

# AN OMINOUS WARNING FOR ANTITRUST LAW: THE DISPOSITION OF THE "BATHTUB" CONSPIRACY—AS APPLIED TO UNINCORPORATED DIVISIONS—MAY HAVE LEFT A TELL-TALE RING AROUND THE TUB

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## I. INTRODUCTION

Beginning with the Sherman Act<sup>1</sup> in 1890, and inferentially repeated in the Clayton Act<sup>2</sup> in 1914, the law has proscribed conspiracies which restrained trade or interstate commerce. Of course, to establish a conspiracy under Section 1 of the Sherman Act, it has long been settled that it takes two persons, as the action of one person alone is not sufficient.<sup>3</sup> In order to prove a violation of Section 2, it must be established that the defendant achieved monopoly power or specifically intended to do so.<sup>4</sup> These concepts are basic prerequisites to an understanding of the law relating to the intracorporate conspiracy problem.<sup>5</sup>

Initially, it should also be noted that, generally, the intracorporate conspiracy doctrine does not apply to concerted activity between officers or employees of a single corporation.<sup>6</sup> That would clearly abrogate any beneficial competition otherwise engendered by the free enterprise system. But, what if there is concerted activity between officers of one incorporated

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<sup>1</sup> The Sherman Act was enacted in 1890 to help combat the giant trusts which were then threatening to absorb the entire free enterprise system. *E.g.*, Vukasin, *The Anti-merger Law of the United States: Yesterday, Today, Tomorrow (Part 1)*, III ANTITRUST BULL. 309, 311 (1958).

Section 1 of the Sherman Act provides in part:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the Several States, or with foreign nations is hereby declared to be illegal . . . . 15 U.S.C. § 1 (1964).

Section 2 of the Sherman Act proscribes monopolies via conspiracy.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states shall be guilty of a misdemeanor . . . . 15 U.S.C. § 2 (1964).

*See*, 15 U.S.C. § 14 (1964).

<sup>2</sup> Section 3 of the Clayton Act has generally been considered capable of proscribing conspiracies, even in the area of "bathtub" conspiracies. Sheehy, *Implications of Intra-Enterprise Conspiracy Doctrine in Clayton Act Section 2 and 3 Cases*, 8 A.B.A. ANTITRUST SECTION 83 (1956); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20, 35 (1968); *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953).

<sup>3</sup> *See* KINTNER, AN ANTITRUST PRIMER 27 (1964).

<sup>4</sup> *Cf.*, Willis & Pitofsky, *supra* note 2, at 22; Kintner, *supra* note 3, at 29.

<sup>5</sup> "This concept is [also] often referred to as the 'intra-enterprise' or 'bathtub' conspiracy doctrine . . ." Willis & Pitofsky, *supra* note 2, at 20. *See also* Handler, *Some Misadventures in Antitrust Policy Making—Nineteenth Annual Review*, 76 YALE L.J. 92, 119-22 (1966); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963).

<sup>6</sup> *E.g.*, Kintner, *supra* note 3, at 29.

subsidiary and officer's of an affiliated incorporated subsidiary? To carry the problem one step further, what if there is concerted activity between officers of one unincorporated division and officers of an affiliated unincorporated division? These two types of situations have been examined under the anti-trust laws in recent decisions. This article will survey the doctrine of the "bathtub" conspiracy, its effect on incorporated and unincorporated subsidiaries, and its prospective application, *i.e.*, whether the waters have settled but have left a tell-tale ring as an ominous warning for the future.

## II. THE "BATHTUB" CONSPIRACY DOCTRINE

In very early judicial times—even before the advent of antitrust law—it was decided that the word "person" in the constitution included artificial persons, *i.e.*, corporations, as well as natural persons.<sup>7</sup> Subsequent developments embellished the doctrine and held that corporations not only could sue and be sued but also could conspire with each other<sup>8</sup> and, for a time, even with its own officers.<sup>9</sup> The increased complexities of the commercial market place engendered bigger and bigger corporations and the rising intricacies of the law generated new plans and devices by the corporations to ever improve their profit picture. One of the schemes with legitimate tax and business reasons behind it<sup>10</sup> was the use of wholly-owned incorporated subsidiaries.<sup>11</sup> Perhaps the corporate counsel believed that the antitrust laws would be no obstacle, under the theory that in economic substance, the parent corporation and all the subsidiaries were acting as one individual.<sup>12</sup> But their beliefs were shattered, for in this instance,

<sup>7</sup> *E.g.*, The Granger Cases, 94 U.S. 113 (1877); Minneapolis & St. Louis R. R. Co. v. Beckwith, 129 U.S. 26 (1889); Sinking Fund Cases, 99 U.S. 700 (1878). See also, HENN, CORPORATION § 79 (1961).

<sup>8</sup> *E.g.*, U.S. v. Socony-Vacuum Oil Company, 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

<sup>9</sup> *E.g.*, White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600, 602 (8th Cir. 1942); Patterson v. United States, 222 F. 599, 633 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (1915). But this rule has been almost totally repudiated. Nelson Radio & Supply Co. v. Motorola, Inc. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 n.9 (9th Cir. 1969); Goldlawr, Inc. v. Schubert, 276 F.2d 614, 617 (3rd Cir. 1960); Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103, 105 (W. D. Tex. 1960); Cott Beverage Corp. v. Canada Dry Gingerale Ale, Inc., 146 F. Supp. 300 (S.D. N.Y. 1956).

<sup>10</sup> See Henn, *supra* note 7; Willis & Pitofsky, *supra* note 2.

<sup>11</sup> *Id.* See also McQuade *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 184-88 (1955).

<sup>12</sup> The theory of "piercing the corporate veil" had long been used to attack corporations. See generally Henn, *supra* note 7, at §§ 143-52. It was, therefore, perhaps reasonable to assume that the corporation could use this same theory as a defense to conspiracy allegations. This proved to be a false assumption. *E.g.*, United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 614 (1941). See also McQuade, *supra* note 11, at 189-92. In the *General Motors* case the court disregarded the fact that the individuals were individually incorporated. "It has been shown as a matter of law that the appellants are separate entities even though as a matter of economics they may constitute a single integrated enterprise . . ." 121

the law insisted on adhering to the legal form of separately incorporated subsidiaries.<sup>13</sup> It was this austere adherence to technical formality which led to the formulation of the intracorporate or "bathtub" conspiracy doctrine, under which a parent corporation, in conjunction with a subsidiary or one subsidiary in conjunction with another subsidiary, can conspire to violate the antitrust laws.<sup>14</sup>

The genesis of the "bathtub" conspiracy occurred in 1914 in *United States v. General Motors Corporation*.<sup>15</sup> General Motors Corporation and three of its subsidiaries, General Motors Sales Corporation, General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana, were charged with conspiring to restrain trade in violation of the Sherman Act.<sup>16</sup> The government alleged that those companies were colluding against individual General Motors dealers to coerce them into financing their new car inventory, as well as the retail customer sales, through General Motors Acceptance Corporation. The court initially noted that two different products markets were involved: automobiles, in which the consumer had a limited choice, and automobile financing, in which there were 375 finance companies competing with General Motors Acceptance Corporation.<sup>17</sup> General Motors did not deny that the intracorporate agreements had taken place, but they argued that all the subsidiaries and the parent corporation were but one individual entity—*i.e.*, a single trader—exercising its privilege of refusing to deal.<sup>18</sup> The court rejected this theory and, in doing so turned on the faucet of the "bathtub" conspiracy:

Nor can the appellants enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade

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7,2d at 410. In spite of these setbacks, commentators still urged that the true corporate picture was viewed through an economic lens, not a technical legal form:

"The corporation is emerging as an enterprise bounded by economics, rather than as an artificial mystic personality bounded by forms of words in a charter, minute books, and books of account. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 345 (1947).

<sup>13</sup> See generally, McQuade, *supra* note 11, at 183.

<sup>14</sup> See generally *id.*; Krause, *The Multi-Corporate International Business Under Section 1 of the Sherman Act — Intra-Enterprise Conspiracy Revisited*, 17 BUS. LAW. 912 (1962); Willis Pitofsky, *supra* note 2; McQuade, *supra* note 11; Stengel, *supra* note 5; Kempf, *Bath Tub conspiracies: Has Seagrams Distilled a More Potent Brew?* 24 BUS. LAW. 173 (1968).

<sup>15</sup> 121 F.2d 376 (7th Cir. 1914); *cert. denied*, 314 U.S. 618 (1914). Case Comments, 30 LIF. L. REV. 204 (1942); 10 GEO. WASH. L. REV. 882 (1942); 27 MARQ. L. REV. 158 (1943).

<sup>16</sup> 121 F.2d 376 (7th Cir. 1914); *cert. denied*, 314 U.S. 618 (1914).

<sup>17</sup> *Id.* at 398-99.

<sup>18</sup> *Id.* at 410. "GMC own[ed] 100 percent of the stock of GMAC and of GMSC. GMAC [ed] 100 percent of the stock of GMAC, Indiana. The four corporations [had] interlocking directorates, and they function[ed] as coordinated units of the large, decentralized scheme." McQuade, *supra* note 11, at 190. In his thorough book on the structure and history of General Motors, Alfred P. Sloan discusses this case and notes that in 1952 the problem was finally terminated under a consent decree with the Justice Department by which GMAC would conduct "its business independently in competition with other financing organizations." A. SLOAN, *MY YEARS WITH GENERAL MOTORS* 390 (MacFadden-Bartell ed. 1963).

by insisting that they are in effect a single trade. The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce.<sup>19</sup>

Thus, the intracorporate conspiracy doctrine was inaugurated. The progeny of *General Motors* only embellished what was stated therein. The rule became established that "common ownership and control does not liberate corporations from the impact of the antitrust laws."<sup>20</sup> The "bathtub" conspiracy doctrine has solidified and it is now "settled" that:

[I]f a corporation chooses to conduct parts of its business through subsidiary or affiliated corporations, and conspires with them to do something that independent entities cannot conspire to do under section 1 of the Sherman Act, it is no defense that the corporations are, in reality, a single economic entity.<sup>21</sup>

In spite of the settled state of the law, the implications and limits of the law are not known.<sup>22</sup> Moreover, the rise<sup>23</sup> and fall<sup>24</sup>—temporarily?<sup>25</sup>—of the doctrine's application to unincorporated divisions or subsidiaries makes it clear that the conspiracy waters are still polluted and that legal and judicial discussion is necessary to clear the waters.

### III. CONSPIRACY WITHIN INCORPORATED SUBSIDIARIES

The cases following *General Motors* solidified the courts' position on the application of antitrust conspiracy proscriptions to affiliated incorporated companies. The first decade following the incipency of the "bathtub" conspiracy doctrine saw litigation centered on related corporations who were independently incorporated. Then, as now, many industries were

<sup>19</sup> 121 F.2d 376, 404 (7th Cir. 1914), *cert. denied*, 314 U.S. 618 (1914).

<sup>20</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *see also Fortner Enterprises, Inc. v. U.S. Steel Corporation*, 394 U.S. 495 (1969); *Parma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 543 (1951); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116 (1948).

<sup>21</sup> *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

<sup>22</sup> *Id.* *See also* Handler, *Through the Antitrust Looking Glass—Twenty-first Annual Antitrust Review*, 57 CALIF. L. REV. 182-93 (1969).

<sup>23</sup> *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons*, 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

<sup>24</sup> *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

<sup>25</sup> The author's basic thesis is a pessimistic one, *i.e.*, that although the first attempt to apply the doctrine to unincorporated subsidiaries has failed, further attempts—perhaps relying on *de facto* individual status of the unincorporated divisions within the corporate structure—will be made, and unfortunately perhaps, will ultimately be successful. It is this bad omen which the author believes will cause future protracted litigation and academic discussion. It is, perhaps of no solace to the future legal jousting that the "plain fact is that intracorporate [unincorporated] conspiracy makes absolutely no sense, legal or economic, and should be flatly repudiated." Handler, *supra* note 5, at 122.

amenable to a separately incorporated, affiliated structure. The multicorporate form permits an increased managerial flexibility. This flexibility is particularly advantageous to an organization which requires an efficient localized form of management.<sup>26</sup> In addition, an industry, by assuming a multi-corporate form, would achieve those tax advantages which are traditionally attributed to operating a single economic enterprise through a number of corporations:

1. *Multiple surtax exemptions.* The potential dollar savings resulting from multiple surtax exemptions under [Internal Revenue Code] § 11(c) can be considerable. For example, if a business with taxable income of \$1,000,000 can effectively spread its income among 21 corporations, rather than operating as a single corporation, the 20 additional surtax exemptions can reduce tax liability by \$130,000 at 1965 rates . . . .

2. *Accumulated Earnings Credit.* Another tax savings created by multiple corporations is the reduction in exposure to the unreasonable accumulations tax of [Internal Revenue Code] § 531 . . . .

3. *Separate elections, accounting methods, and other similar "timing" benefits.* Another advantage of operating through multiple corporations is the opportunity for various segments of business to adopt the accounting methods, periods, and elections (e.g., depreciation, inventory valuating bad debt, installment sale, & foreign tax credit elections) that are most suitable to their needs.

4. *Facilitating future sales of parts of the business.* Initial establishment of multiple corporate entities may provide greater flexibility at a later date to divide up and sell off parts of the business without running the gauntlet of such provisions as § 355 [corporate divisions], § 346 [partial liquidations]. Tax planning looking toward the realization of accumulated corporate earnings at capital gain rates can be greatly facilitated through the multiple corporation device.<sup>27</sup>

It is in the context of the tax and other corporate advantages for multi-incorporated subsidiaries that the antitrust proscriptions must be considered.<sup>28</sup> Beginning with the *General Motors* decision, the courts have, in effect,

<sup>26</sup> There are many other advantages to the multicorporate form, e.g., a more widespread limited liability, savings on taxes, financial flexibility, and other advantages gained by local laws of a given state. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603, 605-06 (1951) (concurring and dissenting opinions).

<sup>27</sup> BITTKER & EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* 670-71 (1966). See also McQuade, *supra* note 11, at 186. The advantages quoted in the text relating to the use of multiple corporations *vis-a-vis* a single structural form are given to explain an historical basis for the popular development of large corporations establishing incorporated subsidiaries. It was this development which laid a basis for antitrust problems. It is beyond the scope of this article to estimate the clear and significant effect of the Tax Reform Act of 1969 (Pub. L. No. 91-172) [Dec. 30, 1969] on these factors.

The 1969 Act made a very significant change in the laws of multiple corporations. Effective for years beginning after December 31, 1974, a parent-subsubsidiary or brother-sister group is allowed only one \$25,000 surtax exemption and only one \$100,000 accumulated earnings tax credit. Levin, *Corporation Adjustments*, *PRACTISING LAW INSTITUTE A PRACTITIONER'S GUIDE TO THE TAX REFORM ACT OF 1969* 25, 26-27 (1970). See INT. REV. CODE OF 1954 §§ 1561-1564, which were significantly amended by § 401, Pub. L. No. 91-172 (Dec. 30, 1969).

<sup>28</sup> Willis & Pitofsky, *supra* note 2.

told corporations that if they wish to enjoy the corporate and tax benefits of the multicorporate structure, they must also bear the burden of the proscriptions of the antitrust laws.<sup>29</sup>

In the "movie cases"<sup>30</sup> the Government alleged violations of the Sherman Act<sup>31</sup> in that chain motion picture distributors — independently incorporated, but a part of an integrated chain structure — conspired with each other and used its aggregated power to bargain, if not coerce, film distributors into granting them preferential terms in films and territories and that the affiliated theater exhibitions were conspiring to extract monopoly rights. In *United States v. Crescent Amusement Co.*,<sup>32</sup> the Supreme Court stated: "The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective."<sup>33</sup> Four years later, in *Schine Chain Theatres, Inc. v. United States*,<sup>34</sup> the Supreme Court considered the concerted action among the corporations, officers and directors within the Schine multicorporate structure. The intra-enterprise conspiracy was bolstered in *Schine*, as the court again expressed its view that the antitrust laws have full force and effect on concerted action between affiliated corporations:

The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor [extracting favorable film rental terms] was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent.<sup>35</sup>

The theory of the Court in *Schine* was supported by its earlier decision in *United States v. Yellow Cab Co.*<sup>36</sup> One Morris Markin was the head of a pyramidal structure of several taxicab companies in Chicago, including Chicago Yellow, Checker Cab Manufacturing Company and De Luxe.<sup>37</sup> In this case, the government alleged a conspiracy to restrain and monopolize commerce.<sup>38</sup> The Court did not preclude every conspiracy within related corporations. It did, however, condemn a conspiracy in this situation if the purpose of creating the affiliated corporations was to suppress or restrain commerce.<sup>39</sup> As the Court stated it, the argument of affiliated cor-

<sup>29</sup> *Cf. id.*

<sup>30</sup> *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948).

<sup>31</sup> 15 U.S.C. §§ 1, 2 (1964).

<sup>32</sup> 323 U.S. 173 (1944).

<sup>33</sup> *Id.* at 189.

<sup>34</sup> 334 U.S. 110 (1948).

<sup>35</sup> *Id.* at 116.

<sup>36</sup> 332 U.S. 218 (1947). On retrial, Yellow Cab proved its contention that the affiliated group was not established with the purpose of combining to restrain commerce. *U.S. v. Yellow Cab Co.*, 80 F. Supp. 926 (N.D. Ill. 1948), *aff'd*, 338 U.S. 338 (1949).

<sup>37</sup> 332 U.S. at 220-22.

<sup>38</sup> *Id.* at 220.

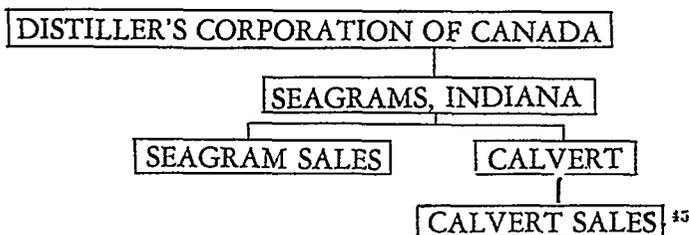
<sup>39</sup> *Id.* at 227-28. See also Case Comment, 32 MINN. L. REV. 521 (1948).

porations is of no value if the incorporated subsidiaries were created pursuant to the conspiracy of restraint:

[T]he fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not be compete.<sup>40</sup>

The situation in *Yellow Cab* was the reverse of the traditional bathtub conspiracy doctrine, for in *Yellow Cab* the affiliated subsidiaries were incorporated pursuant to the conspiracy, while in the normal intracorporate conspiracy problem, the conspiracy arises after the establishment of the multicorporate structure.<sup>41</sup>

Although the concept of intra-enterprise conspiracy was spawned in the *General Motors* case, it matured in the *Kiefer-Stewart*<sup>42</sup> and *Timken* cases.<sup>43</sup> In *Kiefer-Stewart*, the Supreme Court considered the issue of intra-enterprise conspiracies as applied to subsidiaries who were ostensibly in open competition with each other. The defendants all were separately incorporated, but all were eventually controlled by Distiller's Corporation of Canada.<sup>44</sup>



A liquor wholesaler, in a treble damage action, was awarded approximately one million dollars. He charged that Calvert and Seagram conspired to fix and maintain prices and to coerce compliance with those prices by instantaneous cancellation of wholesalers' distributorships if the wholesaler did not acquiesce. The defendants urged the same defense that had been

<sup>40</sup> 332 U.S. at 229.

<sup>41</sup> See generally, Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743, 764-65 (1950); McQuade, *supra* note 11, at 186. In this respect *Yellow Cab* is similar to *United States v. New York Great A&P Tea Co., Inc.*, 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). For an interesting view of the pro and con criticism of this case, compare Dirlam & Kahn, *Antitrust Law & the Big Buyer: Another Look at the A&P Case*, 60 J. POL. ECON. 118 (1952), with Adelman, *The A&P Case: A Study in Applied Economic Theory*, 63 Q.J. ECON. 238 (1949), and Adelman, *Integration & Antitrust Policy*, 63 HARV. L. REV. 27 (1949).

<sup>42</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). Case Comments, 12 OHIO ST. L.J. 474 (1951); 24 S. CAL. L. REV. 507 (1951); 21 TENN. L. REV. 881 (1951).

<sup>43</sup> *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Case Comment, 25 TEMP. L. Q. 227 (1951).

<sup>44</sup> 340 U.S. 211, 229 (1951).

<sup>45</sup> *Id.* It is interesting to note that this company's troubles were not eradicated when they abandoned the "incorporated" status of their subsidiaries. See text accompanying notes 60-79, *infra*.

argued in *General Motors, i.e.*, that the entire organization was but a single enterprise with a multicorporate merchandising structure. Mr. Justice Black rejected this argument:

Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the anti-trust laws. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors.<sup>46</sup>

The result of *Kiefer-Stewart* did not go uncriticized.<sup>47</sup> But the judiciary was not intimidated. Shortly thereafter the Supreme Court decided *Timken Roller Bearing Co. v. United States*.<sup>48</sup> In a civil action, the Government had alleged that Timken Roller Bearing violated the Sherman Act by its concerted action with French Timken and British Timken and that that conspiracy had as its object the restraint and elimination of competition. For almost forty years prior to the institution of the suit, the defendants had entered into certain agreements which set prices and divided market territory among the affiliated corporations. The facts of case established that the American Timken company and British Timken had formed the French company. The defendants argued that, in the overall picture, they were but a single enterprise and that the agreements among themselves were executed pursuant to the operation of their joint venture in France.<sup>49</sup> The Supreme Court rejected the defendants' contentions that their actions were reasonable<sup>50</sup> and hence not violative of the Sherman Act.

The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. . . . Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.<sup>51</sup>

In dissenting, Mr. Justice Jackson argued that the decision placed too much emphasis on the form. His conclusion was based on the Government's view that if the affiliated corporations had not been incorporated, but were merely divisions, there would be no antitrust violation.<sup>52</sup> The Government

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<sup>46</sup> 340 U.S. at 215.

<sup>47</sup> See, e.g., McQuade, *supra* note 11, at 207; Handler, *supra* note 2, at 119-22.

<sup>48</sup> 341 U.S. 593 (1951).

<sup>49</sup> *Id.* 598-600. See also, Krause, *supra* note 14, at 921. See also Note, *Foreign Subsidiaries in Antitrust Law*, 4 STAN. L. REV. 559, 565-66 (1952); *United States v. Imperial Chemical Industries*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951).

<sup>50</sup> Cf. *Standard Oil Company v. United States*, 221 U.S. 1 (1911).

<sup>51</sup> 341 U.S. at 598.

<sup>52</sup> *Id.* at 606-07. This was also essentially the same position that the district judge took in

had adopted the position that "parent and subsidiary corporations must accept the consequences of maintaining separate corporate entities."<sup>53</sup> The dissenting judge warned the majority of the danger of establishing a law of labels.<sup>54</sup>

Thus, the Court applies the well-established conspiracy doctrine that what it would not be illegal for Timken to do alone may be illegal as a conspiracy when done by two legally separate persons. The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are "separate persons," and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels.<sup>55</sup>

The minimum impact of the Court's decision was that affiliated corporations who outwardly act as if they are competitors incur the wrath of antitrust law consequences.<sup>56</sup> The maximum impact is not yet determined.<sup>57</sup> Somewhere in between, however, the law has settled at least to the point that it could be unequivocally stated that a corporation who has adopted the multicorporate organizational structure runs the high risk of violating the antitrust laws. If the affiliated parent and subsidiaries conspire among themselves to a certain course of action — a concerted action which independent corporations could not do without violating the Sherman Act — the corporate units cannot defend themselves by arguing that, despite the difference in form, in substance they are a single economic entity. The view that "common ownership and control does not liberate corporations from the impact of the antitrust laws"<sup>58</sup> has solidified into a very permanent judicial doctrine:<sup>59</sup> the parent corporation who has *incorporated* subsidiaries must pay close heed to the antitrust laws.

*Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). See note 86, *infra*. See also *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365, 393 (1967) (concurring opinion).

<sup>53</sup> 341 U.S. at 607 (Mr. Justice Jackson, quoting the argument of the Government).

<sup>54</sup> Apparently, at least one judge took the view that merely having the label of an unincorporated division did not immunize a corporation from the effects of the intra-enterprise conspiracy doctrine, *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). See note 86, *infra*.

<sup>55</sup> 341 U.S. at 606-07 (dissenting opinion).

<sup>56</sup> See Willis & Pitofsky, *supra* note 2, at 36-37, in which the authors speculate that the instant result is aligned with earlier Federal Trade Commission cases, *e.g.*, *FTC v. Armour & Co.*, 1 F.T.C. 430 (1919); *FTC v. A.A. Berry Seed Co.*, 2 F.T.C. 427 (1920); *FTC v. Fleischmann Co.*, 1 F.T.C. 119 (1918).

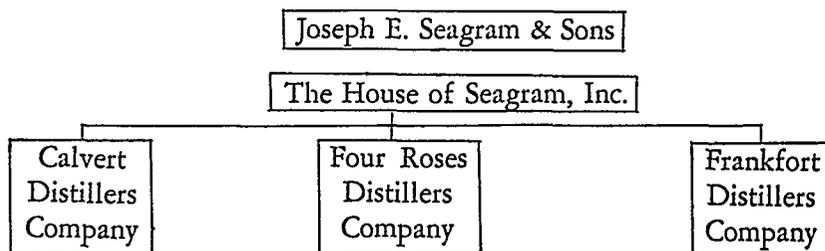
<sup>57</sup> Handler, *Through the Antitrust Looking Glass—Twenty-first Annual Antitrust Review*, 57 CALIF. L. REV. 182 (1969).

<sup>58</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951).

<sup>59</sup> See, *e.g.*, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 507 (1969); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States* 341 U.S. 593, 598 (1951).

## IV. CONSPIRACY WITHIN UNINCORPORATED DIVISIONS

For over twenty-five years from the inception of the doctrine, the "bath-tub" conspiracy has been applied only to affiliated *incorporated* subsidiaries. But in 1967, the traditional corporate and antitrust theories were abruptly disturbed when a federal district court judge in *Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons*,<sup>60</sup> held that *unincorporated* divisions of a corporation were subject to the same intra-enterprise conspiracy doctrine that had theretofore only been applied to separately incorporated subsidiaries. In *Hawaiian Oke*, the plaintiff had a wholesale liquor distributor of various brands of Seagram-produced liquors; these included those supplied to it by Calvert Distillers Company, Four Roses Distillers Company, and Frankfurt Distillers Company, each of which was an unincorporated division of House of Seagram which, in turn, was a wholly-owned subsidiary of Joseph E. Seagram & Sons.<sup>61</sup>



In 1965, each of those unincorporated divisions terminated its distributorship contract with Hawaiian Oke. Each of the divisions decided to switch to McKesson & Robbins, Inc., a diversified corporation that was engaged in, among other things, the wholesale liquor distribution business. Hawaiian Oke filed suit under the Clayton<sup>62</sup> and Sherman Act<sup>63</sup> to recover treble damages for the injury which resulted to its business because of the alleged conspiracy among the divisions.

For the defendant Seagram, this action must have been a culmination of

<sup>60</sup> 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Case Comments, 6 DUQUESNE U. L. REV. 157 (1968); 43 NOTRE DAME LAW. 786 (1968); 36 FORDHAM L. REV. 607 (1968); 37 U. CIN. L. REV. 223 (1968); 21 VAND. L. REV. 375 (1968); 43 N.Y.U. L. REV. 172 (1968). Kempf, *supra* note 14; Willis & Pitofsky, *supra* note 2, at 25-28; Handler, *supra* note 57 at 185-86.

<sup>61</sup> 272 F. Supp. at 916, 920-24.

<sup>62</sup> 15 U.S.C. § 15 (1964). This is commonly referred to as Section 4 of the Clayton Act and provides:

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

<sup>63</sup> 15 U.S.C. § 1 (1964).

frustration. In *Kiefer-Stewart*<sup>64</sup> the Supreme Court had rejected Seagram's contention that its incorporated subsidiaries were, in substance, one entity, even though they were competing with each other. To avoid the effect of that litigation,<sup>65</sup> the Seagram group underwent a corporate reorganization, with each of the incorporated subsidiaries becoming divisions of a corporation ultimately entitled The House of Seagram, Inc.<sup>66</sup> According to the testimony of Seagram's executive vice-president, the newly reorganized Seagram corporate structure was:

[P]retty well designed along the General Motors setup, where they are independent sales divisions, in the sense that they compete, the same as Pontiac competes against Buick and they both compete against Oldsmobile. They are self-contained units. They have their own products. I think they fight each other as hard as they fight anyone else.<sup>67</sup>

This testimony, in the light of earlier related Seagram litigation led the district judge to conclude that unincorporated divisions who hold themselves out as independent competitors cannot avoid the impact of the antitrust laws. The change in corporate structure, caused by *Kiefer-Stewart* did not affect his conclusion:

Although Seagram changed the form of its corporate structure following *Kiefer-Stewart*, there was no substantive change in the marketing technique employed.

. . . .

There is nothing wrong with reorganizing to comply with court rulings. However, to avoid the judicial proscription the reorganization must be more than a shuffling of papers. Courts are concerned with applying rules of law in an actual, factual context. Private parties cannot evade the applicable law merely by changing the label attached to a particular business entry.<sup>69</sup>

The district court then concluded that Seagram, having chosen the separate and independent division as its form, could not avoid the impact of the antitrust laws by pleading that they were mere unincorporated divisions. Instead, the district court found that the divisions "are each distinct and separate, operating, marketing entities [and are] legally and factually capable of entering into the conspiracy"<sup>70</sup> which had been alleged.

The result in *Hawaiian Oke* was a judicial bombshell which evoked extensive legal commentary.<sup>71</sup> The existence of this case as precedent

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<sup>64</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). See text accompanying notes 42-56, *supra*.

<sup>65</sup> 272 F. Supp. at 920 n. 17.

<sup>66</sup> *Id.* at 920-21.

<sup>67</sup> *Id.* at 922.

<sup>68</sup> *Id.* at 924.

<sup>69</sup> *Id.* at 921.

<sup>70</sup> *Id.* at 924.

<sup>71</sup> E.g., Burrus & Savarese, *Developments in Antitrust During the Past Year*, 37 ANTITRUST

would constitute a suspended weapon, capable of disrupting almost any organization which had any internal division of sales, labor, or accounting. Indeed, faithful adherence to this novel doctrine possibly would have created the *deus ex machina* to be used in an ambitious assault on the General Motors corporate structure.<sup>72</sup>

The life of the intra-enterprise theory as applicable to unincorporated divisions, however, was soon aborted. It never survived the appellate process.<sup>73</sup> The Ninth Circuit Court of Appeals reversed the district court's ruling in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*<sup>74</sup> Initially, the appellate court rejected the lower court's notation that the Seagram corporate reorganization was a mere "shuffling of papers."<sup>75</sup>

Before the 1959 reorganization, each subsidiary had its own payroll, accounting department, billing, and each had limited liability. Consolidation destroyed this limited liability, as well as certain tax advantages . . . . The trial judge relied only on the fact that the divisions had autonomous sales organizations . . . , thus in effect conceding that there was no autonomy in other respects. But since sales and price decisions are not made in a vacuum, but are affected by other corporate activities, we doubt that autonomy in sales alone would ever be sufficient independence.<sup>76</sup>

But what disturbed the ninth circuit more than the issue of whether the corporate reorganization was meaningful or a mere paper shuffling exercise, was the issue of whether — if the lower court's opinion was affirmed — there would be any judicial guidance upon which a corporation could rely and whether a corporation of any magnitude could validly organize efficient subdivision of responsibility and still avoid the impact of the antitrust laws.<sup>77</sup> In other words, did the need for judicial certainty outweigh the interest of antitrust law in proscribing conspiracies between unincorporated divisions who openly compete with each other?

Once the theory that 'divisions' or other internal administrative units of a single corporation can 'conspire' with each other is accepted, we can see no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not. No corporation of any size can operate without an internal division of labor between various of its officers and agents . . . . Yet, under the trial court's ruling, the

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L.J., 381, 384 (1968); Kempf, *supra* note 14; Handler, *supra* note 57 at 185-86; Willis & Pitofsky, *supra* note 2. For a partial list of law reviews which commented on this case, see note 60, *supra*.

<sup>72</sup> See text accompanying note 67, *supra*.

<sup>73</sup> *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 83.

<sup>76</sup> *Id.* See also Comment, *Antitrust Law—Conspiracies—Unincorporated Divisions of a Single Corporation Held Capable of Conspiring Under Section 1 of Sherman Act*, 43 N.Y. U. L. REV. 172, 177 (1968).

<sup>77</sup> 416 F.2d at 83-84.

more delegation there is, the more danger there will be that holders of such delegated authority will be found by a court to be capable of conspiring with each other in carrying on the corporation's business . . . .<sup>78</sup>

Accordingly, the Court concluded that if the doctrine—that unincorporated divisions were capable of conspiring with each other—were accepted, “there is no logical or practical way to avoid holding that all intra-corporate agreements are or may be found to be conspiracies in restraint of trade.”<sup>79</sup> It appears that, for the time being, Seagram's corporate structure will remain undisturbed. It also appears that the “bathtub” conspiracy—as it might relate to unincorporated divisions of a corporation—has no present applicability. Accordingly, the ninth circuit, by its rejection, has caused the apparent demise of what would have otherwise been a most controversial doctrine which would cause widespread disagreement in its interpretation and even more widespread confusion in its fair and practical application to specific factual situations.

## V. CONCLUSION

Reasonable men may differ as to their views on the prospective application of the intra-enterprise conspiracy doctrine to unincorporated divisions. In view of the ninth circuit's outright rejection of the applicability of that doctrine to unincorporated divisions, many persons, perhaps, will readily conclude that the issue is settled. Of course, others have always believed that the intra-enterprise conspiracy doctrine had little or no merit, even as applied to competing subsidiaries.<sup>80</sup>

As a third alternative, it is submitted that resolution of the *Hawaiian Oke* litigation might be one disposition of the “bathtub” conspiracy which has left a tell-tale ring around the tub. Even though its application to unincorporated divisions was rejected in this litigation,<sup>81</sup> it is more than a fantasy to suggest that it will be resurrected at a later time. In *Timken Roller Bearing*,<sup>82</sup> Mr. Justice Jackson, in dissenting, observed that applying the “bathtub” conspiracy only to *incorporated* divisions “places too much weight on labels.”<sup>83</sup> Even Milton Handler, a noted opponent of the theory,<sup>84</sup> admits that “antitrust law is concerned with substance and not

<sup>78</sup> *Id.* See also, Willis & Pitofsky, *supra* note 2, at 25-30; Handler, *supra* note 57, at 185-86; Handler, *supra* note 5, at 119-22.

<sup>79</sup> 416 F.2d at 84. See also McQuade, *supra* note 11, at 216; Willis & Pitofsky, *supra* note 2, at 26; Rahl, *Conspiracy and the Anti-trust Laws*. 44 ILL. L. REV. 743, 765-66 (1950).

<sup>80</sup> “The plain fact is that intra-corporate conspiracy makes no sense, legal or economic, and should be flatly repudiated.” Handler, *supra* note 5, at 22. See also McQuade, *supra* note 11, at 214-16; Krause, *supra* note 14, at 936; Willis & Pitofsky, *supra* note 2, at 25-30.

<sup>81</sup> Although the Supreme Court declined to review the case, Mr. Justices Black, Douglas, and White were of the opinion that certiorari should have been granted. 396 U.S. 1062 (1970).

<sup>82</sup> 341 U.S. 593 (1951).

<sup>83</sup> *Id.* at 607. See text accompany note 55, *supra*.

<sup>84</sup> Handler, *supra* note 5, at 121-22; Handler, *supra* note 57, at 185-86.

mere form."<sup>85</sup> When the district judge formulated the doctrine in *Hawaiian Oke*, he also recognized this: "There is nothing sacrosanct about the 'unincorporated' aspect of corporate divisions. To hold otherwise would give businessmen the power to avoid the proscriptions of the antitrust laws by the fortuitous employment of alert legal counsel."<sup>86</sup> It may well be that some corporations prefer the incorporated subsidiary structure while others prefer the unincorporated divisional structure.<sup>87</sup> But the ominous warning emerging from recent litigation is that the appellation of a particular entity as an "unincorporated subsidiary" or an "unincorporated division" may be of little or no import.

Draftsmen may cast business arrangements in different legal molds for purposes of commercial law, but these arrangements may operate identically in terms of economic function and competitive effect. It is the latter factors which are the concern of the antitrust laws.<sup>88</sup>

In sum, while the ninth circuit and some commentators may believe that the "bathtub" conspiracy, as applied to unincorporated divisions, has been drained, it appears that it has left a tell-tale ring. The very real possibility suggested by this omen—in the light of antitrust law's normal adherence to substance, not form—is that it will gain new proponents. Perhaps when the courts thoroughly examine the "bathtub" conspiracy, they will reach results on the basis of whether it is, in fact, a "separate business entity" and not on the basis of whether the law has labeled it an incorporated subsidiary or an unincorporated division.

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<sup>85</sup> Handler, *supra* note 5, at 122. See also *Simpson v. Union Oil Co.*, 377 U.S. 13, 22 (1964).

<sup>86</sup> 272 F. Supp. 915, 920 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). The lower court's opinion concentrated on a factual inquiry to determine the separateness and independence of the sub-corporate entity—no matter whether it was incorporated or unincorporated.

Thus, whether a division is capable of conspiring depends on the peculiar facts demonstrated. Is each facet of the unincorporated division's operation in fact, for all purposes, controlled and directed from above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity? This is the key question. If the division operates independently in directing the relevant business activity, then it is a separate business entity under the antitrust laws. 272 F. Supp. at 920.

See also *Poller v. Columbia Broadcasting System, Inc.*, 284 F.2d 599 (D.C. Cir. 1960) (dissenting opinion), *rev'd on other grounds* 368 U.S. 464 (1962).

<sup>87</sup> Cf. *Willis & Pitofsky*, *supra* note 2, at 26-28.

<sup>88</sup> *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 393 (1967) (concurring opinion).