PUBLIC CORPORATIONS AND THE DAMAGING PRESS RELEASE WRONG WITHOUT A REMEDY

by Edwin J. Bonner*

FOREWORD

Many federal administrative agencies have authority - express or implied - to issue press releases at the time formal action is first initiated against persons suspected of violating the statute which the federal agency is charged with enforcing.[1] The press release, detailing the character of the suspected offense and the name of the person involved, may inflict immediate damage on the reputation of the alleged defendant, even before a formal hearing, findings and final order.[2]

When the person named in the press release is a public corporation, the damage to reputation as reflected in the price of the corporation's stock in exchange trading, can be swift and devastating. The mere hint of agency action against a public corporation is generally sufficient to undermine public confidence in the stock and bring on a surge of selling activity which drives

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1. The Federal Food, Drug and Cosmetic Act is typical. It empowers the Secretary of Health, Education and Welfare "to disseminate information regarding food, drugs, or cosmetics in situations involving, in the opinion of the Secretary imminent danger to health, or gross deception to the consumer." 21 U.S.C.A. 375(b) (Supp. 1955).
   Also see the Securities Exchange Act of 1934, 15 U.S.C.A. 78u (a) (1952).
2. Rourke, Law Enforcement Through Publicity, 24 U. Chi. L. Rev. 225.

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the price of the stock downward. The fickle nature of the investing public is not a new phenomenon but it has changed considerably in the last 20 years.[3] Today's investors include housewives, garage attendants, and subway conductors. Many possess minimal knowledge of the securities business, but most know enough to follow the fortunes of the stock of their particular companies. News of any administrative action against one of these companies is sufficient cause for alarm to bring on sale of small investor holdings, even though the corporation ultimately prevails in the formal action.

The press release therefore is a powerful weapon at the disposal of an agency throughout the administrative process and particularly during the informal administrative process. In fact, the publication of a press release has been termed the most effective sanction which an agency possesses. The consequences of such publication upon a corporation's activities is generally thought to be at least as harmful as the entry of an order suspending those activities.[4]

This article reviews the traditional remedies available to a public corporation damaged by a press release issued by a private individual, and shows

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3. There are at present more than 15,000,000 individuals registered as customers with the nation's major brokerage firms. Merrill, Lynch, Pierce, Fenner and Smith alone reports a list of 1,470,000 individual customers, with an average weekly increase of 1800. Prior to 1950, it is estimated that there were fewer than 3,000,000 registered customers.

4. Monograph, Federal Alcohol Administration, Attorney General's Committee on Administrative Procedure Sen. Doc. No. 186, 76th Cong., 3rd Sess. 16 (1940).

that in most cases these remedies are withheld by the courts when the defendant is a federal agency or an official of a federal agency. In this area of Administrative Law a vacuum currently exists, for there is a wrong without a remedy. Courts have been slow to permit remedies, and legislative measures are required.

PERMISSIBLE USES OF A PRESS RELEASE

The use of publicity by an administrative agency to effectuate compliance with its policies is well known. The publicity power is available where necessary to bring violations and abuses into the open through public investigations.[5] Communication of notice of hearings is widely circulated in the form of press releases, mailed notices, and publication in the Federal Register. In many instances the mere threat of such publicity is sufficient to achieve compliance with agency policies. In view of the great power of publicity it follows that it should be used only to effectuate the ends for which it was authorized.

In Bank of America National Trust & Savings Ass'n. v. Douglas,[6] the plaintiff Bank sued to prevent public disclosure of certain information alleged to have been illegally obtained by the Securities and Exchange Commission. The court in commenting on the propriety of such public disclosure in light of the intent of the enabling statute stated:

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5. U.S. Attorney General's Committee on Administrative Procedure, Report of Securities and Exchange Commission 20 (1940).

6. 105 F. 2d 100, 105 (D. C. Cir. 1939).

It is not difficult to see that such a power might easily be made an instrument of oppression... In addition to this, pretrial publication of evidence - labeled as believed to be true-ought, we think, to be avoided, especially as emanating from the tribunal charged with the judicial responsibility of weighing it and assuring the accused a fair hearing.[7]

This statement concerns itself primarily with the fair hearing concept. The legislative history of the Administrative Procedures Act,[8] also indicates that it is concerned with this same fair hearing concept in describing the proper use and function of publicity in all agencies.[9] The House Report, in discussing section 9(a) of the Act, states:[10]

Legitimate publicity extends to the issuance of authorized documents, such as notices or decisions; but, apart from actual and final adjudication after all proceedings have been had, no publicity should reflect adversely upon any person...otherwise than as required to carry on the authorized agency functions and necessary in the administration thereof. It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of the parties.

Despite these high sounding statements of legislative principles, courts have been reluctant to set up sharp limits to governmental use of publicity even though it may result in coercion and injury to the parties. Public apathy concerning "corporate crime" has been cited as one of the main reasons why

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7. Ibid, p. 105

8. 5 U.S.C. Sec. 1001 - 1011

9. U.S. Attorney General's Committee on Administrative Procedure in Government Agencies, S.Doc. No. 8, 77th Cong. 1st Sess. 221 (1941). Messrs. McFarland, Stason, and Vanderbilt submitted a proposal requiring that the use of publicity be prohibited during the preliminary or investigative phases of administrative proceedings.

10. H.R. Rep. No. 1980, 79th Cong. 2d Sess. 40 (1946).

courts have not yet moved far in this area.[11] Due process requires that corporate defendants are entitled to the same fair hearing safeguards as a defendant in a criminal action. However, courts have moved much further in prohibiting press coverage to protect fair hearing guarantees in criminal actions than they have in civil actions.[12] Just what the current state of the law is regarding remedies available to a complaintant in a civil action are now reviewed.

REMEDIES IN TORT FOR DAMAGES

a. Against Federal Agency Officials

Administrative agency officials are privileged with an absolute immunity from civil suits for damages arising from their acts done in the discharge of duties imposed on them by law,[13] unless such acts are unconstitutional or in excess of their authority.[14] This privilege of immunity has been construed to include a press release addressed to the general public by a governmental official,[15] even though the agency was not specifically empowered or required by statute to inform the public of the general type of activity which was the subject of the press release.[16]

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11. Rourke, Law Enforcement Through Publicity, 24 U. Chi. L. Rev. 225, 228.

12. Friendly, A. and Goldfarb, R.L., Crime & Publicity, Appendix B, Press Regulation By-Law, p. 264 (1967).

13. Spalding v. Vilas, 161 U.S. 483, 498 (1896).

14. Meyer Mfg. Co. v. Foley, 234 F. Supp. 732 (S.D. Iowa, 1964).

15. Barr v. Mateo, 360 U.S. 564, 572 (1959).

16. Ibid, p. 575.

The privilege precludes inquiry into the motive of the official so that once the privilege has been established, questions of bad faith or malice become irrevelant.

This extensive immunity privilege has been defended as necessary, "for it is through freedom of action only that effective administration of statutory obligations result".[17] It is argued that freedom thus accorded the agency official necessarily includes the use of the press release, for where the interested party is the general public, the press is a proper medium of communication.

In Barr, Mr. Justice Brennan suggested that only a qualified privilege be extended to agency officials, since a qualified privilege would be all that a private citizen would be allowed by law under comparable circumstances. It was pointed out that a qualified privilege would protect the agency official unless it appeared on trial that his communication was (a) defamatory, (b) untrue, and (c) malicious.[18]

Despite the appeal of Mr. Justice Brennan's argument, his opinion was in dissent, and it seems clear that today the privilege remains absolute as long as the official is acting within the scope of his authority.[19]

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17. Spalding v. Vilas, 161 U.S. 483, 499 (1896).

18. Barr v. Mateo, 360 U.S. 564, 586 (1959).

19. This scope has been defined as "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act." Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1951).

Mr. Justice Harlan points out that there are other sanctions than civil tort suits available to deter the agency official who may be prone to exercise his functions in an unworthy and irresponsible manner. Just what these sanctions are is not clearly brought out in the opinion. The Attorney General interpreted Mr. Justice Harlan's remarks on the sanctions to mean reprimand or removal from office if official irresponsibility should be involved.[20] Such sanctions, while useful within an agency for purposes of administration in rare cases of proven irresponsibility, offer no remedy to an innocent firm for wrong done by a press release. It can be concluded then that no remedy in tort for money damages is available against an agency official as an individual for harm done by a press release, unless the official is acting outside the scope of his authority.

REMEDIES IN TORT FOR DAMAGES

b. Against Federal Agencies

Consideration of any tort action against a federal agency for damage caused by a press release must first be reviewed in light of the provisions of the Federal Tort Claims Act.[21] Prior to the passage of the Federal Tort Claims Act it had been decided that a "sue and be sued" federally-created agency could be sued for their torts.[22] This meant that if the statute which

20. Memorandum To The Heads of All Departments And Agencies From Attorney General William P. Rogers, July 13, 1959.

21. 28 U.S.C.A. Sec. 1346.

22. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S. Ct. 516 (1938).

created the agency provided that the agency could "sue and be sued", an action in tort could be maintained. If the agency statute was not so drafted, then no action would lie. Since federally created agencies were entering into transactions with the public, it was the feeling of most courts that these agencies should be responsible for their acts to the same extent as a private corporation. In 1946 the enactment of the Federal Tort Claims Act withdrew the right to proceed against federal agencies on tort claims cognizable under the Act.

In Wickman v. Inland Waterways Corporation[23], a federal agency was sued by a private individual on a cause of action not excluded by Section 2680 of the Federal Tort Claims Act. The Court in Wickman held that the suit should have been directed against the United States and not the federal agency. Commenting on the intent of Congress in drafting the Act the Court said:

> In passing this comprehensive legislation, Congress undoubtedly intended that, instead of suits being brought against the various agencies..., all suits for damages on account of torts committed by employees of the Government, must be directed against the United States and not against the federal agency whose employees may have committed the tort.

Some of the distinction between "suable" and "nonsuable" federal agencies was eliminated in Freeling v. Federal Deposit Insurance Corporation.[24] In a tort action for money damages for slander, the Court held that the action

23. 78 F. Supp. 284, 286 (1948).

24. 221 F. Supp. 955 (W. D. Okal. 1962).

could not be maintained against the F.D.I.C. even though by statute it was a "suable" agency, and even though a suit against the United States under the Federal Tort Claims Act would not lie, as it was excluded by Section 2680 of that Act. In commenting that Congress intended to place "suable" and "non-suable" federal agencies on the same footing in tort actions, the Court said in regard to Section 2680:

> This section will place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies. In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as, for example the Suits in Admiralty Act. It is intended that neither corporate status nor 'sue and be sued' clauses, shall, alone, be the basis for suits for money recovery sounding in tort.[25]

If Freeling is followed it will mean that a corporation damaged by a press release cannot recover against

a) A "Nonsuable" Agency, since suit is barred by the agency's own statute,

b) A "Suable" Agency, since Freeling says a suable agency is now equivalent to a non-suable agency, and plaintiff's only recourse is against the United States.

c) The United States, unless plaintiff can allege jurisdiction on the basis of another tort not excluded by Section 2680.

It would appear then that under the present state of the law, a recovery in tort for money damages from a press release issued by a federal agency,

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25. Sen. Rpt. 1400, 79th Cong., 2nd Sess., 33.

will require a highly unusual set of facts to establish jurisdiction, and that the defendant will be the United States and not the federal agency.

EQUITABLE REMEDIES

a. Against Federal Agency Officials

A proceeding to enjoin an agency official from doing an act generally founders on the rocks of the sovereign immunity doctrine. Briefly the doctrine holds that "the government is not liable to be sued, except with its own consent, given by law", [26] and since suit to enjoin an agency official from doing an act within the scope of his authority is in reality a suit to enjoin the government, the suit must fail. The classic exceptions to the doctrine are where the official's act is unconstitutional [27] or exceeds his authority. [28]

In attempting to "do justice" in individual controversies the doctrine of sovereign immunity has been irrationally and inconsistently applied by courts for more than a hundred years. It has been criticized by courts [29] and scholars [30] alike as a refusal of the judicial system to do exactly what it is best qualified to do - to decide controverted questions of law not only of citizens against each other, but also questions between them and their government. Professor Davis has suggested that the Administrative Procedures Act section 10(b) should

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26. United States v. McLemore, 45 U.S. (4 How.) 286 (1846).

27. Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908).

28. Philadelphia Co. v. Stimson, 223 U.S 605, 32 S. Ct. 340 (1912).

29. Larson v. Domestic & Foreign Corp., 337 U.S. 682, 709, 69 S. Ct. 1457 (1949).

30. 3 Davis, Administrative Law Treaties, 2710 (1965).

be amended to permit suit against an agency or an official of an agency for injunctive or declaratory relief where the court finds that the issue or issues are appropriate for judicial determination. The amendment would specifically exempt the defense of sovereign immunity.[31]

Despite attempts such as this to legislate consistency into this area of the law, the doctrine of sovereign immunity is the law today and any proceeding for equitable relief against an agency official arising from a press release would probably not succeed.

EQUITABLE REMEDIES

b. Against Federal Agencies.

In an action for equitable relief against an agency itself, the doctrine of sovereign immunity is today less strictly construed by the courts and less often used by the agency as a defense. Whether this is a developing trend toward the more enlightened judicial attitude espoused by Mr. Justice Frankfurter's dissent in Larson[32] is difficult to judge. Its effect, however, can be seen in two recent press release controversies, where sovereign immunity was neither raised by the agency nor considered by the court.

In B.C. Morton International Corp. v. Federal Deposit Insurance Corp.[33] the F.D.I.C., by issuance of a press release[34] stated that certificates of

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31. id.

32. Larson v. Domestic & Foreign Corp. 337 U.S. 682, 709, S. Ct. 1457 (1949).

33. 305 F. 2d 692 (1st Cir. 1962).

34. Wall Street Journal, Nov. 14, 1960.

deposit issued through a scheme sometimes referred to as "link financing" would not be regarded as qualifying for insurance under the Federal Deposit Insurance Act. The Morton Company, which regularly dealt in certificates of deposit, and in doing so had to represent them as "insured", alleged that it was directly damaged in their business by the press release. Morton sued the F.D.I.C. for a declaratory order that certificates of deposit were insurable under the Act, and for injunctive relief to permanently restrain F.D.I.C. from representing otherwise. The court first disposed of F.D.I.C.'s contention of absolute privilege based on the Barr doctrine, stating that Barr was limited to agency officials and was not intended to provide immunity to the agency itself.[35]

The Court went on to state that the action was not barred by the Federal Tort Claims Act exclusive remedy provision[36] since the action was for declaratory and injunctive relief and not for money damages. In overruling the lower court's dismissal of Morton's complaint, the court in effect held that equitable relief would be available against an administrative agency for misuse of press release power.

In a very recent case, United States v. Diapulse Manufacturing Corp. of America, [37] the court, on claimants request for an injunction against the Food and Drug Administration to restrain the FDA from issuing press releases and

35. Id, p. 695.

36. 28 U.S.C.A. Sec. 2679 (a)

37. 262 F. Supp. 728 (D. Conn. 1967).

other public statements, stated: [38]

> A United States Court undoubtedly has inherent power - indeed, is under a plain duty - to take whatever action may be necessary and appropriate to assure a fair trial, regardless of how the proceedings are labeled: criminal, civil, admiralty, or otherwise. The assurance of a fair trial includes safeguarding against prejudicial pre-trial publicity, regardless of the type of action. Such power may be exercised by injunction, by contempt proceedings or by such less drastic remedies as change in venue or continuance. The power is there. It has been used without hesitation in the past and will continue to be used - upon a proper showing.

This is very strong language. While both cases were only at the district court level they may signal a change in attitude regarding judicial limitations on an agency's use of the publicity power. It should be noted, however, that the court in Diapulse left itself an escape clause - "upon a proper showing" - and then proceeded to use that escape clause to refuse equitable relief.

A "proper showing" is a prerequisite to any request for equitable relief, and to the extent that this clause weakens the Diapulse doctrine, it might be regarded as surplusage. This clause is important, however, in that it clearly stresses the importance of judicial attitude in attempting to forecast whether an equitable remedy might be achieved in a given set of circumstances.

CONCLUSION

It has been shown that a proceeding against a federal agency official based on damaging use of the publicity power - either in tort or for equitable relief - would stand little chance of success. The doctrines of absolute privilege and sovereign immunity have been the main defenses available to

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38. Ibid, p. 730.

such officials although courts also recognize standing, ripeness, and exhaustion of remedies as other grounds for refusing relief.

Despite conflicting and at times overlapping arguments for protection of agency officials, from acts done in carrying out their duties, there seems to be no sound basis for refusing such protection. The suggestion has often been made that all administrative agency action - including proper use of the publicity power - would be improved by recruiting high minded individuals to assure that the spirit of the law was at least as important in day-to-day agency functioning as the letter of the law. A well qualified agency staff, shielded from individual liability for their acts, should produce both a fair and a fearless administration of a statute. This is the ultimate concern of law, and no individual, corporate, or otherwise, is denied due process of law by placing the public interest above an individual interest.

On the other hand, there does not seem to be any sound public policy reason for refusing relief against administrative agencies themselves, where their acts would normally be actionable if they were those of a private individual. Yet it has been shown that there are very few fact situations which will give rise to a tort action against an agency. And until recently courts have seldom granted equitable relief against federal agencies, particularly in press release cases.

In summary, a public corporation damaged by a press release has had no available remedy in the past, either in tort or equity. Several federal district courts have opened the door slightly to grant equitable relief against

federal agencies, but such relief is generally too slow and too late to stem the real damage done to a corporation by a bad press release - loss of investors confidence. What is needed is an overhaul of the Administrative Procedure Act, particularly Section 9 (a) to prevent release by an agency of any document or statement - in particular the first statement - which would reflect adversely on an individual, except as specifically authorized and absolutely required by statute.