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Hawaiian Oke: *Kiefer-Stewart* Revisited?

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COMMENT

HAWAIIAN OKE: KIEFER-STEWART REVISITED?

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Fundamental to a conspiracy[1] under section one of the Sherman Act[2] is the presence of concerted action between two or more persons or entities.[3] In light of this duality requirement, in every section-one conspiracy litigation, consideration must be given to whether each alleged conspirator constitutes a separate person or entity at law.

The utilization of incorporated susidiary[4] and unincorporated division arrangements within multi-corporate enterprises, generated by the search for more efficient, less costly production-distribution techniques,[5] has added special conceptual difficulties to the interpretation and application of the conspiracy provision of section one of the Sherman Act. In addition to the basic inquiry of whether two or more parties *actually* conspired to restrain trade, increased emphasis has been given to the problem of whether, as a matter of law, subsidiaries[6] and divisions[7] are *capable* of conspiring within the context of their enterprise.[8]

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1. A conspiracy has been defined as a combination of two or more persons in concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful by criminal or unlawful means. United States v. Cassidy, 67 F. 698, 702 (N.D. Cal. 1895).

2. This section provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal." 15 U.S.C. § 1 (1964).

3. *See, e.g.*, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952); Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir. 1909); Stewart v. Hevelone, 283 F. Supp. 842 (D. Neb. 1968); 1 H. TOULMIN, THE ANTITRUST LAWS OF THE UNITED STATES § 13.10 (1949).

4. A subsidiary may be defined as "a corporation wholly or virtually wholly-owned by a parent or a corporation with a majority of voting capital stock owned by a parent and a minority held by non-competitors of the parent only for investment purposes." REPORT OF THE ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 30n.106 (1955) [hereinafter cited as ATT'Y. GEN. REP.].

5. For a listing of other incentives which generate the use of subsidiaries and divisions in multicorporate enterprises, see Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 34 (1949) (psychological incentives); Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947) (tax purposes); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 765 (1950) (managerial convenience); Note, 100 U. PENN. L. REV. 1006, 1024 (1952) (division of risk, debt, and earnings to correspond with diverse needs within the enterprise as well as increase of capitalization). The primary motivation for the adoption of unincorporated divisions within the Seagram enterprise in the instant case was to escape antitrust pressures. *See* Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915, 920, 920n.17 (D. Hawaii 1967).

6. *See* cases cited notes 23 & 24 *infra* and accompanying text.

7. *See* cases cited note 31 *infra* and accompanying text.

8. For earlier discussions of subsidiaries and their relationship within the multicorporate

In *Hawaiian Oke & Liquors, Ltd v. Joseph E. Seagram & Sons, Inc.*,[9] the District Court of Hawaii attempted to clarify the legal issue of whether three unincorporated but autonomous divisions of the same corporation had the capacity to conspire among themselves. To determine conspiratorial competency, the court invoked a control test which characterized the divisions as separate, autonomous sales entities. These divisions were, therefore, capable of conspiring at the same market level since each was "endowed with separable, self-generated and moving power to act in the pertinent area of economic activity"[10] alleged to be anticompetitive. Upon appeal, however, the Court of Appeals for the Ninth Circuit reversed, holding, *inter alia*, that the Seagram divisions lacked the requisite independence. Since a corporation and its unincorporated divisions, are one entity at law, they are incapable of conspiring among themselves.[11]

Joseph E. Seagram & Sons, Inc. manufactures and sells various brands of liquors to its national distributor and wholly owned subsidiary, the House of Seagram, Inc.[12] The House of Seagram, while retaining control over banking, employing, and accounting responsibilities,[13] has in turn delegated its national marketing function to seven unincorporated

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enterprise as legal entities, capable of conspiring in restraint of trade, see ATT'Y GEN. REP. 30; Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158 (1962); Carlston, *Basic Antitrust Concepts*, 53 MICH. L. REV. 1033 (1955); Handler, *Through The Anti-Trust Looking Glass—Twenty-First Antitrust Review*, 57 CAL. L. REV. 182 (1969); Kessler & Stern, *Competition, Contract and Vertical Integration*, 69 YALE L.J. 1 (1959); Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting On Its Behalf In Unreasonable Restraint Of Interstate Commerce Violate Section 1 Of The Sherman Act?*, 11 FED. B. J. 130 (1951); Krause, *The Multi-Corporate International Business Under Section 1 of the Sherman Act—Intra-Enterprise Conspiracy Revisited*, 17 BUS. LAW. 912 (1962); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950); Sprunk, *Intra-Enterprise Conspiracy*, 9 A.B.A. ANTITRUST SEC. REP. 20 (1956); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L. J. 5 (1963); Sunderland, *Changing Legal Concepts in the Antitrust Field*, 3 SYRACUSE L. REV. 60 (1951); Whipple, *Problems of Combination—Intergration, Intra-Corporate Conspiracy and Joint Ventures*, 1958 CCH ANTITRUST L. SYM. 34; Willis & Pitofsky, *Antitrust Consequences of Using Subsidiaries*, 43 N.Y.U.L. REV. 20 (1968); Comment, *Intra-Enterprise Consipracy Under the Sherman Act*, 63 YALE L.J. 372 (1954); Note, 43 ILL. L. REV. 551 (1948); Note, 100 U. PA. L. REV. 1006 (1952).

9. 272 F. Supp. 915 (D. Hawaii 1967). The district court's opinion has produced comment, both pro and con. *See* Burrus & Savarese, *Developments in Anti-trust During the Past Year*, 37 ANTITRUST L.J. 381, 384 (1968); Handler, *Through the Anti-trust Looking Glass—Twenty-First Antitrust Review*, 57 CAL. L. REV. 182 (1969); Kempf, *Bathtub Conspiracies, Has Seagram Distilled a More Potent Brew*, 24 BUS. LAW. 173 (1968); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968); Note, 6 DUQUESNE U. L. REV. 157 (1968); Note, 36 FORDHAM L. REV. 607 (1968); Note, 43 NOTRE DAME LAW 786 (1968); Note, 37 U. CIN. L. REV. 223 (1968); Note, 1968 U. ILL. L. F. 248; Note, 21 VAND. L. REV. 375 (1968).

10. 272 F. Supp. at 920.

11. Hawiian Oke & Liquors, Ltd v. Joseph E. Seagram & Sons, Inc., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

12. 272 F. Supp. at 915 (pretrial statement for plaintiff).

13. *Id.* at 924.

sales divisions[14] that engage in competition with one another in selling their designated Seagram-brand liquors through wholesale distributors.[15] One of these wholesalers charged[16] the Calvert, Four Roses, and Frankfort divisions of the House of Seagram, among others,[17] with conspiring to boycott and thereby eliminate him from the wholesale distribution business in violation of section one of the Sherman Act.[18] At trial, after ruling in favor of the Wholesaler's proposed jury instruction, the court instructed the jury that "each . . . division of the House of Seagram should be treated as separate entities for the purpose of determining whether there has been a combination or conspiracy."[19]

The law is clear that a nonaffiliated corporation, being an artificial person at law, is a separate legal entity and capable of conspiring with other corporations or persons in violation of section one of the Sherman Act.[20] Similarly, when the alleged conspirators are affiliated corporations and are thereby components of one enterprise, the courts have encountered little conceptual difficulty in determining the conspiratorial competency of each participant. Where restraint of trade has been proven, intraenterprise conspiracies between either a parent corporation and its subsidiaries or the subsidiaries alone have been held violative of section one.[21] In each instance, the courts have employed the *intraenterprise-conspiracy doctrine*[22] which characterizes each subsidiary as a separate

14. Each Seagram division is called a "company." *See* 416 F.2d at 73.

15. 272 F. Supp. at 920.

16. The plaintiff, Hawaiian Oke & Liquors Ltd., brought a treble damage action against the Calvert, Four Roses, and Frankfort divisions of the House of Seagram under section 4 of the Clayton Act, 15 U.S.C. § 15 (1964), for injury allegedly resulting from the defendents' violation of section 1 of the Sherman Act. 15 U.S.C. § 1 (1964).

17. Other defendants to the action include:

1. Joseph E. Seagram & Sons, Inc. and the House of Seagram.

2. McKesson & Robbins Inc., a corporation, which, among other things, conducts a wholesale liquor distributing business in many parts of the United States, including Hawaii.

3. Barton Distilling Company, a corporation, which is a manufacturer of alcoholic beverages, and Barton Wester Distilling Co., a corporation, which is a wholly owned subsidiary of Barton. *See* 416 F.2d at 71.

No attempt will be made here to outline any other facts as they relate to these other defendants since this discussion is solely concerned with the question of intracorporate conspiracy among the division of the House of Seagram.

18. *See* 272 F. Supp. at 916 (pretrial statement for plaintiff).

19. *Id.* at 917.

20. 15 U.S.C. § 1 (1964). Since each nonaffiliated corporation is a separate entity at law, two or more corporations engaging in concerted activity in restraint of trade satisfied the duality requirement of section 1. *See, e.g.*, United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); United States v. Masonite Corp., 316 U.S. 265 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Maple Flooring Manuf. Ass'n v. United States, 268 U.S. 563 (1925); United States v. Addiston Pipe & Steel Co., 85 F. 271 (E.D. Tenn. 1898). *See also* United States v. American Naval Stores Co., 172 F. 445, 467 (S.D. Ga. 1909).

21. *See* notes 23 & 24 *infra* and cases cited therein.

22. The intraenterprise conspiracy doctrine evolved from the United States Supreme Court's ruling in Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1934), in which the Court recognized that Sherman Act violations must be determined on the basis of the activities of the parties, not on the basis of the form which a corporation chooses to adopt.

and distinct entity capable of conspiring with its parent[23] or with other affiliated subsidiaries.[24] This doctrine[25] is predicated on the rationale

23. The first decision to support the notion that a subsidiary could conspire with its parent in violation of section 1 was United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941). The court in the General Motors case refused to allow the corporation and its wholly owned subsidiaries to utilize their affiliation as a ground for escaping section 1 sanctions. Instead, the court stated that:

> [T]he appellants [General Motors and its subsidiaries] [cannot] enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader. 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. But even if the single trader doctrine were applicable, it would not help the appellants. *Id.* at 404.

A commentator has argued that these three sentences can be translated as follows: "Form Matters. Form does not *really* matter. Even if form did really matter, you're stuck anyhow." McQuade, *Conspiracy, MultiCorporate Enterprises and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 191 (1955). For the view that the *General Motors* rationale seems to ignore the fact that section 1 of the Sherman Act does not make all restraints of trade illegal, but only conspiracies in restraints of trade, *see* Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963).

See, e.g., Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (Conspiracy between a parent and its subsidiary); Perma Life Mufflers, Inc. v. International Parts Co., 392 U.S. 134 (1968) (Conspiracy among subsidiaries themselves and their parent); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (conspiracy among a domestic parent and its foreign subsidiaries); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948) (conspiracy among a parent and its subsidiaries); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (conspiracy between vertically affiliated corporations); *cf.* Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram, Inc., 272 F. Supp. 915, 919 (D. Hawaii 1967) (dictum that a corporation can conspire with its subsidiaries); Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958) (combination between a parent and its wholly owned subsidiary); Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd* 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956) (dictum that corporation dealing with its subsidiaries may be guilty of violation of antitrust laws).

24. A conspiracy between incorporated subsidiaries of the same corporation has been held violative of section 1 of the Sherman Act. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). In that case, a wholesale drug concern charged that the defendant corporations "had agreed or conspired to sell liquor only to those Indiana wholesalers who would resell at prices fixed" by the defendants. *Id.* at 212. The Court dismissed the objection that the instrumentalities of a single manufacturing-merchandising unit cannot conspire since such a suggestion ran counter to the Court's past decisions that common ownership and control did not liberate corporations from the impact of the antitrust laws. *Id.* at 215.

25. Some commentators have expressed concern that an excessive application of the intraenterprise conspiracy doctrine in characterizing subsidiaries as separate legal entities, capable of conspiring within the context of the enterprise, could harass the subsidiary method of conducting business out of existence.

> If the accident of separate corporate entities in a unified enterprise, which probably arose for tax or managerial convenience purposes, is to be seized upon as an antitrust violation, the courts will be put to the necessity of following a logical path to absurdity. The corporate family might first try evasion by abandoning separate entities. This development in turn would invite the finding of conspiracy between the single corporation and one of its officers and directors . . . [o]r the corporate veil could be fully pierced and conspiracies of all variety found among the individuals managing the corporation. . . . [O]nce the enterprise unity is ignored in favor of form, there is no particular stopping-point short of the single entrepreneur with no employees . . . . Every company would be a nest of conspiracies.

Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 764-66 (1950).

A similar view is expressed by another commentator who contends that there is no

that there is no substantive distinction between those corporations that are affiliated under common ownership and those that are nonaffiliated. Incorporation in either case vests affiliated and nonaffiliated corporations with a separate identity as artificial beings at law. In applying the intraenterprise-conspiracy doctrine, the courts have not considered the control actually exercised by the parent over its subsidiary's operations to be relevant but, rather, they have emphasized that affiliated corporations in a single enterprise should be precluded from engaging in anticompetitive practices and then escaping Sherman Act liability by resorting to a defense based on their form of organization.[26]

Intraenterprise conspiracy is not limited only to concerted activity between affiliated corporations. A conspiracy can arise within the framework of a single corporation that is in turn a component of an enterprise structure. With *intracorporate conspiracy*, which is a facet of intraenterprise conspiracy, the courts have been confronted with the conceptual problem of whether corporate officers or unincorporated divisions constitute legal persons or entities capable of engaging in concerted activities with other officers of divisions of the same corporation.[27] The

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place for the intraenterprise conspiracy doctrine within section 1 of the Sherman Act since it gives a prosecutor carte blanche to attack multicorporate enterprises. He argues that the next logical step would be to admit that coordinate action within a corporation that functions through divisions is violative of section 1. He anticipates that "the effect is to read the requirement of conspiracy out of the Act, and to make the presence or absence of restraint the only criterion of violation." McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 216 (1955). *See also*, Kemph, *Bathtub conspiracies, Has Seagram Distilled a More Potent Brew*, 24 BUS. LAW. 173 (1968); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5, 27 (1963); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968).

26. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 394 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); Krause, *The Multi-Corporate International Business Under Section 1 of the Sherman Act—Intra-Enterprise Conspiracy Revisited*, 17 BUS. LAW. 912, 932 (1962).

The intraenterprise conspiracy doctrine as applied to corporations and their subsidiaries remains a viable concept, theoretically capable of encompassing other section 1 conspiracies not reviewed in prior court decisions. The United States Supreme Court has never indicated what, if any, are the limits of this doctrine. *See* Hawaiian Oke Liquors, Ltd v. Joseph E. Seagram & Sons, Inc., 416 F.2d 71 (9th Cir. 1969). Thus, under this theory, concerted activity in restraint of trade between a parent corporation and a division of a subsidiary of that parent, or between two independent divisions of two independent subsidiaries where the divisions conspire between themselves and with the parent may effectively be regulated. In each instance, the single entity rule is applicable to treat each subsidiary and its division as one entity at law. Traditionally, a division, as an agent, assumed the legal entity status of its corporation. *See* note 37 *infra*, and accompanying text. Consequently, vertical or horizontal concerted activity between a subsidiary and its parent or between the subsidiaries themselves and their parent would be actionable under section 1.

27. Whether the corporation and its officers should be regarded as one entity at law and thus incapable of conspiring in violation of section one remains controversial. At one extreme, some commentators argue that a narrow reading of section 1 so as to exempt intracorporate conspiracy between corporate agents is undesirable insofar as it insulates from antitrust sanctions activity that inhibits competition. Kessler & Stern, *Competition, Contract*

problem was first considered with regard to a section-one conspiracy charge between a corporation and one of its officers.[28] Instead of utilizing an *intracorporate-conspiracy doctrine* that would have characterized the alleged participants as distinct entities, the court chose to employ the *single-entity rule* that a corporation and its officer were but one person at law, and, therefore, incapable of satisfying the duality requirement of section one.[29] The application of the single-entity rule thereby avoided the fiction that conscious participation could occur between the minds of both the corporation and its officer when that officer, acting within the scope of his duties, was in effect the alter ego of the corporation.[30]

Even when two or more officers acting on behalf of their corporation are charged with concerted activity in restraint of trade, the prevailing view regards the corporation and its officers as one entity.[31] For example,

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and Vertical Integration, 69 YALE L.J. 1 (1959). A middle of the road position is suggested by another commentator who would limit possible violations to section one conspiracy charges against the officers alone when acting in behalf of their corporation. Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158, 184 (1962). In regard to this violation, the only conceptual problem is reaching beyond the individual officers and holding the corporation liable for the conspiracy. But if the corporation can be held liable for the conspiracy of its officers to defraud the government, it should also be liable for the conspiracy of its officers to impose an unreasonable restraint of trade in its behalf. *Id.* at 186. At the opposite extreme, the ATT'Y GEN. REP. regards favorably those decisions finding no conspiracy in restraint of trade in joint action solely between a corporation and its officers:

> Since a corporation can only act through its officers, and since the normal commercial conduct of a single trader acting alone may restrain trade, many activities of any business could be interdicted were joint action solely by the agents of a single corporation acting on its behalf itself held to constitute a conspiracy in restraint of trade. *Id.* at 30-31.

28. Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir. 1909). In this case, the corporation and its agent were charged with combining in violation of section one to deprive a coal dealer of his supply of coal. In addition to not finding a conspiracy, the court held that there was no substantial evidence of any combination between the defendants either to refuse to sell coal to the dealer or to refuse to transport it to him. *Id.* at 744.

29. *Id.* at 745.

30. "[E]very time an agent commits an offense within the scope of his authority under this theory the corporation necessarily combines with him to commit it." *Id.* at 745. This same reasoning is also applicable to concert of action between two or more officers. *See generally* comment, *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920, 952-53 (1959).

31. Officers, directors, agents, and employees of a corporation, acting within the scope of their authority or performing their corporate duties, have not been considered separate legal entities, capable of conspiring with their corporation in violation of section one of the Sherman Act. *See, e.g.*, Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 n.9 (9th Cir. 1969); South End Oil Co. Inc., v. Texaco, Inc., 237 F. Supp. 650 (N.D. Ill. 1965); Shoenberg Farms, Inc. v. Denver Milk Producers, Inc., 231 F. Supp. 266 (D. Colo. 1964); Tobman v. Cottage Woodcraft Shop, 194 F. Supp. 83 (S.D. Cal. 1961); George Wagner & Co. v. Black & Decker Mfg. Co., 1958 Trade Cas. ¶ 69, 214 (E. D. Mich. 1958); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 153 F. Supp. 684 (N.D. Ill. 1957), *rev'd on other grounds*, 257 F.2d 417 (7th Cir. 1958); Harren Candy Co. v. Curtiss Candy Co., 153 F. Supp. 751 (N.D. Ga. 1957); Beacon Fruit & Produce Co. v. H. Harris & Co., 152 F. Supp. 702 (D. Mass. 1957); Sperry Rand Corp. v. Nassau Research and Dev. Associates, Inc., 152 F. Supp. 91 (E.D.N.Y. 1957); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300 (S.D.N.Y. 1956), *appeal dismissed*, 243 F.2d 795 (2d Cir. 1957); Hershel Cal. Fruit Prod. Co. v. Hunt Foods, Inc., 1955 Trade Cas. ¶ 67,928 (N.D. Cal.

in *Nelson Radio & Supply Company v. Motorola, Inc.*,[32] conspiracy allegations against the corporation which were based upon the concerted anticompetitive practices of corporate officers functioning within the scope of their duties were dismissed. The officers were not regarded as legal persons distinct from the corporation but were recognized as the only medium through which the corporation could act and, consequently, were susceptible to the same single-entity status as the corporation itself.[33] Since the corporation alone could not engage in concerted action, there was no conspiracy in violation of section one.[34]

The single-entity rule was subsequently expanded to encompass *vertical* intracorporate concerted activity solely between a corporation and its unincorporated division.[35] Citing *Nelson*[36] as authority for their position, the few courts considering the relationship have concluded that a division, like a corporate officer, was a mere agent of the corporation.[37] Since the acts of the agent-division were in turn the acts of the corporation, there could be no conspiracy because it was impossible for a person, real or artificial, to conspire with itself.

1954); Marion County Co-op. Ass'n v. Carnation Co., 114 F. Supp 58 (W.D. Ark. 1953), *aff'd*, 214 F.2d 557 (8th Cir. 1954). *Contra*, Patterson v. United States, 222 F. 599, 618 (6th Cir. 1915).

Conspiracies among corporate officers acting on behalf of their corporation have been found when the object of the concerted activity was a substantive crime. *See* Egan v. United States, 137 F.2d 369 (8th Cir. 1943) *cert. denied*, 320 U.S. 788 (1943) (conspiracy among officers to violate Public Utility Holding Company Act); Minnisohn v. United States, 101 F.2d 477 (3d Cir. 1939) (conspiracy among corporate officers to defraud the United States).

32. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *But see id.* at 916 (Rives, J., dissenting). An action was brought against the corporation to recover treble damages for violation of section one of the Sherman Act. Plaintiff's amended complaint alleged that the corporation and certain of its officers engaged in concerted activity to terminate plaintiff's distribution with defendant because of plaintiff's refusal to agree to cease selling communication equipment obtained from sources other than Motorola. *Id.* at 913.

33. *Id.* at 914.

34. *Id.*

35. *See* cases cited note 37 *infra* and accompanying text.

36. Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952).

37. *See* Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962) (the Supreme Court specifically reserved the question of whether a corporation and a division thereof are legally capable of conspiring); Kemwel Auto Corp. v. Ford Motor Co., 1966 Trade Cas. ¶ 71, 882 (S.D.N.Y. 1966); Deterjet Corp. v. United Aircraft Corp., 211 F. Supp. 348 (D. Del. 1962); Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960). At the court of appeals level, the dissenting judge in *Poller* argued that a corporation can conspire with its division "as separate and distinct an organization as a wholly owned subsidiary." Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599, 607 (D.C. Cir. 1960) (Wasington, J., dissenting). *But cf.* Justice Jackson's dissent in Timken Roller Bearing Co. v. United States, 341 U.S. 593, 606-07 (1951), where it was admitted that if the parent corporation had, within its own corporate organization, set up separate divisions instead of subsidiaries, there would have been no vertical intraenterprise conspiracy.

For the view that a corporation can evade the intracorporate conspiracy doctrine if it does business through unincorporated branches, divisions, or departments, *see* ATT'Y GEN. REP. 35. *See also* McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Turner, *An Interview*, 34 A.B.A. ANTITRUST L.J.

Prior to *Hawaiian Oke*, no court had considered the question of whether two or more divisions on the same market level could constitute separate legal entities capable of conspiring to restrain trade. The district court, disregarding the traditional notion that a division did not have an entity status separate from that of its corporation,[38] innovatively employed the intracorporate-conspiracy doctrine to characterize autonomous divisions as independent legal entities. In so doing, the court expanded the scope of actionable conspiracy under section one of the Sherman Act.[39]

In its opinion, the district court noted that the House of Seagram divisions were formerly affiliated subsidiaries, and, as such, *Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc.*,[40] had been adjudicated guilty of horizontal conspiracy in violation of section one of the Sherman Act. It found that the Seagram enterprise, in order to avoid the impact of *Kiefer-Stewart*, underwent a corporate reorganization, switching from subsidiaries to divisions, without a commensurate change in marketing techniques.[41] The court concluded, as a matter of law, that the divisions were, in substance, the same entities that they were before *Kiefer-Stewart*, but without a "paper partition."[42]

In order to endow autonomous divisions with conspiratorial competency, the district court initially endeavored to distinguish those prior decisions which precluded section one violations when either corporate officers engaged in concerted action on behalf of their corporation, or when a corporation and its unincorporated division were the alleged participants. The court apparently assumed that the difference in *form* between horizontal and vertical conspiracies,[43] and between horizontal

113, 123 (1967); Willis & Pitofsky, *Antitrust Consequences of Using Subsidiaries*, 43 N.Y.U.L. REV. 20 (1968); Note, 54 COLUM. L. REV. 1108 (1954).

38. 272 F. Supp. at 919.

39. 15 U.S.C. § 1 (1964).

40. 340 U.S. 213 (1951). *See* note 24 *supra*.

41. *See* 290 F. Supp. at 920-21.

42. *Id.* at 919. The *Hawaiian Oke* court recognized that a multicorporate enterprise could convert its subsidiary organizations to division arrangements and thereby escape section-one sanctions since a division has hereunto never had conspiratorial competency. This was reflected in the following colloquy between counsel for Joseph E. Seagram & Sons, Inc. and the House of Seagram, Inc. which occurred at the close of plaintiff's case during argument on defendant's motion for a directed verdict:

> The Court: It would appear to the Court as an inference only . . . that excellent counsel advised Seagram to tear out the veil of corporate ownership; nevertheless, keep your divisions . . . as independent as they were before, but tear out the veil, and then we will have cured the defect found in our organization setup as pointed out by the U.S. Supreme Court in [Kiefer-] Stewart.
>
> Mr. Anthony: That is correct.

Id. at 921 n.17. *See also* note 37 *supra*.

43. The *Hawaiian Oke* court did not postulate separate-entity status for a division when the conspiracy charged was vertical rather than horizontal, but instead acknowledged that a corporation and its unincorporated division were but one entity at law. 272 F. Supp. at 919. The court distinguished vertical from horizontal intracorporate conspiracy by stating that "we are not here dealing with a vertical organization. Rather, the conspiracy alleged among the Seagram divisions . . . relates to the activity of business entities on the same level of the corporate structure." *Id.*

conspiracies and those among corporate officers,[44] rendered the single-entity rule inapplicable to concerted activity among autonomous divisions on the same economic plane. When the division failed to function autonomously in the particular economic activity alleged to be anti-competitive, however, the court left open the question whether the single-entity rule retained efficacy to treat the divisions and their corporation as one legal person.

To determine when a division constituted an autonomous legal entity, the court devised a *control test* which ascertained whether the corporation controlled and directed "each facet of the unincorporated division's operation . . . for all purposes," or whether the division was "endowed with separable, self-generated and moving power to act in the pertinent area of economic activity" alleged to be anticompetitive.[45] Thus, "[i]f the division operates independently in directing the relevant business activity," it was a separate legal entity.[46]

Applying the control test, the court concluded that the Frankfort, Four Roses, and Calvert divisions of the House of Seagrams were factually and legally capable of conspiring, since each was a self-contained, independent sales entity, responsible for establishing prices and distribution systems within a given geographic area.[47] The court expressed concern over the fact that to reason otherwise would allow a multicorporate enterprise to avoid section-one sanctions by resorting to a division arrangement that operated identically in terms of substantive economic function and competitive effect as a subsidiary organization.[48] In looking beyond "the mere label attached to a particular business entity"[49] as

44. In *Hawaiian Oke* the court considered *Nelson* as limited to conspiracy between the corporation and its officers, since officers, unlike divisions, were always identifiable with the corporation and thereby a single entity with it. Thus, the court concluded that the single entity rule did not preclude conspiracy between autonomous divisions. *Id.* at 919.

45. *Id.* at 920.

46. *Id.*

47. The factual basis for the conclusion that each Seagram division was an autonomous legal entity came from pretrial depositions and testimony given during trial. Indicative of the relationship of the division was the following pretrial statement:

> Q. What do you understand to be the nature, if any, sir, of the relation between the marketing divisions . . . ?
>
> A. Well, it is pretty 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 . . . Oldsmobile. They are self-contained units. They have their own products.

Id. at 922 (Testimony of Jack Yogman, Executive Vice-President of Joseph E. Seagram & Sons, Inc.).

The relationship between the divisions was also depicted during the trial.

> Q. Now, is it correct that each of these divisions, through its own management, makes the decision as to who will be the distributors in any area?
>
> A. That's correct. . . .
>
> Q. And as head of the division, and your counterpart heads, do they make the determination as to the price or prices throughout the country, which you are going to charge to wholesalers for the products?
>
> A. Correct.

Id. at 923 (testimony of Arthur Murphy, President of Calvert).

48. *Id.* at 919.

49. *Id.* at 921.

determinative of a division's conspiratorial competence, the court was adhering to Supreme-court precedent which emphasized that "differences in form do not often represent 'differences in substance.' "[50]

In an elaborate opinion, only part of which dealt with the question of intracorporate conspiracy, the Court of Appeals for the Ninth Circuit rejected the intracorporate-conspiracy doctrine "as applied here," and returned to the single-entity rule, holding that the district court erred in instructing the jury that the House of Seagram divisions should be treated as separate legal entities capable of conspiring with each other.[51] This holding is predicated upon one principal ground. Simply stated, the appellate court, echoing certain commentators who prophesied that the intracorporate conspiracy doctrine would wreck havoc on the American corporate enterprise system,[52] reasoned that if the doctrine is accepted, there would be no practical way to avoid holding that all intracorporate agreements are, or may be found to be, conspiracies in restraint of trade.[53] The appellate court apparently determined that the intracorporate-conspiracy doctrine unreasonably penalized large corporations which delegate authority and divide labor to insure more effective decision-making and production-distribution techniques. According to the appellate court, this is so because the finding of autonomy, and thereby the capacity to conspire, varies directly with the authority delegated.[54] Moreover, the finding of a restraint of trade also varies directly with decentralization—the greater the authority delegated, the more inevitable communication between internal corporate components becomes, and this communication can be utilized in antitrust litigations as evidence of agreed upon understandings.[55] In other words, the net effect of the intracorporate-conspiracy doctrine, according to the appellate court, is to "hand to the plaintiffs, on a silver platter, an automatically self-serving conspiracy."[56]

The appellate court's discussion of intracorporate conspiracy seems questionable on several grounds. First, the court's mechanical and arbitrary application of the single-entity rule has rendered the unincorporated aspect of a division sacrosanct, regardless of how abusive the

50. *Id.* at 920. The court in *Hawaiian Oke* relied on the "rule of reason" enunciated in Standard Oil Co. v. United States, 221 U.S. 1. (1911), to guide each court's discretion in determining whether "in a *given case a particular act* had or had not brought about the wrong against which the statute [the Sherman Act] provided." *Id.* at 60. Applying the rule in *Hawaiian Oke*, the court considered itself bound to protect the broad public policy favoring competition and thereby to prescribe *every* act, whether its form was new or old, which unduly interfered with the flow of interstate commerce. *Id.* at 917-18.

51. 416 F.2d at 82.

52. *See* note 25 *supra.*

53. 416 F.2d at 84.

54. The appellate court seemed to reason as follows: the larger the corporation, the more authority necessarily delegated; the more authority delegated, the more autonomous the corporate component; the more autonomous the corporate component, the more likely conspiratorial competency will follow. *See* 416 F.2d at 83-84.

55. *Id.*

56. *Id.* at 84.

restraint of trade is.[57] The net effect is to allow multicorporate enterprises, such as Seagram, to resort to division instead of subsidiary arrangements in order to avoid section-one sanctions.[58] This result is clearly contrary to the purposes of the antitrust laws,[59] the liberality generally accorded interpretation of the Sherman Act,[60] and the Supreme Court's holding that business may not avoid antitrust liability by accidents of form.[61] Nevertheless, the appellate court seemed persuaded that business form should be determinative of antitrust enforcement, especially since the switch from subsidiaries to divisions resulted in a loss of limited liability and certain tax advantages. According to the appellate court, this proved that "de-incorporation" was not a sham.[62] It is submitted, however, that this conclusion is ill-advised. Certainly the gain of complete exoneration from costly treble damage actions, coupled with a carte blanche to engage in anticompetitive practices, is sufficient impetus to forego limited liability and certain tax advantages. Arguably, it is such carte blanche, rather than the intracorporate-conspiracy doctrine, that may "wreck havoc on the American corporate enterprise system."[63]

Second, the appellate court assumed that an acceptance of the intracorporate-conspiracy doctrine would inevitably cause all intracorporate agreements to be violative of the Sherman Act.[64] This assumption, however, is unfounded. Section one of the Sherman Act requires not only a conspiracy but also an "unreasonable" restraint of trade.[65] Normal communication between internal corporate components cannot be the basis for a section-one violation, unless the communication in fact results in an unreasonable restraint of trade.[66]

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57. Willis and Pitofsky conclude that under the present antitrust laws, branches, divisions, and departments are free to agree among themselves as to prices, territories, classes of customers, levels of production, and the other aspects of planning generally associated with the industrial and marketing process. Willis & Pitosky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20 (1968).

59. The Supreme Court has held that the purposes of the antitrust laws are to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, and to afford protection from the subversive or coercive influences of monopolistic endeavor. Appalachian Coals v. United States 288 U.S. 344, 359 (1932).

60. In *Appalachian Coals v. United States*, the Supreme Court stated that the Sherman Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. The Court found that the Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes *by providing loopholes for escape. Id.* at 360 (emphasis added). According to the Court, "its [the Sherman Act's] general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of *all* efforts unduly to restrain the free course of interstate commerce . . . ." *Id.* (emphasis added).

61. *See, e.g.*, United States v. Sealy, Inc., 388 U.S. 350 (1967); Simpson v. Union Oil Co., 377 U.S. 13, 22 (1964); United States v. Masonite Corp., 316 U.S. 265, 278 (1942); United States v. American Tobacco Co., 221 U.S. 106 (1911).

62. 416 F.2d at 83.

63. *See* note 25 *supra*.

64. 416 F.2d at 84.

65. *See* Standard Oil Company v. United States, 221 U.S. 1 (1911).

66. *See* Note, 6 DUQUESNE U.L. REV. 223, 226 (1968). Even if a court does, as a matter

In addition to "reasonableness," the courts have added other safeguards to the restraint of trade requirement. For instance, courts will deny recovery if the alleged anticompetitive activity is a "private controversy" in which "the public interest is not involved."[67] Moreover, the Supreme Court has never condemned an alleged anticompetitive practice without a "thorough canvassing of the facts;"[68] however, to insure fairness, it is submitted that the per se rules[69] should not be applicable to the intracorporate-conspiracy area.

Finally, the appellate court merely criticized the control test used by the district court in endowing the Seagram divisions with conspiratorial competency and never examined the rationale upon which the test was predicated. The district court did not advocate separate-entity status for divisions that handled intracorporate matters which only affected outsiders indirectly. Rather, it reserved independence for only those divisions which operated identically as subsidiaries in terms of economic function and competitive effect in their external corporate dealings.[70] This rationale is supported by ample Supreme Court precedent.[71] In *Kiefer-Stewart*, the Seagram enterprise argued that its subsidiaries' status as mere instrumentalities thwarted a finding of conspiracy.[72] The court, however, rejected that contention, holding that subsidiaries which

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of law, determine that divisions are independent entities capable of conspiring, the court itself does not determine if the divisions *did* conspire in violation of section one of the Sherman Act. The decision is a question of fact left to the jury. The jury looks at the facts of each case and determines whether the alleged restraint of trade was reasonable. *Id.*

67. *See* Fedderson Motors, Inc. v. Ward, 180 F.2d 519, 521-22 (10th Cir. 1950); Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 828 (D. Md. 1938).

68. Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 387 (1954). *See also* Comment, *Refusals To Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1138 (1949).

69. Agreements between nonaffiliated competitors with respect to prices, division of territories, or allotment of production are per se violations of section 1 of the Sherman Act. *See* Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5, 21 (1963).

70. 272 F. Supp. at 920.

71. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951). In Perma Life, Inc., 392 U.S. 134, 139 (1968), the Supreme Court stated that *Kiefer-Stewart* was premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter *anyone* contemplating business behavior in violation of them.

In Sunkist Growers v. Wincler & Smith Citrus Prod. Co., 370 U.S. 19 (1962), the Supreme Court again resorted to the holding-out test. The Court held that three cooperative organizations were one organization in terms of practical effect and the meaning of section six of the Clayton Act and section one of the Capper-Volstead Act and that in their interorganizational dealings, they were immune from the conspiracy provisions of the antitrust laws. The Court's holding was based on the premise that the use of separate corporations had no economic significance in itself and that *outsiders did not consider and deal with the three entities involved as independent organizations*. *Id.* at 29. Willis and Pitofsky also suggest that the intraenterprise conspiracy doctrine should be limited to those instances where "subsidiaries" hold themselves out as competitors. Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20, 35 (1968).

72. 340 U.S. 211, 215 (1951).

hold themselves out as *competitors* cannot resort to a single-entity defense.[73]

In the *Hawaiian Oke* case, however, the appellate court never considered whether *Kiefer-Stewart* was equally applicable to divisions that hold themselves out as competitors in their dealings with outsiders.[74] This aspect of the district court's rationale still remains viable.

Review of both the district and appellate court decisions leads to the conclusion that the intra-corporate conspiracy doctrine is not, and should not be, defunct. The question remains, however, as to what test would most fairly, within the purposes of the antitrust laws, apply the doctrine to the corporate enterprise system.

At first glance, the district court's decision seems to offer a feasible alternative to the mechanical application of the single-entity rule, since, for the first time, a court has attempted to ascertain in light of business realities whether a division is more than just an agent of its corporation, and is in fact comparable to an independent economic unit. Upon closer scrutiny, however, certain aspects of the court's rationale present both logical and practical difficulties.[75] Logically, it seems inconsistent to characterize the single-entity rule as applicable in vertical intracorporate conspiracies, and then to assume that its mechanical application was not similarly required in the instant horizontal situation merely because the concerted activity occurred at a different level of corporate structure.[76] This assumption presupposes that the horizontal form is somehow inherently distinct from the vertical situation so as to allow a court to apply the control test only when the concerted action occurs between divisions. For a court to endow a division with the competence to conspire with other divisions and then to ignore that determination when the same entity engages in concerted activity with its corporation is a result based on form alone and is thereby contrary to Supreme Court precedent.[77] Moreover, if two or more divisions are charged with conspiring in violation of section one, but under the control test only one can be deemed autonomous, the uncontrolled divisions would be recognized as one entity at law with their corporation since, under the single entity rule, the corporation as principal is answerable for the acts of its agents. Under these circumstances, a court would be required to recognize that two distinct legal units, the corporation as principal for its controlled divisions and the autonomous division, were incapable of conspiring merely because the form is vertical and therefore requires a

73. *Id.*

74. 419 F.2d at 71.

75. It is submitted that the part of the district court's opinion examining a division's behavior in terms of economic function and competitive effect remains sound analysis and will not be questioned here.

76. *See* note 43 *supra* and accompanying text.

77. *See* note 61 *supra* and accompanying text.

mechanical application of the single-entity rule. Realistically, then, a court should not be fettered by the form of conspiracy charged, but rather, to avoid inconsistency should directly apply the test utilized in the vertical as well as the horizontal situations. To reason otherwise would permit an autonomous division to operate identically as a subsidiary, which clearly has the capacity to conspire under existing rationale,[78] and thereafter escape Sherman Act liability merely because it conspired with its corporation instead of with another autonomous division.[79]

In *Hawaiian Oke*, the court posited that a division may be directed and controlled in all other functions except *the one alleged to be anticompetitive* and still be characterized as a distinct and separate legal entity.[80] Each facet of a division's operation, however, does not operate in a vacuum completely unaffected by the retained powers of its corporation.[81] For instance, the distributive function of the Seagram divisions is dependent upon a continuous supply of liquor[82] and funds for advertising which are both controlled by the House of Seagram.[83] The House of Seagram then can withhold liquor or funds or even discharge the personnel of a division whose marketing policies prove unprofitable.[84] In light of these retained powers, it seems unrealistic to depict the divisions' distribution policies as "separable" from the direction of the House of Seagram.[85]

The wisdom of isolating only one economic area in which to test for autonomy becomes even more apparent when a division is actually independent from its corporation's direction and control in every respect but the one in which the conspiracy charge arises. For example, the Seagram divisions can share with the House of Seagram authority to

78. *See* cases cited notes 23 & 24 *supra* and accompanying text.

79. 416 F.2d at 84.

80. 272 F. Supp. at 919. A division can only be an autonomous entity under the control test if it is endowed with separable, self-generated, and moving power to act in an area of economic activity alleged to be anticompetitive. Conversely, a division may not be an independent entity if the particular facet of its operation was, *for all purposes*, controlled and directed from above. The *Hawaiian Oke* court, however, never considered whether a division may also be independent if the *one* particular facet alleged to be anticompetitive was controlled and directed from above for *some* rather than *all* purposes. It can be contended that a corporation's direction and control for some purposes is the direct antithesis of a division's separable, self-generated and moving power to act. Reasoning otherwise would suggest that a division may be autonomous in a particular area of economic activity while at the same time be controlled in that function for some purposes by the corporation. These positions, however, are logically inconsistent since a division cannot be autonomous and controlled for some purposes at the same time.

81. 416 F.2d at 83.

82. *See* 272 F. Supp. 915 (1967) (pretrial statement from plaintiff).

83. *See Id.* at 923.

84. The employment function of the Seagram divisions is controlled by the House of Seagram. *See Id.* at 924.

85. The *Hawaiian Oke* court has required as one element of its control test that a division be endowed with "separable" power distinct from that of its corporation. *Id.* at 920. Thus, if this requirement is not met, the division cannot be characterized as a legal entity.

choose advertising agents, but have "separable, self-generated and moving power to act"[86] in all other areas of economic activity. If those divisions, without the approval of their subsidiary, conspire to withhold future promotional campaigns from their present advertising agent, no court would be able to impose section-one sanctions under the control rationale since the conspirators, not being autonomous in the area alleged to be anticompetitive, could not be separate legal entities.[87] A comparison of results between the two above-mentioned examples suggests the untenable conclusion that a division directed and controlled for all purposes except the one alleged to be anticompetitive is more suitable for legal-entity recognition than another division independent in all but one respect. On the basis of this conclusion, it becomes evident that the district court's control test was too narrowly defined.

Furthermore, the control test is impractical since it can be easily circumvented. A corporation, intent on escaping potential section-one liability, can avoid any characterization of its divisions as legal entities by increasing the "control and direction from above"[88] in those economic areas that may be susceptible to restraint of trade charges. For example, a corporation whose marketing function is effectuated through divisions can require that all distributing and pricing decisions initated at the division level be henceforth approved by the corporation before implementation. Arguably, the division's power to act cannot be characterized as "separable"[89] when the corporation retains the option to accept or reject the distributing or pricing policies innovated by the division. Moreover, even if a division is deemed autonomous when free to initiate its own distribution policies at the moment of the concerted activity, a Seagram by-law stating that all agreements between divisions are null and void from the moment of agreement unless approved by the corporation's board of directors or executive committee on sales may also preclude autonomy.

Rejection of the control test on logical and practical grounds necessitates the formulation of a new rationale to apply the intracorporate conspiracy doctrine to section-one conspiracies. One alternative is the "holding out" test first suggested in *Kiefer-Stewart*.[90] Under this test, to determine if a division is an independent legal entity, a court would consider whether, as a matter of law, a division did in fact hold itself out as a competitor on the open market.[91] If outsiders dealt with a divi-

86. *Id.* at 920.
87. *Id.*
88. *Id.*
89. *See* note 85 *supra.*
90. 340 U.S. 211, 215 (1951).
91. It is submitted that the basis of the holding-out test is not necessarily one of seeking out deception. *But see* Willis & Pitofsky, *Antitrust Consequences of Using Subsidiaries*, 43 N.Y.U.L. REV. 20, 37 (1968). Rather, it is predicated on the assumption that any business entity that possesses sufficient market power to exert a coercive influence on free competition should at least be subject to the antitrust laws. *Cf.* Appalachian Coals v.

sion as an independent organization, distinct from other components of the enterprise with which it is alleged to have conspired, the division would be considered a legal entity for section-one conspiracy purposes.

Acceptance of this test seems desirable for several reasons. First, similar to the district court's control rationale, the holding-out test is geared to prevent competitive business entities with substantial market power from engaging in anticompetitive practices with impunity. Second, the holding out test is not limited to conspiracies at the same market level, but is also applicable to actionable conspiracies between a corporation and one or more of its divisions, providing each division functions as a competitor. Third, a multicorporate enterprise may be hesitant to circumvent the holding out test by divesting divisions of their competitive function, since to do so would sacrifice sales stimulation generated by that very competition.

Thus, applying the holding-out test in the instant case, a court could clearly find that the Calvert, Four Roses, and Frankfort Distillers, all of which having advertised and promoted their respective products as competitors, are separate legal entities capable of conspiring in restraint of trade.

United States, 388 U.S. 344, 359 (1932); United States v. American Can Co., 330 F. 859 (D. Md. 1916).