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Antitrust--Section 4B Clayton Act--Fraudulent Concealment Held to Toll Statute of Limitations (Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962))

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RECENT DECISIONS

ANTITRUST — SECTION 4B CLAYTON ACT — FRAUDULENT CONCEALMENT HELD TO TOLL STATUTE OF LIMITATIONS.—The principal cases arose out of petitions for treble damages filed in 1962 under Section 4 of the Clayton Act.[1] The plaintiffs, alleging conspiracies in violation of Section 1 of the Sherman Act,[2] contended that the defendants had fraudulently concealed the existence of the alleged conspiracies. Defendants pleaded that the statute of limitations barred these actions since "fraudulent concealment" does not cause a tolling of the four-year statute. The Courts of Appeals of the Second and Eighth Circuits *held* that "fraudulent concealment" tolls the four-year statute of limitations applicable to civil antitrust litigation. *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962), *affirming* 207 F. Supp. 613 (S.D.N.Y. 1962); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir. 1962), *reversing* 210 F. Supp. 545 (W.D. Mo. 1962).

The 1940's saw an increase in the number of civil antitrust suits for damages brought in federal courts.[3] Because of the lack of a federal statute of limitations in this area, the federal courts were remitted to state law to determine the statutory period[4] and were bound by the state courts' construction of their statutes. As a result, federal courts were confronted with the added problem of "forum shopping," since the period of limitations in the several states varied from one to twenty years.[5] The Attorney General's National Committee to Study the Antitrust Laws recommended to Congress a uniform statutory period.[6]

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[1] Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] Sherman Act § 1, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958).

[3] Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 242 (2d Cir. 1962).

[4] Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 NW. U.L. REV. 29, 31 (1962).

[5] *Id.* at 32.

[6] *Id.* at 31.

Several Congressmen proposed various amendments to include a tolling provision which would protect plaintiffs injured by fraud or conspiracy.[7]

On January 7, 1956, the federal four-year statute of limitations in civil antitrust suits under Section 4B of the Clayton Act became effective. This section provides: "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ." [8]

The ensuing split in the construction of the above section among the district courts revolves basically around two interpretations of legislative intent. Some argue that Congress expressly rejected tolling provisions based on the doctrine of "fraudulent concealment" while others contend that the intent of Congress was only to provide for a "discovery provision," *i.e.*, a suspension of the running of the statute until the plaintiff discovered or should reasonably have discovered the conspiracy.[9] The district courts for Colorado,[10] Southern New York,[11] Northern Illinois,[12] and Eastern Pennsylvania [13] all decided in favor of tolling. Those for Western Missouri,[14] Northern Georgia,[15] Utah,[16] and New Mexico [17] decided that the statute should not be tolled. The principal cases represent the first pronouncements in this area by appellate courts.

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[7] See H.R. REP. No. 422, 84th Cong., 1st Sess. (1955); H.R. 4954, 84th Cong., 1st Sess. (1955); H.R. 467, 83d Cong., 1st Sess. (1953); H.R. 3408, 82d Cong., 1st Sess. (1951); H.R. 1986, 82d Cong., 1st Sess. (1951); H.R. 1323, 82d Cong., 1st Sess. (1951); H.R. 8763, 81st Cong., 2d Sess. (1950); H.R. 7905, 81st Cong., 2d Sess. (1950); H.R. 4985, 81st Cong., 1st Sess. (1949).

[8] Clayton Act § 4B, added by 69 Stat. 283 (1955), 15 U.S.C. § 15b (1958).

[9] See *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 3 (1951); *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 1, 14, pt. 5 (1950); *Hearings on S. 1910 Before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. (1949).

[10] Public Serv. Co. v. Allen-Bradley Co., Civil No. 7349, D. Colo., Sept. 11, 1962.

[11] Atlantic City Elec. Co. v. General Elec., *supra* note 3.

[12] Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 210 F. Supp. 557 (N.D. Ill. 1962).

[13] United States v. General Elec. Co., Civil No. 29379, E.D. Pa., Aug. 21, 1962.

[14] Kansas City, Mo. v. Federal Pac. Elec. Co., 210 F. Supp. 545 (W.D. Mo. 1962).

[15] Rinzler v. Westinghouse Elec. Co., Civil No. 7427, N.D. Ga., Oct. 29, 1962.

[16] Brigham City Corp. v. General Elec. Co., 210 F. Supp. 574 (D. Utah 1962).

[17] Public Serv. Co. v. General Elec. Co., Civil No. 4924, D.N.M., July 25, 1962.

Since the rationale of the Second Circuit has been adopted by the Eighth Circuit, the principal cases will be treated as one, with the dissenting opinion in the Second Circuit being given individual treatment.

The plaintiffs in the principal cases alleged a violation of Section 4 of the Clayton Act. As early as 1948 and until 1960, the defendants used a scheme called the "light of the moon formula" for quoting to utility companies almost identical prices for electrical equipment. Through a rotating cycle the defendant corporations would be aware of each other's bids. As a result some would bid low, some intermediately, and others high. Each bidder's position would then rotate, and the prices submitted consequently gave the appearance of price competition. To conceal this scheme, defendants would hold secret meetings, call officers at their homes, use public pay phones, conceal or destroy records and resort to other practices to fix prices. The defendants set up as an affirmative defense that the statute of limitations under Section 4B of the Clayton Act barred the cause of action and that fraudulent concealment, even if established, does not toll the statute. As a basis for their contention, defendants offered various arguments which shall be treated in conjunction with the decisions presently under discussion.

The majority opinions [18] rely upon the doctrine established in *Bailey v. Glover* [19] in which it was held that the equitable doctrine of fraudulent concealment is read into every federal limitations statute. This doctrine is intended to enable a plaintiff "to obtain redress against a fraud concealed by the other party, or from which its nature remains a secret" [20] and in furtherance of this purpose, tolls the statute until the fraud is discovered. This rule was reaffirmed in *Exploration Co. v. United States* [21] and *Holmberg v. Armbrecht*.[22] The Court, in the cases under consideration, then ruled that there is a presumption that the doctrine of fraudulent concealment was well known to Congress and was thus present by implication in section 4B.[23] The dissent in the Second Circuit, relying strongly on the language of the statute that "any action" shall be "forever barred," concluded that the doctrine of fraudulent concealment does not toll the statute.[24] The dissenting

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[18] Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 239 (2d Cir. 1962); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 275 (8th Cir. 1962).

[19] 88 U.S. (21 Wall.) 342 (1874).

[20] *Id.* at 349.

[21] 247 U.S. 435, 446 (1918).

[22] 327 U.S. 392, 397 (1946).

[23] Atlantic City Elec. Co. v. General Elec. Co., *supra* note 18, at 239; Kansas City, Mo. v. Federal Pac. Elec. Co., *supra* note 18, at 277.

[24] Atlantic City Elec. Co. v. General Elec. Co., *supra* note 18, at 241.

opinion points out that the lack of discussion of the doctrine in the statute's legislative history evidences congressional unawareness of it,[25] and invokes[26] the statement by Mr. Justice Frankfurter enunciated in *Holmberg* that "if Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter." [27] Because of the apparently unambiguous language in section 4B, the dissent contended that the statute is definitive.

The majority arrived at a contrary conclusion upon their analysis of legislative history and congressional intent. Before its enactment, various amendments had been proposed to provide a tolling provision in the statute.[28] They were, however, rejected.[29] The majorities in the Second and Eighth Circuits believed that intent could be derived from the colloquy between Congressman Patman and the Chairman of the Judiciary Committee, Congressman Celler.[30] The statute, as enacted, provided for a running from the time of the wrong and not from the time of the discovery. Mr. Patman asked if that would be true in the case of fraud or conspiracy. Chairman Celler's answer was "No". He explained that in cases of fraud or conspiracy the statute would run from the time the wrong was discovered.[31] The dissenting opinion

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[25] *Id.* at 244. "If some equitable doctrine of discovery is to be read into every federal statute of limitations then such a doctrine has assumed such quasi-Constitutional dimensions that any statute enacted by the Congress which attempts to put an end to potential litigation within the memory of man—or at least of the witness—might for all practical purposes be as unconstitutional as those statutes which offend against the Constitutional amendments themselves." *Id.* at 241.

[26] *Id.* at 242.

[27] Holmberg v. Armbrecht, *supra* note 22, at 395.

[28] See H.R. REP. No. 422, 84th Cong., 1st Sess. (1955); H.R. 4954, 84th Cong., 1st Sess. (1955); H.R. 467, 83d Cong., 1st Sess. (1953); H.R. 3408, 82d Cong., 1st Sess. (1951); H.R. 1986, 82d Cong., 1st Sess. (1951); H.R. 1323, 82d Cong., 2d Sess. (1951); H.R. 8763, 81st Cong., 2d Sess. (1950); H.R. 7905, 81st Cong., 2d Sess. (1950); H.R. 4985, 81st Cong., 1st Sess. (1949).

[29] *Ibid.* See *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 82d Cong., 1st Sess., ser. 1, pt. 3 (1951); *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 81st Cong., 2d Sess., ser. 14, pt. 5 (1950); *Hearing on S. 1910 Before a Subcommittee of the Senate Committee on the Judiciary,* 81st Cong., 1st Sess. (1949).

[30] Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 241 (2d Cir. 1962); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 278-80 (8th Cir. 1962).

[31] H.R. 3408, 82d Cong., 1st Sess. (1951).

"Mr. Celler: We provide that the 4-year statute shall start to run . . . from the time the wrong was done, not from the time of discovery.

"Mr. Patman: Even in the case of fraud or conspiracy?

"Mr. Celler: No. In the case of fraud or conspiracy the statute of limitations only runs from the time of discovery.

notes that since these two Congressmen were proponents of the tolling provisions that were rejected, this colloquy does not establish congressional intent, and that the conclusion drawn from this colloquy by the majority "is an unwarranted speculation."[32]

Many of the opinions which favor tolling establish a distinction between "discovery provisions" and fraudulent concealment.[33] They therefore determine that the rejected amendments were specifically for discovery provisions and did not concern fraudulent concealment at all. Hence, these opinions maintain that a rejection of these amendments did not establish a congressional intent to reject a tolling for fraudulent concealment.

In 1961, the Second Circuit passed on a similar issue in *Moviecolor, Ltd. v. Eastman Kodak Co.*[34] There, the Court of Appeals looked to state law in determining whether the state statute of limitations could be tolled by fraudulent concealment. The court decided that it could. As a result, federal judges, including Judge Feinberg in the Southern District of New York,[35] are relying upon *Moviecolor* as a precedent for holding that fraudulent concealment tolls the federal statute. Although the Second Circuit affirmed the findings of Judge Feinberg, it noted that *Moviecolor* "is not dispositive of the question before us. . . ."[36] The principal cases represent, therefore, the first time a Courts of Appeals has decided this issue with reference to a federal statute.

The majority in the Second Circuit maintained that the equitable doctrine is read into every federal statute unless "Congress expressly provides to the contrary in clear and unambiguous language."[37] The Eighth Circuit emphasized that courts should interpret statutes only if the language is ambiguous. The Court thought, however, that an interpretation in this case was necessary.[38] The dissent in the Second Circuit argued that congressional intent in this case was clear and therefore the courts are bound by the statute as it stands.[39]

"Mr. Patman: That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

"Mr. Celler: Not at all."

[32] Atlantic City Elec. Co. v. General Elec. Co., *supra* note 30, at 243.

[33] *Id.* at 240; Kansas City, Mo. v. Federal Pac. Elec. Co, *supra* note 30, at 278.

[34] 288 F.2d 80, 82 (2d Cir. 1961).

[35] Atlantic City Elec. Co. v. General Elec. Co., 207 F. Supp. 613 (S.D.N.Y. 1962).

[36] Atlantic City Elec. Co. v. General Elec. Co., *supra* note 30, at 238-39 n.2.

[37] *Id.* at 241.

[38] Kansas City, Mo. v. Federal Pac. Elec. Co., *supra* note 30, at 273-74.

[39] Atlantic City Elec. Co. v. General Elec. Co., *supra* note 30, at 245.

It seems fundamental that courts should consider the purpose behind a statute giving rise to a cause of action before construing the limitations period governing such a statute. Since the present statute is designed to punish those who violate the antitrust laws by granting a civil action for treble damages to those injured, it would seem that to deny the existence of a tolling provision in case of fraud, conspiracy or fraudulent concealment violates the congressional intention to punish offenders. Section 16(b) [40] provides for a suspension of the statute of limitations during the pendency of governmental litigation and for one year thereafter. By allowing individuals to bring private suits and by expressly suspending the limitations period for these suits during the pendency of government actions, Congress would appear to favor the bringing of actions by private persons for violations of the antitrust laws. It seems inconsistent with this position not to toll the limitations period, and thus permit offenders of the antitrust laws who are more adept at concealing their violations to escape the civil action entirely. To say that a tolling provision is repugnant to a limitation statute is not a strong argument, since every statute of limitations can be considered repugnant to individual justice because it extinguishes the legal rights of a plaintiff.[41]

The determination of the principal cases will result, of necessity, in many suits, some of which might well have accrued as early as 1914,[42] the year in which Congress created the cause of action. There are at present approximately 1900 antitrust

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[40] 69 Stat. 283 (1955), 15 U.S.C. § 16(b) (1958). "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust 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 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."

[41] See Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 242 (2d Cir. 1962).

[42] *Id.* at 244-45. The Clayton Act became effective Oct. 15, 1914. Judge Moore, in his dissenting opinion, stated very practically, "Now that the issue has been presented so squarely in the many decisions arising out of a common situation, it may be that Congress will endeavor to decide whether there should be a reasonable time limit in conspiracy cases or whether litigants should be permitted to go back to the time of Benjamin Franklin, who probably created all the trouble by sealing up a bolt from the blue in a little glass jar to be sold to future generations, little knowing whether pursuant to open competition or clandestine conspiracy." *Ibid.*

actions [43] awaiting a final decision upon the precise issue of whether the existence of fraudulent concealment tolls the statute of limitations. While it is clear that the holding in the principal cases removes the defense of the statute of limitations to actions brought on violations which occurred many years ago, it should be remembered that the gathering of evidence and proof of damages on such claims will present a formidable task to plaintiffs.[44]

Although there has been considerable confusion with regard to the congressional intent, the Second and Eighth Circuits seem to have adopted the ancient legal maxim that courts are not disposed to allow a party to profit from his own wrong. The Tenth Circuit in a recent decision has adopted the result reached by the instant cases.[45] Consequently, there is no doubt that a federal trend is emerging, but it remains for the United States Supreme Court to effect the judicial clarity urgently required in this growing area of civil litigation.

CONFLICT OF LAWS — WRONGFUL DEATH — NEW YORK REJECTION OF MASSACHUSETTS DAMAGE LIMITATION HELD NOT A VIOLATION OF FULL FAITH AND CREDIT. — Plaintiff, administratrix of a New York domiciliary killed when defendant's airliner crashed in Massachusetts, instituted a wrongful death action pursuant to the Massachusetts wrongful death statute [1] in a federal district court in New York, jurisdiction being based on diversity of citizenship. Defendant's motion to limit the recovery to $15,000 as prescribed by the Massachusetts statute was denied by the district court on the ground that the New York Court of Appeals had previously declared that the limitation was contrary to New York's public policy and not binding on New York courts.[2] The Court of Appeals

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[43] Public Serv. Co. v. General Elec. Co., Civil No. 7140, 10th Cir., March 15, 1963.

[44] Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles,* 57 NW. U.L. REV. 29, 52 (1962).

[45] Public Serv. Co. v. General Elec. Co., *supra* note 43.

[1] MASS. ANN. LAWS ch. 229, § 2 (1955). "If the proprietor of a common carrier of passengers . . . by reason of his or its negligence . . . causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant. . . ."

[2] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961) (dictum).