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Sherman Act -- Statutory Construction -- Partnerships and Partner Liability -- Western Laundry and Rental Co. v. United States

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CASE NOTE

Sherman Act—Statutory Construction—Partnerships and Partner Liability—*Western Laundry and Linen Rental Co. v. United States.*[1]— The defendant partnership, Western Laundry and Linen Rental Co. (Western), and one Hazan, a partner in Western, were indicted in 1968, together with five corporations and four individuals, for a criminal violation of Section 1 of the Sherman Act.[2] All of the defendants entered pleas of nolo contendere,[3] and all were convicted and fined by the Federal District Court for Neveda. On appeal, the Court of Appeals for the Ninth Circuit was presented with two issues: (1) whether a partnership is a "person" as contemplated by the Sherman Act and, therefore, indictable under that Act; and (2) whether the indictment of a partnership and one of its partners for an antitrust violation is contrary to the constitutional proscription against double jeopardy.[4] A unanimous court, delivering three separate opinions, HELD: that a partnership is subject to indictment as a "person" within the meaning of that word as contained in the Sherman Act, and that the defendant Hazan could be fined as an individual, distinct from the partnership entity. The concurring opinions, however, divided on the rationale pertaining to the separate liability of a partner. It is the purpose of this note to examine and evaluate the statutory construction techniques contained in the opinions. It will be concluded that, although the holding of the court is probably correct, the faulty reasoning has materially altered the precedent value of the decision.

The court of appeals was faced with the threshold question of whether a partnership can be indicted for a violation of the Sherman Act, which provides in part that any "person" engaging in practices considered to be in restraint of trade may be criminally prosecuted.[5] The Sherman Act, while containing an internal definition of "person" to include "corporations and associations,"[6] makes no specific reference to partnerships.

In its opinion, the court, apparently considering the word "associ-

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1 424 F.2d 441 (9th Cir.), cert. denied, 400 U.S. 849 (1970).

2 15 U.S.C. § 1 (1964).

3 This note will not deal with the question raised as to the waiver of rights by a plea of nolo contendere. This would be collateral to the discussion of the essential holding of *Western,* and has been more than adequately treated by many authors. See generally Seamans, Winson and McCarthy, Use of Criminal Pleas in Aid of Private Antitrust Actions, 3 Duquesne U. L. Rev. 167 (1965); Note, Nolo Pleas in Antitrust Cases, 79 Harv. L. Rev. 1475 (1966).

4 U.S. Const. amend. V.

5 15 U.S.C. § 1 (1964).

6 15 U.S.C. § 7 (1964) states:

The word "person," or "persons," whenever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

ations" in the Sherman Act definition of "person" to be ambiguous as to whether it included partnerships, looked to the general construction rule of the United States Code.[7] Although this method of interpretation may indeed be valid in many instances, especially where a particular statute does not define its own terms, resort to the general rules of construction may not be completely valid where Congress has made an attempt to define a specific term.[8] Since Congress has attempted to define the same term for the limited use within the Sherman Act, the court may have overlooked an important aspect of the Act, the specific intent of Congress regarding the coverage of its provision.[9] By finding that partnerships are not within the definition of "person" contained in the Sherman Act, the court in *Western* has in effect superimposed a general rule of construction upon the Sherman Act, without considering what entities Congress intended to include within the definition provided for antitrust acts,[10] when several more appropriate statutory construction techniques were available for use by the court.

The court found authority for its statutory interpretation in *United States v. A & P Trucking Co.*[11] It can be seriously questioned, however, whether the Western court interpreted that case correctly. In *A & P Trucking*, the Supreme Court read the general definition of "person" as found in the general construction section into a criminal provision of the Transportation of Explosives Act.[12] But there, unlike the present case, the Act contained no internal definition of "person." The court merely applied mechanically, and correctly, the general rule of statutory construction. It should be noted further that the *A & P Trucking* Court was construing the word "whoever," which word shares the same definition of "person" in the Rules of Construction Section of the Code.[13] The applicability of such a holding to the construction problem facing the court in *Western* must, therefore, be seriously questioned.

United States v. Brookman Co.[14] provides the strongest precedent

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[7] 424 F.2d at 443. The current general construction rule provides in part that the term "person" shall "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (1964).

[8] "[T]he legislative language will be interpreted on the assumption . . . that if change occurs in legislative language, a change was intended in legislative result." United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133, 155 (N.D. Calif. 1967), citing J. Sutherland, Statutory Construction § 4510 (3d ed. 1943).

[9] See Flora v. United States, 357 U.S. 63, 65 (1958): "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of the words employed."

[10] For example, the Clayton Act adopted the same definition of "person" as that found in the Sherman Act. Cf. 15 U.S.C. § 12 (1964).

[11] 358 U.S. 121 (1958).

[12] 18 U.S.C. § 835 (1964). The Act has since been amended to include a definition of "person" which encompasses partnerships. Id. at § 831.

[13] 1 U.S.C. § 1 (1964). 358 U.S. at 123.

[14] 229 F. Supp. 862 (N.D. Cal. 1964). This decision arose out of a motion to dismiss

for the inclusion of a partnership within the Sherman Act definition of "person." In *Brookman*, the District Court for the Northern District of California held that a partnership is a "person" within the Sherman Act, and, therefore, is subject to prosecutions under that Act.[15] Although that case also relied upon *A & P Trucking*, it noted that the Transportation of Explosives Act contained no internal definition section,[16] a distinction that the *Western* court neglected to draw. This would seem to lead to a conclusion that the *Western* court's line of reasoning contains flaws which notably mar the decision. The holding as to the liability of a partnership in an antitrust action may indeed be the correct one, but, as precedent, this case will remain tainted by the court's questionable statutory construction technique.

However, the finding that partnerships are indeed indictable under a definition of "person" within the Sherman Act may be substantiated by the application of at least three different statutory arguments that could have been pursued. First, "associations" is the key term in the examination of the Sherman Act definition for construction purposes.[17] Congress could have used the term "associations" in the common law sense, as a generic word broad enough to encompass partnerships.[18] In addition, the three important antitrust statutes do not treat the term "association" with any symmetry of meaning. The Sherman Act and the Clayton Act do not define the term, and the Federal Trade Commission Act[19] includes the term "associations" within its definition of "corporations"[20] and treats partnerships as a separate entity together with corporations and persons.[21] However, the term "associations" has been statutorily defined to include partnerships in the antitrust section of the Export Trade Promotion Act[22] which extends the provisions of the Federal Trade Commission Act to the field of export or foreign trade. Since this Act is of most recent vintage, a pattern of increasing specificity as to a definition of the term can be drawn from these four statutes. It could be argued that one definition of the term should be recognized, if only for the sake of consistency in the federal antitrust laws.

Secondly, the Sherman Act's definition of "person" states that the term shall "include corporations and associations."[23] The word "in-

brought by a partnership which had been indicted under the same section as involved in the *Western* case.

[15] Id. at 864.

[16] Id. at 863.

[17] The *Brookman* court recognized this factor when it concluded that neither "person" nor "association" was intended in a limited sense that would exclude partnerships from the scope of the criminal penalty provisions of the Sherman Act. 229 F. Supp. at 684.

[18] United States v. Martindale, 146 F. 280, 284 (D. Kan. 1903); Thomas v. Dakin, 22 Wend. 9, 104 (N.Y. 1839).

[19] 15 U.S.C. § 41 et seq. (1964).

[20] 15 U.S.C. § 44 (1964).

[21] 15 U.S.C. § 45 (1964).

[22] 15 U.S.C. § 61 (1964).

[23] See note 6 supra.

clude" is usually considered a term of enlargement, and not of limitation.[24] By prefacing the definition with such a word, it may be concluded that Congress intended the terms that follow to be other than definitive of all possible parties covered by the Act.[25] Also, use of the term "associations" in conjunction with the term "corporations" could be considered the limits of the intended congressional reach, corporations being one of the most organized business forms and associations being one of the least formalized. Thus, partnerships fall within the range of business forms that Congress intended to reach in the Sherman Act.

As a third possible construction technique, the phrase "existing under or authorized by the laws of either the United States, the laws of any Territories, the laws of any State, or the laws of any foreign country," at the end of the Sherman Act definition of "person," presents one of the strongest arguments for the inclusion of partnerships within the Act. The phrase, modifying the word "associations," seems to limit the word by setting aside a particular type of association, those recognized by law, and makes only those responsible for antitrust violations. Since a partnership is defined as an association under the Uniform Partnership Act,[26] a strong argument[27] exists, therefore, that it is an "association existing under or authorized by the laws" of the state.[28] The mere fact that the Congress employed such language would indicate an intention that the statute be applied to all new organizations recognized by law.

The inclusion of partnerships within an antitrust statute, however, can be viewed as a judicial expansion of a criminal statute. The basic argument is that if Congress did not specifically provide for the indictment of partnerships, the court cannot now expand the criminal scope of the statute to include partnerships.[29] This contention, however, is ill-founded. Although it may be true that as a general rule penal statutes should be strictly construed, courts generally approach the whole problem with a more balanced view. A statute cannot be interpreted "so narrowly as to defeat its obvious intent."[30]

> Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more impor-

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[24] Argosy, Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968).

[25] "Canons of statutory construction in particular are often useful only as a crude guide to legislative intent." District of Columbia v. Orleans, 406 F.2d 957, 958 (D.C. Cir. 1968).

[26] Uniform Partnership Act § 2 (1966).

[27] See United States v. Brookman Co., 229 F. Supp. 862, 863 (N.D. Cal. 1964).

[28] Nev. Rev. Stat. § 87.060(1) (1931): "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

[29] Brief for Appellant at 19, Western Laundry and Linen Co. v. United States, 424 F.2d 441 (9th Cir. 1970), citing the opinion of Chief Justice Marshall in United States v. Wiltberger, 18 U.S. 93 (1820).

[30] United States v. Braverman, 373 U.S. 405, 408 (1963).

> tant aid to the meaning than any rule which grammar or formal logic may lay down."[31]

The more valid approach then would be that of ascertaining the intent of the framers rather than the application of a rigid, mechanical rule of construction.[32] Even in the closely guarded area of penal statutes, including the Sherman Act, the intent of Congress should prevail over the most stringent rule of statutory construction.[33]

However, the true intent of Congress, as determined from the initial legislative history of the Act, has long since been muddled by the elaborate revisions of the original bill, the vagaries of statements of its authors, and the passage of time. A very early case recognized the difficulty of discerning anything meaningful from the congressional debates:

> Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act . . . . All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.[34]

Therefore, any attempt to ascertain the intent of Congress as to the criminal limits of the Act must be futile.

Where the intent of Congress is unclear regarding the specific use of its own language, courts have attempted to discern this intent by concentrating on the "particular evils at which the legislation was aimed."[35] The attempt at generality in the statute was probably intentional. The Act "does not go into detailed definitions which might either work injury to legitimate enterprise, or through particularization defeat its purposes by providing loopholes for escape."[36] The very fact of the sweeping inclusion of various entities was "thought important to preclude any narrow interpretation,"[37] and should guide the court to look upon the generic "associations" with some judicial creativity.

The court in *Western* might well have taken note of the "rule of reason" which was enunciated in *Standard Oil Co. v. United States*,[38]

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31 United States v. Shirley, 359 U.S. 255, 260 (1959).

32 Cf. 229 F. Supp. at 864.

33 In Sherwood v. United States, 112 F.2d 587 (2d Cir. 1940), the court of appeals held that even in the face of New York's General Construction Law, N.Y. Gen. Construction Law § 37 (McKinney 1951), words of a statute "depend upon the legislature's intent under the circumstances." Id. at 594.

34 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897).

35 Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

36 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

37 United States v. Cooper Corp., 312 U.S. 600, 607 (1941).

38 221 U.S. 1 (1911).

for a standard of interpretation of the Sherman Act. In that case, the Court applied "the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character" included within the Sherman Act.[39] "This rule . . . draws the line between zones of legal and illegal conduct under the anti-trust laws by consideration of all of the factors and circumstances in any given situations."[40] Although the rule of reason is in reality a construction of the general language of the Act, it is an indication of the need for judicial interpretation of a vague and open-ended statute. One may even argue that the very fact such a bill was enacted indicated a congressional intent that courts should use some creativity in construing the statute. The indictment of partnerships under the Sherman Act can thus be accomplished by a broad judicial reading of the definition, utilizing the intent of Congress that such matters should be left within the preserve of the courts. But such a determination should not be left to the highly mechanical approach of the court in *Western.*

It may be possible to delineate somehow the intent of Congress regarding the ability of the government to indict a partnership for a Sherman Act violation. However, the court's finding and reasoning that the partners may be individually indicted and fined is more difficult to utilize as sound precedent. The court again examined the *A & P Trucking* decision[41] as precedent for holding the partner liable individually, and its opinion again seems open to serious question.[42] In attempts to interpret the *A & P Trucking* decision, the court of appeals stated:

> The court there held simply that a partnership could violate certain regulatory statutes even if the individual partners did not participate in or have knowledge of the violations . . . . In such an instance the fine levied on the partnership should not be collected from the partners' individual assets.[43]

The setting in *Western* is markedly different. In *Western*, a partner was indicted in his individual capacity, while in *A & P Trucking* there was never any question of the personal guilt or liability of an individual partner[44] since no partner was separately indicted. Therefore, the question of double jeopardy, or more properly double punishment, was never before the Supreme Court.

A & P Trucking, therefore, can serve only as the legal conclusion that the *Western* court should have drawn. That former case stands only for the proposition that under the circumstances, Congress in-

[39] Id. at 60.

[40] Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46, 53 (8th Cir. 1958).

[41] 358 U.S. 121, 126 (1958).

[42] Note that Judge Hufstedter, concurring separately, seriously questioned the expansion of *A & P Trucking* to rationalize the indictment and punishment of a partner where his partnership is also a named defendant. 424 F.2d at 445.

[43] Id.

[44] 358 U.S. at 127.

tended the particular statute to contain a direction that partnerships be considered entities. The passage, "the conviction of the partnership cannot be used to punish the individual partners,"[45] was merely the *A & P Trucking* Court's dictum,[46] and referred only to the contingency of fining a partner when a recovery from the partnership proved impossible.[47]

Instead of looking to *A & P Trucking* for the sole controlling authority, the *Western* court, it is submitted, should have examined other precedent, in particular *United States v. Wise*.[48] In this case, the Supreme Court held that a corporate officer is included within the Sherman Act definition of "person," and that such officer is subject to liability under Section 1 of the Act. The Court found, however, that it had to make a special determination as to the penalizing of an individual, separate from his business organization or association. The Court noted:

> [W]e attribute no significance to the specific inclusion of corporations in the definition of persons in determining whether a corporate officer is within the term . . . [W]e construe § 1 of the Sherman Act in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction.[49]

Once the court in *Western* decided that the partnership was indeed subject to indictment, that it is in fact an entity unto itself,[50] the conclusion that the partner was also separately chargeable and punishable could have been based on the *Wise* rationale. Indeed, it could then be maintained that the partner held a position analogous to the corporate officer for antitrust purposes, and, consequently, is liable separately for antitrust violations.

In conclusion, it is suggested that the holding in *Western* is an example of somehow arriving at one's destination by taking the wrong route. The court's use of the standard and narrow rules of statutory construction can hardly be considered as an enlightened, creative approach to the problem of interpretation of a broad antitrust statute. Therefore, any use of *Western* as precedent should be done with the caveat that the court's use of the rules of statutory construction must remain at least questionable.

The court's findings, however, that partnerships are included

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[45] Id.

[46] 424 F.2d at 445 (concurring opinion).

[47] Id.

[48] 370 U.S. 405 (1962).

[49] Id. at 409.

[50] A detailed analysis of the whole problem of the utility of either the aggregate or entity theories of partnerships is not necessary here. This has been sufficiently discussed. See Jensen, Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?, 16 Vand. L. Rev. 377 (1963); see also Note, The Partnership as a Legal Entity, 41 Colum. L. Rev. 698 (1941).

within the scope of the Sherman Act, and that the individual partners are to be held separately indictable can be justified by either a correct construction of the rather expansive language of the statute or by recourse to the intent of the authors of the original act. To find otherwise would be to use a "construction that is not interpretation, but perversion."[51]

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[51] Holmes, J. in United States v. Pulaski Co., 243 U.S. 97, 106 (1917).