THE CURTAIN RISES ON CONSENT DECREE MODIFICATION IN THE THEATRE INDUSTRY: *UNITED STATES v. SHUBERT*

I. INTRODUCTION

The consent decree[1] has long served as both settlement device[2]

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[1] A consent decree has been defined as an "order of the court agreed upon by representatives of the Attorney General and of the defendant, without trial of the conduct challenged by the Attorney General, in proceedings instituted under the Sherman Act, the Clayton Act, or related statutes." ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT PURSUANT TO H. RES. 27 AUTHORIZING THE COMM. ON THE JUDICIARY TO CONDUCT STUDIES AND INVESTIGATIONS RELATING TO THE CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE ix (Comm. Print 1959) [hereinafter cited as Committee Print], *cited in* Note, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L. REV. 296, 296 n.1 (1977) [hereinafter cited as Note, *New Approaches*]. This Comment discusses consent decrees which are entered by federal courts in proceedings initiated by the Justice Department [hereinafter referred to as the government].

Consent decrees have been described as both judicial contracts, *see, e.g.*, Rheinstrom Bros. v. Societa Nazionale Di Navigazione, 73 F.2d 40, 41 (2d Cir. 1934); United States v. Radio Corp. of Am., 46 F. Supp. 654, 655 (D. Del. 1942); United States v. Hartford-Empire Co., 1 F.R.D. 424, 426-28 (N.D. Ohio 1940); and as "consent judgments," *see, e.g.*, Willie M. v. Hunt, 657 F.2d 55, 59 (4th Cir. 1981); Watson v. United States, 34 F. Supp. 777, 780 (M.D.N.C. 1940).

There are many incentives for defendants to enter into a consent decree. For example, provisions found in a consent decree cannot be used as prima facie evidence in subsequent treble damage actions initiated by private litigants. Clayton Act, ch. 323, § 5, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 16(a) (1976 & Supp. V 1981)). *See* Taubman, *The Performing Arts and the Antitrust Laws*, 43 CORNELL L.Q. 428, 430 (1958); P. MARCUS, ANTITRUST LAW AND PRACTICE, § 400, at 738-44 (1980). Annot., 10 A.L.R. FED. 308 (1972). For a general discussion of the advantages of the consent decree, see 13 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION §§ 91.09[1], 96.01[1] (1979); A. STICKELLS, FEDERAL CONTROL OF BUSINESS-ANTITRUST LAWS § 183, at 683-90 (1972); Isenbergh & Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386, 390-93 (1940); Note, *The Modification of Antitrust Consent Decrees*, 63 HARV. L. REV. 320, 321 n.12 (1949); Note, *The Consent Decree In Antitrust Administration*, 53 HARV. L. REV. 415, 418 (1940).

[2] The consent decree has been used as a means of settling antitrust suits brought by the government since the early 1900's. *See* Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 MICH. L. REV. 1051, 1051 n.2 (1958). By 1973, approximately eighty percent of the cases that ended in settlement did so via the consent decree. Note, *Nonparty Enforcement of Antitrust Consent Decrees Through Contempt Proceedings*, 64 GEO. L.J. 769, 769 (1976). *See* H.R. REP. No. 1463, 93rd Cong., 2d Sess. 6, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6535, 6536. For examples of consent decrees used for the resolution of antitrust suits, *see, e.g.*, Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 YALE L.J. 1391 (1959); Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163 (1976); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967).

Provisions found in consent decrees have traditionally been the product of confidential negotiations between the defendant and the government. The decree contains neither admissions nor any factual background. *See* D. WALDMAN, ANTITRUST ACTION AND MARKET STRUCTURE 131 (1978); Note, *New Approaches*, *supra* note 1, at 296 n.4; Note, *The Consent Decree in Antitrust Administration*, *supra* note 1, at 419-20, 420 n.15. Congress has, however, given courts a greater

and enforcement tool in antitrust actions brought by the government.[3] Since their first widescale use in the early part of this century,[4] consent decrees have been subject to the standards for modification enunciated by the Supreme Court in *United States v. Swift & Co.*[5]

Speaking for the *Swift* Court, Justice Cardozo stated that a consent decree containing perpetual restrictions could be modified only upon a showing that changes in a defendant's competitive market position were so great that the once substantial threat of monopolization had become "attenuated to a shadow."[6] Accordingly, a contested application for modification of a consent decree will be granted only if defendants demonstrate that "new and unforeseen conditions" have transformed the decree into an unwarranted handicap.[7]

In cases where both the government and the defendant agree to modification, some courts[8] have expanded the *Swift* standards by

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role in determining what provisions are in the public interest. *See* Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, §2, 88 Stat. 1706 (1974) (current version at 15 U.S.C. § 16(b-h) (1976)). *See infra* notes 167-72 and accompanying text.

[3] For the purpose of this Comment, "antitrust actions" are proceedings instituted under the Sherman Antitrust Act, ch. 647, §§ 1; 2, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1, 2 (1976 & Supp. V 1981)). *Cf.* Committee Print, *supra* note 1, at ix (consent decree defined more broadly to include the Clayton Act and related statutes).

[4] One of the first consent decrees was entered in United States v. Otis Elevator Co., Equity No. 13884 (N.D. Cal. 1906). *See* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, ANTITRUST CONSENT DECREES 1906-1966, COMPENDIUM OF ABSTRACTS xi-xiii, 209-10 (1968); 1 T. LINDSTROM & K. TIGHE, ANTITRUST CONSENT DECREES 1 (1974). *See also* Kramer, *supra* note 2, at 1051 n.2.

[5] 286 U.S. 106 (1932).

[6] *Id.* at 119.

[7] *Id. Cf.* Kramer, *supra* note 2, at 1055-56 (based on the *Swift* opinion and other decided cases, the author suggested the following test for terminating consent decrees which contain provisions imposing continuing injunctions: the defendant must prove to the court that "(1) the conditions giving rise to the injunction have substantially changed; (2) it is clear that the injunction is no longer necessary to obtain defendant's obedience to [antitrust] law; and (3) the injunction constitutes a serious handicap to the defendant" and his ability to compete). *See also* Peterson, *Consent Decrees: A Weapon of Anti-trust Enforcement*, 19 UMKC L. REV. 34, 35-37 (1949). *Compare* FED. R. CIV. P. 60(b)(5); 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 60.26[4] (2d ed. 1982) (relief from a judgment having perpetual application) *with* Kramer, *supra* note 2, at 1053 (author contended that "[R]ule 60(b)(5) offers little guidance in determining the circumstances under which an antitrust consent decree may be modified").

[8] Several courts have granted uncontested motions for the modification of consent decrees on a pro forma basis. *See, e.g.*, United States v. Culbro Corp., 1980-1 Trade Cas. (CCH) ¶ 63,692 (S.D.N.Y. 1981); United States v. Swift & Co., 1980-1 Trade Cas. (CCH) ¶ 63,185 (N.D. Ill. 1980); United States v. Aerofin Corp., 1979-1 Trade Cas. (CCH) ¶ 62, 598 (S.D.N.Y. 1979); United States v. United Fruit Co., 1978-1 Trade Cas. (CCH) ¶ 62,001 (E.D. La. 1978); United States v. Libbey-Owens-Ford Glass Co., 1974-2 Trade Cas. (CCH) ¶ 75,141 (N.D. Ohio 1974); United States v. American Cyanimid Co., 1974-1 Trade Cas. (CCH) ¶ 74,950 (S.D.N.Y. 1974); United States v. Kelsey-Hayes Co., 1974-2 Trade Cas. (CCH) ¶ 75,391 (E.D. Mich. 1974).

applying a "public interest test."[9] This test requires the court to make an independent determination of the propriety of the proposed alteration and to insure that the modification enhances competitive economic activity.[10]

While a court may consider the position agreed to by the parties, inherent in both the *Swift* and public interest standards is the understanding that the court must make an independent determination[11] which balances the equity of perpetual restrictions[12] against the public's interest in competition.[13]

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[9] For the purpose of this Comment, the "public interest test" for the modification or termination of a consent decree refers to the standards applied to an uncontested motion to modify a consent decree as used in United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill. 1975). *See* United States v. Radio Corp. of Am., 46 F. Supp. 654, 655-56 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943) (district court recognized the propriety of judicial independence in deciding a motion to modify a consent decree). A judicial inquiry into the public interest is also indicated by the Tunney Act, 15 U.S.C. § 16 (b-h) (1976); *see infra* notes 167-72 and accompanying text.

[10] *Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (quoting United States v. Swift & Co., 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961)).

[11] In all matters brought for judicial action, it is fundamental to the American form of government that the court act "in accordance with [its] own convictions, uninfluenced by the opinions of any and every other department of the Government." Irvine v. Marshall, 61 U.S. (20 How.) 558, 567 (1857). *See* THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961); *see also Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03 & n.6; 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 879 (1973). *Compare* United States v. Shubert, 305 F. Supp. 1288, 1292 (S.D.N.Y. 1969) *with* M. HANDLER, *supra*, at 876-86 (discussions of the weight to be given to arguments of intervenors).

[12] A consent decree, although based upon an agreement of the parties rather than a finding of fact by the court, is not a mere authentication or recording of that agreement. It is considered to be a judicial act. *Swift*, 286 U.S. at 115; *Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702. The court must determine whether the decree continues to be equitable in light of changed circumstances. *Swift*, 286 U.S. at 114-15. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 377 (1933). *Cf.* United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975) (the Court indicated that consent decrees have attributes of both contracts and of judicial decrees or administrative orders).

[13] *See Swift*, 286 U.S. at 116. The *Swift* consent decree resulted from a federal antitrust proceeding wherein the government alleged that Swift had achieved an unfair competitive advantage over the market by fixing low prices. *Id.* Swift was unable to convince the Court that important changes in its business organization and market control warranted modification. The Court concluded that Swift's low overhead and gigantic size would continue to put it in a position to force weaker competitors out of the meat-packing market. *Id.*

These same concerns were reflected by Judge Hoffman's discussion of the doctrine of "potential competition" in conjunction with the public interest test. *Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,705. There, the court reiterated the presumption "that the imminent entry of a potential competitor into the market, or the presence of a competitor 'poised on the edge of the market, threatening to enter if market conditions become sufficiently favorable,' *beneficially influences competitive behavior . . . .*" *Id. (quoting United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1232-33 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974)). *See also* United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

In *United States v. Shubert*,[14] the Federal District Court for the Southern District of New York deviated from accepted standards for modifying consent decrees. The *Shubert* court disregarded the goal of judicial independence stressed by both the *Swift* and public interest tests[15] and adopted a narrower interpretation of competition than previously required.[16] Consequently, *Shubert* provides impetus for

[14] No. 56-72 (S.D.N.Y. Sept. 4, 1981).

[15] *See supra* notes 11 & 12 and accompanying text.

[16] Rather than following the *Swift* approach and the public interest test which examined the defendant's competitive presence throughout the entire market, the *Shubert* court focused upon the defendant's competitive impact on certain sectors of the relevant market in making its determination. *See, e.g.*, Figure, *infra* note 127. In addition, the *Shubert* court permitted a lesser showing of changed circumstances than illustrated in either the *Swift* approach or the public interest test.

Both the *Swift* and the public interest test acknowledge that modification of a consent decree is not warranted where the reasons stated in the original complaint continue to exist. *See, e.g.*, *Swift*, 286 U.S. at 119. For example, in 1975, when Swift reapplied for modification of its consent decree, it was able to demonstrate to the court that its market share had declined from 38% to 7% since the issuance of the decree. *Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,704. At the time of requesting modification, Shubert owned 48.5% of all the theatres in the New York City theatre market, Memorandum For The United States In Response To Defendant's Motion To Modify The Final Judgment at 11, United States v. Shubert, No. 56-72 (S.D.N.Y. filed Apr. 8, 1981) [hereinafter cited as Initial Government Memorandum], as compared to 52.77-53.1% when the consent decree was first entered. *See infra* note 28. In contrast, the Nederlander Theatrical Corp., Shubert's closest competitor in New York, owns or operates only nine theatres on Broadway (26.4% of the market). Initial Government Memorandum, *supra*, at 12 n.10. Shubert has also been able to attract many of the most desirable productions to its theatres. Memorandum Of The Nederlander Theatrical Corp. As *Amicus Curiae* In Response To Second Shubert Submission at 7, United States v. Shubert, No. 56-72 (S.D.N.Y. filed May 15, 1981) [hereinafter cited as Nederlander Reply Memorandum].

In May 1981, before modification was approved by the court, Shubert theatres housed thirteen long-running Broadway hits.

Theatre	Show
Ambassador	Dancin'
Ethel Barrymore	Lunch Hour
Belasco	Ain't Misbehavin'
Booth	The Elephant Man
Broadhurst	Amadeus
Broadway	Evita
Imperial	They're Playing Our Song
Longacre	Children of a Lesser God
Lyceum	Mornings at Seven
Majestic	42nd Street
Music Box	Deathtrap
Royale	A Day in Hollywood/ A Night in the Ukraine
Shubert	A Chorus Line

See Nederlander Reply Memorandum, *supra*, at 7. Other New York theatres owned by the Shubert Organization include the Cort, Golden, Plymouth, and Winter Garden. *Id.* at 14 n.*. In total, Shubert currently owns 16.5 of the 34 theatres on Broadway (Shubert owns a half interest in the Royale Theatre.). *See* Initial Government Memorandum, *supra*, at 11.

enjoined defendants to petition for termination of their consent decrees, or at least modification in favor of less restrictive covenants.[17] The implications of this decision are particularly significant because they mark a new era of relaxed antitrust enforcement in the theatre industry.[18]

This Comment will discuss the impact of *Shubert* on modification of consent decrees in the theatre industry. After analyzing the effect of the decision on New York City's Broadway theatre market, the Comment will conclude that the court misconstrued the role of the judiciary and government by failing to undertake the type of independent analysis mandated by public interest standards.

II. Background

The Shubert Organization began producing,[19] booking,[20] and presenting theatrical attractions[21] in the early 1900's.[22] As Shubert became prosperous, it invested in shows in need of funding and offered attractive terms to entice producers to book their productions at its theatres.[23] Eventually, the Shubert Organization turned toward production and promoted their own shows as well as those that played in their theatres.[24]

By the 1940's, Shubert either operated or participated in the operation of approximately forty theatres in key "try-out"[25] and

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[17] *See infra* notes 162-66 and accompanying text.

[18] *See generally infra* note 157.

[19] Producing theatrical attractions involves the assembly of an attraction's component parts (i.e., scripts, actors, etc.), rehearsals, booking arrangements, and travel arrangements for the cast and support staff in accordance with booking arrangements. United States v. Shubert, 348 U.S. 222, 231 app. (1955).

[20] "Booking" has been defined as " 'the arrangements generally made through a booking office, between producers and [theatre] operators for the routing and presentation of legitimate attractions and the fixing of playing dates.' " *Id.* at 223 n.4 (sources omitted).

[21] Theatrical attractions, or "legitimate attractions," were defined by the Supreme Court in *Shubert* as " 'stage attractions performed in person by professional actors' including 'plays, musicals, and operettas,' but not ordinarily including 'stock company attractions, vaudeville, burlesque, bands, individual dancers, dance groups, concerts, and vocal or instrumental presentations.' " *Id.* at 223 n.3 (sources omitted). *Cf.* United States v. Shubert, 1956 Trade Cas. (CCH) ¶ 68,272, at 71,237 (1956) ("theatrical attractions" defined slightly differently).

[22] M. Henderson, The City and the Theatre 189-90 (1973). *See generally*, B. Atkinson, Broadway (1970) (history of the Broadway theatre district in New York City).

[23] *See* Croyden, *The Box Office Room*, N.Y. Times, May 10, 1981, § 6 (Magazine), at 31, *cited in* Nederlander Reply Memorandum, *supra* note 16, at 7.

[24] *See id.*

[25] *Shubert*, 348 U.S. at 223 & n.5.

> After the production has been assembled and rehearsals have been completed, the attraction is presented in one or more 'try-out' towns [included are Boston, Philadelphia and Baltimore] for the purpose of judging audience reaction and correcting observed deficiencies. Audience reaction in try-out towns is important in gauging subsequent financial success in New York City and on the road.

Id. at 232 app. (sources omitted).

"road-show" cities.[26] Shubert grew to own more than half of all theatres in the "Broadway" section[27] of New York City.[28]

In the 1950's, Shubert's dominance over the national theatre industry prompted the government to file suit claiming violations of the Sherman Antitrust Act.[29] The complaint alleged that Shubert's business practices restrained trade and commerce and demanded that Shubert divorce itself from the booking and presentation aspects of its business.[30] The government also challenged the practice of inducing producers to book their attractions exclusively with the Shubert Organization because it gave Shubert an unfair advantage over competitors.[31]

Shubert argued before the district court that, like baseball, theatre was a form of entertainment centered around live performances of local exhibitions and, therefore, should be immune from the interstate commerce provisions of the Sherman Act.[32] Unable to see any valid distinction between the type of interstate commerce involved in

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[26] *Id.* at 223 & n.5. If a show is successful in New York City, "the attraction is sent on tour to 'road-show' towns [which include Baltimore, Boston, Cincinnati, Los Angeles and Philadelphia] throughout the United States." *Id.* The road-show tour is an " 'integral part of the exploitation of the attraction' " and accounts for a " 'substantial part' " of its profits. *Id.* at 232 app. (sources omitted).

[27] *See infra* note 102.

[28] Shubert owned between 52.77% and 53.1% of all the theatres on Broadway. Initial Government Memorandum, *supra* note 16, at 10-11; Goldlawr, Inc. v. Shubert, 290 F. Supp. 482, 489 (E.D. Pa. 1968).

[29] *See Shubert*, 348 U.S. at 225. The Sherman Act, 15 U.S.C. §§ 1, 2 (1952) (current version at 15 U.S.C. §§ 1, 2 (1976)), provided in relevant part:

> § 1 [E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal . . . .
>
> §2 [E]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor . . . .

[30] *Shubert*, 348 U.S. at 225.

[31] *Id.*

[32] 15 U.S.C. § 1. To prosecute a federal antitrust action successfully under the Sherman Act the complainant must prove the defendant's activities are "in restraint of trade or commerce among the several States." *Id.* Trade or commerce is not limited, however, to the exchange or production of commodities, but also includes businesses providing services only. United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950); American Medical Ass'n v. United States, 317 U.S. 519 (1943); United States v. Crescent Amusement Co., 323 U.S. 173 (1944). An activity is considered within the scope of the Act if it forms an inseparable part of a continuous and indivisible stream of intercourse among the states, United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); Swift & Co. v. United States, 196 U.S. 375 (1905); or has a substantial economic effect on interstate commerce. Mandeville Island Farms Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Wickard v. Filburn, 317 U.S. 111 (1942).

baseball and theatre,[33] the court[34] dismissed the complaint under authority of *Federal Baseball Club v. National League*[35] and *Toolson v. New York Yankees.*[36]

On direct appeal under the Expediting Act,[37] the United States Supreme Court reversed.[38] Relying on theatrical cases decided over thirty years earlier,[39] the Court rejected Shubert's analogy to baseball[40] and concluded that the theatre industry would not be exempt

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[33] There was precedent for distinguishing the theatre industry from other aspects of the entertainment industry. For example, in Neugen v. Associated Chataqua Co., 70 F.2d 605, 607 (10th Cir. 1934), the court held that an entertainer performing in a vaudeville circuit was not engaged in interstate commerce. Similarly, in San Carlo Opera Co. v. Conley, 72 F. Supp. 825, 831 (S.D.N.Y. 1946), *aff'd*, 163 F.2d 310 (2d Cir. 1947), the district court asserted that "[I]n cases involving the performance of vaudeville acts the courts have held that contracts for personal services of the entertainers were not the subject of commerce, even though the entertainers were required to go from state to state." *Id.* at 831. *Cf. supra* note 21 (Court did not extend the definition of "legitimate theatre" to include vaudeville). *See also* Hart v. B.F. Keith Vaudeville Exch., 12 F.2d 341, 344 (2d Cir. 1926), *cert. denied*, 273 U.S. 103 (1926) (court distinguishes motion pictures from theatre).

[34] United States v. Shubert, 120 F. Supp. 15, 16 (S.D.N.Y. 1953).

[35] 259 U.S. 200 (1922).

[36] 346 U.S. 356 (1953).

[37] Ch. 544, §§ 1, 2, 32 Stat. 823 (1903) (current version at 15 U.S.C. §§ 28, 29 (1976)). Section 29(b) of the Expediting Act provides that a final judgment can be appealed directly to the Supreme Court, if "the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice."

[38] *Shubert*, 348 U.S. at 222. The Court asserted that Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271 (1923), established that *Federal Baseball* did not automatically immunize the theatrical business from the antitrust laws. *Shubert*, 348 U.S. at 228 n.10, 229. The Court was therefore able to reaffirm its distinction between *Federal Baseball* and the instant case on the ground that "'what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently.' " *Id.* at 229 (sources omitted). *See* Ring v. Spina, 148 F.2d 647, 651 (2d Cir. 1945), *aff'd sub nom.*, Ring v. Authors' League, 186 F.2d 637 (2d Cir. 1951), *cert. denied*, 341 U.S. 935 (1951). *But see* Hooper v. California, 155 U.S. 648, 655 (1895).

[39] *See, e.g., Hart*, 12 F.2d at 341; H.B. Marienelli Ltd. v. United Booking Offices of Am., 227 F. 165 (S.D.N.Y. 1914).

[40] In the absence of unique factors as present in *Toolson* (baseball was considered to be the national pastime), the Court held that the theatre industry could not come within the exception to the antitrust laws granted to baseball. The Court explained:

> In *Federal Baseball*, the Court . . . was dealing with the business of baseball and nothing else. The Court considered the nature of the game, its history and league organization, the necessity of arranging games between cities in different states, and the resulting travel across state lines. The travel, the Court concluded, was 'a mere incident, not the essential thing.' On that basis, the Court held that 'the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.'

Shubert, 348 U.S. at 228 (quoting *Federal Baseball*, 259 U.S. at 209). *See* Eckler, *Baseball—Sport or Commerce?*, 17 U. CHI. L. REV. 56 (1949).

For an analysis of how the performing arts may have been treated according to state antitrust laws see Taubman, *supra* note 1, at 429-31.

from the antitrust laws.[41] The Court, however, did not reach the issue of whether Shubert actually restrained trade or commerce under the Sherman Act.[42]

In 1956, Shubert entered into a consent decree with the government.[43] The essence of the decree[44] required Shubert to divest itself of twelve theatres in six cities across the nation.[45] The decree also contained a perpetual restriction which required Shubert to obtain approval from the Federal District Court for the Southern District of New York before acquiring an interest in any theatre.[46] Future court approval was made contingent upon Shubert demonstrating that any proposed acquisition would not "unduly restrain competition."[47]

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[41] Many of the performing arts have been examined under the Sherman or Clayton Acts. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) (music); United States v. Paramount Pictures, 334 U.S. 131 (1948) (movies) ("Motion picture" cases brought prior to the amendment of section 7 of the Clayton Antitrust Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (amended 1950), were interpreted under the "trade or commerce" provisions found in sections 1 and 2 of the Sherman Act. *See, e.g.*, Schine Chain Theatres v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Interstate Circuit v. United States, 306 U.S. 208 (1939); Binderup v. Pathe Exch., 263 U.S. 291 (1923)).

[42] *Shubert*, 348 U.S. at 230. The Court therefore decided only the narrow issue of whether the theatre industry was subject to the Sherman Antitrust Act.

[43] United States v. Shubert, 1956 Trade Cas. (CCH) ¶ 68,272 (S.D.N.Y. 1956).

[44] Section XVI of the decree, for example, enjoined Shubert from jointly owning, operating or managing a theatre with an independent operator. *Id.* at 71,240. ("Operator" being any person, partnership, association, or company engaged in operating a theatre. Response Of Nederlander Theatrical Corporation As *Amicus Curiae* To Memoranda Of The United States at 4, United States v. Shubert, No. 56-72 (S.D.N.Y. filed May 1, 1981) [hereinafter cited as Nederlander Memorandum]). Section XVIII enjoined Shubert from knowingly allowing any official of its organization to be involved in, or have a financial interest in any independent theatre. *Shubert*, 1956 Trade Cas. (CCH) ¶ 68,272, at 71, 241 ("Independent theatre" being any non-Shubert commercial theatre. Nederlander Memorandum, *supra*, at 5.)

[45] Section XXIII of the consent decree required Shubert to divest itself of theatres in New York, Boston, Chicago, Detroit and Philadelphia. *Id.* at 71,243. Since 1956, Shubert has divested itself of the following theatres:

City	Theatre
Baltimore	Ford's
Boston	Majestic, Plymouth, Copley, Wilbur and Boston Opera House
Chicago	Studebaker, Harris and Selwyn
Cincinnati	Shubert and Cox
Detroit	Cass
New York	Century and George Abbott
Philadelphia	Walnut
Toledo	Town Hall

Notice of Motion at 5, United States v. Shubert, No. 56-72 (S.D.N.Y. filed Feb. 3, 1981) [hereinafter cited as Notice of Motion].

[46] *Shubert*, 1956 Trade Cas. (CCH) ¶ 68,272, at 71,244. To monitor Shubert's compliance with the consent decree, Section XXVI authorized representatives of the Department of Justice, on written request of the Attorney General, to have access to all records in the possession or under the control of Shubert. This authorization was subject to any legally recognized privilege and limited to areas relating to matters covered by the decree.

[47] *Id.* at Section XXV(B)(1). Shubert has twice received permission to acquire interests in

Twenty-five years later, Shubert applied for modification of the decree to obtain the right to acquire interests in theatres throughout the United States.[48] Shubert also requested that the entire decree be terminated on January 1, 1985.[49] The decree was challenged on the ground that it constituted a serious handicap to Shubert's ability to compete effectively under present market conditions.[50]

To evaluate Shubert's competitive market position, the government examined Shubert's control of theatres in New York City and around the nation.[51] The government's investigation revealed that,

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desired theatres. *See* United States v. Shubert, 491 F. Supp. 59 (S.D.N.Y. 1980) (Shubert granted permission to manage a theatre in Washington, D.C.); United States v. Shubert, 305 F. Supp. 1288 (S.D.N.Y. 1969) (Shubert granted permission to acquire a beneficial interest in and to operate a theatre in Los Angeles). Both applications were granted after the court received reports and recommendations from the Justice Department, Antitrust Division, which concluded that such acquisitions would stimulate competition. In both instances, the court found that Shubert had fully complied with the consent decree and had not engaged in any anticompetitive conduct.

[48] *See* Notice of Motion, *supra* note 45, at 2, *quoted in* Initial Government Memorandum, *supra* note 16, at 2.

[49] *Id.*

[50] *See* Initial Government Memorandum, *supra* note 16, at 10-14. The government responded that unless Shubert could show that its competitors had caused it substantial hardship, the activities of competitors were irrelevant to the proceedings at hand. *Id.* at 13. *See generally* Moog Industries, Inc. v. Federal Trade Comm., 355 U.S. 411, 412-13 (1958); United States v. Savannah Cotton and Naval Stores Exch., Inc., 192 F. Supp. 256, 257-58 (S.D. Ga. 1960), *aff'd per curiam sub nom.*, Turpentine & Rosin Factors, Inc. v. United States, 365 U.S. 298 (1961) (the bare showing that a competitor's business activities are not similarly bound by a consent decree does not prove that a defendant is entitled to modification).

[51]

Legitimate Theatres* In The Top 19 S.M.S.A. Cities** Excluding New York City

	1956 Pre-judgment			1981 Holdings			
	Shubert controlled theatres in City	Total number of theatres	Percent controlled by Shubert	Shubert controlled theatres in City	Theatres built or converted since 1956	Total number of theatres	Percent controlled by Shubert
Chicago	7	9	78	2	1	4	50
Boston	6	6	100	1	2	5	20
Philadelphia	4	4	100	1	1	5	20
Washington, D.C.	2	2	100	1	6	7	14.3
Los Angeles	1	1	100	1	9	9	11.1
Baltimore	1	1	100	0	1	1	0
Pittsburgh	1	1	100	0	2	2	0
Detroit	2	3	66.7	0	3	3	0
Atlanta, Cleveland, Dallas-Ft. Worth, Houston, St. Louis, St. Paul-Minneapolis, San Francisco and San Diego	0	<5	0	0	<4	<8	0
Anaheim, Nassau and Newark	0	0	0	0		0	0

Initial Government Memorandum, *supra* note 16, at 6.

* Legitimate theatres were defined as theatres having more than 500 seats which presented Broadway-type attractions on a regular basis. *Id.*

** Standard Metropolitan Statistical Areas chosen for investigation. *See id.* at 5 n.3.

with one exception,[52] Shubert's presence in non-New York theatre markets had become insubstantial due to the divestiture requirements of the consent decree and the growth of theatres in most of these markets.[53] The government concluded, that the consent decree's objective of substantial operating competition[54] had been achieved in markets outside New York, and that an atmosphere had been created in which competition could flourish.[55]

A different result followed with respect to Shubert's request for permission to acquire interests in New York City theatres.[56] Shubert contended that, since it owned fewer theatres in 1981 then in 1956, the conditions which gave rise to the consent decree had changed.[57] The government disagreed, and stressed that the decline in Shubert's market power on Broadway had been insignificant.[58] Consequently, the government reasoned that the dangers of concentrated economic power, which originally prompted the consent decree, were as prevalent in 1981 as they were in 1956.[59] Any acquisition by Shubert in the "stagnant" Broadway theatre market[60] would, therefore, raise "serious competitive issues."[61]

In an "eleventh hour" decision, the government reversed its opinion with regard to Shubert's competitive presence in New York City.[62] A factor contributing to the government's turnabout may have been

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See generally Initial Government Memorandum, *supra* note 16, at 5-9. *See also infra* notes 56-61 and accompanying text.

[52] *See* Table, *supra* note 51; Initial Government Memorandum, *supra* note 16, at 8 (Chicago).

[53] Initial Government Memorandum, *supra* note 16, at 8.

[54] *Id. See Shubert*, 1956 Trade Cas. (CCH) ¶ 68,272, at 71,243, section XXIII.

[55] Initial Government Memorandum, *supra* note 16, at 8. *See* Table, *supra* note 51.

[56] *See* Initial Government Memorandum, *supra* note 16, at 9-18.

[57] *Id.* at 10.

[58] "A decline from 53.1% [in 1956] to 48.5% of the market [in 1981] cannot be said to be a substantial change in Shubert's market power." *Id.* at 11.

The government further concluded that Shubert's "voluntary" divestiture of the Century and George Abbot Theatres was based upon its best business judgment:

> Shubert cannot argue that its divestitures were magnanimously made to advance the purpose of the judgment to increase competition in the Broadway market. These theatres were sold by Shubert for nontheatrical development and were subsequently demolished. Thus, its divestitures of these two theatres for nontheatrical uses in fact increased Shubert's dominance of the market.

Id. at 12.

[59] *See id.* at 11.

[60] *Id.* "[A]fter 25 years only two additional theatres exist in the Broadway market . . . "

[61] *Id.*

[62] Memorandum For The United States In Support Of Entry Of Modified Final Judgment, United States v. Shubert, No. 56-72 (S.D.N.Y. filed Apr. 30, 1981) [hereinafter cited as Revised Government Memorandum].

its new found belief that Shubert's participation in the proposed 42nd Street-Portman Hotel Redevelopment Project would be beneficial.[63]

The planners of the 42nd Street-Portman Hotel Redevelopment Project envisioned both the revitalization of New York City's 42nd Street area[64] and the construction of a luxury hotel in that same vicinity. In 1981, the New York State Urban Development Corporation (UDC) embarked upon the 42nd Street aspect of the Project by announcing the conversion of dilapidated movie theatres, then playing pornographic and low-grade adventure films, into "legitimate" theatres.[65] Construction of the Portman Hotel required the demolition of two existing Broadway theatres[66] which were located adjacent to the most desirable section of Broadway.[67] In their place, the Portman Hotel will house a 1,500-seat theatre.[68]

Although the government originally thought the Redevelopment Project would foster deconcentration of the Broadway market,[69] its revised opinion concluded that Shubert should be allowed to acquire two of the new or converted Redevelopment Project theatres. This

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[63] Curiously, it was in this regard that the government initially proclaimed:

> For the first time in 25 years, the Broadway theatre market has the potential for significant growth . . . . At a time when the objective of increased competition might be realized for the first time in New York City, Shubert requests modification of the judgment. This is an additional reason why the Government is unable to support this part of the Shubert application.

Initial Government Memorandum, *supra* note 16, at 17-18.

Despite these strong sentiments, the government's about-face appears to be related to its tenuous interest in reducing the risks of failure associated with the Redevelopment Project. *See* Revised Government Memorandum, *supra* note 62, at 5. *But cf.* Initial Government Memorandum, *supra* note 16, at 17-18 (there are people other than Shubert who are interested in entering into this expanded market). While the reasons for the government's revised position may remain a mystery, new antitrust policy may have played a greater role than indicated. *See generally infra* notes 155-66 and accompanying text.

[64] The "42nd Street" area includes the areas located on Broadway between 41st and 43rd Streets in Manhattan. *See* Initial Government Memorandum, *supra* note 16, at 16. For a general discussion of the 42nd Street Times Square area's history as a theatrical center in New York City see M. HENDERSON, *supra* note 22, at 192-99.

[65] *See* Initial Government Memorandum, *supra* note 16, at 16. *See also* Holland, *Court Permits Shubert to Buy More Theatres*, N.Y. Times, Sept. 5, 1981, at C12, col. 5. *See generally Goldlawr*, 290 F. Supp. at 489 (legitimate theatre business described as involving the presentation of Broadway-type attractions in a theatre or theatres).

[66] The Helen Hayes and Morosco Theatres were torn down in 1982 to make way for the Portman Hotel. *See* Nederlander Reply Memorandum, *supra* note 16, at 3 n.*.

[67] This is the area on Broadway between 45th and 46th Streets. *See Goldlawr*, 290 F. Supp. at 489 (theatres in New York, particularly the key theatres in the 44th and 45th Street area, are the most important to the producers).

[68] This new theatre will be called the "Portman Theatre." Nederlander Reply Memorandum, *supra* note 16, at 3 n.*.

[69] *See* Initial Government Memorandum, *supra* note 16, 17-18.

was based on the government's belief that Shubert's participation in the "somewhat risky" Redevelopment Project might benefit the Broadway theatre community by providing stability and promoting new growth and competition.[70]

In attempting to prevent Shubert from either dominating the bidding on the proposed theatres[71] or delaying completion of the Redevelopment Project until after the consent decree was vacated,[72] the government suggested that the decree's injunctions with respect to the Project be extended indefinitely.[73] The parties, in "agreement,"[74] turned to the court for approval of their proposed modification.

III. The Holding

Both the district court and the government agreed that, with the exception of the Redevelopment Project, Shubert should be enjoined until 1985 from acquiring a beneficial interest in any Broadway theatre unless it made an affirmative showing that such an acquisition would not unduly restrain competition.[75] Shubert was further enjoined until 1987 from acquiring a beneficial interest in more than

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[70] Revised Government Memorandum, *supra* note 62, at 5.

[71] *See id.* at 3. Interested parties consisting of counsel for the Nederlander Theatrical Corporation, the Brandt Organization, representatives of the New York State Urban Development Corporation (UDC) and the New York City Public Development Corporation asserted that only if Shubert were kept out of the bidding process would other proposals be seriously considered. *See id.* at nn.*, **.

[72] *Id.* at 3-4.

[73] Under the proposed Modified Final Judgment, the restrictions on acquisitions in the two aspects of the Redevelopment Project will remain in effect until both are fully operational. *Id.* at 4.

[74] The government and Shubert did not totally "agree" regarding the acquisition of theatres to be part of the Redevelopment Project. Shubert, in its motion papers, sought modification of its decree to allow it to acquire existing Broadway theatres and additional newly built or reconverted theatres *without limitation*. Notice of Motion, *supra* note 45, at 2. The government, however, requested that the court limit Shubert's acquisitions of new or converted theatres to two. Revised Government Memorandum, *supra* note 62, at 5 n.*.

Similarly, Shubert requested that the entire consent decree terminate in 1985. Notice of Motion, *supra* note 45, at 2. The government suggested that the consent decree remain in effect indefinitely with respect to the Redevelopment Project. Revised Government Memorandum, *supra* note 62, at 3-4; *see supra* note 73.

It is, therefore, debatable whether the parties "agreed" to the extent required to merit use of the public interest test. *See supra* note 9. While it is evident that the parties intended to bilaterally apply for "modification," it is unclear whether this was merely a ploy used to avoid *Swift* analysis. *See supra* note 6; *infra* notes 157-66 and accompanying text. *See generally supra* notes 56-61 and accompanying text (Shubert was unsuccessful in meeting the *Swift* standards with regard to New York City). *See also* Record at 52, United States v. Shubert, No. 56-72 (S.D.N.Y. May 1, 1981) [hereinafter cited as Record].

[75] United States v. Shubert, 1982-1 Trade Cas. (CCH) ¶ 64,572, at 73,132-33 (S.D.N.Y. Oct. 5, 1981).

two theatres to be created as part of the Redevelopment Project.[76] The court also agreed that the consent decree's restrictions on Shubert's ability to acquire theatres outside of New York City should be dissolved immediately.[77] Thus, the court did not significantly diverge from the parties' suggested analysis and treatment of the proposed modification.[78]

In discussing the public interest test,[79] the district court maintained that *Swift* applied only where a party contested modification.[80] The court further indicated that the *Swift* standards were unfair to consent decree defendants because they effectively undermined the utility of the court to adjust to changed circumstances.[81]

In affirming the parties' request for relief, the district court relied on the policy stated in the public interest test that an agreed modification could be granted when " ' "founded in fact and supported by reason." ' "[82] The court concluded that modifying the consent decree to allow Shubert to participate freely in non-New York markets would stimulate competition.[83] This conclusion evolved from the court's receipt of favorable comments filed in response to the proposed modification[84] and from government-supplied statistics which demonstrated that Shubert's divestments caused its nationwide market share to decline while the number of theatres outside New York increased.[85]

The court also reiterated the parties' contention that Shubert's participation in the Redevelopment Project could enhance the potential for significant competitive growth in the Broadway theatre mar-

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[76] *Id.*

[77] *See id.* at 73,132.

[78] Even though the court claimed to be following the public interest test, *Shubert*, No. 56-72, slip op. at 12, it appears to have ignored the proviso of the standard which requires the court to *independently* evaluate bilateral applications for the modification of consent decrees. *See supra* notes 9-13 and accompanying text. Quite to the contrary, the court allowed the government to make all findings of fact and to draw its own legal conclusions. *See generally supra* notes 51-74 and accompanying text. Having done so, the question arises whether the court did in fact "rubber stamp" the government's position.

[79] *Shubert*, No. 56-72, slip op. at 12. The court asserted that it was not compelled to act as a rubber stamp because of the agreement of the parties. *Id.* at 12-13.

[80] *Id.* at 12.

[81] *See id.* at 11-12.

[82] *Id.* at 12 (quoting *Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703) (the public interest test) (quoting *Swift*, 189 F. Supp. at 906). *See also supra* note 9.

[83] *Shubert*, No. 56-72, slip op. at 13.

[84] *Id.* at 4-5. Over 66 comments were filed with the court from a group including producers, labor unions, theatre owners and managers, theatrical agents, deans of major universities, a congressman, a metropolitan mayor and other people involved in the theatre industry. Five-sixths of the comments supported Shubert's application.

[85] *See supra* notes 45 & 58.

ket.[86] The court concluded that Shubert's participation in the Redevelopment Project would stimulate competition in the New York market without permitting Shubert to become overly dominant.[87]

IV. Analysis of the Holding

A. *Shubert and the Broadway Market*

An antitrust violation is more likely to be found using a narrow market definition, selectively focused on an area of industry where the defendant has a large market share, than by using a market definition encompassing a broader area of business.[88] The definitional task in-

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[86] *See Shubert*, No. 56-72, slip op. at 14.

[87] *Id.*

[88] *See* L. Sullivan, Handbook of the Law of Antitrust § 21, at 73 (1977). *See also id.* §17, at 61. For example, company S might sell ninety percent of all widgets sold in New York, while selling only seven percent of all widgets sold nationwide. Company S possesses little market power if the geographic market is defined as the nation. On the other hand, if the relevant market is narrowed to include only New York, company S's power is monopolistic. *See, e.g.*, United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 394 (1956). *But see* United States v. Continental Can Co., 217 F. Supp. 761, 782 (S.D.N.Y. 1963) (merger case in which defendant argued for a narrower market definition in order to show that the two merging companies did not compete in the same market), *rev'd*, 378 U.S. 441 (1964). Since the choice of the relevant market is so important, the standards governing market definition must be chosen and applied with care.

For an analysis of market power see II P. Areeda & D. Turner, Antitrust Law, *An Analysis of Antitrust Principles and Their Application* ¶¶ 501-534a (1978); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981); L. Sullivan, *supra* note 88, §§ 9, 12.

Courts are granted wide discretion in delineating the boundaries of a relevant market. *See, e.g.*, Hecht v. Pro-Football, Inc. 570 F.2d 982, 988 (D.C. Cir. 1977) (finding the relevant geographic market to be " 'the area of effective competition,' the area 'in which the seller operates, and to which the purchaser can practicably turn for supplies' ") (footnotes omitted) (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 321 (1961), *cert. denied*, 436 U.S. 956 (1978)); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 918 (8th Cir. 1976) (relevant market defined as the "area in which the defendant effectively competes with other individuals or businesses for the distribution of the relevant product"); Structure Probe, Inc. v. Franklin Inst., 450 F. Supp. 1272, 1283 (E.D. Pa. 1978) (recognizing that "a geographic market must correspond to the 'commercial realities' of the market for [the relevant product] and must be an economically significant market area") (footnote omitted), *aff'd*, 595 F.2d 1214 (3rd Cir. 1979); United States v. Dairymen, Inc., 1978-1 Trade Cas. (CCH) ¶ 62,053, at 74,539 (W.D. Ky. 1978) (stating that "the relevant geographic market is the market in which competitors effectively compete, and in which the seller supplies and to which the purchaser can practically turn for supplies"), *modified*, 1978-2 Trade Cas. (CCH) ¶ 62,186 (W.D. Ky. 1978), *modified*, 1979-1 Trade Cas. (CCH) ¶ 62,493 (W.D. Ky. 1978); Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co., 1972 Trade Cas. (CCH) ¶ 73,955, at 92,004 (W.D. Tenn. 1972) (market defined as the area of "effective competition"); California Distrib. Co. v. Bay Distribs., Inc., 337 F. Supp. 1154, 1158 (M.D. Fla. 1971) (court looked to economically significant factors in defining the market).

Courts have recognized relevant geographic markets no larger than a section of a city or an entire city. *See* William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738, 741-42 (3d Cir. 1945) (downtown theatre district held to be relevant geographic market), *cert. denied*, 334 U.S. 811 (1948). *See also* Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953) (relevant

volved in delineating relevant competitive markets has been analogized to a process of drawing concentric circles,[89] the diameters of which correspond in part to economic reality,[90] and, to a larger degree, legal fiction.[91] Factors such as simplicity[92] and administrative convenience,[93] dictate the areas of these circles.

In *Shubert*, the court focused on a portion of the Broadway theatre "relevant market"[94] where Shubert had no market share, rather than looking to Shubert's competitive impact on the Broadway market as a whole. The *Shubert* court thereby suggested that the competitive aspect of the public interest test[95] may be met if competition could be enhanced in selectively drawn pockets of an extant market. Such a myopic view of competition is inconsistent with traditional standards for modifying consent decrees.[96]

The court's anomalous interpretation of competition in New York raises many unanswered questions about the distinctions between the competitive activities in the Broadway theatre market and the Redevelopment Project. This uncertainty stems from the court's conclusion that Shubert's participation in the Redevelopment Project "would add life and competition *within that proposed project* without enlargin [sic] Shubert's position *in the remainder* of the New York market or permitting it to become an *excessively dominant factor in the New York market.*"[97] This result is enigmatic because a separate Redevel-

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geographic market defined as New Orleans); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (City of Lorain, Ohio held to be relevant geographic market).

In United States v. Columbia Steel Co., 334 U.S. 495 (1948), the Supreme Court stated that "[t]he Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area." *Id.* at 519. *See also* FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978); Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 709 (7th Cir. 1977), *aff'd*, 570 F.2d 347 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978) Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975) (the definition of a relevant market is considered to be a factual question).

In *Shubert*, the court likewise could have defined the relevant market as only those theatres in the best and most sought after section of Broadway. *See, e.g., Goldlawr*, 290 F. Supp. at 968. Shubert controls 8.5 of the 12 theatres in that area. Nederlander Memorandum, *supra* note 44, at 13. After *Shubert*, Shubert could come to own 79.2 percent of this "market" by purchasing the New Helen Hayes Theatre.

[89] *See* L. SULLIVAN, *supra* note 88, § 21, at 72.

[90] *Id.* § 19, at 68.

[91] *See id.* § 12, at 42.

[92] *Id.* § 21, at 72. *See id.* § 12, at 43.

[93] *Id.* § 19, at 69.

[94] A "relevant market" has been defined as "the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market." *Id.* § 12, at 41.

[95] *See supra* notes 9-10 and accompanying text.

[96] *See supra* notes 11-13 & 16 and accompanying text.

[97] *Shubert*, No. 56-72, slip op. at 14 (emphasis added).

opment Project "market" appears to have been artificially excavated from the pre-existing Broadway market for the sole purpose of allowing the court to focus on competition within the parameters of the Project.[98] In so doing, the court has created at least two different models of the Broadway market.[99] The difference between these models depends on whether the court intended to extend or maintain the traditional Broadway theatre market definition in light of its conception of Redevelopment Project theatres.

1. The Extended Broadway Market Model

Throughout the history of the Shubert litigation the relevant theatre market in New York City has been defined as legitimate theatres[100] which seat at least 500 people[101] and are located in the

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[98] *See id.* at 13-16.

[99] *See supra* notes 89-93 and accompanying text (discussion of factors used in delineating competitive markets). *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (Court discusses competition with respect to product and geographic markets when dealing with mergers). A third possible market analysis, that the Redevelopment Project effectively constituted a submarket, would rarely be considered in Sherman Antitrust Act analysis; *see* L. SULLIVAN, *supra* note 88, § 203, at 605, 607, and is beyond the scope of this Comment. *See* Note, *Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 1979 DUKE L.J. 1152, 1181-82 (1979). The Redevelopment Project would presumably fail to meet the generally accepted test for submarket status which inquires whether the submarket was recognized by both the trade and the public. United States v. Connecticut Nat'l Bank, 418 U.S. 656, 668 (1974) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963)). *See Brown Shoe*, 370 U.S. at 325.

[100] *See supra* note 65 (definition of "legitimate theatre"). Other types of theatres include off-off-Broadway, institutional, cabaret, and experimental theatres, none of which are considered for the purposes of the present discussion.

[101] It may be argued that the 500-seat market requirement does not accurately distinguish Broadway theatres from other theatres in the Broadway geographic area. As the table below indicates, five theatre facilities met the geographic requirement of the Broadway market definition but were excluded from "Broadway" classification because of their seating capacity. Altering the minimum seating requirement of the present market model may yield a more accurate appraisal of Shubert's market control.

Two "Broadway area" theatres were presumably excluded from market consideration because they sat only one less person than Broadway theatres. If this very fine line is erased, 36 theatres would be considered part of the Broadway market. Shubert's share of a market defined as theatres seating 499 or more people would be 45.8 percent.

A more accurate seating requirement, however, would be 940. Of the 34 theatres included in the 1981 Broadway market, 91.2 percent meet this criteria. Moreover, a 940 person minimum seating requirement would also be particularly realistic in light of the seating capacities of the Redevelopment Project theatres (all four projected theatres will meet this qualification). *See infra* note 123. Shubert's market share under this standard would be 39.7 percent.

Manipulation of these criteria present different indications of Shubert's market share. The fallibility of the present seating requirement demands that future courts seriously consider the impact of focusing on this aspect of the market definition.

Broadway theatre district in midtown Manhattan.[102] The government

Broadway Area Theatres[1] Existing in 1981

Theatre	Seating Capacity		Theatre	Seating Capacity	
Alvin	1,334		Little	499	MH
Ambassador	1,095		*Longacre*	1,115	
ANTA	1,177		Lunt-Fontane	1,478	
B. Atkinson	1,088		Lyceum	987[13]	
E. Barrymore	1,099		Majestic	1,655	
M. Beck	1,280		Minskoff	1,621	
Belasco	1,028		Morosco	1,009	
Bijou	365	MH[12]	Music Box	1,010	
Biltmore	948		Nederlander	1,168	
Booth	781		E. O'Neill	1,045	
Broadhurst	1,153		Palace	1,686	
Broadway	1,788		Playhouse	504	
Century	299	MH	Plymouth	1,063	
Cort	1,069		Princess	441[14]	MH
Edison	499[13]	MH	Royale	1,059	
46th St.	1,338		St. James	1,583	
Golden	805		Shubert	1,469	
H. Hayes	1,160		Uris	1,933	
M. Hellinger	1,581		Winter Garden	1,479	
Imperial	1,452				

N.Y.C. PUBLIC DEVELOPMENT CORP. & N.Y.S. URBAN DEVELOPMENT CORP., 42ND STREET DEVELOPMENT PROJECT, ASSESSING MARKET FEASIBILITY OF TEN THEATERS ON 42ND STREET app. C-1 (1981) [hereinafter cited as DEVELOPMENT PROJECT REPORT].

1] Broadway theatre meeting *Shubert* geographic market definition. *See* Initial Government Memorandum, *supra* note 16, at 10 n.7.

2] "Middle house." *See infra* note 117 and accompanying text.

3] NATIONAL DIRECTORY FOR THE PERFORMING ARTS AND CIVIL CENTERS 639-54 (B. Handel 3d ed. 1978).

4] Seating capacity obtained by contacting theatre.

[102] The Broadway area consists of theatres which are located within the geographic area bordered by 53rd Street on the north, 6th Avenue on the east, 41st Street on the south, and 9th Avenue on the west. Initial Government Memorandum, *supra* note 16, at 10 n.7. *See* DEVELOPMENT PROJECT REPORT, *supra* note 101, at exhibit 3. *See generally id.* at 11-12 (the clustering of Broadway theatres into a "critical mass" benefits all theatres in the general area).

For purposes of this Comment, the relevant New York City theatre market consists of theatres in the "Broadway area" as defined above. While recognizing that various geographic market definitions could have been employed, detailed analysis of this issue is beyond the scope of this Comment. For a general discussion of market analysis, *see supra* note 88. It should be noted, however, that a "New York" or "Broadway" market has been judicially recognized since 1955. *See Shubert*, 348 U.S. at 232; *Shubert*, 491 F. Supp. at 61; *Shubert*, 305 F. Supp. at 1291; *Goldlawr*, 290 F. Supp. at 489; *see generally* M. HENDERSON, *supra* note 22, at 189-90 (history of the Broadway theatre district in New York City).

Considering the similarities in physical appearance and business practice between the theatre and movie industries, it is surprising that the same type of market analysis has not been adopted. Movie theatre cases have analyzed market strength primarily in terms of the seating capacity of theatres involved, the types of films shown, and to a lesser degree, geographic location. *See, e.g.*, United States v. Loew's Inc., 1968 Trade Cas. (CCH) ¶ 72,555 (S.D.N.Y.

has consistently asserted that the Redevelopment Project would add five to seven new theatres to the Broadway market.[103] The Nederlander Theatrical Corporation[104] argued, however, that of the seven, only four would meet the traditional market definition.[105] Nederlander stressed that the government's reference to five to seven new theatres was misleading because it included three theatres which would presumably seat less than 500 people (two of which would also be noncommercial) and failed to account for the demolition of two theatres to make way for the Portman Hotel.[106]

If this conception of the Redevelopment Project is considered to be an extension of the Broadway market, then the court has expanded its traditional market definition to include noncommercial theatres

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1968); United States v. Loew's Inc., 1966 Trade Cas. (CCH) ¶ 71,819 (S.D.N.Y. 1966); United States v. Loew's, Inc., 1966 Trade Cas. (CCH) ¶ 71,673 (S.D.N.Y. 1966); Dipson Theatres v. Buffalo Theatres, 190 F.2d 951 (2d Cir. 1951). *Cf. Shubert*, 305 F. Supp. at 1291 (the court recognized that theatres were not completely fungible and that characteristics such as seating capacity were pertinent to weighing market power).

[103] Initial Government Memorandum, *supra* note 16, at 17; Revised Government Memorandum, *supra* note 62, at 2; Record, *supra* note 74, at 22.

[104] The Nederlander Theatrical Corporation (Nederlander) is Shubert's main competitor in New York City. Initial Government Memorandum, *supra* note 16, at 10.

[105] Nederlander Reply Memorandum, *supra* note 16, at 3 n.*.

[106] Nederlander asserted that only the New Amsterdam, Lyric, and Selwyn Theatres could meet the traditional market definition. *See* Initial Government Memorandum, *supra* note 16, at 10 n.7.

Nederlander Conceptualization of
Redevelopment Project Theatres

Name of Theatre	Seating Capacity	Business Nature
Portman	Over 1400	Commercial
New Amsterdam	Over 1400	Commercial
Lyric	Over 500	Commercial
Selwyn	Over 500	Commercial
Apollo	Less than 500	Commercial
Not-for-Profit	Less than 500	Noncommercial
Not-for-Profit	Less than 500	Noncommercial

See Nederlander Reply Memorandum, *supra* note 16, at 3 n.*; *see also* Letter from Malcolm I. Lewin, counsel for the Brandt Organization, Inc. to Bertha Hernandez, counsel for the U.S. Dep't of Justice (May 15, 1981).

The remaining theatres, while meeting the geographic requirements of the market definition, *see* Initial Government Memorandum, *supra* note 16, at 10 n. 7, presumably were exempted for their failure to meet the standard's seating qualification. *See* Nederlander Reply Memorandum, *supra* note 16, at 3 n.*.

with less than 500 seats.[107] The ramifications of this expanded market model are twofold.

First, even if all seven new theatres are eventually constructed or renovated, Shubert's market share on Broadway will decline only 1.1 percent from its present market share of 48.5 percent.[108] If only the

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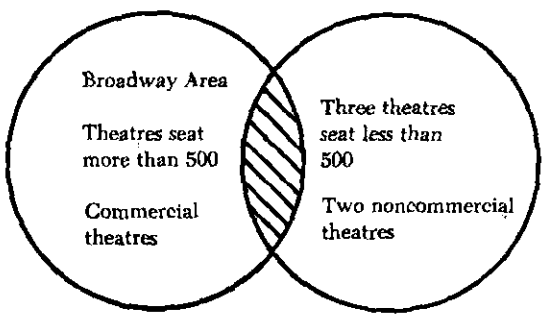
[107]



Initial Government Memorandum, *supra* note 16, at 10 n.7. *See supra* notes 100-06 and accompanying text.

[108] Shubert would then own 18.5 of the 39 possible theatres on Broadway.

Shubert's Potential Percent Share Of An Expanded Broadway Theatre Relevant Market

Number of theatres owned by Shubert	16.5[b]	48.5	51.6	50.0	48.5	45.8	44.6	43.4	42.3
	17.5[c]	—	—	53.0	51.5	48.6	47.3	46.1	44.9
	18.5[d]	—	—	—	54.4	51.4	50.0	48.8	47.4
		34[e]	32	33[f]	34[g]	36	37	38	39[a]
		Number of theatres on Broadway							

a] Initial Government Memorandum, *supra* note 16, at 10-11. (1981, before demolition of the Helen Hayes and Morosco Theatres).

b] *Id.* (1981 holdings).

c] Revised Government Memorandum, *supra* note 62, at 4 (permissible acquisitions under *Shubert*).

d] *Id.*

e] Initial Government Memorandum, *supra* note 16, at 16 n.16.

f] Nederlander Reply Memorandum, *supra* note 16, at 3.

g] Revised Government Memorandum, *supra* note 62, at 2.

Portman Hotel is constructed, however, Shubert's market share could rise as high as 53 percent.[109]

The second result of this extended market definition is that it blurs the distinctions between the Broadway and off-Broadway markets. Off-Broadway has been considered to be a distinct market from the Broadway market for several reasons. Off-Broadway theatres have less than 500 seats and are generally located in areas outside of the Broadway theatre district.[110] The cost of launching an off-Broadway production is significantly lower than that of a Broadway show. For example, in 1981, the approximate cost of assembling an off-Broadway play was $100,000 as compared to $500,000 for its Broadway equivalent. Similarly, the average cost of launching an off-Broadway musical was $175,000, as compared to $1,250,000 for a Broadway musical.[111]

The distinction between Broadway and off-Broadway has also been recognized in the theatre industry by the imposition of different pay scales and wage requirements.[112] Furthermore, Broadway and off-Broadway have served different functions in the theatre industry. Traditionally, off-Broadway has been a training ground for producers, directors, playwrights, and actors who later move on to Broadway.[113] Off-Broadway theatres also cater to a different, smaller audience than Broadway. This has been evidenced by the higher percentage of classics, revivals, and avant-garde plays appearing off-Broadway.[114]

In contrast, Broadway has been, and continues to be, the apex of the American theatre industry.[115] The ultimate goal of most theatre producers is to have their play produced there, because Broadway sets the pattern and determines, to a large extent, what the rest of the country will see.[116]

Consequently, enlarging the Broadway market to accommodate this version of Redevelopment Project theatres creates an arbitrary distinction, based on geographic location, between Broadway and off-Broadway theatres. The most glaring effect of this delineation is

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[109] *See* Initial Government Memorandum, *supra* note 16, at 16 n.16. *See supra* note 68 and accompanying text.

[110] Nederlander Memorandum, *supra* note 44, at 7 (sources omitted). *See, e.g.*, J. PRICE, THE OFF-BROADWAY THEATER (1962) (an historical perspective of off-Broadway theatre).

[111] Nederlander Memorandum, *supra* note 44, at 8 (sources omitted).

[112] *Id.* (sources omitted).

[113] T. MOORE, THE ECONOMICS OF THE AMERICAN THEATER 19-20 (1968).

[114] *Id.*

[115] *See supra* note 102.

[116] Nederlander Memorandum, *supra* note 44, at 12-13.

exemplified by those theatres located in the 42nd Street vicinity which seat between 100 and 499 people. These "middle houses"[117] would be excluded from the Broadway classification while the same theatre across the street would not be.

2. The "Market Within A Market" Model

A second market model would be created if the court believed that the Redevelopment Project and the Broadway market could be treated as separate entities.[118] This model would be based on the premise that, although any New York City acquisition by Shubert in or out of the Redevelopment Project ultimately increases Shubert's competitive dominance within the general Broadway area,[119] the Project theatres could somehow stand apart from surrounding Broadway theatres.

The court's market within a market model is, however, subject to serious flaws. For example, the government indicated that many, if not all, of the Redevelopment Project theatres would have the same characteristics as Broadway theatres.[120] Even under Nederlander's conceptualization of the Project theatres, four theatres meet the traditional market standard based on size, geographic location and commercial nature.[121]

The clearest indication of the court's narrow view of competition comes from the UDC's final report on the 42nd Street Redevelopment Project.[122] Contrary to the positions expressed by the government[123]

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[117] *See* Nederlander Memorandum, *supra* note 44, at 7 n.5. *See supra* notes 64 & 102 and accompanying text (proximity of middle houses to both Redevelopment Project and Broadway theatres). *See also* Table, *supra* note 101.

[118] *See Shubert*, No. 56-72, slip op. at 14-16.

[119] Presumably, after completion of the Redevelopment Project, these theatres will be absorbed by the present Broadway market.

[120] Initial Government Memorandum, *supra* note 16, at 17; Revised Government Memorandum, *supra* note 62, at 2; Record, *supra* note 74, at 22.

[121] *See* Table, *supra* note 106.

[122] *See* DEVELOPMENT PROJECT REPORT, *supra* note 101.

[123] While the Project was in its preliminary stages of development, the government stated that the UDC plan included two nonprofit institutional theatres. Revised Government Memorandum, *supra* note 62, at 3 n.**. Based on this information, the government arrived at its conclusion that "approximately five to seven" legitimate theatres would be infused into the market. *Id.* at 2. The UDC plan acknowledges that two theatres, the Liberty and Victory, should be noncommercial. DEVELOPMENT PROJECT REPORT, *supra* note 101, at 24-25, exhibit 12. *See* Table, *infra* note 124. The government's projection, however, overlooks the major difference between institutional and legitimate theatres. The UDC recommended that the Victory Theatre be used for solo performers, chamber music performances, and small-scale productions. In fact, the Victory Theatre's seating configuration rendered it "impossible" to meet commercial Broad-

and Nederlander[124] regarding the characteristics of Project theatres, the UDC has indicated that only three new facilities are recommended for use as legitimate theatres.[125] All three theatres will seat over 960 people.[126] Based on this projection, the Redevelopment Project theatres will fit within the existing market definition.[127] Shubert's

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way standards. *Id.* at 24. The UDC also suggested that the Liberty Theatre be used for dance rather than as a legitimate theatre. The Liberty Theatre's seating configuration and stage structure was also thought to make it uncompetitive with traditional Broadway houses. *Id.* at 24-25.

[124] Contrary to Nederlander's projections with regard to seating capacity, *see* Table, *supra* note 106, all Project theatres will seat over 500 people.

UDC Conceptualization of
Redevelopment Project Theatres

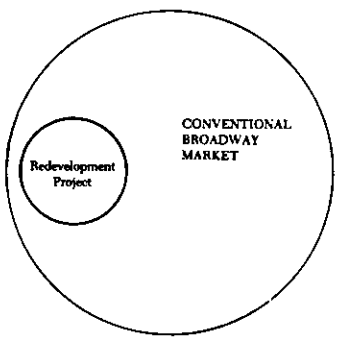
Name of Theatre	Seating Capacity	Recommended Use
Apollo	1,156	Legitimate
Empire	759	(None)
Harris	994	First-Run Film
Liberty	1,054	Institutional Dance
Lyric	1,256	Legitimate
New Amsterdam (Main)	1,537	Legitimate
New Amsterdam (Roof)	631	Cabaret
Selwyn	964	Legitimate
Times Square	1,032	Twin-Run Film.
Victory	769	Institutional Chamber

DEVELOPMENT PROJECT REPORT, *supra* note 101, exhibits 11 & 12.

[125] DEVELOPMENT PROJECT REPORT, *supra* note 101, at 17. The net addition to the market will be three theatres even though a fourth theatre, the Apollo, is included in the UDC plan. The Apollo Theatre is already operating in the market and appears to have been included in the UDC Report because its desirability would be "significantly improved" by the renovation of other Project theatres.

[126] *See* Table, *supra* note 124 (These theatres are the Lyric, New Amsterdam (Main) and the Selwyn. The Apollo Theatre was not considered for present discussion. *See* DEVELOPMENT PROJECT REPORT, *supra* note 101, at 17. *See supra* note 125).

[127]



Shubert, No. 56-72, slip op. at 14-16; *see supra* notes 120-26.

acquisition of Redevelopment theatres could, therefore, cause its share of the Broadway theatre market to fluctuate between 51.4[128] and 54.4[129] percent depending on the number of theatres actually converted. Presumably, this range in market share would not be considered by the court to be "excessively dominant."[130]

Extending the number of theatres which would be considered part of the Broadway market to reflect the absorption of Redevelopment Project theatres eradicates any legalistic distinctions between these two entities. This is an appropriate result because any other interpretation would exclude Project theatres from Broadway classification despite their physical and geographic similarities.

Conversely, the court's market within a market model[131] emphasizes the narrowness of its view of competition. *Shubert*, therefore, illustrates the court's ability to focus selectively on an artifically created segment of an existing market when attempting to bring about desired results.

The court's treatment of Broadway and the Redevelopment Project as separate entities may have stemmed from the belief that Shubert's involvement in the Project would not only increase the Project's chances for success,[132] but would also spur competition for acquisition rights to Project theatres.[133] Allowing Shubert to compete in the Redevelopment Project, however, might actually decrease the competitive pressures in that "market" by forcing out less affluent theatre operators from the bidding process.

The government offered two reasons why theatre operators might not be able to bid successfully against Shubert for the new theatres made available through the Redevelopment Project. First, the projected costs and building standards established for theatres which will be part of the 42nd Street aspect of the Redevelopment

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[128] *See* Table, *supra* note 108 (Shubert could then own 18.5 of the 36 theatres on Broadway).

[129] *See id.* (Shubert could then own 18.5 of the 34 theatres on Broadway). Nederlander argued that only four theatres could meet the market definition and could be considered. As Nederlander argued in 1981, the destruction of the Helen Hayes and Morosco Theatres resulted in a net gain of two new theatres on Broadway. Nederlander Reply Memorandum, *supra* note 16, at 3 n.*.

[130] *Shubert*, No. 56-72, slip op. at 14.

[131] *See* Figure, *supra* note 127.

[132] *Shubert*, No. 56-72, slip op. at 14.

[133] The government believed that the Redevelopment Project was a risky venture. Record, *supra* note 74, at 23; Revised Government Memorandum, *supra* note 62, at 3. Both the government and Shubert suggested that the likelihood of the Redevelopment Project's success would be enhanced by Shubert's participation in the bidding for these theatres because of Shubert's successful operational history. Record, *supra* note 74, at 23, 51. Moreover, Shubert was best financially suited to meet the UDC's high bidding standards. Revised Government Memorandum, *supra* note 62, at 3 n.**.

Project were believed to be much higher than necessary. Only an investor with large capital could afford to undertake such a venture. Second, the 42nd Street aspect of the Redevelopment Project envisioned the operation of two nonprofit theatres which were expected to be auctioned as part of a package including other theatres. Presumably, most theatre operators could not afford to operate these theatres.[134]

Shubert's presence in the bidding process for these theatres permits the UDC to maintain its high standards but may discourage proposals from smaller theatre operators who may consider bidding futile.[135] This example of "theatre Darwinism"[136] effectively subverts the court's professed goal of enhanced competition.[137] Consequently, the *Shubert* decision deviates from the stated goals and objectives of the public interest test[138] with regard to both the Redevelopment Project and the Broadway market.

B. *The Court's Role*

Shubert highlights a difficult problem facing courts, government, and consent decree defendants: What should the court's role be in evaluating a bilaterally requested application for the modification of a consent decree?

There are many practical problems facing the court and the parties when they seek to modify a consent decree. Consent decrees do not contain a record of market structure, competitive conditions, and industry practices to which future courts can look for guidance.[139] Furthermore, when decrees are framed, there is no judicial opinion available to explain why particular provisions of the decree were adopted or how any particular provision is suited to the relief granted.[140] As a result, in passing upon a motion to modify or vacate a consent decree, a court should delve deeply into some or all of the issues that have prompted the parties to request alteration of the

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[134] *Id. See* Table, *supra* note 106.

[135] *See supra* note 71.

[136] The next two largest theatre operators in the New York market, the Brandt Theatrical Organization and Nederlander, claimed that they would be delighted to participate in the Redevelopment Project. Record, *supra* note 74, at 43. Hence, it would appear that only the strongest competitors on Broadway will be involved in the Redevelopment Project's bidding process.

[137] *Shubert*, No. 56-72, slip op. at 14.

[138] *See supra* note 13.

[139] *See supra* note 2.

[140] *Id.*

original decree.[141] This consideration was emphasized by Justice Cardozo when he said, "what was then solemnly adjudged as a final composition . . . will not lightly be undone at the suit of the offenders, and the composition held for nothing."[142]

As the *Shubert* court noted, the judiciary should neither be without power to effectuate a modification in light of changed circumstances,[143] nor act as a rubber stamp of the compromise position reached by the parties.[144] The *Shubert* decision, however, fails to heed the public interest test's sound admonition that bilateral applications for the modification of consent decrees may be granted only when supported by facts and *independent* reasoning.[145] By merely noting objections filed with the court[146] and otherwise adopting the government's factual determinations and legal analysis,[147] the *Shubert* court has subordinated its role as guardian of the public interest.[148]

In contrast to the public interest test's stated goal of enhanced competition,[149] the *Shubert* court indicated that a bilateral modification would be approved as long as it did not *lessen* competition.[150] This allows the Shubert Organization, which already exercises a dominant competitive position,[151] to further enhance its control over the Broadway market. Even though the Shubert Organization could decide not to add more theatres to its present New York holdings, it is likely[152] that Shubert will tighten its control in New York by forcing

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[141] This is not to imply that the court should undergo a full trial on the merits. To do so would undermine the usefulness of the consent decree as a settlement device. What is being suggested is that the court take advantage of its ability to obtain the necessary information to make a meaningful evaluation of the public interest. *See generally* H.R. REP. No. 1463, 93rd Cong., 2d Sess. 7-8, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6535, 6538-39 (quoting S. REP. No. 298, 93rd Cong., 2nd Sess. 6-7 (1974)) (legislative history of the Tunney Act).

[142] 286 U.S. at 120.

[143] *See supra* notes 7 & 12.

[144] *Shubert*, No. 56-72, slip op. at 12-13. *See* M. HANDLER, *supra* note 11, at 879.

[145] *See supra* notes 11-12.

[146] *See supra* note 84 and accompanying text.

[147] *See supra* notes 51-63 and accompanying text.

[148] *See supra* notes 9-13 and accompanying text. It is important to note that a court's power to undertake its own investigation and independent analysis was reinforced by the Tunney Act, which should apply, at least in spirit, to this type of proceeding. *See infra* notes 167-72 and accompanying text.

[149] *See supra* note 13 and accompanying text.

[150] *See Shubert*, No. 56-72, slip op. at 13-14; Shubert Memorandum of Law at 4, United States v. Shubert, No. 56-72 (S.D.N.Y. filed Apr. 30, 1981) (emphasis added) [hereinafter cited as Shubert Memorandum of Law].

[151] *Shubert*, No. 56-72, slip op. at 6.

[152] *See generally supra* note 47 and accompanying text (Shubert has demonstrated its desire to expand in theatre markets across the country).

out competitors in both the Redevelopment Project[153] and the Broadway market.[154]

C. *The Government's Role*

It has been suggested that the Antitrust Division of the Department of Justice has become a regulatory agency by filing cases which it terminates by negotiation rather than litigation. Hence, guidance for the antitrust bar will come from Justice Department officials' speeches and actions rather than from judicial opinions.[155] Similarly, the antitrust bar may be well advised to keep abreast of the ebb and flow of popular political thought.[156] The *Shubert* decision, therefore, may be viewed as a reflection of the government's present view[157] that

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[153] *See supra* notes 63-73 & 132-36 and accompanying text.

[154] *See supra* notes 100-09, 119 & 128-30 and accompanying text.

[155] Kirkpatrick, *Antitrust Enforcement in the Seventies*, 30 CATH. U.L. REV. 431, 481 (1981).

[156] *See* Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 749 (1949). "The development of the Anti-Trust laws has been greatly influenced by the broader flow of economic events and political opinion in the process of American social development."

[157] *See* Reply Memorandum Of Law On Behalf Of The Shubert Organization, Inc. In Support Of The Modification Of The Decree Agreed Upon By The Parties at 5, United States v. Shubert, No. 56-72 (S.D.N.Y. Sept. 4, 1981) [hereinafter cited as Shubert Reply Memorandum].

The Chief of the Justice Department's Antitrust Division, William F. Baxter, has criticized prior administrations for seeking and employing perpetual consent decrees which regulate industry. In criticizing the use of the "regulatory decree," Baxter explained:

> I [will] give some examples of the type of decrees I have in mind. The decree that was entered in the *Swift Packing* case some years ago that legislated Swift out of closely related industries, thereby carefully removing them as one of the most effective competitors in those industries. The *Paramount Picture* decree which has resulted in the motion picture industry largely being run out of a little, and not very good, regulatory agency buried back in the Justice Department somewhere . . . .
>
> The Division should be at some pains to design once and for all remedies wherever it possibly can; examples include divestiture, incarceration . . . and even cease and desist orders that do nothing more than set the defendant up for treble-damage actions. And if it is truly found impossible to come up with a once and for all remedy, then a time limit should be written right into the decree so that it expires by its own terms after five or at most 10 years.
>
> I think there is virtually no industry in the United States where a decree, however carefully written in the first instance, can survive the technological and commercial changes which will occur over the next 10 years. Ten years later the decree is far more likely to be hampering the processes of competition than aiding them.

Baxter, *How Government Cases Get Selected—Comments from Academe*, 46 ANTITRUST L.J. 586, 589 (1977) (footnotes omitted). *Cf.* Kramer, *supra* note 2, at 1064-65 (author suggests that all consent decrees automatically terminate fifteen to twenty years after inception unless a party to the judgment files for extension within three months before the conclusion of the termination date).

Four years later, as Assistant Attorney General, Baxter testified before a United States Senate Committee, that "the [Antitrust] Division had some time ago commenced a project to better monitor outstanding consent decrees, but that it was his objective to revise only 'old

perpetual decrees are neither appropriate nor efficient.[158]

In the past, it has been difficult to modify a consent decree without government support.[159] The government's current policy of modifying or vacating perpetual consent decrees has been viewed as a "unique" opportunity to avoid *Swift* analysis.[160] In fact, the govern-

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consent judgments that no longer make economic sense in the context of today's business realities.'" Testimony before a U.S. Senate Committee (Apr. 29, 1981), *cited in* Shubert Reply Memorandum, *supra*, at 5.

In a speech to the Antitrust section of the Bar Association, Richard J. Favretto, Deputy Assistant Attorney General in the Antitrust Division, stated that the government has come to realize that legislation making antitrust violations a felony provided a sufficient deterrent, and so, long decrees need not be employed. Address by Richard J. Favretto to the Antitrust Section of the American Bar Association (Apr. 2, 1981), *cited in* Shubert Memorandum of Law, *supra* note 150, at 6 n.3. *See* Favretto, *Settlement of Government and Private Cases: The Antitrust Division*, 50 ANTITRUST L.J. 7 (1981). *But see* Peterson, *supra* note 7, at 35; Note, *The Modification of Antitrust Consent Decrees*, 63 HARV. L. REV. 320, 320 (1949) (the government's policy of using consent decrees considered to be one of the most effective instruments used in antitrust enforcement).

Antitrust laws have traditionally been subject to a particular administration's political and business philosophy. *See Report from the U.S. Senate, The Honorable Howard Metzenbaum*, 50 ANTITRUST L.J. 133,137. *See, e.g., Antitrust Division Begins Review of Old, Discredited Consent Decrees*, ANTITRUST & TRADE REG. REP. (BNA) No. 1032, at A-16 (Oct. 22, 1979), *cert. generally* Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (antitrust laws should not serve to protect any company from the "rigors of competition").

Although perpetual decrees have a propensity towards obsolescence, short-term decrees may prove to be much more severe to defendants because the government-desired results will be effectuated in a shorter time. For instance, if the government had chosen to use a short-term consent decree, Shubert would have been forced to immediately divest a large share of its holdings. Even though divestment may be beneficial to investors who could take advantage of such a forced liquidation, Shubert would surely fare better from having more time to redevelop its assets. *See, e.g.*, United States v. Shubert, 163 F. Supp. 123 (S.D.N.Y. 1958) (Shubert had difficulty acquiring a fair price for its theatres two years after the consent decree was signed). *See generally* D. WALDMAN, ANTITRUST ACTION AND MARKET STRUCTURE 150 (1978) ("[W]here a firm was threatened with future divestiture, market structure and performance improved without further direct action by the courts."); Note, *New Approaches*, *supra* note 1, at 314 n.157.

[158] *See supra* note 157. The government has indicated that decrees which are more than ten years old will be evaluated. This is based upon its belief that if a consent decree has not achieved its ameliorative effect within a decade, it probably will never work. In 1982, over 1,000 consent decrees met this qualification. Seltzer & Madden, *"Unique" Opportunity at Hand to Review Antitrust Decrees*, N.Y.L.J., Jul. 15, 1982, at 1, col. 2. *See generally* P. MARCUS, *supra* note 1, at 734-35.

[159] Cases that resulted in modification in the face of government opposition have required an exhaustive effort on the part of the defendant. *See, e.g.*, United States v. Carrols Dev. Corp., 1982-1 Trade Cas. (CCH) ¶ 64,510 (N.D.N.Y. 1981) (new entry dissipated any anticompetitive potential); United States v. Culbro Corp., 1980-81 Trade Cas. (CCH) ¶ 63,692 (S.D.N.Y. 1981) (failing company argument satisfied the *Swift* test); United States v. Continental Can Co., 128 F. Supp. 932 (N.D. Cal. 1955) (accounting methods required in the original decree found to be unworkable). *See also* Note, *The Modification of Antitrust Consent Decrees*, 63 HARV. L. REV. 320 (1949).

[160] For example, only with the government's concurrence were the *Swift* defendants able to obtain partial modification, United States v. Swift & Co., 1980-1 Trade Cas. (CCH) ¶ 63,185

ment has been successful in persuading the courts to dispense with the *Swift* test. Instead, the courts' foci have been directed to whether further restraint is needed in light of contemporary circumstances, and whether removing the restraints will enhance competition.[161]

In seeking decrees which have fulfilled their purpose or which are inconsistent with the present administration's antitrust philosophy,[162] companies have been encouraged to meet informally with the government to discuss whether their consent decree has achieved its "procompetitive" purpose or whether competition would be enhanced by modification or termination.[163] Counsel have also been advised to develop a detailed written analysis[164] showing trends in market share, new entry, price, cross-elasticity of demand among product substitutes, and relevant financial data covering the chronological spectrum from entry of the decree.[165] If the government agrees that modification of an existing consent decree is timely, the parties file a joint motion with the court that originally entered the decree. That court receives a full record endorsed by both government and defendant to use as a basis for modifying or vacating the consent decree.[166] Arguably, this approach gives the government too much power over the courts. To restore the balance of power, the Tunney Act[167] should be applied to consent decree modification.[168]

(N.D. Ill. 1980), and ultimately the complete termination of their decree. United States v. Swift & Co., 1982-1 Trade Cas. (CCH) ¶ 64,464 (N.D. Ill. 1981). *See* Peterson, *supra* note 7, at 37. *See also* United States v. Paramount Pictures, 1974 Trade Cas. (CCH) ¶ 75,378 (S.D.N.Y. 1974).

[161] Seltzer & Madden, *supra* note 158, at 3, col. 4. The degree to which this departs from the *Swift* doctrine is confirmed by Justice Butler's dissent in *Swift*, which forcefully argued that under conditions prevailing in 1930, the *Swift* restrictions were unnecessary and their removal would promote competition. *Swift*, 286 U.S. at 120-23 (Butler, J., dissenting).

[162] Seltzer & Madden, *supra* note 158, at 1, col. 3.

[163] *Id.* at 3, col. 2.

[164] *Id.*

[165] *Id.* Since there will be little opportunity to present live testimony, the burden of persuasion rests substantially upon the written record. *Cf.* Record, *supra* note 74.

[166] Seltzer & Madden, *supra* note 158, at 3, col. 2.

[167] 15 U.S.C. § 16 (b-h).

[168] *See generally* Note, *New Approaches*, *supra* note 1, at 309, 313 n.149; Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594 (1973) (authors indicate the need for Justice Department decision-making to move back to the courts).

The legislative history of the Tunney Act indicated that Congress hoped that forced public disclosure of the private negotiations occurring prior to the signing of a consent decree would shed "sunlight" into an area traditionally considered to be shrouded in secrecy. *See* H.R. REP. No. 1463, 93rd Cong., 2d Sess. 6, *reprinted in* 1974 CODE CONG. & AD. NEWS 6535, 6537. *See generally* 119 Cong. Rec. 24,596-9 (1973); 120 Cong. Rec. 36,342, 36,344-45 (1974) (discussion of the need for public disclosure of the pertinent facts and negotiations leading to a consent decree). It would seem invidious to believe that the very same type of secrecy surrounding the

The government has argued that the Tunney Act applies only to the *original entry* of a consent decree and should not be applied to modification.[169] One Tunney Act commentator has countered that a bilateral application for modification could be construed as a "proposal for a consent judgment" and would, therefore, fall within the scope of the Act.[170]

If the Tunney Act is considered applicable to the modification of consent decrees, the government would be required to file with the district court, publish in the Federal Register, and furnish to any person upon request a competitive impact statement. The statement would include a recitation of the nature and purpose of the modification proceedings as well as a review of the practices that originally gave rise to the alleged violation of the antitrust laws. From the impact statement the court could determine whether a proposed modification was in the pubic interest.[171]

Under the Tunney Act, the court could take the testimony of government officials and experts or appoint a special master and consultants to assist it in arriving at a determination. The court is also encouraged to elicit and review comments from interested persons and agencies concerning the proposed judgment. Finally, the Act allows the court to take any other action that it deems appropriate to serve the public interest.[172]

In conclusion, the *Shubert* decision indicates that when the government decides that a consent decree has not achieved its planned market deconcentration, the decree should be abandoned altogether.[173] This position makes a powerful comment on antitrust planning and enforcement over the last twenty-five years and leaves defendants who are considering entering consent decrees in an uncertain state.

Reliance on governmental antitrust policy-making, as exhibited by the *Shubert* decision, subjects the court to transient fluctuations in

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negotiations occurring prior to the making of a joint motion to modify a consent decree would be excluded from these sentiments.

[169] *See, e.g.*, United States v. General Elec. Co., 1977-2 Trade Cas. (CCH) ¶ 61,659, at 72,716 n.1 (E.D. Pa. 1977). Other courts have overlooked this issue entirely. *See, e.g.*, United States v. Swift & Co., 1980-1 Trade Cas. (CCH) ¶ 63,185 (N.D. Ill. 1980); United States v. United Fruit Co., 1978-1 Trade Cas. (CCH) ¶ 62,001 (E.D. La. 1978); United States v. Hartford-Empire Co., 1978-1 Trade Cas. (CCH) ¶ 62,057 (N.D. Ohio 1978).

[170] *See* Seltzer & Madden, *supra* note 158, at 24, col. 4.

[171] 15 U.S.C. § 16(b).

[172] *Id.* § 16(e)-(f).

[173] The government asserted that "although we would have liked to see some further deconcentration in . . . [the Broadway] market . . . it didn't happen . . . and we have no reason to believe that it is going to happen . . . ." Record, *supra* note 74, at 21.

political attitudes. This will, in effect, draw the judicial system away from the criteria for modifying consent decrees established by the *Swift*, public interest, and Tunney Act standards.

V. Conclusion

Although an outdated consent decree may prevent a company from competing at its fullest potential, courts must protect the public's interest in enhanced competition by independently evaluating the merits of an application for modification.[174] This will be accomplished only if a court endeavors to inquire into the nature of the original decree and the relief requested.[175] The *Shubert* court's failure to respond to the need for independent fact-finding and clear market analysis seriously undermines the court's role as arbiter of the public interest.[176]

The *Shubert* decision reflects the government's present attitude that perpetual decrees are neither appropriate nor efficient.[177] In this case, the court has allowed its attention to be drawn away from traditional standards for modifying consent decrees[178] toward less restrictive criteria. Under the *Shubert* rationale, modification can be effectuated if the parties show that in light of contemporary circumstances, removal of a decree's restraints could enhance competition in any portion of the relevant market.

This decision also provides an example of the judiciary's ability to manipulate a market definition to achieve desired results.[179] The court creates at least two different market models, each of which provides different indications of Shubert's market strength.[180] Unfortunately, the court's failure to clearly delineate the competitive market in New York City provides little guidance for future courts.

Shubert could ultimately allow the Shubert Organization, which already controls almost half of the theatres on Broadway,[181] to enhance its market share without limit.[182] In the absence of restraint, Shubert's overwhelming competitive presence is certain to be felt throughout the entire theatre industry.

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[174] *See supra* notes 11-13 and accompanying text.
[175] *See supra notes 139-42 & 171-72 and accompanying text.*
[176] *See supra* notes 9-10 and accompanying text.
[177] *See supra* notes 162-66 and accompanying text.
[178] *See supra* notes 5-13 and accompanying text.
[179] *See supra* notes 98 & 132-34 and accompanying text.
[180] *See supra* notes 108-09 & 128-29 and accompanying text.
[181] *See supra* note 108 and accompanying text.
[182] *See supra* notes 75-77 and accompanying text.