

Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees Under Section 1

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A 1993 article in this *Journal* reported, without fanfare, a federal district court's holding that a "franchisor and franchisee were legally incapable of conspiring" in restraint of trade.¹ Since that time, two other district courts and two courts of appeals have echoed that decision.²

Franchisors and franchisees that have spent time and energy ensuring compliance with the antitrust laws may be pleasantly surprised to learn that many of these efforts may be unnecessary. Because Section 1 of the Sherman Act (the key antitrust statute under which franchisor actions have been challenged) proscribes only "contracts, combinations and conspiracies" in restraint of trade or commerce, if franchisors are, as a matter of law, incapable of conspiring with franchisees, then franchisors need not worry about such things as mandating the prices at which franchisees resell products, "tying" continuation of the franchise to required purchases, or otherwise restricting franchisees' actions.³ Franchisors could require all franchisees to participate in promotions and sales pricing without any need for the now-ubiquitous caveat—"At participating franchises." Indeed, taken to its arguably logical conclusion, this holding could well mean that competing franchisees themselves could never be liable for jointly fixing prices, agreeing not to compete, or engaging in boycotts.

As promising as this may all seem to franchisors and franchisees alike, the eyebrow-raising nature of these postulates suggests that these decisions warrant a closer look. Regardless whether, as a matter of antitrust policy, franchisors should be deemed guilty of conspiring with their franchisees when they take certain actions—a question that will occupy the final part of this article—the cases addressing this issue raise more questions than they answer. Before franchisors look to these cases as the panacea for their antitrust worries, therefore, they would be wise to consider the genesis and evolution of the "inability to conspire" principle and the implications of its application to franchising.

This article critically analyzes the decisions holding franchisors incapable of conspiring with their franchisees. We begin with a discussion of the 1984 U.S. Supreme Court decision that serves, implicitly or explicitly, as the launching pad for each of these cases—*Copperweld Corp. v. Independence Tube Corp.*⁴ The Court there held that, as a matter of law, a corporation and its wholly owned subsidiary cannot conspire with each other in violation of Section 1 of the Sherman Act. We then consider earlier U.S. Supreme Court decisions that presumed that franchisors and franchisees

could conspire under Section 1 and that may (or may not) have survived *Copperweld*. Next, we touch on the judicial and scholarly debate over whether and to what extent the *Copperweld* doctrine ought to be expanded to other facts, and consider, in this light, the three district court decisions (and two affirmances on appeal) that held that franchisors are incapable of conspiring with their franchisees: *Williams v. I.B. Fischer Nevada*, *Hall v. Burger King Corp.*, and *Search International v. Snelling & Snelling*.⁵

We conclude that these decisions are short on substantive legal analysis and do not consider the potentially radical implications of their holdings. They do, however, reflect an understanding (albeit not well articulated) of an essential reality in franchising: To the extent that a franchisor imposes requirements or restrictions integral to the franchise relationship, it simply does not make sense to think of these actions as an unlawful antitrust conspiracy. But capturing that important principle without doing violence to the purposes of the antitrust laws requires something more nuanced than the broadbrush conclusion that franchisors and franchisees can never conspire, as a matter of law.

A properly thoughtful determination of the limits of antitrust liability in franchising is necessarily a highly fact-intensive one, which requires an appreciation of the scope of the franchise relationship, the business justifications for the alleged restraint, and an understanding of what "hat" the franchisor is wearing when it imposes particular restrictions upon its franchisees. That two alleged Section 1 conspirators are parties to a franchise agreement should not make them incapable of conspiring as a matter of law. Instead, the franchise relationship is one element that courts ought to weigh (heavily or less so, depending on the centrality of the alleged restraint to the franchise relationship) when assessing franchise restrictions under the antitrust rule of reason.

Copperweld v. Independence Tube

The seminal case in defining the limits of "intra-enterprise" conspiracies is *Copperweld Corp. v. Independence Tube Corp.*,⁶ which involved an alleged conspiracy between a parent corporation (Copperweld) and its wholly owned subsidiary (Regal Tube Co.). Independence Tube Corporation claimed that Copperweld and Regal engaged in this conspiracy to prevent Independence from entering the structural tube market in competition with Regal. Copperweld contacted Independence's potential customers, as well as banks that were considering funding Independence's projects, and dissuaded them from doing business with Independence. Independence sued, alleging, among other things, that this conspiracy violated Section 1 of the Sherman Act. A jury found for Independence and awarded \$2,499,009 in dam-

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ages, which were then trebled to \$7,497,027.⁷

The Seventh Circuit affirmed, holding that the jury properly had found, as a matter of fact,⁸ that there was “enough separation between the two entities to make treating them as two independent actors sensible.”⁹

The U.S. Supreme Court reversed. Writing for the majority, Chief Justice Burger held that “the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act.”¹⁰ The Court reasoned:

A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do “agree” to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.¹¹

Furthermore, the Court declared that the amount of control that the parent actually asserts over the subsidiary is irrelevant in determining the corporations’ ability to conspire:

[I]n reality a parent and wholly owned subsidiary always have a “unity of purpose or a common design.” They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.¹²

To hold otherwise, the Court concluded, would be to punish corporations for their choice of corporate form: “Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary.”¹³

Chief Justice Burger openly repudiated a number of U.S. Supreme Court cases that had acquiesced in the “intra-enterprise conspiracy doctrine,” under which Section 1 liability was not foreclosed merely because a parent and its subsidiary were subject to common ownership.¹⁴ But the *Copperweld* majority distinguished these precedents rather than expressly overruling them, characterizing their reliance on the intra-enterprise conspiracy doctrine as dicta, an alternative holding, or simply not necessary or relevant to the disposition of the case.¹⁵

Although *Copperweld* generated relatively little attention when it was decided in 1984,¹⁶ its implications were clearly significant: There could be no antitrust conspiracy claims against a parent corporation and its wholly owned subsidiaries, even if the companies held themselves out to the marketplace, in form and in substance, as entirely independent, competing entities. The amount of actual control that a parent exercised over its subsidiary—central to the application of the intra-enterprise conspiracy doctrine before *Copperweld*—no longer mattered, as the subsidiary was, as a matter of law, considered to be under its parent’s ultimate control and supervision.

As we will discuss shortly, over time *Copperweld* spawned numerous progeny and engendered a continuing,

often impassioned debate about its proper scope. To understand where franchising fits in that debate, however, a brief review of certain pre-*Copperweld* precedent is in order.

Franchising Conspiracies Before *Copperweld*

Before *Copperweld*, the U.S. Supreme Court simply presumed that franchisors and franchisees, just like other related corporate entities, could conspire in violation of Section 1 of the Sherman Act. In 1966, for example, in *United States v. General Motors Corp.*,¹⁷ the Court found an illegal conspiracy between General Motors and certain dealers to prevent other dealers from selling to discount houses. Without mentioning the intra-enterprise conspiracy doctrine or questioning whether a franchisor was “capable of conspiring” with its franchisees, the Court held:

We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose.¹⁸

General Motors survived *Copperweld*, and continues to be cited, primarily for the principle that dealers of a single manufacturer may be held liable for horizontal boycotts.¹⁹

The Court reached a similar conclusion in 1968 in *Perma Life Mufflers, Inc. v. International Parts Corp.*²⁰ There, a number of dealers that had operated Midas Muffler Shops under sales agreements with Midas Inc. alleged that Midas had conspired with its parent corporation, International Parts Corporation, and two of International’s other subsidiaries, in violation of Section 1. The plaintiff dealers alleged that certain provisions of the sales agreements—including terms barring them from purchasing from other sources of supply, preventing them from selling outside their designated territory, tying the sale of mufflers to other products in the Midas line, and requiring them to sell at fixed retail prices—illegal lessened competition.

The district court and the Seventh Circuit each held that the doctrine of *in pari delicto*²¹ barred the dealers’ suit because the dealers “had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had ‘solemnly subscribed’ to the agreement containing the restrictive terms.”²² In addition, the Seventh Circuit held that the Sherman Act claim should be dismissed because the defendants, International and three of its subsidiaries, were all part of a single business entity and therefore entitled to cooperate without creating an illegal conspiracy.²³

The U.S. Supreme Court reversed. Justice Black, writing for the majority, first held that the common law doctrine of *in pari delicto* is not a defense to antitrust liability.²⁴ The Court then considered and rejected the Seventh Circuit’s alternative holding that the defendants were incapable of conspiring because they were a single business entity: “[S]ince respondents Midas and International availed themselves of the privilege 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.”²⁵

Copperweld clearly overruled this proposition.

The *Perma Life Mufflers* Court continued, however, stating that “In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, . . . or between Midas and other franchise dealers, whose acquiescence in Midas’ firmly enforced restraints was induced by the communicated danger of termination.”²⁶

Neither *Copperweld* nor any later U.S. Supreme Court decision has explicitly challenged this independent proposition, i.e., that Midas could conspire with its franchisee dealers, by virtue of the franchise relationship itself. In fact, in distinguishing *Perma Life Mufflers*, the *Copperweld* Court relied on that decision’s alternative holding that Midas could conspire with its franchisees as support for the conclusion that the intra-enterprise conspiracy doctrine was unnecessary to the Court’s earlier holding:

But the [*Perma Life Mufflers*] Court noted immediately thereafter [i.e., after its holding on the intra-enterprise conspiracy] that “in any event” each plaintiff could “clearly” charge a combination between itself and the defendants or between the defendants and other franchise dealers. . . . Thus, . . . the [intra-enterprise conspiracy] doctrine was at most only an alternative holding in *Perma Life Mufflers*.²⁷

Thus, while under *Copperweld*, Midas would today be incapable of conspiring with its parent International, the holding in *Perma Life Mufflers* that Midas could conspire with its franchisees would appear to remain viable. A number of post-*Copperweld* lower courts have so concluded, and have, on that basis, proceeded to analyze conspiracy claims involving franchise systems under the traditional Sherman Act Section 1 tests.²⁸ But given *Perma Life Mufflers*’ limited treatment of the issue—a one-sentence statement, effectively in dicta, with no further discussion—it remains to be seen whether the Court, if faced with the question today, would embrace that dicta or discard it in favor of a different post-*Copperweld* rule.

Extensions of *Copperweld*

In the almost twenty years since *Copperweld*, courts and commentators have debated whether it is appropriate antitrust policy to extend the holding beyond the distinct facts of that case.

Despite the *Copperweld* Court’s express caveat that it was deciding only the discrete issue before it,²⁹ federal courts have extended the *Copperweld* rule to numerous other circumstances. Some of these extensions follow more naturally from the U.S. Supreme Court’s reasoning than do others. For example, the majority of courts have held that sister corporations, i.e., two or more wholly owned subsidiaries of the same parent corporation, cannot conspire as a matter of law.³⁰ That is not surprising, since to hold that wholly owned subsidiaries of the same parent are capable of conspiring with each other would arguably undermine the *Copperweld* rule, opening up an indirect route for plaintiffs to allege a conspiracy against the parent, which ultimately controls both subsidiaries.³¹

Similarly, many courts have held that de minimis devia-

tions from total ownership are irrelevant to application of *Copperweld*. Thus, parents that own 90 percent or more of a subsidiary’s stock are incapable of conspiring with that almost wholly owned subsidiary.³² As with the sister corporation cases, these decisions seem to follow directly from *Copperweld*’s basic principles. *Copperweld*’s admonition against exalting form over substance would be meaningless if 100 percent ownership merited complete immunity under Sherman Act Section 1 while 95 percent ownership did not.

Other extensions of *Copperweld* have been more controversial. Courts have struggled, for example, in deciding whether *Copperweld* protects parent corporations and their nonwholly owned subsidiaries when the deviation from total ownership is more than de minimis. Some courts have held that a corporation cannot legally conspire with any controlling shareholder.³³ For example, in *Novatel Communications v. Cellular Telephone Supply*,³⁴ a Georgia district court held that a parent corporation could not conspire with its 51 percent-owned subsidiary. The court, applying *Copperweld*’s principles, held that “[t]he 51% ownership retained by [the parent] 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.”³⁵ Many courts have disagreed with *Novatel*, however, finding ownership in the 60 percent to 70 percent range insufficient to immunize a parent corporation against claims of conspiring with its subsidiary.³⁶

Similarly, *Copperweld*’s application to more complex corporate arrangements remains uncertain. Courts are split over whether common control—as opposed to identical ownership—makes corporate entities incapable of conspiring with each other.³⁷

The *Copperweld* doctrine also has been applied to a joint venture of independently owned regional electric cooperatives,³⁸ but its relevance continues to be debated in cases involving professional sports leagues³⁹ and other forms of “mutual benefit corporations,” like real estate listing services.⁴⁰

As this brief survey illustrates, some courts have taken a narrow view of the *Copperweld* rule, applying it only to facts essentially indistinguishable from those in *Copperweld*. Others cast the doctrine more broadly. In determining how far *Copperweld* does and should extend, many courts have focused on the degree of common ownership and/or control among the entities at issue. The case law is in flux, however, and the continuing, lively debate makes it difficult to generalize about overarching principles—and to predict how a court might rule on a particular set of facts.⁴¹ At the same time, certain commentators have vigorously questioned whether *Copperweld* ought to be extended at all.⁴²

Are Franchise Conspiracies Possible?

Against this backdrop, at least three federal district courts have held that franchisors are incapable, as a matter of law, of conspiring with their franchisees.⁴³

First to reach this conclusion was the U.S. District Court for the District of Nevada, in *Williams v. Fischer*.⁴⁴ In *Williams*, the plaintiff was a manager of a Las Vegas Jack-in-

the-Box restaurant owned by defendant I.B. Fischer Properties, Inc., and Ira Fischbein (referred to collectively as Fischer). The franchise agreement between Fischer and the Jack-in-the-Box franchisor, defendant Foodmaker, Inc., included a no-switching clause, which stated that a franchisee would not offer employment to anyone who had been a manager of another Jack-in-the-Box restaurant within the past six months without obtaining the prior employer's approval. When the plaintiff received an offer of employment from a Jack-in-the-Box franchisee in Bullhead, Arizona, Fischer refused to consent. The plaintiff sued, alleging among other things that the "no-switching" agreement between the franchisor Foodmaker and the franchisee Fischer violated Section 1.

The district court granted Foodmaker summary judgment on the Section 1 claim.⁴⁵ Central to its holding was the conclusion that Foodmaker and Fischer were "incapable of conspiring."⁴⁶ The court noted that the ability to conspire is a fact-based inquiry that will vary depending upon the relationship between the parties at issue. The court's analysis of the facts, however, was strikingly generalized, addressing the nature of "fast food franchises" generally, rather than anything unique to the Jack-in-the-Box system. The court noted:

In a fast-food franchise the franchisor does everything to promote a uniform, non-competitive environment between the franchisees: Each franchise serves substantially the same products; the products are served to the public in the same manner; the franchisor develops products and services for all franchisees; the employees dress alike; the decor of each franchise is similar; the franchisees are advertised as a single enterprise with a single logo; and the franchisor contracts with each franchise for exclusivity within a certain geographic area to minimize competition between the franchisees.⁴⁷

Thus, because of the degree of control that Foodmaker exercised over its franchised restaurants, there was no evidence of any competition between them, and, therefore, no ability to conspire.

The plaintiff asserted that Foodmaker and its franchisees were separate competing entities because the franchisees had the ability to vary their prices. The court summarily dismissed this argument, stating that "the inference that the franchisees are competing entities, simply because they are able to vary their prices, is not justifiable."⁴⁸

The plaintiff also argued that Foodmaker and Fischer were capable of conspiring because they were separately incorporated entities but not a parent and subsidiary. The court rejected this claim, too, holding that the "mere formality of separate incorporation is not, without more, sufficient to provide the capability to conspire."⁴⁹ The court continued:

For two separate corporations to act as a single entity, it is not necessary that one be owned, wholly or in part, by the other corporation. The presence of a parent and subsidiary relationship is not an essential element. The emphasis is properly placed upon the commonality of interest of the corporations and the degree of control exercised by the dominant corporation. As previously noted, the franchisor does everything in its power to minimize competition and promote uniformity between franchisees. This is for the benefit of both the franchisees and the franchisor. As the Jack-in-the-Box restaurants prosper because of the uniformity of quality food and

service, each franchise benefits from an enhanced reputation which results in an increase in business, as does the franchisor who is able to sell more franchises at a higher price. Additionally, their economic unity of interest continues beyond the payment by the franchisee of the licensing fee. The franchisor continues to receive both a royalty fee and a marketing fee based upon a percentage of the restaurants' gross sales.⁵⁰

The plaintiff next contended that Foodmaker and Fischer were not operating as a single entity and were capable of conspiring because the franchise agreement labeled Fischer an "independent contractor." The court dismissed this argument as well: "Whatever label the parties choose to attach to their relationship it is clear that Foodmaker exercises almost complete control over all of the decisions [a]ffecting the operation of the restaurant."⁵¹

The court concluded that Foodmaker's "plenary control, in addition to Foodmaker's and Fischer's common economic goals, make them a single enterprise, incapable of competing for purposes of Section 1 of the Sherman Act,"⁵² and therefore granted the defendants' motion for summary judgment on the plaintiff's Section 1 claim.

The Ninth Circuit affirmed in a per curiam opinion, holding that "Fischer and Foodmaker are incapable of conspiring" because they were a "common enterprise."⁵³

Hall v. Burger King Corp.

The next court to conclude that a franchisor could not conspire with its franchisees was the U.S. District Court for the Southern District of Florida. In *Hall v. Burger King Corp.*,⁵⁴ a purported class of past and present Burger King franchisees of Black, Hispanic, Asian, and Indian descent alleged that Burger King Corp. (BKC) had conspired with its white franchisees to allocate markets for the sale of franchises, in violation of Section 1 of the Sherman Act. After the district court denied class certification, only one plaintiff, Samuel Lee Price, pursued the Section 1 claim against BKC. The district court granted BKC's motion for summary judgment:

Price is unable to proffer even a scintilla of evidence which establishes the existence of the purported conspiracy alleged in his complaint. . . . *Even if there were a scintilla of evidence which supported Price's conspiracy claim it still would fail because BKC and its franchisees are incapable of conspiring with each other. See Williams v. Nevada*, 794 F. Supp. 1026, 1032 (D. Nev. 1992) (given the commonality of interest between franchisor and franchisee, and the franchisor's degree of control, the defendants were a single enterprise, incapable of conspiring for purposes of Section 1 of the Sherman Act), *aff'd*, 999 F.2d 445 (9th Cir. 1993).⁵⁵

Thus, in the *Hall* court's eyes, the *Williams* holding embodied a general legal principle applicable in all circumstances, including an allegedly racially motivated conspiracy: A franchisor and its franchisees are a single entity that cannot, as a matter of law, be guilty of a section 1 conspiracy.

Search International v. Snelling & Snelling

*Search International v. Snelling & Snelling*⁵⁶ is the third case holding a franchisor incapable of conspiring with its franchisees. Snelling & Snelling is a franchisor of career and

temporary personnel staffing businesses. In addition to selling franchises, Snelling also operates corporate stores. Search International was a Snelling franchisee that wanted to expand by opening a franchise in Richardson, Texas. When Snelling refused to permit Search to expand into Richardson because Snelling already operated a corporate store there, Search sued, alleging among other things a violation of Sherman Act Section 1.

The U.S. District Court for the Northern District of Texas granted Snelling's motion to dismiss for failure to state a claim, holding that: "Snelling and its franchisees constitute a 'single economic unit' incapable of conspiring under Section 1."⁵⁷ The court noted that "at least three courts have held that a franchisor is incapable of conspiring with its franchisee under the *Copperweld* rationale,"⁵⁸ citing *Williams, Hall*, and *St. Martin v. KFC Corp.*,⁵⁹ and asserted that each of these decisions had "followed the Supreme Court's reasoning in *Copperweld* by examining the facts of the particular relationship at issue to determine whether a 'unity of interests' existed such that concerted activity was not possible."⁶⁰

The court then concluded that:

The provisions of the franchise agreement that the Plaintiffs cite in the Amended Complaint inextricably link the economic interests of Snelling and its franchisees and create a relationship in which Snelling maintains almost complete control. For example, Snelling owns all of the improvements, enhancements, advertising, public relations programs, or inventions developed by its franchisees as well as all goodwill associated with Snelling's proprietary marks. In addition, all clients of a Snelling franchise are automatically clients of Snelling, and franchise clients pay Snelling directly for all services rendered by the franchise. Lastly, Snelling controls where its franchises are located and who its franchisees can compete with.⁶¹

The court rejected Search's argument that a conspiracy was possible because Snelling's corporate stores competed with its franchisees and therefore had distinct interests, on the ground that there was no evidence of any actual competition between the corporate stores and franchises. The court reasoned, moreover, that any competition that might exist between the corporate stores and the franchises was insufficient to negate the many common interests created by the franchise agreement.⁶²

The *Search* court then held that, even if Snelling were capable of conspiring with its franchisees, there was no evidence of any such conspiracy here, because Snelling's behavior was "entirely unilateral."⁶³ Snelling's decision to prevent Search from opening a franchise in Richardson, Texas, i.e., the decision that allegedly hindered competition, was Snelling's alone and did not involve any agreement with anyone.

The Fifth Circuit affirmed the district court's decision without opinion.⁶⁴

A Critical Look at *Williams, Hall*, and *Search*

Even this brief consideration of *Williams, Hall*, and *Search* raises many obvious questions: Were these cases correctly decided, and, if so, can they be reconciled with *Perma Life*

Mufflers' apparently contradictory holding and *Copperweld*'s arguable reaffirmation of this aspect of *Perma Life*? How broadly can or should the cases be read? Do they represent the current state of franchise antitrust law, and, if so, what can be made of the many decisions that have seen no barrier to analysis of franchise conspiracy challenges under the Sherman Act both before and since these cases were decided?

A number of thoughts come to mind.

First, perhaps most notable about *Williams* and *Hall* is that neither the district courts nor the Ninth Circuit mentioned *Copperweld*, even though it was decided eight years before the district court's *Williams* decision and eleven years before *Hall*. At the very least, this calls into question the thoroughness of the courts' analyses. The absence of any *Copperweld* citation is most remarkable in *Williams*, given the district court's explicit rejection of the plaintiff's position that separate incorporation and the lack of a parent/subsidiary relationship between Foodmaker and Fischer were evidence of their ability to conspire,⁶⁵ an argument that squarely implicates *Copperweld* and its progeny.

Second, none of these cases mentioned *Perma Life Mufflers*, even though it is the U.S. Supreme Court's most direct discussion of the franchise conspiracy issue. As noted above, that discussion was dicta, to which the *Copperweld* court, in its desire to distinguish *Perma Life Mufflers*, arguably added credence and strength, and it is difficult to predict whether the U.S. Supreme Court, if faced with the question of franchisor/franchisee conspiracy today, would adopt *Perma Life Mufflers*. Nevertheless, that none of these decisions even acknowledged the case again bespeaks the limitations of their analyses.

Third, in an apparent eagerness to articulate categorical principles rather than rule on the unique facts of each case, the decisions miss the trees for the forest. Harkening back to pre-*Copperweld* decisions on the intra-enterprise conspiracy doctrine,⁶⁶ *Williams* recognized that determining two entities' ability to conspire is a fact-intensive inquiry, and that the outcome will vary with the facts. But the court then made sweeping statements about "franchises"⁶⁷ in general, without considering perhaps the most important fact—the relationship between the particular restraint that the plaintiff challenged (the no-switching clause) and the parties' franchise relationship. This imprecise approach made it easier for later decisions to apply the *Williams* holding to other franchise systems with very little discussion or analysis. For instance, the *Hall* court does not even purport (in this part of its analysis) to consider *any* facts concerning the specific relationship between BKC and its franchisees, and merely cites *Williams* for the one-sentence proposition that franchisors and franchisees cannot conspire under Section 1, period.⁶⁸ This is certainly not the fact-intensive inquiry that *Williams* claimed to be central to the analysis.

Fourth, holding that the franchisor was incapable, as a matter of law, of conspiring with its franchisees was not necessary to the outcome of any of these cases. In *Hall*, for

example, the district court first held, on the specific facts of that case, that no conspiracy existed among BKC and its franchisees. The district court's alternative pronouncement that BKC and its franchisees were incapable of conspiring as a matter of law was thus dicta.⁶⁹ Similarly, in *Search*, the district court engaged in a lengthy discussion of *Copperweld* and a franchisor's capacity to conspire with its franchisees only to hold that, even if Snelling and Search were legally capable of conspiring, there was no evidence of any such conspiracy on the facts of the case.⁷⁰ Also, while the *Williams* decision turned entirely on the court's conclusion that Foodmaker and Fischer were incapable of conspiring, given the procedural posture of the case (a summary judgment motion) the court could well have avoided this outcome by deciding the case on the undisputed facts.⁷¹

Finally, the opinions in these three cases simply do not consider the implications of their holdings. They do not try to reconcile the idea that franchisees and franchisors cannot conspire for Section 1 purposes with the plethora of federal court cases before and since that have at least considered Section 1 claims against franchisors (and, to a lesser extent, franchisees) on their merits.⁷² The decisions also do not consider the nonantitrust ramifications of treating franchisors and franchisees as a "single economic unit."⁷³ The law of agency is probably the clearest example of this problem. Franchising vicarious liability cases generally focus on the degree of the franchisor's control over its franchisees.⁷⁴ If courts considering vicarious liability claims adopted the definition of the franchise relationship found in *Williams*, *Hall*, and *Search*, it is difficult to imagine how any franchisor could ever again avoid liability for claims based on the conduct of franchisees or their employees.

For these and other reasons, the few courts and commentators that have given these decisions any attention have not been bashful in their criticism. In a 1995 article, for example, Professor Stephen Calkins identified what he saw as the essential illogic of the *Williams* decision:

Williams reasoned, from the extensive control embodied in a franchise agreement, that the agreement itself was not a Sherman Act conspiracy. The bootstrapping nature of this reasoning is evident . . . [The court] came too close to concluding that only competitors can conspire. *Williams* emphasized that franchisees compete neither with each other nor with their franchisor. . . . Unless the opinion is to be read as ending *sub silentio* Sherman Act scrutiny of tying, exclusive dealing, franchisor-franchisee pricing, and other vertical restraints, *Copperweld* cannot limit Sherman Act coverage to agreements among competitors. A court should be cautious about concluding that a franchisor and franchisee . . . are legally incapable of conspiring.⁷⁵

Similarly, the First Circuit, considering whether *Copperweld* ought to extend to sports leagues, recently observed that *Williams*, *Hall*, and *Search* each "avoided the section 1 inquiry by deeming franchisor and franchisee part of a single entity," but that "[t]he criteria suggested in these cases are so general and so various (unity of interest, lack of existing competition, extent of control) as to emphasize the lack of any developed body of law."⁷⁶

Antitrust Implications for Franchising

Although *Williams*, *Hall*, and *Search* leave much to be desired, they may have been headed in the right general direction. Underlying the courts' sweeping pronouncements is the inchoate recognition that franchising simply cannot function—and deliver all of the benefits that it provides to franchisors, franchisees, consumers, and the economy at large—without numerous restrictions on franchisee independence. At a minimum, this essential reality ought to inform the analysis of antitrust challenges to restraints imposed by franchisors, even if it is not automatically dispositive of those challenges.⁷⁷

In franchising generally and particularly in business format franchises, the franchisor necessarily imposes significant limitations on franchisee operations.⁷⁸ Business format franchisors must constantly work to ensure consistency across their franchise units to a far greater extent than in most independent distribution networks. Recognizing that many purchasers of business format franchises have never run a business before, the franchisor initiates the franchise relationship with intensive training on all aspects of the business. The franchisor then closely monitors the franchisees' compliance with each of the mandates of the franchise system over the life of their operation of the franchise.

The franchisor prescribes such factors as the "look and feel" of the franchise; the required equipment and supplies used in each franchise to create, display, or market the end product to the consumer; the specifications for that end product; record-keeping methods; and systems of cost control, promotion, and advertising. Each of these component parts of the business format franchise is an inseparable part of the package that the franchisees buy when they sign the franchise agreement and pay the franchise fee and royalties. Franchisees do not simply buy a trademark license and run the business as they see fit, and they also do not choose to take certain parts of the system and eschew others.

Requiring every franchisee to operate within the confines of the prescribed business format benefits the franchisor and franchisees alike. Among other things, it ensures that the business is identified with a network of stores whose very uniformity and adherence to prescribed standards attracts customers, and, at least in systems with a proven track record, allows the franchisee to buy into a system whose tested business methods greatly increase the chances for success.

For these reasons, it makes no sense to think of the individual components of the system, each specifically identified, classified, and mandated in the relevant franchise system documentation, as distinct and separable elements that franchisees select and reject at will. To the contrary, these components together make up the essence of the complete business method being franchised. Likewise, applying the logic if not the holding of *Copperweld*, it is not sensible for antitrust purposes to view individual franchisees as wholly independent entities fully separable from the franchisor to whom they have, for the duration of their contractual relationship, hitched their star.

One way to acknowledge these special attributes of a fran-

chise relationship is to appreciate that at least certain required purchases under a franchise agreement are not separate products for purposes of tying law, and some recent courts have (properly, in our view) so held.⁷⁹ U.S. Magistrate Judge William Garfinkel, in his recommended ruling in *Subsolutions, Inc. v. Doctor's Associates, Inc.*,⁸⁰ made this point explicitly, in rejecting a preliminary injunction motion brought by a computerized point-of-sale (POS) system vendor against Doctor's Associates, the Subway franchisor. The vendor claimed that Subway had unlawfully tied franchisees' continuation of the franchise to the purchase of another vendor's POS system. Magistrate Garfinkel disagreed. Among other things, he held, in a ruling adopted in full by the district court, that the POS system is integral to, and therefore inseparable as a matter of tying law from, the franchise itself:

Unlike other business relationships which involve the delivery of products and services, here DAI's own operations and revenue are inextricably linked with those of the franchisee. . . . DAI's program for record-keeping and reports, custom-tailored to the Subway system[,] is a vital organ of the franchise format: the mandatory paperwork and controls guide franchisees in managing their businesses; permit DAI to monitor the operations of individual franchisees; and allow DAI to enhance the efficiency, profitability and competitiveness of the entire franchise system.⁸¹

Magistrate Garfinkel's point extends beyond the world of tying. At least where the franchisor's exercise of control and oversight is directly tied to one of the essential elements of the particular franchise relationship, that is a necessary and desirable aspect of franchising itself, not the stuff of antitrust conspiracy.

This does not mean that courts should embrace the categorical approach of *Williams*, *Hall*, and *Search*. Rather, it is simply to suggest that courts considering antitrust challenges to franchise system restraints ought not ignore the realities of the franchise relationship. The facts and circumstances of each case, and the specific franchise agreement at issue, are of paramount importance in determining whether the restraint offends antitrust law and policy—not because franchisors and franchisees are under all circumstances “incapable” of conspiring, but simply as part of the rule-of-reason balancing test for evaluating every vertical restraint.⁸²

Thus, a court could well find that a franchisor is establishing the features to the particular franchise relationship by defining the types of products to be sold by its franchisees, mandating that franchisees not engage in competing enterprises, maintaining the uniformity of essential inputs into the system, or all three—and reject an antitrust challenge to those restrictions on these bases. In contrast, the argument that price fixing (whether resale or horizontal) is integral to any franchise would be considerably more difficult to sustain. Broader generalizations are hard to make, however, precisely because the end result in particular cases will vary based on the facts.⁸³

Conclusion

Copperweld instructs that “a business enterprise should be free to structure itself in ways that serve efficiency of control,

economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.”⁸⁴ This principle is eminently applicable to franchising. Franchisors should not be subject to increased antitrust liability (or, on the other hand, exempt ab initio from antitrust scrutiny) simply because they chose the advantages, and assumed the risks, of a franchise system. Rather, that a particular restraint is central to the functioning of an efficient franchise system ought to be viewed as an important—even, perhaps, presumptively legitimate—business justification to be taken into account in the calculus that is the antitrust rule of reason. But franchising restraints are neither inherently angelic nor inherently suspect under the antitrust laws, although our jobs might be considerably simpler if they were.

Endnotes

1. Kim A. Goodhard and Jay Conison, *Franchisor and Franchisee Were Incapable of Conspiring to Restrain Trade*, 12 *FRANCHISE L.J.* 77 (1993), citing *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026 (D. Nev. 1992).

2. *See Search Int'l v. Snelling & Snelling*, 168 F. Supp. 2d 621 (N.D. Tex. 2001); *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1548 (S.D. Fla. 1995). Both *Williams* and *Search* were affirmed. *See Search Int'l v. Snelling & Snelling*, 31 Fed. Appx. 151 (5th Cir. 2001) (without opinion); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447 (9th Cir. 1993).

3. The existence of a conspiracy is not a prerequisite under other antitrust statutes, such as Section 2 of the Sherman Act, which regulates monopolistic behavior, the Robinson-Patman Act, which prohibits certain price discrimination, and Section 3 of the Clayton Act, which prohibits exclusive dealing and certain tying arrangements. Therefore, claims under these statutes could proceed against franchisors and franchisees even if the “incapacity to conspire” cases were entirely correct.

4. 467 U.S. 752 (1984).

5. *See supra* note 2.

6. 467 U.S. at 752.

7. *Id.* at 758.

8. The jury had been instructed to consider many factors weighing on the issue of corporate separation, including whether Copperweld and Regal had separate management staffs, separate corporate officers, separate clients, separate records and bank accounts, and/or separate corporate offices. *Id.* at 759 n. 2.

9. *See Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 318 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984).

10. *Copperweld*, 467 U.S. at 771.

11. *Id.*

12. *Id.* at 771–72.

13. *Id.* at 772.

14. *Id.* at 759. *See, e.g.*, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (holding that “[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws”); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) (rejecting argument that two wholly owned subsidiaries of a liquor distiller could not conspire because they were “mere instrumentalities of a single manufacturing-merchandizing unit”); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227–28 (1947) (“the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act”). *See also* discussion of *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968) *infra*.

15. *See Copperweld*, 467 U.S. at 760–66. The Court distinguished each of the cases in turn, and then concluded that: “In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role

in the Court's Sherman Act holdings." *Id.* at 766.

16. *See, e.g.*, Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345, 345 (1995) (noting that *Copperweld*'s "outcome was relatively uncontroversial, and several more celebrated antitrust opinions stole the spotlight of attention and analysis" that year).

17. 384 U.S. 127 (1966).

18. *Id.* at 140.

19. *See, e.g.*, Rossi v. Standard Roofing, 156 F.3d 452, 456, 462 (3d Cir. 1998) (applying *General Motors* to alleged horizontal group boycott of plaintiff by fellow distributor-competitors and their principal manufacturer-supplier); *In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 362 (D.N.J. 2001) (citing *General Motors* for proposition that "a group of horizontal competitors who induced the manufacturer to boycott sales to a price discounter constitute a horizontal group boycott").

20. 392 U.S. 134 (1968).

21. BLACK'S LAW DICTIONARY 791 (6th ed. 1990) ("[I]n a case of equal fault or guilt."):

22. *Perma Life Mufflers*, 392 U.S. at 138.

23. *Id.*

24. *Id.*

25. *Id.* at 141-42 (citing *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947)).

26. *Id.* at 142 (citations omitted).

27. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984).

28. *See, e.g.*, *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669-70 (7th Cir. 1985) (holding that *Perma Life Mufflers*' principle that a franchisor may conspire with its franchisees "survived *Copperweld*," and noting that *Copperweld* "rejected an alternative holding in *Perma Life* that an agreement among jointly owned corporations satisfied the combination requirement of § 1, but expressly refrained from disturbing the holding we quoted above"); *see also* *Western Duplicating, Inc. v. Riso Kagaku Corp.*, 2001-1 Trade Cas. (CCH) ¶ 73,135 (E.D. Cal. 2000) (noting that *Copperweld* overruled *Perma Life Mufflers* "on other grounds," and applying the principle that a franchisor may conspire with its franchisees); *Arno Park, Inc. v. Yogurt Ventures U.S.A., Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,825 (W.D. Mo. 1994) (in franchisee's Section 1 tying claim against franchisor, citing *Perma Life Mufflers* as evidence that there can be a conspiracy even when the franchisee complies unwillingly).

29. The *Copperweld* Court said that

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

Copperweld, 467 U.S. at 767.

30. *See, e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 139 (3d Cir.), *cert. denied*, 122 S. Ct. 506 (2001) (rejecting claimed conspiracy between AT&T and two of its wholly owned subsidiaries under *Copperweld* because "only anti-competitive actions between competitors give rise to Sherman Act liability"); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) ("we conclude that two subsidiaries wholly owned by the same parent corporation are legally incapable of conspiring with one another for purposes of § 1 of the Sherman Act"); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988) ("the actions of a parent corporation, its subsidiaries or sister corporations, and its employees cannot be considered concerted action"); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987) ("two subsidiaries which are wholly-owned by the same parent are . . . not separate enterprises"); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (because subsidiaries share a common purpose with their parent, they cannot conspire with their parent; "[b]y the same token, neither can they

conspire with one another"). *See also* VII PHILLIP E. AREEDA AND HERBERT HOVENCAMP, ANTITRUST LAW ¶ 1464f (2d ed. 2003).

31. The inability of sister corporations to conspire has arisen in at least one case involving franchisees. In *Carlock v. Pillsbury Co.*, 1993-1 Trade Cas. (CCH) ¶ 70,282 (D. Minn. 1988), plaintiff Haagen-Dazs ice cream franchisees sued franchisor Pillsbury Corp. and its wholly owned subsidiaries, The Haagen-Dazs Shoppe Company, Inc., and The Haagen-Dazs Company, Inc. Plaintiffs asserted a Section 1 claim based on defendants' alleged conspiracy to engage in unfair competition, unfair trade practices, and restraint of trade. The district court first held, as a straight application of *Copperweld*, that Pillsbury could not conspire with its wholly owned subsidiaries. *Id.* at 70,433. The court then held that the Haagen-Dazs subsidiaries were incapable of conspiring with each other because they pursued "common interests." *Id.* The court rejected plaintiffs' argument that the subsidiaries did not pursue common interests because one focused on administration of the Haagen-Dazs franchise system, while the other focused on distribution of Haagen-Dazs ice cream products to nonfranchised retailers. *Id.* The court did not consider whether plaintiff franchisees were capable of conspiring with their franchisor Pillsbury and its wholly owned subsidiaries; thus, the court did not address whether the *Copperweld* doctrine covers franchises qua franchises.

32. *See, e.g.*, *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1133 (3d Cir. 1995) (parent company owning 99.92% of subsidiary's stock incapable of conspiring with subsidiary); *Leaco Enters., Inc. v. General Elec. Co.*, 737 F. Supp. 605, 608 (D. Or. 1990) (unity of purpose found based on 91.9% stock ownership); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987) (97.5%-owned subsidiary cannot conspire with parent).

33. *See, e.g.*, *Direct Media Corp. v. Camden Tel. & Tel.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (finding no conspiracy between parent and 51%-owned subsidiary); *Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 765-66 (D.N.J. 1995) (parent cannot conspire with 70%-owned subsidiary); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 706 (N.D. Cal. 1994) (parent and 80%-owned subsidiary cannot conspire); *Viacom Int'l, Inc. v. Time, Inc.*, 785 F. Supp. 371, 374, 384 (S.D.N.Y. 1992) (no conspiracy where parent owned 82% of subsidiary's stock and controlled 93% of voting power); *Novatel Communications, Inc. v. Cellular Tel. Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412, at 62,173 (N.D. Ga. 1986) (parent and 51%-owned subsidiary cannot conspire); *see also* *Fresh Made, Inc. v. Lifeway Foods, Inc.*, 2002 WL 31246922, at *7 (E.D. Pa. Aug. 9, 2002) (noting, in dicta, that even a 20% shareholder could benefit from the *Copperweld* rule where it "controls or exercises significant and substantial influence over" the other company).

34. 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986).

35. *Id.* at 62,173.

36. *See, e.g.*, *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1495 n.20 (3d Cir. 1985) (*Copperweld* does not apply when parent owned 79% of subsidiary's equity stock); *Am. Vision Ctrs., Inc. v. Cohen*, 711 F. Supp. 721, 723 (E.D.N.Y. 1989) (54% ownership insufficient to render parent incapable of conspiring with majority stockholder); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1485 (D. Or. 1987) (97.5%-owned subsidiary cannot conspire with parent, but subsidiaries owned by only 60% and 75% can conspire with parent because "only corporations which are owned 100 percent in common, or a de minimis amount less than 100 percent, are covered by the *Copperweld* rule").

37. *Compare* *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) (holding, just months after *Copperweld* was decided, that two corporations cannot conspire when the same three individuals owned, respectively, 30%, 30%, and 40% of each corporation), *with* *Fishman v. Estate of Wirtz*, 807 F.2d 520, 541-42 n.19 (7th Cir. 1986) (refusing to extend *Copperweld* to two corporations that have "common investors and [that] are under common control").

38. *City of Mt. Pleasant v. Assoc. Elec. Coop., Inc.*, 838 F.2d 268,

274–77 (8th Cir. 1988). Critical to that decision, however, was the absence of evidence that the individual members of the cooperative were actual or potential competitors. *Id.* at 276.

39. *See, e.g.,* Fraser v. Major League Soccer L.L.C. (MLS), 284 F.3d 47, 58 (1st Cir.), *cert. denied*, 123 S. Ct. 118 (2002) (rejecting application of single entity doctrine to MLS, but noting that the “trend” among recent decisions to more flexible rules “recognize[s] the need for accommodation among interdependent enterprises”); Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1387–89 (9th Cir. 1984) (holding that the teams of the NFL are not a single entity).

40. Freeman v. San Diego Ass’n of Realtors, 322 F.3d 1133, 1147–50 (9th Cir. 2003) (Multiple Listing Service operated by independent real estate associations was not immune from Section 1 liability for conspiring with real estate associations and agents because they are not a single entity).

41. A corollary to the *Copperweld* doctrine, which actually predated the decision itself, is the idea that employees and agents of a corporation cannot conspire with their corporate employer or principal. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 & n.15 (1984) (recognizing the rule without discussing its scope or application). Since *Copperweld*, the rule that agents and employees cannot conspire with their corporate employer or principal remains viable. *See, e.g.,* Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1135 (3d Cir. 1995) (sales agent); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1226 (8th Cir. 1987) (same); Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 387–88 (10th Cir. 1985) (employees). However, courts have applied the “independent stake” exception to that rule almost uniformly. *See also, e.g.,* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214–15 (D.C. Cir. 1986) (*Copperweld* does not apply where agents are capable of competing with principal); *Motive Parts*, 774 F.2d at 387–88 (employees/prospective franchisees that had independent personal stake in seeking to stabilize prices were capable of agreeing with defendant to fix prices); Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 469 (8th Cir. 1985) (sufficient evidence that agent had separate motives and acted not in agent capacity but in furtherance of his personal interests). *But see* Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 615 (6th Cir. 1990) (“We are not convinced that an agent acting with anticompetitive motives due to some independent personal stake raise[s] sufficient antitrust concerns to warrant abandoning the traditional rule that a principal cannot conspire with one of its agents.”).

42. *See, e.g.,* Ryan P. Meyers, Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U. CHI. L. REV. 1401, 1414–27 (2001) (discussing the various extensions of *Copperweld* and arguing that it properly should be applied to partially owned subsidiaries only when the parent exercises both economic and voting control over the subsidiary); Ruth Barber Timm, Note, *The Intraenterprise Conspiracy Doctrine and the Pharmaceutical Benefit Management Industry: A Proposed Exception to the Copperweld Holding*, 31 VAL. U. L. REV. 309, 351 (1996) (arguing for an exception to *Copperweld* where a drug manufacturer’s relationship with its wholly owned pharmaceutical benefit management subsidiary shows that potentially anticompetitive practices threaten the industry); Calkins, *supra* note 16 (discussing the many extensions of *Copperweld* and then criticizing the First Circuit’s decision in *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994), which extended *Copperweld* beyond the Sherman Act Section 1 arena to claims under the Robinson-Patman Act); William S. Brewbaker III, *Antitrust Conspiracy Doctrine and the Hospital Enterprise*, 74 B.U. L. REV. 67, 70 (Jan. 1994) (discussing cases extending *Copperweld* to alleged conspiracies among a hospital and its staff physicians and arguing that “courts are usually wrong to view hospital decision making regarding medical staff privileges as the equivalent of decision making within a single integrated firm”); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 30 (1991) (arguing against *Copperweld*’s extension to professional sports leagues). *See also* AREEDA AND HOVENCAMP, *supra* note 30, ¶¶ 1463–78, at 239 (discussing *Copperweld* and its various exten-

sions and arguing that the multifaceted “control” tests are “too indeterminate and difficult to administer”).

43. *See supra* note 2. Other courts have discussed the issue without really deciding it. For instance, in *St. Martin v. KFC Corp.*, 935 F. Supp. 898, 906 (W.D. Ky. 1996), a franchisee brought a Section 1 claim against KFC based on the franchisor’s policy of having company stores in certain areas (here, Las Vegas) and the decision not to permit the plaintiff franchisee to expand by developing franchises in that market. The court held that there was no conspiracy at all because KFC unilaterally imposed the company town policy, and no agreement was necessary. The court cited *Copperweld*, but did not hold franchisees and KFC incapable of conspiring, instead relying on the fact that KFC implemented and enforced the challenged policies unilaterally, not pursuant to any agreement with its franchisees. Because of the language quoted from *Copperweld*, however, courts have cited *St. Martin* as holding that franchisors cannot conspire with franchisees, but that is inaccurate. *See, e.g.,* Fraser, 284 F.3d at 47, 58 n.8; Search Int’l v. Snelling & Snelling, 168 F. Supp. 2d 621, 626 (N.D. Tex. 2001).

44. 794 F. Supp. 1026 (D. Nev. 1992), *aff’d*, 999 F.2d 445 (9th Cir. 1993).

45. As the court noted several times, its ruling on this motion for summary judgment was not the first time it confronted the capacity-to-conspire issue. The court also addressed this issue in January 1991, in ruling on the defendants’ motion to dismiss for failure to state a claim for which relief could be granted. *See id.* at 1030. Unfortunately, the court’s initial analysis of the issue, which may have been more detailed and comprehensive than its ruling on the defendants’ motion for summary judgment, is unpublished.

46. *Id.* In reaching this conclusion, the court noted that it “relied extensively” on a 1982 Ninth Circuit decision, *Thomsen v. W. Elec. Co.*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 459 U.S. 991 (1982). There, the court held that AT&T and two of its subsidiaries, Western Electric and Pacific Telephone, were part of a “common enterprise” and could therefore not violate section 1. Surprisingly, however, as discussed *infra*, the court did not cite *Copperweld*, even though it was decided two years after *Thomsen* and clearly superseded *Thomsen* as the dispositive precedent.

47. *Williams*, 794 F. Supp. at 1031. The court also found dispositive the fact that the challenged arrangements did not involve anyone outside the franchise system. *Id.*

48. *Id.*

49. *Id.* at 1032.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447 (9th Cir. 1993).

54. 912 F. Supp. 1509 (S.D. Fla. 1995).

55. *Id.* at 1548 (emphasis added).

56. 168 F. Supp. 2d 621 (N.D. Tex. 2001), *aff’d without opinion*, 31 Fed. Appx. 151 (5th Cir. 2001).

57. *Id.* at 625.

58. *Id.*

59. As noted *supra* at note 43, *St. Martin v. KFC Corp.*, 935 F. Supp. 898, 906 (W.D. Ky. 1996), did not really consider the ability of franchisors to conspire with franchisees.

60. *Search*, 168 F. Supp. 2d at 626. Note again, however, that, contrary to the *Search* court’s observation, neither *Williams* nor *Hall* even mentioned *Copperweld*.

61. *Id.*

62. *Id.*

63. *Id.*

64. *See Search v. Snelling & Snelling*, 31 Fed. Appx. 151 (5th Cir. 2001).

65. *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026, 1032 (D. Nev. 1992).

66. For example, the *Copperweld* trial court instructed the jury to consider a host of facts in determining the degree of separation between the entities, and the Seventh Circuit affirmed this analysis. *See Copper-*

weld Corp. v. Independence Tube Corp., 467 U.S. 752, 758 (1984). The U.S. Supreme Court reversed, holding that in a case involving a parent and a wholly owned subsidiary, no facts are either necessary or relevant to the determination because the parent always retains ultimate control. *Id.* at 771–72.

67. *Williams*, 794 F. Supp. at 1032 (“[T]he franchisor does everything in its power to minimize competition and promote uniformity between franchisees.”).

68. *See Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1548 (S.D. Fla. 1995).

69. *Id.*

70. *Search Int’l v. Snelling & Snelling*, 168 F. Supp. 2d 621, 626–27 (N.D. Tex. 2001).

71. *See AREEDA AND HOVENCAMP*, *supra* note 30, ¶ 1468 (noting that the difference between “agreement” and “direction” will almost always lead courts, when faced with parents and nonwholly owned subsidiaries, to find, as a matter of fact, the absence of agreement because the subsidiary is simply following direction).

72. *See, e.g., Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994) (reversing dismissal of franchisee’s complaint against franchisor and others, alleging illegal customer allocation); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1482–83 (9th Cir. 1983) (reversing district court’s grant of summary judgment to defendant franchisor on Section 1 tying claim); *Collins v. Int’l Dairy Queen, Inc.*, 939 F. Supp. 875, 884 (M.D. Ga. 1996) (denying defendant franchisor’s motion for summary judgment on Section 1 tying claim).

73. *See, e.g., AREEDA AND HOVENCAMP*, *supra* note 30, ¶ 1467h, at 239–40 (“The negative implication [of holding that firms or associations are sufficiently related that they lack conspiratorial capacity] is that such firms or associations are to be treated as a single economic entity for other purposes as well.”).

74. *Compare, e.g., Butler v. McDonald’s Corp.*, 110 F. Supp. 2d 62, 66–70 (D.R.I. 2000) (denying franchisor’s motion for summary judgment on personal injury claim based on agency and apparent agency theories because of the degree of control and oversight franchisor exercised), *with Hoffnagle v. McDonald’s Corp.*, 522 N.W.2d 808, 813–14 (Iowa 1994) (granting franchisor’s motion for summary judgment in personal injury claim because franchisor’s “control over the property and the daily operation of the restaurant” was insufficient to confer liability). Several articles appearing in this *Journal* have discussed the often controversial topic of franchisor liability for franchisee actions. *See, e.g., Jeffrey A. Brimer and Bryan C. Bacon, Franchisor Liability for Gender Discrimination and Sexual Misconduct*, 20 *FRANCHISE L.J.* 188 (2001) (discussing franchisor liability under common law theories of direct liability, general concepts of agency law, and certain statutory provisions); Kevin M. Shelley and Susan H. Morton, “Control” in *Franchising and the Common Law*, 19 *FRANCHISE L.J.* 119 (2000) (discussing the role that a franchisor’s control over franchisees plays in determining its liability for the acts of its franchisees); William L. Killion and Gregory R. Merz, *Franchisor Liability for Failure by Franchisees to Comply with the Americans with Disabilities Act: Uncertain State of the Law*, 19 *FRANCHISE L.J.* 141 (2000) (noting that courts have almost universally refused to saddle franchisors with liability under the ADA for existing facilities, but noting that courts are split over franchisor liability for new construction); Gregory J. Ellis and Beth Anne Alcantar, *Franchisor Liability for the Criminal Acts of Others*, 18 *FRANCHISE L.J.* 11 (1998) (analyzing cases holding franchisors liable for criminal acts of their franchisees and third parties on the franchise premises).

75. *Calkins*, *supra* note 16, at 357.

76. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58 n.8 (1st Cir.), *cert. denied*, 123 S. Ct. 118 (2002).

77. We recognize that the distinction between franchising and independent distribution arrangements is not black and white; the various relationships often occupy a continuum of gray. Some courts have recognized this, in holding that independent distributors are “franchisees” under state franchise acts. *See, e.g., Hartford Elec. Supply Co. v. Allen-Bradley Co.*, 250 Conn. 334, 347–61 (1999) (affirming trial court’s conclusion that distribution relationship constituted a “franchise” under the Connecticut Franchise Act, CONN. GEN. STAT. § 42–133e). Likewise, the same analysis we propose here may well apply to certain distribution systems that do not necessarily define themselves as “franchisees.” That our analysis may have broad application highlights the need for a fact-intensive inquiry—looking into the nature of the parties’ relationship and the alleged restraint at issue—when determining antitrust liability in a particular arrangement.

78. For a thorough discussion of the characteristics of most business format franchisees, see, e.g., Kurt Strasser, *Big Macs and Radio Shacks: Antitrust Policy for Business Format Franchises*, 27 *ARIZ. L. REV.* 341, 346–48 (1985).

79. *See, e.g., Subsolutions Inc. v. Doctor’s Associates, Inc.*, 2002–1 Trade Cas. (CCH) ¶ 73,630 (D. Conn. 2001) (Revised Recommended Ruling on Plaintiff’s Motion for Reconsideration) (plaintiffs did not prove a likelihood of success on the merits of their tying claim because franchise and point-of-sale computer system allegedly tied to franchise were not two separate products) [Ed. Note: Ms. Wachsstock and Edward Wood Dunham, the Editor-in-Chief of this *Journal*, represented Doctor’s Associates in this action]; *Principe v. McDonald’s Corp.*, 631 F.2d 303, 309–10 (4th Cir. 1980) (rejecting claim that lease of land and building for franchise location was illegally “tied” to the McDonald’s franchise, finding that only one product—a business format franchise—existed); *see also Mozart Co. v. Mercedes-Benz of N. Am.*, 833 F.2d 1342, 1349–50 (9th Cir. 1987) (affirming district court’s directed verdict for franchisor in challenge to required franchisee purchases, accepting franchisor’s argument that “the tying arrangement is necessary to assure quality control and to protect its goodwill”). Antitrust scholar Kurt Strasser made a similar argument as early as 1985. *See Strasser, supra* note 78, at 346–58 (“[T]his contractual arrangement is one interrelated exchange and it should be so treated for purposes of antitrust policy.” *Id.* at 357).

80. 2002–1 Trade Cas. (CCH) ¶ 73,630 (D. Conn. 2001)

81. *Id.* at 93,090.

82. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (holding that vertical restraints are subject to the rule of reason after recognizing that many vertical restraints, particularly those affecting intrabrand competition and not interbrand competition, are not anticompetitive and may even be procompetitive). Following *Sylvania*, antitrust analysis of franchise restrictions must allow room for consideration of the economic and business justifications for franchising. Only then can judges ensure that the antitrust laws are enforced to prevent the conduct that they were intended to prevent without unnecessarily impeding lawful and procompetitive conduct.

83. Also (in theory, at least), a thorough consideration of the specific franchise relationship at issue and the alleged restraint on trade should make it difficult to transform a holding that a franchisor may impose certain restraints on its franchisees into the conclusion that the same franchisor is vicariously liable for its franchisees’ actions or omissions.

84. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).