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Extracting Gold From Copperweld: Ninth Circuit Holds That Wholly-Owned Subsidiaries May be Subject to Antitrust Liability

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A recent decision by the Ninth Circuit may have profound implications in antitrust cases involving wholly owned subsidiaries of parent companies accused of participating in an antitrust conspiracy. In *Arandell v. CenterPoint Energy Services*, -- F.3d ----, No. 16-17099, 2018 WL 3716026 (9th Cir. Aug. 6, 2018) [*Arandell*], the Ninth Circuit held that under *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752 (1984), a "wholly-owned subsidiary that engaged in coordinated activity in furtherance of the anticompetitive scheme of its parent and/or commonly owned affiliates is deemed to engage in such coordinated activity with the purposes of the single 'economic unit' of which it was a part." *Arandell* at *5.

Summary

Arandell is a class action alleging that ten large natural gas companies colluded to fix retail natural gas prices in Wisconsin. The panel, comprised of Circuit Judges Carlos T. Bea and N. Randy Smith and District Judge Robert S. Lasnik (sitting by designation), reversed the district court's summary judgment in favor of Defendant CenterPoint Energy Services, Inc. ("CES"), a natural gas company. (CES was a wholly owned subsidiary of Reliant Energy, Inc. ("Old Reliant"). The Reliant family of companies also included Reliant Energy Services, Inc. ("RES" and, together with Old Reliant and the other Reliant codefendants, collectively "Reliant").)

Copperweld is widely considered a defeat for plaintiffs bringing antitrust class actions, but the *Arandell* plaintiffs were able to use the decision to their advantage. They could not contest the district court's holding that, for antitrust purposes, under *Copperweld* CES was incapable as a matter of law of conspiring with Old Reliant. Instead, Plaintiffs' theory of the case was that CES was part of a "single entity"—including both Old Reliant and RES—that "intentionally colluded with other, non-Reliant conspirators to manipulate natural gas prices and profit from this manipulation." *Arandell* at *4. Therefore, Plaintiffs argued, the district court should have found that as a matter of law it was "not possible for CES to have a different reason than [Old Reliant] and RES for participating in these efforts." *Id*.

The Ninth Circuit remarked with approval, "Although the Plaintiffs' application of the principles laid out in *Copperweld* is novel, we must agree." *Id*. at *5. The *Arandell* panel noted that "Defendants cannot have the *Copperweld* doctrine both ways" and held, "It would be inconsistent to insist both (1) that two affiliates are incapable of conspiring with each other for purposes of Section 1 of the Sherman Act because they "always" share a "unity of purpose," and (2) that one affiliate may escape liability for its own conduct—conduct necessary to accomplish the illegal goals of the scheme—by disavowing the anticompetitive intent of the other, even where the two acted together." *Id*.

Background: *Copperweld and American Needle*

Copperweld, decided by the Supreme Court in 1984, held that a parent company and its wholly owned subsidiary are "incapable of conspiring with each other for purposes of § 1 of the Sherman Act." 467 U.S. at 777. In a later decision, *American Needle v. National Football League*, 560 U.S. 183 (2010), the Supreme Court clarified that the appropriate inquiry "is one of competitive reality," *id*. at 196, and that "'substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1.'" *Id*. at 195 (quoting Copperweld, 467 U.S. at 773 n. 21). "The key is whether the alleged contract, combination . . . or conspiracy is concerted action—that is, whether it joins together separate decisionmakers." *Id*.

The fact "that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture" is not dispositive. Id. at 196. Instead, the relevant inquiry is whether there is a conspiracy between "separate economic actors pursuing separate economic interests," such that the agreement "deprives the marketplace of independent centers of decisionmaking." *Copperweld*, 467 U.S. at 768–69.

"*Copperweld*'s holding turned on the fact that the subsidiary of a corporation, although legally distinct from the corporation itself, 'pursue[d] the common interests of the whole rather than interests separate from those of the corporation itself.'" *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (quoting *Copperweld*, 467 U.S. at 770). "In the Ninth Circuit, related entities are capable of entering into a conspiracy if their interests are sufficiently independent." *Levi Case Co. v. ATS Prod., Inc.*, 788 F. Supp. 428, 431 (N.D. Cal. 1992).

***Arandell* Procedural History**

Plaintiffs filed their action in Wisconsin state court in December 2006 on behalf of a proposed class of "all industrial and commercial purchasers of natural gas" who purchased natural gas for their own use or consumption in Wisconsin during the

class period. *Arandell* at *2. The defendants are ten large natural gas companies and some of their subsidiaries and affiliates, which allegedly colluded to fix retail natural gas prices in Wisconsin. The action was removed on the basis of diversity jurisdiction to the Western District of Wisconsin and then transferred to a related MDL in the District of Nevada.

The class action complaint alleged that CES sold natural gas in Wisconsin at prices that were artificially inflated as a result of the price-fixing conspiracy between Reliant and other, non-Reliant co-conspirators. *Id*. at *3. Plaintiffs brought two causes of action under Wisconsin's antitrust statutes, seeking (1) a declaratory judgment that certain natural gas contracts made during the class period are void under Wisconsin Statute § 133.14 and (2) treble damages for violations of Wisconsin Statute § 133.03, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal." *Id*.

The district court granted CES's motion for summary judgment, holding that Plaintiffs had not raised a genuine issue of material fact sufficient to support a verdict or judgment under Wisconsin Statute § 133.03(1) because there was "no evidence" that CES knowingly "participated in a conspiracy or direct acts in restraint of trade." Id. Because Plaintiffs did not allege that CES engaged in any anticompetitive activity or other wrongdoing in or directed to Wisconsin"—but rather alleged only that CES was affiliated with RES and sold gas to Wisconsin consumers—the district court found there was no evidence that CES knowingly engaged in swaps in conspiracy with RES for the purpose of increasing the price of natural gas, or that CES "knew that RES or others were engaged in such behavior." *Id*.

Arguments on Appeal

On appeal, Plaintiffs argued in pertinent part that the district court erred in determining that Plaintiffs had not submitted sufficient evidence to raise triable issues as to "(1) whether CES had the requisite intent and purpose to restrain trade, and (2) whether CES did in fact act to further the alleged conspiracy." *Id*.

Plaintiffs argued that the evidence on the record established that CES purposely participated in the price-fixing scheme because, as a wholly owned subsidiary of Reliant during the class period, CES is deemed to have shared the intent of the commonly owned Reliant conspirators. *Id*. at *4. Under *Copperweld*, CES was part of a "single entity"—including both Old Reliant and RES—that "intentionally colluded with other, non-Reliant conspirators to manipulate natural gas prices and profit from this manipulation." *Id*. Therefore, Plaintiffs argued, the district court should have found that as a matter of law, it was "not possible for CES to have a different reason

than [Old Reliant] and RES for participating in these efforts." *Id*. Plaintiffs also identified evidence it presented to the district court that CES engaged in anticompetitive conduct.

For purposes of summary judgment, CES did not contest the substance of the evidence that Reliant successfully conspired with the other (non-Reliant) defendants and co-conspirators to manipulate retail gas prices. *Id*. at *5 n.7. As the panel put it, CES asserted "it acted innocently and without knowledge of its parent company's price-fixing scheme, which had pumped up the price of that gas. Yes, [CES] sold the gas at prices previously rigged by the parent, and yes, [CES] sent the profits back to the parent. But [CES] assert[ed] there is no evidence that it knew the prices were inflated or that it had the purpose to carry out the price-fixing scheme." *Id.* at *1.

The Ninth Circuit's Decision

The panel held that plaintiffs submitted sufficient evidence to raise a genuine issue under the Sherman Act—and Wisconsin Statute § 133.03(1)—as to whether CES participated in coordinated activity in furtherance of the alleged inter-enterprise price-fixing conspiracy.

As to CES's anticompetitive intent, the panel decided that Plaintiffs did not need to submit evidence that CES had an anticompetitive purpose; CES could nevertheless be held liable because *Copperweld* establishes that “a parent and a wholly owned subsidiary always have a 'unity of purpose'" and thus act as a 'single enterprise' whenever they engage in 'coordinated activity.'" *Arandell* at *5 (quoting Copperweld, 467 U.S. 752). The panel explained, "This premise led the Supreme Court to conclude that a parent cannot conspire with its subsidiary, but it also leads inescapably to the corollary conclusion that, for antitrust purposes, it is legally impossible for firms within a single 'economic unit' to act together in furtherance of the same price-fixing scheme for independent and distinct purposes." *Id*. In other words, "a subsidiary such as CES as a matter of law cannot innocently advance an anticompetitive scheme (here, by selling gas at prices rigged by Reliant and distributing the profits to Reliant) for a legitimate business purpose, while its parent and sister companies purposely advance the very same scheme (here, by rigging the prices upstream) for an illegal, anticompetitive purpose." Id. As a result, Plaintiffs had raised a triable issue of CES’s anticompetitive intent with their evidence that Reliant's "economic unit" had an anticompetitive purpose during the class period; that such anticompetitive "purpose" could sustain liability under the federal Sherman Act with or without an additional finding of knowledge; and that Reliant's alleged illegal purposes are imputed to CES's coordinated activities. *Id*.

In its analysis of CES's anticompetitive acts, the panel noted that Copperweld does not support holding a subsidiary liable for the parent's independent conduct. *Id*. at *7. As with any antitrust defendant, the panel held, Plaintiffs must put forth evidence that the subsidiary engaged in anticompetitive conduct. The panel found that "CES's alleged contributions to the conspiracy (selling gas to Wisconsin consumers at the inflated prices and disbursing the profits to Reliant), would be adequate circumstantial evidence of conspiracy, if proved, to permit a finding of liability." *Id*. at *7.

Conclusion

Arandell will be an important arrow in the quiver of antitrust plaintiffs in the Ninth Circuit. Plaintiffs seeking to hold a subsidiary liable under federal and state antitrust laws no longer need to prove the subsidiary's anticompetitive intent. Instead, *Arandell* provides that the anti-competitive purpose or knowledge of the "single entity" of commonly owned conspirators will suffice. *Arandell* may be especially advantageous to plaintiffs when proving antitrust liability of U.S. subsidiaries with foreign parent companies.

