Volume 55 | Issue 1

1956

Regulation of Business - Sherman Act - Administration and Enforcement - A Re-Analysis of Consent Decrees

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COMMENTS

REGULATION OF BUSINESS — SHERMAN ACT — ADMINISTRATION AND ENFORCEMENT — A RE-ANALYSIS OF CONSENT DECREES — No problem in the field of antitrust administration and enforcement has attracted so much attention or generated so much comment recently as has the increased use of consent decrees in civil prosecutions[1] brought by the Department of Justice[2] under the Sherman Act.[3] The consent decree may be approached from many different angles. No study of this weapon of antitrust administration has touched upon all aspects of the problem.[4] This comment will deal with a review of the history, nature, and use of the consent decree, an analysis of some of the more recent and important decrees, and a discussion of the crucial problem, raised especially by the *Report of the Attorney General's National Committee to Study the Antitrust Laws,*[5] of the constitutional and statutory bases (or lack thereof) for the relief granted by consent decrees.

I. *History, Nature and Use of Consent Decrees*

In 1906 the first consent decree in a civil suit filed under the Sherman Act was entered in the case of *United States v. Otis Ele-*

1 A consent decree is entered only in a civil suit brought in a federal district court under §4 of the Sherman Act. 26 Stat. L. 209 (1890), 15 U.S.C. (1952) §4. Criminal prosecutions under the Sherman Act are never ended by consent judgment but may be, and often are, either *nolprossed* by the government or ended by a plea of *nolo contendere* on the part of the defendants, either one of which may be considered the practical equivalent to a consent decree. See, generally, Duncan, "The 'Big Case'—When Tried Criminally," 4 WEST. RES. L. REV. 99 at 108 (1953); Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 at 35, n. 3 (1950).

2 This comment is confined to the use of consent decrees by the Department of Justice. On the consent settlement procedure utilized by the Federal Trade Commission, see Sheehy, "Consent Settlements of Federal Trade Commission Complaints," FEDERAL ANTITRUST LAWS 285 (1953) (University of Michigan Summer Institute).

3 Commonly, consent settlements are negotiated as to complaints brought under §§1 and/or 2 of the Sherman Act. But many consent decrees are entered in cases involving the Clayton Act. For a recent and important case arising under §7 of that act [38 Stat. L. 731 (1914), as amended by 64 Stat. L. 1125 (1950), 15 U.S.C. (1952) §18], see United States v. Hilton Hotels Corp., (D.C. Ill. 1956) 1956 CCH Trade Cas. ¶68,253. See also United States v. General Shoe Corp., (D.C. Tenn. 1956) 1956 CCH Trade Cas. ¶68,271.

4 The major studies to date in this area are, chronologically, Donovan and McAllister, "Consent Decrees in the Enforcement of Federal Antitrust Laws," 46 HARV. L. REV. 885 (1933); Hamilton and Till, "Antitrust in Action," T.N.E.C. Monograph No. 16, pp. 88-97 (1940); Isenbergh and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 (1940); Katz, "The Consent Decree in Antitrust Administration," 53 HARV. L. REV. 415 (1940); Timberg, "Recent Developments in Antitrust Consent Judgments," 10 FED. B.J. 351 (1949); Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 (1950).

5 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 361 (1955), hereinafter cited as REPORT.

vator Co.,[6] in which the defendants, while denying any violation of the act and stating that they had no desire or intention to violate it, nevertheless consented to the entry of a decree against them. Since 1906, this procedure has become commonplace. For example, 72 percent of all civil actions filed by the Department of Justice in the years 1935 to 1955 were settled by consent decrees,[7] and, while most of these settlements are in "minor" cases,[8] this suggests that administration and enforcement of the antitrust laws is now accomplished very largely by negotiation. Because a consent decree is commonly worked out by negotiation and is given little or no examination or scrutiny before being signed by the judge,[9] it is regrettable but true that the lack of knowledge of the facts or issues involved in consent decree cases has led to the process often being viewed as either a potential whitewash for the defendants or as a device by which the government squeezes all it can get from the defendants irrespective of the constitutional or statutory basis for the relief sought. Further, the necessary secrecy of the process has subjected it to political attack.[10]

Why the increased use of and emphasis on consent decrees? This question is, unlike most others on this subject, fairly easy to answer. From the point of view of the defendant, the consent decree procedure offers: (1) less expense, (2) less publicity,[11] (3) the knowledge that the decree cannot be used as a basis for a future treble damage suit under section 4 of the Clayton Act,[12] and, of course, (4) less disruption of normal business affairs than would

6 (9th Cir. 1906) Decrees and Judgments in Federal Antitrust Cases 107.

7 REPORT 360.

For other, and even higher, figures, see 63 HARV. L. REV. 320 (1949); Barnes, "Settlement by Consent Judgment," ABA Antitrust Section Proceedings 8 (April 1954).

8 See Hamilton and Till, "Antitrust in Action," T.N.E.C. Monograph No. 16, p. 89 (1940).

9 See the instances cited by Isenberg and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 at 408-409 (1940) and Peterson, "Consent Decrees: A Weapon of Anti-Trust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 at 41 (1950), pointing out the repeated and constant lack of supervision and control by district judges over the terms of consent decrees. See also 63 HARV. L. REV. 320 at 322, n. 13 (1949).

10 E.g., it has been suggested that a conservative administration can use consent decrees to show "paper accomplishment in the enforcement" of the antitrust laws. See Hamilton and Till, "Antitrust in Action," T.N.E.C. Monograph No. 16, p. 90 (1940). Professor Louis Schwartz, dissenting from the *Report*, suggested that the secrecy problem might be solved by requiring that the Department of Justice publish a memorandum stating the background of and the reasons for entering into a consent decree. Schwartz dissent, 1 ANTITRUST BUL. 37 at 54 (1955), and see WALL ST. J., March 30, 1956, p. 5:1.

11 On this point especially, see the example given by Barnes, "Settlement by Consent Judgment," ABA Antitrust Section Proceedings 8 at 11 (April 1954).

12 This is so by the express terms of §5 (a) of the Clayton Act. See Barnsdale Refining Corp. v. Birnamwood Oil Co., (D.C. Wis. 1940) 32 F. Supp. 308 (*nolo contendere*); Bausch Machine Tool Co. v. Aluminum Co. of America, (2d Cir. 1935) 79 F. (2d) 217. The terms

take place if there were a long, involved trial. All four of these factors are important to a defendant, the third perhaps the most so.[13] From the point of view of the government, the consent settlement procedure offers a means to accomplish results it deems desirable in a given industry without the time and expense necessary to secure a litigated decree. Further, it would seem that the Department of Justice has not overlooked the fact that it can secure by consent specific measures of relief that it might be difficult to convince a court to grant in a litigated case.[14] Lastly, the government is freed from the uncertainty of the result that inheres in a litigated case and also from the requirement of producing and proving the factual bases for its complaint and is, generally, subject to much less formal control in the prosecution of its suit.[15]

The consent decree is, of course, a compromise between two parties to a civil (equitable in nature) suit, the exact terms of which are fixed by negotiation between the parties and formalized by the signature of the federal district judge. The whole procedure adds flexibility to antitrust prosecution, but it is not agreed who enters the bargaining room in the better position. Several

of §5 (a) are specifically called into play by the recital in almost every consent decree in recent years that it is entered without findings of fact or conclusions of law. But §5 (a) may not apply where, in fact, part of the case has been litigated—typically where testimony has been taken. Homewood Theatre, Inc. v. Loew's, Inc., (D.C. Minn. 1952) 1952 CCH Trade Cas. ¶67,333; Don George, Inc. v. Paramount Pictures, Inc., (D.C. La. 1951) 1952 CCH Trade Cas. ¶67,294. See also Ulrich v. Ethyl Gasoline Corp., (D.C. Ky. 1941) CCH Trade Reg. Rep., 9th ed., ¶52,549; DeLuxe Theatre Corp. v. Balaban and Katz Corp., (D.C. Ill. 1951) 95 F. Supp. 983.

13 It is interesting to note that the IBM consent decree (1956 CCH Trade Cas. ¶68,245) followed by less than a month the filing of a treble damage suit against IBM by Sperry-Rand Corporation, in the amount of $90,000,000. See N.Y. TIMES, Jan. 26, 1956, p. 1:5. This suit was later withdrawn on Aug. 21, 1956, and at the same time IBM dropped a counterclaim against Sperry-Rand for patent infringement, See N.Y. TIMES, Aug. 22, 1956, p. 39:6.

Professor Schwartz advocates allowing the use of consent decrees as prima facie evidence under §4 of the Clayton Act, i.e., doing away with the exception made by §5 (a). What such a change would do to the whole consent decree procedure Professor Schwartz does not state, nor, apparently care. But obviously a defendant will not be willing to subject himself to the awesome treble damage recovery without first putting up a struggle in the prior suit by the government. Ignoring the question of whether this would emasculate consent decree procedure entirely, Professor Schwartz contents himself with saying that in agreeing to a consent decree, the government is "bargaining away all real possibility of recovery by private victims." A colleague, Professor Stedman, merely observes that the §5 (a) limitation on the use of consent decrees is a disadvantage, especially unfortunate in view of the "fact," for which no authority is cited, that the most flagrant antitrust violations are those that are settled by consent judgment. See Schwartz Dissent, 1 ANTITRUST BUL. 37 at 54 (1955); Stedman, "The Committee's Report: More Antitrust Enforcement—Or Less?" 50 N.W. UNIV. L. REV. 316 at 323 (1955).

14 See the discussion of this point in Part III infra.

15 This overall flexibility in the consent decree procedure is basically the reason for its rejuvenation by Thurman Arnold in 1938. See REP. ATTY. GEN. 65-66 (1938).

writers have suggested, with a great deal of justification, that once a defendant has indicated a willingness to compromise, the government is in the superior position in fixing the precise terms of the decree.[16] On the other hand, it has been pointed out that the government attorneys are in a far from invulnerable position because of their own comparative ignorance of the intricacies of the industry with which they are dealing.[17]

The nature of the consent decree has also caused confusion and uncertainty as to the basic aims which the government ought to pursue in consent cases. Should it be simply a question of securing specific relief against one "law violator"[18] as a means of insuring that no future action of a type previously carried on will occur, or should the government have the responsibility (since, apparently, it has the opportunity[19]) to seek relief in the nature of industry-wide regulation on a broad economic scale?[20] And, if the latter is desirable in theory, is it legally justified in view of the fact that it smacks of both the administrative-regulation type of control used in other federally controlled areas but not authorized in the antitrust field and also of an NRA type of sweeping economic supervision?[21] These questions are unanswered to date and perhaps are unanswerable. But they do suggest that anomalies of consent settlement procedure spring from the ambiguous nature of the decree itself. Is it a horse trade between two litigants formalized by a judge's signature,[22] or is it a decree of a federal district court enjoining certain business practices, differing from the normal decree only in that it lacks specific findings of fact and declarations of illegality? If it is the former, it is arguable that the government is justified in (1) asking for relief that would not otherwise be granted in a litigated case and (2) seeking to move on an industry-

16 See Horsky, "Settlement," ABA Antitrust Section Proceedings 102 (August 1954); Segal and Mullinix, "Administration and Enforcement," 104 UNIV. PA. L. REV. 285 at 297 (1955).

17 Hamilton and Till, "Antitrust in Action," T.N.E.C. Monograph No. 16, pp. 90-91 (1940).

18 Professor Schwartz' description of a defendant. See Schwartz Dissent, 1 ANTITRUST BUL. 37 at 53-55 (1955).

19 But see Carman, "Analysis of Chapter VIII," ABA Antitrust Section Proceedings 148 at 156 (August 1955).

20 Hamilton and Till, "Antitrust in Action," T.N.E.C. Monograph No. 16, pp. 91-92 (1940).

21 See Katz, "The Consent Decree in Antitrust Administration," 53 HARV. L. REV. 415 (1940). Compare the FTC's Trade Practice Conference Rules.

22 See the brief discussion of this view by Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 at 40 (1950).

wide scale without prime attention to the allegedly harmful and illegal business practices of the particular defendant. If not, if the consent decree is thought of as another means of judicial enforcement of the antitrust laws, the converse may be true.[23]

In *Swift & Co. v. United States*[24] the Supreme Court gave its blessing to the consent decree as a weapon of antitrust administration. It held in that case that a decree could be attacked, whether by a motion to vacate, appeal, or bill of review, only on such grounds as lack of actual consent to the decree, lack of federal jurisdiction, fraud in the procurement, clerical error, etc. As for other grounds, such as the existence of a case or controversy, the factual basis for the decree or the justification for the actual terms of it, these points could not be urged by a consenting party in a later attack. Later authority has more fully developed and strengthened the consent decree. For instance, *United States v. Institute of Carpet Manufacturers of America*[25] reiterated that a consent decree estops the consenting party from attacking its validity and, further, that a decree is not open to attack for failure to state the facts and reasons underlying the decree. In legal effect and force, then, a consent decree is practically indistinguishable from a litigated decree.[26] And in practical effect, it is not unlikely that it affords legal precedent for future decrees, both litigated and consensual, especially as to the nature of the relief granted.[27]

Other problem areas which should be briefly mentioned before proceeding to a discussion of some of the more important recent consent decrees are (1) modification, (2) concurrent civil and criminal suits, (3) the appropriate time (before or after the complaint) for the negotiations, and (4) the issue of who should initially draft and present the decree.

[23] See, generally, Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1228-1236 (1952).

[24] 276 U.S. 311, 48 S.Ct. 311 (1928). On the history of the packer's decree generally, see Donovan and McAllister, "Consent Decrees in the Enforcement of Federal Antitrust Laws," 46 HARV. L. REV. 885 at 886-899 (1933); 42 YALE L.J. 81 (1932).

[25] (D.C. N.Y. 1941) 1 F.R.D. 636. See also St. Louis Amusement Co. v. Paramount Pictures, Inc., (D.C. Mo. 1945) 61 F. Supp. 854, affd. (8th Cir. 1948) 168 F. (2d) 988.

[26] See Isenbergh and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 at 388 (1940). On the res judicata effect of consent decrees, see the litigation involving the Aluminum Company of America discussed by Katz, "The Consent Decree in Antitrust Administration," 53 HARV. L. REV. 415 at 420-423 (1940).

[27] It would seem likely that the royalty free licensing provisions of many consent decrees (see note 76 infra) must have had some effect upon Judge Foreman when he ordered dedication of the lamp and lamp parts patents in the litigated case of United States v. General Electric Co., (D.C. N.J. 1953) 115 F. Supp. 835 at 843. Cf. Timberg, "Equitable Relief Under the Sherman Act," 1950 UNIV. ILL. L. FORUM 629.

Modification of Consent Decrees.[28] The federal district court which originally enters an antitrust consent decree retains the power to modify that decree both expressly[29] and by operation of law.[30] In *United States v. Swift & Co.*[31] the defendant, taking a new tack in its efforts to overthrow the packer's decree,[32] had persuaded the district court to grant a modification of the decree on a "change of circumstances" basis. The Supreme Court reversed, however, declaring that much more than this was needed to secure modification of a consent decree. Specifically, the Court stated that the question was not one of changing circumstances but of irreparable injury: "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."[33] The automobile finance decrees[34] provided the Supreme Court with further grist for this particular mill. Despite a suggestion of a liberalization in the requirements for modification in *Chrysler Corp. v. United States*,[35] in which the government was the party seeking modification, the Court apparently returned to the strict "hardship" theory of the second *Swift* case in *Ford Motor Co. v. United States*,[36] also a case in which the government was the petitioning party. In the latter case, although the majority opinion did not even cite the second *Swift* case, it appears to say that the party seeking modification must sustain a heavy burden of proving the necessity of the change.[37]

Concurrent Civil and Criminal Suits. The Supreme Court has given its approval to simultaneous civil and criminal suits in the

28 See, generally, 63 HARV. L. REV. 320 (1949). Cf. also Hughes v. United States, 342 U.S. 353, 72 S.Ct. 306 (1952); Liquid Carbonic Corp. v. United States, 350 U.S. 869, 76 S.Ct. 114 (1955).

29 Most, if not all, antitrust consent decrees contain a specific paragraph asserting that the court retains jurisdiction for the purpose of making any necessary modification.

30 United States v. Swift & Co., 286 U.S. 106 at 114, 52 S.Ct. 460 (1932).

31 Ibid. For the treatment of the modification of consent decrees prior to the second Swift case, see 63 HARV. L. REV. 320 at 321, n. 10 (1949).

32 See note 24 supra.

33 286 U.S. 106 at 119, 52 S.Ct. 460 (1932).

34 United States v. Ford Motor Co., (D.C. Ind. 1938) CCH Trade Reg. Rep., 8th ed., ¶25,171; United States v. Chrysler Corp., (D.C. Ind. 1938) CCH Trade Reg. Rep., 9th ed., 1941-1943 Ct. Dec. Vol. ¶52,537. See, generally, Birnbaum, "The Auto Finance Consent Decree: A New Technique in Enforcing the Sherman Act," 24 WASH. UNIV. L.Q. 525 (1939); Haberman and Birnbaum, "The Auto-Finance Consent Decrees—An Epilogue," 1950 WASH. UNIV. L.Q. REV. 46.

35 316 U.S. 556, 62 S.Ct. 1146 (1942).

36 335 U.S. 303, 69 S.Ct. 93 (1948). See also United States v. Radio Corp. of America. (D.C. Del. 1942) 46 F. Supp. 654.

37 See 63 HARV. L. REV. 320 at 328 (1949).

enforcement of the antitrust laws,[38] and this is significant in the consent decree context. What happens to the concurrent criminal suit on the signing of a consent decree? Can and does the Department of Justice use the concurrent criminal suit as an *in terrorem* device? In 1939, Wendell Berge, then special assistant to Thurman Arnold, formally elucidated on an earlier Department of Justice release[39] and stated that a good consent decree, i.e., one which confers "substantial public benefits," warranted the dismissal of the concurrent criminal suit. On the other hand, Mr. Berge continued, "criminal proceedings should not and will not be used to coerce the submission of consent decrees."[40] Noble as this last sentiment is, it is belied both by the former one and by basic practicalities. The indictment hanging over the head of the corporation officer may not be intentional coercion, but it is surely duress of circumstances, since he knows precisely on what conditions the Department of Justice will dismiss it.[41] However, not only is it evident that the department has not been unreasonable in the use of its *in terrorem* powers,[42] but it has also been pointed out (by Mr. Berge himself) that the department is restricted in the consent decree negotiations if there is a simultaneous criminal case.[43]

Time for Negotiations. In 1954 the then assistant attorney general in charge of the Antitrust Division announced that the division was experimenting with negotiating for consent settlements prior to the filing of a complaint but, presumably, after investigation had already commenced.[44] The Attorney General's National Committee to Study the Antitrust Laws endorsed this

38 Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 at 52, 33 S.Ct. 9 (1912).

39 Release of May 18, 1938, set out in REP. ATTY. GEN. 306 (1938).

40 Berge, "Some Problems in the Enforcement of the Antitrust Laws," 38 MICH. L. REV. 462 at 474 (1940). Compare the interesting statement by the same author that decrees which contain provisions for "affirmative public benefits" are the "only consent decrees which the Department is willing to consider during the pendency of a criminal case. . . ." Berge, "Remedies Available to the Government Under the Sherman Act," 7 LAW AND CONTEM. PROB. 104 at 109 (1940).

41 See Isenbergh and Rubin, "Antitrust Enforcement Through Consent Decrees," 53 HARV. L. REV. 386 at 402 (1940).

42 Id. at 404.

43 Berge, "Remedies Available to the Government Under the Sherman Act," 7 LAW AND CONTEM. PROB. 104 at 108-109 (1940). See also the speech of Mr. Berge reported in 6 U.S. Law Week 282 (1938).

44 See Barnes, "Settlement by Consent Judgment," ABA Antitrust Section Proceedings 8 at 12 (April 1954). The first major case in which this procedure was followed was United States v. Eastman Kodak Co., (D.C. N.Y. 1954) 1954 CCH Trade Cas. ¶67,920, discussed in part II infra. However, it was reported that ten other cases in which this procedure had been tried preceded the Eastman Kodak decree. N.Y. TIMES, Dec. 22, 1954, p. 1:2.

move and recommended "prefiling negotiations whenever the Division deems it feasible for efficient enforcement."[45] With this recommendation, however, Professor Louis Schwartz took exception. Such a procedure, he asserted, will "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."[46] In addition, it has been suggested that prefiling negotiations automatically have the result of delaying the actual filing of the complaint unduly.[47] But the strength and relevance of this latter argument are open to question, for, although probably correct, it overlooks the countervailing points that (1) the pre-filing procedure saves even more time and expense than the normal post-complaint negotiation method and, (2) the negotiations may proceed on a much more flexible basis because the prosecutor has not yet publicly committed himself. As to the point that the procedure tends to lessen the degree of judicial control and public scrutiny, it has already been pointed out that both of these factors are already negligible elements in the consent decree process.[48] Lastly, even though there may be an element of "shaping the complaint to fit the settlement" here, there is no indication that, as a practical matter, this is always bad. If it is all right to enter into a consent decree that bears a questionable relationship to the already-filed complaint,[49] then surely it is permissible to decide what relief will be agreed to and then draw a consistent complaint. At least the suggestion of such a procedure ought not to be subject to immediate and blanket condemnation.

Responsibility for Initiation of Negotiations. Another recommendation of the Attorney General's National Committee to Study the Antitrust Laws was that the government liberalize its heretofore strict practice of making the defendant submit the initial draft of a consent judgment.[50] This proposal has received a mixed re-

[45] REPORT 360.

[46] Schwartz Dissent, 1 ANTITRUST BUL. 37 at 53 (1955).

[47] Stedman, "The Committee's Report: More Antitrust Enforcement—Or Less?" 50 N.W. UNIV. L. REV. 316 at 324 (1955).

[48] See note 9 supra. See also Segal and Mullinix, "Administration and Enforcement," 104 UNIV. PA. L. REV. 285 at 293-294 (1955).

[49] In United States v. Hilton Hotels Co., (D.C. Ill. 1956) 1956 CCH Trade Cas. ¶68,253, the complaint had alleged that the defendant corporation had violated §7 of the Clayton Act by acquiring the Statler hotel chain. In the consent decree the defendant was ordered to sell certain specified hotels, none of which, however, were of the Statler chain.

[50] REPORT 361.

action.[51] It seems likely that the government's position on this matter is intimately connected with its thinking on the question of concurrent civil and criminal actions. It has long been the policy of the Antitrust Division to let the defendant take the first step where criminal proceedings were pending, lest it seem as if it were trying to coerce a consent settlement.[52] But, as long as there are no criminal proceedings involved, there would seem to be nothing questionable in the suggested procedure, other than the extraordinarily flimsy argument that because it may give the government less of an advantage in the negotiations, it is, to that extent, bad.[53]

II. *Recent Consent Decrees*

Practical limitations preclude a review of all of the many consent decrees entered into by the government and antitrust defendants in the past several years. But some of the more recent decrees have made newspaper headlines and more than one has contained provisions of more than routine interest.

The Eastman Kodak Decree. The consent decree handed down in *United States v. Eastman Kodak Co.*[54] was one of the first major consent judgments of the Eisenhower administration and also one of the most publicized, because of its immediate effect on photographers, amateur and professional.[55] It is significant also in that it represented one of the first settlements arrived at via the pre-filing method described above.[56] By the decree, Eastman Kodak is directed to offer its Kodacolor and Kodachrome film for sale without making a retail charge for the processing and developing of the film and also to cease distributing such film with the restriction that it be processed and developed by Eastman. To facilitate competition in the color film processing business, the defendant was also required to license its patents for color processing and color processing equipment on a reasonable royalty basis, and

51 Compare Chadwell, "Antitrust Administration and Enforcement," 53 MICH. L. REV. 1133 at 1143-1144 (1955), with Stedman, "The Committee's Report: More Antitrust Enforcement—Or Less?" 50 N.W. UNIV. L. REV. 316 at 325-326 (1955).

52 See note 40 supra.

53 This argument is made, with a fascinating display of logic, by Stedman, "The Committee's Report: More Antitrust Enforcement—Or Less?" 50 N.W. UNIV. L. REV. 316 at 325-326 (1955).

54 (D.C. N.Y. 1954) 1954 CCH Trade Cas. ¶67,920.

55 For a recent report of the effect of the Eastman Kodak decree, see WALL ST. J., April 24, 1956, pp. 1:6, 13:1.

56 See note 44 supra, and BUS. WEEK, Jan. 29, 1955, p. 66.

also to make available technical information, manuals, designs, specifications, etc., relating to color processing to any applicant. As a part of this requirement, the decree provides that Eastman must send instructors to help licensees in the use of color processing and receive visits by experts of such licensees.[57] Lastly, Eastman must offer for sale chemicals and other materials used in color processing which are not readily available elsewhere. To stimulate the free sale of color film without the processing and developing charge, Eastman was also directed to cancel all fair trade contracts relating to its color film price, presumably on the basis that these fair trade contracts were based upon retail charges which included the processing of the film by Eastman.[58]

The unique and most important aspect of this consent decree is its use of a "conditional divestiture" provision. Under this provision, Eastman will be required to divest itself of so much of its color film processing facilities as exceeds 50 percent of the domestic capacity after seven years *unless* it can then show that there is substantial competition in the color processing market between it and independent processors having a substantial volume of such business. This is, obviously, a clever self-policing mechanism by which it is almost assured that a competitive situation will be generated.

The International Business Machines Decree. Closely paralleling the Eastman Kodak decree is the settlement entered into between the Department of Justice and the International Business Machines Corporation on January 25, 1956.[59] The government's complaint against IBM was filed on January 21, 1952, and alleged that the defendant was monopolizing the domestic and foreign tabulating machine industry, "including new and used tabulating machines, machine parts and service, cards, and service bureaus."[60] IBM, it was alleged, controlled 90 percent of the tabulating machine business in the United States. Material to the development of this dominant position, or so the government (and later Sperry-

[57] This controversial "know-how" type of relief is commonly found in a decree today. See Timberg, "Equitable Relief Under the Sherman Act," 1950 UNIV. ILL. L. FORUM 629 at 641-647. One of the first major decrees into which it was incorporated was United States v. American Can Co., (D.C. Cal. 1950) 1950 CCH Trade Cas. ¶62,679.

[58] See N.Y. TIMES, Dec. 22, 1954, p. 1:2.

[59] (D.C. N.Y. 1956) 1956 CCH Trade Cas. ¶68,245.

[60] Complaint in United States v. International Business Machines Corp., Civil No. C-72-344, filed Jan. 21, 1952, p. 15.

Rand Corporation in a $90,000,000 treble damage suit) charged were the following factors:[61]

1. Control by IBM of important patents for both electrical and electronic tabulating machines; refusal by IBM to grant licenses under these patents except to lessees of IBM machines; interference by IBM to prevent competitors from securing patents.
2. The practice of IBM of leasing rather than selling its machines and making tie-in arrangements to cover servicing, parts, etc. As a practical matter, IBM also controlled all of the cards used on its machine due to its control over the paper stock and to various other practices and devices.
3. A closely-knit worldwide organization of subsidiaries which supplied IBM with exclusive licenses on all patent rights acquired.
4. The prevention by IBM of the use of its machines on an experimental basis by any lessee.
5. The practice of IBM of "buying up" inventors with long-term exclusive retainer contracts and of making contracts whereby it was to be the exclusive recipient of any new discovery or development in the tabulating machine field.
6. The practice of IBM of granting discriminatory concessions to large customers in an effort to restrain any competition and of arranging inter-locking directorates and interchanges of personnel with such lessees.
7. The operation by IBM of so-called service bureaus which were able to draw in and control the demand for tabulating machine service by those who did not lease IBM machines.

The government, in its complaint, prayed that IBM be required to eliminate its patent monopoly by any appropriate means, offer its tabulating machines for sale, divest itself of its service bureaus and tabulating card business, cease imposing restrictions in its leases or sales of tabulating machines, eliminate any and

[61] The following allegations of illegal action by IBM is taken from the complaints of the government and the Sperry-Rand Corporation. No representation is intended as to the truth or falsity of these allegations, nor are the seven points listed intended, by any means, to be exclusive.

It is central to an understanding of the situation in the tabulating machine industry to realize that there are, at present, two separate and distinct systems—electrical and mechanical. The electrical tabulating machine business comprises 90% of the overall market and is controlled solely by IBM. The mechanical tabulating machine business comprises the remaining 10% of the market and the sole manufacturer of these machines today is Sperry-Rand Corporation. The mechanical machines, as a matter of technical fact, use 90 column round hole cards and the electrical machines use 80 column rectangular hole cards. Hence, it is impossible to interchange the two systems. The foregoing facts were admitted by IBM in its answer to the government's complaint.

all territorial restrictions, and, lastly, give appropriate technical instruction to any persons in the repair, maintenance, etc., of its machines.

Comparing this prayer for relief with the actual terms of the decree is sufficient to convince one that the negotiations were highly successful from the government's point of view. The following are the key points of the IBM consent decree:

1. IBM must offer for sale its electrical tabulating machines and electronic data processing machines (EDPM's) and not just lease them, and must provide service, repair and parts at non-discriminatory rates for machines that it sells. In other words, it must see that a buyer of a tabulating machine is given treatment substantially equal to that offered to lessees. IBM must also open up a market in used tabulating machines by offering to sell such machines received as trade-ins to dealers and also supply such dealers with parts and service, etc. IBM cannot acquire its own used machines other than as trade-ins or as credit against accounts due IBM. The decree prohibits IBM from making leases of longer than one year unless such a lease is terminable by the lessee after one year, and also from imposing any restrictions or tie-ins on its sale or lease of tabulating machines.

2. The decree requires IBM to divorce itself from its service bureau business and establish that business as a separate corporation. Although IBM may own all the stock in the new corporation, there are strict terms controlling dominance by IBM and also preventing discrimination against other service bureaus by IBM or by the new corporation in favor of IBM.

3. IBM is required to license on a royalty free basis some forty existing patents relating to tabulating cards and card machinery and, at a reasonable royalty basis, some 1000 existing patents covering tabulating machines and systems and EDPM machines and systems generally.[62] These licenses, as usual, must be non-exclusive and unrestricted, and must be accompanied by a non-exclusive grant of immunity to suit under any corresponding foreign patent. However, IBM need not grant a license to an applicant unless (with some modification in the case of future patents and with the exception of patents on the tabulating cards and tabulating card machinery) the applicant either offers IBM a non-exclusive reasonable royalty license on or immunity to suit for infringement of

[62] The figures are taken from N.Y. TIMES, Jan. 30, 1956, p. 37:8. Altogether, IBM owns some 1500 patents. Ibid.

patents controlled by the applicant relating to tabulating or EDPM systems. It may well be that this reciprocal licensing restriction on the patent relief softens the blow of the decree on IBM, for it is possible that many potentially competitive companies do not feel like paying this high a price to get a license from IBM, royalty free or not.

Future IBM patents are also subject to the compulsory licensing provision. They must also contain a non-exclusive grant of immunity to suit under corresponding foreign patents, but can all be licensed at reasonable royalty rates. Here, too, as a condition to the granting of a license, IBM can require the applicant to agree to grant back to IBM a non-exclusive reasonable royalty license as to patents on tabulating cards, machinery, systems, etc., and EDPM systems, owned or controlled by the applicant for the IBM license.

4. IBM is required to furnish each patent licensee, for five years, appropriate technical information, relating to the electrical tabulating machines only, at reasonable and non-discriminatory rates, including specifications, manuals, etc. In connection with the required sale of IBM machines, it is also provided that IBM furnish technical information and training to employees of repair or maintenance businesses, at reasonable and non-discriminatory rates. Written material and technical information must also be furnished to purchasers or lessees of IBM machines.

5. IBM is specifically restrained, for a period of ten years, from entering into any long term consultant contracts with outside experts or inventors. It may, however, have such people as regular employees with regular hours or as consultants under one-year contracts.[63]

6. Tabulating cards and tabulating card machinery were obviously central in the government's mind, as seen from the royalty free provisions of the patent part of the decree. In addition to this, IBM is also required to eliminate any exclusive dealing arrangements as to the raw materials of the tabulating cards, to cease discriminating in price as to such cards or prescribing unreasonable specifications for cards to be used in IBM tabulating machines, etc. IBM must also offer for sale, for five years, rotary presses and paper stock used in manufacturing tabulating cards if the purchaser cannot acquire it elsewhere and if the purchaser is a

63 Query whether or not the means for evading this provision is apparent on the surface: perpetually renewable one-year contracts.

bona fide potential manufacturer of such cards and if, in the case of the paper stock, IBM has more than it reasonably needs. Then follows the same conditional divestiture provision found in the *Eastman Kodak* decree. Unless, after seven years, IBM can show that "substantial competitive conditions exist in the manufacture, sale and distribution of tabulating cards,"[64] it will be required to divest itself of so much of its tabulating card business as exceeds 50 percent of the total capacity for the manufacture of such cards in the United States.

The American Telephone and Telegraph Decree. The decree entered into between the government and the American Telephone and Telegraph Company and the Western Electric Company[65] came more than seven years after the initial filing of the complaint in the action. The decree encompasses three main areas, aside from various minor provisions.

1. The most important provision of this decree relates to patents. Some 8600 patents owned by the defendants must be licensed royalty free to any applicant. All other patents owned by the Bell system are to be licensed at reasonable royalty rates. In both cases, the licenses are to be non-exclusive and must include a grant of immunity to suit under corresponding foreign licenses. The licenses may contain a condition that any grants of licenses by an applicant for an AT&T license to any of the defendants must cover patents of subsidiary or parent or co-subsidiaries of the same parent company of the applicant and patents on inventions made by inventors or researchers of the applicant or other such companies. The patents which are subject to the royalty free provision are those that previously had been held by the defendants jointly with General Electric Company, Radio Corporation of America, and Westinghouse Electric Company under agreements dating back to 1932. Included in the group is the patent to the vital electronic transistor. The Department of Justice stated that the patent provision was "unprecedented in breadth and duration"[66] and there is every evidence that this was the most important provision to the defendants as well.[67]

64 1956 CCH Trade Cas. ¶68,245 at p. 71,129.

65 (D.C. N.J. 1956) 1956 CCH Trade Cas. ¶68,246.

66 N.Y. TIMES, Jan. 25, 1956, p. 1:5 at 16:4, 5.

67 See BUS. WEEK, Feb. 4, 1956, pp. 26-28; 54 PUB. UTIL. 240 (1956). This is not to say, however, that the royalty free provision hurt the defendant from a financial standpoint, as prior to the decree AT&T had never imposed high royalties on licenses it granted, and 1,000 patents had been made available without restriction previously. See N.Y. TIMES, Jan. 30, 1956, p. 37:8.

2. AT&T is required by the decree to supply patent licensees with technical information relating to the materials and parts comprising the licensed equipment, including drawings, specifications, etc. This right may not be subject to any restrictions save that it may be conditioned upon the payment of reasonable charges and on the furnishing of technical information relating to licenses granted by the applicant to the defendants.

3. AT&T is required by the decree to get out of the private communications field and confine itself, both in terms of present activity and future acquisitions, to "common carrier communications" work, defined to mean communications work subject to federal and/or state control. This means, in effect, that AT&T must divest itself of its Westrex and Teletypesetter subsidiaries. But the government was unable to get the consent of the defendants to the original demand that AT&T divest itself of its manufacturing subsidiary, Western Electric Company. And it may be noted that, in any case, less than one percent of the Bell system revenues came from the private communications area.[68]

The American Association of Advertising Agencies and the American Newspaper Publishers Association Decrees. On May 12, 1955, the government filed its complaint against the American Association of Advertising Agencies, Inc., the American Newspaper Publishers Association, Inc., the Publishers Association of New York City, the Associated Business Publications, Inc., the Periodical Publishers Associations of America and the Agricultural Publishers Association under section 1 of the Sherman Act, charging the defendants with conspiring and combining to restrain the business of developing, placing and servicing national advertising. On February 1, 1956, the AAAA signed a consent judgment in this action[69] and on April 26, 1956, the ANPA, after having stated when the AAAA decree was signed that it would not sign a consent decree,[70] followed suit.[71] A comparison of the principal provisions of the two decrees discloses the following:

1. Both defendants consented to refrain from making contracts establishing or fixing advertising agency commissions. Be-

68 BUS. WEEK, Feb. 4, 1956, pp. 26-28.

69 (D.C. N.Y. 1956) 1956 CCH Trade Cas. ¶68,252.

70 See N.Y. TIMES, Feb. 2, 1956, p. 26:4.

71 (D.C. N.Y. 1956) 1956 CCH Trade Cas. ¶68,330. The Publishers Associations of New York City stipulated that it will accept the terms of the ANPA consent decree. N.Y. TIMES, April 27, 1956, p. 17:2.

fore the decree, it was generally agreed that the "acceptable" agency commission was 15 percent.[72] The government had charged that those agencies which had not gone along with this were subjected to boycott. Further, both decrees contain provisions enjoining the defendants from taking any anti-rebating action. (As to this provision, the interesting view has been taken that it will encourage "chiseling" in agency contracts.[73])

2. Central to both decrees is an injunction against the efforts of the defendants to establish recognition of certain advertising agencies and to encourage the media to do business only with the agencies so recognized.

3. Both defendants are enjoined by the decrees from attempting to secure adherence to published rate cards and from attempting to fix and stabilize advertising rates to be charged so-called house agency advertisers.

4. The AAAA is specifically restrained from enforcing its no-speculative solicitation rule. Previously, the association had banned speculative presentations by member agencies in the latter's efforts to seek new accounts.[74]

5. The ANPA is specifically allowed to establish credit ratings for advertising agencies, so long as such ratings are uniformly given when requested by responsible agencies.

6. Conspicuous by its absence in the ANPA decree is a provision (found in the AAAA decree, as in most, if not all, other recent consent decrees) for the right of inspection of records, accounts, etc., of the defendant and the right to interview and request periodic reports from officers of the defendant. Presumably this omission is justified by an extreme application of the principle of freedom of the press.

III. *Royalty Free Licensing: A Case Study in the Scope of Consent Decree Relief*

Some interesting forms of relief appeared in the consent decrees considered above—compulsory licensing of patents, sometimes even royalty free, "know-how" relief, conditional divestiture, right of visitation and duty to report, etc. What is the relation of these provisions to the antitrust laws themselves? Are they authorized by the Sherman Act and, if so, are they constitutional?

72 See 254 PRINTER'S INK, Feb. 10, 1956, pp. 26-27.
73 Ibid.
74 Ibid.

Even if both of these questions are answered, one yet remains. To the extent that particular relief has been denied by the courts in litigated cases, should it be included in consent decrees?

It would be impossible to consider all of the different consent decree relief provisions in respect to these questions, and so it is proposed to consider only the most controversial one—compulsory licensing of patents royalty free.[75] In considering it, we shall, ultimately, find ourselves back to the basic question of the nature of a consent decree.

As was seen above, both the IBM and AT&T decrees contained provisions requiring the defendants to license some of their patents royalty free. These are but two of scores of consent decrees having such a provision.[76] But compare with this situation that in the area of litigated consent decrees. In *Hartford Empire Co. v. United States*[77] the district court had entered a decree which required the defendant to grant to any applicant a license under defendant's patents, without royalty or charge of any kind. In remanding the case to the district court for a new decree, the Supreme Court ruled that this provision was confiscatory in nature and not justified by the circumstances of the case. Reaffirming the principle that "a patent is property,"[78] the Court also observed that Congress had not seen fit to adopt proposals to provide that forfeiture of patents would be decreed for violations of the antitrust laws. Thus, the use of the "patent is property" concept is the only constitutional basis suggested for the denial of this relief. Most of the other objections seem to be based on policy or

[75] For a discussion of other relief provisions which may "go beyond existing law," see Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 (1950).

[76] For citation to other consent decrees containing such a provision, see Seegert, "Compulsory Licensing by Judicial Action: A Remedy for Misuse of Patents," 47 MICH. L. REV. 613 at 636, n. 159 (1949); Timberg, "Equitable Relief Under the Sherman Act," 1950 UNIV. ILL. L. FORUM 629 at 640-641, n. 52; 24 GEO. WASH. L. REV. 223 at 228, n. 40, 41 (1955). The scores of decrees listed by these authorities contain either a royalty free licensing provision or a requirement that the patent be dedicated. For some purposes it might well be proper to draw a distinction between these two types of relief as there are, at least, technical differences. For instance, in the case of a royalty free provision, the title to the patent is still retained by the patentee and there must be some formal, written application by a prospective licensee. In addition, such a provision might always be amenable to modification. In the case of patent dedication, however, there is nothing left in the patentee whatsoever. See 22 GEO. WASH. L. REV. 257 (1953); 24 GEO. WASH. L. REV. 223 (1955). However, for purposes of the present discussion there is probably no really relevant distinction, and the two types of provisions are considered together here. See note 27 supra.

[77] 323 U.S. 386, 65 S.Ct. 373 (1945).

[78] Id. at 415.

expediency. Justices Black and Rutledge, dissenting, both said that the royalty free provision was proper and was the only form of relief that would be effective under the circumstances.

In *United States v. National Lead Co.*[79] the district court had refused to place a provision in the litigated decree granting royalty free licensing. The government argued to the Supreme Court that such a provision was proper and should be inserted instead of the reasonable royalty provision which was included in the decree. The Court, in affirming the district court, succinctly stated its position as follows: " . . . we feel that, without reaching the question whether royalty-free licensing or a perpetual injunction against the enforcement of a patent is permissible as a matter of law in any case, the present decree represents an exercise of sound judicial discretion."[80] The Court also stressed, more than once, that the aim of a decree was to remedy and prevent wrongs, not punish them, and that the royalty free provision has not "been shown to be necessary in order to enforce effectively the Antitrust Act. We do not, in this case, face the issue of the constitutionality of such an order."[81] Three justices dissented on this issue, pointing out that *Hartford Empire* was a four-to-two decision on this point and asserting that it was not authority for saying that royalty free licensing is an unacceptable provision. Accordingly, these justices argued that the facts of *National Lead* warranted the inclusion of such a provision.

The district courts have, since these cases, split on the issue of the validity of provisions for the royalty free licensing of patents in litigated antitrust decrees. In *United States v. Vehicular Parking*,[82] decided after *Hartford Empire* but before *National Lead*, the court cited the former case for the conclusion that it did not have the power or authority to include such a provision. And in *United States v. Imperial Chemical Industries*[83] the court cited the "patent is property" language of *Hartford Empire* as a basis for refusing this relief. But in *United States v. General Electric Co.*,[84] Judge Foreman said that the *Hartford Empire* holding was

[79] 332 U.S. 319, 67 S.Ct. 1634 (1947).

[80] Id. at 338.

[81] Id. at 349.

[82] (D.C. Del. 1945) 61 F. Supp. 656 (decree).

[83] (D.C. N.Y. 1952) 105 F. Supp. 215 at 223-225.

[84] (D.C. N.J. 1953) 115 F. Supp. 835 at 843-846. See also United States v. General Instrument Corp., (D.C. N.J. 1953) 115 F. Supp. 582. For notes on the former case, see 54 COL. L. REV. 278 (1954); 63 YALE L.J. 717 (1954); 22 GEO. WASH. L. REV. 257 (1953).

seriously diluted by *National Lead,* and he distinguished the *ICI* case on the rather flimsy ground that only section 1 of the Sherman Act had been involved there while in the *GE* case both sections 1 and 2 were involved. As a result, he felt free to decree dedication of certain patents owned by General Electric.[85]

The debate on the wisdom and desirability of royalty free licensing has continued.[86] One thing is clear—whether or not it is an *acceptable* antitrust remedy, the state of the authority in the area of litigated decrees leads to no other conclusion than that it is not yet, at least, an *accepted* one. Is it, therefore, proper to insert such a debatable and debated provision into an antitrust consent decree? In its section on consent decrees the *Report of the Attorney General's National Committee to Study the Antitrust Laws* had this to say:

> "In consent negotiation, the Department should not seek relief (1) deemed by the Supreme Court to transgress constitutional boundaries; or (2) which, in the particular case, could not reasonably be expected after litigation. It has been urged that, since the Division, no mere private litigant, enforces a federal statute, it should demand whatever relief, in the public interest, its bargaining position may coerce. We believe that view ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. It threatens our goal of equitable law enforcement and, accordingly, should be rejected."[87]

It seems clear that the reference here was to the royalty free licensing problem.[88] Professor Louis Schwartz did not concur in this position, however. Dissenting, he argued that acceptance of such a principle would "cut the heart out of a number of consent decrees that powerful and excellently advised defendants have been willing to sign in recent years."[89] Further, he pointed out that

85 It has been pointed out that Judge Foreman's pragmatic approach to the problem was admirably suited to the facts in the GE case. The court had to pry open a forty-year old monopoly in an industry in which the profit margin per unit manufactured (light bulbs) was so small that even a nominal royalty would have had the effect of discouraging competition. See Diggins, "The Patent-Antitrust Problem," 53 MICH. L. REV. 1093 at 1116 (1955); 63 YALE L.J. 717 (1954).

86 See, e.g.: Seegert, "Compulsory Licensing by Judicial Action: A Remedy for Misuse of Patents," 47 MICH. L. REV. 613 (1949); 24 GEO. WASH. L. REV. 223 (1955). The members of the attorney general's committee were sharply divided on this question. REPORT 255-259.

87 REPORT 361.

88 Schwartz Dissent, 1 ANTITRUST BUL. 37 at 53 (1955).

89 Id. at 53. See also Stedman, "The Committee's Report: More Antitrust Enforcement —Or Less?" 50 N.W. UNIV. L. REV. 316 at 324-325 (1955). But see Segal and Mullinix, "Administration and Enforcement," 104 UNIV. PA. L. REV. 285 at 296 (1955).

the problem centered on borderline cases—where the constitutional and statutory basis for the relief was in doubt. The Antitrust Division should be allowed to press for inclusion of such a provision, he argued, for otherwise it is confined to relief of unquestioned validity and this "can probably be gotten in litigation."[90]

In 1954 former Assistant Attorney General Barnes expressed himself as basically in accord with the position subsequently taken by the *Report*.[91] He said that (1) there was never any question about the impropriety of asking for clearly unconstitutional relief, (2) during his term of office no relief not previously granted in litigation has been included in any consent decree, and (3) as to the question of asking for relief "which no court would grant in a particular case, then I suggest it merely pits defendant's judgment of what is required to promote competition against the Division's. And if the defendant is really that confident, I would suggest the only remedy is to proceed to trial."[92] Despite the fact that this statement still leaves several questions unanswered, it must be admitted that the basic thinking behind it is a bit more comforting than the statement by a 1940 antitrust official that a valuable aspect of consent decrees is that they "may contain various socially desirable provisions for reforming the conduct of an industry even though the Government could not force the defendants to accept such provisions."[93]

Bearing in mind that the royalty free licensing provision is only one situation in which the government has been subject to the charge of "going beyond existing law," it would be well to conclude by asking just what ought to be the proper position of the government in these areas. Where should the line be drawn

[90] Schwartz Dissent, 1 ANTITRUST BUL. 37 at 54 (1955). Query whether there is an element of question-begging here. One of the prime premises of consent decree procedure is that, usually, neither party is sure of the outcome of the case if it were to go to trial. There is always the chance that the government would get *no relief at all.* By entering into a consent settlement, the government compromises on *this* possibility and is given some relief. Professor Schwartz' argument seems to assume that the government starts the negotiations in the position of always being able to get some relief in litigation so that the compromise should be, he would argue, on the nature of the relief, giving the government something more than their assured minimum, even including relief of a nature that they might not be able to get in a litigated decree.

[91] Barnes, "Settlement by Consent Judgment," ABA Antitrust Section Proceedings 8 at 12 (April 1954).

[92] Ibid.

[93] Berge, "Remedies Available to the Government Under the Sherman Act," 7 LAW AND CONTEM. PROB. 104 at 107 (1940). See also the speech of Mr. Berge reported in 6 U.S. Law Week 282 (1938).

between permissible and non-permissible provisions? Everyone seems to agree that "clearly unconstitutional" provisions should not be included. Though an argument might once have been supportable that royalty free licensing deprived a patentee of his property without due process of law, in violation of the Fifth Amendment,[94] the decision in the *National Lead* case would seem to indicate that not even the majority of the court, in refusing to require such a provision, were willing to rest their position on anything remotely resembling a constitutional basis. And even if valid constitutional objections could be urged as to the provision in the context of a litigated decree, it may be held that the defendant waives these objections when he consents to such a provision.[95]

The second possible ground for objection is that such provisions are not authorized by the statute and the prosecution is going beyond the statutory bounds in including them in a decree.[96] But who determines the statutory bounds? If this determination must rest on Supreme Court decisions, the situation is obviously unsatisfactory, for such decisions are too few and, as in the *Hartford Empire* and *National Lead* cases, often leave the matter just as clouded as before. Should what equals "the statutory bounds" rest upon litigated decisions, i.e., if you can find such-and-such a provision in a litigated decree, it is acceptable in a consent decree? This appears to be the position subscribed to by Judge Barnes in the statement quoted above. For example, he apparently is willing to say that as long as the *GE* case is on the books, consent decrees may, under any circumstances, contain a provision for the royalty free licensing of patents. It is submitted that the presence of one litigated decree is not an adequate or responsible measure of what is permissible in all cases in a consent decree. Particularly is this so when, as in the *GE* case, the particular litigated decree contained the relevant provision only because it was considered essential to effective antitrust enforcement under the unique facts of the case.[97] A much more desirable standard is whether the

94 For such an argument, see 19 GEO. WASH. L. REV. 400 (1951).

95 Id. at 418. There would seem to be a nice question as to whether the due process clause of the Fifth Amendment can be waived by a party. Cf. Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951); 61 YALE L.J. 105 (1952) (privilege against self-incrimination); Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236 (1942) (federal right to counsel).

96 See Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1228-1236 (1952); Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 (1950).

97 See note 85 supra.

relief included could or "could not reasonably be expected after litigation."[98] The answer that if the defendant maintains that it could not "reasonably be expected" he ought to go ahead to trial and find out[99] is too weak to deserve extended analysis. The government should not be in the position of pushing questionable provisions on a defendant in negotiations designed to avoid the time and expense of litigation and then justify these same provisions by saying that if the defendant wanted to challenge their legality, he should have gone to trial. What may "reasonably be expected in litigation" is, of course, entirely dependent upon the particular circumstances of each case. Such a test would not preclude royalty free licensing in any and all cases—the *GE* case indicates that, under some circumstances, this provision may be necessary to effective enforcement. But neither would this test allow such a wholesale inclusion, irrespective of the facts, as the government has sought and achieved in recent years.

The line between proper and improper provisions in consent decrees is difficult to draw from a purely procedural point of view. It is more important to secure agreement on a basic philosophy in this matter than it is to draw firm and fine lines to apply to all cases. In this respect it is necessary to revert to the contract-decree dichotomy mentioned earlier and quote the observations of a leading writer in this area to the effect that it is a

> "fundamental concept that the antitrust consent decree is not to be viewed solely as a contract resulting from an unrestricted bargaining process between the government and the defendants. Rather, it is an agreement for voluntary settlement of antitrust issues in which the scope and content of the provisions therein can rise no higher than their source in the legislative objectives and prohibitions of the standards embodied by Congress in its national antitrust policy. . . . It follows, therefore, that neither antitrust officials nor a court of equity has authority under law to induce or to accept provisions in consent decrees unless they are related to the prevention and correction of violations of the antitrust laws. . . ."[100]

Therefore, above and beyond any test of what could "reasonably be expected in litigation," the provisions of antitrust consent

[98] REPORT 361.

[99] See note 92 supra and adjacent text.

[100] Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1230, 1234 (1952). See also Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 at 50 (1950).

decrees should be conformable to and justifiable by the necessity of prevention and correction of antitrust violations. They should not be rationalized either on a penal basis or on a basis that they are valid per se if accepted by the defendant in the negotiations. In the last analysis, the responsibility lies with the Department of Justice. It must recognize that the consent decree is a "full blooded judicial sentence"[101] issued by a court for the purpose of law enforcement. Recognizing this, it must be the party to see that the provisions of these decrees conform to the standard enunciated above. It has already been shown that the judiciary has abdicated this responsibility,[102] and it is to be hoped that the Department of Justice will now fill the gap thus created.

Paul R. Haerle, S.Ed.

101 Peterson, "Consent Decrees: A Weapon of Antitrust Enforcement," 18 UNIV. KAN. CITY L. REV. 34 at 50 (1950).

102 See note 10 supra.