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# NOTES

## MODIFICATION OF ANTITRUST CONSENT DECREES

No area of law has produced more voluminous records in litigation than the antitrust field. Because the concepts used to effectuate standards of antitrust control defy narrow definition, cases often compile sprawling records for the judge's consideration.<sup>1</sup> Obviously, the time consumed and the physical impracticability of reading and evaluating this mountain of evidence make the job of the court exceedingly difficult.

More important, perhaps, is the fact that the parties, too, are burdened by this litigation. A defendant is put to great expense by the investigation and trial; its business operations are disrupted, unfavorable publicity results, and triple-damage actions may follow an adverse decision. The Antitrust Division, working within a limited budget, also shuns expensive litigation which may severely circumscribe its other enforcement activities.<sup>2</sup>

To avoid such litigation, and to speed enforcement of the antitrust laws, the Department of Justice has employed "consent decrees." The Antitrust Division first files a complaint with the court or takes it directly to a suspect business prior to filing.<sup>3</sup> Faced with this complaint, the defendant, if he desires to avoid trial and its attendant unpleasant consequences, may agree to abandon the suspect conduct. If the Division is satisfied that antitrust policy is adequately effectuated, this agreement is then submitted to a federal court for consideration and entry as an official court decree.<sup>4</sup> Thus, the judicial process is reduced to the entry

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1. The *Alcoa* case, for example, produced a 480 volume record, and some 58,000 pages of testimony, weighing 325 pounds. CARR, *ALCOA: AN AMERICAN ENTERPRISE* 219-20 (1952).

2. Government litigation expenses have been estimated at \$100,000 to \$150,000 per case. HANDLER, A. *STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF FEDERAL ANTI-TRUST LAWS* 92 (TNEC Monograph No. 38, 1941).

3. The customary procedure in obtaining a consent decree begins after the filing of the complaint in a regular antitrust action. At any time prior to entry of a judgment, a consent decree may be formulated and filed with the court. The current practice of the Antitrust Division is to submit the complaint to the defendant before filing it in court. Barnes, *The Theory and Practice of Anti-trust Enforcement*, 59 *Md.S.B.A.* 72, 77 (1954).

4. The cases differ as to whether the consent decree should be treated entirely the same way as a regularly-litigated court determination. In many instances the consent element of the decree is construed in the light of a contract between the Government and the named defendant. See *United States v. Radio Corp. of America*, 46 *F.Supp.* 654, 655 (D.Del. 1942); *United States v. International Harvester Co.*, 274 *U.S.* 693, 703 (1926). Because the court will not allow the public interest to be determined and perhaps bargained away by the Attorney General, the court possesses a power to modify

of the decree and the granting of contempt action where the conduct of the defendant deviates from that specified in the decree.

In the bargaining the defendant may refuse to consent when it believes it has disobeyed no antitrust commandment, or that the relief sought by the Government is disproportionate to the alleged violation or threat of violation and that the court, after litigation, would not be likely to grant it. However, the threat of suit frequently results in the business agreeing to abandon the questionable practices.<sup>5</sup> The defendant thus bargains to retain as much of its profit-making position as possible and, in some instances, to gain express approval of certain dubious activities in the permissive parts of the decree.<sup>6</sup>

When, after entry, a decree is challenged, the nature of the decree creates difficult practical and theoretical problems.<sup>7</sup> While all decrees are subject to the inherent power of the court to enforce, interpret, and modify,<sup>8</sup> the court has neither participated in formulating the decree nor received any formal record of the bargaining between the parties upon which to base subsequent determinations.<sup>9</sup>

To be a useful device the decree must have some binding effect; however, the method by which the decree is reached should justify mitigation of a strict application of the *res judicata* theory.<sup>10</sup> Factually the court that enters the consent decree hears no evidence and thus adjudi-

that cannot be precluded by the parties. A good discussion of the consent decree and its special position as a civil suit in equity is presented in Oppenheim, *Federal Antitrust Legislation: Guideposts to A Revised National Antitrust Policy*, 50 *MICH L. REV.* 1139, 1229-30 (1952).

5. For a discussion of the pattern of decrees in recent years which illustrates the limited bargaining power of a defendant in a consent decree see Patterson, *Consent Decrees: A Weapon of Anti-Trust Enforcement*, 18 *U. KAN. CITY L. REV.* 34, 42 (1950).

6. A typical example of a permissive provision is *United States v. Owens-Illinois Glass Co.*, where the consent decree operated prospectively to specify that the defendant was not to be denied the right to the benefits of the patent laws in certain areas. *United States v. Owens-Illinois Glass Co.*, *CCH TRADE REG. REP.* (1946-47 Trade Cas.) ¶ 57, 498 (N.D. Cal. Sept. 18, 1946). Permissive provisions are of questionable finality because the Attorney General cannot consent to future violations of the antitrust laws. The decree cannot determine the legality of acts not yet performed; however, permissive provisions do clarify the general understanding of the parties concerning the legality of present practices. Subsequent claims of illegal activity prior to entry of the decree are thus avoided.

7. See note 15 *infra*.

8. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *United States v. Radio Corp. of America*, 46 F.Supp. 654, 655 (D.Del. 1942).

9. During a ten year period prior to 1945 approximately two-thirds of the decrees were entered within three days of the original institution of the proceeding. See Note, 63 *HARV. L. REV.* 320, 322n. 13 (1949). However, the court does reserve the right to determine what is in the "public interest" and, in doing so, requires that the decree be explained to its satisfaction. See Isenbergh & Rubin, *Anti-trust Enforcement Through Consent Decrees*, 53 *HARV. L. REV.* 386, 408-12 (1940).

10. See text, p. 362 *infra*.

cates nothing in most instances.<sup>11</sup> Considering the growing use of consent decrees,<sup>12</sup> modification becomes an increasingly vital and complex matter; so complex, indeed, that the courts have yet to delineate rules to bring certainty to this area of law. It is with this problem that this note seeks to do battle.

As grounds for appeal are obviated by the consensual nature of the decree,<sup>13</sup> disputes arising after the entry of a consent decree usually concern problems of enforcement, interpretation, or modification.<sup>14</sup> Unless a hearing is held the court's sole guide in these activities is generally limited to the content of the decree itself, and, to the extent that there have been no findings, ambiguities may be difficult to resolve.<sup>15</sup>

Enforcement of a decree by contempt proceedings may be easily effected if the conduct provisions of the decree are specifically drafted. However, specific provisions, while expediting enforcement, may hinder

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11. The decree is officially entered without evidence, hearing, or finding of fact. A standard provision is used in each decree expressly stating this fact, *e.g.*, "Now, therefore, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby . . . (ordered, etc.);" *United States v. Eastman Kodak Co.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,920, at 70,005 (W.D.N.Y. Dec. 21, 1954).

12. In a recent address Assistant Attorney General Stanley N. Barnes indicated that from May 1, 1953 to January 20, 1954, ". . . we disposed of just exactly sixty percent more cases by termination than during the preceding nine month period, and with a smaller staff. This amounted to forty-two cases. Twelve were terminated by court decision, three by dismissal, and twenty-seven by consent or nolo pleas." Barnes, *The Theory and Practice of Anti-Trust Enforcement*, 59 MD.S.B.A. 72, 79 (1954).

13. English practice did not allow a consent decree to be set aside by appeal or bill of review, except for clerical errors. The more liberal United States position undercut the no-appeal standard by allowing claims for lack of actual consent, fraud in procurement, and lack of federal jurisdiction because of citizenship of the parties. However, the court seldom, if ever, examines the merits of the cause when it affirms a consent decree. *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928).

14. The court will enter a proposed modification consented to by both parties, if it does not conflict with the limits imposed by "public interest" as determined by the court. In one stipulated modification the court made an independent determination in the absence of a full examination by the Antitrust Division: ". . . It appearing that plaintiff [the Government] has not made a full examination of all the circumstances with respect to alleged difficulties in disposing of said theatres, but it appearing to this Court that if the conditions hereinafter set forth are complied with, competition in Schine towns and the disposition of theatres required to be disposed of will be facilitated." *United States v. Schine Chain Theatres, Inc.*, CCH TRADE REG. REP. (1952-53 Trade Cas.) ¶ 67,237, at 67,349 (W.D.N.Y. Jan. 22, 1952).

15. While a well-written decree could provide the judge with an infallible guide, frequently ambiguity requires resort to the intention of the parties at the time the decree was made. In a 1952 case the Supreme Court interpreted a decree concerning separation of a movie production-distribution company from exhibition company interests. The lower court interpreted the decree to require divestiture. In reversing the divestiture order the Supreme Court indicated that the interpretation of the lower court was contrary to that ordinarily given by "most persons." *Howard Hughes v. United States*, 342 U.S. 353, 356 (1952), CCH TRADE REG. REP. (1952-53 Trade Cas.) ¶ 67,213, at 67,268 (U.S. Feb. 4, 1952).

the flexibility necessary for the decree to prove fully effective amidst changing conditions.<sup>16</sup> As most of the provisions are now expressed in specific terms,<sup>17</sup> the Government apparently has decided that certainty, although it may work a subsequent hardship,<sup>18</sup> outweighs the value of flexibility. To avoid this rigidity many decrees now contain a provision allowing special petition to the court for variance of the original decree.<sup>19</sup> These provisions supply the court with standards by which to judge petitions for change.<sup>20</sup> Enforcement, therefore, presents relatively few problems in actual practice.<sup>21</sup>

Interpretation involves more difficult issues because the possible variation of remedies may affect substantial interests of both parties.<sup>22</sup>

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16. See, *e.g.*, *United States v. Continental Can Co.*, CCH TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,680 (N.D. Calif. June 26, 1950).

17. Specific decrees, by definition, require express conduct on the part of the defendant, *e.g.*, divorcement or divestiture in monopoly situations or orders to grant licenses to prevent patent misuse. The specific order itself may or may not be capable of solving a given antitrust problem, but is a necessary substitute for the vague standards used in the Sherman Act if enforcement is to avoid the cumbersome problems of a litigated decree.

18. In one instance the Government and two of the parties to a consent decree attempted to vacate a decree by showing that the specific relief provided no longer followed the basic purpose of the decree to promote competition. The defendant who had obtained patent advantages from the decree objected and successfully retained its competition-free position in the market. *United States v. Radio Corp. of America*, 46 F.Supp. 654 (D. Del. 1942).

19. A typical decree, ordering a defendant cotton exchange to abandon certain activities, provided for avoidance of the sanction by motion of the defendant if, at the time specified, a showing could be made that failure to continue the exchange would be inconsistent with the public interest. *United States v. Savannah Cotton and Naval Stores Exchange, Inc.*, CCH TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,929 (D.Ga. Oct. 18, 1951). See also *United States v. Kosher Butchers' Ass'n.*, CCH TRADE REG. REP. ¶ 67,988, at 70,209 (S.D. Calif., March 1, 1955).

20. A recent decree provides that the defendant is subject to possible Government request for further court orders or directions to assure that their sale or distribution of food does not result in the defendant's obtaining "unlawful competitive advantages," even when acting consistently with the specific terms of the consent decree. *United States v. The New York Great Atlantic & Pacific Tea Co., Inc.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,658, at 69,114 (S.D.N.Y. Jan. 19, 1954). It might be questioned whether, in some instances, the standard built into the decree is so broad as to prompt extensive litigation on the matter, which would defeat the original purpose of the consent decree. A decree may also provide that after two years the defendant may apply to the court for an exception to the provisions of the decree. In one case the sanction was to terminate if, upon a hearing, the court determines that a proposed acquisition will not "tend to deter or restrict competition in the production, sale or distribution of coarse aggregates . . ." in the New York area. The craftsmanship of this decree illustrates how the parties can allow for the contingent termination of a sanction in accordance with the basic purpose, by placing the burden upon the defendant to establish the status of competition when a change is sought. *United States v. New York Trap Rock Corp.*, CCH TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,838, at 64,472 (S.D.N.Y. May 25, 1951).

21. Even the clear and specific enforcement of consent decrees can raise problems of investigation and proof, but these are not the concern of this note.

22. Two recent cases, involving interpretations effecting a divestiture of valuable property interests by lower courts, were reversed by the Supreme Court. *United States*

The court must look to relatively barren decrees in determining what the original agreement between the parties contemplated. If the interpretation of the Government prevails, the defendant may be divested of valuable property;<sup>23</sup> if the Government loses, it is bound by the adverse interpretation and is precluded from further antitrust enforcement on this ground.<sup>24</sup> In this contest victory by the defendant does not permanently subvert the public interest, for the Government can always bring subsequent actions for new violations.<sup>25</sup> Thus, when the court "interprets" a consent decree, it may effectively "modify" the decree; something to which at least one of the parties never agreed has now been written into, or something upon which a consenting party relied has been written out of, the decree.<sup>26</sup> Without considering further the complex problem of interpretation it should be noted that caution has been exercised to prevent avoidance of judicial safeguards now applicable to modification actions under the guise of "interpretations."<sup>27</sup>

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v. Liquid Carbonic Corp., 123 F.Supp. 653 (1954), reversed—U.S.—(1955); Howard Hughes v. United States, 342 U.S. 353 (1952). The opposing party in these interpretation situations usually argues that any interpretation other than its own involves remedies unalterably inconsistent with those to which it originally consented.

23. See, e.g., United States v. Liquid Carbonic Corp., 123 F.Supp. 653 (1954).

24. One court has found a request for modification requiring a return to competitive conditions prior to the entry of the decree ". . . repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which . . . [the defendant] has, in the exercise of good faith, been entitled to rely." United States v. International Harvester Co., 274 U.S. 693, 703 (1927). Also, although the construction requested by the Government was more nearly in line with the enforcement of the antitrust laws, the court denied the motion because the court found the language of the decree unambiguous. United States v. Radio Corp. of America, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,704 (D. Del. Jan. 11, 1954).

25. Although the court is the determining body as to the public interest, where the Government clearly shows that the consent decree no longer serves the public interest, the court may refuse to modify the decree on grounds of upholding a bargain made by the Government. This seems inconsistent. In any conflict between public interest and private interest, the private interest is usually subordinated. Yet when, in seeking to nullify a decree, the Government argues that the public interest, *i.e.*, achieving conformance with the antitrust laws, has not been met, the courts will uphold a private right. Cf. United States v. Radio Corp. of America, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,704 (D. Del. Jan. 11, 1954). Perhaps the court considers the public interest in upholding consent decrees more important than the public interest in absolute conformance with the antitrust dictates. To allow the Antitrust Division to run rough-shod over the private rights for which a defendant bargained would discourage future defendants from entering into consent decrees.

26. The rights of the parties to rely upon the plain meaning of the decree is usually referred to in contract terms. United States v. Radio Corp. of America, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,704, at 69,265 (D. Del. Jan. 11, 1954). See also United States v. International Harvester Co., 274 U.S. 693, 703 (1927).

27. The recent *Hughes* case decided by the Supreme Court concerned divestiture of a substantial property right. The dispute began with an appeal of a divestiture order which the defendant challenged as a modification of the decree to which he never consented. The court indicated that a divestiture can be the subject of a modification change, but not where done merely as an interpretation. "We entertain no doubt concern-

Expressing the limits of modification is merely one way of defining the extent of finality. In general the doctrine of *res judicata* applies to judicial decrees for the purpose of putting to rest matters in issue.<sup>28</sup> While antitrust consent decrees are primarily concerned only with the remedy, they do include a broad statement of a cause of action, *e.g.*, Sections 1 and 2 of the Sherman Act,<sup>29</sup> and expressly deny trial or adjudication of any issue of fact or law.<sup>30</sup> Yet, the decree, if considered as a bar, would conclude the parties on all matters that could have been litigated under the broad cause of action specified in the decree.<sup>31</sup> No such application of the *res judicata* rule has been made; only matters actually expressed in the decree are concluded.<sup>32</sup> However, while application of the *res judicata* theory has been limited, the courts have achieved finality by fiat, *i.e.*, by refusing to consider whether parts of the decree could have been opposed with success.<sup>33</sup> The difficulty facing the court is that the decree is of no practical value to the parties unless final to some extent.<sup>34</sup>

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ing the District Court's power to require a sale of Hughes' stock after a proper hearing." Howard Hughes v. United States, 342 U.S. 353, 357 (1952).

28. "The traditional doctrine of *res judicata* as applied in the judicial system is inexorable in making a judgment binding so as to shut off further inquiry no matter how clear the mistake of fact or how obvious the misunderstanding of law or how unfortunate the choice of policy or how unjust the practical consequences or how inadequate the evidence in the record or how poorly prepared the briefs and arguments." DAVIS, ADMINISTRATIVE LAW § 171, p. 564 (1951).

29. Where a judgment is rendered it is a bar to not only what was litigated but precludes action upon any part of the cause that could have been litigated in the original action. RESTATEMENT, JUDGMENTS § 62 (1942).

30. The standard provision states: ". . . [the defendant] having appeared and filed its answer to such complaint denying the substantive allegations thereof, and plaintiff and said defendant having severally consented to the making and entry of this Final judgment without trial or adjudication of fact or law herein and without admission in respect to any issue. . . ." See note 10 *supra*.

31. Collateral estoppel normally would prevent the subsequent introduction of matters basic in the determination of the previous finding. However, the consent decree requires no finding of fact; it expressly denies any trial or adjudication of any issue of fact or law. See note 10 *supra*.

32. ". . . [B]ut any such practice, unmentioned or specifically excluded from an injunction, unless affirmatively sanctioned by other terms of the decree, bears the same relation to the antitrust laws as it did before the decree was entered." Department of Justice release, Dec. 16, 1940, 2 CCH TRADE REG. REP. (10th ed.) ¶ 8241.65, at 16,705.

33. Cf. Swift & Co. v. United States, 276 U.S. 311 (1928).

34. The consent decree arose as a bargain between the parties, implicitly sanctioned by the court. The outlines of this bargain are delineated by the allegations of the complaint, which in general language, charge a violation, and by the denials contained in the answer, if any. But the essence of the bargain is two-fold: (1) an agreement that the issues so made are not resolved and are not to be resolved subsequently and (2) an agreement that the defendant will be required to adhere to a certain course of conduct. To allow either of the parties without the consent of the other to ignore the decree would then not only deprive it of its efficacy but would be inequitable. Hence by judicial fiat the decree stands until modified, and the doctrines of modification of their own force define the extent of finality.

Rules of modification serve to mitigate finality where changed circumstances have rendered a consent decree an instrument of wrong.<sup>35</sup> The usual decree contains a standard provision reserving jurisdiction of the court to modify,<sup>36</sup> although a court of equity normally has inherent power to modify a prospective decree where successful application is contingent upon changing circumstances.<sup>37</sup> However, the finality of the decree is seriously limited if, while forbidding direct attack, the courts allow liberal modification.<sup>38</sup>

In 1932 the Supreme Court, in *United States v. Swift & Co.*, ruled against liberal modification.<sup>39</sup> The *Swift* test required that the party seeking modification prove to the court's satisfaction (1) that market conditions or other circumstances essential to the decree have changed from those existing at the time the decree was entered, and (2) that these changed conditions now impose a grievous wrong upon one of the parties.<sup>40</sup>

In contested applications for modification, the court has required strict compliance with the "change of circumstances" rule to effect a policy against review.<sup>41</sup> Application has been made not only to businesses wishing to escape control of the decree,<sup>42</sup> but also to the Antitrust Division, which may wish to abandon a condition that no longer serves the dictates of the antitrust laws.<sup>43</sup> In 1942, however, the Supreme Court deviated from this policy against liberal modification.<sup>44</sup>

The Antitrust Division, prior to World War II, had obtained consent decrees from both Chrysler and Ford, forbidding their affiliation with finance companies.<sup>45</sup> The decrees contained provisions contingent upon the Government imposing similar restrictions upon General Motors

35. *United States v. Swift & Co.*, 286 U.S. 106 (1932).

36. See note 8 *supra*.

37. "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof." *United States v. Eastman Kodak Co.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,920, at 70,010 (W.D.N.Y. Dec. 21, 1954).

38. See note 13 *supra*.

39. 286 U.S. 106 (1932).

40. *Id.* at 119.

41. After the *Swift* case there was a ten year period during which no case raised the issue. See Note, 63 HARV. L. REV. 320, 322n. 17 (1949).

42. See, *e.g.*, *United States v. Swift & Co.*, 286 U.S. 106 (1932).

43. See, *e.g.*, *United States v. Radio Corp. of America*, 46 F.Supp. 654 (D.Del. 1942).

44. See *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

45. *United States v. Chrysler Corp.*, CCH TRADE REG. REP. (1940-43 Trade Cas.) ¶ 56, 106 (N.D. Ind. Nov. 15, 1938); *United States v. Ford Motor Co.*, CCH TRADE REG. REP. (—ed.) ¶ 52,171 (N.D. Ind. 1938).



by January 1, 1941. When the Government could not complete the case against General Motors before the termination date, the Antitrust Division sought to modify the decree by extending the date.<sup>46</sup> The Supreme Court, in *Chrysler Corp. v. United States*, upheld the granting of extensions and announced a more liberal modification doctrine.<sup>47</sup> Any provision in the consent decree not "of the essence" was subject to change so long as the "basic purpose" of the decree was not thwarted.<sup>48</sup> Mr. Justice Frankfurter dissented, arguing that the Government had achieved modification of an express condition without proving that circumstances justified such a change.<sup>49</sup>

As a result of the *Chrysler* decision the termination dates of both the Chrysler and Ford decrees were extended until 1948.<sup>50</sup> When these decrees expired, the Government again sought an extension of time, although General Motors was now utilizing its financing agency. In *United States v. Ford* the Court, speaking through Mr. Justice Frankfurter, overruled an extension granted by a lower court and held that the Government had failed to show good cause why a court of equity should grant relief contrary to the express provisions of a decree "well understood and carefully formulated."<sup>51</sup>

The *Ford* decision neither expressly reiterated the *Swift* test nor expressly overruled the *Chrysler* doctrine. The rationale appears to be that the change of circumstances rule still applies whenever modification concerns matters "of the essence" in the decree.<sup>52</sup> This requires the party seeking modification to show grievous wrong wrought by change in circumstances when dealing with an essential provision. But, in modifica-

46. A modification of the decree, granted December 21, 1940, by the United States District court for the Northern District of Indiana, is unreported. It was modified to extend the date of termination to Jan. 1, 1943. CCH TRADE REG. REP. (1940-43 Trade Cas.) ¶ 56,190 (N.D. Ind. Feb. 16, 1942). The original extension was dismissed for want of a quorum of the court. *Chrysler Corp. v. United States*, 314 U.S. 583 (1941).

47. *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

48. *Id.* at 562. The test used by the court was "whether the change [sought] served to effectuate or to thwart the basic purpose of the original decree."

49. *Id.* at 570.

50. After observing the *Chrysler* decision, Ford consented to extensions of time until 1948.

51. *Ford Motor Co. v. United States*, 335 U.S. 303, 322 (1948). Apparently the decree was not "well understood" by the lower court. The court further ruled that to extend the decree would only "perpetuate inequality." *Ibid.*

52. In 1948 the circumstances existing to "extenuate" the importance of the termination date ten years before were no longer compelling because of the resumption of full-scale competition. Also, implying that non-essential elements of a decree might still be subject to modification, the court ruled that in this instance the defendant did not have to show a harm because of the extension. Thus, the termination date appears to be considered as "of the essence," and the Government failed because it could show neither change of circumstances nor grievous harm. *Id.* at 321, 322.

tions not "of the essence," the burden shifts to the party defending the original decree to show either that the questioned provision is essential to effect the purpose of the decree<sup>53</sup> or that, while it is not "of the essence," modification will produce substantial harm.<sup>54</sup> This raises serious drafting problems for the parties, as a matter "of the essence" when the decree is entered may become "not of the essence" by changing circumstances.<sup>55</sup> Thus in a contested modification the *Swift* rule against liberal modification still applies except when the provision in controversy is not of the essence. What will be termed not of the essence is not clear; but the exception is not to be allowed where it would cause hardship to the defendant.

To avoid the *Swift* rule,<sup>56</sup> some decrees expressly provide for modification without a showing of change of circumstances subsequent to the entry of the decree.<sup>57</sup> To the extent provided, the original decree is not final and allows a specified amount of flexibility.<sup>58</sup> The court may be further aided by the inclusion in the decree of a policy statement by which any proposed modification can be judged.<sup>59</sup> To protect the decree from prompting extended litigation, standards as sweepingly illusive as "com-

53. *Ibid.*

54. The Chrysler decree expressly provided that, in the event the Government did not impose an identical restriction upon General Motors, the defendant had the right to apply for approval of a plan of affiliation. The proof required to abrogate the decree and get affiliation plans approved was a showing of harm resulting from any inconsistent treatment of General Motors and Chrysler. However, the court interpreted the time limit as a protective device merely to insure expedient litigation of the case by the Government, and by interpretation shifted the burden to the defendant opposed to modification to show that modification would cause a competitive disadvantage to occur. *Chrysler Corp. v. United States*, 316 U.S. 556, 563 (1942).

55. In the *Ford* case the extension of the termination dates during World War II was considered as not of the essence. After the war when car sales resumed the term immediately became of the essence. The Ford Company was not required to sustain the burden of proof; the majority opinion clearly places the burden of proof upon the Government and states that the burden was not sustained. *Ford Motor Co. v. United States*, 335 U.S. 303, 322 (1948). Determining precisely what the phrase "of the essence" means at any one time is obviously difficult.

56. *United States v. Swift & Co.*, 286 U.S. 106 (1932).

57. *United States v. Kosher Butchers' Ass'n.*, CCH TRADE REG. REP. ¶ 67,988 (S.D. Calif. Mar. 1, 1955); *United States v. Minute Maid Corp.*, CCH TRADE REG. REP. ¶ 68,131 (S.D. Fla. Sept. 7, 1955); *United States v. Allied Florists Ass'n.*, CCH TRADE REG. REP. (1952-53 Trade Cas.) ¶ 67,433 (N.D. Ill. Feb. 13, 1953); *United States v. Decca Records, Inc.*, CCH TRADE REG. REP. (1952-53 Trade Cas.) ¶ 67,402 (S.D.N.Y. Dec. 10, 1952).

58. The entire decree is seldom declared subject to alteration without showing change of circumstances; the change of circumstances exclusion is usually limited to only one section of the decree. See *e.g.*, *United States v. Decca Records, Inc.*, *supra* note 57, at 68,057.

59. See *United States v. Continental Can Co.*, CCH TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,680, at 63,980 (N.D. Calif. June 26, 1950). *Cf.* note 20 *supra*.

petition" or "monopoly" must be avoided in the drafting of the policy section.<sup>60</sup>

The provisions now employed allowing liberal modification may, where there is a hearing, work an unexpected result.<sup>61</sup> The exemption of consent decree evidence from use in treble-damage actions does not apply to those instances where there has been a hearing with findings of fact.<sup>62</sup> Some liberal modification provisions require a hearing on evidence of conduct occurring before and after the date of the consent decree without any bar or estoppel arising by virtue of the decree.<sup>63</sup> While the provision determines the limits of finality of the decree, it may expose the defendant with unclean hands to substantial pressure not to seek or oppose modification.<sup>64</sup>

The evolution of the consent decree shows promise that it may correct some of its own inherent failings. The dangers of an involuntary loss of rights and property are minimized by the court's unwillingness to allow modification under the guise of interpretation. The likelihood that some technicality written into the decree may frustrate its primary purpose has been minimized by the *Chrysler* decision. And the position of the judge is enhanced by the incorporation of policy provisions to guide prospective changes.

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60. Where the decree uses such vague terms as "proper showing" very little is settled concerning the limits of proof required to effect a change. See *United States v. Allied Florists Ass'n.*, CCH TRADE REG. REP. (1952-53 Trade Cas.) ¶ 67,433, at 68,170 (N.D. Ill. Feb. 13, 1953).

61. Provisions for special petitions to allow the defendant to abate some of the directives in the decree, or to allow the Government to obtain further relief, specify that records of "all proceedings . . . prior to the entry of this judgment . . ." become a part of the record. *United States v. Continental Can Co.*, CCH TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,680, at 63,985 (N.D. Calif. June 26, 1950). See also *United States v. Kosher Butchers' Ass'n.*, CCH TRADE REG. REP. ¶ 67,988 (S.D. Calif. Mar. 1, 1955).

62. Section 5 of the Clayton Act provides that a judgment or decree entered under a litigated proceeding by the Government shall become prima facie evidence in a private action for treble damages against the defendant, unless the decree is a consent decree entered before any testimony has been taken. 38 Stat. 731 (1914), as amended, 15 U.S.C. ¶ 16 (1945). Where testimony is taken subsequently in a modification hearing, the consent decree may lose its immunity under § 5. Apparently this question has never been raised.

63. One decree provides that the record prior to entry of the decree is to be considered by the court together with the additional evidence to support or oppose the decree ". . . including the facts and circumstances arising before or subsequent to the date of this judgment, and without any bar or estoppel arising by reason of the entry of this judgment." *United States v. Kosher Butchers' Ass'n.*, CCH TRADE REG. REP. ¶ 67,988, at 70,209 (S.D. Cal. Mar. 1, 1955).

64. Where a defendant may have succeeded in achieving a favorable decree, it would be unlikely that there would be an attempt to modify except under extreme circumstances. Proper use of this threat to abandon the decree and force an open litigation might prevent a party from accepting the parts of the decree that are favorable and then harassing the opposition over unfavorable parts. Depending upon the quality of the evidence existing in the record prior to entry of the decree the Government may be gaining a powerful weapon to force compliance with the decree.