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THE IMPACT ON BUSINESS OF ANTITRUST DECREES

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Government regulation of business may not be widespread but it is not unknown in this country. The source of such regulation normally, however, is a federal or state statute. Sometimes, as in the case of the Fair Trade Laws, businessmen have even promoted such regulation. Less well known, but often far-reaching, is the regulation of business conduct through antitrust judgments. Needless to say, generally such judgments are not welcomed by those to whom they apply.

About five hundred civil antitrust judgments have been entered in cases brought by the United States under the antitrust laws.[1] Cease and desist orders of the Federal Trade Commission, founded upon violation of the antitrust laws, have also been considerable in number.[2]

Of the one hundred largest corporations in this country, few have escaped antitrust prosecution. This has been so, not because of their size, but because of misuse of power which they have possessed or because they have been parties to a price fixing agreement. Many, through the process of litigation or the medium of consent decree negotiations, have had an antitrust judgment entered against them. Hundreds of other corporations and many a trade association have found themselves in a similar situation.

The number of commodities, lines of commerce, or industries affected by such judgments has been very large, as have been the kinds of business activities reached.[3]

The judgment in a government antitrust suit is not a judgment for damages.[4] It is an equity decree, injunctive in nature. The cease and desist order of the Federal Trade Commission is also injunctive in form.[5] And even in private antitrust cases, although by far the usual

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1. About 360 of these have been consent judgments. For changes in business practices resulting from a successful criminal antitrust suit, see Stelzer, *Economic Consequences of A Successful Antitrust Prosecution, A Note on The South-Eastern Underwriters Case*, 373 INS. L.J. 86 (1954).

2. This article is primarily concerned with business operations under antitrust judgments.

3. See Marcus, *Patents, Antitrust Law and Antitrust Judgments Through Hartford-Empire*, 34 GEO. L.J. 1, 36-54 (1945); Note, *Standards Governing Relief Under Section 4 of the Sherman Act*, 97 U. OF PA. L. REV. 234 (1948).

4. Not until 1955 did Congress provide that the Federal Government could recover antitrust damages for injury to it in its proprietary capacity. 69 STAT. 282 (1955), 15 U.S.C. § 15(a) (Supp. IV, 1957). As of the time of this writing, no action has been brought under this statute.

5. For the most part such orders, founded upon antitrust violations, contain prohibitions few in number, but some are more elaborate. See, *e.g.*, In Matter of Mink Traders Ass'n, 49 F.T.C. 160, 180 (1952).

relief requested is that of damages, equity relief is permissible; in a few instances, such relief granted has been quite broad in nature.[6]

In the early period of enforcement of the antitrust laws, when a suit was brought against a number of defendants it was rare to find a judgment which applied to one defendant acting alone. For many years, however, not infrequently judgments have been made applicable to each defendant when acting alone, even though the complaint was couched in terms of concerted action.[7] This will occur where the judgment would have little or no practical effect without such provisions.

Antitrust judgments commonly apply in express terms to "successors" of the defendants named in the judgment. It is still not clear whether the inclusion of the term makes the judgment more binding upon successors than if the judgment did not so provide.[8] But its presence is certainly an indication that the judgment was not intended to have a transitory effect.

For the most part such judgments are without time limits, although occasionally fixed time limits are attached to particular provisions in a judgment. Amendments to judgments are not frequent. Two notable exceptions, however, will be discussed at some length in this article.

Generally, an antitrust judgment will proscribe certain conduct, but it may also require continuing affirmative action. It may merely prohibit price fixing; it may require dissolution, divorcement, or divestiture which, in turn, may require financial conduct quite different from that with which the defendants were accustomed. And, not infrequently, a complex code of business conduct is prescribed.[9]

It is significant that the most comprehensive antitrust decrees are likely to be found to be directed against the leaders of an industry. This means that although the rules of the game may vary from member to member, in terms of percentage of the business done the greater part of that industry will operate under a government-pre-

6. *E.g.*, William Goldman Theatres, Inc. v. Loew's, Inc., 164 F.2d 1021 (3d Cir. 1948); Bigelow v. RKO Radio Pictures, Inc., 162 F.2d 520 (7th Cir. 1947), *cert. denied*, 332 U.S. 817 (1947); Ball v. Paramount Pictures, Inc., 81 F. Supp. 212 (W.D. Pa. 1948), *modified and aff'd*, 176 F.2d 426 (3d Cir. 1949).

7. For approval of an order of the Federal Trade Commission of this sort, see FTC v. National Lead Co., 352 U.S. 419 (1957). In antitrust judgments, the language used to achieve this result varies. One clause often used, however, is "jointly and severally"; another is "and each of them."

8. See Milwaukee Towne Corp. v. Loew's, Inc., 139 F. Supp. 809, 817-18 (N.D. Ill. 1956). In United States v. Mosaic Tile Co., 3 D. & J. 2128, 2131, 1940-43 Trade Cas. ¶ 56051, (N.D. Ill. 1940), the judgment went to unusual lengths in attempting to make it applicable to "any and all corporations, partnerships, associations, and individuals who may acquire the ownership, control, directly or indirectly, of the property, business and assets of the defendants or any of them. . . ." Some judgments condition transfers of assets upon the transferee filing its consent, in court, to be bound by the judgment.

9. See, *e.g.*, United States v. American Can Co., 1950-51 Trade Cas. ¶ 62679 (N.D. Cal. 1950).

scribed set of rules.[10] In all probability, some of the other members of the industry, either from an abundance of caution or because they think it advisable to follow the practices of the leaders of their industry, will conform to such rules, although not bound by them. Thus, some of the small motion picture companies which were not defendants in the *Paramount* case[11] conformed their practices in licensing feature films to accord with conduct of the defendants called for by judgments against the latter.

It is the misuse of power, or at least a belief in its misuse, that almost always furnishes the basis for a comprehensive antitrust decree. And, since the courts have held that legal activity may be condemned if part of an illegally held power or a broader illegal conduct, it is not surprising to find that many antitrust judgments prohibit or regulate trade practices which, by themselves, would not be within the ambit of the antitrust laws. Also, once interstate commerce has been assumed or proved sufficient to support the cause of action, only in a very unusual situation is the judgment confined to interstate transactions.[12]

Even though a concern is not a party to an antitrust judgment, a judgment may be framed against a defendant, the intended effect of which is to restrict or regulate the business relations of that concern with the defendant.[13]

Usually a government antitrust judgment is framed so that the government may have only minimal participation in the carrying out of the judgment. It does not follow, however, that in practice it so works out, although generally the government is merely a silent policeman. Some judgments, however, by their terms envisage a more active role on the part of the Department of Justice.[14]

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10. It is the judicial branch of the government which enters the judgment. But whether the judgment is consent or litigated, its final terms are more likely to be the result of an amalgam of the views of the government attorneys and representatives of the defendants than of any expertise of the court.

11. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

12. The power of the court to prevent interstate harm would seem to be ample basis to regulate intrastate conduct. The court's jurisdiction as to relief is not limited to its jurisdiction to decide the question of violation.

13. United States v. Greyhound Corp., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68756 (N.D. Ill. 1957) (effect on General Motors).

14. See United States v. Gamewell Co., 4 D. & J. 3175, 1948-49 Trade Cas. ¶ 62236 at 62,379 (D. Mass. 1948). [In 1918 the Department of Justice published a volume called *Decrees and Judgments in Federal Antitrust Cases,* which was distributed to some extent among law libraries. Several years ago the Department published a four volume set entitled *Decrees and Judgments in Civil Federal Antitrust Cases.* This set included all civil judgments and decrees from 1890 to 1949. Apparently none of the sets were sold or distributed to law libraries, but some were distributed to the Library of Congress and to certain Congressional committees, as well as to members of the Department's Antitrust Division. Both the 1918 volume and the four volume set are referred to as "D. & J."; citations with that reference in this article are to the four volume set.]

Those who decry government regulation by antitrust decree may often have the alternatives of dissolution, divorcement, or divestiture relief. Exceedingly few are willing to accept such alternatives. And when, for some reason, the latter relief, although proper, is not adopted, regulatory provisions are wont to be severe and, at times, numerous.

OBLIGATION OF PRIVATE BUSINESS TO DEAL WITH PUBLIC

In addition to other obligations, an antitrust judgment not infrequently imposes those of a public utility nature upon a defendant. Government-granted monopolies to private enterprise in the public utility field, such as electricity and gas, carry with them a corresponding curtailment of a power of refusal to deal. But, although our courts may well have been mistaken in their view that the common law, with few exceptions, allowed a businessman to refuse to deal at his will, this still appears to be the general rule for most types of commercial enterprises.[15]

Yet, since the economic significance of a refusal to sell may be in direct proportion to how important it is to the would-be-buyer to have access to the seller's wares or services, it is apparent that refusals to sell may have important competitive consequences. And, the aphorism that it is "Daddy who pays" usually casts him in the role of the consumer whose affection for a "price-cutter" is not shared by the business fraternity. The problem may become more rather than less complex when a company will sell, but only upon conditions which extend beyond those pertaining to credit.

In one field in particular, antitrust judgments have significantly curtailed the businessman's right to refuse to deal.

Patents and Patent Licensing Agreements

The right to exclude and its corollary right to refuse to deal are the essence of what is granted by the government when it issues a patent. But, perhaps because of the very scope of the power inherent in a patent and the public welfare which it is supposed to promote, misuse of the power has often resulted in the imposition of public utility obligations.

Since the early forties,[16] some ninety-odd antitrust judgments have contained provisions for compulsory licensing at reasonable royalties.

15. See Mund, *Right To Buy And Its Denial To Small Business*, S. Doc. No. 32, 85th Cong., 1st Sess. (1957).

16. It was not until the late 1930's that the Department of Justice began to institute a series of patent antitrust suits designed to elicit from the courts a determination of whether, and to what extent, the antitrust laws applied to conduct asserted to be without their pale because of patent privilege.

A few have required specified patents to be dedicated to the public.[17] And a respectable number have imposed the obligation to license without royalties.[18] While the imposition of the last-mentioned obligation has not received unequivocal sanction by the courts where the patent holder has not consented,[19] it is well settled that an antitrust judgment may require the licensing not only of existing patents but also of future patents.[20] Curtailment of the right to bring infringement suits is also found in antitrust judgments,[21] but not as often as obligations to license. Much more exceptionable is a prohibition against the acquisition of patents, save from limited sources.[22] Thousands of patents have been affected by these types of antitrust judgments.

In some instances, where the patents have covered a machine, the antitrust judgment has required the patent holder to offer the machine for sale as well as to offer to lease it, even though prior to the judgment, the licensor had not offered the machines for sale. Such judgments seek to break the hold on an industry obtained at least in part by restricting the status of the user to that of a licensee.[23] Antitrust patent judgments, moreover, commonly strip from patent licensing agreements restrictions as to price, production or sale.

Antitrust judgments have also enjoined defendants from becoming exclusive licensees under patents held by others.[24]

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17. *E.g.*, United States v. A. B. Dick Co., 4 D. & J. 3121, 1948-49 Trade Cas. ¶ 62233 (N.D. Ohio 1948); United States v. United States Pipe and Foundry Co., 1948-49 Trade Cas. ¶ 62285 (D.N.J. 1948); United States v. Hartford-Empire Co., 3 D. & J. 1848, 1895, 1946-47 Trade Cas. ¶ 57571 (N.D. Ohio 1947); United States v. Kearney & Trecker Corp., 3 D. & J. 2409, 1940-43 Trade Cas. ¶ 56147 (N.D. Ill. 1941).

18. United States v. Western Electric Co., 1956 Trade Cas. ¶ 68246 (D.N.J. 1956); United States v. Wallace & Tiernan Co., 1954 Trade Cas. ¶ 67828 (D. R.I. 1954); United States v. Technicolor, Inc., 1950-51 Trade Cas. ¶ 62586 (S.D. Cal. 1950); United States v. A. B. Dick Co., 1948-49 Trade Cas. ¶ 62233 (N.D. Ohio 1948); United States v. Technicolor, Inc. 4 D. & J. 2282, 1946-47 Trade Cas. ¶ 57448 (D.N.J. 1946) (applicable to Corning Glass Works). Among other things, such judgments have involved color motion picture film, automotive air brakes, cast iron pressure pipe, and plastics.

19. *Compare* Hartford-Empire Co. v. United States, 323 U.S. 386 (1945), *with* United States v. National Lead Co., 332 U.S. 319, 349 (1947).

20. See, *e.g.*, United States v. Hartford-Empire Co., 3 D. & J. 1848, 1946-47 Trade Cas. ¶ 57571 (N.D. Ohio 1947).

21. United States v. Technicolor, Inc., 1950-51 Trade Cas. ¶ 62586 (S.D. Cal. 1950); United States v. A. B. Dick Co., 4 D. & J. 3121, 1948-49 Trade Cas. ¶ 62233 (N.D. Ohio 1948); United States v. General Electric Co., 3 D. & J. 2282, 1946-47 Trade Cas. ¶ 57488 (D.N.J. 1946) (Corning Glass Co.); United States v. Vehicular Parking, 3 D. & J. 2616, 56 F. Supp. 297 (D. Del. 1944).

22. United States v. Wallace & Tiernan, 1954 Trade Cas. ¶ 67828 (D.R.I. 1954).

23. United States v. American Can Co., 1950-51 Trade Cas. ¶ 62679 (N.D. Cal. 1950). Under a licensing system, it is difficult if not impossible, for the non-patent holder to obtain used machines. He is also often under a long term continuing obligation to the licensor. Moreover, through the medium of royalty provisions keyed to production or sales, the licensee may have to divulge business information he would prefer to keep to himself.

24. *E.g.*, United States v. Textile Machine Works, 1950-51 Trade Cas. ¶ 62709 (S.D.N.Y. 1950); United States v. Gamewell Co., 4 D. & J. 3175, 1948-49

Through antitrust judgments, compulsory licensing has been applied to thousands of patents.[25] Compulsory-licensing antitrust judgments have been entered against some two hundred corporations; in some instances, against individuals as well.[26] The roster of companies against whom such judgments have been obtained include the American Telephone and Telegraph Company, Eastman Kodak Company, General Electric Company, International Business Machine Company, Minnesota Mining and Manufacturing Company, as well as others in well-known industries. The significance of a judgment is not necessarily to be determined, however, by size of the company to which it pertains since its application to a patent holding company or to a comparatively small but patent-controlling company in an industry may change the industry pattern. The range of subjects affected by such judgments has been wide—from the well-known to the obscure.[27]

The early antitrust judgments which provided for compulsory licensing at reasonable royalties placed the government in the position of being the moving or resisting party under the procedure set up for determining reasonable royalties. As the result of its experience under the *Hartford-Empire* judgment,[28] the Antitrust Division recoiled from further similar embroilment.

The pendulum swung so far that January 1947 found the Department of Justice arguing strenuously to the Supreme Court for royalty-free licensing on the ground of the onerous burden upon the courts "to determine reasonable royalties." "In fact, in some antitrust suits where large areas of American industry are controlled patent-wise the task would seem impossible."[29] And a further argument was, "that it puts

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Trade Cas. ¶ 62236 (D. Mass. 1948); United States v. A. B. Dick Co., 4 D. & J. 3121, 1948-49 Trade Cas. ¶ 62233 (N.D. Ohio 1948).

25. Since 1949, an arrangement has existed between the Antitrust Division of the Department of Justice and the Patent Office whereby the latter is apprised of judgments affecting patents; lists of patents so affected are procured from defendants and the Patent Office makes available to the public knowledge of such patents.

26. *E.g.*, United States v. Switzer Brothers, Inc., 1952-53 Trade Cas. ¶ 67598 (N. D. Cal. 1953).

27. Among them have been cigar-making machinery; gear-finishing and cutting machines; shoe-making processes; tabulating cards; tabulating machinery and systems; electronic data processing machines; communications services and equipment; wrinkle finish enamels, paints and varnishes; metal wheels; hydraulic oil well pumps; highway crossing gates and gate activation machinery; processing color film and the equipment necessary therefor; metal abrasives; peach-pitting machinery; chlorinating equipment; venetian blinds; lamps; fluorescent lamps; natural latex and latex products; absorption refrigeration units; milling machines; tractor cabs; daylight fluorescent materials and devices; hydraulic braking systems; electrical equipment; variable condensers; telescope carts; shoe making machinery; dry ice; plastic artificial eyes, plain knit elastic top hosiery and plain knit elastic top hosiery machines; chemical products and sporting ammunition.

28. See page 313 *infra*.

29. Brief for Appellee (United States), p. 70, United States v. National Lead Co., 332 U.S. 319 (1947).

the courts squarely in the position of regulating competition in the industry and of fixing the financial terms upon which new competition can enter the industry."[30] These arguments did not persuade the Supreme Court to give the government the relief it desired. Its forebodings, moreover, have not been realized.

Since the judgment against the American Optical Company[31] in 1948, the customary compulsory licensing provision has placed the burden of litigating this issue upon the licensor and licensee—but the burden of proof as to "reasonableness" has continued to be placed upon the defendant-licensor.

The paucity of instances where the reasonableness of the royalty requested by the licensor has been litigated may be thought to reflect upon the value of the rather elaborate reasonable royalty provision found in antitrust judgments.[32] Yet their very presence may have a deterrent effect upon a licensor who would like to get what the traffic could bear.[33]

Know-how or technical information in the use of patented inventions or without such connection has been required to be made generally available by defendants.[34]

Impact on Business Dealings Outside of Patents

Even without the presence of patents, antitrust judgments have prohibited or severely limited organizations from refusing to supply goods or services to those desiring them.[35] Antitrust judgments often

30. *Id.* at 71.

31. United States v. American Optical Co., 1948-49 Trade Cas. ¶ 62308 (S.D.N.Y. 1948).

32. Since litigation is costly, the fact that the licensee rather than the government must wield a laboring oar, may to some extent account for the lack of litigation of this issue.

33. In practice, if there were a going rate before entry of the judgment that rate is likely to persist. Complaints to the government of unreasonableness of a royalty rate have been uncommon.

34. See, *e.g.*, United States v. Western Electric Co., 1956 Trade Cas. ¶ 68246 (D.N.J. 1956); United States v. Technicolor, Inc., 1950-51 Trade Cas. ¶ 62586 (S.D. Cal. 1950) (judgment against Technicolor); United States v. Technicolor, Inc., 4 D. & J. 3246, 1948-49 Trade Cas. ¶ 62388 (S.D. Cal. 1948) (judgment against Kodak); United States v. Western Precipitation Corp., 4 D. & J. 3038, 1946-47 Trade Cas. ¶ 57458 (S.D. Cal. 1946) (written information to be deposited in certain libraries).

35. United States v. Torrington Co., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68611 (D. Conn. 1957); United States v. Technicolor, Inc., 1950-51 Trade Cas. ¶ 62586 (S.D. Cal. 1950); United States v. Textile Machine Works, 1950-51 Trade Cas. ¶ 62709 (S.D.N.Y. 1950); United States v. American Society of Composers, 1950-51 Trade Cas. ¶ 62595 (S.D.N.Y. 1950); United States v. International Nickel Co., 4 D. & J. 3086, 1948-49 Trade Cas. ¶ 62280 (S.D.N.Y. 1948); United States v. Associated Press, 3 D. & J. 2658, 52 F. Supp. 362 (S.D.N.Y. 1944); United States v. Pullman Co., 3 D. & J. 2164, 1944-45 Trade Cas. ¶ 57242 (E.D. Pa. 1944); United States v. Mosaic Tile Co., 3 D. & J. 2128, 1940-43 Trade Cas. ¶ 56051 (N.D. Ill. 1940); United States v. Greater N. Y. Live Poultry C. of C., 2 D. & J. 1443 (S.D.N.Y. 1931); United States v. New

forbid or sharply curtail discrimination by a business enterprise.[36]

Businesses operating on a delivered pricing system have been required to give purchasers the option of buying f.o.b. the point of production.[37] On occasion, suppliers have also been forced to deal with buyers on the basis of the requirements of a single facility rather than with respect to the requirements of all the facilities of a buyer;[38] and buyers have been forced to deal with suppliers on an individual facility basis.[39]

While it is a common business practice to limit a distributor to a particular geographical area, a number of antitrust judgments have prohibited this practice.[40] Not infrequently, antitrust judgments prohibit or restrict exclusive dealings.[41]

England Fish Exchange, 1 D. & J. 860 (D. Mass. 1919); United States v. American Telephone & Telegraph Co., 1 D. & J. 554 (D. Ore. 1914); United States v. Aluminum Co., 1 D. & J. 395 (W.D. Pa. 1912).

In the later *Aluminum* case, an amendment to the judgment required the Aluminum Import Corporation, a subsidiary of Aluminum, Ltd.—a Canadian company—to make available for five years to nonintegrated buyers in the United States not less than 110,000 short tons of primary aluminum pig or ingot; and Alcoa was required to offer Olin Industries, Inc. specific amounts of primary aluminum pig or ingot, for a period of years. United States v. Aluminum Co., 1954 Trade Cas. ¶ 67745 (S.D.N.Y. 1954).

36. United States v. Greyhound Corp., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68756 (N.D. Ill. 1957); United States v. Shubert, 1956 Trade Cas. ¶ 68272 (S.D.N.Y. 1956); United States v. American Can Co., 1950-51 Trade Cas. ¶ 62679 (N.D. Cal. 1950); United States v. Textile Machine Works, 1950-51 Trade Cas. ¶ 62709 (S.D.N.Y. 1950); United States v. General Outdoor Advertising Co., 2 D. & J. 1372 (S.D.N.Y. 1929); United States v. Barbers' Supply Dealers Ass'n, 2 D. & J. 982 (S.D.N.Y. 1920); United States v. Great Lakes Towing Co., 1 D. & J. 260 (N.D. Ohio 1915).

37. United States v. American Can Co., *supra* note 36; United States v. Allied Chemical & Dye Corp., 3 D. & J. 2374, 1940-43 Trade Cas. ¶ 56133 (S.D.N.Y. 1941); United States v. Sugar Institute, Inc., 2 D. & J. 1518, 1932-39 Trade Cas. ¶ 55107 (S.D.N.Y. 1934). In referring to the judgment in the *Stainless Steel* case, which gave the buyer the option of buying f.o.b. mill or at a delivered price no greater than the mill price plus the actual cost of delivery, the head of the Antitrust Division, in explaining the division's policies in 1949, noted that this provision was inserted not in a belief that a delivered price system was illegal, but because it was thought to be the only way the unlawful effects of the price fixing conspiracy could be dissipated.

38. *E.g.*, United States v. American Can Co., 1950-51 Trade Cas. ¶ 62679 (N.D. Cal. 1950).

39. *E.g.*, United States v. Schine Chain Theatres, Inc., 1949 Trade Cas. ¶ 62447 (W.D.N.Y. 1949).

40. *E.g.*, United States v. J. P. Seeburg Corp., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68613 (N.D. Ill. 1957); United States v. Bendix Home Appliances, Inc., 4 D. & J. 3197, 1948-49 Trade Cas. ¶ 62346 (S.D.N.Y. 1948).

41. United States v. International Boxing Club, Civil No. 74-81, S.D.N.Y. (1957); United States v. Western Electric Co., 1956 Trade Cas. ¶ 68246 (D.N.J. 1956); United States v. Wallace & Tiernan Co., 1954 Trade Cas. ¶ 67828 (D.R.I. 1954); United States v. Association of American Battery Manufacturers, 1952-53 Trade Cas. ¶ 67631 (W.D. Mo. 1953); United States v. American Can Co., 1950-51 Trade Cas. ¶ 62679 (N.D. Cal. 1950) (requirement or supply contracts limited to one year); United States v. Libbey-Owens-Ford Glass Co., 4 D. & J. 2931, 1948-49 Trade Cas. ¶ 62323 (N.D. Ohio 1948); United States v. Standard Oil Co., 4 D. & J. 3210, 1948-49 Trade Cas. ¶ 62261 (S.D. Cal. 1948); United States v. Victor Talking Machine Co., 2 D. & J. 901 (S.D.N.Y. 19—); United States v. Great Lakes Towing Co., 1 D. & J. 260 (N.D. Ohio 1915).

On the other hand, some judgments have prohibited a company from engaging in certain types of business,[42] or have limited the amount of business which could be done by it.[43] A related type of restriction is a limitation on the number of distribution outlets.[44] Provisions prohibiting the use of a common purchasing agent have had an early genesis,[45] and a number of companies have been forbidden to act as sales agents for other companies.[46]

In one judgment, defendants were required, over a period of years, to increase the average number of establishments to which they delivered plate or sheet glass.[47] One defendant who, among other things, had protested too much, was required to abandon protests to common carriers allowing others diversion privileges.[48]

In some instances, companies have been required to dedicate their trademarks to the public,[49] or have had their rights in trademarks curtailed, with a corresponding increase in their availability to others or a corresponding diminution of their importance.[50]

Antitrust judgments often require individuals as well as corpora-

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In United States v. Greyhound Corp., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68756 (N.D. Ill. 1957), the judgment prohibited the defendant from contracting to buy all its bus requirements from one source.

42. United States v. Western Electric Co., 1956 Trade Cas. ¶ 68246 (D.N.J. 1956); United States v. Seafarers Sea Chest Corp., 1956 Trade Cas. ¶ 68298 (E.D.N.Y. 1956); United States v. A. B. Dick Co., 4 D. & J. 3121, 1948-49 Trade Cas. ¶ 62233 (N.D. Ohio 1948); United States v. Pullman Co., 3 D. & J. 2164, 1940-43 Trade Cas. ¶ 56301 (E.D. Pa. 1940); United States v. Swift and Co., 2 D. & J. 962 (D.D.C. 1920). In the last-mentioned case, Swift was forbidden to sell specified grocery products, and to have retail meat markets. At the time of this writing, there is pending an application by Swift to be relieved of this prohibition. Also see page .... *infra*.

43. United States v. International Boxing Club, Civil No. 74-81, S.D.N.Y. 1957; United States v. Schine Chain Theatres, Inc., 1948-49 Trade Cas. ¶ 62447 (W.D.N.Y. 1949); United States v. Allied Chemical & Dye Corp., 3 D. & J. 2374, 1940-43 Trade Cas. ¶56133 (S.D.N.Y. 1941). In United States v. Eastman Kodak Co., 1954 Trade Cas. ¶ 67920 (W.D.N.Y. 1954), the judgment provided for divestiture of so much of its facilities as, seven years later, would be in excess of 50% of domestic capacity for processing Eastman color film.

44. *E.g.*, United States v. American Optical Co., 3 D. & J. 2205, 1948-49 Trade Cas. ¶ 62308 (S.D.N.Y. 1948).

45. United States v. American Tobacco Co., 1 D. & J. 163, 188-89, 191 Fed. 371, 429-30 (C.C.S.D.N.Y. 1911).

46. *E.g.*, United States v. General Paper Co., 1 D. & J. 75 (D. Minn. 1906). *Cf.* United States v. Diamond Match Co., 4 D. & J. 2833, 1946-47 Trade Cas. ¶ 57456 (S.D.N.Y. 1956) (prohibition against acting as exclusive agent or being exclusive purchaser or distributor). A somewhat similar interdiction is found in United States v. General Electric Co., 3 D. & J. 2282, 1946-47 Trade Cas. ¶ 57448 (D.N.J. 1946).

47. United States v. Libbey-Owens-Ford Glass Co., 4 D. & J. 2931, 1948-49 Trade Cas. ¶ 62323 (N.D. Ohio 1948).

48. United States v. Borax Consolidated, Ltd., 4 D. & J. 2865, 1944-45 Trade Cas. ¶ 57410 (N.D. Cal. 1945).

49. United States v. A. B. Dick Co., 4 D. & J. 3121, 1948-49 Trade Cas. ¶ 62233 (N.D. Ohio 1948); United States v. Wallace & Tiernan Co., 1954 Trade Cas. ¶ 67828 (D.R.I. 1954).

50. United States v. Gamewell Co., 3 D. & J. 3175, 1948-49 Trade Cas. ¶ 62236 (D. Mass. 1948); United States v. Electric Storage Battery Co., 4 D. & J. 2916, 1946-47 Trade Cas. ¶ 57645 (S.D.N.Y. 1947).

tions to dispose of stock holdings, and such provisions are at times quite complex.[51] A judgment against the Greyhound Corporation prohibited it from purchasing commodities from any person known to it to own more than three percent of Greyhound stock.[52]

Some businessmen and their corporations have regarded state fair trade laws and the Miller-Tydings Act[53] as providing them with a charter of freedom to fix the price at the retail level of a commodity. Even that "freedom" may be curtailed by an antitrust judgment.[54] A 1911 lamp consent judgment against General Electric Company caused it in 1954 great concern because it could be construed to bar resale price maintenance agreements. Within the company's ranks, the belief that it was a bar was sufficiently persuasive for it to seek—and obtain—from the Department of Justice consent to the removal of this prohibition. While a reservation of rights under the Webb-Pomerene Act[55] is found not infrequently in antitrust judgments, a few judgments have been entered expressly taking away benefits of that act.[56]

Judgments prohibiting the acquisition of an interest in other companies engaged in the same or associated business, or the acquisition of additional facilities without prior court approval and notice to the Attorney General or Assistant Attorney General in charge of the Antitrust Division, are common, sometimes as a complement to divestiture provisions, sometimes as a substitute therefor. In practice, it is rare for a defendant merely to file an application to the court and notify the Department of Justice. For the most part, the defendant's representatives will first sound out the feeling within the department on the proposed acquisition, and more often than not will qualify or abandon the proposal if there is serious objection. The application to

51. Thus, in the *Aluminum* case, there was a separate judgment on stock disposal of 27 printed pages. This judgment provided for the appointment of a trustee. United States v. Aluminum Co., Judgment on Stock Disposal, Eq. No. 85-731, S.D.N.Y., Jan. 16, 1951.

52. United States v. Greyhound Corp., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68756 (N.D. Ill. 1957).

53. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

54. United States v. Retail Liquor Dealers Ass'n, CCH Trade REG. REP. (1957 Trade Cas.) ¶ 68751 (E.D. Tenn. 1957); United States v. United Liquors Corp., 1956 Trade Cas. ¶ 68,459 (W.D. Tenn. 1956); United States v. American Optical Co., 3 D. & J. 2205, 1949-49 Trade Cas. ¶ 62308 (S.D.N.Y. 1948); United States v. Libbey-Owens-Ford Glass Co., 4 D. & J. 2931, 1948-49 Trade Cas. ¶ 62323 (N.D. Ohio 1948); United States v. Diamond Match Co., 4 D. & J. 2833, 1946-47 Trade Cas. ¶ 57456 (S.D.N.Y. 1946); United States v. Bausch & Lomb Co., 3 D. & J. 2241, 45 F. Supp. 387 (S.D.N.Y. 1942), *modified and aff'd*, 321 U.S. 707 (1944); United States v. Ideal Cement Co., 3 D. & J. 2524, 1940-43 Trade Cas. ¶ 56199 (D. Colo. 1942).

55. 40 STAT. 516 (1918), as amended, 15 U.S.C. §§ 61-65 (1952).

56. United States v. Libbey-Owens-Ford Glass Co., 4 D. & J. 2931, 1948-49 Trade Cas. ¶ 62323 (N.D. Ohio 1948); United States v. Diamond Match Co., 4 D. & J. 2833, 1946-47 Trade Cas. ¶ 57456 (S.D.N.Y. 1946).

the court will normally follow, rather than precede, negotiations with members of the Antitrust Division.

While it is not uncommon to find companies maintaining excess capacity to deter competition, in some instances where they have run afoul of the antitrust laws this business practice has been denied them or has been severely restricted.[57]

Judgments have been framed in some cases to induce defendants to compete. Thus, a defendant has been required to promote an export business.[58]

In an endeavor to discourage price uniformity, some judgments require a defendant to review its prices and "to determine prices . . . based on its own manufacturing and overhead costs, the margin of profit individually desired and other lawful considerations."[59]

Regulation and record-keeping go hand in hand, yet only in a few instances do antitrust judgments expressly provide that records be kept.[60] However, the right of government attorneys to examine the records of a defendant in connection with the judgment is uniformly provided for, and almost always is accompanied by an obligation of a defendant to furnish relevant reports upon request of the Department of Justice.[61]

We may close this part of the article by noting that at least one antitrust judgment took notice of the ubiquitous improvident or unfortunate automobile buyer.[62]

GLASS CONTAINERS—THE HARTFORD-EMPIRE JUDGMENT

For many years prior to 1940, the glass container industry had been strictly regimented through a series of restrictive patent license agreements covering the automatic machinery necessary to make glass

57. *E.g.*, United States v. Solvay Process Co., 3 D. & J. 2607, 1944-45 Trade Cas. ¶ 57229 (D. Kan. 1944).

58. United States v. United States Rubber Co., 1954 Trade Cas. ¶ 67771 (S.D.N.Y. 1954). Among other things, this judgment required the United States Rubber Company to designate and adopt additional trademarks for use in exports distinct from certain specified ones.

59. United States v. Gold Fillers Manufacturers Ass'n, CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68760 (D. Mass. 1957). See also United States v. L. A. Young Spring and Wire Corp., 1950-51 Trade Cas. ¶ 62908 (E.D. Mich. 1951), after a decline of four consecutive months in the monthly wholesale price index of the 1954 Bureau of Labor Statistics.

60. See, *e.g.*, Wallace & Tiernan Co., 1954 Trade Cas. ¶ 67828 (D.R.I. 1954) (to keep complete and intact for 10 years orderly, classified records). See also United States v. Gamewell Co., 4 D. & J. 3175, 1948-49 Trade Cas. ¶ 62236 (D. Mass. 1948).

61. See. *e.g.*, United States v. General Electric Co., 1954 Trade Cas. ¶ 67714 at 69301 (D.N.J. 1954).

62. United States v. Chrysler Corp., 2 D. & J. 1729 (N.D. Ind. 1938) (no assignment of wages or garnishment with respect to automobiles sold for less than $1,000 for private use unless the buyer was requested to return automobile and did not do so).

bottles. Restrictions ran the gamut from type of glass container which could be made, to the number of glass containers which could be produced. Only a few major glass container companies were wholly or substantially free from such restrictions, and this freedom was the result of their conspiracy with Hartford-Empire Corporation. Almost all the automatic machinery used to make glass containers was made at the instance of Hartford-Empire, a patent holding company which licensed the machines to glass container manufacturers.[63]

The dominant members of the industry were well satisfied with the above state of affairs. While there were a number of smaller glass making companies which desired to throw off this restrictive yoke, there were others which were content to be restricted as long as they knew that others were also restricted, and that because of Hartford-Empire's patent control, newcomers would find it impossible or very difficult to enter the industry.

Into this monopoly picture came the spotlight of TNEC hearings, to be followed by a government antitrust suit.[64] The defendants were Hartford-Empire Corporation, Corning Glass Works, Owens-Illinois Glass Company, Hazel-Atlas Glass Company, Thatcher Manufacturing Company, Ball Brothers Company, Lynch Corporation, Glass Container Association of America, and a considerable number of individual defendants.

In 1942, the trial court entered a complex judgment against all defendants except some of the individuals.[65] This judgment ran to forty-seven mimeographed pages. A keystone of the decree was a provision for royalty-free licensing. Against this judgment, the defendants brought a heavy artillery of objections. The Supreme Court struck the royalty-free licensing provision and used a mattox on a number of other paragraphs of the judgment.[66]

The case went back to the trial court for further proceedings. An abortive proceeding was had before a master to ascertain "reasonable royalties."[67] Patent expert vied with patent expert. Questions of validity and scope found government attorneys without any experience upon which to draw.

All the parties were weary of the extensive litigation and made earnest efforts to agree upon a judgment which could be offered to the court by both sides. Into this situation appeared an extraordinary

63. Owens-Illinois Glass Company used some of its own machines as well as those of Hartford-Empire.
64. For a record of the proceedings see United States v. Hartford-Empire Co., 46 F. Supp. 541 (N.D. Ohio 1942).
65. *Ibid.*
66. Hartford-Empire Co. v. United States, 323 U.S. 386, *clarified,* 324 U.S. 570 (1945).
67. United States v. Hartford-Empire Co., 65 F. Supp. 271 (N.D. Ohio 1946).

body known as the Committee of Hartford-Empire Licensees. Composed of almost all of the rest of the glass container industry which were not defendants, its representatives played an active part in the negotiations which led to the judgment presented to and entered by the trial court in May 1947. This judgment comprised one hundred eighty-nine printed pages, fifty-eight of which were text. The rest consisted of a settlement agreement—the parties to which were Hartford-Empire, the Committee of Hartford-Empire Licensees, the Department of Justice; forms; and explanatory material.[68]

The judgment required the defendants to license and lease and to sell glass making machines. The judgment prohibited the repossession of leased machinery prior to the expiration of the lease except upon thirty days' notice to the Attorney General.

A number of provisions of the decree attempted to furnish definitive guides for determining a reasonable price on the sale of the machinery, as well as for single paid up royalties. The judgment gave an applicant the right to apply for a license under such patents as he desired and not merely under a package of patents. It expunged from the licenses and leases of machines restrictive provisions and prohibited their imposition upon users of the machines.

Under the judgment, for a period of ten years almost all types of future agreements[69] between the corporate defendants had to be filed with the Attorney General at least fifteen days before they could be entered into, and if objected to, a defendant could not become a party thereto without prior court approval.[70]

The judgment prohibited the corporate defendants from acquiring any measure of control over any competing firm unless with the approval of the court, after notice to the Attorney General.

The corporate defendants were enjoined from being members of a trade association for the glass container industry similar to the one which had been dissolved as a result of the suit.

Ball Brothers was required to offer for sale a plant at Three Rivers in Texas. The judgment also required Lynch Corporation to offer for sale certain assets it had acquired from another company.

Not only the judgment, but also the sensitivity of some of the defendants to the shadow of the Department of Justice over the industry —or over them—caused many troublesome problems to come to the Department's attention after the judgment. Hartford-Empire and

68. United States v. Hartford-Empire Co., 1946-47 Trade Cas. ¶ 57571 (N.D. Ohio 1947).

69. Those relating to patents, trade practices, volume or methods of production, or trade relations and to the subject matter of the judgment.

70. Excepted were agreements identical, except as to parties, dates, number and types of machinery, with agreements filed prior thereto with the Attorney General.

Owens-Illinois, perhaps the prime offenders prior to the judgment, were particularly concerned with how the Antitrust Division would regard their activities in the future.

An early problem, never satisfactorily resolved as contemplated by the judgment, was the disposition by Owens of assets of the Kimble Glass Company at the latter's Chicago Heights plant. Owens, which had acquired Kimble, was obligated to offer the assets for sale for a three-year period. A court-appointed appraiser, who had been agreed upon beforehand by counsel for Owens and counsel for the government, made an appraisal of the property which government attorneys felt was out of line as too high to induce a newcomer to come into the glass container industry through the medium of such purchase. Questions arose as to whether improvements made by Owens had to be paid for, and whether a would-be purchaser would have an opportunity to buy the improvements. Conferences were had on such matters as depreciation schedules. There were several inquiries by prospective purchasers, but none was willing to pay the appraised value. No glass company ever did purchase the assets.

After the Glass Container Association was dissolved, a number of the smaller glass companies thought they needed an association. They also felt such an association had to be able to have some contacts with the larger companies who were subject to the Hartford-Empire judgment. Conferences with representatives of the government led to several modifications in the original proposals for such association, but also led to the creation of a Glass Container Institute. At the government's insistence, an appreciable time interval was required between the time of the receipt of statistical information by the Institute from its members and the issuance of compilations of such information by the Institute. This question of time interval was the subject of discussion on several subsequent occasions in 1948 and 1949 between representatives of the Antitrust Division and the Institute. In February, 1949, an amendment reduced the time lag from two months to twenty days.

Questions arose as to whether certain patents acquired by a defendant after the judgment came within the definitions in the judgment.

In 1948, Hartford-Empire raised with the Antitrust Division the matter of reclaiming machinery in possession of a trustee of a glass company which was in receivership. The matter was agreeably resolved by the court's granting the trustee additional retention time under an agreement with Hartford-Empire; the latter agreed to notify the Department of Justice before asserting rights in the machinery. This act of benevolence, however, did not save the life of the company.

New royalty charges proposed by Hartford met with no opposition and received court approval in February, 1948. In April, 1948, with the consent of the Department of Justice, the court entered an order with respect to engineering service charges by Hartford-Empire.

In 1948, Ball Brothers took up with the Department of Justice their contemplated leasing of the Chattanooga Glass Company plant in Jacksonville, Florida. The Department contacted a substantial number of other glass companies to ascertain whether they would be interested in the plant and if not, what competitive effect they thought Ball's acquisition would have. The responses varied from indifference—the majority—to mild opposition. In October, 1948, Ball Brothers was permitted by the court to lease the plant in Jacksonville.

In December, 1949, Hartford-Empire gave notice of its intention to change the royalty rates with respect to the licensing of its class 81 feeder, "a future type machine." It desired to fix the same rates as it had with respect to previous types of feeders, but to make the rate applicable to all types of glassware made on the new feeder. This change would affect principally fruit jar manufacturers. The rates would apply to stoppers, caps, lids, and/or liners, bulbs and balls and marbles. Prior thereto, no royalties had been charged as to the first four, and different royalties as to the last three.

Government attorneys wrote to a number of glassware companies asking if they had any objections or comments to make with respect to Hartford-Empire's proposal. No one objected.

In 1950, Corning Glass Works wanted to acquire the assets of Anchor-Hocking Company. The Department of Justice refused to approve such acquisition and opposed it. The acquisition was not made.

In 1948, pursuant to the judgment, Hartford-Empire filed with the Department of Justice a draft of a proposed agreement with respect to Owens' M lehr loader, and another proposed agreement with Owens-Illinois involving an Owens automatic decorating machine.[71] These proposed agreements were the subject of many conferences between representatives of the two companies and representatives of the Antitrust Division. The Division sent out letters to glassware machinery manufacturers inquiring whether others besides Hartford-Empire desired to receive from Owens-Illinois, at a price, drawing, etc. of the lehr loader. A number of companies expressed an interest. Contact with Owens-Illinois was arranged, but none entered into an agreement with Owens.

Proposed acquisitions by defendants in the case caused the Department of Justice no less involvement and trouble than required dis-

71. It is of interest to note that out of an abundance of caution, agreements were sent to the Department of Justice even when thought by the defendants not to come within the judgment.

positions of property by the defendants. Owens-Illinois' proposed acquisition of Sharpe, Inc. posed a by no means clear-cut problem of whether the acquisition was covered by the judgment.

In 1950, Hartford-Empire proposed ten modifications of the decree. One dealt with the price at which Hartford-Empire was to sell its machines. Some of the other changes proposed were major, some were minor. The Department of Justice thought it should get the views of the licensees before reaching a decision as to what position to take on the application. From at least one licensee there was strong objection. The Committee of Hartford-Empire Licensees, which was still in existence, also voted to disapprove and object to the company's application. Several conferences later, agreement was reached with Hartford-Empire, and a much watered-down amendment was approved by the court.

In 1951, two of the defendant companies were allowed to become members of the Glass Container Manufacturer's Institute.

In November of 1951, Thatcher Glass Manufacturing Company was permitted to acquire the McKee Glass Company, without objection from the Department of Justice.

In 1952, Hartford-Empire gave notice of additional charges for its I. S. machine paste mold attachment. Its application to the court contained the statement that, "The license fee and royalty referred to herein have been submitted to and approved by the Committee of Hartford-Empire Licensees."

In 1953, Owens-Illinois proposed to acquire the Plax Corporation for $9,000,000. Over the government's objection, the court held that the judgment did not prohibit the acquisition.

By 1954, no one had evidenced a serious interest in acquiring Ball Brothers' plant in Three Rivers, Texas. In that year, this defendant applied to the court for permission to sell its plant to someone for scrap and real estate purposes. The Department initially objected to this application, but subsequently withdrew its objection. Approval was given by the court.

In 1954, Hartford-Empire gave notice of a change in charges for servicing and with respect to license fees for feeders and for its 128 machine. In the absence of protest from the licensees and the Department of Justice, these changes were allowed by the court. That year, there was also an unobjected-to amendment to the judgment with respect to the term of Hartford-Empire's stacker licenses and leases.

In the same year, on notice to the Department of Justice, Hartford-Empire wrote to the Committee of Hartford-Empire Licensees asking the Committee to meet and consider a proposal to ask the court's approval to establish a fee for certain new machines and to change the

fee for certain other machines. Approval by the court followed approval by the Committee.

The long-lived Committee of Hartford-Empire Licensees as late as December, 1955, was meeting with Hartford-Empire, in Miami, discussing research on an industry-wide basis.[72]

Prior to the judgment, Hartford-Empire had never sold, but only leased and licensed, its machines. By 1949, it could be said with respect to the option in the judgment to buy or lease, that the greater majority of feeders had been purchased outright, while most of the other machinery continued to be leased. As of March 1950, eighty percent of the feeders had been sold, forty to fifty percent of the I. S. formers, and practically no lehrs.

Another marked effect of the judgment was the entry of Anchor-Hocking Glass Corporation, Knox Glass Bottle Company, and the Brockway Company into the manufacture of fruit jars, which prior to the suit had not been available to them.

While not customary, the extent of the government's participation in the glass container business as the result of the Hartford-Empire judgment was not unique, but the presence and the activities of the Committee of Hartford-Empire Licensees, which could be traced back to the judgment, has no precedent so far as this writer knows.

Motion Pictures—The Paramount Case

The wonderful land of make-believe, sometimes known as motion pictures, has had a history of antitrust litigation unmatched by any other industry. Most of such suits, it has taken as a matter of course. Not so, the antitrust action brought by the federal government in 1938. Not until 1945 did this case, known as the *Paramount* case,[73] come to trial. Defendants were the eight leading motion picture companies: Columbia, Fox, Loew's, Inc.—often called Metro—Paramount, RKO, United Artists, Universal, and Warner Brothers. Five of these companies not only produced and distributed motion pictures, but also had large chains of motion picture theatres.

The primary relief sought by the government was the separation of the exhibition interests from the production and distribution side of the integrated companies, and divestiture of theatres in localities where competition was absent or insubstantial. The case was tried before a special three-judge court.

The court found a violation of the Sherman Act on the part of all

72. By this time, Hartford-Empire had itself become part of Emhart Company. This made little difference in the enforcement of the judgment.

73. United States v. Paramount Pictures, Inc., 1946-47 Trade Cas. ¶ 57526 (S.D.N.Y. 1946).

the defendants. Typically, it received proposed judgments from the parties. Atypically, the key provision in the judgment entered by it on December 31, 1946, was a creation of its own concoction. This provision established an elaborate system of licensing feature films through competitive bidding.[74] No divorcement or divestiture was required except with respect to pooling agreements and joint interest pertaining to motion picture theatres. It had other provisions of varying strength and ran to thirteen mimeographed pages.

To the pained astonishment of the court, the chorus of condemnation for its competitive bidding provision extended even beyond the defendants, although here and there it had a friend—the government was not one such and felt keenly that the judgment was inadequate. All parties appealed to the Supreme Court. The Court handed down a decision which disapproved certain parts of the judgment, including the competitive bidding provision.[75] It suggested that the trial court reconsider its approach to the problem of entering an adequate judgment, but did not tell that court what kind of judgment it should enter.

By the time the case went back to the trial court in 1948, its youngest member had died. His replacement made the court a tribunal of oldsters, none of whom was under seventy. It was still headed by the redoubtable, but sharp-tongued, Augustus Hand.

While both sides were preparing for further proceedings before the trial court, RKO began negotiations for a consent judgment, prodded by its controlling stockholder, Howard R. Hughes, a controversial figure on the American business scene.

A consent judgment was entered against RKO on November 8, 1948.[76] It ran to 22 printed pages. It was the mildest of any of the judgments to be entered in the case, but at the time it was difficult to prophesy what kind of judgment the court might fashion without the consent of the parties. Like the original judgment, it forbade minimum admission price fixing and the imposition of unreasonable clearance between theatres (time interval between runs of pictures). As to the latter, in case of dispute, a burden of justification was placed upon the distributor.

Prohibitions against "formula deals"[77] and "master agreements"[78]

74. *Id.* at 58399.
75. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).
76. United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 62335 (S.D.N.Y. 1948).
77. The term "formula deal" means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a special percentage of the feature's national gross.
78. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

were identical with those in the original judgment, as were prohibitions against licenses in which the right to exhibit one feature was conditioned upon the licensee's taking other features. Where the license covered more than one feature which had not been preshown to the trade prior to the license, the judgment required that the licensee have the right to reject twenty percent of such features.

A prohibition against long-term franchise agreements with exhibitors was similar to that of the former judgment except for the addition of a provision required by the decision of the Supreme Court, namely, an exception to enable independent theatres to operate a theatre in competition with a theatre affiliated with a defendant.

The judgment contained prohibitions like those of the former judgment against pooling agreements and joint theatre interests, but without the trial court's implementation provisions. The judgment permitted one defendant to acquire the joint interest of another defendant upon application to the court if the latter found the acquisition would not unduly restrain competition in the exhibition of feature motion pictures. The original judgment had extended this privilege to joint interests of independent theatre owners.

Like the original judgment, acting through a common agent was prohibited. The judgment prohibited future theatre acquisitions unless the court found the acquisition would not unduly restrain competition in the exhibition of feature motion pictures. This was a substitution for a prohibition against extension of its present theatre holdings. Joint interests in some two hundred eighty designated theatres had to be severed. RKO was permitted to acquire the full interest in thirty of such theatres, but only four of which could be in New York City. The only wholly-owned theatres RKO was required to dispose of were two first run theatres in Cincinnati, Ohio.

The judgment provided for a New Theatre Company and a New Picture Company, to be wholly independent of one another after a year from the date of the judgment. Nothing in the judgment was to limit RKO, during the year or prior to reorganization to favor its own theatres with RKO pictures. Howard Hughes, in recognition of the problem of his holding twenty-four percent of the stock in RKO, expressly consented to dispose of his stock in either the New Picture Company or the New Theatre Company within a year, or trustee his stock until it was sold.

The entry of RKO's judgment did not halt the efforts of all the other parties to have the trial court enter a judgment most favorable to each of them, but it was undoubtedly a cause for Paramount to institute negotiations for a consent judgment. Paramount's theatre interests extended to almost 1500, many of which they held together

with large local circuit partners. The consent judgment entered against Paramount on March 3, 1949, comprised seventy-eight printed pages, not including a separate agreement of several pages, filed at the same time and treated as part of the judgment.[79]

In addition to the trade practice provisions in the RKO judgment, the Paramount decree contained a paragraph which was to become the key unifying provision in all the motion picture judgments. This paragraph 8 prohibited Paramount, "From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."[80] This paragraph was an amalgamation of two provisions in the initial judgment of 1946.

The Paramount judgment contained elaborate provisions for severance of joint interests, with varying timetables, the maximum of which was three years. Paramount was also required to dispose of one or more theatres, as specified, in numerous designated cities, but only in a very few instances were the theatres designated by name. Up to twelve of such theatres could be leased or sub-leased if a sale on reasonable terms could not be made. In a few cities, Paramount had the choice of limiting itself to one first run theatre.

The judgment greatly limited Paramount's acquisition of theatre interests during the time it was to make the required disposition of theatres under the decree. The judgment provided for a New Picture and a New Theatre Company to be independent of one another. It had elaborate provisions for the trusteeing of the stock of the New Theatre Company. Stockholders were to get certificates of interest and to be paid fifty per cent of the dividends, but if fifty-one per cent of the shares of stock were not released by the trustee to nonholders of stock of the New Picture Company within two years, he was to withhold one hundred per cent of the dividends. Provision for termination of the trust upon a reduction to one-third of the stock in the hands of the trustee was provided for.

As the result of the trial court's opinion in July 1949,[81] both sides again submitted proposed judgments to it. The judgments entered against Columbia, United Artists, and Universal contained trade practice provisions similar to those in the Paramount judgment. Those against Fox, Loew's, Inc., and Warner required the submission of plans of divorcement and divestiture.[82] The latter three defendants

79. United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 62377 (S.D.N.Y. 1949).
80. *Id.* at 63011.
81. United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 62473 (S.D.N.Y. 1949).
82. See, *e.g.*, United States v. Loew's, Inc., 1950-51 Trade Cas. ¶ 62573 (S.D.N.Y. 1950).

appealed to the Supreme Court, as did the government. But, by the time of the affirmance of the lower court's judgment in June of 1950,[83] consent judgments with respect to specific joint interests and pooling agreements had been entered, and Warner was in the process of negotiating a consent judgment with one eye windward toward the Supreme Court.

After more than a year of negotiations, judgments were entered against Warner,[84] Fox,[85] and Loew's.[86] The major additional provisions in the judgments against these three defendants were (1) the "sword of Damocles" provision which, in some instances provided for a defendant to be limited in its right to license pictures for its theatres, if a competitor was denied a reasonable opportunity to acquire pictures from the major distributors; and in some other instances provided for an automatic requirement to dispose of additional theatres or take a product limitation if, by a certain time, inadequate competition existed; and (2) a prohibition against the New Picture Company entering into the exhibition business and against the New Theatre Company entering into distribution of pictures without consent of the court.

The judgments entered in these cases ran over four hundred pages. They had a direct effect on competition in several hundred cities and towns, and a substantial indirect effect wherever motion pictures were shown.

The problems that arose in connection with these judgments were, in the annals of the Antitrust Division, unique in number and complexity. This article can touch upon only a few. Since 1949, there has been no time when the Division has not had several problems to wrestle with which have stemmed from the judgments. About two hundred sections of correspondence on the average of one and one-half inches in thickness have been spawned from the judgments. For one lengthy period, at least one-third of the entire correspondence of the Antitrust Division was in the motion picture field. Amendments to the judgments have exceeded the original judgments in size. In number, they have been legion. While many of them have been with respect to extensions of time, numerous ones have dealt with other matters.

The industry was in the process of change induced by the growth of television, drive-ins, and other innovations. Representatives of the defendants have trod a well-beaten path to the offices of the

83. Loew's, Inc. v. United States, 339 U.S. 974 (1950).
84. United States v. Loew's, Inc., 1950-51 Trade Cas. ¶ 62765 (S.D.N.Y. 1951) (consent judgment against Warner).
85. United States v. Loew's, Inc., 1950-51 Trade Cas. ¶ 62861 (S.D.N.Y. 1951) (consent judgment against Fox).
86. United States v. Loew's, Inc., 1952-53 Trade Cas. ¶ 67228 (S.D.N.Y. 1952) (consent judgment against Loew's).

Antitrust Division, and by letter, telephone, telegraph, and in person, exhibitors have sought the help of the Division with respect to enforcing the non-discriminating licensing provisions of the decree.

At an early date, Judge Hand, on behalf of the three-judge court, indicated his distress at having to convene the court from time to time to decide judgment problems. This attitude subsequently led to the designation of a single judge to hear all matters arising out of the Paramount judgment.

An early problem, born out of the Warner judgment, was whether the landlord of the Warner Theatre on Broadway, who had had the lease guaranteed by the parent corporation, could insist upon a guaranty by both the New Picture and New Theatre companies. That question was answered in the negative by the Supreme Court.[87]

In arguing against an anti-discrimination provision, counsel for Universal had asserted: ". . . discrimination could be claimed in every connection—in connection with film rental, in connection with runs, in connection with every form of contract and you would need an Interstate Commerce Commission to administer any such injunction."

Since that time, many such claims have been made, but it has been the exception rather than the rule for the Division to have any real difficulty as to which claims deserved discussion with the distributor or distributors complained of. Decisions in such matters were reached far sooner than in the case of matters submitted to the Interstate Commerce Commission.

Extensions of time to comply with the judgment were frequent. Five years after the judgment against Loew's had been entered, separation into a New Theatre and a New Picture Company—independent of one another—had not taken place. Said Judge Palmierie in March of 1957, upon request by Loew's for a further extension:

"I am dismayed that so much time has already passed without definite solutions and short of the accomplishment of total compliance with the Consent Decree. But I do not wish to imply that more could have been accomplished during the time that has passed since the entry of the Consent Decree. Any conclusion in this regard must necessarily await a thorough study of the problems which remain to be solved."[88]

The court thereupon appointed a special consultant and two directors of the New Theatre Company. Actually, at the end of the prescribed period, the government had refused to consent to a further extension, and the court turned down a proposed order by Loew's for separation.

87. Sutphen Estates v. United States, 342 U.S. 19 (1951).
88. United States v. Loew's, Inc., Civil No. 57-286, S.D.N.Y., March, 1957.

It may be noted that in the case of a number of defendants, after initial extensions of time to dissolve joint theatre interests, subsequent extensions were consented to upon conditions designed to discourage additional requests for extensions of time. In a number of instances, the problems involved—either because of their magnitude or because of change of circumstances—made it difficult for the Department of Justice to demand its pound of flesh. On the other hand, the writer is convinced that in many instances, requests for extensions of time were based upon a belief that it would be less profitable to comply with the decree within the prescribed time than at a later date. And, such extensions might well penalize the timely complying defendant and give a premium to the more dilatory one who would point to a change in conditions which had occurred after the decreed time of compliance. On a few occasions, the Justice Department did resist applications for extensions of time with partial success. One such instance, engendering a major court battle, found minority stockholders of RKO, discontented with Howard Hughes' control of the company, opposing RKO's application for a three-year extension to split into two companies.

How changed conditions, a desire to effect greater relief, or the possibility of achieving the result desired in a different way, could lead to a modification which did not give *carte blanche* to a defendant is reflected in the following amendment to the Paramount judgment:

An order of April 17, 1952 *re* United Paramount Theatres, Inc. provided that if United Paramount did not acquire its co-owner's interest in either of two specified theatres in Springfield, Mass.,

> it may acquire the interest of the co-owner or co-owners, in accordance with the provisions of sub-paragraph (b) of Section III A 9 of the Consent Judgment, in two theatres in Springfield, Mass., provided, however, that in the event more than one theatre in Springfield in which United Paramount has an interest plays first run, upon the request of the Attorney General or Assistant Attorney General in charge of the Antitrust Division, United Paramount shall within 60 days of the request dispose of either the Broadway or Paramount Theatres, at its option, if it has had an interest in the operation of Broadway when it played first run. It shall also cease to play first run pictures at the Broadway within thirty days after said request.[89]

Other provisions in this amendment also required United Paramount, upon certain contingencies, to take steps to diminish its competitive powers in Springfield upon the request of the government.

Applications by the defendants for permission to acquire theatres have caused the Antitrust Division considerable work. It had been

89. United States v. Paramount Pictures, Civil No. 57-286, S.D.N.Y., April 17, 1952.

the practice of the Division to contact nearby exhibitors to ascertain how they feel toward the proposed acquisition and to notify them that they could be heard in opposition at a court hearing if desired. For a number of years, where there was no opposition, the government attorneys merely signed "Not objected to" at the foot of a proposed order drafted by the interested defendant, and there was no actual hearing. More recently, the government has preferred to have all such applications heard by the court. On at least one occasion, when the Division did not object to a proposed acquisition, the court was persuaded not to grant the application by arguments by competing exhibitors.[90]

A recurrent problem, which has been most troublesome to the Department of Justice, is whether, when a distributor releases an unusually popular picture and asks such high terms for it that to make a profit the exhibitor must raise his normal admission prices, that is minimum admission price fixing under the decree.

The split-up between the Skouras and RKO theatres in New York City in 1949 did not take place until after litigation in the state courts and the appointment of an appraiser.

The entry of the judgment against Paramount, with its stock provisions, evoked a chorus of angry letters from stockholders whose consciences had not been bothered by receipt of monopoly profits, but whose emotions erupted when forced to choose between the New Picture Company and the New Theatre Company. Wrote one such stockholder: "By swapping one corporation for two, you are greatly increasing the cost of management. . . . Was it part of a plan to socialize this country?" As a parting shot, he noted: "We no longer live in the 19th century." As time passed, amendments were made to the Paramount judgment so as to take shareholders of not over five hundred shares of stock out of the terms of the trust.

Both in the case of RKO and Loew's, a major problem with respect to splitting into two companies lay in their sizeable indebtedness to financial institutions.

When Howard Hughes' stock in the New Theatre Company was trusteed to a prominent New York City financial institution, the Department of Justice attorneys found themselves less than happy with what they considered too much deference to the desires of Howard Hughes, and too little concern with the terms and intent of the trust. An attempt by the government to remove certain directors of the New Theatre Company because of their direct or indirect connection with Hughes was only partially successful. An attempt by the government to compel a sale of the stock was successful in the

90. See note 88 *supra.*

lower court, but reversed in the Supreme Court.[91] The stock was finally disposed of to third parties.

On several occasions, the question of whether a joint theatre owner should not be considered an actual or potential exhibitor had to be resolved by attorneys for the government. Such resolution was neither always difficult nor always easy.

The matter of the disposition of RKO's stockholdings in Metropolitan Playhouses, Inc., and in Gifts, Inc. became a thorny point. Brought before the court, the tribunal appointed a trustee to dispose of the stock. The trust was to last no longer than two and a half years. As far as the writer knows, the Metropolitan Playhouses, Inc. stock has still not been disposed of, and the trust still obtains. Whether the trustee and the government have been active enough on this score is a matter of opinion.

With respect to one joint interest of Warner, involving a number of theatres in New Jersey, a letter from the Department of Justice written in May of 1950 noted that, "We have now had ten or more conferences with you and the Amsterdams in connection with this matter." At least an equal number of conferences were had subsequently before this matter was resolved. One amendment to the Warner judgment with respect to that same matter ran to nine pages.

In 1950, an important amendment to the Paramount judgment permitted United Paramount to sublease theatres as a method of disposition under stringent conditions as to when it could do so, as well as to the terms which must be in the sublease.[92]

In May of 1950, United Paramount sent the Antitrust Division an agenda of ten important matters its representatives desired to discuss with representatives of the division. The discussion that ensued actually covered sixteen problems of importance.

Easily high up among the major amendments to any of the judgments was one which occurred in 1950. The Paramount judgment had set a top limit to the number of theatres which could be retained by Paramount. However, since the joint partners of Paramount had not been made defendants in the suit, the judgment did not provide for divestiture to third parties of theatres jointly held. The largest of Paramount's partnership chain was known as the Interstate Circuit which operated in many cities in Texas where it had complete or partial monopoly of exhibition. It had been contemplated that the partner would buy out United Paramount. United Paramount and its partner had difficulty in reaching any agreement as to dissolution of the joint interest. United Paramount then proposed that it be permitted to purchase its partner's interest and to make a general shift

91. Hughes v. United States, 342 U.S. 353 (1952).
92. See note 89 *supra*.

of its theatre interests so as not to have more than the prescribed total. United Paramount was also willing to discuss with the division what Interstate theatres it should sell to break up monopoly situations. This proposal did not meet with unanimous approval within the Antitrust Division, but the opportunity to open up many non-competitive situations in Texas was too persuasive to resist. After lengthy negotiations, an amendment to the Paramount judgment was adopted which, with respect to the Interstate theatres, adopted many of the provisions contained in the judgments entered after the one against Paramount.

Certain officials in some of the defendant companies were found to have theatre interests which the government felt were inconsistent with the objectives of the judgments. Separate agreements were entered into by such officials to eliminate such interests. Since, in some instances, the value of the investment was considerable, some of the agreements were complex. In one instance, disposal of common stock led the Division to take a more lenient view with respect to problems involved in the disposition of preferred stock.

Some of the defendants were never willing to accede to the government's view that the theatres required to be disposed of had to be sold or leased for motion picture purposes. There were some, but comparatively few, instances where this was not done. Judicial decision on this question seems never to have been sought by the Division, although with respect to Lakeland, Florida, the government successfully argued to the court that in order to have competition there, United Paramount should divest itself of a large theatre rather than the smaller one it proposed to sell.

A sale of Howard Hughes' stock in 1952, followed shortly by its return to him, caused a flurry of activity with respect to the trust agreement.

The merger of the American Broadcasting Company with United Paramount necessitated an amendment to the voting trust provisions of the Paramount judgment.

In 1953, the take-over by Fabian and Rosen, theatre operators, of the Warner Theatre interests required much negotiation and an order requiring disposal of certain theatres.

One of the more important matters brought to the attention of the Department of Justice took place in 1953. This was the Cinerama deal. Said the application to the court by the Fabian interests:

> Your petitioner seeks an order of this court permitting your petitioner to obtain and exploit a license under the patented so-called Cinerama Process to distribute and exhibit, as well as produce, a new type of motion picture, and to acquire for this purpose a limited number of theatres. Such license and acquisitions are subject to stringent limitations

> and conditions prescribed by the Department of Justice and accepted by your petitioner.

And later,

> The Department took the position that it would only permit integration and exclusivity for a limited period, namely until December 31, 1958, in order to create an incentive upon the part of your petitioner to commit its financial and manpower resources to develop this process, that after December 31, 1958, your petitioner would be confined to exhibition and after December 31, 1960, would be prohibited from distributing Cinerama pictures produced by it. . . .

These were not the only limitations. In 1954, an amendment permitted RKO to sublease a theatre to its Stanley Warner Company in Cincinnati to show Cinerama. A condition for consent as to the amendment was that RKO agree to sell another theatre in Cincinnati if more than three of its theatres there played first run features.

Not the most important, but perhaps the most amusing, matter arising out of the Paramount judgments occurred with respect to a theatre in Brooklyn, New York, which Loew's judgment required to be divested. Shortly after the judgment was entered, Loew's requested permission to sell the theatre to a Negro revivalist group, which had been using the theatre for spiritual purposes. The Government took the position that it was intended that the theatre be sold for motion picture purposes. A congressman from Brooklyn then intervened to have the government consent to the proposed sale. The Department held to its position. Counsel for Loew's then requested an opportunity to come to Washington to confer concerning the matter. A date for the conference was set, to be held in the office of the member of the Antitrust Division in charge of motion picture matters. Came the day of the conference. At the appointed time, the door of the office opened to disclose counsel for Loew's with a delegation of people. The latter were members of the congregation. Hastily, the conference was reconvened in the more spacious quarters of the conference room. As the government's attorney turned to counsel for Loew's to open the conference, one of the delegation held up his hand and said, "Let us pray." While counsel for the government had thought they were accustomed to meet with all kinds of opponents and arguments, they were not prepared to have the Diety entered into the lists against them. We leave the reader to wonder at the up-shot of this conference.

Conclusion

In sum, antitrust judgments contain a great number of "thou-shalt-nots" for businessmen. Individually, they are tailored to the offenses

charged and to the particular industry with which they are concerned. And, no matter how regulatory antitrust judgments may be, it seems generally true that the leaders of an industry, brought to the bar under the antitrust laws, continue as leaders despite the judgment. To them, this may justify their stout resistance to divorcement and divestiture remedies. Yet, on the other hand, opportunity to compete and the continued existence of competitors are often directly traceable to a regulatory decree.

Many a judgment needs little policing. And, many a judgment gets little policing because of lack of manpower or lack of funds. Where the Antitrust Division does act to carry out a judgment, however, in the writer's opinion, it acts with no less expertise, objectivity and expedition than agencies established to regulate industry.