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Trade Regulation—Section 5(b) of the Clayton Act—Tolling the Statute of Limitations During an FTC Proceeding.—Laitram Corp. v. Deepsouth Packing Co.

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CASE NOTE

Trade Regulation—Section 5(b) of the Clayton Act—Tolling the Statute of Limitations During an FTC Proceeding.—*Laitram Corp. v. Deepsouth Packing Co.*[1]—Laitram Corporation brought this action against Deepsouth Packing Company in the United States District Court for infringing patents on shrimp processing machinery. This machinery made it commercially feasible to process the variety of shrimp found in the Pacific Northwest and which are far smaller than the Gulf Coast variety.[2] Laitram had obtained its patents in 1947 and had entered into leasing agreements with various processors. However, it charged the processors of the Pacific Northwest twice the rental rate charged to processors in the Gulf Coast states.[3]

By 1957 Laitram had a competitor, Deepsouth, which was using and marketing similar machinery.[4] Laitram sued both Deepsouth and its president, Raphael Skrmetta, for infringement. In the 1957 action Deepsouth counterclaimed for damages arising from Laitram's alleged violation of the Sherman Act.[5] While the 1957 action is not reported, other litigation between Laitram and various lessees of the Skrmetta machinery involved charges of restraint of trade and monopolization under Sections 1 and 2 of the Sherman Act resulting from Laitram's discriminatory pricing policies.[6] It can reasonably be inferred that Deepsouth alleged similar violations in its counterclaim. The 1957 suit was settled by agreement on March 28, 1967,[7] with a stipulation that the antitrust counterclaim be dismissed with prejudice. Such a dismissal was filed with the court.[8]

In the current infringement suit, Deepsouth filed a motion for leave to amend its answer by adding a counterclaim for damages arising from alleged violations of the Sherman Act.[9] Laitram challenged this motion on the grounds

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1 279 F. Supp. 883 (E.D. La. 1968).

2 The shrimp found in the Northwest are half the size of the shrimp found in the Gulf Coast States. Prior to the invention of Laitram's machinery, all shrimp were processed by hand labor. Since it took the same amount of labor to process each shrimp regardless of size, the amount of labor expended in the Gulf Coast would produce twice the poundage of shrimp as could be produced in the Northwest. Thus, it was commercially impossible for the Northwest shrimp to be marketed because the labor cost was twice as great as the corresponding cost in the Gulf Coast States. See LaPeyre v. FTC, 366 F.2d 117, 119 (5th Cir. 1966).

3 Id. at 120. Laitram is the successor in interest of the LaPeyre family which obtained the patents on the machinery, and also of the Peelers Company which was a partnership through which the LaPeyre family conducted their business.

4 See Grand Caillou Packing Co., [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,927, at 21,989 (FTC 1964).

5 See 279 F. Supp. at 885-86.

6 E.g., Peelers Co. v. Wendt, 260 F. Supp. 193 (W.D. Wash. 1966); Crown Packers, Inc. v. LaPeyre, 260 F. Supp. 193 (W.D. Wash. 1966); Laitram Corp. v. King Crab, Inc., 245 F. Supp. 1019 (D. Alas. 1965).

7 See 279 F. Supp. at 886.

8 Id.

9 Id. at 885. The violations complained of were substantially the same as the ones in the 1957 action. Id. at 889. The court felt that it was unnecessary to reach the res judicata issue. Id. at 891.

that the four-year statute of limitations under Section 4B of the Clayton Act[10] had run and that therefore Deepsouth is barred from asserting antitrust violations.

Deepsouth contended that the statute of limitations had been tolled under Section 5(b) of the Clayton Act[11] by virtue of a Federal Trade Commission action against Laitram, instituted May 13, 1960, and decided September 13, 1966.[12] The FTC had challenged Laitram's discriminatory pricing policies as a violation of Section 5 of the Federal Trade Commission Act and had issued a cease-and-desist order. Thus, Deepsouth sought damages for an alleged violation of the Sherman Act that occurred sometime after May 13, 1956, four years prior to the start of the FTC action, claiming that the FTC action tolled the statute of limitations until September 13, 1967, one year after the conclusion of the FTC action. The court HELD: Deepsouth may not amend its answer to include antitrust violations[13] because the four-year statute of limitations had run; the FTC action against Laitram under Section 5 of the FTC Act did not toll the statute.[14]

Section 4B of the Clayton Act provides a four-year statute of limitations on any private suit to recover damages under the antitrust laws.[15] Section 5(b) of the Clayton Act tolls this statute of limitations in behalf of priviate litigants whenever a civil or criminal proceeding is instituted by the United States Government under the antitrust laws.[16] The statute is tolled during the pendency of the Government's case and for one year thereafter. The antitrust laws are defined in Section 1 of the Clayton Act[17] to be: the Sherman Anti-Trust Act,[18] Sections 73-77 of the Wilson Act,[19] the 1913 Amendments to Sections 73-76 of the Wilson Act[20] and the Clayton Act.[21] This

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[10] "Any action to enforce any cause of action under sections 15 or 15a of this title shall forever be barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (1964).

[11] Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of 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 . . . .

Id. § 16(b).

[12] Grand Caillou Packing Co., [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,927, at 21,955 (FTC 1964).

[13] A challenge to a motion for leave to amend based upon res judicata or the statute of limitations is generally considered only after the proposed motions have been filed, but the court felt it would be more expedient and a better rule to allow the substantive challenge before the amendments were filed. 279 F. Supp. at 887.

[14] The court held that the statute of limitations starts to run from the time the action could first have been brought and that a plaintiff is not entitled to damages for all injuries incurred within four years from the time the action was actually brought. Id. at 887-89.

[15] See note 10 supra.

[16] See note 11 supra.

[17] 15 U.S.C. § 12 (1964).

[18] Id. §§ 1-7.

[19] Id. §§ 8-11.

[20] Id.

[21] Id. §§ 12-27; 29 U.S.C. § 52 (1964).

definition was enacted in 1914 and has not changed although changes have been made in Section 5 of the Clayton Act.

Section 5(a) of the Clayton Act allows a private party in a treble damage suit to introduce as prima facie evidence any final judgment or decree obtained by the United States Government under the Antitrust laws.[22] Originally section 5(b) was thought to be dependent upon section 5(a); the statute of limitations could be tolled only in an action which would produce a decree or judgment admissible as prima facie evidence under Section 5(a) of the Act.[23]

The courts held FTC proceedings inadmissible under section 5(a) for two reasons. The orders issued by the FTC were considered merely as notice of a violation and not as a final judgment or decree since FTC orders were not enforceable without judicial action.[24] This disability was cured in 1959 by the Finality Act[25] which made FTC orders final unless appealed within 60 days. The second reason was the administrative nature of the proceedings. The courts interpreted Section 5 of the Clayton Act to encompass only judicial actions brought by the Department of Justice.[26] FTC actions were considered brought on behalf of an administrative agency and not the United States Government.[27] Thus, FTC proceedings were originally held not to toll the statute under any circumstances.

In 1956, the Supreme Court, in the case of *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,[28] decided that sections 5(a) and 5(b) were independent and that an FTC proceeding under Section 7 of the Clayton Act[29] tolled the statute of limitations.[30] The Court concluded that, while section 5(b) may have been a supplement to section 5(a) when enacted, it was not limited to that effect now, nor was there an express showing of congressional intent to that effect.[31] In determining the actual, though unexpressed, intent of Congress, the Court examined, "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."[32] The Court found the policy behind the statute was "the clearly expressed desire that private parties be permitted the benefits of prior government actions"[33] in order to assist the private enforcement of antitrust policy. The Court therefore concluded that it was the intention of Congress to

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[22] 15 U.S.C. § 16(a) (1964).

[23] As originally passed, Section 5 of the Clayton Act was not divided into subsections. The division was a result of the 1955 amendments to the Act and section 5 now contains two provisions.

[24] E.g., Proper v. John Bene & Sons, Inc., 295 F. 729, 731 (E.D.N.Y. 1923).

[25] 15 U.S.C. §§ 45(c), (g) (1964).

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

[27] See, e.g., Farmington Dowell Prods. Co. v. Forster Mfg. Co., 223 F. Supp. 967, 973 (D. Me. 1963).

[28] 381 U.S. 311 (1965).

[29] 15 U.S.C. § 18 (1964).

[30] 381 U.S. at 321-22.

[31] Id. at 319.

[32] Id. at 321.

[33] Id. at 320.

allow the statute of limitations to be tolled by an FTC proceeding since tolling would be an invaluable aid to private litigants.[34]

Another reason for the Supreme Court's decision was that the FTC was proceeding under Section 7 of the Clayton Act.[35] There is concurrent jurisdiction between the Department of Justice and the FTC to enforce this section. If the Justice Department had brought the action there would be no question that the statute of limitations was tolled. The Court concluded that it was unfair for the rights of a private litigant to be determined solely by which government agency had brought the action.[36]

The main difference between the *Minnesota Mining* case and the case at hand is the statutory basis for the FTC action. The action against Laitram was under Section 5 of the FTC Act.[37] That act is not one of the antitrust laws, as defined in Section 1 of the Clayton Act. This is the basis of the holding in the instant case; a proceeding solely under the FTC Act does not toll the statute whereas a proceeding by the FTC under the Clayton Act does.[38] The statutory basis for the proceeding is controlling rather than the particular agency that institutes the proceeding.

While this distinction is consistent with the language of the statute, it is in conflict with the actual machinery used to combat antitrust violations. Distinguishing between actions brought by the FTC under the Clayton Act and actions brought by the FTC under the unfair-methods-of-competition clause of Section 5 of the FTC Act[39] presupposes different offenses being enumerated in each act.

When enacted in 1914 the FTC Act may have been conceived as a broad, inclusive prohibition against practices not enumerated in the Sherman Act.[40] However, the Supreme Court, in 1920, interpreted the unfair-methods clause of section 5 to include only established violations of either the Sherman or Clayton Acts.[41] Thus, this part of section 5 became coextensive with the Sherman and Clayton Acts. This created a dual system of enforcing the antitrust laws. The Department of Justice could prosecute violations arising under either the Sherman or Clayton Acts. The FTC, in addition to its direct statutory authority to prosecute violations of Sections 2, 3, 7 and 8 of the Clayton Act,[42] could prosecute any other violations of the Clayton Act or any violation of the Sherman Act under Section 5 of the FTC Act. While today, the unfair-methods clause of section 5 reaches activities outside the coverage of the Sherman and Clayton Acts,[43] it still

[34] Id.

[35] 15 U.S.C. § 21 (1964).

[36] 381 U.S. at 322.

[37] 15 U.S.C. § 45 (1964).

[38] 279 F. Supp. at 891.

[39] 15 U.S.C. § 45(a)(1) (1964). Section 5 of the FTC Act, as amended, also gives the FTC power to prosecute "unfair or deceptive acts or practices in commerce." Id. This note deals with the violations prosecuted under the unfair-methods clause of § 5 or those cases where it is impossible to tell under which section the FTC is acting.

[40] The FTC Act was passed before the Clayton Act. The FTC Act on September 26, 1914, 38 Stat. 719, and the Clayton Act on October 15, 1914, 38 Stat. 730.

[41] FTC v. Gratz, 253 U.S. 421, 427 (1920).

[42] 15 U.S.C. §§ 13, 14, 18, 19 (1964).

[43] E.g., FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966).

encompasses all Sherman and Clayton Act violations so that the dual nature of antitrust enforcement continues.

The situations presented by the *Minnesota Mining* case and the instant case are not really dissimilar. Just as it is unfair to prejudice a private litigant's rights by refusing to toll the statute when the FTC acts under Section 7 of the Clayton Act, it is equally unfair to refuse to toll the statute when the FTC acts under Section 5 of the FTC Act if the substantive violation is also a violation of either the Sherman or Clayton Acts. Under the dual system of enforcement of antitrust law, a private party should not lose any benefits because conduct is challenged by the FTC under section 5 rather than by the Department of Justice under the Sherman or Clayton Acts.

Ideally, it would seem that a proceeding brought by the FTC under Section 5 of the FTC Act should toll the statute of limitations whenever the conduct in question could have been prosecuted by the Justice Department as a violation of either the Sherman or Clayton Acts. In practice, however, such a rule would be unworkable. It is often impossible to tell at the outset if a practice later found to violate Section 5 of the FTC Act also violates the Sherman or Clayton Acts. Since section 5 is broader than the Sherman or Clayton Acts, the FTC, and the courts, when considering violations of section 5, need only determine that given conduct violates section 5, without having to reach the question whether a violation of the Sherman or Clayton acts has also been committed.

A good example of the difficulty presented may be found in the present case. Laitram's practice of leasing its patented machinery to processors in the Northwest at twice the rate charged processors on the Gulf Coast was challenged by the FTC as a violation of Section 5 of the FTC Act.[44] The majority of the Commission, in finding a violation only of section 5, pointed to the possible existence of agreements between Laitram, Grand Caillou Packing Company and other Gulf Coast processors to give the Gulf Coast processors an advantage over processors in the Northwest.[45] This conduct, if proved by a private litigant would be a violation of Section 1 of the Sherman Act which proscribes contracts, combinations and conspiracies that are in restraint of trade.[46] In addition, Commissioner Elman, in his concurring opinion, found Laitram's activity to be a violation of Section 2 of the Sherman Act which prohibits anyone from monopolizing any part of trade or commerce.[47] The Fifth Circuit in affirming the FTC order[48] did not consider the question whether Laitram violated the Sherman Act but was satisfied that a violation of Section 5 of the FTC Act had occurred.

Other litigation involving the same conduct by Laitram adds to the problem. In two treble damage actions brought in another district court, Laitram has been found guilty of violating Section 2 of the Sherman Act.[49]

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[44] Grand Caillou Packing Co., [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,927, at 21,955 (FTC 1964).

[45] Id. at 21,988.

[46] 15 U.S.C. § 1 (1964).

[47] Id. § 2.

[48] LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).

[49] Peelers Co. v. Wendt, 260 F. Supp. 193 (W.D. Wash. 1966); Crown Packers, Inc. v. LaPeyre, 260 F. Supp. 193 (W.D. Wash. 1966).

Yet a different district court, however, has found Laitram not to have violated Section 2 of the Sherman Act, although that court did find that Laitram had misused its patents.[50]

Thus, it cannot be said with certainty that Laitram's leasing practices violate the Sherman Act nor can it be said that these practices do not violate the Sherman Act. Yet it has been established that these practices do violate Section 5 of the FTC Act. With respect to such cases, where the activity challenged by the FTC is not clearly a violation of either the Sherman or Clayton Acts, it will be necessary to determine whether the policy considerations behind Section 5(b) of the Clayton Act require the statute of limitations to be tolled whenever the FTC acts pursuant to Section 5 of the FTC Act.

As enunciated by the Supreme Court in *Minnesota Mining*, the basic policy behind Section 5(b) of the Clayton Act is to aid the enforcement of antitrust policy by giving the private litigant as great a benefit as possible from government proceedings.[51] These benefits "flow as naturally from Commission proceedings as they do from Justice Department actions."[52] The information gathered by the FTC could prove an invaluable aid in determining whether a violation has been committed that would sustain a treble damage action inasmuch as the rules of the FTC require that information such as pleadings, motions, transcripts of hearings and testimony, exhibits and documents be made available to private litigants.[53]

Tolling the statute of limitations in all cases under Section 5 of the FTC Act would necessarily result in having the statute tolled in cases where the challenged conduct was not a violation of either the Sherman or Clayton Acts. The same result nevertheless can occur when the Justice Department acts. The Justice Department does not, of course, establish a Sherman or Clayton Act violation in every action it brings. However, the statute of limitations is tolled as soon as the Department of Justice brings the action regardless of the ultimate result.[54] The private litigant in such a case still has the advantage of waiting until the Government's case has concluded in failure before assessing his own chances for success.

Allowing FTC proceedings pursuant to Section 5 of the FTC Act to toll the statute of limitations, while increasing the frequency of the statute being tolled, should not result in a multiplicity of frivolous suits. The number of private suits brought is likely to increase, a result which is in keeping with the policy behind the statute. The substantive grounds for recovery of treble damages remain unchanged for the tolling provision of Section 5 of the Clayton Act does not create any new substantive violations. It merely extends the time during which an action based upon an established or alleged violation of antitrust policy may be brought.

When the Justice Department loses a case, or settles one before trial, the private litigant must decide whether he has a good cause of action. This

[50] Laitram Corp. v. King Crab, Inc., 245 F. Supp. 1019 (D. Alas. 1965).

[51] See text accompanying note 33 supra.

[52] 381 U.S. at 320.

[53] 16 C.F.R. § 4.9(e)(4) (1968).

[54] See note 11 supra.

same determination would have to be made by a private litigant whenever the FTC acts. When the conduct challenged by the FTC appeared unlikely to fall within the Sherman or Clayton Acts, a private suitor would be less likely to risk the expense of a suit. By tolling the statute the plaintiff would be better able to assess his chances on the basis of the information gathered by the Government. Thus, allowing all FTC proceedings to toll the statute of limitations should result in private litigants availing themselves of the benefits of government action almost entirely in cases where the conduct challenged by the FTC appears to be a violation of either the Sherman or Clayton Acts.

The policy objectives behind Section 5(b) of the Clayton Act indicate that FTC proceedings should toll the statute of limitations whenever the FTC acts under Section 5 of the FTC Act. However, it may not be possible to implement such a rule without legislative assistance from Congress. As noted, the definition of the antitrust laws found in Section 1 of the Clayton Act does not include the FTC Act. Before a court can hold that proceedings under Section 5 of the FTC Act toll the statute of limitations it will be necessary to read Section 5 of the FTC Act into the Clayton Act's definition of the antitrust laws as the term is used in Section 5(b) of the Act. While this might be accomplished by the courts on the basis that it was a legislative oversight to omit Section 5 of the FTC Act from the meaning given the term "antitrust laws" in Section 5(b) of the Clayton Act, such a result would seem to be no less than judicial legislation, and it is understandable why the court in the instant case refused to toll the statute.

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