THE SUPREME COURT AND THE PRIVATE ANTITRUST PLAINTIFF

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Thirty years ago Fred Rodell said it so well: "For when the Supreme Court sets out to tell Congress and the world what an act of Congress really means, only the sky and such abstract principles as can be drawn from the sky are the limit."[1] Rodell was complaining at that time about the Court's hindering congressional efforts at effective taxation. Rodell and his fellow legal realists have now had their way on results in most areas of law, and there is not much left for them to complain about so far as the Supreme Court is concerned. And Rodell's "outrageous" statement in 1939 is now accepted as obvious and unworthy of any particular notice.

In 1914, the Congress of the United States declared as a rule for citizens to live by that the statute of limitations as to any private rights created by the antitrust laws should be suspended whenever "any civil or criminal proceeding is instituted by the United States"[2] to enjoin or punish violations closely related to those complained of by a private plaintiff. At the same time that this statute was passed, Congress created a new federal agency, the Federal Trade Commis-

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1 Rodell, Woe Unto You, Lawyers! 51 (2d ed. 1957).

2 Clayton Act § 5, 69 Stat. 283 (1955), 15 U.S.C. § 16 (1964), amending 38 Stat. 731 (1914).

> (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 section 4A, 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.
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> (b) Whenever *any civil or criminal proceeding* is *instituted by the United States* to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, 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 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. (Emphasis supplied.)

sion,[3] with antitrust responsibility parallel to that of the courts, and handed to it great hopes for more flexible and more effective methods of procedure than were possible in traditional courts of law. The idea was that a bipartisan agency created by the Congress, independent to some extent of the executive branch, would carry on for the Congress a continuing surveillance of competitive methods in American business and would, where necessary, declare unlawful for the future, methods which the Commission concluded were unfair. The Commission's method of procedure, specifically described in the statute,[4] was intended to be something quite different from civil or criminal proceedings instituted by the United States in the federal district courts.

In 1950 Congress strengthened the law against corporate acquisitions which could adversely affect competition,[5] and, toward the end of the Fifties, the Federal Trade Commission and the Department of Justice began to engage in some vigorous competition of their own in the enforcement of the antimerger provision. Where the proceedings were handled by the Department of Justice, potential private plaintiffs could anticipate two benefits from the proceedings. First, the filing of the proceeding by the United States tolled the statute of limitations. Second, a government victory could serve as prima facie evidence against the defendant in subsequent treble-damage cases on any matters as to which the Government's judgment would settle the issue between the Government and the defendant.

The value to the private plaintiff of Federal Trade Commission proceedings was not so clear. Highland Supply Corporation followed up a Federal Trade Commission antimerger proceeding against Reynolds Metals with a private action for damages. The District Court for the Eastern District of Missouri found that the two overt acts by Reynolds Metals which could give rise to a private claim for damages by Highland occurred more than four years before Highland filed its complaint. The district court concluded that the action was barred by the statute of limitations.[6] On appeal to the Court of Appeals for the Eighth Circuit, Highland pointed to the FTC proceeding against Reynolds and argued that the FTC proceeding tolled the statute of limitations. The court of appeals could find "no ambiguity" in the terms "civil or criminal proceeding" and concluded that an FTC proceeding, as something entirely different, was not such a proceeding.[7]

The *Highland* case never reached the Supreme Court, but the *New*

[3] Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1964).

[4] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

[5] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).

[6] Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963).

[7] Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 730 (8th Cir. 1964).

Jersey Wood Finishing case did.[8] A 1960 FTC complaint, also under Section 7 of the Clayton Act,[9] alleged that a leading manufacturer of electrical insulation tape, Minnesota Mining and Manufacturing Company (3M), had unlawfully acquired numerous electrical products manufacturers and distributors. The Commission proceeding was settled by a consent order of divestiture in 1961.[10] Within a year thereafter, New Jersey Wood Finishing Company, a competing electrical insulation tape manufacturer which had previously distributed its products through one of the acquired distributors, sued 3M for treble damages, charging that the acquisition violated section 7 and was part of a conspiracy to restrain trade and commerce in electrical insulation products. The acquisition had taken place more than four years before the private complaint was filed, but less than four years before the Commission proceeding had been instituted. The parties assumed that the suit was barred unless the FTC complaint tolled the statute of limitations.

The district court denied a motion to dismiss, holding that the statute had been tolled.[11] On interlocutory appeal, the court of appeals affirmed.[12] When the case was brought up on certiorari, the Supreme Court agreed with the lower courts,[13] holding (1) that the statute of limitations question is separate and distinct from the question of whether an FTC order could be introduced in treble-damage suits as prima facie evidence, (2) that FTC proceedings under the Clayton Act toll the statute of limitations on private suits just as Justice Department prosecutions do, and (3) that the statute is tolled by such Clayton Act proceedings, even with respect to private claims under the Sherman Act, when the challenged conduct in the private suit is the same as in the Commission's Clayton Act proceeding.

The Supreme Court thereby decided that the mere fact that Congress chose the words that it did in 1914 should not stand in the way of what the Court calls "the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions."[14] The Court, in an opinion written by a former Assistant Attorney General in charge of the Antitrust Division, found it necessary to equate Federal Trade Commission proceedings with "government

[8] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

[9] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).

[10] Minnesota Mining & Mfg. Co., 59 F.T.C. 321 (1961).

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

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

[13] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra note 8.

[14] Id. at 320.

actions" in order to avoid denying to private parties "the benefits flowing from a major segment of the Government's enforcement effort."[15]

The case illustrates nicely the high regard which the Court holds for private antitrust plaintiffs and the low regard which it holds for the English language. The case is also worthy of notice for the emphatic dissenting opinion in which Mr. Justice Black, who has probably done as much as any man alive to destroy the plain meaning of words in his interpretations of the Bill of Rights,[16] documents at great length what Senators and Congressmen in 1914 meant when they used the words "civil or criminal proceeding."[17] It may be that this dissent is responsible for two concessions in the Court's opinion. As the Court put it, "It is true that the precise language of § 5(b) does not clearly encompass Commission proceedings."[18] But the Court will go no further than admitting that "there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision."[19] The Court uses this as the starting point from which to state further that "neither is there any substantial evidence that it consciously intended to exclude them," and from there, the Court has placed itself in a position to carry out the will of the Congress by refusing to deny to private parties "the benefits flowing from a major segment of the Government's enforcement effort."[20]

Thus, on the surface, it appears that the legal realists have clearly triumphed at the expense of Minnesota Mining & Manufacturing Company and possibly to the benefit of New Jersey Wood Finishing Company. The old-fashioned notion that ours is a government of laws

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[15] Ibid. It may be that Mr. Justice Clark, who wrote the opinion, and others on the Court felt that by equating FTC proceedings with Department of Justice activities in the courts they were lending greater dignity to the FTC or that by distinguishing between the two types of proceedings that they would be denigrating those of the FTC. I happen to think that the equation is denigrating to the FTC and that the Commission's reason for existence and great potential usefulness depend on preserving the distinction which the *3M* case obscures. I have tried to say why in Antitrust Enforcement: Duopoly or Monopoly, 1962 Wis. L. Rev. 437, and The Federal Trade Commission's Potential for Making Purposeful Antitrust Policy, 24 Fed. B.J. 541 (1964).

[16] For example, a local school board in New York provided that those pupils who wished to do so might join in a brief prayer at the beginning of each school day, acknowledging their dependence upon God and asking His blessing upon them and upon their parents, their teachers, and their country. The Supreme Court, in an opinion by Mr. Justice Black, found this practice prohibited by the first amendment's "Congress shall make no law respecting an establishment of religion." Engel v. Vitale, 370 U.S. 421, 424 (1962).

[17] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra note 8, at 324.

[18] Id. at 321.

[19] Id. at 320.

[20] Ibid.

and not of men—laws at which any literate person can look, understand, and thereby possibly guide his action—is looking more and more old-fashioned. Surely, any literate person with the slightest knowledge of the distinction between government antitrust actions in United States district courts and Federal Trade Commission proceedings in hearing rooms at the old Evening Star Building would have thought that any "civil or criminal proceeding instituted by the United States" could not possibly be referring to the latter. But armed with a higher purpose, the Supreme Court of the United States has read it to do so.

Rather than deciding the question now and thereby depriving the business community, its lawyers and the lower courts of the benefits of further litigation on the subject, the Supreme Court explicitly declined[21] to state its view on how it would interpret the use of the companion subsection as prima facie evidence of "a final judgment or decree . . . in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws." One might feel that if the Court failed to choke on the words "civil or criminal proceeding," it need expect no more difficulty with the words "final judgment or decree."[22]

The *3M* decision raises or leaves unanswered several questions.

I. Is the statute of limitations tolled by an FTC complaint under Section 5 of the Federal Trade Commission Act when the complaint alleges in substance a Sherman or Clayton Act violation?

II. Can a Commission order be relied upon by a treble-damage plaintiff as prima facie evidence?

III. Can a court of appeals order affirming and enforcing a Commission order be relied upon by a treble-damage plaintiff as prima facie evidence?

I. The Tolling Effect of Proceedings Under the Federal Trade Commission Act

The *3M* decision apparently applies to FTC proceedings under the four substantive sections of the Clayton Act—section 2 on price discrimination, section 3 on tying and exclusive arrangements, section 7 on mergers, and section 8 on interlocking directorates.[23] The Commission may, however, proceed as well against other types of antitrust violations as unfair methods of competition, prohibited by Section 5 of the Federal Trade Commission Act.[24] The considerations relied

[21] Id. at 318.

[22] But see Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510 (E.D. Mo. 1965).

[23] 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 13, 14, 18, 19 (1964).

[24] FTC v. Cement Institute, 333 U.S. 683 (1948).

upon by the Supreme Court in *3M* are equally applicable to such proceedings—the importance of private antitrust litigation as an enforcement weapon, the variety of ways in which prior prosecution of a government suit will assist a treble-damage plaintiff charging the same violations, and the illogic of making the enjoyment of these benefits turn on "the arbitrary allocation of enforcement responsibility between the [Justice] Department and the Commission."[25]

The tolling provision of the Clayton Act applies to proceedings "to prevent, restrain or punish violations of any of the antitrust laws."[26] Although Section 5 of the Federal Trade Commission Act is not one of "the antitrust laws" as defined in the Clayton Act,[27] it could be argued that the proper test is the nature of the conduct at which the proceeding is directed rather than the classification of the statute under which the proceeding is brought. Thus, even if a Sherman or Clayton Act violation is proceeded against under Section 5 of the Federal Trade Commission Act, it may be no less a violation of the Sherman or Clayton Act, and the Commission proceeding no less "to prevent [and] restrain" it. The *3M* decision carries with it the suggestion that challenged conduct, rather than the choice of statutes, determines whether the limitations period is tolled, for the Commission's Clayton Act proceeding was held to save the private plaintiff's Sherman Act claim based upon the same acts even though plaintiff might be required to prove a greater anticompetitive effect than the Commission.[28]

The Supreme Court's *3M* opinion does not make entirely clear the basis for the tolling effect of a Commission Clayton Act proceeding. In its amicus brief to the Court, the Department of Justice implied that the statute of limitations might be tolled not through application of the Clayton Act tolling provision but through exercise of established judicial power to toll statutory limitations when circumstances make tolling appropriate. The opinion of the Court could be said generally to adopt this approach, since it avoids, except in one instance,[29] any specific statement that the statute of limitations was tolled by direct operation of the Clayton Act tolling provision. The decision could therefore support an argument that Federal Trade Commission Act Section 5 proceedings toll the statute of limitations on Sherman or Clayton Act claims.

Finally, whether or not the Clayton Act tolling provisions apply

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[25] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra note 8, at 320.

[26] Clayton Act § 5, 69 Stat. 283 (1955), 15 U.S.C. § 16 (1964), amending 38 Stat. 731 (1914).

[27] 38 Stat. 730 (1914), 15 U.S.C. § 12 (1964).

[28] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra note 8, at 322-24.

[29] Id. at 322.

directly to FTC Clayton Act proceedings, the Justice Department's argument might nevertheless be made as an independent basis for an analogous holding with respect to Federal Trade Commission Act proceedings. *3M* would thus outline the policy basis, but not the legal theory, for a holding in favor of tolling.

II. FTC Orders as Prima Facie Evidence

The Supreme Court took great pains in *3M* to separate the tolling issue from the prima facie issue in its consideration of the relationship between FTC proceedings and subsequent treble-damage suits.[30] It pointed to textual differences between the tolling provisions and the prima facie provisions of the Clayton Act; it recited the independent benefits conferred by the tolling provisions; and it recognized the "delicate,"[31] if not constitutional, problems inherent in the prima facie issue not present with the tolling question. But the opinion does not preclude a subsequent holding that FTC orders under the Clayton Act cannot be used as prima facie evidence by treble-damage plaintiffs even though a judicial decree against the same violation could be so employed.

To the extent that *3M* rests upon the judicial power to toll a statute of limitations when basic policy so demands, and not upon the specific command of the Clayton Act tolling provisions, a different result on the prima facie question could be defended. The Court could conclude that despite its freedom to mitigate the rigours of a statute of limitations, it has no such power over the use of judgments between two parties in an action involving a third, and so it must keep within the limits set by the prima facie provision of the Clayton Act.

This rationale—or any other which might be relied upon to withhold prima facie effect from FTC orders—would have to be sufficiently strong to overcome both the policy in favor of private antitrust litigation and the illogic in giving different effect to Commission and court orders against the same conduct under the same statute. These considerations are as applicable to a prima facie claim as to the tolling claim upheld in *3M*. Further, the prima facie question is essentially a question of the quantum of evidence permitted to go to the trier of fact or to support a verdict, matters traditionally governed by judicially-evolved rules. And the question is closely related to the judge-made doctrines of res judicata and collateral estoppel, which seem within the power of courts to expand or to contract except as

[30] Unlike the court of appeals, which had concluded that the two issues should not be separated. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., supra note 12, at 360.

[31] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra note 8, at 317.

Congress may determine otherwise. Thus, unless a legislative intent specifically to withhold prima facie effect from FTC orders can be discerned, the Supreme Court could parallel its *3M* holding with a decision that Commission orders—at least orders under the Clayton Act —may be used like judicial decrees to help prove a treble-damage claim.

An approach to the prima facie question which does not rely on the specific prima facie provision of the Clayton Act would probably be easiest to apply to Commission orders entered under Section 5 of the Federal Trade Commission Act. Unlike the tolling provision, the prima facie provision of the Clayton Act speaks of orders in proceedings "under the antitrust laws to the effect that a defendant has violated said laws."[32] Since Section 5 of the Federal Trade Commission Act is not an "antitrust law," section 5 proceedings could be held outside the scope of the Clayton Act prima facie clause on this account. Nor is it clear, even if a Commission proceeding is a "civil or criminal proceeding brought by or on behalf of the United States," that a Commission order under the Federal Trade Commission Act can be "to the effect that a defendant has violated said laws." The Commission has no jurisdiction to enforce the Sherman Act as such, and a Commission finding that the act has been violated is presumably without legal significance. Even if the "to the effect" clause were interpreted to mean Commission orders entered upon findings which make out a Sherman Act as well as a Federal Trade Commission Act violation, a treble-damage court would be required to determine whether the findings in a particular Commission case could be so characterized. This might prove no easy task. And finally, the specific dependence of the Clayton Act prima facie provision on estoppel doctrine may mean that a Federal Trade Commission Act order can never be prima facie evidence under that provision on the issue of a Sherman Act violation, since the issue in controversy before the Commission was "whether . . . [an unfair method of competition was employed], not whether . . . the Sherman Act had been violated. Consequently, there could be no estoppel."[33]

III. Order on Judicial Review as Prima Facie Evidence

The argument might be made that, even if an FTC order cannot be used as prima facie evidence, the order of a reviewing court affirming and enforcing a Commission order can be so used. Not all of the objections which might be raised against the use of a Commission order, however, such as the nature of Commission procedure and the rules of evidence it applies, would thereby be overcome. The limitation

[32] Clayton Act § 5, 69 Stat. 283 (1955), 15 U.S.C. § 16 (1964), amending 38 Stat. 731 (1914).

[33] United States v. RCA, 358 U.S. 334, 352 (1958).

on the scope of judicial review to whether there was substantial evidence in the record as a whole to support the Commission's findings would still permit an order of affirmance and enforcement to be entered on the basis of less evidence than might be thought appropriate if the order were to be used in a subsequent proceeding between the defendant and a third party.

Reliance upon an order in review proceedings to apply the prima facie provision of the Clayton Act would introduce a new factor into the relationship between the courts and the Commission under the judicial review provisions of the relevant statutes. If a Commission order could not be used as prima facie evidence by a subsequent treble-damage plaintiff in the absence of a favorable judicial order on review, respondents in Commission proceedings might elect to forego their right to review in order to protect themselves against potential damage claims. The Commission would thus acquire significantly more freedom from judicial scrutiny than it presently enjoys. Commission orders would then be divided into two classes of effectiveness—those which had been reviewed and those which had not—returning, in a sense, to a distinction which the 1959 Finality Act[84] seemed aimed at abolishing.

IV. Conclusion

Perhaps there is little point in attempting to defend the plain meaning of words where it is possible that the matter will be reviewed by the Supreme Court. More to the point, perhaps, is to attempt to deal with what might be the Court's thinking about the desirability of particular results. It would be ironic if, out of a sense of delayed respect for the importance of the Federal Trade Commission, the Court were consistently to equate FTC proceedings with court proceedings. For then it would be not the legal realists, but the legal traditionalists, who would have really won the final victory—victory over the concept of the Federal Trade Commission as an administrative agency, with delegated authority both to find the facts through other than traditional methods and to declare rules for the future where none existed before.

[84] 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).