



1963

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Recommended Citation

Whiting, Richard A. (1963) "Criminal Antitrust Liability of Corporate Representatives," *Kentucky Law Journal*: Vol. 51 : Iss. 3 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol51/iss3/4>

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Criminal Antitrust Liability of Corporate Representatives

By RICHARD A. WHITING*

I

Ten years ago in this same city the Section of Antitrust Law held its maiden meeting. The session that first morning was devoted to a discussion of "The Sherman Act and Big Business," and John Cahill, a distinguished member of the New York Bar and one of those instrumental in organizing the new Section, delivered a paper which he titled, *Must We Brand American Business by Indictment as Criminal?*¹ His answer was an emphatic "no."

Mr. Cahill's conclusion was that the criminal provisions of the Sherman Act should be repealed,² although he was quick to add, "No doubt the [Justice] Department will not be satisfied by such a suggestion."³ And as if to demonstrate its dissatisfaction, the Department brought a higher proportion of criminal antitrust suits in the year following his address than in any post Thurman Arnold year.⁴

Roughly two out of every five Government suits over the past ten years have been criminal suits. A few weeks ago, the present head of the Antitrust Division in a speech before the American Society of Corporate Secretaries, noted that "the proportion of

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¹ Cahill, *Must We Brand American Business By Indictment As Criminal?* A.B.A. Proceedings of Section on Antitrust Law 26 (1952). See also, in a similar vein, Hazard, *Are Big Businessmen Crooks?* Atlantic Monthly, Nov. 1961, p. 57. Cf. Kramer, *Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy*, 48 Geo. L.J. 530 (1960).

² Cahill, *supra* note 1, at 46:

The only real and lasting solution is to cut down the tree and not just the fruit. The criminal penalties attaching to antitrust violations must be completely eliminated, with criminal prosecution permissible only for violation of a civil decree, or for racketeering activities.

³ Cahill, *supra* note 1, at 46.

⁴ In calendar year 1953, the Justice Department brought a total of 29 antitrust suits; of these, 19 (66%) were criminal. See Appendix, Table A, Civil and Criminal Antitrust Suits Brought by Justice Department, 1890-1960, Whiting, *Antitrust and the Corporate Executive*, 47 Va. L. Rev. 929, 984-85 (1961).

criminal cases filed in 1961 was the lowest of any year in the last decade."⁵ But this scarcely can be taken as signaling a change in enforcement policy if the 1962 returns are read and tallied, for nearly half of the cases filed in the first six months of this year were criminal cases—a ratio which, if maintained for the balance of 1962, will surpass that of all but three of the past ten years and exceed the ten-year average by a comfortable margin.⁶

In short, the criminal suit is still very much with us, and the indications are that it is enjoying renewed popularity.

Of particular significance to my topic is the fact that since the Section first met here ten years ago, over 400 American businessmen have, along with their corporations, been branded by indictment as Sherman Act criminals. Again, it is the recent statistics that are the most interesting—and for the businessman, the most ominous:

- (1) Of this ten-year, 400-plus total, 128 businessmen—corporate officers and representatives—were named as defendants in indictments filed during the past eighteen months;
- (2) Over 70% of the criminal suits brought in 1961-1962 have named one or more corporate representatives as co-defendants—a proportion considerably higher than in any year since 1952; and
- (3) During the first six months of this year alone, more corporate representatives were indicted for alleged antitrust violations than had been indicated in any year since 1950.

It seems clear beyond doubt that the Justice Department is determined wherever possible to personalize corporate antitrust guilt. What's more, the Civil Investigative Demand legislation

⁵ Address by Lee Loevinger, Assistant Attorney General in charge of the Antitrust Division, before the American Society of Corporate Secretaries, Atlantic City, N.J., June 19, 1962. The statement is repeated in Loevinger, *Antitrust is Pro-Business*, Fortune, Aug. 1962, p. 96, 126. During calendar year 1961, the Department brought 41 civil actions and 20 criminal suits. Included in the latter, is one criminal information charging two corporate officers with violating §14 of the Clayton Act, 38 Stat. 736 (1914), 15 U.S.C. §24 (1958), after the Sherman Act indictments as to them (also filed in 1961) had been dismissed. The 41 civil suits included 18 antimerger complaints under §7 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §18 (1958), (more than in any preceding year), 9 damage suits arising out of the electrical industry indictments, and 5 suits seeking to enjoin practices which were made the subject of contemporaneous criminal actions.

⁶ 23 (47%) of the 49 suits brought during the first half of calendar year 1962 have been criminal suits. The 26 civil complaints include 3 actions under §7 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §18 (1958), and 11 suits to enjoin practices as to which contemporaneous indictments were filed.

when passed⁷ may serve (by obviating to some extent the need for grand jury testimony with its attendant witness immunity) to broaden the base from which the Department selects its management targets.

II

Obviously not every corporate officer is *ex officio* a potential defendant when his corporation has committed an antitrust violation. What degree of complicity in the corporate offense is apt to brand him personally? The Supreme Court's decision this past June in *United States v. Wise*,⁸ by laying down at least the broad guidelines, has gone a long way towards answering the question.

Raymond Wise, a vice president and director of National Dairy Products Corporation, was indicted with his company in the fall of 1959. National was charged in fifteen counts with violations of section 1 of the Sherman Act and Section 3 of the Robinson-Patman. Wise was indicted in two counts for violations of both statutes, the indictment incorporating by reference the alleged illegal acts of the corporation. In a bill of particulars the Government charged that Wise participated in those acts "solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged to have been committed" by the corporation. This, of course, is almost exactly the language of section 14 of the Clayton Act, and Wise moved for a dismissal of the indictment as to him on the ground that he could not be indicted under the Sherman Act.⁹ Rather, he claimed, the only statute applicable to corporate officers acting solely in a representative capacity was section 14 of the Clayton Act. The distinction was more than technical, for conviction under section 14 carries a maximum penalty of \$5,000

⁷ See Decker, *The Civil Investigate Demand*, 51 Ky. L.J. 449 (1963). Although demand can only be made pursuant to investigation of a "civil antitrust violation" (the express insertion of "civil" by the House being agreed to by the Senate in conference), provision is made in the measure for use of the demanded documents by a Justice Department attorney in a grand jury or criminal proceeding.

⁸ 370 U.S. 405 (1962).

⁹ The Robinson-Patman charge had previously been dismissed by the District Court as to both the corporate defendant and Wise on the ground that §3, 49 Stat. 1528 (1936), 15 U.S.C. §13(a) (1958), is unconstitutionally vague. *United States v. National Dairy Prods. Corp.*, 1961 Trade Cas. ¶70,047 (W.D. Mo. 1961), *prob. juris. noted* Oct. 9, 1961, 368 U. S. 808 (1961), *argued* March 21, 1962, *assigned for reargument* in October 1962 term, 369 U.S. 833 (1962). Section 3 of the Robinson-Patman Act has a maximum fine of \$5,000.

on each count, whereas a person found to have violated the Sherman Act, since its amendment in 1955, may be fined up to ten times that amount.

The District Court in Kansas City, per Judge Smith, agreed with Wise and granted his motion.¹⁰ Similar motions were later made by corporate representatives in suits filed in other jurisdictions so that, by the time the Supreme Court rendered its decision on the appeal from Judge Smith's ruling, the score in the district courts stood at six pre-Clayton and two pro-Sherman.¹¹ As you know, the Supreme Court, in June, cast the deciding vote. Reversing the District Court, it held that Wise had been properly indicted under the Sherman Act.

The final terse paragraph of the Chief Justice's opinion, describes the circumstances under which a corporate representative will be held accountable for his company's violation:

[W]e hold that a corporate officer is subject to prosecution under §1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he the one who authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity.¹²

Basically, the Court concluded that Congress when it wrote in 1890 that "every person" who violated the Sherman Act would be subject to its sanctions had no intention of excluding persons acting for or on behalf of a corporation. This was a point, by the way, all but ignored in the government's briefing and argument,¹³ the thrust of its attack centering upon what Congress intended nearly twenty-five years later when it enacted section 14 which, unlike section 1 of the Sherman Act, expressly deals with corporate "directors, officers or agents."

¹⁰ *United States v. National Dairy Prods. Corp.*, 196 F Supp. 155 (W.D. Mo. 1961).

¹¹ *United States v. Wise*, 370 U.S. 405, 415 n.1 (1962) (concurring opinion).

¹² *Id.* at 416.

¹³ The legislative history of the criminal provisions of the Sherman Act is set forth in a single but lengthy footnote in the government's brief. See Brief for the United States, pp. 15-17, n.8, *United States v. Wise*, 370 U.S. 405 (1962). In reporting the Supreme Court argument, the Antitrust and Trade Regulation Report states: "It was when he reached the effect of the 1914 enactment of the Clayton Act that [counsel for the Government] turned to legislative history. In [his] view, the issue in the case is whether Congress intended, when it enacted Section 14 of the Clayton Act, to make it harder or easier to convict corporate officers for antitrust violations." BNA Antitrust Rep. No. 40, pp. A-7, 8 (1962).

It would serve no useful purpose to debate the wisdom of the *Wise* decision. My own views may be inferred from an article I wrote late last year in which I concluded that the case had been "correctly decided" by the district court.¹⁴ Undaunted, let me venture a few comments which I think flow logically in *Wise's* wake.

First, for all practical purposes section 14 of the Clayton Act has been rendered a dead letter and those of you pressed for shelf space can remove it from your compilations. According to the Court, it was enacted simply as a "reaffirmation of the Sherman Act's basic penal provisions and a mandate to prosecutors to bring all responsible persons to justice."¹⁵ Its operative language, "who shall have authorized, ordered, or done," has now been read directly into the Sherman Act.¹⁶

Second, while the standards enunciated by the Court for holding the corporate representative refer only to criminal prosecutions under section 1 of the Sherman Act, the reasoning of the decision makes these standards equally applicable to civil suits to enjoin violations of section 1 and to both civil suits and criminal prosecutions brought under sections 2 and 3 of the Sherman Act.¹⁷

¹⁴ Whiting, *supra* note 4, at 945.

¹⁵ United States v. *Wise*, 370 U.S. 405, 414 (1962).

¹⁶ Although the precise language used by Chief Justice Warren is "authorizes, orders or helps perpetrate the crime" (see note 12 *supra* and accompanying text), this language is substantially identical to the §14 terminology "authorized, ordered or done any of the acts constituting in whole or in part such violation." Webster's Dictionary (2d ed. 1944) definition of "perpetrate" is "to do or to perform, to commit (as an offense)." (Emphasis added.) And the verb "help" according to Webster's, means, "to aid; assist to aid in bringing about, causing to lend aid; to avail or be of use to," which clearly carries over the "in whole or in part" connotation.

¹⁷ The Court's finding that Congress intended to include representative actors in making liable "every person" who commits the previously-defined §1 offense would clearly extend to the almost identical constructions of Sherman Act §§2 and 3. "Every person" is also made guilty of a misdemeanor (and subject to a maximum fine of \$5,000) for a combination or conspiracy in violation of §73 of the Wilson Tariff Act, 37 Stat. 667 (1913), 15 U.S.C. §8 (1958). Compare §3 of the Robinson-Patman Act (maximum fine also \$5,000), which makes it unlawful for any person to "assist in" any of the three offenses defined in that statute, but which as to two of these offenses requires proof that the acts were engaged in "for the purpose of destroying competition or eliminating a competitor." Corporate representatives may also be but seldom are made defendants in civil suits brought by the United States seeking injunctive relief or by one claiming to have been injured by the violation and seeking treble damages and/or an injunction. During calendar year 1961, no corporate official was made a party to a government civil antitrust complaint. See generally Whiting, *supra* note 4, at 950-65 (government civil suits) and 972-81 (private actions). Corporate officers are frequently named as respondents along with their corporations in FTC complaints and included specifically in FTC orders to cease and desist. See Whiting,

(Continued on next page)

Third, any question as to vulnerability of the executive who occupies a position of responsibility from which he could have controlled the illegal activities of subordinates, had he known of them, appears to have been resolved by the decision. While early in its opinion the Court reads the Sherman Act as applying to "all officers who have a responsible share in the proscribed transaction,"¹⁸—and conceivably this concept could be stretched to inculpate the "see, hear, speak-no-evil" superior—the holding is that only he who "knowingly" participates will be made to suffer. Knowledge presumably may be proved circumstantially (though in a criminal case, beyond a reasonable doubt), but there is no warrant under *Wise* or otherwise for imputing liability to the unknowing executive.

Fourth, even if the representative knows of some or all of the unlawful activity, he cannot be held liable unless he "participates." Participation, we are told, may involve the actual doing of one or more of the challenged acts or ordering that they be done by others. It may also include authorizing their commission. Can authorization (*i.e.*, participation) be implied from the superior's knowledge, coupled with his passive acquiescence or continued non-action? Perhaps, though a careful reading of the opinion suggests that the Court had something of a more affirmative nature in mind, it cites with apparent approval, for example, two early

(Footnote continued from preceding page)

supra note 4, at 965-72. The potential consequences of violation of an FTC order are discussed in Austern, *Five Thousand Dollars a Day*, 51 Ky. L.J. 481 (1963).

¹⁸ *United States v. Wise*, 370 U.S. 405, 409 (1962). The executive's responsibility to his corporation may be greater. In *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962), stockholders of Allis-Chalmers charged the company's directors with breach of their fiduciary duty in permitting the company to become engaged in practices that were the subject of the Philadelphia electrical indictments (and as to which the company had pled guilty). Plaintiffs sought to make the directors liable for the fines imposed upon the company in the government suits, any sums the company might have to pay to damage claimants, and for damages due to alleged injury to the firm's business reputation and good will. There was no evidence that the directors knew of the employees' misconduct. The opinion of Vice Chancellor Marvel is principally concerned with whether they "knew or should have known of facts which constructively put them on notice" of the illegal activities. In this view, "it is only where the facts and circumstances of an employee's wrongdoing clearly throw the onus for the ensuing results on inattentive or supine directors that the law shoulders them with the responsibility here sought to be imposed" and among the circumstances to be considered are "the nature of the business, its size, the extent, method and reasonableness of delegation of executive authority, and the existence or non-existence of zeal and honesty of purpose in the directors' performance of their duties." Applying those tests to Allis-Chalmers and its directors, the Court ordered the complaint dismissed.

Sherman Act decisions holding that a corporate officer is properly indicted when charged with "personal participation, direction or activity"¹⁹ as an "actor," an "actual, present, and efficient actor," or as one of those "active in promoting [the] misdemeanor."²⁰ Both the majority and the concurring opinions repeatedly resort to the words "acts," "acted" and "acting" to describe representative conduct that may be subject to the Sherman Act's bans.

Fifth and finally, *Wise* may well be a blessing in disguise. As noted, the opinion does much to clarify legal standards for holding the executive liable. While it also makes clear his exposure to a possible \$50,000 fine, it may at the same time have blunted efforts in Congress, spurred by the revelations of the electrical cases, to enlarge the area of representative responsibility²¹ and increase penalties for representative violations beyond those now set forth in the Sherman Act.²²

¹⁹ *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (C.C.S.D. N.Y. 1906), quoted in *United States v. Wise*, 370 U.S. 405, 410, n.3 (1962).

²⁰ *United States v. Winslow*, 195 Fed. 578, 581 (D. Mass. 1912), quoted in *United States v. Wise*, *supra* note 19, at 410. *But see*, Milton Handler, referring to § 14 in testimony earlier this year before the Senate Antimonopoly Subcommittee: "I think that there may be cases where inaction could very well be participation. I think that if a group of corporation officers are about to engage in flagrant price fixing and they go up to the president and tell him that, his silence can very well be acquiescence and he very well may be participating." *Hearings on S. 996, S. 2252, S. 2254, S. 2254 and S. 2255 before The Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary (Increasing Criminal Penalties)*, 87th Cong., 2d Sess. 169 (1962).

²¹ Companion bills introduced by Senator Kefauver and Representative Celler in the current Congress, S. 2254 and H.R. 8138, 87th Cong., 1st Sess. (1961), would amend Clayton Act §14 *inter alia* to impose liability upon corporate representatives for the ratification of acts constituting a violation. Ratification could be defined as the possession of knowledge or reasonable cause to believe that a corporation is engaged in or about to engage in any violation, the possession of express or implied authority to stop or prevent such violation or to report it to someone with authority to stop or prevent it, and the failure to exercise that authority. This, it might be noted, seems broad enough to catch the knowing or suspicious and non-reporting house counsel. Compare Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 Yale L.J. 280, 303 (1961), recommending that there be imposed "upon every corporate executive an affirmative duty to exercise reasonable care to discover and prevent acquisitive corporate crime [defined earlier in the comment to be that species of crime committed for the purpose of increasing corporate, as distinguished from personal, wealth] within the area of business actually under his effective control," and that failure to fulfill this duty be made a misdemeanor, punishable by a short prison term."

²² See S. 2252, H.R. 8136, 87th Cong., 1st Sess. (1961), amending §§1, 2 and 3 of the Sherman Act to increase the maximum fines to \$100,000 and to make jail sentences, as well as fines, mandatory upon a second offense; S. 2253, H.R. 8137 (see *supra* note 21), 87th Cong., 1st Sess. (1961), making a jail sentence, as well as a fine not exceeding \$100,000 mandatory for per se offenses; S. 2254, H.R. 8138, increasing the maximum fine for Clayton Act §14 offenses to \$100,000 and providing for mandatory imprisonment along with a fine for a second offense.

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III

These two recent developments—the increasing frequency with which corporate officials are being indicted and the decision in *Wise* clarifying both the circumstances under which they may be indicted and the potential consequences when they are—make it appropriate, I think, to re-examine the question Mr. Cahill asked ten years ago.

For a brief period in the late '30's and early '40's when Judge Arnold was in charge of the Antitrust Division, something over two-thirds of the government antitrust suits instituted were brought on the criminal side. It was his view that criminal prosecution was the only effective deterrent to antitrust violation and that civil suits were useful merely as a "supplement to the criminal proceeding."²³ Subsequent Attorneys General and their Assistants have announced a more moderate policy of bringing criminal suits only where violations were wilful or fell clearly within one of the hard-core, per se type categories.²⁴ The record of the past ten years indicates that with few exceptions,²⁵ the policy has been adhered to. I am

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Bills introduced in both the Senate and House, S. 996 and H.R. 4176, although not identical, would give a court power under certain circumstances to bar an individual convicted of an antitrust violation from continuing as an officer of his or another convicted corporation and would impose other penalties, including express denial of indemnity for fines or legal expenses. Hearings were held on the Senate measures on September 6 and October 2, 1961, and on March 9, 1962. See *supra* note 20.

²³ Arnold, *Antitrust Law Enforcement, Past and Future*, 7 *Law & Contemp. Prob.* 5, 16 (1940).

²⁴ See, e.g., Testimony of Attorney General Clark, *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess., ser. 14, pt. 1, at 73, 88-89 (1949); Testimony of Assistant Attorney General Bergson, *id.* at 380; Brownell (then Attorney General), *Economic Liberty Under the Antitrust Laws*, 1954 CCH Antitrust Law Symposium 22; Statement of Assistant Attorney General Barnes, 1955 Att'y. Gen. Nat'l Comm. Antitrust Rep. 350.

²⁵ Only four Sherman Act criminal cases could be found in the CCH Summary of Cases instituted by the United States from 1952 to 1962 which did not clearly allege per se offenses. All of these charged monopolization or attempted monopolization. See *United States v. Kansas City Star Co.*, Cr. No. 18444, D. Kans., 1953 (Dep't of Justice Case No. 1151), defendants found guilty, 1955 Trade Cas. 168,041 (D. Kans. 1955), *aff'd* 240 F.2d 643 (8th Cir. 1957), *cert. denied* 354 U.S. 923 (1956); *United States v. Jas. H. Matthews & Co.*, Cr. No. 15463, W.D. Pa., 1958 (Dep't of Justice Case No. 1374) (pleas of *nolo contendere* accepted by court); *United States v. Harte-Hanks Newspapers, Inc.*, Cr. No. 15393, N.D. Tex., 1958 (Dep't of Justice Case No. 1413), found not guilty by District Court, 1959 Trade Cas. 169,259 (N.D. Tex. 1959); *United States v. General Motors Corp.*, No. 61-CR-356, S.D.N.Y., 1961 (Dep't of Justice Case No. 1605), transferred to District Court in Illinois, 1961 Trade Cas. 170,076 (N.D. Ill. 1961). No individuals were indicted in the *General Motors* case, which was brought only under §2.

not aware of any similar pronouncement by the present head of the Antitrust Division. It does seem significant, however, that since he took office in March of last year, 39 of the 40 criminal suits instituted have involved some form of price-fixing,²⁶ and every one of the 31 criminal suits naming corporate officials as co-defendants has charged this type of offense.²⁷

The uncertainty of application of the antitrust laws to many non-per se areas of business conduct certainly needs no elaboration before this audience. One can sympathize with the businessman who makes a conscientious effort to comply with the confusing, changing and often conflicting antitrust mandates. Most, I think, will agree that criminal pursuit of the businessman for such indefinite transgressions is, as Cahill put it, "in contradiction of American justice and democratic principle."²⁸ At the same time, most businessmen today, when they actually agree with their competitors on prices, on rigging or rotating bids, on allocating customers or territories, or on boycotting another's business, know they are running a grave antitrust risk. For those who play such games and lose, the criminal suit seems altogether appropriate.

Between these extremes, however, there will be conduct which if cast in the formal language of a Sherman Act indictment would read like a per se offense but which will lack any element of deliberate violation and be wholly free of any immoral taint. One

²⁶ Statistics compiled from the current supplements to CCH, *The Federal Antitrust Laws with Summary of Cases Instituted by the U.S.* (through June 30, 1962). The one suit not concerning price fixing is *United States v. General Motors Corp.*, *supra* note 25 (monopolization of manufacture and sale of railroad locomotives). Both *United States v. Minnesota Mining & Mfg. Co.*, Cr. No. 61-73-D, D. Minn., 1961 (Dep't of Justice Case No. 1638), and *United States v. Learner Co.*, Cr. No. 11736, D. Haw., 1962. (Dep't of Justice Case No. 1674), contain charges of price-fixing but appear to be basically conspiracy and attempt to monopolize cases. In *United States v. Consolidated Papers, Inc.*, Cr. No. 14087, D. Wis., 1962, (Dep't of Justice Case No. 1682) (criminal information), and *United States v. Flynn-Learner*, Cr. No. 11735, D. Haw., 1962 (Dep't of Justice Case No. 1673), it is alleged that the defendants conspired to fix (hold down) the prices of their suppliers. *Cf.* *United States v. Huck Mfg. Co.*, Cr. No. 39017, E.D. Mich., 1961 (Dep't of Justice Case No. 1631), where a patentee is charged with conspiring to fix the resale prices of its licensee. Not all price-fixing is pursued by indictment. Civil complaints, rather than indictments, were chosen to attack both horizontal and resale price fixing in several suits brought during the past eighteen months. See e.g., Dep't of Justice Cases Nos. 1594, 1595, 1639, 1672, 1675, 1677, 1685, 1686, 1688.

²⁷ *Cf.* *United States v. Learner Co.*, *supra* note 26 (two officers named). Although price fixing, as such, is not alleged in the indictment in *United States v. General Motors Corp.*, Cr. No. 30132, S.D. Cal., 1961, (Dep't of Justice Case No. 1623) (four officers named), the conspiracy is alleged to have been for the purpose of eliminating discount sales.

²⁸ Cahill, *supra* note 1, at 31.

may rightfully question, for example, whether the criminal suit is a proper vehicle for testing identical industry pricing, absent strong pre-indictment evidence of actual collusion,²⁹ a supplier's refusal to deal with a persistent discounter,³⁰ or an agreement to fix prices where a serious question exists as to the industry's antitrust immunity³¹ or its involvement in interstate commerce.³² In short, while the wilful, per se criteria are good starting points, they should be applied with their own rule of reason. Perhaps no fairer or more flexible policy can be devised than that urged by the Attorney General's Committee—i.e., that criminal cases "should be confined to instances where proof of violation is clear and the law is settled."³³

IV

Even so, one cannot read the steady stream of indictments as they are filed, most of them charging some clear instance of price-fixing or bid-rigging, and not wonder how the individuals involved brought about their predicaments. From my own limited observations, I have found that more often than not they fall into one of three categories. There are those who feel their company or industry is too small to concern the enforcement agencies. These are the presidents, vice-presidents and sales managers who cling to the notion that the Sherman Act is directed against big business—the du Ponts, General Motors and General Electrics—and are genuinely surprised when the FBI pays them a visit. The second group knows it should not fix prices, so evolves all sorts of subtle and devious means to accomplish that very result short of actual written or around-the-table agreement. Some of those included in this

²⁹ See *United States v. Arkansas Fuel Oil Corp.*, 1960 Trade Cas. ¶69,619 (N.D. Okla. 1960); *United States v. Eli Lilly & Co.*, 1959 Trade Cas. ¶69,536 (D. N.J. 1959).

³⁰ See *United States v. Parke, Davis & Co.*, 1957 Trade Cas. ¶68,586 (D.D.C. 1957) (motion for acquittal granted). A companion civil suit alleging the same violations was also dismissed by the District Court, 164 F Supp. 827 (D.D.C. 1958), *rev'd*, 362 U.S. 29 (1960).

³¹ See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *United States v. American Medical Ass'n*, 317 U.S. 326 (1943); *United States v. North American Van Lines*, 1957 Trade Cas. ¶68,761 (D.N.M. 1957). Cf. *United States v. North American Van Lines*, Cr. No. 527-61 (D.D.C., 1961) (Dep't of Justice Case No. 1615), transferred to District Court in Indiana, 1962 Trade Cas. ¶70,283 (S.D. Ind. 1962).

³² See *United States v. National Ass'n of Real Estate Bds.*, 80 F Supp. 350 (D.D.C. 1948). Cf. *United States v. South Florida Asphalt Co.*, 1962 Trade Cas. ¶70,257 (S.D. Fla., 1962) (dismissing indictments). A subsequently filed criminal information was also dismissed. See BNA Antitrust Rep. No. 36, p. A-15.

³³ 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 351.

category sincerely believe they have skirted the statute, others that they have covered their tracks too cleverly to be caught. The third group knows it is courting trouble but is willing to take its chances. Sometimes members of this group are able to justify their actions, at least to themselves, by a variety of conscience-salving explanations: prices, after all, were not unreasonable, agreed-upon increases were sorely needed and long overdue, or joining the conspiracy was necessary to stay competitive or even in business.

As antitrust counsel I think we must bear some of the blame for each of these attitudes. We know better, but the problem, a very difficult problem, is in communicating effectively our knowledge to our clients.³⁴

Those of us who have small business clients should impress upon them the fact that they are by no means indictment-proof. Better than four out of every five companies named as defendants in government antitrust suits during recent years do not even appear in the Fortune directories of the 500 largest corporations.³⁵ Moreover, it is the top management of these smaller companies—the presidents and vice-presidents—that are commonly named with their companies.³⁶

With the big companies this is rarely so. The individual defendants here are commonly drawn from a second or third management tier—persons with such titles as district or division sales manager, plant manager, assistant director of marketing and the like.³⁷ For those of us with big business clients, this suggests

³⁴ Much has been written recently on the subject of preventive antitrust. See e.g., Creighton, *Corporate Counsel and Antitrust*, 48 A.B.A.J. 654 (1962); Freedman, *Antitrust: The Education of a Client*, 17 Bus. Law. 321 (1962); Whiting, *Antitrust and the Corporate Executive II*, 48 Va. L. Rev. 1, 4-18 & n.17 (1962) (citing earlier articles). Most of these contain suggestions as to what to say and how to say it. In many companies counsel's problem may be more basic, viz, to convince management that what might be said needs saying.

³⁵ See Whiting, *supra* note 34, at 2-3 & Appendix II.

³⁶ See Kramer, *supra* note 1, at 540-41; Comment, 71 Yale L.J. 280, 291-92 (1961). Seventy corporate presidents and vice-presidents were indicted during the years 1957-1960, 52 of which were officers of companies not included in the top 500. Twelve of the remaining 18 top executives of "big" companies indicted were presidents or vice-presidents of electrical companies named in the 1960 Philadelphia suits, and four of the 18 were defendants in *United States v. General Dynamics Corp.*, No. 60 Cr. 422, S.D.N.Y., 1960 (Dep't of Justice Case No. 1576), a criminal contempt action. None of the individual defendants were defendants in the original antitrust suit.

³⁷ Presumably because of the greater difficulty in fixing responsibility for the big company violation, proportionally fewer officers of such companies of any rank have been indicted. Thus, while during the 1957-1960 period 101 companies ranked in the top 500 were indicted (including companies named in more than

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either that we are not talking to the right people or that our message is not getting to those down the line and in the field.

I also suspect that we sometimes unwittingly confuse our businessmen clients by over-emphasizing those areas of antitrust that are more controversial and therefore more interesting to us than the relatively predictable per se offenses. At worst, by stressing the inconsistencies and absurdities—and there are many—we may breed cynicism and disrespect. The esoterica of antitrust, I believe, are more properly subjects for the advanced courses. The basic course should be Per Se I and it should teach that all arrangements, however arrived at, between competitors affecting prices (whether high, low, necessary or reasonable) or allocating production, customers, or territories are fraught with antitrust consequences and that attempted concealment is not only marked for failure, but also likely to aggravate the consequences.³⁸

Of course there is always the Group III client who will listen attentively and proceed to ignore—for reasons sufficient unto himself—the advice we have given. For such a person I suppose there is not much that can be done once we have pointed out clearly what the consequences of his disregard may be both to his company and to him personally. A summary of the individual's risks might well include these six basic points:

(1) The current tendency, as we have seen, is to personalize liability for antitrust violations. The corporate representative cannot depend on the corporate structure to shield him from prosecution. Nor can he expect to be protected by his corporate position, be it high or low. The Justice Department has shown no inclination to discriminate on the basis of rank, but has sought to indict every person in a responsible corporate position as to whom there is evidence of participation in the antitrust violation.

(2) Participation does not mean that a corporate representative, to be indictable, must be caught with his own fingers in the

(Footnote continued from preceding page)

one indictment but not including the corporate defendants in the electrical suite), only 13 officers of those companies were named as defendants. The electrical suits (44 individuals indicted) may have emboldened the Justice Department. At any rate, during 1961 and the first six months of this year, 37 officers of 39 Fortune-ranked companies have been named as co-defendants—including 12 presidents and vice-presidents and one chairman of the board.

³⁸ For example, charges in the electrical industry indictments of defendants efforts to conceal their activities were cited by the government as reason why Judge Ganey should reject the proffered *nolo* pleas. See *United States v. Westinghouse Elec. Corp.*, 1960 Trade Cas. ¶69,699 at 76,754 (E.D. Pa. 1960).

antitrust pie. Superiors who order or authorize subordinates to engage in the illegal activities are as vulnerable to prosecution as if they were themselves the effective actors.

(3) Violations may bring a personal fine of up to \$50,000 on each count of the indictment. Severe fines are no longer an idle threat, as those imposed upon executives in the *Safeway* and electrical industry cases, among others, have demonstrated.³⁹

(4) The expense, inconvenience and lost working hours involved in defending or settling the original Justice Department suit and any private actions arising therefrom must be regarded as additional penalties. Indeed, they are frequently more costly and onerous than the fine itself.⁴⁰ Fines paid and legal expenses incurred by the executive in many cases may not be reimbursable by the corporation.⁴¹ And there is always the possibility that angry

³⁹ In *United States v. Safeway Stores, Inc.*, Cr. No. 9584, N.D. Tex., 1955 (Dep't of Justice Case No. 1263), a corporate officer pleading *nolo contendere* was fined \$35,000 on each of two counts and \$5,000 on a third (but see *infra* note 41). In the electrical cases, fines totalling \$137,500 were levied against 36 executive defendants, including individual fines of \$12,500 and \$7,500. Dep't of Justice Cases Nos. 1496, 1498, 1500, 1504, 1506 and 1507 (E.D. Pa. 1960). In *United States v. Consolidated Laundries Corp.*, Cr. No. C.152-79, S.D.N.Y., 1957 (Dep't of Justice Case No. 1316), after a court finding of guilty (1958 Trade Cas. 169,077; 1960 Trade Cas. 169,702), one individual defendant was fined \$15,000 on each of two counts, plus one quarter of the costs of the government's prosecution, and three other individuals were each fined \$10,000 on each of two counts, plus one quarter of the costs of the government's prosecution. The individuals were also given six and three month prison terms. The case was reversed and remanded by the Second Circuit, 291 F.2d 563 (*Id.* Cir. 1961), due to the government's failure to produce certain documents in response to the District Court's discovery order. Also the Second Circuit noted that the 1955 increase in fines could not be made applicable to certain defendants indicted before the legislation went into effect. See *id.* at 573-74. Upon remand, the defendants were permitted to plead *nolo contendere* to the charges against them, and the six association and company officers were fined a total of \$42,000. No jail sentences were meted out in the second sentencing. See *BNA Antitrust Rep.* No. 21 (1961), p. A-1 (S.D.N.Y. 1961). The average fines assessed against both corporations and their officers, of course, have averaged considerably less than the statutory maximum. See *Kramer*, *supra* note 1, at 532 n.9; *Whiting*, *supra* note 4, at 942-43.

⁴⁰ William Stolk, Chairman of the Board, American Can Co., told stockholders at the company's annual meeting in 1961, that, although antitrust violations are very costly in terms of fines, money damages and counsel fees, "even more costly is the extravagant loss of executives time and the continuing expense of compliance with the judgment." He added: "The impact on our Company in terms of lost time by key executives has undoubtedly exceeded by far the specific dollar expenses of the trial."

⁴¹ See generally *Whiting*, *supra* note 34, at 33-46. Reimbursement of the executives fined on *nolo* pleas in *United States v. Safeway Stores, Inc.*, Cr. No. 9584, N.D. Tex., 1955 (Dep't of Justice Case No. 1263), however, was approved in *Koster v. Warren*, 297 F.2d 418 (9th Cir. 1961) (Stockholder suit). Several companies have "enacted" their own set of sanctions, ranging from reprimands and fines (or salary cuts) to outright dismissal, for representatives who violate company antitrust policy.

shareholders will bring suit to recover from him the corporation's fine and expenses of suit.⁴²

(5) No longer can the corporate officer count on paying his way out of antitrust liability. Jail sentences have become more common for the punishment of individuals involved in flagrant corporate violations. Increasing use of this sanction seems probable.⁴³

(6) In the last analysis, all of these *in terrorem* considerations should pale before the realization that the Sherman Act is a *criminal* statute. "White collar" crime⁴⁴ or no, it is the fact of indictment—in the public eye, itself a branding—that should serve as the prime deterrent to the company representative who is concerned about the effect such an indictment will have upon his family, associates and friends. Those of you who have represented indicted executives will appreciate that this can be for them a profoundly distressing experience.⁴⁵ Nor does the stigma end with the filing of the indictment and its attendant publicity. Still to come are such common-criminal events as fingerprinting, making bond, arraignment and, if he pleads or is found guilty or if the usual *nolo* plea is entered and accepted, sentencing in open criminal court.

⁴² See *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962); *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944). Recently the Third Circuit upheld a shareholder's derivative treble damage complaint naming directors of his corporation as defendants where he had charged them with conspiring with another corporation to draw the shareholder's corporation into an antitrust violation. *Rogers v. American Can Co.*, 1962 Trade Cas. ¶70,354 (3d Cir. 1962).

⁴³ Thirty-nine corporate executives received jail sentences in cases brought during 1950-1960, although in all but 12 of these instances sentences were suspended. The CCH Trade Reg. Rep. No. 175, Feb. 17, 1961, states that there were nearly three times as many prison sentences handed down in this decade as in any prior decade of antitrust enforcement.

⁴⁴ Sutherland, *White Collar Crime* (1949).

⁴⁵ See Hamilton & Till, *Antitrust in Action* 80 (TNEC Monograph No. 16, 1940). See also, *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., S. Res. 52, pt. 27 (Price Fixing and Bid Rigging in the Electrical Manufacturing Industry) 16952 (testimony of William Ginn) (1961). This paper is *not* meant to suggest that executive observance of the antitrust laws should be dictated by purely selfish concerns, but rather that there are additional and cogent personal reasons for compliance which may not have been fully appreciated; and that most of these arise from the executive's exposure to criminal suit and involve well-defined practices. The consequences of antitrust violation can be extremely serious to his corporation. Here, however, the chief threat undoubtedly is the civil suit and decree which, as Dean Rostow has said, "can change the structure of industries, and shape their patterns of conduct, and even their habits." *Hearings, supra* note 20, at 114 (in letter to the Subcommittee Chairman).

V

Counsel undertaking the task of antitrust instruction may often become wearied by repetition and discouraged by apparent executive failure to consult him or, even after consultation to take his teachings to heart. But the instruction should somehow be given and the lessons must somehow be learned. There is another answer to John Cahill's question: American business *need* not brand itself as criminal. It is an obvious answer, of course. Whether it is a realistic answer depends largely upon our ability to communicate the fact that this answer exists—that the corporate representative need not and for very practical and persuasive personal reasons, should not, engage in practices, now fairly well defined, which can easily lead to criminal prosecution.