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Antitrust Law -- Limitation of Actions -- A Liberal Interpretation to Save the Private Plaintiff

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NOTES

Antitrust Law—Limitation of Actions—A Liberal Interpretation to Save the Private Plaintiff

In accord with its emphasis on the role of the private prosecutor in antitrust enforcement, the Supreme Court, in a recent case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[1] has increased the protection afforded the private plaintiff against statutory limitations on his treble damage action. That case, which was before the Court for the second time, was initiated with a patent infringement action by Hazeltine Research, Inc. (HRI) in 1959. In 1963 Zenith filed a counterclaim alleging certain violations of the Sherman and Clayton Acts arising out of HRI's participation in patent pools in Canada, Great Britain, and Australia and claimed damages sustained during the previous four year period. The conspiracy of which HRI was alleged to be a member had been the subject of a government suit from November 24, 1958, to November 1, 1963, but HRI was not named in that action.

The trial judge entered preliminary findings of fact and conclusions of law in favor of Zenith on its counterclaim[2] and at this point HRI attempted to reopen the record and present evidence on its limitations defense,[3] which had not been alleged at any earlier point. The trial judge allowed the filing of the motions but refused to modify his findings of fact and conclusions of law concerning HRI's activities in barring Zenith from the Canadian market. The Court of Appeals for the Seventh Circuit reversed on the ground that Zenith had failed to prove injury to its business,[4] but the Supreme Court in an earlier decision held that Zenith had proved its damages from its exclusion from the Canadian market.[5] The Court noted at that time that the trial judge either had rejected the limitations defense on the merits or had deemed it waived, and the Court did not consider the question of whether damages sustained during the

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[1] 91 S. Ct. 795 (1971).

[2] Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F. Supp. 51 (N.D. Ill. 1965).

[3] The statute of limitations on antitrust actions is contained in 15 U.S.C. § 15(b) (1964). This section provides that "[a]ny action . . . shall be forever barred unless commenced within four years after the cause of action accrued."

[4] Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25 (7th Cir. 1967).

[5] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

statutory period that were caused by pre-period conduct could be recovered.[6]

On remand the court of appeals found that the trial judge had not held the defenses to be waived, but rather had erroneously rejected the limitations defense on the merits. This court held that the statute was not tolled by the prior government action since HRI was not named as a defendant and remanded the case for a determination of the extent of the reduction of damages that would result if the defenses were sustained.[7] Zenith petitioned for certiorari[8] and this time the Court heard argument solely on the limitations issues.

Section 4B of the Clayton Act provides that all antitrust actions will be barred unless they are brought within four years from the *accrual of the cause of action.*[9] Section 5B of the Clayton Act[10] gives some relief to the antitrust litigant by providing for the tolling of the statutory period during the pendency of a government suit based in whole or in part on the matter involved in the plaintiff's claim. This statute of limitations has caused considerable difficulties for the federal courts because of the complex nature of antitrust litigation, the amorphous nature of commercial conspiracy, and the difficulty of showing the cause and the effect of individual acts of the defendant.

The application of the statutory period in this case would of course be determinative on the issue of the damages recoverable by Zenith. If the statute were tolled by the government action from November 24, 1958, until November 1, 1963, when a consent decree was entered against the last defendant in the government action, Zenith would have been entitled to recover any damages to its business occurring as a result of the conspiracy conduct at any time after November 24, 1954. The problem in *Zenith* arose because HRI alleged that part of the damage suffered by Zenith from 1959 until 1963 resulted from pre-1954 conduct. It was in this posture that the Court was called upon to decide the issue of waiver of the limitations defense by HRI, the tolling of the statute by a government suit that neither named HRI as a defendant nor as a co-conspirator, and the date of the accrual of the cause of action for purposes of the statute of limitations.

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[6] *Id.* at 117 n.13.
[7] Hazeltine Research, Inc. v. Zenith Radio Corp., 418 F.2d 21 (7th Cir. 1969).
[8] Zenith Radio Corp. v. Hazeltine Research, Inc., 397 U.S. 979 (1970).
[9] 15 U.S.C. § 15(b) (1964).
[10] 15 U.S.C. § 16(b) (1964).

The entire Court agreed that the trial judge would not have abused his discretion under Federal Rule of Civil Procedure 15(a)[11] if, instead of allowing the plaintiff leave to amend his pleadings and incorporate his statutory defenses, the judge had held that the defenses were waived under Federal Rule of Civil Procedure 12(h).[12] Justice Harlan, joined by Justice Stewart, rested his decision on this basis alone.[13] The majority, finding that the record was unclear on the waiver issue, refused to remand the case for another round of proceedings and decided the statutory defenses on the merits.

The court of appeals had held that tolling takes place only with respect to the parties to a government suit.[14] The Supreme Court refused to follow such a restrictive interpretation of the tolling provision and held that Zenith, although suing HRI, which was named neither as a party nor as a coconspirator in the government suit, was not barred from obtaining the benefits of the tolling statute, since Zenith had shown that the conspiracy in which HRI participated was at least in part the same conspiracy as was the object of the government suit. The Court cited this holding as consistent with and a logical extension of its earlier decisions in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*[15] and *Leh v. General Petroleum Corp.*[16]

Once it had passed the tolling hurdle, the Court was faced with the problem of the post-1959 damages caused by the pre-1954 conduct of the conspiracy. The courts have devised many methods for avoiding the harsh result of too strict an interpretation of the statute of limitations. Such

[11] FED. R. CIV. P. 15(a). This rule provides that with two exceptions a party may amend his pleadings only by leave of the court or by written consent of the adverse party. HRI had argued before the Court that leave to amend should have been granted in this case because justice so required.

[12] FED. R. CIV. P. 12(h). Prior to the 1966 amendments rule 12(h) provided that "[a] party waives all defenses and objections which he does not present either by motion . . . or, if he has made no motion, in the answer or reply . . . ."

[13] 91 S. Ct. at 811 (concurring opinion).

[14] 418 F.2d at 25 n.3.

[15] 381 U.S. 311 (1965).

[16] 382 U.S. 54 (1965). In *Leh* the Court had held that a private litigant was entitled to the benefit of the tolling statute even though the conspiracy he alleged covered a different time, named additional parties, and excluded some parties named in the prior government suit. The Court in *Zenith* admitted that *Leh* did not decide the precise issue now before the Court, *i.e.*, tolling of the statute against a defendant not named as either a defendant or coconspirator in the prior government action. 91 S. Ct. at 805. *See generally* Korman, *The Antitrust Plaintiff Following in the Government Footsteps*, 16 VILL. L. REV. 57 (1970); Comment, *Section 5(b) of the Clayton Act: The Tolling Effect of Government Antitrust Actions on Unnamed Parties*, 34 U. CHI. L. REV. 906 (1967); 65 MICH. L. REV. 1661 (1967).

theories as fraudulent concealment of the conspiracy,[17] continuing invasion of the plaintiff's rights,[18] and an overt act occurring within the statutory period[19] have saved private plaintiffs from the strictures of the statute.

Previous decisions on this issue have emphasized the continuing conduct of the defendant and the causal effect of that conduct, *i.e.*, damages to the antitrust plaintiff. As long as some conduct during the statutory period that causes damages can be attributed to the defendant, the courts have not hesitated to deny any statutory defenses. In *Zenith*, however, the Court appears to take a different tack on this issue. As the basis for its decision the Court looked to the language of the statute, specifically to the phrase "accrual of the cause of action." The Court held that the cause of action cannot accrue with regard to future damages until those damages can be proved with some degree of certainty by the plaintiff. If the plaintiff only has speculative damages, he cannot prove those damages in court and therefore has no cause of action with regard to such damages.[20] In the principal case, Zenith's sole proof with regard to damages was its showing of a hypothetical market that it could have obtained in Canada were it not for the conspiracy which denied Zenith entry. Moreover, in 1954 there were other factors barring Zenith's entry into the Canadian market, including a foreign government prohibition. The Court concluded that Zenith, as a plaintiff in 1954, could not possibly show what its damages would be for the period from 1959 until 1963 so those damages must have been speculative, *i.e.*, no cause of action had accrued with regard to those damages. The Court does not isolate the point in time that the cause of action did accrue as to these damages, but nevertheless it concluded that Zenith had filed its counterclaim well within the statutory period.

[17] *E.g.*, Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962); Crummer Co. v. duPont, 223 F.2d 238 (5th Cir. 1955). The fraudulent-concealment doctrine provides that the statute of limitations does not begin to run until the plaintiff is aware or should be aware of the conspiracy. This equitable doctrine is generally applied to all statutory limitations.

[18] *See* Hanover Shoes, Inc. v. United States Shoe Mach. Co., 392 U.S. 481 (1968). This case involved the defendant's continuing policy of only leasing his machines rather than offering them for sale. For a more restrictive approach, See Manok v. Southeast Dist. Bowling Ass'n, 306 F. Supp. 1215 (C.D. Cal. 1969), in which the court held that the original suspension of the plaintiff from the defendant association started the running of the statute of limitations and that the subsequent denials of readmittance were not overt acts and did not involve a continuing invasion of the plaintiff's rights. *See also* Highland Supply Corp. v. Reynolds Metal Co., 327 F.2d 725 (8th Cir. 1964).

[19] *E.g.*, Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956).

[20] 91 S. Ct. at 806.

The case raises serious problems, and a liberal interpretation of the opinion without due consideration of the facts out of which it arose will effectively gut the four year statute of limitations as a statute of repose for the antitrust defendant. There are several facets of the case missing in the opinion of the Court which might dictate a more restrictive approach in similar but not identical situations. It should be pointed out that the Court was dealing with only one aspect of the statute of limitations, its function as a limitation on the extent of recoverable damages. The function of the statute as a complete bar to suit is not raised by the case and was not discussed by the Court. It was found in the lower court that there was a continuing conspiracy after 1954 that caused damages during the statutory period, and therefore the suit by Zenith could not be completely barred by the statute. The continuation of the conspiracy after 1954 and any overt acts committed after that date become irrelevant in any event since the Court focused on the plaintiff and his ability to prove his damages rather than on the conduct of the defendant. Since *some* damages could be recovered by Zenith even under traditional learning, the real problem with the Court's rationale is not raised in *Zenith.*

The objection to the rationale of the Court would arise if the conspiracy had terminated in all respects in 1954 or before. Zenith, as a plaintiff in 1954, would have the same difficulty in establishing its damages for future years since it could not forecast the percentage of the Canadian market that it would lose as a result of the delayed entry caused by the conspiracy. If the rationale of the principal case were adopted in this situation, Zenith would not be required to bring suit until it could prove its damages with some degree of certainty. At any point in the future, Zenith could bring an action, establish the fact of violation, and recover damages incurred during the previous four years along with any future damages that it could prove. This result would not be violative of the policy supporting the statute of limitations if the only effect would be as it was in *Zenith,* an increase in the amount of damages that the plaintiff could recover. However, the policy behind the statute of limitations as a statute of repose with regard to the *fact* of violation would be destroyed. The plaintiff, in the hypothetical situation, would not be required to establish the antitrust violation until some future point which could be ten or fifteen years from the termination of the conspiracy. All the arguments that are normally used to justify any statute of limitations, such as staleness of the evidence and the unavailability of witnesses, apply with full force to this situation. The antitrust defendant would never be

free from suit arising out of his conduct so long as the possibility existed that some plaintiff at some later point would be injured by that conduct.

This result may be justified on policy grounds because of the role of the private prosecutor in enforcing the antitrust laws[21] and the fact that this future plaintiff has suffered real harm from the defendant's violations of those laws. However, the reasoning of the Court breaks down when confronted with another plaintiff in a different situation who is equally deserving of the Court's protection. If the conspiracy in the principal case had terminated in 1954 and at that point Zenith could have proved its damages during the future period, then its later action would have been barred. Such a plaintiff who can show his future damages with some degree of certainty must bring his action within the four year period or be forever barred. The distinction between this plaintiff and one who cannot prove his damages seems dubious when one considers the fact that both plantiffs will have suffered the same damages at the hands of the same defendant. Such a distinction is apparently unjustified.

Future litigants should be forewarned that *Zenith* turns on very special facts. Factors that may have influenced the decision of the Court include the late assertion of the defenses by HRI. There was some evidence that HRI may have deliberately saved its statutory defenses until after the findings of fact and conclusions of law by the trial judge since any attempt to raise the defenses at an earlier stage may have involved admissions of HRI's participation in the conspiracy. The late filing by HRI had precluded Zenith from even introducing evidence on the statutory defenses, and the Court, desiring to prevent a remand of a case already eleven years in duration, may have concluded that Zenith could show acts by HRI that would bring the case within the statutory period under traditional theories. In addition, the fact of antitrust violation was clearly shown in the lower court by Zenith.

The application of the *Zenith* rationale in later litigation should not be viewed by plaintiffs' attorneys as an opportunity for delay. The attorney must now decide if the damages that will occur to the plaintiff are provable at the time when the violation becomes apparent. If the damages are not provable, the plaintiff can delay his suit. This determination by the attorney of the speculative nature of the damages is of course subject to review by the courts, and the lower federal judges, including the court of appeals in the principal case, have not been quite so liberal in construing

[21] *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

the statutes as the Supreme Court has been. The safest course and the one the attorney would most likely take would be to bring the action at an early date. However, a not unusual situation can arise, as it did in *Zenith*, where a litigant will await an action for infringement or similar relief by the violating party before filing his "automatic" counterclaim for treble damages. Such a litigant may hope to find salvation in the *Zenith* decision.

Because of the unsupportable results that obtain from an application of an expanded interpretation of *Zenith*, the rationale of the case should not be extended to exempt a plaintiff from having to show the fact of violation within the statutory period. Such a plaintiff should not be accused of splitting his cause of action since the extent of future damages cannot be proved at the time of the first action.[22] Requiring the plaintiff to prove the fact of violation within the statutory period would not produce harsh results since antitrust litigation is not a summary proceeding and the plaintiff will have an extended period of trial time to show his anticipated damages. In addition the lower courts have tremendous flexibility and could retain jurisdiction of the case and allow the plaintiff to come in at a later date and show the extent of his damages. Furthermore, a recovery in the first suit should not bar later action for subsequent damages.[23] By requiring the plaintiff to show the fact of violation during the four year statutory period, the interests of the defendant will be protected in that he will not have to defend his conduct under the antitrust laws after the expiration of the four year period. The interests of the plaintiff will be protected in that he will not be denied recovery for any future damages incurred as a result of the defendant's conduct.

Zenith reflects the concern of the Court over the role of the private prosecutor in antitrust litigation. This attitude of the Court, reflected in its abolition of the *in pari delicto* defense[24] and the licensee estoppel defense,[25] is commendable in that the private plaintiff serves a useful if not vital role in the enforcement of the antitrust statutes. In this process, however, the Court should be wary of dubious distintions that only com-

[22] *See* RESTATEMENT OF JUDGMENTS §§ 49, 65(2) (1942). A second action should clearly be allowed in pursuit of a remedy which could not be obtained in the first action. This may, however, require a finding by the trial court on the basis of its decision denying future damages. Such a finding would distinguish a case where the future damages were speculative and therefore not recoverable and one where the trial judge finds that the plaintiff will suffer no future damages.

[23] *Id.*

[24] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

[25] Lear, Inc. v. Adkins, 395 U.S. 653 (1969).

plicate the already impossible task of lawyers and judges involved in antitrust litigation. It is regrettable that the Court picked such a complex vehicle as *Zenith*, which could have been decided on the issue of waiver alone,[26] to continue its policy of protection of the private plaintiff.

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Bankruptcy—Wage Earner's Vacation Pay Held Not to Be Property Under Section 70a(5)

In *Lines v. Frederick*,[1] the Supreme Court has held that the accrued vacation pay of two bankrupt wage earners does not pass to a trustee in bankruptcy as "property" under section 70a(5) of the Bankruptcy Act.[2] The referee in each case had ordered the wage earner to turn over his vacation pay to the trustee on receipt, less an amount exempt under applicable California law.[3] On appeal the district court affirmed, but the Ninth Circuit Court of Appeals reversed, maintaining that the accrued vacation pay was not "property" within the coverage of section 70a(5).[4]

[26] See the concurring opinion of Mr. Justice Harlan. 91 S. Ct. at 811.

[1] 400 U.S. 18 (1970) (per curiam).

[2] Bankruptcy Act § 70a, 11 U.S.C. § 110a (1964), provides:

> The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition . . . except insofar as it is to property which is held to be exempt, to all the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him . . . . *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt . . . shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process . . . .

[3] CAL. CIV. PRO. CODE § 690.11 (West 1955) provided that the following shall be exempt from the claims of creditors:

> One-half of the earnings of the defendant or judgment debtor received for his personal services within 30 days next preceding the levy of attachment or execution where such one-half is necessary for the use of the debtor, or his family supported in whole or in part by such debtor.

This California statute was repealed in 1970 by Ch. 1323, § 27, [1970] CAL. STATS. —, but substantially the same provision can be found in CAL. CIV. PRO. CODE § 690.6 (West Supp. 1971). Accordingly, under California law creditors could reach all but a small portion of the accrued vacation pay in *Lines*. This would suffice to pass the nonexempt portion under section 70a(5), assuming that vacation pay would be considered "property."

[4] 400 U.S. at 18. Earlier the fifth circuit had reached an opposite conclusion in Kolb v. Berlin, 356 F.2d 269 (5th Cir. 1966).