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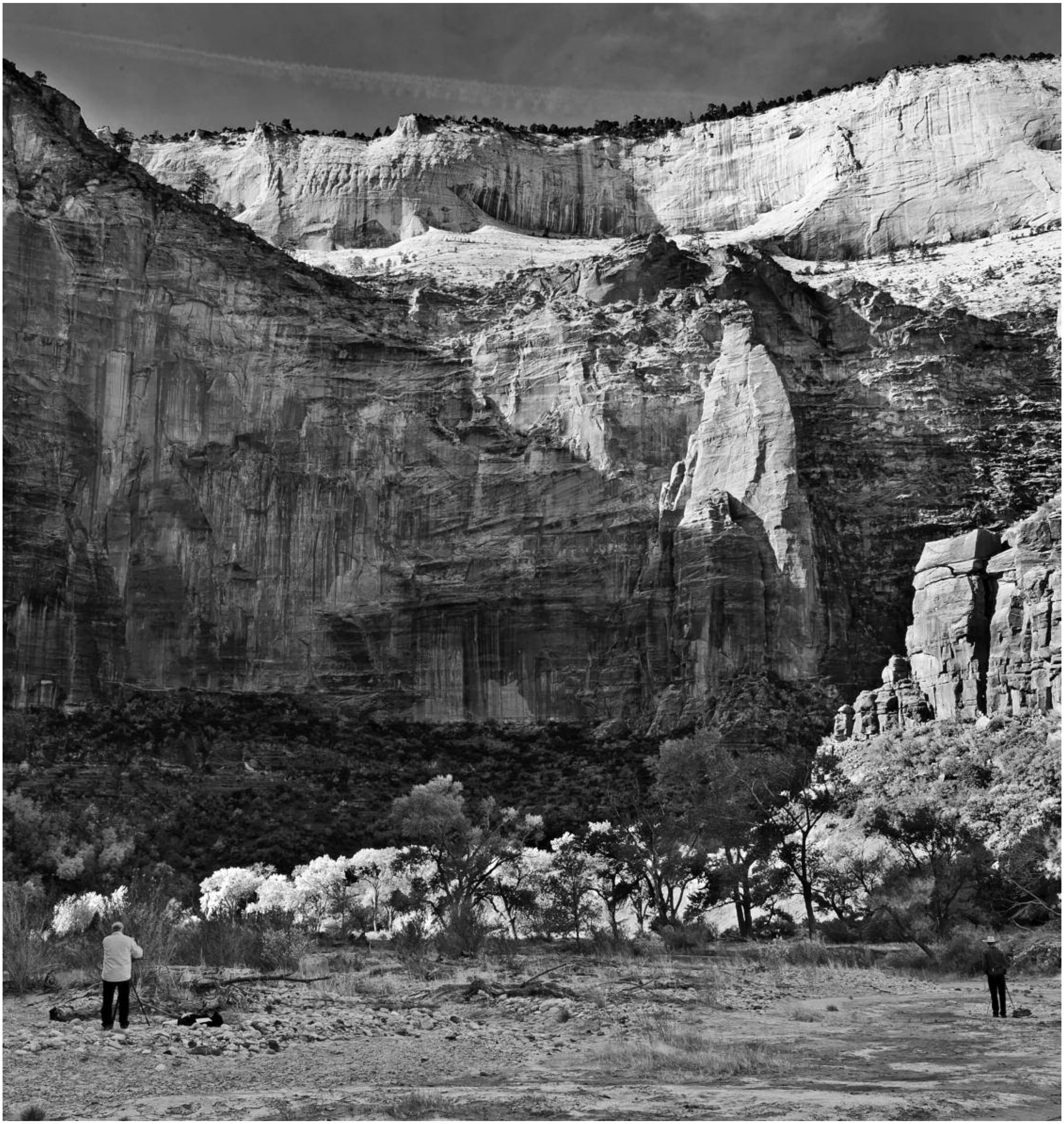

Antitrust and Expert Witnesses

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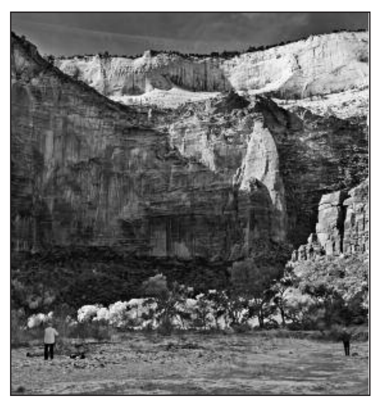

COVER: "Painting the Canyon," Zoin Canyon, Utah.
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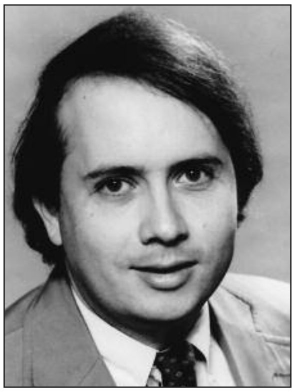

This issue of the Journal features the annual survey article on antitrust law developments, as well as Part 2 of an article by Jay Nelson on the concerted action element of a Sherman Act section 1 claim, and an article on developments in the law governing expert witnesses.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, class actions, D&O and expert witness developments. If you have an idea for a survey article in another area of business litigation, or an article focusing on a particular aspect of or development in the law (even if it falls within one of the broad survey categories), contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

ANTITRUST REVIEW 2010

By Leslie Sara Hyman

This year the Supreme Court decided one antitrust case, in which it addressed whether the NFL teams were capable of illegal concerted action. The lower federal courts in Texas considered antitrust pleading standards, the tobacco settlement, and the filed rate doctrine. There was one reported decision from the Texas state courts involving substantive antitrust issues.

Concerted Action

In *American Needle, Inc. v. National Football League*,[1] the Supreme Court considered whether, when licensing intellectual property, the 32 teams of the National Football League are separate economic actors capable of conspiring with each other or whether they constitute a single economic actor incapable of such conspiracy.

The teams had formed National Football League Properties ("NFLP") in 1963 to develop, license, and market their intellectual property. The teams are able to withdraw from the arrangement and at various times some have sought to do so. Most of the revenues generated by NFLP have been donated to charity or shared equally among the teams.

In 2000, NFLP began to grant exclusive licenses, including one to Reebok. American Needle had previously been a nonexclusive licensee but after 2000, NFLP declined to renew American Needle's license. American Needle sued, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated the Sherman Act. The defendants responded that the teams, NFL, and NFLP were incapable of conspiring within the meaning of Sherman Act section 1 "because they are a single economic enterprise, at least with respect to the conduct challenged."

The district court granted summary judgment on this point, holding that for purposes of exploiting their intellectual property the NFL defendants "have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose." The Seventh Circuit affirmed and the Supreme Court granted certiorari.

The Supreme Court explained that the inquiry was a functional one that did not rely on whether the parties involved were legally distinct entities. Members of a legally single entity are capable of violating section 1 when the entity is "controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity." On the other hand, concerted action is not found simply because more than one legally distinct entity is involved. The relevant inquiry is whether the action in question joins together separate economic interests, or "independent centers of decisionmaking," and thus deprives the marketplace of actual or potential competition.

The Court held that the NFL's 32 teams did not possess unitary decisionmaking or a single aggregation of economic power so as to render them a single economic actor. In addition to being separately, independently owned and managed, the teams compete for fans, managers, and players and compete in the market for intellectual property. The Court rejected the defendants' argument that the formation of NFLP changed this analysis. NFLP's existence as a single entity is nondispositive and "[a]n ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label." The teams' interests in licensing their team trademarks are "not necessarily aligned" and the teams, while presumably all interested in promoting the NFL brand, have distinct, potentially competing interests.

The defendants argued that their actions were immune because NFLP pursued the "common interests of the whole." The Court rejected the argument, holding that "illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties." The Court likewise rejected the defendants' reliance on the fact that NFLP had been operating since 1963 on the ground that "a history of concerted activity does not immunize conduct from § 1 scrutiny." Nor was the Court moved by the defendants' justification for their cooperation, holding that "the justification for cooperation is not relevant to whether that cooperation is concerted or independent action."

The Court acknowledged that because NFLP is a separate corporation with its own management, and because most of the revenues generated by NFLP are shared by the teams on an equal basis, the question of whether NFLP decisions can constitute concerted activity was a closer call. Absent an agreement to cooperate in exploiting their intellectual property, however, nothing would prevent the teams from making their own market decisions relating intellectual property. The Court recognized that an agreement made within a firm can constitute concerted action when the parties to the agreement act on interests separate from those of the firm. Here, the teams operating through NFLP remain potential competitors with economic interests that are distinct from NFLP's financial interests. The Court concluded that NFLP was an instrumentality of the teams in making the licensing decisions. While the teams shared in NFLP's profits or losses, competitors cannot simply create a joint venture to "get around" antitrust review.

The Court did indicate that while the defendants' actions were not immune from antitrust scrutiny, American Needle would face a nearly insurmountable hurdle on remand because the nature of the NFL would provide "a perfectly sensible justification for making a host of collective decisions." Where cooperation and restraints on competition are required to ensure survival of a business, such agreements are likely to survive the rule of reason and "depending on the concerted activity in question, the Rule of Reason may not require a detailed analysis." In the case of the NFL, the Court concluded, the interest in maintaining a competitive balance among athletic teams "may well justify a variety of collective decisions made by the teams."

***Leegin* Redux**

As reported in the 2007 Antitrust Update, the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[2] overturned 96 years of precedent to hold that minimum resale price maintenance is to be judged under the rule of reason. The case was remanded to the district court, which granted the defendant's motion to dismiss. In 2010, the Fifth Circuit affirmed the dismissal.[3]

Leegin manufactures the Brighton line of women's accessories, which are sold both in independently-owned boutiques, which purchase the goods from Leegin at wholesale, and in company stores. Leegin sold Brighton products to the plaintiff, a women's clothing and accessories specialty store. In 1997, Leegin instituted a resale price maintenance policy, which the plaintiff violated. When the plaintiff refused to stop discounting, Leegin suspended all shipments of Brighton products to the plaintiff. The plaintiff sued, alleging that Leegin had violated section 1 of the Sherman Act by entering into illegal agreements with retailers to fix the prices of Brighton products and by terminating the plaintiff as a result of those agreements.

After the Supreme Court's decision, the plaintiff filed an amended complaint alleging that Leegin's most successful retailers had "reached a consensus regarding special occasion discounts and enticements," which agreement was adopted by Leegin, that Leegin was the hub in a hub-and-spoke conspiracy, and that Leegin was involved in a horizontal price-fixing conspiracy because, acting at the retail level, it agreed on prices with other retailers. The plaintiff also alleged that resale price maintenance should be analyzed differently in the dual distribution context and thus that the rule of reason was inapplicable. The district court granted Leegin's motion to dismiss, holding that the plaintiff had failed to plead a plausible relevant market and that the plaintiff's newly-pled horizontal claims were barred by the mandate rule and failed as a matter of law.

Regarding the relevant market, the plaintiff had alleged "(1) the 'retail market for Brighton's women's accessories' and (2) the 'wholesale sale of brand-name women's accessories to independent retailers'." It claimed that Leegin had market power in these markets based on its "highly differentiated products," its large showroom at the Dallas trade show, and its alleged position as the largest among an unspecified number of manufacturers in the proposed wholesale market.

The Fifth Circuit held that an antitrust plaintiff must plead a proposed relevant market "with reference to the rule of reasonable interchangeability and cross-elasticity of demand." A proposed relevant market allegation "that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor," is legally insufficient. The court concluded that neither of the plaintiff's proposed relevant markets met this test.

While in rare circumstances, a single brand may constitute a relevant market for antitrust purposes, the court held that a single-brand market was appropriate only where consumers are "locked in" to a specific brand by the nature of the product. According to the court, the plaintiff had failed to allege any structural barrier to the interchangeability of Brighton products with goods produced by competing manufacturers and failed to properly allege that Brighton products were a submarket.[4]

The plaintiff's second proposed relevant market failed because (1) "wholesale sale" improperly focused on the distribution level, not the product; (2) the plaintiff had failed to "sufficiently" allege why Brighton goods were not interchangeable with non-brand name products;[5] (3) there was no relevance to the use of "independent retailers" in the market definition, because the plaintiff had failed to allege facts that could establish why independent retailers do not compete with larger chain stores in the distribution of Brighton products; and (4) "women's accessories" was not sufficiently specific to constitute a market over which Leegin could have power[6] and pleading a vertical restraint claim requires a plausible allegation of the defendant's market power.

The Fifth Circuit also found flaws with the plaintiff's allegations of anticompetitive harm, holding that the allegation that the RPM program forced consumers to pay "artificially" high prices for Brighton products "defie[d] the basic laws of economics." The court determined, apparently on its own experience, that a price increase by Leegin would merely cause it to lose sales to its competitors.[7] Similarly, while the plaintiff alleged that the RPM policy deprived consumers of "free and open competition in the purchase of Brighton-brand products," the court determined that interbrand competition would force "Brighton retailers to offer a combination of price and service that attracts consumers away from competing products." The court finally noted that the plaintiff had never asserted that a cartel of retailers or one dominant retailer was the "source" of the RPM program.[8] The court concluded that even accepting the plaintiff's factual allegations as true, there was no plausible allegation of harm to interbrand competition.

Because the Fifth Circuit found the plaintiff's market definition and allegations of competitive harm to be fatally flawed, it declined to address arguments made by *amicus* American Antitrust Institute that for resale price maintenance, the rule of reason amounts to a rule of *per se* legality; that resale price maintenance should be treated as "inherently suspect" because it leads to higher prices or reduced output; or that dual distribution systems should be presumptively illegal.

Regarding the plaintiff's horizontal restraint claims, the court reiterated its holding that the plaintiff had failed to allege that the retailers were the source of the price restraint and explained that a manufacturer's discussion of a pricing policy with its retailers and its subsequent decision to adjust its pricing policy does not give rise to an antitrust claim. The court rejected the plaintiff's allegation of a hub and spoke conspiracy on the similar ground that the plaintiff had not alleged that a dominant retailer imposed the RPM policy or that the retailers agreed on the policy amongst themselves. Finally, the court rejected the plaintiff's argument that a restraint by a dual distributor on its retailers should be analyzed as a horizontal restraint. Because Leegin must share its retail profits with other retailers, the court concluded that "economic logic" indicated that Leegin would increase its own profits by raising prices at the wholesale level and would "normally seek to minimize retailer margins as much as possible, including at its own retail stores."

Relevant Geographic Market

The Fifth Circuit considered whether a single multiple dwelling unit ("MDU") is a relevant geographic market in *Wampler v. Southwestern Bell Telephone Company*.[9] The plaintiffs were residents of an MDU. The MDU's owner had entered into "SmartMoves" contracts with AT&T, whereby AT&T was granted the exclusive right to provide video, voice, and broadband Internet services to MDU residents. The plaintiffs sued on behalf of themselves and a class of residents of MDUs with similar arrangements, alleging that the MDU/AT&T contracts violated the Sherman Act. The trial court granted the defendants' motion to dismiss for failure to plead a plausible geographic market.

A relevant geographic market is one "in which the seller operates and to which buyers can practicably turn for supplies." This market must "correspond to the commercial realities of the industry," including size, characteristics of the product in question, and regulatory constraints. The market must also be "economically significant," which takes into consideration the degree to which the market is affected by or independent from competition outside the market.

Applying these principles to the proposed market of a single MDU, the Fifth Circuit held that the competitive forces bearing on a SmartMoves contract for a single MDU keep such a market from being sufficiently isolated to be economically significant. First, because MDUs compete with each other for tenants, an MDU owner has an incentive to provide low cost/high quality services to attract tenants. Second, service providers such as AT&T compete with each other to provide the services contracts in each MDU and thus have incentives to provide lower-cost/higher-quality services. Finally, a prospective tenant who does not like the services provided by a particular MDU may simply chose to live elsewhere. The court concluded that given the competition between MDU owners, the competition between service providers, and "the highly mobile nature of today's society," a single MDU is not so segregated as to be economically significant and thus could not represent a plausible geographic market. The Fifth Circuit therefore affirmed the lower court's dismissal of the plaintiffs' complaint.[10]

Legislation and the Sherman Act

In *Xcaliber International Limited LLC v. Attorney General State of Louisiana*[11] and *S&M Brands, Inc. v. Caldwell*,[12] two panels of the Fifth Circuit considered antitrust challenges to the Master Settlement Agreement ("MSA") that resolved litigation regarding tobacco-related health care costs. Several states had sued the four largest tobacco manufacturers (the Original Participating Manufacturers: "OPMs"). The states alleged that the marketing and use of tobacco products cost the states billions of dollars in increased health care costs. The MSA was the result of a settlement between the OPMs and some of the governmental entities (the "Settling States"). Louisiana was one of the Settling States. The MSA released the OPMs from past, present, and future tobacco-related claims in exchange for, among other things, annual payments into an MSA fund. Non-OPM tobacco manufacturers were permitted to join the MSA as Subsequent Participating Manufacturers ("SPMs"). SPMs are also required to pay into the MSA fund, although the amount and timing of such payments varies depending on when they obtained SPM status.

Because the OPMs and SPMs would thus be required to incur costs not incurred by tobacco manufacturers who sell tobacco products in the state but did not participate in the MSA, the MSA encourages the Settling States to pass a statute (the "Escrow Statute") addressing the obligations of such Non-Participating Manufacturers ("NPMs"). Louisiana passed such a statute, under which NPMs are required to either join the MSA or make an annual deposit into a qualified escrow account based on the quantity of cigarettes the NPM sold in the state during the previous calendar year. The interest earned on the escrow account is paid out to the NPMs while the principal is held for 25 years or paid to Louisiana to satisfy a judgment against an NPM, whichever comes first.

The Escrow Statute also provides for an amount to be returned to an NPM who was deemed to have overpaid compared to OPMs and SPMs. In 2003, this provision was amended to close a perceived loophole that would have allowed certain NPMs to pay less than OPMs and SPMs (the "2003 Amendment"). The 2003

Amendment thus changed the amount released back to the NPM, not the per cigarette amount paid in.

Xcaliber, an NPM, filed suit against the Louisiana Attorney General seeking a declaration that the 2003 Amendment violated, and was preempted by, the Sherman Act. The district court granted summary judgment for the Attorney General and the Fifth Circuit affirmed.

Applying the two-step analysis of *Rice v. Norman Williams Co.*,[13] the Fifth Circuit considered (1) whether the Escrow Statute "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute"; and (2) whether the statute was saved from preemption by state action immunity. The court concluded that the 2003 Amendment did not "force or allow private parties to collude, set prices, divide markets, or in any other manner violate antitrust law" and thus, that the statute did not "mandate[] or authorize[] conduct that necessarily constitutes a violation of the antitrust laws in all cases." Nor did the 2003 Amendment "place[] irresistible pressure on a private party to violate the antitrust law in order to comply with the statute" as it does not pressure NPMs to conspire to violate the antitrust laws. The court rejected Xcaliber's argument that the 2003 Amendment violates the Sherman Act under a hybrid restraint analysis, which applies when a private price-fixing conspiracy is concealed by a purported state-administered price stabilization scheme, concluding that violations based on hybrid restraints arise when the government gives regulatory authority to private parties, which was not the case with the 2003 Amendment.

Although it found that Xcaliber failed to establish the first prong of the *Rice* test, the court nevertheless considered whether the 2003 Amendment would in any event be saved from preemption by the state action doctrine. Xcaliber alleged that the 2003 Amendment, together with the MSA and implementing statutes, implemented a cartel with the purpose of protecting the market shares of the OPMs and SPMs and driving NPMs out of business. Xcaliber further alleged that Louisiana had acted at the behest of the OPMs in enacting the legislation and thus had "attempted to authorize a private conspiracy that would clearly violate the antitrust laws but for the State's involvement."

The court concluded that Xcaliber's evidence of the OPMs' involvement in the enactment of the legislation was little more than speculation particularly when contrasted with Louisiana's articulated reasons for entering into the MSA and the 2003 Amendment, as well as the actual effect of the statute, which had already reduced cigarette consumption and reimbursement to the states for the public costs of cigarette consumption. The fact that the OPMs and SPMs may have lobbied in favor of the legislation, does not establish that the Louisiana legislature acted solely at their behest. Recognizing that lobbying efforts are protected from antitrust liability, the court concluded that it would be highly incongruous for a "legislature to run afoul of antitrust law when it passes a statute after lobbying by private parties."

The *S&M Brands* plaintiffs alleged that the MSA creates a national cigarette cartel designed to increase the prices paid out to the OPMs and protect the OPMs' market share. They further asserted that the only defense even potentially available to the Attorney General was *Parker* immunity, but that such immunity did not apply because Louisiana was acting as a private player when it agreed to restrain trade. The district court granted summary judgment in favor of the defendant.

The Fifth Circuit held that *Xcaliber* foreclosed the plaintiffs' argument that the Escrow Statute was a *per se* violation of the Sherman Act. The court then joined the Sixth, Eighth, and Ninth Circuits in rejecting the argument that the MSA and Escrow Statute working together created an antitrust violation. The plaintiffs had argued that the statutory scheme provided a disincentive for the NPMs to engage in price competition with the OPMs and SPMs. Quoting at length from the Sixth Circuit's opinion in *Tritent Int'l Corp. v. Kentucky*,[14] the court held that the plaintiffs' complaint was really with the behavior of the OPMs and SPMs following the MSA's enactment, which was neither mandated nor explicitly authorized by Louisiana's legislation. Accordingly, the court found no merit to the plaintiffs' arguments that the MSA and Escrow Statute violate federal antitrust laws.

Filed Rate Doctrine

In a *per curium* opinion in *Winn v. Alamo Title Insurance Company*,[15] the Fifth Circuit affirmed, "largely for the reasons expressed by the district court," the dismissal of claims arising from allegedly inflated prices for title insurance.[16] The plaintiffs alleged that title insurance companies had paid financial incentives to middlemen such as real estate agents that influence buyers' selection of title insurance companies and that such incentives were intended to entice the middlemen to steer business to the title insurance companies. The plaintiffs acknowledged that the Texas Department of Insurance sets rates for title insurance but argued that the alleged payments and kickbacks were not expressly prohibited by the rules of the Texas Department of Insurance. They further alleged that the title insurers included such payments and kickbacks in their expenses, which led the Texas Department of Insurance to set title insurance rates higher than they otherwise would be set. The plaintiffs argued that the defendants' conduct constituted a horizontal agreement to fix the form, structure, and price of title insurance in Texas.

The defendants moved to dismiss on the basis of the filed rate doctrine, which precludes the assertion of claims attacking as too high, unfair, or unlawful rates filed with the appropriate regulating authority. The doctrine both "prevents regulated companies from engaging in price discrimination between customers" and "preserves the exclusive role of regulatory agencies in approving rates and keeping courts, which are far less competent to perform this function, out of the rate-making process."

Relying on a case from Washington, *Blaylock v. First Am. Title Ins. Co.*,[17] the plaintiffs had argued that that the filed rate doctrine did not bar their action despite the fact that title insurers and the rates they charge are subject to a comprehensive regulatory scheme in Texas. The *Blaylock* decision, however, relied heavily on the fact that Washington courts had expressed growing skepticism of the filed rate doctrine. In stark contrast, both the Fifth Circuit[18] and the Texas Supreme Court[19] have recently recognized the continued validity of the doctrine. In addition, the *Blaylock* court found that title insurance in Washington was exempt from strict oversight and instead subjected only to superficial regulation. In Texas, on the other hand, the regulatory oversight scheme for title insurance companies is comprehensive.

The plaintiffs also relied upon *Robinson v. Fountainhead Title Group Corp.*[20] in which the plaintiff alleged that she had purchased a house through one defendant, and paid a portion of the title insurance charges to a separate defendant, which the plaintiff contended was a sham affiliated business entity jointly owned by the other defendants. The *Robinson* court concluded that the filed rate doctrine did not apply to bar the plaintiff's claims because the plaintiff was not challenging the reasonableness of the fee in and of itself, but was instead arguing she could have been charged a lesser fee on file. The *Winn* plaintiffs, on the other hand, were not alleging that they were charged more than the applicable filed rate but instead that the filed rates themselves were the product of improper conduct.

The plaintiffs' final argument was that their claims were not barred because the plaintiffs were not seeking to undo a rate, but were seeking "merely to recover damages based on defendants' illegal conduct." The trial court concluded that this characterization was inconsistent with the plaintiffs' repeated admissions that they were seeking "to recover for substantially illegal overcharges" and similar requests for relief premised on the amount paid by the plaintiffs for title insurance.

Pleading a Robinson-Patman Act Claim

In *Staton Holdings, Inc. v. Russell Athletic, Inc.*,[21] the United States District Court for the Northern District of Texas considered the pleading requirements for a Robinson-Patman Act Claim. Staton was a wholesale distributor that purchased manufacturer Russell's apparel products. Staton attempted to return over $1 million of unsold merchandise but Russell refused to accept a portion of the returned products and the following year ceased doing business with Staton. Thereafter, Staton amended an already-existing lawsuit to add a claim under the Robinson-Patman Act.[22]

Russell moved to dismiss on the ground that Staton had failed to allege two of the elements of a Robinson-Patman Act claim: contemporaneous sales at different prices and the possibility of harm to competition. Regarding the sales element, Staton alleged that Russell "discriminate[s] in price between various purchasers" by selling "identical products to numerous wholesalers, but giv[ing] preferential pricing to favored companies." The district court concluded that this assertion survived Rule 12(b)(6) because the statement that Russell "sell[s] the identical products to numerous wholesalers" permitted the reasonable inference that the sales were contemporaneous.

Regarding the harm to competition element, Russell argued that Staton had failed to allege an injury to competition beyond an alleged injury merely to Staton's own ability to compete in the market. The district court concluded that Russell was applying the wrong test; while a competitor alleging primary line price discrimination must prove more than its own inability to compete, Staton was complaining of "secondary line" price discrimination. Thus Staton could show the required competitive injury by establishing that it paid substantially more than a competitor for a given product over a sustained time, thereby establishing that it was engaged in actual competition with the favored purchaser(s) and that competition was harmed by the price discrimination.

Staton alleged that Russell sold identical goods to other wholesalers in Staton's business, that "favored companies are able to actually sell [Russell's] product at below the purchase cost of Plaintiff and other unfavored companies, and that "[t]he effect of this discrimination is to make it impossible for non-favored companies to compete with the favored companies." The court concluded that this was a plausible allegation that Staton was engaged in actual competition with the favored purchasers, and that competition was harmed by the price discrimination.

The court concluded, however, that Staton had not alleged a substantial and sustained injury. While the statement that "Russell sells the identical products to numerous wholesalers" was sufficient to plead contemporaneous sales, it said nothing about sustained sales at preferential prices. And while Staton alleged that discrimination occurred, it did not quantify the prices that were paid or the difference between the prices to favored and disfavored distributors. The court therefore concluded that Staton's claim under the Robinson-Patman Act would be dismissed.

Antitrust Standing and Antitrust Injury

Marlin v. Robertson[23] was filed by two board-certified pediatric neurosurgeons who practiced at Methodist Children's Hospital of South Texas in San Antonio. One plaintiff was the hospital's CEO from 1998 through March 2003. In the summer of 2003, the plaintiffs began to move their practice to North Central Baptist Hospital. In December 2003, one plaintiff resigned her Methodist Children's privileges and the other took a leave of absence. In August 2004, the plaintiff on a leave of absence applied to Methodist Children's for reinstatement of his privileges, but later withdrew his application. The plaintiffs also had privileges at Christus Santa Rosa Health Care until they resigned in 2000/2001. Both reapplied to Christus for their privileges in July 2004, but later withdrew the applications. In November 2004, the plaintiffs closed their practice at North Central Baptist and in March 2005, they closed their practice in San Antonio and moved to Florida.

The plaintiffs sued Methodist Children's, Christus, and various doctors and doctor groups for violations of the Texas Free Enterprise and Antitrust Act and several state court torts, alleging that the hospitals' peer review or administrative review process ultimately resulted in the plaintiffs' applications for reinstatement at Methodist Children's and for privileges at Christus being denied. The plaintiffs alleged conspiracy in restraint of free trade and monopolization of or attempts to monopolize the practice of pediatric neurosurgery in Bexar County, Texas.

The trial court granted the defendants' motions for summary judgment. On appeal, the Fourth Court of Appeals first considered the defendants' argument that the plaintiffs lacked antitrust standing. Antitrust standing requires a demonstration of (1) injury-in-fact; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit. Because the defendants had not challenged the first element, the court determined whether the plaintiffs' alleged injury was "the type of loss that the claimed violations . . . would be likely to cause." The court rejected the defendants' argument that the plaintiffs were required to show at the standing stage that the defendants' conduct affected the prices, quality, or quantity of a specific product within a relevant market. That analysis, the court concluded, overlooked the distinction between antitrust injury for purposes of standing and the effect on competition necessary to prevail on the merits. Quoting the Fifth Circuit's decision in *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*[24], the court held that "the antitrust laws do not require a plaintiff to establish a market-wide injury to competition," which often is a component of substantive liability, "as an element of standing." The court concluded that the defendants' analysis had "too narrowly focused on injury as a component of substantive liability, rather than as an element of standing," and thus that the defendants had not established their entitlement to summary judgment on the issue of standing.

Regarding the merits of the plaintiffs' claims, the defendants argued that there was no antitrust injury to the Bexar County pediatric market because the plaintiffs had chosen to leave Methodist Children's and later the city and that their privileges were never terminated, revoked, suspended, or denied. The defendants also argued that the plaintiffs could not show that any restraint on competition affected the prices, quantity, or quality of pediatric neurosurgery services in Bexar County.

The plaintiffs alleged a group boycott. The Fourth Court of Appeals first determined that *per se* analysis of this claim was inappropriate because courts typically hold that a group of physicians who decide that they do not want to make referrals to a particular surgeon have not committed a *per se* violation. The court then considered whether the plaintiffs' claims could survive a rule of reason analysis by proof that defendants' conduct had an economic effect on the relevant market.

The plaintiffs' evidence was that the former CEO of Methodist Children's had resigned that position under pressure from the defendant-doctors, that his request for a review of his charts for the purpose of clearing his name and reputation was denied, that the CEO's "forced" resignation left the other plaintiff with no choice but to take a leave of absence because he was unable to provide the required backup for emergency and on-call coverage, and that when he was able to find backup help and tried to end his leave of absence, he was informed that he would have to reapply for credentialing. He then withdrew his requests for reinstatement of his privileges because he was threatened with being reported to the National Practitioner Data Bank due to a denial of credentials. The plaintiffs also withdrew their applications for privileges at Christus because the applications were in jeopardy of being denied and thus "the threat and probability of being reported to the National Practitioner Data Bank." According to the plaintiffs, it made economic sense for the defendants to replace the plaintiffs with other doctors the defendants could more easily control. The plaintiffs alleged that the relevant product market was for pediatric neurosurgery and that the defendants' actions decreased the quality of services available to consumers because the only two remaining neurosurgeons practicing pediatric neurosurgery were not board certified in pediatric neurosurgery.

The court found no evidence of harm to competition. There was no evidence that the cost of pediatric neurosurgery had risen and the plaintiffs did not contend that prices for pediatric neurosurgery services would increase over the competitive level. The plaintiffs conceded that the Board of Neurological Surgeons considered general neurosurgeons qualified to perform pediatric neurosurgery and the plaintiffs offered no evidence that pediatric patients were unable to obtain necessary services in Bexar County or that consumers' welfare was damaged. The court concluded that the plaintiffs had failed to carry their burden of submitting summary judgment proof sufficient to raise a fact issue on whether defendants' alleged actions had an adverse effect on competition in the relevant market.

Regarding the plaintiffs' monopolization/attempted monopolization claims, the plaintiffs proffered evidence that the defendant-doctors worked to eliminate the plaintiffs from their practice and then increased their own business in the relevant market. The court concluded that evidence that the defendant-hospitals elected to hire or grant privileges to other neurosurgeons did not create a genuine issue of material fact about whether any of the defendants possessed monopoly power in the relevant market. The court further concluded that the fact that the three remaining pediatric neurosurgeons worked at the two defendant-hospitals did not create a genuine issue of material fact about whether any of the defendants had a dangerous probability of achieving monopoly power. Finally, the plaintiffs offered no evidence that the defendants prevented other pediatric neurosurgeons from entering the relevant market. The court thus affirmed summary judgment for the defendants.

ENDNOTES

1 130 S. Ct. 2201 (2010).

2 551 U.S. 877 (2007).

3 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 615 F.3d 412 (5th Cir. 2010).

4 The plaintiff had alleged that "Brighton-brand products are distinct products characterized by an inelasticity in demand, and little cross-elasticity of demand between Brighton-brand products and demand for competing products." *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, Cause No. 2:03-cv-00107-TJW, United States District Court for the Eastern District of Texas, Docket No. 147 ("PSKS Amended Complaint").

5 The plaintiff had alleged that "Leegin products are differentiated from other products by virtue of carrying the 'Brighton' brand. On its website, Leegin acknowledges and boasts of how it is different from other products: Today Brighton is the only major accessories line featuring products that coordinate from head to toe. . . . The company prides itself on the 'Brighton Difference,' which is rooted in the philosophy that the difference is in the details." The plaintiff had further alleged that "Brighton-brand products are unique. Many customers do not consider other accessories suitable substitutes for their use of Brighton-brand products." PSKS Amended Complaint.

6 The plaintiff had alleged, among other things, that Leegin "is viewed as the preferred supplier to stores offering women's accessories because of the selection and nature of the product offerings, and the fact that it has decided to offer its products through a large network of independent retailers." PSKS Amended Complaint.

7 The plaintiff had alleged that customers seeking Brighton accessories would not "substitute other accessories for Brighton-brand products, nor would they do so even in response to a significant, non-transitory increase in the price of Brighton-brand products." PSKS Amended Complaint.

8 Actually, the plaintiff had, in fact, alleged that Leegin had made changes to its pricing policies and started to enforce those policies "at the insistence of many of its most faithful retail dealers." PSKS Amended Complaint.

9 597 F.3d 741 (5th Cir. 2010).

10 *See also Whitehurst v. Showtime Networks, Inc.*, 2009 WL 3052663 (E.D. Tex. 2010) (holding that a single movie is not a relevant market nor is control over a single movie the same as control over a properly defined relevant film market.

11 612 F.3d 368 (5th Cir. 2010).

12 614 F.3d 172 (5th Cir. 2010).

13 458 U.S. 654 (1982).

14 467 F.3d 547, 557 (6th Cir. 2006).

15 372 Fed. Appx. 461 (5th Cir. 2010).

16 2010 WL 1286890 (5th Cir. 2010), affirming 2010 WL 2102332 (W.D. Tex. 2010).

17 504 F. Supp. 2d 1091, 1103 (W.D. Wash. 2007).

18 *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507 (5th Cir. 2005).

19 *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 625 (Tex. 2007); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 216-17 (Tex. 2002).

20 447 F. Supp. 2d 478 (D. Md. 2006).

21 2009 WL 4016117 (N.D. Tex. 2009).

22 15 U.S.C. § 13(a)

23 307 S.W.3d 418 (Tex. App.—San Antonio 2009, no pet.).

24 123 F.3d 301 (5th Cir. 1997).

One or More?: Two Ways to Avoid Section One at the Threshold

By Jay Nelson[1]

II. *Copperweld*: Common Ownership Criteria and the Functional Approach

In *Copperweld*, the Supreme Court modified its previous interpretation of the Sherman Antitrust Act, which had tacitly approved the "intra-enterprise conspiracy doctrine,"[2] and held that a parent corporation and its wholly owned subsidiary cannot "conspire" for purposes of section 1 of the Act. The Court focused its analysis on whether a parent and its wholly-owned subsidiary constituted one economic actor or two. After reasoning that "[a] parent and its wholly owned subsidiary have a complete unity of interest" and "common" objectives and lack separate "corporate consciousnesses" or "different interests,"[3] the Court concluded that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise."[4] Because a conspiracy under section 1 requires a "plurality of actors,"[5] the *Copperweld* defense, also known as the "single entity" defense, establishes that a parent and its wholly-owned subsidiary are legally incapable of conspiring under section 1 of the Act.[6]

Notably, however, the *Copperweld* Court expressly declined to decide whether a parent and a less-than-wholly-owned subsidiary are capable of conspiring under the Act.[7] Though its holding was narrow, the Court urged that lower courts focus on whether corporate affiliates have a complete unity of interest, rather than on corporate form.[8] The contrary holding, it reasoned, would attach serious legal consequences to a decision to incorporate that is often driven by unrelated factors like tax treatment or management structure. Accordingly, although the progeny of *Copperweld* have been inconsistent,[9] when determining how far to extend the *Copperweld* defense beyond 100% ownership courts have generally applied three verbal formulae: (1) "unity of purpose" and "unity of interest," (2) "complete control," or (3) "single-entity."

The development of post-*Copperweld* single-entity lore reached a significant checkpoint in 2008 with the Seventh Circuit's decision in *American Needle, Inc. v. National Football League*,[10] and the subsequent grant of review by the Supreme Court.[11] While the briefs and arguments of the parties provided many narrower grounds for decision than a determination of the scope of the *Copperweld* rule,[12] some of the justices' questions suggested that they might prefer to reach and adjudicate that issue.[13] In the event, the Supreme Court neither affirmed the Seventh Circuit nor clarified *Copperweld* analysis as it applies to mixed ownership situations.

American Needle was one of several manufacturers of headwear that held licenses from NFL Properties LLC to produce products in team trademarks, logos and colors. Those licenses were allowed to expire after the NFL's decision in 2000 to eliminate multiple licensing of that right and instead auction the right to a single exclusive licensee. Reebok won the auction, and American Needle sued the league, its member teams, NFL Properties, and Reebok.[14] Its theory of the case was that

> because each of the individual teams separately owned their team logos and trademarks their collective agreement to authorize NFL Properties to award the exclusive headwear license to Reebok was, in fact, a conspiracy to restrict other vendors' ability to obtain licenses for the teams' intellectual property.[15]

Several other facts are useful. American Needle did not challenge the formation of NFL Properties, only the decisions to switch from nonexclusive to exclusive licensing and to award the exclusive license to Reebok. Those decisions were made, like all important business decisions of the NFL (like franchise grants, relocations or transfers and major television contracts) by vote of the NFL's Executive Committee, on which each team has one representative. Finally, for almost 15 years, the Dallas Cowboys have enjoyed a partial opt-out from the NFL Properties joint licensing agreement, engaging in a number of separate licensing and franchising agreements.[16]

In granting summary judgment to the NFL defendants,[17] the district court reasoned as follows: (1) the NFL teams' collective licensing agreement serves to promote NFL football; (2) in doing so, the teams act as an economic unit; therefore (3) the NFL defendants lack the required plurality of actors to restrain trade.[18]

The Seventh Circuit affirmed, by a somewhat circuitous route. First, it characterized the basis for the NFL Defendants' motion as immunity from Sherman section 1 under *Copperweld*.[19] Then, it described *Copperweld* itself, never quite making clear whether its description was its own or that of the NFL Defendants:

> In *Copperweld*, the Supreme Court concluded that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes. The Court based its conclusion on its determination that the parent-subsidiary relationship did not yield the anti-competitive risks that the Sherman Antitrust Act was enacted to combat. Specifically, the Court stated that agreements between companies are generally subject to section 1 review because they deprive the market of the independent sources of economic power that competition requires. But because the parent-subsidiary relationship is always "guided or determined not by two separate corporate consciousnesses, but one," the relationship does not [deprive the market of any independent sources of economic power].[20]

Then, it noted that in later cases, federal courts had "extended the single entity concept beyond the context of a parent-subsidiary relationship …"[21] and asserted that the NFL Defendants' theory "[r]el[ied] on this gradual extension …."[22] The panel then summarized proceedings in the district court[23] and purported to begin its own "analysis" two pages later.[24]

For awhile, the court gave the impression that it might treat the matter as a "sports league" case, as it noted the difficulty of classifying organizations that appear unitary from some perspectives but complex from others.[25] Eventually, however, the court reaffirmed the stance adopted in its own earlier decision involving the Chicago Bulls NBA team:

> [W]e have…embraced the possibility that a professional sports league *could* be considered a single entity under *Copperweld*….but…we have expressed skepticism that *Copperweld* could provide the definitive single-entity determination for all sports leagues alike….This skepticism, in turn, has led us to opine that the question of whether a professional sports league is a single entity should be addressed not only "one league at a time," but also "one facet of a league at a time." Thus, in reviewing the district court's decision, we will limit our review to (1) the actions of the NFL, its member teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties.[26]

Ironically, the Seventh Court's apparent modesty about the single-entity status of leagues turned into a much less modest extension of *Copperweld*.

To reach its decision, the court first capsulized American Needle's position:

> American Needle asserts that [treating the NFL teams as a single entity because they "act" as such in licensing their intellectual property] undercuts the Supreme Court's central teaching in *Copperweld*: that the Sherman Antitrust Act was designed to combat the deprivation of independent sources of economic power in the marketplace ….
>
> Therefore, American Needle continues…the district court…should have inquired into whether the [licensing agreement] collectively deprived the market of sources of economic power that control the intellectual property. That question…can be answered by looking to whether the teams *could* compete against one another when licensing and marketing their intellectual property. If so…then it is the individual teams who actually control their intellectual property, meaning that they cannot be considered a single entity for purposes of licensing their intellectual property.[27]

The opinion responded to this stance by acquiescing in concerns about the anti-competitive effects of collective acts on and "depriv[ing] the marketplace of the independent sources of economic control that competition assumes,"[28] but demurring from the rest of the argument.

The court's grounds for disagreement are best appreciated in tabular form:

1. "[W]e are not convinced that the NFL's single-entity status…turns entirely on whether the league's member teams *can* compete with one another …."[29]

2. American Needle's position is "one step removed" from saying the NFL teams can be a single entity only if the teams have a complete unity of interest.[30]

a. We have rejected the "complete unity of interest" standard as "silly."[31]

b. "Even a single firm contains many competing interests."[32]

3. Thus, though the teams *could* have competing interests, "those interests do not necessarily keep the teams from functioning as a single entity."[33]

4. "And with that said, American Needle's assertion that the NFL teams have deprived the market of independent sources of power unravels."[34]

5. The NFL teams can function only as one source of economic power when collectively producing NFL football.[35]

6. It follows that only one source of economic power controls the *promotion* of NFL Football.[36]

7. The record establishes that since 1963 the NFL teams have acted as one source of economic power by licensing through NFL Properties.[37]

8. Nothing in section 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers; indeed, antitrust law encourages such behavior.

9. Therefore, the NFL teams are best viewed as a single source of economic power "when promoting NFL football through licensing the teams' intellectual property…."[38]

It is evident that there are several logical flaws in the opinion, but critique is not our mission here. Had it stood, *American Needle* would have established a precedent for treating affiliates as a single entity even where there is less than complete unity of interest (Step 2), where there are potentially competing interests (Step 3), and where the affiliates "have acted" as a single unit for a particular purpose (Step 7). The dilution of indicia of singleness in this fashion would have qualitatively extended *Copperweld*'s scope and made single entity status almost wholly subjective.

However, a unanimous Supreme Court reaffirmed *Copperweld*'s functional approach to single-entity status, rejecting the metaphysical labeling method employed by the Seventh Circuit.[39] That court had ruled that the league was incapable of conspiring with its teams, its joint venture in charge of managing intellectual property, and its exclusive distributors within the meaning of section 1, grounding its holding on its findings that the "the teams share a vital economic interest in collectively promoting NFL football . . . [to] compet[e] with other forms of entertainment,"[40] and that the potential for competition between the teams was of little significance because they "can function only as one source of economic power when collectively producing NFL football."[41] The Supreme Court rejected both the findings and the Seventh Circuit's implications from them.

The Supreme Court held that despite their united efforts to produce professional football, the 32 teams that comprise the NFL are separate economic decisionmakers who work in concert through their joint venture to license promotional merchandise.[42] Throughout the opinion, the Court rejected reliance on entity status, corporate structure, or ownership percentage, and instead employed an analysis that focused on the "competitive reality" of the challenged activity.[43]

Ultimately, the Court adopted a double-prong approach for determining whether an entity has conspired to restrain trade in violation of section 1. First, a court must determine whether an agreement exists "amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking . . . and thus of actual or potential competition."[44] If so, then "the entities are capable of conspiring under section 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one."[45] Chiding the court of appeals for conflating single-entity analysis with factors more appropriate to assessing liability under the rule of reason, the Court distinguished between arrangements that constitute a single economic actor from structures that, however justifiable, nevertheless involve cooperation among separate sources of economic power.[46] The Court displays some sensitivity to the organizational problems faced by unique institutions such as professional sports leagues; if some degree of cooperation between competitors is necessary to ensure the continued existence and availability of the product, then "the restraint [on competition] must be judged according to the flexible Rule of Reason."[47] But, it noted, this analysis remains separate from the determination whether more than one actor is present, which is a prerequisite to section 1 liability.[48]

Notably, the Court examined the existence of opportunities for *potential* competition in the first prong of its analysis. By focusing on the economic identity of the entities who act rather than the formal labels attached to them,[49] the Court classified entities as separate actors when, whether or not legally distinct, they also have separate interests from, and are not being used as instrumentalities by, potential competitors.[50] For example, the NFL argued that NFLP was a single entity that had acted in the common interests of the teams for numerous decades.[51] According to the Court, neither the structure nor the label associated with an agreement, nor the passage of time, may insulate that agreement from section 1 scrutiny.[52] Furthermore, the fact that "illegal restraints are often in the common interests of the parties to the restraint" does not insulate them from antitrust scrutiny, but may in fact support a court's suspicion of justifications for cooperation.[53]

The critical respect in which *American Needle* clarifies the *Copperweld* doctrine, then, is its focus on whether the challenged agreement involves *potentially* independent centers of decisionmaking which are *capable* of pursuing separate economic interests. In accord with the Act's emphasis on substance over form,[54] organizational distinctions are disregarded in favor of economic and competitive capacities.[55] The *American Needle* gloss on *Copperweld* establishes that legally distinct entities are incapable of conspiring with each other only when they "are controlled by a single center of decisionmaking and they control a single aggregation of economic power."[56]

Unlike the parent and subsidiary in *Copperweld*, professional football teams are separate and capable of competing, and thus are subject to section 1 scrutiny. Because the Court found that the teams had combined through the instrumentality of NFLP to deprive the marketplace of potential competition, the NFL may not characterize itself as a lone actor and must prove on remand that the restraint on trade is a reasonable one.[57] This final step will focus on the peculiar facts of the case and the actual or probable effect of the restraint on trade.[58]

At the circuit and district levels, because the distribution of *Copperweld* results is more balanced between applying and denying the defense than are the agency cases, the case analyses have been arranged by result, then subdivided by jurisdiction. Cases analyzing single-entity status under a top-down "totality of circumstances" approach that does not principally depend on ownership percentage are given separate treatment in Section II.C, *infra*; all of these cases must now be read in the light of *American Needle*.

A. *Copperweld Defense Applies*

All circuit courts have applied the unity of purpose or unity of interest standard to a parent corporation and its subsidiaries. Unity of purpose or interest may be established if: (1) the parent owns a substantial majority of the subsidiary's stock, *and* (2) (a) the economic objectives of the corporations are linked *or* (2) (b) one company exerts almost complete control over the other.[59] These criteria presumptively create "a single entity for antitrust purposes."[60]

1. Circuit Courts

a. Fifth Circuit

The Fifth Circuit applied the *Copperweld* defense to sister corporations under "common ownership."[61] The corporations were separately incorporated, but commonly owned by three men – two owned 30 percent of each corporation, one owned the remaining 40 percent, and all managed the corporations' affairs.[62] Applying the "unity of purpose" formula, the court focused on the economic objectives of the corporations and on the control the three principals exerted over the two corporations. Noting that the corporations had been allowed to remain separate for tax reasons and that "[a] contract between them does not join formerly distinct economic units,"[63] the court concluded that there was "no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations," and held that the sister corporations were a single entity, incapable of conspiring under section 1.[64]

Similarly, in *Hood v. Tenneco Texas Life Ins. Co.*, the Fifth Circuit applied the *Copperweld* defense to two wholly-owned sister subsidiaries of a common parent corporation.[65] The court reasoned that because sister corporations cannot conspire with their parent in violation of section 1, they therefore cannot conspire with each other.[66] The court thus held that the subsidiaries were incapable of conspiring to terminate an insurance agent's contract in violation of section 1.[67]

b. Other circuits

The Third Circuit reached a similar conclusion in *Siegel*.[68] In that case, the court combined ownership analysis with agency principles and focused on the actual control a shipper exercised over its carrier subsidiary.[69] Noting that the parent owned 99.92% of its subsidiary,[70] the court extended *Copperweld* to permit a "*de minimis*" deviation of from 100% ownership.[71] Finding the shipper to be an "inseparable part" of the carrier's management,[72] the court referred to agency cases in characterizing the entities as "one economic unit" and concluded that they lacked capacity to conspire under section 1 of the Act.[73] Notably, the court also recognized that courts have extended *Copperweld* "to situations where parental ownership was in the 80% to 91.9% range."[74]

In *Eichorn v. A T & T Corp.*,[75] the court held that an agreement reached between a parent corporation and its wholly-owned subsidiary just prior to the spinoff of the latter was, nevertheless, an "internal restriction"[76] inside a corporate family; at the time of the agreement, the parent and the sub "retained a unified corporate interest for the purpose of antitrust analysis."[77]

As an issue of first impression for the Fourth Circuit, in *Advanced Health-Care* the court held that two subsidiaries wholly-owned by the same parent were incapable of conspiring under section 1 of the Act.[78] Consulting other circuit decisions and current scholarship, the court followed their conclusion that "the total unity of the corporate enterprise is equally reflected in both the parent-subsidiary relationship and the relationship between sister corporations."[79] The court thus extended *Copperweld* to the sister corporations and held that they were legally incapable of conspiring under section 1.[80]

Likewise, in *Directory Sales Management*, one of the cases cited in *Advanced Health-Care*,[81] the Sixth Circuit applied the *Copperweld* defense to two subsidiaries that were wholly owned by the same parent.[82] The court concluded that the subsidiaries were not separate enterprises; thus, they were incapable of conspiring under section 1.[83]

The court followed *Directory Sales Management* in *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*.[84] In that case, Total Benefits alleged a horizontal group boycott against the Anthem Defendants. Noting that "each of the Anthem Defendants is wholly owned and controlled by Anthem Insurance Company, Inc., which itself is owned by WellPoint, Inc.,"[85] the court held that "[t]his 'sister' relationship between each of the Anthem Defendants makes them incapable, as a matter of law, of conspiring."[86]

The Sixth Circuit reached a similar result in *Guzowski*. In that case, the court determined that two racetracks, owned by separate corporations, but with identical shareholders, could not conspire in violation of section 1.[87] The court concluded that the corporations were "a single economic unit serving a common interest."[88]

Review of the Sixth Circuit cases reveals that the court has never applied *Copperweld* where there was not 100% ownership of the allegedly conspiring entities at some level. Thus, the Sixth Circuit has "extended" *Copperweld* only in the most limited and directly associative sense.

In *City of Mt. Pleasant*, the Eighth Circuit held that a joint venture of independently owned regional electric cooperatives formed a single entity.[89] The court focused on the "economic reality" of the arrangement and reasoned that the cooperatives operated as "a single enterprise pursuing a common goal."[90] Notably, the court opined that "legally distinct entities cannot conspire among themselves if they 'pursue . . . the common interests of the whole rather than interests separate from those of the [group] itself.' "[91] Because there was no evidence that the cooperatives had ever been "actual or potential competitors," the court applied *Copperweld* and concluded that the cooperatives could not violate section 1.[92] The first statement seems overbroad; the second surfaces again in the cases that apply *Copperweld* without regard to common ownership.

The Ninth Circuit reached a similar conclusion.[93] In *Williams v. I.B. Fischer Nevada*, the court applied *Copperweld* to a claim by an employee against a fast food franchisor and its franchisees.[94] Relying on evidence recited by the district court, the court of appeals concluded that the "plenary control" of the franchisor and the "common economic goals"[95] of the franchisor and its franchisees made them a single entity, or "a common enterprise."[96] Because the corporations were not "sufficiently independent of each other," the court extended *Copperweld* and held that the entities were incapable of conspiracy under section 1.[97] It is worth noting that the "commonality" did not rest on common ownership; in fact, the district court explicitly wrote that "[t]he presence of a parent and subsidiary relationship is not an essential element."[98]

The Ninth Circuit also applied the *Copperweld* analysis it had modified in *Fischer Nevada* and other cases to a national association of dog enthusiasts and its regional affiliates.[99] First, it noted that "[l]ower courts have since applied *Copperweld* reasoning … to a broader variety of economic relationships" than parent-subsidiary. Then, it stated that "[t]he critical question is whether the entities … maintain an 'economic unity,' and whether the entities were either actual or potential competitors."[100] After observing that the affiliates were "extensions of the national association rather than independent actors," the court concluded that the association and its affiliates "share a unity of policy, identical economic interests . . . and were never actual or potential competitors."[101] The court then applied *Copperweld* and concluded that the association and its affiliates were not capable of conspiring as separate entities under section 1.[102]

Extending the same logic of reasoning to cooperatives, in *Bell* the Tenth Circuit applied the *Copperweld* defense to an agriculture cooperative and its board members.[103] The court applied the unity of interest standard and focused on whether the actions of the members were for their own benefit or "for the benefit of the cooperative as a whole."[104] Reasoning that "the board members' internal pricing decisions benefited the membership as a whole,"[105] the court concluded that the members were "a single entity unable to conspire with itself" in violation of section 1.[106]

Last, in *Bankers Insurance*, the Eleventh Circuit similarly discussed *Copperweld* in the context of an agreement between an insurance association created by Florida law in the wake of Hurricane Andrew, and its officers and counsel.[107] After applying the unity of interest standard, the court concluded that the interests of the association and its officers and directors were "aligned." Reasoning that "agents and employees of a single entity cannot conspire to restrain trade as a matter of law," the court concluded that the association and the individual defendants were incapable of conspiring under section 1.[108] The court did not reach the single-entity issue as to the relation among the members of the association because, as a body created by the State of Florida, it was entitled to state action immunity.[109]

2. District Courts

a. Fifth Circuit districts:

District courts have primarily focused on ownership interest, resorting to qualitative single-entity reasoning as a supplement to, rather than a substitute for, a high level of common ownership. In *El Aguila Food Products, Inc. v. Gruma Corp.*, for instance, the Southern District of Texas held that a parent could not conspire with its subsidiary retailer.[110] After noting that the parent owned 80% of its subsidiary, the court held that "no conspiracy can exist between the two as a matter of law."[111] Interestingly, the court did not rely on *Copperweld*, but on a First Circuit case decided so soon after *Copperweld* that the Supreme Court's reasoning is not integrated into the First Circuit's analysis.[112]

Similarly, in *Total Benefit* the Eastern District of Louisiana applied the unity of purpose standard to affiliated corporations.[113] After observing that the same person served as president and director of both corporations, and that he owned 85% of one corporation and 100% of the other, the court concluded that the corporations shared a unity of purpose.[114] The court applied *Copperweld* and thus held that the corporations were incapable of conspiring under section 1.[115]

b. Districts in Other Circuits

The Eastern District of New York reached a similar conclusion. In *Rosen v. Hyundai Group (Korea)*, the court applied the *Copperweld* defense where a parent owned 80% of its subsidiary, and one of the parent's managing directors owned the remaining 20%.[116] The court reasoned that "the same rationale that prevents a parent and wholly owned subsidiary from conspiring with each other for the purposes of the antitrust laws" also prevents the corporations under these facts from conspiring with each other."[117] Hence, the court concluded that the two corporations formed a " 'complete unity of interest' "[118] and were, thus, incapable of conspiring under the section 1.[119]

The Southern District of New York has consistently applied the common control standard to determine how far to extend the *Copperweld* defense past 100% ownership. Common control may be established if: (1) the parent owns a substantial majority of the subsidiary's stock *and* (2) one company exerts complete control over the other. In *Viacom*, for instance, the court applied the common control standard to a parent corporation owning 82% of its subsidiary and controlling 93% of its voting power.[120] Reasoning that the corporations represented a "single enterprise," the court extended *Copperweld* and held that the corporations were incapable of violating section 1.[121]

In *Gucci*, the Southern District of New York similarly applied the common control standard to affiliated corporations.[122] In that case, all shareholders of one corporation were beneficial owners of all shares of the other corporation, and one person effectively controlled the business of both.[123] Given the common ownership of both corporations, the court concluded that they had a "unity of purpose."[124] The court thus applied *Copperweld* and held that the corporations were "incapable of conspiring with each other as a matter of law."[125]

Moreover, in *Shaw*, the Southern District of New York applied *Copperweld* to the subsidiary of a subsidiary.[126] Although at the time of suit one "corporate layer" separated the two corporations, one had previously been the wholly-owned subsidiary of the other for 29 years, and the intervening layer had been added in 1977 for further insulation of the parent from liability.[127] After reasoning that the corporations had "never been separate, competing entities,"[128] the court concluded that the alleged "concerted behavior . . . does not threaten to bring two previously competing entities together as one."[129] The court therefore held that the corporations were incapable of conspiring under section 1.[130]

Notably, in *Novatel* the Northern District of Georgia extended the *Copperweld* defense to a parent corporation and its 51% owned subsidiary.[131] Applying the common control standard, the Court reasoned that 51% ownership "assured [the parent] of full control" over its subsidiary.[132] Furthermore, 51% ownership assured that the parent "could intervene at any time that [the subsidiary] ceased to act in its best interests."[133] Hence, the court held that the subsidiary could not conspire with its parent under section 1.[134] This case marks the lowest percentage of subsidiary ownership in which a single-entity theory has been upheld.[135]

The District Court of New Jersey reached a similar conclusion in *Coast Cities*. In that case, the court applied the complete control standard to a manufacturer and two of its dealcors.[136] The court first observed that the manufacturer owned all of the voting shares of one dealcor and, at all relevant times, owned between 70% to 100% of the voting shares of the other dealcor.[137] Moreover, the court found that the manufacturer: (1) created the dealcors "to serve its own purpose," (2) "had a substantial interest in the success of each dealcor," and (3) "dictate[d] the objectives and actions of each dealcor."[138] The court therefore concluded that the interests of the manufacturer and the dealcors were "inextricably linked, "closely knit," and "mutually dependent."[139] Because the entities had "unified economic objectives and the same corporate purpose," the court applied *Copperweld* and concluded that the manufacturer and dealcors lacked the capacity to conspire under section 1.[140]

In *Bell Atlantic*, the Northern District of California applied the unity of interest standard to a parent manufacturer owning 80% of its subsidiary importer.[141] The court found 80% ownership sufficient to give the parent legal control, such that the entities acted "pursuant to the same interests and goals,"[142] and shared "a unity of interest and common corporate consciousness."[143] The court thus extended *Copperweld* and held that the corporations could not conspire under section 1.[144]

The Northern District of Illinois applied the unity of interest standard to an arrangement where the parent owned 82.3% of one subsidiary and 100% of the other.[145] The court reasoned that "a unity of interest is very likely to be found when the parent owns a substantial majority [of] the subsidiary's stock."[146] The court further opined that even if the parent's ownership interest is not strong, "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."[147] The court concluded that 82.3% ownership was enough to make the corporations "interdependent,"[148] extended the *Copperweld* defense, and found that the parent and subsidiaries were legally incapable of conspiring.[149]

B. *Copperweld Defense Does Not Apply*

1. Circuit Courts

In *Tunis Brothers*,[150] the Third Circuit declined to apply the *Copperweld* defense to a parent that owned 79% of its subsidiary's equity stock and 100% of its voting stock.[151] Indicating that it was inclined to limit *Copperweld* to its facts,[152] the court held that an inference of conspiracy between the parent and its subsidiary was "reasonable."[153] The Middle District of Pennsylvania later suggested that this stance had changed, and that *Siegel Transfer* was the controlling law.[154]

The Ninth Circuit rejected application of *Copperweld* to a joint venture between a corporation that maintained a listing service database and its local real estate associations that owned its shares, appointed its directors, and provided it with support services.[155] A single-entity may be established if: (1) the parent owns a substantial majority of the subsidiary's stock, *and* (2) the associations pursue the common interests of the whole, *or* (3) the associations are actual competitors or at least potential competitors.[156]

In applying the single-entity standard, the court first observed that the associations "have no substantial common ownership;" rather, "they are mutual benefit corporations independently owned by their respective members."[157] Moreover, the court noted that the associations did not share profits among themselves, and were, in fact, both potential and actual competitors.[158] Accordingly, the court concluded that the corporation and its associations did not "function as an economic unit in providing support services."[159] The court thus did not apply the *Copperweld* defense and found that the joint venture violated section 1 by fixing support fees.[160]

Similarly, in *Mitchael* the Tenth Circuit did not apply the *Copperweld* defense to an automobile liability insurer and its utilization subsidiary that reviewed claims for insurers.[161] The court focused on the coordinated activity of the parent and its subsidiary and concluded that "[d]espite *Copperweld*'s expansive language about the economic unity of a parent and subsidiary, the Court only held that 'the *coordinated* activity' of a parent and subsidiary must be viewed as that of a single enterprise for section 1 purposes."[162] In the absence of any direct evidence of coordinated activity, the *Mitchael* court found that the parent and its subsidiary were not a single entity for purposes of section 1.[163]

2. District Courts

As in cases approving a *Copperweld* defense, district courts rejecting the defense have focused on ownership interest. In *Sonitrol*, for instance, the District Court for the District of Columbia declined to extend *Copperweld* to American Telephone and Telegraph Company and its various incorporated subsidiaries and unincorporated entities.[164] After finding that AT&T owned only 32.6% of one subsidiary and 23.9% of the other, the court reasoned that a controlling shareholder with less than 100% ownership might lack a unity of purpose and interest with the controlled corporation.[165] Specifically, the court concluded:

> [W]hile AT&T may have undoubtedly de facto control over [its 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 AT&T, they were capable of conspiring with AT&T in violation of section 1 of the Sherman Act.[166]

The Eastern District of New York reached a similar conclusion in *American Vision Centers*.[167] In that case, the court focused on the economic power between two companies and concluded that *Copperweld* did not apply merely because the defendants owned 54% of one company, acted as its officers and directors, and owned 100% of another.[168] The court noted that although 54% ownership gave the defendants control, "the ultimate economic interests of a corporation [were] held by its stockholders, and the other 46% of the stock represented an economic interest different from that of the [defendants]." Because the companies were sufficiently separate to compete,[169] the court concluded that common ownership and majority interest were not enough to invoke the *Copperweld* defense.[170]

Likewise, in *In Re Mushroom* the Eastern District of Pennsylvania held that 50% ownership interest in one cooperative was not enough to exempt the cooperative and its members, officers, and affiliates from antitrust claims brought by a purchaser under section 1 of the Act.[171] Applying the unity of interest standard, the court concluded that "50% deviation in complete ownership and control is too significant to call de minimis."[172] Moreover, the court reasoned that although "some overlap existed in ownership between the affiliated distributors and the member growers, they were not under common control;" thus there was no "unity of interest between the growers and distributors."[173] Accordingly, the court concluded that the entities "lacked the 'complete unity of interest'" necessary to be a single enterprise.[174] Because the distributors were "not a single economic unit with their affiliated member growers," the court held that the entities were capable of conspiring.

Finally, in *Aspen Title*, the District of Oregon similarly declined to extend *Copperweld* to a parent with a 60% and a 75% interest in its subsidiaries.[175] Concluding that there was no "unity of interest" between the parent and its subsidiaries, the court held that the entities were capable of conspiring under section 1.[176]

C. *Copperweld Unbound: Unity Without Reference to Ownership*

As noted by a federal district court in 2003,

> Federal courts have used the *Copperweld* factors and the "substance, not form" mantra to extend *Copperweld* to situations other than that of parents and wholly owned subsidiaries, such as sibling-subsidiaries under the same parent corporation... [c]ertain courts have applied *Copperweld* to corporations sharing no common corporate ownership whatever.[177]

The *HealthAmerica* court identified the *Copperweld* factors to which it referred as:

> (1) the "complete unity of interest" of corporate parents and their wholly-owned subsidiaries;
>
> (2) their "common, not disparate" objectives; and
>
> (3) the direction of their actions by "one," not "separate corporate consciousnesses."[178]

As noted in previous sections, other courts have characterized these factors somewhat differently or added factors to the list (especially whether the alleged conspirators are "actual or potential competitors"[179]), but what is going on here is an attempt to develop criteria by which the unity of interest that may be presumed in the case of 100% ownership may be correctly *deemed* where sole ownership is not present. As previously noted, the most significant attempt to perform such an operation was the Seventh Circuit's opinion in *American Needle*. Despite reversal of that decision, courts will continue to offer criteria for assessment of such unity, if for no other reason than that the Supreme Court provided only minimal hints on the subject.

ENDNOTES

1 Jay Nelson is of counsel to the Houston firm Ware Jackson Lee & Chambers LLP. He works on trials and appeals in business cases and has written on antitrust, securities, federal and state civil procedure, arbitration and legal writing. He gratefully acknowledges research and drafting assistance in preparing this article from Meagan Wilder '10 and Michelle Meriam '11 of the University of Houston Law Center.

2 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760-66 (1984).

3 *Id.*

4 *Id.* at 771.
5 *Id.* at 786.

6 *Id.* at 777; *see also id.* at 737 (explaining that if a parent and its wholly owned subsidiary could be guilty of conspiracy it would " 'impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect' " (quoting *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962)).

7 *See id.* at 767 (limiting the Court's "inquiry to the narrow issue squarely presented").

8 *See id.* at 771-72 (rejecting the "intraenterprise conspiracy" doctrine because it "looks to the form of an enterprise's structure and ignores the reality.)

9 *See* Meghan K. Woodsome & Katherine S. Dumouchel, *Antitrust Violations*, 46 AM. CRIM. L. REV. 275, 291 (2009) (explaining that the *Copperweld* decision has received diverse treatment by lower courts).

10 538 F.3d 736 (7th Cir. 2008).

11 ___ U.S. ___, 129 S. Ct. 2859 (2009).

12 *See, e.g.*, 2009 WL 4919362 (Dec. 17, 2009) (Reply Brief of Petitioner); 2009 WL3844395 (Nov. 17, 2009)(Brief of Respondent Reebok Intl. Ltd.); 2009 WL 3865438 (Brief of NFL Respondents); 2009 WL 3004479 (Sept. 18, 2009) (Brief of Petitioner).

13 *See* Adam Liptak, *Justices Skeptical of N.F.L.'s Court Claim*, N.Y. Times (online), Jan. 13, 2010.

14 *See* 538 F.3d at 737.

15 *Id.* at 738. American Needle also made a monopolization claim, *see id.*, but that claim is irrelevant here.

16 *See generally* 2009 WL 3865438 at *2-7; 2009 WL 3004479 at *2-8.

17 *See* 538 F.3d at 740. Neither the opinion nor the briefs adequately explain why Reebok is not included in this statement or why it is a respondent in the Supreme Court.

18 *See id*. at 739.

19 *See id*. at 738.

20 *Id (citations omitted)*. Although the quoted material is derived from the cited portions of *Copperweld*, that derivation is insufficiently direct to justify "*id.*" citations. For one thing, the Seventh Circuit's version consistently overplays independent "power" and downplays independent "decisionmaking."

21 *Id.* (citing *Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir.2005); *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 205 (5th Cir. 2000); *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n ("Bulls II")*, 95 F.3d 593, 597-600 (7th Cir. 1996); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271, 276-77 (8th Cir. 1988).

22 *Id*.

23 *See id*. at 738-39.

24 *See id*. at 740.

25 *See id.* at 741-42.

26 *See id*. at 742 (citing *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599-600 (7th Cir. 1996)) (other citations omitted) (emphasis in the original).

27 *Id*. (emphasis supplied).

28 *Id.* at 742-43.

29 *Id*. at 743 (citing 95 F.3d at 598).
30 *Id*.

31 *Id.* (citing 95 F.3d at 598).

32 *Id.* (citing 95 F.3d at 598).

33 *Id.* (citing 95 F.3d at 598).

34 *Id*.

35 *See Id*. (citing, *inter alia*, 95 F.3d at 599).

36 *Id*.

37 *Id*.

38 *Id.* (citing 95 F.3d at 599).

39 *Am. Needle, Inc. v. Nat'l Football League*, ___ U.S. ___, 130 S.Ct. 2201 [2010 WL 2025207] (2010).

40 538 F.3d at 743.

41 *Id.* (quoting *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 743 (7th Cir. 2008)).

42 130 S. Ct. at 2211-12.

43 *See, e.g. id.* at 2209, 2212.

44 *Id.* at 2212.

45 *Id.*

46 *See, id.* at 2212-14.

47 *Id.* at 2216.

48 *Id.*

49 *See id.* at 2209-10 (citing *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967)).

50 *See id.* at 2215 (stating that NFLP is an "instrumentality" of the individual teams).

51 *Id.* at 2213.

52 *Id.* at 2213-14.

53 *Id.* at *10–11.

54 *United States v. Yellow Cab Co.*, 323 U.S. 218, 227 (1947).

55 *See, e.g., Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.,* 370 U.S. 19, 29 (1962).

56 *Am. Needle*, No. 08-661, 2010 WL 2025207, at *7.

57 *Id.* at *11–12.

58 *Id.* n. 10 (quoting *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918)).

59 *See generally Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997) (describing how lower courts have applied the "unity of interest" reasoning for antitrust purposes).

60 PHILLIP E. AREEDA, 7 ANTITRUST LAW 1467a (1986).

61 *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th

Cir. 1984).

62 *Id*.

63 *Id*. (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

64 *Id*. The court expressly limited its holding to "two corporations under common ownership." *Id.* at n.1. "The point at which the ownership of two or more corporations so loses its commonality as to furnish a plurality of actors … is not before us." *Id.*

65 739 F.2d 1012, 1015 (5th Cir.1984).

66 *Id*.

67 *Id*.

68 *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1134 (3d Cir. 1995).

69 *See id*. (explaining that "under *Copperweld*, the control a parent corporation exercises over its subsidiary is relevant, not whether a parent operates the subsidiary separately").

70 *Id.* at 1133-34.

71 *Id.* at 1133; *see generally* Stephen Calkins, Copperweld *in the Courts: The Road to* Caribe, 63 Antitrust L.J. 345, 351-55 (1995) (reviewing the lower courts' treatment of conspiracy developments under section 1 of the Act).

72 *Id.* at 1134-35.

73 *Id*. at 1135.

74 *Id*. at 1133 n.7.

75 248 F.3d 131 (3d Cir. 2001).

76 *Id*. at 139.

77 *Id*.

78 *Advanced Health-Care Serv. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir.1990).

79 *Id.* at 147 & n.12.

80 *Id*.

81 *See id.*

82 *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir.1987).

83 *Id*.

84 552 F.3d 430 (6th Cir. 2008).

85 *Id*. at 435.

86 *Id*.

87 *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992).

88 *Id*.

89 *City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op.*, 838 F.2d 268, 275 (8th Cir. 1988).

90 *See id.* (explaining that the "thrust" of the *Copperweld* decision is "that economic reality, not corporate form, should control the decision of whether related entities can conspire").

91 *Id.* at 274.

92 *Id.* at 276.

93 999 F.2d 445, 447 (9th Cir. 1993).

94 *Id*.

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

96 999 F.2d at 447.

97 *Id*. (citing *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979)).

98 794 F.Supp. at 1032.

99 *Jack Russell Terrier Network of N. Ca. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034-36 (9th Cir. 2005).

100 *Id*.

101 *Id*.

102 *Id*.

103 *Bell v. Fur Breeders Agric. Coop.*, 348 F.3d 1224, 1232 n.4, 1235 (10th Cir. 2003).

104 *Id*. 1233-34. Agricultural cooperatives are regulated under a parallel legislative regime providing partial exemption from antitrust laws. Certain misconduct, however, may lead to forfeiture of the exemption, and basic principles, like the plurality requirement for a Sherman section 1 claim, still apply. *See id.* at 1231-34.

105 *Id*. at 1235.

106 *Id*.

107 *Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F. 3d 1293 (11th Cir. 1998).

108 *Id*. at 1295-96.

109 *See id.* at 1296-98.

110 301 F. Supp. 2d 612, 628 (S.D. Tex. 2003).

111 *Id*.

112 *See id.* at 627 (citing *Computer Identics Corp. v. S. Pac. Co.*, 756 F.2d 205 (1st Cir. 1985)).

113 *Total Benefit Services, Inc. v. Group Insurance Administration, Inc.,* 1993 WL 15671 (E.D. La. 1993).

114 *Id*. at *2.

115 *Id*.

116 829 F. Supp. 41, 44 (E.D.N.Y. 1993).

117 *Id*. at 45 (citing *Copperweld*, 467 U.S. at 771-77).

118 *Id*.

119 *Id*.

120 *Viacom Int'l Inc. v. Time Inc.*, 785 F. Supp. 371, 374 (S.D.N.Y. 1982).

121 *Id*. at 384 (explaining that "concerted action by separate economic entities" is a prerequisite to a finding of liability under the Act).

122 *Gucci v. Gucci Shops, Inc.*, 651 F. Supp. 194 (S.D.N.Y. 1986).

123 *Id.* at 197. One person was president and director of one corporation *and* chairman of the board of the other corporation. *Id.*

124 *Id.* at 196.

125 *Id.* at 197.

126 *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 677 (S.D.N.Y. 1987).

127 *Id.* at 678.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Novatel Communications v. Cellular Tel. Supply, Inc.*, 1986 WL 15507 (N.D. Ga. 1986).

132 *Id.* at *6.

133 *Id.*

134 *Id.*

135 The 30/30/40 scheme of *Century Oil Tool* might be thought the lower limit, but the *Century* court analyzed the case as if the two operating companies were the subsidiaries of a holding company owned by the principals. The fact that no such entity had ever been created was considered irrelevant. *See* 737 F.2d at 1317. *Cf. Copperweld*, 467 U.S. at 770-74 (no functional distinction between incorporated subsidiary and unincorporated division).

136 *Coast Cities Truck Sales v. Navistar Intern. Trading Co.*, 912 F. Supp. 747 (D.N.J. 1995). A "dealcor" is a truck dealership initially financed by the principal defendant that may later be bought out by the dealcor manager. *See id.* at 757.

137 *Id.* at 765.

138 *Id.*

139 *Id.*

140 *Id.* at 765-66.

141 *Bell Atlantic Bus. Systems Services v. Hitachi Data Systems Corp.*, 849 F. Supp. 702 (N.D. Cal. 1994).

142 *Id.* at 707.

143 *Id.* at 706.

144 *Id.*

145 *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997).

146 *Id.*

147 *Id.*

148 *Id.* at 345.

149 *Id.*

150 *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, (3d Cir. 1985), *vacated on other grounds*, 475 U.S. 1105 (1986), *reinstated*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988).

151 *Id.* at 1486.

152 *Id.* at 1495 n.20.

153 *Id.* at 1499.

154 *See HealthAmerica Pennsylvania, Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423, 434 (M.D. Pa. 2003).

155 *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003).

156 *Id.* at 1148-49.

157 *Id.* at 1149.

158 *Id.* at 1149-50.

159 *Id.*

160 *Id.* at 1150, 1155. One commentator has praised the Ninth Circuit's analysis in *Freeman* for properly focusing (albeit in slightly different terms) on whether the related entities "join, only join, and are only equipped to join complementary assets, capabilities, or other complementary inputs." Dean V. Williamson, *Organization, Control, and the Single Entity Defense in Antitrust*, 5 J. Competition L. & Econ. 723, 742 (2009). Williamson, a Department of Justice Attorney, believes that the complementarity analysis provides objective factors by which to assess potential competition about related business entities. *See id.*

161 *Mitchael v. Intracorp, Inc.*, 179 F.3d 847 (10th Cir. 1999).

162 *Id.* at 857 (citing *Copperweld*, 467 U.S. at 771 (emphasis added)).

163 *Id.*

164 *Sonitrol of Fresno, Inc. v. AT&T*, 1986 WL 953 (D.D.C. 1986).

165 *Id.* at *3.

166 *Id.* at *5.

167 *American Vision Centers, Inc. v. Cohen*, 711 F.Supp. 721 (E.D.N.Y. 1989).

168 *Id.* at 723.

169 *Id.*

170 *Id.*

171 *In Re Mushroom Direct Purchaser Antitrust Litigation*, 2009 WL 838490 (E.D. Pa. 2009).

172 *Id.* at *11.

173 *Id.* at *11-12.

174 *Id.* at *12.

175 *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or.1987).

176 *Id.*

177 *HealthAmerica Pennsylania, Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423, 434 (M.D. Pa. 2003) (citations omitted).

178 *See id.* (quoting *Copperweld*, 467 U.S. at 771).

179 *See, e.g. Jack Russell Terrier Network*, 403 F.3d at 1035.

Expert Case Law Review 2009-2010

By Amy M. Stewart[1]

This article provides a survey of the noteworthy decisions issued by Texas state and federal courts in the past year relating to the expert witness gatekeeping function of the courts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] and *E.I. du Pont de Nemours & Co. v. Robinson*,[3] and the use of expert witness testimony.

No Objection Required to Preserve Error Where a Proffering Party's Expert's Conclusory Opinion Cannot be Considered Probative Evidence on its Face

***City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009)**

In this case the Pollocks sued the City of San Antonio alleging that landfill gases from a closed municipal waste disposal site migrated through the soil to their nearby home, reducing its value and causing the Pollocks' minor daughter Sarah to contract acute lymphoblastic leukemia ("ALL"). In support of their claims, the Pollocks hired two experts, Dr. Kraft to establish the presence of landfill gases at the Pollock's home during the period of time when Mrs. Pollock was pregnant with their daughter, and Dr. Patel, to testify that Sarah's leukemia was caused by Mrs. Pollock's exposure to the landfill gases during pregnancy.

At trial, Dr. Kraft, an engineer with experience in landfill management, attempted to extrapolate the presence of landfill gases on the Pollocks' property in 1993-94 when Mrs. Pollock was pregnant with Sarah. He used samples taken in 1998 from a sealed monitoring well located 128 feet deep, 30 feet from the Pollocks' back yard and 70 feet from their home and found the presence of landfill gases. Dr. Patel testified that Sarah's leukemia was caused by Mrs. Pollock's exposure to landfill gases when she was pregnant with Sarah. While Dr. Patel was experienced in diagnosing and treating ALL, he had personally performed no research on the causes of the disease or any connection between ALL and benzene. Rather, Dr. Patel based his opinions on Dr. Kraft's testimony and on several studies of cancer rates in workers occupationally exposed to landfill gases. None of the studies that Dr. Patel relied upon considered an exposure to landfill gases at a concentration less than 31 parts per million. Thus, the concentration level upon which Dr. Patel based his opinions was over 200 times greater than the concentration level found by Dr. Kraft.

The City objected to Drs. Kraft and Patel's findings at trial, in motions for directed verdict, at the close of evidence, and in post trial motions for judgment n.o.v. and for a new trial. In its objections, the City objected by asserting that the experts' testimony was conclusory and legally insufficient to support a judgment. The City did not, however, object to the *admissibility* of the evidence. The trial court overruled the City's objections, and the City appealed. The court of appeals affirmed the verdict, and the City filed a petition for review to the Texas Supreme Court asserting the same objections to the Pollocks' experts' testimony.

In response, the Pollocks argued that the City's objections to their experts' testimony were nothing more than a challenge to *its reliability*, to the data the experts used and the experts' methodology, but that the City failed to object to the *admissibility* of the experts' opinions. In response, the City insisted that it was not only challenging the reliability of the experts' testimony, because it agreed with much of the methodology the experts used. Rather, the City argued that there was no basis in the record to support the experts' ultimate opinions, and therefore the evidence could not support the judgment. To put it differently, the City claimed that it was asserting a legal sufficiency objection to the Pollocks' expert testimony.

The Supreme Court first addressed the Pollocks' argument that the City had waived its legal sufficiency objection because it did not assert a timely objection to the admissibility of the experts' testimony. Disagreeing, the court invoked *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004), in which the court held that a party does not have to object to preserve a no evidence challenge when the expert testimony is conclusory on its face:

> [T]here is a distinction between challenges to an expert's scientific methodology and no evidence challenges where, on the face of the record, the evidence lacked probative value. When the expert's underlying methodology is challenged, the court necessarily looks beyond what the expert said to evaluate the reliability of the expert's opinion. When the testimony is challenged as conclusory or speculative and therefore non-probative on its face, however, there is no need to go beyond the face of the record to test its reliability. We therefore conclude that when a reliability challenge requires the court to evaluate the underlying

> methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. *However, when the challenge is restricted to the face of the record -- for example, when expert testimony is speculative or conclusory on its face -- then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.*[4]

Accordingly, "if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection."[5] Applying the standard to the testimony of Drs. Kraft and Patel, the court concluded that there was no evidence to support the opinions regarding Mrs. Pollock's exposure to landfill gases and its effects on Sarah, characterizing the opinions as "naked conclusions." The Supreme Court therefore reversed the trial court and court of appeals decisions regarding the reliability and admissibility of the experts' testimony.

Joined by Justice O'Neill, Justice Medina wrote a strongly worded dissent. Disagreeing with the majority's opinion that the City was not required to object or point out the analytical gaps in the Pollocks' experts' opinions to preserve error, the dissent argued that unlike the facts in *Coastal, Pollock* was not a "legal sufficiency" case. The experts' testimony was not speculative or conclusory on its face because the experts did actually base their opinions on underlying scientific data. The dissent thus reasoned that the City's argument was either that the experts' analysis of otherwise reliable scientific data was flawed or that the underlying data itself was questionable. Under either set of circumstances, the dissent concluded that the City was required to object to the admissibility of the experts' testimony and its underlying basis to preserve error.

Finding that the City's complaints to the Supreme Court were nothing more than a "unpreserved reliability challenge," the dissenting justices were concerned that the majority's opinion "unfortunately blurs the distinction between expert testimony that *purports* to have a basis in science (unreliable expert testimony) and expert testimony that *lacks any apparent support* apart from the expert's claim to superior knowledge (conclusory expert testimony)."[6] The dissent further described the majority's decision as "unfair" and suggested that it may encourage "gamesmanship" in the future: begging the question, "Why have a pre-trial *Robinson* hearing or make a reliability objection at trial and run the risk that the proffering party may fix the problem, when the expert's opinion can be picked apart for analytical gaps on appeal?"[7]

The Proper Review of a Legal Sufficiency Claim Involving Scientific Based Evidence or Methodology Requires an Analysis of the *Robinson* Factors and a *Gammill* Examination of the Expert Testimony for Analytical Gaps

***Whirlpool Corporation v. Camacho*, 298 S.W.3d 631 (Tex. 2009)**

This products liability case involved an expert's opinions regarding a defect in the design of an electric clothes dryer. In October 2002 the Camachos purchased a used dryer and installed it in their trailer home. One evening, Ms. Camacho started the dryer and sometime later, she opened the dryer door. Later that evening, Ms. Camacho smelled smoke. She testified that she looked into the hallway, saw fire "coming from the rear part of the dryer and from inside the dryer," and began yelling to alert the family. The fire destroyed the trailer home. The Camachos' son Joab was trapped in his bedroom and was killed.

The Camachos filed suit against Whirlpool, individually and on behalf of Joab's estate, alleging that the corrugated tube in the dryer's air circulation system was defective. The Camachos supported their design defect claims with the expert testimony of Judd Clayton, an electrical engineer.[8]

Clayton opined that the fire started when the clothes in the dryer drum were ignited by smoldering lint particles. Clayton testified that the corrugated tube in the dryer allowed lint to clog the tube, causing lint to back up into the blower housing assembly, which resulted in lint particles being drawn into the heater box. As the particles passed through the heater box, they were ignited. Once ignited, the lint particles entered the drum and/or came into contact with and ignited other lint particles. As a result, once the ignited lint was in the dryer drum, it landed in the drying, tumbling clothes, and smoldered there through the remainder of the drying and cool-down cycles. Clayton concluded that once Ms. Comacho opened the dryer door, oxygen entered the drum allowing the smoldering lint and clothes to burst into flames. Whirlpool objected to the admissibility of Clayton's opinions as to design defect and safer alternative design on the ground that they were not reliable. It also challenged the legal sufficiency of the evidence to support the jury's submission of a design defect on the basis that Clayton's testimony was the only support for the submission and that his testimony "was not reliable, was based on unfounded assumptions, and was conclusory."[9] The trial court overruled these objections.

Based on Clayton's expert opinions, the jury found that a design defect in the dryer was a producing cause of the fire and Joab's death and the trial court entered judgment against Whirlpool. Regarding Clayton's opinions, Whirlpool appealed reasserting that (1) the evidence was legally insufficient to support the jury's findings of design defect and safer alternative design; and (2) the evidence was legally insufficient to support the damages awarded.

The Corpus Christi Court of Appeals affirmed the trial court's decision to overrule Whirlpool's objections and the jury's verdict. Acknowledging that Whirlpool asserted a challenge to the legal sufficiency of the evidence of design defect, the court limited its review to Whirlpool's challenge to the admissibility of the testimony because it was unreliable. Stating that "the analytical gap test is the appropriate way to analyze the Camachos' expert testimony because such testimony in the instant case is based on the experience of the testifying experts", the court of appeals only reviewed Clayton's testimony to determine whether there were analytical gaps in his testimony."[10]

The court therefore did not evaluate Clayton's testimony under any of the *Robinson* reliability factors.

In its petition for review to the Supreme Court of Texas, Whirlpool renewed its objections and asserted that the court of appeals' analysis of the legal sufficiency of Clayton's expert testimony was flawed for the following reasons. First, the court of appeals applied an abuse of discretion standard instead of using a "de novo-like" review of the entire record. Second, because the court of appeals found that the testimony was based on "the experience of the testifying experts," that court improperly limited its review to whether an analytical gap existed between the data Clayton used and his opinions. As a result, it failed to apply other relevant factors, including the *Robinson* factors, to determine the reliability of Clayton's testimony.

The Texas Supreme Court agreed with Whirlpool's objections, holding that the court of appeals did not conduct a proper legal sufficiency review, or what is referred to as a "no-evidence review" of Clayton's testimony about the alleged design defects in the dryer. The Supreme Court explained why the court of appeals' limited review of trial court's ruling was improper:

> Unlike review of a trial court's ruling as to admissibility of evidence where the ruling is reviewed for abuse of discretion, in a no-evidence review we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict. Further, a no-evidence review encompasses the entire record, including contrary evidence tending to show the expert opinion is incompetent or unreliable.[11]

Further, citing *Mack Trucks, Inc. v. Tamez*,[12] in which the Supreme Court held that the proponent of evidence must satisfy its burden to prove expert testimony is relevant and reliable regardless of the opposing party's evidence, the Supreme Court disagreed with the Camachos' argument that the reviewing court was only required to determine whether or not Whirlpool conclusively disproved that the fire occurred as Clayton testified it did:

> Evaluating whether expert testimony has been conclusively disproved by the opposing party is not the same as considering whether the proponent of the testimony satisfied its burden to prove the testimony is relevant and reliable. The proponent must satisfy its burden *regardless* of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong.[13]

Furthermore, the Supreme Court commented on the court of appeals' blind reliance on an expert's "experience" as an alternative to actual proof:

> Witnesses offered as experts in an area or subject will invariably have experience in that field. If courts merely accept "experience" as a substitute for proof that an expert's opinions are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively insulate his or her conclusions from meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions.[14]

In conclusion, the Court held that that the proper standard of review for a legal sufficiency challenge to testimony based on scientific testing and methodology, such as Clayton's opinions, required the court of appeals to evaluate Clayton's testimony by considering both the *Robinson*-type factors and examining the record for the existence of analytical gaps in his testimony under *Gammill*. After applying this standard, the Supreme Court held that "when all the evidence is considered, as it must be in a proper legal sufficiency review, we conclude that the data on which Clayton relied does not support his opinions."[15] Accordingly, the Supreme Court reversed the judgment of the trial court and court of appeals.

Trial Courts Must Apply the *Robinson* Factors With the Same Vigor to Expert Testimony that is Based on Reliable Medical Techniques

***Transcontinental Insurance Company v. Crump*, No. 09-005, 2010 WL 3365339; 2010 Tex. LEXIS 616; 53 Tex. Sup. J 1124 (Tex. 2010)**

Charles Crump received a kidney transplant in 1975 and began a lifelong regimen of drug therapy to ensure that his body would not reject the new kidney. In 2000, while employed at Frito-Lay, Crump struck his right knee on a piece of machinery at work. The injury caused a bruise and a collection of blood at the wound site. Crump applied for and received workers' compensation benefits for the work-related injury. In January 2001, Crump suffered from a series of serious health complications which resulted in his death. His wife applied for workers' compensation death benefits, alleging that the May 2000 injury was a producing cause of her husband's death. After an administrative proceeding, the hearing officer found that the May 2000 injury did result in Crump's death and awarded death benefits to Mrs. Crump. In 2002, the workers' compensation appeals panel affirmed the hearing officer's benefits award.

Frito-Lay's workers' compensation carrier, Transcontinental Insurance Company, sought judicial review of the administrative award of death benefits. At trial, Transcontinental offered the testimony of Dr. Hunt who had reviewed Crump's medical records. He testified that the May 2000 injury was not a producing cause of Crump's death, and that his death would have occurred without the work-related injury. To rebut Hunt's opinion, Mrs. Crump offered Dr. Daller, one of Crump's treating physicians, who testified that the May 2000 injury was the producing cause of Crump's death.

Transcontinental objected to Dr. Daller's testimony on the basis that the testimony was not founded on reliable evidence; however, the trial court overruled that objection. After hearing all the evidence, the jury delivered a verdict in Mrs. Crump's favor. Transcontinental appealed the jury's verdict, reasserting that Dr. Daller's testimony was unreliable and therefore legally insufficient evidence of causation.

The court of appeals upheld the trial court's ruling, holding that it was appropriate for the trial court to evaluate only whether there was an "analytical gap" between Dr. Daller's opinion and the bases on which his opinion was founded. Further, it explained why it believed it unnecessary to apply the *Robinson* reliability factors to Crump's testimony and the underlying evidence:

> To evaluate the reliability of [the expert's] causation opinion, [Transcontinental] asserts we must apply the six factors first adopted by the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). We disagree. . . . *Instead of applying the six Robinson factors*, in this case, where Dr. Daller's opinion was based on his experience and training in his field, we consider whether there is an "analytical gap" between the expert's opinion and the bases on which the opinion was founded.[16]

Finding that no error was made, the court of appeals affirmed the trial court's judgment, and the Texas Supreme Court granted Transcontinental's petition for review.[17]

The Supreme Court disagreed both with the trial court's and the court of appeals' limited evaluation of Dr. Daller's opinion and with Crump's argument that the application of the *Robinson* factors was tempered because Dr. Daller used a reliable medical technique, the differential diagnosis method, to support his expert opinions:

> This is the approach adopted by the court of appeals below, which refused to apply [*Robinson*] at all. We have held the opposite to be true: "[T]he relevance and reliability requirements of *Rule 702* [apply] to all expert evidence offered under that rule, even though the criteria for assessing relevance and reliability must vary, depending on the nature of the evidence." *Gammill, 972 S.W.2d at 727*; *see also Camacho, 298 S.W.3d at 638*. The mere fact that differential diagnosis was used does not exempt the foundation of a treating physician's expert opinion from scrutiny--it is to be evaluated for reliability as carefully as any other expert's testimony. Both the *Robinson* and *Gammill* analyses are appropriate in this context.[18]

Accordingly, the Supreme Court applied both the *Robinson* reliability and *Gammill* "analytical gap" factors to Dr. Daller's expert opinions and concluded that Dr. Daller's testimony was based on a sufficiently reliable foundation. After completing its own legal sufficiency review of the record, the Supreme Court concluded that reasonable jurors could have believed Dr. Daller's testimony. Therefore, even though the Supreme Court did not agree with how the lower courts conducted their review of Crump's opinions, it did not disturb the jury's finding against Transcontinental on the issue of the producing cause of Crump's injuries and denied Transcontinental's legal sufficiency challenge.

Expert Testimony May be Required to Prove Causation in Medical Cases Where Injured Party Suffered from a Pre-existing Physical Conditions

W.C. LaRock v. Smith, 310 S.W.3d 48 (Tex. App. – El Paso 2010) (pet. denied)

In this case, the El Paso Court of Appeals refused to extend its holding from *Guevara v. Ferrer*,[19] to a case in which the plaintiff with a pre-existing back injury claimed that she reinjured her back during a physical therapy session. Rosemary Smith, a former City of El Paso police officer, sued W.C. LaRock, D.C., P.C., d/b/a Auto & Work Injury Clinic, and Maria Gallardo, alleging that the Clinic failed to train and supervise its workers and that Gallardo, an employee of the Clinic, negligently caused Smith's back injuries.

In 2001, Smith originally injured her back while she was entering her patrol car. Smith sought treatment from the hospital and then her family physician, who referred her to a physician specializing in physical medicine and rehabilitation. Shortly thereafter, Smith sought chiropractic care from Dr. Prasad and began physical therapy. After an MRI was performed on Smith's spine, she was referred to Dr. Vasquez, a board certified neurosurgeon. Dr. Vasquez diagnosed Smith as having a herniated disc between the L4-L5 vertebral bodies of the lumbar spine and proposed two treatment options, either a surgical discectomy or a regimen of physical therapy with epidural injections for pain management. Smith elected to have the surgery in January 2002.

After the surgery was performed, Smith experienced relief. A month after her surgery, Smith visited Dr. Vasquez for a follow-up examination. Smith told Dr. Vasquez that she felt good and wanted to go back to work. However, because Smith still complained about pain in her left leg, Dr. Vasquez did not release Smith for work, instead prescribing physical therapy at the Clinic. Smith returned to the Clinic a week later; however she was unable to participate in physical therapy due to pain at the incision site when she laid on her back.

Two days later, Smith returned to the Clinic for physical therapy. While at the Clinic, a therapist, Chavez, started Smith's therapy by gently lifting her right leg about an inch to an inch-and-a-half off the ground. The therapy session was interrupted when Chavez had to take a phone call. Gallardo stepped in to take Chavez's place. After reviewing Smith's chart, Gallardo took Smith's right leg, placed one hand under her knee and the other at her ankle, and performed a knee-to-chest stretching exercise. Smith began to experience pain. Because the exercise was performed so quickly, Smith did not have the opportunity to tell Gallardo about the pain she felt near her incision site or down her leg. Gallardo only stopped stretching Smith's leg because Smith jerked back and her leg went forward. Smith began to cry from the pain, which she said was worse than she felt after her initial injury in October 2001.

Three days later, Smith returned to the Clinic and saw Dr. Prasad. Believing the pain would go away with more therapy, Smith stayed at the Clinic. However, after various different therapies, Smith's pain grew worse. Because Smith's condition persisted, Dr. Vasquez ordered another MRI, which revealed a recurrent herniated disc at the same place that Smith was operated on before. A second surgery was performed to repair the herniated disk. The doctors had to remove a large fragment of the disc in the same area as her previous surgery. Although she received some relief following the surgery, Smith continued to experience pain that radiated to her legs.

Following the second surgery, Smith underwent physical therapy again. However, this time she sought therapy at a different clinic, El Paso Physical Therapy. The same knee-to-chest stretch that Gallardo performed was conducted. However, this time, an explanation of the exercise was provided to Smith prior to the stretching and the stretch was performed very slowly with minimal pressure. Even though the physical therapy alleviated some of Smith's pain, she continued to experience pain and loss of flexibility.

After returning to work, Smith experienced pain from carrying her equipment. Smith visited Dr. Vasquez, and told him that she was still experiencing pain and that she believed something was wrong. Later, after running on a treadmill, Smith developed a burning and pulling sensation in her back. A third MRI revealed another herniation at L4-L5. Dr. Vasquez told Smith that she needed another surgery to fuse her back. A third surgery was performed. That surgery went better than the second surgery, and although Smith no longer had much pain, she still did not feel well. Smith returned to work at a desk job.[20] Following her return to work, Smith was involved in several incidents noted in her worker's compensation file, which the City included as subsequent injuries to Smith's original injury which occurred in October 2001.

Smith later sued the Clinic and Gallardo, alleging negligence in failure to train and supervise the Clinic's employees and that Gallardo was the cause of her injuries and medical expenses. The City of El Paso, which had paid worker's compensation benefits to Smith, later entered the lawsuit as a plaintiff in its capacity as Smith's subrogee. The contested issue at trial was the cause of Smith's injuries.

At the trial, Dr. Vasquez testified that Smith did well after the first surgery and did not experience any significant pain until after Gallardo administered the knee-to-chest exercise. Dr. Vasquez testified that it was possible that the therapy Gallardo performed caused the recurrent herniation of the disc. Dr. Vasquez refused to testify that the therapy had any causal relation to the need for the fusion that was performed in the third surgery. According to Dr. Vasquez, he believed the fusion was necessary because the herniation returned following the two surgeries, which indicated an abnormal motion at that segment in the spine. The City objected to Dr. Vasquez's testimony on causation on the basis that the evidence was legally and factually insufficient; however the trial court denied the City's objections.

The jury found that Gallardo's negligence caused Smith's injury and awarded her damages. The Clinic and Gallardo moved for a judgment notwithstanding the verdict, which the trial court granted solely to reduce the medical care award. The trial court then rendered judgment in favor of Smith and the City. The Clinic and Gallardo appealed. One issue on appeal was whether Smith's evidence was legally and factually sufficient to establish that Gallardo's alleged negligence was the proximate cause of Smith's reherniation.

Smith argued that Dr. Vasquez's testimony alone was sufficient to establish causation. After reviewing the entire record, the court of appeals disagreed, pointing out that Dr. Vasquez could only testify that Gallardo's action could have *possibly* caused Smith's reherniation. Further, Dr. Vasquez testified that the reoccurrence of the herniation could have resulted from other causes, for instance, the doctor's inability to remove all the disk fragments during the first surgery. Therefore, the court of appeals held that there was no evidence of reasonable medical probability of a causal connection between Gallardo's acts and Smith's reherniation.

Furthermore, the court of appeals cited *Guevara* in support of its argument that Smith's testimony that she felt pain when Gallardo performed the knee-to-chest exercise merely raised a suspicion that the event caused the reherniation, but did not prove that it caused the injury. In *Guevara*, the Supreme Court held that expert testimony on causation was not required in medical cases in limited circumstances where "both the occurrence and conditions complained of are such that the general experience and common sense of lay persons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence."[21] For example, medical testimony is not necessary to prove the causation of an injury where a seemingly healthy person breaks her arm following an automobile accident.

However, for the following reasons, the court of appeals found that *Guevara* did not apply in this case and that expert testimony was required to prove the element of causation. First, Smith suffered from a pre-existing back injury. Second, the medical testimony at trial established that the timing of Smith's onset of pain did not mean that the disc herniated at the moment Gallardo administered the exercise. Rather, based on other testimony at trial, the only inference that could be drawn from Smith's onset of pain was that the disc contacted the nerve at that point in time. Third, Dr. Vasquez testified that the therapy Gallardo administered was only a possible cause of Smith's reherniation. Under those circumstances, the court of appeals concluded that expert testimony was necessary to establish the causation of Smith's injury and reversed the judgment of the trial court.

Expert Opinions Not Automatically Excluded Because an Expert Does Not "Show his Work"

Suzlon Wind Energy Corp. v. Shippers Stevedoring Company, 662 F. Supp. 2d 623 (S.D. Tex. 2009)

This suit arose from a fire that damaged part of a wind turbine generator called a nacelle. The nacelle was manufactured in India by Suzlon Energy, Ltd.[22] Plaintiff Suzlon Wind Energy Corporation was the American distributor who contracted with Defendant ATS Wind Energy Services to ship the nacelle to Minnesota once it arrived at the Port of Houston. ATS hired Fitzley, Inc. to provide the drivers, trucks and trailers to transport the nacelle to Minnesota. Welding employees of Andrews Boom Repair, Inc. ("ABR"), who were hired by defendant Shippers Stevedoring Company, performed "hot work" (welding work) to secure the nacelle to the truck trailer bound for Minnesota. During this process, the nacelle caught fire when sparks from a welder's oxyacetylene torch ignited the foam insulation inside the nacelle. Suzlon Wind and its insurer filed suit, asserting negligence-based and breach of contract claims against ATS, Shippers and others for the damage caused to the nacelle. ATS and Fitzley filed a third-party complaint seeking indemnification or contribution from ABR, and Suzlon Wind subsequently filed cross-claims against ABR.

Suzlon Wind designated Haskell Simpkins as an engineer and welding expert to testify regarding the liability issues in this case. ABR moved to exclude Simpkins' testimony on the grounds that (1) the testimony was not the product of reliable methodology, and (2) his opinion was not based on sufficient facts or data. Specifically, ABR argued that Simpkins' calculations on the amount of dross (expelled molten and oxidized metal) produced by the welder's torch were unreliable because the calculations were made "in his head and on a calculator with no writing memorializing the calculation."[23] Further, ABR also argued that Simpkins' methodology was unreliable because he did not perform any testing in connection with preparing his report. The crux of ABR's argument about the unreliability of Simpkins' calculations was that Simpkins did not "show his work" in his report. In his deposition, Simpkins testified that he used a calculator to arrive at his calculations and explained his calculation method.

The district court reviewed the record and pointed out that ABR did not direct the court to anything that was inherently unreliable about Simpkins' calculations. Further, the district court found that Simpkins was not required to perform his own testing as long as the methodology he used was "of the type reasonably relied upon by experts in the field."[24] The record showed that Simpkins testified that individuals in his field routinely make similar assumptions when making such calculations but that ABR failed to actually contest the methodology used. Accordingly, the district court denied ABR's motion to exclude Simpkins' testimony on the basis that it was not the product of reliable principles and methods.

Expert Opinions Must be Capable of Scientific Verification and the Methodology Used Must be Accepted in its Respective Scientific Community

***Eric Singleton v. Ben Bridge Jeweler, Inc.*, Civ. A. H-07-1689, 2009 WL 3698440; 2009 U.S. Dist. Lexis 107710 (S.D. Tex. 2009)**

Eric Singleton, an African American, went to Ben Bridge Jewelry Store to purchase a Rolex watch; however the transaction did not result in Singleton purchasing a watch. Subsequently, Singleton filed suit against Ben Bridge, alleging that he was denied the opportunity to purchase the watch because of his race. The entire transaction was recorded by Ben Bridge's security cameras without sound. To support his claims, Singleton hired an expert, Al Yonovitz, who was a forensic audio, video and acoustic analyst to evaluate the videotape for tampering. Yonowitz later claimed to also be an expert in cognitive psychology. After analyzing the videotape footage, Yonowitz concluded that the videotape was not altered. However, Yonovitz further opined that Singleton's descriptions of how the transaction occurred were not inconsistent with the videotape footage. During his deposition, Yonovitz made characterizations about Singleton's facial expressions and provided his interpretations of Singleton's body language at various points during the transactions. Yonovitz concluded, "Singleton definitely wanted to buy a Rolex watch."[25]

Ben Bridge filed a motion to exclude challenging Yonovitz's "play-by-play interpretation[s]" of the videotape as beyond his expertise, arguing that Yonowitz's opinions would improperly interfere with the province of the jury.[26] The district court agreed, finding first that Yonovitz's experience in teaching college level classes in cognitive psychology alone did not qualify him as an expert in that field. Second, the district court concluded that even if Yonovitz could have established some expertise in the area of memory and recall, he could not establish that his testimony was reliable and that it would be helpful to the jury as required under *Daubert*:

> Yonovitz's interpretations of what is seen on the tape and his conclusion that Singleton intended to purchase a watch are opinions incapable of scientific verification. Further, there is no evidence that in coming to these opinions Yonovitz used a methodology that is generally accepted by the scientific community of which he claims to be a member. The Fifth Circuit has stated that the trial court has the responsibility "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Without such evidence, Yonovitz's opinion is only his opinion and cannot be deemed reliable.

The district court granted Ben Bridge's motion to exclude Yonovitz's testimony regarding his interpretation of what was seen on the tape, concluding that Yonovitz's opinions impermissibly invaded the province of the jury to assess witness credibility and that the jury did not need an expert's opinion to judge body language or facial expressions.[27]

Expert's Opinions Cannot be Excluded Solely on the Basis that the Expert is Not a Licensed Private Investigator under Texas Law

***Redding Linden Burr, Inc. v. King*, No. Civ. A. H-07-0925, 2009 WL 277531; 2009 U.S. Dist. LEXIS 8248 (S.D. Tex. 2009)**

Plaintiff Redding Linden Burr, Inc. alleged that defendant David King used spyware software to unlawfully obtain the login information for his ex-wife Charity King's laptop computer. Redding alleged that without Charity's knowledge, King was able to track all the activity on her computer. As a result, Redding claims that King used Charity's login information and password to gain unauthorized access to information stored on Redding's computer server.

To determine whether King installed the spyware on Charity's laptop and attempted to use Charity's login information and password to access Redding's server, Redding retained three experts, including Keon Arjmandi. Subsequently, King filed a motion to exclude Redding's experts' opinions. Specifically as to Arjmandi, King argued various grounds upon which to exclude Arjmandi's opinion including lack of qualifications, that his expert opinion was not reliable, and that he failed to follow proper industry standards. Furthermore, King argued that Arjmandi's opinion should be excluded because he did not meet the requirements of a private investigator under Texas Occupations Code § 1702.104.

The district court rejected this last argument, observing that King "fail[ed] to explain how [Texas Occupations Code § 1702.104] applies to this dispute or how a Texas state statute bars an expert's opinion in federal court."[28] Accordingly, the district court denied King's motion to exclude Arjmandi's expert opinions regarding the installation of spyware on Charity's laptop computer on the basis that Arjmandi did not meet the requirements as a private investigator under Texas law.

Conclusion

In the past year, Texas state and federal courts have addressed a wide variety of issues regarding the use and admissibility of expert testimony. *Pollock* indicates that an objection as to the admissibility of evidence is not necessary to preserve error if an expert's testimony is conclusory or speculative on its face. *Whirlpool* outlines the proper "no evidence" or legal sufficiency standard of review to be conducted, which requires the court to review the entire record to determine whether the underlying evidence is reliable and if there are any "analytical gaps" in the expert's testimony. *Crump* directs that the *Robinson* factors must be applied alongside the "analytical gap" test of *Gammill* to evaluate the reliability of scientific evidence and/or methodology, regardless of whether the evidence or methodology in question has been deemed reliable in its respective scientific field. *W.C. LaRock* appears to indicate that the *Guevara* decision limiting the need of expert testimony on causation in certain medical cases, does not apply in the situation where the plaintiff suffers from a preexisting injury that was reinjured and is the basis of the lawsuit. *Suzlon Wind Energy* explains that an expert is not necessarily required to "show his work" in his expert report so long as his methodology is of the type that is reasonably relied upon by experts in his field. *Singleton* reminds us that *Daubert* requires scientific based expert testimony to be capable of scientific verification and that expert opinions cannot invade the province of the jury to access witness credibility. Finally, *Redding* explains that witnesses who testify in federal courts in Texas as experts are not required to be licensed as private investigators under Texas law.

ENDNOTES

1 Amy M. Stewart is an associate in the Litigation Section of Cox Smith Incorporated in Dallas.

2 509 U.S. 579 (1993)

3 923 S.W.2d 549 (Tex. 1995)

4 *Coastal Transp. Co. v. Crown Central Petrol. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (emphasis added).

5 *Pollock*, 284 S.W.3d at 818.

6 *Id.*

7 *Id.* at 828-29.

8 *Id.*

9 *Id.*

10 *Id.* at 96.

11 *Id.* at 638. (citations omitted)

12 206 S.W.3d 572, 578 (Tex. 2006)

13 *Id.* at 639. (citations omitted and emphasis added).

14 *Id.*

15 *Id.* at 643.

16 *Id.* at *6-7 (citations omitted and emphasis added).

17 *Id.* at *4.

18 *Id.* at *10-11.

19 247 S.W.3d 662 (Tex. 2007)

20 *Id.*

21 *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007).

22 *Id.* at 633.

23 *Id.* at 667.

24 *Id.*

25 *Id.*

26 *Id.* at 6.

27 *Id.*

28 *Id.* at 8-9.

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