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Trade Regulation: Prior Change in Decisional Law Limits Retroactivity of Treble Damages

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Plaintiff leased machinery from the defendant. Following a government action[1] in which the defendant was found guilty of monopolization in violation of section 2 of the Sherman Act[2] as a result of its lease-only policy, plaintiff brought an action for treble damages under section 4 of the Clayton Act.[3] The trial court awarded treble damages for the excess of the leasing costs over the cost of ownership of the same machines had they been available for purchase for the period from 1939 to the time of suit.[4] The Third Circuit vacated the judgment and awarded a new trial *holding, inter alia*,[5] that damages could be awarded only for the period commencing with the time of the change in decisional law[6] upon which the Sherman Act violation was based. *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*, 377 F.2d 776 (3d Cir. 1967), *cert. granted*, 36 U.S.L.W. 3143 (U.S. Oct. 9, 1967) (Nos. 335 & 463).

Although changes in decisional law originally were given retroactive effect, there has been a shift from the Blackstonian

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1. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

2. 15 U.S.C. § 2 (1964).

3. Section 4 provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1964).

Hanover relied upon § 5(a) of the Clayton Act, which makes the decree from the government case "prima facie evidence" against United Shoe "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." 15 U.S.C. § 16(a) (1964).

4. The suit was commenced prior to the 1955 amendment, 69 Stat. 283, of § 5 of the Clayton Act creating a federal four-year statute of limitations in antitrust actions. 15 U.S.C. § 15(b) (1964). The applicable Pennsylvania six-year statute of limitations was extended back to 1939 as a result of the tolling provisions of the Clayton Act, 15 U.S.C. § 16 (b) (1964), and the Wartime Tolling Act § 1, 56 Stat. 781, *as amended*, 59 Stat. 306 (1945).

5. This Comment will be limited in scope to the issue of retroactivity. Other issues in the case include the "pass on" defense, which the court once again rejected, *see* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 281 F.2d 481 (3d Cir.), *aff'g* 185 F. Supp. 826 (D. Pa.), *cert. denied*, 364 U.S. 901 (1960), and the question of whether defendant should be permitted to show that plaintiff obtained tax advantages through the lease-only plan. The court found that the trial court erred in excluding evidence on this point.

6. *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946).

view[7] that the latest case merely declares what the law has always been, to the "Realist" view[8] that courts make law. Recognizing that applying a rule retroactively may result in injustice, courts have occasionally limited new rules to prospective application.[9] Usually this practice has been confined to decisions which specifically overrule previous precedents.[10] The question has seldom been faced in situations where the change is a non-overruling precedent[11] or an expanded interpretation of a stat-

7. 1 BLACKSTONE, COMMENTARIES *69-70; J. GRAY, THE NATURE AND SOURCES OF THE LAW 93 (2d ed. 1921). Blackstone's view, however, was criticized long before the current Realist criticism. *See* J. AUSTIN, JURISPRUDENCE 655 (5th ed. 1885); I. HOLLAND, JURISPRUDENCE 66 (13th ed. 1924); O. HOLMES, COMMON LAW 35 (1881); Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law,* 5 HARV. L. REV. 172 (1891).

8. Levy, *Realist Jurisprudence and Prospective Overruling,* 109 U. PA. L. REV. 1 (1960). *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Gilmore, *Legal Realism: Its Cause and Cure,* 70 YALE L.J. 1037 (1961).

9. The Supreme Court has upheld, against an attack based on due process, a state court's application of precedent to the case under consideration, while announcing that for the future a new rule would govern. Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932). An earlier example of prospective overruling is the first of the "municipal bond cases," Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863). Similarly, *see* Moliter v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), where the new rule was applied to the case at bar but was otherwise given only prospective effect. *See generally* Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201 (1965); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision,* 18 COLUM. L. REV. 230 (1937); Snyder, *Retroactive Operation of Overruling Decisions,* 35 ILL. L. REV. 121 (1940); Note, *Prospective-Prospective Overruling,* 51 MINN. L. REV. 79 (1966); Note, *Prospective Overruling and Retroactive Application In the Federal Courts,* 71 YALE L.J. 907 (1962).

10. *E.g.,* Mapp v. Ohio, 376 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949); James v. United States, 366 U.S. 213 (1961), *overruling* Commissioner v. Wilcox, 327 U.S. 404 (1946). *See generally* Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio,* 110 U. PA. L. REV. 650 (1962); Meador, *Habeas Corpus and the "Retroactivity" Illusion,* 50 VA. L. REV. 1115 (1964); Note, *Linkletter, Shott and the Retroactivity Problem in Escobedo,* 64 MICH. L. REV. 832 (1966).

11. Mosser v. Darrow, 341 U.S. 267 (1951), held for the first time that a reorganization trustee was liable for profits taken by employees who were hired to assist in reorganization. The trustee was not aware that the employees were trading in the securities of the corporation in reorganization. Mr. Justice Black, dissenting, unsuccessfully argued that to apply the new rule retroactively to the trustee would be "grossly unfair" since prior to the decision, his conduct would not have subjected him to any penalty.

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), held that a litigant foregoes his right under the abstention

ute.[12]

On only two occasions have courts limited the retroactive effect of a decision which made a significant change in the field of antitrust law. The first case was *Simpson v. Union Oil Company*,[13] where the legality of consignment agreements which allowed the consignor to set the resale price for the consignee was challenged. Plaintiff sued for treble damages alleging violations of sections 1 and 2 of the Sherman Act. Defendant argued that the marketing arrangement was legal under *United States v. General Electric Company*,[14] wherein a similar consignment agreement utilized to market patented articles was found not to violate the antitrust laws. The majority opinion in *Union Oil* did not directly overrule *General Electric*, but instead stated that "whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here."[15] The Court then held that coercive consignment agreements constitute an illegal resale price maintenance under the antitrust laws.[16] However, the Court reserved the question of whether the newly announced illegality of consignment devices should have only prospective application in damage suits by remanding the case for an examination of this issue.[17] On remand, the trial court found actual reliance by the defendant on *General Electric* and dismissed the case holding that actions taken pursuant to the consignment agreements prior to 1964 were lawful, reasonable, and warranted under *General Electric*.[18]

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doctrine to return to federal district court to litigate his federal claims if he freely and without reservation litigates them in state court. Petitioner relied on a precedent which he believed, as did the district court, *required* submission of federal claims to state courts. The Supreme Court clarified the precedent, however, and determined that it required only that a litigant inform the state court of his federal claims. The Court found that plaintiff's view of the precedent was not unreasonable and the new rule was not applied to him. *See* Currier, *supra* note 9, at 250-52.

12. However, where parties have entered into contracts or other transactions in reliance upon prior statutory or constitutional interpretations an overruling decision has generally been denied retroactive effect. *See, e.g.*, Anderson v. Santa Anna, 116 U.S. 356 (1886); Green County v. Conness, 109 U.S. 104 (1883); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863); Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 415 (1853). *See generally* Snyder, *supra* note 9, at 131, 133, 134 n.126.

13. 377 U.S. 13 (1964).

14. 272 U.S. 476 (1926).

15. 377 U.S. 13, 23 (1964).

16. *Id.* at 24.

17. *Id.* at 25.

18. 270 F. Supp. 754, 757, (N.D. Cal. 1967).

In *Lyons v. Westinghouse Electric Corporation*[19] plaintiff brought a treble damage action alleging defendants' marketing arrangements violated the antitrust laws. Defendants argued that nearly identical marketing arrangements had been sustained by the Supreme Court in *General Electric*. Hence, the issue presented was whether *Union Oil*, which held that resale price maintenance by consignment agreement constituted an antitrust violation, should be applied to a defendant who had claimed reliance on *General Electric*. The trial judge recognized that *Union Oil* limited *General Electric* to its special facts,[20] and that the significant fact in *General Electric* was the existence of General Electric's patents. He reasoned that whether *Union Oil* overruled or merely limited *General Electric* was a matter of semantics and that, where there were no patents present, the rule in *General Electric* was no longer the law.[21] After a thorough review of the subject[22] the trial court denied retroactivity to *Union Oil*, reasoning that to hold defendant liable for damages for making contracts which were "perfectly legal at the time . . . made . . . would be manifestly unjust."[23]

Previously, the Supreme Court had found three times[24] that United's lease-only policy did not violate the antitrust laws.[25] In the case brought by the government against United[26] upon which the instant case was based, the court ruled that these decisions precluded a holding that United's lease-only policy violated section 1 of the Sherman Act. Instead, based on a finding of monopolization, it held that United had violated section 2 of the Sherman Act.[27] The court expressly found that United's mo-

19. 235 F. Supp. 526 (S.D.N.Y. 1964).
20. See text accompanying note 15 *supra*.
21. 235 F. Supp. 526, 535 (1964).
22. The court noted that the case most nearly in point was Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).
23. 235 F. Supp. 526, 537 (1964).
24. United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922); United States v. United Shoe Mach. Co., 247 U.S. 32 (1918); United States v. Winslow, 227 U.S. 202 (1913).
25. In United States v. United Shoe Mach. Co., 247 U.S. 32 (1918), United prevailed in an action alleging violation of §§ 1-2 of the Sherman Act. The Court, with three Justices dissenting, found that the company did not unite seven competing companies for the purpose of restraining trade, and that any monopoly power accrued through the exercise of patent rights was lawfully exercised through the lease system. In United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922), certain provisions of United's leases were enjoined under § 3 of the Clayton Act.
26. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).
27. *Id.* at 343.

nopoly power was not predicated upon predatory practices, which had not been an essential prerequisite to finding an illegal monopolization since *American Tobacco Company v. United States*[28] was decided in 1946.[29]

In the instant case, the Third Circuit rejected United's contention that the government decree should have no retroactive effect, and accepted the reasoning of the court in the government case that the law had been changed in 1946. The court thus limited the retroactive effect of the decree to the change in decisional law upon which the violation was based, thereby holding simultaneously that *American Tobacco* was to apply prospectively only. In rejecting United's contention, the court indicated that such a finding would subvert the purpose of prima facie evidence provisions of the Clayton Act,[30] since a decree is prima facie evidence of an antitrust violation only in cases where the damage period is within the period included in the government case.[31]

Therefore, the court found that it was error to compute damages from 1939 to 1955, the allowable statute of limitations period,[32] but that United's liability commenced at the date of the *American Tobacco* decision in 1946.[33] The factors the court considered as bearing on the question of retroactivity included the earlier Supreme Court decisions as to United's lease-only policy, the injustice of the retroactive imposition of treble dam-

28. 328 U.S. 781 (1953). In *American Tobacco* the Supreme Court expressly approved, 328 U.S. at 814-15, Judge Learned Hand's analysis of United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Prior to *Alcoa*, predatory practices had been held to be an essential element of monopolization. The trial judge in the government proceeding against United found that notwithstanding absence of predatory practices, its conduct, although "honestly industrial," violated § 2 of the Sherman Act under the *Alcoa* doctrine.

29. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341-43 (D. Mass. 1953).

30. 15 U.S.C. § 16(a) (1964). See note 3 *supra*.

31. Dart Drug Corp. v. Park, Davis & Co., 344 F.2d 173, 184-86 (D.C. Cir. 1965); International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449 (1st Cir.), *cert. denied*, 375 U.S. 280 (1963).

32. See notes 4 & 30 *supra*.

33. The court held that liability commenced at the date of the *American Tobacco* decision rather than the date of the *Alcoa* decision, stating:

> We do not believe, however, that another business which had three times in various forms been adjudged free from violation of the Sherman Act was required to abandon its well known form of operation before Judge Hand's view in *Alcoa* received the imprimatur of the Supreme Court, however inevitable it may now seem in retrospect.

377 F.2d at 789.

ages, and the absence of predatory practices in United's control of the market. Finally, after recognizing that the question of retroactivity in antitrust cases is open,[34] the court stated that the issue would have to be adjudicated on a case-by-case basis by balancing the purpose which the change of law seeks to accomplish against the comparative value of retroactivity.[35]

A comparison of the present case with *Lyons* demonstrates the import of the Third Circuit's position. In each case, the defendant relied on a marketing arrangement which had previously been affirmed by the Supreme Court. Both courts used the same reasoning, comparing the purpose of the new rule[36] to the injustice, due to reliance, which might result if the new rule were given retroactive effect. The significant difference, however, is that the change of law relied on in *Lyons* was treated as an overruled precedent whose application to *Lyons* was quite clear, while the change relied on by the *Hanover* court was merely an expanded interpretation of "monopolization" as used in section 2 of the Sherman Act. Moreover, the change of law referred to in *Hanover* was an extremely broad and somewhat unclear extension which did not deal directly with the precedents upon which United had ostensibly relied.

The problem raised by the Third Circuit's denial of retroactive application of *American Tobacco* is whether prospective limitation is proper in "nonoverruling" cases. Every decision involves some variation from existing law. In many situations the losing party in a law suit will have relied on an erroneous interpretation of the law.[37] But because of the severe sanction provided by treble damages, the question of retroactivity is arguably more crucial in the area of antitrust law.

If the question of retroactivity is to be determined on a case-by-case basis as suggested by *Hanover*, it is necessary to weigh the policy considerations in light of the circumstances of each case. The prime consideration advanced for limiting

34. *Id., citing* Simpson v. Union Oil Co., 377 U.S. 13 (1964); Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526 (S.D.N.Y. 1964).

35. 377 F.2d at 789.

36. The court in *Lyons* reasoned that the purpose of the *Union Oil* doctrine was to prohibit price fixing by means of an agency or consignment agreement to the end that competition shall be unrestrained. The *Lyons* court noted that treble damages paid in 1964 would not revive competition in 1951, the date of the damage period of the civil suit. This reasoning begs the question in treble damage actions based upon prior government suits which have already eliminated the restraint.

37. Currier, *supra* note 9, at 250.

retroactive application[38]—the protection of parties who have relied on prior decisions[39]—must be balanced against the policy for applying every decision retroactively—the desirability of compensating victims[40] and the deterrent effect that the threat of private treble damage actions may have on potential antitrust violators.[41]

An analysis of the reliance consideration involves the question of whether the defendant actually relied upon earlier decisions, and whether that reliance was justified.[42] Where the defendant's conduct has been expressly approved in an earlier adjudication, as the instant case, the reliance argument is strongest.[43] However, others relying on the same decision will meet the additional difficulty of applying the rule to their own, possibly distinguishable situation.[44] Whether a party's reliance

38. *Id.*, at 234-50, suggesting that the values protected by stare decisis and therefore by prospective limitation include (1) stability, (2) reliance, (3) efficiency in the administration of justice, (4) equality, and (5) the image of the courts.

39. *Id.* at 235; Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 440 (1947); Note, *Limitation of Judicial Decisions to Prospective Operation*, 46 IOWA L. REV. 600, 601 (1961). *Cf.* B. CARDOZO, THE GROWTH OF THE LAW 122 (1924): "The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains."

40 It has been suggested that courts be given discretion to award less than treble damages while still allowing compensation. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 373-79 (1955). *Contra*, McConnell, *The Treble Damage Issue: A Strong Dissent*, 50 NW. U.L. REV. 342 (1955).

41. United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

42. *See* Simpson v. Union Oil Co., 270 F. Supp. 754 (S.D. Cal. 1967).

43. *Cf.* State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), where in a criminal action the same defendant was involved in both the precedent and the overruling decision. Similarly, it may be claimed that a failure of government agencies to challenge a well-known transaction or course of conduct will give rise to equally sympathetic reliance. Small heed was paid to this argument in United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 (1957), where an acquisition of stock made by defendant thirty years earlier was held to be in violation under a new interpretation of § 7 of the Clayton Act.

44. *Compare* Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), *and* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), *with* United States v. International Boxing Club, 348 U.S. 236 (1955), *and* United States v. Shubert, 348 U.S. 222 (1955).

is justifiable turns on many factors affecting the practical weight of the precedent. For instance, where a court expressly limits or overrules an existing precedent on a specific issue, the notice of the change in law afforded to parties relying on that precedent is so clear that no subsequent claim of reliance can be justified. Similarly, where a precedent has lost all vitality due to subsequent decisions, or has been limited to its special facts by subsequent cases, or every effort has been made to distinguish it, a claim of reliance should not be protected.[45] Moreover, where a strong dissent argues that a case falls within a conflicting line of authority which is not overruled and which might furnish a conflicting rule for closely analogous situations, reliance on a precedent is probably not as justifiable as when the decision was unanimous and clearly applicable.[46] When a court makes no reference to prior, conflicting authority, however, defendant's continued reliance on previous decisions is accordingly more justifiable.

The reliance consideration must be weighed against the policy underlying section 4, the private treble damage provision of the Clayton Act. The purpose of this section is to encourage private parties to assist the government in enforcing the antitrust laws[47] and, in this respect, it has served as an effective augmentation to the government's attempt to protect competition.[48] While it is important to protect the reliance of business on the existing state of the law, the effect of carrying the argument to its extreme would be to subvert the deterrent effect of the treble damage provisions of section 4. The denial of treble damages in each situation wherein the defendant's activities had not been expressly declared illegal would emasculate both the purpose and effectiveness of section 4.

On the *Hanover* facts, if United's reliance were to be protected without qualification, the company should be liable for damages occurring only after those decisions implicitly sustaining its lease-only policy were overruled. This proposition was properly rejected by the Third Circuit as inconsistent with the purpose of treble damage actions. Furthermore, even though

45. *See* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 947 (1962).

46. *Id.* at 946.

47. Flintkoke Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1957); Loevinger, *supra* note 41, at 168. *See* United States v. Borden Co., 347 U.S. 514, 518 (1954); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

48. MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113, 129 (1962).

the lease-only policy had been implicitly upheld previously and United's practices were found not to be predatory, United was no longer justified in relying on the earlier adjudications after the Supreme Court's substantial alteration of the law in *American Tobacco*.[49] The fact that United had been found to control ninety per cent of the shoe machinery market in previous litigation,[50] notwithstanding the absence of predatory practices, was sufficient to meet the standards of illegality of section 2 of the Sherman Act. The applicability of *American Tobacco* to United's position seems clear, thus justifying the limitation of the treble damage remedy prospectively from that time. In addition, since the court limited the retroactive effect of the government decree and reduced the damages, without denying recovery, both the compensatory and deterrent functions of the treble damage provisions were fulfilled as of the time defendant should have been on notice of the possible illegality of its conduct.

While a limitation of a precedent to prospective application seems equitable with regard to a case representing a substantial change in the law, it is submitted that the practice should not be extended, at the expense of precluding treble damage actions, to decisions which are merely part of recognizable and foreseeable development of established antitrust doctrines. If the intervening decision is unclear or if a case of first impression makes a substantial change in the existing status of the law, the policy of the antitrust laws is not defeated by a denial of treble damages in the case of a violation based on such change. Given a strong case for reliance on a particular stage in the development of antitrust law, no policy is furthered by a granting of treble damages based on a new and extended interpretation of that law. Only when an intervening decision or series of cases has indicated a clear departure can it be argued that the policy of section 4 is fulfilled by the imposition of treble damages, since it is undesirable and at best difficult to attempt to deter conduct which heretofore had not been held illegal. To conclude otherwise would be to grant the treble damage claimant a windfall without advancing the purpose of the antitrust laws.

49. "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so." 328 U.S. 781, 811 (1946). See note 28 *supra* and accompanying text.

50. United Shoe Mach. Corp. v. United States, 258 U.S. 451, 455 (1922).