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Federal Trade Commission Proceedings and Section 5 of the Clayton Act: Application and Implications

Although the primary responsibility for the enforcement of the antitrust laws falls upon governmental agencies, Congress has recognized the effectiveness of the private suit for damages as a deterrent and has sought to encourage such actions by providing for the recovery of treble damages by an injured party.¹ To assist the private litigant, whose problem of proof is formidable,² Congress enacted section 5(a) of the Clayton Act,³ which allows the introduction, as prima facie evidence of an antitrust violation, of a prior judgment or decree obtained by the Government. As a further aid to private litigants, section 5(b)⁴ provides for the tolling of the applicable stat-

1. Clayton Act § 4, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1964).

2. See Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 171 (1958).

3. Clayton Act § 5(a), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964):

A final judgment or decree . . . 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 proceeding brought by any other party against such defendant under said laws or by the United States under section 15a 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 15a of this title.

Section 15a provides that the United States may sue to recover actual damages when it is injured in its business or property by reason of any practice prohibited by the antitrust laws. 69 Stat. 282 (1955), 15 U.S.C. § 15a (1964).

4. Clayton Act § 5(b), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964):

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 15a of this title, the running of the statute of

ute of limitations⁵ during the pendency of a civil or criminal action by the Government founded upon the same violation alleged in the private suit. For more than fifty years, the only type of government proceeding that suspended the statute of limitations was a Justice Department action to enforce the antitrust laws. In the recent case of *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,⁶ however, the United States Supreme Court held that proceedings instituted by the Federal Trade Commission are also within the scope of section 5(b) of the Clayton Act. It is the purpose of this note to consider the implications of the *Minnesota Mining* decision for the future application of section 5 to private actions.

Since the FTC and the Justice Department have concurrent jurisdiction, under section 11 of the Clayton Act,⁷ to enforce certain provisions of the antitrust laws, the questions have naturally arisen whether an FTC order is admissible, under section 5(a), against the defendant in a subsequent civil suit, and whether an FTC proceeding will toll the statute of limitations, through the application of section 5(b).

Before 1963, courts had twice considered the admissibility of FTC orders as prima facie evidence in a private suit. In *Proper v. John Bene & Sons*,⁸ it was held that FTC orders were inadmissible, primarily on the ground that they were not "final" as required by section 5(a). In 1945, when the question was again presented, the court in *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.*⁹ initially held that the Wheeler-Lea Act of 1939¹⁰ made FTC orders "final" and therefore admissible under section 5(a). On rehearing, however, the court held that the Wheeler-Lea Act did not apply to section 11 orders of the FTC.¹¹

Within the past few years the controversy over FTC proceedings has shifted from their admissibility under section 5(a) to the tolling provision of section 5(b). Before the Supreme Court decision in *Minnesota Mining*, three courts had held that FTC proceedings

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

5. Clayton Act § 4(b), added by 69 Stat. 283 (1955), 15 U.S.C. § 15(b) (1964). Before 1955 there was no uniform federal statute of limitations for a treble damage action; hence, the period varied depending upon state law.

6. 381 U.S. 311 (1965).

7. Clayton Act § 11, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1964), gives the FTC and four other administrative agencies the power to enforce §§ 2, 3, 7, and 8 of the Clayton Act where applicable to their special area of interest. See note 43 *infra*.

8. 295 Fed. 729 (E.D.N.Y. 1923).

9. 150 F.2d 69 (2d Cir. 1945).

10. 52 Stat. 111 (1938), 15 U.S.C. § 45(g) (1964), amending 38 Stat. 719 (1914).

11. 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945).

were not capable of tolling the statute of limitations.¹² Each relied on *Proper* to some extent and emphasized that both the language and the legislative history of section 5 indicate that it was intended to apply only to judicial, rather than administrative, proceedings. Each court assumed that the subsections were interdependent—that the purpose of section 5(b) was to toll the statute of limitations to allow a private party the use, under section 5(a), of the judgment that the Government might obtain.¹³ Since FTC orders could not be used as prima facie evidence, the courts held that FTC proceedings would not toll the statute of limitations.¹⁴ The circuit court in *Minnesota Mining*¹⁵ took the contrary view. Although it did not agree with the assumption that the two subsections were entirely interdependent, the court nevertheless decided that FTC proceedings tolled the statute of limitations because it believed FTC orders to be admissible as prima facie evidence.¹⁶

The Supreme Court, in affirming *Minnesota Mining*, refused to go as far as the circuit court, and expressly declined to consider the issue whether FTC orders are admissible under section 5(a). Instead, the Court found legislative history and language in the section itself indicating that the subsections are not completely interdependent.¹⁷ Thus, it was unnecessary to find FTC orders admissible before the proceedings would toll the statute of limitations. The Court admitted that there is "little in the legislative history to suggest that Congress consciously intended to include Commission actions"¹⁸

12. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967 (D. Me. 1963); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 223 F. Supp. 712 (E.D. Tenn. 1963); *Highland Supply Corp. v. Reynolds Metals Co.*, 221 F. Supp. 15 (E.D. Mo. 1963), *rev'd on other grounds*, 327 F.2d 725 (8th Cir. 1964).

13. *E.g.*, *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967, 971 (D. Me. 1963).

14. *E.g.*, *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 223 F. Supp. 712, 713 (E.D. Tenn. 1963).

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

16. *Id.* at 357.

17. 381 U.S. 311, 316-18 (1965). The Court's interpretation was subsequently reaffirmed in *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965), which held that the principles of collateral estoppel, applicable to determinations under § 5(a), are not applicable to § 5(b). The lower court had relied on *Steiner v. Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956), to hold that the same means must be used by the same defendants to achieve the same objectives of the same conspiracies in order for the tolling provision to apply. In overruling the lower court and the *Steiner* view, the Supreme Court pointed out that *Minnesota Mining* had rejected the contention that §§ 5(a) and 5(b) were coextensive. 382 U.S. at 58-59. The *Lea* decision resolved a three-year conflict between circuits on this point in favor of the standard applied in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1962), that there need be only "substantial identity of subject matter" in order to claim the benefit of the tolling provision of § 5(b). This interpretation seems more in keeping with the language of the section and with the policy of extending § 5 aid to as large a group of private plaintiffs as possible.

18. 381 U.S. 311, 320 (1965). There is some evidence that administrative proceedings were not intended to be included. See *id.* at 324-35 (Black, J., dissenting).

within the scope of section 5, and that "the precise language of § 5(b) does not clearly encompass Commission proceedings."¹⁹ However, it argued that these considerations should not be controlling when they run counter to the purpose of Congress to permit private litigants any benefits they might gain from prior government actions, regardless of the subsequent usefulness of the judgments as prima facie evidence.²⁰

The impact of the Court's decision in *Minnesota Mining* has been made apparent in the recent case of *Broussard v. Socony Mobil Oil Co.*²¹ In dictum, the Court of Appeals for the Fifth Circuit was critical of the district court's refusal to permit the plaintiff to serve an FTC employee with certain interrogatories concerning the existence and nature of complaints made against the defendant by the Government. Citing language in *Minnesota Mining* to the effect that "government proceedings are recognized as a major source of evidence for private parties,"²² the court stated that plaintiff should have been permitted to seek the information relevant to his suit.²³ In the past, the release of this type of information has been at the discretion of the Commission,²⁴ but *Broussard* suggests that an injured party has a *right* to know when the FTC is conducting an investigation, so that he may decide whether to bring his suit or wait for the results of an FTC proceeding.

Allowing FTC proceedings to toll the statute of limitations for private treble damage suits might also result in a substantial increase in the number of consent orders entered into by the FTC in negotiated settlements.²⁵ If a defendant corporation believed that it might be faced with substantial treble damage suits, it could minimize the effect of the tolling provision of section 5(b) by giving the FTC an assurance of voluntary compliance or accepting a consent order to cease and desist.²⁶ The desirability to a corporate defendant of accepting a consent order would be even greater if, after a litigated

19. *Id.* at 321.

20. *Ibid.*

21. 350 F.2d 346 (5th Cir. 1965).

22. 381 U.S. 311, 319 (1965).

23. 350 F.2d 346, 353 (5th Cir. 1965).

24. The rules of the Commission do not expressly allow for disclosure of this type of information, but the Commission may furnish the information if "deemed advisable." 16 C.F.R. § 1.134(d). As to a private litigant's right to information obtained by the government in a Justice Department proceeding, see *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964).

25. *FTC Proceedings and Treble Damage Actions*, 5 CCH TRADE REG. REP. ¶ 50121 (1965).

26. In the past, the number of consent decrees issued in cases involving charges on which treble damage suits could be based has been smaller than the number of litigated proceedings involving the same type of charges. *Ibid.* However, if the bill introduced by Senator Hart (see note 39 *infra*) is enacted, consent decrees will also be prima facie evidence in subsequent private damage actions.

proceeding, an FTC order could be used as prima facie evidence in a subsequent treble damage action,²⁷ because consent decrees entered before testimony is taken are not admissible as prima facie evidence under section 5(a).²⁸ The Commission may find this reduction of the amount of extended litigation desirable from the standpoint of efficient antitrust enforcement, but may, on the other hand, be reluctant to accept consent orders which would deprive an injured party of the benefit of a final FTC order as evidence in a later private action.

Although the Supreme Court expressly declined to decide the question in *Minnesota Mining*, the plain implication of that opinion is that under the proper circumstances FTC orders are admissible as prima facie evidence. Conspicuous by its absence from the Court's opinion is a consideration of the language of section 5(b) to the effect that only a "civil or criminal proceeding . . . instituted by the United States"²⁹ will toll the statute of limitations. As FTC proceedings are now, under *Minnesota Mining*, within the scope of section 5(b), the necessary inference is that they are within that description, which is also essentially the description of the type of proceeding which produces judgments or decrees admissible as prima facie evidence under section 5(a).³⁰ Thus, if Congress intended the same meaning for substantially identical expressions in sections 5(a) and (b),³¹ the Court has eliminated without discussion one of the main objections to admitting FTC orders as evidence: that an FTC

27. Some courts have indicated that the primary purpose of § 5 is to encourage consent decrees. For example, in *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962), the court expressed the belief "that the benefits to treble damage claimants come into being and inure only when defendants have failed to take advantage of the inducement offered to them in that section." *Id.* at 662.

28. The Justice Department has successfully avoided this circumvention by defendants of a potential disadvantage under § 5(a) by incorporating in the consent decree a clause admitting liability and conceding guilt, limited, however, to use by state agencies as prima facie evidence. *United States v. Lake Asphalt & Petroleum Co.*, 1960 Trade Cas. 77271 (D. Mass. 1960). *Contra*, *United States v. Brunswick-Balke-Collender Co.*, *supra* note 27. In *United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964), the Supreme Court declined to decide whether the Justice Department could insist on an admission of guilt, but there seems to be no reason why such a clause could not be used in place of a § 5(a) judgment. See Comment, 53 CALIF. L. REV. 627, 639 (1965). See generally Dabney, *Consent Decrees Without Consent*, 63 COLUM. L. REV. 1053 (1963); Matteoni, *Antitrust Ambiguity Under Section 5(a) of the Clayton Act*, 11 U.C.L.A.L. REV. 792 (1964) (*nolo contendere* pleas).

29. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964).

30. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964) reads in part: "judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States . . ."

31. This is the universal presumption. See, e.g., McCAFFREY, *STATUTORY CONSTRUCTION* § 13 (1953). Furthermore, it would seem that the words "by or on behalf of" strengthen this construction, as they are more inclusive than the § 5(b) terminology of "instituted by."

proceeding cannot be considered a civil or criminal proceeding instituted by the United States.³²

However, section 5(a) includes the phrase "final judgments or decrees," which necessitates the investigation of two further questions: whether an FTC order is final, and whether it is a "judgment or decree." The circuit court in *Minnesota Mining* argued persuasively that the "Finality Act," a 1959 amendment to the Clayton Act³³ which makes FTC orders final unless appealed, gives such orders the force and effect of final judgments.³⁴ These orders now constitute complete relief without application to a federal court of appeals for execution, which would seem to supply the "finality" that the court in *Brunswick* found lacking in 1945.³⁵

On the other hand, there is no simple answer to the question whether an FTC order is to be considered a "judgment or decree."³⁶ Aside from the consideration of whether the non-judicial character and functions of the Commission should preclude its orders from admissibility under section 5(a),³⁷ courts will probably be reluctant to equate an administrative order with a judicial decree because of the relaxed evidentiary standard under which such decrees are obtained.³⁸ However, as the circuit court in *Minnesota Mining* pointed

32. Both *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964), and *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346 (3d Cir. 1964), considered this argument at length before reaching opposite conclusions.

33. Clayton Act § 11(g), 73 Stat. 243 (1959), 15 U.S.C. § 21(g) (1964), amending 38 Stat. 734 (1914), provides that FTC orders "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 . . ." It should be noted, however, that this section makes FTC orders final "orders," not final "judgments."

34. 332 F.2d 346, 354-55 (3d Cir. 1964).

35. *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.*, 150 F.2d 69 (2d Cir.), cert. denied, 326 U.S. 757 (1945); see Matteoni, *An Antitrust Agreement: Whether a Federal Trade Commission Order Is Within the Ambit of the Clayton Act's Section 5*, 40 NOTRE DAME LAW. 158, 162-63 (1965).

36. See *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 326 (1965) (Black, J., dissenting).

37. It has been suggested that the FTC was created as a commission of experts to deal with complex economic problems and that its effectiveness is greatly impaired by an insistence on formal legalistic procedures. Markham, *The Federal Trade Commission's Use of Economics*, 64 COLUM. L. REV. 405 (1964). An intensive discussion of the function and goals of an administrative agency is beyond the scope of this note.

38. "The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 569 (1962). However, there are instances of an administrative order used as prima facie evidence in judicial proceedings. Under the ICC Act, 25 Stat. 859 (1889), as amended, 49 U.S.C. § 16(2) (1964), a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant found to have exceeded reasonable rates. See *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412 (1915); *Hackney Bros. Body Co. v. New York Central R.R.*, 85 F. Supp. 465, 467 (E.D.N.C. 1949). It has been held, however, that the ICC's primary jurisdiction as to questions of reasonableness makes a reparation order a prerequisite

out, this factor should affect only the weight of the order as evidence and not its admissibility.³⁹ The judgment may relieve the plaintiff of the burden of proof, but it does not estop the defendant from subsequent rebuttal.⁴⁰ Furthermore, it has been noted that the "standards of *admissibility* are relaxed, but the fundamental standards of *proof*, as developed in law courts, are generally followed."⁴¹ To help ensure fairness in the proceedings, the FTC operates under an internal separation of functions so that investigators and prosecutors do not also sit as judges.⁴² Moreover, it is possible that any existing abuses of the FTC procedure would be somewhat alleviated if the Commission's decrees were within the scope of section 5(a), since the Commission would be forced to consider the interests of subsequent private litigants. Nevertheless, regardless of the desirability of bringing FTC orders within the ambit of section 5(a), the courts may be reluctant to do so;⁴³ such a departure may therefore require appropriate legislation.⁴⁴

to a civil damage action. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); 62 COLUM. L. REV. 521 (1962).

39. 332 F.2d 346, 358 (3d Cir. 1964). A bill recently introduced by Senator Hart of Michigan would amend § 5(a) to make a final judgment or decree *conclusive* evidence if entered after the commencement of the taking of testimony in a civil or criminal proceeding, and *prima facie* evidence if entered before the taking of testimony. S. 2512, 89th Cong., 1st Sess. (Sept. 8, 1965). If a judgment could be offered as conclusive evidence, it seems unlikely that decrees resulting from proceedings other than judicial proceedings would be used because there would be no opportunity to consider the weight of the judgment as evidence. Making decrees entered before the taking of testimony *prima facie* evidence would discourage respondents from entering into consent decrees to escape potential treble damage claims.

40. Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 GEO. L.J. 44, 49 (1960).

41. COOPER, *THE LAWYER AND ADMINISTRATIVE AGENCIES* 198 (1957). For a criticism of FTC procedure, see Loughlin, *Investigation and Trial of Robinson-Patman Act Cases Before the Federal Trade Commission*, 4 ANTI-TRUST BULL. 741 (1959).

42. Matteoni, *supra* note 35, at 165. It has been argued that this is still inadequate and that the prosecuting arm of the Commission should be entirely severed from the judicial arm. Barton, *The Federal Trade Commission and the Need for Procedural Impartiality*, 64 COLUM. L. REV. 390 (1964).

43. In the second trial of *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510, 514 (E.D. Mo. 1965), the court allowed the plaintiff to plead the dates of the FTC proceedings and the nature of the matter before the Commission in order to toll the statute of limitations but refused to allow the decrees of the previous FTC proceedings to be admitted as evidence.

44. The 1964 Annual Report of the Federal Trade Commission, reprinted in part in 5 CCH TRADE REG. REP. ¶ 50106 (1965), proposed that § 5(a) be amended to include final orders of the FTC. Section 11 of the Clayton Act (38 Stat. 734 (1914), as amended, 15 U.S.C. § 21(a) (1964)) also permits the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Reserve Board to enforce §§ 2, 3, 7, and 8 of the Clayton Act where applicable to their particular area of interest. If FTC orders could be used as *prima facie* evidence, there is the possibility that the other agencies may be considered within the scope of § 5. It would be necessary, however, to examine the special circumstances involved in each agency's proceedings before thus expanding the applicability of § 5(a). Matteoni, *supra* note 35, at 169.

Whether it is accomplished by judicial interpretation or legislative amendment, there are strong arguments for including FTC orders within the scope of section 5(a). First, the FTC defendant is protected by his right to judicial review of the FTC order to determine whether the conclusions of the Commission are supported by substantial evidence.⁴⁵ Second, unappealed orders of the FTC have been accorded a res judicata effect between the defendant and other agencies of the federal government,⁴⁶ and section 5(a) requires only that the facts and judgments established at the government proceeding be such as would work estoppel between the government and the respondent at that proceeding before they may be used as prima facie evidence in the private action.⁴⁷ Finally, it is certainly unfair and, it has been suggested, possibly unconstitutional to apply section 5 to Justice Department prosecutions but not to FTC proceedings.⁴⁸ At present, the private plaintiff's rights, and the corresponding liability of the defendant, may turn on the governmental decision as to which agency brings the action. Such inequality of treatment, which may amount to a denial of due process, could be corrected by including FTC orders within the language of both subsections of section 5.

Successful prosecution of a private antitrust suit frequently depends upon the availability of a government judgment, heretofore only those judgments obtained by the Justice Department.⁴⁹ If FTC orders are held admissible as prima facie evidence, it is probable that an increase in private actions will result.⁵⁰ The desirability of such an increase in private enforcement should be apparent. Private ac-

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

46. *United States v. Willard Tablet Co.*, 141 F.2d 141, 143 (7th Cir. 1944).

47. Clayton Act § 5(a), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964). See Note, 53 GEO. L.J. 481, 491 (1965).

48. Butler, *Application and Construction of Tolling of Statute of Limitations Provisions of Section 5, Clayton Act, in Cases of Dual Enforcement Jurisdiction*, 8 ABA SECTION OF ANTITRUST LAW 42, 47 (1956).

49. As of 1953, approximately 90% of private suits filed followed government action, and, although the percentage had declined somewhat by 1958, 76% to 78% of private antitrust actions could still be traced to successful government suits. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 7 (1959). Sometimes a particular government action will give rise to many private actions. As of June 30, 1962, there were 1,782 pending private antitrust actions in the electrical industry which were filed in the wake of the so-called Philadelphia electrical cases. Timberlake, *Federal Antitrust Treble Damage Actions*, 9 N.Y.L.F. 145 (1963).

50. It should be noted that the FTC is the primary enforcer of § 2 (38 Stat. 730 (1914), as amended, 15 U.S.C. § 13 (1964) (discriminatory practices)), and § 3 (38 Stat. 731 (1914), 15 U.S.C. § 14 (1964) (exclusive dealing)), of the Clayton Act. Hansen, *Functioning of the Antitrust Division—Its Relationship to the Federal Trade Commission and Current Policies of the Division*, 13 ABA SECTION OF ANTITRUST LAW 20, 22 (1958). Since violations of these sections cause more immediate injury to a greater number of private parties than do other violations, the range of antitrust exposure faced by FTC respondents would be likely to increase. *FTC Proceedings and Treble Damage Actions*, 5 CCH TRADE REG. REP. ¶ 50121 (1965).

tions compensate for the economic injury caused by antitrust violations, thereby heightening the financial impact, and consequently the deterrent value, of government civil and criminal actions.⁵¹ Furthermore, it has been suggested that the private action, rather than enforcement by a central government agency, is more in keeping with traditional opposition to authoritarian government.⁵² It would therefore seem desirable that a respondent in an FTC prosecution be subjected to the same conditions in a subsequent private damage action as a respondent in a Justice Department prosecution, if private suits are to become a more effective weapon of antitrust enforcement.

51. Bicks, *supra* note 49, at 8. If the private litigant's problems are made easier by increasing the scope of § 5 aid, an argument might be made in favor of giving the trial judge discretion to reduce the award from the automatic treble damages which were thought necessary to induce injured parties to assert their claims.

52. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168 (1958).