

THE PRIMA FACIE EFFECT OF FEDERAL TRADE COMMISSION ORDERS IN CLAYTON ACT TREBLE DAMAGE ACTIONS

The philosophy of the antitrust laws indicates a conscious legislative determination that effective enforcement of these laws can best be accomplished by a shared responsibility between governmental organizations and private litigants. To further the objectives of this joint operation, private litigants have been given several significant benefits from the activities of federal antitrust enforcers, primarily the use of prior government determinations as evidence and a suspension of the statute of limitations. Previously, the extent of the advantages secured depended on whether the Justice Department or the Federal Trade Commission instigated the antitrust action because these benefits were not accorded FTC orders. Since a large part of the total enforcement activity in this area is accomplished by the FTC,¹ in fact, to the total exclusion of the Justice Department for certain portions of the antitrust laws,² any differences in the utilization of the "fruits" of litigation can be quite significant. However, the recent trend has been toward a parity between these two organizations regarding the subsequent effects of their efforts vis-à-vis private litigation. This note will discuss the most recent step in this trend—the admissibility of an FTC order as prima facie evidence in a private treble damage suit.

Both the Sherman Act³ and the Clayton Act⁴ contain provisions whereby a person injured by a violation of the antitrust laws⁵ may recover treble damages from the violator as compensation for the

1. See generally Matteoni, *An Antitrust Argument: Whether a Federal Trade Commission Order is Within the Ambit of the Clayton Act's Section 5*, 40 NOTRE DAME LAW. 158, 159-60 (1965).

2. The FTC's primary areas of responsibility include the Robinson-Patman Act (sections 2(a)-(f) of the Clayton Act) and section 3 of the Clayton Act. Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 191 (1961); 9 UTAH L. REV. 482, 487 (1964).

3. 15 U.S.C. §§ 1-7 (1964) (originally enacted as Act of July 2, 1890, ch. 647, 26 Stat. 209).

4. 15 U.S.C. §§ 12-27 (1964) (originally enacted as Act of Oct. 15, 1914, ch. 323, 38 Stat. 730).

5. "Antitrust laws" are defined at 15 U.S.C. § 12 (1964) and include the Sherman, Wilson Tariff, and Clayton Acts but not the Federal Trade Commission Act. See *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). See the text accompanying note 22 *infra*.

injury caused by the infringement of these laws.⁶ In 1914, section 5 of the Clayton Act⁷ was enacted to increase the effectiveness of the treble damage provision in two ways. First, "a final judgment or decree" from "any suit or proceeding in equity" brought by or for the United States for a violation of the antitrust laws was to be prima facie evidence against the defendant in a subsequent, private treble damage suit.⁸ This provision represented a departure from the common law rules of evidence⁹ since, absent this mandate, a conviction in a prior proceeding would not be admissible substantively in a subsequent case.¹⁰ Second, the statute of limitations was to be tolled or suspended during the pendency of the government litigation.¹¹ Although opinions differed as to whether the

6. 15 U.S.C. § 15 (1964) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731) provides for recovery of "threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." The Sherman Act also had a similar provision. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210. See generally E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS (1965).

7. 15 U.S.C. § 16 (1964) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 5, 38 Stat. 731). See generally 2 H. TOULMIN, ANTITRUST LAWS §§ 17.1-8 (1949).

8. Act of Oct. 15, 1914, ch. 323, § 5, 38 Stat. 731. The text of the current version is as follows:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

15 U.S.C. § 16(a) (1964) (emphasis added) [hereinafter referred to as section 5(a)]. See generally Shores, *Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act*, 54 IOWA L. REV. 434, 451-54 (1968).

9. *Buckeye Powder Co. v. DuPont Powder Co.*, 248 U.S. 55, 63 (1918) (order from a prior determination not admissible).

10. C. McCORMICK, LAW OF EVIDENCE § 295, at 618 (1954). The *Model Code of Evidence*, contrary to the common law rule, states that: "Evidence of a subsisting judgment adjudging a person guilty of a crime or a misdemeanor is admissible as tending to prove facts recited therein and every fact essential to sustain the judgment," MODEL CODE OF EVIDENCE rule 521 (1942). However, the rule is not supported by judicial decisions. *Id.*, comment. Even without statutory coverage, the trend is toward admissibility, at least where the procedures in the first proceeding are adequate to insure trustworthiness. C. McCORMICK, *supra* at 619 n.9.

11. Act of Oct. 15, 1914, ch. 323, § 5, 38 Stat. 731. The text of the current version is as follows:

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

primary objective of this provision was to benefit private parties injured by antitrust transgressions¹² or to encourage the prompt capitulation of persons being prosecuted by the government,¹³ the statute in operation has both effects.

A cursory reading of section 5 might suggest that a finding of violation of the antitrust laws by almost any federal governmental body would be admissible. However, the functions of an administrative agency are not equivalent to those of a court. At the time of the passage of section 5, orders of the FTC were effectively advisory opinions that required *judicial* action for enforcement.¹⁴ Explicit congressional attention to the relationship of the FTC and section 5 is lacking, but the frequent reference to "courts"¹⁵ and "day in court"¹⁶ during debates prior to passage of section 5 supports the inference that Congress did not equate activities of the FTC with judicial proceedings.¹⁷

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.

15 U.S.C. § 16(b) (1964) (emphasis added) [hereinafter referred to as section 5(b)].

12. Dix, *Decrees and Judgments Under Section 5 of the Clayton Antitrust Law*, 30 GEO. L.J. 331, 333-34 (1942); Note, *Government Antitrust Judgments as Evidence in Private Actions*, 65 HARV. L. REV. 1400 (1952).

13. Dix, *supra* note 12, at 334-35; McConnell, *The Treble Damage Action*, 1950 U. ILL. L. FORUM 659, 672; Comment, *Admissibility and Evidentiary Effect of Criminal Judgments Under Section 5(a) of the Clayton Act*, 1 JOHN MARSHALL J. OF PRAC. & PRO. 111, 112 (1967).

14. Wilson, *Federal Trade Commission Orders and the Clayton Act § 5: A Reexamination*, 12 ANTITRUST BULL. 27, 31 (1967). See also *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 623 (1927) (FTC has only administrative functions, not judicial); G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 45 (1925); Austern, *Five Thousand Dollars a Day—An Inquiry Into the Civil Penalty Consequences of Violation of a Federal Trade Commission Cease and Desist Order*, 21 ABA ANTITRUST SECTION 285, 288 (1962).

15. Various references to "court" are contained in congressional debates: "obtained a judgment, either in a court of law or equity." 51 CONG. REC. 16319 (1914). "[T]he Trade Commission could not deal with criminal penalties because it is not a court." *Id.* at 16154. "The judgment or decree of the court in the suit." *Id.* at 13850 (emphasis added in all quotations).

16. *E.g.*, *id.* at 13851. "The defendant . . . has had its *day in court*. It has had an opportunity to try out before a court, with all the forms of the law, every question involved in the lawsuit." *Id.* (emphasis added).

17. Butler, *Application and Constitutionality of Tolling of Statute of Limitations Provisions of Section 5, Clayton Act, In Cases of Dual Enforcement Jurisdiction*, 8 ABA ANTITRUST SECTION 42, 46 (1956). But see 51 CONG. REC. 13857 (1914). "[I]n an action

Nine years after the passage of the Clayton Act, a federal district court in *Proper v. John Bene & Sons, Inc.*¹⁸ articulated the dichotomy that has survived substantially unchallenged until 1969: A Federal Trade Commission proceeding is not equivalent to a judicial determination for purposes of section 5(a). Proper brought a private treble damage suit against John Bene as well as other defendants in which he attempted to utilize an FTC cease and desist order¹⁹ issued for John Bene's violation of section 5 of the FTC Act.²⁰ In dictum,²¹ the court established six reasons why an FTC order cannot be used as prima facie evidence under section 5(a) of the Clayton Act:

- (1) An FTC order is not a final judgment or decree.
- (2) Proceedings before the FTC are not proceedings in equity since an order has no effect until sanctioned by a court of appeals.
- (3) The proceeding is on behalf of the FTC rather than the United States.
- (4) A proceeding instituted under the FTC Act is not one under the antitrust laws as it is omitted from the statutory definition of "antitrust laws."²²
- (5) An FTC Act violation is not a violation of the antitrust laws.
- (6) All of the defendants in the civil suit were not defendants in the FTC proceeding.²³

brought against an individual who has never theretofore had his day in court you can not make . . . an order of an administrative board conclusive evidence against him. You may make it prima facie evidence." *Id.* at 13856-57.

18. 295 F. 729 (E.D.N.Y. 1923), *rev'd*, 299 F. 468 (1924).

19. *John Bene & Sons*, 5 F.T.C. 314 (1922). John Bene had circulated false and misleading reports of a chemical analysis of hydrogen peroxide distributed by a competitor, Proper Antiseptic Laboratories of Cincinnati.

20. 15 U.S.C. § 45 (1964).

21. *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 216 F. Supp. 507, 510 (D.N.J. 1963).

22. 15 U.S.C. § 12 (1964). *See also* *Lee Nat'l Corp. v. Atlantic Richfield Co.*, 5 TRADE REG. REP. ¶ 73,093 (E.D. Pa. Feb. 4, 1970) (agency finding of a violation of section 5 of the FTC Act not determinative in a subsequent treble damage action for a violation of sections 1 and 2 of the Clayton Act). *But see* *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182 (D. Vt. 1969) (action under FTC Act tolls statute of limitations under section 5(b)).

23. [T]he court is constrained to hold: (1) That the proceedings before the Federal Trade Commission did not result in a final judgment or decree. (2) There is grave doubt whether the proceedings before the Commission is a proceeding in equity. The Commission itself is rather an investigating body than a judicial tribunal, and its order has no binding effect until it has received the judicial sanction of the Circuit Court of

The *Proper* criteria were not questioned²⁴ until *Brunswick-Balke-Collender Co. v. American Bowling & Billard Corp.*²⁵ in 1945. Initially, the Second Circuit allowed the admission of an FTC cease and desist order issued for a Clayton Act section 3 violation under the rationale that a 1938 amendment²⁶ had made an FTC order final unless review was sought within a specified period.²⁷ On rehearing, however, the court realized that the amendment was only concerned with orders issued after the determination of an FTC Act, rather than Clayton Act, violation and therefore held that the proffered evidence should be excluded.²⁸ Arguably, the court had thereby dismissed the other *Proper* objections and had accepted an order emanating from an FTC proceeding as equivalent to a judicial determination for section 5(a) purposes, with the exception of the finality problem.²⁹

Appeals. (3) Strictly speaking, it would seem that the proceeding is not brought by or on behalf of the United States, inasmuch as it is instituted by the Federal Trade Commission, although it may well be held that this body as a creature of the government may be said to be acting on behalf thereof. (5) The suit or proceeding must be brought under the anti-trust laws. Neither the Federal Trade Commission Act in its references to anti-trust acts, nor the Clayton Act in its references to anti-trust laws, includes the Federal Trade Commission Act in such a classification. Therefore the proceeding before the Federal Trade Commission is not such a proceeding as is held by section 5 of the Federal Trade Commission Act to be competent evidence, as asserted by plaintiff. (5) The discussion of the fourth requirement is applicable to the fifth. (6) The act permits the proceedings before the Commission to be received as prima facie evidence against such defendant. In the case at bar there are various other defendants. 295 F. at 732.

Proper was a particularly appropriate case to raise the finality issue since the FTC order was later reversed. See note 18 *supra*.

24. *Proper* was noted as precedent in *International Tag & Salesbook Co. v. American Salesbook Co.*, 6 F.R.D. 45 (S.D.N.Y. 1943). See also *Wright v. Carter Products, Inc.*, 244 F.2d 53, 59 n.4 (2d Cir. 1957).

25. 150 F.2d 69 (2d Cir.), modified on rehearing, 150 F.2d 74 (2d Cir.), cert. denied, 326 U.S. 757 (1945).

26. Act of March 21, 1938, ch. 49, § 5(g), 52 Stat. 113 provided:

(g) An order of the Commission to cease and desist shall become final—

- (1) Upon the expiration of the time allowed for filing a petition for review . . . or
- (2) Upon the expiration of the time allowed for filing a petition for certiorari . . .
or
- (3) Upon the denial of a petition for certiorari . . . or
- (4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court . . .

This amendment is codified as 15 U.S.C. § 21(g) (1964).

27. 15 U.S.C. § 45(g) (1964).

28. 150 F.2d at 74.

29. See 9 UTAH L. REV. 482, 484 (1964). In *Brunswick*, the proceeding was instituted for

Two statutory changes of significance have been enacted since 1945. In 1955, the words "any suit or proceeding in equity or criminal prosecution" of both sections 5(a) and 5(b) were replaced with the phrase "any civil or criminal proceeding."³⁰ Congressional intentions regarding this change are not clear,³¹ but a logical explanation is that the modification was enacted to make the Clayton Act nomenclature equivalent to the *Federal Rules of Civil Procedure*.³² A more significant amendment was the Finality Act of 1959,³³ wherein section 11 of the Clayton Act was modified to provide finality to orders for "antitrust law" violations issued by the FTC if not appealed within 60 days.³⁴ This would appear to remove the belated objection in *Brunswick* that an FTC order entered for a Clayton Act violation was not final.³⁵

Subsequent to these statutory changes, most of the developments have involved the tolling provision of section 5(b) which, although worded in nearly identical terms to the evidentiary provision of section 5(a),³⁶ certainly demands a lower level of procedural fairness than the latter.³⁷ For various reasons, courts were still hesitant to consider an FTC proceeding as a "civil or criminal proceeding" for purposes of suspending the statute of limitations. Tolling by an FTC order was not allowed in *Volasco Products Co. v. Lloyd D. Fry*

a violation of the Clayton Act, an antitrust law, and the sole defendant in the FTC proceeding was the sole defendant in the private treble damage action thereby removing *Proper's* fourth, fifth, and sixth objections. In order to have reached its initial result, the *Brunswick* court must have dismissed the second and third objections and determined that FTC proceedings were proceedings in equity on behalf of the United States.

30. Act of July 7, 1955, ch. 283, § 2, 69 Stat. 283, codified at 15 U.S.C. §§ 16(a) & (b) (1964). For the full text of section 5, see note 8 *supra*.

31. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 334-35 (1964) (Black, J., dissenting) (no change intended by 1955 Act); Matteoni, *supra* note 1, at 164-65; 65 COLUM. L. REV. 158, 161 (1965).

32. FED. R. CIV. P. 2 states "There shall be one form of action to be known as 'civil action.'"

33. Act of July 23, 1959, Pub. L. 86-107, § 1, 73 Stat. 243.

34. 15 U.S.C. § 21(g) (1964). The text of this section appears at note 26 *supra*.

35. See Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1110-14 (1968).

36. Both provisions use the phrase "any civil or criminal proceeding" and apparently require the action to be brought by the United States. Of course there are significant differences due to the varied functions of the two sections. The most significant of these is that section 5(a) requires a *final* judgment or decree while section 5(b) becomes operative once a proceeding is *instituted*, regardless of the outcome.

37. See text accompanying notes 118-21 *infra*.

38. 223 F. Supp. 712 (E.D. Tenn. 1963).

*Roofing Co.*³⁸ under the rationale that the 1955 amendment did not specifically refer to FTC proceedings,³⁹ and also on the basis that a plaintiff should not have the benefit of the statute of limitations suspension if the FTC order is appealed since the defendant may prevail on appeal.⁴⁰ The district court in *Highland Supply Corp. v. Reynolds Metals Co.*⁴¹ reached the same conclusion, primarily because the "plain meaning" of a civil or criminal proceeding is a *judicial* proceeding.⁴² An analysis of legislative history provided support for the refusal to apply section 5(b) to toll the statute of limitations by FTC orders in the first *Farmington Dowel Products Co. v. Forster Mfg. Co.*⁴³ case. The court concluded that the original congressional understanding in 1914 that an agency proceeding was not to be accorded the same effect as a judicial determination had not been altered by subsequent amendments.⁴⁴

The first decision to hold that the initiation of an FTC action tolled the statute of limitations under section 5(b) was *New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.*⁴⁵ The district court determined that a consent decree obtained by the FTC would suspend the statute of limitations by concluding that even though section 5(a) specifically precluded the utilization of a consent decree as *prima facie* evidence of a violation, no such proviso negated the application of section 5(b). Rather the legislative purpose pursuant to which section 5 was adopted allowed the application of section 5(b) to the FTC when an action was commenced.⁴⁶ The Third Circuit affirmed⁴⁷ by interpreting the phrase "proceeding in equity" of the original statute to refer to the

39. *Id.* at 713.

40. The court reasoned that if an action, otherwise barred by the statute of limitations, were allowed before the FTC order was enforced by the court of appeals, a party might get the benefit of section 5(b) without a determination that he was entitled to this benefit.

41. *Highland Supply Corp. v. Reynolds Metals Co.*, 221 F. Supp. 15 (E.D. Mo. 1963), *rev'd on other grounds*, 327 F.2d 725 (8th Cir. 1964), *on remand*, 245 F. Supp. 510 (E.D. Mo. 1965).

42. 221 F. Supp. at 17.

43. 223 F. Supp. 967 (D. Me. 1963).

44. *Id.* at 972-74. "The overwhelming impression one forms after reading the legislative history of the original Clayton Act is that none of the members of Congress in 1914 contemplated that Federal Trade Commission proceedings were within the purview of Section 5." *Id.* at 973.

45. 216 F. Supp. 507 (D.N.J. 1963).

46. *Id.* at 510-11.

47. 332 F.2d 346 (3d Cir. 1964), *noted in* 65 COLUM. L. REV. 158 (1965), 53 GEO. L.J. 481 (1965), 78 HARV. L. REV. 469 (1964), *and* 9 UTAH L. REV. 482 (1964).

court of appeals action that was formerly required to enjoin the violation of an FTC order⁴⁸—FTC orders not originally being self enforcing.⁴⁹ After the Finality Act of 1959, this step was not necessary, and thus the FTC proceedings were taken to have the same effect as the proceedings in equity formerly required.⁵⁰ The court of appeals equivocated regarding the independence of sections 5(a) and 5(b), and concluded that even if, contrary to the district court's decision,⁵¹ the provisions were dependent or complementary, there was "no reason why final FTC orders enforcing the Clayton Act should not be admitted as prima facie evidence under Section 5(a)."⁵²

The Supreme Court was not required to decide the 5(a) issue but did affirm the Third Circuit's application of section 5(b).⁵³ The Court determined that sections 5(a) and 5(b) were not necessarily coextensive⁵⁴ for several reasons. Section 5(a)'s requirement of "final judgment or decree" which is "of *crucial* significance in its application"⁵⁵ is not mentioned in section 5(b) since the latter's applicability is not dependent on the outcome of the Government's case. Second, section 5(a) is limited to matters defined by estoppel principles⁵⁶ while section 5(b) applies if the subsequent private action is based on "any matter" in the prior suit.⁵⁷ The congressional objectives in the two provisions were seen to support an independence since section 5(a) was concerned with the "delicate area"⁵⁸ where a judgment in an action involving two parties could

48. Kauper, *supra* note 35, at 1142 n.200 (FTC order after review is *still* based on administrative findings and it would not be desirable to penalize a party for seeking review); Rockefeller, *The Supreme Court and the Private Antitrust Plaintiff*, 7 B.C. IND. & COM. L. REV. 279, 286-87 (1966).

49. An FTC order was to be more of a "notice" than an injunction and had no effect until enforced by the court of appeals. 332 F.2d at 356.

50. *Id.*; Matteoni, *supra* note 1, at 163.

51. 216 F. Supp. 507, 509-10 (D.N.J. 1963).

52. 332 F.2d at 357.

53. 381 U.S. 311 (1965) [hereinafter referred to as *3M*]. See Note, *Federal Trade Proceedings and Section 5 of the Clayton Act: Application and Implication*, 64 MICH. L. REV. 1156 (1966). See also Wilson, *supra* note 14, at 42.

54. 381 U.S. at 318.

55. *Id.* at 316 (emphasis added).

56. *Id.* at 316-17.

57. "Whatever ambiguities may exist in the legislative history . . . it is plain that in § 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions." *Id.* at 317.

58. *Id.*

be used by a third party not a participant in the first action and is restricted by due process requirements;⁵⁹ section 5(b) was to assist plaintiffs to secure *any* benefits obtainable from governmental action. The Court specifically refrained from ruling on the application of section 5(a) to agency proceedings.⁶⁰ As to section 5(b) itself, the Court admitted that there was no legislative history to support the *inclusion* of FTC actions within section 5(b)⁶¹ but noted that this was not determinative of an intention to *exclude*.⁶² Concluding that Congress had not considered this matter, the Court held that the clearly expressed congressional objective of assistance to private litigants would be served only if section 5(b) tolled the statute of limitations for agency proceedings.⁶³ Justice Black's dissent was based on a thorough analysis of the history of section 5 indicating that Congress had not intended that an FTC proceeding be given the same effect as a court proceeding.⁶⁴

In *Farmington Dowel Products Co. v. Forster Mfg. Co.*,⁶⁵ the First Circuit became the first court of appeals to hold that a cease and desist order by the FTC could be used as prima facie evidence under section 5(a). Based on a complaint filed in 1958, the FTC Trial Examiner in 1962 found Forster Manufacturing in violation of section 2(a) of the Clayton Act due to its discriminatory pricing practices for the woodenware it manufactured.⁶⁶ The Commission

59. *Id.* at 318, *citing* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 569 (10th Cir. 1962).

60. "Even if we assumed *arguendo* that § 5(a) is inapplicable to Commission proceedings—a question upon which we venture no opinion . . ." 381 U.S. at 318.

61. "Admittedly, there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision." *Id.* at 320.

62. The Court did not consider that whenever Congress intends to include agency affairs in a statute, it does not use the phrase "civil proceeding," but "agency proceeding" or "adjudication." *See, e.g.*, 5 U.S.C. § 551(7) & (12) (Supp. 1V. 1969).

63. 381 U.S. at 320-21. *See also* Leh v. General Petroleum Corp., 382 U.S. 54 (1965).

64. 381 U.S. at 324 (Black, J., dissenting). *See* text accompanying notes 14-17 *supra*. This was also the position taken by the amicus brief filed by the Solicitor General. Brief for Solicitor General as Amicus Curiae at 35, *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). The majority position was that the legislative history was inconclusive. 381 U.S. at 320.

65. 421 F.2d 61 (1st Cir. 1969); *accord*, *Purex Corp. v. Proctor & Gamble Co.*, 308 F. Supp. 584 (C.D. Cal. 1970); *Y & Y Popcorn Supply Co. v. ABC Vending Corp.*, 263 F. Supp. 709 (E.D. Pa. 1967); *Carpenter v. Central Ark. Milk Producers Ass'n*, 1966 Trade Cas. ¶ 71,817 (W.D. Ark). *Contra*, *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510 (E.D. Mo. 1965).

66. *Forster Mfg. Co.*, 62 F.T.C. 852, 888 (1963). The trial examiner found that Forster, with precatory intent, engaged in illegal price discrimination in wooden meat skewers, clothespins, and ice cream spoons. *Id.* at 884-85.

adopted the Trial Examiner's cease and desist order with minor modification in 1963.⁶⁷ Two of the five FTC members did not participate and one commissioner dissented.⁶⁸ The First Circuit set aside the Commission's order on the basis that an erroneous standard of proof had been applied when the party attempted to assert the defense of "meeting competition in good faith."⁶⁹ During the pendency of the case at the court of appeals, Farmington Manufacturing Company attempted to initiate a private treble damage suit by utilizing the previous FTC order to toll the statute of limitations under section 5(b) but was unsuccessful⁷⁰—*3M* having not yet been decided. On remand, the FTC reconsidered the "meeting competition" defense but affirmed its earlier decision,⁷¹ modifying the original cease and desist order slightly to meet some of the objections of the court of appeals.⁷² On the second appeal, the First Circuit accepted the Commission's new findings;⁷³ Forster's argument that the original order was invalid due to concurrences by only two commissioners—only three of the five participated—was not accepted since the complaint was not raised on the first appeal.⁷⁴ A timely objection could have been cured at the second FTC hearing which was before the entire five-man Commission.

Since the statute of limitations problem had been resolved by the Supreme Court in *3M*, Farmington, a competing manufacturer of woodenware who was allegedly driven out of business as a result of Forster's antitrust violations,⁷⁵ again sought treble damages, now attempting to utilize the FTC's cease and desist order under section 5(a). Introduction into evidence of portions of that order was allowed by the district court where Farmington was awarded

67. *Id.* at 928.

68. *Id.* at 923. The dissenter felt that the FTC's action in "throwing the book" at a person engaged in reprehensible conduct was not supported by the record. *Id.* at 924.

69. *Forster Mfg. Co. v. FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). See generally H. BLAKE & R. PITOFKY, *CASES & MATERIALS ON ANTITRUST LAW* 1160-62 (1967).

70. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967 (D. Mc. 1963), noted in 17 *VAND. L. REV.* 1310 (1964).

71. *Forster Mfg. Co.*, [1965-1967 Transfer Binder] *TRADE REG. REP.* ¶ 17,304 (FTC 1965).

72. 335 F.2d at 56-57.

73. 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

74. *Id.* at 342-43. Subsequent to this case, the Supreme Court approved a cease and desist order issued by only two of the three participating Commissioners. *FTC v. Flotfill Prods., Inc.*, 389 U.S. 179 (1967).

75. *Forster Mfg. Co.*, 62 F.T.C. 852 (1963).

\$329,000 in damages,⁷⁶ and the decision was affirmed by the First Circuit Court of Appeals.⁷⁷ Judge Coffin, in a logical opinion that evidenced a thorough understanding of the applicable precedents, used the six criteria established by *Proper v. John Bene & Sons*⁷⁸ as the starting point. Since the FTC's action against Forster for a Clayton Act violation was by statute an action under an "antitrust law,"⁷⁹ and the defendant in the instant case was the party against whom the FTC had acted, only three of *Proper's* six objections applied: that an FTC proceeding lacked finality, was not a "proceeding in equity," and was not brought by the United States.⁸⁰ *3M* was utilized to answer two of the three protestations. Acknowledging the "greater delicacy" of section 5(a),⁸¹ the First Circuit found that, in the absence of contrary legislative history, *3M* applied to both parts of section 5 in its holding that an FTC proceeding is a "civil or criminal proceeding" brought by the United States⁸² since words identical to those necessarily construed by the Supreme Court to reach the result in *3M* for section 5(b) are also used in section 5(a).⁸³ Thus, the sole obstacle to the application of section 5(a) to FTC orders was the question whether a Commission order is a "final judgment or decree" as that phrase is used in section 5(a).

The Finality Act of 1959 supplied the statutory provision to make an FTC order for a Clayton Act violation final⁸⁴ and left as the single remaining issue whether an FTC order should be denominated a "judgment or decree."⁸⁵ Admitting that as a matter

76. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 297 F. Supp. 924 (D. Me. 1969) (analysis of fees); 299 F. Supp. 1048 (D. Me. 1967) (extent of admissibility of FTC order); 299 F. Supp. 1043 (D. Me. 1967) (section 5(a) issue).

77. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969).

78. 295 F. 729 (E.D.N.Y. 1923). See text accompanying notes 21-23 *supra*.

79. The FTC's action against Forster was for violation of section 2(a) of the Clayton Act, which, unlike the FTC Act, is an antitrust law. 15 U.S.C. § 12 (1964).

80. 421 F.2d at 67 n.7.

81. *Id.* at 68.

82. "[W]e do believe that *3M* necessarily held that a Commission proceeding is a 'civil or criminal proceeding brought by the United States' for purposes of section 5." *Id.* at 69.

83. The court noted that it was "inconceivable" that the same words used in section 5(a) would have a different meaning than was attributed to them in section 5(b) by the Court in *3M*. *Id.*

84. The court saw the Finality Act as having significance for two reasons: (1) The authority of *John Bene* and its progeny was negated; (2) The FTC order admitted by the district court was made final by the Act. *Id.* at 70.

85. Farmington's argument that the Finality Act was not applicable to the FTC order since the proceeding was commenced before the Act's passage was rejected. *Id.* n.25. The

of semantics these words have historically referred only to judicial pronouncements, the court utilized legislative history⁸⁶ to support its contention that the drafters of section 5(a) in 1914 did not intend that the rights created by this enactment should be dependent on the forum utilized to prosecute antitrust violators, but rather intended that section 5(a) would be applicable if the procedural safeguards of the proceeding are sufficient to assure the fairness connotated by the phrase "day in court" as used by section 5's authors.⁸⁷

After a brief review of the total FTC procedural framework,⁸⁸ the court focused on the primary objections raised by *Forster*—that hearsay evidence admissible in an FTC proceeding would not be admitted under judicial rules of evidence and that no separation existed between the prosecutorial and judicial functions within the FTC. While hearsay evidence that would not be admissible under the common law evidence rules *is* admissible in administrative adjudications,⁸⁹ the court concluded that this admission was unlikely to be dispositive, especially in a non-jury trial.⁹⁰ Regarding the separation of functions, the lack of complete separation was acknowledged,⁹¹ but the *internal* separation of functions characteristic of the FTC⁹² was determined to satisfy due process

district court in *Purex* disagreed with the First Circuit's reasoning on this issue, but found that the purpose for requiring a final judgment, that a decision which might be reversed should not be usable in a private suit, was fulfilled by the Supreme Court's affirmation of the antitrust violation in that case. *Purex Corp. v. Proctor & Gamble Co.*, 308 F. Supp. 584, 587-88 (C.D. Cal. 1970).

86. 421 F.2d at 71 n.27.

87. Congressmen . . . were not thinking in terms of the particular institutions which would satisfy their "day in court" assurance for defendants . . . Congress was using [this] terminology more in the generic sense of a full opportunity to be heard and have one's case determined with finality in a proceeding in which fairness is assured. *Id.* at 72-73.

88. *Id.* at 73-74. This discussion by the court was adequate, but not in the depth of other portions of the opinion.

89. L. JAFFEE & N. NATHANSON, *ADMINISTRATIVE LAW CASES AND MATERIALS* 432 (1968).

90. "[A]ny difference . . . between the courts and the Commission regarding hearsay is one of degree and unlikely to be dispositive." 421 F.2d at 74. However, a quote utilized by the court from *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349, 355 (D. Mass. 1950), indicated that hearsay was admissible in antitrust cases because a defendant could suffer "at most an injunction and order without monetary damages." But if section 5(a) is applicable, large amounts of monetary damages will ultimately be at stake. *E.g.*, *Purex Corp. v. Proctor & Gamble Co.*, 308 F. Supp. 584, 585 (C.D. Cal. 1970) (action for over five hundred million dollars).

91. The FTC was contrasted with the NLRB which has a complete separation of functions. 421 F.2d at 74.

92. 16 C.F.R. § 3.42(f) (1969) requires that hearing examiners not be directly responsible to persons engaged in prosecutorial functions.

requirements. This position was reached by using the ICC as an analogy since the orders of that agency, which has an internal separation of functions similar to the FTC, are admissible as prima facie evidence in subsequent trials.⁹³ On broader due process grounds, the FTC proceeding was found to be sufficiently fair to allow the admission of the ensuing order since only a rebuttable presumption was created, thereby taking nothing from the province of the jury.⁹⁴ The procedure was evidently determined to be sufficiently fair by Congress since a statute provides that a final order can be the unimpeachable basis for suits for violations of FTC commands.⁹⁵ The court also noted that to hold that an FTC order is not usable under section 5(a) would be extremely unfair to the plaintiff by making the usability of the Government's labor turn on an arbitrary allocation of enforcement effort between the FTC and Justice Department.⁹⁶

Another significant issue was considered in *Farmington*. On cross-appeal, Farmington had contended that the district court erred in permitting only the final order of the FTC to be admitted rather than the Examiner's initial decision and the opinion of the Commission.⁹⁷ For support on this issue, Farmington cited *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*⁹⁸ as broadening the scope of admissibility under section 5(a) over the rule established in *Emich Motors Corp. v. General Motors Corp.*⁹⁹ The *Emich Motors* standard of the applicable collateral estoppel principle is to admit "all matters of fact and law necessarily decided"¹⁰⁰ in the previous

93. This analogy is not perfect since the prima facie effect of the ICC orders is *specifically* provided for by statute. 49 U.S.C. § 16(2) (1964) ("[T]he complainant . . . may file . . . a complaint . . . and the order of the Commission [is admissible] . . .") (emphasis added).

94. 421 F.2d at 75, citing *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915).

95. 15 U.S.C. § 21(1) (1964) provides: "Any person who violates any order issued by the Commission . . . shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation." Similarly, see 15 U.S.C. § 45(1) (1964).

96. 421 F.2d at 76. See generally *Butler*, *supra* note 17, at 48-52. This "bootstrap" argument was also used by the Supreme Court in *3M*. 381 U.S. at 320. While it is appealing on equitable grounds, it is not responsive to the central issue involved. Any arbitrariness which results from the allocation of antitrust cases between the Justice Department and the FTC has no relation to the fairness of using the results of either branch's efforts.

97. Farmington had requested admission for the examiner's initial decision, the original opinion and order of the Commission, and the opinion and order after remand. 421 F.2d at 77 n.40.

98. 392 U.S. 481 (1968).

99. 340 U.S. 558 (1951).

100. *Id.* at 569 (emphasis added). However, one commentator has suggested that section 5 is more a rule of evidence than of estoppel, since estoppel is to discourage litigation rather

adjudication; *Hanover Shoe* was interpreted by Farmington to allow the admission of findings that are merely *relevant* to a subsequent proceeding.¹⁰¹ The court rejected this analysis and restated the "necessarily decided" standard in terms of fairness when the parties concentrate on matters of central importance to the litigation.¹⁰² However, the lower court's refusal to admit the FTC finding regarding Forster's "meeting competition" defense was found to be erroneous, since this issue was "necessarily decided," but this mistake did not rise to the level of reversible error.¹⁰³

Two lines of inquiry are necessary in an evaluation of the *Farmington* position regarding section 5(a): What is the proper theory of statutory construction to be applied, and, if the matter is not foreclosed at this point, how do the FTC's proceedings compare with those of courts? There is little doubt that the purpose of section 5 is to aid private litigants to collect damages from violators of the antitrust laws. This conclusion is amply supported by the history of the legislation¹⁰⁴ and is sanctioned by both the majority¹⁰⁵ and

than encourage it as section 5 does. Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 GEO. L.J. 44, 47-48 (1960).

101. 421 F.2d at 78.

102. "But since parties can be expected to exert their full effort only on what seems essential at the time, it seems unfair to close the door to issues which have not been on stage center . . ." *Id.* at 79.

103. The court did not see how additional findings of monopolization could increase the damages awarded to Farmington. "Were Caesar to be run through thrice, he would not be thrice dead." *Id.* at 80.

Another interesting issue discussed concerned the allowance for reasonable attorney's fees as provided by statute, 15 U.S.C. § 15 (1964). The district court had found that \$85,000 was a "reasonable" attorney's fee, but, upon learning of the contingent fee arrangement whereby counsel was to receive the "reasonable attorney's fee" plus one third of the trebled damages, refrained from awarding that amount, reasoning that if the award were made, the *total* amount received by the attorneys would be in excess of the "reasonable amount" and therefore in contravention of the statute. The First Circuit agreed that the court had power to reduce fees but interpreted the statute to require the awarding of the "reasonable amount" to the plaintiff rather than the attorney and not to preclude counsel from receiving both the \$85,000 and the agreed upon portion of the treble damage award from the victor. The matter was remanded for a separate determination of the maximum amount that could be accepted by counsel consistent with the *Canon of Ethics*. Upon a subsequent motion by Farmington to recover \$17,000 as attorney's fees for the appeal itself, the court awarded \$4,000. Although they declined to fragment the appeal into parts won and lost by plaintiff, it did consider that the significant portion of plaintiff's brief which was directed toward securing a reversal and new trial with potential for a larger judgment was not compensable. 421 F.2d at 91.

104. "The entire provision [section 5] is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H. REP. NO. 627, 63d Cong., 2d Sess. 14 (1914).

105. 381 U.S. at 318-19.

minority opinions¹⁰⁶ in *3M*. But this does not settle the question of *how* and to *what extent* Congress intended to help. A blind application of one principle of construction—that “. . . the purpose of a statutory provision is the best test of the meaning of the words chosen”¹⁰⁷—would necessarily allow *prima facie* effect to be given FTC orders since the aid thus provided plaintiffs is obvious. But maxims of statutory construction can be found to support almost any desired result.¹⁰⁸ Applying the equally accepted theory that “resort to legislative history is only justified where the face of the Act is inescapably ambiguous”¹⁰⁹ would command a contrary result since the Supreme Court in *3M* admitted that the “precise language of § 5(b) does not clearly encompass Commission proceedings.”¹¹⁰ And although the majority in *3M* did not discern *any* Congressional intent in 1914 regarding coverage of the FTC,¹¹¹ Justice Black’s dissent is more persuasive in its conclusion that Congress did not intend section 5 to apply to administrative proceedings.¹¹² Given this apparent conflict between the statutory purpose and the clear meaning of the words utilized,¹¹³ the most satisfactory interpretational guideline would appear to be as expressed by Judge Learned Hand:

We are to put ourselves so far as we can in the position of the legislature that uttered [the words of the statute], and decide whether or not it would

106. “[Section] 5 . . . was passed in response to President Wilson’s 1914 plea to Congress to enact a law designed to make it easier for antitrust victims to collect damages through private lawsuits” *Id.* at 325 (Black, J., dissenting).

107. *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959).

108. 12 MODERN FEDERAL PRACTICE DIGEST §§ 174-223 (1960).

109. *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring).

110. 381 U.S. at 321.

111. “Admittedly, there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision. But neither is there any substantial evidence that it consciously intended to exclude them.” *Id.* at 320.

112. *Id.* at 324-34 (Black, J., dissenting).

As my Brother Black has so well demonstrated in his dissenting opinion, both the language and legislative history of the statutes before us clearly show that Congress did not intend that the statute of limitations applicable to private antitrust actions be tolled by the institution of a Federal Trade Commission administrative proceeding. *Id.* at 335 (Goldberg, J., dissenting).

See also 9 UTAH L. REV. 482, 486 (1964). *3M*’s lack of explanation regarding statutory construction was criticized by Wilson, *supra* note 14, at 38.

113. As the *Farmington* court admitted: “Were we to proceed semantically, we would have to acknowledge that these words ‘judgment or decree’ historically have referred only, or chiefly, to courts.” 421 F.2d at 71.

declare that the situation that has arisen is within what it wishes to cover. Indeed, at times the purpose may be so manifest as to override even the explicit words used.¹¹⁴

Thus, even though the procedures of the FTC in 1914 were not adequate to comply with due process requirements,¹¹⁵ application of this standard requires an evaluation, as was recognized in *Farmington*,¹¹⁶ of the *current* adjudicative procedures of the FTC as compared to those of the judicial process.¹¹⁷

The procedural elements necessary to assure fairness before the results of a proceeding should be utilized as prima facie evidence under section 5(a) can be distinguished from those required before the statute of limitations can be tolled under section 5(b). Since section 5(b) is concerned only with the institution of an action¹¹⁸ and does not depend on the outcome of the litigation,¹¹⁹ proper notice

114. *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959). *But see* 421 F.2d at 73. ("[W]e do not understand our function to be simply to speculate what Congress would have done if it squarely addressed this issue in 1914.") To the same effect for Constitutional interpretations, *Home Bldg. & Loan Ass'n v. Blasdell*, 290 U.S. 398, 442-43 (1934).

115. Commentators in 1916 catalogued the short-comings of the FTC as follows:

[I]t seems entirely clear from the nature of the statutory proceeding that the Commission . . . cannot be properly regarded as a court, or as exercising any judicial power whatsoever within the sense and meaning of the Constitution.

The fact that the Commission cannot issue any coercive process to compel the appearance of the accused, or to enforce obedience to its orders, and the further fact that in proceedings before the Commission there shall not be adversary parties litigant, but the Commission itself shall be the actor in the first instance, completely differentiate the Commission from a court.

The Commission is not in any aspect an impartial adjudging body, as is a court. It is essentially an accusing body . . . Congress intended that the Commission, before instituting any proceeding, should investigate *ex parte*, and should measurably prejudge, the guilt of any suspect against whom the issuance of a complaint might be contemplated. J. HARLAN & L. MCCANDLESS, *THE FEDERAL TRADE COMMISSION* 54-55 (1916).

116. "[W]e conclude that the critical question is whether the procedural safeguards of the commission are substantial enough to assure the defendant the 'day in court' . . ." 421 F.2d at 73.

117. Although the following discussion concerns only the FTC, the procedural fairness provided by the rules of other agencies may eventually require consideration, since other agencies, the ICC, FCC, CAB and FRB, may enforce specified portions of the Clayton Act in areas within their jurisdiction. *Matteoni*, *supra* note 1, at 169. Of course, some of the general procedural requirements of the Administrative Procedure Act may be applicable to these agencies also.

118. "Whenever any civil or criminal proceeding is *instituted* by the United States . . ." 15 U.S.C. § 16(b) (1964) (emphasis added).

119. The section 5(a) proviso regarding consent decrees and decrees entered before the taking of testimony is omitted from section 5(b). *Compare id.* § 15(a) *with id.* § 15(b). *See also* *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316 (1965).

would appear to satisfy the requirements of procedural fairness.¹²⁰ However, the totality of procedures including notice, hearing procedures, decisional processes, and standards of review must be fair before the results of a prior determination are deemed trustworthy enough to be admissible into evidence. The Supreme Court has recognized this distinction¹²¹ and in *3M* implicitly determined that the notice provided by the FTC¹²² was sufficient, at least for purposes of tolling the statute of limitations.¹²³

In evaluating the remaining elements of an administrative proceeding, the standards provided by the Administrative Procedure Act¹²⁴ as well as the FTC's Rules of Practice¹²⁵ should be considered since the APA provides the statutory basis for the procedures of agencies subject to that Act.¹²⁶ Although the rules of practice of the FTC may at a given moment be more liberal or pro-respondent than those of the APA, the agency rules are subject to change by the agency without public participation.¹²⁷ Thus the APA provides a minimum level of protection below which the FTC cannot legally operate.

Several components should be considered in analyzing the fairness of the hearing or adjudication itself, including discovery and other preliminary activities, right to counsel, right to confront witnesses, and evidentiary rules. Although the discovery provided by the FTC rules¹²⁸ is certainly not equivalent to that provided by the

120. From a theoretical standpoint, notice of a pending FTC action should be sufficient to warn the litigant that he should preserve all records and materials that may be necessary to defend against a subsequent treble damage suit.

121. 381 U.S. at 317-18.

122. 5 U.S.C. § 554(b) (Supp. 1V, 1969); 16 C.F.R. §§ 3.11, 3.41(c) (1969). Coincidentally, Forster's first appeal involved the FTC's amending of its complaint, but their objection was rejected. 355 F.2d at 50.

123. However, notice of an FTC action is not necessarily equivalent to notice regarding a civil action for treble damages. In the former, all that is at stake is an order not to engage in illegal activity, and it is possible that the respondent will not defend as vigorously as he might if he were aware of the large sums at stake in treble damages. Of course, future parties to FTC actions should be on notice of the potential effect of an FTC order.

124. 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 7521 (Supp. 1V, 1969) [hereinafter referred to as APA].

125. Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §§ 3.1-7.2 (1969).

126. Section 5 of the APA, 5 U.S.C. § 554(a) (Supp. 1V, 1969), establishes the procedures for adjudications required by statute. Since the FTC is required by statute to provide a hearing, 15 U.S.C. § 45 (1964), the agency is required to comply with the APA.

127. 15 U.S.C. § 46(g) empowers the FTC to make rules and regulations to carry out its delegated duties. Section 4 of the APA governs rule making activities and exempts agency rules of practice or procedure. 5 U.S.C. § 553(b)(A) (Supp. 1V, 1969).

128. 16 C.F.R. §§ 3.31-37 (1969).

Federal Rules of Civil Procedure,¹²⁹ its availability, in conjunction with the subpoena power of the FTC¹³⁰ and the provision for a prehearing conference,¹³¹ appear adequate to eliminate the "surprise" element, at least for a diligent party.¹³² The right to representation by counsel in FTC proceedings is provided by statute.¹³³ In fact, the FTC has recently decided that counsel must be provided indigent respondents at government expense in certain proceedings,¹³⁴ and it is, therefore, providing a higher level of protection for the rights of the alleged violator than would be afforded in a normal civil suit. The right to cross-examine witnesses is provided by the FTC rules,¹³⁵ and likewise, the APA provides for "such cross-examination as may be required for a full and true disclosure of the facts."¹³⁶

The evidentiary standards of an administrative hearing¹³⁷ allow the use of evidence such as hearsay which would normally not be admissible in a judicial proceeding before a jury and provide a frequent source of support for persons wishing to distinguish judicial and administrative adjudications.¹³⁸ However, the differences are more illusory than real, and, even if the complaints are valid, the admission of hearsay evidence is seldom grounds for reversible error, at least in non-jury trials.¹³⁹ Standards for the admission of evidence

129. Compare *id.* with FED. R. CIV. P. 26-37. A major distinction is that FED. R. CIV. P. 26(b) generally allows discovery for any matter *relevant* to the subject matter of the suit, while the FTC's rules, 16 C.F.R. § 3.33 (1969), provide for discovery at the discretion of the hearing examiner if *necessary*, and the discovery may not be accomplished by voluntary means. See generally Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 142-46 (1968).

130. 15 U.S.C. § 49 (1964); 16 C.F.R. § 3.34 (1969).

131. 16 C.F.R. § 3.21 (1969).

132. Although the hearings are to be expeditious, the hearing examiner has the power "to order brief intervals to permit discovery." 16 C.F.R. § 3.41(b) (1969). Thus, if a party is "surprised" by evidence introduced by the FTC, he may ask for delay to utilize either discovery or the Commission's subpoena power to bolster his own evidence. Failure to allow such delay could be grounds for reversal on appeal.

133. See 14 U.S.C. § 45(b) (1964); 16 C.F.R. §§ 3.41(c), 4.1(a)(1) (1969). The APA provision regarding counsel is contained in 5 U.S.C. § 555(b) (Supp. IV, 1969).

134. American Chinchilla Corp., 3 TRADE REG. REP. ¶ 19,059 (FTC 1969), *discussed in* Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 112-17.

135. 16 C.F.R. § 3.41(c) (1969).

136. 5 U.S.C. § 556(d) (Supp. IV, 1969).

137. *Id.*, 16 C.F.R. § 3.43(b) (1969).

138. See, e.g., Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 73 (1st Cir. 1969).

139. United States v. United Shoe Mach. Corp., 89 F. Supp. 349, 355 (D. Mass. 1950). See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02 (1958); Davis, *Hearsay in*

in agency proceedings are prescribed by FTC rule and the APA and are phrased to exclude testimony that is not trustworthy.¹⁴⁰ Even when evidence which would traditionally be defined as hearsay is admitted, it alone may not be sufficient to sustain a finding due to the "substantial evidence" review criterion, although this standard of review has been subjected to criticism.¹⁴¹ Overall, the procedures used for the conduct of the hearing itself appear to be sufficiently fair to compare favorably with judicial practices.

More pertinent criticism can be made regarding the decisional process of the FTC. Separation of functions does not exist; the agency operates as both prosecutor and judge.¹⁴² Although several rationalizations may be made to suggest the minimal impact of this organizational structure,¹⁴³ there can be little doubt that less possibility for bias exists with an independent judiciary.¹⁴⁴ This

Nonjury Cases, 83 HARV. L. REV. 1362 (1970). One commentator has noted that the courts have disregarded formalistic evidence rules in antitrust proceedings, but, contrary to what might be expected, these rules still plague the FTC. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 52-53 (1969).

140. 5 U.S.C. § 556(d) (Supp. 1V, 1969) ("reliable, probative and substantial evidence"); 16 C.F.R. § 3.43(b) (1969) ("Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded.").

141. "The reviewing court shall . . . set aside agency action . . . found to be . . . unsupported by substantial evidence . . ." 5 U.S.C. § 706(2)(E) (Supp. 1V, 1969). See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (hearsay is not substantial evidence); *Cohen v. Perales*, 412 F.2d 44, *rehearing denied*, 416 F.2d 1250 (5th Cir. 1969), *cert. granted sub nom. Finch v. Perales*, 38 U.S.L.W. 3401 (U.S. April 21, 1970) (No. 1302). See also 1970 DUKE L.J., *supra* note 134, at 146-56. *But cf.* *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir. 1938). Professor Davis is critical of this standard. 2 K. DAVIS, *supra* note 139, § 14.11. Although the courts are continuing to articulate the standard of review in the terms "substantial evidence," possibly they are in fact utilizing this test only when "better" evidence is available but not utilized.

142. 29 U.S.C. § 153 (1964); 2 K. DAVIS, *supra* note 139, §§ 13.04-.05. See generally Note, *Federal Trade Commission Proceedings and Section 5 of the Clayton Act*, 53 GEO. L.J. 481, 489-90 (1965).

143. The *Farmington* court suggested several: (1) Internal separation of functions, 16 C.F.R. § 3.42(f) (1969); (2) Evidentiary use of orders of another similarly organized agency, the ICC. However, this is by specific statute, 49 U.S.C. § 16(2) (1964), rather than judicial interpretation; (3) Possibility of monetary penalties for violation for an FTC order, suggesting equality with judicial decisions. Again, this is due to a specific statute, indicating explicit congressional approval of this action. 15 U.S.C. § 15(1) (1964).

144. An agency employs practices not utilized by courts, such as making speeches, issuing press releases, and reporting to Congress, whereby a litigant arguably may be prejudiced pending the hearing of his case. Reviewing courts have normally allowed these activities since one of the FTC's primary objectives is to inform the public regarding unfair trade practices. *E.g.*, *All-State Indus. v. FTC*, 5 TRADE REG. REP. ¶ 73,112 (4th Cir. Mar. 9, 1970) (communications to Senate Committee condemning national trade practices paralleling those of respondent not prejudicial);

possible lack of independence exists at both the hearing examiner level and with the Commissioners themselves, who are political appointees without tenure.¹⁴⁵ Recent charges by consumer protection groups that the FTC and other agencies do not represent the public but rather zealously support the groups being regulated¹⁴⁶ would appear to provide a weak basis for complaint by an industrial litigant; however, the charges of bias and favoritism do suggest the dangers created by a lack of independence.¹⁴⁷

The final element essential to procedural fairness is the right to judicial review of an agency determination. This right is provided by statute,¹⁴⁸ and a right of appeal internally within the FTC itself is

FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968). However, at least when extreme bias exists, the courts react by vacating the FTC's orders. In *Cinderella Career & Finishing Schools, Inc. v. FTC*, 5 TRADE REG. REP. ¶ 73,114 (D.C. Cir. Mar. 20, 1970), Chairman Dixon's failure to disqualify himself after making a speech on the subject under consideration was held to violate due process. In what must be one of the most vehement personal criticisms in a recent opinion, the court concluded:

Chairman Dixon, sensitive to theory but insensitive to reality [declined to withdraw from the case] We find it hard to believe that former Chairman Dixon is so indifferent to the dictates of the Court of Appeals that he has chosen once again to put his personal determination of what the law requires ahead of what the courts have time and again told him the law requires. If this is a question of "discretion and judgment," Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action. We can use his own words in telling Commissioner Dixon that he has acted "irrespective of the law's requirements"; we will spell out for him once again, avoiding tired clinche and weary generalization, in no uncertain terms, exactly what those requirements are, in the fervent hope that this will be the last time we have to travel this wearisome road.

. . . .
 . . . It is appalling to witness such insensitivity to the requirements of due process; it is even more remarkable to find ourselves once again confronted with a situation in which Mr. Dixon, pouncing on the most convenient victim, has determined either to distort the holdings in the cited cases beyond all reasonable interpretation or to ignore them altogether. *Id.*

145. The term of office is seven years. 15 U.S.C. § 41 (1964).

146. *E.g.*, Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 2-3 (1970).

147. *See generally* Posner, *supra* note 139. A rather long bibliography of publications criticizing the FTC is contained in *id.* at 47 n.1. For a comprehensive article recommending organizational changes in the FTC, *see* Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383 (1964). Commissioner Elman has recently criticized the FTC in many areas, including lack of separation of functions, poor procedures, and unqualified personnel. SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, COMMITTEE ON THE JUDICIARY, 91ST CONG., 1ST SESS., RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE AGENCY DECISION MAKING 122 (Comm. Print 1969).

148. 15 U.S.C. § 45(c) (1964). *See also* 5 U.S.C. §§ 701-04 (Supp. IV, 1969).

given by the agency's rules.¹⁴⁹ The judicial standard for review, that the agency decision be, *inter alia*, supported by substantial evidence,¹⁵⁰ certainly appears adequate to assure fairness.¹⁵¹ Considerable complaint has been made regarding the vague and imprecise decrees entered by the FTC after the finding of an antitrust violation.¹⁵² Courts have hesitated to review this portion of the FTC's activities as closely as other aspects¹⁵³ since, among other reasons, the order has had only a prospective effect.¹⁵⁴ However, if the order is now to be prima facie evidence of a past violation, it can have a rather severe punitive impact for antecedent activity.¹⁵⁵ Thus, even closer judicial scrutiny and demand for explicitness may be expected.

As a final analysis, the totality of the procedural safeguards provided must be compared to the nature of the right which may be contravened if these procedures are in fact not wholly fair.¹⁵⁶ Since the prior determination is admissible only as prima facie evidence and is therefore rebuttable,¹⁵⁷ and the evidence is directed at only one

149. 16 C.F.R. § 3.52 (1969). However, the agency does not always follow its published procedures for reviewing an initial decision. *See, e.g.*, *Cinderella Career & Finishing School, Inc. v. FTC*, 5 TRADE REG. REP. ¶ 73,114 (D.C. Cir. Mar. 29, 1970) (FTC cannot ignore findings of Trial Examiner and make a complete de novo determination).

150. 5 U.S.C. § 706(2)(E) (Supp. IV, 1969). The agency action may also be reversed if arbitrary, capricious, or an abuse of discretion, *id.* § 706(2)(A), unconstitutional, *id.* § 706(2)(B), ultra vires, *id.* 706(2)(C), or without proper procedure, *id.* § 706(2)(D).

151. A commentator suggests that the standard for review over agency activity has coalesced with the standard utilized by circuit courts over the district courts, that is, clearly erroneous. Howery, *Some Thoughts on Commission Fact Finding and Judicial Review*, 14 ABA ANTITRUST SECTION 32, 36 (1959).

152. *See generally* Austern, *supra* note 14, at 299; Kauper, *supra* note 35.

153. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946).

154. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

155. In theory, only the portion of the order that is supported by the findings of the FTC will be admitted, Kauper, *supra* note 35, at 1144 & n.209, but this theory may not be consistently applied without a complete review of the FTC proceeding.

156. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968).

157. Without strict judicial control, the introduction of prior judgments may be extremely dangerous and prejudicial. Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Litigation*, 36 N.Y.U.L. REV. 991 (1961). In practice, it may create a conclusive presumption of guilt. Seeley, *The Pitfalls Which Lurk in Government Litigation for Defendants Who May be Subjected to Treble Damage Actions*, 4 ANTITRUST BULL. 17, 20-21 (1959).

One writer has suggested that the prior judgment or order be given conclusive effect. Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334, 1346 (1969). *See also* Rockefeller, *supra* note 48, at 285-86. This would

of the three major issues that must be litigated in a treble damage suit,¹⁵⁸ the FTC procedure, though short of judicial standards in some respects, would appear to be adequate to assure "the day in court"¹⁵⁹ demanded by the framers of section 5(a). Even though a private litigant can be aided by FTC activities without giving prima facie effect to FTC orders,¹⁶⁰ the *Farmington* opinion represents no greater "discreet judicial legislation"¹⁶¹ than that practiced by the Supreme Court in *3M* and is likely to be followed by all but the most literal constructionists unless additional consideration is given to the relation of section 5 to the total system of antitrust laws.

Farmington's impact on the attainment of the goals of antitrust policy is uncertain. The potential amount of financial damage to the litigant who loses at the FTC level due to subsequent treble damage suits may have the beneficial effect of encouraging consent decrees since they are not usable as prima facie evidence.¹⁶² While this is of no benefit to the private plaintiff,¹⁶³ overall antitrust policy would seem to be furthered. However, if either the FTC refuses to accept the consent decree or the respondent refuses to consent, litigation may become protracted since a respondent will surely resist even

undoubtedly require a statutory amendment, as would an extension of section 5(a) to apply to FTC orders issued for FTC Act violations. *But see* Lippa's, Inc. v. Lenox, Inc., 305 F. Supp. 182 (D. Vt. 1969) (action under FTC Act tolls statute of limitations under section 5(b)).

158. The three factors are:

(1) Violation of the antitrust laws; (2) Damage to business or property; (3) Causal connection between (1) & (2). *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 389 F. 2d 86, 90 (9th Cir. 1961). Perhaps the most difficult to prove with certainty is (2). *Loevinger, Handling a Plaintiff's Antitrust Damage Suit*, 4 ANTITRUST BULL. 29, 31 (1959).

159. 51 CONG. REC. 9169 *passim* (1914).

160. A treble damage plaintiff will have the advantage of the reported decision and transcript of the FTC action. He may also be able to utilize discovery or the Freedom of Information Act, 5 U.S.C. § 552 (Supp. IV, 1969), to obtain the FTC's files concerning the adjudication. However, unless this effort is encouraged by the FTC, he is unlikely to have success at the latter, either due to claims of executive privilege or an exception to the Freedom of Information Act. *See* 78 HARV. L. REV. 469, 471 (1964). A suggestion has been made to admit FTC decrees but give them a different weight due to the procedures used by the FTC. *Comment, Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 628 (1965).

161. 65 COLUM. L. REV. 158, 162 (1965).

162. 15 U.S.C. § 5(a) (1964) does "not apply to consent decrees." However, a bill has been introduced that would make documentary evidence available to private parties when the government accepts a consent decree. H.R. 16,551, 91st Cong., 2d Sess. (1970). *See also* BNA ANTITRUST & TRADE REG. REP. A-1 (Mar. 24, 1970).

163. In fact, consent decrees may be detrimental to the private litigant since no public record is created which might be of aid in preparing the subsequent case. Of course, modern discovery practices enable a party, at a cost, to garner the same information obtainable by the FTC.

more vigorously rather than risk an unfavorable order usable in a subsequent treble damage action.¹⁶⁴ If the FTC is successful, the burden on the courts may be increased by plaintiffs seeking treble damage "windfalls," arguably reversing the role of private antitrust enforcement actions.¹⁶⁵

A possibility of unfairness to the respondent also exists, not solely from the potentially different quality of justice dispensed by the FTC,¹⁶⁶ but also due to the type of violation being pursued by the agency. Pressure is increasing on the FTC to be innovative in its selection of areas to be attacked as anticompetitive.¹⁶⁷ Commissioner Elman, for example, has suggested that the agency's energy should not be expended in areas where *per se* rules are applicable but that the FTC "should at last begin to function as a policy making body, fashioning and expounding new law and policy within the broad ambit of the statutes it administers."¹⁶⁸ This desirable innovation may be satisfactory when an FTC order has only a prospective effect, but now that it is usable as evidence of past antitrust transgressions, closer scrutiny is required. Possibly a double standard should govern the use of FTC orders. Orders entered for violations in areas where the law is clear and settled could be usable under section 5(a), but orders issued by the FTC in its innovative capacity would not be of further benefit.¹⁶⁹ Congressional clarification in this area would be welcome, especially since legislative intention is certainly not explicit, and may be required if the FTC is to move toward functioning as an effective administrative body by obtaining the maximum utilization from its technical expertise and quasi-legislative capabilities in order to improve competitive conditions rather than acting as merely another court.

164. The "vigor" of the defense is certainly a matter of degree. In many actions, especially where divestiture is a possibility, the extra incentive provided by possible future damages is probably negligible. But in some instances, a respondent might provide little resistance to an order having merely prospective effect, yet would spare no expense to avoid hundreds of suits by customers or competitors who could utilize this same order under section 5(a).

165. This would result since the objective of section 5 is generally considered to be to aid the government's enforcement activity rather than to compensate injured parties.

166. See text accompanying notes 142-47 *supra*.

167. For an example of the FTC's innovation, see *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967).

168. SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, *supra* note 147, at 129.

169. The mechanics and procedures of determining which orders could be used are not without problems. A possible solution might be for the FTC to make a finding whether the order should be usable in a subsequent action. This finding would be incorporated into the order and, as part of the order, would be reviewable if appealed.

