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## MODIFICATION OF CONSENT DECREES: A PROPOSAL TO THE ANTITRUST DIVISION

*Victor H. Kramer\**

THE genius of the Sherman Act has been said to lie in its generality and adaptability.<sup>1</sup> Thus the act has been successfully applied for almost three-quarters of a century to an economy that has been more dynamic than during any comparable period in history.

In 1912, twenty-two years after passage of the act, consent decrees began to be frequently used as a means of settling, without trial, civil antitrust suits brought by the government.<sup>2</sup> Their use became even more popular as a result of the passage in 1914 of section 5 of the Clayton Act.<sup>3</sup> It permitted private plaintiffs seeking triple damages for alleged antitrust injuries to use final judg-

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<sup>1</sup>26 Stat. 209 (1890), as amended, 15 U.S.C. (Supp. V, 1958) §1. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 at 359 (1933).

<sup>2</sup>The first consent decree entered in a civil Sherman Act case instituted by the United States was that in *United States v. Otis Elevator Co.* on June 1, 1906. See CCH, *THE FEDERAL ANTITRUST LAWS*, p. 75, #30 (1952). Until 1912, only two other consent decrees were entered: *United States v. American Seating Co.* in 1907 (*id.* at 78, #45) and *United States v. Southern Wholesale Grocers' Assn.* (*id.* at 84, #72). In 1912, four consent decrees were entered: *United States v. Standard Wood Co.* (*id.* at 90, #94); *United States v. Pacific Coast Plumbing Supply Assn.* (*id.* at 93, #104); *United States v. Aluminum Co. of America* (*id.* at 96, #116); and *United States v. Central-West Publishing Co.* (*id.* at 97, #119). In 1913, six consent decrees were entered—five of them in the final month of the Taft Administration: *United States v. Master Horseshoers' Nat. Protective Assn.* (*id.* at 98, #123); *United States v. Philadelphia Jobbing Confectioners' Assn.* (*id.* at 98, #124); *United States v. Krentler-Arnold Hinge Last Co.* (*id.* at 99, #129); *United States v. Burroughs Adding Machine Co.* (*id.* at 101, #138); *United States v. New Departure Mfg. Co.* (*id.* at 102, #141).

<sup>3</sup>38 Stat. 731, 15 U.S.C. (1952) §16.

ments in antitrust cases instituted by the government as "*prima facie* evidence . . . as to all matters respecting which said judgment of decree would be an estoppel as between the parties thereto." But the section contained a proviso that it should "not apply to consent judgments or decrees entered before any testimony has been taken." The effect of this proviso was to give defendants in antitrust cases a real incentive to compose their difficulties with the government.

There have been about 410 civil cases filed by the United States under the Sherman Act terminated by the filing of consent judgments and about one-fourth of these judgments have been on the books for more than a quarter of a century.<sup>4</sup> The injunctive provisions in these judgments apply in perpetuity unless expressly limited by their terms to some specific period. Consequently, unless the defendants have died or gone out of business, leaving no successor, almost all of these judgments are still in effect.<sup>5</sup> These decrees relate to products as diverse as quinine and peanuts.<sup>6</sup> They apply to businesses as large as General Motors Corporation and as small as the members of the Library Binding Institute in New York City.<sup>7</sup> Their provisions are frequently minute, particularized and carefully tailored to outlaw the specific anti-competitive practices engaged in by the defendants at the time when the decrees were entered. Some of them outlaw activities that do not remotely violate the antitrust laws.<sup>8</sup> The prohibitions were deemed necessary when the judgment was entered

<sup>4</sup> The number entered from 1890 through 1956 was obtained from a count of the cases listed in CCH, *THE FEDERAL ANTITRUST LAWS* (1952) and (1952-1956 Supp.). The number entered in 1957 (22) was obtained directly from the Antitrust Division. When separate consent decrees were entered against more than one defendant in a single case, they are nevertheless counted as one decree. And see note 5 *infra*.

<sup>5</sup> A very few consent decrees, however, have been terminated. For example, the consent decree entered in 1929 in *United States v. General Outdoor Advertising Co.* [CCH, *THE FEDERAL ANTITRUST LAWS*, p. 152, #346 (1952)] was terminated after entry of the consent decree against the same defendant in 1955 [*id.*, 1952-1956 Supp., p. 54, #1058]. Similarly, Article IX of the consent judgment in *United States v. Textile Refinishers Assn., Inc.*, (CCH *TRADE CAS.* 1955, ¶68,126) terminated an earlier consent decree against the same defendant. See CCH, *THE FEDERAL ANTITRUST LAWS*, p. 172, #414 (1952). A consent judgment in *United States v. Gamewell Co.* (*id.* at 346, #874) has been suspended for a three-year period (unreported).

<sup>6</sup> *United States v. Amsterdamsche Chininefabriek* (quinine), CCH, *THE FEDERAL ANTITRUST LAWS*, p. 150, #337 (1952); *United States v. Nat. Peanut Cleaners & Shellers Assn.*, *id.* at 140, #294.

<sup>7</sup> *United States v. General Motors Corp.*, CCH, *THE FEDERAL ANTITRUST LAWS*, p. 31, #566 (1952-1956 Supp.); *United States v. Library Binding Institute*, *id.* at 59, #1081.

<sup>8</sup> E.g., see discussion of the Swift and Harvester decrees, at notes 14 and 34 *infra*.

to dissipate the effects of defendant's unlawful conduct or to insure against its renewal or continuation.

All antitrust consent decrees—at least all those entered in the past twenty years—contain a so-called retention-of-jurisdiction provision, along the following lines:

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions herein and for the enforcement of compliance therewith and punishment of violations thereof.

This provision, while it is frequently cited by courts as the source of their power to modify or terminate judgments,<sup>9</sup> is probably surplusage. The general rule appears to be that courts have inherent power to modify and enforce their judgments.<sup>10</sup> Moreover, they have the power to terminate them,<sup>11</sup> although in recent years the Antitrust Division has attempted to eliminate the phrase "or termination" in the retention-of-jurisdiction provision.

The standard to be applied in determining whether a defendant should be "relieved" from a final judgment is formulated in clause (5) of rule 60(b) of the Federal Rules of Civil Procedure, as amended in 1948.<sup>12</sup> That clause permits a court on motion to "relieve a party or his legal representative" from any final judgment if it "is no longer equitable that the judgment should have prospective application." It appears that amended rule 60(b) applies to judgments entered before, as well as after 1948, "unless it 'would work injustice' so to apply the rule."<sup>13</sup>

The generality of rule 60(b)(5) offers little guidance in determining the circumstances under which an antitrust consent decree may be modified. The Department of Justice has taken the position that the tests for modifying a consent judgment, at least

<sup>9</sup> See, e.g., *United States Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457 at 463-464 (1957); *Chrysler Corp. v. United States*, 316 U.S. 556 at 562 (1942).

<sup>10</sup> See *United States v. Swift & Co.*, 286 U.S. 106 at 114 (1932), and *United States v. California Co-Operative Canneries*, 279 U.S. 553 (1929).

<sup>11</sup> See *Tobin v. Alma Mills*, (4th Cir. 1951) 192 F. (2d) 133.

<sup>12</sup> 28 U.S.C. (1952) §723(c). We are not here concerned with relief from judgments entered by mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or on the ground of newly discovered evidence. Rule 60(b) provides that relief sought on these grounds must be requested not more than a year after the entry of the judgment.

<sup>13</sup> See *Klaprott v. United States*, 335 U.S. 601 at 609 (1949).

on the petition of a defendant, are different from those to be applied in cases involving litigated judgments.<sup>14</sup> There is no unequivocal authority to support the department's position. The leading case is *United States v. Swift & Co.*<sup>15</sup> It grew out of an antitrust consent decree entered into by the government in February 1920 with the then five largest meat packers.<sup>16</sup> Among other things the decree prevented the defendants from selling or distributing groceries and other non-meat products or from operating retail meat stores.<sup>17</sup> A few years later the operation of the decree was suspended.<sup>18</sup> In 1928, the Supreme Court finally held the consent decree valid and enforceable.<sup>19</sup> In 1930, Swift and Armour filed petitions to modify the consent decree by eliminating the injunctions against their entry into the grocery business and in other significant respects. The trial court granted the petitions for modification so as to permit sales of groceries at wholesale but denied the prayers for permission to enter the retail food business.<sup>20</sup> The United States appealed to the Supreme Court, which reversed in an opinion by Justice Cardozo. Although the decision was by only four justices with two dissenting and three not participating, it has acquired great authority with the passing of years, having been cited in well over a hundred judicial opinions.

Cardozo's discussion of the law on modification of equity decrees commenced with the point that the same tests apply to litigated judgments as to those entered by consent of the parties. He said:

"The result is all one whether the decree has been entered after litigation or by consent. *American Press Assn. v. United States*, 245 Fed. 91. In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act."<sup>21</sup>

<sup>14</sup> See Brief for the United States in support of Motion for Summary Judgment in *United States v. Swift & Co.*, filed Sept. 9, 1957, pp. 5-6. See text at note 44 infra.

<sup>15</sup> 286 U.S. 106 (1932).

<sup>16</sup> See CCH, *THE FEDERAL ANTITRUST LAWS*, p. 118, #211 (1952).

<sup>17</sup> See *Swift & Co. v. United States*, 276 U.S. 311 at 328-329 (1928).

<sup>18</sup> See *United States v. California Co-operative Canneries*, 279 U.S. 553 at 555 (1929).

<sup>19</sup> *Swift & Co. v. United States*, 276 U.S. 311 (1928).

<sup>20</sup> See *United States v. Swift & Co.*, 286 U.S. 106 at 113-114 (1932).

<sup>21</sup> *Id.* at 114-115.

Five pages later he seems to reverse himself and hold that a much stricter test is to be applied to petitions to modify consent decrees. He said:

“Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.”

There are practical problems facing the court and the parties when a consent decree is sought to be modified that are not present when modification is sought of a judgment after trial. In consent decrees there is no record available to which the court may turn for guidance on market structure, competitive conditions and industry practices. There is no judicial opinion available to explain the reasons why any particular provision of the decree was adopted. There are no findings of fact to serve as a foundation for the relief granted. It is, therefore, necessary for a court, in passing upon a motion to modify or vacate an antitrust consent judgment, to try some or all of the very issues the trial of which was obviated by the entry of the decree on consent. This consideration was emphasized by Justice Cardozo in the closing sentence of his opinion: “What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.”<sup>22</sup>

The few opinions in the decided cases<sup>23</sup> suggest the following

<sup>22</sup> *Id.* at 120.

<sup>23</sup> The following is a list of all reported judicial opinions found by the writer, passing on petitions or motions by defendants to modify or vacate final decrees or judgments in cases brought by the United States under the Sherman Act:

*Applications granted*

1. United States v. E. I. du Pont De Nemours & Co., (D.C. Del. 1921) 273 F. 869 (litigated decree).
2. American Press Assn. v. United States, (7th Cir. 1917) 245 F. 91 (consent decree).
3. United States v. International Salt Co., (S.D. N.Y. 1948) CCH 1948-1949 TRADE CAS., ¶62,270 (litigated judgment) (granted in part and denied in part).
4. United States v. Minnesota Mining & Mfg. Co., (D.C. Mass. 1951) 96 F. Supp. 356 (litigated judgment).

*Applications denied*

1. United States v. Discher, (S.D. N.Y. 1919) 255 F. 719 (consent decree).
2. United States v. New England Fish Exchange, (D.C. Mass. 1923) 292 F. 511 (litigated decree).
3. United States v. Swift & Co., 286 U.S. 106 (1932) (consent decree).
4. United States v. Tanner Products Co., (N.D. Ill. 1933) CCH TRADE REG. CT. DEC. Supp. 1932-1939, ¶55,037 (consent decree).

generalization: except where the government consents, a provision in a judgment in an antitrust case filed by the United States imposing continuing injunctions will be terminated by the court only upon a showing by the defendant that (1) the conditions giving rise to the injunction have substantially changed; (2) it is clear that the injunction is no longer necessary to obtain defendant's obedience to law; and (3) the injunction constitutes a serious handicap to the defendant. While it may be more difficult for a defendant to obtain a modification of a consent decree than of one entered after trial, the circumstances under which modification will be granted should remain the same in both situations. But a defendant may properly be required to sustain a heavier burden of proof in establishing that the circumstances justifying modification in fact are present.

Thus far we have been considering cases where a defendant seeks to modify or vacate an antitrust judgment. What is the situation when the shoe is on the other foot and the government is the petitioner? Only once has the United States been successful in obtaining modification of an antitrust judgment over defend-

5. *United States v. Vehicular Parking, Ltd.*, (D.C. Del. 1945) 61 F. Supp. 656 (litigated judgment). See also (D.C. Del. 1944) 56 F. Supp. 297.

6. *United States v. Minnesota Mining & Mfg. Co.*, (D.C. Mass. 1951) CCH 1950-1951 TRADE CAS. ¶62,795 (litigated judgment).

7. *United States v. Schine Chain Theatres, Inc.*, (W.D. N.Y. 1954) CCH 1954 TRADE CAS. ¶¶67,848 and 67,902 (litigated judgment). See also (W.D. N.Y. 1952) CCH 1952-1953 TRADE CAS. ¶67,237.

8. *United States v. Besser Mfg. Co.*, (E.D. Mich. 1954) 125 F. Supp. 710 (litigated judgment).

See also *Donaldson v. Read Magazine*, 333 U.S. 178 at 184 (1948); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 at 298 (1941); *Franke v. Wiltschek*, (2d Cir. 1953) 209 F. (2d) 493 at 498, n. 3; *Western Union Tel. Co. v. International Brotherhood*, (7th Cir. 1943) 133 F. (2d) 955; *Bigelow v. Twentieth Century-Fox Film Corp.*, (7th Cir. 1950) 183 F. (2d) 60 at 62; *Bigelow v. Balaban & Katz Corp.*, (7th Cir. 1952) 199 F. (2d) 794 at 797; *Coca-Cola Co. v. Standard Bottling Co.*, (10th Cir. 1943) 138 F. (2d) 788.

For decisions in cases involving analogous issues under cease and desist orders issued by the Federal Trade Commission, see *Indiana Quartered Oak Co. v. FTC*, (2d Cir. 1932) 58 F. (2d) 182; *Century Metalcraft Corp. v. FTC*, (7th Cir. 1940) 112 F. (2d) 443; *American Chain & Cable Co. v. FTC*, (4th Cir. 1944) 142 F. (2d) 909.

The following two cases each involved petitions to terminate injunctions against violating the Fair Labor Standards Act [52 Stat. 1060 (1938), 29 U.S.C. (1952) §201]: *Tobin v. Alma Mills*, (W.D. S.C. 1950) 92 F. Supp. 728, revd. (4th Cir. 1951) 192 F. (2d) 133 (consent decree entered in 1940 dissolved on ground that defendant "has observed the provisions of the statute in good faith over a period of ten years and there is no present reason to apprehend violation by him" and (at 136) "injunction was hampering the owners of the company in disposing of their stock"); *Walling v. Harnischfeger Corp.*, (E.D. Wis. 1956) 142 F. Supp. 202, affd. (7th Cir. 1957) 242 F. (2d) 712 (motion to vacate injunction entered in 1944 denied where based on contention that judgment was inequitable under rule 60(b), Fed. Rules Civ. Proc. and not on the basis of changed conditions).

ant's opposition: *Chrysler Corporation v. United States*.<sup>24</sup> Even then, only four justices voted in favor of upholding the modification allowed by the district court.<sup>25</sup> Chrysler, in 1938, had consented to a decree which contained an injunction prohibiting it from affiliating with an automobile finance company. The decree contained a proviso that this injunction would be lifted if by January 1, 1941 a final order had not been obtained requiring General Motors to divest itself of its wholly-owned automobile finance company. The specified date arrived and no such order had been obtained. The government moved for and obtained modification of the decree extending the date for one year.<sup>26</sup> Another year passed and no relief had been obtained against General Motors. Again the government applied for and obtained from the district court a second one-year extension. Chrysler appealed to the Supreme Court. Justice Black, for the Court, stated that "the test to be applied" is "whether the change served to effectuate or to thwart the basic purpose of the original consent decree."<sup>27</sup> He then proceeded to affirm the district court's findings that the government had proceeded diligently in its suit against General Motors, and that the requested modification would not impose a serious burden on Chrysler. The majority emphasized that Chrysler had made no showing that the modification would place it at a competitive disadvantage.

Justice Frankfurter, in dissent, answered this conclusion, stating, "The burden obviously rested upon the Government to show good cause for disregarding an express provision in a carefully framed decree. . . ."<sup>28</sup>

Six years later, the Court had before it Ford's appeal from an extension by the district court of a similar ban against affiliation with a finance company in a similar decree entered against it. Again the decision of the Court was by four justices. This time Justice Frankfurter was in the majority and wrote the Court's opinion.<sup>29</sup> The Court held that those circumstances in

<sup>24</sup> 316 U.S. 556 (1942).

<sup>25</sup> Chief Justice Stone and Justices Black, Douglas and Byrnes. Justices Roberts, Murphy and Jackson took no part, and Justices Frankfurter and Reed dissented.

<sup>26</sup> See *Chrysler Corp. v. United States*, 316 U.S. 556 at 560 (1942). Chrysler had appealed to the Supreme Court from the first modification but the appeal was dismissed for want of a quorum of qualified justices [314 U.S. 583 (1941), rehearing den. 314 U.S. 716 (1942)].

<sup>27</sup> *Id.* at 562.

<sup>28</sup> *Id.* at 570.

<sup>29</sup> *Ford Motor Co. v. United States*, 335 U.S. 303 (1948). Justices Frankfurter and



the *Chrysler* case which "were found extenuating on behalf of the Government two years after the entry of the decree are hardly compelling ten years afterward,"<sup>30</sup> and reversed the district court's judgment modifying the decree.

Justice Black, in sharp dissent, charged that the Court treated the consent decree "as though it were a contract between private persons for purchase of an automobile."<sup>31</sup> He then cited the *Swift* case as authority for the proposition that "a consent decree is not a contract, but a judicial act."

The fact is that a consent decree has many elements of a contract. Perhaps a more accurate description would be that it is a contract approved by a court. In an opinion handed down but three months after the Supreme Court decision in the *Chrysler* case, Judge Maris held that consent decrees are "based" on agreements "binding upon the government."<sup>32</sup> In the *RCA* case the government had moved to dismiss the complaint and vacate the consent decree entered ten years earlier on the ground that, in the opinion of the Department of Justice, the decree no longer promoted the public interest. In effect, it sought another chance to obtain more effective relief in a new proceeding. Judge Maris, in denying the government motion, stated:

"Since these consent decrees are based upon an 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 re-litigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. *Aluminum Co. v. United States*, 302 U.S. 230, 232 . . . ; *United States v. International Harvester Co.*, 274 U.S. 693, 703. . . . This is a very real benefit of which they would be deprived were the Government's motion to be granted."<sup>33</sup>

In the *International Harvester* case, cited by Judge Maris, the government had obtained a decision by a district court that the

Reed (the two dissenters in the *Chrysler* case) were joined by Chief Justice Vinson and Justice Burton. Justices Murphy and Jackson took no part, and Justices Black, Douglas and Rutledge dissented.

<sup>30</sup> *Id.* at 321.

<sup>31</sup> *Id.* at 322.

<sup>32</sup> *United States v. R.C.A.*, (D.C. Del. 1942) 46 F. Supp. 654 at 656. An appeal by the United States was dismissed on its own motion [318 U.S. 796 (1943)].

<sup>33</sup> *Id.* at 656.

defendant was a combination in restraint of trade.<sup>34</sup> The district court's decree entered in 1914 required that defendant be divided into three companies. Subsequently, this decree was modified by consent and the provision for mandatory dissolution eliminated.<sup>35</sup> A further consent decree, entered after defendant had dismissed its appeal to the Supreme Court,<sup>36</sup> was entered in 1918. The 1918 decree contained a clause providing that if "competitive conditions . . . in harvesting machines . . . shall not have been established at the expiration of eighteen months after the termination of the existing war . . . the United States shall have the right to such further relief herein as shall be necessary to restore said competitive conditions and to bring about a situation in harmony with law. . . ."<sup>37</sup>

In 1923 the United States filed a supplemental petition to secure additional relief.<sup>38</sup> It argued that the purpose of the 1918 decree was to restore competitive conditions as they obtained prior to the formation of the defendant in 1902 and that the decree had not accomplished that purpose.<sup>39</sup> On appeal from the district court's denial of the supplemental petition, the Supreme Court held that lawful "competitive conditions" had been established, though not those existing in 1902, and that to grant further relief "would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely."<sup>40</sup>

The government learned from the *Harvester* case that the privilege of having a try for a second bite is afforded only to those who expressly and plainly reserve that privilege. And even that reservation does not guarantee that the second bite will be very nourishing. The second-bite privilege is written into some consent judgments in a provision that is popularly known as a "sword of Damocles" clause. The term perhaps was first applied to the *Flat Glass* decree in 1948. That decree gives the United States at

<sup>34</sup> *United States v. International Harvester Co.*, (D.C. Minn. 1914) 214 F. 987.

<sup>35</sup> See *United States v. International Harvester Co.*, 274 U.S. 693 at 696 (1927).

<sup>36</sup> *International Harvester Co. v. United States*, 248 U.S. 587 (1918).

<sup>37</sup> Quoted in *United States v. International Harvester Co.*, 274 U.S. 693 at 697 (1927).

<sup>38</sup> See *United States v. International Harvester Co.*, (D.C. Minn., undated) 10 F. (2d) 827 at 828.

<sup>39</sup> See *United States v. International Harvester Co.*, 274 U.S. 693 at 702 (1927).

<sup>40</sup> *Id.* at 703.

any time after three years from the date of the judgment the privilege of filing a petition for dissolution of the principal defendants "without showing a change in circumstance."<sup>41</sup> Since *Harvester*, the government has never invoked this type of clause to obtain additional relief.

The "precedent . . . of Damocles" was explicitly utilized by Judge Wyzanski in his judgment in *United States v. United Shoe Machinery Corp.*<sup>42</sup> In his "Opinion on Remedy" Judge Wyzanski frankly expressed his reluctance to proceed "with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition." He therefore proposed first to try "milder remedies." But he ruled that ten and a half years after termination of any appeal to the Supreme Court "both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market."<sup>43</sup>

Judge Wyzanski's "C Day" provisions evidence an apparent desire by the court for a thorough-going re-evaluation of the effect of the decree some twelve years after he filed his opinion. At that time either party may petition for its modification. For example, defendant could ask that the compulsory machinery-sale provisions—the heart of the decree—be lifted. And the government could ask for more drastic relief such as for abolition of the leasing system altogether.

We must wait until 1965 or later to assay the wisdom of Judge Wyzanski's "C Day." We hazard the guess that much will depend upon whether the judge himself is then sitting in the District of Massachusetts. But surely "C Day" points in the right direction and suggests a principle which might well be adapted by the Antitrust Division for use in most, if not all, its consent judgments.

In two relatively recent litigated judgments entered in the Southern District of New York in important government anti-

<sup>41</sup> *United States v. Libbey-Owens-Ford Glass Co.*, (N.D. Ohio 1948) CCH 1948-1949 TRADE CAS. ¶62,323, Art. XXIX.

<sup>42</sup> (D.C. Mass. 1953) 110 F. Supp. 295 at 351, *affd. per curiam* 347 U.S. 521 (1954).

<sup>43</sup> Arts. 1 and 18 (D.C. Mass. 1953) 110 F. Supp. 295 at 352 and 354.

trust cases, the government was given the privilege of petitioning for "additional" relief during a five-year period following the entry of the judgment.<sup>44</sup> In both cases at the expiration of the five-year period, the government, instead of asking for further relief, asked that the period in which it could apply for such relief be extended. The sought-for extension was for five years in *Alcoa* and for two in the *ICI* case. The court in each case denied the government's petition.<sup>45</sup> In denying the *ICI* extension, Judge Ryan concluded his opinion by saying, "An open end judgment would not aid competition, but rather tends to stifle it and prevent research and development of new or improved products."

In the *Alcoa* case, Judge Cashin held that the purpose of the five-year period "was to observe Kaiser's and Reynolds' progress, or lack of it." He found that during that period, Alcoa's relative share of the aluminum market had declined while Kaiser's had increased and Reynolds' remained the same.<sup>46</sup> He concluded: ". . . Kaiser and Reynolds have not only thrived and prospered but they have removed all reasonable doubts as to their capacity to effectively compete with Alcoa in the future."<sup>47</sup>

If the court in either of these two cases intended to permit the government to request it to reappraise the decrees in these two hard-fought cases, it would seem that Judge Wyzanski's "C Day" provision would have been a preferable formulation for achieving that result. The "C Day" provision contains two vital differences: the length of time for reappraisal is more than doubled to twelve years from the date of the court's formulation of the judgment and *both* sides are given the chance to petition for important modifications.<sup>48</sup>

In *consent* decrees, provisions giving the government the right to further relief are likely to prove little more than empty threats. Consider the position of a court in a petition to modify a consent judgment where the petition seeks the drastic relief of divorce-

<sup>44</sup> *United States v. Aluminum Co. of America*, (S.D. N.Y. 1950) 91 F. Supp. 333 at 419; *United States v. Imperial Chemical Industries*, (S.D. N.Y. 1952) 105 F. Supp. 215.

<sup>45</sup> *United States v. Aluminum Co. of America*, (S.D. N.Y. 1957) 153 F. Supp. 132; *United States v. Imperial Chemical Industries*, (S.D. N.Y. 1957) CCH 1957 Trade Cas. ¶68,859.

<sup>46</sup> *United States v. Aluminum Co. of America*, (S.D. N.Y. 1957) 153 F. Supp. 132 at 167.

<sup>47</sup> *Id.* at 171.

<sup>48</sup> In the *ICI* case, the judgment apparently did give both sides an opportunity to petition for changes in the decree, although the language giving the defendants this opportunity is no more explicit than that in the standard retention-of-jurisdiction clause.

ment or dissolution of a putative monopolist. There is no record to which the court can turn. One must be created for him as a result of hearings. The judge did not fashion the original decree. This was done by consent of the parties. His knowledge of it is confined, at most, to having had it explained to him at the time of its entry, just before he signed it.

While a consent decree is not a private contract, as we have learned above, it is a settlement of litigation and as such has some of the attributes of accord and satisfaction. Courts are apt to be extremely reluctant, no matter how explicit is the privilege of either party to reopen, to grant additional relief to the government.

For much the same reason, provisions analogous to Judge Wyzanski's "C Day" are not apt to prove effective in consent decrees. If either party moves for modification, it is likely that the other party will counter with a petition for modification in the opposite direction. In this circumstance a court is likely to deny both.

The government is not altogether helpless if its demands for further relief are not met. It is usually open to it to institute a new civil case alleging that defendant is presently violating the Sherman Act. And in fact on several occasions the government has filed new suits against defendants already subject to extensive restrictions in consent decrees covering practices in the same markets as those involved in the first suits.<sup>49</sup> In the second case, however, the government may be prevented from introducing evidence of events occurring prior to the entry of the first judgment.<sup>50</sup> And in at least one such instance the attorney general has stated that this prevented the government from successfully prosecuting the second case. Curiously enough, this occurred in

<sup>49</sup> 302 U.S. 230 (1937); *United States v. General Electric Co.*, CCH, *THE FEDERAL ANTI-TRUST LAWS*, p. 86, #82 and p. 240, #575 (1952); *United States v. Aluminum Co. of America*, id. at 96, #116, and 175, #423; *United States v. Central-West Publishing Co.*, id. at 97, #119, and 420, #1105 (sub nom. *United States v. Western Newspaper Union*); *United States v. Swift & Co.*, id. at 118, #211 (sub nom. *United States v. Armour and Co.*) and 374, #944; *United States v. General Outdoor Advertising Co.*, id. at 152, #346, and 406, #1058; *United States v. Radio Corp. of America*, id. at 158, #371, and 147, #1210 (1952-1956 Supp.); *United States v. Textile Refinishers Assn.*, id. at 172, #414, and 420, #1106; *United States v. Borden Co.*, id. at 233, #556, and 415, #1090; *United States v. American Society of Composers*, id. at 247, #593, and 355, #896.

<sup>50</sup> Orders (unreported) to this effect were entered in the second cases against *Armour & Co.*, *General Outdoor Advertising Co.*, and *Borden Co.*, cited in the preceding note. All of these cases arose in the Northern District of Illinois.

the meat industry. In 1948—sixteen years after defendants lost in their effort to modify the 1920 decree—the government filed a second broad equity suit against the American Meat Institute and four of the five defendants in the 1920 case, alleging monopolization in meat extending back to 1905.<sup>51</sup> On defendants' motion, the district court entered an order preventing the government from introducing any testimony as to matters occurring prior to April 2, 1930, the date on which Armour and Swift had filed their amended petitions to modify the 1920 decree.<sup>52</sup> On the eve of trial in 1954, the government dismissed the 1948 complaint on the ground that order limiting proof made it impossible for the government to proceed to try the case.<sup>53</sup>

In the case of RCA, the government filed a second suit in 1954 which is pending.<sup>54</sup> The complaint carefully limits the allegations of illegal activities to a time subsequent to the filing of the first consent decree. The matter first reached the courts as a result of a grand jury investigation instituted in 1952, ten years after Judge Maris denied the government's petition to vacate the 1932 consent decree. When subpoenaed to produce its records before the grand jury, RCA pleaded the consent decree as a bar to the subpoena.<sup>55</sup> Judge Weinfeld refused to quash it and held that the consent decree did not bar subsequent grand jury investigation. The subpoena, however, called for no records dated earlier than 1934, somewhat more than a year after the entry of the consent decree.

The principal benefit which a defendant obtains from a consent decree is, of course, that the litigation is ended. As Judge Maris put it in the *RCA* case, defendant may set up the decree "as a bar to any attempt by the Government to relitigate the issues raised in the suit" or to seek additional relief.<sup>56</sup> Suppose a defendant's conduct fifteen or twenty years after the entry of a decree has neither violated the decree nor the antitrust laws, and suppose

<sup>51</sup> See CCH, *THE FEDERAL ANTITRUST LAWS*, p. 374, #944 (1952).

<sup>52</sup> See p. 52 of Brief cited in note 14 supra.

<sup>53</sup> *Id.*, Exhibit Y. (Press release, Dept. of Justice, dated March 17, 1954). In 1956 defendants Swift, Armour and Cudahy filed new motions to modify the 1920 consent decree. They also moved to transfer the case from the District of Columbia to the Northern District of Illinois. The motion has been granted. *United States v. Swift and Co.*, (D.C. D.C. 1958) 158 F. Supp. 551.

<sup>54</sup> See CCH, *THE FEDERAL ANTITRUST LAWS—1952-1956 Supp.*, p. 147, #1210 (1957).

<sup>55</sup> *Application of Radio Corporation of America*, (S.D. N.Y. 1952) 13 F.R.D. 167.

<sup>56</sup> Quoted at note 33 supra.

further that the decree no longer serves any useful purpose. In the existing state of the law, it is extremely doubtful if either side could vacate it if the other side objected.

This problem is doubtless not serious when related to the majority of antitrust consent judgments. Most of them lose "practical significance with the passage of . . . time."<sup>57</sup> But consent decrees rendered in important monopoly cases [National Cash Register (1916);<sup>58</sup> International Harvester (1918);<sup>59</sup> the Meat Packers (1920);<sup>60</sup> R.C.A. (1932);<sup>61</sup> Ford<sup>62</sup> and Chrysler (1938);<sup>63</sup> Libbey-Owens-Ford (1948);<sup>64</sup> Eastman Kodak (1954);<sup>65</sup> International Business Machines (1956)<sup>66</sup>—to cite some leading examples] continue to hang over the defendants and the public with no real re-examination as the years go by to determine their present effectiveness or their appropriateness.

Forty years ago it seemed proper and wise to limit the Harvester Company to only one dealer in agricultural implements in any one city.<sup>67</sup> This may or may not be a wise restraint today. Thirty-eight years ago, it was thought in the public interest to prevent Cudahy Packing Company from selling meats and groceries at retail.<sup>68</sup> Is this wise in today's market place? Yet, in the absence of a showing of grievous wrong resulting from changing circumstances these provisions will continue, apparently forever.

A consent judgment that has already been in effect for fifteen or twenty years whose injunctions are still necessary has probably been ineffective. Within that period the judgment should have accomplished its objectives. At the conclusion of that period both the government and the defendants should reassess the competitive situation in the market or markets involved, and unless the conclusions are clear both that an injunction is still necessary to compel obedience to law and maintain competition and that the judgment has and will continue to serve that purpose, the judg-

<sup>57</sup> See *Tobin v. Alma Mills*, (4th Cir. 1951) 192 F. (2d) 133 at 136.

<sup>58</sup> See CCH, *THE FEDERAL ANTITRUST LAWS*, p. 91, #100 (1952).

<sup>59</sup> See text at note 34 supra.

<sup>60</sup> See text at note 16 supra.

<sup>61</sup> See text at note 32 supra.

<sup>62</sup> See CCH, *THE FEDERAL ANTITRUST LAWS*, p. 187, #439 (1952).

<sup>63</sup> *Id.* at 186, #438.

<sup>64</sup> See text at note 41 supra.

<sup>65</sup> CCH 1954 *TRADE CAS.* ¶67,920.

<sup>66</sup> CCH 1956 *TRADE CAS.* ¶68,245.

<sup>67</sup> See pp. 1058-1059 supra.

<sup>68</sup> See p. 1054 supra.

ment should be terminated. Thus, there should be inserted in all antitrust consent decrees a paragraph along the following lines:

"Fifteen [or twenty] years after the entry of this final judgment all of its provisions then in effect shall automatically terminate against all defendants unless any party to the judgment shall have filed, within three months before the expiration of said fifteen [or twenty] year period, a petition to continue in force any or all of said provisions. Said petition shall state the reasons why it is deemed equitable and in the public interest that said provisions, or any of them, be continued. Within sixty days after any such petition shall have been filed each other party to the judgment shall file an answer thereto. After the filing of said answers, this court shall hold a hearing at which any party may offer testimony and other evidence on the merits of said petition or petitions. Pending decision on said petition or petitions the provisions in this final judgment sought to be continued by each such petition shall continue in effect."

This suggested provision might not be sufficient to permit the government, after a decree has been terminated pursuant to its terms, successfully to attack the legality in any subsequent suit against the same defendants of their activities prior to the entry of the first decree.<sup>69</sup> To insure that allegations of this type in new suits against the same defendants would withstand defenses based on a theory of estoppel, the proposed new paragraph might also authorize dismissal of the first complaint if and when the judgment is terminated. In addition, the new paragraph should provide that the first judgment shall not bar granting appropriate relief in any new case that may be filed by the government.<sup>70</sup> Thus, an additional sentence could be added along the following lines:

<sup>69</sup> Cf. *United States v. RCA*, (D.C. Del. 1942) 46 F. Supp. 654, discussed in text at note 32 supra; and cases cited note 41 supra. But cf. *United States v. Aluminum Co. of America*, (W.D. Pa. 1937) 20 F. Supp. 608, affd. 302 U.S. 230 (1937).

<sup>70</sup> A provision along these lines is contained in art. IX of the consent judgment in *United States v. International Nickel Co. of Canada, Ltd.*, (S.D. N.Y. 1948) CCH 1948-1949 TRADE CAS. ¶62,280.

Section XIII of the Consent Judgment in the *United Fruit* case provides that twenty years after defendant "has completed performance of the plan for disposition of assets described in Article VIII," the judgment "shall thereafter be of no force or effect." *United States v. United Fruit Co.*, (E.D. La. 1958) 1958 CCH Trade Reg. Rep. ¶68,941. Since art. VIII, §E, gives the defendant a period of not more than four years after June 30, 1966 to comply with a suitable divestiture plan, the 20-year period might not commence until 1970.



“If this court determines that this final judgment shall be terminated, it shall (or may) also enter an order dismissing the complaint herein, without prejudice, in which event, in any new proceeding instituted by the plaintiff under the Sherman Act after the entry of any such order of dismissal, this judgment shall not be deemed a bar to the granting of appropriate relief or the interposition of any defense other than that such relief is barred by this judgment.”

If dismissal of the original complaint is left to the discretion of the court, rather than made mandatory, there is good reason to suppose that the entire paragraph would be acceptable to many defendants for inclusion in consent decrees hereafter entered. The proposal should also have appeal for the Antitrust Division. In drafting and negotiating consent decrees, the Antitrust Division is not in the position solely of a litigant in a law suit; rather it must necessarily assume many of the attributes of an administrative tribunal. In many cases, while occupying this role, the division is purporting to draft what will become an industry code of lawful competition. As such it necessarily has a greater responsibility than if it were proposing a final judgment for consideration by an impartial court after a full trial. Indeed, in negotiating consent decrees the division must perforce assume—if only for the moment—a kind of judicial role.

Viewed in this light, the Antitrust Division, as well as defendants and the public, should gain by agreeing upon automatic termination of consent judgments after they have been in effect for a long period of years unless there is some clear reason in a particular case for continuing any of their provisions.