Bathtub Conspiracies: A Doctrinal Cleansing is Needed

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A Brief Assessment of the Problem

The specific language of Section 1 of the Sherman Act[1] provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." Various court interpretations[2] of factual situations involving alleged violations of the "conspiracy" provision of this section have expanded the traditional definition of conspiracy to include various surprising relationships among so-called intracor-

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The author wishes to express special appreciation to Alan S. Rabinowitz for his outstanding legal work on all parts of this article.

1. 15 U.S.C. § 1 (1964).

2. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Patterson v. United States, 222 F. 599 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (1915); *questioned in* Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952); United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941); United States v. Yellow Cab Co., 332 U.S. 218 (1947); Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967), *rev'd in* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, *rehearing denied*, 397 U.S. 1003.

porate parties as conspirators.[3] Intracorporate conspiracy is affectionately known as the "bathtub conspiracy" doctrine and has created a viable field for legal scholarship on its soundness and feasibility.[4]

There are two underlying reasons for this development. One is based on the potential success or lack thereof of enforcing antitrust violations. Under Section 2, the monopoly provision of the Sherman Act,[5] a prerequisite for criminal violation is intent, if one can believe the Justice Department that size alone is not enough.[6] If monopoly power is not provable under Section 2, the courts have held that the fact of conspiracy is enough to impose antitrust liability under Section 1, and neither actual restraint nor overt act need be proved.[7] It must be qualified that this

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3. Another unusual interpretation of the "conspiracy" concept of § 1 is found in Perma Life Mufflers, Inc. *et al* v. International Parts Corp., 392 U.S. 134 (1968). *Perma Life* presents a new dimension to the intracorporate conspiracy doctrine. The Supreme Court, in essence, held that a "coerced plaintiff to an illegal antitrust activity could, along with the defendant, constitute the joint parties for conspiracy purposes under Section 1." This immediately raises the problem of who is a coerced plaintiff. The court per Justice Black, in its pursuit to attach liability under Section 1, initially rejected the application of the doctrine of *in pari delicto* to treble damage actions. The court indicated the inappropriateness of creating broad common law barriers to relief where a private suit serves important public purposes. The court went on to say that a more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

Apparently, the only restriction on the plaintiff's recovery would be that any possible beneficial by-product to him could be taken into consideration in computing damages. In other words, comparative negligence might be used as a partial test. The court even concluded that the plaintiffs in the alleged illegal activity were far from voluntary participants. That is, although the dealers sought the Midas franchises enthusiastically, they did not actively seek each and every clause of the agreement, but accepted the contract as a whole in order to obtain an otherwise attractive business opportunity.

4. 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); McQuade, *Conspiracy, Multicorporate Enterprises and Section 1 of the Sherman Act,* 63 YALE L. REV. 393 (1954); Comment, *Antitrust Law—Conspiracies—Unincorporated Divisions of a Single Corporation Held Capable of Conspiring Under Section 1 of the Sherman Act,* 43 N.Y.U. L. REV. 172 (1968).

5. Section 2 provides that:

> Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

6. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

7. *See* de Vires v. Brumback, 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532 (1960), where it is stated that there is a clear distinction in the law of

would only apply to a prosecution for criminal conspiracy, while in civil conspiracy under Section 1, damages must be shown to have resulted from an overt act done pursuant to a common design.[8]

Another theory, and probably more basic, is that the activity involved really is anticompetitive and the parties participating in such activity should be held accountable. As stated in *United States v. General Motors Corp.*:[9]

> The theory in back of the Sherman law is to protect free movement of goods in interstate commerce against unreasonable restraints, to assure open interstate markets where traders may freely negotiate sales and to preserve normal competitive forces which otherwise might operate in these markets.[10]

From the inception of the Sherman Act the courts have given it a broad scope in apparent pursuit of this objective. In 1911, the United States Supreme Court reviewed the history of the language employed by Congress and concluded in its landmark *Standard Oil* case[11] that Section 1 is "an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate commerce is achieved can be saved from condemnation."[12]

Although these rationales may be commendable as idealistic objectives of any capitalistic society, the ultimate question is wheth-

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conspiracy as applied to criminal as differentiated from civil cases. The gist of the crime of conspiracy is the agreement to commit the unlawful act, while the gist of the tort is the damage resulting to the plaintiff from an overt act or acts done pursuant to the common design; Cabakov v. Thatcher, 27 N.J. Super. 404, 99 A.2d 548 (1953), where it is stated that in criminal conspiracy, "[t]he agreement or conspiracy was the gravamen of the offense . . . in civil actions, the conspiracy is not the gravamen of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains." The essence of the (civil) action, it seems, is not the conspiracy but the damages done to the plaintiff; *see also* McGrath v. Keenan, 24 N.J. Misc. 121, 46 A.2d 725 (1946), and Smith v. Christopherson, 267 Wis. 150, 64 N.W.2d 744 (1954).

8. *Supra* note 7; Wise v. Southern Pacific Co., 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47 (10th Cir. 1963).

9. 121 F.2d 376 (7th Cir. 1941) [hereinafter cited as *General Motors*].

10. *Id.* at 403.

11. Standard Oil Co. v. United States, 221 U.S. 1 (1910) [hereinafter cited as *Standard Oil*].

12. *Id.* at 59-60.

er or not the "bathtub conspiracy" theory is a sound legal principle as an antitrust precept?

In order to assess this question, one must understand the meaning of conspiracy, as stated in the Sherman Act. The traditional criminal definition of a "conspiracy" is "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means."[13] However, the process of going from allegation of conspiracy to proof is complex and confusing to the bench as well as the bar. In order to determine the existence or non-existence of the conspiracy, one must examine "questions of fact" to be determined from all of the circumstances in evidence.[14] To meet this burden of proof in civil conspiracy, the elements usually encompass: (1) formation and operation of the conspiracy, (2) wrongful act or acts pursuant thereto, and (3) resulting damage.[15] Criminal conspiracy, as discussed earlier, requires just the showing of the conspiracy per se.[16]

Applying those definitions and the proof requirements set out above to the antitrust field forces one to confront a continuum where, at one end, independent companies operating together for purposes of restraining trade would be obvious violators, assuming the proof was satisfactory. At the other end of the continuum would be the single enterprise which supposedly would not be liable under the definitions. There is also a middle ground represented by the multicorporate organization which may or may not be liable depending on one's conception of conspiracy.[17] These last two examples have brought forth the courts' apparent extension of Section 1, which has precipitated the "bathtub conspiracy" and more recently the "coerced" plaintiff doctrines.

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13. R. PERKINS, PERKINS ON CRIMINAL LAW 613 (1969). Spaulding v. Evenson, 149 F. 913, 923 (C.C. Wash. 1906); United States v. Hutcheson, 32 F. Supp. 600, 602 (E.D. Mo. 1940).

14. *See* Gary Theatre Co. v. Columbia Pictures Corporation, 120 F.2d 891, 894 (7th Cir. 1941), where it is stated:

> Obviously it is not necessary in order to establish a conspiracy, to have direct evidence of a formal contract. Determination of existence or non-existence of conspiracy involves questions of fact to be determined from all the circumstances in evidence.

15. Wise v. Southern Pacific Co., 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963).

16. *Supra* note 7, although the essential elements are the same as in a civil conspiracy. *See* text at 870 *supra*. *See* Schreiber v. Jacobs, 128 F. Supp. 44, 56 (E.D. Mich. 1955); United States v. American Precision Products Corp., 115 F. Supp. 823, 826 (D. N.J. 1953).

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

The tracing of the "bathtub conspiracy" probably begins with the Sixth Circuit in 1915 in *Patterson v. United States*,[18] where the court bluntly held that Section 1's reference to combinations and conspiracies in restraint of interstate commerce includes conspiracies between competitors, or between the officers and agents of one competitor on its behalf, against another competitor.[19] The court emphasized the competition requirement by stating that the officers must have such connection with the company that in the performance of their duties they had to work with their competition.

The case seemed to assume that Section 1 covers conspiracies among officers of the same company without any real empirical justification[20] and went from there to the proof problems, noting that through their practices the officers had allegedly acquired 95 percent of the relevant product market.[21]

Refinements on the Early Doctrine

The holding of *Patterson*, although never specifically overruled, was rejected by later circuits beginning with *Nelson Radio & Supply Co. v. Motorola Inc.*[22] There the conspiracy alleged was among the defendant corporation, its president, sales manager, officers, employees, representatives, and agents. The court stated that:

> 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 a general rule that the acts of the agent are the acts of the corporation.[23]

The court cited the district court opinion which had stated:

> . . . the inclusion of the defendant's agents in the alleged con-

18. 222 F. 599 (6th Cir. 1915) [hereinafter cited as *Patterson*]. *See also* White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942) holding same result where single movie exhibitor and officers conspired to violate Section 1 and Section 2.
19. 222 F. at 618-19.
20. *Id.* No discussion of view holding officers as parties to conspiracy under aegis of corporation in terms of requirements of Section 1.
21. *Id.* at 623.
22. 200 F.2d 911 (5th Cir. 1952) [hereinafter cited as *Nelson Radio*].
23. *Id.* at 914.

> spiracy would seem to be only the basis for a technical rather than a substantial charge of conspiracy because obviously the agents were acting only for the defendant corporation.[24]

The Fifth Circuit added that in the absence of any allegation to indicate that the agents of the corporation were acting in other than their normal capacities, the plaintiff failed to state a cause of action based on conspiracy under Section 1 of the Act.[25] The court also indicated that the activities undertaken by the defendants involved no more than day-to-day managerial decisions concerning the price at which the corporation would sell its goods, the quantity it would produce, the type of customers or market to be served or the quality of goods to be produced, and this type of activity would not violate Section 1 as an unlawful restraint of trade.[26]

Although this doctrine has been followed in subsequent cases dealing with corporate officers and employees[27] and attempts have even been made to extend its principle,[28] the case did not close the door to potential intracorporate liability on other theories. In fact, the court in *Nelson* indicated that if a corporation conspired with its subsidiary it could be liable under Section 1 since a subsidiary was a separate legal entity, thereby reaffirming earlier decisions.[29]

The case first enunciating conspiracy based on activities of a corporation and its subsidiaries was the *General Motors*[30] criminal decision of the Seventh Circuit. The conspiracy alleged was

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24. Arthur v. Kraft-Phenix Cheese Corporation, 26 F. Supp. 824, 830 (D. Md. 1937).
25. 200 F.2d at 914.
26. *Id.*
27. *See* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47, 52 (10th Cir. 1963); Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103, 105 (W.D. Tex. 1962); Shasta Douglas Oil Co. v. Work, 212 Cal. App. 2d 618, 28 Cal. Rptr. 190 (1963); Bliss v. Southern Pacific Co., 212 Ore. 634, 321 P.2d 324 (1958).
28. In Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103, 105 (W.D. Tex. 1962), plaintiff's amended complaint alleged that the defendant, Ford Motor Company, through its officers, agents, employees or representatives, and through corporations, franchises, or divisions thereof over which defendant exercised control engaged in a conspiracy to sell a large number of Lincoln automobiles in Texas in the latter part of 1957 and the first months of 1958. The court cited *Nelson Radio* at 105 as to officers and corporation conspiring, thereby disposing of this part of the complaint without discussion of the second allegation of the corporation and its subsidiaries, franchises, or divisions as possible parties for conspiracy purposes.
29. 200 F.2d at 914.
30. 121 F.2d at 376.

between General Motors and three of its wholly-owned subsidiaries: GMSC (General Motors Sales), GMAC (Financing Division), and GMAC of Indiana, for conspiring against GM dealers to force them to finance their purchases from GM and sales to consumers through GMAC. In upholding the conviction, the court stated that as a matter of law the appellants were separate entities, even though, as a matter of economics, they may have constituted a single integrated enterprise, and that they were not impotent to restrain trade and commerce of the dealers in General Motors cars.[31] While the evidence showed that the four corporations had interlocking directorates and the functions of each were mutually complementary, the court in part substantiated its separate entity theory by noting that the manufacturing, selling and finance activities operated on a highly decentralized scheme, giving autonomy to each of the subsidiaries.[32] The court also stated:

> . . . nor can appellants enjoy the benefits of separate corporate identity and escape the consequences of illegal combination in restraint of trade by insisting that they do not affect a single trader.[33]

One thing of interest is that the court did hedge a bit on this principle when it said that ". . . even if the single trader doctrine were applicable it would not help appellants,"[34] since liability could have been predicated on Section 3 of the Clayton Act as a tying case.

On the one hand, the decision announced that a corporation and its subsidiary could conspire and thereby violate Section 1 of the Sherman Act, but the court seemed unsure of its reasoning as evidenced by its justifications for the rule.

Later Applications of the Doctrine

In *United States v. Yellow Cab Co.*,[35] the Supreme Court went one step further than *General Motors* by holding that a restraint of trade may result as readily from a conspiracy among those who are "affiliated" or "integrated" under common ownership as from

31. *Id.* at 410.
32. *Id.* at 386, 404.
33. *Id.* at 404.
34. *Id.*
35. 332 U.S. 218 (1947) [hereinafter cited as *Yellow Cab*].

a conspiracy among those who are otherwise independent.[36] The case involved the plan of a controlling shareholder of a manufacturing corporation to merge that small company with his more important cab companies in other cities. In pursuit of this objective, the manufacturing corporation set up new operating corporations to control the existing businesses. As a consequence of these acts, it was alleged that the companies obtained a monopoly of, for example, as much as 100 percent of the relevant market in Pittsburgh.

While standing for the proposition that a coroporation and its affiliates may constitute the necessary plurality of actors for Section 1 purposes, *Yellow Cab* seems to qualify this broad statement. First, the point that the companies were formed for anti-competitive purposes seems of significance in the court's finding. Using language from *United States v. Reading Co.*,[37] the court stated that the theory of the complaint was that the "dominating power" over the cab operating companies

> . . . was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.[38]

Concluding that section, the court said that if that theory were borne out on retrial by the evidence coupled with proof of an undue restraint of interstate trade, a plain violation of the act had occurred.[39]

In other words, the actors needed for the conspiracy were found in the creation of the organizations; the subsequent agreements established the plan after affiliation.[40] Thereby, arguably it can be said that in the process of forming the operating companies, the existing companies still retained their former existence as independents and could conspire as such.

A later case, *Kiefer-Stewart Co. v. Joseph E. Seagram Sons.*,[41] followed the precedent established by *Yellow Cab* in holding that wholly-owned subsidiaries of a parent corporation could constitute the necessary joint parties for the conspiracy requirement of Section 1.[42] In that case, the conspiracy involved an agreement by

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36. *Id.* at 227.
37. 253 U.S. 26 (1920).
38. *Id.* at 57.
39. 332 U.S. at 228.
40. *Id.* at 227-234.
41. 340 U.S. 211 (1951) [hereinafter cited as *Kiefer*].
42. *Id.* at 71. Note this case is distinguishable from *General Motors* because that case dealt with an alleged conspiracy between a corporation and a subsidiary.

Seagram and Calvert corporations, two subsidiaries of the Seagram corporate family, to sell liquor to only those wholesalers who would resell at prices fixed by Seagram and Calvert. The court rejected the ". . . mere instrumentalities of a single manufacturing-merchandising unit . . ."[43] argument citing *Yellow Cab*. This case again can be limited to its facts, however, as the court hedged its decision by stating that the Sherman Act is ". . . especially applicable where, as here, respondents [subsidiaries] hold themselves out as competitors."[44] This might have been a strong factor indicating to the court the independent character of the subsidiaries in conjunction with their legal separateness.

In *Timken Roller Bearing Co. v. United States*,[45] the court again reaffirmed *Yellow Cab* and *Kiefer*.[46] The alleged violation involved Timken Corporation conspiring with one British and one French corporation, in each of which it had a financial interest, to restrain interstate and foreign commerce in the manufacture and sale of antifriction bearings.[47] The agreements allegedly had allocated trade territories, fixed prices on products of one sold in the territory of the others, cooperated to protect each other's markets, eliminated outside competition, and participated in cartels to restrict imports to, and exports from, the United States.[48] In upholding the conviction found by the District Court, the court reiterated *Kiefer* and stated that:

> . . . the fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.[49]

There is an interesting aside to this case. Although American Timken had interests in the British and French companies, theirs was not an exclusive ownership. Their ownership consisted of 30 percent of the stock in the British company and co-ownership with another party in French Timken.[50] Since a subsidiary is generally defined as a company, the stock in which another com-

43. *Id.* at 215.
44. *Id.*
45. 341 U.S. 593 (1951) [hereinafter cited as *Timken*].
46. 332 U.S. 218 (1947); 340 U.S. 211 (1951).
47. 341 U.S. at 595.
48. *Id.* at 595-96.
49. *Id.* at 598.
50. *Id.* at 595.

pany has at least a majority interest and thus has control,[51] this raises the question of whether the case does fit in with the *Kiefer* and *Yellow Cab* approach. It could be argued that these agreements were between clearly independent companies with no intracorporate connection. This conclusion is further supported by the fact that the majority of the court never used the term "subsidiaries."[52]

New Extensions of Prior Reasoning

In 1967, *Hawaiian Oke and Liquors, Ltd. v. Joseph E. Seagram & Sons,*[53] temporarily extended the "bathtub conspiracy" doctrine as far as it could go.[54]

There, the district court held that divisions within a corporation could conspire for purpose of Section 1 liability.[55] In this suit Hawaiian Oke and Liquors Ltd. brought an action to recover treble damages under Section 4 of the Clayton Act[56] for injury allegedly resulting from defendants' attempt to put it out of business. The court's prime consideration was directed to the requested instruction that Seagram's three unincorporated divisions: Calvert, Four Roses, and Frankfort,[57] be treated as separate entities for purposes of meeting the conspiracy provision of Section 1. The court, in

51. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966); 341 U.S. 593 (1951).

52. It is to be noted that Justice Jackson in his dissent, at 606-607, suggests that the majority of the court is terming British and French Timken as subsidiaries of American Timken. See United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Griffith, 334 U.S. 100 (1948); and Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948) whereby the United States charged that motion picture exhibitors owning extensive chains of movie theatres had violated Sections 1 and 2 of the Sherman Act. The Supreme Court in each case utilized the intracorporate conspiracy doctrine; *but see* McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act,* 41 VA. L. REV. 183, 195-202 (1955) for a discussion of analogous reasoning holding several of the named defendants as independent parties for conspiracy purposes under Section 1.

53. 272 F. Supp. 915 (D. Hawaii 1967) [hereinafter cited as *Hawaiian Oke*].

54. It is to be noted that in *Kiefer,* 340 U.S. 211 (1951), where the court had held the wholly owned subsidiaries of Seagrams liable to conspiracy charges under Section 1 (*see* pp. 875-76), Seagrams had reorganized itself denying itself the tax and corporate benefits of operating through subsidiaries, thereby hoping to take itself out of Section 1 of the Sherman Act.

55. 272 F. Supp. at 918-20.

56. 15 U.S.C. § 15 (1964).

57. Calvert Distillers Company, a division of House of Seagram; Four Roses Distillers Company, a division of House of Seagram; Frankfort Distillers Company, a division of House of Seagram.

sustaining this request, concluded that having made the divisions separate and independent for this particular economic function (separate sales and distribution organizations), the defendants could not then escape the legal impact of their action.[58]

The reasoning of the court in this case is unique and far-reaching. First, it relies on *Standard Oil* in concluding that Section 1 was intended to have broad application.[59] Second, the court distinguishes the case from contrary results[60] by emphasizing the horizontal aspects of the alleged conspiracy as distinguished from the more usual vertical combinations.[61]

Finally, while the court accepts the fact that the divisions were not independent from Seagram in many aspects,[62] it asserts that the crucial question of separateness for Section 1 purposes is whether

> . . . each facet of the unincorporated division's operation is, in fact, for all purposes, controlled and directed above, or is it embodied with separable, self-generated, and moving power to act in the pertinent area of economic activity.[63]

If the latter, the court goes on, then it is a separate business entity under the antitrust laws. Since the violation consisted of the termination of Hawaiian Oke as a sales representative, this criteria clearly was met.[64]

Thus, in the Hawaii District Court, at least, if divisions of a corporation are acting independent of each other in a specific economic activity, and in pursuit of this activity they agree to engage in conduct which would violate the antitrust laws, they are liable as conspirators under Section 1. This case could open the door for a finding that any internal units (*e.g.*, departments or branches) within a corporation are conspirators if they fall within the framework of the decision.[65]

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58. 272 F. Supp. at 924.
59. *Supra* note 11 & 12.
60. Poller v. Columbia Broadcasting Sys., Inc., 284 F.2d 599 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962); Deterjet Corp. v. United Aircraft Corp., 211 F. Supp. 348 (D. Del. 1962); Kemwel Automotive Corp. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960).
61. 272 F. Supp. at 918-19.
62. *Id.* at 924.
63. *Id.* at 920.
64. *Id.* at 924.
65. The applicable question is, "[i]s each facet of the unincorporated

While the doctrine announced in the District Court's opinion still has the potential to expand into other courts, *Hawaiian Oke* was reversed on appeal by the 9th Circuit in 1969.[66] The Circuit Court rejected the lower court's theory of unincorporated divisions as constituting joint parties for conspiracy purposes under Section 1.[67] It accepted the *Yellow Cab* and *Kiefer* holdings, but classified the *Hawaiian Oke* case into the *Nelson's Radio* mode of reasoning.[68]

The Circuit Court also rejected the lower court's argument that the change from the *Kiefer* arrangement to the present one was one of form with no corresponding change in marketing technique.[69]

The crucial holding, from an antitrust viewpoint, is that the Circuit Court looked at the total control situation between the corporation and its unincorporated division, consequently rejecting the test enunciated by the District Court.[70]

The court also dismissed the distinction made by the District Court between horizontal and vertical conspiracies in saying that this was also an elevation of form over substance.[71]

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division's operation in fact controlled, and directed above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity?" *Id.* at 920. It could likewise be extended to other internal units of the corporation—*i.e.*, branches and employee-distributors.

66. 416 F.2d 71.
67. *Id.* at 84.
68. *Id.* at 82-83.
69. *Id.* at 83, where the circuit court states:

> There is here no evidence that the "de-incorporation" of the former corporations was a sham of "shuffling of papers" as plaintiff argues. Nor do we think that there was here a mere chance in the label attached to a business entity. Before the 1959 reorganization, each subsidiary had its own payroll, accounting department, billing, and each had limited liability. Consolidation destroyed this limited liability, as well as certain tax advantages. The trial judge relied only on the fact that the divisions had autonomous sales organizations, thus in effect conceding that there was no autonomy in other respects. But since sales and price decisions are not made in a vacuum, but are affected by other corporate activities, we doubt that autonomy in sales alone would ever be sufficient independence.

70. *Id.* at 83-84.
71. *Id.* at 84, where the Circuit Court stated:

> Nor is it an answer to say, as the trial judge did, that here the conspiracy was "horizontal," [*supra* notes 60 & 61]. This is an elevation of form over substance. If intracorporate divisions are capable of conspiracy only on a horizontal plane, they could avoid the antitrust laws and still conspire by going through somone higher up in the corporation hierarchy. We do not see why the House of Seagram could order Calvert, Four Roses, and Frankfort to change their lines from plaintiff to McResson, but Calvert, Four Roses, and Frankfort cannot themselves agree to do so.

Finally, the court cited the potential danger of intra-corporate conspiracy to the organizational existence of corporations, saying:

> . . . once the theory that 'divisions' or other internal administrative units of a single entity can conspire with each other is accepted, we can see no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not.[72]

The court emphasized the economic necessity of internal units within a large corporation, stating that it is most unlikely that partially autonomous divisions of a single corporate enterprise will or can operate completely independent of each other. It is inevitable that there will be communication between them, either directly or through those persons in the corporate hierarchy to whom they report. Such communication can then be used as evidence that they arrive at understandings with each other as to what they would do. Thus, they are capable of conspiring because they are autonomous, and they have conspired because they are, in fact and law, parts of a single corporation.[73]

However, while the circuit court's opinion would accord more with the definition of conspiracy, the test of the District Court is still available.

While *Hawaiian Oke* represents the most recent court decision on intracorporate conspiracy, it is arguable that the Supreme Court in 1968 extended the reasoning of the doctrine outside of "pure" corporate units in the *Perma Life*[74] case. The case is not totally revolutionary since the framework for the court's decision previously had been established,[75] but it is the latest announcement expanding the potential of the conspiracy of Section 1.

The action was brought by certain dealers who had operated "Midas Muffler Shops" under sales agreements with respondent, Midas, Inc. Their complaint charged that Midas had entered into a conspiracy with the other named defendants—its parent corporation International Parts Corporation, two other subsidiaries, and six individual defendants who were their officers or agents to restrain and substantially lessen competition in violation of Sec-

72. *Id.* at 83.
73. *Id.* at 84.
74. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) [hereinafter cited as *Perma Life*].
75. *See* 340 U.S. 211.

tion 1 of the Sherman Act and Sections 2 and 3 of the Clayton Act as amended by the Robinson-Patman Act.[76] The plaintiff challenged the legality of their sales agreements which imposed various restrictions on the dealers utilizing the "Midas" name. Relying on *Timken* and *Yellow Cab*,[77] the court said in relevant part:

> But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.[78]

The court could have stopped there and found the necessary plurality of actors for conspiracy purposes, but it went on to say:[79]

> In any event each petitioner can clearly charge a combination between Midas and himself as of the day he unwillingly complied with the restrictive franchise agreements,[80] or between Midas and other franchise dealers whose acquiescence in Midas' firmly enforced restraints was induced by the communicated danger of termination.[81]

This was not purely dicta, but to the contrary, the court held that although this allegation of conspiracy was not even pleaded by petitioners, the gist of this new theory was clearly demonstrated and there was no prejudice to respondents. This was based on the rationale that pleadings should ". . . be so construed as to do substantial justice."[82]

One is then presented with the picture of a dealer suing a distributor for antitrust violations with the two of them constituting the joint parties for purposes of the conspiracy provision of Section 1. This holding is based on the rationale that the dealer, although a part of the alleged illegal action, was coerced into it by fear of losing an otherwise attractive business activity.[83] The court also states that to bar them would defeat the purposes of the private action, to wit: deter anyone contemplating business behavior in violation of the antitrust laws.[84] Thus, the dealer has the best of

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76. 392 U.S. at 135; 15 U.S.C. § 1 (1964); 15 U.S.C. § 14 (1964); 15 U.S.C. § 13 (1964).

77. 341 U.S. 593 (1951); 332 U.S. 218 (1947).

78. 392 U.S. at 141-42.

79. *Id.* at 142.

80. Albrecht v. Herald Co., 390 U.S. 145, 150 (1968), *rehearing denied* 390 U.S. 1018 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964).

81. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

82. 392 U.S. at 142 (1968). *See* Rule 8(f), FED. RULES CIV. PROC.

83. 392 U.S. at 139-41. The question really is whether the dealers were coerced as that word is commonly understood. The Court itself states that the dealers sought the franchises enthusiastically, but that many clauses were detrimental to them but accepted to obtain an otherwise attractive business opportunity.

84. *Id.* at 138-39.

both worlds. If he makes it as a dealer, he is happy; if he loses or is fired, he may get treble damages from his business partner.

It is apparent that while this is not a purely intracorporate situation, there is a strong analogy to it. There exists a business relationship going beyond normal arm's-length sales transactions. In order to obtain the Midas franchise, the dealers were under the continuing control of Midas and International, to the extent that they had to conform to the Midas mode of operating in order to purchase their products from Midas. These dealers therefore, while independent in the legal sense were far from economically independent. While they were not subsidiaries or even divisions in the pure sense, they arguably could be termed outlets or branches of the main corporation.[85] The doctrine announced in this case could open the treble damages door for anybody having any dealings with a corporation where there is any modicum of control by one over the other, thereby making it part of a Section 1 conspiracy.

Attacks Upon the Doctrine

While serving as Chief of the Antitrust Division of the Justice Department, Donald Turner stated:

> We should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest.[86]

This statement of policy has not been followed to its fullest extent by all jurisdictions.[87] However, it necessarily implies the question of why one should curtail the intracorporate conspiracy doctrine, when its ultimate purpose is to prevent anticompetitive conduct.

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85. *Id.* at 136-37.

86. Turner, *Address Before the American Bar Association,* 10 ANTITRUST BULL. 685, 687 (1965).

87. *See* Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968). It is interesting to note that the trend could be away from the doctrine as evidenced by the 9th Circuit opinion in Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (1969). Willis and Pitofsky indicate in their article *Antitrust Consequences of Using Corporate Subsidiaries,* 43 N.Y.U. L. REV. 20, 30-35 (1968) that Federal enforcement policy, lower Federal courts, and congressional policy have resisted the "bathtub conspiracy doctrine."

Criticisms of the doctrine[88] revolve around the potential deterring effect it may have on the decision making functions of corporations[89] and more fundamentally, on the soundness of the doctrine itself in terms of the traditional concept of conspiracy.[90]

The intracorporate conspiracy doctrine can be divided for purposes of analysis into the following classifications: (1) a corporation and its officers and directors, (2) a corporation and its subsidiaries, (3) a corporation and its affiliates and (4) a corporation and its divisions or other internal units. Each category will be analyzed with a view toward its historic validity and current efficacy.

A Corporation and Its Officers and Directors

A corporation can only act through its officers and agents. However, the courts have uniformly rejected the doctrine that a corporation and its officers or agents constitute the necessary plurality of actors for conspiracy purposes under Section 1.[91]

These cases are based on the rationale that 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.[92] The basis for this rejection is that if there is no independence (whether or not as a legal entity) between the alleged conspirators except for their titles, then the corporation has sufficient control over its actors for a court to consider them as agents of the corporation.[93]

If such a conspiracy were sustained, it would be found to exist between a corporation and itself. It is arguable that this reasoning

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88. *Supra* note 4.

89. *See* text at 888-89.

90. *See* text at 872. It is interesting to note that in Section 8 of the Sherman Act it is stated:

> That the word "person" or "persons", whenever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

It is arguable that Section 1 should be interpreted in light of this conception of what "person" means, thereby omitting subsidiaries, divisions, affiliates, and other internal units of corporation from the impact of the Act.

91. 200 F.2d 911.

92. *Id.* at 914; *see also* Wise v. Southern Pacific Co., 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963) holding that an alleged conspiracy between a corporation and employee does not meet the definitional requirement of two parties, in the torts field.

93. An agent is defined as one who acts for or in the place of another by authority from him—BLACK'S LAW DICTIONARY 85 (rev. 4th ed. 1968).

could be extended to a rejection of any possible conspiracy between a corporation and its affiliates. While the analogy has not been discussed in any definitive way by the courts, possibly because they feel that there is no basis for holding an affiliate as an agent, *Nelson Radio* and those following do give credence to such a comparison.

A Corporation and Its Subsidiaries

The strongest situation for applying the bathtub conspiracy involves an alleged conspiracy between a corporation and its subsidiaries.[94] A subsidiary is recognized by law as a separate entity from its parent corporation.[95] This multicorporate form has numerous advantages, particularly flexibility in management, reducing taxes, spreading risks, adjusting debts and earnings to correspond with the needs within the enterprise and acquiring new capital.[96]

The court in *General Motors* held that one accepting the benefits of separate existence must also accept the burdens that go along with it if it violates the antitrust laws.[97] If the subsidiary is in fact independent from the parent, this broad rule would present no problems.[98] However, the present majority rule is formalistic in application and does not take into account the actual relationship between the parent and its subsidiaries on a case by case determination.[99] This approach seems questionable for obtaining the two parties needed for a conspiracy and, predictably, has been criticized.[100]

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94. United States v. General Motors Corporation, 121 F.2d 376 (7th Cir. 1941).

95. *See generally*, H. HENN., HANDBOOK OF THE LAW OF CORPORATIONS, § 149 (1970).

96. *See* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 26 (1968).

97. *Supra* note 33.

98. Independence is defined as the state or condition of being free from dependence, subjection, or control—BLACK'S LAW DICTIONARY 911 (rev. 4th ed. 1968). It is also interesting to note the alter ego concept where the corporate veil is broken if the subsidiary is a mere tool of the parent corporation. A similar reasoning is applicable in vicarious liability situations.

99. In 121 F.2d at 404, it is stated "nor can the appellants enjoy the benefits of separate corporate entity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader."

100. *See* Willis & Pitofsky, *supra* note 96.

A more certain indicia for ascertaining if there are, in reality, two parties for Section 1 purposes is the control relationship between the parties on which the suit is based. If the subsidiary is operating within an independent sphere it is capable of meeting the conspiracy requirement, but if it is merely a tool or agent of the corporation then its actions are those of the parent corporation. Thus it would not constitute an additional party to meet the conspiracy requirements.[101]

Furthermore, even if it can be argued that a subsidiary is independent of its parent corporation, thereby along with its parent constituting the necessary plurality of actors for conspiracy purposes, it is questionable whether there is concerted action by agreement between the two entities. In other words, while formally there are two parties, in economic substance the subsidiary may be so dependent on the parent corporation that it is incapable of agreeing or "conspiring" as contemplated by the Act.[102]

A case using this approach is *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*,[103] in which the Supreme Court held that three agricultural cooperatives were not independent parties to meet the requisite plurality of actors for Section 1 purposes. Relying on the Clayton[104] and Capper-Volstead Acts,[105] the court concluded that these cooperatives were one "organization" or "association" even though they had formally organized themselves into three separate legal entities.[106] The court also stated that there was no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations.[107] In effect there really was no cooperation; just a decision and proposed course of action by the parent to which the subsidiaries had no choice but to acquiese.

When determining whether or not a Section 1 violation exists, one should also ascertain whether the alleged conspiracy involves a restraint of trade by hindering outside competition.[108] A purely

101. *See* 200 F.2d 911.
102. *See* Forcione, *Intra-Enterprise Conspiracy Under the Antitrust Regulations of the Common Market*, 25 BUS. LAW. 1419 (1970).
103. 370 U.S. 19 (1962).
104. 15 U.S.C. § 17 (1964).
105. 7 U.S.C. § 291 (1964).
106. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29 (1962).
107. *Id.* at 29.
108. Section 1 of the Sherman Act states in relevant part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is hereby to be declared illegal."

internal agreement by a parent and its subsidiary, regardless of the plurality of actors requirement, would not constitute a violation of Section 1.[109]

In *Kiefer*,[110] the court held that wholly-owned subsidiaries of a corporation were capable of constituting the necessary joint actors for the conspiracy requirement of Section 1.[111] The court did indicate that since the subsidiaries held themselves out as competitors, the Sherman Act was especially applicable.[112] However, it is possible to interpret this remark as a secondary consideration with the court's primary emphasis being on the legal separateness of the subsidiaries.[113] Such an analysis would follow the formalistic approaches of *General Motors*[114] and *Yellow Cab*,[115] but again its emphasis is misplaced if one wants to comport with the legal definition of conspiracy.[116]

The control relationship between the subsidiaries should be the prime test in order to ascertain if the subsidiaries are truly independent from each other. Furthermore, their relationship to the parent corporation would be relevant so as to indicate if they were treated as subsidiaries "in fact" or as part of a single business unit, thereby not able to be classified as separate parties, regardless of their legal autonomy.

A Corporation and Its Affiliates

The allegation of a conspiracy between a corporation and its affiliates involves a different business concept from those discussed previously. While a subsidiary is legally independent of its parent, an affiliate, in business parlance, is a company

109. See United States v. Arkansas Fuel Oil Corp., 1960 Trade Cas. ¶ 69, 619 (N.D. Okla. 1960); Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683 (2d Cir. 1963).
110. 340 U.S. 211.
111. *Id.* at 215.
112. *Id.*
113. This because the Court states that common ownership and control does not liberate corporations from the impact of the antitrust laws and then makes reference to the fact that the rule is especially applicable, where, as here, respondents hold themselves out as competitors. *Id.*
114. 121 F.2d 376.
115. 332 U.S. 218.
116. Conspiracy is defined as requiring two parties—R. PERKINS, PERKINS ON CRIMINAL LAW 613 (1969).

effectively controlled by association with others under common ownership.[117] Since a conspiracy by definition requires two or more "persons,"[118] the question then arises whether or not an affiliate is capable of constituting a necessary part to a conspiracy. *Yellow Cab*[119] would indicate that it can do so. The court stated:

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.[120]

While the case can be limited to its facts,[121] the potential of the statement readily could be extended. The case holds that the restraint provision of Section 1 is the crucial indicator. If this element is found to exist, a harsh interpretation of the case would assert that the parties to it may constitute the necessary plurality of actors, regardless of the actual relation of control between them. This reasoning seems to disregard the specific conspiracy requirement contained in Section 1. Its formalistic reasoning, however, does follow other cases announced by the Court.[122] A better interpretation would combine this rationale with an analysis of economic independence to reach the desired result.

One possible underlying rationale for holding affiliates as independent parties for conspiracy purposes is suggested by the rule announced by the district court in the recent *Hawaiian Oke*[123] case. If the affiliates are functioning in separate activities from the overall operation of the enterprise, they would be independent to the extent of those activities. However, utilizing this approach disregards the total control situation of the parties.[124] More im-

117. It is important to note the definitional distinction between an affiliate and subsidiary, as this distinction is particularly important in analyzing the "bathtub conspiracy"; *see* BLACK'S LAW DICTIONARY (rev. 4th ed. 1968); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966).

118. PERKINS, *supra* note 116.

119. 332 U.S. 218.

120. *Id.* at 227.

121. *See* text at 876-77.

122. Patterson v. United States, 222 F. 599 (6th Cir. 1915); United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941).

123. Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967).

124. *Id.* at 920, 924.

portant, it puts aside the fact that the affiliates comprise a part of a single business unit under common ownership. Therefore, holding them as parties for conspiracy purposes is really holding the entire business unit as conspiring with itself.[125] Such a conclusion, again, ignores the overall view of both restraint of trade and economic independence.

A Corporation and Its Divisions or Other Internal Units

The *Hawaiian Oke* case[126] presents some interesting views on this subject. The decision reached by the district court extended the intracorporate conspiracy doctrine about as far as it could go.[127] The subsequent reversal by the Court of Appeals[128] illustrates the proper approach to be used when facing allegations of intracorporate conspiracy. The circuit court looked at the actual relationship between the parties in terms of control to ascertain if there were "in fact" two independent parties as required by Section 1.[129] While this approach is contrary to the usual formalistic approach the courts have utilized,[130] it eliminates the distinct possibility of an extension of intracorporate conspiracies to a corporation and its internal units, such as departments or branches.[131]

The control approach sanction by the circuit court in *Hawaiian Oke* takes notice of the meaning of conspiracy under Section 1. There must be two parties in reality and not just because different titles are assigned to units of the corporation to differentiate activities within its overall operation. Finally, the reversal recognizes the policy warning of Donald Turner a few years ago.

RECOMMENDATIONS AND CONCLUSIONS

Future efficacy of the "bathtub conspiracy"

The traditional approach for ascertaining the feasibility of the intracorporate conspiracy doctrine under Section 1 as a viable

125. 200 F.2d 911.
126. Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 277 F. Supp. 915 (D. Hawaii 1967) *rev'd* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969).
127. See text at 887-88.
128. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969).
129. 416 F.2d at 83-84.
130. Willis & Pitofsky, *supra* note 96.
131. *Supra* note 65.

antitrust remedy has ignored the legally accepted definition of conspiracy.

Instead, in the evolution of the doctrine, the majority of courts have emphasized only the alleged anticompetitive activity and public policy of Section 1. The consequence of this approach has been to subordinate and occasionally ignore the required definitional elements of a conspiracy.

The effect of the decisions has been to place the entire organizational structure of corporations into question in the antitrust field. A corporation today is not certain whether autonomous units within its structure will be held liable as conspirators under Section 1 if the activity affects competition however indirect.

However, this trend has not been without exceptions. The recent 9th Circuit decision in the *Hawaiian Oke* case reveals that the intracorporate conspiracy doctrine is not all-embracing. On the contrary, that holding marks a point from which other courts might depart, heeding, thereby the legal meaning of conspiracy. This guideline involves examining the total relationship between the alleged conspirators in terms of the control which one holds over the other. Conspiracy requires two parties and concerted action between them. This means that the parties are economically independent of each other in their cooperating activity. A subsidiary, affiliate or division which is controlled in its course of activity by a parent corporation should not be considered to be an independent party capable of conspiring with that parent. If so, such a relationship belies the concept of arms-length concerted action between the alleged conspirators.

For those internal corporate units conspiring between themselves the same test should be applicable. However, the test would involve a two-fold problem. First, the relationship between the units would be of utmost importance in terms of their actual independence or dependence upon each other. Furthermore, their relationship to the parent corporation would be of significance for indicating their de facto or de jure separateness from each other. In other words, if the parent controlled the units in terms of a single activity, regardless of their separate titles, they should not be classified as separate parties.[132]

132. The situation presented by *Perma Life* is susceptible to the same type of reasoning. The crucial question still revolves around whether the alleged plaintiff was really coerced so as to void his agreement. The control test would be used in a reverse manner from the traditional bathtub discussion. Here, if the plaintiff were truly forced into signing by the defendant corporation, this would illustrate that it was not a voluntary,

The reasoning of most courts dealing with the intracorporate conspiracy doctrine illustrates the impropriety of the use of the doctrine in terms of generally accepted concepts of conspiracy. Unfortunately, that approach sets no ascertainable standard as to its limit, but rather leaves the intracorporate door wide open.

knowing participant dealing at arm's length. Therefore, as a participant making no voluntary consent to the agreement, the plaintiff should not be held along with the defendant as the two parties necessary for conspiracy purposes.