

Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability

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The main statutory scheme for antitrust enforcement was laid out over a century ago, with the passage of the Sherman Act.¹ Today, it remains in virtually the same form as it did in 1890. But in the face of a changing corporate culture, courts have been faced with interpretive questions that most likely were beyond the purview of the statute's creators. One of the questions raised in recent years concerns the application of the Sherman Act to alleged conspiratorial activity² between a parent corporation and its subsidiary.³ Although it might be conceptually difficult to think of a parent and subsidiary "conspiring"—much as it would be to think of your left and right hands "conspiring"—it may be surprising to find that in some situations a parent and a subsidiary can be held liable for antitrust damages when their coordinated activity harms consumers or another competitor.

Under existing case law, the activity between a parent and any of its *wholly owned* subsidiaries is clearly immune from conspiratorial antitrust liability. This clarity ends when courts consider partially

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¹ Sherman Act, 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7 (1994).

² Here I only discuss Sherman Act Section 1 liability. This section governs concerted activity. See 15 USC § 1 (1994) (prohibiting "contract[s] . . . or conspirac[ies] in restraint of trade"). See also text accompanying notes 31–35. Regardless of whether there is Section 1 liability, there might be Section 2 liability if the behavior is egregious enough to "threaten[] actual monopoly." *Copperweld Corp v Independence Tube Co*, 467 US 752, 767 (1984). Section 2 liability requires a heightened showing of anticompetitive behavior and is determined without regard to whether the behavior was concerted or unilateral. See *id* at 767–68 nn 13–14. See also text accompanying notes 16–30.

³ A parent is a "corporation that has a controlling interest in another corporation," usually "through ownership of more than one-half the voting stock." *Black's Law Dictionary* 344 (West 7th ed 1999). Likewise, a subsidiary is a "corporation in which a parent corporation has a controlling share." *Id* at 345. Although by the strict definitional views voting stock is the key factor, it is not clear that courts reserve the terms "parent" and "subsidiary" solely for these situations. Often, courts will simply talk of a parent "owning" a certain percentage of stock in the subsidiary, without reference to the parent's voting control. See, for example, *Rohlfing v Manor Care, Inc*, 172 FRD 330, 344 (N D Ill 1997) (noting the percentages of its subsidiaries the parent corporation "own[ed]"); *Bell Atlantic Business Systems Services v Hitachi Data Systems Corp*, 849 F Supp 702, 705–06 (N D Cal 1994) (discussing the parent-subsidiary relationship in terms of "ownership"). Thus, it seems that courts use the terms "parent" and "subsidiary" rather loosely to refer to any corporation owning a significant portion of an affiliated corporation. Because of this loose interpretation, the Comment will also use the terms "parent" and "subsidiary" in a broad and general sense not limited to majority interests in voting stock.

owned subsidiaries. Some jurisdictions grant immunity to all majority owned subsidiaries, just as they do to wholly owned subsidiaries.⁴ Other jurisdictions only grant immunity for coordinated activities with subsidiaries that are at least 90 percent owned.⁵ This uncertainty undoubtedly makes corporate officers uneasy. Under a pessimistic view, the risk of liability might even cause a company and its partially owned subsidiary to forego efficient and procompetitive business activities for fear of antitrust liability. This inefficiency will be passed on to the consumer.

Prior to 1984, a corporation ran the risk of incurring antitrust liability under Section 1 of the Sherman Act⁶ for concerted action with a subsidiary corporation that it wholly owned.⁷ In that year, the Supreme Court ruled that immunity from Section 1 liability should be granted to a parent and its *wholly owned* subsidiary,⁸ but the Court did not address whether, and to what extent, the same immunity should be granted when the subsidiary is only partially owned.⁹ Lower courts have generally held that immunity might be applicable in some of these situations, but they have set inconsistent standards. Some courts use a “de minimis” approach. In practice this means that two corporations have Section 1 immunity when one corporation has an ownership interest in the other corporation that is very close to 100 percent.¹⁰ Other courts grant immunity to partially owned subsidiaries more liberally, through use of a “control approach.” Under this standard, all

⁴ See, for example, *Novatel Communications, Inc v Cellular Telephone*, 1986 US Dist LEXIS 16017, *24–26 (N D Ga) (granting summary judgment on Sherman Act Section 1 claim because parent was “incapable” of conspiring with its 51 percent owned subsidiary).

⁵ See, for example, *Aspen Title & Escrow, Inc v Jeld-Wen, Inc*, 677 F Supp 1477, 1486 (D Or 1977) (extending immunity only to corporations which are a de minimis amount less than 100 percent owned by parent). See also note 10.

⁶ 15 USC § 1.

⁷ See, for example, *Kiefer-Stewart Co v Joseph E. Seagram & Sons, Inc*, 340 US 211, 215 (1951) (holding that two wholly owned subsidiaries of a liquor distiller were guilty under Section 1 of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme).

⁸ See *Copperweld*, 467 US at 777 (“Copperweld and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.”). *Copperweld* is discussed in further detail in Part I.B.

⁹ *Copperweld*, 467 US at 767 (“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.”).

¹⁰ See *Aspen Title*, 677 F Supp at 1482–83, 1486 (extending Section 1 immunity to a parent corporation that held a 97.5 percent interest in a subsidiary, and denying immunity to other subsidiaries in which it owned 60 percent and 75 percent). It is important to note that there is no clear line at which an ownership of less than 100 percent ceases to qualify as de minimis. At least one court has held that an ownership percentage as low as 91.9 percent qualifies for immunity under the de minimis standard. See *Leaco Enterprises, Inc v General Electric Co*, 737 F Supp 605, 609 (D Or 1990) (holding that General Electric’s 91.9 percent share in its subsidiary was a de minimis amount less than 100 percent). While *Aspen Title* suggests that percentages less than or equal to 75 percent are insufficient to qualify for immunity under the de minimis approach, there is relatively little case law dealing with ownership interests between 75 and 90 percent.

that is required is the parent corporation's ability to legally control the subsidiary.¹¹ Legal control has been found when the parent owns more than 50 percent of the subsidiary.¹² Since these differing approaches may result in strikingly different outcomes in factually identical situations, corporate defendants cannot accurately determine their potential liability until they are actually brought into court. This result hinders defendants from being able to limit their liability *ex ante*. It also results in similarly situated defendants being treated differently across different jurisdictions, thereby creating the potential for forum shopping.¹³ All of this uncertainty poses significant difficulty for potential defendants in their efforts to engage in meaningful business planning.¹⁴ To overcome the uncertainty in this area of law, this Comment proposes that courts adopt a modified control approach for analyzing conspiratorial liability of partially owned subsidiaries. The approach considers two aspects of the parent-subsidiary relationship: the percentage of the parent's ownership of the subsidiary's common stock, and the percentage of the parent's ownership of the subsidiary's voting stock. The modified control approach only grants immunity when the parent has more than 50 percent of the common stock and a legally controlling interest in the voting stock.¹⁵

Part I of this Comment discusses Sherman Act Section 1 liability, with a particular focus on the Supreme Court's decisions regarding concerted activity between a parent and its wholly owned subsidiaries. Part II examines the unresolved controversy of liability between a parent corporation and its partially owned subsidiary and analyzes the various court approaches to the issue, primarily the *de minimis* approach and the control approach. Part III proposes that courts adopt a modified version of the control approach.

¹¹ See, for example, *Bell Atlantic*, 849 F Supp at 706 (“*Copperweld* found that a parent and a wholly-owned subsidiary are [incapable of conspiring] because the parent has the power to exercise full control over its subsidiary. For the same reasons, a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade.”).

¹² See, for example, *Novatel Communications*, 1986 US Dist LEXIS 16017 at *24–26 (granting immunity when the parent owned 51 percent of the subsidiary).

¹³ Note, *Forum Shopping Reconsidered*, 103 Harv L Rev 1677, 1677 (1990). The author writes:

Forum shopping has been defined as a litigant's attempt “to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.” The American legal system tends to treat forum shopping as unethical and inefficient; parties who forum shop are accused of abusing the adversary system and squandering judicial resources.

Id., quoting *Black's Law Dictionary* 590 (West 5th ed 1979).

¹⁴ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1, 12 (1984) (noting that the vagueness found in such doctrines as the rule of reason hinders business planning and increases litigation costs).

¹⁵ See Part III.A.

I. CONCERTED ACTIVITY UNDER SECTION 1 OF THE SHERMAN ACT

A. Statutory Interpretation

1. Comparing Sections 1 and 2 of the Sherman Act.

The prevailing view of the Sherman Act is that it was intended “to promote some approximation to the economist’s idea of competition, viewed as a means toward the end of maximizing efficiency.”¹⁶ While a detailed analysis of the economics of monopolies is beyond the scope of this Comment,¹⁷ I include a brief illustration of the monopoly problem: In a monopolized market, a monopolist will raise prices.¹⁸ This increase in prices will decrease consumer demand and thus cause the monopolist to decrease production (output).¹⁹ According to economic theory, this decreased output (the amount that would have been consumed in a competitive market but that is not in a monopolistic market) represents a loss to society.²⁰

The Sherman Act provides two tools that can be used to combat monopolies and thereby minimize inefficiency. Section 1 prohibits unreasonable restraints of trade (it need not be “prove[d] that [the] concerted activity threatens monopolization”²¹) effected by a “contract, combination . . . or conspiracy” between entities.²² It does not reach conduct that is “wholly unilateral.”²³ Thus for Section 1 purposes, “you must have two persons or entities to have a conspiracy,”²⁴ or, put another way, a “plurality of actors”²⁵ is needed. On the other hand, Section 2, which makes it illegal to “monopolize, or attempt to monop-

¹⁶ Richard A. Posner, *Antitrust Law: An Economic Perspective* 20 (Chicago 1976). See also Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J L & Econ 7, 7 (1966) (asserting that “Congress intended the courts to implement . . . only that value we would today call [maximization of] consumer welfare” in drafting the Sherman Act).

¹⁷ For a detailed analysis of the costs of monopoly, see Posner, *Antitrust Law* at 8–22 (cited in note 16).

¹⁸ See id at 9–10 (discussing the effect a monopolist may have on price).

¹⁹ See id (examining the relationship between price and output in a monopolized market).

²⁰ See id (explaining the concept of social loss from monopoly). Posner argues that this traditional calculation of social loss does not measure the full loss caused by monopolization.

It ignore[s] the fact that an opportunity to obtain a lucrative transfer payment in the form of monopoly profits will attract real resources into efforts by sellers to monopolize, and by consumers to prevent being charged monopoly prices. The costs of the resources so used are [also] costs of monopoly.

Id at 11.

²¹ *Copperweld Corp v Independence Tube Co*, 467 US 752, 768 (1984).

²² 15 USC § 1.

²³ *Copperweld*, 467 US at 768, quoting *Albrecht v Herald Co*, 390 US 145, 149 (1968). See also *Columbia River People’s Utility District v Portland General Electric Co*, 217 F3d 1187, 1190 n 4 (9th Cir 2000) (same).

²⁴ *Nelson Radio & Supply Co, Inc v Motorola, Inc*, 200 F2d 911, 914 (5th Cir 1952).

²⁵ *Copperweld*, 467 US at 769.

lize . . . any part of [] trade or commerce,”²⁶ governs unilateral conduct by a single firm. Section 2 only applies to conduct that threatens actual monopolization; “[i]t is not enough that a single firm appears to ‘restrain trade’ unreasonably.”²⁷ The Sherman Act apparently judges unilateral activity less harshly than concerted activity because “‘pure’ unilateral coordination within [a] firm [is] natural and efficient.”²⁸ Since unilateral coordination “is as likely to result from an effort to compete as from an effort to stifle competition,”²⁹ policing unilateral conduct with a vigor equal to that imposed on concerted conduct would likely deter procompetitive corporate activities.³⁰

2. Sherman Act Section 1 and the rise of the intra-enterprise conspiracy.

As mentioned above, Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”³¹ In analyzing a Section 1 claim, courts must confront the following threshold question: is there a plurality of actors as required for conspiratorial liability under Section 1 of the Sherman Act? If not, then Section 1 cannot apply to the defendant’s conduct, even if there is a showing of anticompetitive harm.³²

Whether there exists a plurality of actors is often a straightforward inquiry. For instance, courts widely accept the fact that unincorporated divisions of the same corporation do not satisfy the plurality of actors requirement.³³ This understanding seems intuitive: a corpora-

²⁶ 15 USC § 2.

²⁷ *Copperweld*, 467 US at 767.

²⁸ Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv L Rev 451, 454 (1983).

²⁹ *Copperweld*, 467 US at 769.

³⁰ Id (“In the marketplace, [unilateral] coordination may be necessary if a business enterprise is to compete effectively.”).

³¹ 15 USC § 1. In order to establish a violation of this Section, a plaintiff must establish the following four elements:

(1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Rossi v Standard Roofing, Inc, 156 F3d 452, 464–65 (3d Cir 1998).

³² This does not mean that the defendants have not committed an antitrust violation. There are several provisions that apply to anticompetitive unilateral conduct. For instance, a corporation or individual’s behavior might violate Section 2 if it is an attempt to monopolize or leads to actual monopolization. See 15 USC § 2 (making it a crime to “monopolize” or to “attempt to monopolize”). For a further discussion of when Section 2 liability might be appropriate, see Part III.D.2.b.

³³ See, for example, *Cliff Food Stores, Inc v Kroger, Inc*, 417 F2d 203, 206 (5th Cir 1969) (noting that courts have been reluctant to expand the intracorporate conspiracy doctrine to un-

tion must coordinate the efforts of its various departments to remain competitive in its market, which is consistent with the Sherman Act's goal of fostering competition.³⁴ Traditionally, however, courts treated a parent corporation and its wholly owned subsidiary as two entities, thus subjecting them to conspiratorial liability under Section 1.³⁵ This approach is commonly referred to as the "intra-enterprise conspiracy" doctrine.

B. The *Copperweld* Doctrine: Conspiratorial Immunity for a Parent and Its Wholly Owned Subsidiary

In the seminal case of *Copperweld Corp v Independence Tube Corp*,³⁶ the Supreme Court effectively eliminated the intra-enterprise conspiracy doctrine as it related to a parent and its wholly owned subsidiary.³⁷ The Court began its analysis by stating that Section 1 of the Sherman Act "does not reach conduct that is 'wholly unilateral.'"³⁸ Distinguishing between unilateral and concerted conduct, the *Copperweld* Court explained, is necessary to effectuate the dual antitrust goals of prohibiting coordinated and anticompetitive efforts of separate economic actors while permitting (perhaps even encouraging) intrafirm cooperation aimed at healthy market competition.³⁹

Since coordinated intrafirm efforts to compete are a healthy and necessary part of a market system, officers or employees of the same firm do not provide the plurality of actors imperative for a Section 1 conspiracy.⁴⁰ The same reasoning, the Court held, applies to a parent corporation and its wholly owned subsidiaries:

incorporated divisions); *Joseph E. Seagram and Sons, Inc v Hawaiian Oke and Liquors, Ltd*, 416 F2d 71, 83–84 (9th Cir 1969) (rejecting the proposition that the internal divisions of a single corporation can conspire with each other); *Poller v Columbia Broadcasting System, Inc*, 284 F2d 599, 603 (DC Cir 1960) (same), rev'd on other grounds, 368 US 464 (1962).

³⁴ See text accompanying note 16.

³⁵ See, for example, *Perma Life Mufflers, Inc v International Parts Corp*, 392 US 134, 141–42 (1968) (suggesting that because the defendants "availed themselves of . . . doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities"); *Timken Roller Bearing Co v United States*, 341 US 593, 598 (1951) ("The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of [Section 1].").

³⁶ 467 US 752 (1984).

³⁷ *Id* at 777 (overruling all prior decisions holding that a parent corporation and its wholly owned subsidiary can conspire in violation of Section 1).

³⁸ *Id* at 768, quoting *Albrecht v Herald Co*, 390 US 145, 149 (1968).

³⁹ 467 US at 768–69 ("The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity is inherently fraught with anticompetitive risk.").

⁴⁰ *Id* at 769. The rationale for not holding officers of a single corporation liable for antitrust collusion is similar to the rationale for not holding departments or divisions of a single corporation liable for antitrust collusion as discussed in notes 33–34 and accompanying text.

[They] must be viewed as . . . a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.⁴¹

Indeed, the Court noted the irreconcilable tension that would result in holding a parent corporation and its wholly owned subsidiary liable for conspiracy. Section 1 “agreement” (required for conspiracy) only occurs “when ‘the conspirators had a unity of purpose or a common design and understanding . . . in an unlawful arrangement.’ But in reality a parent and a wholly owned subsidiary *always* have a ‘unity of purpose or a common design.’”⁴²

The Court concluded that for wholly owned subsidiaries the intra-enterprise conspiracy doctrine “impose[s] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect.”⁴³ Thus, after *Copperweld*, a plaintiff cannot allege an antitrust violation based on an “intra-enterprise conspiracy” when the subsidiary is wholly owned by the parent corporation.⁴⁴

II. CONSPIRACY BETWEEN A PARENT AND ITS PARTIALLY OWNED SUBSIDIARY

Although *Copperweld* settled the conspiracy issue between a corporation and its wholly owned subsidiary, it did “not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.”⁴⁵ Still, many courts have taken the liberty of applying the *Copperweld* rationale to conspiracy allegations between a parent and its partially owned subsidiaries. The results have been neither uniform nor consistent.

All the courts that have considered the issue have defined the relevant inquiry using the same language as *Copperweld*: Do the cor-

⁴¹ Id at 771.

⁴² Id, quoting *American Tobacco Co v United States*, 328 US 781, 810 (1946).

⁴³ *Copperweld*, 467 US at 773 (internal quotation marks omitted), quoting *Sunkist Growers, Inc v Winckler & Smith Citrus Products Co*, 370 US 19, 29 (1962).

⁴⁴ This Comment primarily concerns liability of a parent corporation, but the analysis equally applies to individuals who own the entirety or a large portion of a corporation. For instance, if a single individual owns two corporations, that person could not conspire with either one since there is not a plurality of actors. See text accompanying notes 24–25. Likewise, the two “subsidiary” corporations could not conspire with each other since they share common ownership. Therefore, it makes no difference whether the parent is an actual person or a corporate entity for purposes of Section 1. However, for simplicity, this Comment will continue the discussion in the context of the parent being a corporation.

⁴⁵ 467 US at 767.

porations have a complete “unity of purpose” so as to make an agreement between them meaningless in Sherman Act terms?⁴⁶ Most courts refer to one of two approaches as a guide in determining whether a unity of purpose exists: (1) the de minimis approach, which requires ownership nearing 100 percent for immunity; or (2) the control approach, which grants immunity whenever the parent has legal control over the subsidiary.

Other courts have endorsed neither of these approaches and used “unity of purpose” as a naked standard, without an in-depth discussion about what qualifies as a unified interest. These courts typically conduct factfinding and then simply announce, in a seemingly arbitrary fashion, whether the corporations have met the standard or not.⁴⁷ Of the courts that do purport to apply one of the two main approaches, many complicate the problem by citing authority that more accurately supports the other view.⁴⁸

A. The De Minimis Approach

Even though the *Copperweld* Court specifically left open the question of when a parent could conspire with its partially owned subsidiaries,⁴⁹ lower courts were quick to seize on the reasoning that the

⁴⁶ See, for example, *Total Benefit Services, Inc v Group Insurance Administration, Inc*, 875 F Supp 1228, 1239 (E D La 1995) (quoting *Copperweld*'s “unity of purpose” language); *Rosen v Hyundai Group (Korea)*, 829 F Supp 41, 45 n 6 (E D NY 1993) (same).

⁴⁷ See, for example, *Rohlfing v Manor Care, Inc*, 172 FRD 330, 344–45 (N D Ill 1997) (holding that 82.3 percent ownership of a subsidiary qualified the parent for immunity from antitrust conspiracy); *Total Benefit Services*, 875 F Supp at 1239 (holding the same for 95 percent ownership); *Rosen*, 829 F Supp at 45 n 6 (holding the same for 80 percent ownership).

⁴⁸ See, for example, *Coast Cities Truck Sales, Inc v Navistar International Transportation Co*, 912 F Supp 747, 764 (D NJ 1995), citing *Novatel Communications, Inc v Cellular Telephone Supply, Inc*, 1986 US Dist LEXIS 16017 (N D Ga) (using a control approach, but then seemingly applying a de minimis approach); *Siegel Transfer, Inc v Carrier Express, Inc*, 856 F Supp 990, 997 (E D Pa 1994), affd, 54 F3d 1125 (3d Cir 1995) (noting that the legal standard is “the power of a parent to control a subsidiary,” but then citing *Aspen Title & Escrow v Jeld-Wen, Inc*, 677 F Supp 1477, 1486 (D Or 1987), which uses a de minimis approach); *Bell Atlantic Business Systems Services v Hitachi Data Systems Corp*, 849 F Supp 702, 706 (N D Cal 1994) (reviewing the facts based on whether the parent corporation has “legal control” over the subsidiary, but citing *Leaco Enterprises, Inc v General Electric Co*, 737 F Supp 605, 608–09 (D Or 1990), which uses a de minimis standard). Sometimes this happens when a court is applying the de minimis approach in favor of the defendant. When a parent owns nearly a complete interest in the subsidiary (interest percentages in the high nineties), then both approaches will yield a decision in favor of the defendant. In this situation, some courts announce or apply a de minimis rule, the more restrictive of the two approaches, but then cite cases that rely on the more liberal control approach. See, for example, *Coast Cities*, 912 F Supp at 764. Although this does not affect the result of the particular case, the vacillation of courts from one approach to another creates substantial confusion when later courts (and attorneys) try to deduce the proposition for which the precedent stands. More troubling are the instances where the court applies a control approach but cites de minimis precedent. See, for example, *Siegel Transfer*, 856 F Supp at 997; *Bell Atlantic*, 849 F Supp at 706. Here, the court's mistaken reading of precedent may affect the ultimate outcome of the case.

⁴⁹ See text accompanying note 45.

Court employed. The first courts to consider the issue held that a “*de minimus* [sic] difference between [the parent’s] percentage of ownership and 100 percent ownership does not diminish *Copperweld’s* applicability.”⁵⁰ Two of the most cited cases standing for the *de minimis* approach come from the District of Oregon. The first, *Aspen Title & Escrow, Inc v Jeld-Wen, Inc*,⁵¹ explicitly recognized and rejected the competing control approach.⁵² The court reasoned that “a controlling shareholder having less than all shares might lack a unity of purpose and interest with the controlled corporation.”⁵³ Perhaps realizing that this might sound like a denouncement of the *Copperweld* doctrine in any situation where the subsidiary is not wholly owned, the court then quickly stated “that only corporations which are owned 100% . . . or a *de minimis* amount less than 100%, are covered by the *Copperweld* rule.”⁵⁴ The court did not expound upon what would qualify as a *de minimis* amount, except to find that the corporation was not protected from liability for conspiring with its 60 and 75 percent owned subsidi-

⁵⁰ *Satellite Financial Planning Corp v First National Bank of Wilmington*, 633 F Supp 386, 395 (D Del 1986). *Satellite* was one of the first cases setting forth the *de minimis* approach. See also *Siegel Transfer, Inc v Carrier Express, Inc*, 856 F Supp 990, 997 (E D Pa 1994) (using the same language as *Satellite*), *affd*, 54 F3d 1125 (3d Cir 1995). But compare *Tunis Brothers Co, Inc v Ford Motor Co*, 763 F2d 1482, 1495 n 20 (3d Cir 1985), *vacd* on other grounds, 475 US 1105 (1986), which is another early case and one of the few cases that a circuit court has heard on the issue. It held that “*Copperweld* [did] not . . . preclude a conspiratorial relationship” between a parent and a partially owned subsidiary. *Id.* That court held that liability could exist, even though the parent owned 79 percent of the equity stock and 100 percent of the voting stock. *Id.* at 1486. It is not clear from the decision whether the Third Circuit was rejecting the applicability of *Copperweld* entirely or whether it was applying the *de minimis* approach and felt that the *de minimis* difference had not been met. If the court intended the latter, then the result is somewhat suspect given that the parent owned 100 percent of the voting stock. See *Rohlfing v Manor Care, Inc*, 172 FRD 330, 344 n 21 (N D Ill 1997) (calling the *Tunis* outcome “particularly questionable”). In any event, the Third Circuit clarified its position to some extent in *Siegel Transfer*, 54 F3d at 1133 & nn 7–8 (affirming an application of the *de minimis* approach when the parent owned 99.92 percent and also noting that some courts had applied *Copperweld* “to situations where parental ownership was in the 80% to 91.9% range”).

⁵¹ 677 F Supp 1477 (D Or 1987).

⁵² *Id.* at 1486, rejecting *Novatel Communications, Inc v Cellular Telephone Supply, Inc*, 1986 US Dist LEXIS 16017 (N D Ga).

⁵³ *Aspen Title*, 677 F Supp at 1486.

⁵⁴ *Id.* (emphasis added). The court claimed to adopt this standard from *Sonitrol of Fresno, Inc v American Telephone and Telegraph Co*, 1986 US Dist LEXIS 26034 (D DC), but it is not at all clear that *Sonitrol* advocates the *de minimis* approach. In that case, the court was considering a parent that owned less than 50 percent of its subsidiaries. The court ruled against the parent, stating:

[W]hile [the parent] may have undoubtedly *de facto* control over [the subsidiaries], legal control of these corporations rested firmly in the hands of their board of directors. As long as these boards had the legal ability to determine the course of business activity for their corporation independently of [the parent], they were capable of conspiring.

Id. at *13. Nowhere in the opinion does the court mention or allude to a *de minimis* standard. So, contrary to the reading by *Aspen Title*, *Sonitrol* arguably advocates the control approach, which is discussed in detail in Part II.B.

aries but could not have conspired with its 97.5 percent owned subsidiary.⁵⁵ Later, in *Leaco Enterprises, Inc v General Electric Co*,⁵⁶ the Oregon court again announced its use of the de minimis approach, this time finding for the parent.⁵⁷ The parent in *Leaco* owned 91.9 percent of the subsidiary in question and the court was satisfied that this met its previously undefined standard set forth in *Aspen Title*.⁵⁸ However, in arriving at this conclusion, the court discussed at some length the ability of the parent to compel the merger of the subsidiary if it so desired.⁵⁹ Since the ability to compel a merger is generally irrelevant to a de minimis analysis (almost any parent could compel a merger of a 91.9 percent owned subsidiary), this dictum seems to leave open the possibility that the District of Oregon might not be constrained in the future from applying a control-type standard.⁶⁰

The only federal circuit court of appeals to have addressed directly the application of *Copperweld* to partially owned subsidiaries has supported use of the de minimis approach. In *Siegel Transfer, Inc v Carrier Express, Inc*,⁶¹ the Third Circuit affirmed a lower court's application of the de minimis rule.⁶² Although *Siegel* does lend some support for that approach, it is not the best case for concluding that the de minimis approach should be the universal standard, since the defendant there owned over 99 percent of the subsidiary's shares.⁶³ Thus, the de minimis approach was the narrowest rule to grant immunity to the defendants. It seems that the Third Circuit might have embraced the control approach had it been necessary to save the defendants from liability. At one point, the court stated that "under *Copperweld*, the control a parent corporation exercises over its subsidiary is relevant, not whether a parent operates the subsidiary separately."⁶⁴ The court also acknowledged the application of *Copperweld* immunity to ownership levels below the de minimis level by other courts.⁶⁵ In the end, the court seemed content to rest its decision on the narrower de minimis rule applied by the lower court. Thus, the only circuit court to have

⁵⁵ *Aspen Title*, 677 F Supp at 1482, 1486.

⁵⁶ 737 F Supp 605 (D Or 1990).

⁵⁷ Id at 608-09.

⁵⁸ Id at 609.

⁵⁹ Id (discussing merger rules under Canadian corporation law).

⁶⁰ The *Leaco* court is not the only court that has been somewhat apologetic in its adoption of the de minimis standard. See, for example, *Siegel Transfer*, 54 F3d at 1133 n 7 (recognizing the control approach, but not expressly rejecting the de minimis standard).

⁶¹ 54 F3d 1125 (3d Cir 1995).

⁶² Id at 1134.

⁶³ Id at 1133.

⁶⁴ Id at 1134 n 10 (emphasis added).

⁶⁵ Id at 1133 n 7.

addressed the issue did relatively little to produce a definitive standard.⁶⁶

While it is generally accepted that ownership interests approaching 100 percent will satisfy the de minimis requirement, courts have struggled to determine where de minimis ends. Courts have held that parent ownerships of 99.92 percent,⁶⁷ 97.5 percent,⁶⁸ and 91.9 percent⁶⁹ are de minimis differences for the purpose of applying *Copperweld*. On the other hand, courts have found parent ownerships of 75 percent,⁷⁰ 60 percent,⁷¹ and 54 percent⁷² not to be de minimis, thus leaving the corporations open to Sherman Act Section 1 liability. Although the de minimis courts have never specified a bright line rule requiring a certain percentage for immunity, it is interesting to note that the cases that have been decided map closely to the Treasury Regulations standard for control of a corporation. Under these provisions, a person or corporation is considered to be in "control" of a corporation if it owns 80 percent of the total voting stock and 80 percent of all outstanding common stock.⁷³ The corollary between the two might be mere coincidence, as no court has explicitly mentioned or endorsed the use of the regulations in drawing a line for de minimis analysis, nor has any court expressly considered both voting stock and common stock. Further, since the sample size of cases within the range of 75 to 90 percent is so small, it is not clear that the courts are actually aiming for the 80 percent line that the regulations mandate. Still, the regulations might indicate that there is something more concrete to the de minimis cutoff than is evident from the case law.

B. The Control Approach

Other courts, applying the rationale of *Copperweld* more liberally to partially owned subsidiaries, have adopted a control approach. Un-

⁶⁶ The Third Circuit also previously considered the issue shortly after *Copperweld*, but it is unclear on what basis it made its final decision. See *Tunis*, 763 F2d at 1495 n 20 (asserting merely that *Copperweld* does not preclude a conspiratorial relationship in violation of Section 1 when the subsidiary is not wholly owned). The *Tunis* decision has been widely criticized for denying immunity to a parent owning 79 percent of a subsidiary's equity stock and 100 percent of voting stock. It was not discussed in *Siegel Transfer*. For further discussion of the issues regarding *Tunis*, see note 50.

⁶⁷ *Siegel Transfer*, 54 F3d at 1133.

⁶⁸ *Aspen Title*, 677 F Supp at 1482, 1486.

⁶⁹ *Leaco*, 737 F Supp at 609.

⁷⁰ *Aspen Title*, 677 F Supp at 1486 (holding that of three subsidiaries, only the one in which the parent had 97.5 percent ownership met the de minimis standard).

⁷¹ *Id.*

⁷² *American Vision Centers, Inc v Cohen*, 711 F Supp 721, 722-23 (E D NY 1989) (noting that although 54 percent ownership of common stock gave the parent control, "the other 46% of the stock represented an economic interest different from that of [the parents]").

⁷³ 26 CFR § 1.351-1 (1996). See also 26 USC § 368(c) (1994).

der this standard, courts do not require that the parent corporation possess an ownership interest in the subsidiary nearing 100 percent. Rather, the inquiry centers on whether the parent corporation can legally control the subsidiary.⁷⁴ At the outset, it is important to note that a corporation qualifying for immunity under the de minimis approach will almost certainly qualify for immunity under the control approach, since the percentage of ownership needed to control a corporation is almost always lower than the percentage needed to qualify as a de minimis difference.

The most notable of the control approach cases is *Novatel Communications, Inc v Cellular Telephone Supply, Inc.*⁷⁵ Novatel, a Canadian corporation that manufactured cellular telephones, owned 51 percent of Carcom, a Texas corporation formed to market Novatel cellular telephones to the automotive industry.⁷⁶ The other 49 percent of Carcom was owned by a single investment group, so that Carcom was essentially controlled by two corporations with nearly equal stakes in the operation.⁷⁷ The *Novatel* court held that the 51 percent ownership interest made the parent corporation incapable of conspiring for purposes of Section 1.⁷⁸ The court reasoned that “[t]he 51 percent ownership retained by [the parent corporation] assured it of full control over [the subsidiary] and assured it could intervene at any time that [the subsidiary] ceased to act in its best interests.”⁷⁹ The plaintiff attempted to counter this showing of “unity of purpose” by introducing a manufacturer’s agreement between Novatel and Carcom that provided: “this Agreement does not constitute Carcom as an agent or employee of Novatel. . . . Carcom shall be deemed to be an independent contractor.”⁸⁰ Citing *Copperweld*, the court dismissed this showing of independent purpose, stating that the majority ownership interest was controlling regardless of whether the parent “keeps a tight reign [sic] over

⁷⁴ See *Coast Cities Truck Sales, Inc v Navistar International Transportation Co*, 912 F Supp 747, 765–66 (D NJ 1995) (holding that a 70 percent ownership of the voting shares by the parent corporation was sufficient to establish control, and thus, unity of purpose); *Bell Atlantic Business Systems Services v Hitachi Data Systems Corp*, 849 F Supp 702, 706 (N D Cal 1994) (explicitly rejecting the de minimis rule, and finding that the parent company had “the power to exercise full control over its subsidiary” because of its 80 percent ownership). See also Phillip E. Areeda, 7 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1467a at 259 (Little, Brown 1986) (concluding that “majority ownership with its centralized power to control . . . presumptively creates a single entity for antitrust purposes”).

⁷⁵ 1986 US Dist LEXIS 16017 (N D Ga).

⁷⁶ *Id* at *1–2.

⁷⁷ *Id* at *2.

⁷⁸ *Id* at *25–26.

⁷⁹ *Id*. But see *Sonitrol of Fresno, Inc v American Telephone and Telegraph Co*, 1986 US Dist LEXIS 26034, *12–15 (D DC) (holding that the fact that a parent had a 32.6 percent interest and de facto control did not preclude conspiratorial liability since it did not give the parent corporation legal control, which remained with the subsidiary’s board of directors).

⁸⁰ *Novatel*, 1986 US Dist LEXIS 16017 at *26 (internal quotation marks omitted).

the subsidiary.”⁸¹ Thus, under the *Novatel* court’s articulation of the control approach, it appears that a simple majority ownership will suffice to apply *Copperweld* immunity.⁸² Although *Novatel* is the only court using the control approach to decide a case near 50 percent, no court has ever denied immunity for a percentage ownership greater than 50 percent.

One court has hinted at a variation of the control approach that is even more expansive than *Novatel*. In *Coast Cities Truck Sales, Inc v Navistar International Transportation Co.*,⁸³ a court considered whether a parent corporation could conspire with its partially owned, independently incorporated dealcor.⁸⁴ Over the course of several years, the parent’s ownership fluctuated between 70 and 100 percent of the voting shares of the dealcor.⁸⁵ The court’s analysis began by stating that “[c]ourts examining the substance, rather than the form of the economic arrangement, may initially engage in a bright line analysis of whether a subsidiary is wholly owned.”⁸⁶ When the subsidiary is not wholly owned, then a “court must next determine whether the parent and subsidiary are inextricably intertwined in the same corporate mission, are bound by the same interests which are affected by the same occurrences, and exist to accomplish essentially the same objectives.”⁸⁷ The *Coast Cities* court then listed several factors to consider when determining whether the parent “asserts total dominion” over the subsidiary.⁸⁸ These include “management control, contractual obligations, [and] economic incentives.”⁸⁹ Although the court eventually decided the case based upon the parent’s ability to “dictate the objectives and actions of each dealcor” through the control of voting shares⁹⁰ — closely

⁸¹ *Id.* at *25.

⁸² The court in *Novatel* did not explicitly discuss whether the parent owned a majority of the voting stock as well as the common stock. Since the court mentioned the ability of the parent to “assert full control at any time,” *id.*, it might be possible to infer that the parent did indeed own 51 percent or more of the voting stock. Although this detail was not expressly discussed by the district court, it is a factor that has been considered by other courts, see, for example, *Coast Cities*, 912 F Supp at 765 (reviewing various factors relevant to a violation of Section 1 by a parent corporation and its subsidiary, including the ability of the parent to “assert[] total dominion over [the subsidiary’s] actions”), and in this Comment’s proposed approach. See Part III.B.

⁸³ 912 F Supp 747 (D NJ 1995).

⁸⁴ *Id.* at 764–66.

⁸⁵ *Id.* at 765.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* The opinion in *Rohlfing v Manor Care, Inc.*, 172 FRD 330 (N D Ill 1997), shares striking similarities with the reasoning in *Coast Cities*. Both courts relied heavily on the ownership relationship in deciding the cases, and, like the *Coast Cities* court, the *Rohlfing* court implied that other facts might be considered, stating that “unity of interest may be established if the economic objectives of the corporations are interdependent or if the management of one company exerts almost complete control over the other.” *Id.* at 344–45.

⁹⁰ *Coast Cities*, 912 F Supp at 765.

resembling previous “control approach” analysis—the preceding language indicates a possible willingness to delve into a fact-intensive inquiry that is not required under a more traditional control approach, which focuses only upon the percentage ownership of stock or voting stock.⁹¹ Under this articulation of the control approach, de facto control of a subsidiary might be enough to immunize the parent corporation from conspiratorial liability, even if legal control is, in a technical sense, lacking.⁹² No court has actually used the fact-sensitive control approach to determine the outcome of a case.

III. A PROPOSED FRAMEWORK FOR APPLYING *COPPERWELD* TO PARTIALLY OWNED SUBSIDIARIES

This Comment proposes a two-part framework for analyzing anti-trust conspiratorial liability as it applies to partially owned subsidiaries. Under this approach, a parent corporation would be extended Section 1 immunity if: (1) the parent has a legally controlling interest in the voting stock of the subsidiary, *and* (2) the parent owns a majority of the common stock of the subsidiary.

Part III.A will describe the rule and its mechanics. Part III.B will explore the need for the voting control component of the test. Part III.C will do the same for the economic interest component. Finally, Part III.D will examine the policy advantages of the proposed approach.

A. Mechanics of the Proposed Rule

This Comment takes a unique approach to analyzing Section 1 conspiratorial liability for a parent and its partially owned subsidiary. It requires courts to look at two key, readily available pieces of information before determining whether the parent and subsidiary should be afforded immunity from Section 1 conspiratorial liability. The first factor courts should look at is the ability of the parent to legally control the subsidiary.

Although the law defines “control” in many ways and in many different places,⁹³ the concept of “legal control” in *Copperweld* is based on the ability of the parent to “assert full control at any moment” over

⁹¹ See *Bell Atlantic*, 849 F Supp at 706 (“Under the reasoning of *Copperweld* and its progeny, it is not necessary to conduct a factual inquiry to determine whether a parent and a subsidiary over which the parent has legal control can conspire in violation of § 1 of the Sherman Act.”).

⁹² But see *Sonitrol*, 1986 US Dist LEXIS 26034 at *13 (holding that although the parent had de facto control, it was still subject to Section 1 liability since it did not have legal control of the subsidiary).

⁹³ See Part II.B.

the subsidiary.⁹⁴ A parent corporation has this type of legal control over a subsidiary when it has the controlling voting interest or by ownership of a percentage of the voting stock specified by the subsidiary's articles of incorporation or by state incorporation law.⁹⁵ A controlling voting interest assures the parent of the ability to determine the direction of the subsidiary corporation in two ways: (1) by electing a majority of the directors, who in turn will determine the officers of the corporation, and (2) by voting (decisively) on "fundamental matters" that are put to a shareholder vote.⁹⁶ For purposes of applying the *Copperweld* doctrine, the ability to control on "fundamental matters" is crucial, because it is necessary to force a merger, dissolution, or otherwise "assert full control at any moment." Although a simple majority quorum is the default rule for both general and fundamental matters under most states' corporation laws,⁹⁷ a corporation's articles of incorporation may specify a greater quorum, thus requiring a "supermajority" for shareholder voting.⁹⁸ Supermajority provisions have become increasingly popular because of their "utility . . . as a way of protecting minority investors who need veto power over some matters" and "as a takeover defense mechanism."⁹⁹ Correspondingly, a corporation that does not possess a necessary supermajority cannot be assured complete control.

Rather than adopt a pure "majority quorum" or "supermajority quorum" for all matters, many corporations have adopted a hybrid voting structure, requiring a supermajority quorum for fundamental matters and a majority quorum for everything else. In these situations, this Comment's approach would grant immunity only where the parent had the voting share required for "fundamental matters"—that is, the supermajority percentage.

The second relevant fact in determining whether a parent and subsidiary have a unity of purpose—and thereby immunity—is the

⁹⁴ 467 US at 771–72.

⁹⁵ See James D. Cox, Thomas Lee Hazen, and F. Hodge O'Neal, 1 *Corporations* § 1:21 (Aspen 2001) (1998-2 Supp).

⁹⁶ Under most state statutes, "fundamental matters" requiring a shareholder vote include: "(1) mergers involving the corporation . . . , (2) any amendment to the certificate of incorporation, (3) the sale of substantially all the corporation's assets, and (4) liquidation." William A. Klein and John C. Coffee, Jr., *Business Organization and Finance: Legal and Economic Principles* 119 (Foundation 7th ed 2000).

⁹⁷ See, for example, 8 Del Code Ann § 216(2) (1991) (noting that "the affirmative vote of the majority of shares . . . shall be [considered an] act of the stockholders").

⁹⁸ Id § 216 ("[T]he certificate of incorporation or bylaws of any corporation . . . may specify the number of shares . . . which shall be present . . . in order to constitute a quorum."); Model Business Corporation Act § 7.27(a) (West 2001) ("The articles of incorporation may provide for greater quorum or voting requirement for shareholders . . . than is provided by this Act.").

⁹⁹ Jesse H. Choper, John C. Coffee, Jr., and Ronald J. Gilson, *Cases and Materials on Corporations* 578 (Aspen 4th ed 1995).

parent's ownership level of common stock. A parent and subsidiary would only be granted immunity if, in addition to the parent having a controlling voting share, the parent owns a majority of all the subsidiary's outstanding shares of common stock. As explained later,¹⁰⁰ the requirement of common stock ownership, or an "economic stake," promotes antitrust policy by providing safeguards against a vote-controlling parent strategically undermining the competitiveness of a subsidiary for its own benefit. Again, *both* elements must be satisfied before immunity is granted. An extremely high percentage ownership of the common stock *does not* offset an otherwise inadequate ownership of the voting stock, and vice versa.

Traditional analyses under either the de minimis or control approach have typically obscured the distinction between majority stock ownership and majority voting stock ownership. Some courts have pursued their analyses using stock ownership (usually in a de minimis analysis),¹⁰¹ others using voting stock ownership (usually in a control analysis),¹⁰² and still others have referred to both or have not specified which percentages they are using to arrive at their conclusions.¹⁰³ It is not at all clear what leads courts to use various or unspecified methods. One possible reason for the ambiguity may be that in some cases the choice may have little effect on the outcome,¹⁰⁴ so the court fails to engage in a complete analysis.

Copperweld itself does not bifurcate the inquiry into "economic stake" and "control" as this Comment proposes. The reason for this is straightforward: in dealing with wholly owned subsidiaries, the bifurcated analysis is unnecessary. The parent of a wholly owned subsidiary will necessarily be the only party having an economic stake in, and control over, the subsidiary. But despite the fact that an individual analysis of both factors was not needed to decide *Copperweld*, both are necessary for deciding cases of partially owned subsidiaries consistently with the antitrust goals underlying *Copperweld*.

B. Voting Stock Requirement

In granting Section 1 immunity to a parent and its wholly owned subsidiary, the *Copperweld* Court developed the concept of "unity of purpose" in part by pointing to the control that the parent can exert

¹⁰⁰ See Part III.C.

¹⁰¹ See, for example, *Leaco*, 737 F Supp at 608–09.

¹⁰² See, for example, *Coast Cities*, 912 F Supp at 764–66.

¹⁰³ See, for example, *Novatel*, 1986 US Dist LEXIS 16017 at *25–26.

¹⁰⁴ For example, if the defendant parent owned a very high (or low) percentage of the common stock and a similarly high (or low) percentage of the voting stock, then differentiating between the two would not greatly affect the court's analysis.

over the subsidiary.¹⁰⁵ When the parent fails to maintain a controlling portion of voting stock, there is a sound reason for denying immunity. For instance, even to refer to corporations with minority shares of the voting stock as “parents” of “subsidiaries” is perhaps a stretch. A “parent corporation” is technically “[a] corporation that has a *controlling* interest in another corporation . . . through ownership of more than one-half the *voting* stock,”¹⁰⁶ although courts appear to be more liberal than that in applying the labels of “parent” and “subsidiary.”¹⁰⁷ That a “parent” of this sort does not have a unity of purpose with its “subsidiary” is made more evident when the purposes behind a dual-class common stock structure—authorizing voting and nonvoting (or lower-vote) shares—are considered. Typically, a dual-class structure is instituted as a “device for concentrating voting power in the hands of the managers and their allies and thereby barring any threat to their incumbency and autonomy.”¹⁰⁸ Thus, a corporation that has only a minority of the voting stock in a subsidiary, while maintaining a majority of the overall common stock, very likely has this structure for a good reason.¹⁰⁹ The shareholders that have voting control of the subsidiary most likely structured the subsidiary so that the corporation would not attain voting control. With such an adversarial purpose for the dual-class structure, it would be awkward to talk of a noncontrolling corporation having a unity of purpose with the subsidiary corporation.

But what of the situation in which a “parent” does not own a legally controlling portion of the voting stock, but owns enough of the voting stock so that it is in *de facto* control of the corporation? Such a situation might arise if *P*, the parent, owned 30 percent of the voting stock in *S*, the subsidiary. If the other 70 percent of the voting stock were dispersed among a large number of other shareholders, such that *P*'s voting share dwarfed that of the other owners, then *P* probably would have a very influential role in shaping the policy of *S*. One might think that, in this situation, *P* and *S* have a unity of purpose. A closer look, however, reveals that this cannot be the case. *P* might indeed have *de facto* control of *S*, but this control is at the pleasure of the dispersed voters. If *P* ever directs *S* in a way that is controversial, the dispersed voters have the incentive and the ability to form a coalition against *P*, thereby quickly stripping it of control. A corporation in the position of *P* could never unilaterally force the subsidiary to pursue a certain course of action, nor could it force *S* to be absorbed by *P*

¹⁰⁵ 467 US at 771–72.

¹⁰⁶ *Black's Law Dictionary* at 344 (cited in note 3) (emphasis added).

¹⁰⁷ See note 3.

¹⁰⁸ Klein and Coffee, *Business Organization and Finance* at 121 (cited in note 96).

¹⁰⁹ See *id.* at 120–21 (discussing the reasons shareholders would accept nonvoting stock or any class of stock that carried disproportionate voting power).

through a statutory merger, which would require the vote on a “fundamental matter” (likely by a supermajority).

The *Copperweld* Court recognized that the important consideration is whether the parent has the ability to legally control, not whether it in fact micromanages the subsidiary on a day-to-day basis. *Copperweld* states that a “unity of purpose” exists when a parent has the ability to control a subsidiary, “whether or not the parent keeps a tight reign [sic] over the subsidiary.”¹¹⁰ Thus, a parent that lacks legal control, but nonetheless keeps a tight rein on a subsidiary through de facto control, has not satisfied this element of the test. On the other hand, a parent that owns the requisite shares of voting stock has satisfied this element, regardless of whether it is active in the day-to-day affairs of the subsidiary.

C. Common Stock Requirement

Unlike the control element,¹¹¹ common stock ownership was not separately identified as an element of the Court’s holding in *Copperweld*. As mentioned above,¹¹² since *Copperweld* only addressed the situation of the wholly owned subsidiary, it was not necessary to deal with voting stock and common stock separately. However, the underlying policy rationale of the Court’s decision justifies inquiring into common stock ownership when dealing with partially owned subsidiaries. In deciding that a parent and its wholly owned subsidiary could not conspire under Section 1, the Court drew an analogy to coordinated activity among officers of the same firm. A firm’s officers are not subject to Section 1 liability, the Court stated, because they are not “pursuing divergent [economic] goals.”¹¹³ Instead, they are pursuing the same economic goals: those of the firm. Rather than being suspect, the Court noted that this was “an effort to compete,” which is what the Sherman Act (and antitrust laws in general) seeks to promote.¹¹⁴ The Court held that “[for] similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise.”¹¹⁵

When a parent owns a majority of its subsidiary’s common stock, it possesses the greatest economic stake in the success or failure of that subsidiary. The parent is entitled to the residual equity interest,

¹¹⁰ 472 US at 771.

¹¹¹ See text accompanying notes 142–47 for a discussion of the role that a parent’s control of a subsidiary played in *Copperweld*.

¹¹² See Part I.B.

¹¹³ *Copperweld*, 467 US at 769.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 771.

namely, “what is left after all [fixed claims] have been satisfied.”¹¹⁶ The higher the level of the parent’s ownership interest, the more closely its economic goals become aligned—or using *Copperweld’s* terminology, cease to be “divergent”—with that of the subsidiary corporation. This common goal is to maximize profits. If a significant percentage of common stock ownership were not required of a parent corporation, then there would be a risk of strategic behavior on the part of the parent to the detriment of consumers.

Consider the following example: A company involved in the oil refining business has a controlling vote in Shell, a retail level gas station chain. Although the parent has a controlling vote share in Shell, it only owns 1 percent of the common stock.¹¹⁷ Because the parent has a relatively small capital investment in Shell, it may be quite willing to engage in behavior detrimental to Shell, through either horizontal or vertical collusive agreements, if it will benefit the parent by exceeding the value lost by the decline in the value of Shell stock (of which the parent bears only 1 percent).¹¹⁸ The result is that the parent’s actions cause Shell to become an uncompetitive player in the retail gas market, and consumers (not to mention the common stock holders of Shell) suffer harm. To change the scenario slightly, assume the parent owns 70 percent of Shell’s common stock. Shell now has an incentive not to engage in collusive behavior that will be detrimental to its competitiveness, because it would bear 70 percent of the risk of loss to Shell’s stock value. In fact, the parent has an incentive to control Shell in a way that maximizes Shell’s profits consistent with Shell’s corporate goals.¹¹⁹

Having considered the case for including common stock ownership in the partial subsidiary test, the issue remains as to what level of ownership is needed to ensure that the parent’s business purpose is to maximize the wealth of the subsidiary. One possibility would be to re-

¹¹⁶ Klein and Coffee, *Business Organization and Finance* at 271 (cited in note 96).

¹¹⁷ It may be unusual for a shareholder to hold a majority of the voting stock, but only 1 percent of the common stock. However, it is not impossible. In addition, a slightly less extreme example would certainly not strain the imagination. For instance, a parent might very well own 10 percent of common stock and still control the voting shares. A common example of this would be a closely held corporation that goes public.

¹¹⁸ How could the parent possibly gain by causing Shell to become uncompetitive? This could happen horizontally, if the parent was also involved directly in the retail gas market; or it could happen vertically, if the parent had a contract (or perhaps another parent-subsidiary relationship) with one of Shell’s competitors.

¹¹⁹ Some might argue that the parent may still be willing to engage in collusive practices that harm Shell if the payoff is high enough. Although this might be true, a rational parent would first unload a major portion of its common stock in Shell (while maintaining voting control) before undertaking activity that would harm Shell and ultimately itself as shareholder. At this point, the parent would fail to satisfy the ownership component of the test and would be liable for collusive conduct under Section 1.

quire an ownership level of 80 or 90 percent, as the de minimis approach currently does. But using the de minimis standard as a guide seems unwarranted. The courts that have applied this standard have done so as a way of relaxing the *Copperweld* rule slightly, without daring to search for the broader antitrust policy underlying it. This is a conservative approach without an articulated policy basis.¹²⁰ A parent owning a majority of the common stock will have the incentive to maximize the subsidiary's wealth. This would still thereby discourage anticompetitive collusion at levels of ownership below that of the de minimis approach. This Comment suggests the requirement of majority ownership because a greater than 50 percent ownership interest will adequately deter parents from causing their subsidiaries to engage in anticompetitive activities with unprofitable or inefficient results.

It could be argued that an ownership level of 50 percent is not required to align the incentives of the parent with those of its subsidiary and therefore benefit consumers—that a much lower percentage ownership would accomplish the same end. Under this premise, an ownership level of 30 or 35 percent might be sufficient in some cases. The problem with this approach is that a similar argument might be made that 30 or 35 percent ownership is also unnecessary to ensure that the parent will not engage in anticompetitive collusion at the expense of the subsidiary. Thus, no line would ever be drawn. While any bright line rule of common stock ownership will certainly have a degree of arbitrariness—for example, 50 percent instead of 49 percent—it is no more arbitrary than allowing judges to determine in a case-by-case fashion whether a specific percentage had the desired incentive effect on the controlling corporation's mental state, a process bound to be fraught with error costs. In addition, this Comment's "line" is less arbitrary than other possible lines, because it rests on the assumption that a parent corporation is more likely to engage in strategic behavior when dealing with a subsidiary that is primarily owned by somebody else, rather than one that it alone primarily owns.

D. Policy Benefits

This Comment's proposal offers several advantages over existing approaches. It provides a workable, straightforward test for judges to apply, thereby reducing decision and error costs. More importantly, it furthers the antitrust policy of protecting consumers and accurately

¹²⁰ The Treasury Regulations also use an 80 percent standard in measuring the relationship between a shareholder and a corporation. See note 73 and accompanying text. But because they deal only with tax consequences, it is doubtful that they were drafted with the intention of promoting effective antitrust incentives. Thus, they may not provide the most appropriate level for purposes of this test.

preserves the distinction between concerted and unilateral activity that is at the heart of Section 1 of the Sherman Act.¹²¹ Furthermore, it provides incentives that are consistent with other areas of the law, yet it does not render separate doctrinal areas meaningless.

1. Judicial economy.

Like the traditional *de minimis* and control approaches, the proposed approach demands little factfinding. Judges, with the test in hand, simply look to corporate records to determine whether the parent owns the two types of stock in the requisite amounts. It is true that this approach requires *slightly* more factfinding than the previous approaches; here, the judge must look at *both* common stock ownership and voting stock ownership, rather than just one or the other. But this extra burden is so light that it is probably insignificant. To the extent the burden is substantial, it is outweighed by the fact that the judge no longer has to decide which type of stock to use in his or her analysis.¹²²

More importantly, this approach is a marked improvement over the *de minimis* approach, since it establishes a bright line rule for judges to follow. Although most jurisdictions applying the *de minimis* approach consistently grant immunity when the percentage ownership is in the 90s, it is unclear when an ownership level ceases to be “*de minimis*.” Thus, in the hard range of cases (around 80 percent), the judge must make a judgment call. This approach increases the likelihood of error, thereby creating decision costs. Even though bright line rules sometimes run the risk of being over- or underinclusive, this Comment’s rule will likely produce more accurate results than the hit-or-miss style of the *de minimis* approach.¹²³ At the very least, it will establish a standard that is concrete and certain, which will be welcomed by plaintiffs and defendants.

2. Harmony with antitrust policy.

a) *Benefits to consumers.* Under the banner of protecting consumers, pre-*Copperweld* courts forbade a parent and a wholly owned subsidiary from undertaking coordinated conduct. The Court finally realized that this actually hurt consumers by prohibiting procompetitive and efficient conduct by the parent and subsidiary. The

¹²¹ See notes 16–20 and accompanying text.

¹²² This assumes that judges consider the implications of using one over the other. A more pessimistic view is that they do not consider the different possibilities in a Section 1 claim and use whatever is most convenient. In this situation, there probably is no conserving of judicial resources.

¹²³ This defect of the *de minimis* approach makes it inferior to even the traditional control approach.

same is true for a qualifying parent and partially owned subsidiary. When a parent and subsidiary have a “unity of purpose”—exemplified by their “economic stake” and “ability to control”—coordination is likely to have a greater procompetitive rather than anticompetitive justification. This consequence is due to the significant cost efficiencies resulting from vertical coordination, which may include the ability of the firms to

cut sales and distribution costs, facilitate the flow of information between levels of the industry (for example, marketing possibilities may be transmitted more effectively from the retail to the manufacturing level, new product possibilities may be transmitted in the other direction, better inventory control may be attained, and better planning of production runs may be achieved), create economies of scale in management, and so on.¹²⁴

These efficiencies result in cost savings to the corporations that, in a competitive market, will be passed on to consumers. One might point out that parents and subsidiaries that do not meet the requirements for immunity under this test may still coordinate in efficient manners that will not result in liability.¹²⁵ It is important to note, however, that a defendant failing to qualify for immunity under the proposed approach (by failing either one or both of the elements) has not necessarily lost its case. In all but a select few cases—generally naked price fixing—courts will engage in a “rule of reason” analysis.¹²⁶ This

¹²⁴ Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 227 (Free Press 1993).

¹²⁵ This criticism might be made by proponents of the traditional control approach, since it is somewhat less stringent than this Comment’s approach.

¹²⁶ The alternative to “rule of reason” analysis is generally considered “per se” analysis. “Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.” *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma*, 468 US 85, 103–04 (1984). At one time, per se analysis was widely used for many activities that were considered patently anticompetitive, such as price fixing. But over time, courts began to realize that many activities that seem anticompetitive at first glance actually appear procompetitive when the entirety of the circumstances is revealed. See Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* 117–54 (Cambridge 1988) (tracing the history of this jurisprudential shift in antitrust doctrine). Thus, many traditionally per se cases are now dealt with using rule of reason analysis. This means that the plaintiff generally must show other conditions, such as market power or reduced output, that on balance outweigh the defendant’s procompetitive justifications for the behavior. See *Board of Trade of the City of Chicago v United States*, 246 US 231, 238 (1918) (stating that under the rule of reason a court must determine “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition”). Although per se violations may still exist, “there is often no bright line separating per se from Rule of Reason analysis,” since “considerable inquiry into market conditions” is often required before per se condemnation is justified. *National Collegiate Athletic Association*, 468 US at 104 n 26. See also Diane Wood Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 Sup Ct Rev 69, 143 (noting that the Court “is reducing [the per se rule’s] scope at every turn—through expansion of the characterization process, through contraction of the sorts

means that the court will consider a variety of factors in determining antitrust liability. As Justice Breyer has stated, “rule of reason” analysis can be broken down into “four classical [] antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?”¹²⁷ Thus, a defendant that cannot claim immunity because it does not own a controlling portion of the voting stock may still introduce its common stock interest (or vice versa) into the rule of reason analysis where it will be relevant to answer these four questions (especially numbers two and three). A parent that does not own a majority of the common stock or a controlling portion of the voting stock has not acted anticompetitively merely because it fails the test and still acts in concert with its subsidiary. Rather, courts must make a determination on the merits as to whether the activity was procompetitive or anticompetitive. Where the 50 percent ownership and 50 percent voting power thresholds are satisfied, we are confident that the parent and subsidiary have a unity of purpose, making a full-blown analysis of the merits under Section 1 unnecessary.

b) Other antitrust provisions. Although this Comment’s proposed approach significantly broadens the scope of *Copperweld*, it does not make parents or subsidiaries judgment proof when they act in concert with anticompetitive results. In *Copperweld* itself, the Court pointed out that granting broader immunity from conspiracy did not “cripple antitrust enforcement.”¹²⁸ “A corporation’s initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act. . . . Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act.”¹²⁹ The Comment’s approach does not sanction anticompetitive conduct by a parent and a subsidiary satisfying these requirements of the test. Rather, it recognizes that the parent and the subsidiary are really one enterprise and must accordingly be judged under Sherman Act Section 2, which applies if the corporate enterprise “monopolize[s], or attempt[s] to monopolize.”¹³⁰ The threshold for liability under Section 2 is greater than that of Section 1, which applies if concerted activity “is an unreasonable restraint of trade.”¹³¹ But this higher

of conduct to which they apply, and through refinements of the alternative approach, the rule of reason”).

¹²⁷ *California Dental Association v FTC*, 526 US 756, 782 (1999) (Breyer dissenting).

¹²⁸ 467 US at 777.

¹²⁹ *Id* (stating that Clayton Act § 7, 38 Stat 731 (1914), codified at 15 USC § 18 (1994), and Federal Trade Commission Act § 5, 38 Stat 719 (1914), codified at 15 USC § 45 (1994), address the incipient anticompetitive conduct that will not fall under the Sherman Act).

¹³⁰ 15 USC § 2.

¹³¹ 15 USC § 1. See note 2.

threshold is appropriate where the rule grants immunity, because the lesser threshold would otherwise be a severe disincentive for procompetitive coordination by the parent and the subsidiary. This rule also does not preclude all Section 1 claims; it only limits liability after the acquisition is complete (and then only if both ownership criteria are met). Private parties may still invoke Section 1 for conspiracy prior to or during acquisition.

Furthermore, the Sherman Act does not stand in a vacuum; there are other enforcement mechanisms to prevent possible antitrust harms by a parent and a subsidiary. For instance, the 1992 U.S. Department of Justice and FTC Horizontal Merger Guidelines prevent corporations from entering parent-subsidiary relationships when common ownership would give them a dangerous level of control over any given market. The government evaluates the proposed combination using the Herfindahl-Hirschman Index ("HHI").¹³² Generally speaking, any combination that significantly increases the concentration of a moderately concentrated or highly concentrated market (as determined by the post-merger HHI) will receive high scrutiny or be presumed unlawful. Although the DOJ will not step in when the relationship is purely vertical (as many parent-subsidiary relationships are), the Guidelines serve as a safety precaution when the parent already occupies the market of the subsidiary it is acquiring.

Although this Comment's proposed approach will immunize agreements between a parent and a subsidiary more than the de minimis approach, it will by no means immunize them from antitrust scrutiny altogether. Instead, it will accurately preserve the distinction between concerted and unilateral activity that is at the heart of Sections 1 and 2 of the Sherman Act, providing a higher threshold for the latter.

3. Harmony with other law.

In addition to the other policy advantages already mentioned, this Comment's test gives parents an incentive to structure their conduct so it is in harmony with other areas of the law, especially corporate law. State corporation laws uniformly place a duty of loyalty on those in control, in order to protect minority interests. In the context of a parent-subsidiary relationship, this duty might be implicated if a parent with a controlling vote causes a subsidiary to undertake business ventures that are profitable for the parent-subsidiary enterprise

¹³² "The HHI is calculated by summing the squares of the individual market shares of all the participants." ABA Section of Antitrust Law, *The 1992 Horizontal Merger Guidelines with Commentary* § 1.5 (ABA 1993). Thus, a market with only four participants, each having an equal share of the market, would have an HHI of 2,500 ($25^2 + 25^2 + 25^2 + 25^2 = 2,500$).

as a whole, but that put the subsidiary by itself in a less profitable position than it would otherwise have been.¹³³ Generally, these corporate decisions that are not in the minority shareholders' best interest will be made by the subsidiary's officers (many if not all of whom will be hired by the parent-appointed directors) or directors, but occasionally they might also be made by the majority of shareholders, in this case the parent, acting independently. Under standard state corporation laws, the minority shareholders will likely have recourse for corporate decisions that benefit the parent at the expense of the subsidiary because of the fiduciary duty owed them by the directors¹³⁴ and officers.¹³⁵ These remedies would be available anytime it "appears that there was a background of self-dealing, conflict of interest, or illegality."¹³⁶

In addition to the legal limitations on directors and officers—which will catch most of the instances of harm to minority shareholders—courts have increasingly shown a "willingness to apply [fiduciary] duties" to shareholders "to the extent [they] hold[] the power to control the corporation."¹³⁷ Although this principle is most often applied in the context of close corporations,¹³⁸ it was also applied in at least one well-known case of a public corporation.¹³⁹ In that case, the court

¹³³ For instance, imagine that parent *P* owns barely (just over 50 percent) a controlling stock and voting interest in subsidiary *S*. *P* and *S* enter into a course of conduct that will benefit *P* by \$100, but costs \$50. *P* and *S* cumulatively are made better off by the amount of \$50. But *P* actually does better than that. *P* receives \$100 of the gain on its side, and bears only \$25 of the loss on *S*'s side (since *P* owns barely over one half). The minority shareholders bear the other \$25 of loss with no offsetting gain. Thus, this transaction transfers wealth from the minority shareholders to the majority shareholders; *P* walks away with a gain of \$75.

¹³⁴ Klein and Coffee write:

Although the directors are not agents of the shareholders in the legal sense, they are considered to be quasi-trustees who are subject to "fiduciary duties" owed to the corporation; in essence, these duties amount to the same kind of duty of loyalty and duty of care that an agent owes to his or her principal.

Klein and Coffee, *Business Organization and Finance* at 126 (cited in note 96).

¹³⁵ "Legally, the officers . . . of the corporation are agents of the corporation." *Id.* at 131. Because of this, officers, like directors, have both a duty of care and a duty of loyalty that are owed to the shareholders. See *id.* at 148–68 (discussing the obligations of officers and directors to the corporation).

¹³⁶ *Id.* at 126.

¹³⁷ *Id.* at 168.

¹³⁸ See, for example, *Perlman v Feldmann*, 219 F2d 173, 176 (2d Cir 1955) (holding that the same fiduciary duty applicable to a director of a corporation applies to the majority shareholder in a closely held corporation because the majority shareholder chooses and therefore controls the director); *Meiselman v Meiselman*, 309 NC 279, 307 SE2d 551, 564–67 (1983) (reviewing the duty owed by a majority shareholder to a minority shareholder in a closely held corporation); *Wilkes v Springside Nursing Home, Inc.*, 370 Mass 842, 353 NE2d 657, 663 (1976) (noting that "a controlling group in a close corporation" has a "fiduciary obligation to the minority [shareholders]").

¹³⁹ See *Jones v H.F. Ahmanson & Co.*, 1 Cal 3d 90, 460 P2d 464, 471 (1969) ("Any use to which [the majority shareholders] put the corporation or their power to control the corporation must benefit all shareholders proportionately."). The use of litigation against majority sharehold-

stated that “majority shareholders . . . have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner.”¹⁴⁰

The proposed approach harmonizes well with the corporate duty of loyalty because it requires parents that have control of a subsidiary also to align their economic interests with those of their subsidiary, through the common stock requirement. When a controlling parent owns the majority of common stock, it is in the parent’s best interests to control the subsidiary in a way that will maximize the subsidiary’s wealth. In addition to promoting the antitrust goals of competitiveness and consumer welfare, this principle also promotes an adherence to the corporate duty of loyalty owed to other shareholders. At the same time, it gives the parent the economic incentive to pursue efficient and procompetitive conduct, because the benefits will flow to the subsidiary and the parent.

While the antitrust laws can encourage procompetitive behavior when applied appropriately, they should not be used in a manner so as to subsume other areas of the law. Plaintiffs often try to formulate and plead non-antitrust claims in antitrust terms so that they will reap the treble damage awards and attorneys’ fees recoverable under antitrust law.¹⁴¹ *Copperweld* is itself a good illustration of this general pattern in antitrust litigation.¹⁴² *Copperweld Corporation*, the parent, and *Regal Tube Company*, the subsidiary, were alleged to have interfered with a contract between the plaintiff and a third party.¹⁴³ The district court held that they did wrongfully interfere, and placed the contractual damages at nearly \$2.5 million.¹⁴⁴ The court then trebled this as an antitrust violation for a grand total of almost \$7.5 million.¹⁴⁵ The Supreme Court held that no antitrust violation occurred because the two entities had a “unity of purpose.”¹⁴⁶ But that decision did not negate the \$2.5 million of contractual damages that were owed to the plaintiff.¹⁴⁷

ers in public corporations, however, is relatively rare. This probably reflects the fact that in most cases the directors and officers are directly to blame, making them easier targets for litigation. The point here is that majority shareholders have a fiduciary duty and could be held liable if the need existed.

¹⁴⁰ *Id.*

¹⁴¹ See Clayton Act, 15 USC § 15(a) (1994) (stating a person injured by a violation of antitrust laws can commence a civil suit for treble damages as well as costs of suit and reasonable attorneys’ fees).

¹⁴² Judge Wood gives an excellent narrative of the facts and background of *Copperweld*. See Wood Hutchinson, 1984 Sup Ct Rev at 88–95 (cited in note 126) (discussing how *Copperweld* led to the downfall of intra-enterprise conspiracies under the Sherman Act).

¹⁴³ *Id.* at 89.

¹⁴⁴ *Id.* at 90.

¹⁴⁵ *Id.*

¹⁴⁶ See Part I.B.

¹⁴⁷ Since the Supreme Court only reviewed the question of whether the parent and its subsidiary could conspire, it presumably did not disturb the jury decision regarding contractual

As in *Copperweld*, the proposed approach preserves a plaintiff's contract, tort, or other legal claim when the parent and subsidiary pursue legally actionable conduct, yet it realizes that the real harm done was actionable as contractual misfeasance or tort, and *not* because the parent and subsidiary coordinated unlawfully.

CONCLUSION

Ever since the *Copperweld* decision, courts have been struggling with how to apply that case's rationale to parent corporations and their partially owned subsidiaries. Some courts have been very cautious in extending immunity and have only done so to a select few that fall in the sometimes vague world of the de minimis difference. Afraid to step out of the paradigmatic intra-enterprise conspiracy box, this approach stops short of effectuating the underlying themes of *Copperweld*. Other courts have more enthusiastically adopted the theme embodied in "unity of purpose," and have rested their decisions on the concept of control. Although this approach is certainly closer to the mark than the de minimis approach, the better solution lies somewhere between the two.

To properly determine whether two corporations have a unity of purpose, both the economic and voting control implications of the relationship must be taken into account. Considering only one or the other, as has typified the past, oversimplifies the relationship between the two corporations. A corporation can have majority ownership of a subsidiary and still not have a unity of purpose. Likewise it can have a majority voting interest but not have a unity of purpose. But if a corporation has both a majority of the equity and a majority of the voting interest, then the possibility for anticompetitive harm is greatly reduced. The harm that is left is adequately (and more appropriately) policed under other antitrust provisions that do not rely on concerted activity and state law remedies for breach of fiduciary duty.

In addition to the analytic integrity of this approach to *Copperweld*, there will be many ancillary benefits. A bright-line rule will reduce uncertainty and conserve valuable judicial resources. Most importantly, the rule represents a move towards delineating the boundaries of antitrust law. No longer will claims that are, in substance, contract or tort claims be allowed to masquerade as antitrust claims by virtue of the intra-enterprise conspiracy doctrine.

