Private Participation in Department of Justice Antitrust Proceedings

The great bulk of federal civil antitrust suits are terminated by consent decrees.¹ A consent decree is framed as an injunctive order but lacks specific findings of fact or an admission of guilt. Once a decree gains judicial approval, however, it binds the parties to the same extent as would a fully litigated judgment.² Consent decrees are most commonly the product of confidential negotiations between the Antitrust Division of the Department of Justice and the defendants.³ Section 5(a) of the Clayton Act,⁴ while authorizing such settlements, specifically provides that they shall constitute prima facie evidence that the defendant violated the antitrust laws unless entered "before any testimony has been taken."⁵ A desire to avoid this prima facie effect

¹ See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 375 (1970). Of the 323 civil antitrust judgments in favor of the Government during the period from 1950 to 1969, 265 or eighty-two percent were entered by consent.

An extensive antitrust program is also carried on under the auspices of the Federal Trade Commission. Posner, *supra* at 368-71, 404, 406, 408. The enforcement procedures of the Commission will not be examined here, however.

² For a thorough discussion of these and other features of consent decrees, see Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983, 988-1003 (1968). See also M. GOLDBERG, *THE CONSENT DECREE: ITS FORMULATION AND USE* (Michigan State Bureau of Business & Economic Research Occasional Paper No. 8, 1962).

³ The literature describing the nature of consent decree negotiations is copious. Especially illuminating are ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 10-13 (1959) [hereinafter cited as HOUSE REPORT]; Harsha, *Some Observations on the Negotiation of Antitrust Consent Decrees*, 9 ANTITR. BULL. 691 (1964); Jinkinson, *Negotiation of Consent Decrees*, 9 ANTITR. BULL. 673 (1964); Zimmerman, *Procedures for Settling with the Antitrust Division*, 37 ANTITR. L.J. 212 (1968).

⁴ 15 U.S.C. § 16(a) (1964). The statute provides:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

⁵ *Id.*

in subsequent private treble damage actions⁶ provides antitrust defendants with a major inducement to settle.⁷ A settlement also allows savings of considerable time and resources required in a full trial on the merits.⁸

Section 5(a) has had a substantial impact on the role played by courts in reviewing the adequacy of decrees.⁹ Although vested with the power to disapprove those decrees not consonant with the public interest,¹⁰ the courts have exercised this prerogative only rarely.¹¹ Their reticence primarily reflects the courts' deferral to the congressional policy determination that the consent decree option is a useful adjunct to effective antitrust law enforcement. To preserve the full benefits of this alternative, the court must avoid taking testimony concerning the defendant's alleged antitrust violations. This makes it difficult for the court to form any independent judgment concerning the adequacy or propriety of the decree. Unable to conduct an independent evaluation of the merits of a particular settlement, the court must rely on the Antitrust Division's opinion that the decree is consistent with the public interest.¹²

⁶ Private actions are authorized under the provisions of sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1970).

⁷ Flynn, *supra* note 2, at 1003; Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 628 (1965). See generally Symposium—*Relationship Between Government Enforcement Actions and Private Damage Actions*, 37 ANTITR. L.J. 823, 828, 839 (1968) [hereinafter cited as *Symposium*].

⁸ See Posner, *supra* note 1, at 374-78. The difference in time between the resolution of fully litigated contests and those settled by consent decrees is considerable. Between 1951 and 1957, for example, the average litigated case took more than fifty-nine months to try, while those settled by consent decree averaged only thirty-two months. HOUSE REPORT, *supra* note 3, at 8-10.

⁹ See Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 17-23 (1971); Comment, *Consent Decrees and the Judicial Function*, 20 CATHOLIC U.L. REV. 312 (1970).

¹⁰ See, e.g., *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Ling-Temco-Vought, Inc.* 315 F. Supp. 1301 (W.D. Pa. 1970).

¹¹ There is some indication that courts are now making more searching and critical inquiries into the provisions of the consent decrees presented to them. One decree was summarily rejected by the court in *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 434 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968), while another court refused to enter a decree until the parties could demonstrate to its satisfaction that certain provisions accurately reflected congressional intent in the enactment of the antitrust laws. Compare *United States v. Ling-Temco-Vought, Inc.*, 1970 Trade Cas. 88,559 (W.D. Pa. 1970), with *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970).

¹² One authority has been reluctant to credit the typical judge even with making a good faith effort to grasp the merits of the issues raised by the consent decree before him:

At best, judicial implementation of consent decrees in most cases can only be analogized to the performance of a symbolic religious rite by a high priest, or, at

The extensive use of consent decrees has been objected to by non-parties to the litigation for a variety of reasons. Some have felt aggrieved by the loss of *prima facie* evidence entailed by the Antitrust Division's decision to settle rather than to prosecute the suit to judgment.¹³ Others have objected to particular substantive provisions of the agreement which they have felt do not adequately insulate them from recurrences of the defendant's alleged past misconduct.¹⁴ These dissatisfied parties have often attempted to press their claims by seeking to intervene in the decree ratification proceedings.¹⁵

worst, as the performance of an important public function with the machine-like logic of a chicle dispenser.

Thus, a consent decree in an antitrust case . . . [is] submitted to and adopted by a proper judicial tribunal without explanation or understanding of the circumstances and consequences of the agreement . . .

Flynn, *supra* note 2, at 989-90. On the basis of the cases examined in this comment, this appraisal seems unduly harsh. Typically, judges have made considerable efforts to acquaint themselves with the issues raised by the decree, and they have often exhibited a markedly independent point of view from that put forward by the litigants. *See* cases cited note 11 *supra*.

Nevertheless, it is undoubtedly correct that courts are generally deferential to the Antitrust Division's position on controversial issues. As one court frankly acknowledged:

Of course, there should be no pretense that a district judge, confronted with situations like this one, is able to reach detailed judgments on the merits. The court in such a situation—short of compelling the trial a consent decree avoids—must proceed in some degree upon faith in the competence and integrity of government counsel.

Those supporting the decree as well as those opposed to it join in solemn assurances that the court is not viewed as a "rubber stamp" when presented with an elaborate consent decree in a complex case like this one. This leaves the reality, already acknowledged, that the court's time, talents and resources for intensive scrutiny are severely limited.

United States v. CIBA Corp., 50 F.R.D. 507, 513-14 (S.D.N.Y. 1970) (footnote omitted). The issues raised by the court's dilemma in such situations are fully aired in *Handler, supra* note 9, at 18-23; Comment, *supra* note 9, at 316, 320-23.

¹³ This type of concern motivated attempts to intervene in *United States v. National Bank & Trust Co.*, 319 F. Supp. 930 (E.D. Pa. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968). In each case the court denied the petition to intervene.

¹⁴ Typical cases include *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970); *United States v. CIBA Corp.*, 50 F.R.D. 207 (S.D.N.Y. 1970); *United States v. Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo. 1967), *aff'd per curiam sub nom. Lupton Mfg. Co. v. United States*, 388 U.S. 457 (1967).

¹⁵ Although secret consent decree negotiations do not provide a direct means for representing these points of view, objections to this procedure have been at least partly met by the adoption of a regulation by the Department of Justice providing for a thirty-day waiting period between the filing of a decree with the court and the date of entry. During

Such attempts have rarely led courts to grant a formal role in the proceedings to the potential intervenors.¹⁶ This situation exists despite a growing willingness by the courts to expand the degree and type of interest sufficient to support intervention in other areas of the law¹⁷

that time concerned parties may file comments on the decree with the Antitrust Division. The Division customarily reserves the right to withdraw the decree during this waiting period should it find any merit in these objections. The regulation provides:

(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to prevent or restrain violations of the antitrust laws only after or on condition that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations prior to the entry of such proposed judgment by the court.

(b) Pursuant to this policy, each proposed consent judgment shall be filed in court or otherwise made available upon request to interested persons as early as feasible but at least 30 days prior to entry by the court. Prior to entry of the judgment, or some earlier specified date, the Department of Justice will receive and consider any written comments, views or relevant allegations relating to the proposed judgment, which the Department may, in its discretion, disclose to the other parties to the action. The Department of Justice shall reserve the right (1) to 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 and (2) to object to intervention by any party not named as a party by the Government.

(c) The Assistant Attorney General in charge of the Antitrust Division may establish procedures for implementing this policy. The Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require some shorter period than 30 days or some other procedure than that stated herein, and where it is clear that the public interest in the policy hereby established is not compromised.

28 C.F.R. § 50.1 (1971). Prior to the adoption of this regulation in 1961, with but a solitary exception consent decrees presented to the court were apparently adopted as a matter of course. Handler, *supra* note 9, at 17. Since that time, however, there appear to have been a steadily increasing number of cases in which either the Antitrust Division or the court has altered the provisions of consent decrees in response to nonparty objections. See *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970) (provision added to consent decree providing additional security for employee and pension benefit funds of acquired corporation); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968) (one proposed decree withdrawn unilaterally by Government after receiving objections from nonconsenting defendants and amici curiae, another withdrawn after court refused to ratify agreement). See also *United States v. National Bank & Trust Co.*, 319 F. Supp. 930 (E.D. Pa. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968). In each of these cases impounding orders were entered in order to preserve information assembled by the Government for possible utilization in the future by treble damage claimants.

¹⁶ See cases cited notes 13-14 *supra*. See also *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). But see *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. First National Bank & Trust Co.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968).

¹⁷ See, e.g., *Hatton v. County Bd. of Educ.*, 422 F.2d 457 (6th Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967);

and the need of the courts for a full airing of the issues if they are to protect the public interest.¹⁸

Section I of this comment will examine the reasons for denying formal party status to potential intervenors. It will suggest that they do not present insurmountable barriers to limited, conditioned formal participation. Section II will develop the thesis that this near-uniform rejection of nonparty claims in fact conceals a sophisticated judicial experiment in limited but informal intervention.¹⁹ Through this technique the courts have accommodated the pressures against developing *prima facie* evidence while allowing nonparties to air their grievances and to benefit from a series of flexible remedies fashioned to meet their concerns. Section III will conclude with a comparison of a flexible system of *formal* intervention with the present informal system. It will be suggested that while a formal system can be constructed within the framework of existing law governing intervention, this would probably not result in any increase in the procedural rights of nonparties over those available under the informal method presently employed. However, the adoption of a formal alternative might prove to be beneficial to potential intervenors by serving to legitimize their participation in the formulation of the eventual settlement.

I. OBJECTIONS TO FORMAL INTERVENTIONS: AN OVERVIEW

In the federal antitrust context, courts have usually denied intervention to interested nonparties.²⁰ The justifications for denial fall

Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967); *cf.* *Norman's on the Waterfront, Inc. v. Wheatley*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606 (3d Cir. June 17, 1971).

¹⁸ See generally Handler, *supra* note 9, at 18-23; Comment, *supra* note 9.

¹⁹ FED. R. CIV. P. 24 governs intervention in federal civil litigation. The rule provides in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (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.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . 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.

²⁰ See cases cited notes 13, 15 *supra*; *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971); *United States v. General Tire & Rubber Co.*, 1970 Trade Cas. 89,462 (N.D. Ohio 1970); *United States v. Atlantic Richfield Co.*, 50 F.R.D. 369 (S.D.N.Y. 1970) *But see* *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970); *United States v. First National Bank & Trust Co.*,

into four broad categories: (1) those based on the Antitrust Division's assumed exclusive representation of the public interest in such actions, (2) those arising from the Division's right to determine the allocation of its own resources, (3) those founded on the right of the litigants to resolve their differences free from "undue delay or prejudice," and (4) those rooted in the desire to preserve a viable settlement option for the litigants. Careful analysis of these considerations reveals that they apply convincingly only to an unconditioned, all-or-nothing approach to intervention and carry far less weight when directed to carefully controlled, limited participation.

A. The Antitrust Division and the Public Interest

Courts frequently credit the Antitrust Division with pursuing a broad public purpose in its antitrust activities which, it is argued, would be impeded by the introduction of the numerous private grievances growing out of the defendant's alleged activities.²¹ The exclusivity position is based in part on the statute which entrusts the Attorney General with the conduct of antitrust litigation.²² Any intrusion

280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968).

Cascade in particular seemed to auger an increased private participation in federal antitrust proceedings. There the Supreme Court held that objectors to a divestiture order entered below pursuant to its earlier mandate should have been allowed to intervene as of right in the proceedings before the district court. This decision, however, has only limited applicability to the consent decree context. In *Cascade* there was a prior mandate against which to measure the adequacy of the decree. Further, since the illegality of the defendant's conduct had already been determined, the intervenors were not depriving the defendant of an opportunity to obtain a settlement not probative of its guilt. Finally, the only method by which the Supreme Court could revise the terms of this settlement was by first holding that intervention had been appropriate.

None of these conditions are present in the typical consent decree situation. First, the proper standard of relief has not been previously determined by a trial on the merits. Second, any probing of the merits of a controversy by taking testimony limits the opportunity for settlement because it would give the decree evidentiary weight in subsequent private actions. Finally, should the court be persuaded that the applicant's complaint has merit, it need not grant intervention to protect this interest, but instead may merely refuse to approve the decree until the particular deficiency is corrected.

²¹ See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 693 (1961); *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954). See also Letter from Asst. Att'y Gen. Donald F. Turner to Rep. Emanuel Celler, in *BNA Antitr. & Trade Reg. Rep.*, Mar. 21, 1967, at X-1, X-3 [hereinafter cited as *Turner Letter*].

²² 15 U.S.C. § 4 (1964) provides in relevant part:

[I]t shall be the duty of the several United States attorneys, . . . under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such [antitrust] violations.

This statute has even been used to buttress a denial of intervention designed to secure enforcement of a decree already entered. *United States v. Western Electric Co.*, 1968 Trade Cas. 85,280-81 (D.N.J. 1968), *aff'd per curiam sub nom. Clark Walter & Sons v. United*

by nonparties is viewed as fettering the Attorney General's discretion. Private interests, it is asserted, are provided an adequate forum for their grievances in private actions.²³

These arguments assume that protection of private interests is generally unrelated to protection of the public good or that a court granting intervention would not be able to restrict private party participation to those issues which are related to the public good. Such pessimism is not warranted either by rule 24 of the Federal Rules of Civil Procedure or by developing antitrust case law. Any negotiated consent decree raises only a limited number of issues which the Antitrust Division has already determined to be harmful to the public interest. Rule 24(a) insures that once a party is admitted to the proceedings, inquiry beyond the scope of those issues can be barred unless the intervenor can show that his interest is of public concern and inadequately protected by the decree.²⁴

Further, an examination of the cases in which intervention has been sought reveals that those instances in which the applicant advances a considerable number of private interests in opposition to the decree are relatively rare.²⁵ In *United States v. Ling-Temco-Vought, Inc.*²⁶ (*L-T-V*), for example, employees and pensioners of the illegally acquired company voiced the fear that their benefit trust funds were inadequately secured against predatory raids by the acquiring conglomerate. The district court shared their concern and fashioned a

States, 392 U.S. 657 (1968). But this argument seems to prove too much, since the Attorney General's control of the litigation is already conditioned by considerations of public policy, and whether a particular intervenor is raising a meritorious objection to a decree cannot be decided without letting him present his case. Cf. *New Jersey Communications Corp. v. AT&T*, 1968 Trade Cas. 85,445, 85,447 (S.D.N.Y. 1967).

²³ See, e.g., *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141 (1944). See also authorities cited note 21 *supra*.

²⁴ A similar protection against an excessive number of parties intervening under rule 24(b) is provided by the requirement that interventions under that provision shall not cause "undue delay or prejudice" to the adjudication of the rights of existing litigants. But see *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), *on remand*, 291 F. Supp. 3, 33 (D. Utah 1968) (twenty-six parties allowed to intervene), *vacated and remanded sub nom.* *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969).

²⁵ Typical cases in which the intervenor's objections were narrowly defined include *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970) (challenging only provision of decree allowing piecemeal divestiture); *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970) (seeking additional protection for employee and pensioner trust funds); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970) (opposing merger because of possible impairment of contracts with one of merging firms).

²⁶ 315 F. Supp. 1301 (W.D. Pa. 1970).

protective order designed to insure that these trusts would not be diverted from their intended purposes pending divestiture.²⁷

Two points about this case are noteworthy. First, the court had no difficulty in deciding that the employees' and pensioners' concern over possible misuses of their trust funds was "an element of public concern" which merited "judicial protection as long as jurisdiction remains here."²⁸ Thus, it is apparent that the protection of at least some private interests remains an important element of the broader public interests, which are sometimes inadvertently overlooked by the Antitrust Division. This demonstrates that nonparties have a valuable informational function to play in the consent decree process, a fact recognized both by the Division itself²⁹ and by courts.³⁰

The second significant feature of the *L-T-V* case is that accommodation of the objecting parties did not require the court to elevate the objectors to the formal status of parties on a par with the Attorney General. The protective order was fashioned by the court without formally admitting representatives of the employees and pensioners to the proceedings.³¹ It is difficult, however, to see how the claim to exclusive representation was furthered by preventing these groups from acquiring the status of parties. The court's inquiry does not appear to have been circumscribed by their exclusion,³² nor does it appear that granting leave to intervene would have altered the course of the proceedings. Though relegated to an informal status, the employees and pensioners were able to present their grievances fully and to receive appropriate relief; and there is no reason to suppose that any additional procedural rights of formal party status would have been exercised had intervention been granted. Thus, the Attorney General's control of the litigation would have been compromised to an equal

²⁷ *Id.* at 1309-10. The court's order appears at 1970 Trade Cas. 88,871 (W.D. Pa. 1970).

²⁸ 315 F. Supp. at 1310.

²⁹ Turner Letter, *supra* note 21, at X-2.

³⁰ See, e.g., *United States v. CIBA Corp.*, 50 F.R.D. 507, 514 (S.D.N.Y. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 618-19 (C.D. Cal. 1969), *aff'd per curiam sub nom.* *City of New York v. United States*, 397 U.S. 248 (1970) (by implication); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 434 (C.D. Cal. 1967), *aff'd per curiam sub nom.* *Thrifty Shoppers Scrip Co., v. United States*, 389 U.S. 580 (1968).

³¹ The benefited parties had made their concerns known to the presiding judge by letter, whereafter he had acted on his own motion to secure the funds in question. 315 F. Supp. at 1309-10.

³² While recognizing the right of the parties to terminate their dispute by a mutually agreeable settlement, the trial judge stated that he was "nevertheless not relieved from examining . . . and inquiring into any matter which in equity should have been considered had the matter proceeded in adversary fashion." *Id.* at 1309 (emphasis added). It is hard to conceive of a broader scope of investigation than this.

extent in either case. Such a compromise is an inevitable consequence of the court's realization that the exclusivity claim cannot always be maintained.³³

B. The Antitrust Division's Right to Control Its Resources

A second group of reasons often given for denying intervention stems from the Antitrust Division's need to employ its own scarce resources in what it considers to be the optimally effective fashion. It is argued that this goal cannot be achieved unless the Division is free to negotiate settlements whenever it feels that such a course would promote a more efficient and effective antitrust enforcement program³⁴ and that the presence of additional parties would narrow the Government's litigation options to dismissal or full trial.³⁵

This line of reasoning turns on the twofold assumption that antitrust enforcement primarily through consent decrees is optimally productive

³³ The exclusivity position was also undermined by the Supreme Court's recent decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). There, pursuant to an earlier Supreme Court mandate, the Antitrust Division had negotiated a divestiture order with the defendant El Paso which the majority of the Court viewed as threatening "to perpetuate rather than terminate this unlawful merger." *Id.* at 141. Advocates of a more stringent decree had been refused intervention below, and the Supreme Court held that denial to be error. The objections these parties had raised were "part of the public interest in a competitive system" and lay "at the heart of our mandate." *Id.* at 135. The Division, the Court found, had "knuckled under" to El Paso and had "fallen far short of representing . . . [the intervenors'] interests." *Id.* at 136-41. The Court ordered de novo proceedings to fashion a new decree and granted these applicants full party status.

Cascade is an extraordinary case, especially when one considers that the Supreme Court in effect accused the Department of Justice of negotiating a settlement which violated the Court's earlier mandate. While such a flagrant abuse is unlikely in the consent decree context, *Cascade* suggests that where the Antitrust Division has arguably misconceived some element of public concern, a court would be justified in granting some form of participation to a nonparty in order to secure a more balanced appraisal of that issue.

³⁴ Turner Letter, *supra* note 21, at X-2 to X-3; *Symposium*, *supra* note 7, at 860-61.

³⁵ See Defendants' Joint Response to Applications for Leave to Intervene at 8, 16 [hereinafter cited as Defendants' Brief] and Response of the Plaintiff to Applications for Intervention at 16-18 [hereinafter cited as Plaintiff's Brief], filed in connection with applications to intervene in *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967) *aff'd per curiam sub nom.* *City of New York v. United States*, 390 U.S. 715 (1968). In Turner Letter, *supra* note 21, the problem was phrased in this manner:

[T]he very process of formal intervention, if that is held to carry with it the full rights of the usual litigant to present evidence and to appeal, would threaten to eliminate one of the major motivating factors that leads both the Government and the defendants to attempt to work out an appropriate decree, since intervention would force on the Government and defendants at least some of the burdens of litigation that both, for diverse reasons, have sought to avoid.

Id. at X-3 (emphasis added). The qualifications in Mr. Turner's thoughtful statement point out that the thrust of the Division's objections to intervention would be blunted if the procedural rights given intervenors could be carefully controlled.

and that an intervenor would automatically acquire the right to block any settlement not acceptable to it and thus occasion an undue expenditure of governmental resources. A judicial challenge to the first assumption would be tantamount to usurpation of legislative and executive policy-making functions. Consequently, there is a strong rationale for courts not to interfere in this area.³⁶ The second assumption is, however, much easier to challenge. 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.³⁷

In one case in which this situation seems to have arisen, *United States v. Simmonds Precision Products, Inc.*,³⁸ the issue was decided against the intervenor. There intervention in a divestiture proceeding was granted as of right under rule 24(a)(2) for the stated purpose of “opposing the entry of a final judgment on consent”³⁹ After oral argument and an evidentiary hearing, the court overruled all of the intervenor’s objections and entered the decree as originally submitted by the Government and the defendant.⁴⁰ If the intervenor had the right to block the judgment by withholding his consent to the decree, he chose not to exercise it, a highly improbable result considering the court’s adverse ruling on the merits. A more likely explanation is simply that formal participation as a party to the proceedings does not give the intervenor discretionary authority to block the decree. The consent of the intervenor is irrelevant.

Simmonds suggests, therefore, that the critical issue is not whether a potential intervenor should be made a formal party, but rather what degree of participation should be accorded to such an applicant.

³⁶ This position is not based on a claim that an antitrust defendant has a right to settle his dispute with the Antitrust Division. Compare *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962), with *United States v. Ward Baking Co.*, 1963 Trade Cas. 77,449 (M.D. Fla. 1962), *rev’d*, 376 U.S. 327 (1964). That assertion has apparently been discredited. See Comment, *supra* note 9, at 318–20. Nor does its validity depend on a claim that preservation of the settlement option is the paramount rationale underlying section 5(a). That position too would be of doubtful accuracy. See Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334, 1336–37 n.8, 1338–39 & nn.16–18 (1969). Rather, it relies only on the limited assertion that the settlement feature of section 5(a) has as one of its bases a desire to ease the Antitrust Division’s enforcement burden, even at some cost to individual private plaintiffs. Of this there can be little doubt. See Note, *supra* at 1338–39 nn.16–18.

³⁷ This of course assumes that the intervenor’s objections have not been found to be meritorious by the court.

³⁸ 319 F. Supp. 620 (S.D.N.Y. 1970).

³⁹ *Id.*

⁴⁰ *Id.* at 621–23.

C. The Litigants' Right to an Expeditious Resolution of the Controversy

A customary reason for denying intervention in antitrust cases is that participation by intervenors would "unduly delay or prejudice" the resolution of the controversy between the litigants.⁴¹ Such pronouncements should be taken lightly, however, since a close reading of the cases in which these statements appear reveals that the applicant for intervention has usually been heard extensively as an amicus.⁴² Thus, delay and prejudice attributable to additional litigation is not appreciably shortened by the denial of intervention. The arguments of a party and of an amicus consume equal time. Moreover, the denial of intervention is typically coupled with a decision on the merits of the intervenor's claim and, where the court has upheld the claim, the granting of some measure of relief.⁴³ In *United States v. Blue Chip Stamp Co.*,⁴⁴ for example, the court denied intervention, remarking that the potential intervenors had "fail[ed] to raise any additional arguments not already heard at length and denied by this court" and characterizing their objections to the decree as "so shallow as to be devoid of merit."⁴⁵ Yet even such a blanket rejection required the expenditure of the court's time for adequate evaluation. In fact, the court's involvement in negotiations had stretched over eleven months and had resulted in the rejection of two earlier decrees. During this period the applicants for intervention had been heard extensively as amici.

The import of such cases as *Blue Chip* is that a fair amount of "delay and prejudice" will be tolerated by the court before it is found to be "undue." Consequently, the party or nonparty status of the potential

⁴¹ Such characterizations are typically made with the intention of disqualifying the intervenor from permissive intervention under rule 24(b). See, e.g., *United States v. CIBA Corp.*, 50 F.R.D. 507, 514 (S.D.N.Y. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 619-20 (C.D. Cal. 1969), *aff'd per curiam sub nom.* *City of New York v. United States*, 397 U.S. 248 (1970).

⁴² See, e.g., *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* *City of New York v. United States*, 397 U.S. 248 (1970).

⁴³ See, e.g., *United States v. National Bank & Trust Co.*, 319 F. Supp. 930 (E.D. Pa. 1970); *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* *City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom.* *City of New York v. United States*, 397 U.S. 715 (1968).

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

⁴⁵ 272 F. Supp. at 440-41.

intervenor is not the determinative factor. Rather, it is the ability of the court to condition party status appropriately in order to make it conducive to prompt but effective inquiry into the underlying controversy.

D. The Desire to Preserve a Viable Settlement Option

Central to the courts' concern with permitting nonparties to intervene in consent decree proceedings is a desire to maintain the viability of the settlement option. Intervenor could pose two distinct threats to this process. First, they might request the right to be represented at bargaining sessions between the Antitrust Division and the defendant. Second, they might seek to institute discovery procedures to gain access to the Division's evidence of the defendant's antitrust violations.

Were the intervenor to succeed in either of these requests, the utility of the settlement for the defendant would be greatly diminished. Consent decree negotiations involve many sensitive matters which defendants do not want revealed to outside parties. A defendant who believed that such information would be disclosed to third parties would not readily enter into discussions with the Antitrust Division. Even more importantly, granting discovery rights to an intervenor would almost certainly lead to an attempt to introduce testimony regarding the defendant's past antitrust violations. Such testimony would make any judgment subsequently entered available to private treble damage claimants as *prima facie* evidence of the defendant's guilt and would destroy one of the defendant's primary incentives to submit to consent agreements.

The ease with which these difficulties can be avoided varies. First, intervention might be granted without allowing any participation in bargaining discussions or by limiting such participation to permit disclosure of sensitive information only to the Antitrust Division.⁴⁶ Control of discovery presents a more difficult problem. If an intervenor is granted party status for the purpose of arguing a particular claim, and if that charge cannot be investigated adequately without resort to discovery procedures, it is difficult to envision how such privileges can properly be withheld. This dilemma has undoubtedly contributed to the reluctance of courts to confer party status on would-be intervenors. In federal civil actions discovery rights are conditioned on such status.⁴⁷

⁴⁶ Intervention for the purposes of participating in bargaining discussions has been denied in the past. HOUSE REPORT, *supra* note 3, at 25; M. GOLDBERG, *supra* note 2, at 68-69.

⁴⁷ For example, FED. R. CIV. P. 26 (governing the taking of depositions), FED. R. CIV. P. 33 (governing the serving of interrogatories), and FED. R. CIV. P. 34 (governing the discovery and production of documents) all are available only to "any party" to the action.

Possibly feeling that extensive procedural rights would be both inevitable and undesirable, the courts have pretermitted the issue by denying intervention altogether.

Nevertheless, many applicants for intervention can make a colorable showing of a claim to some measure of relief. Certainly, past victims of the defendant's alleged wrongs have a right to request effective protection against future antitrust violations.⁴⁸ Likewise, those disadvantaged by the deprivation of prima facie evidence of the defendant's guilt entailed by entry of a consent decree can point to a primary, if not paramount, purpose of Section 5(a)—a desire to facilitate the prosecution of the claims of private litigants—as a reason for carefully reviewing the Antitrust Division's settlement decision.⁴⁹

The practical problem thus becomes one of fashioning the means for allowing the court to ventilate whatever objections are raised to the decree and to grant whatever relief is required while continuing to preserve a viable settlement option for the litigants. Two competing alternatives for accomplishing this objective present themselves: (1) a system of informal participation and consultation and (2) a system of formal but stringently conditioned intervention. Both approaches have been utilized, although the former is by far the more common. Each merits consideration in more detail.

II. INFORMAL RESOLUTION OF NONPARTY OBJECTIONS

One problem constantly facing the court in the consent decree context is how to develop an adequate understanding of the underlying issues without destroying the utility of the settlement by transgressing the statutory prohibition on taking testimony. The most commonly adopted method for achieving this objective is *amicus curiae* appearances,⁵⁰ although on occasion less formal submissions, such as

⁴⁸ The injunctive relief sought by the Government is intended to restrain the supposed prior antitrust violations of the defendant. Consent decrees which fall short of that goal have arguably failed in their major purpose and should not be entered by the court until revised.

⁴⁹ The argument that the overriding purpose in enacting section 5(a) was to aid private treble damage claimants is ably made in Note, *supra* note 36, at 1338-39 nn.16-18.

⁵⁰ See, e.g., *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

Although amici have traditionally been viewed as neutral participants in the proceedings, a marked shift to a more partisan role in recent years has been noted. See generally Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

letters addressed to the court, have proved sufficient.⁵¹ Neither the Antitrust Division⁵² nor the defendant⁵³ normally opposes a motion by third parties to appear before the court in an informal, information-dispensing capacity. This level of participation serves to focus the attention of the trial judge on the critical provisions of the consent decree and does not risk impairing future settlement possibilities.

Once this knowledge is acquired, the court has considerable discretion to refashion the eventual settlement along lines it regards as consonant with the public interest. This power stems from the court's authority to reject those decrees which it feels inadequately protect legitimate elements of public concern. The court's views, if forcefully expressed, will almost inevitably be adopted in the final decree since they will be interpreted by the litigants as foreshadowing the court's position on the merits were the case to be tried.⁵⁴

Significantly, the court's influence does not depend on the status of the person objecting to the proposed settlement. It should not be surprising, therefore, to find that whether a potential intervenor is admitted as a party is completely independent of whether it is granted relief.⁵⁵ Courts are able to protect the concerns of both parties and nonparties with equal vigor. The mechanics of this process are best understood by examining the judicial response to the two broad classes of problems typically raised by applicants for intervention: (1) requests to obtain evidence of the defendant's alleged past antitrust violations and (2) requests for protection against recurrences of the defendant's alleged illegal activities.

⁵¹ United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970).

⁵² Plaintiff's Brief, *supra* note 35, at 19; Turner Letter, *supra* note 21, at X-2.

⁵³ Defendants' Brief, *supra* note 35, at 6.

⁵⁴ United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968), is illustrative of this process. The decree eventually entered in that case was the third brought forward by the parties—the first having been unilaterally withdrawn by the Government in response to the objections of amici and the second vetoed by the court.

⁵⁵ Intervention denied, relief denied: United States v. CIBA Corp., 50 F.R.D. 507 (S.D.N.Y. 1970); United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968). Intervention denied, relief granted: United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970); United States v. Harper & Row Publishers, Inc., No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom.* City of New York v. United States, 390 U.S. 715 (1968). Intervention granted, relief denied: United States v. Simmonds Precision Prods., Inc., 319 F. Supp. 620 (S.D.N.Y. 1970); United States v. First National Bank & Trust Co., 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom.* Central Bank & Trust Co. v. United States, 391 U.S. 469 (1968). Intervention granted, relief granted: Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

A. Evidence of Past Harms: Discovery Without Intervention

A large percentage of petitions to intervene result from a desire to secure the benefit of a favorable judgment litigated by the Government.⁵⁶ These applicants directly challenge the administrative decision to settle the suit, arguing that the deprivation of evidence entailed by a settlement materially impairs the prosecution of their private treble damage actions.

This type of claim is illustrated by *United States v. Automobile Manufacturers Association*,⁵⁷ in which the defendant association together with the "big four" auto manufacturers were charged with conspiracy to eliminate competition in the production of motor vehicle air pollution control equipment. It was alleged that this scheme was furthered by another conspiracy involving collusive bidding for the purchase of patents and patent rights covering such equipment. The consent decree, filed after eight months of negotiations, was opposed by numerous state and local governmental units either as amici or as petitioners to intervene. All but one member of the latter group were treble damage claimants in pending civil actions. The court recognized that their main objective in seeking to intervene was the prevention of a settlement not probative of the defendants' guilt.⁵⁸

The court denied all motions to intervene, rejecting the applicants' requests on multiple grounds. Initially, it noted that "the decision to settle an antitrust case in this fashion, like the decision to commence it in the first place, is an administrative decision and . . . [a]s such, it is not subject to review by this court."⁵⁹ Continuing, the court analyzed the terms of the decree and found that the Government had obtained substantially all the injunctive relief which would have been warranted by a successful trial on the merits.⁶⁰ Returning to the applicants' assertion that, notwithstanding this fact, approval of the settlement should be withheld, the court stated:

It has been urged that the decree adversely affects the rights of treble damage claimants in the prosecution of their own claims. But . . . [w]e know of no authority . . . which would require the Gov-

⁵⁶ Since *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), four of the seven instances of attempted intervention in the proceedings held prior to entry of consent decrees have raised this issue. Compilation from 1967-71 Trade Cas.

⁵⁷ 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970).

⁵⁸ 307 F. Supp. at 619-20.

⁵⁹ *Id.* at 620.

⁶⁰ *Id.* at 621.

ernment to prosecute this case to judgment solely for the purpose aiding treble damage claimants.⁶¹

While the court's observation is undoubtedly correct, a decision to deny treble damage claimants relief entirely is made particularly difficult by the existence of strong competing equities demanding a high degree of governmental attentiveness to the concerns of injured parties. Arguably, when the inferior resources of a private litigant make successful prosecution of an otherwise valid claim virtually impossible in the absence of presumptive evidence of guilt, a consent decree settlement is tantamount to rejection of one of the underlying rationales of section 5(a)—the facilitation of private antitrust law enforcement.⁶²

The courts are aware of this difficulty, however, and the *Auto Manufacturers* case illustrates an alternative which partially reconciles the Government's interest in reaching a settlement with the nonparty's interest in obtaining evidence of the defendant's guilt, yet at the same time avoids the development of testimony and the consequent prima facie presumption of guilt. An extensive grand jury investigation of the defendants' alleged antitrust violations had preceded the Government's civil suit. While the jury was dismissed before it returned any indictments, it heard numerous witnesses and assembled "a tremendous amount of evidentiary material"⁶³ which was clearly of value to private claimants. Although nonparties were denied intervention in the Government's subsequent civil suit, the court ordered this material, as well as the transcript of the grand jury proceedings, to be impounded by the Department of Justice and directed that it be made available to treble damage claimants upon a showing of good cause.⁶⁴ Through this arrangement the court was able to provide a considerable measure of relief to private plaintiffs who, as a result of the consent decree, were not given presumptive evidence of the defendants' guilt.

Similarly, in *United States v. Harper & Row Publishers, Inc.*,⁶⁵ the trial court was again presented with the opportunity to adopt a compromise measure. That case involved an alleged conspiracy to fix prices on certain lines of books, particularly textbooks involved in large sale orders to government instrumentalities. As in the *Auto Manufacturers*

⁶¹ *Id.*

⁶² See note 36 *supra*.

⁶³ 307 F. Supp. at 620.

⁶⁴ *Id.*

⁶⁵ No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom.* City of New York v. United States, 390 U.S. 715 (1968). Since much of the material referred to here is relatively inaccessible, citations will be more extensive than would be the case were the references to a reported opinion.

litigation, a grand jury investigation had preceded the filing of the Government's complaint. According to one potential intervenor's tart phrasing of the issue:

[S]ubstantial quantities of documents had been produced by defendants, many of which were relevant and material to the unlawful price fixing conspiracy alleged in the pending treble damage actions. The danger exists that such documents will be turned back to the defendants upon entry of the consent judgements in this case and that such documents will be destroyed, suppressed or lost.⁶⁶

The relief requested was impounding of the documents in a central depository until appropriate orders to produce them had been entered by the various trial courts before which treble damage actions were pending.⁶⁷ The defendants objected to this procedure, arguing that the movant should be relegated to its remedies through ordinary discovery procedures.⁶⁸ The Government, on the other hand, felt that extensive disclosure was proper. It desired to exempt only those papers which might be classified as the work product of the Antitrust Division or subject to the informant's privilege.⁶⁹

While denying all motions to intervene, the trial court did enter a separate order impounding all documents in the possession of the Antitrust Division—including those belonging to nonparties—very much as the applicants had requested.⁷⁰ Thus, the court's actions assured the continued existence of this body of material but left the complicated questions of the discoverability and admissibility of various documents for resolution by the appropriate trial forum. By adopting this approach it also managed to avoid being forced into a resolution of factual questions bearing on the culpability of the defendants, thereby preserving the integrity of the eventual consent decree settlement.

⁶⁶ Record at 200; Memorandum in Support of Application to Intervene on Behalf of the School District of Philadelphia, *et al.* at 2 [hereinafter cited as Memorandum].

⁶⁷ Record at 210; Memorandum, *supra* note 66, at 18.

⁶⁸ Record at 170-71; Defendants' Brief, *supra* note 35, at 29-30.

⁶⁹ Record at 263-64; Plaintiff's Brief, *supra* note 35, at 19-20.

⁷⁰ Record at 302-03. The order reads in relevant part:

The United States of America, plaintiff herein, having made an investigation which resulted in the filing of . . . [these] civil injunction cases; and it appearing that numerous treble damage actions based in large part on the same facts as alleged in these civil injunctive actions have been and may be filed . . . ; that motions have been or may be made in these treble damage actions for the production of documents . . . presently in the possession of plaintiff; and that it is in the public interest that these documents be identifiable and preserved and remain together for possible use in these treble damage actions.

IT IS ORDERED, ADJUDGED AND DECREED that all documents procured by process or otherwise by the plaintiff from any individual, partnership, firm, or corporation during its investigation . . . , but not internal memoranda or work product of plaintiff have been impounded . . . until further order

The utilization of a streamlined discovery procedure at a future date as a substitute for formal intervention in the consent decree proceeding is typical of the flexible approach presently followed by courts in the antitrust area. Moreover, the informal status of the entity granted relief has not affected the courts' willingness and ability to fashion a remedy. Indeed, only in *United States v. National Bank & Trust Co.*⁷¹ did the trial judge pause to reflect on the unusual situation presented by an impounding order issuing at the behest of nonparties. But his hesitation was only momentary. The Government raised no objection, and it was "clear that the court can enter such an order without granting intervention."⁷² The court cited only one authority for this pronouncement—the *Auto Manufacturers* litigation.

B. Assumed Facts and the "No Testimony" Limitation

An interest in amassing evidence of a defendant's past violations of the antitrust laws is only one instance of the desire by nonparties to secure what they view as a full measure of relief. Nonparties also attempt to intervene to question the adequacy of the decree's substantive provisions. Such challenges present the court with two interrelated questions: (1) what limits to place on its own investigations in order to avoid giving the consent decree evidentiary weight in a subsequent action and (2) how to prevent undue delay in or prejudice to the adjudication of the rights of the litigants.

In an attempt to resolve such controversies fairly, courts have resorted to a number of procedural devices designed to produce a thorough examination of the issues without impairing the utility of the consent decree for the parties. These informal methods deserve a more detailed examination of their merits.

1. *Limited Inquiry into Prospective Conduct.* Occasionally, challenges directed to the substantive provisions of a decree can be settled on a policy level without introducing evidence in support of the charges made. This situation arises when the intervenor's complaint is directed primarily at the failure of the settlement to anticipate and interdict some allegedly wrongful future activity of the defendant. A striking example of this occurred in connection with *United States v. Harper & Row Publishers, Inc.*,⁷³ discussed above, in which one applicant for intervention proposed a change in the substantive terms of the decree relating to the defendants' practice of publishing books in two editions, denominated "library" and "trade." The library

⁷¹ 319 F. Supp. 930 (E.D. Pa. 1970).

⁷² *Id.* at 933.

⁷³ No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom.* City of New York v. United States, 390 U.S. 715 (1968).

editions were supposedly of a higher-quality binding and thus better able to withstand heavy use than were the corresponding trade editions. In the extensive hearing held prior to entry of the consent decree, however, the applicant alleged that there was no difference in quality between these supposedly distinct versions and that the existing price differential was established and maintained pursuant to a price-fixing conspiracy among the defendants.⁷⁴ The sellers of the defendants' books were accused of aiding in this conspiracy by fraudulently denying that they had the less expensive volume in stock in order to induce purchases of the higher-priced edition.⁷⁵ It was further alleged that while it was economically feasible to produce both library and trade editions, the defendants might nevertheless decide out of "malice or spite" to discontinue the less expensive trade edition.⁷⁶ The potential intervenor's chief concern was that the consent decree as framed did not specifically reach these practices. It argued that unless they were specifically condemned, the investigatory powers given the Antitrust Division in the decree would not be deemed to cover them,⁷⁷ the court would be unable to punish them through contempt proceedings,⁷⁸ and attempts to modify the decree to obtain the supplemental relief necessary to curb these practices would founder.⁷⁹

⁷⁴ See Transcript of Proceedings, Nov. 16, 1967, at 33-38 [hereinafter cited as Nov. 16 Proceedings].

⁷⁵ *Id.* at 16-18, 30.

⁷⁶ *Id.* at 41-42.

⁷⁷ The Division's powers to police settlements are restricted by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (1970), to those matters deemed "relevant" to violations of the consent decree. *Id.* § 1312(a). The question of relevance is often fiercely contested, with the erstwhile defendant obviously adopting a very restrictive view and, by and large, being sustained in its contention by the courts. Flynn, *supra* note 2, at 996-97. Moreover, the recent case of *United States v. Armour & Co.*, 91 S. Ct. 580 (1971), poses additional problems for the Division. Its decision that consent decrees should be narrowly construed would make it difficult to sustain an argument that certain conduct not explicitly condemned in the decree should nevertheless be deemed unlawful by implication.

⁷⁸ While the power of a court to punish consent decree violations through contempt proceedings is unquestioned, this power has seldom been utilized. There are three interlocking reasons for this. First, the Division practically never initiates contempt proceedings. Professor Posner reports that since the inception of the antitrust laws, the Government has instituted criminal contempt proceedings on only twenty-two occasions and has been successful in only twelve of these instances. Posner, *supra* note 1, at 387 (Table 16). Professor Goldberg, writing in 1962, could find only thirty-nine instances of contempt proceedings brought in connection with antitrust consent decrees since 1890. M. GOLDBERG, *supra* note 2, at 66. Another commentator could discover only three such efforts in the period from 1960 to 1969. Note, *supra* note 36, at 1344. Thus, at most a total of forty-two attempts to punish decree violations through contempt proceedings have been made in approximately eighty years.

Second, nonparties to the litigation have traditionally been held to lack standing to initiate contempt actions. See, e.g., *United States v. ASCAP*, 341 F.2d 1003 (2d Cir. 1965), *cert. denied*, 382 U.S. 877 (1965); *United States v. Western Electric Co.*, 1968 Trade Cas.

The defendants denied that any of these practices had ever existed or were contemplated, but the trial judge dismissed their protestations of innocence as irrelevant to the issue confronting him. Desiring to avoid an inquiry into the defendants' past activities, the court nevertheless wanted to insure the prospective effectiveness of the decree.⁸⁰

The trial judge's method of achieving this goal was quite novel. Although no changes were made in the text of the decree, a number of understandings were arrived at between the defendants and the court which the latter likened to legislative history.⁸¹ First, defendants' counsel stipulated that they were willing to interpret the scope of the consent decree to permit investigations by the Antitrust Division to detect misrepresentations of the type of books in stock. It was further agreed that if such investigations disclosed these proscribed practices, the defendants would not oppose, on procedural grounds, a modification of the decree to prohibit them explicitly.⁸² The court indicated its

85,279 (D.N.J. 1968), *aff'd per curiam sub nom.* Clark Walter & Sons v. United States, 392 U.S. 657 (1968). While one recent commentator has criticized this doctrine, his proposal to vest nonparties with limited enforcement powers has not yet been accepted. *See generally* Comment, *Antitrust Consent Decrees: A Proposal to Enlist Private Plaintiffs in Enforcement Efforts*, 54 CORNELL L. REV. 763 (1969).

Finally, this lack of eligible and enthusiastic advocates for contempt sanctions coalesces with the court's traditional ignorance of the factual underpinnings of the consent decree to create an understandable reluctance on its part to exercise its contempt power. In litigated cases or in those instances in which the court has had the benefit of an informal discussion of the issues before entry of the decree, this factor would not be a problem. Generally, however, neither method of fact resolution has been utilized before ratification of the decree, and consequently the court is not able to decide whether a particular course of conduct violates the decree. *Compare* United States v. Western Electric Co., 1968 Trade Cas. 85,279 (D.N.J. 1968), *aff'd per curiam sub nom.* Clark Walter & Sons v. United States, 392 U.S. 657 (1968) (apparently rejecting intervenor's literal interpretation of decree provision, under which the defendant would be in contempt, in favor of parties' construction of document, on the theory that their knowledge of its terms exceeds that of applicant), *with* United States v. R. L. Polk & Co., 1969 Trade Cas. 87,730, 87,733 (E.D. Mich. 1969) (sustaining criminal and civil contempt charges and granting supplemental relief), *vacated and remanded on other grounds*, 438 F.2d 377 (6th Cir. 1971).

⁷⁹ Consent decrees are not easily modified, by either the Government or the defendant, although it is possible that Government attempts are governed by a more liberal standard. *See generally* Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 YALE L.J. 1391, 1392-97 (1959); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967). *Compare* United States v. Swift & Co., 286 U.S. 106, 119 (1932), *with* United States v. United Shoe Machinery Corp., 391 U.S. 244-49 (1968).

⁸⁰ Nov. 16 Proceedings, *supra* note 75, at 7-9.

⁸¹ *Id.* at 45.

⁸² *Id.* at 25-26, 55. In many respects this was the most controversial of the claims raised by the intervenors. Apparently the parties felt that this particular practice was not only not prohibited by the consent decree but was also not reached by the Government's complaint. The defendants maintained that the alleged business practice, while reprehensible and indeed fraudulent, did not constitute a violation of the antitrust laws. Hence they were prepared to oppose modification on substantive grounds. *Id.* at 26.

willingness to do "everything that [it] could to protect . . . against that."⁸³ The judge further stated that differential prices on qualitatively identical items and economically unjustified decisions by the defendants to cease publication of certain types of books would be deemed violations of the decree and punished by contempt sanctions.⁸⁴ With this gloss, the decree provided substantial protection to all major interests raised by the applicants. The "unsuccessful" intervenors were also given an auxiliary role in policing this ban by virtue of an express provision of the decree giving them substantial rights of access to evidence of postdecree violations accumulated by the Division.⁸⁵

Thus, a flexible, informal resolution of the nonparty's concerns was achieved without delving into the defendants' past behavior. By confining the discussion to hypothetical future conditions, no factual controversy was permitted to develop. The question naturally arises whether a similar method can be developed to deal with objections to the decree which are more directly related to the defendant's prior conduct.

2. *Limited Inquiry into Past Conduct.* An intervenor's challenge to a consent decree is often based on a claim that the Antitrust Division is seeking less relief than is required by the public interest. The options available to the court in such a situation depend to a large extent on whether the Division disagrees either with the potential intervenor's assessment of the underlying facts or with its choice and application of the relevant substantive legal standards. If the former,

⁸³ *Id.* at 31.

⁸⁴ With respect to the alleged price fixing conspiracy, the following exchange occurred:

MR. NEWBURG [attorney for intervenors]: What I am saying is the bookstore buys the same book at a discount and it is called a trade edition. The very same edition is sold to the library at net price and it is labeled library edition, so . . . while there is no difference in cost . . . very often the very same identical physical book is sold at different prices

THE COURT: All right. If you can establish that you would have no trouble getting violation of this consent decree.

Id. at 37-38. With respect to economically irrational decisions to cease publication, the court was equally direct:

THE COURT: [I]f I thought for a single moment that the curtailment of the publication of . . . trade editions was motivated by any desire to arrest the public bodies or to deprive them of getting a product that they were entitled to get by virtue of unstifled competition, or if cessation of the publications was out of a mode of revenge or personal satisfaction, I wouldn't hesitate a moment to do something about it.

Id. at 62-63. The court went on to say:

With that understanding I don't think there could be any dispute by anybody about what motivates the Court's willingness to accept . . . this consent decree.

Id. at 64 (emphasis added).

⁸⁵ The decree eventually entered in *Harper & Row* is reported at 1967 Trade Cas. 84,552 (N.D. Ill. 1967). The provision allowing certain intervenors access to evidence of post-decree violations is incorporated in paragraph X of that decree. *Id.* at 84,555.

the pressure to receive testimony becomes intense; but if the latter, the difficulty may be avoided by transforming the issue into one of formulating a proper rule of law on the basis of certain assumed, but not established, factual conditions.

The transformation of a potential factual dispute into a question of law is illustrated by *United States v. Minnesota Mining & Manufacturing Co.*⁸⁶ (3-M). The applicant for intervention in that case argued that the defendant's alleged past patent abuses had been so flagrant that a provision of the consent decree requiring the defendant to grant licenses on a nondiscriminatory, reasonable-royalty basis was insufficient. Dedication of the offending patents was suggested as the appropriate measure of relief.⁸⁷ In responding to this assertion, the Antitrust Division did not terminate consideration of this claim by opposing intervention.⁸⁸ Instead, it engaged in a frank discussion of the bargaining that had gone into the fashioning of the decree. It admitted that royalty-free licenses were often insisted on in similar cases⁸⁹ but pointed to what it considered to be fully adequate substitutes for that relief which were already incorporated into the decree, such as a requirement that 3-M disclose certain important manufacturing processes.⁹⁰ After receiving briefs and hearing oral arguments on these matters, the court denied the applicant any relief.⁹¹

It is important to note that in the 3-M case the court was able to decide the issues in conflict between the Antitrust Division and the unsuccessful applicant without having to resolve factual questions. Once the Division conceded that dedication or its equivalent was the appropriate measure of relief, the court could accept the applicant's representations about the defendant's prior conduct as true for purposes of argument. Freed from the possibility of having to hear evidence or testimony on this issue, it could deal solely with the narrow legal question of whether the relief provided by the consent decree was an adequate substitute for the dedication requested by the applicant for intervention.

A far more difficult problem would have been presented if the potential intervenor and the Antitrust Division had not agreed on the nature

⁸⁶ No. 66 C 627 (N.D. Ill., Sept. 2, 1969).

⁸⁷ See Motion of Polychrome Corporation to Intervene at 2-12; Memorandum of Law in Support of the Motion of Polychrome Corporation to Intervene at 1-3, 6-9.

⁸⁸ The general position of the Government was set out in Transcript of Proceedings, Sept. 2, 1969, at 17-46. While the Government did claim that intervention was inappropriate under existing case law, its discussion of this point was quite perfunctory. *Id.* at 41-46.

⁸⁹ *Id.* at 34-35.

⁹⁰ *Id.* at 17-38, especially 34-38.

⁹¹ *Id.* at 56.

of the defendant's allegedly culpable conduct. Under such circumstances the court finds itself in an almost impossible dilemma. On one hand, it does not seem that such a controversy can be resolved intelligently by the court without a rather detailed inquiry into the defendant's past activities. Yet these are the very matters whose official factual resolution the consent decree is designed to avoid.

Although there are no cases involving intervention which clearly illustrate this problem, similar conflicts have arisen in other consent decree contexts. The techniques employed in those cases are suggestive of those which could be applied in situations in which applicants for intervention disagree with the Division's presentation of the facts. *United States v. Standard Oil Co.*⁹² represents perhaps the most ingenious attempt to resolve this problem. The difficulty in that case arose between the Antitrust Division and the defendants rather than between parties and nonparties. The Government's complaint, filed in 1950, had requested that certain allegedly monopolistic practices of the defendants be remedied by divestiture. The complicated negotiations which followed lasted eight years and finally deadlocked on this point. It appeared that the issue would have to be set for a full trial, and, anxious to avoid this possibility, the trial judge suggested an alternative approach. His basic strategem was to have the parties present their views and relevant background information on the defendants' business practices as if the issue of framing appropriate relief were before the court. The stricture against receiving testimony was to be avoided by having the requested showing made only through statements by counsel. The culpability of the defendants prior to the filing of the complaint was assumed for purposes of argument. On the basis of these "hypothetical" premises, the question to be decided was whether changed market conditions in the eight years since that time had made divestiture an inequitable remedy.

The court received "written statements, presentations and oral arguments" from both parties. The Government generally conceded the accuracy of the defendants' presentation of postcomplaint data "as far as it went" but proceeded to introduce its own evidence of current market conditions. On the basis of this hearing, the court indicated that the Antitrust Division had not sustained the burden of showing divestiture to be appropriate. Since it was virtually certain to lose this point on the merits, the Division withdrew its demand in subsequent conferences and a mutually agreeable settlement was consummated.⁹³

A full-scale evidentiary dispute was avoided in *Standard Oil* when the

⁹² 1959 Trade Cas. 75,522 (S.D. Cal. 1959).

⁹³ *Id.* at 75,526-27.

Division, faced with the court's adverse interpretation of the facts, conceded the validity of the defendants' claim. It seems clear, however, that the court was made aware of material whose formal recognition would have jeopardized the inadmissible character of the consent decree in subsequent private actions.⁹⁴ Thus, the court was able to express its opinion with regard to the merits without engaging in formal fact finding.

While the negotiations in *Standard Oil* were facilitated by the parties' informal acquiescence in the court's view of the case, a formal agreement between them can have serious consequences. *Gurwitz v. Singer*⁹⁵ is enlightening in this respect. In a prior federal antitrust action, the defendants had stipulated that they had engaged in Sherman Act violations and permitted the court in that action to "make findings of fact and conclusions of law on the basis of the foregoing admissions."⁹⁶ These stipulations went on to provide, however, that such admissions were made "for the purpose of [the federal] . . . action only" and were not to be given any weight in any subsequent proceedings.⁹⁷ Despite this disclaimer, the court held that the earlier consent judgment was available to private plaintiffs for evidentiary purposes. It found a "clear distinction" between consent decrees agreed to by the parties and judgments entered on the basis of stipulated facts and held that only the former were exempted from having a prima facie effect in subsequent treble damage actions.⁹⁸

Any difference between the stipulated facts in the prior proceeding in *Gurwitz* and the hypothetical facts adduced in framing the decree in *Standard Oil* seems due more to the artfulness of counsel than to any defensible substantive distinction. In each instance the court was presented with the litigants' own view of the true state of affairs, and in each case its analysis of these data led directly to the parties' eventual

⁹⁴ The question of just what conditions must be satisfied before a consent decree will be given evidentiary weight is undecided. One might expect that the statutory restriction on the taking of testimony refers only to evidence relating to the defendant's alleged anti-trust violations. Presumably, the rationale which explains the failure to give collateral estoppel effect to consent decrees is that such issues have never been officially resolved. The disputed facts in *Standard Oil*, however, were not of this character. Rather, they dealt with postcomplaint activities of the defendant. These were scrutinized less with the intent of proving continuing antitrust violations than of demonstrating the failure of past anticompetitive effects to dissipate over time. Nevertheless, one authority has suggested that *Standard Oil* "violates the spirit," if not the letter, of section 5(a). Flynn, *supra* note 2, at 991 n.31.

⁹⁵ 218 F. Supp. 686 (S.D. Cal. 1963).

⁹⁶ *Id.* at 686-87.

⁹⁷ *Id.* at 687.

⁹⁸ *Id.* at 689.

settlement. Yet the *Gurwitz* case sharply emphasizes one limitation of the *Standard Oil* approach to resolving factual disputes. The court's attempt to effect an agreement between the parties must be confined to an informal, advisory opinion which, although indicating the court's view of the case were it to be litigated, does not result in a formal stipulation of the facts. By adopting the informal procedure employed in *Standard Oil*, it would be possible both to investigate the defendant's past conduct with a considerable degree of thoroughness and to preserve a viable settlement option for the litigants. Such a procedure could be expected to lead to the formulation of sounder decrees initially and to the possibility of subjecting them to more intelligent interpretation, modification, and enforcement in the future.

Standard Oil also serves to highlight another limitation of the court's inquiry if the settlement option is to be preserved. If the data submitted by the disputants, including the potential intervenor, are conflicting and the parties cannot reconcile their differences, the court must either elect to accept one point of view more or less on faith⁹⁹ or else conduct a full hearing designed to uncover the actual state of affairs. Adopting the latter alternative would clearly remove any subsequent decree from the no-evidence exemption,¹⁰⁰ while opting for the former

⁹⁹ This alternative has apparently been adopted on several occasions. For example, in *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971), the consent decree obligated the court to examine purchases of theaters by the defendant to insure that they were not anticompetitive. A particular transaction was challenged by a competitor of the defendant, who alleged that the defendant had entered into a series of secret agreements with the next largest theater chain in the area. It was alleged that these arrangements were designed to reduce competition between these two parties and that as a consequence of the purchase in question, the defendant would actually have a far larger share of the market than appeared on the surface. The objecting party sought to compel production of these alleged secret documents. The court denied this request, stating:

The state of the record is insufficient to warrant the discovery [the objecting party] seeks. The court, under the circumstances, accepts the sworn statement of petitioner's General Attorney for Production Matters whose affidavit submitted upon these proceedings states unequivocally that there is no [such] agreement, written or oral, express or implied . . .

Id. at 90,179. Similarly, in *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970), one applicant for intervention sought to "conduct discovery proceedings to further develop the basic facts and the impact of the proposed merger." *Id.* at 511. But such measures were unwarranted, the court said, since the intervenor "proceeds mostly upon predictions, rumor and speculation rather than upon direct and visible injury to itself . . ." *Id.* at 513.

¹⁰⁰ The taking of testimony prior to entering a decree will allow the decree to be utilized by private plaintiffs for evidentiary purposes. *Soblosky v. Paramount Film Distributing Corp.*, 137 F. Supp. 929 (E.D. Pa. 1955); *De Luxe Theatre Corp. v. Balaban & Katz Corp.*, 95 F. Supp. 983 (N.D. Ill. 1951). This is true even if the decree recites on its face that no testimony has been taken and that no admission of liability has been made.

would entail different results depending on whose viewpoint the court accepted. A decision to side with the potential intervenor might result in the defendant withdrawing its consent to the decree. A decision against the potential intervenor might result in the court resolving an issue against the nonlitigant without giving him the opportunity to establish his view of the facts.

These results are mitigated by two factors, however. First, the unsuccessful applicant can establish his claim to additional relief in a separate private action. Thus, denial of intervention and ratification of the Division's position is not so much a defeat for the applicant on the merits as it is a relegation to a different forum.¹⁰¹ Second, denial of intervention as of right is itself appealable.¹⁰² In antitrust cases this appeal, in order to establish the "inadequacy of representation" of the applicant's interests below, invariably includes a detailed cataloguing of the supposedly repugnant features of the settlement. This procedure clearly has the effect of bringing the merits of the consent decree before the reviewing court; and while the propriety of the decree is not technically at issue on such an appeal, it appears that in litigated cases the appellate court's decision on such matters has influenced its decision on the appropriateness of intervention.¹⁰³ It is the Antitrust Division's contention, apparently accepted by one lower court, that a similar result applies to consent decree settlements:

Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 157 F. Supp. 251 (N.D.N.Y. 1957), *aff'd*, 263 F.2d 533 (2d Cir. 1959), *cert. denied*, 360 U.S. 912 (1959).

¹⁰¹ No collateral estoppel effect results from Government settlements. The ability of private parties to maintain their separate actions is, as a matter of law, unimpaired by such a decision. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689-90 (1961); *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954).

Nor would a potential treble damage claimant necessarily be more effective in obtaining relief as a *practical* matter (the test for intervention under rule 24) as a party to the Government's suit than he would in a private action. He would not be able to force the defendant to enter into a settlement, and a full trial of his claims would result in a greater total expenditure of judicial and governmental resources than if he had maintained a separate action.

¹⁰² This means that in effect all denials of intervention are appealable since any potential intervenor can merely append a claim for intervention "as of right" to his petition for permissive intervention and, if unsuccessful, take a single appeal from the trial court's ruling. This distinction in appealability under the two branches of rule 24 has been most effectively criticized in Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 748-51, 760 (1968).

¹⁰³ See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), *on remand*, 291 F. Supp. 3 (D. Utah 1968), *vacated and remanded sub nom. Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969). See also *United States v. First National Bank & Trust Co.*, 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968) (allowing intervention in part because of prior Supreme Court decision on merits arguably contrary to Government's settlement position).

If the applicants were permitted to intervene, they could of course appeal from erroneous decisions on the law or facts. *The same effect can be achieved by an appeal from a denial of intervention.* If the [subsequent] decision by the District Court [on the merits] is erroneous, then the denial of intervention . . . as a practical matter impaired or impeded the ability of the applicant to protect his interest.¹⁰⁴

This position considerably oversimplifies the difficulties facing an unsuccessful applicant since it assumes that the applicant will have been able to build an adequate record below to sustain its appeal even though not allowed to establish its view of the facts. Nevertheless, this statement contains an important grain of truth. By now enough antitrust intervention cases exist to support the applicant's right to a very full airing of objections to a consent decree.¹⁰⁵ The failure of a district court to follow the informal intervention procedure could well lead a reviewing court to hold the trial court's refusal to be an abuse of discretion.

Therefore, it appears that informal practices now employed in the lower federal courts afford concerned nonparties a considerable role in the fashioning of consent decrees. They are able to direct successful challenges to substantive shortcomings of these decrees and, in effect, to take appeals from adverse rulings—all while remaining technically outside of the litigation.

III. FORMAL INTERVENTION: HOW REALISTIC AN ALTERNATIVE?

This comment has developed the thesis that ostensibly unsuccessful applicants for intervention in federal antitrust cases are in reality given those procedural rights necessary to air their claims effectively and receive the measure of relief dictated by the merits of their grievances. Whether this informal accommodation of the interests of nonparties can be transformed into an equally effective system of formal intervention remains to be answered.

Two recent articles commenting on the strengths and weaknesses of the present rule 24 have concluded that the rule as presently drafted

¹⁰⁴ *United States v. ASCAP*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,492, at 90,012 (S.D.N.Y. Jan. 29, 1971) (quoting with approval from a Government memorandum submitted in opposition to motions to intervene).

¹⁰⁵ See, e.g., *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970); *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968).

affords an opportunity for extensively conditioning the participatory rights given to intervenors.¹⁰⁸ The remarks of Professor Shapiro on this point are particularly insightful:

When one is granted intervention, either as of right or in the exercise of discretion, it does not necessarily follow that he must be granted all the rights of a party at the trial and appellate levels, including full rights of discovery and cross-examination, the ability to veto a settlement of the case, and the right to appeal from a final decision. It is both feasible and desirable to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all.¹⁰⁷

Professor Shapiro's suggestion, at least in the federal antitrust setting, explicitly acknowledges the real nature of the present informal practice of handling objections to consent decrees—a flexible but stringently conditioned form of intervention. The procedural rights now granted to nonparties under this informal system could not be expected to change significantly were they given formal party status since the basic pressures which have fashioned the limitations on these rights would be unaltered. Nevertheless, formal recognition of the system now in effect would to some extent serve to regularize the pragmatic approach adopted by the lower federal courts in handling questions of intervention.

A step in this direction was taken recently in *United States v. Simmonds Precision Products, Inc.*,¹⁰⁸ in which the Government's suit challenged the acquisition of Liquidometer Corporation by Simmonds. At the time of the merger these two corporations and one other controlled the entire market for aircraft fuel gauging systems. Although the complaint had requested that the acquired company be divested intact as a viable enterprise, the proposed consent decree permitted a piecemeal disposal of Liquidometer. The employee's union of the acquired company sought to challenge this provision since it posed a serious threat to the job security and employment rights which had accrued to union members under their contracts with Liquidometer. It insisted that the original request for divestiture of the company as a whole should be followed.¹⁰⁹

¹⁰⁸ See generally Shapiro, *supra* note 102, especially pages 752-59. See also Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 366-67, 374-80 (1969).

¹⁰⁷ Shapiro, *supra* note 102, at 727.

¹⁰⁸ 319 F.Supp. 620 (S.D.N.Y. 1970).

¹⁰⁹ *Id.* at 620-21.

The court granted the union's motion to intervene under rule 24(a)(2) "for the purpose of opposing the entry of a final judgment on consent," and "an evidentiary hearing was held on the merits of the Union's opposition"¹¹⁰ The hearing revealed that after the original complaint had been filed, two groups of key management personnel had left Liquidometer to form two new competitive firms. Their success had been immediate and dramatic, so that the market now contained three thriving firms exclusive of Liquidometer and Simmonds. The court also found that, in striking contrast, Liquidometer had suffered heavy losses and that it threatened not only to go bankrupt, but to cause Simmonds to fail also.¹¹¹

The court reasoned that the Government's primary concern in bringing the suit had been the preservation of a competitive market and that changing conditions had shifted the means of attaining that goal from wholesale divestiture to piecemeal disposal of the acquired firm's assets. It decided that the union's goal of keeping Liquidometer functioning as a unit did not override the legitimate interest of the public in promoting the maximum feasible number of healthy, competitive firms in the market. Judgment against the union was rendered accordingly.¹¹²

The court's decision to grant the union's request for intervention is understandable. The impending divestiture posed a real and immediate threat to its financial well-being and no alternative forum for protecting this interest was available.¹¹³ In allowing intervention, however, the court had to face the question of what procedural rights should be granted the union after its admission. While the *Simmonds* court did not explicitly formulate the limits it placed on the union's participation, a practical solution may be suggested. The Advisory Committee's notes to the 1966 amendment of rule 24 clearly show an

¹¹⁰ *Id.*

¹¹¹ *Id.* at 621-22.

¹¹² *Id.* at 622-23.

¹¹³ *Cf. United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970), discussed in text at notes 26-33 *supra*. It is somewhat surprising that the court allowed the union to intervene as of right under rule 24(a)(2) rather than permissively under rule 24(b)(2), but there is a plausible justification for this result. Professor Shapiro recognizes a broad class of potential intervenors whose interest in the proceedings sets them apart from general members of the public but who may not have an independent legal claim against any of the parties to the litigation. Shapiro, *supra* note 102, at 736-38. Rule 24(b)(2) requires that an applicant present a "claim or defense" having a question of law or fact in common with the main action, while rule 24(a)(2) imposes no such restriction on the intervenor's interest. In *Simmonds* it is not clear that the union had a legally cognizable claim or defense against anyone, so that admitting the union "as of right" may have been the only alternative to not admitting it at all.

intent to allow restrictions to be placed on intervention under rule 24(a): "An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."¹¹⁴ Thus, the scope of the procedural rights afforded to a private intervenor in federal antitrust proceedings should be controlled by the particular problems surrounding the effective presentation and resolution of its claim.¹¹⁵

Just how such rights might be conditioned is best examined in the context of a specific situation. In *Simmonds*, for example, had the

114 39 F.R.D. 69, 111 (1966).

115 Four major areas have been identified in which intervention as of right has traditionally differed from permissive intervention: (1) the right to an immediate appeal from a denial of intervention, (2) the standard of appellate review governing the denial of intervention, (3) the need for an independent jurisdictional base for the intervenor's claim, and (4) the procedural rights conferred by the grant of intervention. Kennedy, *supra* note 106, at 334-35. Professor Kennedy suggests generally that the rationales for these distinctions have weakened over time and that they presently serve no useful purpose. *Id.* at 354-72.

The one possible exception to this development is the right to assert compulsory counterclaims or crossclaims. Professor Kennedy feels that compulsory counterclaims or crossclaims cannot be restricted where intervention is as of right but can where intervention is only permissive. *Id.* at 358. Since it appears that both branches of rule 24 may have to be utilized in order to admit deserving parties to antitrust proceedings, *see* note 113 *supra*, this distinction is of considerable importance. For example, one would certainly not want to allow private parties a *right* to assert their antitrust claims against the defendant if admitted to the Government's suit under rule 24(a)(2).

In addition to denying intervention altogether, two methods of avoiding this consequence without disturbing existing case law appear possible. First, through a broad interpretation of the "common question" provision of rule 24(b)(2), the court could always grant intervention at its discretion. This approach is an especially promising way to treat potential treble damage plaintiffs since it is not unreasonable to treat their claims as presenting "questions of law or fact in common" with the main action for purposes of admission to the proceedings under rule 24(b). Alternatively, where intervention is appropriate only under rule 24(a), the court could regard such crossclaims as "permissive" under rule 13(b) rather than "compulsory" under rule 13(a). Either approach would obviate the necessity of resolving private disputes ancillary to the Government's action.

A more direct approach would be to refuse to perpetuate this distinction in the consent decree context. The blurring of rules 24(a) and 24(b) in that setting is already approaching the point at which the two branches are indistinguishable. As one court noted:

Having concluded that neither movant makes out a case for intervention as a matter of right, . . . the court reaches quickly a similar decision on the alternative of permissive intervention *The critical judgment now made is that the consent decree is a proper disposition.* The prolongation of the suit has not been shown . . . to be desirable or justifiable. Absent such a showing, in an antitrust case brought by the United States, continuation of the litigation becomes *by definition* a course that will unduly delay or prejudice the adjudication of the rights of the original parties.

United States v. CIBA Corp., 50 F.R.D. 507, 514 (S.D.N.Y. 1970) (emphasis added). The clear import of the court's language is that formal intervention under either branch of rule 24 is equally inappropriate if the objections to the decree are found to be insubstantial. Conversely, where the nature of the applicant's claim is held to warrant allowing him to intervene, the branch of the rule employed should be equally irrelevant.

union been able to attribute Liquidometer's poor earning record to Simmonds' mismanagement of the firm, the court might well have accepted the union's contention that a divestiture of the acquired company as a functioning entity rather than piecemeal would better serve the public interest.¹¹⁶ To sustain such a charge, the union would have required access to records of the management and bookkeeping practices of the controlling corporation during the relevant period. Under such circumstances the court would probably have been faced with a challenge to the union's right to discovery of the critical documents. A restriction of the right to utilize discovery procedures beyond those required by the rules of evidence does not seem to be warranted where access to the desired information is indispensable to establishing the applicant's case. If the intervenor can establish a *prima facie* case for relief, it is difficult to justify denying it access to the records necessary to substantiate its claim.¹¹⁷ The opportunity for a full discussion of the disputed matter has been the most beneficial aspect of the informal participation system¹¹⁸ and should not be abandoned when that system is replaced by formal intervention.

Nevertheless, the pressures to avoid compromising the settlement option by allowing the indiscriminate introduction of testimony are strong. Perhaps the best possible accommodation of these conflicting interests would be to allow either the Antitrust Division or the defendant to withdraw its consent as an alternative to letting the discovery procedure go forward. Such an option would provide the parties with another opportunity to frame a settlement agreeable to all concerned and which would not constitute *prima facie* evidence of guilt. Further, it would allow a greater influence by nonparties in the formulation of consent decrees while preserving the basic features of the settlement process.¹¹⁹

¹¹⁶ The union did allege that the acquired company's losses were mere paper allocations by Simmonds of its own debts. Although this matter was settled against the union without explicit reference to actuarial records, other matters were alluded to which fully justified the court's rejection of this contention. *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620, 621-22 (S.D.N.Y. 1970).

¹¹⁷ The proper rule appears to be that framed by Professor Shapiro: "Some limitations would seem appropriate even when intervention is of right, so long as the limits imposed do not preclude effective presentation of the intervenor's interest." Shapiro, *supra* note 102, at 756 (emphasis added).

¹¹⁸ See *United States v. Minnesota Mining & Mfg. Co.*, No. 66 C 627 (N.D. Ill., Sept. 2, 1969), discussed in text at notes 86-91 *supra*; *United States v. Standard Oil Co.*, 1959 Trade Cas. 75,522 (S.D. Cal. 1959), discussed in text at notes 92-94 *supra*.

¹¹⁹ At least one other alternative is open to the court, in certain circumstances. If the issue raised by the applicant for intervention were relatively peripheral, the court might agree to enter all of the decree except the disputed portion. Such a procedure would have

Similarly, adoption of a formal intervention system establishes the existence of the right to appeal. It has been suggested that while waiver of the right to appeal could not be required as a condition to allowing intervention, standing to take an appeal is not automatically conferred by entry into the litigation.¹²⁰ It seems reasonable to suppose, however, that an appeal should be permitted once a party is admitted to the proceedings, provided the challenge is on an aspect of the decree which affects it.

This was the policy followed in *Norman's on the Waterfront, Inc. v. Wheatley*,¹²¹ in which Norman's brought a suit against the Board of Alcoholic Beverages challenging the validity of the Virgin Islands Alcoholic Beverages Fair Trade Law.¹²² Four importers and wholesalers of domestic liquors sought and were granted leave to intervene as additional parties defendant.¹²³ The court found the law void because of its conflict with section 3 of the Sherman Act¹²⁴ and entered a permanent injunction against its enforcement.¹²⁵

The Board chose not to appeal, but the four intervenors did contest the ruling. Norman's questioned their standing to bring an appeal since no declaratory or injunctive relief had been either sought or obtained against them.¹²⁶ The court of appeals brushed aside this objection, holding that "[t]he intervenor . . . has the right to appeal from all interlocutory and final orders which *affect* him.' . . . Put another way, '[o]ne who has become a party by intervention . . . is entitled, if *aggrieved*, to appeal.' "¹²⁷

several advantages. First, it would insure some relief immediately from the major features of the defendant's allegedly wrongful activities. Second, it would guarantee that the bulk of the decree would come within the section 5(a) no-evidence exception, irrespective of the depth of the investigation undertaken with regard to the disputed issue. Finally, it would serve to soften the litigants' resistance to outside inquiry both by restricting its compass and by minimizing its adverse effects.

¹²⁰ Shapiro, *supra* note 102, at 753-54.

¹²¹ 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606 (3d Cir. June 17, 1971).

¹²² V.I. CODE ANN. tit. 8, §§ 150-160 (Supp. 1971). The provisions of the Act were manifestly anticompetitive though arguably legal. For example, section 156 required the brand owner or his licensee to file a list of the minimum retail prices at which his liquors could be sold in the Virgin Islands and banned all sales below those figures. Sections 153 through 155 permitted a wholesaler of alcoholic beverages to enter into contracts with retailers establishing a minimum resale price for branded liquor. This price was binding even on retailers who did not sign such contracts.

¹²³ Since the court of appeals did not indicate whether these interventions were granted under rule 24(a) or rule 24(b), nothing in its opinion turned on such a distinction.

¹²⁴ 15 U.S.C. § 3 (1970).

¹²⁵ The trial court opinion is reported at 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,423 (D.V.I. Aug. 14, 1970).

¹²⁶ 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606, at 90,492; cf. *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

¹²⁷ 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606, at 90,492, *quoting with approval* 3B

This holding is clearly applicable in the consent decree context. It is difficult to imagine a closer analogy to the typical consent decree than an injunctive order from which neither of the original parties seeks to appeal. The sensible approach followed by the court in *Norman's* should govern review of consent decree interventions as well. Standing to appeal should be held to exist whenever the issues triggering the intervenor's participation have been decided against it.¹²⁸

Norman's and *Simmonds* could well serve as prototypes for a formal system of intervention fully capable of resolving the concerns of non-parties in a fair and expeditious fashion. Together, they suggest that the intervenor should have the procedural rights necessary to present its claim and to acquire standing to take an appeal.¹²⁹ In each instance the intervenor's presence created no untoward consequences for the litigants and led to a much fuller discussion of the critical features of the eventual decree than would have otherwise taken place. The widespread utilization of a system of conditioned formal intervention would take advantage of the possibilities for the flexible resolution of conflicts inherent in rule 24.

CONCLUSION

Lower federal courts are now experimenting with limited informal intervention in the resolution of disputes concerning federal antitrust consent decrees. The concerns of nonlitigants are fully heard and accommodated according to their merits without formally admitting them to the proceedings. The denial of formal recognition probably stems from the courts' hesitancy to confer on such applicants all of the rights conventionally thought of as accruing to a party.

The courts' concern that the limited rights now granted informally

J. MOORE, *FEDERAL PRACTICE* § 24.15 (2d ed. 1969) and 9 J. MOORE & B. WARD, *FEDERAL PRACTICE* § 203.06 (2d ed. 1969).

¹²⁸ This does not mean that such an intervenor should have the power to block entry of any settlement agreeable to the Antitrust Division, the defendants, and the court entering the decree. On the contrary, such a right should be withheld, as it apparently was in *Simmonds*, in order to avoid undue delay or prejudice to the original litigants. The ability to seek appellate review of the judgment below should serve as a sufficient protection for the intervenor's interests. See text at notes 38-40 *supra*. See also Shapiro, *supra* note 102, at 756-57 n.157.

¹²⁹ Another group of advantages possibly accruing to an intervenor are the right to seek a judicial construction, modification, or enforcement of the settlement. The typical consent decree contains a provision by which the court retains jurisdiction for these purposes, but only at the request of "any of the parties" to the judgment. Flynn, *supra* note 2, at 997 & n.48. Such privileges do not seem inevitable, however. Were they viewed as undesirable, the wording of this provision could be altered to name specifically those parties entitled to invoke the court's jurisdiction. Such rights do not attach to intervention *per se*.

could not be similarly conditioned in a formal system is unfounded. On the contrary, their power to do so is virtually beyond question.¹³⁰ Should the district courts choose to abandon their informal methods of accommodating the interests of nonparties, the general contours of the resulting formal intervention seem clear. Leave to intervene would be granted at the discretion of the court and would be limited to as narrow a substantive compass as possible. Procedural rights would be afforded as required for a full examination of the underlying controversy, including if necessary the right to discovery and compulsory process, subject in turn to the litigants' alternative right to withdraw their consent from the settlement. The power to block entry of a consent decree or other settlement agreeable to the original parties and the court would be withheld, but the right to appeal from such a judgment would be retained. Formal intervention of this kind would provide a workable framework for harmonizing the conflicting rationales of the antitrust laws—the promotion of effective private enforcement and the utilization by the Government of the most efficient means of settlement.

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¹³⁰ Kennedy, *supra* note 107, at 366–67; Shapiro, *supra* note 102, at 727, 752–56.