

Copperweld: The Basics and Beyond

ABA Section of Antitrust Law “Brown Bag” Program

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Editor’s Note: In 1984, the United States Supreme Court handed down its decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), curtailing application of Sherman Act liability under Section 1 to “intra-enterprise” conspiracies and creating what is considered a mainstay in contemporary antitrust thought. Almost twenty years later, the Corporate Counseling Committee of the ABA Section of Antitrust Law revisited the case in a program addressing *Copperweld*’s historical past, uncertain progeny, and possible future application. In this edited version of that August 28, 2002 Brown Bag program, moderator Brian Henry and panelists Geraldine Alexis, Stephen Calkins, and Mark Whitener provide practical advice and perspectives on *Copperweld* issues.

It is apparent from the discussion that, while the Court’s decision in Copperweld established clear guidance for a parent and a wholly-owned subsidiary, the rule as it relates to structures falling short of that is less clear. This issue is becoming increasingly relevant as firms seek more predictability and courts are faced with increasingly intricate corporate concerns. As Judge Boudin observed in Fraser v. Major League Soccer, L.L.C., “the Supreme Court has never decided how far Copperweld applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in Copperweld itself.”

—MICHAEL R. BARNETT

BRIAN HENRY: We have a distinguished panel for this Corporate Counseling Committee Brown Bag program on *Copperweld: The Basics and Beyond*. Professor Steve Calkins will begin by providing us with a firm grounding on *Copperweld* issues. This will form the basis for the rest of the discussion. Mark Whitener will then cover the issue of how *Copperweld* applies in the context of less than 100 percent ownership. He’ll talk about where the courts and the agencies are on that issue. Gerry Alexis will conclude with a discussion of some recently proposed, though now off the table, California legislation that raised *Copperweld* issues. She will also address EC *Copperweld*-type issues.

STEPHEN CALKINS: Let me first confess that I am hopelessly torn in terms of my biases. As a law professor I revel in uncertainty, confusion, and issues that mystify students. On the other hand, I do a little bit of advising as Of Counsel to Covington & Burling, and while wearing that hat I have the practitioner's love of certainty. The tension between my two interests was driven home in a *Copperweld* context a while back when a client bought another firm. Assume (the actual facts were somewhat different) that before the acquisition both firms had been living contented lives, one with a 100 percent-owned subsidiary that was selling only in the U.S., the other one with a 75 percent-owned subsidiary that was selling only in Mexico. The apparently simple question that arose after the acquisition: could the firm continue to have the U.S. operation stay in the U.S. and the Mexican operation stay in Mexico? Or would that amount to per se illegal horizontal market division? As a legal advisor, I longed for certainty—but as a law professor I was grateful for a nice exam question.

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—STEPHEN CALKINS

It really used to be that black-letter law provided that agreements among separate corporations, even when they were commonly owned or when one was a wholly-owned subsidiary of the other, could be analyzed under Sherman Act Section 1. According to the Antitrust Section's 1975 *Antitrust Law Developments* book, the Supreme Court had indicated that "the intra-enterprise conspiracy doctrine will be applied to strike down concerted action between a parent and subsidiary, or between otherwise related corporations when the challenged conduct has the purpose or effect of unreasonably restraining trade."

That was the law when *Copperweld* came along in 1984. The defendants' situation was most sympathetic. A parent and wholly-owned subsidiary had entered into an agreement that was clearly procompetitive and raised no genuine antitrust concerns. The court of appeals obviously appreciated this but felt bound by precedent to find an agreement. President Ronald Reagan's new Justice Department supported a grant of certiorari in an amicus brief that argued very powerfully that the courts were getting this fundamentally wrong. There is a basic difference between Section 1 and Section 2, the brief asserted, and it is important to limit the reach of Section 1. According to the brief, "the difficulty with the intra-enterprise conspiracy doctrine is that it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases simply on the basis of an enterprise's choice of corporate form." Later, the Court granted certiorari, the FTC joined the Justice Department on a subsequent amicus brief supporting reversal, and the Court did so. Although today we think of *Copperweld* as a no-brainer, in fact, three Justices dissented and Justice White (who could well have joined the dissent) was recused. What today seems obviously correct was not so obvious back then.

What did the Court do? The court followed very closely the lead of the Solicitor General, and ruled in rather stirring language that "the Sherman Act contains a 'basic distinction between concerted and independent action.' The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization."¹ The Court then took this basic insight and applied it to relations between a parent corporation and a wholly-owned subsidiary. The Court ruled that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate conscious-

¹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 452 U.S. 752, 761 (1984)).

nesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.”² *Copperweld* had changed the law.

Copperweld presented the easy case: a parent can direct its wholly-owned subsidiary without concern for whether it is engaged in something the antitrust laws might consider a contract, combination, or conspiracy. On the other hand, it left open a whole host of fact patterns, many of which we’ll discuss today—sister corporations; ownership interests of less than 100 percent; control in part or full through something other than stock ownership; common control; officers, agents, and employees; joint ventures. *Copperweld* issues have been raised in merger cases when firms start to link up their operations shortly before merging (but after an agreement in principle calls for them to merge). The Supreme Court has not revisited the subject and given meaningful guidance on the long list of difficult issues that arise so regularly in everyday life.

Outside of antitrust, *Copperweld* has been considered in a wide variety of non-antitrust contexts, such as RICO, civil conspiracy, or contract or conspiracy tortiously to interfere with a contract. Although these courts cite *Copperweld*, they generally distinguish it, concluding that *Copperweld* is an antitrust decision based on antitrust concerns.³ Apparently recalling the original Solicitor General-inspired concern about too quickly condemning agreements under Section 1, courts have been reluctant to apply *Copperweld* outside of antitrust.

Where does that leave us, today? With considerable uncertainty, which my colleagues will address. As an introduction, let me mention one particularly insightful opinion: *Fraser v. Major League Soccer*.⁴ The case featured a challenge to the basic structure of Major League Soccer, LLC (MLS). Without going into details, MLS differs from the NFL and other sports leagues because a single entity (MLS) owns the various teams in the league. On the other hand, most of those teams have what is known as an “operator/investor,” who invests in MLS but operates an individual team, receiving revenues significantly based on how the team fares. The operators/investors control a majority of seats on MLS’s board of directors. The litigation had to resolve whether this was a single entity (MLS) or rather multiple entities (the operators/investors) who were capable of conspiring under Section 1. The district court found that an LLC was equivalent to a corporation, so MLS should be regarded as a single entity under *Copperweld*.⁵

The court of appeals was more hesitant to reach this conclusion. Judge Boudin’s opinion openly agonizes about the proper application of *Copperweld* in this kind ambiguous situation. Rather than a simple single firm, the court of appeals saw “a diversity of entrepreneurial interests that goes well beyond the ordinary company.”⁶ The court was reluctant to invoke *Copperweld* to immunize such a joining together of multiple business actors with differing views and perspectives. More fundamentally, the court observed that antitrust must choose between two ways of addressing fact patterns such as those presented in this case. *Copperweld* can be made to carry more water through intricate, detailed identification of situations deserving immunity, or, instead, *Copperweld* can be applied in a more relaxed fashion and courts can develop the rule of reason

² *Id.* at 771.

³ *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (RICO) (*Copperweld* “doctrine turns on specific antitrust objectives”); *Scandinavian Satellite Sys., AS v. Prime TV Limited*, 291 F.3d 839 (D.C. Cir. 2002) (*Copperweld* addressed a “limited issue” and did not establish that ownership creates a non-antitrust identity of interests between two corporations).

⁴ *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (Boudin, J.).

⁵ *Fraser v. Major League Soccer*, 97 F. Supp. 2d 130 (D. Mass. 2000).

⁶ 284 F.3d at 57.

into a practical, predictable means of separating the lawful from the illegal. In the end, the court did not have to choose a path because it found alternative grounds to affirm. My sense, however, is that the court preferred to rely more on thoughtful development and application of the rule of reason and less on aggressive use of *Copperweld*.

Back in 1984 when *Copperweld* was decided, the Solicitor General pointed to the spectre of near-certain illegality that followed from finding a Section 1 conspiracy. Today, much of what was then viewed as almost automatically illegal is considered lawful under the rule of reason. This suggests that Judge Boudin's approach (as I read it) makes sense: today, there is less need to rely on expansive applications of *Copperweld* to permit procompetitive activity to continue, and there's more freedom to let the rule of reason distinguish the lawful from the unlawful. On the other hand, of course, any departure from bright-line rules makes counseling more difficult. Thus I'm very pleased to turn the ball over to my colleague Mark Whitener to talk about practice realities.⁷

MARK WHITENER: Let me start by confessing that my bias is entirely that of the practitioner looking for as much certainty as I can get, largely unfettered by academic impulse. That is to say, I think there are a range of cases that should be easy and obvious and that, unfortunately are not, for reasons that I'll describe. And then I think there is another category of cases involving *Copperweld* issues that are going to have to be looked at on the facts of the particular case. I think that's inevitable in some of the situations Steve described. I will also say that, in looking for as much certainty as we're reasonably entitled to, I'm not sure the way forward is to throw everything into a rule of reason analysis.

All of us who counsel in the antitrust area know that once you get to a rule of reason analysis, you introduce a range of issues that are inherently somewhat uncertain. But with that said, one way to deal with *Copperweld* issues is to cover both of your bases. That is, do the best you can to get your arrangement within the protection of *Copperweld*. But also cover your flank by being sure that if there is any uncertainty as to whether you're dealing with a single enterprise for Sherman Act purposes—and there sometimes will be uncertainty—you also have a reasonable case that the conduct should be viewed as lawful, even if it's viewed as outside the protection of *Copperweld*.

So let's pick up where Steve left off, with the *Copperweld* decision itself. As he said, the decision addresses the specific case of a parent and a wholly-owned subsidiary. The Court expressly left open what to do in situations where the facts are different, including the case of a parent and a subsidiary that is not wholly-owned.

I want to divide the *Copperweld* world into two categories. The first category is the case where there is clear control from a corporate and securities point of view. I'll take the easy case, or what should be the easy case, where there is majority ownership by the parent of the voting shares of a corporate subsidiary which, unfortunately, the Supreme Court left open in *Copperweld*. What you have in the intervening years is a range of lower court decisions. And, if you look this up in a hornbook, you will find that the weight of opinion is that where the parent controlled a majority of voting stock in a subsidiary, those two entities could not be found to have conspired under the Sherman Act. But there are exceptions. For the most part, these are district court cases, so the outcome in a given case may depend on which district you're in or which precedent a court would follow in deciding whether a parent and a controlled, but not wholly-owned, subsidiary could be found to have conspired.

⁷ For further background, see Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345 (1995).

Here are some examples of the cases following *Copperweld* that have gone both ways on this issue: In the *Novatel* case, a 1986 Northern District of Georgia decision, the court decided that greater than 50 percent voting control equals *Copperweld* protection.⁸ There was a District of Oregon case, *Aspen Title* in 1987, which went the other way despite 60 or 75 percent ownership by the parent of the subsidiary.⁹ There are other decisions, going predominantly, but not uniformly, toward conferring *Copperweld* protection in the majority ownership situation. As recently as this year, in the Southern District of New York, there was the *Geneva Pharmaceuticals* case¹⁰ where *Copperweld* protection was not found in a sister corporation situation. There was a common parent—an individual who controlled their majority of the shares of two subsidiaries—yet agreements between the commonly-controlled subsidiaries were found to be subject to Section 1.

Now *Geneva Pharmaceuticals* illustrates, I think, how the judicial treatment of the issue has at times gone awry and what the risks are in this area, because of the types of factors that the court looked at in evaluating the *Copperweld* issue. I think these factors caused the court to get confused and go off the rails. You had in the case of one subsidiary the fact that the individual parent's ownership of the shares was not publicly known, and indeed, the court found there were efforts to conceal the parent's ownership of one of the entities. In the case of the other subsidiary, the parent was found not to have been an "active" investor, even though there was unquestioned control of a majority of the equity. So the parent in one instance was concealing his ownership of the shares and in the other instance was a passive investor, at least in the court's view, despite the fact that he owned the majority of the voting stock. And then the two entities entered into an agreement that was challenged under the Sherman Act, and the court said that these are not commonly controlled entities under the rubric of *Copperweld*, pointing to several factors that should have been irrelevant.

For example, the court said that these were independent corporations, and that the only basis for *Copperweld* protection is that they have a common owner. Well, most of the lower court cases have said that, in this so-called sister company situation where both are, in fact, controlled by a common parent, agreements between sister subs are protected. Again, that is the weight of the cases, but it's clearly not the uniform view. Cases like *Geneva Pharmaceuticals* suggest that if, as far as the public was concerned and as far as customers were concerned, the common control of the entities is ambiguous—it's not known, it's not open, notorious, and overt—then some judges may say, "We're not satisfied that the *Copperweld* analysis is met here."

Judges are not the only ones who have helped create the confusion. The antitrust agencies have had something of a hand in this, at least by omission. The 1988 Department of Justice Guidelines for International Operations took a position that I think was pretty straightforward and was clearly a logical follow-on to *Copperweld*. DOJ said, in effect, that when they analyze an acquisition of greater than 50 percent of the voting stock of another company, they treat that merger as a pooling of competitive interests; they're not interested in an argument by the buyer that, "Well, we may own 51 percent of the voting stock, but we're not going to exercise control, or we may let this company go off and exercise some degree of autonomy." Similarly, DOJ said, where you have a parent and a majority-owned subsidiary, *Copperweld* protection exists for agreements between them.

⁸ *Novatel Communications, Inc. v. Cellular Tel. Supply, Inc.*, Civil Action No. C-85-2674A, 1986 U.S. Dist. LEXIS 16017 (N.D. Ga. Dec. 23, 1986).

⁹ *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987).

¹⁰ *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002).

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—MARK WHITENER

We all know that the '88 Guidelines are no longer in effect. When the antitrust agencies started looking at doing Competitor Collaboration Guidelines a couple of years ago, a number of businesses and groups said, "Look, here's an opportunity to deal with a fairly simple issue. Go back and revisit the '88 Guides on *Copperweld* and adopt that position." But the agencies didn't do it. Various reasons have been offered for why that may have been, but my sense is it was an instance of the hard case overwhelming the easy case. So what are the hard cases? Clearly there are going to be situations where there's an argument that entities are coming together for a common purpose but may also be independent for some other purposes. Or there may not be a clear control relationship—such as where there are subsidiaries that have a common shareholder that's only a minority owner; or where you have, as Steve said, individual executives, employees, agents of a company coordinating their efforts with the company itself. Or there may be joint ventures, trade associations, standard setting consortia, or other groups. In those cases, what you find the courts have done, not surprisingly, is look at the facts of a particular case.

Steve mentioned the *Major League Soccer* case. Sports leagues have been primary fodder for *Copperweld* analysis. There is also the *NBA* case in the Seventh Circuit¹¹ where the court said, in essence, we're going to look at *Copperweld* on an issue-by-issue basis, so if you have a business arrangement, like a sports league, you are going to need to look at the particular conduct that's involved, and we may find that the league is a single entity for some purposes and we may find that the members thereof, or investors or teams, or independent actors for different purposes. I think that some case-by-case analysis is inevitable; it's dictated by *Copperweld*, and it's going to continue to be done in some circumstances.

There are several counseling implications from all of this. First, in the clear equity control situation, but where ownership is less than 100 percent—where the *Copperweld* analysis should provide categorical protection, but doesn't—I think the risk can be minimized if you avoid situations like those that have led some courts to go off the rails. Where you have a subsidiary that you clearly control but where there are other shareholders, the way to stay out of *Copperweld* trouble is to make it clear to the public, to customers, to the marketplace, that the control relationship exists—make it overt. And I think a secondary step—again, which arguably shouldn't be necessary—is to ensure that when the affiliated entities are out there in the marketplace, their conduct doesn't create the impression in the minds of customers that they are acting independently and competitively vis-à-vis the parent. That's usually going to make good business sense anyway. It's not usually going to be the case that a corporate parent will want to have its controlled subsidiaries out there competing with each other, approaching the same customers with the same or similar products.

Ordinarily, as a matter of good business organization, that will be the way to do it, but there may be exceptions. There may be times when commonly controlled entities are in related fields, and there are business reasons for them to be doing similar things without tight control in every instance by the parent. But if you allow that to happen and create expectations in the marketplace that these are independent competitive entities, and then take steps behind the scenes to coordinate the entities' competitive actions, there is the possibility of a customer being upset, surprised, and raising a complaint, and a court may be receptive to the argument that there is an antitrust issue despite the fact that common corporate control of the entities ought to be dispositive.

¹¹ Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996).

So, in the range of situations where control is not obvious from an ownership standpoint, you need to do the two-step analysis I described before. First, take steps where possible to make it clear to the marketplace that the enterprise is behaving as a single entity. But then as a back-stop, since *Copperweld* protection may not be clear before the fact, it's important that you also run the antitrust analysis assuming that an agreement could be alleged, and make sure that if it were examined under the rule of reason, there would be a legitimate rationale for it.

GERALDINE ALEXIS: To further complicate things, Senator Dunn of the legislature of the State of California, last February [2002], decided that the *Copperweld* doctrine was not something that should be applied in California. Senator Dunn proposed legislation—SB 1814—that would amend California's counterpart to Section 1 of the Sherman Act, the Cartwright Act. He would amend Section 1 to say "liability under this chapter is not precluded solely because the combination described in subdivision (a) is between two or more persons who are related to one another by common ownership." And even if it was a wholly-owned subsidiary—which *Copperweld* addresses—it would be possible for sister corporations or parent and a sub to conspire and violate the Cartwright Act.

I might add that the Cartwright Act also has criminal penalties, as well as a civil right of action. This bill did pass the Senate—it was a stealth bill in the sense that the business groups in California didn't really become aware that it was moving forward until fairly late in the game. It was sometime around June that this became known. And I was retained, just for full disclosure, by a client to look at this and deal with the staff at the AG's office—they were the ones who were pushing it—to try to persuade them that this didn't make a lot of sense. This was my first lobbying effort. I discovered that arguing that things don't make a lot of sense, and trying to be very rational weren't necessarily the way to go, but I did learn a lot about the process as well as what the thinking was behind this legislation.

The purpose of the amendment to the Cartwright Act was really driven by the concern out here that the energy companies were not being nailed. As you may recall, last year, California went through an electricity crisis of major proportions, and there was a lot of political pressure to bring the energy companies to the courtroom and prosecute them for raising prices to an unreasonable level. The antitrust office within the AG's office, as I understand it, conducted a pretty thorough investigation and wasn't able to find evidence of collusion, at least at that point in time, between unrelated companies. So they decided that this legislation—which I suspect they had in their drawer for many years and probably have tried many times before to get through the legislature—would solve the problem. They would try to amend the Cartwright Act, claim that the bill was clarifying existing law thereby making it retroactive (even, they told me, on the criminal side), and prosecute the energy companies for collusion among corporate subsidiaries in trading energy.

The trading, I think, was basically trading back and forth—sham trading was the allegation—so as to make the prices look higher than they actually were. In my discussions with the California AG's office as well as the Senate staff, it was clear that they hadn't really thought this through. When I questioned them as to whether immunity would ever apply, they took the position, "Well we're not saying that you could never get immunity. What we're saying is that the parent and the sub or the related corporation have to prove that they act with an economic unity of interest as in the pre-*Copperweld* days." They thought that was a reasonable way to proceed, and they were relying a lot on one case out of the California Appellate Court which, curiously, supported *Copperweld*, so I don't quite understand why they were relying on it. But in talking to them I pointed out that if, for instance, the energy subsidiaries were acting under the direction of the parent,

which they probably were, then wouldn't they then have an economic unity of interest? And they said they hadn't thought about that. Well, I said, "Under your own standard for *Copperweld* immunity, or whatever type of intra-enterprise immunity you would permit, they would qualify."

I also pointed out to them that the problem is that, as you prove economic unity of interest—that is, more and more direction from the top—are you also possibly digging yourself into a hole? Because if you don't qualify for *Copperweld*-type immunity—if the court finds you not eligible for it—and this again is if the California bill had passed, then are you really providing evidence of a hub-and-spoke conspiracy where the parent is basically telling its subs what to do? Before you know it, you could have proven the case against yourself at least on the substantive Section 1 claim, in this case the Cartwright Act.

The bill passed the Senate, but by the time it got over to the California Assembly there were a number of business associations that had come together and started to lobby. The Motion Picture Association (which is very powerful in California), a high-tech company association from Silicon Valley, and the California Chamber of Commerce, all descended on the Assembly and argued that this was a totally unacceptable amendment. I think it was that political pressure, as opposed to the reasoning that I was trying to bring to the table, that had the major impact, and the *Copperweld* part of the amendment was withdrawn.

There was also something behind the *Copperweld* amendment that I think Mark was alluding to and what the staff in the AG's office seemed to be concerned about—fraud—that is, basically having a company engaged in transactions that appear to be between unrelated entities and that therefore give the appearance that there is a real transaction, when there really isn't an arms-length transaction. I had pointed out to the AG staff that there is a fraud statute that they might have some success under, but there was no point in using this meat cleaver to affect other companies that have legitimate reasons to have subsidiaries. For regulatory and other reasons, companies often have to have separate subsidiaries in different states.

The other thing I was asked to touch upon, and I'm certainly not an expert on this, is what foreign jurisdictions recognize a *Copperweld*-type doctrine. The only jurisdiction I'm aware of, and this is through secondary sources, is the EU. Article 85 of the Treaty of Rome makes it clear that for an agreement to violate the treaty, it has to be among two or more undertakings. While there isn't a very solid body of law dealing with intra-enterprise activities, there are a few cases in the EU in which it appears that they've adopted an economic entity of interest test. They look to see just how much autonomy the subsidiary and its parent or sister corporations have to determine whether their activity is eligible for immunity. I think they've been clear as to what the purpose is of recognizing that kind of immunity: not to force companies to bring corporate units in as divisions just to avoid a problem, for instance, in having licenses between various subsidiaries within your company. So they recognize that the formation of subsidiaries, etc., can serve economy efficiency purposes which shouldn't be defeated by some formalistic approach to the law.

CALKINS: Well, Gerry, I can't let your claim that California is the strangest state go unchallenged. Massachusetts regularly rivals California, and it does so here. In *West Boylston Cinema Corp. v. Paramount Pictures Corp.*,¹² the Massachusetts Superior Court addressed a movie clearance agreement between a corporation and the "controlling shareholder" of that corporation's parent corporation, and applied *Copperweld* to conclude that the arrangement could not be a "conspir-

¹² *West Boylston Cinema Corp. v. Paramount Pictures Corp.*, 2000 Mass. Super. LEXIS 628 (Sept. 18, 2000).

acy . . . in restraint of trade” under state antitrust law. This did not end the matter for the court, however, which went on to ask “whether the clearance between [the two firms] actually restrained trade,” apparently as a “contract . . . in restraint of trade.” Although the court eventually found the restraint to be reasonable, this should not disqualify the Massachusetts candidacy. The case also serves as a reminder of the potential and actual importance of state law.

Let me put in a good word on behalf of the antitrust system in two respects. First, an awful lot really is clear. Wholly-owned sister corporations are exempt. And 100 percent ownership is exempt. Although I’m not sure I’d join Mark in drawing the line at 50 percent, because as the percentage ownership increases and if nothing unusual is going on, you are very likely to be safe. The courts are really quite good at briskly finding agreements among officers and employees and agents to be exempt, with a few exceptions such as where there is some kind of independent personal stake. There is a wide area where the lower courts are very predictably finding that *Copperweld* immunizes agreements.¹³

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Although many, many cases are easy, creative defendants are understandably attempting to rely on *Copperweld* and *Copperweld*-based thinking to push the envelope. In a few cases, which are worth noting less for counseling than as background, aggressive invocation of *Copperweld* has succeeded or come close. A mere 20 percent ownership may be enough, if accompanied by “significant and substantial influence,” according to *Fresh Made, Inc. v. Lifeway Foods*.¹⁴ Defendants have relied on *Copperweld* to defend franchisor-franchisee situations and licensor-licensee situations.¹⁵ There are cases relying on *Copperweld* to conclude that a trade association did not act by agreement.¹⁶ One case even seems to say that a covenant not to compete is exempt, under *Copperweld*-type of thinking.¹⁷ In an important recent Fourth Circuit decision, a gift with strings attached was found not subject to Sherman Act scrutiny because *Copperweld* had made “concerted action” a term of art that requires a joining together of power to achieve an outcome otherwise not possible.¹⁸

—STEPHEN CALKINS

A good example of aggressive reliance on *Copperweld* is provided by a pending dispute that I’ll present as a hypothetical. Imagine two major hotels in a moderate-sized city both of which are national brands. Although the hotels appear completely independent, in fact one of them is wholly owned and operated by the Jones Corp. and the other is operated by Jones Corp. pursuant to a recently-entered long-term management contract. The two hotels assert that they may agree on anything they wish, including prices, because Jones Corp.’s ownership of one hotel and management of another means that there can be no Section 1 agreement between them. In other words, an agreement merely on prices would be illegal per se, but a contract that temporarily eliminates all competition is immune. *Copperweld* thus offers ample opportunity for creative lawyering.

As with much of antitrust, clients wanting to push the envelope will encounter uncertainty, which should not prevent us from understanding that much is already resolved and well understood. There is a broad area where advice-giving is quite easy.

¹³ See, e.g., *Livingston Downs Racing Ass’n v. Jefferson Downs Corp.*, 2003-1 Trade Cas. (CCH) ¶ 73,946 (M.D. La. 2002).

¹⁴ *Fresh Made, Inc. v. Lifeway Foods, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,779 (E.D. Pa. 2002) (dictum).

¹⁵ *Search International, Inc. v. Snelling & Snelling, Inc.*, 168 F. Supp. 2d 621 (N.D. Tex. 2001); *St. Martin v. KFC Corp.*, 935 F. Supp. 898 (W.D. Ky. 1996) (franchise contract was unilaterally imposed so not subject to Section 1).

¹⁶ *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 942 F. Supp. 905 (S.D.N.Y. 1996).

¹⁷ *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495 (E.D. Ky. 1996).

¹⁸ *Virginia Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002).

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—GERALDINE ALEXIS

ALEXIS: Well, Steve, I can't leave without another word on this. Keep in mind, though, the California AG's office takes the position, whether or not they will ever go into a court and really try to rely on it, that California law—the Cartwright Act—does not recognize *Copperweld* and that they were just clarifying with this amendment. At least over in the AG's office, they believe that there is no *Copperweld* doctrine in California. There may be some states that are still out there, namely California, where there is a little bit of risk on that point. I don't know how you deal with that in counseling, other than just rely on the good sense of the California courts at least to rein them in.

WHITENER: First, I agree with Steve that there are a lot of situations here that are not too hard. It is not an issue that preoccupies me on a daily basis, and my client is a fairly broad-based company. Second, to go back to the question Gerry posed a little earlier—are you essentially prejudicing yourself if you do take the position that affiliated entities are commonly controlled, so that you are setting yourself up to fail if somebody disagrees?

I think you need to essentially make an election in your business planning as to whether you are going to defend coordination on a *Copperweld* basis or not. Now when I said you need to have a hip pocket argument in reserve in cases where *Copperweld* protection is unclear, what I meant in terms of the substantive analysis is that if there were found to be coordination that is subject to Section 1 analysis, you would also have arguments that it should be viewed as legitimate under the rule of reason. But I don't think typically you are going to be able to play both sides of the fence on whether you are coordinating the activities of the affiliates in the first place. If you are, then you either must have a good *Copperweld* argument or the arrangement has to be defensible under the rule of reason. You can't coordinate and then later say, "Well, there was no coordination, there was no agreement."

The other thing I just want to mention is that there can be real business situations in which commonly controlled entities are not always entirely coordinated and seamless. For example, a lot of companies have multiple operations, and suppose that one of those operations deals with a customer who is also a competitor of a different business within the controlled entity. Those customers might in some situations want, as a contractual matter and as a commercial matter, to be assured that certain confidential information they provide to their supplier isn't also going to go to an affiliated entity of the supplier that competes with the customer. They may want an information firewall. Often those are done for business reasons to give the customer the protection it wants. Sometimes firewalls are imposed by antitrust decrees to remedy vertical merger issues. That is not at all inconsistent with *Copperweld* protection for agreements among the commonly controlled businesses. I am just pointing out that, when I say the way to avoid problems in majority ownership situations is to make certain the relationships are overt and that it is clear that everybody is commonly controlled, there may be times when those commonly-controlled entities are not run in an entirely seamless, "single-enterprise" manner. There may be legitimate reasons to respect the separateness of those entities for commercial reasons, such as assuring a customer that information that goes to one entity will not go to the other. Commonly coordinating the affiliates is usually the sensible business thing to do, but it doesn't always mean that you are going to do it entirely or perfectly or in every respect.

HENRY: Let me mention a comment that came in this morning via e-mail during the Brown Bag discussion. Mark, you reference *Copperweld* protection several times and the importance of holding the company as a single entity, but the flip side of that is if you are behaving as a single entity, then for Section 2 purposes, the assessment of market power will combine and consolidate

all of your various holdings. Assuming that you have two wholly-owned subsidiaries that may be competing with each other in the marketplace, offering the same or similar product, will their market shares be combined for Section 2 purposes? It is not really “immunity from the antitrust laws”; you have to consider the Section 2 implications, also.

WHITENER: That is clearly right. When we all talk about *Copperweld* “protection” or “immunity,” we are simply dealing with whether there is an agreement. By the way, there are court decisions that have said that if you meet the criteria of *Copperweld*, it could apply to not only a Section 1 agreement but also to an agreement to monopolize under Section 2. But it is, strictly speaking, only a question of whether there is an agreement.

ALEXIS: I thought I would comment on the use of *Copperweld* in other areas. I think as Steve said, especially in the vertical areas where you have an agent, *Copperweld* seems to be creeping in. I think that makes a lot more sense than the dichotomy in the resale price maintenance area of asking, is somebody really an agent or somebody a retailer for purposes of dictating the retail price? The analysis as to whether there is an economic interest—a unity of interest—seems to me to be a more thorough analysis than trying to just establish that dichotomy, though admittedly on the issue of whether someone is an agent, some of those questions come up.

The other area where *Copperweld* creeps in is under Section 8 of the Clayton Act on interlocking directorates. There you have to worry about whether you have an interlocking director to lead the potential charge when you own less than 100 percent of a company and you are hovering just around 50 percent.

The courts have said that they are going to use the same analysis under *Copperweld*, that is, is there sufficient evidence of control? They obviously go further than *Copperweld* because *Copperweld* only applies to a wholly-owned subsidiary situation, but they will look at situations where the ownership is less than 100 percent and follow some of the district court cases that have developed *Copperweld* in minority ownership situations under Section 1 of the Sherman Act.

HENRY: We really appreciate the participation of everyone on the panel. It’s been very interesting and insightful. ●