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## Civil Rights-Corporate Directors Held Personally Liable for Intentional Racial Discrimination Despite Due Diligence to Know the Law

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# RECENT DECISIONS

**Civil Rights**—CORPORATE DIRECTORS HELD PERSONALLY LIABLE FOR INTENTIONAL RACIAL DISCRIMINATION DESPITE DUE DILIGENCE TO KNOW THE LAW—*Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141 (4th Cir. 1975).

In 1968,<sup>1</sup> the Supreme Court resurrected section 1 of the Civil Rights Act of 1866 [now 42 U.S.C. §§ 1981<sup>2</sup> and 1982<sup>3</sup> (1970)] and held that section 1982 prohibits private as well as public racial discrimination in the sale or rental of property.<sup>4</sup> The question of whether damages are recoverable for violations of section 1982 was then left undecided<sup>5</sup> but was subsequently answered in the affirmative.<sup>6</sup> A similar cause of action<sup>7</sup> has been recognized under section 1981 to compensate for private racial discrimination in the formulation and enforcement of contracts.<sup>8</sup> The issue presented in *Tillman v. Wheaton-Haven Recreation Association*<sup>9</sup> was whether sections 1981 and 1982 impose liability upon the directors of Wheaton-Haven for their

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1. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

2. 42 U.S.C. § 1981 (1970) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. 42 U.S.C. § 1982 (1970) provides that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

4. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The scope of section 1982 encompasses the conduct of private individuals since the Civil Rights Act of 1866 was enacted by Congress pursuant to powers granted under the thirteenth amendment. *Id.* at 437-38. This amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Id.* at 438 quoting from *Civil Rights Cases*, 109 U.S. 3, 20 (1883). In enacting section 1982 Congress exercised its power to pass appropriate legislation to abolish all badges and incidents of slavery. *Id.* at 438-40.

5. *Id.* at 414-15 n.14.

6. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* See *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (1930); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916).

7. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 is the source of the operative language of both sections 1981 and 1982. Due to this common origin, they are construed in a similar fashion. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970). See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 n.28 (1968).

8. *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970).

9. 517 F.2d 1141 (4th Cir. 1975).

racially discriminatory admission policies in view of their diligence to avoid acting contrary to the law.

Wheaton-Haven Recreation Association, Inc. is a community swimming pool association which draws its members largely from a three-quarter mile radius geographical preference area.<sup>10</sup> In the spring of 1968, Dr. Harry C. Press bought a home within the preference area and sought an application for membership. The application was denied solely on the basis of his being a black. In the summer of 1968, the directors of Wheaton-Haven promulgated a white-only membership policy which was soon extended to guests.<sup>11</sup> These policies were affected only after the directors obtained the opinions of two different attorneys that their proposed actions were legal.

The private club exemption<sup>12</sup> of the Civil Rights Act of 1964 was the basis for the lawyers' conclusion that Wheaton-Haven could legally racially discriminate. The district court agreed with this conclusion.<sup>13</sup> The Fourth Circuit affirmed<sup>14</sup> and held that the private club exemption of the Civil Rights Act of 1964 applied to the Civil Rights Act of 1866 as well.<sup>15</sup> In 1973, the Supreme Court reversed the lower courts<sup>16</sup> determining that the directors had acted illegally. The Court held that Wheaton-Haven was not a private club,<sup>17</sup> and that the racially discriminatory admission policy violated section 1982.<sup>18</sup> On remand the district court absolved the directors

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10. Wheaton-Haven's by-laws contain three advantages for residents in the geographical preference area: (1) there is no membership endorsement requirement; (2) they receive priority (if membership is full) over all but those who have first options; (3) an owner-member selling his home can confer to his vendee a first option for membership. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 433 (1973).

11. In July 1968, Mr. and Mrs. Tillman, members of Wheaton-Haven, brought Mrs. Grace Rosner, a black, to the pool as their guest. She was admitted on that occasion but the directors of Wheaton-Haven changed the guest policy the following day to limit guests to relatives of members. The directors conceded that the reason for the policy change was to prevent black guests from using the pool. Mrs. Rosner was subsequently denied admission and instituted this suit.

12. 42 U.S.C. § 2000a (e) (1970) provides:

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

13. In an unreported opinion the district court granted summary judgment to Wheaton-Haven.

14. *Tillman v. Wheaton-Haven Recreation Ass'n*, 451 F.2d 1211 (4th Cir. 1971).

15. *Id.* at 1214-15.

16. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973).

17. *Id.* at 438.

18. The Court would not distinguish the property-linked membership preference in *Wheaton-Haven* from the property-linked membership in *Sullivan v. Little Hunting Park*,

of all personal liability.<sup>19</sup> The complainants appealed and the Fourth Circuit held the directors personally liable for the intentional violation of civil rights.<sup>20</sup>

The thrust of the Fourth Circuit opinion is that the directors of Wheaton-Haven committed an intentional tort<sup>21</sup> in formulating and implementing their racially discriminatory admission policy. The directors themselves acknowledged the intentional nature of the white-only policy and conceded that it was adopted to keep Negroes out.<sup>22</sup> The complainants were denied the right to contract with Wheaton-Haven solely on the basis of race; thus the directors violated section 1981.<sup>23</sup> When Dr. Press was denied membership in Wheaton-Haven his rights to hold and convey real property under section 1982 were impaired because the membership preference was property-linked<sup>24</sup> and could affect the value of the property.<sup>25</sup> The Fourth Circuit cited precedent to establish that racial discrimination violating civil rights is a tort.<sup>26</sup> Well-established corporation law imposes

Inc., 396 U.S. 229 (1969). In *Sullivan*, the Court held that the membership share in the recreation area, Little Hunting Park, was an integral part of the lease on the house. Thus the Park's racial discrimination constituted a violation of section 1982. *Id.* at 236-37.

19. *Tillman v. Wheaton-Haven Recreation Ass'n*, 367 F. Supp. 860 (D. Md. 1973).

20. *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975).

21. An intentional tort is defined as an act committed with the "intent to bring about a result which will invade the interests of another in a way that the law will not sanction." W. PROSSER, *LAW OF TORTS* § 8 (4th ed. 1971).

22. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Tillman v. Wheaton-Haven Recreation Ass'n*, 451 F.2d 1211 (4th Cir. 1971). *See* note 11 *supra*.

23. Dr. Press contended that admission to membership is a contract. Mrs. Rosner claimed an enforceable interest as a third party beneficiary of the Tillman's membership. *Tillman v. Wheaton-Haven Recreation Ass'n*, 451 F.2d 1211, 1213-14 (4th Cir. 1971). An alternative justification for finding that a guest has an enforceable interest is stated in *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974), where the court found that the entry of an invited guest conditioned on the payment of a fee became a contract between the club and the guest. *Id.* at 1339. This case also recognized the validity of the third party beneficiary status. *Id.*

24. *See* note 10 *supra*. The term "property-linked" indicates that membership in the facility is directly keyed to the ownership or lease of real property in the geographic area.

25. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 437 (1973); *Tillman v. Wheaton-Haven Recreation Ass'n*, 451 F.2d 1211, 1223 (4th Cir. 1971) (dissenting opinion).

26. In *Curtis v. Loether*, 415 U.S. 189, 195 (1974), the Supreme Court discussed the civil nature of section 812 of the Civil Rights Act of 1968, stating that "[a] damage action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for injury caused by defendant's wrongful breach." *Id.* This statement is equally applicable to sections 1981 and 1982 since the civil rights are embodied in the statute and the Supreme Court has recognized the validity of implying a remedy. *See* note 6 *supra*. The Court in *Curtis* characterized the tort aspect of a violation of civil rights: "[a]n action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress." *Curtis v. Loether*, 415 U.S. 189,

personal liability on a corporate director for the intentional torts<sup>27</sup> he personally commits, inspires, or specifically directs<sup>28</sup> even though committed in his capacity as a director.<sup>29</sup> The complainants' civil rights had been intentionally violated in a manner the law would not sanction, so liability was imposed upon the actors.

The directors of Wheaton-Haven asserted a three pronged defense to establish that, to be held liable, they must have had notice that the policies they adopted were contrary to the law:<sup>30</sup> (1) they used due diligence to know the law; (2) they relied on counsel's advice as to the legality of the admission policy; (3) due to its then unsettled state, it was impossible for them to ascertain the law.

The Fourth Circuit held that due diligence is not a defense to an intentional tort.<sup>31</sup> The crux of the defense failed because while Wheaton-Haven directors exercised due diligence to know the law, they did not exercise due diligence to prevent the personal affront to complainants' civil rights. On the contrary, they intended the results.<sup>32</sup> The Fourth Circuit recognized due diligence as a defense in a negligence action,<sup>33</sup> but stated that the tort here was intentional. The directors' mistaken justification for their con-

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196 n.10 (1974). *Cf.* *Allen v. Gifford*, 462 F.2d 615 (4th Cir. 1972). *See* C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 961 (2d ed. 1969), where the question of treating racial discrimination as a "dignitary" tort is posed; F. POLLOCK, *THE LAW OF TORTS* 25 (13th ed. 1929) stating "[t]he commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury."

27. 3 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 1135, 1137 (Rev. ed. 1965).

28. *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406 (10th Cir. 1958); *Tedrow v. Deskin*, 265 Md. 546, 290 A.2d 799 (1972).

29. A director, as an agent of the corporation, is subject to the general principle of agency law which imposes personal liability on the agent for his intentional torts. 3 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1135 (Rev. ed. 1965); F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 343 (4th ed. 1952).

30. The directors contended that they should not be liable since they did what was reasonable to ascertain both the facts and the law upon which they based their decision. Their cited authorities failed to support this contention because in those cases, due diligence and good faith were recognized as defenses when the issue was the defendant's knowledge of facts, not his knowledge of the law. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968); *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

31. It is submitted that the intent required for an intentional tort is inconsistent with an exercise of due diligence to avoid the result.

32. "[Intent] must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow what he does." W. PROSSER, *LAW OF TORTS* § 8 (4th ed. 1971).

33. *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975). *See also* H. HENN, *CORPORATIONS* § 234 (2d ed. 1970).

duct neither changed the nature of nor constituted a defense to the intentional tort.<sup>34</sup>

The second prong, reliance on the advice of counsel, was in essence a display of an exercise of due care and diligence. It is a successful defense in a derivative suit where stockholders sue for a breach of the directors' official duty of care,<sup>35</sup> but is not a defense to an intentional tort against third parties.<sup>36</sup> Reliance on counsel's advice "can never be a justification for an act which is unlawful or wrongful in itself. Thus the defense cannot be used successfully in those situations where an act of omission is the only element necessary for . . . liability."<sup>37</sup>

The third prong was that it was impossible for the directors to ascertain the meaning of the law due to its then unsettled nature. This defense failed because the directors need not have known the state of the law to have violated the rights protected thereby.<sup>38</sup> 'The complainants' cause of action was in the nature of an intentional tort,<sup>39</sup> which requires intentional infliction of harm,<sup>40</sup> but it is not essential that the tortfeasor know that the plaintiff has a cause of action against him for the harm done.<sup>41</sup> The directors failed to distinguish between knowledge of the wrongful act itself, and knowledge that the act was forbidden by federal statute. The former is a requirement for personal tort liability of the director;<sup>42</sup> the latter is not.

The Fourth Circuit applied fundamental principles of tort and corporate law to impose liability on the directors. The issue of compensatory dam-

34. W. PROSSER, LAW OF TORTS § 17 (4th ed. 1971):

The plea of unavoidable mistake . . . is that, although the act was voluntary, and the result intended, the defendant acted under an erroneous belief, formed upon reasonable grounds, that circumstances existed which would justify his conduct.

. . . .

[U]navoidable mistake is in itself generally held to be no defense at all.

35. *Spirit v. Bechtel*, 232 F.2d 241 (2d Cir. 1956); *Gilbert v. Burnside*, 13 A.D.2d 982, 216 N.Y.S.2d 430 (App. Div. 1961), *aff'd*, 11 N.Y.2d 960, 183 N.E.2d 325, 229 N.Y.S.2d 10 (1962).

36. *United States v. St. Anthony R.R.*, 192 U.S. 524 (1904).

37. Note, *Reliance on Advice of Counsel*, 70 YALE L.J. 978 (1961).

38. *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). "Lack of knowledge or notice would constitute no defense to the enforcement of [42 U.S.C. § 1982]."

39. It is not a criminal action with a requirement that the law be specific in its prohibitions. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). See *Volkswagen Interamericana S.A. v. Rohlsen*, 360 F.2d 437, 445 (1st Cir. 1966).

40. C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 21 (2d ed. 1969).

41. Thus, even minors and insane persons, members of society least likely to know the law, are liable for their own torts. RESTATEMENT OF TORTS § 887, comment (a) at 468 (1939). See *Felt v. Sligo Hill Dev. Corp.*, 226 Md. 155, 172 A.2d 511 (1961).

42. 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137 (Rev. ed. 1965).

ages was not before the circuit court but the district court's analysis illuminates the tortious nature of the act. The district court held that the complainants should be allowed compensatory damages upon a proper showing of evidence. "These damages may include out-of-pocket expenses and humiliation, embarrassment or emotional injury from 1968 to 1973."<sup>43</sup> Such damages are particularly apparent when racial discrimination results in a personal indignity before neighbors and friends as was the case with Dr. and Mrs. Press and Mrs. Grace Rosner. The courts have repeatedly awarded damages for tangible<sup>44</sup> and intangible<sup>45</sup> harm to individuals whose civil rights under sections 1981 and 1982 were violated. Even when the complainants failed to articulate evidentiary support for damages, the Seventh Circuit was willing to recognize embarrassment and humiliation as natural consequences of such statutory violation.<sup>46</sup> Compensation for instances of racial discrimination was consistent with the "humane and remedial policy"<sup>47</sup> of the Civil Rights Act of 1866.

On first impression one is apt to agree with the directors' claim that knowledge that they were violating the law is a prerequisite to the imposition of personal liability. The application of basic principles of tort and corporate law, however, dictates a contrary conclusion. The Fourth Circuit used precedent to advance the cause of civil rights<sup>48</sup> while retaining continuity with the past.<sup>49</sup> Private individuals will henceforth be conscious of the section 1981 and 1982 prohibitions against racial discrimination. Fear of personal liability may discourage racial discrimination and reduce any reliance on the statutory exemption fostering discrimination.<sup>50</sup>

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43. *Tillman v. Wheaton-Haven Recreation Ass'n*, 367 F. Supp. 860, 864 (D. Md. 1973).

44. Money damages for compensatory backpay have been granted when the plaintiff was denied a job due to racial discrimination. *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972). The courts have been willing to grant injunctive relief as well, especially for racially motivated discrimination involving the sale or lease of property. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1971); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970).

45. The courts will award damages for humiliation, embarrassment and mental anguish. *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974); *Stevens v. Dobs, Inc.*, 373 F. Supp. 618 (E.D.N.C. 1974); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Ore. 1973).

46. *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974).

47. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 650 (5th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 995 n.30 (D.C. Cir. 1973).

48. Prosser views the law of torts as a battleground of social theory. W. PROSSER, *LAW OF TORTS* § 3 (4th ed. 1971). The court employed the technique of social engineering whereby the law is used as an instrument to promote the "greatest happiness of the greatest number." *Id.* at 15.

49. This approach fosters more ready acceptance of decisional creativity. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

50. See note 12 *supra* and accompanying text.