

Anti-Trust--Conscious Parallelism--Insufficient Basis for Directed Verdict (Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 74 Sup. Ct. 257 (1954))

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others recently decided,¹⁹ is a distinct advance in the development of the law.

The Immigration Department, as a governmental agency, has a dual purpose. It must correctly decide the case as between the litigants, and further, its determination must subserve the public interest, which it is charged with protecting.²⁰ It is for the latter reason that such administrative agencies have not been held bound by the strict rules of evidence.²¹ Since it is their duty to investigate, they should be free to receive both judicially competent and incompetent evidence. Nevertheless, in receiving hearsay evidence in the nature of blood test results, the relators are entitled to due process. It would therefore appear that the limitations imposed by the *Lee Kum Hoy* and *Dong Wing Ott* cases are justifiable and necessary implementations of the "fair play" concept of the due process clause.



ANTI-TRUST—CONSCIOUS PARALLELISM—INSUFFICIENT BASIS FOR DIRECTED VERDICT.—Plaintiff, a motion picture exhibitor in suburban Baltimore, brought an action against defendants, moving picture producers and distributors, for violation of the anti-trust laws.¹ In moving for a directed verdict, plaintiff contended that defendants uniformly refused plaintiff the privilege of showing "first-run" pictures, and restricted such exhibits to downtown Baltimore theatres. No direct evidence of an illegal agreement was shown. The same defendants had previously been adjudicated guilty of conspiracy under the anti-trust laws.² The Supreme Court, in affirming a denial of the motion, *held* that consciously parallel business behavior, even taken in conjunction with the prior adverse decrees, is not conclusive proof of a conspiracy in violation of the anti-trust laws. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 74 Sup. Ct. 257 (1954).

Conspiracy, at common law, has generally been defined as an agreement by two or more persons to do an unlawful act, or to do a lawful act by unlawful means.³ In anti-trust litigation, however, the

¹⁹ See *Wong Yoke Sing v. Dulles*, 116 F. Supp. 9 (E.D.N.Y. 1953); *Chin Kwong Hing v. Dulles*, Civil No. 14,980—HW, S.D. Cal., Oct. 5, 1953.

²⁰ See DAVIS, *ADMINISTRATIVE LAW* 453 (1951).

²¹ *Ibid.*

¹ 26 STAT. 209, 210 (1890), 15 U.S.C. §§ 1, 15 (1946) (Sherman Act: made criminal any conspiracy in restraint of interstate commerce and allowed treble damages to parties injured thereby); 38 STAT. 737 (1914), 15 U.S.C. § 26 (1946) (Clayton Act: granted injunctive relief to interested parties).

² See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

³ See *Pettibone v. United States*, 148 U.S. 197, 203 (1893); Common-

conspiracy is regarded as the relationship created by an unlawful agreement rather than the agreement itself.⁴ Basic differences exist between conspiracy in anti-trust law and criminal conspiracy in the usual sense. In the ordinary criminal conspiracy, intent to commit the wrongful act must be proven;⁵ in anti-trust cases, intent to restrain trade need not be shown.⁶ Furthermore, in suits under the Sherman Act,⁷ unlike prosecutions for criminal conspiracy under federal law,⁸ there need be no allegation of an overt act in furtherance of the conspiracy. The typical criminal conspiracy is concerned with acts which are unlawful in themselves.⁹ This differs fundamentally from conspiracy in anti-trust legislation, where the acts which the agreement envisions may be perfectly innocent if done singly, and it is only the conspiracy to do them which renders them illegal.¹⁰

The phrase "conscious parallelism" refers, in anti-trust litigation, to the practice of conducting similar businesses in a uniform manner, the directors of each business being aware that the others are pursuing the same course. The natural effect of such harmonious activity is to eliminate competition among the participating businesses, and to restrain trade generally.¹¹

As long ago as 1914, the Supreme Court had alluded to the inference of a conspiracy from purely circumstantial evidence as

wealth v. Dyer, 243 Mass. 472, 138 N.E. 296, 303, *cert. denied*, 262 U.S. 751 (1923); Commonwealth v. Hunt, 45 Mass. (4 Metc.) 111, 125 (1842).

⁴ See United States v. Kissel, 218 U.S. 601, 608 (1910) (conspiracy defined by Mr. Justice Holmes as "a partnership in criminal purposes"); United States v. General Electric Co., 40 F. Supp. 627, 630 (S.D.N.Y. 1941).

⁵ Mazurosky v. United States, 100 F.2d 958 (9th Cir. 1939); Landen v. United States, 299 Fed. 75 (6th Cir. 1924); Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935); Odneal v. State, 117 Tex. Cr. App. 97, 34 S.W.2d 595 (1931).

⁶ United States v. Griffith, 334 U.S. 100 (1948); Universal Milk Bottle Serv. v. United States, 188 F.2d 959 (6th Cir. 1951); see Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234 (1899).

⁷ See Nash v. United States, 229 U.S. 373, 378 (1913); United States v. Great A. & P. Co., 137 F.2d 459, 463 (5th Cir.), *cert. denied*, 320 U.S. 783 (1943); Lamar v. United States, 260 Fed. 561, 563 (2d Cir.), *cert. denied*, 250 U.S. 673 (1919).

⁸ 21 STAT. 4 (1879), 18 U.S.C. § 371 (1946), United States v. Reichert, 32 Fed. 142 (C.C.D. Cal. 1887); see Hyde v. United States, 225 U.S. 347, 359 (1912).

⁹ State v. Parker, 114 Conn. 354, 158 Atl. 797 (1932); State v. Continental Purchasing Co., 119 N.J.L. 257, 195 Atl. 827 (Sup. Ct.), *aff'd mem.*, 121 N.J.L. 76, 1 A.2d 377 (1938); Commonwealth v. Mack, 111 Pa. Super. 494, 170 Atl. 429 (1934). In New York the acts must be criminal. See People v. Zittel, 114 Misc. 33, 186 N.Y. Supp. 648 (Gen. Sess. 1920).

¹⁰ Swift & Co. v. United States, 196 U.S. 375 (1905); see American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); United States v. Reading Co., 226 U.S. 324, 357 (1912); United States v. Great A. & P. Co., *supra* note 7 at 464.

¹¹ For a discussion of conscious parallelism see Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 755-762 (1950).

"elementary."¹² In the major anti-trust cases prior to World War II, however, there was generally a considerable amount of direct evidence upon which such a finding could be predicated.¹³ In later years, the amount of direct evidence required was permitted to dwindle to a bare minimum, and finally to disappear completely. In *Interstate Circuit, Inc. v. United States*,¹⁴ a finding of a conspiracy as a *matter of law* among moving picture distributors was based on their parallel behavior, in that each distributor entered into a separate conspiracy with the same exhibitor.¹⁵ In 1946, an illegal agreement to suppress competition in the tobacco industry was found because of the defendants' uniformity of action, although virtually no direct evidence was adduced.¹⁶ In 1948, the 7th Circuit Court of Appeals held that a conspiracy existed to maintain high prices in the steel conduit industry,¹⁷ although the evidence consisted almost solely of the uniform adherence of the defendants to a base point pricing

¹² See *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, 612 (1914). See also *Baush Machine Tool Co. v. Aluminum Co.*, 72 F.2d 236 (2d Cir.), *cert. denied*, 293 U.S. 589 (1934), where it was held that a jury is entitled to consider circumstantial evidence in civil anti-trust suits.

¹³ See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) (formal agreement among railroads to fix rates); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) (shares in competing railroads transferred to holding company); *Eastern States Lumber Ass'n v. United States*, *supra* note 12 (retail trade association with express purpose of publishing blacklists of wholesalers); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (express plan to limit production of lumber); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing agreement "... based almost entirely on unequivocal testimony or undisputed contents of exhibits. . . ." *Id.* at 177).

¹⁴ 306 U.S. 208 (1939).

¹⁵ "It taxes credulity to believe that the several distributors would . . . have accepted . . . with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance." *Id.* at 223. The pattern of inferring a horizontal conspiracy from a series of proven vertical conspiracies has recurred. See *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹⁶ See *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

¹⁷ *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd mem.*, 336 U.S. 956 (1949). Professor Rahl regards this case as establishing conscious parallelism as the law in Federal Trade Commission cases. See Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 761 (1950). This evaluation is applicable only to the unfair competition count of the action. There was some direct evidence offered in proof of the conspiracy count. See *Triangle Conduit & Cable Co. v. FTC*, *supra* at 180. As far back as 1945 this circuit had apparently espoused conscious parallelism, but the case had been reversed on another point. *Bigelow v. R.K.O. Radio Pictures*, 150 F.2d 877 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946). This court has been liberal in allowing inferences of a conspiracy to be drawn although little or no direct evidence exists, in Federal Trade Commission cases. See *Fort Howard Paper Co. v. FTC*, 156 F.2d 899 (7th Cir. 1946); *Milk and Ice Cream Can Institute v. FTC*, 152 F.2d 478 (7th Cir. 1946); *United States Maltsters Ass'n v. FTC*, 152 F.2d 161 (7th Cir. 1945).

system.¹⁸ The Supreme Court, in 1951, once again sustained a conspiracy finding on virtually no other evidence than the strikingly harmonious behavior of "competitors."¹⁹

In view of this willingness to uphold conspiracy findings, it is not surprising that the theory was advanced that the "*res ipsa loquitur*" concept would eventually be applied in anti-trust conspiracy cases.²⁰ Thus, defendants would bear the burden of tracing their parallel behavior to a cause other than an illegal agreement.

Finally, in *Milgram v. Loew's, Inc.*,²¹ which bore a striking factual resemblance to the principal case, consciously parallel activity was held to be a sufficient basis upon which a conspiracy under the Sherman Act *could* be inferred. In the case under discussion, however, plaintiff sought a *directed verdict* on the basis of consciously parallel behavior and the additional circumstance of the prior adverse decrees. By refusing to elevate the doctrine to such probative dignity, the Court halted the apparent trend toward the complete abandonment of the element of agreement in anti-trust conspiracies.

The Court would have done a disservice to have decided otherwise. If the concept of "conspiracy" is to retain its utility as a legal term, it cannot be so extended in scope that in the very attempt to give it new meaning, we render it meaningless for lack of precision. Basically, the problem is a legislative one. That is, rather than have the courts distort the meaning of the statute by extending the specified classes of condemned activity, so as to include harmful parallel behavior, Congress should amend the Sherman Act, so as to separate innocent from baneful business practice. The problem is not without difficulty. Since intent to restrain trade is not a necessary element in conspiracy under the anti-trust laws,²² the danger exists that we would fall into the logical fallacy of "*post hoc, ergo propter hoc*," if consciously uniform activity were to be banned as such. A possible

¹⁸ Base point pricing is a method of equalizing the price of a commodity throughout the nation. A base city, or cities, is selected, and each manufacturer, wherever situated, adds to his price a "ghost freight" charge, *i.e.*, what it would have cost to freight the product from the base to the place of sale, had this been done. See *FTC v. Cement Institute*, 333 U.S. 683 (1948).

¹⁹ *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951), *reversing* 182 F.2d 228 (7th Cir. 1950). The only direct evidence of an agreement was a chance remark by a Calvert official that Calvert "had to go along with Seagram" on its selling policy. *Id.*, 182 F.2d at 231.

²⁰ *Rahl*, *supra* note 17, at 758. Placing this burden upon the defendant had been judicially denounced in 1946. See *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533, 544 (7th Cir. 1946), *rev'd on other grounds sub nom.* *FTC v. Cement Institute*, *supra* note 18.

²¹ 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952). In dissenting, Judge Hastie roundly denounced conscious parallelism, asserting that it eliminated the element of agreement hitherto necessary in establishing a conspiracy. *Id.* at 587, 590-591.

²² See note 6 *supra*.

solution would be to amend the statute to require a showing of either conspiracy, as is now the rule, or parallel behavior *plus* the intent to restrain commerce.



CORPORATIONS—DERIVATIVE ACTION—BENEFICIAL OWNER REQUIRED TO POST SECURITY.—In a derivative action against a Delaware corporation and its directors, plaintiff sought damages for fraud, mismanagement and waste, and rescission of certain agreements. A Pennsylvania statute required a *holder* of less than five per cent of any class of outstanding stock to post security for reasonable litigation expenses.¹ Defendant moved pursuant to this statute, to require the plaintiff, the conceded *beneficial holder* of five per cent of stock, to furnish such security. In granting the motion, the Court *held* that by *holder* of five per cent, the statute meant holder of *record*. *Murdock v. Follansbee Steel Corp.*, 114 F. Supp. 690 (W.D. Pa. 1953).

Since all shareholders are, in the final analysis, damaged by a wrong to the corporation, and since individual suits would be impractical, equity afforded relief in the form of a stockholders' derivative suit.² This remedy was long the chief deterrent to fraudulent corporate management.³ The suit is available only where a cause of action has accrued to the corporation, which, after proper demand, the directors fail to prosecute.⁴ Although damages, in the first instance, inure to the corporation,⁵ they may benefit the shareholder by way of increased dividends and serve to protect his investment.⁶

Instances of abuse, however, were not uncommon.⁷ Unfounded

¹ PA. STAT. ANN. tit. 12, § 1322 (Purdon, 1953). The Pennsylvania statute was applied under the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 554 (1949), wherein a similar New Jersey statute was applied to a Delaware corporation, in a derivative action brought in New Jersey.

² See *Continental Securities Co. v. Belmont*, 150 App. Div. 298, 302, 303, 134 N.Y. Supp. 635, 638, 639 (2d Dep't), *aff'd*, 206 N.Y. 7, 99 N.E. 138 (1912); *Hichens v. Congreve*, 4 Russ. 562, 576, 38 Eng. Rep. 917, 922 (Ch. 1828); BALLANTINE, CORPORATIONS § 145 (Rev. ed. 1946).

³ See *Cohen v. Beneficial Industrial Loan Corp.*, *supra* note 1 at 548.

⁴ See *Hawes v. Oakland*, 104 U.S. 450, 460 (1881).

⁵ See *Isaac v. Marcus*, 258 N.Y. 257, 264, 179 N.E. 487, 489 (1932); *Smith v. Hurd*, 53 Mass. (12 Metc.) 371, 385 (1847).

⁶ See BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 222 n.3 (1933).

⁷ "A stockholder's derivative suit may be a useful agency or it may be grossly abused for purposes far removed from any desire to do a service to the corporation represented." *Weinberger v. Quinn*, 264 App. Div. 405, 409, 35 N.Y.S.2d 567, 572 (1st Dep't 1942), *aff'd mem.*, 290 N.Y. 635, 49 N.E. 2d 131 (1943); see *Continental Securities Co. v. Belmont*, 83 Misc. 340, 343, 144 N.Y. Supp. 801, 804 (Sup. Ct. 1913), *aff'd*, 168 App. Div. 483, 154 N.Y. Supp. 54 (2d Dep't 1915), *aff'd mem.*, 222 N.Y. 673, 119 N.E. 1036 (1918).