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Antitrust - Intra-Corporate Conspiracy

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RECENT DECISIONS

ANTITRUST—INTRA-CORPORATE CONSPIRACY—Unincorporated divisions of a corporation are legally capable of conspiring with each other in violation of Section 1 of the Sherman Act.¹


Plaintiff Hawaiian Oke brought this action pursuant to Section 4 of the Clayton Act² to recover treble damages, alleging a conspiracy to eliminate plaintiff from the wholesale liquor business. Named as defendants were several corporations.³ However, for the purpose of determining whether or not there had been a combination or conspiracy the plaintiff requested that the jury be instructed to treat the unincorporated divisions of defendant House of Seagram as separate entities. The issue presented—whether a horizontal conspiracy among unincorporated divisions of a single corporation is legally possible—was one of first impression. The U.S. District Court for Hawaii, in an opinion by Chief Judge Pence, responded affirmatively to this question and instructed the jury in accordance with its determination (Memorandum Decision and Ruling on Plaintiff’s Requested Instruction Number 36 Concerning Possible Intra-corporate Conspiracy).⁴

The defendant, House of Seagram, invoked the single-trader defense, _i.e._, as a matter of law, a corporation cannot conspire with itself; therefore, the unincorporated sales divisions of the corporation cannot enter into a conspiracy among themselves. To support its view defendant cited several cases: In _Nelson Radio & Supply Co. v. Motorola_,⁵ it was held that the defendant corporation could not conspire with its officers, employees, representatives and agents. The U.S. Court of Appeals for the

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1. _26 Stat. 209_ (1890), as amended, 15 U.S.C. §§ 1-7 (hereinafter referred to as Section 1). [Any contract, combination or conspiracy in restraint of trade is made illegal].
3. Named as defendants were Joseph E. Seagram and Sons, Inc., The House of Seagram, Inc., McKesson & Robbins, Inc., Barton Distilling Co., and Burton Western Distilling Co.
4. Plaintiff’s Revised Instruction No. 36: Calvert Distilling Co., Four Roses Distilling Co. and Frankfort Distilling Co. were separate unincorporated divisions of the defendant House of Seagram, Inc. at the time that each terminated dealings with Hawaiian Oke.
5. _200 F.2d 911_ (5th Cir. 1955), _cert. denied_, 345 U.S. 925 (1953).

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Fifth Circuit reasoned that "the allegation claiming the existence of a conspiracy under Section 1 contains a more fundamental defect. It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can." In *Poller v. Columbia Broadcasting System, Inc.* it was alleged that CBS had conspired with CBS-TV, an unincorporated division, and others. The U.S. Court of Appeals for the District of Columbia considered the allegation as being "obviously unsound. It is in reality a charge that CBS conspired with itself."

On appeal, the United States Supreme Court, in a sharply divided opinion, reversed the decision on other grounds. Mr. Justice Clark, however, did give some indication that an intra-corporate conspiracy was possible. Defendant's authority also included *Deterjet Corp. v. United Aircraft Corp.*, *Kemwel Automotive Corp. v. Ford Motor Co.*, and *Johnny Maddox Motor Co. v. Ford Motor Co.*, wherein motions for dismissal or summary judgment were granted as to allegation of conspiracy between a corporation and its unincorporated division.

The *Hawaiian Oke* court, however, did not feel that the broad principle of law laid down in *Nelson, supra*, was applicable to the present fact situation. It reasoned that previous decisions had dealt with vertical corporate structure (a corporation and its unincorporated division) whereas the instant litigation concerned itself with an alleged conspiracy among business entities on the same level of the corporate structure. Not being bound within the confines of precedent, the court turned its attention to

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6. Id. at 914.
8. Id. at 603.
9. The Supreme Court felt that there was some question as to the status of one of the alleged conspirators. The question of whether the alleged conspirator was in fact an employee was a question for the jury; therefore defendant's motion for summary judgment should not have been granted.
10. 368 U.S. 464, 469, n.4: "We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate offices and autonomy in each, the divisions came within the rule as to corporate subsidiaries."
determining whether these horizontal business divisions should be considered as separate legal entities capable of conspiracy. The affirmative resolution of this issue by the Hawaiian Oke court depended upon the acceptance of two propositions, viz., that "substance rather than form should govern," and, logically following, a "factual conclusion that a division has independence of action in the relevant business activity. . . ."

Leading cases have held that a parent corporation may conspire with its subsidiary and that subsidiaries of a common parent are capable of conspiring with one another. Thus, according to the instant decision, the form in which a corporation is cast—wholly owned subsidiaries or unincorporated divisions—will not insulate a corporation from a Section 1 violation when, in substance, the business entity in question has independence of action in the relevant business activity.

According to the Hawaiian Oke court, "independence" is present if the business entity is "endowed with separable, self-generated and moving power to act in the pertinent area of economic activity. . . ."

With leave to disregard corporate form the Hawaiian Oke court concerned itself with a determination of whether the "independence of action was sufficiently manifest to charge the divisions of the defendant with conspiracy. The fact that the divisions in question were, prior to July 31, 1954, wholly owned subsidiaries which were found to be legally capable of conspiracy in Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc. weighed heavily against the defendant. Upon questioning of

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14. 272 F. Supp. at 919, quoting from Reines Distributors, Inc. v. Admiral Corporation, 256 F. Supp. 581, 583 (S.D.N.Y. 1966); see also United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947). Reines Distributors, Inc. was an action brought to determine whether a division could be a purchaser or customer under Sections 2(a), (d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act (Title 15 U.S.C. § 13); however in dicta in Reines at 583, it was stated that the position that divisions cannot conspire with the corporation for purposes of Section 1 of the Sherman Act "seems logical."


17. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). Herein subsidiaries were found to be in actual competition with each other.

18. Impetus is given to these conclusions by the Court's reliance on Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59 (1911) wherein Section 1 of the Sherman Act was construed to be "all encompassing."


21. Prior to the instant decision it was almost unanimously thought that a change in form (for example, a change from the separate corporate existence of the wholly owned subsidiary to an unincorporated division) would provide against allegations of conspiracy. Responsible, at least in part, were the statements by government counsel arguing Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) that "you must have two entities to have a conspiracy," and that separate corporate form makes the difference. This argument is reported 19 U.S.L. WEEK 3219 et seq. Mr. Justice Jackson, dissenting in Timken,
defendant's counsel, it appeared, that, subsequent to Seagram's reorganization, the divisions remained as "independent" as they were prior to the reorganization. The court concluded that the divisions in question were "self-contained," and "independent sales divisions." Therefore, any deviation by these autonomous divisions from independent action to concerted action among them, would render the divisions subject to the antitrust laws. The court made pointedly clear that their decision rested solely on the fact that the divisions had separate sales organizations. Since the conspiracy alleged was to terminate plaintiff as defendant's sales representative, the only relevant business function was distribution. Other joint or common functions of the corporation and division were of no moment in the light of divided responsibility for marketing.

It is submitted that the instant opinion is evidence of a judicial attempt to protect the remnants of a Jeffersonian competitive system. It becomes arduous, however, to surmount the conceptual difficulties imposed by Section 1, for, by its very terms, duality is required. It is obvious in cases such as Timken Roller Bearing Co. v. United States, United States v. Yellow Cab Co. and Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. that the requisite plurality of "persons" is being sought where it would not otherwise be found.

The utility of the instant decision is questionable. Cannot the very economic abuse that the Hawaiian Oke court attempts to guard against be achieved by a slight modification in corporate form, i.e., reorganization of the sales division so as to place decision making responsibility in one corporate manager, as contrasted with separate divisional managers, thereby escaping the proscriptions of Section 1? Certainly a corporation could so intertwine its corporate and divisional structure so as to fail to qualify as having "independent business activity" yet still achieve the same undesirable result. The next step Hawaiian Oke type courts might take would be to disregard form altogether and look merely for a restraint

discusses this point at 606 and states at 607: "I think that result [conspiracy found by the majority] places too much weight on labels."

Many text writers "assumed" that a change in form was adequate compliance with Section 1, see, for one instance, Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139 (1952).


23. That economic abuse, market control and public injury are the primary concern of the courts in this particular area see: Adelman, Effective Competition and the Antitrust Laws 61 Harv. L. Rev. 1289, 1317 (1948); Fuller, Problems Ahead for "Business," 2 ABA ANTITRUST SECTION 61, 72 (1953); Note, The Nature of a Sherman Act Conspiracy, 54 Colum. L. Rev. 1108, 1127 (1954).

24. See Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743, 752 (1950) for a critical and penetrating analysis of the requirements of conspiracy under Section 1 of the Sherman Act.


of trade\textsuperscript{28} which was not made illegal by Section 1.\textsuperscript{29} A decision which could be so easily frustrated by a minor corporate maneuver (and which itself reacted to the attempt by Seagram to frustrate a previous decision, namely \textit{Kiefer-Stewart}) may justifiably be viewed with a certain suspicion. But other aspects of the decision are equally troublesome. No doubt, according to the present decision, a host of American industries are, at this very moment, infested with conspiracies,\textsuperscript{30} and at the mercy of treble damage seekers.

The instant case appears to be an attempt by the judiciary to economically regulate the business community in the nebulous area between pure competition and obvious monopoly. It may well be that existing antitrust law is inadequate to check the economic abuses of a highly developed corporate society, but the question remains whether the intra-corporate conspiracy doctrine should serve this office. Suggestions of authorities in the antitrust field vary greatly in their attempt to resolve this enigma. In line with the decision in the instant case is the view that any reasonable construction of enabling statutes is vindicable.\textsuperscript{31} Others urge the use of existing law,\textsuperscript{32} \textit{viz.} the Clayton Act, Robinson-Patman Amendment, FTC Act,\textsuperscript{33} and, when necessary, Section 2 of the Sherman Act to provide against abusive economic expedients. This does have the redeeming characteristic of not distorting Section 1.\textsuperscript{34} Of course, new antitrust legislation may offer the best solution.

As long as the courts continue to beat a square conspiracy into a round legal conceptual mold, there will be no satisfactory resolution. It is submitted that the courts should abandon the intra-corporate conspiracy doctrine and address their attention to the development of more workable, stable, and certain legal principles.

\textit{Edward C. Land, Jr.}

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\item \textsuperscript{28} McQuade, \textit{Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act}, 41 VA. L. REV. 183 (1955). See also Rahl, \textit{supra} note 24, at 766 where the author states: "This development [looking only for restraints of trade] would perhaps actually be attractive except for the fact that the sudden complete departure of the duality quality of conspiracy would expose a naked restraint of trade doctrine incapable of facing the legal world."
\item \textsuperscript{29} United States v. Chicago Board of Trade 246 U.S. 231 (1918). See also Rahl, \textit{supra} note 24.
\item \textsuperscript{30} \textit{Cf.} Sprunk, \textit{Intra-Enterprise Conspiracy}, 9 ABA ANTITRUST SECTION 20, 21, 24 (1956).
\item \textsuperscript{31} Barndt, \textit{Two-Trees or One?—The Problem of Intra-Enterprise Conspiracy}, 23 MONTANA L. REV. 158 (1962). \textit{Contra}, Handler, \textit{Contract, Combination or Conspiracy}, 3 ABA ANTITRUST SECTION 38, 48 (1953): "Companies should not be punished for conspiracy when they have not conspired. They should not be mulcted for large recoveries when there has been no violation of the law."
\item \textsuperscript{32} McQuade, \textit{supra} note 28.
\item \textsuperscript{33} Private litigants may not avail themselves of the FTC Act.
\item \textsuperscript{34} There are, however, many tactical advantages to a Section 1 prosecution, see Comment, \textit{Intra-Enterprise Conspiracy under the Sherman Act}, 63 YALE L.J. 372 (1954).
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