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AN ANTITRUST ARGUMENT: WHETHER A FEDERAL TRADE
COMMISSION ORDER IS WITHIN THE AMBIT OF THE
CLAYTON ACT'S SECTION 5

Norman E. Matteoni*

Big money makes substantial law out of what may have appeared to be small questions. This Parkinson-type principle is particularly applicable to private enforcement of the antitrust laws. Any competitor or customer, whose business or other property is injured by a violation of the antitrust laws, may "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."¹ The multiplication of big money by three draws into issue all manner and maneuver of the private antitrust suit.

During the past few years, for example, extensive legal battle² has been waged over the interpretation of section 5 of the Clayton Act.³ The primary intent of that section is to make the private litigant's weapon more effective: subsection (a) grants a plaintiff the use of a final judgment, entered against the defendant in a prior government suit, as prima facie evidence of antitrust transgression; and subsection (b) suspends the running of a four-year statute of limitations while the government action is pending and provides one year after its conclusion for the plaintiff to initiate his cause of action.⁴ A portion of the controversy surrounding this statute questions the status of a Federal Trade Commission's antitrust cease and desist order: Can such a proceeding constitute prima facie evidence of antitrust violation, and/or can it toll the statute of limitations for the private suitor?

In 1923, the answer was clearly "no." New York Federal District Judge Edwin L. Garvin declared in the genesis case of *Proper v. John Bene & Sons*:⁵

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1 Clayton Act § 4, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958).

2 For one phase of the battle, see Matteoni, *Antitrust Ambiguity Under Section 5(a) of the Clayton Act*, 11 U.C.L.A.L. Rev. 792 (1964).

3 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16 (1958).

4 Section 5 states in full:

(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 a 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 4a 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 4a of this title.

(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 4a 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 4 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.

5 295 Fed. 729 (E.D.N.Y. 1923).

An analysis of section 5 . . . discloses that there are six requirements in said section 5 with which compliance must be had in order to make the proceedings competent evidence in this suit: (1) *The judgment or decree must be final.* (2) *It must have been rendered in a criminal prosecution or in a suit or proceeding in equity.* (3) *The prosecution, suit, or proceeding must have been brought by or on behalf of the United States.* (4) *It must have been instituted under the anti-trust laws.* (5) *It must be to the effect that a defendant has violated those laws.* (6) *It shall be prima facie evidence against that defendant.*

Considering these in the order set forth, the court is constrained to hold: (1) That the proceedings before the Federal Trade Commission did not result in a final judgment or decree. (2) There is grave doubt whether the proceedings [sic] before the Commission is a proceeding in equity. The Commission itself is rather an investigating body than a judicial tribunal, and its order has no binding effect until it has received the judicial sanction of the Circuit Court of Appeals. (3) Strictly speaking, it would seem that the proceeding is not brought by or on behalf of the United States, inasmuch as it is instituted by the Federal Trade Commission, although it may well be held that this body as a creature of the government may be said to be acting on behalf thereof. (4) The suit or proceeding must be brought under the anti-trust laws. Neither the Federal Trade Commission Act in its references to anti-trust acts, nor the Clayton Act in its references to anti-trust laws, includes the Federal Trade Commission Act in such a classification. . . . (5) The discussion of the fourth requirement is applicable to the fifth. (6) The Act permits the proceedings before the Commission to be received as prima facie evidence against such defendant. In the case at bar there are various other defendants.⁶

Today that reasoning has been challenged.

THE LEGISLATIVE AND FACTUAL CONTEXT

The Federal Trade Commission has been assigned a secondary role⁷ in antitrust enforcement, while the Antitrust Division of the Justice Department, of course, has the primary role.⁸ Under its own enabling act, the Commission is given the broad power to prevent "unfair methods of competition in commerce."⁹ But the real trust-busting strength of the FTC is provided by the Clayton Act. That act¹⁰ establishes a concurrent enforcement scheme by the agency and the Justice Department to prohibit: (1) discrimination in price, services or facilities between different purchasers of commodities of like grade and quality; payment or receipt of commissions, brokerage or discount, in lieu thereof, for anything other than services rendered in the sale or purchase of

6 *Id.* at 731-32. (Emphasis added).

7 Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1958) as amended, 15 U.S.C. § 45(f) (Supp. V, 1964); Clayton Act, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (Supp. II, 1964).

8 Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-8 (1958); Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958), as amended, 15 U.S.C. §§ 13, 21 (Supp. V, 1964).

9 Federal Trade Commission Act § 5, 38 Stat. 719 (1914), 15 U.S.C. § 45(a) (1958).

10 Clayton Act § 11, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (Supp. V, 1964).

merchandise;¹¹ (2) exclusive dealing leases, sales or contracts;¹² (3) the merger, consolidation or acquisition of corporations where, in any line of commerce, the effect may be either substantially to lessen competition or to tend towards monopolization;¹³ and (4) interlocking directorates among corporations, one of which has capital aggregating more than one million dollars.¹⁴ In these four areas of twin Clayton Act jurisdiction, the Commission is competent to act independently of the Department. To prevent duplication of effort, however, each "clears proposed investigation with the other before proceeding."¹⁵

Although these powers have always resided with the FTC, there have been some statutory changes since the *Proper* case which merit attention. First, the dual enforcement of the above provisions was made more efficient by a 1950 amendment to section 11 which gave the Attorney General the right to intervene in a Clayton Act proceeding by the Commission.¹⁶ Second, Congress in 1959 adopted what is termed the Finality Act,¹⁷ modifying this same section. Formerly, the FTC had to seek execution of its order by application to the Court of Appeals, if its command to cease antitrust violation was ignored. It had no enforcement power of its own. But now such a follow-up is unnecessary; the Commission's antitrust order becomes final upon the expiration of the sixty days during which defendant may seek review.¹⁸ Incidentally, the FTC's own Act had been amended several years earlier to provide that a cease and desist order shall become final "upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time."¹⁹ The Finality Act bestowed the same status on the Commission's Clayton Act orders as orders under its own Act had enjoyed since 1938.

There also has been modification of the Clayton Act's section 5. As enacted in 1914, it read in pertinent part:

A final judgment or decree hereafter rendered in *any criminal prosecution or in any suit or proceeding in equity* brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .

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

11 Clayton Act § 2, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13 (Supp. V, 1964).

12 Clayton Act § 3, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1958).

13 Clayton Act § 7, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

14 Clayton Act § 8, 38 Stat. 732 (1914), as amended, 15 U.S.C. § 19 (1958).

15 2 TRADE REG. REP. ¶ 8550.

16 64 Stat. 1126 (1950), as amended, 15 U.S.C. § 21 (Supp. V, 1964).

17 73 Stat. 243 (1959), 15 U.S.C. § 21 (Supp. V, 1964).

18 Clayton Act § 11(g), 73 Stat. 243 (1959), 15 U.S.C. § 21 (Supp. V, 1964), provides: "Any order issued under subsection (b) shall become final—(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time. . . ."

19 52 Stat. 113 (1938), as amended, 15 U.S.C. § 45(g) (1958).

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.²⁰

A 1955 amendment,²¹ however, effected some interesting changes. Although the wording "judgment or decree" remains, the italicized phrases calling for a criminal prosecution or a proceeding in equity no longer do. Substituted are the words "civil or criminal proceeding." This would not seem to make a difference; nonetheless, an argument is made over the modification.²²

The discussion which follows debates the major points upon which *Proper* relied to deny the inclusion of an FTC cease and desist order under section 5. The dispute is given voice through several recent cases: for exclusion stand the opinions of *Farmington Dowel Products Co. v. Forster Mfg. Co.*,²³ and *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*,²⁴ both federal district court decisions, and the Eighth Circuit's *Highland Supply Corp. v. Reynolds Metals Co.*,²⁵ the Third Circuit, in the unanimous decision of *N. J. Wood Finishing Co. v. Minn. Mining & Mfg. Co.*,²⁶ has taken a position for inclusion. The latter opinion, which is also the most recent on the subject, ambitiously sets forth the conclusion that statutory amendments to the Clayton Act have caused the demise of the grandfather *Proper* case.

Before going any further, it may be helpful to posit a hypothetical factual situation in order to take the argument out of the abstract. The typical cast of characters is as follows: the treble-damage Plaintiff is a producer and supplier of a raw material which is utilized by Defendant One, the leading manufacturer in its field. In mid-1959, Defendant One acquired Defendant Two, a competitor of Plaintiff; a few months later it further acquired Defendant Three, a small company making the same product as Defendant One. A concurrent result of this vertical and horizontal integration of manufacturers and supplier was the exclusion of producers, including Plaintiff, from a large portion of their former markets. The FTC, observing this activity, issued a complaint against the defendants in August, 1961, alleging that these acquisitions substantially lessened competition and tended to create a monopoly, as proscribed by section 7 of the Clayton Act. (Note that there can be no question whether the Federal Trade Commission Act is an antitrust law, because here the agency quite obviously asserts antitrust disobedience under the Clayton Act.) The matter was heard by an FTC hearing examiner and appealed to the Board of Commissioners which entered a final order in June, 1963, commanding, *inter alia*, Defendant One to divest itself of all assets of Defendants Two and Three.

Finally, in January, 1964, Plaintiff filed its treble-damage action, alleging violations, to its detriment, of the antitrust laws by Defendants One, Two and Three. The Defendants did not answer but immediately moved to dismiss the complaint on the grounds that over four years had transpired since the cause of action arose and therefore the statute of limitations had raised its bar; or,

20 38 Stat. 731 (1914) (emphasis added) (now 15 U.S.C. § 16 (1958)).

21 69 Stat. 283 (1955), 15 U.S.C. § 16 (1958).

22 See text accompanying notes 35-38, *infra*.

23 223 F. Supp. 967 (D. Me. 1963).

24 223 F. Supp. 712 (E.D. Tenn. 1963).

25 327 F.2d 725 (8th Cir. 1964).

26 332 F.2d 346 (3d Cir. 1964).

in the alternative, they sought to strike all references to proceedings before the Federal Trade Commission which appeared in the complaint. The complaining party vigorously opposed the main thrust of the attack, arguing that the statute was suspended under section 5(b) of the Clayton Act by the agency suit; moreover, hoping for success on that point, Plaintiff attempted to show that a contested FTC order constituted prima facie evidence of antitrust offenses under section 5(a).

Thus the stage for the debate is set.

THE JUDGMENT OR DECREE MUST BE FINAL

For a brief period during 1945, the Second Circuit did indeed adopt the position that an FTC order in a Clayton Act case was prima facie evidence of a violation of the antitrust laws. The majority in *Brunswick-Balke-Collender Co. v. American Billiard & Bowling Corp.*²⁷ initially had reasoned that the 1938 amendment to the Federal Trade Commission Act, making its orders final unless there is appeal to a Circuit Court within 60 days, gave the Commission's order the status of a final judgment or decree under section 5. Judge Evans dissented, pointing out that despite the finality of an FTC order it was not the kind of judgment or decree contemplated by the section. Upon rehearing,²⁸ however, the majority's opinion was withdrawn. The court quite properly realized that the 1938 amendment did not affect the Commission's orders under the Clayton Act since it had reference only to the Federal Trade Commission Act.

It is urged today that the majority's reasoning in the initial decision of *Brunswick-Balke* has been reinstated by the Finality Act of 1959, an express amendment to the Clayton Act. Further, Justice Brennan gave the Supreme Court's recognition to the finality of a Commission antitrust cease and desist order when he said: "The severity of possible penalties prescribed by the amendments for violations of orders which have become *final* underlies the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."²⁹

But the attorneys for Reynolds Metals in their argument for exclusion in *Highland Supply* sought to place the matter in a different perspective, urging that the 1959 Finality Act modified only section 11 of the Clayton Act and did not affect the relevant requirements of section 5. Senator Sparkman's remark was cited to demonstrate that the legislative history sustained their position: "Let me emphasize that the bill before us today proposes no new departure. Nothing new is sought to be injected into our well-established and proven concept of intelligent, effective enforcement procedures. . . ."³⁰ The significance of that quote lies in its deletion. The Senator further stated:

27 150 F.2d 69 (2d Cir. 1945), cert. denied, 326 U.S. 757 (1945).

28 *Id.* at 74.

29 *FTC v. Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962). (Emphasis added). The penalties of which Justice Brennan speaks are the civil penalties of not more than \$5,000 for each separate violation of an FTC final order, as set forth in section 11(1) of the Clayton Act.

30 Brief for Appellee, p. 22, footnote, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964).

The bill attempts to confer no authority that is in anywise different from authority long exercised by the Federal Trade Commission under the provisions of the Wheeler-Lea Act. In fact, the bill proposes to confer upon the Federal Trade Commission, insofar as Clayton Act violations are concerned, precisely—and in almost exactly the same language—the enforcement authority and procedures which Congress conferred and prescribed with respect to the Federal Trade Commission Act as amended by the Wheeler-Lea Act.

The bill before us today can, in truth, be called a *perfecting amendment to the Clayton Act*. It has no other purpose than to effectuate the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement. . . .³¹

If the 1959 amendment were intended to give an FTC order under the Clayton Act the same status that it held under its own act, it then seems that the original conclusion in *Brunswick-Balke* would now be vindicated. Moreover, if the amendment were intended to perfect the Clayton Act, it is unlikely that section 5 would have been insulated from such perfection.

Prior to the Finality Act, enforcement of an FTC order under the Clayton Act followed an arduous path. The initial effort by the agency amounted to little more than investigating and noting breaches of the antitrust law. If the FTC later suspected a disregard of its cease and desist order, it was required to make that determination by formal hearing and then apply to a federal court of appeals for execution of its order. The court, in turn, not only had to resolve the legality of the order, but further had to decide whether the facts found by the FTC constituted a violation of the Act.

No longer does the agency's cease and desist command simply stand as *notice* of antitrust disobedience, having "no effect in itself, unless made operative by the Circuit Court of Appeals. . . ."³² Rather, the order now constitutes complete relief — an *injunctive measure* — in and of itself.

It should be noted that subsection 5(b) omits the "final judgment or decree" language of 5(a), and states that the statute of limitations is suspended upon institution of a "civil or criminal proceeding." It does not require that a private party stand in anticipation of a final order before the statute is tolled. If it did, courts such as the one in *N. J. Wood*, faced with the question whether an FTC *consent order* can toll the statute of limitations in a treble-damage case, could easily dispose of the issue with a finding that a consent order is not a final judgment, since by agreeing to a consent order the defendant does not admit a violation of the antitrust laws but merely agrees to discontinue the challenged activity.

Conceding for the moment that the Finality Act provides the answer to the first requirement of *Proper*, it is asserted that it did not make an FTC proceeding a "civil proceeding," nor did it make the FTC "the United States."

WHAT IS A CIVIL PROCEEDING?

It is readily apparent that the Commission's action is not a criminal proceeding, for the agency has the power neither to imprison nor to fine. Those

31 105 CONG. REC. 4465-66 (1959) (Emphasis added).

32 *Proper v. John Bene & Sons*, 295 Fed. 729, 731 (E.D.N.Y. 1923)..

urging exclusion of these proceedings from section 5 claim that it is equally obvious that they are not civil in nature. In *Highland Supply*, District Judge Meredith declared: "[I]n our view 'civil or criminal proceeding' plainly means a judicial proceeding and not an administrative proceeding."³³ This is clear because the words "civil or criminal" indicate methods of conducting business before a court. The judge not only concluded that an FTC proceeding was not within the meaning of section 5, but further that appellate review standing alone cannot toll the statute "because it was not instituted by the United States, but rather by this defendant."³⁴

On appeal to the Eighth Circuit, attorneys for the plaintiff offered the proposition that the broader language, "any civil or criminal proceeding," substituted for "any suit or proceeding in equity or criminal prosecution" by the 1955 amendment, included an agency action. They noted that Congress, while knowing of the American Bar Association's request for specific exclusion of FTC hearings, refrained from excluding such proceedings, even though it did provide that judgments or decrees entered in actions where the United States sues in the same capacity as a private party for injury to its property caused by anything forbidden by the antitrust laws could not be used as prima facie evidence. The only other explicit exception to section 5 is that to subsection (a), denying the use of "consent judgments or decrees entered before any testimony has been taken" as prima facie evidence. Hence, "[u]nder the maxim, *Expressio unius est exclusio alterius*, it should be concluded that Congress intended to exclude only these two classes of judgments or decrees."³⁵ Although the argument smacks of sophistry, the Court in *Volasco Products*, faced with the same contention, gave the reasoning some dignity by basing its decision solely on a rebuttal.

The language has been streamlined, but an examination of [the 1955 Amendment] clearly shows that it was only an amendment to section 5 of the Clayton Act and that it made no reference to the Federal Trade Commission Act. The *Brunswick* case was reversed on the one point, because of the Court's revised conclusion that section 5 applied only to the Clayton Act. There is *nothing* in the Amendment of 1955 which would point to a different conclusion.³⁶

The court has not only replied too simply, but has also overlooked the 1959 amendment and misconstrued the revised conclusion of *Brunswick*. The better answer was offered by the attorneys for Reynolds Metals: it cannot be assumed that, simply because the American Bar Association expressed the fear that the proposed language might create uncertainty concerning the status of an FTC order, Congress "formed a purpose to make a change in the law, and relied on the 'uncertain' language to achieve the change."³⁷ The court in *Farmington Dowel* said: "It seems reasonable to assume that if Congress had intended by the substitution of the words 'civil or criminal proceeding' in the

³³ 221 F. Supp. 15, 17 (E.D. Mo. 1963).

³⁴ *Ibid.*

³⁵ Appellant's Reply Brief, p. 13, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964).

³⁶ 223 F. Supp. 712, 713 (E.D. Tenn. 1963).

³⁷ Brief for Appellee, p. 52, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964).

1955 amendment of the Clayton Act to include a Federal Trade Commission proceeding, it would have amended the phrase 'judgment or decree' to include an administrative 'order.'"³⁸ It is further asserted that the phrase "suit or proceeding in equity" was replaced by "civil proceeding" simply to conform to the Federal Rules of Civil Procedure which abolished the law-equity distinction.

However, in 1923, *Proper* expressed "grave doubt whether the proceedings before the Commission is a proceeding in equity."³⁹ With the Finality Act now at hand, Chief Judge Biggs of the Third Circuit drove hard at what he deemed a weak point.

Certainly, when the Justice Department seeks an injunction against a defendant for violation of the Clayton Act, its purpose is to prevent irreparable injury to the public weal by the traditional equitable remedy. . . . The effect of the FTC proceeding is *essentially* the same, by virtue of the 1959 amendment to Section 11. . . . Formerly the FTC had to seek the enforcement of its order—after its determination of a Clayton Act violation, and a subsequent violation of the order . . . — by a petition to the Court of Appeals; but now enforcement decrees by the Circuit Court of Appeals are unnecessary and the orders become final and self-executing by the expiration of defendant's time to seek review.⁴⁰

Perhaps it would be well to explore the judicial, or quasi-judicial, framework of the Federal Trade Commission. First, the FTC operates under an internal separation of functions: the investigators and prosecutors do not sit as judges; the adjudicative function is served by hearing officers at the initial decision level and by a board of Commissioners upon agency review. Under its Rules of Practice for Adjudicative Proceedings, a complaint must issue⁴¹ after which the defendant has 30 days to answer.⁴² Further, there is the opportunity to discover the names of witnesses to be called and the nonprivileged documents to be used in the case.⁴³ Counsel supporting the complaint has the burden of proof,⁴⁴ and each party "shall have the right of due notice, cross examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."⁴⁵

Probably the most significant point of comparison between agency adjudication and a judicial proceeding is that of admissibility of evidence. The objection often raised is that evidentiary rules are greatly relaxed in administrative adjudication. Section 4.12(b) of the Commission's Rules of Practice provides simply: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable."⁴⁶ But in a nonjury antitrust case, Judge Wyzan-

38 223 F. Supp. 967, 973 (D. Me. 1963).

39 295 Fed. 729, 732 (E.D.N.Y. 1923).

40 *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 354-55 (3d Cir. 1964). (Emphasis added).

41 Federal Trade Commission Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.4 (1964).

42 *Id.* at § 3.5.

43 *Id.* at §§ 3.8(a)(6) and 3.11.

44 *Id.* at § 3.14(a).

45 *Id.* at § 3.16(b).

46 *Id.* at § 3.14(6).

ski, an authority in the antitrust field, allowed administrative practices to influence judicial methods. He reasoned that in a civil suit in which the Government can secure against a defendant an injunction and order without monetary damages, the trial judge is not required to exclude every type of hearsay evidence which would otherwise be excluded. "It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the Federal Trade Commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the Government."⁴⁷ Professor Davis further observes that the entire legal system is witnessing a trend "toward replacing evidence rules with discretion, admitting all relevant and useful evidence, and basing findings on evidence on which responsible persons rely in serious affairs."⁴⁸

In a word, the FTC has adopted a posture very closely resembling judicial activity, especially in a nonjury civil antitrust suit.

The facile answer remains, however, that "by definition, a proceeding which is *analogous* to a suit or proceeding in equity is *not* a suit or proceeding in equity."⁴⁹ Yet, the Commission, in dealing with monopolistic practices, is recognized to possess an expertise which the courts do not have.⁵⁰ Furthermore, the FTC is the primary enforcer of the antimerger provisions of the Clayton Act's section 7 and "to hold that such a proceeding was not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of section 7."⁵¹ Finally, "[t]here is no difference between the substantive anti-trust law applied by the Commission and that applied by the Court."⁵²

THE INTERRELATIONSHIP OF SUBSECTIONS 5(a) AND 5(b)

The question before the court in *Proper* was whether a Commission order is admissible as *prima facie* evidence in a subsequent treble-damage suit. None of the recent cases has directly faced this issue; rather they have had before them the question of whether an FTC proceeding tolls the statute of limitations.

Nevertheless, the argument is made that "proceedings which cannot yield judgments and decrees applicable as *prima facie* evidence under Section 5(a) cannot toll the statute of limitations under Section 5(b)."⁵³ Assuming *arguendo* that a contested final FTC order cannot constitute *prima facie* evidence of anti-trust misdeeds, it is proposed that the two subsections must be construed *in pari materia*. Historically, they were always but two paragraphs within the same section and only recently were formally separated into subsections (a) and (b).

More significant is the contention that the sole purpose of the tolling provision is to give a treble-damage claimant adequate opportunity to invoke a "judgment or decree." For example, whether or not a Justice Department criminal

47 *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349, 356 (D. Mass. 1950).

48 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.17 (1958).

49 Brief for Appellee, p. 17. See *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964).

50 See *FTC v. Cement Institute*, 333 U.S. 683, 726 (1947).

51 *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 354 (3d Cir. 1964).

52 *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349, 356 (D. Mass. 1950).

53 *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 357 (3d Cir. 1964).

prosecution results in acceptance of a *nolo contendere* plea or an acquittal, there was at its inception the possibility of a conviction which could have been used as prima facie evidence. The same is true of a consent judgment to a Department proceeding. While such judgments cannot constitute prima facie evidence under 5(a), there is the possibility, at the time the action is instituted, that it will result in a judgment which can be used under 5(a). Since the decision to toll the statute must be viewed from the moment the proceeding is initiated, the statute should be suspended whenever it is possible that the resulting judgment might be one that a private plaintiff could introduce as prima facie evidence. This reasoning is not applicable to a proceeding whose resulting order could not possibly be utilized by a private litigant.

The only answer is that the statute does not have as its sole purpose the aiding of treble-damage suitors by providing prima facie evidence of antitrust violations. A recognized complementary purpose is the encouragement of capitulation to government demands through the exclusion, from the operation of section 5(a), of consent decrees entered before any testimony has been taken.⁵⁴ Thus, the argument proceeds that, even conceding that the ideal result of tolling would be to preserve the benefits of subsection (a), it does not necessarily follow that without such benefits, or their possibility, subsection (b) is inoperative.

Despite the fact that a consent judgment is entered, there are nonetheless some benefits which the private plaintiff may reap from the prior government action. Certainly the Government does not maintain open files for one seeking treble damages, but the legal process of its proceeding can uncover much which points the way for the subsequent plaintiff. This was apparently recognized by Congress in 1955 when it suspended the statute of limitations for an additional year beyond the conclusion of the Government's case.

Although the statute is tolled during the pendency of the proceedings brought by the United States, 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. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter.⁵⁵

More tangible, however, was the benefit which the court in *Olympic Refining Co. v. Carter*⁵⁶ recently permitted a private party. The Ninth Circuit ruled that information obtained by the Justice Department from defendants to a prior antitrust suit, which terminated in a consent decree, was discoverable by a plaintiff in subsequent private litigation. "[N]either in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available . . . to other litigants who had need of it."⁵⁷ In *N. J. Wood*, Chief

54 *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 371 (D. Minn. 1939).

55 U.S. CODE CONG. & AD. NEWS 2332 (1955). (Emphasis added).

56 332 F.2d 262 (9th Cir. 1964).

57 *Id.* at 265.

Judge Biggs attempted to remove the necessity of the above reasoning with the dictum that a final order by the FTC is admissible under section 5(a):

Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his "day in Court" on that issue. . . . He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence. . . . 3M argues that FTC orders cannot be admitted because of the more liberal evidentiary rules of the administrative agency. This plus the broader administrative process might place the FTC proceeding on a somewhat unequal footing with a similar judicial proceeding brought by the Department of Justice. . . . The differences at most are peripheral and any attack along those lines would go to the weight of the prima facie evidence, not to its propriety. The use of administrative orders as prima facie evidence in private suits is not new to our law. Under the Interstate Commerce Act, 49 U.S.C. § 16(13), a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant railroad, found by the ICC to have exacted unreasonable rates.⁵⁸

But Judge Wyzanski had taken a contrary position in 1950:

The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as prima facie evidence in a treble damage suit.⁵⁹

Those who seek to place an FTC order within the ambit of section 5, however, reply that the 1955 and 1959 amendments undercut the basis of this stand.

But those amendments do not equate the United States with the Federal Trade Commission.

BY OR ON BEHALF OF THE UNITED STATES

Advocates of exclusion maintain that the Commission is an entity distinct from the United States, "capable of suing and being sued in its own right. The United States and an agency may appear as separate parties in a suit and present opposing views."⁶⁰

It is interesting that *Farmington Dowel* explicitly refused to rule on this point.⁶¹ But recall that the District Court in *Highland Supply* concluded that even the judicial blessing of a Commission order would not qualify it under 5(b), because the appeal was instituted by the defendant and not by the United States. The plaintiff offered this answer to the higher court: "While it is true that the appeal from the Federal Trade Commission order was taken by [defendant], the decree of enforcement was hardly *sought* by the [defendant] in the Court of Appeals, but rather, by the Commission."⁶²

58 *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 358 (3d Cir. 1964). (Citations omitted.)

59 *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349, 356 (D. Mass. 1950).

60 Brief for Appellee, p. 69, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964). (Citations omitted.)

61 223 F. Supp. 967, 973 n.11 (D. Me. 1963).

62 Brief for Appellant, p. 17, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964).

N. J. Wood finds some indication that the agency acts on behalf of the United States in the 1950 amendment to section 11 of the Clayton Act, which gives the Attorney General the right to intervene in the FTC's proceedings. But "on behalf of the United States" is not enough to satisfy section 5(b) which limits itself to proceedings "instituted by the United States." Those who argued against an *in pari materia* construction earlier may desire to change their position. Judge Biggs, however, provides an answer: "Any argument that an FTC proceeding is not a suit by the United States must meet the reality that whether the Commission functions under the Clayton or FTC Act, it does so in the public interest and as an administrative arm of the Government."⁶³

CONCLUSION

The arguments are well matched. Perhaps, if anything is clear, it is that heavy reliance in subsequent cases upon the precedent of *Proper v. John Bene & Sons* allowed the court in *N. J. Wood* to offer a strong opinion to the contrary by a thorough discussion of the various statutory changes which had taken place since the *Proper* decision of 1923. Only Reynolds Metals' brief on appeal produced an independent argument able to meet squarely the Third Circuit's challenge.

Where the balance is struck may depend ultimately upon how the judiciary appraises the quasi-judicial function of the FTC. But the decision cannot be made on the worth or weakness of this agency alone, since section 11 permits the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Reserve Board, where antitrust transgressions arise in the areas under their special jurisdiction, to also enforce sections 2, 3, 7 and 8 of the Clayton Act. To allow an FTC order to constitute prima facie evidence and/or to toll the statute of limitations means that soon an order of one of its sister agencies may also be considered within the scope of section 5. These five agencies of the "headless fourth branch of government"⁶⁴ must each be evaluated in their particular area of specialization.

Further, to hold that an FTC order is within 5(b) makes it easier to find that a controverted agency command is also within 5(a). Therefore, any argument against *in pari materia* construction is but a technical screen of the real issue. If one is a step to the other, certainly the interrelationship of the two subsections is of the utmost importance. Perhaps it can be stated summarily that whether an FTC order constitutes prima facie evidence of an antitrust violation or not, the defendant still has his day in court. The order is obviously not conclusive evidence, and the private plaintiff that relies entirely upon the determination of a Government case, failing to produce independent evidence, is not likely to find his pockets filled with treble damages.

The Third Circuit has either opened a Pandora's Box or made a significant contribution to antitrust law; the answer eventually must be given by the Supreme Court.

63 *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 353 (3d Cir: 1964).

64 *Time*, July 31, 1964, p. 57.

For the moment, however, the reasoning of District Judge Augelli is compelling:

It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding, but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical.⁶⁵

⁶⁵ *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 216 F. Supp. 507, 510 (D. N.J. 1963).