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special expertise to deal "with the major concerns of the shipping industry—with all of them, and not just with a few of them selected on antiquarian criteria." [72] Thus the test for admiralty jurisdiction in all matters should be whether the subject is one of the "major concerns" of the maritime industry. Such a test and purpose for admiralty would arm it with

> the responsibility . . . jurisdiction and remedial power needed to keep watch over the concerns of the shipping industry in their commercial and property aspects. It would be a sort of one-industry Tribunal of Commerce. As such it would be in a position to give vigorous articulation to the federal interest in shipping, and at the same time would implement a valuable experiment in the use of the industrial court.[73]

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CLAYTON ACT TOLLING PROVISION— A NEW INTERPRETATION

Section 5 of the Clayton Act, which was included to encourage the private litigant to seek recovery for antitrust violations[1] in addition to the treble measure of damages provided for in the preceding section of the Act,[2] provides:

> (a) A final judgment or decree . . . 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

present system. In 1960, 5655 admiralty actions constituting 94% of all admiralty actions in the United States were distributed among 19 admiralty districts, the top 6 of which had the following admiralty caseloads: S.D.N.Y., 2294; E.D. La., 869; E.D. Pa., 485; S.D. Tex., 361; N.D. Cal., 261; E.D. Va., 229. Fiddler, The Admiralty Practice in Montana and All That. 17 Me. L. Rev. 15, 17 (1965).

[72]Gilmore & Black, *supra* note 36, at 27.

[73]Black, *supra* note 44, at 276-77.

the offense is committed on the high seas." Firemen's Fund Ins. Co. v. City of

[1]"Section 5 . . . 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.'" Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

[2]Clayton Act 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1914), 15 U.S.C. § 15 (1914).

> 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 . . . [§ 4 of the Clayton Act] as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . .
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> (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .[3]

This section affords 2 advantages to the private litigants: "It may help them with any limitations problems they have," and "it also helps them with their proof by giving them permission to use the government action as evidence."[4]

Section 5(b) (hereafter referred to as the tolling provision) has been judicially interpreted as being related to and dependent on § 5(a) (hereafter referred to as the prima facie evidence provision) for its meaning. As a result, the collateral estoppel language of the prima facie evidence provision has been held to apply to the requirement of the tolling provision that the private suit be "based in whole or in part on any matter complained of" in the Government suit. This means that private litigants have found it necessary to show perfect identity between the private and Government suits to bring the tolling provision into play, thereby depriving private antitrust litigants of many possible advantages of the tolling provision.

Emich Motors Corp. v. General Motors Corp.,[5] decided in 1951, is generally recognized[6] as stating the scope and purpose of the prima

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[3]Clayton Act, *supra* note 2, § 16 as amended 69 Stat. 283 (1955) 15 U.S.C. § 16 (1955).

[4]Simon, The Private Litigant and Prior Government Judgments or Decrees, 7 Antitrust Bull. 27 (1962).

[5]340 U.S. 558 (1951).

[6]Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317 (1965); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 102 (1954); Buckhead Theatre Co. v. Atlanta Enterprises, Inc., 327 F.2d 365, 367 (5th Cir. 1964); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 357 (3d Cir. 1964); Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 225 (9th Cir. 1964); International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 454 (1st Cir. 1963); Hyslop v. United States, 261 F.2d 786, 790 (8th Cir. 1958); Eagle Lion Studios, Inc. v. Loew's, Inc., 248 F.2d 438, 444 (2d Cir. 1957); Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 90 (10th Cir. 1954); Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284, 290 (7th Cir. 1954).

facie evidence provision. That provision must be analyzed before any interpretation of the tolling provision can be attempted.

Emich held that the prima facie evidence provision makes available to the private litigant only those "matters previously established by the Government in antitrust actions." [7] The Supreme Court stated that "Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit." [8] It was further held that the collateral estoppel doctrine must be referred to in order to determine the evidentiary use which may be made of prior judgments or decrees.[9] This means that "final judgments or decrees . . . are admissible under § 5 of the Clayton Act as prima facie evidence only of issues actually determined in the prior adjudication . . . ." [10] The prima facie evidence provision, then, focuses "on the narrow issue of the use by private parties of judgments or decrees as prima facie evidence." [11]

In *Steiner v. 20th Century-Fox Film Corp.*[12] the Supreme Court established the principles to be followed in applying the tolling provision, holding that the prima facie evidence and tolling provisions are to be read together. This means that the identity necessary between the private action and the Government action must be perfect in order to satisfy the requirement in the tolling provision that the private suit be "based in whole or in part on any matter complained of" in the Government suit. Thus, as the Court puts it, "the same means must be used to achieve the same objectives of the same conspiracies by the same defendants" [13] to make the tolling provision operative.

The *Steiner* interpretation is based on the argument that (1) the legislative history of § 5 supports the interpretation of the words "any matter complained of" to mean the *exact acts* of the defendant complained of by the Government, not just the same conspiracy;[14] (2) private civil antitrust actions are not founded upon the conspiracy itself, but upon the overt injury-causing acts done in furtherance of

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[7]Emich Motor Corp. v. General Motors Corp., *supra* note 5, at 568.
[8]*Ibid.*
[9]*Ibid.*
[10]Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 102 (1954), citing Emich Motors Corp. v. General Motors Corp., *supra* note 5.
[11]Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317 (1965).
[12]232 F.2d 190 (9th Cir. 1956).
[13]*Id.* at 196.
[14]*Ibid.*

the conspiracy;[15] thus (3) the tolling provision cannot be extended to matters (acts) which might have been but were not complained of by the United States.[16]

Thus under *Steiner*, claims which the private litigant cannot establish as perfectly identical to those complained of by the Government must be brought within the statute of limitations. If there are also perfectly identical claims, they would fall under the tolling provision, thus leaving 2 different limitation periods governing the same lawsuit, a classic trap for the unknowing.

Application of the collateral estoppel rules to the tolling provision, thus requiring perfect identity between the Government and private claims, would be logical if Congress had intended the scope of the tolling provision to be as limited as the scope of the prima facie evidence provision.[17] The courts accepted this assumption of identical scope until it was questioned in *Union Carbide & Carbon Corp. v. Nisley*[18] decided by the 10th Circuit in 1961. Prior to *Union Carbide*, the problem had seldom arisen as to what constituted the necessary identity between the matters complained of in the private and the

[15]*Ibid.* It is interesting to note here that the Circuit Court in *Leh, infra* note 20, although following *Steiner, supra* note 12, said that the 9th Circuit had gone further than other circuits, by holding that the words "any matter complained of" referred to overt acts of the defendants in the Government proceeding and not just the conspiracy behind those acts. Leh v. General Petroleum Corp., 330 F.2d 288, 301 n.15 (9th Cir. 1964). One commentator expressed a concern whether *Steiner* meant that virtually identical overt acts had to be alleged. Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 Nw. U.L. Rev. 29, 45 (1962). A 1964 Ninth Circuit decision, Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 219 (9th Cir. 1964), held that "the tolling statute does not require, and the Steiner test does not provide, that all matters complained of in the private action must find a counterpart in the Government action." While this holding appears to weaken the *Steiner* test, it is significant that before making the above statement the court in *Goldwyn* went to some length to point out that there were, in fact, the same means, objectives, defendants, and conspiracies alleged in both actions. *Id.* at 217-19.

[16]Steiner v. Twentieth Century-Fox Film Corp., *supra* note 12.

[17]In addition to *Steiner*, support for this proposition can be found in the following: Sun Theatre Corp. v. RKO Radio Pictures, 213 F.2d 284 (7th Cir. 1954); Momand v. Universal Film Exchanges, Inc., 172 F.2d 37 (1st Cir. 1948); United Banana Co. v. United Fruit Co., 172 F. Supp. 580, 586 (D. Conn. 1959); Cardinal Films, Inc. v. Republic Pictures Corp., 148 F. Supp. 156, 159 (S.D.N.Y. 1957). See also Court DeGraw Theatre, Inc. v. Loew's, Inc., 172 F. Supp. 198, 200 (E.D.N.Y. 1959); Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216, 218 (D. Minn. 1957); Schreiber v. Loew's Inc., 147 F. Supp. 319, 323 (W.D. Mich. 1957); Levy v. Paramount Pictures, Inc., 104 F. Supp. 787, 789 (N.D. Cal. 1952).

[18]300 F.2d 561 (10th Cir. 1961).

Government suits to make the tolling provision operative.[19] The courts had merely compared the 2 complaints to determine whether the matters complained of by the private litigant were matters as to which a judgment or decree in the Government suit would be an estoppel as between the parties in the Government suit.

The result reached in 1964 by the 9th Circuit in *Leh v. General Petroleum Corp.*[20] created a conflict between this and the 10th Circuit decision in *Union Carbide*. To resolve this conflict the Supreme Court granted certiorari to determine the degree of identity necessary to satisfy the tolling provision requirement that the private suit be based "in whole or in part on any matter complained of" in the Government suit.[21] *Leh* involved a private treble damage action against 7 companies engaged in producing, refining, and marketing gasoline and other hydrocarbon substances in interstate commerce. The defendants were charged with violating §§ 1 and 2 of the Sherman Act[22] by conspiring to restrain and to monopolize the wholesale and retail distribution of refined gasoline throughout Southern California. The restraint was allegedly accomplished by excluding independent jobbers from distribution and by eliminating such jobbers' retail outlets, thereby preventing them from competing with the retail outlets owned and operated by defendants. Although a problem arose as to which of 2 statutes of limitations was applicable to the action,[23] the plaintiffs were not concerned with that aspect of the case, but contended that any applicable statute of limitations was suspended under the tolling provision of the Clayton Act because a 1950 United States

[19]"Controversy raised by the limitations portion of Section 5 has dealt mainly with the question of during what period of time the government action was pending and when did it cease to pend." Simon, *supra* note 4, at 28. A typical statement of the applicable rule regarding pendency is found in Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747, 758 (S.D.N.Y. 1953): "It is clear . . . that antitrust suits should be considered 'pending' until the entry of a judgment or decree which finally disposes of all the allegations of antitrust violations." See generally Wiprud, *supra* note 15, at 43-44.

[20]330 F.2d 288 (9th Cir. 1964).

[21]Leh v. General Petroleum Corp., 382 U.S. 54 (1965).

[22]26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1955).

[23]The defendants argued that plaintiffs' action was barred by the California 1-year statute of limitations applicable to suits for statutory penalties. Plaintiffs contended that the governing provision was the 3-year statute respecting suits for a statutory liability other than a penalty. The plaintiffs conceded that the 4-year limitations period added to the Clayton Act in 1955, *supra* note 3, was not applicable to their cause of action accruing in 1954.

On this matter, the 9th Circuit held that a private treble damage action was of a penal rather than remedial nature and therefore, the applicable provision was the 1-year statute. For a discussion concerning this aspect of *Leh*, see 40 Wash. L. Rev. 222 (1966).

antitrust proceeding arising from the same conspiracy was still pending at the time the plaintiffs filed their complaint.

The 9th Circuit, in affirming the decision of the District Court,[24] upheld the defendant's statute of limitations defense by interpreting the tolling provision in the light of *Steiner*, thus requiring perfect identity between the Government and private suits to make the tolling provision operative. The Court said the 2 claims lacked perfect identity because:

> 1) The dates of the conspiracies differed—the Government alleging a conspiracy running from 1936 until 1950 and plaintiffs alleging a conspiracy from 1948 until 1951.
> 2) The defendants were not the same in both actions—Shell Oil Co. and the Conservation Committee of California Oil Producers being joined in the Government suit, but not in the private suit, and the Olympic Refining Co., though later dropped, being originally joined by the private claimants but not by the Government.
> 3) The conspiracies differed—the Government charging that the defendants had conspired to eliminate the competition of independent marketers, and plaintiffs charging a conspiracy to eliminate independent jobbers and retailers.
> 4) The areas of the conspiracies differed—plaintiffs alleging a conspiracy involving Southern California, which was only a part of the Pacific States area with which the Government was concerned.

In reversing the 9th Circuit the Supreme Court relied primarily upon *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,[25] decided between the granting of certiorari and oral argument in *Leh*. *New Jersey Wood Finishing* established certain basic principles for the interpretation of the tolling provision and swept away much of the foundation for the perfect identity required in *Steiner*. The Court held that the prima facie evidence provision and the tolling provision are not necessarily coextensive, being governed by different considerations as well as different Congressional policy objectives, thus making the 2 provisions readily severable.[26] *Leh*, in following up and establishing the new approach to be taken to these 2 sections, held that "substantial identity" [27] of subject matter in the 2 suits is all

[24]Leh v. General Petroleum Corp., 208 F. Supp. 289 (S.D. Cal. 1962), *aff'd*, 330 F.2d 288 (9th Cir. 1964).
[25]381 U.S. 311 (1965).
[26]*Id.* at 318.
[27]Leh v. General Petroleum Corp., *supra* note 21, at 63.

that is required to make the tolling provision operative, applying the same test used earlier by the 10th Circuit in *Union Carbide.*

As to the tolling provision itself, "the textual distinctions as well as to the policy basis of . . . [the tolling provision] indicate that it was to serve a more comprehensive function in the congressional scheme of things" [28] than that allowed by the perfect identity interpretation. The purpose in adopting the tolling provision was not as limited as that behind the prima facie evidence provision, because when enacting the tolling provision Congress "was not then dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third" and because it was plain that with the tolling provision "Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions." [29] Thus, the tolling provision can operate to make available to the private litigant the Government's earlier pleadings, transcripts of testimony, and exhibits, all of which are potentially of great value in the investigation of this case. Moreover, involved and difficult legal questions may be resolved to the private litigant's advantage before he initiates proceedings. These are reasonably expectable advantages of the tolling provision if the "more comprehensive function" envisaged by Congress[30] for that provision is to have any meaning. *New Jersey Wood Finishing* went so far as to say that it was of crucial significance that the potential advantages available to litigants because of the tolling provision reach far beyond the specific and limited benefits accruing to them under the prima facie evidence provision.[31]

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[28]Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., *supra* note 11, at 319.

[29]*Id.* at 317.

[30]The Supreme Court admitted that there is almost a complete absence of Congressional discussion on the extent of the coverage of the tolling provision. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., *supra* note 11, at 320. The Court referred, however, to its decision in Burnett v. New York Cent. R.R., 380 U.S. 424 (1965), an FELA case, where the question involved effecting Congressional purpose by tolling the statute of limitations in given circumstances. Burnett said that to determine that intent "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act" must be examined. Burnett v. N.Y. Cent. R.R., *supra* at 427. Since the whole idea of the Clayton Act 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 (1914), it is logical that Congress meant to offer the private litigants as many advantages as a reasonable interpretation of the tolling provision allows.

[31]Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., *supra* note 11, at 320.

Two major textual distinctions between the tolling and prima facie evidence provisions lend further support to the conclusion that they are not dependent upon each other for their application: (1) A "final judgment or decree" is a condition precedent to the application of the prima facie evidence provision. However, the tolling provision suspends the statute of limitations from the time the Government institutes suit regardless of whether a final judgment or decree is ultimately entered. (2) The applicability of the tolling provision in no way turns on the success of the Government's case, while the prima facie evidence provision turns on raising an estoppel against the unsuccessful defendant in the Government suit through use of the pro-Government judgment or decree.

It is clear, then, that the tolling provision is not—and should not be—limited in its applicability to the rules of collateral estoppel which govern the prima facie evidence provision. However, a question remains: the decree of identity required between the private and Government suits to permit the private litigant the benefits of the tolling provision.

The "substantial identity of subject matter" test, originally established by the 10th Circuit in *Union Carbide* and now accepted by the Supreme Court in *Leh*, will cause some difficulty because of the vagueness of the phrase "substantial identity." The Supreme Court did warn that "care must be exercised to insure . . . that the matters complained of . . . bear a real relation to the private plaintiff's claim for relief." [32] The Court continued, however, that "the courts must not allow a legitimate concern that invocation of . . . [the tolling provision] be made in good faith to lead them into a niggardly construction of the statutory language . . . ." [33] Thus the Court has indicated that its desire to give the private litigant the advantages of this tolling provision greatly outweighs the increased difficulty in determining what are "matters complained of" in both private and Government suits.

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[32]Leh v. General Petroleum Corp., *supra* note 21, at 59.

[33]*Ibid. Union Carbide* points out the ultimate inequity of the collateral estoppel approach to the tolling provision:

> If we accept the . . . [collateral estoppel] interpretation of . . . [the tolling provision], a Section 4 [treble damage action provision] plaintiff would be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants.

Union Carbide & Carbon Corp. v. Nisley, *supra* note 18, at 570.

Yet some guideline is necessary to the application of the tolling provision. *Leh* establishes that in applying the "substantial identity" test "effect must be given to the broad terms of the statute itself—'based *in whole or in part* on *any matter* complained of.' "[34] Thus the private plaintiff need not allege that the identical defendants used the identical means to achieve the identical objectives of the identical conspiracies.

As to identity of parties, the Court explained why absence of complete identity of defendants is unrelated to whether the private claimant's suit is based on matters of which the Government complained:

> In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net.[35]

The disparity in time periods is equally insignificant:

> That plaintiffs alleged a conspiracy corresponding in time to the period during which they were in business obviously does not mean that this conspiracy is not based in part on matters complained of by the Government.[36]

Also, differences in the scope and effect of the conspiracies have likewise no effect on the operation of the tolling provision.

Leh, therefore, significantly changes the degree of identity required in the private and Government suits. The statute of limitations can now be suspended even against those defendants not named by the Government. Of course, it is still necessary that the matters complained of in the private suit against that defendant be in some way a part of the conspiracy alleged by the Government. However, if the private plaintiff can show that a particular defendant was involved in the larger conspiracy alleged by the Government, even so remotely as to be unnamed as a defendant in the Government suit, he may take advantage of the tolling provision against that defendant and

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[34]Leh v. General Petroleum Corp., *supra* note 21, at 59.

[35]*Id.* at 64.

[36]*Ibid.*

prove the particular effect of that defendant's localized conspiracy on him as private plaintiff.[37]

Leh is authority for this proposition, but one should note that the 1 defendant named by the private plaintiff and not by the Government was dismissed from the case prior to the ruling on the statute of limitations defense. The Court's statement that some conspirators' activities "may have been too low in the conspiracy to be selected as named defendants . . . in the Government's necessarily broader net" [38] indicates that absence of complete identity of defendants is unrelated to whether the private suit is based on "matters complained of" by the Government and indicates that courts should no longer hesitate to apply the tolling provision to even those defendants not named in the Government suit.

The *Leh* interpretation of the tolling provision is certainly the proper one and makes the provision one of the most effective devices available to private antitrust litigants. This approach to the tolling provision by the Supreme Court now fits the intent of Congress to afford the private litigant as many advantages as possible in its scheme to provide impetus to the whole field of antitrust litigation.

One may question the propriety of tolling the statute of limitations at all during the pendency of Government proceedings. Doing so seems to avoid the whole policy behind statutes of limitations,[39] since the private plaintiff working under the advantages of the tolling provision is not required to pursue his cause of action until 1 year after the Government action has ended. Consequently, defendants may

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[37]Since the statute of limitations against private antitrust actions is tolled by the institution of any civil or criminal proceeding by the United States, the private litigant is spared certain problems. Normally, under Fed. R. Civ. P. 4, a plaintiff is required to serve process within a reasonable time after the complaint has been filed. This would mean that, as to private antitrust litigants, the suit would probably come to trial before the Government proceeding had ended and the private litigant would not have the intended benefits of that Government action. With the tolling provision, however, the private litigant does not even have to file his complaint until 1 year after the Government suit has ended. Therefore, there will be no problem of the suit in trial before the private litigant desires. Of course, even this situation could be handled by obtaining a continuance when the suit did reach trial.

[38]Leh v. General Petroleum Corp., *supra* note 21, at 64.

[39]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 R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).