The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel:
Perspectives in Antitrust

NOVEMBER 2017 VOLUME 6, NUMBER 1

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Sister Company Liability for Antitrust Conspiracies: Open Questions in Reconciling *Copperweld* and *Twombly*

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I. INTRODUCTION

In today's modern business world, where companies often have complex corporate structures with numerous subsidiaries, holding companies and disparate business forms across the world, plaintiffs often allege antitrust claims against multiple affiliated defendants sharing at least some degree of common ownership or control. When plaintiffs allege claims against affiliated defendants under Section 1 of the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of trade,[1] two questions frequently arise. The first is whether the affiliated companies are legally capable of conspiring. The second is whether the plaintiff sufficiently pleads facts plausibly showing that each affiliated company individually joined a conspiracy.

Taken separately, the U.S. Supreme Court has provided relatively straightforward answers to each question. On the first, the Court held in *Copperweld Corp. v. Independence Tube Corp.*[2] that a parent company and its wholly-owned subsidiaries are legally incapable of conspiring with each other because they constitute a single enterprise under the antitrust laws.[3] On the

[1] 15 U.S.C. § 1.
[2] 467 U.S. 752 (1984).
[3] *See id.* at 771, 777.

second, the Court concluded in *Bell Atlantic Corp. v. Twombly*[4] that to state a Section 1 claim, a complaint must contain "enough [non-conclusory] factual matter (taken as true) to suggest an agreement was made" and "plausible grounds to infer an agreement" by a defendant.[5] In so ruling, the Court suggested in a footnote that a complaint cannot simply "furnish[] no clue" as to which defendant entered an agreement "or when and where the illicit agreement took place."[6]

Both lines of authority frequently intersect in cases involving conspiracy claims against multiple affiliated companies. Suppose, for instance, that a plaintiff alleges that a global parent company dominates and closely controls all of its wholly-owned subsidiaries such that they constitute a "single enterprise," but only presents facts suggesting a foreign subsidiary joined a conspiracy and nothing implying a U.S. subsidiary did.

In that scenario, should a court hold that a plaintiff may state a claim against the U.S. sister company based on the affiliate's acts because they are part of a "single enterprise" under *Copperweld*? Or should a court instead hold that the plaintiff must present factual allegations suggesting *each* affiliated company joined or participated in a conspiracy under *Twombly*?

Faced with reconciling *Copperweld* and *Twombly*, courts have struggled with those questions and have reached decisions in considerable tension with each other. Until the U.S. Supreme Court clarifies a plaintiff's burden in presenting allegations against multiple affiliated companies that allegedly are part of a "single enterprise," companies with complex corporate structures would be well-advised to monitor developments in the case law and be cognizant of the different approaches courts have taken.

Below, this Article discusses general principles of corporate liability under *Copperweld*, which form a backdrop to "single enterprise" theories asserted by some plaintiffs. The Article then summarizes examples of two divergent lines of authority weighing in different directions on whether a sister company can be held liable for an affiliate's conduct. It concludes by identifying a number of open questions that might arise in litigation over a sister company's liability for an affiliate's actions in a Sherman Act conspiracy.

II. GENERAL PRINCIPLES OF CORPORATE LIABILITY UNDER COPPERWELD

The U.S. Supreme Court held in *Copperweld* that "as a matter of law, a corporation and its wholly owned subsidiaries 'are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.'"[7] In so ruling, the Court reasoned, in part, that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise," because both shared "a complete unity of interest."[8] The Court added that a parent and a wholly owned subsidiary also "share a common purpose"

[4] 550 U.S. 544 (2007).
[5] *Id.* at 556-57.
[6] *Id.* at 565 n.10.
[7] ABA Section of Antitrust Law, *Antitrust Law Dev.* 31 (8th ed. 2017) (quoting *Copperweld*, 467 U.S. at 777).
[8] *Id.* at 771.

because "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."[9] Based on the Court's reasoning in *Copperweld*, many lower courts have recognized that wholly-owned sister companies are incapable of conspiring with each other.[10] As the U.S. Court of Appeals for the Tenth Circuit recently put it, wholly-owned sister companies, "along with their parent, constitute a single economic enterprise for antitrust purposes."[11]

A very different question, however, is whether a sister company may be liable for the conspiratorial acts of affiliated companies that are neither parents nor subsidiaries. In other words, can affiliated corporate defendants simultaneously assert that they are a single enterprise such that they are legally incapable of conspiring with each other under *Copperweld*, but different entities such that plaintiff must allege "specifics as to the role each played in the alleged conspiracy" under *Twombly*?[12]

III. AUTHORITY SUGGESTING SISTER COMPANY LIABILITY

Some cases suggest that in certain circumstances, courts may consider an entire corporate family to constitute a single enterprise (i.e., that all members of the corporate family, including the parent and all subsidiaries, are alter egos of each other) such that individualized allegations regarding each affiliate's decision to join and role in a Sherman Act conspiracy might be unnecessary.

Perhaps the most notable example in the Section 1 context is the U.S. Court of Appeals for the Sixth Circuit's opinion in *Carrier Corp. v. Outokumpu Oyj*.[13] There, the Sixth Circuit suggested that when a plaintiff alleges that a parent company operated an entire corporate family as a single enterprise through domination and control, detailed factual allegations about each affiliate's role in a conspiracy might be unnecessary.

In *Carrier Corp.*, the plaintiff alleged Section 1 claims against two Finnish parent companies and their U.S. subsidiaries.[14] According to the complaint, the European Commission found that the two Finnish parent companies had participated in a price-fixing and market allocation conspiracy in Europe.[15] The complaint further alleged that the ultimate Finnish parent company "had effective control over the commercial policy and business decisions of its subsidiaries, and did business through its subsidiaries."[16]

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[9] *Id.* at 771-72.

[10] *See, e.g.*, *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1233 (10th Cir. 2017) ("[T]he majority of our sister circuits (indeed, every circuit to address the question) . . . have held that *Copperweld*'s rationale and underlying policy apply with equal force to sister corporations that are wholly owned subsidiaries of the same parent . . . ." (citations and internal quotation marks omitted)); ABA Section of Antitrust Law, *supra*, at 32 ("Most courts have held that the *Copperweld* rule extends to agreements between sister corporations.").

[11] *Lenox*, 847 F.3d at 1233.

[12] *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008); *see also In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1170 (D. Idaho 2011) (discussing case law "holding that an antitrust plaintiff must 'allege that each individual defendant joined the conspiracy and played some role in it . . . ." (quoting *In re Elec. Carbon Prods.*, 333 F. Supp. 2d 303, 311-12 (D.N.J. 2004)).

[13] 673 F.3d 430 (6th Cir. 2012).

[14] *See id.* at 435.

[15] *See id.*at 435-36.

[16] *Id.* at 435.

On appeal, the Sixth Circuit held that the absence of direct allegations regarding the U.S. subsidiaries was not dispositive of the Section 1 claims against them.[17] Rather, the court explained that, in its view, "the court may look beyond th[e] entities' corporate forms if the complaint presents facts to support a determination that the subsidiaries were alter egos of the parent corporation."[18] According to the court, the relevant question was whether the Finish companies' control "was sufficiently extensive to permit imputation of the conspiracy to the U.S. entities."[19]

Deeming the "[m]ost important[]" allegation to be "that the various [defendant] entities were operated and deliberately portrayed to the outside world as a 'single global enterprise'" with overlapping, rotating personnel between the U.S. and European entities, the court held that "[u]nder such circumstances, requiring [plaintiff] to delineate in the complaint the role each subsidiary played in the conspiracy is unnecessary."[20] Accordingly, the court held that the plaintiff had stated a viable Section 1 claim against the U.S. subsidiaries.[21]

Relying on *Carrier Corp.*, a district court reached a similar holding in *In re Automotive Parts Antitrust Litigation*.[22] In that case, the court denied the defendants' motion to dismiss and held that "[b]ecause the complaints must be viewed as a whole, detailed allegations about the involvement of each [subsidiary] are not needed" in light of allegations that the parent company coordinated and controlled its two subsidiaries.[23]

Additionally, a few cases involving claims under Section 2 of the Sherman Act, which prohibits unlawful monopolization, attempted monopolization and conspiracies to monopolize,[24] suggest that a single enterprise theory might be viable in some circumstances to hold sister companies liable for affiliates' acts in Section 1 cases. In *In re Zinc Antitrust Litigation*, for instance, the district court held that two affiliates of a global conglomerate "cannot have it both ways," by arguing that they cannot conspire with each other under *Cooperweld*, but then argue that "[one] may not be individually liable for playing a direct and key role in [the other's] ability to control prices in a market in which it competes."[25] In so ruling, the court stated that, in its view, "neither *Copperweld* nor its progeny state that corporate affiliates may never be treated together where the allegations indicate that such treatment is appropriate."[26]

Similarly, in *Lenox MacLaren Surgical Corporation v. Medtronic, Inc.*, the U.S. Court of Appeals for the Tenth Circuit held that "*Copperweld*'s reasoning necessarily denounces Defendants' belief that [plaintiff] could directly

[17] *See id.* at 444-46.
[18] *Id.* at 445 (citations omitted).
[19] *Id.*
[20] *See id.* at 445-46.
[21] *See id.* at 446.
[22] No. 12-md-02311, 2013 WL 2456613 (E.D. Mich. June 6, 2013).
[23] *Id.* at *1, 4.
[24] *See* 15 U.S.C. § 2.
[25] No. 14-cv-3728 (KBF), 2016 WL 3167192, at *14 (S.D.N.Y. June 6, 2016).
[26] *Id.* at *21.

establish its non-conspiracy § 2 claims only by proving that '*specific* Defendants independently satisfied each necessary element of the claims.'"[27] Instead, the Tenth Circuit explained that "in a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a monopolization or attempted monopolization claim."[28]

IV. AUTHORITY SUGGESTING NO SISTER COMPANY LIABILITY

In contrast, a number of courts have dismissed cases against sister companies where no facts suggested they knew of or joined a conspiracy in which an affiliate allegedly participated. Reasoning that a plaintiff cannot simply group together related corporate entities, those courts have instead held that to state a viable Section 1 claim, a complaint must contain factual allegations suggesting *each* affiliate's role in a conspiracy.[29]

In *Processed Egg Products*, a district court held that class plaintiffs had failed to state a claim against three entities (Hillandale Gettysburg L.P., Hillandale Farms Inc., and Hillandale Farms East, Inc.) because the plaintiffs did not allege specific facts connecting each entity to the overarching entity or satisfy the requirements to impute another affiliated entity's (Hillandale Farms) liability to them.[30] In so ruling, the court rejected application of the "single enterprise" theory as "unsupported by legal authority" and insufficient to disregard their separate corporate forms.[31]

Although the complaint "alleged conduct that ostensibly advanced the conspiracy to 'Hillandale Farms'" (e.g., allegedly signing a commitment sheet to either reduce flock size or dispose of hens), it did not directly allege that any of the three other defendants "individually agreed to or participated in the conspiracy to reduce the supply of eggs."[32] The plaintiffs maintained that doing so was unnecessary because the complaint alleged "that through vertical integration and overlapping owners and management each of the [four] entities is a part of an integrated enterprise."[33]

The court rejected the plaintiffs' argument for several reasons.[34] *First*, the court explained that, in its view, the U.S. Court of Appeals for the Third Circuit had rejected a virtually identical argument line of argument by holding that "it does not follow from *Copperweld* that subsidiary entities are automatically liable under § 1 for any agreements to which the parent is a party," and other

[27] 847 F.3d 1221, 1236 (10th Cir. 2017).
[28] *Id.* (citation omitted). *But see id.* at 1237 (explaining that a corporation cannot be held liable under Section 2 "merely by virtue of its place in the same corporate family" without evidence of its involvement in the challenged conduct).
[29] *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.44 (3d Cir. 2010) ("As a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship.").
[30] 821 F.Supp.2d 709 at 745.
[31] *Id.* at 749.
[32] *Id.* at 746-47.
[33] *Id.* at 747-48.
[34] *Id.* at 748.

courts have similarly rejected attempts "to draw a 'single enterprise' theory from *Copperweld*."[35] *Second*, the court held that allegations of vertical integration and overlapping ownership and control did not intimate that the three entities were "so linked that they effectively function as [a] single entity with respect to alleged antitrust conduct."[36] Thus, the court concluded that the allegations did not plausibly suggest that the three entities were "under common ownership or control such that a single decision-making source exercises definitive control over each of them."[37] *Lastly*, the district court noted that "the mere 'fact that two corporations have common shareholders, officers or directors, or that their names are similar,' does not 'impose liability on one for the torts of the other or its agents."[38]

Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*,[39] another district court considered whether a plaintiff had stated a claim against a related corporate entity. There, Defendant Philips Electronics North America Corporation ("PENAC") moved for dismissal, arguing that the complaint did not contain any allegations suggesting its participation in an alleged price-fixing conspiracy.[40] PENAC was allegedly a wholly-owned subsidiary of Philips International B.V., which in turn was allegedly a wholly-owned subsidiary of Royal Philips Electronics N.V. ("Royal Phillips"), an alleged co-conspirator.[41] Plaintiffs responded, in part, that they had stated a claim based on allegations that Royal Phillips and Royal Phillips' joint venture LG Display had agreed with other defendants to fix prices.[42]

The court concluded that the complaint fell short of alleging PENAC's role in the alleged conspiracy, because it contained no allegations suggesting how PENAC had participated.[43] In addition, the court held that the allegations regarding Royal Phillips and LG Display were insufficient to connect PENAC to the alleged conspiracy.[44] Although the court noted that the complaint "need not include elaborate detail about PENAC's role," the complaint was insufficient because it did not specifically plead that PENAC had joined the conspiracy.[45] Accordingly, the district court granted PENAC's motion to dismiss.[46]

V. CONCLUSION AND OPEN QUESTIONS

As shown above, a sister's company's Section 1 liability for conspiracies in which affiliates allegedly participated raises a host of difficult questions and divergent authority in reconciling *Twombly* and *Copperweld*, particularly when plaintiffs present "single enterprise" theories. Perhaps unsurprisingly given

[35] *Id.* (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 341 n.44).
[36] *Id.* at 749.
[37] *Id.* (citations omitted).
[38] *Id.* (citing 10 *Fletcher Cyclopedia of the Law of Corp.* § 4878).
[39] Nos., 07-1827 SI, 09-5609 SI, 2010 WL 2629728 (N.D. Cal. June 29, 2010).
[40] *Id.* at *6.
[41] *Id.*
[42] *Id.* at *7.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at *8.

the unsettled state of the case law, a number of open questions might arise in litigating "single enterprise" arguments against sister companies. Below are several examples:

- What role do traditional corporate veil-piercing principles play if plaintiffs allege a "single enterprise" theory? To hold a sister company liable, after all, a court would need to engage in "triangular" veil piercing (through veil-piercing[47] from an affiliate to a parent, and then reverse veil-piercing[48] a parent's veil to reach a sister company), an approach that some jurisdictions have expressly rejected.[49]

- If veil-piercing rules still apply, what choice of law rules should govern, especially in cases involving foreign affiliates or parents? What if there are intermediate holding companies incorporated elsewhere? And what if any link in the veil-piercing chain is domiciled in a jurisdiction that would not permit veil piercing or reverse veil piercing based on the complaint's allegations?

- May a plaintiff establish personal jurisdiction over an entire corporate family by naming a U.S. subsidiary with no connection to an alleged conspiracy in which its foreign sister companies allegedly participated and claiming that all family members constitute a single enterprise?

- What if the sister company, affiliates or intermediate holding companies are not wholly-owned subsidiaries of a common parent, but instead partially or majority-owned by other companies?

- If a court accepts the "single enterprise" theory for global corporations, does it need to carve out sales by foreign subsidiaries that would otherwise be beyond the reach of U.S. antitrust law under the Foreign Trade Antitrust Improvements Act of 1982[50] for liability and damages purposes?

Those questions and more remain unsettled and debatable. Nevertheless, companies would be well-advised to be aware of the different arguments that plaintiffs might make to try to establish liability over sister companies, and to monitor developments in case law reconciling *Copperweld* and *Twombly*.

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[47] Veil piercing is a "tool of equity" that in some circumstances permits "disregard of the corporate entity to impose liability on the corporation's shareholders." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (citation omitted).
[48] In reverse veil-piercing, "the plaintiff seeks to hold the corporation liable for the actions of its shareholder or someone who controls the entity." William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corp.* § 41.70 (Sept. 2017 update).
[49] *See, e.g.*, *Donastorg v. Daily News Publish. Co.*, No. ST-2002-CV-1177, 2015 WL 5399263, at *73 (V.I. Super. Aug. 19, 2015) (listing state cases rejecting the single enterprise theory); *Minno v. Pro-Fab, Inc.*, 905 N.E.2d 613, 617 (Ohio 2009) ("[A] plaintiff cannot pierce the corporate veil of one corporation to reach its sister corporation.")
[50] 15 U.S.C. § 6(a).