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Comments: The Intracorporate Conspiracy Doctrine

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COMMENTS

THE INTRACORPORATE CONSPIRACY DOCTRINE

Intracorporate conspiracy arises when a corporation and its own officers, directors, employees, or agents conspire to violate the law. The doctrine of intracorporate conspiracy has posed conceptual problems for the courts, however, because under corporate agency principles a corporation is personified through the acts of its agents and therefore the requisite element of plurality of actors is not present. Notwithstanding this conceptual difficulty, courts have applied the intracorporate conspiracy doctrine in some contexts. This comment reviews the history of the intracorporate conspiracy doctrine and its varied application in the areas of antitrust, civil rights, and criminal law.

I. INTRODUCTION

Under the intracorporate conspiracy doctrine, a corporation is deemed capable of engaging in a conspiracy with its own officers, directors, employees, and agents.[1] Courts have had difficulty accepting the concept of intracorporate conspiracy, however, because under elementary principles of corporate agency law a corporation is personified through the acts of its agents.[2] The acts of corporate agents thus become the acts of the corporation and the corporation is viewed as the sole legal actor.[3] Because a conspiracy requires a plurality of actors, the personification of the corporation as the sole legal actor defeats a conspiracy charge.[4]

Courts have recognized the intracorporate conspiracy doctrine in some contexts, but not in others. In some areas of the law, courts bar the doctrine on the conceptual grounds just stated.[5] In other areas of the law, courts have held that the purposes, policies, and practicalities supporting recognition of the doctrine outweigh any conceptual problem and justify intracorporate conspiratorial liability.[6] This Comment reviews

1. United States v. Hartley, 678 F.2d 961, 970 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). *See generally* Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 437-40 (1983).
2. *Hartley*, 678 F.2d at 970.
3. *Id.*
4. *See infra* note 13 and accompanying text.
5. *See, e.g.*, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Weaver v. Gross, 605 F. Supp. 210 (D.D.C. 1985); Baker v. Stuart Broadcasting Corp., 505 F.2d 181 (8th Cir. 1974).
6. *See, e.g., Hartley*, 678 F.2d 961; United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982); Dussuoy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981); Novotny v. Great Am. Fed. Sav. & L. Ass'n., 584 F.2d 1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979). *See also* Brickey, *Corporate Criminal Liability — A Primer for Corporate Counsel*, 40 BUS. L. 129, 143-45 (1984) (noting that federal courts almost uniformly have held that a corporation and its officers and agents are generally incapable of conspiring under antitrust law while the same courts have

the history of the intracorporate conspiracy doctrine, examines justifications for acceptance and rejection of the doctrine, and addresses specific application of the doctrine in the areas of antitrust, civil rights, and criminal law.

II. THE INTRACORPORATE CONSPIRACY DOCTRINE GENERALLY

A. Origins and Development of Conspiracy Law

At common law, conduct constituting conspiracy was viewed very narrowly. The earliest common law conspiracy was limited to situations involving abuse of legal process; that is, only a confederacy or alliance for the false and malicious promotion of various pleas and indictments was recognized as conspiracy.[7] This earliest form of conspiracy soon was supplemented by various statutes directed against combinations for treasonous purposes, breaches of the peace, disturbance of the markets by merchants, price raising by merchants, and the raising of hourly wages by laborers.[8]

The modern concept of conspiracy has grown out of the early doctrine that the crux of the crime is the intent.[9] The basic theory was that an evil intent manifested by any act done in furtherance of such intent might be punishable, although the act did not amount in law to attempt. Under this reasoning, the infamous Star Chamber, in 1611, finally settled a recurring question under developing conspiracy law. In *Poulterers' Case*,[10] the Star Chamber held that the agreement for the combination or confederacy was indictable as a substantive offense.[11] In effect, the agreement of two parties became the "act" done in furtherance of the conspiracy in the eyes of the law. From this holding, conspiracy law theory made an easy transition to the view that the agreement or combination itself should be regarded as a complete act of conspiracy.[12] The result is a modern definition of conspiracy generally defined as: (1) an agreement, (2) by two or more persons, (3) to do an unlawful act, or to do a lawful act by unlawful means.[13] Still, general agreement on a definition of con-

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universally recognized that a corporation may be liable under general conspiracy law for purely intracorporate agreements); Welling, *Intracorporate Plurality in Criminal Law Conspiracy*, 33 HASTINGS L. J. 1155, 1156-58 (1982) (The question of whether multiple agents of a single corporation can constitute a plurality has been answered differently by the courts in different contexts — in antitrust and civil rights cases, courts generally have held that multiple agents are not a plurality but that the requisite pluality exists in the criminal law context).

7. R. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 6 (reprinted ed. 1986) [hereinafter WRIGHT]; Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 396 (1922) [hereinafter Sayre].
8. *Id.*
9. WRIGHT, *supra* note 7 at 6; SAYRE, *supra* note 7 at 398.
10. 9 Coke 55b, 77 Eng. Rep. 813 (1611).
11. WRIGHT, *supra* note 7, at 6-7.
12. *Id.* at 7.
13. Mason v. State, 302 Md. 434, 444, 488 A.2d 955, 960 (1985) (defining criminal

spiracy does not solve all issues arising under conspiracy law. One prominent issue of controversy is whether a corporation is capable of conspiracy.

B. Intracorporate Conspiracy and the Dilemma it Presents

In modern conspiracy law, the corporation is generally viewed as an entity or person capable of conspiring.[14] This general rule of corporate conspiratorial liability is questioned, however, when an intracorporate conspiracy is alleged.

Under basic agency principles, authorized acts of corporate officers, directors, employees, and agents are attributed to the corporate *persona ficta*.[15] The corporation becomes a legal actor with the appurtenant rights and responsibilities. Under the intracorporate conspiracy doctrine, however, a corporation is deemed to have conspired with its own agents.[16] Thus, principles of agency law conflict with principles of conspiracy law. On one hand, the agent's conduct is attributed to the corpo-

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conspiracy); Beye v. Bureau of National Affairs, 59 Md. App. 642, 658, 477 A.2d 1197, 1206 (1984) (defining civil conspiracy). *See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.4, at 525 (2d ed) [hereinafter LAFAVE].

14. The concept of the corporation as a "person" or entity can be traced as far back as the thirteenth century. Ancient canon law is credited with the creation of the corporate *persona ficta* concept. *See* Rooney, *Maitland and the Corporate Revolution*, 26 N.Y.U.L. REV. 24, 32 (1951). Early common law also recognized the corporation as an entity, viewing the corporate existence as a concession from the state that justified increased governmental control and taxation. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 9, at 18 (3d ed. 1983) [hereinafter HENN]. American corporate law, derived from common law, similarly began by treating the corporation as an entity established by special concession from the state. *Id.* § 12, at 24. Subsequent developments, such as general incorporation statutes and competition among the states for corporate business, have resulted in increased powers and rights for the corporate entity. Today, the corporation is usually regarded as a person unless the subject matter or context of a particular constitutional, statutory, or common law provision requires otherwise. *Id.* § 80, at 179. For a discussion of the corporations rights see H. OLECK, MODERN CORPORATION LAW Vol. 1 § 7, at 23 (1958). *See generally* Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245 (1979).

    The usual situation where the corporation conspires with parties or entities outside the corporate structure can be termed an extracorporate conspiracy. *See* Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 440 (1983). In such a case the plurality requirement is satisfied and conspirational liability imposed upon the corporation. *See* United States v. Hartley, 678 F.2d 961, 968-69 (11th Cir. 1982) (dictum), *cert. denied*, 459 U.S. 1170 (1983). In *Hartley*, the Eleventh Circuit noted that a finding sufficient to connect outside actors with corporate actions justified convictions under 18 U.S.C. § 371, and that existence of the noncorporate conspirators alleviates the need for examination of the intracorporate conspiracy doctrine. *Id.* at 968-70.

15. *Hartley*, 678 F.2d at 970; *Nelson Radio*, 200 F.2d at 914. *Cf.* 2 W. FLETCHER, CYCLOPEDIA OF THE LAWS OF PRIVATE CORPORATIONS § 437 (Rev. ed. 1982).

16. Dussuoy v. Gulf Coast Inv. Corp., 660 F.2d 594, 602-03 (5th Cir. 1981) ("The concept of intracorporate conspiracy raises difficult conceptual problems . . . on whether such a conspiracy is possible."); *see also* Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 437-40 (1983).

ration; on the other hand, the agent and the corporation are considered distinct entities capable of conspiracy. Under the intracorporate conspiracy doctrine, principles of agency law are subordinated to the principles of conspiracy law in order to impose conspiratorial liability on the corporation or its agents.

Critics of intracorporate conspiracy doctrine adopt the single legal actor approach.[17] Illustrative of this approach is the Fifth Circuit opinion in *Nelson Radio & Supply Co. v. Motorola*.[18] In *Nelson Radio & Supply*, the United States Department of Justice alleged that a corporation, its president, sales manager, officers, employees, representatives, and agents had conspired to violate provisions of the Sherman Antitrust Act.[19] The Fifth Circuit observed that because the only mediums through which a corporation can act are its officers, representatives, and agents, the authorized acts of the agents are acts attributable to the corporation under law.[20] The court thus viewed the corporation as the sole legal actor. After noting that conspiracy law requires two or more parties be engaged in an agreement, the Fifth Circuit affirmed dismissal of the conspiracy count for lack of a plurality of actors.[21] By viewing the corporation as the sole legal actor, the Fifth Circuit avoided the inconsistent application of attribution principles that occurs under the intracorporate conspiracy doctrine.

Not all courts accept the rationale of *Nelson Radio & Supply*, however, and debate over the appropriateness of intracorporate conspiracy continues unabated.[22] Proponents of the doctrine view it as a necessary means of curbing corporate conspiracy. Whether the doctrine is accepted or rejected often turns on the particular context of the law in which the doctrine arises.[23] In some instances the social policies, legislative purposes, and practical realities mandate acceptance of the doctrine, while in others they do not. The arguments or justifications for acceptance or rejection of the doctrine, balanced against each other, determine whether imposition of intracorporate conspiratorial liability is appropriate in a given case.

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17. For a discussion of the single legal actor theory see Note, *Intracorporate Conspiracies under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470, 477-85 (1978).

18. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

19. *Id.* at 914.

20. *Id.*

21. In *Nelson Radio & Supply*, the Fifth Circuit specifically stated that, "A corporation cannot conspire with itself any more than a private individual can. . . ." *Nelson*, 200 F.2d at 914.

22. *Compare* Novotny v. Great Am. Fed. Sav. & L. Ass'n., 584 F.2d 1235, 1258 (3d Cir. 1978) (adopting the doctrine), *vacated on other grounds*, 442 U.S. 366 (1979); *with* Weaver v. Gross, 605 F. Supp. 210, 214 (D.D.C. 1985) (rejecting the doctrine).

23. Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. L. 129, 144-45 (1984); Welling, *Intracorporate Plurality in Criminal Law Conspiracy*, 33 HASTINGS L.J. 1155, 1156 (1982).

C. *Justifications for Acceptance or Rejection of Intracorporate Conspiracy*

Proponents of intracorporate conspiracy defend the doctrine by recognizing that personification of the corporation is a legal fiction that *expands* corporate liability.[24] By attributing an agent's conduct to the corporation, legal responsibility is extended to the corporation. Advocates argue that attribution of conduct rules are applicable only where liability can be extended and should not be used to immunize the corporation and its agents from conspiratorial liability.[25] Additionally, proponents suggest that non-recognition of intracorporate conspiracy is contrary to the underlying rationale of conspiracy law,[26] which is to prohibit wrongful group action. Proponents argue that failure to recognize the intracorporate conspiracy allows wrongful group action in the corporate setting to flourish unchecked.[27]

Proponents of the intracorporate conspiracy theory also maintain that acceptance of the doctrine is likely to produce more efficient internal policing by corporations. Advocates challenge the belief that rejecting the single legal actor approach will have a detrimental effect on the business environment.[28] They contend that a corporation is able to factor into its operational decisions all of the opportunity costs that arise, including the possibility of conspirational liability.[29] Proponents contend that, as a matter of public policy, the imposition of conspiratorial liability should be borne by the corporation as a cost associated with its enter-

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24. United States v. Hartley, 678 F.2d 961, 970 (11th Cir. 1982) (dictum), *cert. denied*, 459 U.S. 1170 (1983) ("[T]he underlying purpose is . . . to expand corporate responsibility."); Dussuoy v. Gulf Coast Inv. Corp., 660 F.2d 594, 603 (5th Cir. 1981) ("[A purpose] of the rule attributing agents' conduct to a corporation [is] . . . to require a corporation to bear the costs of its business enterprise.").

25. Novotny v. Great Am. Fed. Sav. & L. Assn., 584 F.2d 1235, 1257 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979). Addressing the issue of intracorporate conspiratorial liability under 42 U.S.C. § 1985(3), the Third Circuit stated, "we can perceive no function to be served by immunizing such action once a business is incorporated." *Id.*

26. Brickey, *supra* note 6, at 439.

27. The foundation of conspiratorial liability is "group danger." Conspiracy is punishable because of the belief that the joint nature of the undertaking increases the risk of successful achievement of the unlawful objective of the agreement. *Id.* Not recognizing the inherent group danger of the concerted actions of corporate employees is the consequence of the rejection of the intracorporate conspiracy doctrine.

28. *Cf.* Handler, *Some Misadventures in Antitrust Policymaking — Nineteenth Annual Review*, 76 YALE L. J. 92, 121 (1966). "If the plurality of actors demanded by Section 1 were satisfied by the officers and directors of a single company, then no corporate action would be immune from antitrust attack. Even an individual proprietorship could not transact any business without violating the antitrust laws." *Id.*

29. The corporation can not only obtain liability insurance for itself, but the corporate officers and directors can be insured by the corporation. *See* 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 6045.4, at 651-52 (Rev. ed. 1984).

prise.[30] Finally, proponents argue that, in some cases, principles of statutory construction may be applied to support the imposition of intracorporate liability.[31]

Opponents of the intracorporate conspiracy doctrine rely heavily on the single legal actor approach. The view that the corporation is the sole legal actor is supported by a number of arguments. First, the single legal actor approach provides consistent application of attribution of conduct rules under agency law.[32] Second, intracorporate conspiratorial liability arguably can have a detrimental effect upon business operations by "chilling" the creativity and aggressiveness of corporate directors and officers.[33] Third, advocates of the single legal actor approach argue that liability should not be imposed on the corporation because the corporation is only a tool, neutral in its instrumental nature.[34] Finally, depending on the particular context, critics of intracorporate conspiracy utilize principles of statutory interpretation and construction to support their position.[35]

Even courts that reject the intracorporate conspiracy doctrine on the basis of the sole legal actor theory frequently recognize the "independently motivated actor" rule to impose conspiratorial liability on corporate personnel. This rule arose from the Fifth Circuit's opinion in *Nelson Radio & Supply*.[36] In that case, the court, in rejecting the intracorporate conspiracy doctrine, observed that "it [was not] alleged affirmatively, expressly, or otherwise, that these officers, agents, and employees were actuated by any motives personal to themselves."[37] Courts have interpreted this language as creating the independently or personally mo-

30. *Cf.* 10 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4877, at 322-27 (Rev. ed. 1984); RESTATEMENT (SECOND) OF AGENCY § 219(1), Comment a (1958).

31. In antitrust law, controversy over the intracorporate conspiracy doctrine implicates both Sections One and Two of the Sherman Act. In order to give full effect to the entire statutory scheme, rules of statutory interpretation and construction must be considered. *See infra* notes 45-60 and accompanying text. In each of the other two contexts that this comment addresses, civil rights law and criminal law, only one statutory provision is implicated. Consequently, rules of statutory interpretation and construction are not as applicable.

32. The general rule is that the acts of the agents are acts of the corporation. Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

33. *See supra* note 28.

34. *Cf.* Caroline, *Corporate Criminality and the Courts*, 27 CRIM. L.Q. 237, 253 (1985).

35. The Third Circuit in Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978), *vacated*, 442 U.S. 366 (1979), undertook an indepth analysis in determining that intracorporate conspiracy exists under 42 U.S.C. § 1985(3). The court examined the history of the section, the broad wording of the statute, possible conflicts with other statutes, as well as the policies underlying the statute.

36. Nelson Radio & Supply Co., Inc. v. Motorola, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

37. *Nelson Radio & Supply*, 200 F.2d at 914.

tivated actor exception to non-liability.[38]

In *Greenville Publishing Co. v. Daily Reflector, Inc.*,[39] for example, the trial court granted summary judgment for the corporate defendant on a charge of conspiracy under Section One of the Sherman Act.[40] The Fourth Circuit agreed with the general rule that a corporation cannot be guilty of an intracorporate antitrust conspiracy because of the single legal actor rule.[41] Nevertheless, the Fourth Circuit reversed the summary judgment granted on the complaint,[42] reasoning that an exception to the general rule is justified when a corporate officer has an independent personal stake in achieving the corporation's illegal objective.[43]

The personally motivated employee is viewed no differently than someone outside of the corporation because the employee is acting without concern as to whether his actions benefit the corporation. Hence, a conspiracy between personally motivated agents and the corporation is not, in reality, an intracorporate conspiracy.[44] Rather, the conspiracy is between the corporation and outside parties — the personally motivated actors. Classifying corporate agents as personally motivated, therefore, takes the case out of an intracorporate or single legal actor analysis.

III. VIABILITY OF INTRACORPORATE CONSPIRACY IN SPECIFIC CONTEXTS

Courts balance the arguments presented above in favor of and against the intracorporate conspiracy theory. Which considerations carry greater weight varies depending upon the particular context. The following discussion addresses the viability of the doctrine in the various contexts in which the doctrine most frequently arises.

A. Antitrust Law

The intracorporate conspiracy doctrine first gained popular recognition in the field of antitrust law.[45] Antitrust law is also the context in

38. *See, e.g.*, St. Joseph's Hosp. v. Hospital Corp. of Am., 795 F.2d 948, 956 (11th Cir. 1986); Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1496 (3d Cir. 1985); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974); Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137, 139 (7th Cir. 1969).
39. 496 F.2d 391 (4th Cir. 1974).
40. *Greenville Publishing*, 496 F.2d 391, 393 (4th Cir. 1974). In *Greenville Publishing*, the corporate defendant was charged with conspiracy under both Section One and Section Two of the Sherman Act. The Fourth Circuit only remanded the Section Two claim for further consideration.
41. *Id.* at 399.
42. *Id.* at 400.
43. *Id.* at 399.
44. If conduct of an agent is not within the scope of his authority, then the conduct is not attributed to the corporation. *See* 10 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4877, at 325 (Rev. ed. 1984). Because that employee's conduct is not attributable to the corporation, he constitutes the second legal actor necessary for the conspiracy plurality.
45. The intracorporate conspiracy debate is generally traced back to the decision of the

which rejection of the doctrine occurs most frequently.[46] The focus of the intracorporate conspiracy debate under antitrust law centers on Section One of the Sherman Antitrust Act, which prohibits conspiracies in restraint of trade or commerce.[47] Although the United States Supreme Court has addressed intra-enterprise conspiracy under Section One,[48] it has never spoken specifically on the validity of intracorporate conspiratorial liability under that section.[49] The lower federal courts and state courts considering the issue consistently have held that the doctrine does not apply.[50]

The first court to consider the intracorporate conspiracy theory under Section One of the Sherman Act was the Fifth Circuit in *Nelson Radio & Supply*.[51] As noted earlier, the court rejected conspiratorial lia-

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Fifth Circuit in Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), which examined the concept under antitrust law. *See* United States v. Hartley, 768 F.2d 961, 970 (11th Cir. 1982) ("The premier case applying general agency principles to preclude intracorporate conspiracy was . . . in the antitrust context.").

46. The overwhelming majority of courts posed with the issue of intracorporate conspiracy under Section One of the Sherman Act reject the doctrine. See *infra* note 50.
47. Section One of the Sherman Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (Supp. 1987).

48. The intra-enterprise conspiracy doctrine governs conspiratorial liability within multi-enterprise corporations where the relationships between alleged conspirators are those of parent-subsidiary, or corporate entitles controlled by the same individuals. *See* Brickey, *supra* note 6, at 144 n.66. Some commentators read the intra-enterprise doctrine broadly to include conspiracies involving both corporate subsidiaries and corporate agents, directors, officers and employees. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 11A, at 323-29 (1977); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 26-38 (1981). The Supreme Court specifically addressed the intra-enterprise conspiracy theory under Section One of the Sherman Act in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). The Court held that a corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of Section One of the Sherman Act.
49. In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court, in dictum, did note that, "nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers." *Id.* at 770, n.15.
50. *See, e.g.*, Quality Foods de Centro Am. v. Latin Am. Agribusiness Devl. Corp., 711 F.2d 989, 997, n.9 (11th Cir. 1983); Morton Bldgs. of Neb., Inc., v. Morton Bldgs., Inc., 531 F.2d 910, 917 (8th Cir. 1976); Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 508 (4th Cir. 1974); Joseph E. Seagrams & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).
51. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *Nelson Radio & Supply* repeatedly has been recognized as the first case applying the intracorporate

bility on the basis of the single legal actor theory.[52] The court noted that the actions of the corporate agents consisted of carrying out their day to day responsibilities and implementing the corporation's management policy.[53] The court also recognized that, under agency law, the corporate entity can only act through its officers and representatives and therefore the acts of the agents are really the acts of the corporation.[54]

Perhaps the most important consideration that the court relied upon, however, was the statutory scheme under the Sherman Act.[55] The Sherman Act establishes a comprehensive legislative scheme that regulates a wide range of conduct, including conspiracy, monopoly, and restraint of trade. The court observed that intracorporate acts were not actionable under Section One but could be actionable under Section Two.[56] Section Two of the Sherman Act prohibits monopolies, attempts to monopolize, and combinations or conspiracies to monopolize by the agents of a single corporation.[57] Because the anti-competitive conduct of the one entity is covered under Section Two, courts hold that interpreting Section One as covering intracorporate conspiracy situations would render language of Section Two meaningless.[58] Because one of the cardinal rules of statutory interpretation is a statute should be construed so as

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conspiracy doctrine under Section One of the Sherman Act. *See, e.g.*, United States v. Hartley, 678 F.2d 961, 970 (11th Cir. 1982) ("The premier case . . . was *Nelson Radio & Supply*. . . ."); Dussnoy v. Gulf Coast Inv. Corp., 660 F.2d 594, 603 (5th Cir. 1981) (referring to the intracorporate debate and the "*Nelson Radio*" rule); Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, *supra* note 6, at 145; Welling, *Intracorporate Plurality in Criminal Law Conspiracy*, *supra* note 6, at 1162.

52. *Nelson Radio & Supply*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).
53. *Id.*
54. *Id.*
55. *Id.*
56. Section Two of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (Supp. 1987).

57. As the *Nelson* court stated: "[T]he acts of the corporate officers may bring a single corporation within section 2 of the Sherman Act. . . ." 200 F.2d at 914. *See also* White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942); Patterson v. United States, 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915).
58. United States v. Hartley, 678 F.2d 961, 971 (11th Cir. 1982) (dictum), *cert. denied*, 459 U.S. 1170 (1983) ("If section one's conspiracy charge was satisfied by a single corporate entity, it would render section two meaningless."); Dussuoy v. Gulf Coast Inv. Corp., 660 F.2d 594, 603 (5th Cir. 1981) ("[A]pplying the prohibition of combinations in restraint of trade contained in section 1 of the Sherman Act to the activities by a single firm renders meaningless section 2. . . .")

to avoid rendering language meaningless or surplusage,[59] courts generally reject the intracorporate conspiracy doctrine under Section One of the Sherman Act.[60]

B. Civil Rights Law Under Section 1985(3)

A second area of the law where debate over the intracorporate conspiracy doctrine continues is civil rights law. The question of intracorporate conspiracy arises under 42 U.S.C. section 1985(3), which prohibits conspiracies depriving individuals of the equal protection of the law or equal privileges and immunities under the law.[61] In this area of the law, acceptance of the doctrine varies among jurisdictions.[62] The Supreme

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59. In construing a statute a court is obliged, if reasonably possible, to read the statute so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory. Rome v. Lowenthal, 290 Md. 33, 41, 428 A.2d 75, 79 (1981).

60. *See supra* note 50. Most states also have statutory provisions regulating antitrust activity, generally similar in form to the Sherman Act. *See, e.g.*, MD. COM. LAW CODE ANN. § 11-202 (1983 & Supp.1987); N.Y. GEN. BUS. LAW § 340 (1968 & Supp. 1986). A corporate defendant must be aware that state law could be interpreted differently than federal antitrust law. In Dussuoy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981), for example, the Fifth Circuit noted that state antitrust law could be read more broadly than its federal counterpart. However state anitrust law generally will be interpreted as consistent with federal case law. *See, e.g.*, Quality Discount Tires, Inc. v. The Firestone Tire & Rubber Co., 282 Md. 7, 11, 382 A.2d 867, 869 (1978) ("The purpose of the [Maryland Antitrust] Act is to 'complement the body of federal law governing restraints of trade' . . . and . . . 'in construing this subtitle, the courts [should] be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.' ") (quoting Commercial Law Article, § 11-202); State v. Mobil Oil Corp., 38 N.Y.2d 460, 463, 381 N.Y.S.2d 426, 428, 344 N.E.2d 357, 359 (1976).

61. Section 1985(3) states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occassioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1981).

62. *Compare* Novotony v. Great Am. Fed. Sav. & Loan Ass'n., 584 F.2d 1235, 1259 (3d Cir. 1978) (concerted action among corporate officers and directors cannot constitute a conspiracy under section 1985(3)) *with* Baker v. Stuart Broadcasting Corp.,

Court had an opportunity to examine the validity of intracorporate conspiracy theory under section 1985(3) in *Great American Federal Savings & Loan Association v. Novotny*.[63] Unfortunately, the Court vacated the judgment on other grounds without commenting on intracorporate conspiracy.[64] Therefore, the current division in federal case law remains.

The first line of cases deciding whether intracorporate conspiracies are actionable under section 1985(3) is derived from the Seventh Circuit's opinion in *Dombrowski v. Dowling*,[65] authored by Associate Supreme Court Justice Blackmun. In *Dombrowski*, the plaintiff alleged that a realty corporation and its employee denied him rental space because many of his clients were members of minority groups.[66] The Seventh Circuit noted that only one corporation was involved and that the individual defendant acted within the scope of his authority.[67] The *Dombrowski* court then held that the statutory requirement of section 1985(3) 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 corporation.[68]

Courts have construed *Dombrowski* to mean that a single business decision or act by one business entity is not actionable under section 1985(3). However, courts adopting the *Dombrowski* formulation must decide whether the nonrecognition of the intracorporate conspiracy applies to cases where continued and varied instances of discrimination and harassment are alleged. Courts disagree on this issue.[69] A number of courts, employing the *Dombrowski* rule of nonrecognition of intracorporate conspiratorial liability, find liability in the multiple instances situation. These courts find that the *Dombrowski* rule is appropriate for one single act, but that the rule loses practicality where two or more corporate agents commit different discriminatory acts.[70] Other courts rely upon *Dombrowski* to reject the intracorporate conspiracy doctrine, even where more than a single discriminatory act is alleged under section

505 F.2d 181, 182-83 (8th Cir. 1974) (single acts of discrimination not actionable under § 1985(3)); Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972) (same) *and* Weaver v. Gross, 605 F. Supp. 210, 214 (D. D.C. 1985) (single or multiple acts of discrimination not actionable under § 1985(3) since there can be no conspiracy by purely intracorporate actions).

63. 442 U.S. 366 (1979).

64. *Id.* The Supreme Court stated that, "For the purposes of [this case], we assume but certainly do not decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3)." *Id.* at 372, n.11.

65. 459 F.2d 190 (7th Cir. 1972).

66. *Id.* at 191.

67. *Id.* at 196.

68. *Id.*

69. *Compare* Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa 1974) (ongoing policy of harassment and discrimination actionable under § 1985(3)); *with* Weaver v. Gross, 605 F. Supp. 210 (D.D.C 1985) (corporation not liable for conspiracy under § 1985(3) even for multiple acts).

70. *See, e.g.*, Craft v. Board of Trustees, 516 F. Supp. 1317, 1324 (N.D. Ill. 1981); An-Ti Chai v. Michigan Tech. Univ., 493 F. Supp. 1137, 1167 (W.D. Mich. 1980).

1985(3).[71] Thus, the *Dombrowski* analysis has been both embraced and rejected when applied beyond the facts of that case.

A second line of cases dealing with the intracorporate conspiracy doctrine under section 1985(3) holds that considerations of policy require application of the doctrine.[72] This reasoning is exemplified by the Third Circuit's opinion in *Novotny v. Great American Federal Savings & Loan Association*.[73] In *Novotny*, the plaintiff alleged that members of the corporation's board of directors intentionally and deliberately embarked upon a course of conduct which denied equal employment opportunities for certain employees.[74] The Third Circuit reviewed the history of section 1985(3)[75] and noted that the Supreme Court had expressed concern that the section would give rise to a general federal tort law.[76] The *Novotny* opinion indicates, however, that the Third Circuit does not believe that interpretation of section 1985(3) to include intracorporate conspiracies encourages development of general federal tort law.

The *Novotny* court acknowledged the *Dombrowski* single act rule, but found unpersuasive the line of cases adopting that rule.[77] The court chose to view the corporate defendant's reliance on the single legal actor rule as an allegation that incorporation confers an immunity from section 1985(3) liability for corporate employees.[78] The court chose not to immunize corporate conduct regardless of whether single or multiple acts are alleged.

Since the *Novotny* decision, courts addressing intracorporate conspiracy under section 1985(3) continue to disagree whether acceptance of the doctrine is justified.[79] Although there is some authority for a *per se* rejection of conspiratorial liability for the discriminatory acts alleged, most courts considering the doctrine agree that multiple acts are actionable under section 1985(3).[80] Thus, the current controversy centers on whether the allegation of a single discriminatory act is actionable. The approach to this issue espoused in *Novotny* appears to be the best approach because conspiracy law principles only require an agreement to do one illegal act and not an agreement to do a number of illegal acts.

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71. *See* Weaver v. Gross, 605 F. Supp. 210, 214 (D.D.C. 1985).
72. *See, e.g.*, Novotny v. Great Am. Fed. Sav. & Loan Assn., 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979); Jacobs v. Board of Regents, 473 F. Supp. 663, 670 (S.D. Fla. 1979).
73. 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).
74. *Id.* at 1237.
75. *Id.* at 1238-40.
76. *Id.* at 1240.
77. *Id.* at 1259.
78. *Id.* at 1257.
79. *Compare* Buschi v. Kirven, 775 F.2d 1240, 1252 (4th Cir. 1985) *with* An-Ti Chai v. Michigan Tech. Univ., 493 F. Supp. 1137, 1166 (W.D. Mich. 1980).
80. In Weaver v. Gross, 605 F. Supp. 210 (D.D.C. 1985), the United States District Court for the District of Columbia considered intracorporate conspiracy under section 1985(3). The court found that a *per se* rejection of the doctrine was justified under the section. *Id.* at 214.

C. *Criminal Law*

A number of courts recently have addressed the intracorporate conspiracy doctrine in the criminal law context. Four United States Courts of Appeals have considered the problem in prosecutions brought under the general federal conspiracy statute, 18 U.S.C. section 371.[81] These courts have all held that intracorporate conspiratorial liability is justified in the criminal context.[82] Illustrative of the approach taken is the Eleventh Circuit's decision in *United States v. Hartley*.[83]

In *Hartley*, the defendant corporation was charged with conspiracy under 18 U.S.C. section 371.[84] The court noted the inherent conflict that exists between agency principles and intracorporate conspiracy theory.[85] However, the court dismissed any conceptual difficulty without an exhaustive analysis. Rather, the *Hartley* court simply stated that intracorporate conspiratorial liability is justified under criminal law because corporations are personified to extend corporate responsibility.[86] The court reasoned that employing the fiction of the corporate personality in the criminal context would not expand corporate liability, but rather would narrow such liability inappropriately.[87]

The recognition of the intracorporate conspiracy doctrine seems to be most certain in the criminal law area. In addition to the uniformity among court decisions, most commentators agree that criminal responsibility for intracorporate conspiratorial acts is proper.[88] Further, case law in other contexts in which the doctrine arises commonly refer to criminal law as the context in which expansive corporate responsibility is demanded. As stated by Associate Supreme Court Justice Harlan in

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81. Section 371, the general federal criminal conspiracy law, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be [found guilty]. . . .

18 U.S.C. § 371 (1966).

82. United States v. American Grain & Related Indus., 763 F.2d 312, 320 (8th Cir. 1985); United States v. Peters, 732 F.2d 1004, 1008 (1st Cir. 1984); United States v. S & Vee Cartage Co., 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464 U.S. 395 (1983); United States v. Hartley, 678 F.2d 961, 970-72 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

83. 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

84. The conspiracy charge under 18 U.S.C. § 371 was only one of multiple charges brought against the defendants in *Hartley*. They were also charged with 17 counts of mail fraud under 18 U.S.C. § 13A, 14 counts of interstate transportation of fraudulently obtained money under 18 U.S.C. § 2314, and one count under RICO, 18 U.S.C. § 1962(c). *Hartley*, 678 F.2d 961, 965 n.2 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

85. *Id.* at 970.

86. *Id.*

87. *Id.*

88. *See* Welling, *Intracorporate Pluraltiy in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1201 (1983) (on balance, therefore, defining multiple agents to be a plurality in the criminal context is the better rule).

United States v. Wise,[89] "[T]he fiction of corporate entity, operative to protect officers from contract liability [has] never been applied as a shield against criminal prosecutions."[90]

IV. CONCLUSION

The intracorporate conspiracy doctrine presents conceptual difficulty for courts seeking to establish a conspiracy between a corporation and its own directors, officers, and agents. The conceptual difficulty stems from agency principles. Normally, acts of a director, officer, or employee are attributed to the corporation and the corporation is viewed as the sole legal actor. With only one actor in law, a charge of conspiracy cannot be sustained.

Courts choose to view the corporation as the sole legal actor in certain contexts, most notably antitrust law. These same courts, however, have not hesitated to ignore the fiction of the corporate person where expansion of liability is necessary most notably in civil rights and criminal law. The approach has been to weigh factors both for and against the doctrine in reaching a societal judgment demanding corporate responsibility in some contexts, but not in others. Consequently, a corporation and its own directors, officers, employees, and agents will be held liable only when the myriad of considerations dictate imposition of intracorporate conspiratorial liability.

John T. Prisbe

89. 370 U.S. 405 (1962).
90. *Id.* at 417 (Harlan, J., concurring).