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Enforcement of Antitrust Consent Decrees by Contempt Proceedings and Civil Actions

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ENFORCEMENT OF ANTITRUST CONSENT DECREES BY CONTEMPT PROCEEDINGS AND CIVIL ACTIONS

The consent decree is presently the primary means of enforcing the antitrust laws. While consent decrees are potentially effective to redress antitrust abuses, a recent United States Supreme Court decision affirming a restrictive "contract" interpretation of these decrees threatens to vitiate their usefulness. The author examines the case law culminating in this decision and urges the adoption of a more expansive "modified contract" analysis of the decree, and a stiffening of penalties for noncompliance with decree terms.

I. INTRODUCTION

WHILE CONSENT DECREES[1] have become a major feature of government antitrust enforcement, the effect of substituting negotiated settlements for full adjudication remains something of a mystery. Few question the convenience and timesaving aspect of the consent decree system. Many writers, however, have criticized consent decrees for creating barriers to private litigants[2] and for not being adequately enforced.[3]

This Note analyzes two aspects of enforcing consent decrees. First, the different approaches courts use to interpret disputed terms in consent decrees will be reviewed. While many courts look to the economic facts which prompted the decree,[4] there has been a general reluctance to use extrinsic evidence to interpret ambiguous terms. Second, the Note will examine the adequacy of existing penalties for

1. The consent decree is an order of the court agreed upon by representatives of the Attorney General and a defendant in proceedings initiated under the Sherman Act, the Clayton Act, or related statutes. *See* ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE, H.R. DOC. NO. 13, 86th Cong., 1st Sess. 9 (1959). There is no trial or adjudication of any issue of fact or law regarding the conduct challenged by the government. Rather, the decree is a negotiated compromise, later formalized before a federal district judge.

2. *See* Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983 (1968); Phillips, *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39 (1961); Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822 (1975); Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627 (1965); Note, *Consent Decrees and Treble Damages: More Effective Enforcement*, 4 GA. L. REV. 592 (1970); Note, *Closing An Antitrust Loophole: Collateral Effects for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334 (1969).

3. *See* note 22 *infra*.

4. *See* notes 44–56 *infra* and accompanying text.

noncompliance and will suggest that judicial approaches to interpreting consent decrees, as well as the structure of existing penalties and the government's emphasis on criminal sanctions, have limited the effectiveness of the consent decree as a means for enforcing antitrust law.

At present, Congress has authorized three groups to enforce the antitrust laws. First, the Attorney General, through the Department of Justice, Antitrust Division, is authorized to bring suit for injunctive relief,[5] civil damages,[6] and criminal sanctions.[7] Secondly, the Federal Trade Commission may issue a cease and desist order[8] for violation of the Federal Trade Commission Act which prohibits unfair or deceptive practices and unfair methods of competition.[9] Finally, a private party may sue to recover three times his actual damages plus costs of the suit.[10]

Antitrust proceedings, however, are complex, time consuming, and costly to all parties involved.[11] Thus, most cases are resolved by negotiated settlement rather than by litigation. The Antitrust Division settles 75 to 80 percent of all civil cases by means of consent decrees.[12] Likewise, the FTC enters into consent orders far more often than it litigates disputes.[13]

A consent decree shares aspects of both a contract and a judicial order. Though negotiated, it is a final court order. It has res judicata effect,[14] but it does not serve as a judicial determination or admission by the defendant that the conduct in question violates any existing law.[15] It can be attacked on appeal only for clerical error, fraud in the procurement, lack of consent, or lack of subject matter jurisdiction.[16] A consent decree also has the flexibility of a contract. With little or no

5. 15 U.S.C. § 25 (1970).

6. *Id.* § 15a.

7. *Id.* §§ 2, 3, 4, 8, 9, 13a, 21.

8. *Id.* § 45(b).

9. *Id.* § 451(a)(1).

10. *Id.* § 15.

11. Kilgore, *Antitrust Judgements and Their Enforcement*, 4 A.B.A. ANTITRUST L.J. 102, 105 (1954).

12. [1972] 5 TRADE REG. REP. (CCH) ¶ 50,137.

13. *Id.* ¶ 50,138. At least 65 percent of all civil antitrust suits from 1915 to 1969 resulted in consent decrees. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365 (1970).

14. United States v. Radio Corp. of America, 46 F. Supp. 654, 656 (D. Del. 1942) (government not permitted to vacate a consent decree in order to get a stronger decree). *See* Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 YALE L.J. 1391, 1397–99 n.24 (1959).

15. Paul M. Harrod Co. v. A.B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961). *See* Comment, *supra* note 2, at 644 n.90.

16. Swift & Co. v. United States, 276 U.S. 311, 324 (1928).

judicial supervision, the parties are permitted wide latitude in negotiating the terms of the decree.[17]

In addition to the important savings in manpower and money, both sides benefit from the flexibility inherent in the negotiating process. The government may achieve concessions and agreements that might not have been reached under the antitrust laws themselves,[18] while the corporation may employ the consent decree to negotiate around activity prohibited by the antitrust laws, to shield itself from further government suits,[19] to avoid the adverse publicity and uncertainty of complex litigation, and, most importantly, to elude the ponderous reach of section 5 of the Clayton Act.[20] Thus the consent decree strikes a

17. Flynn, *supra* note 2, at 989; Phillips, *supra* note 2, at 41.

18. Phillips, *supra* note 2, at 44. The consent decree may bring anticipated corporate activity within the court's jurisdiction. The government may also use a decree to proscribe activities throughout an entire industry. Finally, it is possible that a consent order could serve as the basis of an FTC rule thereby establishing an industrywide minimum standard.

19. Simco Sales Serv., Inc. v. Air Reduction Co., 213 F. Supp. 505 (E.D. Pa. 1963); P. AREEDA, ANTITRUST ANALYSIS 58–59 (1974).

20. 15 U.S.C. § 16 (1970), *as amended* by Act of Dec. 21, 1974, Pub. L. No. 93–528, § 2, 88 Stat. 1706. Under § 5, if the government obtains a "final judgment" against a defendant, a private litigant suing for treble damages may introduce the prior judgment as prima facie evidence of an antitrust violation. Defining "final judgment" in 15 U.S.C. § 16(a) has been a major judicial undertaking. A plea of nolo contendere to a criminal charge is not deemed a "final judgment," but a guilty plea is admissible as prima facie evidence. *E.g.*, Illinois v. Sperry Rand Corp., 237 F. Supp. 520 (N.D. Ill. 1965). *But see* Note, *Government Contempt Order Provides Possible Prima Facie Case for Private Antitrust Action*, 8 UTAH L. REV. 274 (1963); Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334 (1969); Comment, 38 NOTRE DAME LAW. 467 (1963).

After a long debate, FTC orders have been held to be within the scope of section 5 of the Clayton Act. Purex Corp. Ltd. v. Proctor & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969) (FTC cease and desist order given prima facie effect); Carpenter v. Central Ark. Milk Producers Ass'n, [1966] Trade Cas. ¶ 71,817, at 82,772 (W.D. Ark.) (FTC consent order negotiated while appeals were pending held to be prima facie evidence); *see* Matteoni, *An Antitrust Argument: Whether a Federal Trade Commission Order is Within the Ambit of the Clayton Act's Section 5*, 40 NOTRE DAME LAW. 158 (1965).

Consent decrees entered "after testimony is taken" are admissible, but the private litigant must make certain that the time covered by the decree and the nature of the violation stated in the complaint are identical to the private litigant's action. *See* Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 157 F. Supp. 251 (N.D.N.Y. 1957), *aff'd*, 263 F.2d 533 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959). If the decree is entered into before testimony is taken, it cannot be used as prima facie evidence and a third party's chance for success in a § 5 treble damage action is accordingly diminished. 15 U.S.C. § 16(a) (1970). *See* 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).

The private litigant can use government discovery material, but most decrees are entered before discovery begins, and the material on which the complaint is based

delicate balance between legal and economic considerations on the one hand, and the expectations of the parties on the other.

Once a consent decree is entered, enforcement of the decree rests exclusively with the government.[21] Until recently, government enforcement has been limited by manpower constraints and highlighted by general disorganization.[22]

Since 1961, however, there has been a marked trend toward more comprehensive enforcement of decrees.[23] Presently, if a violation is suspected, the Antitrust Division conducts a preliminary inquiry to

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remains confidential. Comment, *supra* note 2, at 650–51. *See generally* Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958). Since secrecy is one of the government's most important bargaining tools, it is not easily relinquished. *See* Comment, *supra* note 2, at 637.

Some consent decrees contain clauses whereby the defendant admits to certain antitrust violations. Third parties have attempted to invoke these admissions to circumvent the § 5 provision that consent decrees not be used as prima facie evidence in private suits. Such efforts have met with little success. Courts have narrowly construed the admission to apply only to later cases brought by local government entities. United States v. Lake Asphalt & Petroleum Co. [1960] Trade Cas. ¶ 69,385, at 77,272 (D. Mass.). In other instances, courts have simply barred private parties from use of such "asphalt clauses." United States v. Allied Chem. Corp., [1961] Trade Cas. ¶ 69,923, at 77,641 (D. Mass. 1960); United States v. Bituminous Concrete Ass'n, [1960] Trade Cas. ¶ 69,878, at 77,486 (D. Mass.). *See* Kaplan, *The Asphalt Clause—A New Weapon in Antitrust Enforcement*, 3 B.C. IND. & COM. L. REV. 355 (1962). In such a situation, a third party's only recourse is to register complaints with the government. Phillips, *supra* note 2, at 51.

21. *See* notes 91–98 *supra* and accompanying text.

22. The general failure of the government to enforce decrees is such a well-known phenomenon that a consent decree slap on the wrist and exhortation to go and sin no more may induce a sense of security on the part of defendants; security to sin some more while the enemy rests on his consent decree laurels.

Flynn, *supra* note 2, at 999.

Recent Senate oversight hearings on antitrust enforcement have disclosed that a major impediment to successful enforcement is caused by the salary differential between private sector and Antitrust Division attorneys. One former deputy assistant attorney general described the situation as a "growing crisis" in antitrust enforcement. *Both Sides Agree: Feds No Match For Private Bar*, 63 A.B.A.J. 785 (June, 1977).

23. Originally, the Antitrust Division reviewed industry surveys, trade journals, and private complaints to identify possible violations of a consent decree. Phillips, *supra* note 2, at 50–51; *see* Duncan, *Post-Litigation Resulting From Alleged Non-Compliance With Government Antitrust Consent Decrees*, 8 W. RES. L. REV. 45, 54-55 (1956).

In 1961, as part of an experimental program, the Division referred 50 selected judgments to the FTC for investigation of possible noncompliance. [1972] 5 TRADE REG. REP. (CCH) ¶ 50,137. The Antitrust Division, not satisfied with the results of this experimental enforcement program, created a Judgments and Judgment Enforcement Section to follow up on decrees. *Id.* The expanding Judgment Enforcement Section of the Antitrust Division, in conjunction with the extensive investigatory powers of the FTC, has brought more order to the enforcement area, although time and manpower constraints still remain a problem. A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 385 (1970).

determine the nature and extent of noncompliance.[24] Information is gathered by the use of boilerplate visitation clauses which permit reasonable access to the suspect's records and files. The Division then prosecutes decree violations by civil and/or criminal contempt proceedings.[25] The Federal Trade Commission enforces its consent orders by civil actions under section 11 (a) of the Clayton Act[26] and section 5 (a) of the Federal Trade Commission Act.[27] Under these provisions, cumulative daily fines of $5,000 to $10,000 may be levied against a defendant who fails to comply with the terms of the consent order.[28]

II. THEORIES OF JUDICIAL INTERPRETATION

A contempt action to enforce a consent decree is theoretically no different from any other action to compel a party to show why he should not be punished for failing to obey the lawful order of a court. In both instances the court has broad discretionary power to fashion appropriate relief.[29] The dual character of a consent decree, part judicial order and part contract,[30] has created problems for courts faced with interpreting ambiguous terms in decrees and orders. The existence of a decree indicates questionable activity; from the viewpoint of the government the decree expeditiously provides a means for correcting the economic harm caused by the activity.[31] As a contract, however, as opposed to a judicial order, the decree contains no findings of fact, and presents a reviewing court with no substantial record.[32] If the scope of inquiry is allowed to extend beyond the express terms of the decree, the court may ultimately review the merits of the original suit, a result sought to be avoided by negotiated settlement. Moreover, to find violations by looking beyond the express terms of the decree to a sketchy factual record would add uncertainty to this major area of antitrust law enforcement. A court must carefully interpret decrees in order to strike the proper balance between the terms bargained for by the parties and the economic purposes of the decree.

24. Kilgore, *supra* note 11, at 128.

25. *Id.*; 18 U.S.C. §§ 401, 402 (1970).

26. 15 U.S.C. § 21(a) (1970).

27. *Id.* § 45(a).

28. The court weighs factors such as evidence of bad faith, injury to the public, and ability to pay to determine the exact amount of the fine. United States v. J.B. Williams Co., 498 F.2d 414, 438–39 (2d Cir. 1974). *See* text accompanying notes 176–88 *infra*.

29. Kilgore, *supra* note 11, at 129–30. *See also* United States v. UMW, 330 U.S. 258 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

30. Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 19–34 (1972). *See* text accompanying notes 14–16, *supra*.

31. Flynn, *supra* note 2, at 1003–04.

32. *See id.* at 990.

A. *The Contract Theory*

Most courts, in striking this balance, have construed consent decrees by applying the traditional rules of contract construction.[33] Such decisions result in strict interpretation, confined largely to the four corners of the decree, and only occasionally stray from these bounds to consider correspondence between the parties during negotiation. No notice is taken of the original complaint, or of the economic circumstances which led to the decree.

In *Hughes v. United States*,[34] the Supreme Court strictly applied contract principles to hold that where the decree was written in the alternative, and the defendant had satisfied one of the alternative requirements, it would be unfair to modify the decree by ordering pursuit of the other alternative without further evidentiary hearings and findings of fact and law.[35] The Court reaffirmed its support of the strict contract approach in *United States v. Atlantic Refining Co.*[36] The Court adopted the definition urged by defendants for two ambiguous words, "share" and "assets," after examining the decree and the parties' previous activity under the decree.

It is against the background of *Hughes* and *Atlantic Refining* that the Supreme Court decided *United States v. Armour & Co.*,[37] its most sweeping affirmation of the strict contractual approach to consent decrees. In *Armour*, the Court held that a 1920 consent decree, which forbade the Armour meatpacking company from acquiring any interest in a retail food chain, did not prohibit Greyhound, a corporation already controlling two retail food chains, from purchasing Armour. Justice Marshall explained that:

> Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with 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

33. The Supreme Court originally rejected the contract analogy in the leading decree modification case, United States v. Swift & Co., 286 U.S. 106, 115 (1932). In other interpretation cases, however, the Court has repeatedly reaffirmed the use of contract principles. *See* United States v. Armour & Co., 402 U.S. 673 (1971), and cases cited therein. *See also* Handler, *supra* note 30, at 33–34; Jinkinson, *Negotiation of Consent Decrees*, 9 ANTITRUST BULL. 673, 675–76 (1964).

34. 342 U.S. 353 (1952).

35. *Id.* at 356.

36 360 U.S. 19 (1959).

37. 402 U.S. 673 (1971).

> respective parties have the bargaining power and skill to achieve.[38]

Of the many possible items each party has given up (or gained) by entering the consent decree, it is clear the defendant has waived the right guaranteed by the due process clause to litigate the issues originally raised in the government's complaint. Therefore, the terms by which defendant gave the 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."[39]

The Government's objection to the Armour acquisition was primarily aimed at Greyhound, a party who had no part in the formation of the decree.[40] The Government had the option to bring an original action against Greyhound instead of attempting to stretch the existing language of the Armour decree to cover a third party. The terms of the decree did not purport to bind "successors and assigns" and contained no indication that the agreement was directed at any third parties;[41] the majority could find no way to bring Greyhound within the ambit of the original decree.[42]

The *Armour* decision has resulted in significant changes in the way the Antitrust Division phrases its consent decrees,[43] thus mooting much of the Court's reasoning. *Armour*'s uncompromised affirmance of strict contract analysis, however, presently sets the standard by which most courts interpret consent decrees.

B. *The Purpose Approach*

An alternative to a strict contract analysis in the interpretation of consent decrees was found in the "purpose" approach. Under this approach courts look to the economic situation which led to the original decree when interpreting and modifying the terms of the agreement.[44] Some decrees have explicit purpose clauses,[45] on which

38. *Id.* at 681–82 (emphasis in original).

39. *Id.* at 682.

40. *Id.* at 677.

41. *Id.* at 680.

42. Justice Douglas, dissenting, insisted that the Court's view was too narrow and that the decree should be read, as the Government had urged, with a view towards the purpose for which the parties had sought the original decree. *Id.* at 686. The majority clearly recognized the strong policy reasons behind the Government's contention, but noted that where "unforeseen circumstances now make additional relief desirable to prevent the evils aimed at by the original complaint," the appropriate enforcement mechanism is either modification or a separate antitrust action. *Id.* at 681.

43. *See* 40 Fed. Reg. 43,236 (1975) (proposed consent decrees).

44. *See* text accompanying notes 47–52 *infra*.

45. *E.g.*, United States v. Columbia Artists Management, Inc., [1955] Trade Cas.

the court can base its analysis. In other instances, a court could consider the original complaint, the economic conditions of the industry, and—if the decree was filed after 1974[46]—the competitive impact statement, and the comments of interested third parties.

The purpose analysis should not be a subterfuge behind which the court effects a modification of the agreement on the basis of general policy arguments. The court is still interpreting a written document. Ambiguous decree terms are defined by considering the words of the decree "in light of the issues and purposes for which [the decree] was sought."[47] When the ambiguous term is a broad one, such as "encouraging competition," an expanded scope of inquiry can actually extend the issue to include the intent of the parties. In consent agreements, however, the intent of the parties is not a unitary concept. As the decree reflects a compromise only tolerably acceptable to the two parties, the language of the decree is left ambiguous.[48] Hence in balancing the parties' conflicting interests, courts most often follow the *Armour* approach and rely almost exclusively on the language of the decree. There is consequently little authority for a purpose analysis.

In *United States v. R.L. Polk and Co.*,[49] however, a district court considered the economic reality of the marketplace to avoid what would have been an illogical result under a strict contract approach. The Antitrust Division brought a contempt action against Polk for violating a court decree which prohibited the firm from selling city directories "below cost." The defendant contended that "sales below cost" meant that "the price at which a copy of the city directory was sold was below the cost of producing that particular copy."[50] The defendant's cost per copy was extremely low because the company operated on a cash basis accounting system and did not include the

¶ 68,173, at 70,830, 70,834 (S.D.N.Y.) (art. VI); United States v. Continental Can Co., [1950–51] Trade Cas. ¶ 62,680, at 63,976, 63,980–81 (N.D. Cal. 1950) (art. III (1)).

46. *See* text accompanying notes 80–91 *infra*.

47. Terminal R.R. Ass'n v. United States, 266 U.S. 17, 29 (1924). The full quote is perhaps the best statement of the Court's ambivalence between contract and purpose approaches:

> [A] decree will not be expanded by implication or intendment beyond the *meaning* of its terms when read in the light of the issues and the *purpose* for which the suit was brought; and the facts must constitute a plain violation of the decree so read.

Id. (emphasis added).

48. *Cf.* United States v. Armour & Co., 402 U.S. 673, 681–82 (1971) (decree reflects best bargaining power and skill of the parties).

49. [1968] Trade Cas. ¶ 72,348, at 84,946 (E.D. Mich. 1967), *rev'd on other grounds*, 438 F.2d 377 (1971).

50. *Id.* at 84,947.

expense of future advertising as a cost in producing the directories. The Government argued that "sale below cost" meant "unreasonably low prices" with the "intent to destroy competition."[51]

The *Polk* court could neither allow the meaning of "sale below cost" to turn on the type of accounting system used, nor could it read "intent to destroy competition" into the express terms of the decree. Instead of contriving an interpretation of decree terms, the court adopted a purpose analysis. It tailored the definition of "sale below cost" to the special circumstances of the market involved. The market for city directories is a natural monopoly since the "mere *existence* of competition predictably resulted in a loss."[52] The court held that Polk was permitted to sell some directories below cost in markets controlled at the time of the decree, since the firm must be permitted to protect itself.[53] However, Polk was prohibited from using extremely low prices or excessive promotional efforts to eliminate competition in surrounding communities. Thus, when Polk attempted to expand its market, it could not charge prices which would ruin the competitor's business.

The purpose analysis thus permits the introduction of a great deal more extrinsic evidence than does the strict contract approach. In *Polk*, a strict contract approach would have prevented consideration of any evidence of market conditions at the time the decree was formulated. The narrow question would merely have been whether "sales below cost" was to be calculated by cash or accrual basis accounting. This would not have resolved the issue as clearly as the purpose approach.

There are two serious drawbacks to the purpose approach. First, courts are generally hesitant to invite a relitigation of the issues in the original suit. Since the purpose approach permits a broader inquiry into economic considerations, and the admission of more extrinsic evidence, relitigation is more likely and the original issues are apt to resurface. Second, the purpose analysis raises due process problems arising from ambiguities in the terms of the negotiated decree.[54] When a defendant has not clearly had notice that its conduct violated the decree terms, courts may be unwilling to mete out punishment. The tendency to alter or expand the meanings in consent decrees is clearly stronger under a purpose approach.[55] Punishment for questionable

51. *Id.*

52. *Id.* at 84,948 (emphasis in original).

53. *Id.*

54. *See* note 39 *supra* and accompanying text.

55. It is especially strong when there is evidence of bad faith. *See* text accompanying notes 177–81 *infra*.

violations, however, may infringe upon the defendant's right to be heard.[56] As long as relitigation and due process problems remain, few courts will be eager to adopt a purpose approach unless they are faced with a special case like *Polk*, where a strict interpretation would vitiate the decree.

C. *The Modified Contract Approach*

While the courts have generally followed a contractual approach when faced with the problem of interpreting consent decrees, in several cases they have attached significance to the purpose, setting, and effect of the clauses concerned in determining a penalty for noncompliance.[57] This "modified contract" approach is not inconsistent with the application of contract principles. Its primary concern is still with the language of the agreement, and it discourages broad ranging inquiry into the original merits and economic underpinnings of the decree. However, while the cases make passing reference to the strict *Armour* standard, it is clear that this approach is both more liberal in the variety of extrinsic evidence that is admissible, and more sensitive to the government's purpose in entering a compromise settlement.

Thus far, the modified contract approach has only been used when violation of the decree was so clear that the only issue before the court was the propriety of daily fines. The analytical and interpretive problems are the same when either question is before the court; in each instance the court is analyzing the challenged conduct in light of the decree terms. However, there are indications that the modified contract analysis may supplant *Armour*'s strict contract approach.[58]

The first case to present the issue of interpretation as it applies to appropriate sanctions for noncompliance was *United States v. Beatrice Foods Co.*[59] In 1956, Beatrice entered into a consent order which forbade it from "acquiring, directly or indirectly, through subsidiaries or otherwise" any "interest in" a dairy.[60] In May 1967, the decree was formally modified to force Beatrice to divest itself of five newly acquired dairies and the nonacquisition clause was reaffirmed. Then, in 1968, Beatrice purchased some distributorships from Maple Island Dairies.

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56. 342 U.S. 353 (1952).

57. *E.g.*, United States v. Beatrice Foods Co., 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

58. *See* United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) (dissenting opinion).

59. 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

60. *Id.* at 1262 n.2. There is an identical provision in at least 54 other FTC orders. United States v. ITT Continental Baking Co., 420 U.S. 223, 250 n.7 (1975) (dissenting opinion).

The FTC brought suit under section 5(*l*) of the Federal Trade Commission Act and section 11(*l*) of the Clayton Act. Taking a modified contract or "effect" approach, the district court refused to permit evidence of the negotiations or the "purpose" of the decree; it looked instead to the effect of the acquisition, and inquired whether the language of the decree supported an interpretation that forbade the conduct.[61] Since the acquisition clearly violated the decree and increased a monopolistic tendency, the court found that daily fines were appropriate.[62] The Eighth Circuit affirmed.[63] Also rejecting a "purpose" approach, the court still went beyond strict contract analysis, holding that the word "acquire" must be construed as meaning "acquire and hold," since any other construction would render the nonacquisition orders meaningless.[64]

The Supreme Court expressly approved *Beatrice*'s modified contract approach in *United States v. ITT Continental Baking Co.*[65] Continental was subject to a 1962 consent decree which forbade it from "acquiring" any part of any concern engaged in the production of bread. Before the decree's ten year term expired, Continental acquired three bakeries. Both the district court[66] and the Tenth Circuit[67] ruled in favor of Continental, holding that since the company could "acquire" only once there was no continuing violation.

Overruling the Tenth Circuit, the Supreme Court distinguished *Hughes, Atlantic Refining,* and *Armour*. Justice Brennan noted that in the earlier cases no violation was found, while the violation in the instant case was clear.[68] The only issue facing the Court was discerning congressional intent in fashioning the "continuing violation" provision of the Act. The violations reached were found to be those in which "the detrimental effect to the public and the advantage to the violator continue and increase over a period of time, and the violator could eliminate the effects of the violation . . . after it had begun."[69] Continental's acquisition was within this rule: it eliminated competitors and naturally increased Continental's share of the market. After reemphasizing that the issue in *Continental Baking* was the

61. United States v. Beatrice Foods Co., 344 F. Supp. 104, 113 (D. Minn. 1972).
62. United States v. Beatrice Foods Co., 351 F. Supp. 969, 971 (D. Minn. 1972).
63. 493 F.2d 1259 (1974), *cert. denied*, 420 U.S. 961 (1975).
64. *Id.* at 1269–70.
65. 420 U.S. 223 (1975).
66. United States v. ITT Continental Baking Co., [1972] Trade Cas. ¶ 73,993, at 92,127 (D. Colo. 1971).
67. United States v. ITT Continental Baking Co., 485 F.2d 16 (1973).
68. 420 U.S. at 234–37.
69. *Id.* at 231.

appropriate penalty, and not the fact of violation, the Court doubled back to state that it did not need to decide whether the acquisition would support the imposition of daily penalties.[70]

The majority examined the decree itself to find the justification for daily penalties. In this case, the consent order between the parties was part of a larger agreement which provided explicitly that the complaint could be used in construing the terms of the order.[71] Read in the context of the negotiations, the use of the word "acquiring" in the complaint was found to be an antitrust term of art which included the retention of assets obtained, thereby justifying daily penalties.[72]

Despite the careful contractual analysis of the decree text by the *Continental Baking* majority, four justices, lead by Mr. Justice Stewart, dissented. Quoting *Armour*,[73] Justice Stewart argued that the majority had inexplicably and without authority broadened the permissible inquiry into a wide-ranging search for purpose.[74] Under the *Armour* rule

> parties to any consent decree could have confidence that its explicit terms alone would control the judicial construction . . . . Now, otherwise unambiguous terms of a consent decree may be construed in light of such considerations as the antecedent complaint, the "meaning" of antitrust decisions, and the policies said to underlie the statutory provision for daily penalties.[75]

Justice Stewart's criticism is not entirely fair. The decree expressly provided for construction in accordance with the allegations of the complaint. The broader scope of evidence examined by the majority in *Continental Baking* can be justified by the differences in language from the decree involved in *Armour*.

The majority noted, in dicta, that consent decrees do not define penalties, but proscribe conduct.[76] Thus, when another decree is before the court, and the language will not support the imposition of a penalty the court finds appropriate, the court may claim for itself the power to punish violations. It is a traditional concern of the judicial system that violators not be able simply to incur legal penalties as a "cost of doing business." In discussing the legislative history of the FTC penalty provision, the Court notes congressional concern with

70. *Id.* at 238.
71. *Id.*
72. *Id.* at 240–43.
73. *Id.* at 244. *See* note 38 *supra* and accompanying text.
74. 420 U.S. at 248.
75. *Id.*
76. *Id.* at 233–38.

this problem.[77] Therefore, in determining the appropriate penalty, courts may emphasize the judicial order rather than the contractual attributes of a consent decree.

D. *The Impact of the Antitrust Procedures and Penalties Act of 1974*

The Antitrust Procedures and Penalties Act of 1974[78] provides additional support for a purpose or modified contractual approach in the interpretation of consent decrees. Dissatisfied with certain practices, which resulted in extremely compromised consent decrees,[79] Congress mandated a more active role for judges in the formation of the decrees. The 1974 Act is designed to safeguard the public's interest in consent decree negotiations by requiring the trial court to examine all relevant comments before entering the decree.

Under the new procedures, the Justice Department must file a "competitive impact statement" reciting:

(1) the nature and purpose of the proceeding;
(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
(5) a description of the procedures available for modification of such proposal; and
(6) a description and evaluation of alternatives to such proposal actually considered by the United States.[80]

77. *Id.* at 231.

78. Act of Dec. 21, 1974, Pub. L. No. 93-528, § 2, 88 Stat. 1706 (amending 15 U.S.C. § 16 (1970)).

79. The revision of consent decree procedures was primarily the result of the 1971 settlement of the ITT litigation. United States v. ITT (Grinnell Corp.), [1971] Trade Cas. ¶ 73,665 (D. Conn.); United States v. ITT (Hartford Fire Ins. Co.), [1971] Trade Cas. ¶ 73,666 (D. Conn.). Some charged that contributions by ITT to the Republican Party influenced the settlement. Prompted by the ITT cases, Rep. Peter W. Rodino, Jr. (D.-N.J.) scheduled hearings aimed at removing the veil of secrecy surrounding consent decree negotiations. He suggested that public impact statements be aired in a public forum. ANTITRUST & TRADE REG. REP. (BNA) No. 630, at A-15 (1973).

80. 15 U.S.C. § 16(b) (1970), *as amended* by Act of Dec. 21, 1974, Pub. L. No. 93-528, § 2, 88 Stat. 1706.

The competitive impact statement must be published in the Federal Register sixty days prior to the entry of the decree, and the proposed decree must be published in newspapers of general circulation for two weeks, beginning sixty days prior to the entry of the decree.[81] The Justice Department is required to consider any written statement relating to the proposed decree.[82] Then, on the basis of the information received, the trial court must determine that the decree is in the "public interest" before it enters the consent judgment.[83]

Critics of the Act assert that these procedures will hamper the government in its attempt to obtain broader relief than it would have been able to achieve through litigation.[84] Professor Handler points out:

> Intervenors, amici curiae, experts, prospective treble damage suitors, self-appointed guardians of the public interest and government agencies will be free to criticize the decree and to ask that it be rejected or that additional relief be provided . . . . What is more, if the court's search for the "public interest" is to be more than pro forma, the process will probably require what amounts to the very trial on the merits that a consent decree is designed to obviate.[85]

Notwithstanding such criticism, the Act should make it easier to enforce consent decrees. The competitive impact statement and other documents used in the "public interest" determination will be available to help clarify terms of the decree. Secondly, the information required by the Act may resolve interpretive issues before the decree is formalized.

Judicial reaction to the provisions of the Act has been generally hostile.[86] Courts have not considered the wisdom of the decree in light of the total economic setting, but have criticized only concrete shortcomings in compliance with the decree.[87] As one court noted:

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81. *Id.* § 16(b), (c).

82. *Id.* § 16(d).

83. *Id.* § 16(e).

84. Handler, *Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211, 243 (1975).

85. *Id.* at 241–42.

86. On the other hand, even before passage of the Act, some courts carefully scrutinized the provisions of decrees before entering a consent judgment. Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965); United States v. Carter Prod., Inc., 211 F. Supp. 144 (S.D.N.Y. 1962). At least one court stated that it would disapprove the decree if it was unenforceable or adversely affected the interests of third parties. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (D.C. Cal. 1969), *appeal dismissed*, 397 U.S. 248 (1970). In several cases where the trial court solicited comments of interested parties, inadequacies in the decrees were discovered and remedied. *E.g.*, United States v. Carter Prod., Inc., 211 F. Supp. 144 (S.D.N.Y. 1962).

87. United States v. Gillette, ANTITRUST & TRADE REG. REP. (BNA) No. 746, at D–1 (D. Mass. 1975) (inadequate divestiture and not agreeing to refrain from entering dry

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically, I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass.[88]

Courts will also decide whether a decree is in the public interest by determining whether the decree provides substantially the same relief the government could have obtained had it won the case at trial.[89]

Although it is still too early to assess the full impact of the Act on the interpretation of consent decrees, the Supreme Court has demonstrated its willingness to utilize documents surrounding the negotiation and entry of the decree to clarify ambiguous terms in order to determine a violation and assess appropriate penalties.[90] The Court was not dealing with the 1974 Act, and made no reference to its provisions; however, the Court's use of extrinsic evidence is an implicit affirmance of the Act's methodology, and may portend future use of the modified contract approach to help interpret consent decrees.

III. ENFORCEMENT AND SANCTIONS

If a defendant fails to comply with the terms of a consent decree, the government may seek one or more of four distinct sanctions. First, either the Antitrust Division or the FTC can request the court to modify the decree.[91] Although modification is not, strictly speaking, an enforcement measure, as there is no penalty imposed on the defendant, the defendant must comply with the terms of the new decree which have been altered to meet new circumstances.

Second, criminal contempt is available to the Antitrust Division if a firm persistently and flagrantly violates the terms of a decree. The consent decree is no different from a litigated decree in this respect: the judge punishes the disobedience in order to vindicate the court's authority.[92]

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shaving products field); United States v. Associated Milk Producers, 394 F. Supp. 29 (W.D. Mo. 1975) (political pressure).

88. United States v. Gillette, ANTITRUST & TRADE REG. REP. (BNA) No. 746, at D–1 (D. Mass. 1975).

89. *Id.*; United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *appeal dismissed*, 397 U.S. 248 (1970).

90. United States v. ITT Continental Baking Co., 420 U.S. 223, 237–40 (1975).

91. *See* Note, *Requests by the Government for Modification of Consent Decrees*, 75 YALE L.J. 657 (1966).

92. *See* United States v. Schine, 125 F. Supp. 734 (W.D.N.Y. 1954). Any court of the United States has "power to punish by fine or imprisonment, at its discretion such contempt of its authority . . . as . . . [d]isobedience or resistance to its lawful writ,

Civil contempt, a third approach, is a judicial sanction to force either "compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance."[93] In a civil contempt action, the court imposes a daily fine, or orders incarceration, until the defendant purges himself of contempt by complying with the court order.[94]

In theory the primary purpose of civil contempt is to preserve the benefit of the decree to third parties by securing immediate compliance.[95] Criminal contempt punishes past conduct which disregarded the authority of the court. The theoretical distinction in purpose between civil and criminal contempt is not as important as the difference in the identity of the parties seeking the order and the nature of the relief sought.

> While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.[96]

Only the FTC may seek the fourth remedy by proceeding under section 11(*l*) of the Clayton Act[97] and/or section 5(*l*) of the FTC Act,[98] which authorize daily civil penalties of up to $10,000. Although proving violation of the consent decree raises issues similar to those of contempt, the action is a "suit to enforce" the consent order.

A. *Modification*

Once a consent decree has been in operation for a few years, either party to the decree may seek to change some of its terms. If the

process, order, rule, *decree*, or command." 18 U.S.C. § 401 (1970) (emphasis added). *Cf.* United States *ex rel.* Porter v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947) (no criminal contempt where court order violated unintentionally).

93. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1948). *See also* Maggio v. Zeitz, 333 U.S. 56, 68 (1948); United States v. UMW, 330 U.S. 258, 303–04 (1947); Penfield Co. v. SEC, 330 U.S. 585, 590 (1947).

94. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 448 (1911). *See also* notes 147–48 *infra* and accompanying text.

95. Maggio v. Zeitz, 333 U.S. 56, 67–68 (1948).

96. McCrone v. United States, 307 U.S. 61, 64 (1939). Even when no third party has a clear proprietary interest, courts have permitted the government to seek civil contempt for the benefit of the public. United States v. UMW, 330 U.S. 258 (1947); United States v. Brotherhood of R.R. Trainmen, 95 F. Supp. 1019 (D.D.C. 1951).

97. 15 U.S.C. § 21(*l*) (1970).

98. *Id.* § 45(*l*) (Supp. V, 1975). The maximum civil penalty was raised from $5,000 to $10,000 in 1973. While 15 U.S.C. § 21(*l*) still limits penalties to "not more than $5,000 for each violation," it has been held that the two sections must be read in *pari materia*. Thus the maximum penalty under both statutes is $10,000. United States v. Papercraft Corp., 393 F. Supp. 415, 417–18 (W.D. Pa. 1975).

defendant feels that the decree restrictions are too burdensome and produce unanticipated results, or if the government decides that the terms are not strict enough, a motion for modification may be filed in the district court. Since modification is essentially antagonistic to the contractual aspect of the consent decree, courts are generally reluctant to grant such a modification and have placed a heavy burden on the moving party who wishes to obtain a change in the status quo.[99] The standard, however, is not settled and courts seem divided as to the proper model to utilize in modification. The majority of courts adhere to a contract model,[100] but there is authority to the effect that, when the party seeking modification is the government, a less burdensome standard should be applied.[101]

The landmark Supreme Court decision, *United States v. Swift & Co.*,[102] set the standard for judicial modification of antitrust consent decrees. In *Swift* the defendant firm argued that certain restrictions in a twelve year old consent decree were "useless and oppressive."[103] Justice Cardozo writing for the majority and denying the motion explained:

> The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[104]

Justice Cardozo's test, as it has been subsequently interpreted, is two-pronged. First, the defendant must show that the conditions leading to the decree have changed so drastically that the need for the

99. *See* notes 102–07 *infra* and accompanying text.

100. *E.g.*, United States v. Owens-Corning Fiberglass Corp., 178 F. Supp. 325 (N.D. Ohio 1959).

101. *See* Note, *supra* note 91, at 662–64.

102. 286 U.S. 106 (1932).

103. *Id.* at 113.

104. *Id.* at 119.

Swift attempted to modify the decree in 1960 on the basis of Rule 60(b)(5) of the Federal Rules of Civil Procedure, which allows a court to relieve a party from a final judgment if it "is no longer equitable that the judgment should have prospective application." This rule, according to the district court, merely enacted existing substantive law and did not change the *Swift* standard. United States v. Swift & Co., 189 F. Supp. 885, 905 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961).

decree no longer exists.[105] Second, the defendant must show an unjustifiable present hardship "evoked by new and unforeseen conditions."[106] Even when the defendant proves that there is a hardship, modification will be denied if the government can establish that the restriction is imposed in the public interest.[107]

The *Swift* test, or one patterned on it, is used at both the federal and state level for modifying decrees of continuing effect.[108] While many commentators and cases have suggested that the *Swift* rule is to be applied just as strictly to the government, as to private parties,[109] government motions for modification appear to be tested on a separate and relaxed standard.[110]

Chrysler Corp. v. United States[111] was the first indication by the Supreme Court that a different standard would be used to evaluate government modification requests. *Chrysler* arose from an indictment of the three major automobile manufacturers, General Motors, Ford, and Chrysler, for discriminatory practices in the financing of automobile purchases. In 1938, Ford and Chrysler consented to decrees which required them to separate from their affiliate loan companies.[112]

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105. The change can be one of fact or law. Systems Fed'n No. 91 v. Wright, 364 U.S. 642, 647–48 (1961).

106. 286 U.S. at 119.

107. 189 F. Supp. at 912.

108. In state courts the moving party must demonstrate that a change in circumstances has made the decree unduly oppressive. *See, e.g.*, Ozark Bi-Products, Inc. v. Bohannon, 224 Ark. 17, 21, 271 S.W.2d 354, 357 (1954); Sontag Chain Stores Co. v. Superior Ct., 18 Cal. 2d 92, 95, 113 P.2d 689, 690 (1941); Jackson Grain Co. v. Lee, 150 Fla. 232, 237–38, 7 So. 2d 143, 146 (1942); Emergency Hosp. of Easton v. Stevens, 146 Md. 159, 166, 126 A. 101, 104 (1924); Weaver v. Mississippi & Rum River Boom Co., 30 Minn. 477, 479, 16 N.W. 269, 269–70 (1883); Board of County Comm'rs v. Scott, 178 Neb. 53, 54–55, 131 N.W.2d 711, 712 (1964); Johnson & Johnson v. Weissbard, 11 N.J. 552, 555–56, 95 A.2d 403, 405 (1953); People v. Scanlon, 11 N.Y.2d 459, 462, 184 N.E.2d 302, 303, 230 N.Y.S.2d 708, 709–10 (1962); 46 S. 52nd St. Corp. v. Manlin, 404 Pa. 159, 160, 172 A.2d 154, 155 (1961); Ladner v. Siegel, 298 Pa. 487, 497, 148 A. 699, 702 (1930); Uvalde Paving Co. v. Kennedy, 22 S.W.2d 1091, 1092 (Tex. Civ. App. 1929).

In federal court, *Swift* has been cited well over one hundred times. *See* United States v. Swift & Co., 189 F. Supp. 885, 901 (N.D. Ill. 1960).

109. M. Goldberg, The Consent Decree: Its Formulation and Use 6 (Occasional Paper No. 8, Bureau of Business and Economic Research, Michigan State Univ.)(1962), at 2; Dabney, *Antitrust Consent Decrees: How Protective An Umbrella?*, 68 YALE L.J. 1391, 1392–93 (1959); Jinkinson, *Negotiation of Consent Decrees*, 9 ANTITRUST BULL. 673, 682 (1964); Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 MICH. L. REV. 1051, 1054–62 (1958). *See* United States v. Radio Corp. of America, 46 F. Supp. 654 (D. Del. 1942).

110. Duncan, *Post-Litigation Resulting From Alleged Non-Compliance With Government Antitrust Consent Decrees*, 8 W. RES. L. REV. 45, 48–49 (1956); Phillips, *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39, 45 (1961); Note, *supra* note 91, at 660–64.

111. 316 U.S. 556 (1942).

112. *Id.* at 557.

The decrees were to lapse in 1941 if the Government did not obtain either a decision against, or settlement with, General Motors. In 1941, Ford and Chrysler agreed to a one year extension when the Government was unable to conclude the suit against General Motors.[113] When the Government requested a second extension in 1942, Chrysler opposed the modification. The lower court granted the modification[114] and the Supreme Court affirmed.[115] The Court stated: "We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree."[116] While the Court cited *Swift*, there was no showing of change sufficient to meet that burdensome test. What is even more surprising, when Ford sought to be relieved of the provisions in 1948, the Court held that the Government had not shown "good cause" to continue the restrictions.[117]

The opinions that followed *Ford* and *Chrysler* have not reconciled the standard employed in the automobile finance cases with the *Swift* standard. In fact, the Court created another test, by denying a government request and stating that modification is appropriate "where necessary to preserve competition and to prevent monopoly."[118]

The differences between various standards result from the dual nature of the consent decree. The strict contract view of consent decrees would emphasize finality, and would therefore favor the *Swift* standard. On the other hand, if the consent decree is perceived as a continuing judicial order, designed to safeguard the public interest in antitrust enforcement, then the government should be able to seek modification to effectuate the "purpose" of the decree. The mixed judicial response is essentially a reflection of the hybrid decree, consequently there are reasons not to overemphasize either aspect.

Commentators have pointed out, with reference to the strict contractual theory of *Swift*, that the efficacy and efficiency of consent decrees as devices to resolve antitrust disputes depends upon the finality of settlements.[119] If the terms of a decree are subject to change, the parties can place little reliance on it, and the entire procedure is

113. *Id.* at 560.
114. *Id.* at 562.
115. *Id.* at 564.
116. *Id.* at 562.
117. Ford Motor Co. v. United States, 335 U.S. 303, 322 (1948). Some commentators suggest that the *Ford* case signalled a return to the *Swift* standard. *See* Comment, 55 MICH. L. REV. 92, 97 (1956); Comment, *The Consent Decree in Antitrust Enforcement—Analysis and Criticism*, 32 ROCKY MTN. L. REV. 367, 371–72 (1960).
118. Hughes v. United States, 342 U.S. 353, 357 (1952).
119. Kramer, *supra* note 109, at 1058; Comment, 55 MICH. L. REV. 92, 95–96 (1956).

wasted. Thus, the commentators argue, courts should require the government to meet the *Swift* standard, and should be reluctant to alter the product of the negotiation process.[120]

The judicial order, or "purpose," approach seems to have arisen as a result of several deficiencies in the strict contract theory.[121] First, the court's role of furthering the public interest in fair competition was more formal than real under the strict contract approach.[122] An interpretation restricted to the written document itself might result in binding the public to the terms of a decree which has an anticompetitive effect. Second, there was concern that the consent decree could easily be abused to shelter and legitimize anticompetitive conduct.[123] Therefore, if a decree is not securing compliance with the law, courts determined that the terms should be modified on a showing that this major justification for the decree was not being fulfilled.[124]

In conclusion, there is merit to arguments for both the contract and purpose analysis and it is not surprising to find that courts have applied both the *Swift* test and the purpose test.[125]

B. *Criminal Contempt*

The elements of a criminal contempt action are that the defendant: (1) committed acts which disobeyed or resisted the lawful decree of the court; (2) had knowledge or notice that the actions were prohibited by the order; and (3) wilfully participated in such disobedience or resistance.[126] The first element is the actus reus and presents little difficulty; the action or threatened action which prompted the government challenge is usually clear. Whether the action is a violation of the decree, and whether the second and third elements are present, raise more difficult problems.

Both the determination of a violation and the second element, notice or knowledge, depend upon the court's interpretation of the

120. *See* Peterson, *Consent Decrees: A Weapon of Anti-trust Enforcement*, 18 U. KAN. CITY L. REV. 34, 40 (1950).

121. Note, *supra* note 91, at 665.

122. *See* Jinkinson, *supra* note 109, at 676.

123. *See* Dabney, *supra* note 109, at 1391.

124. This argument is suggested by the very elements of the standard for modification as enunciated in cases following *Swift*. The first prong of this test relies upon a drastic change in the conditions which originally led to the decree. At the same time, any judicial examination of such conditions would be inimicable to a strict contract approach. Nevertheless, it is obviously important to provide procedures to adapt decrees to changing conditions.

125. *See* notes 99–118 *supra* and accompanying text.

126. United States v. Schine, 125 F. Supp. 734, 737 (W.D.N.Y. 1954).

terms of the decree. If it is unclear whether the defendant has violated the decree, it is unlikely that the firm and its officers would have been aware that the activity was improper, and criminal contempt is probably inappropriate. Where the violation is clear, however, notice may be assumed. Hence, the approach taken in interpretation of the decree may be decisive. If the court takes a strict contract approach, the government will have to prove that the conduct in question violates specific decree prohibitions. Violations under this standard will be difficult to prove. Under a purpose or a modified contract analysis, a court would determine whether the particular action was the type of activity that the decree was intended to cover when the decree was written. Violation and notice should be easier to prove. The harshness of criminal contempt sanctions, on the other hand, could easily make courts utilizing a purpose approach reluctant to find notice.[127] When courts interpret the decree broadly to find a violation, they are more likely to separate the issues of violation and notice. Thus under either the contract or the purpose approach, criminal contempt has been difficult to prove.

An example of how a court's view of the decree will play a factor in the outcome of the criminal contempt action is *United States v. American Can Co.*[128] The defendant, a lessor of canning equipment, was prohibited by a final judgment in a prior antitrust case from "conditioning the availability of . . . containers . . . upon the purchase or lease of container closing machines . . . ."[129] Several years later Davis sued the defendant for damages suffered because of defective cans supplied by American. While the damage claim was pending, Davis's equipment lease expired. American sought renewal of the lease and an "open order acknowledgment contract," which would require Davis to accept cans without the customary warranty until American could approve the methods and processes used by Davis. Davis, however, feared that renewing the lease with the open order acknowledgment would constitute a waiver of its pending warranty claim, and so refused to renew. When American pressured Davis to renew, the Government brought a criminal contempt action against American for violating the terms of the judgment.

The Government argued that American was attempting to prejudice Davis' claim, and had violated the terms of the decree by threatening to break off sales during the peak canning season. American argued that the terms did not discriminate against Davis since the same

127. *See* text accompanying notes 128–33 *infra*.
128. 126 F. Supp. 811 (N.D. Cal. 1954).
129. *Id.* at 811 n.1.

conditions were offered to, and accepted by, other lessees.[130] The court reasoned that:

> [T]he dispute between the government and American narrows itself to this question: Did American, by imposing as conditions for the sale of containers to Davis, the signing of a lease for can closing equipment and an open order acknowledgement contract, violate the decree of this Court? In themselves, the conditions American actually presented to Davis were legitimate and proper under the terms of the judgment of the Court.[131]

The court in *American Can* was dealing with a final judgment, not a consent decree. The interpretation problems regarding the purposes of a negotiated decree never arose. Nevertheless, the court strictly construed the terms of the earlier judgment to find no violation and no notice.

Another example of a court's reluctance even to consider the charge of criminal contempt unless the defendant had notice that its actions constituted contumacious conduct, is *United States v. Kelsey-Hayes Co.*[132] A 1955 consent decree prohibited the defendant manufacturers from entering into any collusive price or marketing agreements with any distributor. The manufacturer subsequently began to "suggest" retail prices and "discuss" market problems with distributors in a joint trade association. The Government conceded that the company's actions, taken by themselves, were not prohibited, but argued that the totality of the conduct violated the decree. The court granted a motion to dismiss with the following explanation:

> While recognizing the importance of enforcing antitrust decrees, it offends my judicial sense of common everyday fairness to have respondents charged with *criminal* contempt on a Consent Decree outstanding for over fourteen years, without notice or even an intimation to them by the government of a claimed violation or a good faith attempt to resolve any differences there may be, . . .[133]

The Government's case never got beyond the actual knowledge or notice requirement because it was premised on a purpose analysis of the consent decree, which the court refused to follow.

The element of wilfulness is the most difficult and elusive part of the government's case for criminal contempt. Even when the violation

130. *Id.* at 812–13. American apparently had sufficient leverage to extract any terms it wanted. The fact that other lessees and purchasers agreed to the conditions would therefore seem irrelevant.

131. 126 F. Supp. at 814.

132. [1971] Trade Cas. ¶ 73,741, at 91,120 (E.D. Mich.), *appeal dismissed*, 476 F.2d 265 (6th Cir. 1973).

133. *Id.* at 91,126 (emphasis in original).

is clear, conviction is rare because the government must prove defendant's specific intent beyond a reasonable doubt.[134] The factual pattern in any antitrust action is complex, which further complicates problems of proof. Moreover, the court seldom separates its analysis of the two crucial issues—interpretation of the decree and evidence of wilful disobedience.[135] For example, in *United States v. Kroger Grocery & Baking Co.*,[136] the defendant Kroger admitted that its employees had violated a court decree, but denied that the violation was intentional. Kroger detected the violation and had made a good faith effort to correct its action. The Government argued that specific intent should be imputed. The Seventh Circuit, however, reversed a judgment of criminal contempt on the ground that the Government failed to prove "specific wrongful intent."[137] Thus, it seems courts are reluctant to find a defendant guilty of criminal contempt unless the violation is "flagrant, intentional, deliberate or reckless," a difficult standard to meet.[138]

In *United States v. Schine*[139] the Government successfully proved wilful disobedience by demonstrating a conspiracy to violate specific decree prohibitions. In 1949, the Government settled a monopolization suit against the Schine Chain Theatres, and the court approved a consent decree which called for divestiture of certain theaters. The order also prohibited Schine from acquiring new theaters, without court approval, and prohibited Schine from entering into any conspiracy or combination to monopolize the theater industry.[140] The corporation, and its owners, thereafter purchased and booked other movie theaters through an affiliated corporation and an illegal pooling arrangement with a subsidiary. The Government instituted criminal

134. *See In re* Floersheim, 316 F.2d 423, 428 (9th Cir. 1963) (defendant found not guilty of contempt because intentional, flagrant, deliberate, or reckless conduct was not proven).

135. *E.g.*, United States v. Schine, 125 F. Supp. at 737.

136. 163 F.2d 168 (7th Cir. 1947).

137. *Id.* at 173–74.

138. 316 F.2d at 428. The court in United States v. Kelsey-Hayes Co., [1971] Trade Cas. ¶ 73,741, at 91,120 (E.D. Mich.) put the standard in perhaps even stricter terms:

> The government here concedes that respondents did not participate in a clandestine, secret, collusive or predatory conduct, "it is hard to characterize them [their conduct] as vicious or overt" and there is no claim of a hard-core sinister price-fixing agreement, as obtained in the *General Electric* cases. There is no claim of a deliberate, "flagrant" violation.

Id. at 91,125 (quoting the Government's statement during oral argument of the case on October 5, 1971, Record at 80, 96).

139. 125 F. Supp. 734 (W.D.N.Y. 1954), *aff'd*, 260 F.2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934 (1959).

140. 125 F. Supp. at 735.

contempt proceedings against Schine and its owners, arguing that the defendants disobeyed the consent decree by using an illegal pooling arrangement to buy and book theaters, by arranging discriminatory pricing conditions, and by acting in concert with the subsidiary to violate the consent decree.[141]

The court held the defendants in contempt for violating and conspiring to violate the decree.[142] The court was convinced that the individuals had devised the pooling arrangement to avoid the prohibitions of the decree, making the violation both flagrant and wilful. Unfortunately for the defendants, the misconduct was itself a violation of the antitrust laws and could not be justified as a normal business practice. All three elements of criminal contempt being present, the court fined both the corporation and its officers for wilfully resisting a lawful judicial order.[143]

The *Schine* case is the exception rather than the rule. The fact that the Antitrust Division had to show a conspiracy to commit what would have been an independent antitrust offense in order to prove wilfulness, demonstrates how difficult it is to meet the standard. Until courts are willing to create a presumption of wilfulness, or decrease the importance of specific intent, criminal contempt will remain an underused enforcement tool.

C. *Civil Contempt*

A civil contempt action offers the government two advantages over a criminal contempt proceeding. First, the government does not have to prove the defendant's wilfulness or specific intent to disobey the decree terms. Since the purpose of a civil contempt action is to effectuate the decree, the only issue is whether the defendant's conduct conforms to the decree terms. Secondly, the government's burden of proof is less onerous. In civil contempt, the proof need only be clear and convincing rather than proof beyond a reasonable doubt.[144]

The nature of a civil contempt proceeding has provided two other enforcement benefits. Because of the harshness and stigma of a criminal conviction, courts have been reluctant to find violations when a criminal sanction is sought. With civil contempt, the harshness of the

141. 260 F.2d at 555.

142. *Id.* at 556.

143. *Id.* at 555.

144. This difference may be more theoretical than real, however, since the courts have required the evidence to be highly convincing. One court has held that the defendant was not in civil contempt "where there is a reasonable ground to doubt the wrongfulness of the conduct." Electro-Bleaching Gas Co. v. Paradon Eng'r Co., 15 F.2d 854, 855 (E.D.N.Y. 1926).

penalty is considerably diminished since the contemnor "carries the keys to the jail in his back pocket;"[145] if the defendant complies, the fine is lifted or the imprisonment ends. Courts, therefore, have been more willing to use their broad discretionary power to fashion appropriate relief.[146]

Moreover, civil contempt is a better device to bring relief to third parties directly affected by noncompliance. While the courts and the Antitrust Division have staunchly refused to permit third parties to enforce consent decrees,[147] a civil contempt action may compensate interested parties who sustain losses as a result of the noncompliance.[148] Thus, a court can not only redress the injury to competition, and reverse the anticompetitive effect of the misconduct, but may also restore third parties to the position they would have occupied had the defendant adhered to the decree terms.

To prove civil contempt, the government must show conduct which violates the decree, and language which expressly prohibits the action and puts the defendant on notice that his action violates the decree terms. If the decree does not prohibit the conduct, the government will fare no better in civil contempt proceedings than it fares in seeking criminal contempt. Thus, in several cases the vague wording of the decrees has led to an early dismissal of the action.

In *United States v. Associated Credit Bureaus, Inc.* (ACB),[149] the defendant was charged with violating a 1933 consent decree which prohibited monopolization of credit information sales, and which prevented the association from expelling members for obtaining credit information from other organizations. ACB rules required members to use "coupons" when transacting business among themselves. A competitor solicited ACB members, and ACB responded by reminding its members that if they did not use "coupons" in intra-association

145. Penfield Co. v. SEC, 330 U.S. 585, 590 (1947) (citing *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

146. The courts must weigh the "character and magnitude of the harm threatened . . . and the probable effectiveness of any suggested sanction . . . ." United States v. UMW, 330 U.S. 258, 304 (1947). *See also* McComb v. Jacksonville Paper Co., 336 U.S. 187, 191–95 (1949).

147. *See* note 2 *supra*.

148. Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946). Where compensation for interested parties is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of the complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the dispute. United States v. UMW, 330 U.S. at 304. *Cf.* Michaelson v. United States, *ex rel.* Chicago, St. P., Minn., & Omaha Ry., 266 U.S. 42, 65 (1924) (criminal contempt fine may be paid to injured third parties, but this does not change the essential nature of the action).

149. 345 F. Supp. 940 (E.D. Mo. 1972).

transactions, membership could be terminated. The Antitrust Division sought civil contempt to have the coupon rules declared a violation of the decree.[150]

The court held that ACB had not violated the decree terms and that nothing in the settlement prevented the defendant from imposing its own rules on its members.[151] The court found that the decree was directed against conduct which prevented members from transacting business with non-member credit bureaus. It reasoned that the coupon rules promoted uniformity and reliability in credit information.[152] More importantly, since the coupon rules had existed in 1933, and the Government had not sought to expressly prohibit them at that time, the defendant was not barred from enforcing its rules, which were a reasonable restriction on the sale of credit.[153] The court held that the coupon rule applied only to transactions between members, and thus did not "prohibit members from using other organizations as sources of credit information."[154]

The court in *Associated* did not reach this conclusion by a strictly contractual approach; rather it analyzed the background of the decree terms, the function of coupon rules and the probable effect on competitors.[155] A contractual approach would have settled the case if the words of the decree did not expressly prohibit the imposition of coupon rules on members. Even under the modified contract approach taken in *Associated*, however, the language of the decree did not put the defendants on notice that its conduct was a violation of the agreement.

In *United States v. Martin Linen and Supply Co.*,[156] the defendant almost succeeded in obtaining the application of criminal contempt standards in a civil contempt hearing. The *Martin Linen* consent decree declared:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
> (A) threatening, coercing, inducing or attempting to induce:
> (1) Any linen rental supplier to refrain while in business, from furnishing linen supplies to any customer . . . .[157]

150. *Id.* at 944.
151. *Id.* at 946.
152. *Id.* at 946–47.
153. *Id.*
154. *Id.* at 946.
155. *Id.* at 945–47.
156. 485 F.2d 1143 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).
157. *Id.* at 1145.

Subsequently, Martin Linen allegedly attempted to recoup its losses by seeking reciprocal trade agreements from other linen suppliers not to compete for Martin Linen's distributorships. The defendant allegedly strengthened its negotiating position with threats of recoupment, price wars, and other retaliatory tactics.[158] The district court held that under the language of the consent decree Martin Linen could make general trade threats to persuade competitors to refrain from soliciting Martin Linen's distributors.[159] The court took a strict contract approach, interpreting the language of the decree to mean that the mere threat of retaliation, without the effect of actually inhibiting competitors, did not violate the decree terms.[160] Such a high standard—an actual showing of harm to competition as a result of the violation of the consent decree—had heretofore never been an element of contempt.

Accordingly, the Fifth Circuit reversed. It found that the only issue was whether the Government could show that the threats were "aimed at a competitor with the intent to have that competitor refrain from competing with Martin."[161] The court went on to say:

> The activities of recoupment and retaliation are not *per se* violations of Sec. V(A)(1) [of the consent decree]. They are violations, however, if their announced purpose is to cause Martin's competitors to refrain from competing, since the Section prohibits activities which "directly or indirectly" attempt "to induce" competitors "*to refrain*" from doing business.[162]

Even as it corrects the trial court, however, the circuit court mistakes the purpose of civil contempt and virtually imposes a standard of "wilfulness." The Government must prove an "announced purpose" where, under any rational interpretation of the language, the defendant is proscribed from making retaliatory threats. Perhaps the court did not need to state the requirement more loosely, since Martin Linen had allegedly aimed its threats at competitors, but there is no justification in a civil contempt proceeding for a court to require that the defendant specifically intend to violate the terms of the decree.[163]

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158. The Antitrust Division originally sought both criminal and civil contempt. The dropping of the criminal charge led Martin Linen to complain that the civil contempt action had placed them in "double jeopardy." The Fifth Circuit rejected the argument. "The mere arraignment and pleading to an indictment or the conduct of a preliminary examination does not place the defendant in jeopardy." *Id.* at 1147. Only when the criminal trial begins do the fifth amendment policies come into play. *Id.*

159. *Id.* at 1145–46.

160. *Id.* at 1150–51.

161. *Id.* at 1149.

162. *Id.* at 1150 (emphasis in original).

163. *Martin Linen* is also noteworthy as an illustration of the danger of joining civil and criminal contempt. Where the two are joined, courts will review both cases on

In another civil contempt action, *United States v. Work Wear Corp.*,[164] the defendant was charged with failure to meet a divestiture schedule contained in a prior consent decree.[165] The defendant had been seeking a favorable tax ruling in regard to the divestiture. Proof of the wilfulness of the delay would have been difficult, so the Government sought only civil contempt. The court found contempt, and ordered the defendant to comply within five months or face a cumulative daily fine of $5,000.[166]

Although *Work Wear* did not involve any difficult issues of interpretation, it illustrates the value of civil contempt enforcement. Since the government does not have to prove specific intent, there is a greater chance of successful enforcement. This in itself makes the terms of consent decrees more meaningful: the corporations are more likely to believe that technicalities will not stand in the way of enforcing compliance with the decree. On the other hand, the reluctance of the courts to relax the criminal contempt standards in antitrust cases raises serious doubts about its deterrent value. Therefore, civil contempt, while more limited in aim, will render the consent decree a more effective and respected device.

In addition, the courts' flexibility in creating an enforcement order in civil contempt actions could allow the court to go beyond merely punishing the wrongdoing; the court could redress injuries suffered by third parties, if the judge felt that such action was appropriate.[167] The government might even begin to anticipate the possibility of third party relief in a civil contempt action. After the violation, when the government petitions for enforcement of the decree, it could describe the parties injured by noncompliance. Then the injured private parties simply would have to establish the quantum of damage. Persons harmed by noncompliance who are outside the group described by the government could still recover damages, but would have to establish that defendant's noncompliance caused the harm in addition to proving damages.

Finally, civil contempt is the most appropriate remedy to achieve the purposes of the consent decree program. Since consent decrees are not predicated on any factual record and the defendant admits to no

appeal in the interest of judicial economy. *Id.* at 1145, 1148. While many courts try to keep the two distinct, the stricter criminal contempt standard may be applied to both. *Id.* at 1149. *See In re* Merchants' Stock & Grain Co., 223 U.S. 639, 642 (1912).

164. [1975-2] Trade Cas. ¶ 60,431, at 66,901 (N.D. Ohio).

165. *Id.* at 66,903.

166. *Id.* at 66,904.

167. *See* note 148 *supra*.

statutory violation, it is difficult for a court to penalize noncompliance unless it is flagrant. Civil contempt allows the government to achieve a remedy comparable to specific performance of a contract.[168] Criminal penalties, largely defined by statute, cannot be fashioned to redress the violation and injury with the same specificity.

D. *Federal Trade Commission Civil Suits*

When a firm has entered into a consent, or cease and desist order with the FTC, there are additional statutory remedies for noncompliance. Under section 5(*l*) of the Federal Trade Commission Act[169] and section 11(*l*) of the Clayton Act,[170] the FTC has the power to bring a civil action to enforce the consent order.[171] The FTC's civil remedy allows a court to assess a defendant up to $10,000 for each separate violation. There is also provision for punishing, on a daily basis, "continuing violations" where the defendant allows or encourages the illegal activity to persist.[172] Thus, in addition to the civil and criminal contempt remedies, the FTC can seek a large punitive fine for violations of its consent orders. While courts can hear enforcement actions brought by the FTC on both civil contempt and statutory grounds,[173] the statutory remedy provides clearer direction when the issue of the appropriate sanction arises. Therefore, the Commission more frequently takes advantage of sections 5(*l*) and 11(*l*) when either remedy might be appropriate.

The issues in the FTC civil suit closely resemble the issues raised under civil contempt. The FTC must prove conduct which violated the

168. *See* note 145 *supra* and accompanying text. Of course, the contract analogy is not completely accurate. The consent decree also has a "public purpose" aspect, and contractual remedies and rules of damages are not responsive to this component. Nevertheless, the analogy is apposite in that the public deserves no less than strict compliance with the terms of the decrees.

169. 15 U.S.C. § 45(*l*) (Supp. V 1975) (amending 15 U.S.C. § 45(*l*) (1970)).

170. 15 U.S.C. § 21 (1970).

171. *See* FTC v. Henry Broch & Co., 368 U.S. 360, 365 n.6 (1962). Originally the FTC had a cumbersome enforcement procedure requiring, in effect, proof of three violations. First, the FTC had to demonstrate conduct which justified the cease-and-desist order; then it had to prove conduct which violated the explicit terms of the order, for a court of appeals to enforce the order. Finally, it had to prove a violation (of either the Clayton Act or the cease-and-desist order) for the "violator to be held in contempt of the court of appeals enforcement order." United States v. Beatrice Foods Co., 493 F.2d 1259, 1266 (1974). *See also* FTC v. Jantzen, Inc., 386 U.S. 228 (1967).

The 1959 Amendments to the Clayton Act replaced this procedure with the present statutory remedy, paralleling the amendments to the Federal Trade Commission Act enforcement provisions contained in the 1938 Wheeler-Sea Act. 15 U.S.C. § 21; 15 U.S.C. § 45(*l*) (Supp. V 1975) (amending 15 U.S.C. § 45(*l*) (1970)).

172. 15 U.S.C. § 45(*l*) (Supp. V 1975) (amending 15 U.S.C. § 45(*l*) (1970)); 15 U.S.C. § 21(*l*) (1970).

173. 267 F. Supp. at 10–11.

terms of the decree, and that the defendant was on notice that its actions violated the terms of the order.[174] Again, the court's interpretive approach is a major aspect of the notice issue. A court adhering to a strictly contractual view will require the government to show clear disobedience of the decree. On the other hand, if a court follows either a modified contract or purpose analysis, it may require a lesser showing to find a violation. Courts can, and do, cite contempt cases as precedent for their decisions in civil penalty actions.[175]

The most important issue in the FTC action is not whether there has been a violation of the decree, but whether there has been a single or "continuing" violation. The line of demarcation is by no means clear. Congress intended the sanction against continuing violations to reach situations in which the harm to competition became irreversible if the practice continued over a period of time. Specifically, it was to cover situations such as failure to eliminate an unlawful merger, failure to break up an interlocking directorate, conspiracies to fix prices, and conspiracies to control production.[176]

The first case to test the imposition of a cumulative daily fine arising from a continuing violation of a consent order was *United States v. Beatrice Foods Co.*[177] Under the terms of a 1956 consent decree, Beatrice was not to acquire "directly or indirectly, through subsidiaries or otherwise, any interest in" a dairy.[178] Subsequently, Beatrice acquired several distributorships from Maple Island dairies, and the FTC contended that there was a continuing violation for 780 days and asked for a total fine of $156,000. The defendant argued that only a single violation had occurred because there had only been one "acquisition." The Eighth Circuit, however, held that the word "acquire" must mean "acquire and hold," since any other construction would render the order meaningless.[179]

In *Beatrice* the issue was not whether there had been a violation, but rather which penalty was appropriate. To determine the proper remedy the court used a purpose or modified contract analysis, looking to factors other than the actual wording of the decree. For example, Beatrice had proved itself to be in bad faith even before the litigation began. In prior acquisitions Beatrice had sought FTC approval; in the

174. *See* United States v. Standard Distrib., Inc., 267 F. Supp. 7 (N.D. Ill. 1967).

175. *E.g.*, United States v. ITT Continental Banking Co., 485 F.2d 16, 18 (10th Cir. 1973), *rev'd*, 420 U.S. 223 (1975); United States v. Standard Distrib., Inc., 267 F. Supp. 7, 10–11 (N.D. Ill. 1967).

176. 96 CONG. REC. 3026–27 (1950).

177. 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

178. *Id.* at 1262. *See* text accompanying notes 59–64 *supra*.

179. 493 F.2d at 1269–71.

present transaction it remained silent.[180] Going beyond a strict contractual analysis, the court noted that this was the type of experimentation with disobedience that consent decrees sought to prevent.[181]

In *United States v. ITT Continental Baking Co.*,[182] the Supreme Court approved the *Beatrice* approach. Continental was subject to a 1962 consent decree which forbade it from acquiring any part of any concern engaged in the production of bread. Before the ten year limit in the decree had expired, Continental acquired three bakeries. The FTC sought cumulative daily fines. The Supreme Court reversed the Tenth Circuit, and held that the term "acquisition" may entail a "continuing violation."[183] The Court construed "acquire" to mean both "obtaining and retaining" other bakery assets.[184] It cited as support *United States v. du Pont*[185] in which the word "acquire," as used in the Clayton Act, was interpreted to mean "acquire and hold," and noted that "acquire" is an antitrust term of art which necessarily implies retention.[186]

After dealing with the interpretation issue, the Court examined the propriety of the daily fine. Justice Brennan noted that Congress' intent in fashioning the continuing violation remedy was to reach those instances in which the detrimental effect to the public, and the advantage to the violator, continues and increases over a period of time, leaving no way to eradicate the effects of the violation after it has begun.[187] Continental's acquisition had eliminated competitors and naturally increased its share of the market. A single fine was clearly inadequate since it would constitute a mere cost of growth. But Continental could not overlook a cumulative daily fine so easily. For that reason, the Court found the cumulative penalty appropriate.[188]

In summary, civil enforcement action under the Federal Trade Commission Act Section 5(*l*) and Clayton Section 11(*l*) are resolved in much the same manner as civil contempt. The new issue that arises for interpretive analysis is the appropriate fine to levy against violators to insure effective enforcement.

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180. *Id.* at 1264.
181. *Id.* at 1269.
182. 420 U.S. 223 (1975). *See* text accompanying notes 65–77 *supra*.
183. 420 U.S. at 243.
184. *Id.* at 240.
185. 353 U.S. 586, 596–97 (1957).
186. 420 U.S. at 240–41.
187. *Id.* at 231.
188. *Id.* at 232–33. "[I]f violation of an order prohibiting 'acquiring' assets were treated as a single violation, any deterrent effect would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits to the perpetrator." *Id.* at 232.

E. *Effective Sanctions for Noncompliance*

Regardless of whether courts employ a contract or purpose analysis in the interpretation of ambiguous consent decree provisions, compliance ultimately hinges upon the effectiveness of the sanction imposed. After the court establishes that the defendant has failed to comply with the terms of the consent decree, the judge has broad discretion (within the bounds of the relief sought by the government) to determine the appropriate penalty.[189] Citation for criminal contempt, as rare as it is, can result in a stiff punitive fine and/or imprisonment of the officers responsible for the offending action.[190] A court which finds the defendant in civil contempt may order imprisonment and/or a daily fine until the order is carried out.[191]

Finally, the penalty in an FTC civil action is a single fine and/or a daily cumulative penalty.[192] Whether a single fine, daily fine, or imprisonment is appropriate depends on a number of factors related to the proper functioning of the antitrust laws. Different criteria are relevant, depending upon the nature of the action and the circumstances of each case.

Generally, the court's primary concern will be its purpose in imposing the penalty. In a criminal contempt action there has been proof of wilful misconduct by the defendant. The fine must be sufficiently severe to vindicate the authority of the court, and to deter the defendant and other parties from similar experiments with disobedience. In a civil contempt action, the fine may be less severe because its purpose is to insure the defendant's compliance. An FTC action combines elements of both civil and criminal contempt, since it is designed to punish disobedience and to coerce compliance.

If a court emphasized the criminal contempt aspect of an FTC action it would be justified in imposing a much stiffer fine than in a civil contempt proceeding. But, if a similar action were brought under

189. *See* United States v. ITT Continental Baking Co., 420 U.S. at 229 n.6; United States v. J.B. Williams Co., 498 F.2d 414, 438 (1974); United States v. ITT Continental Baking Co., 485 F.2d 16, 21 (1973).

190. *See* United States v. Schine, 125 F. Supp. 734 (W.D.N.Y. 1954), *aff'd*, 260 F.2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934 (1959).

191. *See* Penfield Co. v. SEC, 330 U.S. 585 (1947); Parker v. United States, 153 F.2d 66, 70 (1st Cir 1946); *cf.* United States v. UMW, 330 U.S. 258, 303–04 (1947) (lump sum fine ordered for criminal contempt and civil contempt in same proceeding).

192. *See* United States v. Ancorp Nat'l Servs., Inc., 367 F. Supp. 1221 (S.D.N.Y. 1973), *aff'd*, 516 F.2d 198 (2d Cir. 1975) ($204,200); United States v. Bostic, 336 F. Supp. 1312, 1321 (D.S.C.), *aff'd mem.*, 473 F.2d 1388 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ($80,000); United States v. Americana Corp., [1965] 3 TRADE REG. REP. (CCH) ¶ 9701.40 (D.C. Md.) ($100,000).

the FTC statute, the court should also look to other factors. Some of these have been identified by Judge Friendly: "The size of the penalty should be based on a number of factors including [1] the good or bad faith of the defendants, [2] the injury to the public and [3] the defendant's ability to pay."[193] Courts have also considered [4] the "total amounts of the payments received by the defendant in violation of the FTC Order . . . ."[194] These criteria have a broader application to other civil contempt suits, as well.

Reexamining the dual nature of the decree—contract and judicial order—explains these four factors and their relative importance in determining the size of the penalty. If a consent decree is deemed a judicial order, the violation is disobedience to a lawful court order and any sanction should be measured on the basis of the defendant's bad faith. On the other hand, where the decree is considered a contract, the damage award should be sufficient to put the injured party in the position he would have been in had the contract been performed. Since the other party to the contract is the government, as representative of the public, the damage translates into the second factor identified by Friendly—injury to the public. Thus, a strict contract theorist would conclude that the defendant is liable to the extent that his conduct caused the public harm. The practical problems with such a measure of damages are obvious. The tangible economic harm is difficult to measure in the context of the total economy, and it is difficult to assign it a monetary value. One court, in the context of imposing a fine as compensation for an injured third party, has interpreted *ITT Continental Baking* as equating "public harm with the violator's profits during the violation."[195] This simplifies the calculation considerably.

The third and fourth criteria, the defendant's ability to pay and the income resulting from the violation, are probably the most concrete. They are also, to an extent, interrelated. A large profit resulting from a violation can greatly enhance the defendant's ability to pay. A smaller, or nonexistent profit could have a negligible effect on the firm's ability to pay; also, losses in another business area could offset profits resulting from the violation. In this situation the violation profits could be large, but the ability to pay small.

The court will have to balance the ability to pay against the gravity and magnitude of the violation. This balancing may involve several

193. United States v. J.B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974) (enumeration added).

194. United States v. Ancorp Nat'l Servs., 367 F. Supp. 1221, 1224 (1973), *aff'd*, 516 F.2d 198 (2d Cir. 1975).

195. United States v. Papercraft Corp., 540 F.2d 131 (3d Cir. 1976).

considerations, such as projected firm earnings, capital structure, tax arrangements, and the probable deterrent effect of various sanctions. Where the profit from the violation constitutes the only significant increment in corporate earnings, that figure (or something near it) could be the fine, under an unjust enrichment theory. Where the violation profits are indeterminate, or where they do not represent the only significant earnings increase, the court should look primarily to the firm's ability to pay and set the fine at a figure large enough to deter future violations.

Economic theory may further explain why it is valuable to consider the defendant's ability to pay in setting a fine. Economists Breit and Elzinga argue that the present system of antitrust penalties should be replaced with a monetary fine equal to 25 percent of the defendant's pretax profit for each year in which it engaged in anticompetitive conduct.[196] Such a massive fine would cause risk averse corporate managers to be deterred from conduct which even approaches a violation.[197] In the context of enforcement actions, using the firm's profits to determine the appropriate fine has an appealing logic. The defendant's ability to pay is probably the most significant criterion because it provides the most "efficient" method to arrive at a figure that will be large enough to deter the firm, but not so large as to put it into insolvency.[198] Just as the courts developed an intermediary position in decree interpretation, so they should lessen emphasis on the bad faith and public harm aspects of the decree and focus on the more practical considerations.

As Breit and Elzinga recognize, the effectiveness of the sanction depends on the impact it has on management's decision whether to continue its challenged activity. Courts have often used the cumulative daily fine to coerce management to take a new course of action, in both FTC suits and contempt actions.

In *United States v. Schine*, the district court found the defendants guilty of criminal contempt and imposed total daily fines of $73,000.[199] Affirming the penalty, the Second Circuit agreed that the statute of limitations was not a bar to this contempt remedy:

> [A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the "illegal" conditions which

196. Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 711 (1973).

197. "The risk averse person will prefer the large probability of the small loss to the small probability of the large loss. The risk preferrer, on the other hand, will prefer the small probability of the large loss to the larger probability of the smaller loss." *Id.* at 699.

198. *Id.* at 712–13.

199. United States v. Schine, 270 F.2d at 555.

> they created continued up to the date of the order to show cause and resulted in what might be called "continuing contempts."[200]

The circuit court upheld the trial court's findings that the defendant wilfully violated the terms of the decree, and that punitive measures were appropriate to vindicate the authority of the court.[201] The court relied heavily on the purpose of the enforcement proceeding when setting the fine, and it is interesting to note that the penalty was identical to the FTC remedy: a cumulative daily fine.

A cumulative daily fine was also imposed in *United States v. Work Wear Corp.*,[202] where the court set a prospective cumulative fine of $5,000 per day to commence on a specified date in the future in case the defendant failed to comply with the decree.[203]

Unfortunately, it is still questionable whether the existing penalties are sufficient to secure compliance. In *United States v. Papercraft Corp.*,[204] the defendant failed to divest itself of a subsidiary within the timetable agreed upon in the consent decree. The trial judge found that Papercraft had acted in bad faith, and in an attempt to disgorge a part of the $5.3 million profit, fined the company $3,817,500. At a special evidentiary hearing on the propriety of the fine, the judge concluded:

> In considering Papercraft's financial ability to pay, and the harm caused by the delay, the degree of bad faith, and the benefit received by Papercraft, we do not think that the penalty assessed should be the maximum, however, it must be large enough to deter Papercraft and anyone else in the future from showing as little concern as Papercraft did for the need to meet the FTC timetable.[205]

IV. CONCLUSION

While the nature of consent decrees and orders remains partly shrouded in mystery, the effect of such negotiated settlements on the enforcement of antitrust laws is slowly emerging. Third parties cannot use the settlement for their own suits and, until very recently, they had little input into fashioning decrees. For its part, the government is bound by the decree for as long as it is effective since the decree has res judicata effect and modification of the decree is extremely difficult.

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200. 260 F.2d at 555–56.

201. *Id.* at 555, 557.

202. [1975–2] Trade Cas. ¶ 60,431, at 66,901 (N.D. Ohio 1975).

203. *Id.* at 66,904. In a number of FTC cases the total fines have ranged well over $100,000. *See, e.g.*, United States v. Ancorp. Nat'l Servs., Inc., 367 F. Supp. 1221 (S.D.N.Y. 1973), *aff'd*, 516 F.2d 198 (2d Cir. 1975) ($204,200); United States v. Americana Corp., [1965] 3 TRADE REG. REP. (CCH) ¶ 9701.40 (D.C. Md.) (judgment for $16,000; fine of $100,000).

204. [1975] Trade Cas. ¶ 60,314, at 66,254 (W.D. Pa.).

205. *Id.* at 66,263.

Lack of enforcement has led to widespread contravention of decree terms. While there are indications that the government intends to enforce the terms of outstanding decrees, there is very little precedent in the area. Notwithstanding this handicap, a proceeding brought by the government to force compliance with decree terms has much to recommend it. A civil contempt action brought by the Justice Department's Antitrust Division can secure compliance with decree terms by imposing sanctions too large to be ignored as a cost of business.

Much depends, however, on the manner in which the courts construe and interpret the ambiguous terms of consent degrees and orders. If the court adopts a strict contract approach, evidence will be restricted to the four corners of the document. On the other hand, a more expansive modified contract approach would allow the court to view the circumstances surrounding the entry of the consent decree. Such an approach would enable the court to interpret the decree more accurately by permitting consideration of the economic situation surrounding the adoption of the decree. This is why it is disappointing that the Supreme Court in *ITT Continental Baking* has recently reaffirmed the contract approach. Decisions such as this only frustrate the government's efforts to enforce consent decrees through contempt proceedings.

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