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Consent Decrees and the Judicial Function

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Consent Decrees and the Judicial Function

Section 5(a) of the Clayton Act provides that a final judgment or decree in government criminal or civil proceeding which finds that a defendant violated the antitrust laws "shall be prima facie evidence against such defendant in any action or proceeding brought by any other party . . . under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."[1]

Prior to the passage of the Clayton Act in 1914, an injured individual could not use judgments rendered in successful government antitrust suits as evidence of guilt.[2] Concern for improving the record of success for injured plaintiffs was an important force which prompted ultimate passage of the Act. In a special message to Congress before passage of the Act, President Woodrow Wilson expressed the hope:

> that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgment proved and entered in suits by Government.
>
> . . . It is not fair that the private litigant should be obliged to set up and establish again facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.[3]

The House version of the bill provided that consent decrees be given the same evidentiary effect as litigated judgments.[4] In the Senate, however, it was argued that if such a clause were adopted it would "effectually put an end to all consent decrees."[5] The Senate view prevailed, and a resulting proviso in Section 5(a) exempts "consent judgments or decrees entered before any

1. 15 U.S.C. § 16(a) (1964).

2. *See* Buckeye Powder Co. v. E.I. DuPont de Nemours Powder Co., 248 U.S. 55, 63 (1918).

3. 51 CONG. REC. 1962-64 (1914).

4. H.R. REP. No. 627, 63d Cong., 2d Sess., pt. 1, at 2 (1914).

5. 51 CONG. REC. 13,901 (1914) (remarks of Senator Cummins). Defendants agree to consent decrees not only when they feel that trial would produce the same result, but also when they feel that the profits gained from the practices in question do not warrant the expense and publicity of a trial. If a consent decree has the same effect (in subjecting the defendant to private suits) as a litigated judgment, the latter factor does not have as much weight in the decision.

testimony has been taken"[6] from the operation of the section.

In an antitrust action where the plaintiff has limited financial and investigative resources, the successful prosecution of his treble damage action may depend on the availability of a government judgment which serves as prima facie evidence of the alleged violation. When the government agrees to the entry of a consent decree before litigation, private plaintiffs lose the evidentiary benefits of the prima facie provision of Section 5(a). This makes recovery in individual antitrust actions more difficult, a result which seems to be inconsistent with the Act's policy of encouraging private enforcement of the antiturst laws.[7] On the other hand, the government should be free to prosecute and terminate its antitrust cases through the most efficient use of information and resources in representing the public interest. Any resolution of the two conflicting policies of Section 5(a)—that of providing private plaintiffs with prima facie evidence based upon government suits and that of allowing the government to terminate its cases by consent decrees which have no evidentiary effect in private suits—requires an examination of the history and nature of the government's use of the consent decree, and an analysis of its effect upon private enforcement of the antitrust laws.

Private Enforcement of the Antitrust Laws

The Supreme Court has long recognized that the private treble damage action was intended as more than a mere compensatory measure to redress individual injuries. In its view, by the enactment of Section 5(a), "Congress intended to use private self-interest as a means of enforcement"[8] of the antitrust laws in the belief that "private antitrust litigation is one of the surest weapons for effective enforcement."[9]

In *Cinammon v. Abner A. Wolf, Inc.*,[10] the court discussed the policy of the antitrust laws with respect to private treble damage actions:

> The purpose of Section 4 of the Clayton Act . . . which provides for private triple damage suits is "to enlist the 'business public . . . as allies of the government in enforcing the antitrust laws;' the means chosen, on the other hand, is to give 'the injured party ample recompense for the wrong suffered' by allowing threefold damages." . . . In other words, the private antitrust suit is a

6. 15 U.S.C. § 16(a) (1964).
7. *See, e.g.*, Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955).
8. Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).
9. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965). In Quemos Theatre Co. v. Warner Bros. Pictures, 35 F. Supp. 949 (D.N.J. 1940), the private suit was graphically described as a means of supplying "an ancillary force of private investigators to supplement the Department of Justice in law enforcement." *Id.* at 950.
10. 215 F. Supp. 833 (E.D. Mich. 1963).

> substantial weapon in effectuating a national policy of protecting, preserving, and promoting free competition in the market place by blending "antitrust policy with private compensatory law."[11]

Those charged with public enforcement of the antitrust laws are quick to recognize private actions as a desirable and necessary supplement to government enforcement efforts. Robert A. Bicks, former First Assistant to the Attorney General in charge of the Antitrust Division, listed ways by which treble damage actions contribute to the government's policing functions:

> Private actions . . . do more than duplicate government work. They may adjudicate practices not expressly covered by government decrees. Or they may help close the breach left by necessarily incomplete government policing of decrees. And, most important, private recoveries heighten the financial impact and consequently the deterrent value of both civil and criminal government actions. In addition, the threat of subsequent private litigation may well be a major consideration prompting defendants to enter into consent decrees.[12]

In a statement delivered before the Senate Select Committee on Small Business, Leo Loevinger, who was later to take charge of the Antitrust Division, speculated that even a quadruple appropriation for the Division would not equal the enforcement effectiveness of private action.[13] He urged Congress to "enact a straight-forward and unequivocal declaration of policy stating that primary reliance for antitrust enforcement is upon private action."[14]

Since the success of a private treble damage suit frequently depends directly on the availability of a government judgment as prima facie evidence,[15] a decision to terminate an action by consent decree necessarily involves the

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11. *Id.* at 834.

12. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 8 (1959).

13. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167-68 (1958).

14. *Id.* at 172. The present Assistant Attorney General in charge of the Antitrust Division, Richard W. McLaren, has expressed a similar view. In an address before the Antitrust Committees of the Federal Bar Ass'n and the Philadelphia Bar Ass'n on December 11, 1969, he stated:

> Private antitrust proceedings today are not merely a means of compensating victims of antitrust conspiracies; they provide a substantial and meaningful deterrent to violations of the antitrust laws. Indeed, until the Congress acts on our recommendation to increase the maximum Sherman Act fine for corporations from $50,000 to $500,000, the treble damage action provides the only meaningful financial deterrent to antitrust violations.

BNA ANTITRUST & TRADE REG. REP. No. 440 at X-15 (Dec. 16, 1969).

15. It has been estimated that nearly 90 percent of all private treble damage suits have followed the successful conclusion of Government litigated actions. STAFF OF THE ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE 23, n.73 (Comm. Print 1959) [hereinafter cited as REPORT].

possibility of weakening another important means of antitrust enforcement. Thus, when the Antitrust Division enters into negotiations with a defendant concerning a possible settlement, its position is analogous to that of a regulatory agency in determining whether a proposed consent decree provides the most effective means of relief necessary for protection of the public interest.[16]

History and Nature of the Consent Decree Program

Historically, the disposition of antitrust cases by consent of the parties, rather than through trial, has been a salient feature of the administration of the antitrust laws by the Department of Justice. From its first use in 1906,[17] the consent decree has been used with increasing frequency; since 1955 consent decrees have consistently accounted for approximately 70 percent of all terminations of civil actions filed by the Antitrust Division.[18]

The decree itself usually emerges from a series of secret, informal negotiations between lawyers representing the Antitrust Division and counsel for the defense. These negotiations closely resemble normal business contract negotiations. The parties are engaged in a bargaining process in which the government offers to refrain from formal litigation in return for the defendant's consent to enter a "contract" obligating him to institute or refrain from certain conduct. The resulting "consent decree," when ratified by the court, carries the sanction of contempt if breached.

Pursuant to congressional recommendation,[19] the Justice Deartment in July of 1961 put into effect a policy requiring that all proposed consent decrees be "filed in court or otherwise made available upon request to interested persons" at least 30 days prior to entry by the court.[20] During this 30 day period, the Justice Department expressly reserves the right to withdraw or withhold its consent to the proposed decree whenever the comments, views, or allegations submitted by non-parties "disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate. . . ."[21] At the same time the Department reserves the right to object to intervention by any person who has not been named as a party by the government. Generally speaking, government objections to intervention that would defeat the entry of a consent decree have been consistently

16. *See* Timberg, *Recent Developments in Antitrust Consent Judgments,* 10 FED. B.J. 351 (1949).
17. United States v. Otis Elevator Co., 1 Decrees & Judgments in Fed. Antitrust Cases 107 (9th Cir. 1906).
18. ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS, 1955-1968 at 226 (1968).
19. REPORT 27.
20. 28 C.F.R. § 50.1(b) (1970).
21. *Id.*

sustained by the courts.[22]

As a general rule, consent decrees are accepted and signed by the court as a matter of purely formal routine. If the court, after a brief presentation by defendant's counsel and the Antitrust Division attorneys, is satisfied that the parties are in agreement, the requested order is entered with only cursory examination.[23] Ordinarily, no record is made of the proceedings. Findings of fact or conclusions of law are not made, nor are they required.[24] The Justice Department need not prepare a written statement of facts upon which the government bases its case, nor declare what it expects to accomplish through the decree. Similarly, the court is not required to render a written opinion. This is so notwithstanding the fact that: (1) the final order is treated as a final judgment; (2) the terms of the consent decree may become the standard for an entire industry; and (3) traditional competitors of the defendant are denied the right to intervene and object to the entry of the decree and therefore may be adversely affected in their business operations.

The Automobile Manufacturers Anti-Pollution Consent Decree

On September 11, 1969, the Department of Justice filed a proposed consent decree prohibiting the major automobile manufacturers and their trade association from conspiring to delay and obstruct the development and installation of pollution control devices for motor vehicles. The events which gave rise to this decision and which resulted in the ultimate approval of the decree by the court on October 28, 1969, highlight both the advantages and disadvantages of the government's consent decree program.

In mid-1966, a federal grand jury commenced investigation of the practices of the automotive industry regarding possible anti-competitive practices in the failure to develop automotive anti-pollution devices. After 18 months of grand jury proceedings the Antitrust Division's trial attorney wanted to ask the grand jury for an indictment. The Division, however, dropped the criminal case and had the grand jury discharged without public explanation. One

22. United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968). Traditionally, such intervention has not been permitted either as of right under FED. R. CIV. P. 24(a), or in the discretion of the court under Rule 24(b). The most frequent rationale employed by the court is that intervention would interfere with the Justice Department's control of its action, and consequently the government's representation of the public interest. United States v. A.S.C.A.P., 11 F.R.D. 511, 513 (S.D.N.Y. 1951).

23. ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS, 1955-1968, at 229 (1968).

24. United States v. Institute of Carpet Mfrs. of Am., 1940-43 TRADE CAS., ¶ 56,097 (S.D.N.Y. 1941).

year later, on January 10, 1969, the United States filed a civil complaint charging that General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and the Automobile Manufacturers Association had violated Section 1 of the Sherman Act by conspiring to eliminate competition in the research, development, manufacture, and installation of automotive air pollution control equipment, and in the purchase of patents and patent rights covering such equipment.[25]

The defendants did not answer the complaint. Instead, following the entry of several stipulations extending their time for answer, the parties filed a stipulation for entry of a consent judgment terminating the litigation. On its own motion, the district court ordered a hearing and invited all interested persons to express their views on the proposed consent decree. Pursuant to this invitation, 16 objections to or requests for modification of the proposed judgment and 13 applications for intervention were filed by interested associations and individuals.[26]

At the hearing, the court heard arguments from proponents and opponents of the decree, but neither the government nor the defendants introduced evidence. They called no witnesses. The did not summarize their substantive contentions nor did they advise the court what facts supported their respective positions. Nevertheless, at the conclusion of oral argument, the court denied all applications for intervention and approved the consent decree as submitted by the parties:

> The decision to settle an antitrust case [by consent decree] like the decision to commence it in the first place, is an administrative decision and is a part of the implementation of the general policy of the Executive branch of government. As such, it is not subject to review by this court.
>
> This court does have the power to disapprove the proposed settlement, but its use requires the exercise of discretion, based upon legal, as distinguished from administrative considerations. For instance, the court should withhold its approval if the decree be unenforceable or if it should provide for relief not consistent with the prayer of the complaint. The court may properly consider whether or not the rights of the persons not parties to the action are jeopardized and whether the consent decree, on the whole, is against the public interest.[27]

One aspect of the consent decree program which requires examination is the role of courts in deciding whether a proposed decree is in the "public in-

25. United States v. Automobile Mfrs. Ass'n, Civil No. 69-75 (C.D. Cal., filed Jan. 10, 1969).

26. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of New York v. United States, 397 U.S. 248 (1970).

27. 307 F. Supp. at 620-21.

terest." In the *Automotive* case, the court concluded that the anti-pollution consent decree was in the public interest, on the basis of a record consisting solely of the government's complaint and the proposed decree. The fact that the decree paralleled the complaint apparently sufficed to settle this issue.[28]

To hold that a consent decree is necessarily in the public interest whenever it contains all the relief specifically requested in the government's complaint can be justified on one of two grounds. Either a defendant has a "right" to such a decree, or the court to which it is submitted for approval is without power to question the government's decision not to press for further relief.

The "Right" to a Consent Decree

Litigation concerning the right to a consent decree normally involves attempts by antitrust defendants to force entry of decrees over the opposition of the government in cases where the decree allegedly includes all the relief requested in the complaint. The early case of *United States v. Hartford-Empire Co.*,[29] appeared to rule out the notion of a consent decree without consent, pointing out that a consent decree involves an agreement between the contending parties in a case. The court therefore held that since the government had not consented to the proposed decrees, they could not properly be termed "consent decrees." This view is in accord with the traditional concept of a consent decree—a court order based upon the mutual understanding of the parties.[30]

The emergence of the so-called "asphalt clause" in antitrust terminology has occasioned some disagreement on this point, however. First inserted in consent decrees entered against ten sellers of asphalt, road tar, and bituminous concrete,[31] this provision purported to enjoin the defendants from denying the prima facie effect of the decree in the pending treble damage actions filed by certain state and local agencies.

Controversy over such an "asphalt clause" in *United States v. Brunswick-Balke-Collender Co.*[32] resulted in a shift away from the *Hartford-Empire* "mutual understanding" reasoning and introduced the somewhat contradictory concept of a unilateral consent decree. The complaint in *Brunswick* charged the defendants with combining and conspiring to restrain and monopo-

28. *Id.* at 621.
29. 1 F.R.D. 424 (N.D. Ohio 1940).
30. *See, e.g.*, United States v. Swift Co., 286 U.S. 106 (1932).
31. United States v. Allied Chem. Corp., 1961 TRADE CAS. ¶ 69,923 (D. Mass. 1960); United States v. Lake Asphalt & Petroleum Co., 1960 TRADE CAS. ¶ 69,835 (D. Mass. 1960).
32. 203 F. Supp. 657 (E.D. Wis. 1962).

lize interstate trade and commerce in folding gymnasium bleachers. After negotiations with the government had appeared to result in agreement upon a satisfactory consent decree, defendants were advised that the Justice Department's new policy required the inclusion in the decree of an "asphalt clause" which would permit the decree to be used as prima facie evidence of guilt in future private treble damage suits. The defendants objected to the proposed clause and moved for entry of judgment against themselves in the form proposed by the government except for the objected-to provision.

The court approved the decree without the "asphalt clause" characterizing the government's apparent policy of seeking to advance the cause of private litigants as an "unauthorized attempt on the part of an administrative agency to avoid Congressional intent as clearly set forth in the proviso in § 5 of the Clayton Act."[33] That proviso, said the court, gave the defendants "an unqualified right"[34] to avoid a judgment with prima facie effect. By withholding its consent, the Department of Justice was "not only arbitrarily denying the moving defendants this right but frustrating the clear intent of Congress to encourage early entries of injunctional decrees without long and protracted trials."[35]

The view that the congressional policy in the proviso to Section 5 gives a defendant a *right* to capitulate is supported by neither the language nor the legislative history of Section 5. Rather than conferring rights upon antitrust defendants, Section 5 was intended to benefit third parties injured by an antitrust violation,[36] as well as to provide a stimulus to defendants to settle for the benefit of efficient government enforcement.[37] Instead of being contrary to the congressional purpose for enacting Section 5, the government's attempted means of settlement in the *Brunswick* case seems to be a useful device for carrying out the two major congressional purposes behind Section 5—to assist injured third parties and to obtain efficient government enforcement by consent decrees.

The Supreme Court has not adopted such an approach toward consent decree rights. In *United States v. Ward Baking Co.*,[38] the Court held that a district court should not have concluded, at least without an "opportunity to know the record,"[39] that the government was not entitled to demand the

33. *Id.* at 661.
34. *Id.* at 662.
35. *Id.*
36. 51 CONG. REC. 13851 (1914) (remarks of Senator Walsh); *id.* at 15825 (remarks of Senator Reed); *id.* at 16,046 (remarks of Senator Norris).
37. 51 CONG. REC. 15824 (1914) (remarks of Senator Lewis); *id.* at 16276 (remarks of Senator Webb); *id.* at 16,004 (remarks of Senator Chilton).
38. 376 U.S. 327 (1964).
39. *Id.* at 333.

inclusion of additional relief in a consent decree not specifically requested in its complaint. The district court had been of the opinion that the decree provided all the relief to which the government would be entitled if a decree had been entered after trial, and approved the proposed consent decree.[40] In reversing and remanding for trial, the Supreme Court held that "where the Government seeks an item of relief to which evidence adduced at trial *may* show that it is entitled,"[41] the trial court may not enter a consent decree without the government's consent. Implicit in *Ward Baking*, therefore, is the notion that the Attorney General has the discretionary power to force a trial where the government insists upon injunctive relief which is unacceptable to the defendant. If, in this manner, the Attorney General can force a trial which will result in a Section 5 judgment, there would seem to be little reason why the "asphalt clause" should not be used to provide the same effect in appropriate situations.

In a public statement discussing the policy of the Antitrust Division concerning the inclusion of "asphalt clauses" similar to those involved in the *Brunswick* case, Assistant Attorney General McLaren argued from the premise that antitrust defendants have no right to a decree which otherwise contains the full relief requested in a government complaint:

> I would not expect to see an 'asphalt clause' contained in any great number of consent decrees in the future. However, in situations where the Division has determined to oppose the entry of nolo pleas in order to aid private litigants, but where the court nevertheless accepts the nolo pleas, it would seem to follow that in any companion civil case the Division should consider going to trial if the defendants will not agree to the inclusion of an 'asphalt clause' in the decree. In making this determination, we would consider whether the strength of the Division's civil case is such that there is a substantial chance to obtain a favorable judgment.[42]

The Judicial Function

Assuming that an antitrust defendant can not insist upon a consent decree, should a district court make an independent judicial determination that such a decree is in the public interest? A court should give weight to the Attorney General's determination that the decree is in the public interest, and should likewise recognize that the settlement of antitrust litigation is encouraged by the congressional policy reflected in the Section 5(a) proviso. The public is

40. United States v. Ward Baking Co., 1963 TRADE CAS. ¶ 70,609 (M.D. Fla. 1962).
41. 376 U.S. at 334 (emphasis added).
42. Remarks of Richard W. McLaren before the Antitrust Committees of the Federal Bar Ass'n and the Philadelphia Bar Ass'n, Dec. 11, 1969, in BNA ANTITRUST & TRADE REG. REP. No. 440 at X-15, 17.

entitled to have the final judicial determination made upon a record sufficiently complete to permit an informed adjudication of the issue.

A major failing of the present practice of measuring the public interest standard of a consent decree by its similarity to the items of relief requested in the government's complaint is highlighted by the Antitrust Division's frequently used procedure of conducting pre-complaint negotiations with prospective antitrust defendants. This is a procedure whereby a consent decree is negotiated prior to the time the government complaint is filed. The technique is not new to the Antitrust Division, having been used in approximately one-fourth of all antitrust cases disposed of during the 1920's.[43] The pre-negotiation was largely disregarded during the 1930's and was used only sparingly during the period between 1939-1942,[44] but since 1954 it has been used with increased frequency in settling antitrust litigation.[45]

An outline of the procedure and its advantages was set forth by a former Assistant Attorney General in charge of the Antitrust Division:

> Under our policy, in some cases which appear to us to be adapted to its use, the Division after it has investigated a particular situation and prepared a proposed complaint, notifies the prospective defendants of the intention of filing a civil complaint against them. In general terms, we outline to the proposed defendants the nature and the grounds of our charges. If the prospective defendants care to start negotiations towards a possible decree in advance of the filing of our complaint, we are ready to meet them at the conference table . . . .
>
> . . . Pre-filing negotiation permits quick discussion and settlement of the economic and legal issues of the case without the rigidity and the publicity of an already filed complaint.[46]

Whenever the pre-filing negotiations result in the satisfactory agreement of both parties, the complaint and proposed decree are filed at the same time.

This method of handling antitrust cases has met with severe criticism. In his dissent to the *1955 Report of the Attorney General's National Committee to Study the Antitrust Laws,* Professor Louis B. Schwartz stated:

> The report recommends that the Department of Justice enter into negotiations with prospective defendants for consent decrees. Such a practice will certainly have the advantage claimed for it in the majority report, namely, 'increased cooperation between business and Government,' saving time and money. What it will also do is

43. *Hearings on the Consent Decree Program of the Dep't of Justice Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 85th Cong., 1st Sess., ser. 9, pt. 1, at 12 (1957) (statement of Asst. Attorney General Hansen).
44. REPORT 11.
45. *Id.*
46. *Id.*

> whittle away the last remnants of judicial control and public scrutiny in this area, and involve the Government in bargaining with a law violator not only as to the relief but also as to the nature of the accusation to be made against him. The proposal opens the possibility that the Government's complaint will be modified so as to be consistent with the relief that defendant is prepared to consent to. But the settlement of an antitrust case ought not to be a simple matter of bargaining between the Department and the defendant.[47]

Regardless of the merit of the government's negotiating with alleged law violators, the court should recognize that protection of the public interest is slim indeed when a judge does nothing more than compare the complaint and the proposed consent decree which were negotiated in secret and filed simultaneously.

Although a district court has the power to reject a proposed consent decree, criteria to be followed in the exercise of that power have never been outlined. In *United States v. Pan American World Airways, Inc.*,[48] the court refused to approve a proposed decree and ordered the parties to trial, but it expressly refrained from stating the reasons behind its decision. This single rejection, like the numerous cases of rubber-stamp approval of consent decrees,[49] offers no guidance for future action.

Recently two district courts have moved away from this pro forma approval, at least in large cases where the resulting decree has far-reaching effects. In *United States v. Automobile Mfrs. Ass'n*[50] and *United States v. Ling-Temco-Vought, Inc.*,[51] the courts delayed approval of the proposed decree and ordered public hearings to determine whether the settlement entered into between the parties were in the public interest. However, in both instances public interest considerations were limited to objections based on the effects of the substantive provisions of the consent decree. All objections based on the adverse effects caused by the entry of the decree (as opposed to proceeding to trial) were disallowed.[52] This process is an improvement over rubber-stamp approval, but still presents an overly narrow view of "public interest." In a hearing concerning the public interest considerations involved in the approval of a consent decree, the court should consider how such approval will effect a proper balance of the conflicting purposes of Section

47. SCHWARTZ, DISSENT TO REPORT, ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955).
48. 1959 TRADE CAS. ¶ 69,300 (S.D.N.Y. 1959).
49. *See* notes 23-24 and accompanying text *supra*.
50. 307 F. Supp. 617 (C.D. Cal. 1969).
51. 1970 TRADE CAS. ¶ 73,156 (W.D. Pa. 1970).
52. It is not clear that any such objections were raised in the *Ling-Temco-Vought* case. The reasoning of the court in the *Automotive* case is revealed in the text accompanying note 27, *supra*.

5(a).[53] To that end, the following questions are pertinent and should be answered before any consent decree is approved:

(1) Will important issues of law that should be judicially determined remain unresolved as a result of the proposed settlement?

(2) Will settlement by consent decree, as a practical matter, impair important rights of public and private institutions and citizens?

(3) Is the offense alleged of such serious magnitude or of such public concern so as to warrant the greater deterrent and public educational purposes achieved by a full trial?

(4) Does the proposed decree achieve the same objective as the original complaint?

Unresolved Issues of Law

Since direct appeal to the Supreme Court is permitted in antitrust cases brought by the government,[54] the litigated antitrust action provides the Supreme Court with an opportunity to establish precedent that gives content to the meaning of antitrust law. Through appellate review, the Supreme Court is able in litigated cases to preserve the flexibility in the antitrust laws that is needed to meet changing economic conditions. Settlement by consent decree, on the other hand, provides no meaningful precedent, thereby depriving business and bar of an opportunity to ascertain whether, in fact, the practices attacked in the government's complaint are illegal. Neither findings of fact nor conclusions of law are required to be entered, making reliance upon language contained in consent decrees uncertain. Similarly, antitrust enforcement officers are deprived of a reliable means by which to judge comparable activities in other industries.

The recent suit against Ling-Temco-Vought, Inc. illustrates these points. On January 29, 1969, Assistant Attorney General McLaren, in testimony befor the Senate Judiciary Committee indicated that he was not convinced that new legislation was essential to regulate conglomerate mergers under the antitrust laws. He felt that Setion 7 of the Clayton Act could be used for that purpose.[55]

The government antitrust suit filed on April 14, 1969, against Ling-Temco-Vought, Inc.[56] was considered an excellent test case for the final resolution

53. See notes 36-37 and accompanying text, *supra.*

54. 15 U.S.C. § 29 (1964).

55. Testimony of Asst. Attorney General Richard W. McLaren before the Senate Judiciary Comm. (Jan. 29, 1969), reported in BNA ANTITRUST & TRADE REG. REP. No. 395 at A-1, A-2.

56. United States v. Ling-Temco-Vought, Inc., Civil No. 69-438 (W.D. Pa. filed April 14, 1969); the complaint is reproduced in BNA ANTITRUST & TRADE REG. REP. No. 405 at X-12.

of this important question. The complaint charged that Ling-Temco-Vought's acquisition of Jones & Laughlin Steel violated Section 7 of the Clayton Act by threatening to diminish their potential independent competition in the steel industry, other metal markets, and diversified industries; to enhance their power to engage in reciprocal dealing; to increase substantially the concentration of control of the nation's manufacturing assets; and to encourage the trend toward further concentration by merger.[57] This first court test of the Justice Department's theories about Section 7, however, was negated when the action was terminated by court approval of a consent decree on June 10, 1970.[58] Thus, the crucial issue as to the applicability of Section 7 to conglomerate acquisitions was disposed of without a judicial determination as to its correctness.

Impairment of Important Rights

Because the antitrust laws recognize the rights of persons or groups to initiate private antitrust actions,[59] the Antitrust Division occupies a position of trusteeship in administering the laws. Any decision made must take into some account how the final resolution will affect the rights of public and private parties under the antitrust laws. The fear expressed by President Wilson in 1914 that private persons had neither the resources nor the power to duplicate government investigative efforts is no less real today. Discovery in the *Automotive* case, for example, took the government several years and several hundred thousand dollars.

To the extent that consent decrees impede the prosecution of private antitrust actions by withdrawing government evidence from a trial as complex and expensive as a treble damage action, such decrees contribute to a substantial lessening of the deterrent effect of the antitrust laws upon business operations. Several years ago the House Antitrust Subcommittee summed up this effect upon antitrust enforcement of the consent decree program:

> The almost inevitable consequence of the acceptance of a consent decree by the Department of Justice, 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.[60]

Advantages of a Full Trial

The diminished threat of private treble damage suits is one inducement for

57. *Id.*
58. United States v. Ling-Temco-Vought, Inc., 1970 TRADE CAS. ¶ 73,105 (W.D. Pa. 1970).
59. 15 U.S.C. § 15 (1964).
60. REPORT 24.

antitrust defendants to accept a consent decree. Another is the avoidance of much of the unfavorable publicity that usually attends antitrust litigation. Compared to the publicity connected with hard fought antitrust trials, press coverage of the filing of a proposed consent decree is minimal. The relative informality and secrecy accompanying consent decree negotiations provide important incentives for today's image-conscious businessmen.

In terms of the public interest, the natural consequences of these considations are two-fold. First, the deterrent value of the antitrust laws is weakened by knowledge that a suspected violator stands only a one in four chance of being brought to trial.[61] Business decisions as to whether to pursue questionable conduct can be viewed in terms of calculated risks. As employment of the consent decree as an antitrust enforcement tool becomes more widespread, the smaller the chances that such conduct, if challenged by the government, will subject a company to the unfavorable publicity of a full trial.

Secondly, the avoidance of a full trial deprives the public of an opportunity to learn of the nature and depth of the charges brought by the government. The American people are the customers of industry and have a right to know the extent to which their lives may have been affected by questionable corporate business practices.

Achieving the Objectives of the Complaint

Comparison of the items of relief sought in the government's complaint with the specific provisions of a proposed consent decree seems to be the basis for the rejection or approval of proposed decrees by the courts. However, an adjudication having prima facie effect would appear to constitute an independent form of relief so that even if a defendant were to consent to all of the government's other demands for relief, a consent judgment could nonetheless be withheld.

Many of the potential private intervenors in the automobile anti-pollution case sought to block the proposed consent decree in the hopes of compelling the government to litigate the case to judgment. A final judgment could then be used as a basis for their own treble damage actions.[62] In the alternative, they sought the inclusion of an "asphalt clause" which would produce the same result.[63] The court, however, denied such relief, holding that the absence of a clause admitting liability was irrelevant to the issue of whether

61. *See, e.g.*, ABA ANTITRUST SECTION, ANTITRUST CONSENT DECREE MANUAL at *i.* (1968).

62. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617, 619-20 (C.D. Cal. 1969).

63. *Id.* at 620.

the decree satisfied the public interest.[64] The argument that inclusion of such a clause could be justified by the language of the general prayer for relief in the government's complaint was rejected.[65] Most complaints, including the one involved in the anti-pollution case contain a prayer requesting "such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises."[66] However, this court stated: "The prayer for such relief as seems proper is a general catch-all clause, as all attorneys know, and it means little if anything."[67]

Nevertheless, in the *Ward Baking* case, where the complaint also contained a prayer for general relief, the Supreme Court upheld the government's right to include items of relief not specifically requested in the complaint but capable of proof at trial in a proposed consent decree:

> The disputed provisions certainly may be regarded as within the general scope of the relief sought in the complaint, which included a request for "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.[68]

Therefore, when a court is called upon to consider a proposed consent decree in a case where there are no compelling reasons to require actual trial, the court should be empowered to reject any consent form of decree that lacks the prima facie effect which would otherwise provide the opportunity for private parties to pursue their remedies. To bar the courts from taking such action is to hold that a determination of what is best for the public interest does not involve consideration of potential private treble damage litigants.

Conclusion

The consent decree has become one of the Antitrust Division's most important instruments for terminating antitrust cases, and it would be unrealistic to suggest that its importance will not continue in the future. Yet a strong danger remains that continued rubber-stamp approval of consent decrees by the courts will result in the complete abdication of the contemplated judicial function in favor of an administrative procedure in which there are no rules to safeguard the interests of the public. Protection of the public interest has been entrusted to the courts as well as the Justice Department, and it is possible that they will arrive at conflicting conclusions. For example, in describing the role of the Justice Department as spokesman for the public in the *Cascade*

64. *Id.* at 621.
65. *Id.*, oral opinion (Oct. 28, 1969).
66. *Id.*
67. *Id.*
68. United States v. Ward Baking Co., 376 U.S. 327, 333 n.3 (1964).

Natural Gas case,[69] the Supreme Court found that the government had "fallen far short of representing"[70] the intervenors, and that the United States had "knuckled under to El Paso and 'settled' this litigation."[71]

By recommending a more active judicial role in the consent decree procedure, it is not intended that a court should indulge in second guessing the Attorney General by resolving the public interest issue *in vacuo*. The court should seek to ascertain the circumstances leading to the filing of the proposed decree, and this information should be provided by the government. Before any decree is acted upon, the courts should require the government to file a brief outlining the essential facts involved, the defendant's position, what the terms of the decree are designed to accomplish, and the advantages to the public of settlement as opposed to trial. If necessary, a hearing should be held with an opportunity for interested persons to be heard. Only through such a zealous protection of the public interest can there be a workable coordination between consent decrees and private actions in the enforcement of the antitrust laws.

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69. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).
70. *Id.* at 136.
71. *Id.* at 141.

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