

Spring 1965

# Liabilities of Corporate Officers for Violations of Fiduciary Duties Concerning the Antitrust Laws

Wesley E. Forte

*Member of the Pennsylvania Bar*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Antitrust and Trade Regulation Commons](#), and the [Business Organizations Law Commons](#)

## Recommended Citation

Forte, Wesley E. (1965) "Liabilities of Corporate Officers for Violations of Fiduciary Duties Concerning the Antitrust Laws," *Indiana Law Journal*: Vol. 40: Iss. 3, Article 2.

Available at: <http://www.repository.law.indiana.edu/ilj/vol40/iss3/2>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# LIABILITIES OF CORPORATE OFFICERS FOR VIOLATIONS OF FIDUCIARY DUTIES CONCERNING THE ANTITRUST LAWS

WESLEY E. FORTE†

Stockholders have become increasingly active in attempting to fasten personal liability upon corporate officers for antitrust violations.<sup>1</sup> Such liabilities could conceivably be imposed under either the law of fiduciary duty or the antitrust laws. The law of fiduciary duty determines a corporate officer's obligations to his corporation, whereas antitrust laws determine a corporate officer's obligations to the public. The corporate officer's obligations to his corporation may differ from his obligations to the public, and the reconciliation of these obligations with the requirement for profits will cause legal and ethical problems for many executives.

This article is a review of the legal theories under which liabilities may arise through the law of fiduciary duty because of a corporate officer's violation of the antitrust laws. "Fiduciary duty" is used as a synonym for the three broad duties of management (obedience, diligence, and loyalty)<sup>2</sup> while "antitrust laws" refers to the federal antitrust laws included in section one of the Clayton Act.<sup>3</sup> Conditions precedent to a derivative suit (for example, whether demand for suit must be made on the board of directors and shareholders<sup>4</sup> and whether security for costs must be posted)<sup>5</sup> are not discussed here and the stockholder's suit against corporate officers for treble damages under the antitrust laws is mentioned only briefly.<sup>6</sup> I have excluded any discussion of the unhappy prospect of prison sentences for corporate officers<sup>7</sup> and have included

---

† Member of the Pennsylvania Bar.

1. See *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963); *Knopfler v. Bohlen*, 15 App. Div.2d 922, 225 N.Y.S.2d 609 (2d Dep't 1962); *Borden v. Cohen*, 231 N.Y.S.2d 902 (Sup. Ct. 1962); see also the cases cited note 15 *infra*.

2. See HENN, CORPORATIONS 363 (1961).

3. 38 Stat. 730 (1914), 15 U.S.C. § 12 (1958).

4. For a discussion of the requirement of demand on the board of directors and shareholders see HENN, CORPORATIONS 575-79 (1961); LATTIN, CORPORATIONS 352-56 (1959); BALLANTINE, CORPORATIONS 345-48 (rev. ed. 1946). See also Note, *Demand on Directors and Shareholders As a Prerequisite to a Derivative Suit*, 73 HARV. L. REV. 746 (1960).

5. For a discussion of security for costs see HENN, CORPORATIONS 588-92 (1961); BALLANTINE, CORPORATIONS 374 (rev. ed. 1946).

6. See text accompanying notes 12-22 *infra*.

7. The more important criminal prohibitions of the antitrust laws are found in §§ 1, 2, and 3 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-3 (1958), and § 14 of the Clayton Act, 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958). Section 14 of the Clayton Act provides that whenever a corporation violates any of the penal provisions of the antitrust laws, the violation is deemed also to be that of the individual

only cursory comments on the indemnification of corporate officers for their antitrust litigation expenses and monetary penalties since indemnification has been reviewed recently and adequately elsewhere.<sup>8</sup> The law remaining in the area encompassed by the title emanates primarily from stockholders' derivative suits arising under the common law; and while there are few such cases involving antitrust violations, it is here we will focus.

Let us assume that P, the president of a large drug company, instituted a policy of resale price maintenance in 1950 and personally directed the following actions: (1) distribution to wholesalers and retailers of catalogues listing minimum resale prices for the drug company's products; (2) release of a statement to wholesalers announcing that the drug company would refuse to deal with those who did not charge the minimum resale prices listed in the catalogues; (3) visits by drug company salesmen informing wholesalers that the drug company would refuse to deal with wholesalers if they sold to retailers who cut prices; (4) visits by drug company salesmen informing retailers that both the drug company and its wholesalers would refuse to deal with retailers who cut prices; and (5) refusals to deal with both retailers who cut prices below the suggested minimum retail price and wholesalers who continued to sell to such retailers.<sup>9</sup> Assume also that in 1960 the United States Supreme Court held that the implementation of this policy violated section one of the Sherman Act<sup>10</sup> in a suit brought by the government against the company and that, notwithstanding a discontinuance of these actions promptly after the Supreme Court decision, a number of retailers who were boycotted by the corporation and its wholesalers for price-cutting recover treble-damage judgments against the corporation.<sup>11</sup> Can

---

directors or officers who have authorized, ordered, or done the acts constituting the violation. Section 3 of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13a (1958), while technically not an antitrust law, is an analogous statute containing criminal prohibitions.

8. See Note, *Indemnification of Directors: The Problems Posed By Federal Securities and Antitrust Legislation*, 76 HARV. L. REV. 1403 (1963); see also Bishop, *Current Status of Corporate Directors' Right to Indemnification*, 69 HARV. L. REV. 1057 (1956).

9. These facts are analogous to *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), with the exception of the personal participation of P. No inference is intended concerning the knowledge or participation of the president of Parke, Davis & Co. in those acts which ultimately became the subject of the Supreme Court decision against his company.

10. See *ibid.*, in which the United States Supreme Court held, "In thus involving the wholesalers to stop the flow of Parke, Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke, Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." *Id.* at 45.

11. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), holding that a boycott organized by a competing store for monopolistic reasons created a cause

S, a stockholder of the drug company, recover damages in a derivative suit against P either under the antitrust laws or the law of fiduciary duty?

### I. THEORIES OF LIABILITY

If S sued under the antitrust laws, there would be a possibility of treble damages<sup>12</sup> as opposed to the compensatory damages which are the maximum possible recovery under the law of fiduciary duty. In 1916 the United States Supreme Court held that a stockholder could not bring a derivative action under the antitrust laws in equity because the defendant was entitled to a jury trial in treble-damage suits.<sup>13</sup> In 1917 the United States Supreme Court held that a stockholder could not bring a derivative action under the antitrust laws at law because a derivative action was solely an equitable remedy.<sup>14</sup> These two decisions left stockholders in a procedural dilemma from which there was no escape. The adoption of the Federal Rules of Civil Procedure merging law and equity appear to have resolved this problem.<sup>15</sup> On the merits, however, it is likely that S would be told that he has considerably less than an even chance of success in a suit against P for treble damages under the antitrust laws.<sup>16</sup>

---

of action for treble damages under the antitrust laws. The refusal of the drug company and the wholesalers to sell drugs to retailers pursuant to an implied agreement to maintain resale prices would also seem a basis for treble-damage actions. Compare *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), holding that a supplier is liable for treble damages if he uses coercion on his retail outlets to achieve resale price maintenance, with *Dart Drug Corp. v. Parke, Davis & Co.*, 221 F. Supp. 948 (D.D.C. 1963), *aff'd*, 5 CCH TRADE REG. ¶ 71, 371 (D.C.Cir. 1965), holding that a unilateral refusal to deal is not illegal under the Sherman Act.

12. See 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). The Attorney General's National Committee to Study the Antitrust Laws suggested that treble damages be made discretionary rather than mandatory. If this proposal is adopted the trial judge will decide whether compensatory damages are sufficient or whether double or treble damages should be imposed. The court could then penalize the purposeful violator without imposing the harsh penalty of multiple damages on innocent actors. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378-80 (1955). This would obviate the possibility of trebling treble-damage judgments and make an action under the antitrust laws a much more reasonable remedy against corporate management. See text accompanying notes 12-22 *infra*.

13. *Fleitmann v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916).

14. *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261 (1917).

15. See FED. R. CIV. P. 2. See also *Rogers v. American Can Co.*, 305 F.2d 297 (3d Cir. 1962); *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953); *Kogan v. Schenley Indus., Inc.*, 20 F.R.D. 4 (D.Del. 1956). See also *Schechtman v. Wolfson*, 244 F.2d 537 (2d Cir. 1957); *Ramsburg v. American Inv. Co.*, 231 F.2d 333 (7th Cir. 1956); *Gomberg v. Midvale Co.*, 157 F. Supp. 132 (E.D. Pa. 1955); 2 CCH TRADE REG. REP. ¶ 9044 ("A procedural dilemma which barred a derivative suit for treble damages under the antitrust laws was eliminated by the adoption of the Federal Rules of Civil Procedure."); 13 FLETCHER, CYC. CORP. § 5929 (perm. ed. 1961); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 582-83 n.103 (1964).

16. There are no cases in which a stockholder has succeeded under § 4 of the Clayton Act in charging his corporate officers with three times the treble-damage judgments rendered against the corporation when the corporation was a participant in the

While the literal language of the Clayton Act supports S's claim,<sup>17</sup> those who have considered the question seem to agree that it would be unreasonable to charge P with personal liabilities amounting to three times the corporation's damages (which is nine times the damage suffered by treble-damage plaintiffs who sued the corporation.)<sup>18</sup> Since this type of windfall was not intended for the corporation and this type of penalty was not intended for the offender, the courts could be expected to leave S to his remedies under the law of fiduciary duty.<sup>19</sup> S would not be permitted to sue P in S's own right under the antitrust laws even if the value of S's stock has been impaired<sup>20</sup> or if S has suffered a loss of dividends or income,<sup>21</sup> because the injury is to the corporation and only remotely or indirectly to S as a stockholder.<sup>22</sup>

S could be expected to elect to sue derivatively for a breach of fiduciary duty rather than for a violation of the antitrust laws. Early cases indicated that the state and federal courts had concurrent jurisdiction over this cause of action.<sup>23</sup> The state court had jurisdiction according to these cases because the allegation was that the officer had committed "malfeasance" or an "ultra vires act" and state law governed these claims.<sup>24</sup> The federal court had jurisdiction according to these cases be-

---

antitrust violation. The commentators agree that such a result is unlikely. (See authorities cited note 18 *infra*.) This must be distinguished from the situation in which corporate officers conspire with another corporation with intent to act detrimentally to their own corporate employer. See *Rogers v. American Can Co.*, *supra* note 15, in which the latter was alleged.

17. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

18. See Blake, *The Shareholders' Role In Antitrust Enforcement*, 110 U. PA. L. REV. 143, 157-58 n.63 (1961); Note, *Stockholders' Suits and the Sherman Act*, 5 STAN. L. REV. 480, 491 (1953); 59 MICH. L. REV. 904, 909-12 (1961).

19. This seems desirable since the law of fiduciary duty is expressly designed to adjust intracorporate disputes while the antitrust laws apply awkwardly (if at all) to these situations. See 59 MICH. L. REV. 904, 911-12 (1961).

20. *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); Bergstrom, *The Private Litigant's Standing to Sue*, 7 ANTITRUST BULL. 3, 17 (1962): "As to stockholders, the decisions are numerous and unanimous that a shareholder cannot sue under the antitrust laws for a diminution of the value of his stock by reason of a conspiracy which injures the business of the corporation"; Note, *Standing to Sue For Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 581-82 (1964).

21. *Westmoreland Asbestos Co. v. Johns-Manville Co.*, 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940) (*per curiam*).

22. 2 CCH TRADE REG. REP. ¶ 9042: "A claimed injury to a stockholder resulting from an injury to the business or property of the corporation is remote, indirect, or consequential and, hence, not recognized under the remediable provisions of the antitrust laws."

23. See *Hand v. Kansas City So. Ry.*, 55 F.2d 712 (S.D.N.Y. 1931); *Guiterman v. Pennsylvania R.R.*, 48 F.2d 851 (E.D.N.Y. 1931).

24. See *Guiterman v. Pennsylvania R.R.*, *supra* note 23:

The particular ultra vires act alleged to have been committed arises out of the Sherman Act and the Clayton Act. The Supreme Court of the State of New York certainly has jurisdiction in causes in which stockholders charge directors

cause the particular "ultra vires act" arose out of a federal statute, the Sherman Act.<sup>25</sup> In *Meyer v. Kansas City So. Ry.*<sup>26</sup> the court held:

So far as they [the early cases] stand for the proposition that an allegation that a defendant violated a federal statute is sufficient to bring a case within federal jurisdiction, although the fact that a statute was violated is immaterial to the plaintiff's cause of action, we must decline to follow them. So far as the cases decided that a state court of equity had power to redress a waste of the assets of a corporation by its directors, we think the decisions were rightly reached.<sup>27</sup>

After *Meyer v. Kansas City So. Ry.*, it was recognized that the state courts alone possess jurisdiction over the cause of action for breach of fiduciary duty<sup>28</sup> unless that cause of action is joined with a related claim under federal law<sup>29</sup> or unless there is a diversity of citizenship and a claim of more than \$10,000.<sup>30</sup> Whether S's claim for breach of fiduciary

---

with malfeasance. That such malfeasance may arise out of a violation of a federal statute should not deprive the state court of jurisdiction unless Congress conferred exclusive jurisdiction on the federal courts as to all rights and remedies in respect thereto. *Id.* at 855.

25. See *Hand v. Kansas City So. Ry.*, 55 F.2d 712 (S.D.N.Y. 1931): "The action was begun in the Supreme Court of the state of New York and was removed to this court, upon the petition of defendants, on the ground that the controversy involved a substantial federal question to wit, the construction and effect of the Sherman Antitrust Law and Clayton Act." *Id.* at 712 (citations omitted).

26. 84 F.2d 411 (2d. Cir.), *cert. denied*, 299 U.S. 607 (1936).

27. *Id.* at 414.

28. See *Clayton v. Farish*, 191 Misc. 136, 154, 73 N.Y.S.2d 727, 745 (Sup. Ct. 1947).

29. Combining the treble-damage suit under the antitrust laws with the suit for breach of fiduciary duty into a single action will cause difficult problems. Jurisdiction for the treble-damage claim under the federal antitrust laws will not lie in the state court. See 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958); see also 28 U.S.C. § 1337 (1958); *Kalmanash v. Smith*, 291 N.Y. 142, 51 N.E.2d 681 (1943). Jurisdiction for the claim for breach of fiduciary duty will lie in the federal court only if there is a diversity of citizenship and a claim of over \$10,000 or if the doctrine of pendent jurisdiction applies because of the related claim under the federal antitrust laws. See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (1960). The doctrine of pendent jurisdiction will apply if the federal antitrust question is not plainly insubstantial, *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933), and if the claims are two distinct grounds in support of a single cause of action as opposed to two separate and distinct causes of action. *Hurn v. Oursler*, 289 U.S. 238 (1933); 62 COLUM. L. REV. 1018 (1962). If jurisdiction is obtained because a federal antitrust question exists, the decision of the question against the plaintiff will not prevent the court from deciding the non-federal claim for breach of fiduciary duty. See 1 CYC. OF FED. PROCED. § 2.237 (1951). If the federal court decides it has jurisdiction, it will then have to decide whether federal or state law governs the non-federal claim for breach of fiduciary duty. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), will not be applicable because this is not a diversity of citizenship situation. However, it is likely that the federal court will follow the philosophy of *Erie R.R. v. Tompkins* and apply state rather than federal law to insure uniformity of decisions by all courts within the same state. See 24 U. CHI. L. REV. 543 (1957).

30. 28 U.S.C. § 1332 (1958).

duty was in the state court or in the federal court on diversity of citizenship jurisdiction<sup>31</sup> or pendent jurisdiction<sup>32</sup> the law of the state of incorporation probably would govern since the claim concerns the "internal affairs" of the company.<sup>33</sup>

S might rely upon any combination of five different theories in his suit against P. Each of these is analyzed below, and basic to all of them is proof that the corporate officer's conduct actually did violate the antitrust laws. Absent illegality, P's conduct in setting up a resale price maintenance program would seem to be defensible under the business judgment rule.<sup>34</sup> P was not a party to the prior actions brought by the government and the treble-damage plaintiffs, and the doctrine of collateral estoppel could not bar him from asserting that his conduct was legal under the antitrust laws.<sup>35</sup> The state court would thus be in the somewhat

31. The conflict of laws rule of the state in which the federal court sits governs in diversity suits. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). For examples of conflict of laws rules referring suits for breach of fiduciary duty to the law of the state of incorporation see note 33 *infra*.

32. The conflict of laws rule of the state in which the federal court sits probably governs the claim for breach of fiduciary duty in pendent jurisdiction cases. See note 29 *supra*. For examples of conflict of laws rules referring suits for breach of fiduciary duty to the law of the state of incorporation, see note 33 *infra*.

33. RESTATEMENT, CONFLICT OF LAWS § 183, comment b (1934) states, *Right to object to corporate activities*. The right of a shareholder to object to conduct occurring in the operation of the corporate enterprise is determined by the law of the state of incorporation. This includes acts that are beyond the purposes of the corporation, acts which are prohibited either by the state of incorporation or by the state where the acts are to be performed and acts which are alleged to be beyond the authority of the officers or directors.

See also LEFLAR, THE LAW OF CONFLICT OF LAWS §§ 95, 97, 98 (student's ed. 1959).

The law of the state of incorporation was applied in the following cases: *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933); *Hausman v. Buckley*, 299 F.2d 696 (2d Cir.), *cert. denied*, 369 U.S. 885 (1962); *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955); *Beneficial Indus. Loan Corp. v. Smith*, 170 F.2d 44 (3d Cir. 1948), *aff'd*, 337 U.S. 541 (1949); *Maxwell v. Enterprise Wall Paper Mfg. Co.*, 131 F.2d 400, 402 (3d Cir. 1942); *Selama-Dindings Plantations, Ltd. v. Durham*, 216 F. Supp. 104 (S.D. Ohio 1963). See also *Mayflower Hotel Stockholders Protective Comm. v. Mayflower Hotel Corp.*, 193 F.2d 666 (D.C. Cir. 1951).

However, the courts could also characterize a suit against the directors of a corporation for mismanagement as a "tort" (negligence) action rather than an action concerning the internal affairs of the corporation. If the suit is characterized as a tort action, the law of the state where the acts or omissions took place rather than the law of the state of incorporation will probably be held to govern. See *Platt Corp. v. Platt*, 42 Misc. 2d 640, 249 N.Y.S.2d 1 (Sup. Ct. 1964).

Additionally, when the only contact with the incorporating state is the incorporation and all other contacts—*e.g.*, residence of parties and witnesses, sites of property, principal place of business, location of the disputed acts or omissions—are in the forum the laws of the forum may govern. See *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317, 321 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

34. The business judgment rule is discussed generally at 3 FLETCHER, *CYC. CORP.* § 1039 (perm. ed. 1947); HENN, *CORPORATIONS* § 233 (1961); and BALLANTINE, *CORPORATIONS* § 63a (rev. ed. 1946).

35. See RESTATEMENT, JUDGMENTS § 93 (1942). *Cf. Blake, supra* note 18, at 158

awkward position of having to either dismiss this case or determine whether P violated a federal statute.<sup>36</sup> If the state court dismisses the case, S will have no remedy against P.<sup>37</sup> The state court could and, under these circumstances should, accept jurisdiction.<sup>38</sup>

#### A. "Malfeasance Theory"

The essence of the malfeasance theory is deliberate intent to violate the antitrust laws as distinguished from a negligent or unintentional violation. S would be likely to couple his cause of action for malfeasance with a cause of action for negligence. (The individual defendants . . . "knew, or should have known, that such course of conduct was in

---

n.64: "However, an adjudication in a Government suit or a treble damages action that a director has been involved in an illegal activity is not *res judicata* in a later suit on behalf of the corporation, nor will collateral estoppel necessarily apply." Whiting, *Anti-trust and the Corporate Executive II*, 48 VA. L. REV. 1, 46 n.194 (1962). The finding of a violation of the federal antitrust laws by a federal court involving the same conduct by P will probably be most persuasive to the state court on the issue of illegality in the fiduciary duty action. 59 MICH. L. REV. 904, 915 (1961). Therefore, P may conclude that it is better tactically to concede the illegality of his conduct. See *Simon v. Socony-Vacuum Oil Co.*, note 36 *infra*, in which illegality was conceded under similar circumstances.

36. New York and Delaware seem to be the only states in which cases for breach of fiduciary duty concerning the antitrust laws have been reported.

In the Delaware case, there was no dispute concerning the legality of the conduct under the antitrust laws; therefore, the state court did not have to either interpret the federal antitrust laws or dismiss the action. See *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963).

The New York cases fall into three categories: (i) cases in which the illegality is conceded, *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 (1st Dep't 1944); (ii) cases in which the problem is not discussed, *Knopfler v. Bohen*, 15 App. Div.2d 922, 225 N.Y.S.2d 609 (2d Dep't 1962); and (iii) cases in which the problem is discussed in a dictum and the dictum indicates that the courts will not take jurisdiction unless the illegality is conceded, see *Clayton v. Farish*, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947); *Borden v. Cohen*, 231 N.Y.S.2d 902 (Sup. Ct. 1962). Cf. *Gomburg v. Midvale Co.*, 157 F. Supp. 132 (E.D. Pa. 1955) for a similar dictum.

There does not seem to be any reported case in which a state court has squarely faced the problem of either deciding the legality of a corporate officer's conduct under the federal antitrust laws or dismissing the action. Most of the dicta which indicate that the court would dismiss the action under such circumstances stem from *Clayton v. Farish*. This dictum is subject to serious question since the court in *Clayton v. Farish* erroneously believed that it did not have the power to decide the fiduciary duty case when illegality was not conceded. *But see* 59 MICH. L. REV. 904 (1961), which discusses the fallacies of that theory.

37. See text accompanying notes 27-33, *supra*. See *Clayton v. Farish*, *supra* note 36 at 154, 73 N.Y.S.2d at 745: "Any other conclusion would leave Standard remediless for these losses caused by defendants' wrongful acts, since no relief therefor could be obtained in the Federal courts." (dictum).

38. 59 MICH. L. REV. 904, 921-29 (1961) and authorities cited *infra*. The state courts can and do entertain actions against corporate officers for breach of fiduciary duty in connection with alleged failures to file proper federal income tax returns. See *Sellers v. Head*, 261 Ala. 212, 73 So.2d 747 (1954); *Coeur D'Alenes Lead Co. v. Kingsbury*, 59 Idaho 627, 85 P.2d 691 (1938). Such cases present many of the same problems as cases for breach of fiduciary duty concerning the antitrust laws.



violation of the Act.")<sup>39</sup> The complaint would allege that the willful and intentional violation of the antitrust laws was a breach of P's fiduciary duty making him personally liable for all damages directly resulting therefrom. If P were to move to dismiss the complaint for failure to state a cause of action, the court would be forced to rely upon dicta and analogous authority in deciding this motion since there are no cases directly in point.

In 1934 and 1938, the New York courts were faced with somewhat similar situations in *Broderick v. Marcus*<sup>40</sup> and *Van Schaick v. Carr*.<sup>41</sup> In these two cases, the directors were forced to pay for losses sustained by their corporations because they had knowingly violated provisions of New York's Banking Law and Insurance Law respectively. In neither case was there a corrupt motive of personal gain, but the court held the directors liable.<sup>42</sup> Both of these cases were cited with approval in *Simon v. Socony-Vacuum Oil Co.*,<sup>43</sup> which involved an alleged negligent violation of the antitrust laws. A dictum in the *Simon* case indicated that an intentional violation of the antitrust laws does create a cause of action for breach of fiduciary duty.<sup>44</sup> This would lead one to believe that in New York at least the business judgment rule would not relieve P from personal liability for a deliberate violation of the antitrust laws, even if P intended his violation to benefit the corporation.<sup>45</sup>

The later case of *Clayton v. Farish*<sup>46</sup> caused some confusion. In *Clayton v. Farish* it was alleged that the defendant-directors had entered into a cartel arrangement which violated the federal antitrust laws. The directors had allegedly acted in the interest of their partner in the cartel arrangement rather than in the interest of their own corporation. The court rejected the theory that the directors were liable simply because the

39. See, e.g., *Borden v. Cohen*, 231 N.Y.S.2d 902, 903 (Sup. Ct. 1962). (Emphasis added.)

40. 152 Misc. 413, 272 N.Y. Supp. 455 (Sup. Ct. 1934).

41. 170 Misc. 539, 10 N.Y.S.2d 567 (Sup. Ct. 1938).

42. See cases cited notes 40 and 41 *supra*; see also 33 CORNELL L.Q. 421, 424 (1949); cf. JACKSON, CORPORATE MANAGEMENT (THE DIRECTORS AND EXECUTIVES) 370 (1955): "So a director who knowingly participates in a corporate loan or guaranty forbidden to the corporation may find himself subjected to personal liability for the losses thereby sustained by the corporation."

43. 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 (1st Dep't 1944).

44. *Id.* at 204-05, 38 N.Y.S.2d at 273-74; see also Whiting, *supra* note 35, at 44-45: Finally, where there has been a per se or willful violation, should the responsible executive be compelled not only to foot his own bill but to pay as well the company's defense expenses and any fines or judgments, including treble damages, it may have sustained? Although direct precedent is lacking, the *Simon* case and the analogies from other indemnification cases suggest an affirmative answer.

45. Cf. 1 HORNSTEIN, CORPORATION LAW AND PRACTICE 539 (1959).

46. 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947).

antitrust laws were violated<sup>47</sup> and stated that the alleged violations of the antitrust laws were irrelevant and should be disregarded.<sup>48</sup> The cause of action was treated like a waste of corporate assets case rather than a malfeasance case. This approach probably indicates either that the court did not realize that the statutory violation itself could be a breach of fiduciary duty or that the court doubted its power to decide whether a federal statute had been violated.<sup>49</sup>

*Knopfler v. Bohem*<sup>50</sup> dispelled some of the confusion created by *Clayton v. Farish*. In *Knopfler v. Bohem*, the stockholder's complaint on behalf of Allis-Chalmers Corporation alleged two causes of action. The first cause of action was against the directors of Allis-Chalmers and the second cause of action was against the directors, Allis-Chalmers, and two other corporations, General Electric and Westinghouse. The first cause of action was stayed and Allis-Chalmers moved to dismiss the second cause of action for failure to state a cause of action against it or, alternatively, because there was no allegation of a demand on the board of directors of Allis-Chalmers to institute suit against General Electric and Westinghouse. The court stated: "The first cause of action is against the members of the board of directors of Allis-Chalmers, and is based on allegations that they engaged in a course of conduct to violate Federal anti-trust laws, causing the corporation to pay fines and to be subject to treble damage suits, with attendant expense. . . . The second cause of action incorporates all the allegations of the first cause of action, and so read it alleges a cause of action against the individual and the corporate defendants, with damages to Allis-Chalmers as the result of the active wrongdoing of *both* the individual and the corporate defendants."<sup>51</sup> The only "wrongdoing" of the directors mentioned in the opinion was their alleged violation of the antitrust laws. Therefore, contrary to *Clayton v. Farish*, this court's dictum indicates that the allegations of an antitrust violation are not irrelevant in a suit for breach of fiduciary duty in a state court.

In the more recent case of *Borden v. Cohen*,<sup>52</sup> the complaint alleged a willful violation of the Sherman Act but failed to allege proper damages. The complaint was dismissed. In a dictum the court cited *Clayton v. Farish* with approval for the proposition that allegations of illegality

---

47. *Id.* at 153, 73 N.Y.S.2d at 744.

48. *Id.* at 146-54; 73 N.Y.S.2d at 737-45.

49. See note 36 *supra*, discussing the court's confusion concerning its jurisdictional power.

50. 15 App. Div. 2d 922, 225 N.Y.S.2d 609 (2d Dep't 1962).

51. *Id.* at 922-23, 225 N.Y.S.2d at 610.

52. 231 N.Y.S.2d 902 (Sup. Ct. 1962).

must be disregarded and allegations of disloyalty alone considered.<sup>53</sup> The court then stated:

No damage is to be inferred from the conduct of corporate business which happens to violate the Sherman Anti-Trust Act unless the acts constituting such violation also cause independent damage to the corporation, and were against the interests and the benefit of the corporation. Plaintiff appears to concede this proposition and urges distinction by reason of the claimed crucial allegations contained in the complaint that the individual defendants in causing the corporation to engage in the course of conduct violative of the Sherman Anti-Trust Act and to make such expenditures, did so recklessly and in violation of their fiduciary duty and knew, or should have known, that such course of conduct was in violation of the Act. *Knowledge of the violation is not an element which will give rise to an actionable claim unless the acts otherwise worked harm to the corporation.* Plaintiff endeavors to supply such additional element by alleging that as a further direct result of the course of conduct substantial damage was caused to customers using the services of the corporation which was thereby subjected to civil suits for the recovery of treble damage. The allegations are conclusory, particularly in the absence of an allegation that such suits were successful and subjected the corporation to loss rendering the defendants liable.<sup>54</sup>

In *S v. P*, with the treble-damage judgments having been rendered in favor of the claimants and the officer's acts having caused harm to the corporation, it is likely that the New York courts would hold that a willful violation of the statute causing legal damage to the corporation creates a cause of action for malfeasance. *Simon v. Socony-Vacuum Oil Co.* laid the foundation for such a holding and *Knopfler v. Bohlen* and *Borden v. Cohen* appear to have repaired any damage temporarily caused by the unfortunate dictum in *Clayton v. Farish*. Other jurisdictions can be expected to reach a similar result<sup>55</sup> although the decisions now supporting a cause of action for malfeasance are few and far removed from antitrust.<sup>56</sup>

---

53. *Ibid.*

54. *Id.* at 902-03. (Emphasis added.)

55. See 46 MICH. L. REV. 683, 684 (1948): "It would be understandable that any willful breach of a statute should result in liability per se for the directors, where such a violation would result in criminal prosecution and a fine against the corporation."

56. *E.g.*, *Sellers v. Head*, 261 Ala. 212, 73 So.2d 747 (1954) (president intentionally filed false tax returns); *Precision Extrusions, Inc. v. Stewart*, 36 Ill. App. 2d 30, 183 N.E.2d 547 (1962) (directors purchased the corporation's own stock in violation of an

While S's complaint for malfeasance states a cause of action, S would find it difficult to secure evidence that P's violation of the anti-trust laws was intentional. Direct evidence of unlawful intent probably would be difficult to secure since, if it exists, it would be primarily in the hands of hostile witnesses (P or his subordinates). Further complicating matters would be the protection afforded opinions of P's lawyers by the attorney-client privilege.<sup>57</sup> Under all these circumstances, S might well be forced to argue that the court should infer that unlawful intent existed. Two arguments could be raised to justify such an inference: (i) the violation was price-fixing, a *per se* violation of the antitrust laws,<sup>58</sup> or, (ii) the law prohibiting this conduct is so clear and unambiguous that the violation must have been willful.<sup>59</sup>

The answer to the first argument lies in *Simon v. Socony-Vacuum*.<sup>60</sup> The antitrust violation involved in that case was price-fixing<sup>61</sup> and price-fixing was already recognized as a *per se* violation of the antitrust laws before the offenses in *Simon* occurred.<sup>62</sup> The court in *Simon* refused

---

Illinois statute prohibiting such purchases when the capital of the corporation was below a certain minimum); *Hill v. Murphy*, 212 Mass. 1, 98 N.E. 781 (1912) (directors intentionally circulated a libel for their own personal ends); *Pennington v. Seal*, 49 Miss. 518 (1873) (trustee knowingly approved illegal loans of his guardian's funds); *Thompson v. Greeley*, 107 Mo. 577, 17 S.W. 962 (1891) (bank directors knowingly approved a loan in excess of the amount permitted by Missouri statutes). Cf. Note, *Stockholders' Suits and the Sherman Act*, 5 STAN. L. REV. 480, 490-91 (1953): "There are suggestions in the law of corporations that directors are guilty of a breach of trust whenever they cause the corporation to engage in illegal activity. At least this is so when they bring about the illegal activity willfully or knowingly or for the benefit of other than the corporation."; *Whiting*, *supra* note 35, at 44-45 (1962); RESTATEMENT (SECOND), AGENCY § 34, comment g (1958).

57. The attorney-client privilege is discussed generally in McCORMICK, EVIDENCE 181-99 (1956). The opinions of P's lawyers would not be privileged if S could establish that P consulted his lawyers in furtherance of a criminal violation of the antitrust laws. *Id.* at 200-02.

58. Cf. Blake, *The Shareholders' Role In Antitrust Enforcement*, 110 U. PA. L. REV. 143, 170 (1961), in which the author apparently assumes that the *per se* offenses are always clear violations of antitrust law. However, this analysis overlooks situations such as *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), which involved *per se* offenses in which the law was not at all clear. See also 59 MICH. L. REV. 904, 928 (1961), for the same type of error. Both of these authors have apparently overlooked the fact that a *per se* offense (price-fixing) was alleged in *Simon v. Socony-Vacuum Oil Co.*, *supra* note 36, and the holding was no liability because the law was ambiguous.

59. See the cases cited notes 40, 41, 56 *supra*.

60. 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 (1st Dep't 1944).

61. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

62. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), held price-fixing illegal *per se*. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), then seemed to indicate that price-fixing might be permitted in depressed industries. However, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940), the United States Supreme Court held: "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under

even to find negligence and, a fortiori, it would seem that unlawful intent could not be inferred from every per se violation of the antitrust laws. This result is consistent with criminal antitrust cases for price-fixing under section one of the Sherman Act and with many similar antitrust situations. No intent is required in such cases other than the intent to do the acts which constitute the violation.<sup>63</sup> This is also consistent with the origin of the per se classification. The per se classification is a judicial invention and nothing in the federal antitrust laws or the cases originating this concept indicate that it is intended to have any effect in connection with actions in the state court for breach of fiduciary duty. The per se classification is relevant in the fiduciary duty cases only if it is used to support the second argument—that the law is unambiguous and therefore the violation must have been willful.<sup>64</sup>

The answer to the second argument lies in the facts. P instituted his resale price maintenance program in 1950 and abandoned it in 1960 promptly after the United States Supreme Court held it was illegal. Prior to the United States Supreme Court's decision in 1960 declaring the program illegal, the governing authority was *United States v. Colgate*

---

the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."

63. No intent other than the intent to commit the acts need be shown for the following offenses: (i) price-fixing under § 1 of the Sherman Act, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); (ii) monopolizing under § 2 of the Sherman Act, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); (iii) unreasonable restraints of trade under § 1 of the Sherman Act, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); (iv) exclusive dealing in violation of § 3 of the Clayton Act, *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949); (v) unlawful acquisition of stock under § 7 of the Clayton Act, *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

64. Because the per se prohibitions are generally plainer than most, blatant violations of them are more likely to result in personal liabilities for corporate officers. It seems certain, for example, that a court would consider a horizontal agreement among corporate presidents to charge uniform prices as a willful violation of the law. The same would probably be true of a horizontal agreement allocating geographic markets among competitors. However, other combinations affecting prices may not be willful violations even though they are per se offenses if the law at the time of the violation is ambiguous. *E.g.*, suppose that the Supreme Court holds, contrary to *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), that conscious parallelism conclusively constitutes a Sherman Act offense. (*Cf. Winchester Theatre Co. v. Paramount Film Distrib. Corp.*, 324 F.2d 652 (1st Cir. 1963); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), holding that conscious parallelism is not even enough evidence of conspiracy to permit a jury to conclude that there was a Sherman Act violation.) Such behavior would be a per se violation but it is difficult to believe that a stockholder could surcharge a corporate officer for fines imposed on the corporation in the initial landmark case establishing that new rule of law. There would probably be no malfeasance, no negligence, and no breach of the fiduciary duty in such a situation. (See note 58 *supra* for further discussion of the relation of the per se doctrine to breach of fiduciary duty suits.)

& Co.,<sup>65</sup> holding that a refusal to deal with price-cutters was permissible. A dictum in *Frey & Sons, Inc. v. Cudahy Packing Co.*,<sup>66</sup> offered clear support for the belief that the Supreme Court itself had approved refusals to deal with wholesalers who sold to price-cutters. *FTC v. Beech-Nut Packing Co.*<sup>67</sup> and *United States v. Bausch & Lomb Optical Co.*<sup>68</sup> had made it plain that concerted action to maintain resale prices was illegal but had not indicated (even to some distinguished members of the Supreme Court)<sup>69</sup> that this type of resale price maintenance program would be considered as concerted rather than unilateral action. In view of this ambiguity, the court would be unlikely to hold that P's actions in setting up this resale price maintenance program showed a deliberate intent to violate the antitrust laws. If P had committed the violation for personal gain<sup>70</sup> or as part of a personal vendetta,<sup>71</sup> unlawful intent could be inferred and liability would follow.

P could not defend his actions on the ground that they have been ratified by the board of directors or the shareholders since there can be no ratification of an illegal act.<sup>72</sup> Once a court found that P's violation was deliberate, P would be held liable even if he was ordered to commit these acts by the board of directors or shareholders of the drug company.<sup>73</sup>

### B. "Negligence Theory"

The essence of the negligence theory is the failure to use reasonable

65. 250 U.S. 300 (1919).

66. 256 U.S. 208, 210-11 (1921).

67. 257 U.S. 441 (1922).

68. 321 U.S. 707 (1944).

69. See the dissenting opinion in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 52-54 (1960).

70. See *DiTomasso v. Loverro*, 250 App. Div. 206, 293 N.Y. Supp. 912 (2d Dep't), *aff'd*, 276 N.Y. 551, 12 N.E.2d 570 (no opinion), *rehearing denied*, 276 N.Y. 610, 12 N.E.2d 601 (1937), which stated that directors are liable to the corporation for entering into an illegal contract to create a monopoly. This particular contract violated the New York state law against monopolies but the same reasoning would apply to a contract violating § 2 of the Sherman Act.

71. *Compare* *Abrams v. Allen*, 297 N.Y. 52, 74 N.E.2d 305, *rehearing denied*, 297 N.Y. 604, 75 N.E.2d 274 (1947) (officers and directors may be personally liable for a loss caused by the removal of a plant to punish a labor union); and *Leech v. Fuller*, 173 Misc. 543, 19 N.Y.S.2d 98 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 816, 20 N.Y.S.2d 398 (1st Dep't) (*per curiam*), *rehearing and appeal denied*, 259 App. Div. 876, 20 N.Y.S.2d 666 (1st Dep't 1940) (like facts and like holding); *with* *Hornstein v. Paramount Pictures, Inc.*, 22 Misc. 2d 996, 37 N.Y.S.2d 404 (Sup. Ct.), *aff'd*, 266 App. Div. 659, 41 N.Y.S.2d 210 (1st Dep't 1942) (no opinion), *aff'd*, 292 N.Y. 468, 55 N.E.2d 740 (1944) (*per curiam*) (officers and directors are not personally liable for payment made to labor racketeer when the payment was intended to benefit the corporation).

72. 13 FLETCHER, *CYC. CORP.* 122-23 (perm. ed. 1961); see also *Rogers v. American Can Co.*, 187 F. Supp. 532, 537 (D.N.J. 1960), *aff'd*, 305 F.2d 297 (3d Cir. 1962).

73. See *Holmes, Booth & Haydens v. Willard*, 125 N.Y. 75, 79-80, 25 N.E. 1083, 1083-84 (1890), in which the court stated that a subordinate officer may be liable for *ultra vires* acts even if he was ordered to commit the acts by the directors (dictum).

care resulting in loss to the corporation. The gravamen of the negligence complaint may be in the failure to become reasonably informed of the facts, the law, or both. To raise the question of P's negligence S's complaint would allege failure to use reasonable care concerning the law; that is, that P should have known that his conduct was illegal and would result in damage to the corporation. If S also alleges a complaint against the directors of the corporation his theory would be failure to use reasonable care concerning both the facts and law; that is, that the directors should have informed themselves of P's actions and that, having learned the facts, they should have known that P's conduct was illegal and would result in damage to the corporation unless stopped. Because actual intent to violate the antitrust laws need not be proved under the negligence theory, negligence would present a much more attractive theory to S than malfeasance.

In all jurisdictions directors and other corporate officers are liable for "gross negligence," and they are liable for "ordinary negligence" in most jurisdictions.<sup>74</sup> Assuming ordinary care is the test, it can be defined as (i) the care which would be exercised by a reasonably prudent man; (ii) the care which would be exercised by a prudent man under similar circumstances; or (iii) the care which would be exercised by an ordinarily prudent man in his own affairs.<sup>75</sup> It is doubtful whether these conflicting standards make much difference in practical application.<sup>76</sup> Ordinarily there is no liability for mere mistake (whether of law or fact).<sup>77</sup> Unless the plaintiff proves that the mistake resulted from a failure to exercise proper care, skill, or diligence the judgment must be for the defendant.<sup>78</sup>

S's suit against P for negligence in instituting this resale price maintenance program would probably be decided in accordance with *Simon v. Socony-Vacuum Oil Co.*<sup>79</sup> In the *Simon* case the directors had approved the purchase of "distress" gasoline from small refiners as part of a buying program in which other large oil companies participated. The United States Supreme Court held that the buying program was an unlawful combination and conspiracy in restraint of trade which was illegal per se under section one of the Sherman Act.<sup>80</sup> A minority stockholder brought a derivative suit in a New York court to hold the directors personally

74. 3 FLETCHER, CYC. CORP. §§ 1033-35 (perm. ed. 1947); cf. RESTATEMENT (SECOND), AGENCY § 379 (1958); MECHEM, AGENCY § 524 (4th ed. 1952).

75. See 3 FLETCHER, CYC. CORP. §§ 1036-38 (perm. ed. 1947); HENN, CORPORATIONS § 235 (1961); BALLANTINE, CORPORATIONS § 63 (rev. ed. 1946).

76. BALLANTINE, CORPORATIONS § 63 (rev. ed. 1946).

77. 3 FLETCHER, CYC. CORP. § 1039 (perm. ed. 1947).

78. *Id.* at § 1040.

79. 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 (1st Dep't 1944).

80. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

liable for breach of fiduciary duty. Damages alleged included fines imposed on the corporation and its employees (two of whom had pleaded *nolo contendere*) and litigation expenses. The directors conceded their participation on behalf of the corporation in the buying program and conceded the illegality of their acts.<sup>81</sup> The complaint was dismissed on the merits because the directors had at most made "an honest and reasonable mistake or error of judgment or of law."<sup>82</sup> Since the directors did not know or have reason to know that their participation in the buying program was prohibited by the Sherman Act, they were not held personally liable for damages.<sup>83</sup> This is in conformity with the general rule applied in mistake-of-law cases having no antitrust implications, and this rule is supported by venerable authorities.<sup>84</sup>

In *S v. P*, a court would face many of the same problems as the court which decided *Simon*. The antitrust statutes are very complex and, perhaps, imprecise,<sup>85</sup> thus aiding P's defense.<sup>86</sup> Advice of counsel may be given much weight as evidence of non-negligence.<sup>87</sup> At the time P instituted the resale price maintenance program both the *Colgate* decision<sup>88</sup> and the *Cudahy* decision<sup>89</sup> indicated that the program was legal.<sup>90</sup> A United States district court<sup>91</sup> and three United States Supreme Court

---

81. *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 203, 38 N.Y.S.2d 270, 272 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1st Dep't 1944): "That the defendant corporation participated in the unlawful buying program is not disputed. Nor is it questioned that defendants, as directors, participated therein in behalf of the corporation."

82. *Id.* at 204, 38 N.Y.S.2d at 273.

83. *Id.* at 205, 38 N.Y.S.2d at 274.

84. See *Scott v. Deppester*, 1 Edw. Ch. (N.Y.) 513 (1832); *Cass v. Realty Sec. Co.*, 148 App. Div. 96, 132 N.Y. Supp. 1074 (1st Dep't 1911), *aff'd mem.*, 206 N.Y. 649, 99 N.E. 1105 (1912); *Spring's Appeal*, 71 Pa. 11 (1872); *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850); *Alderman v. Alderman*, 178 S.C. 9, 181 S.E. 897 (1935); see also *Yap v. Wah Yen Ki Tuk Tsen Nin Hue*, 43 Hawaii 37 (1958). *Cf. Spirt v. Bechtel*, 232 F.2d 241 (2d Cir. 1956).

85. *Cf. The United States Supreme Court's celebrated dictum in Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 (1953): "[P]recision of expression is not an outstanding characteristic of the Robinson-Patman Act."

86. "Whether directors are personally liable for committing acts prohibited by statute depends upon the nature of the prohibited act; *whether the statute is plain and unambiguous*, and whether it contains a limitation or restriction on the powers of the corporation or the powers or duties of the directors themselves." *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 204, 38 N.Y.S.2d 270, 274 (Sup. Ct. 1942) (emphasis added), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1st Dep't 1944) See also 12 N.Y. JUR. § 872 (1960).

87. See, e.g., *Gilbert v. Burnside*, 13 App. Div. 2d 982, 216 N.Y.S.2d 430 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 960, 183 N.E.2d 825 (1962) (*per curiam*); *cf. 3 FLETCHER, CVC. CORP.* §§ 1026-27 (perm. ed. 1947).

88. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

89. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 210-11 (1921).

90. See text accompanying notes 65-69 *supra*, where the apparent legality of the program is discussed more fully.

91. See *United States v. Parke, Davis & Co.*, 164 F. Supp. 827 (D.D.C. 1958), *rev'd*, 362 U.S. 29 (1960).



Justices<sup>92</sup> expressed the belief that the *Parke, Davis* resale price maintenance program (similar to P's program) was legal. P terminated the drug company's program as soon as the court decided it was illegal.<sup>93</sup> Under the circumstances, it is likely that the court would hold that this was an innocent mistake of law and dismiss the cause of action for negligence.

S would encounter even greater problems in proving his cause of action against the directors. He would first have to establish that the directors were negligent in failing to inform themselves of the course of action followed by P in the resale maintenance program. *Graham v. Allis-Chalmers Mfg. Co.* is a very similar case.<sup>94</sup> In the *Graham* case minority stockholders brought a derivative action against the directors, alleging that they were negligent in failing to discover that corporate employees were engaged in a price-fixing conspiracy which violated the antitrust laws. The price-fixing consisted of rigged bids and agreements to refrain from bidding. Damages alleged were fines and penalties and possible treble-damage judgments and injury to the reputation of the corporation. The Delaware Court of Chancery dismissed the complaint because there was no evidence which indicated that the directors knew or should have known of the price-fixing. The Delaware Supreme Court affirmed the dismissal. The Delaware courts placed great weight on the diverse nature of the corporation's products, the size and complexity of the corporation, the decentralization of decisions in the corporation, and the uncontroverted evidence of the directors' attention to the affairs of the corporation.<sup>95</sup> These seemed to be the bases of the judgment for the defendants, particularly in view of the plaintiff's failure to advance any persuasive reason supporting his argument that the directors should have suspected the price-fixing.<sup>96</sup>

---

92. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 49 (1960) (dissenting opinion).

93. See *United States v. Parke, Davis & Co.*, 365 U.S. 125 (1961), indicating that the *Parke, Davis* resale price maintenance program was also terminated promptly after the Supreme Court decision.

94. 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963). *Graham v. Allis-Chalmers Mfg. Co.* is discussed at 1963 ANN. SURVEY AM. L. 492 and in 35 U. COLO. L. REV. 619 (1963).

95. *Id.* at 329-30, 188 A.2d at 128.

96. An abortive attempt was made to convince the court that 1937 consent decrees in favor of the FTC against the company should have put the directors on their guard against further price-fixing. The attempt failed because none of the directors had been in office in 1937 and the three directors who knew about the consent decrees were convinced that the company was innocent and had accepted the decrees only to avoid litigation expense. *Id.* at 331, 188 A.2d at 129. Additionally, the trial court thought the consent decrees were irrelevant because the 1937 violations arose from a conspiracy to charge uniform prices while the 1960 violation arose from a conspiracy to allocate bids. *Id.* at 331. The Delaware Supreme Court did not comment directly on the validity of this distinction.

S's suit against the directors of the large drug company would raise many of the same problems as the case of *Graham v. Allis-Chalmers Mfg. Co.* Whether the directors should have known of P's antitrust violations would depend upon the surrounding facts and circumstances.<sup>97</sup> P's personal participation in the resale price maintenance program in contrast to the participation of only minor officials in the price-fixing at Allis-Chalmers would bring the conduct much closer to the directors' level. Since the resale price maintenance program of the drug company affected all of the company's products (whereas the price-fixing in *Graham v. Allis-Chalmers* affected only a few of that company's products), a court would be more disposed to hold that the drug company's directors were negligent in not knowing the facts. This holding would not impose liability upon the directors. S's complaint against the directors would be dismissed because the directors (like P) would have had no reason to believe that the resale price maintenance program was illegal.<sup>98</sup> The directors' negligence, if any, in failing to properly inform themselves of the facts underlying this broad corporate policy of resale price maintenance, was not the legal cause of the drug company's losses.

### C. The "Per Se" Theories

There are two per se theories—the negligence per se theory and the liability per se theory.

#### (i) The "Negligence Per Se" Theory

The essence of the negligence per se theory is a statutory violation causing the type of harm which the statute was intended to prevent to a person within the class the statute was intended to protect.<sup>99</sup> When all of these elements exist the judgment must be for the plaintiff regardless of the degree of care exercised by the defendant.<sup>100</sup> The statutory violation is considered to be in and of itself negligence.<sup>101</sup>

The doctrine of negligence per se, well-recognized in tort law,<sup>102</sup> finds little support in cases involving alleged breaches of corporate officers' fiduciary duties.<sup>103</sup> This may be because stockholders in deriva-

---

97. 3 FLETCHER, CYC. CORP. § 1067 (Supp. 1964).

98. See text accompanying notes 85-93 *supra*.

99. See PROSSER, TORTS § 34 (2d ed. 1955); see also RESTATEMENT, TORTS § 286 (1934).

100. See PROSSER, TORTS § 34 (2d ed. 1955).

101. See *Ibid*.

102. See *Ibid*.

103. The applicability of the negligence per se theory to suits involving alleged breaches of corporate officers' fiduciary duties is supported by *Lyons v. Corder*, 253 Mo. 539, 162 S.W. 606 (1913) (failure of bank directors to comply with Missouri statutes requiring the cashier to be bonded was negligence in and of itself); and by dicta in *Downing v. Howard*, 162 F.2d 654, 657 (3d Cir.), *cert. denied*, 332 U.S. 818 (1947), and *Michelsen v. Penney*, 135 F.2d 409, 419 (2d Cir. 1943). The other liability cases seem

tive suits have found it difficult to prove that the harm suffered by their corporation was the type of harm the statute was intended to prevent. In *S v. P*, the court would probably hold that the antitrust laws are intended to protect the public generally,<sup>104</sup> including the drug company. Whether this is the type of injury that the statute was intended to prevent is more dubious. S would be suing on behalf of the drug company which has suffered damage because it engaged in a price-fixing conspiracy and was thus subjected to penalties and treble-damage judgments. P was the cause of the drug company's participation in this conspiracy. The antitrust laws were clearly intended to prevent the harm suffered by the retailers who were boycotted in furtherance of this price-fixing conspiracy.<sup>105</sup> The antitrust laws were also clearly intended to prevent the harm suffered by the purchasers who paid higher prices for their drugs because of this price-fixing conspiracy.<sup>106</sup> The third type of injury occurring in this situation—the reduction in the net worth of the drug company by the fines and treble-damage judgments imposed for the price-fixing—is remote from the more evident purposes of the statute.<sup>107</sup> That is probably the reason why neither the *Simon* case<sup>108</sup> nor any other case involving an alleged breach of fiduciary duty concerning the antitrust laws has mentioned the negligence per se theory.<sup>109</sup> While there are no cases on point, it seems likely that the court would dismiss S's cause of action based on the negligence per se theory since the injury is not generally

---

to be primarily malfeasance cases or ordinary negligence cases. See Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143, 162 (1961), in which the author states,

To argue that in general these cases support a negligence per se theory of director liability seems unjustified. In most of those in which liability was found, the court specifically noted that the statute was so clear that its mandate could not have been misunderstood. Thus any act implementing a violation was clearly either negligent and a breach of the duty of due care or, worse, a willful act not to be imputed to the corporation.

104. The antitrust laws have long been recognized as designed for the protection of the public. See 64 COLUM. L. REV. 570, 574-75 (1964) and authorities cited *infra*.

105. The retailers have, of course, recovered for this harm under § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958). See text accompanying notes 10, 11 *supra*.

106. The purchasers would have a cause of action under § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

107. It would seem difficult under any circumstances to argue that a statute was designed to prevent the injury which it expressly imposes for its violation. The legislative history of the Sherman Act does not indicate any such intention. See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956), for a general discussion of the legislative history of the Sherman Act. Indeed, Congress was partially motivated by hostility to large corporations (especially monopolies and trusts) rather than concern about their financial well-being in enacting the Sherman Act. Cf. *Ibid*.

108. *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 (1st Dep't 1944).

109. See the cases cited note 36 *supra*.

recognized as the type of harm which the antitrust laws were intended to prevent.<sup>110</sup>

(ii) *The "Liability Per Se" Theory*

The essence of the liability per se theory is a statutory violation causing damage to the plaintiff. Under this theory, corporate officers incur personal liability whenever they violate a statute. This approach has almost no support.<sup>111</sup>

If S relied upon this theory, he would be confronted by a unanimity of adverse authority extending from *Simon*<sup>112</sup> and *Clayton v. Farish*<sup>113</sup> to *Borden v. Cohen*.<sup>114</sup> Under these circumstances, S's cause of action based on the liability per se theory would surely be dismissed.

D. *The "Ultra Vires" Theory*

The essence of the ultra vires theory is that a corporate officer becomes personally liable when he acts beyond the authority conferred on the corporation by its charter. The rule is usually applied when the violation is clear or willful (even if it was intended to benefit the corporation), such as when the directors take the funds of a business for speculation in the stock market.<sup>115</sup> Since no corporate charter could

110. "The antitrust laws are designed to prevent injuries to the competitive economy, not to prevent the financial injuries which a corporation may suffer in the form of penalties, when its directors have led it into an antitrust violation." Blake, *supra* note 103 at 160.

111. See *Rogers v. American Can Co.*, 187 F. Supp. 532, 536 (D.N.J. 1960), *aff'd*, 305 F.2d 297 (3d Cir. 1962): "*Indeed, any derivative suit which involves antitrust violations almost necessarily must involve some breach of fiduciary duty or mismanagement by officers or directors, since they have guided the corporation into activities which violate the law, or at the very least, have acquiesced in such conduct.*" (dictum); *Coeur D'Alenes Lead Co. v. Kingsbury*, 59 Idaho 627, 85 P.2d 691 (1938) (failure of directors to pay federal taxes on the advice of counsel resulted in personal liability); see also the cases cited notes 56, 70, 71 *supra*. These cases have been classified by me as malfeasance cases. However, it is possible to treat the intention to violate the statute as unimportant. If the cases are so considered, they become "liability per se" cases rather than "malfeasance" cases. *DiTomasso v. Loverro*, 250 App. Div. 206, 293 N.Y. Supp. 912 (2d Dep't), *aff'd*, 276 N.Y. 551, 12 N.E.2d 570 (no opinion), *rehearing denied*, 276 N.Y. 610, 12 N.E.2d 601 (1937), clearly seems to be a malfeasance case. In that case the court said, "It was found by the trial court that they knew, or should have known, the contract was unlawful, and that they entered into it for personal gain. Thus they have violated their trust duty." *Id.* at 209, 293 N.Y. Supp. at 916-17. It is classified in 5 STAN. L. REV. 480, 490-91 (1953) as a liability per se case: "There are suggestions in the law of corporations that directors are guilty of a breach of trust whenever they cause the corporation to engage in illegal activity.", citing, *inter alia*, *DiTomasso v. Loverro, supra*.

112. See note 108 *supra*.

113. 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947).

114. 231 N.Y.S.2d 902 (Sup. Ct. 1962).

115. See *Felsenheld v. Bloch Bros. Tobacco Co.*, 119 West Va. 167, 192 S.E. 545 (1937); see also *Hemsley & Co. v. C. C. Duncan Co.*, 98 Misc. 338, 164 N.Y. Supp. 282 (Sup. Ct. 1917) (speculation in cotton futures). *Cf. Yap v. Wah Yen Ki Tuk Tsen Nin Hue*, 43 Hawaii 37 (1958) (indebtedness not permitted by corporate charter); *cf. Fergus Falls Woolen Mills Co. v. Boyum*, 136 Minn. 411, 162 N.W. 516 (1917) (similar situa-

authorize a violation of the federal antitrust laws, S could argue that P is acting ultra vires and should be held personally liable whenever he commits an antitrust violation.<sup>116</sup>

The ultra vires theory is, of course, merely the liability per se theory masquerading under another name. Ultra vires is a misnomer when it is applied to conduct which violates state or federal statutes rather than conduct which merely exceeds the corporate charter.<sup>117</sup> The same law would be applied and the complaint dismissed,<sup>118</sup> regardless of whether S labeled this cause of action "ultra vires" or "liability per se."

It is possible to make a more sophisticated argument from the ultra vires cases. Some authorities suggest that corporate officers are charged with constructive knowledge of their corporation's charter whether or not they have actual knowledge of it.<sup>119</sup> Under these cases when the

tion); *Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A.2d 295 (1952) (pension given to widow to express the corporation's sympathy regarding her husband's death); *BALLANTINE, CORPORATIONS* 166 (rev. ed. 1946): "Thus the directors or other officers of a bank become personally liable to the bank or its receiver if they authorize or participate in speculation and its funds are lost by use for unauthorized or illegal purposes." Note that these cases involving patent breaches of corporate charters could be classified as malfeasance cases.

116. *Cf. Guiterman v. Pennsylvania R.R.*, 48 F.2d 851, 855 (E.D.N.Y. 1931), in which such an argument was apparently made. The railroad company allegedly acquired stock in a competing company in violation of the Sherman Act. A motion was made to dismiss the complaint for lack of jurisdiction and in a dictum the court said, "Now, in the case at bar, essentially the issue is whether the defendant directors committed an ultra vires act. That is the general allegation. The action rests on that broad charge. The particular ultra vires act alleged to have been committed arises out of the Sherman Act and the Clayton Act."

117. [A]n illegal act or contract, defined as one expressly prohibited by the charter or a general statute, or which is immoral or against public policy, is ultra vires and also something more. It is illegal, not merely because it is ultra vires, or beyond the powers conferred upon the corporation, but, as in the case of an act of a natural person, because of its immorality, or of its being contrary to public policy, or its being in violation of an express legislative prohibition. Such acts, strictly speaking . . . are not classified as ultra vires.

7 *FLETCHER, Cyc. Corp.* § 567 (perm. ed. 1964). The distinction between illegal and ultra vires acts or contracts is supported by the following cases: *Wagg v. Toler*, 80 Cal. App. 501, 251 Pac. 973 (1926); *Mitchell v. Hart*, 107 Ind. App. 548, 25 N.E.2d 665 (1940); *State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N.W. 500 (1907); *Maryland Trust Co. v. Mechanics Bank*, 102 Md. 608, 63 Atl. 70 (1906); *Ely v. Oakland Circuit Judge*, 162 Mich. 466, 127 N.W. 769 (1910); *Strickland v. National Salt Co.*, 79 N.J. Eq. 182, 81 Atl. 828, *aff'd*, 79 N.J. Eq. 223, 81 Atl. 832 (1911) (*per curiam*); *Bissell v. Michigan So. & No. Ind. R.R.*, 22 N.Y. 258 (1860); *Tourtelot v. Whithed*, 9 N. D. 467, 84 N.W. 8 (1900); *Staacke v. Routledge*, 111 Tex. 489, 241 S.W. 994 (1922).

118. See *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 (1st Dep't 1944); 3 *FLETCHER, Cyc. Corp.* § 1024 (perm. ed. 1947).

119. See *Cooper v. Hill*, 94 Fed. 582, 587 (8th Cir. 1899); *Percy v. Millaudon*, 8 Mart. (N.S.) 68 (La. 1829); *Campbell v. Watson*, 62 N.J. Eq. 396, 50 Atl. 120 (1901); see also *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 54 Atl. 209 (1903). *Cf. McGowan v. Wells*, 184 Ky. 772, 781-82, 213 S.W. 573, 578 (1919) (bank directors are presumed to have actual knowledge of the extent of the bank's indebtedness).

officers exceed their authority through ignorance of the charter, they become personally liable.<sup>120</sup> Building upon these cases, S could argue that ignorance of the law is also no excuse and that when P caused the drug company to violate the antitrust laws, P was either willfully violating the antitrust laws or acting in ignorance of the antitrust laws and in either event should be liable.

This argument overlooks the possibility of mistake of law. Ignorance of the law and mistake of law are not synonymous terms.<sup>121</sup> P could be expected to testify that when he instituted the resale price maintenance program, he thought it was legal. Even in the ultra vires cases, when a corporate officer proceeds under a mistake of law non-negligently, he is exonerated.<sup>122</sup> This argument also overlooks the distinction between charging P with constructive knowledge of his rather limited corporate charter in contrast to charging P with constructive knowledge of all of the antitrust laws. The latter would be clearly unreasonable and the court so indicated when it rejected this line of reasoning in *Simon v. Socony-Vacuum Oil Co.*<sup>123</sup>

Regardless of whether S relied upon the simple or sophisticated ultra vires argument, the judgment should be for P.

## II. DAMAGES

If a court imposed liability under any of the theories, it would be compelled to consider the subject of damages. The general rule governing damages was stated in *Clayton v. Farish*.<sup>124</sup> In that case, plaintiff alleged

---

120. See *ibid.*

121. See *Culbreath v. Culbreath*, 7 Ga. 64, 70 (1849): "There is a clear and practical distinction between *ignorance* and *mistake* of the law. . . . *Ignorance* does not pretend to knowledge, but *mistake* assumes to know." (emphasis in court's opinion); cf. BLACK, LAW DICTIONARY 881 (4th ed. 1951).

122. See *Scott v. Depeyster*, 1 Edw. Ch. (N.Y.) 513 (1832); *Spering's Appeal*, 71 Pa. 11 (1872); *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850); *Alderman v. Alderman*, 178 S.C. 9, 181 S.E. 897 (1935).

123. In *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 (1st Dep't 1944), the plaintiff combined the ultra vires and malfeasance cases into a single argument. Plaintiff argued that the ultra vires cases charged the directors with knowledge of their charter and that the directors ought also to be charged with a knowledge of the antitrust laws. Plaintiff then reasoned that since the directors were charged with knowledge of the antitrust laws and had violated these laws, they were liable under the malfeasance cases. The court rejected the constructive knowledge part of the argument, holding, "Obviously, no such knowledge can be imputed to the defendants when they, in behalf of the defendant corporation, entered into the buying programs which were later held to be in violation of law." *Id.* at 205, 38 N.Y.S.2d at 274. See also *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963), in which the plaintiff argued that the directors should have been on their guard against antitrust violations because of the prior FTC orders against the company. The court rejected this theory in part because none of the directors had been in office when the FTC decrees were issued and most of the directors did not have actual knowledge of them. See also note 96 *supra*.

124. 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947).

that defendant-directors had breached their duty of loyalty to the corporation and had violated the antitrust laws by entering into an illegal cartel arrangement. Damages allegedly included loss of profits from a failure to compete with the cartel-partner, illegal payments to the cartel-partner, and a loss of royalties arising from a court decree requiring the licensing of the corporation's patents free of all royalties.

The court held, "[O]nce liability has been established . . . , the measure of damage is the entire loss sustained by Standard, which should include all damages or penalties paid by Standard to others as the result of the self-same unlawful acts."<sup>125</sup>

In applying the "entire loss" formula for damages to *S v. P*, the court would encounter two major problems: (1) what elements of damage can legally be included as part of the costs of P's antitrust violation, and (2) whether any benefits which may have accrued to the drug company from P's antitrust violation can be deducted from the costs of the violation. In addition to these questions of law, the court as fact-finder might experience difficulty in placing monetary values on abstract costs and benefits. The problem, while complex, is probably not appreciably more difficult than the monetary evaluation of pain and suffering in the ordinary personal injury suit.

#### A. Determining the Costs of P's Antitrust Violation

Plaintiffs in other fiduciary duty suits concerning the antitrust laws have included as elements of damages the following: (i) counsel fees required to defend the corporation in an antitrust suit;<sup>126</sup> (ii) fines imposed on corporate officers who pleaded *nolo contendere* to antitrust violations;<sup>127</sup> (iii) fines imposed on the corporation for antitrust violations;<sup>128</sup>

125. *Id.* at 153-54, 73 N.Y.S.2d at 744-45 (emphasis in the original opinion).

126. *Smiles v. Elfred*, 149 N.Y.L.J., Feb. 20, 1963, P. 14, col. 6 (N.Y. Sup. Ct. 1963); *Premseelaar v. Chenery*, Civil No. 6151, N.Y. Sup. Ct., N.Y. County, Feb. 13, 1963; *Borden v. Cohen*, 231 N.Y.S.2d 902 (Sup. Ct. 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 (1st Dep't 1944).

127. See *Koster v. Warren*, 297 F.2d 418 (9th Cir. 1961); *Simon v. Socony-Vacuum Oil Co.*, *supra* note 126.

128. See *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963); *Knopfler v. Bohlen*, 15 App. Div. 2d 922, 225 N.Y.S.2d 609 (2d Dep't 1962); *Smiles v. Elfred*, 149 N.Y.L.J., Feb. 20, 1963, P. 14, col. 6 (N.Y. Sup. Ct. 1963); *Premseelaar v. Chenery*, Civil No. 6151, N.Y. Sup. Ct., N.Y. County, Feb. 13, 1963; *Borden v. Cohen*, 231 N.Y.S.2d 902 (Sup. Ct. 1962); *Clayton v. Farish*, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947); *Spinella v. Heights Ice Corp.*, 186 Misc. 996, 62 N.Y.S.2d 263 (Sup. Ct. 1946); *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 (1st Dep't 1944).

(iv) possible future treble-damage judgments and litigation expenses;<sup>129</sup> (v) injury to the business reputation and goodwill of the corporation;<sup>130</sup> (vi) loss of time of corporate employees;<sup>131</sup> (vii) payment of illegal price discriminations to favored customers;<sup>132</sup> (viii) costs of newspaper advertisements explaining the corporation's defenses in the antitrust action;<sup>133</sup> (ix) loss of profits from failure to compete;<sup>134</sup> (x) illegal payments made as part of an antitrust conspiracy;<sup>135</sup> and (xi) loss of royalties from an antitrust decree requiring royalty-free patent licenses.<sup>136</sup>

The courts have deleted some of these elements from plaintiffs' complaints. When the corporation has paid the fines of the defendant-corporate officers on condition that they plead *nolo contendere* to an alleged antitrust violation rather than stand trial, the cause of action has been dismissed.<sup>137</sup> A "contract" theory<sup>138</sup> or even "promissory estoppel" theory<sup>139</sup> (quite apart from the possibility that the corporation could otherwise indemnify the officers)<sup>140</sup> then precludes a judgment for the plaintiff. The possibility of future treble-damage judgments (and litiga-

---

129. See *Graham v. Allis-Chalmers Mfg. Co.*, *supra* note 128; *Knopfler v. Bohen*, *supra* note 128; *Smiles v. Elfred*, *supra* note 128; *Premseelaar v. Chenery*, *supra* note 128; *Borden v. Cohen*, *supra* note 128.

130. See *Graham v. Allis-Chalmers Mfg. Co.*, 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963); *Premseelaar v. Chenery*, Civil No. 6151, N.Y. Sup. Ct., N.Y. County, Feb. 13, 1963.

131. *Premseelaar v. Chenery*, *supra* note 30.

132. See *Diamond v. Davis*, 263 App. Div. 68, 31 N.Y.S.2d 582 (1st Dep't 1941); *Hoffman v. Abbott*, 180 Misc. 590, 40 N.Y.S.2d 521 (Sup. Ct. 1943).

133. See *Hoffman v. Abbott*, *supra* note 132.

134. See *Clayton v. Farish*, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947).

135. *Ibid.*

136. *Ibid.*

137. See *Koster v. Warren*, 297 F.2d 418 (9th Cir. 1961) (dictum); *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 (1st Dep't 1944).

138. The contract theory is supported by the holding in *Simon v. Socony-Vacuum Oil Co.*, *supra* note 137, and the dictum in *Koster v. Warren*, *supra* note 137. The antitrust laws provide that a final judgment in favor of the United States under the antitrust laws may be used as prima facie evidence against the same defendant in a treble-damage suit brought under the antitrust laws. See 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16 (1958). A judgment of conviction entered upon a plea of *nolo contendere* is probably not prima facie evidence in a subsequent treble-damage suit. See *Simco Sales Serv., Inc. v. Air Reduction Co.*, 213 F. Supp. 505 (E.D. Pa. 1963). The courts frequently refuse to accept a plea of *nolo contendere* from one defendant unless all defendants in the same action make a similar plea. Cf. *Koster v. Warren*, *supra* note 137 at 423. Under these circumstances it is important for the corporation to persuade the individual defendants to plead *nolo contendere* to avoid the possibility of an adverse judgment in the antitrust case which would be prima facie evidence in the subsequent treble-damage actions. The individual defendant's promise to enter such a plea becomes the consideration for the corporation's promise to pay his fine.

139. Cf. RESTATEMENT, CONTRACTS § 90 (1932).

140. Cf. N.Y. BUS. CORP. LAW § 723 which appears to permit such indemnification when the corporate officer reasonably believed he was acting in the best interests of the corporation and had no reasonable cause to believe that his conduct was unlawful.



tion expenses) has been deleted from complaints as "conclusory."<sup>141</sup> Causes of action to recover for newspaper advertisements which explained the corporation's defense in the antitrust case have been dismissed because the expenditures were within the business judgment rule.<sup>142</sup> The other elements of damages have either been sustained by the courts or have not been ruled on by the courts in cases involving a net loss from an antitrust violation.<sup>143</sup>

S probably would allege that the out-of-pocket costs of P's antitrust violation were (i) the fines imposed on the drug company; (ii) the treble-damage judgments recovered by the retailer; and (iii) the counsel fees and other litigation expenses incurred in the government and treble-damage suits. He might include with these allegations for out-of-pocket costs some allegations for more abstract costs. Some examples are (i) injury to the business reputation and goodwill of the corporation; (ii) loss of time of corporate employees in connection with the antitrust and treble-damage suits; and (iii) loss of profits from the refusals to sell to retailers who were deviating from the listed prices and to wholesalers who were selling to such retailers. The combination of these out-of-pocket and abstract costs, if supported by satisfactory evidence, would probably be accepted by the court as the total costs of P's antitrust violation.

#### B. *Deducting the Benefits of P's Antitrust Violations*

Upon determining the total costs of P's antitrust violations, the court would be compelled to consider whether P's action resulted in any benefits to the corporation and, if it did, whether the benefits might offset in whole or in part the total costs of P's action. Pleading and burden of proof would be of crucial importance to the litigants in this part of the lawsuit.

Generally, when the defendant's wrong not only has caused damage but also has conferred a benefit upon the plaintiff which he would not have otherwise received, the value of this benefit must be credited to the defendant in assessing the damage.<sup>144</sup> This rule has been applied in suits

---

141. See *Smiles v. Elfred*, 149 N.Y.L.J., Feb. 20, 1963, P. 14, col. 6 (N.Y. Sup. Ct. 1963): "The anticipated damages allegations do not constitute present or existing damages and are not properly pleaded as damages, 'in the absence of an allegation that such suits were successful and subjected the corporation (Olin) to loss rendering the defendants liable'"; *Borden v. Cohen*, 231 N.Y.S.2d 902, 903-04 (Sup. Ct. 1962): "The allegations are conclusory, particularly in the absence of an allegation that such suits were successful and subjected the corporation to loss rendering the defendants liable."

142. See *Hoffman v. Abbott*, 180 Misc. 590, 40 N.Y.S.2d 521 (Sup. Ct. 1943).

143. See cases cited notes 126-36 *supra*.

144. See McCORMICK, DAMAGES § 40 (1935).

for breach of fiduciary duty concerning the antitrust laws.<sup>145</sup> Yet, this rather simple rule of damages presents the courts with a very thorny question: whether S must preclude the possibility that the corporation profited from the antitrust violation in his complaint or whether P must plead that the gains exceeded the losses in his answer. In favor of requiring S to preclude gain is the argument that normally in derivative suits the plaintiff-stockholder must allege material facts constituting a prima facie showing of damage or his complaint will be dismissed.<sup>146</sup> In favor of requiring P to plead gain as a defense is the argument that P and his subordinates (rather than S) know whether the corporation has benefitted and what facts can be pleaded to show this benefit. The New York courts have considered several situations analogous to *S v. P*.

In *Diamond v. Davis*,<sup>147</sup> the plaintiff-stockholder alleged that the defendant-directors had given favored dealers price discriminations and allowances in violation of the Robinson-Patman Act. The court dismissed the complaint because the illegality was not properly alleged and because ". . . the acts complained of . . . are not such that injury to the corporation would ordinarily be inferred therefrom as the natural and probable result thereof. Facts establishing damage . . . should be pleaded."<sup>148</sup> The court, in the later case of *Hoffman v. Abbott*,<sup>149</sup> which involved similar facts, dismissed the cause of action because the facts were not properly pleaded and because, "Moreover, no facts are set forth showing any damage to the corporations as a result of the acts complained of. On the contrary, the nature of those acts is not such, in the ordinary course, as to result in loss."<sup>150</sup>

Substantially the same reasoning was relied upon in *Spinella v. Heights Ice Corp.*,<sup>151</sup> where the plaintiff-stockholder alleged that defendant-officers had caused the corporation to violate the antitrust laws and that the corporation had been fined when it pleaded *nolo contendere* to the alleged violation. The court noted that the fine was \$1,000 and yet dismissed the complaint.<sup>152</sup>

Since the cases just discussed were decided approximately twenty

---

145. See *Smiles v. Elfred*, 149 N.Y.L.J., Feb. 20, 1963, P. 14, col. 6 (N.Y. Sup. Ct. 1963); cf. the cases cited at notes 147, 149, 151, 153 *infra*; see also Whiting, *Antitrust and the Corporate Executive II*, 48 VA. L. REV. 1, 46 (1962), wherein the author takes the position that proof of a net loss will probably be necessary.

146. See 13 FLETCHER, *CYC. CORP.* § 5947 (perm. ed. 1961); BALLANTINE, *CORPORATIONS* § 143 (rev. ed. 1946); McCORMICK, *DAMAGES* § 14 (1935).

147. 263 App. Div. 68, 31 N.Y.S.2d 582 (1st Dep't 1941).

148. *Id.* at 69, 31 N.Y.S.2d at 584.

149. 180 Misc. 590, 40 N.Y.S.2d 521 (Sup. Ct. 1943).

150. *Id.* at 596, 40 N.Y.S.2d at 527.

151. 186 Misc. 996, 62 N.Y.S.2d 263 (Sup. Ct. 1946).

152. *Id.* at 997, 62 N.Y.S.2d at 263.

years ago, one may properly question their value as precedent in the rapidly changing field of antitrust litigation. However, recent cases have sustained and added to the vitality of the earlier cases.

In *Borden v. Cohen*,<sup>153</sup> the plaintiff-stockholder alleged that the defendant-officers had caused the corporation to violate the antitrust laws and that the corporation had pleaded *nolo contendere* and was fined \$50,000. The court dismissed the complaint stating, "No damage is to be inferred from the conduct of corporate business which happens to violate the Sherman Anti-Trust Act unless the acts constituting such violation also cause independent damage to the corporation, and were against the interests and the benefit of the corporation."<sup>154</sup>

In *Smiles v. Elfred*,<sup>155</sup> the plaintiff-stockholder alleged that the defendant-directors and their co-conspirators caused the corporation to violate the antitrust laws and that therefore the corporation was fined \$20,000 and had to pay litigation expenses. The court dismissed the complaint against the co-conspirators, holding:

It is not sufficient simply to state that damage did in fact result; but the facts should be alleged from which the court can see, if the facts are true, that damage would naturally or possibly result from the acts stated.

The serious weakness in plaintiff's complaint, *whatever the relief sought may be*, lies in the fact that damage in a situation such as is presented in this complaint may not be presumed from the mere imposition of a fine, the expenditure of specified substantial sums of money in defending criminal contempt proceedings or the exposure to anti-trust suits on the part of customers, in the absence of allegations in the complaint excluding the possibility that "Olin" may have gained more from the price-fixing conspiracy than the amounts of the fine paid and the expenditures said to have been incurred or risked. For this reason if no other, this derivative stockholder's complaint is defective in law.<sup>156</sup>

The above cases support the view that S must plead the facts which show that the corporation suffered a net loss from P's antitrust violations. An unreported New York case<sup>157</sup> is contra and an older New York case<sup>158</sup>

153. 231 N.Y.S.2d 902 (Sup. Ct. 1962).

154. *Id.* at 903.

155. 149 N.Y.L.J., Feb. 20, 1963, p. 14, col. 6 (N.Y. Sup. Ct. 1963).

156. *Ibid.* (citations omitted).

157. *Premseelaar v. Chenery*, Civil No. 6151, N.Y. Sup. Ct., N.Y. County, Feb. 13, 1963, is discussed in Note, *Pleading and Proof of Damages in Stockholders' Derivative Actions Based on Antitrust Convictions*, 64 COLUM. L. REV. 174 (1964).

(which does not directly discuss the question) offers some support for a contrary result.

It has been argued that after S has pleaded a net loss and established a breach of fiduciary duty resulting in a fine and treble-damage judgments against the drug company, the court should shift the burden of proving offsetting gains to P.<sup>159</sup> There are no cases directly in point but the courts have shifted the burden of proof similarly in cases in which directors approved transactions in which they had a personal interest.<sup>160</sup> Such a shift would avoid the anomaly of requiring S to prove a negative—that P's acts did not benefit the drug company. It would also place the burden of proof upon the party who has the most knowledge of the benefits which have accrued to the drug company through the antitrust violation.<sup>161</sup> If the burden is placed on P, he may be able to show that his antitrust violations in connection with the resale price maintenance policy enabled the drug company to retain many of the higher quality stores as distributors of its products and that the sales and goodwill of the company were increased through this policy. This evidence should be accepted as it is almost the converse of the plaintiff's evidence—that sales and goodwill were decreased by reason of the antitrust suit and the conduct which resulted in the antitrust suit.

#### CONCLUSION

Many of the problems arising from a corporate officer's alleged breach of his fiduciary duty concerning the antitrust laws will not be resolved in the immediate future.<sup>162</sup> In general, the courts are approaching these problems with commendable restraint, imposing liability only when the antitrust violation is willful or negligent and has resulted in a net loss to the corporation. This probably reflects a judicial recognition of the difficulties in understanding the sweeping commands of the antitrust laws and the vast difference between the fiduciary character of a corporate officer and the fiduciary character of a trustee under a will or deed of trust.<sup>163</sup> This difference lies primarily in the corporation's requirements

---

158. See *Roth v. Robertson*, 64 Misc. 343, 118 N.Y. Supp. 351 (Sup. Ct. 1909).

159. This type of shift is advocated in Note, *supra* note 157 at 178-79.

160. See 3 FLETCHER, *CYC. CORP.* §§ 931, 974 (perm. ed. 1947); HENN, *CORPORATIONS* § 239 (1961); BALLANTINE, *CORPORATIONS* § 70 (rev. ed. 1946).

161. See note 157 *supra*.

162. Despite an increase in complaints alleging such causes of action (see cases cited notes 1, 15 *supra*), most jurisdictions still do not have a single reported case on this subject.

163. See *Hunt v. Aufderheide*, 330 Pa. 362, 376-77, 199 Atl. 345, 352 (1938): Most all business . . . involves speculative elements. The fiduciary character of the directors' relation to the corporation and the measure of their responsibility are quite different from those of a trustee under a will or a deed; such a trustee must preserve the principal for the benefit of remaindermen, and at the same

for financial growth which can best be fulfilled without placing undue restrictions upon the members of the managerial group.<sup>164</sup>

---

time, within the restricted field of investment prescribed by law, obtain income for parties presently entitled. But the assets of a business corporation are held in a lighter grasp; shares of stock are taken with notice that the assets shall be employed in making a profit, and that it is customary to take business risks (dictum).

164. *Cf. Ibid.* Criminal prosecutions of corporate officers for antitrust violations have been relatively infrequent and the corporations have usually been charged with, and have absorbed, the more drastic monetary penalties. If the courts surcharge corporate officers with their corporation's monetary penalties under a "liability per se" or similar rule (see text accompanying notes 99-123 *supra*), the aggressiveness of management may be curbed at the cost of lower profits to their corporations.