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CASE NOTES

ANTITRUST—SHERMAN ACT—CORPORATE OFFICER ACTING IN REPRESENTATIVE CAPACITY IS "PERSON" WITHIN MEANING OF SECTION 1 OF SHERMAN ANTITRUST ACT.

United States v. Wise (U.S. 1962).

A grand jury indicted the National Dairy Products Corporation charging it with engaging in a combination and conspiracy to eliminate price competition in the sale of milk in the Kansas City market.[1] It was claimed that these activities constituted an unreasonable restraint of trade and commerce in violation of § 1 of the Sherman Antitrust Act.[2] The Government charged that Wise, an officer of the corporation, was acting solely in his executive capacity when he committed the acts constituting the alleged violation. The district judge dismissed the case against Wise stating that a corporate officer acting solely in a representative capacity can be indicted only under § 14 of the Clayton Act[3] and cannot be charged with a violation of § 1 of the Sherman Act. The United States Supreme Court reversed, *holding* that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting an illegal contract, combination, or conspiracy, regardless of whether he was acting in a representative capacity. *United States v. Wise,* 370 U.S. 405, 82 S. Ct. 1354 (1962).

The question presented was one of first impression for the United States Supreme Court. Although corporate officers have been indicted

1. United States v. National Dairy Products Corp., (Cr. 20542 W.D. Mo. 1959) Dept. of Justice Case No. 1478.

2. 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C. 1 (1958):
"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."

3. 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958):
"Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have 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 director, officer, or agent, he shall be punished by a fine, of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

The Sherman Antitrust Act was passed in 1890; the Clayton Act was passed in 1914 as "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." 38 Stat. 719 (1914), 15 U.S.C. § 44 (1958).

under the Sherman Act throughout its history,[4] the impetus for raising the issue in the present case stemmed from the fact that in 1955 Congress raised the maximum fine of the Sherman Act from five thousand dollars to fifty thousand dollars without making a corresponding increase in the five thousand dollar maximum penalty in the Clayton Act.[5]

The crux of the appellee's argument was that an officer acting solely in a representative capacity is not a "person" within the meaning of § 1 of the Sherman Act since his activities, however illegal, are chargeable to the corporation as principal and not to himself as an individual. The legislative history of the Sherman Act lends no support to such a contention. The Regan Bill, an unsuccessful competitor of the Sherman Bill, specifically included corporate officers in its penal section while the Sherman Bill had no such provision. The Regan Bill was redrafted and resubmitted in the form which became the Sherman Act.[6] This act subjects to penalties "[e]very person" who has engaged in certain combinations; there appears no intention to exempt corporate officers, representative or otherwise, from the phrase "[e]very person." It could be argued that since corporate officers were explicitly included in the Regan Bill and not explicitly included in the Sherman Act there is evidence of an intent by Congress to deliberately exclude corporate officers from prosecution under the Act. This argument fails for two reasons: first, such intention was never mentioned in the discussion surrounding the passage of the Act;[7] second, when the Act was passed in 1890, it had long been settled that corporate officers could be criminally prosecuted, with or without their corporation, for criminal corporate activity in which the officers had personally participated.[8] In the absence of contrary evidence, it is submitted that Congress intended, when drafting the Act, to apply the normal rules governing the criminal liability of corporate officers. Further, an examination of legislative thinking at the time of the Clayton Act and the 1955 Amendment to the Sherman Act reveals a widespread belief that representative corporate officers could be indicted under either Act. Section 14 of the Clayton Act contained a penal provision corresponding to that of § 1 of the Sherman Act. Although the meaning of the word "person" in § 1 of the former statute may not have been entirely clarified in the Judiciary Committee's reports and debates, the discussions incident to the passage of § 14 of the Clayton Act showed a major con-

4. *E.g.*, United States v. Greenhut, 50 Fed. 469 (D. Mass. 1892); United States v. Patterson, 55 Fed. 605 (D. Mass. 1893). In the Government's brief in the present case, the Solicitor General cited 40 cases in which corporate officers had been indicted under the Sherman Act between 1890 and 1914. Brief for Appellant pp. 69-72.

5. *Supra* note 2.

6. 21 CONG. REC. 2731, 3152 (1887).

7. "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." Trailmobile v. Whirls, 331 U.S. 40, 61, 67 S. Ct. 982, 992 (1947); State v. Great Works Milling and Man. Co., 20 Me. 41 (1841).

8. State v. The Morris & E. R. Co., 23 N.J.L. 360 (1852); Tyler v. Savage, 143 U.S. 79, 97-98, 12 S. Ct. 340, 345-346 (1891).

cern with the problem. Due to the apparent similarity of the two sections, the debates were primarily concerned with whether § 14 of the Clayton Act was an entirely new provision to provide for the criminal responsibility of corporate officers acting in a representative capacity, or whether it was merely supplementary to § 1 of the Sherman Act. Senator Shields of Tennessee, an opponent of § 14 stated: "[Section 14][9] was merely a reenactment of the Sherman Laws § 1, § 2. In other words, it has always been held that the officers of corporations violating the law are punishable under these sections . . ."[10] He added: "This adds nothing to the Sherman Law. It is already the law of the land."[11] In presenting the Bill for vote in the House of Representatives, Mr. Floyd stated in reference to § 14: "We do not disturb the Sherman Law in its efficacy as a criminal statute, we do not disturb the penalties described in the Sherman Law."[12] The proponents of the bill drew no distinction as to the capacity in which the officer was acting; the Court in the present case also apparently adopted the view that the chief purpose of § 14 of the Clayton Act was to clarify § 1 of the Sherman Act. Nor was it intended that the 1955 Amendment to the Sherman Act be restricted in its application to corporations. In fact, the committee report stated that the purpose of the bill was to authorize a more flexible and effective punishment, not only for corporations, but for their officers.[13] It was pointed out that as early as 1900 the penalty provision of the Sherman Act had been considered insufficient and this inadequacy was the primary reason for the increase of the maximum penalty to fifty thousand dollars.[14]

From a study of the legislative history of § 1 of the Sherman Act and § 14 of the Clayton Act it is submitted that three conclusions may properly be drawn. First, corporate officers can be prosecuted under either Act; second, Congress did not intend to differentiate between representative corporate officers and corporate officers acting in an individual capacity; third, § 14 of the Clayton Act supplemented and clarified rather than expanded § 1 of the Sherman Act. It is clear that Congress in enacting § 14 believed it was imposing some new criminal liability on corporate officials that went beyond the existing Sherman Act liability.[15] It is not clear what Congress actually accomplished in § 14 beyond reaffirming the criminal liability of corporate officials responsible for their corporations' violations of the Sherman Act. But what Congress did not

9. During the debates in the Senate the draft of the proposed penal provision was contained in § 12 of the bill. In the final draft § 12 became § 14.

10. 51 CONG. REC. 14214 (1914).

11. *Id.* at 14225.

12. *Id.* at 9609.

13. S. REP. No. 618, 84th Cong., 1st Sess. (1955).

14. The committee was of the opinion that in the popular mind the amount of the fine bears a relationship to the gravity of the offense and that furthermore some businessmen might consider violation of the Act a good business risk. The committee felt this could be shown in the frequency of pleas of *nolo contendere* in antitrust criminal cases, particularly since such a plea cannot be used as evidence in a civil treble damage action. *Id.* at 2.

15. See 51 CONG. REC. 9609, 9676, 9678, 9679, 9681, 16320 (1914).

do seems more evident: it did not limit or repeal the existing Sherman Act liability of representative corporate officers.

In interpreting § 1 of the Sherman Act and § 14 of the Clayton Act as they apply to corporate officers the courts have been primarily concerned with two problems: whether corporate officers are "persons" within the meaning of the Sherman Act and whether officers acting in a representative capacity can be prosecuted under either statute or only under the Clayton Act. The fact that corporate officers are not specifically mentioned in § 1 of the Sherman Act has presented no great difficulty to the courts. As previously pointed out, corporate officers had been indicted under the Sherman Act since 1892.[16] In *United States v. Dotterweich*,[17] the United States Supreme Court was involved with the construction of the Federal Food, Drug and Cosmetic Act.[18] By a specific provision of the Act corporate officers had been made amenable to indictment.[19] Although this provision was subsequently deleted, the Court nevertheless held that the officers were not released from liability. The Court found: "Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow or loosen it."[20] Similarly, the Court in the instant case construed § 1 of the Sherman Act "in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction."[21] More recently, the courts have not hesitated to prosecute a corporate officer for illegal acts done on behalf of the corporation. By 1912 it had been settled that neither in the civil nor the criminal law could an officer protect himself behind the corporate shield when he is the "actual, present, and efficient actor."[22] As to whether or not *representative* corporate officers can be indicted under the Sherman Act the instant Court made the following observation:

> We have found no case between 1890 and 1914 in which a corporate officer successfully secured the dismissal of an indictment or the reversal of a conviction on the ground that he was not a "person" within the Sherman Act when he acted solely as a representative of the corporation.[23]

After passage of the Clayton Act in 1914 the government did not change its prior practice of prosecuting representative corporate officers

16. *Supra* note 4.
17. 320 U.S. 277, 64 S. Ct. 134 (1942).
18. 52 Stat. 1040 (1938), 21 U.S.C. §§ 301-392 (1958).
19. 34 Stat. 768 (1906), repealed by 52 Stat. 1059 (1938).
20. United States v. Dotterweich, *supra* note 17 at 282.
21. United States v. Wise, 370 U.S. 405, 82 S. Ct. 1354, 1358 (1962).
22. Tyler v. Savage, *supra* note 8; United States v. Winslow, 195 Fed. 578, 581 (D. Mass. 1912), *aff'd* 227 U.S. 202, 33 S. Ct. 253 (1912).
23. United States v. Wise, *supra* note 21, 82 S. Ct. 1354, 1358 (1962): In further support of its conclusion the court cited United States v. MacAndrews & Forbes Co., 149 Fed. 823 (C.C.S.D.N.Y. 1906) and United States v. Winslow, *supra* note 22. However, these cases merely held that corporate officers could not escape liability when they acted in their own individual interests or used a sham corporation for personal benefit. In neither case were the indicted officers acting in their representative capacities.

under § 1 of the Sherman Act. For forty-five years the same pattern of indictment continued.[24] The courts, after passage of the Clayton Act, again considered whether corporate officers were properly charged under the Sherman Act.[25] In these cases the courts viewed § 14 not as precluding but as supporting prosecution of corporate officials under the Sherman Act. Nevertheless the question remained essentially academic until passage of the 1955 Amendment. Representative corporate officers indicted under § 1 of the Sherman Act had nothing to gain by arguing that indictment should properly have been brought under § 14 of the Clayton Act. The Senate Judiciary Committee that reported on the proposed amendment seemed well aware of the government's practice of indicting representative corporate officers solely under the Sherman Act. The Committee report implied that such indictments would continue under the Sherman Act. However, the courts, in setting the fine, and the Department of Justice, in making recommendations to the court, should continue to exercise their discretion, taking into account the means and circumstances of the defendant and the character of the offense.[26] There is no mention of possible indictment of representative corporate officers under § 14 of the Clayton Act, but this fact in itself does not negate such possibility. Since the passage of the 1955 Amendment, the lower federal courts have considered the indictment problem with varying results. Five district courts have taken the view that a representative corporate officer can be indicted only under the Clayton Act,[27] while two have held he can be prosecuted under either Act.[28] The former line of decisions has stressed that any other construction would render § 14 of the Clayton Act a nullity, since the corporate executive whose act violated that section would be equally liable in an action under the Sherman Act where the penalty would be much higher. However, it should be noted that a criminal statute should not necessarily be considered repealed by a subsequent statute which penalizes the same conduct.[29] Therefore, although it is

24. Butchart v. United States, 295 Fed. 577 (9th Cir. 1924). *E.g.*, Boyle v. United States, 259 Fed. 803 (7th Cir. 1919); Belfi v. United States, 259 Fed. 822 (3d Cir. 1919).

25. United States v. National Malleable & Steel Castings Co., 6 F.2d 40 (N.D. Ohio 1924); United States v. General Motors Corp., 26 F. Supp. 353 (N.D. Ind. 1939).

26. *Supra* note 13 at 3.

27. United States v. A. P. Woodson Co., 198 F. Supp. 582 (D.C. Cir. 1961), *appeal pending*, No. 1019, O.T. 1961; United States v. Milk Distributors Assn., 200 F. Supp. 792 (D. Md. 1961); United States v. American Optical Co., 1961 Trade Cases, par 70,156 (E. D. Wis. 1961) *appeal pending sub. nom.* United States v. Staley, No. 882 O.T. 1961; United States v. Englehard-Hanovia, Inc., 204 F. Supp. 407 (S.D.N.Y. 1962).

28. United States v. North American Van Lines, Inc., 202 F. Supp. 639 (D.C. Cir. 1962); United States v. Packard-Bell Electronics Corp., Cr. No. 30158, S.D. Cal., *motion to dismiss denied without opinion*, 5 CCH TRADE REG. REP. (1961) par. 45061, case 1632. The indictment charged a violation of § 14 of the Clayton Act as well as of § 1 of the Sherman Act. 5 CCH Trade Reg. Rep. (1961) par. 45061, case 1632.

29. Berra v. United States, 351 U.S. 131, 134, 76 S. Ct. 685, 687 (1955); Rosenberg v. United States, 346 U.S. 273, 294, 73 S. Ct. 1152, 1163 (1953); United