Michigan Law Review

Volume 61 | Issue 3

1963

Corporations-Officers and Directors-Liability for Representative Acts Under the Sherman Act

Leon E. Irish
University of Michigan Law School

CORPORATIONS—OFFICERS AND DIRECTORS—LIABILITY FOR REPRESENTATIVE ACTS UNDER THE SHERMAN ACT—An indictment brought under section 1 of the Sherman Act charged appellee and the corporation that employed him with conspiracy to eliminate price competition in the greater Kansas City milk market. Appellee was charged solely in his capacity as officer, director or agent of the corporation. The district court dismissed the indictment on the ground that natural persons are indictable under section 1 of the Sherman Act only for acts done on their own account. On direct appeal to the Supreme Court,[1] *held,* reversed and remanded. A corporate

1 18 U.S.C. § 3731 (1958) allows the Government to appeal directly to the Supreme Court when a district court dismisses a criminal indictment upon a construction of the statute on which the indictment is founded.

officer is liable under section 1 of the Sherman Act whether he acted on his own account or solely in a representative capacity. *United States v. Wise*, 370 U.S. 405 (1962).

As enacted in 1890,[2] section 1 of the Sherman Act made "every person" who violated its provisions subject to a maximum fine of five thousand dollars, but this was raised to fifty thousand by amendment in 1955.[3] Section 14 of the Clayton Act,[4] enacted in 1914, reaches "individual directors, officers, or agents," and imposes a maximum fine of five thousand dollars. In the principal case, the issue on appeal was essentially whether corporate officers who violate antitrust laws while acting solely in their representative capacities are subject to the more severe fine imposed by the Sherman Act.[5]

The sources available for interpreting the Sherman Act suggest opposing conclusions. At common law an agent could be punished for crimes committed for his principal[6] and, by 1890, it was recognized that this rule made corporate officers liable for crimes committed in their representative

2 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine . . . or by imprisonment . . . or by both . . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

3 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958), amending 26 Stat. 209 (1890).

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

5 Although the principal case was briefed and decided solely on the basis of legal arguments, it also suggests certain questions of policy. That businessmen can be punished as criminals for acts done strictly in the pursuit of economic objectives must be regarded as settled in view of the existence and enforcement of the Sherman Act for over seventy years. There has been continued reluctance, though, to regard such "white-collar crimes" as really criminal in the ordinary and moralistic sense of the word. This reluctance has manifested itself in the failure of judges to impose stringent fines [the average fine imposed on convicted officers has been only slightly more than $2,100; Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 943 (1961)] and in the public furor created when officers are actually given jail terms, as in the recent electrical industry price-fixing cases. The principal case clearly shows, however, that the Court is willing to subject corporate officers who act solely on behalf of their corporation to very large fines. Whereas most sizable corporations could absorb a $50,000 fine, such a fine would be a severe burden on even highly-paid executives. If the officer committed the violation for some personal advantage, a large fine might be justifiable; but a $50,000 fine for acts done merely in a representative capacity seems more controversial. That the Court has thrown its whole weight behind such a possibility may indicate and presage a shift in judicial attitude which, if detected and acted upon by the Attorney General and the lower federal courts, could spell a new and harsher era in the prosecution of individuals under the Sherman Act.

6 1 BISHOP, CRIMINAL LAW § 892 (7th ed. 1882).

capacities, even though the corporation might also be punishable.[7] Assuming that Congress chose the words with an eye to their common-law meaning, "every person" as used in section 1 might seem to include officers acting in their representative capacities.[8] It must be recognized, however, that the phrase "every person" is qualified by the words that follow it. Section 1 purports to cover only "every person who shall make any contract or engage in any combination or conspiracy." Since only corporations, individuals acting on their own account, and other legally recognized economic entities can "make contracts"[9] or "engage in combinations or conspiracies" in restraint of trade,[10] the better construction of the statutory language is that it does not reach officers acting in their representative capacities.

On the other hand, the legislative history of the Sherman Act suggests a contrary conclusion. Senator Sherman's original bill had a criminal section that specifically included officers acting in their representative capacities.[11] The criminal section was later removed,[12] but Senator Reagan introduced a substitute bill with a similar criminal provision,[13] and this was adopted as an amendment to the Sherman bill[14] before it was sent back to the committee.[15] The bill went through extensive redrafting, and the words "every person" were adopted in place of the specific enumerations in the criminal provisions.[16] No reason was given for this change in wording,[17] and it may have been made merely to improve and simplify the language of the bill.

A number of cases were brought under section 1 of the Sherman Act between 1890 and 1914, but in none of them was an indictment against an individual dismissed on the ground that section 1 did not cover his cor-

7 State v. Morris & E. R.R., 23 N.J.L. 360, 369 (1852); R. v. Great No. of Eng. Ry., [1846] 9 Q.B. 315, 325-27, 115 Eng. Rep. 1294, 1298.

8 Although § 8 of the Sherman Act, 26 Stat. 210 (1890), 15 U.S.C. § 7 (1958), defines "person" "to include corporations and associations," this does not mean that corporate officers are thereby excluded. This section seems to have been included to dispel any doubts as to whether corporations were criminally liable, a question not fully settled in 1890. See New York Cent. & H.R.R.R. v. United States, 212 U.S. 481 (1909).

9 See RESTATEMENT (SECOND), AGENCY §§ 320, 328 (1958).

10 It is generally recognized that an employee acting within the scope of his office cannot conspire with his corporation. See, *e.g.*, Union Pac. Coal Co. v. United States, 173 Fed. 737, 745 (8th Cir. 1909); Whiteley v. Foremost Dairies, Inc., 151 F. Supp. 914, 923 (W.D. Ark. 1957), *aff'd*, 254 F.2d 36 (8th Cir. 1958).

11 S. 1, 51st Cong., 1st Sess. (1889).

12 21 CONG. REC. 1765 (1890). It was feared that the bill would be construed narrowly if it contained criminal sanctions. See *id.* at 2456-57.

13 S. 62, 51st Cong., 1st Sess. (1889).

14 21 CONG. REC. 2560-61, 2611 (1890). Senator Sherman later acknowledged his approval of the Reagan amendment. *Id.* at 2655.

15 *Id.* at 2731.

16 *Id.* at 2731, 3152.

17 Senator Hoar, who was primarily responsible for the language of the bill, stated that he would not explain it as its meaning was well understood. 21 CONG. REC. 3145 (1890). The bill was adopted approximately as redrafted by a vote of 52-1. *Id.* at 3153.

porate acts.[18] Of these cases, however, only two involved the question of whether the Sherman Act could penalize the representative acts of corporate officers. In both cases such acts were deemed covered,[19] but in neither was such a finding necessary to the decision.[20] Thus, the Court could not base its holding in the principal case on the language of the statute or on its previous judicial interpretation. Although it could claim some support from the relevant legislative history, congressional intent is not clear enough to justify fully the unqualified decision of the Court.

Although examined at length in the principal case, the Clayton Act was relevant to the Court's inquiry only insofar as it may have partially repealed section 1 of the Sherman Act, or extended antitrust penal provisions beyond the scope of the Sherman Act.[21] Section 14 contains no language expressly repealing section 1,[22] and the positive repugnance required to find an implied repeal[23] is absent. Whereas a clear and manifest intention of the legislature would also seem necessary,[24] the legislative history of the Clayton Act in fact shows a clear intent to leave the Sherman Act untouched.[25]

This, however, does not necessarily settle the relationship between section 1 and section 14. There remain three possible views: (1) that section 14 alone punishes the representative acts of corporate officers, (2)

18 The Government prepared a table of forty cases brought between 1890 and 1914 in which corporate officials were indicted for violation of the Sherman Act. Brief for Appellant, pp. 69-72, principal case.

19 "[The Sherman Act] seems to me clearly passed in contemplation of the elementary principle that . . . all those who personally aid and abet in its [violation] are indictable as principals . . . . [U]nder this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment." United States v. MacAndrews & Forbes Co., 149 Fed. 823, 832 (C.C.S.D.N.Y. 1906). "[N]either in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; . . . all parties active in promoting a misdemeanor, whether agents or not, are principals." United States v. Winslow, 195 Fed. 578, 581 (D. Mass. 1912).

20 In United States v. MacAndrews & Forbes Co., *supra* note 19, the court recognized that it could be inferred from the indictment that the individuals were acting on their own account. All that the court had to decide was that such persons were not shielded from criminal responsibility. In United States v. Winslow, *supra* note 19, the individuals were charged with having used corporations as devices to control industry. All that the court had to decide was that individuals who use sham corporations for their personal ends were covered by the Sherman Act. Mr. Justice Harlan, concurring in the principal case, points out the weaknesses of these cases. Principal case at 420.

21 As the Court pointed out, what the 1914 Congress thought the Sherman Act meant is irrelevant to the interpretation of that statute. Principal case at 414.

22 See the statutory language quoted in note 2 *supra*.

23 United States v. Borden Co., 308 U.S. 188, 198-99 (1939).

24 *Ibid.*

25 For example, Representative Floyd, a House manager, stated, "We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law." 51 CONG. REC. 16317 (1914). The Senate committee report on the bill pointed out that "it is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890." S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

that section 14 merely restates the penal provisions applicable to such acts under section 1, or (3) that section 14 in part duplicates section 1 and in part extends criminal liability for representative acts. By concluding that the Sherman Act did reach representative acts, the Court ruled out the first possibility. But in choosing between the latter two, the Court has expressed inconsistent views. It points out that in enacting section 14 Congress intended (a) to give a mandate to judges, jurors and prosecutors who had been reluctant to convict corporate officers, (b) to punish for the first time the ordering and authorizing of violations of the antitrust laws, and (c) to punish acts which formed a part of antitrust violations, but which were not, in themselves, previously culpable.[26] Then, in summarizing the legislative history of section 14, the Court said that "insofar as section 14 relates to the corporate officer who participates in the Sherman Act violation, whether or not in a representative capacity, *no change was either intended or effected.*"[27] This contradicts the former statement; Congress either intended something additional by passing section 14, or it did not. More importantly, though, the quoted statement clearly indicates that the Court has interpreted section 14 as a mere restatement of the penal provisions of section 1.[28] By taking this stand, the Court implies that the legislation was pointless.[29] Such a view manifests a direct disregard for the judicial canon that no statute should be construed so as to make it a nullity.[30]

The Court could have avoided the inconsistency in its approach by holding that, although Congress intended this provision to extend existing law, it in fact did not.[31] But it would then be implying that the

26 Principal case at 412-14.

27 *Id.* at 414. (Emphasis added.)

28 That the Court meant to incorporate the entire coverage of § 14 into § 1 is further established by the rule laid down in the principal case: "[A] corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity." Principal case at 416. "Helps perpetrate" includes the meaning of "done" in § 14, and "participates in effecting" has the same scope as "in whole or in part." The rest of the language is directly from § 14.

29 Although the quoted statement is seemingly limited by the words "insofar as § 14 relates to . . . the Sherman Act," this is unimportant. When the Clayton Act was passed in 1914 only two other statutes besides the Sherman Act had penal antitrust provisions, the Interstate Commerce Act of 1887, § 10, 24 Stat. 382, as amended, 36 Stat. 349 (1910), 49 U.S.C. § 10 (1958), and the Wilson Tariff Act of 1894, 28 Stat. 570, as amended, 36 Stat. 667 (1913), 15 U.S.C. § 8 (1958). Both of these acts specifically named officers and agents as within their scope. Therefore, § 14 could have no more effect on them than the Court decides it has on the Sherman Act.

30 Bird v. United States, 187 U.S. 118 (1902); Market Co. v. Hoffman, 101 U.S. 112 (1879).

31 In view of the legislative history it cannot be doubted that Congress intended to do something by passing § 14. Over forty pages of volume 51 of the *Congressional Record* are devoted to discussions of § 14. Some opponents felt that it added nothing to existing law [See 51 CONG. REC. 9079, 9201, 9610, 14214, 15820 (1914).], but the majority unquestionably thought they were imposing some new criminal liability on corporate

professional lawmakers were unable to pass an effective law when they had so intended. Alternatively, the Court might have decided that, although section 1 reached representative acts, section 14 did add something new to the antitrust laws. This view raises the difficult problem of determining which acts made criminal by section 14 fall within section 1, and which do not. It can be argued that "making a contract" or "engaging in a combination or conspiracy" is more in the nature of doing an act than of authorizing or ordering one.[32] It could also be maintained that section 1 reaches only those who commit the whole violation, whereas section 14 reaches those who violate the law in part or in whole. Adopting these distinctions, the Court could have legitimately differentiated the portion of representative acts covered by section 1 from the whole range covered by section 14. Such distinctions have substantial support in legislative history,[33] and would allow section 14 to stand as more than an empty shell.[34] If the Court made these distinctions, however, the lower courts would be faced with constant problems of distinguishing "doing" from "ordering" and violations in part from violations in whole. Such a result would make it very difficult to prosecute corporate officers effectively.

Since both of the views which let section 1 operate against corporate officers in their representative roles have serious drawbacks, the Court might better have adopted the first possibility. That view makes section 14 the sole penal provision covering the representative acts of officers, and, prior to the decision in the principal case, had been adopted by six district courts.[35] This position can be justified by the language of the Sherman

officials that went beyond the existing Sherman Act liability. See *id.* at 9609, 9676, 9678-79, 9681, 16320.

32 "Make" and "engage" suggest direct activity, whereas "authorize" and "order," particularly the former, suggest a more removed and passive involvement.

33 For example, during the debates Representative Floyd said: "Under the existing law, and without . . . [§ 14], the person who did the things would undoubtedly be guilty; but in the enforcement of the criminal provisions of the Sherman law, experience has demonstrated that both juries and courts are slow to convict men who have simply done acts authorized or ordered by some officers of the concern higher up, and the words 'authorized' and 'ordered' were introduced to reach the real offenders, the men who caused the things to be done." 51 CONG. REC. 9609 (1914). See also *id.* at 9074, 9185, 9676-79, 16317.

34 However, it would require a different disposition of the principal case. The district court would need to order the indictment amended to show whether the appellee was charged with violating § 1 or only § 14.

35 United States v. Engelhard-Hanovia, Inc., 204 F. Supp. 407 (S.D.N.Y. 1962); United States v. General Motors Corp., 1962 Trade Cas. ¶ 70203 (S.D. Cal.); United States v. American Optical Co., 1961 Trade Cas. ¶ 70156 (E.D. Wis.); United States v. Milk Distribs. Ass'n, 200 F. Supp. 792 (D. Md. 1961); United States v. A. P. Woodson Co., 198 F. Supp. 582 (D.D.C. 1961); United States v. National Dairy Prods. Corp., 196 F. Supp. 155 (W.D. Mo. 1961). The present case involved an appeal from the last case cited above. Before the *Wise* case was decided, two other district courts had reached a result contrary to that of the six cases above: United States v. North Am. Van Lines, Inc., 202 F. Supp. 639 (D.D.C. 1962); United States v. Packard-Bell Electronics Corp., Cr. No. 30158, S.D. Cal., 1961 (motion to dismiss indictment charging violations of both § 14 and § 1 denied without opinion).

Act,[36] would give full effect to the legislature's intent that section 14 be a meaningful law, and would not create any great difficulties in administering the antitrust laws.[37]

It is true that if the Government were forced to prosecute officers under section 14, its burden of establishing guilt would be greater. Under that section an officer can be convicted only if it is proved that his corporation violated the penal provisions of the antitrust laws, and that he authorized, ordered, or did the acts which constituted the violation in whole or in part.[38] Nonetheless, Congress purposely framed the statute in this manner; section 14 was designed as an improved means of controlling corporations, and was intended to punish officers only as a means of coercing compliance by corporations.[39]

It may be argued that the fines leviable under section 14 should be the same as those possible under section 1. This does not, however, defeat the view that section 14 is the sole remedy against representative acts. The 1955 increase in the Sherman Act penalty was not intended to exempt officers in their representative roles from effective prosecution. Purely practical considerations seem to have led Congress to raise the Sherman Act fine and leave the penal provisions of the other antitrust laws as they were.[40] And, in the absence of this decision, there are indications that Congress would have increased the fines possible under the other laws.[41] Defects in the law should be corrected by recourse to the legislature, and

36 See text at notes 8-10 *supra*. The legislative history and judicial interpretation of the Sherman Act is too inconclusive to be controlling here. The distinction between representative acts of a corporate officer and those done on his own account was not clearly seen at the time, and most of the debates and cases are too ambiguous on the issue to be decisive. 46 MINN. L. REV. 631 (1962) analyzes this issue in detail, and Whiting, *supra* note 5, at 946-48, has helpful material. From them it is clear that on the basis of the legislative history and judicial interpretations of the Sherman Act and the Clayton Act alone, this case could have been decided either way.

37 Under this view corporate officers could be indicted under § 1 of the Sherman Act only if it was alleged that the acts in question were committed on their own account. This would not, though, make it difficult for the Government to lay a proper indictment. The evidence it would have gathered before initiating a suit would show in almost all cases whether the officer was acting on his own account or not.

38 This increased burden of proof under § 14 may explain, in part, why the Government has nearly always chosen to indict corporate officers under the Sherman Act; no officer has yet been brought to trial under § 14. Whiting, *supra* note 5, at 942. Although the difference in proof requirements between § 1 and § 14 might have provided a sufficient motivation to raise the question of whether § 1 covered representative acts or not, in fact this question was not directly raised in any case between 1914 and 1960. This is probably because the ultimate penalty was the same under § 1 and § 14 until 1955.

39 See 51 CONG. REC. 9679-82 (1914).

40 In the House debates on an earlier version of the amendment that increased the Sherman Act penalty, Representative Celler said: "We did not wish to encourage too much opposition by including acts other than the Sherman Act . . . . We are willing to make progress slowly. Let us increase the penalties under the Sherman Act, which is the most important of all the acts. Then subsequently we may consider the other acts." 96 CONG. REC. 8071 (1950).

41 Whiting, *supra* note 5, at 983.

not by judicial decrees which bring about the desired end only by making congressional enactments ineffectual.

The interpretation of congressional intention and the reasoning in the principal case are unsatisfactory. Nonetheless, the holding is unequivocal, and the Court would find it difficult to limit its breadth in any future decision.[42] Though it established the rule that all acts violative of section 14 also violate section 1, the decision does not mention sections 2 and 3 of the Sherman Act.[43] The maximum fine under these sections was also raised to fifty thousand dollars in 1955.[44] In dealing with sections 2 and 3, it is very doubtful that the Court will adopt the view suggested here without overruling the principal case,[45] but these sections do provide a possible vehicle for again bringing the entire issue before the Court. Hopefully, a better analysis and resolution of the problem than is given in the principal case would result from such litigation.

Leon E. Irish

42 The Court voted 8 to 0, Mr. Justice Frankfurter not participating.

43 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 2, 3 (1958). Section 2 makes it criminal to attempt to monopolize trade, and § 3 extends the Sherman Act to the District of Columbia.

44 69 Stat. 282 (1955), 15 U.S.C. §§ 2, 3 (1958), amending 26 Stat. 209 (1890).

45 Since §§ 1, 2 and 3 of the Sherman Act treat the same basic subject, are part of the same chapter, and were enacted in the same session of Congress, no clearer case of laws being *in pari materia* could be presented. Accordingly they are to be construed with reference to each other and in such a way as to prevent any disharmony in the antitrust laws. See Hamilton v. Rathbone, 175 U.S. 414 (1899).