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Oksanen v. Page Memorial Hospital: The Fourth Circuit's Antitrust Analysis for Peer Review Actions Under the Sherman Act

I. INTRODUCTION

"The basic federal antitrust law, the Sherman Act, was passed in 1890 against a background of rampant cartelization and monopolization of the American economy." Congress sought to correct what it thought was a market defect—disparity and unfair trade practices. As a consequence, section one of the Sherman Act prohibits concerted action that imposes restraint on trade. Section two prohibits the formation of monopolies as a result of unilateral conduct.

The plaintiff in Oksanen v. Page Memorial, Dr. Oksanen, claimed that as a result of a peer review, which suspended then revoked his staff privileges, he was prevented from practicing medicine at Page Memorial Hospital ("Page Memorial") and that such constituted a violation of sections one and two of the Sherman Act. The scope of this note is limited to the allegation that Page Memorial and its medical staff conspired

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3. § 1. Trusts, etc., in restraint of trade illegal; penalty
   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
4. § 2. Monopolizing trade a felony; penalty
   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
6. Id. at 702.
against Dr. Oksanen resulting in an unreasonable restraint of trade in violation of section one of the Sherman Act.  

This note will employ four sections to analyze the Fourth Circuit’s position of extending the inter-enterprise immunity doctrine to hospital peer review under section one of the Sherman Act. Section II presents a factual summary as well as procedural synopsis of Oksanen. In section III the Fourth Circuit’s rationale that:

1) During the peer review process the medical staff acts as the agent of Page Memorial and as such the intra-enterprise immunity doctrine is applicable:

2) "There are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and the medical staff aren’t competitors." Furthermore, “there is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review:

3) The personal stake exemption does not apply since there was only one doctor who practiced in overlapping areas, and he wasn't even a member of the staff when these problems occurred nor did he participate in the peer review that suspended Dr. Oksanen:

is analyzed and questioned. In conclusion, section IV recapitulates that there is no need to extend intra-enterprise immunity to peer group review in a hospital backdrop.

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8. The actions of a single enterprise are immune from the coverage of section one of the Sherman Act. The inter-enterprise doctrine has extended this immunity from violation of section one of the Sherman Act to cases in the business setting where the alleged coconspirators have an agent/principal relationship. One such case exists when a subsidiary and a parent company act together to further their business concerns. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
9. 945 F.2d at 696.
10. Id. at 703 (citation omitted).
11. Id. at 704, n.2 (citation omitted).
II. FACTUAL SUMMARY AND PROCEDURAL SYNOPSIS

A. Factual Summary

In 1978, Dr. Oksanen launched his career as a family practitioner in Luray, Virginia. He received full medical staff privileges at Page Memorial in 1979.

A short time after Dr. Oksanen received his medical staff privileges, the hospital began to receive complaints about his conduct. These complaints continued to increase and it was often reported that Dr. Oksanen addressed or referred to hospital employees and other professionals with profanity.

Dr. Oksanen often displayed his unprofessional attitude through public and demeaning outbursts. These had a disrupting effect on the operation of the hospital. For example, one member of the Page Memorial staff was reported to have said, "he has a volatile personality and you just don't know when it's going to erupt."

Relations between Dr. Oksanen and other members of the medical and hospital staffs deteriorated over time. In May

12. Luray is located in Page County, Virginia and is comprised of 18,000 residents. Id. at 699.
13. Id.
14. Page Memorial Hospital (Page Memorial), a fifty-four bed institution, is the only hospital in Page County. The organizational structure of Page Memorial, which is similar to other hospitals, can be broken down into three sub-groups:
   - Board of Trustees (Board) - The Board operates as the hospital's governing body, and exercises final decision making authority on issues affecting Page Memorial.
   - Hospital Administrator - John S. Berry (Administrator Berry) is in charge of day to day management of Page Memorial such as the supervision of the nursing staff, laboratory personnel, and service providers.
   - Medical Staff - The medical staff embodies all those physicians who have been granted staff privileges. The medical staff is responsible for the process of peer review. Peer review entails the members of the medical staff making recommendations to the Board as to whether a physician's privileges should be continued or revoked. Id. at 699-700.
Page Memorial does not directly employ the medical staff. The relation between the two consists of the hospital providing office space, an allowance for expenses, and a facility where the staffed physicians may treat their patients needing hospital care. Id. at 700.
15. Id. at 699.
16. Id. at 700. For example, in October 1979, Administrator Berry received complaints from laboratory personnel involving Dr. Oksanen's mistreatment of them.
17. Id.
18. Id.
19. Id.
1983, when Dr. Oksanen publicly reprimanded a nurse and her supervisor concerning the care given to one of his patients, his conduct had overstepped the bounds of professionalism.20 Although the nurse tried to explain herself, Dr. Oksanen threw down his charts and left the area.21 It was this incident that prompted the Hospital Administrator (Administrator Berry), in accordance with the hospital by-laws, to request that the medical staff investigate the incident.22 The medical staff recommended that no disciplinary action be taken against Dr. Oksanen with regards to the nurse/Oksanen episode.23

Later in 1983, the Board of Trustees (Board) distributed a letter to the entire medical staff explaining Page Memorial's need to seek a harmonious working environment.24 Dr. Oksanen stated that he found the letter demeaning and insulting.25 He wrote the Board that he would cooperate when it had retracted its letter and a trustee had personally retrieved the letter from his office.26

As a result of Dr. Oksanen's reputation of arrogance and the two above-explained incidents, the Board, at its July 12 meeting, "voted unanimously to request that the medical staff take corrective actions against [Dr.] Oksanen."27 The Board warned the medical staff that another refusal to take action against Dr. Oksanen, would force the Board "to evaluate more thoroughly [Dr. Oksanen's] hospital privileges during the annual credentialing process."28

The medical staff subsequently revoked Dr. Oksanen's staff privileges and Dr. Oksanen appealed their revocation to a Joint Conference Committee ("Committee").29 The Committee recommended that at the very least Dr. Oksanen's privileges be suspended.30

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20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id. at 701.
29. Id. The Joint Conference Committee (Committee) was comprised of Dr. Ancheta, a member of the medical staff, and two members of the Board. The Committee heard testimony from sixteen witnesses and Dr. Oksanen. Id.
30. Id.
In October 1983, Dr. Oksanen and his attorney argued before the Board that his privileges not be suspended. Irrespective of their arguments the Board voted nine to two, with Dr. Holsinger abstaining, to suspend Dr. Oksanen's medical staff privileges for two months, after which, his privileges would be reinstated on a one-year probationary basis. The Board also directed other staff members to cooperate with Dr. Oksanen during his probationary period.

Dr. Oksanen's privileges were restored and his probationary period began in January 1984. Throughout the probationary period, both Dr. Oksanen and the medical staff traded accusations that the other was failing to meet the requirements set forth by the Board. In addition, the Board continued to receive complaints of Dr. Oksanen's disruptive behavior.

On May 8, 1984, the Board again requested that the medical staff take disciplinary action against Dr. Oksanen. This time the medical staff recommended that Dr. Oksanen's medical privileges at Page Memorial be permanently revoked. On June 27, 1984, before the Board had made a final determination in the disposition of Dr. Oksanen's staff privileges, he resigned from the Page Memorial medical staff.

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31. Id.
32. Id. It should be noted that this suspension in no way affected Dr. Oksanen's licensure in the State of Virginia.
33. Id. During Dr. Oksanen's two-month suspension he held a news conference in which he asked for community support in his plight against Page Memorial. During the news conference, he also questioned the competence of one of the hospital's staff surgeons and alleged that the reason he was unable to place his patients in the local nursing home was because Dr. Holsinger controlled the home. As a result, a group of supporters campaigned to elect representatives to the Board who would be more favorable to Dr. Oksanen—they managed to elect four representatives from their ticket, including a replacement for Dr. Holsinger. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 702.
40. Id. at 702. After resigning Dr. Oksanen continued to receive staff privileges from nearby Shenandoah Memorial Hospital. In September 1984, the Virginia Board of Medicine initiated disciplinary proceedings against Dr. Oksanen which culminated in a consent order reprimanding Dr. Oksanen for practicing medicine without a valid Virginia license and for negligence in the death of a patient. Id.
B. Procedural Synopsis

In 1988, Dr. Oksanen brought suit against Page Memorial and its medical staff in federal district court for violations of the Sherman Antitrust Act.\(^{41}\) The United States District Court for the Western District of Virginia, held in summary judgement, that there were no violations of the Sherman Act and that as a matter of law the defendants may have lacked the capacity to conspire.\(^{42}\) Dr. Oksanen appealed to the Fourth Circuit of the United States Court of Appeals.\(^{43}\) A panel of this circuit concluded that the defendants did indeed have the capacity to engage in antitrust conspiracy.\(^{44}\) The Fourth Circuit reversed the grant for summary judgement and held that Dr. Oksanen was not given an adequate opportunity to take and receive discovery.\(^{45}\)

Upon rehearing en banc, the Fourth Circuit confirmed the district court’s hypothesis that the defendants may not have the capacity to conspire.\(^{46}\) The basis for the Fourth Circuit’s decision was the intra-enterprise doctrine, they felt it should be extended to hospital peer review.\(^{47}\)

III. Analysis

As stated earlier, the scope of this note is confined to Oksanen’s allegation that Page Memorial and/or its medical staff violated section one of the Sherman Act.\(^{48}\) Dr. Oksanen asserted that the revocation of his staff privileges and other conduct by the defendants constituted a violation of section one of the Sherman Act.\(^{49}\) The following two subsections analyze and criticize the court’s rationale in holding that Page Memorial and the medical staff lacked the capacity to conspire in violation of section one of the Sherman Act.\(^{50}\)

\(^{41}\) Id.
\(^{42}\) Id.
\(^{44}\) Id. at 77.
\(^{45}\) Id. at 73.
\(^{47}\) Id.
\(^{48}\) Id.
\(^{49}\) Id.
\(^{50}\) Id.
A. Conspiracy Under Section One of the Sherman Act

Application of section one of the Sherman Act is extended only to those situations where there is evidence of a concerted action. The Oksanen court interprets this to require "evidence of a relation between two legally distinct persons or entities." It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression. Section one of the Sherman Act is intended to reach only unreasonable restraints on trade precipitated by contract, combination or conspiracy between distinct and separate entities.

Therefore, to establish a violation of section one of the Sherman Act, plaintiff must first show that commerce has some how been affected. This is the jurisdictional key that gets the case in federal court. Next, the plaintiff needs to show the "existence of an agreement in the form of a contract, combination or a conspiracy that imposes an unreasonable restraint on trade." Dr. Oksanen contended that during the peer review process, the hospital and the medical staff conspired to keep him from practicing at Page Memorial.

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51. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). The prima facie elements in a section one claim are:
   1) Existence of a contract, combination or conspiracy
   2) affecting interstate commerce
   3) which imposes an unreasonable restraint on trade.


54. White & White, 723 F.2d at 504.


57. White & White, 723 F.2d at 504.

58. Id. "Demonstrating that an alleged agreement would affect interstate commerce [or commerce between the states and foreign nations] has been treated as a jurisdictional prerequisite to bringing a section one claim that must be satisfied before the other two elements of such a claim can be addressed. See Summit Health, Ltd. v. Pinhas, _ U.S. __, 111 S. Ct. 1842, 114 L.Ed.2d. 366, 59 U.S.L.W. (1991)." 945 F.2d at 702 (citing White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983)).

59. 945 F.2d at 702 (citing White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983)).

60. Id.
Dr. Oksanen claimed that the jurisdictional element is met because among other things, "the hospital and its staff purchase supplies and receive insurance payments from out-of-state sources and that they treat non-Virginia residents." Therefore their actions have an effect on commerce.

Dr. Oksanen alleged that the peer review process constituted a conspiracy that imposed an unreasonable restraint on trade. First, "it was used as a vehicle to punish him for sending patients to other area hospitals . . . " Second, "[Dr.] Oksanen argued that the peer review serves a gatekeeping function so that an unfavorable review from Page Memorial could affect his ability to obtain staff privileges at other hospitals."

B. The Fourth Circuit's Analysis of Oksanen

Dr. Oksanen maintains that the medical staff and the hospital are distinct legal entities. The Fourth Circuit, in implementing the distinct entity test to this fact scenario, stated that the relationship between Page Memorial and the medical staff—as far as the peer review process—is one of principal and agent. The court then asserted that this relationship was similar to the relationship covered by the umbrella of intra-corporate immunity as set forth in Copperweld Corp. v. Independence Tube Corp.:

[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy . . . . The distinction between unilateral and concerted conduct is necessary for the proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinate conduct among officers or employees of the same company.

Therefore the hospital and the medical staff are to be considered one indistinct entity when performing a peer review.

61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
67. Id. at 703.
68. 467 U.S. at 769.
69. 945 F.2d at 703.
Copperweld held that agreements between a parent company and a wholly owned subsidiary were not concerted actions as defined in section one because the parent and the subsidiary always have a unity of interests and hence their agreements can not be considered a sudden joining of independent interests. The Fourth Circuit feels that a "similar unity of interest is present in the relationship between the hospital and its staff", and consequently held that Copperweld's functional approach required the court to look beyond form and into the substance of the relationship.

Although the Fourth Circuit concluded that technically the hospital staff and the medical staff are two distinct legal entities, they held that when acting in the peer review process they are in substance acting as one indistinct entity with a unity of interest—increasing the quality of patient care—and that their actions do not implicate the concerns of section one of the Sherman Act.

Dr. Oksanen argues, that even if Page Memorial and the medical staff comprise the same enterprise, the intra-enterprise immunity doctrine is inapplicable because some of the doctors had an independent stake in the outcome of the peer evaluation. The court narrowly reads the personal stake exception to extend only so far as the rationale underlying Greenville Pub. Co. v. Daily Reflector, Inc. In Greenville, the defendant company's president would directly benefit from the alleged conspiracy, but in Oksanen, the only doctor whose practice

70. 467 U.S. at 752. Further the Supreme Court has expressed its dislike of rules such as the intra-enterprise conspiracy doctrine, that penalize coordinate conduct "simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits." Id. at 771.
71. 945 F.2d at 703. Both Page Memorial and the medical staff seek to upgrade the quality of patient care. Id.
72. Id. "Copperweld in fact criticized the notion that a corporation can conspire with itself because this 'looks to the form of an enterprise's structure and ignores the reality.'" Id. (citation omitted).
73. 945 F.2d at 704.
74. Id. at 705. "This circuit has observed that an exception to the general rule that a corporation cannot conspire with its officers or agents 'may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective.'" Id. (citing Greenville Pub. Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974)).
75. 496 F.2d 591 (4th Cir. 1974). Here the court held that the president of the defendant company was capable of conspiring with said company if he held an interest in another company that competed with the plaintiff firm and that would benefit if the plaintiff were forced out of the market. Id. at 400.
might have directly benefited from Dr. Oksanen's expulsion was Dr. Dale, and he wasn’t admitted to the hospital until August 1983 and he did not take part in the peer review leading to Dr. Oksanen’s suspension.  

The summation of the court’s rationale for holding that Page Memorial and the medical staff are incapable of conspiring during the peer review can be stated as follows:

1) During the peer review process the medical staff acts as the agent of Page Memorial and as such the intra-enterprise immunity doctrine is applicable.

2) "There are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and the medical staff aren’t competitors." Furthermore, “there is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review."  

3) The personal stake exemption does not apply since there was only one doctor who practiced in overlapping areas, and he wasn’t even a member of the staff when these problems occurred nor did he participate in the peer review that suspended Dr. Oksanen.

C. Conflict Among the Other Circuit Courts

Whether a hospital and its medical staff have the capacity to conspire is at controversy among the different circuit courts. There are those circuits that hold that a hospital and its medical staff lack the capacity to conspire when conducting a peer review, extending some form of the intra-enterprise immunity doctrine to the peer review process, thereby insulating the hos-

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76. 945 F.2d at 705.

In any event, the more important aspect of Greenville for the purpose of peer review is the degree of control the officer or agent with the independent interest exercised over the defendant firm's decisionmaking process. If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then the independent interest is largely irrelevant to antitrust analysis.

Id.

77. Id. at 703 (citation omitted).

78. Id. at 704 n.2 (citation omitted).

In *Nurse Midwifery Assocs. v. Hibbett*, Nurse Midwifery Associates brought an action against the hospital, its doctors and a mutual insurer to recover for conspiracy in unreasonable restraint of trade where the midwives were denied staff privileges at hospitals.\footnote{80}{918 F.2d at 605.} The Sixth Circuit stated that to establish a violation of section one of the Sherman Act the plaintiffs must establish that the defendants combined or conspired with the intent to unreasonably restrain trade.\footnote{81}{Id. at 611 (citing Smith v. Northern Mich. Hosps., 703 F.2d 942, 949 (6th Cir. 1983)).} A section one claim cannot be established by unilateral conduct.\footnote{82}{Id. (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984)).} The court held that "[t]he [intra-enterprise] doctrine prevents a finding of a conspiracy between a hospital and medical staff but in certain situations does not preclude a conspiracy among individual members of a medical staff."\footnote{83}{Id. at 614. Furthermore, the court stated that:

an agreement between officers or employees of the same firm does not ordinarily constitute a section 1 conspiracy, because officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively . . . .

Id. at 612 (citation omitted).}

In so holding, the Sixth Circuit found that a hospital and its staff were analogous to a corporation and its officers or employees.\footnote{84}{Id. at 611.} Like a corporation where a relationship of principal and agent exist, a medical staff when acting as the staff of the hospital is acting as a quasi-agent and therefore is incapable of conspiring with the hospital.\footnote{85}{Id.}

In *Nanavanti v. Burdette Tomlin Memorial Hosp.*, Dr. Nanavanti, a board certified cardiologist, claimed that the hospital and the executive committee conspired against him in
violation of section one of the Sherman Act. Dr. Nanavanti alleged that the hospital and the executive committee had sought to "boycott Nanavanti's services in two ways: first, they allegedly conspired to revoke his hospital staff privileges; and second, they allegedly discourage doctors from referring cardiological patients to Nanavanti."

The Third Circuit, citing Weiss v. York Hosp., stated that a hospital could not conspire as an entity with its medical staff on the grounds that the medical staff operates as an agent for the hospital as would an officer of a corporation and has "no interest in competition with the hospital." Therefore Tomlin Memorial Hospital was not capable of conspiring with the executive committee.

The Eleventh Circuit, on the other hand, reasoned that intra-enterprise immunity constitutes a necessary doctrine in the world of business. Without such a doctrine, every action by an agent in the business world theoretically violates section one of the Sherman Act.

The rule for corporations [(intra-enterprise immunity)] is based on considerations unique to the corporate context. Theoretically, a "conspiracy" involving a corporation and one of its agents would occur every time an agent performed some act in the course of his agency, for such an act would be deemed an act of the corporation. Thus, the rule that a corporation is incapable of conspiring with its agents is necessary to prevent the erosion of the principle that section 1 does not reach unilateral acts. A hospital and the member of its medical staff, in contrast, are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a "conspiracy".

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87. Id. at 111.
89. 857 F.2d at 118.
90. Id.
91. Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 829 (11th Cir. 1990), cert. denied, 110 S. Ct. 1960 (1990) (Physician whose medical staff privileges were revoked brought action against the hospital, members of medical staff, and local medical society for violation of federal antitrust laws).
92. Id.
93. Id. at 819.
The Eleventh Circuit therefore held that "[t]o establish a violation of section 1 of the Sherman Act, a plaintiff must prove that two or more distinct entities agreed to take action against him."94 The court found faulty the rationale that permitted the extension of intra-enterprise immunity to peer review situations, and that there was no basis for "holding that a hospital is legally incapable of conspiring with members of its medical staff."95 The Eleventh Circuit's bottom line is that the medical staff and the hospital are indeed capable of conspiring with one another.96

D. Criticism of the Court's Rationale

The first area of analysis in question is the application of Copperweld97 to Page Memorial and its medical staff where Oksanen is so easily distinguished. The medical staff is not a wholly owned subsidiary of Page Memorial as were the facts in Copperweld, nor does Page Memorial exercise the same degree of control over the medical staff as does a parent company over its subsidiary.

A subsidiary, as an entity, is always acting under the direction of the parent corporation, to hold such action a violation of section one of the Sherman Act would effectively permit section one to reach unilateral conduct.98 Hospitals on the other hand do not exercise the absolute control over their medical staffs as would a parent company over its subsidiary. Although hospitals and their staffs may share a common interest it should not be assumed that they have complete congruency of interest and are acting as a single entity. A hospital merely provides an environment where the doctors as independent contractors can apply their trade. This type of arrangement is a symbiotic relationship between distinct individuals, not an agency relationship.

The Board of Directors of a subsidiary are fiduciaries to the parent company and are under an obligation to maximize shareholder value. The medical staff is under no obligation to

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94. Id. at 818.
95. Id. at 819.
96. Id.
maximize revenues coming into the hospital. This is clear in light of the facts that doctors often hold staff privileges at more than one hospital. Were doctors held responsible to maximize the incoming rents to the hospital then that requirement would categorically prohibit them from seeking to hold staff privileges at other hospitals.

Nor are doctors under any strict responsibility to effectively participate in any professional peer review. Sure, they may be required to go through the motions of participation, but they can not be forced to act in any certain way. Furthermore, they receive no renumerations for their participation and are not authorized to act as agents.

Considering the differences between the fact in *Oksanen* and *Copperweld* and the distinct differences in the relationships between the two sets of alleged conspirators, there is reason to believe that perhaps the doctrine of intra-enterprise immunity should not have been extended to Page Memorial and its medical staff.

Secondly, even if the intra-enterprise doctrine should be extended in this case, the private interest exception could also, in all fairness, be extended in *Oksanen*. It is true that Dr. Oksanen’s practice only overlapped one of the physician’s on the medical staff, and that that physician arrived after the problems began and did not participate in the proceeding wherein Dr. Oksanen was suspended. However, there is evidence that other members of the medical staff also had a private interest which they may have wished to protect by suspending Dr. Oksanen.

Doctors Horng and Ancheta were surgeons at the hospital who may have had private interests in seeing Dr. Oksanen lose his medical staff privileges. For instance, Dr. Oksanen questioned whether or not Drs. Horng and Ancheta knew the limitations of their expertise, and as a result Dr. Oksanen began sending his patients to other hospitals for surgery. The lost revenue of these surgeons could easily provide for motive to establish a personal stake.

Lastly, the court could just as easily have ended with the same result, that there was no section one violation, by applying the traditional two prong test as set forth in section one of the Sherman Act. Namely, was there a contract, combina-

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99. 945 F.2d at 700.
100. 15 U.S.C. § 1 (1988). The Fourth Circuit’s rationale may have been moti-
tion or conspiracy between the medical staff and Page Memorial that imposed an unreasonable restraint on trade.

There is clearly no objection to the first prong that the defendants acted in concert, that may be assumed to be a given in this case. Page Memorial and the medical staff did act in concert to prevent Dr. Oksanen from practicing at Page Memorial. There is however no evidence that the concerted action imposed an unreasonable restraint on trade. Dr. Oksanen was already a staff member of another hospital that competed with Page Memorial. They did not unreasonably restrict Dr. Oksanen's ability to practice medicine in the Page County area. It would have been unreasonable if Page Memorial had gotten together with the other hospitals that Dr. Oksanen worked at and jointly decided to black-ball him from practice. Here however, Page Memorial merely made a business decision that Dr. Oksanen was not the type of doctor that enhanced the medical staff and that the hospital would be better off without him.

IV. CONCLUSION

The court's rationale in the paragraphs above the extension of the intra-enterprise immunity doctrine to peer review evaluations should be reexamined for the reasons stated above, namely:

- The relationship between a hospital and a medical staff are very different from the relationship between a parent company and its officers of subsidiaries.

- The same result could have been reached had the Fourth Circuit simply employed the standard two prong test, as there was no evidence of an unreasonable restraint of trade.

Therefore, the position of this Note differs from those circuits that extend intra-enterprise immunity to hospitals and their medical staffs, and sides with the Eleventh Circuit which held that "[t]he rule for corporations [(intra-enterprise)] is based on considerations unique to the corporate context . . . . A hospital

vated by the public policy concern of protecting evaluating doctors in the interest of public safety. Were these doctors found to have conspired against Dr. Oksanen the possible dampening effect on future peer group review could endanger the patients of incompetent doctors.
and the members of its medical staff ... are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a 'conspiracy.'"\textsuperscript{101}

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\textsuperscript{101} Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 819 (11th Cir. 1990).