Northwestern University Law Review
Winter, 1996

Comment

*720 THE VATICAN MERGER DEFENSE -- SHOULD TWO CATHOLIC HOSPITALS SEEKING TO MERGE BE CONSIDERED A SINGLE ENTITY FOR PURPOSES OF ANTITRUST MERGER ANALYSIS?

Michael D. Belsley

***721** I. Introduction

A merger wave swept across the United States in the 1980s. While the wave has subsided in many industries, the health care merger wave has yet to crest. Since the early 1980s, a large number of hospitals across the country have consolidated or merged. [FN1] According to the American Hospital Association, more than four hundred hospitals merged or consolidated between 1980 and 1991. [FN2] Church-owned hospitals accounted for forty-four of these transactions. [FN3] Hospital mergers continue to rise. [FN4]

***722** A. Causes of Hospital Merger Mania

Hospitals' need to improve their ability to compete in the health care market is the driving force behind many of these hospital mergers. [FN5] Over the last decade, hospital revenues have been depressed by shorter average patient hospital stays and by an oversupply of hospital beds. [FN6] Both the shortened stays and the oversupply of beds are a result of changing economics and advanced patient care methods. [FN7]

Hospitals merge primarily to benefit from resulting efficiencies. [FN8] The Department of Justice and Federal Trade Commission (FTC) acknowledge the economic value of efficiency-enhancing mergers, noting that "[t]he primary benefit of mergers to the economy is their efficiency-enhancing potential." [FN9] Merging parties usually suggest that efficiencies will result in one or more of four major areas: (1) the cost of capital; (2) shared inputs; (3) better use of fixed-cost assets (economies of scale); and (4) elimination of duplicative services. [FN10] Further, if ***723** a hospital today wants to remain competitive with rival hospitals, it needs strong geographic market coverage. [FN11] One result of a hospital merger may be stronger geographic market coverage for the surviving hospital. Logically, the post-merger market coverage of the surviving hospital should exceed the pre-merger coverage of either of the original hospitals.

Another possible result of a hospital merger is an increase in market power of the surviving firm. This result is the only concern that warrants government intervention. [FN12] Market power is the ability of a firm to set its prices above what the competitive price should be. [FN13] The concern behind market power is that "[i]f a sufficient number of firms in one industry all merge, the resulting firm would face less competition and acquire additional market power." [FN14]

As early as 1979, the health care industry recognized that it was undergoing important, fundamental changes. [FN15] Five major changes in the industry can be identified: (1) the rise of the "hydra-consumer"; [FN16] (2) the increased role of government as a third-party payer via the Medicare and Medicaid programs; (3) technological improvements; (4) expansion and growth of facilities in response to increased demand and awareness; and (5) the "dramatic change in the governance and administration of all health care institutions," with boards of trustees beginning to actively watch the bottom lines of their hospitals. [FN17]

Changes made to the Medicare system in 1983, such as the establishment of the Medicare prospective payment system (PPS), added to the pressure on hospitals to become more cost-effective. [FN18] Under PPS, because the revenue for treatment is tied to the diagnosis and ***724** not to the cost of treating the patient, hospitals have an incentive to deliver cost-efficient care. [FN19] As a result of these Medicare reforms, and to a lesser degree, Medicaid reforms, hospitals shifted costs to their private, paying (or insured) patients. [FN20] During the early and mid-1980s, private individuals and medical insurance companies did not question the costs of treatment billed by the hospitals. In contrast, insurance companies today scrutinize hospital billings and unilaterally refuse to pay inflated charges. [FN21] Hospitals' revenue flows are also depressed because inpatient hospital admissions are down, and the length of the average patient stay has declined since 1981. [FN22]

Adding to the pressure on hospitals, the last three to five years have marked the rise of health maintenance organizations (HMOs), [FN23] health care networks, and managed care. [FN24] Hospitals' last profit base -- paying or privately insured patients -- is being eroded by the HMO-imposed cost controls and decreased patient stays. One HMO, U.S. Healthcare, Inc., successfully controls costs by slashing "the fees it pays to specialists and hospitals by 12% to 20% and sometimes more . . . . In the past year, it has cut members' days in hospitals by 11%. Increasingly, it asks specialists and hospitals to assume the financial risk for procedures that cost more than anticipated." [FN25] Adding to the recent cost pressures is the assumption that any national health care reform package will be financed by reducing spending on existing health programs, such as Medicare and Medicaid. [FN26] Financial considerations, coupled with the threat of national health care reform, ***725** have increased the pressure on hospitals to merge in order to remain competitive.

The United States government's permissive enforcement of antitrust laws during the 1980s further fueled the merger wave. [FN27] Antitrust enforcement under the Republican administrations was extremely lax. An outspoken critic of the government's antitrust enforcement during the mid-1980s, Professor James Ponsoldt of the University of Georgia went as far as declaring to Congress that "[t]he FTC and Justice Department under the Reagan Administration have failed to enforce section 7 [of the Clayton Act] . . . thus ignoring or revising the intent of Congress." [FN28] An antitrust challenge can effectively kill a merger. If the government challenges a merger, it will first seek a preliminary injunction to prevent its consummation. A preliminary injunction is a merger-killer because the synergies that may result from the merger often dissipate if the merger is delayed. [FN29]

The health care industry represents 14% of the United States gross domestic product. [FN30] Without health care reform, the health care industry's share of the gross domestic product is expected to top 19% by the end of the decade. [FN31] Possibly because it is such a large industry, the health care industry historically has received a high degree of antitrust scrutiny. [FN32] Although Congress failed to pass President Clinton's proposed health care reform plan in 1994, it is probable that health care reform will happen in the near future. [FN33] Hospitals cannot ignore ***726** the potential cost efficiencies and profit concessions that a national health care reform package would probably demand. [FN34]

B. The Vatican Merger Defense

Imagine for a moment a hypothetical town with only two hospitals. [FN35] Under the current antitrust laws, if these two hospitals wanted to merge, the government would seek to block the transaction because of the potential reduction in health care competition in that town. [FN36] Now assume that these two hospitals are both Catholic-affiliated hospitals, but that each is owned by a different Catholic religious order. [FN37] This may change the antitrust analysis of the merger.

In Copperweld Corp. v. Independence Tube Corp., [FN38] the Supreme Court found a parent company and its wholly owned subsidiary to be one economic actor for purposes of antitrust analysis. Likewise, two wholly owned subsidiaries sharing the same parent corporation are considered to be the same unitary actor for antitrust analysis. [FN39] The ***727** Court's analysis in Copperweld has been extended to mergers. [FN40] The logical corollary of Copperweld is that two wholly owned sibling corporations that share the same ultimate parent company could merge with immunity from an antitrust challenge. [FN41] Under Copperweld, the parent company and both of the subsidiaries would be considered as one economic actor. [FN42] The effect of extending Copperweld to such a merger is tantamount to antitrust immunity for the transaction. If both subsidiaries are considered to be the same economic actor, a ***728** merger between these subsidiaries will not change the market concentration because there is no change in the "actual" number of firms in the market. Generally, when there is no change in market concentration, there is no antitrust concern. [FN43]

Under antitrust law, the ultimate parent company does not need to exercise actual control over the companies, just potential control. [FN44] As the Supreme Court noted in Copperweld, a court need not focus on "whether or not the parent keeps 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 interests." [FN45] While the Vatican is not involved in directing the daily operations of Catholic hospitals, it may be argued that, under canon law, the Vatican possesses potential control over all Catholic hospitals. [FN46] Furthermore, the Vatican and the Catholic Church may influence hospital policies. If these assertions are true, then the Vatican may effectively function as the parent company of all Catholic hospitals.

For antitrust analysis, if the Vatican is the ultimate parent company, then two Catholic hospitals seeking to merge would, as sibling corporations, be immune from an antitrust challenge. This extension of Copperweld to Catholic hospitals seeking to merge will be referred to in this Comment as the Vatican Merger Defense. [FN47] While this defense remains theoretical, in

light of the fact that taken collectively, the almost six hundred Catholic hospitals in the United States are the largest not-for-profit player in the healthcare system, the implications of such a merger defense are far-reaching indeed. [FN48]

This Comment examines the validity of the Vatican Merger Defense. Part II presents the antitrust issues governing Catholic hospital mergers. Part III addresses the canon law aspects of the defense, and the connection between the American legal system and canon law. ***729** Having set forth the canon law and antitrust law related to the Vatican Merger Defense, this Comment then analyzes the validity of the Vatican Merger Defense in Part IV. Part V explores the implications of the Vatican Merger Defense.

II. Antitrust Merger Law

The United States has experienced several major merger movements. The formation of the original Standard Oil trust in 1879 marked the beginning of the first great merger movement in the United States. [FN49] Public outrage with the late-nineteenth century's industrialists and their wave of anticompetitive mergers and trust formations contributed to passage of both the Sherman Act and the Clayton Act. Judge Posner describes the Sherman Act as passing in 1890 "against a background of rampant cartelization and monopolization of the American economy." [FN50]

Most mergers, including hospital mergers, are subject to government antitrust scrutiny. In deciding whether a merger violates antitrust laws, one must consider more than just the early antitrust statutes. This Part presents the basics of antitrust merger analysis. Subpart A identifies the statutory authority for government challenges to mergers. Subpart B then discusses the current antitrust merger enforcement standards. The Vatican Merger Defense is based in the Supreme Court's holding in Copperweld, which is discussed in subpart C. Subpart D addresses hospital merger caselaw.

A. The Statutes

A very narrow body of federal antitrust law is applicable to mergers. [FN51] Only five major acts of Congress -- the Sherman Act, the Clayton Act, the Federal Trade Commission Act, the 1950 Amendments to the Clayton Act, and the Hart-Scott-Rodino Antitrust Improvements Act -- govern the antitrust aspects of mergers. [FN52] The following sections discuss each of these Acts.

***730** 1. The Sherman Act. -- Congress responded to the merger wave of the late 1800s by passing the Sherman Act in 1890. [FN53] Under section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is illegal. [FN54] Section 2 of the Act prohibits both attempted and actual monopolization of an industry. It is important to note that section 2 does not expressly prohibit the possession of monopoly power; rather, it prohibits the willful acquisition or maintenance of monopoly power by illegitimate means, such as predatory pricing. [FN55] Section 2 is not concerned with increases in a firm's market share through legitimate means, such as efficient production techniques.

Challenges to mergers under the Sherman Act are based on both sections 1 and 2. [FN56] Section 1 prohibits combinations that result in undue restraint of trade. [FN57] Section 2 prohibits monopolization and attempts to monopolize an industry. [FN58] The Sherman Act also distinguishes between concerted and independent action. [FN59] As the Supreme Court pointed out in Copperweld Corp. v. Independence Tube Corp., [FN60] section 1 of the Sherman Act prohibits "unreasonable restraints of trade effected by 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.' " [FN61]

In contrast, section 2 of the Sherman Act governs the conduct of a unitary actor. Notwithstanding section 1's plurality requirement, the key difference between sections 1 and 2 lies in the government's burden [FN62] -- under section 1, the government has to prove an unreasonable restraint of trade, whereas under section 2, the government must prove actual (or attempted) monopolization. [FN63] To establish a monopolization claim, the government must prove: (1) possession of actual monopoly power in the relevant market; (2) willful acquisition or maintenance of that power in an exclusionary manner; and (3) resultant antitrust injury. [FN64] To establish an attempted monopolization claim, the government must

prove: (1) specific intent to monopolize; (2) predatory or anti-competitive acts; and (3) a high probability of successful monopolization. [FN65]

2. The Clayton Act. -- In 1914, Congress passed the Clayton Act [FN66] in response to several Supreme Court cases narrowly interpreting the applicability of the Sherman Act. [FN67] The Clayton Act was intended to be a true trust-busting act by limiting stock acquisitions by "holding companies." [FN68]

In contrast to the Sherman Act's general language, the Clayton Act identifies four specific practices -- price discrimination, [FN69] conditional sales contracts, [FN70] mergers, [FN71] and interlocking directorates [FN72] --***732** that Congress thought were potentially anticompetitive. [FN73] Only section 7 of the Clayton Act is applicable to merger analyses. A merger can be challenged under section 7 if the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly." [FN74] Therefore, the proof required for a section 7 violation is more easily established than for a Sherman Act violation -- while the Sherman Act requires actual anticompetitive effects, section 7 of the Clayton Act requires only potential effects. [FN75] However, as adopted, section 7 of the Clayton Act had a large loophole -- it did not apply to asset acquisitions. To circumvent the scope of section 7, an acquiring firm would not buy any of the stock of the acquired company, and instead would simply purchase all of the assets of the acquired firm, leaving only a shell corporation. [FN76]

In 1950 the Supreme Court held that a firm's acquisition of substantially all of the assets of one of its competitors was not covered by the Clayton Act. [FN77] As a result of this, and a 1948 FTC report that urged a revision of section 7, [FN78] Congress rewrote the Clayton Act to include regulation of asset acquisitions. [FN79] The goal of the 1950 amendments was "to limit future increases in the level of economic concentration ***733** resulting from corporate mergers and acquisitions." [FN80] The Senate report on the 1950 amendments to the Clayton Act stated that

[t]he objective of Congress in passing section 7 of the Clayton Act has been circumvented by the acquisition of assets rather than, or in addition to, the purchase of stock. The proposed bill [amending section 7 of the Clayton Act] would eliminate this practice by extending the application of the Clayton Act to acquisitions of assets. [FN81]

Some of the amendments to the Clayton Act strengthened the Act, while others weakened it. Overall, however, Congress wanted the courts to enforce the antitrust merger laws more stringently. As Professor Sullivan explained:

Congress wanted the courts to be tougher than they had been since 1911 and not to wait for a showing of power aggressively used, or even for a showing that structural change would inevitably do injury to competitive processes. It wanted the courts to act at the edge of harm in order to choke off those mergers likely . . . to cause irreversible injury to the competitive process. [FN82]

3. The Federal Trade Commission Act. -- Also in 1914, Congress passed the Federal Trade Commission Act. [FN83] In addition to creating the Federal Trade Commission, section 5 of the Act vested the FTC with the authority to enforce the ban against unfair competition. [FN84] Section 5's broad and sweeping language -- "[u]nfair methods of competition in or affecting commerce . . . are declared unlawful" -- provides the government with the ability to challenge anticompetitive practices that do not fall within the scope of the Sherman Act or the Clayton Act. [FN85] However, section 5 claims are rarely used to challenge hospital mergers. [FN86]

4. Hart-Scott-Rodino Antitrust Improvements Act. -- In passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, [FN87] Congress further strengthened the Clayton Act. The Act now "requires ***734** certain enterprises merging or entering into acquisition transactions to notify both the [Department of Justice's] Antitrust Division and the Federal Trade Commission" of the proposed merger and to submit certain documentation related to the merger. [FN88] As a general rule, these government enforcement agencies should be notified thirty days prior to consummation of a merger for transactions worth more than $15 million; those worth less are usually excused

from the Act's reporting requirements. [FN89] During this thirty-day window, the agencies may request additional information from the parties. The purpose of this advance notification requirement is to prevent the consummation of problematic mergers. Early governmental intervention in a problematic merger may prevent a number of problems that might occur should a consummated merger later be enjoined by a court. After a merger, two entities may commingle their assets or intertwine their management teams, which creates logistical problems for a court attempting to "undo" the merger.

B. Enforcement

1. The Agencies. -- Two agencies -- the Department of Justice's Antitrust Division [FN90] and the Federal Trade Commission [FN91] -- share responsibility for enforcing the federal antitrust laws governing mergers. [FN92] Even though the enforcement responsibility is shared, merger investigations are never conducted jointly; representatives of the two agencies meet and determine which one will investigate a particular acquisition. [FN93] The enforcement agencies will "challenge[ ] those mergers***735** that a careful economic analysis shows are likely to increase prices to consumers." [FN94] The enforcement agencies may become aware of a problematic merger through a Hart-Scott-Rodino pre-merger notification filing, [FN95] a complaint by anyone in the public, or as a result of the agencies' own discovery. [FN96]

2. The Merger Guidelines. -- In addition to complying with the major federal antitrust statutes governing mergers, corporate mergers must also conform to another set of rules commonly called the Merger Guidelines. [FN97] Promulgated jointly by the two enforcement agencies, the Merger Guidelines detail under what circumstances the agencies will prosecute mergers as violations of section 1 of the Sherman Act, section 7 of the Clayton Act, or section 5 of the FTC Act. [FN98] The Merger Guidelines formally describe the analytical framework that the government will apply in determining the need to challenge the merger. There have been four versions of these guidelines -- 1968, 1982, 1984, and 1992.

Under all four versions of the Merger Guidelines, the merger is analyzed to predict the potential competitive effect of the merger on the merging firms' geographic and product markets. Beginning with the 1982 Merger Guidelines, the government relied on the Herfindahl-Hirschman Index (HHI) to measure market power. [FN99] The ***736** 1982 Guidelines outlined the significance of various HHI figures in triggering antitrust scrutiny. [FN100] The scope of the Merger Guidelines' analysis was expanded two years later by the 1984 Merger Guidelines, [FN101] in which the existence of foreign competition and evidence that a merger will achieve economic efficiencies became additional factors the government would include in its merger analysis. [FN102]

Under the current guidelines, [FN103] the government's analysis involves five different assessments: (1) definition and measurement of the relevant market and determination of the merger's effect on the market concentration; (2) assessment of potential adverse competitive effects; (3) analysis of ease of entry and barriers to entry; (4) evaluation of efficiency gains resulting from the merger; and (5) determination of whether, should the merger not be consummated, one of the merging firms would exit the market (the failing firm analysis). [FN104]

3. Antitrust Joint Health Care Statements. -- The combination of the merger wave sweeping the health care industry and the industry's complexity prompted the government enforcement agencies to issue a narrower set of guidelines to address the antitrust aspects of the health care industry. [FN105] The goal of the Joint Health Care Statements was to "provide education and instruction to the health care community in a time of tremendous change, and to resolve, as

completely as possible, the problem of antitrust uncertainty that some have said may deter mergers . . . that would lower health care costs." [FN106]

***737** Not all hospital mergers and consolidations face antitrust scrutiny. [FN107] The position of the enforcement agencies is that "most hospital mergers and acquisitions do not present competitive concerns." [FN108] Since 1987, only eight of the more than two hundred hospital mergers in the United States have been challenged by the government. [FN109] The Department of Justice and FTC have established an "antitrust safety zone" for hospital mergers. [FN110] "[A]bsent extraordinary circumstances," hospital mergers that fit within this safety zone will not be challenged by the government. [FN111] This antitrust safety zone applies to small hospitals because of the recognition that "cost-saving efficiencies [for small hospitals] may be realized . . . through a merger with another hospital." [FN112] For hospital mergers that fall outside of the antitrust safety zone, the government's antitrust analysis follows the 1992 Merger Guidelines. [FN113]

In September 1994 the government enforcement agencies issued Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, which superseded the 1993 Joint Health Care Statements. [FN114] While the scope of the new Joint Health Care Statements expanded, [FN115] the hospital merger statement issued in the 1993 version remained essentially unchanged in the 1994 version. Under the 1994 Joint Health Care Statements, a merger with a hospital that has an average of fewer than one hundred licensed beds over the three most recent years, and has an average daily inpatient census of fewer than forty patients over the three most recent years falls within the antitrust merger safety zone. [FN116] For hospital mergers falling outside of the antitrust safety zone, the 1994 Joint Health Care Statements reaffirmed that this type of merger would be analyzed following the "five steps set forth in the Department of Justice/Federal Trade ***738** Commission 1992 Horizontal Merger Guidelines," [FN117] which is the same policy set out in the 1993 Joint Health Care Policy statements. [FN118]

The first application of the 1993 Joint Health Care Statements was to a merger of two Florida hospitals. [FN119] The Department of Justice challenged the merger of the two major hospitals in northern Pinellas County, Florida, because of its concern with the potential anti-competitive effects of a complete merger. [FN120] As a result of a compromise consent decree, the two hospitals were eventually allowed to partially merge. [FN121] The consent decree allowed the two hospitals to achieve some of the efficiencies they sought in a complete merger, [FN122] while at the same time, to maintain competition in certain medical areas. [FN123] Assistant Attorney General Anne Bingaman described the consent decree as an agreement that

allows those efficiencies to be obtained with lower prices for consumers, lower hospital costs and lower prices for managed care, but it also maintains two separate entities to bid against each other, to discount managed-care plans, to maintain the competition that the whole president's health care plan is premised on. [FN124]

***739** C. The Copperweld Decision

The legal foundation for the Vatican Merger Defense can be traced to the 1984 Supreme Court's decision in Copperweld Corp. v. Independence Tube Corp. [FN125] In Copperweld, the Court defined a parent corporation and its wholly owned subsidiary as a single entity for antitrust analysis. [FN126] The Court declared that "[a]ntitrust liability [cannot] turn[ ] on the garb in which a corporate subunit [is] clothed." [FN127] Even the dissent conceded that a "single firm, no matter what its corporate structure may be, is not expected to compete with itself." [FN128] The Court's finding in Copperweld, that a parent and its wholly owned subsidiary are incapable of conspiracy under section 1 of the Sherman Act, [FN129] focused on a rejection of the "intra-enterprise conspiracy" doctrine. [FN130]

The intra-enterprise conspiracy doctrine [FN131] was established by a line of Sherman Act conspiracy cases involving joint activity by commonly owned enterprises. [FN132] Under the intra-enterprise conspiracy doctrine, commonly owned enterprises, such as a parent corporation and its subsidiaries, are considered to be separate entities for conspiracy analysis. [FN133] The doctrine stems from the Supreme Court's decision in United States v. Yellow Cab Co., [FN134] where the Court found the ***740** owner of several (formerly independent) taxicab companies capable of conspiracy within the meaning of the Sherman Act. [FN135]

In Copperweld, the Court rejected intra-enterprise liability theory and stated that though "this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never [before] explored or analyzed in detail the justifications for such a rule." [FN136] The Court reasoned that "[a]ntitrust liability should not depend on whether a corporate subunit is

organized as an unincorporated division or a wholly owned subsidiary." [FN137] The Court further noted that:

[A] parent and its wholly owned subsidiary must be viewed as . . . a single enterprise for purposes of s 1 of the Sherman Act. [They] have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. [FN138]

When read narrowly, Copperweld applies only to a section 1 Sherman Act conspiracy between a parent and its wholly owned subsidiary. [FN139] However, the opinion suggests that a broader reading of its decision is intended. The Court specifically contrasted section 1 and section 2 of the Sherman Act, noting that section 1 addresses restraints of trade effected by a "contract, combination . . . or conspiracy" between separate entities, and does not reach conduct that is "wholly-unilateral." [FN140] The Court did not offer a test nor explicit guidance for how the lower courts should determine the existence of a single entity. [FN141]

The extension of Copperweld to merger analysis is a logical one. While the 1992 Merger Guidelines do not directly address the intra-company merger issue, the regulations promulgated under the Hart-Scott-Rodino Act provide an express exemption for intra-company ***741** transactions. [FN142] Section 802.30 provides an example that is applicable to the Vatican Merger Defense: "Corporation A merges its two wholly owned subsidiaries S1 and S2. The transaction is exempt under this section." [FN143] The reason why this example does not outright validate the Vatican Merger Defense is that Catholic hospitals are not wholly owned subsidiaries of the Vatican. [FN144]

Even the dissent in Copperweld admitted that "[i]t is safe to assume that corporate affiliates do not vigorously compete with one another." [FN145] The logic of extending Copperweld to mergers parallels agency law's concept of master and servant. If a parent and its subsidiary are considered one economic actor, then two subsidiaries sharing the same parent could argue that functionally, they are "not unlike a multiple team of horses drawing a vehicle under the control of a single driver." [FN146] If the two subsidiaries are deemed to be one economic actor already, then there would be no change in the relative concentration of the market if the subsidiaries merged. Moreover, in Copperweld, the Court cited an amicus curiae brief filed by the government for the proposition that the "Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can 'combine' or 'conspire' under [section] 1." [FN147] The Court in Copperweld also noted in dicta that certain 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. [FN148] 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. [FN149]

The Court also observed that "it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that section 1 was designed to police." [FN150] Ultimately, the validity of extending Copperweld to the Vatican Merger Defense will hinge on the definition of a unitary actor. [FN151] If the relationship between the Vatican and the Catholic-owned hospitals fails to constitute a unitary relationship, Copperweld itself suggests ***742** that a merger between them does not deserve preferential treatment. [FN152] In Copperweld, the Court reflected:

In any conspiracy, two or more entities that previously pursued their own interests separately are combined 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, merging of resources may well lead to efficiencies that benefit consumers, but their anti-competitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly. [FN153]

D. Hospital Mergers

Under current antitrust analysis of hospital mergers, heavy reliance is placed on analysis of the post-merger market concentrations. [FN154] As commentators have noted, antitrust law results in a "competitive paradigm that presumes that in 'highly concentrated markets' any reduction in the number of independent competitors, [which is] the necessary result of mergers or joint ventures involving existing hospital services, is likely to be associated with higher prices and lower quality." [FN155] As discussed in Part I of this Comment, the merger wave sweeping the hospital industry is a result of market pressures to become more efficient. [FN156] Under the government's guidelines, efficiency defenses are affirmative defenses that the merging parties must plead and prove. [FN157]

Historically, very few hospital mergers have been challenged by either enforcement agency. [FN158] Even fewer nonprofit charitable hospital mergers have been attacked. [FN159] In the 104 -year history of federal antitrust jurisprudence, only three times have nonprofit charitable hospital mergers resulted in government challenges: FTC v. University Health, Inc., [FN160] United States v. Rockford Memorial Corp., [FN161] and ***743** United States v. Carilion Health System. [FN162] In all three cases the government charged violations of section 1 of the Sherman Act and section 7 of the Clayton Act. [FN163]

Section 7 of the Clayton Act is used to challenge mergers that "may . . . substantially . . . lessen competition or tend to create a monopoly." [FN164] While modern merger challenges traditionally are brought under section 7 of the Clayton Act, a merger may also be challenged under section 1 of the Sherman Act. As Judge Posner summarized in Rockford Memorial:

[There is not a] substantive difference today between the standard for judging a merger challenged under section 1 of the Sherman Act and the standard for judging the same merger challenged under section 7 of the Clayton Act. . . . A transaction violates section 1 of the Sherman Act if it restrains trade; it violates the Clayton Act if its effect may be substantially to lessen competition. . . . [The standards] have, after three quarters of a century, converged. [FN165]

While the Fourth Circuit reached an opposite conclusion in Carilion Health Systems, Judge Posner noted that the "discussion in the Fourth Circuit's [Carilion Health Systems] opinion is brief, indeed perfunctory . . . in any event, the court did not want its decision to have a precedential effect." [FN166]

Mergers likely to violate section 1 of the Sherman Act will also likely violate section 7 of the Clayton Act. [FN167] Section 7 of the Clayton Act requires only an incipient, rather than an actual, antitrust violation. [FN168] Though this is arguably a lesser burden of proof for the government to meet than is required for a merger challenge brought under section 1 of the Sherman Act, both antitrust statutes are concerned with hospital mergers that reduce, or may reduce, competition in the relevant market.

***744** In Hospital Corp. of America v. FTC, [FN169] Judge Posner cited Brown Shoe Co. v. United States [FN170] and United States v. Philadelphia National Bank [FN171] for establishing a presumption of illegality for "any nontrivial acquisition of a competitor, whether or not the acquisition [is] likely . . . to bring about . . . oligopoly pricing." [FN172] With respect to health care industry mergers, Judge Posner discounted the applicability of United States v. General Dynamics Corp., [FN173] specifically noting that it did not overrule either Brown Shoe or Philadelphia National Bank. [FN174] In his opinion, Judge Posner warned of a potential danger caused by a hospital merger:

The reduction in number of competitors is significant in assessing the competitive vitality of the . . . hospital market. The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act, which forbids price fixing. [FN175]

The threshold issue for antitrust scrutiny of a hospital merger is whether the transaction creates or enhances "market power." Market power is approximated based on an inspection of the merging hospitals' pre-merger and (predicted) post-merger market shares, along with the pre-merger and (predicted) post-merger market concentration. [FN176] Market power is the ability to profitably increase a price above (or decrease output below) competitive levels. [FN177] The 1992 Merger Guidelines consider the post-merger ability to raise prices by a "small but significant and nontransitory" amount, without suffering from consumer defection, to be indicative of market power. [FN178]

***745** If a hospital merger would result in such market power, [FN179] then the hospitals have the burden of raising affirmative defenses, such as the creation of efficiencies that will benefit consumers. The 1992 Merger Guidelines state that "the presumption [of illegality of a merger] may be overcome by a showing that the . . . [efficiencies] make it unlikely that the merger will create or enhance market power or facilitate its exercise in light of market concentration and market shares." [FN180] The burden is on the merging hospitals to prove that other factors, such as the efficiencies, outweigh the competitive threat posed by the post-merger increase in market power.

Hospital mergers are two to three times more likely than other types of mergers to raise government scrutiny. [FN181] According to the 1992 Merger Guidelines, a post-merger market concentration HHI over eighteen hundred creates the presumption of market power if the resulting change (pre-merger to post-merger) in HHI is at least one hundred points. [FN182] As the American Hospital Association's Fredric Entin points out, in more than eighty percent of the communities in

the United States, any reduction in the number of hospitals through merger is presumptively illegal under the 1992 Merger Guidelines. [FN183] ***746** If accepted by the courts, the Vatican Merger Defense would be an affirmative defense used to rebut any presumptions of illegality. [FN184]

III. Canon Law Aspects of the Vatican Merger Defense

In addition to corporate law, Catholic organizations are also subject to canon law. [FN185] Catholic hospitals are considered to ultimately belong to the Catholic Church. [FN186] Consequently, Catholic hospitals are governed by two separate legal systems. An analysis of the validity of the Vatican Merger Defense requires an inspection of (1) the organizational structure of the Catholic Church; (2) the canon law governing mergers; (3) the canon law restrictions on a Catholic organization's autonomous governance; and (4) the relationship between canon law and the American legal system. Subparts A, B, C, and D address these concerns, respectively.

A. Organizational Structure of the Catholic Church

Canon law governs nearly every aspect of the Catholic Church. [FN187] As commentators have noted, when compared to civil legal codes, the actual Catholic canon law code is relatively short -- the most recent version, promulgated in 1983, contains only 1,752 canons. [FN188] One commentator, John A. Alesandro, postulates that:

***747** The [canon law] Code's comparative brevity . . . results . . . from its tendency to remain, in many cases, on the level of principle rather than to offer detailed regulations. To achieve church order, the Code frequently relies on the exercise of discretion by ecclesiastical administrators in applying the law to concrete situations. The administrator is called upon to humanize and accommodate the legislator's canonical principles, set them in their proper context, [and] apply them equitably. [FN189]

The organization of the Catholic Church also lacks any notion of horizontal balance of powers -- "[n]ot only the Pope but every diocesan bishop is legislator, administrator, and judge." [FN190] The Church instead relies on a vertical hierarchy, with the Pope occupying the highest position. [FN191] It follows that the Pope is the Church's ultimate legislator, administrator, and judge. The canon law code also provides a detailed hierarchy of the lesser Church authorities and their responsibilities. [FN192] As Alesandro observes, "[s]ince the regulation of the exercise of power in the Church is based principally on the hierarchical relationship of ecclesiastical authorities to each other, recourse is pursued within the line of administrative authority and not outside it." [FN193] Thus, a brief explanation of the structural hierarchy of the Catholic Church is necessary to determine the scope of the Church's potential control of Catholic hospital mergers.

As commentator James H. Provost notes, "[t]he 1983 Code adopts a . . . focus[ ] on authority rather than power: supreme church authority and authority, in relationship to particular churches." [FN194] The chart below illustrates the organizational structure of the Church:

***748** Pope (Holy See) (Head of the College of Bishops) P College of Bishops ---- College of Cardinals P The Roman Curia (Administrative/Bureaucratic arm of the Vatican) P Numerous Provinces (Governed by an Archbishop) P Numerous Dioceses (Governed by a Bishop) P Numerous Vicarates (Governed either by a Bishop directly or by a Vicar) P Numerous Parishes P Individual Churches and Catholic Institutions (including Catholic hospitals)

1. The Papal State. -- As head of the Catholic Church, the Pope enjoys juridical independence and unreviewable power over all aspects of the Church, including local situations. [FN195] Canon 333 declares the primacy of the Pope over the other bishops and "over all particular [local] churches and groupings of churches." [FN196] The canon goes on to explicitly state that "[t]here is neither appeal nor recourse against a decision or decree of the [[[Pope]." [FN197] While the Pope has the ability to intervene directly in "a local ecclesial situation," papal custom and canon law both dictate that such power "be used as a support to the proper and immediate authority that the local bishop exercises in virtue of his office, and not as a replacement or diminution of the local bishop's role." [FN198]

The Pope is head of the college of bishops; the college is composed of all consecrated Catholic bishops -- whether the bishop governs a diocese, has a special papal office, or is retired. [FN199] The college ***749** of bishops has the power to gather as a synod or as an ecumenical council -- essentially as a convention of bishops -- to address major doctrinal questions. [FN200] However, when the college of bishops gathers, their main duty is to advise the Pope.

In addition to the college of bishops is a special college, the college of cardinals. [FN201] All cardinals are bishops, [FN202] however, not all bishops are cardinals -- the Pope alone selects who will serve as cardinal bishops. [FN203] Cardinals have three major functions: (1) provide for the election of the Pope; (2) serve as special advisors to the Pope; and (3) assist the Pope by serving as special papal officers charged with the daily care of the Catholic Church. [FN204]

In addition to the college of bishops and the college of cardinals, the papal state also contains a body known as the Roman Curia. [FN205] This body is a collection of administrative departments within the Vatican, the structure of which roughly parallels the American legal system's executive branch agencies and departments. The Roman Curia functions as the instrument through which the Pope conducts the business of the Catholic Church. [FN206] Composed of bishops and cardinals, it consists of the Papal Secretariat, the Council for the Public Affairs of the Church, and various institutions called congregations and tribunals. [FN207]

The Papal Secretariat acts as the Pope's manager, responsible for coordinating the work of the various curial offices and institutions. [FN208] The numerous congregations function as the Vatican's administrative agencies. Among the numerous curial congregations is the Sacred Congregation for the Clergy, responsible for addressing issues involving the ministry of the Catholic clergy. More importantly, this congregation is also charged with overseeing matters of temporal administration, which include the alienation of ecclesiastical goods, matters relating to pious foundations, wills and legacies, the condition of church buildings, sanctuaries, taxes, pensions, and the proper support for the clergy. [FN209] With respect to Catholic hospital mergers, which are alienations of church property, this congregation is one of ***750** two charged with the papal review of the merger. [FN210] A more detailed discussion of canon law with respect to hospital mergers follows in subpart III.B of this Comment.

2. The Local Church. -- While the foregoing discussion may suggest that the Vatican's structure parallels that of a modern government, the Catholic Church remains a collection of subsidiary institutions -- local Catholic churches and institutions, such as schools and hospitals. One commentator observed the existence of a "highly centralized preconciliar ecclesiology and legal system . . . [in which] the particular churches [were] merely . . . useful administrative subdivisions of that universal Church [Vatican]." [FN211] However, one commentator asserts that the 1983 Code "reflects a central feature of conciliar ecclesiology, namely, that the particular churches are not field offices of a giant multi-national corporation, but local realizations of the one Church of Christ." [FN212] Such an assertion, if valid, would not necessarily negate the Vatican Merger Defense. As Part IV of this Comment discusses, the validity of the Vatican Merger Defense will revolve around the extent of the Vatican's control of the local Catholic institutions. Contrary to the above opinion, the Catholic Church's vertical and horizontal organization suggests that the local institutions are sufficiently subservient to the Vatican to be described as "local field offices."

At the bottom of the Catholic hierarchy are the local institutions -- local churches, hospitals, or schools. The local institutions are organized territorially. [FN213] Every institution is located in a particular parish, which is a subdivision of a diocese. [FN214] The individual Catholic institution is directly accountable to the bishop for the diocese in which it is located. [FN215] Canon law empowers the bishop with pastoral responsibility for the local institutions' education, worship, and governance. [FN216] The bishop is "to rule the particular church [institution] committed to him with legislative, executive and judicial power in accord ***751** with the norm of [canon] law." [FN217] However, canon law restricts the bishops' power, noting that such power "can be exercised only when they [the bishops] are in hierarchical communion with the head of the college [of bishops -- i.e., the Pope] and its members." [FN218] This restriction means that, though the bishop has effective day-to-day oversight and control of institutions in his dioceses, the papacy maintains potential ultimate control over the activities of these local institutions. Since the Pope appoints and confirms the bishops, it follows that they

are functioning as the Vatican's agents with regard to local governance. [FN219] One commentator observes that "bishops have a twofold representative function. They represent the universal Church . . . and they also represent the individual particular churches in which the universal Church is actualized." [FN220] Under canon law, the "diocesan bishop can conduct pontifical functions throughout his entire diocese," [FN221] including the administration of Church property. [FN222] However, because bishops serve at the pleasure of the Pope, a "renegade" bishop could be replaced on motion of the Pope. [FN223]

Dioceses are also organized territorially into ecclesiastical provinces. [FN224] A province "is composed of neighboring dioceses -- one of which is designated as the archdiocese whose bishop, the metropolitan, has a special role within the province. . . . If there are a number of provinces within [a] country, these can be organized into regions." [FN225] In every province, one diocese is designated as the province's metropolitan, which functions as the capital of that province. [FN226] The bishop of the metropolitan is an archbishop. [FN227] The metropolitan is expected "to be vigilant that the faith and ecclesiastical discipline are carefully preserved and to inform the [Pope] of abuses if there are any." [FN228] However, canon law does not vest the metropolitan with much power over the bishops and dioceses within the province. Except when the ***752** Pope specifically vests the metropolitan with special duties and/or power, the metropolitan "possesses no other power of governance within the suffragan dioceses." [FN229] Thus, the archbishop's power and influence effectively flow from his position as bishop of his dioceses, rather than from his position as archbishop or metropolitan.

3. Religious Institutes and Societies (Orders). -- The Vatican does not literally own any Catholic hospitals. The Catholic Church's religious congregations, institutes, and societies own and administer the Catholic hospitals. [FN230] Commonly thought of as orders of priests, monks or nuns (e.g., Jesuits), religious orders function as distinct entities, [FN231] and they own and administer property "in trust" for the benefit of the Church. [FN232] Consequently, the officials of the religious order are involved in any decision concerning a Catholic hospital merger.

While the Vatican does not actually directly own any Catholic hospitals, Papal rule of the religious orders gives the Vatican effective control over Catholic hospital mergers. [FN233] Technically, the Catholic hospitals belong to the Catholic Church in general. The Pope is the supreme administrator and steward of all church property. [FN234] However, the Pope "does not personally administer all church property. The primary administrators are diocesan bishops, major superiors [heads of the religious order], and those they appoint as administrators. The administrator has the responsibility to ensure church property is used in a manner that is consistent with the purpose and teachings of the church." [FN235]

***753** The members of the orders "must obey the bishop in matters concerning the pastoral care of souls. This includes work in the parishes, campus ministry, schools, liturgy, preaching, health care, and any other [activity] that involves working with the faithful of the diocese." [FN236] Furthermore, the members are bound by virtue of their vows [FN237] to "submit to legitimate superiors [who are] commanding according to the constitutions of the institute." [FN238] By canonical definition, the Pope is a legitimate superior. [FN239] While religious orders are organized vertically -- the whole institute (governed by a council called the "general chapter"), provinces of the institute, and autonomous houses -- the Vatican, through its bishops, has direct influence in the appointment of the order's governing officials, known as superiors. [FN240] These religious orders are intended to serve the Church at the local level -- "[i]t is the function of monasteries and convents to remind us, by their organization and the very structure of their vocation, . . . of the presence of catholicity at the diocesan level." [FN241] The Pope can exempt a religious order from the authority of the bishop. [FN242] This protects the Vatican from vulnerability to local bishops' refusal to enforce the Vatican's directives. Most importantly for analysis of the Vatican Merger Defense, religious orders are subject to canon law itself. [FN243]

In addition to canon law, each religious order has its own internal constitution and rules of operation. [FN244] Such internal governing documents are subject to heavy Vatican influence -- the Vatican approves their original organization [FN245] and any subsequent changes in their constitutions. [FN246] Thus, in addition to canon law, a Catholic hospital would also be governed by its sponsoring religious order's rules. Because a Catholic hospital is simultaneously subject to the Vatican's rules, the local bishop's rules, and its sponsoring religious order's rules, it is difficult ***754** to make generalizations about the internal operations of Catholic hospitals. [FN247] It also follows that both the Catholic hospital's sponsoring religious order and the Vatican must approve that hospital's merger.

B. Canon Law Related to Mergers

A Catholic hospital seeking to merge with any hospital (regardless of whether the merger partner was another Catholic hospital) would be subject to canon law restrictions on that merger. [FN248] All ecclesiastical property is subject to canon law on administration of Church goods. [FN249] Further, the alienation or conveyance [FN250] of any Catholic real estate, buildings, or fixed capital is further restricted by canon law. [FN251] By virtue of canon law, Catholic hospitals are Church property.

Under canon law, an alienation or conveyance of assets requires justification, "such as urgent necessity, evident usefulness, piety, charity, or some other serious pastoral reason." [FN252] Furthermore, if the transaction involves alienation or conveyance of assets over a certain monetary amount, permission from the Catholic Church is required. [FN253] The required level of permission to alienate the assets depends on the property value involved. [FN254] Canon 1292 describes two categories of alienations -- minor alienations and major alienations -- and sets forth who has sufficient authority for each type of alienation. [FN255] While permission from a local bishop is canonically sufficient ***755** for a minor alienation, major alienations require permission from the Vatican. [FN256] Two different offices of the Vatican -- the Congregation for Clergy and the Congregation for Religious and for Secular Institutes -- have the authority to grant this permission. [FN257] The Congregation for Clergy is responsible for reviewing alienation requests of a diocese and the diocese's member entities. [FN258] The Congregation for Religious and for Secular Institutes is responsible for the major property alienation requests of religious and secular institutes -- including Catholic hospitals. [FN259] Regardless of which Vatican office reviews a major alienation request, the lower levels of approval (the approvals required for a minor alienation request) remain a necessary condition to Vatican approval of the transaction. [FN260]

If the property involved exceeds the threshold, a party cannot circumvent the Vatican approval requirement by structuring the transaction as a series of smaller transactions. [FN261] Even if each of the smaller transactions individually would be considered a minor alienation, Canon 1292 requires that "where the property to be alienated is divisible, the value of any previously alienated parts must be added to that of the part currently being alienated in order to determine the threshold of permission required." [FN262] If the goal is to alienate or convey the entire piece of property, and the aggregate value of the transactions exceeds the threshold value, then it is deemed a major alienation that requires Vatican approval. [FN263]

Hospitals are sponsored by different groups within the Catholic Church. [FN264] These religious sponsoring groups may have internal alienation thresholds that are even lower. [FN265] It is also common for individual dioceses to require diocesan approval for alienation of assets. [FN266] If Catholic Church property is alienated without approval, the Church ***756** may take civil action to recover the property or otherwise protect the rights of the Church. [FN267]

When faced with a request for permission to alienate or convey assets, the canonical steward [FN268] has a canon-law obligation to make an informed decision. Section 3 of Canon 1292 requires that permission to alienate (or convey) the property be withheld until the canonical steward has been thoroughly informed about both the current financial condition of the alienating entity and about the entity's previous alienations. [FN269] The canonical steward's duty under section 3 of Canon 1292 is similar to the fiduciary duty a trustee has under civil law. [FN270] The canonical steward is expected to consult with members of the appropriate financial council, composed of "persons experienced in financial matters, business affairs, and the civil law." [FN271] It is the expectation that the canonical steward will obtain an expert appraisal as to the value of the property, [FN272] especially since Canon 1294 prohibits the alienation or conveyance of church property for less than the appraised value. [FN273]

Canon 1293, which is very open-ended, also permits the canonical steward to unilaterally set additional conditions for their approval of the alienation. [FN274] In theory, a canonical steward could kill a merger by imposing impossible conditions on the transaction. Notwithstanding, ***757** commentators defend Canon 1293, arguing that "[g]iven the complexity of modern-day alienations, especially in the health care field, in which questions of high finance or complex civil and canonical issues arise, prudence would seem to dictate that the competent authority should impose additional conditions [to assure protection of the Catholic Church's interests]." [FN275]

If a transaction is on a short timetable [FN276] such that the formal canon-law alienation approvals cannot be completed within the scope of the transaction, the Catholic entity "may act with presumed permission, provided a timely attempt is made nunc pro tunc to obtain ratification of such alienation by the competent authority." [FN277] This presumed permission is not inconsistent with the goals of canon law. A duty of prudent management of the Church's assets exists under canon law.

[FN278] However, if the transaction is not ratified via formal approval granted nunc pro tunc, then the transaction will be treated as if permission was never sought. [FN279]

Thus, canon law, through its regulation of the alienation of Church property, governs mergers of Catholic hospitals. Under canon law, Papal approval is required for a Catholic hospital merger.

C. Canon Law Related to the Vatican's Control of Hospitals

An understanding of the Catholic Church's views on unwise alienation and conveyances (and consequently unwise mergers) may help explain the controls exerted by the Church on Catholic hospitals. Commentators Bouscaren and Ellis reflect that:

The purpose of such precautions [on the alienation of Church property] is to avoid loss or harm to the Church -- either material loss because of foolish alienations, or moral harm which may arise from accusations made against the Church by reason of ignorance, carelessness, disregard of the civil laws, etc., on the part of the administrators who alienate Church property. [FN280]

The Canons are also designed to ensure that Catholic entities, such as Catholic hospitals, do not "enter into commercial arrangements [***758** or conveyance transactions] with other parties that may prove scandalous to the Church." [FN281]

The Church's control over Catholic hospitals is more than just canonical restrictions on the alienations of a Catholic hospital's assets. The Catholic Church's teachings govern a Catholic hospital's operation. [FN282] Consequently, it is impossible to obtain certain medical services (e.g., abortions, voluntary sterilizations, or family-planning services) at a Catholic hospital. [FN283] The Vatican's ability to define or restrict services provided by Catholic hospitals suggests that some degree of control exists.

While the Vatican may have some control over Catholic hospitals, it is not always apparent. The inescapable fact is that Catholic hospitals do compete with one another. In the same geographic market, Catholic hospitals compete for the same patients, staff physicians, and even membership in various managed care networks. Under merger analysis, it is potential control of the competition, not actual control, that is important. Consequently, the fact that Catholic hospitals currently compete does not negate the possibility that the Vatican is their parent company. The pivotal issue in determining the applicability of the Vatican Merger Defense is whether the Vatican has adequate potential control over the Catholic hospitals to establish the existence of a parent-subsidiary relationship.

In August 1994 the Chicago Archdiocese issued formal merger guidelines for Catholic hospitals. [FN284] These guidelines require Chicago-***759** area Catholic hospitals to clear their mergers and joint ventures with the Archbishop of Chicago. [FN285] The Hospital Protocol states that, as the representative of the Catholic Church in the Chicago area, "the Archbishop of Chicago is responsible for coordinating all of the ministries of this local church." [FN286] The Hospital Protocol continues, noting that "[b]ecause Catholic health care is one of those ministries, the Archbishop is responsible for assuring and supporting the Catholic identity of this ministry in the Catholic hospitals, Catholic long term care facilities and other Catholic health care activities." [FN287] The Hospital Protocol states that the Archbishop's "coordinating responsibility pays particular attention to, but is not restricted to, ethical and religious matters . . . . Indeed, it extends to all matters pertaining to the viability of this ministry in particular institutions and throughout the Archdiocese . . . ." [FN288]

Catholic hospitals, at least in the Chicago area, can be derecognized by the Church -- in essence "excommunicated" -- for violating the Hospital Protocol. The Hospital Protocol spells out penalties for failure to abide by its terms, one of which is revocation of the Catholic status of the hospital. Specifically, the Hospital Protocol provides that: "Failure to abide by these policies could result in the withdrawal of the Archbishop's recognition of the involved institution's ***760** Catholic identity." [FN289] Revoking a hospital's Catholic status could "affect patient loyalties, fund raising and staff recruitment and retention." [FN290]

The ability to revoke a hospital's Catholic status enables the Hospital Protocol to achieve its objectives and enforce its policies. The underlying theme of the Hospital Protocol is that the Archbishop has hospital merger review power, including the power to disapprove mergers. After stating that "it is the expectation of the Archbishop [of Chicago] that all Catholic health care institutions will collaborate effectively to ensure their individual and collective well-being," [FN291] the document announces that

joint ventures and other substantive [affiliating] actions of individual Catholic health care institutions . . . will be evaluated as to how they will impact the future viability of that Catholic institution as well as the viability of other Catholic hospitals/systems . . . . [Any] business arrangement that would place Catholic health care in the [Chicago] Archdiocese at serious risk will not be approved. [FN292]

Having announced the Archdiocese's merger review policy, [FN293] the Hospital Protocol then lists factors the Archdiocese should consider when reviewing a proposed merger (or affiliation): (1) whether the affiliation is with "institutions/systems that share in a substantive way [the] Catholic vision and values;" [FN294] (2) the not-for-profit status of the ***761** merging hospitals; [FN295] (3) the requirement that the surviving hospital cannot "by policy or practice, provide direct abortions;" [FN296] and (4) a catch-all criterion: a Catholic hospital cannot "enter into any collaborative effort with an institution that would violate the principle of cooperation with evil regarding procedures prescribed by the 'Ethical and Religious Directive' as they currently exist or are amended in the future. Likewise, traditional Catholic moral guidance with regard to scandal must be observed." [FN297]

Approximately five months after the issuance of the Hospital Protocol, the nation's largest hospital chain, Columbia/HCA Healthcare Corporation, unsuccessfully approached the Chicago Archdiocese regarding its potential acquisition of Catholic hospitals in Chicago. [FN298] Sam Holtzman, president of Columbia/HCA's Chicago division admitted: "We would really appreciate an opportunity to talk with some [Chicago] Catholic facilities about the possibility of some joint ventures or mergers, though that decision is not obviously, entirely in our hands." [FN299] Columbia/HCA was rebuffed by the Chicago Archdiocese because of its for-profit status and its provision of abortion services at some of its hospitals. [FN300] Cardinal Bernardin reflected that "[w]hile economics is indeed important, most of us would agree that the value of human life and the quality of the human condition are seriously diminished when reduced to purely economic considerations." [FN301]

The Chicago Archdiocese's concern with Catholic values is not unique to the Chicago Archdiocese. Reverend Dennis Brodeur, a former Catholic parish priest and now a Catholic health care network executive, recently summarized the situation faced by parties in a Catholic hospital merger negotiation, stating:

Ten years ago, there weren't [Catholic hospital] mergers like this. We're creating the future right now, and it's real messy. There are some areas what is acceptable to a bishop in one diocese may not be acceptable to the bishop in the next. And there are areas, like abortion, where the church guidelines are clear. [FN302]

***762** It took ten years of sporadic negotiations before Catholic St. Clare's Hospital in Denville, New Jersey, merged with Riverside Medical Center in Boonton, New Jersey. [FN303] According to a spokesman for the surviving hospital, " '[t]he Catholic philosophy was always the major issue standing in the way of agreement.' " [FN304] Under the eventual terms of the merger, the parties agreed that the surviving hospital would "abide by the health-care principles of the Catholic Church. This means it will not provide abortions, voluntary sterilizations or family-planning services." [FN305]

Merger agreements between non-Catholic hospitals and Catholic hospitals typically contain warranties regarding the surviving hospital's intention to follow the doctrines of the Catholic Church. Should the surviving hospital decide to circumvent or breach such warranties, [FN306] and were the canonical steward to challenge it, [FN307] the dispute would be treated by the courts as a contract dispute. [FN308] Thus, even if a Catholic hospital is purchased by a non-Catholic hospital, the Vatican can effectively insure that Catholic philosophy and Papal doctrines will be followed by the surviving institution.

***763** D. Relationship Between Canon Law and American Civil Law

The Catholic Church's control of Catholic hospitals flows from canon law. While canon law is an independent legal system, in the United States, it must operate within the framework of the American legal system. [FN309] Because canon law and American civil law are two independent legal systems, it is inevitable that conflicts between them will arise. When canon law conflicts with American civil law, if the conflict is related to internal Church matters, courts will allow canon law to govern. [FN310] However, if the issue is not purely one of internal Church polity, then civil law will be the controlling law. [FN311]

The first major case to reach the Supreme Court regarding the status of canon law within the American civil system was Gonzalez v. Roman Catholic Archbishop of Manila. [FN312] In Gonzalez, the Court found canon law to be the governing

law of the Roman Catholic Church and its organizations. [FN313] The Court laid out the foundations for a doctrine known as "church polity" -- the recognition of a voluntary association's right to govern its own internal affairs. [FN314] Moreover, ***764** the Court characterized the Catholic Church as a voluntary association of people and found that its canon law was the equivalent of a voluntary association's bylaws. [FN315] Under this sort of analysis, the Court found canon law to be binding on all internal proceedings of the Catholic Church (and Catholic organizations). [FN316]

The next major Supreme Court case involving the applicability of church law to secular matters was Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church. [FN317] There, the Court overturned a New York anti-Communist statute that vested all control and title of the Russian Orthodox Church's property located in New York State in the American branch of the Russian Orthodox Church. [FN318] The statute also denied all ownership and control rights in the property of the Russian Orthodox Church's patriarchy in Moscow. [FN319] Following its ruling in Gonzalez, the Court in Kedroff classified the issue as an interpretation of the applicability of the Russian Orthodox Church's internal governing code. [FN320] It ruled that because of the Fourteenth Amendment's protection of First Amendment rights state courts and state legislatures cannot decide internal church matters. [FN321] The Court found that the "controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." [FN322] Kedroff extended Gonzalez and held internal church polity to be constitutionally protected against state interference. The Court observed the existence of

> a spirit of freedom for religious organizations, independence from secular control or manipulation -- in short, power to decide for themselves, free from state interference, matters of church government as well as ***765** those of faith and doctrine . . . . [Such freedoms] we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference. [FN323]

The next major Supreme Court case regarding the applicability of a church's internal governing code to civil law issues was Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich. [FN324] In Milivojevich, the parent Serbian Eastern Orthodox Church, located in Belgrade, Yugoslavia, attempted to reorganize its one American diocese into three dioceses, and to transfer some of the American diocese property. [FN325] The head of the American diocese attempted to block the reorganization in Illinois state court. [FN326] The Illinois Supreme Court enjoined the reorganization, finding the parent church's reorganization of the American diocese to be arbitrary with respect to internal church governance. [FN327] The United States Supreme Court reversed the Illinois Supreme Court and threw out the arbitrariness exception. [FN328] The Court noted the existence of a "constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." [FN329]

Professors Maida and Cafardi argue that the Court's holding in Milivojevich incorrectly led many hierarchical churches in the United States to believe that "their canon law, and the church's interpretation of it, would control any related civil law adjudication." [FN330] According to Maida and Cafardi, Milivojevich stands for two propositions: (1) a church can control its polity -- a church can interpret and make rulings according to its own bylaws; and (2) civil courts must defer to church rulings on a church's internal affairs, even if the church's polity decisions have civil-law effects. [FN331] This has been deemed the "deference" approach -- the civil courts must defer to churches on internal matters and on the churches' interpretations of these internal matters. [FN332]

***766** In Jones v. Wolf, [FN333] the Court announced a neutral principles approach to interpreting canon law issues within the civil-law arena. [FN334] The Court found that Georgia's civil (property) law was the controlling law to determine an internal church property dispute. [FN335] This case was not a reversal of Milivojevich, but a clarification of the deference approach. The Court explained that its prohibition in Milivojevich against reviewing internal church procedures does not apply when a civil court: (1) uses neutral principles of law; and (2) does not inquire into religious doctrine. [FN336] Thus, if a matter is not purely one of polity, canon law is not binding on the civil court. [FN337] Wolf therefore stands for the proposition that if a court could reach its own conclusion by relying on neutral principles of law, it is not constitutionally bound to defer to the canon-law determination of the matter. [FN338] The Court found it appropriate for the lower court to rely on neutral principles -- such as land deeds, corporate articles of incorporation, corporate bylaws, and various contracts between the parties -- to determine external (or "nonpolity") matters. [FN339]

Under current law, the extent to which canon law (and the decisions of church judicatories) binds civil courts will depend on

the lower courts' classification of the church matter in dispute. If the matter is an internal matter -- such as Church discipline, faith, internal organization and ecclesiastic rule, custom, or law -- then the deferential approach announced by the Court in Milivojevich is applicable and the court will defer to the church's judicatories. If the question before the court is not a purely internal matter, then the civil court is permitted to use the neutral principles approach, and thus arrive at a different result than it would under the deferential approach. [FN340]

***767** IV. Analysis of the Vatican Merger Defense

Defining the relationship between Catholic hospitals and the Vatican is the pivotal issue in assessing the validity of the Vatican Merger Defense. Subpart A addresses the elements needed to establish a parent-subsidiary relationship. Subpart B analyzes the Vatican Merger Defense's validity in light of those requirements set forth in subpart A.

A. Establishing the Existence of a Unitary Actor

As discussed earlier in this Comment, the key to validating the Vatican Merger Defense is to establish that the Catholic hospitals and the Vatican are one unitary actor within the meaning of antitrust law. [FN341] The Sherman Act, the Clayton Act, and the FTC Act all fail to define what constitutes a unitary actor or plurality of actors. Sample jury instructions for an antitrust conspiracy action explain the importance of establishing that the parties constitute a unitary actor: "[O]ne corporation can combine or conspire with another corporation if the two operate as separate entities; [and affiliated corporations do not lose their separate existences in that respect merely because they are affiliated]." [FN342]

However, as discussed extensively throughout this Comment, the Court in Copperweld Corp. v. Independence Tube Corp., [FN343] addressed the narrow question of the duality of a parent corporation and its wholly owned subsidiary, and found them to constitute a single economic actor. [FN344] This subpart addresses the various approaches adopted by courts to define a unitary actor.

1. Single Entity Test. -- The single entity test sets forth various criteria for evaluating the validity of a parent-subsidiary relationship. Among the factors to be considered are: (1) the extent of the subsidiary's control of its day-to-day operations; (2) the existence of separate officers; and (3) the separate corporate headquarters. [FN345] The Court in ***768** Copperweld explicitly rejected the single entity test for wholly owned subsidiaries, holding that "[a]s 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." [FN346] The Court reasoned that "[a]t least when a subsidiary is wholly owned . . . these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act." [FN347]

While the Court narrowly limited its holding to relationships between parents and their wholly owned subsidiaries, its logic in rejecting the single entity test suggests a broader reading. [FN348] The Court stated that the single entity test's criteria

simply describe the manner in which the parent [corporation] chooses to structure a subunit of itself. They [the criteria] 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. [FN349]

The Court left open the question of the appropriateness of using the single entity test for less than wholly owned subsidiaries, but the lower courts have addressed that issue. [FN350] The next two subparts discuss the lower courts' pre-Copperweld and post- Copperweld approaches.

2. Pre- Copperweld Approaches . -- Of the tests adopted by the lower courts prior to Copperweld, [FN351] the most extreme was the "separate incorporation" test. [FN352] In applying the separate incorporation test, the court is to look no further than the structure of the entities -- ***769** separate incorporation of the parent and the subsidiary is sufficient

to establish duality. Addressing a suit against International Harvester and its subsidiary, the court in H & B Equipment Co. v. International Harvester Co. [FN353] stated that: "The parent's choice of form is important. Having availed itself of separate incorporation for [the subsidiary], [the parent] marked it off as a distinct entity, and the antitrust laws treat it as such." [FN354] Prior to Copperweld, the First, Third, and Fifth Circuits all employed the separate incorporation test. [FN355]

Other courts applied a "competitors" test to determine the duality of a parent and its subsidiary. [FN356] Under a competitors test, duality is established if the affiliated entities hold themselves out as competitors. The competitors test evolved from the Supreme Court's statement in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. [FN357] that "[t]he [intra-enterprise conspiracy] rule is especially applicable where [the corporations] hold themselves out as competitors." [FN358] Commentators have criticized the Court's failure to define what type of activity would constitute corporations holding themselves out as competitors. [FN359] Further, the text of the Sherman Act fails to provide any affirmative duty for related entities to hold themselves out as competitors. [FN360]

Borrowing heavily from agency law, other courts utilized a "sole decision maker" test. [FN361] The presumption of the sole decision maker test is that "when one person owns, controls, and makes decisions for separate corporations, the organizations are incapable of conspiring ***770** because a person is unable to conspire with himself." [FN362] This logic of the "sole decision maker" approach is reflected in the Court's description of the parent-subsidiary relationship in Copperweld as "not unlike a multiple team of horses drawing a vehicle under the control of a single driver." [FN363]

3. Post- Copperweld Approaches . -- In Copperweld, the Court failed to address "under what circumstances, if any, a parent may be liable for . . . an affiliated corporation it does not completely own." [FN364] When faced with a merger between a parent and its less than wholly owned subsidiary, the lower courts have employed different tests and interpretations of Copperweld in determining duality. Among the tests this section discusses are: (1) the de minimis test; (2) the forced merger test; (3) the unity of purpose test; (4) the potential control test; and (5) a common interests and goals test.

(a) De minimis test. -- In Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., [FN365] the court adopted a strict interpretation of the Copperweld rule and held that "only corporations which are owned 100% in common, or a de minimis amount less than 100%, are covered by the Copperweld rule." [FN366] The court specifically rejected extending Copperweld to a situation where the parent corporation owned 60% or 75% of the subsidiary's stock. [FN367]

(b) Forced merger test. -- While the de minimis principle of corporate control actually originated in Sonitrol of Fresno, Inc. v. AT&T, [FN368] the District of Columbia Circuit actually relied upon a different ***771** extension of the Copperweld rule -- a forced merger test. [FN369] The court announced that if, under the law of incorporation of the subsidiary, the parent corporation owned a sufficient percentage of stock to force a merger of the subsidiary with the parent, then the subsidiary should be treated as a wholly owned subsidiary of the parent. [FN370] Thus, if a parent corporation has the power to force a merger with its subsidiary, under a forced merger test, the court infers sufficient control of the subsidiary to satisfy the Copperweld test. [FN371]

(c) Unity of purpose test. -- The Court in Copperweld observed that a parent and its wholly owned subsidiary, by definition, share "a complete unity of interest." [FN372] This suggests that a unity of interest, or unity of purpose, test may be the appropriate standard to test the plurality of relationships between a parent corporation and its partially owned

subsidiaries. [FN373] The Court's rationale -- that coordinated activity between a parent corporation and its wholly owned subsidiary does not "suddenly bring together [an] economic power that was previously pursuing divergent goals" [FN374] -- would appear to be applicable to merger law's concern of increased market power. The Court's holding seems to advocate a functional test, such as a unity of purpose test, over a formal structural test like the de minimis test or the forced merger test. The Court in Copperweld explained that Sherman Act liability does not turn on the formal structure of the relationship between a company and its subsidiaries (or divisions), noting that a "business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors ***772** dictated by business judgment without increasing its exposure to antitrust liability." [FN375]

The court in Leaco Enterprises, Inc. v. General Electric Co. [FN376] adopted the forced merger test, but suggested in dicta a laundry list of factors a court should consider under a unity of purpose test: (1) the legal relationship between the corporations; (2) the makeup of the board of directors of the subsidiary; (3) the corporate purposes of each of the corporations; and (4) the amount of autonomy exercised by the subsidiary. [FN377]

(d) Potential control test. -- Another structural test for single entity status is the potential control test. Under such a test, single entity status for a parent and its partially owned subsidiary is established if the parent can "assert full control" over the subsidiary. [FN378] The Court's opinion in Copperweld relied heavily on the control a parent corporation has over its wholly owned subsidiaries. If a corporation has a controlling level of equity [FN379] in a subsidiary, then the parent ***773** possesses the ability to "assert full control at any moment" [FN380] over the partially owned subsidiary. [FN381]

While control of a corporation typically results from ownership of the majority of voting stock of that corporation, internally and externally imposed restraints may increase or limit a parent's control of a partially owned subsidiary. [FN382] Internally, a corporation's articles of incorporation and its corporate bylaws can limit (or increase) control of the company by its owners. [FN383] Externally, control of a corporation is subject to consent decrees, regulations, statutes, and actions of foreign governments. [FN384]

In Novatel Communications, Inc. v. Cellular Telephone Supply, Inc., [FN385] the court adopted a "potential control" test in determining the applicability of the Copperweld rule. [FN386] The court reasoned that a unitary actor within the context of Copperweld exists when the parent corporation can assert control over its subsidiary, even if the subsidiary is only partially owned. [FN387] In holding that 51% stock ownership constituted sufficient control, the court focused on the parent corporation's ability to intervene any time the subsidiary ceased acting in the best interests of the parent. [FN388] Thus, under a potential control test, unity is established if the parent has a controlling level of equity in the subsidiary, regardless of whether the parent exercises the potential control.

(e) Common interests and goals test. -- Bell Atlantic Business Systems Services, Inc. v. Hitachi Data Systems Corp. [FN389] was the first case in the Copperweld line to address the issue of conspiracy between subsidiaries of the same parent, where the parent does not wholly own both subsidiaries. [FN390] The court found that the three entities (the parent and the two sibling subsidiaries) were acting pursuant to the same ***774** interests and goals. [FN391] Further, the court explicitly rejected the de minimis ownership standard of Aspen Title Escrow, Inc. v. Jeld-Wen, Inc. [FN392] in favor of a "common interests and goals" test. [FN393] The court found that a parent and a subsidiary "over which the parent has legal control . . . share a unity of interest and common corporate consciousness because they work toward the same goal." [FN394] This unity of interest and goal approach mirrors

traditional agency law's definition of a principal-agent relationship. [FN395]

4. Related-Entities Cooperative Approach. -- In City of Mount Pleasant v. Associated Electric Cooperative, Inc., [FN396] the Eighth Circuit announced an "economic reality" application of Copperweld:

[T]he logic of Copperweld reaches beyond its bare result, and it is the reasoning of the Court, not just the particular facts before it, that must guide our determination.

Copperweld explains that a conglomeration of two or more 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 . . ." [FN397]

The thrust of the holding is that economic reality, not corporate form, should control the decision of whether related entities can conspire. [FN398]

Under Copperweld, related entities in a cooperative have the burden of proving that any coordination between any two members of the cooperative is a "joining of two independent sources of economic power previously pursuing separate interests." [FN399] In Associated Electric, the Eighth Circuit found the cooperative organization to be a single enterprise pursuing a common goal. [FN400] Unlike a parent-subsidiary relationship, a finding of a unitary actor in the form of a cooperative can be rebutted by the government upon a showing that any of the cooperative members "pursued interests diverse from those of the cooperative itself." [FN401] Diverse interests are those that "tend to show ***775** that any two of the [members] are, or have been, actual or potential competitors." [FN402]

5. Agency Doctrine. -- The validity of the Vatican Merger Defense rests on the establishment of the hospitals and Vatican as one legal entity. Agency doctrine provides another potential method of establishing this unity. Under agency doctrine, the principal may be held liable for the agent's torts and the agent's contractual obligations. [FN403] The Restatement (Second) of Agency notes that "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." [FN404] The court in Murphy v. Holiday Inns, Inc. [FN405] noted that the critical test of agency is the nature and extent of the control of the agent. [FN406]

An agency relationship can also be viewed as a species of the common interests and goals test announced in Bell Atlantic Business Systems Services, Inc. v. Hitachi Data Systems Corp. [FN407] In Pink Supply Corp. v. Hiebert, Inc., [FN408] the court observed that parties in an agency relationship are "so closely intertwined in economic interest and purpose . . . as to amount to a unified economic consciousness incapable of conspiring with itself." [FN409] This view of an agency relationship closely parallels Bell Atlantic 's common interests and goals test. [FN410] Moreover, in Copperweld, the Court suggested that, as a general rule, agents are incapable of conspiring with their employers within the meaning of section 1 of the Sherman Act. [FN411]

However, under agency doctrine, the agency relationship does not extend if the agents act in their own interests. For purposes of the Vatican Merger Defense, an agency argument may be made upon (1) ***776** a showing of common interests and goals, and (2) a showing that the hospitals did not pursue their own interests.

Alternatively, an agency relationship exists in a fiduciary relationship. The Restatement also provides that "[o]ne who has title to property which he agrees to hold for the benefit and subject to the control of another is an agent-trustee and is subject to the rules of agency." [FN412] This raises the question of whether a Catholic hospital's sponsoring religious order is an agent-trustee of the Vatican. The more control the Vatican has over the property, the greater the indication of an agency relationship. [FN413] However, the lack of the power to bind the Vatican, contractually or otherwise, diminishes an indication of an agency relationship. [FN414]

6. Corporate Law's Single Entity Doctrines. -- Stockholders are a corporation's

owners. Under corporate law, stockholders have limited liability for the corporation's actions. Normally, a plaintiff suing a corporation cannot include its stockholders as codefendants in the suit. In certain situations, a court will disregard the limited liability status of a corporation's stockholders by piercing the corporate veil. [FN415] When the corporate veil is pierced, the stockholders and the company share a unity of liability. Under certain circumstances, corporate law will find a unitary actor by piercing the corporate veils of related companies -- ignoring the technical separateness of related corporate entities and treating the related corporations as a single entity. Two major corporate law doctrines are used to pierce the corporate veil -- enterprise liability theory and alter ego theory. In light of commentator Stephen Presser's observation that "corporate veils are now more permissively pierced than they have been in the past," [FN416] it is possible that the courts might apply veil piercing doctrine to the Vatican Merger Defense.

(a) Enterprise liability. -- Enterprise liability can be applied where two companies are separate, but related, entities. For example, if Company A is insolvent, and Company B is solvent, a plaintiff suing Company A will attempt to convince the court to disregard the separateness ***777** of A and B, so that the plaintiff can recover from the solvent B. [FN417] Under enterprise liability, courts will consider the following factors in determining the separateness of the entities: (1) commingling of the two corporations' books; (2) commingling of the two corporations' assets; (3) frequent shifting of funds from one corporation to the other; (4) common shareholders of both corporations; [FN418] (5) common facilities (offices or production facilities); and (6) overlapping corporate formalities [FN419] and other external formalities. [FN420]

(b) Alter ego theory. -- Another method of piercing the corporate veil is through the use of alter ego theory. Under alter ego theory, the plaintiff must show that the company is acting as the alter ego of its owner. [FN421] With respect to related corporations, the plaintiff must prove that the subsidiary is a mere instrumentality of the parent company -- an alter ego of the parent company created by the parent to shield it from liability, rather than for reasons of business efficiency. [FN422] Under alter ego theory, the court may treat the corporation and its shareholders as a single entity for liability purposes. The "courts are concerned with reality and not form, with how the corporation operated and the individual defendant's relationship to that operation." [FN423] ***778** The court will consider the following factors in evaluating an alter ego claim:

> [I]nsufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely a facade for individual dealings. [FN424]

Alter ego theory is rooted in the idea of an equitable remedy. In Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., the court noted that alter ego doctrine should be applied when equity demanded that the corporate veil be pierced. [FN425] The court reasoned that unique personalities of the parent and subsidiary do not exist upon a showing of unity of interest and ownership between the two corporations. [FN426] The language of Bell Atlantic -- referring to unity of interest and unity of ownership as reasons for finding a unity of liability -- parallels agency doctrine's concern with common interests and goals. The alter ego language also parallels two of the post- Copperweld tests -- the unity of purpose test and the common interest and goals test.

B. Application to the Vatican Merger Defense

A hypothetical merger of the only two hospitals in a market would meet the presumption of illegality test outlined in the 1992 Merger Guidelines [FN427] -- the surviving hospital would have a 100% market share, and the HHI score would increase from 5000 to 10,000. [FN428] The Vatican Merger Defense must overcome this presumption of illegality, and its validity depends on how the Catholic hospitals' relationship to the Vatican is classified. There are several possible classifications: (1) as incorporated divisions of the Vatican (traditional corporate family relationship); [FN429] (2) as agents of the Vatican (principal-agent ***779** relationship); (3) as a cooperative arrangement; or (4) as members of a network. [FN430]

Of the pre- Copperweld tests -- separate incorporation, competitors, and sole decision maker -- the Vatican Merger Defense fails all three. Catholic hospitals are separately incorporated, therefore they fail the separate incorporation test. They also compete with one another for the hydra-consumer, [FN431] and thus fail the competitors test. While the Vatican does exert influence and some control on the Catholic hospitals, it clearly is not the sole decision maker -- hence the Vatican Merger Defense also fails the sole decision maker test. [FN432]

The Vatican Merger Defense would also fail the post- Copperweld tests that rely on a structural analysis -- such as the parent corporation's level of equity ownership of the subsidiary -- to determine the status of the parent-subsidiary relationship. The structural post- Copperweld tests are the de minimis test, the forced merger test, and the potential control test. [FN433]

In jurisdictions employing the de minimis test, the Vatican would be required to maintain either 100% ownership or a de minimis amount less than 100% of the stock of the Catholic hospitals. Under canon law, the property of the Catholic hospitals is considered to be the property of the Catholic Church. [FN434] However, by definition, Catholic hospitals are nonprofit, nonstock corporations. [FN435] Consequently, the Catholic Church cannot maintain a stock equity position in the Catholic hospitals. The hospitals are actually owned by their sponsoring religious order. [FN436] The Vatican also does not own the sponsoring religious orders. [FN437] For the above reasons, it is likely that the Vatican would not be able to demonstrate an adequate level of ownership to satisfy the de minimis test.

To satisfy the forced merger test, the Vatican Merger Defense will also have to overcome the fact that the Vatican lacks structural ownership of the hospitals. The determinative factor under a forced merger ***780** test is whether the parent corporation owns a sufficient percentage of the stock of the subsidiary to force a merger. Even if a court attempted to employ a more functional forced merger test, [FN438] it is not likely that the Vatican Merger Defense would pass. While canon law requires that the Catholic Church approve the alienation of assets, and hence any Catholic hospital merger, the Church does not have the ability to force an alienation of assets. Canon law protects the Church against unwise alienations of its property, but canon law does not provide the Church with the power to force a merger of two hospitals. Consequently, the Vatican Merger Defense would fail both a structural and a functional potential merger test.

The potential control test also requires structural control of the subsidiary as measured by level of stock equity. As a structural test, the Vatican Merger Defense fails for the same reason that it fails the other structural merger tests -- the Vatican's lack of equity ownership. However, if a court elected to employ a more functional potential control test, the Vatican Merger Defense might pass.

Canon law does not give the Vatican power to force alienation of assets (necessary to satisfy the functional forced merger test suggested above), but the structural hierarchy of the Catholic Church might establish an adequate level of potential control. While most of the Church's power to control Catholic hospitals is linked to its ability to restrict Catholic hospitals' operations, these restrictions are in effect "controls." The Church's ethical restrictions on provision of certain medical procedures, such as abortions, flow directly up to the Pope. The hospitals are owned by their sponsoring religious order. The religious order establishes the operational rules for its hospitals. The religious order must answer to the bishop for the diocese where the hospital is located. [FN439] Under canon law, the bishop is accountable to the Pope. [FN440] Consequently, under a functional test, the fact that Catholic hospitals retain freedom from Vatican control in most of their day-to-day operations does not negate the Vatican Merger Defense. Functionally, the Vatican has potential control over the hospitals, and consequently, it is likely that the Vatican Merger Defense would pass a functional (but not necessarily a structural) potential control test. [FN441]

***781** The Vatican Merger Defense also may pass the other two functional post- Copperweld tests -- the common interests and goals test and the unity of purpose test. The Catholic hospitals, as evidenced by their policies and governing documents, [FN442] do share the same common interests and goals as the Catholic Church. Further, the bylaws of a typical Catholic hospital include language that the purpose of the hospital is to "establish, conduct, operate, staff and maintain [the hospital] . . . in accordance with the teachings, doctrines, [and] traditions . . . of the Roman Catholic Church." [FN443] This would appear to satisfy the common interests and goals test set out in Bell Atlantic Business Systems Services, Inc. v. Hitachi Data Systems Corp. [FN444]

The common interest and goals test was heavily influenced by the common law of agency -- even the language of the common interest and goals test and the test for agency are similar. [FN445] The Vatican Merger Defense might also satisfy a court employing the common interest and goals test -- if that court were to adopt the Restatement (Second) of Agency's position that one who holds title to property for the benefit and control of another is an agent-trustee. [FN446] As discussed earlier, Catholic hospitals belong to the Catholic Church. [FN447] These hospitals are sponsored by religious orders, who administer the property for the Church. Ultimately, the Pope is the "supreme administrator and steward of all church property," [FN448] who has delegated responsibility for administration of church property down to the religious order. A court could find this relationship sufficient to satisfy the common interest and goals test.

Under a unity of purpose test, the court considers the legal relationship between the corporations, the subsidiary's board of directors, the purposes of each of the corporations, and the autonomy of the subsidiary. [FN449] The legal relationship between the Catholic Church and the Catholic hospitals is under canon law, not American civil law. However, under Jones v. Wolf, [FN450] the courts may recognize a legal relationship regarding questions of Catholic "polity." It is likely that the relationship between a Catholic hospital and the Vatican would satisfy the Jones test. The Board of Trustees of a Catholic hospital must ***782** grant reserve powers to the sponsoring religious order. [FN451] Among these reserve powers may be appointment power on the hospital's board of trustees. While the Vatican does not have this appointment power, it has authority over the sponsoring religious order under canon law. Catholic hospitals also share a similar corporate purpose with the Church as noted in the above discussion of the "common interests and goals" test. The stumbling block for the Vatican Merger Defense under the unity of purpose test is the amount of autonomy exercised by the hospitals. The Catholic Church's control over the hospitals may be insufficient to satisfy the unity of purpose test's requirement of lack of autonomy by the subsidiary. This may not necessarily doom the Vatican Merger Defense in a jurisdiction applying the unity of purpose test since the degree of autonomy would be a jury question.

V. Implications of the Vatican Merger Defense

If valid, the Vatican Merger Defense would mean that, for antitrust analysis, all Catholic hospitals would be considered sibling corporations with the Vatican as their parent corporation. Extending Copperweld and its progeny to Catholic hospitals would result in antitrust merger immunity for these hospitals because they would be considered to be a unitary actor.

As a collective entity, the combination of all Catholic hospitals would constitute the largest, non-government, health care provider in the country. [FN452] Currently, because the Vatican Merger Defense remains a theory and not a rule, there is no need for the government to scrutinize the actions of Catholic hospitals, nor to force the Catholic Church to divest some of its control over the hospitals. This Part examines the potential implications for Catholic hospitals if the Vatican Merger Defense is recognized by the courts.

A. Predicted Effect on Hospital Mergers

The Vatican Merger Defense would affect more than just Catholic hospitals seeking to merge with other Catholic hospitals. Mergers between Catholic hospitals would be allowed because, as a unitary actor, there would be no change in market concentration as measured by the HHI resulting from the merger of the hospitals. [FN453] However, mergers between Catholic hospitals and non-Catholic hospitals may be prima facie violations of the 1992 Merger Guidelines. [FN454]

***783** Under the Vatican Merger Defense, a single Catholic hospital seeking to merge would have an artificially high market share -- the market share of all of the Catholic hospitals in its market. The dissent in Copperweld warned that the rule announced in Copperweld ignored the true issue -- the relative market power held by the concerned entities. [FN455] All of the Catholic hospitals in the United States, as a collective entity, would constitute a "mega-hospital" with significant market

power. Should the issue of the validity of the Vatican Merger Defense reach the Court, it is likely that a concern with the market power of the entities will be an important factor in the Court's decision.

Even if the government refused to recognize the validity of the Vatican Merger Defense -- that is, considered each Catholic hospital to be a discrete entity for market share analysis -- a Catholic hospital seeking to merge still might have the Vatican Merger Defense's market share problem. Merger mania has spawned a wave of recent challenges to hospital mergers. Most of these challenges are being brought by competitors, rather than the Department of Justice's Antitrust Division or the FTC. [FN456] It is possible that a hospital seeking to block a Catholic hospital from merging with a non-Catholic hospital might assert the Vatican Merger Defense offensively -- by claiming that the individual Catholic hospital's market share is actually the aggregate market share of all Catholic hospitals in the relevant market. Catholic hospitals might be effectively barred from merging with non-Catholic hospitals. This is because even a small Catholic hospital would be deemed to be the same economic actor as all Catholic hospitals. While Catholic hospitals are a major health care participant at the national level, [FN457] it does not necessarily follow in the local market. Merger analysis is concerned with the effect of the merger on the relevant market -- which includes both the product market and the geographic market. Consequently, the market share of a Catholic hospital would be the aggregate of all Catholic hospitals in the relevant market. Collectively, the Catholic hospitals in the relevant geographic market may or may not possess significant market power. The potential danger for a small Catholic hospital is that, under merger ***784** analysis, a finding of a large market share in the relevant market could kill the merger. [FN458]

Conversely, large non-Catholic hospitals seeking to merge with other non-Catholic hospitals would be able to argue that their merger (a merger of two non-Catholic hospitals) is not problematic because the collective market share of the Catholic hospitals in the area offsets the large non-Catholic hospital's power. The validity of this argument also depends on the relative size and number of Catholic hospitals in the relevant geographic market.

B. Possibility of Section 2 Claim

While the Vatican Merger Defense would grant Catholic hospitals protection from section 1 of the Sherman Act and section 7 of the Clayton Act, a valid Sherman Act claim under section 2 of the Act might be brought against the hospitals in spite of the Vatican Merger Defense. While section 1 of the Sherman Act requires duality of the participants, section 2 claims can be brought against a single party. [FN459]

The dissent in Copperweld alluded to this type of section 2 liability and stated that "[u]nilateral conduct by a firm with market power has no less anti-competitive potential than conduct by a plurality of actors which generates or exploits the same power." [FN460] However, for a simple merger of two Catholic hospitals, it is likely that a section 2 claim would fail. To establish a section 2 claim, the government needs to prove the willful acquisition or maintenance of monopoly power by illegitimate means. [FN461] With respect to Catholic hospital mergers, two stumbling blocks exist for establishing a section 2 violation: proof of monopoly power and demonstration that such monopoly power resulted from, or is maintained by, illegitimate means. [FN462] Even if the Catholic hospitals explicitly state that the purpose of their merger is to increase -- or maintain -- their ability to compete against non-Catholic hospitals, [FN463] this would not necessarily give rise to section 2 liability. Absent a showing of illegitimate means, it is unlikely that the government ***785** could successfully challenge a merger of two Catholic hospitals solely on section 2 grounds. [FN464] Further, as the Court observed in United States v. United States Steel Corp., [FN465] "the [Sherman Act] does not make mere size an offense . . . [it] requires overt acts." [FN466] Absent post merger anti-competitive activity by the hospitals, such as price-fixing, the Court should not be concerned under section 2 of the Sherman Act with the implications of the Vatican Merger Defense. [FN467]

C. Alter Ego Vulnerability

Under corporate law, most courts will pierce the corporate veil in situations where the evidence suggests that the subsidiary was the alter ego of the parent company. [FN468] To succeed with an alter ego claim, a plaintiff must establish complete unity of interest and common ownership of the parent and subsidiary. Furthermore, the courts will not find alter ego liability unless equity demands that the subsidiary's conduct not be treated as the unilateral action of the subsidiary -- that is, the parent must be held responsible for the subsidiary's actions. [FN469]

If the Vatican and the Catholic hospitals are found to be legally one entity, it does not necessarily follow under corporate law that the Catholic hospitals are the alter ego of the Vatican. [FN470] The canon-law controls that govern the Catholic

hospitals do suggest a great deal of control over the hospitals. [FN471] To de-emphasize this control, the Archdiocese of Chicago has stated: "The Catholic health care institutions [in the Chicago-area] are not agents of the Archbishop of Chicago and nothing in this [Chicago Archdiocese, Hospital] Protocol shall make the Archbishop of Chicago liable for the actions of the Catholic health ***786** care institutions." [FN472] This disclaimer may be unnecessary. As the court in Bell Atlantic pointed out, an "attempt to equate s 1 conspiracy liability with alter ego liability fails because s 1 deals with federal antitrust policies and the alter ego doctrine is governed by [state] corporation law. The two legal principles have different purposes and policy considerations." [FN473]

Further, the relationship between Catholic hospitals and the Vatican will not satisfy the high standard of complete unity of interests and ownership that alter ego doctrine requires. [FN474] Even if Catholic hospitals and the Vatican are considered unitary actors under the Vatican Merger Defense, the Vatican will not be liable under alter ego theory for the Catholic hospitals' actions.

The other possible unity tests can be dismissed. For Catholic hospitals to be considered a cooperative, they cannot be actual or potential competitors. Catholic hospitals can and do compete with one another. [FN475] While agency doctrine might apply, the Catholic hospitals would need to show that they did not pursue independent interests from the Catholic Church. Unlike the common interests and goals test, which looks for common interests, agency doctrine requires the Catholic hospitals to have no independent interests from that of the Church. [FN476]

The Vatican Merger Defense does not adapt to an interpretation under either of the two corporate law theories by which the corporate veil may be pierced. It fails under enterprise liability theory because there is no commingling of finances or assets of the hospitals (unless one defines the merger of the Catholic hospitals as such a commingling). Alter ego theory fails for essentially the same reasons -- no financial relationship between the Catholic Church and the Catholic hospitals.

VI. Conclusion

The pressures on the health care industry will continue to fuel the hospital merger wave. The six hundred Catholic hospitals in the ***787** United States are not insulated from this consolidation movement. However, these Catholic hospitals are subject to canon-law controls -- namely, canon-law limitations on their ability to merge. This nexus between Catholic hospitals and canon law may create an antitrust "immunity" for Catholic hospital mergers with other Catholic hospitals.

The Vatican Merger Defense postulates that Catholic hospitals are effectively exempt from antitrust merger scrutiny because of their relationship to the Vatican. For purposes of merger analysis, the validity of the Vatican Merger Defense will depend upon where the merger is challenged. The Court's holding in Copperweld -- that a parent and its subsidiary should be considered one economic actor for antitrust analysis -- probably can be extended to the merger of two Catholic hospitals. However, the Vatican's control over Catholic hospitals depends on a variety of factors, including the diocese where the hospital is located and the Catholic religious order with which the hospital is affiliated. [FN477] If the Vatican Merger Defense is valid, it would be an affirmative defense, and thus the burden should be on the merging hospitals to prove the defense.

The Vatican's lack of equity ownership in the Catholic hospitals suggests that the Vatican Merger Defense would fail in jurisdictions relying on structural post- Copperweld tests. However, in jurisdictions employing functional post- Copperweld tests, it is possible, and perhaps even probable, that the Vatican Merger Defense would be accepted. The structure of the Catholic Church creates a vertical hierarchy, at which the religious orders that own the Catholic hospitals are at the bottom. [FN478] Consequently, the Vatican has some degree of control over the operations of these hospitals. Further, canon-law controls and restrictions themselves may constitute sufficient control within the meaning of antitrust merger analysis to constitute a parent-subsidiary relationship between these Catholic hospitals and the Vatican.

[FN1]. For the purposes of this Comment, hospital consolidations and mergers will be treated as similar transactions. A hospital consolidation occurs when two, usually not-for-profit, hospitals pool their assets to form a third hospital. Neither of the original hospitals survives a consolidation. In a hospital merger, the two hospitals combine their assets, with one hospital absorbing the other. After a hospital merger, there is only one surviving hospital. Whether the transaction is structured as a merger or as a consolidation, the end result is substantially the same. Accordingly, the use of the term "merger" within this Comment is intended to encompass both types of transactions. Barnes & Noble, Dictionary of Business And Finance Terms 47 (defining consolidation), 153 (defining merger) (1993).

[FN2]. American Hospital Ass'n, Hospital Mergers and Consolidations 1980 - 1991, at 1 (1994).

[FN3]. Id. The American Hospital Association does not further break down its statistics on the "church-owned hospitals" group to show the religious affiliation of those hospitals. There are, however, approximately six hundred Catholic hospitals in the United States with annual revenues exceeding $32 billion. See infra note 48 and accompanying text; see also Thomas R. Prince & Ramachandran Ramanan, Operating Performance and Financial Constraints of Catholic Community Hospitals, 1986 -1989, Health Care Mgmt. R., Sept. 22, 1994, at 38 (noting that the 1981 capacity -- as measured in beds -- of Catholic hospital systems collectively -- 132,560 beds -- was greater than the 74,860 bed capacity of investor-owned health care systems and the 12,883 bed capacity of investor-owned nonaffiliated hospitals).

[FN4]. Telephone Interview with John Prince, Health Care Consultant with Arthur Andersen Co. (Aug. 29, 1994); see also James Coates, Merger to Link 4 Catholic Hospitals, Chi. Trib., Dec. 9, 1994, s (Business), at 1 (noting that the merger "is the latest in a flurry of health-care [sic] industry mergers"). See generally Fredric J. Entin et al., Hospital Collaboration: The Need for an Appropriate Antitrust Policy, 29 Wake Forest L. Rev. 107, 120 (1994) (noting that in 1991, after a decline in the number of hospital mergers, the volume rose significantly from the previous year).

[FN5]. Entin, supra note 4, at 109; see also Coates, supra note 4, at 1 (noting that the merging hospitals "said the merger comes in response to pressure from corporations and insurance companies to merge hospitals and cut costs through managed health care").

[FN6]. See Joe Davidson, Partial Merger of 2 Hospitals Approved, Allowing for Efficiencies, Competition, Wall St. J., June 20, 1994, at B3 (discussing the hospital industry's problem of decreased average patient stays and hospital over-capacity in the form of the oversupply of hospital beds).

[FN7]. Telephone Interview with John Prince, supra note 4.

[FN8]. See generally Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organizations 165 - 67 (1989). Carlton & Perloff identify several major benefits of merging: (1) efficiencies of scale; (2) efficiencies of scope (synergies); (3) efficiencies in management; and (4) additional market power. Id. Traditional economic efficiencies of scale should result from the larger capacity (as measured in hospital beds) of the merged hospitals. But see supra note 6 and accompanying text (discussing the decrease in the average length of patient hospital stays and the industry's oversupply of hospital beds). More recently, hospital efficiencies also result from the surviving hospital's ability to integrate services and expensive equipment (e.g., magnetic resonance imaging devices). Additionally, merging hospitals also benefit from the ability to reduce or eliminate duplicative services, such as a marketing department. Telephone Interview with John Prince, supra note 4.

[FN9]. U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines s 4 (April 2, 1992) [hereinafter 1992 Merger Guidelines].

[FN10]. Charles F. Rule, Assistant Attorney General for the U.S. Department of Justice, Antitrust Division, Speech to National Health Lawyers Association (Jan. 21, 1988), in Compendium of Informal Antitrust Enforcement Agency Advice in Health Care 129 -31 (1991) [hereinafter Compendium] (summary of speech). While Rule commented that the Antitrust Division disallows the first two efficiencies (cost of capital and shared inputs) because those benefits could be accomplished without a merger, he acknowledged that the Antitrust Division will consider economies of scale that cause average costs to decline because fixed costs are spread over higher output levels. Rule also acknowledged that efficiencies can result when duplicative services are consolidated, "especially where the hospitals have complimentary strengths and weaknesses." Id. at 130.

[FN11]. Telephone Interview with John Prince, supra note 4.

[FN12]. The antitrust implications of a merger are discussed extensively throughout this Comment. One thing to consider is that "[w]ith respect to efficiencies defenses [(reasons) for merging] ... [the government's view is that] the touchstone is whether the merger benefits consumers, not whether it benefits the parties, and that only in extraordinary cases will efficiencies be considered as a mitigating factor in the decision whether to challenge a merger." John W. Poole, Speech to National Health Lawyers Association (Feb. 1, 1983), in Compendium supra note 10, at 89 (summarizing speech).

[FN13]. Carlton & Perloff, supra note 8, at 167.

[FN14]. Id.

[FN15]. Richard L. Epstein, Vice President of the American Hospital Association, Antitrust Issues Relating to Hospital Delivery Systems, Address Before the American Bar Association Forum Committee on Health Law (March 31, 1979), in Forum, Health Law Issues: 1979 tab 6 (1979).

[FN16]. A consumer of health care services is not one discrete entity, but three separate entities -- the selector of services, the patient (the traditional consumer), and the payer -- each of whom may have different, and often conflicting, objectives in desired health care service. Id. Epstein refers to this trinity as the "hydra-consumer." Id.

[FN17]. Id.

[FN18]. See Alma L. Koch, Financing Health Services, in Introduction to Health Services, 299 -331 (Stephen J. Williams & Paul R. Torrens eds., 4th ed. 1993) (discussing recent reforms of health insurance, Medicare, and Medicaid); see also John K. Iglehart, Health Policy Report: The American Health Care System -- Medicare, 327 New Eng. J. Med. 1467 (1992).

[FN19]. It follows that if a hospital wants to be profitable, the hospital's average cost of treatment for an ailment must fall below the Medicare payment for that ailment. Should a hospital incur losses because of an imbalance between the cost of care of Medicare patients and the Medicare payments, the hospital must shift the costs to private patients. See infra text accompanying note 20.

[FN20]. See Gary Whitted, Private Health Insurance and Employee Benefits, in Introduction to Health Services, supra note 18, at 332- 60 (discussing private health insurance trends).

[FN21]. See id. at 356 -58.

[FN22]. William G. Kopit & Robert W. McCann, Toward a Definite Antitrust Standard for Nonprofit Hospital Mergers, 13 J. Health Pol. Pol'y L. 635, 636 (1988).

[FN23]. See Ron Winslow, HMO Juggernaut: U.S. Healthcare Cuts Costs, Grows Rapidly And Irks Some Doctors, Wall St. J., Sept. 6, 1994, at A1.

[FN24]. See Stephen J. Williams & Paul R. Torrens, Managed Care: Restructuring the System, in Introduction to Health Services, supra note 18, at 361-74 (discussing both the historical origins of managed care and the recent growth and evolution of managed care).

[FN25]. Winslow, supra note 23, at A1.

[FN26]. See, e.g., David Rogers & Hilary Stout, Health Reform Is Dead for '94, Mitchell Admits, Wall St. J., Sept. 27, 1994, at A1, A3, A6 (noting that "[v] irtually all [of] the [health care] plans considered this year [1994] proposed to finance reform to some degree by achieving savings from existing health programs, such as Medicare and Medicaid"; and predicting that health care reform would be renewed after the November 1994 elections); see also Laurie McGinley, Retooling of Medicare, Medicaid Will Increase Pressure on Hospitals, Wall St. J., Oct. 2, 1995, at A1, A7 (predicting that the Republican Congress' healthcare reform will cause more hospital mergers).

[FN27]. Ronald W. Davis, Antitrust Analysis of Mergers, Acquisitions, and Joint Ventures in the 1980s: A Pragmatic Guide to Evaluation of Legal Risks, 11 Del. J. Corp. L. 25 (1986) (observing that the "conventional wisdom today [in 1986] is that antitrust enforcement with respect to mergers, acquisitions, and joint ventures is dead, and in the vernacular, that 'anything goes' "); see also Frederic M. Scherer & David Ross, Industrial Market Structure and Economic Performance 159 (3d ed. 1990) ("Antitrust policy also swerved in a more permissive direction as the Reagan Administration took office in 1981. Sensing the reduced probability of government challenge, many companies attempted horizontal mergers that would have been inconceivable under prior administrations.").

[FN28]. Antitrust: House Judiciary Panel Holds First Hearing on Mergers, Focusing on Takeover Phenomenon, 65 Daily Rep. for Executives (BNA) A-22, A-23 (Apr. 4, 1985) (summarizing the testimony of Prof. James Ponsoldt).

[FN29]. It is difficult for a major transaction to remain in limbo for a long period of time. Further, challenged merger transactions do not usually have enough steam to exhaust all possible administrative hearings and legal appeals -- e.g., the hospitals in FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991), abandoned their merger rather than attempt to appeal the case to the Supreme Court. Entin, supra note 4, at 121.

[FN30]. Dan Cordtz & Gregory E. David, The Public Policy Issue of 1994: How health care reform pits big business against small business. Who's likely to win., Fin. World, Nov. 23, 1993, at 47.

[FN31]. Id.

[FN32]. See John J. Miles, Hospital Mergers and the Antitrust Laws: An Overview, 29 Antitrust Bull. 253 (1984); Cordtz & David, supra note 30, at 42- 43.

[FN33]. Even the shift in Congressional composition -- now the Republicans control both houses -- will not stop the health care revolution. See, e.g., McGinley, supra note 26, at A1. A major part of the Republican's efforts at budget-cutting includes large Medicare and Medicaid payment reductions. Id. As McGinley notes, "hospitals are now being drafted by Republican [[[congressional] leaders to shoulder much of the burden of squeezing $270 billion from projected Medicare spending over seven years." Id.

[FN34]. For a prediction of the eventual framework of U.S. health care policy, see Stephen J. Williams & Paul R. Torrens, Understanding the Present, Planning for the Future: The Dynamics of Health Care in the United States in the 1990s, in Introduction to Health Services, supra note 18, at 421-29.

[FN35]. For those antitrust attorneys reading this Comment, imagine instead a hypothetical relevant market with only two hospitals. This Comment does not intend to address any of the relevant market definition antitrust issues of a hospital merger. It is interesting to query whether one could successfully assert that religious hospitals, whether Catholic, Protestant, or Jewish hospitals, constitute a narrower product market for merger analysis than the general market for hospital care in the relevant geographic market. An analysis of the consumer preferences for religious-affiliated hospitals is beyond the scope of this Comment. For a discussion of defining relevant markets for hospital mergers, see Jack Zwanziger, Hospitals and Antitrust: Defining Markets, Setting Standards, 19 J. Health Pol. Pol'y & L. 423 (1994).

[FN36]. This hypothetical merger would be a two-to-one merger -- basically, the surviving hospital would have a 100% market share in this town (the relevant market). The government would probably challenge this hypothetical merger under s 1 of the Sherman Act or s 7 of the Clayton Act. For a detailed discussion of the antitrust laws governing mergers, see infra Parts II & IV.

[FN37]. Assume, for example, that the only two hospitals in this hypothetical town (relevant market) are a Jesuit-affiliated hospital and a Franciscan-affiliated hospital. If the two hospitals are owned by the same religious order, then they would be sibling subsidiaries with the religious order as their parent corporation. This Comment addresses whether two Catholic hospitals owned by different Catholic religious orders can claim that they are sibling corporations with the Vatican as their parent corporation.

[FN38]. 467 U.S. 752 (1984).

[FN39]. Copperweld's progeny -- applying Copperweld to dismiss an antitrust question involving concerted activity between two wholly owned subsidiaries of the same parent corporation -- is extensive. See, e.g., Advanced Health-Care Serv., Inc. v. Radford Community Hosp., 910 F.2d 139, 145 (4th Cir. 1990) (holding that any concerted activity between siblings "would clearly fall outside the reach of s 1 of the Sherman Act"); Directory Sales Management Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611 (6th Cir. 1987) (finding that " Copperweld precludes a finding that two-wholly owned sibling corporations can combine" in violation of s 1); Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984) (reasoning that if two siblings cannot conspire with their parent in violation of s 1, they cannot conspire with each other); Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984) (observing the lack of any relevant differences

between a corporation and its wholly owned subsidiary, and two corporations wholly owned by a third corporation); Bell Atl. Business Sys. Serv. v. Hitachi Data Sys. Corp., 849 F. Supp. 702 (N.D. Cal. 1994); see also Newport Components v. NEC Home Elec. Inc., 671 F. Supp. 1525, 1544 (C.D. Cal. 1987) (following Copperweld in finding a corporation and its two wholly owned subsidiaries to be a "single entity" with "complete unity of interest" for purposes of s 1 analysis); Gucci v. Gucci Shops, Inc., 651 F. Supp. 194, 197 (S.D.N.Y. 1986) (holding two corporations with identical owners to be legally incapable of conspiring with each other by definition). But see In re Ray Dobbins Lincoln-Mercury, Inc., 604 F. Supp. 203, 205 (W.D. Va. 1984) (holding that Copperweld does not extend to a conspiracy between two subsidiaries of the same parent corporation), aff 'd on other grounds, 813 F.2d 402 (4th Cir. 1985) (subsequently disapproved by the Fourth Circuit in Advanced Health-Care Serv., 910 F.2d at 146). For scholarly discussion of the applicability of Copperweld to two sibling corporations sharing the same parent, see VII Phillip E. Areeda, Antitrust Law s 1464f (1986) (concluding that Copperweld denies "conspiratorial capacity" to sister corporations' dealings with one another).

[FN40]. See, e.g., Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325 (7th Cir. 1985). In Ball Memorial Hospital, the court found that a merger failed to raise any antitrust concerns because the two merging entities had, "for more than 30 years acted as one company." Id. at 1337. The court explained that because of this unity, "[t]heir merger did not change the conditions of competition in the market." Id. (citing Copperweld).

With respect to mergers of two wholly owned subsidiaries, the Copperweld decision appears to have influenced the government's Hart-Scott-Rodino filing instructions, 16 C.F.R. s 802.30, which specifically exempt the merger of two wholly owned subsidiaries from having to comply with the Hart-Scott-Rodino Act's reporting requirements. See infra notes 140 - 42 and accompanying text (identifying the merger of two wholly owned subsidiaries sharing a common parent as exempt from the Hart-Scott-Rodino Act's requirements).

[FN41]. It is beyond the scope of this Comment to examine or analyze the variety of alternative cooperative arrangements -- such as joint ventures or partnerships -- into which two entities could enter rather than electing to merge. It should be recognized that the structure of the cooperative arrangement could have drastic antitrust implications. See Kevin E. Grady, A Framework for Antitrust Analysis of Health Care Joint Ventures, 61 Antitrust L.J. 765 (1993); Jonathan M. Joseph, Comment, Hospital Joint Ventures: Charting a Safe Course Through a Sea of Antitrust Regulations, 13 Am. J.L. & Med. 621 (1988); see also NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (holding that because joint ventures consist of multiple entities, they are legally capable of violating s 1 of the Sherman Act).

[FN42]. This follows from lower court decisions that have held that two wholly owned subsidiaries sharing the same parent are incapable of s 1 conspiracy. See supra note 39 (listing several of these lower court holdings that extend Copperweld to two sibling corporations).

When sibling corporations are not wholly owned by their parent corporation, the federal courts have adopted a variety of extensions of Copperweld. See infra Part IV (discussing the applicable extensions of Copperweld).

[FN43]. See generally infra subpart II.B.

[FN44]. See, e.g., Copperweld, 467 U.S. at 771-72.

[FN45]. Id.

[FN46]. An example of this control is that any alienation of assets over $3 million requires the approval of the Pope himself. See infra subparts III.B & III.C. With respect to a Catholic hospital merger, this gives the Vatican effective veto power over the merger.

[FN47]. The key to the Vatican Merger Defense lies in establishing that Catholic hospitals are sibling corporations sharing the same ultimate parent corporation. While the Vatican Merger Defense could have also been called the "Pope is boss" defense, any constitutional claims -- such as a First Amendment claim -- of antitrust immunity are beyond the scope of the Comment. See Daria K. Nacheff, Religion-Based Antitrust Exemptions: A Religious Motivation Test, 57 Notre Dame L. Rev. 828 (1982) (examining religion-based antitrust exemption claims).

[FN48]. Telephone Interview with Mark Unger, Research Specialist for the Catholic Health Ass'n of the United States (Sept. 1, 1994); see also Bruce Japsen, Church Puts Faith in System Mergers: In Light of Healthcare Reforms, Catholic Hospitals Face the Challenge of Non-Catholic Collaborations, Mod. Healthcare, June 6, 1994, at 32, 33 ("Government-owned hospitals

aside, Catholic hospitals are the largest not-for profit player in [American] healthcare with more than $32 billion in revenues."); cf. supra note 3 and accompanying text.

[FN49]. Lawrence A. Sullivan, Handbook of the Law of Antitrust 577 (1977). Sullivan identifies five major merger movements: "[T]he first movement is seen as running from 1879 to 1892 or 1893, the second (perhaps the greatest wave, which did the most to transform the economy) from 1897 to 1904; the third, from 1920 to 1929; the fourth from 1940 to about 1963; with a fifth, essentially a 'conglomerate movement,' thereafter." Id. at 578 n.1.

[FN50]. Richard A. Posner, Antitrust Law: An Economic Perspective 23 (1976).

[FN51]. An examination of all of the applicable laws governing mergers, e.g., state antitrust laws or federal securities laws, is beyond the scope of this Comment.

[FN52]. Modern antitrust merger analysis focuses primarily on s 1 of the Sherman Act, s 7 of the Clayton Act (as amended), and the Hart-Scott-Rodino Act.

[FN53]. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. ss 1-7 (1994)). For the history behind the Sherman Act's enactment, see Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. Law & Econ. 7 (1966).

[FN54]. Sherman Act s 1, 15 U.S.C. s 1.

[FN55]. See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2586 - 90 (1993) (establishing the elements of predatory pricing claims under s 2 of the Sherman Act and s 2(a) of the Robinson-Patman Act).

[FN56]. To date, no one has attempted to block a nonprofit, nonstock hospital merger under s 2. As later discussed in subpart II.D of this Comment, the only three challenges to nonprofit, nonstock hospital mergers were under s 1 of the Sherman Act and s 7 of the Clayton Act.

[FN57]. Section 1 of the Sherman Act provides that
[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony .... 15 U.S.C. s 1 (1994).

[FN58]. Section 2 of the Sherman Act provides that "[e]very 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 ...." 15 U.S.C. s 2 (1994).

[FN59]. See Advanced-Health Care Serv., Inc. v. Radford Community Hosp., 910 F.2d 139, 145 - 46 (4th Cir. 1990).

[FN60]. 467 U.S. 752 (1984).

[FN61]. Id. at 768 (emphasis added) (citations omitted).

[FN62]. While the majority of Sherman Act cases have been brought by the two federal government enforcement agencies -- the Department of Justice and the FTC -- private plaintiffs can and do bring antitrust suits. See Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, 94 Mich. L. Rev. 1 (1995).

[FN63]. Sherman Act s 2, 15 U.S.C. s 2.

[FN64]. United States v. Grinnell Corp., 384 U.S. 563, 570 -71 (1966).

[FN65]. Advanced Health-Car Serv., Inc. v. Radford Community Hosp., 910 F.2d 139, 147 (4th Cir. 1990).

[FN66]. 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. ss 12-27 (1994)).

[FN67]. S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1915).

[FN68]. See, e.g., Henry R. Seager & Charles A. Gulick, Jr., Trust and Corporation Problems 55 -59 (1929).

[FN69]. Clayton Act s 2, 15 U.S.C. s 13 (1994). Section 2 was amended in 1932 and is frequently referred to as the Robinson-Patman Act of 1932. Id. The section prohibits price discrimination when "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." Id. s 13(a).
For a discussion of parent-subsidiary issues under the Robinson-Patman Act, see Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 748 -51 (1st Cir. 1994) (applying Copperweld, 467 U.S. 752 (1984), to find a parent corporation and its wholly owned subsidiary to be a single seller under the Robinson-Patman Act); see also Stephen Calkins, Copperweld in the Courts: The Road to Caribe, 63 Antitrust L.J. 345, 379 - 85 (1995).

[FN70]. Clayton Act s 3, 15 U.S.C. s 14 (1994).

[FN71]. Clayton Act s 7, 15 U.S.C. s 18 (1994). As enacted in 1914, paragraph 1 of s 7 provided that
no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. Id. While applying to all mergers, s 7 is concerned primarily with horizontal mergers, as opposed to vertical mergers. See Phillip Areeda & Louis Kaplow, Antitrust Analysis 820 (1988).

[FN72]. Clayton Act s 8, 15 U.S.C. s 19 (1994). Section 8 restricts the use of interlocking directorates (directors serving on the boards of directors of different firms) between firms that are competitors.

[FN73]. The practices described in ss 2, 3, 7, and 8 of the Clayton Act are not illegal per se. Rather, the government is charged with examining such practices and seeking to enjoin those that may have an anticompetitive effect or tend to create a monopoly.

[FN74]. Clayton Act s 7, 15 U.S.C. s 18 (1994).

[FN75]. S. Rep. No. 1775, 81st Cong., 2d Sess. 4 -5 (1950) ("The intent here ... is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.").

[FN76]. This loophole was eliminated in 1950, when the Clayton Act was amended. Representative Estes Kefavuer testified that the amendments were intended "simply to plug the [asset acquisition] loophole in section 7 and 11 of the Clayton Act." Amending Sections 7 and 11 of the Clayton Act: Hearings on H.R. 515 Before the House Subcommittee No. 2 of the House Committee on Judiciary, 80th Cong., 1st Sess. 4 (1947) (statement of Representative Estes Kefauver).

[FN77]. United States v. Columbia Steel Co., 334 U.S. 495, 533 -34 (1948).

[FN78]. FTC, The Merger Movement: A Summary Report 68 (1948) (warning that the failure to revise s 7 would be that the "giant corporations will ultimately take over the country").

[FN79]. Clayton Act s 7, 15 U.S.C. s 18 (1994). As amended, paragraph 1 of s 7 now provides that
No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, when in any line of commerce or in any activity affecting commerce in any section of the country, [if] the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly. Id.

[FN80]. S. Rep. No. 1775, 81st Cong., 2d Sess. 1, 3 (1950). For a general discussion of the legislative history of the Clayton Act, see Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962).

[FN81]. S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).

[FN82]. Sullivan, supra note 49, at 592- 93.

[FN83]. 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. ss 41-58 (1994)).

[FN84]. FTC Act s 5, 15 U.S.C. s 45.

[FN85]. 15 U.S.C. s 45(a)(1).

[FN86]. A November 1, 1995 search of the GENFED database on LEXIS using the following search yielded zero matches: HOSPITAL W/3 MERGER & VIOLATION W/10 ("SECTION 5" OR "s 5") W/5 ("FEDERAL TRADE COMMISSION ACT" OR "15 U.S.C. s 45").

[FN87]. Pub. L. No. 94 - 435, 90 Stat. 1390 (1976) (codified as amended at 15 U.S.C. s 18a (1994)). The Hart-Scott-Rodino Act added s 7A to the Clayton Act. The Premerger Notification Rules and Regulations issued by the FTC under the Act specify what transactions are covered under the Act, what transactions are exempted, and how to transmit the documentation required by the Act. See 16 C.F.R. ss 800-803.90. (1995).

[FN88]. U.S. Dep't of Justice, Antitrust Division Manual III-15 (2d ed. Oct. 18, 1987) [hereinafter Antitrust Division Manual]. The basic merger rules and regulations under the Hart-Scott-Rodino Act have been codified at 16 C.F.R. ss 801- 803. Specifically, s 801 sets forth the conditions and thresholds that must be met for the Hart-Scott-Rodino Act to apply; s 802 outlines exemptions to the applicability of the Act; and s 803 describes the reporting requirements of the parties seeking to merge. Id.

[FN89]. 16 C.F.R. ss 802.20, 803.10; see also Davis, supra note 27, at 25.

[FN90]. The Department of Justice's Antitrust Division was formally established in 1933. Prior to the creation of the Antitrust Division, the Assistant Attorney General of the Department of Justice was charged with enforcing the antitrust laws. Antitrust Division Manual, supra note 88, at I-17.

[FN91]. The FTC was created in 1914 by the Federal Trade Commission Act of 1914. The FTC is an administrative agency, consisting of a chairman, who is appointed by the President, and four commissioners, who are appointed by the President (with Senate confirmation) and serve staggered seven-year terms. Within the FTC, the Bureau of Competition is responsible for antitrust enforcement. See, e.g., FTC, Premerger Notification Source Book (1990).

[FN92]. With respect to antitrust merger law, the Department of Justice is responsible for enforcing the Sherman Act (by civil and criminal proceedings) and the Clayton Act (by civil proceedings). U.S. Dep't of Justice & FTC, Antitrust Division of the United States Department of Justice and the Bureau of Competition of the Federal Trade Commission: Clearance Procedures for Investigations (1993). The FTC is responsible for enforcing the Clayton Act and the FTC Act. Id.

[FN93]. Id.; see also Antitrust Division Manual, supra note 88, at III-5, VII-1 to VII- 6.

[FN94]. U.S. Dep't of Justice, Antitrust Enforcement and the Consumer 3 (undated pamphlet).

[FN95]. 15 U.S.C. s 18a(a); 16 C.F.R. ss 800-803.90; see also supra notes 87 to 89 and accompanying text.

[FN96]. See Terry Calvani, Acting Chairman of the FTC, & Neil Averitt, Assistant to the Acting Chairman of the FTC, Remarks before the Joint Program on Antitrust Issues in the Health Care Industry (Feb. 20, 1986), in 7 Trade Reg. Rep. (CCH) P 50,001 (observing that since most hospital mergers and acquisitions are not large enough to trigger Hart-Scott-Rodino reporting requirements, the FTC attorneys look to trade publications, other public accounts, and competitor complaints to target potentially anti-competitive mergers).

[FN97]. As the name suggests, these guidelines provide guidance for parties who are considering consummating (or challenging) a merger. It is important to note that the guidelines do not carry the force of law, but courts have recognized these merger guidelines as an "advisory aid" for their evaluation of mergers under s 7 of the Clayton Act. See, e.g., Ansell

Inc. v. Schmid Lab., 757 F. Supp. 467, 475 (D.N.J. 1991) (relying on the guidelines as "an advisory aid in determining the relevant product market"). See generally Steven A. Newborn & Virginia L. Snider, The Growing Judicial Acceptance of the Merger Guidelines, 60 Antitrust L.J. 849 (1992) (discussing weight given to the Merger Guidelines by the courts).

[FN98]. See, e.g., 1992 Merger Guidelines, supra note 9, s 0.

[FN99]. The HHI is a statistical calculation designed to calculate market power. The actual formula is the sum total of the square of each firm in the relevant market's market share. Thus to calculate an HHI for a market: (1) define the relevant market; (2) determine each individual firm's market share in the relevant market; (3) square each firm's market share individually; and (4) sum the squared market shares. See 1992 Merger Guidelines, supra note 9, s 1.5 (providing the formula for calculating the HHI). Numbers are squared to emphasize the effect of larger market shares. The HHI for a market is dependent on both the number of firms in the market and the distribution of market share among firms.

[FN100]. An increase in the HHI of one hundred points and a resulting post-merger HHI score above eighteen hundred creates a presumption of illegality. Id.

[FN101]. U.S. Dep't of Justice, Merger Guidelines, 49 Fed. Reg. 26,824 (1984).

[FN102]. Id. ss 3, 4.

[FN103]. 1992 Merger Guidelines, supra note 9.

[FN104]. Even if the merger would give the acquiring firm market power (in the relevant market), the merging parties may plead the failing firm defense. The failing firm defense is extremely difficult to establish, in that a company must show that, absent the merger, it will fail. Because the failing firm defense is an affirmative defense, a failing firm has the burden of proof. It must establish that (1) its own resources are exhausted to the point that the firm will exit the market absent the merger; (2) the acquiring party is the only available purchaser (or the least problematic purchaser); and (3) self-help, through internal gains by improving the failing firm's management and efficiencies, is not a viable option. 1992 Merger Guidelines, supra note 9, s 5.1. A firm seeking to assert that it is a failing firm would also be required to establish that (1) it had "shopped" itself around, probably by hiring an investment bank to attempt to locate other purchasers; and (2) it had unsuccessfully attempted self-help, probably by hiring a consulting group. See Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (applying the 1968 Merger Guidelines to reject an attempted failing firm defense); International Shoe Co. v. FTC, 280 U.S. 291 (1930) (setting out the failing firm test adopted by the 1968 Merger Guidelines).

[FN105]. U.S. Dep't of Justice & FTC, Statements of Antitrust Enforcement Policy in the Health Care Area (1993), reprinted in 4 Trade Reg. Rep. (CCH) P 50,754 [hereinafter 1993 Joint Health Care Statements].

[FN106]. Id. at 1.

[FN107]. Hospital mergers that do face antitrust scrutiny pose special problems for antitrust analysis. See Andrew J. Strenio, Jr., Commissioner of the FTC, Speech to the Program on Competition and New Business Relationships in the Health Care Industry (June 17, 1986), in Compendium, supra note 10, at 123 -24 (summarizing speech) (discussing some of the potential problems in the application of merger law to health care entities and stating that in hospital mergers, "price competition may be dulled by the diversity and individuality of services and by the third-party payer system. On the other hand, nonprice competition may be intense.").

[FN108]. 1993 Joint Health Care Statements, supra note 105, at 4.

[FN109]. Id. at 6.

[FN110]. Id. at 4.

[FN111]. Id.

[FN112]. Id. at 4 -5.

[FN113]. Id. at 5.

[FN114]. Id. at 3; see U.S. Dep't of Justice & FTC, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust 2 (1994) [hereinafter 1994 Joint Health Care Statements].

[FN115]. The 1993 Joint Health Care Statements consisted of six statements, whereas the 1994 Joint Health Care Statements consisted of nine statements.

[FN116]. 1994 Joint Health Care Statements, supra note 114, at 12-13. The statement also explicitly excludes hospitals less than five years old from the antitrust safety zone. Id. at 13.

[FN117]. Id. at 13. The 1994 Joint Health Care Statements also excludes the following mergers that might, under the 1992 Merger Guidelines, "otherwise raise an inference of anti-competitive effects [because of a substantial lessening of competition in the relevant market]": (1) a merger between hospitals that would still face post-merger competition from strong competitors; (2) a merger between sufficiently differentiated hospitals; (3) a merger that would allow realization of significant cost savings and efficiencies; and (4) a merger that would eliminate a hospital that would likely fail in the absence of the merger with the failing hospital's assets leaving the market (failing firm defense). Id. at 14.

[FN118]. Cf. 1993 Joint Health Care Statements, supra note 105, at 5.

[FN119]. Davidson, supra note 6, at B3; see also Sabrina Comizzoli, First Hospital Agreement to Follow New Health Care Antitrust Enforcement Policy, Competition Matters: An Antitrust Update (U.S. Dep't of Justice, Antitrust Division), Aug. 1994, at 1, 3.

[FN120]. Davidson, supra note 6, at B3. In assessing the potential impact of the proposed merger, Assistant Attorney General Anne Bingaman, head of the Department of Justice's Antitrust Division, predicted that the surviving hospital would have dominated the northern Pinellas County, Florida, market and "would likely have reduced the drive to keep prices down and service up." Id.

[FN121]. Id.

[FN122]. The hospitals were allowed to form a partnership that would jointly provide certain services at both hospitals at the partnership's cost. Via this partnership, the hospitals would be allowed to combine their medical staffs, and the partnership could provide services such as outpatient care, open-heart surgery, radiology, and laboratory services. The partnership also could provide administrative services, such as accounting, housekeeping, laundry, and maintenance of medical records. Id.

[FN123]. Under the consent decree, competition between the two hospitals would continue in areas such as general surgery, emergency care, obstetrics, and gynecology. Certain managerial functions, such as marketing, planning, and pricing also were excluded from the merger. Id.

[FN124]. Id. (quoting Anne K. Bingaman, News Conference on June 17, 1994).

[FN125]. 467 U.S. 752 (1984).

[FN126]. Id. at 777. See Thomas W. McNamara, Defining a Single Entity for Purposes of Section 1 of the Sherman Act Post Copperweld : A Suggested Approach, 22 San Diego L. Rev. 1245, 1248 -56 (1985) (cataloging the various pre- Copperweld single entity tests).

[FN127]. Copperweld, 467 U.S. at 773.

[FN128]. Id. at 792 (Stevens, J., dissenting).

[FN129]. If the government can establish the existence of an agreement to conspire, the government does not need to prove that the parties carried out or even had the capacity to carry out the agreement. Keith N. Hylton, Lectures on Antitrust 6 -11

(Sept. 1994) (forthcoming, mimeograph, on file with author) [[[hereinafter Hylton Lectures]. To establish a Sherman Act conspiracy violation, the government must traditionally establish only two elements: (1) proof of an agreement to conspire; and (2) duality of the conspiracy's participants; because under antitrust law, it is impossible for a party to conspire with itself. Id. The narrow issue before the Court in Copperweld was whether a parent and its wholly owned subsidiary could conspire within the meaning of s 1 of the Sherman Act, i.e., whether the required element of duality could be satisfied by a relationship between a parent corporation and its wholly owned subsidiary. Copperweld, 467 U.S. at 759.

[FN130]. Copperweld, 467 U.S. at 758 -77.

[FN131]. Intra-enterprise conspiracy doctrine is similar to tort and agency law's intra-enterprise liability doctrine.

[FN132]. See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947). See generally Areeda & Kaplow, supra note 71, at 315 -26 (discussing the history of the intra-enterprise conspiracy doctrine); Hylton Lectures, supra note 129, at 10 (noting that prior to the Copperweld decision, Yellow Cab was the leading intra-enterprise conspiracy case).

[FN133]. See Areeda & Kaplow, supra note 71, at 315 -26.

[FN134]. 332 U.S. 218 (1947). While Yellow Cab marks the Supreme Court's announcement of an intra-enterprise conspiracy doctrine, the doctrine had previously been espoused by the lower courts. See, e.g., United States v. General Motors, 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

[FN135]. As Hylton discussed, the justification for the intra-enterprise conspiracy doctrine was that it "prevented organizations from hiding behind the shield of common ownership when they conspire in violation of section 1 [of the Sherman Act]." Hylton Lectures, supra note 129, at 7.

[FN136]. Copperweld, 467 U.S. at 766. The Court also noted the heavy criticism of the intra-enterprise conspiracy doctrine by commentators. Id. at 767 n.12 (citing multiple law journal articles).

[FN137]. Copperweld, 467 U.S. at 772.

[FN138]. Id. at 771.

[FN139]. The majority explicitly stated:
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 s 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. Id. at 767.

[FN140]. Id. at 767- 69.

[FN141]. The Supreme Court in Copperweld rejected the single-entity test relied on in many of the lower courts' pre-Copperweld decisions. Id. at 772 n.18. For a discussion of the single-entity test, see infra text accompanying notes 345 -50.

[FN142]. Hart-Scott-Rodino Act Regulations, 16 C.F.R. s 802.30 (1995).

[FN143]. Id.

[FN144]. The Vatican's control of the hospitals flows from a canon-law, rather than a corporate-law nexus. See subparts III.A and III.C.

[FN145]. Copperweld, 467 U.S. at 778 (Stevens, J., dissenting).

[FN146]. Id. at 771.

[FN147]. Id. at 777 & n.25 (citing Brief for United States as Amicus Curiae 26 n.42).

[FN148]. Id. at 768.

[FN149]. Id. (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) for the modern rule of reason test).

[FN150]. Id. at 769.

[FN151]. See infra subpart IV.A. for the definition of a unitary actor.

[FN152]. Copperweld, 467 U.S. at 769.

[FN153]. Id. at 769.

[FN154]. See 1992 Merger Guidelines, supra note 9 (discussing the importance of market concentration). See generally Dayna B. Matthew, Doing What Comes Naturally: Antitrust Law and Hospital Mergers, 31 Hous. L. Rev. 813 (1994) (providing an empirical examination of effect of antitrust laws on the hospital industry).

[FN155]. Entin, supra note 4, at 110 (footnote omitted).

[FN156]. See supra Part I.

[FN157]. See, e.g., 1992 Merger Guidelines, supra note 9, ss 1.51, 4.

[FN158]. While few hospital mergers are being challenged by the government, hospital mergers are extremely likely as an industry group to receive increased government scrutiny in the form of a second request letter. See infra note 181 and accompanying text (discussing this paradox).

[FN159]. Catholic hospitals are nonprofit, nonstock, charitable hospitals.

[FN160]. 938 F.2d 1206 (11th Cir. 1991).

[FN161]. 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990).

[FN162]. 707 F. Supp. 840, 841 n.1 (W.D. Va.), aff 'd without opinion, 892 F.2d 1042 (4th Cir. 1989); see also Cabell M. Adams, Nonprofit Hospital Mergers: Proceed with Caution, 20 Cumb. L. Rev. 719 (1990) (discussing the implications of the Rockford and Carilion merger challenges on future nonprofit hospital mergers); Andy A. Tschoepe II, Nonprofit Hospital Mergers and Federal Antitrust Law: The Quest for Compatibility, 15 Del. J. Corp. L. 539 (1990) (analyzing the viability of mergers as a competitive mechanism for nonprofit charitable hospitals).

[FN163]. The applicability of s 7 to nonprofit hospitals was an issue in these three cases because nonprofit hospitals are nonstock corporations. Consequently, the government alleged that the merger violated both the Sherman Act and the Clayton Act. See infra text accompanying notes 165 - 66 (providing Judge Posner's analysis of the appropriate statute under which to prosecute nonprofit hospital mergers).

[FN164]. Clayton Act s 7, 15 U.S.C. s 18. Section II.A.2 of this Comment discusses s 7 of the Clayton Act in detail.

[FN165]. Rockford Memorial, 898 F.2d at 1282 (citations omitted).

[FN166]. Id. at 1286.

[FN167]. Id. at 1282.

[FN168]. See supra note 75.

[FN169]. 807 F.2d 1381 (7th Cir. 1986).

[FN170]. 370 U.S. 294 (1962).

[FN171]. 374 U.S. 321 (1963).

[FN172]. Hospital Corp. of Am., 807 F.2d at 1385.

[FN173]. 415 U.S. 486 (1974). Posner felt that "[a]lthough [General Dynamics] refused to equate the possession of a significant market share with a significant threat to competition, [it] involved highly unusual facts, having no counterpart [in most health care mergers]." Hospital Corp. of Am., 807 F.2d at 1385.

[FN174]. Hospital Corp. of Am., 807 F.2d at 1385 (commenting on the validity of statistical analysis of market shares for assessment of a proposed merger).

[FN175]. Id. at 1387. Posner also noted that "[s]ection 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences." Id. at 1389.

[FN176]. Market power is measured by the proxy of market concentration, which is measured using a market share index called the HHI. 1992 Merger Guidelines, supra note 9, s 1.4. See supra notes 99 -100 for a discussion of HHI calculation.

[FN177]. Judge Easterbrook explained the antitrust laws' concern with market power: "Liability in antitrust law almost always requires proof of market power. This is because market power is an essential ingredient of injury to consumers. Market power means the ability to injure consumers by curtailing output and [/or] raising price." Fishman v. Estate of Wirtz, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting in part).

[FN178]. 1992 Merger Guidelines, supra note 9, s 1.1. The 1992 Merger Guidelines later define a five percent increase in price to constitute a "small but significant and nontransitory increase in price" for most industries, but also caution that "what constitutes a 'small but significant and nontransitory' increase in price will depend on the nature of the industry." Id. s 1.11.

[FN179]. The courts have accepted the HHI measurement as a valid approximation of market power in hospital mergers. In FTC v. University Health, Inc., 938 F.2d 1206, 1218 (11th Cir. 1991), the court held that a prima facie merger violation was established on the basis of the pre-merger and post-merger HHI scores. Thus, a significant change in HHI scores creates a presumption of illegality of the merger.

[FN180]. 1992 Merger Guidelines, supra note 9, s 1.51.

[FN181]. Entin, supra note 4, app. C at 116. Entin measures scrutiny by comparing the number of government second information requests (under its investigative power for Hart-Scott-Rodino pre-merger filings) for hospital mergers compared to mergers in other industries. In contrast, it should be noted that the government actually challenges very few hospital mergers in court. See supra notes 160 - 63 and accompanying text. From a practical point, however, it is probable that as a result of the second request, many problematic mergers are voluntarily withdrawn or modified. For example, where a merger would cause problematic horizontal overlap, parts of the merging hospitals are often sold or spun-off. See, e.g., Steven Oberbeck, Health-Care Giants to Sell 3 Utah Hospitals, Salt Lake Trib., Feb. 16, 1995, at B4 (noting that "[t]he Federal Trade Commission has told the country's two largest health-care companies - Columbia/HCA Healthcare and Healthtrust - [that] they must agree to sell three Utah hospitals before [antitrust] regulators will allow the companies to merge"). Consequently, the number of hospital merger challenges may be deceptively low.

[FN182]. 1992 Merger Guidelines, supra note 9, s 1.51.

[FN183]. Entin, supra note 4, at 115 -16 & 115 n.46. Assuming that all of the firms have equal market shares (which, mathematically, will result in the lowest possible HHI score for that market), Entin observes that the lowest possible HHI for a six-hospital market is 1668 and the lowest possible HHI for a five-hospital market is 2000. Id. at 115 n.46. Entin also observes that 80% of the communities in the United States have six hospitals or less. Id. at 115 -16.

[FN184]. The fact that Catholic hospitals are nonprofit, charitable organizations is irrelevant for merger analysis. See, e.g., FTC v. University Health, Inc., 938 F.2d 1206, 1224 (11th Cir. 1991) ("[T]he Supreme Court has rejected the notion that nonprofit corporations act under such a different set of incentives than for-profit corporations that they are entitled to an implicit exemption from the antitrust laws.") (quoting National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100 n.22 (1984)); see also Kopit & McCann, supra note 22, at 641- 42 (observing that antitrust enforcement policy "denies the existence of analytical distinctions between mergers of nonprofit charitable hospitals and mergers among commercial institutions").

[FN185]. The most recent version of the Catholic Church's canon-law code, Codex Iuris Canonici, was published in 1983. Although English translations of the Code are available, they are not official. As one commentator observed, "[t]he only authentic text of the [canon] law for purposes of interpretation remains the Latin one." Ladislas M. Orsy, From Vision to Legislation: From the Council to a Code of Laws 53 (1985). The English translation relied upon for this Comment was Canon Law Society of America, Code of Canon Law (1983). For a detailed discussion of the actual canons, see The Code of Canon Law: A Text and Commentary (James A. Coriden et al., eds., 1985) [hereinafter Canon Law Commentary]. See also James A. Coriden, An Introduction to Canon Law (1991); Readings, Cases, Materials in Canon Law: A Textbook for Ministerial Students (Jordan Hite & Daniel J. Ward eds., rev. ed. 1990) [hereinafter Canon Law Casebook]. For a general discussion of the corporate aspects of canon law, see Adam J. Maida & Nicholas P. Cafardi, Church-Property, Church Finances, and Church-related Corporations - A Canon Law Handbook 9 (1984) (providing an academic assessment of the canon-law constraints on church-related corporations).

[FN186]. See infra section III.A.3.

[FN187]. Canon Law Commentary, supra note 185, at 11.

[FN188]. See, e.g., id.

[FN189]. Id. Alesandro also observes that "[c]anon law tries to be clear and simple. It emphasizes written principles. It is not so dynamic a system as the common law tradition .... In general, the [canon law] Code tends to be theoretical and abstract, rather than empirical." Id. at 13. Alesandro notes that "it is ... surprising that [the canon law Code] limit[s] its treatment of church structures to a relatively small number of canons. These statutes are in no way comparable to the finely detailed norms found in civil legislation." Id. at 12.

[FN190]. Id. at 12.

[FN191]. Canon 331 specifies that "in virtue of [the Pope's] offices he enjoys supreme, full, immediate and universal ordinary power in the Church, which he can always exercise freely." 1983 Code c.331.

[FN192]. The organizational hierarchy of the Catholic Church is set out in Book II of the 1983 Code, specifically canons 330 -572. For a discussion of the organizational hierarchy of the Catholic Church prior to the 1983 Code, see Hans K degreesung, Structures of the Church (Salvator Attanasio trans., 1964).

[FN193]. Canon Law Commentary, supra note 185, at 12. The significance of this vertical line of appeal is that the Pope can interfere with local matters that are normally the responsibility of the dioceses' bishop. See text accompanying infra notes 218-20, 242; see also Hugh R. K. Barber, M.D., A Crisis of Conscience 187 (1993) ("[T]here is no area or person within the Church not subject to a direct command from the Pope."). But see text accompanying infra note 198 (noting that the Pope's power is not supposed to be used to dilute the power of the bishop in local matters).

[FN194]. Canon Law Commentary, supra note 185, at 258.

[FN195]. 1983 Code cc.330 -333. Canon 331 states that "in virtue of his office [the Pope] enjoys supreme, full, immediate, and universal ordinary power in the Church, which he can always exercise freely." Id. at c.331.

[FN196]. Id. at c.333, s 1.

[FN197]. Id. at c.333, s 3.

[FN198]. Canon Law Commentary, supra note 185, at 269; see also 1983 Code c.333, s 1. But see infra note 242 and accompanying text (noting that the Pope can exempt a religious order of monks or nuns from the authority of the bishop).

[FN199]. Canon Law Commentary, supra note 185, at 276; see also 1983 Code c.336.

[FN200]. 1983 Code cc.337- 341.

[FN201]. The 1983 Code discusses the role of cardinals at canons 349 -359. See also Canon Law Commentary, supra note 185, at 286 - 88. See generally Petrus C. Van Lierde & Alexandre Giraud, What is a Cardinal? (A. Manson trans., 1964) (providing a discussion of the history and composition of the college of cardinals).

[FN202]. 1983 Code c.351, s 1.

[FN203]. Id.

[FN204]. Id. at c.349.

[FN205]. Id. at c.360; see also Canon Law Commentary, supra note 185, at 295.

[FN206]. 1983 Code c.360.

[FN207]. Id.

[FN208]. Canon Law Commentary, supra note 185, at 295.

[FN209]. Id. at 297.

[FN210]. See, e.g., 1983 Code c.1292, s 2 (requiring Vatican approval for alienation of ecclesiastical goods).

[FN211]. Canon Law Commentary, supra note 185, at 311.

[FN212]. Id. (citations omitted).

[FN213]. 1983 Code cc.371-374; see also Canon Law Commentary, supra note 185, at 317-319, 350.

[FN214]. 1983 Code cc.374, 515 -518. It is also possible under 1983 Code c.374, s 2 for several neighboring parishes to be combined into "special groups such as vicarates forane" for more effective functioning.

[FN215]. 1983 Code cc.375 - 380. The institution may also be accountable additionally to lower-ranking clergy -- e.g., a vicar. See generally Thomas J. Green, A Manual for Bishops (1983) (providing an overview of the rights and responsibilities of Catholic bishops in governing the local institutions).

[FN216]. 1983 Code c.375, s 1.

[FN217]. Id. at c.391, s 1.

[FN218]. Id. at c.375, s 2.

[FN219]. See supra section II.A.1 for a discussion of the Pope's appointment power. Under canon law, the "definitive judgment concerning the suitability of the person to be promoted [to bishop] belongs to the [Pope.]" 1983 Code c.378, s 2.

[FN220]. Canon Law Commentary, supra note 185, at 320. The 1983 Code requires that "[b]efore he takes canonical possession of his office, the person promoted is to ... take an oath of fidelity to the [Pope.]" 1983 Code c.380.

[FN221]. 1983 Code c.390.

[FN222]. Id. at c.392, s 2.

[FN223]. Id. at cc.377, 378.

[FN224]. Canon Law Commentary, supra note 185, at 350.

[FN225]. Id. at 351. The United States has 13 regions. Id.

[FN226]. Id. at 350 -51; 1983 Code c.435.

[FN227]. 1983 Code c.435. While the head of a metropolitan must be an archbishop, there are some archbishops who do not head a metropolitan. See Canon Law Commentary, supra note 185, at 353. An archbishop who heads a metropolitan bears the rank of metropolitan. Id.

[FN228]. 1983 Code c.436, s 1.

[FN229]. Id. at c.436, s 3.

[FN230]. Thomas P. Doyle, Rights and Responsibilities: Catholic's Guide to the New Code of Canon Law 18 (1983) (observing that "[c]ommon to all [Catholic congregations, institutes, and societies] is a commitment of the part of the members to live according to the evangelical counsels of poverty, chastity, and obedience"); see also Elizabeth McDonough, Religious in the 1983 Code: New Approaches to the New Law 57 (1985) (stating that the religious duty of obedience "touches the fundamental meaning of authority in religious life, as well as the role of superiors, chapters, councils, participation and governmental structures themselves").

[FN231]. Doyle, supra note 230, at 18.

[FN232]. 1983 Code cc.634 - 640. The 1983 Code states that "the temporal goods of religious institutes, since they are ecclesiastical goods, are regulated by the prescriptions of Book V [of the 1983 Code]." Id. at c.635, s 1. See infra subpart II.B of this Comment for a discussion of Book V's provisions and restrictions on the alienation of Church property.

[FN233]. See Jordan F. Hite, The Administration of Church Property, in Canon Law Casebook, supra note 185, at 408 -18. Canons 617- 640 discuss the internal governance of Catholic institutes. 1983 Code cc.617- 640. See generally Mary G. Nwagwu, Autonomony and Dependence of Religious Institutes of Diocesan Law on the Local Ordinary: A Comparative Analysis of the Legislation Concerning Them in the Codes of Canon Law of 1917 and 1983 (1987) (providing a detailed comparison of the effect of the revisions in the 1983 Code that impact religious orders).

[FN234]. 1983 Code, c.1273; Hite, supra note 233; see also Doyle, supra note 230, at 17-20.

[FN235]. Hite, supra note 233, at 411-12.

[FN236]. Doyle, supra note 230, at 19 -20 (emphasis added).

[FN237]. 1983 Code c.601; see also id. c.618 (requiring members to accept tasks assigned to them).

[FN238]. McDonough, supra note 230, at 65.

[FN239]. 1983 Code c.590.

[FN240]. Id. c.624, s 2; see also Hubert Proesmans, Religious Orders in the Pastoral Work of the Diocese and Parish, in Post Conciliar Thoughts: Renewal and Reform of Canon Law 79, 81- 83, 87 (Neophytos Edelby et al. eds., 1968) (noting that the diocesan bishop is responsible for coordinating the religious order at the diocesan level).

[FN241]. Proesmans, supra note 240, at 81.

[FN242]. 1983 Code c.591.

[FN243]. See, e.g., id. cc.617-618; see also supra note 233 & infra notes 249-51 and accompanying text (noting that the religious orders' ownership and administration of property is governed by canon law).

[FN244]. A detailed comparison of the various religious orders' individual constitutions is beyond the scope of this Comment. See generally McDonough, supra note 230, at 33 -72 (discussing the impact of the 1983 Code on members of religious institutes).

[FN245]. 1983 Code c.589.

[FN246]. Id. c.587, s 2. The Vatican can also exempt a religious order from the bishop's local authority. See supra text accompanying note 242.

[FN247]. This is not necessarily a case of Catholic hospitals having multiple masters; rather it is analogous to having different levels of management setting policies for different subsidiaries (or divisions) of a large corporation. The difficulty in making generalizations arises when bishop A's rules diverge from bishop B's rules, or when religious order A's rules diverge from religious order B's rules. See infra note 302 and accompanying text (quoting Rev. Brodeur's observation that "[t]here are some areas where what is acceptable to a bishop in one diocese may not be acceptable to the bishop in the next").

[FN248]. Because Catholic hospitals are owned by the Church, they are considered Church assets. The canons of the Roman Catholic Church related to alienation (sale or transfer) of Church owned assets are codified in The Temporal Goods of the Church -- which is Book V of the 1983 Code.

[FN249]. Maida & Cafardi, supra note 185, at 85; see also Canon Law Commentary, supra note 185, at 859.

[FN250]. For an explanation of what are considered conveyances under canon law, see Maida & Cafardi, supra note 185, at 86 - 87.

[FN251]. Id. at 85.

[FN252]. 1983 Code c.1293; see also Maida & Cafardi, supra note 185, at 89.

[FN253]. 1983 Code c.1291. For a valid alienation or conveyance, Canon 1291 requires that permission of a competent authority be given. Id.

[FN254]. Id. c.1292.

[FN255]. Minor alienations are transactions involving property worth no more than a certain threshold value. The threshold monetary amount is set by the bishops of each country. Id. s 1. In the United States, the National Conference of Catholic Bishops sets the threshold amount, which, until recently, was $1 million. Sacred Congregation of the Clergy, Protocol no.165967/III (July 3, 1981). The threshold was recently revised, and now it is $3 million. Coriden, supra note 185, at 168.

[FN256]. 1983 Code c.1292. The required permission is actually from the Holy See, which is the equivalent of the executive branch of the Vatican. Within this Comment, references to the Vatican are intended to include both the Pope and the Holy See.

[FN257]. Maida & Cafardi, supra note 185, at 94.

[FN258]. Id.

[FN259]. Id. Catholic hospitals are owned by either a Religious Institute or by a Secular Institute. See infra subpart III.A.3.

[FN260]. Maida & Cafardi, supra note 185, at 94.

[FN261]. 1983 Code c.1292.

[FN262]. Maida & Cafardi, supra note 185, at 87- 88; see also 1983 Code c.1292.

[FN263]. 1983 Code c.1292.

[FN264]. See supra section III.A.3.

[FN265]. Maida & Cafardi, supra note 185, at 93.

[FN266]. 1983 Code c.1292, s 1; see also Maida & Cafardi, supra note 185, at 93 - 94. A recent example of this diocesan approval requirement is the Chicago Archdiocese recent issuance of a Hospital Protocol that governs hospital mergers in the Chicago area.

[FN267]. Maida & Cafardi, supra note 185, at 15; see also 1983 Code c.1296. When an alienation of property that requires approval occurs without permission, Canon 1296 requires the canonical steward -- who should have reviewed and approved/disapproved the alienation of Church property -- to investigate and recommend an appropriate remedy. 1983 Code c.1296. Appropriate remedies include civil litigation to undo the alienation or canonical procedures against the parties who ignored the canons. Maida & Cafardi, supra note 185, at 90 - 91; see also Office of the Archbishop for the Archdiocese of Chicago (Roman Catholic Church), Protocol for Evaluating Joint Ventures and Affiliations Relating to Catholic Health Care Ministry 2 (1994) [[[hereinafter Hospital Protocol] (unpublished document, on file with author) (providing for revocation of Catholic hospitals' Catholic status for failing to follow the Chicago Archdiocese's hospital merger guidelines).

[FN268]. A canonical steward is the authority competent to give the alienation permission. The appropriate canonical steward for a given alienation will depend on the size of the alienation or conveyance -- whether it is classified as a minor or major transaction. As discussed in supra note 256, the canonical steward for major alienations and conveyances must be a representative of the Vatican. See generally supra notes 253-60 and accompanying text (setting forth the approval requirement).

[FN269]. 1983 Code c.1292, s 3 (requiring the canonical steward to acquire the information); Id. c.1292, s 4 (requiring the alienating entity to provide the information); see also Maida & Cafardi, supra note 185, at 88, 100. Typically, the financial information includes a financial statement in the form of a balance sheet. Id. at 100.

[FN270]. Maida & Cafardi, supra note 185, at 88. For a general discussion of the fiduciary duties of a trustee, see 2A Austin W. Scott & William F. Fratcher, The Law of Trusts s 171.2 (4th ed. 1986).

[FN271]. Maida & Cafardi, supra note 185, at 88; see also 1983 Code c.492, s 1.

[FN272]. Maida & Cafardi, supra note 185, at 89.

[FN273]. Id. at 90.

[FN274]. 1983 Code c.1293.

[FN275]. Maida & Cafardi, supra note 185, at 89.

[FN276]. 1983 Code c.1293 (listing "urgent necessity" and "evident usefulness" as causes for alienation). An example of a short timetable would be an "exploding offer," in which the offer to purchase a Catholic entity's assets expires if it is not accepted by a certain date. Another example would be selling a "fixed" stock (i.e., shares of stock in a company being held as an investment by the Catholic entity) at the peak of its value.

[FN277]. Maida & Cafardi, supra note 185, at 101.

[FN278]. 1983 Code cc.1292- 1294. Canon 1294 requires that "[o] rdinarily an object must not be alienated for a price which is less than that indicated in the estimate."

[FN279]. Id. cc.1294 - 1296; see also supra note 267 (discussing options available to the canonical steward when church property is alienated or conveyed without approval).

[FN280]. T. Lincoln Bouscaren, S.J. & Adam C. Ellis, S.J., Canon Law 814 (3d ed. 1957).

[FN281]. Maida & Cafardi, supra note 185, at 95.

[FN282]. See, e.g., Roman Catholic Church, Ethical & Religious Directives for Catholic Hospitals (1991); see also Eric S. Tower, Sample Bylaws for a Catholic Hospital (Aug. 6, 1993) (unpublished document, on file with author) (providing that the Catholic hospital will "establish, conduct, operate, staff and maintain [the hospital] ... in accordance with the teachings, doctrines, [[[and] traditions ... of the Roman Catholic Church"). See generally Am. Med. Ass'n, Compassion and Cures: A Historical Look at Catholicism and Medicine, JAMA, Jan. 1991, at 266 (providing a historical analysis of the Catholic Church's attitudes toward health care and hospitals). But see Kathleen M. Boozang, Deciding the Fate of Religious Hospitals in the Emerging Health Care Market, 31 Hous. L. Rev. 1429, 1430 (1995) (predicting that the changes in the health care market will pressure "sectarian health providers to render health care services that contravene their ethical, moral, and religious principles").

[FN283]. See, e.g., Sandra Friedland, Hospitals' Merger Studied by Others, N.Y. Times, Nov. 17, 1985, at 11NJ, at 4. Dr. Edward Murphy, the chief executive of a nonsectarian hospital, commented on his hospital's merger negotiations with Catholic St. Mary's Hospital: "We put the questions about abortion, contraception, sterilization and euthanasia on the table right away, because we knew they could be a problem." Tamar Lewin, With Rise in Health Unit Mergers, Catholic Standards Face Challenge, N.Y. Times, Mar. 8, 1995, at B7 (discussing how nonsectarian hospitals that have "entered into mergers or joint ventures with Catholic institutions [have] had to review [their] medical practices in areas concerning the beginning and the end of life, to comply with [Catholic] church teachings") (emphasis added).

[FN284]. Hospital Protocol, supra note 267. While this document suggests a high degree of control, it also includes an express disclaimer of any legal agency relationship between the Catholic hospitals and the Archdiocese of Chicago. Id. at 2.

[FN285]. See Della de Lafuente, Cardinal's Rules Limit Hospitals' Plans to Merge, Chi. Sun-Times, Sept. 19, 1994, at 6. According to Lafuente, the Hospital Protocol was a result of Cardinal Bernardin's desire to "bring the region's 20 Catholic hospitals together under a regional hospital alliance called the Catholic Health Care Network." Id. However, at the time of the issuance of the Hospital Protocol, certain Chicago-area Catholic hospitals (in particular, the largest Catholic hospital in the Chicago area, Loyola University Medical Center in Maywood, Illinois) had opted to form their relationships with non-Catholic hospitals. Two Chicago-area affiliations that may test the Hospital Protocol are Loyola University Medical Center's planned merger with West Suburban Hospital in Oak Park, Illinois (a non-Catholic hospital), and Chicago's Mercy Hospital and Medical Center's planned affiliation with the University of Chicago hospitals. Id.; see also Arsenio Oloroso, Jr., Bernardin Raps Hospitals Cardinal: Join Up or Lose Catholic Status, Crain's Chi. Bus., Sept. 19, 1994, at 1; Abortion Coverage: Catholic Network, Abortion Report (American Political Network), Sept. 20, 1994, at 1; Bernardin's Guidelines, Chi. Sun-Times, Sept. 19, 1994 (late ed.), at 6; Hospitals: Face Challenges in Evolving Marketplace, Health Line (American Political Network), Sept. 20, 1994, at 1.

[FN286]. Hospital Protocol, supra note 267, at 1 (citing to Canon 394). Under Canon 394, the Hospital Protocol's language "ministries of this local church" refers to Church-affiliated activities, e.g., evangelizing, teaching, or caring for the sick and needy. 1983 Code c.394.

[FN287]. Hospital Protocol, supra note 267, at 1. The Hospital Protocol applies to all 20 Catholic hospitals operating in the Diocese, including several Catholic hospitals that have already entered into affiliations with non-Catholic hospitals. See Oloroso, supra note 285, at 1.

[FN288]. Hospital Protocol, supra note 267, at 1. The document also notes the Archbishop's responsibility and "particular concern for the health care needs of the poor." Id. According to the Rev. Michael D. Place, a health care policy adviser to Cardinal Bernardin: "We [the Catholic Church] are not in health care because it's a business but because it's part of the

mission of Jesus Christ." Oloroso, supra note 285, at 1.

[FN289]. Hospital Protocol, supra note 267, at 2 (citing 1983 Code cc.216, 300, 323, 394). In addition to derecognition of an institution's Catholic identity, the Archbishop also has the power to withdraw "canonical approval for a particular Apostolic work of a religious community (cc.678, 680, and 683)." Id.

[FN290]. Oloroso, supra note 285, at 1.

[FN291]. Hospital Protocol, supra note 267, at 1.

[FN292]. Id.

[FN293]. The Hospital Protocol also sets forth a brief sketch of the merger review procedure. Prior to the beginning of any formal merger negotiations (or for that matter any "possible substantive business decision on the part of a Catholic health care institution"), the Hospital Protocol requires that the Archbishop be notified "at the earliest possible date." Id. at 2. If the Archbishop determines that the "proposed action pertains to any of the matters outlined [in the Hospital Protocol] ... he will ask the entity involved to provide him with the information he deems necessary to evaluate such proposals." Id. Ultimately, any Catholic hospital merger may not be consummated without the Archbishop's approval, as the Hospital Protocol notes that a Catholic hospital seeking to merge "may not finalize any such agreement without the approval of the Archbishop or his delegate." Id. According to the Hospital Protocol, failure to provide the Archbishop with requested information or failure to seek the Archbishop's approval or consummating the merger in the absence of the Archbishop's approval could result in the withdrawal of the hospital's Catholic identity. Id.

[FN294]. Id. at 2. While a preference is announced for a Catholic hospital merging with another hospital that shares the Catholic Church's vision and values, the Hospital Protocol also recognizes that "[b]ecause of the complex nature of health care it is possible, and indeed may be necessary, for Catholic health institutions, [and] systems ... to enter into cooperative arrangements with institutions that are 'other-than Catholic.' " Id. at 1; see also infra text accompanying notes 298-301 (discussing the Chicago Archdiocese's rejection of a non-Catholic, for-profit hospital chain -- Columbia/HCA Healthcare Corporation -- that wanted to purchase Catholic hospitals in the Chicago area).

[FN295]. The Hospital Protocol prefers that both hospitals be nonprofit institutions because "[a]t this time, substantive collaboration with or sale to for-profit corporations is not seen as being in the best interest of Catholic health care." Hospital Protocol, supra note 267, at 2.

[FN296]. Id.

[FN297]. Id.

[FN298]. Cindy Schreuder, Bernardin Wary of Hospital Mergers, Chi. Trib., Jan. 13, 1995, s 2, at 3.

[FN299]. Id. (quoting Sam Holtzman).

[FN300]. Id.

[FN301]. Id. (quoting Cardinal Bernardin).

[FN302]. Lewin, supra note 283, at B7.

[FN303]. Friedland, supra note 283, at 4.

[FN304]. Id. (quoting William Huber, Vice President for marketing at the surviving hospital).

[FN305]. Id.; see also Hospital Affairs: Reviewing the Effects of Merger Mania -- Catholic Clash, Health Line (American Political Network), May 15, 1995, at 1-2 (noting that Boston Cardinal Bernard Law had "ruled out any mergers between Catholic hospitals and the [Brigham and Women's Hospital and Massachusetts General Hospital] merger, citing the fact that

Brigham is the state's largest abortion provider").

[FN306]. See, e.g., Glenn Singer, Hospital Will Still Continue Female Services, Sun-Sentinel (Ft. Lauderdale, FL), Oct. 14, 1994, at 5B (discussing the merger between Good Samaritan Medical Center and St. Mary's Hospital, both of West Palm Beach, Florida). During the merger negotiations, Good Samaritan Medical Center "agreed not to perform certain procedures to avoid conflict with doctrines of the Catholic Church. Now [after the merger], however, a separately licensed provider financed by Good Samaritan will offer women's services [including family planning and tubal ligations, and excepting planned abortions] at Good Samaritan." Id. Here, the creation of a separate subsidiary to deliver services that conflict with the doctrines of the Catholic Church was described by a spokesman for St. Mary's Hospital as "respectful and one that recognizes plurality in the community. It is within the practice and precedent of similar ... [mergers] between Catholic and nondenominational hospitals across the nation." Id. Had such actions been taken in Chicago under the Chicago Archdiocese Hospital Protocol, it is possible that Cardinal Bernardin, the Chicago Archbishop, would have revoked the Catholic status of the Catholic hospital involved. Under canon law, every diocese is responsible for establishing its own additional criteria (to those provided by canon law) for approving mergers. Telephone Interview with John Prince, Health Care Consultant with Arthur Andersen Co. (Oct. 26, 1994).

[FN307]. See supra notes 259, 271. Under canon law, the steward is responsible for the alienation of church property, including insuring any alienations comply with canon law. 1983 Code cc.1293, 1296.

[FN308]. A merger agreement is a contract. It follows that a breach of a merger agreement would be treated by a court as a civil-law breach of contract.
This Comment does not analyze the validity of various possible post-merger policies that could be adopted by the surviving hospital of a merger between a Catholic and a non-Catholic hospital.

[FN309]. Maida & Cafardi, supra note 185, at 105; see also Ponce v. Roman Catholic Apostolic Church in Puerto Rico, 210 U.S. 296, 318 (1908) (holding that "[t]he corporate existence of the Roman Catholic Church, as well as the position occupied by the papacy, has always been recognized by the government of the United States").

[FN310]. Maida & Cafardi, supra note 285, at 109.

[FN311]. Id. at 109 -10; see Jones v. Wolf, 443 U.S. 595 (1979) (upholding the Georgia Supreme Court's finding that Georgia's civil (property) law was the controlling law in determining an internal church property dispute).

[FN312]. 280 U.S. 1 (1929). In Gonzalez, the Court was faced with the issue of whether the canon law of the Catholic Church governed a Catholic foundation established in the Philippines, which were still U.S. possessions at the time. Id. at 15 -16. The charitable foundation, established by the will of Petronila de Guzman, had an internal provision that the foundation's chaplain would be a member of the Guzman family. Id. at 11-12. When the foundation was established, canon law permitted laypersons (nonclergy) to be appointed as chaplains of such foundations. Id. at 13.
In 1917, the Catholic Church revised its canons and issued the 1917 Code (the Pio-Benedictine Code). Coriden, supra note 185, at 27. Under the new canon-law system (1917 Code c.1442, when read in conjunction with 1917 Code c.108, s 1 & c.976, s 1), only ordained clergy could be appointed to chaplaincies. The Archbishop of Manila's subsequent refusal to appoint a lay member of the Guzman family as the foundation's chaplain prompted the suit. Gonzalez, 280 U.S. at 11-12.

[FN313]. Gonzalez, 280 U.S. at 15 -17. In order to hold that canon law was the governing law of the foundation, the Court first found that the foundation was a Catholic organization. The Court accepted the argument that
[t]he petitioner's theory of a civil right enforceable in the secular courts is entirely contradictory to the clear and expressed intention of the testratix herself; for it is indisputable that she was a devout member of the Roman Catholic Church, and intended to establish ... [a charitable foundation] and have it subject to the laws and jurisdiction of that Church. Id. at 9 (Respondent's argument), 12-13, 17.

[FN314]. Gonzalez, 280 U.S. at 16. The Court further stated that "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive." Id.

[FN315]. Id. at 16 -17 (noting that "[u]nder like circumstances, effect is given in the courts to the determinations of the

judicatory bodies established by clubs and civil associations") (citations omitted); see also Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations ... and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."). See generally John L. Schaver, The Polity of Churches (1956) (discussing the internal governance of churches).

[FN316]. Gonzalez, 280 U.S. at 16. The Court noted that there are three exceptions to its general rule -- where fraud, collusion, or arbitrariness are involved. Id.

[FN317]. 344 U.S. 94 (1952).

[FN318]. Id. at 109 -10.

[FN319]. Id. at 97- 99, 107.

[FN320]. While Kedroff addresses the applicability of the Russian Orthodox Church's internal governing code (which is also referred to as canon law), it is likely that a similar analysis would be applied in interpreting the Roman Catholic Church's canon law. Both the Russian Orthodox Church and the Roman Catholic Church are episcopal, hierarchical polities with detailed and codified canon laws that govern the respective church's matters. Maida & Cafardi, supra note 185, at 106 - 07.

[FN321]. Kedroff, 344 U.S. at 115.

[FN322]. Id.

[FN323]. Id. at 116; see also id. at 107- 08 ("Legislation that regulates Church administration [and] the operation of the churches ... prohibits the free exercise of religion.").

[FN324]. 426 U.S. 696 (1976).

[FN325]. Id. at 703 - 06.

[FN326]. Id. at 706 - 07.

[FN327]. Id. at 707. Arbitrariness is one of the exceptions to the general rule of Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929). See supra note 316.

[FN328]. Milivojevich, 426 U.S. at 724 -25. Gonzalez is not completely overruled by this decision. The Court in Milivojevich eliminated one of the three exceptions -- the arbitrariness exception -- to the internal church governance rule.

[FN329]. Milivojevich, 426 U.S. at 713.

[FN330]. Maida & Cafardi, supra note 185, at 108.

[FN331]. Id.

[FN332]. Arlin M. Adams & William R. Hanlon, Jones v. Wolf: Church Autonomy and the Religion Clauses of the 1st Amendment, 128 U. Pa. L. Rev. 1291, 1292 (1980) (tracing the origin of the deference approach to Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871)); see also Maida & Cafardi, supra note 185, at 108 (noting that the Court in Milivojevich did not hold that the "deference approach was the sole, constitutionally compelled means of adjudicating church disputes," and citing Jones v. Wolf, 443 U.S. 595 (1979), as clarification of Milivojevich).

[FN333]. 443 U.S. 595 (1979).

[FN334]. Id. at 602- 06; see also Presbyterian Church v. Mary Elizabeth Blue Hill Mem. Presbyterian Church, 393 U.S. 440, 449 (1969) (forbidding civil court from awarding church property on the basis of the civil court's interpretation and

assessment of church doctrine).

[FN335]. Wolf, 443 U.S. at 602-10.

[FN336]. Id. at 602- 03.

[FN337]. Id.

[FN338]. Id.

[FN339]. Id. at 603.

[FN340]. The lower courts split on the use of canon-law experts to challenge a church judicatory's holding (under canon law) in a civil court proceeding. Compare Stevens v. Roman Catholic Bishop of Fresno, 123 Cal. Rptr. 171 (Cal. Ct. App. 1975) (upholding the use of experts to determine the directive of the canon law) with Ambrosio v. Price, 495 F. Supp. 381, 385 (D. Neb. 1979) (rejecting the use of such expert testimony).

[FN341]. See supra note 47 and accompanying text.

[FN342]. 3 Hon. Edward J. Devitt et al., Federal Jury Practice and Instructions s 90.08 (4th ed. 1987) (second brackets in original).

[FN343]. 467 U.S. 752 (1984).

[FN344]. Copperweld only addresses the issue of a partially owned subsidiary once, in a reference to Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), noting that "[t]he American defendant in Timken did not own a majority interest in either of the foreign [corporations] and ... it did not control them." Copperweld, 467 U.S. at 765. In analyzing the unity of sibling corporations sharing the same parent corporation for Sherman Act liability under s 1, the lower courts -- in particular the Fourth, Fifth, and Sixth Circuits -- have found Copperweld to be applicable. See supra note 39 (discussing the unity of two wholly owned sibling corporations sharing the same parent).

[FN345]. See Copperweld, 467 U.S. at 772 n.18; see, e.g., Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

[FN346]. Copperweld, 467 U.S. at 772 n.18.

[FN347]. Id.

[FN348]. One example is the Northern District of Georgia's extension of Copperweld in Novatel Communications, Inc. v. Cellular Tel. Supply, Inc., 1986 -2 Trade Cas. (CCH) P 67,412 (N.D. Ga. 1986). In Novatel, the court found 51% ownership of a subsidiary sufficient to constitute full control by the parent corporation, thereby making the parent and its 51% owned subsidiary one economic actor under Copperweld. Id.

[FN349]. Copperweld, 467 U.S. at 772 n.18.

[FN350]. Further, several commentators have argued that the Court's rejection of the single entity test for wholly owned subsidiaries suggests a movement toward adopting an agency approach for antitrust analysis of relationships between a parent and its less than wholly owned subsidiaries. See, e.g., Hylton Lectures, supra note 129, at 20.

[FN351]. McNamara identifies five single entity tests adopted by the circuits prior to Copperweld: (1) the absolute rule (separate incorporation rule); (2) the holding out as competitors rule; (3) the sole decision-maker rule; (4) the third-party restraint rule; and (5) the "all the facts" rule. See McNamara, supra note 126, at 1251; see also Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661, 668 -76 (1982) (surveying lower court decisions limiting intra-enterprise conspiracy doctrine).

[FN352]. See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 557 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975).

[FN353]. 577 F.2d 239, 244 - 45 (5th Cir. 1978).

[FN354]. Id. at 245.

[FN355]. See McNamara, supra note 126, at 1250 n.33, 1251-52 (discussing various First, Third, and Fifth Circuit cases employing the separate incorporation test); see also Advanced Health-Care Serv., Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990) (applying Copperweld to attack the logic of the separate incorporation test).

[FN356]. See, e.g., J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 793 (5th Cir. 1983); Aaron E. Levine & Co. v. Calkraft Paper Co., 429 F. Supp. 1039, 1043 - 44 (E.D. Mich. 1976); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1325 -26 (E.D.N.Y. 1970), aff 'd per curiam, 451 F.2d 593 (2d Cir.), cert. denied, 408 U.S. 922 (1971).

[FN357]. 340 U.S. 211 (1951).

[FN358]. Id. at 215.

[FN359]. See, e.g., Everett I. Willis & Robert Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U. L. Rev. 20, 37 (1968) (noting that "the Court [in Kiefer-Stewart Co.] does not spell out how the plaintiff was misled into thinking that [the related subsidiaries] were actual competitors").

[FN360]. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," but is silent on any duty of related entities to hold themselves out as competitors. Sherman Act s 1, 15 U.S.C. s 1 (1994).

[FN361]. See, e.g., Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979). In Harvey, the court found that because "no meeting of two or more minds [had] occurred" between the parent and its subsidiary, their relationship was that of a single entity. Id. at 457; see also infra note 403 and accompanying text.

[FN362]. McNamara, supra note 126, at 1253; see, e.g., Harvey, 589 F.2d at 455 -57 (finding that six corporations, which were wholly owned and controlled by a single person, were, by definition, incapable of intra-enterprise conspiracy); In re Mid-Atlantic Toyota Antitrust Litig., 560 F. Supp. 760, 767 n.12 (D. Md. 1983) (observing that "as a matter of law a 'one-man show' exception exists to the general rule of intra-enterprise conspiracy"); Windsor Theater Co. v. Walbrook Amusement Co., 94 F. Supp. 388, 396 (D. Md. 1950), aff 'd, 189 F.2d 797 (4th Cir. 1951) (finding two corporations that shared a common president and chief executive officer were not capable of conspiracy because "there can be no conspiracy unless there is a meeting of two or more minds").

[FN363]. Copperweld, 467 U.S. at 771.

[FN364]. Id. at 767.

[FN365]. 677 F. Supp. 1477 (D. Or. 1987).

[FN366]. Id. at 1486; see also Siegel Transfer, Inc. v. Carrier Express, Inc., 856 F. Supp. 990 (E.D. Pa. 1994) (holding that a de minimis deviation from 100% ownership of the subsidiary does not prevent application of Copperweld); Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del.) (finding a parent's 99% ownership of its subsidiary to be sufficient for Copperweld to apply), modified in part on other grounds, 643 F. Supp. 449 (D. Del. 1986).

[FN367]. Aspen Title, 677 F. Supp. at 1486.

[FN368]. 1986 -1 Trade Cas. (CCH) P 67,080 (D.D.C. 1986). The court, in Aspen Title, in dicta, stated that a "controlling shareholder having less than all shares might lack a unity of purpose and interest with the controlled corporation." 677 F.

Supp. at 1486; see also id. at 1485. The court in Aspen Title considered and rejected the theory applied in Novatel Communications v. Cellular Tel. Supply, 1986 -2 Trade Cas. (CCH) P 67,412 (N.D. Ga. 1986). In Novatel, the court found unity of interest where the parent corporation had at least 51% ownership of the subsidiary.

[FN369]. Rooted in corporate merger law, a forced merger test looks at whether the parent corporation's equity interest in the subsidiary exceeds a certain threshold level of ownership. See, e.g., Rev. Model Business Corp. Act s 11.04 (1985) ("A parent owning at least 90 percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.").

[FN370]. Sonitrol, 1986 -1 Trade Cas. (CCH) P 67,080. In Sonitrol, the court found AT&T's ownership of 23.9% and 32.6% of two subsidiaries not sufficient to constitute unity of purpose. However, the court found unity of purpose concerning subsidiaries in which AT&T owned 90% of the stock. Id.; see Leaco Enter., Inc. v. General Elec. Co., 737 F. Supp. 605 (D. Or. 1990) (holding that a parent corporation's 91.9% ownership established a subsidiary as wholly owned because under the law of the subsidiary's jurisdiction of incorporation (Canada), only 67% ownership was required to force the subsidiary to merge); see also infra note 377.

[FN371]. It is not clear that the corollary -- when a parent corporation owns sufficient stock to block a potential merger -- would satisfy the Copperweld test.

[FN372]. Copperweld, 467 U.S. at 771.

[FN373]. See James L. Brock, Jr., Comment, A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues, 52 U. Chi. L. Rev. 999, 1001- 02 (1985).

[FN374]. Copperweld, 467 U.S. at 769.

[FN375]. Id. at 773.

[FN376]. 737 F. Supp. 605 (D. Or. 1990).

[FN377]. Id. at 608. Only when the subsidiary is not wholly owned by the parent corporation is the "unity of purpose" test applicable. The court in Leaco, citing Sonitrol, noted that under the laws of Canada -- the subsidiary's place of incorporation -- the parent corporation needed only 67% ownership to force a merger with its subsidiary. Id. The parent corporation in Leaco owned 91.9% of the stock of its subsidiary, which the district court found to be a de minimis deviation from 100% ownership. Id. Consequently, because the court found the relationship to be equivalent to that between a parent and its wholly owned subsidiary, its holding was based on a straightforward application of Copperweld to a wholly owned subsidiary. Id. at 608 - 09.

[FN378]. See Note, The Long Awaited Death Knell of the Intra-Enterprise Doctrine, 30 Vill. L. Rev. 521, 564 (1985) (suggesting that the appropriate test for parent-partially owned subsidiary relationships under Copperweld is a potential control test); see also Calkins, supra note 69, at 354 (discussing a common ownership and control test); McNamara, supra note 126, at 1264 - 66.

[FN379]. See Diane W. Hutchinson, Antitrust 1984: Five Decisions in Search of a Theory, 1984 S. Ct. Rev. 69, 96 (discussing the case of a parent corporation and a 51- 99% owned subsidiary as clearly indicating potential control and noting that "[t]he more complex cases of corporate control with less than a majority stock interest would require fact-findings on the control issue"); ABA House Adopts 3 Antitrust Resolutions; Section Probes ADR Mergers, Distributions, 47 Antitrust & Trade Reg. Rep. (BNA) 360, 363 - 64 (Aug. 23, 1984) (predicting "that the Court ultimately [will] extend [its Copperweld] rationale to subsidiaries whose stock ownership reflects a [minimum of] 50.01% holding by the parent company); see also Phillip I. Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations s 22.02.01, at 425 (1983) (observing that "[c]ontrol normally rests on the ownership of a majority of the voting stock of the subsidiary, ... but where shares are widely distributed, control can arise from ownership of a substantial minority of the voting stock") (citations omitted). But see Jennifer Stewart, Comment, The Intra-Enterprise Conspiracy Doctrine After Copperweld Corp. v. Independence Tube Corp., 86 Colum. L. Rev. 198, 204 - 05 (1986) (arguing that "a parent's control over its partially owned subsidiary may be limited by its fiduciary duty to other stockholders.... Even if the parent has potential control, it may

not exercise it legally if doing so would disadvantage its co-owners."). Potential control of a partially owned subsidiary may also be measured by the power (or lack thereof) to appoint the subsidiary's directors. Id. at 205.

[FN380]. In Copperweld, the Court reasoned that, while a wholly owned subsidiary might operate independently on a day-to-day basis, the parent corporation "may assert full control at any moment." Copperweld, 467 U.S. at 771-72.

[FN381]. Id. at 752. In Copperweld, the Justice Department advocated that the Court adopt a common control test for determining single entity status under the Sherman Act. Brief for United States as Amicus Curiae at 14, n.29, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (No. 82- 1260); see also McNamara, supra note 126, at 1264.

[FN382]. See Stewart, supra note 379, at 205 - 06 (noting that a controlling level of equity interest in a company does not necessarily equate to control).

[FN383]. For example, a supermajority voting requirement. See id. at 205.

[FN384]. See id.

[FN385]. 1986 -2 Trade Cas. (CCH) P 67,412 (N.D. Ga. 1986).

[FN386]. Id.

[FN387]. Id.

[FN388]. Id.

[FN389]. 849 F. Supp. 702 (N.D. Cal. 1994).

[FN390]. In Bell Atlantic, the parent company, Hitachi, owned 100% of one subsidiary and 80% of the other subsidiary in question. Id. at 706.

[FN391]. Id. at 707. According to the court, the common interest and goal was the distribution of the parent company's (Hitachi) products. Id. at 707.

[FN392]. Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477 (D. Or. 1987).

[FN393]. Bell Atlantic, 849 F. Supp. at 706.

[FN394]. Id. In effect, the court sidestepped adopting a bright-line test for what constitutes legal control of a subsidiary by the parent corporation.

[FN395]. See infra section IV.A.5 for a discussion of the applicability of agency doctrine to the Vatican Merger Defense; see also Restatement (Second) of Agency s 1 (1958) (setting out control as an element of the principal-agent relationship).

[FN396]. 838 F.2d 268 (8th Cir. 1988).

[FN397]. Id. at 270 (quoting Copperweld, 467 U.S. at 770 -71).

[FN398]. Associated Elec., 838 F.2d at 272 (emphasis added).

[FN399]. Copperweld, 467 U.S. at 771.

[FN400]. Associated Elec., 838 F.2d at 279.

[FN401]. Id. at 276.

[FN402]. Id.; see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214 -15 (D.C. Cir. 1986) (relying on Copperweld to find that a board of directors -- which included representatives of competing, independent companies -- lacked the plurality of factors necessary for antitrust conspiracy), cert. denied, 479 U.S. 1033 (1987); Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985).

[FN403]. See Restatement (Second) of Agency ss 212-267 (liability for agent's torts), ss 140 -211 (liability for breach of contract) (1958); see also Hoover v. Sun Oil Co., 212 A.2d 214 (Del. 1965); Humble Oil & Refining Co. v. Martin, 216 S.W.2d 251 (Tex. Ct. App. 1949).

[FN404]. Restatement (Second) of Agency s 1(1) (1958).

[FN405]. 219 S.E.2d 874 (Va. Ct. App. 1975).

[FN406]. Id. at 876.

[FN407]. 849 F. Supp 702 (N.D. Cal. 1994).

[FN408]. 788 F.2d 1313 (8th Cir. 1986).

[FN409]. Id. at 1317.

[FN410]. See supra text accompanying note 393; cf. Bell Atlantic, 849 F. Supp. at 706 (describing how a parent corporation and subsidiary "share a unity of interest and common corporate consciousness because they work toward the same goal").

[FN411]. Copperweld, 467 U.S. at 769; see also Pink Supply, 788 F.2d at 1316; Carlock v. Pillsbury Co., 1993 -1 Trade Cas. (CCH) P 70,281 (D. Minn. 1988).

[FN412]. Restatement (Second) of Agency s 14B (1958); see also id. s 16 ("The relation of principal and agent can be created although neither party receives consideration.").

[FN413]. Id. s 14B cmt. f ("[T]he question whether there is an agency depends upon the amount of control agreed to be exercised by the person for whose benefit" the property is held.).

[FN414]. Id. s 14B cmt. g ("If a trustee is not an agent, he has no power to bind the beneficiary by contract or otherwise ..., although he can subject the trust property to a claim based upon a tort, a contract, or a restitutional duty.") (citation omitted).

[FN415]. See Stephen B. Presser, Piercing the Corporate Veil (1991). Presser identifies when the federal and state courts will pierce the corporate veil and compares the different circuits' and states' treatment of the various piercing doctrines. Additionally, Presser provides a historical overview of these doctrines.

[FN416]. Id. s 1.05(4).

[FN417]. This example assumes that Companies A and B are separate, but related entities.

[FN418]. In looking for common shareholders, the court is trying to determine if the corporations are related corporations -- viz., parent and subsidiary or sibling corporations.

[FN419]. Examples of such overlapping formalities would be the existence of interlocking boards of directors, or the same personnel holding management positions in both companies.

[FN420]. See, e.g., Gartner v. Snyder, 607 F.2d 582, 587- 88 (2d Cir. 1979); Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966); cf. Presser, supra note 415, s 1.03 (listing other factors). See generally William A. Klein & J. Mark Ramseyer, Business Associations: Agency, Partnerships, and Corporations 162- 67 (1991) (discussing the elements of enterprise liability theory); Adolf A. Berle, Jr., The Theory of Enterprise Entity, 47 Colum. L. Rev. 343 (1947) (noting that courts usually disregard separate artificial personalities only when the corporate device is used to defraud creditors or circumvent a statute).

[FN421]. Presser, supra note 415, s 1.03(4); see also Frederick J. Powell, Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of its Subsidiary 4 - 6 (1931) (requiring, under alter ego doctrine, the plaintiff to show complete control and domination of the subsidiary by the parent). Powell's treatise included a laundry list of factors the court should consider in determining when a subsidiary was the "alter ego" of the parent corporation. Powell, supra, at 9. Presser notes that "Powell's elaborate listing of factors shows up with some frequency in reported cases, as courts attempt to articulate bright-line rules." Presser, supra note 415, s 1.03(4).

[FN422]. Powell, supra note 421, at 9. It follows that under agency law, to show that the corporation functioned as an agent of its shareholders, the plaintiff must establish that the corporation is really a "dummy" corporation -- functioning for the personal goals of its owners, rather than pursuing legitimate corporate ends. See Restatement (Second) of Agency s 14 (1958) (setting out the principal's right to control his agent's conduct). If the plaintiff satisfies his burden of proof, the court will treat the shareholder and the corporation as one entity. Thus, traditional corporate shareholder's limited liability status is removed, and the plaintiff will be able to hold shareholders personally liable. Id. ss 140 -142.

[FN423]. DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 685 (4th Cir. 1976).

[FN424]. Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 512 (Minn. 1979) (citation omitted); accord DeWitt Truck Brokers, 540 F.2d at 684 - 86; see also Powell, supra note 421, at 9; Presser, supra note 415, s 1.03(4).

[FN425]. 849 F. Supp. 704, 707 (N.D. Cal. 1994).

[FN426]. Id.

[FN427]. 1992 Merger Guidelines, supra note 9.

[FN428]. Pre-Merger HHI = 50  50 = 5000; Post-Merger HHI = 100 = 10,000. See supra note 99 for discussion of HHI calculation. See also supra notes 100, 179 (discussing HHI thresholds creating the presumption of illegality).

[FN429]. Catholic hospitals are not unincorporated divisions of the Vatican; Catholic hospitals are incorporated and licensed in the state in which they operate. If Catholic hospitals were unincorporated divisions of the Vatican, then they would be considered unitary actors. As the Court in Copperweld explicitly noted, unincorporated divisions, by definition, cannot conspire with each other or with their "parent." Copperweld, 467 U.S. at 771.

[FN430]. See Capital Imaging Assoc. v. Mohawk Valley Medical Assoc., 996 F.2d 537, 544 - 45 (2d Cir.) (finding members of an independent medical practice association capable of conspiring within the meaning of s 1 of the Sherman Act), cert. denied, 114 S. Ct. 388 (1993); Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 673 (7th Cir.) (holding that the National Basketball Association, as a sports league, may be a joint venture, which requires rule of reason antitrust analysis), cert. denied, 113 S. Ct. 409 (1992).

[FN431]. See supra notes 15 -17 and accompanying text.

[FN432]. See supra notes 361- 63 and accompanying text.

[FN433]. See supra subsections IV.A.3.(a) (de minimis test), IV.A.3. (b) (forced merger test), and IV.A.3.(d) (potential control test).

[FN434]. See supra notes 232-35 and accompanying text (observing that the Catholic hospitals' sponsoring religious orders administer the property "in trust" for the Church).

[FN435]. See supra note 159.

[FN436]. See supra text accompanying note 230.

[FN437]. See supra text accompanying note 233.

[FN438]. Unlike the structural "forced merger test" announced by the District of Columbia District Court in Sonitrol of Fresno, Inc. v. AT&T, 1986 -1 Trade Cas. (CCH) P 67,080 (D.D.C. 1986), a functional test could look further than the parent's level of equity stock holdings.

[FN439]. See supra section III.A.3.

[FN440]. See supra section III.A.2.

[FN441]. Because of the Vatican's lack of equity ownership in the hospitals, the Vatican Merger Defense would probably fail a structural potential control test. However, if one argues that the canon-law code functions as an internal structural control similar to a corporation's articles of incorporation, then the Vatican Merger Defense might also pass a structural potential control test.

[FN442]. See supra note 282 (discussing the bylaws of a Catholic hospital); see also supra note 248 (suggesting that the canon-law code itself functions as a governing document for Catholic hospitals).

[FN443]. Tower, supra note 282.

[FN444]. 849 F. Supp. 702 (N.D. Cal. 1994).

[FN445]. See supra note 395 and accompanying text.

[FN446]. Restatement (Second) of Agency s 14B (1958); see also supra section IV.A.5 (discussing the application of agency law to find a unitary actor).

[FN447]. See supra section III.A.3.

[FN448]. Hite, supra note 233, at 411.

[FN449]. See supra notes 372-77 and accompanying text (setting out unity of purpose test).

[FN450]. 443 U.S. 595 (1979).

[FN451]. See, e.g., Tower, supra note 282, at 7.

[FN452]. See supra note 3 (stating that there are approximately six hundred Catholic hospitals in the United States).

[FN453]. See supra notes 35 - 43 and accompanying text.

[FN454]. 1992 Merger Guidelines, supra note 9.

[FN455]. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 789 - 90 (1984) (Stevens, J., dissenting) ("As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.").

[FN456]. See Santa Cruz Medical Clinic v. Dominican Santa Cruz Hosp., 65 Antitrust & Trade Reg. Rep. (BNA) 322 (N.D. Cal. Aug. 19, 1993); see also Adventist Challenges Acquisition of Galen Health Care by Columbia, News & Comment, 65 Antitrust & Trade Reg. Rep. (BNA) 233 (Aug. 12, 1993).

[FN457]. See supra note 3.

[FN458]. Further, single-entity status for Catholic hospitals might bar a small Catholic hospital that qualifies under the 1994 Health Care Guidelines, supra note 114, from the protection of the small hospital antitrust safety zone.

[FN459]. See supra notes 58 - 65 and accompanying text (discussing s 2 of the Sherman Act).

[FN460]. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 790 (1984) (Stevens, J., dissenting).

[FN461]. See supra notes 58 - 65 and accompanying text (discussing s 2 of the Sherman Act).

[FN462]. See supra notes 58 - 65 and accompanying text (discussing s 2 of the Sherman Act).

[FN463]. See, e.g., Hospital Affairs: Reviewing the Effects of Merger Mania -- Catholic Clash, supra note 305, at 1-2 (observing that Boston's Cardinal Bernard Law "has apparently given his approval" to the contemplated merger of New England Medical Center, a non-Catholic hospital, and several of the Boston-area's Catholic hospitals "in order to form a [Catholic] network large enough to compete with the merger between Boston's Brigham and Women's [[[Hospital] and Massachusetts General [Hospital]").

[FN464]. See supra notes 63 - 65 and accompanying text.

[FN465]. 251 U.S. 417, 451 (1920).

[FN466]. Id.

[FN467]. This Comment argues that the Vatican Merger Defense exempts the merger of two Catholic hospitals from ss 1 and 2 of the Sherman Act and s 7 of the Clayton Act. The merger might be challenged under s 5 of the FTC Act, which provides the FTC with the authority to declare the conduct of "persons, partnerships, or corporations" illegal if it constitutes an "unfair method of competition." FTC Act s 5, 15 U.S.C. s 45. It is beyond the scope of this Comment to analyze the potential effect a s 5 challenge would have on the Vatican Merger Defense. See supra note 86 (observing that the FTC Act is rarely used in hospital merger challenges).

[FN468]. See supra subsection IV.A.6.(b).

[FN469]. Bell Atl. Business Sys. Serv. v. Hitachi Data Sys. Corp., 849 F. Supp. 704, 707 (N.D. Cal. 1994).

[FN470]. See, e.g., id. (cautioning that "a parent is not liable for the wrongful acts of its subsidiary simply because the parent wholly-owns the subsidiary"); United Nat'l Records, Inc. v. MCA, Inc., 616 F. Supp. 1429, 1432 (N.D. Ill. 1985) (refusing to retroactively pierce the corporate veil because of the absence of "direct manipulative conduct" by the parent company); cf. Restatement (Second) of Agency s 14M (1958) ("A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other.").

[FN471]. See supra subpart III.B. (discussing Hospital Protocol, supra note 267).

[FN472]. Hospital Protocol, supra note 267, at 2.

[FN473]. Bell Atlantic, 849 F. Supp. at 707; see also Masa, Inc. v. ICG Keeprite Corp., 1989 U.S. Dist. LEXIS 7770, at *7 n.3 (N.D. Ill. June 28, 1989) (declining to extend Copperweld and stating: "This court fails to see propriety of applying case law concerning federal anti-trust law to this Illinois tort action."); Calkins, supra note 69, at 377 (noting that " 'alter ego' or 'piercing the corporate veil' doctrine is a creature of state law. It turns on considerations different from those that determine whether a Sherman Act conspiracy is possible."). But see Presser, supra note 415, ss 3.01-.16 (discussing federal law on piercing the corporate veil); Note, Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982).

[FN474]. See supra subpart IV.B.

[FN475]. See supra subpart III.C.

[FN476]. It is beyond the scope of this Comment to identify any independent interests a Catholic hospital may have.

[FN477]. See supra section III.A.3.

[FN478]. See supra section III.A.3 (discussing the religious orders). See generally supra subpart III.A (setting forth the vertical hierarchy of the Catholic Church).

END OF DOCUMENT