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## Copperweld Corp. v. Independence Tube Corp.:Has the Supreme Court Pulled the Plug on the Bathtub Conspiracy

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**COPPERWELD CORP. V. INDEPENDENCE TUBE CORP.:  
HAS THE SUPREME COURT PULLED THE  
PLUG ON THE "BATHTUB  
CONSPIRACY"?**

**I. INTRODUCTION**

Section 1 of the Sherman Act<sup>1</sup> declares illegal every "contract, combination . . . or conspiracy" in restraint of trade.<sup>2</sup> Typically, a section 1 plaintiff alleges a conspiracy between two or more distinct business entities, and the court focuses on whether the defendants made an agreement to restrain trade.<sup>3</sup> The question of conspiratorial capacity becomes more

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1. 15 U.S.C. § 1 (1982) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."

2. *Id.*

3. In *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), the Supreme Court established the classic definition of conspiracy as "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *See also* *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). Although a § 1 conspiracy is most easily established by evidence of an explicit agreement to restrain trade, *see Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 213-18 (1899), a tacit understanding is sufficient. *United States v. General Motors Co.*, 394 U.S. 127, 142-43 (1966); *United States v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965).

In order to violate § 1, a conspiratorial agreement must also unreasonably restrain trade. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Courts have developed two methods for determining whether such a restraint has occurred: First is the per se rule, which holds illegal those "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Id.* Second is the rule of reason, which governs those "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reason why it is imposed." *Id.* Typical per se violations include horizontal price fixing, bid rigging and market division, vertical price fixing, certain group boycotts and some tying arrangements. *See generally* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 22-49, 56-65, 75-91 (2d ed. 1984) [hereinafter ANTITRUST LAW DEVELOPMENTS]; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 165-97 (1977); P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES ch. 3A (3d ed. 1981).

Where per se violations are not apparent, the burden is on the plaintiff to prove that the subject conduct amounts to an unreasonable restraint of trade. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1971) and *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), the Court limited the rule of reason inquiry to a question of whether the subject restraint "is one that promotes competition or one that suppresses competition" in terms of the "impact on competitive conditions." *Professional Eng'rs*, 425 U.S. at

traenterprise" or "bathtub" conspiracy.

The Supreme Court decided *Copperweld Corp. v. Independence Tube Corp.*<sup>7</sup> amidst long-standing confusion and controversy surrounding the intraenterprise conspiracy doctrine. Prior to *Copperweld*, problems related to the doctrine were clearly evident: circuit courts had settled on several conflicting tests for invoking the intraenterprise principle;<sup>8</sup> commentators had condemned the concept for decades;<sup>9</sup> and the Supreme Court had provided little guidance in the area with a scattered line of ill-defined precedents.<sup>10</sup> The *Copperweld* Court attempted to put the intraenterprise conspiracy debate to rest.<sup>11</sup>

In *Copperweld*, the Court held that as a matter of law a parent corporation and its wholly-owned subsidiary are incapable of conspiring in violation of section 1 of the Sherman Act.<sup>12</sup> Although the Court admitted that it had previously acquiesced in the intraenterprise conspiracy doctrine, it reasoned that it had never before fully analyzed its justifica-

7. 104 S. Ct. 2731 (1984).

8. See *infra* notes 68-70 and accompanying text.

9. See, e.g., Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 453 (1983) (arguing that the intraenterprise doctrine is a misplaced attempt to reach significant anticompetitive behavior "that otherwise would fall into the interstices of Sherman, Clayton, and the Federal Trade Commission Acts," and should be rejected or severely limited); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 25 (1981) (concluding that the policies of the antitrust laws would best be served by holding as a matter of law that where a subsidiary or affiliate is wholly-owned or controlled by its parent corporation, the corporations are incapable of conspiring); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968) (same, with the exception that the authors would retain the principle for limited situations in which incorporated subsidiaries hold themselves out as competitors or in which the subsidiaries are specifically created or used to achieve anticompetitive results); Kempf, *Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?*, 24 BUS. L. 173, 181 (discussing the strength of the doctrine in 1968 but noting that it appears to be most applicable "where the conduct involved is beyond defense and involves coercion of outsiders"); McQuade, *Conspiracy and Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 186, 215 (1955) (noting that if the doctrine is extended to its logical conclusion "[a]ny nationally coordinated multicorporate enterprise could hardly escape a violation," and suggesting that "[t]here must be some opportunity to show economic justification") (footnote omitted); see also Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950); Sprunk, *Intra-Enterprise Conspiracy*, 9 ABA ANTITRUST SECTION REP. 20 (1956); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977) [hereinafter cited as Note, *A Suggested Standard*]; Note, *Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 CALIF. L. REV. 1732 (1983) [hereinafter cited as Note, *A Decisionmaking Approach*]; Barndt, *Two Trees or One?—The Problem of Intraenterprise Conspiracy*, 23 MONT. L. REV. 158 (1962).

10. See *infra* text accompanying notes 29-70 for a discussion of the historical development of the intraenterprise doctrine in the Supreme Court.

11. The *Copperweld* Court expressly stated that it "granted certiorari to reexamine the intraenterprise conspiracy doctrine." 104 S. Ct. at 2736 (citation omitted).

12. *Id.* at 2745.

tion.<sup>13</sup> The Court rejected the intraenterprise doctrine because it erroneously allowed section 1 to apply to single enterprise conduct whereas Congress intended section 1 to scrutinize agreements "between *separate* entities."<sup>14</sup> A parent corporation and its wholly-owned subsidiary, the Court reasoned, cannot be considered separate economic actors for anti-trust purposes.<sup>15</sup>

The Court's decision in *Copperweld* does not settle the intraenterprise debate. By expressly limiting its holding to the facts before it,<sup>16</sup> the Court chose not to address a range of intraenterprise relationships which may still be subject to section 1 scrutiny. The holding in *Copperweld* is not controlling with respect to agreements between parent corporations and their partially-owned subsidiaries, or with respect to agreements among wholly-owned or partially-owned affiliates which share a common parent. This Note discusses the application of *Copperweld* to these intraenterprise relationships.

The Court's adoption of an economic enterprise approach to anti-trust law also raises an interesting question about intraenterprise liability in general. Several commentators argue strongly in favor of an economic enterprise justification for "piercing the corporate veil"<sup>17</sup> to find a parent corporation responsible for the liabilities of its subsidiary.<sup>18</sup> This Note questions whether the law should permit corporations and their subsidiaries to avoid section 1 scrutiny because they are one economic enterprise, while continuing to treat the same corporations as separate entities to shield the parent from the liability of a subsidiary.

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13. *Id.* at 2736.

14. *Id.* at 2740 (emphasis in original).

15. *Id.* at 2745.

16. The Court expressly limited its holding to wholly-owned subsidiaries. *Id.* at 2740. See *infra* note 152.

17. For a definition and discussion of piercing the corporate veil to hold a parent liable for its subsidiary's acts, see *infra* notes 194-97 and accompanying text.

18. See, e.g., P. BLUMBERG, THE LAW OF CORPORATE GROUPS §§ 102-02.1 (1983), discussed at *infra* text accompanying notes 193-97. Other commentators have noted the similarities between the intraenterprise issue and the issue of piercing the corporate veil. See Handler & Smart, *supra* note 9, at 65 (stating that "intracorporate conspiracy doctrine has flourished in an environment which is most conducive to piercing the corporate veil"); see also Areeda, *supra* note 9, at 469 n.64 (noting that piercing the corporate veil determines circumstances under which previously established liability of subsidiary should be imputed to parent, while intraenterprise doctrine is concerned with establishing illegality in the first place; also noting that various versions of the test have been severely criticized (citing P. BLUMBERG, *supra*)).

## II. HISTORICAL DEVELOPMENT

### A. *The Sherman Act*

When the Sherman Act was enacted in 1890, the United States had become a world industrial force. Capital intensive production began to dominate the manufacturing industries, and as these production operations grew so did their markets.<sup>19</sup> Following the lead of European cartels,<sup>20</sup> United States industry witnessed a wave of mergers and corporate consolidations unequalled in its history.<sup>21</sup>

Congress passed the Sherman Act<sup>22</sup> to balance the profit-seeking behavior of private enterprises with the public interest in maintaining competitive markets.<sup>23</sup> It was hoped that the statute would function both to inhibit undesirable business conduct and to channel and shape market structure along competitive lines.<sup>24</sup> In this respect, section 1 was aimed at competitors who deliberately attempted to stifle competitive market forces through mutual agreement,<sup>25</sup> while section 2 was aimed at anticompetitive effects considered to be inherent in a single firm possessing monopoly power.<sup>26</sup> Although section 1 enforcement began inauspi-

19. See generally H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 58-59 (1954); A. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCES* 422-25 (1970).

20. H. THORELLI, *supra* note 19, at 58-91; A. SCHERER, *supra* note 19, at 424. Professor Sullivan defines a cartel as an "arrangement through which two or more firms negotiate concerted decisions about price, output, or territory, yet continue to independently control all other aspects of their operations." L. SULLIVAN, *supra* note 3, at 154. Apart from the obvious anticompetitive effects of cartelization with respect to price fixing, such arrangements also lead to inefficient internal organization and a disincentive to compete through innovation. For example, in England, the British economy in the 1950's and 1960's was greatly weakened, in part, by sluggishness resulting from several decades of cartelization. A. SCHERER, *supra* note 19, at 405 (citing R. CAVES, *BRITAIN'S ECONOMIC PROSPECTS* 12-13, 279-323, 491-93 (1968)).

21. H. THORELLI, *supra* note 19, at 72-91.

22. 15 U.S.C. §§ 1-7 (1982).

23. A. SCHERER, *supra* note 19, at 424-25.

24. *Id.* at 424; see also L. SULLIVAN, *supra* note 3, at 19-29; P. AREEDA, *supra* note 3, at 5-43.

25. Professor Sullivan writes:

The statutory phrase, "contract, combination or conspiracy," conjures up the classic image of robber barons gathering clandestinely to carve up a market. The statute, classically conceived, aims at bad conduct, at conspirators who deliberately plan . . . and execute action to stifle market forces . . . . [T]he classical concept of concerted action is a horizontal one; it deals with the way *competitors relate to each other* . . . .

L. SULLIVAN, *supra* note 3, at 311-12 (emphasis added).

26. 15 U.S.C. § 2 (1982) makes it a crime to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part [of interstate or foreign commerce]." Generally, a firm has monopolized if it has obtained or maintained the power to control prices or exclude competition in the relevant market. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Grinnel Corp.*, 384 U.S. 563 (1966); see generally L. SULLIVAN, *supra* note 3, at 106-32. An

ciously,<sup>27</sup> it eventually became a major weapon for policing anticompetitive behavior between separate firms.<sup>28</sup>

attempt to monopolize may be established even where the power of the firm in the relevant market falls short of monopoly. A prima facie case of attempt is established by showing (1) specific intent to monopolize unilaterally or with others, with (2) a "dangerous possibility of success." See, e.g., *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953); but cf. *United States Steel Corp. v. Fortner Enter., Inc.*, 429 U.S. 610, 612 n.1 (1977) (a mere business desire to increase market share does not satisfy this standard).

Monopoly by combination and conspiracy under § 2 is the provision most relevant to this Note. It is important because the intraenterprise debate does not exist when the issue is combination or conspiracy to monopolize. Despite the statute's use of the word conspiracy, § 2 does not require a plurality of actors because it addresses unilateral firm conduct. *Copperweld*, 104 S. Ct. at 2740. The essential element of a § 2 conspiracy is a specific act or course of conduct with the intent to monopolize. See *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), *infra* notes 39-42 and accompanying text; see also *American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946) ("Petitioners . . . might have been convicted here of conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy . . ."). Moreover, the "dangerous probability of success" requirement is not applicable to § 2 conspiracies. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980) ("no particular level of market power or 'dangerous probability of success' has to be alleged or proved in a [§ 2] conspiracy claim"), *cert. denied*, 450 U.S. 921 (1981).

Monopoly power means the ability to affect or control the price and output of a given product in a certain product market. See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50, 58 (1911) (Standard Oil's ability to control prices was monopoly power despite appellants' relatively small share of the crude oil market); see also *American Tobacco Co.*, 328 U.S. at 182-83 (purpose of Act was to protect against market conduct "designed to injure others" by "driving competitors out of business," and erecting "barriers to entry"). However, beginning with *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), the intuitive approach of the earlier cases was replaced by a more modern structural analysis. Writing for the court, Judge Learned Hand introduced a two-step analysis: the court first is to define the relevant market, and then assess the defendant's power in that market. This approach, with some fine tuning, has since been generally followed. See, e.g., *United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377 (1956); *United States v. Grinnel Corp.*, 384 U.S. 563 (1966); see also ANTI-TRUST LAW DEVELOPMENTS, *supra* note 3, at 110-21 (discussing the recent cases in the area). For an excellent treatment of the economic theory related to the ill-effects of monopoly power, see A. SCHERER, *supra* note 19, at 13-36.

27. Professor Scherer provides a good summary of the Sherman Act's beginnings:

Enforcement of the Sherman Act during its first 10 years was unspectacular, to say the least. Several attorneys general entrusted with enforcing the law lacked not only funds and personnel, but also enthusiasm, partly because of prior affiliations as private counsel to leading corporations. The government also suffered significant legal defeats in cases brought against the Whiskey and Sugar Trusts—setbacks traceable in no small measure to careless preparation and unimaginative argumentation. However, government test case victories in 1897 and 1899 set the stage for an invigorated enforcement program after Theodore Roosevelt took office as President in 1901.

A. SCHERER, *supra* note 19, at 424.

28. See generally H. THORELLI, *supra* note 19, at ch. 8; see also cases cited *supra* at note 3 (discussing development of per se and rule of reason approaches to § 1 enforcement).

### B. "Intraenterprise Conspiracy"

The intraenterprise conspiracy doctrine was a policy response to the unscrutinized anticompetitive conduct of a single enterprise or firm.<sup>29</sup> The need for the doctrine arose, in part, in response to the development of oligopolistic market structures in the United States.<sup>30</sup> In highly concentrated markets, firms could jointly influence price and output without acting as monopolists. Courts simply did not, and still do not, recognize that these so-called shared monopolies can violate section 2.<sup>31</sup> Similarly, single firms could coordinate their subsidiaries and affiliates with little fear of violating section 2. Antitrust plaintiffs eventually turned to section 1 to combat anticompetitive single firm conduct that did not violate section 2. The ambiguity of section 1 nurtured the concept that a single enterprise could conspire with itself to restrain trade.

Judicial acceptance of an intraenterprise conspiracy began with *United States v. General Motors Corp.*<sup>32</sup> There, the Seventh Circuit upheld a criminal conviction of General Motors Corporation (GM) and three of its wholly-owned subsidiaries for violating both sections 1 and 2 by conspiring to force GM dealers to finance their purchases and car

29. As one commentator has explained:

The policy concern of the [intraenterprise] doctrine came to be with arrangements unduly threatening the desired automatic play of competitive forces in a free market place. The occasion for realizing that one person or enterprise could, without joining forces with competitors or without committing some independent crime or tort, seriously threaten the competitive order had not yet arisen. . . . Few entrepreneurs could individually dominate or even materially influence the free play of market forces. The danger lay not in concentration of power . . . but in the propensity of traders to associate or conspire.

Rahl, *supra* note 9, at 746 (footnote omitted); see also L. SULLIVAN, *supra* note 3, at 324 ("enforcement officials are inevitably and understandably drawn by conspiracy theory in their efforts to strike down single firm conduct which is harmful to competition, but fails to cross the threshold of monopolization or attempt to monopolize").

30. Oligopoly means "few sellers" or shared monopoly. P. AREEDA, *supra* note 3, at 270-71. An oligopolistic market structure can be said to exist when "the sellers are sufficiently few in number so that each believes his economic fortunes are perceptively influenced by the market actions of other individual firms, and that those firms are in turn affected significantly by his own actions." A. SCHERER, *supra* note 19, at 10. It is similar to a monopolistic market structure in that the individual competitors have a perceptive influence on price; that is, to some extent they possess market power weighing on monopoly power. *Id.* Although oligopolies differ from monopolies in that the few firms in the market are still supposed to compete, statistical studies generally reveal that oligopolistic markets lend themselves to higher prices and noncompetitive performance. See Bain, *Relation of Profit Rate to Industry Concentration, American Manufacturing, 1936-1940*, 65 Q.J. ECON. 293 (1951).

31. P. AREEDA, *supra* note 3, at 289. See also L. SULLIVAN, *supra* note 3, at 330-73 for a full treatment of the oligopoly problem, including the various legal theories, current trends and legislative proposals for dealing with it.

32. 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

sales through a GM financed subsidiary.<sup>33</sup> The defendants claimed a "single trader defense,"<sup>34</sup> contending that they were affiliated, noncompeting units engaged in a single enterprise and could not be held liable for conspiracy under section 1.<sup>35</sup> Without citing any authority, the court held that the defendants possessed conspiratorial capacity and could not "enjoy the benefits of separate corporate identity."<sup>36</sup>

The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce. But even if the single trader doctrine were applicable, it would not help the appellants.<sup>37</sup>

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33. *Id.* at 398.

34. Unlike the intraenterprise doctrine, the single trader defense has its origin in the vertical context of manufacturer-dealer relations. The defense, commonly known as the "Colgate Doctrine," generally made it permissible for manufacturers to refuse to deal with dealers who did not follow an announced resale price policy. See *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919). However, the Colgate Doctrine was itself limited substantially by the Court's decisions in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960) (terminated dealer could allege conspiracy between manufacturers and independent dealers where steps went beyond mere refusal to deal), and *Albrecht v. Herald Co.*, 390 U.S. 145, 150 (1968) (hiring outside agents overstepped unilateral conduct when done to enforce maximum resale prices). The intraenterprise doctrine had afforded dealers a way around *Colgate*. In those cases in which manufacturers' subsidiaries were also dealers, the plaintiff dealer could allege a conspiracy between the subsidiary dealer and the manufacturer. See, e.g., *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968) (finding a § 1 conspiracy based on intraenterprise theory, with an alternative holding based on an exception to Colgate Doctrine; see *infra* notes 56-60 and accompanying text).

At the same time that the Colgate Doctrine had developed exceptions or issues giving rise to intraenterprise concepts, courts had begun to deal with the issue of intracorporate conspiracies involving corporate officers. See, e.g., *Patterson v. United States*, 222 F. 599 (6th Cir.) (officers and agents of cash register company which gained control of 90% of the market violated both §§ 1 and 2 of Sherman Act), *cert. denied*, 238 U.S. 635 (1915). The *Patterson* court specifically noted that § 1 of the Sherman Act could include conspiracies "between competitors, or between the officers and agents of a competitor on its behalf against a competitor." *Id.* at 618. Although the court's language was dictum because it was properly a § 2 case, it does show that courts considered the intracorporate conspiracy issue well before establishing the general rule excluding officers, directors, and employees from § 1 liability (this rule is discussed *supra* at note 5).

35. 121 F.2d at 404.

36. *Id.*

37. *Id.* As one noted writer has suggested, this passage can be read to mean: "Form matters. Form does not *really* matter. Even if form did really matter, you're stuck anyhow." See McQuade, *supra* note 9, at 191 (emphasis in original). The court's proposition that "the test of illegality [under § 1] is the presence or absence of restraint of trade in commerce" also appears to have been a misstatement of the law, as § 1 necessarily requires combination or conspiracy in addition to restraint of trade. Apparently, the court relied upon *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936), a case that applied § 3 of the Clayton Act, which does not require conspiring entities. See Stengal, *supra* note 9, at 10-12 for a discussion of this point.



The *General Motors* court concluded that even though GM and its subsidiaries may have constituted a single integrated enterprise "as a matter of economics," they were separate entities "as a matter of law."<sup>38</sup> In the following years, the judiciary increasingly adopted the idea that section 1 addressed entities that were legal rather than economic in form.

The Supreme Court first addressed the intraenterprise question in *United States v. Yellow Cab Co.*,<sup>39</sup> which involved the relationship between a taxicab manufacturing corporation and several Yellow Cab affiliates which it had acquired and controlled as one family.<sup>40</sup> The complaint alleged conspiracies under both sections 1 and 2 of the Sherman Act among the controlling shareholder, the manufacturing corporation and five operating corporations.<sup>41</sup> The Court found conspiracies under both sections and in dictum stated:

[A]ny affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act.

[T]he common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.<sup>42</sup>

This language became the life-breath of the intraenterprise doctrine and, according to some, had taken on "talismanic qualities" prior to *Copperweld*.<sup>43</sup>

After *Yellow Cab*, the Supreme Court applied the intraenterprise concept in four other cases. The first of these was *Schine Chain Theatres, Inc. v. United States*,<sup>44</sup> in which the Court found that negotiations con-

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38. 121 F.2d at 410.

39. 332 U.S. 218 (1947).

40. One person, Morris Markin, headed the firm. He owned 100% of the stock of the Cab Sales and Parts Corporation and a controlling interest in Checker Cab Manufacturing Corp. (CCM). CCM held 62% of the stock in Parmelees Transportation Co., which in turn owned 30% of Chicago Yellow Cab and 100% of several other operating companies. Chicago Yellow Cab held complete ownership of Yellow Cab. *Id.* at 221-22.

41. *Id.* at 224.

42. *Id.* at 227.

43. Areeda, *supra* note 9, at 458.

44. 334 U.S. 110 (1948). Prior to *Schine Chain Theatres*, the Court had considered one other movie case which indirectly dealt with the intraenterprise concept. In *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), the United States successfully prosecuted section 1 and 2 claims against horizontally integrated claims of theatre exhibitors. The Court found that the defendants had used their buying power in towns with no competing theatres to induce distributors to give preferential treatment to their movie houses in towns with competing theatres. *Id.* at 180-83. This was sufficient evidence to find an attempt to monopolize local

ducted by a parent and its wholly-owned subsidiaries with motion picture distributors had illegally restrained trade.<sup>45</sup> Although the case could have been decided on the ground of attempted monopolization,<sup>46</sup> the Court chose instead to rely on section 1. It reasoned that "[t]he concerted action of the parent company, its subsidiaries, and the named officers and directors . . . was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent."<sup>47</sup>

By this time, the intraenterprise concept had evolved into a doctrine. When the Court decided *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,<sup>48</sup> there was no hesitation to apply it to competing subsidiaries.

In *Kiefer-Stewart*, the Court found that two wholly-owned subsidiaries of a liquor distiller were guilty under section 1 of jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme.<sup>49</sup> The Court rejected defendant Seagram's argument that its subdivisions merely acted as instrumentalities of a single manufacturing/

markets in violation of § 2. Justice Douglas noted that the "vice of this undertaking was the combination of several exhibitors in a plan of concerted action." *Id.* at 183. Although some writers have suggested this was recognition of an intraenterprise theory, *see, e.g.*, Rahl, *supra* note 9, at 764 n.69, the record showed that one family owned a majority of the stock in Crescent, which in turn owned 50% of the stock in two of the theatre distributors and that Crescent had no ownership interest in the two other defendants. McQuade, *supra* note 9, at 196-97. In essence the case is like *Timken*, *see infra* note 53 and accompanying text, in which a typical combination existed. Nevertheless, the *Schine* Court understood *Crescent* to support the intraenterprise concept. *Schine*, 334 U.S. 110, 116-17 (1948).

Another movie case decided the same day as *Schine* was *United States v. Griffith*, 334 U.S. 100 (1948), in which four theatre corporations and two individuals were charged with using their buying power to contract certain exclusive privileges with local distributors. *Id.* at 101-04. The case appeared to rest on a § 2 theory but the Court stated that "[t]he appellees, having combined with each other and with the distributors to obtain those monopoly rights, formed a conspiracy in violation of §§ 1 and 2 of the Act." *Id.* at 109. However, the two affiliated corporations shared no common control except for common selling agencies, and the mutual stock holdings in each other were minimal. *Id.* This, too, suggests a § 1 premise in that the case involved distinct economic entities under the law at that time. McQuade, *supra* note 9, at 200. If these relations could be considered intraenterprise, "competitors could sanctify illicit agreements by exchanging a few hundred shares *inter se.*" *Id.*

45. 334 U.S. at 116. A parent company and five of its wholly-owned subsidiaries used their aggregate buying power to negotiate unreasonably favorable master agreements with eight major film distributors. *Id.*

46. *See* Rahl, *supra* note 9, at 764 n.69.

47. 334 U.S. at 116. It should be noted that a § 1 amalgamation theory was not even argued in *Schine*. The defendants were so sure the case would turn on a § 2 claim that they dedicated only three of 230 pages of their brief to the single entity question. McQuade, *supra* note 9 at 202. The opinion itself gave the issue only the few lines quoted in the text to support the intraenterprise theory.

48. 340 U.S. 211 (1951).

49. *Id.* at 212-14.

merchandising unit.<sup>50</sup> As an additional twist, the Court noted that the intraenterprise doctrine was especially applicable where the conspiring units held themselves out to the public as competitors,<sup>51</sup> dictum that has since been the subject of much debate.<sup>52</sup>

The intraenterprise issue arose again in *Timken Roller Bearing Co. v. United States*,<sup>53</sup> which involved restrictive horizontal agreements between an American corporation and two foreign corporations in which the former owned thirty and fifty percent interests respectively.<sup>54</sup> The Court upheld the district court's finding of a section 1 conspiracy. Most commentators agree, however, that *Timkin*, along with *Yellow Cab* and *Schine Chain Theatres*, turned on the fact that the initial combinations were themselves created for anticompetitive purposes.<sup>55</sup> These cases did not provide a firm basis for a general intraenterprise doctrine.

It appeared that the intraenterprise doctrine was vindicated by Justice Black's opinion in *Perma Life Mufflers, Inc., v. International Parts Corp.*<sup>56</sup> There, the Court found a section 1 conspiracy among a parent corporation and its subsidiaries to impose various illegal restrictions on

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50. *Id.* at 215. Justice Black delivered the opinion of the Court stating that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws." *Id.* (citing *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947)). Hence, the vitality of the intraenterprise doctrine was assumed. Nor could the case have been decided on the *Parke, Davis-Albrecht* rationale, discussed *supra* at note 34, because these cases had not yet been decided.

51. 340 U.S. at 215.

52. Few commentators embrace the "hold-out" concept. Professor Areeda, for example, argues that such a claim in substance is for fraud and therefore not an antitrust concern. Areeda, *supra* note 9, at 461. *But cf.* McQuade, *supra* note 9, at 213 (as to affiliates which "are independent in all respects and do not achieve substantial added efficiencies because of their integration [the rule] would be in keeping with the basic premises of an antitrust policy designed to encourage the conditions of an effective competitive economy"; noting, however, that the intraenterprise doctrine is a poor tool with which to achieve such a result. For cases which have followed this rule, *see infra* note 68.

53. 341 U.S. 593 (1951).

54. *Id.* at 595. In *Timken*, an American Company owned 30% of the stock of an English corporation and 50% of the stock of a French corporation, each of which had substantially the same name. These companies entered into traditional cartel type arrangements, including allocating trade territories, fixing prices in the other's trade territory and generally protecting each other's markets. *Id.* at 595-96.

55. Areeda, *supra* note 9, at 458; McQuade, *supra* note 9, at 194-95; Rahl, *supra* note 9, at 764-65 n.69; *accord* *United States v. Columbia Steel Co.*, 334 U.S. 495, 520-23 (1948). One commentator has adequately summarized the common view, stating that in *Timken* "there was no corporate-subsidary relation [or at the least] the combination was one formed for the purpose of carrying on the prior illegal agreements. Both eliminate the case as authority for an intra-enterprise conspiracy doctrine." McQuade, *supra* note 9, at 212 (footnote omitted). The *Copperweld* Court agreed. 104 S. Ct. at 2739.

56. 392 U.S. 134 (1968).

plaintiff franchisees.<sup>57</sup> In no uncertain terms, Justice Black stated that because the defendants "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."<sup>58</sup> The Court also noted that the defendants could have been held liable under section 1 for conspiracy between the petitioner himself and Midas, or between Midas and other franchise dealers.<sup>59</sup> The *Perma Life* Court did not discuss the defense offered by the defendants—significant to the Court in *Kiefer-Stewart*—that they had not held themselves out as competitors.<sup>60</sup> Under *Perma Life*, the intraenterprise doctrine appeared to be applicable in all cases in which the alleged conspirators were separately incorporated.

Some have argued that the expansive rule of *Perma Life* was limited by the Court's later decision in *United States v. Citizens & Southern National Bank*.<sup>61</sup> There, Citizens & Southern National Bank (Citizens) set up a banking system in Georgia and retained only five percent of the shares in each branch to avoid violating state law prohibiting branch banking.<sup>62</sup> As a practical matter, Citizens controlled these banks<sup>63</sup> and when Georgia amended its laws to permit branch banking, Citizens attempted to acquire the banks' outstanding shares. The Justice Department objected, claiming in part that the former relations between Citizens and the branch banks constituted price fixing.<sup>64</sup>

The Court upheld the trial court's finding that the defendants had

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57. *Id.* at 140-41. The plaintiffs were several franchise dealers of defendant Midas. The other defendants were Midas' parent, International Parts Corporation, two other subsidiaries of International Parts, and six individuals who were officers or agents of the corporation. *Id.* at 135. The plaintiffs alleged as illegal restraints of trade certain provisions of Midas' franchise agreements which precluded them from purchasing material from other sources, barred them from selling outside their designated territories, tied their sale of mufflers to the sale of other Midas products, and required them to sell at fixed prices. *Id.* at 137.

58. *Id.* at 141-42 (citing *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947)). The Seventh Circuit held that the defendants were incapable of conspiring as a matter of law because they comprised a "single business entity." The court noted that there was no evidence that the corporations competed with each other or acted in any way other than as a fully integrated firm. *Perma Life*, 376 F.2d 629, 694, 699 (7th Cir. 1967), *rev'd* 392 U.S. 134 (1968).

59. 392 U.S. 134, 142 (citing *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968) (discussed *supra* note 34)).

60. See *supra* notes 51-52 and accompanying text.

61. 422 U.S. 86 (1975).

62. *Id.* at 91-93.

63. Citizens selected the principal executive officers, oversaw selection of their directors, appointed one of its own executives to serve as an "advisory director," and generally provided banking experience and expertise. *Id.*

64. 422 U.S. at 112.

not fixed prices, stating that "the correspondent associate programs . . . were permissible under the Sherman Act."<sup>65</sup> Although this language has been cited as requiring that a parent corporation actually control a subsidiary in order for them to be treated as a single entity under section 1,<sup>66</sup> a better interpretation is that the defendants' conduct might have been price fixing had they been competitors, but among more closely related companies, the restraints were reasonable.<sup>67</sup> In any event, it was not clear what limits *Citizens* placed on the broad implications of *Perma Life*.

The ambiguity of these Supreme Court cases led to confusion in the circuits about the correct standard to use to determine whether related corporations could conspire under section 1. A few circuits latched on to the "hold out" language found in *Kiefer-Stewart*,<sup>68</sup> other circuits adopted the strict separate incorporation rule of *Perma Life*,<sup>69</sup> while a number of circuits settled on an all-the-facts-and-circumstances test somewhat similar to the control test implied in *Citizens*.<sup>70</sup> It was in the midst of this

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65. *Id.* at 114.

66. See Note, *A Suggested Standard*, *supra* note 9, at 741-42.

67. See Handler & Smart, *supra* note 9, at 35-37.

68. See, e.g., *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980); *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Aaron E. Levine & Co. v. CalKraft Paper Co.*, 429 F. Supp. 1039, 1042-46 (E.D. Mich. 1976); *but cf. Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976) (noting fact that parent and subsidiary corporation did not compete or hold themselves as competitors was not dispositive of conspiratorial capacity issue), *cert. denied*, 433 U.S. 910 (1977).

69. In the First, Third, and Fifth Circuits, see *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 557 (1st Cir. 1974) (holding that swimming pool recirculation manufacturer and affiliated merchandisers could conspire under § 1, and considered fact of vertical integration evidence of conspiracy or agreement), *cert. denied*, 421 U.S. 1004 (1975); *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501 (3d Cir. 1976) (noting intraenterprise conspiracy doctrine is not limited to affiliated corporations that hold themselves out as competitors, and finding that parent and wholly-owned subsidiaries had capacity to conspire); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978) ("The parent's choice of form is important. Having availed itself of separate incorporation . . . marked it off as a distinct entity, and the antitrust laws treat it as such").

70. The Seventh, Eighth, and Ninth Circuits had adopted an all-the-facts-and-circumstances standard on the premise that the capacity of separately incorporated but related corporations to conspire cannot be determined exclusively from the fact of separate incorporation. See *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 319 (7th Cir. 1982), *rev'd* 104 S. Ct. 2731 (1984) (decision below); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589-90 (8th Cir. 1981); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1054 (9th Cir. 1981); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

This test also has its specific pigeon holes. For example, one commentator has suggested focusing more closely on day to day managerial control, because "when a parent corporation creates, wholly owns, and controls the day-to-day operations of one or more subsidiary corporations, two or more independent 'minds' do not exist." See Note, *A Suggested Standard*,

confusion that the Supreme Court heard *Copperweld*.

### III. STATEMENT OF THE CASE

#### A. *The Facts*

In 1972, Copperweld Corporation (Copperweld) purchased Regal Tube Company (Regal), a manufacturer of steel tubing, from Lear Siegler, Incorporated (LSI) which had operated Regal as an unincorporated division.<sup>71</sup> Under the sale agreement, LSI was bound not to compete with Regal for five years.<sup>72</sup> Copperweld then transferred Regal's assets to a newly formed wholly-owned subsidiary, which continued to conduct its manufacturing operations in Chicago but shared its corporate headquarters with Copperweld in Pennsylvania.<sup>73</sup>

Shortly before Copperweld bought Regal from LSI, Regal's president, David Grohne, accepted a position with LSI. While working there, Grohne set out to establish his own steel manufacturing business to compete in the same market as Regal.<sup>74</sup> In May, 1972, Grohne formed Independence Tube Corporation (Independence Tube), which then accepted an offer from Yoder Company (Yoder) to supply a tubing mill.<sup>75</sup> Yoder was to build a mill for Independence Tube by December, 1973. However, after executives at Copperweld and Regal learned of Grohne's plans, they sent Yoder and others a letter warning that Copperweld would be "greatly concerned if [Grohne] contemplated entering the

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*supra* note 9, at 738. Another writer advocates a decision-making approach which would focus on the "pattern of decisionmaking within a business in order to determine when corporate sub units are independent entities." See Note, *A Decisionmaking Approach*, *supra* note 9, at 1753-54. This proposition is similar to a rule recognized by some courts that, even given conspiratorial capacity, related businesses will be considered one entity where a single decisionmaker owns and runs both companies. See *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 4512, 457-58 (9th Cir. 1979); *Las Vegas Drive-In Theatre, Inc., v. National Gen. Theatres, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,895 (D. Nev.); *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, 1358-59 (N.D. Cal. 1974), *aff'd in part and rev'd in part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951). Professor Areeda, however, generally rejects an all-the-facts-and-circumstances approach: "[I]t makes little sense to ascribe conspiratorial capacity to a corporate family when the enterprise's functional character as a single economic unit is established by evidence of actual integration or, *more coherently, of unified power to control.*" Areeda, *supra* note 9, at 470 (emphasis added). In this sense, it appears that Professor Areeda greatly influenced the thinking of the *Copperweld* Court. See text accompanying note 110.

71. 104 S. Ct. at 2734.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

structural tube market . . . in competition with Regal Tube."<sup>76</sup> Two days later, Independence Tube was forced to seek another builder and did not receive its mill until September, 1974.<sup>77</sup>

Independence Tube's original complaint named Copperweld, Regal, the Chairman of the Board and Chief Executive Officer of both companies, and Yoder.<sup>78</sup> The claims against the Chief Executive Officers were dropped prior to trial, as was a section 2 allegation.<sup>79</sup> The jury found that Copperweld and Regal had conspired in violation of section 1, but that Yoder was not part of that conspiracy.<sup>80</sup>

### B. *The Seventh Circuit's Opinion*

Because Yoder had been exonerated by the jury, on appeal the Seventh Circuit squarely faced the question of whether a parent corporation could conspire with its wholly-owned subsidiary. The court affirmed the jury's verdict based on its previous approval of the intraenterprise doctrine in *Photovest Corp. v. Fotomat Corp.*,<sup>81</sup> in which it had adopted an all-the-facts-and-circumstances test to determine conspiratorial capacity between related corporations.<sup>82</sup> Although the appellate court questioned the wisdom of subjecting a corporate subsidiary and its parent to anti-trust liability when the same conduct by the corporation and its unincorporated division would escape liability,<sup>83</sup> it held that the jury instructions "took account of the proper factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their businesses."<sup>84</sup> The court also found that there was sufficient evidence for the jury to find that Regal was more like a separate corporate entity than

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76. *Id.* The letter to Yoder was not Copperweld's only effort to discourage prospective business contacts with Independence Tube. Copperweld also repeatedly contacted banks that were considering financing Independence's operation, real estate firms that were considering providing space to Independence, and prospective suppliers and customers. *Id.* at 2735.

77. *Id.* at 2734-35.

78. *Id.* at 2735.

79. *Id.*

80. *Id.* The trial court also found that Copperweld, but not Regal, had interfered with Independence Tube's contract with Yoder; and that Regal, but not Copperweld, had interfered with another contractual relationship. *Id.*

81. 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

82. *Id.* at 726. In *Photovest*, a franchise of 15 drive-thru photofinishing kiosks brought a treble damage antitrust action against its franchisor, Fotomat, under §§ 1 and 2 of the Sherman Act, among other claims. The trial court held in favor of the plaintiff and awarded treble damages. On appeal, the Seventh Circuit reversed, stating, in part, that it "must decide each case on its particular facts" to determine when separate corporations are single enterprises incapable of conspiring. *Id.*

83. 691 F.2d 310, 316-18 (7th Cir. 1982).

84. 104 S. Ct. at 2735-36. These factors included whether Copperweld and Regal had separate management staffs, separate corporate officers, separate directors, separate records

a mere arm of the parent.<sup>85</sup>

### C. *The Majority Opinion*

The Supreme Court reversed, abolishing the intraenterprise doctrine and the Seventh Circuit's single entity test to the extent each had applied to conduct between parent corporations and their wholly-owned subsidiaries.<sup>86</sup>

Speaking for the majority, Chief Justice Burger made it clear that the Court had granted certiorari to reexamine the intraenterprise conspiracy doctrine because in no case had it considered the merits of the doctrine in depth.<sup>87</sup>

The Court first traced the history of the intraenterprise doctrine in its own decisions and methodically distinguished each case which had been credited with developing or giving approval of the doctrine. The Court distinguished *Yellow Cab*, the case which had "breathed life into the intraenterprise doctrine,"<sup>88</sup> as merely confirming the general rule that a pattern of acquisition may itself create an illegal combination under section 1, especially when the subsequent conduct of the defendants reflects an original anticompetitive purpose.<sup>89</sup> In contrast, the intraenterprise concept addressed the subsequent conduct of legally formed affiliates and subsidiaries. The Court further explained that in *Yellow Cab* and *Schine Chain Theatres*, the Court also had found section 2 violations for attempted monopolization of local markets.<sup>90</sup>

The majority next admitted that *Kiefer-Stewart* gave direct support to the intraenterprise doctrine.<sup>91</sup> It maintained that the decision strayed beyond *Yellow Cab* because it failed to "confront the anomalies an in-

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and banking accounts, autonomy in setting policy, and so on. See *Copperweld*, 104 S. Ct. at 2736 n.2.

85. 691 F.2d at 320.

86. 104 S. Ct. at 2736.

87. *Id.*

88. *Id.* at 2737.

89. *Id.* (citing *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) (plurality opinion) (railroad stock acquisition which came into existence solely to suppress competition between companies, held to violate § 1); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (trust holding company created to bring together previously independent firms to lessen competition and obtain monopoly power)). The Court distinguished *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), discussed *supra* at note 44, on the same basis. 104 S. Ct. at 2737 nn.4 & 6.

90. *Id.* at 2738 & n.8. The Court also argued that *Schine Chain Theatres* and *Griffith*, see *supra* note 44, today would be upheld on the theory that the parent company conspired with independent distributors. *Id.*

91. *Id.* at 2738.



traenterprise doctrine entails,"<sup>92</sup> concluding that had this case been decided today, the same result could stand on the ground that Seagram's subsidiaries conspired with wholesalers other than the plaintiff.<sup>93</sup>

As for *Timken* and *Perma Life*, the two other cases in which the Court had invoked the intraenterprise conspiracy doctrine, the majority observed that these cases did little more than cite *Yellow Cab* and *Kiefer-Stewart*.<sup>94</sup> It further maintained that the intraenterprise doctrine was unnecessary to the result in each. The Court explained that in *Timken* "there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices,"<sup>95</sup> and that the American defendant neither owned a "majority interest" in either of the foreign corporations nor did it "control them."<sup>96</sup> As for *Perma Life*, the Court observed that the intraenterprise doctrine was merely an alternative section 1 holding.<sup>97</sup>

Having rid itself of this troubling precedent, the majority attacked what it considered the anomalies of the intraenterprise doctrine. In discussing the distinction between concerted and independent action under sections 1 and 2 of the Sherman Act, the majority explained that the conduct of a single firm is governed by section 2 alone and that such conduct is unlawful only when it threatens actual monopolization.<sup>98</sup> "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression."<sup>99</sup>

92. *Id.*

93. *Id.* The Court based this conclusion on two later cases in which it held that § 1 allegations could be maintained by terminated distributors or franchisors who allege termination conspiracy between the manufacturer and a non-terminated affiliated dealer. *See Albrecht v. Herald Co.*, 390 U.S. 145, 149-50, & n.6 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) (discussed *supra* note 34). But as the majority itself noted, *Kiefer-Stewart* was decided in 1951 before these cases introduced the theory, hence this argument is not useful in distinguishing that decision.

94. 104 S. Ct. at 2739. The *Timken* Court simply cited *Kiefer-Stewart* to show that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *See Timken*, 341 U.S. 593, 598 (1951) (discussed *supra* notes 53-55 and accompanying text).

95. 104 S. Ct. at 2739. The Court agreed with most commentators, *see supra* note 55, that *Timken* was not an intraenterprise case at all, but rather addressed a classic conspiracy or at least something akin to a joint venture. *Id.*

96. 104 S. Ct. at 2739.

97. *Id.*

98. *Id.* at 2740.

99. *Id.* The Court also noted that § 2 does not forbid market power acquired as the result of a "superior product" or "business acumen." *Id.* at n.14 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)); *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws protect "*competition, not competitors*") (emphasis added) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

The majority contrasted this with section 1 which was intended by Congress only to reach "unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities."<sup>100</sup> It explained that Congress decided to treat concerted behavior more strictly than unilateral behavior because the former was inherently fraught with anticompetitive risks.

It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.<sup>101</sup>

After laying this theoretical groundwork, the majority discussed how the distinction between sections 1 and 2 had long been recognized in the courts. It noted that officers of a single firm could not conspire with their corporations because they were "not separate economic actors pursuing separate economic interests,"<sup>102</sup> reasoning which also had been applied to employees of the same firm.<sup>103</sup> The Court also agreed with lower courts that operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor.<sup>104</sup> A division within a corporate structure

pursues the common interests of the whole rather than interests separate from those of the corporation itself . . . . Because

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100. 104 S. Ct. at 2740 (emphasis in original). The Court cited *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968), for the rule that § 1 does not reach conduct that is "wholly unilateral." 104 S. Ct. at 2740. It should be remembered, however, that the third-party conspirator in *Albrecht* was separate both in the economic and legal sense as an independent newspaper carrier. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

101. 104 S. Ct. at 2741.

102. *Id.* (citing *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982) and cases discussed *supra* note 5).

103. *Id.* The Court admitted that "it is true that a 'person' under the Act includes both an individual and a corporation." However, it explained that § 1 does not declare every combination between two "persons" to be illegal. *Id.* at 2741 n.15. *But see infra* text accompanying note 134 which shows that such language was included in the Act's original draft.

104. *Id.* at 2741-42 (citing *Copperweld*, 691 F.2d 310, 316 (7th Cir. 1982) (decision below); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 205-06 (5th Cir. 1969); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970)).

coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.<sup>105</sup>

When the Court finally considered whether a parent corporation and its wholly-owned subsidiary possessed conspiratorial capacity, the answer was academic; a parent corporation and its wholly-owned subsidiary always had a "unity of purpose and common design."<sup>106</sup> Based on this presumption, the Court reasoned that a parent corporation and its wholly-owned subsidiary could not even have an illegal "meeting of the minds" under the established definition of a section 1 conspiracy.<sup>107</sup> A wholly-owned subsidiary and its parent were necessarily part of a single "corporate consciousness"; hence, no conspiracy was possible between them.<sup>108</sup>

The Court specifically noted that the scope of this "corporate consciousness" is not limited by a parent corporation's actual control over its wholly-owned subsidiary. It explained that "[t]hey share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."<sup>109</sup>

The majority concluded that the Seventh Circuit's single entity test was inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct.<sup>110</sup> The Seventh Circuit's stress on various control-oriented factors had missed the point; these factors were irrelevant to the question of whether the ultimate interests of the subsidiary and the parent were identical.<sup>111</sup> In the Court's view, any reading of the Sherman Act which retained its distinctions between unilateral and concerted conduct must recognize that Congress intended that a mul-

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105. 104 S. Ct. at 2742.

106. *Id.*

107. *Id.* The Court made reference here to the classic conspiracy definition given in *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), *see supra* note 3, in which that Court used the words a meeting of *minds* (emphasis added).

108. 104 S. Ct. at 2742.

109. *Id.*

110. *Id.* at 2742-43 n.18.

111. *Id.* The Court also rejected the *Perma Life* Court's view outright, stating:

Because an "agreement" between a parent and its wholly-owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations. . . ." The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

*Id.* at 2743 n.19 (citation omitted).

ticorporate enterprise could restrain trade in an intraenterprise setting to the same extent that it could if it were one single firm.<sup>112</sup> Copperweld and its subsidiary could restrain trade without fear of violating section 1.<sup>113</sup>

#### D. *The Dissenting Opinion*

Justice Stevens wrote the dissenting opinion in which Justices Brennan and Marshall joined.<sup>114</sup> The dissenters would have preferred retention of a rule of reason<sup>115</sup> approach to the conspiratorial capacity issue rather than the per se rule adopted by the majority. According to the dissent, the anomaly was clear: by invoking a per se approach, the majority condoned the free use of corporate subsidiaries to eliminate competition, one of the chief evils to which the Sherman Act was addressed.<sup>116</sup>

Although the dissent readily admitted that section 1 was not intended to scrutinize efficient intraenterprise conduct, which may have the effect of eliminating competition,<sup>117</sup> it pointed out that Copperweld and Regal's conduct had little to do with efficient integration. Copperweld and Regal had purposefully and successfully delayed Independence Tube's entry into the steel tubing market through the coercion of Independence Tube's customers and bankers.<sup>118</sup> This type of exclusionary conduct, the dissent maintained, was "plainly distinguishable from vertical integration designed to achieve competitive efficiencies."<sup>119</sup>

The dissent rejected the majority's treatment of the precedent that had established the intraenterprise conspiracy doctrine. It noted that even if *Yellow Cab* and *Schine Chain Theatres* could be distinguished on their alternative holdings, these cases actually rested on a section 1 conspiracy theory among related defendants.<sup>120</sup> Neither was the dissent impressed with the majority's attempt to distinguish *Kiefer-Stewart* on the

112. *Id.* at 2744.

113. *Id.*

114. 104 S. Ct. at 2745 (Stevens, J., dissenting).

115. *Id.* at 2746 (Stevens, J., dissenting). See *supra* note 3 for a discussion of the "rule of reason" approach which focuses on anticompetitive effect in determining the illegality of certain conduct.

116. *Id.* (Stevens, J., dissenting).

117. *Id.* (Stevens, J., dissenting).

118. *Id.* (Stevens, J., dissenting). See *supra* note 76.

119. 104 S. Ct. at 2746 (Stevens, J., dissenting).

120. 104 S. Ct. at 2746-47 (Stevens, J., dissenting). The dissent also noted that the *Yellow Cab* Court had specifically stated that the "the restraints imposed by the corporate parent on the affiliates that it *already* owned in themselves violated § 1." *Id.* at 2747 (citing *United States v. Yellow Cab Co.*, 332 U.S. 218, 226-27 (1947) (footnote omitted) (emphasis in original)).

ground that if it had been decided today a different theory might have been used. The dissent pointed out that in *Kiefer-Stewart*, Seagram had unsuccessfully argued that *Yellow Cab* was limited to cases concerning unlawful acquisitions.<sup>121</sup>

The dissent stressed the majority's failure to discuss the clear words of *Timken*<sup>122</sup> and of *Perma Life*, in which the Court established the rule that where an enterprise availed itself of the privilege of using corporate subsidiaries it would not be saved from the obligations the law placed on separate entities, despite common ownership.<sup>123</sup> This, the dissent argued, is where the inquiry into conspiratorial capacity should end.<sup>124</sup>

The intraenterprise conspiracy doctrine's forty-year development and Congress' failure to challenge it, buttressed the dissent's argument that the language of section 1 should be viewed broadly.<sup>125</sup> The activities of what had become known as "trusts" in 1890's, it observed, were of special concern to the makers of the Sherman Act.<sup>126</sup>

As to economic theory, the dissent disagreed with the majority's presumption that there was an economic rationale behind a plurality of actors requirement under section 1. It argued that the dual person requirement was a consequence of plain statutory language rather than economic principles, stating that "[a]s an economic matter, what is criti-

121. *Id.* at 2748 n.4 (Stevens, J., dissenting).

122. *Id.* at 2748 n.5 (Stevens, J., dissenting). The *Timken* Court had stated:

Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

341 U.S. at 598 (cited by the dissent at 104 S. Ct. 2748 n.5). This reference, however, gives just as much support to the majority's view that *Timken* simply involved an illegal initial combination which is distinct from an intraenterprise theory. See *supra* note 55.

123. 104 S. Ct. at 2748 (Stevens, J., dissenting) (citing *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968)).

124. *Id.* at 2750 (Stevens, J., dissenting).

125. *Id.* (Stevens, J., dissenting).

126. *Id.* at 2751 (Stevens, J., dissenting). The dissent noted Senator Sherman's remarks:

Because these combinations are always in many States . . . it will be very easy for them to make a corporation within a State. So they can; but that is only one corporation of the combination. The combination is always of two or more . . . all bound together by a link which holds them together, in the name of trustees, who are themselves incorporated under the laws of one of the States.

. . . .  
The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests. . . . It is the kind of competition we have to deal with now.

*Id.* at 2751 (quoting 21 CONG. REC. 2569, 2457 (1890) (statement of Sen. Sherman)). However, the Senator appears to have addressed these statements to the jurisdiction debate. See *infra* note 135 and accompanying text.

cal is the presence of market power, rather than a plurality of actors."<sup>127</sup>

Even assuming there was an economic rationale underlying section 1, the dissent believed that the intraenterprise doctrine had an economic justification: It reached "anticompetitive agreements between affiliated corporations which have sufficient market power to restrain marketwide competition, but not sufficient power to be considered monopolistic within the ambit of § 2 of the Act."<sup>128</sup> Although a single firm is not expected to compete with itself or forego efficient production of expansion, the intraenterprise doctrine served to scrutinize intraenterprise conduct unrelated to such procompetitive conduct.<sup>129</sup>

The question not answered by the majority, the dissent concluded, was why should two corporations that engage in a predatory course of conduct, which as separate legal entities could easily fit within section 1, be immunized from liability because they are controlled by the same "godfather?"<sup>130</sup>

#### IV. ANALYSIS

##### A. *An Economic Enterprise Approach to Conspiring Entities*

The question addressed in *Copperweld* is one that has troubled courts ever since the Sherman Act was enacted. In determining conspiratorial capacity under section 1, should courts focus on distinct legal persons, as Justice Black concluded in *Perma Life*, or should courts focus on separate economic entities, as the Court did in *Copperweld*?

##### 1. Legislative history

To answer this question, the first inquiry is into the legislative history of the Sherman Act, especially because both the majority and the dissent in *Copperweld* claimed legislative approval of their respective positions on the conspiratorial capacity issue.<sup>131</sup> The majority's view, that

127. *Id.* at 2752 (Stevens, J., dissenting) (footnote omitted).

128. *Id.* (Stevens, J., dissenting). The dissent argued that the intraenterprise doctrine is best seen as "a forceful weapon [that] would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers." *Id.* at n.22 (Stevens, J., dissenting) (quoting L. SULLIVAN, *supra* note 3, at 324). The dissent further explained that from a competitive standpoint, the decision of a single firm to exercise monopoly power has the same consequences as two firms acting together, as in an agreement not to compete. *Id.* at 2752 & n.21 (Stevens, J., dissenting) (citing *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) (quotation omitted)).

129. *Id.* at 2755 (Stevens, J., dissenting).

130. *Id.* (Stevens, J., dissenting).

131. Compare *id.* at 2744 & n.24 in which the majority argues that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct, with *id.* at

a wholly-owned subsidiary should be shielded from scrutiny under section 1 except when acquired or formed for anticompetitive purposes, is supported by these words of Senator Sherman:

It is said that this bill will interfere with lawful trade, with the customary business of life. I deny it. . . .

. . . .

This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations *made* with a view to prevent competition. . . . It is unlawful combination . . . that is aimed at by the bill, and not the lawful and useful combination.<sup>132</sup>

Other excerpts from the legislative record lend indirect support to the dissent's argument that Congress never intended for section 1 to exclude all anticompetitive single enterprise conduct.<sup>133</sup> For example, at one point in the debates, Senator Hoar had this exchange with Senator Sherman.

Mr. HOAR:

I do not understand why Senator Sherman has inserted in the bill the language of the first few lines, confining his penalty to citizens or corporations of different States. . . . I suppose it was prepared with some idea . . . that contracts between citizens . . . of different States were necessarily commerce between those States, and that this was essential to bring the proposed statute within the constitutional power of Congress . . . .

However, [t]his bill must stand, if at all, upon the fact that it is a bill to protect what is described alone, and that is the importation, transportation, or sale of articles [in interstate commerce].

Mr. SHERMAN:

In the bill as originally draughted [sic] by myself I did not insert the words "between two or more citizens or corporations."

. . . .

. . . [T]hese words were inserted with a view to confine

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2751 n.18 (Stevens, J., dissenting), in which the dissent argues that Congress intended for § 1 to extend beyond acquisitions of corporate affiliates or § 1 would not apply to trusts and combinations.

132. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

133. 104 S. Ct. at 2751 (Stevens, J., dissenting).

the operation of the bill to contracts made between citizens or corporations of different States, *so as not to invade, by possibility, the jurisdiction of the courts of the States.*<sup>134</sup>

Thus, as originally amended, the express two party requirement of section 1 was based on a jurisdictional concern<sup>135</sup> rather than on a desire to shield single enterprise conduct from section 1 scrutiny. No two person requirement can be implied from the legislative history alone.

The dissent's view is further supported by Congress' objective of reducing the anticompetitive effects of trust formation.<sup>136</sup> Senator Sherman explained the underlying policy goal, stating that Congress should aim "to preserve freedom of trade and production, the natural competition of increasing production, [and] the lowering of prices by such competition."<sup>137</sup>

The dissent's focus on congressional objectives in 1890, however, ultimately reveals the weakness of its argument. The dissent strains to equate the 51st Congress' concern with trust formation to its own concern with the anticompetitive conduct of modern multicorporate enterprises. The critical difference is that in 1890 Congress did not confront the problem of anticompetitive conduct between members of legally formed trusts; this would be the subject, in part, of the Fair Trade Commission Act of 1914.<sup>138</sup> Rather, the problem addressed by the Sherman Act in 1890 was the initial combination of distinct economic entities into single trusts for the purpose of limiting the competition that would have existed in competitive markets. This focus on initial trust formation is analogous to the majority's treatment of *Yellow Cab* and *Timken*, both of which involved combinations made for anticompetitive purposes.<sup>139</sup> Conversely, *Copperweld* involved the conduct of legally combined, mul-

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134. 21 CONG. REC. 2567 (1890) (statements of Sens. Hoar and Sherman) (emphasis added).

135. The jurisdictional problem related to the issue of whether Congress' powers under the commerce clause required the actual transportation of goods. Senator George of Mississippi was particularly concerned about infringing on the police powers of the state. *Id.* at 1460 (statement of Sen. George). Hence, the assumption that trusts necessarily included corporations located in different states led to the discussion of using diversity as an alternative constitutional and jurisdictional basis for the Act. Senator Sherman supported this view. *Id.* at 2569 (statement of Sen. Sherman). The Act's original multiparty language was apparently deleted when it was decided that Congress' commerce clause powers extended to conduct addressed by the Act.

136. *See supra* note 126.

137. H. THORELLI, *supra* note 19, at 168-69 (quoting Sen. Sherman) (emphasis omitted).

138. *See infra* note 145 and accompanying text.

139. *See supra* notes 39-41 and 53-55 and accompanying text.



ticorporate groups.<sup>140</sup>

The congressional record indicates that Congress intentionally made the Sherman Act vague so that courts could create a federal common law unique to the development of American business.<sup>141</sup> The issue of the conspiratorial capacity of affiliated corporations only arose when business structures became more complex than the common trust or classic combination.<sup>142</sup> Until the Court decided *Copperweld*, the judiciary had yet to fully address the issue.

## 2. Is there a role for the intraenterprise doctrine?

The intraenterprise doctrine is an attempt to address the anticompetitive effects of single firm conduct that does not also threaten monopolization.<sup>143</sup> Such conduct is said to fall within the "gap" between sections 1 and 2 of the Sherman Act.<sup>144</sup> Since 1890, Congress has attempted to fill this gap with legislation,<sup>145</sup> and it has always been the subject of unfair competition at common law.<sup>146</sup>

140. Independence Tube did not allege that Copperweld's acquisition of Regal was unlawful. See *supra* notes 78-79.

141. P. AREEDA, *supra* note 3, at 48-49; L. SULLIVAN, *supra* note 3, at 161. At the congressional hearings, when asked why Congress should bother denouncing monopoly when it was already prohibited at common law, Senator Hoar replied: "Because there is not any common law of the United States." 21 CONG. REC. 3146, 3152 (1890) (statement of Sen. Hoar) (cited in P. AREEDA, *supra* note 3, at 49 n.9). See also 21 CONG. REC. 2460 (1890) ("I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.") (statement of Sen. Sherman). In sum, Congress borrowed common law principles to create the Sherman Act but left it to the courts to create new common law in applying the Act.

142. See *supra* note 25 and accompanying text.

143. See *supra* note 29.

144. See 104 S. Ct. at 2744-45.

145. In 1914, Congress established the Federal Trade Commission (FTC) as an independent regulating agency to administer the Federal Trade Commission Act, Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 719 (current version at 15 U.S.C. § 45 (1982)). Section 5 of the Act declared unlawful "unfair methods of competition." *Id.* In 1938, this was amended by the Wheeler-Lea Amendment to include "unfair or deceptive acts or practices." Act of March 21, 1938, § 5(a), 52 Stat. 111, codified as amended at 15 U.S.C. § 45(a)(1) (1982). The Act's scope is substantively broad. For example, in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972), the Supreme Court held that § 5 empowers the FTC "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws" and to prosecute "practices [which are] unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." *Id.* at 239. One drawback of the Act for private plaintiffs is that an FTC case must be in the "public's" interest and not simply involve a dispute between two competitors. See *FTC v. Klesner*, 280 U.S. 19 (1929). The FTC is empowered to enforce a variety of other trade regulation acts. See generally, ANTITRUST LAW DEVELOPMENTS, *supra* note 3, at 276 and ch. V.

146. States tend to have very liberal common law rules protecting persons from unfair com-

An underlying policy question in *Copperweld*, therefore, concerns the wisdom of the judiciary using section 1 to combat anticompetitive single firm conduct. The dissent in *Copperweld* claimed that Congress impliedly approved of this use by not repudiating the doctrine with legislation.<sup>147</sup> But one should not assume that Congress had impliedly approve of a doctrine which not even the courts could define and which had resulted in costly unpredictability.<sup>148</sup>

The greatest risk caused by the intraenterprise doctrine is that it may limit procompetitive conduct of single enterprises. Retaining a rule of reason approach, as the dissent suggests, does not provide a solution. It is impracticable to develop section 1 standards which apply concurrently to competitors and to single firms. To be sure, if a conspiracy can exist in a single firm setting, then simple intrafirm agreements and policies may be used to show evidence of conspiracy.<sup>149</sup> This potential necessarily reduces a firm's incentive to coordinate the activities of its subsidiaries for procompetitive purposes. The *Copperweld* decision is the Court's acknowledgment that the intraenterprise conspiracy doctrine has led to more confusion than competition.

### 3. Rejecting legal formalism

The Court's rejection of the intraenterprise concept puts to rest the inconsistency of basing conspiratorial capacity purely on separate incorporation, as Justice Black proposed in *Perma Life*. As one commentator has noted:

[T]he Sherman Act [has been characterized] as a "charter of economic freedom." Absent some compelling reason to the contrary, therefore, it might reasonably be expected that economic fact should prevail over legal fiction, and that freedom to adopt the most economical form of business organization would be encouraged.

. . . It seems inconceivable that the philosophy "you can't have your cake and eat it" should be permitted to twist a "charter of economic freedom" into a device to compel businessmen

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petition, although a survey of these rules is beyond the scope of this Note. See generally 2 F. CALLMAN, UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES §§ 2.01-2.08 (4th ed. 1981).

147. 104 S. Ct. at 2749 (Stevens, J., dissenting).

148. As the majority points out, only *Kiefer-Stewart* squarely rested on the intraenterprise doctrine, and today it could be sustained on an alternative § 1 theory. *Id.* at 2738-39. The obfuscation of §§ 1 and 2 caused by the doctrine's continued existence is not warranted by such marginal returns.

149. See Areeda, *supra* note 9, at 452.

to forego desirable forms of corporate organization without any offsetting gain to the competitive nature of our economy.<sup>150</sup>

Although the *Copperweld* Court adopted the above economic rationale, it remains troubling that Independence Tube was denied the same "economic freedom" in entering the steel tube market that Copperweld enjoyed in transforming its division into a subsidiary. In this sense, the Court's rejection of *Perma Life's* legal formalism is replaced by an economic rationale that is no less formalistic in its favoring multicorporate organization at the expense of market entry. Ultimately, the Court placed its faith in the effectiveness of non-treble damage remedies to protect the economic freedom of competitors who are injured by the unilateral conduct of firms that do not possess monopoly power.<sup>151</sup>

#### 4. *Copperweld's* "economic enterprise"

The Court avoided the need to give a thorough definition of a single economic enterprise by limiting the scope of its holding to wholly-owned subsidiaries.<sup>152</sup> Nevertheless, in more complex factual cases, lower courts will base their understanding of a single enterprise on what can be understood from *Copperweld*.

The most novel aspect of the Court's reasoning is its introduction of the concept of the "corporate consciousness,"<sup>153</sup> which is the overall mind of a single enterprise.<sup>154</sup> If a subsidiary or an affiliate is deemed to be a part of the same corporate consciousness as the parent corporation, any agreements flowing between them will merely be considered internal

150. Sprunk, *supra* note 9, at 27-28. The same writer states it is self-evident that a parent corporation and its subsidiaries are single economic units. *Id.* at 26 n.18 (citing Schwartz, *Relations with Affiliated Customers*, ANTITRUST LAW SYMPOSIUM 214, 214-15 (1953)); see also Rahl, *supra* note 9, at 767; Adelman, *Effective Competition and Antitrust Laws*, 61 HARV. L. REV. 1289, 1315 n.96 (1948).

151. See 104 S. Ct. at 2745. Although the effectiveness of § 5 of the FTC Act and state unfair competition laws in reducing unilateral trade restraints is beyond the scope of this Note, the question is critical in today's oligopolistic markets. A § 2 solution is also ill-advised. See generally Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 411-13, 450-52 (1974) (warning of ill effects on a firm's pro-competitive conduct if expansion of § 2 is undertaken to deal with intraenterprise restraints of trade).

152. The Court stated:

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

104 S. Ct. at 2740 (emphasis added).

153. *Id.* at 2742.

154. *Id.*

transmissions not subject to section 1 scrutiny.<sup>155</sup>

The Court first explained this enterprise theory through negative implication. By rejecting the *Perma Life* rule, the Court established that economic substance rather than corporate form is the proper focus for the conspiratorial capacity question. But the factors considered by the Court in determining the economic substance of an intraenterprise relationship are somewhat vague. These include whether the related corporations had a "unity of purpose and common design"<sup>156</sup> or whether the parent corporation had the power to change its subsidiary into a division.<sup>157</sup> Other language in the decision points to a standard based on the lack of independent centers of decision making; that is, whether ultimate economic decisions of the firm are guided by only one person or group.<sup>158</sup> Collectively, this language amounts to a single enterprise standard requiring that the parent have the ultimate power to guide the economic forces of the subsidiary; and similarly, that the subsidiary have the same economic objectives as the parent.

The Court's statement that the parent corporation need not exercise its ownership power reveals the expansive scope of its enterprise theory. The Court noted:

[A parent corporation and its wholly-owned subsidiary] are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. . . .

. . . .

[T]hey share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.<sup>159</sup>

Thus, an agreement among members of the same corporate consciousness cannot violate section 1 regardless of how little control the parent corporation exerts over its subsidiary. Similarly, conduct that could have been considered a per se violation under the intraenterprise doctrine would, under the Court's reasoning, be considered mere efficient internal arrangements. The Court's adoption of an economic enterprise theory implies much more than its narrow holding suggests.

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155. *Id.* at 2742-44. See *supra* text accompanying note 108.

156. *Id.* at 2742. The Court borrowed this language from the classic definition of § 2 conspiracy given by the Court in *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

157. 104 S. Ct. at 2742.

158. *Id.*

159. *Id.*

## B. *Copperweld's Impact on Other Single Entity Concepts*

A variety of theories in the circuits are used to determine if and when a parent corporation and its subsidiaries or affiliates should be considered separate entities under section 1.<sup>160</sup> Now that the *Copperweld* Court has clearly adopted an economic enterprise approach to conspiratorial capacity, these theories need to be reexamined.

### 1. "Single economic units"

Prior to *Copperweld*, the Seventh, Eighth and Ninth Circuits, seeking to elevate substance over form, had adopted an all-the-facts-and-circumstances test to determine if related corporations were a single economic unit.<sup>161</sup> This approach encompasses a great variety of factors, including the presence of a single decisionmaker,<sup>162</sup> the existence of consolidated financial statements and tax returns,<sup>163</sup> common officers and employees,<sup>164</sup> common directors,<sup>165</sup> and common day-to-day control of operations.<sup>166</sup>

Of these factors, only the single decisionmaker rule is consistent with the *Copperweld* Court's emphasis on the power to control economic forces.<sup>167</sup> But too much focus on a single decisionmaking approach might result in a narrow application of *Copperweld* in the courts below. It should not matter that more than one person or group actually makes the decisions concerning the channeling of economic forces, as long as the ultimate power is similarly consolidated. The sole decisionmaker rule should, however, play a more important role in considering the conspiratorial capacity between a corporation and a minority held subsidiary.<sup>168</sup>

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160. See *supra* notes 68-70.

161. See cases cited *supra* note 70.

162. See, e.g., *Las Vegas Sun v. Summa Corp.*, 610 F.2d 614, 618 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); see also Note, *A Decisionmaking Approach*, *supra* note 9, at 1753-54.

163. See, e.g., *Ogilvie v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

164. See cases cited at *supra* note 70.

165. *Id.*

166. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); see also Note, *A Suggested Standard*, *supra* note 9, at 739-40.

167. See P. AREEDA, *supra* note 3, at 470-73 (discussing how other factors do not relate to ultimate decisionmaking power).

168. See *infra* text accompanying note 192.

a. the "outsider rule"

A lingering concept in the all-the-facts-and-circumstances determination has been the proposition that courts should ascertain whether the conduct of the related corporations adversely affects third parties.<sup>169</sup> This theory has long been criticized.<sup>170</sup> The idea is questionable because regardless of its legality all conduct of a single firm eventually affects third parties. This approach puts a misplaced focus on the nature of the restraint rather than on conspiratorial capacity.<sup>171</sup> Nevertheless, the concept has consistently appeared in court opinions.<sup>172</sup>

The outsider concept is simply inconsistent with the reasoning in *Copperweld*. The Court made it clear that a single economic firm is permitted to unilaterally restrain trade subject only to section 2 of the Sherman Act and section 5 of the FTC Act.<sup>173</sup> A concept which emphasizes anticompetitive effect should play no part in determining conspiratorial capacity.

2. The "hold out" doctrine

In rejecting *Kiefer-Stewart*, the *Copperweld* Court also impliedly rejected the concept that a conspiracy to restrain trade could depend on whether the related defendants had held themselves out as competitors. Because this concept is irrelevant to the question of whether related corporations have a unity of purpose and objectives or whether they are guided by the same corporate consciousness, it should no longer be con-

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169. See cases cited *infra* note 172.

170. The consensus is that such a standard would erroneously expose otherwise permissible unilateral restraints of single firms by focusing on competitive impact rather than on conspiratorial capability. An outsiders rule provides no guidance to determine whether the alleged anticompetitive effect is illegal because it is similar to that of a conspiracy among independent competitors, or whether it is legal because the Sherman Act permits the same kind of conduct in a single enterprise setting. See *Handler & Smart, supra* note 9, at 49-51; *Willis & Pitofsky, supra* note 9, at 49; *McQuade, supra* note 9, at 213.

171. See *supra* note 170.

172. Some circuits, however, including the Third, have recognized the effect on outsiders concept. See, e.g., *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 32 (3d Cir.) (noting possible exception if concerted action relates solely to internal management of a safe form and does not restrain external competition), *cert. denied*, 439 U.S. 876 (1978); *accord* *Thomsen v. Western Electric Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 859-60 (W.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *Handguards, Inc. v. Johnson & Johnson*, 413 F. Supp. 921 (N.D. Cal. 1975); *Report of The Attorney General's National Committee To Study the Antitrust Laws* 34 (1955) (only if intended to cause or result in coercive undue restraint on their customers or competitors); see also L. SULLIVAN, *supra* note 3, at 328 (drawing same distinction).

173. 104 S. Ct. at 2745.

sidered by the courts.<sup>174</sup>

While it has little relevance to the corporate consciousness, the holdout concept may nevertheless be attractive to courts facing the question of conspiratorial capacity among affiliates. These sub-units, when viewed apart from the common parent, are less likely to carry with them the assumption of procompetitive integration.<sup>175</sup>

### C. Problems Raised by the Decision

#### 1. What about conspiring affiliates?

Because the *Copperweld* decision is limited to parent corporations and their wholly-owned subsidiaries, the question of whether affiliated corporations can conspire in violation of section 1 has been left to the circuits.

Section 1 plaintiffs may attempt to distinguish *Copperweld* on several grounds. First and most obvious is the fact that the *Copperweld* Court expressly left this question undecided.<sup>176</sup> This could be inferred to mean that the Court was unwilling to extend the single enterprise concept that far. Plaintiffs could also argue that the intraenterprise concept should still apply to those affiliates which are independent in all respects and which do not achieve substantial efficiencies despite their having a common parent.

Since *Copperweld*, however, lower courts have generally accepted the broad implications of the Court's adoption of an enterprise theory and have unanimously held that related affiliates cannot conspire under section 1.<sup>177</sup> In *Century Oil Tool, Inc. v. Production Specialties, Inc.*,<sup>178</sup> the Fifth Circuit held that two corporations under common ownership

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174. See *supra* note 52. Whether these companies otherwise violate trade regulation laws may be another matter. The FTC Act is particularly applicable in this setting. As noted at *supra* note 146, the FTC is given broad powers under the commerce clause to enforce various trade regulation acts. A few old FTC cases support the hold out concept. See, e.g., *FTC v. A. A. Berry Seed Co.*, 2 F.T.C. 427 (1920); *FTC v. Armour & Co.*, 1 F.T.C. 430 (1919); *FTC v. Fleischmann Co.*, 1 F.T.C. 119 (1918).

175. Although a subsidiary and its parent corporation may be presumed to achieve procompetitive efficiencies through various integrations of capital, labor and management, this presumption does not necessarily exist as between affiliates. Affiliates are much less likely to share resources to decrease their respective production costs.

176. See *supra* note 152.

177. See *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66, 136 (1984); *Hood v. Tenneco Texas Life Insurance Co.*, 1984-2 Trade Cas. (CCH) ¶ 66, 163 (1984); *Hizel & Sons, Inc. v. Browning-Ferris Industries, Inc.*, No. 83-K-1743, slip op. at n.2 (D. Col. 1984) ("Although the Court's holding does not explicitly preclude allegations of a conspiracy between two sister corporations . . . the Court's rationale does apply to such situations.").

178. 1984-2 Trade Cas. (CCH) ¶ 66,136 (1984).

and control of three individuals were incapable of conspiring under section 1.<sup>179</sup> The court reasoned that a contract among them did not join formerly distinct economic units, and, in reality, the defendants had a unity of purpose and common design.<sup>180</sup> 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[d] all affairs of the two corporations."<sup>181</sup> Soon after that case, the Fifth Circuit held that wholly-owned affiliates could not conspire among themselves regardless of whether the common parent corporation was a defendant.<sup>182</sup>

None of these lower courts considered whether the affiliated corporations had held themselves out as competitors or whether agreements between them had adversely affected third parties. This suggests that these concepts have been extinguished by the expansive enterprise reasoning of the *Copperweld* Court.<sup>183</sup>

## 2. Partially-owned subsidiaries and affiliates

The majority's decision in *Copperweld* rests on the assumption that a wholly-owned subsidiary has a unity of purpose and a common design with its parent, regardless of the form in which the subsidiary is created

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179. *Id.* at 66,371.

180. *Id.*

181. *Id.*

182. *See Hood v. Tenneco Texas Life Insurance Co.*, 1984-2 Trade Cas. (CCH) 66,163 at 518 (1984).

183. The issue of whether it is illegal for a firm to sell a product to its subsidiary below market prices should also be resolved by extending the *Copperweld* holding. Under § 2(a) of the Clayton Act it is "unlawful for any person engaged in commerce . . . to discriminate in price between different purchases of commodities of like grade and quality." 15 U.S.C. 13(a) (1982) (as amended by § 1 of the Robinson Patman Act, ch. 592 § 1, 49 Stat. 1526 (1936)). Prior to *Copperweld*, circuits differed as to the circumstances under which a subsidiary would be considered a "purchaser" under the Act. *See, e.g., Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 965 (5th Cir. 1979) ("transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer"), *cert. denied*, 444 U.S. 942 (1980). *Cf. Parish v. Cox*, 586 F.2d 9, 11-12 (6th Cir. 1978) (approving a standard that precludes a wholly-owned subsidiary from being a "purchaser" under the Act if parent corporation "controls" subsidiary); *Brown v. Hansen Publications, Inc.*, 556 F.2d 969, 971-72 (9th Cir. 1977) (also emphasizing control but noting overlapping officers, directors, employees, payroll and taxes as examples of its exercise). Given the *Copperweld* Court's holding that a parent corporation and its subsidiary cannot even have an illegal meeting of minds in the § 1 sense, it is reasonable to conclude, as did the Fifth Circuit, that neither can it have an illegal agreement in the price discrimination sense. It is suggested here that this price discrimination issue should mirror the extension of *Copperweld* to partially-owned subsidiaries because both deal with shielding internal agreements of firms from antitrust scrutiny.



or the extent to which the parent asserts its inherent power to control the subsidiary's policies. The issue of conspiratorial capacity becomes more complex when a parent corporation is related to a subsidiary through partial ownership. The *Copperweld* Court expressly avoided the application of its reasoning to this issue.<sup>184</sup>

In distinguishing precedent, however, the Court suggested what level of ownership or control might indicate the existence of two separate enterprises. In discussing *Timken*, the majority dismissed the application of the intraenterprise doctrine because the parent corporation "did not own a majority interest [in the subsidiaries and] did not control them."<sup>185</sup> This comment implies that a firm's "corporate consciousness" could extend to include those entities in which the parent owns a majority interest, or possibly to entities over which the parent has actual control.

Interestingly, Professor Areeda, the primary advocate of an economic enterprise approach in situations involving 100 percent ownership, recommends falling back into the quagmire of an all-the-facts-and-circumstances standard in situations involving less than complete ownership:

When ownership is not completely in common, courts must face additional issues, such as the relative weight to be given de facto as compared with de jure control, the existence of contracts between related corporations when direction is insufficient to assure operational control, the possible significance of the controlling party's duties to the minority interests, and the market characteristics of the other owners who may be otherwise unrelated competitors of the controlling party.<sup>186</sup>

However, in light of the majority's quick rejection of this factually inclusive test as used by the Seventh Circuit in its application to wholly-owned subsidiaries, courts should not necessarily follow Professor Areeda's lead in this area.

This Note proposes that there is no reason to differentiate between 100 percent ownership of a subsidiary and majority ownership in determining conspiratorial capacity under section 1. As one writer has suggested, "as long as the parent holds more than 50 percent, control is being exercised through ownership rather than through an agree-

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184. See *supra* note 152.

185. 104 S. Ct. at 2739 (citing *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 311-12 (W.D. Ohio 1949), *modified*, 314 U.S. 593 (1951)).

186. Areeda, *supra* note 9, at 452 n.3.

ment."<sup>187</sup> This tracks the *Copperweld* Court's reliance on the fact that Copperweld, through its ownership power, could have made Regal a division—not subject to section 1—at any time.<sup>188</sup> More importantly, a corporation which is majority owned by another necessarily has a unity of purpose and common design, and agreements between them would not join formally distinct economic forces. A majority interest rule would also provide needed certainty in an area in which courts, businesses, and plaintiffs are confused by the inconsistent single enterprise tests.

Only one court has addressed the partially-owned subsidiary issue since *Copperweld*. In *Magnum Force Distributors v. Bon Bon Co. of America, Inc.*,<sup>189</sup> a New York district court dismissed a section 1 claim, reasoning that a corporation is incapable as a matter of law of conspiring with a firm it controls through a sixty percent ownership interest.<sup>190</sup> This rationale is consistent with a rule establishing a majority interest as the single enterprise boundary under section 1.<sup>191</sup>

#### a. minority holdings

The most difficult area remaining after *Copperweld* involves agreements between corporations and companies in which the former owns a minority interest, or agreements between similar affiliates. It should be assumed initially that a minority interest holding should not be given the

187. See McQuade, *supra* note 9, at 212 (the writer also emphasizes actual control).

188. 104 S. Ct. at 2743. This line of analysis does not address the statutory limits placed on a parent company's power to convert its divisions into subsidiaries. Nor does it matter that the parent company cannot convert them, as long as the power to control the affiliate remains.

189. No. 84-2629 (E.D.N.Y. 1984) (order dismissing § 1 claim).

190. *Id.*

191. This rule would preclude the extension of the Court's reasoning in *Copperweld* to third parties or sports leagues because in neither situation is there overlapping ownership between the potential defendants. The issue of conspiratorial capacity between corporations and third parties was resolved by the *Copperweld* Court's express approval of *Albrecht v. Harold & Co.*, 390 U.S. 145 (1968). 104 S. Ct. at 2740. See also *supra* note 5.

The question of conspiratorial capacity among franchised sports leagues is more complex. Teams probably will latch on to the *Copperweld* Court's language of a "unity of purpose and common design" and argue that a league should be considered a single entity under § 1. However, it cannot be disputed that generally there is no overlapping ownership among franchises in a league and that agreements among them do combine economic forces that previously pursued separate interests. For a thorough discussion of *Copperweld's* application to sports leagues, see Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 167 (1984). The author notes that most professional sports teams are "separately incorporated . . . [and] separately owned and [therefore] do not share a complete unity of interest or a single corporate consciousness." He further observes that leagues are at best like unconventional joint ventures and should be subject to §1 under the rule of reason. *Id.* at 171. See also Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 *MICH. L. REV.* 1 (1983).

same presumption of non-conspiratorial capacity as that of a majority holder. A minority interest holder does not necessarily have the same economic objectives as the other interest holders, nor could it by right control the other interests if it wished.

A fair rule would apply a presumption of conspiratorial capacity to corporations in which the parent has a minority interest, rebuttable only if the parent shows that it has actual decisionmaking power and control.<sup>192</sup> This would remain consistent with *Copperweld*'s emphasis on the power to control. As a practical matter, placing the burden of proof on the controlling parent would be fair because of the parent's access to the relevant evidence, and because of the presumption of non-conspiratorial capacity in the parent's favor when it owns more than fifty percent of a subsidiary.

#### D. Corporate Liability: Unravelling the Corporate Veil

A final question should be asked in light of *Copperweld*. Is it logical or fair to permit enterprises to avoid all antitrust scrutiny under section 1 because they are one "corporate consciousness," yet continue to allow the parent company of an enterprise to avoid the liabilities of its subsidiaries simply because of their separate incorporation?

After the development of corporations, the principle developed that a shareholder's liability should be limited to promote the continued use of the corporate structure.<sup>193</sup> Once the law changed so that corporations could acquire stock in other corporations,<sup>194</sup> the issue arose as to whether these sub-units, like other shareholders, would be protected from the liabilities of their related corporations. Courts, not taking note of any distinction between shareholder liability and intracorporate liability, assumed that the sub-units were protected.<sup>195</sup> When courts developed identity rules<sup>196</sup> to find shareholders liable for corporate acts under

192. This is similar to one standard that has been suggested for all intraenterprise problems. See Note, *A Decisionmaking Approach*, *supra* note 9.

193. See generally P. BLUMBERG, *supra* note 18, at 3; 6A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 2824-26, 2835 (rev. perm. ed. 1968); Note, *Power of a Corporation to Acquire Stock of Another Corporation*, 31 COLUM. L. REV. 281, 284-86 (1931).

194. See *supra* note 193.

195. P. BLUMBERG, *supra* note 18, at 4-5. The writer noted that the effect of treating corporations like shareholders is really "limited liability within 'limited liability'" because the parent receives "limited liability on its investment in the subsidiary, in addition to the limited liability the ultimate investor receives on his or her investment in the parent." *Id.* at 5 & n.9 (citing E. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* 192-221 (1936)). But see Hackney & Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 871-76, 900-01 (1936).

196. The history of the various alter ego doctrines that have developed over the years is

certain dictates of equity, these same standards were applied to corporate subsidiaries.<sup>197</sup>

Writers and courts have recently begun to recognize that corporate subsidiaries should not be treated exactly like shareholders. The trend is to replace the old identity rules with enterprise theory:

Legal scholars increasingly understand that the objectives and policies of the law are often more adequately served by relating legal consequences to the enterprise than by relying primarily on legal concepts. This development—in areas as diverse as torts, antitrust, jurisdiction and venue—relates legal consequences to the enterprise that has created them.<sup>198</sup>

An enterprise theory alternative to piercing the corporate veil is not novel. Several decades ago, Professor A. Berle suggested that a corporate group should be looked upon as a unit rather than as a collection of various independent entities.<sup>199</sup> The updated version of the argument is that:

Where the constituent components of the group form a unitary business and conduct interrelated operations as part of an integrated enterprise under common direction directed at the maximization of return for the group as a whole, the legal consequences . . . should reflect a judgment of the extent to which the objectives of the particular procedural rule under discussion are best achieved in dealing with the several components of the group.<sup>200</sup>

The writer, Professor Blumberg, concluded that an enterprise ap-

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thoroughly summarized in P. BLUMBERG, *supra* note 18, at §§ 1.02-1.02.1. These include instrumentality, identity, alter ego, and agency theories. Each of these traditional theories uses a somewhat formalistic laundry list, similar to the all-the-facts-and-circumstances test used in the intraenterprise context, to determine when to pierce the corporate veil.

197. *Id.*

198. P. BLUMBERG, *supra* note 18, at 23. According to Professor Blumberg, emergence of this trend is generally recognized. *Id.* at 24 n.1 (citing L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 2A.01 (1982); 1 THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS §§ 11.01-.06 (V. Nanda ed. 1981); Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 789 (1971); Davis, *Workmen's Compensation—Using an Enterprise Theory of Employment to Determine Who is a Third Party Tort-Feaser*, 32 U. PITT. L. REV. 289 (1971); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-17 (1961); Morris, *Enterprise Liability and the Acturial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947)).

199. Professor Berle had stated: "The corporation is emerging as an enterprise bounded by economics, rather than as an artificial mystic personality bounded by forms of words in a charter, minute books, and books of account." Berle, *supra* note 198, at 345.

200. P. BLUMBERG, *supra* note 18, at 24.

proach should replace the various entity rules for piercing the corporate veil in the subsidiary context. Such a focus would result in a more defensible and coherent body of law than the "useless metaphors and conclusory terms that are the foundations of 'piercing the veil' jurisprudence."<sup>201</sup>

The *Copperweld* decision indirectly supports the enterprise theory suggested by Professor Blumberg by recognizing the economic singleness of a multicorporate enterprise. In fact, Professor Blumberg's description of an enterprise is only a more sophisticated version of the Court's description in *Copperweld*.

The application of *Copperweld* to this area has not gone totally unnoticed by the courts. The bankruptcy matter of *In re G & L Packing Co.*,<sup>202</sup> is the sole example. There, a family meat processing corporation formed a slaughtering business in response to a shortage of local meat in the market.<sup>203</sup> The two businesses maintained separate records but the wife of the owner of the meat processor was the president, sole director and shareholder of the meat supply corporation.<sup>204</sup> This corporation eventually failed. The court faced the question of whether the creditors of the supply corporation could collect debts from the family packing corporation under a provision of the Packers & Stockyards Act<sup>205</sup> which would enable them to do so if the corporations were considered a single entity.

The court noted that, as a general matter, the law of the state of incorporation normally determines internal corporate issues. However, the court read *Copperweld* to mean that where strong federal policy exists, federal common law should control on the corporate identity issue:

Although the *Copperweld* Court did not frame the problem before it as one of . . . choice-of-law, it . . . implicitly decided the choice of law question in favor of applying a federal rule of decision. That is, the Court considered the policy and purpose of § 1 of the Sherman Act, found that such policy would be disserved by treating corporations that are separate under state law as independent entities, and therefore rejected the application of state corporate law to this issue.<sup>206</sup>

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201. *Id.*

202. 41 Bankr. 903 (N.D.N.Y. 1984).

203. *Id.* at 906.

204. *Id.* at 907.

205. 7 U.S.C. § 196 (1982).

206. 41 Bankr. at 911 (citing, Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982)). The court held that the corporate veil should be pierced because "[a]s in *Copperweld*, a federal rule of decision [was]

It is yet to be seen whether *Copperweld* will be used to support the general enterprise liability theory suggested by Professor Blumberg, or whether it will continue to be limited to situations in which strong federal policy calls for the application of federal common law over state law on the issue of piercing the corporate veil. The Supreme Court's application of the enterprise concept to multicorporate firms should at least send a signal to both federal and state courts: It may be time to unravel the corporate veil, at least to the extent that it has protected economic subunits as if they were shareholders, where strong federal policy supports recognizing a firm's singleness. A desire to recognize substance over form, mandated in *Copperweld*, would seem to demand as much.

#### V. CONCLUSION

In *Copperweld*, the Court finally confronted the anomalies of the intraenterprise doctrine. The rejection of the doctrine implies that the Court's holding should be extended to include majority-owned affiliates and subsidiaries. Not to do so undermines the Court's reasoning that section 1 entities are economic enterprises. Similarly, minority controlled entities should be permitted to rebut a presumption of conspiratorial capacity by showing that the actual decisionmaking power and control is with the parent corporation.

The complete adoption of an economic enterprise theory for anti-trust law should also prompt courts to reconsider the present standards for piercing the corporate veil. Multicorporate enterprises should enjoy the burdens of their associations as well as the benefits.

*James A. Keyte*

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necessary to ensure the substance, not form, determines whether a separately incorporated entity is in fact the alter ego . . . ." *Id.*

# CALIFORNIA EVIDENCE CODE SECTION 1103: FURTHER ABUSE OF THE RAPE VICTIM

## I. INTRODUCTION

According to Dean Wigmore, “[n]o question of evidence has been more controverted”<sup>1</sup> than the admissibility at trial of a rape victim’s previous sexual conduct. The controversy entails important political as well as legal considerations.

Reputation and opinion evidence of a rape victim’s previous sexual conduct, used in a rape case to prove consent, is arguably irrelevant and prejudicial in a society where neighbors are often strangers and premarital or nonmarital sex is commonly accepted. However, because such evidence is frequently deemed admissible, women are discouraged from pursuing complaints after being raped because of their fear of harassment on the witness stand. The fears of victims in this regard are not unfounded. Because they are permitted by rules of evidence to do so, defense attorneys dwell on reputation and opinion testimony filled with rumors of the victims’ sexual lives. Thus, the focus of the judicial proceedings shifts, placing the victims rather than the defendants on trial.

Adoption in California of Rule 412 of the Federal Rules of Evidence, which severely limits the defense counsel’s inquiry into the victim’s past sexual conduct, could potentially alleviate these problems. Over the last few decades, state legislatures gradually have begun to respond to the growing fears of women and to the criticisms of the laws relating to the crime of rape. Perhaps it is now time for California to make such a response.

This Comment evaluates section 1103 of the California Evidence Code (CEC) and Rule 412 of the Federal Rules of Evidence (FRE). The author concludes that California should adopt the substantive provisions of Rule 412 regarding methods of proving consent in rape cases.

## II. CHARACTER EVIDENCE

In preparing a consent defense in a rape trial, a defense attorney often focuses upon the victim’s prior sexual conduct to suggest her willingness to consent on the specific occasion in question. Such a defense is usually introduced through circumstantial evidence,<sup>2</sup> as opposed to di-

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1. 1 J. WIGMORE, EVIDENCE § 200, at 682 (3d ed. 1940).

2. “The circumstantial use of character involves not only the establishment of the rele-