

DATE: October 23, 1997
TO: Brian Toman
cc: Michael Mazerov
FROM: John S. Warren
RE: Lunka Redraft of Unitary Business Definition

I have just received Bill Lunka's redraft of the regulation which I presume will be discussed at the October 28 meeting in Washington. Since I will not be there, I would like you to convey for me the following point about lines 35 to 39 where it is said that if the activities of a corporation either contribute to or are dependent upon the activities of another corporation, a unitary business exists.

The Minnesota court decisions do not support Lunka's position. In *Western Auto Supply Co.*, 71 N.W. 2d 797, the court said:

"A multistate business is a unitary business when the operations in one state benefit and in turn are benefited by the operations conducted in another state or states."

Later in the opinion, the court said:

"The test of whether a business is unitary is whether its various parts are interdependent and of mutual benefit so as to form one business unit rather than separate business entities and not whether the operating experience of the parts is the same in all places."

This requirement of mutuality of benefit and contribution has also been stated in *Walgreen*, 104 N.W. 2d 714, *Rothschild*, 133 N.W. 2d 524, and *Great Lakes Pipeline*, 138 N.W. 2d 612. I know of no Minnesota case (or California case, for that matter) which holds that a unitary business determination can be based solely on a finding that the business operations in one state are dependent upon but don't contribute anything to the business operations in the other state or states.

Someone might say that the *Mole-Richardson* case is an example of unitary treatment being applied where the benefit flowed only one way (*i.e.*, one might say Colorado was dependent on California and didn't benefit California). But that case was not decided under the contribution or dependency test. Rather, the business was held to be unitary because of strong centralized management. If we have the contribution or dependency test as a separate test and emphasize the disjunctive, then a business could be held unitary where the benefit flows only one way and without the necessity of showing strong centralized management, which is a part of a different test. This will come very close to saying that all businesses are unitary if there is unity of ownership.

One other point about the Lunka redraft is that it is directed entirely at a multicorporate business and is of no help at all on the question of whether the instate and out-of-state activities of a single corporation are unitary.