William & Mary Law Review

Volume 4 (1963)
Issue 2

Article 10

April 1963

# Anti Trust - Personal Liability of Corporate Officers Participating in Sherman Act Violations

Paul Auster

## ANTI-TRUST

*Personal Liability of Corporate Officers participating in Sherman Act Violations.*

In *U. S.* v. *Wise*,[1] the question of the personal liability of a corporate officer, acting solely in his representative capacity, under Section I of the Sherman Act,[2] was litigated. The court, in the instant case, following an earlier interpretation of the word "person,"[3] reversed the lower court's decision and held that a corporate officer, acting solely in his representative capacity, "is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy."[4] The court went on to say, ". . . insofar as Section 14 [of the Clayton Act[5]] relates to the corporate officer who participates in the

1 370 U.S. 405 (1962). This paper is concerned only with the appeal of the individual defendant, Wise. In a companion case, the indictment charged that appellee, as corporate officer acting solely in his representative capacity, had violated Section I of the Sherman Act by "engaging in a combination to eliminate price competition . . . in unreasonable restraint of trade and commerce . . ." Appellee moved that the charge against him be dismissed because it failed to state a crime. According to appellee, the word "person" as used in Section I of the Sherman Act, applied only to corporate officers acting solely in their individual capacities. The court distinguished between representative capacity and individual capacity. One who is acting for his own account is considered acting in his individual capacity, whereas, one who is representing his company is acting in his representative capacity. The appellee further alleged that due to the legislative intent of those who enacted the Clayton Act, corporate officers acting solely in their representative capacities, could be indicted only under Section 14 of that Act. The District Court granted appellee's motion. U.S. v. National Dairy Products Corp., 196 F.Supp. 155 (W.D. Mo. 1961), *rev'd* 83 S.Ct. 594 (1963).

2 "Every person who shall make any contract or engage in any combination or conspiracy, declared by Sections 1-7 of this title to be illegal, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C., Section 1 (1958).

3 United States v. Dotterweich, 320 U.S. 277 (1943). Although the Dotterweich decision involved the interpretation of the word "person" in Section 301 of the Federal Food and Drug Act, 52 Stat. 1040, 21 U.S.C. 331(a) (1958), the court reconciled the two: "No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion." U.S. v. Wise, 370 U.S. 405, 409 (1962).

4 370 U.S. 405, 416 (1962).

5 " . . . [W]henever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have

Sherman Act violation, whether or not in a representative capacity, no change was either intended or effected."[6]

Prior to the *Wise* decision, five district court cases[7] held contra to it, while only two[8] were in accord. To settle this conflict, the government appealed directly to the Supreme Court.[9]

Although it had been the policy of the government to indict corporate officials under the Sherman Act,[10] the question of their capacity, at the time of the violation, was never brought before the court until this late date. However, earlier cases, though not confronted with the issue as presented in the instant case, speak of it in settling the case before them, and appear to be in accord with the *Wise* decision.[11]

---

authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent, he shall be punished by a fine of not exceeding five thousand dollars or by imprisonment for not exceeding one year, or by both, in the discretion of the court." 38 Stat. 736 (1914), 15 U.S.C. 24 (1958).

[6] 370 U.S. 405, 414 (1962).

[7] United States v. A. P. Woodson Co., 198 F.Supp. 582 (D.D.C. 1961); United States v. American Optical Co., C.C.H. Trade Reg. Rep. ¶ 70, 156 (E.D. Wis. 1961); United States v. Milk Distributors Association, Inc., 200 F.Supp. 792 (D.C. Md. 1961); United States v. General Motors Corp., Crim. No. 30132 (S.D. Cal. 1962); and, United States v. Engelhard-Hanovia, Inc., 204 F.Supp. 407 (S.D. N.Y. 1962).

[8] United States v. Northern American Van Lines, Inc., 202 F.Supp. 639 (D.D.C. 1962); United States v. Packard-Bell Electronics Corp., Crim. No. 30158 (S.D. Cal. 1962). A motion to dismiss was denied without opinion.

[9] The government, in a criminal case, may appeal directly to the Supreme Court where an indictment has been dismissed based upon the construction of statute, "upon which the indictment . . . is founded [or] [f]rom a decision arresting a judgment of conviction for insufficiency of the indictment." Federal Rules of Criminal Procedure, 62 Stat. 844 (1948), 63 Stat. 97 (1949), 18 U.S.C. § 3731 (1958).

[10] United States v. Greenhut, 50 F. 469 (D.C.D. Mass. 1892); American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1945), affirmed, 328 U.S. 781 (1946).

[11] See, for example, United States v. American Tobacco Co., 164 F. 700 (1908). The court said, "The statute [Sherman Act] declares unlawful every combination in restraint of trade. It contains no words of limitation or qualification, and the Supreme Court of the United States has decided that the courts have no right to attach them to it." See, also, Gulf Coast Shrimpers and Oysters Association v. United States, 236 F.2d 658, 662 (5th Cir. 1956); United States v. General Instruments Corp., 115 F.Supp. 582, 587 (D.D.C. N.J. 1953); United States v. Winslow, 195 F. 578, 581 (D.C.D. Mass. 1912); United States v. MacAndrews and Forbes Co., 149 F. 823, 831 (C.C.S.D. N.Y. 1906).

The importance of the *Wise* decision is evident when one notes that the government has primarily used Sections I and II of the Sherman Act to indict corporate officers.[12] In 1955, Congress, presumably in light of this fact, amended Section I of the Sherman Act and raised the fine for violating that section from five to fifty thousand dollars.[13] The fine for violating Section 14 of the Clayton Act remained at five thousand dollars.[14]

Had the court upheld appellee's contentions, the government would have been limited to indicting corporate officers, for all practical purposes, under Section 14 of the Clayton Act, with its smaller fine. As a result, the 1955 amendment to the Sherman Act would have been meaningless and the government's overall enforcement of the anti-trust laws would have been more difficult.

An interesting result of the *Wise* case, and probably a new procedure for the indictment of corporate officers, may have been illustrated in *United States* v. *Engelhard-Hanovia*,[15] where the government charged corporate officials, acting solely in their representative capacity, of violating both Section I of the Sherman Act and Section 14 of the Clayton Act. The precedent for this form of indictment appears to have been established earlier,[16] but does not appear to have been used again until two recent cases.[17] The court dismissed count 1 of the charge as to the individual defendants, on the ground that it did not believe that Congress intended to make those individuals, acting in their executive capacity, liable under the Sherman and Clayton Acts.[18]

---

12 U. S. v. Wise, 370 U.S. 405, 414 (1962).

13 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958).

14 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958).

15 204 F.Supp. 407, (D.C. S.D. N.Y. 1962).

16 Baran v. Goodyear Tire & Rubber Co., 256 F. 570 (D.C. S.D. N.Y. 1918).

17 U. S. v. Wise, 370 U.S. 405, 415, 416, 417 (1962). (Since these are the latest cases on this question, it appears that the government may be using this form of indictment in the future.)

18 U. S. v. Engelhard-Hanovia, 204 F.Supp. 407, 409, 410 (D.C. S.D. N.Y. 1962).

Based upon the *Wise* decision, *Engelhard-Hanovia* has been reversed,[19] and it now appears that a corporate officer, acting solely in his representative capacity, may be prosecuted for violating both Section I of the Sherman Act and Section 14 of the Clayton Act. A maximum fine of fifty-five thousand dollars and a two-year jail sentence would thus result. As was said in an earlier decision, "The question for the courts, however, is not economical, but wholly legal, to wit, the true interpretation of the law as enacted by Congress."[20] When viewed in this light, the courts will be giving full effect to the intent of Congress as interpreted by the *Wise* decision. The decision reached by the court in the *Wise* case is consistent with the true legislative purpose of the Sherman Act.

Senator Sherman said: "I do not wish to single out any particular trust or combination. It is not a particular trust, but the system I aim at."[21] By including the corporate executive who acts in his representative capacity, the court has allowed an integral part of the "system" to be included in the scope of Section I of the Sherman Act. Its decision supports a position taken by many of the courts in trying previous anti-trust cases under the Sherman Act,[22] *i. e.*, where the intent to violate the Act is shown, the guilty party should be prosecuted.

The government has not used the increased penalty, provided by the 1955 amendment to the Sherman Act, to its

---

[19] U. S. v. Fred D. Brown, et al., 83 S.Ct. 22 (1963). The court only rejected appellee's contention that the Clayton Act is the sole means available for indicting a corporate officer, acting solely in his representative capacity. It did not say corporate officers, acting solely in their representative capacity, could not be indicted under § 14 of the Clayton Act. Throughout its opinion, in the Wise decision, the court speaks of the Clayton Act as supplementary, and not as a ". . . restriction of Section I of the Sherman Act." 370 U.S. 405, 414 (1962).

[20] Paramount Pictures v. United Motion Pictures, T.O., 93 F.2d 714, 719 (3rd Cir. 1937).

[21] 21 Cong. Rec. 2457 (Remarks of Senator Sherman).

[22] "Under the Sherman Act, a combination found for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" United States v. Socony Vacuum Oil Co., 310 U.S. 150, 223 (1940). See also, United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (D.C. E.D. Penna. 1960); Patterson v. United States, 222 F. 599 (6th Cir. 1915); Lawlor v. Loewe, 187 F. 522 (2nd Cir. 1911).

maximum.[23] The *Wise* case may serve as the impetus for the government to prosecute corporate executives for the maximum penalty provided by Section I of the Sherman Act and thus help the anti-trust laws achieve their true goal of " . . . free and unlimited competition."[24]

P. A.

---

[23] The average fine for guilty pleas since 1955 is actually two thousand, three hundred and thirty-seven dollars and twenty cents. Compiled from CCH. The Federal Anti-Trust Laws (Supps. 1952-1956, 1957-1961) as reported in Whiting *Anti-Trust and the Corporate Executive,* 40 VA. L. REV. 1 (1962).

[24] Thurmond Arnold, "A Reappraisal of the Anti-Trust Laws," *Conference on Freedom and the Law,* 13 University of Chicago Conference Series 98 (1958), p. 102.