action is the result of litigation or negotiation, enforcement is critical. Unless practices found illegal are discontinued, currently and in the future, antitrust action is devoid of significance. Does the Antitrust Division have an instrument with which to make decrees effective?

Writing in 1940, Hamilton and Till stated:

"If a decree provides for immediate changes, such as the sale of a property, a divestment of shares of stock, the dissolution of a trade association, the file is held open until such steps are taken. After that is done, the matter is adjudicated, the issues are removed from controversy. In the records of Justice the episode is closed; the case has gone to the hall of records; a fresh initiative is necessary to call it once more into action. Nor is an effort made to follow up the decree, observe success and shortcomings in operation, check practical result against intent, determine upon necessary revisions."<sup>42</sup>

In support of this conclusion is the fact that from the passage of the Sherman Act through 1952, the Division had instituted only 18 criminal or civil contempt proceedings to enforce judgments entered in Government antitrust suits.<sup>43</sup> By and large, effective enforcement was nonexistent.

More recently, some improvement can be noted. From 1953 through 1957, 9 criminal or civil contempt proceedings were brought. The Judgments and Judgment Enforcement Section of the Division—the section responsible for the enforcement of all antitrust judgments—was increased from 11 to 21 staff attorneys. Today, the section devotes at least 90 per cent of its time to enforcement, compared to 50 per cent a few years ago. In the enforcement of the *Atlantic Refining* judgment, for example, the section has brought 4 proceedings to effectuate the decree.<sup>44</sup>

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<sup>41</sup>Report, p. X.

<sup>42</sup>Hamilton and Till, *op. cit. supra* note 10, at 92-93.

<sup>43</sup>Hearings, p. 434.

<sup>44</sup>*Id.* at pp. 435-441. More recently, the Government announced a settlement terminating a civil contempt action against the A. B. Dick Company. The Company was charged with violating certain provisions of a consent decree entered on March 25, 1948. Department of Justice Press Release September 13, 1960.

In the opinion of the present writer, however, enforcement proceedings are still far from ideal. The Division learns about noncompliance from three sources: industry surveys made by the Division, complaints by persons who are adversely affected by acts of a defendant, and from incidental notices in trade journals. As these methods imply, no systematic enforcement procedure has been developed.

Budgetary limitations explain, in large part, the failure of the Antitrust Division to establish more adequate procedures. Limited personnel have little opportunity to devote sufficient attention to the enforcing of the more than 400 outstanding judgments. This situation, while explainable, still remains a serious deficiency in the administration of the antitrust laws.

The enforcement problem, however, must not obscure the beneficial results of consent decrees. Often the results are readily apparent. Two examples will serve to illustrate how consent judgments can result in new competition.<sup>45</sup>

1. *United States v. Eastman Kodak Co.*<sup>46</sup> The Division's complaint sought the abolition of Kodak's monopoly of amateur color film processing and the company's practice of controlling the resale price of its color film by fair-trade contracts, including in the retail price an unsegregated charge for subsequent processing of the film. A consent decree was negotiated prior to the filing of the complaint.

The decree required Kodak to cancel its fair-trade contracts and enjoined their use in the future. In addition, the decree prohibits Kodak from selling its color film with a processing charge in the sale price, and from tying together in any other way the sale and processing of its film. The company is required: (a) to grant upon request licenses on reasonable royalties under its pertinent processing and material patents; (b) to provide upon request technical manuals describing its color film processing technology; (c) to send technically qualified persons to plants of independent processors to supplement the technical information contained in the manuals; and (d) to permit independent processors to send technical personnel to certain of its processing plants to observe the processing methods, processes, machines, and equipment.

"Within 4 months of the decree 9 regional or national firms had announced plans or actually begun to seek business in color finishing. Eighteen months after the judgment 8 companies had

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<sup>45</sup>The information regarding these two decrees is found in the testimony of former Assistant Attorney General Hansen. Hearings, pp. 433-34.

<sup>46</sup>CCH 1956 Trade Cas. ¶ 67,920.

made investments of over \$100,000. Of these one had invested \$650,000 and 2 firms had invested more than \$1 million. In addition, innumerable small-businessmen were expected to seek the local finishing business. One company which served about 125 dealers in New York City soon after the decree announced an expenditure of \$70,000 to buy equipment from Eastman."<sup>47</sup>

2. *United States v. International Business Machines*.<sup>48</sup> The complaint against IBM charged that the company owned more than 90 per cent of all tabulating machines and sold approximately 90 per cent of all tabulating cards used in the United States. The complaint further alleged that IBM had excluded other manufacturers and potential manufacturers of tabulating machines and cards from the industry, had cramped the growth of independent service bureaus, and had stunted the independent business of repairing tabulating machines and manufacturing and distributing replacement parts. The complaint charged IBM with utilizing several means for achieving these illegal ends, but the heart of the plan was the Company's refusal to sell its machines. Moreover, leases were made only under tabulating service agreements providing for a single charge covering rental of the machines, instruction in their use, repairs and maintenance. Consequently, lessees had little incentive either to rely upon independent business for services or to service the machines themselves.

Under the terms of the consent decree, IBM was required to sell as well as lease their machines upon reasonable terms. All members of the tabulating industry were given access to existing IBM patents and patent applications at reasonable royalties. In addition, the Company was forbidden to require any lessee or purchaser of a machine to have it repaired by or purchase parts from IBM. "Should this program for relief prove ineffective, a sword of Damocles provision requires IBM to divest itself after 7 years of any part of its manufacturing capacity which would then be in excess of 50 per cent of the total capacity in the United States unless IBM can show substantial competitive conditions exist or that divestiture is not appropriate."

"Within less than 6 months of the judgment several companies had indicated that they planned to enter the business of (1) manufacturing and selling tabulating machines, (2) repairing and maintaining those machines, (3) manufacturing

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<sup>47</sup>Hearings, p. 433.

<sup>48</sup>CCH 1956 Trade Cas. ¶ 68,245.

tabulating cards, and (4) preparing, via service bureaus, accounting and statistical information on a fee basis."<sup>49</sup>

These two consent decrees have achieved positive results. They are also enforceable. Whatever the pros or cons of the decrees' terms may be, they clearly demonstrate the impact and competitive results that the Antitrust Division's program is capable of achieving.

#### V. SUMMARY AND CONCLUSIONS ON THE USE OF CONSENT DECREES

The consent decree has become one of the Antitrust Division's most important instruments for terminating antitrust cases. Its legal status is well established. Nor is it mere speculation to suggest that the use of the consent decree will continue to be important in the future. And yet, an essential question remains: have the results of consent decree settlements indicated mere legal victories devoid of competitive significance?

This question was dealt with by the Supreme Court in the *International Salt* case of 1947. Delivering the majority opinion, Mr. Justice Frankfurter wrote:

"In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplished less than that, the government has won a law suit and lost a cause."<sup>50</sup>

In general, the effectiveness of consent decrees has varied widely from case to case. Some consent decrees have produced readily apparent results, such as the two outlined in the preceding section. Far more often, however, they have been either filed and forgotten or they have been the subject of dispute over the meaning of the decrees' terms. In the latter situations, enforcement has been neglected. As a means of settling antitrust cases the use of the consent decree should not be curtailed. At the same time, three procedural changes might result in their improvement.

1. Under present practices, the terms of a consent decree are kept secret until after the decree has been finally entered. Often, interested third parties have not been consulted. It has been proposed that a consent decree should be published and that a waiting period should

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<sup>49</sup>Hearings, p. 434.

<sup>50</sup>*International Salt Co. Inc. v. United States*, 332 U.S. 392, 401 (1947).

be afforded to interested parties to present their views to the court before the decree is finally presented to the court.<sup>51</sup> Such a change would permit third parties, who will be in some way affected by the entry of a decree, an opportunity to present their objections to the court without becoming litigants in the proceeding. Third parties thus will be provided with a limited measure of protection.

2. At present, especially under the prefiling negotiation procedures, the complaint and the decree are entered simultaneously. The decree is usually approved by the court and a public announcement made of the fact. It is recommended that along with the complaint and the decree, the Antitrust Division should file a brief that would cover the following: the facts upon which the Government based its case, the meaning of the terms of the decree, what the decree is expected to accomplish, and the reasons for the Government's acceptance of the particular compromise. Such a statement would have two advantages: (a) it would indicate to all interested parties the basis of the case and the settlement objectives, and (b) it would be of aid in the enforcement of the consent decree.

3. Of even more critical importance, however, is enforcement. Antitrust decrees have never been systematically enforced. The Antitrust Division has lacked the money and the staff to carry out this function and to check on the observance of decree terms. Once the court has accepted the decree, the case has been closed, except in the rare instances where dissolution or divestiture has been required. Often the provisions of a decree have become obsolete, but they have not been modified unless the defendants have come into court and asked that they be liberalized. The success of an antitrust program depends upon adequate enforcement.

Effective enforcement would mean, of course, an added cost. With more than 400 decrees now outstanding, systematic investigations by the Division would require a larger staff than at present, and so a larger appropriation. But only in this way can decrees be kept up-to-date and achieve their purposes.<sup>52</sup>

These three procedural changes might well result in fewer defendants accepting consent decrees when faced with antitrust action. In-

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<sup>51</sup>See H.R. Rep. No. 2465, 80th Cong., 2d sess. 27 (1948).

<sup>52</sup>One writer has recommended that the duration of consent decrees be limited to a certain number of years on the theory that any decree which does not restore competition within that period requires modification or additional action on the part of the Government. See Kramer, *Modifications of Consent Decrees*, 56 Mich. L. Rev. 1051 (1957). If decrees were adequately enforced, however, no such arbitrary time limit would need to be imposed.

stead, defendants might decide to proceed to trial and thus risk receiving an adverse court decision and becoming subject to treble damage suits.<sup>53</sup> In any event, the end result would be beneficial, for quality is of more importance than mere quantity. The success of antitrust action can never be measured by the number of cases started or terminated. Success can only be measured by the effect upon competition and the economy of the resulting decisions and decrees.

Despite defects, however, the consent decree has worked fairly effectively. The primary goal of antitrust policy is the maintenance of a competitive economy. The consent decree provides an instrument for prompt action against those who would eliminate competition and close the channels of commerce. Improvements are possible and highly desirable. Yet, there is probably no other legal device which has been more successful in accomplishing the purpose of antitrust policy.

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<sup>53</sup>The exception, of course, is in a simple conspiracy situation, where defendants are usually readily willing to accept consent decrees to escape possible treble damage suits.

