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Copperweld in the Courts: The Road to Caribe

Stephen Calkins
Wayne State University, calkins@wayne.edu
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Many antitrust observers have not appreciated fully the importance and breadth of Chief Justice Burger's opinion in *Copperweld Corp. v. Independence Tube Corp.* The case's outcome was relatively uncontroroversial, and several more celebrated antitrust opinions stole the spotlight of attention and analysis. Justice Breyer has focused attention on *Copperweld* by relying heavily on it in one of his last opinions as a circuit judge, *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft,* and this renewed attention may teach us something about *Copperweld* and perhaps about Justice Breyer.

The pre-*Copperweld* intra-enterprise conspiracy doctrine was a blessing to litigators (who billed countless hours applying it) and scholars (who won attention largely by lamenting it), but a curse to students trying to understand it and counselors trying to apply it. It was understood that "the mere fact that corporations are under common ownership does not render them incapable of conspiring with each other." Little else was clear.

*Copperweld* changed this: one corporation's 100 percent ownership of another renders them incapable of forming a Sherman Act conspiracy. This narrow holding was not without importance, but the antitrust community greeted it as something of a non-event.  

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1 Professor of Law, Wayne State University Law School.
3 19 F.3d 745 (1st Cir. 1994).
It has now been ten years since the Court decided Copperweld. Upon its issuance the opinion's implications seemed relatively straightforward, but the history of those implications in subsequent court decisions belies that initial assessment. On Copperweld's central issue—determining when entities are sufficiently separate that Sherman Act conspiracy is possible—lower courts have issued scores of opinions, addressing some easy questions and some moderately tricky ones. Beyond that, many Sherman Act opinions have drawn on Copperweld's language and analysis to help resolve important issues not involving conspiracy determination. Since much of this language and analysis was suggested by the William Baxter-led Antitrust Division, these decisions can be seen as part of that Division's legacy. Finally, many judges have addressed parties' requests for courts to apply Copperweld's description of the unity of parents and subsidiaries to statutes other than the Sherman Act. Even without such a request, the First Circuit in Caribe chose to apply Copperweld perhaps too quickly to a difficult price discrimination question.

7 A LEXIS search showed that each year beginning in 1984, between 20 and 40 majority opinions or more relied in part on, or distinguished, Copperweld.
8 See infra Part II.
9 See infra Part III.
10 See infra Parts IV & V.


Before reviewing and commenting on the several categories of judicial treatment of *Copperweld*, this article briefly discusses that case and the context in which it arose.

A. BACKGROUND TO *COPPERWELD*

It is difficult to imagine a case better than *Copperweld* for a Supreme Court petitioner. Regal Tube Co., a steel tubing manufacturer, had been a wholly owned subsidiary of one firm, an unincorporated division of another, and finally a wholly owned subsidiary of a third (Copperweld Corp.). When Regal’s former general manager left and took steps to enter into competition with Copperweld/Regal, Copperweld succeeded in delaying his entry for nine months by issuing a threatening letter that invoked Copperweld’s rights under its purchase agreement. Somehow a jury was persuaded that an agreement between Copperweld and Regal violated the antitrust laws. The district court agreed, and the Seventh Circuit affirmed.

The Seventh Circuit’s opinion deliberately or inadvertently made the case for certiorari. Academic commentary on the intra-enterprise conspiracy doctrine was “almost uniformly critical,” it noted. The circuits had taken “various limiting approaches.” The Seventh Circuit’s position, which was new and evolving, eschewed Supreme Court language and academic pronouncements, and rather looked to the extent of separation in fact between the parent and the wholly owned subsidiary.

When the Solicitor General strongly urged the granting of certiorari to resolve the disarray in the lower courts, it would have bordered on
the irresponsible for the Court not to do so. In its opinion, the Court claimed that it limited its "inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." In fact, however, the Court's language and approach went beyond that.

The Solicitor General's amicus briefs were key to the Court's eventual opinion. Copperweld's petition for certiorari set forth a straightforward position: There is "disarray among the circuits"; Supreme Court clarification is needed; and there is a "principled and practical alternative to the existing confusion." The petition sought a narrow response to a narrow question.

The Government's amicus brief, written principally by the Antitrust Division, took a different approach. The heart of antitrust doctrine, the brief argued, is the application of "more stringent legal standards for multiparty conduct than for unilateral action." In words that would reemerge, the brief contrasted Sherman Act Sections 1 and Section 2. Under the latter, "there is no violation unless analysis of market structure and conduct indicates the presence of at least a dangerous probability of monopolization." "The difficulty with the intrainnerprise conspiracy doctrine is that it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form."

The Court also may have been influenced by an issue it declined to address. In their petition, Copperweld and Regal Tube had proposed

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16 467 U.S. at 767.
17 Petition for Certiorari, Copperweld, available in LEXIS, Genfed Library, Briefs File. For its "practical alternative," petitioners urged the Court to hold that no agreement among parents and wholly owned subsidiaries can violate Sherman Act § 1. "This rule would recognize that, where there is a complete unity of legal and economic interests, a parent and subsidiary should be viewed as a single enterprise." Petition.
18 The Government's brief on the writ of certiorari was signed by (among others) the deputy solicitor general who argued the case and an assistant to the Solicitor General. Neither name appeared on the brief on the petition. On that brief the Solicitor General was joined only by Antitrust Division attorneys and the FTC's general counsel.
19 DOJ Brief on Petition. The same distinction was highlighted in an article Professor Areeda published in the December 1993 Harvard Law Review, Areeda, supra note 12, at 454-56.
20 See infra notes 126-127 and accompanying text.
21 DOJ Brief on Petition (citations omitted).
22 Id.
23 Conceivably a third key was the absence of Justice White, who did not participate. Had Justice White voted against the majority, as has been suggested would have been likely, Wood Hutchinson, supra note 6, at 91 n.77, the vote would have been 5-4 and Chief Justice Burger might have crafted his opinion a little more narrowly, out of fear of losing the fifth vote. See Campbell, supra note 6, at 460 ("lopsided majorities leave room
a second (of two) "questions presented," asking whether competitive harm could be shown under the rule of reason "without analysis of the structure of the relevant market and proof that defendants possess sufficient market power to have an adverse effect on that market." Petitioners argued that it was undisputed that the affected market was at all times highly competitive, and the lower courts had found a violation without giving attention to "market realities." Although petitioners' claim was without merit, as the Solicitor General pointed out, the Court may have been troubled by the assertion.

B. THE COURT'S OPINION

The Court's Copperweld opinion closely followed the Solicitor General's lead. The opinion's analysis began with the " 'basic distinction between concerted and independent action' "—quoting Monsanto, which the Court had issued in March, three and a half months after it heard argument in Copperweld, and three months before it published the Copperweld opinion. The Copperweld Court then explained, as had the Government, that it follows from this distinction that agreements involving a corporation's unincorporated divisions and (usually) officers and employees cannot rise to the level of a Sherman Act conspiracy. The Court extended the logic of this reasoning to wholly owned subsidiaries, using colorful language not echoing any brief:

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for

to maneuver, to massage the statement of a rationale, to plant useful dicta for a later case").

Petition for Certiorari. The first question, on which certiorari was granted, asked, "What is the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly-owned subsidiary in violation of the Sherman Act?" Id.

Id.

See DOJ Brief on Petition (petitioners' second question does not warrant review). The Seventh Circuit had rejected an argument that competitive harm could be shown only by an increased market share. 691 F.2d at 322. Increased market share is not the sine qua non of competitive harm at least in a case challenging actions that delayed new entry into a market, which is all the Seventh Circuit held, id. at 322–23 (and the Solicitor General endorsed). Yet the district court had expressed a lack of enthusiasm for market share evidence, and petitioners were able to claim that the market had always been competitive; together, these facts gave petitioners a colorable basis for arguing that "this Court should reject the Seventh Circuit's conclusion that, in rule of reason cases, it is unnecessary to examine the structure of the relevant market or to assess whether defendants possess sufficient market power to have an adverse impact on competition in that market." Petition for Certiorari.

Copperweld and the role of market power is discussed infra at Part III.B.

467 U.S. at 767 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984)).

Id. at 769–771.
purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do “agree” to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.30

The Court pointed out that the competitive consequences of the actions here at issue would have been the same whether they had occurred while Regal was a corporate division or a corporate subsidiary.

Finally, the Court closed its opinion with ruminations on what the dissent called the “gap” in antitrust law created by the decision, namely, the potential that a firm not subject to Sherman Act Section 2 may be able unilaterally to harm competition.31 The Court responded that any such “gap” was probably sound policy and in any event was the creature of Congress. “[T]he appropriate inquiry requires us to explain the logic underlying Congress’ decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary.”32 The Court concluded by noting that Clayton Act Section 7, Sherman Act Section 2, and FTC Act Section 5 provide ample authority for preventing harm to competition.33 Eliminating the intra-enterprise conspiracy doctrine “will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.”34

30 Id. at 771.

31 See id. at 789–96 (Stevens, J., dissenting). In his article anticipating the Copperweld decision, Professor Areeda had argued that there is no antitrust “lacuna” and, even if there were, it would not justify a broad intra-enterprise conspiracy doctrine. Areeda, supra note 12, at 452–57.

32 467 U.S. at 776.

33 Id. at 777 (any “enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act”); cf. DOJ Merits Brief, Copperweld, available in LEXIS, Genfed Library, Briefs File (“Anticompetitive conduct by commonly owned and controlled corporations would remain fully subject to antitrust enforcement under the standards applicable to other unilateral conduct. Thus, it would be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances.”); id. (“Anticompetitive conduct by such enterprises would remain subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act.”).

34 467 U.S. at 777; cf. Petition for Certiorari (arguing second issue, which the Court did not accept) (“If state business tort law is not to be swallowed by the antitrust laws, and the federal courts swollen with commercial grievances masquerading as antitrust claims, this Court must insist that the lower courts demand . . . a persuasive demonstration of injury
II. POST-COPPERWELD SHERMAN ACT CONSPIRACY DEVELOPMENTS

Lower courts have been called upon regularly to apply Copperweld to claims of Sherman Act conspiracy. Some applications have represented the predictable filling in of gaps in Copperweld's rule. Many decisions have been challenging, however. Sometimes the issue has been easy to pose but difficult to resolve; other times it has seemed that even the question being asked has been elusive.

Some decisions required only modest extrapolation from the Copperweld opinion. Courts quickly extended Copperweld to Sherman Act Section 2 conspiracies to monopolize. Another obvious conclusion, which courts quickly grasped, was that sister corporations are incapable of conspiring in violation of the Sherman Act. Other progeny of Copperweld are more controversial.

A. OWNERSHIP SHORT OF 100 PERCENT

Courts struggled with the question of how far to extend Copperweld beyond 100 percent ownership. In its 1988 International Guidelines, the Antitrust Division adopted a majority-stockholding test, but the Division is replacing the 1988 Guidelines with Guidelines that do not address the...
Courts have held uniformly that de minimis deviations from 100 percent do not prevent application of *Copperweld.* In particular cases courts have applied *Copperweld* where parental stock ownership totaled 91.9 percent, 85 percent, 82 percent, 80 percent, and, in the extreme case, 51 percent. Other courts, however, have found stockholdings of 54 percent, 75 percent, and 79 percent to be insufficient to invoke *Copperweld.*

In his *Copperweld* brief, the Solicitor General suggested that levels of 50 percent to 100 percent stockholdings should create a rebuttable presumption that the two entities are insufficiently independent to conspire. This continues to be an attractive suggestion, with the understanding that *Copperweld* should apply to stockholdings of virtually 100 percent.

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40 Leaco Enters., Inc. v. General Elec. Co., 737 F. Supp. 605 (D. Or. 1990) (unity of purpose found based on 91.9% stock ownership where, under applicable Canadian law, parent could compel subsidiary to merge).

41 Total Benefit Servs., Inc. v. Group Ins. Admin., Inc., 1993-1 Trade Cas. (CCH) ¶ 70,148 (E.D. La.) (two corporations sharing the same president and director cannot conspire where that individual owns 100% of the stock of one, 85% of the stock of the other), amended on other grounds, 1993-1 Trade Cas. (CCH) ¶ 70,223 (E.D. La. 1993).

42 Viacom Int'l, Inc. v. Time Inc., 785 F. Supp. 371, 374, 384 (S.D.N.Y. 1992) (dismissing claim alleging an agreement between a subsidiary and a parent that owned 82% of the stock and controlled 93% of the voting power).

43 Rosen v. Hyundai Group (Korea), 829 F. Supp. 41, 45 n.6 (E.D.N.Y. 1993) (complete unity of interest shown where corporation owned 80% of subsidiary's stock, with the other 20% owned by one of the parent's managing directors), aff'd without opinion sub nom. Rosen v. Samick, 22 F.3d 1091 (2d Cir. 1994).


45 American Vision Ctrs., Inc. v. Cohen, 711 F. Supp. 721 (E.D.N.Y. 1989) (54% stockholding insufficient for *Copperweld*).

46 Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477 (D. Or. 1987) (75% insufficient; only de minimis departures from 100% permitted).


48 DOJ Merits Brief.

49 See also AREEDA, supra note 6, ch. 14E-2; Stewart, supra note 6. A contrary view was espoused without much discussion in Wood Hutchinson, supra note 6, at 96 ("logic of
Copperweld colorfully depicted a parent and its wholly owned subsidiary as "not unlike a multiple team [sic] of horses drawing a vehicle under the control of a single driver." Corporate law makes clear, however, that when reins are shared no driver can steer without regard for other drivers. The possible overinclusiveness of a bright line rule is particularly apparent in an age of increasingly complex corporate inter-relationships. U.S. firms can acquire 49 percent interests in foreign joint ventures yet may have more practical control—through contractual provisions and bargaining leverage—than majority shareholders. Foreign firms establish U.S. joint ventures in which control may not be based on majority stock positions. "Parent" corporations with majority equity positions may have less power than entities with commanding ownership of debt or convertible securities. Ownership of a special class of stock, or supra-majority voting protection, may confer power. It is too great a stretch to conclude that Sherman Act issues will never arise in horizontal or vertical agreements between two firms when one has a majority equity position in the other.

Although it might be possible to rule that majority stock ownership suffices to invoke Copperweld except in an indicated series of situations, it is simpler and probably more prudent to use a rebuttable presumption. Courts are always free, moreover, to consider preexisting stock ownership when evaluating an agreement's effect on competition.

Copperweld" calls for finding no § 1 conspiracy wherever majority ownership, because there would be "no destruction of competition that was otherwise in the market"); cf. Baxter, supra note 6, at 425 ("[M]y own guess is that the Supreme Court will come eventually to a 50.0001 percent bright line test. . . . But that is just a guess.").

50 467 U.S. at 771.

51 See, e.g., ROBERT CHARLES CLARK, CORPORATE LAW § 7.8 (1986) (discussing legal obligation of parent to share corporate opportunities with partially owned subsidiary).

52 Cf. 31 C.F.R. § 800.204 (1994) (regulations implementing Exon-Florio Amendment to the Defense Production Act of 1950, 50 U.S.C. § 2170) ("control" defined to include any power, "whether or not . . . exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities . . ., or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting an entity").

53 In Aerotech, Inc v. TCW Capital, 7 Trade Reg. Rep. (CCH) ¶ 70,616 (S.D.N.Y. Apr. 20, 1994), Copperweld was held to apply when one corporation controlled another through debt rather than equity (and presumably the equity holders could not have shown control). Had this been a case involving subtle control through the pressure that debt holders can assert when a firm finds itself in financial straits, Aerotech might have posed difficult issues. It was not such a case. Instead, one firm provided the financing for a leveraged buyout of another, and, according to the plaintiff's complaint "totally control[led] the operations" of the bought-out firm. Id. at 72,551. Conceded total control has always justified a conclusion that conspiracy is impossible.

54 See AREEDA, supra note 6, ¶ 1469.
B. Common Ownership and Control

In *Century Oil Tool, Inc. v. Production Specialties, Inc.*\(^{55}\) the Fifth Circuit extended *Copperweld* to situations with common control. The court held that two corporations cannot conspire in violation of the Sherman Act when three individuals own, respectively, 30 percent, 30 percent, and 40 percent of each corporation:

Given *Copperweld*, we see no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations. A contract between them does not join formerly distinct economic units.\(^{6}\)

*Century Tool* made the resolution of common control cases seem self-evident, and courts have followed the Fifth Circuit's lead.\(^{57}\) On the other hand, in *Fishman v. Estate of Wirtz*\(^{58}\) the Seventh Circuit refused to extend the common ownership cases beyond identical ownership situations.\(^{59}\)

Cases involving common control often also feature influence through personal relationships and service as an officer and director. Thus, the Eastern District of Pennsylvania found that two corporations were incapable of conspiring where an individual served as president of both corporations, owned half of the shares of each corporation, and had a brother who owned the other shares.\(^{60}\) And where one person effectively controlled two corporations and the same shareholders owned the stock, a court ruled out Sherman Act conspiracy without discussing whether the percentage ownership interests were identical.\(^{61}\)

C. Officers, Employees, Agents, and Contracting Parties

Even before *Copperweld* the courts generally recognized that a corporation's agreements with its officers and employees were not subject to Sherman Act review. *Copperweld* acknowledged this and noted that "many

\(^{55}\) 737 F.2d 1316 (5th Cir. 1984) (Higginbotham, J.).

\(^{56}\) Id. at 1317.


\(^{58}\) 807 F.2d 520 (7th Cir. 1986).

\(^{59}\) Judge Easterbrook in dissent argued that the owner (with his son) of one corporation effectively controlled the other, but the court majority concluded that "there is no indication that [this owner] controlled or could control [the second corporation] independent of the wishes of his co-investors." Id. at 542 n.19.


courts have created an exception for corporate officers acting on their own behalf.\textsuperscript{65} Agreements among officers and employees continue generally to escape Sherman Act Section 1,\textsuperscript{66} and most courts extend the protection to corporate agents.\textsuperscript{64}

Much litigation has involved the exception noted by \textit{Copperweld} for agents "acting on their own behalf." The Eighth Circuit in \textit{Pink Supply Corp. v. Hiebert, Inc.}\textsuperscript{65} captured this rule: "When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal."\textsuperscript{66} Other circuits have recognized a similar exception,\textsuperscript{67} although the Sixth Circuit has declined.\textsuperscript{68} Except for litigation over whether a hospital and its medical staff are capable of conspiring, which is a specialized question still needing resolution,\textsuperscript{69} even in those circuits recognizing a personal stake excep-

\textsuperscript{62} 467 U.S. at 769–71 & n.15.
\textsuperscript{65} 788 F.2d 1313, 1317 (8th Cir. 1986).
\textsuperscript{66} \textit{Id.} at 1317 (citation omitted) (exemption did not apply) (distinguishing ongoing principal-agent relations from the situation in Albrecht v. Herald Co., 390 U.S. 145 (1968), where two separate firms came together to lessen competition).
\textsuperscript{67} \textit{See} St. Joseph’s Hosp., Inc. v. Hospital Corp. of Am., 795 F.2d 948 (11th Cir. 1986) (giving leave to amend complaint to allege that hospital management corporation had an independent personal stake in conspiracy with the hospital that employed it); Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1486 (3d Cir. 1985) ("If corporate officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employers for purposes of section 1.") (citations omitted), \textit{vacated}, 475 U.S. 1105 (1986), \textit{order reenteread and opinion largely readopted}, 823 F.2d 49 (3d Cir. 1987), \textit{cert. denied}, 484 U.S. 1060 (1988).
\textsuperscript{68} Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 615 (6th Cir. 1990) (declining to adopt independent personal stake exception), \textit{cert. denied}, 112 S. Ct. 406 (1991); cf. Potters Medical Ctr. v. City Hosp. Ass’n, 800 F.2d 568 (6th Cir. 1986) (any such exception would require an independent personal stake in lessening competition).
\textsuperscript{69} \textit{See}, \textit{e.g.}, Willman v. Heartland Hosp. East, 34 F.3d 605, 610 (8th Cir. 1994) (reviewing split in circuits); Page I. Austin, \textit{Application of the Intracorporate Immunity Doctrine in Hospital Peer Review Cases}, \textit{Antitrust}, Spring 1992, at 40 (reviewing cases).
tion plaintiffs rarely manage to prove a conspiracy in these cases.\(^7\)

Two district court cases in the Ninth Circuit—one affirmed per curiam in a brief opinion—ruled that contractual relationships precluded a Sherman Act conspiracy. One seemed to say that franchisors and franchisees cannot conspire for Sherman Act purposes; another that a patent holder and patentee cannot. Neither opinion is convincing.

The first case, *Williams v. I.B. Fischer Nevada*,\(^7\) involved a challenge to a franchise agreement’s “no-switching” clause, which prevented one Jack-in-the-Box restaurant franchisee from hiring another franchisee’s managers without permission. Without mentioning *Copperweld*, and relying on pre-*Copperweld* Ninth Circuit cases, the district court granted summary judgment against a former manager. The court began by noting that “the cornerstone of the Ninth Circuit analysis for a § 1 violation—competition between entities—does not exist in this case,”\(^7\)\(^2\) The court then emphasized the franchisor and franchisee’s “common economic goals” and the franchisor’s “complete control over all of the decision[s] effecting [sic] the operation of the restaurant.”\(^7\)\(^3\) The court of appeals explained briefly that it agreed with the district court’s result. It said that the defendants were incapable of conspiring because they were a “‘common enterprise.’”\(^7\)\(^4\)

The second case, *Levi Case Co. v. ATS Products, Inc.*,\(^7\)\(^5\) addressed an accusation that one Lawrence Shea and a corporation he formed, ATS

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A recent case limited the kinds of personal interests that would satisfy the exception. *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 856 F. Supp. 990 (E.D. Pa. 1994). While the employees in *Siegel Transfer* may have had personal interests distinct from those of the corporate defendant (Carrier Express), “plaintiffs have alleged no interest on their part in competition with Carrier Express. It is the joining together of formerly competitive interests which implicates the antitrust laws.” *Id.* at 999 (citations omitted).

\(^7\) See *999 F. Supp. 1026 (D. Nev. 1992)*, aff’d per curiam, 999 F.2d 445 (9th Cir. 1993).

\(^7\) Id. at 1031.

\(^7\) Id. at 1031–32; see also id. at 1032 (“The emphasis is properly placed upon the commonality of interest of the corporations and the degree of control exercised by the dominant corporation.”).

\(^7\) 999 F.2d at 447 (quoting Thomsen v. Western Elec. Co., 680 F.2d 1263, 1266–67 (9th Cir.), cert. denied, 459 U.S. 991 (1982)).

\(^7\) 788 F. Supp. 428 (N.D. Cal. 1992).
COPPER WELD Products, engaged in an antitrust conspiracy to lessen competition in ductwork produced using patents obtained by Mr. Shea and exclusively licensed, initially, to ATS. The court found an incapability of conspiring while Mr. Shea was an officer and majority shareholder of ATS. This result may well have been correct. But the court also found conspiracy impossible after Mr. Shea sold ATS to another corporation, ended his relations with ATS, changed the exclusive license (except for an existing sublicense to the plaintiff) to the new firm (which gave a sublicense to its subsidiary ATS), and promised not to compete in that business. The court reasoned that Mr. Shea and ATS were not "'independent sources of economic power previously pursuing separate interests'" because the exclusive license prevented Mr. Shea from competing. Since they could not compete, they could not conspire, according to the court.

There are a number of weaknesses in both courts' analyses. Williams reasoned, from the extensive control embodied in a franchise agreement, that the agreement itself was not a Sherman Act conspiracy. The bootstrapping nature of this reasoning is evident. Levi Case misunderstood that an inventor's grant of an exclusive license under a patent does not prevent him from competing; it just prevents him from competing with the aid of that patented technology. He may be capable of competing without it.

More fundamentally, both courts came too close to concluding that only competitors can conspire.\footnote{Id. at 432 (quoting City of Mt. Pleasant, Iowa v. Associated Elec. Cooper., Inc., 838 F.2d 268, 274–75 (8th Cir. 1988), which is discussed infra text at note 86).}\footnote{78 768 F. Supp. at 431.} Williams emphasized that franchisees compete neither with each other nor with their franchisor.\footnote{77 794 F. Supp. at 1031.} Although Levi Case said that Mr. Shea could not compete, it noted that he always had the right "to approve sublicenses."\footnote{80 One oddity is that the new firm was named neither as a defendant nor as a co-conspirator. If nothing else, the agreements while ATS was being sold, the patent rights were being rearranged, and Mr. Shea was promising not to compete would seem susceptible to Sherman Act review.} This right gave him an independent role and differentiated him from ATS.\footnote{80 19951}
Copperweld discussed the potential harm from agreements that deprive the market of "independent centers of decisionmaking." Unless the opinion is to be read as ending sub silentio Sherman Act scrutiny of tying, exclusive dealing, franchisor-franchisee pricing, and other vertical restraints, Copperweld cannot limit Sherman Act coverage to agreements among competitors. A court should be cautious about concluding that a franchisor and franchisee, or a patent holder and a sublicensee, are legally incapable of conspiring.

D. JOINT VENTURES AND OTHER HORIZONTAL RELATIONSHIPS

Copperweld issues also have arisen repeatedly in joint venture cases. (Copperweld's most publicly celebrated role has been in sports litigation, where defense lawyers have argued futilely that it protects league activities.) The leading Copperweld joint venture case continues to be Rothery Storage & Van Co. v. Atlas Van Lines, Inc. In Rothery, a group of shippers had formed Atlas Van Lines. The Atlas board of directors was comprised of actual and potential competitors. When the board adopted an allegedly anticompetitive policy prohibiting carrier agents from operating on their own account, the district court thought the decision was protected by Copperweld. The court of appeals disagreed firmly (although finding for Atlas on other grounds), because the venture and the board were made up of actual or potential competitors.

Subsequent cases have largely followed Rothery's lead. Although many joint venture issues remain to be resolved, courts have been reluctant thus far to let joint ventures robe themselves in Copperweld's cloak of protection from Sherman Act scrutiny.
The leading case finding what could be considered a joint venture to be a single entity is City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc. Less than a year after the Supreme Court decided Copperweld, the Mount Pleasant district court granted summary judgment in favor of a rural electric cooperative charged by some cities with engaging in price discrimination, a price-squeeze conspiracy, and monopolization. The district court held that the cooperative and its constituent cooperatives were a single entity. This entity had three tiers: consumer-members owned forty-three electricity retail-distribution cooperatives; these forty-three cooperatives owned six generation and transmission cooperatives; and these six cooperatives owned Associated Electric, a "super" generation and transmission cooperative responsible for supplying power to the six. The court ruled that any agreement among these cooperatives about the price at which to wholesale electricity to the cities was not subject to Sherman Act Section 1. Relying heavily on Copperweld, the court declared the cooperatives a "single entity" because the system "does not join separate economic actors who previously sought different goals."

On appeal, the Eighth Circuit agreed with the district court's analysis and affirmed the judgment. The court relied heavily on Copperweld's discussion of corporate divisions. Without significant factual analysis

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the Eighth Circuit concluded that "the cooperative organization is a single enterprise pursuing a common goal." The court said it followed from this conclusion that the plaintiffs could avoid summary judgment only by showing that some defendants had pursued interests diverse from those of the cooperative itself. By "diverse" we mean interests which tend to show that any two of the defendants are, or have been, actual or potential competitors, or, at the very least, interests which are sufficiently divergent so that a reasonable juror could conclude that the entities have not always worked together for a common cause. In the language of Copperweld, the City must show facts that could lead a reasonable juror to find the coordination between any two defendants to be a "joining of two independent sources of economic power previously pursuing separate interests." The court stressed that none of the constituent cooperatives were "independent sources" of power. Occasional disputes about service areas did not alter the nature of this interdependent, single enterprise.

_City of Mt. Pleasant_ is unlike the typical joint venture case. Unhappy wholesale customers accused an ongoing, multitier cooperative system of improper pricing. No defendant preexisted the cooperative system. Since the defendants functioned exclusively inside the cooperative system, realistically they were neither competitors nor potential competitors (which, as the court noted, distinguished the case from _Rothery Storage_). Pricing by the cooperative system could not affect competition differently from pricing by a more conventional single firm; common pricing did not entail surrender of independent decisionmaking but was the inevitable consequence of the cooperative system. Accordingly, it made little sense to subject pricing by the cooperative system to special antitrust scrutiny.

Coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants §1 scrutiny. quoted in part at 838 F.2d at 274.

91 838 F.2d at 276.
92 Id. (citations omitted).
93 Id. at 277 (emphasis by the court).
94 _Mt. Pleasant_ found substantial support for its conclusion in Copperweld's apparent endorsement of Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19 (1962), see Copperweld, 467 U.S. at 773 (two agricultural cooperatives and the subsidiary of one of them were found to be a single organization even though the membership of one cooperative was a subset of membership of the first). 838 F.2d at 275 (also finding support in United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975)).
95 838 F.2d at 276.
96 _City of Mt. Pleasant_ is more obviously correct than a rural electric cooperative decision that relied on the _Mt. Pleasant_ district court opinion, Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345 (N.D. Ga. 1986). In _Greensboro_, 39 preexisting rural electric membership cooperatives (EMCs) formed Oglethorpe Power Corporation, a not-for-profit electric generation and transmission cooperative. Oglethorpe "was organized to supply the electric power needs of its 39 members through the generation, wholesale sale, wholesale
The Eighth Circuit went one step beyond City of Mt. Pleasant in International Travel Arrangers v. NWA Inc.,[97] when it approved a jury's finding that two otherwise unrelated firms became incapable of Sherman Act conspiracy by agreeing in principle to merge. International Travel Arrangers presented an unusual situation. A tour operator alleged, as a small part of what was principally a monopolization suit, that Minneapolis's largest airline and largest tour operator had conspired to harm the smaller tour operator. The district court instructed the jury to decide whether the two defendants were capable of conspiring during the period between their decision to merge and their actual merger; and the jury found for the defense. The instruction asked whether the two firms "possessed[ed] an inherent unity of economic interest and purpose," and whether the firms "lacked independent economic consciousness after they had decided to merge." An affirmative answer to either question called for a defense verdict on the Section 1 charge. [98] The Eighth Circuit said this was a proper instruction.

purchase, and transmission of electricity...[T]he EMCs entered into a series of 'wholesale power sales contracts' under which the EMCs purchase most of their energy needs from Oglethorpe." Id. at 1352-53. "These contracts, which extend through the year 2022, obligate each EMC to buy all of its power and energy requirements from Oglethorpe" (with an unimportant exception). Id. at 1362.

A company seeking to sell power to an EMC claimed that those supply agreements between Oglethorpe and the various EMCs violated the Sherman Act. Without much analysis the Northern District of Georgia granted a defense motion for summary judgment on this issue because it concluded that Oglethorpe and the EMCs were a single entity:

[T]his Court considers Oglethorpe and the EMCs to be, in economic substance, an integrated unitary business enterprise. Oglethorpe is, in essence, a wholly-owned subsidiary of its collective members which was created for the purpose of providing them with their power supply needs. As such, Oglethorpe and its members are legally incapable of concerted action in violation of the antitrust laws. See City of Fulton, Missouri v. Associated Electric...Id. at 1367 (In an omitted footnote the court stated that Oglethorpe was too permanent and integral to be fairly characterized as a joint venture.).

In fact, however, Greensboro differed significantly from City of Fulton/Mt. Pleasant. The latter case involved a challenge to pricing by a prior-existing cooperative. Greensboro addressed the terms under which a group of formerly independent EMCs came together and agreed not to purchase power from firms such as the plaintiff. Before this agreement the EMCs must have been competitors or at least potential competitors in the purchase of power; the lawsuit challenged the ending of that competition.


[98] The instruction was as follows:

Section 1 of the Sherman Act prohibits only those unreasonable restraints of trade which are affected [sic] by a contract, combination or conspiracy between separate entities. The economic substance of the relationship between two entities determines whether they are "separate" for purposes of a section 1 conspiracy. Where the entities possess an inherent unity of economic interest and purpose, they are not separate entities capable of conspiring. Thus, if you find that [the
International Travel Arrangers is an unfortunate decision for several reasons. Asking a jury to speculate about the “economic consciousness” of a corporation seems unlikely to focus the jury’s attention on anything important to a sound decision. The instructions have a specific substantive flaw as well. They declare that there can be no conspiracy when two entities have “an inherent unity of economic interest and purpose.” Yet when two firms achieve “unity of economic interest,” the law declares that they have conspired. The International Travel Arrangers instruction seemingly teaches that when defendants have agreed with specificity to harm consumers, raise prices, drive out competition, and share equally in the returns, the defendants can be found incapable of conspiring! It is asking too much to expect an unassisted jury to distinguish between mere “unity” (which establishes agreement) and “inherent unity” (which makes agreement impossible). Although the jury instruction finds support in Copperweld’s language,99 the instruction invites mischief.

The likely effect of International Travel Arrangers on premerger corporate planning and procedures also is troubling.100 Before that decision, merging firms knew they were subject to Sherman Act Section 1 at least potentially until the date of the merger. Now there is added uncertainty. Even if International Travel Arrangers is good law in the jurisdiction where a plaintiff might choose to file suit, merging firms do not know whether protection from a conspiracy charge starts with an initial conversation, a letter of intent, or an agreement in principle. For that matter, any counselor must fear the deal that turns sour. A jury would seem unlikely to conclude that two firms that drifted apart had “lacked independent economic consciousness.” But by the time of the schism the parties may be in an antitrust violation. Copperweld’s is a bright line rule based on ownership and probably should not apply until ownership is final. If two firms that enter into a challenged agreement formerly had competed with little vigor, for whatever reason, this may101 or may not102 lessen the

defendant firms] lacked independent economic consciousness after they had decided to merge and before the merger was completed, they were not capable of conspiring together at that time.

99 Copperweld likely was the source of this error. It incorporated American Tobacco’s test for finding a Sherman Act agreement into its explanation of why parents and wholly owned subsidiaries should be incapable of Sherman Act conspiracy: “In reality a parent and a wholly owned subsidiary always have a ‘unity of purpose or a common design.’” 467 U.S. at 771 (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)). Thoughtful readers should have realized that American Tobacco’s test for finding conspiracy should not double as the test for finding conspiracy impossible.

100 See also Blumenthal, supra note 97.

101 See supra note 54.

102 For instance, the Sherman Act likely would condemn an agreement by two significant firms to continue forever refraining from crossing the Mississippi River and competing with each other.
COPPERWELD

anticompetitive effect of the agreement, but it is not reason to say there is no agreement.\(^\text{108}\)

III. NONCONSPIRACY SHERMAN ACT APPLICATIONS OF COPPERWELD

Although *Copperweld* addressed a narrow intra-enterprise conspiracy question, Chief Justice Burger wrote a rather vigorous, wide-ranging opinion, drawing significantly on the Solicitor General's briefs. Many courts have applied *Copperweld's* language and analysis and applied them to Sherman Act issues not involving conspiracy. Examples include (a) the need for special concern about concerted action; (b) market power's role in the rule of reason; and, especially, (c) the need for caution in applying Sherman Act Section 2.

A. Concern About Concerted Action

The *Copperweld* Court grounded its analysis—as had the Solicitor General—on the "basic distinction between concerted and independent action."\(^\text{104}\) *Copperweld* forcefully warned of the risks associated with the former:

Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. . . . [I]t is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. 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. Of course, such mergings 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.\(^\text{105}\)

\(^{108}\) *International Travel Arrangers* may have been led astray by language in *Pink Supply Corp*. *Pink Supply* recognized that a principal and an agent, although normally treated as a single entity, may be capable of conspiring when their interests diverge. See *supra* text at note 66. *International Travel Arrangers* concluded that the defendants in its case had non-divergent interests. But *Pink Supply* involved a narrow exception to a general rule applicable to a corporation and its sales representatives, who are naturally closely aligned. Parties to a merger, in contrast, are expected to guard their own interests right up to the end.

The Eighth Circuit's decision in *City of Mt. Pleasant* had looked to whether the constituent cooperatives had had "diverse interests," by which it meant (among other things) the interests of actual or potential competitors. 838 F.2d at 276. This would seem applicable to the situation in *International Travel Arrangers*. The *International Travel Arrangers* court merely said it was not. 991 F.2d at 1398.

\(^{104}\) 467 U.S. at 767 (quoting *Monsanto*, 465 U.S. at 761).

\(^{105}\) *Id.* at 768–69 (emphasis added).
Much of this language echoes the Solicitor General's\textsuperscript{106} and, to a lesser extent, petitioners' briefs.\textsuperscript{107}

Few majority opinions have relied upon this insistence that concerted actions are "fraught with anticompetitive risk." The notable exception is \textit{Alvord-Polk, Inc. v. F. Schumacher \& Co.}\textsuperscript{108} In reversing a lower court grant of summary judgment, the \textit{Alvord-Polk} court opened its opinion with an explanation of why agreement is at the heart of antitrust, and quoted most of the above language from \textit{Copperweld}.\textsuperscript{109}

Justices and other judges, as well, have quoted the same language in dictum, dissents, and a vacated opinion. Justice Stevens quoted at length from this part of \textit{Copperweld} in his dissent in \textit{Atlantic Richfield Co. v. USA Petroleum Co.},\textsuperscript{110} prefacing the quotation with the lament that "[u]ntil today, the Court has clearly understood why § 1 fundamentally differs

\textsuperscript{106} DOJ Merits Brief

(Combinations of otherwise independent economic entities are properly subject to stricter scrutiny. . . .)\textsuperscript{111} [A]ll combinations among otherwise independent economic entities reduce to some extent the number of independent decision makers, thus raising sufficient anticompetitive potential to merit careful scrutiny of their effects on competition. In a system designed to foster multiple independent sources of economic decision making, there is little reason to tolerate concerted business conduct among rivals unless it involves an integration of resources under common control or contractual sharing of functions that holds out the possibility of increased output, lower prices, or other procompetitive benefits that cannot be attained by individual firms.)

\textsuperscript{107} Brief of Petitioners, \textit{Copperweld}, available in LEXIS, Genfed Library, Briefs File ("The dichotomy between the reach of Sections 1 and 2 reflects Congress's policy decision to encourage vigorous competition among separate economic entities by imposing a stricter standard of liability on concerted conduct."); \textit{id.} ("Since Section 1 is concerned with collaborative practices in which economic resources under one source of legal control are joined with those of another, its stringent standards . . . should not be construed to apply where the 'conspirators' are part of a single entity.").

\textsuperscript{108} 37 F.3d 996 (3d Cir. 1994).

\textsuperscript{109} \textit{id.} at 999–1000. Another example is Hess v. Inland Asphalt Co., 1990-1 Trade Cas. (CCH) ¶ 68,954 (E.D. Wash. 1990), where the court denied summary judgment in a horizontal refusal to deal case. Citing this part of \textit{Copperweld}, the court wrote that "[c]oncerted activity between separate entities is precisely the type of activity prohibited under section 1 and, under the law, is judged more sternly than unilateral activity under section 2." \textit{id.} at 63,114.

\textsuperscript{110} 495 U.S. 328, 346 (1990) (Stevens, J., dissenting).
from other antitrust violations." On remand in that case, Judge Reinhardt's dissent also relied on this special concern about concerted action. The Eleventh Circuit's controversial (and subsequently vacated) decision in *Key Enterprises of Delaware, Inc. v. Venice Hospital* featured this *Copperweld* language, and, in dictum in *H.J., Inc. v. International Telephone & Telegraph Corp.*, the Eighth Circuit wrote as follows:

Under Section 1, there is no need to prove that concerted activity threatens monopolization; concerted behavior is treated more strictly than unilateral behavior because the former "is fraught with anticompetitive risk." Thus, the inquiry in Section 1 cases ... does not focus upon the definition of the relevant market which may be subject to monopolization, but upon the threat of "anticompetitive effects" resulting from concerted activity.

**B. Market Power and the Rule of Reason**

While *Copperweld* emphasized the dangers of concerted action, by clearly inserting a market power requirement into the rule of reason calculus it also strengthened the litigation posture of firms accused of certain concerted action. (Through their second question for review, petitioners had highlighted the possibility that a firm without market power might be at risk under the rule of reason.) The Court enhanced the role of market power through two brief sentences that are part of

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111 Id. at 358 n.17. The majority showed more reluctance in finding competitor antitrust injury based on vertical price restraints.

Justice Stevens, joined by Justices Brennan and Marshall, had dissented in *Copperweld*. He had argued in part that the "trusts" from which antitrust got its name had consisted of combinations of affiliated corporations. "The anomaly in today's holding is that the corporate devices most similar to the original 'trusts' are now those which free an enterprise from antitrust scrutiny." 467 U.S. at 788.

112 USA Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276, 1293 (9th Cir. 1994) (Reinhardt, J., dissenting). Judge Reinhardt would have been more aggressive in extending the Sherman Act to reach conspiracies to predate. The majority concluded that the plaintiff had lost its chance to advance an alternative theory. Judge Nelson had made points similar to Judge Reinhardt's in an earlier majority opinion by the Ninth Circuit, 972 F.2d 1070, 1074 (9th Cir. 1992) (2–1, with Judge Alarcon dissenting), but the Ninth Circuit vacated that opinion and issued its new, post-Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993), opinion, 2–1, with Judge Reinhardt dissenting.

113 919 F.2d 1550 (11th Cir. 1990), vacated and rehearing en banc granted, 979 F.2d 806 (11th Cir. 1992), order granting en banc review vacated and panel ordered to dismiss the appeal, vacate the original judgment, and order dismissal of the case, 9 F.3d 893 (11th Cir. 1993) (en banc) (per curiam), cert. denied, 114 S. Ct. 2132 (1994).

114 *Id.* at 1562 ("Heightened scrutiny is justified in the instant case since we are confronted with a conspiracy.").

115 867 F.2d 1531 (8th Cir. 1989).

116 *Id.* at 1543–44 (quoting *Copperweld*) (but finding no Monsanto-sufficient evidence of conspiracy to support jury verdict).

a paragraph reviewing Sherman Act Section 1 (and contrasting it with Section 2). After noting that certain action is per se illegal, the Court continued:

Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.118

The language echoed that in the Solicitor General's brief.119

While some lower courts had declared previously that a market power inquiry is essential to the rule of reason,120 this was the first such declaration by the Supreme Court.121 Without resolving the ultimate role of a market power analysis,122 Copperweld provided important support to the argument that market power should be a near-ubiquitous screen in antitrust.123 Although other cases support the proposition, courts continue to cite Copperweld regularly on the role of market power in rule of reason cases.124 The Seventh Circuit has also cited this part of Copperweld for

118 467 U.S. at 768 (emphasis added) (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), and Chicago Board of Trade v. United States, 246 U.S. 231 (1918)).

119 See DOJ Merits Brief ("Concerted conduct that involves, for example, the creation or transfer of productive units (e.g., a merger) is judged according to the 'rule of reason,' under which courts examine market power and market structure to determine whether the adverse effects of a combination are unlikely to outweigh its benefits"); id. ("Combinations that may increase efficiency . . . (e.g., mergers, joint ventures and various types of vertical agreements) are judged under the 'rule of reason,' under which courts consider the market power of the firms involved and the structure of the relevant markets in determining whether the net effect of the combination is anticompetitive or procompetitive.").


121 See Wood Hutchinson, supra note 6, at 145 (language "inserted more content into the rule than the old lists provided").

122 As if to ensure that controversy would continue, the Court issued NCAA a week after Copperweld. In what it claimed was a rule of reason analysis, the Court in NCAA examined competitive effects and found market power, while insisting that market power need not always be proven. 468 U.S. at 109-11.


124 See Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993) (discussing factors to be considered on remand: "inquiry into market power and market structure necessary to gauge combination under rule-of-reason approach"), cert. denied, 114 S. Ct. 1054 (1994); Islami v. Covenant Medical Ctr., Inc., 822 F. Supp. 1361, 1385 (N.D. Iowa 1992) (quoting Copperweld language and Chicago Board of Trade in denial of defense request for summary
rejecting "the proposition that [under Section 1] horizontal mergers are unlawful without regard to competitive effects."  

C. RELUCTANCE TO INVoke SECTION 2

Although no Section 2 issues were before the Court in *Copperweld*, the opinion may be almost as important in Section 2 litigation as in Section 1. The flip side of the Court's dichotomy between concerted and unilateral action is that Section 2 should be reserved for select occasions. The Court crafted a strongly-worded paragraph that began by noting the Sherman Act's "'basic distinction'" between Sections 1 and 2, and continued with a paean to market deference:

The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, 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. 

Once again, some of this language echoes the Solicitor General's brief. Both the Court and the Solicitor General appended to their sentences

judgment in hospital peer review case); Allen-Myland, Inc. v. IBM Corp., 693 F. Supp. 262, 302 (E.D. Pa. 1988) (IBM's installation and warranty service charge was not an unreasonable restraint of trade where plaintiff had failed to define a market and measure impact; "while lack of proof of a relevant market is not fatal to AMI's claim [citing FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)], an inquiry into market power and market structure helps determine the competitive impact of a challenged business practice under the Rule of Reason.") (citing *Copperweld*), vacated, 33 F.3d 194 (3d Cir. 1994); Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1150 (S.D. Ohio 1986) (exclusive dealing case quoting *Copperweld* on requirements of rule of reason). 


126 467 U.S. at 767-68 (footnotes omitted).

127 See DOJ Merits Brief: [Individual firm decisions on matters such as pricing ... provide the "hard" competition among independent enterprises that the antitrust laws are designed to foster. It is often difficult in practice, however, to distinguish between "hard" competition that benefits consumers (even if it harms rivals) and conduct that will have the long-run effect of lessening competition and consumer welfare. Therefore, a relatively nonintrusive standard for unilateral conduct is preferable, since [otherwise] ... the incentive for firms to compete aggressively would be materially diluted, to the detriment of consumer welfare.]}
about consumer interests (or welfare) a footnote 14 repeating Brunswick's admonition that the antitrust laws were enacted to protect "competition, not competitors."\(^{128}\)

This is a rich paragraph, and its language was picked up quickly by Chicago-minded courts. The Ninth Circuit quoted all of this market deference paragraph in *Drinkwine v. Federated Publications, Inc.*,\(^{129}\) a brief opinion affirming a directed verdict on the monopolization charge filed by the publisher of a "shopper" that was allegedly driven out of business by the local newspaper. The Seventh Circuit also quoted virtually the entire paragraph in its important Seventh Circuit opinion, *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*,\(^{130}\) an opinion advancing the view that intent evidence merits little weight.\(^{131}\)

*Ball Memorial Hospital's* language (adopting *Copperweld's*) was then borrowed by and played a key role for another Seventh Circuit panel, in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*\(^{132}\) *Indiana Grocery* was an important decision that affirmed summary judgment against a Section 2 predation claim. The plaintiff's story, if believed, was that Kroger had embarked on a predatory pricing campaign designed to discipline the plaintiff (a rival), slow its expansion, and cause it to raise its prices in Indianapolis, a market with high entry barriers. The court affirmed summary judgment, reasoning that the theory "at best" threatened an oligopolistic or duopolistic market. Conduct with that possible end does not violate Section 2, the court wrote, because *Ball Memorial/Copperweld* taught that Section 2 is implicated only by "a danger of monopolization."\(^{133}\)

(footnotes omitted); see also id. ("Economic harm inflicted on rivals because of their inability to operate efficiently or to offer products attractive to consumers is not the sort of harm Congress intended to prevent under the antitrust laws.") (citations omitted); cf. Brief of Petitioners ("Section 2, by contrast, reaches unilateral action by a single firm and requires at least a dangerous probability of monopolization.") (citation omitted).

\(^{128}\) 467 U.S. at 767 n.14 ("We have also made clear that the 'antitrust laws...were enacted [etc.]"). DOJ Merits Brief ("[T]his Court has emphasized that the statutory goal is the protection of competition, [etc.]"). Professor Wood noted the significance of reasoning and a result consistent with the consumer welfare-driven vision of antitrust. Wood Hutchison, *supra* note 6, at 96.

\(^{129}\) 780 F.2d 735 (9th Cir. 1983), cert. denied, 475 U.S. 1087 (1986).

\(^{130}\) 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).

\(^{131}\) Immediately after the long quotation from *Copperweld, Ball Memorial* continues, with a new paragraph: "So 'intent to harm rivals' is not a useful standard in antitrust." 784 F.2d at 1338. *Ball Memorial* adds a citation to and quotation of a First Circuit opinion, but the "So" implies that the thought is implicit in *Copperweld*.

\(^{132}\) 864 F.2d 1409, 1413–14 (7th Cir. 1989) (Bauer, Ch. J.).

\(^{133}\) *Id.* at 1413–14, 1416 (quoting *Ball Memorial Hospital, 784 F.2d* at 1338, in turn quoting *Copperweld*, at 767–68). The pattern of quoting quotations did not end with *Indiana Grocery*. In Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422–23 (6th Cir. 1990), cert. denied, 112 S. Ct. 51, 274 (1991), the Sixth Circuit reversed a Section 2 jury award, quoting at great length from *Indiana Grocery* (including its quoting of *Ball Memorial's*
A particularly important decision limiting Section 2 is *Alaska Airlines, Inc. v. United Airlines, Inc.* In *Alaska Airlines*, some relatively small airlines sued their two largest competitors, alleging that the competitors employed biased computerized reservations systems to harm competition and gain an unfair advantage. The district court granted a defense motion for summary judgment and the court of appeals affirmed. Both courts relied heavily on *Copperweld* to reject monopoly leveraging as an independent antitrust violation. The district court rejected the theory as "inconsistent with *Copperweld*'s reading of the section 2 requirement that a monopolist's action must threaten monopolization." The court of appeals quoted this same language and clearly relied on the reasoning.

The Third Circuit followed *Alaska Airlines* in *Fineman v. Armstrong World Industries*, which also rejected monopoly leveraging as an independent theory. That court, too, relied principally upon, and quoted at some length from, *Copperweld*.

At least one commentator has criticized *Alaska Airlines*'s use of *Copperweld*, and with some justification. Everything in a Section 1 opinion quoting of *Copperweld*, Langenderfer's language—if one can call a quotation part of a court's language—was then quoted at length in *Brookeside Ambulance Serv., Inc. v. Walker Ambulance Serv., Inc.*, 1993-2 Trade Cas. (CCH) ¶ 70,394, at 71,060 (N.D. Ohio 1993), which granted summary judgment for a monopolist that had engaged in some very aggressive attempts to stifle new competition.


*694 F. Supp. at 1455, 1475; see also id. at 1475 ("While halting a monopolists [sic] advances in their incipiency may represent a rational policy decision, it appears to be . . . a policy precluded by the language of section 2, as well as the purpose of the statute as interpreted in *Copperweld*.").

*948 F.2d at 541-42.

*See id. at 549 ("The antitrust laws seek to punish only the willful attainment and maintenance of a monopoly, or the attempt to attain such a monopoly.").


*Id. at 205-06 (quoting *Copperweld*, 467 U.S. at 774). Other cases relying on *Copperweld*'s teaching about conduct short of monopolization include *Vinci v. Waste Management, Inc.*, 1994 U.S. Dist. LEXIS 12071, at *20 (N.D. Cal. Aug. 19, 1994) ("The conduct of a single firm is governed by 15 U.S.C. § 2 and is unlawful only when the firm's conduct poses a danger of monopolization.") (citing *Copperweld*); and *Healthco Int'l, Inc. v. A-dec, Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,703, at 61,691 (D. Mass. 1989) (Section 2 applies "only when there is a showing of actual or potential monopoly power") (citing *Copperweld*).

*Lawrence A. Sullivan, *Section 2 of the Sherman Act and Vertical Strategies by Dominant Firms*, 21 Sw. U. L. Rev. 1227, 1255 (1992) ("nothing in the opinion implies that a blatant, anticompetitive attack by a monopolist on a related market passes scrutiny unless it creates a new monopoly").
about Section 2 is dictum. Beyond that, concluding that an attempt should be punished only if there is a danger of success does not answer the question of what more than monopoly power should be needed for the offense of monopolization. Monopoly leveraging may or may not be a flawed theory, but *Copperweld* should not be regarded as having given the theory the *coup de grâce*.

*Copperweld* has played an important role in limiting the attempted monopolization offense as well. That opinion's market deference paragraph twice limits Section 2 to actual and probable monopolization: Single firm conduct “is unlawful only when it threatens actual monopolization,” and the Sherman Act permits scrutiny of individual firms “only when they pose a danger of monopolization.” The same point surfaces later: The Sherman Act “leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization).” Less than a year after *Copperweld*, Justice White pointed to the tension between *Copperweld* and more expansive views of the attempt offense. The issue arose when the Court denied certiorari in *Mobil Oil Corp. v. Blanton*. Justice White dissented, since the Ninth Circuit's opinion had relied on its earlier, controversial opinion in *Lessig v. Tidewater Oil Co.* Lessig permitted a finding of a violation of Section 2 without proof of an effect on a relevant market. Justice White argued that this was inconsistent with *Copperweld*'s demarcation of the bounds between Sherman Act Sections 1 and 2.

In his last term on the Court, Justice White was able to accomplish his *Mobil Oil* mission by using *Copperweld*'s language to bury Lessig. In *Spectrum Sports*, an opinion that left unanswered the difficult questions, the Court ruled unanimously that proof of a dangerous probability of success of monopolizing a relevant market is essential to the offense of attempted monopolization.

*Spectrum Sports* quoted extensively from *Copperweld* and cited *Copperweld*'s discussion of the difficulty of distinguishing “robust competition

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142 467 U.S. at 767–68.
143 *id.* at 775.
145 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).
146 471 U.S. at 1008 (“Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, [t]he conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.”) (quoting *Copperweld*).
from conduct with long-term anticompetitive effects." The Seventh Circuit relied on this cautionary language in *Polk Bros., Inc. v. Forest City Enterprises, Inc.* to declare, not that care must be taken in deciding which of Sections 1 or 2 applies, but rather that "a court must be very sure that a category of acts is anti-competitive before condemning that category *per se*." The Ninth Circuit gave weight to this same cautionary language from *Copperweld* in *The Jeanery, Inc. v. James Jeans, Inc.* Jeanery was an important early decision signaling judicial reluctance to permit terminated dealers to win cases alleging that they had been treated wrongfully as part of a resale price maintenance conspiracy.

Even *Copperweld's* reiteration that it is interested in competition rather than competitors, although not new, has been important. The repetition of that line contributed to the cementing of it in the forefront of antitrust consciousness.

**IV. NON-SHERMAN ACT APPLICATIONS**

The legal effect of separate corporate status is important in diverse areas of law. Litigants in cases not involving the Sherman Act have sought to rely on *Copperweld's* declaration that a parent and its wholly owned

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148 113 S. Ct. at 890 & 892 (citing 467 U.S. at 767–69).
149 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.).
150 *Id.* at 189 (adding citations to Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), and NCAA).
151 849 F.2d 1148 (9th Cir. 1988) (2–1).
152 Although it also gave substantial attention to *Monsanto*, the Ninth Circuit quoted extensively from *Copperweld*. In warning of the dangers of permitting weak evidence to support a conclusion of conspiracy, the court cited *Monsanto* and, with a *cf. Copperweld*, appending a parenthetical: "explaining that courts must carefully scrutinize allegations of concerted conduct to ensure that aggressive, procompetitive conduct of a single firm is not curtailed improperly." 849 F.2d at 1154 (citing 467 U.S. at 768); see also 849 F.2d at 1156 n.7 (pointing to *Copperweld* and other Supreme Court cases reflecting "a more sophisticated use of economic analysis" that requires courts to "be less concerned with subjective notions of motive and more concerned with the economic effect of challenged conduct").
153 467 U.S. at 767 n.14.
subsidiary have a "complete unity of interests." Courts have generally extended *Copperweld* to closely analogous statutes, but further extensions have been more controversial.\(^\text{155}\)

The easy decisions involved statutes that paralleled the Sherman Act. With an exception or two, courts were quick to extend *Copperweld* to state antitrust laws, some of which explicitly mimic federal law, some of which merely look for guidance to federal interpretations.\(^\text{156}\) Two courts applied *Copperweld* to Section 73 of the Wilson Tariff Act,\(^\text{157}\) which is analogous to Section 1 of the Sherman Act.\(^\text{158}\) One court, reasoning that the Automobile Dealer's Day in Court Act\(^\text{159}\) supplements the antitrust laws and reaches practices that are unreasonable restraints of trade or invalid trade practices, applied *Copperweld* to hold that a parent and its wholly owned subsidiary could not conspire to violate that statute.\(^\text{160}\)

Also meeting with considerable approval has been the application of *Copperweld* to common law civil conspiracy. Most courts that have considered the question have concluded that parents and wholly owned subsidiaries should be incapable of common law civil conspiracy.\(^\text{161}\) This applica-

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\(^{155}\) Extension to Robinson-Patman Act cases is discussed in Part V of this article.


\(^{157}\) 15 U.S.C. § 8 ("Every combination, conspiracy . . . or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom . . . is engaged in importing any article from any foreign country . . ., and when such combination, conspiracy . . . or contract is intended to operate in restraint of lawful trade. . . .").


\(^{159}\) 15 U.S.C. § 1221 et seq.


\(^{161}\) Siegel Transfer v. Carrier Express, 856 F. Supp. 990 (E.D. Pa. 1994) (parent and subsidiary cannot conspire for purposes of Pennsylvania civil conspiracy law); Nissan Motor
tion has not been free from disagreement, however, or from claims that *Copperweld* should be limited to antitrust actions.\(^\text{162}\)

Controversy also has arisen, even more sharply, over other applications of *Copperweld*. Some courts have declined to apply *Copperweld*’s language about unity of interests to complaints alleging that a parent corporation wrongly induced a breach of a wholly owned subsidiary’s contract, or intentionally interfered with that subsidiary’s business relations.\(^\text{163}\) Other

\(^{162}\) See *In re ContiCommodity Servs.*, Inc., Sec. Litig., 733 F. Supp. 1555, 1568 (N.D. Ill. 1993) (*Copperweld* “is limited to the context of antitrust actions,” and does not apply to Texas common law, under which parents and subsidiaries may be found to conspire), rev’d on other grounds sub nom. *Brown v. United States*, 976 F.2d 1104 (7th Cir. 1992). *Compare Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 447 (Tex. Ct. App. Texarkana 1993) (concluding “that *Copperweld* was restricted to the antitrust context and was not applicable to common law conspiracies”) and *Metropolitan Life Ins. Co. v. La Mansion Hotels & Resorts, Ltd.*, 762 S.W.2d 646 (Tex. App. San Antonio 1988) (*Copperweld* irrelevant to civil conspiracy charge) *with Atlantic Richfield Co. v. Misty Prods., Inc.*, 820 S.W.2d 414 (Tex. App. Houston 14th Dist. 1991) (parent and subsidiary cannot civilly conspire, applying *Copperweld*).

One case, in dictum, strongly doubted that *Copperweld* should be extended to securities fraud, RICO, and common law conspiracies:

The [*Copperweld*] court noted that vigorous competition, which is at the base of our free market economy, is dependent upon the ability of firms to execute unitary corporate policy and therefore concluded that concerted action within a firm or between a firm and its wholly owned subsidiary is not constrained by section 1 of the Sherman Act. Since we see no similar social benefit flowing either from agreements to commit securities fraud or to establish and maintain racketeering enterprises, or from joint tortious behavior, we question whether *Copperweld* should be extended to these contexts.


*Thompson Trading, Ltd. v. Allied Lyons PLC*, 124 F.R.D. 534 (D.R.I. 1989), colorfully dismissed defendants’ attempt to rely on *Copperweld* in a case involving alleged conspiracy to interfere tortiously with a business relationship. The court noted the narrow reach that the Supreme Court claimed for *Copperweld*, and added that the issue was one of state (Rhode Island) law, even if *Copperweld* would have controlled were the issue federal.

Finally, it would be incongruous to, on the one hand, hold that Allied Lyons PLC
courts have been more willing to apply *Copperweld* in tortious interference cases. Another controversial area has been civil rights laws. Several courts have applied *Copperweld* here. Other courts have stressed that *Copperweld* was grounded in the structure of the Sherman Act and rarely should be extended beyond it.

is incapable of conspiring with its wholly-owned subsidiaries because they are one entity, and then to hold that this foreign defendant is not subject to this forum's personal jurisdiction through its subsidiaries because they are separate legal entities. Moreover, defendants would have this Court rule that Allied Lyons PLC is not responsible for the alleged tortious interference of its subsidiaries because they are separate entities, but then hold that Allied Lyons PLC could not have conspired with its subsidiaries because they are one single entity. "Having one's cake and eating it, too, is not in fashion in this circuit." *United States v. Tierney*, 760 F.2d 382, 388 (1st Cir. 1985).

124 F.R.D. at 537.


( Antitrust conspiracies, however, are a unique breed. Antitrust laws were designed to promote competition. By prohibiting conspiracies in restraint of trade, antitrust laws focus on collaboration among competitors. Agreements between agents of a single business ordinarily do not give rise to the evils that antitrust laws seek to prevent. ... Moreover, in the anti-trust context actions within a single business are presumed to be procompetitive and, therefore, beneficial to society.

In [Copperweld], the Supreme Court demonstrated that the justifications for the intracorporate conspiracy doctrine derived from the special nature of antitrust law: [quoting from *Copperweld*] Nowhere did the Court justify the doctrine on the basis that a corporation can act only through its agents and that acts of an agent are acts of the corporation, thus preventing a plurality of actors.)
One of the most common sources of litigation has been the Racketeer Influenced and Corrupt Organizations Act (RICO). Three months after the Supreme Court issued *Copperweld*, the Seventh Circuit, in *Haroco, Inc. v. American National Bank & Trust Co.*, had to apply the "unity of interests" language to determine whether a wholly owned subsidiary could be a "person" and its parent corporation a separate "enterprise" for purposes of 18 U.S.C. § 1962(2c). The Seventh Circuit quickly dismissed the argument: *Copperweld's* holding turned on the Sherman Act's basic distinction between unilateral and concerted action, unlike RICO, "which is targeted primarily at the profits from patterns of racketeering activity." *Haroco* has been persuasive, and many cases have declined to extend *Copperweld* to RICO Section 1962(c) or to cases alleging a RICO conspiracy. But other cases have disagreed and con-

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167 747 F.2d 384 (7th Cir. 1984), aff'd per curiam, 473 U.S. 606 (1985).

168 Id. at 386 (quoting the statute as it then read: "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."), aff'd per curiam, 473 U.S. 606 (1985); see 18 U.S.C. § 1962(c): "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.


171 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."); see Ashland Oil v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989) (noting division in district courts, but concluding that corporation can conspire with officers under RICO; "Since a subsidiary and its parent theoretically have a community of interest, a conspiracy 'in restraint of trade' between them poses no threat to the goals of antitrust law—protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.") (citations omitted); Borden, Inc. v. Spoor Behrns Campbell & Young, Inc., 828 F. Supp. 216, 223-24 (S.D.N.Y. 1993) (dictum); Wegoland, Ltd. v. Nynex Corp., 1991 U.S. Dist. LEXIS
cluded that RICO's purposes would not be served by permitting a parent and subsidiary to be "enterprise" and "person," or by permitting an intra-enterprise conspiracy to violate RICO.173

_Copperweld_ has received even cooler receptions on other issues. Courts have shown little inclination to use _Copperweld_ to render impossible criminal conspiracies among parents, subsidiaries, and employees and agents.174 Similarly, plaintiffs have met with no success when they have

20455, at *46-48 (S.D.N.Y. Sept. 17, 1991) (report and recommendation of magistrate judge) (_Copperweld_ not applicable; parents and subsidiaries should be capable of conspiring); Bowman v. Western Auto Supply Co., 773 F. Supp. 174 (W.D. Mo. 1991) (parents and subsidiaries are capable of conspiring in violation of § 1962(d), _rev'd on other grounds_, 985 F.2d 383 (8th Cir.)), _cert. denied_, 113 S.Ct. 2459 (1993); Curley v. Cumberland Farms Dairy, 728 F. Supp. 1123 (D.N.J. Dec. 29, 1989) (parent and subsidiary may conspire for RICO; "While antitrust law seeks to encourage inter-corporate competition even at a cost to intra-corporate competition [citing _GTE Sylvania_], RICO seeks to eliminate all racketeering activity, both inter-corporate and intra-corporate."); Atlass v. Texas Air Corp., 1989 U.S. Dist. LEXIS 5297, at *13 (E.D. Pa. May 10, 1989) ("anticompetition law is not compatible with RICO law on the topic of conspiracy because of their vastly different goals"); Pandick, Inc. v. Rooney, 632 F. Supp. 1430 (N.D. Ill. 1986) (intracorporate conspiracies can offend the purposes of RICO, which are quite different from those of the Sherman Act).

172 E.g., Nebraska Sec. Bank v. Dain Bosworth Inc. 838 F. Supp. 1362, 1368-70 (D. Neb. 1993) (relying on _Copperweld_ to hold that a parent and its subsidiary cannot be a "person" and an "enterprise"; "a parent corporation and a wholly owned subsidiary are, from an economic perspective, one and the same"); cf. NCB Nat'l Bank v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) (parent and subsidiary cannot be "person" and "enterprise," relying on _pre-Copperweld_ authority without discussing _Copperweld_); Odishelidze v. Actna Life & Casualty Co., 853 F.2d 21 (1st Cir. 1988) (per _cambique_ [without discussing _Copperweld_ (on this point—it was discussed on an antitrust issue)] or _Haroco_, court ruled that the requirement of a "person" and an "enterprise" was not met by complaint alleging agreement among a corporation, some of its subsidiaries, and some of its employees); cf. Kovian v. Fulton County Nat'l Bank & Trust Co., 1990 U.S. Dist. LEXIS 3526, at *40 (N.D.N.Y. Mar. 28, 1990) ("the reasoning employed in _Haroco_ is suspect") (dictum).


174 United States v. Hughes Aircraft Co., 20 F.3d 974, 979 (9th Cir. 1994) (reviewing uniform authorities); United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990) (attempted price fixing is wire fraud; _Copperweld_ does not shield conspiracy between parent and subsidiary, or among a corporation and its officers, employees, and agents); United States v. Lov-It Creamery, Inc., 704 F. Supp. 1532, 1543 (E.D. Wis. 1989) (rejecting analogy to _Copperweld_), _aff'd as modified on other grounds_, 895 F.2d 410 (7th Cir. 1990); _see Judy L. Whalley, Crime and Punishment—Civil Antitrust Enforcement in the 1990s, 59 Antitrust L.J. 151, 156-57 (1990) (discussing Ames)_. This limited applicability of _Copperweld_ was anticipated by the Solicitor General in _Copperweld_:

The mere fact that corporate officers and employees work within a single economic enterprise does not mean they cannot be co-conspirators in some types of cases.
sought to rely on Copperweld to impose liability on parent corporations for acts of subsidiaries.

Parent corporations are not ordinarily directly liable for their subsidiaries' violations of federal or state statutes. Under standard corporate law, however, plaintiffs may "pierce the corporate veil" and reach parent corporations under certain circumstances. The corporate case law tends to rely less on reason than on buzz words such as "alter ego," "mere instrumentality," "undercapitalized," "perpetrate a fraud," and "sham." 175

This "alter ego" or "piercing the corporate veil" doctrine is a creature of state law. It turns on considerations different from those that determine whether a Sherman Act conspiracy is possible. The Northern District of California drew this distinction crisply in Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., 176 which relied on Copperweld to grant summary judgment on Sherman Act issues but denied summary judgment on corporate alter ego liability. The court was untroubled by the plaintiff's claim that the defendants "are attempting to 'have it both ways':"

Plaintiff's attempt to equate § 1 conspiracy liability with alter ego liability fails because § 1 deals with federal antitrust policies and the alter ego doctrine is governed by California corporation law. The two legal principles have different purposes and policy considerations. It does not follow that because Hitachi, Hitachi America and Hitachi Data are legally incapable of conspiring in violation of federal antitrust laws, that Hitachi, the parent, is the alter ego of its subsidiaries. 177

Other cases are to the same effect. 178 Similarly, Copperweld did not prevent a subsidiary from suing its corporate parent pursuant to state corporate law. The Northern District of Illinois explained its decision as follows:

For example, it is clear that corporate officials within a single economic enterprise can conspire with each other, e.g., to defraud the government and thereby violate the law. In addition, where a conspiracy among distinct economic enterprises exists, a criminal or civil action can be brought under Section 1 against responsible officials, as well as against the corporations for which they acted.

DOJ Merits Brief (footnote omitted).


177 Id. (citation omitted) (in California, whether subsidiaries are "mere instrumentalities" of parent is a factual issue).

178 See Kacprzycki v. A.C. & S., Inc., 1990 U.S. Dist. LEXIS 16552, at *10 (D. Del. Oct. 31, 1990) (magistrate's report and recommendation) (Copperweld is "expressly and unambiguously limited to conspiracies to restrain trade under § 1 of the Sherman Antitrust Act"); Masa, Inc. v. ICG Keeprite Corp., 1989 U.S. Dist. LEXIS 7770, at *7 n.3 (N.D. Ill. June 28, 1989) (declining to apply Copperweld in piercing case; "This court fails to see the
The key to the [Copperweld] Court's reasoning, however, was its focus on the underlying concern of the Sherman Act which is to prohibit the concerted activity of "two independent sources of economic power [that] previously pursued separate interests." Our conclusion is entirely consistent with the Copperweld decision. We do not hold that a wholly-owned subsidiary has a separate economic agenda than its parent. We merely conclude that they are independent entities, each worthy of recognition here.\(^1\)

In many different situations, courts have recognized that Copperweld turned on a balancing of Sherman Act interests that may have little applicability in other contexts.

**V. COPPERWELD AND THE ROBINSON-PATMAN ACT: CARIBE**

Several courts have addressed the applicability of Copperweld to the Robinson-Patman Act's prohibition of certain price discrimination. Appreciating Copperweld's role in Robinson-Patman issues requires understanding some particularly perplexing aspects of that notoriously complicated Act. The statutory language is as follows:

> It shall be unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .\(^2\)

An antitrust "piercing" issue was raised in BellSouth Advertising & Publishing Corp. v. BellSouth Corp., 719 F. Supp. 1551 (S.D. Fla.), rev'd on other grounds, 999 F.2d 1436 (11th Cir. 1993), cert. denied, 114 S. Ct. 943 (1994). Counter-claimant relied on Copperweld's language to argue that a parent corporation should be liable automatically for its subsidiary's alleged violation of Sherman Act Section 2. The court strongly rejected the suggestion: "As mentioned, Copperweld is a Section 1 case and that opinion only addressed the issue of separate corporate entities as it related to allegations of conspiracy." Id. at 1567.


\(^1\) Id. The Act provides defenses for discrimination that is cost-justified, justified by the need to meet competition, or justified by "changing conditions affecting the market for or the marketability of the goods concerned." For a review of the Act see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS ch. 4 (3d ed. 1992).
Copperweld has played a gradually increasing role in pricing issues involving parent and subsidiary corporations.

A. PARENT-SUBSIDIARY ISSUES UNDER THE ROBINSON-PATMAN ACT

The question of just who is selling goods, or who should be held responsible for their sale, arises in Robinson-Patman cases in several different situations. Although courts have not always distinguished clearly among the situations and the tests applicable to each, it is helpful to keep them separate. There are four separate but related issues: Vicarious liability, and the indirect purchaser, different purchaser, and single seller doctrines.\(^{182}\)

1. Vicarious Liability

Parent corporations are no more liable directly when their subsidiaries violate the Sherman Act\(^{183}\) or Robinson-Patman Act\(^{184}\) than when they violate other laws.\(^{185}\) The leading case on the liability of a parent corporation for a subsidiary's price discrimination is National Lead Co. v. Federal Trade Commission.\(^{186}\) In National Lead, the Seventh Circuit held that the FTC should have dismissed a complaint against a parent corporation. The court explained that for a parent to be liable derivatively “there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the

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\(^{182}\) Another somewhat related issue concerns whether the Robinson-Patman Act’s “in commerce” requirement has been met by intrastate sales by a wholesaler. Sales by an autonomous local subsidiary may be considered separate from the activities of a parent corporation and thus not subject to the Act (because no sale crossed a state line). E.g., Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 880 (9th Cir. 1982) (“we examine the extent to which the subsidiaries acted as independent distributors in their pricing and marketing decisions, in effect, breaking the flow of commerce between the manufacturer and the local retailer”), cert. denied, 460 U.S. 1085 (1983); Hiram Walker, Inc. v. A&S Tropical, Inc., 407 F.2d 4, 9 (5th Cir. 1969); Ashkanazy v. I. Rokeach & Sons, Inc., 757 F. Supp. 1527, 1547 (N.D. Ill. 1991) (denying summary judgment on this issue) (“To assess the independence of the subsidiary, a question of fact, courts look to how much control the parent exerts over the subsidiary’s pricing and marketing decisions.”) (citing cases on related control issues).

\(^{183}\) E.g., H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1549 (8th Cir. 1989) (parent corporation not liable for subsidiary’s Sherman Act violations where no evidence showed that subsidiary “was a mere instrumentality or alter ego” of the parent or that the subsidiary was “a sham corporation formed to shield ITT [the parent] from liability”; opinion discusses Copperweld in another context).


\(^{185}\) See supra note 175.

\(^{186}\) 227 F.2d 825 (7th Cir. 1955), rev’d on other grounds, 352 U.S. 419 (1957).
conclusion that the corporate identity of the subsidiary is a mere fiction.”

2. Indirect Purchaser Doctrine

The “indirect purchaser doctrine” appeared early in Robinson-Patman history. (This doctrine is unrelated to a Clayton Act doctrine unhappily bearing the same name.) This body of law, associated closely with the Federal Trade Commission, holds that a manufacturer may be responsible for the pricing of a nonaffiliated distributor where the manufacturer has controlled that distributor's pricing. Since repeal of the Fair Trade laws effective in 1976, plaintiffs have had little success invoking the indirect purchaser doctrine. The doctrine lost significance, moreover,

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187 Id. at 829 (citing cases) (insufficient that subsidiary was wholly owned and had interlocking officers and directors with its parent).

188 In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Court held that while direct purchasers of goods sold at illegally inflated prices may recover the entire overcharge, indirect purchasers normally may recover nothing. This indirect purchaser doctrine is summarized in Antitrust Law Developments, supra note 181, at 653-58.

189 E.g., Purolator Prods., Inc. v. FTC, 352 F.2d 874, 883-84 (7th Cir. 1965) (upholding doctrine and enforcing FTC order; “[i]f the seller controls the sale, he is responsible for the discrimination in the sale price”); American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir. 1962) (affirming FTC’s finding of violation) (“If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a ‘customer’ or ‘purchaser’ of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys.”) (citations omitted), cert. denied, 371 U.S. 824 (1962); Kraft-Phoenix Cheese Corp., 25 F.T.C. 537, 546 (1937) (order dismissing complaint on other grounds explained that retailers buying from wholesalers are considered to be “purchasers” from the manufacturer where the manufacturer promotes sales directly to the retailers and the manufacturer exerts effective control (here through dissemination of price lists) over the prices charged by wholesalers); cf. Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74, 84 (6th Cir. 1981) (dismissing claim) (“The purpose of the indirect doctrine is to prevent a manufacturer from insulated itself from Robinson-Patman liability by using a ‘dummy’ wholesaler to make sales at terms actually controlled by the manufacturer.”) (citation omitted); Monroe Auto Equip. Co., 66 F.T.C. 276, 299-301 (1964) (Elman, Comm’r, dissenting) (minority view that “indirect-purchaser” doctrine should be limited to instances in which manufacturers seek to evade the statute by use of devices such as dummy wholesalers), aff’d, 347 F.2d 401 (7th Cir. 1965), cert. denied, 382 U.S. 1009 (1966). The doctrine is discussed at Cyrus Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 37-38 (2d rev. ed. 1959), and Frederick M. Rowe, Price Discrimination Under the Robinson-Patman Act § 4.5 (1962).

As if to confuse matters further, the indirect purchaser doctrine has what is known as a “buyer corollary” that limits a corporation’s freedom to disguise discounts by passing them through an extra entity. Antitrust Law Developments, supra note 181, at 429-30.


when the Supreme Court expanded the levels at which liability-triggering competitive injury can be found.\textsuperscript{192}

3. Different Purchaser Doctrine

The Robinson-Patman Act only addresses discrimination in price between “different purchasers.” Early on the question was raised whether, and if so when, an impermissible discrimination can occur when a parent corporation charges a third party more than it charges its subsidiary.\textsuperscript{193} That a parent-subsidiary sale could trigger Robinson-Patman liability was first suggested in \textit{Danko v. Shell Oil Co.}\textsuperscript{194} \textit{Danko} and commentary it spawned found support in the intra-enterprise doctrine, which then held that parent and subsidiary corporations could be found to have conspired in violation of Sherman Act Section 1.\textsuperscript{195} Several cases, some of which discussed the intra-enterprise conspiracy doctrine, indicated that a sale from a parent to its subsidiary can trigger Robinson-Patman liability depending on the extent of the parent corporation’s ownership and control.\textsuperscript{196} Some “different purchaser” cases relied on

was “no ‘dummy’ entity or spurious intermediary”), \textit{aff’d per curiam}, 876 F.2d 86 (11th Cir. 1989); Krause v. General Motors Corp., 1988-2 Trade Cas. (CCH) ¶ 68,163 (E.D. Mich. 1988) (dismissing complaint where plaintiff purchased cars from franchised dealers); W.H. Brady Co. v. Lem Prods., Inc., 659 F. Supp. 1355, 1376 (N.D. Ill. 1987) (insufficient control where distributors were free to set terms); Kenwood Lincoln-Mercury, Inc. v. Ford Motor Co., 1986-2 Trade Cas. (CCH) ¶ 67,221 (S.D. Ohio 1986) (summary judgment where manufacturer did not negotiate with or control prices to its independent dealers’ customers).


\textsuperscript{193} Comment, \textit{Application of the Robinson-Patman Act to Price Discrimination in Intra-Enterprise Transactions}, 53 Nw. U.L. Rev. 253, 257 (1958); see also Joseph E. Sheehy, \textit{Implications of Intra-Enterprise Conspiracy Doctrine in Clayton Act Sections 2 and 3 Cases}, 9 \textit{Section of Antitrust Law Proceedings} 83, 107 (1956) (FTC Director of Litigation suggested that discrimination between a sales subsidiary and a rival could have requisite effect on competition).

\textsuperscript{194} 115 F. Supp. 886 (E.D.N.Y. 1953). \textit{Danko} declined to dismiss a challenge to Shell’s selling gasoline to its company-owned gasoline station for considerably less than it charged a rival station. \textit{Id.} at 888 (“The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser. In any event, it is doubtful that such relationship, if discriminatory, would be permitted to accomplish such objective. See for analogy, Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199, and cases cited therein.”).

\textsuperscript{195} See supra note 194; Northwestern Comment, supra note 193, at 257 (noting the connection).

\textsuperscript{196} E.g., Schaben v. Samuel Moore & Co., 462 F. Supp. 1321, 1329–31 (S.D. Iowa 1978) (subsidiary may be a purchaser, citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), but not, as in this case, “where the corporate bodies involved act as a single entity”), \textit{aff’d per curiam on basis of lower court’s opinion}, 606 F.2d 831 (8th Cir. 1979). \textit{But cf.} Reines Distrbs., Inc. v. Admiral Corp., 256 F. Supp. 581, 585–86 (S.D.N.Y. 1966) (declining to apply intra-enterprise conspiracy doctrine; a subsidiary may be a “purchaser” only if “the corporate entities deal at arm’s length”).
the "single seller" cases discussed below, thus suggesting a common approach.\textsuperscript{7}

Different purchaser jurisprudence took an important turn in 1979, when the Fifth Circuit, in \textit{Security Tire & Rubber Co. v. Gates Rubber Co.},\textsuperscript{198} rejected \textit{Danko} and held that transfers from a parent to its wholly owned subsidiary can never be sales for Robinson-Patman purposes. Although it found frequent judicial references to \textit{Danko}, the Fifth Circuit found no case in which liability had been premised on \textit{Danko}'s theory. The court regarded the substance of a parent-subsidiary exchange as an intra-company transfer, which, the court said, was not a sale, thus making Robinson-Patman liability untenable.

\textit{Security Tire} justified its bright line rule by saying that the Robinson-Patman Act did not intend to regulate intracorporate transactions and that such transactions could have no competitive effect. It also suggested—somewhat unfairly—that its rule was consistent with the rules employed for the "indirect purchaser" doctrine\textsuperscript{199} and the "single seller" doctrine.\textsuperscript{200} Both doctrines turn on control, however, which the court noted, without seeming to acknowledge the sharp degree to which it was departing from those approaches.

Although lower court authority remains mixed, the trend has been decidedly in favor of the \textit{Security Tire} rule.\textsuperscript{201} Just as some of the decisions

\begin{itemize}
\item \textsuperscript{7} Carroll-McCreary Co. v. New Jersey Steel Corp., 1980-2 Trade Cas. (CCH) \textsuperscript{f} 63,436, at 76,280 (E.D.N.Y. 1980) (relying in part on Bain & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957), in declining to dismiss case where control was not clear); \textit{Reines}, 256 F. Supp. at 585 (heavy reliance on \textit{Bain & Blank}). \textit{But see} Brown v. Hansen Publications, Inc., 556 F.2d 971, 971-72 (9th Cir. 1977) (per curiam) (sheet music distribution corporation not a "purchaser" from its sister music publishing corporation where the two shared office space, employees, accounting, etc.; the distribution firm's pricing discretion might be important to the "single seller" issue (citing \textit{Bain & Blank}) but not to this one).
\item \textit{A footnote in Brewer v. Uniroyal, Inc., 498 F.2d 973, 977 n.2 (6th Cir. 1974) (per curiam), traced the argument that subsidiaries can be "purchasers" and "customers" to the intra-enterprise conspiracy cases. The court asserted that the same "domain and control" standard was used to determine a subsidiary's status as a plaintiff, a parent's and subsidiary's status as a "single seller," and a nonaffiliated distributor's status as a supplier to an "indirect purchaser" from the manufacturer. Although it declined to decide the issue, the court noted that "[t]here appears to be general agreement that there can be no sale under the Act unless the parties deal at arm's length, although the argument has been advanced that the realistic effect on competition, rather than the question of control, should be the standard." \textit{Id.} (citations omitted) (dictum; improper damages had been awarded under any theory).
\item \textsuperscript{198} 598 F.2d 962 (5th Cir. 1979).
\item \textsuperscript{199} Supra Part V.A.2.
\item \textsuperscript{200} \textit{Infra} Part V.A.4.
\item \textsuperscript{201} \textit{See} O'Byrne v. Cheker Oil Co., 727 F.2d 159, 164 (7th Cir. 1984) (cannot compare oil company's wholesale prices to terms under which company retail stores obtained product); Island Tobacco Co. v. R.J. Reynolds Indus., Inc., 515 F. Supp. 726, 734 (D. Haw. 1981) ("intra-enterprise transfers cannot be considered sales for Robinson-Patman Act price
following Danko had drawn support from the intra-enterprise conspiracy doctrine then in effect, the more recent decisions give significant weight to Copperweld's declarations that a parent and its wholly owned subsidiary are a single economic unit. In City of Mt. Pleasant, the Eighth Circuit extended Security Tire to sales by an electricity generation-and-transmission cooperative to the retail-distribution cooperatives that together owned it. The court reasoned that what were nominally sales within the cooperative system had no economic consequence, and liability should not turn on whether or not the system was organized as a corporation with divisions. The Sixth Circuit also relied heavily on Copperweld when it decided to adopt Security Tire in Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co. Judge Cornelia Kennedy wrote a powerful dissent explaining that Copperweld was grounded in a distinction between unilateral and concerted action that had no relevance to the Robinson-Patman Act. The trend, however, is against her.

4. Single Seller Doctrine

The Robinson-Patman Act prohibits certain discriminatory sales by a "person." The "single seller" doctrine sought to determine when sales


Thoughtful articles have discussed the trend favoring Security Tire and applauded it, Howard Shelanski, Robinson-Patman Act Regulation of Intraenterprise Pricing, 80 Cal. L. Rev. 247 (1992), and criticized it, John Huddleston, Comment, Can Subsidiaries Be "Purchasers" from Their Parents Under the Robinson-Patman Act? A Plea for a Consistent Approach, 63 Wash. L. Rev. 957 (1988).

See supra notes 195–97.

Id. at 279. In reaching this conclusion the Eighth Circuit gave significant weight to Copperweld, concluding that "it would, in our opinion, be completely anomalous to hold, on the one hand, that the cooperative is a single enterprise which cannot conspire with itself under the Sherman Act, and, on the other hand, that the same single enterprise cannot enjoy the fruits of vertical integration by transferring goods between its constituent units at a 'price' below what it charges outsiders." Id.

772 F.2d 214, 221 (6th Cir. 1985) (per curiam). Russ' Kwik noted that Copperweld said that "[a]ntitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary.' Admittedly, the Court was dealing there with combinations or conspiracies between parent and subsidiary. However, the Court stated without qualification, that 'a subsidiary acts for the benefit of the parent.' " Id. (quoting Copperweld). The Sixth Circuit also quoted Copperweld's statement that "the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.' So, here, the parent and subsidiary are a single economic unit. The Robinson-Patman Act is not concerned with transfers between them." Id. (quoting Copperweld).

Id. at 221–23 (Kennedy, J., dissenting); see also Huddleston, supra note 201, at 972–73.
by a parent and a subsidiary should be considered sales by a single person.\(^{207}\) (Clarity might have been aided had the doctrine been called the "single selling person" doctrine.) The relationship between this question and the "different purchaser" doctrine has not gone unnoticed.\(^{208}\)

An important 1957 opinion, *Bairn & Blank, Inc. v. Philco Corp.*,\(^{209}\) provided substantial comfort to prospective defendants by drawing on the language of corporate piercing law.\(^{210}\) *Bairn & Blank*, a Brooklyn appliance retailer, complained that Philco Corporation charged higher prices to *Bairn & Blank* than to a twenty-eight-store New York area retail chain. Philco won summary judgment by showing that whereas the chain bought directly from Philco, *Bairn & Blank* bought from Philco Distributors, Inc. Although Philco Distributors was wholly owned and, with one exception, was led by the same officers as the parent, *Bairn & Blank* could not show that the subsidiary was "merely the alter ego of the parent" and that "they acted in legal effect as one seller."\(^{211}\) The leading price discrimination text saluted *Bairn & Blank*,\(^ {212}\) and ever since then plaintiffs have faced an uphill battle in proving that a parent and subsidiary are a single selling person. Courts addressing the single seller doctrine have inconsistently based decisions on alter ego, control over pricing, and more general control standards, and have casually cited different purchaser doctrine and even vicarious liability cases.\(^^{213}\)

\(^{207}\) This issue is of importance principally in secondary line Robinson-Patman cases, since primary line Robinson-Patman and Sherman Act Section 2 predatory pricing actions largely overlap. No sensible predatory pricing analysis of a subsidiary's pricing would accept unquestioningly the transfer prices paid by the subsidiary as costs. *See Vollrath Co. v. Sammi Corp.*, 1990-1 Trade Cas. (CCH) \$ 68,955, at 63,131 (C.D. Cal. 1989) (relying on *Copperweld* to suggest it would be improper to base a predatory pricing case on the intracorporate transfer prices paid by a Japanese manufacturer's U.S. subsidiary) (dictum, since defendants would prevail regardless how the issue is resolved), *aff'd*, 9 F.3d 1455 (9th Cir. 1993) (without discussing issue), *cert. denied*, 114 S. Ct. 2163 (1994).

\(^{208}\) *E.g.*, *Irving Scher, The Robinson-Patman Act: Jurisdictional Issues, in PLI, New Robinson-Patman Act Developments*, at 30 ("[r]elated question") (1990); Robert R. Vawter, Jr., *Jurisdiction, Commerce and Exemptions; Sales, Commodities and Like Grade and Quality Requirements*, 53 Antitrust L.J. 847, 857 (1985) ("Closely related to the question of two separate purchasers is the issue of when there is one seller for Robinson-Patman purposes.").


\(^{210}\) See supra notes 175-79.

\(^{211}\) 148 F. Supp. at 544.

\(^{212}\) Rowe, supra note 189, at 53-56. Although Rowe praised *Bairn & Blank*, he concluded by writing that a single seller could be found "only upon affirmative proof of the parent's direction or participation in the subsidiary's pricing." *Id.* at 56. He cautioned that "recognition of a sales subsidiary as a separate legal entity also creates the possibility that the parent corporation's prices to its own subsidiary may be exposed to the tests of Robinson-Patman." *Id.* at 56 n.43. Unwittingly anticipating an unwinding of the law, he found support for the treatment of subsidiaries as separate in the intra-enterprise conspiracy cases. *Id.* at 56 n.44.

\(^{213}\) *E.g.*, Schwimmer v. Sony Corp. of Am., 637 F.2d 41, 49 (2d Cir. 1980) (affirming summary judgment for defendant, because "the record contains no proof that Sony con-
The challenge to single seller doctrine plaintiffs did not lessen after Security Tire and Copperweld. In Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp., the trial court had extended Security Tire to find that a parent and its subsidiary are a single entity. The court of appeals, by a panel that included Security Tire's author, disagreed. Security Tire had "left intact" the single seller doctrine. Before finding a "single entity," it wrote, "there must be an 'affirmative showing' that the parent actively controls its subsidiary." Although this rule would seem to place on the plaintiff the burden of proof of this issue, the court noted that the plaintiff had "never pleaded actual control"; in denying a petition for rehearing, the court declared that it had "intended to make no holding to locate or measure the burden of proof on the issue of control by the parent corporation."

B. Caribe

Caribe gave the First Circuit a chance to address the single seller doctrine. Defendant BMW AG had won dismissal of price discrimination and resale price maintenance claims filed by a Puerto Rican importer-retailer of BMW automobiles. The case law on the single seller doctrine was in BMW's favor; the trend in the decisions on another issue—the
so-called "availability" defense—was favorable; and its "antitrust injury" defense to the resale price maintenance claim was on a winning streak in the courts. Yet the First Circuit reversed in an opinion by Judge Breyer (as I shall refer to him, since he wrote as a circuit court judge) joined by Judges Boudin and Coffin.

The opinion would be important even were its author not now on the Supreme Court. It applies Copperweld to create a split in the circuits and raises practical Robinson-Patman compliance problems. It evinces more deference to the purposes of that controversial Act than courts have sometimes shown. And it declines to employ the antitrust injury concept to achieve an arguably procompetitive substantive end that neither Congress nor any court has been willing to accept. With the author now writing opinions binding on all the circuits, the opinion is that much more important.

1. The District Court

Caribe's facts are critical but relatively simple. BMW AG funnels most of its North American sales through a wholly owned wholesaler, BMW of North America, Inc. (BMW NA). Most North American retailers buy BMW automobiles from BMW NA, which in turn buys them from BMW AG. Caribe was different. For almost a decade Caribe bought automobiles in Germany directly from BMW AG and sold them at retail in Puerto Rico. This bypassing of the infamous "middle man" failed to work to Caribe's advantage, however; to the contrary, according to the complaint Caribe paid more for cars than BMW NA charged other retailers, as well as (obviously) more than BMW NA paid. After BMW AG terminated its contract with Caribe in December 1990, Caribe filed an action claiming that it had been injured by the pricing disparity.

The district court examined separately the pricing by BMW AG to BMW NA, and by BMW NA to retailers, and found that neither set of

220 Cf. Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1152 (D.C. Cir. 1988) (Mikva, J., dissenting) (majority disregarded policies chosen by Congress). David Balto, in a discussion principally of Judge Breyer's other Robinson-Patman opinions, has discerned a tension between Judge Breyer's interest in economic efficiency and his commitment to interpreting statutes fairly in light of legislative history. David A. Balto, The Robinson-Patman Act and Price Discrimination, Address at the Seminar on Antitrust for the '90s, The Second Century of Change, Minnesota Institute for Legal Education (July 14, 1994).
221 The antitrust injury issues deserve a separate article and are not addressed here.
222 19 F.3d at 747.
223 This article does not discuss Caribe's claimed violations of the rule against resale price maintenance and of the Puerto Rico Dealers' Contracts Act.
lower prices supported a claim. Caribe could not challenge the price paid by BMW NA because Caribe did not allege that it competed with BMW NA in selling automobiles to retailers.\textsuperscript{224} Caribe could not challenge the price other retailers paid to BMW NA because, under what the court regarded (with some justification) as settled law, BMW AG and BMW NA could be regarded as a single seller only if Caribe had affirmatively pleaded that BMW AG actively controlled the terms under which BMW NA sold merchandise.\textsuperscript{225} Because even the Second Amended Complaint alleged nothing more than 100 percent stock ownership,\textsuperscript{226} the court was unwilling to regard BMW AG as having made the two sales requisite for Robinson-Patman Act liability.

As a separate basis for dismissing the complaint, the court ruled that lower prices were always available to Caribe through the simple expedient of buying from BMW NA, rather than BMW AG.\textsuperscript{227} The court also dismissed Caribe's allegations that BMW violated Robinson-Patman Act Sections 2(c), (d), and (e), which govern brokerage payments and allowances and services.\textsuperscript{228} The district court said that Caribe had done nothing more than invoke some "antitrust 'buzzwords,'" which is not sufficient.\textsuperscript{229}

\section*{2. The Appeal}

On appeal, plaintiff Caribe's briefs did little damage to the defendants' position. Caribe did not mention \textit{Copperweld} in connection with the Robinson-Patman Act.\textsuperscript{230} Apparently adopting a strategy of obfuscation, Caribe argued that it competed with BMW NA as an "importer" of automo-

\textsuperscript{224} 821 F. Supp. at 812.
\textsuperscript{225} Id. at 811–12. For this proposition the court relied on \textit{Acme Refrigeration}, \textit{Bain \& Blank}, Island Tobacco Co. v. R.J. Reynolds Indus., Inc., 513 F. Supp. 726 (D. Haw. 1981), and, with a "see also" citation, \textit{Security Tire}.
\textsuperscript{226} Second Amended Complaint, \textit{Caribe}, ¶ 3 ("Upon information and belief, it [BMW N.A.] is a wholly owned subsidiary of BMW A.G."); see also 821 F. Supp. at 812. ("Caribe's unsupported conclusion that BMW AG and BMW NA are a single entity... cannot survive the defendants' well-founded challenge, particularly considering that plaintiff has had ample warning and opportunities to meet its burden.").
\textsuperscript{227} Id. at 813 (noting that Caribe had rejected an offer to buy from BMW NA because Caribe "did not want to lose unspecified benefits as BMW AG's importer-retailer").
\textsuperscript{228} Second Amended Complaint, \textit{Caribe}, ¶¶ 19(c)–(e); see \textit{Antitrust Law Developments}, \textit{supra} note 181, at 431–44.
\textsuperscript{229} 821 F.Supp. at 813–14.
\textsuperscript{230} Cf. Brief of Appellant Caribe BMW, Inc., at 25 (Without making much of it, appellants had drawn the connection with \textit{Copperweld} while discussing it in terms of Sherman Act standing: "Just as under the 'single entity' doctrine described above, BMW A.G. and BMW N.A. are viewed as a single entity for purposes of § 1 of the Sherman Act.") (citing \textit{Copperweld} and quoting three sentences from the case, including the discussion of an enterprise's "unity of interest").
biles and "in the downstream marketing of those cars," glossing over the difference between selling to retail dealers and to consumers. Caribe went on to argue that there is a "traditional 'separate seller' doctrine" and also a "trend toward a categorical conclusion that parent and subsidiary corporations are a single seller," and under either approach Caribe should win (by comparing its relatively high prices with the lower ones paid by retail dealers to BMW NA, on the one hand, and by BMW NA to BMW AG, on the other). This argument ignored (a) the fact that Caribe did not actually compete with BMW NA, and thus could not complain about prices paid by that subsidiary, and (b) that the trend that Caribe described concerned the different purchaser doctrine rather than the single seller doctrine. In contrast, in each of the relatively few reported single seller decisions, parental liability turned on the parent's active control over the subsidiary.

Then at oral argument BMW's lawyer, Irving Scher, encountered Judge Breyer. Breyer peppered Scher with questions, keeping him for almost twice the allotted time. Scher later observed that Breyer was concerned about symmetry: It seemed anomalous to Breyer that parent-subsidiary sales could be protected from challenge because many courts do not consider intracompany transfers sales to different purchasers, but that a parent and subsidiary should not then automatically be considered a single seller. In this context, during oral argument Breyer noted that some courts had applied Copperweld in "different purchaser" cases. Breyer also was interested in preventing evasion of the Robinson-Patman Act. He wondered aloud whether economic considerations necessitated treating some parents as separate from wholly owned subsidiaries for purposes of the single seller doctrine.

3. The Opinion

In the First Circuit's Caribe opinion, Copperweld was the fulcrum for Robinson-Patman analysis. Caribe reversed the findings that the availability defense protected BMW and that the complaint's allegations con-

251 Brief of Appellant Caribe BMW, Inc. at 9.
239 Id. at 11–12.
233 This was called to the First Circuit's attention. Brief for Defendants-Appellees at 13–15.
234 This account of the oral argument is based on an interview with Irving Scher.
235 The court held that there can be no availability defense "if the disfavored customer does not know about the favored treatment." 19 F.3d at 752 (italics removed). This is not controversial. E.g., Irving Scher, How Sellers Can Live with the Robinson-Patman Act, 41 Bus. Law. 533, 537 (1986) ("Under current law, the seller must make the availability of the lower price known to all competing customers, and all of the conditions that must be met to obtain the favorable price must be attainable by most customers.") (citing cases). But cf. Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276,
cerning brokerage and allowances and services had been inadequate. The more important part of the opinion, however, addressed the single seller doctrine. The court concluded its analysis by "find[ing] it appropriate to apply Copperweld's reasoning outside Sherman Act § 1." The court of appeals gave three reasons for this conclusion. The first reason relied entirely on and quoted extensively from Copperweld, as follows:

1283 (9th Cir.) (where, in only occasion of price discrimination, the discount was available to any buyer of more the $300 in goods, it was "not enough" that members of plaintiff association "did not remember having received the offer"), cert. denied, 464 U.S. 822 (1983).

The puzzling thing about the court's principal basis for rejecting the availability defense is that no one else—not BMW, the district court, nor even Caribe—seemed to think the argument important. Caribe's principal assertion was that the lower prices were not practically available because qualifying for them would have required Caribe to change its status from "importer" to "merely a retailer." This is the only "availability" argument mentioned in Caribe's brief. Brief of Appellant Caribe BMW, Inc. at 17 (subsection headed, "Caribe was not required to alter its purchasing status when faced with BMW's discriminatory pricing"). Although it mentioned in passing that Caribe had said it was not told about favorable terms available to retailers, the district court concluded that Caribe would not have become a retailer to obtain those terms at the cost of losing unspecified benefits as an importer. 821 F. Supp. at 813. The district court also explained that, contrary to Caribe's suggestion, BMW had no obligation to announce that were Caribe to become a BMW NA customer it would have enjoyed the same benefits as other customers.

The First Circuit ignored these arguments and relied instead on a sentence in the complaint that suggested that Caribe may not have known about the lower prices. 19 F.2d at 752 ("[u]nbeknowst to Caribe, and beginning by at least 1987, BMW began lowering its prices for BMWs sold to Caribe's competitors . . . .") (quoting complaint) (brackets and italics by court). This was sufficient for the court of appeals to conclude that the complaint could not be dismissed on availability grounds.

On the question of whether lower prices are "available" even if Caribe could enjoy them only by buying from BMW NA, the district court ruled for BMW. 821 F. Supp. at 812–13. The court of appeals treated this issue somewhat casually. Without going so far as to say that a change in status always precludes a finding of availability, the court found it sufficient that Caribe claimed that switching its source of supply from BMW AG to BMW NA would cause it to lose various unnamed advantages flowing from its status as importer. There was no need, to resist a motion to dismiss, to indicate what those claimed advantages were—and, indeed, Caribe's complaint and briefs are silent on the subject.

The court was somewhat forgiving in its reversal of these claims. Caribe went no further than to allege that other retailers had enjoyed "lower prices and 'other economic advantages' which were not made available to Caribe on proportionately equal terms." Brief of Appellant Caribe BMW, Inc. at 23 (quoting complaint). Nowhere was the nature of these "other economic advantages" indicated. Instead, Caribe's brief merely said that the reference to economic advantages "serves to envelop not only rebates, discounts, or allowances," but also such things as "cooperative advertising; handbills; demonstrators and demonstrations; catalogs; cabinets; display materials; [and] prizes or merchandise for conducting promotional contests." Id. at 23–24 (citing FTC Advertising Guide). Without significant analysis or discussion the court of appeals reversed the district court, saying that the pleadings, though "rather sparse . . . are sufficient to give BMW AG and BMW NA notice of the substance of Caribe's complaint." 19 F.3d at 752.

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19 F.3d at 751 (citing City of Mount Pleasant and Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214, 221 (6th Cir. 1985), different purchaser cases where courts followed Security Tire in part because of Copperweld, and, in a "cf." cite, United States v. Waste Management, Inc., 743 F.2d 976, 979 (2d Cir. 1984), which (without citing Cop-
It [*Copperweld*] held that . . . a wholly owned subsidiary could not "conspire" with the parent. That, the Court said, is because they have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . [And t]hey share a common purpose whether or not the parent keeps a tight rein over the subsidiary. . . .

The Court added that a "corporation has complete power to maintain" a portion of the enterprise either in the form of an unincorporated division, or in the form of a separately incorporated subsidiary. But, the economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.

For these reasons, the Court held, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act.238

The *Caribe* court concluded that *Copperweld*’s reasoning should be applied to Robinson-Patman single seller cases. "In essence, the [*Copperweld*] Court saw an identity of economic interest between parent and wholly owned subsidiary that, considered in terms of the economically oriented antitrust laws, warrants regarding them as one."239 Little would be gained, Judge Breyer wrote, by searching for those "few and far between" instances "in which a wholly owned subsidiary would intend to act contrary to the economic interests of its owner."240

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238 19 F.3d at 749 (citations omitted).
239 Id. at 749-50.
240 Id. at 750. *Caribe* evinces a distaste for case-specific factual examination:

Any claimed instance of truly "independent," owner-hostile, subsidiary decisionmaking would meet with the skeptical question, "But, if the subsidiary acts contrary to its parent's economic interest, why does the parent not replace the subsidiary's management?" Given the strength of that joint economic interest, we do not see how a case-specific judicial examination of "actual" parental control would help achieve any significant antitrust objective. Those instances in which a wholly owned subsidiary would intend to act contrary to the economic interests of its owner are likely few and far between, and, if they ever exist, would seem hard to prove.

Id. at 750 (citing, as a cf., Areeda and Kaplow's summary discussion of the rationale for per se rules, AREEDA & KAPLOW, supra note 6, at ¶ 215).

Although single opinions are limited evidence, judicial views on the value of certainty are central to many antitrust decisions. Much recent Supreme Court antitrust jurisprudence has been marked by a majority-driven search for increased objectivity. Calkins, *More Objectivity,* supra note 147; Stephen Calkins, The 1990–91 Supreme Court Term and Antitrust: Toward Greater Certainty, 60 ANTITRUST L.J. 603, 615 (1991) (contrasting views of Justices
Caribe's second reason echoed a concern raised during oral argument: Robinson-Patman evasion. A manufacturer should not be able to “avoid the law simply by creating a wholly owned, but ‘independent’ [subsidiary].”

Oral argument also anticipated the court's third reason, namely, that “applying Copperweld avoids a potential anomaly.” The court perceived an anomaly if a parent and subsidiary were regarded as a single entity for the different purchaser doctrine (based in part on Copperweld) but not the single seller doctrine. The simplest resolution, according to the court, was “to hold in parallel fashion that ownership alone makes a ‘single seller’ of a firm and its wholly owned distributor, just as ownership alone eliminates the possibility of a Robinson-Patman Act 'sale' between them.”

4. Appraisal

There is much to admirable in Judge Breyer's Caribe opinion. Only a judge committed to rationalizing the law could have authored it. Caribe won on arguments it never made. Copperweld is at the heart of the opinion; but only Breyer made an issue of Copperweld. Caribe won the availability issue based on reasoning different from that in its brief. The court relied heavily on secondary sources not cited by the litigants, and it cited cases not mentioned in the briefs. Scalia and Stevens). The pattern has been most conspicuous in predatory-pricing law, where courts prefer to examine costs and recoupment potential rather than subjective intent. Cf. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) (Breyer, J.) (choosing a bright line predatory pricing test). Interest in objectivity also has driven the preference for bright lines in state action, vertical price restraint law, and extraterritorial application of antitrust laws. See Calkins, More Objectivity, supra note 147, at 359-68 (discussing the short shrift given comity balancing approaches in Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993)). Caribe suggests tentatively that Justice Stevens, the Justice most reluctant to sacrifice other values to greater antitrust certainty, may not have gained an ally on this pivotal issue.

19 F.3d at 750. The court recognized that some of the Robinson-Patman Act's structures may interfere with sensible distribution programs but the court asserted that "these same problems exist, in one form or another, regardless of our holding in this case." Id. at 750 (emphasis in original).

Id. at 750.

Id. at 751.

242 See supra note 230.

See supra note 235.

244 The court cited 7 AREEDA, supra note 6, at ¶ 1464, 19 F.3d at 750; AREEDA & KAPLOW, supra note 6, at ¶ 601(c) (cited twice), 19 F.3d at 748, 749; AREEDA & KAPLOW at ¶ 215, 19 F.3d at 750; KINTNER & BAUER, supra note 184, ¶ 21.11 at 192-93, 19 F.3d at 748; KINTNER & BAUER ¶ 21.16, at 212, 19 F.3d at 749; KINTNER & BAUER at ¶ 22.14, 19 F.3d at 750; KINTNER & BAUER ¶ 25.7, at 454-60 (cited twice), 19 F.3d at 750, 751; and James F. Rill, Availability and Functional Discounts Justifying Discriminatory Pricing, 53 ANTITRUST L.J. 929 (1985) (cited twice), 19 F.3d at 750. None of these citations was in the briefs.
Caribe's reliance on Copperweld also has considerable appeal. Commentators found support in the early intra-enterprise cases for the conclusion that a parent and its subsidiary are not necessarily a single seller.\textsuperscript{247} The early different purchaser cases relied on the intra-enterprise cases to support possible liability.\textsuperscript{248} Then, after Copperweld, certain Robinson-Patman defendants succeeded in persuading courts to rely on the new intra-enterprise doctrine to reject liability, because a subsidiary cannot be a different purchaser.\textsuperscript{249} Single seller issue opinions have relied on different person opinions, and vice versa.\textsuperscript{250} Caribe continues this blending of standards and creates symmetry by treating a parent and its wholly owned subsidiary as a single entity for purposes of the single seller as well as the different purchaser doctrines.

Although there is much to admire in Caribe, the opinion fails to address thoroughly some countervailing considerations. That the opinion has weaknesses is not surprising, since the court worked without benefit of briefing on questions the court regarded as central. The Copperweld-based Robinson-Patman part of the opinion is vulnerable to questioning on several grounds.

a. Copperweld Should Have Little Applicability to Robinson-Patman Act Litigation

Caribe gave Copperweld excessive weight. Copperweld was driven in large measure by the distinction, championed by the Solicitor General, between

Perhaps most centrally, the court wrote that although Copperweld "spoke of Sherman Act § 1 and of 'coordinated activity,' its reasoning applies here," and cited Professors Areeda's and Kaplow's text. Areeda & Kaplow, supra at 929. In fact, that normally excellent text is weak on this point and devotes only a single paragraph to it. The paragraph explains that courts increasingly regard intra-enterprise transfers as not sales for Robinson-Patman purposes. As for whether a subsidiary's sales should be attributed to the parent, Areeda and Kaplow state as follows: "Although there is little authority on this question—apart from occasional holdings that members of the same corporate family are separate persons unless one is the alter ego of the other [citing Baim & Blank]—the courts probably would not allow a seller to practice otherwise unlawful discrimination through the simple formality of using two selling corporations." Areeda & Kaplow, supra at 929. The authors declare that both conclusions "are reinforced by the Supreme Court's Copperweld holding." This paragraph may or may not provide sound policy advice, but it fails to discuss Acme Refrigeration, Inc. v. Whirlpool Corp., 785 F.2d 1240 (5th Cir.), cert. denied, 479 U.S. 848 (1986), and the other authorities cited supra note 213.

Caribe also cited several cases not included in any brief: Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co., 129 F. Supp. 736, 739 (D. Mass. 1955); Mueller Co. v. FTC, 323 F.2d 44, 46–47 (7th Cir. 1963), cert. denied, 377 U.S. 923 (1964); and Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350, 355–56 (E.D. Wis. 1979). 19 F.3d at 749, 752. Each case was included in a string citation with one or more other cases that were included in a brief, and none of the cases appears to have contributed to the court's reasoning or result.

\textsuperscript{247} See supra note 212.

\textsuperscript{248} See supra notes 195–96, 212.

\textsuperscript{249} See supra notes 203–05.

\textsuperscript{250} See supra notes 197 & 213.
unilateral and concerted action. From that distinction flowed the interpretation of the words "contract, combination . . . or conspiracy." The key was policy, not language. "Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny." And because a corporation's agreement with its wholly owned subsidiary is indistinguishable in competitive effect from an agreement with a division, such an agreement cannot support a Section 1 violation.

This reasoning has limited applicability to the Robinson-Patman Act. Caribe interpreted the statutory word "person" and considered when sales by two legally separate corporations should be considered sales by a single selling "person." The answer may not rest on whether the two corporations can lessen competition or sacrifice independence through an agreement.

Copperweld did not declare that all wholly owned subsidiaries should be considered part of their parents for purposes other than Sherman Act conspiracy law. Many courts have limited Copperweld's scope. Courts do not rely on Copperweld to shield criminal conspiracies, or to impose liabilities on parents for acts of subsidiaries, or to prevent a subsidiary from suing its parent. In other areas of the law, as well, many courts have recognized that Copperweld turned on unique Sherman Act considerations and should not be applied broadly beyond that statute.

One could distinguish these cases limiting Copperweld because they do not interpret an antitrust law such as the Robinson-Patman Act provision interpreted by Caribe. Courts have long recognized the tension between the purposes of the Sherman and Robinson-Patman Acts, however. Because Copperweld's reasoning is wedded so closely to the Sherman Act's structure, Copperweld's language about parents and subsidiaries should not be applied quickly to Robinson-Patman decisions.

Courts should hesitate especially before applying Copperweld to the single seller doctrine. Copperweld explained that an interest in permitting firms to organize themselves efficiently counseled restraint in applying

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251 467 U.S. at 770–71.
252 Id. at 774.
253 See supra note 174.
254 See supra notes 175–78.
255 See supra note 179.
256 See supra Part IV and note 183.
257 But cf. supra notes 183–84 (parents may not be vicariously liable for their subsidiaries' antitrust violations).
258 But cf. cases cited supra notes 203–05 (applying Copperweld).
the relatively strict rules of Sherman Act Section 1. 259 Corporate efficiency is enhanced by applying Copperweld to different purchaser cases such as Security Tire. An interest in efficient internal corporate structures, however, counsels against treating the two corporations as one for the single seller doctrine. 260

b. Avoidance of a Perceived Anomaly Does Not Require Extension of Copperweld

The Caribe court was troubled by a perceived anomaly: If a parent and wholly owned subsidiary are not a single seller, how can that subsidiary's purchases not be those of a "different purchaser?" Although the juxtaposition of these rules is facially worrisome, the court may have been unduly concerned. Any anomaly would arise in fact (not just in theory) only when the parent lacked sufficient control over the subsidiary. More important, the law will always have what can be considered anomalies: two units regarded as one for the Sherman Act, or the Robinson-Patman Act, or civil rights laws, or civil conspiracy, but not for corporate law purposes, or RICO, or bankruptcy law, or criminal conspiracy. Given the many different purposes of different bodies of law, consistency is impossible. The presence of perceived inconsistency does not prove that a decision is wrong.

Caribe was concerned particularly about the co-existence of inconsistent rules for the Robinson-Patman different purchaser and single seller doctrines. Other courts, as has been noted, have contemplated that the two doctrines are or should be harmonious. Harmony could be achieved by extending or limiting Copperweld, however, so harmony does not work only toward Copperweld's extension. Moreover, since Copperweld's interest in corporate efficiency works for the case's extension to the different purchaser doctrine but against its extension to the single seller doctrine, 261 courts should not overvalue harmony between these doctrines. 262

259 467 U.S. at 771, 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.").

260 This difference in efficiency consequences may be behind the Fifth Circuit's refusal to extend Copperweld to single seller doctrine cases, see supra notes 214–17.

261 See supra text at note 260.

262 Although Copperweld provides relatively little support for the Security Tire different purchaser rule, there are other justifications. It is difficult to imagine how an intracorporate price could harm competition, since no third party is affected until the product leaves the corporate family, and there are so many alternative ways that a parent could subsidize a subsidiary's operations if it wished to do so. Nor is it easy to see a justification for interfering with internal pricing. See Shelanski, supra note 201.
c. Concern About Evasion of the Robinson-Patman Act Should Not Be Overstated

The Caribe court was on somewhat firmer footing when it expressed concern about the possibility that a different rule could encourage evasion of the Robinson-Patman Act. Whether a court agrees with that Act's purposes or not, it is the law of the land unless Congress changes it, and courts must uphold it.

Given the technical nature of Robinson-Patman, however, courts should hesitate before concluding that something is improper evasion. For instance, it is reasonably settled that a manufacturer may charge a single price to all comers, even though such a policy disadvantages wholesalers. A single-price policy may seem to harm the Act's interests in fairness—and in limiting the advantages of chains, and so forth—but few would advocate interpreting the Act expansively to prevent level pricing. Firms are free to structure their operations to maximize efficiency consistent with the law, even though at times this will involve taking steps that could be characterized as seeking to evade Robinson-Patman liability.

d. Caribe's Rule Potentially Creates Practical Problems

Before Caribe, Robinson-Patman counseling about pricing by subsidiaries was relatively straightforward. If a parent actively controlled a wholly or partly owned subsidiary (and particularly its pricing), the parent was likely responsible under Robinson-Patman for that subsidiary's pricing; if there was no such control, the parent could price without regard to what the subsidiary was doing or planning to do. Now, consider a Robinson-Patman counselor's plight. In theory, active control remains critical in most courts; but a corporation may not be confident what law

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263 Antitrust Law Developments, supra note 181, at 430.
264 See generally Kintner & Bauer, supra note 184, at 124 ("Unless it can be demonstrated that the parent corporation actually exercised some degree of control over its subsidiary's pricing practices, usually there will be no Robinson-Patman Act problem. The presence of common ownership and common directors does not, in itself, make two corporations a single seller.") (citing Baim & Blank); Chris S. Coutroulis, Developments in Robinson-Patman Law, 58 Antitrust L.J. 443, 454-55 (1989) ("where the subsidiary is truly independent in its pricing and sales strategy, and is not simply a device to avoid the strictures of the Robinson-Patman Act, dual selling—that is, selling by both the parent and the subsidiary—should withstand Robinson-Patman scrutiny"); Robert M. Klein, The Robinson-Patman Act: Jurisdictional Aspects and Elements, 59 Antitrust L.J. 777, 787 (1991) ("the control element . . . is of determining importance"); "for compliance or planning purposes, the opportunity to reach different customers through subsidiary operations without Robinson-Patman constraint appears available if the seller is willing to assume the obligations of bona fide entity separation"); Vawter, supra note 208, at 857 n.21 (corporate affiliation not enough; "the critical inquiry is the extent to which the corporate parent controls the pricing decisions of the wholly-owned subsidiary").
will be applied to any particular transaction. Any court outside the Fifth Circuit may be persuaded to follow Caribe, which represents the views of the First Circuit and the only Supreme Court Justice to address the question.

Following Caribe is not as easy as it might seem, however. Some courts have limited Copperweld to 100 percent stock ownership (with de minimis exceptions permitted). Other courts have been more aggressive, ratcheting the bright line down to 51 percent ownership. If Copperweld controls Robinson-Patman decisions, presumably Robinson-Patman law will vary with the shifting reach of Copperweld; and, at present, a prudent counselor would assume that a parent corporation might be responsible for pricing by every majority-owned subsidiary.

Holding parent corporations automatically responsible for pricing decisions by majority-owned subsidiaries seems problematic. Business considerations may make it important that subsidiaries price independently. Parent corporations may need to remain removed from subsidiaries for nonantitrust legal reasons, moreover—most notably to prevent some future plaintiff from relying on pricing interference to "pierce the corporate veil." If parent corporations were required to interfere excessively with subsidiaries, we would have a true anomaly: a case (Copperweld) that sought to enhance business flexibility being applied in a way that could reduce efficiency.

e. Conclusion of Appraisal

The First Circuit applied Copperweld too quickly to the single seller doctrine. Attractive arguments support this application, but the application also raises serious concerns. Without benefit of briefing on the issue the court failed adequately to address these concerns and make clear the meaning of its holding.271

266 See supra note 46.
267 See supra note 44.
269 Cf. Shelanski, supra note 201 (many factors affect sensible pricing).
270 See supra note 175.
271 One alternative would be to interpret Caribe as limited to the 100% ownership cases discussed in Copperweld proper, and to leave to the future decisions about more difficult cases.
On the other hand, the Caribe court appears to have sensed that corporations can avoid Robinson-Patman limitations too easily by adding a corporate layer; and perhaps the court is correct. The original single seller case, Baim & Blank, likely took a wrong turn when it imported the narrow and unrelated "alter ego" concept from corporate law.\textsuperscript{272} A more general showing of control, and especially of control directly or indirectly over pricing,\textsuperscript{273} ought to be sufficient. Nor would there seem to be sound objection to presuming control (rebuttably) where there is substantial equity domination (or perhaps even majority ownership), leaving it to the corporate defendant, with its superior access to critical information, to demonstrate distance.\textsuperscript{274} In short, Caribe addressed an important issue with insight, and it may have been well advised to prescribe change; but the court was probably a little too quick to extend Copperweld’s bright line rule to this new context.

VI. CONCLUSION

Caribe is just one example of the extraordinary array of cases that have addressed a seemingly unremarkable opinion. Copperweld supplied what appeared to be a clear statement about the capacity of corporations to conspire, but clarity continues to elude the courts. Judicial decisions during the past decade have applied Copperweld’s language and analysis to fundamental nonconspiracy Sherman Act issues, and through this process have helped build the legacy of the William Baxter-led Antitrust Division. Other courts have struggled with whether to limit Copperweld to the Sherman Act that supplied the structural core of the opinion. The First Circuit, in Caribe, issued an impressive opinion that nonetheless may have adopted too quickly a new application of Copperweld’s bright line rule. In retrospect, Copperweld appears to have raised as many questions as it answered.

\textsuperscript{272} Baim & Blank is discussed supra text at notes 209–12.

\textsuperscript{273} For an argument that control over pricing is important for the single seller doctrine but not for the different purchaser doctrine, see Huddleston, supra note 201, at 969–70.

\textsuperscript{274} Recall that Acme Refrigeration, Inc. reserved on locating and measuring burden of proof. See supra text at note 217.