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Parental Liability For A Subsidiary's Antitrust Violations Under U.S. Law

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A frequently-arising issue in both civil and criminal antitrust cases in the United States is whether a parent company can be held liable for the antitrust violations of a subsidiary or other related company. The applicable U.S. law on this issue is remarkably clear: corporate separateness and formalities must be respected. Simply because Company A has an ownership interest, even a 100 percent ownership interest, in Company B does not mean that Company A can be held criminally or civilly liable for Company B's conduct. Neither government enforcers nor civil plaintiffs should be able to maintain an action against a company simply because it owns an interest in another company whose conduct is in question or simply because there is some other factor—common parent, overlapping directors, exercise of general supervisory power—suggesting a relationship between the entities.

This rule should be of particular importance to defendants in civil cases given the United States Supreme Court's 2007 *Twombly* decision, which requires plaintiffs to plead factual detail regarding the alleged antitrust violations and dismiss those complaints that do not establish that the alleged cartel is plausible. *Twombly*, coupled with the corporate separateness rule, should allow corporate defendants to obtain early dismissals from cases in which they have been named defendants simply because of their relationship to or ownership of another company.

The foundational principle of corporate separateness under United States law is that a corporation is regarded as a distinct legal entity, separate from its shareholders. As the United States Supreme Court recognized in *Bestfoods*,[2] "a corporation and its stockholders are generally to be treated as separate entities." Even where a corporation owns 100 percent of another company, such a parent corporation is not liable for the acts of its subsidiaries.

Thus, it is very clear that under U.S. law, the power of a parent corporation to appoint or elect directors of a subsidiary; the appointment of managers of a subsidiary; the overlap of some directors or officers; and/or the exercise of general supervisory power over the subsidiary's

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[2] United States v. Bestfoods, 524 U.S. 51, 61 (1998).

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business plans, performance, finance, and capital budget decisions are not enough to impose liability on the parent based on acts of the subsidiary. Simply put, in the United States, it is a bedrock corporate law principle that, in general, a parent company is not liable for the acts of its subsidiaries or other affiliated corporations.

These principles were applied in an antitrust case by the Ninth Circuit Court of Appeal in British Leyland Motors[3] in which the appellate court ruled that the relationship between a subsidiary and a British parent company was insufficient to hold the British parent liable under the antitrust laws for the acts of a subsidiary. Similarly, in Arnold Chevrolet LLC,[4] the Court stated "in the antitrust context, courts have held that absent allegations of anticompetitive conduct by the parent, there is no basis for holding a parent liable for the alleged antitrust violation of its subsidiary."

Of course, there are exceptions to every rule. The main legal theory raised in efforts to hold a parent company liable for acts of a subsidiary is sometimes referred to as the alter ego doctrine, which is also referred to "piercing the corporate veil." The essence of this doctrine is that an owner of a "sham" corporation—a corporation that does not have sufficient assets and is in fact totally controlled by and indistinguishable from its owner (in essence, where the subsidiary acts as a division of the corporate parent)—is liable for the conduct of such an entity. Importantly, courts have indicated that the alter ego doctrine is "an extreme remedy," which is "sparingly used."[5]

Issues of alter ego liability in the United States are usually matters of individual state law. As a general matter, in order to impose liability on a parent company based on its ownership of another company, a plaintiff must demonstrate: (1) that such "unity of interest" and ownership exists among two entities so that the individuality of the corporation and its parent has ceased; and (2) that failing to disregard the separate identities of different corporations would result in fraud or injustice.

In order to satisfy the "unity of interest" factor in the first prong, it is necessary to show more than the mere existence of inter-corporate connections. Rather, a party seeking to impose alter ego liability must show extreme abuse of the corporate form itself. In other words, a party seeking to impose alter ego liability must establish that: (1) the subsidiary corporation was inadequately capitalized; (2) corporate formalities were ignored—for example, stock was not issued; minutes were not kept; officers and directors were not elected; corporate records were not segregated; and (3) the corporation's assets were hopelessly commingled—for example, assets were commingled; joint bank accounts kept; and the parent company used the corporate shell of the subsidiary to obtain goods and services.

In order to satisfy the second prong, a plaintiff must show that respecting corporate separateness in a particular case would lead to an inequitable result. A plaintiff cannot meet this

[3] Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 441 (9th Cir. 1979).
[4] Arnold Chevrolet LLC v. Tribune Co., 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006).
[5] Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 539 (2000).

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element simply by showing that it would be denied a benefit if the Court respected the corporate form—that is, it is insufficient to show that the subsidiary lacks sufficient assets to pay any damages caused by its conduct. Rather, the "fraud or injustice" element requires a plaintiff to show not only that the supposed corporate separateness was "illusory" but also to set forth bad faith or some other factor indicating that ignoring the true relationship between the companies in question would be unjust.

In sum, corporate separateness matters in the United States. United States courts do not allow either civil plaintiffs or the government to blur the distinction between separately incorporated and functioning entities. Where a parent company scrupulously maintains corporate formalities and keeps its operations separate from those of a subsidiary, even where there is complete ownership of or some other connection with that subsidiary, it should not be held liable for antitrust violations committed by the subsidiary.

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