

# NOTE

## THE *COPPERWELD* QUESTION: DRAWING THE LINE BETWEEN CORPORATE FAMILY AND CARTEL

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## INTRODUCTION

Antitrust law treads a fine line between creation of a status offense for dominant commercial organizations on the one hand, and devolution into incomprehensibly complex legal standards on the other. The Sherman Antitrust Act<sup>1</sup> prohibits anticompetitive business practices, for which draconian penalties are contemplated by the Act and subsequent legislation.<sup>2</sup> The difficulty of drawing legal distinctions between anticompetitive conduct and aggressively competitive conduct, however, is a significant obstacle to achieving the policy objectives of the Act.<sup>3</sup> When faced with allegedly anticompetitive business prac-

<sup>1</sup> 15 U.S.C. §§ 1–3 (2012).

<sup>2</sup> Penalties for felony violations of the Sherman Act might include a fine of up to \$100,000,000 for a corporation, \$1,000,000 for an individual, or imprisonment for up to ten years. *Id.* Any jury award in a private action is automatically trebled. *Id.* § 15.

<sup>3</sup> For example, in 1967, the Supreme Court declared that vertical “exclusive territory” resale restraints were anticompetitive per se, at least where the manufacturer has parted with “dominion” over the merchandise. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375–76, 379 (1967), *overruled by* *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). For a decade, courts applied this rule to find that vertical restraints violated the Sherman Act. *See, e.g.*, *United States v. Glaxo Grp. Ltd.*, 302 F. Supp. 1, 9 (D.D.C. 1969) (commenting that “[h]owever laudable the motive,” vertical restraints constitute a per se violation of the Sherman Act); *Kugler v. Koscot Interplanetary, Inc.*, 293 A.2d 682, 699 (N.J. Super. Ct. Ch. Div. 1972) (finding that a manufacturer’s vertical restraints on the distribution and marketing of its products violated the Sherman Act); *see also* Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 295–99 (1975) (discussing inconsistency of the law with underlying economic policy and critiquing the *Arnold, Schwinn & Co.* decision as lacking an economic rationale). But in 1977, the Court reversed tack, abandoning

tices, courts recognize the risk of chilling conduct that can, in some circumstances, be procompetitive and salutary to consumers.<sup>4</sup> For example, predatory pricing by a monopolist might drive nascent competitors from the market and lead to long-term monopoly entrenchment, but in a less concentrated market the same conduct looks a lot like a procompetitive price war, resulting in lower prices for consumers.<sup>5</sup>

Another obstacle to achieving the policies of the Sherman Act is the difficulty of applying the law to a range of ever-innovative business practices without exploding the legal standards beyond manageability.<sup>6</sup> Simple legal standards provide greater predictability and minimize the risk of chilling procompetitive conduct.<sup>7</sup> But simplifying the legal standard creates two risks: first, an underinclusive standard eviscerates the strong deterrent intent of the Act; second, an overinclusive standard begins to resemble a status offense for businesses in concentrated markets. In the United States, antitrust law stops short of declaring the status of “monopoly” a violation of the law,<sup>8</sup> perhaps reflecting the legal community’s gen-

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the per se rule against vertical price restraints, and in 2007 the Court finally declared that even vertical resale price restraints may in fact be procompetitive in certain circumstances. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007); *GTE Sylvania Inc.*, 433 U.S. at 57–59.

<sup>4</sup> See, e.g., *Leegin*, 551 U.S. at 895 (“[Per se rules of antitrust liability] can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage.”).

<sup>5</sup> See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223–24 (1993) (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of *competition*, not *competitors*.” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))).

<sup>6</sup> See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 & n.10 (1972) (emphasizing the importance of predictability because “courts are of limited utility in examining difficult economic problems” and have not been left free by Congress to “ramble through the wilds of economic theory in order to maintain a flexible approach”). But see *Leegin*, 551 U.S. at 895 (“[A]dministrative ‘advantages are not sufficient in themselves to justify the creation of *per se* rules.” (quoting *GTE Sylvania Inc.*, 433 U.S. at 50, n.16)).

<sup>7</sup> See *Topco*, 405 U.S. at 609–10 n.10.

<sup>8</sup> See *United States v. Aluminum Co. of America*, 148 F.2d 416, 429–30 (2d Cir. 1945) (L. Hand, J.) (by certification of the Supreme Court, pursuant to 15 U.S.C. § 29 (2012)) (“[P]ersons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since the Act makes ‘monopolizing’ a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances. . . . A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins.”).

eral aversion to anything approaching a criminal status offense.<sup>9</sup>

Nonetheless, anticompetitive outcomes, rather than conduct undertaken with the anticompetitive intent, are the focus of the Sherman Act.<sup>10</sup> Put simply, the Sherman Act protects “*competition, not competitors,*” and, sometimes, inefficient victims suffer in healthy competitive markets.<sup>11</sup> One problematic aspect of antitrust law is that courts are often asked to estimate damages and predict anticompetitive outcomes, a task that sometimes requires a court to “ramble through the wilds of economic theory.”<sup>12</sup>

Skirting questions of causation that remain unsettled in academic economic debate, courts cautiously draw judicially manageable bounds to antitrust liability, focusing on conduct that will almost always result in anticompetitive outcomes.<sup>13</sup> To this end, courts treat differently monopolization claims under § 2 of the Sherman Act—where the threshold question is whether the defendant has or is likely to acquire dominant market power<sup>14</sup>—from cartel and conspiracy claims under § 1 of the Sherman Act—where antitrust liability may be found even absent significant market power on the part of any individual defendant.<sup>15</sup> This distinction is made because courts

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<sup>9</sup> See Joseph L. McEntee, Jr. & Robert C. Kahrl, *Damages Caused by the Acquisition and Use of Monopoly Power*, 49 ANTITRUST L.J. 165, 166 (1980) (asserting that even where the status of the defendant may be deemed anticompetitive, some conduct by the defendant is always required to constitute a violation of the antitrust laws).

<sup>10</sup> See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984) (“[W]e [have] emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its ‘market impact.’” (quoting *GTE Sylvania Inc.*, 433 U.S. at 51)).

<sup>11</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

<sup>12</sup> *Topco*, 405 U.S. at 622 (Burger, C.J., dissenting). On the other hand, courts do eventually adopt bright-line “per se” rules prohibiting certain categories of business practices as anticompetitive once experience has shown that a business practice is “always or almost always [likely] to restrict competition.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

<sup>13</sup> See, e.g., *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (noting that agreements among competitors to fix prices or divide markets almost always restrict competition).

<sup>14</sup> See, e.g., *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (defining monopoly power as “power to control prices or exclude competition” (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 389–91 (1956))).

<sup>15</sup> See *F.T.C. v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 433–36 (1990) (“Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that . . . disclosed by this record, to warrant condemnation under the *antitrust laws.*” (emphasis added)).

consider anticompetitive conspiracies to be especially likely to result in anticompetitive outcomes.<sup>16</sup>

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy[] in restraint of trade.”<sup>17</sup> Courts have read into § 1 a strict requirement of concerted action between independent firms in order to draw the line between procompetitive and anticompetitive conduct where defendant businesses have less than monopoly power.<sup>18</sup> Unilateral action is categorically exempt from § 1,<sup>19</sup> but where concerted action is shown it becomes unnecessary for the state or plaintiff to demonstrate that the defendants had a significant likelihood of succeeding in establishing market dominance.<sup>20</sup> Courts justify stricter treatment of erstwhile competitors on the theory that, in a competitive market, they have no business colluding to make anticompetitive practices profitable.<sup>21</sup>

In the context of corporations, a corporate defendant is generally incapable of conspiring with its own agents or divisions (a contrary approach would extend conspiracy liability to every claim against a corporation).<sup>22</sup> Separate divisions of a single corporation are treated as a single entity in antitrust law, incapable of conspiring amongst themselves.<sup>23</sup> The fact that alleged conspirators operated as part of a single corporate en-

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<sup>16</sup> See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984) (“Concerted activity inherently is fraught with anticompetitive risk. . . . Of course, . . . mergings [sic] of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.”); *Super. Ct. Trial Lawyers Ass’n*, 493 U.S. at 433–36 (“Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.” (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–26 & n.59 (1940))).

<sup>17</sup> 15 U.S.C. § 1 (2012).

<sup>18</sup> See, e.g., *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“[T]he act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”).

<sup>19</sup> See, e.g., *Copperweld*, 467 U.S. at 768–69 (holding that the Sherman Act “does not reach conduct that is ‘wholly unilateral’” (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968))); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 760–61 (1984) (holding that “[i]ndependent action is not proscribed”).

<sup>20</sup> See *Super. Ct. Trial Lawyers Ass’n*, 493 U.S. at 433–36.

<sup>21</sup> See *Copperweld*, 467 U.S. at 768–69 (“The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.”).

<sup>22</sup> See *id.* at 769–71.

<sup>23</sup> See *id.*

tity disproves concerted action, the threshold requirement for liability under § 1 of the Sherman Act, and therefore is a complete defense against a claim under § 1.<sup>24</sup>

The unilateral action defense becomes more complicated, however, where alleged conspirators are separately incorporated but part of the same complex corporate family. Until the mid-1980s, the prevailing bright-line rule held that “[where defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from [antitrust liability].”<sup>25</sup> But the Supreme Court rejected this approach in *Copperweld Corp. v. Independent Tube Corp.*<sup>26</sup>

The *Copperweld* Court reasoned that the central concern of § 1 was the anticompetitive risk of agreements that “deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands,” a concern that did not lend itself to mechanical treatment of separately incorporated defendants.<sup>27</sup> Where, as in *Copperweld*, the parent defendant wholly owns the subsidiary defendant, the interests of the two are so closely aligned that conceptualizing the two as separate decision makers is absurd.<sup>28</sup> The Court expressly restricted its ruling to situations such as the one before it, however, involving a parent corporation and a wholly owned, though separately incorporated, subsidiary.<sup>29</sup> The *Copperweld* Court declined to reach the question of the degree of functional control between a parent and less than wholly owned subsidiary required for the two to constitute a single center of decision making, incapable of conspiracy.<sup>30</sup>

The *Copperweld* Court rejected the prevailing bright-line approach to the threshold test of corporate concerted action in favor of a (sometimes difficult) factual analysis of the realities of corporate decision making.<sup>31</sup> This approach is a departure from the usual inclination of antitrust courts, favoring man-

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<sup>24</sup> See *id.*

<sup>25</sup> *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 141-42 (1968).

<sup>26</sup> 467 U.S. 752 (1984).

<sup>27</sup> *Id.* at 769.

<sup>28</sup> See *id.* at 772, 774.

<sup>29</sup> *Id.* at 767.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 773 (“Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.”).

ageable legal standards over economically complex ones.<sup>32</sup> The *Copperweld* decision reflects a tension between this inclination and the requirements of antitrust enforceability: the Court cautions that antitrust law should not manipulate the choice of corporate structure.<sup>33</sup> *Copperweld's* important contribution is its doctrinal emphasis on independent decision making, and its illustrative formulation of the threshold question of § 1 liability: Absent the agreement, would the alleged conspirators, in fact, compete?<sup>34</sup>

Following *Copperweld's* rejection of a bright-line approach, however, lower courts have failed to converge upon a consistent approach to the unilateral action defense where alleged conspirators are members of the same corporate family.<sup>35</sup> Some courts have fallen back on various new bright-line rules,<sup>36</sup> while others have suggested a factor-balancing approach.<sup>37</sup> The case law provides little clarity and few judicially manageable standards to courts confronted with antitrust claims against complex corporate families.<sup>38</sup> This Note will, in part, attempt to determine where the inconsistencies emerge in the current analytical frameworks.

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<sup>32</sup> See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609–10 (1972) (noting that courts favor bright-line rules in antitrust cases because “courts are of limited utility in examining difficult economic problems”).

<sup>33</sup> See *Copperweld*, 467 U.S. at 773. But see *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) (holding irrelevant the fact that American Major League Soccer may have been designed so as to avoid antitrust liability; note that sports leagues are given special treatment under antitrust law in numerous regards); Michael P. Waxman, *Fraser v. MLS, L.L.C.: Is There A Sham Exception to the Copperweld Single Entity Immunity?*, 12 MARQ. SPORTS L. REV. 487, 495–99 (2001) (suggesting that *Fraser* might have held otherwise).

<sup>34</sup> *Copperweld*, 467 U.S. at 768–69 (“In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.”).

<sup>35</sup> Compare *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) (concluding that two subsidiaries wholly owned by the same parent corporation are legally incapable of conspiring with one another), with *Aspen Title & Escrow, Inc., v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1488 (D. Or. 1987) (finding that two subsidiaries that are less than wholly owned by a parent corporation may conspire with one another).

<sup>36</sup> See, e.g., *Leaco Enters., Inc. v. Gen. Elec. Co.*, 737 F. Supp. 605, 608–09 (D. Or. 1990) (adopting a rule that a parent and subsidiary constitute a unilateral actor for § 1 purposes where, under applicable corporate law, the parent could force a merger).

<sup>37</sup> See, e.g., *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1216 (S.D. Ga. 1997) (weighing factors including “the interests and objectives of each company” and the identity of “significant decision makers”).

<sup>38</sup> For further discussion of post-*Copperweld* confusion, see *Princeton Insurance Agency, Inc. v. Erie Insurance Co.*, 690 S.E.2d 587, 594 (W. Va. 2009).

Clarifying this analysis will create a more judicable standard for the threshold question of conspiracy under § 1, which would allow judges to dispose of some meritless claims before reaching the imbroglia of projected anticompetitive economic outcomes. A coherent framework must also reflect the important considerations underlying antitrust law: in particular, consumer protection and promotion of competitive markets.<sup>39</sup> A flexible standard is required, but one that also provides clarity to courts.

This Note will consider the appropriateness for this purpose of the factors weighed in a similar analysis under corporate law: whether a parent corporation exerts sufficient control over a subsidiary to justify "piercing the corporate veil." Differences in policy and theory between the two analyses must be recognized and will be a continuous theme in this Note. For example, the fundamental question to the antitrust analysis is, in the language of the *Copperweld* Court, whether the conspiracy "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands."<sup>40</sup> By contrast, the veil-piercing analysis asks whether "circumstances [were] such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice."<sup>41</sup> The equity element of the veil-piercing analysis is notably absent from the antitrust analysis. However, the corporate law analysis's focus on functional control is well suited to the *Copperweld* Court's concern that antitrust law not restrict the range of permissible business structures.<sup>42</sup>

Part I discusses the background of the *Copperweld* decision, including the concerted action requirement under § 1 of the Sherman Act as applied to corporations, as well as the *Copperweld* decision itself. Part II considers the confusion in the case law addressing this issue after *Copperweld*. Part III assesses the divergent tests adopted by lower courts in light of the theory underlying the concerted action requirement. Part IV provides a brief survey of prior scholarship relating to this

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<sup>39</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("[T]he primary purpose of the antitrust laws is to protect interbrand competition."); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is . . . to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.").

<sup>40</sup> 467 U.S. 752, 769 (1984).

<sup>41</sup> *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569-70 (7th Cir. 1985).

<sup>42</sup> See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 773 (1984).

topic, and finally, Part V attempts to frame a coherent test for concerted action in the context of a complex corporate family, looking to the veil piercing doctrine under corporate law for potentially probative factors. Parts VI and VII provide applications of this test.

## I

### BACKGROUND: THE UNILATERAL ACTION DEFENSE FOR A CORPORATE FAMILY

#### A. Section 1 of the Sherman Act: The Concerted Action Requirement

Early courts interpreting the Sherman Act recognized that the breadth of the language of § 1 could reach just about any commercial contract.<sup>43</sup> Courts restrict the scope of liability, therefore, by consistently imposing a threshold requirement of concerted action, meaning an agreement between two or more otherwise independent entities.<sup>44</sup> The distinction between concerted and unilateral action, however, is not always immediately clear, for example where the allegedly anticompetitive agreement arose within a trade association,<sup>45</sup> a vertical supply chain,<sup>46</sup> a sports league,<sup>47</sup> or a joint venture.<sup>48</sup> Further, complex corporate structures raise the question of the degree of structural unity that will allow separately incorporated entities to claim the unilateral action defense. This Note attempts to answer this question.

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<sup>43</sup> See, e.g., *Appalachian Coals v. United States*, 288 U.S. 344, 360–61 (1933) (“Every agreement concerning trade, every regulation of trade, restrains.’ The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions.” (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918))), *overruled by Copperweld*, 467 U.S. 752.

<sup>44</sup> See *Copperweld*, 467 U.S. at 768 (“Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.”).

<sup>45</sup> See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 681 (1978) (finding § 1 violation where trade association rule prohibited competitive bidding).

<sup>46</sup> See *Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939) (finding § 1 violation where film distributors imposed restrictions on second-run movie theaters).

<sup>47</sup> See *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 202–04 (2010) (finding § 1 violation where NFL collectively licensed intellectual property to clothing producer, but noting that not all sports league-related restrictions are anticompetitive).

<sup>48</sup> See *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (finding no § 1 per se violation where agreement between gasoline distributors was characterized as a procompetitive joint venture).

## B. The Concerted Action Requirement as Applied to Corporations Pre-*Copperweld*

Before the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*,<sup>49</sup> lower courts relying on Supreme Court dicta held that separately incorporated entities were independent and capable of concerted action, regardless of the degree of control or alignment of interests between them.<sup>50</sup> Courts reasoned that, even in the context of a parent and wholly owned subsidiary, the choice of separate incorporation exposed the two corporations to antitrust liability.<sup>51</sup> This approach drew analogies to the intra-enterprise conspiracy doctrine.<sup>52</sup> In earlier decisions, the Supreme Court appeared to reject the defense of unilateral action to antitrust liability between a parent and subsidiary corporation.<sup>53</sup> In *Perma Life Mufflers v. International Parts Corp.*, the Court reasoned that, "since [defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."<sup>54</sup>

This bright-line rule was problematic in light of courts' concern in antitrust cases that aggressive competition can resemble anticompetitive conduct.<sup>55</sup> The severity of antitrust penalties calls for a strong, logical connection between compet-

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<sup>49</sup> 467 U.S. 752 (1984).

<sup>50</sup> See, e.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 557, 562 (1st Cir. 1974) ("While the doctrine recognizing what we might call 'thin' conspiracies among corporations associated in one business enterprise has not been free of criticism, it seems alive and well.").

<sup>51</sup> See, e.g., *Tamaron Distrib. Corp. v. Weiner*, 418 F.2d 137, 139 (7th Cir. 1969) (reasoning that the choice to hire a separate entity to solicit business in Illinois, Indiana, and Wisconsin rather than sending their own employee subjects the two separate entities to antitrust laws).

<sup>52</sup> The intra-enterprise conspiracy doctrine holds that a corporation may conspire with its own agent or employee where the "corporate employee or agent operates as an independent actor for his own self-interest, and not as a true agent of the corporation." HOLMES & MANGIARACINA, *ANTITRUST LAW HANDBOOK* § 2:7, at 146-48 (2014).

<sup>53</sup> See, e.g., *United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 85-86 (1912) ("The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly held this general phraseology embraces all forms of combination, old and new.").

<sup>54</sup> 392 U.S. 134, 141-42 (1968).

<sup>55</sup> See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984) ("[T]he economic effect of all of the conduct described above—unilateral and concerted vertical price setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable." (citations omitted)).

itive injury and culpability in order to avoid “chilling aggressive . . . competition,”<sup>56</sup> and the bright-line rule simply failed to provide this.<sup>57</sup>

C. *Copperweld Corp. v. Independence Tube Corp.*<sup>58</sup>

The *Copperweld* Court rejected the bright-line rule that an agreement between separately incorporated entities constitutes concerted action.<sup>59</sup> Copperweld Corporation (Copperweld) purchased Regal Tube Corporation (Regal) from Lear Siegler, Inc. (Lear) with a noncompete covenant.<sup>60</sup> Regal had been a division of Lear, but after the sale it separately incorporated as a wholly owned subsidiary of Copperweld.<sup>61</sup> Shortly after the transaction, David Grohne, an officer of Lear, formed Independence Tube Corp. (Independence) to compete with Regal.<sup>62</sup>

The newly incorporated Independence formed agreements with suppliers to purchase equipment and inputs for production.<sup>63</sup> Copperweld threatened legal action directly against these suppliers for interference with the noncompete covenant, even though Copperweld’s management knew that the covenant did not apply to Grohne individually.<sup>64</sup> Independence’s suppliers withdrew, and Independence sued Copperweld, Regal, and the suppliers for violations of § 1 of the Sherman Act.<sup>65</sup> At trial, the jury found a conspiracy in violation of § 1 between Copperweld and Regal, awarding damages trebled to almost \$7.5 million, but further found that the suppliers were not parties to the conspiracy.<sup>66</sup> The Seventh Circuit affirmed, but “questioned the wisdom of subjecting an ‘intra-enterprise’ conspiracy to antitrust liability, when the same conduct by a corporation and an unincorporated division would escape liability for lack of the requisite [concerted action].”<sup>67</sup>

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<sup>56</sup> *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 451 (2009).

<sup>57</sup> *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007) (suggesting that vertical agreements in restraint of intrabrand competition are likely to enhance interbrand competition).

<sup>58</sup> 467 U.S. 752 (1984).

<sup>59</sup> *Id.* at 772–74.

<sup>60</sup> *Id.* at 756.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 467 U.S. 752, 756–57 (1984).

<sup>65</sup> *Id.* at 757–58.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 758–59.

The Supreme Court reversed on certiorari.<sup>68</sup> The Court announced, “[r]eview of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy.”<sup>69</sup> The Court answered in the negative.<sup>70</sup>

Chief Justice Warren E. Burger, writing for the Court, explored the importance of concerted action under § 1. Section 2 of the Sherman Act, which treats monopolies, has no concerted action requirement, but does require that “[t]he conduct . . . threatens actual monopolization.”<sup>71</sup> In the absence of this “threat-of-actual-monopolization” requirement from § 1, Chief Justice Burger reasoned that the concerted action requirement distinguishes anticompetitive conspiracies from vigorous unilateral competition.<sup>72</sup>

Chief Justice Burger rejected as meaningless the distinction between the coordinated conduct of separate divisions of a single corporation, and conduct coordinated between a parent and a wholly owned subsidiary.<sup>73</sup> He therefore rejected the intra-enterprise conspiracy doctrine as applied to a parent and wholly owned subsidiary, declaring that antitrust liability should not distort the choice of corporate form.<sup>74</sup> However, the Supreme Court carefully restricted the holding to a parent corporation with a separately incorporated, but wholly owned subsidiary.<sup>75</sup> The Court explicitly left open the question of what degree of ownership or alignment of interest, if any, is sufficient to meet the unilateral action defense for a parent and less than wholly owned subsidiary.<sup>76</sup>

The *Copperweld* ruling replaced a clean and manageable (but overinclusive) unilateral action test with a rule that was

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<sup>68</sup> *Id.* at 759.

<sup>69</sup> *Id.*

<sup>70</sup> 467 U.S. at 752, 771–74 (1984).

<sup>71</sup> *Id.* at 767.

<sup>72</sup> *Id.* (“It is not enough that a single firm appears to ‘restrain trade’ unreasonably, for even a vigorous competitor may leave that impression.”).

<sup>73</sup> *Id.* at 770–71 (“A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate . . . . Indeed, the very notion of an ‘agreement’ in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning.”).

<sup>74</sup> *Id.* at 772–73 (“Separate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests. Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency . . . without increasing its exposure to antitrust liability.”).

<sup>75</sup> *Id.* at 767.

<sup>76</sup> *Id.*

easy to apply to the *Copperweld* facts. But the *Copperweld* rule is not easily extended to situations involving less than complete ownership.<sup>77</sup> This shift towards a more involved inquiry was justified, however, by the underlying policies of antitrust law:<sup>78</sup> Chief Justice Burger explained that there is a hole in the Sherman Act, whereby a corporation without monopoly market power is free to unilaterally compete as aggressively as it can without incurring antitrust liability.<sup>79</sup> Even conduct that may be fraudulent or tortious will be immune from antitrust treble damages for such an actor.<sup>80</sup> This gap in the coverage of antitrust law is important because it protects the legal distinction between anticompetitive conduct and aggressive competitive conduct.<sup>81</sup> The former bright-line rule precluding separately incorporated entities from pleading the unilateral action defense did not recognize the importance of this gap and rendered aggressive competition legally risky for complex corporate families.<sup>82</sup>

## II

### THE UNILATERAL ACTION DEFENSE POST-*COPPERWELD*

Lower courts facing *Copperweld* questions have applied inconsistent approaches and reached inconsistent results.<sup>83</sup> A few courts have strictly limited the *Copperweld* ruling, allowing the unilateral action defense only to parents and wholly owned subsidiaries.<sup>84</sup> Most courts have focused on the factual question of the unity of interests between two corporations arising from interrelated corporate structures; some courts have considered the totality of the circumstances, while others have

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<sup>77</sup> See *Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 690 S.E.2d 587, 594 (W. Va. 2009).

<sup>78</sup> *Id.* (“[C]ourts have looked to the amount of control the parent company has over its subsidiary, examining, in view of the principles enunciated in *Copperweld*, whether there is a unity of purpose which essentially forecloses the risk of anticompetitive conspiracy.”).

<sup>79</sup> *Copperweld*, 467 U.S. at 776–77.

<sup>80</sup> *Id.* at 777.

<sup>81</sup> *Id.* at 774–75.

<sup>82</sup> See *id.*

<sup>83</sup> See, e.g., *Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 690 S.E.2d 587, 594 (W. Va. 2009) (recognizing inconsistency).

<sup>84</sup> *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987); see also *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 856 F. Supp. 990, 997 (E.D. Pa. 1994), *aff'd*, 54 F.3d 1125 (3d Cir. 1995) (reasoning that a de minimis difference between a parent’s ownership and 100% ownership does not change the fact that the parent has complete control over the subsidiary).

adopted a balancing test.<sup>85</sup> This Note assesses these approaches in light of the underlying purposes of the concerted action requirement under § 1 and the theory of the unilateral action defense.

### A. Strictly Limiting the *Copperweld* Ruling

Some courts have adopted a very strict reading of *Copperweld*, rejecting any extension of the unilateral action defense beyond the context of a parent and wholly owned subsidiary. The U.S. District Court for the District of Oregon, in *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, refused to countenance a unilateral action defense unless defendant corporations “are owned 100% in common, or a de minimis amount less than 100%.”<sup>86</sup> The court found concerted action between defendant real estate developer and defendant title insurance provider, where the former owned 75% of the latter’s stock.<sup>87</sup>

### B. Unity-of-Interests Tests

Most courts, when faced with *Copperweld* questions in novel situations, consider some formulation of a “unity-of-interests” test. For example, the U.S. District Court for the Northern District of Illinois, in *Rohlfing v. Manor Care, Inc.*,<sup>88</sup> reasoned that a parent and majority-owned subsidiary are likely to have a unity of interests, but that “[e]ven in cases where the parent’s ownership interest is not strong, unity of interest may be established if the economic objectives of the corporations are interdependent or if the management of one company exerts almost complete control over the other.”<sup>89</sup> The court found unity of interest between the parent nursing home corporation and its 82%-owned pharmacy subsidiary.<sup>90</sup>

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<sup>85</sup> Compare *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447 (9th Cir. 1993) (“Whether corporate entities are sufficiently independent requires an examination of the particular facts of each case.”), with *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997) (applying factor balancing approach), and *Direct Media Corp. v. Camden Tel. and Tel. Co.*, 989 F. Supp. 1211, 1216 (S.D. Ga. 1997) (same).

<sup>86</sup> 677 F. Supp. at 1487.

<sup>87</sup> *Id.* at 1486; see also *Siegel Transfer*, 856 F. Supp. at 997 (holding that the *Copperweld* doctrine applies to a company that owns 99.92% of a subsidiary because the economic reality was that the company was in complete control of the subsidiary’s affairs).

<sup>88</sup> 172 F.R.D. at 344.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

The Third Circuit, in *Weiss v. York Hospital*,<sup>91</sup> applied a unity-of-interests test to find that a collection of doctors working for a single hospital were capable of conspiring in violation of § 1:

Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form. The 'substance' of an arrangement often depends on the economic incentive of the parties. The York medical staff is a group of doctors, all of whom practice medicine in their individual capacities, and each of whom is an independent economic entity in competition with other doctors in the York medical community.<sup>92</sup>

The Ninth Circuit also accepted a factual unity-of-interests standard in *Williams v. I.B. Fischer Nevada*, finding that a Jack in the Box franchisor and franchisee were incapable of conspiracy given their natural alignment of interests.<sup>93</sup>

The Eighth Circuit adopted a unity-of-interests test structured by evidentiary burdens in *City of Mt. Pleasant v. Associated Elec. Co-op., Inc.*<sup>94</sup> The court placed upon the plaintiff the burden of making the initial showing that any of the defendants had actually pursued interests divergent from the defendant cooperative.<sup>95</sup> The court found that plaintiff had shown heated internal disputes among the distributor members of an electricity generating cooperative as to pricing but found this insufficient: "Even though the [defendants] may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are independent sources of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent."<sup>96</sup>

### C. Factor-Balancing Approach

In *Direct Media Corp. v. Camden Telephone & Telegraph Co.*,<sup>97</sup> the U.S. District Court for the Southern District of Georgia adopted a factor-balancing approach. The court enumerated three nonexhaustive factors: "[1] the interests and objectives of each company, [2] the significant decision makers,

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<sup>91</sup> 745 F.2d 786, 815 (3d Cir. 1984).

<sup>92</sup> *Id.* (citations omitted).

<sup>93</sup> 999 F.2d 445, 447 (9th Cir. 1993).

<sup>94</sup> 838 F.2d 268, 276-77 (8th Cir. 1988).

<sup>95</sup> *Id.* at 276.

<sup>96</sup> *Id.* at 277.

<sup>97</sup> 989 F. Supp. 1211, 1216 (S.D. Ga. 1997).

and [3] who will receive the benefit of the activity.”<sup>98</sup> The court concluded that the parent and subsidiary telephone service provider qualified for the unilateral action defense and granted summary judgment where the parent owned only 51% of the subsidiary and plaintiff had not alleged divergent interests.<sup>99</sup>

#### D. Forced-Takeover Test

Before *Williams*, the U.S. District Court for the District of Oregon had ruled that the unilateral action defense could only apply where the parent corporation was capable of forcing a merger with the subsidiary.<sup>100</sup> The court in *Leaco Enterprises, Inc. v. General Electric Co.* held that a parent corporation could not conspire with its 91.9%-owned subsidiary, where the law of the place of incorporation of the defendant required 67% ownership to force a merger.<sup>101</sup>

#### E. Identical Ownership Test

All courts following *Copperweld* accord immunity from § 1 liability for two corporations that, though structurally independent, share identical ownership.<sup>102</sup> This “sister corporations” rule closely follows the reasoning of *Copperweld*.<sup>103</sup>

### III

#### ASSESSING APPROACHES TO THE UNILATERAL ACTION DEFENSE IN LIGHT OF THE THEORY OF CONCERTED ACTION UNDER § 1

Concerted action poses a heightened threat to competition because individual members of a conspiracy do not need to have significant market power for a conspiracy to restrain trade, block new entrants, and raise consumer prices.<sup>104</sup> An-

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

<sup>99</sup> *Id.* at 1217.

<sup>100</sup> See *Leaco Enters., Inc. v. Gen. Elec. Co.*, 737 F. Supp. 605, 608–09 (D. Or. 1990) (relying on *Sonitrol of Fresno, Inc. v. Am. T. & T. Co.*, No. 83-2324, 1986 WL 953, at \*5–6 (D.D.C. 1986)).

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1316 (5th Cir. 1984); *Livingston Downs Racing Ass’n, Inc. v. Jefferson Downs Corp.*, 257 F. Supp. 2d 819, 835 (M.D. La. 2002); *Bell Atlantic Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 706 (N.D. Cal. 1994); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987).

<sup>103</sup> See, e.g., *González-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 249 (1st Cir. 2012) (noting that *Copperweld*’s reasoning applies to sister corporations); *Bell Atlantic*, 849 F. Supp. at 706–07.

<sup>104</sup> See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984) (“Concerted activity inherently is fraught with anticompetitive risk. . . . Of

ticompetitive agreements between competitors threaten the fundamental principles of competition.<sup>105</sup> But the *Copperweld* Court expressed concern that mechanical applications of antitrust law should not distort the choice of corporate structure.<sup>106</sup>

The *Copperweld* Court was concerned that the unilateral action defense should not proceed from mechanical distinctions but should reflect the realities of intercorporate relationships.<sup>107</sup> The unity-of-interests tests adopted by most of the lower federal courts reflect this concern<sup>108</sup> and look to the realities of the corporate relationship. But courts apply these tests inconsistently.<sup>109</sup> Courts that have strictly limited the *Copperweld* rule, finding unilateral action only between parents and wholly owned subsidiaries, ignore the reasoning in *Copperweld* itself and risk distorting the choice of corporate structure.<sup>110</sup> The forced-takeover test is also problematic because state laws governing takeovers are themselves fairly mechanical, and the test does not necessarily look to the realities of the corporate relationship at the time of the alleged anticompetitive violation.<sup>111</sup>

A unity-of-interests approach is consistent with *Copperweld's* reasoning and provides flexibility, but it poses the risk of becoming unmanageably complicated and overdetering aggressively competitive conduct.<sup>112</sup>

The proconsumer and deterrent purposes of antitrust law would be best served by an approach that consistently allows courts to address the realities of the corporate relationship through a nonexhaustive list of commonly probative factors. A factor-balancing approach provides flexibility while also struc-

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course, . . . mergings [sic] of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.”).

<sup>105</sup> *Id.* at 769 (“[Collusion] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.”).

<sup>106</sup> *Id.* at 772–73.

<sup>107</sup> *See id.* at 754 (“[R]ealities must dominate the judgment.” (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933))).

<sup>108</sup> *See supra* Part II.

<sup>109</sup> *Id.*

<sup>110</sup> *See Copperweld*, 467 U.S. at 769.

<sup>111</sup> *See Leaco Enters., Inc. v. Gen. Elec. Co.*, 737 F. Supp. 605, 608–09 (D. Or. 1990) (applying forced-takeover test).

<sup>112</sup> *See United States v. Topco Assocs.*, 405 U.S. 596, 609–10 (1972) (noting that “courts are of limited utility in examining difficult economic problems” and that without manageable rules, “businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act”).

turing the analysis and providing guidance to judges. Probative factors should illuminate issues relevant to the policy and purposes of antitrust law, providing a threshold test for concerted action clearly based in law.

#### IV

##### PRIOR WORK IN LEGAL SCHOLARSHIP

Writing in anticipation of the Court's decision in *Copperweld*, Professor Phillip Areeda espoused the abandonment of the bright-line rule against the unilateral action defense for separately incorporated entities.<sup>113</sup> Areeda's article examined the policy justifications for the prevailing bright-line rule and rejected them as vacuous, suggesting that there is no economically meaningful difference between separately incorporated but wholly owned subsidiaries and separate divisions of a single corporation.<sup>114</sup> While Areeda's reasoning was incorporated only at the most theoretical level in the Court's opinion,<sup>115</sup> his analysis has remained influential for subsequent commentators.<sup>116</sup>

Following the *Copperweld* decision, legal academics recognized that the abandonment of the bright-line rule provided little guidance for courts facing questions of concerted action in the context of corporate families.<sup>117</sup> Writing shortly after the *Copperweld* decision, James A. Keyte suggested that extending the unilateral action defense to a majority-owned subsidiary and its parent would be a straightforward extension of the *Copperweld* reasoning, while a rebuttable presumption of capacity to conspire should apply to a minority owned subsidiary and its parent absent a showing of "actual decisionmaking power and control."<sup>118</sup>

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<sup>113</sup> Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 552-53 (1983).

<sup>114</sup> *Id.* at 463-70.

<sup>115</sup> The Court demonstrated an awareness of Areeda's work by repeated citation in the *Copperweld* opinion. See 467 U.S. at nn.9, 12, 20.

<sup>116</sup> Citing Areeda, see Peter J. Alessandria, *Intra-Entity Conspiracies and Section I of the Sherman Act: Filling the "Gap" After Copperweld Corp. v. Independence Tube Corp.*, 34 BUFF. L. REV. 551, 568 (1985); Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 644, 649, 655 (2001); Jennifer Stewart, *The Intra-Enterprise Conspiracy Doctrine After Copperweld Corp. v. Independence Tube Corp.*, 86 COLUM. L. REV. 198, 210 (1986); Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL*, CATO SUP. CT. REV. at 369, 373-74 (2010).

<sup>117</sup> See James A. Keyte, *Copperweld Corp. v. Independence Tube Corp.: Has the Supreme Court Pulled the Plug on "Bathtub Conspiracy"?*, 18 LOY. L.A. L. REV. 857, 869 (1985).

<sup>118</sup> *Id.* at 890-91.

Scholars have also suggested the adaptation of corporate control tests from other areas of law for the purposes of the antitrust analysis. Writing shortly after *Copperweld*, Thomas W. McNamara proposed a large number of concrete factual considerations that might inform the analysis of the unilateral action defense, illustrating the sensitivity of his test to “modern business realities” by applying it to a number of hypothetical business structures.<sup>119</sup> More recently, Professor Richard A. Booth suggested a less delineated and more continuous approach to the treatment of business organizations under various questions of law involving conspiracy, based on recognition of fiduciary duties that align the interests of constituent parts of a single corporate family.<sup>120</sup> In contrast, J. Matthew Schmitten suggests a return to a more formalistic approach, arguing that the damage created by the current state of uncertainty outweighs any salutary policy implications of a more sensitive approach.<sup>121</sup>

Prior scholarship has not addressed the difficulties of adapting corporate law tests for the antitrust context, arising from potential inconsistencies in the underlying theories and policies. For example, while Professor Booth correctly notes the inherent artificiality of treating any form of business organization as more than the sum of its constituent parts,<sup>122</sup> his approach is unhelpful in a § 1 analysis of conspiracy because antitrust theories of harm require some threshold of corporate identity in order to identify the population of potential competitors and define the market.<sup>123</sup>

This Note seeks guidance from the corporate law analysis for judicially manageable factors to structure the factual inquiry under Sherman Act § 1, keeping in mind potential inconsistencies in theory and policy. It focuses on first principles of antitrust theories of harm to identify factors in corporate law appropriate for the antitrust analysis.<sup>124</sup>

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<sup>119</sup> Thomas W. McNamara, *Defining a Single Entity for the Purpose of § 1 of the Sherman Act Post Copperweld: A Suggested Approach*, 22 SAN DIEGO L. REV. 1245, 1267–73 (1985).

<sup>120</sup> Richard A. Booth, *Partnership Law and the Single Entity Defense*, 18 STAN. J.L. BUS. & FIN. 1, 7 (2012).

<sup>121</sup> J. Matthew Schmitten, *Antitrust’s Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule*, 46 COLUM. J. L. & SOC. PROBS. 93, 95 (2012).

<sup>122</sup> Booth, *supra* note 120, at 6–7.

<sup>123</sup> In fact, an extreme extension of Booth’s argument would suggest that there is little purpose for a separate body of antitrust law.

<sup>124</sup> For an analogous analysis that looks in the opposite direction, applying concepts from antitrust law to the corporate law context, see generally Edward B.

## V

## FRAMING A COHERENT UNITY-OF-INTERESTS TEST

The unity-of-interests tests are theoretically sound, but they lack consistency in their formulation.<sup>125</sup> De facto unity of interests should be the broadest concern, as most consistent with both the Sherman Act's distinction between unilateral and concerted action and with the *Copperweld* Court's reasoning.<sup>126</sup> I suggest that the clearest formulation of a test for unity of interest is to ask whether, but for the allegedly anticompetitive agreement, the independent interests of the alleged conspirators would lead them to compete over the subject matter of the agreement. Some factors relevant to this inquiry are suggested by prior formulations of the unity-of-interests tests, but very few are specific enough to provide clear guidance to courts. Therefore, I turn to another area of law in which corporate unity-of-interest is relevant: the corporate law analysis for "piercing the corporate veil" to attach the liabilities of a subsidiary to a parent corporation.

## A. Corporate Control Under the Veil-Piercing Analysis

In certain situations, a court may abrogate the corporate privilege of limited liability to allow a creditor of a subsidiary to hold a parent corporation liable for its debts.<sup>127</sup> However, veil piercing runs afoul of powerful corporate law policies supporting limited liability.<sup>128</sup> It is significant for this inquiry that courts are always hesitant to pierce the corporate veil, and so the test for corporate control is applied strictly, especially to publicly traded corporations.<sup>129</sup> At its core, veil piercing is an

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Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 498 (1992).

<sup>125</sup> See *supra* Part II.

<sup>126</sup> See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771-72 (1984).

<sup>127</sup> See, e.g., *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457 (2d Cir. 1995) (noting that a court may disregard corporate privilege in cases of fraud or where a company is merely an instrumentality of its owner).

<sup>128</sup> See *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) ("Although decisions to pierce a corporate veil, exposing those behind the corporation to liability, must be taken reluctantly and cautiously, courts will not hesitate to take such action when justice so requires."); Peter French, *Parent Corporation Liability: An Evaluation of the Corporate Veil Piercing Doctrine and Its Application to the Toxic Tort Arena*, 5 TUL. ENVTL. L.J. 605, 607-09 (1992) (discussing the policy justifications for the principle of limited liability).

<sup>129</sup> See Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 353 (3rd Cir. 2001) ("[C]ourt[s] must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception. . . . Care should be taken on all occasions to avoid making the entire theory of the corporate entity useless." (alteration in

equitable doctrine that gives courts discretion to circumscribe limited liability to the extent that it unjustly interferes with the rights of creditors and the public.<sup>130</sup> A wholly owned subsidiary might be expected to act in the interests of the parent corporation (as recognized, of course, by the *Copperweld* Court), but where the safeguards of the corporate form have been disregarded, courts may, in equity, disregard its limited liability as well.<sup>131</sup>

Courts apply a two-part test to a plaintiff's plea to pierce the corporate veil.<sup>132</sup> First, the court looks to the factual question of whether the parent and subsidiary operated as a single economic unit; sometimes the inquiry is framed as whether the subsidiary functioned as an "alter ego."<sup>133</sup> Second, the court considers the equities and determines whether a failure to disregard separate corporate structures would result in injustice.<sup>134</sup> With due regard for the theoretical inconsistencies that emerge between antitrust and veil-piercing theories of liability, I suggest that factors from the well-developed corporate law inquiry may inform the distinction between concerted and unilateral action in the antitrust context as well. The equitable prong of the veil-piercing test, as well as the policy-based resistance to piercing the corporate veil, are not applicable in the antitrust context, and the following attempt to adapt veil-piercing factors to the antitrust context must recognize these inconsistencies.<sup>135</sup>

One factor relevant to the corporate control prong of the veil-piercing analysis is the degree to which statutory corporate formalities, such as record keeping and shareholder meetings, are disregarded.<sup>136</sup> Disregard for corporate formalities demon-

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original) (quoting *Wedner v. Unemployment Comp. Bd. of Review*, 296 A.2d 792, 795 (1972))).

<sup>130</sup> *But see* Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 641 (2005) (criticizing this apparently discretionary power of the courts).

<sup>131</sup> For the "alter ego" formulation, see, e.g., *Fletcher*, 68 F.3d at 1457.

<sup>132</sup> See *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569-70 (7th Cir. 1985).

<sup>133</sup> See *id.*

<sup>134</sup> See *Harper v. Delaware Valley Broads., Inc.*, 743 F. Supp. 1076, 1085 (D. Del. 1990), *aff'd*, 932 F.2d 959 (3d Cir. 1991).

<sup>135</sup> For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Court held that the Sherman Act is meant to protect competition, not to protect competitors. This holding suggests that antitrust law is concerned only with effects on market competition. In contrast, decisions concerning corporate liability include consideration of equitable outcomes because private parties are harmed by (and seek relief from) corporations.

<sup>136</sup> See, e.g., *Fletcher*, 68 F.3d at 1459 (noting the relevance of corporate formalities like recordkeeping and shareholder meetings to the corporate control

strates both that the subsidiary's decision-making process was not independent, and that best practices for the protections of creditors were not employed.<sup>137</sup>

A second factor relevant to the corporate control prong is the undercapitalization of the subsidiary at the time of its incorporation.<sup>138</sup> Undercapitalization can indicate that the subsidiary acted as a de facto division of the parent because the subsidiary depended upon the parent corporation for operating capital or resources to support debts. However, undercapitalization also reflects the equity inquiry in the veil-piercing analysis: the fact that the parent failed to provide for the liabilities of the subsidiary at the time of its incorporation constitutes a failure to adequately protect creditors.<sup>139</sup>

Other factors relevant to the veil-piercing analysis include the intermingling of corporate assets,<sup>140</sup> concentration of assets in one entity separate from the concentration of liabilities in another,<sup>141</sup> absence of corporate records, fraudulent representations to shareholders, payment by the corporation of personal obligations, and other evidence that shareholders or owners manipulated the corporate form.<sup>142</sup>

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prong of the veil-piercing analysis); *Laborers' Pension Fund v. Lake City Janitorial, Inc.*, 758 F. Supp. 2d 607, 619 (N.D. Ill. 2010) ("Courts consider a 'laundry list of factors' to determine whether there is a 'unity of interest' between two corporations or between a corporation and a controlling shareholder, 'but the focus is on whether the corporations have respected corporate formalities—respected their separateness from each other—or whether one was a sham acting at the whim of the other.'" (quoting *Star Ins. Co. v. Risk Mktg. Grp. Inc.*, 561 F.3d 656, 660–61 (7th Cir. 2009))).

<sup>137</sup> See *In re Rood*, 448 B.R. 149, 163 (Bankr. D. Md. 2011) ("The alter ego doctrine may be applied 'where the corporate entity has been used as a subterfuge and to observe it would work an injustice, the rationale being that if the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors.'" (quoting *Hildreth v. Tidewater Equip. Co.*, 838 A.2d 1204, 1210 (Md. 2003))).

<sup>138</sup> See, e.g., *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 212 (4th Cir. 1991) (noting a subsidiary's "gross undercapitalization" as a factor in ruling the corporate-control prong satisfied); *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 65 (4th Cir. 1989).

<sup>139</sup> See, e.g., *In re Antone's Records, Inc.*, 445 B.R. 758, 785 (Bankr. W.D. Tex. 2011) ("The theory of undercapitalization permits the veil to be pierced if the corporation was undercapitalized to the point that it created an injustice.").

<sup>140</sup> See *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 521–22 (7th Cir. 1991).

<sup>141</sup> See *Laya v. Erin Homes, Inc.*, 353 S.E.2d 93, 98–99 (W. Va. 1986).

<sup>142</sup> See, e.g., *InterGen N.V. v. Grina*, 344 F.3d 134, 149 (1st Cir. 2003) ("The independent operations prong, for instance, looks at such things as . . . failure to maintain adequate records . . . and [ ] diversion of the corporation's funds or assets to noncorporate uses."); *Middle Tenn. News Co. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 n.3 (7th Cir. 2001) ("A court must balance evidence

While significant overlap between the boards of directors or officers of the two corporations is entirely permissible,<sup>143</sup> the court looks with disfavor upon directors or officers who appear to prioritize the interests of the parent while acting on behalf of the subsidiary.<sup>144</sup> The direction of operations of the subsidiary by one who is an officer of the parent only is a warning sign,<sup>145</sup> indicating both disregard for corporate formalities and the operation of the subsidiary as a de facto division.

### B. Relevance of Veil-Piercing Factors for the Unilateral Action Defense

Some inconsistencies emerge between the underlying theories and policies of Sherman Act § 1 and the veil-piercing analysis. Antitrust law is concerned first and foremost with general consumer protection,<sup>146</sup> while the veil-piercing doctrine protects contractual and tort creditors of the mismanaged subsidiary.<sup>147</sup> Antitrust law proceeds from a legislative determination that competitive markets are preferable to concentrated or collusive ones.<sup>148</sup> Veil piercing's theoretical underpinnings are in equity, and it considers primarily the specific relationship between the parties.<sup>149</sup> These policy inconsistencies do not negate the relevance of veil-piercing factors for the antitrust inquiry, but they recommend caution and careful translation of veil-piercing factors to the antitrust question of collusion.

Of course, the most significant practical divergence between the antitrust and veil-piercing analyses is the position preferred by the corporate defendants. In the antitrust analysis, the corporate parent defendant will want to demonstrate

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of . . . fraudulent representation by corporation shareholders or directors . . . and other shareholder acts or conduct ignoring, controlling or manipulating the corporate form.”).

<sup>143</sup> See *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1460 (2d Cir. 1995).

<sup>144</sup> See *United States v. Bestfoods*, 524 U.S. 51, 72 (1998).

<sup>145</sup> *Id.*

<sup>146</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

<sup>147</sup> See, e.g., *RDM Holdings, Ltd. v. Cont'l Plastics Co.*, 762 N.W.2d 529, 550 (Mich. Ct. App. 2008) (“The traditional basis for piercing the corporate veil has been to protect a corporation’s creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations.” (quoting *Rymal v. Baergen*, 686 N.W.2d 241, 252 (Mich. Ct. App. 2004))).

<sup>148</sup> See *Appalachian Coals v. United States*, 288 U.S. 344, 359–60 (1933), *overruled by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) (discussing legislative intent behind the Sherman Act).

<sup>149</sup> See *Aetna Cas. & Sur. Co. v. Stover*, 327 F.2d 288, 291 (8th Cir. 1964) (“The [veil-piercing] doctrine is founded in equity and is applied only when the facts warrant its application to prevent an injustice.”).

that the subsidiary is very closely aligned with its interest: so much so that an agreement between them is hardly necessary. By contrast, the corporate defendant in the veil-piercing analysis will want to claim that the subsidiary pursues divergent interests with complete independence.<sup>150</sup> But note that, in most cases, the interests of the parent as major shareholder will be significantly aligned with the interests of the subsidiary in its own health and longevity, and this will not require any interference with corporate formalities.<sup>151</sup>

The undercapitalization factor illuminates this divergence. Under the veil-piercing analysis, undercapitalization is treated as probative of an inequitable purpose (or dispositive, in some jurisdictions).<sup>152</sup> In the antitrust context, undercapitalization may indicate a close alignment of interests. Undercapitalization may therefore weigh against a finding of concerted action in violation of § 1, but simultaneously expose the parent to veil-piercing liability.<sup>153</sup>

The equity prong of the veil-piercing analysis may allow for harmonization between a defendant's positions in the veil-piercing and the § 1 analyses. Veil piercing usually requires some showing of fraud, wrongdoing, or at the very least serious mismanagement to the injury of creditors of the subsidiary.<sup>154</sup>

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<sup>150</sup> For a case in which a defendant attempted to "have it both ways," see *Bell Atlantic Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 707 (N.D. Cal. 1994) (dismissing § 1 claim for lack of concerted action, but remanding for discovery on the veil-piercing question).

<sup>151</sup> See, e.g., *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458–61 (2d Cir. 1995) ("[T]his type of conduct[—requiring the parent corporation's approval of significant contracts—]is typical of a majority shareholder or parent corporation.").

<sup>152</sup> Compare *Flame S.A. v. Indus. Carriers, Inc.*, 24 F. Supp. 3d 493, 506 (E.D. Va. 2014), *aff'd sub nom.*, *Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352 (4th Cir. 2014) (treating undercapitalization as probative but not dispositive (citing *De Witt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976))), and *In re BH S & B Holdings LLC*, 420 B.R. 112, 136 (Bankr. S.D.N.Y. 2009), *aff'd as modified*, 807 F. Supp. 2d 199 (S.D.N.Y. 2011) ("[Under Delaware law,] undercapitalization is rarely sufficient to pierce the corporate veil."), with *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 n.8 (10th Cir. 1993) ("[U]ndercapitalization could be found to be a sufficient indication of fraud or inequity in certain cases where the corporation was substantially undercapitalized in light of the nature and magnitude of the corporate undertaking."), and *In re Antone's Records, Inc.*, 445 B.R. 758, 785 (Bankr. W.D. Tex. 2011) ("The theory of undercapitalization permits the veil to be pierced if the corporation was undercapitalized to the point that it created an injustice.").

<sup>153</sup> See *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147–48 (9th Cir. 2003) ("[The single-entity defense applies] to 'partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit.'" (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 356 (1982))).

<sup>154</sup> See *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569–70 (7th Cir. 1985).

Absent these elements, limited liability will be respected in most jurisdictions regardless of the degree of control exerted by the parent over the subsidiary.<sup>155</sup> Therefore, absent misconduct, the parent corporation is safe from veil-piercing liability even though the structure of the parent and subsidiary are so closely aligned that the two function as a single decision maker under the antitrust analysis.<sup>156</sup>

Although the separate theories of liability lend different roles to these factors in the antitrust and veil-piercing contexts, the underlying inquiry is fundamentally similar. Namely, is this formally separate corporate structure reflected in the understandings of the parties of their unified or separate interests, as evidenced by the operations of the subsidiary?

### C. Probative Value of Veil-Piercing Factors to the Unilateral Action Defense

Bearing in mind the above discussion of consistencies and conflicts between antitrust and veil-piercing policies, this Note next considers the probative value of veil-piercing factors for the unilateral action defense.

#### 1. *Adherence to Statutory Corporate Formalities*

Corporate formalities hold more than just normative value; the formalities of corporate decision making protect the interests of investors and creditors.<sup>157</sup> Disregard for corporate formalities is a useful consideration for the unilateral action defense: it indicates that the interests of noncontrolling shareholders and creditors might be insufficiently weighed in the subsidiary's decision-making process, possibly because the decision-making process is dominated by the parent.<sup>158</sup>

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<sup>155</sup> See, e.g., *Liberty Mut. Ins. Co. v. Fast Lane Car Serv., Inc.*, 681 F. Supp. 2d 340, 347 (E.D.N.Y. 2010) ("Generally, corporate officers will not be liable for breach of contract absent a showing that it is necessary to pierce the corporate veil to prevent inequity.").

<sup>156</sup> See *Iceland Telecom, Ltd. v. Info. Sys. & Networks Corp.*, 268 F. Supp. 2d 585, 589-91 (D. Md. 2003).

<sup>157</sup> See *In re Rood*, 448 B.R. 149, 163 (Bankr. D. Md. 2011) (veil piercing has been applied "where the corporate entity has been used as a subterfuge and to observe it would work an injustice, the rationale being that if the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors" (quoting *Hildreth v. Tidewater Equip. Co.*, 838 A.2d 1204, 1210 (Md. 2003))).

<sup>158</sup> See *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1399 (E.D. Pa. 1985) (to pierce the corporate veil, plaintiff must show that "[t]he corporate entity being disregarded [is] so controlled as to have essentially no 'mind' of its own").

A problem with any doctrine that contemplates a conspiracy between corporations is that the courts must decide what a decision by a corporate entity really looks like. When corporate formalities are followed, a corporate decision may be identified in a resolution of the board, a shareholder vote, or significant decisions within the purview of executive officers.<sup>159</sup> Corporate formalities, in a sense, *are* the decision-making processes of the corporation. Where corporate formalities of the subsidiary are completely ignored, then, the subsidiary lacks an independent center of decision making. The absence of what might, in other contexts, be called an agreement between the corporations is meaningless because the subsidiary has no mechanism through which it could decide to compete with the parent.

One corporate formality especially important to the veil-piercing analysis is the maintenance of detailed and accurate corporate records.<sup>160</sup> This factor is suffused with considerations from the equity prong of the veil-piercing analysis, because accurate recordkeeping makes it more difficult for corporations to conceal fraud.<sup>161</sup> Accurate recordkeeping may play a more limited but conflicted role in the antitrust context. The absence of records of a corporate decision may suggest that independent decision making did not occur. However, it may also indicate just the opposite: that cartel-like agreements were taking place in the apocryphal "hotel room." Absence of accurate records should therefore be treated with caution, and should not automatically raise a presumption in either direction.

## 2. *Overlap Between Officers and Directors: The "Two Hats" Problem*

It is worth briefly noting that corporate law does not necessarily consider a significant overlap between the boards of directors or officers of the parent and subsidiary to be

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<sup>159</sup> See *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459–61 (2d Cir. 1995).

<sup>160</sup> See *id.* at 1459 (analyzing and determining that defendant Atex followed corporate formalities, including thorough recordkeeping).

<sup>161</sup> See *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1521 (3d Cir. 1994), *aff'd*, 514 U.S. 938 (1995) ("Not every disregard of corporate formalities or failure to maintain corporate records justifies piercing the corporate veil. That remedy is available only if it is also shown that a corporation's affairs and personnel were manipulated to such an extent that it became nothing more than a sham used to disguise the alter ego's use of its assets for his own benefit in fraud of its creditors.").

improper.<sup>162</sup> It is assumed that the dual-director or dual-officer is able to serve his fiduciary duty to the parent when acting in his capacity as its agent, and his fiduciary duty to the subsidiary when acting in his capacity as *its* agent: he wears “two hats.”<sup>163</sup>

Recognizing that corporate formalities may constitute the decision-making process of the corporation, there is no problem with finding that a single individual may act separately as decision maker for one corporation in some settings, and as decision maker for another (potentially competing) corporation in other settings.<sup>164</sup> While agency problems might arise from a situation in which a single individual serves on the board of directors of competing firms, the director’s duty would be to instruct each corporation to compete with the other, if competition would be in the best interests of each. But just like in the veil-piercing analysis, if a director or officer who only represents the parent corporation is permitted to direct the operations of the subsidiary, this would indicate that the subsidiary is not an independent center of decisionmaking.<sup>165</sup>

### 3. Undercapitalization

Undercapitalization is a central factor in the veil-piercing analysis for the obvious reason that it determines the assets available to creditors of the subsidiary, and therefore is of particular concern to plaintiffs.<sup>166</sup> However, only capitalization at the time of incorporation is held to be probative of the veil-piercing analysis because courts have stopped short of imposing a duty to bail out a failing subsidiary.<sup>167</sup>

Undercapitalization may also be relevant to the unilateral action defense. In the absence of an agreement, a drastically undercapitalized subsidiary would be unable to compete. However, unlike the veil-piercing analysis, undercapitalization should be considered at the time of the allegedly anticompeti-

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<sup>162</sup> See *Fletcher*, 68 F.3d at 1460 (“Parents and subsidiaries frequently have overlapping boards of directors while maintaining separate business operations.”).

<sup>163</sup> See *Forsythe v. Clark USA, Inc.*, 836 N.E.2d 850, 862 (Ill. App. Ct. 2005), *aff’d*, 864 N.E.2d 227 (Ill. 2007) (McNulty J., dissenting).

<sup>164</sup> *But see Sky Angel U.S., LLC v. Nat’l Cable Satellite Corp.*, 33 F. Supp. 3d 14, 20 (D.D.C. 2014) (assuming, without deciding, “that antitrust law and fiduciary duty principles do not perfectly align in such a fashion”).

<sup>165</sup> See *Forsythe*, 836 N.E.2d at 862 (McNulty, J., dissenting).

<sup>166</sup> See *Slottow v. Am. Cas. Co. of Reading*, 10 F.3d 1355, 1360 (9th Cir. 1993) (suggesting that undercapitalization may be dispositive in California).

<sup>167</sup> See *Truckweld Equip. Co. v. Olson*, 618 P.2d 1017, 1022 (Wash. Ct. App. 1980).

tive agreement. The intentions of the firms at the time of incorporation are irrelevant to the question of whether, at the time of the agreement, the two firms were potential competitors. Undercapitalization should also be judged in light of the substance of the agreement: where a subsidiary is capitalized just enough to fulfill an agreed-upon purpose, it is unlikely to be an independent decision maker.

#### 4. *Intermingling of Assets*

The veil-piercing analysis treats the intermingling of assets between two corporations with care. Courts do not condemn corporate financial practices that streamline management across interrelated corporate structures through centralized accounting systems.<sup>168</sup> On the other hand, courts are highly skeptical of closely held corporations where all of the corporation's assets are kept in a personal bank account of a majority shareholder.<sup>169</sup> Somewhere between these two extremes, courts view intermingling of assets as probative of an understanding between corporations regarding their own corporate separateness.

The application of this factor to the antitrust analysis is much more clearly aligned with theory. Corporations with divergent interests are unlikely to intermingle assets. This is not to discount significant antitrust cases in which defendants have formed closely held corporations or holding companies to manage assets related to an anticompetitive agreement.<sup>170</sup> But where corporate funds for all purposes are intermingled, this suggests a close alignment of interests. Where only funds utilized in the furtherance of a particular agreement are intermingled, perhaps this would be evidence that interests would not be so closely aligned absent an anticompetitive agreement.

#### 5. *Concentration of Assets or Liabilities*

The concentration of assets in one corporation separate from the concentration of liabilities in another is a highly suspect practice under the veil-piercing analysis, but there are legitimate business reasons why a complex corporate family may choose this type of allocation. The fact that a parent cor-

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<sup>168</sup> See *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995).

<sup>169</sup> See *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 521 (7th Cir. 1991).

<sup>170</sup> See, e.g., *United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 85 (1912) (holding that domination and control forbidden by Sherman Antitrust Act can be effected by grant of controlling stock to competitor or creation of a holding company).

poration can impose its liabilities upon a subsidiary is all but dispositive of the alignment of interests, however, and suggests that the two would under no circumstances compete with each other.

However, this factor may be misleading where potential competitors have colluded to design this allocation across jointly held subsidiaries. Antitrust law recognizes that anticompetitive agreements might invite cheating. Courts therefore look for evidence of certain types of arrangements that help conspiring parties enforce their agreement.<sup>171</sup> Where multiple parent corporations jointly own an asset-concentrated subsidiary and a liability-concentrated subsidiary, this could be interpreted as a method of enforcing an agreement between them. An agreement that requires enforcement measures suggests that the conspirators would otherwise compete.

#### D. Synthesis

The above factors are not exhaustive of the veil-piercing analysis, but they provide a good sample of categories for considerations. Courts reframe these factors to make them relevant to the facts of individual veil-piercing cases, but the reasoning and the analogy to the antitrust context remains similar.

I suggest that these factors are probative of whether corporations' independent interests would lead them to compete but for an anticompetitive agreement between them. For example, a subsidiary that does not conform to corporate formalities may simply lack the independent processes necessary to reach a decision to compete with the parent corporation. This conclusion is not necessary, however, where there is merely significant overlap between the directors and officers of the two corporations. But at all times the factual inquiry remains whether the structure and practices of the parties demonstrate sufficiently divergent interests that, absent an agreement, they would compete with regard to the substance of the agreement.<sup>172</sup>

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<sup>171</sup> See Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 Wis. L. REV. 887, 901-02 (1983) (discussing contractual clauses with buyers that function to enforce collusive behavior between sellers).

<sup>172</sup> Alternatively, the burden of proof could be reversed. The inquiry could be framed as whether the structure and practices of the corporations demonstrate sufficient *alignment* of interest to escape antitrust liability.

A parent corporation's concentration of assets or liabilities in a subsidiary normally suggests a high degree of alignment of interests. A corporation that is drastically undercapitalized is unlikely to be independent enough to choose to compete with a parent corporation. Where assets are generally intermingled, this would seem to also suggest recognition on the part of both parties of a close alignment of interests. By contrast, where assets are intermingled only for a specific purpose, or are structured in some other way so as to isolate intermingled assets from the general assets of either corporation, this could suggest divergence in interests.

The parent's percentage ownership in the subsidiary (a central concern for lower courts addressing the antitrust question of conspiracy after *Copperweld*) seems to be absent from the above analysis, but in fact it underlies all of the above considerations. The more significant the majority share, the more likely that the parent can impose structures that reflect an alignment of interests. Where the subsidiary is less than wholly owned, on the other hand, the board of directors has fiduciary duties running to minority shareholders that require them to resist parental control and to direct the subsidiary in competition with the parent if this would best serve the subsidiary's interests. In practice, the question will be a difficult one for directors. The greater the majority stake, the more easily they will be ousted by the parent for failing to align the subsidiary with the parent's interests.

The percentage of the majority share provides no bright-line rule for distinguishing between concerted and unilateral action in the above analysis. This fact is a strength of the approach. It means that consistency can be reached regardless of divergent state law, and it also reflects the *Copperweld* Court's admonition to consider the realities of the relationship. A majority shareholder, even a very significant one, may be disinterested or may decide to exert control. The fact of its majority stake alone cannot predetermine the realities of the alignment of interests between it and the subsidiary.

## VI

### APPLICATION: *WESLEY HEALTH SYSTEM, LLC V. FORREST COUNTY BOARD OF SUPERVISORS*<sup>173</sup>

The framework developed above for distinguishing between concerted and unilateral action for the purpose of § 1 liability

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<sup>173</sup> No. 2:12-CV-59-KS-MTP, 2014 WL 232109 (S.D. Miss. Jan. 22, 2014).

may be illustrated by application to the facts of a recent case, *Wesley Health System, LLC*. Plaintiff Wesley Medical Center (Wesley) alleged that defendants Forrest General Hospital (Forrest General) and AAA Ambulance Service (AAA) conspired to divert customers despite their express preference for Wesley.<sup>174</sup> Wesley claimed that defendants falsified medical records, defamed Wesley, and obtained a disproportionate share of state trauma funds through misrepresentation.<sup>175</sup> Forrest General raised a unilateral action defense to the Sherman Act claim, noting its close corporate relationship with AAA.<sup>176</sup> With regard to that claim, the court found the following facts:

[AAA] was [incorporated] by the Board of Trustees of [Forrest County] . . . . The bylaws require that Forrest General fund half of AAA's operating deficits and capital expenditures, while the City and County each contribute one-fourth of the necessary funds. . . .

AAA is owned by Forrest General, the City [and] County . . . . Four of the directors represent Forrest General, while the City [and] County each have one representative on the Board . . . . Additionally, the Chairman of AAA's Board—Evan Dillard—is the Chairman, President, and CEO of Forrest General. AAA's officers . . . are all employees of Forrest General.

As for AAA's operations, Forrest General and AAA executed a General Management Services Agreement [by which] Forrest General . . . provide[s] AAA's management. But the contract specifically provides that "AAA has, and at all times during the Term shall exercise, the ultimate control and direction of the assets and affairs of Service." . . .

Dillard . . . testified that AAA submits its budget to Forrest General for approval, and that AAA's financial statements are consolidated with Forrest General's. . . . AAA maintains a separate "set of books and records" from Forrest General.<sup>177</sup>

The court went on to say that "corporate formalities are meaningless," declaring the correct test for the unilateral action defense to be "whether [the agreement] joins together separate decisionmakers."<sup>178</sup> It held that AAA and Forrest General constitute a single decision maker.<sup>179</sup> I suggest, to the con-

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174 *Id.* at \*1.

175 *Id.*

176 *Id.* at \*7.

177 *Id.* at \*8–9 (citations omitted).

178 *Id.* at \*9 (quoting *Am. Needle Inc., v. NFL*, 560 U.S. 183, 195 (2010)).

179 *Wesley Health Sys. LLC*, 2014 WL 232109, at \*9.

trary, that corporate formalities are highly probative of whether an agreement joins separate decision makers.

As previously discussed, corporate formalities can provide substance to the concept of corporate decisions. Here, AAA has a board of directors and shareholders that are sophisticated and capable of participating in corporate governance. The fact of extensive overlap between the officers and directors of Forrest General and AAA should not be dispositive, as the officers have unique fiduciary duties to each corporation.

In addition to Forrest General, which may or may not be the majority shareholder (the court does not specify), AAA has two other shareholders, the City and County, with divergent interests from those of Forrest General. The directors of AAA have a fiduciary duty running to the corporation for the benefit of all shareholders. Further, the City and County are exceptional in that they may enforce their interests through external, regulatory pressures. The board would be extremely misguided if it favored the interests of Forrest General to the detriment of the interests of these other shareholders.

The board of AAA contracted its management and operation to Forrest General, perhaps suggesting an understanding between the two that the former be run as a *de facto* division of the latter. However, the contract maintained separation of assets, and AAA retained ultimate control of these assets. Forrest General contributed funds to AAA, but did not treat those funds as its own, once committed.

There is, however, an additional factor uniquely relevant to the divergence of interests here. Ambulance services are governed by statute and highly regulated, as the court notes, including protections for patients' choice of hospital destination.<sup>180</sup> AAA, through the oversight of its board of directors, has a strong interest in conforming to regulations, so AAA has interests significantly divergent from those of Forrest General.

An ambulance service is of course not a natural competitor for a hospital. But AAA's interests are sufficiently divergent from those of Forrest General that, absent the alleged agreement, it would adhere to law and regulation in serving Forrest General's competitors, contrary to the practices alleged by the plaintiff. It therefore would "compete" with Forrest General regarding the substance of the alleged agreement.

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<sup>180</sup> See *id.* at \*3-5.

## VII

APPLICATION: *ROBERTSON V. SEA PINES  
REAL ESTATE COS.*<sup>181</sup>

A case recently before the Fourth Circuit Court of Appeals illustrates the power of the analysis developed here for distinguishing between procompetitive joint ventures and anticompetitive collusive conduct. In *Robertson v. Sea Pines Real Estate Companies*,<sup>182</sup> customers of two real estate listing services alleged that the services' bylaws excluded innovative and low-cost competitors from a resource critical to the local real estate brokerage businesses.<sup>183</sup> Defendants included Consolidated Multiple Listing Service of Columbia, Inc., a multiple listing service (MLS) that provided a database of real estate listings to its dues-paying members, as well as various licensed real estate brokerage firms that, through their personnel, served on the MLS Boards of Trustees.<sup>184</sup>

On interlocutory appeal from the trial court's denial of defendant's motion to dismiss, the Court of Appeals recognized the following specific allegations:

A multiple listing service . . . is an incorporated joint venture that, among other things, maintains a database of properties listed for sale in the MLS service area, which its member brokerages use to post and find property listings. . . . Particularly in an area served by only one MLS, access to MLS resources may be critical for a brokerage to successfully participate in the relevant real estate market. . . .

. . .

The complaints allege that while serving on the . . . MLS board[ ] of trustees, defendants conspired to restrain competition in their respective real estate markets in violation of § 1 of the Sherman Antitrust Act. According to the complaints, defendants used the MLS "as a conduit" to "create[ ] rules . . . "which "inhibit[ed] competition" and "illegally stabilized the prices" paid by plaintiffs as customers of real estate brokerage services. Specifically, the complaints allege that the rules passed by the defendants were designed to exclude innovative, lower-priced competitors and thus insulate the defendants from competitive pressures posed by brokerages that

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<sup>181</sup> 679 F.3d 278 (4th Cir. 2012).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 283.

<sup>184</sup> Second Amended Complaint at ¶¶ 1–10, *Robertson v. Sea Pines Real Estate Co.*, 679 F.3d 278 (4th Cir. 2012) (No. 3:09-1335-SB), 2010 WL 1787986.

offered a larger menu of service[s] . . . and alternative pricing . . . .

. . . [T]he defendants aimed to exclude lower-priced internet-based brokerages from the MLS by requiring, among other things, that member brokerages maintain a physical office in the MLS service area.<sup>185</sup>

The Court of Appeals affirmed the trial court's denial of the defendants' motion to dismiss; rejecting the defendants' argument that the bylaws constituted unilateral corporate action on the part of the MLS, and were thus immune from § 1 liability under *Copperweld*, the court held that "the alleged conspiracy joins independent centers of decisionmaking that are capable of conspiring under section 1."<sup>186</sup>

The Court of Appeals drew an analogy between the case before it and *American Needle, Inc. v. National Football League*,<sup>187</sup> in which the Supreme Court held that the bylaws of the National Football League (NFL) might in some circumstances constitute concerted action where they govern otherwise competing economic interests.<sup>188</sup> In *American Needle*, the Supreme Court, citing *Copperweld*, held that the individual teams of the NFL lacked a unity of interest with regard to the licensing of intellectual property, and would compete absent league rules providing for the aggregate licensing of teams' intellectual property.<sup>189</sup>

The *Robertson* court noted that, like the individual teams of the NFL, the individual brokerage firms that manage the MLS are "substantial, independently owned, and independently managed business[es] that [are] 'guided . . . [by a] 'separate corporate consciousness[.]'" And therefore, like the NFL teams, the individual brokerages lack a 'complete unity of interest' and 'do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action.'<sup>190</sup>

However, the *Robertson* court's extension of the *American Needle* reasoning is problematic. Although the *American Needle* Court cautioned that joint ventures do not receive *Copperweld* immunity for agreements between erstwhile

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<sup>185</sup> *Robertson v. Sea Pines Estate Cos.*, 679 F.3d 278, 282–83 (4th Cir. 2012).

<sup>186</sup> *Id.* at 283 (quoting *Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 511 (D.S.C. 2011)).

<sup>187</sup> 560 U.S. 183 (2010).

<sup>188</sup> *Robertson*, 679 F.3d at 284–86.

<sup>189</sup> *American Needle*, 560 U.S. at 196–200.

<sup>190</sup> *Robertson*, 679 F.3d at 285 (quoting *American Needle*, 560 U.S. at 196).

competitors,<sup>191</sup> joint ventures have traditionally been treated with caution under antitrust law. Courts recognize that some joint ventures can be procompetitive or offer consumers an otherwise impossible new product.<sup>192</sup> The *Robertson* court's straightforward extension of *American Needle* eviscerates this limited protection for joint ventures, threatening to blur the line between procompetitive joint ventures and anticompetitive concerted action. This loss of clarity regarding the scope of antitrust liability is likely to chill procompetitive joint ventures, such as the essential information services provided by the MLS at issue in *Robertson*.

Greater clarity could be rendered from the *Robertson* decision by engaging critically with the factual circumstances supporting the court's conclusory decision that the component brokerages of the MLS lacked sufficient unity of interest to invoke *Copperweld* immunity. The veil-piercing factors discussed above provide meaningful content to this analysis, beyond general analogies to past cases.

The *Robertson* plaintiffs in effect allege that the defendant brokerage directors have adopted bylaws that undercapitalize the MLS in service of those brokerages' exogenous interests.<sup>193</sup> Information assets are concentrated in the MLS, but further access to capital (in the form of membership fees paid by potential new members) is subordinated to the interests of the existing brokerage members in limiting access to these information assets.<sup>194</sup> This fact is evidence that the structural relationship between the MLS and the brokerages is such that the MLS has no capacity to act independently to safeguard its own interests.

There is no suggestion that the assets of the MLS are intermingled with the assets of the brokerages, but given the structure of the MLS's corporate family, this separateness suggests the MLS is best categorized as a limited purpose corporate vehicle operated for the benefit of members, rather than a stand-alone corporate entity with independent economic interest.

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<sup>191</sup> See *American Needle*, 560 U.S. at 201–02.

<sup>192</sup> See *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 21–24 (1979) (“Joint ventures and other cooperative arrangements are [ ] not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.”).

<sup>193</sup> *Robertson*, 679 F.3d at 282.

<sup>194</sup> See *id.* at 286 (referring to “the power of MLS board members to pass restrictive membership rules” that can “threaten economic harm to nonmembers”).

Defendant brokerages argued that the plaintiffs alleged only corporate action on the part of the MLS, which can only act through its trustees.<sup>195</sup> They contend that the plaintiffs failed to allege anything beyond normal corporate formalities: “The complaints allege no wrongful act by any Defendant except those allegedly performed by Defendants while serving as MLS Board members. The complaints do not allege Defendants were acting outside their normal duties as Board members.”<sup>196</sup>

Overlap between the executives and directors of parent and subsidiary corporations is not necessarily grounds for concluding that the interests of the two are functionally aligned, but a subsidiary acting contrary to its own interests is a strong indication that the structure of the corporate relationship leaves little space for the subsidiary to make independent decisions. The *Robertson* plaintiffs alleged—and the Court of Appeals agreed—that the MLS bylaws were incongruous with the interests of a joint venture.<sup>197</sup> Membership dues fund the MLS.<sup>198</sup> Bylaws restricting membership based on criteria irrelevant to the provision of the MLS’s services were therefore found clearly contrary to the interests of the incorporated MLS, reflecting instead the anticompetitive interests of the brokerages on the Board of Trustees in excluding potential competitors from an essential service.<sup>199</sup> There is little evidence in the record, therefore, that the MLS constitutes a separate center of economic decision making, rather than a subsidiary organization subordinated to the interests of its brokerage directors.

Nevertheless, the Fourth Circuit reached the correct conclusion through its analogy to *American Needle*: the individual brokerages, like the individual teams of the NFL, are the relevant actors whose interests are served through adoption of the allegedly anticompetitive bylaws.<sup>200</sup> No conspiracy may exist between the MLS and its brokerage directors because no independent interests motivate the MLS, but a conspiracy may exist between the parent brokerages through the artifices of the subsidiary MLS. Because the MLS is not an independent economic decision maker, it cannot extend the unilateral action defense to the concerted action of the brokerage directors.

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<sup>195</sup> Brief for Appellants at 13–18, *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278 (4th Cir. 2012) (No. 11-1539).

<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Robertson*, 679 F.3d at 285–86.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 285.

At the core of the *Robertson* decision is a subtle rule of law recognizing that the framing of the question of unilateral action depends upon the specific anticompetitive conduct alleged. Courts should look to the nature of the allegedly anticompetitive agreement with care to distinguish between procompetitive coordination and a joint venture that drifts across the legal delineation of cartel conduct. The economic interests relevant to the question of collusion will depend upon the nature of the agreement. The question of whether two defendants constitute a single decision-making entity is contextual. Just as the NFL may constitute a single center of decision making with regard to some categories of decisions, as recognized by *American Needle*,<sup>201</sup> the MLS may constitute a single center of decision making with regard to decisions governing the method of aggregation of information, the extension of other services to members, etc.; but with regards to the allegedly anticompetitive membership criteria that exclude potential competitors, the relevant interests are demonstrably those of the brokerage directors, and any relevant independent interests of the MLS are vacuous.

#### CONCLUSION

The unilateral action defense against liability under § 1 of the Sherman Act protects the legal distinction between anticompetitive collusion and aggressive competition, a distinction fundamental to the consumer protection purposes of antitrust law. A manageable analytical framework for the unilateral action defense is necessary for it to perform this role. One benefit of looking to the veil-piercing analysis for guidance is that case law in that area is extensively developed, providing a wealth of guidance to courts considering the factors proposed in this Note. The post-*Copperweld* approaches adopted by many lower courts, by contrast, either require assessment of the entirety of the circumstances or draw focus to factors too vague or narrow to provide consistent guidance.

Relevant veil-piercing factors that provide for more discrete and manageable analysis of the unilateral-action defense include adherence to corporate formalities, adequate capitalization, and intermingling of corporate assets. All of these factors add meaning to the percentage ownership position of the parent corporation, completing the conceptual link between ownership and unity of interests sufficient to preclude competition

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<sup>201</sup> *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010).

between two corporations, even absent an anticompetitive agreement. Strengthening this conceptual link serves to protect the distinction between anticompetitive conduct and aggressive competition.