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Casenotes: Antitrust — Parent Corporation and Its Wholly Owned Subsidiary Are Incapable of Conspiring with Each Other under Section One of the Sherman Act. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984)

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ANTITRUST — PARENT CORPORATION AND ITS WHOLLY OWNED SUBSIDIARY ARE INCAPABLE OF CONSPIRING WITH EACH OTHER UNDER SECTION ONE OF THE SHERMAN ACT. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

Copperweld, a parent corporation, sent letters to various businesses urging them not to deal with Independence Tube, a competitor of Copperweld's wholly owned subsidiary, Regal Tube.[1] Independence sued Copperweld and Regal in federal district court alleging that the two companies conspired in restraint of trade in violation of section 1 of the Sherman Act (Act).[2] The jury returned a verdict against the defendants, and the United States Court of Appeals for the Seventh Circuit affirmed,[3] finding that Copperweld and Regal were sufficiently distinct entities, that were capable of conspiring in violation of section 1 of the Act.[4] The Supreme Court granted certiorari to reevaluate the intra-enterprise conspiracy doctrine used as the basis for holding the affiliated corporations liable as independent entities capable of conspiring in violation of section 1 of the Sherman Act.[5] The Supreme Court reversed, holding that a parent corporation and its wholly owned subsidiary are incapable of conspiring in violation of section 1 of the Sherman Act[6] because they must be treated as one unified entity.[7] The Court, therefore, held that a parent corporation and its wholly owned subsidiary are not subject to the intra-enterprise conspiracy doctrine.[8]

In 1890, the Sherman Act was passed[9] in response to public concern over the growth of trusts and monopolies.[10] At that time the trust was a device used by corporations in the same line of business to control the price and supply of certain goods and to restrict competition.[11] The pur-

1. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984). Upon receipt of one of the letters sent by Copperweld, Yoder Co. voided the purchase order for a tubing mill which it had agreed to supply to Independence Tube. Independence was able to obtain a mill from another company, but the breach by Yoder Co. delayed Independence's entry into the steel tubing industry by nine months. *Id.* at 2734-35.
2. Sherman Antitrust Act, 15 U.S.C. § 1 (1982).
3. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).
4. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 320 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).
5. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2736 (1984).
6. *Id.* at 2745.
7. *Id.* at 2742.
8. *See id.* at 2745.
9. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).
10. THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 6 (1955 & reprint 1981); A. AUSTIN, ANTITRUST: LAWS, ECONOMICS, POLICY § 3.2 (1976); 1 E. KINTNER, FEDERAL ANTITRUST LAW § 4.1, at 125 (1980); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 222 (1956).
11. *See* United States v. Northern Securities Co., 120 F. 721, 724 (D. Minn. 1903), *aff'd*, 193 U.S. 197 (1904); E. HODGES, THE ANTITRUST ACT AND THE SUPREME COURT

pose of the Act was, and is to promote free competition and to prohibit unreasonable[12] restraints of trade.[13] Section 1 of the Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal . . . ."[14]

As evident from its language, section 1 is not intended to proscribe the unilateral conduct of a single enterprise.[15] An unreasonable restraint of trade by a single enterprise is prohibited by other provisions of antitrust laws. For example, section 2 of the Sherman Act[16] prohibits monopolization or attempted monopolization resulting from both the concerted conduct of two or more independent entities and the unilateral conduct of a single enterprise.[17] Section 5 of the Federal Trade Commission Act also proscribes anticompetitive conduct by a single enterprise.[18]

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2 (1941); 1 E. KINTNER, *supra* note 10, at § 4.2, at 131 (quoting President Grover Cleveland); 1 H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES § 3.1, at 55-56 (1949). By combining their stock to be held in trust by a central committee, the corporations were controlled by that committee through its members' voting power as trustees. *See* Article, *A Statement of the Trust Problem*, 16 HARV. L. REV. 79, 80-81 (1902); BLACK'S LAW DICTIONARY 1352 (5th ed. 1979).

The trusts were most prevalent in the consumer goods industries, such as fuel oil, sugar, matches, whiskey and cottonseed. *See* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 12 (2d ed. 1970); LETWIN, *supra* note 10, at 225.

12. Section 1 of the Sherman Act has been interpreted to prohibit only those contracts, combinations, or conspiracies that "unreasonably" restrain trade. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (citing Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) and Board of Trade of Chicago v. United States, 246 U.S. 231 (1918)).
13. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (purpose was to "preserve the right of freedom to trade").
14. Sherman Antitrust Act, 15 U.S.C. § 1 (1982).
15. *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); Albrecht v. Herald Co., 390 U.S. 145, 149 (1968). *Monsanto* was decided three months before *Copperweld*.
16. *See* Sherman Antitrust Act, 15 U.S.C. § 2 (1982) which provides in pertinent part: "Every person who shall monpolize, or attempt to monopolize, . . . or conspire with any other person . . . to monopolize . . . shall be deemed guilty. . . ." Not every monopoly is illegal under section 2 of the Sherman Act. For example, monpolies granted by the government under the patent law for a limited time period and those that exist as the result of such extensive economies of scale that the industry can support only one enterprise, are not illegal under section 2. Mueller, *Monopoly and the Law: The Case of the 'Prudent' Monopolist*, 11 ANTITRUST L. & ECON. 73, 83 n.6 (1979); *see also* Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1051 (9th Cir. 1974) (manufacturer has natural monopoly over its own products, especially if sold under trademark); Lamb Enter., Inc. v. Toledo Blade Co., 461 F.2d 506, 515 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) (natural monopoly not per se violation of antitrust laws). *But cf.* Hamilton & Caulfield, *The Defense of Natural Monopoly in Sherman Act Monopolization Cases*, 33 DEPAUL L. REV. 465 (1984) (urging that a natural monopoly should not be completely immunized from section 2 liability).
17. Section 2 of the Sherman Act reaches conduct of a single "person who shall monopolize" and conduct involving a conspiracy to monopolize. Sherman Antitrust Act, 15 U.S.C. § 2 (1982).
18. Federal Trade Commission Act, 15 U.S.C. § 45 (1982). Section 5(a) of the Federal

Because section 1 of the Sherman Act is aimed at unreasonable restraints of trade resulting from contracts, combinations such as trusts, or conspiracies, a plurality of actors is required to prove a violation of section 1.[19] This requirement encouraged affiliated corporations charged with a violation of section 1 to use the defense that they were a single entity incapable of conspiring under section 1.[20]

In order to bring affiliated corporations within the sweep of the section 1 plurality requirement, courts developed the intra-enterprise conspiracy doctrine. This doctrine treats members of the same corporate enterprise as separate actors, thus preventing affiliated corporations from escaping liability under section 1.[21] The Supreme Court first applied the doctrine in *United States v. Yellow Cab Co.*[22] In *Yellow Cab*, the controlling shareholder of a taxicab manufacturing company was charged with conspiring with the manufacturing company and five other affiliated corporations[23] to restrain and monopolize trade in the sale of taxicabs and

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Trade Commission Act provides in pertinent part: "Unfair methods of competition . . . and unfair or deceptive acts or practices . . . are declared illegal."

19. *See supra* note 15 and accompanying text.
20. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141 (1968) (defendants argued they were a single entity); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951) (defendants argued they were "mere instrumentalities" of a single unit); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947) (defendants argued they were a "vertically integrated enterprise").
21. Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 23 (1981); *see also supra* note 20 and accompanying text.
22. 332 U.S. 218 (1947). Although *Yellow Cab* was the first Supreme Court case to make use of the intra-enterprise conspiracy doctrine, courts had found affiliated corporations liable under section 1 of the Sherman Act on other grounds prior to *Yellow Cab*. *See* United States v. Crescent Amusement Co., 323 U.S. 173 (1944) (defense of conspiratorial incapacity was never raised); United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). The defendants in *General Motors* argued the "single trader" defense which is premised on the idea that, as a single trader, they have a right to condition the sale of their product and to restrain their own product by selling it to whomever they choose. Rejecting this defense, the court stated, "[n]or can the . . . [defendants] enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination . . ." by arguing that they are one "trader." The court cited no authority in support of their statement and, furthermore, held that the defendants could be held liable on other grounds. *Id.* at 404. The other basis for liability of the defendants in *General Motors* was that their activities constituted an illegal vertical contractual restraint. *See* Handler & Smart, *supra* note 21, at 27.
23. The exact ownership of the affiliated corporations can be broken down as follows: Morris Markin was the controlling shareholder of Checker Cab Manufacturing Corporation (CCM) and the sole shareholder of Cab Sales and Parts Corporation (Cab Sales). CCM owned 62% of the stock of Parmalee Transportation Company (Parmalee) which owned a controlling interest in Chicago Yellow Cab Company, Inc. (Chicago Yellow) and owned all of the stock of Deluxe Motor Cab Company. Yellow Cab Company (Yellow) was the wholly owned subsidiary of Chicago Yellow. Associates of Markin owned 97% of the stock of Checker Taxi Company (Checker). Yellow, Chicago Yellow, Parmalee, Cab Sales, Checker, CCM, and Markin were the alleged conspirators, and the corporate interrelationships between those companies resulted in the exclusion of other taxicab manufacturers from 15%

taxicab services in violation of sections 1 and 2 of the Sherman Act.[24] The Court held that the common ownership and control of the affiliated companies did not immunize the alleged conspiracy from the application of the Sherman Act[25] when the companies had affiliated for the illegal purpose of restraining trade.[26]

In *Yellow Cab*, the initial acquisitions of the affiliated taxicab companies alone constituted a section 1 violation, because the acquisitions resulted from the concerted action of several previously separate entities, lessening competition and retraining trade in the taxicab industry.[27] Furthermore, the *Yellow Cab* Court could have found the defendants in violation of section 2 of the Sherman Act because the corporations' activities constituted an attempted monopolization of the taxicab business.[28] Unfortunately, the Court in *Yellow Cab* did not expressly restrict its holding to the original illegal affiliation or the attempted monopolization, but instead stated that any affiliation among the corporate defendants would not relieve them of liability under the Sherman Act.[29] This holding has been interpreted broadly by lower courts, that have held that whenever defendants are separately incorporated, they are capable of conspiring.[30] The Supreme Court also subsequently applied *Yellow Cab* to find violations of section 1.[31] Although the Court has had the opportunity to clarify *Yellow Cab* and to analyze the basis for its holding, the Court has

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of the New York City market, 58% of the Minneapolis market, 86% of the Chicago market, and 100% of the Pittsburgh market. United States v. Yellow Cab Co., 332 U.S. 218, 221-24 (1947).

24. Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2 (1982). A monopoly prohibited under the Sherman Act has been defined as "the power to fix prices or exclude competition coupled with policies designed to use or preserve that power." BLACK'S LAW DICTIONARY 908 (5th ed. 1979) (quoting United States v. Otter Tail Power Co., 331 F. Supp. 54, 58 (D. Minn. 1971)). Section 2 liability is established when the defendant possesses monopoly power and has wilfully acquired or maintained that power. *See, e.g.*, Juneau Square Corp. v. First Wisconsin Nat'l Bank of Milwaukee, 624 F.2d 798, 813 (7th Cir.), *cert. denied*, 449 U.S. 1013 (1980); Deere & Co. v. Farmhand, Inc., 560 F. Supp. 85, 100-101 (D. Iowa 1982), *aff'd per curiam*, 721 F.2d 253 (8th Cir. 1983); Becker v. Egypt News Co., 548 F. Supp. 1091, 1096 (D. Mo. 1982), *aff'd*, 713 F.2d 363 (8th Cir. 1983).
25. *Yellow Cab*, 332 U.S. at 227.
26. *Id.* at 229.
27. *See* Handler & Smart, *supra* note 21 at 29.
28. Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L. J. 5, 12 (1963).
29. *Yellow Cab*, 332 U.S. at 227.
30. *E.g.*, Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 34 n.29 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 205-06 (5th Cir. 1969).
31. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (holding that a parent corporation, its wholly owned subsidiary, and two other subsidiaries had violated section 1); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (American corporation and two foreign affiliated corporations found guilty of a section 1 violation); Kiefer-Stewart Co. v. Joseph E. Seagram &

simply reiterated its holding that affiliated corporations are capable of conspiring in violation of section 1 of the Sherman Act.[32]

The most recent Supreme Court decision to find that affiliated corporations had conspired in violation of section 1 of the Act is *Perma Life Mufflers, Inc. v. International Parts Corp.*[33] In *Perma Life*, a parent corporation, its wholly owned subsidiary, and two partially owned subsidiaries were charged with illegally restraining trade by making agreements with muffler dealers that restricted the dealers' resale prices, prohibited the dealers from trading with the defendants' competitors, tied the sale of mufflers to the sale of other products in the defendants' line, and fixed sales territories.[34] The defendants argued that they were all part of a single enterprise incapable of conspiring under section 1.[35] Citing *Yellow Cab*, the Court rejected that argument, stating that because the defendants were separately incorporated, any affiliation would not preclude the Court from imposing the sanctions of section 1.[36]

Sons, Inc., 340 U.S. 211 (1951) (two subsidiaries of a common parent held to have conspired in violation of section 1).

Schine Chain Theaters, Inc. v. United States, 334 U.S. 110 (1948) has been included by at least one commentator in the discussion of Supreme Court cases that have applied the intra-enterprise conspiracy doctrine. *See, e.g.*, Note, *(Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 CALIF. L. REV. 1732, 1739 n.36 (1983) (including *Schine Chain Theaters* in a list of Supreme Court cases that had applied the doctrine). The defendants in *Schine Chain Theaters*, however, were found guilty of conspiring with unaffiliated distributors under section 1 and monopolizing under section 2. Thus, the intra-enterprise conspiracy doctrine was inapplicable in that case. Handler & Smart, *supra* note 21, at 27-28 n.22.

32. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951). In *Kiefer-Stewart*, two affiliated corporations in the business of selling liquor to wholesalers were held liable for a section 1 violation. The Court determined that the defendant corporations had conspired to sell liquor only to those wholesalers that agreed to sell at prices fixed by the two corporations. The two affiliated corporations contended that they were "mere instrumentalities of a single manufacturing merchandizing unit," and, therefore, incapable of conspiring. *Kiefer-Stewart*, 340 U.S. at 215. In response, the *Kiefer-Stewart* Court simply reiterated the rule set forth in *Yellow Cab* that affiliation between the corporations would not relieve them of liability under the Sherman Act. The Court stressed that the rule of *Yellow Cab* was particularly applicable, where, as in *Kiefer-Stewart*, the corporate defendants held themselves out as competitors of each other. *Id.*

In *Timken Roller Bearing Co.*, the Court again applied the doctrine of intra-enterprise conspiracy. The Court ruled against the defendants — a domestic corporation and its partially owned foreign counterparts — finding that the affiliated corporations had fixed prices, allocated trade territories, and engaged in other anticompetitive conduct in violation of section 1 of the Sherman Act. Although the Court had the opportunity to explain or clarify the holding of *Yellow Cab*, the Court simply cited *Kiefer-Stewart* for the *Yellow Cab* rule that common ownership or control will not relieve affiliated corporations of the sanctions of the Sherman Act. *Timken Roller Bearing Co.*, 341 U.S. at 598.

33. 392 U.S. 134 (1968).

34. *Id.* at 136-37.

35. *Id.* at 141.

36. *Id.* at 141-42. The Court stated that because the parent corporation (International)

The absence of Supreme Court analysis of the intra-enterprise conspiracy doctrine led the various circuits to devise their own tests to deal with the issue of the conspiratorial capacity of affiliated corporations under section 1. One approach was the "all the facts and circumstances" test, which required consideration of factors such as the past relationship between the corporations, and whether the corporations had separate managerial staff, records and bank accounts, and corporate offices and officers.[37] For example, if the firms had never operated as separate entities before becoming affiliated, and the businesses had common staff, bank accounts and offices, it would indicate that the corporations were one entity incapable of a section 1 conspiracy. A second test focused on whether the affiliated corporations' intent was to have a detrimental economic effect on third parties or whether the corporations' conduct reflected a purely internal decision.[38] According to this test, a decision related to internal matters of the enterprise would not be scrutinized under section 1. Application of a third test resulted in a finding of conspiratorial capacity if the corporations held themselves out as competitors of one another.[39] A fourth approach, the "sole decision maker" test, was premised on the theory that if one person controlled and made the decisions for several affiliated corporations, the corporations were incapable of conspiring because they lacked the requisite plurality of actors.[40]

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and its wholly owned subsidiary (Midas) "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." *Id.* Thus the percentage of the subsidiary owned by the parent was irrelevant. A parent corporation and its wholly owned subsidiary would be capable of conspiring under the *Perma Life* interpretation.

37. *See, e.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726-27 (7th Cir. 1979) (overlapping management, consolidated financial statements, same corporate offices), *cert. denied*, 445 U.S. 917 (1980); Knutson v. Daily Review, Inc., 548 F.2d 795, 802 (9th Cir. 1976) (newspapers had same sports, financial, and editorial pages, same presidents and management, and common officers), *cert. denied*, 433 U.S. 910 (1977); Murphy Tugboat Co. v. Shipowners & Merchants Tugboat Co., 467 F. Supp. 841, 849 (N.D. Cal. 1979) (separate managements, locations, equipment, and solicitation of business), *aff'd on other grounds*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

38. *See, e.g.*, Thomsen v. Western Electric Co., 512 F. Supp. 128, 131-33 (N.D. Cal. 1981) (agreement concerning manpower is matter of internal management), *aff'd*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 459 U.S. 991 (1982); REA Express, Inc. v. Alabama Great S. R.R. Co., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976) (agreement affected no one other than parent and subsidiary), *aff'd mem. sub nom.*, Somerwine v. United States, 431 U.S. 961 (1977). *Cf.* Chastain v. American Telephone & Telegraph Co., 401 F. Supp. 151, 160 (D.D.C. 1975) (if defendants have anticompetitive intent and effect is similar to conspiracy, then corporate affiliation no defense).

39. *See, e.g.*, J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 795 (5th Cir. 1983) (subsidiaries neither competed nor held themselves out as competitors); Aaron E. Levine & Co. v. Calkraft Paper Co., 429 F. Supp. 1039, 1043-45 (E.D. Mich. 1976) (parent and subsidiary never acted as competitors); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 572-73 (D. Md. 1975) (parent and subsidiary were not in competition in the market), *aff'd in part, rev'd in part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

40. *See, e.g.*, Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 455-58 (9th Cir.

A fifth test involved the simple inquiry into whether the defendants were separately incorporated and thus capable of conspiring in violation of section 1.[41]

In *Copperweld Corp. v. Independence Tube Corp.*[42] the Court examined the rationale for the intra-enterprise conspiracy doctrine and abolished the former standards for determining the conspiratorial capacity of a parent corporation and its wholly owned subsidiary.[43] In *Copperweld*, the Court held that a parent corporation and its wholly owned subsidiary are incapable of conspiring under section 1 of the Sherman Act, and thus abolished the intra-enterprise conspiracy doctrine with respect to parent corporations and their wholly owned subsidiaries.[44]

The Court analogized the status of a wholly owned subsidiary vis-a-vis its parent corporation to that of an officer of a corporation and to an unincorporated division.[45] The officer, unincorporated division, and the wholly owned subsidiary are all incapable of conspiring with the parent corporation because they strive to benefit the parent corporation.[46] This unity of interest with the parent corporation was the basis for the Court's holding that the two corporations were incapable of conspiring under section 1.[47] The Court repudiated the intra-enterprise conspiracy doctrine with respect to parent corporations and their wholly owned subsidiaries because the doctrine focuses on the legal form of an enterprise, that is, whether the enterprise is separately incorporated, rather than on the substantive realities of how the business is operated.[48] There may be no difference between the way the affiliated corporations are managed and the way an unincorporated division and its parent operate. Yet, under

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1979) (no conspiracy when sole shareholder alone made allegedly anticompetitive decision); Maryland *ex rel.* Sachs v. Mid-Atlantic Toyota Distrib., 560 F. Supp. 760, 767 n.12 (D. Md. 1983) ("one man show" exception exists to the intra-enterprise conspiracy doctrine) (dictum); Windsor Theatre Co. v. Walbrook Amusement Co., 94 F. Supp. 388, 396 (D. Md. 1950) (where one person directed and caused activities, no conspiracy found), *aff'd*, 189 F.2d 797 (4th Cir. 1951).

41. *See, e.g.*, H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244-45 (5th Cir. 1978) (separate incorporation made subsidiary a distinct entity); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 (3d Cir.) (parent and subsidiary capable of conspiring because separately incorporated entities), *cert. denied*, 439 U.S. 876 (1978); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 557 (1st Cir. 1974) (applied doctrine recognizing "thin" conspiracies among corporations), *cert. denied*, 421 U.S. 1004 (1975).
42. 104 S. Ct. 2731 (1984).
43. *Id.* at 2736.
44. *Id.* at 2745. The Court did not consider whether a parent corporation is capable of conspiring with a subsidiary that it does not wholly own. *Id.* at 2740.
45. *Id.* at 2741-42.
46. *See id.* at 2741-42; Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (holding that officers are incapable of conspiring with corporation); 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) (holding that unincorporated divisions are incapable of conspiring with corporation).
47. *Id.* at 2742.
48. *See id.* at 2743-44.

the intra-enterprise conspiracy doctrine, the affiliated corporations are capable of conspiring when unincorporated divisions are not.[49] The Court therefore established a per se test, eliminating the need for the various tests previously applied by the circuits.[50]

The Court emphasized the distinction between section 1 and section 2 of the Sherman Act to demonstrate that conduct of a single entity is not intended to be proscribed by section 1.[51] If, however, a single firm's anticompetitive conduct does not rise to the level of a section 2 monopolization, the firm will escape the reach of the Sherman Act because the firm lacks the plurality of actors required for liability under section 1. Thus, a gap is created in the scope of the Sherman Act. The majority stressed that Congress left this gap open to effectuate the procompetitive purpose of the Act. Subjecting the entrepreneurial efforts of an enthusiastic competitor to the scrutiny of section 1 would discourage the zealous competition that the Sherman Act seeks to promote.[52]

Furthermore, the Court reasoned that interpreting section 1 as prohibiting the unilateral conduct of one enterprise would make the "contract, combination, or conspiracy" language of the Act superfluous, because conduct by a single entity does not constitute a joining of two previously independent enterprises, a factor which is essential to a contract or conspiracy.[53] Although recognizing the gap in the coverage of sections 1 and 2, the majority pointed out that the activities of a parent corporation and its wholly owned subsidiary may be adequately scrutinized under other antitrust laws, without the need to apply the intra-enterprise conspiracy doctrine.[54]

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49. *See id.* at 2741-43.

50. The Court rejected the "all the facts and circumstances" test which was applied by the lower court in *Copperweld*, stating that those factors tending to show the separateness of the subsidiary are not sufficient to "overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical." *Id.* at 2742 n.18.

51. *Id.* at 2740-41; *see supra* notes 15-17 and accompanying text.

52. *Copperweld*, 104 S. Ct. at 2744. For example, nothing in the Sherman Act prohibits one competitor from acquiring another's customers through the development of a superior product or service. *Id.* at 2740 n.14.

53. *Id.* at 2744.

54. *Id.* at 2745. For example, the initial acquisition of a subsidiary by a parent corporation is subject to the scrutiny of sections 1 and 2 of the Sherman Act if the acquisition constituted either an unreasonable restraint of trade resulting from concerted conduct or an attempted or actual monopolization. Furthermore, the initial acquisition would be scrutinized under section 7 of the Clayton Act, which prohibits the acquisition of the stock of one corporation by another corporation where the effect of such acquisition would be to substantially decrease competition or to create a monopoly. Clayton Act, 15 U.S.C. § 18 (1982). Post-acquisition conduct of the parent and its wholly owned subsidiary would remain subject to section 2 of the Sherman Act and section 5 of the Federal Trade Commission Act, which both proscribe anticompetitive conduct, including that of a single enterprise. Federal Trade Commission Act, 15 U.S.C. § 45 (1982). For a discussion of section 2 of the Sherman Act, see *supra* notes 16-17, 24 and accompanying text. For a discussion of section 5 of the Federal Trade Commission Act, see *supra* note 18 and accompanying text.

A three-judge dissent[55] argued that the majority's holding was unsound and overly broad because the opinion created a per se rule of legality with respect to the activities of a parent corporation and its wholly owned subsidiary, without any discussion of either the anticompetitive conduct of the parent corporation and its wholly owned subsidiary in *Copperweld*, or the effect that such conduct has on a competitor.[56]

The dissent stated that the majority was too quick to discount the *Yellow Cab* line of cases in finding that antitrust liability could have been based on grounds other than the intra-enterprise conspiracy doctrine.[57] The dissent contended there was no evidence in *Yellow Cab* and its progeny to show that liability rested on anything other than the intra-enterprise conspiracy doctrine.[58] Moreover, the dissent asserted that because the affiliated enterprises in *Copperweld* were separately incorporated, they were capable of conspiring.[59] The dissent further stated that because the original trust[60] was one of the combinations Congress intended to police, the majority's immunization of a parent corporation and its wholly owned subsidiary from section 1 liability frees from antitrust scrutiny the type of organization most resembling the trusts existing at the time of the Sherman Act's enactment.[61] The dissent urged that any conduct that is anticompetitive and restrains third parties, such as the defendants' actions that caused the plaintiff's delayed entry into the steel tubing industry, should not escape Sherman Act liability simply because the conduct is that of a parent corporation and its wholly owned subsidiary.[62]

The majority opinion in *Copperweld* reflects the economic realities of corporate structures. Decentralized management and autonomy in day-to-day decisionmaking increases corporate efficiency and thus enhances competition by allowing top management to focus on the major decisions and long-term goals of the corporate family while delegating short-term

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55. Justice Stevens wrote the dissenting opinion, and was joined by Justices Brennan and Marshall. Justice White did not participate in the decision. *Id.* at 2745.

56. *Id.* at 2755.

57. *See id.* at 2746-48. For the other grounds of liability noted by the majority, see *supra* note 54 and accompanying text.

58. *Copperweld*, 104 S. Ct. at 2746-48.

59. *See id.* at 2750. The dissent stated that the corporation is a "separate legal entity; . . . [its] form cannot be disregarded." *Id.*

60. *See supra* note 11 and accompanying text.

61. *Copperweld*, 104 S. Ct. at 2751. The dissent stated that if, as the majority contends, section 1 of the Sherman Act applies only to acquisitions of corporate affiliates, then, "it would have meant that [in 1890] § 1 would have no application to trust combinations which had already been formed - the very trusts to which Senator Sherman was referring." *Id.* at 2751 n.18.

The majority, however, rejected the dissent's analysis by pointing out that a trust or combination already in existence in 1890 falls within the purview of section 1 when the "original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct." *Id.* at 2737 (footnote omitted).

62. *See id.* at 2753-55.

decisionmaking to lower level management.[63] Separate incorporation may effectuate such efficiency by utilizing a form of decentralized management. Furthermore, doing business through a separately incorporated subsidiary offers other advantages not within the scope of antitrust liability.[64] Because the risk of failure can be passed on to the subsidiary, separate incorporation of the subsidiary allows the corporate family to enter new markets that it would not otherwise enter.[65]

The anomaly in the dissent's analysis is that the analysis focuses initially on whether there has been an unreasonable restraint of trade. If such a restraint exists, the dissent would hold that the corporations' affiliation should not relieve them of section 1 liability.[66] The dissent's order of analysis is backward. If the parent corporation and wholly owned subsidiary lack the capacity to conspire, the inquiry ends for purposes of section 1 of the Sherman Act, and whether there may have been an unreasonable restraint of trade is irrelevant. By arguing in support of the intra-enterprise conspiracy doctrine, the dissent failed to acknowledge the economic reality that a parent corporation and its wholly owned subsidiary constitute one entity, striving to benefit the subsidiary's sole shareholder, the parent. Although the dissent points out the explicit adoption of the intra-enterprise conspiracy doctrine in the *Yellow Cab* line of cases, the only justification that the dissent provides for treating incorporated subsidiaries differently from unincorporated divisions is that the entity may realize possible efficiencies in operating its subsidiary as a separate corporation.[67] Taking advantage of economic efficiencies, however, is no reason to penalize incorporated subsidiaries when their conduct poses no greater anticompetitive threat to society than does a division's conduct. The dissent's argument, that entities such as the parent corporation and wholly owned subsidiary in *Copperweld* are similar to the original trusts prohibited by the Sherman Act,[68] also fails because the trusts referred to in the Sherman Act were formed for the illegal purpose of inhibiting competition.[69] There was no evidence that Cop-

63. *See* A. CHANDLER, STRATEGY AND STRUCTURE 57, 309-11 (1962) (discussing the organizational structures adopted by E.I. du Pont de Nemours & Co., General Motors Corp., Standard Oil Co. (New Jersey) and Sears, Roebuck and Company).

64. *See* Handler & Smart, *supra* note 22, at 62-63 n.193; *see also Copperweld*, 104 S. Ct. at 2743.

65. *See* Amicus Curiae Brief of Kaiser Aluminum & Chemical Corporation In Support of Petitioners [Copperweld] at 14, Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984); *see also* Handler & Smart, *supra* note 22, at 62-63 n.193 (two reasons cited for doing business through a subsidiary are expansion of operations into a new country where the local law prohibits or makes difficult the operation of the parent in that country and the limitation of contract or tort liability).

66. *Copperweld*, 104 S. Ct. at 2746.

67. *Id.* at 2753-54 n.27. The dissent suggested that because the enterprise may realize some economic benefit from the separate incorporation of the subsidiary, to subject such entities to the sanctions of the Sherman Act, while immunizing unincorporated divisions, is appropriate. *Id.*

68. *Id.* at 2751; *see supra* note 11 and accompanying text.

69. *Copperweld*, 104 S. Ct. at 2737 n.4, 2744 n.23. The Court noted that it is the unlaw-

perweld acquired Regal Tube intending to unreasonably restrain trade in the steel tubing industry. The dissent artificially created two entities in order to bridge the gap in the majority's interpretation of the Sherman Act. It was unnecessary to bridge the gap between section 1 and section 2, however, because as the majority stated, other provisions of the antitrust laws provide adequate sanctions for anticompetitive conduct that the Sherman Act leaves untouched.[70]

Because the Court explicitly restricted its holding to cases involving a parent corporation and its wholly owned subsidiary,[71] *Copperweld* did not answer whether two wholly owned subsidiaries of a common parent corporation can conspire with each other. The reasoning of the majority, however, suggests that two wholly owned subsidiaries of a single parent corporation are likewise incapable of conspiring in violation of section 1;[72] again, because both are striving to benefit their sole shareholder, the parent corporation. That the two subsidiaries may hold themselves out as competitors is irrelevant because they are both ultimately controlled by the parent; any agreement among them does not involve the prohibited "sudden joining of economic interests which were previously independent."[73]

To resolve the question of the conspiratorial capacity of a parent corporation and its subsidiaries that are less than wholly owned, a standard is needed that can easily be applied and understood, that promotes the goals of the Sherman Act, and that acknowledges the efficiencies created by today's enterprise structures.[74] Measuring the percentage of the subsidiary's stock owned by the parent provides such a standard. The percentage of the subsidiary's stock owned by a parent corporation is usually indicative of the degree of control that the parent may exercise

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ful combination that is prohibited by the Sherman Act; not the "lawful and useful combination" (quoting Senator Sherman). *Id.* at 2744 n.23.

70. *See supra* note 55 and accompanying text.

71. *Copperweld*, 104 S. Ct. at 2740.

72. *See* McDavid, *The Court's Welcome Demise of the "Bathtub" Conspiracy Doctrine*, Nat'l L.J., July 23, 1984, at 24, cols. 1 & 2. Lower courts since *Copperweld* have held that two wholly owned subsidiaries of a common parent corporation are incapable of conspiring in violation of section 1 of the Sherman Act. *See* Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1496 (5th Cir. 1985); Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984); Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984); Carol Hizel & Sons, Inc. v. Browning-Ferris Indus., 590 F. Supp. 1201, 1202 (D. Colo. 1984). *But see* Ray Dobbins Lincoln-Mercury, Inc. v. Ford Motor Co., 604 F. Supp. 203, 205 (W.D. Va. 1984) (holding that *Copperweld* is not applicable to two wholly owned subsidiaries of a common parent).

73. *Copperweld*, 104 S. Ct. at 2742.

74. In formulating a new standard to determine when an enterprise contains the plurality of actors required under section 1 of the Sherman Act, four necessary characteristics of a test have been identified: sensitivity to antitrust goals; comprehension of modern business structures; resistance to easy manipulation by corporations; and simplicity. Comment, *Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 CALIF. L. REV. 1732, 1753 (1983).

over the subsidiary.[75] If the parent corporation owns more than fifty percent of the subsidiary's stock and exercises its right to vote in accordance with its ownership, the parent corporation has the ultimate control over major decisions affecting the subsidiary. The exercise of such voting rights may include the election of directors who, in turn, may elect the officers of the subsidiary corporation. Thus, the parent can control the subsidiary through the managerial staff it elects. In accordance with *Copperweld*'s holding, a per se rule that a parent corporation that owns more than fifty percent of its subsidiary's stock is incapable of conspiring with its subsidiary would provide a well reasoned and easily applied test.[76]

To determine the conspiratorial capacity of an affiliated corporation and its parent that owns less than fifty-one percent of the stock, a combination of the tests previously applied by the various circuits[77] would provide an appropriate standard. The courts should consider several factors: whether the corporations have separate officers and directors or separate corporate headquarters;[78] who makes the long-term decisions within the subsidiary;[79] and the history of the corporations,[80] such as, whether the subsidiary in the past has taken actions adverse to the parent corporation. These factors would tend to show the autonomy, or lack thereof, of the affiliated corporations and determine whether the corporations make

75. *See* McQuade, *Conspiracy, Multicorporate Enterprises and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 212 (1955) (if parent holds greater than fifty percent of stock, control is through ownership, not agreement).

76. If, however, the alleged Sherman Act violation involves a consolidation, merger, or a transfer of assets, a greater percentage of shareholder votes may be required to approve the activity in question. Thus, a fifty-one percent ownership of the stock itself would not allow the owner of that stock to control the decision. *See, e.g.*, IOWA CODE ANN. § 491.105 (West 1949) (requiring the approval of two thirds of the votes entitled to be cast to ratify proposed merger); MD. CORPS. & ASS'NS CODE ANN. § 3-105(d) (1985) (proposed merger, consolidation, or transfer of assets requires approval by two thirds of the votes entitled to be cast on the matter); WASH. REV. CODE ANN. § 23A.24.020(3) (1969 & Supp. 1985) (requiring two thirds approval by shareholders entitled to vote on a proposed transfer of assets). *But see* DEL. CODE ANN. tit. 8, § 251(c) and § 271(a) (1983) (requiring only a majority approval of such matters).

77. *See supra* text accompanying notes 37-41.

78. *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726 (7th Cir. 1979) (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977)), *cert. denied*, 445 U.S. 917 (1980).

79. Identifying who makes the long-term decisions would indicate who retains ultimate control over the affiliated corporation. *See* Comment, *supra* note 74 at 1738 n.35, 1754 (advocating decisionmaking approach for all entities regardless of their corporate status). The short-term decisionmaking should not be a factor in determining conspiratorial capacity because the decentralization of a corporate enterprise resulting in the delegation of "day-to-day authority" is in harmony with antitrust goals. *See id.* at 1739.

80. *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726 (7th Cir. 1979), (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977)), *cert. denied*, 445 U.S. 917 (1980).

up the plurality of actors required by section 1 of the Sherman Act.[81] Another factor that indicates the degree of the parent corporation's control over the subsidiary is the number of proxies assigned to the parent corporation by the remainder of the shareholders. For example, if individual shareholders own a majority of the affiliate's stock, and the parent corporation owns only twenty percent of the affiliated corporation, the parent corporation may control the major decisionmaking of the affiliate through voting the proxies of the other shareholders.[82]

The Court's holding in *Copperweld* reflects the economic realities of the modern business world. Although the *Copperweld* opinion is limited to parent corporations and their wholly owned subsidiaries, the rationale underlying *Copperweld* may similarly be applied to two wholly owned subsidiaries of a common parent corporation or to a subsidiary whose parent corporation owns more than fifty percent of the subsidiary's stock. *Copperweld*'s focus on the degree of ultimate control exercised by the parent corporation over the subsidiary provides guidance for determining conspiratorial capability of a subsidiary and parent corporation owning less than fifty-one percent of the subsidiary's stock. Moreover, the *Copperweld* decision provides lower courts with a uniform standard to apply in the case of a parent corporation and its wholly owned subsidiary.

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81. The "detrimental effect on third parties" test, mentioned previously in the text, has been omitted as a relevant factor in determining the conspiratorial capacity of a corporation and its parent that owns less than fifty-one percent of the stock. This test is rejected because it focuses on the impact of the corporations' conduct rather than on the separateness of the corporations. *See* Handler & Smart, *supra* note 21, at 51. The "holding out as competitors" test is also omitted because there may be no deception involved when the people who deal with the corporations are aware that the corporations are affiliated. *See id.* at 55.

82. *Cf.* McQuade, *supra* note 33, at 212-13 (majority may acquiesce in minority's exercise of control if they reap benefits therefrom).