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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. 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). The jury returned a verdict against the defendants, and the United States Court of Appeals for the Seventh Circuit affirmed, finding that Copperweld and Regal were sufficiently distinct entities, that were capable of conspiring in violation of section 1 of the Act. 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. 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 because they must be treated as one unified entity. The Court, therefore, held that a parent corporation and its wholly owned subsidiary are not subject to the intra-enterprise conspiracy doctrine.

In 1890, the Sherman Act was passed in response to public concern over the growth of trusts and monopolies. 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. 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.
6. *Id.* at 2745.
7. *Id.* at 2742.
8. *See id.* at 2745.
pose of the Act was, and is to promote free competition and to prohibit unreasonable\textsuperscript{12} restraints of trade.\textsuperscript{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 . . . .”\textsuperscript{14}

As evident from its language, section 1 is not intended to proscribe the unilateral conduct of a single enterprise.\textsuperscript{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\textsuperscript{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.\textsuperscript{17} Section 5 of the Federal Trade Commission Act also proscribes anticompetitive conduct by a single enterprise.\textsuperscript{18}

\begin{footnotes}
\item[12] See United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (purpose was to “preserve the right of freedom to trade”).
\item[15] See Sherman Antitrust Act, 15 U.S.C. § 2 (1982) which provides in pertinent part: “Every person who shall monopolize, 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, monopolies 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, \textit{Monopoly and the Law: The Case of the ‘Prudent’ Monopolist}, 11 \textit{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.), \textit{cert. denied}, 409 U.S. 1001 (1972) (natural monopoly not per se violation of antitrust laws). \textit{But cf.} Hamilton & Caulfield, \textit{The Defense of Natural Monopoly in Sherman Act Monopolization Cases}, 33 \textit{DePaul L. Rev.} 465 (1984) (urging that a natural monopoly should not be completely immunized from section 2 liability).
\end{footnotes}
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.\(^\text{19}\)

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.\(^\text{20}\)

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.\(^\text{21}\)

The Supreme Court first applied the doctrine in *United States v. Yellow Cab Co.*\(^\text{22}\) In *Yellow Cab*, the controlling shareholder of a taxicab manufacturing company was charged with conspiring with the manufacturing company and five other affiliated corporations\(^\text{23}\) to restrain and monopolize trade in the sale of taxicabs and...
taxicab services in violation of sections 1 and 2 of the Sherman Act. 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 when the companies had affiliated for the illegal purpose of restraining trade.

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. 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. 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. This holding has been interpreted broadly by lower courts, that have held that whenever defendants are separately incorporated, they are capable of conspiring. The Supreme Court also subsequently applied *Yellow Cab* to find violations of section 1. Although the Court has had the opportunity to clarify *Yellow Cab* and to analyze the basis for its holding, the Court has...
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, (Intra-enterprise 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.

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. 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. 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. 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.

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.


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

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. 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.

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. 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.

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 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 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.

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. 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. Moreover, the dissent asserted that because the affiliated enterprises in Copperweld were separately incorporated, they were capable of conspiring. The dissent further stated that because the original trust 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. 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.

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...
decisionmaking to lower level management. Therefore, 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. 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.

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. 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. 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, also fails because the trusts referred to in the Sherman Act were formed for the illegal purpose of inhibiting competition. There was no evidence that Cop-


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 unlawful-
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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70. See supra note 55 and accompanying text.
71. Copperweld, 104 S. Ct. at 2740.
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 circuits77 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.
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.
up the plurality of actors required by section 1 of the Sherman Act.\textsuperscript{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.\textsuperscript{82}

The Court's holding in \textit{Copperweld} reflects the economic realities of the modern business world. Although the \textit{Copperweld} opinion is limited to parent corporations and their wholly owned subsidiaries, the rationale underlying \textit{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. \textit{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 \textit{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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\textsuperscript{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. \textit{See} Handler \& Smart, \textit{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. \textit{See id.} at 55.

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