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courts will continue in their refusal to find state action in the conduct of the internal operations of private educational institutions, in spite of the predictions and admonitions of the commentators. Needed is a clear-cut policy decision by the Supreme Court to bring the private university within the scope of state action for due process purposes. No such decision appears to be forthcoming; until then, the lower courts will continue their application, or misapplication, of the *Burton* test.

SCOTT MACNEELY TURNER

LIMITATION OF ACTIONS IN PRIVATE SUITS UNDER SECTION 303 OF THE LABOR MANAGEMENT RELATIONS ACT

When Congress passed the Labor Management Relations Act,¹ a primary goal was to control union practices considered injurious to employers and the public.² In achieving this objective, section 8(b)(4) of the Act³ forbids specific concerted union activities such as the secondary boycott.⁴ Section 303⁵ permits anyone injured in his business or property by reason of a violation of 8(b)(4) to sue the union to recover damages

¹Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. § 141 *et seq.* (1970).

²S. REP. NO. 105, 80th Cong., 1st Sess. 2 (1947).

³29 U.S.C. § 158(b)(4) (1970). Section 8(b)(4), relating to unfair labor practices, was one of numerous amendments to the National Labor Relations Act (Wagner Act), 29 U.S.C. § 141 *et seq.* (1970).

⁴The thrust of section 8(b)(4) was expressed in terms of prohibiting union conduct intended to induce strikes or concerted work stoppages by employees in the course of their employment where an object is to force any employer or person to cease doing business with another employer or person. *See* 29 U.S.C. § 158(b)(4) (1970). *See also* C. MORRIS, *THE DEVELOPING LABOR LAW* 604-74 (1971).

⁵Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. § 187 (1970), provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation [of] subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

sustained by him and the cost of the suit. However, in creating this federal cause of action in favor of those injured by unfair labor practices, Congress failed to provide either a limitation on the time for bringing suit or a reference as to when such a cause of action accrues.⁶ The problems created by this omission are well illustrated in a recent Fourth Circuit decision.

In *Railing v. United Mine Workers of America*,⁷ plaintiffs, doing business as the C & P Coal Company, conducted a non-union strip-mining operation and coal tipple in West Virginia. Beginning in April of 1958, the company's employees, allegedly instigated by the United Mine Workers (UMW), struck and picketed these operations. Plaintiffs maintained the UMW's purpose was violative of section 8(b)(4) relating to unfair labor practices.⁸ In addition, plaintiffs asserted that UMW destroyed specific items of equipment and property.⁹ All strike activity ended on July 14, 1959 pursuant to an injunction issued by the National Labor Relations Board (NLRB); however, plaintiffs did not institute this action for damages under section 303 until June 28, 1961, nearly one year and eleven and one-half months after cessation of the strike.

The Railings claimed that the continuous illegal conduct on the part of UMW constituted a single cause of action which accrued on July 14, 1959 when the unlawful activities ceased. UMW contended, first, that a separate cause of action accrued for each day's damage as it occurred and, second, that a West Virginia one-year statute of limitations was applicable. On UMW's motion for summary judgment, the district court¹⁰ found that since section 303 of the Labor Management Relations Act contained no statute of limitations, it must refer to state law to determine the period of limitation to be applied.¹¹ As a result, the court

⁶Suits under section 303 of the Labor Management Relations Act are distinct from complaints of unfair labor practices by the National Labor Relations Board. Although Congress provided no national statute of limitations for section 303 suits, it did impose a six month statute of limitations on complaints before the National Labor Relations Board. National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1970). See Notes 81-95 and accompanying text *infra*.

⁷445 F.2d 353 (4th Cir. 1971).

⁸Plaintiffs alleged that defendant induced and encouraged the employees of the C & P Coal Company to engage in a refusal to produce coal at plaintiff's strip pit for the purpose of forcing the plaintiffs to cease doing business with other employers and to force other employers to recognize the union as the bargaining representative of their employees. *Railing v. UMW*, 276 F. Supp. 238, 247-48 (N.D. W. Va. 1967).

⁹Plaintiffs requested compensatory and punitive damages for these common law torts pursuant to the court's pendent jurisdiction. 276 F. Supp. at 240.

¹⁰276 F. Supp. at 243-45.

¹¹*Id.* at 241. See text at notes 41-51 *infra* relating the absence of a controlling federal statute of limitations to actions at law in which a federally created right is being enforced.

adopted the West Virginia two-year statute of limitations¹² and held that this period began to run on defendant's alleged illegal activities each day damage occurred, and not from the time when all such activities ceased.¹³ The effect of this ruling was to deny recovery for all damages except for those which occurred after June 28, 1959.¹⁴

The court of appeals reversed,¹⁵ reasoning that since the total damage would not have been ascertainable before the illegal strike ceased, the application of a day to day accrual principle was inapposite.¹⁶ Moreover, the court noted that inclusion of all damages resulting from day to day acts would require frequent amendments to the complaint to include newly accrued damages, or speculation as to total damages that would eventually result from the strike.¹⁷ Thus, focusing upon the continuing nature of the injury, the court held that the cause of action accrued on the last date of continuing illegal conduct for purposes of applying the statute of limitations.¹⁸ Under the theory enunciated in this decision, plaintiff's entire suit was timely.

The Supreme Court, however, in a per curiam opinion,¹⁹ vacated judgment and remanded to the court of appeals for further consideration in light of *Zenith Radio Corp. v. Hazeltine Research, Inc.*,²⁰ a recent Supreme Court decision construing the accrual of a cause of action for

¹²W. VA. CODE ANN. § 55-2-12(a) (1971). The Railings originally instituted this action in the District Court for the Eastern District of Kentucky, but it was transferred to the District Court for the Northern District of West Virginia upon motion of UMW. Consequently, the court held that it must look to the law of the State of Kentucky, the state from which the transfer was made, including Kentucky's "borrowing statute," KY. REV. STAT. ANN. § 413.320 (1971), to determine the statute of limitations applicable to the cause of action sued upon. The Kentucky statute required the application of the West Virginia two-year period of limitation, since it was shorter than the period of limitation prescribed by Kentucky. This ruling was not challenged by plaintiffs in subsequent proceedings. 276 F. Supp. at 241-42.

See further discussion of the statute of limitations at notes 41-45 and accompanying text *infra*.

¹³276 F. Supp. at 243.

¹⁴Since under rule 3 of the Federal Rules of Civil Procedure an action is deemed commenced upon the filing of the complaint with the court, June 28, 1961 in the principal case, the earliest date of applicability of the statute of limitations would be June 28, 1959. See FED. R. CIV. P. 3.

¹⁵429 F.2d 780 (4th Cir. 1970).

¹⁶*Id.* at 783.

¹⁷*Id.*

¹⁸The court reasoned that the victim should be entitled to sue as soon as he could do so, but should not be required to sue until illegal activity had ceased. Thus, suit for separate injuries for which damages could be ascertained may have been brought at an earlier time. *Id.*

¹⁹401 U.S. 486 (1971).

²⁰401 U.S. 321 (1971).

damage to business and property under the Clayton Act.²¹ In *Zenith* the Court held that in the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff suffers injury by an act of the defendant, a cause of action accrues to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.²² In light of *Zenith*, the Supreme Court urged the Fourth Circuit to explore whether private suits under the Labor Management Relations Act²³ are distinguishable from those under the Clayton Act²⁴ for purposes of determining the time at which a cause of action accrues.²⁵

On remand, the court of appeals found, as the Supreme Court seemed to suggest, that suits under the Labor Management Relations Act and the Clayton Act are not distinguishable with regard to the accrual of a cause of action for injury to business or property.²⁶ Consequently, applying the *Zenith* rationale, the court held that a cause of action accrues, for the purpose of determining when a suit may be brought and when the statute of limitation runs, at the time that ascertainable damage occurs.²⁷

Several similarities between private remedies under the Labor Management Relations Act and those in the Clayton Act support the analogy suggested by the Supreme Court and subsequently adopted by the court of appeals. Section 303(a) of the Labor Management Relations Act provides that it shall be unlawful for any labor organization to engage in "any activity or conduct defined as an unfair labor practice in section [8(b)(4)] of the National Labor Relations Act."²⁸ The language of section 303(b) creates a right of action in "[w]hoever shall be injured in his business or property"²⁹ by the unlawful activity and provides that the injured party may "recover damages by him sustained."³⁰ Section 4 of the Clayton Act permits "[a]ny person who shall be injured in his business or property"³¹ by reason of a violation of the antitrust laws to bring suit to "recovery threefold the damages by him sustained. . . ."³² In both cases, suit may be brought in the federal courts without regard to the

²¹15 U.S.C. § 15 (1970).

²²401 U.S. at 338. For consideration of the *Zenith* holding as to future damages, see text accompanying notes 63-64 *infra*.

²³Labor Management Relations Act § 303, 29 U.S.C. § 187 (1970).

²⁴Clayton Act § 4, 15 U.S.C. § 15 (1970).

²⁵401 U.S. at 486.

²⁶*Railing v. UMW*, 445 F.2d 353, 354 (4th Cir. 1971).

²⁷*Id.*

²⁸Labor Management Relations Act § 303(a), 29 U.S.C. § 187(a) (1970).

²⁹Labor Management Relations Act § 303(b), 29 U.S.C. § 187(b) (1970).

³⁰*Id.*

³¹Clayton Act § 4, 15 U.S.C. § 15 (1970).

³²*Id.*

amount in controversy.³³

Indeed, the legislative history of the Labor Management Relations Act indicates that those who drafted section 303 intended that the private action for damages under that section should be similar to the private action for damages under the antitrust laws. In this regard, Senator Taft in response to a question on the Senate floor stated:

The Senator [Morse] asks for a parallel and I shall give him one. Under the Sherman Act³⁴ the same question of boycott damage is subject to a suit for damages and attorney's fees. In this case, we simply provide for the amount of the actual damages. But the parallel is exactly the same, only under the Sherman Act, if a group of businessmen put a small concern out of business, they are subject to a suit for damages [through operation of section 4 of the Clayton Act]. If a labor union does the same thing, why should it not be subject to a suit for damages.³⁵

The most apparent difference between suits under the two acts is that damages under section 303 are strictly compensatory³⁶ while those under section 4 of the Clayton Act are three times the loss sustained by the injured party.³⁷ Nevertheless, the policy of permitting private suits under both statutes is identical, *i.e.*, that damage actions should serve not only to compensate the innocent party, but also to deter proscribed behavior.³⁸ Thus, because of the similarities in the nature of the injury involved

³³*Id.*; Labor Management Relations Act § 303(b), 29 U.S.C. § 187(b) (1970).

³⁴15 U.S.C. § 1 *et seq.* (1970). It should be noted, however, that labor organizations are exempted from the application of antitrust laws. Clayton Act § 6, 15 U.S.C. § 17 (1970).

³⁵93 CONG. REC. 5074 (1947) (remarks of (Senator Taft), *cited in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 1398 (1948).*

³⁶Labor Management Relations Act § 303(b), 29 U.S.C. § 187(b) (1970). *See also* Teamsters Local 20 v. Morton, 377 U.S. 252, 260 (1970) (recovery under section 303 limited to actual compensatory damages).

³⁷Clayton Act § 4, 15 U.S.C. § 15 (1970).

³⁸Senator Taft remarked:

Under the bill there is a kind of injunctive remedy through the National Labor Relations Board, but there is no possibility of a suit for damages. . . . I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes.

93 CONG. REC. 5060 (1947), *cited in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 1371 (1948).*

The Attorney General's National Committee to Study the Antitrust Laws has commented on the federal purpose of private suits under the antitrust laws:

Private suits aid antitrust enforcement. The private suit blends antitrust policy with private compensatory law; on the one hand . . . such suits aim to enlist the 'business public . . . as allies of the Government in enforcing the antitrust laws;' the means chosen, on the other hand, is to give the

and in the policies underlying the right to recover for such injuries, it seems the Fourth Circuit was justified in finding that a cause of action for injury to business or property is basically the same whether derived from a statute governing labor-management relations or free enterprise between competing business entities.³⁹

If, in fact, the Labor Management Relations Act and the Clayton Act offer essentially parallel remedies for injury to business and property, the question becomes whether case law under the Clayton Act may be utilized to fill gaps left by Congress in the drafting of the Labor Management Relations Act. Such an analysis, as the Supreme Court seemed to intimate,⁴⁰ might prove helpful in providing answers to problems which federal courts, on the whole, have not always handled adequately. The issues which confronted the court in *Railing* are fairly representative of problems, created by statutory omission, which arise in section 303 suits. These appear to be, first, what statute of limitations should apply; second, when does the cause of action accrue, *i.e.*, when might suit be brought and what starts the running of the limitation period; and third, should the statute of limitations be suspended during the pendency of a parallel government hearing related to defendant's alleged unfair labor practices.

The initial problem in *Railing* was to determine the applicable statute of limitations. Since Congress failed to limit the time within which an action for damages might be brought, the district court, deferring to precedent, resorted to the law of the state where the action was instituted.⁴¹ This determination precipitated problems typical in this area of inquiry since Kentucky, the jurisdiction where suit was originally brought, had several conflicting limitation statutes, any one of which might have applied.⁴² However, the scope of these limitation provisions

'injured party ample recompense for the wrongs suffered' by allowing three-fold recovery of damages.

TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 3.01 (1965) *citing* Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1956 at 378.

³⁹445 F.2d 354 (4th Cir. 1971).

⁴⁰401 U.S. at 486.

⁴¹276 F. Supp. at 241. The district court noted that the practice of resorting to state statutes of limitation had been followed in the majority of the decisions concerned with an interpretation of section 303. *See, e.g.*, *UMW v. Meadow Creek Coal Co.*, 263 F.2d 52 (6th Cir. 1959); *International Union of Operating Eng'rs v. Fischbach & Moore, Inc.*, 350 F.2d 936 (9th Cir. 1965).

⁴²Kentucky statutes of limitations provide a ten-year period for actions upon which no other limitation is prescribed and a five-year period for actions involving injury to real or personal property or to enforce liability created by statute not fixing a different limitation period. KY. REV. STAT. ANN. §§ 413.160, 413.120(2) (1971).

was subsequently narrowed by Kentucky's "borrowing statute"⁴³ which shifted the focus to the law of West Virginia, where the cause of action arose. After continued deliberation, the court settled ultimately upon a West Virginia two-year limitation period.⁴⁴

The convoluted inquiry pursued in *Railing* at the district court level is routinely forced upon courts faced with the problem of discovering a limitation period for private suits under section 303 of the Labor Management Relations Act.⁴⁵ The cost in terms of the courts' time and expense to the litigants is considerable, and the end result is that the statute of limitations applicable to this federal remedy varies throughout the fifty states.

Federal courts have been urged to adopt a uniform time limitation for actions under this legislation such as the four-year period permitted in Clayton Act suits.⁴⁶ None has actually done so, however, and it is doubtful that any court will seriously consider such an alternative since the Supreme Court has spoken unfavorably of the matter. In *UAW v. Hoosier Cardinal Corp.*,⁴⁷ an action for damages under section 301 of the Labor Management Relations Act,⁴⁸ the Court was urged to devise a uniform time limitation to close the statutory gap left by Congress.⁴⁹ But the Court refused to permit what it termed "so bald a form of judicial innovation,"⁵⁰ and held that state statutes of limitation controlled.⁵¹ Thus,

⁴³KY. REV. STAT. ANN. § 413.320 (1971). This section provides:

When a cause of action has arisen in another state or country, and by the laws of the state or country where the cause of action accrued the time for commencement of an action therein is limited to a shorter period of time than the period of limitations prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period.

⁴⁴W. VA. CODE ANN. § 55-2-12(a) (1971). The applicable statute was amended June 11, 1959. UMW contended that the pre-1959 statute's one year limitation period regarding personal actions which do not "survive" should be applied. Plaintiff argued and the court so held that a section 303 cause of action did survive the injured party, and thus the two-year limitation period for such actions in both the pre-1959 and post-1959 versions of the statute applied.

⁴⁵See, e.g., *UMW v. Meadow Creek Coal Co.*, 263 F.2d 52, 61 (6th Cir. 1959).

⁴⁶See *International Union of Operating Eng'rs v. Fischbach & Moore, Inc.*, 198 F. Supp. 911, 915 (S.D. Cal. 1961), *rev'd*, 350 F.2d 936 (9th Cir. 1965). See also *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 713 (1966); (White, J. dissenting).

⁴⁷383 U.S. 696 (1966).

⁴⁸29 U.S.C. § 185 (1970).

⁴⁹383 U.S. at 701.

⁵⁰*Id.*

⁵¹*Id.* at 703-04. The Court commented:

As early as 1830, this Court held that state statutes of limitation govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. . . . Since that time, state statutes have repeatedly

despite the loss of time, the expense and the unfairness created by the lack of a limitation period in section 303 actions, it is not probable that any court will look to parallel legislation, such as the Clayton Act, to provide a uniform statute of limitations.

The next issue, and certainly the major problem in *Railing*, involved the determination of when a cause of action under section 303 accrues.⁵² This determination is of pivotal importance since it governs the time a suit might be brought and also starts the running of the limitation period. On remand from the Supreme Court, the Fourth Circuit observed that there would appear to be no common sense reason why Congress would intend that injuries to business or property be treated differently with respect to timeliness simply because one of the litigants may be a labor union.⁵³ As a result, *Railing* explicitly held that the rationale of *Zenith*⁵⁴ regarding the accrual of a cause of action under the Clayton Act applies fully to similar suits for injury to business or property brought in the form of a section 303 action.⁵⁵

In restating the holding of the Supreme Court in *Zenith*, the court of appeals found that a cause of action accrues, for the purpose of determining when a suit may be brought and thus for the purpose of determining

supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. . . . Yet when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitation. *E.g.*, 69 Stat. 283, 15 U.S.C. § 15(b) (1964 ed.) (Clayton Act) Against this background, we cannot take the omission in the present statute as a license to judicially devise a uniform time limitation for § 301 suits.

Id.

⁵²Although a federal statute may fail to indicate when a cause of action accrues, the issue as to when there is a complete and present cause of action so that suit might be brought is nevertheless a federal question to be resolved by the application of federal as opposed to state law. *See, e.g.*, *Rawlings v. Ray*, 312 U.S. 96, 98 (1941).

⁵³445 F.2d at 354. The court argued:

There are, of course, differences between the Labor Management Relations Act and the Clayton Act. It may well be theoretically possible to distinguish the statutes so as to render the *Zenith* interpretation of the Clayton Act inapplicable to a Section 303 cause of action. But a cause of action for injury to business or property is pretty much the same in nature whether derived from a statute governing labor-management relations or free enterprise between competing business entities. We think the order of remand is not an invitation to conclude that the rationale of *Zenith* is inapplicable to a Section 303 cause of action, and that instead the Court has intimated the contrary.

Id.

⁵⁴401 U.S. 321 (1971).

⁵⁵445 F.2d at 354.

⁵⁶*Id.*

when the statute of limitations begins to run, at the time that damage occurs. *Zenith* had rejected those cases which assume that a civil conspiracy involves a single, indivisible cause of action.⁵⁷ Under this now discarded theory, some single point in time had to be seized as marking the beginning of the limitation period,⁵⁸ with the result that if that time was earlier than the statutory period prior to commencement of the suit the action was timely,⁵⁹ although the unlawful conduct began prior to the limitations period.

The theory adopted by the Supreme Court in *Zenith* reflected the policy⁶⁰ that some division of an extended antitrust claim must be made for purposes of applying the statute of limitations.⁶¹ Thus the Court reasoned that where successive damages are suffered day by day from a continuing conspiracy the statute of limitations begins to run on each day's damages as they occur.⁶² The recovery of future damages, however, presented a slight variation to the problem.

The Court noted in *Zenith* that an injured party might not be able to prove future damages with sufficient certainty to recover in an initial suit, even though the acts which cause the damages had already occurred. In this situation, it was determined that the cause of action would accrue and thus the statute of limitations would begin to run only when such damages became ascertainable.⁶³ Otherwise, future damages which could not be proved within the limitation period following the conduct from which they flowed would be forever incapable of recovery.⁶⁴

⁵⁷*E.g.*, *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215 (C.D. Cal. 1969); *Winkler-Koch Eng'r Co. v. Universal Oil Prod. Co.*, 100 F. Supp. 15 (S.D.N.Y. 1951).

⁵⁸The criterion determining the beginning of the limitation period was the time at which the unlawful activity terminated, or when the purpose of the unlawful activity was achieved. *Winkler-Koch Eng'r Co. v. Universal Oil Prod. Co.*, 100 F. Supp. 15, 29 (S.D.N.Y. 1951).

⁵⁹The single cause of action theory was the position taken by plaintiffs and adopted by the Fourth Circuit prior to remand from the Supreme Court. 429 F.2d 780 (4th Cir. 1970).

⁶⁰The Supreme Court's opinion was based upon earlier statements of the "multiple cause of action" theory articulated in *Crummer Co. v. duPont*, 223 F.2d 238 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955); *Delta Theaters, Inc. v. Paramount Pictures, Inc.*, 158 F. Supp. 644 (E.D. La. 1958).

⁶¹See note 71 *infra* regarding the underlying purpose of statutes of limitation.

⁶²*Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1 (3d Cir. 1917), *appeal dismissed*, 248 U.S. 595 (1918), contains the earliest statement of the rule:

The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred. Then action might have been brought.

Id. at 20.

⁶³401 U.S. at 339. The Supreme Court argued that not to permit these damages would be contrary to the congressional purpose that private actions serve as a bulwark of antitrust enforcement. *Id.* at 340.

⁶⁴401 U.S. at 340.

The Fourth Circuit accepted the *Zenith* holding that speculative damages may be recoverable at a later time, and related the theory of recovery of present and provable damages to that of future damages by stating that

[a] single wrong may produce immediately ascertainable damages and also have a future speculative impact and potential injury. In such a situation the cause of action accrues and the period of limitations begins to run at different points in time, but in both instances at the time the damages are ascertainable.⁶⁵

Consequently, a single act which causes injury may give rise to several causes of action by the same plaintiff, each accruing at different times depending upon when damages become provable.

Plaintiffs in *Railing* sought three kinds of compensatory damages: one million dollars for loss of profits and damage to their business; one hundred thousand dollars for damage to property, machinery and equipment; and twenty thousand dollars for sums expended to resume business operations.⁶⁶ Since the Railings initially filed complaint in this action on June 28, 1961, the earliest date of applicability of the statute of limitations would be June 28, 1959.⁶⁷ Applying *Zenith* to plaintiffs' allegations, the court of appeals indicated the following pattern of possible recovery:

I. Recovery of the costs of resuming business would not be barred by the statute of limitations because there would be no way of determining these costs with reasonable precision until after the unlawful activity ceased and resumption of business had begun. . . .

II. Recovery for specific property, machinery and equipment, damaged before June 28, 1959, would be barred. Recovery for such property damaged after June 28, 1959, would not be barred.

III. Lost profits which are reasonably attributed to the loss of daily sales before June 28, 1959, would be barred.

IV. Lost profits reasonably attributable to the loss of daily sales after June 28, 1959, would not be barred.

V. Lost profits or operating losses which can reasonably be attributed to the total effect of the illegal activity during the entire strike period because of the overall effect on plaintiff's business reputation and capacity to produce and perform contracts, and other similar losses which may be determined by the District Court

⁶⁵445 F.2d at 354.

⁶⁶*Id.* at 355.

⁶⁷The statute of limitations under the West Virginia Code is two years. W. VA. CODE ANN. § 55-2-12(a) (1971). Under rule 3 of the Federal Rules of Civil Procedure, an action is deemed commenced upon the filing of the complaint with the court. FED. R. CIV. P. 3.

to have been unascertainable on June 28, 1959, would not be barred. Stated differently, and more accurately, the statute of limitations would not begin to run with respect to such damages until such time as the District Court may determine that they were reasonably ascertainable.⁶⁸

Viewed in this light, it appears that the court of appeals has increased the protection offered the private plaintiff. Now suit may be brought when damages become ascertainable and without regard to when the acts of the defendant actually occurred. For example, the court suggests that lost profits attributable to the overall effect on plaintiff's business reputation caused by defendant's illegal strike activities may be recovered although many years intervene between cessation of the strike and bringing of suit.⁶⁹ The sole requirement is that action be brought within the statutory period following the time that such damages become reasonably ascertainable.⁷⁰

It may be argued, however, that the policy behind the statute of limitations would be destroyed since, by the time damages become ascertainable and suit can be brought, evidence will be stale and witnesses may no longer be available.⁷¹ As a result, the union might never be free from suit arising out of its conduct as long as there remains any possibility that plaintiff at some later point would be injured by that conduct.

Perhaps the wisest course would be to require the plaintiff to prove the fact of the violation within the statutory period following defendant's illegal conduct in every case. Any recovery in the first suit would not bar a later action for damages which could only be determined at a later time. When those damages, too speculative to permit recovery in the first action, become ascertainable the plaintiff could then bring a second suit. In this manner, the interests of the defendant will be protected since he will not have to defend his conduct under the Labor Management Rela-

⁶⁸445 F.2d at 355.

⁶⁹Text accompanying note 68 *supra*.

⁷⁰Text accompanying note 65 *supra*.

⁷¹Justice Goldberg, speaking for the Court in *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965), commenting on the purpose of statutes of limitation, indicated that [s]tatutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 [(1944)].

Id. at 428.

tions Act after the statutory period.⁷² In addition, the plaintiff's interest will be protected in that he will not be denied recovery for future damages caused by defendant's conduct.

On remand to the district court, the Fourth Circuit suggested a third area in which the Clayton Act analogy might assist courts in defining rights under section 303 of the Labor Management Relations Act. The court noted that section 5(b) of the Clayton Act⁷³ permitted the suspension of the statute of limitations during the pendency of an action brought by the United States Government for the same violation. Thus, the court of appeals requested the lower court to consider whether there may be appropriately fashioned an analogous tolling rule that would apply to the period of time during which an administrative proceeding involving the same unlawful activities is pending before the NLRB.⁷⁴

Since provisions of the Clayton Act are enforceable not only by private parties under section 4 but also by a number of federal administrative bodies,⁷⁵ the similarities between government enforcement under the Clayton Act and the Labor Management Relations Act invite comparison. The Federal Trade Commission, for example, was established to protect business and the public against unfair methods of competition and to prevent practices which would lessen competition or tend to create a monopoly.⁷⁶ The Commission has broad investigatory powers,⁷⁷ and should it find evidence of an unlawful practice it may order the offending party to "cease and desist."⁷⁸ The Supreme Court has ruled that

⁷²The doctrine of collateral estoppel makes conclusive in subsequent proceedings between same parties determinations of fact, and mixed law and fact, that were essential to the decision. *Commissioner v. Sunnen*, 333 U.S. 591, 601-02 (1948).

⁷³Clayton Act § 5(b), 15 U.S.C. § 16(b) (1970).

⁷⁴455 F.2d at 355. The court observed that the purpose of statutes of repose is to prevent suits after the evidence is stale, and suggested that depending upon the identity of issues before the Board it is possible that such a proceeding, like a government suit under the Clayton Act, may keep the litigants on guard to preserve and perpetuate evidence and have it available for subsequent litigation that might develop.

⁷⁵Section 11 of the Clayton Act authorizes the Interstate Commerce Commission to enforce Clayton Act provisions where applicable to common carriers subject to the Interstate Commerce Act; the Federal Communications Commission has similar authorization where applicable to common carriers engaged in wire or radio communication or radio transmission; the Civil Aeronautics Board where applicable to air carriers; the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and the Federal Trade Commission where applicable to all other character of commerce. 15 U.S.C. § 21(a) (1970).

⁷⁶16 C.F.R. § 1.1 (1970). Under section 15 of the Clayton Act, the Department of Justice may also enforce antitrust provisions in the federal district courts. 15 U.S.C. § 25 (1970).

⁷⁷Federal Trade Commission Act § 6(a), 15 U.S.C. § 46(a) (1970).

⁷⁸Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(b) (1970).

a proceeding brought by the Federal Trade Commission suspends the running of the statute of limitations to the same extent and in the same circumstances as does an action brought by the Antitrust Division of the Department of Justice in a federal district court.⁷⁹ In a more recent decision, the Supreme Court has indicated that despite differences between a governmental action and a later private suit, as long as the complaint is based in part on matters of which the government complained, the statute of limitations is tolled.⁸⁰

In provisions similar to those of the Clayton Act, the Labor Management Relations Act provides that unfair labor practices may be the object of a private suit under section 303, and also of governmental action by the NLRB.⁸¹ Section 10(1)⁸² authorizes the Board to investigate charges of unfair labor practices, and if the Board officer or regional attorney finds reasonable cause to believe the charge is true, he may petition the federal district court for injunctive relief pending final adjudication by the Board.⁸³ Subsequently, if it determines that an unfair labor practice has been committed, the Board has the remedial power to order the union to "cease and desist" from the unlawful activity.⁸⁴

In addition, the NLRB shares a number of policy and procedural objectives with the FTC. The purpose of the FTC is to investigate and condemn unfair methods of competition as defined by the antitrust laws;⁸⁵ one of the principal purposes of the NLRB is to investigate unfair labor practices as defined in the National Labor Relations Act.⁸⁶ Any person can request the FTC to institute an investigation in respect to any matter within its jurisdiction;⁸⁷ similarly, an unfair labor practice charge can be filed with the NLRB by anyone.⁸⁸ Despite the fact that private persons bring the charge, however, the FTC and the NLRB are considered parties to actions which they investigate, and it is these boards that must seek

⁷⁹*Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

⁸⁰*Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965). The Court observed that the tolling of the statute of limitations may not be made to turn on whether the government is successful, but that matters complained of in the government action must bear a "real relation" to the plaintiff's claim. *Id.* at 59.

⁸¹National Labor Relations Act § 10(a), (k), 29 U.S.C. § 160(a), (k) (1970). In order to bring a suit for damages under section 303, there is no requirement that plaintiff obtain prior determination of unfair labor practices by the NLRB. *See International Longshoremen v. Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952).

⁸²29 U.S.C. § 160(1) (1970).

⁸³*Id.*

⁸⁴29 U.S.C. § 160(c) (1970).

⁸⁵16 C.F.R. § 1.1 (1970).

⁸⁶29 U.S.C. § 160(1) (1970).

⁸⁷16 C.F.R. § 2.2(a) (1971).

⁸⁸29 C.F.R. § 102.9 (1971).

court enforcement of their cease and desist orders.⁸⁹ Moreover, as an aid to the private litigant, formal documents constituting the record in a proceeding before either the FTC or the NLRB are available to anyone for inspection and copying.⁹⁰

Lastly, the result of a finding of a violation of the laws by the FTC or the NLRB may have similar effect upon the outcome of subsequent private litigation. Section 5(a) of the Clayton Act⁹¹ provides that a finding of a violation of the antitrust laws in a proceeding brought by the United States shall be prima facie evidence against a defendant in a private action.⁹² Although there is no similar statute pertaining to NLRB actions, the Fifth Circuit Court of Appeals has held that a finding of a union violation of 8(b)(4)⁹³ is res judicata of the union's liability in a suit brought under section 303.⁹⁴ Thus, in many respects, it would appear that Congress's announced policy that private actions should serve as a deterrent to unfair labor practices⁹⁵ would be furthered by permitting the tolling of the statute of limitations during the pendency of governmental actions before the NLRB. Certainly it would alleviate much of the harshness to prospective plaintiffs in those states which have limitation periods of two years or less.

On the other hand, the Supreme Court has given some indication of a countervailing policy which might outweigh advantages inherent in tolling the statute of limitations. In *UAW v. Hoosier Cardinal Corp.*⁹⁶ the Court ruled that the limitation period in a private suit under section 301⁹⁷ was not tolled by prior state court litigation involving the same

⁸⁸See 15 U.S.C. § 45(b) (1970); 29 U.S.C. § 160(e) (1970).

⁸⁹See 16 C.F.R. § 4.8 (1971) (regarding FTC provisions); 29 C.F.R. § 102.117(b)(1) (1971) (regarding NLRB provisions).

⁹⁰15 U.S.C. § 16(a) (1970).

⁹¹The First Circuit has held that a final order of the Federal Trade Commission in an antitrust case may be admitted as prima facie evidence against defendants in a subsequent treble-damage suit pursuant to section 5(a) of the Clayton Act. *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 75 (1st Cir. 1970). The court approved the theory that this provision only establishes a rebuttable presumption and, therefore, takes no question of fact from either court or jury. *Id.*

⁹²29 U.S.C. § 158(b)(4) (1970).

⁹³*H.L. Robertson & Assoc., Inc. v. Plumbers Local 519*, 429 F.2d 520 (5th Cir. 1970); *Painters' Dist. Council v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969). *But see Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local 584*, 359 F.2d 598 (2d Cir.), *cert. denied*, 385 U.S. 832 (1966).

⁹⁴Note 38 *supra*.

⁹⁵383 U.S. 696 (1965).

⁹⁷Labor Management Relations Act § 301, 29 U.S.C. § 185 (1970). Section 301 authorizes private suits to recover damages caused by breach of a collective bargaining agreement.

parties and issues.⁹⁸ Indeed, the Court specifically pointed out that the six months provision regarding unfair labor practice proceedings by the NLRB⁹⁹ suggested that relatively rapid disposition of labor disputes is a goal of federal labor law.¹⁰⁰ It was also noted that section 301 of the Labor Management Relations Act establishes no policy of uniformity expressed in the form of a national limitations provision.¹⁰¹ The implication was clear that only when Congress expresses a uniform time limitation upon the bringing of suit based on a federal right should courts consider fashioning a tolling rule. Thus it is doubtful that courts will graft a tolling provision on section 303 actions as long as Congress refuses to establish a uniform statute of limitations.

It is apparent that when Congress drafts a law in response to strong public demand, it does not always pay attention to the small details which remain to plague courts for years thereafter. As indicated in the case of the Labor Management Relations Act, statutory gaps in the law have resulted in considerable loss of time and expense. Thus, after four court decisions and more than ten years of litigation, *Railing v. United Mine Workers of America* finally proceeds to a hearing on the merits.

The problems which have delayed *Railing* were based upon the lack of a statute of limitations and any reference for determining when a cause of action accrues. As *Railing* indicates, courts have refused to judicially create a uniform statute of limitations, referring instead to state limitation periods which vary considerably. By drawing an analogy to parallel remedies in the Clayton Act, the Fourth Circuit adopted the antitrust rule that a cause of action accrues only when damages become ascertainable, thus extending the plaintiff's scope of recovery. What remains to be decided is whether courts should fashion a tolling rule such as that permitted by the Clayton Act. The Supreme Court's reluctance, however, to consider this alternative in a similar suit makes this prospect doubtful. Thus, while the creation of a tolling provision would appear to be consistent with policy underlying section 303 actions, the initiative in this direction most probably must come from Congress.

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⁹⁸383 U.S. at 707.

⁹⁹National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1970). This section provides in part:

[N]o complaint shall issue [from the National Labor Relations Board] based upon any unfair labor practice [as defined in section 8(b)(4)] occurring more than six months prior to the filing of the charge with the Board. . . .

Id.

¹⁰⁰383 U.S. at 707.

¹⁰¹*Id.* at 708.