ENFORCEMENT OF GOVERNMENT ANTITRUST DECREES BY PRIVATE PARTIES: THIRD PARTY BENEFICIARY RIGHTS AND INTERVENOR STATUS

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I. INTRODUCTION

The problem upon which this Article will focus can perhaps best be illustrated by the following hypothetical scenario:[1]

The United States, through the Department of Justice, has brought a civil antitrust suit against IBM, alleging a number of antitrust violations. One of these is IBM's practice of leasing rather than selling its machines.[2] *After appropriate preliminary sparring, the parties enter into a settlement of the suit which, once approved by the court and incorporated into a consent decree, bars the practice of leasing unless purchases are also permitted on terms which "shall have a commercially reasonable relationship to the lease charges."*[3] *Alternatively, the settlement negotiations fail, the case goes to trial and, after several appeals and remands, final judgment is entered against IBM to the same effect.*

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[1] The scenario represents a version of part of the complaint of Data Processing Financial & General against IBM which was at issue in Control Data Corp. v. International Business Mach. Corp., 306 F. Supp. 839 (D. Minn. 1969), *aff'd sub nom.* Data Processing Financial & Gen. Corp. v. International Business Mach. Corp., 430 F.2d 1277 (8th Cir. 1970). Because the court dismissed this portion of the complaint, no finding on the accuracy of DPF&G's allegations was ever made. This Article certainly does not express any opinion on that question.

[2] Such a practice may, in appropriate circumstances, be a violation of § 2 of the Sherman Act. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[3] The consent decree in United States v. International Business Mach. Corp., 1956

For several years IBM unquestionably complies with the terms of the judgment, during which time a number of businesses spring up which purchase new machines directly from IBM and lease them in competition with IBM's leasing program. Then IBM changes its pricing formula for purchases, arguably ceasing compliance, and, in any event, threatening the businesses of those who formerly flourished in the shade of the decree.

The businesses which were beneficiaries of the decree (using "beneficiary" merely as a factual description) may be fortunate. The Department of Justice, either on its own initiative or prompted by the complaints of the decree beneficiaries, may institute contempt proceedings against IBM. But this remedy may be inadequate in two ways. First, even if compliance is eventually renewed, the decree beneficiaries will not necessarily be compensated for damage suffered during the period of violation.[4] Second, obtaining future compliance depends on an Antitrust Division with much to do and relatively few resources with which to do it. Even meritorious complaints to the Department may not result in contempt proceedings.[5] This is particularly true to the extent that such proceedings might involve the

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Trade Cas. ¶ 68,245 (S.D.N.Y. 1956), so provides in § IV(c)(2). The end to be achieved by this and other provisions of the decree is described in § IV(a):

> It is the purpose of this Section IV of this Final Judgment to assure to users and prospective users of IBM tabulating and electronic data processing machines at any time being offered by IBM for lease and sale an opportunity to purchase and own such machines at prices and upon terms and conditions which shall not be substantially more advantageous to IBM than the lease charges, terms and conditions for such machines.

Consistant with this purpose, § IV(b) of the decree orders IBM not only to sell on "not substantially more advantageous terms" what it offers for "lease and sale" but also to offer for sale machines previously available only by lease.

[4] In a civil contempt proceeding the court might condition the defendant's purging itself of contempt on payment of damages to the decree beneficiaries. *Cf.* McComb v. Jacksonville Paper Co., 336 U.S. 187, 193-95 (1949), where the Court upheld the district court's order that, at the government's motion, the respondents pay workers lost wages resulting from violations of an earlier decree requiring the workers be paid in accordance with the Fair Labor Standards Act. However, the availability of such relief will again depend largely on the government's willingness to press for it. That willingness is likely to be significantly influenced by the intensity of the defendant's opposition to contempt, which in turn will increase in direct proportion to the monetary stakes.

[5] Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 387 (1970), indicates that as of 1969 a total of 22 criminal contempt proceedings for violations of antitrust decrees were initiated, of which only 12 resulted in some penalty being imposed. This lends support to the historic criticism of the Department of Justice for failing to police compliance with the decrees it obtains, whether by consent or after litigation. *E.g.*, W. HAMILTON & I. TILL, ANTITRUST IN ACTION 92-95 (TNEC Monograph No. 16, 1940); HOUSE COMM. ON THE JUDICIARY, ANTITRUST SUBCOMM., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 86th Cong., 1st Sess. 16-19 (1959); Phillips, *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39,

difficult question whether there was a "commercially reasonable relationship" between sale and lease charges. Thus, the Division might, quite justifiably, decide to deploy its resources in other areas.[6]

If reliance on Department of Justice action is likely to be misplaced, the question of alternative means of obtaining relief arises. Two come to mind quickly, but neither qualifies as a certain, inexpensive, and efficacious enforcement device. The aggrieved parties can complain to the court which issued the judgment in question since the court has the power to punish for criminal contempt sua sponte.[7] However, except in the most blatant cases, which certainly do not include our hypothetical, it is unlikely that the court will act without the prompting of a party to the suit. A second alternative offers a somewhat greater chance for success, namely, a private antitrust action brought by the decree beneficiaries. The problem with this approach for the plaintiff is that he will usually have to demonstrate considerably more than mere breach of the provisions of the judgment in order to make out a violation of the antitrust laws. Consider, for example, our hypothetical. There is nothing illegal per se about merchandising solely through lease agreements. In order to prove, for example, a Sherman Act section 2 violation within the doctrine of *United States v. United Shoe Machinery Corp.*,[8] the plain-

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50-53 (1961); Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334, 1344 (1969). Perhaps in recognition of this criticism, the Department of Justice formally established a Judgment Enforcement Unit in late 1970 to increase compliance. Whether this new unit will have significant effects remains to be seen.

However, there is good reason to believe that the unit will not prove a panacea in light of the limited expectations within the Antitrust Division itself relating to its future performance. As the Division's Director of Operations wrote, "we cannot, of course, maintain a continuing surveillance of all judgments; but we hope to be able to take a look at every judgment, either preliminarily or thoroughly, every 10 years." Rashid, *The Three E's of Consent Decrees—Execution, Entry, and Enforcement*, 16 ANTITRUST BULL. 301, 314 (1971).

[6] This decision will presumably be based on a cost-benefit calculus incorporating a number of factors. One consideration is the importance of the violation in the particular industry at issue when compared with the other matters clamoring for the Division's attention in light of the relative impacts on the competitive functioning of the entire economic system. A second factor, closely related to the first, is the comparative efficiency of deployment of government resources in one mode rather than another in terms of the deterrent effects to be achieved. A third consideration is the amount of resources which will have to be devoted to achieve the desired effects of the various alternatives.

[7] *See generally* Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911); MacNeil v. United States, 236 F.2d 149 (1st Cir. 1956), *cert. denied*, 352 U.S. 912 (1956); Kienle v. Jewel Tea Co., 222 F.2d 98 (7th Cir. 1955).

[8] 110 F. Supp. 295, 345-46 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

tiff must also demonstrate that IBM had monopoly power—not an inconsiderable task. The difficulty of such proof is likely to have serious consequences, since, except for the class of per se offenses, the legality of the conduct proscribed by consent decrees will turn on the economic consequences in particular cases.[9]

Accordingly, from plaintiffs' point of view, there would be considerable utility in some device which would permit them to seek enforcement of the consent decree provisions directly and as of right. It is the purpose of this Article to explore two legal theories by which a plaintiff may attain this end: (1) the notion that, under traditional contract law principles, the decree beneficiary is entitled directly to enforce the decree as a third party beneficiary of the settlement contract, and (2) the possibility of postjudgment intervention by a beneficiary to enforce the decree, whether the decree is the result of bargaining or litigation. It is the thesis of this Article that both avenues ought to be available to private plaintiffs in appropriate circumstances.

Before beginning to consider these theories, it is important to flesh out the background of the problem by sketching the central role consent decrees play in the government's civil antitrust enforcement. The Antitrust Division prefers such settlements to litigation because of the savings in its resources. Such decrees avoid usually complex and protracted litigation and eliminate uncertainty of outcome. For these same reasons, antitrust defendants will often choose to enter into consent decrees. Furthermore, for defendants such a resolution avoids an adjudi-

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[9] For a listing of the kinds of conduct barred by consent decrees but not necessarily illegal under the antitrust laws, see Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983, 999-1003 (1968). There are at least two justifications, from the government's viewpoint, for prohibiting such practices. First, the government may well believe that the particular conduct, in the economic context in which it appears, does constitute an antitrust violation under traditional "rule of reason" analysis. Second, as an official of the Antitrust Division put it:

> Quite often . . . the injunctive relief necessary to prevent recurrence of the violation must be supplemented by other prophylactic relief designed to remedy the past effects of the illegal practices and to create an atmosphere where these effects will not be carried over automatically into the future. This approach was recently reaffirmed by the Supreme Court in the *Ford Autolite* case.

Rashid, *Consent Decrees—Putting Procedures in Focus*, N.Y.L.J., June 23, 1972, at 4, col. 1. *See* United States v. DuPont & Co., 366 U.S. 316, 326 (1961). Ford Motor Co. v. United States, 405 U.S. 562 (1972), does contain language to the effect that relief must be directed *"to eliminate the effects"* of violations. *Id.* at 573 n.8 (emphasis in original). However, that language was concerned with relief obtained after trial, so Mr. Rashid may have somewhat overstated the Supreme Court's position on what he terms the prophylactic purpose of consent decree provisions.

cated determination of anticompetitive conduct which may later be asserted as prima facie evidence of antitrust violations in subsequent treble damage actions instituted by private parties.[10] These considerations explain the widespread use of consent decrees.[11] Further, since entry of a consent judgment is a substitute for enforcement of antitrust statutory prohibitions through trial and final judgment, the consequences anticipated to flow from adherence to the decree are similar to those expected to follow a litigated settlement. Revitalization of competitive economic behavior within the affected industry should occur. Similarly, as in our scenario, new competitors, or even new industries, may arise in the resulting environment, protected by the strictures of the decree from the former anticompetitive practices of the defendant. So long as adherence to the consent judgment continues, the decree's policies are perpetuated. The difficulty arises, however, when the consent decree is disobeyed.

II. THE USE OF THE CONSENT DECREE AS A CONTRACT BASIS FOR THIRD PARTY BENEFICIARY RIGHTS

The possibility of third party beneficiary contract rights arising out of consent decree settlements has not been the subject of scholarly attention.[12] This is odd in view of the widespread rec-

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[10] *See* note 14 *infra*.

[11] While the extent of use of the consent decree by the Department of Justice has fluctuated, it has always been high. *See* Posner, *supra* note 5, at 375, indicating that consent judgments from 1915-69 have never in any five year period dropped below 65% of all civil antitrust judgments in favor of the government. The figure has risen as high as 90%. *Compare* Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 628 n.8 (1965), *with* Flynn, *supra* note 9, at 985 n.3.

[12] Perhaps the closest that commentators have come to this issue is the suggestion of legislation which would authorize private parties to seek enforcement of government consent decrees through either an injunction or damage remedy. Comment, *supra* note 11, at 647. This proposal has also been approved by Flynn, *supra* note 9, at 1016. Although this recommendation is endorsed here, the thrust of this Article is that such a right may be found without resort to Congress. *See also* Note, *Antitrust Consent Decrees: A Proposal to Enlist Private Plaintiffs in Enforcement Efforts*, 54 CORNELL L. REV. 763 (1969). The Antitrust Procedures and Penalties Act, Pub. L. No. 93-528 (Dec. 21, 1974), does not seem to affect the theories considered here. An examination of the statute and its legislative history reveals no intent to recognize a direct right of third parties to enforce court decrees. The Act does amend Clayton Act § 5, 15 U.S.C. § 16 (1970), by adding a new paragraph (b) which requires a public impact statement to be submitted by the Department of Justice to the district court with every proposed consent degree providing, *inter alia*, a statement of "the remedies available to potential private plaintiffs damaged by the alleged violation in the event the proposed judgment is entered." This, however, seems to go to past and present violations of the antitrust laws themselves, not future violations of the decree.

ognition of the central role played by the consent decree in government civil antitrust enforcement which has led to detailed examination of almost every other aspect of the phenomenon.[13] Even the extensive treatment given the effect of consent decrees on private treble damage actions under the antitrust laws[14] has not led to exploration of the present problem.

Indeed, the only discussions of the question have been in the opinions of the three courts which have dealt with the theory, and none of these is very satisfactory. It is the purpose of this portion of the Article to undertake a thorough consideration of the doctrinal and policy bases of the theory that nonparties to a decree have third party beneficiary rights under contract law to enforce those decrees that can fairly be said to have been

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[13] Concern with the consent decree program has ranged over a wide spectrum of opinion. While some have feared that government leverage permits the Antitrust Division to obtain unauthorized relief from downtrodden defendants, *see, e.g.*, Dabney, *Consent Decrees without Consent*, 63 COLUM. L. REV. 1053 (1963); McHenry, *The Asphalt Clause—A Trap for the Unwary*, 36 N.Y.U.L. REV. 1114 (1961), others have been concerned that the cloak of secrecy which surrounds settlement negotiations may disguise the bartering away of the public interest for private gain. United States v. International Tel. & Tel., 349 F. Supp. 22 (D. Conn. 1972), *aff'd sub nom.* Nader v. United States, 410 U.S. 919 (1973). *See generally* Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594 (1973). Likewise, although consent decrees have been criticized for the inflexibility they may build into government enforcement, *see, e.g.*, Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967); Note, *Requests by the Government for Modification of Consent Decrees*, 75 YALE L.J. 657 (1966), others have been concerned that antitrust defendants will lose the benefit of their bargains if the decrees are too readily subject to modification or liberalizing construction. *See, e.g.*, Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 19-34 (1972).

[14] Section 5(a) of the Clayton Act, 15 U.S.C. § 16 (a) (1970), provides that plaintiffs in private antitrust suits may use "final judgments" obtained by the United States in civil or criminal antitrust actions as prima facie evidence, except for "consent judgments or decrees entered before any testimony has been taken." Accordingly, the question what constitutes a consent judgment has received considerable attention, especially with respect to the status of pleas of guilty and nolo contendere in criminal actions. It now seems established that nolo pleas constitute consent judgments within the meaning of Clayton § 5(a), Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939); however, guilty pleas do not, *e.g.*, Armco Steel Corp. v. North Dakota *ex rel.* Hjelle, 376 F.2d 206 (8th Cir. 1967); General Elec. Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., *supra*. *See generally* Seamans, Wilson & McCartney, *Use of Criminal Pleas in Aid of Private Antitrust Actions*, 3 DUQ. L. REV. 167 (1965); Note, *The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damage Actions*, 71 YALE L.J. 684 (1962); Annot., 10 A.L.R. FED. 328 (1972). On a related issue, see Matteoni, *An Antitrust Argument: Whether a Federal Trade Commission Order is Within the Ambit of Clayton Act's Section 5*, 40 NOTRE DAME LAW. 158 (1965). Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970), answered the Matteoni question in the affirmative. *See* Annot., 10 A.L.R. FED. 307 (1972).

made for their benefit. The method of approach will be to review the cases which have dealt with the theory, to determine whether such a right would be consistent with the present doctrinal treatment of antitrust consent decrees, briefly to explore the contract law problems that will be relevant to defining the extent of any right recognized, and, finally, to examine the relevant policy considerations.

A. *The Case Law*

In one of the opening skirmishes in the private monopolization suits brought against IBM,[15] the district court rejected a novel theory urged by plaintiff Data Processing Financial & General Corporation (DPF&G) that it was entitled to recover single damages from IBM on third party beneficiary contract grounds for alleged IBM breach of a consent decree entered in a prior government antitrust action.[16] This decision was subsequently affirmed by the Court of Appeals for the Eighth Circuit on the basis of the district court's "well-reasoned and clearly stated opinion." Since that opinion is less than satisfying, despite the court of appeals' approbation, it is appropriate to begin by analyzing the stated rationale for Judge Neville's decision.

Control Data Corp. v. IBM involved, for our purposes,[17] a motion by defendant IBM to strike from the complaint of plaintiff DPF&G references to a consent decree entered against IBM in a prior government antitrust suit.[18] The DPF&G complaint, predicated on much the same grounds as those sketched in the initial hypothetical, asserted a third party beneficiary cause of

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[15] Over the past six years, IBM has been sued by the government and by a number of private plaintiffs, including, *inter alia*, Control Data Corp. and Data Processing Financial & General Corp. in addition to the more famous Telex Corp. v. International Business Machines Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd*, 1975 Trade Cas. ¶ 60,127 (10th Cir. 1975). In the interest of full disclosure, the author should note that he was at one time involved in the defense of IBM; however, he took no part in the work relating to IBM's successful attack on the DPF&G third party beneficiary claim.

[16] *See* note 1, *supra*.

[17] Another portion of the court's *IBM* opinion struck allegations relating to the consent decree from the complaint of plaintiff Control Data since those references were prejudicial and were justified by Control Data only as useful background information to its antitrust claim. Like references by plaintiffs Applied Data Research, Inc. and Programmatics Inc. were stricken in the face of both a like attempted justification, and as support for a prayer that the court hold IBM in contempt for violation of the 1956 consent decree and a 1935 litigated decree, as well as perhaps presenting a third party beneficiary claim. For our purposes, however, it will suffice to consider the DPF&G complaint and the court's treatment of it.

[18] United States v. International Business Mach. Corp., 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956).

action. Its reference to the prior consent decree, therefore, obviously was relevant. The district court held for the defendant, ruling that the decree would not be admissible at trial "nor will any claim be sustained based upon alleged violation thereof or failure to comply therewith."[19]

Our consideration of Judge Neville's opinion is somewhat complicated by the fact that he was concerned with two different questions: whether a plaintiff asserting an antitrust cause of action can found his suit on a breach of the consent decree or seek to enforce it directly by contempt; and whether a plaintiff can claim recovery as a third party beneficiary of the prior decree. Although initially distinguishing between the two issues, the opinion finally treated them both as being resolved against the plaintiff's claims for the same policy reasons.[20] It is, then, appropriate for us to take Judge Neville at his word and consider all his arguments as applicable to the third party beneficiary theory. Nevertheless, this unfortunate equating of the third party beneficiary contention with other attempts to utilize government obtained decrees may explain why some of the judge's arguments are so far wide of the mark when considered solely with reference to the third party beneficiary theory.

Judge Neville began his discussion by citing authority for the proposition that consent decrees (and nolo contendere pleas in criminal cases) are not admissible as prima facie evidence under section 5 of the Clayton Act.[21] This is quite correct, but it simply does not support the court's decision that such decrees are inadmissible for any purpose.[22] If DPF&G stated a contract cause of action, it would be odd—to say the least—if the contract could not be considered in evidence.

We must, therefore, turn to the underlying question whether such a contract cause of action exists. Judge Neville began by citing four cases for the proposition that "[t]he law is rather clear that a third party, a stranger to the decree and not a party to the government action either directly or by intervention,

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[19] 306 F. Supp. at 843-44.

[20] "Plaintiff DPF&G is attempting to do indirectly [via the third party beneficiary claim] what it cannot do directly [by founding an antitrust cause of action on mere violation of the consent decree] and *the same policy reasons as press for not permitting third parties and private treble damage plaintiffs to enforce an antitrust decree or judgment apply equally to the contract third party beneficiary contention.*" *Id.* at 848 (emphasis added).

[21] *See* note 14 *supra.*

[22] 306 F. Supp. at 844.

cannot attempt to enforce it against the defendant."[23] However, the cases cited do not support so broad a rule. One held only that a violation of a consent decree did not necessarily constitute a violation of the antitrust laws for which treble damages are available.[24] Since we have seen that a consent decree may forbid actions not per se illegal under the statute, this is a perfectly sensible position for which plentiful authority exists.[25] But it simply is not relevant to the question whether single damages or injuctive relief on a contract theory ought to be available.

Two other cases relied on by Judge Neville were also of dubious relevance to the question before him. Both held, at most, only that a private plaintiff has no standing to seek to hold a defendant in contempt for violation of a consent decree.[26] Considering the stringent nature of the contempt sanction, which may culminate in imprisonment or fines beyond the damages suffered by the injured party,[27] these cases plainly are not determinative whether such a plaintiff can employ contract remedies for breach of a decree.

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[23] *Id.* at 845.

[24] Paul M. Harrod Co. v. A.B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961).

[25] *See* notes 8 & 9 *supra*, & accompanying text. *Accord*, Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120 (N.D. Cal. 1970); Steel v. American Broadcasting—Paramount Theatres, Inc., 1961 Trade Cas. ¶ 70,175 (S.D.N.Y. 1961); Ida Amusement Corp. v. RKO Pictures Corp., 1954 Trade Cas. ¶ 67,837 (S.D.N.Y. 1954); Brownlee v. Malco Theatres, 99 F. Supp. 312 (W.D. Ark. 1951); Tivoli Realty v. Paramount Pictures, Inc. 80 F. Supp. 800 (D. Del. 1948).

[26] United States v. American Soc'y of Composers, Authors and Publishers, 341 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 877 (1965); United States v. Paramount Pictures, 75 F. Supp. 1002 (S.D.N.Y. 1948). In fact, neither decision is clear authority even for the limited proposition that a private plaintiff has no standing to bring civil contempt proceedings. In the *ASCAP* case this principle constitutes no more than an alternative holding since the court determined that there had been no violation of the decree in any event. And *Paramount Pictures* is distinguishable since the district court relied on unusual language in the decree to the effect that jurisdiction was retained to enable "any of the parties to the judgment and *no others* to apply to the court at any time . . . for the enforcement of compliance therewith, and for the punishment of violation thereof. . . ." 75 F. Supp. at 1003 (italics added).

[27] While this Article will not consider at length whether nonparties should be permitted to seek contempt citations against those who violate antitrust decrees, the Supreme Court's decision in Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924), casts doubt on the correctness of the Second Circuit's determination in *ASCAP*. *Terminal* involved an attempt by certain "west side lines" to have the Association and the "east side lines" adjudged guilty of contempt for violation of an antitrust decree. Although holding against petitioners on the merits by finding no contempt, the Court had no difficulty with their right to seek such relief which apparently was not challenged.

Terminal is factually different from *ASCAP* in that the petitioner west-side lines were codefendants with the east-side lines in the original action, and thus parties to the decree, a fact which the *ASCAP* court found "crucial." But it is not clear why this difference should warrant a legal distinction. If the purpose of allowing the petitioners to seek

The final case relied on by Judge Neville furnishes no stronger support than the first three for the rule that a "stranger to the decree" cannot attempt to enforce it. In *United States v. United States Gypsum Co.*[28] the United States had previously brought an antitrust action against United States Gypsum and other defendants for patent related violations, and eventually obtained a favorable judgment. Defendant Gypsum thereafter filed actions in other courts for patent royalties against four of its codefendants in the government suit. The defendants petitioned the district court which had issued the antitrust decree to enjoin Gypsum from proceeding because that decree barred such suits. In the face of Gypsum's contentions that only the government, as the original complainant, could enforce the decree, the court held that "where a dissolution decree by express statement or by fair implication therein accords rights to parties thereto, they have standing, in the main suit to enforce such rights . . . ."[29] Apparently the *IBM* decision read this case as establishing that *only* parties can enforce such rights. But it is evident that the question at issue in *Gypsum* was simply whether *at least* such parties could do so.

It is true that the *Gypsum* opinion does lay considerable stress on the fact that the petitioners were parties to the original suit. For example, the court writes:

> Parties to an original anti-trust suit have a status therein which often does not apply to outsiders. This arises from the practical effects of the decree upon the legal rights of the parties. Such a decree is based upon a determination that the Act has been violated by an existing economic situation. Necessarily, the relief is such alteration of that situation as will do away with all unlawful features and potentialities. Unavoidably, such legal surgical operations involve and change the interrelationship of the defendants, whose only reason for

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contempt is to permit them "to enforce rights . . . under the original decree," one wonders why the fortuity whether they were parties to that decree should be determinative. Perhaps the *ASCAP* court felt that the decree represented a balancing of the parties' interests, making it unfair to subject certain parties to its disadvantages while depriving them of effectual means for securing its benefits. But this rationale does not stop short of nonparties, especially if they have, as DPF&G alleged, established businesses in reliance on the decree, precisely as the government wished at the time the decree was entered.

[28] 124 F. Supp. 573 (D.D.C. 1954), *rev'd on other grounds*, 352 U.S. 457 (1957). The Supreme Court explicitly approved the district court's assumption of jurisdiction.

[29] 124 F. Supp. at 580.

> being made parties defendant was that they participated in the violation of the Act. Such decrees are intensely practical. Often, in this readjusting process, a decree provides not only for duties but also for rights *inter se* the parties. Where such rights are given, they carry to the recipient party the right to urge compliance, within the limits of the decree.[30]

Granting this argument as far as it goes, it is not apparent why "readjustment" should be limited to parties to the original action.[31] And, interestingly enough, *Gypsum* looks for support not only to *Terminal R.R. Ass'n v. United States*[32] which did involve parties to the original action seeking to enforce the decree by contempt proceedings, but also to *Missouri-Kansas Pipe Line Co. v. United States*,[33] which did not. In *Pipe Line*, the Supreme Court approved intervention by a nonparty seeking to protect its rights under a consent decree. This is significant because the Court, in describing the source of the right to intervene, did *not* look to the applicable federal rules, but instead focused on a provision in the decree itself that stated that the petitioner may "become a party" hereto "for the limited purpose of enforcing the rights conferred by Section IV hereof."[34] Accordingly, Judge Neville's attempt to rely on the dictum in *Gypsum* as establishing that nonparties have no rights is unpersuasive.

Not only do the cases cited by Judge Neville fail to establish that nonparties have no right to enforce government consent decrees, but a careful review of the authorities suggests precisely

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[30] *Id.* at 579.

[31] The main reason for this distinction may have been the *Gypsum* court's concern with the Supreme Court decision in Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42 (1925), which denied intervention to nonparties seeking to alter a final decree. The most obvious ground upon which *Gypsum* could distinguish *Buckeye* was the fact that there a nonparty sought rights. However, *Buckeye* is also distinguishable from the *IBM* situation because it involved an attempt to modify a decree, not to enforce one, as well as other reasons. Indeed, the *Buckeye* Court cited "an embarrassment of reasons," *id.* at 47, why the appeal should fail, thus undermining the reliance that may be placed on any one factor. Beyond the fact that the attempt was to attack the decree, the Court found res judicata sufficient to bar the relief. Then the Court referred to the status of the intervenors, characterizing their positions: "They wish to have this temptation to crime on their part [conspiracy with the defendant] removed, and incidentally have themselves relieved from obligations which were recognized by the court as valid and binding. . . ." *Id.* at 48. Only after these three arguments were made did the Court refer to the "fundamental objection" that the intervenors were neither parties to the original suit nor persons who suffered by the original antitrust violation.

[32] 266 U.S. 17 (1924). *See* note 27 *supra*.

[33] 312 U.S. 502 (1941).

[34] *Id.* at 507.

the opposite conclusion. First, the Supreme Court's decision in *Pipe Line* is certainly susceptible of the reading that the parties to an agreement which is incorporated into a consent decree *can* thereby confer rights on a nonparty. *Pipe Line* involved an antitrust consent decree entered in a government suit against Columbia Gas and Electric Company. That decree was "designed to protect Panhandle [Company] from Columbia which had acquired domination of [Panhandle] to stifle its competition."[35] After the government and the defendant both sought modification of the decree, Panhandle attempted to intervene to protect its interest in the original decree. The Supreme Court reversed the district court's denial of intervention, writing:

> All of these arguments misconceive the basis of the right now asserted. Its foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow parties having a common interest with the formal parties to enforce the common interest with their individual emphasis. Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.
>
> That is the present case. Panhandle's right to economic independence was at the heart of the controversy.[36]

Second, in the *ASCAP* case,[37] which was cited directly by Judge Neville, the Second Circuit, while rejecting the attempt of Metromedia, a nonparty, to hold the Society in contempt, did point out petitioner's appropriate remedy:

> Metromedia's proper recourse . . . was to continue negotiations with ASCAP for the next few weeks until

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[35] As described by the Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 134-35 (1967).

[36] 312 U.S. at 506.

[37] 341 F.2d 1003 (2d Cir. 1965).

> sixty days had elapsed from the date of its application [in accordance with the procedure established by the consent decree to determine royalty disputes]—or, at least, to make a good faith effort to negotiate during that period. Failing that, *Metromedia then would be able to invoke the court's jurisdiction for the purpose of determining a reasonable fee.*[38]

The obvious question is why one who follows this procedure has a right to "invoke the court's jurisdiction"; and the only answer is because the consent decree so provides! Accordingly, the *ASCAP* opinion seems to recognize, at least in dictum, the notion of some enforceable rights in third parties created by a government antitrust consent decree.[39]

Admittedly, this reading of *ASCAP* is not altogether consistent with that portion of the opinion which stresses that the Department of Justice is "the sole proper party to seek enforcement of government antitrust decrees" and concludes that the vindication of the public interest requires that the government have "continuing control" over the suit.[40] Although it is doubtful that the Second Circuit was aware of the internal inconsistencies in its opinion, we will see that the third party beneficiary theory does offer a means of reconciling the notion that some rights do devolve on nonparties from consent decrees contemplating that result with the desideratum that flexibility be preserved for the government in its pursuit of the public interest.

If Judge Neville's reliance on authority is less than convincing, his mustering of "policy" reasons to support the result he reaches is no more compelling. In all he states seven such reasons. First, "[t]raditionally and historically only the parties to a judgment have rights of enforcement thereunder." It is doubtful whether this statement was ever entirely accurate; but in any

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[38] *Id.* at 1006 n.3 (emphasis added).

[39] United States v. Western Elec. Co., 409 F.2d 1377 (3d Cir.), *cert. denied*, 396 U.S. 876 (1969), is not contrary to this aspect of *ASCAP*, since the court in *Western Electric* merely held that, properly interpreted, the consent decree did not authorize application to the district court for establishing royalties for *past* uses of a patent.

[40] At one point the court wrote:

> Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights.

341 F.2d at 1008.

event rule 71 of the Federal Rules of Civil Procedure establishes that it is not a correct statement of present law in the federal courts.[41] Further, "traditionally and historically" third party beneficiary contracts have been enforced by this country's courts; the opinion gives no reason why this rule should not apply when the contract has been incorporated in a judgment.

Second, the court argues that the relief plaintiff sought should be made available only prospectively through legislative enactment:

> Were it to be held that these consent decrees accord rights to third parties, then retroactively 495 companies or industries (and perhaps more if several defendants are involved in one case) would have consequences attached to their consent decrees which undoubtedly their attorneys who drafted them or advised concerning them did not contemplate, intend nor expect.[42]

First, it is clear that this objection is limited to retroactive application of the third party beneficiary theory, and has no effect on future decrees if the Department of Justice should decide to seek them. Second, the court's description of the consequences of such retroactive application is unexceptionable as a statement of fact, but of dubious persuasiveness as a reason for denying the cause of action. The court properly is concerned with notions of fairness, but the unfairness of creating retrospectively a third party beneficiary right is not evident. After all, the defendant will be under a court order to do (or not to do) the acts which are the subject of the private suit. It does not lie well in his mouth to argue that he expected that his obligation to obey would be enforced only by one means (contempt proceedings brought by the Department of Justice) rather than another (a private action for damages). In either case he is merely being compelled to do that which he has promised in the consent negotiations, and that which he is obliged to do in any event under the court order.

Third, the court notes that "[w]ere plaintiffs' contentions upheld, certainly it would be very apt to foster litigation from multiple sources."[43] There are at least two responses to this ar-

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[41] FED. R. CIV. P. 71 states in pertinent part: "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party . . . ." *See* notes 119-20 *infra* & accompanying text.

[42] 306 F. Supp. at 846.

[43] *Id.*

gument. Assuming it to be true, it ought not to be conclusive. Against this problem must be weighed the advantages of litigation which promotes greater compliance with court orders. Further, it is doubtful that a net increase in litigation will result. Precisely the opposite will occur to the extent that private enforcement of consent decrees by third party beneficiary contract suits replaces treble damage antitrust suits because the issues in the former action will usually be much simpler than those involved in an antitrust case. Even if the contract claims are coupled with antitrust causes of action, as in the *IBM* case, significant complication of the suit is not likely to result in view of the usual simplicity of the factual issues on the contract claim.

The fourth stated policy reason for the court's result appears on its face to be more substantial, but survives analysis no better than the first three:

> If plaintiffs were to prevail, the practice and feasibility of entering antitrust consent decrees as contemplated by Congress might virtually disappear. A company charged with an antitrust violation might well reason that it has little to lose by a trial of its case even should it be unsuccessful, since the alternate of entering into a consent decree thereafter is going to be usable against it in damage actions in any event. Certainly the government would be hampered in attempting to procure consent decrees.[44]

Judge Neville is plainly right that any rule that makes consent decrees more onerous for a defendant may tend to discourage his willingness to agree to them. But he ignores two critical points. First, since third party beneficiary rights are created by the parties to the contract, the parties are also free to negate such rights. Not only will the Department of Justice not find its hands tied, it will gain greater flexibility from having court recognition that it has the option to create a third party beneficiary right of action. Second, this is not a case of attempting to use the consent decree to impose liability for past actions. A consenting defendant will have no liability arising from the decree unless he breaches it in the future. Accordingly, the only defendant who would have settled the government suit *but for* the third party beneficiary theory is the one who settles with the intention of disobeying the court's order, counting on the Justice De-

[44] *Id.*

partment's inadequate resources to escape enforced compliance. There is no public interest in inducing such a defendant to agree to a consent decree.

The fifth and sixth policy reasons cited by the court against third party enforcement of consent decrees are related and may be treated together. Judge Neville writes:

> To permit the parties in effect by their private negotiations and stipulations to enlarge, narrow or otherwise define the scope of the antitrust laws in a consent decree so as to create a cause of action in a third person, raises the question of an unauthorized delegation of legislative power.[45]

This singular statement is perhaps explained by the court's reference immediately afterward to *Paul M. Harrod v. A.B. Dick Co.*[46] which, as we have seen,[47] held that a violation of a consent decree was not necessarily a violation of the antitrust laws. To the extent that the *IBM* court was merely asserting that treble damages are not available for consent decree violations, the court's language is not troublesome. If the phraseology was meant to apply to the third party beneficiary claim, however, it can only mean that the government cannot create by contract third party beneficiary rights, a proposition clearly contrary to the great weight of authority,[48] including a case later cited in the opinion itself.[49]

A similar problem exists with respect to the court's sixth argument: "To permit enforcement of an antitrust consent decree by third parties in reality makes the decree a statute continuing perhaps in perpetuity, and one, withal, not enacted by Congress."[50] It is not clear why permitting contract enforcement by third parties does not make the decree "in reality" a contract. Further, the decree is enforceable in perpetuity already: the only question is whether the enforcement may be by private action for damages in addition to the government seeking contempt. It

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[45] *Id.*

[46] 194 F. Supp. 502, 504 (N.D. Ohio 1961).

[47] *See* text accompanying note 24 *supra.*

[48] *See* text accompanying notes 98-107 *infra.*

[49] Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967). *See also* Weinberger v. New York Stock Exch., 335 F. Supp. 139 (S.D.N.Y. 1971).

[50] 306 F. Supp. at 846.

is hard to imagine why the decree is more or less a "statute" in the one case than the other.

It may be that underlying the court's obvious concern about adding to the means of enforcing consent decrees are reservations about the legitimacy of the decrees themselves, even when enforced by the government. For example, to the extent that the relief the government obtains by a consent decree includes barring conduct which might be perfectly legal under the antitrust laws, the problem of government overreaching presents itself. Without examining the merits of this issue,[51] it should at least be clear that it is not a persuasive objection to nonparty enforcement of consent decrees. Such decrees ought to be either permissible or not, without regard to who seeks to enforce them. It is true, of course, that less enforcement of possibly suspect decrees would result if fewer persons were authorized to enforce. But the same effect could be achieved, with equal logic, by not allowing even the government to enforce decrees entered on Mondays. If good reasons exist to deny third parties per se the right to enforce consent decrees, that should be the policy basis for denying such persons contract beneficiary status. A mere generalized hostility to consent decrees will not suffice.

For its seventh and final policy argument, the court reverted to the contention that recognition of third party beneficiary rights will undercut the proviso to section 5(a) of the Clayton Act which excludes consent decrees from the prima facie evidence effect given decrees entered after testimony has been taken. The court, however, is mistaken in its interpretation of the statute.[52] The main thrust behind section 5(a) was a desire to facilitate "private attorney general" enforcement of the antitrust laws by providing assistance to private plaintiffs in proving

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[51] The problem has frequently been adverted to in passing in the literature but never carefully considered, at least with respect to antitrust consent decrees.

[52] 15 U.S.C. § 16 (a) (1970). The relevant text of the provision is as follows:

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

On the effects of using a decree as prima facie evidence, see Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951). *See generally* Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. REV. 991 (1961).

violations.[53] It was recognized, however, that to apply this principle across the board would seriously hinder government enforcement efforts by removing an incentive for defendants to settle. Accordingly, section 5(a) was carefully tailored to balance these two competing interests: a final judgment obtained by the United States is prima facie evidence of defendant's violation of the antitrust laws, unless it is a consent decree "entered before any testimony has been taken." In this context it is plain that any congressional intent to "benefit" consenting defendants is purely subsidiary to assisting the government in obtaining consent decrees in the sense that, had Congress been able to aid private plaintiffs without hindering government enforcement, it would have done so. Since Congress cannot be presumed to want to encourage consent decrees which would not be enforced, there is no inconsistency between immunizing consenting defendants from the prima facie evidence effect of past violations and giving a third party beneficiary cause of action to private plaintiffs for future breaches of them. The statutory provision would continue to encourage defendants who intended to abide by consent decrees to enter into them. Thus, the decrees would be better obeyed, while private parties would be benefited. It is difficult to imagine a better accommodation of the divergent purposes of section 5(a) than could be achieved by recognition of a third party beneficiary cause of action.[54]

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[53] *See, e.g.*, President Wilson's Special Message to Congress, January 20, 1914, which states:

> I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit . . . . It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.

51 CONG. REC. 1962, 1964 (1914).

[54] Perhaps some additional light on the purpose of the proviso to § 5(a) can be shed by an examination of the "asphalt clause" problem. *See generally* Dabney, note 13 *supra*; McHenry, note 13 *supra*; Note, *supra* note 12; Comment, *Section 5 of the Clayton Act and Entry of Consent Decree Without Government Consent*, 1963 WIS. L. REV. 459. Asphalt clauses were incorporated into a number of consent decrees at the insistence of the Department of Justice including, *e.g.*, United States v. Allied Chem. Corp., 1961 Trade Cas. ¶ 69,923 (D. Mass. 1960); United States v. Bituminous Concrete Ass'n, Inc., 1960 Trade Cas. ¶ 69, 878 (D. Mass. 1960); United States v. Lake Asphalt and Petroleum Co., 1960 Trade Cas. ¶ 69,835 (D. Mass. 1960). The clause admits the charges against defendants and agrees that the decrees will serve as prima facie evidence in private suits brought against them by state or local governments, the ones primarily injured by the conspiracy.

Two other cases, both subsequent to *Control Data Corp. v. International Business Machine Corp.*, have also considered third

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The reasons for this policy are set forth in Bicks, *Significant New Antitrust Developments*, 17 A.B.A. ANTITRUST SECTION 268 (1960).

The asphalt clauses were quickly attacked on the grounds that the government was using its leverage to extract from defendant's their "right" not to have a consent decree used as prima facie evidence in a subsequent private suit.

The question reached the courts in United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962), when the defendants, after both parties had agreed on the other substantive terms of the consent decrees, petitioned the district court to enter the decree without the asphalt clause, despite the absence of government consent. The court ruled for the defendant, holding that § 5 of the Clayton Act barred the government's position. In so doing it emphasized the absence of any need for the "asphalt clause" to prevent future violations of the Sherman Act. In its opinion the court rejected the government's contention that it was legitimate for it to consider the interests of private plaintiffs in deciding whether to settle or go to trial:

> The right given to antitrust defendants by the proviso to § 5 to avoid the "prima facie evidence" sanction by capitulation is an unqualified right. No authority or discretion is given to the Department of Justice to deny that right even to the most flagrant violator nor, a fortiori, can it deny that right to one who by fortunes of commerce does substantial business with governmental units or agencies. The Department of Justice here, by withholding its consent, is not only arbitrarily denying the moving defendants this right but frustrating the clear intent of Congress to encourage early entries of injunctional decrees without long and protracted trials.

Id. at 662.

The decision has, not surprisingly, been the subject of considerable criticism. Although the court is correct in its major premise that the government should not be allowed to extract unconstitutional or unauthorized relief from a defendant as a condition for settling a suit, *see, e.g.*, U.S. DEP'T OF JUSTICE, REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 361 (1955), its minor premise that § 5 bars the asphalt clause is another matter. The court's perception of a congressional intent to create a "right" in defendants to avoid the prima facie effect of consent judgments is ill-founded, since the purpose of the proviso is to assist the Justice Department's enforcement efforts, not to benefit defendants. The Department, therefore, should be permitted to decide when the avoidance of litigation is desirable, and the mere fact that the reason for requiring an asphalt clause as a condition for settlement is to further the interests of private parties does not necessarily taint the government's decision. After all, the existence of a private treble damage remedy and the prima facie evidence provision of § 5(a) itself both demonstrate that Congress did not recognize any inherent inconsistency in furthering the public interest by permitting private parties to recover from antitrust violators. As one commentator noted:

> But Congress never referred to the "rights" of the defendants in this regard; Congress was concerned only with the plight of the private parties plaintiff and with maintaining enforcement flexibility in the Justice Department. *Twin Ports Oil Co. v. Pure Oil Co.*, as quoted in *Brunswick*, is mistaken in suggesting that Congress unequivocally sacrificed private litigant concern for considerations of economy where consent decree negotiations were appropriate. The court's position shackles rather than maintains Government flexibility. The government apparently believes that it can in this case implement at one stroke the two values which lay behind section 5. Clearly the 1914 Congress would only applaud such an effort.

Comment, *supra*, at 462-63 (footnotes omitted). *See also*, Flynn, *supra* note 9, at 1010-15.

The question whether *Brunswick* represents good law remains open since no other decision has been handed down. A case involving the issue did reach the Supreme Court,

party beneficiary rights under government consent decrees, but neither adds much to the *IBM* opinion. *Bailey v. Iowa Beef Processors, Inc.*,[55] a contract action under a third party beneficiary theory in state court, involved a class action brought for members of a labor union as creditor beneficiaries of a government antitrust consent decree requiring defendant Beef Processors to divest itself of two packing plants. The decree provided, *inter alia*, that pending sale the defendant "shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair [its] ability to accomplish the divestiture."[56] Plaintiff claimed that defendant's two-month closing of one plant and consequent laying off workers violated these provisions.

The Iowa Supreme Court, after finding that the lower court had jurisdiction over the action,[57] analyzed the plaintiff's claim under third party beneficiary law without noting any problem in application of that theory to a consent decree in a government antitrust suit. An examination of the briefs of the parties shows that *IBM* was not brought to the attention of the court. Accordingly, *Bailey* cannot be read as rejecting its reasoning. Nevertheless, it is interesting that neither the attorneys nor the court sua sponte recognized any problems with applying contract notions.

United States v. Ward Baking Co., 376 U.S. 327 (1964), but no definitive decision was rendered. There, as in *Brunswick*, the district court entered a consent decree over the government's objection. The Supreme Court reversed, holding that the government's contention that the relief provided was not broad enough had "a reasonable basis under the circumstances." The Court then wrote:

> Since we conclude that there was a bona fide disagreement concerning substantive items of relief which could be resolved only by trial, we need not, and do not, reach appellees' contention that, where there is agreement on every substantive item of relief, insistence by the Government upon an adjudication of guilt as a condition to giving its consent to a judgment would conflict with the congressional policy embodied in § 5 of the Clayton Act [citing *Brunswick*]. We decide only that where the Government seeks an item of relief to which evidence adduced at trial may show that it is entitled, the District Court may not enter a "consent" judgment without the actual consent of the Government.

Id. at 334.

In any event, the implications of *Brunswick* for the development of a third party beneficiary theory are minimal. Even beyond the question whether *Brunswick* is good law, the rationale of the decision does not reach the third party beneficiary situation. Recognition of a "right" to avoid the prima facie evidence effect of a consent decree with respect to liability for past antitrust violations says nothing about a "right" to be free from third party suit for damages suffered from future violations of the consent decree itself.

[55] 213 N.W.2d 642 (Iowa 1973), *cert. denied*, 95 S. Ct. 52 (1974).

[56] *Id.* at 643.

[57] The jurisdictional aspects of the third party beneficiary suit are discussed at note 127 *infra*.

On the merits, the court affirmed the lower court's dismissal on the ground that the plaintiff was only an incidental beneficiary of the consent decree. It recognized the propriety of third party beneficiary suits under the Iowa law of contracts,[58] but found the requisite "intent to benefit" not present. To establish that element, the plaintiff relied on the intent of the promisee Department of Justice as inferred from its duties under the Clayton Act. The supreme court, quite rightly, found this argument unconvincing: the purpose of section 7 of the Clayton Act is to preserve competition, not to ensure that small units remain intact. Although the notion of intent to benefit and its implication for the *Bailey* case will be considered at length,[59] for present purposes it is important only to note that the court saw no reason why an intent to benefit could not, in appropriate circumstances, be inferred from a consent decree.

The second post-*IBM* case involving third party enforcement of a consent decree, *Manor Drug Stores v. Blue Chip Stamps*,[60] is somewhat more complex but may ultimately prove the most significant decision because the Supreme Court has granted certiorari. *Manor Drug Stores* arose out of a prior consent decree[61] requiring reorganization of defendant Blue Chip. The plan approved by the court required an offering of stock to retailer-purchasers of Blue Chip stamps, such offering to be registered under the federal securities laws. The plaintiffs in *Manor Drug Stores* alleged that the purpose of the consent decree was to provide them with stock at a "bargain basement price" in compensation for the damages that they had suffered from the defendants' prior antitrust violations. They also charged that the defendants sought to avoid the purpose of the decree by placing in the prospectus misleading statements which induced the

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[58] The Iowa Supreme Court, and the parties in their briefs, assumed that state contract law governed, although plaintiff did argue that the Clayton Act was relevant in determining whether a third party beneficiary right was created. In its petition in the United States Supreme Court for a writ of certiorari, the plaintiff, naturally enough, emphasized the "federal question" involved in the state court decision since the presence of such a question was essential to issuance of the writ. Apparently, however, the plaintiff continued to contend that state law governed whether a federal antitrust consent decree was a contract, and, if so, what third party rights would be recognized. The possibility that these questions are federal ones is examined at note 89 *infra*.

[59] *See* textual discussion beginning at note 111 *infra*.

[60] 339 F. Supp. 35 (C.D. Cal. 1971), *rev'd*, 492 F.2d 136 (9th Cir. 1973), *cert. granted*, 95 S. Ct. 302 (1975).

[61] United States v. Blue Chip Stamp Co., 1967 Trade Cas. ¶ 72,087 (C.D. Cal. 1967). Other litigation arose out of this decree in the course of an attempt to intervene to modify. *See* note 179 *supra*.

plaintiffs not to purchase. This, they concluded, was a violation of the federal securities laws and a breach of the plaintiffs' rights as third party beneficiaries under the consent decree.[62]

The district court rejected the third party beneficiary claim without extended discussion, relying mainly on the *IBM* opinion. It apparently found persuasive Judge Neville's rationale that allowing third party beneficiary recovery would diminish the incentive for defendants to enter into consent decrees. Turning to the securities law issues, the court held that plaintiffs did not have a cause of action for damages because they lacked "purchaser-seller" standing within the meaning of rule 10b-5.[63]

On appeal to the Ninth Circuit, a panel of that court, in a two-to-one decision, reversed the district court's dismissal.[64] Although the third party beneficiary theory had been abandoned on appeal, the court did suggest in its discussion of the securities law issue that the consent decree affected the plaintiffs' rights. It perceived the purchaser-seller doctrine as rooted in the belief that, absent a purchase or sale, a plaintiff will rarely be able to demonstrate a causal nexus between the loss and the alleged violation. However, where a contract exists between the parties, it furnishes "objective evidence of the reality of a plaintiff's intention to purchase or sell but for the fraud, and thus of causation."[65] Having so stated the law, the court then described the consent decree as "serv[ing] the same function as [a] contractual relationship,"[66] bringing plaintiffs within the class of those non-purchasers-sellers allowed to sue.

The implications of the majority opinion for a direct third party beneficiary contract action are unclear. On the one hand, the fact that the decree is described as a functional equivalent of a contract supports such a right. This may be especially significant since the comparison was drawn despite Judge Hufstedler's strong dissent in which she attacked the functional equivalence notion by arguing that the plaintiffs could not have enforced rights under the consent decree.[67] On the other hand, however,

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[62] Jurisdiction on the contract claim was grounded on federal pendent jurisdiction.

[63] On the parameters of this doctrine, see the authorities cited in the *Manor Drug Stores* opinions.

[64] 492 F.2d 136 (1973).

[65] *Id.* at 142.

[66] *Id.*

[67] The dissent, like the district court's opinion, looks to the *IBM* decision and Judge Neville's argument that the third party beneficiary theory will discourage consent decrees as a "persuasive rationale" for rejecting the rule. *Id.* at 144 n.3.

the court may have merely been treating the decree as enough evidence of a "special interest" in a particular stock offering to satisfy the requirement of a casual nexus between fraud and loss. Two footnotes, perhaps mutually contradictory, compound the uncertainty. At one point the court states that "as defendant-appellees point out, plaintiff-appellant could not have directly enforced the decree,"[68] and refers to the lower court's dismissal of the third party beneficiary claim. However, this language is not only dictum on the third party beneficiary theory, but, perhaps significantly, it also fails expressly to approve either the defendant's contentions[69] or the lower court's decision. Further, the next footnote states that "an informed decision by plaintiff-appellant to purchase these shares could not have been thwarted by the intervention of an earlier or higher bidder. . .,"[70] thus perhaps implying that the plaintiffs had some kind of vested right.

The Supreme Court's grant of certiorari will provide it with an opportunity to resolve these issues. Unfortunately for our purposes, however, the posture in which the case appears may permit it to be decided without a definitive decision on the status of third party rights under consent decrees. And, in any event, our review of the few authorities on the question establishes that it is not clear which way the Court should rule on third party beneficiary status should it desire to do so. *IBM*'s rationale is unsatisfactory; *Manor Drug Stores* is profoundly ambiguous; and *Bailey*, while implicitly accepting the theory, also fails to come to grips with the underlying issues. Accordingly, it is appropriate to undertake a fresh approach to the problem.

B. *The Consent Decree as a Contract*

If, as we shall see, the relevant policy reasons suggest the creation of some kind of third party enforcement device, the next question is whether the use of the contract law of third

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[68] *Id.* at 142 n.14.

[69] The court referred to Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971), after noting the defendant's contention. That decision rejected a complaint of violation of a consent decree, but the claim there was not predicated on a third party beneficiary claim. The *Dahl* court's conclusory statement that "only the Government can seek enforcement of its consent decrees," and its citation to United States v. American Soc'y of Composers, Authors & Publishers, 341 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 877 (1965), suggests that it read the plaintiff's argument as an attempt to cite defendant for contempt. *See* notes 26 & 27 *supra* & accompanying text.

[70] 492 F.2d at 142 n.15.

party beneficiaries is an appropriate means of achieving this end. This, in turn, involves two questions: whether such a notion conflicts with the antitrust law of consent decrees; and whether contract law is a suitable instrument to achieve the desired ends. This latter point will be discussed in part *C*; it is to the former that we now turn.

Although one should be rightly hesitant about discussing what a consent decree "really" is, it is necessary to inquire into the nature of the beast in order to ascertain if it may be a "contract" for purposes of a third party beneficiary cause of action. No discussion of antitrust consent decrees can begin elsewhere than with the *Meat Packing Cases*.

These involved consent decrees arising out of a suit brought in 1920 by the Department of Justice against the five leading meat packers. The decree enjoined the defendants, *inter alia*, from engaging in any business ancillary to their central function. For example, they were barred from engaging or having any interest in manufacturing, selling, or transporting many enumerated food products.[71] After some unsuccessful preliminary skirmishing,[72] two of the original defendants filed a petition seeking to modify the decree. The lower court modified it in some respects, but refused to do so in others. The appeal to the Supreme Court resulted in Mr. Justice Cardozo's famous opinion in *United States v. Swift & Co.*[73] Cardozo had to deal with a number of issues in deciding the case, the first being whether the courts had the power to modify a consent decree. This power was conceded by both the original defendants and the government, but was challenged by would-be intervenors who argued that the decree was not an adjudication by a court but a contract between the parties, and therefore could not be modified without the government's consent. Assuming, without passing on, the status of the intervenors to object, the Court gave short shrift to this contention:

> We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act. A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree

[71] United States v. Swift & Co., 286 U.S. 106, 111 (1932).
[72] *E.g.*, Swift & Co. v. United States, 276 U.S. 311 (1928).
[73] 286 U.S. 106 (1932).

> concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth [it] was not a contract as to anyone. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.[74]

This passage warrants our examination since it seems to bar a third party beneficiary right for two reasons: because there is no contract; and because the Court rejects any third party rights in any contract that might exist. Further, although a hair-splitting critic might denigrate either of these points as "mere dictum," it is clear that together they constitute a holding that the agreement underlying every consent decree is no bar to modification. Accordingly, it is appropriate to consider Mr. Justice Cardozo's language at some length.

It should be noted that the putative intervenors did not explicitly raise the third party beneficiary theory; therefore the Court's language that if "the decree was a contract as to others . . . it was not one as to them" may not have been well-considered. However, Cardozo was certainly familiar with the concept of third party beneficiaries,[75] so it is strange that the possibility did not occur to him in *Swift*. Perhaps the only explanation for this lapse is that the point merited only passing attention if the real basis for his decision was that there was no contract at all. This latter conclusion, then, is best viewed as the holding on this aspect of the case.

At first glance this holding appears conclusive against the theory espoused here—after all, there can be no contract third party beneficiaries without a contract. But we should recall the purpose for which Cardozo found the consent decree not to be a contract. The would-be intervenors put forth a simple syllogism: The consent decree is a contract; contracts cannot be modified without the assent of the parties; *ergo*, the consent decree cannot be modified without the assent of the parties. In order to avoid a result which Cardozo rightly saw as intolerable—the permanent freezing of consent decrees absent agreement to modify—

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[74] *Id.* at 115.

[75] Just four years earlier, while on the New York Court of Appeals, he authored the opinion in the famous third party beneficiary case of H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).

Cardozo simply denied the major premise: a consent decree is not a contract.

He would, perhaps, have done better either by attacking the minor premise,[76] or by cutting through the brittle logic of the syllogism with the argument that, though a consent decree may be a "contract" for some purposes, it is one which must be subject to modification for reasons of social policy inapplicable to the usual contract. Indeed, the fact that contractual notions are unavailable to bar modification of consent decrees absolutely does not mean that they are not frequently employed for other purposes with respect to such decrees.

Such notions have, in fact, been invoked by the Supreme Court in at least two different kinds of situations involving consent decrees: modification and interpretation. *Swift* is itself authority for the judicial power to modify, and Cardozo's opinion takes some care in expounding the circumstances which warrant the exercise of that power.[77] Although the intricacies of that question need not here concern us,[78] it is important for our purpose to note that in at least two post-*Swift* cases the Court has adverted to the consensual nature of consent decrees as restricting the freedom of the courts to modify them. Thus, Mr. Justice Frankfurter, writing for the Court in *Ford Motor Co. v. United States*,[79] plainly found that aspect a weighty factor:

> The appellants [Ford] agreed for a limited term to refrain from pursuing conduct which, in the absence of an adjudication that it was illegal, they were otherwise

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[76] Many contracts are entered into with the expectation of possible modification for changed circumstances, either by further agreement between the parties in accordance with certain standards, *see, e.g.*, UNIFORM COMMERCIAL CODE § 2-305, or by arbitration. Certainly the contract embodied in the consent decree could be viewed as entered into by the parties with the mutual understanding that it could be modified by court determination at either's motion because of changed circumstances.

[77] We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject to adaptation as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . 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.

286 U.S. at 114-15 (citations omitted).

[78] *See generally* Note, HARV. L. REV., *supra* note 13; Note, YALE L.J., *supra* note 13.

[79] 335 U.S. 303 (1948).

> free to pursue and which General Motors has always been free to pursue. There has been no such adjudication and successive extensions of the term have expired. The crucial fact now is not the degree of actual disadvantage but the persistence of an inequality against which the appellants had secured the Government's protection. Yet the Government seeks a change in the express terms of the decree which would perpetuate that inequality. The Government has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated.[80]

Likewise, in *Hughes v. United States*[81] the Court reversed the district court's exercise of its power to modify, on the ground that the decree defendant's consent did not extend to the procedure employed in ordering a sale of certain stock without a hearing on the necessity of doing so.

The point of these opinions is not that absence of defendant's consent bars modification but rather that the destruction of expectations based upon the original consent decree imposes a heavy burden on the government when it seeks modification. The importance of this factor can perhaps be seen by contrasting *Ford* and *Hughes* with the recent Supreme Court decision in *United States v. United Shoe Machinery Corp.*[82] where the Court held the *Swift* standards for modification *not* applicable to a government attempt to modify a *litigated* decree:

> *Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.
>
> The present case is the obverse of the situation in *Swift* if the Government's allegations are proved. Here, the Government claims that the provisions of the decree were specifically designed to achieve the establishment of "workable competition" by various means and that the decree has failed to accomplish this result. Because time and experience have demonstrated this fact, ac-

[80] *Id.* at 322.
[81] 342 U.S. 353 (1952).
[82] 391 U.S. 244 (1968).

> cording to the Government, it seeks modification of the decree. Nothing in *Swift* precludes this. In *Swift*, the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact.[83]

This radically different approach of the Court can be explained only on two grounds. First, and more probable, is the fact the defendant's consent was not involved in *United Shoe*, where the judgment was entered after litigation. In such a setting the judiciary may modify the decree free of any concern about breaching a bargain. A second possible interpretation that *United Shoe* marks a full-scale retreat from the former standards for modification, of any decree, ceased to be tenable after the Supreme Court's recent decision in *United States v. Armour & Co.*[84] involving the same consent decree which had been at issue in *Swift*. The provision in question barred Armour from engaging "directly or indirectly"[85] in certain transport services. It was common ground that an Armour acquisition of Greyhound would have violated the decree. But the question before the Court was whether this held true when Greyhound acquired Armour. In finding no violation—despite a recognition that the evils, if any, flowing from a Greyhound-Armour acquisition would be substantially the same as those resulting from an Armour-Greyhound transaction—the Court, in an opinion by Mr. Justice Marshall, laid great stress on contractual concepts:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up

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[83] *Id.* at 248-49. The decree at issue provided that jurisdiction was retained, *inter alia*, "to set aside the decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act." This provision in a retention of jurisdiction clause is most unusual, and the Court could have chosen to rely on this language; instead, it seemed disposed to establish a more general principle liberalizing the standard controlling government attempts to modify litigated decrees.

[84] 402 U.S. 673 (1971). The decision was 4-3. Justices Douglas, Brennan and White dissented; Justices Blackmun and Black did not participate.

[85] *Id.*

> something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of the consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, *the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written* had the plaintiff established his factual claims and legal theories in litigation.[86]

This, of course, raises an interesting question: is *Armour* consistent with *Swift*? The former focuses on the sanctity of consent decrees, while the latter upholds the court's power to alter them. Professor Handler recently argued that there was no fundamental inconsistency:

> The only issue before the Court in *Armour* was the "narrow question" of the proper construction of the Meat Packers Decree. *Armour* is in total harmony with the time-honored view that consent decrees are to be treated as contracts for purposes of construction. When Justice Cardozo characterized such a decree in *Swift* as a judicial act, it was with reference to the equally time-honored principle that an injunction is always subject to adaptation on a showing of changed circumstances. Hence, *Armour* and *Swift* merely reflect the fact that "it is possible for a court to treat a stipulated judgment as a contract for one purpose but not for another"—a recognition that avoids the pitfalls of "lump concept" thinking.[87]

The Handler reconciliation may be too facile. In a narrow sense of course, Handler is correct since, for example, liability on con-

[86] 402 U.S. at 681-82 (footnotes omitted, emphasis added in last sentence). The argument and, indeed, some of the language of this paragraph closely tracks that of Note, HARV. L. REV., *supra* note 13.

[87] Handler, *supra* note 13, at 28.

tempt proceedings may well turn on whether the decree is construed "narrowly" or "broadly." But in a wider sense it will do a defendant little good to be told that the courts are refusing to "interpret" the decree he consented to against him, but are freely "modifying" it to his disadvantage. After all, contempt proceedings are rare, and the typical corporate defendant is likely to be much more concerned with the extent to which it can safely structure its business arrangements in accordance with the terms of a consent decree that will be stable against change, whether from modification or construction. The processes are not as separate and distinct as Handler would have it. This suggests that for *Armour* to have real meaning, a strict standard must be applied even to attempts to modify, a result which is permissible only if the liberal approach to modification taken by the Court in *United Shoe Machinery* is confined to litigated decrees. And if a distinction between litigated and consent decrees is to be drawn, the only reason for doing so is the contractual elements inherent in consent decrees.[88]

Accordingly, contractual notions play an important part in judicial treatment of consent decrees. Certainly *Armour* demonstrates that this is true with respect to interpreting them; and *Ford* and *Hughes* indicate that this is a weighty factor in deciding whether to modify them. If we wish also to avoid the pitfall of "lump-concept" thinking, no reason is to be found in the doctrines of antitrust law why, despite the language to the contrary of *Swift*, a consent decree may not be treated as a contract for purposes of a third party beneficiary right.

C. *Third Party Beneficiary Rights Under Government Consent Decrees According to the Law of Contracts*

Since, as we shall see, on balance third party enforcement of government consent decrees is desirable from a policy viewpoint, and we have seen that the Supreme Court is already predisposed to treat consent decrees as having some of the attributes of contracts, we must now turn to the task of sketching the

[88] Professor Handler also suggests a purportedly different basis for drawing a distinction between consent and litigated decrees for purposes of modification, namely the relative ease in determining the purposes of a litigated decree as opposed to a consent decree. *Id.* 32. Upon analysis, however, this turns out to be no different at all. As the Court in *Armour* pointed out, it is the fact that there are different parties with different, usually conflicting, purposes which renders it impossible to enforce the "purpose" of the consent decree.

scope of the third party beneficiary rights under the applicable law of contracts. This is likely to be federal law;[89] however, since there is no well-established federal law of third party benefi-

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[89] Notwithstanding Erie R.R. v. Tompkins, 304 U.S. 64 (1938), federal common law governs those situations where a federal question is involved. 28 U.S.C. § 1331(a) (1970). Since federal questions are not limited to those under federal statutes, the inquiry is not ended by our determination that violations of the antitrust laws are not involved in our third party beneficiary theory. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS § 60, at 247 (2d ed. 1970); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969). *See also* Weinberger v. New York Stock Exch., 335 F. Supp. 139 (S.D.N.Y. 1971). There are two basic reasons why the breach of a consent decree should be considered a federal question governed by federal law. First, there is the notion, initially enunciated in Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), and later expansively described in United States v. County of Allegheny, 322 U.S. 174 (1944), as follows: "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state." *Id.* at 183. *See generally* 1A J. MOORE, FEDERAL PRACTICE ¶ 0.321 (1974); Pofcher, *The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 LA. L. REV. 37 (1951) (now somewhat dated). Although this statement is perhaps overbroad in view of subsequent developments, *e.g.*, United States v. Yazell, 382 U.S. 341 (1966), it still provides a strong basis for a presumption that federal law should govern federal contracts. With respect to the third party beneficiary theory, there is no apparent countervailing state interest, unlike the situation in *Yazell*, so the presumption ought to control. *But see* Rhode Island Discount Co. v. United States, 94 F. Supp. 669 (Ct. Cl. 1951).

A second basis for finding federal law determinative on the issue what third party beneficiary rights may obtain under a consent decree lies in the close connection of this theory with the federal antitrust laws. It is intimately related to them simply because the policy justifications for adopting such a theory are rooted in the desirability of maximizing enforcement of those laws. One statement of the notion of federal relatedness is found in Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942), where the Court dealt with the doctrine that a licensee was estopped from challenging a price fixing clause in a patent license. The Court, after noting that it was not clear whether the lower court's decision on this issue rested on state or federal law, found that point unimportant: "here a different question is presented—whether the doctrine of estoppel as invoked below is so in conflict with the Sherman Act's prohibition of price-fixing that this Court may resolve the question even though its conclusion be contrary to that of a state court." *Id.* at 175. The Court then rejected the application of *Erie*:

> But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. [Citations omitted] When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.

Id. at 176. Of course *Sola Electric* is not precisely on point: the consent decree, though emanating from attempts to enforce a federal statute, is not itself such a statute. Nevertheless, the Court's language is certainly broad enough to justify application of federal law, since federal antitrust policy may be significantly affected by the law applied to consent decrees. *See also* Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); Goldlawr,

ciaries,[90] we will have to deal with generally accepted principles which are likely to be incorporated into any federal law.[91]

If consent decrees *may* be treated as contracts for the purpose of creating third party beneficiary rights, we must still describe those situations in which they *will* be. The analytic tool which contract law has evolved to make this determination is the notion of "intent to benefit." Unfortunately, while the concept resolves those cases where there is a clear statement of the primary parties' intention whether a designated person may seek judicial relief, it fails to provide clear guidelines in precisely those cases where help is most needed—when no such statement is made.

Further, this general difficulty with third party beneficiary analysis is compounded by the possibility that somewhat different rules apply in the case of government contracts, either because "intent to benefit" is not the appropriate test or because

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Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960); Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339 (S.D.N.Y. 1969). *But see* Momand v. Twentieth-Century Fox Film Corp., 37 F.Supp. 649 (W.D. Okl. 1941), which suggests that there remains an area where state law may appropriately limit remedies for federally created rights. *See generally* 1A MOORE, *supra*, ¶ 0.323[1] & [2].

Further, the policy reasons favoring application of a uniform federal law are compelling. Most consent decrees will be interstate in effect so that putative beneficiaries in different states might otherwise find themselves hindered by local laws relating to third party beneficiaries. Second, the basic justification for creating a third party beneficiary right is to assist antitrust enforcement; it would be absurd to risk frustration of this end by permitting local law to bar a beneficiary's suit. Finally, there seems to be no peculiar state interest in establishing a third party beneficiary rule on this point. *Cf.* United States v. Yazell, *supra*.

[90] It seems likely that the pre-*Erie* federal general common law relating to third party beneficiaries will be persuasive but not controlling with respect to such questions arising under the federal question common law:

> And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson* . . . represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943). This might prove important since there was a fairly extensive body of federal common law on the subject of third party beneficiaries whose development was cut short by the *Erie* decision. If that law were controlling, it is possible that some of the more recent developments in the area would, technically at least, be irrelevant. *See, e.g.*, Isbrandtsen Co. v. Local 1291, Int'l Longshoremen's Ass'n, 204 F.2d 495 (3d Cir. 1953), where the court apparently looked to a 1927 Supreme Court decision to establish the federal law; the governing law was, however, not important in that case because the court stated that both federal and state law were the same.

[91] The notion of a federal common law essentially relates to the *power* of the federal courts themselves to choose a rule of decision. The courts may, of course, look to state law for the appropriate rule. C. WRIGHT, *supra* note 89, § 60.

government involvement itself alters the inference of intent that is otherwise appropriate. This possibility is supported by eminent authority: both the *Restatement of Contracts* and the *Restatement (Second) of Contracts (Tentative Drafts Nos. 1-7)* treat beneficiaries of government contracts separately from other beneficiaries.

Perhaps we should begin our consideration of the notion of intent to benefit by turning to the *Restatement (Second)*'s definition of "intended" beneficiaries, the only class of beneficiaries which has the right to seek enforcement of the contract. Such a person qualifies, absent contrary agreement by the original parties, "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and *either* the performance will satisfy the promisee's obligation to the third party *or* "the promisee intends to give the beneficiary the benefit of the promised performance."[92] In the consent decree situation, a decree beneficiary certainly might qualify under this definition. To the extent that the Department of Justice wants to prohibit certain conduct in order to maximize competition, and to the extent that the Department may view private party enforcement as facilitating the attainment of that goal, one may infer that recognition of the right will "effectuate the intention of the parties." Further, these same facts also support the inference "that the promisee [Department of Justice] intends to give the beneficiary the benefit of the promised performance," at least absent indications to the contrary.

The *motive* of the promisee in extracting a promise for the benefit of the third party is immaterial. It suffices that the benefit was intended to pass. Illustration 5 to section 133 of the *Restatement (Second)* makes this clear: "C is a troublesome person who is annoying A. A dislikes him but, believing the best way to obtain freedom from annoyance is to make a present, secures from B a promise to give C a box of cigars. C is an intended beneficiary . . . ." Accordingly, the fact that the "ultimate purpose" of the Department is to improve the competitive functioning of the economy, rather than increasing profits of a decree beneficiary, does not demonstrate the absence of the requisite intent to be-

[92] RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Drafts Nos. 1-7, 1973). The fundamental change brought about by this revision of the original *Restatement* is to eliminate the distinction between creditor and donee beneficiaries, merging these classes into the concept of intended beneficiaries.

nefit. It is not even a strained use of the word "intent" to say that one who intends an end also intends the means necessary to the attainment of that end.

Of course the whole notion of "intent" is here, as elsewhere in the law, problematic.[93] Ultimately, while including actual intent, it goes far beyond that, reaching that species of intent best described as "constructive"—what the promisee would have intended had he thought about the question.[94] As has often been observed, it would be better not to speak of this as "intent" at all, but the usage is too deeply ingrained to challenge now. Not only is it the everyday approach to statutory interpretation,[95] but it has a respectable place in the law of contracts.[96]

The question, then, is when an intent will be imputed to the Department of Justice that decree beneficiaries have enforcement rights. But before beginning this inquiry, it is necessary to consider whether "intent to benefit" has a different meaning when applied to third party beneficiaries of government contracts. This point was raised in the *IBM* opinion[97] when, after re-

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[93] *See generally* A. CORBIN, CONTRACTS § 776 (1951).

[94] In third party beneficiary problems, it is the promisee's intent, actual or constructive, which is crucial. CORBIN, *supra* note 93, at § 776. The promisor's intent may be relevant only if he does not have, and reasonably could not have had, knowledge of the promisee's intent. Even in such cases, the law will usually recognize a third party beneficiary right. The promisor has promised a performance, and it is hard to appreciate his concern with who enforces that promise. The exception to this is, of course, when the promisor's breach results in differing consequential damages to the promisee and to the third party; plainly, under an a fortiori application of the doctrine of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854), he should not be liable for damages to a party he could not reasonably foresee.

[95] *See generally* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 45 (4th ed. 1973).

[96] There are justifications for using constructive intent with respect to legislation that do not apply full force to the interpretation of contracts. For example, the fact that a statute may be the product of literally hundreds of legislators, each with a potentially different intent, makes the search for "real" intent impossible. While this kind of problem is not absent in interpreting contracts, since the parties may have different intents, it does not rise to the same magnitude as with statutes. Nevertheless, the difficulties are often severe enough to warrant the search for constructive intent. A classic example of this kind of judicial reasoning is found in Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863), where the court concluded that the continued existence of a theatre was a constructive condition of a contract for the use of premises:

> There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

Id. at 312.

[97] *See* note 1 *supra*.

jecting the whole notion of third party beneficiary rights arising from a consent decree, Judge Neville added dictum to the effect that there was no intent to benefit in any event.[98] He cited section 145 of the *Restatement of Contracts* as establishing a restrictive test for such beneficiaries.[99]

In fact, it seems dubious whether section 145 does establish a different test for government contracts than for "ordinary" ones. A careful reading of that provision reveals that intent to benefit remains critical. Only the phraseology suggests a niggardly reading: section 145 is stated negatively (*no* beneficiary rights *unless* there is an intent to benefit) while section 133, dealing with beneficiaries of nongovernmental contracts, is phrased positively (beneficiary rights if there is such an intent).

This is not to suggest that the involvement of a government contract cannot influence the decision on intent to benefit. The original *Restatement* plainly had in mind decisions such as the then-recent case of *H.R. Moch Co. v. Rensselaer Water Co.*,[100] in which the New York Court of Appeals found no third party beneficiary right to recover for fire losses resulting from the failure of a water company to perform its contract with the city to provide adequate water for fire hydrants. Since the purpose of the contract plainly was to provide water for the benefit of the inhabitants, the court had to explain why the intent to benefit inhabitants with water did not imply the intent to benefit them by also conferring a right of action for fire losses. This it did in terms of the excessive liability which the waterworks company could have had imposed on it under such a state of affairs.[101] The court's reasoning may be reconstructed as follows. The city

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[98] The relevant language of the decree which Judge Neville was interpreting is reproduced in note 3 *supra*. It is not clear what law he was applying in denying intent to benefit. The problem of the governing law in such suits is treated in note 89 *supra*.

[99] In pertinent part, § 145 of the original RESTATEMENT OF CONTRACTS (1932) provides:

> A promisor bound to the United States . . . by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences . . . .

[100] 247 N.Y. 160, 159 N.E. 896 (1928).

[101] Such a conclusion, even in these circumstances, is not inevitable. *See, e.g.*, Gorrell v. Greensboro Water-Supply Co., 124 N.C. 328, 32 S.E. 720 (1899). *See generally* A. CORBIN, *supra* note 93, § 806.

wished to benefit its inhabitants by providing them an adequate water supply. However, to provide them also with a right of action for consequential damages for breach, would have resulted either in no water (if the company were unwilling to assume such risks) or water at a higher price (if the company shifted some or all of its costs of increased risk back upon the purchasers). Accordingly, the city chose a middle ground: the inhabitants were beneficiaries of the water, but had no right to sue for consequential damages for failure of it.[102]

This reasoning justifies the result in *Moch*, although whether it represents either the actual intentions of the parties or the best reading of their constructive intentions is doubtful. What is more important for our purposes, however, is that *Moch* does not establish a rule barring third party beneficiaries of government contracts, a proposition that would plainly not be the law.[103] At most, *Moch* suggests that the courts should be hesitant to give consequential damages as a remedy for breach of third party beneficiary rights. Since the basis of *Moch*, the notion of excessive liability, simply does not apply when the remedy sought by the beneficiary is specific performance (a fact recognized in *Moch*),[104] the principle seems to be that a more restrictive standard for third party beneficiaries of government contracts is expressly limited to contractual liability for consequential damages. This is, in fact, the precise position taken by the *Restatement (Second)*'s tentative revision of section 145.[105]

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[102] The denial of third party beneficiary rights under nondiscrimination clauses in government contracts with its suppliers can be similarly explained. In Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967), and Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964), the courts found no intent to benefit employees by giving them a private right of action, reasoning that the government's emphasis on administrative relief and the possible disruption of government contract performance indicated this result.

[103] *See generally* A. CORBIN, *supra* note 93, §§ 805-06.

[104] *Moch* explicitly approves prior New York cases holding that the inhabitants of a city could enforce city contracts with companies providing public services to obtain service at the rate schedules provided therein. 247 N.Y. at 166, 159 N.E. at 898.

[105] RESTATEMENT (SECOND) OF CONTRACTS § 145:

(1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.

(2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless

(a) the terms of the promise provide for such liability; or

(b) the promisee is subject to liability to the member of the public for the

While such a limitation would be a serious restriction on the utility of a third party beneficiary right under a government consent decree, it would not be fatal to such a theory. There would still be advantages in enabling a decree beneficiary specifically to enforce a contract, without a damage remedy, or in permitting him to obtain direct damages even if consequential ones are not available.[106] It should be clear, however, that the unavailability of consequential damages would prevent the third party beneficial right from achieving the full advantages which we have sketched, simply because of the reduced incentive to litigate decree violations. There may, however, be a way around the difficulty.

To begin with, the formulation of section 145 of the *Restatement (Second)* does not absolutely bar consequential damages. These are available when either branch of the "unless" clause of section 145(2) is satisfied. Unfortunately, neither is very helpful in our situation. The first alternative, section 145(2)(a), would allow consequential damages only when "the terms of the promise provide for such liability." While this validates express provisions in future consent decrees, should the Department of Justice decide to negotiate for their inclusion, it does not reach most present decrees. The second alternative, section 145(2)(b), is no more helpful since it imposes on the promisor liability for consequential damages only when the promisee government agency "is subject to liability to the member of the public for the damages." The United States is not liable to decree beneficiaries for violations either of the decree or of the underlying antitrust laws.

But it should be remembered that the formulation of section 145 is not dispositive. Even if the tentative draft is ultimately

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damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

[106] The notions of direct versus consequential damages are often hard to separate, especially in third party beneficiary cases. An example, however, will demonstrate that the difference may be significant. If we revert to the original hypothetical, plaintiff DPF&G's direct damages for the alleged breach of the consent decree promise to sell IBM machines on no less favorable terms to IBM than leasing them would be the difference in value between a purchased machine and a leased one since DPF&G would, of course, be required to mitigate its damages by leasing available machines. Consequential damages, by way of contrast, might include lost profits if DPF&G went out of business because it was unable to compete with IBM on the latter's offered lease terms. Clearly, IBM would be more likely to adhere to a consent decree if liable for consequential damages than if responsible only for direct damages.

approved, the *Restatement (Second)* is at most only persuasive, not authoritative. And it seems clear that there are good reasons for granting beneficiaries a right to consequential damages in situations not covered by the present formulation of section 145. This is not to say that the notions of excessive liability that underlie *Moch* do not have validity; rather it is to assert that their vitality varies with the circumstances.

The consent decree beneficiary situation is a good example. If we grant the possibility of large losses resulting from breach, it still does not follow that consequential damages ought not to be allowed. While some mercy with decree and promise breakers is perhaps praiseworthy, this ought not be done at the expense of innocent third parties. In *Moch* the justification for not shifting the loss was apparently a combination of economics and fairness: since the water rates did not reflect the cost of insurance, it was unfair to impose liability on the water company; and, presumably, the city felt it was uneconomic to adjust the rates to provide that additional protection. But with decree beneficiaries, neither unfairness nor a considered judgment of the economic advantages of nonliability obtains. The antitrust law reflects a societal policy, presumably furthered by the consent decree, which should bind the defendant. If either the laws or the expression of them in the consent decree are mistaken, there are ways to achieve changes. Failing to seek this, the defendant who violates a decree has little claim for sympathy when his conduct causes serious harm to a decree beneficiary.

However, this is not to say that all consequential damages for breaches of consent decrees ought to be actionable, just as it is not the thesis of this Article that all breaches of consent decrees necessarily give rise to a private cause of action for some remedy. Rather, the notion of intent to benefit must be applied both to the fundamental question who has third party beneficiary rights and to the subsidiary, but still critical, question what rights such a beneficiary has. Without purporting to be definitive, we turn finally to a consideration of the intent to benefit concept in its application to the breach of consent decrees.

We have already noted that the problem areas in third party beneficiary law arise when no intention, either way, is clearly expressed. Accordingly, we are not here concerned with situations such as that in *ASCAP*, where the decree provided that third parties could invoke the jurisdiction of the court for a

determination of the reasonableness of royalties under a copyright license, or that in *Pipe Line*, where the decree provided for intervention in further proceedings under it.[107] If these cases establish a third party beneficiary right under consent decrees, they still do not provide guidance when the intention of the parties, actual or constructive, is less clearly manifested.

We can perhaps begin our inquiry with *Control Data Corp. v. International Business Machines Corp.* There Judge Neville had to interpret language in the decree which specified that its purpose was "to assure to users and prospective users" machines for purchase at rates competitive with leased machines.[108] This is as close to recognizing a third party beneficiary right explicitly as any language short of actually so stating: after all, the best way to "assure" a particular result is to give the party needing assurance an enforceable legal right to that result. Nevertheless, Judge Neville found no intent to benefit derivable from such language, although he failed to offer any persuasive rationale for his position. It would seem, then, that the judge's objections to the whole theory prevented him from focusing clearly on the notion of intent to benefit.[109]

This problem need not hinder us. It seems clear that the purpose of the provision in question, from the viewpoint of the promisee (the Department of Justice), was to create a second-hand market in IBM machines which would eventually act as a brake on IBM's market power over its machines.[110] That required that machine consumers purchase rather than lease, which in turn required that at least some prospective purchasers

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[107] *See* text accompanying notes 35-40 *supra*. For an instance in which the decree explicitly bars third party rights, see United States v. United Fruit Co., 1958 Trade Cas. ¶ 68,941 (E.D. La. 1958).

[108] For the full text of the relevant paragraph, see note 3 *supra*.

[109] This conclusion is buttressed by the lame way in which Judge Neville dealt with a precedent he cited as involving third party beneficiary rights arising from a government contract. Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). Judge Neville described the case as: "[A] class action brought by Negro children, where the court held them in effect to be third party beneficiaries of an assurance in writing which was given by the school board in return for obtaining federal funds for school construction that equal educational opportunities would be offered to them." 306 F. Supp. at 848. But he then dismissed it conclusorily: "Clearly this fact situation is not analogous to the case at bar . . . ." *Id.*

[110] This was precisely the theory enunciated only three years earlier in United States v. United States Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). With the correctness of the economic basis of this theory, we need not now concern ourselves. *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

be assured that the consent decree-mandated merchandising policies be more or less permanent. While some users of IBM equipment might make their purchase-lease decision on the basis of present relative cost-benefit analysis, obviously many businesses would be concerned with having a reliable long term source of supply. This became true of the leasing companies—large scale purchasers of IBM machines who leased them in competition with IBM's leases of its own machines. The effect of this type of business was to achieve precisely what the government wanted from its consent decree—"second hand" competition for IBM.

If *IBM* then, despite Judge Neville's opinion, is a clear case of intent to benefit prospective users, the facts in *Bailey v. Iowa Beef Processors, Inc.* present an equally clear case where traditional third party beneficiary analysis, classifying the beneficiaries as "incidental," would deny such rights. It will be recalled[111] that *Bailey* involved an attempt by employees of a decree defendant to enforce a provision of the decree requiring the defendant to keep certain plants in normal operation so as not to impair its ability to divest. The Iowa Supreme Court recognized that continued operation was of considerable economic interest to the employees, but rejected their argument that they were intended beneficiaries of the decree:

> Plaintiff misconstrues the distinction between creditor and incidental beneficiaries. The distinction is not based on how strongly or adversely one might be affected by the breach of a contract. The distinction . . . depends on whether the contracting parties had and expressed the purpose to bestow a benefit on the third person. Any person claiming to be a third-party beneficiary to a contract is bound to feel vitally interested in it. Such a person will always feel more and more vitally interested as the economic stakes increase. However the economic consequences do not necessarily relate to the controlling question of whether the parties who entered the contract intended and expressed an intention to benefit those claiming to be third party beneficiaries.
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> There is no indication in the [Clayton] Act or in the authorities which interpret it that Congress intended

[111] *See* text accompanying notes 55-59 *supra*.

> employment opportunities to be any more than incidental benefits arising from the enforcement of the Act. The fundamental purpose of the Act was to control monopolies for the direct economic benefit of the entire public. Plaintiff cites no authorities and we find none which support a contention that the job opportunities of defendant's employees were any factor in the enactment or enforcement of the Act. Indeed, there is no claim or indication the defendant would offer fewer or poorer jobs if it had succeeded in achieving what the government claimed was a monopoly.[112]

We can accept that, under traditional analysis, the court is correct. There appears to be no reason why either the government or the decree defendant would want to preserve employment opportunities of the employees per se. For example, if divestiture were accomplished, the Department of Justice would not be concerned with whether the divested assets were automated, or even moved, so long as a viable competitor emerged in the relevant market. This would then seem to be a perfect case within the illustrations of incidental beneficiaries to the *Restatement (Second)*'s section 133.[113]

It might be argued, however, that traditional contract notions ought to be somewhat modified when applied to the question whether a third party has any rights under a consent decree. For example, *IBM* involved a situation where the government's end was increased secondhand market competition; as a means to that end, the government wished to induce new entrants into that market. However, the new entrants would be at the mercy of a monopolist but for the consent decree. In such a context, it

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[112] 213 N.W.2d 642, 646 (Iowa 1973), *cert. denied*, 95 S. Ct. 52 (1974).

[113] RESTATEMENT (SECOND) OF CONTRACTS § 133, Illustrations:

15. B contracts with A to erect an expensive building on A's land. C's adjoining land would be enhanced in value by the performance of the contract. C is an incidental beneficiary.

16. B contracts with A to buy a new car manufactured by C. C is an incidental beneficiary, even though the promise can only be performed if money is paid to C.

17. A, a labor union, promises B, a trade association, not to strike against any member of B during a certain period. One of the members of B charters a ship from C on terms under which such a strike would cause financial loss to C. C is an incidental beneficiary of A's promise.

18. A contracts to erect a building for C. B then contracts with A to supply lumber needed for the building. C is an incidental beneficiary of B's promise, and B is an incidental beneficiary of C's promise to pay A for the building.

makes sense to infer from an "assurance" to such entrants third party beneficiary rights necessary to vitalize that assurance. Further, arguably those rights should vest to become safe from mutual contract rescission or modification[114] once a particular beneficiary has acted in substantial reliance thereon.

Bailey is clearly not this kind of case. Since the employees' benefit is plainly incidental to the purposes of the decree, any rights which accrue should never be safe from mutual modification by the primary parties. Even if there is reliance on such rights, that reliance is unreasonable. However, while such a conclusion would end the inquiry under traditional contract analysis, by labelling the beneficiaries as "incidental," perhaps it should not be conclusive in the context of antitrust consent decrees. Although incidental beneficiaries' rights should always be subject to modification by mutual agreement of the parties, perhaps plaintiffs such as those in *Bailey* should have the right to enforce the contract until such change occurs.

Consider Illustration 16 to the *Restatement (Second)*'s section 133: "B contracts with A to buy a new car manufactured by C. C is an incidental beneficiary, even though the promise can be performed only if money is paid to C." Although the Illustration does not say so, the justification lies in that *C* is designated only as a matter of convenience; it could just as easily have been *C's* competitors *D*, *E*, or *F*.[115] *C* should, of course, realize this, and would be unjustified in banking on the performance. Further, *C* should have no enforcement rights regardless of reliance because *A* is perfectly capable of vindicating his own rights. If he wants to modify the contract, rescind it, or simply not enforce it, he will presumably be making his decision in his own interest. If we shift to the *Bailey* situation, however, we immediately note a striking difference. The promisee Department of Justice may not enforce its rights for reasons that have little to do with *A's* decision to forgo them. The Department may not find out about the breach; if it does, it may not be able to spare resources to

[114] Whether third party rights in such a situation should vest against a court ordered modification of the decree, over the objection either of the third party or of one of the primary parties, is another question. However, *Swift* appears to foreclose this possibility, so the point will not be further considered here. Interestingly enough, modification was unsuccessfully sought in *Bailey*. United States v. Iowa Beef Processors, Inc., 1974 Trade Cas. ¶ 75,014 (N.D. Iowa 1974), *aff'd*, 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974).

[115] The Illustration would be misleading if there was a reason why *A* wanted *C*, and only *C*, to provide the car; for instance, if *A* is president of *C* and does not want to give business to a competitor; *see* RESTATEMENT (SECOND) OF CONTRACTS § 134, Illustration 4.

compel compliance. Since the government has no direct pecuniary interest in enforcement, full exercise of its legal rights may not be warranted by the costs incurred. Accordingly, there may be good reason to permit even incidental third party beneficiaries to seek enforcement of decrees. However, their enforcement rights are qualitatively different from those of intended beneficiaries, since they are subject to being cut off by an agreement between the consent decree parties modifying that decree and perhaps even subject to a stipulation by the Department of Justice to the court opposing a particular attempt to enforce a decree (which could be viewed as a tacit modification—breach by the decree defendant assented to by a knowing and intentional failure to act by the Department).

In summary, the contract notion of intent to benefit provides some assistance, but is far from conclusive. Decrees explicity conferring rights on third parties should be recognized to do so, the rights vesting in accordance with the normal rules. Decrees which invite, expressly or by reasonable implication, substantial reliance on the terms of the decree by third parties should also be viewed as creating third party rights which vest no later than upon substantial reliance. In a departure from traditional contract analysis, however, even incidental beneficiaries should be allowed to enforce consent decrees unless or until there is an express or tacit modification.

D. *The Advantages and Disadvantages of the Third Party Enforcement of Government Antitrust Consent Decrees*

Despite the *IBM* decision, one would think that, from a policy standpoint, the most natural frame of mind in which to approach the question whether third parties ought to be able to enforce consent decrees is not "Why so?" but rather "Why not?" The decrees, after all, reflect the informed judgment of the Antitrust Division that their provisions will lead to a more competitive economy in accordance with the policy of the antitrust laws. Furthermore, the decrees have the imprimatur of a court as a check upon the accuracy of the Division's judgment.[116] In such a context, private party enforcement of consent decrees seems de-

[116] It is true that the courts in practice rarely exercise independent judgment about the appropriateness of the decrees they enter. Nevertheless, their existence as a screening device may put some constraints on the terms of the final settlement.

sirable since it would maximize enforcement of decrees by providing additional persons interested in obtaining compliance. Indeed, the pecuniary motives of the third parties may well make them more interested and effective than the Justice Department.[117] Moreover, an increase in enforcement efforts by third parties might enable the Antitrust Division to shift some of its limited resources to other facets of its operations. This is not to suggest that compliance can be left entirely to third parties —there may well be situations where no one has a sufficient economic motive to oversee enforcement, or industries where a "don't-rock-the-boat" attitude makes third party enforcement unlikely. Nevertheless, the net effect of permitting such enforcement should be greater compliance for less government expenditures.[118]

It may be in recognition of these kinds of considerations that rule 71 of the Federal Rules of Civil Procedure was approved: "When an order is made in favor of a person who is not

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[117] The Department of Justice has itself recognized to a limited extent the utility of involving interested parties in its compliance program as demonstrated by the provisions often found in consent decrees requiring the defendants to notify customers or competitors about the terms of such decrees. *See* Flynn, *supra* note 9, at 995. The purpose of such provision is clearly to create a pool of potential informers among those most likely to know about violations simply because they suffer from them. While useful as far as it goes, this approach is too limited to achieve the gains which might be attained through shifting the burden of enforcement to private parties by giving them direct enforcement powers.

[118] Although facilitating government enforcement has not often been a ground for decision in private antitrust suits, there is at least one case where the court relied on this notion to reach its result. In Simco Sales Serv. v. Air Reduction Co., 213 F. Supp. 505 (E.D. Pa. 1963), defendant moved to strike from plaintiff's antitrust complaint references to a government consent decree and to the defendant's plea of guilty to criminal contempt proceedings brought by the government for violation of that decree. The court denied this motion on the ground that § 5(a) of the Clayton Act permitted the plaintiff to use the guilty plea against the defendant. The court rejected the defendant's argument that, because the contempt proceedings arose out of the original consent decree, which was clearly within the proviso to § 5(a), the contempt conviction was also a "consent proceeding":

> In my opinion such an interpretation does violence to the Congressional policy underlying the limited immunity granted by the proviso to § 5. The proviso was inserted to ". . . encourage defendants to submit to the demands of the government." To extend the scope of the proviso to proceedings instituted to punish violations of such consent decrees would be to encourage the very conduct which the legislation was designed to eliminate. I cannot ascribe such a contradictory intent to Congress.

213 F. Supp. at 507.

Though one may quarrel with the reasoning in *Simco* on the ground that violation of a decree is not necessarily a violation of the antitrust laws, *see* Note, *supra* note 9, the case clearly rests on the judgment that private enforcement works in tandem with government efforts under the antitrust laws.

a party to the action, he may enforce obedience to the order by the same process as if he were a party . . . ." The rule has been invoked in a few cases to permit beneficiaries of government obtained judgments to seek enforcement of those judgments,[119] although two attempts to employ it in the context of antitrust consent decrees have failed.[120]

Against these obviously desirable effects a number of objections may be counterposed. Although several have been discussed previously, it will be useful to treat them all here in order to put them in proper perspective. First of all, at least some consent decrees may involve overreaching by the government, and permitting private enforcement only maximizes this difficulty. But, as we have pointed out,[121] this problem is one which is best approached directly, through review of the decrees themselves, rather than indirectly and inefficaciously by limiting the persons who may seek enforcement.

Second, it may be objected that increased consent decree enforcement will not necessarily further the substantive policies of the antitrust laws. Consent decrees may be anticompetitive,

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[119] In United States v. Hackett, 123 F. Supp. 104 (W.D. Mo. 1954), the court had previously awarded a judgment to the plaintiff United States "for and on behalf of" certain individuals who were not plaintiffs for defendant's violations of rent control laws. The individuals, not the United States, sought to execute on this judgment, and the defendant moved to quash, arguing that only the United States could execute. The court, relying on rule 71 and the phrasing "for and on behalf of," denied the motion.

Likewise, in Woods v. O'Brien, 78 F. Supp. 221 (D. Mass. 1948), the United States had previously obtained a permanent injunction barring defendant from evicting one Miller except in accordance with applicable federal law. Miller filed a petition for attachment for defendant's contempt of this injunction under rule 71. The court, without noticing any problem with the moving party, found the defendant in contempt, and ordered $50 paid, $5 to the petitioner and the remaining $45 to the United States. *See also* Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp., 288 F. 80 (E.D.N.Y. 1923); Farmers Loan & Trust Co. v. Chicago & A. Ry. Co., 44 F. 653 (C.C.D. Indiana 1890) (reaching a similar result under old equity rule 11, the predecessor of rule 71).

[120] United States v. American Soc'y of Composers, Authors & Publishers, 341 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 877 (1965); United States v. Paramount Pictures, Inc., 75 F. Supp. 1002 (S.D.N.Y. 1948). *See* notes 26, 27 & 38 *supra* & accompanying text. The courts rejected the contention on the ground that the orders were not made in favor of the plaintiffs. Thus, the *ASCAP* court wrote: "Here, no order was made in Metromedia's favor. No monetary or other relief was specifically granted to Metromedia—it was not even named in the judgment—and it is not enough to say that Metromedia was indirectly or economically benefitted by the decree." 341 F.2d at 1008. Interestingly enough, this portion of the *ASCAP* opinion, much like that treated earlier, *see* text accompanying notes 37-40 *supra*, implicitly leaves open the possibility that third parties may have rights to enforce decrees. Further, since it is familiar third party beneficiary law that a beneficiary has rights only if the parties so contemplate, this decision can be explained simply on the basis of no intention to create such rights.

[121] *See* text accompanying note 51 *supra*.

either *ab initio* because of the mistaken judgment of the Antitrust Division, or because terms once procompetitive have become anticompetitive through changed circumstances. This second objection ties in with a third, that private parties, precisely because they seek to further their own pecuniary interests rather than the public interest, may enforce anticompetitive provisions that the Antitrust Division, in the exercise of enlightened prosecutorial discretion, would not.[122]

Several responses to these objections are possible. First, they are applicable only to instances in which government nonenforcement reflects a considered Department of Justice decision that continued compliance with the decree would be contrary to the public interest. It has been suggested, however, that most nonenforcement is attributable to a lack of resources rather than to such a decision.[123] Just as we are often cautioned to avoid equating automatically the protection of competitors with the protection of competition, we should also eschew the equally fallacious notion that one can never preserve competition by protecting competitors. The interests of the public and of private plaintiffs may coincide. It is the thesis of this Article that when an initial determination of such coincidence has been made by the Antitrust Division, accepted by a court of law, and incorporated into a final judgment, the decree beneficiaries should have the power to enforce the provisions of the decree which run to their benefit. Second, even granting that in some cases a competitor may vigorously enforce an anticompetitive provision in a consent decree, it does not necessarily follow that the third party beneficiary theory ought to be rejected entirely. These situations may be sufficiently rare that the disadvantages of enforcement in such cases are greatly offset by the effects of increased compliance with the more usual procompetitive decrees, although admittedly this conclusion cannot be supported empirically at this time. It is, therefore, necessary to turn to a third response to these objections.

The possibility of increased enforcement of an anticompetitive decree is a serious objection to recognizing third party beneficiary rights only if such rights are unqualified and the decrees are not subject to modification. Neither principle is urged here.

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[122] *See generally* Note, *An Experiment in Preventive Anti-Trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees*, 74 YALE L.J. 1041 (1965).

[123] *See* note 5 *supra*.

Under current practice the two original parties to the decree may, if convinced that its provisions have begun to have anticompetitive consequences, agree to modify or end the decree, an agreement which is almost certain to be approved by the court. It is true that third party beneficiary law might impose some obstacles to this method of change. However, while the two parties to a contract can vest indefeasible rights in third party beneficiaries, they can also make any rights subject to divestment by mutual agreement. Like so many questions in the third party beneficiary area, whether rights do vest is as matter of intent, and it would usually be easy to find either an implied-by-custom, or, in some cases, an express provision permitting the primary parties to modify the decree. Accordingly, the courts could recognize third party beneficiary rights in a manner that would leave Department of Justice prosecutorial discretion entirely unaffected.

It has, however, been pointed out that in cases of substantial and justifiable reliance by the beneficiaries perhaps such rights ought to vest in the contract law sense of becoming immune from mere mutual rescission.[124] With respect to future decrees, the Department could avoid even this result by an express reservation of the power to modify with the defendant's consent, but as to past decrees, recognition of such rights would impinge on prosecutorial discretion to some extent. It would not, however, amount to giving the decree beneficiary a veto power over modifications sought by the Department in the public interest. As we have seen, consent decrees are always subject to court ordered modification at the petition of either party, even over the objection of the other, and, a fortiori, over the objection of a third party beneficiary.[125] Therefore, recognizing vested third party rights would simply give the decree beneficiary standing to intervene to oppose the modification agreed to by the original parties.[126] It might perhaps be suggested that this is undesirable for two reasons: that litigating questions now resolved informally would itself be a drain on government resources; and that judicial review of Department decisions is undesirable. The first

[124] *See* text accompanying note 114 *supra*.

[125] *See* text accompanying notes 72-88 *supra*.

[126] This was precisely the situation in which intervention was approved by the Supreme Court in Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941), although there the right of the decree beneficiary to intervene was expressly provided for in the consent decree. *See* text accompanying notes 33-36 *supra*.

problem is easily resolved. Since we are dealing with a situation where, by definition, the government has determined that the public interest is congruent with the interest of the defendant seeking modification, the government need not take an active role in the dispute. In most cases, the Department could simply stipulate its agreement with the defendant's position and trust to the defendant's economic self-interest to ensure adequate representation of the common position in the dispute between the private parties. Any drain on government resources, then, would be negligible, and well worth the gains in increased compliance generally upon which the third party beneficiary theory is predicated.

The second problem, that of judicial review of the Department's decision in the context of the dispute between the antitrust defendant and the decree beneficiary, is somewhat more difficult, but is ultimately unconvincing as an objection to the theory. To begin with, government resort to consent decrees (which require court approval and a concomittant retention of jurisdiction), rather than mere contract settlements, invites a real judicial role. Second, while court deference to the Antitrust Division's judgment is ordinarily appropriate in view of the Division's expertise, it is much less compelling in the situation involving two conflicting judgments: that in the original consent decree and that in the supported modification. Third, by definition, the third party has relied on the original position in a substantial and justifiable manner. The equities in favor of permitting the beneficiary to argue the correctness of the original decree, and the absence of any conditions warranting modification, are obvious. Finally, the minimal impingement on the Department's discretion can be justified in terms of the long-range interest of antitrust enforcement, whatever the outcome in a particular case, since allowing third parties such standing will encourage their reliance on future consent decrees and thus often enhance the effectiveness of such decrees. For example, in the initial hypothetical, more leasing companies might come into existence to compete with IBM in computer services if their source of supply at nondiscriminatory prices were assured.

Another objection to third party enforcement is that different, possibly conflicting interpretations of the consent decree by different courts with juridiction over third party beneficiary claims may play havoc with the purposes of the decree. This is a substantial problem since there is a possibility either that the

decree will be interpreted inconsistently with its purposes, or that a defendant will be subjected to conflicting interpretations of its obligations by different courts.[127]

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[127] The question of which courts will have subject matter jurisdiction over the third party beneficiary claim is a thorny one, but we must recognize the possibility that the state courts and the federal district courts will all be able to assert jurisdiction over such claims.

There are five possible distinct bases for subject matter jurisdiction over a third party beneficiary cause of action deriving from a government antitrust consent decree. The first is the general jurisdiction of the state courts since they are not barred by the exclusive jurisdiction of the federal courts. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides for such exclusive jurisdiction only with respect to suits for injuries "by reason of anything forbidden in the antitrust laws"; the suit contemplated would be for breach of contract, not for violation of the antitrust laws. A second basis for jurisdiction is that of the federal courts in a diversity action. Neither of these bases poses problems peculiar to our study, and therefore we will not consider them further. A third jurisdictional basis, the notion that such a suit arises under the federal common law is discussed above. *See* note 89 *supra*. Presumably a matter arising under federal common law is a federal question within the original jurisdiction of the federal district courts under 28 U.S.C. § 1331(a) (1970). Illinois v. City of Milwaukee, 406 U.S. 91 (1972). *See also* Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964).

The remaining two bases for federal court jurisdiction, pendent and ancillary, require further elaboration here. The statutory foundation for pendent jurisdiction, 28 U.S.C. § 1338(b) (1970), is so limited in scope as to be of no assistance to us. However, § 1338(b) is itself merely a particular statutory formulation of a more general judicially established principle, one enunciated by the Supreme Court most famously in Hurn v. Oursler, 289 U.S. 238 (1933), and, more recently, in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). *See* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968). The principle is that, given a substantial federal claim and a state claim with the requisite nexus to the federal claim, a federal court with jurisdiction over the federal claim may in its discretion decide the state claim without regard to whether it decides in favor of the plaintiff on the federal claim. Without attempting to plumb too deeply the mysteries of either "substantiality" or the nexus requirement, we should note that pendent jurisdiction over the third party beneficiary claim will exist in at least some cases if the claim is brought in conjunction with an antitrust suit. For example, let us reconsider our hypothetical version of DPF&G's complaint in *Control Data Corp. v. International Business Mach. Corp.*, text accompanying note 1 *supra*. The federal antitrust cause of action alleged was monopolization, the elements of which are monopoly and an abuse of that monopoly. If we grant that DPF&G has at least an arguable case concerning IBM's monopoly power, one abuse which plaintiff could claim was that IBM engaged in leasing rather than selling its products. *See* United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). This is, of course, the very conduct barred by the consent decree. Accordingly, the DPF&G claims under federal law and under state law would satisfy the *Gibbs* test as deriving from a "common nucleus of operative fact." If the antitrust claim foundered, either because IBM was not a monopoly or because leasing was not, in this context, an abuse, the contract claim would remain viable. However, while pendent jurisdiction in many cases may offer a basis for discretionary exercise of federal court jurisdiction, the requirement of a substantial federal claim will significantly diminish the utility of the third party beneficiary claim. For many plaintiffs, the chief advantage of suing for breach of contract is the avoidance of the complex litigation involved in asserting legitimate antitrust claims.

The fifth possible jurisdictional basis is ancillary jurisdiction, which has been described as follows:

Such difficulties troubled the court in *New Jersey Communications Corp. v. American Telephone and Telegraph Co.*[128] where the plaintiffs petitioned the Southern District of New York to en-

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> This concept, which is buttressed on the premise that ancillary jurisdiction is essential to the efficiency, independence, and self-sufficiency of the federal judicial system, enables the federal courts to adjudicate controversies related to or dependent on the principal action which if brought independently would be outside the court's jurisdiction or barred for lack of proper venue. In its broadest sense, the concept of ancillary jurisdiction encompasses proceedings which have a direct relation to property or assets drawn into the control or custody of the court by the original action, or which arise from the same set of operative facts upon which the principal proceeding was grounded.

Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383, 383-84 (1963) (footnotes omitted). Unfortunately, the parameters of the doctrine, except for situations in which a *res* has come into the control or custody of a court, are not well-defined. *See*, Note, *The Ancillary Concept and the Federal Rules*, 64 HARV L. REV. 968 (1951). As the court in Walmac Co. v. Isaacs, 220 F.2d 108, 113-14 (1st Cir. 1955), stated:

> The doctrine of dependent or ancillary jurisdiction is not capable of exact definition. At least so far as we are aware no court has ever tried to fix its limits with any degree of precision. It springs from the equitable doctrine that a court with jurisdiction of a case may consider therein subject matter over which it would have no independent jurisdiction whenever such matter must be considered in order to do full justice.

The question at issue, then, is simply whether a federal district court which has jurisdiction over a consent decree has ancillary jurisdiction over a contract suit brought to remedy a breach of that decree, without regard to whether the plaintiff also alleges an antitrust cause of action. Involved in this question are two subsidiary questions: Is a contract suit on a consent decree "ancillary" to that decree? and, Is ancillary jurisdiction precluded when a nonparty to the principal proceeding seeks to invoke the jurisdiction of the court? On neither point may a definitive answer be found. Nevertheless, it is arguable that such a suit could be brought. If, for example, the government chose to sue the defendant for breach of contract for violation of the consent decree, such a suit would grow out of the consent decree itself and therefore should be within the jurisdiction of the court which entered the decree under the well-established principle that a court has ancillary jurisdiction "to include those acts which the federal court must take in order properly to effectuate its judgment on a matter as to which it has jurisdiction." W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURES WITH FORMS § 23, at 95 (C. Wright rev. 1960). And it is not clear why this language and the principle it expresses ought not to be extended to persons not parties to the original action but who have a right arising from the agreement settling it. Nevertheless, the cases at most seem to establish ancillary jurisdiction over what might be described as ancillary defendants; they do not yet establish the status of ancillary plaintiff. *See, e.g.*, C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1444 (1971); *cf.* Note, *Federal Pendent Subject Matter Jurisdiction—the Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973).

[128] 1968 Trade Cas. ¶ 72,455 (S.D.N.Y. 1967). *See also* United States v. United States Gypsum Co., 124 F. Supp. 573 (D.D.C. 1954), *rev'd on other grounds sub nom.* United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457 (1957). The *Gypsum* court found as a reason for assuming jurisdiction over a petition by several codefendants seeking to enforce a final judgment against their codefendant to bar it from suing them in other courts, *see* text accompanying notes 28 & 29 *supra*, the fact that the decree would be subject to possible misconstruction by the state courts if the petitioner raised it as a defense in those suits. 124 F. Supp. at 582. The Supreme Court's decision explicitly approved the exercise of jurisdiction on this ground, among others. 352 U.S. at 464.

force an antitrust consent decree entered by the District Court for New Jersey by seeking both an injunction and a contempt citation.[129] Jurisdiction was asserted on the basis of a federal question arising out of the decree.[130] The court, after stating that plaintiff could either bring an independent treble damage suit or seek to intervene in the original action, then turned to the plaintiffs' attempt to seek enforcement of the decree in another court:

> We hold that this action must be dismissed for lack of jurisdiction over the subject matter. For this Court to undertake to decide whether a defendant named in an action filed in another District Court was guilty of a violation of the provisions of a final judgment entered in that action, and if found to be guilty, to undertake to fix and impose just punitive measures, would be an impertinent and unjustifiable intrusion on the jurisdiction of the other Court. Such a course, if pursued, would lead to confusion as to the construction to be placed upon the final judgment, a multitude of independent proceedings in numerous jurisdictions, and would defeat the very purposes of the final judgment.[131]

At least two observations should be made with respect to this reasoning. It suggests, at most, that enforcement by third parties be limited to the district court which entered the decree. It does not reject third party enforcement entirely. Further, such deference is especially appropriate in cases such as *New Jersey Communications* where the plaintiff had only to cross the Hudson to be in the appropriate court. Accordingly, the opinion is not authority for a general rule that, regardless of hardship to the plaintiff, a federal district court will not enforce a consent decree issued by another such court.[132]

Second, the result reached in that case is by no means in-

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[129] The judgment in question did not qualify as one which could be registered in the Southern District of New York and thereafter enforced in like manner as in the issuing jurisdiction. 28 U.S.C. § 1963 (1970). *See generally* WRIGHT & MILLER, *supra* note 127, § 2787. Of course even if § 1963 were to govern, it would not be clear whether any person other than the one who obtained the original judgment could register it.

[130] *See* note 89 *supra*.

[131] 1968 Trade Cas. ¶ 72,455, at 85,447-48.

[132] To the extent that jurisdiction is predicated solely on the ancillary theory, *see* note 127 *supra*, the problem of enforcement by a different court does not arise: by definition the action will be brought in the court which issued the consent decree. However, under any other possible basis for jurisdiction, the problem of different courts dealing with the same decree is present.

evitable. In at least two recent subsequent cases the same district court which decided *New Jersey Communications* indicated that the interpretation of a consent decree of another district court "would not seem to pose insurmountable difficulties."[133] And *Bailey v. Iowa Beef Processors, Inc.*[134] rejected the theory that the federal district court had exclusive jurisdiction over the consent decree it issued,[135] and went on to interpret the decree to determine if it did in fact create third party beneficiary rights. In many situations, as in *Bailey*, the actual probability of conflicting interpretations of the consent decree will be minimal. At most, then, this difficulty suggests a discretionary decision on the part of the court which is asked to enforce a consent decree issued elsewhere, a discretion which should be exercised in the light of such factors as the ease and efficacy of plaintiff's resort to the issuing court, and the possibility and seriousness of conflict.

To summarize, there are strong policy arguments favoring the creation of a third party beneficiary right of action. And, while some of the objections to such recovery are not without substance, it seems possible to resolve the problems they raise by tailoring the contours of the legal right to be recognized rather than rejecting the notion out of hand.

III. POSTJUDGMENT INTERVENTION

At one point in his opinion in *Control Data Corp. v. International Business Machines Corp.*,[136] Judge Neville referred to the

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[133] Berkey Photo Inc. v. Eastman Kodak Co., 1974 Trade Cas. ¶ 74,882, at 95,977 (S.D.N.Y. 1974); City of New York v. General Motors Corp., 357 F. Supp. 327, 329 (S.D.N.Y. 1973). Each case involved an attempt by the defendant to transfer a private antitrust suit from the district in which it was brought to the district court which issued the government consent decree.

[134] 213 N.W.2d 642 (Iowa 1973), *cert. denied*, 95 S. Ct. 52 (1974).

[135] The trial court in *Bailey* dismissed the complaint on the ground that the federal court had retained exclusive jurisdiction for enforcement of the consent decree. The Iowa Supreme Court rejected this theory because "[A] provision for retention of jurisdiction is effective in accordance with its wording," and the wording of the decree allowed retention "for the purpose of enabling any of the parties to this Final Judgment to apply" to the federal court for further orders. Since the present plaintiffs were not parties to that suit, the Iowa Supreme Court concluded that the federal court's retained jurisdiction did not extend to them. *Id.* at 644.

This reasoning is overly simplistic. On the one hand, it would be easy enough either to read the jurisdiction clause as implicitly including all ancillary matters, or to find that the district court had inherent jurisdiction. *See* note 127 *supra*. But, on the other hand, it is not clear why either trial or supreme court thought that, if there were federal jurisdiction, it had to be exclusive.

[136] 306 F. Supp. 839 (D. Minn. 1969), *aff'd sub nom.* Data Processing Financial & General Corp. v. International Business Mach. Corp., 430 F.2d 1277 (8th Cir. 1970).

then recent Supreme Court decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*[137] as permitting intervention by interested third parties prior to the finalization of the decree in a government antitrust suit. He then wrote:

> Such would indicate that if these plaintiffs believe they have a right to enforce either the 1935 [litigated] or the 1956 [consent] decrees, they should petition the Federal District Court for the Southern District of New York accordingly. On the question as to whether they would be permitted some 34 and 13 years later to intervene or to assert claims, this court does not express an opinion.[138]

In order to assess the feasibility of intervention as of right[139] as an alternative to the third party beneficiary theory discussed, it is necessary to tread where Judge Neville held back and explore the availability of postjudgment intervention.

Before undertaking this consideration, however, two caveats are necessary. First, intervention, even if available of right, may not be a perfect substitute for third party beneficiary recovery because of possibly differing remedies. There is no difficulty with respect to equitable relief, since a successful intervenor could, as a party, employ the contempt sanction to compel defendant's compliance[140] and obtain an injunction against conduct within the purpose of the decree.[141] The effect would be the functional equivalent of an order of specific performance emanating from a contract suit. But a problem does exist with respect to damages. If these are not required by the court as a condition for purging the defendant of contempt,[142] they can only be awarded on a third party beneficiary theory. Nevertheless, the power to compel compliance will often be valuable even absent a concomitant right to damages. Accordingly, it is worthwhile to explore postjudgment intervention as an alternative to the contract theory earlier considered.

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[137] 386 U.S. 129 (1967).

[138] 306 F. Supp. at 845.

[139] Intervention by permission of the court may also be available, perhaps on less stringent terms, FED. R. CIV. P. 24(b), but it offers too uncertain a route to vindicate the policy interests underlying the recognition of enforcement powers in third parties with respect to government antitrust decrees.

[140] *See* Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924).

[141] *See* United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457 (1957).

[142] *See, e.g.*, McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949).

Second, the restricted scope of the present inquiry must be stressed. No attempt is made to treat thoroughly the whole concept of intervention,[143] or even the somewhat more limited question of the general propriety of intervention in antitrust cases.[144] Rather, the focus of this portion of the Article is on the narrow issue of the availability of postjudgment intervention in government antitrust suits solely for the purpose of enforcing that judgment. This limitation is critical since, as we shall see, many of the policy reasons cutting against a general expansion of intervention are inapplicable to intervention at this stage for such a purpose.

The starting point for any consideration of intervention must be, of course, rule 24(a) of the Federal Rules of Civil Procedure, which provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The simplicity of this formulation is deceptive, for it conceals intractable problems involved in determining whether the applicant has a cognizable "interest," ascertaining if that interest is "impaired or impeded," and deciding whether the existing parties "adequately represent" it.

To pose these problems in the setting in which we are interested, let us return to our original scenario. There the decree beneficiaries' concern about IBM compliance with the judgment is understandable since, as purchasers, they have a strong economic interest in buying IBM equipment at the lowest price.

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[143] *See, e.g.*, Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329 (1969); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

[144] *See, e.g.*, Buxbaum, *Public Participation in the Enforcement of the Antitrust Laws*, 59 CALIF. L. REV. 1113 (1971); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 17-23 (1971); Comment, *The Automobile Pollution Case: Intervention in Consent Decree Settlement*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 408 (1970). There is also a developing body of literature on the subject of intervention before administrative agencies which may provide useful analogies for considering intervention in government antitrust suits. *See, e.g.*, Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

But is this "interest" the kind which satisfies rule 24(a)(2)? Although any applicant willing to incur attorneys' fees in seeking to intervene has thereby demonstrated his interest in the litigation, the rule may contemplate a more stringent test. Another problem arises with the applicant's interest being "impaired or impeded." To the extent that IBM's conduct is susceptible of attack under the antitrust laws, is the would-be intervenor's interest sufficiently protected by this remedy? Or should the decision turn on the difficulty of the applicant establishing an antitrust violation? For example, intervention might be denied where the government's act was directed at per se offenses, but permitted where the rule of reason governed. Finally, assuming both an interest and its impairment, there remains the problem of determining whether the government's representation is adequate. Does the failure of the Justice Department to enforce the decree establish inadequacy, or is something more required?

Unfortunately, there is a dearth of authority on point. Only one decision has been discovered on whether a private party who is the beneficiary of a decree in a government antitrust suit may intervene to seek enforcement. In *United States v. Western Electric*[145] the District Court for the District of New Jersey denied intervention, and the Supreme Court affirmed without opinion. In order to assess the implications of this decision, two questions must be considered: whether, as a matter of precedent, the Supreme Court's affirmance elevates *Western Electric* to the status of binding authority;[146] and the correctness of the district court's decision on the merits.

The first question need not delay us long since it seems recognized that such affirmance means little. As one commentator wrote:

> The Supreme Court's use of the straightforward affirmance in these direct appeals rather than dismissal for want of a substantial federal question does not indicate that the general issue of the propriety of allowing inter-

[145] 1968 Trade Cas. ¶ 72,415 (D.N.J. 1968), *aff'd mem. sub nom.* Clark Walter & Sons, Inc. v. United States, 392 U.S. 659 (1968).

[146] Even if *Western Electric* is binding authority on intervention to enforce a consent decree, it does not hold on the question of intervention under a litigated decree. That the difference may warrant a legal distinction is clear from both of the district court's reasons for its decision. One basis was that allowing intervention would reduce defendant incentive to consent; obviously this has no application to a decree entered after litigation. The second justification, the "flood of intervenors" argument, has a much reduced impact with respect to intervention under litigated decrees since these constitute only a small portion of the judgments obtained by the Department of Justice. *See* note 11 *supra*.

> vention, as opposed to the essentially judgmental issue of allowing intervention in a particular case, has been reviewed in any meaningful sense by the Court.[147]

The second question, the correctness of the decision on the merits, is more difficult. The applicants for intervention alleged that the defendants were furnishing communications equipment to hospitals in violation of the consent decree settling the government's antitrust suit. The district judge conceded the violation on the basis of the facts before him but denied intervention on the grounds that enforcement of consent decrees by nonparties would discourage defendants from consenting to them and that to allow intervention would result in "a volume of litigation that would be almost impossible for the Court to handle."

The parallel between this reasoning and that in *IBM* is striking, although Judge Neville's opinion is more elegant and more elaborate. Nevertheless, the opinions share the same fallacies that need not be reconsidered at length. We have already seen that there is no public interest in encouraging defendants to enter into consent decrees they do not intend to obey.[148] And with respect to the flood of litigation argument, the same factors that rendered the contention unconvincing in the third party beneficiary context are also applicable in the intervention setting.[149]

While the rationale of *Western Electric* is unpersuasive, perhaps the result can be justified. In order to determine this, we must consider the decision in the light of the precedents interpreting rule 24(a). In undertaking this task, we must begin by sharply differentiating the state of the law before and after 1967, the year the Supreme Court decided *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*[150] The law prior to *Cascade* can be simply summarized: intervention of right by private persons in government antitrust suits was greatly disfavored.[151] Whether

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[147] Buxbaum, *supra* note 143, at 1132-33 n.82. The Supreme Court itself is not disposed to put much weight on an affirmance without opinion. In Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), the dissent cited a number of such decisions which the majority ignored in reaching its conclusion. *See* note 151 *infra*.

[148] *See* text accompanying note 44 *supra*.

[149] *See* text accompanying notes 43 *supra* & 192 *infra*.

[150] 386 U.S. 129 (1967). The decision was 5-2, with Justices Harlan and Stewart dissenting. Justices Fortas and White did not participate.

[151] Mr. Justice Stewart, joined by Mr. Justice Harlan, dissented in *Cascade*, and characterized the majority decision as being a radical change: "The Court's decision not only overturns established general principles of intervention, but . . . also repudiates a

and to what extent *Cascade* may have altered this attitude are questions to which we now turn.

Cascade grew out of a suit by the United States to enjoin the acquisition by El Paso Natural Gas of Pacific Northwest Pipeline. In an earlier decision the Court had found the acquisition in violation of section 7 of the Clayton Act, and it remanded with directions to the district court to order divestiture.[152] The Justice Department and the defendant agreed on the provisions of the divestiture decree, which was then approved by the district court. At this point several applicants sought to intervene to protect interests which they saw endangered by the decree. These included California (which wanted Pacific Northwest restored as a substantial competitor in the state), Southern California Edison (a large purchaser of natural gas from El Paso sources which wanted to restore competition in California), and Cascade Natural Gas (a distributor whose sole supplier had been Pacific Northwest and would be the new company established by the divestiture). The district court denied all applications for intervention, and the would-be intervenors appealed.

The Court's decision is somewhat complicated by the fact that when the district court denied the motions to intervene old

large and long-established body of decisions specifically, and correctly, denying intervention in government antitrust litigation." 386 U.S. at 147. In support of this statement, the dissent cites some eight Supreme Court decisions denying intervention, with only two decisions, both of which it distinguishes, in support of it. While strictly speaking this is accurate, the cited authority is perhaps more probative of a climate hostile to intervention than a carefully articulated doctrine disallowing it in government antitrust cases. Of the eight anti-intervention cases cited, six were decisions without opinion: Bardy v. United States, 371 U.S. 576 (1963); Westinghouse Broadcasting Co. v. United States, 364 U.S. 518 (1960); Wometco Television & Theatre Co. v. United States, 355 U.S. 40 (1957); Partmar Corp. v. United States, 338 U.S. 804 (1949); Ball v. United States, 338 U.S. 802 (1949); *Ex Parte* Leaf Tobacco Bd., 222 U.S. 578 (1911). Of the four cases dealing with intervention in full opinions, two permitted intervention: Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941); United States v. Terminal R.R. Ass'n, 236 U.S. 194 (1915); and two denied it: Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944). And even if, as Stewart contends, the two "pro" cases supported a right of intervention only in limited circumstances, a similar objection can be made to one of the "con" cases. *Sam Fox* denied intervention only under one possible branch of the rule then governing it (admittedly, however, *Sam Fox* contains language broadly hostile to intervention in government antitrust suits). Stewart's dissent buttresses its citations to government antitrust cases with authority in other contexts which points in much the same direction. In sum, we can perhaps agree with the dissent that *Cascade* marks a change in direction while reserving judgment on the firmness and consistency of the previous approach. In any event, in view both of the majority opinion and the textual changes made by the 1966 amendments to rule 24 of the Federal Rules of Civil Procedure governing intervention, no exhaustive treatment of the prior authority is warranted.

[152] United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

rule 24(a)[153] controlled, but by the time the case was argued before the Supreme Court the present version of the rule had become effective. The Court ultimately held that California and Southern California Edison were entitled to intervene under old rule 24(a)(3) as parties so "geographically situated" as to be "adversely affected" by the district court's disposition of the defendant's assets through the divestiture. It also held that Cascade had an "interest" that the disposition of the action might impede its ability to protect within new rule 24(a)(2).[154]

Both branches of the Court's decision are relevant to our inquiry, but that portion allowing intervention under new rule 24(a) is of the greater interest because it constitutes an application of the presently governing standard. On this aspect, unfortunately, the majority opinion is conclusory rather than analytic. Read most broadly, this branch of *Cascade* can be said to establish that a would-be intervenor in a government antitrust suit has a cognizable "interest" whenever he has a substantial economic stake in the outcome.[155] Such an interpretation can be supported by the comments of the Advisory Committee responsible for drafting new rule 24(a). The committee wrote, in language which was italicized by the majority opinion in *Cascade*:[156]

> If an absentee would be substantially affected in a practical sense by the determination made in an action, he

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[153] FED. R. CIV. P. 24:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

[154] The Court justified applying the new rule to Cascade's application on the ground that the rule governs further proceedings in pending actions: "Since the entire merits of the case must be reopened to give California and Southern California Edison an opportunity to be heard as of right as intervenors, we conclude that new Rule 24(a)(2) is broad enough to include Cascade also . . . ." 386 U.S. at 136.

[155] This approach was a fairly radical departure from the prior case law under old rule 24(a)(2) which, unlike old rule 24(a)(3), did speak in terms of the applicant's "interest." *See* note 153 *supra*. The cases interpreting the provisions usually found a property interest required, although there was some flexibility even here. *E.g.*, *Cascade*, 386 U.S. at 145-56 (Stewart, J., dissenting); 3B MOORE, *supra* note 89, ¶ 24.09-1[2]; Note, *Intervention of Right Granted Private Party in Government Antitrust Suit under New Rule 24(a)(2)*, 1968 DUKE L.J. 117, 120-22 & nn.26-36. *See also* Shapiro, *supra* note 142, at 729-40, who suggests that no coherent principle on the meaning of "interest" can be extracted from the pre-*Cascade* cases.

[156] 386 U.S. at 134 n.3.

> should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.[157]

But whether such a broad reading will in fact become the accepted interpretation of *Cascade* remains unclear. Although some commentators have approved this approach,[158] others have attempted to limit such a reading,[159] and, generally, the lower courts have not accorded *Cascade* the deference one would normally expect for a recent Supreme Court decision; at least two have already described the case as sui generis.[160]

Accordingly, we cannot say with certainty whether a competitor or customer seeking to intervene to compel compliance with the judgment in an antitrust action will be held to satisfy the threshold interest criterion under rule 24(a). It does seem likely, however, that the stronger the applicant's economic stake, the more probable it is that an interest will be found.[161] Thus, if

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[157] The notes of the Advisory Committee on the 1966 amendments to rule 24 are reprinted in 3B MOORE, *supra* note 89, ¶ 24.01 [10].

[158] One noted authority wrote:

> It is harder to criticize the Cascade decision for its understanding of the concept of "interest." . . . As one lower court judge has noted, "though Cascade's interest in the decree may have been somewhat remote, it did show a strong, direct economic interest, for the new company would be its sole supplier." Cascade seems to have had an important interest in seeing that the decree made its sole supplier an economically feasible enterprise and the formulation of the decree in this case was the only forum in which that interest could be asserted. Thus, unless this interest were being adequately represented by the United States, the holding that Cascade could intervene seems soundly based.

7A WRIGHT & MILLER, *supra* note 127, § 1908, at 499-500 (footnote omitted). This also seems to be the thrust of the comments of another noted authority. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 405-06 (1967). *See also* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Shapiro, *supra* note 143; Note, *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 221 (1967).

[159] *E.g.*, Note, *supra* note 158, at 224-25, focusing on the fact that Cascade had a substantial economic interest and its interest was consistent with the position that the government should have taken. But as to the consistency of Cascade's interest and the public interest, *see* Note, *supra* note 155, at 128-29.

[160] United States v. Paramount Pictures, Inc., 333 F. Supp. 1100, 1102 (S.D.N.Y.), *aff'd mem. sub nom.* Syufy Enterprises v. United States, 404 U.S. 802 (1971); United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617, 619 n.3 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of New York v. United States, 397 U.S. 248 (1970).

[161] That such a strong economic stake is necessary (if not sufficient) seems likely since there are indications that the court will not look with favor on persons merely asserting their interest in being "vicarious avengers" of the public interest. United States v. International Tel. & Tel. Corp., 349 F. Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom.* Nader v. United States, 410 U.S. 919 (1973).

See also Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom.* Thrifty Shoppers

intervention had been sought by DPF&G in the *IBM* case on the ground that IBM's pricing changes threatened the applicant's existence, *Cascade* strongly militates for a finding of the requisite "interest." If, then, at least some would-be intervenors will be able to leap this first hurdle, the question becomes whether the remaining two prerequisites can be met: whether the disposition of the action will "impair or impede" the protection of the interest, and whether the government's representation is inadequate.

On the former point the first branch of the *Cascade* decision dealing with intervention under old rule 24(a)(3) is at least indirectly relevant. That provision allowed intervention by an applicant "so situated as to be adversely affected" by disposition of property within the court's control.[162] Since the district court had control of the assets to be divested,[163] the only question was whether California and Southern California Edison might be adversely affected. Prior law had not gone as far as to find such effects for "applicants who, like those in [*Cascade*], were affected in the sense that they shared with buyers the concern that competitive rivalry be maintained."[164] Yet this seems quite close to the result actually reached in *Cascade*. Indeed, the only limitation the Court suggested on such an expansive rule was that the interests of the would-be intervenor must be "at the heart of the controversy" in the government suit,[165] and there was even a suggestion of the application of a broader test than even that

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Scrip Co. v. United States, 389 U.S. 580, *rehearing denied*, 390 U.S. 975 (1968). This litigation has continued. Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136 (9th Cir. 1973), *cert. granted*, 95 S. Ct. 302 (1974).

[162] *See* note 153 *supra*.

[163] Even had old rule 24(a)(3) continued in effect, instead of being superseded by new rule 24(a)(2), *Cascade* would have had limited impact since old 24(a)(3) governed only cases where the court had control or custody of property the disposition of which would adversely affect the intervenor. *Cascade*, which involved the disposition of merged assets, is the exceptional antitrust case. *But see* 3B MOORE, *supra* note 89, ¶ 24.09[2] (suggesting that the control requirement was liberally construed).

[164] Kaplan, *supra* note 158, at 404.

[165] The Court looked to Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941), and read it as holding that intervention is permissible when the applicant's interests are at "the heart of the controversy" in the government suit. *Id.* at 506. The *Cascade* majority, however, ignored a readily distinguishable feature of *Pipe Line*—the consent decree there explicitly provided for Panhandle's becoming a party to enforce the rights conferred by the decree. *See* text accompanying notes 35 & 36 *supra*. That this factor was critical to the *Pipe Line* decision is clear both from *Pipe Line* itself where the Court stated that for this reason, "the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem," 312 U.S. at 508, and from the Court's use of *Pipe Line* in its subsequent decision in Allen Calculators, Inc. v. National

somewhat nebulous standard.[166] However, even if it is true that the Supreme Court adopted a very broad reading of "adversely affected" under old rule 24(a)(3), a question remains about the import of this for cases now governed by new rule 24(a)(2). That provision, it will be recalled, does not deal with adverse effects of a court's disposition of property, but, rather, authorizes intervention when the disposition of the action "may as a practical matter impair or impede [the applicant's] ability to protect" a particular "interest." If the Court's interpretation of "adversely affected" under the old rule can be equated with "impeding or impairing" an applicant's ability to protect his interest under the new rule, *Cascade* has broad implications: any adverse effects on a competitor or customer would suffice. Indeed, the only remaining bar of any significance to intervention in government antitrust suits would be the requirement in rule 24(a)(2) that representation by the government be inadequate.

There are, however, good reasons to believe that *Cascade* will not be read quite so broadly. Although one could argue that "impair or impede" is a lesser included category within "adversely affected," so that the old rule 24(a)(3) branch of *Cascade* is a fortiori determinative of new rule 24(a)(2) cases, such a contention ignores the different settings of two tests. Old rule 24(a)(3) required only that the applicant be adversely affected *by* the disposition of property. Even if *Cascade* holds that any beneficiary of the increased competition flowing from a restructuring of the market is adversely affected by less than optimum divestiture, it would not be conclusive in a case decided under

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Cash Register Co., 322 U.S. 137, 141 (1944). The failure of the *Cascade* Court to advert to this distinction, in the face of the dissent's emphasis on it, 386 U.S. at 151 n.16, suggests a deliberate attempt to broaden the *Pipe Line* rule.

[166] At one point the majority wrote:

> *Apart from that* [*i.e.*, being at the heart of the controversy] but in the spirit of *Pipe Line Co.* we think that California and Southern California Edison qualify as intervenors under Rule 24(a)(3). Certainly these two appellants are "so situated" geographically as to be "adversely affected" within the meaning of Rule 24(a)(3) by a merger that reduces the competitive factor in natural gas available to Californians.

386 U.S. at 135 (emphasis added). If this does constitute a more liberal test than "heart of the controversy" for permitting intervention, it is not clear whether it constitutes holding or dictum since the Court had apparently already held that California's interest in a competitive system was at the heart of the controversy when it noted these interests were "at the heart of our [prior] mandate directing divestiture." *Id.* at 135. Thus, any suggestion that California also satisfied another—perhaps less rigid—test is dictum. However, the Court also held that Southern California Edison had a right to intervene, and it is not clear whether the decision with respect to this applicant was founded on a less rigorous standard enunciated or merely on a judgment that it, too, was at the heart of the controversy.

new rule 24(a)(2). That provision requires that the applicant's "ability to protect" his interest be impaired or impeded by the disposition of the action in which he seeks to intervene. This clearly shifts the focus from the consequences of a particular action considered alone to an examination of the whole spectrum of legal remedies available to the would-be intervenor. Perhaps only after concluding that the alternatives to intervention are inadequate in some sense may the court decide that denial of the application will impair or impede the would-be intervenor's ability to protect his interest.[167]

Curiously enough, the first branch of *Cascade*, though decided under old rule 24(a)(3), can be explained in these terms. Mergers, such as that at issue in the government suit, have traditionally been difficult for private parties to attack: damages may be too speculative to recover,[168] and the availability of divestiture as a remedy in private suits has been doubted.[169] Further, even if divestiture were theoretically available, as a practical matter no court is likely to restructure a defendant after previously ordering some divestiture in the government's suit.

The significance of this for postjudgment intervention should be obvious. To the extent that such actions would merely track the relief already available under the antitrust laws, intervention is likely to be denied. At the other pole, where the government's action will for all practical purposes foreclose further private relief, or where the antitrust laws provide a private party with no remedy at all, intervention should be permitted. The difficult question relates to the class of cases in which a private remedy is available, but intervention would be quicker, cheaper, or more certain. For example, a third party intervenor could compel compliance with a decree via contempt proceedings merely by proving the decree and its violation; were that

[167] Such inadequacy might exist, for example, when the applicant can demonstrate that the relief obtainable in a purely private suit will probably be insufficient or when he can persuasively argue that stare decisis renders it unlikely that the result in a prior government suit will be disturbed in a subsequent private action. *E.g.*, Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).

[168] *See* Guilfoil, *Damage Determination in Private Antitrust Suits*, 42 NOTRE DAME LAW. 647 (1967); Parker, *Measuring Damages in Federal Treble Damage Actions*, 17 ANTITRUST BULL. 496 (1972). *See also* Note, 29 OHIO ST. L.J. 756, 766 (1968).

[169] At least two post-*Cascade* lower court decisions have held divestiture available to private plaintiffs. *See generally* Comment, *Private Divestiture: Antitrust's Latest Problem Child*, 41 FORDHAM L. REV. 569 (1973). However, at the time *Cascade* was decided the issue was very much in doubt. *See* Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964). *See also* Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 TEX. L. REV. 54 (1969).

party required to bring a private antitrust suit, he would have to establish not only the fact of the conduct which violated the decree but also (except in the case of strict per se offenses) its unreasonableness as a restraint of trade. Whether requiring an applicant to pursue a more difficult and hazardous course constitutes impairing or impeding his ability to protect his interest remains an open question. It may be that the onerousness of alternatives will be a factor in a balancing of pro- and anti-intervention interests. With respect to postjudgment intervention to enforce decrees, however, the scales will usually tip in favor of the applicant.[170]

If, therefore, *Cascade* suggests that an applicant with a substantial economic stake has a rule 24(a) interest, and if failure to permit intervention will, in at least some cases, impair or impede his ability to protect that interest, the only remaining obstacle to intervention is the adequacy of the government's representation. On this point, *Cascade* is again of assistance. Although the facts there were truly unique, involving the Court's perception that the Department of Justice participated in flouting its prior mandate,[171] it would seem that failure of the Department to enforce judicial decrees is not significantly different conduct. A court's order can be flouted just as much by ignoring it as by cooperating in changing it.[172] In any event, however, it seems clear that the failure of the Justice Department to enforce a decree which benefits a particular third party cannot constitute adequate representation of that party's interests therein.[173]

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[170] *See* text accompanying notes 185-96 *infra*.

[171] This kind of ultra vires conduct could not, by definition, qualify as adequate representation of the interests the Supreme Court's original mandate was designed to protect:

> We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate [citation omitted]. Our direction was that the District Court provide for "divestiture without delay." That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market.

386 U.S. at 136.

[172] This is not to suggest that court orders may not appropriately be modified by consent of the parties *with the approval of the court*. It is, however, dubious procedure to permit the Department of Justice and the defendant tacitly to reach this result, without court approval, by violations which are not prosecuted.

[173] Regardless whether the Department of Justice's failure to enforce compliance is the result of inadvertence, a considered decision that resources are better devoted else-

The foregoing analysis suggests that, on the facts available, *Western Electric* was wrongly decided. The applicant there stated a strong economic stake in alleging that the defendant was competing with it in violation of the consent decree.[174] Second, the would-be intervenor seems to satisfy the requirement that its ability to protect its interest be adversely affected. The applicant's alternative, a private antitrust suit, was likely to be unsatisfactory because courts rarely enjoin competition entirely, even by monopolists, as the decree apparently did. Finally, the applicant's interest was not adequately represented by the government since the would-be intervenor alleged resort to the Department of Justice and its failure to act.[175]

In fairness to the *Western Electric* result, however, it must be admitted that there are facets to the problem of intervention which we have not yet treated and which may influence our conclusions. Most of our analysis has relied heavily on *Cascade*, and, although that decision is not yet eight years old, its continued vitality has been much mooted. In part this is due to several Supreme Court affirmances, without opinion, of district court denials of intervention. And, while we have seen that such affirmances are, individually, of little value in assessing the law of intervention,[176] the pattern perceived from them has led several district courts to doubt the continued authority of *Cascade*.[177]

With all due deference, the evidence for a retreat from *Cascade* is not as strong as those courts would have it. The "pattern" becomes less coherent when it is recognized that several

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where or a judgment that the decree is no longer procompetitive, nonenforcement still does not adequately represent the interests of the decree beneficiary.

[174] Of course, no opinion is expressed about the wisdom of the particular decree in question in furthering the ends of the antitrust laws.

[175] The *Western Electric* opinion avoided this conclusion by distinguishing *Cascade*: it did not involve a consent decree, and, there the Department of Justice ignored the Supreme Court's mandate. Why either of these differences warrants a legal distinction was not made clear. With respect to the first point, the judge was concerned that third party enforcement would diminish defendants' incentive to enter into such decrees. As we have seen, this is hardly persuasive since there can be no public interest in encouraging defendants who intend to breach such decrees from entering into them in the first place. On the second point, it is likely that the judge had in mind the inadequacy of the government's representation, demonstrated in *Cascade* by the flouting of the Court's mandate. But *Cascade* never suggested that only such action would constitute proof of inadequate representation, and it would seem that resort to the Department of Justice followed by no action on the applicant's complaint should establish a prima facie case of inadequacy.

[176] *See* text accompanying note 147 *supra*.

[177] *E.g.*, United States v. CIBA Corp., 50 F.R.D. 507, 512 (S.D.N.Y. 1970).

affirmances are easily reconciled with *Cascade*. Thus, one district court opinion can be read as simply finding government representation adequate,[178] while another rested its decision on four grounds, several of which were entirely consistent with *Cascade*.[179]

It is true, however, that not all of the post-*Cascade* affirmances without opinion can be reconciled so easily with that decision. To explain these, and attempt to evolve a more general theory of the present state of the law of private intervention in government antitrust suits, it is necessary to take into account

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[178] United States v. Aluminum Co. of America, 41 F.R.D. 342 (E.D. Mo.), *appeal dismissed sub nom.* Lupton Mfg. Co. v. United States, 388 U.S. 457 (1967).

After noting that the Antitrust Division had "diligently protected the interest of the public," the court wrote, with respect to the would-be intervenor's claim:

> The Antitrust Division has vigorously examined the situation from that time to the present date and has required Alcoa and Cupples to submit a great deal of information concerning the circumstances of the bidding for the purpose of determining whether or not they have violated any provisions of the final judgment of this Court. After a careful examination of this situation, the Antitrust Division has concluded in its opinion there has been no violation warranting an injunction and it opposes the motion of Lupton to intervene in this proceeding.

41 F.R.D. at 343.

[179] United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968). *See also* note 161 *supra*. The grounds the district court relied on were:

(1) the petition was not timely because the would-be intervenors waited, without justification, until after the decree had been entered; (2) the applicants did not have their interests impaired or impeded by the settlement since both had filed treble damages actions; (3) the applicants had no interest as members of the general public because they had not established that the government had not acted properly in the public interest; (4) the claims of applicants were without merit. Obviously, the first, third and fourth grounds do not in any sense fly in the face of *Cascade*, and the Supreme Court's affirmance may have relied on any one of them. Only the second ground poses any difficulty, and, upon further consideration, this too disappears. The applicants, who had filed treble damage action, failed to give any reason why intervention was necessary to protect their interests except for the argument that the prima facie evidence effect in their private action of a favorable judgment in the government suit under § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1970), was an interest that would be impaired if intervention could not be used to force the government to litigate. *See* note 14 *supra*. The district court rejected this contention, apparently because this did not constitute an "interest." The result is probably correct, but it should be grounded on an affirmative governmental privilege to settle, established by the Clayton Act itself, rather than upon the intervenor's lack of an interest. The very statute that creates the prima facie effect of a government judgment, thus establishing the intervenor's interest, also gives the government the right to enter into consent decrees.

A like argument was rejected in United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617, 621 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of New York v. United States, 397 U.S. 248 (1970). *See* Comment, *The Automobile Pollution Case: Intervention in Consent Decree Settlement*, 5 HARV. CIV. RTS.-CIV. LIB. L. REV. 408 (1970). Although not precise in its reasons for rejecting prima facie evidence effect as an "interest" protectable by intervention, the Court did speak of a right to settle which may be shorthand for an affirmative governmental privilege rooted in § 5(a) of the Clayton Act.

considerations found neither in *Cascade* nor in the text of rule 24(a). The two primary reasons for limiting intervention relate to the plaintiff's interest in the right to control the course of his suit and to the problems of spoiling the broth by introducing too many cooks.[180] These considerations explain, and perhaps justify, decisions which are apparently inconsistent with the analysis heretofore developed. In the context of attempted private intervention in government antitrust suits, they have a special relevancy. As Mr. Justice Stewart wrote, dissenting in *Cascade*:

> This Court is all too familiar with the fact that antitrust litigation is inherently protracted. Indeed, it is just such delay which seems to so concern the Court in this case. But nothing could be better calculated to confuse and prolong antitrust litigation than the rule which the Court today announces. The entrance of additional parties into antitrust suits can only serve to multiply trial exhibits and testimony, and further confound the attempt to bring order out of complicated economic issues.[181]

Without denigrating what is obviously a substantial and legitimate concern with respect to private intervention in government antitrust suits generally, the objection is misplaced as applied to the situation of postjudgment intervention for the purpose of enforcing that judgment.

Consider, for example, the cases denying intervention sought for the purpose of opposing the entry of a consent decree, some of which have been affirmed without opinion by the Supreme Court.[182] While perhaps marking a retreat from the broadest possible reading of *Cascade*, these decisions left largely undisturbed our analysis of postjudgment intervention. They represent a judicial balancing of the possible impairment of private interests against the government's interest in deciding when and on what terms to terminate its litigation. But when such a balancing test is applied to postjudgment applications, there is little to counterbalance the reasons favoring intervention.

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[180] *Cf.* Kennedy, *supra* note 142.

[181] 386 U.S. at 147-48.

[182] United States v. Nat'l Bank & Trust Co., 319 F. Supp. 930 (E.D. Pa. 1970); United States v. CIBA Corp., 50 F.R.D. 507 (S.D.N.Y. 1970); United States v. Atlantic Richfield Co., 50 F.R.D. 369 (S.D.N.Y. 1970), *aff'd sub nom.* Bartlett v. United States, 401 U.S. 986 (1971); United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970).

To begin with, Stewart's concern that intervention will complicate and prolong the litigation is largely inapposite simply because the litigation has already culminated in a final judgment. This same consideration seems equally telling with respect to the government's interest in controlling its resource allocation. As Professor Buxbaum notes, there are considerations cutting against intervention to oppose settlement of a suit that do not apply in other contexts. Forcing the government to litigate involves at least quantitatively different results in Antitrust Division resource allocation than does intervention merely to "reshape the direction of the litigation or the emphasis of particular items."[183]

It is true, of course, that some postjudgment interventions may have effects analogous to lengthening and complicating the litigation. For example, when one of the original parties seeks a modification of the decree, the presence of an intervenor may complicate the proceedings, as in the *Pipe Line* case. This possibility, however, does not justify barring intervention in those cases where no modification is at issue. Along these lines, Professor Shapiro has suggested that courts ought to be more flexible with respect to intervention; instead of an all-or-nothing approach, intervenors should be given different bundles of rights appropriate to the necessity and convenience of the proceeding in question.[184]

One can go further, however, and contend that there are at least three reasons why postjudgment intervention is distinctly different from pretrial intervention, and warrants more liberal treatment. First, any modification inquiry necessarily must focus on the presence or absence of changed circumstances, and will not involve a fullblown antitrust trial. Accordingly, the argument that intervention may prolong and complicate an already lengthy and complex proceeding has much less weight in this context.[185]

The intervenor may also have a much stronger interest in influencing a postjudgment than a pretrial proceeding, simply

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[183] Buxbaum, *supra* note 143, at 1136.

[184] Shapiro, *supra* note 142, at 743-48. *See also*, Comment, *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143 (1971).

[185] There may be exceptions to this general rule. The ones that come readily to mind are the "regulatory" decrees which envision continuing judicial control of a particular industry. In such cases complex fact determinations may continually be made after judgment is entered, and postjudgment intervention may have many of the disadvantages of pretrial intervention. *See* Note, *An Experiment in Preventive Anti-trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees*, 74 YALE L.J.

because it may have ventured much in reliance on the decree. If decrees are to be effective, such reliance ought to be encouraged by the government. Finally, the possible distortion of antitrust policies which may result from private interests intervening ought to be significantly less in the case of a consent decree —where the procompetitive thrust has already been stipulated by the Department of Justice and approved by a court.

If problems of complicating the government suit or distorting Department of Justice resource allocation are likely to be of little weight in the postjudgment context, then we must inquire whether there are other anti-intervention considerations. These need not detain us long. It has sometimes been suggested that the fact that Congress has established two separate schemes of relief, public and private, makes private intervention in government suits inappropriate.[186] But it seems clear that as a matter of authority, *Cascade* has rejected any strict dichotomy,[187] and, on the merits, the basis for the argument has always been questionable.[188]

1041, 1045-49 (1965). However, even with respect to such decrees, private involvement is not necessarily inappropriate. For example, in the essentially regulatory decree covering ASCAP, one implementation device employed by the judgment is authorizing third persons to apply to the district court for determination of a reasonable royalty. *See* notes 37-39 *supra* & accompanying text.

[186] *Cascade*, 386 U.S. at 148 (Stewart, J., dissenting).

[187] It is clear that even before *Cascade* the "rule" of nonintervention in government antitrust suits was subject to exception. *E.g.*, Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941); United States v. Vehicular Parking, Ltd., 7 F.R.D. 336 (D. Del. 1947).

[188] The rationale for a dichotomy between public and private schemes of relief has perhaps best been articulated in United States v. Bendix Home Appliances Inc., 10 F.R.D. 73 (S.D.N.Y. 1949).

The *Bendix* case bases its contentions on the proposition that a private party may not bring an injunction suit under § 4 of the Sherman Act, 15 U.S.C. § 4 (1970). Private suits for injunction were not permitted at all under the Sherman Act, but were authorized only by the Clayton Act, 15 U.S.C. § 26 (1970). From this statutory scheme, the court concludes:

> It would seem to be a necessary corollary of this dichotomy of rights which underlies the structure of the anti-trust laws that private persons may not intervene in suits which are maintainable only by the United States. And this corollary should apply whether the particular action is for enforcement of the anti-trust laws, or for the enforcement of decrees rendered under those laws.

10 F.R.D. at 76. This reasoning is extremely tenuous. First, although § 4 of the Sherman Act permits only a government, not a private suit, any rigid separation of two schemes of relief was ended by the Clayton Act, which gave private parties the right also to seek injunctive relief. Second, it does not necessarily follow that a private party may not intervene in a suit brought by the government to enforce a decree obtained by the government, even if the party could not have brought the suit originally. *Cf.* Trobvich v. UMW, 404 U.S. 528 (1972). To the extent that the original Sherman Act's failure to provide private parties an injunction action reflected a considered judgment that such

Another objection to intervention is the notion that the Department of Justice alone must speak for the public interest.[189] The rationale underlying this objection is not clear. To the extent that it either reflects fear of confusing the government's litigation or of introducing issues tainted by self-interest, it merely reformulates what has been discussed before. Further, the argument, even if accepted, is not fatal to all intervention. If the government favors it, surely intervention ought to be allowed under this notion without regard to the defendant's views. Where the government is neutral, this objection has no effect; intervention then ought to be allowed or not according to other relevant policy considerations. Only when the government opposes intervention does the notion of the government alone speaking for the public interest have any bite. And even here one would think that, as to postjudgment intervention at least, it is not very compelling. The government and the court have, by definition, already spoken for the public interest. And while the public interest, or at least particular views of it, need not remain static, some weight should be accorded the prior view. One way to do this is, of course, precisely by allowing an intervenor to seek to enforce the judgment and say what may be said in its defense. Finally, the idea that the Department of Justice is the sole body entitled to enforce the antitrust laws runs counter to the strong "private attorneys general" concept running through the laws themselves.[190] The Supreme Court has recognized

> that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.[191]

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power in private hands might unjustifiably clog the judicial process, this problem is largely obviated by the fact that the government obtained the injunction, thereby raising a presumption that the public interest is served by its terms.

[189] Mr. Justice Stewart, dissenting in *Cascade*, made this argument, 386 U.S. at 149, attributing the notion to Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42, 49 (1925). *See* note 31 *supra*. Interestingly, *Buckeye* is not inconsistent with this argument, the decision there only denied intervention to *set aside* the district court's order.

[190] *See* text accompanying note 53 *supra*.

[191] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). *See also* Guilfoil, *supra* note 168; MacIntyre, *Antitrust Injunctions—A Flexible Private Remedy*, 1966 DUKE L.J. 22.

Intervention has also been opposed along the familiar lines of a "deluge of litigation," always cited to defeat any new approaches in the law. The species of this genus with which we are now concerned is the "flood of intervenors." While the argument is not always without merit, it is usually grossly overdrawn, which is precisely the case here. If the intervention is only to obtain enforcement of a decree, the first successful intervenor who "adequately represents" persons in like positions will bar further interventions under rule 24(a)(2). Even if damages are sought for breach of the judgment (perhaps warranting multiple interventions) there are adequate devices, including perhaps class intervention, to keep the problem manageable. In any event, real difficulties are posed only when numerous persons are being damaged by the defendant's noncompliance with a prior court order. In this case, the Department of Justice is most likely to act, and, failing that, this is precisely the situation where the policy reasons underlying third party enforcement are strongest. Accordingly, vindication of the national antitrust policy may prove a sufficient impetus for coping with the flood. A final rebuttal to the argument is perhaps the most convincing: to the extent that intervention is substituted for private antitrust suits, the net effect is likely to be a decrease in the drain on judicial resources.

A last objection to postjudgment intervention arises from the language of rule 24 itself. Intervention is permissible only if the application is "timely," and the question arises whether a postjudgment application is timely.[192] While, absent special circumstances, it should be clear that such an application is not timely when the purpose of the intervention is to modify a decree,[193] there is no reason why it should not be considered timely with respect to enforcing one, at least if the applicant does not sleep on his right to intervene after the decree defendant breaches.[194] Certainly, *Pipe Line* allows postjudgment intervention.[195] Although that case is distinguishable as a species of intervention not within rule 24, the notion of timeliness still would seem applicable to this kind of intervention.

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[192] *See* NAACP v. New York, 413 U.S. 345, 365-69 (1973).

[193] United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 435-36 (C.D. Cal., 1967), *aff'd per curiam sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968). *See also* note 161 *supra*.

[194] *See, e.g.*, McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970).

[195] *See* text accompanying notes 35 & 36 *supra*.

In sum, the objections to intervention, whatever their validity with respect to earlier stages, are not persuasive as regards postjudgment intervention. And the reasons in favor of permitting the practice are compelling. On the basis of rule 24(a) and the decisions interpreting it, the postjudgment applicant will often qualify. Furthermore, all of the policy reasons favoring the recognition of a third party beneficiary right are applicable to intervention, and at least some of the possible objections to the contract theory are inapplicable here. For example, since intervention is, by definition, before the same court which rendered the judgment in question, there is no problem with different and possibly conflicting interpretations of the same decree.[196]

IV. Conclusion

The implications of judicial recognition of either theory of third party enforcement remain to be treated. Unfortunately, these can only be sketched in broad outline because of the many variables involved. For example, court adoption of the intervention theory will have significantly different consequences than would recognition of a third party beneficiary right, if only because, unlike the contract theory, intervention would be available with respect to both litigated and consent decrees. Further, the contours of the rights recognized under either theory remain to be shaped, and the full implications of the theories will emerge only after the courts have engaged in this process. For example, the reach of the third party beneficiary notion will depend in large part upon judicial application of the "intent to benefit" concept.

Nevertheless, it is possible at this time to suggest some of the developments which may follow recognition of either theory. For this purpose, the consent decrees in the 1973-2 volume of *CCH Trade Cases* were examined. Consent decrees were chosen, since the third party beneficiary theory would be limited to such decrees and the intervention notion would encompass them. Although the time period was arbitrarily selected, the cases, regardless of their representativeness, constitute the minimum situations where the theories may be utilized by private plaintiffs if the defendants violate the decree and the government fails to act. Of course, no opinion is expressed about the likelihood of

[196] *See* text accompanying notes 127-34 *supra*.

either of these eventualities with respect to the particular decrees in question.

As might be expected, most of the decrees, at least in part, prohibit practices which are per se illegal. For example, *United States v. Clark Mechanical Contractors, Inc.*[197] enjoins price fixing and territorial division. To the extent that consent decrees enjoin only this kind of conduct, third party action based on the decree has few advantages over suit under the antitrust laws.[198] Indeed, it may be of substantially less utility to the plaintiff than a private antitrust action, since success in the latter will bring treble damages and attorneys' fees. However, a careful examination of the decrees shows that the conduct they prohibit is often not limited to that which is per se illegal. In these cases, enforcement of the decrees themselves, without need to resort to a private antitrust suit, may be of significant assistance to decree beneficiaries.

One example of this is *United States v. Bankers Trust.*[199] The consent decree permitted the merger of two defendant banks, but barred them for ten years, absent prior Antitrust Division approval, from acquiring any commercial bank "in the same county in which either or both Defendant Banks currently have a commercial banking office, or in any country contiguous thereto"—a total of thirty-one of South Carolina's forty-six counties.[200] Considering the difficulty that private plaintiffs have in attacking mergers,[201] the right to invoke this decree could prove invaluable if defendants were disposed to violate it and the Justice Department did not act.[202]

Much the same can be said of cases enjoining the consenting defendants from refusing to sell. For example, the decree in

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[197] 1973-2 Trade Cas. ¶ 74,648 (W.D. Ky. 1973).

[198] This may somewhat overstate the case since there are incidental differences in the theories which may have significant effects in particular cases. For example, it is possible that a contract suit will be allowed when the antitrust suit is foreclosed by the applicable federal statute of limitations if the state statute for breach of contract has not yet run.

[199] 1973-2 Trade Cas. ¶ 74,687 (D.S.C. 1973).

[200] *Id.* at 95,038.

[201] *See* P. AREEDA ANTITRUST ANALYSIS 72-73 (2nd ed. 1974), & cases cited therein. *See also* A.B.A. ANTITRUST DEVELOPMENTS 1955-1968 (1968).

[202] *See* United States v. Texaco Inc., 1973-2 Trade Cas. ¶ 74,831 (S.D.N.Y. 1974). The decree enjoined not only Texaco's acquisition of a refinery for ten years without prior Department of Justice approval, but also prohibited Texaco from "entering into crude oil processing agreements" for that refinery in excess of "45,000 barrels a day or 25 percent of the refinery's capacity, whichever is the lesser." *Id.* at 95,696. Presumably a party foreclosed from the refinery by a breach of this provision would have a chance to challenge that foreclosure under the theories considered.

United States v. Ed. Phillips & Sons Co.[203] restrains the defendant, *inter alia*, from "[r]efusing to sell . . . to any person because of the prices, markups, or other terms or conditions" at which that person sells.[204] While a concerted refusal to deal is a per se offense, the decree precludes not only this action but also a "mere" unilateral refusal, conduct traditionally immune from antitrust scrutiny in the absence of monopolization or an attempt to monopolize.[205] The injunction in *Phillips* is apparently not atypical since several other consent decrees also restrict the right of decree defendants unilaterally to refuse to deal.[206]

A number of decrees bar resale price maintenance, conduct which is per se illegal under the Sherman Act except when it is immunized by state fair trade laws.[207] Although some of the decrees themselves exempt from their prohibitions defendant's exercise of rights under such laws,[208] at least one does not.[209] This suggests that a decree beneficiary able to utilize successfully either a third party beneficiary claim or intervention to enforce the consent decree would be able in this matter to attack resale price maintenance, even in a state with a fair trade law legitimizing such conduct.

The conclusion to be drawn is obvious: there are significant areas in which one or both theories of third party enforcement might provide a decree beneficiary with real advantages over presently recognized remedies. Of course, the extent to which the exercise of such rights is necessary to vindicate the provisions

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[203] 1973-2 Trade Cas. ¶ 74,606 (D. Neb. 1973).

[204] *Id.* at 94,675.

[205] United States v. Colgate & Co., 250 U.S. 300 (1919). United States v. Parke, Davis & Co., 362 U.S. 29 (1960), was thought by some to have sounded the death knell for the *Colgate* doctrine, but that has clearly not been the case as to all applications. Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROB. 590 (1965). *But cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967).

[206] United States v. United Scientific Co., 1973-2 Trade Cas. ¶ 74,776, at 95,469 (N.D. Cal. 1973); United States v. Swift Instruments, Inc., 1973-2 Trade Cas. ¶ 74,762, at 95,317 (N.D. Cal. 1973); United States v. Wohl Shoe Co., 1973-2 Trade Cas. ¶ 74,633, at 94,796-97 (D.N.M. 1973); United States v. Greater Portland Convention Ass'n, 1973-2 Trade Cas. ¶ 74,614, at 94,717 (D. Ore. 1973).

[207] *See* A.B.A. ANTITRUST DEVELOPMENTS 1955-1968, at 110-19 (1968); UNITED STATES DEPT. OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS, 149-55 (1955).

[208] *See* United States v. United Scientific Co., 1973-2 Trade Cas. ¶ 74,776, at 95,469 (N.D. Cal. 1973); United States v. Swift Instruments, Inc. 1973-2 Trade Cas. ¶ 74,762, at 95,317 (N.D. Cal. 1973).

[209] United States v. Ed. Phillips & Sons Co., 1973-2 Trade Cas. ¶ 74,606 (D. Neb. 1973).

of the decree in question depends on the effectiveness of Department of Justice compliance machinery. While no definitive answer to this question can be given without the kind of empirical study beyond the scope of this Article, both the scholarly commentary and the persistent, if disjointed, attempts by third persons to enforce government decrees suggest that recognition of such a right would result fairly frequently in enforcement where there is little or none now. It is the thesis of this Article that the doctrinal and policy arguments establish a convincing case in favor of such a right.*

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* The Supreme Court's decision in United States v. ITT Continental Baking Co., 43 U.S.L.W. 4266 (U.S. Feb. 19, 1975), handed down as this Article goes to press, adds at least indirect support to the third party beneficiary theory considered. The central issue in *Continental Baking* was whether the violation of a Federal Trade Commission consent order barring Continental from "acquiring" certain firms constituted a single act, warranting only one fine, or a continuing violation subjecting the violator to daily penalties. In reaching its conclusion that daily penalties were appropriate, the Court interpreted the consent order to bar not only the initial acquisition but also the continued retention of the acquired firm. Since the language of the order was, at best, ambiguous, the Court looked to a variety of indicia of "intent" not actually present in the consent order, including (1) an appendix to the agreement between the parties which set forth the background of the controversy and referred to the original FTC complaint, and (2) the antitrust context of the consent order in which "acquiring" is said to refer both to attaining and retaining control of a firm.

Full examination of the meaning of *Continental Baking* must be left for another day. The decision certainly goes substantially further than United States v. Armour & Co., 402 U.S. 673 (1971), in according interpretative latitude to the courts where consent decrees are concerned, although it is doubtful if it reaches as far toward overruling that case as the dissenting opinion of Mr. Justice Stewart (in which Justices Burger, Powell and Rehnquist joined) suggests, if only because Mr. Justice Marshall, the author of the *Armour* opinion, joined the *Continental Baking* majority. For our purposes, however, three aspects of the opinion need be stressed. First, the majority remained faithful to the basic predicate of *Armour* that it is "a contract we are construing." Thus, the overarching principle it applied was phrased in contractual terms:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the "four corners" rule of *Armour*.

43 U.S.L.W. at 4271 (footnote omitted). No opinion is, of course, intimated as to the correctness under general contract law of the Court's application of this principle to the facts before it.

Secondly, the *Continental Baking* Court gave implicit approval to the proposition, urged in the Article, that there is nothing inherent in consent decrees that precludes the application of a contract law where sound policy indicates it is appropriate:

> Consent decrees and orders have attributes both of contracts and of judicial decrees, or, in this case, administrative orders. . . . Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.

Id. at 4270 n.10.

Third, the instant case provides support for another position taken in the Article, namely, that in view of the fact that a consent decree violator has both breached his promise and committed a contempt of court, it is not unfair to hold him liable, even retroactively, to a third party who has been injured by this wrongful conduct. Speaking to an analogous point, the *Continental Baking* majority wrote:

> We note that this case differs from *Armour* . . . in a most important respect. In [that case] the question of whether or not the consent decree was violated was the question for decision; in this case respondent was found to have committed violations, and the issue before us affects only the manner of assigning penalties for each violation found. Thus respondent is subject to some penalty, and there is no possibility as there was in *Armour* . . . that respondent will be penalized for behavior not prohibited at all by the order "within its four corners" . . . .

Id. at 4271. In sum, *Continental Baking* provides no basis for reassessing the positions taken in the Article, and, indeed, offers some further support for them.