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Antitrust-Limitation of Actions-Clayton Act Statute of Limitations Tolled on Treble Damage Suits Against Non-Government Defendant Co-Conspirators-- *Michigan v. Morton Salt Co.*

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RECENT DEVELOPMENTS

ANTITRUST—LIMITATION OF ACTIONS—Clayton Act Statute of Limitations Tolled on Treble Damage Suits Against Non-Government Defendant Co-Conspirators—*Michigan v. Morton Salt Co.**

Plaintiffs,[1] several states and smaller governmental units, filed related antitrust treble damage claims[2] against ten rock salt companies that had allegedly conspired to fix prices.[3] These private actions were instituted subsequent to civil and criminal antitrust proceedings brought by the federal government in which four of the ten companies had been named as defendants[4] and five designated as co-conspirators but not prosecuted.[5] Section 5(b) of the Clayton Act

* 259 F. Supp. 35 (D. Minn. 1966), *aff'd sub nom.* Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir. 1967) [the district court litigation will hereinafter be cited as principal case.] The only issue decided on appeal was the application of the tolling provision to non-government defendants.

1. Plaintiffs in the consolidated actions included the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, and Wisconsin as well as various governmental units within these states.

2. These treble damage claims were brought under § 4 of the Clayton Act which provides:

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

38 Stat. 131 (1914), 15 U.S.C. § 15 (1964).

3. Defendants were American Salt Co. (American), Barton Salt Co. (Barton), Carey Salt Co. (Carey), Cargill, Inc. (Cargill), Cargo Carriers, Inc. (Cargo), Cutler-Magner Co. (Cutler-Magner), Diamond Crystal Salt Co. (Diamond), Hardy Salt Co. (Hardy), International Salt Co. (International), and Morton Salt Co. (Morton).

4. On June 28, 1961 an indictment was returned in the District of Minnesota against Morton, International, Diamond, and Carey alleging that they had conspired to fix the prices of rock salt in violation of § 1 of the Sherman Act. United States v. Morton Salt Co., Criminal No. 4-61, Cr. No. 65, D. Minn. On July 11, 1961 the government instituted a corresponding civil proceeding in which it sought injunctive relief against the same alleged violations by the same defendants. United States v. Morton Salt Co., Civil No. 4-61, Civ. No. 162, D. Minn. However, prior to trial of the criminal action, defendant Carey pleaded *nolo contendere*, and entered a consent decree in the civil action on March 26, 1962. The civil suit against the remaining three defendants was then suspended pending the outcome of the parallel criminal action.

On June 7, 1962 the defendants obtained a verdict in their favor. The civil trial then was reconvened, and on September 18, 1963 defendant International submitted a stipulation for a consent decree. This decree was signed and entered on November 4, 1963 and became operative on January 5, 1964. Pursuant to agreement, the civil case against Morton and Diamond was tried on the record established in the criminal action, supplemented by interrogatories and answers. An amended final judgment adverse to Morton and Diamond was entered on February 19, 1965, and this decision was subsequently affirmed by the United States Supreme Court on October 25, 1965. Morton Salt Co. v. United States, 382 U.S. 44 (1965).

5. Defendants mentioned as co-conspirators in the government litigation but not named as defendants were American, Barton, Hardy, Cutler-Magner, and Cargill.

provides that when such actions are brought by the government, "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 . . . ."[6] Plaintiffs filed their claims within one year of the termination of the last of the government suits but more than four years after the occurrence of the alleged violations. The six companies not prosecuted by the government claimed that the tolling provisions of section 5(b) applied only to former government defendants, and, consequently, that the private actions against them were barred by the Clayton Act's four-year statute of limitations.[7] The United States

Cargo was neither a named defendant nor a designated co-conspirator in the government litigation.

6. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964).

7. These defendants relied on numerous cases limiting the application of § 5(b) to government defendants. *E.g.*, cases cited in note 17 *infra*. The tolling provision of § 5(b) of the Clayton Act provides as follows:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 15(a) of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

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

The four companies that were former government defendants argued that the statute of limitations barred some of the plaintiffs' claims against them, notwithstanding the fact that the statute had been tolled as to these companies. Defendant Carey maintained that the government criminal and civil actions against it were terminated on March 26, 1962 when a plea of *nolo contendere* was entered in the criminal action and a consent decree entered in the civil action. It argued that therefore, since the earliest filing of a private damage claim against it occurred on December 30, 1964, this and all subsequent claims were barred both by the four-year statute of limitations provided by § 4B (the causes of action having arisen more than four years prior to the filing of the damage claims) and by the one-year statute of limitations applicable to damage claims based on violations prosecuted in earlier government litigation as provided for in § 5(b) (nearly two years having elapsed between the termination of government proceedings against defendant Carey and the filing of damage claims). Defendant International contended that, with respect to it, the government proceedings terminated with its consent decree in the civil suit, and, because only the action brought by the State of Illinois was commenced within the following twelve-month period, Illinois alone was accorded any benefit by § 5(b). Finally, defendants Diamond and Morton claimed that all actions filed after June 7, 1963 were barred by the one-year statute of limitations since § 5(b) provides for tolling during only *one* government proceeding. Thus they argued that after termination of the *criminal* proceeding on June 7, 1962 the statute of limitations commenced to run notwithstanding the fact that the civil suit did not terminate until October 25, 1965. Brief of Diamond Crystal Salt Co. and Morton Salt Co., pp. 5-6, principal case.

In response to these assertions, plaintiffs made three arguments: (1) that the government litigation had caused the tolling of the statute of limitations as to all of the private defendants, whether or not they had been parties to the government suit;

District Court for Minnesota held that the Clayton Act's statute of limitations can be tolled as to parties not prosecuted by the government, and that such tolling commences when the government institutes a related criminal or civil proceeding for violation of the antitrust laws against any alleged co-conspirator and terminates when the related government litigation is concluded. Thus, the court held that none of the plaintiffs' actions was time-barred.[8]

In so holding, the court in the principal case failed to distinguish between two related, but nonetheless distinct, criteria which determine the application of section 5(b): "identity of matters" and "party scope." "Identity of matters" refers to the degree of similarity that is required between a private plaintiff's treble damage claim and prior government litigation before the plaintiff can properly claim that the government action tolled the statute of limitations. Section 5(b) requires that the private right of action must be based "in whole or in part on any matter complained of" in the government proceeding.[9] "Party scope" is concerned with the identification of those parties against whom the statute has been tolled. The court in the principal case reasoned that since no language in section 5(b) specifically relates to "party scope," the statute of limitations may be tolled with regard to every private right of action that satisfies the "identity of matters" requirement. Thus, the court in effect rendered nugatory the question of "party scope." This interpretation of section 5(b) is, however, unwarranted.

The court in interpreting the "party scope" limitation based its decision in part on language in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*,[10] and *Leh v. General Petroleum Corp.*[11] In *Minnesota Mining* a private plaintiff instituted antitrust actions against both Minnesota Mining and Essex, although Essex had not been a defendant in the prior government litigation.

(2) that such tolling began with the commencement of the first grand jury proceeding against any of the alleged conspirators, and terminated upon the conclusion of the last of the government suits maintained against those conspirators; and (3) that plaintiffs were not precluded by the statute of limitations from proceeding against any conspiring party, since their claims were all filed within one year of the termination of a related government suit against one of the present defendants. In short, plaintiffs maintained that they had complied with the statute of limitations. Brief for the State of Michigan, p. 5, principal case.

8. On the facts before it, the court found that the running of the statute of limitations was suspended on June 28, 1961 when the first indictment based on the alleged conspiracy was filed, and began running again on October 25, 1965 with the Supreme Court's affirmation of the civil judgments entered against the last of the prosecuted conspirators.

9. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964), quoted in note 7 *supra*.

10. 381 U.S. 311 (1965).

11. 382 U.S. 54 (1965). The opinion in the principal case cites the following language from the *Leh* decision: "[T]he 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." *Id.* at 59.

The Supreme Court held that inclusion of Essex as a private defendant had not impaired the necessary "identity of matters." Similarly, in *Leh* the Supreme Court held that there was sufficient identity between the government litigation and a later treble damage claim to toll the statute of limitations, even though the private action was brought against only six of the eight government defendants. The Court reasoned that, even in the absence of the remaining government defendants, there was still a *substantial relation* between the substantive bases of the actions; furthermore, the policy of encouraging antitrust enforcement by private plaintiffs was felt to outweigh the need for complete party identity.[12] In both *Minnesota Mining* and *Leh*, however, the party objecting to the tolling was a former government defendant;[13] thus, it must be recognized that these decisions merely held that a private plaintiff could sue parties not prosecuted by the government together with former government defendants, and still satisfy the "identity" requirement of section 5(b). In neither case was tolling as to the non-government defendants ("party scope") an issue before the Supreme Court.[14] Furthermore,

12. Leh v. General Petroleum Corp., 382 U.S. 54, 63-64 (1965). The courts initially construed the "identity of matters" clause as requiring that the private plaintiff allege not only the same antitrust violation which the government had prosecuted, but also that the same means were used to reach the same objectives by the same defendants as were the subject matter of the government action. Steiner v. Twentieth Century Fox Film Corp., 232 F.2d 190, 196 (9th Cir. 1956). This construction was based on the premise that since §§ 5(a) & (b) are complementary, they must be read together. Having made this assumption, the courts concluded that since § 5(a) limits the use of government-secured judgments in order to insure that the party against whom the decree is used has had an opportunity to litigate fully those issues of which the decision is dispositive, § 5(b) is impliedly restricted by the principles of collateral estoppel.

The Ninth Circuit later clarified the *Steiner* standard as requiring only that, with respect to § 5(b), the private action be based *in part* on a matter complained of in the government prosecution, and not that all matters complained of necessarily find a counterpart in the government action. Twentieth Centry Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964). Shortly thereafter, the Tenth Circuit adopted a similar test. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1963). Although the Tenth Circuit required only a substantial identity between the private and government suits, it expressly rejected the Ninth Circuit's conclusion that the complementary nature of §§ 5(a) & (b) necessitates the incorporation of a collateral estoppel limitation into the latter. The Supreme Court settled this "incorporation" dispute by ruling that the restrictions of collateral estoppel are not implicit in the language of § 5(b), and, consequently, that its scope is not restricted by such considerations. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

13. In *Minnesota Mining* the Supreme Court was presented with only that part of the district court's ruling which involved Minnesota Mining since the lower court's decision that the statute of limitations had not been tolled as to Essex was not appealed. In *Leh* the case against the non-government defendant (Olympic Oil Co.) was dismissed prior to the ruling on defendants' statute of limitations defense. Leh v. General Petroleum Corp., 382 U.S. 54, 61 n.4 (1965).

14. Admittedly, some language in these recent Supreme Court opinions, taken out of context, appears to support the conclusion reached in the principal case. In *Leh* the Court said:

> 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

the district court in *Minnesota Mining* had sustained the non-government defendant's claim that it was not subject to tolling under section 5(b),[15] and, although this issue was not appealed, the Third Circuit indicated support for this decision in dictum.[16]

The court in the principal case did not view its opinion as an independent rejection of the many prior contrary decisions which refused to toll the statute of limitations as to non-government defendants;[17] rather, it saw itself as following the precedent laid down in *Minnesota Mining* and *Leh* which the court thought overruled the rationale of the earlier cases.[18] It assumed that the contrary decisions were based on the incorporation into section 5(b) of the principles of collateral estoppel expressed in section 5(a).[19] Thus, the court interpreted the Supreme Court's rejection, in *Minnesota Mining* and in *Leh*, of this "incorporation doctrine"[20] as overruling the earlier contrary cases *sub silentio*. However, the court's interpretation of the earlier cases appears to be mistaken. These cases did not rely on the incorporation doctrine; instead, several of these decisions, without making any reference to the principles of collateral estoppel, either regarded the limitation of the application of the tolling provisions to former government defendants as self-evident or rejected the argument in favor of extending section 5(b) to non-government defendants as "a surprising theory of con-

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claimant's suit is based on matters of which the Government complained. . . . [S]ome 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.

The court in the principal case read this language in light of the Supreme Court's general mandate to maximize the benefits accruing to private claimants from government litigation. However, again it must be emphasized that the Court wrote the quoted passage in response to a claim by a former government defendant that tolling was not warranted as to it because the "identity of matters" requirement of § 5(b) was not satisfied. Read in this light, the language only implies that the presence of a non-government defendant in a later private damage claim does not, in and of itself, impair the requisite "identity of matters." It in no way supports a conclusion that tolling against non-government defendants is proper.

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

16. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 360 n.15 (3d Cir. 1964) (dictum).

17. See, *e.g.*, Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284 (7th Cir. 1954); Momand v. Universal Film Exch., Inc., 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); Charles Rubenstein Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959) (wholly owned subsidiary of a government defendant); Court Degraw Theatre, Inc. v. Loew's, Inc., 172 F. Supp. 198 (E.D.N.Y. 1959) (unimplicated subsidiary of a defendant parent corporation); Electric Theatre Co. v. Twentieth Century Fox Film Corp., 113 F. Supp. 937 (W.D. Mo. 1953) (party to a nationwide conspiracy not included as a defendant in the prosecution of that conspiracy).

18. See text accompanying notes 10-14 *supra*.

19. Principal case at 53-54.

20. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 316-21 (1965); Leh v. General Petroleum Corp., 382 U.S. 54, 58-59 (1965).

struction."[21] Those opinions which did rely to some degree on the theory of incorporation also suggested that their decisions could have rested independently on the alternative grounds of logic or public policy.[22]

On the other hand, some support can be found, both in a literal reading of section 5(b) and in an examination of its underlying policy considerations, for a broader interpretation of the section than that which is found in the earlier cases or which can be inferred from congressional inaction in the face of those decisions. First, section 5(b) contains no specific language which would indicate a "party scope" limitation; in fact, if read literally, the statute is to be tolled as to *every* private right of action that is based in whole or in part on a related government proceeding.[23] Second, since private damage claims constitute an important branch of antitrust enforcement,[24] Congress has eased the evidentiary burden on private plaintiffs by providing them with access to the fruits of prior government investigation and litigation. Specifically, the private plaintiff

21. Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216, 218 (D. Minn. 1957), *aff'd*, 289 F.2d 418 (8th Cir. 1961); see Momand v. Universal Film Exch., Inc., 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); Court Degraw Theatre, Inc. v. Loew's, Inc., 172 F. Supp. 198 (E.D.N.Y. 1959).

22. *E.g.*, Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284 (7th Cir. 1954).

23. Although an interpretation of this kind is logical, congressional inaction militates against such a literal reading and, in fact, argues for a "party scope" limitation which is satisfied only when tolling is restricted to former government defendants. Because Congress has been silent as to the intended "party scope" of § 5(b), it has devolved upon the judiciary to determine how this section should be applied. Concluding that neither logic nor public policy considerations would permit tolling of the statute of limitations on claims against *all* private defendants without regard to whether they had been defendants in the prior government litigation, the courts restricted the application of § 5(b) to former government defendants. See, *e.g.*, Momand v. Universal Film Exch., Inc., 172 F.2d 37, 48 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949). Prior to 1955 when Congress amended § 5(b), *all* courts faced with the "party scope" question had interpreted the provision in this manner. And although the 1955 amendments revised certain sections of the Clayton Act in response to judicial interpretations—§ 4A of the amended act authorizes damage suits instituted by the United States contrary to the opinion expressed in United States v. Cooper, 312 U.S. 600 (1941)—Congress did not alter § 5(b). A compelling inference to be drawn from this silence is that Congress concurred with the settled judicial construction which limits application of the tolling provision to former government defendants. And indeed, all decisions subsequent to the 1955 revision, with the exception of the principal case, have adhered to the "government defendant limitation." See, *e.g.*, Court Degraw Theatre, Inc. v. Loew's, Inc., 172 F. Supp. 198 (E.D.N.Y. 1959).

24. See Clayton Act § 4, 38 Stat. 131 (1914), 15 U.S.C. § 15 (1964), quoted in note 2 *supra*. The "entire provision [was] intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H.R. REP. No. 627, 63d Cong., 2d Sess. 14 (1914). In fixing the amount of redress at three times the value of the actual injury sustained, Congress intended not only to create a convincing deterrent to potential antitrust violators, but also to provide an incentive for private prosecution, thereby enlisting an auxiliary force of investigators to supplement the Justice Department's enforcement of the antitrust laws. Quemos Theatre Co. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949 (D.N.J. 1940).

receives the following benefits: prima facie effect is given to final judgments entered against government defendants;[25] rulings on

25. The principles of collateral estoppel limit such effect to those government defendants against whom the judgments were entered. Section 5(a), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964) provides:

> 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 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.

In the principal case, however, the court held that a government judgment and the findings upon which it is based may be considered in determining the prima facie effect which is to be given a consent decree previously entered in the litigation by an alleged co-conspirator and government defendant. Principal case at 61 (supplemental decision). International, Morton and Diamond were named as government defendants, and although International entered into a consent decree prior to judgment against Morton and Diamond, the court reasoned that the consent decree was nonetheless entitled to prima facie effect against International because the actual *taking* of testimony used in the proceeding occurred *before* the consent decree was entered. More specifically, the civil proceeding from which the consent decree and judgment resulted relied primarily on a record established in a prior criminal prosecution of the same three defendants which terminated with a verdict in their favor. Therefore, while the civil consent decree arguably was entered prior to the submission of testimony (though the decree and Morton and Diamond's stipulation as to use of the criminal record were filed on the same date), the decree was entered *after* the *taking* of the testimony in the criminal case upon which the civil *judgment* was subsequently based.

In defense, International contended unsuccessfully that *as to it* neither the consent decree nor the judgment used to interpret the prima facie effect to be given the decree satisfied the conditions requisite to prima facie effect as provided for in § 5(a): that neither the decree nor the judgment constituted a finding of an antitrust violation, and that as to the allegations of the complaint, International had not had its day in court.

In response to the latter contention, the court stated that since the indictment and the complaint were virtually identical, International had received the opportunity to litigate required by due process in the application of the principles of collateral estoppel. As to the former ground of objection, it emphasized that, although International was neither a party to nor specifically mentioned in the judgment, the findings of fact upon which the judgment was based did make reference to "an illegal conspiracy between Morton and Diamond, and other conspirators." The court then considered these findings in connection with the contents of the criminal record, the complaint and the civil consent decree, and drew the inference that "others" included International. In the court's opinion this inference was sufficient to justify giving the consent decree prima facie effect with respect to International's participation in the conspiracy found illegal in the judgment against Morton and Diamond. Finally, the court argued that the purpose of exempting consent decrees entered before the taking of testimony—to save government the time and expense of a protracted trial—would not be satisfied by exempting the consent decree in the instant case since the government had already had to prove its allegations in the *criminal* prosecution. It therefore concluded that such an exemption would be contrary to congressional policy.

The conclusion of prima facie effect as to International is subject to question for several reasons. In the first place, the testimony which the court treated as taken before the entry of the civil consent decree was not taken in that proceeding, but rather in the prior criminal prosecution which resulted in a verdict in favor of the defendants. Of course, heretofore it has always been assumed that the testimony must not only have been taken prior to the consent decree, but also in the *same* proceeding in which the decree or judgment occurs. Secondly, the court's decision fails to take account of

controlling points of law made during the government proceedings are available to him as authority; and he has access to the pleadings, transcripts, and exhibits of the government litigation as sources of evidence.[26] In fact, as enunciated in *Minnesota Mining* and *Leh*,[27] the policy underlying section 5(b) is to enable private litigants to take advantage of any and all benefits that they might derive from the government litigation. It is arguable that if the tolling provision is not applicable in private suits against non-government defendants, private plaintiffs in many instances would not be able to take advantage of the information garnered in related government proceedings, since the time span between the alleged antitrust violation and the termination of the subsequent government investigation and litigation is often longer than the four-year statute of limitations.[28] It was basically for this reason that the court in the principal case considered it necessary to apply the tolling provision to non-government defendants.[29]

Clearly, the court's holding will result in the increased use by private plaintiffs of materials derived from prior government proceedings. Upon closer examination, however, it seems that the ap-

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the fact that International agreed to the consent decree on the assumption that it was being entered before the taking of testimony and that therefore neither the decree nor any subsequent judgment would have prima facie effect as to it in a later treble damage action. Thirdly, International did not stipulate as to use of the criminal record in the civil proceeding; thus it is doubtful if, *as to it*, there was ever *any* testimony submitted or taken in the *civil* proceeding. And lastly, the court was unwarranted in assuming that the government did not save time and expense as a result of International's civil consent decree. On the contrary, had International remained in the proceeding it is possible that it would have forced the government to a full proof of all of its allegations.

On this general issue *compare* Homewood Theatre, Inc. v. Loew's, Inc., 110 F. Supp. 398 (D. Minn. 1952), *appeal dismissed*, 207 F.2d 263 (8th Cir. 1953) (consent decrees entered before the taking of testimony *on remand* are prima facie evidence as to the consenting party since a remand is in effect but a continuation of the first trial), *with* Barnsdall Ref. Corp. v. Birnamwood Oil Co., 32 F. Supp. 308 (E.D. Wis. 1940) (a plea of *nolo contendere* entered in a *new trial* before the taking of testimony is exempt from the provisions of § 5(a) since a new trial proceeds as if none had ever gone before).

26. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965). In addition to the increase in evidentiary benefits, private litigants will benefit from their ability to consolidate their damage claims and thus avoid the expenses involved in multiple litigation. It should be noted, however, that in any event the Federal Rules of Civil procedure would permit a plaintiff to move for a continuation and a consolidated trial once he has instituted a lawsuit against each defendant. FED. R. CIV. P. 18(a).

27. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317 (1965); Leh v. General Petroleum, 382 U.S. 54, 58-59 (1965).

28. In fact, "there are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws." H.R. REP. No. 422, 84th Cong., 1st Sess. 8 (1955); S. REP. No. 619, 84th Cong., 1st Sess. 5 (1955).

29. Principal case at 56. For a decision in which a court expressly adopted the contrary position, see Sun Theatre Corp. v. RKO Pictures, Inc., 213 F.2d 284 (7th Cir. 1954).

parent benefits to private plaintiffs resulting from the decision are to some degree illusory.[30] Damage awards in private antitrust suits dealing with conspiratorial violations are jointly and severally recoverable.[31] Moreover, the acts of a non-government defendant conspirator may be charged against a government defendant co-conspirator without joining the former in the private suit against the latter.[32] As a result, private plaintiffs need not sue each and every conspirator in order to get a full recovery. In fact, plaintiffs usually seek recovery only from the most financially responsible members of the conspiracy, who tend to be the principal conspirators. Since the government also usually focuses on the most active violators, private treble damage actions are in many instances brought against former government defendants. Thus, the holding in the principal case will be of practical value to private plaintiffs only in cases in which the government defendants are not financially responsible or in which the private plaintiff cannot bring suit against the government defendants because of his inability to establish the requisite conspiratorial relationship between them and the non-government defendants that caused his injury.[33]

Moreover, whatever advantages actually accrue to private plaintiffs are at the cost of a conflict with the purposes of the statute of limitations, which seeks to provide a definite and reasonable time span for the litigation of claims in order to reduce the element of surprise, to insure a good state of evidence, and to discourage delay in the filing of actions.[34] The principal decision, by broadening the coverage of the Clayton Act's tolling provision,[35] will, of course,

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30. On the other hand, the advantage heretofore enjoyed by *non-government defendants* as a result of the "party scope" restriction would appear to be both actual and substantial. In the first place, their potential liability to injured parties is limited to the normally shorter and certainly more definite four-year statute of limitations. Secondly, the running of the statute confers a total immunity since no right of contribution appears to exist between them and any co-conspirator government defendants subsequently found liable for treble damages to a private plaintiff. See generally 18 AM. JUR. 2d *Contribution* § 33 (1965). Were such a right to exist, the benefit gained from immunity to tolling might be offset by liability for contribution.

31. Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284, 293 (7th Cir. 1954); City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).

32. Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943); Klein v. American Luggage Works, Inc., 206 F. Supp. 924 (D. Del. 1962); Riss & Co. v. Association of Am. R.Rs., 187 F. Supp. 306 (D.D.C. 1960).

33. This possibility was recognized by the Eighth Circuit in its affirmance of the principal decision. Hardy Salt Co. v. Illinois, 377 F.2d 768, 774-75 (8th Cir. 1967).

34. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944); S. REP. No. 619, 84th Cong., 1st Sess. 5 (1955).

35. Dictum in the principal opinion suggests that the statute of limitations may be tolled against "a private defendant notwithstanding the fact that he was neither a party to nor a named conspirator in the Government action." Principal case at 54. The

result in increased litigation of stale and tenuous claims, and consequently in increased reliance on time-tainted evidence at trial. Another undesirable consequence of the court's decision is its inhibiting effect on sound business planning. When a company becomes aware of a government prosecution involving its business associates, it is faced with a great uncertainty because of its own potential involvement in subsequent private litigation. Since the principal case extends this uncertainty over an indefinite period of time, the company might find its business position extremely difficult to evaluate, and thus might well be inhibited in making financial plans. Even a company that has actually been involved in a conspiracy in violation of the antitrust laws has a right to be free of stale claims and possible liability after a reasonable period.[36]

Once the court in the principal case decided that the "party scope" requirement was properly satisfied, it was still faced with the problem of determining when tolling commenced and when it ceased.[37] Plaintiffs' contention that the initiation of a grand jury proceeding starts the tolling[38] was rejected on the language of section 5(b) which requires that the government proceedings be for the purpose of *preventing, restraining* or *punishing* violations.[39] Although hearings before grand juries are preliminary criminal proceedings which, in the case of federal crimes, are instituted by the United States, their investigatorial and inquisitorial functions place them outside the statutory definition. Moreover, apart from this statutory argument, the congressional policy of aiding private plaintiffs by making the products of government proceedings available to them would not be furthered by the ruling for which plaintiffs contended. Grand juries decline to return an indictment in a

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Eighth Circuit found it unnecessary to rule on this issue. Hardy Salt Co. v. Illinois, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,104, at 83,965 (8th Cir. May 22, 1967).

36. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

37. The determination of this time span is important for two reasons. In the first place, all claims originating more than four years prior to commencement of the tolling are barred by the statute, but those arising within four years thereof are sustained by the tolling until one year after termination of government proceedings. Secondly, the date upon which the tolling terminates fixes the point from which the additional one-year period begins to run. See § 5(b), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964), quoted in note 7 *supra*.

38. Brief for the State of Michigan, p. 18, principal case. Plaintiff argued that a grand jury proceeding is a "judicial proceeding" within the meaning of § 5(b) on the grounds that grand jury proceedings are an integral phase of criminal prosecution, that these proceedings are analogous in nature to FTC hearings which have been held to toll the statute, and that for other purposes grand jury proceedings have been classified as "judicial proceedings." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co. 381 U.S. 311 (1965).

39. Section 5(b), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(b) (1964), quoted in note 7 *supra*. See also Emich Motors Corp. v. General Motors Corp., 229 F.2d 714, 718-19 (7th Cir. 1956).

high percentage of cases,[40] and even when one is returned, the secrecy required often blocks the flow of beneficial information to the plaintiff. It would appear, therefore, that the court in the principal case was correct in concluding on the facts before it that the first government proceeding falling within the ambit of section 5(b) was the filing of a criminal indictment.[41]

The court, having decided the commencement question, then moved to the issue of when the tolling of the statute of limitations should cease. Rejecting the argument that the tolling terminated on a defendant-by-defendant basis as the government litigation against each of them was concluded with the entry of consent decrees,[42] it held that tolling continued as to all parties until the government litigation against the last remaining government defendant had ceased.[43] In so doing, the court relied on substantially the same rationale that it had rested on in deciding the issue of tolling as to non-government defendants.[44] It reasoned that since the government litigation might result in evidence and rulings of law applicable to defendants who had previously been released through consent decrees, the private plaintiffs would lose some of the benefit of such evidence and rulings if the running of the statute of limitations were to resume as to these defendants upon their withdrawal from the government litigation.[45]

In reaching this conclusion, the court correctly dismissed the legislative history of section 5(b) as inconclusive and subsequent judicial interpretation of the section as obsolete.[46] The cases construing section 5(b) prior to congressional amendment of the Clayton Act in 1955 regarded the tolling as terminating on a defendant-by-defendant basis,[47] and Congress made no changes in the

40. The first two grand juries in the principal government litigation adjourned without returning an indictment.

41. The criminal indictment was returned on June 28, 1961.

42. Carey and International maintained that the government actions against them terminated upon the entry of their respective consent decrees. In support of their contention, they cited the following cases which hold that a government action terminates at different times for different defendants: Grengs v. Twentieth Century Fox Film Corp., 232 F.2d 325 (7th Cir.), *cert. denied*, 352 U.S. 871 (1956); Sun Theatre Corp. v. RKO Radio Pictures, 213 F.2d 284 (7th Cir. 1954) (expressly rejecting the conclusion that the pendency of the government proceeding continues against all the defendants as long as it endures against any); Tague v. Balaban, 146 F. Supp. 356 (N.D. Ill. 1956); Manny v. Warner Bros. Pictures, 116 F. Supp. 807 (S.D. Cal. 1953); Electric Theatre Corp. v. Twentieth Century Fox Film Corp., 113 F. Supp. 937 (W.D. Mo. 1953).

43. Principal case at 50.

44. See text accompanying notes 23-29 *supra*.

45. The principal case would be an instance in point if one accepts the rationale of the supplemental opinion. See note 25 *supra*. See also Leh v. General Petroleum, 382 U.S. 54, 58-59 (1965); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-320 (1965).

46. Principal case at 47-49.

47. See cases cited note 42 *supra*. These decisions hold that since the purpose of § 5(b) is to assure the availability of the evidentiary benefits conferred by § 5(a), once

act to alter this interpretation. As suggested in connection with the "party scope" question, congressional acquiesence could reasonably be inferred from this inaction.[48] However, doubt may be cast upon the significance of this legislative history. Among the several proposed amendments submitted by the Attorney General's National Committee To Study the Antitrust Laws was a recommendation to Congress that the tolling of the statute of limitations under section 5(b) terminate with respect to a particular defendant upon a plea of *nolo contendere* or the entry of a consent decree by him.[49] Congress declined to act on this recommendation although it did enact several of the accompanying proposals. Thus, given the policy considerations which support its decision, the court was on reasonably firm footing on the termination question.

However, there is a countervailing policy consideration: the court's decision may result in a weakening of the incentive for a government antitrust defendant to enter into a consent decree. The consent decree is a valuable procedural device.[50] The parties, as well as the public, benefit from the time and expense saved by avoiding a prolonged trial. The ability to avoid a long tolling of the statute of limitations is an added incentive for a government defendant to enter such a decree. This added incentive will not be present, however, if, when a defendant enters a consent decree, the statute continues to toll against him until the conclusion of the government's actions against his co-conspirators. On the other hand, since the remaining financial inducements to enter into such decrees are considerable, any overall decline in incentive might merely be marginal.

The principal case represents a substantial deviation from prior judicial construction of the tolling provision. Although the court appears to have decided correctly the issues of commencement and

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a judgment or decree is available against a particular defendant as prima facie evidence the rationale for considering a government prosecution *as pending against that defendant* ceases to exist. The crux of the cases is their assumption that protection of § 5(a) is the *exclusive* purpose of the tolling provision. If, however, the purpose of § 5(b) is really more comprehensive—and *Leh* and *Minnesota Mining* appear to stand for this proposition—this aspect of the rationale of these decisions would appear to be destroyed.

The force of the authority cited by defendants is weakened further by the fact that the cases are all district or circuit court decisions arising out of the same government prosecution and are interdependent in their holdings. Thus the precedent is not as comprehensive and persuasive as the number of cases would seem to indicate. See Reply Memorandum of Illinois and Indiana Plaintiffs, pp. 3-4, principal case.

48. See note 23 *supra.*

49. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, Recommendation 2C (1955).

50. Congress took cognizance of this fact when it exempted consent decrees entered before the taking of testimony from the prima facie effect given to judgments under § 5(a). See § 5(a), 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964), quoted in note 25 *supra.*

termination, on the basic question of "party scope" it failed to recognize considerations which might well have required it to reach the opposite result. It is to be hoped that this will not be the final word; future courts faced with the same problem should weigh more carefully the practical consequences of the alternative decisions before deciding where to strike the balance.