Washington University Law Review

Volume 24 | Issue 4

January 1939

The Auto-Finance Consent Decree: A New Technique in Enforcing the Sherman Act

Harold F. Birnbaum
New York Bar Association

THE AUTO-FINANCE CONSENT DECREE: A NEW TECHNIQUE IN ENFORCING THE SHERMAN ACT

HAROLD F. BIRNBAUM†

On May 18, 1938, the Attorney General of the United States made an announcement[1] introducing the practice of issuing public statements to set forth the policy of the Department of Justice with regard to anti-trust laws. Such statements are intended to furnish a guide to businessmen on the probable action of the Department of Justice in similar circumstances; to aid the Department in formulating a consistent enforcement policy; to warn those engaged in what the Attorney General characterizes as "similar illegal practices"; and to call the attention of Congress to the interpretation and application of the anti-trust laws by the Attorney General.

Coincidentally with the Attorney General's announcement, the Department issued a statement regarding the automobile financing case.[2] This has since been followed by important statements on the second Madison Oil case,[3] Chicago Milk and Ice Cream investigation,[4] the Motion Picture suit,[5] and the Medical Monopoly suit.[6]

In connection with the automobile financing matter, it is common knowledge that during the fall of 1937, while evidence regarding alleged violations of the Sherman Act was being presented to the Grand Jury in Milwaukee, Wisconsin, discussions looking to a possible consent decree were taking place at the same time at Washington between the Department of Justice and the prospective defendants, three large automobile manufacturers, and several finance companies. United States District Judge Geiger, upon learning of these discussions, and after

† A.B., University of Colorado, 1920; LL.B., Harvard University, 1923. Attorney, Commercial Investment Trust Corporation.

1. (1938) 106 C. C. H. Trade Reg. Serv. par. 17,001.
2. (1938) 106 C. C. H. Trade Reg. Serv. par. 17,002. See also the statement of November 7, 1938, when these decrees were presented to the court (1938) 106 C. C. H. Trade Reg. Serv. par. 17,011.
3. (1938) 106 C. C. H. Trade Reg. Serv. par. 17,003.
4. Id. at par. 17,004.
5. Id. at par. 17,005.
6. Id. at par. 17,006.

hearing various counsel involved, discharged the Grand Jury on December 17, 1937, with the following statement:

> I do not think it was proper for these parties to get together during the session of this grand jury and negotiate a deal here in a matter that would be comprehended within the terms of a probable indictment. There is nothing to do here but to discharge the grand jury. The clerk will enter an order to that effect.[7]

In the automobile finance statement,[8] after referring to the foregoing incident, the Department summarized its policy as follows: The Department will not compromise a criminal case upon an agreement by the defendants to refrain from repeating the violations with which they are charged; while the commencement of a criminal prosecution does not abolish the presumption of innocence, the Department regards such action as announcing that it possesses "evidence of violation of law which it deems so compelling that it cannot accept the responsibility of ignoring it"; the concurrent use of civil and criminal proceedings is not intended "to coerce or compel the prospective defendants to consent to a civil settlement on threat of criminal prosecution"; the Department will consider proposals for consent decrees and if such proposals, in addition to prohibiting violations with which the respective defendants are charged, offer "substantial public benefits" connected with the policy of maintaining free competition in an orderly market which could not be obtained by the criminal prosecution, the Department will present them to the court.[9]

The pronouncement is also made that such proposals must be voluntary and that the Department does not invite their submission. This statement is obviously intended by the Depart-

7. 2 *Hearing before Committee on the Judiciary*, House of Representatives, 75th Congress, 3rd Session, with regard to the official conduct of Judge Ferdinand A. Geiger, United States District Judge for the Eastern District of Wisconsin (1938) 111. Judge Geiger also said, "Now, then, that being done and with the co-pendency of a Grand Jury session, it is my judgment that the Department did not have the power to negotiate with these companies, and I call it 'negotiation' deliberately; did not have the power to negotiate with these parties for a consent decree."

8. See note 2, supra.

9. If such proposals are made after indictment they will be submitted as the basis for a *nolle prosequi* in the public interest. If submitted while the matter is still pending before the Grand Jury, the Judge will be informed of the proposals so that, if he considers it desirable, they may be presented to the Grand Jury for consideration in connection with the evidence.

ment as an answer to the charge of coercion. Although the Department states that "an indictment for violation of the anti-trust laws does not necessarily charge a crime involving moral turpitude,"[10] and that the proposed proceeding against the American Medical Association should be compared to "a prosecution for reckless driving, committed by a person of distinction and good will who is in a hurry to meet his legitimate engagements,"[11] it nevertheless regards criminal proceedings as "most useful as a deterrent."[12] It also recites that the avowed purpose of the statements is "to create an atmosphere which leaves the door open to a constructive proposal at any stage of the litigation."[13] Moreover, in the statement in the Motion Picture suit, the Department announced the abandonment of its previous technique of approving business practices in advance through private conferences with representatives of an industry whose operations involve anti-trust questions.

Accordingly, it must be evident that the new technique in enforcing the Sherman Act[14] is to confront members of an industry, against whom the Department has evidence which it believes to be substantial, with the alternative of a criminal prosecution or the tender of a consent decree which, in the judgment of the Department, offers substantial public benefits which could not be obtained by the criminal prosecution.

Assistant Attorney General Thurman Arnold, in an address on June 15, 1938, which was broadcast over two national hookups, stated:

---

10. Medical Monopoly Suit statement (1938) 106 C. C. H. Trade Reg. Serv. par. 17,006.

11. Ibid.

12. Chicago Milk and Ice Cream statement (1938) 106 C. C. H. Trade Reg. Serv. par. 17,004. Since the Attorney General's statement of May 18, the Department has proceeded criminally in all matters on which it has issued a statement, except (1) in the Motion Picture Suit where two reasons were given for proceeding in equity; first, that divorce of the ownership of theatres from production and distribution facilities could only be accomplished through an equity decree, and second, because prior dealings between the Department and the industry made it inequitable to institute a general criminal proceeding relating to the general subject matter. Motion Picture statement (1938) 106 C. C. H. Trade Reg. Serv. par. 17,005; and (2) in the Columbia Gas and Electric Co. case (1938) 106 C. C. H. Trade Reg. Serv. par. 17,010, in which divestment of a subsidiary is sought, and civil process used because, the Department says, the subsidiary was acquired eight years ago.

13. Medical Monopoly statement, supra, note 6; Motion Picture statement, supra, note 5.

14. (1890) 26 Stat. 209, (1927) 15 U. S. C. A. sec. 1 et seq.

> It will be charged that this practice may be used coercively. The answer is that any criminal law may be used coercively. The danger in the use of this power is in its secret use and not where public statements giving the grounds for action must be made. * * *
>
> In outlining our procedure on the consent decree we have furnished every safeguard that the procedure will not be used either for unjustified coercion, or to hide a vacillating prosecution policy, by providing first for a public statement and second for submitting the proposal to the judge in charge of the criminal proceeding. Offers made by defendants in the hope that they may lead to a consent decree neither imply that the case was improperly brought nor that it is weak nor that the Government is anxious to drop it. The sole test is that they confer important public benefits related to restoring orderly competitive markets which go beyond a promise to desist from the practices charged, and beyond any results which could be obtained by a conviction.

It would be unfair and inaccurate to charge the Department of Justice with intentionally employing coercive tactics. Concededly, the Department is charged with the enforcement of laws as they are written, and the laws vest in it the power to prosecute as well as the power to discontinue prosecution. But, in a broad sense, the powers thus conferred are potentially coercive. This is the case where consent decrees offer greater relief than could be obtained as a result of litigation, and the Department, therefore, announces a formulated policy of entertaining proposals for them from actual or prospective defendants, declaring that an acceptable consent decree will result in a *nolle prosequi*. Of course, the term "coercive" is not necessarily condemnatory. Strictly speaking, every legal action is coercive in that compliance with law is demanded under pain of punishment or damages. The inquiry is, therefore, not to be satisfied by merely concluding that the new anti-trust policy is "coercive." It must ultimately be determined, if possible, whether standards of conduct based upon laws adopted through the normal legislative processes are likely to be traded away to save the annoyance and cost of defending a prosecution. The practice of indicting individuals who are officers or directors of corporate defendants involves something of a stigma even though, in the words of the Department itself, "many types of antitrust violations are in the nature of misdemeanors."[15] The practice followed in the

15. Medical Monopoly statement, supra, note 6.

long oil trial of requiring the principal indicted officers to attend throughout the entire trial involves a certain amount of harassment, particularly where, as in the automobile finance and oil cases, the indictment is brought in a district located at a substantial distance from the main offices of the defendants. The Department's practice of issuing official statements[16] is in itself cause for apprehension as being prejudicial to the prospective defendants in the area from which the petit jury must be drawn. In such circumstances the prospect of submitting to the determination of a jury of twelve laymen complicated issues relating to the practices and methods of a huge industry is far from inviting, particularly under the restrictions of criminal procedure.

Accordingly, the situation of a prospective corporate defendant whose management feels itself unjustly accused involves a Hobson's choice between "millions for defense but not one cent for tribute" and a consideration of how far restrictions can be imposed upon its business activities by a consent decree without too great a penalty upon future operations.

Stated in another way, the aim of every business is to acquire "its share" of the available market. The Department may feel that the desired share is monopoly; the concern contends that its share is as much as it can capture by virtue of services, facilities, products, or values, which are superior to those of competitors. The consent decree does not ordinarily circumscribe the amount of the defendant's share of the market, but rather the methods by which it obtains any share.

The problem of the defendant is, therefore, whether it can successfully compete even though it foregoes certain methods of competition. It must be borne in mind that the prospective defendant need not have used or threatened to use certain of the prohibited methods. Likewise, there may be legitimate doubts—at least sincere disagreement between the Department and the defendant—as to whether certain or all of the methods to be prohibited are illegal under the Sherman Act. The question is whether surrender of freedom to use the methods to be prohibited by the consent decree is too high a price to pay for settle-

16. The propriety of the Department's statements is the subject of correspondence between a Special Committee of the St. Louis Bar Association and Assistant Attorney General Thurman Arnold referred to in (1939) 25 A. B. A. J. 358-359.

ment of the controversy, particularly since a final judgment or decree in either a criminal prosecution or an equity proceeding brought by or on behalf of the United States, to the effect that a defendant has violated the anti-trust laws, is prima facie evidence against the defendant in a treble-damage action,[17] except where there is a consent judgment or decree entered before any testimony has been taken.[18]

With the foregoing in mind, it may be interesting to examine the first consent decrees[19] entered after the Attorney General's statement of policy of May 18, 1938.

These consent decrees terminated proceedings under two of three indictments, all returned at South Bend, Indiana, on May 27, 1938. Both indictments were nol-prossed immediately upon entry of the consent decrees on Nov. 15, 1938. One other proceeding, *United States v. General Motors Corp.*, is still pending and it will be the purpose of the following comments to avoid any discussion of the merits of this controversy which is still *sub judice*.[19a]

NATURE OF THE INDUSTRY

In the automobile industry, it is not the general practice of the manufacturer to ship cars to dealers on consignment or open credit. Unless a dealer pays for the cars in cash (which he may do out of his own funds or out of funds borrowed on a secured or unsecured basis), payment for the cars is made by a finance company which acquires title from the manufacturer and arranges for the delivery of the cars to the dealer under a title retention or lien instrument, usually a trust receipt.[20] Under the provisions of the instrument, whether trust receipt, conditional sale contract, chattel mortgage, or consignment receipt, the dealer agrees to pay the finance company the amount

17. (1914) 38 Stat. 731, (1927) 15 U. S. C. A. secs. 15, 16.
18. (1914) 38 Stat. 731, (1927) 15 U. S. C. A. sec. 16.
19. United States v. Ford Motor Co. and Universal Credit Corp. (D. C. N. D. Ind. 1938); United States v. Chrysler Corp. (D. C. N. D. Ind. 1938).
19a. A demurrer to the indictment was overruled, United States v. General Motors Corp. (D. C. N. D. Ind. 1939) 26 F. Supp. 353.
20. For an exposition of the mechanics of wholesale financing, see In re Bell (C. C. A. 8, 1930) 45 F. (2d) 19, cert. denied (1931) 293 U. S. 819; In re James (C. C. A. 2, 1929) 30 F. (2d) 555. See also Uniform Trust Receipts Act, which has been adopted in California, Connecticut, Illinois, Indiana, Massachusetts, New Jersey, New York, Oregon, and Tennessee. (1936 Supp.) 9 U. L. A. 208.

advanced by the finance company,[21] usually at a named date, and, in any event, upon the sale of the car to a retail purchaser.

If the retail sale is on the installment plan, the dealer has an obligation payable to the finance company and, instead of cash with which to meet that obligation, has the purchaser's note and conditional sale contract calling for payment in twelve or more monthly installments. Some dealers have sufficient working capital to enable them to pay their obligations to the finance company and at the same time retain and collect the purchaser's installment obligation. In the majority of cases, however, the dealer sells[22] the retail obligation to a finance company, frequently the one which advanced the money to the factory for the car in question. Out of the proceeds he pays the finance company the amount of its advance, the difference representing his gross profit on the transaction and recoupment of sums paid on account.

The time selling price of the car regularly exceeds the cash selling price by an amount which has become known as the finance charge.[23] The finance charge covers the cost of making

21. Oil City Motor Co. v. Commercial Inv. Trust Corp. (C. C. A. 10, 1935) 76 F. (2d) 589.

22. Cullum v. General Motors Acceptance Corp. (C. C. A. 5, 1933) 68 F. (2d) 310; General Motors Acceptance Corp. v. Midwest Chevrolet Co. (C. C. A. 10, 1933) 66 F. (2d) 1, (C. C. A. 10, 1934) 74 F. (2d) 386; Eastern Acceptance Corp. v. Godfrey (1936) 14 N. J. Misc. 190, 183 Atl. 822; Lansdowne Finance Co. v. Prusky (1936) 120 Pa. Super. 555, 182 Atl. 794; Note (1935) 95 A. L. R. 1197.

23. This difference may be more than the amount equivalent to legal interest without constituting usury. Hogg v. Ruffner (U. S. 1861) 1 Black 115; In re Bibbey (D. C. D. Minn. 1925) 9 F. (2d) 944; Commercial Credit Co. v. Tarwater (1926) 215 Ala. 123, 110 So. 39, 48 A. L. R. 1437; Commercial Credit Co. v. Parks (1927) 215 Ala. 648, 112 So. 237; Smith v. Kaufman (1920) 145 Ark. 548, 224 S. W. 978; Standard Motors Finance Co. v. Mitchell Auto Co. (1927) 173 Ark. 875, 293 S. W. 1026, 57 A. L. R. 877; Wilson v. French Co. (1931) 214 Cal. 188, 4 P. (2d) 537; Ricker v. Fay Securities Co. (1931) 110 Cal. App. 750, 294 Pac. 732; Pacific Finance Corp. v. Lauman (1928) 95 Cal. App. 541, 273 Pac. 48; Murphy v. Agen (1928) 92 Cal. App. 468, 268 Pac. 480; Berger v. Lodge (1928) 90 Cal. App. 19, 265 Pac. 515; Daniels v. Fenton (1935) 97 Colo. 409, 50 P. (2d) 62; Gilbert v. Hudgens (1933) 92 Colo. 571, 22 P. (2d) 858; Zazzaro v. Colonial Acceptance Corp. (1933) 117 Conn. 251, 167 Atl. 734; Bridgeport L. A. W. Corp. v. Levy (1928) 110 Conn. 255, 147 Atl. 841; Davidson v. Davis (1910) 59 Fla. 476, 52 So. 139, 28 L. R. A. (N. S.) 102, 20 Ann. Cas. 1130; Napier Co. v. Trawick (1927) 164 Ga. 781, 139 S. E. 552; Rushing v. Worsham (1898) 102 Ga. 825, 30 S. E. 541; Talley v. Commercial Credit Co. (1929) 39 Ga. App. 297, 147 S. E. 175; Manufacturers Finance Trust v. Stone (1929) 251 Ill. App. 414; Porter v. Stolkin (1936) 101 Ind. App. 705, 200 N. E. 74; Stevens v. Grossman (1935) 100 Ind. App. 417, 196 N. E. 123; Newkirk v. Burson (1867) 28 Ind. 435; Gilmore & Smith v. Ferguson &

credit investigations of prospective purchasers, the cost of making collections, and credit losses. Sometimes the cost of insurance on the car is stated separately; otherwise, it is included in the finance charge.

Many finance companies operate on the so-called "recourse" or "repurchase" plan. Under this plan, if the car is repossessed by the finance company and returned to the dealer within a limited period of time after default, the dealer repurchases the car for the amount of the unpaid balance; if repossessed after a specified period of time, the dealer pays only the appraised value. As compensation to the dealer for assuming the risk of loss in repairing and reselling the repossession, the dealer receives a portion of the finance charge on all installment transactions. For example, on a new car, if the finance charge is $30 the dealer may receive from $7.50 to $10. This fund, frequently called "loss reserves," operates upon the principle of insurance, *i. e.*, the expense and loss on any single repossession will almost certainly be substantially higher than the reserves on that particular transaction, but is made up out of the reserve fund. Whether the fund is adequate or inadequate depends upon whether sales are made to good, border-line, or poor risks, upon fluctuations in business and economic conditions, upon transitory catastrophes, and upon the ability of the particular dealer to repair and resell the car advantageously.

Cassell (1868) 28 Iowa 220; Atlas Securities Co. v. Copeland (1927) 124 Kan. 393, 260 Pac. 659; General Motors Acceptance Corp. v. Swain (La. 1937) 176 So. 636; Robbins v. Page and Sons (1929) 10 La. App. 207, 120 So. 683; Hartwick Lumber Co. v. Perlman (1928) 245 Mich. 3, 222 N. W. 147; Commercial Credit Co., Inc. v. Shelton (1925) 139 Miss. 132, 104 So. 75; General Motors Acceptance Corp. v. Weinrich (1924) 218 Mo. App. 68, 262 S. W. 425; Holland-O'Neal Milling Co. v. Rawlings (1925) 217 Mo. App. 466, 268 S. W. 683; Grand Island Finance Co. v. Fowler (1933) 124 Neb. 514, 247 N. W. 429; Levine v. Nolan Motors, Inc. (Sup. Ct. 1938) 169 Misc. 1025, 8 N. Y. S. (2d) 311; P. J. Tierney Sons, Inc. v. Bajowski (1932) 258 N. Y. 563, 180 N. E. 333; Sayler v. Brady (1933) 63 N. D. 471, 248 N. W. 673; Mayer v. American Finance Corp. (1935) 172 Okla. 419, 45 P. (2d) 497; Mondie v. General Motors Acceptance Corp. (1936) 178 Okla. 584, 63 P. (2d) 708; Pierce v. Commercial Inv. Trust Corp. (1935) 170 Okla. 633, 41 P. (2d) 481; Graham v. Universal Credit Co. (Tex. 1933) 63 S. W. (2d) 727; Conway v. Skidmore (1935) 48 Wyo. 73, 41 P. (2d) 1049. For an interesting series of articles on various legal problems applicable to the finance industry, see Ecker, Commentary on "Usury in Installment Sales" (1935) 2 Law & Contemp. Prob. 173; Cavers, The Consumer's Stake in the Finance Company Code Controversy (1935) 2 Law & Contemp. Prob. 200; Adelson, The Mechanics of the Installment Credit Sale (1935) 2 Law & Contemp. Prob. 218; Myerson, Practical Aspects of Some Legal Problems of Sales Finance Companies (1935) 2 Law & Contemp. Prob. 244.

A large number of other finance companies operate on the so-called "without recourse" plan, pursuant to which the dealer has no responsibility in the case of the purchaser's default or repossession of the car. Nevertheless, some of the "without recourse" finance companies pay the dealer a portion of the finance charge.

NATURE OF THE COMPLAINT UNDER THE SHERMAN ACT

The foundation of each of the three indictments is a charge made to the Department of Justice that each of the manufacturers conspired to require dealers of the particular manufacturer to sell their retail paper to the favored finance company. This requirement was enforced through the alleged use of various discriminatory and coercive practices and the payment of loss reserves. Although each indictment is so framed as to refer throughout to an alleged restraint on interstate trade and commerce in automobiles, it is clearly apparent, on analysis, that the real complaint is an alleged restraint of trade in installment paper, which is the profitable end of the finance industry—wholesale financing being handled more as a convenience to dealers and at rates which allow little profit. While this article will not analyze the point, it will be noted, of course, that there are interesting problems of federal jurisdiction involved.[24]

24. See Hemphill v. Orloff (1928) 277 U. S. 537; Blumenstock Bros. Advertising Agency v. Curtis Publishing Co. (1920) 252 U. S. 436; Hall v. Geiger-Jones (1917) 242 U. S. 539; N. Y. Life Ins. Co. v. Deer Lodge County (1913) 231 U. S. 495; Paul v. Virginia (U. S. 1869) 8 Wall. 168; Nathan v. Louisiana (U. S. 1850) 8 How. 73. The writer has found no case in which the Supreme Court has passed squarely on the question of whether stocks and bonds are objects of interstate commerce, the point being specifically left open in Hall v. Geiger-Jones (1917) 242 U. S. 539. In Jones v. Securities and Exchange Comm. (1935) 298 U. S. 1, the Supreme Court found it unnecessary to pass on the constitutionality of the Federal Securities Act of 1933, 48 Stat. 74, (1938 Supp.) 15 U. S. C. A. sec. 77 (a - mm). Both the Federal Securities Act of 1933 and the Securities Exchange Act of 1934, 48 Stat. 881, (1938 Supp.) 15 U. S. C. A. sec. 78 (a - jj), seem to be predicated on Champion v. Ames (1903) 188 U. S. 321, which sustained the power of Congress to exclude lottery tickets from transportation in interstate commerce or through the mails, a somewhat different principle. The retail sale of practically all automobiles and the retail purchase of practically all installment paper is interstate within the meaning of A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495. The theory of the Department is evidently based upon the doctrine of "burden of interstate commerce" as indicated by the reasoning in N. L. R. B. v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1; N. L. R. B. v. Fruehauf Trailer Co. (1937) 301 U. S. 49; N. L. R. B. v. Friedman-Harry Marks Clothing Co. (1937) 301 U. S. 58; Washington, V., & M. Coach Co. v. N. L. R. B. (1937) 301 U. S. 142. See also Furst v. Brewster (1931)

ANAYLSIS OF INDICTMENT AGAINST FORD MOTOR CO.[25]

Jurisdictional Allegations.[26] The indictment alleges the volume of business done by the three large automobile manufacturers (although only one manufacturer was indicted in each case) and the proportion of the whole done by them; the states wherein they conduct manufacturing operations; the number of dealers; the transportation of cars from the place of manufacture to the dealers; the requirement that cars be paid for prior to the shipment from the factory and the amount involved; the need for wholesale financing; the making of contracts between dealers and different financing companies for wholesale financing; the transfer of title to the defendant finance companies before shipment; the existence of some 375 other finance companies; the refusal of the manufacturers to transfer title to such other finance companies and the transfer of title to them by the dealers; the mechanics and volume of retail financing; the need for, and volume of, retail financing; the need for retail financing for used automobiles traded in on the sale of a new automobile.

Gravamen. The charge is not that the defendants restrained either wholesale or retail financing of automobiles, as the Department evidently was troubled by the matter of federal jurisdiction.[27] Instead, the indictment alleges that the defendants

282 U. S. 493; Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U. S. 282.

25. In each indictment against a particular manufacturer and a particular finance company, allegations are made throughout relating to the practices of the other two manufacturers and their particular finance companies. The three indictments are substantially identical. The principal differences are that in the General Motors indictment reliance is placed upon the ownership by General Motors Corporation of its finance company subsidiary, General Motors Acceptance Corporation. In the Chrysler indictment it is alleged that, as part of the conspiracy, Chrysler Corporation and Commercial Credit Company entered into contracts in which it was agreed that Chrysler Corporation should bring about the use by Chrysler dealers of the financing plans of Commercial Credit Company in return for which the latter agreed to sell to Chrysler Corporation a large number of shares of common stock of Commercial Credit Company, and to pay to Chrysler Corporation a substantial part of the consolidated net profits of Commercial Credit Company for each calendar year. In the Ford indictment it is alleged that as part of the conspiracy it was agreed that Commercial Investment Trust Incorporated, a finance company affiliated through common ownership with Universal Credit Corporation, would refrain from competing with Universal Credit Corporation for the business of Ford dealers.

26. Pars. 1-28.

27. Cf. note 24, supra.

"unlawfully have engaged in a conspiracy in restraint of the aforesaid trade and commerce among the several States in Ford automobiles."[28] It continues:

> It has been a purpose of the defendants and an object of said conspiracy to procure, monopolize and keep within their control to the greatest extent possible, and to the exclusion of all other persons and corporations, the business of financing the trade and commerce in Ford automobiles, and in used automobiles of any make sold and handled by Ford dealers.[29]

Means of Accomplishing the Restraint.[30] The indictment alleges that the defendants (the manufacturer, the finance company, and certain individual directors, officers and employees of each) arranged and agreed among themselves: to require dealers, as a condition of selling them new cars, to agree to patronize the designated finance company and no other; to make dealer franchises run for a term of one year, providing cancellation at will as a penalty for failing to patronize the designated finance company; to refuse to furnish, transport, and deliver automobiles to dealers who refuse to patronize the designated finance company, or who patronize other finance companies; to inspect the dealer's records for the purpose of detecting patronage of other finance companies; to coerce dealers to permit such inspection of their records; to compel dealers to disclose the information; to procure such information from dealers' employees and to require dealers to explain and justify their patronage of other finance companies; to compel dealers to refrain from patronizing other finance companies by other means not known to the Grand Jury.

It was further alleged that the defendants agreed among themselves: to grant favors to dealers patronizing the designated finance company and to refuse such favors to dealers patronizing other finance companies; to delay shipments to dealers patronizing other finance companies; and to discriminate between dealers as to the kind, model, time of shipment, and time and manner of payments based on their patronage of the particular finance company or other finance companies;

28. Par. 34 of the General Motors, and par. 33 of the Chrysler, indictment contain corresponding allegations.
29. Par. 35.
30. Pars. 37-65.

to give office space in the factory, information, title documents, and title to the designated finance company and refuse it to others; to enforce discriminatory, onerous, and unreasonable requirements relative to the manner, form, and time of payment for automobiles; to advertise and recommend the designated finance company, and require dealers to do so, and to refrain from advertising or recommending others; to fix the finance charge of the designated finance company and to pay the dealer a portion thereof for diverting the financing of retail sales to the designated company; and to represent to purchasers that the dealer received no part of the finance charge—the effect of which was to require other finance companies to engage in the same practice of paying dealers a portion of the finance charge, the total of such payments to dealers being set forth.

The indictment then alleges that the dealers have substantial investments in their businesses which would have been destroyed if dealers had not submitted to the requirements of the defendants and concludes that the defendants "unlawfully have engaged in a conspiracy in restraint of trade and commerce among the several states in Ford automobiles."[31]

CONSENT DEGREES

The consent decrees are framed upon principles designed to: prohibit coercive and discriminatory practices; permit the conduct of business without undue restrictions; benefit the public in matters not covered by the Sherman Act; leave disputed economic questions, involving the competitive position of a defendant, to future determination in a trial *de novo*, if subsequent events should make this appropriate; protect the defendants against unfair competition from competitors who are not similarly restrained; allow for compliance with state laws; permit a review of the situation after four years, unhampered by the restrictions of *Swift & Co. v. United States*.[32]

A. Restrictions on Manufacturer

In the nature of things, the majority of the restrictions operate upon the manufacturer, and fall into various classes.

Flat Restrictions. The manufacturer is required to permit any finance company or other person to pay for any automobile

31. Par. 72.
32. (1932) 286 U. S. 106.

delivered by the manufacturer to any dealer, upon written specific or continuing authority of the dealer.[33] Under this provision the manufacturer is not permitted to insist that the dealer give his own check in payment for cars or to restrict the dealer's freedom in selecting such person as he desires to advance the cost of the car. On the other hand, in order to protect the franchise relationship, as well as to prevent mere volunteer payments, the dealer, if he is not to pay for cars himself, must give the factory either a specific authorization to accept payment from someone else for a particular shipment or a continuing authorization which may run for a period of time.

The manufacturer is forbidden to make, or continue, a contract with a dealer which requires the dealer to patronize a particular finance company, or group of finance companies, or which requires the dealers to observe any plan for, or rate of, financing designated by the manufacturer.[34] The manufacturer is forbidden to cancel or terminate a dealer's franchise or threaten to do so because of his failure to patronize any particular finance company or any class of finance companies.[35]

The manufacturer is forbidden to obtain from any finance company any payment as a bonus or commission on account of retail financing done by that finance company, and is forbidden to make any loan to any finance company or purchase its securities except for purchases of notes, bonds, commercial paper, or other evidences of indebtedness in the open market.[36]

Finally, the manufacturer is forbidden to recommend, endorse, or advertise any particular finance company to any dealer or to the public.[37] The manufacturer is nevertheless free to adopt, advertise, and recommend to the public and to its dealers plans of financing retail sales of new automobiles.

At this point, however, there is a major divergence between the two decrees.[38] Under the Ford decree, the manufacturer

33. Final Decree, United States v. Ford Motor Co. (D. C. N. D. Ind. 1938), and United States v. Chrysler Corp. (D. C. N. D. Ind. 1938), contain corresponding paragraphs, the contents of which are similar. Hereinafter both will be cited as "decree." Decree, par. 6(a).

34. Decree, par. 6(g).

35. Decree, par. 6(h).

36. Decree, par. 12.

37. Decree, par. 6(k).

38. Compare decree, par. 6(k), with clause D of Finance Company Registration statement, reading as follows:

"Until the effective date of any withdrawal of this statement by the

is permitted to adopt plans for financing retail sales of new automobiles manufactured by Ford and to recommend the use of such plans to dealers and the public. It is not, however, permitted to name any single finance company, or group of finance companies, in its advertising. Chrysler Corporation, on the contrary, while also permitted to adopt plans for financing retail sales of new automobiles manufactured by Chrysler, is permitted, but not required, to include in its advertising the names of those finance companies which are registered[39] finance companies. However, if any registered finance company is named in the advertising, the manufacturer is obligated to include the names of all registered finance companies in the territory to which the advertising is directed, who agree to offer the "Chrysler Plan," and no other plan, for financing retail sales of new Chrysler cars. The finance charges included in the installment paper to be acquired by registered finance companies pursuant to the "Chrysler Plan" may be lower than the finance charges specified in the "Chrysler Plan" and the other terms of the paper may be more favorable to the retail purchaser. If, on the contrary, the finance charge is higher than that specified in the "Chrysler Plan," the registered finance company may not purchase it unless it promptly credits the excess on the purchaser's obligation.

---

finance company in the manner provided by paragraph 1 of subparagraph (k), or in any manner provided by paragraph 5 or by paragraph 6, of sub-paragraph (j), of paragraph 6 of said decree, all retail time sales paper, created after the effective date of any plan or plans or modification thereof and covering new automobiles made by the Manufacturer, acquired by the finance company by the Manufacturer's dealers (whether located in the area described in Clause (C) hereof or elsewhere), shall be acquired by it in accordance with the terms of any plan or plans of financing adopted by the Manufacturer as provided by sub-paragraph (j) and then in effect provided:

a. The finance charges included in such retail paper may be less than the finance charges specified by such plan or plans or modification thereof, and the other terms of such paper may be more favorable to the retail purchaser than the terms so specified; and b. the finance company may acquire retail time sales paper covering new automobiles made by the Manufacturer in which the retail purchaser of the automobile is required to pay a finance charge in excess of the finance charge specified in the plan so adopted or modification thereof, but only if the finance company shall promptly credit such retail purchaser on the time purchase price of the automobile with the amount of the excess. The words 'finance charge' as used in this statement shall mean the difference between the cash delivered price of an automobile and the price of that automobile when sold on an installment payment plan, including or not including (as the plan may provide) insurance for the retail purchaser."

39. See p. 547, infra.

The Department, in its statement issued November 7, 1938,[40] hails these provisions as great advances in the field, and states that, "There are no precedents which compel the adoption of such restrictions on advertising." It believes that uneconomic results follow from the advertising of particular trade names, stating:

> In the oil industry, to take one example, refiners are deprived of their market because of the belief induced by great expenditure that good gasoline is sold only under particular trade names. * * * Such a method of advertising has never been held to be violative of the anti-trust laws, and the legality of its use, in the absence of positive fraud, has not been questioned.[41]

The importance of lending the trade name of the manufacturer to a finance plan may be very great. Competition in the sale of cars from year to year depends upon features which have public appeal. One year it may be four-wheel brakes, another year it may be steel bodies, another year it may be finance plans available to the installment purchaser. One manufacturer may make a successful appeal to the public based upon the *imprimatur* of his trade name as a guarantee that the finance plan serves the best interest of the purchaser, so that the purchaser has as much confidence in the finance plan as he has in the motor or body carrying the same trade name. Consequently, other manufacturers must make equally good finance plans available to purchasers of their cars and must certify to the soundness of the plan by their sponsorship.

The decree sets no limits upon the contents of the "plan." Primarily, the manufacturer will be interested in the amount of the finance charge; indeed, the amount of the finance charge may be the sole element of importance to the manufacturer. However, the ingenuity of business men may in the future develop other features of a finance plan which may be of as great importance to the manufacturer as the amount of the finance charge. Conceivably, even the relationship between the finance company and the dealer may be of importance to the manufacturer in developing sales of his product. The decree sets no limits which would confine the industry in a straight-jacket by defining "plan" in terms of the elements which now are thought

40. (1938) 106 C. C. H. Trade Reg. Serv. par. 17,011.
41. Id., at par. 17,011, 4(b).

to be of importance. The manufacturer is free to adopt and recommend any plan, subject only to two limitations: the manufacturer may not enter into any contract with the dealer which requires the dealer to observe any plan recommended by the manufacturer;[42] and any aggrieved finance company or other aggrieved person, upon filing proper bond may apply to the court to vacate a plan on the ground that it constitutes an unreasonable restraint of trade or commerce in automobiles under the Sherman Act.[43]

Experience will determine whether the manufacturers were wise in adopting any limitations upon their freedom to advertise and recommend the services of particular finance companies. The Department of Justice's statement declares that the advertising is to be used "for the purpose of increasing consumption without giving any advantage to particular competing companies whose services are equivalent." The Department has assumed that such services are equivalent (just as it assumes in its statements that all brands of gasoline are equivalent) and, by the rules of conduct for registered finance companies,[44] has approved a number of rules through which it believes such equivalence can be assured. However, in the nature of things, various subjective elements are not governed by these objective rules. For example, suppose Finance Company *A* and Finance Company *B* use the same finance charge, arrange for identical insurance, and make exactly the same charge for extending a past-due installment. Assume further that Finance Company *A* is lenient in granting extensions and has facilities for disposing of repossessed cars at the smallest possible loss, whereas Finance Company *B* is very hard-boiled about granting extensions to purchasers who justifiably require indulgence, and does not have the facilities for disposing of repossessions to good advantage. The services of these two finance companies are not equivalent from the standpoint of the manufacturer and the good will of the manufacturer's customers. Yet by these decrees the manufacturers are not permitted to say to their purchasers and dealers: "We recommend Finance Company *A* rather than Finance Company *B*, although both of them offer our 'official plan'."

42. Decree, par. 6(g).
43. Decree, par. 6(k), subsec. 3. Cf. (1914) 38 Stat. 737, (1927) 15 U. S. C. sec. 26.
44. See p. 547, infra.

These provisions of the decree constitute the recognition from the standpoint of the Department (or the adoption, from the standpoint of the manufacturer) of the premise that after title has passed from the manufacturer it does not have power to control the finance charge or the method of retail financing or the selection of the financing agency. It may be difficult in the future to demonstrate the effect of these provisions, but it is to be hoped that the Department and the court will be sensitive to a realization of the problem.[45]

Prohibitions Qualified by Purpose. There are four restrictions placed upon the manufacturer which are qualified by the provision that the manufacturer may not perform an act with a specified purpose. As to this, the decree provides[46] that the burden of proof is upon the respondent to prove that the act complained of as a violation of the decree was done for a purpose not forbidden.

In the first place, the manufacturer is forbidden to establish any practice, procedure, or plan for the retail or wholesale financing of automobiles for the purpose of enabling any particular finance company or finance companies to enjoy a competitive advantage in obtaining the patronage of dealers through any service, facility, or privilege extended by the manufacturer,

45. From the standpoint of the parties, much the same issue is involved as in a number of other matters in which the manufacturers have sought to control their dealers on subjects in which the good will of the manufacturer was involved. See, *e. g.*, International Business Machines Corp. v. United States (1936) 298 U. S. 131, 140; Pick Manufacturing Co. v. General Motors Corp. (C. C. A. 7, 1935) 80 F. (2d) 641, aff'd (1935) 299 U. S. 3; Oxford Varnish Corp. v. Ault & Wiborg Corp. (C. C. A. 6, 1936) 83 F. (2d) 764. A related principle is involved in the price resale statutes. Cf. Old Dearborn Distributing Co. v. Seagram-Distiller's Corp. (1936) 299 U. S. 183, 195. Note, however, that as distinguished from the standard price-fixing cases, Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911) 220 U. S. 373; Old Dearborn Distributing Co. v. Seagram-Distiller's Corp., supra; the automobile manufacturer was not attempting to fix or maintain a minimum resale price; its interest being in controlling a maximum time selling price in the belief that, if its dealers have too high a time selling price by reason of not making available to the public the lowest finance charge which is available to the dealer, the manufacturer's good will will be impaired and the public will tend to purchase cars of competing manufacturers whose dealers make available lower finance charges and therefore have lower time selling prices. It is common knowledge that the cash prices of competing cars of the same general class are highly competitive. See also Ford Motor Co. v. Boone (C. C. A. 9, 1917) 244 Fed. 335, in which resale price contracts on patented articles were sustained where the patented article was only one of several competing products.

46. Decree, par. 10.

if the same service, facility, or privilege, or one corresponding thereto, is not made available to any other finance company upon its written request and upon substantially similar terms and conditions.[47]

Under this provision, arbitrary specifications for the purpose of benefiting a particular finance company or group of finance companies would not be allowed. On the other hand, the decree clearly sanctions financing plans which are established for other purposes, such as to benefit the manufacturer *qua* manufacturer, the dealers or the public. If established for such purposes or any other purpose not forbidden, the unwillingness or inability of a particular finance company to meet the specifications is of no consequence. Even if no purpose other than the forbidden purpose could be shown, there would be no violation of the decree if the plan were open to all finance companies; but if, for example, a plan were made available only to finance companies having some arbitrarily selected characteristic so that the ostensible characteristic really amounted to a specification of one particular company, and if no purpose other than the forbidden purpose could be shown, a violation of the decree would be present. It is apparent, therefore, that no legitimate interest of the manufacturer is restricted by this provision.

In the second place, the manufacturer is forbidden to give, make available, deny, or threaten to deny, to any dealer any service or facility, or otherwise to discriminate among its dealers, for the purpose of influencing a dealer to patronize a particular finance company or class of finance companies.[48]

In the third place, the manufacturer is forbidden to arrange or agree with any finance company that an agent of the manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize that finance company.[49] There is a corresponding provision applicable to the respondent finance company named in the decree.[50] The restriction does not apply to joint visits for the purpose of arranging some special service or facility for the dealer, going beyond mere retail or wholesale financing in the ordinary course of business, even

47. Decree, par. 6(e).
48. Decree, par. 6(f).
49. Decree, par. 6(i).
50. Decree, par. 7(d).

though the result might be to influence the dealer to patronize the finance company or even to contract to do so. Examples of such services or facilities would be the making of capital loans, arranging a plan to liquidate the dealer's past due or frozen debts, or arranging to extend financing facilities in an amount clearly and substantially beyond that justified by the dealer's financial condition.

There is, however, a significant distinction in the two provisions. The manufacturer is forbidden to arrange or agree that such joint visit shall be made "except in each instance upon the written request of the dealer or prospective dealer"; whereas the respondent finance company is forbidden to arrange or agree that such joint visit shall be made except upon the written request of the dealer or prospective dealer, with the phrase "in each instance" omitted. In other words, it was recognized by the draughtsman of the decree that there might be many occasions for such joint visits which might have the incidental effect of influencing the dealer to patronize the particular finance company. It was further recognized that there could be no coercive effect in such joint visits if the dealer requested them. However, if the manufacturer could insert a "blanket request" in its dealer franchises, it could thus inferentially compel the dealer to make such requests; this is not allowed. On the other hand, the finance company has no such power and therefore "blanket requests" obtained by the finance company are permitted.

Finally, the manufacturer is forbidden to use any information obtained from the dealer, or his employees, or to require disclosure of any information for the purpose of influencing the dealer to patronize any particular finance company or companies.[51] No restriction is placed upon the manufacturer in obtaining any information which it desires from dealers; the restriction is only upon the use for a forbidden purpose and upon requiring disclosure for the forbidden purpose. Here, too, recognition is given to the fact that no coercive effect can result where the dealer requests the disclosure or use of the information, or where the dealer requests the manufacturer to assist the dealer in obtaining wholesale or retail financing, or special facilities or services from a particular finance company which the dealer designates. In the latter case, although the dealer's re-

51. Decree, par. 6(l).

quest covers obtaining the facilities rather than disclosure of the information, disclosure of the information may become necessary and is not restricted.

Prohibitions against Discrimination. There are five provisions to the effect that so long as the manufacturer continues to do specified things for one finance company, it shall not refuse to do the same or a corresponding thing for other finance companies upon substantially similar terms and conditions, and upon written request of the other finance companies. These are: First, giving documents of title.[52] Second, furnishing space for maintaining an office in any place of business of the manufacturer.[53] The decree, however, provides that the manufacturer is permitted, if it so elects, to furnish space only to registered finance companies.[54] Third, knowingly furnishing the identity of dealers or prospective dealers or other information concerning them.[55] However, the manufacturer is permitted, if it so elects, to furnish information only to registered finance companies or to a finance company designated by a dealer or prospective dealer. So far as the latter is concerned, this means that if a prospective dealer notified the manufacturer to have the *X* Finance Company get in touch with him, the manufacturer is free to do so without notifying all other finance companies as to the identity of this prospective dealer. Similarly, if a dealer or prospective dealer notifies the manufacturer to give financial information, or data respecting shipments of cars to him, only to the *X* Finance Company, the manufacturer is not required to give it to all other finance companies. Fourth, affording any other service, facility, or privilege to one finance company and refusing similar or corresponding services, facilities, or privileges to other finance companies upon substantially similar terms and conditions and upon written request.[56] There are similar provisions conferring the right to limit these to registered finance companies and finance companies designated by the dealer or prospective dealer. Also, as noted above, this discrimination is forbidden only if it is for the purpose of giving a particular finance company a competitive advantage in obtain-

52. Decree, par. 6(b).
53. Decree, par. 6(c).
54. See infra, p. 547.
55. Decree, par. 6(d).
56. Decree, par. 6(e), subdiv. (ii); see also par. 12.

ing the patronage of a dealer. Fifth, paying money to one finance company with the purpose or effect of inducing or enabling it to offer dealers a lower finance charge. In such case, the manufacturer must make payment upon substantially similar basis, terms, and conditions, to every other finance company offering such lower finance charges.[57]

Provisions Facilitating the Conduct of Business. There are a number of provisions designed to facilitate the conduct of business either by way of limiting certain prohibitions or by way of affirmative provisions.

Provisions are made for honoring requests from dealers. This has already been noted with regard to the furnishing of information, joint visits, services, facilities and privileges, and disclosure or use of information at the dealer's request or in connection with obtaining facilities which he has requested.

The manufacturer is not required to do the identical act for several finance companies but only to perform similar or corresponding acts.

Except as to the identity of dealers or prospective dealers, the request of a finance company for information or for a service, facility, or privilege from the manufacturer must be a specific written request.[58] A blanket request, such as "Please give us all services, facilities, and privileges which you give to any other finance company," or "Please give us all information about dealers which you give to any other finance company," is not valid.

Finance companies are frequently required to furnish special facilities or services which go beyond retail or wholesale financing in the regular course of business. Instances of these are the making of capital loans to dealers, or the granting of extensions of time within which to liquidate the dealer's past due or frozen obligations, usually with arrangements for periodical amortization. Extraordinary amounts of financing, in connection with transactions not in the ordinary course of business, or beyond the dealer's financial worth, are also sometimes required. In connection with these matters and other similar matters, it is frequently necessary for the finance company to consult jointly with the dealer and the manufacturer, and the decree makes

57. Decree, par. 12.
58. Decree, par. 6(d-e).

express provision[59] for such consultations even though the effect of such consultations may be to influence the dealer to patronize the particular finance company involved.

Attention was called[60] to the provisions relating to recommending, endorsing, or advertising a particular finance company, and to the fact that a manufacturer might desire to do so in order to preserve its own good will and to develop the sales of its product, and not to aid the particular finance company. The decrees allow the manufacturer,[61] in connection with developing plans for financing the retail sale of new automobiles, to obtain assurances from one or more finance companies, either before or after adoption of any plan, that such finance company or companies will make the plan available for at least a specified period of time.

Two provisions of the decree present the fundamental conflict between the viewpoint of the manufacturer and that of the Department.[62] One manufacturer, while claiming the right to do so, had never gone so far as to make contracts with its dealers requiring them to use finance charges not higher than those approved by the factory. Another manufacturer[63] had included in its current dealer contracts a provision that the dealer would not make finance charges to purchasers in excess of the rates then available under any plan that the manufacturer may have provided or recommended, if the terms of the plan were reasonably available to the dealer. The making or continuance of such contracts is now forbidden to the manufacturer.[64] The manufacturer's power to protect its good will against over-charges by dealers is therefore restricted to the power of advertising and recommending equitable rates, and, under the Chrysler decree, to naming all registered companies which offer the plan. The theory of the decree is that, if the manufacturer advertises such rates with sufficient vigor and if it arranges with one or more finance companies to make such rates available, the public will demand them and the dealers will supply them in response. There can be no safe prediction as to the efficacy of such appeals

59. Decree, pars. 6(i), 7(d).
60. Supra, p. 537 et seq.
61. Decree, par. 6(k).
62. Decree, pars. 6(g), 6(k).
63. See Petition for Declaratory Judgment in Chrysler Corporation v. Cummings (D. C. D. Colo. 1938) 106 C. C. H. Trade Reg. Serv. par. 15,022.
64. Decree, par. 6(g).

to the public and to dealers. Experience alone will tell whether the Department has injured the public by insisting that the manufacturer may not require its dealers to patronize low-rate finance companies, and may not recommend particular low-rate companies.

B. Voluntary "Codes of Good Conduct" for Finance Companies

A benefit to high-rate finance companies as one segment of the public has just been referred to, namely, removal from the area of competition between finance companies of any restrictions imposed by the manufacturer upon dealers in favor of low-rate finance companies. The manufacturer is permitted to limit certain privileges to registered finance companies, but may not discriminate between dealers. There are, however, a number of other finance company practices which affect the good will of the factory. As to these, a novel technique was evolved, reminiscent of the N. R. A. Codes.[65] An informal finance company code is set up under which finance companies may voluntarily register, and, pursuant to which, registered finance companies may, at the election of the factory, be the sole recipients of office space, information, and other privileges,[66] and, in case of Chrysler, of advertising.

The finance company is required to file a sworn statement with the United States District Court for the Northern District of Indiana and to serve a copy, certified by the clerk, on the manufacturer. In its statement the finance company designates the area in which it operates,[67] and agrees, on behalf of itself and all of its affiliates,[68] to observe a set of rules in doing business with the manufacturer's dealers, wherever located. These rules contain the following provisions:[69]

If the finance plan includes insurance to be arranged for by the finance company, it shall arrange for such insurance, unless the insurance company to which the risk is submitted declines to write the risk. The finance company contact is with the dealer until after it has acquired the paper, and therefore it must rely on the dealer's representations as to the kind of insurance

65. Decree, par. 6(j).
66. Decree, par. 6(c, d, e); also par. 6(k) of the Chrysler decree.
67. Decree, par. 6(j), subdiv. 4(C).
68. Ford decree, par. 6(j), subdiv. 4(D); Chrysler decree, par. 6(j) subdiv. 4(E).
69. Decree, par. 6(j), subdiv. 4(B).

which is involved. However, if the dealer represents that, for example, $50 deductible collision insurance is to be arranged, the finance company will not be permitted to arrange $100 deductible collision insurance and profit by the saving in premium. It must promptly send a certificate or copy of the policy to the purchaser, reciting the character of the coverage and the amount of the premium.

The finance company will not require or accept wage assignments, or garnish wages or salaries, to collect deficiency judgments on automobiles sold for less than $1000, which were for private and non-commercial use and voluntarily returned to the finance company at its request. The theory is that the small wage-earner who purchases a low-price car and voluntarily returns it after default should not have his wages garnished to pay a deficiency judgment established by the resale of the car. No such indulgence is justified in the case of the purchaser of a high-priced car, or one who conceals the car after default, or who forces the finance company to go to the expense of locating and replevying the car.

Where the purchaser of an automobile sold for private or non-commercial use has paid at least 50 per cent of his note or other obligation, the finance company will not take a deficiency judgment after repossession and resale of the car but will either look to the car, or to the purchaser's personal responsibility without repossession. In no event is the finance company permitted, through such means as rigged foreclosures, to collect any amount in excess of its actual losses and expenses, or to forfeit the purchaser's equity.

Obviously, the finance company is not to evade these restrictions by passing the paper on to a successor holder. Furthermore, extension charges, reinstatement fees, and expenses of collection or repossession are limited.

The finance company may not require the dealer to take, or accept an assignment from the dealer of, chattel mortgages or other liens on property other than the automobile purchased, as additional security on private, non-commercial transactions.

The finance company is not permitted to represent that it is connected or affiliated with the manufacturer, or has been endorsed, recommended, or approved by it. However, a registered finance company is permitted to state that fact; and a registered

finance company, offering a plan adopted by the manufacturer, is likewise permitted so to state, thus implementing, to a limited extent, the manufacturer's advertising of a plan which it approves.

The finance company agrees that it will not intentionally injure the manufacturer's good will, or the reputation of its product, or the good will of its dealers, except in so far as this may inferentially result from asserting its legal or contractual rights. The finance company also agrees not to disclose information received from a manufacturer to a competitor of the manufacturer.

The finance company agrees to disclose to the purchaser whatever information on the subject of reserves is required by a supplemental decree of the court on this subject.[70] It also agrees to comply in all other respects with the provisions of such supplemental decree, if any should be hereafter entered.

The finance company agrees not to violate any other reasonable rule made a part of the Code by the manufacturer, and approved by the Department of Justice and the Court, after notice and hearing.

In the Chrysler decree, there is an additional clause[71] pursuant to which a registered finance company cannot buy paper covering new Chrysler cars at a higher finance charge than specified in any plan adopted by Chrysler. If the paper contains a higher charge, the finance company must refund the excess to the purchaser by crediting it upon his obligation. This is an attempt to control overcharges. The obvious weakness is that no finance company is compelled to register, and no dealer can be compelled to use a registered finance company.

Provision is made for withdrawal from registration and also for removal of registered finance companies. The latter is accomplished through a petition filed by either the Government, the manufacturer, or another registered finance company, applying to the court for an order that a particular finance company shall cease to be a registered company because it has failed to comply with the Code. After hearing, the court may enter such orders as justice may require. The order may provide for sus-

70. Decree, par. 8.
71. Decree, par. 6(j), subdiv. 4(D). There is no corresponding provision in the Ford decree.

pension for a limited period of time, or for an indefinite suspension, in which case the finance company may apply for reinstatement after the expiration of at least six months.

It is apparent that there are really two agencies operating to "police" the Code: the public (which may complain either to the Department or to the manufacturer), and competitors who may learn of violations. The only penalty for violation, to be sure, is the loss of privileges. Consequently, the efficacy of the Code will, in substantial measure, depend upon the extent to which the manufacturer decides to make privileges available only to registered finance companies.

C. Restrictions on Respondent Finance Company

As indicated above,[72] most of the prohibitions in the decree are directed to the manufacturer and restrain its actions with regard to any particular finance company or group of finance companies. However, certain restrictions are applicable explicitly to the respondent finance company.

It is forbidden to represent to a dealer that the manufacturer requires him to patronize respondent finance company, or that his failure to do so will result in the cancellation or termination of his franchise or in the loss of any advantage, service, or facility furnished by the manufacturer, or that respondent finance company can obtain any facility, service, or privilege from the manufacturer which is not available to other finance companies under the provisions of the decree.[73]

Until entry of any further order by the court in the contingent supplemental proceedings[74] on the subject of reserves, it is directed to pay to each dealer, subject to offsets, the amount of all loss reserves standing to the credit of the dealer. Payment is to be made within thirty days after liquidation of all retail installment paper acquired from the dealer. The respondent company is also directed to comply with any supplementary decree entered on the subject of reserves.[75]

It is forbidden to enter into any agreement pursuant to which it might finance wholesale shipments for a dealer without charge in consideration of the dealer's agreement to patronize it for

72. Supra, p. 536 et seq.
73. Decree, par. 7(a).
74. See infra, p. 551.
75. Decree, par. 7 (b).

retail financing in connection with the sale of automobiles not financed by it at wholesale.[76] This somewhat involved provision requires explanation. Suppose Finance Company *A* is financing ten cars at wholesale for a particular dealer. It anticipates (and sometimes by contract may have the dealer's agreement) that if any of these ten cars are sold on the installment plan the dealer will sell the retail contract to Finance Company *A*. Finance Company *B* might offer to finance two cars at wholesale free of charge in consideration of the dealer's agreement that any retail paper resulting from the sale on the installment plan of the ten cars financed by Finance Company *A* should be sold to Finance Company *B*. This the decree forbids. The decree does not interfere with the arrangement with Finance Company *A*, nor would it interfere with Finance Company *B*'s proposal if it charged for the wholesale financing instead of doing it free.

The restrictions on joint visits[77] have already been discussed.[78]

D. Reservation of Questions for Future Determination

Controversial Economic Points. The present decree involves an important and highly controversial question relating to dealer loss reserves.[79] This matter has divided the industry since before N. R. A. days, and defeated the attempt to frame an N. R. A. code. It will be recalled that the indictment[80] dealt with reserves and alleged that payment of a portion of the finance charge to the dealer was concealed from the purchaser and was used as a bonus for diverting the sale of retail paper to the finance company, and that other finance companies were compelled to engage in the same practice.

At least seven questions were involved: Does the provision for, and payment of, loss reserves have anything to do with the Sherman Act? Is it proper for dealers operating on the recourse or repurchase plan to receive part of the finance charge

76. Decree, par. 7(c). It may be noted that this provision, and the limitation of joint visits contained in par. 6(i) and 7(d), refer to matters not specifically set forth in the indictment.

77. Decree, par. 7(d).

78. Supra, p. 542 et seq.

79. Supra, p. 532. It has been suggested that the Federal Trade Commission should act as an adviser to the Department of Justice on economic questions involved in consent decree negotiations. Donovan and McAllister, Consent Decrees in the Enforcement of Federal Anti-Trust Laws (1933) 46 Harv. L. Rev. 885, 912, 913.

80. Supra, p. 536.

as a loss reserve? Is it proper for dealers operating on the non-recourse plan to receive part of the finance charge? Assuming that it is proper for the dealer to receive part of the finance charge on either or both of the above types of transaction, how much should he receive and how should that amount be determined? Should the amount of the loss reserves be paid to the dealer at the time of purchase of the retail paper or should they be held by the finance company as security for the dealer's obligation to repurchase repossessed cars; and, if so, when should the loss reserves be paid to the dealer? What disclosure to the purchaser, if any, is proper with regard to the receipt by the dealer of a portion of the finance charge? How could any restrictions imposed on respondent finance company be also made applicable to its competitors?

These problems were dealt with,[81] not by appointing the Federal Trade Commission as a Special Master, but by reserving the matter for future trial in case the Government should succeed by consent or litigated decree in limiting or restricting the reserve practices of General Motors Corporation and General Motors Acceptance Corporation. In other words, if no relief is granted against the principal competitor of the defendant manufacturer and its finance company subsidiary, then these defendants are not to be subjected to further supplemental proceedings. If relief is granted, then the Government may apply to the court in these cases to decide whether the practices of the respondent finance company relating to reserves, considered in combination with the other acts and practices of it and the manufacturer established before the court, violate the Sherman Act. If such violation is discovered, the court is to decide what further decree, if any, is necessary in order that respondent finance company's reserve practices may thereafter be within the Sherman Act. The point of the last provision is to recognize that many acts, lawful in themselves, may be objectionable if performed in combination with other acts; and their continuation may be free from objection if the other acts are discontinued. As a decree is to be such as justice may "then" require, the court is free to consider intervening changes. It is also expressly free to consider the practices and volume of competitors.

This recognizes the distinction which exists in many anti-trust

81. Decree, par. 8.

cases as to various practices which are made the subject of complaint. The defendant may be willing to say it has never engaged in, and does not desire to engage in, some of them, and consequently may be willing to consent to their prohibition. Others the defendant may justify, thereby permitting the solution of the case by disposing of the non-controversial points and leaving the balance for subsequent investigation and determination.

It is a matter of regret that the Department did not embrace the opportunity to demonstrate that the anti-trust laws are not to be used for the purpose of binding a defendant and leaving the complainant free. This could have been done in respect to dealer reserves, which in this aspect was purely a matter of intense competition between the complainant finance companies and the respondent finance companies, by providing that any supplemental decree shall be entered and be binding upon the respondent finance company only when and to the extent that substantially identical decrees are also entered against the complainants.[82]

Thus, the Department would have taken the position that, with respect to a competitive practice, no relief will be given to a complainant unless it is willing to abide by the same restrictions as are imposed upon the defendant. This would be a unique, salutary, and most important development in the technique of anti-trust law enforcement. It tests the good faith of complainants and would tend to prevent complaints under the Sherman Act from being used as a method of unfair competition.

Attention should be called to one other consideration, in so far as binding complainants is concerned. Where a practice is admittedly lawful, unless perchance it forms part of an unlawful conspiracy, the procedure of dealing with all elements of the conspiracy are clear. For example, let us assume that the respondent manufacturer and the respondent finance company are engaged in interstate commerce and that, in violation of the

82. "A Court of equity 'in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.'" Inland Steel Co. v. United States (1939) 59 S. Ct. 415.

Sherman Act, they have agreed that the manufacturer shall recommend the respondent finance company and that respondent finance company will pay to the dealers part of the finance charge as a partial inducement to the dealers to follow the manufacturer's recommendation—all of this being assumed but not conceded by the present respondents, who in the consent decree asserted the truth of their answers and their innocence of any violation of law.[83] Now assume that the Department seeks to impose a prohibition against payment of the reserves upon a complainant finance company which has never been recommended by the manufacturer and which has never received from the manufacturer any other service or facility alleged to be unlawful. It is obvious that the Department would have a difficult problem in imposing, through litigation, such a prohibition upon this complainant. Therefore, adoption of any such principle by the Department would serve warning that the complainant who desires to restrict his competitor's practices (which are entirely lawful when standing by themselves, and which are subject to restriction only because they possibly form a part of an entire program which has been called into question) must be prepared voluntarily to accept a like restriction upon his employing the same practices.

New Statutes and State Laws. Provision is also made in the decree for modification upon the application of the respondents in order to conform the decree to any act of Congress hereafter enacted,[84] or to permit respondents to conform to the obligations imposed by the laws or regulations of any state with which the respondents must comply in order to do business therein.[85]

Review After Four Years. The rigidity of a consent decree, unless the Government consents to its modification upon application of the respondents, is exemplified by the statement of the late Mr. Justice Cardozo, in *United States v. Swift & Co.:*

> Nothing less than a clear showing of a 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.[86]

---

83. Decree, par. 1.
84. Decree, par. 14.
85. Decree, par. 17.
86. United States v. Swift & Co. (1932) 286 U. S. 106, 119. The litigation referred to is the Federal Trade Commission investigation of the meat packing industry. The court also said that "We reject the argument for

The present consent decree provides that after four years any respondent may apply to the court to vacate the entire decree, or to vacate or modify any provision of the entire decree

> on the ground that the commission or omission of any of the agreements, acts or practices herein prohibited or required, under the economic or competitive conditions existing at the time of such application, does not constitute an unreasonable restraint of trade or commerce among the states in automobiles within the meaning of the Sherman Anti-Trust Act as amended to the date of such application, regardless of whether or not such economic or competitive conditions are new or unforeseen.[87]

Thus, the doctrine of the *Swift* case will have no bearing on an application to modify this decree after it has been in effect for four years.

E. Protection against Competitors Not Restrained by the Decree

Protection against competitors in respect to reserve practices has just been discussed. There are other important provisions on the subject of protection against competitors.

General Motors Corporation. A simultaneous indictment,[88] was returned against General Motors Corporation and General Motors Acceptance Corporation, its wholly owned subsidiary finance company. No consent decree has been entered against them, and the case against them will probably be tried.

The present consent decree provides[89] that the manufacturer shall not purchase the securities of any finance company. It was recognized that if General Motors were, nevertheless, free to own a finance company, the respondent manufacturer might be at a disadvantage in competition. The decree accordingly provides[90] that, if a final decree is not entered on or before Jan-

---

the intervenors that a decree entered upon consent is to be treated as a contract and not as a judicial act." 286 U. S. at 115. See also United States v. International Harvester Co. (1927) 274 U. S. 693; cf. Hodges v. Snyder (1923) 251 U. S. 600 (relating to the modification of litigated injunctions); Pennsylvania v. Wheeling & Belmont Bridge Co. (U. S. 1855) 18 How. 421. See Indiana Quartered Oak Co. v. Federal Trade Comm. (C. C. A. 2, 1932) 58 F. (2d) 182, for an instance of modification of a cease and desist order upon consent of both parties; cf. Hatch v. Wallamet Iron Bridge Co. (C. C. D. Ore. 1886) 27 Fed. 673. Donovan and McAllister, supra, note 79, at 886-899.

87. Decree, par. 18.

88. United States v. General Motors Corp. (D. C. N. D. Ind. 1930).

89. Decree, par. 12.

90. Decree, par. 12.

uary 1, 1941, requiring General Motors Corporation to divest itself of all ownership and control of, and interest in, General Motors Acceptance Corporation, the court reserves jurisdiction to modify the present decree so as to permit the manufacturer to acquire ownership or control over or interest in a finance company.

Recognition is further given to the fact that it may be impossible, or for other reasons inadvisable, to force the manufacturer to take this step in order to compete with another manufacturer owning its own finance company. Accordingly, a further provision[91] is contained in the decree to the effect that if, prior to any divestment by General Motors Corporation of General Motors Acceptance Corporation, the latter shall make available to General Motors dealers a finance charge lower than that available to the manufacturer's dealers, then nothing in the decree shall forbid the manufacturer to make adjustments, allowances, or payments to its dealers who make available equally low finance charges to their purchasers.

To explain the operation of this provision, it may be stated that the current finance charge for new cars is six per cent of the unpaid balance if payable in twelve monthly installments. That is, if the balance to be paid is $500, and the customer desires to make his total payment in twelve installments, the finance charge would be six per cent of $500 or $30, so that the purchaser's obligation would be $530, payable $44.17 a month.

If General Motors Corporation should decide to operate its wholly owned finance company subsidiary on a non-profit basis and to reduce the basis of the charge from six to four per cent,[92] intending as a manufacturer to recoup out of increased sales the profit which its finance company subsidiary lost by this reduction, the other manufacturers bound by the present consent decrees might be severely handicapped. In this event, they are free to say to their dealers, "The lowest finance charge available to you from finance companies who will finance your sales is $30; if you will only charge the purchaser $20, we will make you an allowance of the $10 difference."

91. Decree, par. 12.

92. Compare the Robinson Patman Act (1936) 49 Stat. 1528, (1938) Supp.) 15 U. S. C. A. sec. 13a, which provides: "It shall be unlawful for any person engaged in commerce * * * to sell, or contract to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

The effect of this provision is two-fold. In the first place, it removes the premium which would otherwise exist on taking advantage of a competitor which did not own a finance company. Secondly, it would induce the dealers to patronize low-rate finance companies. If Finance Company *A* wants $30 for financing a transaction and Finance Company *B* insists on $35, there is no advantage in the dealer's patronizing Finance Company *B*, and he will lose $5 by doing so, since the manufacturer will only make up $10.

There is an additional and important provision in paragraph twelve of the decree, making the continuance of the decree depend upon the outcome of the General Motors litigation. It provides that if the criminal proceeding against General Motors finally terminates in any manner except by a conviction, the restraints contained in the decree are to be suspended until similar restraints are imposed upon General Motors Corporation and its subsidiaries either by a consent decree or by a litigated civil decree.[93] It will be noted that the disputed question of jurisdiction, *i. e.*, whether the subject matter of this proceeding is within the Sherman Act, will be determined as affecting the parties to the consent decree by the outcome of the General Motors case. In other words, if the General Motors litigation results in a dismissal because there is no interstate commerce, for example, then the consent decree must be vacated permanently, since the same objection would prevent a civil injunction. The same result will follow if it is held as a matter of law that there is no "unlawful restraint." Failure to convict for other reasons might merely suspend the consent decree until such time as a civil decree is obtained.

The Department has thus far preferred to proceed against General Motors Corporation by criminal rather than civil proceedings upon the theory that a criminal proceeding is the most effective deterrent.[94] Furthermore, it believes that a clear pronouncement in the criminal proceedings that certain acts violate the Sherman Act would establish the fact that a continuance of such acts would be illegal and would amount to the equivalent of a civil decree prohibiting their continuance. Accordingly, it is provided[95] that a general verdict of guilty followed by the

93. Decree, par. 12a(1).
94. Supra, note 4.
95. Decree, par. 12a(2).

entry of judgment shall be deemed to be a determination of the illegality of any agreement, act, or practice of General Motors Corporation which the trial court, in its instructions to the jury, held to be a proper basis for the return of a general verdict of guilty. A special verdict of guilty followed by the entry of judgment shall be deemed to determine the illegality of any agreement, act, or practice of General Motors Corporation which is the subject of the special verdict; that is also true as to the plea of *nolo contendere* or the plea of guilty. Such determination shall be considered the equivalent of a decree restraining the performance by the General Motors Corporation of such agreement, act, or practice unless or until the judgment is reversed or unless the determination is based, in whole or in part, upon General Motors' ownership of the finance company subsidiary or upon its performance of the agreement, act, or practice in combination with some other agreement, act, or practice with which the present respondents are not charged.

In other words, if in its instructions to the jury the trial court charges that it was a violation of the Sherman Act for General Motors Corporation to recommend that its dealers patronize General Motors Acceptance Corporation, and if a verdict of guilty is returned on this charge, and such judgment is not reversed on appeal, this is considered to be the equivalent of a prohibition forbidding further recommendation by General Motors Corporation of General Motors Acceptance Corporation. However, General Motors Corporation had a profit motive in the operations of General Motors Acceptance Corporation, whereas Ford Motor Company had no profit motive in the operation of Universal Credit Corporation. Accordingly, if the trial court's charge should be that such recommendation violated the Sherman Act, in whole or in part, because of the profit motive, then there would be no determination that such recommendation would violate the Act in the absence of the profit motive, and a conviction is accordingly not the equivalent of a decree. The same is true if an act, charged to have been performed by both General Motors Corporation and Ford Motor Company, was performed by General Motors Corporation in combination with some other act not charged against Ford Motor Company. Here, too, a conviction of General Motors Corporation would determine nothing about the legality of the act performed by itself. This

provision is unique and may well offer difficulties in application. It is difficult for lawyers to consider that a verdict and judgment in a criminal case settles the law to the same extent as a civil decree. However, in a non-technical sense, it is certainly true that the final decision in a criminal case may establish that a certain act is unlawful under a broad statute.[96]

After the entry of a consent decree, a final litigated decree, a judgment of conviction against General Motors Corporation, or after January 1, 1940 (whichever date is earliest), any restraints not imposed upon General Motors Corporation and General Motors Acceptance Corporation by a decree or the equivalent thereof are to be suspended as to the manufacturer until such restraints are imposed either by a civil decree or by conviction which is the equivalent of such a decree,[97] as just indicated. Of course, the decree would be suspended still earlier if the criminal proceeding should end, otherwise than by a conviction, before January 1, 1940.

Other competitors. Provisions of the decree will be suspended unless and until they are imposed upon competitors, who have done twenty-five per cent of the volume of business of either respondent, if the respondents are placed at a competitive disadvantage because such competitors are engaging in any of the prohibited practices, and if the Department is not proceeding with due diligence to obtain an adjudication as to illegality of such competitors' practices.[98] Such suspension may be either nation-wide or as to particular states.

F. The Consent Decree as Res Adjudicata

In view of the problem raised in *Aluminum Co. of America v. United States*,[99] an express provision is contained in the decrees[100] to the effect that the decrees shall not be pleaded in bar

96. See Caminetti v. United States (1917) 242 U. S. 470, construing (1910) 36 Stat. 825, (1927) 18 U. S. C. A. sec. 398.

97. Decree, par. 12a(3). Suspension of certain of the restraints will require a showing that General Motors Corporation or its subsidiaries is performing the prohibited agreement, act, or practice; these relate to the payment for cars, the furnishing of documents of title, the furnishing of office space and the making of contracts requiring dealers to use a particular finance company or class of finance companies or to use a particular financing plan.

98. Decree, par. 15.

99. (1937) 302 U. S. 230.

100. Decree, par. 13.

as to matters arising after the date of entry of the decree, unless such matters are covered by the decree, form part of the cause of action, or are a repetition or continuance of matters which form part of the cause of action pleaded in the complaint in the present proceeding.[101]

CONCLUSION

Consent decrees have been referred to as "law enforcement by negotiation * * * the settlement by negotiation of economic questions of great public importance."[102]

Under the new technique of the Department, consent decrees may be regarded as an enforcement by special legislation applicable to individual industries, supplementing a statute applicable to industry as a whole. This result follows from the recognition by the Department that it is proper to impose like restraints upon all major competitors in the industry, regardless of whether they are proceeded against in the same proceeding. It would follow, further, from the recognition by the Department, that complainants, whether they are major competitors, should be required to submit to the same restrictions which they seek to have imposed upon others. Thus, without the N. R. A., there is nevertheless the possibility of specialized legislative rules, applicable to individual industries to govern special situations.

Whether one agrees or disagrees with the Department's philosophy as to what constitutes a violation of the Sherman Act, or its policy of inviting consent decrees which offer more than could be obtained as a result of litigation, one can only commend the Department's recognition of the principle of protecting a defendant against competitive disadvantage. Similarly, one can only commend the Department's recognition that some phases of a complicated industry may not be solvable by consent decree and should be reserved for further investigation and future determination.

101. Cf. Grubb v. Public Utilities Comm. of Ohio (1930) 281 U. S. 470; Baltimore S. S. Co. v. Phillips (1927) 274 U. S. 316; United States v. California & Oregon Land Co. (1904) 192 U. S. 355.

102. Donovan and McAllister, supra, note 79, at 912.