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D&O LIABILITY FOR ANTITRUST VIOLATIONS

Barak Orbach*

This Article provides a guide for liability of directors and officers ("D&O") for antitrust violations.

Where violations of law appear profitable, a misalignment of compensation schemes and formal compliance policies may preserve incentives to engage in misconduct. In such situations, the likelihood and prevalence of misconduct heavily depend on the effectiveness of the company's oversight system. Antitrust violations intend to increase profit, are hard to detect, and are hard to prove. The perceived profitability of antitrust violations, thus, sometimes motivates D&O to participate in, encourage, or ignore such violations.

I review the liability standards that may apply to D&O for antitrust violations, as well as trends in relevant doctrines and enforcement policies. I explain the reasons for the growing risk of personal liability and argue that this risk is likely to continue rising in the foreseeable future. Specifically, today, D&O may be held liable for failures to make good faith efforts to develop and maintain organizational culture of compliance with antitrust law. I outline factors that D&O and their counsels should consider.

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INTRODUCTION

One of the defining characteristics of the past decade is the changing public attitudes toward large corporations and their executives.[1] Since the Great Recession (2007-2009), public pressures to increase scrutiny of large business and hold executives accountable for corporate wrongdoing have been mounting. While this trend has been particularly conspicuous during the past decade, it began in the early 1990s. This Article examines an important aspect of the trend: personal liability of directors and officers ("D&O") for antitrust violations. The central question that I explore is whether D&O may be held accountable for creating, preserving, or neglecting an organizational culture that motivates antitrust violations. I find that D&O already face an increased risk of such liability and that this risk is likely to continue growing.

My inquiry focuses on a common pattern of antitrust violations in large companies: agents of the company make decisions and take actions that constitute steps in the progress of an antitrust violation, believing that their actions serve the company for their perceived profitability even though the company's policies expressly prohibit conduct that may violate the antitrust laws.[2] In this scenario, (1) standing alone, the

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1. *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018) (criticizing the permissiveness of enforcement policies toward businesses and their managers); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (same); *A Mammoth Guilt Trip*, ECONOMIST, Aug. 30, 2014, at 21 (summarizing the changing attitudes).

2. All agents are fiduciaries but not all fiduciaries are agents. Specifically, corporate directors are fiduciaries although they are not agents. *See* Hill v. Bache Halsey Stuart Shields Inc., 790 F.2d 817, 824 (10th Cir. 1986) (stating that "all agents are fiduciaries with respect to matters within the scope of their agency.") (internal quotation marks omitted); Mgmt. Techs., Inc. v. Morris, 961 F. Supp. 640, 651 (S.D.N.Y. 1997) ("directors are not agents of the corporation and have no authority as directors to act on its behalf."); Young v. Colgate-Palmolive Co., 790 F.2d 567, 573 (7th Cir. 1986) (holding that "directors are not acting as agents in their management of the corporation, but as fiduciaries"); Arnold v. Soc'y for Sav.

individual decisions and actions may be lawful; (2) the violations are potentially profitable; (3) perceived contributions of agents and other fiduciaries to profit are rewarded; (4) the company's policies strictly prohibit conduct that violates antitrust law; and (5) the board of directors and senior management are not aware of specific violations. In such circumstances, the concern is that the company's compliance policies are formalities intending to shield D&O from liability for antitrust violations that they incentivize indirectly.

Most alleged antitrust violations are analyzed under review standards that do not draw bright lines between lawful and unlawful conduct, resulting in some uncertainty about the legality of practices and agreements. The rule of reason is the paradigmatic example of such standards.[3] Under corporate law, however, uncertainty about the legality of actions does not absolve D&O of their obligations to evaluate legal risks.[4] To the contrary, to meet their fiduciary responsibilities, D&O must make good faith efforts to detect, evaluate, and address material legal risks.[5] Similarly, federal securities law requires disclosure of material risks, including uncertainty about potential legal liabilities.[6]

To illustrate, consider "reverse-payment settlements" that used to be very common in the pharmaceutical industry. These settlements, also known as "pay-for-delay settlement agreements," resolve patent disputes between brand-name drug companies and generic drug companies. Under the terms of the settlement agreements, the brand-name drug company pays the generic drug company to delay entry of generic versions of its brand-name drug. In 2013, the Supreme Court held that the legality of reverse-payment settlements should be evaluated under the rule of reason.[7] Does the ambiguity of the rule of reason relieve pharmaceutical executives of the duty to evaluate material legal risks associated with individual reverse-payment settlements? No. A positive answer to this question would give companies a license to enter into agreements between competitors to avoid or delay competition. Consider now a more generic situation—the acquisition of company *A* by company *B*. Do *B*'s D&O who participate in the negotiation and

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Bancorp, Inc., 678 A.2d 533, 539–40 (Del. 1996) ("Directors, in the ordinary course of their service as directors, do not act as agents of the corporation. . . . An agent acts under the control of the principal. . . . A board of directors, in fulfilling its fiduciary duty, controls the corporation, not *vice versa*."). *See generally* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983) ("Fiduciaries appear in a variety of forms, including agents, partners, directors and officers, trustees, executors and administrators, receivers, bailees, and guardians.").

3. *See generally* Herbert Hovenkamp, *The Rule of Reason*, 70 FL. L. REV. 81 (2018).
4. *See infra* Section IV.A.
5. *Id*.
6. *See infra* Section IV.C.
7. *See* FTC v. Actavis, Inc., 570 U.S. 136, 159-60 (2013).

approval of the transaction have a duty to make good faith efforts to evaluate potential liabilities for past antitrust violations of *A*? Yes. Antitrust liabilities may have a material effect on the value of *A*.

I. Principles

A. D&O Liability

D&O liability may be imposed for direct involvement in corporate wrongdoing or for failures to evaluate legal risks. It is *not* imposed for poor business decisions.[8]

Direct Involvement in Corporate Wrongdoing. Liability for direct involvement in corporate wrongdoing concerns situations where a person participated in, directed, or authorized violations of law. Strictly speaking, this form of personal liability is not for corporate wrongdoing but for the person's involvement in wrongdoing. For example, agents who coordinate a price-fixing scheme may be held criminally liable for their participation in unlawful conspiracy.[9] Likewise, an executive, who directs subordinates to conceal and destroy evidence relevant to an antitrust investigation, may be held liable for obstruction of justice.[10]

The Yates Memorandum, enforcement guidelines that the Justice Department ("DOJ") issued in 2015, formalized the growing emphasis on personal accountability for direct involvement in corporate wrongdoing.[11] The Yates Memorandum, however, recognizes that in large corporations, "responsibility can be diffuse and decisions are made at various levels," while "high-level executives" are "insulated from the day-to-day activity in which the misconduct occurs."[12] For these organizational attributes, it is often difficult to determine the culpability of individuals, especially senior executives.[13] The Yates Memorandum's

8. *See infra* Section IV.D.

9. See, e.g., United States v. VandeBrake, 679 F.3d 1030 (8th Cir. 2012); United States v. Andreas, 216 F.3d 645 (7th Cir. 2000).

10. See, e.g., Press Release, U.S. Dep't. of Justice, Former Coach USA Inc. Executive Sentenced to 15 Months in Prison for Obstruction of Justice (March 23, 2017).

11. *See* U.S. Dep't of Justice, Memorandum of the Deputy Attorney General on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter *Yates Memorandum*]; Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Individual Accountability for Antitrust Crimes*, Remarks at the Yale Global Antitrust Enforcement Conference (February 19, 2016); Gideon Mark, *The Yates Memorandum and Cartel Enforcement*, 51 UC DAVIS L. REV. ONLINE 95 (2018). *See also* Bill Baer, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium at 8 (Sept. 10, 2014) ("It is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions . . . who have refused to accept responsibility for their crimes and who the companies know to be culpable.").

12. *Yates Memorandum*, *id.*, at 2.

13. *Id.*

principles were incorporated into the Justice Manual, which contains the major DOJ policies and procedures pertaining to the investigation, litigation, and prosecution of violations of federal law.[14] The 2018 Justice Manual states that "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing," because "a corporation can act only through individuals."[15] Accordingly, the Manual instructs that the prosecution of corporate crimes must focus on "wrongdoing by individuals" and, specifically, "high-level corporate officers."[16]

Oversight Failures. Personal liability for failures to evaluate legal risks concerns situations where D&O efforts to detect, prevent, or report about corporate wrongdoing were inadequate.[17] Direct involvement in corporate wrongdoing is not a necessary condition for oversight liability. Courts often say that oversight liability is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[18] Be that as it may, oversight liability is also a critically important legal theory. Oversight liability risks incentivize compliance with applicable laws and regulations.

In large companies, however, a misalignment of compensation schemes and oversight systems sometimes results in incentives to engage in seemingly profitable violations of law, while organizational complexities insulate D&O from knowledge about improper conduct.[19]

Over the past three decades, oversight responsibilities have become a central feature of federal enforcement policies.[20] The 1991 Organizational Sentencing Guidelines created "incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[21] Two years later, the Antitrust Division introduced the leniency program, which provides that, under certain conditions, the first cartel member to report about the cartel to

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14. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL (Sept. 2018).

15. *Id.* § 9-28.210.

16. *Id.* §§ 9-28.010, 9-28.210.

17. *See infra* Section IV.A.

18. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). *See also* Marchand v. Barnhill, 212 A.3d 805, 820 n.99 (Del. 2019) (citing *Caremark*); *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009) (same); *In re* Am. Int'l Grp., Inc., 965 A.2d 763, 799 (Del. Ch. 2009) (same); Desimone v. Barrows, 924 A.2d 908, 939 (Del. Ch. 2007) (same); *In re* Verisign, Inc., Derivative Litig., 531 F. Supp. 2d 1173, 1195 (N.D. Cal. 2007) (same); Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006) (same); Guttman v. Huang, 823 A.2d 492 (Del. Ch. 2003) (same); McCall v. Scott, 239 F.3d 808, 817 (6th Cir. 2001) (same).

19. *See infra* Section II.B.

20. JUSTICE MANUAL, *supra* note 14, § 9-28.800; U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (Nov. 2018).

21. U.S. SENTENCING GUIDELINES MANUAL, ch. 8, introductory cmt.

the DOJ may receive immunity.[22] For the increased risk of liability and prospects of immunity, the leniency program created powerful incentives to implement antitrust compliance programs, or revise existing ones.[23] In the wake of the accounting scandals of the early 2000s, Congress passed the Sarbanes-Oxley Act (SOX) to improve the auditing of public companies.[24] SOX and its regulations require public companies to maintain effective internal controls, CEOs and CFOs of public companies to certify the accuracy of financial statements filed with the Securities and Exchange Commission (SEC), and lawyers for public companies to report internally material violations of law by their company. More recently, in 2017, the DOJ released guidance to prosecutors on how to assess corporate compliance programs.[25] This policy rewards companies that have effective oversight systems, thereby incentivizing companies to harden their oversight systems. In July 2019, the DOJ's Antitrust Division issued a policy that applies the same principles to antitrust enforcement.[26] Under this policy, federal prosecutors may weigh the existence and effectiveness of a corporate compliance program at both the charging and sentencing recommendation stages. Specifically, the policy states:

> An effective compliance program will promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. . . . *Support of the program from the company's top management is critical to the success of an antitrust compliance program*. The Division has recognized that *if senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one*.[27]

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22. *See* CHRISTINE A. VARNEY ED., THE CARTELS AND LENIENCY REVIEW 319 (2013).

23. *See* Janet Novak, *Fix and Tell*, FORBES, May 4, 1998, at 46-47 ("Attention price fixers-and bid-riggers. Confess and the U.S. Department of Justice will let you off the hook. But hurry! Only one conspirator per cartel.").

24. The Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002). *See generally* John C. Coates & Suraj Srinivasan, *SOX After Ten Years: A Multidisciplinary Review*, 28 ACCOUNTING HORIZONS 627 (2014); John C. Coates IV, *The Goals and Promise of the Sarbanes–Oxley Act*, 21 J. ECON. PERSP. 91 (2007).

25. *See* U.S. Dep't of Justice, Criminal Division, Fraud Section, *Evaluation of Corporate Compliance Programs*, Feb. 8, 2017. The policy was updated in 2019. *See* U.S. Dep't of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (Apr. 30, 2019).

26. *See* U.S. Dep't of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019) [hereinafter *Antitrust Compliance Policy*]; Assistant Attorney General Makan Delrahim, *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs*, Remarks as Prepared for Delivery at New York University School of Law (July 11, 2019).

27. *Antitrust Compliance Policy, id.*, § 2 (internal quotation marks omitted and emphasis added).

To illustrate the differences between involvement in violations and oversight of violations, consider the London Inter-Bank Offered Rate ("Libor") and Foreign Currency Exchange Rates ("Forex") antitrust cases.[28] These cases concerned conspiracies to manipulate benchmark rates. Motivated to boost their perceived performance, traders in competing banks conspired to manipulate Libor and Forex. A large number of traders were indicted and prosecuted for their participation in the conspiracies. There was no evidence that the directors or senior officers of the colluding banks were aware of the conspiracies and, thus, none were held liable.[29] The Libor and Forex cases and similar ones raise concerns that profitable violations of law are products of internal policies.

B. Compliance and the Pursuit of Profit

At the heart of most antitrust violations lie hopes to increase profits or reduce losses. As entrepreneur and venture capitalist Peter Thiel noted, "competition is for losers."[30] Antitrust law bans transactions, agreements, and business practices that harm or tend to harm the competitive process, even when the involved firms expect to gain from them. Such restrictions on the pursuit of profit are rather common. Many areas of law impose restrictions on certain profit-seeking activities to ensure that the pursuit of profit does not generate excessive externalities or is otherwise incompatible with public policies. Restrictions on profitable activities, however, tend to be controversial, chiefly because the diagnosis of the alleged social costs—harm to competition in the context of antitrust law—is imprecise and may be incorrect.

For the analysis here, three themes are particularly important: profitable violations, decentralization of organizational control, and organizational culture.

(1) Profitable Violations. Several commentators have argued that managers have neither legal nor ethical obligations to comply with applicable laws when violations are profitable to the firm.[31] For example,

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28. For summaries of the relevant facts, see Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from Libor for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. ONLINE 10 (2012); Martin D.D. Evans, *Forex trading and the WMR Fix*, 87 J. BANK. & FIN. 233 (2018).

29. The CEO of one of the banks, Barclays, was ousted supposedly for the bank's failure to detect its traders' misconduct. *See* Andrew Ross Sorokin, *The Damnedest People Ride the Subway*, N.Y. TIMES MAG., May 5, 2013, at 20.

30. Peter Thiel, *Competition Is for Losers*, WALL ST. J., Sept. 13, 2014, at C1.

31. *See* AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE, 2.01, comment g (1994) [hereinafter PRINCIPLES] ("It is sometimes maintained that whether a corporation should adhere to a given legal rule may properly depend on a kind of cost-benefit analysis, in which probable corporate gains are weighed against either probable social costs."). For a

Frank Easterbrook and Daniel Fischel posited that "[s]ome antitrust violations are efficient, just as some breaches of contract are efficient."[32] This notion of efficient antitrust violations is nothing more than a pretext for objections to antitrust enforcement, which should be understood as a cynical disregard of effects on consumers.[33] Antitrust violations intend to increase profit, are hard to detect, and are hard to prove.[34] Ex ante, most antitrust violations may appear profitable. Thus, under the efficient violation thesis, D&O arguably have no legal obligations to assure compliance with antitrust law. This notion of efficient violations made some inroads into antitrust law. During the past three decades, the Supreme Court has been dismissive of the "slight benefits of antitrust intervention,"[35] emphasizing the costs of false positives (erroneous condemnation of business practices),[36] similarities between competitive and anticompetitive behavior,[37] and the "unusually serious mistakes" of antitrust courts.[38]

(2) Decentralization of Control. Organizations integrate activities to generate value through efficiencies and economic power.[39] Organizational scale and scope resulting from such integrations, in turn, require decentralization of control and diffusion of responsibilities.[40] But

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recent formulation of the idea, see Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709 (2019).

32. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1157 (1982).

33. *See* Barak Orbach, *The Consumer Welfare Controversy*, CPI ANTITRUST CHRONICLE, Nov. 2019, at 22.

34. *See* D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L. J. 201 (2012).

35. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 399-400 (2004).

36. *See, e.g.*, Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281 (2007) (expressing concerns regarding "the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible [in antitrust law]."); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (arguing that "mistaken inferences in [antitrust] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."). *See generally* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

37. *See*, *e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553-54 (2007); *Matsushita*, 475 U.S. at 574.

38. *Credit Suisse*, 551 U.S. at 264. *See generally* Orbach, *The Consumer Welfare Controversy*, *supra* note 33.

39. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). *See also* GOLDMAN SACHS GLOBAL INVESTMENT RESEARCH, GOLDMAN SACHS GLOBAL INVESTMENT RESEARCH (Feb. 12, 2014) (advising investors to "look for opportunities created by disruptive consolidation," because "[a]n oligopolistic market structure can turn a cut-throat, commodity industry into a highly profitable one through reduced competitive intensity, scale cost benefits, higher barriers to entry and more.").

40. Decentralization of control and responsibilities should not be confused with the notion of centralized management. Ultimately, a corporation has and should have one management team that delegates tasks to subordinates. *See*, *e.g.*, Marcel Kahan & Edward

decentralization of managerial and monitoring tasks comes with a variety of inefficiencies and agency costs. In decentralized organizations, the downward communication of goals and policies and the upward communication of challenges and problems are indirect, as information is transmitted through a hierarchy of agents and a network of communication channels.[41] Under such conditions, corporate agents who engaged in unlawful or unethical conduct can be described as "bad apples" or "rogue employees," while D&O may remain unaware of any unlawful or unethical conduct.

(3) Organizational Culture. Organizational culture is a maze of formal and informal norms, beliefs, authorities, responsibilities, and values that are understood by insiders as "the way we do things around here."[42] Formal policies and stated values are readily available and verifiable, often set compliance standards, and rarely prescribe unlawful or unethical conduct. By contrast, informal organizational norms are elusive, especially for outsiders, and frequently shape the approaches of fiduciaries toward compliance with formal policies. That is, informal norms may reflect and deepen existing gaps between formal policies and compliance patterns and, once such norms form, they reinforce patterns of selective compliance. For example, insiders tend to know more about strictly enforced policies and know less about neglected policies. This happens because informal norms—the understanding of enforcement patterns—shape the understanding of formal policies. Further, inconsistencies among formal policies sometimes play a role in the formation of selective compliance. For example, tensions between performance and compliance standards sometimes create incentives to engage in unlawful conduct. Where a company fails to detect and address such discrepancies, violations of law are likely to follow.[43]

Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1051 (2010) ("One of the great virtues of the corporate form is centralized management.").

41. *See*, *e.g.*, Independent Directors of the Board of Wells Fargo & Company, Sales Practices Investigation Report (Apr. 10, 2017) (finding that demanding performance goals in a highly decentralized company contributed to unlawful and unethical conduct of employees).

42. Malvin Bower, *Company Philosophy: 'The Way We Do Things Around Here'*, 2003 MCKINSEY Q. 111 (2003). *See generally* Edgar H. Schein, *Corporate Culture*, 4 INT'L ENCYCLOPEDIA SOC. & BEHAVIORAL SCI. 923 (Neil Smelser ed. 2015); Luigi Guiso et al., *The Value of Corporate Culture*, 117 J. FIN. ECON. 60 (2015); George Baker et al., *Informal Authority in Organizations*, 15 J. L. ECON. & ORG. 56 (1999); Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1 (1997); Jacques Crémer, *Corporate Culture and Shared Knowledge*, 2 INDUS. & CORP. CHANGE 351 (1993); JOHN P KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE (1992); David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90 (James E. Alt & Kenneth A. Shepsle eds. 1990); TERRENCE E. DEAL & ALLAN A. KENNEDY, CORPORATE CULTURES (1982).

43. *See, e.g.*, Max H. Bazerman & Ann E. Tenbrunsel, *Ethical Breakdowns*, 89(4) HARV. BUS. REV. 58 (2011).

C. Core Legal Standards

D&O liability for antitrust violations can be found in antitrust, corporate and securities laws. Under antitrust law, D&O may be held criminally and civilly liable for antitrust violations, where they "actively and knowingly engaged in a scheme designed to achieve anticompetitive ends," including by exerting their influence "to shape corporate intentions."[44] Specifically, D&O who formulated, negotiated, authorized, directed, or executed policies or agreements which constituted steps in the progress of an antitrust violation may be criminally and civilly liable for the violation,[45] including treble damages.[46] Under corporate law, D&O who were aware of violations of law or failed to make good faith efforts to oversee material risks and compliance with applicable laws and regulations may be held liable for losses caused by unlawful acts.[47] Under securities law, D&O may be

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44. Brown v. Donco Enterprises, Inc., 783 F.2d 644, 646-47 (6th Cir. 1986).

45. *See, e.g.*, United States v. Wise, 370 U.S. 405, 406, 416 (1962) (holding that a corporate officer may be "subject to prosecution under Section 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime."); Journal Co. v. U.S., 342 U.S. 143 (1951) (holding that corporate officers participated in an unlawful monopolization scheme); Hartford-Empire Co. v. United States, 323 U.S. 386, 401-02 (1945) (holding that directors and officers may be liable for participating in "violations in their capacities as officers and directors."); Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393, 397 (2d Cir. 1943) (A "director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them."); *In re* Southeastern Milk Antitrust Litig, 801 F. Supp. 2d 705, 736 (E.D. Tenn. 2011) (holding that the "standard for individual liability" is "active and knowing participation."); Reifert v. South Central Wisconsin MLS Corp., 368 F. Supp. 2d 912, 913 (W.D. Wis. 2005) (holding that affirmation of an unlawful corporate policy is by itself sufficient to sustain antitrust liability.); Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd., 467 F. Supp. 841, 852 (N.D. Cal. 1979) ("Personal liability must be founded upon specific acts by the individual director or officer."); Deaktor v. Fox Grocery Co., 332 F. Supp. 536, 542 (W.D. Pa. 1971) ("Under the antitrust laws the liability of the participating officers of the offending corporation has long been established."); Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 482 (E.D. Mo. 1965) ("Corporate officers, directors and agents are personally liable for acts of the corporation that violate the antitrust laws if they participate in those actions or authorize them."); Shoenberg Farms, Inc. v. Denver Milk Producers, Inc., 231 F. Supp. 266, 269-70 (D. Colo. 1964) ("A corporate officer, acting as such, can individually [engage in an antitrust violation] for which he is personally responsible."); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F. Supp. 728, 738 (W.D. Ky. 1941) (rejecting the argument that a corporate officer could not be liable for antitrust violations of the corporation, stating that an "agent does not escape personal liability because the act complained of imposes liability upon the principal.").

46. *See*, *e.g.*, Am. Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982); Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808, 810 (E.D. Pa. 1975); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300, 301-02 (S.D.N.Y. 1956) (holding that individual directors could be held personally liable in a treble damage action brought under the Clayton Act); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F. Supp. 728, 738 (W.D. Ky. 1941) (noting that an "agent does not escape personal liability because the act complained of imposes liability upon the principal.").

47. *See infra* Section IV.

held liable for misleading statements and omissions concerning antitrust risk.[48]

II. Illustrations

Many legal landmarks may be used to illustrate how courts and enforcement agencies evaluate patterns of compliance in large organizations. I use three legal episodes for this purpose: (1) The Electrical Conspiracy, (2) Hilton Hotels' antitrust liability for actions of a rogue agent, and (3) *Caremark*'s formulation of the corporate oversight duty.

A. The Electrical Conspiracy

The "Electrical Conspiracy" was an elaborate price-fixing and bid-rigging scheme of the large U.S. heavy electrical equipment manufacturers.[49] The prosecution of the cartel and subsequent litigation produced two important legal landmarks. First, the criminal convictions of the corporate and individual defendants marked a turning point in antitrust enforcement. Until the revelation of the Electrical Conspiracy, "the general attitude [was] that price-fixing was not really a crime in the common understanding of that term."[50] Imprisonment sentences were imposed infrequently, "mostly in cases involving either acts of violence or union misconduct."[51] The prosecution of the Electrical Conspiracy resulted in record fines and the first prison sentences for executives for their participation in antitrust violations.[52] It was estimated that 2,233 private lawsuits followed the convictions.[53] Second, a derivative action against D&O of Allis-Chalmers, the third largest equipment manufacturer, prompted a judicial analysis of the proposition that corporate directors had an affirmative duty to oversee legal

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48. *See infra* Sections IV.D.

49. *See* Robert R. Faulkner et al., *Crime By Committee: Conspirators and Company Men in the Illegal Electrical Industry Cartel, 1954-1959*, 41 CRIMINOLOGY 511 (2003); Gilbert Geis, *White Collar Crime: The Heavy Electrical Equipment Antitrust Case of 1961*, *in* CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 139 (Marshall B. Clinard & Richard Quinney eds., 1967); John G. Fuller, THE GENTLEMAN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY (1962); Richard A. Smith, *The Incredible Electrical Conspiracy: Part I*, FORTUNE, Apr. 1961, at 132; Richard A. Smith, *The Incredible Electrical Conspiracy: Part II*, FORTUNE, May. 1961, at 161.

50. Anthony Lewis, *Trust Case Raises Big Questions*, N.Y. TIMES, Feb. 12, 1961, at E6.

51. Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 389 (1970).

52. The government prosecuted 29 corporations and 45 individuals who pleaded guilty or no defense. *See* Nate White, *Indictment of the Organization Man*, CHRISTIAN SCI. MONITOR, Feb. 8, 1961, at 7.

53. Posner, *supra* note 51, at 371, 389.

compliance.[54] The Delaware Chancery Court ruled and the Delaware Supreme Court affirmed that, absent cause for suspicion, directors did not have such duty.[55]

Additionally, studies of the Electrical Conspiracy led to the recognition that cartel members have powerful incentives to cheat and, therefore, cartels tend to utilize enforcement mechanisms.[56] This insight has profoundly influenced the development of antitrust law and policy. In the context of proof of unlawful conspiracy, it contributed to doctrinal emphasis on evidence of communication among competitors. A more nuanced thinking about the incentives of cartel members inspired the development of the leniency program.

The Electrical Conspiracy trials pressed the question of whether D&O of large and decentralized organizations should be held accountable for wrongdoing committed by employees. No director or senior officer was criminally prosecuted in connection with the cartel, only mid-level managers.[57] The government was "unable to uncover probative evidence" that could secure convictions "of those in the highest echelons of the corporations."[58] Nonetheless, the trial judge believed that the individual defendants "were torn between conscience and an approved corporate policy with rewarding objectives."[59] He stated in the courtroom that the "real blame" was at "the doorstep of the corporate defendants and those who guide[d] and direct[ed] their policy," and that "one would be most naïve . . . to believe that . . . [the] facts were unknown to those responsible for the conduct of the corporation."[60] Testimonies of employees of the corporate defendants supported this conclusion. They described organizational systems in which the senior management discouraged aggressive competition, mid-level managers operated the cartel believing that they were expected to do so, and compliance policies were not followed.[61]

Allis Chalmers was one of the corporate defendants. The company employed more than 30,000 people, and operated sixteen plants in the United States and eight plants in other countries. The company's salesforce included over 5,000 dealers and distributors working from

54. *See* Graham v. Allis-Chalmers Mfg. Co., 182 A.2d 328, 332 (Del. Ch. 1962) [hereinafter *Graham I*], *aff'd*, 188 A.2d 125 (Del. 1963) [hereinafter *Graham II*].

55. *Graham I*, 182 A.2d at 332; *Graham II*, 188 A.2d at 85.

56. *See* Faulkner et al., *supra* note 49; Kenneth G. Elzinga, *New Developments on the Cartel Front*, 29 ANTITRUST BULL. 3, 6-9 (1984); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

57. *See* Faulkner et al., *supra* note 49; Geis, *supra* note 49.

58. *Judge's Statement in the Electrical Antitrust Case*, N.Y. TIMES, Feb. 7, 1961, at 26.

59. *Id.*

60. *Id.*

61. *See* Geis, *supra* note 49, at 147-50.

145 sales offices.[62] During the relevant period, the company's annual revenues ranged from $530 to $550 million.[63] Managers of the Power Equipment Division, including managers of the Division's ten departments, colluded with their counterparts in rival companies to fix prices and bids through frequent communication. The Power Equipment Division was part of the company's Industries Group, which had five divisions and was headed by an officer who served on the company's board of directors. This director-officer "made it clear to his staff as well as representatives of Allis-Chalmers' business competitors that it was the firm policy of his company that ruthless price cutting should be avoided."[64]

Allis-Chalmers' "operating policy" rested on decentralization "by the delegation of authority to the lowest possible management level capable of fulfilling the delegated responsibility."[65] Prices of products were ordinarily set by department managers, who occasionally conferred with the division's manager.[66] For the "complexity of the company's operations," the board of directors considered "matters concerning the general business policy of the company."[67] The directors, however, did not "consider in detail specific problems of the various divisions" and did not "participate in decisions fixing the prices of specific products."[68] The company had no antitrust compliance policies, although it operated under consent decrees that settled prior investigations into price fixing schemes of heavy electrical equipment.[69] The company's directors were arguably unaware of these consent decrees.[70]

The Delaware Chancery Court and Supreme Court emphasized that decentralization and diffusion of responsibilities were necessary for large businesses. They portrayed oversight and, specifically, compliance policies as intrusive and costly and ruled that, in the absence of grounds for suspicion, the directors were "entitled to rely on the honesty and integrity of their subordinates."[71] Both courts believed that the consent decrees "were notice of nothing."[72]

62. *Graham I*, 182 A.2d at 329; *Graham II*, 188 A.2d at 128.
63. *Graham I*, 182 A.2d at 329; *Graham II*, 188 A.2d at 128.
64. *Graham I*, 182 A.2d at 330.
65. *Graham II*, 188 A.2d at 128.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 129-30.
70. *Id.*
71. *Graham II*, 188 A.2d at 130; *Graham I*, 182 A.2d at 332 (holding that the directors "had no reason to believe that minor officials in the lower echelons of an industrial empire had become involved in violations of the federal antitrust laws.").
72. *Graham II*, 188 A.2d at 130.

B. Hilton Hotels*' Rogue Agent*

Hilton Hotels concerned a cartel among purchasing agents of hotels and restaurants in Portland, Oregon.[73] The manager of Hilton Portland instructed the hotel's purchasing agent to take no part in the cartel. The agent testified that he had ignored the instruction because of his "anger and personal pique" toward one of the hotel's suppliers.[74] Hilton Hotels Corporation tried to exculpate itself by arguing that the agent's acts were unauthorized.[75] The trial judge rejected the argument. He instructed the jury that, where an agent acts with apparent authority, his actions may be attributed to the organization, even when the actions violate organizational policies and instructions.[76] Hilton Hotels appealed.

The Ninth Circuit upheld the jury instruction, stating that, under antitrust law, "a corporation is liable for acts of its agents within the scope of their authority even when done against company orders."[77] The court's analysis of corporate criminal liability under antitrust law is insightful.

First, the Ninth Circuit recognized that, with some exceptions, proof of antitrust violations requires evidence of general intent—namely, knowledge of the underlying facts. Specific intent—namely conscious wrongdoing—is not an element of most antitrust offenses.[78] Second, the court was critical of Hilton Hotels' "strenuous efforts" to escape accountability for employees' misconduct.[79] The court observed that antitrust corporate liability intends to stimulate "a maximum effort" to assure compliance with antitrust law by holding organizations accountable for acts of "those to whom they choose to delegate the conduct of their affairs."[80] Third, the court recognized that, in "large, complex, and highly decentralized corporate business enterprises," it is often difficult to identify the individuals responsible for antitrust violations, as corporate acts are typically products of "intricate business processes, practices, and arrangements."[81] The court further observed that antitrust violations in large, decentralized organizations are "a likely consequence of the pressure to maximize profits that is commonly

73. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

74. *Id*. at 1004.

75. *Id*.

76. *Id*. An agent has apparent authority when third parties could reasonably believe that the agent had the authority.

77. *Id.*

78. *Id.* at 1005. *See generally* Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657 (2001).

79. *Hilton Hotels*, 467 F.2d at 1006.

80. *Id.* at 1006. *See also* United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958) (noting that entity liability under antitrust law intends to assure that agents, regardless of their seniority, comply with the antitrust law).

81. *Hilton Hotels*, 467 F.2d at 1006.

imposed . . . upon managing agents and, in turn, upon lesser employees."[82] For these reasons, the court concluded that, under antitrust law, a corporation is liable for the "acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent."[83] Accordingly, a corporate defendant cannot "gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks."[84]

C. Caremark*'s Oversight Duty*

Caremark is one of the most consequential Delaware decisions.[85] Writing for the Delaware Court of Chancery, Chancellor William Allen formulated the duty to monitor in an opinion that transformed corporate law.[86]

Caremark concerned contractual arrangements between the company and physicians, which Caremark's salespersons negotiated with physicians on behalf of the company. To induce physicians to refer patients to Caremark's products and services, these contracts provided for payments that constituted unlawful kickbacks.[87] As a result of the alleged violations, Caremark was subject to extensive federal investigations for four years, paid $250 million in fines and damages, and reorganized its operation to improve compliance.[88] The plaintiffs argued on behalf of the company that Caremark's directors breached their fiduciary duties by failing to monitor and supervise the enterprise. The Chancery Court reviewed a proposed settlement.

Caremark was a relatively large company with approximately 7,000 employees in ninety branches.[89] It had a "decentralized management structure."[90] Responding to the federal investigations of alleged kickback arrangements, Caremark implemented an oversight system that included (1) a formal anti-kickback policy prohibiting payments intending to induce benefits to the company,[91] (2) an annual review of the anti-kickback policy,[92] (3) "an internal audit plan designed to assure

82. *Id.*
83. *Id.* at 1007.
84. *Id*.
85. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor*, *in* CORPORATE LAW STORIES 323, 325 (J. Mark Ramseyer ed., 2009).
86. *See infra* Section IV.A.
87. *Caremark*, 698 A.3d at 962.
88. *Id*. at 960-61.
89. *Id.* at 962.
90. *Id.*
91. *Id.*
92. *Id.*

compliance with business and ethics policies,"[93] and (4) a review of the company's control system by outside auditors.[94] During the period of the investigations, Caremark hardened its compliance system, although internal and external examinations of the system did not identify any material vulnerabilities.[95] Additionally, the company made "attempts to centralize its management structure in order to increase supervision over its branch operations."[96]

The proposed settlement that the Chancery Court reviewed gave the plaintiffs "express assurances" that Caremark would implement "a more centralized, active supervisory system."[97] Concluding that the plaintiffs' claims were "extremely weak," Chancellor Allen ruled that the proposed settlement was an adequate, reasonable, and beneficial outcome for all parties.[98] Along the way, Chancellor Allen noted that a "rational person attempting in good faith to meet" her fiduciary obligations is bound to take into account the "increasing tendency, especially under federal law, to employ the criminal law to assure corporate compliance with external legal requirements."[99] Accordingly, the Chancellor wrote, to satisfy their fiduciary obligations to be reasonably informed, directors must assure themselves that "reasonably designed" information and reporting systems exist in the organization.[100] This review standard provides that courts might hold directors liable for oversight failures, where the directors acted in "bad faith," which Chancellor Allen interpreted as a "sustained or systematic failure of a director to exercise reasonable oversight."[101]

D. Summary

The foregoing discussion illustrates the intricacy of violations in big corporations. D&O may be unaware of violations of laws and regulations, even when they set policies that incentivize employees to engage in such violations. The purpose of oversight liability is to incentivize D&O to make good faith efforts to implement protocols and procedures that are likely to improve organizational compliance with applicable laws and regulations.

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93. *Caremark*, 698 A.3d at 963.
94. *Id.*
95. *Id.*
96. *Id.* at 962.
97. *Id.* at 972.
98. *Id.*
99. *Caremark*, 698 A.3d at 969-70.
100. *Id.* at 970.
101. *Id.* at 971.

III. Antitrust Violations

Antitrust policies related to individual accountability for antitrust violations have developed in two distinctive eras of sympathy for individual defendants. First, until the early 1960s, antitrust enforcement was periodically vigorous,[102] but the prosecution of executives for antitrust violations was infrequent and ineffective, largely due to sentiments that antitrust violations were not "crimes."[103] Second, since the mid-1970s, the Supreme Court has been persistently narrowing the scope of antitrust law for skepticism of the virtues of antitrust enforcement.[104] During this period, the DOJ and FTC have developed policies to address individual accountability and private actions have considerably evolved.

A. The Personification of Antitrust Offenders

The language and legislative history of the Sherman, Clayton, and FTC Acts unequivocally indicate that, in passing these statutes, Congress expected the enforcement agencies to hold D&O accountable for antitrust violations.[105]

The Sherman and Clayton Acts refer to antitrust offenders as "persons" and provide that the word "person," or "persons," may mean organizations ("corporations and associations"), not only individuals.[106] By contrast, the FTC Act uses the phrase "person, partnership, or corporation" to describe offenders.[107] Since 1974, Sections 1, 2, and 3 of the Sherman Act separate corporations from "any other person."[108] Natural persons who violate these provisions may be fined or imprisoned, whereas corporations may be punished by much larger fines.

The legislative history of the principal antitrust statutes is even more telling. When Congress debated the Sherman Act, the notion of corporate criminal liability was still new. Corporate defendants insisted that criminal intent could not be imputed to and criminal sanctions could

102. *See* Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439 (2019).

103. *See supra* Section II.C; United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir. 1941) ("We cannot understand how the jury could have acquitted all of the individual defendants [while finding the corporate defendants guilty].").

104. *See* Orbach, *supra* note 102, at 1456; *see also* Barak Orbach & Lindsey Huang, *Con Men and Their Enablers: The Anatomy of Confidence Games*, 85 SOC. RES. 795, 806-08 (2018) (examining the effects of the Supreme Court's jurisprudence on misconduct).

105. *Wise*, 370 U.S. at 406-15.

106. 15 U.S.C. §§ 7, 12.

107. 15 U.S.C. § 45.

108. 15 U.S.C. §§ 1-3. The Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974), (also known as the Tunney Act, revised these sections).

not be imposed on corporations.[109] This approach established a jurisprudential irony. Judicial interpretations of the word "person" included corporations, only for the purpose of defending corporations. The interpretation of the Equal Protection Clause of the Fourteenth Amendment included corporations,[110] while the same word in criminal statutes meant natural persons, not corporations.[111]

The drafters of the Sherman Act were aware of the uncertainty that surrounded the idea of corporate criminal liability. Senator John Sherman believed that a criminal statute "can only reach officers or agents employed by the corporation," because a "corporation cannot be indicted or punished except through civil process."[112] Accordingly, Senator Sherman's anti-trust bill and its amendments distinguished between "corporations" and "persons."[113] They declared that any person who enters into any "arrangement, contract, agreement, trust, or combination" in restraint of trade, "either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor."[114] Additionally, Senator Sherman's bill provided for civil actions by the federal government and private parties against corporations and individuals. The Senate Judiciary Committee redrafted Senator Sherman's bill.[115] Among other things, the

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109. *See, e.g.*, *Wise*, 370 U.S. at 408-09 ("The doctrine of corporate criminal responsibility for the acts of the officers was not well established in 1890."); N.Y. Cent. & H.R.R. Co. v. United States, 212 U.S. 481, 492 (1909) [hereinafter *New York Central*] ("It is contended that . . . Congress has no authority to impute to a corporation the commission of criminal offenses."); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 296 (1899) (Field, C.J.) ("It is said that an intent cannot be imputed to a corporation in criminal proceedings.").

110. *See* Santa Clara County v. S. Pac. R.R., 118 U. S. 394 (1886), (holding that the word "person" in the Equal Protection Clause covers corporation and that this determination did not warrant discussion). There is no debate that the Supreme Court's ruling in *Santa Clara* was based on misunderstanding of the legislative history of the Fourteenth Amendment. *See* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85-86 (1938) (Black, J., dissenting) (stating that "[n]either the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection."). For the events leading to the adoption of this dubious interpretation, see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Andrew C. McLaughlin, *The Court, The Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940); Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment: 2*, 48 YALE L. J. 171 (1938); Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 YALE L. J. 371 (1938); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655 (1926).

111. *See, e.g.*, Wise, 370 U.S. 408-09; United States v. Dotterweich, 320 U.S. 277 (1943); United States v. MacAndrews & Forbes Co., 149 F. 823 (S.D.N.Y. 1906).

112. 21 CONG. REC. 2456 (March 21, 1890).

113. S. 3445, 50th Cong., 1st Sess. (Aug. 14, 1888); S. 1., 51st Cong., 1st Sess. (Dec. 4, 1889). Both bills were revised a few times by Senator Sherman and the Senate Committee on Finance, on which Sherman was an influential member.

114. S. 1., 51st Cong., 1st Sess. § 3 (Dec. 4, 1889).

115. S. 1., 51st Cong., 1st Sess. (Apr. 2, 1890).

Committee eliminated the distinction between "corporations" and "persons" and clarified that, under the statute, a person could be a corporation. Congress passed the Judiciary Committee's bill, not the bill that Senator Sherman drafted.

In 1909, the Supreme Court held that a corporation may be criminally liable for offenses committed by agents acting within the scope of their authority for the benefit of the corporation.[116] Nonetheless, many believed that new federal legislation was needed to supplement the Sherman Act. Antitrust enforcement in the first years of the Sherman Act was disappointing and contributed to a massive merger wave, which resulted in increased concentration in numerous industries.[117] Further, the adoption of the rule of reason in 1911 was perceived as emasculation of the Sherman Act. In 1912, the Democratic Party took over the White House and Congress, with a platform declaring that a "private monopoly is indefensible and intolerable" and calling for "the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials."[118] President Wilson urged Congress to adopt legislation that would hold corporate agents "individually responsible" for antitrust violations, arguing that acts of corporations were done "at the command or upon the initiative" of individuals.[119] In 1914, Congress passed the Clayton and FTC Acts that emphasized that antitrust enforcement must reach individuals.

Stated simply, Congress enacted the principal antitrust statutes believing that personal accountability was the most effective means to enforce competition policy. Expressions of this view have always decorated the narrative of antitrust enforcement.[120] Nonetheless, until the mid-1990s, criminal prosecution of individuals for antitrust violations was very limited in scope.[121] In most years, more corporations than individuals were indicted for alleged antitrust violations. Since the mid-1990s, in every given year, the number of indicted individuals has been larger than the number of indicted corporations. This trend has not changed during the Trump Administration, when criminal antitrust enforcement has been neglected (thus far). The number of criminal

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116. *See New York Central*, 212 U.S. at 495-96.

117. *See* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 at 107-08 (1985).

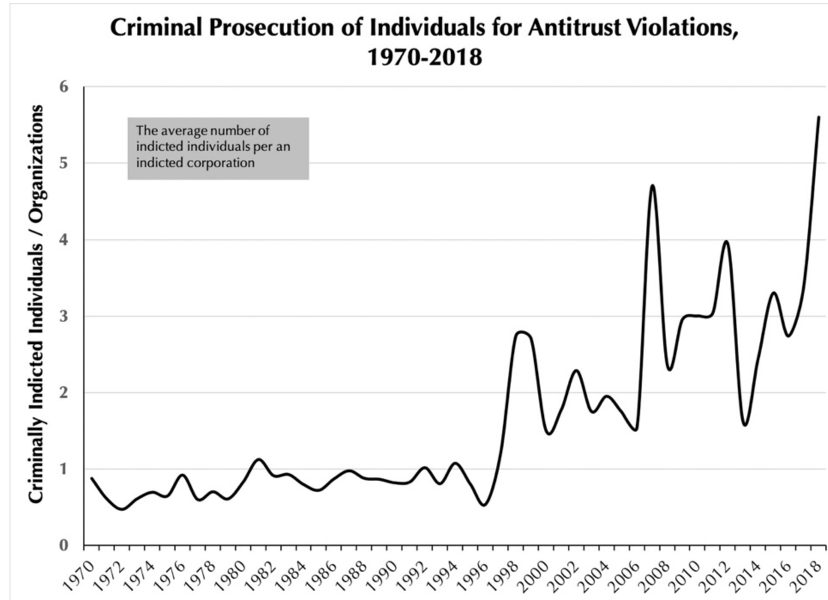
118. DEMOCRATIC NAT'L COM., NATIONAL DEMOCRATIC PLATFORM: PROGRESS IN EVERY PLANK 2 (Jul. 12, 1912).

119. 51 CONG. REC. 1963 (Jan. 20, 1914) (The President's Address).

120. *See* Gregory J. Werden, *Individual Accountability Under the Sherman Act: The Early Years*, 31(2) ANTITRUST 100 (2017); Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001).

121. *See* Judy L. Whalley, *Crime and Punishment: Criminal Antitrust Enforcement in the 1990s*, 59 ANTITRUST L.J. 151 (1990).

antitrust cases fell from sixty-six in 2015 to twenty-eight in 2018. Corporate criminal fines dropped from $3.6 billion in 2015 to $172 million in 2018.



Source: Department of Justice Antitrust Division.

B. Section 14 of the Clayton Act: Statutory Personal Liability

Section 14 of the Clayton Act, titled "Liability of Directors and Agents of Corporation," emphasizes that an individual may be criminally liable for antitrust violations of the corporation, where her actions constituted steps in the progress of a Sherman Act violation, even where such actions, in and of themselves, did not constitute a violation.[122] It provides:

> 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 . . . who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor.[123]

Section 14 suffers from three significant shortcomings that compromise its usefulness. First, individual liability under Section 14 requires a conviction of the corporation, whereas individual liability under the Sherman Act does not. Second, Section 14 includes the

122. United States v. Atl. Comm'n Co., 45 F. Supp. 187, 194-95 (E.D.N.C. 1942) [hereinafter *Atlantic Commission*].
123. 15 U.S.C. § 24.

original language of the Sherman Act, providing that antitrust violations were misdemeanors carrying a maximum fine of $5,000 and up to one year in prison. Since the enactment of the Clayton Act, however, Congress has amended this Sherman Act several times, but failed to amend Section 14. Today, a Sherman Act violation is a felony, "punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both." The resulting differences between Section 14 and the penal provisions of the Sherman Act eroded the significance of Section 14.[124] Third, Section 14 addresses D&O criminal liability, but there is no corresponding statutory provision addressing D&O civil liability under antitrust law.[125] For these shortcomings, Section 14 is largely symbolic. Several old cases suggest that Section 14 possibly expanded the scope of the Sherman Act and created new antitrust offenses.[126] With the exception of these cases, it is difficult to identify any actual effect of Section 14 on antitrust enforcement and individual accountability. Discussions of individual accountability for antitrust violations in judicial opinions and the literature rarely mention Section 14.[127]

The ineffectiveness of Section 14 deserves attention. Congress passed the provision responding to "the sympathy shown to corporate officers by judges, juries, and prosecutors" and concerns that the Sherman Act "did not cover officers who merely authorized or ordered the commission of the offense."[128] Section 14, thus, intended to serve as "a reaffirmation of the Sherman Act's basic penal provisions and a mandate to prosecutors to bring all responsible persons to justice."[129] In

124. After Congress amended the Sherman Act, in several instances defendants argued that Section 14 addresses D&O acting in a representative capacity, whereas the Sherman Act applies to individuals acting in their personal capacity. *See*, *e.g.*, United States v. N. Am. Van Lines, Inc., 202 F. Supp. 639, 640-41 (D.D.C. 1962) [hereinafter *Van Lines*]; United States v. Milk Distributors Ass'n, Inc., 200 F. Supp. 792, 794 (D. Md. 1961); United States v. A. P. Woodson Co., 198 F. Supp. 582, 582 (D.D.C. 1961). In 1962, the Supreme Court categorically rejected the argument. *See Wise*, 370 U.S. at 416.

125. Courts rejected the argument that this statutory silence reflects legislative intent to limit the scope of personal liability to criminal sanctions. *See*, *e.g.*, Eastern Star, Inc., S.A. v. Union Bldg. Materials Corp., 6 Haw. App. 125, 136 (1985); Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808, 810 (E.D. Pa. 1975); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F.Supp. 300, 302 (S.D.N.Y. 1956).

126. *See, e.g.*, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); *Van Lines*, 202 F. Supp. 639; *Atlantic Commission*, 45 F.Supp. at 194-95.

127. *See, e.g.*, Gregory Walker, *Note: The Personal Liability of Corporate Officers in Private Actions Under the Sherman Act: Murphy Tugboat in Distress*, 55 FORDHAM L. REV. 909 (1987); Richard A. Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 931-32, 942 (1961); Victor H. Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 YALE L.J. 1266 (1950); Gardiner C. Means, *Interlocking Directorates*, 8 ENCYC. SOC. SCI. 148 (1932).

128. *Wise*, 370 U.S. at 413.

129. *Id*. at 414.

practice, however, Section 14 has been a toothless legislative commitment to hold directors, officers, and other agents accountable for antitrust violations. Cynics may argue that the ineffectiveness of Section 14 was by design.

C. Section 8 of the Clayton Act: Interlocking Directors and Officers

Section 8 of the Clayton Act bans D&O horizontal interlocks. It prohibits, with certain exceptions, one person from serving as a director or officer of competing companies when two thresholds are met.[130] The exceptions include "banks, banking associations, and trust companies," which other statutes cover.[131] The thresholds—Section 8's safe harbors—are *de minimis* exemptions.[132] They refer to the aggregate "capital, surplus, and undivided profits," as well as the "competitive sales" of the companies, and are revised annually by the FTC.[133] Competing firms under Section 8 are companies that "by virtue of their business and location of operation, . . . the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."[134]

Thus, unless protected by Section 8's exceptions or safe harbors, an interlock between two companies is unlawful, where a price-fixing agreement between the companies would be illegal under antitrust law.[135] Under the "deputization theory," Section 8 also bans indirect interlocks that meet these standards. Indirect interlocks are situations where different individuals, who are agents of the same person—an organization or individual—serve as directors or officers of competing companies.[136]

When Congress passed the Clayton Act, interlocks were so prevalent that there were concerns that interlocking directors could not

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130. 15 U.S.C. § 19. *See generally* AM. BAR ASSOC., INTERLOCKING DIRECTORATES HANDBOOK (2011).

131. 15 U.S.C. § 19(a). The exceptions have changed several times since the enactment of the Clayton Act. AM. BAR ASSOC., *supra* note 130, at 4-7, 12, 44-48, 76-78.

132. AM. BAR ASSOC., *supra* note 130, at 10-11.

133. 15 U.S.C. § 19(a)(1)(B). "Competitive sales," under Section 8, means the annual gross revenues that the products and services in competition generate in that corporation's last completed fiscal year. 15 U.S.C. § 19(a)(2).

134. 15 U.S.C. § 19(a)(1)(B).

135. *See* Protectoseal Co. v. Barancik, 484 F.2d 585, 589 (7th Cir. 1973) (holding that, where any horizontal agreement would violate any of the antitrust laws, interlocks between the same companies would be unlawful under Section 8).

136. *See, e.g.*, *Reading Intern'l v. Oaktree Capital Management, LLC*, 317 F. Supp. 2d 301, 326-31; Square D Co. v. Schneider S.A., 760 F. Supp. 362, 366-68 (S.D.N.Y. 1991); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 216-17 (4th Cir. 1987).

satisfy their fiduciary responsibilities.[137] Such concerns contributed to the enactment of Section 8, but are not part of the statute, whose purpose is "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[138] The enforcement of the ban on horizontal interlocks has been limited and infrequent, largely for skepticism about their anticompetitive effects.[139]

The growing concentration in the US economy revived concerned about horizontal interlocks. For example, in 2016, the Justice Department required the restructuring of a transaction, in which one company acquired about twenty percent of the outstanding stock of a competitor and the right to nominate one member of the competitor's board of directors.[140] In this spirit, responding to government inquiries, high-tech companies dismantled horizontal interlocks. Directors who served simultaneously on the boards of Apple and Google resigned from one board of directors to end an FTC investigation.[141] In May 2019, Assistant Attorney General Makan Delrahim, the head of the DOJ's Antitrust Division, stated that the Division "regularly encounters potential Section 8 violations" and had been evaluating how to adjust the interpretation of Section 8 to "modern corporate structures."[142]

In sum, Section 8 of the Clayton Act concerns individual directors and officers, but is not used to impose personal liability beyond the

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137. *See* AM. BAR ASSOC., INTERLOCKING DIRECTORATES UNDER SECTION 8 OF THE CLAYTON ACT (Monograph 10, 1984) [hereinafter INTERLOCKING DIRECTORATES] at 25; *see generally* Victor H. Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 YALE L.J. 1266 (1950); Gardiner C. Means, *Interlocking Directorates*, 8 ENCYC. SOC. SCI. 148 (1932); *see also* Louis Brandeis, *Serve One Master Only!*, HARPER'S WKLY., Dec. 13, 1913, at 10; Louis Brandeis, *The Endless Chain*, HARPER'S WKLY., Dec. 6, 1913, at 13; Louis Brandeis, *Breaking the Money Trust*, HARPER'S WKLY., Nov. 22, 1913, at 10.

138. SCM Corp. v. FTC, 565 F.2d 807, 811 (2d Cir. 1977) (quoting United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953) (internal quotation marks omitted). *See also* Square D Co. v. Schneider S.A., 760 F. Supp. 362, 366 (S.D.N.Y. 1991) ("The purposes of § 8 are to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors.").

139. *See, e.g.*, AM. BAR ASSOC., *supra* note 130, at 41-48; INTERLOCKING DIRECTORATES, *supra* note 133. *See also* TRW, Inc. v. FTC, 647 F.2d 942, 954 (9th Cir. 1981) (holding that the FTC abused its discretion in issuing cease and desist orders proscribing interlocking directorates).

140. Press Release, U.S. Dep't. of Justice, Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates (July 14, 2016).

141. Jessica E. Vascellaro, *Google Board Member Resigns Amid Inquiry*, WALL ST. J., Oct. 13, 2009, at B3; Jessica E. Vascellaro & Yukari Iwatani Kane, *Schmidt Resigns His Seat on Apple's Board*, WALL ST. J., Aug. 4, 2009, at B1.

142. Assistant Attorney General Makan Delrahim, *Don't "Take the Money and Run": Antitrust in the Financial Sector*, Remarks as Prepared for Delivery at Fordham University School of Law (May 1, 2019).

enforcement of the ban itself.[143] Nonetheless, enforcement actions involving alleged Section 8 violations can be disruptive for companies and burden executives. Thus, in the present era, direct and indirect horizontal interlocks are riskier than they used to be, especially for large companies. Importantly, the renewed attention to Section 8 enforcement is likely to add a layer of scrutiny for merger review.

D. The Responsible Corporate Officer Doctrine

Under the responsible corporate officer doctrine ("RCOD"), D&O may be criminally liable for a corporate crime that they had the authority to prevent, regardless of their knowledge of or participation in the acts that formed the offense. As explained by the Supreme Court:

> The liability of managerial officers [does] not depend on their knowledge of, or personal participation in, the act made criminal by . . . statute. Rather, where the statute under which they [are] prosecuted dispensed with 'consciousness of wrongdoing,' an omission or failure to act [is] deemed a sufficient basis for a responsible corporate agent's liability.[144]

RCOD permits prosecution of D&O for certain corporate crimes, without the need to establish their intent or involvement in wrongful conduct. RCOD prosecutions have been concentrated in criminal violations of the federal Food, Drug and Cosmetic Act. In *Wise* (1962), the Supreme Court ruled that RCOD may apply to criminal antitrust violations.[145] In practice, however, the Justice Department rarely seeks to hold D&O liable for antitrust violations under RCOD.

In the present era of growing emphasis on personal accountability and oversight standards, D&O must consider the risk of personal liability under RCOD for failing to implement effective oversight systems.

IV. Corporate and Securities Law

Antitrust investigations, litigation, settlements, and sanctions frequently trigger enforcement actions alleging that D&O breached their fiduciary duties or failed to disclose liability risks. The financial costs of such enforcement actions typically fall on the company itself, yet they discipline D&O.

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143. *See, e.g.*, United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1036 (N.D. Cal. 2013); Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1561 (10th Cir. 1984) (holding that for a recovery of monetary damages for a violation of Section 8, a private plaintiff must show actual harm).

144. United States v. Park, 421 U.S. 658, 670-71 (1975). *See also* United States v. DeCoster, 828 F.3d 626, 632 (8th Cir. 2016) (citing *Park* to explain RCOD).

145. *Wise*, 370 U.S. at 416.

A. Oversight Liability

Corporate law requires D&O to maximize corporate profit and shareholder gain,[146] so long as the pursuit of profit complies with applicable laws and regulations.[147] It is well settled that a "fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity."[148] This general standard, however, offers little guidance for garden variety situations in which the firm's operations and management are decentralized, performance goals conflict with formal compliance policies, and effectiveness of internal controls is questionable.

Caremark and its progeny examined alleged breaches of fiduciary duties by directors of large and decentralized corporations.[149] As noted, under this line of cases, to satisfy their duty of loyalty, directors must make a good faith effort to exercise their duty of care by implementing and monitoring an oversight system.[150] Stated simply, a breach of the duty of loyalty may be inferred from certain breaches of the duty of care. Correspondingly, a valid oversight claim must plead that (1) the D&O defendants knew or should have known that the company was violating applicable laws, (2) the D&O defendants acted in bad faith by failing to prevent or remedy those violations, and (3) the failures resulted in losses to the company.

Most judicial decisions addressing oversight liability involve actions against directors; although, in practice, senior officers implement oversight systems and are responsible to report to the board about violations and the effectiveness of the systems. Until the Great Recession, there was some ambiguity as to the nature of the fiduciary

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146. PRINCIPLES, *supra* note 31, at § 2.01(a) ("[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.").

147. PRINCIPLES, *supra* note 31, at § 2.01(b) (A corporation is "obliged . . . to act within the boundaries set by law," may "take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business," and "[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes," "[e]ven if corporate profit and shareholder gain are not thereby enhanced.").

148. Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004). *See also* Miller v. AT&T Co., 507 F.2d 759, 762 (3d Cir. 1974); Abrams v. Allen, 74 N.E.2d 305, 306-07 (N.Y. 1947); Roth v. Robertson, 64 Misc. 343, 345 (N.Y. Sup. Ct. 1909). In the 1960s, New York courts dismissed derivative actions seeking to hold corporate officials accountable for fines imposed on the corporation, where the plaintiff failed to prove that the illegal conduct did not pay off. PRINCIPLES, *supra* note 31, at § 7.18 n.7.

149. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); *Citigroup*, 964 A.2d 106; *Stone*, 911 A.2d 362.

150. *Marchand*, 212 A.3d at 821; *Stone*, 911 A.2d at 370.

duties of corporate officers.[151] In 2009, the Delaware Supreme Court settled the question holding that "the fiduciary duties of officers are the same as those of directors."[152] The consequences of fiduciary breaches, however, are not necessarily the same for directors and officers.[153] In Delaware and many other jurisdictions, corporations may exculpate their directors from monetary liability for breaches the duty of care, but are not authorized to exculpate officers.[154] Other differences may arise for the different functions that directors and senior officers serve.

The oversight duty requires D&O to make good faith efforts to monitor material risks. *Caremark* introduced this duty, stating that to "satisfy their obligation to be reasonably informed concerning the corporation," directors must assure themselves that "information and reporting systems exist in the organization that are reasonably designed to provide" the board of directors and senior management with "timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."[155] Other judicial formulations of the duty talk about a duty to "be active monitors of corporate performance,"[156] "exercise oversight and to monitor the corporation's operational viability, legal compliance, and financial performance[,]"[157] and "put in place a reasonable board-level system of monitoring and reporting."[158] Importantly, the oversight duty is not an independent duty. Rather, it is derived from the duty of care and the duty of loyalty.

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151. *See, e.g.*, *In re* World Health Alternatives, Inc., 385 B.R. 576, 592-93 (Bankr. D. Del. 2008) (evaluating the ambiguity and concluding that "it is clear" that under Delaware law, "both officers and directors owe fiduciary duties to the corporation."); *In re* Tower Air, Inc., 416 F.3d 229, 238 n.12 (3d Cir. 2005) ("[We] assume . . . that theories of liability against corporate directors apply equally to corporate officers."). *See generally* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105 (2009).

152. Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009).

153. *See, e.g.*, Hampshire Grp., Ltd. v. Kuttner, No. CIV.A. 3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010) ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors."); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 440 (2005) (arguing that the business judgment rule "does not and should not be extended to corporate officers in the same broad manner in which it is applied to directors.").

154. *See, e.g.*, Del. Code Ann. Tit. 8, § 102(b)(7) (permitting exculpation from liability for breaches of the duty of care by directors but not officers); McPadden v. Sidhu, 964 A.2d 1262, 1275 (Del. Ch. 2008) (Though an officer owes to the corporation identical fiduciary duties of care and loyalty as owed by directors, an officer does not benefit from the protections of a Section 102(b)(7) exculpatory provision, which are only available to directors.").

155. *Caremark*, 698 A.2d at 970.

156. *Id.* at 967.

157. *Marchand*, 212 A.3d at 809 (internal quotation and citation omitted).

158. *Id.* at 821.

Judicial opinions addressing oversight claims frequently state that the implemented oversight system must be adequate, appropriate, and reasonable.[159] Accordingly, nominal compliance with applicable laws and regulation does not satisfy the oversight duty.[160] It cannot be said that nominal compliance is a product of good faith efforts to oversee legal risks. This reasonableness standard, however, concerns only *decision-making procedures* and does not extend to the *effectiveness of oversight systems*, which is protected by the business judgment rule.[161]

An oversight failure is "conscious disregard" of the oversight duty; namely, a failure to act in good faith in violation of a known duty to act.[162] Directors fail to satisfy the oversight duty when they (1) "completely fail to implement any reporting or information system or controls," or (2) "having implemented such a system or controls, consciously fail to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[163] Courts treat such conscious disregard as "bad faith." It concerns "conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (*i.e.*, gross negligence)."[164] Bad faith may be inferred from evidence (1) suggesting that the board of directors made no effort to implement an oversight system,[165] (2) showing disregard of information about problems that ought to be addressed,[166] or (3) indicating that the company had no reporting protocols.[167] This legal notion of failure heavily rests on the bedrock principle of fiduciary duties—the business judgment rule. Courts are willing to review the good faith or rationality of the decision-making processes, but not the content of business decisions.[168]

In *Marchand v. Barnhill* (2019), the Delaware Supreme Court refined the oversight duty. Under *Marchand*, companies must tailor their governance, risk management, and compliance functions to address "central compliance risks," as well as "yellow and red flags" about

159. *See Marchand*, 212 A.3d at 823; *Stone*, 911 A.2d at 368, 371-73, *Caremark,* 698 A.2d at 970-71.

160. *Marchand*, 212 A.3d at 823.

161. *Id.* at 821.

162. *See*, *e.g.*, *Citigroup*, 964 A.2d at 123-25; *Stone*, 911 A.2d at 369-70; *In re* Walt Disney Co. Derivative Litigation, 906 A.2d 66 (Del. 2006).

163. *Marchand*, 212 A.3d at 821.

164. *Stone*, 911 A.2d at 369.

165. *Marchand*, 212 A.3d at 822; *Caremark*, 698 A.2d at 971 ("an utter failure to attempt to assure a reasonable information and reporting system exists" or "sustained or systematic failure of a director to exercise reasonable oversight.").

166. *See Marchand*, 212 A.3d at 820-21, 823; *see also Caremark*, 698 A.2d at 967.

167. *Marchand*, 212 A.3d at 822-23.

168. *Caremark*, 698 A.2d at 967.

matters that are "intrinsically critical to the company's business operation."[169] *Marchand*'s requirements may be summarized as follows:

> *(1) Governance.* The board must make a good faith effort to implement and monitor "a reasonable board-level system of monitoring and reporting."[170] This board-level system must include (a) reporting protocols that keep the board informed of critical compliance risks, (b) a board committee (or committees) to oversee critical compliance issues, (c) a "full board-level process" to address critical compliance risks, and (d) documentation of the board-level oversight processes that goes beyond references to discussions of operational issues.[171]
>
> *(2) Risk Management*. The company's risk management function should have policies intending to identify, detect, and analyze hazards concerning the critical issues.[172]
>
> *(3) Compliance*. The company's compliance function should include policies intending to identify, implement, and monitor preventative controls to limit risks, as well as reporting protocols.[173] The "[a]ppropriate corporate officials must monitor these preventative controls."[174] Importantly, compliance systems largely operate at the interiors of organizations. Therefore, reporting procedures that inform the board of performance and risks are necessary.

This judicial interpretation of the oversight duty is still underdeveloped. For example, it is unclear what compliance risks are "central," "essential," or "mission critical" to an organization.

Citing *Caremark*, courts regularly emphasize that an oversight failure claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[175] Even so, today D&O face an increased risk of liability. Technological advancements of the digital era have considerably improved and will continue to improve the ability to monitor compliance with applicable laws. Over time, it will become difficult to argue that the exercise of good faith judgment could result in the implementation of ineffective information and reporting systems. In other words, the technology of information and reporting systems is likely to become a factor that courts will consider.

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169. *Id.* at 823-24 (providing that a food company should calibrate its governance, risk management, and compliance functions to address food safety and compliance with food safety laws.).

170. *Id.* at 821.

171. *Id.* at 809, 813, 824.

172. *Id.* at 810.

173. *Marchand*, 212 A.3d at 810.

174. *Id.*

175. *Caremark*, 698 A.2d at 967.

B. Derivative Actions: The Demand Requirement

Companies rarely sue D&O to recover losses resulting from alleged antitrust violations. Judicial opinions and the literature cite *Wilshire Oil Co. v. Riffe* (1969) to illustrate circumstances in which companies may take such course of action.[176] There, a company sued former executives of a newly acquired business, not officers of the company itself. For the common unwillingness of companies to sue D&O, derivative actions offer a path for investors to sue on behalf of the company. This path, however, requires a preliminary legal battle. When an organization suffers losses, any legal claims that may be used to recover the losses belong to the organization. The pursuit of such claims is within the fiduciary responsibilities of the board and management that must evaluate whether such action is within the interests of the organization. The plaintiff, thus, must show that the majority of the board is too conflicted to pursue such claims.[177]

Procedurally, the plaintiff must make a demand on the board of directors to pursue the claims. Alternatively, the plaintiff can file a complaint, alleging that a demand is futile because the majority of the directors have an interest in the underlying claims, lack independence, or face a substantial risk of personal liability. Judicial evaluations of this standard are favorable to defendants. For the purpose of this paper, the key point is that changing attitudes toward executives may affect the interpretation of the demand requirement.

C. Securities Class Actions

The U.S. securities regulatory framework heavily rests on the premise that public information enhances accountability. The regulation of disclosures is, accordingly, a central element of this framework. A complex set of statutory and regulatory standards require the disclosure of material risks, measures taken to monitor and address material risks, certification of the correctness and completeness of certain types of information, and certification of the effectiveness of internal controls.

Public companies must disclose material information about the competition they face, as well as information about material risks and liabilities. For example, Regulation S-K imposes affirmative obligations on registrants to disclose "any material pending legal proceedings," "proceedings known to be contemplated by governmental authorities," and "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or

176. *See* Wilshire Oil Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969).

177. *See* Collins J. Seitz, Jr. and S. Michael Sirkin, *The Demand Review Committee: How It Works, and How It Could Work Better*, 73 BUS. L. 305 (2018).

unfavorable impact on net sales or revenues or income from continuing operations."[178] Material misstatements and omissions may expose D&O, especially those who make statements or certify financial statements, to potential liabilities.

The evolution of disclosure requirements has paralleled the development of the oversight duty. Today, public companies are expected to disclose legal risks created by government investigation and private lawsuits.[179] Further, settlements of investigations and lawsuits raise the question of whether prior statements were adequate. For example, competition and legal risks are risk factors that public companies describe in their financial statements. Where an antitrust action claims that a company engaged in unlawful anticompetitive conduct, the question is whether past representations about competition and legal risks were adequate. In recent years, the initiation of antitrust actions has triggered securities class actions against companies and their senior executives.[180]

D. Protections Against Personal Liability

D&O enjoy broad protections against personal liability for losses suffered by the corporation. These protections intend to preserve risk taking and minimize chilling effects.[181] They include the business judgment rule, exculpatory clauses, indemnification, advancement, and insurance. The business judgment rule and exculpatory clauses release D&O from certain liabilities, whereas indemnification, advancement, and insurance cover certain costs of investigations, litigation, and damages. The latter set of protections shift the costs of personal liability to the company. Companies may reduce these costs by hardening their oversight systems. Thus, again, courts may infer that rational D&O must harden oversight system to reduce the costs of certain legal risks.

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178. 17 C.F.R. § 229.303(a)(3)(ii).

179. *See*, *e.g.*, Diehl v. Omega Protein Corp., 339 F. Supp. 3d 153 (S.D.N.Y. 2018); *In re* Wells Fargo & Co. Shareholder Derivative Lit., 282 F. Supp. 3d 1074 (N.D. Cal. 2017); *In re* Eletrobras Sec. Litig., 245 F. Supp. 3d 450 (S.D.N.Y. 2017); *In re* Sanofi Sec. Litig., 155 F. Supp. 3d 386 (S.D.N.Y. 2016); *In re* Gentiva Sec. Litig., 932 F. Supp. 2d 352 (E.D.N.Y. 2013).

180. *See, e.g.*, *In re* Mylan N.V. Sec. Litig., 379 F. Supp. 3d 198 (S.D.N.Y. 2019); Speakes v. Taro Pharm. Indus., Ltd., 2018 WL 4572987 (S.D.N.Y. Sept. 24, 2018); Utesch v. Lannett Company, Inc., 316 F. Supp. 3d 895 (E.D. Pa. 2018); Chamberlain v. Reddy Ice Holdings, Inc., 757 F. Supp. 2d 683 (E.D. Mich. 2010); Menkes v. Stolt-Nielsen S.A., 2005 WL 3050970 (D. Conn. Nov. 10, 2005); *In re* Sotheby's Holdings, Inc., 2000 WL 1234601 (S.D.N.Y. Aug. 31, 2000).

181. *See, e.g.*, Hermelin v. K-V Pharm. Co., 54 A.3d 1093, 1094 (Del. Ch. 2012) ("No corporation can be a success unless led by competent and energetic officers and directors. Such individuals would be unwilling to serve if exposed to the broad range of potential liability and legal costs inherent in such service despite the most scrupulous regard for the interests of stockholders.").

The business judgment rule is the principal protection and first line of defense. The rule is "a presumption that in making a business decision the directors [and officers] of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[182] This presumption of propriety proscribes judicial second guessing of business decisions. Accordingly, "the mere fact that a company takes on business risk and suffers losses—even catastrophic losses—does not evidence misconduct, and without more, is not a basis for personal director liability."[183] The business judgment rule, however, does not extend to D&O who (1) knowingly approve, direct, or participate in violations of law,[184] or (2) consciously disregard their fiduciary obligations, which include the duty act in good faith to assure that the organization complies with applicable legal standards.[185]

Exculpatory clauses are optional provisions in the certificate of incorporations that relieve D&O from monetary damages for breaches of fiduciary duties. In Delaware, exculpatory clauses cannot absolve D&Os of "breaches of the duty of loyalty or actions or omissions not in good faith or that involve intentional misconduct or a knowing violation of law."[186] As interpreted by Delaware courts, conscious disregard of legal risks is an act of bad faith.[187]

The Delaware General Corporation Law ("DGCL") "*requires* a corporation to indemnify a person who was made a party to a proceeding by reason of his service to the corporation and has achieved success on the merits or otherwise in that proceeding."[188] The statute, however, "*prohibits* a corporation from indemnifying a corporate official who was not successful in the underlying proceeding and has acted, essentially, in

182. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (*overruled* on other grounds); Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (articulating the most cited formulation of the business judgment rule).

183. *Citigroup*, 964 A.2d at 130.

184. *See, e.g.*, *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 66-67 (Del. 2006) (holding that "acts with the intent to violate applicable positive law" of a fiduciary constitutes "bad faith."); Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996) (holding that "bad faith" means, among other things, a transaction or act that is "known to constitute a violation of applicable positive law."); Miller v. AT&T Co., 507 F.2d 759, 762 (3d Cir. 1974) (holding that directors and officers are not insulated from liability for a breach of fiduciary duties on the ground that a decision to authorize violation of a federal law constituted exercise of sound business judgment).

185. *See, e.g.*, *Stone*, 911 A.2d 362 (holding that where "directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.").

186. *Citigroup*, 964 A.2d at 124.

187. *Id.* at 125 (holding that "bad faith" includes conscious disregard of the "obligation to be reasonably informed about the business and its risks" and conscious disregard of "the duty to monitor and oversee the business.").

188. Hermelin v. K-V Pharm. Co., 54 A.3d 1093, 1094 (Del. Ch. 2012).

bad faith."[189] "For any circumstance between the extremes of 'success' and 'bad faith,' the DGCL leaves the corporation with the discretion to determine whether to indemnify its officer or director."[190] Indemnification and advancement clauses are contractual arrangements that formalize criteria for such discretion.

Indemnification clauses define the scope of the potential reimbursement of D&O for litigation costs, and potentially judgments, incurred in connection with claims arising out of the director's or officer's service to the company.[191] Advancement clauses may require the corporation to cover certain costs prior to the conclusion of an investigation or litigation through advancements. D&O, however, may repay any paid advancement if "determined that [the] person is not entitled to be indemnified by the corporation."[192] Indemnification and advancement rights continue after an individual has ceased to serve the company, unless the governing provisions expressly state otherwise.[193] Such rights cannot be eliminated or impaired after the occurrence of the relevant act or omission, unless the governing provisions expressly state otherwise.[194]

D&O liability insurance typically provides (1) protection for individual D&O when indemnification is not available, (2) coverage for the organization when it indemnifies directors and officers, and (3) protection for the organization itself. Such insurance policies frequently contain exclusions precluding coverage for criminal misconduct. The availability of insurance for antitrust liabilities requires companies to consider their commitment to compliance, as such the premia they pay reflects such commitments.[195]

CONCLUSION

Congress debated and passed the principal antitrust statutes—the Sherman, Clayton and FTC Acts, believing that personal accountability for antitrust violations was an effective and necessary enforcement mode. Nonetheless, until the 1990s, the prosecution of individuals for their roles in antitrust violations was relatively limited.

The past three decades have witnessed growing pressures to increase scrutiny of large businesses and hold executives accountable for

189. *Id.* at 1095.
190. *Id.*
191. 8 Del. C. § 145(c).
192. *Id.* at § 145(e). For analysis see Marino v. Patriot Rail Co., 131 A.3d 325, 333 (Del. Ch. 2016).
193. 8 Del. C.§ 145(j); *Marino*, 131 A.3d at 337.
194. 8 Del. C.§ 145(f).
195. *See* Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 FORDHAM L. REV. 487 (2007).

corporate wrongdoing. This trend led to a gradual transformation of liability standards and enforcement policies toward D&O oversight responsibilities. A complex set of interrelated factors have contributed to the trend: technological disruption, globalization, large-scale corporate fiascos, the Great Recession, soaring economic disparities, and the persistent expansion of corporate rights in the United States.[196] These factors have also renewed old beliefs that antitrust law could and should be used to deconcentrate the economy, break up large corporations, and curb corporate greed. This Article explored how the changing attitudes toward corporate wrongdoing and antitrust law have affected the expectations for D&O oversight of antitrust risks.

Until recently, the growing emphasis on personal accountability has mostly focused on individuals who took part in the alleged violations. In large and decentralized corporations, however, D&O rarely participate in, direct, or authorize violations of law. Instead, consciously or subconsciously, they incentivize violations through compensation schemes that are tied to profit. This pattern has further contributed to the perception that D&O are not held accountable for corporate misconduct.

Recently, the DOJ and the Antitrust Division adopted guidelines that require federal prosecutors to evaluate the effectiveness of compliance programs. These guidelines are consistent with the growing understanding that D&O sometimes create, preserve, or neglect an organizational culture that motivates violations. The guidelines clarify that, in the modern economy, rational D&O must adopt effective compliance programs. In *Marchand*, the Delaware Supreme Court adopted this standard.

This Article finds that antitrust's personal accountability standards still focus on direct involvement and, as such, are relatively outdated and ineffective. In this context, the Antitrust Division's guidelines for effective antitrust compliance program mark a critically important development. This Article also finds that parallel developments in corporate and securities laws have further reinforced the growing expectations for oversight of antitrust compliance and require D&O to meet heightened oversight responsibilities.

To conclude, it is often said that with great power comes great responsibility. Recent developments in American law follow this rule of thumb. There are good reasons to hold D&O accountable for failures to develop and maintain corporate culture of compliance with applicable laws and regulations, including antitrust law.

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196. *See* Orbach, *The Present New Antitrust Era*, *supra* note 102.