The Statute of Limitations for Antitrust Damage Actions: Four Years or Forty?

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Less than three years ago the Supreme Court, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*,¹ construed the statute of limitations for antitrust damage actions contained in section 4B of the Clayton Act.² In the brief period since then, courts and commentators have adopted three widely divergent interpretations of that ambiguous opinion and thus of the statute.³ This nonuniform construction of a statute, by which Congress intended to create a uniform statute of limitations⁴ makes a careful examination of *Zenith* desirable. This article undertakes that examination and goes further. After determining the proper meaning of *Zenith*, it examines the language and legislative history of section 4B and concludes that *Zenith* rests upon an erroneous interpretation of the statute, has serious adverse consequences, and should be overruled.

I. *Zenith* AND THE ACCRUAL OF A CAUSE OF ACTION UNDER SECTION 4B OF THE CLAYTON ACT

Hazeltine Research, Inc., sued Zenith Radio Corporation in 1959 for patent infringement.⁵ In 1963 Zenith counterclaimed for damages suffered between 1959 and 1963 as a result of alleged antitrust violations by HRI between 1943 and 1963, related to HRI's domestic patent licensing practices⁶ and its participation in patent pools that prevented

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¹ 401 U.S. 321 (1971).

² Clayton Act § 4B, 15 U.S.C. § 15(b) (1970).

³ See text and notes at notes 24-42 *infra*.

⁴ See S. REP. No. 619, 84th Cong., 1st Sess. 5 (1955); H.R. REP. No. 422, 84th Cong., 1st Sess. 7 (1955).

⁵ *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 239 F. Supp. 51 (N.D. Ill. 1965). The patent in issue involved an automatic contrast control system for television sets. For more information on this apparatus than one could possibly want, see *id.* at 54-68.

⁶ HRI offered a standard package license under which the licensee would be free for five years from suit by HRI for patent infringement. In return the licensee paid royalties on its entire production line regardless of whether any HRI patents were used in production. Zenith was an HRI licensee until 1959, but, when Zenith refused to renew its license,

the importation of radio and television products into three foreign countries.⁷ The district court found Zenith innocent of patent infringement⁸ and awarded damages on the counterclaim for HRI's antitrust violations both in the United States and in the foreign patent pools. The Seventh Circuit reversed the award as to the foreign patent pools on the ground that Zenith had failed to prove that it had been injured during the four years prior to the bringing of the suit.⁹ The Supreme Court reversed, ruling that the fact of injury resulting from the Canadian pool had been adequately proved,¹⁰ but that the case should be remanded to the court of appeals for a consideration of certain defenses raised by HRI after the entry of judgment.¹¹

One of the defenses considered by the Seventh Circuit on remand was that the trial court should not have awarded the entire amount of

HRI then tried to force Zenith to take the package license rather than licenses only for the patents actually used. This attempt, and the method of computing royalties, formed the foundation for a claim that HRI's domestic licensing practices violated the antitrust laws. *See id.* at 69-72.

⁷ The three countries were Canada, Great Britain, and Australia. The British patent pool is typical; the major radio and electronics firms in Great Britain, including HRI, pooled their patents and agreed that licenses could be granted only by the pool. The pool granted only package licenses for the manufacture of products in Great Britain. Thus, for Zenith to sell radio and television products in Great Britain without fear of patent infringement suits, it would have to set up a manufacturing plant in Great Britain. *See id.* at 72-73.

⁸ The trial court held that Zenith had not infringed the HRI patent and that, in any event, the patent was invalid on the grounds of prior publication, prior public use, and failure to present a patentable invention in light of the prior art. *Id.* at 68. The finding of invalidity was affirmed by the court of appeals, 388 F.2d 25, 30-33 (7th Cir. 1967), and was not in issue before the Supreme Court, 395 U.S. 100, 105 (1969).

⁹ 388 F.2d 25 (7th Cir. 1967). As to the Australian pool, the court of appeals found that government regulations had prevented sales in Australia before 1960, that Zenith had not attempted to obtain an import license from the pool after 1960, and that high import duties and shipping costs were barriers to Zenith's entry into the Australian market. The court thus held no damages had been proved for the 1959-1963 period. *Id.* at 36. An embargo prevented sales in Great Britain until 1959. Further, Great Britain used a 405-line scanning signal in its television transmission, while Zenith only makes 525- and 625-line scanning signals. As a result, the failure of Zenith to capture a share of the British market in 1959-1963 was not due to the patent pool. *Id.* at 36-37. In Canada, Zenith had sold 65,000 radios and 60,000 televisions during the damage period; there was no evidence of threatened litigation against Zenith's distributors in Canada. On this basis the court held that the fact of damages during 1959-1963 had not been proved with respect to the Canadian market. *Id.* at 37-38.

¹⁰ 395 U.S. 100 (1969). The Court held that the policing activities of the Canadian pool—warning notices to distributors, dealers, and consumers and threatened patent infringement suits—were sufficient to prove some damages during 1959-1963. It also held that some damage resulted from acts performed within four years of the counterclaim, thus avoiding the statute of limitations problem. *Id.* at 114-25. The rulings on the British and Australian pools, however, were upheld. *Id.* at 125-29.

¹¹ *Id.* at 117 & n.13.

damages suffered by Zenith during the four-year period preceding its 1963 counterclaim, because the four-year statute of limitations for private antitrust actions barred recovery of damages caused by conduct occurring more than four years before the filing of the counterclaim.¹² Zenith had contended in the district court that HRI had waived the statute of limitations defense by failing to raise it until after the adverse judgment.¹³ The Seventh Circuit held that the statute of limitations defense had not been waived,¹⁴ but the Supreme Court again reversed.¹⁵ The Court first held that a related government action filed in 1958 and terminated in 1962 had tolled the statute of limitations against HRI for all of its antitrust violations in the Canadian market since 1954.¹⁶ Because HRI had participated in the Canadian patent

¹² Clayton Act § 4B, 15 U.S.C. § 15(b) (1970). Another defense raised by HRI was that liability for damages from pre-1957 conduct was barred by a release that Zenith gave in settlement of a claim brought against RCA, General Electric, and Western Electric. The court of appeals held that Zenith had released HRI by not expressly reserving its rights against HRI, because HRI was an unnamed coconspirator with the defendants in that action. 418 F.2d 21, 24 (7th Cir. 1969). The Supreme Court, however, concluded that HRI was not protected by the release, holding that a release protects only those whom the releasing party intends to release. 401 U.S. 321, 347-48 (1971).

¹³ 401 U.S. at 329. HRI did not assert the statute of limitations defense until one year after trial, at which time it had already learned that the trial court's ruling would be unfavorable. *See* 401 U.S. at 327. The district court, however, allowed HRI to file these contentions as of the date of argument so that they technically were filed prior to judgment. 401 U.S. at 329 n.3.

¹⁴ The case was remanded to the trial court for a determination of which damages were caused by HRI's conduct before 1959 and therefore excluded. 418 F.2d at 24-26.

¹⁵ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Court held that it was not an abuse of discretion to reject the limitations defense on the ground of waiver; the Court then discussed whether the damage award would have been modified if the defense had been raised at the proper time.

¹⁶ The government filed an antitrust action on November 24, 1958, against certain American companies that participated in the Canadian pool along with HRI. This action was terminated by a consent decree on November 1, 1962. The Clayton Act provides:

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 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

Clayton Act § 5(b), 15 U.S.C. § 16(b) (1970). Thus, the running of the statute of limitations was suspended from November 24, 1958, to November 1, 1963. *See* 401 U.S. at 333-34 nn.5 & 6.

This holding that the statute of limitations was tolled as to a party not named in the government action has been criticized as violating the policies of the statute of limitations. A company not named in the government's suit may not be on notice that the statute of limitations had been tolled and thus might not have taken care to preserve evidence needed for an adequate defense. *See, e.g.*, Note, 21 J. Pub. L. 203, 211 (1972); Note, 38 J. AM. L. & COM. 67, 73-74 (1972) (recognizing that the problem of lack of notice may be minimal because corporate awareness in industries under investigation by the government leads nonparties to preserve necessary records). An earlier lower court opinion had also

pool since 1943, the Court then considered the question of whether damages suffered during 1959–1963 but caused by HRI's pre-1954 acts could be recovered. The answer turned on a construction of section 4B of the Clayton Act, which states that any suit for damages resulting from an antitrust violation "shall be forever barred unless commenced within four years after the cause of action accrued."¹⁷ If, as Hazeltine contended, the cause of action accrued at the time of the act giving rise to damages, all damages attributable to pre-1954 conduct would have been barred.

The Court rejected Hazeltine's construction, but its own interpretation of the statute is somewhat ambiguous. The Court stated that the general rule in antitrust cases is that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."¹⁸ The first part of this formulation indicates that the cause of action accrues when the plaintiff is injured, but the second part of the Court's formulation provides that the statute of limitations begins to run from the commission of the actionable conduct. The two parts of this rule can be harmonized only when the antitrust violation and the injury occur simultaneously.¹⁹

The Court also stated that, although each separate cause of action entitles a plaintiff to recover damages suffered at the date of accrual and also those damages that will be suffered in the future, the plaintiff cannot recover if the fact of the damages' accrual is too speculative or their amount and nature unprovable. The Court then stated that, because this refusal to award future profits as too speculative is the equivalent of holding that no cause of action has accrued for damages not already suffered, in these instances "the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."²⁰ The con-

applied the tolling provision to defendants not named in a government action. *Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966), *aff'd sub nom.*, *Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir. 1967). See Comment, *Section 5(b) of the Clayton Act: The Tolling Effect of Government Antitrust Actions on Unnamed Parties*, 34 U. CHI. L. REV. 906 (1967) (generally favorable to *Morton Salt*); Note, 65 MICH. L. REV. 1661 (1967) (criticizing the decision). See also Note, *Clayton Act Provision—A New Interpretation*, 23 WASH. & LEE L. REV. 353 (1966) (questioning the propriety of tolling the statute of limitations during government suits).

¹⁷ Clayton Act § 4B, 15 U.S.C. § 15(b) (1970).

¹⁸ 401 U.S. at 338.

¹⁹ For example, in a pricefixing case the initial purchasers are injured at the same time the defendants sell to them at the illegally fixed price; but subsequent purchasers in the distributional chain are injured after the illegal act was committed.

²⁰ 401 U.S. at 339.

fusion in the opinion is increased by this use of two definitions of accrual within one sentence.

The final element of ambiguity in *Zenith* is that neither the "suffered" test nor the "inflicted" test²¹ describes the manner in which the Court applied section 4B to the facts of the case. The accrual date adopted cannot have been the date of infliction, since that standard would mean that a cause of action accrues when the act giving rise to damages occurs, and the Court clearly intended to reject this rule as to claims for future damages. The "suffered" test, while not clearly an incorrect reading of *Zenith*, is also inconsistent with the Court's approach. If the date on which the injury was actually suffered had been determinative, the Court could simply have observed that the damages awarded to *Zenith* and challenged on appeal had all been suffered within the past four years; but it did not do so.

The approach actually employed by the Court was to ask whether the 1959-1963 damages would have been held speculative in 1954—because of the tolling by the government suit, the earliest date on which a cause of action could have accrued without being barred by the statute of limitations.²² Thus, despite contrary language, the Court in fact held that a cause of action for damages arising from an antitrust violation accrues when the damages cease to be speculative.

This holding, that accrual depends on the time damages become ascertainable rather than when they are in fact suffered, has more than semantic significance. When an antitrust violation gives rise to future damages—generally anticipated lost profits—the suffering and ascertainability of the damages may not occur simultaneously. For example, assume that a conspiracy to exclude the plaintiff from a particular market ends in 1980 and that the plaintiff, as a new entrant, gains one percent of the market in 1981. Since the measure of damages is the difference between actual profits and what would have been earned absent the violation,²³ damages for 1981 would be the difference between what the plaintiff's profits would have been had its entry not been impeded prior to 1981 and the profits actually earned. In 1981,

²¹ The distinction between the two tests the Court mixes together can be demonstrated by a simple hypothetical. Assume that the actionable conduct occurs in 1970, giving rise to future damages. Under the "inflicted" test, the cause of action for profits lost in 1974 would accrue in 1970 when the actionable conduct occurred. Section 4B would thus bar suits filed after 1974. Under the "suffered" test, however, a cause of action for lost profits would not accrue until 1975, and the plaintiff could sue in 1979.

²² 401 U.S. at 340-42.

²³ See *Victor Talking Mach. Co. v. Kameny*, 271 F. 810 (3d Cir. 1921). Courts have not applied this requirement strictly. See Comment, *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV. 130, 134-35 (1950).

however, it may be impossible to determine with sufficient precision the market share the plaintiff would have had by that time in a freely competitive market. The extent of the plaintiff's damages therefore may not be ascertainable until the court has a sufficiently definite standard against which to measure damages, which might not occur, until the plaintiff achieves his maximum share of a freely competitive market. Under these facts the plaintiff would have to sue by 1985 if his cause of action accrues when damages are actually suffered. If the cause of action accrues when the damages cease to be speculative, however, and if, for example, the plaintiff's share of a freely competitive market cannot be ascertained until 1990 he need not sue until 1994. The potential effect of the *Zenith* holding is thus a significant extension of the effective statute of limitations.

II. REACTIONS BY THE COURTS AND COMMENTATORS

Even if a cause of action for private antitrust damages accrues at the time the claimed damages become nonspeculative, substantial confusion still remains about the precise nature of the test set forth in *Zenith*. In fact, three interpretations of the Court's opinion have already been proposed by the courts and commentators.

A. The Threshold Test

The first interpretation, or the threshold test,²⁴ construes *Zenith* to require that two conditions be satisfied before damages can be recovered more than four years after the actionable act. The court must initially determine that the damages in question would have been held speculative if suit had been brought four years after the act causing the damages. If that threshold is met, recovery is then allowed only when suit is brought less than four years after the damages become nonspeculative.²⁵

A requirement that future damages be speculative four years after the actionable conduct might be consistent with the result in *Zenith*, but the Court never articulated such a standard. The Court asked only whether the 1959-1963 damages were speculative in 1954,²⁶ while under the threshold test it would have been necessary to ask whether that part of the 1959-1963 damages attributable to 1943 violations²⁷ was speculative in 1947, whether that portion attributable to 1944 vio-

²⁴ Professor Milton Handler is the most noted proponent of this two-pronged test. See Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1 (1972).

²⁵ *Id.* at 49-50; Note, 38 J. AIR L. & COM. 67, 77-78 (1972).

²⁶ See 401 U.S. at 340.

²⁷ The continuing violation began in 1943. 239 F. Supp. at 74.

lations was speculative in 1948, and so forth. Although the finding that the 1959-1963 damages caused by pre-1954 violations were speculative in 1954 implies that those damages were also speculative in every year prior to 1954, the Court gave no indication that its single reference point was shorthand for a more complex test.

Further, the substantial possibility of absurd results indicates that the Court did not intend to adopt the threshold test. Suppose that an antitrust violation is committed on January 1, 1970, that the damages cease to be speculative on December 31, 1973, and that the plaintiff sues on March 1, 1974. Although the plaintiff meets the second part of the threshold test by suing within four years after his damages cease to be speculative, the case would be dismissed for failing to meet the threshold test. The damages are not speculative four years after the actionable conduct, even though they are speculative three years and 364 days after the act. If, on the other hand, the violation occurs on January 1, 1970, but the damages are not judicially ascertainable until January 2, 1974, he could sue any time before January 2, 1978. These two hypotheticals obviously represent the extremes, but similarly unjust disparities would be likely whenever the damages become ascertainable a short time before the first four years expire and there is insufficient time to prepare a case and file a complaint.²⁸ The threshold test should therefore be rejected.

B. A Judicial Interpretation

The Court of Appeals for the Second Circuit articulated another interpretation of *Zenith* in *Ansul Co. v. Uniroyal, Inc.*:²⁹ "[A] plaintiff in an antitrust action may recover damages occurring within the statutory limitations period that are the result of conduct occurring prior to that period if, at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof."³⁰

In this formulation of the rule, it is necessary to ask only whether the damages were speculative at the time of the actionable conduct; the question of when the damages ceased to be speculative is never

²⁸ This hypothetical, and the analysis of this article, obviously depends on the court's ability to fix objectively the precise date on which the damages became nonspeculative.

²⁹ 448 F.2d 872 (2d Cir. 1971). A distributor of chemical products claimed treble damages for profits lost due to the termination in 1963 of his distributorship for failure to comply with illegal resale price maintenance and territorial restrictions. He sued on May 31, 1968, clearly more than four years after the allegedly illegal conduct. The trial court held that the entire claim was barred by the statute of limitations. 306 F. Supp. 541, 569 (S.D.N.Y. 1968).

³⁰ 448 F.2d at 884.

reached. The significance of this interpretation, and the way in which it differs from the threshold test, can be seen in a hypothetical example. Assume that an antitrust violation is committed in 1970 and causes future damages that at that time are speculative; the extent of the damages ceases to be speculative in 1973, and the plaintiff sues in 1990. The *Ansul* test would not bar recovery in the 1970 suit of damages occurring between 1986 and 1990—because the damages were speculative when the actionable conduct occurred—even though they were ascertainable seventeen years before suit was brought.

Although the *Ansul* interpretation might be a permissible inference from *Zenith*, its results would be undesirable. *Ansul* permits the victim of an illegal act committed in 1970 to sue in 1990 for all injuries suffered between 1986 and 1990, without regard to when the damages became ascertainable, if the damages were speculative in 1970. This rule makes a shambles of the policies underlying statutes of limitations.³¹ The hypothetical plaintiff could recover damages by proving an illegal act that had occurred many years prior to suit, and witnesses and evidence essential to determine the truth might by then be unavailable. Further, one who has committed a violation would not be free from suit until four years after the last possible injury caused by the violation has occurred.³² As a result, a potential defendant might feel obliged to maintain unusual liquidity against future damage awards, rather than employing its resources in the most efficient manner, a problem that is exacerbated by a potential defendant's inability to determine the extent of its potential liability.³³ In addition, the ability to raise capital might be adversely affected by the prospect of indefinite liability for antitrust damages. Since the sole basis for extending the statute of limitations when damages are not ascertainable is to give the injured parties a reasonable chance to recover, there is no compelling reason to extend the limitations period beyond four years from the date on which damages become ascertainable.

31 A classic statement of these policies—disfavor for stale claims in which important evidence has been lost and avoidance of surprise on the part of one who has committed an act far in the past—is in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944). See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, *rehearing denied*, 325 U.S. 896 (1945); text at notes 37–42 *infra*.

32 This prospect will tend to negate the function of the statute of limitations as a vehicle of repose. See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, *rehearing denied*, 325 U.S. 896 (1945); *Levy v. Stewart*, 78 U.S. (11 Wall.) 244, 249 (1870).

33 See Note, 21 J. Pub. L. 203, 211–12 (1972); Comment, *Section 5(b) of the Clayton Act: The Tolling Effect of Government Antitrust Actions on Unnamed Parties*, *supra* note 16, at 913–14 (1967).

C. The Accurate Interpretation

A third interpretation of *Zenith*, employed by several courts,³⁴ is that a cause of action accrues only after the amount of future damages ceases to be speculative, and suit must be brought within four years of that date.³⁵ Under this "ascertainability test," if an antitrust violation occurred in 1970, damages ceased to be speculative in 1973, and suit were brought in 1975, the case would be dismissed under the threshold test but not under this third reading of *Zenith*. The inequities caused by the threshold test when damages become nonspeculative slightly less than four years after the actionable conduct are thus eliminated.³⁶

Although this interpretation of *Zenith* is clearly preferable to the threshold test from a policy viewpoint, the more restrictive recovery of the *Ansul* rule³⁷ may suggest that *Ansul* is the most desirable of the three readings. Suppose that allegedly illegal conduct occurs in 1970 when future damages are speculative. If damages caused by that conduct occur in 1971 but are not judicially ascertainable until 1980, *Ansul* would bar recovery of the 1971 damages in an action initiated after 1975; but the third reading of *Zenith* would permit recovery of those damages in any suit brought by 1984. *Ansul* is thus less destructive of the policies underlying statutes of limitations than is this reading of *Zenith* whenever the damages resulting from an antitrust violation actually occur before they become ascertainable.

The ascertainability standard nevertheless appears to have been intended by the Court. First, promotion of the underlying policies of statutes of limitations was not given any significant weight by the Court. The Court focused its attention predominantly upon the role of treble damage actions in antitrust enforcement³⁸ and concluded that extension of the limitations period to facilitate private recoveries was desirable. This solicitous attitude toward private plaintiffs indi-

³⁴ *Continental-Wirt Elec. Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir. 1972); *Poster Exch., Inc. v. National Screen Serv. Corp.*, 456 F.2d 662 (5th Cir. 1972); *Railing v. UMW*, 445 F.2d 353 (4th Cir. 1971).

³⁵ This rule is the threshold test without the objectionable threshold requirement that the damages be speculative four years after the commission of the actionable conduct. See text at note 25 *supra*.

³⁶ See text at note 28 *supra*. With this test, there is no difference in treatment caused by the fortuity of whether the damages become nonspeculative shortly before or shortly after the passage of four years from the commission of the violation.

³⁷ Under this rule, recovery is limited to damages occurring less than four years prior to suit. In the hypothetical in the text, if the plaintiff brought suit in 1976, for example, he could recover only those damages occurring since 1972.

³⁸ See text at notes 43-44 *infra*.

cates that the Court, if presented with the issue, would have rejected the *Ansul* test.

In addition, *Ansul* is consistent with the Court's handling of the facts of *Zenith* only if the Court, without any indication, was telescoping a complicated factual inquiry into a simple shorthand.³⁹ Further, *Ansul* focuses primarily on the date on which damages were suffered⁴⁰ and thus is inconsistent with the emphasis in *Zenith* on postponing the running of the statute of limitations to alleviate the adverse effects of delayed ascertainability of damages in antitrust actions.⁴¹ The only language in *Zenith* that might support this concentration on the date of occurrence rather than on the date of ascertainability in defining accrual does not appear to have been intended to do so.⁴²

The determination of the accurate interpretation of *Zenith* does not solve the problem, however, because none of the three interpretations is supported by the legislative history of section 4B of the Clayton Act or by policy considerations.

III. SECTION 4B OF THE CLAYTON ACT: CONGRESSIONAL INTENT

Because the precise issue presented in *Zenith* was a construction of the four-year limitation period in section 4B of the Clayton Act, the Court should have focused on congressional intent. The only discussion of this topic in the opinion, however, is a statement of the congressional purposes that private actions be "a bulwark of antitrust enforcement" and that antitrust laws "protect the victims of the for-

³⁹ The Court determined that *Zenith's* counterclaim was not barred because the damages from pre-1954 conduct were speculative in 1954. 401 U.S. at 340-41. To apply the *Ansul* test, it would be necessary to determine whether damages attributable to 1943 acts were speculative in 1943, whether those caused by 1944 acts were speculative in 1944, and so on. The same weakness was presented by the threshold test. See text at notes 26-27 *supra*.

⁴⁰ Even though *Ansul* requires a threshold determination that the damages were speculative on the date of the illegal conduct, the determinative date for the running of the four-year period is the occurrence of the damages and not ascertainability.

⁴¹ The Court felt that this new test for the accrual of a cause of action was justified because "[o]therwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery . . ." 401 U.S. at 340. For example, if conduct gives rise to damages that are unascertainable in 1970 and those damages occur in 1971 but are not ascertainable until 1976, the statute of limitations on the 1971 damages would have run in 1975, one year before they became ascertainable.

⁴² The Court stated that "the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." 401 U.S. at 339. While the "suffered" language in that sentence might imply that the occurrence of the damages fixes the date of accrual, the statement contains such internal contradictions and ambiguities that it would be unwise to rely on it to interpret the Court's meaning. See text at notes 18-21 *supra*.

bidden practices as well as the public."⁴³ In this context, the only reason advanced in favor of the holding was that if treble damage actions could not be filed within four years after damages become ascertainable, "future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose."⁴⁴

Unfortunately, this statement of congressional purpose begs the question. It is true that Congress provided a treble damage remedy to private parties to deter antitrust violations and to compensate victims of violations; but Congress also expressly limited the period in which such actions could be brought. This limitation evidences a legislative belief that at some point in time other considerations outweigh the benefits of treble damage actions. The congressional purpose to be determined concerns the point at which that limitation was intended to take effect.⁴⁵

Only one statement in the congressional debates on the proposed statute of limitations expressly referred to the time at which the limitations period begins to run, and that statement is somewhat ambiguous. During the House debate Congressman Emanuel Celler, the principal advocate of the bill, stated that "[i]n the case of conspiracy or fraud, the statute only runs from the time of discovery."⁴⁶ Since this statement was a reply to an inquiry whether the statute would bar a suit on a conspiracy not discovered until ten years after the illegal conduct, it probably means only that discovery must occur before the statute can commence running. The statement thus leaves unanswered the question of what must be discovered—the illegal conduct, the fact of injury to the plaintiff caused by the illegal conduct, or the fact of injury and illegal conduct together with judicially ascertainable damages.

Despite the ambiguity of this single direct comment on the limitations period, other evidence suggests that *Zenith* does not follow congressional intent. The House Committee expressed its concern that a lengthy statute of limitations combined with the provision tolling the statute during government actions⁴⁷ would "prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts."⁴⁸ The Senate Committee noted that unduly prolonged pro-

⁴³ 401 U.S. at 340.

⁴⁴ *Id.*

⁴⁵ The statutory language provides no guidance. Although section 4B bars all actions not commenced "within four years after the cause of action accrued," it does not define "accrued."

⁴⁶ 101 CONG. REC. 5129 (1955).

⁴⁷ Clayton Act § 5(b), 15 U.S.C. § 16(b) (1970). See note 16 *supra*.

⁴⁸ H.R. REP. NO. 422, *supra* note 4, at 8.

ceedings would not be "conducive to effective and efficient enforcement of the antitrust laws."⁴⁹ These statements indicate that one purpose of section 4B was to shorten the length of time antitrust actions would burden defendants and the courts. The ascertainability standard creates the opposite effect, however, by indefinitely extending the period in which actions can be brought.⁵⁰

In addition, the principal purpose of section 4B was to remedy the situation created by *Chattanooga Foundry & Pipe Works v. Atlanta*,⁵¹ in which the Supreme Court held that private antitrust actions were governed by state statutes of limitations.⁵² The result of this holding had been "widespread variations from jurisdiction to jurisdiction as to the time within which an injured party [could] institute such a suit, as well as considerable confusion in ascertaining the applicable State law."⁵³ Congress thus attempted to establish a uniform period and chose a four-year period because the average state statute of limitations in antitrust actions was approximately four years.⁵⁴ If the primary purpose of section 4B was to introduce uniformity and decrease uncertainty, *Zenith* is not consistent with congressional intent.

Moreover, Congress expressed no dissatisfaction with the way the states had determined when the applicable statutes of limitations began to run and did not define a particular time at which antitrust actions accrue. It is thus necessary to look to the generally accepted rules governing that issue.

Although it is well established that statutes of limitations commence running when a cause of action accrues,⁵⁵ the multiplicity of ways in which causes of action accrue has prevented the emergence of a single rule governing the date on which all statutes of limitations begin to run.⁵⁶ Private antitrust actions can be brought only by a person "injured in his business or property,"⁵⁷ however, suggesting that the applicable rule should be the one generally governing causes of action

⁴⁹ S. REP. NO. 619, *supra* note 4, at 6.

⁵⁰ Admittedly, the same effect is created by the discovery exception accepted by Congress. See text at note 45 *supra*. These two possible exceptions can, however, be meaningfully distinguished. See text and notes at note 78-80 *infra*.

⁵¹ 203 U.S. 390 (1906).

⁵² See S. REP. NO. 619, *supra* note 4, at 5; H.R. REP. NO. 422, *supra* note 4, at 7.

⁵³ H.R. REP. NO. 422, *supra* note 4, at 1.

⁵⁴ S. REP. NO. 619, *supra* note 4, at 5; H.R. REP. NO. 422, *supra* note 4, at 7. See 101 CONG. REC. 5129 (1955) (remarks of Congressman Celler).

⁵⁵ See, e.g., *United States v. Wurts*, 303 U.S. 414 (1938); *Grayson v. Harris*, 279 U.S. 300 (1929).

⁵⁶ Compare, e.g., *Yaffee v. Fort Smith Light & Traction Co.*, 159 Ark. 636, 252 S.W. 925 (1923), with *Sullivan v. Old Colony St. Ry. Co.*, 200 Mass. 303, 86 N.E. 511 (1908).

⁵⁷ Clayton Act § 4, 15 U.S.C. § 15 (1970).

that require a showing of actual injury to the plaintiff as an element of recovery.⁵⁸

If the ascertainability test represented the law governing such causes of action, the statutes of limitations would commence running on the date the damages resulting from the actionable conduct become judicially ascertainable in full; but no court has construed the applicable statute of limitations in this manner. The courts have instead held that where a showing of actual injury is a required element, a cause of action accrues when actual injury can be shown, and the statute of limitations begins to run at that time even though the ultimate extent of the damages is unknown and unpredictable.⁵⁹

A middle ground between *Zenith* and this generally adopted rule is that, where a showing of actual damage is an element of the cause of action, the statute of limitations begins to run when actual injury occurs and some damages are judicially ascertainable.⁶⁰ The statute of limitations would thus begin to run when some, not necessarily all, of the damage flowing from the actionable conduct becomes nonspeculative. Under this test the Court in *Zenith* would have asked whether Zenith could have proved nonspeculative damages in 1954 from the pre-1954 conduct for any period of time, not necessarily 1959–1963. An affirmative answer would have necessitated dismissal of Zenith's claim. This doctrine simply holds that factual injury is not legal injury until some damages can be ascertained. This middle ground, however, has not been adopted by any court.

Support for the ascertainability test is further diminished when principles governing situations in which proof of actual damage is not an element of a cause of action are considered. In those cases the statutes begin to run on the date of the actionable conduct or when the plaintiff discovers or reasonably should discover the actionable con-

⁵⁸ See, e.g., *Kitchener v. Williams*, 171 Kan. 540, 236 P.2d 64 (1951); *White v. Schnobelen*, 91 N.H. 273, 18 A.2d 185 (1941). For an explanation of how this class of cases evolved despite the common law rule not requiring fact of injury as an element of the cause of action, see C. McCORMICK, DAMAGES § 22 (1935).

⁵⁹ See, e.g., *United States v. Reid*, 251 F.2d 691, 694 (5th Cir. 1958).

⁶⁰ This middle ground might appear at first glance to be equivalent to the actual injury test under which a statute of limitations begins to run when there is both an violation and actual injury. If a plaintiff could prove that he was injured in a conspiracy to exclude him from the widget market, he could probably prove that he would have sold some minimum number of widgets had he been allowed freely to enter the market, thus establishing "some damages." These facts would provide no assistance, however, in determining the extent of the damages resulting from the violations; the damages depend on whether he would have made a profit on the illegally prevented widget sales and what the amount of that profit would have been.

duct.⁶¹ This determination does not depend either on the fact of injury or the ascertainability of damages.

The only accepted rule approaching the ascertainability test is in the area of trespass to real property. Where a trespass occurs courts have generally held that the trespass is complete when committed and the statute of limitations begins to run at that time, but under some circumstances there is a continuing wrong for which the plaintiff may maintain several successive actions.⁶² These cases present the question of whether the plaintiff must bring a single action for all past and future damages within the relevant statute of limitations or whether the plaintiff can institute a new action following each injury. The answer generally depends on the likelihood of future damages, determined by examining the permanence of the damaging condition and asking whether the defendant is likely to prevent future damages, for example by more careful maintenance or use of his land.⁶³ If future injury is fairly certain to occur, if the damaging condition is relatively permanent, and if future injuries are not likely to be abated, only one cause of action will lie; past and future damages must be claimed regardless of the degree of precision with which future damages may be ascertained.

One could argue that an antitrust violation creates a "continuing antitrust trespass" and that whenever new harm occurs from past conduct a new cause of action accrues; but antitrust cases are hardly analogous to cases involving continuous trespasses. An antitrust violation that has occurred and terminated is certainly not abatable, since the violator has no control over future damages to the victim. In addition, future injury is typically certain; only the amount is speculative. Prospective damages caused by an antitrust violation are more like future pain and suffering or wage losses from a personal injury than a continuing trespass. It is unlikely that Congress intended to apply the continuing trespass rule to antitrust actions, particularly since there is no mention of this procrustean effort in the legislative history of section 4B.

Thus, Congress seems to have intended that the four-year statute of limitations for treble damage actions should begin to run from the date of actual injury caused by an antitrust violation, except in con-

⁶¹ See, e.g., *Acker v. Sorenson*, 183 Neb. 866, 165 N.W.2d 74 (1969).

⁶² See W. PROSSER, *LAW OF TORTS* § 13, at 74-75 (4th ed. 1971); Note, 33 TEX. L. REV. 753 (1955). A commonly used example is a dam that periodically floods adjoining land.

⁶³ See, e.g., *Hilton v. Duke Power Co.*, 254 F.2d 118 (4th Cir. 1958).

spiracy cases where it should not begin to run until the victim knows or reasonably should know of the violation and his injury.⁶⁴

IV. SECTION 4B OF THE CLAYTON ACT: POLICY PERSPECTIVE

The ascertainability standard and similar rules are also undesirable as a matter of policy. The considerations that prompted those rules—deterrence of antitrust violations and compensation of antitrust victims—are certainly significant. In this context, however, there are countervailing considerations that outweigh those factors.⁶⁵

The principal considerations militating against an ascertainability rule were articulated in the House and Senate reports on section 4B. Such a rule “may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of the courts.”⁶⁶ For example, Zenith alleged that it was illegally prevented from entering the Canadian market. The Court suggested hypothetically that Zenith might have been unable to attain its maximum share of a freely competitive market for ten years after the end of actionable conduct by Hazeltine.⁶⁷ Since the amount of Zenith’s lost profits would depend on its ultimate share of a free Canadian market, its damages would remain speculative for ten years. The courts would thus be left with the difficult task of determining the time at which Zenith had attained its ultimate maximum share of a freely competitive Canadian market. Presumably some share of the market would have to be held by Zenith for a few years in order for that determination to be made. In addition, Zenith would have four years after the date on which its share became ascertainable to file suit. The net result may be to allow a private antitrust action over fifteen years after the alleged violation ceased—definitely a stale claim.

During those years, uncertainty about future damage claims might

⁶⁴ See text at note 46 *supra*. Two commentators have suggested another approach that has no support in the congressional consideration of the statute of limitations in section 4B. Note, 38 J. AIR L. & COM. 67, 76–79 (1972); Note, 49 N.C.L. REV. 731, 736–38 (1971). They suggest that an initial action be allowed to settle the question of liability, which will not be relitigated. The plaintiff would then be free to bring any number of later actions to recover damages that were caused by the adjudged violation but previously held speculative. See text at note 69 *infra*.

⁶⁵ Similarly, policy considerations have spawned the standing doctrine that prevents large groups of people injured by antitrust violations from bringing suit under the Clayton Act. See, e.g., *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir.), *cert. denied*, 401 U.S. 923, *rehearing denied*, 401 U.S. 1014 (1970); *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967).

⁶⁶ H.R. REP. NO. 422, *supra* note 4, at 8. See text at note 48 *supra*.

⁶⁷ 401 U.S. at 341.

prevent Hazeltine from operating at maximum efficiency.⁶⁸ Hazeltine's problem may be more serious because it has no clear idea of the amount of possible damages; if it had a clear idea, the damages involved would presumably not be speculative. In the extreme case of hopelessly speculative damages, the statute of limitations will never run, and the potential defendant will be left in the unenviable position of judging which damages are hopelessly speculative and therefore unworthy of further concern.

Finally, the ascertainability standard may foster fruitless litigation in cases in which damages are speculative. Even if the courts impose an arbitrary limit on the number of times a plaintiff can sue on the same cause of action, judicial inefficiency must result. When the suit is first filed, the court must examine the evidence to determine whether the damages are speculative. Each time another suit is filed the same examination must be undertaken and new evidence of damages added. The total inefficiency will depend on the number of times plaintiffs are permitted to sue after being dismissed for seeking speculative damages.

It has been suggested that these problems could be eliminated by having the issue of liability settled in an initial action and allowing speculative damages to be recovered by later actions in which the question of liability need not be relitigated.⁶⁹ Permitting plaintiffs to continually bring fruitless claims for speculative damages is obviously a waste of judicial resources, although the risk of this occurring is limited by litigation costs. The courts might also limit the number of suits that could be based on the initial liability determination, but this result is unsatisfactory because of its obvious legislative appearance. Most important, it is not at all certain that this proposal would actually ameliorate the problems at which it is directed. It is entirely possible that the damage determination in most cases is at least as complex as the liability question. If this is the case, the proposed solution would not remove the prospect of repeatedly reviewing complex evidence when damages are sought before becoming judicially ascertainable.

In addition to these difficulties with the ascertainability rule, insofar as it is justified as dampening the adverse effects of the statute of limitations on private plaintiffs, it is unnecessary.⁷⁰ *Story Parchment Co. v.*

⁶⁸ See text at notes 31-33 *supra*.

⁶⁹ See note 64 *supra*.

⁷⁰ There are also two categories of actions involving claims for anticipated lost profits in which *Zenith* is inapposite because the plaintiff's performance for years after the termination of the illegal conduct will not be examined to determine what its share of the relevant market would have been absent the violation. First, the plaintiff may have been in the relevant market prior to the illegal conduct. Using data about the plaintiff's

*Paterson Parchment Paper Co.*⁷¹ and *Bigelow v. RKO Radio Pictures, Inc.*⁷² made clear that the degree of proof required to prove the amount of damages in an antitrust case is considerably lower than that which is needed to establish injury.⁷³ Other concepts, including the doctrine of fraudulent conspiracy,⁷⁴ the tolling provision of section 5(b),⁷⁵ delaying the running of the statute of limitations until the violation is or should be discovered,⁷⁶ and the usual length of time between the violations and their detection in antitrust cases,⁷⁷ extend the actual

performance before the violation, its market share without the illegal conduct can be estimated with sufficient judicial precision. See, e.g., *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). This method of calculation cannot be employed if the plaintiff recently entered the market or if the market structure and conditions in the "before" period differed substantially from the period of the impact of the defendant's conduct. See Parker, *Measuring Damages in Federal Treble Damage Actions*, 17 ANTITRUST BULL. 497, 506 (1972).

Zenith is also unnecessary for the plaintiff when its market share absent the violation can be estimated by comparing the performance of a similar entity not adversely affected by the illegal conduct—frequently one of the defendants—during the period in which the violations occurred. A similar test is one in which an estimate of the plaintiff's share in the competitive market is based on his performance in a comparable market. For example, the trial court calculated *Zenith's* share of the Canadian market in the absence of the patent pool based on *Zenith's* actual share of the American market in 1959-1963. Thus, despite analytical weaknesses in the above measurements, where the plaintiff meets their requirements *Zenith* is unnecessary.

⁷¹ 282 U.S. 555 (1931).

⁷² 327 U.S. 251 (1946).

⁷³ In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), the Court stated:

Eleven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his wrong has created.

327 U.S. at 264-65 (citations omitted). *Bigelow* has been credited with instigating a marked increase in private treble damage actions. Collen, *Procedural Directions in Antitrust Treble Damage Litigation: An Overview of Changing Judicial Attitudes*, 17 ANTITRUST BULL. 997, 998-99 (1972) (surveying procedural changes in antitrust law that have aided private plaintiffs).

⁷⁴ The fraudulent concealment by the violator of a cause of action constitutes an exception to the statute of limitations, postponing the running of the statute of limitations until the victim discovers or reasonably should discover the cause of action. See, e.g., *Traer v. Clews*, 115 U.S. 528 (1885).

⁷⁵ Clayton Act § 5(b), 15 U.S.C. § 16(b) (1970). See note 16 *supra*.

⁷⁶ See text at note 46 *supra*.

⁷⁷ See Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. —, — (1973).

period of time in which suit may be brought far beyond four years from the date on which the actionable conduct occurred.

In addition to these drawbacks in the ascertainability test, the most significant factor may be the absence of compensating benefits. Deterrence is not likely to be increased by this attempt to facilitate recovery in private actions.⁷⁸ It is inconceivable that a potential antitrust violator will try to guess whether damages caused by some action will be held speculative when deciding whether possibly illegal conduct is worthwhile. The unlikelihood that a potential antitrust violator will consider the added risk created by the ascertainability test distinguishes that standard from the doctrine of fraudulent concealment, an exception that Congress clearly intended to incorporate into the Clayton Act.⁷⁹ The added risk that the potential violator might face because of the ascertainability test is totally imponderable, turning on such factors as the difficulty of proving the extent of damages in antitrust cases, the nature of the potential victims, and the presence or absence of factors that would allow the potential victims to prove their damages. The doctrine of fraudulent concealment, on the other hand, clearly increases the risk for the potential violator, because it merely asks whether the violator took steps to conceal his violation from his victims, a question within the knowledge of the violator and susceptible to proof by direct or circumstantial evidence.

Judicial efficiency also favors adoption of a fraudulent concealment exception and rejection of the ascertainability test. The doctrine of fraudulent concealment involves traditional legal issues concerning defendants' conduct and the reasonable availability of information that did inform, or should have informed, plaintiffs of the existence of an antitrust violation and their injuries. The ascertainability test, however, requires the courts to scrutinize complex and ambiguous economic evidence and to ask whether a hypothetical trial court at an earlier point in time would have held the alleged damages speculative had the plaintiff sued at that time.⁸⁰

⁷⁸ In addition to the reasons discussed below, so few injured parties receive compensation under the existing statutory scheme that it is unlikely that the extension of the statute of limitations provided by *Zenith* will substantially increase antitrust victims' compensation. *Id.* at 000.

⁷⁹ See text at note 46 *supra*. In addition to the policy reasons discussed below for distinguishing between the ascertainability and discovery notions, there is the obvious difference in support in the legislative history.

⁸⁰ In short, neither legislative history nor general policy considerations favor the ascertainability test as strongly as the doctrine of fraudulent concealment. The simple fact that the purpose underlying the two notions—facilitation of private antitrust actions to promote deterrence—may be the same is hardly a valid reason to adopt both. The question to be addressed is whether antitrust plaintiffs should be helped and, if so, to what extent. The policy arguments advanced here justify drawing a line between these two doctrines.

Finally, all actions in which plaintiffs seek to recover lost future profits involve the problems that the Court in *Zenith* attempted to ameliorate for antitrust plaintiffs. Unless antitrust actions possess some unique quality to justify more favored treatment than other actions in which businessmen have been injured tortiously, antitrust actions should be treated no differently than other actions. This article has recognized one possible difference—a greater emphasis on the deterrent purpose of antitrust suits⁸¹—but that purpose is adequately served by other liberalizing rules peculiar to antitrust law,⁸² and *Zenith* does not provide any further deterrence that might be thought necessary.

V. CONCLUSION

Many weaknesses in the existing antitrust enforcement scheme prevent the laws from being as effective a deterrent and compensatory mechanism as might be desirable. Because most of the needed changes ought to be accomplished legislatively, and because Congress has been slow to recognize this need, the Supreme Court has too often faced the task of giving real substance to antitrust damage actions—the only tool for achieving compensation for antitrust injury and one of the few means of achieving deterrence. *Zenith Radio Corp. v. Hazeltine Research, Inc.* represents another attempt by the Court to effectuate the goals of antitrust laws. That case formulated a rule in which the statute of limitations for antitrust damage actions begins to run only after the plaintiff's damages have become ascertainable. Congress apparently intended, however, that the statute should begin to run from the date of actual injury, except in cases of conspiracy where it begins to run when the actionable conduct is or reasonably should be discovered. In addition to the basic rule that courts should respect congressional intent, there are major policy considerations that favor the congressional rule over the ascertainability test. In the future, therefore, a cause of action should be held to accrue, for the purposes of section 4B of the Clayton Act, on the date on which the actionable conduct occurs, subject to extension only where the statute is tolled by section 5(b) of the Clayton Act or the conduct has gone undiscovered.

⁸¹ See text at notes 43–44 *supra*.

⁸² See text and notes at notes 71–77 *supra*.