
Linda J. Griffiths
NEW LIFE FOR THE AGENCY THEORY:  

LINDA J. GRIFFITHS

IN 1949, the United States Supreme Court addressed the issue of whether a nominee corporation which is holding title to property for the benefit of its shareholders can be a nontaxable agent. In *National Carbide Corp. v. Commissioner*, the Court set forth the circumstances that must be present before an agency relationship will be recognized for tax purposes. Although the Supreme Court declared that an agency relationship between a corporation and its shareholders is possible, courts in subsequent cases rarely found a "true" agency relationship to exist. In contemporary cases dealing with this issue, the Fourth and Fifth Circuits interpreted the *National Carbide* test very strictly; under their interpretation, a closely held corporation would likely never meet the criteria. In 1986, a conflict between the circuits arose when the Sixth Circuit determined that the *National Carbide* test should be interpreted more liberally.

In *Commissioner v. Bollinger*, the Supreme Court revisited the agency question for the first time to resolve the conflict between the circuit courts. Affirming the Sixth Circuit, the Court held that if a written agency agreement is executed at the time the property is acquired, the corporation functions as agent for all purposes relating to the property, and the corporation is represented solely as an agent in

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2. *Id.*
3. *Id.* at 437. Although the Court in *National Carbide* determined that no agency relationship existed, it preserved the possibility that such a relationship could exist by setting forth a six-factor test which became the standard for subsequent agency cases. For a complete discussion of *National Carbide* and the six-factor test, see infra notes 73-81 and accompanying text.
6. See *Ourisman*, 760 F.2d at 541; *Roccaforte*, 708 F.2d at 986.
9. *Id.* at 1175.
dealing with third parties, the relationship satisfies agency requirements for tax purposes.10

The pro-taxpayer decision in Bollinger is a victory for real estate developers who must resort to the corporate form to secure financing for their projects. State usury laws often restrict the rate of interest at which a noncorporation may borrow, so the type and amount of financing a developer needs may only be available at the higher corporate lending rate.11 To avoid this problem, the individual or partnership can form a corporation to obtain the loan, but prior to Bollinger, they risked incurring undesirable tax consequences.12 The decision in Bollinger allows developers to avoid state usury laws through the use of closely held corporations, while enjoying as individuals the tax benefits that flow from the property.

This Comment will discuss the dilemma that traditionally faced taxpayers who used closely held corporations to hold title to property. It will trace the development of the two major theories taxpayers advanced in trying to resolve that dilemma. It will examine the case law leading to the conflict between federal circuit courts of appeals and the resolution by the Supreme Court in Commissioner v. Bollinger. Finally, this Comment will analyze the impact of Bollinger on subsequent cases and discuss the ramifications of this decision.

I. THE NATURE OF THE PROBLEM

A number of reasons unrelated to federal income taxation may compel a property owner to have someone else hold record title to his or her property. For example, the property owner may wish to avoid mortgage liabilities, remain anonymous, simplify conveyance of the property, or avoid title complications which can arise upon death.13 Although an individual may serve as a title holder, such an arrangement presents problems that can be avoided by the use of a nominee corporation, sometimes called an "agent corporation," "conduit corporation," "dummy corporation," "shell corporation," or "straw corporation."14 Unlike an individual, a corporation has perpetual life,

10. Id. at 1179.
11. See infra notes 19-23 and accompanying text.
12. See infra notes 24-31 and accompanying text.
14. Although different courts and authors have sometimes used the terminology inconsistently, for the purposes of this Comment the term "nominee corporation" will refer to a closely held corporation which is holding naked legal title for a sole stockholder, a partnership, or a corporation, which will be referred to as the beneficial owner.
so it cannot create title problems by dying.\textsuperscript{15} An individual's marital difficulties can also create title problems, a danger absent in the corporate arrangement.\textsuperscript{16} In addition, the liabilities of one property can be insulated from the liabilities of another by using a separate corporation for each.\textsuperscript{17} Finally, a corporation can be kept impecunious, and its officers can execute all documents and be easily replaced if the need arises.\textsuperscript{18}

Nominee corporations are also useful for avoiding state usury laws. Usury laws, which have existed in America since its colonial days,\textsuperscript{19} establish a maximum rate of interest on loans, and were developed to protect borrowers from unscrupulous lenders.\textsuperscript{20} Often a borrower and lender do not enter into the loan agreement on "an equal footing," and the usury statutes attempt to prevent the exploitation of needy borrowers by capping the interest that lenders can charge.\textsuperscript{21}

Most states, perhaps viewing the corporation as better able to protect itself than an individual, have some provision permitting businesses to borrow at a higher rate.\textsuperscript{22} Thus, when a real estate developer is unable to secure financing in compliance with the limit imposed by the state's usury law, the developer may resort to a corporate nominee.\textsuperscript{23} In this way, the developer secures the necessary financing while retaining control over the property.

However, the tax consequences often make such an arrangement unattractive when the developer wants the tax attributes arising from the operation of the property reflected on his or her individual, rather than the corporation's, tax return. Because the tax benefits and burdens generated by property generally belong to its "owner,"\textsuperscript{24} devel-

\begin{itemize}
  \item \textsuperscript{15} Kurtz & Kopp, \textit{supra} note 13, at 647-48.
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{20} K. Brown \& K. Keest, \textit{Usury and Consumer Credit Regulation} §§ 1.1-.2 (1987).
  \item \textsuperscript{21} \textit{Id.} § 1.2.
  \item \textsuperscript{22} \textit{Id.} § 9.1.1, at 203; \textit{see, e.g.,} KY. REV. STAT. ANN. § 360.025 (Michie/Bobbs-Merrill 1989).
  \item \textsuperscript{23} In fact, the lender may require the developer to use a corporate nominee. Hoffman, \textit{Straw or Nominee Corporations Must Be as Passive as Possible to Protect Investors Deductions}, 5 \textit{Tax'N for Law.} 10, 11 (1976); \textit{see, e.g.,} Commissioner v. Bollinger, 108 S. Ct. 1173, 1178 (1988).
  \item \textsuperscript{24} \textit{See} Bollinger, 108 S. Ct. 1173, 1176 (1988); Cliff \& Levine, \textit{Reflections on Ownership—Sales and Pledges of Installment Obligations}, 39 \textit{Tax Law.} 37, 37 (1985); Note, \textit{Tax Aspects of the Nominee Corporation: Roccaforte v. Commissioner of Internal Revenue}, 22 \textit{Tulsa L.J.} 61, 61 (1986). \textit{But see} Corliss v. Bowers, 281 U.S. 376, 378 (1930) ("taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the
opers create problems when they use a nominee corporation to hold title to their property. Since the corporation is holding title, the tax law may recognize the corporation as the "owner" and require it to treat the income as its own. Generally, individuals want income and losses from property attributed to themselves, rather than to a corporation. When income gain is attributed to a corporation, it is first subject to a corporate tax before being passed on to shareholders through dividends; the shareholders then must pay tax on the dividend, resulting in a double taxation. Furthermore, unless a corporation can meet the requirements for S Corporation status, corporate deductions cannot pass through to the shareholders. Since nominee corporations usually do not have income against which to offset losses, the deductions may be permanently lost. However, courts have generally reasoned that since the beneficial owners chose the corporate entity as the most advantageous means of conducting their business, they must also accept the undesirable tax consequences that follow, and thus have attributed income and losses to the corporation.

actual benefit for which the tax is paid"); Estate of Franklin v. Commissioner, 544 F.2d 1045, 1049 (9th Cir. 1976) ("depreciation is not predicated upon ownership of property but rather upon an investment in property" (citations omitted) (emphasis in original)); Bolger v. Commissioner, 59 T.C. 760 (1973); Gladding Dry Goods Co., 2 B.T.A. 336 (1925) ("The important question is . . . who made the investment of the capital which is to be recovered over the period of the exhaustion of the property. The one who made the investment is entitled to its return."). Bolger presents an especially interesting case because the court rejected both the disregard and agency arguments, but nonetheless awarded the depreciation deductions to the taxpayer. 59 T.C. at 767, 770-71.

25. See, e.g., Bollinger, 108 S. Ct. at 1176 ("The problem we face here is that two different taxpayers can plausibly be regarded as the owner.").

26. See Note, supra note 24, at 61-62.


28. An S corporation is one which is taxed "in the same manner as in the case of an individual," with a few exceptions. I.R.C. § 1363(b) (1988). S corporations generally avoid double taxation as well. See id. §§ 1366-1368. For detailed instructions on the restrictions and requirements for electing S corporation status, see I. SCHRIEBER & S. TRAUM, SUBCHAPTER S: PLANNING & OPERATION (1983).


II. Development of the Theories

Taxpayers tried two approaches in attempting to avoid the unfavorable tax consequences of using a nominee corporation to hold record title to property. In the first approach, known as the disregard theory, the corporate entity is ignored completely; the argument is that the corporation has no tax identity distinct from its shareholders. Under this theory, the courts analyze the activities of the corporation to determine whether the corporation is totally without substance and should therefore be disregarded for tax purposes.32

The second approach recognizes the existence of the corporation, but posits that the corporation is merely acting as the nominee or agent of its shareholders, who are the beneficial owners. The problem taxpayers have traditionally faced under this theory is proving they have a true agency relationship with the corporate nominee. The courts look for the presence of a number of factors to determine whether a true agency relationship exists.33

The two theories overlap to some extent. Many cases combined elements of both, particularly during the early development of the theories.34 Additionally, the theories were argued in the alternative in several cases,35 although some commentators have opined that the two theories lend no support to each other, and serve only to weaken the stronger argument when presented together.36

A. The Disregard Theory

The disregard theory first found support in Southern Pacific Co. v. Lowe,37 when the Supreme Court held that income earned by a wholly-owned subsidiary prior to the effective date of the Income Tax (1974); see also Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 439 (1943) (“The choice of the advantages of incorporation to do business ... require[s] the acceptance of the tax disadvantages.” (citing Burnet v. Commonwealth Improvement Co., 287 U.S. 415 (1932))).

32. See infra notes 37-67 and accompanying text.
33. See infra notes 68-81 and accompanying text.
34. See, e.g., Jackson v. Commissioner, 233 F.2d 289 (2d Cir. 1956); Palcar Real Estate Co. v. Commissioner, 131 F.2d 210 (8th Cir. 1942); United States v. Brager Bldg. & Land Corp., 124 F.2d 349 (4th Cir. 1941); Sheldon Bldg. Corp. v. Commissioner, 118 F.2d 835 (7th Cir. 1941); see also Miller, The Nominee Conundrum: The Live Dummy is Dead, but the Dead Dummy Should Live!, 34 Tax L. Rev. 213, 232-36 (1979).
35. See, e.g., Robert D. Wray, 37 T.C.M. (CCH) 1849-81 (1978) (taxpayer arguing both theories); Aldon Homes, Inc. v. Commissioner, 33 T.C. 582 (1959) (Commissioner arguing both theories).
37. 247 U.S. 330 (1918).
Act of 1913 would be treated as that of its parent corporation. The theory underlying the decision was that the two corporations could be treated as identical "because of the complete ownership and control" the parent exercised over its subsidiary. However, this case is generally regarded as unique, and not as standing for the proposition that a corporation can be disregarded for tax purposes.

The first major case relying on the disregard theory was Burnet v. Commonwealth Improvement Co., in which a corporation sold stock to its sole shareholder and claimed a loss on its income tax return. The corporation was wholly owned by the estate of a decedent, who had set up the corporation and transferred the stock to avoid multiple death duties and ensure the safety of a charitable endowment. Upon audit, the Commissioner determined that the sale actually produced a gain for the corporation, not a loss. The corporation contested the Commissioner's finding, and alternatively argued that it realized "no true loss or gain" on the sale because it and the shareholder were the same entity. The corporation did not propose that any time a corporation engages in a transaction with its single shareholder, the transaction should be disregarded, but rather that the court should look beyond mere form to regard the substance of the transaction. Under its own facts, the corporation claimed that "there was really no income, nothing properly taxable as such." The Court, however, rejected the corporation's argument, finding that the two entities were separate and distinct, having been recognized as such for years and taxed accordingly.

In 1943, the Supreme Court handed down what has become the controlling case in this area. In Moline Properties, Inc. v. Commissioner, a sole stockholder organized Moline Properties, Inc. (Moline) to give greater security to a creditor. Under the arrangement, the shareholder conveyed property and mortgages to the corporation in exchange for all but the qualifying shares of stock, which he then

39. Id. at 337.
41. 287 U.S. at 415.
42. Since the corporation had not contested the Commissioner's method of reckoning in the lower courts, the Supreme Court did "not undertake to determine what was not considered below." Id. at 418.
43. Id.
44. Id. at 419.
45. Id. at 417-20.
46. 319 U.S. 436 (1943).
transferred to a voting trustee appointed by the creditor. After five years, control of the corporation reverted to the shareholder when he paid off the creditor and refinanced the mortgages. During this five-year period, the corporation assumed a financial obligation the shareholder owed to the creditor, defended several condemnation proceedings, and sued to remove restrictions imposed on the property by a prior deed. After the corporation sold its holdings, it transacted no further business, but was not dissolved. Moline sought to have the gain realized on the sale of the property recognized on the shareholder’s individual return, arguing that the corporation should be ignored as merely fictitious.47

In rejecting Moline’s argument, the Court focused on the corporation’s status as a separate entity with “a tax identity distinct from its stockholder.”48 The Court stated that so long as the purpose served by the corporate entity “is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.”49 The Court emphasized that because the corporation was never dissolved after the discharge of the original debt, it stood ready to again serve the business interests of the shareholder. In fact, Moline had again mortgaged its property, discharged that mortgage, sold the property, and filed income tax returns reflecting those activities. At one time, it had also leased part of the property as a parking lot for a substantial rental. Such activity compelled the Court to conclude that the corporation had its own distinct tax identity.50

Moline also attempted to argue the agency theory, but the Court summarily dismissed the argument in the absence of an actual contract of agency and the usual incidents of an agency relationship.51 The Court stated that “the mere fact of the existence of a corporation with one or several stockholders, regardless of the corporation’s business activities, does not make the corporation the agent of its stockholders.”52

Cases following Moline focused on what has been dubbed the “business purpose” or “business activity” test. Basically, courts will

47. Id. at 436-38.
48. Id. at 440.
49. Id. at 439. This statement has become known as the “separate entity doctrine” and continually appears as a policy concern throughout the agency cases.
50. Id. at 440.
51. Id. This dicta would later be read as approving the use of the agency theory under the right circumstances. See, e.g., Ourisman v. Commissioner, 82 T.C. 171, 185-86 (1984), rev’d, 760 F.2d 541 (4th Cir. 1985).
52. Id.
recognize the corporation as a separate taxable entity if either a business purpose or business activity is present. The courts have interpreted this language very broadly, finding a business purpose behind almost every reason for incorporating. A finding that a corporation is doing business does not necessarily depend on the amount of business activity, and in fact, "[t]he degree of corporate purpose and activity requiring recognition of the corporation as a separate entity is extremely low."

This broad interpretation of the business purpose test made it extremely difficult for a corporation to be disregarded. For example, in Paymer v. Commissioner taxpayers formed two corporations to protect their assets from a possible lawsuit. The corporations each held title to income-producing property, but had no offices, kept no books or bank accounts, and collected no income. One corporation did nothing with respect to the property held in its name, and the court declared it "a sham to be disregarded for tax purposes." But the other corporation obtained a loan and assigned the lender "all the lessor's rights, profits and interest in two leases on the property and covenanted that they were in full force and effect and that it was the sole lessor." The court found that single transaction sufficient to satisfy the business activity test and declared the corporation a separate taxable entity.

The nominee corporation in Evans v. Commissioner also engaged in limited activity, which the court similarly found sufficient to recog-
nize the corporation as a separate taxable entity. In *Evans*, an individual formed a corporation to obtain a loan for the purchase of an aircraft. The corporation obtained the loan and gave the lender a promissory note and a security interest in the aircraft. The corporation leased the aircraft to another corporation, received payments under the lease, then authorized the lessee corporation to return the aircraft so it could be sold. The individual claimed depreciation of the aircraft and loss from its sale on his tax return. The Fifth Circuit denied the personal deductions because "the substantial business activities" of the corporation brought the case within the purview of *Moline*.61

Occasionally the taxpayer prevailed under the disregard theory. Recall that in *Paymer* the court disregarded one of the corporations, characterizing it as a "passive dummy."63 The taxpayer in *Jackson v. Commissioner*64 experienced similar success. In *Jackson*, corporations were formed solely to transfer and hold stock of other corporations partly owned by the taxpayer. This arrangement allowed the taxpayer's wife to hold stock free of claims from the taxpayer's creditors.65 The court likened the case to *Paymer* and disregarded the corporations for tax purposes.66

Despite the successes in *Paymer* and *Jackson*, taxpayer arguments for disregard of nominee corporations failed in the vast majority of cases.67 Consequently, most taxpayers turned to the agency theory as the best strategy for prevailing on the taxability of the corporate nominee.

61. *Id.* at 1097.
62. *Id.* at 1100.
63. *Paymer v. Commissioner*, 150 F.2d 334, 337 (2d Cir. 1945); *see also supra* notes 56-59 and accompanying text.
64. 233 F.2d 289 (2d Cir. 1956).
65. *Id.* at 289-90.
66. *Id.* at 291.

Other cases in which the taxpayer successfully argued the disregard theory rest on rather weak rationales. For example, in Baltimore Aircoil Co. v. United States, 333 F. Supp. 705 (D. Md. 1971), and Dobyns-Taylor Hardware Co. v. United States, 278 F. Supp. 538 (E.D. Tenn. 1967), the courts relied on pre-*Moline* authority to disregard the corporations. Similarly, in K-C Land Co. v. Commissioner, 19 T.C.M. (CCH) 183 (1960), the court disregarded the corporation but relied partly on a case that was subsequently reversed on appeal. *Id.* at 186. *See State-Adams Corp. v. Commissioner*, 32 T.C. 365 (1959), rev'd, 283 F.2d 395 (2d Cir. 1960), cert. denied, 365 U.S. 844 (1961); *see also Comment, supra* note 36, at 804 n.68 (noting that *K-C Land Co.* is probably not good law).
B. The Agency Theory

Although the Supreme Court in *Moline* rejected application of the agency theory, it hinted in dicta that such a theory could work, and indeed, in a limited number of early cases, it did. For example, in *Worth Steamship Corp. v. Commissioner*, pursuant to a written agreement, three individual joint venturers used a corporation to hold title to and manage a steamship for which they paid a monthly fee. The Tax Court attributed the income derived from the operation of the steamship to the joint venturers, rather than the corporation. The court emphasized that only two of the venturers held any stock in the corporation, and that the third venturer had no interest in the corporation other than having the steamship operated for his own account.

In 1949, however, the Supreme Court decided a case in which the taxpayers had specifically arranged their business affairs in an attempt to take advantage of an agency relationship, only to find that their arrangement was unable to protect them from adverse tax consequences. In *National Carbide Corp. v. Commissioner*, three wholly-owned subsidiary corporations of Air Reduction Corporation (Airco) entered into an agency contract with the parent corporation, which sought to avoid the double taxation that would result from operating through subsidiaries. The agreement provided that Airco would furnish working capital, executive management, and office facilities for the subsidiaries in exchange for all the profits in excess of six percent on capitalization. The subsidiaries retained the six percent as a nominal fee for acting as agent. Airco reported those profits as its own income and the subsidiaries reported only the six percent fee.

The Court rejected the assertion that the subsidiaries were merely acting as agents, despite the "form of ownership of assets adopted by

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68. Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 440-41 (1943); see also supra notes 51-52 and accompanying text.
69. See, e.g., Caswal Corp. v. Commissioner, 19 T.C.M. (CCH) 757 (1960) (corporation acting as fiduciary was not engaged in any business in its own right); Industrial Union Oil Co. v. Commissioner, 5 T.C.M. (CCH) 879 (1946) (corporation not taxable on income from oil leases where corporate resolution provided that it would hold title to oil leases as agent or trustee for beneficial owner).
70. 7 T.C. 654 (1946).
71. *Id.* at 659-61.
72. *Id.* at 665.
73. 336 U.S. 422 (1949).
74. The tax treatment of affiliated corporations has since changed. *See* I.R.C. § 243(a)(3), (b) (1988) (allowing deduction for dividends received from affiliated corporation); *id.* §§ 1501-1505 (allowing pass-through of losses by consolidated return).
Airco and its subsidiaries'"76 and the careful language of the contract. Rather, the Court determined that income must "be taxed to those who earn it, despite anticipatory agreements designed to prevent vesting of the income in the earners."77 The Court found that contractually requiring the subsidiaries to turn over their profits to Airco was "entirely consistent with the corporation-sole stockholder relationship whether or not any agency exists."78

However, the Court did not foreclose the possibility that a true agency relationship could exist,79 and its qualifying statements paved the way for subsequent attempts to tailor an arrangement that would pass the test. The Court enunciated six factors that became the standard test for a true agency relationship:

[1] Whether the corporation operates in the name and for the account of the principal, [2] binds the principal by its actions, [3] transmits money received to the principal, and [4] whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. . . . [5] Its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. [6] Its business purpose must be the carrying on of the normal duties of an agent.80

The Court particularly noted that the "usual incidents of an agency relationship" referred to in Moline are not present merely because of an identity of ownership and control.81

III. POST-NATIONAL CARBIDE CASES

National Carbide created new possibilities for the agency argument, for it seemed that with the "blessing" of the Supreme Court, those who carefully structured their business affairs could employ corporate nominees and still retain the tax benefits of individual ownership. However, taxpayers soon learned that this was not so easily accomplished. In fact, it became almost impossible to meet the National Carbide requirements.
Carbide criteria. As a result, most taxpayers suffered a fate similar to that of the taxpayers in Given v. Commissioner. 82

In Given, five individuals bought a commercial building and used an existing corporation to hold title to protect the asset from any potential complications arising from death or suit against any of the owners. The corporation had no assets except what the investors had deposited for the purchase of the building, and the three hundred shares of the corporation's stock were distributed evenly among the five contributors. No contracts between the shareholders and the corporation were ever drawn to establish an agency relationship. A year later, two of the shareholders bought out the interests of the other three, and the following year the property was sold. During the two-year period that the corporation held title, it entered into rental contracts with tenants and assumed other duties of a landlord, such as collecting rent and making repairs and improvements on the property. 83 The Eighth Circuit refused to recognize that the corporation was acting merely as agent for the shareholders. The court emphasized that the corporation had engaged in substantial business activity and that it was acting in the absence of any agreement granting it agency status. 84

Even where the parties executed a contract of agency and complied with the terms of the agreement, success for the taxpayer was not guaranteed. In Harrison Property Management Co. v. United States, 85 taxpayers formed a corporation to provide for "efficient management in the event of the death of one of the individuals" and to facilitate routine business operations that would otherwise require the signatures of all the owners. The individuals and the corporation entered into a written agreement in which the corporation would hold title to certain oil leases strictly for convenience and without any consideration, and which recognized the individuals as the true and beneficial owners of the property. 86

Although the taxpayers were apparently relying on the agency theory, the court devoted much discussion to the disregard theory and whether the corporation was a separate taxable entity. The court con-

82. 238 F.2d 579 (8th Cir. 1956).
83. Id. at 580-82.
84. Id. at 582-83. One commentator has suggested that had the parties "entered into a specific contract of agency with the corporation, adhered closely to its terms, provided for payment to the corporation of a reasonable management fee, and not maintained identity of corporate ownership," the case might have been decided differently. Bertane, supra note 27, at 757.
86. Id. at 624.
87. Id. at 624-25.
cluded that the corporation was a separate taxable entity and rejected the agency argument as well. The court relied on language from National Carbide that "the formal designation of 'agency agreement' is not conclusive" in determining the existence of an agency relationship. The court emphasized that such an agreement was made only because the individuals were the corporation's shareholders, and that "all of the corporation's relations with the beneficial owners of the managed property were wholly dependent on the fact that they were the sole shareholders." The court also noted that the fact that the shareholders received all the profits directly and supplied the corporation its assets and operating capital was insufficient to create a "true agency."

Relying heavily on Harrison, the court in Collins v. United States also found the corporation to be a taxable entity and determined it was not the agent of the beneficial owners. In Collins, the individuals formed the corporation to obtain a loan to construct an apartment complex, as they would have violated state usury laws if they had borrowed as individuals. The documents represented the corporation as a trustee merely holding title until the property could be reconveyed to the individuals and specified that the corporation could take action only when directed by the shareholders.

The court first rejected the disregard theory, emphasizing that because the loan could not have been obtained without the corporation, it was "more than [just] a business convenience, it was a business necessity to plaintiffs' enterprise." The court then summarily disposed of the agency argument, stating little more than that "the facts fail to meet the test of National Carbide and other cases dealing with the trustee-agency contention."

With the guidance of National Carbide, it would seem an easy task to devise a situation that would meet the criteria for an agency relationship. However, as the courts applied the six-factor test, the fifth and sixth factors were interpreted first as "crucial" and later as

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88. Id. at 626-27.
89. Id. at 627.
90. Id. at 628.
91. Id. at 628-29 (quoting National Carbide Corp. v. Commissioner, 336 U.S. 423 (1949)).
93. Id. at 18-19.
94. Id. at 20.
95. Id. at 21.
96. Id. Such abbreviated treatment of the agency argument has caused at least one commentator to question whether the court even understood the argument. See Miller, supra note 34, at 260.
"mandatory."" As a result, most attempts at agency failed one or both of these factors. The Fifth Circuit became the source for much of the authority on the treatment of nominee corporations, and its interpretation of the National Carbide test made it difficult for any agency arrangement to survive.

For example, in Jones v. Commissioner, the court applied the six National Carbide factors to determine that no agency relationship existed between a controlled corporation and the limited partnership in which taxpayers were partners. The partnership had been formed to develop and operate an apartment complex, but when it sought permanent financing, the lending institution informed it that state usury laws would prohibit the loan unless the partnership incorporated. When the partnership sought interim financing, that bank also insisted that the loan be made to a corporation. The partners formed the corporation and became the sole shareholders, and the partnership admitted the corporation as an additional general partner. The corporation had authority in all matters relating to the construction of the apartment complex, and title to the property was in the corporation's name without disclosure of its fiduciary capacity. The corporation received thirty percent of the net profits with the remaining seventy percent divided between the remaining partners; however, the corporation was not to share in any losses. Although the project fell behind schedule, some apartments were leased. The individual partners reported the losses relating to interest and business expenses, as well as the rent from the leased apartments, on their tax returns. The Commissioner asserted that the corporation, rather than the individuals, was entitled to both the losses and rental income from the project.

Although much of the Tax Court's opinion related to whether the corporation should be disregarded, the Fifth Circuit correctly perceived that the question at issue in this case was not whether the corporation should be recognized, but whether the "alleged relationship" of the corporation as an undisclosed general partner of the limited partnership should be recognized for tax purposes despite legal title

98. Roccaforte v. Commissioner, 708 F.2d 986, 990 (5th Cir. 1983).
99. See Moncrief v. Commissioner, 730 F.2d 276 (5th Cir. 1984); Roccaforte, 708 F.2d at 986; Jones, 640 F.2d at 745.
100. 640 F.2d at 745.
101. Id. at 747.
102. Id. at 748.
103. Id. at 749.
104. Id. at 750.
lying in the corporation. The court then applied the *National Car- bide* factors and determined that the corporation was not acting as agent for the general partnership.

The court found that only the second and fourth factors were satisfied. In particular, the court found no evidence of the "crucial" fifth and sixth factors. The court interpreted the fifth factor as requiring an independent and arm's length relationship and the sixth factor, in this case, as requiring evidence that "corporate general partners commonly take title to real estate without disclosure of any fiduciary capacity."

In *Roccaforte v. Commissioner*, the Tax Court ignored the strong stand taken by the Fifth Circuit regarding the importance of the fifth and sixth factors. Rather, the court found that the nominee corporation was acting as agent for the partnership that wholly owned it because the arrangement as a whole constituted an agency relationship, despite its failure to satisfy the fifth factor.

The partnership, consisting of thirteen individual investors, formed the corporation to avoid state usury laws in securing financing for construction of an apartment complex. A "nominee agreement" between the partners and the corporation provided that the corporation would hold title to the property, but emphasized that the partners were the owners of the property. The corporation agreed to refrain from engaging in any business activity not authorized by the partnership and to remit all rents and proceeds from the project to partners, who would reimburse the corporation only for expenses. A second document, an "agency agreement," specifically designated the corporation as agent for the partnership in the apartment complex project. It also specified that lenders would be informed of the agency arrangement and that the partnership would be liable for any debts or

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105. *Id.* at 750-51. The Fifth Circuit noted that the Tax Court was "understandably misled because the courts have not sharply distinguished the fictitious entity argument from the agency argument." *Id.* at 750 n.9. The Fifth Circuit also noted that even where the relationship is that of a "controlled corporate general partner to the limited partnership, as opposed to the alleged agency relationship in *National Carbide* and *Collins*, . . . the same standards apply." *Id.* at 752. The standards will vary in that the third *National Carbide* factor is not relevant and that with respect to the sixth factor, the corporation must function in a manner consistent with the normal duties of a corporate general partner, as opposed to the normal duties of an agent. *Id.* at 752 n.11.

106. *Id.* at 752-55.

107. *Id.* at 754-55.

108. *Id.* at 754.


110. *Id.* at 287.

111. *Id.*
suits arising out of the project.112 Describing itself as a “nominee corporation” engaging in “no activity,” the corporation filed federal corporate income tax returns “but reported no income, losses, assets or liabilities.”113 The partners reported losses from the apartment complex, and the Commissioner disallowed them.114

To determine whether the corporation was an agent of the partnership, the Tax Court reviewed the National Carbide factors. The court found that five of the six factors were satisfied or inapplicable,115 but had to concede that the fifth factor was not: the corporation was dependent on the fact that it was owned and controlled by the partners. The same investors owned one hundred percent of the corporation’s stock in the same proportion as their original ownership in the partnership and the corporation received no fee for its services to the partnership. The court concluded from these circumstances that the partnership had not dealt at arm’s length with the corporation.116 Nonetheless, the court concluded that “the entire substance of the arrangement was one of an agency relationship,” noting that the partners sought none of the “traditional insulating benefits of a corporate shareholder . . . [and were] the true economic owners of the property with all the risks and benefits attendant thereto.”117

The Fifth Circuit reversed, rejecting the Tax Court’s application of the National Carbide test, especially its weighting of the factors.118 The court asserted that both the fifth and sixth factors were “mandatory and absolute,” and that since the fifth factor required that “a corporation’s ‘relations with its principal must not be dependent upon the fact that it is owned by the principal,’” the corporation was not a “true nontaxable corporate agent.”119

In addition to discussing several cases which had previously applied the National Carbide test,120 the court pointed to “strong policy con-

112. Id. at 270.
113. Id. at 277.
114. Id. at 278.
115. Id. at 283-87 (finding that factors one, two, four, and six were satisfied, and that factor three did not apply because an agent would not regularly transmit moneys to the principal during the ongoing construction and management of this type of project).
116. Id. at 286-87.
117. Id. at 287-88.
118. Roccaforte v. Commissioner, 708 F.2d 986, 986-87, 989 (5th Cir. 1983).
119. Id. at 989-90 (emphasis in original) (quoting National Carbide Corp. v. Commissioner, 336 U.S. 422, 436 (1949)).
siderations" in support of its holding. The court feared that an individual could avoid tax liability while displaying nothing more than characteristics common to all shareholders and corporations. Thus, the court concluded that the taxpayer must show that an agency relationship could exist independent of ownership and control of the corporation.

In Moncrief v. United States, the Fifth Circuit recognized an agency relationship between a partnership and a nominee corporation. However, the Fifth Circuit did not retreat from its position in Roccaforte. In Moncrief, an individual formed a general partnership with two others to renovate an office building. To secure immediate financing and avoid state usury laws, the partners deeded their interests in the building to a corporation that was wholly owned by one of the other partners. After the corporation borrowed the necessary funds, it conveyed title back to the partnership. The individuals claimed losses from the office building on their income tax returns and the Commissioner disallowed them for the period during which the corporation held title to the property.

Although the jury found that the corporation had acted as the partnership's agent, the district court granted the Commissioner's motion for judgment notwithstanding the verdict (n.o.v.) on the grounds that the taxpayers had not sustained their burden of proof on the existence of an agency relationship. The district court refused to instruct the jury on the nature of the fifth and sixth factors, but nonetheless relied on the absence of proof of those two factors in granting the judgment.

On appeal, the issue before the Fifth Circuit was "whether there was sufficient evidence to support the jury's finding that the [corporation] was the partnership's agent." The court determined that the district court had committed error in granting judgment n.o.v. based on its own findings regarding the fifth and sixth factors after refusing to instruct the jury on their importance. It also found "no evidence in

121. Id.
122. Id.
123. 730 F.2d 276 (5th Cir. 1984).
124. This partner died during pendency of the suit and two co-executors were substituted as parties. Id. at 279 n.2.
125. Id. at 278-79.
126. Id. at 279.
127. Id. at 283.
128. Id. at 282. The court specifically stated that it was restricted from assessing the "correctness" of the construction of the National Carbide factors in Roccaforte. Id.
the record to support a conclusion that either of these 'factors' was unsatisfied." 129

Although the Fifth Circuit supported the jury's determination that an agency relationship existed, it did not depart from its position that the fifth and sixth factors are mandatory. Rather, it distinguished this case from Roccaforte on the issue of the critical fifth and sixth factors.

The court found the fifth factor satisfied because the partnership did not directly own any of the corporation's stock and the same parties did not own a controlling interest in both the partnership and the corporation. In addition, no evidence indicated that the taxpayer had any control over the corporation through its owner. 130 The court also concluded that the parties had operated at arm's length with each other. 131

The court found the sixth factor satisfied because the corporation was formed solely to avoid state usury laws in securing financing, and nothing indicated that this purpose was "inconsistent with the role of agent." 132 Finally, the court reasoned that the policy consideration expressed in Roccaforte that "the 'separate entity regime would collapse' if the taxpayer could predicate an agency relationship on characteristics common to all closely-held corporations" was not relevant in this case. 133

Moncrief, like other cases where courts have found agency, 134 involved a situation where the corporation was not under the complete ownership of those claiming it as agent. Because the Fifth Circuit continued to focus on a narrow interpretation of the fifth factor's requirement that agency "must not be dependent upon the fact that [the corporation] is owned by the principal," 135 it seemed unlikely that such a closely held corporation would survive the National Carbide test.

129. Id. at 283.
130. Id. at 285. The court cited Raphan v. United States, 3 Cl. Ct. 457, 461-62 (1983), aff'd in part, rev'd in part, 759 F.2d 879 (Fed. Cir.), cert. denied, 474 U.S. 843 (1985), in analyzing the nature of the affiliation between an agent corporation and its principal. The two entities are affiliated if: 1) the principal owns a controlling interest in the agent, or 2) the same parties own a controlling interest in both. Moncrief v. Commissioner, 730 F.2d 276, 284 (5th Cir. 1984).
131. Moncrief, 730 F.2d at 285.
132. Id. at 286.
133. Id. (quoting Roccaforte v. Commissioner, 708 F.2d 986, 990 (5th Cir. 1983)).
134. See Raphan v. United States, 759 F.2d 879 (Fed. Cir.) (principal and agent not commonly controlled and agency agreement therefore recognized), cert. denied, 474 U.S. 843 (1985); Carver v. United States, 412 F.2d 233 (Cl. Ct. 1969) (because corporation acted as agent for partner owning no stock in corporation, it also acted as agent for partnership).
Undaunted by the Fifth Circuit’s literal interpretation of the *National Carbide* factors, in *Ourisman v. Commissioner*, under facts very similar to *Roccaforte*, the Tax Court maintained its position that the entire substance of the arrangement should dictate the existence of a true agency relationship. Noting that it was not bound to follow the Fifth Circuit as the case would go to appeal in either the Fourth Circuit or District of Columbia Circuit, the Tax Court “carefully reexamined” its position but remained unconvinced that it should follow the Fifth Circuit. In *Ourisman*, a partnership formed a corporation to avoid state usury laws in securing financing for the construction of an office building. By corporate resolution the corporation was designated as agent or nominee for the partnership. The parties also executed an agency agreement which provided that the corporation would hold title to the project solely as nominee. The agreement specifically stated the partnership was the true and lawful owner. The partners reported the losses, deductions, and income generated from the project on their individual tax returns, and the Commissioner once again disallowed them.

The Tax Court again determined a true agency relationship existed between the corporation and the partnership, with five of the six factors met. However, on the controversial fifth factor the court refused to follow the Fifth Circuit, stating that

> [t]he Supreme Court expressly recognized that a corporation could act as an agent for its owners under certain circumstances and specified the indicia of a true agency relationship. There is no indication that the Court intended to deny a corporation the status of agent for its shareholders in spite of the presence of the indicia of agency (factors one through four) merely because the agency is to some extent based upon the shareholders’ control of the corporation (factor five). . . . When the Supreme Court stated that the corporation’s relations with its principal “must not be dependent upon the fact that it is owned by the principal,” the Court was merely reiterating its holding in *Moline Properties* that any such agency must be proved by “evidence other than the control which shareholders automatically possess over their corporations.” In other words, the taxpayer must prove that the agency existed independently of the shareholders’ ownership and control.

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137. Id. at 185.
138. Id. at 173-74.
139. Id. at 176.
140. Id. at 185-86 (citations omitted).
The court concluded that even though the corporation acted for no other principal and performed its services for free, it had acted as the partnership’s agent.

On appeal, however, the Fourth Circuit declined to adopt the Tax Court’s construction of the fifth factor, choosing instead to follow the Fifth Circuit’s literal interpretation that the fifth factor was mandatory. Accordingly, the court held that “a corporation may not be a true nontaxable agent if its relations with its principal are dependent upon the fact that it is owned by the principal.” Conceding that it would be difficult for a controlled corporation to demonstrate the independence of the principal, the court ventured that such a showing was not impossible, citing such factors to consider as the identity of ownership interests of the agent and its principal, whether the corporation is specifically limited to act as an agent only for third parties, whether the agent acts for more than one principal, whether a written agency contract exists, and whether the corporation collects a fee for its services as agent.

While the Tax Court asserted that an agency relationship could be present in the absence of one factor if the relationship as a whole indicated agency, the Fourth and Fifth Circuits were asserting that all six factors must be present and given equal weight in making the agency determination. Ironically, the Fourth and Fifth Circuit’s interpretation only acted to create a “super-factor” out of the fifth factor because it virtually dictated the result of the agency relationship inquiry. Because the fifth factor made the test outcome determinative, the factors were weighted no more equally under the Fourth and Fifth Circuits’ analysis than they were under the Tax Court’s.

IV. NEW LIFE FOR THE AGENCY THEORY

After Roccaforte and Ourisman, the agency argument looked unpromising for principals who owned nominee corporations, and commentators advised taxpayers to plan accordingly. Workable
strategies included: (1) using a corporation that is independent of the principal;\textsuperscript{147} (2) using a corporation without actually transferring the property to it, granting the lender a mortgage in the property still held by the principal, and then having the corporation lend the funds to the principal;\textsuperscript{148} and (3) using an S corporation.\textsuperscript{149}

\textbf{A. Commissioner v. Bollinger}

In addition to the other tax planning strategies, taxpayers could hold out for a circuit court of appeals that would agree with the Tax Court.\textsuperscript{150} Once a conflict between the circuits arose, the Supreme Court would be more inclined to grant certiorari. This was just the situation presented by \textit{Commissioner v. Bollinger}.\textsuperscript{151}

1. \textit{The Facts of Bollinger}

Jesse Bollinger was a real estate developer who either individually or in partnership with others constructed several apartment complexes in Kentucky. To obtain financing in compliance with state usury laws, Bollinger used two nominee corporations to hold title to the properties. One corporation was owned solely by Bollinger; the other was owned by Bollinger and the partner in the particular venture for which that corporation was formed.\textsuperscript{152}

With each corporation, the parties executed a written agreement providing that the corporation was acting as agent only to secure temporary and permanent financing for the project.\textsuperscript{153} Bollinger or his partnerships always regarded themselves as the actual owners of the properties,\textsuperscript{154} as did the lending institutions, which required partial personal guarantees from them.\textsuperscript{155} The corporations had no liabilities, assets, employees, or bank accounts, and did not manage any of the buildings once they were rented.\textsuperscript{156} Each partnership managed its own complex and maintained a separate bank account for receiving rents and paying expenses.\textsuperscript{157}

\textsuperscript{147} Falk, \textit{supra} note 146, at 729; Note, \textit{Recent Developments, supra} note 146, at 386; Note, \textit{supra} note 24, at 79.
\textsuperscript{148} Falk, \textit{supra} note 146, at 729-30.
\textsuperscript{149} Note, \textit{The Use of Corporations, supra} note 146, at 385-86; see also \textit{supra} note 28 and accompanying text.
\textsuperscript{150} See Falk, \textit{supra} note 146, at 729; Note, \textit{Recent Developments, supra} note 146, at 387.
\textsuperscript{152} \textit{Id.} at 1444-49.
\textsuperscript{153} \textit{Id.} at 1447 n.4, 1448.
\textsuperscript{154} \textit{Id.} at 1448.
\textsuperscript{155} \textit{Id.} at 1449.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.} at 1448.
Bollinger and his partners reported the losses incurred from the construction and operation of the buildings on their individual returns, and the Commissioner disallowed them, determining that such losses belonged to the corporation holding title to the property. 158

2. The Tax Court Opinion

True to form, the Tax Court reiterated its position regarding the six-factor National Carbide test for agency, emphasizing that "[n]o one factor is mandatory and absolute." 159 Finding the case "indistinguishable from Roccaforte and Ourisman," the court similarly determined that the partnerships rather than the corporations were the owners of the properties for income tax purposes. 160 The court again stressed that the corporations were formed solely to obtain financing, with the partners seeking "none of the traditional insulating benefits of a corporate shareholder." Since "the indicia of an agency relationship [were] present," the court chose to respect that relationship. 161

3. The Sixth Circuit Affirmance

The Sixth Circuit affirmed the Tax Court, finding its decision "consistent with the Supreme Court’s opinion in National Carbide." 162 Criticizing the Fourth Circuit’s interpretation in Ourisman as "exalt[ing] form over substance," 163 the Sixth Circuit focused on the substance of the agency relationship. The court declared that when the evidence establishes the attributes of an agency and the nominee corporation has acted as would an independent agent which had conducted its affairs at arm’s length with the principal, then a true agency relationship exists. 164 The court further opined that the Supreme Court in National Carbide did not intend to foreclose the possibility of a

158. Id. at 1448-49.
159. Id. at 1450. In a footnote, the court recognized its conflict with the Fifth Circuit. Id. n.6. The Fourth Circuit had not yet reversed Ourisman.
160. Id. at 1450.
161. Id. at 1452.
163. Id. The Sixth Circuit cited both Roccaforte v. Commissioner, 708 F.2d 986 (5th Cir. 1983), and Vaughn v. United States, 740 F.2d 941 (Fed. Cir. 1984), as supporting the Commissioner, but quickly disposed of them as being factually distinguishable from the present case. Bollinger, 807 F.2d at 69 & n.3. In Vaughn, the taxpayer failed to prove that the activities of the corporation were consistent with those of an agent. The corporation concealed its agency status from creditors, suppliers and contractors, obtained insurance, assumed full liability for a loan note, and defended law suits. Thus, it engaged in activities that are not normally the duties of an agent. Vaughn, 740 F.2d at 946-47.
164. Bollinger, 807 F.2d at 69.
true agency relationship existing between a nominee corporation and its owner-principal.165

4. The Supreme Court Clarifies the Agency Test

The Supreme Court granted certiorari to resolve the conflict between the circuit courts and chose not to debate whether the fifth and sixth factors were mandatory, but rather to clarify what is required to satisfy them.166 Although the Court acknowledged the necessity of "unequivocal evidence of genuineness [of agency] in the corporation-shareholder context," it refused to "parse the text of National Car- bide."167

The Commissioner claimed that the principle enunciated in Moline that a corporation is a separate taxable entity, even if owned and controlled by a single shareholder, would be undermined by anything less than a "prophylactically clear test of agency."168 Although the Court agreed with the principle, it questioned whether the test proposed by the Commissioner was the appropriate one.169

The Commissioner claimed that both the fifth and sixth factors were unsatisfied in this case, and the Court chose to dispose of the sixth factor first. The Commissioner argued that the corporation was acting as owner rather than agent in regard to the state's usury laws, and therefore was not performing a normal duty of an agent. The Supreme Court disagreed, stating emphatically that the corporation was not acting as owner since the partners always represented themselves as the principals in all loan transactions.170

The Court declined to impose "a federal tax sanction for the apparent evasion of Kentucky's usury law," observing that the Commissioner had not established that the transactions were an evasion even of "the spirit of the Kentucky law, much less its letter."171 The Court reasoned that the use of a corporate nominee is "positively envisioned" by Kentucky's usury law because the statute forbids the use of a corporation whose only asset is a one- or two-family dwelling. In

165. Id.
166. Commissioner v. Bollinger, 108 S. Ct. 1173 (1988). The Court did, however, characterize the factors as "four indicia and two requirements," id. at 1177, which arguably means that the fifth and sixth factors are in fact mandatory. However, that argument will probably be moot because of the Court's relaxed interpretation of what is required to satisfy them.
167. Id. at 1179.
168. Id. at 1177.
169. Id.
170. Id. at 1178. In fact, the lenders required the use of a corporate nominee, id., so they obviously knew the corporation was not the real owner.
171. Id.
other words, the law acknowledges the use of a corporate nominee as long as it is not merely used to secure a home mortgage. The Court also noted that under Kentucky’s usury laws, only the lender is penalized for usury and the borrower is regarded as the victim. The Court concluded that “the United States would hardly be vindicating Kentucky law by depriving the usury victim of tax advantages he would otherwise enjoy.”\textsuperscript{172} Therefore, the Court found “no basis in either fact or policy for holding that the corporation was the principal because of the nature of its participation in the loans.”\textsuperscript{173}

The Court also rejected the Commissioner’s position that the fifth factor requires nothing less than an arm’s length relationship between the corporate agent and its principal that includes payment of an agency fee.\textsuperscript{174} Conceding that the language of the fifth factor is “not entirely clear,” the Court determined that it was merely “a generalized statement of the concern” that closely held corporations should not be allowed to claim agency status at their convenience to minimize their tax liability.\textsuperscript{175} The Court concluded its discussion by summarizing what is required to ensure that the agency relationship is genuine and tax avoidance is circumvented:

[1] the fact that the corporation is acting as agent for its shareholders with respect to a particular asset is set forth in a written agreement at the time the asset is acquired, [2] the corporation functions as agent and not principal with respect to the asset for all purposes, and [3] the corporation is held out as the agent and not principal in all dealings with third parties relating to the asset.\textsuperscript{176}

Having determined that “these requirements were met here,” the Court affirmed the judgment of the Sixth Circuit.\textsuperscript{177}

\textbf{B. Bollinger Applied}

Even as the Supreme Court was deciding \textit{Bollinger}, parties in two other agency cases petitioned for certiorari. \textit{George v. Commis-
sioner\textsuperscript{178} and Frink \textit{v. Commissioner}\textsuperscript{179} arose out of the same transaction,\textsuperscript{180} and presented the typical fact pattern found in most of these agency cases. A partnership wishing to avoid state usury laws in securing a loan for the construction of a hotel used a corporation that was wholly owned by one of the partners and his wife. Additional limited partnership interests were sold, and the partnership entered into a written nominee agreement with the corporation which provided that the corporation would only act on behalf of the partnership, with the partnership indemnifying the corporation for any loss or liability. The agreement also stated that the corporation held title to the property for the equitable, legal and beneficial ownership of the partnership. The agreement did not provide for any compensation, but three years after the corporation conveyed title to the partnership, the partnership paid the corporation one hundred dollars for its services.\textsuperscript{181} The partners deducted losses from the project on their income tax returns, and the Commissioner disallowed them.\textsuperscript{182}

Both the Fourth Circuit\textsuperscript{183} and the Fifth Circuit\textsuperscript{184} reversed the Tax Court's determination that the corporation had acted as agent for the partnership, following their opinions in \textit{Ourisman} and \textit{Roccaforte} respectively. Subsequent to its decision in \textit{Bollinger}, the Supreme Court vacated the judgments of the courts of appeals and remanded them for reconsideration.\textsuperscript{185}

On remand, the Fourth Circuit affirmed the Tax Court in a rather terse opinion.\textsuperscript{186} Quoting the three-clause statement from \textit{Bollinger} laying out the new agency requirements, the court simply said that in light of this criteria, the test for genuine agency had been met.\textsuperscript{187}

In a somewhat more enlightening opinion, the Fifth Circuit likewise affirmed the Tax Court on remand.\textsuperscript{188} Also reviewing the three-part

\begin{footnotesize}
\begin{enumerate}
\item[178.] 108 S. Ct. 1264 (1988).
\item[179.] 108 S. Ct. 1264 (1988).
\item[180.] These cases were part of twenty consolidated docket numbers heard by the Tax Court in Frink \textit{v. Commissioner}, 49 T.C.M. (CCH) 386 (1984). Eighteen of the docket numbers appealed to the Fifth Circuit in George \textit{v. Commissioner}, 803 F.2d 144 (5th Cir. 1986) and the remaining two appealed to the Fourth Circuit in Frink \textit{v. Commissioner}, 798 F.2d 106 (4th Cir. 1986). George, 803 F.2d at 145 n.1.
\item[181.] Frink, 49 T.C.M. (CCH) at 388-94. The limited partnership entered into a similar agreement with a second identically owned corporation which had been formed to acquire and operate a golf course, but the Tax Court found that each corporation had acted in its own name and for its own account with respect to ownership and operation of the golf course. \textit{Id}.
\item[182.] \textit{Id} at 394.
\item[185.] Frink, 108 S. Ct. at 1264; George, 108 S. Ct. at 1264.
\item[186.] Frink \textit{v. Commissioner}, 846 F.2d 5 (4th Cir. 1988) (per curiam).
\item[187.] \textit{Id} at 6.
\item[188.] George \textit{v. Commissioner}, 844 F.2d 225 (5th Cir. 1988).
\end{enumerate}
\end{footnotesize}
Bollinger test, the Fifth Circuit summarized that “when it is clear that the parties intended that the corporation act only as an agent, there is no need to make a separate strict inquiry about the extent to which the agent corporation’s status is dependent on the principal’s ownership.”

Sundance Ranches, Inc. v. Commissioner presented the Tax Court with its first agency case since the Supreme Court decided Bollinger. The case is significant because the Tax Court ended any speculation that Bollinger completely replaced National Carbide.

In Sundance Ranches, the Tax Court rejected the agency claim because the corporation did not represent itself as agent in dealings with third parties. In all the sales transactions, the corporation was identified as owner on warranty deeds and other documents, and several subdivision reports listed the corporation as “developer.” The Tax Court concluded that:

[d]evelopment of property is not among “the normal duties of an agent”; a developer typically acts for its own account. There is no evidence in this case that the grantor trust was bound by [the corporation’s] actions; that [the corporation] transmitted more than a part of the income in question to the grantor trust; or that the income was attributable to the assets and employees of the grantor trust.

This conclusion, consisting largely of an analysis of the National Carbide factors, indicates that National Carbide is still the agency test, subject to the Bollinger interpretation.

C. Analysis of Bollinger

The three-part Bollinger test, combined with the National Carbide factors, sets the new standard for an agency relationship to be recognized for tax purposes. Although the danger exists that this new test will be read as literally as the old one was, principals who carefully arrange their relationships with their wholly-owned nominee corporations may now achieve their business purposes while avoiding adverse tax consequences.

On at least one level, the result in Bollinger makes sense: real estate developers should not be subject to tax penalties merely because they

189. Id. at 229.
190. 56 T.C.M. (CCH) 695 (1988).
191. Id. at 701.
comply with state usury laws. As the Supreme Court noted, Bollinger did nothing illegal in using a corporate nominee to secure the higher interest rate.\textsuperscript{193} Therefore, it would be unfair to subject developers in one state to adverse tax treatment because that state allows only corporations to borrow at the higher interest rates, when developers in another state can secure financing as individuals and thus receive more favorable tax treatment simply because that state's usury laws are different. Such a result raises the question of the propriety of allowing state laws to dictate federal income tax policies. The exertion of Congress' power under the Constitution to tax income "is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a \textit{uniform application to a nationwide scheme of taxation}."\textsuperscript{194} The Bollinger decision lends greater uniformity to the tax treatment of real estate developers in states which restrict noncorporate lending rates, thus harmonizing with the principle that "differences in state law should not override the intent of Congress in enacting federal taxing statutes."\textsuperscript{195}

One issue left undecided by \textit{Bollinger} is the limits to which the decision will extend. Although the result in \textit{Bollinger} will protect an agency arrangement where the corporation is used solely to acquire funding in compliance with state usury laws, what other business purposes it will likewise protect is unclear. Because the agency arrangement now offers more attractive tax benefits, undoubtedly more taxpayers will make use of it. Therefore, courts will likely examine the motive behind the use of the corporation and ferret out any tax-avoidance manipulation.\textsuperscript{196}

[It makes no] sense to adopt a contrary-to-fact legal presumption that the corporation was the principal, imposing a federal tax sanction for the apparent evasion of Kentucky's usury law. To begin with, the Commissioner has not established that these transactions were an evasion. Respondents assert without contradiction that use of agency arrangements in order to permit higher interest was common practice, and it is by no means clear that the practice violated the spirit of the Kentucky law, much less its letter.

See also supra notes 171-72 and accompanying text.

\textsuperscript{194} Burnet v. Harmel, 287 U.S. 103, 110 (1932) (emphasis added).

\textsuperscript{195} Vaughn v. United States, 719 F.2d 196, 200 (6th Cir. 1983).

\textsuperscript{196} See Sundance Ranches, Inc. v. Commissioner, 56 T.C.M. (CCH) 695 (1988), discussed supra notes 190-91 and accompanying text. The Commissioner claimed that the transaction between the principal and nominee corporation was a "sham transaction, created solely to avoid income taxes." \textit{Id.} at 699. Although the court would not hold that the transactions were a sham, it concluded that they were "mischaracterized for tax purposes." \textit{Id.} at 701.
It is also unclear how the courts will determine whether the corporation is acting as agent or principal. Although the *Bollinger* test requires the corporation to "function[] as agent and not principal with respect to the asset," the Court never stated exactly what that entails. *Bollinger* and the other agency cases seem to suggest that only when the corporation *does not act at all* will it be deemed an agent. This apparent passive activity requirement is so strongly reminiscent of the disregard theory that it raises the question of whether the two theories actually are only one. The same activities which would cause a corporation to satisfy the *Moline* business purpose or business activity test could also be characterized as activities of a principal. It seems that the "agency test" is really saying that when the controlled corporation *does nothing* but hold naked legal title, it is "acting" as agent, but in reality it is not "acting" at all. Thus, when the corporation is deemed "agent," the court in essence is merely disregarding it.

Perhaps the real lesson that *Bollinger* teaches is that as long as the parties do not become too greedy, the courts will allow the parties to decide who the "owner" of the property is for income tax purposes. This is not a new theme, as evidenced by the Supreme Court in *Frank Lyon Co. v. United States* when it held:

> [W]here . . . there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties.

Taxpayers no doubt applaud this approach as it allows them some flexibility in arranging their business affairs. Although the courts will continue to examine each case individually, the agency theory is now a viable tax alternative.

V. CONCLUSION

For nearly forty years, the agency theory has been little more than just that: a theory. The Supreme Court's decision in *Commissioner v.*
*Bollinger* has brought new life to the theory by defining standards which a developer and a closely held corporation can realistically meet. Had the Court adhered to a literal interpretation of the *National Carbide* factors, it would have surely precluded an agency relationship from ever being recognized where the agent is a closely held corporation.

The result in *Bollinger* brings fairness to a situation that was otherwise favorable only to developers living in states that did not restrict noncorporate lending rates. Now developers who must incorporate to secure financing in compliance with state usury laws can claim the income and deductions arising from their property on their individual tax returns. As long as developers and their closely held corporations are careful in arranging their affairs and adhere to the requirements of *National Carbide* and *Bollinger*, their agency relationships will be respected for income tax purposes.