Notre Dame Law Review

Volume 43 | Issue 5 Article 4

1-1-1968

Case Comments

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CASE COMMENTS

CONSTITUTIONAL LAW — TRANSIT DISTRICT MAY NOT CONSTITUTIONALLY RESTRICT PAID ADVERTISING SO AS TO EXCLUDE OPINIONS AND BELIEFS WITHIN THE AMBIT OF FIRST AMENDMENT PROTECTION. — On September 10, 1964, the Berkeley-Oakland Chapter of Women for Peace sought permission to place a paid anti-war advertisement[1] on the motor coaches of the Alameda-Contra Costa Transit District (hereinafter referred to as the district). The defendant district refused to accept the advertisement on the ground that its policy limited paid advertisements to commercial advertising for the sale of goods and services, political advertising being accepted only in connection with and at the time of a duly called election within the boundaries of the district. Plaintiffs, acting as individuals and as representatives of the Berkeley-Oakland Chapter of Women for Peace, sought an injunction restraining the district from refusing to accept the advertisement. The trial court, finding that the plaintiffs were unconstitutionally deprived of their rights of free speech as well as denied the equal protection of the laws, issued a preliminary injunction. In a divided opinion, the Supreme Court of California affirmed the trial court's ruling and *held:* having opened a forum for the expression of ideas by providing facilities for advertisements on its buses, a transit district cannot, for reasons of administrative convenience, decline to accept advertisements expressing opinions and beliefs within the ambit of first amendment protection. *Wirta v. Alameda-Contra Costa Transit District,* 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

The first amendment to the United States Constitution[2] was adopted in 1791, but it was not until 1939 that the United States Supreme Court declared that citizens have a right to exercise first amendment guarantees in the streets and open areas of parks.[3] That year, in *Hague v. CIO,*[4] the Court noted:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[5]

As a result of the *Hague* decision, streets and public parks clearly furnish a forum in which first amendment rights may be exercised. Following *Hague,* efforts have been made to enlarge this forum to include public buildings and

1 The advertisement read:
" 'Mankind must put an end to war or war will put an end to mankind.'
President John F. Kennedy.
Write to President Johnson: Negotiate Vietnam.
Women for Peace
P.O. Box 944, Berkeley."

2 U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . ." First amendement freedoms are protected from state infringement by the due process clause of the fourteenth amendment. Smith v. California, 361 U.S. 147, 149-50 (1959); Near v. Minnesota, 283 U.S. 697, 707 (1931).

3 Gorlick, *Right To A Forum,* 71 DICK. L. REV. 273 (1967).

4 307 U.S. 496 (1939).

5 *Id.* at 515.

other facilities, but numerous cases have clearly held that public buildings need not be made available for public meetings.[6] Thus, it has been said that unless a forum has been declared to exist, there is no right to a forum.[7]

Mr. Justice Mosk, writing for the majority in *Wirta,* felt that the district's determination to accept advertising on its motor coaches evidenced an opening of that forum to the public,[8] and so he effectively avoided considerations applicable to ascertaining whether public transportation *must* be made available as a forum for the exercise of first amendment rights. Once he made that assumption, the case of *Danskin v. San Diego Unified School District*[9] furnished Justice Mosk with compelling precedent. In that case, a statute required governing boards of school districts to grant organizations formed for educational, political, economic, or other stated purposes access to the schools for meetings; but the privilege was not to be granted to organizations constituting a "subversive element" as that term was broadly defined in the statute. In requiring the school board to permit the San Diego Civil Liberties Committee to use a school auditorium, Justice Traynor, speaking for the California Supreme Court, remarked:

> The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property.[10] (Citations omitted.)

Justice Mosk felt that the factual situation in *Wirta* was even more compelling than that in *Danskin* since

> [i]n the instant case, unlike *Danskin,* the ban is not upon the expression of ideas by persons or organizations whose convictions or affiliations are disapproved, but upon all ideas which do not relate to the sale of products or services or to an election. The prohibition here is painted with a much broader brush than that used by the school and condemned in *Danskin.* There all opinions and beliefs which fell within the protection of the First Amendment could be aired in the schools, and only their expression by purportedly subversive elements was barred, whereas here the

6 Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963) (dictum), *aff'd per curiam,* 375 U.S. 395 (1964); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 545, 171 P.2d 885, 891 (1946) (dictum); Coughlin v. Chicago Park Dist., 364 Ill. 90, 107, 4 N.E.2d 1, 9 (1936); Ellis v. Allen, 4 App. Div. 2d 343, 344, 165 N.Y.S.2d 624, 626 (1957) (dictum); Hooker v. Conte, 208 Misc. 188, 193, 143 N.Y.S.2d 750, 755-56 (Sup. Ct. 1955). *See also* the statement of Mr. Justice Black in Brown v. Louisiana, 383 U.S. 131, 166 (1966) (dissenting opinion):

> Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas.

7 Gorlick, *supra* note 3, at 274.

8 Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 985, 64 Cal. Rptr. 430, 433 (1967).

9 28 Cal. 2d 536, 171 P.2d 885 (1946).

10 *Id.* at 545-46, 171 P.2d at 891.

> ban is directly related to the content of the ideas sought to be published. . . . The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection . . . . Thus the district's regulation exercises a most pervasive form of censorship.[11]

To Justice Mosk, the district was not only attempting to regulate the content of the advertisements, but it was doing so in a way that afforded total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs protected by the first amendment precisely because of their noncommercial content.[12] By so doing, the district's policy necessarily disregarded a long line of Supreme Court decisions enshrining noncommercial messages while expressly stating that commercial messages do not come within the orbit of the first amendment and may therefore be regulated or prohibited by government in the same manner as other business affairs.[13]

After proposing a number of hypothetical situations to illustrate the paradoxical scope of the district's policy,[14] Justice Mosk went on to analogize the regulation in the principal case to that involved in the recent Supreme Court decision of *Cox v. Louisiana*.[15] There a state statute prohibited the obstruction of public passageways, but permitted picketing by labor organizations for legal objectives. Appellant was convicted for leading a sidewalk meeting to protest racial segregation, but the Supreme Court reversed his conviction on the ground that the statute improperly permitted local officials to exercise unfettered discretion in regulating the use of the streets.[16] In a concurring opinion, Justice Black stated:

> [B]y specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.[17]

Relying on Justice Black's statement, Justice Mosk stated: "In creating an iron

11 Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 986, 64 Cal. Rptr. 430, 434 (1967).

12 *Id.*

13 Thus, a city may ban commercial advertising in the form of handbills, Valentine v. Chrestensen, 316 U.S. 52 (1942); but it may not prohibit the public distribution of all handbills including those expressing religious beliefs, Schneider v. State, 308 U.S. 147 (1939); door-to-door solicitation for the sale of magazine subscriptions may be banned, Breard v. Alexandria, 341 U.S. 622 (1951); but a distributor of notices for a religious meeting may not be barred from soliciting homeowners by an ordinance against the ringing of doorbells to distribute advertisements, Martin v. City of Struthers, 319 U.S. 141 (1943).

14 *E.g.*, A cigarette company could advertise, but a cancer society could not warn of the injurious effects of cigarette smoking; an oil refinery may advertise, but a citizens' organization may not demand enforcement of existing air pollution statutes; advertisements for travel, food, clothing, toiletries, and automobiles are acceptable, but the American Legion could not place a paid advertisement reading, "Support Our Boys in Viet Nam. Send Holiday Packages." Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 986-87, 64 Cal. Rptr. 430, 434-35 (1967).

15 379 U.S. 536 (1965).

16 *Id.* at 558.

17 *Id.* at 581 (concurring opinion).

curtain barring expression of all ideas not related to an election or to the sale of goods or services, the regulation is comparable to the statute in *Cox* . . . which banned issues unrelated to labor unions."[18]

Justice Mosk ultimately faced the district's primary contention that the basic issue in *Wirta* was not the right of free speech, but the right to equal protection of the laws.[19] By making such a contention, the district was apparently attempting to convince the court of the general reasonableness of its classification.[20] However, Justice Mosk not only dismissed any societal interest, other than free speech, which might be present as "too obscure or trivial to be readily apparent,"[21] but he went on to say that "*Danskin* . . . and numerous other cases have recognized that the general reasonableness test applicable to the due process and equal protection clauses is not to be utilized where First Amendment rights are at stake."[22] Indeed, the reasonableness test has generally been applied in considering the constitutionality of ordinances dealing with the time, place, and manner of expression,[23] rather than the *content* of expression.[24]

In searching for the test to apply to the factual situation in *Wirta*, Justice Mosk relied heavily on the case of *Weaver v. Jordan*[25] where a statute prohibiting pay television in the home was struck down by the California Supreme Court as an abridgement of free speech. The court noted:

> When a restriction of a First Amendment freedom is of such unlimited potential scope it may be imposed only to avoid a "clear and present danger" that a substantive evil will otherwise result which the state has a right to prevent. The weighing of interests [the reasonableness test] which the courts have at times found necessary or appropriate when considering a restriction more narrow in language or in application may be dispensed with *if . . . the enactment is so broad as to impose a complete ban of expression and communication through a specified medium.*[26] (Emphasis added.)

Applying the *Weaver* test, Justice Mosk concluded that the district's policy almost completely banned noncommercial expression through the medium of advertis-

18 Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 987, 64 Cal. Rptr. 430, 435 (1967).

19 *Id.* at 988, 64 Cal. Rptr. at 436.

20 The district attempted to justify its policy on the following grounds: (1) the acceptance of advertising unrelated to an election or the sale of goods and services might give the impression that the district endorses the views of the advertiser; (2) the district would be required to accept all messages submitted to it; (3) the district would have to contact opposing groups and make space available for expression of their views. *Id.* at 989, 64 Cal. Rptr. at 437.

21 *Id.* at 988, 64 Cal. Rptr. at 436.

22 *Id.* For Supreme Court support for this idea, see Thomas v. Collins, 323 U.S. 516, 530 (1945); West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

23 M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 78 (1966). *See also* Frantz, *The First Amendment In the Balance*, 71 YALE L.J. 1424, 1429 (1962).

24 *See* text accompanying note 11 *supra.*

25 411 P.2d 289, 49 Cal. Rptr. 537 (1966).

26 *Id.* at 295, 49 Cal. Rptr. at 543.

ing on motor coaches without asserting the existence of any clear and present danger.[27]

Justice Burke, dissenting in *Wirta*, relied solely on logic without a single resort to precedent. His basic contention was that the majority was operating under an invalid assumption, *i.e.*, that the announced policy of the district constituted an opening of a forum for the expression of ideas.[28] He felt that what was involved instead was a managerial judgment to augment revenues by selling advertising space, and such policy determinations are lodged by the California legislature exclusively within the purview of the board of directors of the district.[29] Furthermore, from the fact that commercial messages do not come within the orbit of the first amendment, Justice Burke reached the dubious conclusion that, as to the use of bus advertising space for commercial purposes, the board in no way transgressed upon the plaintiffs' first amendment rights.[30]

The existence of a forum was undoubtedly of crucial importance to the holding in *Wirta*.[31] Logically, the majority's position is unimpeachable since "the determination of the district to accept advertising on its motor coaches serves as its considered conclusion that this form of communication will not interfere with its primary function of providing transportation."[32] Even though such a determination does constitute a managerial judgment, it also constitutes an opening of a forum to the expression of first amendment rights.[33] However, precedent does not always follow logic in the area of first amendment rights. In *State ex rel. Greisinger v. Grand Rapids Board of Education*,[34] the Ohio Court of Appeals refused to order the defendant to permit Jehovah's Witnesses to use a school auditorium, even though the auditorium was available to other organizations for educational, religious, civic, social, and recreational meetings.[35] In referring to the statutory provisions authorizing defendant's conduct, the Ohio court stated: "The purposes and intent of the Legislature to confer on the Board discretionary power could hardly be expressed with greater clarity or in a more appropriate area of our free society."[36] Fundamental to such a statement is a philosophical commitment that courts should not interfere with the discretionary power lodged in administrative bodies by the legislature.[37] This may be desirous in some instances, but as the holding in *Greisinger* and the dissent in *Wirta* illustrate, such a philosophy can lead to the conclusion that forums for the expression of ideas may be opened on a limited basis without regard to first amendment freedoms.

The reliance by the *Wirta* majority on the "clear and present danger" test

27 Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 988, 64 Cal. Rptr. 430, 436 (1967).
28 *Id.* at 990, 64 Cal. Rptr. at 438 (dissenting opinion).
29 *Id.* at 991-92, 64 Cal. Rptr. at 439-40 (dissenting opinion).
30 *Id.* at 991, 64 Cal. Rptr. at 439 (dissenting opinion).
31 *See* text accompanying notes 6 and 7 *supra*.
32 Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 985, 64 Cal. Rptr. 430, 433 (1967).
33 It is interesting to note that neither of the parties in *Wirta* questioned this basic assumption made by the majority. *Id.*
34 88 Ohio App. 364, 100 N.E.2d 294 (1949), *cert. denied*, 340 U.S. 820 (1950).
35 *Id.* at 370, 100 N.E.2d at 298.
36 *Id.* at 371, 100 N.E.2d at 299.
37 *See generally* Gorlick, *supra* note 3, at 279.

is also noteworthy. This time-honored phrase was first used by Justice Holmes in *Schenck v. United States*[38] and since its inception has undergone considerable discussion and refinement.[39] The test should not be mechanically applied in every case touching first amendment freedoms,[40] and in fact under prevailing authority, its application appears limited to situations involving restrictions upon the *content* of speech.[41] By interpreting the district's policy as a regulation of content,[42] the *Wirta* majority was therefore justified in applying the test. *Kissinger v. New York City Transit Authority,*[43] a recent decision by the District Court for the Southern District of New York, supports the *Wirta* court's use of the clear and present danger test. In *Kissinger*, a student group sought a declaratory judgment that the city transit authority be required to accept anti-Vietnam posters for display in New York subway stations. Although the motion was denied because defendants' contention that the posters would seriously endanger safety in the subways raised questions of fact,[44] the court did state that "[a]bsent a showing that the posters would present a 'clear and present' danger . . . the guarantee of freedom of speech under the First and Fourteenth Amendments extends to plaintiffs' posters."[45] As the Supreme Court stated in *Terminiello v. Chicago,*[46]

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[47]

George L. Burgett

ANTITRUST LAW — SHERMAN ACT — INTER-DIVISIONAL CONSPIRACY — UNINCORPORATED DIVISIONS OF A SINGLE CORPORATION ARE LEGALLY CAPABLE OF CONSPIRING AMONG THEMSELVES IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT — Until 1965, Hawaiian Oke & Liquors was a wholesale liquor

38 249 U.S. 47, 52 (1919).
39 For an excellent analysis of the development of the test, see M. SHAPIRO, *supra* note 23, at 46-75.
40 American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
41 *See, e.g.,* Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961); Weaver v. Jordan, 411 P.2d 289, 301, 49 Cal. Rptr. 537, 549 (dissenting opinion).
42 *See* text accompanying note 11 *supra.*
43 274 F. Supp. 438 (S.D.N.Y. 1967).
44 *Id.* at 443.
45 *Id.* at 442.
46 337 U.S. 1 (1949).
47 *Id.* at 4-5.

distributor in Hawaii of products supplied by Calvert Distillers Company, Four Roses Distillers Company, Frankfort Distillers Company, and Barton Western Distilling Company. Calvert, Four Roses, and Frankfort were unincorporated divisions of House of Seagram which in turn was a wholly-owned subsidiary of Joseph E. Seagram & Sons. Barton Western was a wholly-owned subsidiary of Barton Distilling Company. Calvert, Four Roses, and Frankfort had one-year distributorship contracts with Hawaiian Oke which by their terms expired on July 31, 1965. On June 25, 1965, Calvert notified Hawaiian Oke that it would not renew its contract. A few days later, Four Roses and Frankfort sent Hawaiian Oke separate notices to the same effect. On July 6, 1965, Barton Western notified Hawaiian Oke that it had decided to terminate its oral working arrangement with Hawaiian Oke. Calvert, Four Roses, Frankfort, and Barton Western had each decided to distribute its products in Hawaii through McKesson & Robbins, a national wholesale distributor of drugs and liquors.

Thereafter, Hawaiian Oke brought suit in federal district court under section 4 of the Clayton Act[1] to recover treble damages for injury to its wholesale liquor distribution business allegedly resulting from violations of section 1 of the Sherman Act[2] by Joseph Seagram, House of Seagram, Barton, Barton Western, and McKesson. The court instructed the jury to treat the Calvert, Four Roses, and Frankfort divisions of House of Seagram as separate entities for the purpose of determining whether or not they had combined or conspired, within the meaning of the Sherman Act, to terminate Hawaiian Oke as their distributor. The jury found a conspiracy and returned a verdict of $65,000 against all defendants.[3] The United States District Court for the District of Hawaii then entered a final judgment of $246,938 including treble damages, interest, costs, and attorneys' fees[4] and *held:* unincorporated divisions of a corporation are legally capable of conspiring in violation of section 1 of the Sherman Act; and the business activity related to the alleged conspiracy is the only business activity that must be considered in determining each division's status as a separate legal entity capable of conspiring in violation of section 1 of the Sherman Act. *Hawaiian Oke & Liquors, Limited v. Joseph E. Seagram and Sons,* 272 F. Supp. 915 (D. Hawaii 1967).

Section 1 of the Sherman Act provides: "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. . . ."[5] Section 1 was first interpreted by the Supreme Court in *Standard Oil Company v. United States,*[6] where the Court dismembered the Standard Oil petroleum combine. In construing the Sherman Act, Chief Justice White reviewed the legal history of the language employed by Congress and concluded:

1 15 U.S.C. § 15 (1964).
2 15 U.S.C. § 1(1964).
3 Opening Joint Brief on Behalf of Appellants at 9, Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, No. 22162 (9th Cir.).
4 *Id.* The district court held that the divisions were to be considered as being the corporation for purposes of returning a verdict and entering final judgment. Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, 272 F. Supp. 915, 917 (D. Hawaii 1967).
5 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).
6 221 U.S. 1 (1911).

> That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. . . .
>
> [The enumerated classes of acts are] broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce . . . . [T]he standard of reason . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.[7]

From the broad language used both by Congress in the Sherman Act itself and by the Supreme Court in *Standard Oil* flowed an endless stream of litigation involving charges that a wide variety of contracts, combinations, and conspiracies were in restraint of trade. Depending on the circumstances of each case, these contracts, combinations, and conspiracies may be classified as either inter-corporate, intra-enterprise, intra-corporate, or inter-divisional.

An inter-corporate contract, combination, or conspiracy is one between separate corporations. A conspiracy between independent corporations is truly an inter-corporate conspiracy.[8] A conspiracy between a subsidiary corporation and its parent corporation[9] and a conspiracy between two subsidiary corporations of the same parent[10] are both technically inter-corporate conspiracies since two separate corporations are involved in each conspiracy. However, parent and subsidiary corporations are not actually independent since they are parts of the same enterprise. Therefore, parent-subsidiary and subsidiary-subsidiary conspiracies are more accurately classified as intra-enterprise conspiracies.[11]

In contrast to inter-corporate conspiracies are intra-corporate conspiracies, which involve only one corporation. A conspiracy between a corporation and its officers acting in its behalf[12] or a conspiracy among the employees of a corporation acting in its behalf[13] or a conspiracy between a corporation and its unincorporated division[14] is an intra-corporate conspiracy. A conspiracy between two unincorporated divisions of a corporation is also an intra-corporate conspiracy since it involves only one corporation. However, this latter type of conspiracy more closely resembles an intra-enterprise conspiracy between subsidiary corporations of the same parent than it does the other types of intra-corporate

7 *Id.* at 59-60.
8 *E.g.*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927).
9 *E.g.*, United States v. Yellow Cab Co., 332 U.S. 218 (1947).
10 *E.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).
11 *See generally* Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963). For citations to earlier treatments of the subject, see *id.* at 5 n.3.
12 *E.g.*, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (no violation of § 1 of the Sherman Act). *Cf.* Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960) (no conspiracy between a corporation and the individual who was its sole shareholder). *See also* Windsor Theatre Co. v. Walbrook Amusement Co., 94 F. Supp. 388 (D. Md. 1950) (no conspiracy between two corporations whose stock was owned jointly by a husband and wife).
13 *E.g.*, South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650 (N.D. Ill. 1965) (no violation of § 1 of the Sherman Act).
14 *E.g.*, Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960) (no violation of § 1 of the Sherman Act).

conspiracy and is therefore more accurately classified as an inter-divisional conspiracy.[15]

Typical of many antitrust cases,[16] *Hawaiian Oke* contained alleged conspiracies of various types. For instance, Joseph Seagram and Barton were independent corporations, and therefore, the alleged conspiracy between them was inter-corporate.[17] Since House of Segram was a subsidiary of Joseph Seagram, the alleged conspiracy between them was intra-enterprise.[18] Calvert was an unincorporated division of House of Seagram; hence, the alleged conspiracy between them was intra-corporate.[19] And finally, since Calvert, Four Roses, and Frankfort were unincorporated divisions of House of Seagram, the alleged conspiracy among the divisions themselves was inter-divisional.[20]

Although many previous cases under the Sherman Act had dealt with inter-corporate, intra-enterprise, and intra-corporate conspiracies,[21] *Hawaiian Oke* was the first case to deal with "an alleged horizontal conspiracy among the unincorporated divisions of a single corporation."[22] Before analyzing this inter-divisional conspiracy issue, the district court in *Hawaiian Oke* considered the general aims and purposes of the antitrust laws. After briefly quoting from the Sherman Act and *Standard Oil,* the district court concluded: "The judiciary is entrusted with protection of the broad public policy favoring competition, and 'every' act, whether its form be new or old, which unduly interferes with the interstate flow of commerce is proscribed."[23]

House of Seagram contended that as a matter of law "a corporation cannot conspire with itself through its unincorporated divisions."[24] The district court, however, held that a division could be considered a separate legal entity capable of conspiring if it had independence of action in the specific business activity related to the alleged conspiracy. Since Hawaiian Oke alleged a conspiracy to terminate it as House of Seagram's sales representative in Hawaii, the district court concluded:

> The distribution of defendant's products is the only business function which is relevant herein. The fact that the Seagram divisions may have certain joint or common functions does not detract from the admittedly divided responsibility for marketing. Plaintiff's allegations related to defendant's sales organizations. This is the only activity which must be considered in determining each division's status as a separate legal entity capable of conspiring. . . . The court finds that Four Roses, Frankfort and Calvert

15 The district court in *Hawaiian Oke* did not use the term "inter-divisional."
16 *E.g.,* Standard Oil Co. v. United States, 221 U.S. 1 (1911).
17 House of Seagram and Barton Western were subsidiaries of different independent parents, therefore, the alleged conspiracy between them was also inter-corporate.
18 The alleged conspiracy between Barton Western and Barton was similarly intra-enterprise.
19 The alleged conspiracies between House of Seagram and Four Roses, and between House of Seagram and Calvert were also intra-corporate.
20 The alleged conspiracy between any two of the divisions was likewise inter-divisional.
21 See cases cited notes 8-10, 12-14 *supra* and accompanying text.
22 Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, 272 F. Supp. 915, 917 (D. Hawaii 1967).
23 *Id.* at 917-18.
24 *Id.* at 918.

> are each distinct and separate, operating, marketing entities, legally and factually capable of entering into the conspiracy alleged.[25]

The primary case relied upon by House of Seagram was *Nelson Radio & Supply Company v. Motorola, Incorporated.*[26] In that case, the alleged conspirators were a corporation and its officers, employees, representatives, and agents. As the district court in *Hawaiian Oke* noted, *Nelson* contained "no allegation that either a corporate subsidiary or division participated."[27] *Nelson* did, however, contain the following language which House of Seagram believed supported its position.

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.[28]

Three of the other decisions, *Johnny Maddox Motor Company v. Ford Motor Company,*[29] *Deterjet Corporation v. United Aircraft Corporation, (Hamilton Standard Division),*[30] and *Kemwel Automotive Corporation v. Ford Motor Company,*[31] advanced by House of Seagram as authority for its position involved alleged conspiracies between corporations and their unincorporated divisions. In each case the respective district courts, after stating that the defendant corporation was charged with conspiring with one of its divisions, quoted or restated the principle enunciated in *Nelson* and concluded that there could be no such conspiracy.[32]

The United States Court of Appeals for the District of Columbia in *Poller v. Columbia Broadcasting System, Incorporated*[33] gave the corporation-division conspiracy theory a somewhat fuller treatment.

> The purpose of Section 1 is to prohibit joint action of two or more persons in combining their economic power and restricting competition. Poller's charge that CBS conspired with one of its unincorporated divisions and two of its employees is obviously unsound. It is in reality a charge that CBS conspired with itself. As the Fifth Circuit said in [*Nelson*] . . . .
>
> We conclude that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade or commerce.[34]

However, Judge Washington, dissenting in *Poller,* stated:

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25 *Id.* at 924.
26 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953).
27 Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, 272 F. Supp. 915, 918 (D. Hawaii 1967).
28 Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953).
29 202 F. Supp. 103 (W.D. Tex. 1960).
30 211 F. Supp. 348 (D. Del. 1962).
31 1966 Trade Cases ¶ 71,882, at 83,095 (S.D.N.Y. 1966).
32 Johnny Maddox Motor Co. v. Ford Motor Co., 202 F.2d 103, 105 (W.D. Tex. 1960); Deterjet Corp. v. United Aircraft Corp. (Hamilton Standard Division), 211 F. Supp. 348, 353-54 (D. Del. 1962); Kemwel Automotive Corp. v. Ford Motor Co., 1966 Trade Cases ¶ 71,882, at 83,095 (S.D.N.Y. 1966).
33 284 F.2d 599 (D.C. Cir. 1960), *rev'd on other grounds,* 368 U.S. 464 (1962).
34 *Id.* at 603.

> In my view, CBS could conspire with CBS-TV, a wholly-owned, but not incorporated, "division" — as separate and distinct an organization as a wholly-owned subsidiary. Since there were other [outside] alleged co-conspirators, it is unnecessary, however, to rely on that ground.[35]

On appeal to the Supreme Court, CBS contended that "CBS-TV was not a separate entity but only a division of CBS, and therefore there could be no conspiracy between the two . . . ."[36] However, the Supreme Court reserved that issue: "We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries."[37] Instead, the Court reversed and remanded on the ground that summary judgment was not in order since there was a genuine issue as to the material facts. Poller had also alleged that CBS conspired with independent parties.

In reply to the position taken by House of Seagram, the district court in *Hawaiian Oke* stated its belief that "the broad principle of law taken from *Nelson,* and applied unswervingly in *Poller, Deterjet, Kemwel,* and *Johnny Maddox*"[38] was not controlling in the factual situation before the court, since

> [e]ven as enunciated in *Nelson,* the principle that a corporation cannot conspire with itself does not preclude divisions from being legally capable of conspiring. As quoted above, "you must have two . . . entities to have a conspiracy." The interpretation given this concept to date, when related to divisions, is that a corporation and an unincorporated division thereof are but one entity in a court of law.[39]

The court then distinguished these prior cases on the ground that they involved alleged vertical corporation-division conspiracies in contrast to the horizontal inter-divisional conspiracy among Calvert, Four Roses, and Frankfort alleged by Hawaiian Oke.

In addition, the district court made a more basic objection when it asserted that the Fifth Circuit in *Nelson* had mechanically applied the historical legal concept of a corporation as a "person."

> But are all corporations, in fact, "persons," each with one brain, one nerve center, at which all decisions are reached? It is well settled that in corporate structures which consist of a parent corporation and incorporated subsidiaries, each entity is capable of conspiring. . . . The question, then, is what, if any, magic occurs when the paper partition is removed. Is a business group which chooses to organize as a single corporation with unincorporated divisions automatically cast in the form of a normal person? Or may we have a corporate "person" in the form of a multiheaded Siva, or as portrayed by Dali or Artzybasheff?
>
> Thus, whether a division is capable of conspiring depends on the peculiar facts demonstrated.[40]

35 *Id.* at 607 (dissenting opinion).
36 Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 468 (1962).
37 *Id.* at 469 n.4.
38 Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, 272 F. Supp. 915, 918 (D. Hawaii 1967).
39 *Id.* at 918-19.
40 *Id.* at 919-20.

In support of its statement that a parent corporation and its *incorporated* subsidiaries are capable of conspiring, the court cited two of the leading cases[41] involving an intra-enterprise conspiracy. In *United States v. Yellow Cab Company,*[42] the Supreme Court found a conspiracy among a corporation and its subsidiaries. In that case, the Supreme Court rejected the contention that section 1 of the Sherman Act does not apply to a vertically integrated enterprise. The Court stated that the "corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form."[43] The other leading case, *Kiefer-Stewart Company v. Joseph E. Seagram & Sons,*[44] involved a horizontal conspiracy between subsidiary corporations. Citing *Yellow Cab,* the Supreme Court in *Kiefer-Stewart* rejected the contention that the Seagram and Calvert subsidiary corporations were not capable of conspiring in a manner forbidden by the Sherman Act because they were " 'mere instrumentalities of a single manufacturing-merchandising unit' . . . ."[45] The Court noted that the rule enunciated in *Yellow Cab* that common ownership and control does not liberate corporations from the impact of the antitrust laws is "especially applicable where, as here, respondents [Calvert and Seagram] hold themselves out as competitors."[46]

Less than two years after the *Kiefer-Stewart* decision, the Federal Trade Commission charged the Seagram enterprise corporations with violating the Federal Trade Commission Act.[47] That suit was disposed of on March 2, 1954, by a consent settlement requiring a compliance report.[48] Prior to July 31, 1954, Joseph Seagram had distributed its alcoholic beverages in the United States through a group of wholly-owned subsidiaries. At that time, the Seagram enterprise underwent a corporate reorganization, with each of the domestic sales subsidiaries becoming divisions of a newly formed corporation known as the House of Seagram. Commenting on what it called the "organizational juggling"[49] of the Seagram enterprise, the district court in *Hawaiian Oke* stated that "there was no substantive change in the marketing technique employed. There is nothing wrong with reorganizing to comply with court rulings. How-

41 Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947). The court in *Hawaiian Oke* also cited Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) which has been described as "too unique to be cited in this context." 1 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES 351 n.92 (3d ed. 1967).

42 332 U.S. 218 (1947).

43 *Id.* at 227.

44 340 U.S. 211 (1951).

45 *Id.* at 215.

46 *Id.*

47 *In re* Distillers Corp.-Seagrams, Ltd., 50 F.T.C. 738 (1954). A similar charge was made against Schenley on the same date. *In re* Schenley Indus., 50 F.T.C. 747 (1954).

48 *In re* Distillers Corp.-Seagrams, Ltd., 50 F.T.C. 738, 745-46 (1954). Noting that under the compliance reports the corporate sales subsidiaries were changed to divisions, one commentator characterized that type of antitrust enforcement as an "obsession with legal form devoid of any substantive connotations." Warnke, *Symposium—Antitrust Limits on Distribution Policies and Programs—Relationship of Antitrust to Conventional Legal Categories,* 26 ABA ANTITRUST SECTION 144, 153 (1964).

49 Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, 272 F. Supp. 915, 920 (1967).

ever, to avoid the judicial proscription the reorganization must be more than a shuffling of papers."[50]

The relationship between the various divisions and corporations in the reorganized Seagram enterprise was described by several Seagram officers. After setting forth portions of those descriptions, the court stated: "If these autonomous divisions deviated from their normal procedure, so that separate, decision-making 'heads' acted in concert [in terminating Hawaiian Oke], they became subject to the proscriptions of the antitrust laws."[51]

Although the district court in *Hawaiian Oke* based its inter-divisional conspiracy holding on broad principles of antitrust law drawn from the Sherman Act and *Standard Oil,* the intra-enterprise conspiracy doctrine was relied upon as specific support. The court stated: "It is well settled that in corporate structures which consist of a parent corporation and incorporated subsidiaries, each entity is capable of conspiring."[52] In 1955, however, a minority of the members of the Attorney General's National Committee to Study the Antitrust Laws rejected the intra-enterprise conspiracy theory.[53] They felt that in no instance could a parent corporation and its subsidiary be held guilty of violating section 1 of the Sherman Act. Their belief was based on a statement made by Justice Jackson, dissenting in *Timken Roller Bearing Company v. United States,*[54] that counsel, in arguing that case for the United States, had conceded that if Timken had, within its own corporate organization, set up separate departments, " 'that would not be a conspiracy. You must have two entities to have a conspiracy.' "[55] Therefore, these members of the Committee thought it to be wholly unjust to impose liability where a company employed subsidiaries instead of branches, departments, or divisions. In contrast, a majority of the members of the Committee agreed that under *Timken, Yellow Cab,* and *Kiefer-Stewart,* an intra-enterprise conspiracy unreasonably restraining the trade of strangers violates section 1 of the Sherman Act, but a conspiracy that restrains no trade other than that of the parent and its subsidiaries is not prohibited by section 1.[56] In other words, most members accepted the intra-enterprise conspiracy doctrine. Their requirement of an unreasonable restraint on the trade of strangers merely acknowledged that the *Standard Oil* "rule of reason"[57] in antitrust cases also applies to intra-enterprise conspiracies.

One commentator has stated that application of the intra-enterprise conspiracy doctrine has such grotesque implications that it could end the use of

50 *Id.* at 921.
51 *Id.* at 923.
52 *Id.* at 919.
53 Att'y Gen. Nat'l Comm. To Study the Antitrust Laws, Report 35 (1955).
54 341 U.S. 593 (1951).
55 *Id.* at 606 (dissenting opinion).
56 Att'y Gen. Nat'l Comm. To Study the Antitrust Laws, *supra* note 53, at 34-35.
> The use of subsidiaries is generally induced by normal, prudent business considerations. No social objective would be attained were subsidiaries enjoined from agreeing not to compete with each other or with their parent. To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare. *Id.* at 34.

57 Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). The "rule of reason" was refined by Justice Brandeis in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

subsidiary corporations in American business and industry.[58] This author stated unequivocally that there is no place for the doctrine of intra-enterprise conspiracy within the present Sherman Act.[59] Another writer, conceding that there is some support for the strange doctrine of intra-enterprise conspiracy, asserted that no court had flatly decided that there could be such a conspiracy although there is language in several cases to that effect.[60] This latter commentator regarded as "unfortunate"[61] the implication in Justice Clark's statement in *Poller* that "[w]e do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions . . . the divisions came within the rule as to corporate subsidiaries,"[62] and he urged that the intra-enterprise conspiracy doctrine be rejected in its entirety.

> A parent corporation must control and coordinate the activities of its subsidiaries. Finding a violation of Section 1 of the Sherman Act because of a conspiracy solely between a parent and its subsidiaries, or between subsidiaries, is like condemning the bi-sexual oyster for incest. Neither the oyster nor a corporate family should be condemned for something it cannot avoid.[63]

The primary reason why most commentators criticize or reject the intra-enterprise conspiracy doctrine is because subsidiary corporations are held to violate the Sherman Act for doing what unincorporated divisions could do legally.[64] Admitting that it would be absurd to take the position that the same type of conduct is reasonable in one case and unreasonable in the other, one commentator, instead of rejecting the intra-enterprise conspiracy doctrine, favored applying the rationale of that doctrine to inter-divisional conspiracies.[65] This writer advocated reaching the same result whether an enterprise operates as a simple corporation, as a corporate family, or as a corporation with divisions. He submitted that "the permissible course of conduct for any corporation should be determined by an evaluation of the nature of the undertaking itself, rather than by an attempt to erect technical and artificial barriers in an effort to furnish

58 McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act,* 41 VA. L. REV. 183, 188 (1955).

59 *Id.* at 216.

60 Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act,* 35 MISS. L.J. 5, 9-10 (1963) Professor Stengel's article is a comprehensive attempt to explain the language and holdings in *Yellow Cab, Kiefer-Stewart, Timken, Poller,* and the lower court cases involving intra-corporate and intra-enterprise conspiracies. *See also* McQuade, *supra* note 58, at 188-214.

61 Stengel, *supra* note 60, at 26.

62 Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 469 n.4 (1962).

63 Stengel, *supra* note 60, at 27.

64 *See, e.g.,* Warnke, *supra* note 48, at 155.

> [I]f the courts are to find antitrust violation when two subsidiaries of a single enterprise do what two divisions could do without raising any legal question, the resulting situation is a bit like Professor Higgins' complaint in "My Fair Lady": "The French don't care what they do as long as they pronounce it correctly." *Id.*

House of Seagram has suggested in its appellate court brief that there is no validity to the inter-divisional conspiracy doctrine since it can be easily circumvented by having all the corporation's products handled by the same salesmen. Opening Joint Brief on Behalf of Appellants at 20, Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, No. 22162 (9th Cir.).

65 Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy,* 23 MONT. L. REV. 158, 198 (1962).

immunity."[66] Such reasoning reached fruition in the decision in *Hawaiian Oke*.[67]

The inter-divisional conspiracy doctrine formulated by the district court in *Hawaiian Oke* eliminates a loophole in the application of the antitrust laws. An enterprise, like Seagrams, which is " 'pretty well designed along the General Motors setup' "[68] should not enjoy an automatic immunity from section 1 of the Sherman Act. That section proscribes every conspiracy in restraint of trade. Therefore it proscribes not only inter-corporate conspiracies, but inter-divisional conspiracies as well. As the *Hawaiian Oke* court pointed out, "[t]here 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."[69] The corporations potentially affected by the inter-divisional conspiracy doctrine lose an easy, but unfair, defense to an alleged violation of section 1. All is not lost, however, because corporations with divisions retain the defenses available to other alleged violators, namely, no actual conspiracy and no unreasonable restraint of trade. Equality of treatment under section 1 of the Sherman Act should be and is restored by the decision in *Hawaiian Oke*.

William J. Hassing

66 *Id.* at 199.

67 Although the court in *Hawaiian Oke* did not cite Barndt's article, it did state that corporations could "not evade the applicable law merely by changing the label attached to a particular business entity." Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, 272 F. Supp. 915, 921 (D. Hawaii 1967).

68 *Id.* at 922 (deposition of Joseph Seagram's executive vice-president). The president of Joseph Seagram stated that the Seagram enterprise had a "General Motors type concept . . . ." *Id.* at 921.

69 *Id.* at 920.