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Article 5

# Antitrust Consent Decrees a Proposal to Enlist Private Plaintiffs in Enforcement Efforts

A. Bruce Campbell

# ANTITRUST CONSENT DECREES: A PROPOSAL TO ENLIST PRIVATE PLAINTIFFS IN ENFORCEMENT EFFORTS

Because of the vast complexity and expense of adjudicating antitrust violations, the consent decree has become the Justice Department's principal weapon in civil enforcement of federal antitrust laws.[1] Negotiated settlement between the government and an antitrust violator, culminating in court entry of a consent decree, has given the government an efficient alternative to cumbersome litigation. Consent settlement has been criticized for circumventing the scrutiny of judicial process and for insufficiently protecting the public interest by avoiding the reinforcing deterrent effect of private treble damage suits. Nonetheless, the longevity of the consent decree program and the government's increasing reliance on it suggests that it is here to stay.[2]

There is little doubt that in terms of time and expense negotiated settlement is relatively efficient.[3] Yet the value of the program as a substitute for adjudication of antitrust violations on the merits is negligible if there is no assurance that the dictates of the consent de-

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1 A consent decree is a court order entered to enforce a settlement between representatives of the Justice Department and the defendant, without a trial of the conduct challenged, in proceedings instituted under the Sherman Act, the Clayton Act, or related statutes. ANTITRUST SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE, ix (House Jud. Comm. Pub. 1959, v. 2) [hereinafter cited as REPORT]. Although there is no express statutory authorization for the use of consent settlements, this practice has gone largely unchallenged for 40 years. *Id.* at 1. The only statutory reference to antitrust consent settlement is in § 5 of the Clayton Act. *See* note 5 *infra.*

Surveys of the means of disposing of government civil antitrust suits indicate that more than 70% of such cases terminate with the entry of a consent decree. *See* REPORT, at ix; Turner, *Antitrust Consent Decrees: Some Basic Policy Questions*, 23 RECORD 118 (1968).

For an outline of the procedure involved in negotiating a consent decree settlement, see Jinkinson, *Negotiation of Consent Decrees*, 9 ANTITR. BULL. 673, 687-88 (1964). For an outline of the usual content of the consent decree, see Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983, 991-97 (1968).

2 As early as 1955 a comprehensive study of the Justice Department's handling of antitrust cases revealed that: "[T]o the Government, caught in the vise of increasing complaints and decreasing enforcement resources, [consent decree] economy may make or break enforcement success." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 360 (1955). *See also* A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 372 n.1 (1960).

3 *See, e.g.*, figures regarding appropriations and time commitments of the Justice Department from the period 1951-57 which demonstrate that the litigated suit takes, approximately, on the average 60 months, nearly twice the time of the consent settlement. REPORT, *supra* note 1, at 8-10.

cree will be followed or enforced. Whereas the litigated antitrust decree enlists the auxiliary support of interested private plaintiffs, negotiated settlement precludes such assistance. By encouraging the private parties to play a limited role in assuring antitrust defendants' compliance with consent decrees, the government could more nearly achieve its goal of eliminating anti-competitive practices.

## I

## THE BARGAIN NATURE OF THE CONSENT DECREE SETTLEMENT

In an effort to reduce cost and achieve efficiency, the government foregoes formal litigation in return for defendant's consent to a legally binding agreement, backed by the sanction of contempt,[4] obligating defendant to refrain from or to engage in certain conduct. Since consent decree settlements frequently require comprehensive and expensive demands of antitrust defendants, the advantages of avoiding litigation must be substantial.

The prospect of civil litigation of alleged anti-competitive practices is ominous in diverse respects: Pending determinations may create years of paralyzing uncertainty in business decision making; such suits are costly in terms of distraction of executives and unusually large legal fees; and sustained court proceedings are likely to be the source of unfavorable publicity for the antitrust defendant. Moreover, any determination of anti-competitive conduct in a litigated government suit may be asserted, under section 5 of the Clayton Act, as prima facie evidence of antitrust violations in subsequent treble damage suits instituted by interested private parties.[5]

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4 *See* 18 U.S.C. §§ 401(3)-402 (1964); Duncan, *Post-Litigation Resulting from Alleged Non-Compliance With Government Antitrust Consent Decrees*, 8 CASE W. RES. L. REV. 45, 50-54 (1956); Harsha, *Some Observations on the Negotiation of Antitrust Consent Decrees*, 9 ANTITR. BULL. 691, 695-96 (1964).

5 Section 5 of the Clayton Act reads as follows:

> **Judgment in favor of Government as evidence; suspension of limitations**
>
> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be au estoppel as between the parties thereto: *Provided*, That this sectiou shall not apply to cousent judgments or decrees entered before any testimouy has beeu taken or to judgments or decrees entered in actions under section 15a of this title.

38 Stat. 731 (1914), 15 U.S.C. § 16(a) (1964).

By agreeing to the entry of a consent decree, defendant automatically makes two concessions. If defendant's challenged conduct was not objectionable under the antitrust laws, defendant relinquishes his opportunity to prove this in court. And it is not unlikely that in some circumstances a defendant concedes more in negotiation than would be imposed by a court after litigation.[6] Of course, the converse possibility exists—the government may concede more in negotiating the consent decree than litigated relief would demand.[7]

Although the Justice Department owes a duty to the public to attack anti-competitive practices according to the dictates of the antitrust statutes, it digresses somewhat from these statutory standards under the desirability of practical efficiency in settlement. Since consent decrees are designed in part to set a standard for industry,[8] compromise of antitrust principles through consent decrees could render the antitrust laws useless.[9]

Recognizing this fact, the Antitrust Division enters the negotiations for a consent decree with a predetermined position of noncompromise as to remedial demands.[10] And normally the government need not compromise. The consent decree arises most often where evidence for the government is sufficiently strong to withstand vigorous litigation, not in cases where defendants think they have a chance to prevail.[11] Despite protestations that the government will not accept anything less than what adjudication would yield, experience indicates that some compromise occurs.[12] Such compromise can only be defended in "carefully defined situations," as when: (*1*) The theory of the government is unclear on a given issue; (*2*) the potential gain does not outweigh the cost and risk of litigation; or (*3*) the case is relatively

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6 NEALE, *supra* note 2, at 372.

7 *Id.*

8 *See* Assistant Attorney General Hanson's statement to the Antitrust Subcommittee concerning the purpose of central review in Washington before a given consent settlement is accepted by the government. He noted:

> Since any judgment provision used once by the Division is often the basis of requests—in court and in negotiation—for similar terms by other defendants, it is desirable that the Division adopt similar methods to cope with similar economic problems.

REPORT, *supra* note 1, at 13.

9 M. GOLDBERG, THE CONSENT DECREE, ITS FORMULATION AND USE 67 (1962); REPORT, *supra* note 1, at 22. *Cf.* S.C. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 845 n.29 (3d ed. 1968).

10 *See* Turner, *supra* note 1, at 121; GOLDBERG, *supra* note 9, at 19.

11 Jinkinson, *supra* note 1, at 680.

12 See the analysis of the government complaint and the resulting consent decree in the 1956 case of *United States v. Western Elec. Co. and American Tel. & Tel. Co.* in GOLDBERG, *supra* note 9, at 37-47.

small and presents difficult fact questions.[13] So long as the Justice Department substantially conforms to its policy of demanding in consent decrees no less than a litigated order would require, and of limiting exceptions to "carefully defined situations," the dictates of the antitrust laws are not necessarily undermined.

## II

### THE PRICE OF EXPEDIENCY

Section 4 of the Clayton Act provides for private antitrust treble damage suits by parties injured by anti-competitive practices.[14] In light of the deterrent effect of threatened treble damages for conduct violative of the antitrust laws, Congress passed section 5 to facilitate private civil antitrust suits.[15] Under section 5, the private plaintiff's difficult task of proving that given conduct violates the antitrust laws is ameliorated, and he is left only with proving damages. Because of the evidentiary difficulties in proceeding without a section 5 determination, a substantial majority of treble damage cases follow in the wake of successful government litigation.[16]

By entering the consent decree settlement with the government, an antitrust violator is able to avoid what may otherwise be the devastating consequences of government litigation—*i.e.*, section 5 is not applicable to suits settled by consent.[17] Arguably, if the prospect of

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13 Turner, *supra* note 1, at 119-20.

14 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964) reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 The extension of the Sherman Act triple recovery provisions in the Clayton Act suggests that compensation for private injuries is not the sole purpose of § 4. *See* J. SCOTT & E. ROCKEFELLER, ANTITRUST AND TRADE REGULATION TODAY: 1967, at 261-62 (1967); E.C. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 3.01 (1965); Jinkinson, *supra* note 1, at 683; Wham, *Antitrust Treble Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

16 It has been estimated that 75 to 90% of these cases have followed successful government suits. REPORT, *supra* note 1, at 23 & n.73. It has been suggested that where litigation of antitrust cases is "extremely difficult," it is "virtually untenable" for private parties to proceed without the assistance of a § 5 determination. GOLDBERG, *supra* note 9, at 68. *See also* NEALE, *supra* note 2, at 388-89; Note, *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1060 (1952).

17 The proviso to § 5 expressly excepts "consent judgments or decrees" from the prima facie evidentiary advantage. 38 Stat. 731 (1914), 15 U.S.C. § 16(a) (1964).

An exception has been made to the proviso in a few cases by the government's incorporation of an "asphalt clause" in the consent decree. By such a clause the defendant

treble damage sanctions serves to prohibit anti-competitive practices, because of the section 5 prima facie rule, the prospect of settlement by consent encourages such questionable practices. This situation has been termed "an invitation to corporate officers to undertake programs that may violate the law."[18]

Some commentators have taken the position that the consent decree not only removes the teeth of the Clayton Act, but also affirmatively affords protection for antitrust violation. A defendant may find a perpetual decree to his advantage both in protecting himself from future antitrust litigation and in preventing the government from charging that additional relief is necessary.[19] A recent analysis of one decree characterized it as a comprehensive immunity whereby a non-party cannot intervene to amend, expand, use as evidence, sue for violation, or sue for activity "immunized" by it.[20] One writer has pointed out in this regard that "a consent decree may be more anxiously sought by defense counsel than dismissal of a case."[21]

But the Clayton Act itself authorizes disregard of the prima facie advantage in deference to settlement. Section 5 expressly withholds the prima facie advantage when the prior suit is settled by consent.[22] This alone suggests that Congress intended to place the consent settlement above private actions in the hierarchy of available tools to enforce the antitrust laws. When the treble damage provision was proposed in Congress as an attempt to remove the economic incentive of violation of antitrust laws, the provision met with objection. It was

agrees to let the consent decree serve as prima facie evidence in certain subsequent litigation (usually that initiated by states or other political subdivisions), thus giving the consent decree the same effect as the litigated decree. It has been noted that government insistence on defendant's consent to an asphalt clause is likely to force a trial, and thus use of the clause is limited by the government's ability to litigate. The asphalt clause is functional only where the government's case is so strong that there is little possible gain for the defendant in going to trial. Note, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 638-40 (1965). In one case the government tried to compel defendant to accept an asphalt clause in an otherwise agreed-upon settlement. United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962). In entering the consent decree without the clause, the court attacked the Antitrust Division's efforts as an "unauthorized attempt . . . to avoid Congressional intent" to give the consenting defendant the right to escape § 5. *Id.* at 661.

18 REPORT, *supra* note 1, at 25.

19 Jinkinson, *supra* note 1, at 681-82, where the former chief of the midwest office of the Antitrust Division cites dramatic examples of such protection: United States v. International Harvester Co., 274 U.S. 693 (1927); United States v. Radio Corp. of America, 46 F. Supp. 654 (D. Del. 1942).

20 Note, *The ASCAP Consent Decree: The Effect on Potential Litigants*, 41 S. CAL. L. REV. 418, 436 (1968).

21 Dabney, *Antitrust Consent Decrees: How Protective An Umbrella?*, 68 YALE L.J. 1391 (1959).

22 See text of § 5 of the Clayton Act, note 5 *supra*.

feared that the section 5 prima facie provision would complicate government enforcement efforts by discouraging capitulation by defendants in government suits.[23] In response to this objection, the exclusion of the prima facie doctrine from consent cases was added.[24] Thus, the legislative intent of section 5 and its proviso was to encourage settlement by consent.[25]

Also, the suggestion seems unfounded that defendants, as a matter of course, may prefer the sanction of a consent decree, with its "umbrella" protection against further government or private claims, to dismissal of the government complaint. Although consenting defendants may avoid subsequent private treble damage suits, demands of consent decrees may be burdensome enough to deter non-competitive practices. Many go beyond a mere order to cease particular unfair practices and demand comprehensive affirmative action by the defendant. Provisions for divestiture, dissolution, patent licensing, restriction of future acquisitions, restriction of fair trade agreements, and market limitations are common examples of affirmative demands imposed by consent decrees.[26]

The partial sacrifice of the deterrent effect of private treble damage suits can be justified on grounds other than economic efficiency. Settlement by consent affords a degree of regulatory flexibility which is unavailable in government or private litigation. In formulating the consent decree, the Antitrust Division can proceed with its ultimate

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23 The legislative history of § 5 demonstrates this concern:

> From the standpoint of the Government, the proposal to make Government decrees conclusive in private suits is open to serious objection. . . . [C]onsent decrees have accomplished, without the consumption of the time and expense involved in conducting prosecutions, all the relief which could be obtained by successful litigation. No hindrance should be put in the way of the Department of Justice in respect of these negotiations.
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> If this proposal were enacted, it would deter any company from ever consenting to the entry of a decree in a Government suit under the antitrust laws.

H.R. REP. No. 627, 63d Cong., 2d Sess., part II, at 9-10 (1914). *See also* United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 371, 374, 376 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); SCOTT & ROCKEFELLER, *supra* note 15, at 261.

24 The preliminary draft of § 5 of the Clayton Act (§ 6 of the bill) did not include the proviso. H.R. REP. No. 627, 63d Cong., 2d Sess., Part I, at 2 (1914). *See* United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657, 662 (E.D. Wis. 1962) (noting in regard to the § 5 proviso, "the clear intent of Congress to encourage early entries of injunctional decrees without long and protracted trials."); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 371 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941). *See also* TIMBERLAKE, *supra* note 15, at § 18.02; *cf.* McHenry, *The Asphalt Clause —A Trap for the Unwary*, 36 N.Y.U.L. REV. 1114, 1122 (1961).

25 *See* Wham, *supra* note 15, at 1061-63.

26 For illustrative consent decree settlements with such provisions, see Flynn, *supra* note 1, at 1001 nn.62-67 (1968).

goal—design of a remedy which will achieve competitive conditions. Such conditions cannot be readily accomplished by ordinary penalties or injunctions. The flexibility of negotiated settlement enables government to direct its demands for relief at the causal factors of the violation.[27]

Finally, an important purpose of the antitrust treble damage actions is to allow compensation to the private parties injured by defendant's violation.[28] And nothing in current settlement procedure precludes the private third party from bringing suit against the defendant, proving his whole case, and being triply compensated in addition to being reimbursed for attorney's fees.[29]

Balancing the consent decree's shortcomings against the public interest in flexible and economical regulation suggests that the consent decree program should be retained.

## III

### POST-SETTLEMENT ENFORCEMENT OF CONSENT DECREE PROVISIONS

The Justice Department does not attain the degree of effective antitrust law enforcement that an examination of the sanctions included in its many consent decrees might indicate. Like any other court-entered decree, the consent decree is a basis for contempt pro-

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27 The potential regulatory value of the consent settlement, enhanced by the flexibility inherent in negotiation, was set out in W. HAMILTON & I. TILL, ANTITRUST IN ACTION 88-89 (TNEC Monograph No. 16, 1940):

> It can go beyond sheer prohibition; it can attempt to shape remedies to the requirements of industrial order. . . . It can . . . comprehend all the parties to the industry. It can accord some protection to weaker groups and safeguard to some extent the rights of the public. . . . It can, unlike a decree emerging from litigation, take into account the potential consequences of its terms. It can make its attack on the sources, rather than the manifestations, of restraint . . . . It can amend usage, create new trade practices, provide safeguards against unintended harm.

The consent decree may even regulate some legal conduct when it is suspected of being used as part of an "illegal conspiracy to monopolize." GOLDBERG, *supra* note 9, at 26-29. *But see* NEALE, *supra* note 2, at 412-13, noting that "some of the most remarkable and comprehensive examples of judicial legislation are to be found among negotiated consent decrees."

*See also* Flynn, *supra* note 1, at 1003; Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1305 (1967); Note, *supra* note 20, at 430.

28 The House Report on the Clayton Act stated that the present § 5 "is intended to help persons of small means who are injured in their property or business [by violations of] the antitrust laws." H.R. REP. No. 627, 63d Cong., 2d Sess., Part I, at 14 (1914). *See* 51 CONG. REC. 9270, 9490, 13851 (1914). *See also* TIMBERLAKE, *supra* note 15, at § 3.01.

29 See the text of § 4 of the Clayton Act, note 14 *supra*.

ceedings.[30] Yet, where the court-entered decree is merely the result of a tacit bargain between the government and defendant, contemptuous conduct will often go unnoticed unless the Justice Department makes a specific effort to prevent it.[31] If limited resources preclude litigation of the majority of antitrust suits, that same lack of funds may prohibit pursuing settlement cases beyond the entry of the consent decree.[32] Almost thirty years ago, a comprehensive evaluation of government enforcement of the antitrust laws found that "the great weakness [of the consent decree program] is that the [Antitrust] Division lacks the facilities for the follow-up essential to keep the decree alive."[33] Since that time the Justice Department has devised no procedures by which conduct transgressing the terms of the consent decree is brought to its attention "as a matter of routine."[34]

It has been suggested that only when the consent decree requires immediate action, such as sale of property, divestment of shares of stock, or dissolution of a trade association, is the authorities' attention held during the remedial process.[35] The Justice Department has relied on two types of provisions within the decree to attain compliance; neither has been effective. Some decrees have included specific provisions for continuing supervision in the courts. Such provisions have been termed "essentially regulatory" and outside the normal, proper business of the Division, since they may create detailed supervisory obligations.[36] Other decree provisions contemplate direct supervision by the Justice Department. The decree may grant inspection rights to the Justice Department or may require the defendant to submit periodic progress reports to the Justice Department as evidence of conformity. A congressional investigation of the consent decree program revealed that such progress reports had been infrequently used, and, although inspection was more frequently imposed, it was rarely followed up for practical reasons.[37] Thus any guarantee of detection of non-conformity with consent decree demands is absent. The Division's resources have permitted little more than investigation of complaints by interested outside parties.[38]

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30 62 Stat. 701 (1948), 18 U.S.C. § 401(3) (1964).

31 *See* GOLDBERG, *supra* note 9, at 66; HAMILTON & TILL, *supra* note 27, at 92-93; Flynn, *supra* note 1, at 997.

32 *See* NEALE, *supra* note 2, at 374-75; Duncan, *supra* note 4, at 55.

33 HAMILTON & TILL, *supra* note 27, at 95 n.21.

34 REPORT, *supra* note 1, at 16.

35 HAMILTON & TILL, *supra* note 27, at 92-93.

36 *An Interview with the Honorable Donald F. Turner*, 30 ABA ANTITRUST SECTION 100, 108-09 (1966).

37 REPORT, *supra* note 1, at 16; *see* Flynn, *supra* note 1, at 995-97.

38 REPORT, *supra* note 1, at 16; Duncan, *supra* note 4, at 55.

A. *Post-Decree Enforcement*

Since both consent and litigated decrees are entered by the court and are subject to contempt sanctions, a similar degree of enforcement assurance might be expected. But because of the reduced threat of subsequent private litigation and the element of secrecy that surrounds the whole consent settlement procedure, this is not the case.

A litigated determination of anti-competitive conduct inherently represents to the defendant a threat of future litigation by private plaintiffs under sections 4 and 5 of the Clayton Act.

Under section 5, presumably the private plaintiff would have a prima facie case only regarding the defendant's anti-competitive conduct prior to the entry of the litigated decree.[39] But, if the private plaintiff alleges that he has been damaged further by defendant's post-entry anti-competitive practices, noncompliance with the terms of the litigated decree could be fatal to defendant's case. Although the private plaintiff will not have a prima facie advantage, the Justice Department's initial case is readily accessible to the plaintiff. The defendant who has not complied with the prior litigated decree may be hard pressed to show that it is inapplicable to subsequent violations of antitrust regulations.[40] Although it would be difficult to estimate the subjective impact of lack of compliances on a court and jury, the mere possibility of its drastic consequences should encourage conformity with provisions of litigated decrees.

This element of pressure on the defendant is present to a substantially lesser degree where the defendant has submitted to a consent decree. The threat of further judicial exposure is mitigated by the consent decree's preemption of private plaintiffs' prima facie advantage; the strategy and data of the government's prior attack are unavailable to a private plaintiff who would pursue treble damages for post-decree anti-competitive practices.[41] Consent settlement negotiations are car-

39 *See* International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449 (1st Cir. 1963).

40 *Cf.* Sablosky v. Paramount Film Distrib. Corp., 137 F. Supp. 929, 935-36 (E.D. Pa. 1955). Under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (1964), the potential antitrust defendant must surrender to the Antitrust Division "any documentary material relevant to a civil antitrust investigation." *Id.* § 1312(a). The documents will be returned at the conclusion of a case brought by the United States without having been made available to anyone but the government, *except* those which have passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding. *Id.* § 1313(e).

41 It has been suggested that the challenged antitrust defendant who wishes to obtain the § 5 proviso advantages from settling by consent should agree to negotiations before the government commences its pre-trial discovery. Answers to interrogations, depositions, and other pre-trial steps may lead to government exposure to the public of damaging evidence; the § 5 proviso may be less meaningful where the government has made out a

ried on in private, no formal records are kept, and information is disclosed to the government only on the condition that it will not be made public.[42] In defense of these procedures, the government position must be that consent decree negotiations are distinct from the adjudication process, and are therefore not subject to the standards which control adjudicative procedure.[43] But a direct result of the secrecy surrounding consent decrees is the reduced possibility of a court's having contemptuous conduct brought to its attention by private plaintiffs.

Another objection to the secrecy of the consent decree program is that interested outsiders have no way of knowing if their interests are being adequately protected by the Justice Department.[44] The government has taken the position that the Antitrust Division can most effectively represent the public interest.[45] Although it is unlikely that the secrecy surrounding actual consent decree negotiation will be penetrated,[46] the Department and the courts have recently shown some sensitivity to the concerns of interested third parties. Prior to a change in administrative regulations, the first time any outsider had access to settlement terms was after a decree's entry by the court as a final judgment. Under current procedures, however, the proposed settlement is filed for thirty days, during which time it is subject to objection and modification where outside parties can show this would be ap-

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case for any interested private litigant even though it may not be asserted as prima facie evidence. *See* Publicity in Taking Evidence Act, 15 U.S.C. § 30 (1964); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964) (protective court orders dissolved in deference to policies favoring disclosure of pre-trial discovery matters); Harsha, *supra* note 4, at 697-98.

42 The Justice Department's commitment to protecting the strict secrecy surrounding consent settlement negotiations prevented it from cooperating with the House Antitrust Subcommittee in its study of the consent decree program. REPORT, *supra* note 1, at xi.

43 *Cf.* William H. Rorer, Inc. v. FTC, BNA ANTITR. & TR. REG. REP. No. 151, A-7 (D.D.C. 1964).

44 GOLDBERG, *supra* note 9, at 68; Flynn, *supra* note 1, at 1009.

45 *See* United States v. ASCAP, 341 F.2d 1003, 1008 (2d Cir. 1965). It has been suggested that it may not be in the public interest to recognize the recommendations of individual private parties, however justifiably aggrieved they may be, because such recommendations can frequently not be disassociated from the self-interest of the parties making them, and the clamor created by their intrusion may be unconducive to successful negotiation. Timberg, *Recent Developments in Antitrust Consent Judgments*, 10 FED. B.J. 351, 354-55 (1949).

46 Should the veil of secrecy surrounding consent settlement be pierced, it is likely that the government would be forced to trial in many more antitrust suits. The consenting defendant is protected to a large degree by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (1964), which provides for withholding from public scrutiny relevant documentary material unless it has passed into the control of the court as evidence in the record. 15 U.S.C. §§ 1313(c), (d) (1964). The Publicity in Taking Evidence Act refers only to hearings before a master or examiner or to depositions. 15 U.S.C. § 30 (1964).

propriate.[47] A 1964 Ninth Circuit case, *Olympic Refining Co. v. Carter*,[48] held that protective court orders guaranteeing non-disclosure of certain government-discovered documents could not stand in the face of policies supporting disclosure. A case currently pending in the federal courts will decide the applicability of *Olympic* to protective orders concerning consent decree progress reports.[49]

B. *A Proposal For Consent Decree Enforcement*

By integrating several provisions already familiar to antitrust law enforcement, the Antitrust Division could insure compliance with consent decrees without substantially increasing commitments of Justice Department resources.

Because of the secrecy that surrounds the consent decree negotiation, the only information regarding the settlement available to interested parties is the government's initial complaint and the actual decree. The interested outsider, with nothing more before him, will probably not fully understand the meaning of the decree.[50] Several critics of the consent decree program have proposed that the Department submit an opinion to the court, along with the proposed consent decree, explaining the facts involved in the case, the meaning of the terms of the decree, and the basis of the government's acceptance of the settlement.[51] These proposals are sound. An opinion from the Antitrust Division will eliminate the current absence of any specific connection between the allegations of the complaint and the relief demanded in the consent decree. Also, interested outsiders will receive the assurance that the Justice Department is not settling for less than it could get by litigation.

The Antitrust Division has occasionally required progress reports on conformity to consent settlement demands.[52] Were this required in

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47 28 C.F.R. § 50.1(b) (1968). *See, e.g.*, United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967); United States v. Schaefer, 5 TRADE REG. REP. (1968 Trade Cas. 84,939) ¶ 72,345 (E.D.N.Y. 1967).

48 332 F.2d 260 (9th Cir. 1964).

49 Standard Fruit & S.S. Co. v. Lynne, BNA ANTITR. & TR. REP. No. 375, A-1 (E.D. La. Aug. 14, 1968).

50 HAMILTON & TILL, *supra* note 27, at 90.

51 *E.g.*, GOLDBERG, *supra* note 9, at 69-70; ATTORNEY GENERAL'S REPORT, *supra* note 2, at 360. *But see* Note, 80 HARV. L. REV., *supra* note 27, at 1315, where as to a statement of purposes and objectives within the decree it is objected that, "it appears unlikely that the parties would be able to agree on this point." In response to this it is suggested that the Justice Department unilaterally submit a statement explaining basic facts and objectives of the decree.

52 *See, e.g.*, summary of provisions in a representative decree in GOLDBERG, *supra* note 9, at 31-33; Standard Fruit & S.S. Co. v. Lynne, BNA ANTITR. & TR. REG. REP. No. 375, A-1 (E.D. La. Aug. 14, 1968).

every consent decree, the Justice Department and interested outsiders would have some assurance that the consenting defendant would not consider his obligations fulfilled with the entry of the decree.

Finally, the price the Justice Department ultimately pays for the economy of settlement by consent is the abandonment of its auxiliary enforcement agent, the private treble damage plaintiff. The private antitrust plaintiff is properly denied a prima facie case of violation prior to entry of the consent decree because this encourages antitrust defendants to enter settlement negotiations with the government. But the same considerations are not present to militate against employing the private plaintiff to insure compliance with consent decree provisions. Although it is financially unfeasible for the government to police the hundreds of consent decrees currently in force, interested private parties could be economically and effectively used in the enforcement effort.[53] The obvious incentive to such enforcement would be the application of a variation of the Clayton Act prima facie doctrine to the defendant who violates the provisions of a consent decree; private plaintiffs could recover treble damages upon proof of losses resulting from defendant's transgressing the consent decree's prohibitions.[54]

It has usually been held that allegations of injury resulting from

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[53] *See* Flynn, *supra* note 1, at 1015-18. The commentator's evaluation of the consent decree program stresses that the government's failure to enforce decrees, the questionable utility of contempt proceedings for violation of consent decrees, and the invitation to circumvent the standard set by the consent decree suggest that a consent decree should be used as a regulatory decree. Flynn maintains that, if consent decrees are to be regulatory, a regulatory, rather than a litigation-oriented, branch of the government should administer them. He goes on to suggest that if consent decrees retain their prohibitive (as opposed to regulatory) function, "that private litigants be given a right of action to enforce the decree . . . in light of the Government's failure [to do so]." *Id.* at 1016.

A recent commentator proposed that private plaintiffs be permitted to assert a judgment of a consent decree defendant's contempt of the decree as prima facie evidence in a subsequent private treble damage suit. Note, *supra* note 17, at 644-46. This would promote compliance with consent decrees, but could be effective only to the extent that the courts first efficiently policed consent decree compliance with their contempt powers.

[54] In every case, the private treble damage plaintiff must demonstrate direct injury to his business or property by reason of the defendant's unlawful act, aside from injury to the general public. It is for the government to protect the public at large, not private treble damage plaintiffs. *See, e.g.*, Goldlawr, Inc. v. Shubert, 169 F. Supp. 677, 690-91 (E.D. Pa. 1958); Brownlee v. Malco Theatres, 99 F. Supp. 312 (W.D. Ark. 1951). This merely gives force to the expressed wording of § 4 of the Clayton Act: "Any person who shall be injured in his business or property . . . ." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

The proposal to extend an evidentiary advantage to the treble damage plaintiff concerns *only* damages suffered subsequent to the entry of the consent decree. This of course is necessary to preserve for the defendant the appeal of consent settlement as contemplated by the proviso of § 5 of the Clayton Act.

defendant's violation of prior consent decrees are inappropriate,[55] and that the section 5 prima facie privilege is limited to violations "under [the antitrust] laws."[56] In effect, the courts' objection has been that giving the private plaintiff a prima facie case after defendant violates the consent decree approaches giving the provisions of the consent decree the force of statutory law. But this is inaccurate. Violation of a consent decree would not of itself assure recovery,[57] but rather it would create an evidentiary[58] disadvantage to the violator, rendering him particularly vulnerable to suit. Proof of such a violation and resultant damages would establish a presumption that defendant violated the antitrust laws.[59] Defendant could conceivably demonstrate that the conduct which violated the consent decree was not a violation of the antitrust laws. The proposed scheme would not prohibit this, but

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55 *E.g.*, Paul M. Harrod Co. v. A.B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961); Independent Theatres, Inc. v. American Broadcasting—Paramount Theatres, Inc., 179 F. Supp. 489 (S.D.N.Y. 1959); Brownlee v. Malco Theatres, Inc., 99 F. Supp. 312 (W.D. Ark. 1951); *cf.* Kearuth Theatres Corp. v. Paramount Pictures, Inc., 1956 Trade Cas. 72,309 (S.D.N.Y. 1956); Tivoli Realty v. Paramount Pictures, Inc., 80 F. Supp. 800 (D. Del. 1948). *See also* TIMBERLAKE, *supra* note 15, at §§ 2.04, 18.17.

56 *E.g.*, Paul H. Harrod Co. v. A.B. Dick Co., 194 F. Supp. 502, 504 (N.D. Ohio 1961) (in granting a motion to dismiss certain allegations in a complaint the court said, "The definition of 'antitrust laws' in 15 U.S.C.A. § 12 [§ 1 of Clayton Act], clearly embraces only the statutes described therein."); Independent Theatres, Inc. v. American Broadcasting—Paramount Theatres, Inc., 179 F. Supp. 489, 490 (S.D.N.Y. 1955) (in striking references to a prior consent decree from plaintiff's complaint, the court held, "Plaintiff's claim must rest upon alleged violation of the antitrust statutes and not upon any claimed violation of the decree."); Brownlee v. Malco Theatres, Inc., 99 F. Supp. 312, 317 (W.D. Ark. 1951) (in striking reference in the complaint to non-compliance with a prior decree the court noted, "[I]t appears to the court that it is not proper to plead the decree, because the basis of plaintiff's claim is not the decree but the violation on the part of the defendant of the anti-trust laws.").

57 Violation of the consent decree, in and of itself, subjects the antitrust defendant to contempt prosecution, 18 U.S.C. § 401 (1964), but the private plaintiff has no standing to enforce a court decree. United States v. ASCAP, 341 F.2d 1003, 1007 (2d Cir. 1965); United States v. Paramount Pictures, Inc., 75 F. Supp. 1002, 1004 (S.D.N.Y. 1948).

58 *Cf.* Kearuth Theatres Corp. v. Paramount Pictures, Inc., 1956 Trade Cas. 72,309 (S.D.N.Y. 1956), where the court points out that the Clayton Act § 5 prima facie doctrine is a "rule of evidence."

59 The legislative history and the case law establish that the prima facie doctrine of § 5 creates a presumption of defendant's violation of the antitrust laws rather than conclusive evidence. Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 723-27 (9th Cir. 1959); United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657, 660 n.1 (E.D. Wis. 1962). Although the House version of the bill provided for a conclusive case, the Senate proposal for a prima facie advantage was adopted. S. REP. No. 698, 63d Cong., 2d Sess. 45 (1914). The private plaintiff's prima facie presumption does not serve to relieve him of his burden of proof. Sablosky v. Paramount Film Distrib. Corp., 137 F. Supp. 929, 936 (E.D. Pa. 1955).

it would give defendant the burden of coming forward to rebut plaintiff's prima facie case.[60] And this is proper since the private plaintiff has no access to the information that led to the government-defendant settlement.[61]

Furthermore, the objection that this procedure amounts to giving statutory force to non-statutory matter is too simplistic. Consent decree provisions currently have statutory qualities; the regulations set forth in the settlement are the antitrust "law" as to individual consenting defendants. And defendant's violation of the consent decree subjects him to liability for contempt, even in the absence of direct evidence that antitrust statutes have been violated.[62] If the Antitrust Division can create sanctions for individual antitrust defendants through consent decrees, it seems equally justifiable to permit private plaintiffs, who have suffered resultant pecuniary loss, to enforce these government-created sanctions.[63] The history of the consent decree program has demonstrated that, without such assistance, the Justice Department is unable to effectively enforce the regulations it creates.[64]

The body of case law holding allegations of violations of consent

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60 The proposal assumes, in placing the burden on the defendant of proving that non-conformity with the consent decree is not a violation of antitrust laws, that the mandates of the consent decree will accurately reflect the mandates of the antitrust laws. Most consent decrees are perpetual in duration. Conceivably, consent decree demands that were consistent with the antitrust laws at a point in time of the entry of a consent decree, after the passage of time and with a change in competitive conditions, may no longer reflect such consistency. Thus the proposal that consent decree violation should evidence violation of the antitrust laws increases the need for a procedure whereby the terms of the consent decree can be modified if the passage of time renders provisions inappropriate. Recent comment on the consent decree program suggests that such a procedure is lacking. *See generally* Note, 80 HARV. L. REV., *supra* note 27, at 1303. *See also* OPPENHEIM & WESTON, *supra* note 9, at 843-54; REPORT, *supra* note 1, at 3-6; Dabney, *supra* note 21, at 1392-97; Duncan, *supra* note 4, at 48; Harsha, *supra* note 4, at 693-95; Turner, *supra* note 1, at 126-28.

61 *See* pp. 771-73 & notes 41 & 42 *supra*.

62 *See* Note, *supra* note 20, at 430.

It has been noted that consent decrees frequently enjoin acts which are "lawful *in themselves*." (emphasis added). Paul M. Harrod Co. v. A.B. Dick Co., 194 F. Supp. 502, 504 (N.D. Ohio 1961). Yet the fact that these acts are the subject of consent decree regulations may suggest that, in the estimation of the Justice Department, they are unlawful in the context of defendant's total business practices. *See* GOLDBERG, *supra* note 9, at 26-29.

63 Vesting a private right of action in interested outsiders who have suffered direct injury from defendant's violation of government regulations is not foreign to other areas of the law. *Cf.* Kardon v. National Gypsum Co., 73 F. Supp. 798, *modified by additional conclusions of fact and law*, 83 F. Supp. 613 (E.D. Pa. 1947), where, in connection with alleged violation of securities regulations, the court held that, "although not expressly provided for in the statute, a remedy by civil action to enforce such duties and liabilities was available to the plaintiffs." *Id.* at 800.

64 *See* pp. 769-71 *supra*; Flynn, *supra* note 1, at 999.

decree provisions not to be violations under the antitrust laws[65] suggests that the initiation of the above proposal would necessitate legislative action.[66] This should take the form of an amendment of the proviso to section 5 of the Clayton Act:[67]

> *Provided*: This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Except, that violation of the consent judgment or decree shall be prima facie evidence of violation of said antitrust laws in suits by any other party against such defendant for injuries suffered subsequent to the entry of the consent judgment or decree.*

However, one case suggests a means by which a prima facie advantage could be given private treble damage plaintiffs under the current statutes. In *Simco Sales Service v. Air Reduction Co.*,[68] a private treble damage plaintiff alleged that defendant had violated a prior government consent decree and had subsequently been found in contempt. Defendant moved to strike these allegations. The court, interpreting section 5, denied defendant's motion. It maintained that an established violation of a consent decree by a contempt judgment comes within section 5 proceedings "under the antitrust laws":

> [W]here contempt proceedings are instituted to compel compliance, or punish failure to comply, with the terms of a Court decree entered to enforce the provisions of [the antitrust laws], the contempt proceedings are ancillary to and, therefore, a "proceeding under" the laws for the enforcement of which the decree was entered.[69]

Contempt proceedings need not make out actual violations of the antitrust laws.[70] Thus, since contempt proceedings can be viewed as "ancillary to, and, therefore, proceeding under" the antitrust laws, the direct private action for consent decree violation could come "under the laws for the enforcement of which the decree was entered."

The proposed enlistment of the private plaintiff in effective antitrust law enforcement will bolster the Justice Department's consent decree program where it is currently most deficient: in insuring com-

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65 *See* note 55 *supra*.

66 *See* Note, *supra* note 17, at 647.

67 Complete text of § 5 of Clayton Act appears at note 5 *supra*.

68 213 F. Supp. 505 (E.D. Pa. 1963).

69 *Id.* at 507. As to any interference with the Clayton Act § 5 consent proviso by this holding, the court noted:

> To extend the scope of the proviso to proceedings instituted to punish violations of such consent decrees would be to encourage the very conduct which the legislation was designed to eliminate.

*Id.*

70 *See* note 62 *supra*.

pliance with consent decree demands once a decree becomes effective. Defendants will not be discouraged from negotiating settlements with the Antitrust Division and there will be no interference with either defendant's protective shield of secrecy in negotiating or the protection from the prima facie violation doctrine in regard to treble damages prior to entry of the decree. The government's bargaining leverage will remain intact. And perhaps most significant, enlistment of the private plaintiff will not tax the resources of the Justice Department.

*A. Bruce Campbell*