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Post-Litigation Resulting From Alleged Non-Compliance With Government Antitrust Consent Decrees*

By John A. Duncan

SINCE THE Sherman Act[1] was enacted in 1890, over 400 consent decrees have been entered into with the federal government.[2] In fact, from 1935 to March 31, 1955, 72% of the civil anti-trust actions were terminated by consent decrees.[3] It therefore follows that most of those who have been named defendants in such antitrust litigation have taken what appears to them to be the "easy way out," little realizing at the time they made their "settlement" with the Antitrust Division of the Department of Justice that the whole thing might come back to "haunt" them some day. In this regard, an eminent writer has cautioned:

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> A company subject to such orders [consent decrees], moreover, must live with them from generation to generation, the sins of the fathers descending from decade to decade unto their guiltless corporate successors.[4]

If the charge made by the Government is criminal, one can readily understand why a party indicted of violating the antitrust laws wants to

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* This article does *not* deal with the question of the *public* enforcement by the Federal Trade Commission of its cease and desist orders (over 4,000), stipulations of cease and desist (about 8,000) and trade practice rules (about 2,000); nor does it deal with the question of *private* enforcement of consent decrees.

[1] 26 STAT. 209 (1890), 15 U.S.C. §§ 1-3 (1952).

[2] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY ANTI-TRUST LAWS 366 (March 31, 1955). "Presently (March 31, 1955) the Department is responsible for enforcement of some 378 judgments entered since 1890." However, according to 2 CCH TRADE REG. REP. ¶ 8421 (1955), the list of consent decrees since the entry of the first such decree in 1906 to March 19, 1956 totals 406.

[3] *Id.* at 360.

[4] VanCise, *Laying the Foundation, How to Comply with the Anti-Trust Laws*, CCH ANTITRUST LAW SYMPOSIUM 14 (1954), commenting on *United States v. Swift & Co.*, 286 U.S. 106 (1932)

dispose of the matter by pleading *nolo contendere.*[5] But consent decrees are only the outgrowth of civil actions leveled against an alleged antitrust violator, and it is therefore difficult to surmise why such litigants should so readily "negotiate" in a civil antitrust action and thereafter, by agreement, permit themselves to be enjoined perpetually by a "continuing decree of injunction directed to events to come."[6] The usual answer is that such a disposition avoids expense, thereby stopping the meter of the lawyers from running any further. To this end their action is to be commended both by the Board of Directors and the stockholders, *unless* the parties who have so pleaded are unfortunate enough to be later charged with having failed to comply with the terms of the consent decrees. In that event the meter will again run into unknown dollars, and it is that kind of a post consent decree action with which this article intends to deal.

It has been said that an important arm in enforcing the anti-trust laws is the consent decree.[7] With that there is no dispute. Since 1906, when the first consent decree was entered,[8] until the present time, the Department of Justice has relied upon that type of enforcement in civil antitrust actions instituted by the Government. Inasmuch as the regu-

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[5] "The institution of criminal proceedings, however, has graver implications than the mere danger of financial penalty. It may mean indictment, surrender to the custody of the U.S. Marshal, fingerprinting, posting of bonds, unfavorable publicity and, above all, the very real threat of a jail sentence." Jerrold G. VanCise, *Laying the Foundation, How to Comply with the Anti-Trust Laws,* CCH ANTITRUST LAW SYMPOSIUM 14-16 (1954). In a recent proceeding in the United States District Court for the District of Nevada, the court not only imposed fines but also sentenced three of the individuals to terms of six months "in the custody of the Attorney General." Las Vegas Merchant Plumbers Ass'n. v. United States, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67, 673 (9th Cir. 1954)

A Senate Bill introduced in 1956 provides for the imposition of civil penalties on corporation officials who are responsible for criminal antitrust violations. Under the bill, corporation officials who *authorize* acts which constitute a *criminal* violation of the antitrust laws would be liable to *forfeit* to the United States an amount equal to *twice* their compensation covering the period during which the violation occurred. The bill also provides that such officials may be *enjoined* from rendering any services to their company, *permanently* or for a *specified period* of not less than 90 days and from receiving *compensation* during that period. If passed, it will prompt a businessman charged criminally with antitrust violations to "run to cover" and plead *nolo contendere* almost the very day the indictment is returned. See S. 3516 84th Cong., 2d Sess. (1956)

[6] As in United States v. Swift & Co., 286 U.S. 106, 114 (1932)

[7] Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees,* 53 HARV. L. REV. 386 (1940)

[8] United States v. Otis Elevator Co., 1 DECREES AND JUDGMENTS IN FEDERAL ANTITRUST CASES 106 (C.C.N.D. Cal. 1906) See also CCH ANTITRUST BLUEBOOK 73 (1949 ed.).

larity of consent decrees has been on the increase in recent years,[9] it appears that a study of what sometimes happens where subsequent noncompliance with an existing consent decree is charged by the Government, should serve as being timely as well as interesting.

MODIFICATION OF CONSENT DECREES

The earliest case found where the Government applied for further relief *after* a consent decree was entered is *United States v. International Harvester Company.*[10] It established the proposition that where the *Government* files a supplemental petition and endeavors to show (inasmuch as it seeks the modification and thus has the burden of "convincing" proof[11]) that there has been disobedience on the part of those who have consented to the decree, if there has been substantial compliance with the terms of the decree, the action by the Government must be dismissed. In the *Harvester* case, the *original* decree[12] which was entered in 1914 ordered the dissolution of International Harvester into three parts. On motion of the defendants, however, this order was modified and, on November 2, 1918, while the case was pending before the Supreme Court, a consent decree was entered which reinstated the earlier decree obtained by the Government, providing at the outset that the objective to be attained under the terms of the decree was

> to restore competitive conditions in the United States in the interstate business in harvesting machines and other agricultural implements, and, in the event that such competitive conditions shall not have been established at the expiration of eighteen months after the termination of the existing warranty * * * then, and in that case, the United States shall have the right to suggest further relief herein as shall be necessary to restore such competitive conditions and to bring about a situation in harmony with the law. [13]

Five years *after* this antitrust consent decree was entered, a supplemental petition was filed by the Government which alleged that competitive conditions as they had existed some nineteen years before, when the company had acquired its five competitors, had not been restored, and that unless International Harvester was broken up, it would continue its monopolistic control. Three years later, the supplemental petition was disposed of by

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[9] Donovan and McAllister, *Consent Decrees in the Enforcement of Federal Antitrust Laws,* 46 HARV. L. REV. 885 (1933) "Since (1917), with a few breaks, their (consent decrees) regularity has been increasing."

[10] 274 U.S. 693 (1927).

[11] Oriel v. Russell, 278 U.S. 358 (1929); Kansas City Power v. N.L.R.B., 137 F.2d 77 (8th Cir. 1943); United States v. Univis Laws Co., 88 F. Supp. 809 (S.D.N.Y. 1950); United States v. Discher, 255 Fed. 719 (S.D.N.Y. 1919)

[12] United States v. International Harvester Co., 214 Fed. 987 (D. Minn. 1914).

[13] United States v. International Harvester Co., 274 U.S. 693, 697 (1927).

the trial court,[14] which found that the Government (which sought the modification and therefore had the burden of proof) had failed to establish non-compliance by clear and convincing evidence. This finding was affirmed by the Supreme Court.[15]

Thus, the Government lost in its attempt to restore the competitive conditions that had existed sixteen years before when the consent decree had been entered.

In 1932, however, the Supreme Court decided the case of *United States v. Swift & Co.*,[16] and announced in effect that the court which entered the consent decree has the power to modify the decree, if such becomes necessary by reason of changed conditions. But said the Court, "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."[17] So one can readily conclude that when the Government tries to modify the terms of a consent decree, it is indeed an uphill fight.[18] By the same token, it is equally as hard for a former alleged violator to obtain relief by filing an application to modify a consent decree so as to throw off what might in some cases be tantamount to a straight jacket.[19] And this appears to be so, even though the court retains jurisdiction by reason of a provision in the consent decree that the jurisdiction of the court is retained so as to enable *any* of the parties to the decree to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the modification thereof.[20] In the case of *United States v. Radio Corp. of America*,[21] the Government filed a motion in 1954 to construe and enforce a consent decree entered *eighteen* years before. But the District Court denied it because the language in the decree was deemed clear and unambiguous.

The doctrine announced by the Supreme Court in the *Swift* case was "not to reverse [consent decrees] under the guise of readjusting."[22] However, when the Supreme Court passed upon the case of *United States v. Chrysler Corp.*[23] in 1942, it departed somewhat from this *caveat* and found that the extension of the bar against affiliation did not amount to an abuse of the District Court's power to modify the consent decree in

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[14] United States v. International Harvester Co., 10 F.2d 827 (D. Minn. 1926).

[15] See note 10 *supra.*

[16] 286 U.S. 106 (1932).

[17] *Id.* at 119.

[18] United States v. Radio Corp. of America, 46 F. Supp. 654 (D. Del. 1942)

[19] See note 16 *supra.*

[20] United States v. Bausch & Lamb Optical Co., 97 F. Supp. 71 (N.D. Ill. 1951)

[21] CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,704 (D. Del. 1954).

[22] United States v. Swift & Co., 286 U.S. 106 (1932)

[23] 316 U.S. 556 (1942)

the absence of a showing by Chrysler that the extension placed it at a competitive disadvantage, inasmuch as such opportunity was specifically granted by the trial court in extending the date of the contingency provision.

Six years later in *United States v. Ford Motor Co.*,[24] the Supreme Court granted relief to Ford by suspending from the consent decree the prohibition which banned affiliation between Ford and a finance company. The Supreme Court found that the prohibited acts had not yet been enjoined as to the competitor and that there had been no adjudication of the acts being illegal and further found that the prohibitions had expired by the very terms of the consent decree.

In brief, the doctrine announced in the *Swift* case dealing with modification of consent decrees appears to have been somewhat relaxed. But whether the Government or those defendants who consented to enter into the decree later move to modify the decree so as to conform to present conditions, the probabilities are that such a motion will eventually be denied, unless it is shown that the modification is a *necessary* adaptation to changed conditions. Courts have been somewhat reluctant to allow modification although there have been some Government antitrust consent decrees, in addition to the *Ford* case, which have been modified.[25] Recently the Department of Justice has "persuaded" some defendants to agree in the decree to permit the Government to apply within two or three years for other or further relief with regard to the activities of any of the defendants relating to credit, and furthermore to agree that such relief might be granted upon proper showing but without the necessity of a showing by the Government of any change of circumstances since the entry of the decree.[26]

Usually the party seeking the modification has the burden of proof and must show that conditions have changed,[27] but a U. S. district court sitting in Florida recently held that the Government could petition the

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[24] 335 U.S. 303 (1948).

[25] *See* Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944); United States v. Schine Chain Theatres, Inc., CCH TRADE REG. REP. (1952 Trade cas.) ¶ 67,237 (W.D.N.Y. 1952); United States v. American Bosch Corp., CCH TRADE REG. REP. (1948 Trade Cas.) ¶ 62,284 (S.D.N.Y. 1948); United States v. Columbia Gas & Electric Corp., CCH TRADE REG. REP. (1943 Trade Cas.) ¶ 56,-268 (D. Del. 1943); United States v. Standard Oil Co. (N.J.), CCH TRADE REG. REP. (1943 Trade Cas.) ¶ 56,269 (D. N.J. 1943); United States v. Radio Corp. of America, 3 F. Supp. 23 (D. Del. 1935).

[26] United States v. Allied Florists Ass'n., CCH TRADE REG. REP. (1953 Trade Cas.) ¶ 67,433 (N.D. Ill. 1953).

[27] See note 10 *supra*.

court for further relief *without* the necessity of showing any change in circumstances.[28] Obviously this does not represent the general rule.

ENFORCEMENT OF GOVERNMENT CONSENT DECREES

It has become apparent, over the years, that immediate settlement of injunction suits brought by the Government under the Sherman Act has been regarded by most businessmen and some lawyers as a quick way of cheaply disposing of antitrust litigation.[29]

But inasmuch as consent decrees are subject to being opened up[30] by supplemental proceedings instituted by the Government when its enforcement division believes, or has reason to believe, that the defendants have failed to comply with the terms set forth in the decree, it behooves the parties named as defendants originally in an antitrust case to realize what *post-litigation* might be in store for them. And this is even true where permissible activity enumerated in the consent decree comes under the scrutiny of the enforcement division. For it must be remembered

> that the declaratory provisions do not constitute a judical guarantee that the described acts are legal. They merely announce that those acts are not prohibited by this (particular) injunction and this announcement would seem to be no legal barrier to the Department's obtaining another injunction against just those acts if it could prove that they violated the antitrust laws.[31]

And neither advice of counsel nor good intentions are valid defenses since the purpose of a *civil* contempt proceeding is remedial.[32] However, they may be considered by the court in mitigation of failure to comply.[33]

Because of the vagueness of the Sherman Act, the Consent Decree Section of the Department of Justice appears to have broad discretion as to what the decree will contain "since almost any phase of economic regu-

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[28] United States v. Minute Maid Corp., CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68,131 (D. Fla. 1955)

[29] Duncan, John A., *The "Big Case" — When Tried Criminally,* 4 WEST. RES. L. REV. 99, 108 (1953).

[30] 62 STAT. 701 (1948), 18 U.S.C. § 401 (1952) "A court of the United States shall have power to punish by fine or imprisonment at its discretion, such contempt of it authority, *and none other,* as:

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." (Emphasis added)

Punishment may be by imprisonment *in excess* of six months for commission of acts constituting criminal contempt of a decree enjoining a violation of the antitrust laws, rendered in a suit brought by the United States. Hill v. United States *ex rel.* Weiner, 300 U.S. 105 (1937), *reversing,* 84 F.2d 27 (3d Cir. 1936).

[31] Isenbergh and Ruben, *Antitrust Enforcement Through Consent Decrees,* 53 HARV. L. REV. 386, 394 (1940).

[32] Bigelow v. R.K.O., 78 F. Supp. 250, 258 (N.D. Ill. 1948).

[33] *In re* Chilcote Co., 9 F.R.D. 571, 573 (N.D. Ohio 1949) But advice of counsel and reliance thereon is a good defense in a *criminal* contempt proceeding.

lation could conceivably and perhaps plausibly be related to the enforcement of the Sherman Act."[34] At best, a consent decree is not a litigation decree but merely the product of bargaining between the Government and the defendants [the latter having a marginal incentive to avoid three things: (1) the onerous expense and adverse publicity; (2) possible treble damage suits; and (3) the obvious desirability to avoid a criminal conviction].

Assume that a client has taken the "easy way out" by entering into a consent decree, and assume further that the Department, either upon complaint or otherwise, notifies the client that it is making an investigation in order to determine whether the client has complied with the terms of the consent decree involved. There would be a threshold question as to the extent of the investigative powers of the Government in such a situation.

Except for special provisions in a consent decree relative to (a) retention of jurisdiction, (b) examination of records of the defendants by Government representatives to determine whether or not there has been compliance, and/or (c) self-policing and dissolution,— antitrust consent decrees entered into with the Government are enforceable in the same way as contested decrees.

However, most of the consent decrees drafted in recent years have provided for their own enforcement. Usually at the end of the decree there is a paragraph with respect to retention of jurisdiction by the court,[35] and it is interesting to note that the courts have declared that the mere passage of time will not deprive them of jurisdiction over the subject matter of their original decree.[36]

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[34] Isenbergh and Ruben, *supra* note 31, at 405.

[35] An an example of this kind of government reservation, see the following provision inserted in the consent decree entered in *United States v. Automatic Sprinkler Co.*, CCH TRADE REG. REP. (1948 Trade Cas.) ¶ 62,230 (N.D. Ill. 1948)

"For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to any defendant, be permitted, subject to any legally recognized privilege, (a) access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any of the matters contained in this judgment; and (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; provided, however, that no information obtained by the means permitted in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law."

[36] United States v. Wallace & Tiernan Co., CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,828 (D. R.I. 1954).

Consent decrees also contain ordinarily a provision permitting reasonable access by Government agents to books, ledgers, accounts, correspondence, memoranda and other data in the defendants' possession or under their control which in any way relate to the matters set up in the consent decree. In addition, they usually have an express provision permitting Government enforcement representatives to interview officers and employees for the purpose of determining whether there has been a compliance with the terms of the consent decree. To facilitate this determination the Government has required records to be maintained intact and open for inspection for as long as *ten* years.

Another typical provision contained in a great many consent decrees requires a defendant association or union to inform their members of the contents of the decree and if members violate the terms, the association or union is charged with the duty of disciplining them so as to secure compliance.[37]

This method of self-policing imposed by the Antitrust Division appears to be within statutory and constitutional bounds. Such is especially so since the Division is not a mere private litigant. But in enforcing a federal statute, the antitrust officials are inclined to the view that they should demand whatever relief their bargaining position may coerce, and sometimes insist upon inserting a provision in the consent decree which requires dissolution after a certain fixed period.[38]

The self-policing provision has been extended to a situation in which a defendant newspaper was required to insert in its publication a notice which fully apprised its readers of the substantive terms of the consent decree.[39]

In the main, whatever data is requested which in any way pertains to the terms set forth in the decree would appear to be subject to Government reach. In all probability, this will put a client to some hardship, but no matter how great that will be, the Government enforcing agents can pursue their investigation to the point where, armed with sufficient data, litigation dealing with the question as to whether there has been a compliance since the decree was entered, may and usually does follow. Non-compliance with an antitrust consent decree is punishable by the

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[37] United States v. Tile Contractors' Ass'n., CCH TRADE REG. REP. (1940 Trade Cas.) ¶ 56,044 (D. Ill. 1940); United States v. Long Island Sand & Gravel Producers Ass'n., CCH TRADE REG. REP. (1940 Trade Cas.) ¶ 56,048 (D. N.Y. 1940).

[38] United States v. Minute Maid Corp., CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68,131 (D. Fla. 1955); *see also,* United States v. Liquid Carbonic Corp., 121 F. Supp. 141 (E.D.N.Y. 1954), *order modified on rehearing,* 123 F. Supp. 653 (E.D.N.Y. 1954).

[39] United States v. Mansfield Journal Co., CCH TRADE REG. REP. (1952 Trade Cas.) ¶ 67,210 (N.D. Ohio 1952).

federal court either as civil or criminal contempt. This may take the form of a supplemental petition and be filed on the civil side of the court seeking a modification of the antitrust consent decree. This may also take the form of either a civil or criminal contempt action, *or both.* In a *criminal contempt* proceeding, the burden is upon the Government to prove its charges beyond all reasonable doubt.[40] In *Bridges v. California,*[41] Mr. Justice Frankfurter stated in a dissenting opinion that "the power to punish for contempt should be used only in flagrant cases and with the utmost forbearance," inasmuch as it "is always better to err on the side of tolerance and even of disdainful indifference." However that may be, a federal court has the power to punish, by fine or imprisonment, for contempt of its authority where disobedience of its decree has been shown.[42]

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[40] It is interesting to note that in such proceedings, the court's summary powers have been curtailed to the extent that the accused (1) must be presumed to be innocent: People v. Spain, 307 Ill. 283, 138 N.E. 614 (1923); (2) need not testify against himself: Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); Root v. MacDonald, 260 Mass. 344, 157 N.E. 684 (1927); and (3) must be found guilty beyond a reasonable doubt: *In re* McIntosh, 73 F.2d 908 (9th Cir. 1934); Sabin v. Fogarty, 70 Fed. 482 (C.C.E.D. Wash. 1895)

An accused is entitled to (1) be advised of the charges against him, and (2) have a reasonable opportunity to meet them by way of defense or explanation. *In re* Oliver, 333 U.S. 257, 266 (1948). According to *In the matter of* Patterson, 125 F. Supp. 881, 885 (S.D.N.Y. 1954) "A mere categorical denial of knowledge of the whereabouts or existence of the records is certainly *not* conclusive, and may be insufficient to overcome the *prima facie* case, particularly where his credibility is impaired by prior contradictory statements. As the Supreme Court has pointed out, it is not incumbent on the prosecution to negative every possible excuse for nonaction upon its mere assertion by the witness." (Emphasis supplied) See also: United States v. Hall, 198 F.2d 726, 729 (2d Cir. 1952); Clark v. United States, 61 F.2d 695, 700 (8th Cir. 1932); United States v. Dachis, 36 F.2d 601, 603 (S.D.N.Y. 1929).

However, in contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought. The facts found must show a *PLAIN* violation of the decree so read. Terminal R.R. Ass'n. v. United States, 266 U.S. 17, 29 (1924); United States v. Atchison Ry. Co., 142 Fed. 176 (C.C.W.D. Mo. 1905); *In re* Cary, 10 Fed. 622 (S.D.N.Y. 1882); Deming v. Bradstreet, 85 Conn. 650, 84 Atl. 116 (1912); Louisville & Nashville R.R. v. Miller, 112 Ky. 464, 66 S.W 5 (1902); Porous Plaster Co. v. Seabury, 1 N.Y. Supp. 134 (1888); Weston v. Lumber Co., 158 N.C. 270 .73 S.E. 799 (1912); Sullivan v. J. & L. Steel Co., 222 Pa. 72, 70 Atl. 775 (1908); Ophir Creek Water Co. v. Ophir Hill Mining Co., 61 Utah 551, 216 Pac. 490 (1923); Wisconsin Central Ry. Co. v. Smith, 52 Wis. 140, 8 N.W 613 (1881).

[41] 314 U.S. 252, 304 (1941) (dissent); *see also,* United States v. Shipp, 203 U.S. 563 (1906).

[42] Punishment may be by imprisonment in excess of 6 months for commission of acts constituting *criminal* contempt of a decree enjoining a violation of the antitrust laws, rendered in a suit brought by the United States. Hill v. United States *ex rel.* Weiner, 300 U.S. 105 (1937), *reversing,* 84 F.2d 27 (3d Cir. 1936).

There is ample authority empowering United States District Courts to punish as criminal contempt violations of its order even though the basic action has become moot.[43]

In *United States v. Gamewell Company*,[44] the Government instituted *both* criminal and civil contempt proceedings which grew out of an alleged violation of a consent judgment (where fines aggregated $43,250).[45] In those proceedings the Government was successful in its efforts to have the defendants found guilty of contempt of court, *both civil and criminal*. In the *Gamewell* case, the charge of non-compliance related to a consent decree which had been entered some four years before the enforcement contempt actions began. The Government contended that since the defendants had disobeyed certain parts of the decree, and had become "cozy," so to speak, with municipal officials by giving them free engineering services, the district court should enter an order requiring them (1) to remedy their course of conduct so as to conform to the decree and (2) to punish for past violations. The defendants were enjoined under the consent decree from giving engineering services free of charge where they were the highest bidders. In certain specific instances, they were shown not to have billed for the cost of engineering services where they were the successful bidders and the Court so found.

A more recent set of cases involving alleged disobedience of a final judgment entered in a Government antitrust case is *United States v. J. Myer Schine*,[46] which also involved a dual proceeding (civil and criminal) before a District Court sitting in the Western Division of New York The defendants who were charged with non-compliance filed motions both in the civil contempt action and in the criminal contempt action, asking that such actions be dismissed. The trial court denied both motions. Neither the *Gamewell* nor the *Schine* cases were appealed, and there appear to be no authorities reversing them. Therefore, they stand as favorable authorities in behalf of the Government.

CONCLUSION

Enforcement actions should be limited to situations where *substantial*

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[43] Ford Motor Co. v. United States, 335 U.S. 303, 322 (1948); United States v. United Mine Workers, 330 U.S. 258, 293 (1947); Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942); United States v. Swift & Co., 286 U.S. 106, 114 (1932); Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911); Worden v. Searls, 121 U.S. 14 (1887); Bigelow v. R.K.O. Radio Pictures, 170 F.2d 783, 786 (7th Cir. 1948). See also REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY ANTITRUST LAWS 366, 367 (March 31, 1955)

[44] 95 F. Supp. 9 (D. Mass. 1951).

[45] CCH TRADE REG. REP. SUPP. ¶ 62,771 (1950)

[46] 125 F. Supp. 738 (W.D.N.Y. 1954) (civil); 125 F. Supp. 734 (W.D.N.Y. 1954) and 126 F. Supp. 464 (W.D.N.Y. 1954) (criminal)

complaints have been received. The mere receipt of a few complaints should not alone determine whether there has been disobedience on the part of an alleged offender. If the department were to conduct an investigation at random (and it has carried on compliance campaigns from time to time in the past[47]), the financial burden would be exorbitant and the result might be of little consequence. Perhaps the answer to the situation lies in that part of the report of the Attorney General's National Committee to Study the Antitrust Laws,[48] wherein it recommended that the department conduct regular studies to determine whether its antitrust decrees or judgments had been effective to restore competition, utilizing Section 6(c) of the Federal Trade Commission Act authorizing the Commission "upon the application of the Attorney General" to "make investigation" and report to the Attorney General on how any antitrust decree "has been or is being carried out." This may solve a very perplexing and sometimes a most confusing problem so far as the Government is concerned.[49]

But looking at it from the standpoint of those defendants who are to

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[47] In January, 1941, a special unit was established to handle matters in connection with the operation of the motion picture consent decrees entered in these cases: United States v. Paramount Pictures, 1 F.R.D. 100 (D.C.N.Y. 1940); United States v. Balaban, 26 F. Supp. 491 (N.D. Ill. 1939). *See* CCH TRADE REG. REP. §§ 8401.35, 8401.38 for the Department of Justice release of January 16, 1941, describing the scope of that unit's activity, and Preliminary Report (ending November 20, 1943) of the special unit established to supervise the operation of the motion picture decrees.

[48] See note 2 *supra.*

[49] It is interesting to note that doubt as to whether adequate relief has been afforded in important antitrust cases through reliance upon consent decrees rather than court adjudication, has recently been expressed by the Staff Members of the Subcommittee on Antitrust and Monopoly. Senate Report No. 1879, 84th Cong., 2d Sess. 119 (1956). The following conclusion resulted from a study of "Bigness and Concentration of Economic Power — A Case Study of General Motors Corp."

"The long struggle of dealers to force abandonment of coercive and oppressive practices by which they were compelled to purchase parts and accessories exclusively from General Motors culminated in the issuance of a cease and desist order against General Motors by the Federal Trade Commission more than 14 years ago. Yet, because of innumerable complaints of violations, this order is still under investigation in order to determine the extent to which General Motors is complying therewith."

By way of explanation for having resorted to such a case study, it is stated in the introduction of the study: "On the subjject of bigness and concentration, the Report of the Attorney General's National Committee to Study the Antitrust Laws is largely silent. It inadequately treats the problem of oligopoly, confining itself for the most part to a consideration of existing law dealing with conduct which results in restraint of trade or monopolization. The Attorney General's committee stated that there was a need for factual studies by which the report's specific recomendations could be tested. However, it did not feel that it was equipped, or that it was its function, to make the type of factual findings that would be required. ..."

be examined and cited and who are under a duty to defend their actions since the consent decree went into effect (which might be a period of many years), perhaps the best recourse for them is not to rush in "where angels fear to tread." So many of them, when *first* charged with antitrust violation, capitulate and "sign up" a consent decree which may eventually serve to haunt them the rest of their corporate days.