Chapter 13

"In Necessary Things, Unity"—Conspiracies, *Copperweld*, and Health Care Joint Ventures

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I. INTRODUCTION

§ 13:1 In general

Strategic partnerships and joint ventures are commonplace in the health care industry, perhaps more so than in any other sector of the economy. Among many reasons, the fragmented nature of the health care delivery system unquestionably has promoted joint ventures as a means to align incentives and long-term business interests of otherwise independent market participants. Thus, many health care joint ventures are undertaken between physicians or medical groups and hospitals, and involve both service lines (*e.g.*, cardiac services) and delivery modalities (*e.g.*, ambulatory surgery and imaging centers).

Many such joint ventures represent an economic truce. That is, the joint venture allows the physician partners to capture revenue that belonged historically to the hospital, and concomitantly, allows the hospital to preserve part of the revenue that might otherwise be lost to direct competition from physicians. In some cases, the partners may remain erstwhile competitors.

For tax-exempt hospitals, the IRS expects hospital-

physician joint ventures to demonstrate significant alignment with the hospital's charitable mission. Thus, most such arrangements today include agreements to support the charity care policies of the hospital partner, and give the hospital approval or objection rights over changes in the purposes of the joint venture or decisions that would potentially impair the hospital's tax exemption. In some cases, the joint venture documents reflect an intention to resolve any such conflicts; in other cases, the hospital's remedy may be limited to withdrawal or dissolution.

Beyond supporting the hospital's general and charitable purposes, the joint venture may be more or less independent of the hospital. This fact raises an important antitrust question—can the joint venture conspire with the hospital owner (or, for that matter, the physician owners) to violate § 1 of the Sherman Act? The question is frequently posed in the context of whether a hospital and its joint venture subsidiary, *e.g.*, an ambulatory surgery center, can negotiate as one with third party payors. The question also may arise with respect to agreements not to deal with third parties, or to allocate territories.

The ability of a hospital and a joint venture to act as a single economic entity may be advantageous to the joint venture. Although we do not suggest that every joint venture does, or should, pursue this result, the issue is frequently raised, particularly if the market for the joint venture's services is strongly competitive.

In 1984, the Supreme Court, in its *Copperweld* decision,[1] held that the economic interests of a corporation and its wholly-owned subsidiary are to be considered unitary, and the two therefore should be considered one entity for purposes of the antitrust laws. As such, agreements not to compete between a parent and its wholly-owned subsidiary are beyond the reach of § 1 of the Sherman Act. But the Court conspicuously did not extend its analysis to agreements between a firm and its partially-owned subsidiary or joint venture, instead leaving the lower courts to read between the lines of *Copperweld* over almost twenty-five ensuing years.

[Section 13:1]

[1] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

This chapter examines the way in which courts have interpreted *Copperweld* in a variety of fact situations over nearly twenty-five years and discusses those interpretations in the context of health care systems and joint ventures.

§ 13:2 The "intra-enterprise conspiracy" doctrine

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.[1] By definition, § 1 applies only to concerted, as opposed to unilateral, conduct. Concerted action requires a plurality of actors. Prior to *Copperweld*, there was a widely held judicial view that any two legally separate entities could constitute the required plurality. This view, one of form rather than substance, even extended to a corporation and its wholly-owned subsidiary. This premise is commonly known as the "intra-enterprise conspiracy" doctrine.

To the extent a rationale existed for the intra-enterprise conspiracy doctrine, it was to be found in the origins of the Sherman Act itself. The Act is styled as an anti-*trust* law, and the commercial and industrial "trusts" of the late nineteenth century were its principal target. Those trusts were combinations of companies in which the stock of the constituent companies was held in a voting trust by a central board of trustees. Those arrangements effectively eliminated competition between the constituent companies, which were affiliated through the trust notwithstanding that the stock ownership of the companies technically remained separate. Thus, the trusts in fact constituted a form of intra-enterprise conspiracy in restraint of trade.

After the passage of the Clayton Act in 1914, the antitrust enforcement agencies had a more specific weapon with which to prevent the formation of anticompetitive business combinations, including trusts, in the first instance. Yet, the notion persisted that § 1 of the Sherman Act should be understood to reach the conduct of existing trusts, including agreements between corporations within a trust.[2] This view of intra-enterprise conspiracy ultimately extended beyond trusts to other corporate relationships.

[Section 13:2]

[1] 15 U.S.C.A. § 1.

[2] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 788, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (Stevens, J., dissenting).

The Supreme Court appeared to affirm the intra-enterprise conspiracy doctrine in its 1947 decision in *U.S. v. Yellow Cab Co.*[3] In *Yellow Cab*, the Justice Department alleged, *inter alia*, a § 1 conspiracy among several taxicab operating companies, and a taxicab manufacturing company, all of which were owned, either wholly or partially by the same individual. The government asserted that exclusive agreements between the taxicab operating companies and the manufacturing company precluded the former from purchasing taxicabs from any other manufacturer, thereby restraining trade. Reversing the trial court's dismissal of the § 1 claims, the Supreme Court stated that "the presence or absence of an unreasonable restraint on interstate commerce . . . may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."[4] The Court thus concluded that the corporate interrelationships of alleged conspirators were not determinative of the applicability of the Sherman Act.

Subsequent to *Yellow Cab*, the Supreme Court affirmed the intra-enterprise conspiracy doctrine in several other cases, suggesting a bright line rule that if a corporate subdivision were separately incorporated, a plurality of actors would exist that is sufficient to expose the separately incorporated subdivision and its parent to § 1 liability.[5] However, because the Supreme Court never clearly explained the rationale underlying the intra-enterprise conspiracy

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[3]U.S. v. Yellow Cab Co., 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947) (overruled by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)). However, in *Copperweld*, the Court backed away from the view that *Yellow Cab* was a direct affirmance of the doctrine.

[4]U.S. v. Yellow Cab Co., 332 U.S. 218, 227, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947) (overruled by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)).

[5]*See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968) (overruled by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)) (common ownership between defendants, a parent and its wholly-owned subsidiary, did not immunize them from § 1 liability because they "availed themselves of the privilege of doing business through separate corporations."); Schine Chain Theatres v. U.S., 334 U.S. 110, 68 S. Ct. 947, 92 L. Ed. 1245 (1948) (overruled by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628

principle, lower courts began chipping away at the doctrine, creating a number of tests that limited the scope of its application.[6] Such tests included the "actual competitor" test, under which the intra-enterprise conspiracy doctrine would apply only to cases in which the related corporations actually competed with each other, the "holding out" test, which required that the related corporations hold themselves out to the public as competitors or as distinct entities in order for the doctrine to apply, and the "internal decision" test, which immunized certain internal decisions among related corporations from § 1 liability.[7]

In the face of lower court efforts to read the intra-enterprise conspiracy doctrine out of the Sherman Act, the Supreme Court ultimately reversed its view in 1984.

§ 13:3 The *Copperweld* decision

In *Copperweld Corp v. Independence Tube Corp.*,[1] the issue narrowly framed by the Court was whether a parent and its wholly-owned subsidiary were capable of conspiring in violation of § 1 of the Sherman Act. The facts presented a strong case for abandoning the intra-enterprise rule.

Copperweld Corporation purchased Regal Tube Company from Lear Siegler, Inc. Lear Siegler had operated Regal as an unincorporated division, but Copperweld instead organized Regal as a wholly-owned subsidiary. Shortly after Copperweld's acquisition of Regal, however, a former officer of Lear Siegler established his own steel tubing business, Independence Tube Co., which began to compete with Copperweld. Copperweld and Regal jointly contacted and discouraged firms that contemplated doing business with Independence Tube, in an effort to thwart the competing

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(1984)) (joint negotiations conducted by parent and its wholly-owned subsidiary violated § 1).

[6] *See* Jones, "Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach," 71 Cal. L. Rev. 1732, 1743 (1983); *see also* Note, " 'Conspiring Entities' Under Section 1 of the Sherman Act," 95 Harv. L. Rev. 661 (1982).

[7] Note, " 'Conspiring Entities' Under Section 1 of the Sherman Act," 95 Harv. L. Rev. 661, 668-76 (1982).

[Section 13:3]

[1] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

business. In fact, Copperweld and Regal were successful in convincing at least one company to void its contract with Independence Tube. In response, Independence Tube filed a complaint asserting, among other claims, that Copperweld and Regal had conspired in violation of § 1 of the Sherman Act. Independence Tube was successful in its case against Copperweld and Regal Tube in both the trial court and the Seventh Circuit Court of Appeals.

The Supreme Court reversed, holding that Copperweld and Regal, as parent and wholly-owned subsidiary, were *not* capable of conspiring to violate § 1 of the Sherman Act, but rather that their activities were those of a single enterprise. The Court abandoned its prior acquiescence in the intra-enterprise conspiracy doctrine and in fact averred that the Court had "never explored or analyzed in detail the justifications" for such a doctrine.[2] The Court went so far as to say that its reliance on the intra-conspiracy doctrine in prior decisions, including in *Yellow Cab*, was in "no way necessary to the result" in those cases.[3]

Nonetheless, the Court had reversed its analytical focus from that of *Yellow Cab*, finding the intra-enterprise conspiracy doctrine to be inherently flawed because it created an "artificial distinction" in the form of a corporation "at the expense of substance."[4] The Court observed that a corporation's decision to create a subsidiary instead of corporate division should not increase the corporation's exposure to antitrust liability under § 1 of the Sherman Act. Certainly, it would have been illogical to hold Copperweld liable for conspiring with Regal when, prior to the acquisition, the same conduct by Lear Siegler and Regal would have been beyond the reach of § 1.

In explaining its reasoning, the Court identified three attributes that rendered a parent and wholly-owned subsidiary incapable of conspiring:

(1) a parent and its wholly-owned subsidiary have a complete "unity of interest;"

[2] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 766, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[3] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 760-65, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[4] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 763, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

(2) the objectives of the parent and subsidiary are "common, not disparate;" and
(3) their general corporate actions are guided or determined by a "[single] corporate consciousness."[5]

The Court further explained that a parent and a wholly-owned subsidiary *always* share a unity of purpose, whether or not the parent maintains a tight rein over the subsidiary, because the parent "may assert full control at any moment" if the subsidiary fails to act in the parent's best interest.[6]

The three attributes, along with the concept of momentary control and the admonition to consider the substance of a relationship and not the form, have suffused the post-*Copperweld* analyses of the lower courts in determining whether conduct challenged under § 1 is concerted or unitary. These principles collectively supplanted the intra-enterprise conspiracy doctrine with the "Copperweld Doctrine."

§ 13:4 The significance of unitary treatment under *Copperweld*

Treatment as a single entity under § 1 of the Sherman Act does not exempt an enterprise from antitrust liability, but rather allows its conduct to be judged under § 2 of the Sherman Act. The standards by which a firm's conduct is judged under § 2 differ, however, from those under § 1, in that § 2 tolerates a higher degree of "anti-competitiveness" before liability will attach.

As stated, § 1 prohibits concerted conduct that unreasonably restrains trade.[1] To determine the "unreasonableness" of the restraint on trade, courts typically analyze the concerted conduct under two standards, the "rule of reason" standard and the "per se" rule. Under a rule of reason analysis, courts examine the full context of the concerted conduct to determine whether the actual pro-competitive effects of

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[5]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[6]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-72, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[Section 13:4]

[1]15 U.S.C.A. § 1; *see* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

the conduct outweigh the harm to competition.[2] However, certain types of concerted conduct, such as horizontal price fixing and market allocation, are deemed to inherently restrain trade and to lack any redeeming purpose.[3] This inherently anticompetitive conduct is subject to the strict *per se* rule, in which case courts automatically presume illegality of the conduct without inquiry into the harm it has actually caused.[4]

In contrast, § 2 reaches only conduct that creates, sustains or threatens monopolization, but proving such monopolization is typically more difficult than establishing that a restraint is "unreasonable" under § 1.[5] In order to establish an offense of monopolization under § 2, there must be: (1) proof of actual or threatened monopoly power—the power to raise prices or reduce output without relinquishing business prospects that would make the conduct unprofitable; and (2) conduct designed to maintain or enhance that power improperly.[6] This second element is generally understood to be conduct that rises to the level of "predatory" or "unreasonably exclusionary" activities directed toward competitors or potential competitors.[7]

Because § 1 only prohibits *concerted* conduct that unrea-

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[2]*See* Board of Trade of City of Chicago v. U.S., 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918).

[3]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[4]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[5]15 U.S.C.A. § 2; s*ee* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[6]*See, e.g.,* U.S. v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986).

[7]*See* Miles, *Health Care and Antitrust Law,* § 5.4 at 5-39 to 5-47; Matter of International Telephone & Telegraph Corp, 104 F.T.C. 280, 1984 WL 565367 (1984). "Predatory" conduct generally means conduct that is rational to the actor only because of its detrimental effects to competition and usually involves a short-term economic sacrifice of profitability for the actor where as "unreasonably exclusionary" conduct generally means conduct that drives or plainly threatens to drive an equally efficient firm out of the market without an economic sacrifice on the part of the actor.

sonably restrains trade, "it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability."[8] In *Copperweld*, the Supreme Court explained that Congress, when drafting the Sherman Act, left this intentional gap in the Act's proscription in order to promote competitive enthusiasm of a single entity.[9] Accordingly, enterprises that can obtain single entity status under the Copperweld Doctrine are permitted a wider range of conduct, and escape the potential of *per se* scrutiny.

II. EXTENSION OF THE *COPPERWELD* DOCTRINE

§ 13:5 In general

The holding of *Copperweld* is narrow—confined to a parent and wholly-owned subsidiary—but the principles on which the decision rests are capable of broader reach. Thus, the concepts of a "unity of interest" and a "single corporate consciousness" have been advanced by antitrust defendants as a basis to avoid § 1 liability in a wide range of situations other than that of a parent and its wholly-owned subsidiary. But judicial views of these arguments have been far from uniform and in some cases conflicting.

To consider how the courts have extended *Copperweld*, it is useful to categorize the decisions according to the type of relationship between the parties at issue. Somewhat arbitrarily, the discussion that follows divides cases applying the Copperweld Doctrine as follows:

(1) Cases assessing the unity of interest between parties engaged in a joint enterprise.
(2) Cases assessing the unity between a partially-owned subsidiary or joint enterprise and the parties who own or control it. Within this category, the relationships at issue can be further divided into:
   (a) Partial, but nearly complete, ownership of the joint venture or subsidiary;

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[8] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

[9] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

(b) Significantly incomplete ownership of the joint venture or subsidiary; and
(c) Entities owned, in whole or in part, by the same third party (*i.e.*, "sister" subsidiaries and separate companies with common owners).

(3) Cases assessing the unity between parties that do not evidence any common ownership.

§ 13:6 Relationships between the parties engaged in a joint enterprise

Given the focus of this chapter, the cases in this section are something of a detour. Although *Copperweld* focused on the *vertical* relationship between a parent and subsidiary, its rationale has emerged frequently in cases where the *horizontal* joint conduct of the parties to a venture (*i.e.*, the "parents" themselves) has been at issue. Although factually distinguishable from the analysis of parent-subsidiary relationships, the cases are of interest for the courts' views of the *Copperweld* principles. We also discuss here a recent Supreme Court case that is notable because it does *not* discuss *Copperweld* in this context.

Joint ventures frequently entail related agreements between the joint venture partners. Antitrust analysis of such agreements falls within the so-called "ancillary restraint" doctrine, which holds that restraints that would otherwise be condemned as *per se* violations will be analyzed under the rule of reason when they are reasonably necessary for the operation of an efficient joint venture, and no broader than necessary for that purpose. The rationale of *Copperweld* can be overlaid on this analysis in the sense that, to the extent the partners share a unity of purpose through the joint venture, their agreements might be considered those of a single economic actor, rather than separate actors, to which neither the *per se* rule nor rule of reason analysis under § 1 would apply.

§ 13:7 Relationships between the parties engaged in a joint enterprise—Sports leagues

The relationships among teams that make up professional sports leagues present a good example in a non-health care context of joint venturers who must refrain from competing in some respects but not necessarily in others. Some agree-

ment to refrain from independent decision-making is necessary for a sports league to function at all. But how far does that rationale extend? Courts have held that *Copperweld* deems the members of sports leagues to act with a unity of interest in matters such as licensing team paraphernalia[1] and licensing broadcast rights.[2] However, the courts have ruled with consistency that sports leagues are not unitary in nature, and thus are capable of conspiring to violate the antitrust laws, when it comes to labor agreements.[3] Other courts have ruled that the sports leagues do not act as a single enterprise, but rather as competitors, in adopting rules limiting franchise sales or relocations.[4]

Cases denying single entity status to sports leagues outside of the labor context would seem to rest on questionable logic, which generally posits that because teams compete for fan support, management and player talent, and broadcast revenues, and because they often do not fully share profits and losses, their interests are more diverse than alike. But as one commentator has noted, such an analysis overlooks the fact that in some respects, teams in a league must cooperate to ensure the integrity of the franchises, maintain fan support, and create the competition that brings

[Section 13:7]

[1]American Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941 (N.D. Ill. 2007).

[2]Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 95 F.3d 593 (7th Cir. 1996).

[3]*See, e.g.*, Fraser v. Major League Soccer, LLC, 284 F.3d 47 (1st Cir. 2002) (noting that, despite unique structure of MLS, lower court may have been incorrect to find single entity status under *Copperweld*; § 1 claim dismissed on other grounds); McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) (contesting the NFL's elimination of severance benefits and the player retirement system); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) (challenging the NFL's football draft on antitrust grounds); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (opposing an NFL policy requiring franchises signing a free agent to compensate the player's former team).

[4]Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994), as amended on denial of reh'g, (Oct. 26, 1994); Los Angeles Memorial Coliseum Com'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984).

in the revenues.[5] Indeed, the Seventh Circuit has held that in order to determine whether a unity of interest exists, courts should analyze a sports league on a case-by-case basis, one facet at a time.[6] In this regard, the court emphasized that, "*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities."[7] In other words, the fact that joint venturers need not, or do not, cooperate in every facet of their operations does not necessarily deprive the venture of a *Copperweld* defense to a § 1 claim. Although the courts retain mixed views of sports leagues, the Seventh Circuit's approach is helpful to many health care joint ventures.

§ 13:8 Relationships between the parties engaged in a joint enterprise—Associations and cooperatives

Similar to sports leagues, the activities of associations and cooperatives also have been analyzed under *Copperweld*. In these cases, it is apparent that courts are disinclined to extend single entity analysis to agreements that implicate the independent economic interests of the participants, as opposed to their mutual purposes in the joint undertaking. This is consistent with the ancillary restraint doctrine.

In a significant and frequently-cited decision, *Freeman v. San Diego Association of Realtors*,[1] the Ninth Circuit Court of Appeals considered whether the Copperweld Doctrine applied to the conduct of eleven associations of realtors, each of which owned shares in a multiple listing service (*i.e.*, a joint venture of the associations), but that otherwise did not have any common ownership or other corporate relationship with each other. The associations were alleged to have conspired

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[5]Note, "There's No 'I' in 'League': Professional Sports Leagues and the Single Entity Defense," 185 Mich. L. Rev. 183 (Oct. 2006) (cited by the court in *American Needle*). The Note argues that *all* non-labor agreements of professional sports leagues should be analyzed as unitary conduct.

[6]Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996).

[7]Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 95 F.3d 593, 599 (7th Cir. 1996).

[Section 13:8]

[1]Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir. 2003), as amended on denial of reh'g, (Apr. 24, 2003).

through the multiple listing service (MLS) to fix the prices of certain support fees charged by the associations to real estate brokers who subscribed to the MLS. In its analysis, the court distinguished factual situations in which there is "substantial common ownership" among the owners of the joint enterprise from those in which there is an "absence of economic unity." The court defined substantial common ownership as either: (1) a fiduciary obligation to act for each other's economic benefit; or (2) an agreement to divide profits and losses.[2] In those cases, said the court, the individual firms function as an economic unit and are generally treated as a single entity legally incapable of conspiring under § 1. The court then examined: (1) the extent of common economic interests and goals among the shareholder realtor associations; and (2) the extent of both actual and potential competition among the associations.

Under the facts of the case, the court concluded that the eleven associations did not act with a unity of interest in all respects in operating the MLS and thus, their joint venture was capable of acting as a conspiracy among the associations to violate § 1. The court's determination was based, in part, on the facts that the associations did not share profits among themselves and that they were actual competitors for realtor membership in the same geographic area. While holding that agreements wholly internal to the MLS would be presumptively immune from antitrust challenge, the court deemed the fee agreements at issue to extend beyond the MLS to implicate the independent economic interests of the shareholder associations.

Although *Freeman* on its face would appear to take a narrow view of *Copperweld*'s common interest test (by confining it to a two-pronged test of "economic unity"), the outcome is consistent with the ancillary restraint doctrine in that there was no basis to conclude that an agreement to set a uniform price for support services provided separately by the associations who owned the MLS was necessary to the efficient functioning of the MLS.[3]

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[2]Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 2003), as amended on denial of reh'g, (Apr. 24, 2003).

[3]A similar analysis was applied by the Tenth Circuit in Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195 (10th Cir. 2006), which

§ 13:9 Relationships between the parties engaged in a joint enterprise—Hospital joint operating agreements

There have been two cases challenging pricing agreements by hospitals within the context of a joint operating arrangement. *HealthAmerica Pennsylvania, Inc., et al. v. Susquehanna Health System, et al.*[1] concerned a § 1 challenge to a joint operating arrangement under which two health care systems delegated the authority for the management and operation of all of their subsidiary entities, including matters of overall policy, oversight of management, long range planning, budgeting, managed care, and overall programs and services, to a nonprofit entity (the Alliance) of which the systems were the members. The two parent systems remained independent of each other, retained the ownership of their respective assets, and shared equally in the financial risks and rewards of the Alliance. Each party also retained authority for its own mission-related, governance, credentialing, medical staff, and quality matters, but could not engage in any major corporate transactions, or initiate or terminate any program or service, without the approval of the Alliance. Following the imposition of significant price increases by the Alliance, the joint operating arrangement was challenged by a third party payor as unlawful price fixing.[2]

Concluding that the Alliance's somewhat unconventional

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held that *Copperweld*'s requisite unity of interest was lacking with respect to the defendant association's decision to deny participation in a trade show to a non-member competitor. The court stated that the decision could not be fairly characterized as one involving day-to-day operations of the association, but rather was one primarily furthering the independent economic interests of the members. *Compare* City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc., 838 F.2d 268 (8th Cir. 1988) (holding that alleged concerted refusal to deal among constituent corporations of a rural electric cooperative was not cognizable under § 1 because none of the defendant corporations pursued interests antithetical to the cooperative as a whole).

[Section 13:9]

[1]Healthamerica Pennsylvania, Inc. v. Susquehanna Health System, 278 F. Supp. 2d 423 (M.D. Pa. 2003).

[2]To resolve potential antitrust concerns arising from the formation of the Alliance, the parties sought approval from the Pennsylvania Attorney General and eventually entered into a consent judgment with the Commonwealth, which required that certain cost savings be returned to

joint operating structure would not preclude a finding of single entity status under *Copperweld*, the district court found that the Alliance "enjoys substantial and significant control over the defendant hospitals." It concluded:

> Although the organizational form employed here is unique, . . . the Alliance *functions* as a single entity. Defendants' composition is akin to a corporate parent (Susquehanna Alliance) and its subsidiaries (the hospitals and Affiliates). When defendants act, they "do not suddenly bring together economic power that was previously pursuing divergent goals." [citing *Copperweld*] . . . Decisions therefore are not the product of conspiracy; they are the product of Susquehanna Alliance's exercise of authority.[3]

In the period following the formation of the Alliance, significant organizational and operational changes also occurred. The medical staffs of the two Williamsport hospitals were merged. A plan of service consolidation and differentiation was implemented, resulting in the provision of all medical/surgical inpatient services and emergency services at Williamsport Hospital, with psychiatric services, outpatient surgery, outpatient cancer treatment, renal dialysis, and community health services being provided at Divine Providence Hospital. The physician groups of the two parties also were merged into a single entity, Susquehanna Physician Services.

The District Court in *Susquehanna* distinguished *New York ex rel. Spitzer v. Saint Francis Hospital*,[4] which struck down a similar joint operating arrangement between two Poughkeepsie, NY hospitals, and on which the plaintiff payors relied in their challenge to the Alliance. In 1994, the two Poughkeepsie hospitals obtained a certificate of need to jointly operate three clinical services through a new legal entity called Mid-Hudson Health. In 1995, the scope of the activities jointly undertaken through the Mid-Hudson Health was enlarged under an agreement to unify "substantially all" hospital operations, which included a covenant between the hospitals not to compete with each other or with Mid-

the community. The challenged price increases occurred after the expiration of the consent order.

[3]Healthamerica Pennsylvania, Inc. v. Susquehanna Health System, 278 F. Supp. 2d 423, 435 (M.D. Pa. 2003) (emphasis in original).

[4]New York ex rel. Spitzer v. Saint Francis Hosp., 94 F. Supp. 2d 399 (S.D. N.Y. 2000).

Hudson in the provision of "the same or substantially similar" services. The 1995 agreement, however, did not require or contemplate the total integration of the hospitals' separate assets or governance.

The *Susquehanna* court found the major distinction in the cases to be the independence of decision making. The Court concluded that the Alliance hospitals had ceded significant control to a single decision-maker, whereas the Mid-Hudson hospitals had remained largely independent decision-makers. The court's emphasis on the control issue fit its reliance on *Copperweld*'s "single corporate consciousness" analysis. Beyond mere control, however, the fact that distinguished the Alliance from Mid-Hudson as a practical matter was the degree to which operations were or were not integrated. As described above, the functional integration of the Williamsport hospitals was extensive. Such integration was missing in the Mid-Hudson venture. The two Poughkeepsie hospitals remained mostly autonomous in both governance and function—some differentiation of services occurred, but the degree of risk sharing was limited. Despite the continued separate ownership of assets, the *Susquehanna* hospitals ceased competing to become an organization with differentiated operating units, a result much closer to the facts considered by the Supreme Court in *Dagher*, discussed below.

§ 13:10 Relationships between the parties engaged in a joint enterprise—The Supreme Court's distinction in *Dagher*

In 2006, the Supreme Court held that the core pricing decisions of a fully-integrated and otherwise legitimate joint venture should not be condemned as *per se* unlawful. At issue in *Texaco, Inc. v. Dagher*[1] was a pair of joint ventures through which Texaco, Inc. and Shell Oil Co. completely combined their refining and marketing activities in the United States. The lawsuit, brought by a class of Texaco and Shell service station owners, did not challenge the joint venture itself, but rather the propriety of the agreement by

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[1] Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006).

the venture partners to sell the joint venture output to their respective retailers at the same price. The plaintiffs characterized the arrangement as a *per se* unlawful price-fixing agreement. The Ninth Circuit agreed with the plaintiffs, stating that the defendants failed to demonstrate that the uniform pricing was reasonably necessary to achieve the legitimate aims of the joint venture,[2] but the Supreme Court reversed. The Supreme Court reasoned that, because Texaco and Shell were in fact no longer competitors (with each other or with the joint venture) in the refining business, the case did not present a horizontal price-fixing agreement between two or more competitors.[3]

The case is noteworthy here because the Court relied not at all on *Copperweld* in its decision, even though petitioners had argued extensively in reliance on Copperweld and the respondent had questioned the wisdom of extending *Copperweld* to joint ventures with equal vigor.[4] At the end of the day, the Supreme Court said neither that *Copperweld*'s analysis applied to the joint ventures under the facts presented, nor that *Copperweld* was inapplicable. This result is probably best explained by the fact that the Court did not view the price agreement in *Dagher* as an "ancillary restraint." Rather, the Court found that the joint ventures ended all competition between Texaco and Shell in the relevant market, and explained that the ancillary restraints doctrine does not apply to "the core activity of the joint venture itself—

[2]*See* Dagher v. Saudi Refining, Inc., 369 F.3d 1108, 1116-18 (9th Cir. 2004), rev'd, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006).

[3]Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 1279-80, 164 L. Ed. 2d 1 (2006).

[4]*See* Brief for Petitioner Texaco Inc., Texaco, Inc. v. Dagher, Nos. 04-805 and 04-814, at 15-16 (Sept. 12, 2005) ("No 'independent centers of decisionmaking' existed with respect to [the joint venture's] pricing decisions, because [its] owners had validly and completely ended competition between them within the United States and thus had a complete unity of interest with respect to such decisions."); Brief for Respondents, Texaco, Inc. v. Dagher, Nos. 04-805 and 04-814, at 22-31 (Nov. 10, 2005) ("If *Copperweld* applies to joint ventures, then § 1 will not. Instead, *Copperweld* will require courts to draw lines and make fine distinctions over what degree of integration by joint venturers is sufficient to convey *Copperweld* protection, and what degree insufficient.").

namely, the pricing of the very goods produced and sold" by the joint venture.[5]

The Court thus drew an implicit distinction between fully-integrated and partially-integrated ventures for purposes of *Copperweld*, leaving the *Copperweld* analysis of the latter category for another day. By the same token, *Dagher* also cannot be read to signal a more lenient approach to the analysis of ancillary restraints arising from joint ventures in which the participants continue to act as competitors with each other outside of the joint venture.[6]

§ 13:11 Partially-owned subsidiaries and joint ventures—Ownership of all but *de minimis* interests in a subsidiary

Although *Copperweld* was limited in its holding to a parent and its wholly-owned subsidiary, lower courts had little difficulty from the outset extending the Copperweld Doctrine to situations in which the parent's ownership of the subsidiary, though less than 100 percent, was nearly complete. Many early post-*Copperweld* decisions concern this fact pattern. For example, in 1986, the Delaware federal district court was one of the first to hold that even though a parent did not wholly-own its subsidiary, the *de minimis* difference between the parent's percentage of ownership (which was in excess of 99 percent) and 100 percent did not diminish the applicability of the Copperweld Doctrine.[1] The court reasoned that the parent and subsidiary still engendered an inherent unity of purpose and common design that made it impossible

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[5]Dagher v. Saudi Refining, Inc., 369 F.3d 1108, 1281 (9th Cir. 2004), rev'd, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). In substance, the Court relied mainly on its analysis in Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 356, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982), which holds that when those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market.

[6]For a more extensive discussion, *see* Kessler, et al., "The Supreme Court's Decision In Dagher: Canary In A Coal Mine Or Antitrust Business As Usual?," 21 Antitrust 40 (Fall 2006).

[Section 13:11]

[1]Satellite Financial Planning Corp. v. First Nat. Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986), on reconsideration, 643 F. Supp. 449 (D. Del. 1986).

for them to conspire in violation of § 1 of the Sherman Act.[2] In the same year, the U.S. District Court for the District of Columbia concluded, *inter alia*, that a 90 percent ownership interest likewise was a *de minimis* variation from the control contemplated by *Copperweld*.[3]

Decisions adopting this "*de minimis*" approach can be read to define a *de facto* safe harbor under *Copperweld* for cases in which the parent's ownership interest in the subsidiary is at least 90 percent. Thus, the U.S. District Court in Oregon ruled in 1990 that a parent's ownership of 91.9 percent of the shares of its subsidiary was a *de minimis* variation from total ownership and that a unity of purpose existed as a matter of law between the parent and subsidiary.[4] Although the court identified facts that it considered inconsistent with that conclusion, including the parent company's minority representation on the subsidiary board and the subsidiary's significant operational autonomy, the court relied on the fact that the parent had the legal ability, with its 91.9 percent ownership, to force the subsidiary to merge with the parent as evidence of the requisite unity of purpose.[5]

Early post-*Copperweld* decisions on balance reflect a reluctance to extend *Copperweld* beyond such "*de minimis*" situations. For example, a 1987 decision of the Oregon federal district court held that subsidiaries that were merely majority owned (in this case, the parent held 75 percent and 60 percent of the interests in two subsidiaries) lacked a unity

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[2]Satellite Financial Planning Corp. v. First Nat. Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986), on reconsideration, 643 F. Supp. 449 (D. Del. 1986). *See also* Siegel Transfer, Inc. v. Carrier Exp., Inc., 856 F. Supp. 990, 997 (E.D. Pa. 1994), judgment aff'd, 54 F.3d 1125 (3d Cir. 1995) (rejecting assertion that the Copperweld Doctrine was inapplicable where the defendant parent corporation owned 99.92 percent of the defendant subsidiary's stock, holding that lack of total ownership did not change the economic reality of parent's complete control over the affairs of the subsidiary and, thus, there was a unity of interest between parent and subsidiary).

[3]Sonitrol of Fresno, Inc. v. A.T. & T., 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. 1986).

[4]Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605, 609 (D. Or. 1990), order clarified, 1990 WL 200085 (D. Or. 1990).

[5]Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605, 608-09 (D. Or. 1990), order clarified, 1990 WL 200085 (D. Or. 1990).

of purpose and interest with the parent.[6] The Oregon court relied primarily on the above-referenced *Sonitrol* opinion of from the U.S. District Court for the District of Columbia,[7] which also considered whether a corporation (AT&T) would be legally precluded from conspiring with two corporations over which it exercised *de facto* control, but in which it legally held only minority interests (23.9 percent and 32.6 percent). The *de facto* control was alleged to exist because "as a practical matter [the subsidiaries] adhered to all AT&T policies and were closely intertwined with AT&T and its other subsidiaries through various agreements, contracts, operating directive, and the like." However, the D.C. court reasoned that the boards of those subsidiaries had a legal ability to act contrary to AT&T's interests, and had legal duties to other shareholders that might require them to do so. That they did not (or, more significantly, that it may have been economically infeasible for them to) act with a contrary purpose was not sufficient for the court to find that the subsidiaries were part of a single AT&T enterprise.

§ 13:12 Partially-owned subsidiaries and joint ventures—Incompletely owned subsidiaries

More experience with *Copperweld* engendered greater judicial willingness to extend the Copperweld Doctrine beyond "*de minimis*" situations. In particular, many courts have applied a "legal control" test to analyze whether a parent and a partially-owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. This test asks whether, if the subsidiary were to cease acting in the best interest of the parent, the parent could assert (in the language of *Copperweld*) "full control" over the subsidiary, in which case a unity of interest between the parent and subsidiary would be presumed.[1]

In one of the earliest such decisions, certainly at odds with

[6]Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486, 25 Fed. R. Evid. Serv. 261 (D. Or. 1987).

[7]Sonitrol of Fresno, Inc. v. A.T. & T., 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. 1986).

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[1]Novatel Communications, Inc. v. Cellular Telephone Supply, Inc., 1986-2 Trade Cas. ¶ 67,412 (N.D. Ga. 1986) (unpublished opinion); Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., 849 F.

the prevailing view at the time it was issued, a Georgia federal district court held that a parent and its 51 percent-owned subsidiary were incapable of conspiring for purposes of § 1.[2] Enunciating a legal control test, the court stated that the "51 percent ownership retained by Novatel-Canada [the parent] assured it of full control over Carcom [the subsidiary] and assured it could intervene at any time that Carcom ceased to act in its best interests."[3] Although some courts, including the Oregon federal district court in *Aspen Title*, expressly declined to follow the *Novatel* decision, other courts concluded that the "legal control test" more appropriately followed *Copperweld's* admonition to examine the substance of the corporate relationship rather than just form.[4]

Similarly, a California federal district court held in *Bell Atlantic Business Systems Services v. Hitachi Data Systems Corporation* that an 80 percent interest in a subsidiary evidenced sufficient legal control, without further factual inquiry, to conclude that the parent corporation was incapable of conspiring with a second tier subsidiary that, in turn, was wholly owned by the 80 percent subsidiary.[5] Likewise, a 1995 opinion of the New Jersey federal district court stressed that, in such matters, the court must inquire whether the

Supp. 702, 706 (N.D. Cal. 1994); Rohlfing v. Manor Care, Inc., 172 F.R.D. 330 (N.D. Ill. 1997).

[2]Novatel Communications, Inc. v. Cellular Telephone Supply, Inc, 1986-2 Trade Cas. ¶ 67,412 (N.D. Ga.1986) (unpublished opinion); *see also* Direct Media Corp. v. Camden Tel. and Tel. Co., 989 F. Supp. 1211 (S.D. Ga. 1997), a more recent case which held that a plaintiff failed to produce sufficient evidence to suggest that a parent and its 51 percent owned subsidiary were capable of conspiring in violation of § 1.

[3]It is probably worth noting, however, that the opinion suggests that subsidiary's sole business was to be the distributor of the parent's product. One could infer that this fact simplified the court's inquiry into a unity of purpose.

[4]*See also* Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985), cert. granted, judgment vacated, 475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986), in which the Third Circuit held, without explanation, that a parent could conspire with a subsidiary in which it owned 79 percent of the equity stock, notwithstanding that the parent held 100 percent of the voting stock. This holding appears to have been overruled by Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1135 (3d Cir. 1995).

[5]Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., 849 F. Supp. 702 (N.D. Cal. 1994).

parent and its partially-owned subsidiary: (1) are inextricably intertwined in the same corporate mission; (2) are bound by the same interests which are affected by the same occurrences; and (3) exist to accomplish essentially the same objectives.[6] The court concluded in this case that a 70 percent ownership of the subsidiary was sufficient to dictate the objectives and actions of the subsidiary, thereby making it incapable of conspiring with its subsidiary for purposes of § 1.[7]

Some courts have ventured beyond the question of legal control to consider the somewhat more subjective nature of the economic and operational relationships between the parent and subsidiary. For example, an Illinois federal district court concluded that a parent corporation was legally incapable of conspiring with its subsidiary because the subsidiary was dependent on the parent for essential services.[8] In this case, the subsidiary was 82.3 percent owned by the parent, which would have been sufficient for the court's conclusion under a legal control test. However, the court instead gave significant weight to the fact that the subsidiary obtained its tax, legal, and accounting services, as well as insurance, preparation of SEC filings and access to credit, from or through the parent, and concluded that the parent's provision of those essential services to the subsidiary created an economic interdependence by which formed a unity of interest between them.[9]

A more extreme example of this approach was suggested by a 2002 opinion of the U.S. District Court for the Eastern District of Pennsylvania.[10] The plaintiff had alleged a § 1 conspiracy between two companies, Lifeway and Danone. At

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[6] Coast Cities Truck Sales, Inc. v. Navistar Intern. Transp. Co., 912 F. Supp. 747, 765 (D.N.J. 1995).

[7] *See also* Rosen v. Hyundai Group (Korea), 829 F. Supp. 41 (E.D. N.Y. 1993), similarly concluding that a corporation and an 80 percent-owned subsidiary were incapable of conspiring. However, any broader reading of this decision arguably is limited by its facts—the other 20 percent interest in the subsidiary was held by its president, who was also a managing director of the parent.

[8] Rohlfing v. Manor Care, Inc., 172 F.R.D. 330 (N.D. Ill. 1997).

[9] Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 334, (N.D. Ill. 1997).

[10] Fresh Made, Inc. v. Lifeway Foods, Inc., 2002-2 Trade Cases ¶ 73779 (E.D. Pa. 2002).

the time of the alleged conspiracy, Danone owned 20 percent of Lifeway's stock. The court observed that a parent corporation's ownership of only 20 percent of a subsidiary's common stock ordinarily would not be enough to obtain protection under the Copperweld Doctrine. However, the court noted that the plaintiff also had alleged in its complaint that Danone controlled or exercised significant and substantial influence over Lifeway. For purposes of a motion to dismiss, the court concluded that the plaintiff's own allegations putatively made the parent and subsidiary a single enterprise incapable of conspiring in violation of § 1, and on that basis, the Court concluded that the plaintiff failed to plead a cognizable conspiracy for § 1 purposes.

§ 13:13 Partially-owned subsidiaries and joint ventures—Entities under common ownership or control

Because corporate family relationships do not always fit into the parent-and-subsidiary model, *Copperweld* issues may arise between "sister" corporations controlled by the same corporate parent, or between distinct business entities that have common investors. In health care, for example, § 1 questions may arise regarding an agreement between a hospital and a joint venture, where the joint venture interest is not held by the hospital, but instead by the hospital's system parent or by a "sister" subsidiary.

Soon after the Supreme Court's decision in *Copperweld*, the Fifth Circuit considered a trio of cases concerning application of the Copperweld Doctrine to concerted action among sister subsidiaries owned by a common parent, and to otherwise-unrelated entities owned or controlled by the same third person(s).[1] In *Century Oil Tool, Inc. v. Production Specialties, Inc.*, the Fifth Circuit considered whether two separately incorporated companies, both wholly owned by the same three individuals, were capable of conspiring for

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[1]Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316 (5th Cir. 1984); Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012 (5th Cir. 1984); Greenwood Utilities Com'n v. Mississippi Power Co., 751 F.2d 1484, 17 Fed. R. Evid. Serv. 790 (5th Cir. 1985).

purposes of § 1.[2] The court observed that all three individuals served as officers and directors of both corporations, compensation of each was based on his percentage of ownership in the corporations, both corporations operated from the same plant, and the corporations had retained their dual structures rather than merging for tax reasons. The court concluded that the two corporations could not conspire within the meaning of § 1, because "[i]n reality" they have always had a unity of purpose or a common design.[3]

The court also opined that there was "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 managed the affairs of the two corporations.[4] Although the court did not provide elaborate reasoning for its conclusion, the conclusion is both a logical and intuitive extension of *Copperweld*. Plainly, if a parent has a definitional unity of interest with each of its wholly-owned subsidiaries, it follows that any two subsidiaries have the same unity of interest with each other. Thus, *Century Oil Tool* has been widely cited for introducing the principle that sister subsidiaries of a common parent *and* multiple corporations owned by the same third party cannot conspire in violation of § 1.[5]

§ 13:14 Partially-owned subsidiaries and joint ventures—Entities under common ownership or control—Sister subsidiaries of a common parent

Consistent with *Century Oil Tool*, courts have had no dif-

[2]Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316 (5th Cir. 1984).

[3]Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984).

[4]Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984).

[5]*See, e.g.*, Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486, 25 Fed. R. Evid. Serv. 261 (D. Or. 1987); Greenwood Utilities Com'n v. Mississippi Power Co., 751 F.2d 1484, 17 Fed. R. Evid. Serv. 790 (5th Cir. 1985); Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F.2d 606 (6th Cir. 1987); Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 257 F. Supp. 2d 819 (M.D. La. 2002).

ficulty shielding conduct among sister subsidiaries *wholly owned* by the same parent from § 1 scrutiny. For example, the Fifth Circuit ruled in 1984, in *Hood v. Tenneco Texas Life Insurance Company*, that two wholly-owned sister corporations that simultaneously terminated the plaintiff's employment could not engage in a group boycott in violation of § 1.[1] In a health care matter, the U.S. District Court for the Western District of Virginia examined whether a hospital's exclusive referral of business to an affiliated durable medical equipment (DME) company was a violation of § 1.[2] Adopting the reasoning in *Hood*, the court concluded that there could be no § 1 liability because the hospital and the DME company were both wholly-owned either directly or indirectly (through another wholly-owned subsidiary) by a common parent.[3]

As courts began applying the "legal control" test to concerted action between a parent and its partially-owned subsidiary, they also adopted the legal control test for concerted action among partially-owned sister subsidiaries. In *Bell Atlantic* (discussed above), the California federal district court also considered whether two sister corporations—one 80 percent owned and another 100 percent owned by the parent—could conspire for § 1 purposes.[4] The court found that, for the same reasons that it concluded that a parent could not conspire with its 80 percent owned subsidiary, the sister corporations could not conspire with each other, as both subsidiaries acted pursuant to the same interests and goals as the parent.[5]

[Section 13:14]

[1]Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984).

[2]Advanced Health-Care Services, Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990).

[3]Advanced Health-Care Services, Inc. v. Radford Community Hosp., 910 F.2d 139, 146-47 (4th Cir. 1990).

[4]Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., 849 F. Supp. 702 (N.D. Cal. 1994).

[5]Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., 849 F. Supp. 702 (N.D. Cal. 1994).

§ 13:15 Partially-owned subsidiaries and joint ventures—Entities under common ownership or control—Corporations owned or controlled by the same third person(s)

Subsequent to *Century Oil Tool*, other federal courts likewise extended the Copperweld Doctrine to situations in which multiple corporations were owned by the same third person or persons.[1] Initially, however, courts were reluctant to immunize entities from § 1 liability if such they were not *wholly* owned by the same third parties. For example, in a 1986 decision, the Seventh Circuit Court of Appeals found that two closely-held corporations, arguably controlled in common but with an incomplete overlap of investors, were not precluded from § 1 liability.[2] A 1989 decision by a New York federal district court arrived at the same conclusion.[3]

The New York decision is noteworthy because, given the straightforward facts of the case, it seems particularly misfocused. Three individual defendants collectively owned 54 percent of the stock in American Vision Center and 100 percent of the stock in Cohen Fashion Optical, which conducted the same line of business. The three individuals served as the directors and officers of both corporations. In that capacity, they agreed that American Vision Center would not open stores in certain states so as not to compete directly with Cohen Fashion Optical. This action was chal-

[Section 13:15]

[1] *See, e.g.,*, Guzowski v. Hartman, 969 F.2d 211 (6th Cir. 1992) (finding that two racetrack corporations wholly owned by identical shareholders were a single economic unit that service a common interest and could not conspire for § 1 purposes.); D'Last Corp. v. Ugent, 863 F. Supp. 763 (N.D. Ill. 1994), aff'd, 51 F.3d 275 (7th Cir. 1995) (distinguishing the Seventh Circuit's holding in *Fishman*, the court found that multiple corporations wholly owned by a single and controlling shareholder were not capable of conspiring with each other in violation of § 1.).

[2] Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986). The Court read *Century Oil Tool* to authorize unitary treatment of two unrelated entities only when the two are owned by the same set of investors *and* in identical proportions. Fishman v. Estate of Wirtz, 807 F.2d 520, 541 (7th Cir. 1986). Judge Easterbrook wrote a strong dissent emphasizing the identity of interests between the two entities at issue, as opposed to their ownership. Fishman v. Estate of Wirtz, 807 F.2d 520, 576 (7th Cir. 1986).

[3] American Vision Centers, Inc. v. Cohen, 711 F. Supp. 721 (E.D. N.Y. 1989).

lenged as an unlawful market division agreement under § 1. Notwithstanding that the three individuals owned a majority of the stock of, and had legal control over, American Vision Center, the court concluded that because the *minority* shareholders of American Vision Center did not share an economic interest in the success of Cohen Fashion Optical, the two corporations could not be treated as a single entity within the meaning of the Copperweld Doctrine.[4]

Those two decisions contrast with later decisions on similar facts from other jurisdictions, which reflect the shift to a legal control test. Thus, a 1998 decision of the Fourth Circuit Court of Appeals held that an individual's *control* over multiple defendant corporations accused of concerted action in violation of § 1 was more relevant than the individual's ownership of the various corporations.[5] The court posited that even if the individual did not own all of the interests in the defendant corporations, the fact that he controlled them would be enough to cause the plaintiff's § 1 claim to fail.[6]

Similarly, a case before a Louisiana federal district court involved the § 1 liability of many different parties who were accused of frustrating the plaintiff's entry into the racetrack market.[7] The defendants included a married couple who wholly owned two corporations, controlled approximately 72 percent of the voting stock of another corporation and had *de facto* control over a fourth corporation, CCG. As to the concerted action among the two individuals and their wholly owned corporations, the court easily concluded that such concerted action did not come within the purview of § 1 liability based on the reasoning in *Century Oil Tool*. Similarly, with respect to the corporation in which the individuals held 72 percent of the voting stock, the court applied a legal control test to preclude § 1 liability. Finally, and interestingly, in examining the individuals' relationship with CCG, in which they did not own or control any voting stock, the court nonetheless concluded that the individuals had *de facto* control over CCG (based on evidence that the individuals

[4]American Vision Centers, Inc. v. Cohen, 711 F. Supp. 721, 723 (E.D. N.Y. 1989).

[5]Zachair, Ltd. v. Driggs, 141 F.3d 1162 (4th Cir. 1998).

[6]Zachair, Ltd. v. Driggs, 141 F.3d 1162 (4th Cir. 1998).

[7]Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 257 F. Supp. 2d 819 (M.D. La. 2002).

financed, and directed their attorney to operate, CCG) and, on that basis, that no plurality of actors existed sufficient for § 1 liability.[8]

§ 13:16 *Copperweld* analysis of non-ownership relationships

Antitrust defendants also have relied on *Copperweld*'s broad unity of interest analysis even in cases where no formal parent-subsidiary relationship exists. Courts have been receptive to such arguments, but not uniformly so. These cases are relevant insofar as health care business relationships may not always reflect typical ownership or control relationships.

§ 13:17 *Copperweld* analysis of non-ownership relationships—Independent agents

Given the logic of *Copperweld*, it is unsurprising that courts would conclude that a firm's agents, even if independent corporations, are incapable of conspiring with their principal. The Eighth Circuit so held in a § 1 challenge brought by a terminated dealer against a furniture manufacturer and certain of its sales representatives.[1] The court observed that the representatives acted at all times on behalf of the manufacturer, and that they "had no authority to set prices, no discretion to arrange terms of sale and no ability to accept orders. Orders generated through their efforts had to be approved by [the manufacturer] and were filled by [the manufacturer] or its dealers."[2] The court concluded that *Copperweld*'s admonition to consider substance, not form, dictated that the manufacturer and the sales representatives were incapable of conspiring under § 1.

§ 13:18 *Copperweld* analysis of non-ownership relationships—Franchise relationships

The Ninth Circuit has held that a restaurant franchisor

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[8]Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 257 F. Supp. 2d 819, 837-38 (M.D. La. 2002).

[Section 13:17]

[1]Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313 (8th Cir. 1986).

[2]Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1316 (8th Cir. 1986).

and a franchisee were engaged in a "common enterprise," such that a restaurant manager's § 1 challenge to a "no-switching" agreement (which prohibited the franchisor from offering employment to the franchisee's employees without the franchisee's permission) would be dismissed for lack of the requisite agreement between independent parties.[1] Of note, the Circuit did not rely on *Copperweld* for this result, but rather on its own pre-*Copperweld* decision in which it held that multiple casino-hotels operated or controlled by the same individual could not conspire to violate § 1 because they neither competed with each other nor represented themselves as competitors.[2] Other courts have treated franchise relationships similarly under § 1.[3]

§ 13:19 *Copperweld* analysis of non-ownership relationships—Affiliate organizations

A 2005 decision of the Ninth Circuit held that a national dog breed club and its independent regional affiliates were not capable of conspiring as separate entities under § 1 of the Sherman Act. The court concluded that the national club and the affiliates shared a common goal of promoting the Jack Russell terrier dog breed, and had identical economic interests in the current and future value of the breed, and as such, the affiliates acted as extensions of the national club, rather than as independent economic actors in competition with the national club.[1] Applying *Copperweld*, the Circuit found a commonality of economic interests to be manifest in the affiliation agreement which, among other things, mandated that affiliates be solely affiliated with the national club; adopt the national's constitution and uphold its goals,

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[1]Williams v. I.B. Fischer Nevada, 999 F.2d 445 (9th Cir. 1993).

[2]Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 28 Fed. R. Serv. 2d 859 (9th Cir. 1979).

[3]*See, e.g.*, Hall v. Burger King Corp., 912 F. Supp. 1509 (S.D. Fla. 1995) (citing *Williams*).

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[1]Jack Russell Terrier Network of Northern Ca. v. American Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005).

purposes, and policies; and recognize only the national's registry of the breed.[2]

§ 13:20 *Copperweld* analysis of non-ownership relationships—Pre-merger agreements

The pre-consummation activities of parties to a merger agreement present particularly sensitive antitrust issues. Thus, it is perhaps surprising to find *Copperweld* applied so as to deem firms that have "almost" merged to have a unity of interest sufficient to preclude § 1 liability for their pre-merger agreements. In 1993, the Eighth Circuit Court of Appeals ruled that it was not erroneous to permit a jury to determine whether, following an agreement to merge but before the merger was consummated, the "economic substance of the relationship" between the parties was such that they lacked "independent economic consciousness."[1] The jury in fact had determined that the parties were not capable of conspiring at that time. The Circuit relied in part on its interpretation of *Copperweld* in *Pink Supply*, discussed *supra*. The court stated, "We do not conclude, as [plaintiff] would have us do, that only the formal consummation of a merger precludes the application of § 1 of the Sherman Act to an alleged conspiracy between the merging companies."[2]

The Eighth Circuit's decision was recently distinguished by the Northern Illinois District Court in *Omnicare, Inc.* v. *Unitedhealth Group, Inc.*[3] The case concerned United's acquisition of Pacificare, and a provision of the acquisition agreement that prohibited Pacificare from entering into or renewing certain contracts without United's permission (a relatively typical type of provision). The plaintiff was a contractor to both United and Pacificare and alleged that United used the provision to force Omnicare to accept

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[2]Jack Russell Terrier Network of Northern Ca. v. American Kennel Club, Inc., 407 F.3d 1027, 1035 (9th Cir. 2005).

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[1]International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1398 (8th Cir. 1993).

[2]International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1398 (8th Cir. 1993).

[3]Omnicare, Inc. v. Unitedhealth Group, Inc., 524 F. Supp. 2d 1031 (N.D. Ill. 2007).

noncompetitive rates. In refusing to dismiss the § 1 claim, the court held that *International Travel Arrangers* stands only for the proposition that it would be *possible* for a jury to find that a merger agreement, as a factual matter, had so combined two organizations that they had no separate interests. The court viewed this as "logically and factually distinct" from Omnicare's challenge to the legality of the merger agreement itself.[4]

III. APPLYING *COPPERWELD* TO HEALTH CARE JOINT VENTURES

§ 13:21 In general

The negotiated relationships between parties to a health care joint venture typically reflect a balancing of the parties' independent economic and control interests. In the hospital-physician joint venture context, political considerations (*i.e.*, medical staff relations) and legal compliance issues (*i.e.*, exempt organization tax law, the anti-kickback law), in addition to the parties' mutual and independent economic interests, can play a significant role in defining agreements concerning the scope of the venture, governance, approval mechanisms for major decisions, identity, and non-compete covenants, among other issues. Tensions in these matters may be exacerbated by the existence of actual or potential competition between the partners. Thus, the extent to which the joint venture has a unity of interest with its owners (and with its hospital owner in particular) can be debatable in some cases.

Nonetheless, there are many instances in which a joint venture may wish to be considered part of a "single enterprise" with the hospital, not the least of which may be the benefit of including the joint venture in the hospital's payor negotiations. To this end, the details of the joint venture's structure and operation are critical.

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[4]It may also be possible to distinguish the cases on the basis that the agreement at issue in *International Travel Arrangers* was a vertical acquisition (of the plaintiff's competitor by an airline), whereas the agreement at issue in *Omnicare* involved a horizontal merger of two competing customers of the plaintiff. *See also* Carlock v. Pillsbury Co., 1993-1 Trade Cas. (CCH) ¶ 70282, 1988 WL 404839 (D. Minn. 1988), holding that "the problem presented by the intra-enterprise conspiracy doctrine does not infect plaintiffs' allegation" that the sellers of the Haagen-Dazs ice cream business conspired with the purchaser of that business in violation of § 1.

Although there is no "typical" structure for hospital-physician joint ventures, many are structured as 50-50 deals, or something very close to it, and capital contributions and profit sharing reflect ownership percentages, consistent with the anti-kickback law safe harbors. However, even in cases where the hospital has a percentage majority of the ownership, the hospital and physician owners may share a great deal of control. But as the preceding sections of this chapter have illustrated, the *Copperweld* case law is a diverse and sometimes inconsistent set of "rules." The only clear conclusion to be drawn from the case law in this regard is that, if the hospital's ownership (and concomitant control) of the joint venture is not significant, there can be no assurance that a retrospective examination of an agreement between the hospital and the joint venture will be deemed beyond the reach of § 1.

Indeed, notwithstanding that there are exceptions, few courts in any jurisdiction have been willing to extend the *Copperweld* Doctrine to subsidiary relationships in which the parent has less than majority ownership or voting control. For the large number of 50-50 health care joint ventures (as well as those in which, despite majority ownership by the hospital, control is shared significantly), this means that evidence of a unity of interest must come from a balancing of multiple factors relating to both the legal terms of the partnership and the manner in which it operates in fact.

It thus bears looking at typical joint venture relationship characteristics in terms of their propensity to support or undermine a *Copperweld* defense.

§ 13:22 Factors relevant to determining a unity of interest

Based on the existing interpretations of *Copperweld*, the following factors, to the extent applicable in any particular case, should be relevant to the question of whether a hospital and its joint venture share a unity of interest.

First, there would seem to be one obvious factor. For there to be a unity of interest, except perhaps in the most unusual circumstances, the hospital must hold equity in the joint venture and participate in the profits and losses of the venture. The hospital's ownership interest should be

substantial (at least 50 percent) and the hospital should be an active participant in the management of the joint venture, not a passive investor.

Other factors are more variable in the individual case, and we thus pose them as questions. No one of these questions, whether answered affirmatively or negatively, is likely to be determinative, but cumulatively, these considerations may tend to overcome an inclination on the part of a court to focus on percentage ownership.

Business Considerations

- Is the joint venture a *de facto* continuation or expansion of an existing hospital business line? Was it formed out of the hospital's objective to remain in that business line? This might occur, for example, if the hospital was unsuccessfully operating a freestanding ambulatory surgery center, which it reorganized as a physician joint venture in order to improve the venture's visibility in the physician community and therefore its business prospects. Such facts would be consistent with a unity of interest with the hospital.
- Is the joint venture required by its formational documents to support, and to operate in a manner consistent with, the hospital's charitable purposes or community benefit objectives? Such a requirement would be consistent with exempt organization tax law compliance, but would be relevant whether or not the hospital is exempt. Obviously, this factor is more compelling if the hospital in fact has the authority to mandate action by the joint venture as necessary to comply with the commitment.
- Beyond tax exemption-related considerations, does the hospital have a legal ability to cause the joint venture to act in a particular manner (related to the hospital's business objectives)? *Copperweld* analyses often look to whether the parent entity, for example, could impose a change in the composition of the joint venture governing board if necessary to ensure that the joint venture's actions were aligned with the interests of the parent.
- To what degree does the hospital consider itself to be, or not to be, in competition with the joint venture? A number of factors could be relevant to this question, but the existence of complementarities in service lines, for

example, would be an objective indicator that the hospital and the joint venture act cooperatively and not competitively. For example, there may be clinical differentiation between outpatient surgical patients treated at the hospital versus those treated at a freestanding joint venture ASC.

Governance and Management

- Is the hospital represented on the joint venture board by individuals who are meaningfully involved in the management of the hospital? Such representation would reflect an intent to maintain a single "corporate consciousness." It is additionally helpful if the hospital representatives have demonstrable influence over the joint venture's business (as opposed to clinical) decisions.
- Is the joint venture management integrated into the hospital management structure? Is the manager of the joint venture a hospital employee or, alternatively, does the manager have dual reporting relationships to the hospital and the joint venture? Even if there is no formal relationship between the joint venture management and the hospital, involvement of the joint venture manager in regular hospital management team meetings would evidence an intent to align decision-making.

Non-Competition Covenants

- Do the formational documents prohibit the joint venture from affirmatively acting against the hospital's interest without the hospital's approval? Such a prohibition would be evidence of a unity of interest. Note that such "negative control," in and of itself, does not assure that the hospital can cause the venture to act consistently with the hospital's objectives (a factor discussed above), and therefore does not necessarily prevent a deadlock on important decisions. Given, however, that affirmative control is often limited for the hospital partner, the ability to veto significant business decisions contrary to the hospital's interest could become an important consideration in a *Copperweld* analysis.
- Are the physician owners precluded from competing with the joint venture? Such preclusion would suggest that the interests of the physicians are to some degree

aligned—at least by contract—with those of the hospital insofar as the operation of the joint venture is concerned.

- Can the hospital reserve certain business relationships (*e.g.*, a particular payor contract) for itself, or must the hospital present all relevant business opportunities to the joint venture?

Planning and Marketing

- Is the joint venture co-branded with the hospital? Is the joint venture held out as a hospital service on the hospital website and in other promotional materials? The way in which the joint venture is marketed also may reflect the existence or absence of competition between the hospital and the joint venture.
- Does the hospital identify the joint venture as a hospital resource in its strategic plan? Is there structured involvement of the joint venture in the hospital's strategic and operational planning? If the joint venture's strategic planning is effectively separate from that of the hospital, it would be an indicator that the enterprises consider themselves separate.

Operations

- Are physicians on the staff of the joint venture required to hold privileges at the hospital?
- Is there clinical and/or operational systems integration between the hospital and the joint venture, *e.g.*, of clinical management, patient records, scheduling, financial management, etc.? Even if the joint venture management is independent of the hospital, the adoption of common clinical protocols and systems would evidence a common enterprise.
- Does the hospital consolidate the joint venture into its financial statements?

Operational History

- Is there a factual history of the joint venture acting in a manner inconsistent with the hospital's interests or of payors playing the hospital and the joint venture against each other? A history of non-cooperative behavior, or of actual competition, could undermine favorable inferences that might be drawn from the joint venture's structure and legal documents.

- Even if there is no inconsistent history, does the joint venture in fact operate autonomously from the hospital?

As noted, the case law to date is fact-specific and short on black-letter rules. Thus, no single factor can be determinative, but their impact must be considered cumulatively. For any joint venture, it likely will be possible to identify changes in its structure and/or operation that would increase the likelihood that a court would find a unity of interest to exist with the hospital owner. The most effective change, but the generally most difficult to achieve, would be the acquisition of voting control by the hospital. Although courts generally have equated majority ownership with voting control, it is clear that control, not ownership *per se*, is the relevant question. Thus, control could be acquired through an increased ownership percentage, but also could be acquired through an enforceable long-term voting agreement between the hospital physician owners of the venture. Although somewhat speculative, it also seems reasonable to believe that the type of control that would matter more in a *Copperweld* analysis would be control over the operational aspects of the business (*e.g.*, planning, budgeting, pricing of services, contracting, marketing, etc.) as opposed to control over clinical management issues.

But because organic change of that nature is difficult, hospitals and joint ventures may wish to consider those factors from the discussion above, short of a restructuring of control, that at the margin would improve the probability that a court would view the hospital and joint venture as having a unity of interest.

§ 13:23 Assessing conflicts with other laws and obligations

In an environment as extensively regulated as health care, it is sadly ironic that efforts to create compliance with one set of laws often can exacerbate compliance with other laws or contractual obligations. Thus, parties to a joint venture should also consider the implications of structural or operational changes designed to enhance a *Copperweld* defense for their continued compliance with Medicare rules, tax regulations, and payor contracts, for instance.

We offer an example based on the Stark Law, and we begin with the admonition that the implications we describe are

probably, at this time, more theoretical than real. However, this example suggests how future interpretations of existing law could have significant implications for, in this case, ambulatory surgery center joint ventures.

The federal "Ethics in Patient Referrals Act," commonly known as the "Stark Law," prohibits, *inter alia*, Medicare and Medicaid referrals by a physician to a provider of "designated health services" (a statutorily-defined term) with which the physician has a financial relationship, unless a specific Stark Law exception is met.[1] All inpatient and outpatient hospital services are "designated health services." The law is significantly restrictive of the types of financial relationships that can exist between hospitals and physicians.

To the extent a joint venture ASC is a distinct entity from its hospital owner, however, the Stark Law is not implicated. Congress specifically declined to include ambulatory surgical services in the definition of "designated health services."[2] Accordingly, a latent tension exists between the Stark Law and the Sherman Act with respect to the further integration of an ASC's operations into the overall hospital enterprise. That is, to the extent an ASC were to become highly integrated with a hospital, the Centers for Medicare and Medicaid Services (CMS) hypothetically could deem it to be operating—for Stark Law purposes—as a provider of hospital outpatient services. In such a case, the financial relationship between the ASC's physician investors and the ASC would become subject to Stark Law limitations. The physician investors would not be able to refer patients to the ASC for such "outpatient hospital services" unless their financial arrangements with ASC complied with a Stark Law exception.

There are no Stark Law-defined criteria upon which to assess whether a hospital and ASC have become "too integrated." Indeed, CMS has never indicated whether it in fact believes that there is a scenario under which otherwise-independent non-hospital providers can be deemed the "alter-egos" of hospitals. Arguably, it should be sufficient

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[1]Social Security Act § 1877; 42 U.S.C.A. § 1395nn.

[2]*See* 66 Fed. Reg. 856, 934 (Jan. 4, 2001) (commentary by HCFA (now CMS)).

that an ASC is separately licensed and that Medicare recognizes the ASC as a separate provider with a separate provider number. In other words, given that Congress excluded ASC services from the scope of the Stark Law, an entity that is defined and licensed as an ASC under state law and maintains separate provider designation as an ASC under Medicare logically should be outside of the Stark Law no matter how much its operations are entwined with those of a hospital.

But to the extent that a contrary view could exist, one might suggest that the relationship between a hospital and its ASC joint venture could be evaluated by reference to the Medicare provider-based status regulations.[3] To obtain provider-based status for an otherwise-freestanding facility, that facility must be operated under the same license as the main provider, *i.e.*, the hospital (unless state law requires separate licensure); be integrated with the main provider, both clinically and operationally, and hold itself out to the public and payers as a part of the main provider.[4] Clinical services are deemed to be sufficiently integrated if, *inter alia*,

- the professional staff of the facility have clinical privileges at the hospital;
- the hospital maintains the same monitoring and oversight of the facility as it does for any other department of the hospital;
- medical staff committees at the hospital are responsible for the medical activities in the facility, including quality assurance, utilization review, and the coordination and integration of services between the facility and the hospital;
- medical records for patients at the facility are integrated into a unified retrieval system of the hospital; and
- the services of the facility and the hospital are integrated, so that patients treated at the facility have full access to all services of the hospital, and patients are referred where appropriate to the corresponding inpa-

[3] 42 C.F.R. § 413.65.

[4] 42 C.F.R. § 413.65(d).

tient or outpatient department or service of the hospital.[5]

Thus, actions taken to raise the probability of a hospital and an ASC joint venture being treated as a single economic entity for antitrust purposes are very similar to the outcomes required for provider-based designation.

However, the Stark Law concern can be too easily overstated. Provider-based status under Medicare is not automatic. Indeed, provider-based status for affiliated entities is disfavored by the Medicare program, as evidenced by recent regulatory efforts to tighten the standards for designation. CMS considers provider-based status a controlled designation, not a state of being, and it would be ironic (to say the least) if CMS relied on the provider-based status regulations to "deem" an ASC a part of a hospital for Stark Law purposes. Still, the interplay is an interesting illustration of the way in which conflicts can arise.

IV. CONCLUSION

§ 13:24 Is it safe to go in the water?

It seems intuitive that firms under common control are not "competitors" as that term is understood by the antitrust laws. But, except for the simplest of cases, the courts have not rushed to embrace broad, or even uniform, principles that would define when "control" or a "unity of interest" exists in the context of joint ventures and evolving business relationships. The fact is that many of the narrower interpretations of *Copperweld* discussed in this chapter have not been revisited, distinguished, or overruled in their jurisdictions.[1]

As discussed at the outset, many health care joint ventures evidence a significant and purposeful sharing of control, *e.g.*, between a hospital and physician investors, and, in some

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[5] 42 C.F.R. § 413.65(d)(2).

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[1] Note also that the discussion in this chapter has been confined to federal law. State courts, interpreting state law, may apply different principles. *See, e.g.*, Louisiana Power and Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149 (La. 1986) (Louisiana law does not except unreasonable restraints of trade committed by a parent corporation and its partially or wholly owned subsidiary corporation).

jurisdictions, it would be difficult to provide assurance that such joint ventures would be treated as a single enterprise with a hospital owner for Sherman Act purposes. Certainly, however, more recent case law suggests a broader perspective on the Copperweld Doctrine, and there are logical avenues within health care joint ventures to pursue evidence of common purpose and unitary interests. Where antitrust-sensitive joint conduct may be implicated, it will often be prudent to take stock of a joint venture's actual operating relationships and policies, as well as its structure, and to consider steps that would strengthen the case for single enterprise treatment.[2]

[2]"In necessary things, unity; in disputed things, liberty; in all things, charity." (Variously ascribed; motto of the English Nonconformist Richard Baxter (1615-1691).).