IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3035
Summary Calendar

HIBERNIA NATIONAL BANK,

Plaintiff,

VERSUS

INDUSTRIAL ALLOYS COMPANY,
a Division of Indalloy, Inc.,

Defendant-Third Party Plaintiff-Appellant,

VERSUS

ACADIA STATE BANK,

Third Party Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
90 CV 2509 "M"

June 4, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Hibernia National Bank filed this action to recover from

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Industrial Alloys Company ("Industrial") on a promissory note. Industrial asserted a third-party claim against Acadia State Bank ("Acadia") under the anti-tying provisions of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1971-1978 (the "Act"). Following removal, Acadia raised defenses including the bar of the four-year statute of limitations of 12 U.S.C. § 1977. The district court dismissed the third-party claim, concluding that it had prescribed. We agree and affirm.

I.

Industrial alleged that an agent of Acadia induced Industrial's principal, Donald Surkand, to purchase stock in Acadia by promising a loan on a real estate project. The funds to acquire the stock were advanced by First National Bank of Covington, as evidenced by a promissory note dated May 8, 1986. Industrial claims that on June 20, 1986, Surkand was informed that the loan would not be approved. Industrial filed its third-party claim on June 20, 1990, exactly four years after that alleged notification but more than four years after the loan was made to buy the stock.

II.

Industrial argues that limitations did not begin to run until Acadia refused to go forward with the loan for the real estate purchase, which constituted the alleged tied credit. We may use antitrust law by analogy in anti-tying cases. <u>Swerdloff v.</u>

Miami Nat'l Bank, 584 F.2d 54, 58-59 (5th Cir. 1978). In applying the antitrust laws, we consider that the limitations period begins to run when the defendant commits an act that injures the plaintiff's business. Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 677 F.2d 1045, 1051 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983).

As the district court correctly held, "The violations of the Bank Anti-tying Act occurred at the latest on the date that plaintiff purchased the stock in Acadia, as evidenced by the promissory note dated May 8, 1986." That is, the limitations period begins to run when the alleged violation occurs. Jackson v. Union Nat'l Bank, 715 F. Supp. 892, 895 (C.D. Ill. 1989) (citing Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 268 (7th Cir. 1984), cert. denied, 472 U.S. 1018 (1985)).

The logic of this is that the anti-tying violation, if any, occurred when the unwanted product)) i.e., the Acadia stock)) was offered to Surkand in exchange for prospective favorable loan treatment and when Surkand, acting for Industrial,[1] purchased the stock on May 8, 1986. By that time, the forbidden act)) tying one product to another)) had occurred, and damages were cognizable.

Industrial argues, to the contrary, that there was no anti-tying claim until the loan application was rejected. We rejected a similar assertion in Swerdloff, 584 F.2d at 60, in which we

[1] In light of our disposition of the prescription claim, we pretermit deciding Acadia's assertion that Industrial has standing to assert an anti-tying claim on Surkand's behalf and assume, arguendo, that there is standing.

stated, "Simply by demanding that the [plaintiffs] sell their stock, however, the bank violated the statutory prohibition." As Acadia notes, the ultimate rejection of the loan is irrelevant to this analysis, as the anti-tying injury would have been present even if Acadia had approved the loan: In either case, Surkand would have been forced to buy stock he did not want and that, under the Act, he could not be forced to buy as a condition of receiving the loan.

In support of its conclusion, the district court relied upon Jackson. Although that district court opinion from another circuit is not binding on us, we find its reasoning persuasive. There, the bank required the borrower's brother to execute a mortgage in order for the borrower to renew a note. The court held that limitations "expired . . . four years after [the brother] executed the . . . mortgage . . . [T]he fact that the bank customers do not suffer the final harm caused by the bank's conduct until some later time is irrelevant to the determination of whether their claim against the bank is time barred." 715 F. Supp. at 894 (citing Lancianese v. Bank of Mount Hope, 783 F.2d 467, 470 (4th Cir. 1986)). In Lancianese, the court held that "[i]t is not sufficient that the plaintiff may have suffered the damages caused by the defendant's violation within the limitations period. 783 F.2d at 470 (citing, inter alia, Kaiser Aluminum).

III.

Industrial argues that a recognized exception to the running of the four-year limitations statute applies to this case. That exception applies when there is a "continuing benefits violation" and the damages sustained are speculative and unprovable during the ordinary limitations period. See Poster Exch. v. National Screen Serv. Corp., 456 F.2d 662, 666-68 (5th Cir. 1972).

We have squarely held, however, that the continuing benefits theory cannot be applied where the damages were not speculative or unprovable at the time of the alleged anti-tying injury. See Kaiser Aluminum, 677 F.2d at 1053; City of El Paso v. Darbyshire Steel Co., 575 F.2d 521, 523 (5th Cir. 1978), cert. denied, 439 U.S. 1121 (1979). Here, any damages that Surkand sustained were determinable on May 8, 1986, when he paid for the Acadia shares he allegedly did not want and would not have bought but for the illegal tying arrangement.

Finally, citing Imperial Point Colonnades Condominium v. Mangurian, 549 F.2d 1029, 1043 (5th Cir.), cert. denied, 434 U.S. 859 (1977), Industrial argues that a new cause of action was triggered each time Industrial made a periodic payment and when Hibernia filed suit on the note. See Al George, Inc. v. Envirotech Corp., 939 F.2d 1271, 1274 (5th Cir. 1991) (per curiam). We addressed this argument in Kaiser Aluminum, holding that "[t]o the extent that Kaiser received benefits under the contract, such receipts were merely the abatable but unabated inertial consequences of some pre-limitation actions, rather than from some injurious act actually occurring during the limitation period." 677 F.2d at 1053 (citations and internal quotation marks omitted).[2] Moreover, the alleged benefits, i.e., the note payments, were received by Hibernia, not Acadia.

In summary, the district court correctly concluded that the four-year statute of limitations began running, at the latest, when the stock was purchased. The summary judgment, accordingly, is AFFIRMED.

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[2] As we noted in City of El Paso, 575 F.2d at 523, Imperial Point, unlike the case at bar, involved damages that could not be ascertained at the time of the violation. An anomaly may be Spitz v. Buchwald, 551 F.2d 1051, 1053 (5th Cir. 1977), which, relying upon Imperial Point, suggests that limitations are renewed when payments are made. The panel failed to address the distinction, later made by this court in City of El Paso, between damages that are ascertainable at the time of the initial violation and those that are not.