

PRIVATE ANTITRUST ACTIONS: LIMITATIONS AND RELEASES

INTRODUCTION

On November 20, 1959, Hazeltine Research Incorporated (HRI) brought a patent infringement suit against Zenith Radio Corporation, claiming that television sets manufactured by Zenith infringed HRI's patents on a particular automatic control system.¹ In its answer, Zenith alleged that it was not guilty of infringement, that the patent asserted was invalid² and that HRI was guilty of patent misuse and unclean hands through conspiracy with foreign patent pools.³

On May 22, 1963, Zenith filed a counterclaim for treble damages⁴

¹ Hazeltine Research Incorporated is a wholly-owned subsidiary of Hazeltine Corporation, a New York corporation engaged in the manufacture and sale of electronic equipment. It is engaged in accumulating domestic and foreign patents for use in its patent licensing business in the electronics industry. Its policy has been to grant electronics manufacturers a standard package license according to which they are free from charges of infringement under any present patents, and under any patents which it might obtain during the term of the licensing agreement, which is usually five years. Licensees are required to pay royalties on their entire production, whether or not their products employ any of HRI's patents. Whenever HRI decides that the manufacture or sale of any particular apparatus infringes upon any of its patent rights, its policy has been to bring suit against those manufacturers and distributors not protected by the standard package license.

Until 1959, Zenith Radio Corporation possessed the right to use all HRI domestic patents under HRI's standard package license. In that year, however, with the expiration of Zenith's license imminent, Zenith declined to accept HRI's offer to renew, asserting that it no longer required a license from HRI. HRI then asserted that Zenith was infringing at least four of its patents in the manufacture and sale of monochrome television receivers, and it offered to grant Zenith less than the entire package at a different royalty rate. Zenith refused to sign either the package license renewal agreement or the proposed alternative agreement. After negotiations had proceeded to a stalemate, HRI filed suit. *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 239 F. Supp. 51, 59-70 (N.D. Ill. 1965).

² HRI's application for the patent, originally filed in 1946, was amended in 1949. HRI called the 1949 application a "continuation" of its original application, but Zenith argued that since the amendment contained new matter, it was actually a new application. Zenith further argued that the patent asserted was invalid because its subject matter had been published and used by the public for more than a year before the 1949 filing date, and because the claims under the patent failed to describe any invention patentable over prior art. Zenith also maintained that the patent asserted was unenforceable by reason of misuse. *Id.* at 59-66.

³ According to Zenith's argument in the district court, HRI for several years had been an active participant in Canadian Radio Patents Limited, Australian Radio Technical Services and Patents Company Pty. Limited (ARTS), and a British patent pool. Each of these organizations was allegedly a vehicle by which several of the world's largest electronics companies made use of each other's patents, granted local patent licenses, and regulated the terms and conditions under which the patents of member companies were licensed in the respective territorial markets. Members agreed that the only licenses employed by them would be standard package licenses limited to local manufacture, and that no license would be issued permitting the export of radio and television receivers from the United States into those markets. *Id.* at 72-76.

⁴ Under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), any person injured in his business or property by reason of conduct forbidden by the antitrust laws may sue

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and injunctive relief, alleging that HRI had violated the Sherman and Clayton Acts⁵ by its participation, along with Canadian, Australian and British patent pools, in a conspiracy to exclude Zenith's products from the markets of those foreign countries.⁶ The U.S. government had brought a civil antitrust suit on November 24, 1958, against other American companies which had participated in these pools; that suit was terminated as to all parties on November 1, 1962.⁷

A year after the taking of evidence on HRI's patent infringement claim and Zenith's antitrust counterclaim, the district court, sitting without a jury, found for Zenith on both claims.⁸ Soon thereafter, HRI moved to amend its reply to the counterclaim and to reopen the record for the taking of additional evidence. The motion sought leave to assert the defenses of limitations⁹ and release¹⁰ as well as to demonstrate that Zenith's damage in the British and Australian markets had resulted primarily from the operation of government embargoes, tar-

therefor in any district court of the United States and recover threefold the damages he has sustained.

⁵ Clayton Act—15 U.S.C. §§ 1-7 (1970); Sherman Act—15 U.S.C. §§ 12-27 (1970).

⁶ According to its argument before the district court, Zenith had persistently attempted to export its radios and televisions to distributors and dealers in Great Britain, Canada and Australia, but it had been largely unsuccessful because these distributors and dealers had been threatened with suit by the patent pools. Zenith and its subsidiary, the Rauland Corporation, had initiated litigation against some of the American companies in the Canadian pool by means of a counterclaim in a patent infringement suit initiated by Radio Corporation of America. In 1957, as a result of this litigation, RCA, Western Electric Corporation and General Electric Corporation were released from all claims against them arising from pre-1957 conduct and these companies were enjoined from participation in the conspiracy insofar as radios and black-and-white television sets were concerned. At the same time Zenith was granted \$10,000,000 in damages as well as royalty-free world-wide rights under the inventions and patents of those companies issued prior to 1957. Soon thereafter, Zenith began to ship radios to Canada, but it still suffered from the operations of the patent pool in excluding its television sets. It was shortly after Zenith received a letter from the manager of the Canadian pool advising it that post-1957 patents would be asserted against it that HRI filed its original complaint in this suit. 239 F. Supp. at 72-76.

⁷ *United States v. General Electric Co.*, terminated by consent decree as to *N. V. Philips' Gloeilampenfabrieken*, Trade Cas. ¶ 70,342 (S.D.N.Y. June 25, 1962); terminated as to *Westinghouse Electric Corp.*, Trade Cas. ¶ 70,428 (S.D.N.Y. September 4, 1962); terminated as to *General Electric Co.*, Trade Cas. ¶ 70,546 (S.D.N.Y. November 1, 1962).

⁸ Specifically, the court entered preliminary findings of fact and conclusions of law that HRI had failed to establish any cause of action against Zenith, that HRI had misused its patents, and that Zenith had been damaged in stated amounts in all three foreign markets. The court found grounds for injunction and damages against Hazeltine Research, Inc., and its parent, Hazeltine Corp. In so doing, it relied upon a pre-trial stipulation that the research company and the parent corporation were to be considered as an entity for the purposes of this suit. 239 F. Supp. at 69.

⁹ Damages are recoverable under the federal antitrust laws only if suit therefor is "commenced within four years after the cause of action accrued," as required by § 4B of the Clayton Act (15 U.S.C. § 15b (1970)), plus any additional time during which the statute of limitations is tolled.

¹⁰ HRI claimed that part or all of Zenith's damages were barred by the releases described in note 6 supra.

iffs, and other technical factors. The district court permitted the defenses to be filed, but it denied HRI's motion for a judgment based on them. The court also heard HRI's additional evidence concerning the British and Australian markets and eventually reduced its damage award for those markets. The court, however, refused to modify its findings or conclusions as to the Canadian market.¹¹

On appeal, the decision of the trial court was reversed on the ground that Zenith had failed to prove injury to its business in any of the foreign markets as a result of the conspiracies.¹² On certiorari, the United States Supreme Court found that Zenith had proved damages in the Canadian market, but not in the British and Australian markets, and it remanded the case to the court of appeals for resolution of the remaining issues with respect to Canada.¹³ On remand, the court of appeals found that the trial court had erroneously rejected HRI's defenses of limitations and release on their merits. The court therefore held that Zenith was barred from recovering damages flowing from any misconduct on the part of HRI prior to certain releases given by Zenith to HRI's co-conspirators. The court further held that Zenith was barred from recovering that part of its damages in the Canadian market which had been caused by conspiratorial conduct prior to the commencement of the four-year period allowed by statute.¹⁴ The court of appeals remanded the case to the trial court to determine what portion of Zenith's damages arising between 1959 and 1963 had resulted from conduct occurring before that period and to reduce the award of damages accordingly.¹⁵ Before the district court could consider the

¹¹ For an account of the post-trial proceedings, see *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 105-07 (1969).

¹² The Second Circuit, however, affirmed the trial court's treble damage award for patent misuse. It further held that the district court lacked jurisdiction over the research company's parent corporation, and that the stipulation relied upon (see note 8 *supra*) was an insufficient basis for entering judgment against the parent corporation. *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 388 F.2d 25 (7th Cir. 1967).

¹³ The Supreme Court agreed with the holding of the court of appeals that the district court lacked jurisdiction over the parent corporation, but it also held that the district court had properly granted injunctive relief against the research company's participation in the conspiracy restricting Zenith's trade in the Canadian market. The Court also noted that the district court's refusal to disturb its original findings with respect to the Canadian market was a rejection of HRI's defenses either on the merits or on the ground that they had been waived under Fed. R. Civ. P. 12(h). 395 U.S. at 117 n.13.

¹⁴ See note 9 *supra*.

¹⁵ *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 418 F.2d 21, 23 (7th Cir. 1969) Zenith had claimed that the statute of limitations was tolled by the operation of § 5(b) of the Clayton Act (see note 19 *infra*) during the pendency of the original government suit against General Electric. However, the court of appeals decided that Zenith's tolling claim was not properly before it because it had not been properly raised at trial. The court held that, if the tolling argument had been properly raised, the law of that circuit would have required rejection of that argument. The court further held that since HRI was an unnamed joint tortfeasor and Zenith did not expressly reserve any rights against HRI, the releases given by Zenith to HRI's co-conspirators in 1957 barred recovery of all damages flowing from any misconduct of HRI prior to the dates of the releases. 418 F.2d at 23-25.

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issue on remand, the Supreme Court granted Zenith's petition for certiorari¹⁶ and, in an antitrust decision of major importance, held: (1) the statute of limitations for private antitrust suits is tolled against all participants in a conspiracy that is the object of a government suit whether or not these participants are named as defendants or conspirators in the government action; and (2) the effect of a release upon antitrust co-conspirators is to be determined in accordance with the intentions of the parties to that release. In accordance with these holdings, the Court reversed the decision of the court of appeals and remanded with instructions to reinstate the judgment of the trial court with respect to Canada.¹⁷

The Supreme Court's ruling in *Zenith* is likely to have a substantial effect on the burden of sustaining affirmative defenses in private antitrust suits. Furthermore, the judicial attitude reflected in the Court's approach in this case is likely to have a considerable effect on antitrust law in general. It is the purpose of this comment to examine the line of cases that have considered the policy which underlies the tolling of limitations in antitrust cases. The comment will then attempt to determine the applicability of the newly-announced "intention" rule regarding release of antitrust co-conspirators. Finally, the comment will consider generally the Court's rationale in reaching its decision and the possible effects the case may have on antitrust enforcement.

I. THE BACKGROUND

A. Tolling Of Limitations

Section 5 of the Clayton Act contains two principal provisions. The first of these permits the private plaintiff to use any final judgment against the defendant in a government suit as prima facie evidence of a violation of the antitrust laws.¹⁸ The second tolls the statute of limitations in private antitrust actions during the pendency of a government suit on which the actions are based.¹⁹ The two provisions were

¹⁶ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 979 (1970).

¹⁷ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, rehearing denied, 401 U.S. 1015 (1971).

¹⁸ 15 U.S.C. § 16(a) (1970), which provides that:

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 in actions under section 15a of this title.

¹⁹ 15 U.S.C. § 16(b), which provides that:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws

part of one undivided section until each was given the status of a distinct subsection when the Clayton Act was amended in 1955—the first becoming Section 5(a), and the second, Section 5(b).²⁰ Although various courts have reached different conclusions as to the legislative purpose underlying section 5(b), congressional intent has been a primary consideration of the courts in determining when to apply the tolling provision.²¹ The conclusion of each court considering the issue of intent has depended largely upon whether the inquiry was based on an examination of the face of section 5 as a whole or on an examination of the face of section 5(b) by itself, along with the history surrounding its enactment. It appears that, until recently, the intent of the tolling provision was determined on the former basis, to the almost complete exclusion of the latter.

By the time of the 1955 amendments to the Clayton Act, a line of federal cases had held that the two provisions of Section 5 were addressed to the same legislative intent and were coextensive in their application.²² It appears to have been assumed that the purpose of the tolling provision was to preserve the benefits of the provision granting the prima facie case. The early cases accordingly held that the statute of limitations could be suspended only long enough to permit the private plaintiff to obtain prima facie evidence in the form of a judgment in a prior government action. If the rules of collateral estoppel²³ did not apply, the courts did not permit tolling. In *Christensen v. Paramount Pictures, Inc.*,²⁴ for example, the plaintiff attempted to apply the tolling provision against corporate defendants which had not been parties to the prior government suit. The tolling provision was held not to apply because the decree obtained in the government suit could not have been introduced in evidence under the terms of section 5(a).²⁵

The notion that the operation of section 5(b) is limited to matters of collateral estoppel was perhaps most clearly articulated in *Sun*

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.

²⁰ Act of July 7, 1955, ch. 283, § 2, 69 Stat. 283.

²¹ See, e.g., *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284 (7th Cir. 1954); *Steiner v. Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

²² See, e.g., *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (W.D. Mo. 1953); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284 (7th Cir. 1954); *Steiner v. Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

²³ Under the doctrine of "collateral estoppel," a judgment, whether in favor of plaintiff or defendant, is conclusive in a subsequent action between the parties on a different claim as to issues actually litigated and determined in the prior action. *Stone v. William Stienen Mfg. Co.*, 7 N.J. Super. 321, 328, 70 A.2d 803, 807 (1949).

²⁴ 95 F. Supp. 446 (D. Utah 1951).

²⁵ *Id.* at 455.

*Theatre Corp. v. RKO Radio Pictures, Inc.*²⁶ Although the court in that case stated that the purpose of section 5 was to protect the private party's rights, it went on to construe that section narrowly. The purpose of the second paragraph, according to *Sun Theatre*, was to insure for the injured party "the full fruits of the government's case."²⁷ This was to be accomplished by suspending the running of the statute of limitations during the pendency of the government's suit in favor of a party who had been injured by the same violation. The wording of the statute—"[tolling limitations] in respect of each and every private right of action . . . based in whole or in part on any matter complained of [in the government suit]"—led the court to conclude that the parties and the facts had to be identical:

Neither logic nor public policy considerations demand, or even permit, us to say that the pendency of a government antitrust suit operates to suspend the running of the statute as to every party who participated, either locally or nationally, in the nationwide combination condemned thereby without regard to whether or not he was named therein as a defendant. Rather, the suspension provisions must be construed in the light of what can be accomplished thereby. Our hypothetical complaint charges and our hypothetical decree finds that A, B, C and D conspired together to eliminate competition on a national scale. The decree is prima facie evidence as to this question only. P reaps the full benefit of Section 5 if the statute is suspended as to the parties named. If a different result is desirable, provision for its promulgation is a function of the Congress, not of the courts.²⁸

As late as 1956, it was held in *Steiner v. 20th Century-Fox Film Corp.*²⁹ that in order for the tolling provision to apply, there had to be an identity of subject matter between the private suit and the government action on which it was based:

General allegations of conduct in violation of the antitrust laws unrelated to the same conduct alleged in a public suit are insufficient to toll the running of a statute of limitations. A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants.³⁰

Thus even after the 1955 amendments to the Clayton Act, the courts appeared to attach little significance to the division of Section 5. It was

²⁶ 213 F.2d 284 (7th Cir. 1954).

²⁷ Id. at 291.

²⁸ Id.

²⁹ 232 F.2d 190 (9th Cir. 1956).

³⁰ Id. at 196.

assumed that the second paragraph was intended only to give greater operative effect to the collateral estoppel provision of the first paragraph. As long as this assumption prevailed, those who had been injured by the effects of antitrust conspiracies could obtain the treble-damage remedy only with great difficulty.³¹

Prior to 1971, it was also generally assumed that an antitrust cause of action accrues, and the statute of limitations begins to run, at the time a prospective defendant commits an act which injures the plaintiff's business.³² In the context of an antitrust conspiracy, it often takes many months or even years for a plaintiff to begin to feel the injurious effects of such an act; even then he may be at a loss to explain the decline in his business. Without help, he may never discover the existence of a conspiracy or the identity of its perpetrators. Although he may suspect a conspiracy, he may be unable to prove anything. Situations are readily conceived in which the limitations period has almost run out by the time the government brings action against the conspirators; yet this may be the first time the plaintiff is able to discover what has happened to him. Under the rule of *Steiner*, *Christensen*, and *Sun Theatre*, if for some reason the government failed to join a particular conspirator as a defendant in its suit, a plaintiff whose damage had resulted largely or primarily from that conspirator's participation might lose his right of action before he even knew that he had been injured.

Decisions such as those just mentioned had the effect of limiting the availability of the private antitrust remedy.³³ They resulted largely from the assumption that the two parts of section 5 were addressed to the same legislative purpose and, as such, were coextensive in their application. However, once the courts began to consider the second paragraph as independent of the first, their treatment of the entire section began to yield a different result. In 1961, the Tenth Circuit ruled in *Union Carbide and Carbon Corp. v. Nisley*³⁴ that the application of section 5(b) is not limited to the evidentiary rules of estoppel which restrict section 5(a). That court held that, although "the competency

³¹ This difficulty is illustrated by the fact that between 1952 and 1958 private plaintiffs in treble damage suits won 20 cases and lost 115, for a ratio of about 6 to 1 in favor of defendants. In private suits for injunctive relief only, there were eight victories as opposed to nine losses, or almost an even split during that period. Government suits during that period resulted in 31 government victories and 39 government defeats, for a ratio of about 4 to 3. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 *Antitrust Bull.* 5, 11-12 (1959). Such figures as these have been interpreted by some as an indication of judicial hostility to the treble damage remedy. See Bicks, at 11-15; Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 *Harv. L. Rev.* 1566, 1569 (1967).

³² See, e.g., *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950); *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 20 (3d Cir. 1917); Fulda and Kemme, *The Statute of Limitations in Antitrust Litigation*, 19 *Ohio State L. J.* 233 (1955).

³³ See note 34 *supra*.

³⁴ 300 F.2d 561 (10th Cir. 1961).

of a government judgment in a private suit is necessarily restricted to the requirements of due process, . . . the tolling of the statute during the pendency of the government litigation is not so limited."³⁵ As long as there was a "substantial identity of the subject matter," the running of the statute would be suspended.³⁶ Given this view as to the purpose of the statute, the "identity" requirement of *Steiner* took on a new meaning.

The problem of interpreting section 5(b) first came before the Supreme Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,³⁷ a case concerning the applicability of the tolling provision to Federal Trade Commission actions. In construing the legislative intent, the Court first examined the statute itself. It found certain textual distinctions between sections 5(a) and 5(b) which suggested that the two paragraphs were not wholly interdependent. The Court noted, for example, that whereas the words "final judgment or decree" appear to be of crucial significance in the application of the first paragraph, the second paragraph tolls limitations during the pendency of the prior government suit regardless of the government's success or failure in prosecuting its case.³⁸ Furthermore, whereas the first paragraph provides for the use of the judgment or decree only "as to . . . matters respecting which . . . [it] would be an estoppel as between the parties," the tolling provision applies to "every private right of action . . . based in whole or in part on any matter complained of" in the government suit.³⁹ The Court also surveyed the background to the enactment of section 5, including congressional speeches and resolutions,⁴⁰ and concluded that there were differences in the policies behind the two provisions of the section.

Whatever ambiguities may exist in the legislative history of these provisions as to other questions, it is plain that in § 5(b) Congress meant to assist private litigants in utilizing

³⁵ *Id.* at 569.

³⁶ *Id.* at 570.

³⁷ 381 U.S. 311 (1965).

³⁸ *Id.* at 316.

³⁹ *Id.* at 316-17.

⁴⁰ The Court cited, *inter alia*, the following legislative history:

Section 5, later §§ 5(a) and 5(b), was passed in response to the plea of President Wilson. In a speech to the Congress on January 20, 1914, he urged that a law be enacted which would permit victims of antitrust violations to have "redress upon the facts and judgments proved and entered in suits by the Government" and that "the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action." 51 Cong. Rec. 1964. The broad aim of this enactment was to use "private self-interest as a means of enforcement" of the antitrust laws. (Citations omitted.) 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.

Id. at 318-319.

any benefits they might cull from government antitrust actions.⁴¹

On the basis of these inquiries, the Court declared that the two provisions of section 5 are not necessarily coextensive⁴² and that the tolling provision of section 5(b) applies to Federal Trade Commission actions.⁴³

In *Leh v. General Petroleum Corp.*,⁴⁴ the Supreme Court began to define the new scope afforded to section 5(b) by the *Minnesota Mining* decision. The complaint in *Leh* differed significantly from that in the prior government proceeding on which it was based. Whereas the government complaint had alleged the operation of a conspiracy in the Pacific states, *Leh's* complaint alleged a nationwide conspiracy. Moreover, two of the defendants in the government suit were not named as defendants in *Leh's* complaint.⁴⁵ The Court held that these subject-matter differences were not fatal, and that *Leh's* complaint, being "based in whole or in part on any matter complained of," met the requirements of the statute. The requirement of "identity" as defined in *Steiner* was specifically rejected.⁴⁶

In *Michigan v. Morton Salt Co.*,⁴⁷ a federal district court in Minnesota was faced with a fact situation similar to that in *Christensen*. Several of the defendants in that case, who had not been named as conspirators or as defendants in the prior government action, asserted the statute of limitations as a defense. They argued that the statute was not tolled, citing the line of cases holding that the two provisions of section 5(a) were coextensive.⁴⁸ However, the district court found that the *Minnesota Mining* and *Leh* decisions had rendered the theory of coextensiveness obsolete, and that the independent policy of section 5(b) outweighed any hardship caused to the defendants in suspending the statute.⁴⁹ The court therefore concluded that complete identity of the parties was not required, and that the tolling provision could be applied against a defendant notwithstanding the fact that he was neither a party to nor named a conspirator in the government action.⁵⁰ The *Morton Salt* decision was affirmed by the Eighth Circuit in *Hardy Salt Co. v. Illinois*,⁵¹ and the Third Circuit reached a similar result in *New Jersey v. Morton Salt Co.*⁵² Thus, with the Seventh Circuit, in *Sun Theatre*, and the Ninth Circuit, in *Steiner*, holding to the contrary,

⁴¹ *Id.* at 317.

⁴² *Id.* at 318.

⁴³ *Id.* at 321-22.

⁴⁴ 382 U.S. 54 (1965).

⁴⁵ *Id.* at 60-62.

⁴⁶ *Id.* at 59.

⁴⁷ 259 F. Supp. 35 (D. Minn. 1966).

⁴⁸ *Id.* at 53.

⁴⁹ *Id.* at 54-56.

⁵⁰ *Id.* at 57.

⁵¹ 377 F.2d 768 (8th Cir. 1967).

⁵² 387 F.2d 94 (3d Cir. 1967).

there was a substantial conflict on the question of the tolling provision when that issue came before the Court in *Zenith*.

B. *The Effect Of A Release On Antitrust Co-Conspirators*

At early common law, when a release was given to one of two or more joint tortfeasors, it necessarily released the others.⁵³ The wrongdoers having acted in concert, there existed only one cause of action, and the injured party was entitled to only one satisfaction from whatever source. The release of one wrongdoer therefore barred action against the other for the same wrong.⁵⁴ Because early releases were under seal, possible disputes over consideration were avoided. With the diminished importance of the seal in the United States, the distinction between a release (which is a surrender of a cause of action, and which may be gratuitous or given for less than complete compensation) and a satisfaction (which is an acceptance of full compensation for the injury) became more important as a source of difficulty.⁵⁵ Even where a releasing instrument contained an express reservation of the releasor's rights against joint wrongdoers who were not parties to the release, such a reservation was of no effect because only one recovery was permitted.⁵⁶ The common law rule has for some time been criticized as tending to defeat the fair expectations and intentions of the parties to the release.⁵⁷ The rule has often compelled a plaintiff either to forego any opportunity of obtaining what he could from one defendant without suit or to give up his entire claim against the other defendant without full compensation.⁵⁸

Dissatisfaction with the original common-law rule led many American courts and legislatures to modify it in various ways. The most common of these has been to hold that, as distinguished from a release, a covenant not to sue one of several joint tortfeasors does not operate to release the others.⁵⁹ By such a covenant, the plaintiff does not surrender his cause of action, but merely agrees that he will not enforce it; he becomes liable for an equivalent amount of damages if he breaks the agreement and sues.⁶⁰ Many jurisdictions in which this distinction is made place considerable importance on the form of the instrument, and on whether the actual words used are the words of a covenant not to sue or the words of a release.⁶¹ In some jurisdictions, an instrument which is in the form of a release but which also expressly reserves rights against persons not parties to the release is treated as a covenant not to sue.⁶²

⁵³ W. Prosser, *Law of Torts* § 46 (3d ed. 1964).

⁵⁴ See Annot., *Joint Tortfeasors—Release*, 73 A.L.R. 2d 403, 407 (1960).

⁵⁵ Prosser, *supra* note 53 at § 46.

⁵⁶ *Id.*

⁵⁷ 73 A.L.R. 2d at 407.

⁵⁸ Prosser, *supra* note 53 at § 46.

⁵⁹ 73 A.L.R. 2d at 418-19.

⁶⁰ Prosser, *supra* note 53 at § 46.

⁶¹ 73 A.L.R.2d at 420.

⁶² *Bolton v. Ziegler*, 111 F. Supp. 516 (N.D. Iowa 1953).

In several states the common law rule has been modified by statute. The rule of the Uniform Contribution Among Tortfeasors Act is that a release by the injured person of one tortfeasor does not release other joint tortfeasors unless the release expressly so provides.⁶³ On the other hand, under the First Restatement of Torts and under the Model Joint Obligations Act, the release of one joint tortfeasor generally releases all others, but it will not have such an effect if a plaintiff expressly reserves his rights against the others.⁶⁴ It is much easier for a plaintiff to reserve rights against joint tortfeasors under any of the modified rules, but none of these rules completely eliminates the difficulties which existed at common law. The injured person who releases one tortfeasor for less than full satisfaction and only later discovers the identity of other persons jointly responsible for his injury, from whom he could have recovered more, is still at a disadvantage. Unless he has provided in the releasing instrument for the subsequent unforeseen discovery of additional obligors, he must be content with less than full satisfaction for his injury. Attempts to achieve full satisfaction in all cases where it is desired have yielded still another rule, which is incorporated in the tentative draft of the Second Restatement of Torts. This rule provides that the effect of a release upon a joint tortfeasor not a party to that instrument is to be determined in accordance with the intention of the parties.⁶⁵ By this formulation, the need to examine the instrument for magic words of one kind or another is alleviated, and extrinsic evidence may be considered in appropriate cases.⁶⁶

The common law rule, by which a release of one released all, was employed by the federal courts in many cases governed by state or federal common law.⁶⁷ The trial court in *Twentieth Century-Fox Film Corp. v. Winchester Drive-in Theatre, Inc.*,⁶⁸ found that the scope of

⁶³ Uniform Contribution Among Tortfeasors Act, 9 Uniform Laws Ann. 223. This act has been adopted in Arkansas, Ark. Stat. Ann. §§ 34-1001 to -1009 (1947); Delaware, Del. Code Ann. tit. 10, §§ 6301-08 (1953); Hawaii, Hawaii Rev. Laws §§ 246-10 to -16 (1955); Maryland, Md. Ann. Code art. 50, §§ 16-24 (1957); New Mexico, N.M. Stat. Ann. §§ 24-1-11 to -1-18 (1953); Pennsylvania, Pa. Stat. Ann. §§ 2082-89 (1967); Rhode Island, R.I. Gen. Laws §§ 10-6-1 to -6-11 (1956); South Dakota, S.D. Comp. Laws §§ 15-8-11 to -8-22 (1967). Two States—Massachusetts and North Dakota—have adopted a slightly different 1955 revision of the Act. See Mass. Gen. Laws Ann. ch. 231B §§ 1-4 (Supp. 1971); N.D. Cent. Code §§ 32-3801 to -3804 (1960).

⁶⁴ Restatement of Torts § 885(1) (1939). The Model Joint Obligations Act, 9B Uniform Laws Ann. 355, has been adopted in four states. These states are Nevada, Nev. Rev. Stat. ch. 101 (1967); New York, N.Y. General Obligations Law §§ 15-101 to -109 (1964); Utah, Utah Code Ann. §§ 15-4-1 to -4-7 (1953); Wisconsin, Wis. Stat. §§ 113.01-.10.

⁶⁵ Restatement (Second) of Torts § 885 (1) (Tent. Draft No. 16, 1970).

⁶⁶ Id. § 885, comment d.

⁶⁷ See, e.g., *Chicago & Alton R.R. v. Wagner*, 239 U.S. 452, 456-57 (1915); *United States v. Price*, 50 U.S. (9 How.) 83, 92 (1850); *Hunt v. Rhodes*, 26 U.S. (1 Pet.) 1, 16 (1828); however, it was expressly disapproved by the Supreme Court for cases arising under federal patent law. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 501 (1964).

⁶⁸ 232 F. Supp. 556 (N.D. Cal. 1965).

the release in question was a matter of federal law, because the case arose under the antitrust laws. The court concluded that the Uniform Rule was the most appropriate rule in such a case.⁶⁹ On appeal, the Ninth Circuit affirmed the district court's determination that federal, not state, law should control, but, finding the First Restatement rule to be the proper one, ruled that the defendants, against whom no rights were reserved, had nevertheless been released.⁷⁰ In *Zenith*, HRI claimed, and the Second Circuit agreed, that the First Restatement rule was most appropriate in cases arising under the federal antitrust laws; and that since *Zenith* had not expressly reserved any rights against HRI, the research company was entitled to the benefit of the releases given by *Zenith* to some of HRI's co-conspirators in 1957. The court of appeals therefore held that, since these releases barred recovery of all damages flowing from any misconduct prior to 1959, damages suffered by *Zenith* between 1959 and 1963 as the result of conduct occurring before 1957 should not have been included in the award of the trial court.⁷¹

II. *Zenith Radio Corp. v. Hazeltine Research Inc.*:

TOLLING OF LIMITATIONS AND EFFECT OF RELEASE

Any uncertainties that remained concerning the application of the tolling provision and the effects of a release were put to rest in the *Zenith* decision. HRI had argued that part or all of *Zenith's* damages were barred by the operation of the statute of limitations in Section 4B of the Clayton Act.⁷² To this contention *Zenith* had replied that the statute of limitations was tolled by operation of Section 5 (b) of the Clayton Act⁷³ during the pendency of the original government action,⁷⁴ and for one year thereafter.

Although HRI had asserted that the counter-claimant's tolling argument had been raised too late in the proceedings to be considered on its merits, the Supreme Court in *Zenith* found otherwise.⁷⁵ The

⁶⁹ Id. at 562.

⁷⁰ 351 F.2d 925, 931 (9th Cir. 1965).

⁷¹ 418 F.2d at 24. The releases here being discussed are the releases, described in note 6 supra, which were given in settlement of the counterclaim of *Zenith* and Rauland Corporation against Radio Corporation of America.

⁷² See note 9 supra.

⁷³ See note 19 supra.

⁷⁴ See note 7 supra.

⁷⁵ Before it reached this issue, however, the Supreme Court considered the holding of the court of appeals that the district court had erroneously rejected HRI's defenses on their merits rather than on waiver grounds. Reversing this conclusion, the Supreme Court held that, if the district court had ruled that the limitations and release defenses were waived by the untimeliness of their presentation, it did not abuse its discretion. 401 U.S. at 332. Allowing these defenses to be litigated would have entitled *Zenith* to avoid undue prejudice by perfecting its proof as to damages resulting from the operation of the patent pools from 1959 to 1963. This would have required a virtual retrial of the damage issue. At the time of the hearings in the district court, Fed. R. Civ. P. 12(h) (1963) provided that "(a) party waives all defenses and objections which he does not present" either by motion or in answer or reply. The grant of leave to amend

merits of the tolling issue had been briefly considered in a footnote to the opinion of the court of appeals which had concluded that the law of that circuit, as established by the *Sun Theatre* decision, was that tolling takes place only with respect to defendants who were parties to the prior government suit.⁷⁶ Finding this to be error, the Supreme Court chose to consider Section 5 (b) of the Clayton Act as being independent of Section 5 (a), and it examined the tolling provision to determine its independent purpose. On the basis of this inquiry, the Court upheld the *Morton Salt* interpretation of legislative intent, and concluded that the tolling provision of section 5(b) is available against private treble damage action defendants not named as defendants or conspirators in the government suit on which the private action is based:

The language of 15 U.S.C. § 16(b) expressly provides for tolling of the statute of limitations "in respect of *every* private right of action . . . based *in whole or in part* on any matter complained of" in the proceeding instituted by the Government. . . . On the face of this section, a private party who brings suit for a conspiracy against which the government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the

HRI's pleadings pursuant to Rule 15(a) was within the discretion of the trial court, but, absent a showing that substantial justice would be served by such an amendment, the Supreme Court determined that "[w]hatever HRI's reasons for not offering its limitations and release defenses during trial . . . the trial court would not have erred in concluding that they were waived." 401 U.S. at 333.

For two members of the Court, this was all that need have been decided. In a separate opinion, Mr. Justice Harlan, joined by Mr. Justice Stewart, concurred as to the overall result in the case on the grounds that the trial judge had properly rejected the limitations and release defenses on grounds that they were belatedly raised, and that it was unnecessary to reach any other issues. 401 U.S. at 349-54. However, in the absence of a statement by the district judge as to why he did not amend his findings regarding the Canadian market, the majority of the Court refused to make such an assumption. Instead, they proceeded to consider what conclusions would follow from a finding that the defenses were not waived, eventually rejecting both defenses on their merits.

Before it could reach the tolling argument, the Court dealt with another issue regarding timeliness of pleadings. Zenith had argued in its original brief before the district court that the statute of limitations was tolled by reason of § 5(b) of the Clayton Act during the pendency of *United States v. General Electric* from November 28, 1958, to November 1, 1962, and for one year thereafter. However, this argument was not formally raised in Zenith's original complaint. The court of appeals had therefore assumed that this issue, not having been raised at the trial in reply to HRI's affirmative defense, was not properly before the Court, and it decided that Zenith was forever barred from raising the claim of tolling. 418 F.2d at 25 n.3. The Supreme Court decided that it was only fair to permit Zenith to amend its reply after trial. It is not necessary, the Court explained, for a party to raise a claim of tolling until the defense of limitations is raised, especially where, as here, there was little reason to anticipate such a defense. Since the trial judge was ambiguous as to his reason for rejecting HRI's defenses, it was only natural for Zenith to read that decision as having been made on waiver grounds, and the Court ruled that Zenith should therefore not be penalized for failing to enter a formal plea of tolling. 401 U.S. at 334-35.

⁷⁶ 418 F.2d at 25 n.3.

government suit, even if the defendant named in the private suit was named neither as a defendant nor as a conspirator by the Government. If, that is, the Government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied. Nor could tolling be denied if a defendant had never been shown to be a conspirator by the evidence offered in the earlier Government suit, but then had been proved to be such in the subsequent private suit.⁷⁷

In the legislative history of section 5(b), the Court found no indication that Congress intended the tolling provision to apply only against parties defendant in the government action. It determined that the aim of Congress was to make private antitrust litigation an effective weapon for the enforcement of the antitrust laws. Consistent with this aim, Congress enacted section 5(b) to enable the private plaintiff to receive any benefits which might have been furnished by the prior government action.⁷⁸ With respect to those decisions which had confined the operation of the tolling provision to defendants named in the government suit, the Court stated that these cases "fly in the face of the language of the statute, are antithetical to its aims, and cannot be squared with our recent decisions" in *Minnesota Mining* and *Leh*.⁷⁹ It therefore ruled that, by reason of the pendency of the government's suit against HRI's co-conspirators, the four-year statute of limitations was tolled at all times between November 24, 1958, and November 1, 1963. Since the counterclaim was brought within that period, Zenith was entitled to sue for any damage to its business occurring as a result of conspiratorial conduct occurring at any time after November 24, 1954; that is, at any time within four years prior to the filing of the government suit.⁸⁰

With respect to the question of damages, HRI had contended—and the court of appeals had agreed—that Zenith was entitled to recover only that portion of its damages which resulted from conspiratorial acts occurring during the statutory period. The argument was that since the tolling argument had not been timely raised, and since Section 5(b) of the Clayton Act did not provide for tolling against persons such as HRI who were not parties to the prior government suit, damages were recoverable only for the four years immediately prior to the filing of the counterclaim. HRI argued that a cause of action accrues when the defendant commits an act which injures the plaintiff. Zenith had been able to show only one overt act in furtherance of the conspiracy during the four year period prior to the filing

⁷⁷ 401 U.S. at 335 (emphasis added by *Zenith* Court).

⁷⁸ Id. at 336.

⁷⁹ Id. at 336-37.

⁸⁰ Id. at 337-38. However, this finding was subject to the Court's further determination as to the release issue.

of the counterclaim—the sending on June 5, 1959, of a letter from the manager of the Canadian Patent Pool threatening Zenith with suits for patent infringement.⁸¹ HRI maintained that the only damages which could be recovered were damages flowing from that act. Since the original computation of damages was made on the assumption that full damages began to accrue on May 22, 1959, and since the only overt conspiratorial act did not occur until June 5, 1959, HRI argued that at least some of the damages awarded Zenith in the Canadian market were not attributable to that act.⁸² It was on the basis of this argument that the court of appeals had concluded that the award of damages was excessive.⁸³

In reversing this conclusion, the Supreme Court reasoned that, because the statute of limitations was tolled, the period for which recovery was possible commenced on November 24, 1954. But if Zenith had brought its suit in 1954 for conspiratorial conduct prior to that time and had sought to recover for damages it expected to suffer between 1959 and 1963, those damages would have been denied as being too speculative to be proven. Refusal to award future damages as too speculative, the Court reasoned, is equivalent to holding that no cause of action has yet accrued. In such an instance, therefore, the cause of action for future damages accrues only on the date they are suffered. To rule otherwise, the Court explained, would present a windfall to the antitrust violator and would undermine the congressional purpose that private actions serve as a bulwark of antitrust enforcement. The Court concluded that since Zenith could not have recovered 1959-1963 damages if it had brought suit for them at the beginning of the extended limitations period, it must now recover all damages which it suffered during the four year period to which Zenith had limited its claim of damages.⁸⁴

HRI contended, however, that, irrespective of the Court's disposition concerning the limitations defense, part or all of Zenith's claim for damages was barred by the releases given by Zenith to HRI's co-conspirators in 1957.⁸⁵ Before determining the effect of these releases, the Supreme Court reviewed the prevailing rules as to when the release of one joint tortfeasor releases other jointly-liable tortfeasors who were not parties to or named in the release. The Court first considered the applicability to antitrust treble damage suits of the "ancient common-law rule, which was grounded upon a formalistic doctrine that a release extinguished the cause of action to which it related."⁸⁶ Private antitrust litigation, the Court explained, is usually multi-party and multi-state in character, for conspirators must often be sued in a number of

⁸¹ This is the same letter described in note 6 *supra*.

⁸² Respondent's Brief at 18-41, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

⁸³ 418 F.2d at 25-26.

⁸⁴ 401 U.S. at 338-42.

⁸⁵ See note 6 *supra*.

⁸⁶ 401 U.S. at 343.

different states if they are to be reached. While defendants in some states may be willing to enter into settlements, defendants in other states may refuse to do so. Therefore, the Court determined, to adopt the "ancient common-law rule" would frustrate partial settlements and thereby promote litigation.⁸⁷ Having recently rejected this rule as to patent infringement suits,⁸⁸ the Court *now* rejected it as to antitrust suits. The Court likewise disposed of the Uniform and First Restatement rules, saying that to adopt either of them "would be to create a trap for unwary plaintiffs' attorneys."⁸⁹ The Court chose, instead, to adopt the Second Restatement's "intention" rule as the rule "most consistent with the aims and purposes of the treble damage remedy under the antitrust laws The straightforward rule is that a party releases only those other parties whom he intends to release."⁹⁰ Since HRI was not a party to the release, the Court looked to parole evidence to determine the intention of the parties.⁹¹ On the basis of the contract in which the parties in 1957 agreed to exchange releases, the Court determined that the releases were intended to bind or benefit the named parties and their parents and subsidiaries. HRI, being neither a party to the releases nor a parent or subsidiary of a party to the releases, was therefore ruled not entitled to the benefits of the releases.

The Court noted, however, that if any portion of the \$10,000,000 received by Zenith in return for the 1957 releases was to provide compensation for future damages Zenith anticipated it would suffer from pre-1957 conspiratorial acts, that amount would not be chargeable to HRI.

It is settled that, entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment.⁹²

This presented only a minor problem for the Court, however, because undisputed evidence at trial had disclosed that the entire amount of the settlement was understood by the parties as compensation only for Zenith's damages up to the time of the releases.

III. CONCLUSION

The method by which the Court arrived at its rulings is perhaps as significant as the rulings themselves. Not content merely to resolve

⁸⁷ Id. at 347.

⁸⁸ *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476 (1964).

⁸⁹ 401 U.S. at 347.

⁹⁰ Id. at 346-47.

⁹¹ The Court stated that:

Resort may be had to the contract in construing the release since the parole evidence rule [under the Restatement (Second) of Torts] is . . . operative only as to parties to a document, and HRI here was not a party to the release.

Id. at 347 n.12.

⁹² Id. at 348.

the issues squarely before it, the Court seems to have actively sought to further a general policy. Great weight appears to have been attached to the importance of the treble damage suit as a means of enforcing the antitrust laws.⁹³ This consideration seems to have outweighed any concern over the inconvenience that antitrust defendants might suffer as a result of the Court's decision. Henceforth, the tolling provision will be construed in a way that best facilitates private enforcement of the antitrust laws. With respect to damages, a cause of action will accrue when the damages are suffered, regardless of when the precipitating act occurred. When a co-conspirator, not a party to a release, attempts to raise the release as an affirmative defense, he will no longer be able to escape liability merely by showing that such a release exists; rather, he will have to demonstrate that the parties *intended* by that instrument to release him as well. In the reasoning of the Court, these rules are the most appropriate ones for private treble damage actions because they are the ones most conducive to effective antitrust enforcement.

This marked policy-directed approach has elicited at least one accusation of "unwonted aggressiveness" against antitrust defendants.⁹⁴ The validity of such an accusation, however, is doubtful. The increased burden imposed on antitrust defendants is far from overwhelming. It is true that they can no longer escape liability by automatically raising the statute of limitations or merely pointing to a general release. It is also true that they will be called on in their defense to produce evidence of events which occurred many years before the initiation of the suit. Nevertheless, the burden resting on the plaintiff remains substantial. Although he benefits from the tolling provision, he cannot make use of a judgment obtained in a prior government suit in which his defendant was not a named party. This burden is compounded by the fact that the plaintiff often has considerably greater difficulty in obtaining crucial information which is usually within the exclusive knowledge of the conspirators. With respect to the defendant's burden of having to produce in his behalf what might be termed "stale" evidence, it should be noted that any corporation that is associated in any way—culpably or not—with organizations which are sued by the government for violation of the antitrust laws is put on sufficient notice to preserve any evidence which might be used in its own defense in the event it is joined in a subsequent treble damage suit.

Since injunctions and fines are of little deterrent effect against giant concentrations of economic power,⁹⁵ private treble damage actions are necessary if the antitrust laws are to be effectively enforced. As has been noted, however, these actions have had a dismal success

⁹³ *Id.* at 336, 340.

⁹⁴ See 40 U.S.L.W. 3037 (1971).

⁹⁵ Maximum fine for violation of the Sherman Act is \$50,000. 15 U.S.C. § 1 (1970).

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rate.⁹⁶ It is anticipated that *Zenith's* holdings concerning limitations and releases will reverse this pattern and make treble damage actions the enforcement weapon they were intended to be.

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⁹⁶ See note 31 *supra*.