NOTES

THE SHAREHOLDER'S ROLE IN INTRACORPORATE POLICING OF THE ANTITRUST LAWS*

WHEN corporate officers or directors violate the prohibitions of the antitrust laws, they subject the corporation to the risk of onerous civil as well as criminal liability.[1] Although a shareholder of the corporation has a substantial interest in protecting the corporation from such loss, the traditional avenues open to him are not likely to be utilized. He may complain to the Attorney General, requesting that the Department of Justice bring either a criminal or a civil action to terminate the violation.[2] Because these remedies create the liability which the shareholder seeks to prevent, their practical value is small.[3] When the violation falls within certain provisions of the Clayton Act, the shareholder also may complain to a designated administrative body to have it institute proceedings leading to a "cease and desist" order, under section 11 of the Clayton Act.[4] However, because the scope of such proceedings cannot

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*Schechtman v. Wolfson, 141 F. Supp. 453 (S.D.N.Y. 1956), *appeal docketed*, No. 24225, 2d Cir., Aug. 9, 1956.

1. Ballard Oil Terminal Corp. v. Mexican Petroleum Corp., 28 F.2d 91 (1st Cir. 1928) (civil treble damage action); United States v. W. T. Grant Co., 345 U.S. 629 (1952) (civil injunctive suit); United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618, *rehearing denied*, 314 U.S. 708 (1941) (criminal indictment).

2. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-3 (Supp. III, 1956); 28 STAT. 570 (1894), as amended, 15 U.S.C. § 8 (1952); 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 13, 13a, 14, 18, 19, 20, 24 (1952) (criminal action); 26 STAT. 209 (1890), as amended, 15 U.S.C. § 4 (1952); 28 STAT. 570 (1894), as amended, 15 U.S.C. § 9 (1952); 38 STAT. 736 (1914), 15 U.S.C. § 25 (1952) (civil action).

3. A successful action by the Attorney General produces either a criminal conviction or a civil decree enjoining the violation. Section 5 of the Clayton Act permits the use of a final judgment or decree in any suit brought by the Attorney General as prima facie evidence against the defendant in any subsequent treble damage action instituted by an injured private party, or in any subsequent single damage action instituted by the Attorney General in behalf of the United States. 38 STAT. 731 (1914), as amended, 15 U.S.C. § 16 (Supp. III, 1956).

4. 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (1952). The four provisions of the Clayton Act which fall within administrative body cognizance are: § 2, 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13 (1952) (discrimination in price, services or facilities between purchasers); § 3, 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952) (sale on agreement not to use goods of competitor—"tying clauses"); § 7, 38 STAT. 731 (1914), as amended, 15 U.S.C. § 18 (1952) (acquisition by one corporation of stock of another where the effect may be substantially to lessen competition); § 8, 38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1952) (interlocking directorates and officers, see note 9 *infra*).

be predicted, shareholders can rarely be expected to risk full-scale investigations into the affairs of the corporation.[5]

A recent decision, *Schechtman v. Wolfson*,[6] indicates that a third alternative may be open to the shareholder—a derivative action,[7] brought under section 16 of the Clayton Act to have the directors enjoined from continuing the activity.[8] In this case a derivative suit was brought, alleging a violation of section 8, the "interlocking directorate" provision, of the Clayton Act.[9] Plaintiff, a shareholder in Merritt-Chapman & Scott Corporation, sought to have two of its directors, and a third person alleged to be under the control of one of them, enjoined from continuing as directors of Montgomery Ward & Co., Inc., on the ground that Ward and subsidiaries of Merritt were competitors in interstate commerce. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted; but the court denied the motion.[10]

The court's ruling on the motion is a new development in the area of antitrust law enforcement. In a 1953 decision, *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*,[11] the Second Circuit dispelled previous judicial doubt that a shareholder of *A* corporation could bring a derivative action on behalf

5. See notes 57 and 58 *infra* and accompanying text.

6. 141 F. Supp. 453 (S.D.N.Y. 1956), *appeal docketed*, No. 24225, 2d Cir., Aug. 9, 1956.

7. The derivative action is a suit, brought in equity to enforce a right lying primarily in the corporation itself, but asserted "secondarily" by the shareholder because of the corporation's failure, after demand, to act upon it. Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106, 112-13 (S.D.N.Y. 1951). In a derivative action instituted to prevent or correct an intracorporate abuse, the corporation must be joined as a nominal party defendant. *E.g.*, Davenport v. Dows, 85 U.S. (18 Wall.) 626, 627 (1873). The remedy sought requires the corporate management to do what it should have done in the first instance with regard to corporate affairs. Gordon v. Elliman, 202 Misc. 612, 615-16, 115 N.Y.S.2d 567, 571 (Sup. Ct. 1952). For general discussion see BALLANTINE, CORPORATIONS 333-74 (rev. ed. 1946); STEVENS, CORPORATIONS 783-837 (2d ed. 1949). See also Note, 44 YALE L.J. 1091 (1935) (discussing the necessity of joining corporation as defendant).

8. "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title. . . ."

38 STAT. 737 (1914), 15 U.S.C. § 26 (1952).

9. "No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce . . . if such corporations are or shall have been theretofore . . . competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."

38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1952).

10. 141 F. Supp. at 454.

11. 202 F.2d 731 (2d Cir. 1953).

of *A* against *B*, who had allegedly injured *A* by violating the antitrust laws.[12] Prior to *Schechtman*, however, the ability of a shareholder of *B*, in a similar situation, to enjoin those in control of *B* from subjecting it to the risk of antitrust law sanctions, had consistently been denied.[13] The courts held that *B*'s shareholder had no standing to sue because he could not show "threatened loss or damage," under section 16 of the Clayton Act,[14] either to himself or to his corporation. They apparently felt that *B* corporation would probably profit, not lose, by violating the statutes,[15] and that if it did lose the shareholder's loss would be too indirect to support a claim for relief.[16] *Schechtman*, in permitting what previous cases had denied, did so in a situation where plaintiff

12. This doubt grew out of several cases, all decided prior to the adoption of the Federal Rules of Civil Procedure in 1938, holding that the shareholder of an injured corporation could not maintain a suit for treble damages in equity because an award of such damages necessitated a jury trial, Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928) (injunctive relief granted, treble damages denied), and that the shareholder could not maintain an action for treble damages at law because his cause of action was historically of equitable cognizance only, United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917). This led courts to believe not only that a shareholder treble damage action could not lie, but that, in view of the cases denying injunctive relief to the shareholder of an injuring corporation, see notes 13-16 *infra* and accompanying text, a shareholder could never have standing to sue. Meyer v. Kansas City So. Ry., 84 F.2d 411 (2d Cir.), *cert. denied*, 299 U.S. 607 (1936); Kalmanash v. Smith, 291 N.Y. 142, 157, 51 N.E.2d 681, 688 (1943). However, in Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953), *reversing* 107 F. Supp. 532 (S.D. N.Y. 1952), where plaintiff sought both injunctive relief and treble damages, the court pointed out that the new Federal Rules indicate that the demand for judgment forms no part of the claim for relief, that the final judgment shall grant all the relief to which a plaintiff is entitled whether demanded or not in his pleadings, that a jury may be empanelled for the purpose of assessing treble damages if necessary, and that an antitrust derivative suit can undoubtedly be maintained. 202 F.2d at 734-35.

13. Some courts held, in the earlier days of the antitrust laws, that the shareholder's remedy was the traditional suit against the directors for breaching their fiduciary obligations by committing an illegal act. De Koven v. Lake Shore & M.S. Ry., 216 Fed. 955 (S.D.N.Y. 1914); Boyd v. New York & H.R.R., 220 Fed. 174 (S.D.N.Y. 1915). This view, however, was soon rejected in two cases holding that the civil remedies specially provided for in the antitrust statutes were intended to be exclusive, and that prior to the enactment of § 16 of the Clayton Act in 1914 a shareholder's suit could not have been maintained. Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921) (dictum); General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 286 (1922) (dictum). Neither of these cases decided the effect of § 16 upon the shareholder's standing to sue; but subsequent cases held that this provision would not authorize a shareholder's suit against his own corporation. Continental Securities Co. v. Michigan Cent. R.R., 16 F.2d 378 (6th Cir. 1926); General Inv. Co. v. New York Cent. R.R., 23 F.2d 822 (6th Cir.), *cert. denied*, 277 U.S. 588 (1928); Graves v. Cambria Steel Co., 298 Fed. 761 (S.D.N.Y. 1924).

14. See note 8 *supra*.

15. See Graves v. Cambria Steel Co., 298 Fed. 761, 762 (S.D.N.Y. 1924).

16. Continental Securities Co. v. Michigan Cent. R.R., 16 F.2d 378, 379 (6th Cir. 1926); General Inv. Co. v. New York Cent. R.R., 23 F.2d 822, 824 (6th Cir.), *cert. denied*, 277 U.S. 588 (1928).

shareholder's "threatened loss or damage" was clearly indirect, for plaintiff alleged solely an interlocking directorate which does not of itself subject the corporation to any risk of liability.[17]

The *Schechtman* court's conclusion seems better reasoned than the earlier contrary decisions. *A* corporation, when permitted to enjoin *B*, faces only a risk, not a certainty, that the "threatened loss or damage by violation of the antitrust laws" will ever accrue.[18] In *Fanchon & Marco* this type of suit, which has always been maintainable, was extended to shareholders of *A* acting in its behalf.[19] In this same situation, since the officers and directors of *B* corporation are violating the antitrust laws, *B* also faces a "threatened loss or damage," in being subjected to the risk of civil or criminal actions which impair the value of its shareholders' interests.[20] And since only *B*'s shareholders will attempt to correct management's abuses in *B*'s name,[21] they should also be given standing to sue. This broad reading of section 16 is consistent with legislative intent in extending to private persons the right to obtain injunctive relief; for Congress intended to prevent injury before it occurs by enlisting the aid of all persons who might be affected by unlawful practices.[22] Thus, the distinctions between suits by shareholders of *A* and *B* are, as the cases prior to *Schechtman* admitted, theoretical at best.[23] Moreover this reasoning

17. Section 8 of the Clayton Act does not make the corporations possessing a common director liable along with the director himself. "No person at the same time shall be a director in any two or more corporations . . . ." 38 STAT. 732 (1914), as amended, 15 U.S.C. § 19 (1952). In the two reported cases arising under § 8 the corporations possessing the common directors were joined, and actively participated, as defendants in the proceedings. United States v. W. T. Grant Co., 345 U.S. 629 (1953); United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953). However, the propriety of the joinder was not challenged in the *Sears* case. Defendant appellees in the *Grant* case argued before the Supreme Court, as an alternative ground for affirmance, that the government had no cause of action against the corporations involved. Brief for John M. Hancock, p. 11, Brief for the Kroger Co., pp. 10-12, United States v. W. T. Grant Co., *supra*. But the Court did not find it necessary to consider this point in its opinion, since it affirmed upon the basis of appellees' other argument.

18. A private party need not prove that the danger of irreparable loss or damage is immediate in order to qualify for injunctive relief under § 16 of the Clayton Act, although proof to this effect may entitle him to a preliminary injunction if desired. 38 STAT. 737 (1914), 15 U.S.C. § 26 (1952).

19. See notes 11 and 12 *supra* and accompanying text.

20. See note 1 *supra* and accompanying text.

21. See note 38 *infra* and accompanying text.

22. United States v. Borden Co., 347 U.S. 514, 518 (1954); United States v. National City Lines, Inc., 334 U.S. 573, 581 (1948). See General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 286-87 (1922); 51 CONG. REC. 9261, 9270, 16319 (1914); *cf.* Weinberg v. Sinclair Refining Co., 48 F. Supp. 203, 205 (E.D.N.Y. 1942).

23. Continental Securities Co. v. Michigan Cent. R.R., 16 F.2d 378, 380 (6th Cir. 1926). Indeed, in other areas, the courts have described the antitrust laws as giving broad protection against indirect as well as direct injury.

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage,

applies not only to cases of violations which immediately cause compensable injury, but also to violations of the interlocking directorate section. For that section presumes that an interlocking directorate will lead to a lessening of competition, which will eventually subject the two corporations to liability under the statutes.[24]

However, the subsequent holding by the district court in *Schechtman* does much to vitiate its ruling that plaintiff shareholder had standing to sue. Before the case came to trial the two Merritt directors resigned as directors of Ward, and the third person did not seek reelection when her term as a Ward director expired. A motion by defendants to dismiss the complaint was then granted on a concession of mootness; but plaintiff's cross-motion for an award of counsel fees was denied. Although the suit did not go to judgment on the merits, the court found that the plaintiff had successfully accomplished his purpose of dissolving the interlock. It did not, however, go on to consider whether this resulted in a benefit to Merritt, since the court felt that in any event the shareholder was "debarred from reimbursement of counsel fees by his failure initially to invoke the aid of the Federal Trade Commission."[25] In proceedings by the Commission, the entire expense of the prosecution is borne by the inquiring Commission itself. Thus the shareholder in the instant case "could have obtained for Merritt gratuitously everything for which he now asks Merritt to reimburse his attorneys." In view of this, the plaintiff assumed the expense of civil litigation "voluntarily," and could not thereafter place it upon the corporation.[26]

> protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Rutledge, J., in Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (treble damage action). See also Turner v. United States Gypsum Co., 11 F.R.D. 545 (N.D. Ohio 1951) (treble damage suit by trucker claiming that defendants' conspiracy to fix prices was in part effected by an "all-rail basing point system" which injured plaintiff's intrastate business).

24. "Section 8 was but one of a series of measures which finally emerged as the Clayton Act, all intended to strengthen the Sherman Act, which through the years had not proved entirely effective. . . . Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or to foster joint action against third party competitors. The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, fair reading of the legislative debate leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by section eight was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative."

Weinfeld, J., in United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953). See also note 9 *supra* (test of illegality of interlocking directorship is whether lessening of competition between the corporations would violate the antitrust laws).

25. 141 F. Supp. at 455.

26. *Id.* at 455-56.

At first glance *Schechtman* seems consistent with a long line of decisions in which courts have deferred to administrative agencies.[27] The Federal Trade Commission was created to provide the expertise often needed to cope with such difficult questions as that presented by the complaint in the *Schechtman* case: the existence of competition between Ward and Merritt.[28] Since the decision will force future shareholders to take similar complaints to the FTC, it apparently gives effect to the policy of Congress in establishing the Commission. But the background of the antitrust laws shows that the Commission's jurisdiction was in no sense intended to be exclusive. Sections 11 and 16 of the Clayton Act give both the FTC and private parties power to prevent activities prohibited in sections 2, 3, 7 and 8, indicating that the courts and the administrative agency were concurrently opened as forums for preventing restraints on competition.[29] And legislative debate further demonstrates the im-

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27. See Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 Yale L.J. 315 (1956). This deference appears most clearly when the courts feel that Congress has given an administrative agency primary jurisdiction in its field. Dismissal of actions brought, in the first instance, to the courts follows such a determination. Far East Conference v. United States, 342 U.S. 570 (1952) (primary jurisdiction over shipping associations, for purposes of antitrust law enforcement, lies in Federal Maritime Board). See Glassberg v. Boyd, 116 A.2d 711 (Del. Ch. 1955), 65 Yale L.J. 1196 (1956) (Federal Power Commission's approval of contract rates may not be attacked collaterally in a shareholder's suit). The judicial deference is also manifested in dicta of the courts.

> "The economic effects on competition of such discounts [quantity discounts allegedly violating § 2 of the Clayton Act] are for the Federal Trade Commission to judge. Until the Commission has determined the question, courts are not given guidance as to what the public interest does require concerning harm or benefit of these quantity discounts on the ultimate interests sought to be protected in the Act."

Jackson, J., Bruce's Juices v. American Can Co., 330 U.S. 743, 746 (1946) (dictum). When the courts have retained jurisdiction, they have given great weight to prior or pending administrative determination of the issues presented. See United States v. Morgan, 118 F. Supp. 621, 698-99 (S.D.N.Y. 1953) (prior opinion of Securities Exchange Commission set forth and followed); United States v. Railway Express Agency, 89 F. Supp. 981 (D. Del. 1950) (injunctive suit by government stayed pending conclusion of proceedings before Interstate Commerce Commission); Guiterman v. Pennsylvania R.R., 48 F.2d 851 (E.D.N.Y. 1931) (shareholder's action will be stayed pending review of Interstate Commerce Commission determination of issues presented) (dictum).

28. 141 F. Supp. at 455; see note 9 *supra*.

See, *e.g.*, 51 Cong. Rec. 8977-78 (1914); S. Rep. No. 597, 63d Cong., 2d Sess. 9, 11 (1914). "In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a 'body of experts' to deal with complex competitive practices . . . and second to authorize this body of experts to deal with unfair competitive methods in their incipient stages." Address by Edward F. Howrey, Chairman, Federal Trade Commission, 1953-1955, University of Michigan's Institute on Federal Antitrust Laws, 1953, reprinted in 40 A.B.A.J. 113, 114 (1954).

29. See notes 4 and 8 *supra*. Where Congress did not wish to enable private parties to seek injunctive relief under § 16 (common carriers subject to jurisdiction of the Interstate Commerce Commission), an explicit clause giving exclusive jurisdiction to the ICC was inserted. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1952).

portance Congress attached to private enforcement of the antitrust laws.[30] Further, when courts in exercising their jurisdiction wish an expert determination, they can obtain one by an interlocutory order referring the question to the appropriate administrative body.[31] The decision therefore must be analyzed in terms of the sole consideration mentioned by the court: the availability of a "gratuitous" remedy.

Schechtman will have broad consequences in the field of antitrust law enforcement. It cannot apply when the shareholder of an injured corporation seeks to enforce a right to obtain damages from the injuring corporation; the remedy sought in such a case is beyond the power of any commission enforcing the antitrust laws. But since a Commission proceeding will be either gratuitous or less expensive than a derivative action, the court's reasoning would deny counsel fees to any shareholder asking for injunctive relief against violation of the three other provisions of the Clayton Act within the cognizance of governmental commissions.[32] And it would similarly apply whenever a

30. See, *e.g.*, 51 CONG. REC. 9261, 9270, 16319 (1914).

31. For example, if *Schechtman* had gone to a decision on the merits, the court could have suspended the proceedings, referred to the Federal Trade Commission the question concerning competition between Ward and subsidiaries of Merritt, and then used the Commission's findings, along with its own determination of the fact of the alleged interlocking directorate, in reaching a decision. For a discussion of this suggested practice see Note, 65 YALE L.J. 1196, 1203 & nn.35, 36 (1956). *Cf.* United States v. Morgan, 118 F. Supp. 621, 698-99 (S.D.N.Y. 1953); United States v. Railway Express Agency, 89 F. Supp. 981 (D. Del. 1950); Guiterman v. Pennsylvania R.R., 48 F.2d 851 (E.D.N.Y. 1931) (dictum).

32. See note 4 *supra.*

Any conclusion that a shareholder's complaint to either the Federal Trade Commission or the Attorney General would be gratuitous to the corporation should be modified. See Note, 70 HARV. L. REV. 369, 370-71 (1956). Since, in seeking to eliminate interlocking directorates, the government has in the past joined the corporations concerned, the corporations may be faced with defense costs. United States v. W. T. Grant Co., 345 U.S. 629 (1953); United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953). In addition, if the three other relevant sections of the Clayton Act are involved, the corporation would incur substantial expenses in defending proceedings brought against it. See Comment, 62 YALE L.J. 912, 914-15 (1953).

In most instances, however, the government action will at least be less expensive than a derivative action. In the interlocking directorate context, the government need not move against the corporations, but can limit its proceeding to the individual directors involved; indeed, the corporations may not be proper parties. See note 17 *supra.* Secondly, in derivative actions the successful shareholder may require the corporation to reimburse him for investigation expenses, see note 62 *infra* and accompanying text; in a government proceeding, the corporation does not bear these costs even if it loses the action, FTC v. Klesner, 280 U.S. 19, 25 (1929); Schechtman v. Wolfson, 141 F. Supp. 453, 455-56 (S.D.N.Y. 1956). Finally, the corporation need not incur the costs of defending actions brought against it. Theoretically, this is as likely to occur in the derivative action as in the government proceeding; but the corporation is under considerably more pressure not to litigate in the latter case. The increased availability of the consent decree, see Comment, 65 YALE L.J. 34, 39-41 (1955), the greater likelihood that the government will obtain telling evidence against the corporation, see notes 50 and 53 *infra* and accompanying text, and the possibility that an FTC proceeding will be wider in scope, see note 57 *infra* and accom-

shareholder sues to enjoin a corporation from violating any antitrust statute, for simply by filing a complaint with the Attorney General, he could have prompted a less costly suit by the government.

In the light of this broad application the district court's ruling upon the motion for award of counsel fees virtually nullifies its prior ruling upon the motion to dismiss the complaint. Essential to the shareholder's derivative action to correct intracorporate abuse is the allowance of counsel fees to the successful litigant. In theory, a class of persons—all of the shareholders of the corporation—has benefited from the litigation; and each should contribute his proportion of the expenses incurred by the "representative" shareholder,[33] who impliedly contracted for them all in retaining an attorney.[34] This contribution is most easily effected by charging the corporation directly for the amount of counsel fees.[35] The practical necessity for the allowance is apparent. The individual shareholder receives no direct monetary reward for his action; the benefit accrues primarily to the corporation.[36] Although his suit may enhance the value of the corporation's stock, the shareholder's expenses of litiga-

panying text, mean that the corporation will be less inclined to incur a costly defense in a government action. *But see* statutes cited at note 45 *infra* (unsuccessful shareholder in derivative action may be required to reimburse corporation for its expenses).

33. Edwards v. Bay State Gas Co., 172 Fed. 971, 975-76 (C.C. Mass. 1909); Buell v. Kanawha Lumber Corp., 201 Fed. 762, 767-69 (E.D.S.C. 1912); Murphy v. North American Light & Power Co., 33 F. Supp. 567, 570 (S.D.N.Y. 1940); *cf.* Trustees v. Greenough, 105 U.S. 527, 532 (1881) (same reasoning applied in suit by bondholder); Borden Central Sugar-Refining Co. v. Ferris Sugar-Mfg. Co., 87 Fed. 810, 811 (5th Cir. 1898) (same; suit by general creditor). This rationale applies even though some of the shareholders may well lose gains illegally made as fiduciaries, due to the suit. Steinfeld v. Zeckendorf, 15 Ariz. 335, 342, 138 Pac. 1044, 1047 (1914), *aff'd*, 239 U.S. 26 (1915); Sant v. Perronville Shingle Co., 179 Mich. 42, 58-59, 146 N.W. 212, 218 (1914).

34. Lamar v. Hall & Wimberly, 129 Fed. 79, 83 (5th Cir. 1904); Hubbard v. The Camperdown Mills, 25 S.C. 496, 501, 1 S.E. 5, 8-9 (1886); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 789 (1939); *cf.* Farmers' Loan & Trust Co. v. Green, 79 Fed. 222, 224 (5th Cir. 1897) (railroad mortgage receivership); Hand v. Savannah & Charleston R.R., 21 S.C. 162, 178-80 (1883) (suit between classes of bondholders). *Contra*, Murphy v. North American Light & Power Co., 33 F. Supp. 567, 570 (S.D.N.Y. 1940).

Other courts have stated the conclusion in simpler terms. A benefit has been procured for the corporate entity by the shareholder; and the corporation should reimburse him for his expenses. Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943); Hutchinson Box Board & Paper Co. v. Van Horn, 299 Fed. 424, 430 (8th Cir. 1924).

35. Buell v. Kanawha Lumber Corp., 201 Fed. 762, 767-69 (E.D.S.C. 1912); *cf.* Trustees v. Greenough, 105 U.S. 527, 532 (1882). It has been the courts' practice to make the award directly to the attorney, instead of to the client, since the Supreme Court adopted this procedure in Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

36. Liken v. Shaffer, 64 F. Supp. 432, 441 (N.D. Iowa 1946); Landis v. Sea Isle City Hotel Co., 53 N.J. Eq. 654, 33 Atl. 964 (Ct. Err. & App. 1896); Dewing v. Perdicaries, 96 U.S. 193, 197-98 (1877) (dictum); STEVENS, CORPORATIONS 798-99 (2d ed. 1949). *But see* Note, 69 HARV. L. REV. 1314 (1956) (discussing the limited number of situations in which a pro rata recovery is allowed the individual shareholder in a derivative action).

tion will almost always exceed any increment in the value of his own holdings. He therefore will decline to litigate unless he is at least recompensed for those expenses.[37] Thus the effect of denying counsel fees to the shareholder who has successfully procured compliance by his corporation with the provisions of the antitrust laws through a derivative action, is to eliminate this method of antitrust law enforcement.

Shareholder intracorporate enforcement of the antitrust laws is, moreover, important. When the directors of a corporation are violating the antitrust statutes, the shareholders of the corporation must be looked to as the only parties within the corporation who will attempt to correct the abuse.[38] Thus the derivative action would appear to be desirable in the antitrust law area, despite the disrepute into which it has fallen in other areas of the law, due to its past abuses and its cumbersome apparatus.[39]

The *Schechtman* decision, by excluding the derivative action from the antitrust law enforcement structure, obviously serves to keep the abuses of such litigation out of this area of the law. Derivative actions have long included spurious suits instigated solely for their nuisance value in the hope that the corporation will settle.[40] They have been marked by settlements of suits which, though based on genuine claims, cause the corporation to lose twice—its assets are depleted when the plaintiff is paid to withdraw his suit, and it remains vulnerable to the wrongdoing at which the suit was aimed.[41] Corporations

37. Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943). See Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 791-93 (1939); *cf. In re* Solar Mfg. Corp., 215 F.2d 555, 563 (3d Cir. 1954) (attorney for trustee in bankruptcy); Silver v. Rosenberg, 139 F.2d 1020, 1021 (2d Cir. 1944) (same); Fox v. Lantrip, 169 Ky. 759, 767, 185 S.W. 136, 139 (1916) (taxpayer's suit to recover illegally disbursed funds).

38. In New York the Attorney General may bring an injunctive or redressive suit which a corporation's shareholders could have maintained; but the statute permitting this has been largely neglected. Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 437 (1941).

39. "[O]ne common characteristic is undeniably present wherever and whenever such an action is instituted: the stockholders' suit is universally reviled and deplored. Both those who must bring them and those who must suffer them almost invariably deprecate the necessity for the employment of this form of action, and regret the lack of a more effective and at the same time less bludgeon-like procedure."

Berlack, *Stockholders' Suits: A Possible Substitute*, 35 MICH. L. REV. 597, 605-06 (1937). See also Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123-41 (1944); Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369, 395 (1936); Washington, *Stockholders' Derivative Suits: The Company's Role, and a Suggestion*, 25 CORNELL L.Q. 361, 374 (1940).

40. Such suits are commonly referred to as "strike" suits. "A 'strike suit' is an action brought by a security holder, not in good faith, but, through the exploitation of its nuisance value, to force the payment of a sum disproportionate to the normal value of his interest as the price of discontinuance." Note, 34 COLUM. L. REV. 1308 (1934). See also Berlack, *supra* note 39, at 604-05.

41. See Note, 50 YALE L.J. 1474 (1941); Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 425-26 (1941). Frequently these

have frequently instigated collusive derivative actions in order to harass pending shareholders' suits brought either in good faith or merely to gain a favorable settlement.[42] *Schechtman*, by denying counsel fees, does eliminate an important incentive for bringing a spurious suit;[43] and it thereby attacks a major motivation for corporations' collusive suits. *Schechtman* also tends to prevent secret settlements, injurious to the corporation, by directing shareholder complaints into the hands of governmental enforcement agencies.[44]

There is, however, little need to fear these abuses in the area of antitrust law enforcement. The long history of abuse of the derivative action has produced effective state and federal legislation. Many major commercial states permit a corporate defendant to obtain substantial security from plaintiff shareholder, from which the corporation and other defendants may be reimbursed for their expenses when they successfully defend the derivative action.[45] Thus spurious

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suits are also labelled "strike" because, although the claims are genuine, plaintiffs are more interested in profitable settlement than in successful prosecution.

42. "The most subtle ruse on the part of [the corporate] wrongdoers is to anticipate a derivative suit, and themselves institute a suit they do not intend to press, or cause a friendly stockholder to do so and thereby forestall a genuine complainant, who then has the additional burden of proving that the pending suit is collusive before it will be ordered stayed while he prosecutes a real suit. An alternative defense strategem is to have a stockholder friendly to the management intervene in a legitimate suit and 'bore from within,'—harass his co-plaintiff."

Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 422 (1941). See also Berlack, *supra* note 39, at 606-07.

43. The instigation, by attorneys, of derivative actions based upon petty grievances, for the sake of the counsel fees involved or for a tacit share of a nuisance value settlement, is a form in which the "strike" suit often appears. Eisenberg v. Central Zone Property Corp., 1 App. Div. 2d 353, 149 N.Y.S.2d 840 (1st Dep't), *motion for leave to appeal denied*, 1 App. Div. 2d 1007 (1st Dep't 1956); Lien v. Savings, Loan & Trust Co., 43 N.D. 260, 174 N.W. 621 (1919); SEC REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, pt. 1, at 883 (1937).

44. Upon complaint, the Commission becomes the prosecutor. FTC v. Klesner, 280 U.S. 19, 25 (1929).

45. See, *e.g.*, N.Y. GEN. CORP. LAW § 61-b:

"In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five per centum of the outstanding shares . . . unless the shares . . . have a market value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by other parties defendant in connection therewith for which it may become subject . . . ."

On approving this legislation, the Governor stated:

"It simply requires that the plaintiff represent a certain minimum of interest in the corporation or that he put up security for the costs and expenses, which will be incurred if his case is determined to be unfounded."

N.Y. GEN. CORP. LAW following § 61-b, Governor's Memorandum (Supp. 1956). A similar requirement has been enacted in four states: CAL. CORP. CODE ANN. § 834 (Deering 1947);

suits have lost much of their nuisance value.[46] Federal courts, where derivative suits to enforce the antitrust laws are brought, must apply these state security statutes if the corporation invokes them,[47] but they also can apply the more selective federal rule which corrects all three abuses of the derivative action without impeding genuine suits.[48] Federal Rule 23(c) subjects settlement and dismissal of these suits to the scrutiny and approval of the court.[49] Collusive suits, moreover, are improbable in the antitrust law area. For any litigation, particularly prolonged litigation, may arouse the interest of the Attorney General or of an administrative agency charged with preventing the violation identified by the original complaint.

It is true that a shareholder may avoid many of the obstacles confronting him as a prospective plaintiff if he goes to a governmental commission for the relief he is seeking. Inordinate barriers currently lie in the path of a shareholder attempting to institute a derivative action, regardless of the nature of his complaint. Typically, the shareholder cannot readily obtain enough information to file a complaint before the statute of limitations bars his action;[50] and even when he does, he faces the risk that his suit may fail because of a

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MD. ANN. CODE art. 16, § 206 (1951); N.J. STAT. ANN. tit. 14, § 3-15 (Supp. 1956); PA. STAT. ANN. tit. 12, § 1322 (1953). Wisconsin's statute denies owners of less than 5% of the corporation's outstanding stock the right to bring a derivative action ". . . unless the action is one based on conduct which results, and is willfully intended to result, in a direct or indirect personal benefit or advantage to one or more directors or officers, or conduct which results in a personal benefit or advantage to one or more stockholders over the other stockholders." WIS. STAT. c. 182.013(3) (1953).

46. These state statutes have been criticized because of their tendency to bar genuine suits along with those of a spurious nature. See Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944); Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1-11 (1947).

47. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 555-57 (1949), *affirming* Beneficial Industrial Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948).

48. See 3 MOORE, FEDERAL PRACTICE § 23.24(2), at 3549 (2d ed. 1948); 26 MINN. L. REV. 267 (1941); *Hearings Before the House Committee on the Judiciary on H.R. 8892*, 75th Cong., 3d Sess., ser. 17, at 115 (1938).

49. FED. R. CIV. P. 23(c).

50. It is difficult to discover wrongdoing on the part of those in control of the corporation for the obvious reason that the corporation's records and management are in the hands and control of the malefactors. This situation is currently being somewhat alleviated by the increased statutory requirements of publicity, and disclosure of corporate records to shareholders on demand. For a discussion of these statutes see Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 432-36 (1941). But even given awareness of wrongdoing, and an opportunity to inspect corporate records, ". . . in an overwhelming majority of cases it is impossible to ascertain wrongdoing by any of the foregoing methods. It is probably no exaggeration to say that in many cases the transactions are so complicated that even skilled accountants and attorneys, informed that the corporation has been abused, find it impossible to unravel the intricacies and discover the nature of the wrong before suit is barred by the statute of limitations." Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405, 420 (1941).

Time, in the form of the statute of limitations, always works against the shareholder with a bona fide action. Much confusion exists with regard to which statute of limita-

technicality,[51] and the heavy expense of litigation consequently will fall upon him.[52] A shareholder suspicious of an antitrust violation on the part of those in control of his corporation might easily avoid these difficulties by filing a complaint with, for instance, the Federal Trade Commission. Its broad powers of investigation and access to corporate records,[53] coupled with its ability to disregard technical legal barriers in its hearings,[54] would then be brought to bear in support of the genuine suitor's complaint;[55] and its "gratuitous" prosecution would then free the shareholder from the risk of expensive failure.[56]

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tions should apply, if any. The action is historically equitable; but its basis is often a legal-sounding claim. When the generally shorter legal statute of limitations is held to apply, it is frequently difficult to determine whether the contract, tort or fraud statute of limitations should be used. For a discussion of the problem, see Note, 56 COLUM. L. REV. 106 (1956).

51. The plaintiff may, for example, be estopped by his own prior conduct, Bojum v. Johnson, 127 F.2d 491, 496 (8th Cir. 1942); Isaac v. Milton Mfg. Co., 33 F. Supp. 732, 736-37 (M.D. Pa. 1940), or be found guilty of laches, Backus-Brooks Co. v. Northern Pac. Ry. Co., 21 F.2d 4, 12-13 (8th Cir. 1927); Mullins v. De Soto Securities Co., 45 F. Supp. 871, 882-83 (W.D. La. 1942). If a statute of limitations is held applicable, it may have run. See note 50 *supra*.

52. "All litigation is expensive, to be sure, but stockholders' suits are exceptionally so. Because of the scope and complexity of the state of facts usually involved, and the number and closeness of the legal questions which arise, the labors of counsel are necessarily long and arduous. Extensive investigation to establish details of fact must be conducted; accountants and special investigators must be employed. Books and documents must be assembled, examined and copied; examinations must be conducted before trial wherever possible and stenographic minutes transcribed and filed; witnesses must be interviewed, often in distant places, and foreign depositions may be necessary; the expense of assembling the evidence is, alone, usually enormous. The trial is often a long-winded proceeding .... The problem of expense is not confined to the stockholder; a heavy burden falls upon the corporation and the other defendants as well."

Berlack, *Stockholders' Suits: A Possible Substitute*, 35 MICH. L. REV. 597, 601 (1937).

53. 38 STAT. 722 (1914), 15 U.S.C. § 49 (1952).

54. See Hornstein, *A New Forum for Stockholders*, 45 COLUM. L. REV. 35 (1945).

55. Even before *Schechtman*, commentators have frequently visualized a governmental panacea for derivative action abuses and shortcomings. Proposals include: suggestion that the Attorney General institute actions for the relief obtainable in shareholders' suits by invoking the visitatorial powers of equity, Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369, 395 (1936); suggestion that a governmental agency be formed to represent stockholders and to prosecute, in ordinary equity courts, all complaints not frivolous, Berlack, *Stockholders' Suits: A Possible Substitute*, 35 MICH. L. REV. 597 (1937); suggestion that existing administrative agencies may serve the same function as the derivative action, Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COLUM. L. REV. 405 (1941); Hornstein, *A New Forum for Stockholders*, 45 COLUM. L. REV. 35 (1945). In addition, there has been a persistent advocacy of federal control of incorporation by Senator O'Mahoney in Congress. For a history of this effort, see REUSCHLEIN, THE SCHOOLS OF CORPORATE REFORM 39-67 (1950). A suggestion to empower the Federal Trade Commission to license corporations, and be the first forum for stockholders' complaints, under the 1937 version of Senator O'Mahoney's bill was made by Stocker, *The Derivative Suit: Its Limitations and A Suggestion*, 29 GEO. L.J. 363, 371 (1940).

56. 141 F. Supp. at 456.

However, all of this aid is offered by the antitrust statutes themselves. Shareholders who cannot surmount the obstacles to a derivative action can use the proferred ancillary device of complaint to the government, without a rule denying, as *Schechtman* does, to shareholders who have overcome those obstacles the availability of the courts and a civil injunctive suit.

Furthermore, an intracorporate shareholder's suit to enjoin a violation of the antitrust laws has two practical advantages over the device of a complaint to a governmental commission. The *Schechtman* decision may, in the first instance, effectively discourage shareholder policing. A shareholder, upon discovering that his corporation is violating the law, might well hesitate to take any action at all if he is able to do so only through governmental agencies. The Commission is not restricted in its investigation to the practice complained of originally.[57] A shareholder aware of these rules may fear that such an investigation would disrupt the corporation's functioning, create adverse publicity, and eventually lead the corporation into costly litigation.[58] But these consequences are not likely to arise if the shareholder institutes a court action. Although the litigation may provoke the Commission's interest and an ensuing investigation, the Commission may well prefer to obtain the maximum benefit of private enforcement by remaining out of the case.[59] And often the case will not warrant an interlocutory order referring the matter to the Commission. Moreover, the shareholder may often have reason to hope that simply by starting legal proceedings he will induce the defendants to discontinue the practices on which his complaint is based.[60]

The derivative action has a further advantage over a commission proceeding. In all derivative actions considerable "investigation" expense may be incurred by a shareholder in the course of substantiating a suspicion that his corporation's officers are violating their fiduciary duties.[61] Reimbursement for such expense is awarded by the courts if the investigation uncovers a violation which

57. 38 STAT. 721 (1914), 15 U.S.C. § 46 (1952).

58. ". . . . The history of the Federal Trade Commission, and of the Sherman and Clayton Acts, shows us that it is the energy and ability of the enforcing agency upon which we must rely—and shows also how greatly the quantity and quality of enforcement can vary from administration to administration. . . . Anyone who is familiar with the Pecora and Sabath investigations can testify as to the energy and enthusiasm of the investigators: he can also testify to the resulting disruption of business, the inconvenience to employees and managers, and the cost. Inquisitions of that type . . . should not be initiated at the request of every dissatisfied stockholder."

Washington, *Stockholders' Derivative Suits: The Company's Role, and A Suggestion*, 25 CORNELL L.Q. 361, 376 (1940).

59. "Such proceedings [private antitrust suits] have a vital role to play in aiding understaffed Government agencies to enforce antitrust prohibitions throughout the Nation." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 380 (1955).

60. The principal case is an example of this.

61. See note 52 *supra;* Note, 70 HARV. L. REV. 369 (1956).

is subsequently corrected, even if the correction is procured without resort to litigation.[62] But none of the five administrative bodies charged with enforcing the antitrust laws[63] may be expected to reimburse private persons for their expense in bringing to light a violation of the laws.[64]

Schechtman's denial of counsel fees greatly curtails the effectiveness of the derivative action in antitrust law enforcement. By referring future shareholders to governmental agencies wherever possible, the decision serves to prevent some of the abuses and shortcomings which have plagued shareholders' suits in the past. But the advantages can be gained, and the abuses of derivative suits curbed, without this denial. The decision thus seems inconsistent with the legislative intent to include private parties within the forces policing the antitrust laws.

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62. Dottenheim v. Emerson Elec. Mfg. Co., 77 F. Supp. 306 (E.D.N.Y. 1948); Kaufman v. Shoenberg, 92 A.2d 295 (Del. Ch. 1952).

63. "Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers . . . ; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers . . . ; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . ."

38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (1952).

64. Although the Securities Exchange Commission possesses no express power to award reimbursement, *compare* 48 STAT. 885 (1934), as amended, 15 U.S.C. § 78d(b) (1952), *with* 38 STAT. 718 (1914), as amended, 15 U.S.C. § 42 (1952), it has awarded counsel fees to helpful intervenors in proceedings before it. See Hornstein, *A New Forum for Stockholders*, 45 COLUM. L. REV. 35, 46-48 (1945) (collecting cases). But no case has been found where the ICC, FCC, FTC, CAB, or FRB has followed this practice.