ESNIE 2006 Workshop
Law & Economics of the Single Entity Defense in Antitrust

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Selected passages from selected cases:

1.	Seagram and Sons v. Hawaiian Oke and Liquors (1969)	Reasonably accessible
2.	Copperweld (1984)	Difficult to read
3.	Chicago Professional Sports (1996)	Reasonably accessible
4.	Freeman (2003)	Reasonably accessible

United States Court of Appeals Ninth Circuit.
JOSEPH E. SEAGRAM AND SONS, INC., and The House of Seagram, Inc., Appellants,
v.
HAWAIIAN OKE AND LIQUORS, LTD., Appellee.
McKESSON AND ROBBINS, INC., Appellant,
v.
HAWAIIAN OKE AND LIQUORS, LTD., Appellee.
BARTON DISTILLING COMPANY, Appellant,
v.
HAWAIIAN OKE AND LIQUORS, LTD., Appellee.
Nos. 22162, 22162 A, 22162 B.

Sept. 8, 1969.

Treble damages antitrust suit in which defendants appealed from an adverse decision of the United States District Court for the District of Hawaii, Martin Pence, Chief Judge, 272 F.Supp. 915. The Court of Appeals, Duniway, Circuit Judge, held, inter alia, that in action by wholesale liquor distributor against distilleries and others charging antitrust violations, nothing in the record suggested, much less supported, the inference that purpose of defendants in terminating distributor's contract with one of the distilleries was to eliminate or damage distributor or to force it to comply with unlawful demands, rather than to obtain improved distribution of products of distillery.

Reversed with directions to dismiss the action.

* * *

[8] It is now settled law that if a corporation chooses to conduct parts of its business through subsidiary or affiliated corporations, and conspires with them to do something that independent entities cannot conspire to do under section 1 of the Sherman Act, it is no defense that the corporations are, in reality a single economic entity. The Supreme Court has said that 'common ownership and control does not liberate corporations from the impact of the antitrust laws.' … The Court has never indicated what, if any, are the limits of this doctrine. Handler, Through the Anti Trust Looking Glass Twenty first Annual Anti trust Review, 57 Cal.L.Rev. 182 93 (1969).

[9] On the other hand, it has been held that 'a corporation cannot conspire with its officers or agents to violate the antitrust laws.' ...

The decision of the trial court is the first that has not followed these cases. …

The trial judge noted that the House of Seagram divisions had formerly been separate but related corporations, and had been found in 1951 to have conspired with each other in Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra, 341 U.S. 211, 71 S.Ct. 259. He felt that all that had happened since Kiefer Stewart had been a formal change in corporate structure, and that there had been no change in marketing technique. He concluded that, as a matter of law, the

divisions were, in substance, the same entities that they were at the time of the Kiefer Stewart decision.

We cannot agree. There is here no evidence that the 'de incorporation' of the former corporations was a sham or 'shuffling of papers,' as plaintiff argues. Nor do we think that there was here a mere change in the label attached to a business entity. See United States v. Sealy, Inc., 1967, 388 U.S. 350, 352, 87 S.Ct. 1847, 18 L.Ed.2d 1238. Before the 1959 reorganization, each subsidiary had its own payroll, accounting department, billing, and each had limited liability. Consolidation destroyed this limited liability, as well as certain tax advantages. The advantages of the corporate subsidiary form are spelled out in Willis & Pitofsky, supra, 43 N.Y.U.L.Rev. 20, 27 28. The trial judge relied only on the fact that the divisions had autonomous sales organizations, 272 F.Supp. at 924, thus in effect conceding that there was no autonomy in other respects. But since sales and price decisions are not made in a vacuum, but are affected by other corporate activities, we doubt that autonomy in sales alone would ever be sufficient independence. See 43 N.Y.U.L.Rev. 172, 177 (1968).

Once the theory that 'divisions' or other internal administrative units of a single corporation can 'conspire' with each other is accepted, we can see no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not. No corporation of any size can operate without an internal division of labor between various of its officers and agents. The larger the enterprise, the more necessary such internal units become. Moreover, sound management demands extensive delegation of authority within the organization. Yet, under the trial court's ruling, the more delegation there is, the more danger there will be *84 that the holders of such delegated authority will be found by a court to be capable of conspiring with each other in carrying on the corporation's business, as in this case, where the trial court so held as a matter of law. It is most unlikely that partially autonomous (here the autonomy extended to sales only) divisions of a single corporate enterprise will or can operate completely independently of each other. It is inevitable that there will be communication between them, either directly or through those persons in the corporate hierarchy to whom they report. And such communication can then be used as evidence that they arrived at understandings with each other as to what they would do. Thus, they are capable of conspiring because they are autonomous and they have conspired because they are, in fact and law, parts of a single corporation. Here, for example, plaintiff relies heavily on the fact that the top executives of the divisions 'officed' in the same building, 'only steps apart' in New York, and that their Western Division managers 'officed' in the same building in Los Angeles. The doctrine hands to plaintiffs, on a silver platter, an automatically self proving conspiracy.

Supreme Court of the United States
COPPERWELD CORPORATION, et al., Petitioners
v.
INDEPENDENCE TUBE CORPORATION.
No. 82 1260.

Argued Dec. 5, 1983.
Decided June 19, 1984.

Tubing company sued another tubing company and its parent corporation as well as tubing mill manufacturer and others for, Sherman Act conspiracy. The United States District Court for the Northern District of Illinois, Eastern Division, Hubert L. Will, J., found that the parent subsidiary had conspired to violate section 1 of the Act and awarded treble damages. The Court of Appeals for the Seventh Circuit affirmed, 691 F.2d 310. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that a parent corporation and its wholly owned subsidiary were not legally capable of conspiring with each other under section 1 of the Sherman Act.

*   *   *

We limit our 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. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

A

[2] The Sherman Act contains a "basic distinction between concerted and independent action." Monsanto Co. v. Spray Rite Service Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. [FN13] 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 **2740 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. [FN14] In part because it is sometimes difficult to *768 distinguish robust competition from conduct with long run anti competitive 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.

FN13. Section 2 of the Sherman Act provides in pertinent part:
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U.S.C. § 2.
By making a conspiracy to monopolize unlawful, § 2 does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under § 2 and

not under § 1. Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1.

FN14. For example, the Court has declared that § 2 does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). We have also made clear that the "antitrust laws ... were enacted for 'the protection of competition, not competitors.' " Brunswick Corp. v. Pueblo Bowl O Mat, Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (damages for violation of Clayton Act § 7) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)).

[3][4][5][6] Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination ... or conspiracy" between separate entities. It does not reach conduct that is "wholly unilateral." Albrecht v. Herald Co., 390 U.S. 145, 149, 88 S.Ct. 869, 871, 19 L.Ed.2d 998 (1968); accord, Monsanto Co. v. Spray Rite Corp., supra, at 761, 104 S.Ct., at 1469. Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. See generally Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). 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. See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); Chicago Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Whatever form the inquiry takes, however, it 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 inherently is fraught with anticompetitive *769 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.

B

[7] The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination ... or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly **2741 bring together economic power that was

previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

* * *

[8] *770 There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. [FN16] Although this Court has not previously addressed the question, [FN17] there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation *771 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.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

C

[9] For similar reasons, 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. 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 **2742 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.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert *772 full control at any moment if the subsidiary fails to act in the parent's best interests. [FN18]

FN18. As applied to a wholly owned subsidiary, the so called "single entity" test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct.

Followed by the Seventh Circuit below as well as by other Courts of Appeals, this test sets forth various criteria for evaluating whether a given parent and subsidiary are capable of conspiring with each other. See n. 2, supra; see generally Ogilvie v. Fotomat Corp., 641 F.2d 581 (CA8 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (CA9 1979), cert. denied, 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (CA7 1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980). These criteria measure the "separateness" of the subsidiary: whether it has separate control of its day to day operations, separate officers, separate corporate headquarters, and so forth. At least when a subsidiary is wholly owned, however, these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact 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.

[10][11] The intra enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. 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. [FN19] Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve *773 management, avoid special tax problems arising from multistate operations, or serve other legitimate interests. [FN20] 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. Because there is nothing inherently anticompetitive about a corporation's decision **2743 to create a subsidiary, the intra enterprise conspiracy doctrine "impose[s] grave legal consequences upon organizational distinctions that are of de minimis meaning and effect." Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29, 82 S.Ct. 1130, 1136, 8 L.Ed.2d 305 (1962). [FN21]

FN19. Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141, 88 S.Ct. 1981, 1985, 20 L.Ed.2d 982 (1968). The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

FN20. For example, "[s]eparate incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profit sharing plans or different accounting practices." Areeda, 97 Harv.L.Rev., at 453.

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951). [FN22] Such an *774 incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

United States Court of Appeals,
Seventh Circuit.
CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN Continental Broadcasting Company, Plaintiffs Appellees, Cross Appellants,
v.
NATIONAL BASKETBALL ASSOCIATION, Defendant Appellant, Cross Appellee.
Nos. 95 1341, 95 1376, 95 3935 and 95 4021.

Argued June 4, 1996.
Decided Sept. 10, 1996.
Rehearing and Suggestion for Rehearing
En Banc Denied Oct. 7, 1996. [FN*]

FN* Judge Cummings did not participate in the consideration of the suggestion for rehearing en banc.

Professional basketball team and cable television station sued professional basketball league, claiming that agreement between league and national television broadcast network was impermissible restraint on trade. The United States District Court for the Northern District of Illinois, Hubert L. Will, J., 874 F.Supp. 844, made permanent allowance of number of games television station could broadcast and declared basketball league's fee for such broadcasts excessive. Both television station and league appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) Sports Broadcasting Act's exemption to antitrust laws was inapplicable to league's contract to broadcast its teams' games; (2) teams need not have to have complete unity of interest for league itself to be treated as single firm for antitrust purposes; and (3) when acting in broadcast market, league was closer to single firm than to group of independent firms.

Vacated and remanded.

* * *

According to the league, the analogy to a corporate board is apt in more ways than this. The NBA concedes that it comprises 30 juridical entities 29 teams plus the national organization, each a separate corporation or partnership. The teams are not the league's subsidiaries; they have separate ownership. Nonetheless, the NBA submits, it functions as a single entity, creating a single product ("NBA Basketball") that competes with other basketball leagues (both college and professional), other sports ("Major League Baseball", "college football"), and other entertainments such as plays, movies, opera, TV shows, Disneyland, and Las Vegas. Separate ownership of the clubs promotes local boosterism, which increases interest; each ownership group also has a powerful *598 incentive to field a better team, which makes the contests more exciting and thus more attractive. These functions of independent team ownership do not imply that the league is a cartel, however, any more than separate ownership of hamburger joints (again useful as an incentive device, see Benjamin Klein & Lester F. Saft, The Law and Economics of Franchise Tying Contracts, 28 J.L. & Econ. 345 (1985)) implies that McDonald's is a cartel. Whether the best analogy is to a system of franchises (no one expects a McDonald's outlet to

compete with other members of the system by offering pizza) or to a corporate holding company structure (on which see Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)) does not matter from this perspective. The point is that antitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers. To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it: the producers of Star Trek may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market, just as the NBA's superstation rule does.

The district court conceded this possibility but concluded that all cooperation among separately incorporated firms is forbidden by § 1 of the Sherman Act, except to the extent Copperweld permits. Copperweld, according to the district court, "is quite narrow, and rests solely upon the fact that a parent corporation and its wholly owned subsidiary have a 'complete unity of interest' " (quoting from 467 U.S. at 771, 104 S.Ct. at 2741). Although that phrase appears in Copperweld, the Court offered it as a statement of fact about the parent subsidiary relation, not as a proposition of law about the limits of permissible cooperation. As a proposition of law, it would be silly. Even a single firm contains many competing interests. One division may make inputs for another's finished goods. The first division might want to sell its products directly to the market, to maximize income (and thus the salary and bonus of the division's managers); the second division might want to get its inputs from the first at a low transfer price, which would maximize the second division's paper profits. Conflicts are endemic in any multi stage firm, such as General Motors or IBM, see Robert G. Eccles, Transfer Pricing as a Problem of Agency, in Principals and Agents: The Structure of Business 151 (Pratt & Zeckhauser eds. 1985), but they do not imply that these large firms must justify all of their acts under the Rule of Reason. Or consider a partnership for the practice of law (or accounting): some lawyers would be better off with a lockstep compensation agreement under which all partners with the same seniority have the same income, but others would prosper under an "eat what you kill" system that rewards bringing new business to the firm. Partnerships have dissolved as a result of these conflicts. Yet these wrangles every bit as violent as the dispute among the NBA's teams about how to generate and divide broadcast revenues do not demonstrate that law firms are cartels, or subject to scrutiny under the Rule of Reason their decisions about where to open offices or which clients to serve.

Copperweld does not hold that only conflict free enterprises may be treated as single entities. Instead it asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent subsidiary group to the "unilateral" side in light of those functions. Like a single firm, the parent subsidiary combination cooperates internally to increase efficiency. Conduct that "deprives the marketplace of the independent centers of decisionmaking that competition assumes", 467 U.S. at 769, 104 S.Ct. at 2740, without the efficiencies that come with integration inside a firm, go on the "concerted" side of the line. And there are entities in the middle: "mergers, joint ventures, and various vertical agreements" (id. at 768, 104 S.Ct. at 2740) that reduce the number of independent decisionmakers yet may improve efficiency. These are assessed under the Rule of Reason. We see no reason why a sports league cannot be treated as a single firm in this typology. It produces a single product; cooperation is essential (a *599 league with one team would be like one hand clapping); and a league need not deprive the

market of independent centers of decisionmaking. The district court's legal standard was therefore incorrect, and a judgment resting on the application of that standard is flawed.

Whether the NBA itself is more like a single firm, which would be analyzed only under § 2 of the Sherman Act, or like a joint venture, which would be subject to the Rule of Reason under § 1, is a tough question under Copperweld. It has characteristics of both. Unlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in NCAA, the NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams. After this case was last here the NBA created new teams in Toronto and Vancouver, stocked with players from the 27 existing teams plus an extra helping of draft choices. All of this makes the league look like a single firm. Yet the 29 clubs, unlike GM's plants, have the right to secede (wouldn't a plant manager relish that!), and rearrange into two or three leagues. Professional sports leagues have been assembled from clubs that formerly belonged to other leagues; the National Football League and the NBA fit that description, and the teams have not surrendered their power to rearrange things yet again. Moreover, the league looks more or less like a firm depending on which facet of the business one examines. See Phillip E. Areeda, 7 Antitrust Law para. 1478d (1986). From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet. But from the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the human capital of players is not readily transferable to other sports (as even Michael Jordan learned) the league looks more like a group of firms acting as a monopsony. That is why the Supreme Court found it hard to characterize the National Football League in Brown v. Pro Football, Inc., 518U.S. 231, , 116 S.Ct. 2116, 2126, 135 L.Ed.2d 521 (1996): "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival.... In the present context, however, that circumstance makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us." To say that the league is "more like a single bargaining employer" than a multi employer unit is not to say that it necessarily is one, for every purpose.

The league wants us to come to a conclusion on this subject (six years of litigation is plenty!) and award it the victory. Yet as we remarked in 1992, "[c]haracterization is a creative rather than exact endeavor." 961 F.2d at 672. The district court plays the leading role, followed by deferential appellate review. We are not authorized to announce and apply our own favored characterization unless the law admits of only one choice. The Supreme Court's ambivalence in Brown, like the disagreement among judges on similar issues, implies that more than one characterization is possible, and therefore that the district court must revisit the subject using the correct legal approach.

Most courts that have asked whether professional sports leagues should be treated like single firms or like joint ventures have preferred the joint venture characterization. E.g., Sullivan v. NFL, 34 F.3d 1091 (1st Cir.1994); North American Soccer League v. NFL, 670 F.2d 1249 (2d Cir.1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C.Cir.1978). But Justice

Rehnquist filed a strong dissent from the denial of certiorari in the soccer case, arguing that "the league competes as a unit against other forms of entertainment", NFL v. North American Soccer League, 459 U.S. 1074, 1077, 103 S.Ct. 499, 500, 74 L.Ed.2d 639 (1982), and the fourth circuit concluded that the Professional Golf Association should be treated as one firm for antitrust purposes, even though that sport is less economically integrated than the NBA. Seabury Management, Inc. v. PGA of *600 America, Inc., 878 F.Supp. 771 (D.Md.1994), affirmed in relevant part, 52 F.3d 322 (4th Cir.1995). Another court of appeals has treated an electric cooperative as a single firm, Mt. Pleasant v. Associated Electric Cooperative, 838 F.2d 268 (8th Cir.1988), though the co op is less integrated than a sports league. These cases do not yield a clear principle about the proper characterization of sports leagues and we do not think that Copperweld imposes one "right" characterization. Sports are sufficiently diverse that it is essential to investigate their organization and ask Copperweld 's functional question one league at a time and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities. Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players. See Jesse W. Markham & Paul V. Teplitz, Baseball Economics and Public Policy (1981); Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, The National Collegiate Athletic Association: A Study in Cartel Behavior (1992).

United States Court of Appeals,
Ninth Circuit.
Arleen FREEMAN, individually and on behalf of all others similarly situated;
James Alexander, individually and on behalf of all others similarly situated,
Plaintiffs Appellants,
and
Edward Y. Urata, individually and on behalf of all others similarly situated,
Plaintiff,
v.
SAN DIEGO ASSOCIATION OF REALTORS; North San Diego County Association of Realtors; Pacific Southwest Association of Realtors, Inc.; East San Diego County Association of Realtors; Coronado Association of Realtors; Sandicor, Inc.; Michael Spilger; Greg Britton; Joel Forrel; Gwen Hovland; Aileen Oya; Marty Conrad; Lauren Reiser; Anita Alkire; Phyllis Gritts; Chris H. Lewis; Lou Ann Williams; Cory Shepard; Sara Brown; Joyce V. Amick; Jerry Scantlin; Walter Baczkowski; Mark Marchand; Stephen Games; California Association of Realtors, Defendants Appellees.
Arleen Freeman, individually and on behalf of all others similarly situated; James Alexander, individually and on behalf of all others similarly situated; Edward Y. Urata, individually and on behalf of all others similarly situated, Plaintiffs Appellees,
v.
San Diego Association of Realtors; North San Diego County Association of Realtors; Pacific Southwest Association of Realtors, Inc.; East San Diego County Association of Realtors; Coronado Association of Realtors; Sandicor, Inc.; Anita Alkire; California Association of Realtors, Defendants Appellants,
and
Michael Spilger; Greg Britton; Joel Forrel; Gwen Hovland; Aileen Oya; Marty Conrad; Lauren Reiser; Phyllis Gritts; Chris H. Lewis; Lou Ann Williams; Cory Shepard; Sara Brown; Joyce V. Amick; Jerry Scantlin; Walter Baczkowski; Mark Marchand; Stephen Games, Defendants.
Nos. 01 56199, 01 56231.

Argued and Submitted July 9, 2002.
Filed March 10, 2003.
As Amended on Denial of Rehearing April 24, 2003.

Subscribers to countywide real estate listing service sued, inter alia, corporation that maintained listing service database, local real estate associations that were corporation's shareholders and provided support services for listing service, and state association, asserting claims under Sherman Act for price fixing and conspiracy to monopolize market for support services and seeking injunctive and monetary relief. The United States District Court for the Southern District of California, M. James Lorenz, J., granted defendants' summary judgment motion. Parties cross appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) activities of corporation and local associations had requisite substantial effect on interstate commerce to support Sherman

Act claims; (2) defendants engaged in price fixing in violation of Sherman Act; (3) subscribers had standing to sue defendants for price fixing; (4) defendants' joint venture was not shielded from liability under single entity rule; (5) rule of reason analysis did not apply to price fixing claim; and (6) defendants were not liable for conspiracy to monopolize support services market.

Affirmed in part, reversed in part, and remanded.

* * *

[16][17] 2. Defendants argue that they are immune from section 1 because they constitute a "single entity" and are thus incapable of conspiring with one another. Section 1, like the tango, requires multiplicity: A company cannot conspire with itself. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). If two erstwhile competitors combine to become a single economic entity by merger or acquisition, for example the act of combination may violate the antitrust laws, but their subsequent relations are generally immune from section 1.

[18][19] The single entity rule is relevant in a variety of contexts. It applies to a company and its officers, employees and wholly owned subsidiaries. Id. at 769, 771, 104 S.Ct. 2731. It also applies to subsidiaries controlled by a common parent, Thomsen v. W. Elec. Co., 680 F.2d 1263, 1265 66 (9th Cir.1982), firms owned by the same person, Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 616, 618 (9th Cir.1979), and a firm owned by a subset of the owners of another, Copperweld, 467 U.S. at 773 n. 21, 104 S.Ct. 2731 (citing Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962)). It applies to principal agent relationships, Calculators Haw., Inc. v. Brandt, Inc., 724 F.2d 1332, 1336 (9th Cir.1983), and to "partnerships or other joint arrangements *1148 in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." Maricopa County Med. Soc'y, 457 U.S. at 356, 102 S.Ct. 2466; see also Hahn v. Or. Physicians' Serv., 868 F.2d 1022, 1029 n. 5 (9th Cir.1988). The theme in these cases is economic unity. Where there is substantial common ownership, a fiduciary obligation to act for another entity's economic benefit or an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity.

Some decisions have found a single entity even in the absence of economic unity. In City of Mt. Pleasant v. Associated Electric Cooperative, Inc., 838 F.2d 268 (8th Cir.1988), the Eighth Circuit held that a joint venture of independently owned regional electric cooperatives was a single entity. Id. at 271. It opined that "legally distinct entities cannot conspire among themselves if they 'pursue[ ] the common interests of the whole rather than interests separate from those of the [group] itself.' " Id. at 274 (quoting Copperweld, 467 U.S. at 770, 104 S.Ct. 2731). Crucially, though, there was no evidence that "defendants are, or have been, actual or potential competitors." Id. at 276. Similarly, Williams v. I.B. Fischer Nevada, 794 F.Supp. 1026 (D.Nev.1992), aff'd, 999 F.2d 445 (9th Cir.1993) (per curiam), found that a fast food franchisor and its franchisees were a single entity; among other things, the franchisees were located too far apart to be effective competitors, even though they could vary their prices. See id. at 1031.

On the other hand, in Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.1984), we held that the teams of the NFL are not a single entity. [FN17] We noted that "[t]he member clubs are all independently owned," id. at 1389 90, and that "profits and losses are not shared," id. at 1390. We further observed that "the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel." Id. This competitive element distinguishes Los Angeles Memorial Coliseum from cases like Mt. Pleasant and Williams.

FN17. Los Angeles Memorial Coliseum was decided before Copperweld, but nothing in the latter impugns our holding in the former.

[20] Although the single entity inquiry is fact specific, Williams, 999 F.2d at 447, a few general guidelines emerge. First, in the absence of economic unity, the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity. "[A] commonality of interest exists in every cartel." L.A. Mem'l Coliseum, 726 F.2d at 1389. Retailers have a common interest in distributing a supplier's product, but they certainly are not exempt from section 1. See Plymouth Dealers, 279 F.2d at 134. And, the Court routinely scrutinizes joint ventures that involve aspects of common interest. See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); Broad. Music, Inc. v. CBS, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979); United States v. Topco Assocs., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); United States v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); see also 1 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 11.02[2], at 11 17 (2d ed.2000) (noting that cases finding joint venturers to be incapable of conspiracy are the "exception").

[21] Second, in the absence of economic unity, the fact that firms are not actual *1149 competitors is also usually not enough, by itself, to render them a single entity. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself, as where firms conspire to divide the market. See Maricopa County Med. Soc'y, 457 U.S. at 344 n. 15, 102 S.Ct. 2466 (division of markets is per se illegal). Cases have required instead that the constituent entities be neither actual nor potential competitors, City of Mt. Pleasant, 838 F.2d at 276, cf. Williams, 794 F.Supp. at 1031.

[22] Finally, where firms are not an economic unit and are at least potential competitors, they are usually not a single entity for antitrust purposes. This rough guideline fairly captures the holdings of the cases above.

[23][24] These principles resolve the issue here. [FN18] The associations do not function as an economic unit in providing support services. Sandicor is a corporation, so agreements wholly internal to the company and its officers and employees are presumably immune. [FN19] But the agreements at issue extend beyond Sandicor to its shareholder associations contracting on their own accounts. See Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 57 (1st Cir.2002) ("That a stockholder may be insulated by Copperweld when making ordinary governance decisions does not mean automatic protection when the stockholder is also an entrepreneur separately contracting with the company."). The associations have no substantial common ownership; they are mutual benefit corporations independently owned by their respective

members. Their profits thus don't all wind up under the same corporate mattress. Even assuming that the associations act as Sandicor's "agents" for some purposes, their decision to fix the price of the support services they sell to Sandicor at a supracompetitive level services on which the associations bear the economic risk was not an exercise of agency authority on Sandicor's behalf. Cf. Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1450 (9th Cir.1988). Nor do the associations share profits among themselves; Sandicor pays support fees on a per subscriber basis, so an association's revenues are tied to the number of agents it signs up. An association that attracts lots of agents doesn't share the fruits of that industry with one that attracts few.

FN18. We may resolve the issue of capacity to conspire because the relevant facts are not disputed. See L.A. Mem'l Coliseum, 726 F.2d at 1387.

FN19. We assume this to be the case, although we do note that each association's ownership interest in Sandicor is automatically adjusted every year to reflect the relative number of subscribers it serves, so that the associations have eliminated many of the elements of risk sharing traditionally associated with the corporate form.

The associations are also at least potential competitors. Nothing innate in the economics of a countywide MLS requires an agent to subscribe through one association rather than another. Because Sandicor pays support fees on a per subscriber basis, competition among associations to sign up new MLS subscribers is also competition in the market to sell support services to Sandicor. The more subscribers an association signs up, the more support services it sells to Sandicor. If one association offered better support services longer hours, a nicer building, more patient help staff it could attract more subscribers.

The associations are also now actual competitors. Before 1994, rules of the National Association of Realtors required an agent to join the association in the geographical *1150 area where the agent's office was located. But that year NAR adopted the "board of choice" system, which allows agents to choose their association. Under board of choice, the associations compete for members. [FN20] SDAR, for example, sent letters to other associations' members offering free trials. Another association considered using flyers and a presentation to retain or attract members in response to board of choice. Agents could consider an association's MLS support services in deciding whether to become a member; at a minimum, those services are part of the total package that an association offers. [FN21]

FN20. The district court held that "[c]ompetition for members is outside the scope of the Associations' joint venture." But MLS subscriptions are one of the services associations sell to their respective members. An association that attracts more members thereby attracts more subscribers, and thus earns more support fees from Sandicor.

FN21. The associations may have been actual competitors even before board of choice, because under Palsson, 16 Cal.3d at 937 38, 130 Cal.Rptr. 1, 549 P.2d 833, they had to sell MLS subscriptions to nonmembers, who were not subject to NAR's geographical restrictions.

Defendants sabotage their theory by their own admissions. They concede they fixed support fees in part because SDAR "would undoubtedly have been able to offer different prices to MLS users than would Fallbrook" under the board of choice regime, whose arrival was imminent when they formed Sandicor. They explain: "The board of choice prospect buttressed the attractiveness of a centralized MLS structure, working hand in glove with the underlying notion of fairness of offering the same services at the same prices to all participants." In other words: "The prospect of having to compete with one another buttressed the attractiveness of a cartel, where we could fix prices and services in ways we thought were fair." Rarely do antitrust defendants serve up their own heads on so shiny a silver platter.

The associations are not a single entity, and so their joint venture is not immune from scrutiny under section 1.