PRIVATE EQUITY GROUPS UNDER COMMON LEGAL CONTROL CONSTITUTE A SINGLE ENTERPRISE UNDER THE ANTITRUST LAWS

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In *Copperweld Corp. v. Independence Tube Corp.*,[1] the Supreme Court held that a parent and its wholly-owned subsidiary should be treated as a single firm under the antitrust laws. The Supreme Court overruled the "intra-enterprise" conspiracy doctrine which had allowed different corporations under the same ownership and control to conspire with each other under the antitrust laws. While lower courts have expanded the *Copperweld* doctrine to apply beyond parents and their wholly owned subsidiaries, the case law is unclear as to what level of control or ownership suffices to trigger the *Copperweld* doctrine. This ambiguity can deter increasingly common investments by private equity groups that gives one investment fund manager with legal control of two different competitors but only minority ownership interests in them.

THE PRIVATE EQUITY MARKET

With $2 trillion in spending power, the private equity groups "now rule the deal world."[2] As the *New York Times* recently observed, "private-equity firms have gone on a shopping spree. This year they have bought some of the world's best-known brands, worth more than $347 billion, twice last year's pace and roughly equal to the gross domestic product of Belgium."[3] And, this "buyout spree is expected to run on."[4] In July 2006, three private equity firms joined forces to acquire Hospital Corporation of America in the "largest leveraged

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1. 467 U.S. 752 (1984).

2. Andrew Ross Sorkin, *Huge Buyout of Hospital Group Highlights Era of Going Private*, N. Y. TIMES, July 25, 2006, at A1.

3. *Id.*

4. *Id.*

buyout" in history.[5] And, in September 2006, two "titans of private equity"—each with support from other private equity funds—"battle[d]" to purchase Freescale Semiconductor "in the largest leveraged buyout of a technology company ever."[6] These joint investments—often referred to as "club deals"—have allowed private equity funds to leverage their assets and increase their ability to acquire control of prominent companies in a myriad of industries, such as Hertz Car Rental, Toys R' Us, Sealy and Sungard Data Systems.[7] Indeed, one commentator recently observed that "[t]he structure of the private equity business has evolved. . . [to] accommodate larger deals. . . . [T]he rise of 'club deals' including five or six players is common [and]. . . is starting to boost. . . buying power."[8]

Private equity fund managers invest pools of money from third-party investors. In practice, they often structure club deals with a separate investment vehicle (e.g., a limited liability company) in which the fund manager maintains a majority voting interest and control. In turn, the investment vehicle acquires majority ownership and the right to control the target. This structure can leave the private fund manager with a minority ownership interest in the target but the right to control the target's board of directors. Antitrust issues arise where private equity fund managers—through the use of different investment vehicles (with different investors)—acquire interests in competing firms and the right to control both of them. Although antitrust scrutiny does not apply to single firms, except when related to monopolization so as not to dampen "the competitive zeal of an aggressive entrepreneur,"[9] treatment of these companies remains murky.

In particular, no court has addressed whether two firms should be treated as one entity under the antitrust laws where

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5. *Id.*

6. Andrew Ross Sorkin & Laura J. Flynn, *Blackstone Alliance to Buy Chip Maker for $17.6 Billion*, N.Y. TIMES, Sept. 16, 2006, at C3.

7. Steve Rosenbush, *Fresh Barbarians at the Gates?*, BUSINESS WEEK ONLINE, June 13, 2006, *available at* http://www.businessweek.com/investor/content/jun2006/pi20060613_736996.htm. Also see the websites of private equity funds, specifically Kohlberg Kravis Roberts & Co., http://www.kkr.com, Bain Capital, http://www.baincapital.com and The Blackstone Group, http://www.blackstone.com.

8. Rosenbush, *supra* note 7.

9. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984).

a single investor has the right to control the boards of both firms but lacks majority ownership interests in either of them. Consistent with the *Copperweld* Court's command that "in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways. . . dictated by business judgment without increasing its exposure to antitrust liability,"[10] this article demonstrates that different entities under common legal control should constitute a single economic actor under the antitrust laws. As a single economic actor, they would be able to take advantage of the *Copperweld* doctrine.

Most antitrust laws regulate conduct involving a multiplicity of actors. Part I discusses how the *Copperweld* doctrine can alter liability under these laws. Part II explains the underpinnings of the *Copperweld* doctrine and traces the growth of its application to different organizational structures. Part II also demonstrates that the rationale of the *Copperweld* doctrine supports its application to all entities under common legal control.

A. *The Effect of the* Copperweld *Doctrine on Antitrust Laws That Require More Than One Actor*

The *Copperweld* doctrine applies to antitrust statutes that require a multiplicity of actors. The Copperweld doctrine can alter liability under Sections 1 and 2 of the Sherman Act, Sections 3, 4 and 8 of the Clayton Act and Section 2(a) of the Robinson-Patman Act.[11] The Copperweld doctrine can affect both plaintiffs and defendants depending upon the claim asserted. If the Copperweld doctrine applies to investors with legal control of, but minority ownership interests in, two competitors, investors and their legally-controlled firms can be relieved of liability under the antitrust laws that might otherwise exist. As a result, these investors can operate the commonly controlled firms in a manner that maximizes efficiencies without fear of antitrust liability.

Specifically, the *Copperweld* doctrine may provide a shield from liability under Sections 1 and 2 of the Sherman Act. Sec-

10. *Id.* at 773.

11. *See* 15 U.S.C. § 1 (2000 & Supp. 2003); 15 U.S.C. § 2 (2000); 15 U.S.C. § 13(a) (2000); 15 U.S.C. § 14 (2000); 15 U.S.C. § 15(a) (2000 & Supp. 2003); 15 U.S.C. § 19 (2000).

tion 1 prohibits "[e]very contract, combination. . . or conspiracy. . . in restraint of trade."[12] Every offense under Section 1 requires joint action.[13] Similarly, one of the proscribed offenses under Section 2 is a "combin[ation] or conspirac[y]. . . to monopolize any part of. . . trade or commerce."[14] Under the *Copperweld* doctrine, no liability under Sections 1 and 2 exists where both parties to the agreement or conspiracy are treated as the same actor.[15]

The *Copperweld* doctrine can have more subtle implications with respect to Sections 3 and 8 of the Clayton Act and Section 2(a) of the Robinson-Patman Act. Section 3 prohibits, among other things, exclusive dealing under certain circumstances. If the exclusive dealing is between two firms that are treated as the same actor under the *Copperweld* doctrine, no liability can arise.[16] Similarly, Section 2(a) of the Robinson-Patman Act makes it unlawful for "any person. . .to discriminate in price between direct purchasers of [a] commodit[y]" under certain circumstances.[17] A plaintiff cannot maintain a claim under this provision where the favored sales to its competitor are to the same economic actor as the seller under the

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12. 15 U.S.C. § 1 (2000 & Supp. 2003).

13. *See Copperweld*, 467 U.S. at 768 (stating "The point remains, however, that purely unilateral conduct is illegal only under § 2 and not under § 1").

14. 15 U.S.C. § 2 (2000). Section 2 also prohibits monopolization and attempted monopolization. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 445, 454 (1993) ("While §1 of the Sherman Act forbids contracts or conspiracies in restraint of trade or commerce, §2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.").

15. *See Copperweld*, 467 U.S. at 776 (holding that parent and wholly-owned subsidiary cannot conspire under § 1); Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139,147 n.13 (4th Cir. 1990) (affirming dismissal of claim for conspiracy to monopolize among two subsidiaries of the same parent); H.R.M., Inc. v. Tele-Commc'n, Inc., 653 F. Supp. 645, 648 (D. Colo. 1987) ("*Copperweld* applies to foreclose a claim of conspiracy to monopolize under § 2 of the Sherman Act").

16. *See, e.g., Advanced Health-Care*, 910 F.2d at 152 ("Although *Copperweld* has not specifically been applied to § 3 Clayton Act claims, extension of the Supreme Court's analysis is appropriate. If there can be no conspiracy or illegal agreement between Radford and Southwest, it follows, likewise, that there cannot be an illegal exclusive dealing arrangement within the corporate enterprise").

17. 15 U.S.C. § 13(a) (2000).

Copperweld doctrine.[18] In addition, the *Copperweld* doctrine can have important implications for liability involving interlocking directorates under Section 8 of the Clayton Act. That statute provides that "[n]o person shall, at the same time, serve as a director or officer in any two corporations. . . that are. . . competitors."[19] If the two corporations are treated as the same economic entity under the *Copperweld* doctrine, Section 8 will not apply and the same person can serve as an officer or director of competing corporations.[20]

While the *Copperweld* doctrine is often used defensively, plaintiffs can use the *Copperweld* doctrine offensively to establish liability under Sections 1 and 2 where none would otherwise exist. For example, Section 4 of the Clayton Act limits damages recoveries to direct purchasers (or competitors in certain circumstances) of defendants for harm suffered by reason of Section 1 and 2 violations.[21] Relying upon the *Copperweld* doctrine, plaintiffs have recovered damages based upon direct purchases of their parents, subsidiaries or sister corporations.[22] Without the *Copperweld* doctrine, those claims might otherwise have been dismissed.

Notably, the *Copperweld* doctrine does not apply where the single economic actor engages in anticompetitive behavior or uses the initial acquisition to gain market power. Section 7 of the Clayton Act prohibits a transaction that would result in an acquisition of market power and Section 2 of the Sherman Act forbids misuse of market power. Importantly, these offenses do not require a multiplicity of actors and, therefore, the *Copperweld* doctrine has no application in such situations.

Thus, the *Copperweld* doctrine can have far reaching implications upon the organizational structure of the firms in-

18. *See* Novatel Commc'n, Inc. v. Cellular Tel. Supply, Inc., No. C85-2674A, 1986 WL 15507, at *4 (N.D. Ga. Dec. 23, 1986) ("[T]his court concludes that Carcom and Novatel-Canada are one enterprise for purposes of § 2(a) of the Robinson-Patman Act. As a single enterprise, sales from Novatel-Canada to Carcom cannot be considered favored sales").

19. 15 U.S.C. § 19 (2000) (subject to certain de minimis exceptions).

20. Healthamerica Pa., Inc. v. Susquehanna Health Sys., 278 F. Supp. 2d 423, 440-41 (M.D. Pa. 2003) (rejecting challenge under § 8 because "the Alliance and the defendant hospitals function as a single entity").

21. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

22. *See, e.g.*, Aventis Envtl. Sci. USA, LP v. Scotts Co., 383 F. Supp. 2d 488, 500 (S.D.N.Y. 2005) (holding "AgrEvo EH may assert claims on behalf of its parent. . .and affiliate").

volved. Depending upon its scope, firms under common control may be unconstrained by formalistic antitrust rubrics and, therefore, should be free to structure their corporate family to obtain the legal benefits that a given organizational structure provides. Indeed, the Supreme Court justified the *Copperweld* doctrine because "[e]specially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."[23] Reasons to create different organizational structures often have nothing to do with competition issues but rather address, for example, tax planning, limited liability, debt structure, dividends, profit sharing, pensions, labor contracts and management control.[24]

B. *The Scope of the* Copperweld *Doctrine*

1. *The Rationale Underlying the* Copperweld *Doctrine*

In *Copperweld*, the Supreme Court was faced with the "question whether the coordinated acts of a parent and its wholly owned subsidiary can. . . constitute a combination or conspiracy" in violation of Section 1. The Court granted certiorari to examine the continued viability of the "intra-enterprise" conspiracy doctrine, which imposed liability on corporations under common control and ownership that conspired with each other in violation of the antitrust laws. Although Justice Stevens' dissenting opinion observed that repudiation of the intra-enterprise conspiracy doctrine would be "inconsistent with what this Court has held on at least seven previous occasions,"[25] the Court's majority disagreed, pointing out that "[i]n no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth."[26]

Based upon established precedent, the Court observed that an agreement under Section 1 requires "the conspirators [to have] a unity of purpose or a common design and understanding."[27] The Court proffered two bases for its decision to

23. *Copperweld* 467 U.S. at 773.
24. *Id.* at 772-73.
25. *Id.* at 783 (Stevens, J., dissenting).
26. *Id.* at 760 (majority opinion).
27. *Id.* at 771.

invalidate the intra-enterprise conspiracy doctrine—(1) the "unity of interest" between the parent and subsidiary and (2) the parent's "full control" of the subsidiary. The Court held that "[i]n reality a parent and wholly owned subsidiary always have a 'unity of purpose or a common design.'"[28] Aside from the unity of interest, the Court grounded its result in the fact that "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."[29] In repudiating the intra-enterprise conspiracy doctrine, the Court sought to eliminate the elevation of form over substance where an unincorporated division was treated differently than a wholly-owned subsidiary solely because of its corporate structure.

2. *Extension of the* Copperweld *Doctrine*

After *Copperweld*, courts were faced with determining the application of the *Copperweld* doctrine to a variety of affiliates in the same corporate family. These cases generally fall within one or more of the following categories: (1) the entire corporate family is wholly owned by the same investors; (2) the parent has sufficient ownership to force a merger with its partially-owned subsidiary; (3) the parent has majority ownership of its subsidiary; and (4) the same entity has the right to control both affiliates even without majority ownership. Under each of those circumstances, courts had applied the *Copperweld* doctrine to the entire organization because the same investor or corporation has the right to "assert full control at any moment."[30] Those cases therefore support the proposition that the *Copperweld* doctrine applies to all entities under common legal control of the same investor regardless of that investor's ownership interest.[31]

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28. *Id.*

29. *Id.* at 771-72.

30. *Id.*

31. *Copperweld* has also been applied to separate firms that have a unity of (or common) interest in a given course of action. *See, e.g.*, Chi. Prof'l Sports, Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 599 (7th Cir. 1996) ("Whether the NBA itself is more like a single firm, which would be analyzed only under § 2 of the Sherman Act, or like a joint venture, which would be subject to the Rule of Reason under § 1, is a tough question under *Copperweld*"). This independent basis to apply *Copperweld* is beyond the scope of this article.

Courts have consistently dismissed antitrust claims based upon coordinated acts of sister subsidiaries wholly owned by the same parent. In applying the *Copperweld* doctrine, those courts held that the parent's ability to control the entire corporate family created a unity of interest among the sister subsidiaries. Accordingly, those courts treated the entire corporate family as a singe economic actor for antitrust purposes.[32]

Similarly, most courts that have considered the issue applied the *Copperweld* doctrine to subsidiaries in which the parents had an ownership interest in the subsidiary or affiliate that was sufficient to force a merger over the objections of the minority shareholders.[33] Those cases make clear that the right to control the affiliate (and not the exercise of that control) is what is critical to the analysis. Indeed, in one case, the court applied the *Copperweld* doctrine to a subsidiary in which the parent only appointed a minority of directors and allowed the subsidiary "sufficient autonomy" to enter into major contracts without the parent's approval. The court nevertheless held that the parent's ability to force a merger gave it legal control over the subsidiary.[34] These decisions are consistent with the Court's command in *Copperweld* to examine the substance and not the form of the organizational structure. Under these circumstances, a unity of interest exists between the parent and subsidiary because the parent could terminate the subsidiary's existence if the subsidiary did not act in the parent's best interests. Indeed, if the subsidiary became a division, courts had held long before *Copperweld* that divisions of corporations cannot conspire with each other.[35]

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32. *See, e.g.*, Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 146-47 (4th Cir. 1990).

33. *See, e.g.*, Sonitrol of Fresno, Inc. v. Am. Tel. & Tel. Co., No. 83-2324, 1986 WL 953 at *2, n.2 (D.D.C. Apr. 30, 1986) (affirming special master recommendation that *Copperweld* applied to "subsidiaries in which AT&T owned more than the percentage of stock that permitted it, under the law of incorporation of the subsidiary, to force a merger of the subsidiary into AT&T over the objections of minority shareholders"); Leaco Enters., Inc. v. Gen. Elec. Co., 737 F. Supp. 605, 609 (D. Or. 1990) (holding that *Copperweld* applied to parent and subsidiary as a matter of law because parent's ownership interest would allow parent to force a merger with its subsidiary).

34. *Leaco*, 737 F. Supp. at 609.

35. *See Copperweld*, 467 U.S. at 770 ("There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions").

Courts have further extended the *Copperweld* doctrine to apply to claims against a parent and subsidiary in which the parent only has a majority, but not a complete, ownership interest. These cases have also relied upon the parent's ability to control its partly owned subsidiary.[36] In applying the *Copperweld* doctrine to corporations controlled by the same investors, one court explained that "what is important is whether the individual can control the policies of both (or all) corporations. If so, then there can be no conspiracy between (or among) the corporations."[37] Similarly, another court made clear that majority ownership was critical because it gave the parent the right to control the subsidiary, holding that "[t]he 51% ownership interest retained by [the parent] assured it of full control over [the subsidiary] and assured it could intervene at any time that [the subsidiary] ceased to act in [the parent's] best interests."[38] Again, the court found irrelevant whether the parent "ke[pt] a tight rein over the subsidiary."[39] These cases are consistent with Professor Areeda's theory that the *Copperweld* doctrine should apply where the same investor has majority ownership over both affiliates. As Professor Areeda has explained, "the power to control that accompanies majority ownership creates a single economic unit lacking internal conspiratorial capacity."[40]

In other contexts, courts have applied the *Copperweld* doctrine to preclude liability where one corporation has legal control of another corporation even though it has no ownership interest in it. As one court explained, "[f]or two separate corporations to act as a single entity, it is not necessary that one be owned, wholly or in part, by the other corporation. . . . The

36. *See, e.g.*, Livingston Downs Racing Ass'n v. Jeffersons Downs Corp., 257 F. Supp. 2d 819, 836, n.17 (M.D. La. 2002) (holding that *Copperweld* applied where common ownership gave the same individual control over both entities); *Bell Atl. Bus. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 707 (N.D. Cal. 1994) ("Two sister subsidiaries of the same parent over which the parent has legal control are legally incapable of conspiring. . ."); Novatel Commc'n, Inc. v. Cellular Tel. Supply, Inc., No. C85-2774A, 1986 WL 15507, at *6 (N.D. Ga. Dec. 23, 1986).

37. *Livingston Downs*, 257 F. Supp. 2d at 835-36.

38. *Novatel*, 1986 WL 15507, at *6.

39. *Id.*

40. PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, Vol. VII at 239 (2d ed. 2003).

emphasis is properly placed [on]. . . the degree of control exercised by the dominant corporation."[41] That court and others held that franchisors and franchisees are incapable of conspiring with each other because of the franchisor's control.[42] In another case, a court applied the *Copperweld* doctrine to an agreement between a manufacturer and distributor even though the firms only had twenty percent common ownership because the distributor "controls or exercises significant influence over" the manufacturer.[43]

Aside from those authorities, federal antitrust regulators treat firms under common legal control as a single enterprise regardless of whether the firms have common ownership or are operated independently. For example, on August 18, 2006, the FTC challenged a consummated transaction because it allowed the same investment fund manager to control two different publicly traded investment funds with competing assets. Even though both funds had different investors, directors and management, the FTC treated the transaction as a merger between the two funds because the same manager had legal control over both of them. These two firms had a combined share of seventy percent of the natural gas liquids storage capacity in a key location in Texas. Notwithstanding the structural constraints imposed by the fund manager, the FTC still required a divestiture to avoid any potential reduction in competition among these storage suppliers that could arise from common control.[44]

Notably, a key distinction has been made between legal and *de facto* control. For example, where an investor has the legal right to control a corporation, such as the right to appoint a majority of the board of directors, he would be deemed to have legal control. In contrast, without any other contractual rights or interests in a corporation, an investor

41. Williams v. I.B. Fischer Nev., 794 F. Supp. 1026, 1032 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

42. *Id.*; *see also* Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. *Co.*, 912 F. Supp. 747, 766 (D.N.J. 1995) ("[T]he restrictive administrative control that NITC exercises over the dealcors simply do[es] not allow for the concerted, anti-competitive action contemplated by § 1").

43. Fresh Made, Inc. v. Lifeway Foods, Inc., No. 01-4252, 2002 WL 31246922, at *7 (E.D. Penn. Aug. 9, 2002).

44. *See, e.g.*, Matter of Duncan, FTC File No. 051-0108 (Aug. 18, 2006), 2006 WL 2522712.

that owns a substantial minority of the shares of a corporation may as a practical matter control the corporation but that *de facto* control would be insufficient to give him legal control. The *Copperweld* doctrine does not apply in the absence of legal control.[45]

Two principal objections have been raised to the application of the *Copperweld* doctrine to firms under common legal control without common majority ownership. Neither of them is persuasive. First, if the two firms are competitors, opponents claim that application of the *Copperweld* doctrine might result in decreased competition. However, the Supreme Court has already rejected that very concern in *Copperweld* holding, that "[a]ny anticompetitive activities of corporations and their wholly owned subsidiaries. . . may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control is subject to scrutiny under §1 of the Sherman Act and §7 of the Clayton Act."[46] This scrutiny is genuine because, as noted above, federal antitrust authorities have challenged transactions that result in common legal control of competitors even without regard to the degree of common ownership.[47] Unless such a challenge is successful, however, the combined acts of the different companies should be treated as the act of a single enterprise. Even then, the enterprise's unilateral behavior is subject to Section 2 of the Sherman Act, which prohibits the misuse of market power.

Second, opponents argue that the *Copperweld* doctrine should not apply if the controlling person (actually or apparently) operates both entities independently.[48] The *Copperweld*

45. *See, e.g.*, Sonitrol of Fresno, Inc. v. Am. Tel. & Tel. Co., No. 83-2324, 1986 WL 953 at *5 (declining to apply *Copperweld* because "[W]hile AT&T may have undoubtedly *de facto* control over CBI and SNET, legal control of these corporations rested firmly in the hands of their board of directors").

46. *Copperweld*, 467 U.S. at 777.

47. *See, e.g., Fresh Made, Inc.*, 2002 WL 31246922 at *7; United States v. Dairy Farmers of Am., Inc., 426 F.3d 850 (6th Cir. 2005) (DOJ challenge to consummated transaction that allowed a wholly-owned subsidiary to obtain control of a company that competes with the parent).

48. *See* Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp.2d 236, 275 (S.D.N.Y. 2002) (refusing to apply *Copperweld* to firms under control and majority ownership of the same shareholder because he "took great pains to conceal his passive ownership" and "conducted their business[es] at arms' length"), *aff'd in part and rev'd in part on other grounds*, 386 F.3d 485 (2d

Court rejected this concern, holding that the exemption applies regardless of "whether or not the parent keeps a tight rein over the subsidiary."[49] To the extent consumers detrimentally rely upon the apparent independence of the two firms, they may have redress under various consumer protection laws. This type of injury, however, does not implicate the policies that the antitrust laws are designed to protect. Accordingly, those consumers would lack antitrust standing to bring claims for this type of injury even if the *Copperweld* doctrine did not apply.[50]

In sum, the focus of the *Copperweld* doctrine should be on whether separate firms are under common legal control. If the same person has the right to control different entities, those firms should be treated as one. Otherwise, the person with control would have to structure his enterprise to avoid formalistic antitrust rules divorced from genuine competitive concerns. Such a narrow view can inhibit "an aggressive investor" from leveraging his assets to obtain control of competing firms even where those investments would be procompetitive (e.g. infusing new capital into a business or optimizing management of both businesses). Competitive concerns have been adequately addressed by statutes intended to prevent the acquisition or misuse of market power. Those investments might result in lower prices or better products from both businesses. Thus, the *Copperweld* doctrine should be applied to provide protection for new forms of investments such as the burgeoning private equity market that is so important to our national economy today.

Cir. 2004). This case conflicts with the numerous cases that have applied *Copperweld* based upon whether the same person had the right to control the two firms (even if not exercised or disclosed).

49. 467 U.S. at 771.

50. *See, e.g.*, Burns v. Lavender Hill Farm, Inc., No. 01-CV-7109, 2002 WL 31513418, at *7 (E.D. Penn. Oct. 30, 2002) (holding that consumer lacked antitrust injury for claim based upon consumer fraud).