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CONSENT DECREE SETTLEMENTS BY ADMINISTRATIVE AGENCIES IN ANTITRUST AND EMPLOYMENT DISCRIMINATION: OPTIMIZING PUBLIC AND PRIVATE INTERESTS

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[With respect to antitrust consent decrees] the judicial function has been superseded by an administrative procedure in which there are no administrative rules to safeguard the interests of the public or the interest of parties not privy to the Government's case. The consent decree practice has established an orbit in the twlight zone between established rules of administrative law and judicial procedures.

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

5 UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 (1975) [hereinafter cited as CIVIL RIGHTS COMMISSION REPORT];

Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983 (1968) [hereinafter cited as Flynn];

Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 [hereinafter cited as Shapiro];

Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822 (1975) [hereinafter cited as Sullivan];

Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594 (1973) [hereinafter cited as *ITT Dividend*];

Note, *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143 (1971) [hereinafter cited as *Private Participation*].

REPORT OF THE ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 86th Cong., 1st Sess. 15 (1959).

Before entering any consent judgment proposed by the United States . . . the court shall determine that the entry of such judgment is in the public interest.

Antitrust Procedures and Penalties Act of 1974.[1]

I. INTRODUCTION

Several recent developments have shifted the attention of legal minds to an area of adminstrative law too often neglected: the settlement process utilized by enforcement agencies to resolve questions of compliance with their governing statutes. The most significant factor contributing to this shift was the controversy over the Justice Department's resolution of its several conglomerate merger attacks under the antitrust laws against International Telephone and Telegraph Corporation,[2] not only because of the public nature of the debate but also because of the "ITT Dividend"—statutory reform by virtue of the Antitrust Procedures and Penalties Act of 1974.[3] But however important the *ITT* case, it represents only one aspect of a recurrent problem existing more generally under the antitrust laws[4] and, to a great degree, in wholly disparate areas. For example, in the employment discrimination field there has been widespread dissatisfaction with settlements negotiated by the Equal Employment Opportunity Commission (EEOC) and other enforcement authorities, emanating both from spe-

1. 15 U.S.C.A. § 16(e) (Supp. 1976).

2. United States v. International Tel. & Tel. Corp., 324 F. Supp. 19 (D. Conn. 1970) (Grinnell Corporation acquisition); United States v. International Tel. & Tel. Corp., 1971 Trade Cas. ¶ 73,619 (N.D. Ill. 1971) (Canteen Corporation acquisition); United States v. International Tel. & Tel. Corp., 1971 Trade Cas. ¶ 73,666 (D. Conn. 1971) (Hartford Fire Insurance Company acquisition). A good, brief recitation of the events involved in the controversy is found in *ITT Dividend* 603-06.

3. Pub. L. No. 93-528, 88 Stat. 1706. Section 2 thereof amends section 5 of the Clayton Act, and is codified at 15 U.S.C.A. §§ 16(b)-(h) (Supp. 1976).

4. Dissatisfaction with various aspects of the Justice Department's consent decree programs for enforcing the antitrust laws has been expressed with almost cyclical regularity, both by students of the field and in congressional investigations. *See, e.g.*, W. HAMILTON & I. TILL, ANTITRUST IN ACTION 88-97 (TNEC Monograph No. 16 1940); REPORT OF THE ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 86th Cong., 1st Sess. 290-305 (1959). An exhaustive bibliography of the general literature concerning antitrust consent decrees may be found in Flynn 983-84 n.1. Some of the more significant subsequent publications include: Buxbaum, *Public Participation in the Enforcement of the Antitrust Laws*, 59 CALIF. L. REV. 1113 (1971); *ITT Dividend; Private Participation.*

cial interest groups, such as the National Organization for Women and the NAACP, and from private plaintiffs who fear that the agency compromises will adversely affect their rights under Title VII of the Civil Rights Act of 1964.[5]

Although each of these settlements is well-deserving of careful scholarly examination, the focus of the present Article is broader than an evaluation of the merits of any particular agency action. Rather, our purpose is to consider the settlement process itself with attention to the intersection of private and public interests. In the antitrust area it has been said that "the consent settlement procedures as currently implemented by the Antitrust Division reflect what is really a process of administrative adjudication confirmed by consent decree."[6] Hopefully, our concern with process—free of the complications of applying intricate substantive law to involved factual situations—will yield insights the significance of which might otherwise escape observation. In sum, then, the discussion which follows will attempt to construct a general theory of the settlement process in terms of its aims and methods for ensuring that those aims are in fact pursued by enforcement agencies. In so doing, we will draw upon the learning available from several different substantive areas.

This rather ambitious undertaking is rendered manageable by a number of limitations on the scope of the present effort. First, this study is confined to settlements of enforcement proceedings which are in some sense formally commenced. Second, it focuses only upon resolutions of controversies in which the agency obtains, or purports to obtain, some relief from alleged violations.[7] These two restrictions, which

5. *See* CIVIL RIGHTS COMMISSION REPORT. The Report takes government enforcement efforts to task in several respects. First, as to the AT&T consent decree, the Report criticizes the lack of machinery to oversee compliance and the resultant discovery of widespread violations of the settlement agreement. *Id.* at 553-55. Second, the Report expresses uncertainty over the adequacy of the back-pay provisions of the steel industry consent decree in light of the fact that "the government conducted no broad-scale investigations of the industry's prior employment practices." *Id.* at 557. Finally, the Report warned that the steel consent decree's clause requiring the EEOC to advise the court that private plaintiff relief beyond back-pay is unwarranted "could result in an unfortunate alliance between Government agencies responsible for enforcing anti-discrimination laws and corporate interests which violate them." *Id.* at 560.

6. Comment, *The Automobile Pollution Case: Intervention in Consent Decree Settlement*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 408, 413-14 (1970). *See also* Flynn 1008-09; Timberg, *Recent Developments in Antitrust Consent Judgments*, 10 FED. B.J. 351 (1948).

7. These limitations avoid the "iceberg" issue of prosecutorial discretion, that is, whether decisions to refuse to initiate enforcement action are subject to review. The clearest authority for the doctrine of prosecutorial discretion lies in criminal law. The general rule still stands that "federal courts have traditionally and, to our knowledge,

exclude from consideration both agency refusals to initiate an enforcement proceeding and voluntary agency termination of such proceedings, share a common basis. Non-party objection to an agency settlement must be founded on the conjunction of two factors, the existence of a statutory violation and the failure of the agency to obtain satisfactory relief. Whatever the difficulties of examining whether the relief obtained is appropriate, the existence of an agency settlement providing some relief, implying as it does a continued agency belief in the exist-

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uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made." Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973). *But see* Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974). Ralph Nader sued the Attorney General in an attempt to force the Justice Department to enforce alleged criminal violations of the campaign practices laws. While the court of appeals dismissed, finding Nader lacked standing, it did indicate there was some judicial review of prosecutorial discretion: "[T]he exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review." *Id.* at 679 n.19.

In administrative law, the source most cited for the notion that agency decisions not to prosecute are not reviewable is dicta from a labor case, Vaca v. Sipes, 386 U.S. 171, 182 (1967). While the decision of the General Counsel of the NLRB not to issue an unfair labor practice complaint is not subject to judicial challenge by the unsuccessful charging party, *see* Terminal Freight Cooperative Ass'n v. NLRB, 447 F.2d 1099 (3d Cir. 1971), there is authority for allowing participation by the charging party in subsequent proceedings once a complaint issues, *e.g.*, United Auto Workers v. Scofield, 382 U.S. 205 (1965), including a right to some review of formal and informal settlements between the General Counsel and the charged party. *See* Leeds & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966) (requiring hearing and full adjudication once complaint issues unless charging party consents to a settlement); International Ladies' Garment Workers Union v. NLRB, 501 F.2d 823 (D.C. Cir. 1974) (recognizing that unreviewable prosecutorial discretion may be exhausted with the issuance of a complaint, although it demanded only a statement of reasons, not aggrieved party consent, prior to settlement). *See also* NLRB v. Electrical Workers Local 357, 445 F.2d 1015 (9th Cir. 1971); Concrete Materials, Inc. v. NLRB, 440 F.2d 61 (5th Cir. 1971).

In Action on Safety and Health v. FTC, 498 F.2d 757 (D.C. Cir. 1974), a public interest group sought to intervene in an FTC proceeding before any complaint was issued. Under agency regulations, 16 C.F.R. §§ 2.31 *et seq.* (1975), the FTC announced its intention to charge Volvo with a violation of section 5 of the Trade Communications Act, 15 U.S.C. § 45 (1970); the announcement was accompanied by a proposed complaint and a proposed order. Volvo requested pre-complaint consent negotiations; Action on Safety and Health moved to intervene in those negotiations. The court noted that under the Trade Communications Act only persons subject to a cease and desist order are entitled to judicial review, 15 U.S.C. § 45(c) (1970), so that the public interest intervenors could get review only under the Administrative Procedure Act. Under that Act, however, they were faced with the exemption from judicial review of "agency actions . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1970). The court found that these "nonadjudicative consent negotiations" were part of the

> whole consent negotiation procedure . . . promulgated by the Commission pursuant to its broad enforcement discretion. As such, we hold that the decision to grant or deny intervention is an agency action committed to agency

ence of a violation, offers some verification that there has been a violation of the statute. By limiting our study to settlements in which the agency evidences its own continued determination of a violation, we may, in a rough and ready fashion, filter out a class of objections which may have an unduly high proportion of ill-founded claims.[8]

A third restriction narrowing our study is that it deals only with settlements implemented through consent decrees. This limitation does not spring from a belief that consent decrees are necessarily more significant than other settlements. The basic distinction between various approaches—consent decrees may be enforced by contempt sanctions, non-judicially approved settlements by contract remedies—scarcely supports such a view.[9] Rather, consent decrees have been chosen simply because the mechanism for their review already exists, at least in embryonic form. Whereas judicial review of agency contract settlements might require enabling legislation,[10] we shall see that compromis-

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discretion and therefore is specifically exempt from judicial review under § 701 (a)(2) of the APA. 498 F.2d at 762-63 (footnotes omitted).

The court further denied petitioner's due process challenge to the consent order rules because petitioner failed to articulate any life, liberty or property interest "of a more substantial nature than the right of an undefined 'public' to participate in agency enforcement proceedings at a stage prior to formal adjudication." *Id.* at 764. *Compare* Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974) (no judicial review where SEC refused to examine the Commission staff's view to take no action where management refused to include in proxy materials shareholder proposals), *with* Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972) (judicial review where Commission actually reviewed and agreed with staff recommendation).

8. This is not to suggest that all complaints upon which the agency refuses to take any action are less meritorious than all of those it decides to act upon. Nor is it to assert that the problems involved in "settlements," as the term is used here, may not arise in connection with refusals to proceed at all. *See* Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974) (discussed in note 7 *supra*). Rather, the distinction simply reflects the judgment that the agency's "confirmation" of a possible violation through initiating enforcement efforts provides a sound basis for taking such cases somewhat more seriously than other cases. While the considerations adduced here may have application to at least some agency refusals to act, *see* Dunlop v. Bachowski, 421 U.S. 560 (1975); Buxbaum, *supra* note 4, at 1120-23, the present study is limited to a simpler problem.

9. Other considerations influencing the choice of settlement by consent decree rather than by contract are sketched in Note, *The Consent Decree as an Instrument of Compromise and Settlement,* 72 HARV. L. REV. 1314, 1314-15 (1959):

> The attorney's choice of the [consent decree] doubtless has as an object the rendering of the agreement in the "toughest" form available. Thus this choice may be motivated by the ordinary immunity of contested judgments from collateral attack, the longer limitations period applicable to judgments, or the availability of a convenient enforcement process, including enforcement in jurisdictions other than that in which the judgment was entered.

10. *Cf.* Consumer Federation of America v. FTC, 515 F.2d 367 (D.C. Cir. 1975) (barring judicial review of a Federal Trade Commission cease and desist order at the instance of one not subject to that order). See note 15 *infra.* It is true, however, that the

es contained in consent decrees can be examined without resort to Congress.[11]

A fourth restriction, implicit in the notion that we are dealing with consent decrees, is that this study does not apply to traditional common law civil actions where the government sues or is sued in contract or tort.[12] Such settlements, whether agreed to or not by a court once litigation is initiated, usually involve money damages and not the equitable kinds of relief involved in consent decree settlements. In such actions for private common law claims there seldom would be a conflict between the parties to the suit and any discernible third parties.

Our fifth limitation is also mandated by the third: the discussion concerns court enforcement by executive or administrative agencies since it is in this context that consent decrees are entered. Accordingly, the use of settlements by agencies empowered to issue their own cease-and-desist orders after administrative adjudication is relegated to a subsidiary role.[13] Again, this stems not from a belief that the problems

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Consumer Federation court relied heavily on the legislative history of the Federal Trade Commission Act, and that other administrative agency orders may be more susceptible to court review in proceedings brought by third parties, possibly under section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *But see* Action on Safety and Health v. FTC, 498 F.2d 757 (D.C. Cir. 1974) (Commission denial of intervention by public interest group in consent negotiations preceding issuance of complaint is exempt from judicial review as agency action committed to agency discretion by law). See note 7 *supra.*

11. This is not to suggest that legislation extending review powers to contract settlements may not be desirable, if only to plug a bothersome loophole. Suppose, for example, an administrative agency submits a proposed consent decree to a district court which, after reviewing it, decides not to enter the decree because it is not in the public interest. If an acceptable alternative cannot be worked out, this forecloses the consent decree. However, the agency, at least theoretically, may go forward with settlement by discontinuing prosecution and relying on the settlement agreement and contractual remedies to vindicate the agency's perception of the public interest. This would seem to be the worst of all worlds: the substantive provisions in the proposed decree continue as the only relief obtained while the agency loses the main advantage a consent decree affords, the contempt sanction for violation. This possibility may be more theoretical than real since public opinion and congressional oversight will be potent factors militating against an agency's decision merely to ignore an adverse court determination. Nevertheless, such an outcome is possible unless the judicial power reaches to ordering the agency to prosecute such a case, perhaps by judicial review under the Administrative Procedure Act. See note 10 *supra.*

12. *E.g.*, Federal Tort Claims Act, 28 U.S.C. §§ 1346 *et seq.* (1970).

13. The more general question of third party intervention in administrative proceedings in trial-type cases has been explored in two articles. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J.

explored here are inapplicable to that enforcement approach,[14] but rather is indicated by the absence of a ready mechanism to review such settlements independent of the agency involved.[15]

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359 (1972). Unfortunately, neither of these authorities focuses on the precise role "public interest" interventions may play in the settlement of such proceedings. *See* Action on Safety and Health v. FTC, 498 F.2d 757 (D.C. Cir. 1975) (indicating intervenor had to show an interest more substantial than general public interest to challenge denial of intervention).

14. The fact that public interest may be as much implicated by agency settlements in administrative proceedings as by court decrees entered in agency-initiated court suits is illustrated by those cases in which both enforcement devices are utilized against violations of the same or similar substantive law. In the antitrust area, for example, the Federal Trade Commission exercises a cease-and-desist authority overlapping substantively the Department of Justice's authority to bring court actions. P. AREEDA, ANTITRUST ANALYSIS 62-63 (2d ed. 1974). The FTC also has a settlement process comparable to Justice Department consent decrees, 16 C.F.R. §§ 2.31 *et seq.* (1975), including a sixty-day comment period. Clearly, whatever problems exist with respect to Justice Department settlements will also apply to Commission ones, although, admittedly, factors such as the extent of the enforcement powers administered and the relationship of agency and private enforcement may influence the importance of regulating the disparate kinds of settlement. *See* Cramton, *supra* note 13, at 531. Perhaps in recognition of the similarity between FTC and Justice Department enforcement efforts, a bill already has been introduced in the House which would establish a consent procedure for the FTC similar to that governing Justice Department consent decree proposals under the Antitrust Procedures and Penalties Act of 1974. *See* H.R. 499, 94th Cong., 1st Sess. (1975).

15. For example, Federal Trade Commission orders become final unless the respondent seeks judicial review within sixty days from the date of service of an FTC order. 15 U.S.C. § 45(c) (1970). Since neither the Commission nor the respondent have any reason to call into question a cease and desist order to which both agree, no court action is required. Indeed, it would appear that, at least as far as the relevant statute is concerned, no court intervention is even appropriate. Although section 45(b) authorizes the Commission to allow intervention in its proceedings, section 45(c) authorizes judicial review only by a person required to cease and desist by a Commission order. In Consumer Federation of America v. FTC, 515 F.2d 367 (D.C. Cir. 1975), the court held that not only did section 5(c) specify who may seek review but also, by inference from the legislative history, precluded judicial review on the part of those not so authorized, thus foreclosing a review effort under the Administrative Procedure Act. *See generally* Note, *Statutory Preclusion of Judicial Review under the Administrative Procedure Act*, 1976 DUKE L.J. 431.

If only intervention in the administrative proceedings is left as a device for controlling settlements, the agency is left the arbiter of the propriety of its own settlements. Nevertheless, interest in the possibilities of intervention in such proceedings is growing. *See* Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702 (1972).

Of course, different administrative enforcement schemes may admit of more of a role for independent judicial review of a settlement, especially under the Administrative Procedure Act. To this extent, the principles developed in this study relating to court supervision of agency settlements may prove useful in those settings as well.

One large problem of federal administrative law, well deserving of separate study, is the transfer of litigation responsibility from a particular agency to the Justice Department. For example, the Food and Drug Administration does not have authority to bring enforcement actions in federal courts. *See* 21 U.S.C. §§ 301 *et seq.* (1970). So the

With these parameters in mind, we can commence our consideration. This Article is organized as follows: Part II sketches the public and private interests which are involved in consent decree settlements. Part III next attempts to develop certain principles reconciling those interests which ought to be followed by administrative agencies in reaching settlement agreements and which might be employed by the judiciary as standards for reviewing proposed decrees. Finally, Part IV brings together the themes developed previously by considering the appropriateness and limitations of judicial review in optimizing both private and public interests.

II. THE CONVERGENCE AND DIVERGENCE OF PUBLIC AND PRIVATE INTERESTS IN CONSENT DECREE SETTLEMENTS

Agency settlements of court proceedings are, like all administrative actions, supposed to further the public interest. Hidden within this platitude, however, are two seemingly intractable problems. The first is simply: what is "the public interest," or formulated in institutional terms, who determines that question, and how? The obvious answer, that Congress defines public policy by the statutes it enacts, must be immediately qualified: the congressional unwillingness to provide the resources for universal enforcement[16] necessitates that some room for choice remain, at least in the first instance, with the agency charged with obtaining complaince. The question, therefore, is to what extent should an agency's choices relating to its law enforcement duties be subject to outside influence.

FDA may well tend to settle cases before any court action is commenced to avoid the loss of control of the litigation to the Justice Department and United States Attorneys incident to the initiation of an action. As limited, our study does not directly reach the FDA's settlement negotiations before any action is started. However, the procedures we suggest would be applicable to settlement negotiations leading to consent decrees that the Justice Department would undertake in the enforcement of the Food, Drug and Cosmetic Act. *Id.* §§ 332-33. We take no position on the right of an agency, deprived of direct enforcement authority, to act as a third party representing the public interest in an enforcement proceeding brought by the Justice Department.

16. Congress has provided in a number of statutes for the award of attorneys fees to a prevailing private party, for example, under the antitrust laws, *see* 15 U.S.C. § 15 (1970), and many of the civil rights statutes, *see* 42 U.S.C. § 2000e-5(k) (1970), thus to a large extent shifting the cost of enforcement to those who have been determined to be in violation. For reasons that are not entirely clear, however, Congress failed to provide an analogous recovery for government enforcement. Indeed, Title VII explicitly excludes the EEOC and the government as persons who may recover attorneys fees. *Id.* Thus, agency enforcement is usually circumscribed by the amount of its compliance budget.

The second problem is related to the first but has a somewhat different focus. Certain private parties will be more immediately affected by an agency settlement than members of the general public. If the effect is adverse, as viewed by the third parties themselves, they may argue that the agency has not properly taken such consequences into account in formulating its settlement. In institutional terms, the question is whether the agency can, as part of the settlement process, be induced or compelled to deal with adverse effects on third parties.

In short, we are concerned with the extent to which an administrative agency's view of the public interest should be subject to outside influence, possibly extending to judicial review, with respect to the views either of a disinterested "vicarious avenger" who has a conception of the public interest different from that of the agency view, or of a person whose interest is more immediate in terms of his job, property, or wallet. This inquiry entails a consideration of both kinds of private interests and of the agency's interest in the unreviewability of its settlements.

On a superficial level, it may appear that public and private interests in enforcing a statute are identical—compliance with a statute's mandate. Reflection, however, suggests a number of ways in which these interests may differ. First, the agency is presumably disinterested, at least in the sense of having no pecuniary stake in the outcome. This differentiates it from private persons who stand to receive some tangible benefits from successful enforcement. Hence, the agency may take a more balanced view of uncertain facts and perhaps ambiguous law than one whose judgment is influenced by considerations of personal gain.[17] Of course, the smaller the interested party's personal economic stake, the less important this consideration becomes. Yet even if the private party involved does not stand to receive some economic benefit from successful enforcement, as with some special interest groups, its view of a particular case may well be different from that of the agency. The disagreement in this instance will almost always be over variant interpretations of the governing statute,[18] and to the extent that the interpretation offered by the special interest group is reasonable[19] (in

17. After all, a private party with an economic claim has much to gain, and nothing to lose, if the agency advocates an "extreme" position successfully.

18. Unlike a private person with a monetary interest, the special interest group will rarely urge agency action where it perceives, with the agency, that the facts regarding an alleged violation are unclear. However, it is entirely possible that the group will believe a certain state of facts to exist contrary to the view of the agency. The basis of this belief ought to be susceptible of evaluation. To the extent that it rests on "facts" not known to the agency, these are certainly relevant to any decision to settle; if, on the other hand, it is founded only on unreliable rumors, it can be easily rejected.

19. Testing reasonableness in this sense should pose no unusual difficulties. The

the sense of being tenably argued, not necessarily right), it is by definition one which the agency could have espoused itself. While the agency may have good reasons for choosing otherwise,[20] it is by no means clear that its view should be treated as any more sacrosanct when the agency decides to settle a case than it would be in litigation on the merits.[21]

A second basis for the divergence of private and agency viewpoints on enforcement questions lies in the resource-allocation dimension of agency decision-making.[22] This aspect is closely intertwined with the first consideration. While a private person who may be personally benefited by a successful agency suit will almost always favor a lawsuit over a settlement because of the something-for-nothing factor, the enforcement authority must weigh the costs incident to any particular action against competing demands on agency resources in choosing the remedy it will pursue. This determination will involve at least an assessment of the relative factual settings and legal contexts of different cases to determine the probability of success, the direct impact of any one action, and some consideration of the indirect implications on the total enforcement effort. In this regard, the position of the special interest group is similar to that of the agency, since like the agency, such a group is concerned with obtaining the most enforcement for each resource dollar within the confines of the group it represents. While the special interest group may reach a different result on this balance, it will at least be interested in performing this calculus.[23]

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essential question is one of statutory interpretation: is the group's position rooted in the act's language, scheme, or legislative history, or does it merely reflect what the group wishes Congress had done?

20. Situations in which enforcement agencies have reversed fields on their view of the meaning of governing statutes are easy to find. For example, the EEOC has radically altered its view of the legality of seniority systems under Title VII. Compare the Commission's view in 1965, as reported by the court in United Papermakers Local 189 v. United States, 416 F.2d 980, 984 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), with more recent positions of the Commission, *e.g.*, Jersey Central Power & Light Co. v. Electrical Workers Local 327, 508 F.2d 687, 696 (3d Cir. 1975). For a good insider's view of internal policy shifts in the EEOC, see A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 51-79 (1971). Given this kind of demonstration of agency fallibility, the question whether evaluation of agency policy must be limited to purely internal processes or whether it is appropriate to involve third parties, in one fashion or another, becomes more meaningful.

21. Although the Supreme Court has occasionally expressed a standard of judicial deference to agency interpretations, *e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971), it is always possible to find cases where agency interpretations are given short shrift, *e.g.*, Espinosa v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973).

22. *See Private Participation* 151-52.

23. This is not to say that resolution of conflicts between special interest groups and the agency will be easy. Consider, for example, the employment discrimination field where there is a noticeable tension between black- and women-oriented groups concern-

A third factor over which private and public interests may diverge is timing. Put simply, the agency may prefer something for some people now to more relief for more people later, even without regard to the resource savings involved in a settlement.[24] Some private persons and special interest groups, on the other hand, may prefer the converse. Indeed, in this situation the interaction of private and public interests may be extraordinarily complex. When *some* relief benefiting third parties is obtained, but it does not constitute the fullest conceivable relief, risk-avoiders will favor settlement and will oppose risk-preferers in their views on the appropriateness of the settlement. Thus, not only is a division likely between the agency, private persons, and special interest groups, but these different units may find themselves split internally as well.

A fourth factor may divide the various interested parties in an entirely different fashion. A public agency may be influenced by factors wholly irrelevant to a private person's efforts to recover. For example, a law enforcement body might adopt a litigation strategy aimed at expanding the coverage of its controlling statute through case-by-case interpretation. If, in the process, a particular situation antithetical to its grand design arises, the agency might decide to forego vindication of a particular person's rights in favor of a more orderly development of the law in the "right" direction. The special interest groups may also favor this approach since they are, by definition, more concerned with maximizing group gains than individual ones; alternatively, their strategy may differ both from the agency's and from the interests of the private person who believes a particular proposed agency settlement unresponsive to his needs.

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ing what fair employment practices commissions ought to be doing, as well as the problems in certain areas involving inter-minority claims to a limited enforcement pie. In this area there are no apparent guideposts either for the agency in its allocation decisions or for the courts to review such decisions. The statute bars *all* discrimination equally, and, although the legislative history may be suggestive of certain priorities (for instance, Title VII was passed largely in response to black pressures), it is scarcely definitive (the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending Title VII, clearly was influenced in large part by sex-discrimination difficulties).

24. *See Private Participation* 153-54. In United States v. Operating Engineers Local 3, 4 FEP Cas. 1088 (N.D. Cal. 1972), private plaintiffs challenged as insufficient preliminary injunctive relief entered by consent decree between the defendant union and the attorney general who had brought the action pursuant to his then effective authority under section 707 pattern and practice suits. The government did not oppose the private plaintiffs' action since it had entered into the consent settlement "primarily because it wanted to obtain an immediate quota for blacks and Chicanos in the Union's apprenticeship program, not because it thought the further relief private plaintiffs are now seeking unwarranted or inappropriate." *Id.* at 1094 (footnote omitted).

These kinds of considerations are complicated by the fact that third parties are themselves differentiated. Some will be "aggrieved" by an alleged violation in the sense that the statute upon which the agency's enforcement proceeding is based also affords them a private cause of action. Others may be affected in a different, nonstatutory sense, ranging from an altruistic concern for correct settlements (the "vicarious avenger" or "officious intermeddler," depending on your view) to parties who are seriously affected in a practical way but have no statutory recognition of their "rights."[25] Although lacking standing[26] to sue, the latter group has interests in agency settlements which are no less real. For example, a white employee may have a stake in the consent settlement which alters the seniority structure at his place of employment to his detriment.[27]

The significance of this difference among third parties is unclear with respect to their possible participation in agency settlements. On the one hand, the aggrieved person's statutory right to sue suggests his paramount status over one who lacks standing; however, it may be countered that the very right to bring an action renders *agency* vindication of an aggrieved person's rights less important. Further, the fact that a party lacks standing to bring suit independently does not necessarily mean that his rights are not a matter of statutory concern,[28] although that is a possible inference in some situations.

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25. Some of the considerations limiting private plaintiffs' standing to sue under the antitrust laws are briefly noted in P. AREEDA, *supra* note 14, at 71-78. *See* Action on Safety and Health v. FTC, 498 F.2d 757 (D.C. Cir. 1974) (public interest group must have life, liberty, or property interest greater than mere membership in general public to make due process claim challenging preadjudicative settlement regulations of FTC).

26. "Standing" is used in this context as a convenient term to describe whether the statute in question recognizes a right to sue for violations of its provisions. In this sense, the usage has a respectable lineage at least in antitrust law, see note 25 *supra*, although purists may complain that it trenches upon "standing" as a case-or-controversy concept involving the power of the federal courts to review governmental actions. *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 167 (1970) (Brennan, J., concurring).

27. *See* Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975). *Cf.* EEOC v. American Tel. & Tel. Co., 506 F.2d 735 (3d Cir. 1974). Analogous problems occur in connection with settlements in the antitrust area. In United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970), employees of an acquired company sought protection against the acquirer's predation on their pension funds. They obtained some relief. *Id.* at 1309-10. *See also* United States v. Simmons Precision Prods., Inc., 319 F. Supp. 620 (S.D.N.Y. 1970) (union entitled to intervene in consent decree proceeding on behalf of union members whose job security was threatened thereby).

28. *See* Trbovich v. U.M.W., 404 U.S. 528 (1972) (statute precluding union from bringing private suit did not ban union's intervention in suit by Secretary of Labor to enforce union election statute).

Perhaps some elaboration will help clarify the problem. An aggrieved party can benefit in a number of ways from an agency action. If injunctive relief will suffice, an agency suit which obtains the prohibitions desired by the potential private plaintiff will often be satisfactory.[29] Where compensation for injuries suffered is at issue, the agency may be empowered to obtain such relief;[30] but, even where it is not, an agency suit may benefit subsequent private plaintiffs either by virtue of a special statutory provision[31] or, if prosecuted to final judgment, because of the doctrine of collateral estoppel.[32] Finally, even when not specifical-

29. It is uncertain whether a private plaintiff may enforce a judgment entered in a suit brought by a government enforcement agency. *See generally* Sullivan (discusses question in antitrust context). While doubt persists, a private person might wish to bring his own suit to obtain an identical injunction which *he* could enforce by contempt proceedings. The mere existence of the prior injunction in favor of the enforcement agency should not be an absolute bar. *See* United States v. Borden Co., 347 U.S. 514 (1954) (Supreme Court held it an abuse of discretion for district court to deny antitrust injunction to Justice Department solely because of decree against defendants in prior private action). Of course, in most situations, the aggrieved person will rely on defendant's voluntary compliance or governmental enforcement efforts, judging that the incremental advantage of obtaining a decree in his favor is not worth the costs of a separate suit.

30. Under Title VII, for example, the EEOC may seek back-pay relief for injured persons, whether under the pattern or practice authority, *see, e.g.*, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (suit brought by the Attorney General who previously exercised the Commission's pattern or practice authority), or under the right to sue on the basis of individual charges. *See* 42 U.S.C. §§ 2000e-5(f)-(g) (1970).

31. In the antitrust context, section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1970), provides that a final judgment in a government suit shall be prima facie evidence against the defendant in a subsequent private action "as to all matters respecting which said judgment would be an estoppel thereto;" this is subject to a proviso that the section is inapplicable to "consent judgments or decrees entered before any testimony has been taken." Obviously, a potential private plaintiff would prefer a government suit to be litigated (rather than settled, thus falling within the proviso) in order to obtain the prima facie evidence benefit.

32. The use of collateral estoppel by a non-party against a defendant who was also the losing defendant in a fully litigated prior agency suit raises at least two questions. First, the effect of special statutory provisions: does the prima facie evidence provision of section 5(a) of the Clayton Act, *id.*, imply that collateral estoppel may not be employed to give conclusive effect to the issues determined by the prior judgment? *See* Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334, 1345-46 (1969). Second, and more generally, does the "mutuality" requirement preclude a non-party to the prior suit from pleading collateral estoppel? Although the doctrine of mutuality has been on the decline, and may in fact have been definitely rejected as a general requirement, at least as a matter of federal law, *see* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971), mutuality problems remain in the "offensive use" of collateral estoppel, *see id.* at 324, 329-30. These questions must be resolved before one can confidently assert that a subsequent private plaintiff, not party to an agency action, may plead collateral estoppel of issues litigated fully in the prior agency suit and decided adversely to the same defendant.

ly authorized by statute, the agency may be able to provide for relief in consent decrees which will redound to the benefit of plaintiffs in subsequent private suits, as in the antitrust "asphalt clause."[33] Accordingly, a person aggrieved by an alleged violation will have a very real stake in the terms upon which an administrative agency settles a suit against the violator.[34]

On the other hand, an agency settlement will often not adversely affect an aggrieved person by undercutting his or her right to relief in a separate court action.[35] Although one can sympathize with a plaintiff's desire to be relieved of the necessity of suit, or at least have the burdens

33. The "asphalt clause," so named because it originated in connection with price-fixing in road-paving cases, was employed in a few government antitrust decrees. Although section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1970), provides for prima facie evidence effect in a subsequent private suit only for non-consent judgments, the Department of Justice occasionally required the insertion of clauses in consent decrees providing for prima facie evidence effect with respect to certain private plaintiffs. *See* Sullivan 839-41 n.54. Presumably, a consent decree could also provide for collateral estoppel effects in subsequent private suits, *see* James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173 (1959), when, absent such a provision, collateral estoppel effect would be most unlikely under federal law. *See* Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955); United States v. International Bldg. Co., 345 U.S. 502 (1953). The possibility of inserting any clause of this type in a settlement agreement, however, is likely to be of more academic than practical use since the defendant will rarely settle when the terms require an admission of liability to anyone damaged. *See* Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 639-40 (1965). This conclusion does not necessarily mean that such clauses should not be "required" in the sense that, should the defendant fail to agree, the enforcement agency will proceed with the suit. Professor Buxbaum in his provocative article, Buxbaum, *supra* note 4, at 1136-37, suggests that governmental "private" plaintiffs (that is, states or their subdivisions suing for damages in their proprietary capacities) should have a right to intervene in antitrust consent decree cases to seek an asphalt clause since they represent the "public interest" as much as does the Justice Department.

34. It may be possible for the Justice Department to benefit private plaintiffs, without forsaking a settlement otherwise acceptable to it, by providing such plaintiffs with the evidence the Department has gathered. Indeed, several cases have ordered that such evidence be preserved for possible future use by private plaintiffs. *See, e.g.*, United States v. National Bank & Trust Co., 319 F. Supp. 930 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970) (per curiam); United States v. Harper & Row Publishers, Inc., Civil No. 67 C 612 (N.D. Ill., filed Nov. 27, 1967), *aff'd sub nom.* City of New York v. United States, 390 U.S. 715 (1968) (per curiam). *See also* Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964). *See generally* Comment, *Consent Decrees and the Private Action*, *supra* note 33, at 647-54; *Private Participation* 157-60. It would not seem unreasonable for the Department, either on its own initiative or by order of a provision in the consent decree, to provide such data as a matter of course, subject to whatever limitations may be appropriate to preserve informer confidentiality or protect other agency interests.

35. United States v. Operating Engineers Local 3, 4 FEP Cas. 1088 (N.D. Cal. 1972) (private plaintiffs' class action not affected adversely by agency consent decree settlement with defendant union).

of litigation lightened, such a person's "plight," especially where the statute provides for the award of attorneys fees to a prevailing plaintiff,[36] can scarcely be compared to the situation of those who may be damaged by the alleged violation and yet have no recourse other than the administrative agency charged with enforcing the statute.[37]

Reconciling all these divergent interests is impossible; our task is somewhat more modest: ordering and optimizing the consideration of each in the most efficient manner within the consent decree process. In the course of this undertaking, we are guided by two overarching and interrelated guidelines. First, we will look to the applicable governing statute as a touchstone for our efforts. Second, the results of our analysis will be formulated in terms of principles or, if possible, rules capable of easy administrative and judicial application. Thus, it is not enough to caution an agency to "balance" interests, or to conclude that a district judge should determine whether a proposed decree is in the "public interest."[38] Instead, we provide at least some preliminary groupings towards assessing which factors should be accorded what weight. This is not to suggest that this Article, or others following, will be able to evolve a precise calculus. Rather, it is to assert merely that some meaningful principles should govern agency settlements, that the courts can play a role in ensuring that they do, and that the gains from a properly tailored process will exceed the costs involved.

III. Principles Governing Agency Settlements

Our task in this section is to explore principles which might be used to govern settlements by administrative agencies. In so doing, we seek to attain to two ends. The first is to formulate guidelines which an agency may employ in assessing various settlement models. These guidelines are, of course, applicable to agency settlements by contract as well as consent decree, and since they touch a process in which agencies are already engaging, any indicated changes of policy may be implemented without great difficulty. The second purpose, however, is more ambitious: to provide a basis for more controversial proposals concerning judicial review of settlements incorporated in proposed consent decrees.

36. Both Title VII and the antitrust laws provide for recovery of attorneys fees to a prevailing plaintiff. See note 16 *supra*.

37. Concern for the interests of such persons may explain the observed willingness of the federal courts to expand the boundaries of intervention in administrative agency proceedings. *See generally* Shapiro 764-65.

38. A more general analysis of the optimization of divergent interests through the particular procedural device of intervention can be found in Kennedy, *Let's All Join In: Intervention Under Rule 24*, 57 Ky. L.J. 329, 377-78 (1969).

Before proceeding to this task, one final prefatory note is in order. Administrative settlements are not a unitary phenomenon. Such factors as the complexity of the substantive law administered by the agency[39] and the guidance to be derived from a statute's language, legislative history or scheme,[40] may well influence the appropriateness of an agency settlement in any given situation. Nevertheless, the purpose of this Article is to construct a general theory into which peculiar factual and legal variations can be integrated. To that end, we avoid overly particularistic discussions, at least in the text, although it is no doubt true that the success of application of the principles evolved will be the ultimate measure of the utility of our efforts..

A. *Procedures Before a Consent Decree Is Entered*

(1) *Third-Party Input of Information: Comment Period Before Settlement Agreement*

The complex of interests involved in every settlement of a suit brought by an administrative agency requires that an informed agency

39. Of course, this factor can cut different ways, even within the same statutory enforcement scheme. In antitrust, for example, the existence of complicated factual settings and uncertain legal principles might suggest that a wide discretion is appropriate for the enforcement agency. Alternatively, one could look to those areas where Supreme Court decisions create virtually per se illegality for ubiquitous business conduct, thus making the question more a matter of who is sued than what conduct is legal, and argue that such power in the agency renders review of its decisions more important. *See* Buxbaum, *supra* note 4, at 1116.

40. For example, the Title VII statutory scheme suggests an intimate relationship between private and public enforcement, at least with respect to suits originating in charges filed with the EEOC. A person claiming to be aggrieved must, as a jurisdictional prerequisite to court action, file a charge with the EEOC within 180 days of the alleged violation, 42 U.S.C. § 2000e-5(e) (1970); the Commission, after serving the respondent with the charge, conducts an investigation culminating in a determination of whether there is reasonable cause to believe the charge is true. *Id.* § 2000e-5(b). If the Commission finds no reasonable cause, it notifies the charging party who may bring a private suit within ninety days. *Id.* § 2000e-5(f)(1). If, on the other hand, the EEOC does find reasonable cause, it is first directed to try to resolve the problem by conciliation, *id.* § 2000e-5(b); if that fails, it may bring suit. *Id.* If the Commission fails to sue within 180 days, the private party has a statutory right to intervene; if the private party sues, the Commission may intervene by permission of the court. Hence, the Commission is, at least in some sense, a vindicator of the private interest reflected in a charge it chooses to sue upon, and the statute takes care to ensure that the private interest is adequately protected through the statutory right to intervene. Accordingly, agency "discretion" in the settlement process may be more limited in the Title VII area than in other administrative law contexts. Even under Title VII, however, the statute has been interpreted so that it does not clearly define public-private interaction with respect to EEOC enforcement under its pattern or practice authority. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975). For a more detailed treatment of the Title VII statutory scheme, see Sullivan & Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?* (pt. I), 26 S.C.L. REV. 1, 21-25 (1974).

decision be predicated on full knowledge of the implications of the particular resolution. This, in turn, suggests that at least some kind of informal input of information and argument from interested third parties is needed. So much would seem indisputable but for administrative practices that demonstrate an affirmative desire to avoid any outside influences. For example, third parties have been presented with a fait accompli by the EEOC's resort, in several important cases, to filing a complaint together with a proposed consent decree.[41] Such pre-filing negotiations were used before 1960 in Justice Department antitrust enforcement efforts,[42] despite an occasional stinging criticism,[43] and, although dropped during the early 1960s, were later reinstituted.[44] Very recently, however, they have again been abandoned.[45]

But consent decrees submitted simultaneously with the filing of the complaint are not the only method of insulating the agency from third-party input. The present secrecy of settlement negotiations[46] works to this end even if substantial time lapses between the complaint and the submission to the court of the proposed decree. The Justice Department has made an attempt to mitigate this difficulty on the administrative level[47] with the institution of a thirty-day waiting period between

41. In United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), for example, suit was filed simultaneously with the submission of two proposed consent decrees. The decrees were approved on the same day. *Id.* at 834.

42. *See generally ITT Dividend* 609-10.

43. Dissenting to approval of this practice, *see* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 360 (1955), Professor Schwartz wrote that the process would

> whittle away the last remnants of judicial control and public scrutiny in the area, and involve the Government in bargaining with a violator not only as to relief but also as to the nature of the accusation to be made against him. *Hearings Before the Select Comm. on Small Business*, 84th Cong., 1st Sess., pt. 1, at 258.

See also Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 53 (1955).

44. *ITT Dividend* 609. The Antitrust Procedures and Penalties Act of 1974, amending section 5 of the Clayton Act, will apparently have no direct effect on pre-filing negotiations, although manipulation of the allegations in the complaint in relation to the relief obtained might enable the Department to make a settlement look better than if it had first filed a complaint containing all the charges over which negotiations took place. Pub. L. No. 93-528, § 2, 88 Stat. 1706 (codified at 15 U.S.C.A. §§ 16(b)-(h) (Supp. 1976)); *see* Stedman, *The Committee's Report: More Antitrust Enforcement—Or Less?*, 50 NW. U.L. REV. 316, 324 (1955). It may be that, faced with this situation in a consent decree review procedure under the new Act, the district court should demand disclosure of all the documents involved in the negotiations.

45. Speech by Thomas E. Kauper, head of the Antitrust Division, before the Oregon Bar Conference held in Portland on October 24, 1975.

46. The standard practice of conducting secret negotiations in the context of antitrust settlements is discussed in *ITT Dividend* 600-03.

47. Although an administrative innovation in the sense that the regulation was not mandated by statute, even this change was largely influenced by a House of Representa-

filing and entrance of an antitrust decree. Essentially, this regulation provides that proposed decrees are merely tentative, establishes a minimum thirty-day comment period prior to the entrance of the decree during which interested third parties may comment, and states that the Department may "withdraw or withhold its consent to the proposed judgment if the comments, views or allegations submitted disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate . . . ."[48]

Although this approach has since been supplanted by the more elaborate provisions of the Antitrust Procedures and Penalties Act of 1974,[49] the concept was sound so far as it went.[50] Third-party input into adminstrative determinations is clearly desirable, and the Antitrust Division's approach was at least a step in the right direction.[51] Indeed, on one occasion the Department actually withdrew a filed decree because of third-party objections.[52] The new Act elaborates on the Division's concept, the notion of a comment period, although expanding the time to sixty days; it also provides for additional publicity for the proposed decree.[53]

The merits of this approach, however, must not be allowed to obscure its limitations. It is a minimally acceptable reform because it increases third-party involvement while maintaining complete agency autonomy.[54] Its main defect is precisely the fact that the agency

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tives investigation. REPORT OF THE ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 86th Cong., 1st Sess. (1959).

48. 28 C.F.R. § 50.1 (1975).

49. 15 U.S.C.A. §§ 16(b)-(h) (Supp. 1976).

50. Such an approach has also been endorsed by the Civil Rights Commission Report with respect to employment discrimination suit settlements. CIVIL RIGHTS COMMISSION REPORT 560.

51. Donald Turner, then head of the Antitrust Division, wrote to the Chairman of the House Judiciary Committee on March 21, 1967 that the comment procedure "substantially eliminated the danger that the Government would improvidently settle an antitrust case because of incomplete knowledge of the facts or inadequate appreciation of defects in proposed remedies." *See ITT Dividend* 606.

52. *See* United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968) (per curiam).

53. The proposed decree is to be published in the Federal Register, together with a "competitive impact statement." See text accompanying notes 55-57 *infra*. During the sixty-day waiting period, comments and the Department's responses thereto are also to be published. 15 U.S.C.A. § 16(b) (Supp. 1976).

54. Even Professor Handler, who is generally critical of increased private participation in governmental antitrust suits, speaks approvingly of the notice provision. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 18 (1971).

remains paramount, since leaving the agency the sole judge of its own enforcement efforts is hardly likely to lead to much change except in the case in which the most obvious error is revealed by third-party comments. An approach which relies on an agency to recognize and rectify its own errors requires an overly optimistic view of the bureaucratic or human process of acknowledging one's own mistakes. This approach also may undercut the agency's own rational self-interest. Agency negotiators may well fear that refusing too frequently to consummate "tentative" settlements because of third-party input will impede the use of the settlement process. Defendants are likely to take a tougher stance initially in order to save some concessions for the "second round." Left to their own devices, agency negotiators and their supervisors are almost certain to share the practitioner's distaste for "welching on a deal," a judgment borne out by the paucity of withdrawals of consent decrees under the Justice Department's comment procedure.

(2) *An Agency Explanation of the Settlement*

A second principle for reconciling the divergent interests involved in consent decree settlements is that the agency should prepare a statement explaining its action in all such cases. Although not employed by the Justice Department on its own initiative, a "competitive impact statement" is part of the package of reforms now required by the Antitrust Procedures and Penalties Act.[55] This statement is to include the following items:

(1) the nature and purpose of the proceeding;
(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
(5) a description of the procedures available for modification of such proposal; and
(6) a description and evaluation of alternatives to such proposal actually considered by the United States.[56]

55. 15 U.S.C.A. § 16(b) (Supp. 1976).
56. *Id.*

It will be quickly apparent that this format could be applied to a number of enforcement contexts with little in the way of modification: a "discrimination impact statement," for example, could be formulated in much the same terms for employment discrimination consent decree settlements.

As with the comment period, there is much to applaud in the notion of a statement explaining the consent decree. The intrusion into agency autonomy and the drain on agency resources are minimal. At the same time, the process of justification may itself provide for healthy introspection, at least if the agency employs the process in deciding whether to settle rather than as a post-settlement rationalization. Finally, if the statement is coupled with a comment procedure, it may obviate, or at least focus, third-party objection.

Yet there may also be limitations to this approach. One problem which has been raised with reference to the Antitrust Procedures and Penalties Act is applicable to any statement of reasons:

> Should the decree be rejected . . . the Government faces its own dilemma. The prosecutor may have been amenable to a compromise because the evidence was insufficient to justify either the relief originally sought or, indeed, any substantial relief at all. After revealing the weaknesses of its case on the public record, the Government is hardly in a position to litigate.[57]

However, while the argument has superficial appeal, on reflection there appears to be a convincing response. In the first place, should the court believe the government's case to be tenable but weak, it is highly unlikely that it would reject a consent decree as not providing enough relief. Second, if the court believed the government's case fatally weak, it might reject the decree for providing too much relief, that is, as "punishing" a nonviolator.[58] A rejection of the proposed decree in the latter case would seem to be totally unobjectionable.[59]

Even if there is nothing affirmatively objectionable about requiring a statement of reasons, however, the statement requirement, either alone or in conjunction with the comment period, achieves a "reconciliation"

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57. Handler, *Antitrust—Myth or Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211, 241-42 (1975).

58. However, should the court believe the government's case to be strong, it may be tempted to reject the decree if it believes the relief sought is inadequate. If a rejection occurs after the government has attempted to convince the court of the sufficiency of the relief by divulging the weaknesses of its case, the government will be in the same difficult position. *See id.* at 242-43.

59. Clearly this result would be unobjectionable to Professor Handler, who has often deplored some of the "excesses" of recent substantive developments. *Id.* at 212 & n.7.

strongly favoring the agency's interests. Unless subject to some sort of meaningful review, an agency explanation requirement will be constantly threatened by bureaucratic pressures toward standardization that may well cause the process to degenerate into the dissemination of agency boilerplate. Accordingly, while we accept the issuance of an "impact statement" as an appropriate procedural principle,[60] it is done with an awareness that the ultimate utility of the principle is likely to be limited unless coupled with further reform.[61]

(3) *Third-Party Participation in Actual Settlement Negotiations*

As a possible third procedural principle, it may be desirable to require agencies to involve third parties in the actual settlement negotiations. Such a practice would have the tangible advantage of providing input and guidance to agency decision-making while minds and options are still open.[62] But, if the comment and statement principles can be

60. Although we thus conclude that agencies should, before finally accepting a settlement, provide an opportunity for input by third parties and state reasons to support the settlement, one exception must be made for emergency circumstances. In some rare enforcement settings, where irreparable injury will result without quick action, such risk of injury outweighs the benefits of third party participation before entry of the consent decree. For example, under section 2061 of the Consumer Product Safety Act, 15 U.S.C.A. §§ 2051 *et seq.* (1974), the Consumer Product Safety Commission is authorized to initiate court action to seize an "immediately hazardous consumer product." In such action involving "imminent and unreasonable risk of death, serious illness, or severe personal injury," the Commission might be justified in shortcircuiting the consent decree procedures in order to reach a settlement immediately removing the product from the marketplace.

61. A recent Supreme Court decision, Dunlop v. Bachowski, 421 U.S. 560 (1975), provides some support for the principle advocated in this section. The case grew out of a losing candidate's complaint to the Secretary of Labor alleging union election violations of Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* (1970). The Secretary, who alone had authority to bring suit, refused to do so, and hence the complainant filed an action seeking both a declaration that the refusal to sue was arbitrary and a court order that suit be brought. The Supreme Court ultimately found that the district court had jurisdiction of the complainant's suit and that the Secretary's decision was subject to review under the Administrative Procedure Act. Although reserving the question whether the district court could order the Secretary to sue (an issue which might be obviated by the Secretary voluntarily bringing suit if the trial court ever decided that the Secretary's refusal to bring an action was arbitrary and capricious), the Court did hold that "the Secretary must provide the court and the complaining witness with copies of a statement of reasons supporting his determination." 421 U.S. at 571. The court predicated this result not only on the necessity for some basis for judicial review, but also on the notion that the Secretary was, in a sense, a lawyer for the complainant.

62. The Civil Rights Commission Report recommends that representatives of affected employees be included "in the negotiations precedent to future agreements" such as the steel industry and AT&T consent decrees in the employment discrimination fields. CIVIL RIGHTS COMMISSION REPORT 560. *See also id.* at 672.

faulted for preserving almost complete agency autonomy, outside participation in the negotiations themselves may tend too far in the opposite direction.

It is clear that neither negotiating partner will normally welcome outside participation. The defendant will oppose it for a variety of reasons, ranging from the divide-and-conquer strategy of dealing with public and private adversaries separately, to the perhaps more legitimate fear that making the negotiations more public will have an adverse effect on sales or stock prices.[63] The administrative agency may also oppose such participation on varied grounds.[64] Its reluctance may be the result of "derivative" fears. That is, the agency may oppose third-party involvement simply because such participation will make defendants less willing to negotiate, decreasing chances for a resource-conserving settlement. Further, there may be legitimate concern that such participation may disclose enforcement strategies better left hidden, or simply complicate the process so that a satisfactory resolution becomes impossible.[65]

There is, then, reason to believe that negotiation is a fragile process which may be impeded (or not even begun) if third-party participation is likely. Requiring outsider involvement at the expense of decreasing agency settlements surely has little to commend it, entailing as it does the expenditure of more litigation resources without any guarantee of substantive improvement. Further, allowing third-party involvement may not in fact effect a settlement toward which the agency and the defendant are disposed. The right to raise objections does not ensure that they will be listened to, and the granting of participant status to outsiders does not accord them a veto.[66]

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63. In the antitrust context, where the third parties will often be either competitors, suppliers, or customers, the problems of disclosure of business information and strategy are magnified.

64. *See generally* Timberg, *supra* note 6, at 354-55.

65. In Action on Safety and Health v. FTC, 498 F.2d 757 (D.C. Cir. 1974) (see note 7 *supra*), the court, quoting from Moog Indus., Inc. v. FTC, 355 U.S. 411, 413 (1958), refused to overturn a Commission decision to deny a public interest group's motion to intervene in pre-complaint settlement negotiations:

> [T]he power to prescribe consent negotiation procedure is part of the general enforcement power of the Commission, and such enforcement decisions are generally not subject to judicial review. In this area, concerned as it is with questions of administrative policy and allocation of scarce Commission resources, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." 498 F.2d at 762 (footnote omitted).

See generally Note, *Consent Decrees and the Private Action, supra* note 33, at 637; *Private Participation* 154-55.

66. Indeed, within wide limits, the agency apparently need not concern itself with even the defendant's attack on the legitimacy of agency demands during settlement

In sum, the disadvantages of third-party participation in settlement negotiations are considerable, and the advantages uncertain, at least if such participation is not backed by some kind of review of the agency's final decision. And, if such review is available (a point to be considered),[67] little incremental advantage will flow from participation at the negotiation stage. After all, the agency will need to justify its determination at the judicial review stage, at which time the third-party input that otherwise would have been provided by direct participation in negotiations may be approximated, without the concomitant problems of such participation. Accordingly, participation, as a general principle governing all negotiations, is to be rejected,[68] although there may be some statutory contexts or particular enforcement situations in which the agency should allow outsider involvement. If it does so, it may choose to tailor the extent of such participation to minimize the problems we have mentioned.[69]

B. *Considerations in Determining the Public Interest*

The foregoing discussion suggests the existence of two procedural principles—the requirement of a comment period and a statement explaining the settlement—which may improve the reconciliation of interests in the settlement process by perfecting the flow of information and focusing agency analysis on the ends and means of settlements. Moreover, both principles may be implemented by an agency itself without

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negotiations. *But see* United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962) (in antitrust context, court held that defendant could obtain court ordered "consent" decree without government's consent). In this case the government and the defendant had reached agreement on all substantive terms except one, an asphalt clause, see note 33 *supra*, which the defendant claimed was being extracted in violation of its statutory right to settle free of prima facie evidence effect. The district court agreed, and entered the decree without the disputed clause.

Criticism of the decision has generally focused on the court's recognition of such a "right," *see* Sullivan 839-41 n.54, leaving relatively unconsidered the court's major premise: if the only factor barring agency consent was its insistence on relief that was in some sense illegitimate, the court could enter the decree without such a provision. The Supreme Court, although faced with the issue in United States v. Ward Baking Co., 376 U.S. 327 (1964), avoided a definitive ruling by holding it inappropriate for a consent decree to be entered over the government's objection when the relief the government sought had a reasonable basis under the circumstances. *See* Note, *Consent Decrees and the Private Action*, *supra* note 33, at 629-33.

67. See notes 149-67 *infra* and accompanying text.

68. The court in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), found no right to third party participation in government settlement negotiations. In fact, it found "highly doubtful" the desirability of such involvement. *Id.* at 875-76.

69. *See Private Participation* 154-55.

resort to court order or enabling legislation. The utility of these procedural innovations, however, is limited by the absence of articulated methods of reconciling the interests involved once they have been exposed to view. That defect is all the more serious in that it pervades previous attempts to deal with the problem.

For example, the Antitrust Procedures and Penalties Act of 1974,[70] in addition to legislating a comment period and a competitive impact statement,[71] also establishes a requirement that the district court, prior to entering a proposed decree, determine if it is "in the public interest."[72] Although the statute, in the course of listing factors to be found in the competitive impact statement[73] and elsewhere,[74] suggests some considerations relevant to such a determination, it nevertheless provides the court with no guidance as to when a settlement is in the public interest—that is, how the relevant factors are to be weighed in the balance. Yet this failure of the statute is perhaps not only excusable but also inevitable, since it involves considerations which may be better worked out through careful scholarly and judicial development than by legislative fiat. To this end, it is our purpose to suggest some guidelines for agencies and the courts to employ in making such determinations.

(1) *An Agency Should Not Expend Its Resources Obtaining Decrees Which Merely Parrot the Provisions of the Governing Statute*

A proposed decree, although typically disclaiming any admission of liability by the defendant, must nevertheless be predicated on the enforcing agency's belief that the defendant has violated the law.[75] The fact that the defendant does not necessarily concur, and that its consent to the relief in the proposed decree is contingent on nonadmission, is irrelevant to our purpose, which is to assess the propriety of the settlement from the viewpoint of the enforcement agency. And for this the

70. 15 U.S.C.A. §§ 16(b)-(h) (Supp. 1976).

71. *Id.* See text accompanying note 55 *supra.*

72. *Id.*

73. See text accompanying note 56 *supra.*

74. The court is advised to consider "the competitive impact of such judgment," resorting to the factors in the impact statement, 15 U.S.C.A. § 16(e)(1) (Supp. 1976), and "the impact of entry of such judgment upon the public geuerally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." *Id.* § 16(e)(2).

75. A belief that a violation has occurred is not necessarily an all-or-nothing affair. Unclear facts or uncertain law may make an agency judgment more an estimate than anything else. Despite this, however, an enforcement authority would hardly be acting properly if it continued to prosecute a case once it became convinced that a violation was improbable.

agency's belief in the existence of a violation is critical, distinguishing the consent decree from other forms of agency resolution of complaints prior to adjudication.[76]

From the fact that the agency believes a violation to exist we can derive our first principle: to justify the expenditure of agency resources already incurred, the settlement must obtain relief which remedies, at least in part, the violation alleged in the complaint. This principle would seem almost too obvious to mention were it not violated so often in practice. For example, in the antitrust area, it is common for a consent decree merely to enjoin conduct which is per se illegal.[77] Since the whole notion of per se offenses is that illegality may be established without proof of more than the defined conduct,[78] such a remedy merely reproscribes what is already prohibited by the statute.[79] The proof necessary to enforce the decree through contempt sanctions is precisely that required to prove a violation *ab initio*.[80] Accordingly, the only

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76. See note 8 *supra* and accompanying text. It is true that non-consent decree settlements may have consequences similar or identical to those we are considering. Indeed, to the extent that a failure to sue at all, or agency acquiescence in a dismissal with prejudice, implies *no* relief while a compromise involves *some*, perhaps more injury to third parties will follow from the former disposition. However, third party participation, in the absence of a continuing agency belief in a violation, entails problems beyond the scope of this Article. Furthermore, although the dangers of abuse or misdirection exist in the no-prosecution or dismissal areas, there is reason to believe that the agency will be more sure of itself—less likely to make a mistake—when it capitulates than when it compromises. After all, the same bureaucratic tendency towards a good paper record that may encourage compromise, even if less than adequate, cuts against unjustified out-and-out retreats.

77. *See, e.g.*, Flynn 999-1000 n.59.

78. The classic definition of per se offenses is found in Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958):

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the types of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation. . . .

79. Indeed, proof of contempt, at least criminal contempt, may be more difficult than proof of the underlying violation because "wilfulness" is an element of the contempt offense but not of the antitrust violation. *See* United States v. United States Gypsum Co., 404 F. Supp. 619 (D.D.C. 1975). The *Gypsum* case is discussed further in note 81 *infra*.

80. Barring per se illegal conduct through consent decrees does not even have the advantage during enforcement proceedings of obviating inquiry into such questions as the jurisdiction of the district court. It is a truism that subject matter jurisdiction may not be conferred by consent, C. WRIGHT, LAW OF FEDERAL COURTS 7 (2d ed. 1970), and thus there would seem to be no obstacle to the defendant pleading lack of jurisdiction as a defense to contempt proceedings to enforce the decree.

It is true, however, that certain conduct which is apparently within a per se rule

societal gain flowing from this kind of decree is the availability of contempt sanctions; however, at least in the antitrust area, not only are such sanctions of negligible incremental advantage over the civil and criminal penalties already available,[81] but the sparsity of contempt proceedings offers some evidence of their limited utility.[82]

Use of the settlement process merely to achieve such minimal results cannot be justified. This kind of decree either represents a sub silentio retreat from a belief in the existence of a violation, in which case it would be more honest to seek a dismissal, or it constitutes "relief"

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may be held legal because of extraordinary circumstances. For example, Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), is a frequently cited exception to the recognized per se rule against horizontal price-fixing. Other instances are not hard to find. *Compare* Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970), *with* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). Since the thrust of the text is that enforcement agencies ought not to obtain relief that amounts merely to repeating a statutory prohibition, it might be permissible under this principle for the Justice Department to negotiate a consent decree proscribing conduct normally considered per se illegal if the Department concluded that the case involved a reasonably possible exception to the per se rule. In such an instance, the agency is obtaining relief beyond reiterating the statute.

81. This is particularly true if, as one court has held, a defendant cannot, consistent with double jeopardy and due process rights, be tried successively for both criminal contempt and for a new Sherman Act criminal violation arising from the same acts. United States v. United States Gypsum Co., 404 F. Supp. 619 (D.D.C. 1975). If such is the law, a criminal contempt proceeding becomes not a supplement but rather an alternative to a new antitrust enforcement proceeding, thus further reducing the utility of the decree.

It is possible, of course, that civil contempt might be available together with a new criminal proceeding, since this would not infringe the constitutional right not to be subjected to double jeopardy. However, there is a suggestion in *United States Gypsum* that this alternative also may be unavailable. Referring to a criminal contempt action, the court found that such a proceeding after a criminal antitrust action would infringe defendants' due process rights:

> Multiple antitrust prosecutions arising out of the same course of action are particularly unfair because of their length and expense and because of the complex and voluminous nature of the evidence which is customarily involved, and courts have not hesitated to prevent abuse in this area. *Id.* at 624.

Although the case cited for this proposition involved dismissals of several "regional" indictments for a single nation-wide conspiracy on due process grounds, United States v. American Honda Motor Co., 271 F. Supp. 979, 987 (N.D. Cal. 1967), it is possible that a court would be receptive to due process arguments against successive civil contempt proceedings and criminal prosecutions arising out of the same actions.

One way to obtain the incremental benefits of criminal or civil contempt in a new criminal prosecution would be to attack all violations in a single trial, as suggested by the *United States Gypsum* court, but the true redundancy of a decree which merely repeats statutory prohibitions becomes obvious in such a situation. It is difficult to believe that the punishment for a losing defendant in such a case would significantly exceed that which would have been imposed had either proceeding been brought alone.

82. Sullivan 823 n.5.

which is by definition inadequate since it totally fails to obtain anything beyond a parroting of the prohibitions of the statute.

Accordingly, it is submitted that agencies should screen settlement proposals to avoid agreements that merely mimic the underlying statute. If a tentative settlement is demonstrated by third-party input to be so flawed, the agency should withdraw its tentative consent.[83] Although this first standard has the advantage of clarity, since it requires no complex balancing of other interests, it is also of limited utility. The existence of any relief beyond that implicit in the governing statute renders the standard satisfied. We now turn to a standard of more general use, but which is considerably less certain in application.

(2) *The Standard of Clarification*

Assuming the proposed consent decree settlement provides some relief and thus conforms to the first standard, the next standard requires the agency to determine whether the law and facts of the particular case are clear. Generally, settlement short of the broadest possible relief may be justified where agency resources will be saved. Thus, on the one hand, where the facts and law are clear, the agency ought not to accept a settlement for less relief than the broadest available by litigation since such a case may be litigated without extensive use of resources. On the other hand, a settlement for less than could be expected through litigation may sometimes be justified where the facts or law are not clear.

However, there are limits on the extent to which an agency ought to rely on indefiniteness as justifying a compromise. To begin with, reliance on uncertainty in the law is bothersome because, other things being equal, clarification is usually desirable, a fact recognized by Congress in the Antitrust Procedures and Penalties Act. One of the few specific considerations listed as relevant to the court's public interest determination is "the public benefit, if any, to be derived from a determination of the issues at trial."[84] Of course, other things are not always equal. For instance, an enforcement agency may be tempted to retain a certain fuzziness in the law, hoping that those subject to the statute's prohibition will be prudent and steer well clear of areas of uncertainty. But this kind of consideration fails to survive analysis. Not only is definiteness to be sought as minimizing the burdens of

83. A demonstration of this by a third party, or a court's unaided perception of it, should suffice to establish that a proposed decree is not "in the public interest" under the Antitrust Procedures and Penalties Act, 15 U.S.C.A. § 16(e) (Supp. 1976).

84. *Id.* § 16(e)(2). The language "determination of the issues at trial" is, of course, not limited to resolution of legal questions.

those governed by the controlling statute, but also it is plainly illegitimate for an agency to attempt to discourage conduct which is beyond the outer boundaries of a statutory prohibition, wherever those boundaries may ultimately be determined to lie.

There are, however, at least two situations in which an agency might be justified in relying on legal indefiniteness as a basis for settlement. First, the point at issue may be unimportant, in the sense that it rarely arises, or when it does, no great consequences hinge on its resolution.[85] If significant resources are necessary to resolve this kind of difficulty, avoidance of the problem through a settlement may be appropriate. Second, the agency might be engaged in a "grand design" aimed at expanding the perimeters of the governing statute by a steady case-by-case progression of judicial interpetation. It may fear that litigating a particular case will threaten the entire strategy by prematurely raising an issue. The existence of these justifications for reliance on legal indefiniteness, however, does not validate widespread appeals to the legal uncertainty factor. The situations in which such reliance is legitimate are narrow, and the agency should be careful to confine its reliance to them.[86]

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85. In addition to legal questions which arise from factual idiosyncracies, there are whole areas of enforcement where certain questions are relatively unimportant merely because they are transitory. For example, an amendment to a statute may resolve, propsectively, a number of legal questions; the enforcing agency may then decide that the expenditure of resources to decide those same issues with respect to pending cases will yield lower returns than devoting them to resolving open questions under the present version of the law.

86. The potential usefulness of this principle for third parties wishing to attack a proposed settlement is uncertain. In the antitrust field, for example, it could be persuasively argued that the *ITT* settlement was inappropriate precisely because it failed to advance the central purpose which initially motivated the suits: clarification of the law of conglomerate mergers. *See generally* Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973). The above author notes that the public policy issues raised by conglomerate mergers "could and should have been faced years ago," *id.* at 556, and criticizes the *ITT* settlement short of such an authoritative determination as "casting grave doubts on either or both the integrity of the settlement process or the candor of the Department's policy pronouncements in this area." *Id.* at 559.

Yet, notwithstanding this criticism, the agency might be able to justify the settlement in *ITT* on the ground that strategic considerations dictated settlement because the potential for ultimate success was so bad. Assessing the validity of such a position is difficult. On the one hand, the government had lost all three of its suits at the district court level, either on the merits or on a motion for a preliminary injunction. United States v. International Tel. & Tel. Corp. (Grinnell), 324 F. Supp. 19 (D. Conn. 1970); United States v. International Tel. & Tel. Corp. (Canteen), 1971 Trade Cas. ¶ 73,619 (N.D. Ill.); United States v. International Tel. & Tel. Corp. (Grinnell and Hartford), 306 F. Supp. 766 (D. Conn. 1969) (motion for a preliminary injunction denied). On

Turning to settlements which may be justified because of factual uncertainty, the considerations opposing such a resource-conserving decision to settle will normally be of less weight. While clarification of a legal question may have widespread consequences for public and private enforcement as well as adjustment of practices by those subject to the statute's prohibitions, resolution of a factual dispute in a particular controversy will usually have a more limited impact. However, before accepting a settlement which obtains less than complete relief in order to avoid a fact inquiry, the administrative agency should first take into account the possibility of a present or subsequent private suit. If the alleged violation is one which seems likely to trigger a number of private actions, this factor should militate in favor of the litigation-or-complete-relief route. The point is simply that the costs in judicial resources of trying a multiplicity of suits to establish a common factual pattern ought to enter into the calculation. It would be myopic, in terms of the public interest, to conserve a small amount of administrative resources at the expense of a much greater amount of judicial ones.[87]

In reaching its decision whether to settle in a particular case because of factual uncertainty, the administrative body must, of course, make a careful inquiry into whether or not a complex factual question actually exists. Although in some law enforcement contexts, for example, monopolization suits in antitrust, wide-ranging inquiry is mandated by the substantive law, in others the difficulty of the factual questions may not be so obvious. Thus, in the employment discrimination set-

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the other hand, the government had not lost an anti-merger case before the Supreme Court since the 1950 amendment to section 7 of the Clayton Act, 15 U.S.C. § 18 (1970). The Justice Department might perhaps find some post-settlement vindication of its fears, however, from a greater apparent willingness of subsequent Supreme Court decisions to sustain mergers, albeit on very narrow grounds. *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486 (1974).

87. The calculations involved are somewhat more complicated than the text might suggest. Thus, it may be difficult to determine the likelihood of a multitude of private suits. And, even granting that this prospect is probable, the effect of such suits on agency litigation is not certain. In most cases, a successful agency suit will not necessarily mean avoidance of subsequent private ones, depending upon whether the relief obtained fully vindicates private rights. It is true, however, that such doctrines as the prima facie evidence rule in antitrust, see note 31 *supra*, and the rule of collateral estoppel, see note 32 *supra*, may reduce private litigation, either by encouraging settlement by defendants who lose in the agency action or by simplifying the trial of subsequent private suits. Moreover, in at least some situations, the terms of a proposed settlement may be such that it is clear that an avalanche of private litigation will follow which could have been avoided or drastically reduced by the alternative of administrative prosecution of the case absent a significantly more favorable compromise.

ting, a prima facie case against an employer's policies or practices will frequently be easy to make out, consisting, as it does, of proving a disproportionate adverse impact on the protected class.[88] The complexities arise in connection with the defendant's rebuttal case, which, however, faces a fairly rigorous legal standard,[89] and in plaintiff's surrebuttal.[90] In such a situation, assuming a well founded belief in the existence of a prima facie case, an EEOC decision on settlement would be extremely questionable without a real inquiry into the merits of the employer's defense. Should the inquiry reveal that complex questions will in fact be raised by the employer, then a settlement may be appropriate. Such an inquiry could, of course, stop far short of full-blown pre-trial discovery while still providing the agency with meaningful insight into the probable complexity of the prospective trial.

(3) *A Settlement Should Not Be Influenced by Irrelevant Factors*

The *ITT* settlement was questioned not only because of the possibility of venality, although that charge received the most publicity, but also because it was apparently predicated, at least in part, on the "hardship" to ITT, its stockholders, and the economy if ITT were forced to divest itself of the Hartford Fire Insurance Company.[91] This variation on an old theme—"what is good for ITT is good for the country"—posed a dilemma of antitrust policy that has yet to be resolved.[92]

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88. This is, of course, somewhat oversimplified. For a more extended discussion of the legal concept of discrimination see Sullivan & Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?* (pt. II), 27 S.C.L. REV. 1 (1975).

89. *See id.* at 16-20.

90. *See id.* at 19-22.

91. *ITT Dividend* 603-05.

92. The legitimacy of this basis was questioned by Ralph Nader in an application to intervene to reopen the decrec. United States v. International Tel. & Tel. Corp., 349 F. Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom.* Nader v. United States, 410 U.S. 919 (1973). The court, in rejecting this attack, found that the employment of such a factor did not constitute "fraud on the court," which it announced as the governing legal standard. 349 F. Supp. at 28-31. A consideration, however, might be illegitimate in the sense of not being a factor permitted by the statute, and yet not amount to "fraud." This suggests that the standard the court employed was perhaps too restrictive, at least with respect to our problem of intervention before entering the decree. The standard the court employed was in fact predicated on a policy determination that the Antitrust Division's discretion would be confined only within the widest limits. In the antitrust field, the Antitrust Procedures and Penalties Act has apparently reversed such a policy. Indeed, one suspects that the judicial "public interest" determination the Act requires, *see* 15 U.S.C.A. § 16(e) (Supp. 1976), will in practice be undertaken by comparing the congruency of the considerations listed in the competitive impact statement, *id.* § 16(b), with substantive policies of the antitrust laws.

Although such an inquiry is beyond the scope of the present effort,[93] the *ITT* issue suffices to point out that the statute which the administrative agency is charged with enforcing should provide the benchmark for testing the legitimacy of particular factors considered in the settlement process.[94] Those that distort the purposes of the statute should be rejected. Others which are neither explicitly mandated by the statute nor explicitly barred pose for the agency the legal question whether or not they may be allowed to play a role.[95]

Although it was unsuccessful, a charge that the agency had improperly included factors in a settlement that were contrary to the purpose of the governing statute seemed to be involved in the attack of certain intervenors on the government's consent decree settlement of employment discrimination charges against the steel industry. The Fifth Circuit, in *United States v. Allegheny-Ludlum Industries, Inc.*,[96] considered, *inter alia*, the objections of certain intervenors[97] that the consent decree was invalid insofar as it (1) illegally required private plaintiffs to waive their rights to sue as a condition of receiving a back-pay settlement under the decree; (2) unlawfully abdicated the responsibilities of

93. As substantive antitrust law has expanded the scope of its per se prohibitions, many business practices have become less a question of "are they legal?" than "will anyone sue?," since suit by a party with standing to raise the issue results in an almost certain finding of illegality. This, in turn, shifts large segments of policy-making from the courts to the enforcement agencies since substantive results will turn on their choice of enforcement strategies. In such a setting the question naturally arises concerning the extent to which considerations which are irrelevant in a court assessment of legality, such as economic or social "justifications" for per se offenses, may be legitimately considered in agency enforcement decisionmaking. *See generally* Buxbaum, *supra* note 4, at 1115-16.

94. There is, however, respectable authority for rejecting any "ultimate reckoning of social or economic debits and credits" concerning a merger which substantially lessens competition. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963).

95. For example, the Supreme Court has indicated that regulatory bodies, in making public interest determinations, must take into account competitive considerations. McLean Trucking Co. v. United States, 321 U.S. 67, 84-88 (1944). Perhaps the Justice Department, in making competitive determinations, is required, or at least allowed, to consider other economic factors. Such a conclusion might permit consideration of the adverse consequences to the whole economy resulting from divestiture of ITT to influence the remedy decision. But it seems doubtful that even this view would permit the decision to be influenced by tenderness for the defendant's stockholders. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961) (in a litigated case, economic hardship "can influence choice only as among two or more effective remedies").

96. 517 F.2d 826 (1975).

97. *Allegheny-Ludlum* also considered the question of statutory intervention as of right under Title VII, finding no such right in pattern and practice suits. *Id.* at 843-44. That issue, however, is not critical to our discussion since even permissive intervention will satisfy our purposes. See text accompanying notes 183-87 *infra*.

the EEOC; and (3) provided for inadequate judicial supervision. Although the Fifth Circuit's opinion begins by recognizing the strong public policy in favor of settlement, especially in employment discrimination actions, and concludes by holding against the intervenors, it is significant that the court treated each of the objections and, though refuting them, construed the decree much to the advantage of the technically unsuccessful intervenors. Further, the court noted that there was a competing interest in preserving the private right of action as one essential means of obtaining judicial enforcement of Title VII.[98] It therefore seems reasonable to infer that, had the court found that the decree contained clauses contravening the statutory mandates of Title VII, it would have ordered the district court to set it aside.

(4) *A Settlement Should Not "Adversely Affect" Aggrieved Third Parties*

We have already seen how a settlement may affect third parties in different ways. Our concern for the moment, however, is with a particular class of third parties, those "aggrieved" by the violation alleged in the agency's complaint in the sense that they, too, have a right to relief under the statute that authorizes administrative enforcement.[99] Further, even with respect to such persons, we are not now dealing with every manner in which they may be affected by an agency settlement. Rather, the standard proffered is simply that no settlement ought to be reached which, without their consent, adversely affects aggrieved persons in the sense of practically restricting their statutory rights to sue. Excluded from this formulation is mere deprivation of prima facie evidence effect[100] or collateral estoppel consequence[101] which might otherwise follow were the agency suit adjudicated.[102]

98. 517 F.2d at 848, *quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

99. It is not clear whether we should distinguish statutes expressly authorizing private suit, such as the antitrust laws, Title VII, and other civil rights acts, from those providing explicitly for only public agency enforcement but which have been held by the judiciary to create by implication a private right of action. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (NLRB does not have exclusive primary jurisdiction of duty of fair representation actions judicially derived from a silent statutory scheme); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Securities Exchange Act of 1934 impliedly created a right of action in stockholders for violation of SEC rules governing proxy solicitation).

100. See note 31 *supra* and accompanying text.

101. See note 32 *supra* and accompanying text.

102. In fact, courts have invariably rejected attempts to intervene to oppose antitrust consent decrees grounded on the objection that the decree does not provide for prima facie evidence effect with respect to the applicant's private suit. *See* United States v. National Bank & Trust Co., 319 F. Supp. 930 (E.D. Pa. 1970); United States v.

This principle finds both its rationale and its limitations in the notion that Congress, having created a private right of action, must be taken to have intended that it not be rendered nugatory by the action of public enforcement agencies,[103] except in those situations where Congress has expressly provided that a private right of suit is cut off by agency action.[104] Thus, those without statutory "standing" are beyond this principle, although their interests may be cognizable under another standard or in the exercise of the "unprincipled" discretion left after our principles are exhausted. And even those with a statutory right may resort to this standard only as a shield (against adverse effects) rather than a sword (to demand affirmative benefits).

Perhaps the standard can be clarified by way of example. Suppose a Justice Department antitrust suit which is prompted by a merger is settled by a consent decree which does not provide for any divestiture by defendant but merely restricts future acquisitions.[105] Suppose further, a

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Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970) (per curiam); United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968) (per curiam).

The courts rejecting the would-be intervenor's arguments have based the decision on the intervenor's lack of a cognizable interest. However, the result is better justified as an affirmative governmental privilege to settle, free of prima facie effect, rooted in section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1970), which originally established the prima facie evidence rule. *See* Sullivan 886 n.179.

103. One district court so fundamentally misconceived this point in Title VII steel industry litigation that it forbade attorneys for a proposed class from contacting class members in order to prevent the "sabotage" of the EEOC consent settlement. The Third Circuit struck down the court's action, Rodgers v. U.S. Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 96 S. Ct. 54 (1975), but on grounds which avoided any inquiry into the appropriateness of preserving a government settlement that deprived employees of information as to the alternative of a private action.

104. For example, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970), provides for termination of an employee's right to sue "upon the commencement of an action by the Secretary [of Labor] to enforce the right of such employee under this [Act]." *Id.* § 626(c). Even in Age Discrimination Act cases, however, it may be possible for public and private enforcement to overlap since a private suit filed before the Secretary commences his action will not be affected. Under another statutory scheme, the Equal Pay Act, 29 U.S.C. § 206(d) (1970), which similarly limits private suits to actions filed before the Secretary sues, there is less chance of a private action being adversely affected through the Secretary's resolution of such action since the private plaintiff has no right to sue for injunctive relief. *See generally* Richards, *Monetary Awards in Equal Pay Litigation*, 29 ARK. L. REV. 328 (1976).

105. Such a decree might run afoul of our first standard, see text accompanying notes 75-83 *supra*, unless its prohibition of future acquisitions amounts to a proscription that goes beyond the language of the statute, as by barring mergers of a particular kind in a particular area. *See, e.g.*, United States v. Bankers Trust, 1973-2 Trade Cas. ¶ 74,687 (D.S.C.).

point which is not in fact certain,[106] that the remedy of divestiture is unavailable to private plaintiffs. Under such facts the decree would not violate our fourth principle, since regardless of how "wrong" the settlement was, it would not cut off any right that otherwise existed. On the other hand, one can alter the hypothesis to show how the principle might be violated. Suppose, in the same anti-merger suit, the consent decree provides for partial divestiture—forming a new business entity from a portion of the assets acquired in violation of the antitrust laws—and further, that the law does recognize divestiture as a private remedy. It seems quite clear that, as a practical matter, the consent decree in the government suit is likely to foreclose the private remedy. Although as a matter of technical res judicata, a judgment in one suit cannot bar a second action by a person not a party or privy to a party in the first,[107] except for possible stare decisis consequences[108] not applicable when the first suit results in a consent decree,[109] it would be a rare

106. There have been several district court decisions holding divestiture available to private plaintiffs, *see, e.g.*, Calnetics Corp. v. Volkswagen, Inc., 353 F. Supp. 1219 (C.D. Cal. 1973). *See generally* Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 TEXAS L. REV. 54 (1969); Comment, *Private Divestiture: Antitrust's Latest Problem Child*, 41 FORDHAM L. REV. 569 (1973). While the first circuit court to pass on this question recently rejected the theory, International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 518 F.2d 913 (9th Cir. 1975), the Third Circuit, in dictum, at least held open the possibility that such relief might be appropriate. NBO Indus. Treadway Co. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975). *Accord*, Fuch Sugar & Syrups, Inc. v. Amstar Corp., 1975-2 Trade Cas. ¶ 60,568 (S.D.N.Y.).

107. *See Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 861-65 (1952). This principle is rooted in the due process notion that such a person is entitled to his "day in court." Hansberry v. Lee, 311 U.S. 32 (1940). *Hansberry* recognizes an exception to this rule for class actions.

108. The question of how far a court should go in permitting intervention in order to protect a third party's interest against the rendering of an adverse precedent is unclear. In Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944), the Supreme Court refused to allow an intervenor in ICC proceedings and before a district court to take a separate appeal to the Court. The intervenor claimed that it was aggrieved by the Commission's decision, subsequently sustained by the district court, because the precedent established by the decision was adverse to its interest. However, the Supreme Court decided the substantive issue that same day on the appeal of the party at whom the Commission's proceedings were directed. Thus, the precedent established by the decision below was fully reexamined without permitting the separate appeal. In a situation involving precisely this problem—no appeal taken except by the intervenor—the Court reached the opposite result, recognizing an "appealable interest" in the intervenor, although it did not rely on this distinction. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946). There bas subsequently been a tendency in the lower courts to permit intervention where stare decisis consequences might adversely affect the applicant. See note 126 *infra*. In any event, this problem will not arise with respect to consent decree settlements: third parties cannot be adversely affected in this manner since consent decrees have no precedential consequences. See note 109 *infra*.

109. United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975). *See also*

lower court which would re-reorganize a defendant.[110] That this is not merely a theoretical consideration is indicated by Supreme Court recog-

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United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 845-46 n.21 (5th Cir. 1975).

110. Such a conclusion was reached by Professor Shapiro in discussing a similar hypothetical situation: "[I]t is highly unlikely that any court would use the existing decree simply as a springboard for the grant of additional relief, even if the requisite private injury could be established." Shapiro 734.

Another example can be drawn from the law of employment discrimination. Suppose that an employer's seniority system is based on tenure in particular lines of progression rather than on length of service in the plant as a whole. Suppose further that blacks are disproportionately concentrated in the lowest-paid, lowest-status lines due to overt discrimination prior to the passage of Title VII which confined them to certain jobs. These facts would constitute a prima facie case of discrimination. *See* United Papermakers Local 189 v. United States, 416 F.2d 981 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See also* United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorrillard Corp., 444 F.2d 791 (4th Cir. 1971). In addition, a remedial action could be brought by either the EEOC or by an aggrieved employee. (Although this somewhat oversimplifies the enforcement scheme found in Title VII, it does represent one possibility: an EEOC "pattern or practice" suit, 42 U.S.C. § 2000e-6 (1970), and a private individual or class action aimed at the same violation, 42 U.S.C. § 2000e-5(f)(1) (1970). *See* Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973)).

But a prima facie case is not conclusive illegality: the employer's policies could still be justified by the notions of job-relatedness or business necessity. *See* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 81-89 (1972); Sullivan & Zimmer, *supra* note 88, at 13-20. Thus, a black who has been a plant janitor and has been barred from a better position by line of progression seniority may still legitimately be denied advancement to the job that would be his were plant seniority to govern if, because of his lack of experience and training in the various jobs in a skilled line of progression, he is unable to perform the skilled job. Further, a review of the seniority cases reveals much room for differences of opinion as to the job-relatedness of various positions. Accordingly, the EEOC may wish to avoid a particularistic inquiry in each case and agree to a consent decree settlement conceding much to the employer (concerning, for example, what "periods of residency" or other job prerequisites were necessary in a restructured seniority system).

In such a situation, a black benefited by the Commission's proposed decree may still feel that the speed with which his plight is being remedied is too deliberate. He has, of course, the option of a private suit, but a court faced with a demand to revamp a particular seniority system again is likely to be very reluctant to accede. While the Second Circuit in Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), rejected defendant's attempt to utilize a prior government consent decree as a shield against private suit, *accord*, Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974) (employment discrimination); Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974) (antitrust), a subsequent district court in the Second Circuit did recognize that a prior decree, even by consent, would influence the relief granted in a subsequent action. In Leisner v. New York Tel. Co., 358 F. Supp. 359 (S.D.N.Y. 1973), Judge Motley, after citing to the *Williamson* decision, wrote:

> The court's reasoning obviously applied with equal force to a class action pending after a [consent] decree has been entered in an action brought by gov-

nition of the possibility of a prior government consent decree adversely affecting a subsequent private action:

> [applicants for intervention] argue that even should they not be precluded from bringing a private action, nevertheless the very existence

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ernment agencies since the interests of the class have not been shown to be in privity with those of federal agencies.

However, this court will avoid granting relief which is merely duplicative of, or which conflicts with, relief granted in the consent decree. *Id.* at 369-70 (emphasis added).

In fact, perhaps in reliance on this language, the private consent decree which ended the *Leisner* litigation provided that, in the event of conflict between the decree and the prior government consent decree, the "court shall resolve the conflict or inconsistency so as not to derogate from the effect" of the prior decree. 6 CCH EMP. PR. DEC. ¶ 8871, at 5696.

In contrast, however, the Fifth Circuit took a less deferential view towards a prior government consent decree in Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (1974), writing: "We have chosen not to accord the consent decree any great weight in our outline of the relief to be awarded by the district court." *Id.* at 65. The court cited these reasons for its approach: (1) a theory, underlying the consent decree but rejected by the court, that protected class members who accepted lesser jobs when higher ones were not open to them were not affected by the discriminatory practices of the employer; (2) the different interests of the government and private plaintiffs; and (3) the possibility that by allowing "negotiated settlements by the Government to control the relief accorded in pending private actions against the same [defendants], private actions will be significantly discouraged," a result inconsistent with congressional policy. *Id.* at 66.

If other courts are willing to follow the Fifth Circuit's lead and heavily discount the persuasive effect of a prior agency-obtained consent decree, the problem of adverse impact would be largely obviated. The likelihood of this result, however, is uncertain in view of the built-in deference to prior court orders reflected in the principle of comity. See note 111 *infra* and accompanying text. Further, the extent to which the outlined *Rodriguez* relief *conflicted with* that provided in the prior consent decree, as opposed to merely going *beyond* the former judgment, is unclear. Certainly a court is likely to be more deferential to a prior court's order where the relief demanded in the second case actually conflicts with the first court's relief.

Finally, the Fifth Circuit's recent decision in United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975), may portend a retreat from *Rodriguez*. In *Jackson*, the court affirmed a district court denial of intervention to challenge the back pay provision in a consent decree obtained by the Justice Department. The applicants argued that, although they still technically retained the right to sue for back pay, the consent decree would be given stare decisis effect, thus meaning, as a practical matter, that they would be bound by those provisions of the decree. The court rejected this argument, noting that "courts fully understand that [consent] decrees do not purport to be definitive statements of the parties' legal rights and will accord them little or no weight in the determination of the rights of persons not party to them." *Id.* at 1152, *citing* Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974). Up to this point, no retreat from *Rodriguez* was discernable. The court, however, then added a footnote which concluded with the sentence: "In fashioning injunctive relief, of course, courts should and do take care to avoid overlapping or conflicting injunctive commands." 519 F.2d at 1152 n.10. This sentence is clearly dictum in the case and of uncertain import in any event. Nevertheless, it raises the possibility that some effect akin to stare decisis may arise even from a consent decree with respect to its injunctive provisions.

An alternative avenue of enforcement under Title VII may minimize problems of

of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree. Although there is no reason why such a court need consider the present decrec as anything but a minimum . . . should a claim for further relief be made out, there is considerable weight to

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divergent public and private efforts. The statute, 42 U.S.C. § 2000e-5 (1970), envisions a charge filed by an aggrieved party, or his or her representative, with the Commission; thereafter, the EEOC, within proscribed time periods, determines probable cause and attempts conciliation. If conciliation fails, the EEOC may bring suit and the aggrieved party will have a statutory right to intervene. If the Commission does not sue within 180 days, the aggrieved party may bring an action within the following ninety days, with the Commission authorized to intervene in the discretion of the court. See note 40 *supra*. Although the EEOC's right to sue does not terminate at the end of 180 days, *see, e.g.*, EEOC v. E.I. du Pont de Nemours & Co., 516 F.2d 1297 (3d Cir. 1975); EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), *cert. denied*, 411 U.S. 931 (1975), duplicate suit by the Commission may be barred once a private action is commenced. EEOC v. Missouri Pac. R.R., 493 F.2d 71 (8th Cir. 1974). *But see* EEOC v. Kimberly-Clark, 511 F.2d 1352 (6th Cir. 1975). The scheme insures that all public and private complaints are considered within the context of a single proceeding.

A court will be especially unreceptive to a demand by a private plaintiff to revamp a seniority system where the judgment sought would put the defendant in the position of being subject to two court orders requiring mutually exclusive conduct. Precisely this kind of issue, although in a somewhat different coutext, was raised in Construction Indus. Comm. v. Operating Engineers Local 3, 11 FEP Cas. 254 (E.D. Mo. 1975). There, plaintiffs brought a class action on behalf of a number of contractors, including those who had entered into collective bargaining agreements with the defendant union. The suit attacked a consent decree agreed to by the union and the defendant EEOC in a prior Commission action against the union. Plaintiffs, alleging that the decree changed the work referral practices specified in the collective bargaining agreements, challenged the minority preferences provided in the decree. The defendant union moved to dismiss on the ground, *inter alia*, that a decision in favor of the plaintiffs would put the union in the possible position of being bound by conflicting judgments. The court ultimately dismissed for lack of subject matter jurisdiction. It predicated its decision on the notion that "plaintiffs should not litigate the merits of the subject consent decree in a separate action." *Id.* at 255. Rather, they should "seek their remedy in the [prior] action before attacking the judgment before a [court] of co-equal authority." *Id.* To the extent that this is possible, that is, if intervention in the prior suit is allowed, such an approach is clearly preferable. Yet the opinion in *Construction Industry Committee* seemed to reflect more a requirement of "exhaustion" of remedies rather than a firm belief that intervention would be granted: the judge "took no position" on whether the plaintiffs should be allowed to intervene in the prior action to challenge the decree that had been entered. *See also* St. Louis Amusement Co. v. Paramount Pictures, Inc., 61 F. Supp. 854 (E.D. Mo.), *appeal dismissed*, 326 U.S. 680 (1945) (second court avoided conflicting judgments by giving deference to the first court's decision as a matter of comity). *Cf.* United States v. Carter Prod., Inc., 211 F. Supp. 144 (S.D.N.Y. 1962) (court entered consent decree between government and one defendant, over objection of second defendant, enjoining adherence to allegedly illegal contract between defendants). In *Carter Products* the court reasoned that the second defendant, not being bound by the decree, could still recover damages for the first defendant's breach of contract should the contract ultimately be held valid. *Id.* at 148. The issue the court ignored, perhaps because it was inapplicable on the facts, was whether the non-consenting defendant somehow lost any right he may have had to specific enforcement.

> the argument that the court will feel constrained as a matter of comity at least to build on the foundations of the present decree.[111]

At any rate, it should be plain that one way to avoid prejudicing the private plaintiff is to refuse to enter into a settlement which will deprive him of rights he might otherwise have.[112] This kind of notion may have been in the mind of the Civil Rights Commission when it recommended, in an unelaborated sentence, that "the inclusion in these [settlement] agreements of provisions which seriously limit the ability of employees to obtain private legal relief should be avoided."[113]

One practical problem with applying this principle, however, may require some compromise with the basic theory. Thus far we have been considering cases where a particular private plaintiff raises an objection to a proposed settlement because of its adverse effect on his law suit. In this situation, application of our principle poses no serious problems. To prevail, the plaintiff must persuade the agency, or if this fails the court to which the decree is submitted, that he has a cause of action and that the entrance of the proposed decree is likely to prejudice relief to which he would otherwise be entitled. If he establishes a persuasive

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111. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 694 (1961). *See also* St. Louis Amusement Co. v. Paramount Pictures, Inc., 61 F. Supp. 854, 857 (E.D. Mo.), *appeal dismissed*, 326 U.S. 680 (1945); Torquay Corp. v. Radio Corp. of America, 2 F. Supp. 841, 843-44 (S.D.N.Y. 1932). The Court in *Sam Fox Publishing* nevertheless rejected the application for intervention because, under the then controlling version of rule 24(a) of the Federal Rules of Civil Procedure, intervention of right was required only as to those who were "legally bound" by a decree; the practical effects of comity described by the Court did not constitute being "legally bound." Partly in response to this decision, rule 24(a) was amended to its present form which only requires that the suit in which intervention is sought "may as a practical matter impair or impede [the applicant's] ability to protect" his interests. FED. R. CIV. P. 24(a). *See* Notes of the Advisory Committee, which drafted the 1966 amendments to rule 24(a), *reprinted in* 3B J. MOORE, FEDERAL PRACTICE ¶ 24.01[10] (2d ed. 1975).

In addition to the policy change wrought by the amendments to rule 24, other indications of concern about adverse effects flowing from stare decisis or comity can be discerned. For instance, in Auto Workers v. Scotfield, 382 U.S. 205 (1965), the Court approved intervention by a successful party to an NLRB proceeding in a circuit court review of the Board's decision by the unsuccessful party:

> To be sure, if intervention is denied [the charged party] in the initial review proceeding [brought by a charging party who was unsuccessful before the Board], the charged party would not be bound by the decision under technical *res judicata* rules. Still, the salient facts having been resolved and the legal problems answered in the initial review, subsequent litigation serves little practical value to the potential intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of *stare decisis* or of comity. *Id.* at 213.

See also id. at 220.

112. In determining whether plaintiff is deprived of practical rights, the agency should look to whether, if no decree were extant, a court would award relief beyond that provided in the consent decree.

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case of prejudice, then under our principle the decree will be redrafted to avoid the problem or perhaps even to give the private plaintiff the relief to which he is entitled.[114] If, on the other hand, the plaintiff simply fails to persuade the agency and the court of the merits of his claim, then obviously the principle is not violated even though the decree is entered without modification.

Suppose, however, there is neither a present private plaintiff nor anyone else who objects to the proposed decree during the comment period. Clearly, the agency should not forego obtaining relief in a proposed settlement merely because of the abstract possibility that some future plaintiff may thereby be prejudiced. Yet on the other hand, there may be persons who are not even aware that their rights may have been violated until the consent decree is entered and its provisions implemented. This is, of course, especially true in employment discrimination matters where the practices under dispute are often highly complicated[115] (such as the validation of employment tests) and the affected person unsophisticated. However, it may be that reconciliation of the public and private interests in this situation can be achieved through the use of consent decrees which attempt to preserve private rights to the maximum extent possible. For instance, in the steel industry consent decrees,[116] where the full impact of the settlement on individual employees (with respect to both back pay and alterations of the seniority systems) was unclear at the time the decrees were entered, it might have been appropriate for the EEOC to write into the decrees a provision allowing them to be reopened at the option of individual employees once the complications became more concrete. But such a solution is scarcely ideal: while it would cut into the certainty that is a major advantage of settlement, a court would not be likely to throw open a decree which on the whole had worked well just because some private persons had idiosyncratic problems not solved by the decree. Nevertheless, such a provision at least offers a safeguard against the entrance of a decree which fundamentally fails to remedy the violation adequately while at the same time standing as an obstacle to private efforts to resolve the problem.[117]

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114. This is particularly likely where the decision as to the private party's rights is made before the district court in the intervention context. Since any determination of issues favorable to the private plaintiff should collaterally estop the defendant from relitigating them in a private suit, a defendant should have little reason to resist expanding the relief provided in the consent decree.

115. *See generally* Sullivan & Zimmer, *supra* note 88, at 2-61.

116. These decrees are discussed in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975).

117. Another alternative might be to add a clause to the decree instructing future

In sum, the principle we have suggested requires that the agency attempt to formulate decrees which will have the least practicable adverse effect on private rights of action while still obtaining the maximum relief that can be negotiated with the defendant.

(5) The Necessity for the Protection of Private Rights by a Public Agency

The fourth standard suggests a fifth one: a proposed settlement which does not adversely affect third parties, but which fails to benefit them to the extent possible within the scope of the complaint, should be assessed in terms of the ability of such persons to protect themselves. Thus, the greater the ability affected third parties have to protect themselves, the less the public agency need concern itself about their interests. "Benefit" is used here not only in the sense of obtaining actual relief for private parties, such as recovery of back pay for them in a Title VII suit, but also to include the advantages that would flow from litigation in terms of collateral estoppel, prima facie evidence, or in antitrust cases, the "asphalt clause."[118]

The most extreme case of when the agency must act to protect private interests is where only the agency has authority to bring enforcement actions. For example, Title IV of the Labor Management Reporting and Disclosure Act[119] vests exclusive authority in the Secretary of Labor to institute actions to set aside elections for union offices.[120] In *Dunlop v. Bachowski*,[121] the Supreme Court recognized that because of

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federal courts not to defer to the decree as a matter of comity. Although this might be reminiscent of telling a person not to think about pink elephants, it will at least provide a subsequent private plaintiff some room for argument.

118. The view taken here may or may not be consistent with the congressional intent underlying the Antitrust Procedures and Peualties Act. *See* S. REP. No. 93-298, 93d Cong., 1st Sess. 6-7 (1973):

> Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs. The primary focus of the Department's enforcement policy should be to obtain a judgment—either litigated or consensual—which protects the public by insuring healthy competition in the future. The Committee believes that in the majority of instances the interests of private litigants can be accommodated without the risk, delay and expense of the government going to trial. For example, the court can condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claim.

It is not clear from this passage whether the congressional intent was that consent decrees should rarely be set aside merely to assist private plaintiffs (a position with which we agree, especially in the antitrust context), or that they should never be set aside (an approach from which we must dissent for reasons made clear in the text).

119. 29 U.S.C. §§ 401, 481-83 (1970).

120. Calhoon v. Harvey, 379 U.S. 134, 140 (1964).

121. 421 U.S. 560 (1975).

this exclusive authority, the Secretary became in a sense the lawyer for the complainant and thus was required to provide the losing candidate for office with a statement of reasons supporting the determination not to bring an action challenging the election.[122]

The notion that an agency should assess a proposed settlement in terms of the ability of third parties to protect themselves focuses attention on a number of factors which might otherwise be ignored. To begin with, the presence or absence of a statutory provision for the award of attorneys fees is relevant.[123] If no award is possible, private suits will be affected in two ways: first, since the fees must be subtracted from the damages recovered in any such suit, the relief obtained will never provide complete vindication of statutory rights; and second, since the benefits of success will be reduced while the risk of failure remains the same, it is less likely that private suits will be brought at all. Conversely, the presence of a provision for attorneys fees is a factor cutting against agency litigation instead of settlement. Since a successful private plaintiff may achieve precisely the same result[124] as a prevailing agency suit, without any cost to the public and, indeed, at little or no cost to the private plaintiff,[125] the alternative of agency litigation, rather than settlement, is harder to justify.[126]

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122. *Id.* at 572.

123. See note 16 *supra*. The importance of a *statutory* provision has been reaffirmed by a recent Supreme Court decision holding against the award of attorneys fees without statutory authority. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

124. In some cases, a successful private suit may be less effective than a public one. Private remedies may be narrower, see note 106 *supra*, the most likely private litigants may not have standing, see notes 25-26 *supra*, and there is also the ever present danger that a particular private plaintiff may be "bought off" by a settlement which leaves the violation unremedied and numerous other private persons, who are less likely litigants, suffering from it.

125. The attorneys fees a plaintiff pays his own counsel may, of course, be considerably higher than the "reasonable fees" awarded by the court to the prevailing plaintiff. But the scope of this problem is not clear, and an enforcement agency may be justified in assuming that a successful private suit will mean a substantially "cost free" recovery for plaintiff and society, with the wrongdoer paying the major costs of punishing himself.

126. Nevertheless, there are situations of this kind in which agency litigation may be appropriate. If, for example, the violation at issue raised an important question of first impression, the agency might correctly decide to conduct the litigation itself rather than rely solely on private enforcement. Although the agency would not be "bound" by an adverse decision in the private suit in the sense of res judicata or collateral estoppel, it could be faced with a severe stare decisis problem if the plaintiff loses. This kind of difficulty has led courts to permit intervention as of right for the agency in some situations. *See, e.g.*, Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967). In addition, this factor ought to suffiee to justify an agency's decision to litigate a case in which a private party is also ready to bring an action.

A second relevant factor is whether the private plaintiffs can effectively invoke the protection of the law, even with the stimulus of a statute providing for attorneys fees. Recent restrictions on the use of antitrust class actions,[127] for example, have narrowed the utility of such devices. If relief is obtainable by the enforcement agency that, as a practical matter, is unlikely to be available to a large class of injured private parties who each have a very small claim, an agency settlement that obtains little or nothing for the class members is suspect.

This consideration may well have more relevance in some statutory schemes than others. Although we have mentioned antitrust, the nature of the interests involved and the availability of both treble damages and attorneys fees to a successful plaintiff mean that an aggrieved party in the typical case will be well able to protect his own interests. Although this fact will not bar such a party from vociferously demanding that the public take care of its interests, the claim on public resources is obviously weak.[128] On the other hand, agency settlements under statutory schemes designed to protect disadvantaged classes should, on the whole, be expected to produce more in the way of private benefits than antitrust consent decrees.

A third factor relevant to this principle is the complexity of the substantive issues involved. We have already suggested that settlements obtaining less than complete relief are most readily justified, in terms of conserving enforcement resources, where the issues are complicated.[129] Situations posing this difficulty for enforcement authorities, however, almost certainly will present an equal, or more serious, problem for private litigants who do not have either the agency's expertise or its resources. Although occasionally somewhat comparable resources may be available to potential litigants, as when the NAACP Legal Defense Fund becomes involved in an employment discrimination suit, this will be more the exception than the rule.

While the fifth principle obviously affords an agency considerable leeway, it at least offers some guidance where now there is none and provides an easy answer for at least some polar cases. For example, consider the antitrust action brought by the Justice Department where

127. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

128. Even in antitrust, there are notable exceptions. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), for example, involved a small claim, but one urged by the purported class representative for hundreds of thousands of stockholders. In evaluating its settlements, the Antitrust Division should consider whether the case is one likely to trigger a private suit by an entity well able to protect its own interests or whether those aggrieved are more likely to absorb their losses than to litigate.

129. See text accompanying notes 75-90 *supra*.

the offense alleged is a per se violation and the third party opposing a proposed consent decree is a large corporation with standing to bring a private action which, if successful, would entitle it to the very relief which it desires the Department to obtain. Clearly, adoption of the proposed settlement would not violate our fifth principle. Conversely, an EEOC suit should perhaps not be settled on terms which do not afford significant benefits to employees who, as a practical matter, do not have access to the kind of legal assistance necessary for full vindication of their statutory rights. In this regard, the Commission might consider such things as whether the attorneys in the particular geographic area involved lack Title VII competence or the willingness to bring a civil rights suit against the employer in question.[130]

Unfortunately, principle five is of limited use with respect to one common situation. Suppose, in response to an attack on the adequacy of individual benefits obtained in a particular proposed decree, the EEOC freely concedes that the seniority alterations and back-pay fund are less than might be recovered if the suit were pressed. Suppose, further, that the Commission advances a "half a loaf" justification: getting less relief for more injured workers is better than getting more relief for fewer such workers, especially since there is at least the possibility that a private action will be successful for full recovery for employees dissatisfied with the relief under the agency decree.[131] One can, of course, disagree with such a policy, perhaps on the ground that vigorous enforcement against a few large industries would not only result in bigger recoveries in those cases but would also have a salutary effect on other defendants. Nevertheless, the policy cannot be characterized as unreasonable. Further, analysis demonstrates that it is not in violation of principle five since there is no reason to prefer the disadvantaged workers in the company which is settling to those in other indus-

130. The EEOC ought to take this factor into account even in cases where the employees have the right to intervene to protect their own interests, see note 40 *supra*, but have failed to do so. The same considerations which obstruct employee resort to independent suit may also limit their efficacious use of the right of intervention.

131. This seemed to be the Commission's position, accepted by the court, in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975). According to the steel consent decrees, back pay would average about $500 per class member. *Id.* at 852 n.29. In United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), the court upheld back pay claims averaging over $4000 apiece for private class action members who would otherwise be beneficiaries under the steel consent decrees. Further, the court reversed a denial of back pay for 2,700 blacks who also would otherwise be beneficiaries of the steel consent decrees. This latter group came to be represented on appeal by counsel for the private action plaintiffs after the government withdrew its appeal of the denial of back pay because of the intervening steel consent decrees.

tries whose rights may not be vindicated at all if Commission resources must be concentrated on full-scale litigation elsewhere.

An agency justifying a settlement on these grounds, however, should be satisfied that such an enforcement policy really exists. This would entail withholding enforcement resources in areas where other remedies are likely to suffice. Perhaps an example will be useful. Suppose a Justice Department complaint alleges a conspiracy by automobile manufacturers to retard the development of pollution control devices. Suppose further that a consent decree is proposed which fails to obtain significant relief for injured parties.[132] Since the damage from such a conspiracy is likely to be widely dispersed among numerous persons, there may be little chance of any one entity bringing suit.[133] Further, "consumer" litigation may be improbable, both because of class action difficulties and because of "standing" problems.[134] Accordingly, the failure of the Justice Department to obtain compensatory relief may mean a violation without any remedy. Despite this possibility, such a settlement would seem appropriate if it were part of a Department policy to maximize consumer welfare by prospectively ending numerous conspiracies, although failing to obtain complete compensatory relief in any one. On the other hand, the settlement clearly would seem unjustified if the Department were simultaneously pursuing a number of suits not conforming to such a policy.

IV. Judicial Review of Consent Decrees

Even conceding that the standards we have developed, and others which may be evolved, should govern the enforcement efforts of execu-

132. *See generally* Comment, *The Automobile-Pollution Case*, *supra* note 6.

133. In the actual automobile pollution private litigation, governmental entities, such as states and cities, attempted to carry forward the prosecution only to be met with the objection that they lacked standing to bring a treble damage action for injury to their proprietary interests because they alleged no injury to commercial ventures and enterprises. *In re* Multi-district Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). Farmers bringing suit were commercially affected but lacked standing because they were beyond the target area of the conspiracy. *Id.* at 129. Efforts by states to sue as *parens patriae* for overcharges to the state's citizens have been rejected, *see, e.g.*, California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973), as have suits for treble damages for injury to the state's general economy, Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). Apparently, however, a state can still bring an injunctive suit. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); *In re* Multi-district Vehicle Air Pollution, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

134. "Mere" consumers injured by pollution resulting from an alleged automakers conspiracy may have no standing to sue for treble damages, either because they are not injured in their "business or property," or because they are not in the "target area." *See In re* Multi-district Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

tive and administrative agencies, it does not necessarily follow that the law ought to provide a mechanism to ensure that the agencies adhere to these principles. It may be that the costs involved in overseeing agency compliance will outweigh the resultant benefits.[135] Indeed, since one of the purposes underlying our concern with the consent decree process is to encourage the efficient use of agency resources, considerable care should be taken with respect to any proposal which, by requiring administrative defense of its actions, will put a drain on these resources. Further, the potential expenditure of judicial resources involved in any court-review scheme must also be considered.

To a large degree, the judgment one makes about the desirability of judicial review is a function of two factors: the extent to which law enforcement agencies are trusted to comply independently with proper principles governing settlements, and the possibility of efficiently structuring review of agency settlement. We shall consider the latter aspect in some detail shortly. As to the former, the decision must be largely judgmental. It is, of course, easy to list reasons for distrusting agency processes, ranging from venality to incompetence. Indeed, the very inadequacy of resources which makes settlement so preferable to litigation may mean that agency compromises are more often the consequence of inadequate attention to the implications of a proposed resolution than the result of informed judgments. This factor is compounded by the built-in bureaucratic tendency to establish a good paper record of enforcement, most easily attainable through numerous court decrees, and sometimes achieved at the expense of the substance of compliance. Finally, an agency may be affected with an institutional myopia: its decisions concerning its resource-allocation, while perhaps rational from a narrow agency perspective, fail to take into account a broader public interest. This latter possibility is especially likely where the governing statute may be enforced through private as well as agency action, and agency attention to all factors, including the potential squandering of judicial resources through numerous private suits, would dictate a different result in any given case.[136]

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135. One persistent opponent of enhanced judicial supervision of proposed consent decrees is Professor Handler. Prior to the passage of the Antitrust Procedures and Penalties Act, he expressed the opinion that satisfaction as to the parties' "good faith" should mark the limits of any judicial inquiry. Handler, *supra* note 54, at 22. Barely had the ink dried on the new Act before Professor Handler indicated his dissatisfaction, expressing his "doubts" as to the continued effectiveness of the Justice Department's consent decree program. Handler, *supra* note 57, at 239-44.

136. For example, an EEOC acceptance of the settlement in its pattern or practice suit against the steel industry, if it is generally perceived to be inadequate, may trigger a number of private actions against different companies, plants, departments, or lines of progression. Although the Commission may have saved itself extensive resources, the

However, establishing that these defects in administrative agencies are logical possibilities, or even demonstrating their occurrence in a number of instances, does not prove that court review would, on balance, be superior to a system leaving settlements almost entirely to agency discretion. It is true that a laissez-faire attitude characterized the law until recently: courts routinely rubber-stamped proposed decrees[137] while settlements were virtually immune from third party attack through formal intervention,[138] largely due to doubts about the wisdom of reviewing Justice Department determinations.[139] A recent statutory innovation, however, establishes a contrary public policy, at least in the antitrust field. The Antitrust Procedures and Penalties Act of 1974[140] necessarily reflects a congressional judgment that the costs of judicial review of Justice Department antitrust consent decrees, in terms of both Department resources devoted to justifying them and of judicial resources in reviewing them, are exceeded by anticipated improvements in the Department's consent decree program.[141]

For our purposes, however, the Act is deficient in three respects. First, of course, it applies only to the antitrust area, and therefore leaves to the judiciary the question of balancing advantages and disadvantages of consent decree review in other enforcement contexts. Second, as we have noted,[142] the statute largely fails to define in substantive terms the relevant factors in assuring the "public interest" congruence of a proposed consent decree. Third, and perhaps a fairer criticism of a statute

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consequences could be inefficient in terms of both private plaintiffs and the courts if a multiplicity of suits in different districts follows. There is good reason to believe that at least substantial dissatisfaction exists, although the extent to which it will be reflected in a multiplicity of private actions is unclear. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975).

137. Flynn 989-90. Although finding Professor Flynn's characterization of the process "unduly harsh," another commentator agreed that "courts are generally deferential" to government positions. *Private Participation* 144-45 n.12.

138. *See ITT Dividend* 597-600. Another commentator, however, suggests that the substance of review was often achieved through less formal devices. *Private Participation* 155-69.

139. The Supreme Court expressed such a view, albeit in dictum, in Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961): "Apart from anything else, sound policy would strongly lead us to decline appellant's invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."

140. Pub. L. No. 93-528, § 2, 88 Stat. 1706 (codified at 15 U.S.C.A. §§ 16(b)-(h) (Supp. 1976)).

141. Although the ITT case undoubtedly provided the impetus for the Act, Congress may also have been responding to its own prior concern about the Department's consent decree program and to the scholarly criticism of it. See note 4 *supra*.

142. See text accompanying notes 70-74 *supra*.

with limited purposes, even in the antitrust field the Act fails to provide real guidelines as to the extent of the inquiry to be conducted in making the public interest determination. Although Congress authorized court use of a number of different procedural devices, it did not mandate the use of any of them beyond requiring a competitive impact statement, publicity and comment process. Thus, while some help can be found in the legislative history of the Act,[143] the congressional failure to give content to the meaning of "public interest" is a substantive defect of the statute that is compounded by the legislative unwillingness to give concrete procedural direction.

The significance of both these shortcomings is evident from *United States v. Associated Milk Producers, Inc.*,[144] an opinion approving the first consent decree under the new Act.[145] Like *ITT, Associated Milk Producers* involved a "Watergate" question: the use of "milk money" to influence high level government decisions.[146] Without passing on the merits of the decision to approve the decree involved, or the correctness of the district judge in denying intervention to oppose it, the case illustrates the limited way in which the Act influenced the procedures. Despite good reason to be at least suspicious of the settlement, the court refused to conduct a "plenary evidentiary hearing."[147] But even

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143. For example, S. REP. No. 93-298, 93d Cong., 1st Sess. 6 (1973) states:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible. Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.

144. 394 F. Supp. 29 (N.D. Mo. 1975).

145. In fact, the district court was apparently not certain whether the Act applied to the decree in question since it had been submitted for approval prior to the statute's passage. Nevertheless, the court found the procedures it employed to be in "substantial compliance" with the Act. *Id.* at 32.

146. *Id.* at 36-40.

147. The court apparently found no reason to believe that lobbying efforts at higher levels had tainted the actual negotiation of the decree. It therefore rejected a would-be intervenor's argument that it should be granted a "prosecutory" role because "where there is smoke, there must be fire." *Id.* at 40. One can certainly quarrel with the court's conclusion, on the ground that evidence of corruption at one level at least signifies the possibility of corruption at a lower level enough to warrant an inquiry (where there's smoke, it is not unreasonable to look hard for fire). However, the court's position may be justified by the intervention applicant's evident unwillingness to assert that corruption may have directly tainted the settlement in question.. *Id.* at 37.

more significant, in passing on application for intervention, the court cited with apparent approval prior expressions of judicial unwillingness to "assess the wisdom" of government compromises embodied in consent decrees.[148] Since the Act would scarcely have been passed had Congress shared this view of the appropriate deference to be paid such administrative determinations, the court's approach seems fundamentally misconceived.

Our remaining task is essentially to sketch mechanisms for efficient structuring of possible judicial review. This will be undertaken in two parts: first, we must consider the extent to which the scheme created by the Antitrust Procedures and Penalties Act is adaptable to non-antitrust fields; and second, we must elaborate the factors which should guide the courts in administering both the Act and similar approaches utilized in other areas.

A. *Judicial Power to Review Proposed Consent Decrees*

The Antitrust Procedures and Penalties Act not only requires the courts to make a "public interest" determination before entering a proposed decree[149] but also authorizes the use of a number of devices in reaching this determination. Briefly summarized, they include (1) the Justice Department's "competitive impact statement;" (2) publicity for the decree and the statement; (3) a sixty-day comment period, and the Department's response to any comments submitted; (4) the taking of

148. The court, *inter alia*, quoted the Supreme Court's dictum in Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961), see note 139 *supra*. 394 F. Supp. at 41.

149. Although the question will not be extensively pursued here, there have apparently been some doubts about the constitutionality of requiring a court to undertake a "public interest" review of a Justice Department decision to settle. The "additional views" of Representative Hutchinson in H. REP. No. 93-1463, 93d Cong., 2d Sess. 21 (1974), relating to the Antitrust Procedures and Penalties Act, challenged the statute's approach on the ground that the question committed to the court is "executive" rather than "judicial." Although Representative Hutchinson cited no authority for this objection, it may find some support in a sentence from Mr. Justice Stewart's dissent in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 156-57 (1967): "This court does not have the constitutional power to second-guess decisions of the Attorney General made within the bounds of his official discretion." However, not only is this position weakened by the fact that it was espoused in a dissent, but Justice Stewart also failed to cite supporting authority or reasoning.

The objectors may have had in mind the notion, expressed in Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930), that the courts ought not to decide "administrative" questions. Whatever the meaning of that doctrine, however, there seems to have been a progressive retreat from it. *See, e.g.*, United States v. First City Nat'l Bank, 386 U.S. 361 (1967); United Steelworkers v. United States, 361 U.S. 39 (1959). In addition at least one district court seems to believe that entering a consent decree without making some kind of public interest determination is itself not a judicial function. United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970).

expert witness testimony; (5) the utilization of a special master and outside consultants; (6) the acquisition of information from persons or agencies; and (7) a provision for intervention

> [authorizing] full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate. . . .[150]

The statute also requires the defendant to supply the court with a list of contacts between himself and any officer or employee of the United States relevant to the proposed decree.[151]

The statute thus authorizes a full panoply of judicial powers. The extent to which they should be employed is considered in part B of this section; our present concern is whether the kinds of powers specified in the Act are available to courts in situations in which a specific statute does not so provide. In fact, a careful review of the Act reveals that it was necessary more as a policy direction to the courts to encourage them to undertake a real review of proposed decrees,[152] contrary to the prior practice of rubber-stamping them,[153] than as enabling legislation since most if not all of the powers specified were already extant, either deriving from the Federal Rules of Civil Procedure or stemming from the inherent power of courts. As the first court to consider the new act said,

> Section 2(f) of the Antitrust Procedure and Penalties Act, in our judgment, merely codified the existing discretionary power of a court to take such testimony as it may deem necessary and to authorize full or

150. 15 U.S.C.A. § 16(f)(3) (Supp. 1976).

151. *Id.* § 16(g).

152. The statute may have also been necessary to avoid a problem arising from a statutory quirk peculiar to the antitrust laws. As we have seen, section 5 of the Clayton Act provides for prima facie evidence effect for judgments in government suits, except for "consent judgments or decrees entered *before any testimony has been taken.*" 15 U.S.C. § 16(a) (1970) (emphasis added). See note 31 *supra.* It could be argued, therefore, that a court's evidentiary inquiry into the propriety of a consent decree would mean that "testimony has been taken," entailing a prima facie evidence effect and removing a major incentive for defendants to settle. *See generally Private Participation* 163-69. Whatever the merits of this controversy in the past, the new Act clearly resolves the difficulty. 15 U.S.C.A. § 16(h) (Supp. 1976) provides:

> Proceedings before the district court under subsections (e) and (f) of the section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party . . . nor constitute a basis for the introduction of the consent judgment or prima facie evidence against such defendant . . . .

153. *See* Flynn 989-90; Note, *The Consent Decree as an Instrument of Compromise, supra* note 9, at 1316; *cf. Private Participation* 144-45 n.12.

limited participation in proceedings before the Court in a manner which would serve the public interest if the Court may deem appropriate.[154]

The power to issue a consent decree implies the power to refuse to issue it; that, in turn, implies the power to refuse to do so unless certain conditions are satisfied.[155] Further, the exercise of such power can hardly be deemed unfair since the agency seeking the consent decree has the alternative of a contractual settlement: it can scarcely demand the benefits of a court decree while refusing to submit to judicial scrutiny of the terms it proposes.[156] While this logic does not automatically validate the imposition of any conditions whatsoever since limitations are imposed by the Constitution, governing statutes or rules, and notions of judicial propriety, the court could at least require, as a condition precedent to entering a decree, that the parties supply it with information sufficient for it to make a public interest determination.[157] That could include the equivalent of an "impact" statement, justifying the decree in terms of the governing statute,[158] and responding to third-party "comments."[159] In order to maximize the information flow, the court could also provide for publicity for the proposed decree and statement, and invite comments.[160]

154. United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 (N.D. Mo. 1975).

155. United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970). *See also* United States v. F. & M. Schaeffer Brewing Co., 1968 Trade Cas. ¶ 72,345 (E.D.N.Y. 1967).

156. *ITT Dividend* 613-14.

157. In one case, United States v. Standard Oil Co., 1959 Trade Cas. ¶ 69,399 (S.D. Cal.), the district court held a "hypothetical trial" in order to resolve a question upon which turned the appropriateness of certain relief which had deadlocked the parties. The odd way in which the inquiry was conducted, however, appears to reflect more of a concern about the prima facie evidence effect, see note 152 *supra*, than concern about the propriety of a court hearing as a precondition for entering a decree. Professor Handler apparently believes that the power to inquire into the background of the current decree inheres in the district court. Handler, *supra* note 54, at 22.

158. *But see ITT Dividend* 615-18.

159. Professor Buxbaum proposed precisely this requirement without suggesting that an enabling statute was necessary. Buxbaum, *supra* note 4, at 1141. The court in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), while avoiding a decision on the point, reacted favorably to the idea:

> Citing a policy of the Department of Justice under which proposed antitrust consent decrees are made public for "comment or criticism" thirty days prior to entry, appellants ask us to order the EEOC and Department of Labor to adopt a similar policy for Title VII—Executive Order 11246 consent decrees. Appellants assert that we have the necessary authority by virtue of our general supervisory appellate jurisdiction. Perhaps appellants are correct, but we decline at this time to so order the agencies. The issue is not fully briefed, and our reluctance is based on an exercise of discretion. The appellants' idea, however, may deserve serious consideration by the appropriate departments of government. *Id.* at 876 n.77.

160. This has apparently been done in at least one instance. *See ITT Dividend* 613-14.

The only substantial objection to judicial power to demand such information has been phrased in terms of the absence of any "duty to disclose" on the part of the Justice Department.[161] This characterization of the issue, of course, largely misses the point: if the Department has no duty to disclose, surely the court has no "duty" to enter a consent decree. If the court decides not to condition decree entrance on concessions in the way of disclosure from the Justice Department, it does so as a matter of policy, not lack of power. Thus, it is irrelevant that a court, on its own motion or on that of a third party, would be powerless to inquire into the Justice Department's exercise of discretion. Such discretion, even if ordinarily unreviewable and undisclosable, can be subjected to judicial examination before the reviewing court exercises *its* discretion to enter a consent decree.[162]

As for the participation of third parties in the court's review of a proposed decree, rule 24 of the Federal Rules of Civil Procedure provides the authority necessary for whatever degree of participation the reviewing court thinks necessary. Under rule 24(b),[163] which deals with discretionary intervention, the court could exercise its discretion to permit intervention subject to whatever limits it deems appropriate, precisely as contemplated by the new Act. To the extent rule 24(a)—intervention as of right[164]—governs, a third party will have a right to

161. The main underpinning of the argument against a "duty to disclose" is United States v. International Tel. & Tel. Corp., 349 F. Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom.* Nader v. United States, 410 U.S. 919 (1973). There, the court undertook a quite circumscribed inquiry into the settlement process. See note 92 *supra*. However, the nature of what the court *did* is distinct from its *power*. It conceivably might be a sensible rule for the courts to take a laissez-faire attitude towards agency settlements, even those proffered as consent judgments. That policy decision, however, has little to do with the court's power to leave the agency to contractual remedies unless it discloses relevant information, or to refuse to enter a decree if the disclosure or other evidence convinces the court that the agency discretion has been in some sense abused. It is, of course, the thrust of this study that the policy decision has in the past been weighted too heavily towards deference to the administrative decision to settle.

162. *See generally ITT Dividend* 615-18.

163. FED. R. CIV. P. 24(b) states:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

164. FED. R. CIV. P. 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right

participate,[165] though it is nevertheless possible for the court to tailor participation in the proceeding to the extent necessary for the intervenor to protect his interest.[166]

Finally, the other provisions of the Act dealing with expert witnesses, opinion from outside agencies, a special master, and so forth would seem to add little to the powers already possessed by the district courts.[167]

In sum, should a court presented with a proposed decree in a non-antitrust matter deem it desirable, it could conduct the kind of public interest inquiry provided for in the Antitrust Procedures and Penalties Act without the benefit of enabling legislation. This is not to suggest, however, that such statutes are not valuable. Not only may they obviate lingering questions as to the propriety of certain judicial acts but, more importantly, they may also establish a legislative policy in favor of a real, as opposed to a pro forma, judicial review of administrative agency settlements.

B. *Considerations Relevant to the Exercise of Judicial Review*

Thus far we have articulated certain principles which may be useful in formulating and reviewing agency settlements and have concluded that the judicial powers necessary to facilitate such review are already available to the district courts, absent specific enabling legislation. The question remaining, however, is the most critical: when, and to what extent, should the courts exercise their powers?

The costs of review, in terms of both agency and judicial resources and of possible spoiled settlements are significant factors militating against excessive liberality. Nevertheless, there are reasons to believe that objections based on these grounds have been somewhat overdrawn. First, third party participation need not amount to a veto on a consent settlement.[168] Second, the drain on agency resources in defending a proposed settlement can be minimized by shifting some of the burdens to the defendant, whose interest in upholding the settlement is likely to

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to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

165. The courts have been generally hostile to third party intervention in government antitrust suits. *See generally ITT Dividend* 618-26; *Private Participation* 169-75.

166. *See generally* Shapiro.

167. *See, e.g.*, FED. R. CIV. P. 53 (court use of masters); FED. R. EV. 706 (court appointment of expert witnesses).

168. Shapiro 756-57 n.157.

be considerably stronger than that of the agency. After all, should a proposed consent decree be rejected and full-scale litigation ensue, the agency need be concerned only about the drain on its prosecutorial resources; but the defendant has to consider not only the costs of defense but also the possibility of an adverse judgment, entailing both the penalties prescribed by statute and possible collateral estoppel and prima facie evidence effects in subsequent private suits. Given the defendant's interest in preserving the settlement, rational agency management would allocate to the defendant a large share of the defense. It is true that some agency involvement will be necessary, especially since certain factors will be peculiarly within the agency's knowlege—factors which should not be totally divulged to the defendant because of the possibility that, should the decree be rejected, the agency will again have to prosecute this once-and-future adversary. Nevertheless, involvement of the defendant in the justification of the proposed decree at least reduces fears of devoting too great a share of agency resources to the review proceeding.

With respect to the inevitable use of judicial resources, there is a similar counterbalancing factor, namely, the savings of judicial time achieved to the extent that third party participation takes the place of private civil suits. Although in some areas this effect may be less likely (in antitrust, for example, treble damages offer a powerful incentive to sue for injuries even if a violation is discontinued prospectively), there is good reason to believe that in a number of instances the savings will be substantial. In the employment discrimination area, for instance, the controversy surrounding such EEOC settlements as the steel industry consent decree may well give rise to a multiplicity of actions.[169] These actions might well be avoided, or minimized, if either more adequate relief were obtained in a single Commission suit or the dissatisfied third parties were, after participation in a review proceeding, convinced that the relief obtained was reasonable. The exact calculus of benefits and burdens with respect to judicial resources cannot, of course, be computed. But the possibility of some significant benefits in this respect suggests that judicial resource objections may be overstated.

The cost of possible spoiled settlements may also be raised as an argument against review of proposed decrees. One is first tempted to dispose of this in a rather off-hand fashion: settlements which cannot withstand examination probably should not be encouraged in any event. Yet, even conceding that some "good" settlements may be foreclosed

169. See note 87 *supra*.

by the possibility of closer judicial scrutiny, it seems doubtful that these will occur frequently enough to pose a substantial counterweight to the advantages.

In sum, we can recognize that there are drawbacks to judicial review while questioning whether they are as weighty as they may first appear. Further, the concept of "judicial review" is not a monolithic one: it may well be possible to structure the extent of any judicial supervision of proposed consent decrees in order to minimize the drain on agency and judicial resources while maximizing the anticipated benefits. This will entail court-enforced adherence to at least our procedural principles—a statement of reasons and a comment period—since this will impose minimal burdens on the agency while providing the court with at least some input from third parties. But, clearly, this will not be enough. Absent the possibility of a further inquiry, the statement of reasons may degenerate into self-serving boilerplate, and the comment avenue will often be inadequate to explore complicated issues.

Accordingly, something more will be required, at least at times. While, on the one hand, it is clear that the review proceeding must stay well short of a full trial of the issues involved, and, on the other, it must provide for something more meaningful than mere agency certification that a proposed decree is in the public interest, precisely where to draw the line is unclear. In fact, decree review in practice is likely to fan out over the entire spectrum. Thus, an "impact" statement will probably suffice if there is no objection raised by third parties, at least if the judge, after the cursory scrutiny that is usually the best that can be expected in an essentially ex parte proceeding, does not perceive obvious difficulties. Even if this kind of pro forma review occurs frequently, however, the process will still serve a useful function since agency uncertainty over the possibility of third party challenges may well affect the contours of every negotiated settlement.

At the other end of the spectrum, the review proceeding may sometimes approach a full trial of at least some issues. For example, one standard or consideration we proposed was that no settlement be approved which adversely affected an aggrieved party's right to sue under the governing statute. Granting this, a review proceeding will have to resolve a third party's claim of adverse impact, which may involve the resolution of factual questions. For example, in our anti-merger hypothetical where we assumed the law recognized divestiture as a private remedy,[170] a potential private litigant, opposing a proposed

170. See text accompanying notes 105-10 *supra*.

decree which provides for only partial divestiture, may make a prima facie case of violation of the principle by showing that it is unlikely that a subsequent court will re-reorganize the defendant. If, however, the agency or the defendant could demonstrate that the third party's case for greater relief was ill-founded, the "adverse effect" would be merely academic. Accordingly, such an issue might be tried out.[171]

Between the two poles of pro forma approval and full trial of some issues, however, the extent of review is uncertain, and courts should beware of turning every proposed consent decree into a battleground over agency enforcement policies. While such an inquiry may sometimes be warranted, as upon a showing that agency priorities have grossly distorted the legislative intent, such extensive review should be exceptional. Without purporting to be exhaustive, it is appropriate to discuss some of the factors which may influence the kind of review called for.

As a preliminary matter, it should be noted that the question of the appropriate scope of judicial review of a proposed settlement generally will arise only in limited situations in which the reviewing judge has fairly wide discretion in deciding how to proceed. We have already suggested that independent court review in a non-adversary proceeding will rarely be useful; accordingly, the question normally will be raised before the court in the context of third party challenges, whether by "commenters"[172] or by persons seeking more formal status as intervenors. Further, those who attack the decree as commenters rather than intervenors will do so for one of two reasons: first, their interest is not sufficient to warrant formal participation as a party; or, second, they believe the issues they raise to be legal ones, capable of being resolved

171. This example also illustrates some of the points made earlier in this section. The cost in agency resources may be minimal since the agency could let the defendant and third party fight out the issue. The cost in judicial resources might be substantial, but could be offset by the concomitant avoidance of a full-blown private suit. If the third party, presumably as an intervenor, loses, the determination would collaterally estop relitigation of that issue; this, in turn, would mean avoidance (or at least simplification) of a private suit. If the intervenor prevails, the decree will not be entered unless modified, but in any subsequent suit, whether by the Commission or the third party, the issues tried should be treated as settled. Again, any subsequent suit should be simplified and the determination of issues adverse to the defendant may be likely to mean a more favorable settlement.

172. There seems to be no reason to distinguish "commenters" from amici curiae. This kind of limited participation, however, must be sharply distinguished from intervention because the latter, although subject to being circumscribed, makes the intervenor a party to the action, with concomitant res judicata and collateral estoppel consequences. For situations in which intervenor status may not have such effects, see note 181 *infra*.

"on briefs." In either situation, the expenditure of judicial resources is clear and limited.

Consequently, the court will usually be presented with the issue in the form of an application to intervene[173] under rule 24 of the Federal Rules of Civil Procedure which, in turn, permits the judge a fair amount of discretion. Rule 24(b),[174] of course, authorizes intervention at the discretion of the court, so that the judge will ordinarily be free to do what he thinks appropriate. Although rule 24(a),[175] specifying the principles governing intervention as of right, may constrain his discretion somewhat, even a cursory examination of the rule and the accompanying case law reveals that the court is left with much room to maneuver.[176] Under the rule, except where an absolute right to intervene is conferred by statute, intervention is "of right" only where the applicant is so situated with respect to a claimed "interest relating to the property or transaction which is the subject of the action" that "the disposition of the action may as a practical matter impair or impede his ability to protect that interest."[177] Further, even in such a situation, intervention is actually required only where the applicant's interest is not adequately represented by existing parties.[178] Although an extended consideration of the law in this area is unwarranted, the cases interpreting the rule do indicate that the concept of "interest" is ill-defined, the notion of when a disposition will "impair" or "impede" protection of that interest is uncertain, and adequacy of representation is not a self-evident quality.[179] Accordingly, it will be a rare case where full scale intervention will be clearly required under the rule. With respect to our particular problem, private participation in government settlements, if the experience under the antitrust laws is predictive, the "right" of intervention in

173. One objection to the efficacy of intervention as a means of vindicating private interests in government settlements is the fact that such a route may be too burdensome for many private parties. For example, a plaintiff with a pending Title VII class action against Bethlehem Steel Co. in Buffalo, New York would obviously find it difficult or impossible to appear by counsel in the Northern District of Alabama to oppose the EEOC steel industry consent decree on the ground that it adversely affected his suit. Granting the accuracy of this observation, however, our proposal would at least give such a person an opportunity which he does not now have. If, as may frequently be the case, the opportunity is one he cannot take advantage of, it does him no harm while benefiting those more fortunately situated. To further protect the litigant with severely limited resources is, if not impossible to reconcile with the goal of effective ageucy enforcement and settlement, at least beyond the scope of the present effort.

174. FED. R. CIV. P. 24(b), *quoted in* note 163 *supra.*

175. FED. R. CIV. P. 24(a), *quoted in* note 164 *supra.*

176. *See generally* Kennedy, *supra* note 38.

177. FED. R. CIV. P. 24(a).

178. *Id.*

179. *See* Kennedy, *supra* note 38, at 345-53.

such government actions will be narrow or non-existent.[180] In addition, even where intervention is of right, the extent of participation may perhaps be limited to that necessary to protect the interest which justifies intervention in the first place.[181] Finally, even full-fledged intervention will not confer a veto power on the intervenor with respect to the settlement agreement. As one commentator noted, "It is difficult to see how any objections that an intervenor might have to a particular consent decree could prevent the court from entering the decree as an independent agreement binding solely on the signatories—the Government and the defendants."[182]

The question which is presented, then, is what sort of showing by an applicant for intervention should be required and what level of participation should be permitted in the court review proceeding. First, we have already stated that review of an agency's entire enforcement policy, for example, at the instance of a public interest group which perceives distorted agency priorities, rarely ought to be permitted, and then only upon the strongest showing.[183] To allow this would be to open

180. Prior to Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), the cases reflected a generalized hostility to intervention, although there were exceptions. *Cascade* threatened to alter this, and continues to have some potential for so doing, but the lower courts have largely continued their hostility. *See generally* Sullivan 877-92. The effect of the Antitrust Procedures and Penalties Act on this remains to be seen. Although not technically altering the legal status of would-be intervenors, courts should be responsive to a liberalized "tone." However, the first consent decree decision under the new Act, United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 (W.D. Mo. 1975), expressed the usual reluctance to permit intervention. See text accompanying notes 144-48 *supra*.

181. *See* Shapiro 759. *See also* Notes of the Advisory Committee on the 1966 Amendments to Federal Rule of Civil Procedure 24, 39 F.R.D. 69, 109-11 (1966). Professor Shapiro suggests ways to limit the consequences of intervention including, for example, denial of the right to appeal. Shapiro 753. Of course, if intervention is too limited, courts may be less ready to apply collateral estoppel against intervenors on the ground that they did not have a full and fair opportunity to litigate the issue in question. *See* Kennedy, *supra* note 38, at 380.

182. *Private Participation* 152. United States v. Simmonds Precision Prod. Co., 319 F. Supp. 620 (S.D.N.Y. 1970), is cited as authority for this proposition. In *Simmonds*, the court permitted intervention by a union to oppose the entrance of a consent decree which failed to provide for divestiture of an acquired competitor as a going concern. The union, although its motives for opposing the decree had little to do with competitive considerations, argued its case on the ground that the proposed decree did not meet the purposes of the antitrust laws. Similarly, the court, in upholding the decree, concluded that under the circumstances the Justice Department's resolution was reasonable in terms of the policies of the antitrust laws. *Id.* at 623. Accordingly, the case illustrates the usefulness of intervention to test proposed decrees against the governing statute, even when the party opposing the decree has an "ulterior motive." *Cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). *See also* United States v. Carter Prod., Inc., 211 F. Supp. 144 (S.D.N.Y. 1962).

183. For example, if the applicant could show, independent of the anticipated

up every consent decree proceeding to attack on grounds which are only tangentially relevant to the propriety of the decree in question. Formulated more generally, an attempted intervention must be limited in scope to the particular settlement proposed and the consequences flowing from it.[184]

Such a rule, while helpful, obviously will not resolve many difficulties of excessive and unjustified intrusion on agency decision-making. A second rule may be more useful. Obviously, a prime consideration for the court is the standard against which a consent decree is to be judged, that is, defining "public interest" in meaningful terms. The agency "impact" statement will provide one benchmark for testing the decree, since it should at least live up to its sponsor's claims. Although there are obvious objections to allowing the agency to establish the governing criteria, some benefits may flow from even so limited an approach. Settlements influenced by venality or favoritism may be hard to square with the "normal" statement, and, although the statement could be altered to fit the decree, such alteration might trigger precisely the interest that those illegitimately influenced would most like to avoid. In sum, the mere need to justify a settlement in terms of a statement which can withstand at least a superficial public scrutiny will prove a healthy innovation.

Nevertheless, making the goat the keeper of the cabbage patch has its problems, so the intervenor must be allowed not only to test the decree against the statement but also to review the statement in terms of the controlling statute. Such a process has both a factual and a legal dimension. The legal aspect, if entirely free of fact complications, poses no serious problems of resource costs and ought to be freely allowed. We have already seen an example of this in *United States v. Allegheny-Ludlum Industries Inc.*,[185] where intervenors opposed an EEOC consent decree settlement of the employment discrimination suit against the steel industry on the ground that the decree required unlawful acts.[186] Without commenting on the merits of these attacks, it can be noted that they were resolved with no great cost to either agency or judicial resources since the issues involved (what did the decree provide, and was such a

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discovery in intervention, a sound factual basis for believing that agency policies distort the legislative intent in enacting the governing statute, perhaps by resort to congressional hearings, the scope of the inquiry might be broadened beyond the decree at issue.

184. Professor Shapiro argues that courts could successfully limit the issues an intervenor may raise, although he recognizes a contrary view. Shapiro 754-55.

185. 517 F.2d 826 (5th Cir. 1975).

186. See text accompanying notes 96-98 *supra*.

provision congruent with the applicable statutes and decisional law) were answered on the basis of briefs and oral argument.[187]

The more difficult question is faced when the intervenor's objections rest, at least in part, on a different view of the facts than that taken by the agency.[188] Suppose the intervenor concedes the appropriateness of a settlement if a certain factual situation (including agency uncertainty as to the precise state of the facts) specified in the impact statement obtains, but argues that the factual predicate is incorrect. Suppose further that the agency agrees that, if it is wrong on the facts, the decree is misconceived. Thus, the only question is whether the intervenors should be permitted to litigate the factual issues.[189]

The answer is a function of several different factors. The first such factor is the complexity of the factual question. Some issues may be so narrow as to invite resolution, especially if this might obviate a subsequent full-fledged private suit; others will be so broad as to make the review proceeding resemble the trial the decree was designed to avoid. In such cases, intervention should be barred except in those cases where the proposed decree adversely affects aggrieved parties so that it may not be entered unless this difficulty is resolved.

In those situations in which the factual inquiry is neither so broad as to be clearly precluded nor so narrow as to be definitely indicated, the extent of third party participation permitted should turn on three factors: first, the extent to which resolution of the problem now will preclude raising it later; second, the time factor; and, third, the kind of showing the would-be intervenor makes regarding his factual assertions. The first factor is self-explanatory in view of our previous discussion;[190] the second, the time factor, requires little comment: an otherwise justified agency settlement should not be delayed for any great

187. *See also Private Participation* 164, discussing United States v. Minnesota Mining & Mfg. Co., Civil No. 66 C 627 (N.D. Ill., filed Sept. 2, 1969).

188. The problems may also be compounded when the applicant attempts to intervene to influence the administration of a consent decree already entered, as opposed to intervening to question the appropriateness of a proposal for a decree. *See generally* Note, *An Experiment in Preventive Antitrust: Judicial Regulation of the Motion Picture Exhibition Market Under the* Paramount *Decrees*, 74 YALE L.J. 1041 (1975). This study is concerned only with the latter situation.

189. On occasion, it may be possible to avoid a factual inquiry by informal means. An instance of this, United States v. Harper & Row Publishers, Inc., Civil No. 67 C 612 (N.D. Ill., filed Nov. 27, 1967), *aff'd sub nom.* City of New York v. United States, 390 U.S. 715 (1968) (per curiam), is recounted in some detail in *Private Participation* 160-63. *See also* United States v. General Tire & Rubber Co., 1970 Trade Cas. ¶ 23,364 (N.D. Ohio 1970).

190. See text accompanying note 87 *supra*.

length of time while an intervenor carries out intensive discovery. To some extent, then, the broader the factual issues, the less likely it is that the proposed decree ought to be suspended because more time will be necessary to prepare the intervenor's case.[191]

The third factor requires more extended discussion. It is submitted that the would-be intervenor should be required to establish sound reason to believe that the factual predicates of the proposed decree are erroneous, "sound reason" meaning something more than the kind of self-serving affidavits which might be adequate to raise a factual issue sufficient to defeat a motion for summary judgment. The showing might be found in the decisions of other courts or agencies or in hearings before congressional committees.[192] In the more usual situation, however, such evidence will be absent, and, to make the possibility of intervention meaningful, something less must suffice.

It is submitted that the showing should be predicated on the coalescence of two kinds of data; first, whatever proof the intervenor can muster independently and, second, the outcome of an inquiry into the agency's investigative processes. Thus, the court should permit the would-be intervenor to conduct a preliminary inquiry into how the agency determined the facts. This might be limited to interrogatories, or if good reason appears, might be extended to depositions of agency personnel. The focus would be limited in at least two respects. First, the aim is not to judge the correctness of the agency's result, but rather to determine whether it falls within a zone of reasonableness, defined by the complexity of the factual issues, the amount of information available to the agency, and the cost and probable utility of further fact-finding. Second, in order to establish a "reasonable person" standard, the inquiry would be limited to what the agency actually did, not the thought processes of the agency decision-makers.[193]

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191. One consideration leading the Fifth Circuit to reject intervenor's attack on the steel industry consent decree in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), was the court's view of the facts:

> Against the overwhelmingly speculative advantage that might accrue to a small number of aggrieved persons if the decrees were vacated must be weighed the certain loss to all of *the immediate injunctive benefits and the unimpeded opportunity to receive some back pay today—instead of after months or years of litigation. Id.* at 851 (emphasis added).

192. *See, e.g.*, United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 (W.D. Mo. 1975) (motion to intervene based on evidence disclosed in Senate Watergate Committee Report).

193. *See* United States v. Morgan, 313 U.S. 409, 422 (1941) (court generally disapproves of subjecting thought processes of administrative officials to examination in the course of judicial review of agency decisions).

Perhaps an example will illustrate the point. One substantive question in Title VII settlements appears to be the extent to which the EEOC ought to restructure seniority systems in cases of discrimination facilitated through the use of such systems. Since seniority systems may vary not only from company to company but from plant to plant, the Commission, especially in a "pattern of practice" suit against a whole industry, may be justified in avoiding a trial on every aspect. Nevertheless, the EEOC should be fairly certain that the settlement is not grossly inadequate, and it should therefore rely on something more than employer-union assurances. Thus, if an intervenor demonstrated good reason to doubt the adequacy of the restructuring and also showed that the Commission failed to take reasonable fact-finding steps (such as a sample investigation into several plant seniority systems), the court should open the decree to a full resolution of the issue.[194]

The greatest difficulty with authorizing such an inquiry into agency fact-finding processes is determining how much discovery will be permitted of agency processes in view of the obvious dangers in terms of disruption of agency work and possible improper use of data obtained. For example, agency enforcement policies might be discovered which would reveal to potential law-violators precisely how far they can safely go before being prosecuted. These problems can be minimized by the kinds of restrictions suggested above: focusing on what the agency actually did rather than officer thought-processes[195] and perhaps confining the inquiry to interrogatories, or at least permitting protective orders allowing the culling of "privileged" documents from agency files.

In sum, and without purporting to have exhausted the possible problems of judicial inquiry into agency settlements, or the solution of them, this Article suggests that properly tailored proceedings reviewing such proposals are both feasible and desirable, and that judicial power to narrow the inquiry or issue protective orders should suffice to minimize the problems entailed in adopting this innovation while permitting

194. This would be one way in which to achieve an end strongly endorsed by the Civil Rights Commission. In speaking of the steel consent decree, the Commission wrote:

> In addition, although not done in this instance, future agreements must be preceded by thorough investigations of all of the employers' installations. It is difficult to see how an effective agreement can be reached unless the Government has specific knowledge and data on the extent of the discriminatory practices. CIVIL RIGHTS COMMISSION REPORT 560.

We have suggested earlier that this particular example might warrant rejection of the decree without a showing of reasonable investigation on the ground that the aggrieved parties could demonstrate "adverse effect." See text accompanying notes 111-17 *supra*.

195. *See* United States v. Morgan, 313 U.S. 409, 422 (1941).

maximum attainment of anticipated benefits. Hopefully, we have thereby pointed the way to optimize public and private interests in the difficult area of consent decree settlements.

CONCLUSION

This Article is an attempt to start the development of lines of judgment and control of agency discretion in settling cases short of full adjudication. Because it is only a start it is limited in scope and application to consent decree settlements in a court adjudication setting. Within its limits we are satisfied that we have derived useful principles. The recommendations we have made would no doubt be appropriate beyond the immediate scope of this Article. Yet we pause in our enthusiasm in view of such large issues as prosecutorial discretion and the transfer to the Justice Department of various agency cases for judicial enforcement. These problems need direct study; should such inquiry be made, our study and recommendations hopefully will prove useful.