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THE GOVERNMENT SUSPENSION PROVISION OF THE CLAYTON ACT'S STATUTE OF LIMITATIONS: FOR WHOM DOES IT TOLL?

CHARLES EVAN STEWART*

INTRODUCTION

Section 4B of the Clayton Act prescribes a four-year period of limitations for private damage claims arising from alleged antitrust injury.¹ Under this statutory provision, a complaint must be filed within four years after the antitrust cause of action accrued or it

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¹ See Clayton Act, ch. 323, 38 Stat. 730, 730-40 (1914), amended by Act of July 7, 1955, ch. 283, § 4B, 69 Stat. 282, 282-83 and Act of Sept. 30, 1976, 90 Stat. 1396 (current version at 15 U.S.C. § 15b (1982)). Section 4B provides in pertinent part:

Any action to enforce any cause of action under sections 4, 4A, or 4C 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 Act shall be revived by this Act.

Id.

The primary reason Congress enacted § 4B was to prevent forum shopping. See S. REP. No. 619, 84th Cong., 1st Sess. 4, reprinted in 1955 U.S. CODE CONG. & AD. NEWS 2328, 2330-31 [hereinafter cited as S. REP. No. 619]. The "evil" of forum-shopping existed because, prior to the addition of § 4B, the period of limitations applicable to private treble damage actions arising under the Clayton Act was governed by state statutes of limitations. See *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir.), cert. denied, 368 U.S. 821 (1961). Since the plaintiff's injury could have occurred in a number of states, the plaintiff would often forum shop for the state with the most favorable statute of limitations. See S. REP. No. 619, *supra*, at 2330-31. Section 4B put an end to forum-shopping by establishing a national period of limitations. See *Hall v. E.I. Du Pont De Nemours & Co.*, 312 F. Supp. 358, 361 (E.D.N.Y. 1970).

A second and related goal of Congress in enacting § 4B was to guarantee uniformity in determining the appropriate limitations period for private antitrust claims, as well as certainty not provided by state statutes of limitations. See *City of Burbank v. General Elec. Co.*, 329 F.2d 825, 830 (9th Cir. 1964); *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575, 579-80 (9th Cir. 1964); Wheeler & Jones, *The Statute of Limitations for Antitrust Damage Actions: Four Years or Forty?* 41 U. CHI. L. REV. 72, 83 (1973). The uniform period of limitations was thus designed to eliminate the possibility that a defendant would be placed "in constant jeopardy until the longest period of limitations ha[d] transpired." S. REP. No. 619, *supra*, at 2331; see *Glazer Steel Corp. v. Toyomenka, Inc.*, 392 F. Supp. 500, 503 (S.D.N.Y. 1974) (national period of limitations gives defendant peace of mind by not permitting him to be surprised by "stale causes of action of which [he is] unaware").

will be forever barred.² The period begins to run on the date of the "commission of the last overt act causing injury or damage."³ When a plaintiff alleges a continuing conspiracy,⁴ the statute has been interpreted to mean "that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."⁵ In short, under section 4B, a plaintiff may recover damages for al-

² Clayton Act § 4B, 15 U.S.C. § 15b (1982).

³ *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (period of limitations for conspiracy to violate antitrust laws runs from commission of act); *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 337 (10th Cir.) (cause of action for antitrust claim accrues on date defendant commits act which injures plaintiff's business), *cert. denied*, 459 U.S. 1090 (1982); *Harold Friedman, Inc. v. Thorofare Mkts., Inc.*, 587 F.2d 127, 137 (3d Cir. 1978) (limitations period only runs when damages are "inflicted and ascertainable"). When the last overt act did not occur within the four-year period required by § 4B, the action is time-barred. *See, e.g., National Souvenir Center, Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 512-13 (D.C. Cir.) (action for illegal tying of franchises of wax museums to initial sale or lease through overt act prohibited), *cert. denied*, 105 S. Ct. 103 (1984); *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 595-96 (S.D.N.Y. 1982) (overt acts that allegedly caused damages occurred too long before time permitted by § 4B).

⁴ *See, e.g., Electroglas, Inc. v. Dynatex Corp.*, 497 F. Supp. 97, 105 (N.D. Cal. 1980) (question was whether amendment in distributorship agreement continued conspiracy found in original agreement); *Woolen v. Suntran Taxicabs, Inc.*, 461 F. Supp. 1025, 1035-36 (N.D. Tex. 1978) (cab drivers' claim accrued each time they were denied right to pick up passengers at airport).

⁵ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see In re Penn Cent. Transp. Co.*, 771 F.2d 762, 766 (3d Cir. 1985), *cert. denied*, 54 U.S.L.W. 3411 (U.S. Dec. 16, 1985) (No. 85-737); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 572-73 (4th Cir. 1976); *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 126-28 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 325b (1978). Congress, in enacting § 4B of the Clayton Act in 1955, rejected "discovery-type" limitations provisions — which would toll the limitations period in antitrust cases until such time as a plaintiff could discover facts upon which its claim is based — in favor of the accrual standard explicitly set forth in the statute. *See, e.g., S. REP. NO. 1910*, 81st Cong., 1st Sess. (1949) (proposed "discovery-type" statutes which were rejected); *H.R. REP. NO. 7905*, 81st Cong., 2d Sess. (1950) (same). The congressional hearings and debates reflect Congress' favorable disposition towards an accrual standard. *See Hearings before the Subcomm. on Study of Monopoly Power of the House Comm. on the Judiciary*, 81st Cong., 2d Sess. (1950); 101 CONG. REC. 5129, 5132 (1955). For example, in a debate on the floor of the House of Representatives, Representative Celler pointed to the danger of enacting a discovery-type limitations provision by stating: "The statute of limitations will start running from the time the action accrues, not from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all." 101 CONG. REC. 5129, 5132-33 (1955). Several courts have cited the legislative history of § 4B in applying the accrual standard. *See Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236, 239-41 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *Kansas City v. Federal Pac. Elec. Co.*, 310 F.2d 271, 278-80 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), 373 U.S. 914 (1963).

leged injurious acts only if he commences an action within four years of the particular injurious act.

Notwithstanding the four-year bar provision, there are certain circumstances that can operate to suspend or toll the antitrust statute of limitations, giving a plaintiff an extended period in which to bring suit.⁶ The focus of this Article is on one such circumstance—section 5(i) of the Clayton Act;⁷ under that provision

⁶ The statute of limitations for antitrust claims may be tolled for, *inter alia*, fraudulent concealment. See 2 P. AREEDA & D. TURNER, *supra* note 5, at § 325d; 8 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 103.03 (1985). The purpose of the tolling provision in cases of concealment is "neither [to] reward the wrongdoing defendant nor deprive the unknowing plaintiff of his compensation." 2 P. AREEDA & D. TURNER, *supra* note 5, at § 325d. There is no tolling for fraudulent concealment, however, if the plaintiff knew or should have known of the facts constituting an antitrust claim. See *Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 441-43 (6th Cir. 1981); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978); *Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 295 (8th Cir. 1975). Thus, a plaintiff is expected to have exercised "due diligence" to have discovered the fraud, see *Westinghouse Elec. Corp. v. Burlington*, 351 F.2d 762, 764 (D.C. Cir. 1965), and if he has, he is permitted the full statutory period from the date of discovery of the alleged fraud to commence an action, see *Norton-Children's Hosps.*, 658 F.2d at 443; *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698-99 (9th Cir. 1977), *cert. denied*, 449 U.S. 831 (1980). See generally Comment, *Fraudulent Concealment as Tolling the Antitrust Statute of Limitations*, 36 *FORDHAM L. REV.* 328, 329 (1967) (statute tolled if fraud affirmatively concealed); Comment, *Intent to Conceal: Tolling the Antitrust Statute of Limitations Under the Fraudulent Concealment Doctrine*, 64 *Geo. L.J.* 791, 791 (1976) (same); *infra* note 69 (discussion of fraudulent concealment doctrine).

In addition to actions by a defendant that can toll the period of limitations, the institution of a class action will also toll the statutory period. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351-52 (1983); see also Note, *Antitrust Law—Class Actions—Tolling of Federal Statutes of Limitations—American Pipe & Construction Co. v. Utah*, 15 *B.C. INDUS. & COM. L. REV.* 1010 (1974) (tolling of limitations period for class actions may allow some class members to derive unjust benefit at expense of defendant). Moreover, it has been held that a plaintiff's commencement of a private treble damage antitrust action by filing a complaint tolls the period of limitations under § 4B of the Clayton Act. See *Moore Co. v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921, 922 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966).

⁷ See Clayton Act § 5(i), 15 U.S.C. § 16(i) (1982), which provides:

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 4A, the running of the statute of limitations in respect of every private or State 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 4 or 4c 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.

Id.

private plaintiffs may take advantage of the suspension of the statute of limitations during, and for up to one year after, the pendency of a government action.⁸ At the conclusion of the one year period, any suit based upon a government proceeding is time-barred.⁹

Although this provision appears straightforward, nearly every aspect of section 5(i) has been litigated, often with conflicting results.¹⁰ This Article will examine the congressional purposes in enacting section 5(i) and will chart the jagged course of the various court rulings that have attempted to implement those purposes, with the aim of placing future litigants on notice of the opportunities and risks posed by section 5(i).

I.

LEGISLATIVE HISTORY OF THE TOLLING PROVISION

Prior to 1955, there was no federal antitrust statute of limitations; federal courts were empowered to utilize applicable state

⁸ *Id.* The government is not a private litigant for purposes of the § 5(i) tolling provision, even when the government commences an action for single damages on the basis of an earlier action for equitable relief. *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 83, 86 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971); *United States v. Grinnell Corp.*, 305 F. Supp. 285, 287 (S.D.N.Y. 1965). *But see* *Chippano v. Champion Int'l Corp.*, 702 F.2d 827, 833 (9th Cir. 1983) (section 5(i) applicable when government commences single-damage action and seeks injunction).

⁹ Clayton Act § 5(i), 15 U.S.C. § 16(i) (1982); *see, e.g.,* *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 871 (9th Cir.) (limitations period tolled until return of indictment), *cert. denied*, 439 U.S. 829 (1978); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1363 (5th Cir. 1976) (government action no longer "pending" once consent decree entered), *cert. denied*, 429 U.S. 1094 (1977).

The Supreme Court articulated the purpose underlying the enactment of § 5(i) as being "to assist private litigants in utilizing any benefits they might cull from government antitrust actions." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965). Section 5(i) permits victims of antitrust violations to recover damages based on the facts and judgments proved in suits by the government against the same or related defendants. *Id.* at 318. The statute of limitations runs against such victims/plaintiffs only from the date of the conclusion of the suit by the government. *Id.* One significant, and often litigated, issue is at which procedural point and date the "pendency" of a government proceeding concludes. *See infra* notes 57-67 and accompanying text.

¹⁰ *Compare, e.g.,* *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967, 974 (D. Me. 1963) (FTC proceedings not capable of tolling statute) *with* *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320-22 (1965) (FTC proceedings toll statute to same extent as Justice Department actions). The limitation aspect of § 5 was initially viewed as having generated little controversy. Simon, *The Private Litigant and Prior Government Judgments or Decrees*, 7 ANTITRUST BULL. 27, 27 (1962).

statutes of limitations.¹¹ Under the original tolling provision set forth in the Clayton Act of 1914, the "applicable" statute of limitations was suspended during the pendency of the government's suit.¹² That provision created widespread confusion, however, because of the great differences between the statutes of limitations of each state.¹³ Thus, in 1955 when Congress enacted a uniform period of limitations of four years, it also recognized the need to address the issue of tolling the limitations period for private parties during a suit by the government.¹⁴ In an effort to bring "certainty

¹¹ See *supra* note 1. For an example of the havoc resulting from the application of state statutes of limitations, see *Northern Ky. Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 73 F.2d 333, 335 (6th Cir. 1934) (court applied one-year conspiracy statute instead of five-year limitations period applicable for statutory liability), *cert. denied*, 294 U.S. 719 (1935); *Reid v. Doubleday & Co.*, 109 F. Supp. 354, 363-64 (N.D. Ohio 1952) (court applied six-year limitations period applicable for statutory liability instead of one-year period applicable to actions based on statute imposing penalty or forfeiture). Although the different limitations periods ranged from one to twenty years, the Senate Judiciary Committee, in passing the uniform statute, noted that the perceptible trend of periods of limitations for antitrust actions was toward shorter periods, that the states in which the greatest number of suits had arisen had four-year limitations periods, and that the average period for all forty-eight states was around four years (4.85 years). See 100 CONG. REC. 5130 (1955) (remarks of Rep. Keating); see also TRADE REG. REP. (CCH) ¶¶ 30,201-35,532 (compilation of fifty states' antitrust statutes, including limitations periods).

¹² See Clayton Act of 1914 § 5, 38 Stat. 731. Section 5 provided in pertinent part: Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

Id.

¹³ See S. REP. NO. 619, *supra* note 1, at 2331; see also 101 CONG. REC. 5129, 5129 (1955) (statement of Rep. Celler) (states had one, three, four, five, six, and up to twenty-year statutes of limitations for federal antitrust actions).

¹⁴ See *Hearing Before the Subcomm. on Study of Monopoly Power of the House Comm. on the Judiciary*, 81st Cong., 2d Sess. 65 (1950). Congress had debated the issue of a federal antitrust statute of limitations since 1949, see S. REP. NO. 1910, 81st Cong., 1st Sess. (1949), but it was not until the 84th Congress that the suspension provision was actually addressed. Indeed, the prior legislative proposals specifically excluded such a provision and, in a 1950 hearing before the House of Representatives, the rationale for not including a tolling provision was explained by the Department of Justice's representative in terms of the variety of circumstances in which a private individual could take advantage of the government's action. See *Hearing Before the Subcomm. on Study of Monopoly Power of the House Comm. on the Judiciary*, 81st Cong., 2d Sess. 65 (1950).

We question . . . the advisability of amending section 5 of the Clayton Act to provide for tolling the statute of limitations with respect to private suits where the Government has instituted suit for damages. Only rarely will the Government's action be of significance to third parties since, unlike the typical antitrust violation, the damage is likely to be confined to the Government and not extend to

and predictability" to the application of section 5(i),¹⁵ Congress amended the Clayton Act to allow private plaintiffs to sue *either* within one year after the end of the government's suit *or* within four years after the cause of action accrued. The latter is the federal limitations period established and set forth in section 4B.¹⁶

The Senate Judiciary Committee articulated the rationale for the one year provision:

The plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. . . . [The one additional year provision] would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.¹⁷

private persons. But in any event, we feel the Government suit should be viewed as more analogous to the private remedial action than to the usual civil or criminal action brought for the benefit of the competitive economy as a whole. Consequently, recovery or denial of recovery by the private plaintiff should not depend upon the fortuity of the Government's bringing or not bringing a suit for the damages accruing to it as a Government.

Id.; see also Korman, *The Antitrust Plaintiff Following in the Government's Footsteps*, 16 VILL. L. REV. 57, 59 (1970) (tolling provision assists litigants in following government suit).

¹⁵ *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978); see 101 CONG. REC. 5129, 5130 (1955) (statement of Rep. Keating).

¹⁶ See Clayton Act § 4B, 15 U.S.C. § 15(b) (1982).

¹⁷ See S. REP. No. 619, *supra* note 1, at 2332. The Senate Judiciary Committee stated: "While the Committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation is conducive to effective and efficient enforcement of the antitrust laws." *Id.* at 2333. Section 4 of the Clayton Act states that "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . ." Clayton Act § 4, 15 U.S.C. § 15(a) (1982). The United States Supreme Court has recognized three primary purposes for allowing treble damage awards in private antitrust actions. First, the award is seen as compensation for the economic damage to the plaintiff caused by a defendant's antitrust violation. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (section 4 was to be a remedial statute). The second purpose was the punishment of the violators. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). Related to this purpose was the congressional intent to deprive wrongdoers of the "fruits of their illegality." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). Finally, the Court has held that the threat of possible treble damage awards was an effective deterrence to future violations of the antitrust laws. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

For the purposes of punishment and deterrence, the Court has viewed the private plaintiff to be a vindicator of the public interests in the free enterprise system, see *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969), and the public interest in the enforcement of the antitrust laws, see *Zenith Radio Corp. v. Hazeltine Research, Inc.*,

Thus, Congress wanted to ensure that, even if the four year period was about to run out at the conclusion of a government suit, a private litigant would still be entitled to a reasonable period thereafter in which to sue.¹⁸ Alternatively, the regular four year limitations period, which might extend beyond the termination of the one year period depending upon the accrual date of the cause of action, would also be available to the plaintiff.¹⁹

Notwithstanding the congressional intention of giving private plaintiffs adequate time to prepare their suits, the Judiciary Committee recognized that "the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts."²⁰ In light of the Committee's belief that undue prolongation would not be "conducive to effective and efficient enforcement of the antitrust laws," it was expected that the one year tolling provision, in conjunction with the uniform federal statute of limitations, would "tend to shorten the period over which private treble-damages actions [would] extend."²¹ Accordingly, by enacting the one year tolling provision,

395 U.S. 100, 130-31 (1969). Plaintiffs in this capacity have been called "private attorneys general." See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). Treble damages, therefore, were to encourage "private attorneys general" to bring suit by overcoming the burdens and costs of litigation. See S. REP. NO. 619, *supra* note 1, at 2329; see also *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982) (discussion of the purposes of treble damages); Note, *Redefining the "Cost of Suit" Under Section Four of the Clayton Act*, 82 MICH. L. REV. 1905, 1917-23 (1984) (same).

¹⁸ See S. REP. NO. 619, *supra* note 1, at 2332; *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-69 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962); Bagdasarian, *Government Damage Suits and Role in Private Antitrust Suits*, in *TREBLE DAMAGE ACTIONS* 21 (G. Reycraft ed. 1970); Note, *supra* note 6, at 1156-57; *cf.* *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 832 (9th Cir. 1983) (section 5(i) encourages private antitrust actions by allowing plaintiff more time to prepare case).

¹⁹ See 15 U.S.C. § 16(i); S. REP. NO. 619, *supra* note 1, at 2333; see also *Russ Togs, Inc. v. Grinnell Corp.*, 426 F.2d 850, 852 (2d Cir.) (private plaintiffs received benefit of tolling provision by filing suit within one year of conclusion of government action), *cert. denied*, 400 U.S. 878 (1970).

²⁰ S. REP. NO. 619, *supra* note 1, at 2333.

²¹ *Id.* On the floor of the House of Representatives, Congressman Keating, a sponsor of the amendments, stated that the purpose of the new tolling provision was two-fold: first, to give injured parties an "adequate time in which to take advantage of the Government's antitrust proceedings"; and second, "to prevent undue and lengthy prolongation of stale claims." 101 CONG. REC. 5129, 5130 (1955). Congressman Keating added that by offering private parties the new tolling provision, or four years after the accrual date, "plaintiffs will not be afforded time to procrastinate and delay." *Id.*; see also *id.* at 5131 (remarks of Cong. Rogers). The tension Congress intended to create through the statute and the tolling provision—a tension between time of repose for the defendant and necessity of adjudicating anti-

Congress wanted to allow private litigants to benefit from the government's antitrust efforts with reasonable promptness in a limitations period that could be calculated with certainty.²²

II.

JUDICIAL INTERPRETATION OF THE TOLLING PROVISION

Since the 1955 enactment of section 5(i), courts have struggled in applying the tolling provision to a myriad of private parties, all of whom have attempted to invoke the statute to bar or avoid the bar of section 4B.²³ Litigants, in advocating their positions, and courts, in attempting to make sense of section 5(i), have principally focused upon four key phrases in section 5(i). Unfortunately, to a great extent the intent of Congress has been blurred as a result.

A. A "Civil or Criminal Proceeding"

Section 5(i) requires that the suit "instituted" by the government be a "civil or criminal proceeding . . . to prevent, restrain or punish violations of any of the antitrust laws."²⁴ Although most

trust claims before they became stale—was recognized and articulated by the court in *Mari-copa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 85-86 (D. Ariz. 1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

²² S. REP. No. 619, *supra* note 1, at 2332.

²³ See, e.g., *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 868 (9th Cir.), *cert. denied*, 439 U.S. 829 (1978); *Stewart Aviation Co. v. Piper Aircraft Corp.*, 372 F. Supp. 876, 877-78 (M.D. Pa. 1974). In *Dungan*, plaintiff instituted an antitrust treble damage action against the defendant on August 20, 1975. See 570 F.2d at 868. The plaintiff conceded that the date of accrual of the action was no later than April 23, 1969, more than six years before the date on which the plaintiff commenced the action. *Id.* Though the claim appeared to be barred by § 4B, the plaintiff attempted to invoke the tolling provision of the Clayton Act to make the action timely. *Id.* However, since the government action commenced on August 2, 1973, the court held that the tolling provision did not make the action timely; the four year statute of limitations under § 4B had already run before the government instituted its proceeding against the defendant. *Id.* at 869.

In *Stewart*, the plaintiff brought a civil antitrust treble damage action against Piper Aircraft on February 12, 1968, for violations of the Sherman Act. 372 F. Supp. at 877. Previously, the federal government had commenced an action against the same defendant. *Id.* at 878. The government action was instituted on April 10, 1964, and terminated on June 16, 1966. *Id.* Piper Aircraft attempted to invoke § 4B to prevent the plaintiff from recovering damages for violations occurring before February 12, 1964, since the plaintiff instituted the private action four years from this date. *Id.* at 877. The court held that, since the plaintiff did not bring his action within the one-year suspension period after termination of the government suit, he could recover damages only for injuries sustained after February 11, 1964. *Id.* at 877-78.

²⁴ Clayton Act § 5(i), 15 U.S.C. § 16(i) (1982).

The term "antitrust law" within the meaning of § 5(i) is defined in § 1 of the Clayton

private treble-damage litigants have sought to employ section 5(i) in the wake of a government criminal suit or civil action seeking injunctive relief,²⁵ a number of private plaintiffs have successfully stretched the liberal language of that portion of the statute.

In *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*,²⁶ the plaintiff contended that a proceeding by the Federal Trade Commission under section 7 of the Clayton Act against one of two defendants tolled section 4B of the Clayton Act.²⁷ The Supreme Court, while conceding that "there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision . . . [and] that the precise language of section 5(b) does not clearly encompass Commission proceedings,"²⁸ neverthe-

Act and includes the Sherman Act, the Clayton Act, and §§ 73-77 of the Wilson Tariff Act of 1894. See 15 U.S.C. § 12 (1982). Neither § 5 of the Federal Trade Commission Act, *id.* § 45 (1982), nor § 3 of the Robinson-Patman Act, *id.* § 13a (1982), is included in that definition. See *id.* § 12 (1982); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958) (section 3 of Robinson-Patman Act); *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 186 (D. Vt. 1969) (FTC Act).

²⁵ See Korman, *The Antitrust Plaintiff Following in the Government's Footsteps*, 16 VILL. L. REV. 57, 57 (1970) (large percentage of private antitrust actions filed because of information disclosed in prior government civil or criminal antitrust actions); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 829 (9th Cir. 1983). In *Chipanno*, the plaintiff's private action was based in part on prior government civil and criminal proceedings. See 702 F.2d at 829. A conspiracy charge based on the same facts in the government action formed the basis for the plaintiff's complaint. *Id.* at 832. Because of the prior government action, the private litigant could take advantage of the tolling provisions of § 5(i). *Id.*; see also *Marine Firemen's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 249 (9th Cir. 1974) (criminal proceeding); *Chambers & Barber, Inc. v. General Adjustment Bureau, Inc.*, 60 F.R.D. 455, 457 (S.D.N.Y. 1973) (civil injunctive action); *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 82, 87 (D. Ariz. 1969) (criminal proceeding, suit for single damages under § 4A of the Clayton Act and suit for injunctive relief), *aff'd*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

²⁶ 381 U.S. 311 (1965).

²⁷ *Id.* at 313. New Jersey Wood Finishing Co. filed its original complaint on November 20, 1961, alleging violations of § 7 of the Clayton Act by Minnesota Mining in 1956. *Id.* Minnesota Mining raised the defense of the statute of limitations under § 4B of the Clayton Act. *Id.* In 1960, however, the FTC had filed a § 7 proceeding against Minnesota Mining, which concluded in a consent order, dated August 24, 1961, directing the defendant to divest itself of improperly acquired assets. *Id.* at 315. Consequently, the New Jersey Wood Finishing Co. asserted that this FTC proceeding tolled the four-year statute of limitations, and that its action was timely since the suit had been instituted within one year of the termination of the FTC action. *Id.* at 313.

²⁸ *Id.* at 320-21. The Court in *Minnesota Mining* noted that there is no mention in the record of the 1914 legislative proceedings as to whether Commission actions would enable the invocation of the tolling provision. *Id.* While the Court acknowledged that the precise wording of § 5(i) does not include FTC proceedings, it stated that the literal wording was not controlling in this instance. *Id.* at 321. Instead, the Court declared that it was necessary

less agreed that the tolling provision applied.²⁹ In permitting the provision to be invoked, a majority of the Court stated that it was giving "effect to Congress' basic policy objectives in enacting section 5(i)—objectives which would be frustrated . . . [if] large numbers of private litigants [were deprived] of the benefits of government antitrust suits simply because those suits were pursued by one governmental agency rather than the other."³⁰

Based upon the Court's extremely expansive reading of congressional intent, subsequent courts were not reluctant to extend the boundaries of what constituted a "proceeding" for the purposes of section 5(i).³¹ Thus, for example, several courts have held that a Federal Trade Commission proceeding under section 5 of the Federal Trade Commission Act tolls section 4B because, even though the FTC Act is not an "antitrust law,"³² a section 5 pro-

to examine the underlying purposes and policies of the tolling provision. *Id.*

Justice Black's strongly worded dissent took the majority to task because there was no support in the statute or the legislative history to conclude that FTC proceedings should be pulled within the scope of section 5(i). *Id.* at 324-25 (Black, J., dissenting).

²⁹ *Id.* at 321-22.

³⁰ *Id.* at 322. In light of congressional silence, the Court relied "on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions." *Id.* at 320. To further this congressional objective the Court reasoned that, since FTC proceedings constitute a major portion of government enforcement efforts in the antitrust field, the tolling provision should include FTC proceedings. *Id.* at 320-21. The Court ruled that FTC proceedings are just as much government actions as are Justice Department antitrust suits and relied, not only on the legislative history of the amendments, but also on the interrelationship of § 5(a) of the Clayton Act (the prima facie effect of judgments or decrees in subsequent civil suits) with § 5(i). *See id.* at 316-18; *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 569 (10th Cir. 1962); *infra* note 53.

Prior to the Supreme Court's decision in *Minnesota Mining*, several federal courts had determined that FTC proceedings were not government actions capable of tolling the antitrust statute of limitations for private suits. *See, e.g.*, *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967, 974 (D. Me. 1963) (FTC proceedings do not toll statute); *Valasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 223 F. Supp. 712, 713 (E.D. Tenn. 1963) (FTC proceeding does not suspend running of statute); *Highland Supply Corp. v. Reynolds Metals Co.*, 221 F. Supp. 15, 17 (E.D. Mo. 1963) (judicial, not administrative, proceeding), *rev'd on other grounds*, 327 F.2d 725 (8th Cir. 1964).

³¹ *E.g.*, *In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 320 (S.D.N.Y. 1971); *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 186 (D. Vt. 1969). *But see* *Laitram Corp. v. Deepsouth Packing Co.*, 279 F. Supp. 883, 891 (E.D. La. 1968) (FTC proceeding based only on § 5 of FTC Act does not toll statute of limitations because proceeding may not be for violation of antitrust law).

³² Section 5 of the FTC Act is directed toward "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45 (a)(1) (1982); *see* *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). This section of the FTC Act enables the FTC "to define and proscribe an unfair competitive

ceeding "restrains" a violation of the "antitrust laws."³³

In recent years, however, the judiciary, led by the Supreme Court, has become more restrained, unwilling to permit just any government proceeding to toll the limitations period.³⁴ Private treble damage suits, based on government proceedings that were initiated by private litigants, have not received section 5(i) relief—even though antitrust issues were raised—because they were not "instituted by the United States."³⁵ Neither have grand jury

practice, even though the practice does not infringe . . . [upon] antitrust laws." 405 U.S. at 239. Commentators have been concerned about the attempt to use § 5 of the FTC Act to create a source of antitrust enforcement authority in addition to that of the Sherman or Clayton Acts. See Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 52 (1969); accord Aranson, Gelhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982). Posner criticized the FTC for its operational inefficiency and overall ineffectiveness in eliminating trade restraints, see Posner, *supra*, at 87, and stated that extensions of antitrust enforcement under § 5 of the FTC Act are "highly questionable," *id.* at 52. Posner concluded by arguing that the scope of the Commission's authority in the antitrust area should be limited or eliminated. *Id.* at 88. *Contra Comments of the AntiTrust Division of the Justice Department on the "Ash Council" Report*, 57 VA. L. REV. 933, 944-46 (1971)(FTC should not be abolished or reduced since flaws are result of congressional restraints).

³³ See *Rader v. Balfour*, 440 F.2d 469, 471-73 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971). The FTC proceeding in *Rader* was based on a violation of § 5 of the FTC Act, which authorizes the FTC to commence a proceeding for a cease and desist order. See *id.* at 471. The Court of Appeals for the Seventh Circuit pointed out that § 5 of the Act is not one of the antitrust laws enumerated in the Clayton Act and that conduct deemed unlawful under this section may not be a violation of an antitrust law. See *id.* However, the court did acknowledge that, in some instances, underlying the § 5 proceedings is conduct that does violate antitrust laws, *id.* at 471, and that the FTCA proceeding is intended at least "to prevent, if not to restrain or punish" such violations, *id.* at 473; *Luria Steel & Trade Co. v. Ogden Corp.*, 484 F.2d 1016, 1020-21 (3d Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974). The Court of Appeals for the Third Circuit in *Luria* relied on the Seventh Circuit's decision in *Rader*, in determining that the § 5 proceeding may toll the statute of limitations under the Clayton Act. See 484 F.2d at 1020-21. It distinguished the Supreme Court's decision in *Minnesota Mining* on the ground that the *Minnesota Mining* Court did not address the issue of whether a proceeding alleging violations of § 5 of the FTC Act can trigger the tolling provision of the Clayton Act. See *id.*

³⁴ See Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1414 (1978).

³⁵ See, e.g., *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 331 (1978); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1280, 1282 (N.D. Ohio 1980) (action before Nuclear Regulatory Commission prompted by Attorney General's communication). In *Greyhound*, a private party instituted a proceeding before the Interstate Commerce Commission requesting that it reopen proceedings against the petitioner bus company and alleging that the petitioner had not "lived up to representations that the acquisitions [by petitioner] would not adversely affect respondent." 437 U.S. at 322. Because of the gravity of the charges against the petitioner, the United States intervened in the action. *Id.* The Court of Appeals below had concluded that government intervention in a private antitrust suit was the "functional equivalent" of an action instituted directly by them. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 700 (9th Cir. 1977), *vacated*

investigations been considered "proceedings" because the empaneling of that body in and of itself does not result in the enforcement of the antitrust laws—the investigation does not "prevent, restrain, or punish" within the meaning of section 5(i).³⁶

B. "Based In Whole Or In Part"

To invoke section 5(i) successfully, a private litigant must demonstrate that the cause of action is "based in whole or in part on any matter complained of" in a proceeding brought by the government.³⁷ When interpreting that language courts have generally compared the two complaints;³⁸ they have not required, however, that the issues in,³⁹ or the parties to,⁴⁰ the two proceedings be

and remanded, 437 U.S. 322 (1978). The Supreme Court rejected the lower court's determination because "[a] functional-equivalence standard, applied this loosely, resurrects the very confusion and uncertainty concerning the application of the statute of limitations that Congress sought to eliminate in the 1955 amendments." 437 U.S. at 335. It therefore held the § 5(i) tolling provisions inapplicable. *Id.* at 336-37. The Supreme Court noted, however, that in some instances the tolling provision might be triggered under equitable principles, rather than under § 5(i). *Id.* at 337 n.21.

Another factor that justifies the outcome of these cases is the fact that the government agencies involved did not possess the authority under the antitrust laws to enforce those laws. See *Handler, supra* note 34, at 1414-15. Thus, even if the federal government had initiated the ICC proceeding in *Greyhound*, the issue involved in that proceeding—whether certain representations made by Greyhound at the time it received ICC approval for several route acquisitions were being honored—was not an issue of the violation of antitrust laws, and, therefore, not enforceable by the federal government. See *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459-63 (1968). Indeed, the issue involved in *Greyhound* was that of contempt for violation of the earlier court orders. See *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974) (affirmed both lower courts' decisions due to willful violations of criminal and civil orders), *aff'g* 370 F. Supp. 881 (N.D. Ill.) and 363 F. Supp. 525 (N.D. Ill. 1973). Therefore, the tolling provision of § 5(i) would not have been available in the subsequent private action. See *Handler, supra* note 34, at 1414-15.

³⁶ *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 871 (9th Cir.), *cert. denied*, 439 U.S. 829 (1978); see *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983, 987 n.7 (D. Conn. 1978) (tolling period starts with FTC complaint, not investigation), *aff'd in part and remanded on other grounds*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982)

³⁷ Clayton Act § 5(i), 15 U.S.C. § 16(i) (1982).

³⁸ See *Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965) (private litigant's complaint must be compared to government complaint to determine if tolling provision applies); *Chipanno v. Champion*, 702 F.2d 827, 832 (9th Cir. 1983) (whether statute tolled depends only upon "comparison of the two complaints on their face," not on outcome of government litigation); *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 190 (D. Vt. 1969) (allegations in both complaints must present "substantially the same claims" to toll statute of limitations).

³⁹ See, e.g., *Chipanno v. Champion*, 702 F.2d 827, 829-30 (9th Cir. 1983) (private litigant alleged broader conspiracy than did government); *In re Master Key Antitrust Litig.*, 70 F.R.D. 29, 33 (D. Conn. 1976) (private litigant alleged horizontal and vertical conspiracies, whereas government alleged only vertical conspiracy); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 320-22 (S.D.N.Y. 1971) (government alleged domestic conspiracy, whereas

identical. Rather, they have taken their cue from three significant Supreme Court decisions that stressed the "in part" and "any matter" language.⁴¹

The first decision interpreting this phrase was *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*⁴² Besides addressing the issue of whether an FTC administrative proceeding was a "proceeding" for the purposes of the statute,⁴³ the *Minnesota Mining* Court also considered whether the private litigant's claims under sections 1 and 2 of the Sherman Act were barred because the FTC proceeding was brought under section 7 of the Clayton Act. The Court determined that the difference between the allegations was "a distinction without a difference," reasoning that "[t]he fact that [the private plaintiff] claims that the same conduct has a greater anti-competitive effect does not make the conduct challenged any less a matter complained of in the gov-

private plaintiffs alleged domestic and international conspiracy); *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 190 (D. Vt. 1969) (although totally identical issues not raised, tolling provision applied because there was "substantial identity"). *But see* *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 89-90 (D. Ariz. 1969) (proceeding brought pursuant to § 7 of Clayton Act did not toll period for subsequent action brought pursuant to §§ 1 and 2 of Sherman Act), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

⁴⁰ *See, e.g.*, *Rader v. Balfour*, 440 F.2d 469, 473-74 (7th Cir.) (155 out of 156 defendants the same in each proceeding), *cert. denied*, 404 U.S. 983 (1971); *New Jersey v. Morton Salt Co.*, 387 F.2d 94, 95-97 (3d Cir. 1967) (only some defendants in government action named in civil suit; only one appellee before Third Circuit also defendant in government action), *cert. denied*, 391 U.S. 967 (1968); *Hardy Salt Co. v. Illinois*, 377 F.2d 768, 775 (8th Cir.) (tolling provision applied when co-conspirator named in government proceeding even though not named as defendant), *cert. denied*, 389 U.S. 912 (1967); *cf. Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 74 (unnamed parties could be joined if from within six-state area covered by government proceeding), *aff'd on other grounds sub nom. Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967). *But see* *Aurora Enter. v. National Broadcasting Co.*, 688 F.2d 689, 693 (9th Cir. 1982) (individual government suits against NBC's rival networks did not toll limitations period given that government did not allege conspiracy among networks), *aff'g in relevant part* 529 F. Supp. 655, 661 (C.D. Cal. 1981).

⁴¹ *See infra* notes 42-53 and accompanying text; *see also* 8 J. VON KALINOWSKI, *supra* note 6, at § 103.03[2].

⁴² 381 U.S. 311 (1965). Prior to *Minnesota Mining* most courts, drawing on the concept of collateral estoppel, had restrictively viewed the "based in whole or in part" language, usually requiring that the private complaint plead the same acts and conspiracy as alleged by the government. *See, e.g.*, *Leh v. General Petroleum Corp.*, 330 F.2d 288, 301 (9th Cir. 1964) (tolling provision not applicable because neither party named in government action nor time of conspiracy were identical), *rev'd*, 382 U.S. 54 (1965) (rejecting Ninth Circuit's collateral estoppel analysis); *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 196, 198 (9th Cir. 1956) (when allegations of conspiracy by private party not sufficiently similar to allegations in government action, statute of limitations not tolled).

⁴³ 381 U.S. at 314.

ernment action."⁴⁴

In *Leh v. General Petroleum Corp.*⁴⁵ the Supreme Court was confronted with a different issue. While the same antitrust provisions were invoked in both the government and private proceedings, the allegations in each proceeding were significantly different with respect to time period,⁴⁶ geographic scope,⁴⁷ and alleged wrongdoers.⁴⁸ The Court, building upon *Minnesota Mining*, minimized those distinctions:

⁴⁴ *Id.* at 323. The *Minnesota Mining* Court stated that the only significant difference between the government suit and the private action was that of burden of proof for the private plaintiff under the Sherman Act. *Id.* at 323-24.

⁴⁵ 382 U.S. 54 (1965).

⁴⁶ *See id.* at 57. The government's civil complaint in *Leh*, which was initiated in May of 1950, alleged that the conspiracy covered the years 1936-1950. *Id.* at 60. The private plaintiffs charged that the conspiracy for which they sought damages covered the years 1948-1956. *Id.* at 61. That the Supreme Court's analysis was result-oriented is evidenced by its failure to mention the illogical proposition that the defendants' conspiracy—as alleged by the private plaintiffs—would have continued on for six years after the government had initiated its suit to punish the same conspiracy. *Id.* at 55-66. The Court merely termed the time difference "without significance". *Id.* at 64.

⁴⁷ *See id.* at 57. In *Leh* the government alleged that the geographical center of the conspiracy was located in the pacific states area. *Id.* at 60. The private plaintiffs, on the other hand, identified southern California as the focus of the conspiracy. *Id.* at 61. Undoubtedly, the plaintiffs pointed to the narrower area as the focal point of the conspiracy because that is where their principal place of business was located, and therefore, where they suffered injury. *Id.* at 61-62.

⁴⁸ *See id.* at 63. In *Leh* the government's complaint named eight defendants. *Id.* at 60. In the private suit, two of those eight were not named as defendants, and the plaintiffs named as an additional defendant an individual not a party to the government suit. *Id.* at 61. The Supreme Court viewed this as "substantial identity of parties." *Id.* at 63. The Court explained:

In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of 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 violation 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 of the 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.

Id. at 63-64.

The Court's explanation of the differences in the parties named is technically correct in the abstract; however, a trial court entertaining a motion for dismissal because of the running of the statute of limitations is in a position to do more than merely speculate. Whatever reasons led the government not to name, or even identify, an alleged conspirator should not prevent a court from taking into account the very significant fact that the government did not do so.

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'—read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. 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 to lead them into a niggardly construction of the statutory language here in question.⁴⁹

The Supreme Court further expanded its view of the "based in whole or in part" language of section 5(i) in *Zenith Radio Corp. v. Hazeltine Research, Inc.*⁵⁰ In *Zenith*, the sole defendant sued had been named neither as a defendant nor as a conspirator in the earlier government suit.⁵¹ The litigation was before the Court, however, after lengthy pretrial and trial proceedings that had established that the defendant participated in at least part of the conspiracy that was the target of the government action.⁵² In light of that showing the Court saw "nothing destructive of Congress' purpose in holding that [section 5(i)] tolls the statute of limitations against all participants in a conspiracy which is the object of a government suit, whether or not they are named as defendants or conspirators therein."⁵³

⁴⁹ *Id.* at 59 (quoting *Minnesota Mining*, 381 U.S. at 318) (emphasis added).

⁵⁰ 401 U.S. 321 (1971).

⁵¹ *Id.* at 337. In *Zenith*, the prior government suit was *United States v. General Elec. Co.*, Civil Action No. 140-157 (S.D.N.Y. Nov. 1, 1962), which involved a government antitrust action against various defendants who were charged with restraining the export of American-made radio and television sets by refusing to grant patent licenses to American manufacturers. See 401 U.S. at 323, 333-34 & n.6. This action was terminated on Nov. 1, 1962, when a consent decree was entered against the final defendant named in the government action. See *id.* at 333 n.5.

⁵² 401 U.S. at 337-38. The defendant in *Zenith*, although not named in the prior government action, participated in patent pools in Canada, Great Britain and Australia, along with those defendants named in the government action. *Id.* at 323, 337-38.

⁵³ *Id.* at 336. The Court set forth two situations in addition to that in *Zenith* in which the period of limitations would toll when private defendants were not participants in the government's suit. See *id.* at 335. First, if the government does not name or identify co-conspirators, but alleges and proves at trial that others were in fact co-conspirators, the statute will toll as to the co-conspirators even though they were not named in the prior

Notwithstanding the very broad sweep of the Supreme Court's decisions, the lower courts have increasingly limited the scope of the "based in whole or in part" language. For example, one court ruled that the statute of limitations does not toll when the government's case involves some of the same defendants, but is otherwise different, involving different activities and different periods of time.⁵⁴ Section 5(i) also has been held inapplicable when the alleged illegal conduct is different from and unconnected to the prior proceeding,⁵⁵ as well as when there is no common element of con-

action. *Id.* Second, if the government did not make an evidentiary showing as to the purported co-conspirator in the prior action, but such a showing is made in the subsequent civil action, the statute will toll as to all co-conspirators. *Id.*

A practical result of the broad net cast by the Supreme Court in *Zenith* is that private treble damage actions may have to be severed at the trial stage pursuant to Rule 42 of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 42(b) ("court in furtherance of convenience or to avoid prejudice . . . may order a separate trial"). Because the Clayton Act allows a private plaintiff to use for its *prima facie* case a final judgment against a defendant in an antitrust action brought by the government, 15 U.S.C. § 16(a) (1982), a private defendant not a party to the government's suit would surely move to have the private action severed. One significant limitation, however, is that a plea of *nolo contendere* is not admissible against a defendant in a civil action. *City of Burbank v. General Elec. Co.*, 329 F.2d 825, 834 (9th Cir. 1964). Furthermore, a government judgment is not admissible against a defendant not subject to that judgment. *Buckhead Theatre Co. v. Atlanta Enters., Inc.*, 327 F.2d 365, 367 (5th Cir.), *cert. denied*, 379 U.S. 888 (1964); *Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 59 (D. Minn. 1966), *aff'd on other grounds sub nom. Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967). A trial court, in a civil action case involving defendants who were not part of a prior government proceeding, would have discretion either to block admission of the government judgment in its entirety (surely to be opposed by the plaintiff) or to sever the suit along the lines of defendants against whom the judgment is or is not admissible as *prima facie* evidence. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2388 (1971).

⁵⁴ *Peto v. Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967), *cert. denied*, 390 U.S. 989 (1968). In *Peto*, the plaintiff alleged that a professional hockey conspiracy prevented him from building a competing hockey arena. *Id.* at 683. In support of a § 5(i) statute of limitations toll, the plaintiff cited *United States v. International Boxing Club*, 150 F. Supp. 397 (S.D.N.Y. 1957), *aff'd*, 358 U.S. 242 (1959), as the prior government action. See 384 F.2d at 683. In *International Boxing* the government had instituted a civil action to eliminate restraints of trade and monopolization in the professional boxing industry, particularly in the sale of media rights. 150 F. Supp. at 400. The existence of some of the same defendants was the only common ground in the two actions. See *Peto*, 384 F.2d at 683. The *Peto* court held that the conspiracies were entirely different and therefore did not apply the tolling provision. *Id.*; accord *Charley's Tour & Transp., Inc. v. InterIsland Resorts, Ltd.*, 1985-2 Trade Cas. (CCH) ¶ 66,703 (D. Hawaii 1985) (tolling provision unavailable because private plaintiff's suit based on conspiracy primarily affecting market different from one involved in government's suit).

⁵⁵ *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 89-90 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971). In *Maricopa*, the plaintiff sought to toll the statute of limitations under § 5(i), based on an FTC proceeding against the defendant in a prior government action. *Id.* at 89. The court,

spiracy between the two proceedings.⁵⁶

C. The "Pendency"

Private plaintiffs may take advantage of the suspension of the statute of limitations during, and for up to one year after, the "pendency" of a government action.⁵⁷ Any suit based upon a government proceeding is time-barred at the end of that year.⁵⁸

As a general matter the pendency of a government action ceases when a final judgment effected against the last remaining defendant has been resolved on appeal,⁵⁹ or, if no appeal is taken from that judgment, when the time for appeal expires.⁶⁰ The courts, however, have not uniformly followed those general rules.

however, determined that the FTC proceeding was insufficient to invoke the toll. *Id.* The court reasoned that the alleged monopolistic acts in violation of §§ 1 and 2 of the Sherman Act were unrelated to defendant's acts forming the basis for the FTC proceeding, which was brought under § 7 of the Clayton Act. *Id.* at 89-90.

⁵⁶ *Aurora Enters., Inc. v. National Broadcasting Co.*, 688 F.2d 689, 693 (9th Cir. 1982), *aff'g in relevant part* 524 F. Supp. 655, 661 (C.D. Cal. 1981). In *Aurora*, the plaintiff, in a suit against NBC, attempted to take advantage of prior government suits against NBC's rivals, ABC and CBS. 524 F. Supp. at 661. The government had brought a similar suit against NBC but since that action had ended more than one year prior to the plaintiff's suit, it was unavailable for tolling purposes. 688 F.2d at 693. Notwithstanding that the public and private suits were linked by similar issues of syndication rights, the Ninth Circuit, agreeing with the district court, ruled that the plaintiff's action was not within the purview of the tolling provision since no conspiracy had been alleged in the prior government suits. *Id.*

⁵⁷ See *Minnesota Mining*, 381 U.S. at 314; *Russ Toggs, Inc. v. Grinnell Corp.*, 426 F.2d 850, 857 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970); *Grengs v. Twentieth Century-Fox Film Corp.*, 232 F.2d 325 (7th Cir.), *cert. denied*, 352 U.S. 871 (1976); *Vermont v. Cayuga Rock Salt Co.*, 276 F. Supp. 970, 971 (D. Me. 1967).

⁵⁸ See, e.g., *Chandler Trailer Convoy, Inc. v. Morgan Drive-Away, Inc.*, 1981-2 Trade Cas. (CCH) ¶ 66,418 (W.D. Ark. 1981) (filing of private action on June 30, 1977, not within one-year of termination of government action on June 30, 1976).

⁵⁹ *New Jersey v. Morton Salt Co.*, 387 F.2d 94, 98-99 (3d Cir. 1967). The statute of limitations was tolled in *Morton Salt* pending the resolution on appeal even though a consent decree was entered years earlier. *Id.*; *accord Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 87 (D. Ariz. 1969) (statute tolled until one year after final judgments as to all defendants in prior government action), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 857-58 (8th Cir.) (case pending until final decree either affirmed by the Supreme Court or time for appeal expired), *cert. denied*, 343 U.S. 942 (1952); *Barnett v. Warner Bros. Pictures Distrib. Corp.*, 112 F. Supp. 5, 7 (N.D. Ill. 1953) (pendency on government suit ends when appellate proceedings are concluded or parties agree to judgment).

⁶⁰ *Russ Toggs, Inc. v. Grinnell Corp.*, 426 F.2d 850, 857 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 404 (S.D.N.Y. 1961); *Leonia Amusement Corp. v. Loew's Inc.*, 117 F. Supp. 747, 761 (S.D.N.Y. 1953); *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 944 (W.D. Mo. 1953).

Courts have instead picked different termination dates for a government proceeding on appeal; it has been marked at the time of the denial of the petition for certiorari,⁶¹ the date after which a petition for rehearing could have been filed following the denial of the certiorari petition,⁶² the Supreme Court's affirmance of the judgment below,⁶³ or the date on which the Supreme Court denied rehearing.⁶⁴

The manner in which a government proceeding is resolved has been a critical factor influencing "pendency." The "normal" rules regarding pendency have been avoided in government antitrust proceedings involving consent decrees and *nolo contendere* pleas. When a consent decree is entered, it is the date of entry, not the expiration of the time for appeal, from which the one year period is calculated.⁶⁵ Similarly, when a defendant pleads *nolo contendere* in a criminal antitrust suit, courts have ruled that pendency, for purposes of a subsequent civil action, ceases at the entry of the

⁶¹ See, e.g., *Luria Steel & Trading Corp. v. Ogden Corp.*, 336 F. Supp. 1238, 1240-41 (E.D. Pa. 1972), *aff'd on other grounds*, 484 F.2d 1016 (3d Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974). The *Luria* court argued that placing the termination date at any time other than the date on which *certiorari* is denied would force subsequent plaintiffs to read all motions and papers from previous government action. *Id.*

⁶² *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073, 1078 (10th Cir. 1975). The *Monarch* court stated that the losing *certiorari* petitioners had twenty-five days in which to file a petition for rehearing and that even though no petition was filed, the case was "pending" in the Supreme Court during that time. *Id.*

⁶³ See *New Jersey v. Morton Salt Co.*, 387 F.2d 94, 95-96 (3d Cir. 1967), *cert. denied*, 391 U.S. 967 (1968); *Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 46, 53 (D. Minn. 1966), *aff'd on other grounds sub nom. Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967).

⁶⁴ See *Baldwin v. Loew's Inc.*, 312 F.2d 387, 391 (7th Cir. 1963); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 404 (S.D.N.Y. 1961); *Leonia Amusement Corp. v. Loew's Inc.*, 117 F. Supp. 747, 761 (S.D.N.Y. 1953).

⁶⁵ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 333 n.5 (1971); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1363 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Potts v. Jos. Schlitz Brewing Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,538 (N.D. Okla. 1977); see also *KWF Indus., Inc. v. AT&T*, 592 F. Supp. 795 (D.D.C. 1984) (filing of consent decree, not the lodging of same, terminated government's suit for purposes of § 5(i)). Provisions in a consent decree reserving the power to enforce or modify the decree, or requiring the performance of certain acts, do not affect the pendency for tolling purposes. See *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284, 293-94 (7th Cir. 1954); *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 90 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971). A decree in which the government reserves the right to vacate the decree within a certain period to seek the relief initially sought, however, is not final for purposes of establishing a date from which to calculate the one-year period. See *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 857 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

judgment of conviction.⁶⁶

D. "Commenced Action Within the Period of Suspension or Within Four Years After the Cause of Action Accrued"

In light of the accrual standard explicitly adopted by Congress when it enacted section 4B of the Clayton Act,⁶⁷ this provision would appear to be straightforward—a timely claim could be filed one year after the government proceeding ceased to "pend" or four years after the last overt act causing injury or damage.⁶⁸ In two instances involving the doctrine of fraudulent concealment, however, this provision of section 5(i) could be considered ambiguous.⁶⁹

⁶⁶ See *Marine Firemen's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 249-50 (9th Cir. 1974); *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 83 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (1970), *cert. denied*, 401 U.S. 937 (1971). This rule makes a great deal of sense because convictions pursuant to a *nolo contendere* plea cannot be attacked on the merits; they can be challenged on appeal only for lack of subject matter jurisdiction, or because the indictment fails to charge an offense. See *United States v. Bessimer & Lake Erie R.R.*, 717 F.2d 593, 597-98 (D.C. Cir. 1983).

In *Marine Firemen's*, the Court of Appeals for the Ninth Circuit criticized the varying rules enunciated by other courts. See 503 F.2d at 250. The court stated that these varying rules resulted in "[c]ase law chaos" and lack of uniformity in determining the termination of the pendency of a criminal proceeding, and therefore held that "the 'pendency' of the related criminal proceeding . . . terminates at the procedural point and date of the clerk's notation in the 'criminal docket' for the case of the entry of the judge's signed written judgment of conviction of the last remaining defendant in the criminal proceeding." *Id.*

⁶⁷ See *supra* note 5 and accompanying text.

⁶⁸ See *supra* note 2 and accompanying text.

⁶⁹ See *supra* note 6. Fraudulent concealment is an old chancery doctrine that was applied in Supreme Court decisions when the elements of fraud or deceit were clearly established. See *Wood v. Carpenter*, 101 U.S. 135 (1879); *Bailey v. Glover*, 88 U.S.(21 Wall.) 342 (1874). In *Bailey*, the landmark case in the area of fraudulent concealment, the Supreme Court determined that the Bankruptcy Act of 1867, which had a two-year statute of limitations, was tolled by the concealment of the parties' fraudulent conduct. See 88 U.S. at 348.

The fraudulent concealment doctrine is not applicable merely because there is evidence of secrecy, silence, concealment or other clandestine activities by the alleged conspirators. If it were, the 4-year limitation period Congress adopted in 1955 would be of no practical significance for antitrust conspiracies, most of which obviously operate in clandestine fashion, with the participants seeking to keep their covert machinations hidden from public view. Courts have therefore consistently held that conduct which adds up to "mere non-disclosure or denial does not constitute fraud or deceit for tolling purposes; otherwise, the tolling exception to the statute of limitations would eclipse the basic statute itself." *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cas. (CCH) ¶ 62,894, at 79,178 (E.D. Wash. 1979); *accord Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F. Supp. 546, 548 (N.D. Ohio 1974) (mere "passive concealment" through silence or non-disclosure does not justify tolling the statute of limitations), *aff'd sub nom. Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) (outright denial of wrongdoing to prospective plaintiff does not constitute fraudulent concealment). Three elements must be pleaded and proven to establish fraudu-

In the first instance, a private plaintiff asserts that it is entitled to an enlarged period of time in which to recover treble damages (*i.e.*, for more than four years) because of the interplay of the defendant's fraudulent concealment and the government proceeding.⁷⁰ The private plaintiff attempts to "tack on" the period of fraudulent concealment to the beginning of the government proceeding.⁷¹ When a plaintiff can successfully demonstrate acts by the defendant constituting fraudulent concealment of the plaintiff's accrued claims within four years prior to the commencement of a government proceeding, that plaintiff is entitled to damages covering three periods: the period during which the claims were fraudulently concealed, the period of the government proceeding, and the period until which private action was filed—as long as this period

lent concealment: 1) wrongful concealment of their actions by the defendants; 2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period cause of action; and 3) plaintiff's exercise of due diligence until discovery of the facts. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (quoting *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974)). These elements have their source in rule nine of the Federal Rules of Civil Procedure which mandates that the party alleging fraudulent concealment must plead with particularity the circumstances giving rise to the fraud. FED. R. CIV. P. 9(b).

Because of the strong policies underlying statutes of limitations, the application of the doctrine of fraudulent concealment "is usually very much restricted." *Geromette v. General Motors Corp.*, 609 F.2d 1200, 1203 (6th Cir. 1979), *cert. denied*, 446 U.S. 985 (1980). Accordingly, a heavy burden of proof is on the party seeking to toll the statute — "[a]ll presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions." *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); see *Sukow Borax Mine Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 209 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615, 620 (E.D. Mich. 1962).

Notwithstanding the foregoing, the doctrine of fraudulent concealment has been employed to toll the Clayton Act statute of limitations with increasing frequency in private litigation. See, e.g., *Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440 (6th Cir. 1981); *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978); see also Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 833 & n.31 (1983); Comment, *The Application of the Doctrine of Fraudulent Concealment to Modern Federal Trade Conspiracy Cases*, 14 CONN. L. REV. 115 (1981).

⁷⁰ See *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 n.26 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978); *supra* note 35.

⁷¹ E.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 84 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971); see also *Union Carbide & Carbon Corp. v. Nisely*, 300 F.2d 561 (10th Cir. 1962) (tacking permitted to enable antitrust plaintiffs to sue in 1958 for acts occurring in 1938 because wartime tolling statute added to period of government proceeding).

is within one year of the end of the government suit.⁷²

The second instance of possible ambiguity is one in which a private plaintiff invokes the doctrine of fraudulent concealment in an attempt to circumvent the Clayton Act's time bar, notwithstanding that its claims accrued more than four years before the filing of its action *and* that it did not file suit within one year from when the government proceeding ceased to pend. In such a case, a private plaintiff attempts to "tack on" more than the one year permitted after termination of the government proceeding, contending that prior acts of concealment by the defendant continued to prevent the plaintiff from asserting its claims in a timely fashion. While there is virtually no case law in this area,⁷³ the statute and its legislative history clearly support a time bar to such claims.⁷⁴

⁷² See *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 & n.26 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 84-86 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

⁷³ Two federal courts declined to address the issue of an antitrust suit tolled by fraudulent concealment and brought within one year after the government proceeding ceased to pend. See *Chambers & Barber, Inc. v. General Adjustment Bureau, Inc.*, 60 F.R.D. 455 (S.D.N.Y. 1973); *Althoff's, Inc. v. Sterling Faucet Co.*, 1972 Trade Cas. (CCH) ¶ 74,066 (N.D. Ill. 1972).

The defendant in *Chambers* moved to strike the allegations of the complaint that charged fraudulent concealment up until the government proceeding on March 11, 1971. 60 F.R.D. at 456. The government proceeding terminated by a consent judgment on April 15, 1971, and the private suit was subsequently filed more than a year later on April 24, 1972. *Id.* Since the issue had been raised in the wrong procedural mode, the court declined to resolve the issue until there was a motion brought to dismiss on the ground that the suit was time barred. *Id.* at 457-58.

In *Sterling Faucet*, the plaintiff's private action was held timely. See 1972 Trade Cas. (CCH) at 92,411. Plaintiff made undisputed allegations of fraudulent concealment up until the date of the government proceeding and the suit was brought within four years of initiation of the government proceeding. *Id.* However, there was not a clear indication as to when the government proceeding ceased to pend. *Id.*

⁷⁴ See 15 U.S.C. § 15(b) (1982). As previously set forth, Congress used an accrual standard for the Clayton Act's statute of limitations period, and explicitly rejected a "discovery-type" standard. See *supra* note 5 and accompanying text. In providing the alternate periods in section 5(i), Congress used the same accrual standard, to the extent the private suit was not filed within the one-year period. See *supra* note 7. It would thus appear to be at odds with the clear language of the statute to allow a plaintiff to "tack on" the four years after the accrual of a cause of action and more than one year after the termination of the government proceeding. See *id.* However, suit could be brought after the one year period if the cause of action had accrued less than four years before. See Comment, *Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment*, 72 YALE L.J. 600, 601 n.18 (1963); Comment, *supra* note 6, at 329.

That the aforementioned articulations of Congress's purpose, see *supra* notes 1, 5, 14, &

Moreover, the equitable principles underlying the doctrine of fraudulent concealment seem to be inapplicable when the government has instituted a well-publicized antitrust proceeding, thereby putting potential plaintiffs on notice of the defendant's injurious acts and their resulting possible claims.⁷⁵

III.

FUTURE APPLICATION OF SECTION 5(i)

The goal of Congress in amending section 5(i)—to bring “certainty and predictability” to its application—clearly has not been accomplished. In view of the Supreme Court's broad reading of the statute in the *Minnesota Mining, Leh* and *Zenith* trilogy, the thirty-year existence of section 5(i) has been anything but stable, despite the lower courts' struggle to develop notions of jurisprudential consistency. In recent years, however, there has been a discernible trend, led by the Supreme Court, toward a more restrictive reading of section 5(i), one more consistent with congressional intent.⁷⁶ That trend, together with the already extant body of case

21, are determinative is well settled. The fraudulent concealment doctrine, being merely an old equitable doctrine, is applicable to toll statutes of limitations only in the absence of clear expressions of legislative intent to the contrary. See *Wood v. Carpenter*, 101 U.S. 135 (1879); *Bailey v. Glover*, 88 U.S. 342 (1875); *Kansas City v. Federal Pac. Elec. Co.*, 310 F.2d 271, 274 (8th Cir. 1962) (“legislative will is the all important or controlling factor”), *cert. denied*, 373 U.S. 914 (1963). As stated in *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946), when Congress explicitly puts a limit upon the time for enforcing a right which it created—as it has in section 5(i)—that is the “end of the matter.” *Id.* at 395.

⁷⁵ See *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965). While tolling by reason of fraudulent concealment is directly tied to affirmative conduct of the defendants, *e.g.*, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974), the one-year government suspension period is not based, in any way, on such conduct. Rather, the one-year provision assumes such conduct is out in the open, with the one year designed to assist affirmatively the bringing of suits within that defined, and limited, period of time.

⁷⁶ The most recent restriction on § 5(i) is found in *Charley's Tour & Transp., Inc., v. InterIsland Resorts, Ltd.*, 1985-2 Trade Cas. (CCH) ¶ 66,703 (D. Hawaii 1985), in which the federal district court ruled that the Clayton Act's statute of limitations was not tolled by a government suit, notwithstanding that there were defendants common to both proceedings, there was an interrelation of theories between the government's and the private plaintiffs' suits, and the same people were impacted upon in each proceeding. *Id.* at 63,366. On the defendant's motion for summary judgment, the court closely examined the two suits and determined that the private plaintiffs' suit was aimed at a conspiracy primarily affecting a market different from the one involved in the government's suit. *Id.* Building upon that determination, the court reasoned that “[t]o extend § 5(i) to this situation would mean that a defendant doing business in different markets would have the statute of limitations tolled as to all of its markets,” and such a result would not only be “inequitable” but would also

law, should be of considerable assistance to both private plaintiffs and defendants, in reducing risks and uncertainty in most instances. With respect to unforeseen circumstances (and imaginative arguments of counsel), courts in the future will presumably continue to be more sensitive to the original purposes of Congress in amending section 5(i), and attempt to reach results that will engender more, rather than less, "certainty and predictability."

"frustrate" the congressional goal of certainty and predictability "by removing any certainty as to when a cause of action was barred." *Id.* There can be little doubt that the *Leh* Court would have ruled differently from the Hawaii district court. *See supra* notes 45-49 and accompanying text.