REPRESENTING INDIVIDUAL CORPORATE OFFICERS AND AGENTS IN CRIMINAL ANTITRUST PROCEEDINGS

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Corporate officers and agents and on occasion even corporate directors have been named as individual defendants in indictments handed down under the Sherman Act virtually since its inception.[1] While it was established at an early date that a corporate officer or agent was not criminally responsible for antitrust violations merely by virtue of his office,[2] joinder of corporate officers and agents as individuals along with corporate defendants was sanctioned by the courts in cases in which the sufficiency of the indictment was put at issue by certain of the individual defendants.[3] Where the indictment even in a single count generally charged the individual defendant with some active participation in the alleged offense, the indictments were sustained as against attack. In an early case, it was pointedly held that the indicted officer or agent could not shield himself from individual responsibility for his conduct by virtue of the fact that he acted for or on behalf of a corporation which he either owned or by which he was employed.[4]

Thus, while it is by mo means novel for individual officers and agents to be indicted and for that matter convicted, it is of some significance in representing the officers and agents of a corporation as individuals to attempt to discern at any given point in time whether as a matter of enforcement policy there is an effort being made to personalize responsibility and in so doing liberally name in the indictment individuals who are deemed by the Antitrust Division and the grand jury to have had, in the words of

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1. United States v. Greenhut, 50 F. 469 (D. Mass. 1892); United States v. Patterson, 55 F. 605 (D. Mass. 1893); United States v. MacAndrews & Forbes Co., 149 F. 823 (S.D.N.Y. 1906), *aff'd*, 149 F. 836 (C.C.S.D.N.Y. 1907), *appeal dismissed*, 212 U.S. 585 (1908); United States v. Patterson, 201 F. 697 (S.D. Ohio 1912), *rev'd on other grounds*, 222 F. 599 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (1915); United States v. Winslow, 195 F. 578 (D. Mass. 1912); United States v. Nash, 229 U.S. 373 (1913); United States v. National Malleable & Steel Castings Co., 6 F.2d 40 (N.D. Ohio 1924); United States *ex rel.* McGrath v. Mathues, 6 F.2d 149 (E.D. Pa. 1925); Meehan v. United States, 11 F.2d 847 (6th Cir. 1926); United States v. Atlantic Comm'n Co., 45 F. Supp. 187 (E.D.N.C. 1942); United States v. North American Van Lines, 202 F. Supp. 639 (D.D.C. 1962).

2. United States v. Winslow, 195 F. 578, 581-82 (D.Mass 1912), adopting the holding of National Cash Register Co. v. Leland, 94 F. 502, 508 (1st Cir. 1899). *See* jury instructions in United States v. Standard Oil of Indiana, 23 F. Supp. 937 (W.D. Wis. 1938), quoted in JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 84, 104 (1965); *see also* Patterson v. United States, 222 F. 599, 631 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915).

3. *See* cases cited in note 1, *supra*.

4. United States v. Winslow, 195 F. 578, 581 (D.Mass. 1912).

United States v. Wise,[5] "a responsible share in the proscribed transaction." Certain statements emanating from the head of the Antitrust Division and from the Attorney General leave little doubt as to the present enforcement climate. In a recent address before the 11th Annual Corporate Counsel Institute at Northwestern University, Mr. Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division stated:

> Even if convictions are obtained against corporate officers and against the companies involved, fines and jail sentences have in the past been relatively insignificant. With respect to fines, even the maximum fine is only $50,000, and that exposure, particularly with respect to the corporation, may have very little impact. It can be viewed, I suppose, as the cost of doing business illegally, and in many instances is more than offset by the illegal profits gained by price fixing. As for jail sentences, many are suspended, and there is some reluctance on the part of the judiciary to impose the maximum sentence, one year, on first offenders.
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> But I think judges are becoming increasingly aware that price fixing is a serious economic crime and affects the very basic foundations of our free enterprise economy. In one of our recent price-fixing cases, for example, a judge imposed a nine month jail sentence on a defendant with no suspension of any part of the term. Admittedly the judge was influenced by the fact defendant had a prior federal conviction. We are hopeful, however, that this heralds a new era in which price fixing draws the stiff sentence it deserves.[6]

Since it is the individual defendant and not the corporation who will draw the "stiff sentence" for which Mr. Kauper opts, the enforcement emphasis in terms of personalizing responsibility for an antitrust violation would appear obvious.

A portion of the remainder of Mr. Kauper's remarks dealt with the desirability of increasing antitrust penalites. This has, of course, been accomplished by vitue of the passage of amendments to the Sherman Act increasing penalities for violations of the Act which amendments were signed into law by President Ford on December 21, 1974.[7] A Sherman Act violation is now a felony rather than a misdemeanor; maximum fines for individuals are now $100,000.00, a revision upwards from the previous $50,000.00; maximum fines for coporations are now $1,000,000.00 rather than the $50,000.00 maximum which Mr. Kauper viewed as inadequate. Perhaps, of most concern to an indicted officer or agent is the increase to three years of the maximum prison sentence which a court can impose on an individual defendant.

Perhaps the remarks of Attorney General Saxbe in a speech before Associated Industries of New York, October 4, 1974, are the most candid and revealing of all. The Attorney General said:

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5. 370 U.S. 405, 409 (1962).
6. 5 TRADE REG. REP. ¶ 50,149, at 55,251 (Oct. 4, 1972).
7. Pub. L. No. 93-528, §3, 88 STAT. 1706 (1974).

> During the past fiscal year, the Department filed 34 criminal cases compared to 33 civil—and criminal defendants totaled 84 persons. The emphasis on criminal antitrust cases will continue—particularly on price fixing . . . . We will generally seek prison terms for all who are convicted or who plead guilty or no contest. The time for unequal justice is long since past.[8]

It is doubtful that the increased penalties will alter the desire of the Antitrust Division for prison terms "for *all* who are convicted or who plead guilty or no contest," assuming, as I do, that Mr. Saxbe's remarks express the views of the Antitrust Division.

The foregoing makes it fairly obvious that individual corporate officers and agents must become increasingly sensitive to antitrust concerns. If any more support for that conclusion is needed, recent remarks of the United States District Judge Charles B. Renfrew of the Northern District of California add an additional note. Judge Renfrew said:

> If we're talking about a price-fixing conspiracy, I would think that a businessman would face a very real and substantial risk of incarceration for some period of time. I would not be sanguine if I were a businessman appearing before any district court today on a price-fixing conspiracy.[9]

Those of us who, in the recent past, have represented corporate clients who have pleaded nolo contendere only to be fined the maximum and have represented individuals who pleaded nolo contendere and found themselves fortunate enough to have received a suspended sentence, can attest to no lack of reluctance on the part of the judiciary to view antitrust violations, particularly price fixing, as a serious offense and to impose sentence accordingly.

It is not surprising that individual officers and agents of corporations are expressing renewed interest in the substantive principles of law which determine their individual responsibility for antitrust violations affecting their companies. Understandably, given the present enforcement climate, the degree of personal involvement which would or which could possibly subject the corporate official to individual liability is of great interest. If one is fortunate, these inquiries are addressed to counsel in the course of a workable compliance program where the certainties as well as the vagaries attending the inquiry may be addressed with as much specificity as the question permits. All too often, however, such inquiries are made only after a grand jury has been empaneled, and a subpoena issued to the official to testify,[10] and when little or no time is available for taking corrective action

8. BNA ANTITRUST & TRADE REG. REP., No. 683, at A-5 (Oct. 8, 1974).

9. BNA ANTITRUST & TRADE REG. REP., No. 689, at AA-7 (Nov. 19, 1974).

10. Under the Organized Crime Control Act of 1970, immunity is no lonqer automatic where a witness is testifying before a grand jury in an antitrust case. An appropriate order must be entered giving the witness immunity. 18 U.S.C. § 6001 *et seq.* (1970).

beneficial to either the offical or his corporation. At worst, such inquiries are made with reference to specific facts for the first time only after indictment, when, at least from the standpoint of the Antitrust Division and the grand jury, a decision has already been made that the individual officer or agent is to be held personally accountable for what is alleged to be a violation of the antitrust laws. What is called for in the first instance and prior to indictment is a well considered effort to persuade the Antitrust Division as a matter of either law or fact, or both law and fact (assuming you have a persuasive position as to either), that the purported activities of the officer or agent do not rise to the dignity of an indictable offense, at least as the alleged offense pertains to the individual or individuals in question. In the latter case an effort is sometimes worthwhile to get the Antitrust Division to reconsider the inclusion in the indictment of the individual or individuals you represent, failing which, you are probably faced with a trial on the merits in the face of what the Antitrust Division doubtlessly asserts and the indictment alleges is a per se offense.[11]

The Antitrust Division has recognized that, while the Supreme Court has upheld the constitutionality of the Sherman Act as against charges that the Act was unconstitutionally vague,[12] an indictment in a particular case might unfairly attack conduct not known to the defendant to be unlawful. The solution to the problem and the announced policy of the Antitrust Division following the suggestions of the Attorney General's committee to study the antitrust laws is to proceed criminally only where violations of the law are willful or where the violation is one of the hard-core or per se offenses as to which the law is purportedly clear.[13] It would

11. The Justice Department claims that it brings criminal indictments only for per se violations. The most common criminal indictment sought by the Justice Department is for price-fixing. Over 80 percent of the criminal cases involve conspiracies to fix prices. The second most common criminal action is against predatory monopolization and attempts to monopolize by predatory conduct, such as persistent below-cost pricing to destroy a competitor, coercion of suppliers of customers of a competitor, or systematic boycotts in order to exclude a competitor. Other indictments might involve the per se crimes of combinations to exclude or to drive out a competitor and agreements by competitors to allocate customers or territories in order to bring about price increases. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATOR OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT-AN ASSESSMENT 109-11 (1967) [hereinafter cited as TASK FORCE REPORT].

12. United States v. Nash, 229 U.S. 373 (1913). It is interesting to note that in Mr. Justice Holmes' opinion he called for "conscience and circumspection" on the part of government prosecutors in indicting corporate officials for actions which might be interpreted as beinq part of an antitrust criminal conspiracy, but which, in fact, are not. Justice Holmes warned against creating out of whole cloth the intent necessary to implicate a corporate officer in an illegal conspiracy. *Id.* at 378.

13. *See Institutes on Sentencing*, 37 F.R.D. 111, 183 (1964), in which Mr. Robert L. Wright, then First Assistant, Antitrust Division, stated in his address that the Justice Department does not return indictments against antitrust violators unless the Department and the grand jury are persuaded that the violation is willful. This policy decision stems from the belief that petit juries will not convict without a showing of willfulness. For this reason, " a

be consistent with the attempt to apply these policies that the Antitrust Division have made available to it all relevant factual and legal materials applicable to the situation of a particular individual or group of individuals where counsel is persuaded in good faith that he has a valid case to present on the individual's behalf.

The foregoing is not to suggest that after indictment one's entire defensive strategy be unilaterally revealed to the Government. It is to suggest that where the individual's involvement in an alleqed violation is essentially passive and peripheral, it may be possible to advocate legitimately the individual's cause with the Antitrust Division as an alternative to a trial, where, at one point or the other, the jury will no doubt be instructed that "wide latitude is allowed [the prosecution] in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charges."[14] Moreover, as against the contention that a particular defendant was not involved in the conspiracv, it is likely the prosecution can ask for and receive the chilling instructions (at least to the defendant) that once a conspiracy or illeqal agreement has been established, only slight additional evidence is necessary to connect any particular defendant with the conspiracy.[15]

The nature and type of involvement sufficient to implicate a corporate official as an individual in an antitrust offense and affix individual criminal responsibility has not been without attention from either the courts or commentators.[16]

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per se offense is generally present in our criminal cases . . . ." *Id.* at 186. For a reaffirmation of this policy, see TASK FORCE REPORT 110; *see also* ATTORNEY GENERAL'S NATIONAL COMMITTEE ANTITRUST REPORT 350 (1955).

14. Nye & Nissen v. United States, 168 F.2d 846, 857 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949).

15. United States v. Cohen, 197 F.2d 26, 29 (3rd Cir. 1952); Tomplain v. United States, 42 F.2d 202 (5th Cir.), *cert. denied*, 282 U.S. 886 (1930).

16. *See, e.g.*, Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929 (1961); Whiting, *Criminal Antitrust Liability of Corporate Representatives*, 51 KY. L. REV. 434 (1963) and 21 ABA ANTITRUST SECTION 327 (1962); Kramer, *Criminal Prosecution for Violations of the Sherman Act: In Search of a Policy*, 48 GEO. L. J. 530 (1960); KRAMER, *Liability of Corporate Officers and Directors Under the Antitrust Laws*, 17 BUS. LAWYER 897 (1962); Note, *The Antitrust Laws and the Corporate Executive's Civil Damage Liability*, 18 VAND. L. REV. 1938 (1965); Rooks, *Personal Liability of Officers and Directors for Antitrust Violations and Securities Violations*, 18 BUS. LAWYER 579 (1963); Bicks & McLaren, *Standards of Conduct Under the Antitrust Acts*, 27 BUS. LAWYER 95 (1972 special ed.). *See* cases listed in note 1, *supra*. *See also* United States v. American Naval Stores Co., 172 F. 455 (S.D. Ga. 1909), *rev'd on other grounds sub. nom.* Nash v. United States, 229 U.S. 373 (1913); United States v. Standard Sanitary Mfg. Co., 191 F. 172 (D. Md. 1911), *aff'd*, 226 U.S. 20 (1912); Patterson v. United States, 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915); Truck Drivers' Local No. 421, I.B.T. v. United States, 128 F.2d 277 (8th Cir. 1942); United States v. Food & Grocery Bureau of S. Cal., 43 F. Supp. 974 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943); California Retail Grocers & Merchant's Ass'n v. United States, 139 F.2d 978 (9th Cir. 1943); United States v. San Francisco Elec. Contractor's Ass'n, 57 F. Supp. 57 (N.D. Cal. 1944);

In *United States v. Wise*,[17] the Supreme Court of the United States held that section 14 of the Clayton Act[18] which declares that corporate directors, officers, or agents shall be liable for any corporate violation if they authorized, ordered, or did any of the acts constituting all or part of the corporate violation, was not the exclusive antitrust penal statute for corporate officials, but was supplemental to the penal provisions of the Sherman Act. This determination was important at the time because Congress had increased the maximum fines for Sherman Act violations from $5,000.00 to $50,000.00, but had not increased the maximum fines under section 14 of the Clayton Act.

In language which has been much quoted in subsequent decisions, the Court laid down the following criteria for determing when a corporate representative will be held accountable for his company's violation:

> [W]e hold that a corporate officer is subject to prosecution under § 11 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.[19]

As specifically noted in an excellent article by Richard D. Whiting appearing in both the *Kentucky Law Journal*[20] and the *ABA Antitrust Law Journal*,[21] the *Wise* case would appear to have resolved debate over the vulnerability of an executive who occupies a position of responsibility from which he could have controlled the illegal activities of subordinates, had he known of them, by requiring that one must "knowingly participate" as a prerequisite to individual criminal liability. Conceivably, in the proper application of this standard it would be improper to impute liability to the unknowing executive. Knowledge, however, just as any other fact, may be proven circumstantially. One can certainly conceive of cases where an executive is found to have known much more than he claimed he did, and certainly a denial of knowledge by the executive is not conclusive.[22]

United States v. New York Great A.&P. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957); Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962); United States v. Wise, 370 U.S. 405 (1962); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

17. 370 U.S. 405 (1962).

18. 15 U.S.C. §24 (1970).

19. 370 U.S. at 416.

20. Whiting, *Criminal Antitrust Liability of Corporate Representatives*, 51 KY. L. REV. 434 (1963).

21. 21 ABA ANTITRUST L.J. 327 (1962).

22. *See* United States v. New York Great A.&P. Tea Co., 173 F.2d 79, 88-90 (7th Cir.

Wise and the conclusions expressed therein applicable to liability for having "authorized" the crime are less satisfactory. The question as posed by Whiting is "Can authorization (i.e., participation) be inferred from the superior's knowledge, coupled with his passive acquiescence or continued non-action?"[23] Whiting suggests that something more affirmative is required to impose criminal sanctions.[24]

A review of some of the cases preceding *Wise* may be helpful in determining individual culpability for antitrust violations.

In *United States v. MacAndrews & Forbes Co.*,[25] the presidents of two corporations were indicted along with their corporations for restraining trade and attempting to monopolize the licorice paste business. The court refused to dismiss the indictments, which alleged, *inter alia*, various overt acts by the individuals in devising and performing the alleged price-fixing and market division, including correspondence with each other to set prices for their corporations' goods. The individual defendants sought to excuse themselves on the grounds that they were merely acting under corporation coercion. The court said that such a defense was a question of fact which should be determined at trial. The court also said it was possible to charge in the same indictment the individual defendants with personal "participation, direction, or activity" in the illegal activities as well as charge the corporation itself. In any event, the court of appeals refused to set aside a guilty verdict against the corporate defendants[26] and no mention of the individual defendants was made. The appeal to the Supreme Court was dismissed.[27]

In *United States v. Patterson*,[28] indictments were upheld against officers and agents of the National Cash Register Co. as well as against the corpo-

1949); Coro, Inc., 63 F.T.C.1164, 1204-06 (1963).

23. Whiting, *supra* note 20, at 439, and *supra* note 21, at 332.

24. It is interesting to note that, while Congress has increased the penalites for antitrust violations on at least two occasions, Congress has refused the opportunity of making corporate officials criminally liable for merely siting back and acquiescing in the illegal activities of subordinates. During the debates on section 14 of the Clayton Act, Representative Volstead introduced a provision that "any person who shall suffer or permit to be done" any act prohibited by the antitrust laws would himself be guilty of the violation. The House rejected this provision as "too drastic." 51 CONG. REC. 9676, 9678 (1914). Similarly, after Senator Kefauver conducted investigations into the electrical equipment conspiracy in 1961, he and Representative Celler introduced companion bills, S. 2254 and H.R. 8138, 87 Cong., 1st Sess. (1961), which would have extended liability of corporate officers to include ratification of acts that violated the Sherman Act. The bills defined ratification to include:(1) the possession of knowledge or reasonable cause to believe that a corporation is engaged in or is about to engage in any violation; (2) the possession of express or implied power to prevent such violation or to report the violation to a corporate official with such power; and (3) failure to exercise that power. Apparently, these bills were never reported out of committee.

25. 149 F. 823 (S.D.N.Y. 1906).

26. 149 F. 836 (C.C.S.D.N.Y. 1907).

27. 212 U.S. 585 (1908).

28. 201 F. 697 (S.D. Ohio 1912).

ration itself. The court said that the indictment was sufficient since it alleged that the individual defendants controlled and directed the corporate defendant as officers or agents and that they *knowingly* and *consciously* participated in a corrupt conspiracy to restrain trade, by committing such acts as inducing, hiring, and bribing employees and ex-employees of competitors to disclose trade secrets of competitors, and instructing NCR salesmen to make derogatory comments about competitors.

In *United States v. Winslow*,[29] the court upheld the sufficiency of an indictment that alleged that certain individual defendants had organized the United Shoe Machinery Co. and directed and controlled the lease and sale of the shoe machinery. The court said that the corporate officials had specifically been charged with an active role in the alleged illegal activites of the corporation. The court said that an officer, who is the "actual, present and efficient" actor, cannot hide behind his corporate obligations to escape personal liability since all parties "active" in promoting a violation are principles. Interestingly, the court relied on an earlier civil case, *National Cash Register Co. v. Leland*,[30] for the principle that a corporate official is liable only for those torts which he himself commits or which he specifically commands.

In *United States v. National Malleable & Steel Castings Co.*,[31] the court upheld an indictment against officers of various corporate defendants on the ground that the indictment averred the officers were active in the management, direction and control of the corporate defendants, and, thus, the indictment complied with language of section 14 of the Clayton Act.

In *United States v. Mathues*,[32] the court upheld the sufficiency of the indictment of corporate officials on the theory that the indictment averred the corporate defendants acted under the direction and control of the officials in the illegal activity.

In *Meehan v. United States*,[33] the court upheld the sufficiency of the indictment against a corporate official on the ground that the indictment alleged the illegal corporate acts were done under the official's direction.

A fair reading of the above cases would tend to support the view that non-action or passive acquiescence even with knowledge would fail to meet the more demanding criteria of some active personal involvement or participation which the above cases seem to emphasize. Indeed, in a case decided four days after the Supreme Court's decision in *Wise* the court seemed clearly to require some positive action by the individual defendant in order to subject him to personal criminal liability. In *United States v. North American Van Lines*,[34] the court emphasized that the individual

29. 195 F. 578 (D. Mass. 1912).
30. 94 F. 502, 508 (1st Cir. 1899).
31. 6 F.2d 40 (N.D. Ohio 1924).
32. 6 F.2d 149 (E.D. Pa. 1925).
33. 11 F.2d 847 (6th Cir. 1926).
34. 202 F. Supp. 639, 644-45 (D.D.C. 1962).

defendant officer of the defendant corporation must have "authoirzed, ordered or done something under such circumstances as to have contributed to the corporation's violation . . . [or] that the defendant officer participated in an active way in the conspiracy."

The view has persisted, however, both before and after the *Wise* case that there are circumstances under which non-action or passive acquiescence ought to be sufficient to charge the passive executive with criminal responsibility as a "participant." It is by no means difficult to construct tough (from the standpoint of the defendant) hypotheticals. One difficult hypothetical was proffered by Milton Handler, testifying before the Senate Anti-Monopoly Subcommittee, where Mr. Handler suggested that if a group of corporate officers, who are about to engage in flagrant price-fixing, inform their president of their plans, and the president sits there in silence, then such non-action by the president might well be viewed as participation.[35] The situation suggested by Mr. Handler, however, deals with a *prospective violation* and should be distinguished from a report by subordinates to their corporate superior of past violations which are abruptly halted by the executive receiving knowledge of the past transgressions.[36]

Some commentators have not been willing to read the available precedents and particularly the language of some of the cases to limit the criminal liability of corporate officers and agents who actively promote the coporation's participation in illegal activities. At least one commentator asserts that a corporate official is criminally liable not only when he actively participates in illegal activities, but also when he fails to take action to stop illegal practices which come to his attention and which he has authority to stop.[37]

A note, appearing in the *Vanderbilt Law Review* in 1965,[38] seems to suggest that a corporate official's criminal liability may stem from his passive *acquiescence* and *ratification* of the illegal activities.

Mr. Richard A. Whiting in an article written before the *Wise* decision, suggested that under certain circumstances, non-action by a superior official in a position to take action may be deemed his authorization to the subordinate to persist in the practices in question.[39] This concept would apply where a passive executive has knowledge of illegal activity by one of his subordinates and acquiesces. In Whiting's view, acquiescence may be

35. *Hearings on S. 996, S. 2252, S. 2254, and S. 2255 before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 169 (1962).

36. *See* Kramer, *Liability of Corporate Officers and Directors Under the Antitrust Laws*, 17 BUS. LAWYER 897, 902 (1962); Note, *The Antitrust Laws and the Corporate Executive's Civil Damage Liability*, 18 VAND. L. REV. 1938, 1953 (1965).

37. Rooks, *Personal Liability of Officer and Directors for Antitrust Violations and Securities Transactions*, 18 BUS. LAWYER 579, 585-86 (1963).

38. Note, *The Antitrust Laws and the Corporate Executive's Civil Damages Liability*, 18 VAND. L. REV. 1938, 1943 (1965).

39. Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 933 (1961).

implied from failure to repudiate the illegal activites or to take steps to prevent their recurrence.

Some of the major cases relied upon to impute liability to a corporate official for his acquiescence are *Phelps Dodge Refining Corp. v. FTC*;[40] *Metropolitan Bag & Paper Dist. Rib Ass'n v. FTC*;[41] *Riss & Co. v. Association of American R.R.*;[42] *FTC v. Standard Education Society*;[43] *Standard Distributors v. FTC*;[44] *United States v. Masonite Corp.*;[45] *Alaska Steamship Co. v. International Longshoreman's Ass'n*;[46] and *United States v. Food & Grocery Bureau.*[47]

One difficulty with placing great reliance on these cases as precedents for the proposition that a corporate official's acquiescence in actions of subordinates constitutes criminal liability is that only *Food & Grocery Bureau* involved the criminal liability of a corporate official. Admittedly, however, certain courts have suggested that the legal standards governing civil liability are no different from those which are applicable in determining criminal responsibility.[48]

In *Phelps Dodge*, the FTC issued a complaint against an association, its corporate members, and various officers and directors of the association for unfair methods of competition. The Commission issued a cease and desist order. Four corporate members and one director appealed the order on the ground of insufficient evidence. In sustaining the order against the corporate petitioners, the Second Circuit said that corporate members of the association who continue membership in the association after they know or should know of the illegal activites of the association will be held as coconspirators. Failure to disassociate from the association constitutes ratification. However, when the court examined the evidence against the director of the association it dismissed the order against him. The court said that there was no evidence that he had ever attended a directors' meeting or knew anything about the illegal activites. The court applied the doctrine that a director is not personally liable for the torts of his corporation unless

40. 139 F.2d 393 (2d Cir. 1943).

41. 240 F.2d 341 (2d Cir.), *cert. denied*, 355 U.S. 819 (1957).

42. 170 F. Supp. 354 (D.D.C.), *cert. denied*, 361 U.S. 804 (1959); and 187 F. Supp. 306 (D.D.C. 1960).

43. 302 U.S. 112 (1937).

44. 211 F.2d 7 (2d Cir. 1954).

45. 316 U.S. 265 (1942).

46. 236 F. 964 (W.D. Wash. 1916).

47. 43 F. Supp. 974 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943).

48. *See Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 1000 (1959), in which it is said that in practice the courts, in discussing applicable rules, do not seem to distinguish between civil and criminal Sherman Act cases. *See also* United States v. American Precision Prods. Corp., 115 F. Supp. 823 (D.N.J. 1953) (false claims civil action by the United States); Schreiber v. Jacobs, 128 F. Supp. 44 (E.D. Mich. 1955) (a stockbroker's derivative action). A conspiracy in a criminal action, however, must be proven beyond a reasonable doubt.

he is shown to have *personally voted* for *or otherwise participated in them.*[49]

In *Metropolitan Bag*, the FTC issued a complaint against a trade association, its officers, affiliated associations, their officers, and the corporate members for a conspiracy to fix uniform prices and discount terms. The Commission issued a cease and desist order, and on appeal the Second Circuit affirmed the order in regard to some of the petitioners and set aside in regard to others. The court relied on *Phelps Dodge* for the principle that corporate members of the association were charged with knowledge from which they could have discovered the illegal activities of the association. In discussing the sufficiency of evidence against two individuals, the court set aside the order against one for whom there was no evidence that he even knew of illegal activites of the association and sustained the order against one who was shown to have taken an active role in the illegal activites of the association. In setting aside the order against Fred Free, Jr., the secretary of one of the associations, the court declared, "There is nothing in the record to suggest that Free knew about Metropolitan's illegal life; and to infer so much from his title is unwarranted."[50]

In *Riss & Co.*, the plaintiff filed a civil antitrust suit seeking damages and an injunction against the defendant railroad associations, their members and a public relations firm for conspiracy to restrain trade. Judge Sirica cited *Metropolitan Bag* for the proposition that continued membership in an association and payment of dues, with a resonable opportunity to learn of the illegal activities of the association, sufficiently enables a member corporation to be *charged with liability*. However, a corporation can be *held responsible* for the illegal actions of the association only if it can be shown that the corporation knew and approved of such activities and their unlawful objective.[51] Thus, Judge Sirica seemed to be making the distinction between sufficiency of evidence to charge a corporation with liability, (i.e., sufficient evidence to withstand a motion for summary judgment by the corporation, and sufficiency of evidence to hold the corporation responsible for the association's illegal actions. The latter requires actual evidence of approval (an affirmative act), while the former requires only membership in the association and a reasonable opportunity to discover the illegal activities.

In *Standard Education Society*, the Court held that the FTC was justified in including a corporate official within the ambit of a cease and desist order where the corporation involved is owned, dominated, and managed by the official and the official acts with practically the same freedom as though no corporation existed. The Court emphasized the necessity of making the cease and desist order as effective as possible.[52]

49. 139 F.2d at 397.
50. 240 F.2d at 345.
51. 187 F. Supp. 306, 312-13 (D.D.C. 1960).
52. 302 U.S. at 119-20.

In *Standard Distributors*, the Second Circuit, in an opinion by Judge Learned Hand, expanded the rationale for including corporate officials in the terms of a cease and desist order. Judge Hand noted that to be included within a cease and desist order a corporate official need not be shown to have the same connection with the illegal activity as he would in order to be made an accomplice to a crime or a joint tort-feasor. Rather, Judge Hand read the *Standard Education Society* decision to permit inclusion of those corporate officials who are in top control of the illegal activities but not necessarily actively involved in the activities. Judge Hand defended this approach as being similar to holding a principal responsible for acts of his agent under the doctrine of "apparent authority."[53]

In *Masonite Corp.*, the Supreme Court used broad language to implicate corporations in the price-fixing scheme effectuated by patents held by the named defendant. The Court cited *Interstate Circuit v. United States*[54] for the principle that evidence of complicity in the illegal conspiracy could be satisfied by showing that the conspirators knew concerted action was contemplated and invited, and that they gave their adherence to the scheme and participated in it. The Court refused to accept the corporations' argument that only the named defendant had fixed prices. The Court declared that the fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct joint action.[55] Thus, the Court seemed to extend liability for Sherman Act violations to those corporations that acquiesced in the illegal activity of another. But implicit in the facts of the case is the overriding consideration that the corporations were not totally passive in the illegal price-fixing scheme. Although they did not set the prices, they did agree with the named defendant to adhere to the prices fixed by the named defendant for his patented products.

Another case cited in support of the view that acquiescence by officers may expose them to criminal liability is *Alaska Steamship Co.*. In that case, the district court enjoined the officers of a union from committing any further illegal activites against the plaintiff during a labor dispute. The court said that, if the officers of the union did not disavow the illegal acts of members under their control by disciplining them or expelling them from the union, then the officers would also be held liable for the illegal acts.[56] While the language in this case might be applied to a situation involving a corporate official and his subordinates, the context of the case and later legislative actions by Congress should be kept in mind. In the early portion of this century, union officials were often held responsible for illegal actions by union members until the passage by Congress of section

53. 211 F.2d at 14-15.
54. 306 U.S. 208 (1939).
55. 316 U.S. at 275-76.
56. 236 F. at 972.

6 of the Norris-LaGuardia Act[57] which imposed liability on a union official for acts of others in the union only upon clear proof of actual participation in, authorization of, or ratification of such acts after actual knowledge of the acts.

Food & Grocery Bureau is one of the few criminal antitrust cases which is cited for the proposition that criminal liability can be fastened on directors who knew of the illegal activities engaged in by the Bureau's secretaries to maintain retail grocery prices and who did not repudiate such activities.[58] The court seemed to indicate that a director could be held criminally liable for his passive acquiescence in the illegal activites of subordinates. In fact, this case has been cited for this very proposition.[59]

The Ninth Circuit affirmed the guilty verdicts.[60] In affirming the district court, however, the court of appeals analyzed the factual context of the directors' activities more closely than the district court. The Ninth Circuit's opinion demonstrated that the directors were not passive observers of the illegal activities of the Bureau's secretaries. Rather, the directors attended meetings at which they agreed that price quotations given out by the Bureau should be adhered to by members of the Bureau, at which they set up a committee to meet with manufacturers in order to encourage them to place certain items under so-called Fair Trade contracts in order to insure the retailer a "reasonable profit," at which they later authorized the Bureau's secretary to urge Bureau members to press manufacturers for this purpose, and at which they adopted resolutions condemning Bureau members who sold items below agreed-upon prices.[61] These examples of activities by the board of directors seem to discredit the view that the directors were held liable only because of their passive acquiescence in the illegal activities of their subordinate secretaries.

The foregoing cases, which have been cited for the principle that a corporate official is criminally liable for acquiescence in actions of his subordinates appear something less than conclusive.

Even in the so-called per se offenses such as price-fixing, market division, customer allocation, and group boycotts, there may be legitimate differences of opinion between the Antitrust Division and the individual

57. 29 U.S.C. § 106 (1970):

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

58. 43 F. Supp. at 980-81.

59. *See* Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 933 n.20 (1961); Rooks, *Personal Liability of Officers and Directors for Antitrust Violations and Securties Violations*, 18 BUS. LAWYER 579, 586 n.17 (1963).

60. 139 F.2d 973 (9th Cir. 1943).

61. *Id.* at 976-78.

officer or agent on such questions as whether the circumstances are adequate to infer "knowledge" on the part of the individual officer or agent. Moreover, as suggested above, even with knowledge an individual officer or agent may have played merely a passive role and it may legitimately be advocated that the individual officer or agent was not a participant in a conspiracy within the proper meaning and application of the standards announced in *Wise*. In addition, there are circumstances where one should not be too ready to accept the per se label which the Antitrust Division seeks to ascribe to conduct, even if the Division's theories are reflected in the indictment. The blunt truth is that what the Antitrust Division and even the grand jury may assert to be per se offenses may well involve conduct that is susceptible to quite different inferences. Quite obviously, even the courts are not always in agreement on the propriety of affixing per se labels to a particular course of conduct.[62]

The foregoing is not to suggest that there is great room for debate over the criminal responsibility of an individual officer or agent who actually attends and participates in meetings at which prices are fixed, customers or markets allocated, or other activities undertaken which have been clearly illegal for many decades. Nor is it suggested that a case can be made for an individual officer or agent where the individual officer or agent authorizes or directs subordinates to engage in violations of the law. It is to suggest that where conduct is equivocal as it frequently is, where "knowledge" must be inferred from circumstantial evidence, where "authorization" must be premised on implied authorization, and where "directing" illegal activities must be premised on proof that is more related to the position of the executive rather than to proof that he actively played a role in the conspiracy, the individual officer or agent has a viable case which should not be submerged by focusing on the culpability of the corporation or of other subordinates who are active in the conspiracy.

It seems reasonably predictable that individual officers and agents faced with the severity of the new penalties and, in particular the possibility of jail sentences, for up to three years, will be more aggressive in seeking to defend their individual activities and establish their lack of knowing participation in a conspiracy, even under circumstances where the corporation by which the officer or agent is employed may well desire to enter a plea of nolo contendere, notwithstanding the increased penalties.[63] In the past

62. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969) (decided by a sharply divided Court, 5-4).

63. Under section 5(a) of the Clayton Act, 15 U.S.C. §16(a) (1970), a judgment may be used against a defendant in permitting subsequent civil private antitrust actions as prima facie evidence. However, a nolo contendere plea is an exception to this general rule, and a corporation may be well advised to plead nolo contendere and pay its fine rather than assume the risk of suffering an adverse judgment that may be used by subsequent plaintiffs in treble damage actions. For a discussion of the considerations involved in entering a nolo contendere plea, see TASK FORCE REPORT 111.

this has not always been the case. Marginal cases involving the criminal responsibility of individual officers and agents have been infrequently litigated, but almost all of us who work in the criminal antitrust area are familiar with cases where pragmatic considerations and evaluation of risk resulted in a nolo plea for an individual officer or agent (usually at the individual's insistance and always with his consent) who was at best at the fringes of an alleged conspiracy and who may well have been acquitted by the jury had the case been tried.

One can readily understand an enforcement policy that seeks to personalize responsibility in criminal cases when the maximum fine for the corporate defendant is $50,000.00. The rationale of the policy becomes less clear, except in extremely clear-cut cases of active individual participation, where the maximum fine for the corporation is increased to $1,000,000.00.

In *United States v. Hilton Hotels Corp.*,[64] the Ninth Circuit affirmed the conviction of the defendant hotel and its purchasing agent who threatened a supplier with loss of the hotel's business unless the supplier made contributions to an association set up by businesses in Portland to attract conventions. The jury convicted the corporation and the purchasing agent for violations of section 1 of the Sherman Act, despite the fact that the agent's action was contrary to the policy of the corporation and contrary to the express instructions of the manager and assistant-manager of the hotel. The manager of the hotel was acquitted. On appeal, the court cited *Wise* for the principle that corporate agents are subject to punishment if they authorized, ordered, or participated in the acts constituting the violation. The court of appeals went on to discuss the likelihood that high management officials are likely to have participated in policy decisions underlying Sherman Act violations, or at least become aware of them. Instead of indicating that such awareness alone constituted criminal liability, the court declared that identification of the particular agents responsible for the violation is especially difficult and ineffective as a deterrent. The court concluded that the most appropriate and effective deterrent is conviction and punishment of the corporation rather than any individual.[65]

There have been and will continue to be cases where the individual conduct of the officer or agent is so clearly a violation of the law and so willful in its execution that indictments can and should be returned. It is suggested, however, that it will be appropriate in an increasingly large number of cases to weigh carefully the fairness of naming an individual officer or agent in indictments which charge the commission of a felony. Certainly, no general policy of personalizing responsibility will suffice where facts indicate only marginal involvement and where likelihood of convicition would flow from mere joinder with more culpable actors in the conspiracy.

64. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, ___ U.S. ___, 93 S.Ct. 938 (1973).
65. *Id.* at 1006.

It will not do to rely on "slight evidence of participation" or a dubious chain of circumstances, or the desire to take advantage of a more effective tactical use of the co-conspirator exception to the hearsay rule. In short, taking into account the new penalites and in particular the more effective sanctions that are now available with respect to corporations, the Antitrust Division should engage in an even more careful review of each decision made with respect to prosecution of individual officers or agents. Extremely wide latitude should be given to permit an individual officer or agent to tell his story and make out his case prior to the issuance of indictment.

Voluntary compliance with the antitrust laws is essential. Hopefully, antitrust compliance will receive renewed attention if only because an effective compliance program may well be essential for financial self-preservation of corporations and individuals. Voluntary compliance and efforts toward that end will be promoted and confidence in the antitrust laws and their fundamental fairness enhanced by cautious and selective use by the Antitrust Division of its new weapon, the increased penalties, particularly as applied to individual officers and agents who in the final analysis must make the antitrust laws work by reflecting in their day to day business decisions respect for and adherence to the underlying principles expressed in the antitrust laws.