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Ruth Barber Timm

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Timothy: The Intra-Enterprise Conspiracy Doctrine and the Pharmaceutical Bar

# THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE AND THE PHARMACEUTICAL BENEFIT MANAGEMENT INDUSTRY: A PROPOSED EXCEPTION TO THE *COPPERWELD* HOLDING\*

## I. INTRODUCTION

Anne has just entered her doctor's office for an appointment. After examining Anne, the physician determines that Anne is in need of medication to improve her health. The physician promptly fills out a prescription form and hands it to Anne. Upon leaving the doctor's office, Anne drives to a nearby pharmacy to have the prescription filled. Anne's health insurance company has provided her with a "pharmacy card" to present to the pharmacist. As far as Anne is concerned, this card simply means she has to pay less for her medication, and her insurance company will pay the difference.<sup>1</sup> Anne pays her portion of the payment due and leaves with her prescription in hand.

In the above hypothetical, it may appear that Anne has benefited both from a physician's expertise and an insurance company which is saving her money. What Anne may not realize is that her physician very likely had little discretion in choosing which drug to prescribe for her condition. Thus, while Anne may think that her doctor evaluated her condition and then objectively chose a medication for her, this may not be the case. Instead, the company issuing Anne her pharmacy card may exercise some control over which medications the doctor prescribes.<sup>2</sup> Further, because this pharmacy card company may be owned by a drug manufacturer, the drug manufacturer itself often possesses the

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\* This note is dedicated to the memory of my mother, Myrle Jeanette Barber (1927-1996), whose love and support were always a constant source of strength. There is truly no love like that of a mother. It is comforting to know that the lives of those departed live forever in the memories of those whose lives they touched. "But you, man of God, flee from all this, and pursue righteousness, godliness, faith, love, endurance and gentleness. Fight the good fight of the faith. Take hold of the eternal life to which you were called . . ." 1 Timothy 6:11-12 (New International Version).

1. Generally, the amount of a healthcare bill for which the patient, or insured, is responsible is referred to as the patient's "co-pay." Andrew S. Krulwich, *The Response to Health Care Reform by the Pharmaceutical Industry*, 50 FOOD & DRUG L.J. 1, 2 (1995).

2. Pharmacy benefit management companies (PBMs), which manage pharmaceutical costs for health insurance plans, generally cover only selected drugs. *Id.* A physician is then encouraged to prescribe one of these selected drugs to a patient covered by the PBM to ensure insurance payment. *Id.* See *infra* notes 51-59 and accompanying text.

power to ensure that its own pharmaceuticals are prescribed. Thus, the above scenario illustrates a major problem facing the pharmaceutical industry. Drug manufacturers, by acquiring companies controlling disbursement of pharmaceuticals, possess the ability to conspire with those companies to hinder competition and, ultimately, harm consumers.

Drug manufacturers did not always possess the ability to control when their drugs are prescribed. This ability emerged as the healthcare industry shifted towards managed healthcare.<sup>3</sup> Managed healthcare operates on the premise that if a third party, such as a health maintenance organization (HMO),<sup>4</sup> manages the care of a patient through employment of physicians, costs will be contained while quality will increase.<sup>5</sup> This concept has further developed to encompass not only medical care in a clinic or hospital setting, but pharmaceutical care as well.<sup>6</sup> As a result, insurance companies wishing to manage pharmaceutical costs now receive assistance from pharmacy benefit management companies (PBMs).

PBMs are now dominant in the health care industry.<sup>7</sup> PBMs control costs in much the same manner as other managed healthcare entities, such as HMOs

3. Gordon K. MacLeod, *An Overview of Managed Health Care*, in THE MANAGED CARE HANDBOOK 3 (Peter R. Kongsvedt ed., 2d ed. 1993). By 1992, over one million Americans were enrolled in managed health care plans. *Id.* Further, the number of employees in Preferred Provider Organizations increased from zero in the late 1970's to over 37 million by December 1991. *Id.* Much of this growth is attributable to the HMO Act of 1973, which facilitated growth in medical plans by financing them with grants, contracts and loans. *Id.* at 4. As a result, it is now estimated that approximately 100 million people, including dependents of enrollees, are currently enrolled in some form of managed care plan. *Id.* at 6.

4. An HMO collects premiums from its subscribers and, in return, provides medical services through its own employed physicians. MICHAEL G. MACDONALD ET AL., HEALTH CARE LAW: A PRACTICAL GUIDE §7.02[2] (1995). Because the physicians are employed by the HMO, usually for an agreed-upon salary, the physician has less incentive to authorize unnecessary tests and procedures. *Id.*

5. MacLeod, *supra* note 3, at 5. The HMO Act of 1973 received support because it was assumed that HMO's could lower costs and enhance medical care competition without the government getting involved. *Id.* See also Bruce N. Kuhlik, *The FDA's Regulation of Pharmaceutical Communications in the Context of Managed Care: A Suggested Approach*, 50 FOOD & DRUG L.J. 23, 24 (1995) (pointing out that "[t]he principal elements of any managed care system are arrangements with selected providers to furnish covered services to enrollees and guidelines for care to ensure quality and control utilization"); MACDONALD ET AL., *supra* note 4, § 7.02[2] (noting that managed care includes any attempt to control the utilization of healthcare).

6. Kuhlik, *supra* note 5, at 27-28. "In 1993, the number of outpatient prescriptions under some form of managed care surpassed the number of unmanaged prescriptions for the first time." *Id.* at 28.

7. Alex Barnum, *Behind the \$4 Billion Drug Deal*, S.F. CHRON., July 12, 1994, at B1 (stating that PBMs control almost half of the prescription drug market and that experts predict this share will increase to 90% by the year 2000).

or preferred provider organizations (PPOs).<sup>8</sup> Typically, a PBM will contract with pharmaceutical manufacturers that agree to provide their drugs at a discounted rate to the PBM's subscribers or patients.<sup>9</sup> Drug manufacturers are willing to provide these drug discounts in exchange for guarantees that the PBM will encourage physicians and patients to use those drugs over rival manufacturers' drugs.<sup>10</sup> Therefore, in the above scenario, Anne's pharmacy card indicates that she is a subscriber of a PBM. Most likely, her PBM provided her physician with a list of drugs, known as a formulary,<sup>11</sup> which the physician is to use when selecting a medication to prescribe for Anne.<sup>12</sup> As a result, Anne paid a lower price for her medication than if the PBM had not existed.<sup>13</sup> In an ideal situation, the PBM has selected only the "best" drugs for its formulary,<sup>14</sup> so Anne's health has not been compromised in the name of cost-savings. Unfortunately, however, many "less than ideal" situations involving PBMs are emerging, such as that of drug manufacturers purchasing PBMs and subsequently controlling which drugs achieve formulary placement.

8. In a PPO, physicians join together and contract with insurance companies or businesses to provide medical services. *MACDONALD ET AL.*, *supra* note 4, § 7.02[2]. The beneficiary of a PPO is then provided services at a discount as long as one of the "preferred" physicians is utilized. *Id.* These arrangements are most successful when a surplus of physicians exists. *Id.*

9. Kevin J. Dunne & Ciara R. Ryan, *How Management of Medical Costs is Revolutionizing the Drug Industry: Managed Pharmaceutical Care and Vertical Integration of Drug Makers and PBMs Promise Benefits, But Also Harbor Lurking Liability*, 62 DEF. COUNS. J. 177, 178 (1995) (explaining that PBMs negotiate discounts from drug manufacturers and then guarantee to purchase drugs in volume).

10. Thomas M. Burton & Elyse Tanouye, *Eli Lilly's Planned Purchase of PCS May be Tied to Strict Conditions by FTC*, WALL ST. J., Oct. 13, 1994, at A3 (stating that pharmaceutical manufacturers either give PBMs better discounts or simply buy the PBMs to ensure preferential status for their drugs). See also Krulwich, *supra* note 1, at 2-4 (noting that drug manufacturers exchange price losses resulting from offering discounts for a guaranteed high volume of sales).

11. A formulary is a list of drugs that the PBM has compiled to indicate those drugs that should be prescribed. Essentially, the drugs on the formulary are those the PBM was able to purchase from the drug manufacturers via volume discounts and rebates. See *infra* notes 51-59 and accompanying text.

12. Darlene Superville, *Eli Lilly Accepts Restrictions on Takeover of PCS*, Associated Press, Nov. 3, 1994, available in WESTLAW, ALLNEWSPLUS, at \*1 (explaining that the PBMs require participating doctors to select drugs for their patients from the PBM's formulary); Barnum, *supra* note 7, at B1 (noting that doctors are strongly urged to use only formulary drugs).

13. *Retail Drug Stores Support FTC Decision to Review Merck, SmithKline Acquisitions*, PR Newswire, Nov. 15, 1994, available in WESTLAW, ALLNEWSPLUS, at \*1 [hereinafter *Retail Drug*] (noting that the reason insurance companies hire PBMs is to help control drug costs).

14. In creating a formulary, a PBM selects each drug by examining the drug's price, effectiveness, safety, and side effects. Krulwich, *supra* note 1, at 3. Therefore, the "best" drug is the one that is the most effective *and* the most reasonably priced. Under this theory, the goal of any formulary should be to provide quality drugs at an affordable price; a low-priced drug that is not medically effective should not be chosen. See *infra* notes 51-59 and accompanying text.

While it would seem that PBMs provide an advantage for all parties involved, a recent practice has created a disturbing trend. Drug manufacturers have begun to see the benefits of further aligning with PBMs.<sup>15</sup> As a result, three major pharmaceutical manufacturers acquired PBMs in a period of just eighteen months.<sup>16</sup> In 1993, Merck & Company acquired Medco Containment Services for \$6.6 billion.<sup>17</sup> In 1994, SmithKline Beecham purchased Diversified Pharmaceutical Services for \$2.3 billion.<sup>18</sup> Also in 1994, Eli Lilly & Company purchased PCS Health Systems for \$4 billion.<sup>19</sup> In theory, PBMs are supposed to contract with a diverse number of drug manufacturers, thus ensuring that the PBMs select only the best and most cost-effective drugs to offer to their subscribers.<sup>20</sup> However, once a PBM is owned by a single drug manufacturer, that manufacturer has great potential to exert control over the PBM.<sup>21</sup> This situation results in the PBM selecting its parent company's drugs simply because the parent company requires it to do so, which could compromise consumers' health and safety, and ultimately lead to higher priced pharmaceuticals being selected.<sup>22</sup> Therefore, the acquisitions by Merck, SmithKline and Lilly raise serious questions about whether these new alliances

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15. Several theories exist concerning why drug manufacturers are buying PBMs. The most prevalent theory is that drug manufacturers want to find out which drugs certain patients are taking so that the manufacturer can exert its power to switch those prescriptions to its own drugs. Burton & Tanouye, *supra* note 10, at A3. Others theorize that drug manufacturers simply want to ensure access to the market for their own new drugs. U.S. FTC "Unlikely" to Curb PBM Strategies, MARKETLETTER, Nov. 21, 1994, at \*1, available in 1994 WL 2792994 [hereinafter *PBM Strategies*]. Still others opine that drug manufacturers have realized how much power PBMs have, and the manufacturers are simply trying to regain control. Barnum, *supra* note 7, at B1.

16. These acquisitions are said to be only one of several changes drug manufacturers plan to make. The ultimate goal is to convert the drug manufacturer into a "disease-management" company, meaning the manufacturer will take on the responsibility of managing more aspects of healthcare. Barnum, *supra* note 7, at B1. For example, under a disease-management regime, a drug manufacturer would agree to manage all of the health care costs for a specific illness. *Id.* The illness chosen is usually one that is normally treated with pharmaceuticals, such as diabetes. *Id.* In return for managing the disease, the manufacturer receives a set fee, thereby ensuring the manufacturer a profit only if its costs do not exceed the previously set fee. *Id.* For a detailed discussion of these acquisitions and the FTC's response to them, see *infra* notes 67-97 and accompanying text.

17. Barnum, *supra* note 7, at B1. Merck is the largest pharmaceutical company in the world. *Id.* Medco both manages the costs of pharmaceuticals and runs a mail-order drug business. *Id.*

18. *Id.* Diversified was previously owned by United HealthCare, a Minnesota-based corporation that owns and manages several HMOs. *Id.* See also Superville, *supra* note 12, at \*2.

19. Barnum, *supra* note 7, at B1. PCS is considered the leading PBM in the industry. *Id.*

20. Krulwich, *supra* note 1, at 2-3.

21. The drug manufacturer may, for example, force its PBM subsidiary to redesign its formulary to include more of the parent company's drugs. Barnum, *supra* note 7, at B1. For a discussion of the concerns generated by these acquisitions, see *infra* notes 75-86 and accompanying text.

22. See *infra* notes 77-80 and accompanying text.

may violate antitrust laws.<sup>23</sup> Unfortunately, the courts have construed federal antitrust statutes so that these merged companies are largely insulated from antitrust liability.

Currently, several federal antitrust statutes exist to discourage all types of businesses from engaging in anticompetitive activity.<sup>24</sup> However, drug manufacturers which merge with PBMs are almost always beyond the reach of these statutes because each statute requires that a company meet very specific criteria before the company is found to violate the antitrust statute.<sup>25</sup> First, section 7 of the Clayton Act<sup>26</sup> was created to provide some guidance over vertical mergers<sup>27</sup> like the ones involved here. However, the Supreme Court has held that private plaintiffs, unlike the government, have no standing to challenge a vertical merger.<sup>28</sup> Although the Federal Trade Commission (FTC)<sup>29</sup> always has standing to challenge mergers,<sup>30</sup> once the FTC has given

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23. See *infra* notes 87-97 and accompanying text.

24. Four main statutes govern anti-competitive activity. First, the Clayton Act applies when one company purchases the stock of another company with the intent to reduce competition or create a monopoly. 15 U.S.C. § 18 (1994). Second, the Federal Trade Commission Act created the FTC and granted the FTC power to declare unfair competition as unlawful. 15 U.S.C. §§ 41-45 (1994). Third, § 2 of the Sherman Act applies to any company which attempts to exercise monopoly power over its competitors. 15 U.S.C. § 2 (1994). Fourth, § 1 of the Sherman Act prohibits companies from contracting or conspiring in restraint of trade. 15 U.S.C. § 1 (1994). See *infra* notes 98-159 and accompanying text.

25. See *infra* notes 98-159 and accompanying text.

26. 15 U.S.C. § 18 (1994). The Act provides in pertinent part:

No person engaged in commerce . . . shall acquire . . . the whole or any part of the stock or other share capital . . . of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

*Id.*

27. A vertical merger is one in which different levels of the same industry merge to form one company. Krulwich, *supra* note 1, at 16. For example, if a company that manufactures widgets acquires a company that distributes those widgets, a vertical merger has taken place. Both the manufacturer and the distributor are involved in the same industry, but are involved at different levels. See also ROBERT H. BORK, *THE ANTITRUST PARADOX* 18 (1978). When two markets in the same manufacturing chain link, vertical integration has occurred. *Id.* This usually involves two firms that have a supplier/customer relationship. *Id.*

28. *Cargill v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986). *Cargill* held that a plaintiff "must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* at 113 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). See *infra* notes 99-110 and accompanying text.

29. The Federal Trade Commission was created by the Federal Trade Commission Act, and was granted the authority to prevent persons or organizations from engaging in "unfair methods of competition." 15 U.S.C. §§ 41-45 (1994). Section 41 of the Act states that "[a] commission is created and established, to be known as the Federal Trade Commission . . ." *Id.* § 41.

30. *Burton & Tanouye*, *supra* note 10, at \*2 (noting that, technically, the FTC could challenge a merger years after it takes place).

its approval to a merger, as it has to the drug manufacturer/PBM mergers, it is highly unlikely that the FTC will later challenge the merger under any of the existing statutes.<sup>31</sup> The second statute, the Federal Trade Commission Act (FTC Act),<sup>32</sup> contains broad language which encompasses a substantial amount of anticompetitive activity. Unfortunately, courts have been reluctant to review actions based upon the FTC Act, especially when the FTC has not given notice as to what actions are proscribed under the Act.<sup>33</sup> Thirdly, section 2 of the Sherman Act<sup>34</sup> requires that a company have monopoly power and that it tries to exercise that power.<sup>35</sup> While the PBM industry is now dominated by those PBMs that have merged with drug manufacturers, none of the three merged companies alone has the market power to meet this monopoly criteria.<sup>36</sup>

The final possible deterrent of unfair competition is section 1 of the Sherman Act,<sup>37</sup> which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”<sup>38</sup> While this would seem to be the appropriate statute to use in deterring unfair competition by drug manufacturers that have merged with PBMs, this statute is inapplicable to the companies because of the Supreme Court’s holding in *Copperweld Corp. v. Independence Tube Corp.*<sup>39</sup> In *Copperweld*, the Court repudiated the previously used intraenterprise conspiracy doctrine,<sup>40</sup> which stated that a parent company and its wholly-owned subsidiary could conceivably conspire in restraint of trade.<sup>41</sup> Instead, the Court decided that because a conspiracy requires two entities in law, such merged companies could not conspire since they legally

31. See *infra* notes 201-03 and accompanying text.

32. 15 U.S.C. § 45 (1994). The Act declares “[u]nfair methods of competition in or affecting commerce” unlawful. *Id.* The Act also empowers the FTC to prevent organizations from using such methods of competition by enabling the FTC to enter a cease and desist order. *Id.*

33. See *infra* notes 111-39 and accompanying text.

34. 15 U.S.C. § 2 (1994). The Act states that “[e]very 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 . . .” *Id.*

35. See *infra* notes 143-47 and accompanying text.

36. See *infra* notes 152-53 and accompanying text.

37. 15 U.S.C. § 1 (1994).

38. *Id.*

39. 467 U.S. 752 (1984).

40. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). For a critical analysis of these cases, see *infra* text accompanying notes 164-85.

41. *Copperweld*, 467 U.S. at 769. The Court noted that an agreement to follow a single company’s policy “does not raise the antitrust dangers that § 1 was designed to police.” *Id.* The Court reasoned that there existed a unity of interest among the parent and its subsidiary; therefore, it was to be viewed as a single entity. *Id.* at 771.

only constituted one entity.<sup>42</sup> Thus, these newly merged drug manufacturers and PBMs are left with little or no incentive to avoid unfair competition.

This Note will analyze the current antitrust statutes in effect and discuss why these laws are essentially ineffective weapons to enforce possible violations by drug manufacturers that have merged with PBMs. This Note will focus on the gap left in antitrust law as a result of the Supreme Court abandoning the intraenterprise conspiracy doctrine. Additionally, this Note proposes that the Court create an exception to the *Copperweld* holding which would allow the intraenterprise conspiracy doctrine to apply when merged companies meet specific criteria. Thus, instead of a blanket rule declaring that a parent company and its wholly-owned subsidiary cannot conspire, the exception would, in limited situations, allow just the opposite finding. This exception would fill the gap left by *Copperweld* and would allow courts to apply the intraenterprise conspiracy doctrine in situations where a company has great incentive to engage in unfair competition with little threat of criminal prosecution. As a result, the newly merged companies in the PBM industry would be deterred from unfair competition in restraint of trade.

Section II of this Note will discuss the background of managed pharmacy care and explain the relationship PBMs have with drug manufacturers, as well as the recent trend of drug manufacturers merging with PBMs.<sup>43</sup> Section II will also discuss the FTC's response to these mergers.<sup>44</sup> Section III will explain how the four main federal antitrust statutes are inadequate to deal with these mergers, emphasizing section 1 of the Sherman Act and the possibility of the merged companies conspiring in restraint of trade.<sup>45</sup> Next, Section IV will examine the intraenterprise conspiracy doctrine and its demise in *Copperweld*.<sup>46</sup> Finally, Section V will propose that the Supreme Court create an exception to the *Copperweld* holding to allow application of the intraenterprise conspiracy doctrine. This exception would only apply in limited situations where a parent corporation and its subsidiary have such opposing goals that illegal competition is highly likely and where the demand for the merged companies' product is inelastic.<sup>47</sup>

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42. *Id.*

43. See *infra* notes 48-86 and accompanying text.

44. See *infra* notes 87-97 and accompanying text.

45. See *infra* notes 98-159 and accompanying text.

46. See *infra* notes 160-246 and accompanying text.

47. See *infra* notes 247-87 and accompanying text.



## II. BACKGROUND OF MANAGED PHARMACY CARE

## A. How PBMs Operate

Pharmaceutical managed care operates under the same premise as any other area of managed healthcare: the managed care organization will try to reduce costs for its subscribers while providing them with quality care.<sup>48</sup> The trend towards including pharmacy benefits in managed care occurred largely because of the increasing cost of pharmaceuticals.<sup>49</sup> Because individual insurers and managed healthcare entities want to control these costs, yet do not have the expertise to make decisions concerning pharmaceuticals, they contract with PBMs to actually purchase pharmaceuticals for their subscribers.<sup>50</sup>

PBMs obtain pharmaceuticals at a discount using a two-step process. First, the PBM creates a drug formulary;<sup>51</sup> second, the PBM secures volume discounts from drug manufacturers that want their drugs to be placed on the formulary.<sup>52</sup> A formulary is "a dynamic, comprehensive list of drugs designed to direct physicians to prescribe the most cost-effective medications."<sup>53</sup> In determining whether a drug will be placed on the formulary, a PBM examines a drug's price, effectiveness, and safety, as well as a number of other factors.<sup>54</sup>

48. Henry F. Blissenbach, *Pharmaceutical Services in Managed Care*, in THE MANAGED HEALTH CARE HANDBOOK 142-43 (Peter R. Kongstvedt ed., 2d ed. 1993) (stating that a PBM's "responsibility is to contain the cost of . . . medicines without depriving individuals of necessary medicines"). Further, the goal of managed healthcare is to provide quality medical care at prices which are competitive. MacLeod, *supra* note 3, at 8.

49. Robert Marks, *Managed Care Perspectives*, MANAGED CARE WK., Dec. 5, 1994, at 1 (stating that from 1980 to 1990, prescription drug prices increased 152%, while during the same time the general inflation rate rose only 58%; further, prescription cost increases have outpaced other health services costs). See also Krulwich, *supra* note 1, at 2 (stating that expenditures for pharmaceuticals increased 15% in 1993, compared to only an 8% increase in overall employer healthcare costs). Furthermore, one-third of all health benefits for retirees are now consumed by prescription drug costs. *Id.*

50. Krulwich, *supra* note 1, at 2. A PBM may serve more than one health insurance plan and may create a slightly different formulary for each plan. *Id.*

51. See *infra* notes 53-59 and accompanying text.

52. See *infra* notes 60-66 and accompanying text.

53. Blissenbach, *supra* note 48, at 152. See also Krulwich, *supra* note 1, at 2 (stating that "formularies . . . are lists of 'preferred' drugs"); Dunne & Ryan, *supra* note 9, at 178 (noting that "PBMs promote the medications on their formularies by providing physicians and pharmacists with information about their efficacy and cost relative to other comparable medications"). A hypothetical formulary might require that for diabetic patients, the physician must prescribe Brand X of insulin rather than Brand Y or Z. Thus, Brand X is the "preferred" insulin. The formulary would then go on to list a preferred drug for each therapeutic category.

54. Krulwich, *supra* note 1, at 3 (listing other factors as the possible side effects of a drug and how the drug fares in comparison to other medications). Some drugs are typically not included in formularies, such as those which are "experimental or unproven . . . or [those] that are not generally accepted by the medical community as a standard of care." Blissenbach, *supra* note 48, at 144.

The obvious result of a formulary is that providers prescribe drugs on the formulary more often than those not on the formulary,<sup>55</sup> especially since a PBM usually buys only one drug out of a group of similar, competing drugs.<sup>56</sup> Subscribers of health plans using a PBM are also encouraged, and often required, to use drugs on the formulary.<sup>57</sup> The formulary results in lower overall pharmaceutical expenditures because it controls which drugs a doctor will prescribe to patients.<sup>58</sup> Optimally, the formulary will include the most clinically effective and cost effective drugs and will result in those drugs being prescribed.<sup>59</sup>

Because PBMs are effective in controlling costs and have become so prominent in the healthcare industry, they now represent a huge potential market

Furthermore, to be successful, a drug formulary must meet three criteria: first, “[i]t must reflect the practice of medicine in the community”; second, “[i]t must be responsive to the therapeutic needs of the physicians”; and third, “[i]t must be representative of cost-effective therapy.” *Id.* at 152.

55. See Krulwich, *supra* note 1, at 2 (stating that a PBM will incorporate many types of incentives to encourage use of the formulary drug). The formulary may also require physicians to use formulary drugs by threatening to discontinue contracting with the physician. *Id.* The more common method of ensuring formulary compliance is through incentive programs. *Id.* For example, a PBM may pay pharmacists bonus fees whenever they convince a physician to prescribe a formulary drug. *Id.* See also Blissenbach, *supra* note 48, at 154 (suggesting that placement on a formulary “serves as an endorsement for the [drug]” and that formulary placement results in a spillover effect through which “physicians will tend to prescribe formulary products for all their patients, not just those belonging to the HMO”); Kuhlik, *supra* note 5, at 29 (noting that a pharmacist might notify a physician that the drug he or she prescribed is not on the formulary and subsequently convince the physician to prescribe the formulary drug instead).

56. Anne E. Tergesen, *Drug Makers Probed: FTC Looking Into Possible Antitrust*, REC. N.N.J., June 22, 1994, at C1. To ensure competitiveness with other PBMs, a PBM must “seek out the best drug at the lowest price.” *Id.*

57. For example, a subscriber may be required to have his or her prescription filled at a “network pharmacy” with which the PBM has contracted to provide the drugs on the formulary at the agreed-upon discounted price. Dunne & Ryan, *supra* note 9, at 178. Similarly, unless a physician receives prior authorization from the PBM, the PBM may refuse to pay for a prescription if it is not on the formulary. Kuhlik, *supra* note 5, at 30. Lastly, the patient’s portion of the pharmaceutical fee may be higher if the drug prescribed is not on the formulary. Krulwich, *supra* note 1, at 2.

58. Blissenbach, *supra* note 48, at 152 (stating that the use of a drug formulary can result in a savings of 10% or more on pharmaceutical costs).

59. Marks, *supra* note 49, at 1 (noting that absent a managed care system, either a doctor or a pharmacist generally selects a prescription drug, and that they lack the incentive to choose cost-effective drugs); Dunne & Ryan, *supra* note 9, at 178 (stating that as a means of promoting formulary drugs, PBM’s provide physicians and pharmacists with information about each formulary drug’s effectiveness and cost in comparison with other drugs).

for drug manufacturers.<sup>60</sup> For this reason, drug manufacturers will often go to great lengths to have their products placed on a formulary.<sup>61</sup> The first and most common tactic is for a manufacturer to offer a generous rebate to a PBM in exchange for placement on the PBM's formulary.<sup>62</sup> Under a simplified rebate program, a drug manufacturer will offer a certain amount of dollars each time one of its particular drugs is prescribed to a subscriber of the PBM.<sup>63</sup> A second method of ensuring placement on a formulary is for the drug manufacturer to allow the PBM volume discounts when purchasing drugs.<sup>64</sup> Manufacturers are willing to offer the PBMs such generous rebates and discounts because the manufacturer's drug is then made available to an almost guaranteed market.<sup>65</sup> However, manufacturers are now looking to alternative methods of accessing the PBM market, such as acquiring PBMs.<sup>66</sup>

### B. The Trend of Manufacturers Further Aligning With PBMs

Because drug manufacturers have realized that managed pharmaceutical care is not going to disappear,<sup>67</sup> they have begun to align further with PBMs,

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60. Krulwich, *supra* note 1, at 2 n.3. Over 100 million Americans belong to a PBM, a number that was expected to double by the end of 1995. Marks, *supra* note 49, at 1. PBMs provide benefits to over fifty percent of the insureds in the United States. *Id.* at 2. This is evidenced by the fact that in 1993, nearly 50% of all prescriptions were filled under managed care plans, a considerable rise from only 37% in 1990. *Id.* See also Barnum, *supra* note 7, at B1 (noting that in the United States, about 50 percent of the \$60 billion prescription drug market is now influenced by PBMs).

61. Marks, *supra* note 49, at 2 (stating that drug makers are aware of the popularity of PBMs, and, therefore, want to ensure that they have a position on the PBM's formulary). See also Dunne & Ryan, *supra* note 9, at 178 (stating that "competition is fierce" among pharmaceutical manufacturers seeking representation on formularies); Krulwich, *supra* note 1, at 2-3 (suggesting that "achieving a spot on the formulary as a preferred drug is key for pharmaceutical manufacturers").

62. Blissenbach, *supra* note 48, at 153; Marks, *supra* note 49, at 3. Because the PBM is the final decision-maker as to which drugs will ultimately be prescribed to health plan subscribers, the PBM has a great deal of purchasing leverage over drug manufacturers. Dunne & Ryan, *supra* note 9, at 178.

63. James G. Kimball, *Pharmacies Sue Over Pricing*, BUS. MARKETING, Nov. 1, 1994, at \*1, available in 1994 WL 11048942. See also Kuhlik, *supra* note 5, at 31 (noting that PBMs grant formulary status to a manufacturer's drug in exchange for discounts and rebates). This formulary placement can help the manufacturer increase the utilization of its product. *Id.*

64. Marks, *supra* note 49, at 1 (noting that because PBMs are large volume purchasers of drugs, they "are in a better position than consumers" to obtain discounted prices). As a result, the drug manufacturers competing for contracts with PBMs will offer price discounts to the PBM. *Id.* at 3.

65. See *supra* note 60.

66. See, e.g., Marks, *supra* note 49, at 2 (noting that drug manufacturers are seeking methods to ensure formulary placement with PBMs); Krulwich, *supra* note 1, at 3 (stating that the drug industry has reacted to PBMs by forming alliances with PBMs).

67. Dunne & Ryan, *supra* note 9, at 177.

beyond offering rebate schemes or volume discounts.<sup>68</sup> In a period of just two years, three major drug manufacturers acquired the three largest PBMs in the country.<sup>69</sup> The first such merger occurred in November of 1993, when Merck & Company purchased Medco Containment Services for \$6.6 billion.<sup>70</sup> SmithKline Beecham then purchased Diversified Pharmaceutical Services for \$2.3 billion in 1994.<sup>71</sup> Following suit, Eli Lilly & Company purchased PCS Health Systems in 1994 for a purchase price of \$4 billion.<sup>72</sup> These three companies now control more than eighty percent of the PBM market,<sup>73</sup> which translates into a potential market of ninety-four million patients.<sup>74</sup> The dominance of these three newly merged companies has generated a continuing concern from consumers and competitors over possible antitrust violations by the companies<sup>75</sup> despite the fact that the FTC approved all three of the mergers.<sup>76</sup> The main concern focuses on the ease with which a drug manufacturer could exert influence over its PBM subsidiary in the creation of the PBM's drug formulary.<sup>77</sup> The perceived evil is that the drug manufacturer will force the PBM to place its drugs on the formulary, regardless of the drugs' cost or

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68. See *infra* notes 69-74 and accompanying text.

69. Kimball, *supra* note 63, at \*1.

70. Krulwich, *supra* note 1, at 3-4.

71. Dunne & Ryan, *supra* note 9, at 180; Kuhlik, *supra* note 5, at 32.

72. Dunne & Ryan, *supra* note 9, at 180; Kuhlik, *supra* note 5, at 32.

73. *Retail Drug*, *supra* note 13, at \*1; *Chain Drug Stores, Consumer Groups Oppose FTC Proposed Consent Order in Lilly/PCS Merger*, PR Newswire, Dec. 8, 1994, available in WESTLAW, ALLNEWSPLUS, at \*3 [hereinafter *Chain Drug*].

74. *Vertical Arrangements in Prescription Benefit Management Business Under Antitrust Microscope*, 423 FTC WATCH 3, 3 (1994) [hereinafter *Vertical Arrangements*].

75. *Chain Drug*, *supra* note 73, at \*1 (suggesting that the mergers "will work against the public welfare through higher prescription prices for consumers" (quoting Ronald L. Ziegler, President & CEO of the National Association of Chain Drug Stores)). Those familiar with the FTC claim that competitors of Merck and SmithKline Beecham complained to the agency about the way the merged companies were operating. Viveca Novak & Elyse Tanouye, *FTC Restudies 2 Acquisitions by Drug Firms*, WALL ST. J., Nov. 15, 1994, at A3.

76. *FTC Gives Final Approval to Lilly Order*, FTC Press Release, July 31, 1995, available in WESTLAW, 1995 WL 451033 [hereinafter *Final Approval*]. One antitrust law professor has questioned whether the FTC was too permissive in approving the first two mergers so easily. Novak & Tanouye, *supra* note 75, at \*2.

77. Burton & Tanouye, *supra* note 10, at \*1 (suggesting that the real motive behind these mergers is that the drug manufacturers want to "put as many of their drugs on the formulary as possible" (quoting Alan L. Hillman, Director of the Center for Health Policy at the University of Pennsylvania)). Ronald L. Ziegler, president and CEO of the National Association of Chain Drug Stores, stated that "[t]he acquisition of PBMs by drug makers is like letting the fox in the hen house," and that such acquisitions are really producing less competition. *Retail Drug*, *supra* note 13, at \*1. Many people recognize that the main reason manufacturers are willing to pay such large amounts of money to purchase PBMs is to guarantee formulary placement and thereby gain a higher market share. Kuhlik, *supra* note 5, at 47.

effectiveness.<sup>78</sup> For example, some critics feel that PBMs owned by drug manufacturers might promote the owning manufacturer's generic drugs, thereby eliminating from the formulary any lower-priced generics produced by other manufacturers.<sup>79</sup> Such activity would have obvious negative effects for the drug manufacturer's competitors, because once a specific drug receives a position on the formulary, any drug which is therapeutically similar is then excluded from the formulary, thus providing the formulary drug with a "quasi-monopoly."<sup>80</sup>

A further concern is that the parent companies will possibly have access to pricing data and other information concerning their competitors' drugs.<sup>81</sup> A PBM's database contains a wealth of information on subjects such as drug utilization, medical costs for certain illnesses, and bid information.<sup>82</sup> The PBM uses this database when selecting which specific drugs it will place on its formulary.<sup>83</sup> The PBM's database may break such information down by manufacturer, providing drug manufacturers that own PBMs access to confidential information concerning competitors.<sup>84</sup> In fact, a Medco executive

78. *Superville*, *supra* note 12, at \*1 (noting that the concern with Eli Lilly's acquisition of PCS was that it would result in PCS favoring its parent company's pharmaceutical products); *Barnum*, *supra* note 7, at B1 (stating that critics of the mergers "predict that once owned by a drug company, PBMs will redesign their formularies so that they favor drugs made by its parent, forcing out competing drugs that might be less expensive"); *Dunne & Ryan*, *supra* note 9, at 180 (stating that critics feel that mergers between drug manufacturers and PBMs "jeopardize[] the objectivity of the PBMs in selecting drugs for formularies"); Thomas M. Burton, *U.S. FTC Approves Lilly's PCS Purchase But Pledges Scrutiny*, WALL ST. J. EUR., Aug. 2, 1995, at 2 (noting that the "overall concern is whether the Lilly-PCS arrangement—and others like it—could lead to higher drug prices and to Lilly's profiting at the expense of consumers"). One consultant has stated that despite the PBMs' claims that their practices will not change due to drug manufacturer ownership, "he has noticed 'holes' in their formularies where the drug company's competitor's drug isn't included." *Novak & Tanouye*, *supra* note 75, at A3.

79. *Retail Drug*, *supra* note 13, at \*2. See also *Kuhlik*, *supra* note 5, at 47 (recognizing that ownership of a PBM includes the opportunity for the drug manufacturer to affect the PBM's formulary decisions).

80. *Chain Drug*, *supra* note 73, at \*2 (noting that a PBM could unfairly enhance the market share of its parent company's products by placing those products on a separate formulary, and subsequently price that formulary higher than other formularies that contain more of the competitor's drugs).

81. *Id.* (echoing the fear that "parent companies would have access to such data which would give them a potentially unfair advantage"); *Retail Drug*, *supra* note 13, at \*2 (stating that there is a concern that PBMs owned by drug makers will share pricing information with their parent company).

82. *Krulwich*, *supra* note 1, at 4.

83. *Id.* (noting that a PBM's database contains drug utilization information gleaned from actual patients). This utilization information can then be used as statistical evidence of a drug's effectiveness and safety. See *supra* note 82 and accompanying text.

84. See *Retail Drug*, *supra* note 13, at \*2 (noting the fear that PBM subsidiaries might provide their parent companies with pricing information concerning the drug manufacturer's competitors).

stated that Medco is able to provide Merck, its parent company, with data that aids Merck in tabulating its own offers for other PBMs.<sup>85</sup> Furthermore, although the FTC, in the third industry merger, required Lilly to erect a "fire-wall" between its divisions to prevent Lilly from obtaining competitors' pricing and bid information through its PBM subsidiary, the FTC's order would not prevent Lilly from obtaining other nonconfidential marketing data which could still give Lilly an unfair advantage over competitors.<sup>86</sup> For example, in their quest to have their drugs placed on a formulary, drug manufacturers may provide PBMs with marketing or research data regarding their drugs. Since this specific data is not covered by the FTC's consent order, Lilly, or other parent companies, could gain access to this data and use it to its competitors' detriment.

In summary, the trend of drug manufacturers purchasing PBMs has generated a growing amount of concern. Specifically, critics of the acquisitions fear that drug manufacturers now possess an excessive amount of influence over the creation of drug formularies. This influence, it is feared, will ultimately result in reduced competition. However, despite these fears, the FTC approved all of the drug manufacturer/PBM mergers.

### C. *The FTC's Response to Drug Manufacturer/PBM Mergers*

Despite the concern of consumer groups, the FTC's initial response to drug manufacturers merging with PBMs was minimal at most. In fact, the FTC quite easily approved the first two mergers, which aligned Merck with Medco and SmithKline Beecham with Diversified.<sup>87</sup> However, the FTC's response to the Lilly/PCS merger differed substantially. Initially, the FTC placed conditions

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85. *Id.* A pharmaceutical industry official noted that this places other drug manufacturers at a disadvantage. *Id.* Furthermore, a Merck official admitted that one of the reasons for its acquisition of Medco was to increase the percentage of Merck drugs on Medco's formularies. *Id.*

86. *Chain Drug*, *supra* note 73, at \*2. One critic feels this "fire-wall" will not prevent collusive activities by manufacturers. *Id.* The "consent-order" for the Lilly-PCS merger was intended to prohibit Lilly's access to non-public pricing and bid information PCS receives from other drug manufacturers. *Id.* The reasoning is that this information could potentially provide the parent company with an unfair advantage in placing its own bids. *Id.* However, the order does not affect Lilly's access to other information that PCS is not required to keep confidential, and this information could still provide Lilly with an unfair advantage. *Id.*

87. *Retail Drug*, *supra* note 13, at \*1; Burton & Tanouye, *supra* note 10, at \*2 (pointing out that the FTC approved the Merck and SmithKline mergers without limitations). Although it may seem strange for the FTC to criticize an alliance it previously approved, all three of the mergers were not examined by the same panel. Novak & Tanouye, *supra* note 75, at \*2. One panel examined the Merck and SmithKline Beecham mergers, and a different panel examined the Lilly/PCS merger. *Id.* Thus, the panel which questioned the legality of the Lilly/PCS merger also decided to reopen investigations into the first two mergers. *Id.*

upon Lilly's merger with PCS.<sup>88</sup> As long as Lilly met the conditions, it would retain the FTC's approval. But public concern from consumer groups and drug store officials following this conditional approval prompted the FTC to reopen investigations into all three of the mergers.<sup>89</sup> Much of the concern was due to the fact that the FTC imposed no similar restrictions upon Merck and SmithKline Beecham when it approved their respective mergers.<sup>90</sup> In addition, some consumer groups felt that the conditional requirements would not adequately protect consumers from "monopolistic practices."<sup>91</sup> While the FTC did reopen an investigation into the three mergers, it eventually approved all of them.<sup>92</sup>

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88. The FTC imposed the following conditions: (1) Lilly had to separate its pharmaceutical operations from its management function to ensure confidentiality of competitors' information; (2) PCS had to "accept all discounts, rebates or other concessions offered by Lilly's competitors for drugs listed on the formulary"; (3) Lilly had to get FTC approval, for a five-year period, before buying an interest in any company providing formulary management to more than two million American patients. Superville, *supra* note 12, at \*1-2. See also *Oligopoly the Future for the Pharma Industry*, MARKETLETTER, Jan. 2, 1995, at \*1, available in 1995 WL 2151216 (stating that Lilly and PCS were required to maintain an open formulary, and Lilly was to "establish a 'fire wall' to protect sensitive information on its competitors"); Milt Freudenheim, *FTC Approves Lilly Purchase of Drug Distribution Company*, MINNEAPOLIS STAR TRIB., Nov. 4, 1994, at 4D (same).

89. *Ties Between Drug Makers, Benefit Managers Probed*, Dow Jones News Serv., Nov. 25, 1994, available in WESTLAW, ALLNEWSPLUS (stating that the FTC wrote several letters to drug manufacturers and PBMs indicating its intent to undertake a broader investigation); *Vertical Arrangements*, *supra* note 74, at \*1; Marks, *supra* note 49, at 2 (noting that the FTC was reexamining the Merck and SmithKline mergers). See generally Novak & Tanouye, *supra* note 75, at A3. SmithKline Beecham's response to the reopening of the investigation was to point out that when its acquisition of Diversified was approved, SmithKline "proposed a voluntary firewall." *Id.* In a company statement, SmithKline said, "We strongly believe that the procedures we have in place are responsive to any reasonable concerns that the FTC or other government representatives may have, and that these procedures provide an appropriate basis for our ongoing business." *Id.*

90. *Retail Drug*, *supra* note 13, at \*1 (quoting Ronald L. Ziegler, President and CEO of the National Association of Chain Drug Stores as stating, "[w]ithout the FTC imposing conditions similar to the Lilly/PCS case on Merck and SmithKline, the potential for market manipulation and domination remains a strong likelihood"). Similarly, one member of the FTC who voted against the Lilly/PCS merger, despite the conditions, stated that she felt "imposing this order without addressing similar acquisitions raises a question of evenhandedness and leaves unanswered the broader question of the competitive effect of vertical integration in this industry." *Chain Drug*, *supra* note 73, at \*3 (quoting Commissioner Mary L. Azcuenaga).

91. *Chain Drug*, *supra* note 73, at \*1 ("Monopolistic clustering by drug makers will not lead to lower prices." (quoting Ronald L. Ziegler, president and CEO of the National Association of Chain Drug Stores)). Mr. Ziegler further stated that he felt the mergers "[would] have an adverse impact on the marketplace for prescription drugs." *Id.* Mark Whitener, acting deputy director of the FTC, also stated that these acquisitions could make it more difficult for competing manufacturers to enter the market. Tergesen, *supra* note 56, at C1.

92. In reality, approval for the Merck/Medco merger and the SmithKline/Diversified merger was never rescinded. Instead, the companies were a part of the FTC's overall investigation into the industry. This investigation ultimately led the FTC to grant final approval to the Lilly/PCS merger. Michael F. Conlan, *Fire Wall or Fig Leaf?*, DRUG TOPICS, Sept. 4, 1995, at 58.

The FTC gave its final approval for the Lilly/PCS merger in July of 1995.<sup>93</sup> When the FTC announced its approval, it indicated that it would continue to monitor the PBM and drug manufacturing industry for future violations in three specific areas.<sup>94</sup> These areas included the following: (1) whether the mergers would result in other drug manufacturers' products being foreclosed from the PBM's formulary; (2) whether the mergers foster anticompetitive dealing among the merged companies; and (3) whether the mergers result in price increases or a reduction in choices of drugs for consumers.<sup>95</sup> Unfortunately, the FTC gave no indication as to how this monitoring would take place.<sup>96</sup> Furthermore, the FTC's past actions indicate that it is highly unlikely that any violations will be found since the FTC already approved the initial mergers.<sup>97</sup> Thus, the merged companies have only the existing antitrust statutes to guide their actions. Unfortunately, the Supreme Court has construed each of these statutes so that they will not effectively deter drug manufacturers merged with PBMs from using anti-competitive practices.

### III. CURRENT ANTITRUST STATUTES: INEFFECTIVE DETERRENTS

Currently, the United States has several antitrust statutes which could conceivably be applied to the newly merged drug companies in an attempt to deter anticompetitive conduct.<sup>98</sup> However, none of these laws, as they are currently construed, is an effective weapon against such conduct. For each of the statutes, the Supreme Court has created specific criteria which must be met before any violation will be found. Because these elements are usually difficult to prove, the statutes are, in effect, useless against some types of companies, including drug manufacturers merged with PBMs.

93. *Final Approval*, *supra* note 76, at \*1.

94. *Id.* See also Burton, *supra* note 78, at 2 (quoting FTC Chairman Robert Pitofsky as stating that the FTC may reexamine the mergers in a couple of years and "possibly go back and challenge the merger[s]"). By stating that it would continue to monitor the industry and the mergers themselves, the FTC as much as conceded that it feared the merged companies would gain an unfair advantage and ultimately harm consumers. Superville, *supra* note 12, at \*1.

95. *Final Approval*, *supra* note 76, at \*2.

96. One member of the FTC voted against approving the merger. Conlan, *supra* note 92, at 58. Commissioner Mary L. Azcuenaga stated that she felt the consent order was "inadequate" and was really "no more than a fig leaf to conceal apparent indecision over the extent and nature of the competitive problem." *Id.*

97. For the proposition that the FTC will not have the leverage it had when the mergers had not yet been approved, see Novak & Tanouye, *supra* note 75, at A3; Conlan, *supra* note 92, at 58 (noting former Senator Howard Metzenbaum's dubiousness as to "whether the threat of postacquisition divestiture was credible"); *infra* notes 201-03 and accompanying text.

98. These statutes include the Clayton Act, the FTC Act, and sections 1 and 2 of the Sherman Act. See *supra* note 24. See also *infra* notes 99-159 and accompanying text.



### A. Section 7 of the Clayton Act

Section 7 of the Clayton Act was designed to govern vertical mergers which could result in anticompetitive conduct.<sup>99</sup> A vertical merger is one in which different levels of the same industry merge to form one company.<sup>100</sup> A drug manufacturer merging with a PBM constitutes a vertical merger because the PBM essentially acts as a distributor for the manufacturer's drugs.<sup>101</sup> Because the FTC has already given its approval to the drug manufacturer/PBM mergers, however, the Clayton Act has become a weakened weapon. Generally, it is the FTC's responsibility to proclaim Clayton Act violations.<sup>102</sup> However, the FTC will most likely not rescind its prior approval of the drug manufacturer/PBM mergers.<sup>103</sup> Additionally, the Clayton Act cannot be strengthened by a private cause of action because private plaintiffs other than the FTC have no cause of action to allege a Clayton Act violation.

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, the Supreme Court held that, generally, a private plaintiff, such as a firm's competitor, has no standing to challenge a vertical merger.<sup>104</sup> The private plaintiff has no standing because "the antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"<sup>105</sup> Therefore, in *Cargill*, the Court did not allow the plaintiff

99. 15 U.S.C. § 18 (1994). The Act provides that

[n]o person engaged in commerce . . . shall acquire . . . the whole or any part of the stock or other share capital . . . of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

*Id.*

100. Krulwich, *supra* note 1, at 16. The most common example of a vertical merger is that of a manufacturer merging with a company which distributes the manufacturer's products. As a general rule, interest in vertically integrated companies usually stems from a concern that the integration's purpose is to gain anticompetitive effects. OLIVER E. WILLIAMSON, *ANTITRUST ECONOMICS* 44 (1987).

101. See *supra* note 27.

102. Under the FTC Act, the FTC is charged with the responsibility of declaring all unfair competition unlawful. 15 U.S.C. § 45 (1994). Further, in *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986), the Supreme Court held that only the FTC could bring an action for a Clayton Act violation. See *infra* notes 104-10 and accompanying text.

103. Conlan, *supra* note 92, at 58 (quoting former Senator Howard Metzenbaum who noted that "he was unaware of any instances where the FTC had sought to undo a previously approved merger").

104. 479 U.S. 104, 122 (1986). In *Cargill*, the plaintiff claimed that a merger between a competitor meat packing company and another packer violated § 7 of the Clayton Act because the merger would lessen competition or tend to create a monopoly. *Id.* at 107. The plaintiff's claim was based on the fact that the merged companies would now have a market share almost as large as that of the largest packer in the industry. *Id.* at 106. For a comprehensive overview of *Cargill*, see Michael Malina, *Supreme Court Review: 1987*, 56 *ANTITRUST L.J.* 289 (1987).

105. *Cargill*, 479 U.S. at 110 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

to enjoin a prospective merger under the Clayton Act because the Act would not provide any relief to the plaintiff even if an injury actually occurred after the merger took place.<sup>106</sup> The result of the *Cargill* holding is that a private plaintiff cannot challenge a vertical merger, including one between a drug manufacturer and a PBM, unless the plaintiff can allege a loss "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful."<sup>107</sup> Because of *Cargill's* holding, the likelihood of any private plaintiffs having the ability to challenge mergers between drug manufacturers and PBMs is low.<sup>108</sup> The obvious injury that most "plaintiffs" in such a situation would allege is that the mergers have resulted in reduced competition.<sup>109</sup> Unfortunately, as the Court points out in *Cargill*, absent proof that reduced competition is actually the result of unfair trade practices, the merged company's competitors will not be able to challenge the merger under the Clayton Act.<sup>110</sup>

Because the Clayton Act affects a relatively small amount of activity, that of vertical mergers, its use in deterring anticompetitive conduct is quite limited. Conversely, the FTC Act applies to a wider variety of activity. Unfortunately, courts have also construed the FTC Act in a manner that has weakened the Act's ability to deter anticompetitive practices by drug manufacturers merged with PBMs.

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106. *Id.* at 112 (stating that "[i]t would be anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred").

107. *Id.* at 113 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)). In *Cargill*, the plaintiff's claim failed because it merely alleged that the merger would cause the plaintiff to lose profits. The Court reasoned that this loss in profits was simply due to continued competition, and the antitrust laws would only be concerned with lost profits resulting from "practices forbidden by the antitrust laws." *Id.* at 116.

108. The practical ramification of the Supreme Court's holding in *Cargill* is that a private plaintiff, such as a consumer or competitor, cannot file a claim alleging that a prospective merger violates § 7 of the Clayton Act. *Id.* at 112.

109. The majority in *Cargill* pointed out that the mere fact that a competitor loses profits because it is forced to lower its prices to survive in the market is not enough to prove an antitrust violation. *Malina*, *supra* note 104, at 294. As long as these lower profits are not the result of illegal practices, no antitrust violation has occurred. *Id.* Further, if a competitor chooses to challenge a merger based upon a fear of a future threat, the competitor must prove the merged companies will actually act with predatory intent or purpose. *Id.*

110. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986).

### B. Section 5 of the Federal Trade Commission Act

The Federal Trade Commission Act (FTC Act)<sup>111</sup> created the FTC to oversee mergers, acquisitions, and agreements between companies that might result in restraining competition.<sup>112</sup> The FTC Act also contains a substantive provision similar to those found in the Clayton and Sherman Acts.<sup>113</sup> Essentially, the FTC Act declares “unfair methods of competition” as unlawful,<sup>114</sup> and gives the FTC the power to prevent such acts.<sup>115</sup> Although this language seems to be broader than that of either the Clayton Act<sup>116</sup> or the Sherman Act,<sup>117</sup> it has not resulted in the FTC Act being a sharper deterrent against anticompetitive conduct.

Initially, the Supreme Court interpreted the FTC Act broadly, causing many mergers to fall under the Act’s provisions.<sup>118</sup> For example, in *FTC v. Brown Shoe Co.*,<sup>119</sup> the Court determined that the FTC had the power to find trade practices violative of the FTC Act if the trade practices “conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.”<sup>120</sup> This holding suggested that the FTC Act was actually broader than either the Sherman or the Clayton Act, or that the FTC

111. 15 U.S.C. § 45 (1994).

112. The FTC Act authorizes the FTC to prohibit persons or companies from using unfair methods of competition. *Id.* Therefore, any merger, acquisition, or contract which the FTC deems to be an unfair method of competition can be prevented. The FTC is presumed to have more expertise than is available to the courts. HERBERT H. HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 57 (1994).

113. Just as the Clayton Act prohibits vertical mergers that are intended to reduce competition, the Sherman Act also prohibits practices which attempt to monopolize or conspire in restraint of trade. 15 U.S.C. §§ 1, 2, 18 (1994). The FTC Act is similar, except that its language does not specifically define those activities which are prohibited. 15 U.S.C. § 45 (1994). Instead, the FTC Act simply prohibits “unfair methods of competition.” *Id.*

114. 15 U.S.C. § 45 (1994). The Act provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” *Id.*

115. *Id.* (stating that “[t]he Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”).

116. *See supra* notes 99-110 and accompanying text.

117. *See infra* notes 140-59 and accompanying text.

118. HOVENKAMP, *supra* note 112, at 391. Historically, the FTC Act was interpreted more broadly than the Sherman Act or the Clayton Act. *Id.* However, this interpretation has given way to a new application of a standard that is similar to the standards used with the Sherman and Clayton Acts. *Id.*

119. 384 U.S. 316 (1966).

120. *Id.* at 321.

Act was intended as a supplement to the Sherman Act and the Clayton Act.<sup>121</sup>

Similarly, in 1972, the Supreme Court held that the language in the FTC Act was not limited to proscribing only those practices which violated the "letter and spirit" of the antitrust laws.<sup>122</sup> Instead, the FTC Act granted the FTC the power to define the language within the FTC Act itself, specifically, what was meant by an "unfair trade practice."<sup>123</sup> The Court reasoned that the Act's broad language indicated congressional intent to protect "consumers as well as competitors."<sup>124</sup>

However, despite the Supreme Court's statement that the FTC Act is broader than the other antitrust statutes, lower courts seem reluctant to recognize that this Act gives the FTC the power to proclaim antitrust violations by companies. For example, in *E.I. Du Pont De Nemours & Co. v. FTC*,<sup>125</sup> the Second Circuit held that to prove a violation of the FTC Act, the FTC must show both evidence of anticompetitive intent or purpose, and an absence of an independent business reason for the company's conduct.<sup>126</sup> In *Du Pont*, the FTC claimed that several practices by Du Pont and by Ethyl Corporation resulted in reduced competition.<sup>127</sup> Noting that it was the court's function to interpret the FTC Act, the Second Circuit determined that Congress did not intend for the FTC to declare *any* practice having an adverse effect on

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121. *Id.* at 322 (stating that the FTC Act was designed "to stop in their incipiency acts and practices which, when full blown, would violate [the Sherman and Clayton] Acts . . . as well as to condemn as 'unfair methods of competition' existing violations of them" (quoting *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392 (1953))).

122. *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233 (1972).

123. *Id.* at 240, 246 (noting that in passing the FTC Act, Congress determined that it would allow the FTC to decide which actions would be deemed unfair). The Court also listed the factors that the FTC used to determine whether a practice which does not violate antitrust laws is nonetheless unfair. These factors include the following: (1) "[w]hether the practice . . . offends public policy as it has been established by statutes, the common law, or otherwise. . . ."; (2) "whether it is immoral, unethical, oppressive, or unscrupulous"; and (3) "whether it causes substantial injury to consumers." *Id.* at 244 n.5. Ultimately, the Court held that while the FTC had the power to define unfair trade practices, it had not done so in this case because the Court felt that the FTC's determination that the company's trade practices were unfair *were* based upon classic antitrust doctrines, and the lower court found that the company's activities did not violate the spirit or the letter of antitrust laws. *Id.* at 249-50.

124. *Id.* at 244.

125. 729 F.2d 128 (2d Cir. 1984).

126. *Id.* at 139. The court felt that the FTC "owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair" so the firms would be able to tailor their actions to conform to the Act. *Id.*

127. *Id.* at 130. The practices under scrutiny essentially involved the companies selling their products at delivered prices, giving certain customers advance notice of price increases, and using a "most favored nation" clause promising that no customer would be charged a higher price than another customer. *Id.*

competition as violative of the FTC Act.<sup>128</sup> Instead, the court limited the FTC's authority by stating that the FTC only has the power to "attack[] collusive, predatory, restrictive or deceitful conduct that substantially lessens competition."<sup>129</sup>

Similarly, in *Official Airline Guides, Inc. v. FTC*,<sup>130</sup> the Second Circuit reversed the FTC's cease and desist order directed toward a company which published an airline guide to aid in finding connecting flights.<sup>131</sup> The FTC's findings indicated that the company's practice of listing only certified air carriers, while arbitrarily excluding commuter airlines, constituted a violation of the FTC Act.<sup>132</sup> Despite agreeing with the FTC's findings showing competitive disadvantages toward the commuter airline companies, the court held that the FTC Act does not confer such a broad amount of power upon the Commission.<sup>133</sup> The court indicated that allowing the FTC's order to stand would vest the FTC with too much discretionary power, resulting in the Commission "substitut[ing] its own business judgment" in place of the company's.<sup>134</sup>

The Ninth Circuit has also limited the use of the FTC Act towards antitrust violations. In *Boise Cascade Corp. v. FTC*,<sup>135</sup> the court declined to enforce the FTC's order which found that several plywood-producing companies' pricing systems violated the FTC Act.<sup>136</sup> The court held that unless the FTC could show that the pricing scheme actually had a stabilizing effect on prices, known

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128. *Id.* at 136.

129. *Id.* at 137. Since the defendants' conduct did not fall into these categories, the FTC had no power to order its cessation. *Id.* Any other application would allow the FTC to act in an arbitrary manner. *Id.* at 138.

130. 630 F.2d 920 (2d Cir. 1980).

131. *Id.* at 921-22, 928.

132. *Id.* at 923. The Commission argued that its conclusions as to what constitutes an "unfair method of competition" or an "unfair act or practice" were to be given great weight. *Id.* at 927 (citing *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965)).

133. *Id.*

134. *Id.* The court reasoned that the FTC should not be allowed to evaluate "social, political, or personal reasons" for a company's decision not to deal with a particular organization. *Id.*

135. 637 F.2d 573 (9th Cir. 1980).

136. *Id.* at 573. The companies involved had a practice of including "western" freight in their pricing scheme. The reason for the pricing scheme was that originally, all plywood was produced in the western United States. When southern companies began production, they also included western freight so their prices could be easily compared to those of western producers. However, the FTC felt that the justification for such a pricing scheme no longer existed and ordered the southern companies to discontinue its use. *Id.* at 574.

as "price-fixing," it could not proclaim a section 5 violation.<sup>137</sup> The court did recognize that the FTC constitutes an expert body designed to control any practice which has the potential to grow into a Sherman section 1 violation if left unrestrained.<sup>138</sup> However, the court noted that while it must give deference to the FTC at times, it must also accept the responsibility of interpreting the FTC Act.<sup>139</sup>

Thus, rather than recognize the apparent broad language of the FTC Act, courts have restricted the FTC Act's use considerably. Because the Clayton Act and the FTC Act cannot be used to guide drug manufacturer/PBM mergers, the Sherman Act is the only remaining federal statute that may act as a deterrent to unfair practices. However, section 2 of the Sherman Act, which applies when a company attempts to monopolize an industry, fails to provide the needed deterrent.

### C. Section 2 of the Sherman Act

Section 2 of the Sherman Act<sup>140</sup> is another example of courts' interpretations resulting in the Act's limited applicability. The Act is intended to prohibit monopolization or attempts to monopolize.<sup>141</sup> While the mergers between drug manufacturers and PBMs have resulted in a few large companies dominating the industry,<sup>142</sup> the companies will remain largely insulated from any violation of section 2 of the Sherman Act because they will not have the requisite individual market share or market power to violate the Act.

Currently, a company cannot illegally monopolize unless the company "(a) has 'monopoly power,' which is substantial market power; and (b) has 'exercised' that power."<sup>143</sup> This rule stems from *United States v. Aluminum Co. of America*,<sup>144</sup> known as the *Alcoa* case, decided by the Second Circuit.

137. *Id.* at 577. The court refused to adopt the FTC's recommendations that artificial price-quoting throughout an industry be deemed a per se violation of the FTC Act. *Id.* at 581. Instead, the FTC would be required to prove either collusion or an effect on competition to establish a § 5 violation. *Id.* at 582.

138. *Id.* at 581.

139. *Id.*

140. 15 U.S.C. § 2 (1994). For a discussion of the history and public sentiment leading up to the passage of the Sherman Act, see William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1955-56).

141. 15 U.S.C. § 2 (1994). The Act states that "[e]very 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. . . ." *Id.*

142. See *supra* notes 67-74 and accompanying text.

143. HOVENKAMP, *supra* note 112, at 243.

144. 148 F.2d 416 (2d Cir. 1945).

In *Alcoa*, Judge Learned Hand introduced his theory that a company with monopoly power does not necessarily have to use that power to exclude others to be guilty of a Sherman Act violation.<sup>145</sup> Later, the Court in *United States v. Grinnell Corp.* added the second prong to the rule, requiring that the monopoly power be willfully acquired or maintained.<sup>146</sup> However, the key point in both cases is that the company must *possess* monopoly power.<sup>147</sup>

“Monopoly power” is not easily defined, but most cases attempt to do so by determining whether the defendant possesses “substantial market power.”<sup>148</sup> What exactly constitutes substantial market power is difficult in itself to ascertain, but there are some definite benchmarks. For example, in *Grinnell Corp.*, the Supreme Court found that a company with eighty-seven percent of the market had monopoly power.<sup>149</sup> In contrast, the Second Circuit indicated in *Alcoa* that a market share of thirty-three percent would definitely not constitute a monopoly, and that it was doubtful whether a sixty-four percent market share would constitute monopoly power.<sup>150</sup> Thus, a company’s possession of monopoly power turns on the company’s market share, and the result is only conclusive if that power is either very small or extremely large, such as ninety percent.<sup>151</sup>

In the case of drug manufacturers merging with PBMs, the market power most likely will not reach the level necessary to find an existing monopoly. While the three mergers mentioned earlier have resulted in the three companies controlling over eighty percent of the market,<sup>152</sup> that number is a result of *combining* the three companies’ market shares. None of the three merged companies, alone, has a market share even close to eighty percent; rather, the highest market share among the companies is around forty-five percent—a

145. *Id.* at 427 (stating that “it is no excuse for ‘monopolizing’ a market that the monopoly has not been used to extract from the consumer more than a ‘fair’ profit,” and that “[t]he Act has wider purposes”).

146. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

147. For example, in *Grinnell*, the Court stated that a § 2 Sherman Act violation required the “possession of monopoly power in the relevant market.” *Id.* at 570-71. This monopoly power equates to the ability to exclude competitors or control prices. *Id.* at 571.

148. HOVENKAMP, *supra* note 112, at 242. See also *Grinnell*, 384 U.S. at 571 (stating that monopoly power “may be inferred from the predominant share of the market”).

149. *Grinnell*, 384 U.S. at 571.

150. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945). Ultimately, the court determined that *Alcoa* had over 90% of the market share, and the court concluded that this was enough to constitute a monopoly. *Id.*

151. Monopoly power is to be inferred when a competitor controls a predominant share of the market. *Grinnell*, 384 U.S. at 571. The *Grinnell* Court intimated that a two-third’s share of the market constituted a monopoly. *Id.* (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

152. See *supra* notes 73-74 and accompanying text.

number which would definitely not constitute a monopoly.<sup>153</sup> As a result, section 2 of the Sherman Act cannot be used against any of the merged companies.

Therefore, neither the Clayton Act, the FTC Act, nor section 2 of the Sherman Act can be used to effectively deter potential anticompetitive conduct by drug manufacturers merged with PBMs. While the language of each of the Acts tends to suggest their applicability, courts have construed the Acts so as to hinder their effective application. Thus, the remaining possible deterrent to antitrust activity is section 1 of the Sherman Act.

#### *D. Section 1 of the Sherman Act*

The final antitrust statute which could conceivably apply to drug manufacturer/PBM mergers is section 1 of the Sherman Act, which prohibits conspiracies in restraint of trade.<sup>154</sup> At first glance, this would be the most logical statute to apply to drug manufacturers merging with PBMs because the general fear is that the drug manufacturer and the PBM will conspire to exclude other manufacturers from formularies, or to obtain confidential information about competitors.<sup>155</sup> Unfortunately, however, the Supreme Court has construed this Act so that it will not apply to the merged companies.<sup>156</sup> In *Copperweld Corp. v. Independence Tube Corp.*,<sup>157</sup> the Court held that a company and its wholly-owned subsidiary cannot conspire because a conspiracy requires two entities in law, and two companies which merge together constitute only a single entity.<sup>158</sup> This decision represents a departure from the previously recognized "intraenterprise conspiracy doctrine" which stated just the opposite: that it was possible for a company to conspire with its wholly-owned subsidiary.<sup>159</sup> Because of the Court's decision in *Copperweld*, the one statute which would provide the most effective antitrust deterrence to drug manufacturers merging with PBMs has been rendered useless.

153. Barnum, *supra* note 7, at B1. In 1993, McKesson's financial reports indicated that PCS controlled 42% of the PBM market, while Medco and Diversified each controlled 10%. *Id.* (with market share being reported as a percent of members).

154. 15 U.S.C. § 1 (1994). The Act provides that "[e]very 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." *Id.*

155. See *supra* notes 75-86 and accompanying text.

156. See *infra* notes 169-71, 196-223 and accompanying text.

157. 467 U.S. 752 (1984).

158. *Id.* at 777. See generally section IV.B.

159. Ellen M. Gregg, Note, *Antitrust—Repudiation of the Intraenterprise Conspiracy Doctrine: Copperweld Corp. v. Independence Tube Corp.*, 7 CAMPBELL L. REV. 369, 370 (1985) ("The intraenterprise conspiracy doctrine . . . provides that section 1 liability is not foreclosed merely because the parties acting in concert are parent and subsidiary corporations subject to common ownership"). See generally section IV.A.



In summary, drug manufacturers merged with PBMs possess great potential to use anticompetitive practices. Further, because of the way courts have construed the federal antitrust statutes, no effective deterrent exists for the merged companies. The intraenterprise conspiracy doctrine, which states that a parent company and its wholly-owned subsidiary can conceivably conspire under the Sherman Act, would serve as the best possible deterrent to the merged companies.

#### IV. THE INTRAENTERPRISE CONSPIRACY DOCTRINE

Prior to *Copperweld*, the intraenterprise conspiracy doctrine served as a deterrent for potential anticompetitive conduct by a company and its subsidiary.<sup>160</sup> The doctrine had achieved acceptance in several Supreme Court cases decided before *Copperweld*.<sup>161</sup> In essence, the doctrine provided that a company which conspired with its wholly-owned subsidiary could be charged with violating section 1 of the Sherman Act.<sup>162</sup> However, since the *Copperweld* decision was handed down, companies no longer fear the threat of antitrust prosecution, despite many critics' beliefs that *some* type of deterrent must be found to prevent anticompetitive activities.<sup>163</sup>

##### A. Supreme Court Cases Embracing the Intraenterprise Conspiracy Doctrine

The intraenterprise conspiracy doctrine, which the *Copperweld* Court effectively abandoned, was previously recognized as a viable weapon against anticompetitive conduct. For example, in five cases decided prior to *Copperweld*, the Supreme Court supported the doctrine.<sup>164</sup> The first, *United States v. Yellow Cab Co.*,<sup>165</sup> was decided in 1947. In *Yellow Cab*, the

160. By adopting the intraenterprise conspiracy doctrine in several previous cases, the Supreme Court implied that mergers and acquisitions could still occur, but that the merged companies would still be liable for potential antitrust violations. Such a stance served as a deterrent for anticompetitive activity. See *infra* notes 161-85 and accompanying text.

161. See *infra* notes 164-85 and accompanying text.

162. Ann I. Jones, Comment, *Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 CAL. L. REV. 1732, 1732-33 (1983). The doctrine essentially provides that two divisions within one enterprise should be considered multiple actors with the ability to conspire under the Sherman Act. *Id.* See *supra* notes 159-61 and accompanying text.

163. See, e.g., Gregg, *supra* note 159, at 371 (stating that the *Copperweld* decision ignored the potential harmful effects of anticompetitive practices); Jones, *supra* note 162, at 1754 (suggesting that because subsidiaries often possess authority to make their own decisions, they should be subject to conspiracy violations).

164. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

165. 332 U.S. 218 (1947).

Supreme Court concluded that the mere fact that several corporate companies were under common ownership did not preclude a finding of a section 1 violation of the Sherman Act.<sup>166</sup> The defendants in *Yellow Cab* were each in the business of providing taxicabs for use in Chicago, Pittsburgh, New York City, and Minneapolis.<sup>167</sup> The complaint alleged that the companies violated the Sherman Act by agreeing to purchase all taxicabs from one company, which resulted in excluding other cab manufacturers, as well as preventing other cab companies from purchasing from other manufacturers.<sup>168</sup> Noting that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman] Act,"<sup>169</sup> the Court reversed the district court's order granting a motion to dismiss.<sup>170</sup> The Court unmistakably declared that the existence of a vertically integrated organization did *not* bar the application of section 1 of the Sherman Act.<sup>171</sup> Instead of focusing on the form of an integrated organization, the Court focused on whether any agreement between the two integrated companies resulted in an "unreasonable restraint on interstate commerce."<sup>172</sup> Thus, *Yellow Cab* openly stood for the proposition that a parent company and its subsidiary could conspire.

Similarly, just one year after *Yellow Cab*, the Court decided *Schine Chain Theatres, Inc. v. United States*.<sup>173</sup> In this case, the Court embraced the intraenterprise conspiracy doctrine by finding that a theater parent company and five of its wholly-owned subsidiaries could form a conspiracy in violation of the

166. The Court noted that a restraint of trade was just as possible in a fully integrated firm as it was between two independent firms. Therefore, "[t]he corporate interrelationships of the conspirators . . . [were] not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form." *Id.* at 227.

167. *Id.* at 220.

168. *Id.* at 224.

169. *Id.* at 227.

170. *Yellow Cab* reached the Supreme Court on direct appeal from the district court for the Northern District of Illinois. See *United States v. Yellow Cab Co.*, 69 F. Supp. 170 (N.D. Ill. 1946).

171. *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

172. *Id.*

173. 334 U.S. 110 (1948). The defendant, Schine Chain Theatres, operated the largest theater circuit in the United States. *Id.* at 114. The United States alleged that Schine used this circuit buying power to negotiate films from distributors and, thereby, restrict competitors. *Id.* The complaint charged that the Schine theaters conspired among themselves and with distributors. *Id.* at 115. Specifically, the complaint alleged that the distributors granted favors to Schine, such as giving Schine the first run of movies, refusing to give Schine's competitors second runs, and allowing Schine lower rental prices than its competitors. *Id.* at 114. Further, Schine was alleged to have forced some of its competitors out of business. *Id.*

Sherman Act.<sup>174</sup> The Court cited *Yellow Cab* for the proposition that co-conspirators did not have to be independent from each other to violate the Sherman Act.<sup>175</sup>

Again in 1951, the Court applied the intraenterprise conspiracy doctrine in two cases. First, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,<sup>176</sup> the Court found that Seagram and its affiliated company violated section 1 of the Sherman Act by selling their products only to purchasers who would agree to price ceilings.<sup>177</sup> The Court rejected the notion that because the "conspirators" were "mere instrumentalities of a single manufacturing-merchandising unit," they could not legally conspire.<sup>178</sup> Second, in *Timken Roller Bearing Co. v. United States*,<sup>179</sup> the Court found that a parent company and its subsidiaries in Britain and France had conspired in violation of the Sherman Act.<sup>180</sup> The Court noted that "common ownership or control" does not immunize contracting companies from antitrust violations.<sup>181</sup>

The final case prior to *Copperweld* in which the Supreme Court entertained the intraenterprise conspiracy doctrine was *Perma Life Mufflers, Inc. v. International Parts Corp.*<sup>182</sup> In this case, dealers operating Midas Muffler Shops claimed that their parent company, Midas, Inc., conspired with its own

174. *Id.* at 116. The Supreme Court agreed with the district court's findings that the Schine defendants conspired among themselves to restrain competition. *Id.* at 115-16. Schine and its subsidiaries used their power to obtain preferences from distributors and to threaten competitors. *Id.*

175. *Id.* at 116 (stating that "[t]he concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent").

176. 340 U.S. 211 (1951). *Kiefer-Stewart Company* brought this action alleging that Seagram and Calvert Corporation engaged in a conspiracy to sell liquor only to wholesalers who agreed to resell at fixed prices set by Seagram. *Id.* at 212. *Kiefer-Stewart* alleged that this conspiracy deprived it of a supply of liquor. *Id.*

177. *Id.* at 213-14. The Court held that conspiracies formed for the purpose of fixing prices are illegal per se. *Id.* at 213.

178. *Id.* at 215 (finding that Seagram's claim that they were simply "mere instrumentalities . . . [ran] counter to . . . past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws").

179. 341 U.S. 593 (1951).

180. *Id.* at 598. The complaint alleged that Timken, an American corporation, conspired with its British and French subsidiaries to eliminate competition in the manufacture of bearings. *Id.* at 595. The three companies had business agreements to divide up market territories, fix prices, and eliminate competition. *Id.* at 595-96. The Court adhered to the district court's finding that the dominant purpose of these agreements was to eliminate competition. *Id.* at 597-98.

181. *Id.* at 598. The Court rejected Timken's argument that the agreements merely indicated a "joint venture" between the companies, noting that any agreement to restrain trade could then be labeled as such. *Id.*

182. 392 U.S. 134 (1968).

parent corporation, International Parts Corporation, to restrain competition.<sup>183</sup> Although the Seventh Circuit held that the defendants could not have conspired because they shared common ownership, the Supreme Court reversed.<sup>184</sup> Once again, the Court noted that the parties' common ownership did not serve to insulate them from antitrust liability.<sup>185</sup> Thus, the Supreme Court announced its approval for the intraenterprise conspiracy doctrine in five separate cases. However, the Court rescinded this approval when it decided *Copperweld*.

### *B. The Copperweld Majority Opinion: A Departure from Precedent*

Despite the fact that for over thirty-seven years the Supreme Court had applied the intraenterprise conspiracy doctrine,<sup>186</sup> in *Copperweld Corp. v. Independence Tube Corp.*,<sup>187</sup> the Court completely repudiated the doctrine.<sup>188</sup> In *Copperweld*, a former Copperweld employee created and formed Independence Tube Corporation, a company which intended to compete in the steel tubing business.<sup>189</sup> A Copperweld subsidiary, Regal Tube Company, competed in this same market.<sup>190</sup> Copperweld and Regal sent letters to any parties with which Independence Tube Corporation attempted to deal.<sup>191</sup> In one instance, a company had accepted Independence's order for a tubing mill; but once the company received one of the letters from Copperweld, it voided its acceptance, resulting in a nine-month delay in beginning operations for Independence.<sup>192</sup> Letters were also sent to banks contemplating financing Independence's operations, real estate firms considering providing plant space

183. *Id.* at 135. The plaintiffs, who were Midas dealers, claimed that Midas required them to sign sales agreements obligating them to purchase all mufflers from Midas. *Id.* at 136-37. Further, the agreements required that the dealers refrain from doing business with any of Midas' competitors, and the agreements also required that the dealers refrain from selling outside of their designated territories. *Id.* at 137.

184. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692 (7th Cir. 1967); *Perma Life*, 392 U.S. at 136.

185. *Perma Life*, 392 U.S. at 141-42 (noting that "the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities").

186. *See supra* notes 164-85 and accompanying text.

187. 467 U.S. 752 (1984).

188. *Id.* at 777.

189. *Id.* at 756.

190. *Id.*

191. *Id.* These letters were based on a form letter, which stated that "Copperweld would be 'greatly concerned if [Independence] contemplates entering the structural tube market . . . in competition with Regal Tube.'" *Id.* at 756-57. The letter also promised that Copperweld would "take 'any and all steps . . . necessary to protect [its] rights.'" *Id.*

192. *Id.* at 757.

to Independence, and prospective suppliers and customers.<sup>193</sup> The effect of these letters was to thwart Independence's attempts at gaining any clientele in the steel tubing business.<sup>194</sup> The Supreme Court reversed the Seventh Circuit's decision which found that Copperweld and its subsidiary had conspired in violation of section 1 of the Sherman Act.<sup>195</sup> In doing so, the Court effectively discarded thirty-seven years of precedent.<sup>196</sup> However, the majority opinion indicated that no such binding precedent existed because four out of the five earlier intraenterprise conspiracy cases had alternate grounds for their results.<sup>197</sup>

The Court, in a conclusory manner, disposed of the four cases previously used as a basis for applying the intraenterprise conspiracy doctrine. For example, the Court stated that *United States v. Yellow Cab Co.*, recognized as the case which "breathed life into the intra-enterprise conspiracy doctrine,"<sup>198</sup> was never intended to stand for such a proposition.<sup>199</sup> Rather, the Court indicated that what it meant when it stated that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman] Act" was that a "pattern of acquisitions" may create a combination or conspiracy in violation of section 1.<sup>200</sup> However, under section 7 of the Clayton Act, acquisitions are

193. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 757 (1984). Copperweld and its subsidiary later claimed that the letters were only intended to prevent third parties from developing reliance interests which would later dissuade a judge from enjoining Independence's operations. *Id.*

194. *Id.*

195. *Id.* at 758-59. The Seventh Circuit recognized that its decision "left a parent company and its wholly owned subsidiary as the only parties to the § 1 conspiracy," but still determined "that liability was appropriate 'when there is enough separation between the two entities to make treating them as two independent actors sensible'" *Id.* at 758-59 (quoting *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 318 (7th Cir. 1982)).

196. See *supra* notes 164-85 and accompanying text.

197. The Court stated that "[a]lthough the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result." *Copperweld*, 467 U.S. at 760. Instead, the Court indicated that it had never really examined the doctrine in depth, but support for the doctrine emerged from what the Court considered to be a narrow holding in *Yellow Cab*. *Id.*

198. *Id.* at 761.

199. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 761 (1984). The Court referred to what it called "the ambiguity of the *Yellow Cab* holding . . ." *Id.* at 763. Ironically, it was the Supreme Court itself that followed the *Yellow Cab* holding in four cases decided prior to *Copperweld*. See *supra* notes 173-85 and accompanying text.

200. *Copperweld*, 467 U.S. at 760. The Court further noted that this combination would especially be deemed illegal if an "original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct." *Id.* at 761. In the case of the defendants in *Yellow Cab*, the Court stated that their affiliation was irrelevant "because the original acquisitions were themselves illegal." *Id.* See also *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944) (holding that the "creation of the combination [was] itself the violation").

generally reviewed at the time of the merger.<sup>201</sup> The Court's suggestion that now the Sherman Act, instead of the Clayton Act, can be used to invalidate a vertical merger at the time of the merger seems greatly misplaced. The Sherman Act is not intended to govern new mergers; instead, the Clayton Act applies to new mergers and acquisitions.<sup>202</sup> Furthermore, if a proposed merger receives FTC approval under the Clayton Act, it would seem unlikely that the Sherman Act could then reverse that approval simply by claiming that the acquisition was unlawful from the beginning.<sup>203</sup> If this were the case, the acquisition should never have been approved under the Clayton Act in the first place.

The Court used similar reasoning to distinguish *Copperweld* from *Schine Chain Theatres, Inc. v. United States*.<sup>204</sup> The Court noted that *Schine* relied on *Yellow Cab* for its holding, but also pointed out that the finding of an intraenterprise conspiracy was not necessary to the holding.<sup>205</sup> The doctrine was deemed extraneous because the Court also found a monopoly violation, and because the defendants had conspired with independent film distributors.<sup>206</sup> The Court gave this same reasoning as a basis for distinguishing *Copperweld* from both *Timken Roller Bearing Co. v. United States*<sup>207</sup> and *Perma Life Mufflers, Inc. v. International Parts Corp.*<sup>208</sup> The Court reasoned that in neither of the above two cases "was the [intraenterprise conspiracy] doctrine necessary to the result reached."<sup>209</sup> For example, in *Timken*, the foreign "subsidiaries" were not wholly-owned by the American corporation, nor were they controlled by the American corporation.<sup>210</sup> Therefore, the intraenterprise

201. See generally section III.A.

202. The Clayton Act prohibits a company or person from *acquiring* the stock or capital of another person or company engaged in commerce when the acquisition would result in substantially reduced competition. 15 U.S.C. § 18 (1994). The reference to the *acquisition* of stock includes mergers in which one corporation purchases another corporation, as drug manufacturers are doing with PBMs.

203. If a proposed merger is inherently unlawful, the Clayton Act's purpose is to prevent the merger from ever taking place. Therefore, if the FTC approves a proposed merger under the Clayton Act, the presumption is that the merger is lawful. Any subsequent action taken by the FTC via the Sherman Act would then be based upon the merged companies' post-approval conduct, not upon the original lawfulness of the merger.

204. 334 U.S. 110 (1948).

205. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 763 n.8 (1984).

206. *Id.*

207. 341 U.S. 593 (1951).

208. 392 U.S. 134 (1968).

209. *Copperweld*, 467 U.S. at 764.

210. *Id.* at 765. Further, the stock acquisitions of the foreign companies "were themselves designed to effectuate restrictive practices." *Id.*

conspiracy doctrine relating to *wholly-owned* subsidiaries did not apply.<sup>211</sup> Further, in *Perma Life*, the plaintiffs were franchisees of the defendant corporation and its subsidiaries; the plaintiffs were *not* wholly-owned subsidiaries.<sup>212</sup> The *Copperweld* Court noted that the majority in *Perma Life* stated that the plaintiffs themselves could charge a conspiracy “between themselves and the defendants or between the defendants and other franchise dealers.”<sup>213</sup> The Court reasoned, therefore, that the intraenterprise conspiracy doctrine “was at most only an alternative holding.”<sup>214</sup>

Unfortunately, for the *Copperweld* Court, the intraenterprise conspiracy doctrine in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*<sup>215</sup> was more than simply an alternative holding.<sup>216</sup> The Court recognized that the *Kiefer-Stewart* holding went beyond what the Court interpreted as the “narrow” holding of *Yellow Cab*.<sup>217</sup> However, the Court stated that “[i]n straying beyond *Yellow Cab*, the *Kiefer-Stewart* Court failed to confront the anomalies an intra-enterprise doctrine entails.”<sup>218</sup> The Court’s main support for disregarding *Kiefer-Stewart*’s direct approval of the intraenterprise conspiracy doctrine rested on what the result would have been if the case were decided in 1984. The Court claimed that the same result would have occurred in 1984 by using a theory that Seagram’s subsidiary conspired with companies other than its parent corporation.<sup>219</sup> However, the Court cannot justify abandoning precedent by simply changing the issue of the original case. Through a close examination of the facts of *Kiefer-Stewart*, one can clearly see that it was never alleged that Seagram’s subsidiary conspired with outside companies. The complaint alleged that the subsidiary conspired with Seagram, its *parent corporation*.<sup>220</sup> Therefore, while the Court should have distinguished *Copperweld*’s facts from *Kiefer-Stewart*, it never did. Ironically, the *Copperweld* Court did exactly what it charged the *Kiefer-Stewart* Court with doing: “offhandedly [dismissing] the defendants’ argument that ‘their status as

211. The *Copperweld* Court was careful to point out that its holding was limited to the issue of whether a parent corporation and its *wholly-owned* subsidiary were capable of conspiring under section one of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

212. *Id.* at 765-66.

213. *Id.*

214. *Id.*

215. 340 U.S. 211 (1951).

216. The *Copperweld* Court indicated it felt that *Kiefer-Stewart* was “the one case giving support to the intra-enterprise conspiracy doctrine.” *Copperweld*, 467 U.S. at 763.

217. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 763 (1984).

218. *Id.* at 764.

219. *Id.*

220. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 212 (1951). “The complaint charged that *respondents*, [Seagrams and its distributor, Calvert], had agreed or conspired . . . .” *Id.* (emphasis added).

“mere instrumentalities of a single manufacturing-merchandising unit” makes it impossible for them to have conspired.”<sup>221</sup> The Court merely pointed out that *Kiefer-Stewart’s* holding relied on a citation to *Yellow Cab*, which the *Copperweld* Court had previously indicated should not have been relied on for the proposition that a company and its wholly-owned subsidiary could conspire to violate the Sherman Act.<sup>222</sup>

However, at the same time the *Copperweld* Court was denouncing the intraenterprise conspiracy doctrine, it recognized that its holding would leave a “‘gap’ in the [Sherman] Act’s proscription against unreasonable restraints of trade.”<sup>223</sup> Because this “gap” has never been filled, many vertically integrated companies, such as drug manufacturers and PBMs, are, in essence, immune from antitrust liability.

### C. Criticism of *Copperweld*: *The Dissent and Other Commentators*

The dissent in *Copperweld* pointed out that the Court’s decision left a major gap in antitrust law. Justice Stevens, joined by Justices Brennan and Marshall, systematically attacked the majority’s reasoning for abandoning precedent.<sup>224</sup> The dissent focused on the fact that *Copperweld* Corporation and its subsidiary, Regal Tube Company, clearly acted for the purpose of restraining trade.<sup>225</sup> Furthermore, Justice Stevens felt that the Court could not distinguish *Kiefer-Stewart* from *Copperweld*.<sup>226</sup> He noted that the defendant in *Kiefer-Stewart* had argued essentially the same theory as *Copperweld* Corporation had: that *Yellow Cab* should only be applied to cases involving unlawful acquisitions.<sup>227</sup> Thus, the Supreme Court, in *Kiefer-Stewart*, had already rejected the approach which the *Copperweld* Court adopted.<sup>228</sup> Therefore, contrary to the majority’s claims, the majority *did* abandon precedent

221. *Copperweld*, 467 U.S. at 763-64 (quoting language from *Kiefer-Stewart*, 340 U.S. at 215).

222. See *supra* notes 198-200 and accompanying text.

223. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). See also *Gregg*, *supra* note 159, at 380 (noting that “short of threatened monopolization, the Sherman Act does not reach the anticompetitive conduct of a single firm, even though its effects may be indistinguishable from the effects of a two-firm conspiracy”).

224. *Copperweld*, 467 U.S. at 778-96 (Stevens, J., dissenting).

225. *Id.* at 778 (Stevens, J., dissenting) (stating that the purpose of *Copperweld’s* letters was to exclude Independence, a potential competitor, from the market).

226. *Id.* at 778-79 (Stevens, J., dissenting).

227. *Id.* at 782 (Stevens, J., dissenting).

228. In *Kiefer-Stewart*, the defendants had argued that “their status as ‘mere instrumentalities of a single manufacturing-merchandising unit’” denied them the ability to conspire. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951). However, the Supreme Court flatly rejected this proposition, and instead relied on *Yellow Cab*. *Id.* The Court further noted that the intraenterprise conspiracy doctrine was especially applicable because the defendants held themselves out as competitors. *Id.*



set by *Kiefer-Stewart*.<sup>229</sup> Justice Stevens also found compelling the fact that almost all commentators and lower courts had concluded that the Supreme Court's cases established that a parent and its wholly-owned subsidiary were capable of conspiring in violation of the Sherman Act.<sup>230</sup> The dissent accused the majority of "elevat[ing] form over substance," implying that the majority's rule focused only on the fact that the subsidiary was wholly-owned by the parent corporation and ignored the possibility that these two entities could still agree to restrain trade.<sup>231</sup>

As an alternative to the per se rule adopted by the majority, the dissent recommended continuing to follow *Yellow Cab*, which stated that "[t]he test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."<sup>232</sup> Justice Stevens indicated that this approach would fill the gap left by the majority's decision, while still allowing economically efficient

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229. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 782 (1984) (Stevens, J., dissenting).

230. *Id.* at 783-84 (Stevens, J., dissenting). See also *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1054 (9th Cir. 1981) (holding that the defendants' parent-subsidiary relationship did not preclude the finding of an illegal conspiracy); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 588-89 (8th Cir. 1981) (holding that the separate incorporation of a subsidiary does not automatically provide a defense to § 1 liability); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979) (stating that if a corporate parent and its subsidiary are sufficiently independent from each other, they may conspire in restraint of trade); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979) (same); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33 (3d Cir. 1978) (noting that the intraenterprise conspiracy doctrine provided for a finding of a conspiracy between a corporation and its wholly-owned subsidiary); *H&B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978) (noting that, especially when the two corporations compete with each other, a parent corporation and its wholly-owned subsidiary can conspire in violation of the Sherman Act); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 557 (1st Cir. 1974) (recognizing that conspiracies among associated corporations are possible). See also Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977) [hereinafter *Suggested Standard*]; Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983).

231. *Copperweld*, 467 U.S. at 789 (Stevens, J., dissenting). See also Gregg, *supra* note 159, at 378 (stating that the majority failed to "address the significance of the anticompetitive conduct engaged in by the defendants"). "The majority's holding . . . automatically elevates the form of the corporation over the reality of the substantial restraint of trade." *Id.*

232. *Copperweld*, 467 U.S. at 779 (Stevens, J., dissenting) (quoting *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947)).

mergers to exist.<sup>233</sup> In essence, the dissent's proposal would follow the general rule used for all alleged violations of section 1 of the Sherman Act: the Rule of Reason.<sup>234</sup> This would mean that in analyzing an alleged conspiracy or contract in restraint of trade, a court would use a reasonableness standard to determine whether the agreement was adopted for legitimate efficiency purposes, in which case it would be legal.<sup>235</sup> Conversely, if the agreement was adopted for the sole purpose of restraining competition, it would violate the Sherman Act.<sup>236</sup> The rule of reason, the dissent felt, would allow for "procompetitive integration," while, at the same time, it would provide a deterrent for anticompetitive integration.<sup>237</sup> However, the dissent's proposal would essentially follow *Yellow Cab* and apply the intraenterprise conspiracy doctrine to all merged companies.<sup>238</sup> This approach could possibly deter companies from merging for fear that they will be found guilty of an antitrust violation, which is exactly what the *Copperweld* majority hoped to avoid.<sup>239</sup>

Other commentators have also criticized the *Copperweld* holding for not adhering to precedent and for not admitting the realities of anticompetitive

233. *Id.* at 790-92 (Stevens, J., dissenting). Justice Stevens noted that the *Yellow Cab* holding was economically justified because it allowed antitrust enforcement to reach anticompetitive agreements that might possibly restrain competition, but would not attain sufficient power to be considered monopolies under § 2 of the Sherman Act. *Id.* at 790-91. Justice Stevens stated that the majority's holding in *Copperweld* left "a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration." *Id.* at 789.

234. The "Rule of Reason" began in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), and was later adopted in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). This approach analyzes activities by companies using a reasonableness standard. *Addyston* stated that any restraint of trade that is larger than necessary is unreasonable, and, therefore, unlawful. *Addyston*, 85 F. at 282. The Supreme Court, in *Standard Oil Co.*, indicated that "in every case where it is claimed that an act or acts are in violation of [Sherman § 1] the rule of reason, in light of the principles of law and the public policy which the act embodies, must be applied." *Standard*, 221 U.S. at 66.

235. Agreements that actually enhance competition would not be violative of the antitrust laws because they do not result in the dangers the Sherman Act was enacted to prevent. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 778 (1984) (Stevens, J., dissenting).

236. *Id.* at 792-93 (Stevens, J., dissenting).

But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a "combination or conspiracy in restraint of trade."

*Id.*

237. *Id.* at 794 (Stevens, J., dissenting).

238. *Id.* at 790-92 (Stevens, J., dissenting).

239. *Id.* at 771 (noting that *Yellow Cab* might discourage corporations from decentralizing and creating divisions, thus depriving consumers of the economic benefits this type of organization might provide).

conduct.<sup>240</sup> It has been argued that allowing a Sherman Act violation by incorporated subsidiaries would simply place the same threat of antitrust liability on subsidiaries that is on every other person or organization covered by the Act.<sup>241</sup> Furthermore, although the majority used economic efficiency as a basis for its holding, many argue that the Court failed to recognize that potential antitrust liability deters anticompetitive behavior and, therefore, promotes economic efficiency.<sup>242</sup> The *Copperweld* dissent and later critics of the majority's decision all point out that many merged companies, including drug manufacturers merged with PBMs, are now free to practice as they choose without any threat of antitrust liability.<sup>243</sup>

Because drug manufacturers merged with PBMs lack any real incentive to avoid unfair practices, a change is necessary. However, there is no need for the legislature to pass new legislation concerning the matter. Ample antitrust legislation already exists within the Clayton Act, the FTC Act, and the Sherman Act. The problem is the Supreme Court's interpretation of these acts, particularly section 1 of the Sherman Act.<sup>244</sup> While *Yellow Cab*, as well as the *Copperweld* dissent, went too far in allowing intraenterprise conspiracies, and thereby deterred potentially efficient mergers from occurring,<sup>245</sup> the *Copperweld* majority strays too far in the opposite direction.<sup>246</sup> *Copperweld* causes the most effective deterrent, Sherman section 1, to cease to exist with respect to drug manufacturer/PBM mergers. The solution lies in finding a "middle ground" between *Yellow Cab* and *Copperweld*.

#### V. A PROPOSED SOLUTION: CREATING AN EXCEPTION TO *COPPERWELD*

The Supreme Court should create a limited exception to its *Copperweld* holding. This exception would allow the courts to apply the intraenterprise conspiracy doctrine to certain corporations and their wholly-owned subsidiaries. Application of the exception would continue to allow mergers to occur for economic efficiency reasons, thereby alleviating the concern of the *Copperweld*

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240. Gregg, *supra* note 159, at 371 (stating that the *Copperweld* Court prematurely repudiated the intraenterprise conspiracy doctrine); David J. Brown, Comment, *Antitrust Law—The Demise of the Intraenterprise Conspiracy Doctrine: Copperweld Corp. v. Independence Tube Corp.*, 10 J. CORP. L. 785, 797 (1985) (claiming that the Sherman Act *does* allow for a finding that affiliated corporations can conspire).

241. Gregg, *supra* note 159, at 379.

242. See, e.g., Brown, *supra* note 240, at 799.

243. See *supra* notes 224-42 and accompanying text.

244. See *supra* notes 99-159 and accompanying text.

245. See *supra* notes 165-72, 224-39 and accompanying text.

246. See *supra* notes 186-223 and accompanying text.

Court.<sup>247</sup> Only those corporations and their subsidiaries that meet specific criteria would ultimately be subject to the intraenterprise conspiracy doctrine. Once a court determines that a merged entity meets these criteria, the court would then use the standard Rule of Reason to determine if an antitrust conspiracy actually exists.<sup>248</sup> Thus, the exception would simply provide the criteria to be used to determine whether the intraenterprise conspiracy doctrine should apply.

Although the antitrust laws were meant to promote economic efficiency and competition,<sup>249</sup> *Copperweld* claims that the intraenterprise conspiracy doctrine thwarts that goal because it fails to allow companies to realize these efficiencies through vertical integration.<sup>250</sup> However, without the intraenterprise conspiracy doctrine, a gap exists in antitrust law.<sup>251</sup> This gap allows companies to use anticompetitive illegal practices in vertical integration without being subject to antitrust liability.<sup>252</sup> While applying the intraenterprise conspiracy doctrine in a blanket fashion to *all* vertically integrated companies would provide justification for the *Copperweld* Court's concerns, a limited exception would successfully address those fears and fill the gap that currently exists in the law.

Because of the high probability of a drug manufacturer engaging in anticompetitive practices with its wholly-owned PBM subsidiary, and because

247. The *Copperweld* Court feared that the intraenterprise conspiracy doctrine might discourage corporations from creating incorporated divisions, thereby depriving consumers of the economic efficiencies that can result from a decentralized form of management. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). The Court listed examples of reasons why a corporation may create a subsidiary, including achieving tax benefits or improving management. *Id.* at 772-73.

248. See *supra* notes 232-39 and accompanying text.

249. Jones, *supra* note 162, at 1738-39 (suggesting that any application of antitrust law must encourage procompetitive practices such as vertical integration).

250. Handler & Smart, *supra* note 230, at 44 (claiming that there is not a public policy or an antitrust law justification for the rule that a corporation and its subsidiary can conspire and that courts should hold that such a finding is impossible); Everett I. Willis & Robert Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 26-27 (1968) (noting that corporations usually incorporate subsidiaries for reasons other than to affect the market or competition); *Suggested Standard*, *supra* note 230, at 727 (warning against emphasizing the form of integrated companies, which results in inhibiting many economically efficient agreements, rather than the substance of the agreement).

251. *Copperweld*, 467 U.S. at 779; Willis & Pitofsky, *supra* note 250, at 22 (noting that because it is difficult to prove monopolistic practices, the conduct of a single enterprise often falls beyond the reach of antitrust laws); Brown, *supra* note 240, at 785 (noting that unilateral conduct is not subject to § 1 of the Sherman Act, and that § 2 only applies when monopolization can be proved).

252. Brown, *supra* note 240, at 799 (noting that the Court, in *Copperweld*, failed to realize that potential antitrust liability would serve as a deterrent to anticompetitive practices).

none of the current antitrust statutes, as construed, are effective in deterring such conduct, the Court should create an exception to the *Copperweld* holding.<sup>253</sup> This exception would apply when a parent company's goals and its subsidiary company's goals would be served by opposing practices, as is the situation with drug manufacturers and PBMs.<sup>254</sup> Further, the doctrine would apply when the goods or services the merged companies produce are subject to inelastic demand.<sup>255</sup> By creating an exception to the *Copperweld* holding, the Supreme Court would recognize that, in limited situations, the form of a company and its subsidiary is irrelevant to the plausibility of the companies conspiring to restrain trade.<sup>256</sup> Rather than focus on the form of the relationship, meaning whether the subsidiary is separately incorporated, the exception would focus on the actual ability of the companies to conspire.

#### A. *The Proposed Exception to Copperweld*

Any exception to *Copperweld* must provide for procompetitive vertical integration while, at the same time, deter such arrangements when they are intended to hinder competition. Such an exception would ensure that the antitrust goals of promoting competition are advanced. Therefore, the exception must apply only when companies meet specific criteria that indicate a strong potential for anticompetitive practices.

##### 1. Why Drug Manufacturers Merged with PBMs Merit Special Treatment

Drug manufacturers aligned with PBMs have two major incentives to practice anticompetitively. First, the drug manufacturer has the complete opposite goal of the PBM: the manufacturer wants to sell its drugs at the highest price possible, while the PBM, by definition, exists to offer lower prices to its subscribers. Second, drug manufacturers know that even when prices are raised, many people will continue to purchase pharmaceuticals at the same rate as before. While a PBM with a formulary containing drugs that are not cost-effective or clinically effective runs the risk of losing subscribers,<sup>257</sup> a PBM owned by a drug manufacturer may not have the final decision-making

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253. See *supra* notes 75-86, 98-159 and accompanying text.

254. See *infra* notes 260-62 and accompanying text.

255. See *infra* notes 263-66 and accompanying text.

256. The *Copperweld* Court claimed that the intraenterprise conspiracy doctrine placed too much focus on the form of a parent and its subsidiary. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766-67 (1984). The Court stated that the mere fact that a subsidiary is separately incorporated does not mean it should be treated as a separate entity for conspiracy purposes. *Id.* However, the Court's ruling makes the same mistake. It creates a blanket rule that a parent and its wholly-owned subsidiary can *never* conspire. This is truly exalting form over substance.

257. See *supra* notes 48-59 and accompanying text.

authority as to what drugs will actually be placed on the formulary.<sup>258</sup> Industry officials claim that they have already seen gaps which exclude a competitor manufacturer's drugs in the formularies of PBMs owned by drug manufacturers.<sup>259</sup> The implication is that these gaps are the result of anticompetitive practices.

First, a drug manufacturer conspiring with a PBM is highly plausible because the two newly merged companies ultimately have diametrically opposed goals. Both the manufacturer and the PBM want to obtain as high a profit margin as possible and, at the same time, retain a large amount of consumers.<sup>260</sup> However, each company uses a different method to generate its profits. A drug manufacturer, just like any other ordinary manufacturer, attempts to earn revenue by selling its product at the highest price the market will bear.<sup>261</sup> In other words, a drug manufacturer prices pharmaceuticals at the highest price it can without suffering a loss of consumers. In contrast, the PBM does the opposite. PBMs, as managed care entities, seek to manage their subscribers' pharmaceutical care by offering pharmaceuticals at discounted prices.<sup>262</sup> This situation gives the parent company manufacturer great incentive to force its PBM subsidiary to increase the manufacturer's pharmaceutical prices.

The second factor providing drug manufacturers with the incentive to conspire with their subsidiary PBMs is that the drug industry has a unique

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258. See *supra* notes 75-86 and accompanying text.

259. Novak & Tanouye, *supra* note 75, at A3. John Fortin, a consultant for a firm that reviews PBMs, stated that he has noticed "holes" in formularies of PBMs owned by drug manufacturers. *Id.* These "holes" suggest that the parent company's competitors' drugs are being excluded from the formulary. *Id.*

260. A manufacturer will generally set a price at a point where the price and quantity of a good are balanced. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 64 (12th ed. 1985). This price represents a price at which consumers are willing to purchase and manufacturers are still willing to sell. *Id.*

261. The Law of Demand states that the amount of a good that will be purchased varies inversely with the price of that good. PAUL F. GEMMILL, *FUNDAMENTALS OF ECONOMICS* 384 (6th ed. 1960). This means that if the price is set lower, more of the good will be purchased. *Id.* Of course, the manufacturer does not want to set low prices. Therefore, the manufacturer increases the price up to the point where revenue will be maximized (with revenue being the price of a good multiplied times the quantity purchased). *Id.* at 380-81. This price is determined by examining both the demand for a good and the supply of the good. *Id.* at 398. The optimum price is the point referred to as "equilibrium of demand and supply." *Id.* See also C.E. FERGUSON & S. CHARLES MAURICE, *ECONOMIC ANALYSIS* 44-47 (rev. ed. 1974).

262. See *supra* notes 48-66 and accompanying text.

characteristic: relatively unchanging demand in the face of increased prices.<sup>263</sup> This phenomenon is true of almost all areas of healthcare for one simple reason: most people will go to great lengths to ensure good health.<sup>264</sup> Generally, a person will pay large amounts of money, even to the point of going deeply into debt, to become healthy.<sup>265</sup> Therefore, while a PBM's purpose is to offer effective drugs at a lower price, people who are sick and need medicine generally will not question the cost of a prescribed pharmaceutical.<sup>266</sup>

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263. BARRY R. FURROW ET AL., HEALTH LAW 662-63 (2d ed. 1991). The marketplace for pharmaceuticals has generally exhibited extremely high profits without any real price competition. *Retail Drug*, *supra* note 13, at \*1. Also, many patients are not concerned about the price of pharmaceuticals because their insurance pays the cost. Krulwich, *supra* note 1, at 1.

264. Admittedly, those people who simply cannot afford medical care are often forced to do without it. However, when discussing PBMs, it should be understood that PBMs affect *only* people with insurance. A PBM is a method of managing pharmaceutical care. Therefore, if a PBM engages in unfair competition, the consumers who are injured are the same people the PBM is supposed to protect: its insureds.

265. See RICHARD K. THOMAS, HEALTH CARE CONSUMERS IN THE 1990s 38 (1993) (noting that cost is often not a consideration for traditional healthcare consumers). Often healthcare demand is not elastic; this is commonly a result of patients facing serious health conditions which must be treated. *Id.* at 39. Elasticity is the concept that the change in demand for goods or services is a direct result of the change in price of those goods and services. WILLIAM J. WARD, AN INTRODUCTION TO HEALTH CARE FINANCIAL MANAGEMENT 6 (1988).

There are several explanations for the relative inelasticity of demand for healthcare services, including pharmaceutical services. The most common reasoning recognizes that the decision-making process for healthcare considers much more than simply cost. THOMAS, *supra*, at 77. For example, a person's emotions play a large part in the decision, simply because a person's very life may be at stake. *Id.* (noting that a person's decision may be "driven by everything from fear to vanity"). The second common explanation for unchanging demand in the healthcare industry is the fact that consumers (or patients) are often unaware of the prices. *Id.* at 78. This "ignorance" may be a result of the patient not caring, because other factors have motivated the decision to seek services. Alternatively, the lack of knowledge regarding prices may simply be a result of the prevalence of third-party payer systems such as HMOs, PPOs, and Medicare. Under such a system, a patient is not ultimately responsible for payment. *Id.* When a third party insurance company is responsible for paying the patient's bill, those persons who order and select healthcare services, including physicians and patients, are completely outside of the monetary environment. WARD, *supra*, at 9. Because of this "alienation," any change in price is unlikely to affect the decision-making, and therefore unlikely to change demand. *Id.* Another model analyzing the unique status of healthcare demand lists three components, other than price, affecting the decision to use healthcare services: predisposing, enabling, and need. MICHAEL D. ROSKO & ROBERT W. BROYLES, THE ECONOMICS OF HEALTH CARE: A REFERENCE HANDBOOK 74 (1988). This theory recognizes that a person's age, sex, marital status, or beliefs about illness may cause a predisposition to use healthcare services. *Id.* Further, the person's perception of his or her health status will affect whether an actual need for services is felt. *Id.* Lastly, a person's income and insurance coverage, as well as the availability and accessibility of services, affect whether the person is actually enabled to receive the services. *Id.* The influence of these factors on consumers' decisions to purchase healthcare services diminishes the influence price increases have on such decisions.

266. See *infra* notes 277-83 and accompanying text.

## 2. Model Legal Reasoning: A Guide for the Court in Creating an Exception to *Copperweld*

Despite the fact that PBMs exist to offer lower pharmaceutical prices, anticompetitive practices between PBMs and drug manufacturers still threaten the industry. One argument asserts that a PBM acquired by a drug manufacturer cannot afford to use anticompetitive practices because it will lose business to other PBMs which are not owned by drug manufacturers.<sup>267</sup> Proponents of this argument claim that although drug manufacturers themselves are also consolidating, this consolidation is unlikely to inhibit competition as long as numerous PBMs exist to encourage continued competition.<sup>268</sup> However, the three merged companies discussed above currently control over eighty percent of the PBM market, which indicates a lack of other powerful PBMs to increase the competition.<sup>269</sup> Therefore, if all three of these companies engage in anticompetitive practices, resulting in higher pharmaceutical prices, smaller PBMs are likely to follow their lead.<sup>270</sup> If the consumer prices in eighty percent of the market increase, none of the large merged companies will likely suffer a loss of subscribers; that is, each company will be viewed as offering a competitive price in comparison to each other.<sup>271</sup> For this reason, the mergers

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267. *PBM Strategies*, *supra* note 15, at \*1. One critic feels that because PBMs are intended to encourage price competition, there was no reason for the FTC to impose conditions upon the Lilly/PCS merger. *Id.* (stating the opinion of Hemant Shah of HKS & Co.). This critic also feels that a PBM will lose business if it fails to offer savings to its subscribers; that the actual reason for the mergers was that the drug manufacturers wanted guaranteed access to subscribers, not information on its competitors; and that the restricted formularies of PBMs are "unlikely to face much resistance from physicians or patients." *Id.* See also Barnum, *supra* note 7, at B1 (noting that pharmaceutical "industry officials argue that the competitive pressures are so intense that PBMs cannot afford to play favorites").

268. Krulwich, *supra* note 1, at 9.

269. See *supra* text accompanying notes 73-74.

270. See, e.g., *Vertical Arrangements*, *supra* note 74, at 3 (noting the strong potential for domination and market manipulation by the three PBMs merged with drug manufacturers); *Chain Drug*, *supra* note 73, at \*1 (echoing the concern that the acquisition of PBMs by drug manufacturers is simply a method of transferring wealth to the merged companies at the expense of consumers). One drug store official feels that the mergers will have a negative impact on the entire PBM market. *Id.* This concern is especially present because, unlike the conditions placed on the Lilly/PCS merger, no conditions were placed on the Merck/Medco or SmithKline/Diversified mergers. *Retail Drug*, *supra* note 13, at \*1. Additionally, the PBM market is already highly concentrated, which makes it difficult for new competitors to enter the market. *Superville*, *supra* note 12, at \*2.

271. *Retail Drug*, *supra* note 13, at \*1 (noting that if 80% of consumers are moved into PBM plans, as is predicted, and the majority of PBMs are run by drug manufacturers, little incentive to offer competitive prices will exist).



could easily result in anticompetitive practices which ultimately will cause consumer prices to rise.<sup>272</sup>

The first step in applying an exception to *Copperweld* is to examine the goals of both the parent company and its subsidiary. However, the mere fact that the goals are different should not alone trigger application of the intraenterprise conspiracy doctrine. For example, a manufacturer of any item will always want to maintain as high a price as possible to achieve the best profit.<sup>273</sup> Conversely, the distributor for that manufacturer's items will want to sell as many items as possible and may, therefore, be willing to sell at a lower cost. Thus, the two entities' goals appear to oppose one another. However, unlike the healthcare industry, most other industries will face lowering demand as prices increase.<sup>274</sup> Consequently, an ordinary manufacturer has less incentive to force its subsidiary to sell at higher prices.<sup>275</sup> Meanwhile, a drug manufacturer possesses far greater incentive to request that its subsidiary

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272. *Id.* at \*2 (stating that vertical integration in the PBM industry will ultimately lead to less competition and result in higher prices); *Chain Drug*, *supra* note 73, at \*1 (stating that the mergers will harm the public and result in higher prescription drug prices). Unless the FTC imposes requirements that the PBMs owned by drug manufacturers maintain price competitive formularies, they will have no incentive to do so. *Id.* at \*2. The increased wealth from higher priced formularies will then benefit the vertically integrated drug manufacturer/PBM companies, and harm consumers. *Id.* at \*1.

Further, the FTC itself admitted that reduced competition is a possible result of these mergers. *Novak & Tanouye*, *supra* note 75, at \*2. One industry consultant believes that the FTC's order that prices remain confidential will actually cause prices to increase. *Id.* In fact, the National Association of Chain Drug Stores has officially petitioned the FTC to reopen its prior approval of Lilly's acquisition of PCS. *NACDS Asks FTC to Reopen Lilly Consent*, CHAIN STORE AGE EXECUTIVE FAX, Aug. 5, 1996, available in WESTLAW, 1996 WL 8626246. This organization claims that drug manufacturer ownership of PBMs has resulted in increased prices and reduced competition. *Id.* It further claims that because of the overall increased drug prices, drug manufacturers are now offering their products at higher prices to other PBMs, not just the PBMs that they own. The petition requested that the FTC strengthen provisions in the consent order for the Lilly Merger and that these strengthened provisions be applied to other similar mergers in the industry. *Id.*

273. This price will be set according to both the available supply of the product and the demand for the product. *SAMUELSON & NORDHAUS*, *supra* note 260, at 64-66. These factors balance to what is known as "equilibrium of supply and demand." *Id.* at 64. Therefore, if the manufacturer increases the price beyond the equilibrium point, the demand for the product would decrease. *Id.* at 64-65. See also WILLIS S. PETERSON, *PRINCIPLES OF ECONOMICS* 141-43 (3d ed. 1977) (explaining the profit-maximizing rule, under which a producer makes the quantity of products at which the cost of each unit is equal to the added returns of each unit). See *infra* notes 274-76 and accompanying text.

274. The Law of Demand states that as prices increase, the quantity of a good that will be purchased decreases. *GEMMILL*, *supra* note 261, at 384.

275. Based on the Law of Demand, if a manufacturer increases prices for a product, the quantity purchased will decrease. *Id.* Subsequently, the manufacturer will receive lower revenues. *Id.*

PBM sacrifice its goals of low pharmaceutical prices and place the parent company's drugs on the formulary, regardless of their cost or effectiveness.<sup>276</sup>

Therefore, the second step in determining whether to apply the intraenterprise conspiracy doctrine is to examine whether the goods or services that the merged companies produce result in elastic or inelastic demand. Elastic demand exists when the quantity of the good or service is sensitive to price changes, meaning fewer goods are bought when the price increases, and vice versa.<sup>277</sup> If a good or service produces elastic demand, it would not be economically wise for a manufacturer to insist that its subsidiary sell at an extremely high price. Doing so would only reduce consumption of the good or service. Conversely, when demand is inelastic, changes in price only slightly affect the change in sales.<sup>278</sup>

Several factors indicate that the demand for healthcare goods and services, including pharmaceuticals, is inelastic.<sup>279</sup> First, few, if any, substitutes exist for pharmaceuticals.<sup>280</sup> This lack of substitutes means that consumers must either pay the necessary price for pharmaceuticals or go without them. A second reason pharmaceuticals create inelastic demand is that they serve a limited number of uses.<sup>281</sup> Generally, consumers purchase a drug only for its medicinal value. That is, drugs are rarely used for any purpose other than curing or treating an illness. Because no alternative uses exist for pharmaceuticals, demand is less sensitive to price changes. Lastly, the existence of health insurance results in purchasers of pharmaceuticals being disaffected by

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276. *Retail Drug*, *supra* note 13, at \*2 (noting that industry experts foresee no incentive for drug manufacturer owned PBMs to keep competitive prices).

277. GEMMILL, *supra* note 261, at 390 (noting that in a situation with elastic demand, larger receipts would result from lower prices than from higher prices).

278. *Id.* See also FERGUSON & MAURICE, *supra* note 261, at 28 (stating that inelastic demand results in a smaller proportional change in the amount demanded than the proportional change in the price); PETERSON, *supra* note 273, at 77 (stating that inelastic demand indicates an unresponsiveness to price changes by consumers).

279. See, e.g., ROSKO & BROYLES, *supra* note 265, at 63 (noting that data indicate that the demand for healthcare is inelastic); SAMUELSON & NORDHAUS, *supra* note 260, at 390 (stating that "the price elasticity of demand for medical care is inelastic").

280. The degree of substitution between a specific good and other goods is often the most determinative factor affecting elasticity. PETERSON, *supra* note 273, at 83. If a product has many substitutes, the demand will be more elastic. *Id.* Accordingly, if a product has few substitutes or has poor substitutes, that product's demand tends to be inelastic. *Id.* See also FERGUSON & MAURICE, *supra* note 261, at 34 (noting that a lack of substitutes for a good always results in a tendency toward inelasticity). Additionally, products with broad definitions have lower price elasticity. PETERSON, *supra*, at 88. The broad definition results in fewer feasible substitutes that would fit the broad definition and, therefore, lower elasticity. *Id.*

281. FERGUSON & MAURICE, *supra* note 261, at 34 (noting that commodities with several possible uses have greater elasticity because people are willing to buy them for more reasons).

price increases.<sup>282</sup> If an insurance company pays all of or the majority of a patient's bill, that patient will not be concerned with high prices. Thus, the insurance coverage insulates consumers from price increases so that they do not respond by decreasing their demand.<sup>283</sup> Because of these factors, the demand for pharmaceuticals probably will not decrease when the price increases.

When a parent company and its subsidiary do possess opposite goals and possess inelastic demand for their product, courts should apply the intraenterprise conspiracy doctrine. However, applying the doctrine will not mean that the companies have automatically violated antitrust laws, or specifically, section 1 of the Sherman Act. Instead, it will mean that if the companies agree to use anticompetitive practices, they will potentially be subject to liability under the Sherman Act. Actual liability will still depend upon proof that the two companies actually *did* conspire in restraint of trade, as with any other companies which are not otherwise affiliated with each other.<sup>284</sup> This approach would serve the policy concerns voiced by the majority in *Copperweld*.<sup>285</sup> Those companies merging for purely economic reasons, lacking opposing goals that increase the incentive to illegally conspire, would not be subject to intraenterprise conspiracy. However, drug manufacturers merged with PBMs, and other similarly merged organizations, will effectively be deterred from using such practices because they will once again be subject to antitrust liability. The potential application of the intraenterprise conspiracy doctrine will ensure that the merged companies use only procompetitive practices. Thus, economically beneficial mergers may still occur.

### B. How an Exception to Copperweld Will Affect the PBM Industry

The potential for antitrust liability should have a positive effect on the PBM industry. If a drug manufacturer wishes to acquire a PBM, it may, assuming FTC approval, still do so. Further, as long as such an acquisition occurs for

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282. STEVEN R. EASTAUGH, *MEDICAL ECONOMICS AND HEALTH FINANCE* 9 (1981). Often, when insurance pays for services, doctors are prone to recommend more services. *Id.* Further, this situation also causes consumers to demand more services since they will ultimately not be responsible for payment on the services. *Id.*

283. *Id.*

284. Actual proof of a Sherman Act violation is typically analyzed under the Rule of Reason. *See supra* note 234. The Rule of Reason generally condemns conduct if the only rational basis for the conduct's existence is that it will destroy competition. HOVENKAMP, *supra* note 112, at 248.

285. The *Copperweld* Court feared that overapplication of the intraenterprise conspiracy doctrine would deter companies from realizing the potential economic efficiencies that flow from decentralization. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). However, if the intraenterprise conspiracy doctrine is only applied in limited situations where a high potential for using anticompetitive practices exists, legitimate incorporation of subsidiaries could still occur.

purely economic efficiency reasons, the merged companies will have no reason to fear prosecution for violating the Sherman Act. This is true of a merger within any industry: the Sherman Act only applies if the merged company attempts to monopolize or attempts to conspire in restraint of trade.<sup>286</sup> Conversely, if the drug manufacturer's sole reason for acquiring a PBM is to gain access to competitors' data and force placement of its drugs on the formulary,<sup>287</sup> it will face antitrust charges. The potential liability available via the intraenterprise conspiracy doctrine will ensure that PBMs continue to exist to serve consumers, not simply their parent companies. With the threat of being charged with a Sherman Act violation, drug manufacturers will not be tempted to engage in practices which would only increase their profits, while harming consumers. This potential liability will ensure that PBMs retain their goals of selecting cost-effective drugs for their formularies. As a result, the needs of companies wishing to vertically integrate will be balanced with the antitrust law goals of encouraging competition.

## VI. CONCLUSION

The federal antitrust statutes exist to protect consumers from the harsh results of anticompetitive practices.<sup>288</sup> However, when these statutes are construed so that some companies are insulated from violations, the statutes cease to meet their goals of protecting consumers.<sup>289</sup> Such a situation currently exists with drug manufacturers that have merged with PBMs.<sup>290</sup> While a PBM's aim should be to serve its subscribers by providing them with cost-effective pharmaceuticals, a PBM owned by a drug manufacturer may not be allowed to pursue this aim.<sup>291</sup> As a result, the current state of the antitrust statutes fails to protect consumers as Congress intended.

The Supreme Court must, therefore, create an exception to its *Copperweld* holding. While the Court was fully justified in wanting to encourage procompetitive integration among companies, its holding in *Copperweld* exceeded the justifications offered in support of it. Rather than focus only on form, and consider only whether a subsidiary is wholly-owned by its parent company, the Court must examine the substance of the merged companies' relationship. An examination of the substance of a drug manufacturer's

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286. See *supra* notes 140-59 and accompanying text.

287. See *supra* notes 75-86 and accompanying text.

288. See, e.g., BORK, *supra* note 27, at 17 (noting that both Congress and the judiciary believed that agreeing to eliminate rivals or attacking rivals to drive them out of the market could result in injuring competition "to the detriment of consumers").

289. See *supra* notes 99-159 and accompanying text.

290. See *supra* notes 99-159 and accompanying text.

291. See *supra* notes 75-86 and accompanying text.

relationship with its wholly-owned PBM subsidiary shows that potential anticompetitive practices threaten the industry. An exception to the *Copperweld* holding allowing the intraenterprise conspiracy doctrine to be applied will provide the impetus for these companies to adopt only procompetitive practices and, therefore, protect consumers.

Ruth Barber Timm