



INTRACORPORATE CONSPIRACY AND CIVIL RIGHTS IN THE NINTH CIRCUIT

BY MATTHEW KNEPPER, ESQ. AND CHELSEA LANCASTER

Under the intracorporate conspiracy doctrine (ICD), a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation. ICD developed in antitrust law (*United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994)), and stems from basic agency principles "attribut[ing] the acts of agents of a corporation to the corporation so that all of their acts are considered to be those of a single legal actor." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981). Two rationales underlie ICD:

1. "It is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself" (*Dickerson v. Alachua Cnty. Comm'n*, 200 F.3d 761, 766 (11th Cir. 2000)); and
2. "Applying the prohibition of combinations in restraint of trade contained in section 1 of the Sherman Act to activities by a single firm renders meaningless section 2, which prohibits monopolization and attempts to monopolize." *Dussouy*, 660 F.2d at 603 (citations omitted); see also 15 U.S.C. §§ 1, 2.

While the circuits are divided on the reach of ICD, the Ninth Circuit has yet to decide whether ICD

applies in civil rights actions.

42 U.S.C. § 1985(3) and ICD

In the civil rights context, ICD functions as a limiting principle on the broad language of 42 U.S.C. § 1985(3). To state a claim under section 1985(3), a plaintiff must allege four elements:

“(1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of a right or privilege of a United States citizen.” *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1181 (9th Cir. 1998). Several circuits have extended ICD to civil rights cases.

See, e.g., Amadasu v. Christ Hosp., 514 F.3d 504, 507 (6th Cir. 2008) (noting ICD “provides that where all of the defendants are members of the same collective entity, there are not two separate people to form a conspiracy”) (internal quotation marks omitted); *Meyers v. Starke*, 420 F.3d 738, 742 (8th Cir. 2005) (explaining ICD “allows corporate agents acting within the scope of their employment to be shielded from constituting a conspiracy under § 1985”); *Dickerson*, 200 F.3d at 767 (same); *Dussouy*, 660 F.2d at 603 (same). Other circuits — while not expressly rejecting ICD’s application to civil rights cases — recognize exceptions to its application

in circumstances where government agents’ actions:

1. Involve convictions for criminal conspiracy (*United States v. American Grain & Related Ind.*, 763 F.2d 312, 320 (8th Cir. 1985));
2. Are outside the scope of their employment (*Hartman v. Board of Trustees*, 4 F.3d 465, 469–71 (7th Cir. 1993)); and
3. Have an independent personal stake in the corporate action (*Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985)).

Alternatively, the First, Third and Tenth Circuits have declined to extend ICD to civil rights cases. These circuits reason that, “the doctrine, designed to allow one corporation to take actions that two corporations could not agree to do, should not be construed to permit the same corporation and its employees to engage in civil rights violations.” *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1127 (10th Cir. 1994); *see also Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1257 (3d Cir. 1978) *vacated on other grounds, sub nom. Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366 (1979).

Plaintiffs: State Your Intracorporate Conspiracy Claim

While the Ninth Circuit has not decided whether ICD is a cognizable shield in civil rights cases (*Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993)), it rejected ICD as a defense to a civil Racketeer Influenced and Corrupt Organizations (RICO) action, reasoning:

Since a subsidiary and its parent theoretically have a community of interest, a conspiracy “in restraint of trade” between them poses no threat to the goals of antitrust law — protecting competition. In contrast, intracorporate conspiracies do threaten RICO’s goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits. *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (adopting the rationale of *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989)) (quotations omitted).

This policy-oriented position is consonant with the approach taken in those circuits rejecting ICD in civil rights actions.

In *Novotny*, the plaintiff, a male employee of the defendant savings and loan association, was also a member of the defendant’s board of directors. 584 F.2d at 1237. He alleged that the individual defendants — officers and board members — fired him for taking up a female employee’s claim for sexual harassment. *Id.* The Third Circuit noted that, rather than allege the defendant corporate entity conspired with the individual defendants, the plaintiff alleged the individual defendants conspired amongst themselves to accomplish his termination. *Id.* at 1257–58. The court rejected ICD, reasoning: “[i]f, as seems clear under [section] 1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes an actionable conspiracy, we can perceive no function to be served by immunizing such action once a

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business is incorporated.” *Id.* at 1257. Ultimately, the court held that, in the absence of an articulable policy supporting the extension of ICD to section 1985(3) cases, such a result was not otherwise sustainable. *Id.* at 1259.

Because the Ninth Circuit rejected ICD in the context of RICO on public policy grounds, a successful FRCP 12 defense will be based on two fundamental grounds. First, the plaintiff must craft a well-pled equal rights violation. Second, when the inevitable motion to dismiss arrives, the successful opposition will distinguish the policy supporting ICD’s application in antitrust, from that supporting its rejection in the equal rights context. One elegant articulation of that policy came through the pen of Justice Potter Stewart:

At the very least, the freedom that Congress is empowered to secure under the [Reconstruction Amendments] includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the [Reconstruction Amendments are] promise[s] the nation cannot keep. *Jones v. Mayer Co.*, 392 U.S. 409, 443 (1968).

Defendants: State Your Intracorporate Conspiracy Defense

Courts extending ICD to section 1985(3) focus on actions at the entity level, emphasizing that the

individuals within the corporation are merely agents. In *Dombrowski v. Dowling*, the plaintiff was a white lawyer with a successful criminal practice, largely comprised of minorities. 459 F.2d 190, 191 (7th Cir. 1972). The plaintiff alleged that a realty corporation and its employee denied him rental space immediately upon learning that “a number of his clients were of the black race or of Latin origin.” *Id.* Noting that only one firm was involved, and the individual defendant acted within the scope of his authority as the firm’s agent, the Seventh Circuit held “the statutory requirement that ‘two or more persons ... conspire...’ is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm.” *Id.* at 196.

In *Hoefler v. Fluor Daniel, Inc.*, the plaintiff was a compliance director at the defendant corporation. 92 F. Supp. 2d 1055, 1055–56 (C.D. Cal. 2000). He alleged that the corporation’s defendant employees conspired to terminate him in retaliation for bringing Federal False Claims Act proceedings against his employer. *Id.* at 1057. The court declined to limit ICD to the antitrust context, noting, “[t]he logic of the doctrine comes directly from the definition of a conspiracy.” *Id.* The court reasoned that “a conspiracy requires a meeting of the minds ... you must have two persons or entities to have a conspiracy.” *Id.* (Internal quotations and citations omitted). Accordingly, the court held that, as it is the general rule that the agents’ acts are indistinguishable from the corporation’s act; “[a] corporation cannot conspire with itself any more than a private individual can.” *Id.*

Conclusion

The success of an intracorporate conspiracy claim will turn on two approaches yielding opposite results. If the Ninth Circuit does not extend ICD to civil rights actions, the court will emphasize the policy underlying the protection of the right the plaintiff alleges the corporation violated. Alternatively, if the court extends ICD, it will do so by emphasizing actions at the entity level and embracing the logic underlying the definition of a conspiracy. In either event, plaintiffs must draft a well-pled articulation of the civil right allegedly violated, as trial courts will prefer dismissal on those grounds, before reaching the more difficult ICD issue. **NL**



MATTHEW KNEPPER is a litigation associate with Akerman LLP’s Consumer Finance Litigation practice group. Previously, Matthew clerked for United States District Judges Andrew P. Gordon and Jennifer A. Dorsey, and for Chief United States Bankruptcy Judge Mike K. Nakagawa.



CHELSEA LANCASTER is a second-year student at UNLV’s William S. Boyd School of Law and a member of the *Nevada Law Journal* and the moot court competition team, Society of Advocates. She was a summer extern for U.S. District Court Judge Andrew P.