

1950

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Phillip W. Haberman

Harold F. Birnbaum

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### Recommended Citation

Phillip W. Haberman and Harold F. Birnbaum, *The Auto-Finance Consent Decree: An Epilogue*, 1950 WASH. U. L. Q. 046 (1950).  
Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol1950/iss1/8](https://openscholarship.wustl.edu/law_lawreview/vol1950/iss1/8)

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## THE AUTO - FINANCE CONSENT DECREE AN EPILOGUE

PHILLIP W. HABERMAN\*

HAROLD F. BIRNBAUM\*\*

An article<sup>1</sup> written over ten years ago analyzed the consent decrees which had been entered on November 15, 1938, in the United States District Court for the Northern District of Indiana, in cases brought by the United States against Ford Motor Company, Chrysler Corporation and certain finance companies, and which contained certain features that constituted significant precedents of evident importance.

It was pointed out<sup>2</sup> that the purpose of the new policy of the Department of Justice was to restore and preserve the equilibrium of competition, not to dislocate it permanently against defendants who, in the words of the then Assistant Attorney General Arnold

. . . confer important public benefits related to restoring orderly competitive markets which go beyond a promise to desist from the practices charged, and beyond any results which could be obtained by a conviction.<sup>3</sup>

Plainly stated, this is a policy by which the defendants are first indicted; and then the attorney for the Government exacts concessions "*beyond any results which could be obtained by a conviction*" as the price of filing a *nolle prosequi* to the indictment. This policy connotes a dangerous assumption of power. The economic theories and the conception of "public benefits" entertained by a Government attorney are unorthodox guideposts as to which a later incumbent of the same office may differ radically. Infusing the extra-legal views of an administrative officer (conservative or radical) into a consent decree holds the

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\* Member of the Missouri and New York Bars; formerly General Counsel, Commercial Investment Trust Corporation, now C.I.T. Financial Corporation.

\*\* Member of California, Massachusetts and New York Bars.

1. Birnbaum, *The Auto Finance Consent Decree: A New Technique in Enforcing the Sherman Act*, 24 WASH. U. L. Q. 525 (1939). See also Isenbergh and Rubin, *Antitrust Enforcement through Consent Decrees*, 53 HARV. L. REV. 386, 395 *et seq.* (1940); Katz, *The Consent Decree in Antitrust Administration*, 53 HARV. L. REV. 415, 434 *et seq.* (1940); Note, 63 HARV. L. REV. 320 (1949).

2. *Id.* at 560.

3. *Id.* at 528.

possibility of great danger unless adequate "escape clauses" have been obtained from the Government in the course of negotiating the decree. The ability of a defendant to avoid being chained like Prometheus depends on the success of counsel in working out a safeguard for the client. Without express provisions, the possibility of obtaining relief in the future is conditioned by the rigidity of the rule of *United States v. Swift & Co.*<sup>4</sup>

Nothing less than a clear showing of a grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.<sup>5</sup>

The article gave particular emphasis to the provisions of the two decrees which related to the future position of the defendants in competition with other concerns who were not restrained by the decrees. The decrees touch future competition in various ways.

First, the manufacturers are required to treat all finance companies alike.<sup>6</sup>

Second, codes of good conduct were written which related to such matters as wage assignments, repossession and foreclosure procedures, delinquency charges, and insurance coverage; and mechanics were provided whereby the defendant manufacturers were free to give preferential treatment and competitive advantages to any individual finance companies (whether or not they were defendants) who voluntarily agreed to conform to these codes.<sup>7</sup> In ten years, not a single finance company has taken advantage of this provision of either decree,<sup>8</sup> which seems to indicate that American business concerns are fundamentally opposed to regulation, no matter how slight its burden or how attractive the inducement to submit to regulation voluntarily.

Third, although the Department refused to make the complainants automatically subject to the same restraints as the decree imposed on the defendants,<sup>9</sup> there is a provision which required the anti-trust division to take cognizance of the activities of those competitors of a defendant who were or became

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4. 286 U. S. 106 (1932).

5. *Id.* at 119.

6. Birnbaum, *supra* note 1, at 536-47.

7. *Id.* at 547-50.

8. Letter from Clerk of U. S. District Court, December 15, 1948.

9. Birnbaum, *supra* note 1, at 553-4.

large enough to do at least one-fourth as much business as the defendant.<sup>10</sup>

Fourth, paragraph 18 of the decrees provides that, after four years from the date of entry, any respondent may apply to vacate the decree in whole or in part, or to modify it, on the ground that the commission of any of the acts which the decree prohibits or the omission of any of the acts which the decree requires, would not constitute a violation of the Sherman Act<sup>11</sup> under the economic or competitive conditions existing at the time of the application.<sup>12</sup> Most significantly, the decree states that it shall not be material to such application “. . . whether or not such economic or competitive conditions are new or unforeseen.” In that manner the District Court which entered the decree also ruled that the doctrine of *United States v. Swift & Co.* should not be applicable, when the application to vacate or modify was made on the ground stated above.<sup>13</sup>

Fifth, and most important, the decree contained three specific provisions regarding competition between the defendants and General Motors Corporation.<sup>14</sup> That company was also under indictment, together with its finance company subsidiary, General Motors Acceptance Corporation. They were not party to any consent decree and were later convicted of violating the Sherman Act.<sup>15</sup>

(a) The decree prohibited the defendant manufacturers (Ford and Chrysler) from owning, controlling, having an interest in or dealing with a finance company, but this prohibition would be lifted on application of any respondent unless a final decree was entered prior to January 1, 1941, requiring General Motors

10. *Id.* at 559.

11. 26 STAT. 209 (1890), 15 U. S. C. § 1, *et seq.* (1927).

12. Birnbaum, *supra* note 1, at 555.

13. The “escape clauses” which were interpreted and given effect by the Supreme Court in accordance with their terms, in *Ford Motor Co. v. United States*, *infra*, note 18, are provisions of a specific character contained in paragraphs 12 and 12(a) and were designed to permit relief against specific restraints contained in the decree. Those clauses were invoked as bases of the motions for relief upon which the proceedings were instituted and which resulted in action of the Supreme Court. No prayer for general relief was presented in that case based on paragraph 18 of the decree, which is an all-inclusive omnibus clause designed to leave a wide open door for future relief if the need therefor develops because of economic or competitive conditions arising in the long-range future.

14. Birnbaum, *supra* note 1, at 555-9.

15. 26 F. Supp. 353 (N. D. Ind. 1939), 121 F. 2d. 376 (7th Cir. 1939); *cert. denied* 314 U. S. 618 (1941); *rehearing denied* 314 U. S. 710 (1942).

Corporation permanently to divest itself of ownership and control of its finance subsidiary, General Motors Acceptance Corporation.<sup>16</sup>

(b) Prior to divestment, General Motors would be able to cause its subsidiary to offer lower finance rates than were available for buyers of Ford or Chrysler cars; if this is done, the respondent manufacturers are able to subsidize other finance companies to meet the rate war.<sup>17</sup>

(c) Most important, the continuation of the decrees was made to depend on the outcome of the proceedings against General Motors.<sup>18</sup> If General Motors was not convicted, all of the restraints of the decree would be lifted until equivalent restraints were imposed on General Motors and its subsidiary by civil decree, either consent or litigated. If General Motors was convicted, the decree would be continued only to the extent that the restraints related to agreements, acts or practices whose illegality had been established by the conviction (or whose performance by General Motors was restrained by a civil decree). Under a general verdict of guilty, the charge to the jury is determinative; and those agreements, acts or practices which the court instructed the jury would support a general verdict of guilty are deemed to be thus declared illegal. A special verdict of guilty, or a plea of guilty or a plea of *nolo contendere* is deemed to declare the illegality of any agreement, act, or practice which is its subject matter.

The time limit for imposing similar restraints upon General Motors (either by judgment of conviction, or by civil decree) was originally January 1, 1940, but for several years the government requested and the defendants agreed to extensions. Now, upon the third attempt,<sup>19</sup> the restraints have been suspended under the express terms of the decrees.

The first attempt under paragraph 12 of the decree to take advantage of the government's failure to obtain a divestment by General Motors within the time limit was denied by the District

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16. Final Decree, *United States v. Ford Motor Co. and United States v. Chrysler Corp.* (N. D. Ind. 1938), ¶12, quoted in footnote at 335 U. S. 303, 307 (1948).

17. *Id.* at ¶12a(4), quoted in footnote, *id.* at 311.

18. *Id.* at 12a(1)-(3).

19. *Ford Motor Co. v. United States*, 335 U. S. 303 (1948).

Court, and the Supreme Court dismissed the appeal for want of a quorum of Justices qualified to hear the case.<sup>20</sup>

The second attempt likewise grew out of an order of the District Court which further extended the time limit for divestment under paragraph 12, against the protest of Chrysler. On appeal, the government prevailed in a 4-2 decision.<sup>21</sup>

The majority opinion was written by Mr. Justice Byrnes, who was joined by Chief Justice Stone and Justices Black and Douglas. The court holds that the District Court retained jurisdiction to modify the original decree under its express terms, and that there was no abuse of discretion in extending the time limit of paragraph 12, even though one of the parties to the decree protested.

The process of reasoning was stated in terms which made no distinction between a consent decree and a litigated decree. The court said that the test was

whether the change served to effectuate or to thwart the basic purpose of the original consent decree.<sup>22</sup>

It stated that this basic purpose was to determine the ultimate rights of the parties by the outcome of the anti-trust proceedings against General Motors. It ruled that the propriety of continuing the ban on Chrysler's ownership of a finance company after the time limit specified in the decree depended on whether Chrysler was thereby placed at a competitive disadvantage. It placed the burden of proof upon Chrysler and found that Chrysler had made no such showing.

Thus, the majority opinion gave no effect to the factor of *consent* pursuant to which the ban of the decree was imposed. The Government had never established any violation of law by Chrysler, nor had Chrysler ever admitted such violation. On the contrary, the decrees specifically recited the defendants' assertion of their innocence.<sup>23</sup> Chrysler had expressly consented to be bound by the ban only until a specified date, if General Motors was still free on that date to own a finance company; its consent was not dependent upon competitive disadvantage.

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20. *Chrysler Corp. v. United States*, 314 U. S. 583 (1941); *rehearing denied* 314 U. S. 716 (1942).

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

22. *Id.* at 562.

23. Decree, *op. cit. supra* note 16, ¶1; Birnbaum, *supra* note 1, at 554.

This was fully recognized in the minority opinion of Mr. Justice Frankfurter, in which Mr. Justice Reed joined.

Obviously, it was an essential feature of the consent decree against Chrysler that the prohibition of affiliation with the finance company should result in this great competitive disadvantage only long enough to enable the Government to press its claim against General Motors to successful conclusion with all reasonable speed. The parties might have refrained from fixing any definite period, leaving the matter wholly for determination in the future and by undefined standards of reasonableness. Instead, the Government chose to specify with particularity the length of the period—more than two years—in which Chrysler would be required to bear competitive hardships resulting from the lack of the same restraints upon General Motors.<sup>24</sup>

The minority agreed with the majority, that the District Court had power to modify the consent decree to effectuate its basic purpose. But, the minority argued, the burden was on the Government, as the moving party, to show that circumstances justified a change in the specified date.

In other words, in 1942, it appeared to be the law that even if a consent decree specified that it would remain in effect only until a given date, the court retained inherent power to extend the date. The only issue, as between the majority and minority opinions, was as to the burden of proof. The majority held that the defendant had the burden of showing that adherence to the original date would effectuate the main purpose of the decree. The minority urged that the burden was on the Government to show that extension of the original date would effectuate this purpose. Neither view conceded any validity to the defendant's claim that it was entitled to stand upon the letter of its consent.

In 1948 the issue was again presented to the court by the defendants named in the Ford consent decree. This time they asked broader relief: Ford asked relief, under paragraph 12, from the ban on its owning or controlling a finance company; and both defendants asked for the suspension and modification, under paragraph 12a, of various provisions of the decree, on the ground that the practices therein prohibited had not been held by the trial court in the General Motors case, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty.

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24. *Chrysler Corp. v. United States*, 316 U. S. 556, 565 (1942).

This time Mr. Justice Frankfurter wrote the prevailing opinion, concurred in by Chief Justice Vinson and Justices Reed and Burton. Mr. Justice Black dissented; Mr. Justice Rutledge concurred; and Mr. Justice Douglas concurred in part. Justices Murphy and Jackson did not participate.

Perhaps the most significant feature of the decision is that the majority now appears to give full validity to the limitations of the defendants' consent. It will be recalled that in 1942 both majority and minority had held that the District Court had inherent power to extend the period for which the defendants had consented to be bound; the only issue was as to the burden of proof.<sup>25</sup> In 1948, in the words of the majority:

If the Government seeks to outlaw possible arrangements by Ford with a finance corporation, it must establish its case in court against Ford as against General Motors and not draw on a *consent which by its very terms is not available*.<sup>26</sup> [italics supplied]

The minority opinion starts out:

The Court appears to accept the argument of appellant that this consent decree must be treated as though it were a contract between private persons for purchase of an automobile. But a consent decree is not a contract. A consent decree in an antitrust proceeding like a decree entered after a contest must be treated as a judicial determination and order made in the public interest. *United States v. Swift & Co.*, 286 U.S. 106, 114-115.<sup>27</sup>

This approach of the minority seems to overlook the substance of the relationship, and to exalt its formula.

Of course a consent decree is not a mere contract between the Department of Justice and the defendants; no one would suggest that the parties could agree subsequently upon a modification and that the court would be bound to rubber-stamp the change. No more would it be contended that there was a contract between the court and the parties.

On the other hand, the court in making a decree is an agent of the sovereign at work. A statement in the decree that its provisions will be suspended under given conditions at a specified future date is at least a unilateral pledge of the sovereign's word.

Perhaps one cannot go so far as to say that never, under any

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25. *Supra*, page 51.

26. *Ford Motor Co. v. United States*, 335 U. S. 303, 322 (1948).

27. *Ibid.*



circumstances, may the sovereign directly or indirectly break the letter or the spirit of its word. The memory of the gold clause cases<sup>28</sup> is a warning that the nation's survival may be considered to require narrow distinctions to be drawn or implied reservations to be read into the Government's contracts.

However, different considerations apply to the suspension of a consent decree. The Government becomes free to litigate as to the legality of the defendant's conduct and to obtain relief according to purely judicial standards.<sup>29</sup> The conditions of suspension should be met fairly and ungrudgingly.

Moreover, as between the majority<sup>30</sup> and the minority,<sup>31</sup> it seems clear that the suspension of a decree is no immunity bath. On the contrary, prudence would seem to warn such defendants to give a wide berth to borderline activities.

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One further point deserves comment: when the principle was established, in the negotiations for the consent decrees, that the defendants were ultimately to be put in the same competitive status as General Motors, it was not known whether the General Motors proceedings would ultimately terminate in a civil decree, a criminal judgment, or both. On the assumption that if General Motors were convicted the Government might take no further legal steps against it, it became the problem of the draftsmen of the consent decrees to frame a standard by which to compare civil proceedings against Chrysler and Ford with criminal proceedings against General Motors; the lawyers could only hope that they would be able to propose a sufficiently definite test.<sup>32</sup>

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28. See *Perry v. United States*, 294 U. S. 330 (1935).

29. See the position of the department, Decree, *op. cit. supra* note 16, ¶1.

30. "The lifting of the restraints imposed by the consent decree does not, of course, affect the liability of Ford for any violations of the Sherman Law that the Government may establish in court." *Ford Motor Co. v. United States*, 335 U. S. 303, 320 (1948).

31. "For if Ford should after today 'affiliate' with C. I. T., or renew its 'persuasion' of dealers, could it be expected that this court would thereafter hold these other companies legally responsible, even though it should be thought that today's permitted conduct ran afoul of the antitrust law? Is it conceivable that if Ford now 'affiliates' with C. I. T., Ford's 'vested interest', acquired with this court's tacit approval, would be taken from Ford by a federal court?" *Id.* at 328.

32. *Cf. Birnbaum, supra* note 1, at 558-9.

It is a great tribute to the English language that it was possible to frame a comparison which a majority of the court characterized as "a litmus-paper test for determining what restraints survive;"<sup>33</sup> and as to which the opinion could say that:

it [sub-paragraph 12(a)(2) of the decree] provided a definite standard for ascertaining what rules of law were at a future date to be made binding on a competitor of Ford. The rules which the trial judge [in his instructions to the jury] formulated against General Motors were thereafter to be the rules of law against Ford.<sup>34</sup>

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The outcome of the Ford case may make the Department "gun-shy" of decrees which are drawn with an eye to the defendant's future competitive position. This would be understandable but most unfortunate.

The Ford consent decree (like the companion decree against Chrysler) was the result of protracted negotiations. It evidenced a forward conception in the administration of the anti-trust laws. Prior thereto, there were examples in which a restraint incorporated in a consent decree operated to freeze a defendant to its permanent disadvantage although competitors were not subject to the same restraints, merely because such a result was not "unforeseen", in the words of the *Swift* case.

The Ford decree made provision to maintain equilibrium of competition. Although it restrained the defendants, its essence was tantamount to a warning to those who were not parties to the decree that the administration of the anti-trust laws would be sufficiently flexible so that the defendants would not be subjected permanently to unchangeable restraints which were not imposed on competitors.

A consent decree is much like legislation, but on a private level. It is almost a private or special statute, drawn not by Congress but by the parties and the court. A policy under which the defendant is placed at a permanent competitive disadvantage is unworkable. Fairness and feasibility alike require that the decree say to the defendant: for a fixed period of time you will be restrained from certain practices; after that time the rules will be the same for all competitors.

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33. *Ford Motor Co. v. United States*, 335 U. S. 303, 312 (1948).

34. *Id.* at 319.