PRIVATE ANTITRUST SUITS: TOLLING THE STATUTE OF LIMITATIONS AS TO DEFENDANTS NOT NAMED IN A PRIOR GOVERNMENT SUIT

Section 4 of the Clayton Act provides private individuals with a right of action for injuries resulting from violations of the antitrust law.[1] Toward this end, Section 5a[2] allows the private plaintiff to use a prior government judgment against the same defendant as prima facie evidence of a violation. In addition, during the pendency of a government action the Act's four year statute of limitations[3] is tolled,[4] allowing the private plaintiff to await the outcome of the case and use a favorable judgment to his benefit.[5] The purpose of this Comment is to examine the extent to which the statute of limitations is tolled.

In filing an antitrust suit, a major consideration concerns the operation of the statute of limitations against the proposed defendants. Where the proposed defendants were named as defendants in the prior government action, the statute is clearly tolled as to them, as of the time the Attorney

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[1] Clayton Act §4, 15 U.S.C.A. §15. "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has his agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] Clayton Act §5(a), 15 USCA §16(a). "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that the defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15(a) of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* that this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15(a) of this title."

[3] In 1955 Congress enacted a statute of limitations applicable to the private antitrust action. Clayton §4(b), 15 U.S.C.A. §15(b). "Any action to enforce any cause of action under sections 15 or 15(a) of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15(a) and 16 of this title shall be revived by said sections."

[4] Clayton §5(b), 15 U.S.C.A. §16(b). "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15(a) of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* that whenever, the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." Section 15(a), which is excepted from this provision's benefits, provides for the United States recovering damages as a private litigant.

[5] Minnesota Mining and Manufacturing v. New Jersey Wood, 281 U.S. 311, 319 (1965); see quotation at note 31, *infra.*

General files the case. A difficult problem arises, however, if a proposed defendant was generally involved in the conspiracy or transaction which formed the basis of the government's complaint, but for one reason or another was not actually named as a party defendant therein. It is not a problem without solution, however, and the key appears to lie in a judicial approximation of the Congressional intent underlying Section 5 of the Clayton Act.

Basis of the Private Plaintiff's Right of Action

Congress instituted the private right of action in an effort to secure more effective enforcement of the antitrust laws.[6] A successful plaintiff is awarded treble damages,[7] attorney's fees, and costs.[8] In addition to being provided with a prima facie case against the defendant (where the government obtains a judgment),[9] the plaintiff may use government pleadings, transcripts and evidence to his own private advantage.[10] Finally, the statute of limitations is generally tolled during the pendency of the government action. Thus Congress made the private right of action quite attractive. In essence, by making the private action lucrative and by placing the plaintiff in so strong a position, another enforcement agency has been created.[11] Hence, it would seem that these provisions should be broadly construed,[12] and any search for Congressional intent must be guided by this policy.[13]

That this is the position of the Supreme Court is indicated in *Minnesota Mining and Manufacturing v. New Jersey Wood*[14] (hereafter referred to as *Three M*), which broadly interpreted the rights of the private litigant. The question before the Court was whether the statute of limitations had been tolled; a divided Court felt that it had. Citing *Burnett v.*

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[6] Minnesota Mining and Manufacturing v. New Jersey Wood, *supra* note 5; Bergen v. Parke Davis & Company, 307 F.2d 725, 727–728 (3rd Cir. 1962); TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS §3.01 (1965).

[7] See note 1, *supra*.

[8] *Ibid.*

[9] *Ibid.*

[10] Minnesota Mining and Manufacturing v. New Jersey Wood, 281 U.S. 311, 319 (1965); 16 CFR 132 (e).

[11] Kinnear-Weed Corp. v. Humble Oil and Refining Co., 214 F.2d 891, 893 (5th Cir. 1954), *cert. den.* 348 U.S. 912 (1955); Weinberg v. Sinclair Refining Co., 48 F.Supp. 203, 205 (E.D. N.Y. 1942); Quemos Theatre Co., Inc. v. Warner Bros. Pictures, 35 F.Supp. 949, 950 (D.N.J. 1940); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, March 31, 1956, p. 378.

[12] Bergen Drug Co. v. Parke Davis & Co., 307 F.2d 725, 727–8 (3rd Cir. 1962); Kinnear-Weed Corp. v. Humble Oil and Refining Co., 214 F.2d 891, 893 (5th Cir. 1954), *cert. den.* 348 U.S. 912 (1955).

[13] Karseal Corp. v. Richfield Corp., 211 F.2d 358, 365 (9th Cir. 1955); Fanchon & Marco v. Paramount Pictures, 100 F.Supp. 84, 88 (S.D.Calif. 1955).

[14] 381 U.S. 319 (1965).

New York Central[15] the court stated the test to be, "whether the Congressional purpose is effectuated by the tolling of the statute of limitations in given circumstances."[16] With this test even the dissenter, Mr. Justice Goldberg, agreed.[17] Thus it was crucial to determine the Congressional intent underlying the private right of action:

> Whatever ambiguities may exist in the legislative history of these provisions as to other questions, it is plain that in 5(b) Congress meant to assist the private litigants in utilizing any benefits they might cull from government antitrust actions.[18]
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> The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit.[19]

This general attitude was reaffirmed in *Leh v. General Petroleum*[20] where the Court held that for the statute of limitations to be tolled the issues in the private suit need not be identical to those in the government action. Rather, it is sufficient that the matters complained of be substantially similar to those in the government action:

> The private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants. Rather, effect must be given to the broad terms of the statute itself—"*based in whole or in part on any matter* complained of" (emphasis added)—read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. 381 U.S. at 318, 14 L.Ed.2d at 411. Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief. But the courts must not allow a legitimate concern that invocation of §5(b) be made in good faith lead them into a niggardly construction of the statutory language here in question.[21]

Having demonstrated the Court's willingness to broadly interpret the tolling provision, it should not seem so great a step to toll the statute with regard to a defendant who, although not named as a defendant in the government action, was a party to the conspiracy or transaction sued upon. Prior case law, however, would appear to militate this view.

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[15] 380 U.S. 424 (1965).

[16] *Id.* at 427.

[17] Minnesota Mining and Manufacturing v. New Jersey Wood, 381 U.S. 311, 335 (1965).

[18] *Id.* at 317.

[19] *Id.* at 317 quoted from Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 569 (10th Cir. 1962).

[20] 382 U.S. 54 *rehearing denied* 382 U.S. 1001 (1965).

[21] *Id.* at 59.

The Restrictive Approach: Prior Case Law

The early case law had indicated that provisions of Clayton should not apply to a "non-government" defendant.[22] *Sun Theatre v. RKO Pictures*[23] provided a basic expression of this point of view, the collateral estoppel theory. Here the Court restricted the application of tolling to the defendant named in the government action:

> The second paragraph of that Section (5 Clayton) is designed to insure injured parties the full fruits of the government's case by suspending during pendency thereof, the running of the statute against a right of action in favor of parties injured by the same acts. Although this paragraph does not speak in terms of defendants in a suit brought by the government, it suspends the running of limitations during pendency thereof "in respect of each and every right of action based in whole or in part on any matter complained of" therein. Neither logic nor public policy considerations permit us to say that the pendency of a government antitrust suit operates to suspend the running of the statute as to every party who participated whether locally or nationally, in the nationwide combination condemned thereby without regard to whether or not he was named therein as a defendant. Rather the suspension provisions must be construed in the light of what can be accomplished thereby. Our hypothetical decree finds that A, B, C and D conspired together to eliminate competition on a national scale. *The decree is prima facie evidence to this question only.* P reaps the full benefit of Section 5 if the statute is suspended as to the parties named. If a different result is desirable, provision for its promulgation is a function of the Congress, not of the courts.[24] [Emphasis added.]

Thus the tolling provisions were held not to apply to the private defendant who was not named in the government action. Although the Court broadly stated the purpose of Clayton's protection of the private party's rights, it ultimately arrived at a most restricted view of the benefits of the government action. Thus, the benefit of tolling was limited to mere preservation of the prima facie case and, therefore applies only to the defendant named in the government action. The plaintiff's prima facie case, of course, flows from the judgment in the government action and is necessarily limited to that which appears therein. The Court called an application of the tolling provision to the non-government defendant an *extension* of the provision and in this way justified its refusal to act in the absence of explicit congressional expression supporting the extension. The Court reasoned that since such an application found a basis "neither in logic nor public pol-

[22] Sun Theatre Corp. v. RKO Pictures, 213 F.2d 284, 291 (7th Cir. 1954); Electric Theatre Co. v. Twentieth Century Fox Corp., 113 F.Supp. 937, 945 (W.D.Mo. 1953); Levy v. Paramount Pictures, Inc. 104 F.Supp. 787, 789 (D.Utah 1951); Momand v. Universal Film Exchange, 172 F.2d 37, 48 (1st Cir. 1948), *cert. den.* 336 U.S. 967 (1949).

[23] Sun Theatre v. RKO Pictures, 382 U.S. 54, *rehearing denied* 382 U.S. 1001 (1965).

[24] *Id.* at 291.

icy," the private plaintiff was seeking not to *apply* but rather to extend the statute. This, then, was for Congress.

Although not mentioned in *Sun Theatre,* an alternative approach reaching the same result has been used, i.e., Section 5(b) (tolling) is merely complementary to Section 5(a) (granting the prima facie case). Therefore, the statute of limitations was intended to be tolled only as to those items *and persons* mentioned in the government judgment, which forms the basis for the prima facie decree.[25] Thus the statute continued to run for the benefit of those conspirators not named in the government action.

Another restrictive interpretation, expressed in *Steiner v. 20th Century Fox,*[26] permitted the statute of limitations to be tolled only in *identical* cases. That is to say, the statute of limitations will be tolled only where the defendants and the issues involved in the government action are "identical" to those in the subsequent private action.

The Expansive Approach

It would appear that the restrictive approach and the cases decided thereunder are no longer controlling. However, the change does not reflect a judicial usurpation of the legislative function as the *Sun Theatre* Court suggested. Rather, the mere judicial recognition of the intent underlying the antitrust laws vitiates the logic of the *Sun Theatre* case. Following the rationale of *Three M,* the Court now takes cognizance of the Congressional purpose in enacting the private right of action, *i.e.,* to better enforce the antitrust laws. Thus, the crucial issue is whether the establishment of the prima facie case or the tolling of the statute of limitations will substantially aid the private litigant *and* aid in the enforcement of the antitrust laws. Posing the question in such a way obviates any considerations of identity of issues, and a new idea emerges:

> In suits of this kind, the absence of complete identity may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matter which the government complained. In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the government was in fact not a party to the antitrust violations alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the government whose activities contributed most directly to the injury of which he complains. On the other hand, some conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the government's necessarily broader net.[27]

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[25] See Christensen v. Paramount Pictures, 95 F.Supp. 446, 454–456 (D.Utah 1949); Steiner v. Twentieth Century Fox, 232 F.2d 190, 196 (9th Cir. 1956).

[26] 232 F.2d 190, 196 (9th Cir. 1956).

[27] Leh v. General Petroleum, 382 U.S. 54, 63–64 (1965).

Thus, *Leh v. General Petroleum*[28] held that the statute of limitations would be tolled if the private action was merely based in whole or *in part* on *any matter* complained of in the government action. In coming to this conclusion, the Court reasonably construed legislative intent and was not guilty of usurping a legislative function by substituting its will for that of Congress.

Similarly under this expansive approach, the *Three M* Court rejected the idea that the rights flowing to the private plaintiff are limited to those found on the fact of the government decree from which he derives his prima facie case. For example, the government action may not proceed to judgment thus depriving the private plaintiff, under the proviso of Section 5(a), of a prima facie case. Yet even the government's initial action in bringing the suit and investigating the facts may be of great aid to the plaintiff under Section 5(b).[29] Being deprived of a 5(a) prima facie case, the plaintiff may still use the government's pleadings, transcripts, data, and exhibits to help him pursue his case to a successful end:[30]

> Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties.[31]

Again, such reasoning flows from a more expansive approach which seeks to find and effectuate Congressional intent. Given this, support vanishes for the proposition that the factors which limit plaintiff's use of the government judgment as a prima facie case (Section 5(a)) also limit the application of the tolling provision (Section 5(b)). Rather there is every indication in *Three M* and *Leh* that the tolling provision is neither conditioned upon nor limited to the preservation of the prima facie decree. It would seem that a court should not hesitate in extending the tolling provision to the "non-government" defendant who is nonetheless a part of the conspiracy which was the subject of the government action and which caused injury to the plaintiff.[32]

The "Non-government" Defendant: Tolling of Statute of Limitations

A recent district court decision concluded that Clayton 5(b) should be so extended.[33] That case involved six "government" defendants who

[28] *Id.* at 54.

[29] Minnesota Mining and Manufacturing v. New Jersey Wood, 381 U.S. 311, 319 (1965).

[30] 16 CFR §§1.131 et seq; 16 CFR §1.132 (3).

[31] Minnesota Mining and Manufacturing v. New Jersey Wood, 381 U.S. 311, 319 (1965).

[32] *Ibid.* at 321.

[33] State of Michigan v. Morton Salt, 259 F.Supp. 35 (D.Minn. 1966). Notice of appeal filed Sept. 13, 1966.

were named as co-conspirators and two "non-government" defendants who were not named at all in the government suit. The Court held that the statute should be tolled relying on the reasoning of *Three M* and *Leh.*

In this case, *State of Michigan v. Morton Salt,*[34] the Court pointed to the different purposes of the two subsections of Section 5. The Court reasoned that the subsections are to some extent independent: while Section 5(a) provides for the prima facie decree, 5(b) provides for all the possible benefits of the government action being preserved for the use of the private litigant. A 1955 amendment of Section 5 separated the provisions for the prima facie decree and for tolling. The *Morton* Court did not feel that the 1955 amendment required a repudiation of the *Sun Theatre* logic. But it did hold that the prima facie provision (Section 5(a)) is separate from the tolling provision (Section 5(b)) and does not limit it in any way.[35] Since the basis of this decision was the Supreme Court's approximation of Congressional intent as stated in *Three M* and *Leh,* the *Morton* case seems highly authoritative.[36]

Further support for the application of the tolling provisions of Section 5(b) to the "non-government" defendant can be found in the wording of the statute: ". . . the running of the statute of limitations in respect of *every right of action* arising under said laws and based *in whole or in part* on any matter complained of in said proceeding shall be suspended during the pendency thereof (i.e., the civil or criminal proceeding instituted by the United States) and for one year thereafter. . . ." [Emphasis added.] The statute provides for tolling "in respect of *every* private right of action. . . ."[37] The District Court in *Morton Salt* did not focus on this wording, though the Court did recite it. Where a statute speaks so broadly, an expansive interpretation seems not only justified but necessary. "(E)very right" would appear to include a right of action against any party to the conspiracy or transaction which resulted in the private plaintiff's injury regardless of whether included in the government's complaint.

In light of the foregoing, the question now becomes whether the "non-government" defendant must be even associated with the conspiracy sued upon in the government action. The answer to this question appears in the statute's wording and *Leh's* holding that the private right of action need only be based "in whole or in part" on any matter complained of in the government action, read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of

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[34] *Ibid.*

[35] Minnesota Mining and Manufacturing v. New Jersey Wood, 381 U.S. 311, 321 (1965); Leh v. General Petroleum, 382 U.S. 54, 58; State of Michigan v. Morton Salt, *supra* note 33, at 48–49; *cf.* cases at note 23, *supra.*

[36] See notes 14 and 16, *supra.*

[37] See note 4, *supra.*

the antitrust laws.[38] Thus, the defendant in the private antitrust action must in some way be associated with the wrongs involved in the government action.

Conclusion

A re-examination of Congressional intent can and does lead to a broader application of Section 5(b) of the Clayton Act. And this is further supported by considering the underlying principle of all antitrust law as stated by Judge Learned Hand:

> Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and to preserve for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.[39]

Nothing could better effectuate this purpose than an interpretation of Sections 4 and 5 of the Clayton Act which permits lucrative, practicable and feasible enforcement of the antitrust laws by the small businessman.

It is therefore concluded that where a person is generally involved in the conspiracy upon which the government brings suit, Section 5(b) tolls the statute of limitations regardless of whether (1) the person was a defendant in the government action or (2) the private plaintiff can use the result of the government action as a prima facie case.

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[38] Leh v. General Petroleum, 382 U.S. 54, 59 (1965).

[39] United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2nd Cir. 1945). The Court cites this statement with approval in United States v. Vons Grocery, 384 U.S. 270, 274 (1960); Brown Shoe v. United States, 370 U.S. 294, 316 (1962).