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The Antitrust Laws and the Corporate Executive's Civil Damage Liability

Joseph R. Manning

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I. INTRODUCTION

The modern corporate executive labors in a complex business world that would have astounded his predecessors. His corporation, with its emphasis on commercial diversification, is much more intricate than the corporation of yesterday. As this corporate activity has expanded so has the responsibility of the corporate executive, who is charged with the duty of seeing that the entire entity functions properly.

In addition to his increased managerial function, the executive of today is surrounded by state and federal regulations of which he must be ever mindful. If he allows himself to run afoul of these regulations, he may find that he is being pressed from both sides by persons seeking to penalize him for the injuries he has caused them. On one side is the state or federal government seeking to impose criminal sanctions. At the same time, private litigants may be demanding compensation for injuries they have sustained as a result of his misconduct.

It will be the purpose of this note to examine the executive's potential civil liability for damages resulting from his violations of the federal antitrust laws. First, there is the injury to the persons against whom his unlawful conduct was directed. They may desire compensation for their injuries, as well as treble damages in a suit authorized by section 4 of the Clayton Act.[1] Also, the executive may cause injury to his corporation by subjecting it to fines, damages, and litigation expenses. This presents the question: whether a shareholder may bring a derivative suit against the executive for these damages to the corporation. This note will seek to answer these questions and to deal with the various subsidiary issues involved in each. Brief mention will also be made of the executive's possible indemnification by the corporation.

II. TREBLE DAMAGE SUITS AGAINST THE CORPORATE EXECUTIVE

A. *Treble Damage Liability of the Corporate Executive*

The primary purpose underlying the enactment of the antitrust laws was a desire on the part of Congress to protect the public from combinations that tended to monopolize and restrain interstate trade.[2]

1. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).
2. See, *e.g.*, Wilder Mfg. Co. v. Corn Prods. Co., 236 U.S. 165 (1915); Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 889 (4th Cir. 1934).

To implement this purpose a procedure was established whereby the federal government could investigate suspected violations and institute both criminal and civil proceedings. Further compliance was insured by Congressional solicitation of aid from private individuals. To encourage private suits for antitrust violations, Congress enacted section 4 of the Clayton Act,[3] which gives to anyone injured in his "business or property"[4] by reason of an antitrust violation an action for treble damages.[5] It was hoped by Congress that the lure of treble damages would entice injured persons to prosecute private actions, thus deterring further violations and aiding the federal government in enforcing the antitrust laws.[6]

On its face, section 4 of the Clayton Act places no limitation on the person the private litigant may name as a defendant in his treble damage suit. Consequently, a question may arise as to just what the executive's potential liability is under the treble damage provision.[7] Although private suits are numerous, there seem to be few cases in which corporate officers and directors have been named as defendants. This inclination to name the corporation as the defendant rather than the executive is better understood when one considers the greater likelihood of a corporation being able to satisfy a large treble damage judgment. There are circumstances, however, under which a person might understandably prefer suing the executive

3. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

4. The term "business or property" denotes a commercial venture or enterprise, and § 4 of the Clayton Act contemplates an injury to this interest before a treble damage suit will be authorized. See, *e.g.*, Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641, 644-45 (D.N.J. 1960); Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322 (S.D.N.Y. 1959).

5. The courts have not agreed as to the nature of the treble damage suit. Some courts have said that the action was compensatory in nature. Strout v. United Shoe Mach. Co., 195 Fed. 313 (D. Mass. 1912). Others have said the suit was to exact a penalty for the misconduct and to act as a deterrent for future wrongdoings. Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176 (E.D. Tenn. 1940). And still others have held that the action is to multiply the antitrust enforcement agencies and their effectiveness and, at the same time, to compensate the injured plaintiff. Maltz v. Sax, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943).

6. See, *e.g.*, United States v. Borden Co., 347 U.S. 514, 518 (1954); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 846 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

7. For an excellent discussion of the antitrust laws and their general effect on the corporate executive, see Whiting, *Antitrust and the Corporate Executive* (pt. I), 47 VA. L. REV. 929 (1961), (pt. II), 48 VA. L. REV. 1 (1962). See also Rooks, *Personal Liabilities of Officers and Directors for Antitrust Violations and Securities Transactions*, 18 BUS. LAW. 579 (1963).

directly. The most obvious situation arises where the corporation is insolvent. Under these circumstances the corporation would be unable to satisfy any judgment against it, and the private litigant's best hope of compensation would be in a suit against the individual executive. Second, if the corporation has been dissolved and its assets liquidated, the private litigant might have no recourse except against the executive, unless he could follow the assets into the hands of the recipients.[8] The corporation being no longer in existence, the executive may well be the only person subject to a suit to redress the plaintiff's injury.[9]

In conclusion, the plaintiff's selection of the appropriate defendant must be made after an examination of the particular facts of each case. The plaintiff might very reasonably conclude that it would be to his advantage to seek to hold both the executive and the corporation as joint tort-feasors. The only generalization to be drawn is that the private litigant should give consideration to the question of whether the corporation or the individual executive will be better able to satisfy a large treble damage judgment.

B. *Legal Theories Imposing Executive Liability*

It is well-settled that the corporate executive is personally liable for torts which he commits.[10] This doctrine is based upon a widely accepted rule of agency law. "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal. . . ."[11] When the executive, who may rightfully be called an agent of his corporation, commits a tort, whether in the scope of his employment or not, he may be held personally liable regardless of the fact that the principal may also be liable to the third person for his misconduct.[12] Consequently, the executive will not be permitted to use the corporation to shield him from his unlawful conduct. If the agent's tort is done within the scope of his authority, however, the corporation may also be liable with its agent, and the injured third person may look to either for satisfaction of his injuries.

The action by a private individual seeking treble damages is an action in tort for the damages he has actually sustained to his

8. 15A Fletcher, Private Corporations §§ 7580-93 (1947).

9. For a discussion of the problems raised by the dissolution of a corporation facing impending antitrust litigation, see Comment, 21 U. Chi. L. Rev. 480 (1954).

10. See, *e.g.*, Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962); Armour & Co. v. Celic, 188 F. Supp. 700 (E.D.N.Y. 1960).

11. Restatement (Second), Agency § 343 (1958).

12. See United States *ex rel.* Marcus v. Hess, 41 F. Supp. 197, 211-12 (W.D. Pa. 1941).

"business or property."[13] Section 4 of the Clayton Act requires the judge to treble the amount of damages the jury finds the plaintiff has sustained. The leading case applying the agency rule of liability to a corporate executive for treble the amount of damages his antitrust violations has caused is *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*[14] In this action, the complaint alleged that the corporate executive had violated the Robinson-Patman Act[15] by paying secret commissions to the plaintiff's agent. The court held that, if his participation in the unlawful transaction was proved, the executive would not be relieved of liability merely because he was an agent of the corporation making the illegal payments; he must personally suffer the consequences of his own tortious conduct.[16]

It is no defense to a charge of participation in conduct prohibited by the antitrust laws that the executive lacked a specific intent to violate the statute. The antitrust laws do not speak of liability being imposed on those who "knowingly and willfully" violate them. Liability is phrased instead in terms of unlawful consequences. The Supreme Court has stated that is is not necessary to find a specific intent to restrain trade, eliminate a competitor or creat a monopoly[17] to be found guilty of an antitrust violation. It is sufficient that the natural consequences of the intended act create a condition prohibited

13. See Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 267 (7th Cir. 1943).

14. 37 F. Supp. 728 (W.D. Ky. 1941), *aff'd sub nom.* Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943).

Early cases talked of the executives being "more than simply agents," and closer to being principals when they have participated in the wrongdoing. See, *e.g.*, Thomsen v. Cayser, 243 U.S. 66, 88 (1917); Clabaugh v. Southern Wholesale Grocers' Ass'n, 181 Fed. 706-07 (C.C.N.D. Ala. 1910).

15. Section 4 of the Clayton Act authorizes a treble damage suit for a violation of *any* of the antitrust laws, of which the Robinson-Patman Act is a part.

16. Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., *supra* note 14, at 732.

In Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300-03 (S.D.N.Y. 1956), *appeal dismissed,* 243 F.2d 795 (2d Cir. 1957), the defendants in a treble damage suit contended that they could not be individually liable under § 4 of the Clayton Act for conduct performed on behalf of the corporation. They reasoned that since § 4 and § 14 of that act were enacted at the same time, Congress manifested an intention to make executives criminally liable but not civilly liable when acting in their representative capacities. The directors' conclusion was based on the fact that § 14 expressly makes executives criminally liable for conduct performed on behalf of the corporation while § 4 omits such a specification. The court rejected the directors' contention holding that, considering the broad purpose of the antitrust laws, if Congress had meant to exempt executives acting on behalf of the corporation, Congress would have used language making that intention clear. See also Maternity Trousseau, Inc. v. Maternity Mart, 196 F. Supp. 456, 458 (D. Md. 1961). For a pre-Clayton Act case, see Clabaugh v. Southern Wholesale Grocers Ass'n, *supra* note 14.

17. United States v. Griffith, 334 U.S. 100, 105 (1948). See also Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 26 (9th Cir. 1960).

by the antitrust laws.[18] The parties are presumed to have intended the natural consequences of their conduct.[19] It has been said that to require a specific intent would be adverse to the purpose and policy of the antitrust laws and would destroy their meaning.[20]

Since a specific intent to violate the antitrust laws is not a prerequisite to liability, an executive cannot escape liability on the grounds that he acted with good[21] intentions. Likewise the executive's good faith belief that he was not violating the law is no defense.[22] This can produce some harrowing situations for the honest executive who by his best efforts attempts to abide by the prohibitions of the antitrust laws. The executive owes a duty to the shareholders of his corporation to manage it in as profitable a manner as is possible within the law. But the antitrust laws speak only of forbidden results and are vague about the standards of allowable conduct. If the executive seeks the advice of legal counsel and carries forward a plan of future conduct only after receiving counsel's approval, is he protected from treble damage suits?[23] From the principles stated above, this question when litigated is likely to be answered in the negative. Since good faith and good intentions are not a defense to treble damage actions, it appears reasonable to assume that the courts would not sustain a defensive plea which contended that the conduct was pursued only after a good faith reliance on the advice of counsel. Because of the vagueness and uncertainty of the antitrust laws, such a rule, and to some extent the general application of the rule disallowing good faith as a defense, seems somewhat harsh on the executive who makes an honest attempt to abide by the antitrust laws but who has committed a technical violation. It may be quite difficult for even the experienced executive to forecast accurately the consequences of a planned course of conduct. Consequently, the advice of counsel would be quite beneficial to the executive. It is submitted that, if an executive seeks such advice and in good faith relies on it, he should be protected in a civil suit where the charged violation against him is not of the per se type.[24] It is not, however, suggested that this rationale be

18. See Sunkist Growers, Inc. v. Winckler & Smith Prod. Co., *supra* note 17, at 105; *cf.* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608, 614 (1953).

19. Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., *supra* note 17.

20. United States v. Griffith, *supra* note 17.

21. See, *e.g.*, United States v. United States Gypsum Co., 340 U.S. 76, 87 (1950); United States v. Richfield Oil Corp., 99 F. Supp. 280, 286-87 (S.D. Cal. 1951).

22. See Amusement Co. v. Ludwig, 82 F. Supp. 265, 267 (D. Minn. 1949).

23. The same problem may be present where the executive relies on an advisory opinion of the Justice Department or the Federal Trade Commission. What is the executive to do if a private litigant later brings a treble damage suit against him?

24. Per se antitrust violations are those acts which without more are unreasonable restraints of trade. They include such acts as agreements to fix prices, United States

applied in cases involving the criminal liability of the executive. Rather, it is suggested that the Justice Department, by its policy of criminally proceeding against the executive only for the per se type violation, has impliedly acknowledged the vagueness in the standards of conduct established by the antitrust laws.[25] In the per se type of violation, the illegality of the conduct is clear or an intent to violate the laws is manifest. Thus, there is far less danger of an executive, who makes an honest attempt to abide by the antitrust laws, being criminally prosecuted.

Where the executive is not charged with having actively participated in the prohibited conduct, his liability must rest on his passive acquiescence and ratification of the illegal activities.[26] To prove the acquiescence, it must be shown that he had knowledge and approved of the activities and their unlawful objective.[27] The executive will have little to fear if, upon learning of the illegal activities, he repudiates and dissociates himself from them.[28] But if he does not repudiate the violations, he may be found to have ratified them and will consequently be as guilty as the actual participants.[29] Actual knowledge is not the sole requirement. Once the executive has been put on notice that something unlawful is being conducted, he can not close his eyes to it, but is charged with knowledge of all that a reasonable inquiry would have revealed.[30]

The second legal theory imposing treble damage liability upon the corporate executive predicates his civil liability upon his corporation's criminal liability. Section 14 of the Clayton Act[31] charges a corporate antitrust penal violation to the corporate executive who authorized, ordered, or did any of the acts constituting the violation.

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v. Socony-Vaccum Oil Co., 310 U.S. 150 (1940), concerted refusals to deal, Associated Press v. United States, 326 U.S. 1 (1945), tying clauses, International Salt Co. v. United States, 332 U.S. 392 (1947), and agreements to restrict production or allocate territories. United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

25. See generally ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 349-50 (1955).

26. See Phelps Dodge Ref. Corp. v. FTC, 139 F.2d 393, 397 (2d Cir. 1943).

27. However, the executive is not a party to the misconduct for the simple reason that he is a director or officer of the corporation or is a member of an association guilty of an antitrust violation. See *ibid.;* Riss & Co. v. Association of Am. R.R., 187 F. Supp. 306, 312-13 (D.D.C. 1960).

28. Phelps Dodge Ref. Corp. v. FTC, *supra* note 26, at 396-97.

29. United States v. Masonite Corp. 316 U.S. 265, 274-76 (1942); Metropolitan Bag & Paper Distribs. Ass'n v. FTC, 240 F. 341, 344 (2d Cir.), *cert. denied,* 355 U.S. 819 (1957).

30. Phelps Dodge Refining Corp. v. FTC, *supra* note 26, at 396.

31. "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation. . . ." 38 Stat. 736 (1914), 15 U.S.C. § 24 (1964).

Therefore, since a corporation can act only through its executives, every antitrust penal violation can be traced to some executive who may also be charged. This places the executive's liability on an equal footing with that of the corporation so that both are within the civil liability provision of section 4 of the Clayton Act, which gives a right of action to anyone injured "by reason of anything forbidden in the antitrust laws."[32]

Predicating the corporate executive's civil liability upon his corporation's penal violation raises an interesting question. That is whether it is only necessary for the corporation to be criminally liable in order to impose treble damage liability upon the executive. Under a literal applieation of section 14 the question must be answered in the affirmative. But this result appears to be inconsistent with the policy of the Justice Department in not bringing criminal proceedings against the executive except in the per se type of antitrust violation. The Justice Department, by following this policy, has impliedly said that there may be circumstances under which it will not feel justified in proceeding against the executive; however, it may proceed against the corporation. This difference arises from the vagueness of the antitrust laws and their standards in the non per se situation, as well a desire on the part of the Justice Department not to prosecute the honest but negligent offender.[33] The import of this is that a court, basing its decision on the executive's and the corporation's criminal liability as defined by the broad language of section 14, may find an executive civilly liable under circumstances which the Justice Department would consider as insufficient justification for bringing a criminal proceeding. It is submitted that this second basis of civil damage liability needs to be redefined and that it should be limited only to the per se type of antitrust violation where the executive's criminal liability is clear.[34]

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32. Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., *supra* note 14, is the leading case on this theory of liability.

33. In United States v. Winslow, 195 Fed. 578, 584 (D. Mass. 1912), *aff'd*, 227 U.S. 202 (1913), the court recognized the uncertainty of the antitrust laws and hardships that fear of a criminal indictment could bring to the corporate executive who has acted honestly and in good faith.

34. Whiting in his article *Antitrust and the Corporate Executive* (pt. I), *supra* note 7, at 980-81, has suggested a new standard for determining the executive's treble damage liability under the antitrust laws. In an attempt to blend the executive's liability under the antitrust laws with his liability under other statutes, Whiting has suggested that the executive be liable for treble damages only when: "(1) his corporation has violated one of the penal provisions of the antitrust laws and the activities comprising the violation are of the sort traditionally regarded as per se offenses, or the violation has been willfully and knowingly committed; and (2) the officer has authorized, ordered or affirmatively participated in (done) the acts constituting in whole or in part the violation, or is using the corporation as a front, sham or mere instrumentality for personal gain." *Id.* at 981.

C. *The Use of Section 5(a) of the Clayton Act in the Treble Damage Suit Against the Corporate Executive*

In establishing his treble damage case against the corporate executive, the private litigant must allege and prove two elements: (1) that the defendant has engaged in conduct that is prohibited by the federal antitrust laws; and (2) that he has sustained damages that were proximately caused by the defendant's unlawful conduct.[35] Thus, the plaintiff must prove a public injury (the antitrust violation) and a private injury (his personal damages). It has been said that the main purpose of the antitrust laws is to protect the public from unlawful combinations in restraint of trade, and that any private right of action is secondary to that purpose. Therefore, before the plaintiff can recover for his damages, he must show that the executive's conduct was also a public injury.[36]

To effectuate the legislative purpose of section 4 of the Clayton Act,[37] Congress enacted section 5(a) of that act.[38] Realizing that a private litigant faced an almost impossible task in proving the unlawful conduct on the part of the executive, Congress enacted section 5(a) "to minimize the burdens of litigation for injured private suitors by making available to them all matter previously established by the Government in antitrust actions."[39] Section 5(a) allows the private litigant to introduce as prima facie evidence[40] of the executive's illegal conduct a final civil, criminal, or equity judgment or decree

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This standard offers much to be desired, not only because it would equalize the executive's potential civil liability whenever he violates any other statute, but because it would also bring his civil liability in line with his expected criminal liability.

35. See, *e.g.*, Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (5th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960); Glenn Coal Co. v. Dickinson Fuel Co., *supra* note 2, at 887.

36. Glenn Coal Co. v. Dickinson Fuel Co., *supra* note 2, at 889. See generally Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 212 (1959).

37. See text accompanying notes 2-5 *supra*.

38. "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1964).

39. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

40. The evidence is not couclusive proof of the violation, but may be rebutted since it is only prima facie. To allow it to be conclusive may, it has been feared, deny the defendant his day in court. *Ibid.*; Richfield Oil Corp. v. Karseal Corp., *supra* note 35, at 723-28. One writer has expressed the opinion that the § 5(a) evidence should be conclusive to give the private litigant the full benefit Congress meant him to have. Note, 61 YALE L.J. 417, 424-25 (1952).

obtained by the government in a suit under the antitrust laws against the named defendant.[41] The use of a prior judgment or decree can go a long way in proving the first element of illegal conduct in the plaintiff's case. However, there are a number of restrictions on this practice. If the executive was not defendant in the prior suit, that judgment or decree can not be used against him in the treble damage action. Before it can be used as prima facie evidence of the illegal conduct, the injury claimed must have arisen from the same conduct found to be unlawful in the prior proceeding.[42] The plaintiff, moreover, is prevented by section 5(a) from introducing prior judgments and decrees entered on the defendant's plea of *nolo contendere* or with his consent.[43]

To determine the scope of application of section 5(a) in a given case, reference must be made to the doctrine of estoppel. The proof admissible under section 5(a) is prima facie evidence of all matters[44] to which the prior judgment would work an estoppel against the defendant in a subsequent suit by the government.[45] The courts seem to refer to the doctrine of collateral estoppel[46] rather than to res judicata in the application of section 5(a), for it is well settled that only those matters "distinctly put in issue and directly determined" in the prior judgment may be considered as prima facie evidence of the executive's misconduct.[47]

41. The court in Proper v. John Bene & Sons, 295 Fed. 729, 731-32 (E.D.N.Y. 1923), lists six conditions for the prior judgment or decree to be used as prima facie evidence under § 5(a): (1) The judgment or decree must be final. (2) It must have been rendered in a criminal prosecution or a suit or proceeding in equity. (3) The prosecution, suit, or proceeding must have been brought by or on behalf of the United States. (4) It must have been instituted under the anti-trust laws. (5) It must be to the effect that a defendant has violated those laws. (6) It shall be prima facie evidence against that defendant.

42. In Sun Theatre Corp. v. RKO Radio Picture, 213 F.2d 284 (7th Cir. 1954), the defendants had been previously convicted of a national conspiracy in a criminal proceeding brought by the federal government. The court in the treble damage suit said the prior conviction was not prima facie evidence of a conspiracy in a particular locality, only of a national conspiracy. See also International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449 (1st Cir. 1963).

43. See Baush Mach. Tool Co. v. Aluminum Co. of America, 79 F.2d 217, 226 (2d Cir. 1935).

44. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 225 (9th Cir. 1964).

45. See Emich Motors Corp. v. General Motors Corp., *supra* note 39.

46. See, *e.g.*, Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 631 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952) ("Whatever the defendants would normally be collaterally estopped to deny is thus established prima facie by the admission of a previous criminal conviction."); Samuel Goldwyn Prod. v. Fox West Coast Theatres Corp., 146 F. Supp. 905, 909 (N.D. Cal. 1956), *aff'd sub nom.*, Twentieth Century Fox Film Corp. v. Goldwyn, *supra* note 44.

47. See note 42 *supra*. See also Emich Motors Corp. v. General Motors Corp., *supra* note 39; Sun Theatre Corp. v. RKO Radio Picture, *supra* note 42.

Where the prior judgment or decree was rendered by a judge sitting without a jury, one has little difficulty in determining the issues litigated and decided. The judge will make detailed findings of fact when he hands down his decision,[48] thus, making it clear what facts he relied on and the legal conclusions he drew therefrom. Consequently, the issues that the defendant will be estopped to deny are specific, and no problem is presented in regard to the private litigant's use of this judgment or decree in his subsequent treble damage action against the same defendant. Much the same is true of a special jury verdict rendered in answer to specific questions. Here again the issues the jury decided and on which they based their decision are not too difficult to ascertain.

However, a general verdict rendered by a jury offers little or no insight into either the factual issues they considered or the conclusions they derived therefrom. Consequently, the application of the estoppel doctrine and section 5(a) will need some further examination to determine what issues were litigated and determined in the prior judgment or decree. The leading case on the interpretation of section 5(a) and its scope of application, especially in regard to the use of a judgment rendered on a general jury verdict of guilty, is *Emich Motors Corp. v. General Motors Corp.*[49] This case was a treble damage suit against the defendant corporation for damages resulting from the defendant's alleged participation with its subsidiary finance company in a conspiracy to restrain trade[50] in violation of section 1 of the Sherman Act.[51] The defendant and its subsidiary had previously been convicted of the alleged conspiracy in a criminal suit brought by the federal government. The criminal indictment had alleged twenty-six illegal acts against the defendant and its subsidiary. However, in the criminal action the government did not attempt to prove all twenty-six violations alleged in the indictment. The jury returned a general verdict of guilty against the defendant and its subsidiary. In the trial of the subsequent treble damage suit, the plaintiff sought to introduce into evidence the prior indictment, verdict, and judgment as prima facie evidence of the defendant's antitrust violation and the alleged acts of misconduct directed toward the plaintiff. The defendant objected to the admis-

48. "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, ..." FED. R. CIV. P. 52(a).

49. 340 U.S. 558 (1951).

50. The fact that the conspiracy was one existing between affiliated corporations does not clothe the conspiracy with legality. See, *e.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

51. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

sibility of this evidence contending that it was impossible to determine from the general verdict which of the twenty-six charged violations the jury in the criminal suit had found it to have committed, since the government did not offer evidence to prove all twenty-six acts alleged. The Supreme Court held that the prior indictment, verdict, and judgment were admissible as prima facie evidence of the defendant's antitrust violation and the means by which it sought to effectuate its plan of conspiracy.[52] Consequently, the prior judgment was prima facie proof of the public injury, and the plaintiff had only to prove by independent evidence his private injury.[53] But the real importance of the *Emich* case lies in its discussion of section 5(a) and a prior judgment rendered on a general jury verdict. The Court in *Emich* said that all the "issues which were essential to the verdict must be regarded as having been determined by the judgment."[54] The determination of the issues necessarily decided in the antecedent suit is a question of law for the trial judge hearing the treble damage suit to make and on which he is to instruct the jury.[55] In making his determination, the judge may examine the prior indictment or complaint, the trial record and any exhibits, the instructions given to the jury, any opinions given by the court, the verdict, and the judgment. It is only those matters which must have been decided to support the guilty verdict that defendant is estopped to deny in a subsequent suit by the government. Consequently, it is only these matters which the plaintiffs may rely on to prove a prima facie antitrust violation by the defendant.[56]

It may be asked whether a prior judgment or decree in a criminal suit finding the executive not guilty will have any effect in the subsequent treble damage action. Could the executive in the treble damage suit introduce the prior judgment or decree finding him not guilty as prima facie evidence of his not having violated the antitrust laws? Probably not as there are different standards applied by a jury in a criminal as contrasted with a civil case. In a criminal case, the jury must find the defendant guilty "beyond a reasonable doubt."

52. Emich Motors Corp. v. General Motors Corp., *supra* note 49, at 570-71. See also Richfield Oil Corp. v. Karseal Corp., *supra* note 35. *But see* Monticello Tobacco Co. v. American Tobacco Co., *supra* note 46.

53. Emich Motors Corp. v. General Motors Corp., *supra* note 49, at 570-71.

54. *Id.* at 569.

55. *Id.* at 571.

56. In its opinion, the court in Emich Motors Corp. v. General Motors Corp., *supra* note 49, at 572, laid down a procedure for the trial judge to follow when presented with a prior general judgment. He should: (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial.

In a civil case, however, the jury need only find guilt by a "preponderance of the evidence." To say that the executive was not found guilty beyond a reasonable doubt is not to say that he might not be found guilty by a preponderance of the evidence.

An interesting related question is what effect is to be given in a treble damage suit to an order of the Federal Trade Commission finding that certain conduct is prohibited by the antitrust laws. Will that order be admissible under section 5(a) as prima facie evidence of the charged antitrust violation?[57] The chief problem that has confronted the attempted use of such orders as prima facie evidence is whether they qualify as final decrees rendered in a civil proceeding brought on behalf of the United States. It seems settled today that the Federal Trade Commission is the representative of the United States and that their decrees are rendered on behalf of the United States.[58] The big controversy, however, is whether the order is a "final decree" rendered in a "civil proceeding." The term "civil proceeding" has been interpreted to mean a judicial proceeding and not an administrative proceeding. The Federal Trade Commission proceeding standing alone is not within the definition of "civil proceeding."[59] But the order issued by the Federal Trade Commission can become final and binding upon the parties if enforced by the court of appeals. Thus, the "civil proceeding" is not the Commission proceeding, but the proceeding before the court of appeals which reviews the conclusions of fact and law as found by the Commission and will issue a judgment affirming the order and restraining the violation or refuse to enforce the order. Consequently, a Commission order that has been enforced by the court of appeals is a final decree rendered in a civil proceeding and is admissible as prima facie evidence of the charged violation.[60] Commission orders, moreover, may rise to the level of final civil proceeding decrees by another procedure. Under the Finality Act[61] a Commission order will become final upon the expiration of the time allowed to seek appellate review of the order. This source of finality places the cease and desist order in the nature of an injunction against the defendant. Consequently, an order that has become final upon the expiration of the time to appeal for review should meet the section 5(a) requisite of being a

57. On Federal Trade Commission decrees and the scope of § 5(a) of the Clayton Act, see generally New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 216 F. Supp. 507 (1963), *aff'd,* 332 F.2d 346 (3d Cir. 1964).

58. *Id.* at 353-54; Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15, 17 (1963). *But see* Proper v. John Bene & Sons, Inc., *supra* note 41, at 732.

59. Highland Supply Corp. v. Reynolds Metal Co., *supra* note 58, at 17-18.

60. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., *supra* note 57, at 354-56.

61. 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

final decree rendered in a civil proceeding.[62]

III. SHAREHOLDER SUITS AGAINST THE EXECUTIVE

A. *Is the Executive a Proper Defendant in a Shareholder Suit?*

The corporate executive stands in a fiduciary relation to the shareholders of the corporation. His obligation includes the utilization of his managerial abilities to maximize corporate profits for the shareholders, and, of course, forbids the use of the corporation for his personal benefit. The executive, however, is not free to use all means available in the pursuit of a profit. The executive owes the shareholders and the corporation he serves a duty to employ only reasonable means in the performance of his management functions.[63] To violate the antitrust laws in the performance of his duties is not an exercise of reasonable care on his part. If he does act outside the scope of his authority, as he reasonably determines that to be, he becomes liable to the corporation for any damages he may have caused it to sustain as a result of his unlawful conduct.[64] Consequently, if the executive causes the corporation to suffer an injury as a result of any antitrust violations he may have committed, he is potentially liable to the corporation for the amount of damages sustained, which may include fines, treble damages, and litigation expenses.[65] If the corporation wrongfully refuses to enforce its own cause of action against the executive, one or more of its shareholders may bring a derivative suit against the guilty executive and seek recovery on behalf of the corporation.[66]

B. *Is the Derivative Suit for Damages an Action Under the Antitrust Laws?*

When derivative suits for injury to the corporation by reason of the executive's violation of the antitrust laws first arose, the question was raised whether such a suit was under the antitrust laws or was merely a common law suit for breach of the executive's fiduciary duty? Since federal courts have exclusive jurisdiction over all suits arising under the antitrust statutes, the question had more than mere

62. New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., *supra* note 57, at 354-56.

63. See Otis & Co. v. Pennsylvania R.R., 61 F. Supp. 905, 910-12, (E.D. Pa. 1945), *aff'd*, 155 F.2d 522 (3d Cir. 1946).

64. See Leppaluote v. Eggleston, 57 Wash. 2d 393, 357 P.2d 725 (1960).

65. Section 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964), gives a victorious plaintiff in a treble damage suit a right to recover a reasonable attorney's fees in addition to his damages. This was meant to be a further inducement to private litigants.

66. Ramsburg v. American Investment Co., 231 F.2d 333, 339 (7th Cir. 1956).

academic value. One of the leading cases distinguishing a suit under the antitrust laws and the common law derivative suit for damages to the corporation is *Meyer v. Kansas City Southern Ry.*[67] where the court stated:

> But so far as the appellees are liable for a breach of the fiduciary duties to minority stockholders imposed upon them by reason of their control of the St. Louis Southwestern, it is immaterial that their breaches of faith to the appellant also involved violations of federal statutes. The appellee's liability would be complete though their acts were not public offenses and a determination of federal law is thus not necessarily involved.[68]

Other courts, in subsequent cases, have made it clear that a shareholder's derivative suit against the corporate executive for breach of his fiduciary duty by violating the federal antitrust laws is a suit under state law rather than federal law. The right of a shareholder to maintain a derivative suit against the executive for damages he has caused the corporation is granted by the law of each state. Being a creature of the state, the derivative suit is controlled by state law. The antitrust laws make available two types of remedies: the equity injunction to enjoin existing or threatened violations,[69] and the suit for treble damages.[70] Both of these remedies are designed specifically to relieve antitrust violations,[71] whereas the derivative suit against the executive for damages to the corporation is one to enforce the executive's fiduciary duty.[72]

An analogous question is whether a state court is competent to

67. 84 F.2d 411 (2d Cir.), *cert. denied*, 299 U.S. 607 (1936). See also Hand v. Kansas City So. Ry., 55 F.2d 712 (S.D.N.Y. 1931); Guiterman v. Pennsylvania R.R., 48 F.2d 851 (E.D.N.Y. 1931).

68. 84 F.2d at 414.

69. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964).

70. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

71. A shareholder may seek an injunction in a general equity proceeding against the directors or officers of a corporation to restrain them from engaging in activities violative of the antitrust laws. Such a suit is not under the antitrust statutes, but a right granted by the law of the state. This remedy is independent of any remedies granted by the antitrust statute. DeKoven v. Lake Shore & M.S. Ry., 216 Fed. 955, 957 (S.D.N.Y. 1914). See also Schechtman v. Wolfson, 244 F.2d 537, 538 (2d Cir. 1957) (The court intimated, by denying the defendant's motion to dismiss for failure to state a cause of action, that the shareholder's suit for an injunction against the executives would lie.); Boyd v. New York & N.H.R.R., 220 Fed. 174, 180 (S.D.N.Y. 1915).

72. See Hand v. Kansas City So. Ry., *supra* note 67, at 713-14, where the court stated: "[The] plaintiff is not here seeking to enforce a right created by the act [Sherman Act.] On the contrary, he is seeking merely to redress an injury to the corporate defendant, and which was inflicted as a result of an effort on the part of the defendant directors to accomplish a public wrong. There is therefore no occasion to measure plaintiff's remedial rights by the statutory penalties of the Sherman and Clayton Acts." See also Clayton v. Farish, 191 Misc. 136, 153, 73 N.Y.S.2d 727, 744 (Sup. Ct. 1947) ("The basis of their liability here must be acts which fail to conform to their fiduciary duty . . . .").

determine whether the executive's conduct was in violation of the federal antitrust statutes. When faced with the charge that the executive has breached his fiduciary duty by violating the federal antitrust laws, the state court must examine the federal law for one purpose: Did the executive violate the antitrust laws?[73] This is the basic question in determining whether the executive breached his fiduciary duty by committing an ultra vires act. In deciding this issue it is usually stated that "it is immaterial that their breaches of faith . . . also involved violations of federal statutes."[74] The state courts are competent to determine alleged breaches of fiduciary duty; therefore, a state court would seem to be competent to determine if the alleged conduct was in violation of the federal law.[75]

C. *Elements of the Shareholder's Suit Against the Executive*

1. *That the Executive Violated the Antitrust Laws.*—To maintain his derivative suit, the shareholder must allege and prove that the executive has breached his fiduciary duty to the corporation and to the shareholders. A wilful violation of a statute which results in the imposition of penalties and damages to the corporation is always a breach of the director's fiduciary duty to the corporation. The executive can act with impunity only within the scope of his authority, and he is never authorized to knowingly violate the law. Consequently, if the plaintiff shareholder is alleging that the executive breached his fiduciary duty by violating or causing the corporation to violate the antitrust laws, he must allege and prove a wilful violation as a necessary part of his case.[76]

In proving illegality on the part of the executive, the shareholder will find that a prior judgment or decree finding the executive guilty of an antitrust violation will be of little or no assistance. Section 5(a) of the Clayton Act[77] states that the "final judgment or decree . . . shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said [antitrust] laws. . . ." This language restricts the evidentiary use of section 5(a) to suits arising *under* the antitrust laws. Since, as noted above, the shareholder's derivative suit for damages to the corporation resulting from the executive's antitrust violation

73. See text accompaniyng notes 67-72 *supra*.

74. Meyer v. Kansas City So. Ry., *supra* note 67, at 414.

75. See *id.* at 414 (Quote in text); DeKoven v. Lake Shore & M.S. Ry., *supra* note 71; Comment, 59 MICH. L. REV. 904, 921-27 (1961). *But see* Clayton v. Farish, *supra* note 72, at 737-45.

76. See, *e.g.*, Diamond v. Davis, 263 App. Div. 68, 31, N.Y.S.2d 582 (1st Dept. 1941); Clayton v. Farish, *supra* note 72.

77. See note 38 *supra*.

is not one arising under the antitrust laws, the prior judgment or decree finding the executive guilty of illegal conduct will not serve as prima facie evidence of the alleged violation.[78] Even though it is not prima facie evidence of the violation, however, if the prior judgment or decree is admitted in evidence, it will doubtless prove to be very persuasive evidence of the executive's misconduct.

The question may be asked whether the general doctrine of collateral estoppel will apply to make the prior judgment or decree in a suit by the government prima facie evidence of the illegal conduct. To have the benefit of collateral estoppel, the parties must be identical, or in privity, and the issues must be the same as those litigated and determined in the prior suit. Where the shareholder is attempting to introduce a prior antitrust judgment or decree finding the executive guilty of an antitrust violation as prima facie evidence of the executive's alleged violation in the derivative suit, identity of the parties is lacking. In the prior suit, the government was the prosecutor, while a private individual, a shareholder, is the complainant in the present action. In the prior suit, the government, representing the public of which the shareholder is a part, proved that the executive committed an antitrust violation or an injury to the public. The shareholder in his derivative suit is alleging the very same antitrust violation on the part of the executive that the government has previously proven. Therefore, it may seem unrealistic that section 5(a) and the doctrine of collateral estoppel do not aid the shareholder in proving his case. However, there is a difference in the standards of the two actions. In a suit under the antitrust laws, no knowledge of the illegality of the conduct is required to be proved. But in a shareholder's derivative suit, as will be discussed below, the executive must have knowingly violated the statute before his conduct will be labeled a breach of his fiduciary duty and, therefore, ultra vires. Thus, it is submitted that this difference in the standard of conduct is a just reason for not allowing section 5(a) or the doctrine of collateral estoppel to be used in proving a breach of fiduciary duty by the executive.

2. *That the Executive Had Knowledge of the Illegality of His Conduct.*—As the second element of his derivative suit for damages to the corporation, the shareholder must prove that the executive knew

78. See Volk v. Paramount Pictures, Inc., 91 F. Supp. 902, 904 (D. Minn. 1950), where the court analyzed § 5(a)'s application in regard to a suit for a declaratory judgment. Congress, the court said, contemplated the use of § 5(a) in conjunction with suits arising under the antitrust laws and not "private actions seeking relief based primarily upon the common law." The suit for a declaratory judgment was not a suit arising under the antitrust laws. Consequently, § 5(a) was inapplicable to provide prima facie evidence of the defendant's antitrust violation.

or with the exercise of reasonable care should have known that he was violating the antitrust laws or was causing his corporation to do so. This is a general corporate law principle that has been carried over into the area of derivative suits against the executive who has committed an antitrust violation.[79] When the executive is charged in a derivative suit with exceeding his authority by violating a statute, the courts ought not to consider whether his conduct was reasonably calculated to further the corporation's interest.[80] Rather, the courts should be concerned only with whether the executive had knowledge or should have had knowledge of the ultra vires nature of his conduct.[81]

Mistake of law or fact has often been recognized as a defense to a derivative suit for damages to the corporation, where the statutory standards in question were vague or ambiguous.[82] When the executive relies in good faith on what he ascertains to be the correct interpretation of an ambiguous statute, he ought not to be liable in a derivative suit for damages to the corporation.[83] Likewise when he acts in good faith in reliance on an attorney's advice that the proposed conduct is legal, he ought not to be liable for a breach of his fiduciary duty.[84] In *Simon v. Socony-Vacuum Oil Co.*,[85] a derivative suit for damages to the corporation caused by the directors' antitrust violations, the court exonerated the directors because they had made an honest mistake in interpretating an ambiguous statute.[86] Although the question has not been litigated, it appears that the court would exonerate the executive charged with an antitrust violation in a derivative suit, where he in good faith acted in reliance on legal advice suggesting that the planned course of future conduct was not

79. One of the leading cases on this element of the plaintiff's case is Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 205, 38 N.Y.S.2d 270, 274 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1st Dept. 1944), where the court stated that "as defendants did not knowingly exceed their authority or the authority of the corporation, and did not know or believe or have reason to believe that their participation in the buying program was prohibited by the Sherman Act, they cannot be held personally liable for damages."

80. "[I]f the director knowingly exceeds his authority or the authority of the corporation, he is liable without regard to the exercise of reasonable care." 3 FLETCHER, PRIVATE CORPORATIONS § 1023, at 531 (1947).

81. *Ibid.*

82. See Scott v. Depeyster, 6 N.Y. (1 Edw. Ch.) 513 (1833).

83. However, it has been held that where the statute is clear and unambiguous, mistake of law is not a defense. New Haven Trust Co. v. Doherty, 75 Conn. 555, 54 Atl. 209 (Sup. Ct. Err. 1903).

84. See Gilbert v. Burnside, 13 App. Div. 2d 982, 983, 216 N.Y.S.2d 430, 432 (2d Dept. 1961).

85. 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 489 (1st Dept. 1944).

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

prohibited by the federal antitrust laws.[87]

The element of executive knowledge was dealt with in *Graham v. Allis-Chalmers Mfr. Co.*[88] In this case, the plaintiffs, shareholders in the defendant corporation, brought a derivative action against the directors and officers of the corporation alleging that they had breached their fiduciary duty by failing to prevent certain minor officials from violating the antitrust laws. The minor officials had been found guilty of a criminal antitrust violation in the electrical price-fixing scandal in 1960. It was the plaintiffs' contention that if the directors had not had actual knowledge of the lower officials' misconduct, then such knowledge should be imputed to them. In holding that the officers and directors were not liable for the unlawful acts of their minor employees, the court stated:

> [T]he degree of care required of corporate directors in the selection and supervision of employees [in] each case of alleged negligence must be considered on its own facts, giving regard to the nature of the business, its size, the extent, method and reasonableness of delegation of executive authority, and the existence or non-existence of zeal and honesty of purpose in the directors' performance of their duties. . . . And, while there is no doubt . . . but that corporate directors, particularly of a small corporation, may cause themselves to become personally liable when they foolishly or recklessly repose confidence in an untrustworthy officer or agent and in effect turn away when corporate corruption could be readily spotted and eliminated, such principle is hardly applicable to a situation in which directors of a large corporation, whose operation is hedged about with numerous and sometimes conflicting federal and state controls, had no reason to believe that minor officials in the lower echelons of an industrial empire had become involved in violations of the federal anti-trust laws.[89]

The *Graham* decision clarifies the point that the corporate executive will not be responsible for the antitrust violations of his employees as a matter of law.[90] The executive is not an insurer of the fidelity of the employees, and he does not have to assume that they are all law violators.[91] The executive does have a duty to use reasonable care in the supervision of his employees.[92] He is not required, however, to go about investigating every transaction the employees engage in to determine if they are prohibited by the antitrust laws.[93] He

87. Note the difference in the knowledge requirement in the derivative suit for damages on account of the executive's antitrust violation and that required for his treble damage liability. See text accompanying notes 17-30 *supra.*

88. 40 Del. Ch. 335, 182 A.2d 328 (1962), *aff'd,* 188 A.2d 125 (Del. 1963).

89. *Id.* at 342, 182 A.2d at 332.

90. See Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, (Del. 1963). See generally 3 FLETCHER, *op. cit. supra* note 80, §§ 1065-1100.

91. The Delaware Supreme Court emphasized this point in Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130-31 (Del. 1963).

92. See Briggs v. Spaulding, 141 U.S. 132, 147 (1891).

93. Scott v. Depeyster, *supra* note 82, at 541-42.

properly performs his supervisory responsibility from a corporate law viewpoint if he inquires into a subordinate's conduct only after he is informed of certain activities which would naturally tend to raise his suspicions. But when circumstances are such as to place him on guard, he must inquire and reprimand those responsible.[94] If he fails in his duty, the shareholder, in a derivative suit, may require the director or officer to account to the corporation for any loss it may have suffered by reason of his failure to discover and correct any antitrust violations of his junior employees.

3. *That the Corporation Has Sustained an Injury as a Result of the Executive's Illegal Conduct.*—Besides alleging and proving an antitrust violation by the executive and the required knowledge of the act and of its illegality on his part, the shareholder in his derivative suit must prove, as the third element of his case, that his corporation has suffered an injury by the unlawful conduct of the executive.[95] The courts ought not to infer the resulting injury only from proof of an antitrust violation and knowledge on the part of those responsible. There must be proof of an independent nature establishing the injury.[96]

A question raised in numerous derivative suits involving corporate violations of the antitrust laws concerns the measure of damages. Are they single or treble damages? Section 4 of the Clayton Act gives the right to sue for treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law." When the corporation sustains a loss through the illegal act of the executive, the loss to the individual shareholder may be quite small. It may come about through a reduction in the value of his stock because the assets of his corporation have been reduced by the fines, damages, and litigation expenses the corporation has sustained. Also, the goodwill of the corporation may have suffered through adverse publicity. Thus, whatever loss the shareholder realizes came about because of the corporation's failure to recover from the executive and not as a direct consequence of the executive's unlawful conduct. The term "business or property" as used in section 4 has been judically interpreted to denote a commercial venture or enterprise.[97] It is settled that a shareholder's stock

94. See Edelstone v. Salmon Falls Mfg. Co., 84 N.H. 315, 150 Atl. 545 (1930).

95. See Diamond v. Davis, *supra* note 76.

96. Borden v. Cohen, 231 N.Y.S.2d 902, 903 (Sup. Ct. 1962) ("Knowledge of the violation is not an element which will give rise to an actionable claim unless the acts otherwise worked harm to the corporation.").

97. See Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641, 644 (D.N.J. 1960).

ownership is not a part of his "business or property,"[98] since normal stock ownership constitutes an investment rather than a business enterprise. Consequently, it appears that the shareholder cannot recover treble damages for the injuries he suffered to his stock interest.[99]

The shareholder, in the derivative suit against the executive, can not recover treble damages under section 4 of the Clayton Act for an injury to the corporation.[100] The purpose of the antitrust laws is to protect the public from combinations which tend to lessen free enterprise and competition.[101] Consequently, recovery of treble damages is limited to those persons who have been injured by a breakdown in the competitive system.[102] The injury to the corporation does not arise from a "lessening of competition" when the executive violates the antitrust laws and imposes an injury upon the corporation. The loss to the corporation arises in the form of fines and damages it must bear as a result of the executive's unlawful conduct. Consequently, the corporation and the shareholder in a derivative suit[103] are outside the area of those allowed by the antitrust laws to seek treble damages.[104] Thus, the damages that may be recovered

98. Bookout v. Schine Chain Theatres, 253 F.2d 293 (2d Cir. 1958); Peter v. Western Newspaper Union, 200 F.2d 867, 872 (5th Cir. 1953).

99. See generally Peter v. Western Newspaper Union, *supra* note 98, at 872; Loeb v. Eastman Kodak Co., 183 Fed. 704, 709 (3d Cir. 1910); Harrison v. Paramount Pictures, 155 F. Supp. 312 (E.D. Pa. 1953); see note 4 *supra.*

A situation can be imagined where a shareholder might be able to sue for treble damages for the loss in value of his stock. Consider the parent-subsidiary relationship where the subsidiary is the victim of an antitrust violation. The parent could be injured in both its marketing ability and in the value of stock it held in the subsidiary. The parent might be able to tack on a claim for treble damages for the devaluation of its stock held in the subsidiary with a treble damage claim for its marketing injury. In Loeb v. Eastman, *supra,* the court also hinted at the possibility of a shareholder suing for treble damages if he can show that the illegal conduct was directed at him rather than the corporation. But under either situation, the shareholder and the parent corporation might have a difficult time in showing that their stock interest was their "business or property" to meet the § 4 requirement.

100. There is dictum to the effect in Loeb v. Eastman Kodak Co., *supra* note 99, at 709, if the executives' illegal conduct directly injured the corporation in its "business or property," they would be liable for treble damages to the corporation.

101. See text accompanying notes 2-5 *supra.*

102. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1952).

103. Where one has been injured by the antitrust violations of a second corporation, the shareholders of the first may, if the corporation refuses to do so itself, bring a treble damage suit against the second corporation for the benefit of their corporation. Rogers v. American Can Co., 305 F.2d 297 (3d Cir. 1962); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 734 (2d Cir. 1953).

104. Another theory for not allowing a shareholder to recover treble damages in a derivative suit for damages to the corporation has been advanced by one writer. When a corporation has been found guilty of an antitrust violation in a civil suit, it has been forced to pay treble damages. Now to allow a shareholder to recover from the executive for the corporation's benefit three times the damages the corporation has

will be single damages equal to the amount of fines, damages, and litigation expenses[105] the corporation has sustained on account of the executive.[106]

IV. Indemnification

When an executive is threatened with a suit, either by a third party or a shareholder, for his alleged antitrust violations, he would like to know to what extent he can pass on the expense of litigation to the corporation. The answer to this question depends upon the policy decision of whether the corporation or the executive should bear the risk of antitrust litigation. This question will be considered in two parts: the executive as a defendant in (1) a treble damage suit, and (2) a derivative suit for damages to the corporation.

A. *Treble Damage Suit*

It is a generally accepted principle of agency law that the agent may be indemnified by his principal for damages the agent may incur while acting within the scope of his authority.[107] This principle of agency law is applicable in corporate situations to allow the executive, when named as a defendant in a suit brought by a third party, to be indemnified for his expenses and legal fees incurred in a successful defense.[108] It is only those expenses and fees arising as a result of conduct done on behalf of the corporation for which he is entitled to reimbursement.

But consider the situation where the defense of a treble damage suit was not successful, and the corporation voluntarily indemnified the executive. May the corporation do so? May the executive be forced to return the money he received as reimbursement? These questions take on added significance when it is the antitrust laws that

sustained would subject the executive to damages in the amount of nine times the original amount. This would most certainly make the treble damage suit a penalty imposed by a private citizen upon another for his illegal conduct and not a means of compensation for an injury received by the corporation. The proponent of this view feels that such an outcome was not within the contemplation or intent of Congress when it enacted § 4 of the Clayton Act. Comment, *supra* note 75, at 911.

105. The successful shareholders suing in the derivative suit for damages to the corporation may recover their own legal fees if they can show that they have bestowed some benefit upon the corporation. Schechtman v. Wolfson, *supra* note 71, at 540. The case is commented upon in 66 Yale L.J. 413 (1957), where the writer makes an argument in favor of allowing the payment of the shareholders' counsel fees.

106. Clayton v. Farish, *supra* note 72, at 153-54, 73 N.Y.S.2d at 744-45.

107. Restatement (Second), Agency § 439, comments *g* and *h* (1958).

108. *In re* E. C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950). Some courts require the executive to show that the corporation has received some benefit from his exoneration before he is entitled to indemnification. See Griesse v. Lang, 37 Ohio App. 553, 175 N.E. 222 (1931). See generally Washington & Bishop, Indemnifying the Corporate Executive 86-90 (1963), where the writers discuss the "benefit" fallacy.

the executive is found to have violated. A case which may be helpful in answering some of the questions just posed is *Simon v. Socony-Vacuum Oil Co.*[109] This case was a derivative suit against two directors who had previously been found guilty in a criminal antitrust prosecution and two additional directors who had pleaded *nolo contendere* in the previous criminal proceeding. The shareholder sought to have all four of these executives refund the money the corporation had paid for their counsel fees and fines and, further, to have them bear the counsel fees and fines incurred by the corporation. The court held that the two executives who had been found guilty in the prior criminal action did not have to refund the money or indemnify the corporation for its expenses because they had acted in good faith and in what they thought to be the best interests of the corporation. They did not know or have reason to believe that they were violating the antitrust laws.[110] As for the defendants who had pleaded *nolo contendere,* they did not have to repay the corporation, since their plea advanced the interests of the corporation by allowing the corporation to negotiate a favorable settlement in a suit against it.[111] Thus, the corporation could voluntarily indemnify the executives where they had attempted in good faith to advance the interests of the corporation and did not knowingly violate the antitrust laws.[112]

When sued by a third party for treble damages, the executive's liability will turn on his breach of a duty owed to that person, and not on whether he breached his duty to the corporation. The executive's duty to the third party will be defined by the antitrust laws in

109. 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.,* 267 App. Div. 890, 47 N.Y.S.2d 589 (1st Dept. 1944). See Whiting, *Antitrust and the Corporate Executive* (pt. II), 48 VA. L. REV. 1, 33-47 (1962); Note, 76 HARV. L. REV. 1403 (1963).

110. 179 Misc. at 205, 38 N.Y.S.2d at 274, quoted in note 79 *supra; cf.* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

111. *Supra* note 79, at 206, 38 N.Y.S.2d at 275; *accord,* Koster v. Warren, 297 F.2d 418, 423 (9th Cir. 1961).

112. State statutes may also grant a right of indemnity to the executive or empower the corporation to indemnify its executive for his expenses incurred in the defense of a suit brought against him in his representative capacity brought by a third person. New York has taken the lead amoug the states on this issue of indemnity where the executive was not wholly successful in his defense. New York would allow the corporation to voluntarily indemnify the executive for his legal expenses, fines, and damages levied against him in the prior suit, if he "acted, in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation. . . ." N.Y. BUS. CORP. LAW § 723. This appears to be a codification of the common law as stated in Simon v. Socony-Vacuum Oil Co., *supra* note 79. See Hoffman, *The Status of Shareholders and Directors Under New York's Business Corporation Law: A Comparative View,* 11 BUFFALO L. REV. 496, 569-83 (1962). *Compare* N.Y. BUS. CORP. LAW §§ 721-26 (1963), *with* CAL. CORP. CODE § 830 (1955); DEL. CODE ANN. tit. 8, § 122(10) (1953); KY. REV. STAT. § 271.375 (1962); MO. REV. STAT. § 351.355 (1959).

this situation. But, as earlier discussed, these laws do not define the executive's duty to the corporation. Regardless of the antitrust laws, the executive must still exercise reasonable care in advancing the interests of the corporation. Therefore, the executive acting in good faith to benefit his corporation could be liable to the third party and yet not have breached his duty to the corporation. In conclusion, it is submitted that when the executive has exercised good faith in pursuing what he reasonably believed to be in the best interests of the corporation, the risk of antitrust litigation should be placed on the corporation.

But what if the executive in *Simon* had committed a per se violation or had willfully violated the antitrust laws? May the corporation voluntarily indemnify him? If not, then must he indemnify the corporation for its fees and expenses? *Simon* implies that if the executive had knowingly violated the antitrust laws, he would have to refund the money and indemnify the corporation for its legal fees and expenses.[113] Under these circumstances, the executive can safely be said to have breached his duty to the corporation by exposing it to possible fines and treble damage liability. This conclusion also seems correct on the grounds of public policy. To allow the corporation to indemnify the executive for a treble damage judgment against him would weaken the enforcement provisions of the antitrust laws. As noted earlier in this article,[114] one of the reasons section 4 of the Clayton Act was enacted was to seek the aid of private litigants in the enforcement of the antitrust laws and thereby deter future violations. The *Simon* holding may to some extent subvert this policy, but there appears to be more reason to allow voluntary indemnification of the honest, though technically guilty, executive who did not commit a willful or per se violation.[115]

B. *Derivative Suits*

Where the executive has been found guilty in a derivative suit for damages to the corporation, there appears little reason or justification for allowing indemnification. He has been shown to have committed a breach of his fiduciary duty owed to the corporation. He should not then be allowed to pass the consequences of this breach on to the corporation by being indemnified by the very one he has wronged.

113. See text accompanying notes 76-106 *supra*.

114. See text accompanying notes 2-6 *supra*.

115. See Note, *supra* note 109, at 1411, where the writer makes a distinction between indemnification for liabilities and for counsel expenses. He implies that allowing indemnification for counsel expenses would not endanger the policy of the antitrust laws. See also WASHINGTON & BISHOP, *op. cit. supra* note 108, at 108-11, for a discussion of voluntary indemnification.

Derivative suits are in the name and for the benefit of the corporation. To allow indemnification, even voluntary, would make the derivative suit for the enforcement of the executive's fiduciary duty a nullity.[116] However, if the executive was successful in his defense of a derivative suit, there appears to be adequate justification for allowing reimbursement of litigation expenses. By allowing indemnification, the corporation encourages executive activity free from the harassment of shareholder strike suits.[117]

JOSEPH R. MANNING

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116. See, *e.g.*, Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603 (1895); Hollander v. Breeze Corp., 131 N.J. Eq. 585, 26 A.2d 507 (Ch. 1941), *aff'd per curiam*, 131 N.J. Eq. 613, 26 A.2d 522 (Ct. Err. & App. 1942).

117. See note 108 *supra*.