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## A Free Pass for Corporate Conspirators: Inconsistent Distinctions between Civil and Criminal Corporate Conspiratorial Liability

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# **A FREE PASS FOR CORPORATE CONSPIRATORS?: INCONSISTENT DISTINCTIONS BETWEEN CIVIL AND CRIMINAL CORPORATE CONSPIRATORIAL LIABILITY**

## **I. INTRODUCTION**

The act of incorporating a business allows the resulting corporation to be viewed as a single entity in the eyes of the law.<sup>1</sup> Individual agents of the corporation acting within the scope of their professional capacities and in furtherance of corporate objectives are considered a part of this legal entity.<sup>2</sup> The notion of this single fictitious “person” created by the act of incorporation has resulted in troublesome conceptual discrepancies in the area of civil and criminal corporate conspiratorial liability.<sup>3</sup> The essence of a conspiracy charge is that two or more persons – a plurality of individuals – have agreed to engage in illegal conduct.<sup>4</sup> Therefore, in a corporate context, the multiplicity of actors necessary to constitute a conspiracy is negated because the corporation and its agents are viewed as a single legal actor.<sup>5</sup>

The intracorporate conspiracy doctrine developed in response to the question of whether a corporation is capable of conspiring with its own agents.<sup>6</sup> The doctrine concludes that because it is not legally possible for an individual to conspire with himself, it is also not legally possible for a single entity consisting of a corporation and its agents to conspire with

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<sup>1</sup> See *United States v. Hartley*, 678 F.2d 961, 970 (11th Cir. 1982) (“Under elementary agency principles, a corporation is personified through the acts of its agents.”).

<sup>2</sup> See *id.*; see also *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981) (noting agent’s acts are attributed to corporation and are those of single legal actor).

<sup>3</sup> See *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c): The Impact of Novotny v. Great American Federal Savings & Loan Association*, 13 GA. L. REV. 591, 598-99 (1979) [hereinafter *Intracorporate Conspiracies*] (recognizing a corporation, in the eyes of the law, is “a single fictive person”). Agents working on behalf of the corporation, though multiple in number, still act as a single entity and thus are incapable of conspiring with each other. *Id.* at 600.

<sup>4</sup> See JOSEPH F. MCSORLEY, A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW: DEVELOPING STRATEGIES FOR CRIMINAL AND CIVIL CASES 14 (American Bar Association 1996) (outlining conspiracy elements).

<sup>5</sup> See *Dussouy*, 660 F.2d at 603 (stating rationale for conspiracy rule).

<sup>6</sup> See 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS 266 (Clark, Boardman & Callaghan, 2d ed. 1992) (explaining intracorporate conspiracy doctrine’s purpose).

itself.<sup>7</sup> Although the doctrine originated in the antitrust context, federal courts have considered its applicability in the contexts of civil conspiracies under 42 U.S.C. § 1985 and criminal conspiracies under 18 U.S.C. § 371.<sup>8</sup> The majority of circuit courts have allowed the intracorporate conspiracy doctrine defense to civil conspiracy claims filed under § 1985, employing precisely the same reasoning concerning the absence of the plurality of actors requirement as applied in antitrust litigation.<sup>9</sup> A small number of circuit courts, however, have refused to allow the intracorporate conspiracy doctrine defense in § 1985 civil conspiracy claims because the doctrine was conceived for use in an entirely different and unrelated context.<sup>10</sup> The doctrine was never intended to shield corporations from liability for conspiring to violate an individual's civil rights.<sup>11</sup> For seemingly similar reasons, every court that has addressed the application of the intracorporate exception to criminal conspiracies in violation of § 371 has ruled that the doctrine cannot be extended as a liability shield for corporate criminal activity.<sup>12</sup>

In contrast, no such uniformity exists among the circuit courts in the context of civil conspiracies, even though the doctrine was also not originally intended to act as a shield against liability for conspiring to

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<sup>7</sup> See *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (reasoning it is an "absurd assertion" that defendant corporation conspired with itself). Before *Nelson*, there was little federal case law that addressed this issue. See BRICKEY, *supra* note 6, at 266 (outlining intracorporate conspiracy doctrine's development).

<sup>8</sup> See generally Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 23-26 (1981-82) (reviewing doctrine's origin and its role in antitrust litigation); Lawrence C. McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 183-84 (1955) (explaining rationale behind an intra-enterprise conspiracy doctrine in antitrust context). 42 U.S.C. § 1985 prohibits civil conspiracies to interfere with an individual's civil rights in three distinct ways: § 1985(1) states that "two or more persons" cannot conspire to prevent an officer from performing his duties; § 1985(2) states that "two or more persons" cannot conspire to obstruct justice by intimidating a party, witness, or juror, or to injure a person or his property for lawfully enforcing or attempting to enforce the right of any person to the equal protection of the laws; and § 1985(3) states that "two or more persons" cannot conspire to deprive persons of their rights or privileges. 42 U.S.C. § 1985 (2000). The federal criminal conspiracy statute makes it illegal for "two or more persons" to conspire to commit any offense against the United States. 18 U.S.C. § 371 (2000).

<sup>9</sup> See *infra* note 44 and accompanying text (listing circuit holdings in regard to intracorporate conspiracy doctrine as applied to civil conspiracy claims).

<sup>10</sup> See cases cited *infra* note 49 and accompanying text (listing First, Third, and Tenth Circuit holdings).

<sup>11</sup> See cases cited *infra* note 49 and accompanying text (identifying minority courts' reasonings).

<sup>12</sup> See cases cited *infra* note 82 and accompanying text (explaining doctrine's applicability to criminal conspiracies).

violate one's civil rights.<sup>13</sup> This Note seeks to discern why the circuit courts have failed to adequately address the reasons for drawing a distinction between civil and criminal corporate conspiratorial liability.<sup>14</sup> Furthermore, it purports that if the doctrine's original intent serves as the courts' sole basis for refusing to extend the doctrine as a defense in criminal conspiracy claims, then it logically follows that there should be no split among the circuit courts as to its applicability in civil conspiracies.<sup>15</sup> This reasoning follows because the doctrine was only intended to eliminate corporate liability in an antitrust context.<sup>16</sup> Part II traces the origin and development of the intracorporate conspiracy doctrine in light of basic agency principles and the need to protect corporations from certain types of liability under the Sherman Antitrust Act.<sup>17</sup> It also discusses the current circuit split regarding the application of the intracorporate conspiracy doctrine to civil conspiracy claims, the uniform refusal among circuit courts to apply the doctrine as a defense to criminal conspiracies, and the Eleventh Circuit's unique attempt to reconcile the current inconsistencies.<sup>18</sup> Part III applauds the Eleventh Circuit's logical approach and asserts that, at the very least, the majority of courts that have failed to recognize the many arguments against allowing the intracorporate conspiracy defense in civil claims should consider adopting the Eleventh Circuit's reasoning.<sup>19</sup> It further concludes, however, that the reasoning provided by the Eleventh Circuit, like the reasoning of the majority of other circuits, fails to adequately address why a distinction exists between corporate civil and criminal conspiratorial liability.<sup>20</sup> Accordingly, the distinction should be reconsidered.<sup>21</sup>

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<sup>13</sup> See *infra* notes 44, 49, and 82 and accompanying text (summarizing jurisdictional differences).

<sup>14</sup> See *infra* Part III(C) (addressing stated question).

<sup>15</sup> See *infra* text accompanying notes 123-125 (stating author's conclusion).

<sup>16</sup> See *infra* Part II(B)(2) (outlining intracorporate conspiracy doctrine's development).

<sup>17</sup> See *infra* Parts II(A) and (B).

<sup>18</sup> See *infra* Parts II(C-E); see also *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1034 (11th Cir. 2000) (drawing parallel between civil and criminal conspiracies arising from same activity). The court held that "just as the intracorporate conspiracy doctrine cannot shield a criminal conspiracy from prosecution under the federal criminal code, the doctrine cannot shield the same conspiracy, alleging the same criminal wrongdoing, from civil liability arising under 42 U.S.C. § 1985(2)." *Id.* The Eleventh Circuit recognized that a claim arising under 42 U.S.C. § 1985(2), alleging a conspiracy to deter an individual from testifying in federal court by force, intimidation, or threat, necessarily alleges both criminal activity in violation of 18 U.S.C. § 1512, the criminal statute prohibiting tampering with a witness, and a criminal conspiracy in violation of 18 U.S.C. § 371. *Id.*

<sup>19</sup> See *infra* Part III(A).

<sup>20</sup> See *infra* text accompanying notes 118-120.

<sup>21</sup> See *infra* Part IV (providing author's conclusion).

## II. HISTORY

### A. *Basic Agency Principles*

The Supreme Court described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>22</sup> The act of incorporation creates a seemingly immortal fictitious being whose existence is potentially infinite, despite changes in individual leadership behind the corporation.<sup>23</sup> Individual agents of the corporation who act within the scope of their professional capacities and in furtherance of corporate objectives are considered a part of this legal entity and thus afforded broad immunity from any personal liability for misdeeds.<sup>24</sup> Courts will only pierce this corporate veil of liability and hold individual actors personally liable in very rare instances, usually when there is evidence of intermixture of affairs, lack of corporate formalities, or inadequate capitalization.<sup>25</sup>

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<sup>22</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

<sup>23</sup> *See id.* (explaining legal result of incorporation). The *Woodward* Court stated in relevant text, “[a]mong the most important [corporate properties] are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.” *Id.*

<sup>24</sup> *See United States v. Hartley*, 678 F.2d 961, 970 (11th Cir. 1982) (recognizing “[u]nder elementary agency principles . . . the acts of its agents become the acts of the corporation . . .”); *see also Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981) (noting agents’ acts all attributed to corporation as a single legal actor).

<sup>25</sup> *See Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1230 (E.D.N.Y. 1978) (refusing to recognize corporate entity due to lack of corporate formalities). The court noted, “[a] failure to observe corporate formalities coupled with inadequate capitalization has frequently been cited as a basis for disregarding the corporate entity . . .” *Id.* Furthermore, any attempt to do corporate business without providing sufficient assets to meet corporate responsibilities to creditors is an abuse of the corporate privilege and grounds for piercing the corporate veil. *See Minton v. Cavaney*, 364 P.2d 473, 475 (Cal. 1961) (finding liability when corporate agents made no attempt to provide adequate capitalization). Courts will also pierce the corporate veil if there is evidence of intermixture of affairs. *See Walkovszky v. Carlton*, 223 N.E.2d 6, 8-9 (N.Y. 1966) (imposing individual liability only if company is instrumentality for carrying on stockholder’s business). The company is simply an instrumentality without imposing upon it other responsibilities incidental to operation of the business. *Id.* at 8. An intermixture of affairs refers to the “blurring of the distinction between the concerns of the corporation and those of its owners.” ARTHUR R. PINTO & DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* 42 (Bender & Co., 2004).

## B. Development of the Intracorporate Conspiracy Doctrine

### 1. Elements of Conspiracy

A conspiracy is traditionally defined as “an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means.”<sup>26</sup> According to the Supreme Court, the plurality element of a conspiracy charge represents a “distinct evil.”<sup>27</sup> This stems from the idea that two people who agree to commit a crime create a more dangerous threat to society than one or both of them planning to commit the same offense independently.<sup>28</sup> A civil conspiracy, while not criminally punishable, contains the same plurality of actors element.<sup>29</sup>

### 2. Doctrinal Development in an Antitrust Context

The intracorporate conspiracy doctrine developed in response to the question of whether a corporation is capable of conspiring with its own agents.<sup>30</sup> In *Nelson Radio & Supply Co. v. Motorola, Inc.*,<sup>31</sup> the Fifth Circuit was the first court to announce the doctrine. The court concluded

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<sup>26</sup> See Douglas G. Smith, Comment, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1170 (1996) (defining “conspiracy”).

<sup>27</sup> See *United States v. Jimenez Recio*, 537 U.S. 270, 274-75 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

<sup>28</sup> See *Krulewitch v. United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring). In his concurrence, Justice Jackson stated “the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.” *Id.* Moreover, purported dangers in collective criminal activity include unlikelihood of a person abandoning his or her criminal plans because of fear or loyalty to co-conspirators. See *Jimenez Recio*, 537 U.S. at 275 (recognizing danger remains if co-conspirators do not abandon conspiracy). The *Jimenez Recio* Court noted that the combination of individuals “decreases the probability that [they] will depart from their path of criminality.” *Id.* (quoting *Callanan v. United States*, 364 U.S. 587, 593-94 (1961)). Group criminality also makes it possible to commit more elaborate crimes, and the “[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.” *Callanan*, 364 U.S. at 593-94.

<sup>29</sup> See *Beye v. Bureau of Nat’l Affairs*, 477 A.2d 1197, 1206 (Md. Ct. Spec. App. 1984) (defining civil conspiracy). A civil conspiracy is defined as “a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff.” *Id.* (citing *Green v. Wash. Sub. San. Comm’n*, 296 A.2d 815, 824 (Md. 1970)).

<sup>30</sup> See BRICKEY, *supra* note 6, at 266 (outlining intracorporate conspiracy doctrine’s development).

<sup>31</sup> 200 F.2d 911 (5th Cir. 1952).

that because it was not legally possible for an individual to conspire with himself, it was also not legally possible for a single entity consisting of a corporation and its agents to conspire with itself.<sup>32</sup> The court found that “[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy . . . and it is the general rule that the acts of the agent are the acts of the corporation.”<sup>33</sup> In *Nelson Radio* and its progeny, the defense of intracorporate conspiracy was utilized in an antitrust context because courts found it logical to conclude that a single corporation could not conspire with itself to restrain trade in the way imagined by Section 1 of the Sherman Antitrust Act.<sup>34</sup>

In addition to conspiracies between corporations and their agents, courts have also considered whether a conspiracy can exist between a parent corporation and its subsidiaries in violation of the Sherman Antitrust Act.<sup>35</sup> The Supreme Court addressed this issue in *Copperweld Corp. v. Independence Tube Corp.*,<sup>36</sup> where it held that a conspiracy for the purposes of Section 1 of the Sherman Antitrust Act is not possible between a parent corporation and its wholly owned subsidiary.<sup>37</sup> The Court reasoned that a parent corporation and its subsidiary “have a complete unity of interest,” with common objectives and corporate actions that are “guided

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<sup>32</sup> *Id.* at 914 (reasoning it is an “absurd assertion” that defendant corporation conspired with itself). The court noted that the complaint did not name the individual officers and agents separately. *Id.* Nevertheless, the court went on to state that “the inclusion of the defendant’s agents in the alleged conspiracy would seem to be only the basis for a technical rather than a substantial charge of conspiracy because obviously the agents were acting only for the defendant corporation.” *Id.* (quoting *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 830 (D.C. Md. 1937)).

<sup>33</sup> *Nelson Radio*, 200 F.2d at 914.

<sup>34</sup> See 15 U.S.C. § 1 (2000). Section 1 of the Sherman Antitrust Act states 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.* Section 1 “does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy.” *Nelson Radio*, 200 F.2d at 914. A single corporation can, on the other hand, act in violation of Section 2 of the Act because the statute simply prohibits attempts to monopolize. *Id.* While a single corporation can monopolize, it cannot *alone* form a contract, combination, or conspiracy in restraint of trade so as to violate Section 1 of the Act. *Id.*; see also Smith, *supra* note 26, at 1175 (emphasizing corporate liability distinction existing between Sections 1 and 2 of Sherman Antitrust Act). The corporate liability distinction between the two sections of the Act is how the doctrine came to light in an antitrust context. See Handler & Smart, *supra* note 8 (reviewing origin of doctrine and its role in antitrust litigation); McQuade, *supra* note 8 (explaining rationale behind “intra-enterprise conspiracy doctrine” in antitrust context).

<sup>35</sup> See Smith, *supra* note 26, at 1175-78 (noting intracorporate issue arises in context of conspiracies between parent corporation and its subsidiaries).

<sup>36</sup> 467 U.S. 752 (1984).

<sup>37</sup> *Id.* at 777.

or determined not by two separate consciousnesses, but one.”<sup>38</sup> The Court recognized that the corporate form chosen by the corporation should not dictate whether it is subject to antitrust liability.<sup>39</sup> Therefore, a corporation should not be penalized simply because it chose to adopt the subsidiary form of organization in order to “serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.”<sup>40</sup>

C. *Application of the Intracorporate Conspiracy Doctrine to Civil Conspiracy Claims*

1. Statutory Basis Under 42 U.S.C. § 1985

42 U.S.C. § 1985 applies to alleged conspiracies to interfere with an individual’s civil rights.<sup>41</sup> It prohibits these types of conspiracies in three distinct ways: § 1985(1) states that “two or more persons” cannot conspire to prevent an officer from performing his duties; § 1985(2) states that “two or more persons” cannot conspire to obstruct justice by intimidating a party, witness, or juror, or to injure a person or his property for lawfully enforcing or attempting to enforce the right of any person to the equal protection of the laws; and § 1985(3) states that “two or more persons” cannot conspire to deprive persons of their rights or privileges.<sup>42</sup> Courts and legal commentators have repeatedly addressed whether the application of the intracorporate conspiracy doctrine to claims arising under this statute is analogous to its application in an antitrust context.<sup>43</sup>

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<sup>38</sup> *Id.* at 771. The *Copperweld* Court stated that “a rule that punishe[s] coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.” *Id.*

<sup>39</sup> *Id.* at 772-73 (stating “intra-enterprise conspiracy doctrine looks to the form of an enterprise’s structure and ignores the reality.”).

<sup>40</sup> *Id.* at 773. The Court reasoned that “[i]f antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. . . . Such an incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.” *Id.* at 773-74.

<sup>41</sup> 42 U.S.C. § 1985 (2000).

<sup>42</sup> *Id.*

<sup>43</sup> See Smith, *supra* note 26, at 1178-79 (explaining proposed “antitrust analogy”). According to Smith, the purposes of Section 1 of the Sherman Antitrust Act and § 1985 are identical. *Id.* The Sherman Act “is designed to prohibit conspiracies to deprive individuals of their right to engage in free trade,” while § 1985 is “designed to prohibit certain conspiracies to



## 2. Majority Rulings

The Second, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits have allowed the intracorporate conspiracy defense in civil conspiracy claims filed under § 1985.<sup>44</sup> Employing precisely the same reasoning as applied in antitrust litigation, these courts focus on the idea that because the “acts of the agent are the acts of the corporation,” the individual actors or the corporation itself cannot be considered separate entities that join forces to conspire to commit a civil wrong.<sup>45</sup> These courts

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deny individuals of the equal protection of the laws or of equal privileges and immunities under the laws.” *Id.* Smith points to the Seventh Circuit’s decision in *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990), in which the court acknowledged that the antitrust reasoning could be applied to § 1985(3) claims. Smith, *supra* note 26, at 1180. According to the Seventh Circuit, “the antitrust laws aim at preserving independent economic decisions, which supposes cooperation inside economic entities – cooperation that cannot be called ‘conspiratorial’ without defeating the foundation of competition.” *Travis*, 921 F.2d at 110. The court reasoned that such a purpose is congruous with that of § 1985, which “aims at preserving independent decisions by persons or business entities, free of the pressure that can be generated by conspiracies . . .” *Id.*

<sup>44</sup> See *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994) (concluding corporation cannot be held liable for civil conspiracy). The court reached its conclusion by applying the idea that “the acts of the agent are the acts of the corporation.” *Id.* (quoting *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952)); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 510 (6th Cir. 1991) (dismissing terminated employee’s § 1985(3) claim). The court reasoned that “[s]ince all of the defendants are members of the same collective entity, there are not two separate ‘people’ to form a conspiracy.” *Id.*; *Buschi v. Kirven*, 775 F.2d 1240, 1251 (4th Cir. 1985) (dismissing § 1982(2) claim by group of discharged whistleblowers). The court in *Buschi* concluded that there was no conspiracy because the “officers or employees of the same firm do not provide the plurality of actors imperative for a . . . conspiracy.” *Id.* at 1252 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)); *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978) (upholding dismissal of Brooklyn Law School faculty member). The court upheld the dismissal despite the faculty member’s § 1985(2) claim because the school “is admittedly an educational corporation” and all those involved in the termination decision were acting in that capacity. *Id.*; *Baker v. Stuart Broad. Co.*, 505 F.2d 181, 183 (8th Cir. 1974) (dismissing sex-discrimination § 1985(3) complaint). In *Baker*, the court dismissed the complaint because the act was that of a single business entity and therefore was not an actionable conspiracy cognizable under the statute. *Id.*; *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (finding no conspiracy when two executives of the same firm made a business decision). In *Dombrowski*, the court ruled that a decision to discriminate in furtherance of the business’s purpose cannot be categorized as a conspiracy for purposes of § 1985(3). *Id.*; *Tabb v. Dist. of Columbia*, 477 F. Supp. 2d 185, 191 (D. D.C. 2007) (dismissing § 1985(2) claim). The court dismissed the claim because the defendant corporate agents were acting within the scope of their employment and therefore were not seen as separate and distinct entities. *Id.* at 190-91.

<sup>45</sup> See e.g., *Hilliard*, 30 F.3d at 653 (applying holding in *Nelson Radio*). There were not two or more people to form a conspiracy because all members were part of the same collective entity. *Id.*; *Hull*, 926 F.2d at 509 (adopting general rule that “a corporation cannot conspire with its own agents or employees”); *Baker*, 505 F.2d at 183 (finding no conspiracy). The plurality of actors requirement “is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm.” *Id.* (quoting *Dombrowski*, 459

have also recognized, however, that such a defense should only be applied when the individual agents are acting within the scope of their corporate capacities.<sup>46</sup> The decisions that apply the intracorporate conspiracy doctrine to civil conspiracies do not readily distinguish between the doctrine's application in an antitrust context and in a claim under § 1985.<sup>47</sup> Rather, some decisions simply recognize that despite the fact that the doctrine developed in an antitrust context, "the same rule has been consistently applied in allegations of conspiracy under the Civil Rights Act."<sup>48</sup>

### 3. Minority Rulings

The First, Third, and Tenth Circuits refuse to allow the intracorporate conspiracy defense to § 1985 civil conspiracy claims.<sup>49</sup> These circuits reason that the doctrine is inapplicable because it was conceived for use in an antitrust context and was not intended to provide impunity for corporations and corporate agents that conspired to violate an individual's civil rights.<sup>50</sup> The Third Circuit was the first to diverge from the popularly held judicial ruling that the intracorporate conspiracy doctrine was as equally applicable in a civil conspiracy context as in an antitrust

F.2d at 196).

<sup>46</sup> See *Dombrowski*, 459 F.2d at 196 (reasoning two or more executives acting within their official capacities constitutes single corporate business decision). The *Dombrowski* court, however, "do[es] not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding." *Id.* The court illustrated this assertion by further stating that members of the Ku Klux Klan could not avoid liability for committing acts of violence pursuant to orders executed by the Grand Dragon. *Id.*

<sup>47</sup> See *Doherty v. Am. Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984) (citing *Nelson Radio*, 200 F.2d at 914). The Sixth Circuit employed *Nelson Radio* as the basis for the intracorporate conspiracy doctrine's applicability to both antitrust litigation and civil conspiracy claims. *Id.*; see also *Herrmann*, 576 F.2d at 459 (applying intracorporate conspiracy doctrine). *Herrmann* involved a § 1985(2) claim where the plaintiff alleged a race-based conspiracy to terminate his employment as a professor at Brooklyn Law School. *Id.* at 454.

<sup>48</sup> See *Doherty*, 728 F.2d 334, 339 (6th Cir. 1984) (citing *Nelson Radio*, 200 F.2d at 914).

<sup>49</sup> See *Breuer v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994) (recognizing intracorporate conspiracy doctrine's original purpose). The court stated that "the doctrine, designed to allow one corporation to take actions that two corporations could not agree to do, should not be construed to permit the same corporation and its employees to engage in civil rights violations." *Id.* at 1127; *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984) (noting intracorporate conspiracy exception not so broad as to apply to civil conspiracies); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1257 (3d Cir. 1978) (reasoning there was no benefit gained by immunizing corporate criminal activity). The *Novotny* court stated that in terms of discriminatory action in violation of § 1985(3), "we can perceive no function to be served by immunizing such action once a business is incorporated." *Id.* (citing First, Third, and Tenth Circuit holdings).

<sup>50</sup> See cases cited *supra* note 49 (explaining First, Third, and Tenth Circuit holdings).

context.<sup>51</sup> In *Novotny v. Great American Federal Savings and Loan Association*,<sup>52</sup> a former director of the defendant corporation sued his employer and certain directors and officers pursuant to § 1985(3).<sup>53</sup> The director alleged that he was terminated because he supported a female employee who claimed she suffered sexual discrimination at the hands of the corporation.<sup>54</sup> The district court dismissed the complaint because it held that the termination was “a single act . . . by a single business entity,” and therefore lacked the foundation for a conspiracy claim.<sup>55</sup> The Third Circuit, however, reversed, reasoning that because Novotny named individual officers in his complaint rather than the corporation, he had alleged sufficient facts to support a finding of conspiracy.<sup>56</sup> *Novotny*, therefore, appears to stand for the proposition that individual officers and agents are never immune from conspiratorial liability, even when acting within the scope of their official capacities.<sup>57</sup> Furthermore, the *Novotny* court’s holding seems to suggest that the reasoning behind the intracorporate conspiracy doctrine – that it is impossible for a corporation to conspire with itself – is only a legitimate defense when the plaintiff names the corporate entity as one of the conspirators.<sup>58</sup> Even in such a situation, however, the individual agents and officers are not exempt from liability.<sup>59</sup>

*Novotny* also recognizes the idea that an unlawful action undertaken by members of an unincorporated partnership cannot be deemed protected from conspiratorial liability simply because the business decides to incorporate.<sup>60</sup> According to the court, “[i]f, as it seems clear

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<sup>51</sup> See *Intracorporate Conspiracies*, *supra* note 3, 612-613 (1979) (commenting on Third Circuit’s reasoning). “The Third Circuit abandoned the uncertain factual distinctions that have plagued courts” in their application of the intracorporate conspiracy doctrine. *Id.* at 612; see also *Novotny*, 584 F.2d at 1258 (examining legal effect of concerted corporate action). The Third Circuit held that “concerted action by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a § 1985(3) complaint.” *Id.*

<sup>52</sup> 584 F.2d 1235 (3d Cir. 1978).

<sup>53</sup> *Id.* at 1238 (listing Novotny’s allegations).

<sup>54</sup> *Id.* at 1238 (stating case facts).

<sup>55</sup> *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 430 F. Supp. 227, 229-30 (W.D. Pa. 1977), *rev’d*, 584 F.2d 1235 (3d Cir. 1978).

<sup>56</sup> *Novotny*, 584 F.2d at 1257-58 (explaining circuit court’s holding). The court noted that due to the complaint’s structure, this case was “no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself.” *Id.* at 1258.

<sup>57</sup> See *Intracorporate Conspiracies*, *supra* note 3, at 614 (analyzing policy impact of court’s decision).

<sup>58</sup> See *id.* (explaining implications of *Novotny* decision on corporate liability).

<sup>59</sup> See *id.* at 613-14 (theorizing court’s decision prohibits other courts from applying doctrine in same way).

<sup>60</sup> *Novotny v. Great Am. Fed. Sav. and Loan Ass’n*, 584 F.2d 1235, 1257 (noting statute does not seek to protect such unlawful actions).

under § 1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes a conspiracy, we can *perceive no function to be served by immunizing such action once a business is incorporated.*"<sup>61</sup> As such, the court saw no reason to protect the alleged action simply because the individual agents were acting on behalf of a single corporate entity under the law.<sup>62</sup>

The few circuit courts that have refused to apply the intracorporate conspiracy doctrine to civil conspiracy claims also devote a substantial portion of their analysis to emphasizing a distinction between a conspiracy in the antitrust context and a conspiracy to violate an individual's civil rights.<sup>63</sup> In *Stathos v. Bowden*,<sup>64</sup> the First Circuit noted that the intracorporate conspiracy exception should not be read so "broadly" as to extend to corporate conspiracies to violate an individual's civil rights because the considerations that led to the doctrine's establishment in the antitrust field were significantly different.<sup>65</sup> Section 1 of the Sherman Antitrust Act seeks to quell the evil that arises when two separate enterprises join to act in restraint of trade (e.g., fixing prices).<sup>66</sup> In a competitive marketplace, the same action taken separately by individual corporations as a result of "joint decision-making by managers within a single enterprise" is less harmful and even "legitimately socially useful."<sup>67</sup> The court noted, however, that in equal protection claims "one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several."<sup>68</sup> As such, the boundaries of the intracorporate conspiracy exception should be narrower in equal protection claims than in antitrust situations.<sup>69</sup>

<sup>61</sup> *Id.* at 1257 (emphasis added).

<sup>62</sup> *Id.* at 1257-58 (explaining court's reasoning).

<sup>63</sup> See *Breuer v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994) (recognizing doctrine's origin was in no way related to civil conspiracies); *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984) (noting distinction between civil conspiracies and antitrust cases); *Novotny*, 584 F.2d at 1258 (distinguishing between antitrust and civil rights cases).

<sup>64</sup> 728 F.2d 15 (1st Cir. 1984).

<sup>65</sup> See *id.* at 20-21; see also *Handler & Smart*, *supra* note 8, at 72-73 (examining doctrine's origin and role in antitrust litigation); *McQuade*, *supra* note 8, at 185 (explaining why intracorporate conspiracy doctrine exists in antitrust context).

<sup>66</sup> See *Stathos*, 728 F.2d at 21 (stating purpose of Section 1 of Sherman Antitrust Act).

<sup>67</sup> *Id.* (distinguishing between act by single corporation and act undertaken by two businesses joined together). The legitimate social use refers to fostering healthy competition in the free marketplace, a purpose that is negated when two corporations conspire in restraint of trade. See *id.*

<sup>68</sup> *Id.* (noting difference between antitrust and equal protection cases in terms of resulting harm). The court also noted that such action is not made more desirable when multiple officers of a single enterprise decide to act. *Id.*

<sup>69</sup> See *id.* (stating court's conclusion).

Similarly, in *Novotny*, the Third Circuit reasoned that the “economic efficiencies and pro-competitive effects” set forth as justifications for the intracorporate conspiracy exception in antitrust litigation do not have viable counterparts in the civil rights field.<sup>70</sup> There is no analogous defense that “would protect a conjuration to deprive a minority of equal rights.”<sup>71</sup> The Tenth Circuit adopted *Novotny*’s reasoning in *Brever v. Rockwell International Corp.*<sup>72</sup> In *Brever*, plaintiffs claimed that they were terminated after cooperating with the FBI by providing testimony in an investigation regarding potential environmental crimes committed by their employer.<sup>73</sup> In dealing with the § 1985(2) claim, the court refused to allow “the doctrine, designed to allow one corporation to take actions that two corporations could not agree to do . . . [to] be construed to permit the same corporation and its employees to engage in civil rights violations.”<sup>74</sup>

Legal scholars have also pointed to the premise that a corporation that acts through its agents “poses all the dangers of a prototypical conspiracy.”<sup>75</sup> This notion is founded upon the rationalization that an agreement by persons to achieve a certain end produces a greater likelihood that the offense will be committed.<sup>76</sup> In such situations, “the view of the corporation as a single legal actor becomes a fiction without a purpose” because the collective action by individual agents of a corporation “creates the ‘group danger’ at which conspiracy liability is aimed.”<sup>77</sup> Furthermore, it is established that corporate agents are held primarily liable, and the corporation itself derivatively liable, when the agents commit tortious acts while acting within the scope of their employment.<sup>78</sup> It has been argued that such primary and derivative liability is no different than holding corporate agents liable for conspiring while acting within the scope of their

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<sup>70</sup> *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1257-58 (3d Cir. 1978) (explaining court’s reasoning).

<sup>71</sup> *Id.* at 1258 (recognizing doctrine’s justifications as inappropriate in civil rights context).

<sup>72</sup> 40 F.3d 1119 (10th Cir. 1994).

<sup>73</sup> *Id.* at 1123 (stating case facts).

<sup>74</sup> *Id.* at 1126-27 (explaining court’s holding).

<sup>75</sup> See *Intracorporate Conspiracies*, *supra* note 3, at 617 (detailing reasoning behind conspiracy laws); see also *supra* note 28 and accompanying text (describing reasons collective action poses distinct threat).

<sup>76</sup> See *supra* note 28 and accompanying text (listing unique dangers associated with collective unlawful action).

<sup>77</sup> *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981). The Fifth Circuit did not adopt this reasoning, but simply explained the alternative reasoning set forth by various other courts. *Id.*; see also Note, *Intracorporate Conspiracies under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470, 478-79 (1978) (explaining need for conspiracy liability in corporate setting).

<sup>78</sup> See *Intracorporate Conspiracies*, *supra* note 3, at 616-17 (discussing corporate versus individual liability when tortious acts are committed in the workplace).

employment.<sup>79</sup> Holding corporate agents liable for conspiracy “would attach no greater burden to the attribute of incorporation than do the other forms of tort liability that . . . have [been] applied to corporate agents.”<sup>80</sup>

*D. Application of the Intracorporate Conspiracy Doctrine to Criminal Conspiracies*

18 U.S.C. § 371 of the Federal Criminal Code makes it illegal for “two or more persons” to conspire to commit any offense against the United States.<sup>81</sup> Every court that has addressed the application of the intracorporate exception to criminal conspiracies has ruled that the doctrine cannot be extended to criminal activity undertaken by multiple agents of a single corporation.<sup>82</sup> These rulings were reached regardless of each court’s respective holding regarding a distinction, if any, between the applicability of the doctrine in an antitrust versus a civil rights context.<sup>83</sup> The relevant courts did not provide extensive reasoning for these holdings.<sup>84</sup> In *United States v. Wise*,<sup>85</sup> the Supreme Court stated that “the fiction of corporate entity . . . has never been applied as a shield against criminal prosecutions .

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<sup>79</sup> See *id.* (questioning whether public policy supports protecting corporate agents from liability for conspiracy).

<sup>80</sup> *Id.* at 617.

<sup>81</sup> 18 U.S.C. § 371 (2000).

<sup>82</sup> See *United States v. Wise*, 370 U.S. 405, 417 (1962) (recognizing “the fiction of corporate entity . . . had never been applied as a shield against criminal prosecution . . .”); *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994) (stating it was “illogical” to apply doctrine to criminal conspiracies); *United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) (noting a corporation can be convicted of conspiring with its officers); *United States v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) (finding corporation is responsible when multiple agents engage in criminal conspiracy on its behalf); *United States v. Peters*, 732 F.2d 1004, 1007-08 (1st Cir. 1984) (upholding criminal conspiracy convictions of corporate officers). The court affirmed the convictions despite the fact that the officers were authorized to perform the acts and intended benefit the corporation because “the corporate veil does not shield them from criminal liability.” *Id.*; *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981) (discussing dangers of conspiracy). The *Dussouy* court recognized that “the view of the corporation as a single legal actor becomes a fiction without a purpose” when “the action by an incorporated collection of individuals creates the ‘group danger’ at which conspiracy liability is aimed.” *Id.*; see also Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1191 (1982) (noting corporate status not addressed in cases of corporate criminal conspiracies, despite automatic liability).

<sup>83</sup> See cases cited *supra* note 82 and accompanying text (providing circuit court decisions refusing to allow intracorporate defense to criminal conspiracies).

<sup>84</sup> See generally Welling, *supra* note 82, at 1191-92 (recognizing lack of courts’ reasoning). The article states in relevant text, “[a]lthough these cases implicitly hold that multiple agents of a single corporation constitute a plurality, they are unenlightening because the courts do not discuss the issue.” *Id.*

<sup>85</sup> 370 U.S. 405 (1962).

...<sup>86</sup> Various other courts have adopted similar simplistic reasoning concerning the applicability of the doctrine to criminal conspiracies.<sup>87</sup> The Ninth Circuit even went so far as to state that it was “illogical” to apply the doctrine to criminal conspiracies because if it were permitted, “no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy.”<sup>88</sup>

It has been suggested that the distinction between corporate liability in civil and criminal conspiracies lies in the “greater social harm embodied in the latter.”<sup>89</sup> Courts allow business activity to the extent that it does not offend public policy, which is obviously violated by a criminal conspiracy.<sup>90</sup> To counter this argument, however, it has been asserted that prohibiting the intracorporate conspiracy defense in criminal cases is of little public policy importance because the corporate entity would have a greater fear of the “substantive wrongdoing underlying the would-be conspiracy charge,” rather the conspiracy charge itself.<sup>91</sup> Therefore, no deterrent effect is created by prohibiting the defense in criminal conspiracy claims.<sup>92</sup>

*E. The Special Relationship Between 18 U.S.C. § 371, 18 U.S.C. § 1512, and 42 U.S.C. § 1985(2)*

In *McAndrew v. Lockheed Martin Corp.*,<sup>93</sup> the Eleventh Circuit recognized that a civil claim arising under 42 U.S.C. § 1985(2), alleging a conspiracy to deter an individual from testifying in a federal court, necessarily constitutes criminal activity in violation of 18 U.S.C. § 1512 (tampering with a witness) and a criminal conspiracy in violation of 18 U.S.C. § 371.<sup>94</sup> The *McAndrew* court held that just as the intracorporate

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<sup>86</sup> *Id.* at 417. The *Wise* Court determined the fictitious entity created through incorporation is only “operative to protect officers from contract liability.” *Id.*

<sup>87</sup> See *United States v. Peters*, 732 F.2d 1004, 1007-08 (1st Cir. 1984). (upholding convictions of corporate officers involved in a conspiracy); see also *United States v. Hartley*, 678 F.2d 961, 970 (11th Cir. 1982) (recognizing limits of corporate entity fiction). The court noted that the fictitious corporate entity “was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other.” *Id.*

<sup>88</sup> *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 978 (9th Cir. 1994).

<sup>89</sup> *Intracorporate Conspiracies*, *supra* note 3, at 615, n.111 (theorizing reason for distinction between civil and criminal conspiracies).

<sup>90</sup> See *id.* (explaining public policy concerns).

<sup>91</sup> Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 461 (1998) (discussing deterrent effect, if any, of intracorporate conspiracy protections).

<sup>92</sup> See Martin, *supra* note 91, at 461 (negating idea that prohibition of defense acts as deterrent).

<sup>93</sup> 206 F.3d 1031 (11th Cir. 2000).

<sup>94</sup> *Id.* at 1035-36; see also 18 U.S.C. § 371 (2000) (“two or more persons” cannot conspire to

conspiracy doctrine cannot shield a criminal conspiracy from prosecution under the Federal Criminal Code, the doctrine also cannot shield the same conspiracy, alleging the same criminal wrongdoing, from civil liability arising under § 1985(2).<sup>95</sup> McAndrew, an employee of Lockheed Martin, claimed that on the morning before he was scheduled to testify before a grand jury concerning Lockheed Martin's possible violations of the Foreign Corrupt Practices Act, he was contacted by his immediate supervisor, who told him that it would not be in his best interest to testify.<sup>96</sup> He was later compelled by subpoena and court order to testify, and his employment was subsequently terminated, purportedly due to his job performance.<sup>97</sup> McAndrew filed suit pursuant to § 1985(2).<sup>98</sup>

The Eleventh Circuit noted, however, that the action alleged under § 1985(2) also fell within the scope of a criminal conspiracy to tamper with a witness under 18 U.S.C. § 371 and 18 U.S.C. § 1512.<sup>99</sup> The court was then faced with the question of "whether the criminal conspiracy exception to the intracorporate conspiracy doctrine [was] somehow limited to cases in which the underlying criminal conspiracy arises under 18 U.S.C. § 371 rather than under 42 U.S.C. § 1985(2)."<sup>100</sup> The court answered this question in the negative, reasoning that there was no need to differentiate between the criminal and civil conspiracy statutes because the underlying conduct being challenged was exactly the same.<sup>101</sup> Nevertheless, the

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commit any offense against the United States); 18 U.S.C. § 1512 (2000) (the criminal statute prohibiting tampering with a witness); 42 U.S.C. § 1985(2) (2000) ("two or more persons" cannot conspire to obstruct justice by intimidating a party, witness, or juror).

<sup>95</sup> *McAndrew*, 206 F.3d at 1040-41 (stating case holding).

<sup>96</sup> *Id.* at 1034 (stating case facts).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1035.

<sup>99</sup> *Id.* at 1037-38 (recognizing circuit precedent in extending doctrine to civil claims under § 1985(3)). The Eleventh Circuit – formerly the Fifth Circuit – consistently applied the intracorporate conspiracy defense to claims arising under § 1985(3). See *Dickerson v. Alachua County Comm'n*, 200 F.3d 761, 768 (11th Cir. 2000) (holding doctrine barred plaintiff's § 1985(3) claim). *Dickerson* dealt with a claim alleging a conspiracy among employees of a public entity to deprive plaintiff of his civil rights. *Id.* at 763; see also *Chambliss v. Foote*, 562 F.2d 1015, 1015 (5th Cir. 1977) (affirming intracorporate conspiracy doctrine barred § 1985(3) claim). *Chambliss* involved a plaintiff's claim that a university decision not to renew her teaching contract was the result of a conspiracy to violate her civil rights. *Chambliss v. Foote*, 421 F.Supp. 12, 14 (E.D. La. 1976), *aff'd* 562 F.2d 1015 (5th Cir. 1977). The *McAndrew* court, however, drew a distinction between § 1985(2) and § 1985(3) claims, and refused to allow the defense to claims arising under § 1985(2). *McAndrew*, 206 F.3d at 1041.

<sup>100</sup> *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1040 (11th Cir. 2000) (stating issue before the court).

<sup>101</sup> *Id.* at 1041 (explaining court's reasoning). The court stated:

Because, the underlying conspiratorial conduct being challenged is precisely the same regardless of whether a criminal conspiracy is alleged under § 371 or under § 1985(2),



reasoning provided by the Eleventh Circuit fails to adequately address why a distinction exists between corporate civil and criminal conspiratorial liability.

### III. ANALYSIS

#### A. *Eleventh Circuit Distinction*

The Eleventh Circuit takes a unique and logical approach to distinguishing between § 1985(2) and § 1985(3) claims.<sup>102</sup> All other circuits have failed to draw a distinction between § 1985(2) and § 1985(3) claims, but rather, have chosen to either extend or refuse to extend the intracorporate conspiracy defense to civil conspiracy claims arising under § 1985 as a whole.<sup>103</sup> The Eleventh Circuit was the first and only court to agree with the majority of circuits in extending the intracorporate conspiracy defense to claims arising under § 1985(3), but refusing to extend it to claims arising under § 1985(2).<sup>104</sup>

The *McAndrew* court recognized its own precedent in extending the intracorporate conspiracy doctrine to claims arising under § 1985(3).<sup>105</sup> The court, however, rejected the application of this precedent to *McAndrew* because none of the prior cases “involved a claim brought under § 1985(2) and . . . neither involved allegations of a criminal conspiracy to deter by force, intimidation, or threat an individual from testifying before a federal grand jury.”<sup>106</sup>

Instead, the court focused its analysis on the long-recognized

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there is no reason to differentiate between the criminal and civil conspiracy statutes. In either case, when a criminal conspiracy is alleged, the underlying conduct is of a sort that neither the corporate entity fiction nor the intracorporate conspiracy doctrine was intended or used to shield.

*Id.*

<sup>102</sup> *Id.* at 1038 (recognizing need to provide different analysis). The court asserted, “[w]e have no occasion to revisit [precedent § 1985(3) cases] today because neither case addressed the precise question presented here: whether the intracorporate conspiracy doctrine applies to and bars claims alleging a criminal conspiracy among corporate officers and the corporation itself arising under 42 U.S.C. § 1985(2).” *Id.*

<sup>103</sup> See *supra* notes 44 and 49 and accompanying text (explaining holdings of various circuits).

<sup>104</sup> See *supra* text accompanying notes 93-95 (distinguishing holding and reasoning between § 1985(2) and § 1985(3) claims).

<sup>105</sup> See *supra* note 99 and accompanying text (noting history of circuit precedent).

<sup>106</sup> *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038, 1041 (11th Cir. 2000) (distinguishing issue at bar from prior issues presented to the court).

exception to the application of the intracorporate conspiracy doctrine to criminal conspiracies under 18 U.S.C. § 371.<sup>107</sup> The plaintiff's allegation of a conspiracy to deter an individual from testifying in a federal court by force, intimidation, or threat also alleges criminal activity in violation of the criminal statute prohibiting witness tampering, and a criminal conspiracy in violation of § 371.<sup>108</sup> Accordingly, the 11th Circuit found that "the criminal conspiracy exception to the intracorporate conspiracy doctrine applies regardless of whether the criminal conspiracy arises under 18 U.S.C. § 371 or under 42 U.S.C. § 1985."<sup>109</sup> This unique and logical analysis has yet to be adopted by any other court.<sup>110</sup>

### *B. Failure of Other Circuits to Draw Such a Distinction*

If the majority of circuits fail to recognize the many arguments against allowing the intracorporate conspiracy defense in civil claims, these same courts should at least consider the distinction made by the Eleventh Circuit in *McAndrew* and hold that the doctrine is barred in § 1985(2) claims.<sup>111</sup> All circuits that have addressed the issue have held that the corporate entity fiction was neither intended nor used to shield criminal conspiratorial conduct.<sup>112</sup> As such, these courts refuse to apply the intracorporate conspiracy exception to criminal conspiracy claims.<sup>113</sup>

Despite a uniform holding regarding criminal conspiracy claims, no court other than the Eleventh Circuit has recognized that in § 1985(2) claims, the underlying conspiratorial conduct is exactly the same whether

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<sup>107</sup> See *supra* text accompanying notes 94-95 (explaining consistency of holding doctrine's inapplicability to criminal conspiracies).

<sup>108</sup> See *supra* note 99 and accompanying text (recognizing parallel between alleged underlying conduct). The *McAndrew* court found "no basis" for the distinction between cases in which the underlying criminal conspiracy arises under 18 U.S.C. § 371 rather than under 42 U.S.C. § 1985. *McAndrew*, 206 F.3d at 1040. The court recognized that "both the rationale for the intracorporate conspiracy doctrine and the legislative history of § 1985(2) counsel in favor of a consistent application of the criminal conspiracy exception . . . regardless of whether the criminal conspiracy arises under the federal criminal or civil code." *Id.*

<sup>109</sup> See *McAndrew*, 206 F.3d at 1040-41 (stating court's holding).

<sup>110</sup> See *infra* Part III(B).

<sup>111</sup> See cases cited *supra* note 44 and accompanying text (explaining circuit holdings in regards to intracorporate conspiracy doctrine as applied to civil conspiracy claims). The Second, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits have all allowed the intracorporate defense to civil conspiracy claims. *Id.*; see also *McAndrew*, 206 F.3d at 1035-41 (summarizing facts, reasoning, and holding of case).

<sup>112</sup> See *supra* Part II(D) (detailing courts' refusal to extend the doctrine to criminal conspiracies).

<sup>113</sup> See *supra* Part II(D) (detailing courts' refusal to extend the doctrine to criminal conspiracies).

alleged criminally under § 371 or civilly under § 1985(2).<sup>114</sup> Accordingly, there is no reason to differentiate between the two when determining corporate liability because “the underlying conduct is of a sort that neither the corporate entity fiction nor the intracorporate conspiracy doctrine was intended or used to shield.”<sup>115</sup> Nevertheless, all other courts have failed to draw a distinction between § 1985(2) and § 1985(3) claims.<sup>116</sup> In circuits that have considered both types of claims, the same reasoning is applied to the extension of or refusal to extend the intracorporate conspiracy doctrine.<sup>117</sup> This lack of distinction is illogical and troublesome, and thus should be addressed by the various circuit courts.

### C. *Lingering Inconsistencies*

The reasoning provided by the Eleventh Circuit and neglected by all other circuits fails to adequately address why a distinction exists between corporate civil and criminal conspiratorial liability.<sup>118</sup> In *McAndrew*, the Eleventh Circuit draws a logical conclusion based upon its prior ruling that the intracorporate conspiracy doctrine is not applicable in criminal cases, and that a certain provision of the civil conspiracy statute imposes liability for the same underlying conduct.<sup>119</sup> No other circuits, however, have addressed this issue and have simply accepted the premise that there is an inherent distinction between criminal and civil corporate conspiratorial liability.<sup>120</sup> Courts have reasoned that the doctrine was not intended to shield criminal behavior.<sup>121</sup> If this reasoning is the sole basis for the distinction, however, it logically follows that the doctrine was also not intended to shield corporations from conspiring to violate one’s civil rights, whether the conspiracy be alleged under § 1985(2) or § 1985(3).<sup>122</sup>

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<sup>114</sup> See *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1040-41 (11th Cir. 2000) (recounting holding in regard to the underlying conspiratorial conduct).

<sup>115</sup> *Id.* at 1041.

<sup>116</sup> See *supra* notes 44 and 49 and accompanying text (listing circuit decisions).

<sup>117</sup> See *supra* notes 44-62 and accompanying text (outlining circuit holdings and reasoning regarding civil conspiracies arising under § 1985).

<sup>118</sup> See *McAndrew*, 206 F.3d at 1038-41. The Eleventh Circuit noticed the differences between previous holdings regarding the distinction between civil and criminal corporate conspiratorial liability, but did not address the basis for such a distinction. See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *Welling*, *supra* note 82 at 1191-92 (noting “unenlightening” nature of courts’ reasoning).

<sup>121</sup> See *supra* text accompanying notes 81-88 (explaining why intracorporate doctrine does not apply to criminal conspiracies).

<sup>122</sup> See *supra* text accompanying notes 81-88 (explaining why intracorporate doctrine does not apply to criminal conspiracies); see also *supra* notes 49, 63-80 and accompanying text (outlining “intent” argument).

Consequently, it is illogical and inconsistent for circuit courts to refuse to extend the intracorporate conspiracy defense in criminal conspiracies, but to allow it for civil conspiracies.<sup>123</sup> If the “intent” of the intracorporate conspiracy doctrine is the sole basis for the refusal to extend the doctrine to criminal conspiracies, then it should also be inapplicable to civil conspiracy claims filed pursuant to § 1985, regardless of whether they are alleged under § 1985(2) or § 1985(3).<sup>124</sup> Thus, the same arguments set forth by the First, Third and Tenth Circuits in their refusals to extend the doctrine to civil conspiracies should apply consistently to all conspiracy claims.<sup>125</sup>

#### IV. CONCLUSION

The intracorporate conspiracy doctrine is a judicial rule that is inconsistently applied among civil and criminal conspiracy claims. The Eleventh Circuit recognized that it is illogical to shield corporations from liability under a civil statute that addresses the same conduct subjecting corporations to criminal conspiratorial liability. Despite this important recognition, however, the Eleventh Circuit has made no more progress than the majority of circuits that have illogically allowed the application of the intracorporate conspiracy defense in civil conspiracies, but not in criminal conspiracies. These circuits refuse to extend the defense in such situations simply because the doctrine, when it was created and subsequently adopted by the various courts, was not “intended” to shield corporations from liability for such behavior. If the doctrine’s original intent is the sole basis for such a distinction, then these courts should also hold that it is inapplicable to civil claims because the doctrine was initially intended for use in an antitrust context. The doctrine was subsequently applied to other types of conspiracy claims by the various circuit courts, but without extensive discussion regarding the extended application. All circuit courts

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<sup>123</sup> Compare cases cited *supra* note 44 (examining circuit holdings and applicability of doctrine to civil conspiracies) with cases cited *supra* note 82 (examining circuit holdings that the doctrine does not apply to criminal conspiracies).

<sup>124</sup> See *supra* text accompanying notes 81-88 (explaining why intracorporate doctrine does not apply to criminal conspiracies); see also *supra* notes 49, 63-80 and accompanying text (outlining “intent” argument). The intracorporate conspiracy doctrine was developed in an antitrust context “to allow one corporation to take actions that two corporations could not agree to do.” *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994) (explaining doctrine’s original purpose). When addressing criminal conspiracies, the Supreme Court refused to extend the doctrinal defense, stating “the fiction of corporate entity . . . has never been applied as a shield against criminal prosecutions.” *United States v. Wise*, 370 U.S. 405, 417 (1962).

<sup>125</sup> See *supra* note 49 and Part III(B)(3) (explaining reasoning of First, Third, and Tenth Circuits).

refuse to extend the intracorporate conspiracy doctrine to criminal claims simply because the doctrine was not intended for use as a defense to these claims. Conversely, however, the majority of circuit courts allow the intracorporate conspiracy defense in civil conspiracy claims, regardless of the intent argument. Such inconsistencies must be addressed by the various circuit courts of appeals in order to prevent the doctrine from being abused in ways for which it was never intended. The existing distinction between civil and criminal corporate and conspiratorial liability must be reconsidered in order for the doctrine's original intent to be realized and to provide consistency in its application by the courts.

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