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A TREND TOWARD STRENGTHENING ANTITRUST SANCTIONS

Antitrust laws are normally enforced through sanctions imposed in criminal prosecutions and civil treble damage actions.¹ The burden of deterring antitrust violations, however, seems to rest more on the civil action instituted by private individuals than on the penal sanctions of the antitrust laws.

In the civil action the plaintiff's problem lies in the obstacles which must be overcome in proving (1) that there was a violation of the antitrust law,² (2) that the plaintiff was injured in his "business or property"³ and (3) that the violation was the cause of the injury.⁴ A review of cases involving actions for treble damages reveals a tendency to lessen the burdens in establishing the grounds for recovery of damages, thereby providing a more effective sanction against violators. Although a majority of the courts hold that the remedy provided by the Clayton Act is merely compensatory,⁵ it is clear that the courts are aware of the deterrent affect of trebling a "compensatory" award.⁶

In view of various problems created by the use of private civil actions as a means of enforcing the antitrust laws, legislative attention has recently been directed toward bringing up to date the penal sanctions of the antitrust laws in order to make them more effective. This note will demonstrate that the courts have decreased the burdens that a plaintiff

1. See OPPENHEIM, *FEDERAL ANTITRUST LAWS CASES AND COMMENTS*, 22-25 (2 Ed. 1959) for a general discussion of other remedies available under the antitrust laws.

2. See Comment, 18 U. CHI. L. REV. 130 (1950) for a discussion of the obstacles to the treble damage action.

3. *Glenn Coal Co. v. Dickinson Coal Co.*, 72 F.2d 885, 887 (4th Cir. 1934). "In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or . . . attempt to monopolize . . . but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitutes a violation."

4. *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972 (2d Cir. 1944).

5. *Karseal-Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Paramount Films Dist. Co. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506 (D.C. Colo. 1952).

6. *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957). The court stated that the private treble damage action was an important means in helping to combat unlawful business practices. See also, *Franchon & Marco v. Paramount Pictures*, 100 F. Supp. 84 (S.D. Cal. 1951).

must overcome in a civil action and will discuss the present and proposed penal sanctions, pointing up the present trend toward making the anti-trust laws more effective.

JUDICIAL DECISIONS WHICH HAVE LESSENE PLAINTIFF'S BURDEN

Proof of Damages. A comparison of early antitrust decisions with more recent cases indicates the willingness of the courts to make it easier for a plaintiff to recover damages. In 1924 the Court of Appeals for the Second Circuit in *Straus v. Victor Talking Machine Co.*,⁷ in answer to a respondent's contention that the damages suffered by the plaintiff were merely speculative, stated that it was the tendency of the courts to find some way in which damages could be awarded where a wrong had been done. The court concluded that recovery of damages is properly denied when there is merely speculation as to whether the defendant actually caused an injury to the plaintiff, but when the fact of injury is established, the courts do not deny recovery simply because it is difficult to ascertain the exact amount of damages.

Although the courts generally require certainty in proof of damages, modifications have been accepted which allow the courts to mitigate the severity of the certainty doctrine. For example, in some instances the difficulty in accurately determining the plaintiff's damages stems from the defendant's illegal conduct. Here the courts refuse to listen to a defendant's assertion that the damages cannot be accurately shown,⁸ just as it would be improper in a breach of contract action to allow the breaching party to insist on proof which his very breach has made impossible to secure.

The certainty doctrine was further modified in an action resulting from an unlawful conspiracy to monopolize interstate commerce and trade in the vegetable parchment industry. In *Story Parchment Co. v. Patterson Parchment Co.*,⁹ the Court of Appeals for the First Circuit had reversed a judgment in favor of the petitioner, holding that the evidence of damages was mere speculation and conjecture. The Supreme Court reversed, saying that although there was uncertainty as to the extent of damages, there was no uncertainty as to the fact of damages.¹⁰ Thus it

7. *Straus v. Victor Talking Machine Co.*, 297 Fed. 191 (2d Cir. 1924).

8. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). In discussing the requirement that damages be certain, the Supreme Court stated: "A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."

9. 282 U.S. 555 (1931). The court allowed the jury to infer the amount of damages from the facts and circumstances of the case.

10. *Id.* at 562.

can be seen that a plaintiff can prove the amount of his loss by a just and reasonable inference. This supports the *Straus* case, showing the willingness of the courts to find some basis for allowing a recovery if the injury is clear. The Court in *Story* further exhibited its lenient attitude by generalizing that the "best available evidence" obtainable under the circumstances was sufficient.¹¹

Another case allowing recovery on the basis of an inferential proof of loss was *Bigelow v. R.K.O.-Radio Pictures, Inc.*¹² involving a conspiracy to prevent the plaintiff from showing films in his theatres until the defendant had shown them first. The Supreme Court held that a comparison of the plaintiff's admission receipts before and after the defendant's unlawful action against the plaintiff's business afforded a sufficient basis for the jury's computation of damages.

When a violation and injury have been shown, these modifications of the standard of certainty required in proof of damages relieve the plaintiff of burdens which might prevent recovery due to the complex nature of antitrust violations.

Defenses. Earlier it might have been argued that "pari delicto" and "unclean hands" defenses would preclude a plaintiff from recovering for a violation of the antitrust laws.¹³ The courts agreed that a party "in pari delicto" could not seek redress.¹⁴ Recent decisions, however, have aided the plaintiff's cause by practically eliminating these defenses. The Supreme Court in *Kiefer-Stewart v. Seagrams & Son*¹⁵ upheld a trial court's instruction that a liquor wholesaler's agreement with other dealers in a conspiracy to fix minimum prices would not constitute a defense to the wholesaler's action for treble damages against the distillers, for illegal conduct of the plaintiff could not legalize the conduct of the defendants nor grant them immunity.

Also, in an action¹⁶ for treble damages and injunctive relief under the Sherman and Clayton Acts, the defendant publishing companies pleaded affirmative defenses, alleging that the plaintiff, a wholesale

11. *Id.* at 565.

12. 327 U.S. 251 (1946).

13. *Eastman Kodak Co. v. Blackmore*, 277 Fed. 694 (2d Cir. 1921). The court held that a plaintiff could not recover for damages allegedly suffered during the period of time in which it had been participating in the wrongful act.

14. *Hall v. Corcoran*, 107 Mass. 251, 253 (1871). The court said: "The general principle is undoubted that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal acts."

15. 340 U.S. 211 (1951).

16. *Interborough News Co. v. Curtis Pub. Co.*, 108 F. Supp. 768 (S.D.N.Y. 1952), citing as authority: *Kiefer-Stewart Co. v. Seagrams & Sons*, 340 U.S. 211 (1951); *Moore v. Mead Service Co.*, 190 F.2d 540 (10th Cir.), *cert. denied*, 342 U.S. 902 (1951).

distributor of magazines in the New York area, had acquired a monopoly and was therefore barred by "unclean hands" from seeking relief against the defendants. In striking the affirmative defenses in accordance with Rule 12(f) of the Federal Rules of Civil Procedure the court said that recent cases have greatly limited the "pari delicto" and "unclean hands" defenses, if not completely abolishing them.

Judicial Interpretation. The plaintiff has also been aided by the court's interpretation of the Clayton Act that the remedy of a treble damage action applies to persons who have been prevented from engaging in business because of a violation of the antitrust laws.¹⁷ In several cases, however, a plaintiff seeking to enter into business has been denied recovery, but usually on some other grounds.¹⁸ In one case the court applied the doctrine that "he who is prevented from embarking in a new business can recover no profits" in denying recovery.¹⁹ However, in that case the plaintiff had been in business for several years but had never made a profit, and the court thought the estimate of damages was too speculative.

A recent district court decision upheld the right of a person who had been prevented from engaging in business to maintain an action, but directed a verdict for the defendant on the grounds of insufficient evidence.²⁰ Thus it can be concluded that a person who has demonstrated an intent coupled with an actual preparedness to enter into business can maintain an action, but he will have a difficult time in recovering where he cannot clearly prove damages.

Procedural Aid. The courts have afforded the plaintiff several procedural aids. For example, the Clayton Act contains its own venue provision in section 12,²¹ which the Supreme Court held must be construed with section 4 in determining the proper venue for a treble damage action. When these sections are read together the plaintiff may bring an action not only where the defendant is "found," but, also, wherever the defendant is "transacting business."²² In addition, one court shifted the

17. *Tomsen v. Union Castle Mail Steamship Co.*, 166 Fed. 251 (2d Cir. 1908).

18. *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, 152 F.2d 308 (3rd Cir. 1945). Recovery was denied the plaintiff because he did not allege that he had "intended" to go into the business of producing bushings "commercially."

19. *Baush Machine Tool Co. v. Aluminum Company of America*, 79 F.2d 217 (2d Cir. 1935); See also, *Donovan, Proof of Damages Under the Antitrust Law*, 88 U. PA. L. REV. 511, 522 (1940) for a discussion of cases dealing with prevention from entering business and the certainty requirements for damages.

20. *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D.Pa. 1960).

21. 38 Stat. 736 (1914), 15 U.S.C. § 12 (1958).

22. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 359, 374 (1927). The Supreme Court said: "To construe the words 'or transact business' as adding nothing of substance to the words 'is found' . . . would to that extent defeat the plain purpose of this section [§ 12 Clayton Act]."

burden of going forward with evidence to the defendant when the plaintiff established facts giving rise to an inference of a violation.²³

The Culmination of the Trend. From a pattern of relatively moderate judicial expansion, a federal court in *Hanover Shoe Co. v. United Shoe Machinery Co.*²⁴ recently moved to the extreme position of granting a plaintiff recovery when he appeared to have passed the loss on to his customers in the form of higher prices, although prior courts seemed to agree that a plaintiff could not recover in such circumstances.²⁵ The Hanover Shoe Company brought the action to recover treble damages alleging that the defendant unlawfully controlled the market in the field of shoe machinery rental.²⁶ The trial court ordered a special trial, with the agreement of both parties, to determine if the plaintiff had been "injured" as defined by section 4 of the Clayton Act.²⁷ In finding for the plaintiff, the court seemed to base its reasoning on two conflicting theories, one of which indicates that the defense of "passing on" does not exist in law, the other seeming to recognize the defense but limiting its application.

In regard to the first theory advanced, the court stated that this case called for a straight application of tort law and that the "excessive price was the injury."²⁸ The court said also that an actionable injury occurs at the exact moment that an over-charge is made through monopolistic practices, and that any subsequent shifting of the loss has no effect on the plaintiff's right to recovery. The widespread application of this theory could lead to several suits to recover the same damages where they have been passed on "down the line." This theory also gives rise to another area of disagreement in civil antitrust actions—*i.e.*, whether a treble damage action is in tort²⁹ or some other type of action. In *Philco Corp. v. RCA*³⁰ it was recently held that an antitrust action was

23. *William Goldman Theatres, Inc. v. Loew's Inc.*, 150 F.2d 738, 743 (3rd Cir. 1945). In discussing the plaintiff's proof the court said: "When the proof supported, as we think it did, the inference of such concert, the burden rested on the [defendant] of going forward with the evidence to explain away or contradict it."

24. 185 F. Supp. 826 (M.D.Pa.), *aff'd*, 281 F.2d 481 (3rd Cir.), *cert. denied*, 364 U.S. 901 (1960).

25. *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir. 1955), *cert. denied*, 350 U.S. 915 (1955); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945).

26. Plaintiff relied on a decree rendered against *United Shoe Machinery Co.* in an earlier prosecution by the United States in *United States v. United Shoe Machinery Co.*, 110 F. Supp. 295 (D. Mass.), *aff'd*, 347 U.S. 521 (1953).

27. This separate trial was based on Fed. Rule Civ. Proc. 42(b) and proceeded upon two assumptions: "(1) that the violation of law existed, and (2) that the excessive cost of shoe machinery as alleged existed." *Hanover Shoe Co. v. United Shoe Machinery Co.* 185 F. Supp. 826, 828 (M.D. Pa. 1960).

28. *Ibid.*

29. *Ibid.*

30. 186 F. Supp. 155 (E.D.Pa. 1960).

a creature of statute, unknown at common law, and that it was improper to indiscriminately apply common law tort concepts.

The reasoning behind the *Hanover* decision becomes less clear, however, when the court discusses the defendant's contention that the precedents in the "oil jobber" cases should govern.³¹ In those cases civil actions were initiated against several oil companies which had been convicted in a previous government action for conspiring to raise the market price of gasoline in the Midwest. Recovery was denied on the grounds that the plaintiffs were unable to prove that they had suffered a loss, as they had passed on their loss in higher prices. The plaintiff in the *Hanover* case argued that its case could be distinguished from the "oil jobber" cases because those cases involved "middlemen" buying bulk oil and reselling the oil to their consumers, whereas the plaintiff was himself a "consumer" of the leased machinery. There is no doubt from the language of the court in the "oil jobber" cases that "passing on" was recognized as a valid defense. The problem raised by the *Hanover* opinion is the extent to which this defense has been limited or excluded, and whether or not the consumer-middleman classification is too uncertain to be a satisfactory test for granting or denying relief in a treble damage action.

This "consumer-middleman" distinction is novel in its application to antitrust actions. The normal concept of a "consumer" is one who uses economic goods and thereby destroys their utility.³² It is true that the plaintiff in *Hanover* was the sole user of the leased shoe machinery, whereas the "oil jobbers" did redistribute the gasoline after they had acquired and stored it for a period of time. But it does not follow that this distinction is sufficient to prevent the application of the defense of "passed on" costs. Both the "oil jobbers" and the Hanover Company performed an intermediate service which was then furnished to an ultimate consumer; Hanover by selling finished shoes to its customers and the "oil jobbers" by distributing gasoline to other dealers. Although the increased costs to the Hanover Company were in the form of higher rental rates on the leased shoe machinery, this did not prevent them from charging their customers a proportionately higher price for the finished shoes. The distinction of a middleman as opposed to a consumer should

31. *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.) *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 847 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941). For an analysis of the earlier decisions involving oil jobbers see Comment, 70 *YALE L.J.* 469, 470-477 (1961).

32. *Union Portland Cement Co. v. State Tax Commissioners*, 110 Utah 135, 170 P.2d 164 (1946); *St. Paul & Tacoma Lumber Co. v. State*, 40 Wash. 2d 347, 243 P.2d 474 (1952).

not be the controlling factor in a case such as *Hanover*; rather the real issue should be a question of fact as to whether a company actually sustained a loss, or whether it in fact passed the loss on to its customers. The use of a consumer-middleman distinction seems to be a rather indefinite classification in that the technical use of the term "consume" implies that the cost could not be passed on, or in the alternative, a person who is able to pass on the product and increased cost cannot be a consumer. It seems that the *Hanover* court's definition has introduced a new meaning in the term "consumer."

Pointing up the logical problems in the district court opinion, counsel for United Shoe Machinery Corporation argued on appeal that the finding of the court was erroneous because, "(1) It ignores the statutory requirement that a plaintiff show he was injured in his business or property and the explicit limitation on the recovery of such a plaintiff to 'threefold the damages by him sustained'."³³ The appellant's arguments were rejected in a per curiam decision of the Court of Appeals for the Third Circuit, which said that the district court's opinion was thoroughly convincing.³⁴ The Supreme Court denied a petition for a writ of certiorari.³⁵

Since there are two apparently conflicting theories, the problem remains to determine the actual theory upon which relief was granted in the *Hanover* case, although neither can be relegated to the category of obiter dictum.³⁶

The problem is made more acute because of the impact of the *Hanover* decision on pending and future litigation, as it could result in financial disaster for many offenders. For example, a joint suit has been filed by the United States and the Tennessee Valley Authority to recover more than \$12 million in damages from five manufacturers of heavy electrical equipment.³⁷ A multitude of suits could arise whereby each party in succession might bring an action for excessive charges.³⁸ For example, what if a manufacturer caused a discriminatory overcharge to be placed on a wholesaler, who in turn raised his prices to a retailer in order to cover the increase, and the retailer then raised the price charged

33. Brief for Appellant pp. 6-7, *Hanover Shoe Co. v. United Shoe Machinery Co.*, 281 F.2d 481 (3rd Cir. 1960).

34. *Hanover Shoe Co. v. United Shoe Machinery Co.*, 281 F.2d 481 (3rd Cir. 1960).

35. *Hanover Shoe Co. v. United Shoe Machinery Co.*, 364 U.S. 901 (1960).

36. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).

37. *United States & T.V.A. v. General Electric Co.*, civ. #29379 filed 14 March 1961. The United States government cannot recover treble damages; and query as to the official status of the Tennessee Valley Authority.

38. Brief for Appellant, pp. 19-20, *Hanover Shoe Co. v. United Shoe Machinery Co.*, 281 F.2d 481 (3rd Cir. 1960).

to a consumer? It appears that the wholesaler, retailer and consumer, in separate actions, could recover for this same overcharge in light of the *Hanover* decision. It seems unlikely that this is the result intended by the courts or the legislature.

The district court's opinion in the *Hanover* case is a result of the trend toward making the private action for treble damages a more effective device for deterring violations of the antitrust laws. Thus the result is based on policy considerations, not the rather strained theories of the court. In light of numerous earlier decisions and a recent district court decision,³⁹ the soundness of the legal reasoning of the district court in *Hanover* can be questioned.

The Prima Facie Case. Section 5 of the Clayton Act allows final judgments rendered in a government antitrust action against the same defendants to be entered as prima facie evidence of a violation in a subsequent treble damage action.⁴⁰ Although this provision was enacted in the Clayton Act and, in itself, does not indicate any trend, a brief discussion is included because of the important part that it plays in the civil action.

Despite the limitations imposed on the use of prior judgments,⁴¹ it is apparent that section 5 presents the plaintiff with a strong procedural tool to implement his private suit; the prima facie evidence of a violation shifts the burden of going forward with the evidence to the defendant to show that the violation for which he was convicted was not the cause of an injury to the plaintiff. Therefore, the use of prior judgments saves the plaintiff time and money which would be expended in procuring the voluminous evidence required to establish a violation. While the weight to be given to prior judgments may be disputed, it is clear, that the bulk of private litigation has been and will continue to be based on section 5. If the trend in strengthening antitrust enforcement continues to develop, it is quite possible that the suggestion might be adopted making a prior judgment conclusive evidence of a defendant's violation.⁴²

39. *Samuel Freedman v. Philadelphia Auction Co.*, 197 F. Supp. 849 (E.D.Pa. 1961). The court stated that the plaintiff had no automatic right to recover damages without proof of loss even though a violation existed.

40. See Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Under the Antitrust Laws*, 36 N.Y.U. L. Rev. 991, (1961).

41. See generally, Comment, 61 YALE L.J. 1010 (1951). It has been pointed out that section 5 has limited application because in most criminal actions the defendant pleads *nolo contendere* or submits to consent decrees. In addition, the plaintiff must establish that he has sustained an injury as a result of the particular violation for which the government judgment was entered against the defendant. *Monticello Tobacco Co. v. American Tobacco Co.*, 197 F.2d 629 (2d Cir. 1951), *cert. denied*, 344 U.S. 815 (1952).

42. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

Proposed Reform. A treble damage judgment is a penalty on the defendant; to argue otherwise seems to ignore reality. Therefore, the civil action could be divided into two areas. The first area could include only clear violations, with scienter as a requisite factor, and provide both compensatory damages and punitive treble damages, plus costs and reasonable attorney's fees, as now provided in the Clayton Act. The second area could consist of cases in which scienter is not proven—*i.e.* where only intent to commit the acts but not intent to violate the law is proven. The latter situation is clearly an area in which the remedy should be limited to compensation. In addition, the plaintiff could be allowed to recover his costs and reasonable attorney's fees.

It is recognized that the two areas delineated are the opposite extremes with the majority of cases falling somewhere between these points. In application, it may often be hard to determine whether a plaintiff should be limited to compensation or should be allowed punitive damages in addition. However, assuming that the proposed increased penal sanctions are adopted,⁴³ and assuming that they are able to provide the requisite deterrent force, it may be that a plaintiff should be limited to compensatory damages whenever the court is in doubt as to the existence of scienter. Granting that such an application of the treble damage provision would remove much of its deterrent effect, it would be more reasonable than granting plaintiff's windfall profits from every violation of the antitrust laws.

Conclusions: The importance of the treble damage action in the antitrust law cannot be denied, and the courts which are aware of this importance have done much to develop the treble damage action into a potent tool of enforcement. Modifications in the requirement of certainty in the proof of damages have gone a long way to ease a plaintiff's burden of proof. In addition, procedural help has substantially aided the plaintiff in establishing his right of recovery. Although the logic of the decision may be questionable, the *Hanover* case points up the extreme position that courts are willing to take in order to redress violations of the antitrust laws, even though windfall gains to private plaintiffs sometimes result.

The discussion thus far shows some of the problems involved in using judicial expansion to reach a desired policy goal. If the policy behind the liberalizing of recovery under the antitrust laws is one of providing a greater deterrent force, then legislation would seem to be a more satisfactory means, rather than providing private claimants with windfall profits.

43. S. 2252, S. 2253, S. 2254, H. 8137 87th Cong. 1st Sess. (1961).

In spite of the language classifying the treble damage action as compensatory, it is apparent that the underlying policy of protecting the public has assumed a greater role of importance and is probably the basic reason for the judicial trend. The reason for this trend is not discernible from a consideration of the civil cases alone, however. A look at the penal sanctions of the Sherman and Clayton Acts points up an existing inadequacy which probably has influenced the courts in their attempts to make recovery easier in the civil actions. Decisions such as the *Hanover* case clearly show the need for penal reform.

PENAL SANCTIONS AND PROPOSED REFORM

Basic Penal Provisions. The penal sanctions established in 1890 in the Sherman Act provided that violators "shall be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."⁴⁴ These provisions remained unchanged for sixty-four years as the country grew and the economy expanded. While the purchasing power of the dollar has declined, total corporate assets have increased greatly.⁴⁵

In comparison to the civil remedy of treble damages, the penal sanctions did not enjoy the same growth. The inadequacy in the penal sanctions was recognized by the Temporary National Economic Committee in its study on the concentration of economic power, and recommendations were made to Congress in 1941 to increase the sanctions.⁴⁶ It was not until 1955, however, that the Senate Judiciary Committee favorably reported a bill proposing an increase in the fine under the Sherman Act to \$50,000 in lieu of the then existing \$5,000 fine.⁴⁷ Although there was some fear that increasing the fine would work a hardship on the small businessman, the committee pointed out that only the maximum ceiling on the fine was increased, and a court need not always impose the maximum penalty. The Sherman Act was amended in 1955 to increase the maximum fine to \$50,000.⁴⁸

With the passing of time, the effectiveness of this increased fine as a deterrent against violations of the antitrust laws has become questionable. A fine of \$50,000, viewed in relation to the corporate assets of many corporations, seems small. For example, if a fine of \$50,000

44. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

45. 2 U.S. Code Cong. & Ad. News 2322 (1955). from a sample of twenty-five corporations, the assets increased from 3,883 million dollars in 1910, to 14,240 million dollars in 1948.

46. T.N.E.C., 77th Cong. 1st Sess., Final Report and Recommendation of T.N.E.C. 3, 40 (1941).

47. 2 U.S. Code Cong. & Ad. News 2322, 2323 (1955).

48. 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958).

were imposed upon a corporation with a capital and surplus of \$50 million, the fine would amount to approximately one-tenth of one percent—an amount which such a corporation could treat as a “cost of doing business.”

Proposed Increased Penal Sanctions. Steps to correct the present inadequacies of the penal sanctions have recently been taken by the introduction in the Senate of three bills dealing with proposed reform.⁴⁹ Senate Bill 2252 would increase the basic fine from \$50,000 to \$100,000 for violations of sections 1, 2 and 3 of the Sherman Act. In addition, a new subsection to be added at the end of sections 1, 2 and 3 would provide for a more severe penalty in the case of subsequent violations, imposing a mandatory prison sentence in lieu of a permissive or alternative imprisonment in the case of a natural person.⁵⁰ Enactment of this bill would result in a definite strengthening of the penal sanctions.

Another bill⁵¹ would amend section 1 of the Sherman Act by distinguishing combinations or conspiracies in violation of the Act from those growing out of (1) price fixing, and (2) the apportioning, allocating or dividing of any product market. For the latter two categories the penalty would be a \$500,000 fine in the case of a corporation, and a \$100,000 fine and a mandatory imprisonment not exceeding one year for a natural person for a first violation.

A bill has also been introduced which would increase the penalties for violations by directors, officers and agents of a corporation.⁵² The present law under section 14 of the Clayton Act provides that a violation by a corporation shall be deemed to be that of the individual officers or directors who “have authorized, ordered, or done any acts constituting a violation,” and provides for a fine of \$5,000 or imprisonment not exceeding one year, or both, at the discretion of the court.⁵³ The proposed legislation with respect to section 14 would increase the fine to \$100,000. Also, it would extend liability to violations ratified by such officers or directors, with the failure of an officer or director to prevent or stop a violation constituting ratification. In addition, it would provide for a mandatory prison sentence in the case of a second violation, basing liability on a “reasonable cause to believe” test, rather than scienter.

49. S. 2252, S. 2253, S. 2254 87th Cong. 1st Sess. (1961).

50. Provided, That after the conviction of any person of any violation of this section committed after the enactment of this proviso, any conviction of that person for a subsequent violation of this section committed within ten years after such previous conviction shall be punished by a fine not exceeding \$500,000 if that person is not a natural person, and by a fine not exceeding \$100,000 and by imprisonment not exceeding one year if that person is a natural person. S. 2252, 87th Cong. 1st Sess. (1961).

51. H. 8137, 87th Cong. 1st Sess. (1961).

52. S. 2254, 87th Cong. 1st Sess. (1961).

53. 38 Stat. 736 (1914), 15 U.S.C. § 24 (1955).

In comparison with the prior inaction of Congress in the penal sanction area of the anti-trust laws, except for the 1955 amendment, the enactment of these proposed amendments would constitute a large step toward strengthening the deterrent force of the statutes. Although the form and substance of the various proposals may be questioned, the necessity of bringing the antitrust sanctions up to date cannot be denied. As indicated earlier, the courts have been struggling to enforce the anti-trust laws in civil cases since the penal sanctions have been ineffective. Inequities which have previously arisen, such as windfall profits, need not recur as a result of the use of penal instead of civil remedies to effectuate the policy of law.⁵⁴

Evaluation and Criticism. The effect of the proposed legislation in achieving the goal of providing a more adequate deterrent force is open to conjecture. It would seem, however, that increased fines, increased penalties for second violations and the mandatory prison sentences would significantly affect the enforcement of the antitrust laws. Since the increased fine for a first violator is only \$100,000 in most instances, it is possible that the civil action for treble damages would continue to be a major factor in deterring future violations. A plaintiff who establishes damages in the million dollar category, for example, provides a far greater potential burden to the financial position of a corporation when these damages are trebled than does a fine of \$100,000 which could still be considered a "cost of doing business." The fine could remain a calculated risk that many large corporations would be willing to assume.

The most significant change proposed by the pending legislation is the increased emphasis placed on the liability of the individuals of a corporation who order, authorize or ratify a violation. As previously pointed out, the new bill would provide for a mandatory imprisonment of corporate officers under certain circumstances. Under existing legislation, where imprisonment is an alternative sanction to be imposed at the discretion of the courts, this sanction is often ignored.⁵⁵ This may be explained, as one writer has noted, because, "the persons to whom criminal prosecution is directed are almost invariably leading citizens in their respective community and are men of unquestioned personal integrity. . . ."⁵⁶ Although it may be true that very few prosecutions are instituted against individuals, it does not necessarily follow that these

54. See generally, KAYSER AND TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 257-258 (1959).

55. See Kramer, *Criminal Prosecution for Violations of the Sherman Act—In Search of a Policy*, 48 *Geo. L.J.* 530 (1960).

56. *Id.* at 536.

persons do not deserve to be called criminals.⁵⁷ The increased penalty on individual corporate officers and directors may be able to accomplish much more than either the fine or the treble damage action against the corporate entity, since the person responsible may fear prison much more than a monetary penalty.

Criticism may be properly directed to that part of Senate Bill 2254 which provides for the liability of corporate officers and directors where they had "reasonable cause to believe" that a corporation was engaged in, or about to engage in conduct amounting to a violation. Many times, where a corporation has been found to be in violation of the antitrust laws, it may not have been clear that it was a violation until a court of law so decided. It may be easy to look back upon a violation and say that there were reasonable grounds to believe that a violation was being committed, whereas it would have been very difficult for a corporate officer to speculate as to whether or not his intended actions were unlawful. Removing scienter as an element of an antitrust violation may tend to harm business in that officers and directors may become overly cautious in areas which normally justify a speculative business venture. In those areas the possibility of a violation might properly be treated as a justified business risk, the cost of which should be borne by the industry. It is not usually the policy of the law to hold a person criminally liable unless he is proved to have intended to commit a criminal act, and statutes defining criminal offenses without the element of scienter have been held unconstitutional.⁵⁸ It may be, however, that a subjective test of criminal intent is an ideal almost incapable of achievement. A study by the Temporary National Economic Committee indicated that the adoption of a purely subjective test would be unwise considering the complicated field of industrial integration.⁵⁹

Notwithstanding the need to enforce sanctions against individuals, who, after all, are responsible for the acts of the corporation, it would seem that the proposed legislation basing penal liability on the mere negligence of such corporate officials is improper.⁶⁰ Again there is a need for a distinction between those violations which were clearly intended

57. Loevinger, *Recent Developments in Antitrust Enforcement*, 6 ANTITRUST BULL. 3, 4 (Jan.-Feb. 1961).

58. *Smith v. California*, 361 U.S. 147 (1959); See also 22 C.J.S. *Criminal Law* § 29 (1961). For a discussion and evaluation of objective liability, see HALL, *GENERAL PRINCIPLE OF CRIMINAL LAW* 146-170 (2 Ed. 1960).

59. T.N.E.C., 76th Cong. 3rd Sess., Monograph 38, *A Study of the Construction and Enforcement of the Federal Antitrust Laws* 1, 78 (1941). The committee reasoned that antitrust laws should be concerned not with a state of mind but with economic realities.

60. HALL, *op. cit. supra* note 58 at 167.

or ratified, and those violations which were violations only after a trial on the merits. Can it plausibly be argued that a jury, looking back on a given set of facts, is in a better position to ascertain whether there were "reasonable grounds to believe" that a violation was in existence or about to happen than a business man who had many years of experience in the field? It is obvious that the answer must be in the negative; yet that is what would happen if an objective test of liability were established for corporate officials. If individuals are to be subjected to more rigorous penal sanctions, it may be necessary for Congress to clearly specify what are violations, and to adequately define what is meant by "price fixing," and the phrase "apportioning, allocating or dividing any product market," for example.⁶¹ It is not suggested that such violations should escape all liability. The violators should be liable to compensate persons who have been damaged, but to also impose criminal liability in those cases would seem to be unjust.

It is to be hoped that in the future the penal sanctions will assume their rightful place in the prevention and punishment of violations, and the civil action will be relegated to its original purpose of compensating those who have been injured by violations.

TERMINATION AND NON-RENEWAL OF FRANCHISES UNDER THE AUTOMOBILE DEALERS FRANCHISE ACT

Automobile retail distribution through the use of franchise agreements has expanded greatly in the last fifty years.¹ This growth² has brought with it conflicts and tensions.³ The bargaining strength of the manufacturer⁴ reached such proportions⁵ that the franchise relationship

61. S. 2253, 87th Cong. 1st Sess. (1961).

1. For a general discussion of dealer franchise agreements see Note, 63 HARV. L. REV. 1010 (1950); DAVISSON, *MARKETING CHANNELS FOR MANUFACTURED PRODUCTS* 83, 104-106 (Clewett ed. 1954).

2. The emergence of the manufacturer as the dominant party in the franchise relationship is discussed in HEWITT, *AUTOMOBILE DEALER FRANCHISES* (1956).

3. See *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong. 2d Sess. (1956).

4. In 1954, the automobile industry turned out a total of 9,177,919 cars and trucks. Its investment was 7-1/3 billion dollars. See generally *Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 1119 (1956).

5. In terms of total economic investment the difference between the manufacturing industry and those engaged in distribution is not too great. In 1954, the total investment of the 42,000 franchise dealers was about five billion dollars. The superior bargaining position of the manufacturer is apparent when the assets of one manufacturer are compared with those of a single dealer. For example in 1955 General Motors had assets