

THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE AS APPLIED TO  
AFFILIATED CORPORATIONS UNDER SECTION 1 OF THE SHERMAN ACT

by

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(Under the direction of Professor James F. Ponsoldt)

ABSTRACT

The thesis revisits antitrust law's intra-enterprise conspiracy doctrine in the context of affiliated corporations. After an analysis of the doctrine, its tension with the inevitable cooperation in a corporate group, and the reasons for its rejection in a limited setting by the Supreme Court, the paper goes on to explore the groundings for a broader solution. It clarifies how far the lower courts have extended the Supreme Court's rationale and suggests a consistent standard as to when corporate groups form a single economic unit for purposes of section 1 of the Sherman Act. According to this standard, courts should assess on a case-by-case basis whether a parent corporation can control its subsidiary. There should be a rebuttable presumption for the existence of such potential control when the parent owns a majority of the subsidiary's voting and common stock. To the contrary, when a parent owns less than a majority the rebuttable presumption should be that the corporations have conspiratorial capacity for antitrust purposes.

INDEX WORDS: Antitrust law, Sherman Act section 1, Intra-enterprise conspiracy doctrine, Capacity to conspire, Affiliated corporations, Corporate groups, Parent corporation, Subsidiary, Single economic unit, Control, Potential control, Unity of interests

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## DEDICATION

To my parents, Dr. Hans-Peter Menz and Beate Isert. You not only bore a large share of the financial burden of my studies but also continuously supported me with your love and wisdom.

And to Annette. Your love guided me through what has not always been an easy year.

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## CHAPTER ONE

### INTRODUCTION

Until the end of the nineteenth century, corporate groups were unknown.<sup>1</sup> To hold shares in another company a corporation needed an explicit authorization by statute. When, in the 1890s, states began to permit the acquisition and formation of subsidiary companies, groups of corporations gained control over large parts of the American economy within a decade.<sup>2</sup> Today, corporate families are the dominant actors in the business world. Virtually all modern major enterprises consist of several affiliated corporations.<sup>3</sup> Separate incorporation has become an omnipresent device in our modern economy. Corporations use the possibility of distinct legal persons when they organize their internal functions such as production, distribution, or financing. The internal growth of a company can be accelerated by introducing outside investment into separately incorporated parts of the business. Separate corporations are also used in the context of external expansion, which can be carried out with less equity capital in case of a partial acquisition of stock. Even when a firm completely acquires another, it often keeps the corporate form

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<sup>1</sup> Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 605 (1986) [hereinafter Blumberg, *Limited Liability*]; Joseph H. Sommer, *The Subsidiary: Doctrine without a Cause?*, 59 FORDHAM L. REV. 227, 275 (1990).

<sup>2</sup> Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 298 (1996) [hereinafter Blumberg, *Recognition of Enterprise Principles*]. New Jersey was the first state to permit corporations to own stock in other corporations. See Sommer, *supra* note 1, at 275. See also I PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS - PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS §1.01.1 at 3 (1983 & Supp. 1988) [hereinafter BLUMBERG, LCG - PROCEDURAL LAW].

<sup>3</sup> See VI PHILLIP I. BLUMBERG & KURT A. STRASSER, THE LAW OF THE CORPORATE GROUPS – PROBLEMS OF PARENT AND SUBSIDIARY CORPROATIONS UNDER STATE STATUTORY LAW § 14.03.1 at 515 (1995) [hereinafter VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE]

of the acquired firm. Finally, due to their enormous resources, corporate families are the main force in globalization. International commitment, on the other hand, reinforces the growth of affiliations since regulations in foreign countries or mere practicability reasons often call for the separate incorporation of the business abroad. Large multinational enterprises are already incorporated under the national laws of numerous states and dominate the world economy.<sup>4</sup>

Antitrust law has long since found it difficult to deal adequately with the relationships between affiliated corporations.<sup>5</sup> If one accepts the fundamental legitimacy of corporations owning stock and of corporations separately incorporating part of their

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(“[T]he modern public corporate enterprise almost always is conducted as a corporate group with scores of subsidiaries, each of which is a separate corporate entity.”).

<sup>4</sup> Cf. Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 297 (“Multinational corporate groups increasingly have become predominant in the world economy.”), 342, 346. Thirty to forty percent of all American exports are already intra-enterprise transactions of multinational corporations. *See id.* at 297 n.1. A reaction to this international dimension of corporate groups are international agreements on coordination and cooperation of the enforcement of antitrust laws between the United States and the European Union, Canada and Australia; *see id.* at 342.

<sup>5</sup> *See, e.g.*, the Supreme Court cases discussed in Ch. 3 *infra*.

Interestingly, Canada has explicitly addressed the problem in its Competition Act. The Act provides that the conspiracy provision does not apply to affiliated companies, defined as a parent-subsidary or subsidiary-subsidary relationship based on control. *See* Competition Act section 2, R.S.C. ch. 34 (1985), ch. 19 (2nd Supp. 1988) (Can.).

Section 45 provides in pertinent part “(1) Every one who conspires, combines, agrees or arranges with another person (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence ... (8) *Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.*” (emphasis provided). Section 2 provides in pertinent part: “(2) For the purposes of this Act, (a) one corporation is *affiliated* with another corporation *if one of them is the subsidiary of the other or both are subsidiaries of the same corporation* or each of them is controlled by the same person; (b) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other ... (3) For the purposes of this Act, a corporation is a *subsidiary* of another corporation *if it is controlled* by that other corporation. (4) For the purposes of this Act, (a) a corporation is *controlled* by a person other than Her Majesty if (i) securities of the corporation to which are attached *more than fifty per cent of the votes* that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and (ii) the votes attached to those securities are sufficient, if exercised, to *elect a majority of the directors* of the corporation.” (emphasis provided).

businesses, it is equally clear that affiliated corporations will not behave towards each other as if they were totally unrelated. Furthermore, to use separate corporations efficiently a certain level of coordination among the corporations is inevitable. It is exactly the coordination of behavior among corporations that is generally highly suspicious to section 1 of the Sherman Act. Section 1 bans concerted actions if they lead to an unreasonable restraint of trade. More precisely it states in pertinent part that:

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 declared to be illegal. Every person who shall make a contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...<sup>6</sup>

There seems to be a fundamental conflict between this call for independent market behavior in section 1 of the Sherman Act and the need for coordination between, for example, a parent and a subsidiary. The question then becomes under what circumstances and to what extent is the internal conduct within a corporate family subject to section 1 scrutiny. How far does the strict standard of section 1 reach, and when would it be better to leave the field open to the corporate group's freedom to organize and carry out its business in the most efficient way?

While the scope of this study is limited to the question of under what circumstances is section 1 applicable to affiliated corporations, it should be noted that this dispute is part of a larger theme about the scope of the antitrust laws in general. Those who argue in favor of an intra-enterprise conspiracy doctrine, i.e. a broad section 1 scrutiny of conduct within a corporate group, often do so because they worry that there is

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<sup>6</sup> 15 U.S.C. § 1 (2000).

anticompetitive conduct which could not be reached otherwise.<sup>7</sup> Their impulse for finding a conspiracy is often a desire to give plaintiffs an antitrust remedy.<sup>8</sup> Proponents of the theory generally want antitrust law to intervene whenever anticompetitive effects can be shown.<sup>9</sup> Others however refuse to take action solely because anticompetitive effects can be shown.<sup>10</sup> They adhere closely to the language and the structure of the statute and accept that there might be conduct that is not reached by the antitrust laws even if it has anticompetitive results.<sup>11</sup> Therefore, the larger discussion that builds the framework for the problem of this study may be summarized as whether anticompetitive effects by themselves are sufficient to justify the intervention of the antitrust laws, particularly

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<sup>7</sup> Compare, e.g., Wolfgang Harms, *Intra Enterprise Conspiracy?*, 1 EUROPARECHT [EUR] 230, 247 (1966) [hereinafter Harms, *Intra Enterprise Conspiracy?*] (stating that the Department of Justice and the Federal Trade Commission used the intra-enterprise conspiracy doctrine as a welcome means of exerting pressure against conduct that they could not attack otherwise). The author even uses the term “*Konzernverfolgung*,” which means as much as the specific persecution of affiliated corporations; see *id.* at 270. See also WOLFGANG HARMS, KONZERNE IM RECHT DER WETTBEWERBSBESCHRÄNKUNGEN 52 (1968) (“The legal structure of corporate groups was only a welcomed weakness for attacks motivated by other reasons.”).

<sup>8</sup> VII PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1462b at 223 (1986) [hereinafter VII AREEDA, ANTITRUST].

<sup>9</sup> See *id.* ¶ 1464 at 240-41 (“[P]roponents would attack whatever conduct the statute could be made to reach.”); Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 454 (1983) [hereinafter Areeda, *Intraenterprise Conspiracy*] (same). See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 779 (1984) (Stevens, J., dissenting) (“If ... the challenged conduct was manifestly anticompetitive, it should not be immunized from scrutiny under § 1 of the Sherman Act.”). The dissent analyzes backwards by focusing initially on whether there has been an unreasonable restraint of trade. If such a restraint exists the dissent wants to find section 1 liability despite the corporation’s affiliation. To put it differently, if there is a restraint of trade, corporations should not escape liability “simply” because they are wholly owned in common. But from the order of analysis the capacity to conspire should have been addressed first. Cf. Linda T. Penn, Case Note, 15 U. BALT. L. REV. 366, 375 (1986). See also Owen T. Prell, Note, *Copperweld Corp. v. Independence Tube Corp.: An End to the Intraenterprise Conspiracy Doctrine?*, 71 CORNELL L. REV. 1151, 1158 (1986) (stating that critics argue, “that these cases [*Yellow Cab* and its progeny] ... proscribe any interference with market competition without first requiring that a plurality of independent actors be present.”).

<sup>10</sup> See *Copperweld*, 467 U.S. at 776 (“The appropriate inquiry ... is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects...”).

<sup>11</sup> See *Copperweld*, 467 U.S. at 775 (“Because the Sherman Act does not prohibit unreasonable restraints of trade as such – but only restraints effected by a contract, combination or conspiracy – it leaves untouched a single firm’s anticompetitive conduct ... that may be indistinguishable in economic effect from the conduct of two firms subject to section 1 liability”). See also LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 185 (2000) [hereinafter SULLIVAN & GRIMES] (stating that “the majority in *Copperweld* hued closely to the statutory language.”).

section 1 of the Sherman Act, or whether further (possibly limiting) requirements have to be met. Or, in essence, how intervening should antitrust law be notwithstanding the statute's prerequisites.

This study structures the problem as follows. To assess the treatment of affiliated corporations under section 1, chapter two will lay out the problem by taking a look at the role of subsidiaries within a corporate family. It will further analyze the relevant part of section 1 of the Sherman Act and introduce the intra-enterprise conspiracy doctrine. Chapter three will develop the Supreme Court's precedent up to the seminal case of *Copperweld Corp. v. Independence Tube Corp*<sup>12</sup> and appraise the Supreme Court's decision to largely abandon the intra-enterprise conspiracy. From the limited holding in *Copperweld*, chapter four seeks a broader solution and tries to establish a consistent standard for the assessment of affiliated corporations and their conduct under section 1 and related areas. Finally, chapter five summarizes the conclusions.

As a result, this study argues for a broad exception of affiliated corporations from section 1 of the Sherman Act. While the antitrust laws are certainly an important device to monitor the growing power of nets of corporate affiliations, they have to do so in consideration of economic reality, which has always been an important guideline for the application of the antitrust laws. This study, therefore, takes the approach that if the relationship between affiliated corporations is of a certain quality with respect to the potential of influence, sharing of interests, and durability, making this relationship subject to section 1 scrutiny serves no desirable purpose anymore. In this case, economically speaking,

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<sup>12</sup> 467 U.S. 752 (1984).

there is only one actor, and antitrust law should observe this fact. Making the conduct of a single actor subject to the standard for concerted action is therefore inappropriate.

## CHAPTER TWO

### LAYING OUT THE PROBLEM: THE USE OF SUBSIDIARIES, SECTION 1 AND THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE

#### I. Affiliated Corporations

Corporations are affiliated if they are related to another corporation by shareholdings or other means of control.<sup>13</sup> Within this group, a parent corporation is a corporation that has a controlling interest in another corporation, usually through owning the majority of the voting stock.<sup>14</sup> The corporation in which the parent company has the controlling share is called a subsidiary corporation.<sup>15</sup> Two or more corporations controlled by the same owners are termed sister corporations.<sup>16</sup>

#### A. Reasons for the Use of Corporate Subsidiaries

There are several reasons why corporate groups of different parent, subsidiary and sister corporations exist. First of all, separate incorporation offers increased financial flexibility. Liability for torts and contracts can be limited to certain subparts of the business.<sup>17</sup> A firm can engage in a risky project without putting its total assets at stake.

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<sup>13</sup> BLACK'S LAW DICTIONARY 59 (7th ed. 1999).

<sup>14</sup> *Id.* at 344.

It should be noted that courts use the terms "parent" and "subsidiary" rather loosely to refer to any significant affiliation between corporations. *See, e.g.,* Rohlff v. Manor Care, Inc., 172 F.R.D. 330, 344 (N.D. Ill. 1997). *See also* Ryan P. Meyers, Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U. CHI. L. REV. 1401, 1401 n.3 (2001). This study too will use the terms in a more general sense not limited to majority interests in another corporation.

<sup>15</sup> BLACK'S LAW DICTIONARY 345 (7th ed. 1999).

<sup>16</sup> *Id.* at 344.

<sup>17</sup> *See* Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 62-63 n.193 (1981) [hereinafter Handler & Smart]; James M. Steinberg, Note, *The Long Awaited Death Knell of the Intra-Enterprise Doctrine*, 30 VILL. L. REV. 521, 542 n.72 (1985).

Because the risk of failure can be passed on to the subsidiary, the corporate group can enter new markets it would not enter otherwise.<sup>18</sup> Capital acquisition might be easier because investors or lenders may prefer to specialize in a particular aspect of a conglomerate business.<sup>19</sup> Special problems with federal and state taxes that arise from multi-state operations can be avoided.<sup>20</sup> In addition to this risk-spreading function, a subsidiary serves as a conflict device by minimizing the number of forums in which suit may be brought, thus reducing inefficient forum shopping.<sup>21</sup> Separate incorporation might also increase managerial flexibility due to the introduction of decentralized decision-making on different functional or territorial levels. The attempt to profit from psychological effects among employees, who are given titles in the subsidiary, might yet be another incentive.<sup>22</sup> When a parent attempts to operate in a state or foreign country with unfavorable local law, separate incorporation might even be necessary to comply with these laws or to avoid regulations discriminating against foreign corporations.<sup>23</sup> Sometimes subsidiaries are set up to evaluate a specific business operation or to facilitate compliance with

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<sup>18</sup> Penn, *supra* note 9, at 375.

<sup>19</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 238; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453. See also Prell, *supra* note 9, at 1176 n.160.

<sup>20</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984); Sommer, *supra* note 1, at 235 & 241; Everett I. Willis & Robert Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 27 (1968) (tax advantages include multiple surtax exemptions only available to separate corporations, reduction in exposure to unreasonable accumulations tax, and expedition of more suitable accounting periods and tax credit elections); Joan M. Neri, Note, 15 SETON HALL L. REV. 943, 964 (1985). In *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) two commonly owned and controlled subsidiaries would have been merged but for tax reasons.

<sup>21</sup> See Sommer, *supra* note 1, at 227-28, 253-59.

<sup>22</sup> Willis & Pitofsky, *supra* note 20, at 28; Neri, *supra* note 20, at 964.

<sup>23</sup> Willis & Pitofsky, *supra* note 20, at 28; Neri, *supra* note 20, at 964; Julie K. Robberson, Note, 59 TUL. L. REV. 781, 788 n.45 (1985); Steinberg, *supra* note 17, at 542 n.72. See also Thomas W. McNamara, Comment, *Defining a Single Entity for Purposes of Section 1 of the Sherman Act Post Copperweld: A Suggested Approach*, 22 SAN DIEGO L. REV. 1245, 1266 n.145 (1985) (giving an example for such limitations).



regulatory or reporting laws.<sup>24</sup> Further, local incorporation may improve local identification.<sup>25</sup> The parent may maintain corporate good will associated with a particular subsidiary.<sup>26</sup> Finally, the possibility to tailor accounting and financial systems to meet a subsidiary's specialized operating needs and to keep employee benefit, pension and profit sharing plans in each operating unit separately may work towards separate incorporation.<sup>27</sup>

Whether these considerations are desirable from society's standpoint or not,<sup>28</sup> they are "not relevant to whether the enterprise's conduct seriously threatens competition."<sup>29</sup> Most of these reasons bear little or no relation to a corporate family's ability or willingness to behave anticompetitively.<sup>30</sup> Separate incorporation might be relevant for competition in so far that it affects a firm's ability to compete on the market, but the organizational decision itself bears no risk for competition.<sup>31</sup>

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<sup>24</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 237; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453.

<sup>25</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 237-38; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453.

<sup>26</sup> Handler & Smart, *supra* note 17, at 62-63 n.193; Robberson, *supra* note 23, at 788 n.45; Steinberg, *supra* note 17, at 543 n.72.

<sup>27</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 238; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453; Robberson, *supra* note 23, at 788 n.45; Steinberg, *supra* note 17, at 542 n.72.

<sup>28</sup> See, e.g., Sommer, *supra* note 1, at 230-42, 280 (arguing that limited liability within the subsidiary organization cannot be justified using price theory, that it is disadvantageous for society as a whole and should be eliminated).

<sup>29</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 (1984).

<sup>30</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 237; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453.

<sup>31</sup> See also *Copperweld*, 467 U.S. at 773 ("[T]here is nothing inherently anticompetitive about a corporation's decision to create a subsidiary..."); S. John Goodwin, Recent Development, *The Demise of the Intra-Enterprise Conspiracy Doctrine: Flexible Antitrust Enforcement Policy Abandoned in a Maze of Economic Certainty* - *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984), 60 WASH. L. REV. 757, 757 (1985) ("[F]orm of corporate organization bears little, if any relationship to a firm's ability to restraint trade."); Ellen M. Gregg, Note, *Antitrust - Repudiation of the Intraenterprise Conspiracy Doctrine* - *Copperweld Corp. v. Independence Tube Corp.*, 7 CAMPBELL L. REV. 369, 379 (1985); Neri, *supra* note 20, at 964.

It seems to be generally accepted, that “in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.”<sup>32</sup> This position recognizes two important premises for the application of the antitrust laws. First, competition includes competition for the most efficient organizational structure. As long as a given structure is not inherently anticompetitive, the antitrust laws should not intervene in this part of the competitive process and should not discourage certain business’ structures. Antitrust laws should be neutral towards structures that are interchangeable from the viewpoint of competition.<sup>33</sup> Second, a judge applying antitrust laws is seldom in a position to replace a valid business judgment – here the one about the appropriate structure of the firm – adequately and should therefore be cautious to do so unless harm to competition is clearly established.<sup>34</sup>

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<sup>32</sup> *Copperweld*, 467 U.S. at 773. See also RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTI-TRUST CASES, ECONOMIC NOTES, AND OTHER MATERIAL 728-29 (1981); CHRISTIAN POTRAFKE, KARTELLRECHTSWIDRIGKEIT KONZERNINTERNER VEREINBARUNGEN UND DARAUF BERUHENDER VERHALTENSWEISEN 47 (1991); Brad McChesney, *Professional Sports Leagues and the Single Entity Defense*, 6 SPORTS LAW. J. 125, 136 (1999) (“Antitrust liability should not depend on the structure a corporation chooses, because the choice may be based on sound management principles and the desire for efficiency.”); Gregg, *supra* note 31, at 378; John Huddleston, Comment, *Can Subsidiaries Be ‘Purchasers’ From Their Parents Under the Robinson-Patman Act? A Plea for a Consistent Approach*, 63 WASH. L. REV. 957, 968 (1988) (“Corporations may have many valid business reasons for forming legally separate corporations rather than divisions. ... The law should promote valid business practices when these practices do not conflict with congressional intent.”).

<sup>33</sup> See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 238 (“The differences in corporate form between the divisions of a single corporation and the subsidiaries of a single parent are, from the standpoint of antitrust policy, insignificant.”); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453-54 (same).

<sup>34</sup> This, of course, does not mean to immunize blatantly anticompetitive conduct. But behavior that is arguably indifferent from the viewpoint of antitrust should not be second-guessed by the judiciary unless harm to competition can be shown. This position is not what has been called a “libertarian deference to business judgment,” see James F. Ponsoldt, *The Enrichment of Sellers as a Justification for Vertical Restraints: A Response to Chicago’s Swiftian Modest Proposal*, 62 N.Y.U. L. REV. 1166, 1169 (1987) [hereinafter Ponsoldt, *Enrichment of Sellers*].

Since the reasons to incorporate a subsidiary are generally not anticompetitive, its incorporation is within the zone where an enterprise can freely pick its structure. Setting up a wholly owned subsidiary is acknowledged to be lawful and at least competitively neutral.<sup>35</sup> It is regularly driven by factors beyond the scope of antitrust liability and of no significance to antitrust policy.<sup>36</sup> It can even lead to economic efficiencies such as cutting costs and effective product distribution.<sup>37</sup> Other efficiencies might result from decentralized management when autonomy in day-to-day decisions and the delegation of short-term decision-making to lower levels, allows the top management to focus on long-term goals and decisions. Thereby, the formation of subsidiaries can actually be procompetitive. To summarize, since the purposeful choice to organize subunits as subsidiaries rather than unincorporated divisions is not laden with anticompetitive risk, this choice is not by itself a reason for heightened antitrust scrutiny.<sup>38</sup>

#### B. Interaction within a Corporate Group

The level of coordinated decision-making within a corporate family may vary greatly among different groups. While most corporate families have at least a common financial planning or budget system, the further centralization of functions and decisions depends on the group's needs, preferences and policy considerations. Even though consisting of separately incorporated units, some corporate groups may actually be led as if they were a single unitary firm leaving no leeway whatsoever for independent actions by the subsidiaries. Control over a wholly owned subsidiary may be as complete as over an

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<sup>35</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 236; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 454.

<sup>36</sup> Cf. Penn, *supra* note 9, at 375. See also Peter Ulmer, "Wettbewerbsbeschränkende Absprachen" im Rahmen von Unternehmenszusammenschlüssen, 10 WIRTSCHAFT UND WETTBEWERB [WUW] 163, 169 (1960).

unincorporated division or department.<sup>39</sup> Other groups may be directed with a minimum amount of coordination with the subsidiaries appearing as almost independent enterprises. While for many issues the entire spectrum from independent decision-making within the subsidiary over directions from the parent executed by the subsidiary to the parent actually making the decision for the subsidiary can be found within different corporate groups, the point is that there is always a certain threshold below which the coordination of activities cannot fall without the efficiencies of a corporate group getting lost. In order to manage a corporate family effectively, the different members must interact in a similar manner as in any business consisting of more than one person.<sup>40</sup> Much like a corporation must coordinate the efforts of its various departments to remain competitive in its markets, which is consistent with the Sherman Act's goal of fostering competition,<sup>41</sup> a parent holding corporation has to be able to execute at least a basic level of control over its group members to maintain a functional group and remain an efficient competitor in the market. All firms replace the market to some extent with alternative means of decision-making and suppress competition internally in so far.<sup>42</sup> Moreover, a parent

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<sup>37</sup> See Steinberg, *supra* note 17, at 542 n.72.

<sup>38</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 n.19 (1984).

<sup>39</sup> George W. Stengel, *Intra-Enterprise Conspiracy under Section 1 of the Sherman Act*, 35 MISS. L.J. 5, 21 (1963).

<sup>40</sup> See *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979) (“[C]ommon ownership or control of corporations will inevitably bring about communications, understandings, and common actions among them in areas reached by section 1 such as production, distribution, and price”), *aff’d on other grounds sub. nom.*, *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 236 (calling intra-enterprise contacts “natural and efficient” as opposed to those between unrelated firms which are dangerous for competition.); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453 (same). See also *Copperweld*, 467 U.S. at 769 (“Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may necessary if a business enterprise is to compete effectively.”).

<sup>41</sup> See Meyers, *supra* note 14, at 1405-06.

<sup>42</sup> POSNER & EASTERBROOK, *supra* note 32, at 728.

not only has a right to control its subsidiaries, but also a duty to do so.<sup>43</sup> If one accepts separate incorporation as a legitimate and not by itself anticompetitive means of doing business one also has to accept that certain interaction and coordination between the affiliated corporations is inevitable.<sup>44</sup> To accept separate incorporation, but to expect affiliated corporations to act as if they were not affiliated simply makes no sense.

Ultimately, even the proponents of the intra-enterprise conspiracy doctrine agree, that “functional integration by its very nature requires unified action” and that a single firm, regardless of its corporate structure, “is not expected to compete with itself.”<sup>45</sup> It is therefore accepted that corporate affiliates are distinctive from unrelated market participants.<sup>46</sup> A parent corporation will not behave toward its subsidiary corporation as if they were totally unrelated, but will rather make use of their affiliation in its own best interest.<sup>47</sup> To the extent the parent owns the subsidiary, the subsidiary’s interest is identical

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<sup>43</sup> Stengel, *supra* note 39, at 21.

<sup>44</sup> See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1468 at 275 (“Setting up a wholly owned or majority owned subsidiary is ordinarily lawful and not even competitively suspect. It would seem to follow that those parent-subsidiary contacts which form a normal part of their relationship should not be considered improper.”).

<sup>45</sup> *Copperweld*, 467 U.S. at 792 (Stevens, J., dissenting). See also *id.* at 778 (Stevens, J., dissenting) (“It is safe to assume that corporate affiliates do not vigorously compete with one another.”); VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 241 (“If that be true, should we not equally acknowledge that the single firm is not expected to refrain from the internal consultations and coordination that would constitute a conspiracy among unrelated firms?”).

But see *United States v. Citizens & Southern Nat’l Bank*, 422 U.S. 86, 116 (1978) (“[E]ven commonly owned firms must compete against each other, if they hold themselves out as distinct entities.” But VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463g at 230 n.27 interprets this to mean merely “may not conspire unreasonably.”

<sup>46</sup> See *Citizens & Southern*, 422 U.S. at 113-14, where the Court contrasts the “independent competitors having no permissible reason for intimate and continuous cooperation and consultation” with the “permissible” collaboration between the affiliates in the instant case. See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 219, ¶ 1469d at 280-81 (describing a different standard used by the courts for evaluating concerted decisions of commonly owned corporations).

<sup>47</sup> The Supreme Court has acknowledged that a parent will not compete with its subsidiary. See *supra* note 45 and compare *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 169 (1964) (“If the parent companies [of a joint venture] are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture’s market.”).

because the corporation exists for the benefit of its shareholders. In the parent-subsidary setting, interaction occurs even though the same conduct would be highly suspicious if undertaken by unrelated market participants.<sup>48</sup> For example, agreements on prices, or division of territories are routine matters between parents and subsidiaries; however they are per se violations of section 1 of the Sherman Act when the agreements are between unaffiliated competitors.<sup>49</sup> Even data dissemination, which is essential for a corporate group to install an effective controlling and planning system, is highly problematic between competitors, especially with respect to price information.<sup>50</sup> Therefore, information exchange within a corporate family that consists of two separate distribution corporations, that could at least in theory compete against each other, would be a critical issue raising antitrust concerns if the affiliates were treated as unrelated corporations. In a corporate group, on the other hand, the manufacturing corporation, for example, has to provide the distribution corporation with information about new products as much as the latter has to give a feedback about the market's reaction to a new product in return. This ability to facilitate the flow of information between levels of the industry has been seen

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<sup>48</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1469 at 277 (“[T]he courts have persistently and wisely refused to treat intra-enterprise conspiracies according to the rules governing real conspiracies.”).

<sup>49</sup> Stengel, *supra* note 39, at 21. See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1468 at 277, ¶ 1469 at 277 (“[A]ny agreements between [affiliated corporations] on such matters as price and territory have been regarded as ‘reasonable’ and therefore lawful. ... The enterprise’s assignment of functions or geographic or product areas to different subsidiaries has never been treated as an unlawful market allocation between unrelated firms.”); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 471.

See also *Copperweld*, 467 U.S. at 778 (Stevens, J., dissenting) (“A price-fixing or market-allocation agreement between two or more such [affiliated] corporate entities does not ... eliminate any competition that would otherwise exist.”).

See generally *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing illegal per se); *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990) (allocations of markets illegal per se).

<sup>50</sup> See generally *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Maple Flooring Manufacturers Ass’n v. United States*, 268 U.S. 563 (1925); *United States v. Container Corp.*, 393 U.S. 333 (1969).

as a major advantage of vertical integration.<sup>51</sup> To ensure that the information flow is limited to the vertical direction seems to be impossible as a practical matter, and it is not even clear that the vertical exchange of information is always free from antitrust concerns.

As a result, two things can be stated with confidence. First, corporate groups are like any firm consisting of more than one person in that they must coordinate their actions to function at all. Second, the members of corporate groups are distinctive from unrelated corporations because they are not expected to compete with each other and their conduct is judged differently.<sup>52</sup> While this is the starting point for further analysis, it does not by itself answer the question whether and when affiliated corporations can be subject to section 1 scrutiny.

## **II. Section 1 of the Sherman Act: The Requirement of Concerted Action**

### **A. Concerted Action and its Inherent Dangers**

Section 1 of the Sherman Act requires proof of a “contract, combination ... or conspiracy, in restraint of trade.”<sup>53</sup> In most cases, the dispute is whether there is a restraint of trade or at the most, whether a conspiracy can be proven. The reason is that the element of “contract, combination ... or conspiracy” is seldom a problem between unrelated entities. But sometimes – particularly in the context of affiliated corporations – the parties’ legal capacity to conspire is in dispute, and since proof of this capacity to

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<sup>51</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* 227 (1978) (giving as examples for vertical information flow “marketing possibilities may be transmitted more effectively from the retail to the manufacturing level, new product possibilities may be transmitted in the other direction, better inventory control may be attained, and better planning of production runs may be achieved.”).

<sup>52</sup> That their conduct is judged by different rules – even under an intra-enterprise conspiracy doctrine – has been seen as a strong argument against the intra-enterprise conspiracy doctrine. See Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 470.

<sup>53</sup> See 15 U.S.C. § 1 (2000), cited *supra* at text accompanying note 6.

conspire is the first element of a section 1 claim, every investigation logically has to start here.

The courts usually use the terms contract, combination and conspiracy interchangeably, and the use of any one of them does not imply any distinction between the terms.<sup>54</sup> The three terms imply a single concept: to apply section 1 of the Act a plaintiff must establish concerted action.<sup>55</sup> If concerted action is present, a further classification of this action as a contract, a combination, or a conspiracy is not necessary.<sup>56</sup> Conspiracy is the most prevalent example on the list. A conspiracy is “an agreement by two or more persons to commit an unlawful act” or “a combination for an unlawful purpose.”<sup>57</sup> In addition, the words the Supreme Court used in *American Tobacco*<sup>58</sup> have become famous in the antitrust context. There the court explained that the existence of a conspiracy could

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<sup>54</sup> See VI PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1403 at 17 (1986) [hereinafter VI AREEDA, ANTITRUST]. See also *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445 (3d Cir. 1977) (“We perceive no distinction between the terms combination and conspiracy ... Our reading of section 1 cases indicates that the two terms [conspiracy and combination] are used interchangeably.”), *cert. denied*, 434 U.S. 1086 (1978).

<sup>55</sup> *Bogosian*, 561 F.2d at 445-46 (3d Cir. 1977) (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 312 (1977)); *Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137, 1139 (10th Cir. 1997) (“A plaintiff who alleges a violation of section 1 must establish: (1) concerted action in the form of a contract, combination, or conspiracy, ...”); SULLIVAN & GRIMES, *supra* note 11, at 176. See also Peter J. Alessandria, Comment, *Intra-Enterprise Conspiracies and Section 1 of the Sherman Act: Filling the 'Gap' After Copperweld Corp. v. Independence Tube Corp.*, 34 BUFF. L. REV. 551, 574 n.114 (1985). Cf. Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 451; Gregg, *supra* note 31, at 369.

<sup>56</sup> VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1403 at 17.

<sup>57</sup> BLACK'S LAW DICTIONARY 305 (7th ed. 1999). See also John T. Prisbe, Comment, *The Intracorporate Conspiracy Doctrine*, 16 U. BALT. L. REV. 538, 539 (1987) (citing cases that show a modern definition of conspiracy consists of “(1) an agreement, (2) by two or more persons, (3) to do an unlawful act, or to do a lawful act by unlawful means.”).

It seems noteworthy that unlike in the typical concept of conspiracy, the underlying act in a Sherman Act's conspiracy is not independently unlawful. For example, setting a profit-maximizing price is perfectly lawful for a single actor. In antitrust the conspiracy creates the initial illegality. See VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a at 9.

<sup>58</sup> *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). The Court in *Copperweld* incorporated this phrase when it stated, “a parent and a wholly owned subsidiary always have a ‘unity of purpose or a common design.’” See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).



be concluded where “the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.”<sup>59</sup>

The concept of concerted action or an agreement is critical to section 1. The terms used to describe this requirement share the requirement that at least two separate entities must be involved. A person can neither conspire, nor combine, nor contract with himself. The term concerted action implies the participation of a majority. Thus, the language of section 1 requires a plurality of actors.<sup>60</sup> This requirement has been recognized since the days of *Colgate*.<sup>61</sup> According to the Supreme Court, section 1 “does not reach conduct

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<sup>59</sup> *American Tobacco*, 328 U.S. at 810.

<sup>60</sup> SULLIVAN & GRIMES, *supra* note 11, at 176; POSNER & EASTERBROOK, *supra* note 32, at 728; CLAUS-JÖRG RÜTSCH, STRAFRECHTLICHER DURCHGRIFF BEI VERBUNDENEN UNTERNEHMEN? 80 (1987); James F. Ponsoldt, *Refusals to deal in “locked-in” Health Care Markets Under Section 2 of the Sherman Act After Eastman Kodak Co. v. Image Technical Services*, 1995 UTAH L. REV. 503, 510 [hereinafter Ponsoldt, *Refusals to Deal*]; Ulmer, *supra* note 36, at 164; David J. Brown, Comment, *Antitrust Law - The Demise of the Intraenterprise Conspiracy Doctrine: Copperweld Corp. v. Independence Tube Corp.*, 10 J. CORP. L. 785, 785 (1985); McNamara, *supra* note 23, at 1245; Meyers, *supra* note 14, at 1404; Neri, *supra* note 20, at 943; Penn, *supra* note 9, at 367; Prell, *supra* note 9, at 1151 n.2, 1152; Robberson, *supra* note 23, at 782; Steinberg, *supra* note 17, at 527, 568; John A. Thomson, Jr., Case Comment, *Copperweld Corp. v. Independence Tube Corp.: The Changing Complexion of Intra-Enterprise Conspiracy Under the Sherman Antitrust Act*, 19 GA. L. REV. 189, 193-94 (1984). See also *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (“It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy.”), *cert. denied*, 345 U.S. 925 (1953); Eric S. Smith, Note, *Antitrust: Harold’s Dillard: It Takes Two to Tango - Except in Oklahoma: The Tenth Circuit Interprets Oklahoma Antitrust Law to Reach Unilateral Activity*, 50 OKLA. L. REV. 405, 413 (1997) [hereinafter Smith, *Two to Tango*] (“[T]he Sherman Act’s framers meant to adopt the common law principles ... The term restraint of trade, as applied by the common law, always involved situations requiring a plurality of actors.”). But see Alessandria, *supra* note 55, at 586 whose suggested analysis contains no plurality of actors requirement at all.

Interestingly, the first section of the Oklahoma Antitrust Act is construed to prohibit unilateral acts in restraint of trade. See *Harold’s Stores, Inc. v. Dillard Department Stores, Inc.*, 82 F.3d 1533 (10th Cir. 1996), *cert. denied*, 519 U.S. 928 (1996). While the provision largely duplicates section 1 of the Sherman Act, it adds the important word “act” to the list of activities that could impose a restraint on trade. Because of this difference in statutory language, which the court interpreted to encompass unilateral action, and a different legislative history the court declined to apply Sherman Act authority to the state statute in this case. See *id.* at 1549-50. See also Smith, *Two to Tango*, *supra* note 60, at 412-14.

<sup>61</sup> See *United States v. Colgate & Co.*, 250 U.S. 300, 306-07 (1919). See also *Fisher v. City of Berkley*, 475 U.S. 260, 266-67 (1986); *Copperweld*, 467 U.S. at 775-76 (“This court has recognized that section 1 is limited to concerted conduct at least since the days of [*Colgate*].”) and *id.* at 789 (Stevens, J., dissenting); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

that is ‘wholly unilateral.’”<sup>62</sup> “Even where a single firm’s restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under section 1 in the absence of agreement.”<sup>63</sup> Unilateral action by a single firm does not violate section 1, regardless of its purpose or effect.

Thus, the Sherman Act contains a “basic distinction between concerted and independent action.”<sup>64</sup> Section 1 covers concerted, collaborative action if it unreasonably restrains trade, while section 2 deals with unilateral behavior but only when monopoly power is present or attempted.<sup>65</sup> This standard is apparently stricter for concerted action

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<sup>62</sup> *Copperweld*, 467 U.S. at 768. See also *Monsanto*, 465 U.S. at 761; *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968); *Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137, 1140 (10th Cir. 1997); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1131 (3d Cir. 1995) (“Proof of concerted action requires evidence that two or more distinct entities agreed to take action against a plaintiff.”).

<sup>63</sup> *Fisher*, 475 U.S. at 266. See also *Monsanto*, 465 U.S. at 760-61.

<sup>64</sup> *Copperweld*, 467 U.S. at 767; *Monsanto*, 465 U.S. at 761; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999-1000 (3d Cir. 1994); *Advanced Health-Care Services, Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 145 (4th Cir. 1990), *on remand*, 846 F.Supp. 488 (W.D. Va. 1994). See also VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a at 9; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 219; Brown, *supra* note 60, at 785; Gregg, *supra* note 31, at 369; McNamara, *supra* note 23, at 1248. But see Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 95 (2000) (“What distinguishes a section 1 violation from a section 2 violation is the difference between market power and monopoly power, as reflected in a divergence in market share.”). Although Congress, when enacting the Sherman Act, failed to articulate the reasons for treating unilateral conduct differently from concerted conduct, it is clear from the Congressional debates and the evolution of the Act that the distinction was intentional. See I EARL W. KNITNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 23-25 (1978); Steinberg, *supra* note 17, at 524 n.8.

<sup>65</sup> Section 2 of the Sherman Act, 15 U.S.C. § 2 (2000), provides in pertinent part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...” It should be noted that section 2 is not limited to unilateral action since the conspiracy alternative deals with collaborative action. But this is of de minimis meaning since a conspiracy to monopolize is also a conspiracy to restrain trade within the meaning of section 1. See infra Ch. Four I. E. See also *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946) (discussing differences between section 1 and section 2); *Amarel v. Connell*, 102 F.3d 1494, 1521-22 (9th Cir. 1997) (same).

For a similar distinction in European competition law see *Joined Cases C-395/95P and C-396/96P, Compagnie Maritime Belge Transports SA v. Commission*, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076, para. [34] (E.C.J. 2000) (“Article 85 of the Treaty [now article 81] applies to agreements, decisions and concerted practices which may appreciably affect trade between Member States, regardless of the position on the market of the undertakings concerned. Article 86 of the Treaty [now article 82], on the other hand, deals with the conduct of one or more economic operators consisting in the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the

than for the behavior of a single firm.<sup>66</sup> It is not necessary to prove that concerted activity threatens monopolization to find illegality.<sup>67</sup> This is true even though the conduct of a single actor can have the same or an even greater impact on the market than that of cartels, while at the same time not facing the coordination and policing problems of a cartel.<sup>68</sup>

This distinction based on concerted action raises two questions. Why is concerted action so evil that it has to be monitored closely? And why is unilateral behavior not monitored with the same intensity given that it can lead to the same results?

First of all, the Sherman Act incorporates a certain economic system.

It “was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.”<sup>69</sup>

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relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately consumers.”).

<sup>66</sup> See, e.g., SULLIVAN & GRIMES, *supra* note 11, at 176 (“[I]t is now well established that section 1 reaches a variety of collective conduct, at least some of it in circumstances that, if engaged in unilaterally, would not violate section 2.”)

<sup>67</sup> *Copperweld*, 467 U.S. at 768. See also *id.* at 767 (“The conduct of a single firm is governed by section 2 alone and is unlawful only when it threatens actual monopolization.”); Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 426 (1998); McChesney, *supra* note 32, at 135.

<sup>68</sup> See *Copperweld*, 467 U.S. at 775 (“[A] single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of [two independent firms agreeing to restrain trade].”); *id.* at 790 (Stevens, J., dissenting) (“Unilateral conduct by a firm with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power, and probably more, since the unilateral actor avoids the policing problems faced by cartels.”). See also Opinion of the Advocate General Lenz in Case C-73/95 P, *Viho Europe BV v. Commission*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419, para. [62] (E.C.J. 1996) (“[A]greements between [undertakings forming a single economic unit] may have the same effects as agreements between independent undertakings.”). Cf. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 727 (1988) (“Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier.”).

<sup>69</sup> *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

Therefore, to appraise conduct adequately it has to be evaluated for its consequences on competition.

Addressing the concerns for collusion, the Supreme Court stated, “concerted action inherently is fraud with anticompetitive risk.”<sup>70</sup> What the Court meant with these accusatory words is the following. Cooperating competitors substitute common action for competition, achieving an anticompetitive restraint that could not occur otherwise.<sup>71</sup> Thereby they reduce the number of “independent centers of decision-making that competition assumes and demands.”<sup>72</sup> Such independent sources of economic power are needed to ensure that resources are allocated through the market where prices are set through competition. While any form of concerted action, even a legal one, reduces the number of independent entities, there is generally no reason in a market-based economy to tolerate concerted business conduct among rivals absent some procompetitive benefits that cannot be arrived at otherwise. Secondly, when competitors collude they not only give up their independence with respect to decision-making, but at the same time they create or increase market power.<sup>73</sup> Market power enables the colluding parties to partially eliminate the mechanisms of a competitive market. For example, they can set prices at a supra-competitive level. Generally, aggregation of previously independent market power is a

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<sup>70</sup> *Copperweld*, 467 U.S. at 768-69. See also *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000 (3d Cir. 1994) (reciting the discussion from *Copperweld*).

<sup>71</sup> VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a at 11. Compare *McChesney*, *supra* note 32, at 135.

<sup>72</sup> *Copperweld*, 467 U.S. at 769; *Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137, 1143 (10th Cir. 1997). See also *Goodwin*, *supra* note 31, at 760 n.22; *McNamara*, *supra* note 23, at 1272 (goal of section 1 is “to promote independent centers of decision-making”).

<sup>73</sup> VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a at 11. See also *Albrecht v. Herald Co.*, 390 U.S. 145, 160-61 (1968) (Harlan, J., dissenting) (“The premise of section 1 adjudication has always been that it is quite proper for a firm to set its own prices and determine its own territories, but that it may not do so in conjunction with another firm with which, in combination, it can generate *market power* that neither would otherwise have.” (emphasis provided)).

core concern of the Sherman Act.<sup>74</sup> As a final point, an agreement reduces the future autonomy and the freedom of action of the contracting parties.<sup>75</sup>

To summarize, section 1 strictly supervises conspiracies because they increase market power or make a restraint possible that could not occur otherwise.<sup>76</sup> By preventing the sudden joining of independent sources of previously separate economic power, section 1 seeks to encourage competition.<sup>77</sup> The anticompetitive potential of such joining warrants scrutiny short of monopoly power.

Turning to the second question, the issue becomes what warrants the more lenient standard for unilateral behavior. The reasons why single firm conduct is treated differently are readily appreciated. As one commentator has put it, conspiracies are “relatively infrequent, easily appraised for reasonableness, and simply remedied through prohibition. By contrast, unilateral behavior is not only omnipresent, but also often difficult to evaluate or remedy by any means short of governmental management of the enterprise.”<sup>78</sup> These administrative difficulties are addressed when the Supreme Court states, “it is sometimes difficult to distinguish robust competition from conduct with long-run

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<sup>74</sup> See *Copperweld*, 467 U.S. at 769 (“This [combination of entities for the common benefit in a conspiracy] not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.”).

<sup>75</sup> VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a 11-12; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462b at 222 n.6. Since it is the very nature of every contract to restrain, this danger might be stated more adequately as surrendering “important decision making autonomy on a matter of competitive significance.”; see VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a at 10.

<sup>76</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462b at 222. See also McNamara, *supra* note 23, at 1259 (“Section 1 is concerned with collaborative practices in which economic resources of one entity are joined with those of another”).

<sup>77</sup> Thomson, *supra* note 60, at 213-14.

<sup>78</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 236; VI AREEDA, ANTITRUST, *supra* note 54, ¶ 1402a at 9-10 (same); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 454 (same). See also Thomson, *supra* note 60, at 197.

anticompetitive effects.”<sup>79</sup> Thus, policing unilateral conduct with the same strictness imposed on concerted conduct would likely deter procompetitive corporate activities.<sup>80</sup> A different standard for unilateral, as opposed to collaborative behavior, therefore is neither surprising, nor arbitrary. The divergence rather reflects a policy decision to encourage competition by imposing a stricter standard on collaborative interaction between firms than on single firm conduct.<sup>81</sup>

In practice, the courts have taken the administrative difficulties seriously. They have taken pains not to construct the Act in a way that might arguably chill competitive behavior.<sup>82</sup> Courts apparently expect competitors to fight with their gloves off. Therefore, to find a certain conduct in violation of section 2, a firm must clearly have crossed the line. In the Supreme Court’s words, “it is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression.”<sup>83</sup>

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<sup>79</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). See also Brown, *supra* note 60, at 792.

<sup>80</sup> Meyers, *supra* note 14, at 1405.

<sup>81</sup> See *McNamara*, *supra* note 23, at 1248. See also *Copperweld*, 467 U.S. at 768 (“Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.”); Douglas G. Smith, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1179 (1996) [hereinafter Smith, *Original Intent*] (“Separate provisions governing cases where multiple entities engage in detrimental activities are a response to the greater potential for damage to the rights of individuals or society due to concerted action on the part of multiple actors.”).

<sup>82</sup> See *Spectrum Sports*, 506 U.S. at 458 (“[T]his court and other courts have been careful to avoid constructions of section 2 which might chill competition, rather than foster it.”).

<sup>83</sup> *Copperweld*, 467 U.S. at 767 (giving the example of an efficient firm that captures “unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result.”). See also *Spectrum Sports*, 506 U.S. at 458 (“The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”); Steinberg, *supra* note 17, at 524 (“Congress deliberately chose to scrutinize concerted behavior more strictly than single firm behavior for fear of inhibiting the type of conduct the Sherman Act was designed to encourage.”).

This sharp distinction between the two sections makes it all the more important to determine whether a given behavior is unilateral or multilateral.

#### B. Intracorporate and intra-enterprise conspiracy

The capacity to conspire, and with it the distinction between section 1 and section 2, is problematic only when coordination occurs solely between persons or members of the same business entity, such as employers, officers, divisions or corporations of one enterprise.

So far it has not been stated what quality entities have to have to be regarded as separate for purposes of section 1. What exactly establishes a plurality of actors? In determining conspiratorial capacity, one could either focus on distinct legal persons or on separate economic entities.<sup>84</sup> The Act itself does not define what constitutes a plurality of actors. A “person” under the Sherman Act includes both an individual and a corporation.<sup>85</sup> Thus, the literal statutory language might seem to reach every agreement among two or more individuals or corporations.<sup>86</sup>

The Act’s purpose and the recognized need for coordination within the firm indicate a different way. After all, it would not be surprising for an Act that is concerned with

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<sup>84</sup> Cf. Brown, *supra* note 60, at 797; James A. Keyte, Note, *Copperweld Corp. v. Independence Tube Corp.: Has the Supreme Court Pulled the Plug on the 'Bathub Conspiracy'?*, 18 LOY. L.A. L. REV. 857, 878 (1985). For an approach that focuses solely on legal entities see, for example, Gregg, *supra* note 31, at 379-80. See also *United States v. General Motors*, 121 F.2d 376, 410 (7th Cir. 1941) (even though GM and its subsidiaries may constitute a single enterprise “as a matter of economics,” they were separate entities “as a matter of law”), *cert. denied*, 314 U.S. 618 (1941); Goodwin, *supra* note 31, at 759 n.12 (language of the statute requires two parties but not necessarily two separate economic entities).

<sup>85</sup> See 15 U.S.C. § 7 (2000) (providing in pertinent part: “The word ‘person’ or ‘persons’ wherever used in sections 1 to 7 of this title shall be deemed to include corporations ...”).

<sup>86</sup> Cf. *Copperweld*, 467 U.S. at 769 n.15; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464b at 234.

economic power to focus on the economic independence of the actors, rather than on their legal separateness.<sup>87</sup>

To be sure, one could say that labeling conduct rather broadly as concerted action is not a significant classification, because the decision whether this conduct is an unreasonable restraint of trade still has to be made, thus leaving a further filter down the road. Therefore, it would seem as if the decision whether two officers of the same firm or a parent and its subsidiary have the capacity to conspire is of minor importance. However, the step may be small to call a firm's internal conduct such as price decisions a restraint once it is seen as a conspiracy.<sup>88</sup> After all, the purpose of characterizing a relationship as a conspiracy is to control or forbid it.<sup>89</sup> Furthermore, once the threshold requirement of concerted action is established, the gate is open to control virtually every internal decision of a firm for its reasonableness, a task that would overtax the courts and paralyze decision-making within the firms.<sup>90</sup> Therefore, the initial decision regarding what suffices the plurality of actors is significant.

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<sup>87</sup> See, e.g., *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000 (3d Cir. 1994) ("For this reason [the court previously restated *Copperweld's* discussion of the threat of concerted action, see *supra* notes 70-77 and accompanying text], when we examine an alleged violation of section 1 of the Sherman Act, we look for an agreement that 'brings together economic power that was previously pursuing divergent goals.'" citing *Copperweld*, 467 U.S. at 769). See also James A. Sprunk, *Intra-enterprise Conspiracy*, 9 ABA ANTITRUST SECTION REP. 20, 27 (1956) ("[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 adapt the most economical form of business organization would be encouraged.").

<sup>88</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 220. See also *id.* ¶ 1464a at 234 ("That [the Sherman Act's] statutory design is not satisfied by calling every coordination among legal persons a 'conspiracy' and then condemning only the 'unreasonable' ones."). But see *Copperweld*, 467 U.S. at 778 (Stevens, J., dissenting) (arguing for an application of the rule of reason in such cases).

<sup>89</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1468 at 27; 5Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 454. See also Alessandria, *supra* note 55, at 574.

<sup>90</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 220. See also *Copperweld*, 467 U.S. at 776.



### 1. *The Intracorporate Conspiracy Doctrine*

If a corporation could conspire with its divisions or employees, such a “conspiracy” would be within the corporation and is therefore termed an intracorporate conspiracy.<sup>91</sup> However, a corporation is only able to act through its officers or employees when making agreements or setting policies. Moreover, intrafirm coordinated efforts to compete are a healthy and necessary part of the market system.<sup>92</sup> Were coordinated action among persons within the same firm sufficient for the conspiracy requirement in section 1, every business decision would be subject to scrutiny, because few firms consist of only a single person.<sup>93</sup> Furthermore, a requirement that could be fulfilled so easily ceases to have any meaning. An intracorporate conspiracy doctrine would completely annul the requirement of a plurality of actors from section 1.<sup>94</sup> More importantly, although governed by the literal meaning of section 1, coordination among the officers of a single firm does not raise the dangers policed by section 1.<sup>95</sup> As long as they act on the firm’s and not their own behalf, employees or directors of a single firm are not separate economic

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<sup>91</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 221. The term intracorporate conspiracy refers to situations where the alleged conspirators are members of the same legal entity. For a proponent of the doctrine see, for example, Alessandria, *supra* note 55, at 592-93.

<sup>92</sup> Meyers, *supra* note 14, at 1406.

<sup>93</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464b at 235; Willis & Pitofsky, *supra* note 20, at 26. See also Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 83 (9th Cir. 1969) (“Once the theory that ‘divisions’ or other internal administrative units of a single corporation can ‘conspire’ with each other is accepted, we can see no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not. No corporation of any size can operate without an internal division of labor between various of its officers and agents. The larger the enterprise, the more necessary such internal units become. Moreover, sound management demands extensive delegation of authority within the organization.”), *cert. denied*, 396 U.S. 1062 (1970).

Even if most of this conduct would be found reasonable under the rule of reason in the end, it would still be subject to possibly extensive antitrust scrutiny with an uncertain result first. For a proposal to apply the rule of reason to intracorporate as well as intra-enterprise conspiracy doctrines see Alessandria, *supra* note 55, especially at 579 n.126.

<sup>94</sup> Willis & Pitofsky, *supra* note 20, at 26; Steinberg, *supra* note 17, at 529 n.20. See also *Copperweld*, 467 U.S. at 775 (“Had Congress intended to outlaw unreasonable restraints of trade as such, section 1’s requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of section 2.”).

actors with separate economic interests. They act for their corporation, implementing its single, unitary policy. Hence, their coordination does not present the kind of joining of formerly independent economic resources that section 1 is concerned about.<sup>96</sup> In sum, it is persuasive to conclude that employees of a single firm do not provide the plurality of actors required by section 1. Concerted action by persons within a single corporation is not sufficient to establish an agreement within the meaning of section 1.<sup>97</sup>

The coordination between unincorporated divisions is not sufficient to trigger section 1 liability for the same reasons.<sup>98</sup> Divisions within a single corporation are part of the same actor<sup>99</sup> and do not pursue independent goals. They are simply organizational subunits of a corporation set up to structure a business more efficiently and have no economic interests separate from those of the corporation. Their existence “reflects no more than a firm’s decision to adopt an organizational division of labor.”<sup>100</sup> As the Supreme Court noted, holding otherwise might discourage corporations from creating divisions,

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<sup>95</sup> See *Copperweld*, 467 U.S. at 769.

<sup>96</sup> See *id.*

<sup>97</sup> *Copperweld*, 467 U.S. at 769; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000 (3d Cir. 1994); *Guzowski v. Hartman*, 969 F.2d 211, 213-214 (6th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *Johnson v. Con-Vey/Keystone, Inc.*, 814 F. Supp. 931, 934 (D. Or. 1993) (section 1 does not prohibit internal agreements to implement the policy of a single unitary firm); 1 AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 21-22 (4th Ed. 1997) [hereinafter 1 ABA, DEVELOPMENTS]; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 219; VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 516; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 451; Smith, *Original Intent*, *supra* note 81, at 1174; Brown, *supra* note 60, at 785; McNamara, *supra* note 23, at 1249. But see Alessandria, *supra* note 55, at 576-77, 593.

<sup>98</sup> *Copperweld*, 467 U.S. at 770-71 (“Because 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 section 1 scrutiny.”); *Alvord-Polk*, 37 F.3d at 1000; *Copperweld Corp. v. Independence Tube Corp.*, 691 F.2d 310, 316 (7th Cir. 1982) (calling it a truism), *rev’d on other grounds*, 467 U.S. 752 (1984); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83-84 (9th Cir. 1969) (“The doctrine hands to plaintiffs, on a silver platter, an automatically self-proving conspiracy.” *Id.* at 84.), *cert. denied*, 396 U.S. 1062 (1970); 1 ABA, DEVELOPMENTS, *supra* note 97, at 21-22. See also Brown, *supra* note 60, at 785; McNamara, *supra* note 23, at 1249.

<sup>99</sup> *Copperweld*, 467 U.S. at 770.

<sup>100</sup> *Id.*

which would in turn deprive consumers of the efficiencies of decentralized management.<sup>101</sup>

“The firm is accepted as a single actor for antitrust purposes, and its internal operations and decision-making are not regarded as conspiracies, notwithstanding the coordination of many individuals or unincorporated divisions.”<sup>102</sup> The rejection of the intra-corporate conspiracy doctrine also proves that section 1 favors economic realities over formalistic distinctions. Thus, the proposition that employees or unincorporated divisions of the same firm cannot conspire with each other or with their firm can serve as a useful starting point. The question of conspiratorial capacity becomes even more complex when the entities are members of the same corporate family, either as parent and subsidiary, or as affiliated corporations that share a common parent.<sup>103</sup> Should such affiliated corporations be considered separate entities for purposes of section 1?

## *2. The Intra-enterprise Conspiracy Doctrine*

According to the so-called intra-enterprise conspiracy doctrine, a corporation and its subsidiary or two subsidiaries of the same corporate group may be sanctioned for agreeing or conspiring to restrain competition.<sup>104</sup> The doctrine holds section 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership.<sup>105</sup> Thus, the doctrine recognizes a capacity to conspire among commonly controlled corporations within a corporate family. It is built on the foundation that each corporation is a separate legal person for most legal purposes. The conspiracy requirement is mainly

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<sup>101</sup> *Id.* at 771.

<sup>102</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462a at 220.

<sup>103</sup> See Keyte, *supra* note 84, at 858.

seen as a formal requirement, a technicality that can be overcome by the technicality of separate incorporation.<sup>106</sup> It is argued in favor of this doctrine that even a wholly owned subsidiary might conceivably facilitate trade restraints that would not occur otherwise.<sup>107</sup> This argument points to the doctrine's policy concerns. Arising in an interventionist area of antitrust law, it was a response to the unscrutinized anticompetitive conduct of a single firm.<sup>108</sup> It attempts to address anticompetitive behavior of a single firm short of attempted monopolization. But it is yet to be shown whether it was an appropriate reaction to the development of oligopolistic market structures.

The next chapter will review the doctrine's rise in the Supreme Court's decisions and analyze the merits of the decision to finally abolish it. But even prior to further analysis, it should be noted that it is problematic to distinguish agreement and direction in the context of intra-enterprise transactions. What is puzzling about the doctrine is the aptness of finding an "agreement" in a relationship of subordination and control. An agreement implies the notion of choice, which is absent if a subsidiary obeys its owner's will.<sup>109</sup> As one commentator has put it: "Is 'conspiracy' possible with one who lacks the legal power to disobey?"<sup>110</sup> One could hardly call a conspiracy that which evolves from

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<sup>104</sup> See Thomson, *supra* note 60, at 199. See also Alessandria, *supra* note 55, at 552 n.4 ("'[I]ntra-enterprise conspiracy' has traditionally been used to refer to alleged conspiracies between closely affiliated but separately incorporated firms.").

<sup>105</sup> See *Copperweld*, 467 U.S. at 759.

<sup>106</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464a at 233 (explaining this position and arguing to the contrary). See also Ulmer, *supra* note 36, at 171.

<sup>107</sup> Compare VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464a at 233 (describing this argument).

<sup>108</sup> See Keyte, *supra* note 84, at 863. See also William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1379 (1988) (stating that the doctrine was part of an expansive approach to Sherman Act liability which has fallen into disfavor in the 1970s and 1980s).

<sup>109</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1468 at 275; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 470.

<sup>110</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462c at 223.

consultation and direction between the superior and the subordinate.<sup>111</sup> When a subsidiary has to obey its parent's order, the subsidiary lacks the capacity to conspire with its parent.

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<sup>111</sup> See *id.* ¶ 1462c at 223-24.

## CHAPTER THREE

### THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE IN THE SUPREME COURT

#### I. The Road to *Copperweld*: Prior Cases

##### A. Yellow Cab

The question of whether affiliated corporations can conspire together was first brought before the Supreme Court in *United States v. Yellow Cab Co.*<sup>112</sup> An individual named Markin acquired the Checker Cab Manufacturing Corporation (CCM) and several companies operating taxicabs in four major cities.<sup>113</sup> Markin ran the companies as a

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<sup>112</sup> 332 U.S. 218 (1947).

The origins of the intra-enterprise conspiracy doctrine go back to *Patterson v. United States*, 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915) (upholding the conviction of a firm's employees for conspiracy in violation of section 1) and *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (finding a conspiracy between General Motors and three of its wholly owned subsidiaries to coerce GM's dealers into financing their GM purchases and sales of cars through the credit services of one of the subsidiaries).

In *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944) the Supreme Court found violations of section 1 and 2 by affiliated film exhibitors who used their monopoly power in same towns to force film distributors to give them favorable terms in other towns. Even though the distributors were involved in the conduct, the Court based its finding of a conspiracy solely on the participation of the affiliated entities. *Id.* at 183. It should, however, be noticed that ownership was far from complete in this case, and therefore that the film exhibitors although affiliated arguably present the plurality of actors needed under section 1. *See* Lawrence C. McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 196-97 (1955); Keyte, *supra* note 84, at 865 n.44. Nevertheless, the Court in *Schine* understood *Crescent* to support the intra-enterprise concept. *See* *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116 (1948).

<sup>113</sup> Markin was the president and general manager of Checker Cab Manufacturing Corporation (CCM) and owned a controlling interest in it. He also owned one hundred percent of the stock of Cab Sales and Parts Corporation. CCM held sixty-two percent of the stock of Parmalee Transportation Company, which in turn owned a controlling interest in Chicago Yellow Cab Company, Inc. (Chicago Yellow) and all the stock of Deluxe Motor Cab Company. In Addition, Parmelee organized or acquired five subsidiaries, which operated cabs in Pittsburgh, Minneapolis and New York. Yellow Cab Company was a wholly owned subsidiary of Chicago Yellow. Markin's associates held 97% of the stock of Checker Taxi Company. *Yellow Cab*, 332 U.S. at 221-22.

Through his (slightly confusing) corporate family, Markin controlled one hundred percent of the Pittsburgh market, eighty-six percent of the Chicago Market, fifty-eight percent of the Minneapolis market, and fifteen percent of the New York market. The alleged conspirators were Yellow Cab, Chicago Yellow, Parmalee, Cab Sales, Checker, CCM, and Markin. *Id.* at 224.

single corporate family, with the operating companies purchasing their cabs solely from CCM. The Government alleged this exclusive selling arrangement was a restraint of trade because – as the Court found – it excluded all other cab manufacturers from the segment of the market represented by the Yellow Cab operating companies and prevented the operating companies themselves from purchasing cabs in a free and open market.<sup>114</sup> The alleged conspirators under section 1 and 2 of the Sherman Act were CCM, Markin, and five operating companies controlled by Markin.<sup>115</sup> The Supreme Court held that,

The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent ... the corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. The statute is aimed at substance rather than form.

And so in this case, the 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>116</sup>

While this language served as the basis for future holdings applying the intra-enterprise conspiracy doctrine, it is widely recognized by now, that the theory of the case was actually unlawful merger and that the quoted language appeared in this context.<sup>117</sup>

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<sup>114</sup> *Yellow Cab*, 332 U.S. at 226-27. This allegation itself is quite doubtful because it basically alleges that the affiliated corporations made use of their vertical integration through purchasing cabs from an affiliated corporation.

<sup>115</sup> See *supra* note 113.

<sup>116</sup> 332 U.S. at 227. The District Court had dismissed the complaint on the ground that the affiliated corporations could not conspire together, *United States v. Yellow Cab Co.*, 69 F. Supp. 170, 175 (N.D. Ill. 1946), *rev'd*, 332 U.S. 218 (1947). The Supreme Court did not take the details of the corporate relationships into consideration. Although Markin's control of the operating companies was not complete and was even a minority interest in some cases, the Court did not mention that fact and the district court assumed control. See 69 F. Supp. at 172.

<sup>117</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 761 (1984); VII AREEDA, *ANTI-TRUST*, *supra* note 8, ¶ 1463b at 225; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 458; Handler & Smart, *supra* note 17, at 29; Brown, *supra* note 60, at 786; Penn, *supra* note 9, at 369; Prell, *supra* note 9, at 1155; Steinberg, *supra* note 17, at 543 n.40; Thomson, *supra* note 60, at 200. See also *Yellow Cab*, 332 U.S. at 227-29 (“[A]ny affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed ... ‘dominating power’ over the cab operating companies ‘was not obtained by normal expansion ... but by deliberate, calculated purchase for control.’ ...

The original acquisition of Checker and the operating companies was a conspiracy under section 1.<sup>118</sup> Therefore, “the Court need only be understood to have said that the formation of the corporate family for unlawful ends and the later pursuit of those ends constituted an illegal conspiracy notwithstanding the unity of the parties.”<sup>119</sup> As commentators have noted, this is “hardly a startling or disputable proposition and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to section 1.”<sup>120</sup> Other commentators point out that the successive mergers and acquisitions in *Yellow Cab* presented a situation closer to an attempted monopolization than to a section 1 conspiracy. They see the intra-enterprise conspiracy in this case as a gap-filler to sanction activities normally within the ambit of section 2 but immune thereof for lack of sufficient market power.<sup>121</sup>

Since the illegality of the initial acquisition was sufficient to condemn any post-acquisition conduct,<sup>122</sup> the case could have been decided solely on this basis. This alter-

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[T]he fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete.”); *United States v. Columbia Steel Co.*, 334 U.S. 495, 523 (1948).

<sup>118</sup> In *Copperweld*, 467 U.S. at 761 the Court stated, “It has long been clear that a pattern of acquisitions may itself create a combination illegal under section 1, especially when an original anti-competitive purpose is evident from the affiliated corporations’ conduct.” For an application of section 1 to a scheme of acquisitions see, for example, *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

<sup>119</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463b at 226; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 458. See also *Copperweld*, 467 U.S. at 761 (“[T]he affiliation of the defendants was irrelevant because the original acquisitions were themselves illegal. An affiliation ‘flowing from an illegal conspiracy’ would not avert sanctions.”); *Robberson*, *supra* note 23, at 784. But see 467 U.S. at 779-80 (Stevens, J., dissenting) (“[T]he Court mentioned acquisitions only as an additional consideration ... the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it already owned in themselves violated section 1.”); *Alessandria*, *supra* note 55, at 563 (stating it is not clear whether illegal acquisition was a finding or part of the rationale in *Yellow Cab*).

<sup>120</sup> *Handler & Smart*, *supra* note 17, at 29.

<sup>121</sup> Gilles Assant, *Anti-trust Intracorporate Conspiracies: A Comparative Study of French, EEC and American Laws*, 2 ECLR 65, 70 (1990). See also *Penn*, *supra* note 9, at 369.

<sup>122</sup> *Copperweld*, 467 U.S. at 761 n.5. See also *Steinberg*, *supra* note 17, at 534 n.40 (subsequent combination could be attacked as “the fruit of that [initial illegal] conspiracy”).



native holding notwithstanding, the case established a ban on intra-enterprise agreements and was so interpreted in later cases.<sup>123</sup> It was followed up by five more cases.<sup>124</sup>

### B. Kiefer-Stewart

The next case before the Supreme Court was *Kiefer-Stewart*.<sup>125</sup> Seagram Sales and Calvert Sales, two wholly owned subsidiaries of Seagram of Indiana, were charged with horizontally conspiring to set maximum resale prices for their alcoholic beverages and conspiring to refuse to deal with unabiding wholesalers. The defendants' point of view was that their "status as mere instrumentalities of a single manufacturing-merchandising unit"<sup>126</sup> immunized their concerted practices from section 1 liability. The Court held 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. ... The rule is especially applicable where, as here, respondents hold themselves out as

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<sup>123</sup> See e.g. 467 U.S. at 779 (Stevens, J., dissenting) ("*Yellow Cab* ... explicitly stated that a corporate subsidiary could conspire with its parent"); Prell, *supra* note 9, at 1155 n.34 ("*Yellow Cab*'s precedential force, however, is not limited to acquisition cases."). See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463a at 224-25 ("[T]he *Yellow Cab* language induced suits that would not otherwise have occurred, complicated and lengthened independently meritorious suits, confused judges and juries, and sometimes led the lower courts to condemn unilateral behavior without analysis of antitrust policy.").

<sup>124</sup> In addition, the Court handed down two opinions based on facts similar to those in *Crescent Amusement* (see *supra* note 112). In the first, *United States v. Griffith*, 334 U.S. 100 (1948), the Court assumed without discussion that the affiliated defendants could conspire together. It also held the defendants liable for single enterprise monopolization. However, this was not a pure intra-enterprise conspiracy case, as the defendants' holdings in each other's capital were minor. The shareholdings were backed up by family ties. McQuade, *supra* note 112, at 200 (arguing that the minor holdings between some of the defendants did not justify a single enterprise defense).

In *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948) the Court expressly recited that "the concerted actions of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent." *Id.* at 116 (citing *Yellow Cab* and *Crescent Amusement*).

In both cases, however, the intra-enterprise conspiracy was unnecessary because the Court found a violation of section 2 and because the affiliated exhibitors had conspired with independent distributors. See *Copperweld*, 467 U.S. at 763 n.8. See also Robberson, *supra* note 23, at 784; Steinberg, *supra* note 17, at 536 n.41.

<sup>125</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

<sup>126</sup> See 340 U.S. at 215.

competitors.”<sup>127</sup> Seagram and Calvert indeed had individual pricing policies. Furthermore, Calvert had first promised to supply the plaintiff despite its refusal to implement Seagram’s maximum price policy before reneging on this promise. Therefore, it seemed to have been the Court’s impression that the defendants, notwithstanding their belonging to a single corporate group, operated as independent entities and thus could conspire together.

Even though it came up as a maximum price fixing case, *Kiefer-Stewart* turned out to be the only Supreme Court case where the intra-enterprise conspiracy doctrine was not superfluous as there was no basis for the defendants’ liability other than their horizontal interaction.<sup>128</sup> Unlike in *Yellow Cab*, *Griffith*, or *Schine*, there was no monopoly situation. Today, the case could be based on the theory that the subsidiaries conspired with wholesalers other than the plaintiff.<sup>129</sup> However, when *Kiefer-Stewart* was decided the law was unclear on this point. Thus, while the case need not come out differently today, there was no alternative holding present in 1951.<sup>130</sup>

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<sup>127</sup> *Kiefer-Stewart*, 340 U.S. at 215 (citing *Yellow Cab*). In *Copperweld*, 467 U.S. at 764 the Court noted that this passage is not limited to corporations whose initial affiliation was illegal. Thereby the passage goes beyond *Yellow Cab* without confronting the “anomalies” of an intra-enterprise conspiracy doctrine. See id. See also Steinberg, *supra* note 17, at 537 n.46. Interestingly, Seagram – apparently unsuccessfully – raised the argument that *Yellow Cab* was limited to cases concerning unlawful acquisitions. See Copperweld, 467 U.S. at 782 n.4 (Stevens, J., dissenting).

<sup>128</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463c at 227; Assant, *supra* note 121, at 70; Handler & Smart, *supra* note 17, at 26 n.16; Neri, *supra* note 20, at 951.

<sup>129</sup> *Copperweld*, 467 U.S. at 764; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463c at 227.

The plaintiff itself is not a possible part of the conspiracy here since *Kiefer-Stewart* apparently never acquiesced in the resale price maintenance scheme. Compare *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 182 F.2d 228, 231 (7th Cir. 1950), *rev’d*, 340 U.S. 211 (1951). For a theory of conspiracy between manufacturer and wholesaler 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).

<sup>130</sup> See Handler & Smart, *supra* note 17, at 31 (arguing that the intra-enterprise doctrine was necessary to the holding in *Kiefer-Stewart*). See also *Copperweld*, 467 U.S. at 782 (Stevens, J., dissenting) (pointing out that *Copperweld*’s holding is inconsistent with the actual holding of *Kiefer-Stewart*). But see Willis & Pitofsky, *supra* note 20, at 45 (arguing that *Kiefer-Stewart* involved a section 1 conspiracy even without reliance on the intra-enterprise doctrine).

In the aftermath of this case, it was recognized that the range of the doctrine established was highly problematical. There was hardly a group of affiliated corporations without the kind of agreements existent between Seagram and Calvert.<sup>131</sup> As one commentator noted, except for attorneys, telephone companies became the biggest beneficiaries of the intra-enterprise doctrine because correspondence within corporate families was reduced to a minimum.<sup>132</sup>

### C. Timken

In the same year that the Court handed down *Seagram* when it was confronted with yet another case of an alleged conspiracy among affiliated corporations. Timken Roller Bearing Co. was prosecuted for having conspired to allocate trade territories and fix prices on the world market of antifriction bearings with two of its oversea subsidiaries, British Timken, Ltd. and Société Anonyme Française Timken (French Timken). Timken Roller Bearing Co. held only a non-controlling percentage of the shares in these subsidiaries.<sup>133</sup> Through the use of different classes of shares, voting agreements and a holding company, another shareholder was entitled to manage both subsidiaries on the condition that they made a certain annual profit under his management. Therefore, the affiliation did not entail a joint control of the defendants. Again the Court held that “[c]ommon ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.”<sup>134</sup> The only attempt to warrant the doctrine might

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<sup>131</sup> Harms, *Intra Enterprise Conspiracy?*, *supra* note 7, at 270. See also Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561, 564 (7th Cir. 1951) (“And with all due reference to the Supreme Court, if there was any evidence... of conspiracy in that case [*Kiefer-Stewart*], it is difficult to visualize a case where it would not be sufficient.”).

<sup>132</sup> Harms, *Intra Enterprise Conspiracy?*, *supra* note 7, at 271.

<sup>133</sup> American Timken owned only a third of British Timken and half of French Timken with the other half owned by British Timken. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 595 (1951).

<sup>134</sup> *Timken*, 341 U.S. at 598 (citing *Kiefer-Stewart*).

be seen in a concurring opinion: “It may seem strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even a major interest, but any other conclusion would open wide the doors for violation of the Sherman Act at home and in the foreign fields.”<sup>135</sup> The possible problems arising from this decision were pointed out by Justice Jackson in his dissent: since the incorporation of foreign subsidiaries may lead to antitrust liability, American corporations would have to operate through unincorporated foreign divisions subject to each country’s restrictions of foreign business “[i]n a world of tariffs, trade barriers, empire or domestic preference, and various forms of parochialism.”<sup>136</sup> He concluded that holding foreign subsidiaries able to conspire with their parent corporation “places too much weight on labels.”<sup>137</sup>

Again the intra-enterprise conspiracy doctrine was not necessary to reach the result in this case. Not only was common ownership absent, the district court had expressly found that the several corporations were separately controlled in fact.<sup>138</sup> Thus they were indeed restrained by contract from competition that could have occurred otherwise. In addition, the challenged market division agreements between the British and American companies originated in 1909 when they were entirely unrelated. American Timken’s acquisition of stock in British Timken in 1927 may in consequence be seen as perfecting

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<sup>135</sup> *Id.* at 601-02 (Reed, J., concurring).

<sup>136</sup> *Id.* at 607 (Jackson, J. dissenting). He concluded, “this decision will restrain more trade than it will make free.” *Id.* at 608.

<sup>137</sup> *Id.* at 607 (Jackson, J., dissenting).

<sup>138</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 765 (1984); VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463d at 227-28; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 459; Robberson, *supra* note 23, at 785. *See* *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 306, 311-12 (N.D. Ohio 1949) *aff’d as modified* 341 U.S. 593 (1951). Therefore, while it would be incorrect to say the corporations were unrelated, they might be considered sufficiently independent to conspire under section 1 even without an intra-enterprise conspiracy doctrine.

the unlawful agreement and thus as itself unlawful.<sup>139</sup> Like in *Yellow Cab*, the case seemed to turn on the fact that the initial acquisition was itself illegal.

#### D. Perma Life

In *Perma Life Mufflers, Inc. v. International Parts Corp*<sup>140</sup> Perma Life and other franchisees of Midas, Inc. initiated a section 1 claim against Midas, its parent International Parts Corp., two other International subsidiaries and six corporate managers. The plaintiffs challenged the franchise agreements as a conspiracy to restrain trade, because they required the franchisees to purchase all of their muffler and exhaust systems from Midas, to sell at fixed resale prices and at specified locations and to obey various other restrictions.<sup>141</sup> The Court rejected the defendants' single enterprise defense with the argument that since they "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>142</sup> While this is merely a "tautology", there was no reasoning why the law should require affiliated corporations to behave as if they were not.<sup>143</sup>

The Court noted, that "in any event" each plaintiff could "clearly" charge a combination between itself and the defendants or between the defendants and other franchise

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<sup>139</sup> *Copperweld*, 467 U.S. at 765 & n.11; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463d at 228. See also Keyte, *supra* note 84, at 867; Neri, *supra* note 20, at 950; Robberson, *supra* note 23, at 785.

<sup>140</sup> *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

<sup>141</sup> See *id.* at 136-37.

<sup>142</sup> *Id.* at 141-42 (citing *Yellow Cab* and *Timken*). Here, the Court restates *United States v. General Motors*, 121 F.2d 376, 404 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941) (defendants may not "enjoy the benefits of separate corporate identity and escape the consequences"). See also Handler & Smart, *supra* note 17, at 34.

<sup>143</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463e at 228.

dealers.<sup>144</sup> Therefore, as in all intra-enterprise conspiracy cases, except for *Kiefer-Stewart*, the doctrine was not necessary to reach the result.<sup>145</sup>

*Perma Life* is the last case where the Supreme Court used the intra-enterprise conspiracy to find section 1 liability.

#### E. Sunkist

While the cases mentioned so far implemented and apparently reaffirmed the intra-enterprise conspiracy, two cases weakened it.

In the first case, three agricultural cooperatives, Sunkist Growers Inc., its wholly owned subsidiaries Exchange Orange and Exchange Lemon, whose members all belonged to Sunkist Growers' Inc. membership of 12,000 growers, were alleged of commit a section 1 conspiracy. The Supreme Court disapproved instructions allowing the jury to find a conspiracy among the three cooperatives. Without citing the former cases dealing with the intra-enterprise conspiracy the Court said:

“the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one ‘organization’ or ‘association’ even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to these growers who have banded together for processing and marketing purposes... There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations.”<sup>146</sup>

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<sup>144</sup> See *Perma Life*, 392 U.S. at 142. This let the Court in *Copperweld* argue that the doctrine was “at most an alternative holding” in *Perma Life*. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984). See also Thomson, *supra* note 60, at 201 n.53.

<sup>145</sup> See *Copperweld*, 467 U.S. at 760; Assant, *supra* note 121, at 70-71; Keyte, *supra* note 84, at 868; Neri, *supra* note 20, at 951; Robberson, *supra* note 23, at 784-785. See also *supra* note 128 and accompanying text.

<sup>146</sup> *Sunkist Growers Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).

While this decision did not end the intra-enterprise conspiracy, it undermined its rationale. It shifted the weight from the legal technicality of separate incorporation to the economic realities of the defendants' situation.

*Sunkist* may merely be read to establish an exception to the intra-enterprise conspiracy doctrine for agricultural cooperatives<sup>147</sup> under section 6 of the Clayton Act<sup>148</sup> and the Capper-Volstead Act.<sup>149</sup> While the opinion analyses and cites the legislative history of the Capper-Volstead Act,<sup>150</sup> it fails to mention any characteristics of agricultural cooperatives or reasons in the legislation that would warrant a different application of the intra-enterprise conspiracy doctrine in this setting. Moreover, the Court has taken pains to construe special cooperative legislation narrowly in other cases.<sup>151</sup>

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<sup>147</sup> For this interpretation see *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33 n.49 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978). See also Thomson, *supra* note 60, at 203 & n.65 (decision “did not clearly state whether the Court intended to generally deny the intra-enterprise conspiracy doctrine or merely affirm the Capper-Volstead Act ...”).

<sup>148</sup> Section 6 of the Clayton Act immunizes agricultural organizations from antitrust liability under certain circumstances. It provides in pertinent part: “Nothing contained in the antitrust laws shall be construed to forbid the existence ... of ... agricultural, or horticultural organizations, instituted for the purpose of mutual help ... nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.” 15 U.S.C. § 17 (2000).

<sup>149</sup> The Capper-Volstead Act provides in pertinent part: “Persons engaged in the production of agricultural products ... may act together in associations, corporate, or otherwise ... in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes ...” 7 U.S.C. § 291 (2000).

<sup>150</sup> See 370 U.S. at 28-29.

<sup>151</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463f at 229; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 461. Professor Areeda also notes that there is no good reason to limit the holding here, because the organizational form is clearly discussed as an antitrust consideration. See *id.* See also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984) (“*Sunkist Growers* provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire ... Although this holding derived from statutory immunities granted to agricultural organizations, the reasoning of *Sunkist Growers* supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under section 1.”).

### F. Citizens & Southern

In the last case to consider, the Citizens & Southern National Bank (C&S) encouraged the formation of a number of suburban banks that it treated as de facto branches. It held only five percent of the stock of each bank with the remaining shares held by officers, employees, and “friends” of C&S. Because the suburban banks rather routinely followed C&S’s price leads, of which C&S notified them, the government charged the relationship among the banks as a conspiracy in violation of section 1. It also alleged that C&S’s efforts to acquire all the stock in five de facto branch banks after Georgia enacted legislation to allow de jure branch banking violated section 7 of the Clayton Act.

The Supreme Court stated that under the intra-enterprise conspiracy doctrine “even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. ‘The corporate interrelationships of the conspirators...are not determinative of the applicability of the Sherman Act.’”<sup>152</sup> This time, however, this was not the introduction to a finding of intra-enterprise liability, but rather the Court focused on economic reality. It found that because the branches were not set up to be competitors, section 1 did not compel them to compete.<sup>153</sup> C&S would have expanded into the suburban market through formatting de jure branches but for state law, which forbade such branching to protect suburban banks from city bank competition. Consequently, the subsequent merger of C&S and the de facto branches was found not to reduce any

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<sup>152</sup> United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 116 (1975) (citing *Yellow Cab*). VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463g at 230 n.27 interprets “must compete” to mean, “may not conspire unreasonably.” See also *supra* note 45.

<sup>153</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463g at 230; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 461. See *Citizens & Southern*, 422 U.S. at 119-20 (“We hold that, in the face of the stringent state



pre-existing competition and thus fell outside the meaning of section 7 of the Clayton Act.<sup>154</sup> Even though the Court did not deny the possibility of an intra-enterprise conspiracy in *Citizens*, it showed an increased willingness to consider the economic substance.<sup>155</sup>

### G. Result

While these cases were generally interpreted to establish that a parent and its (even wholly owned) subsidiary are capable of conspiring,<sup>156</sup> little more was clear.<sup>157</sup> The Supreme Court had never considered the merits of the doctrine.<sup>158</sup> The Supreme Court precedent provided little guidance for the application of the intra-enterprise conspiracy doctrine.<sup>159</sup> Without further analysis *Kiefer-Stewart*, *Timken* and *Perma Life* relied primarily upon citing *Yellow Cab*, a case with an arguably unclear holding.<sup>160</sup> Most of the

restrictions on branching, C&S's program of founding new de facto branches, and maintaining them as such, did not infringe section 1 of the Sherman Act.”).

<sup>154</sup> See *Citizens & Southern*, 422 U.S. at 121 (“It thus indisputably follows that the proposed acquisitions will extinguish no present competitive conduct or relationships.”). See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1463g at 230; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 461.

<sup>155</sup> Cf. SULLIVAN & GRIMES, *supra* note 11, at 242 (reading *Citizens & Southern* to anticipate the *Copperweld* principle with C&S and the five percent banks characterized as a single enterprise); Thomson, *supra* note 60, at 203-04 (same); Prell, *supra* note 9, at 1157 n.48 (suggesting to view *Sunkist* and *Citizens & Southern* as a transitional step between *Yellow Cab* and *Copperweld*).

<sup>156</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 783-84 & n.8 & n.9 (1984) (Stevens, J., dissenting) (citing lower courts and commentators). See also Steinberg, *supra* note 17, at 40-41 (“Whatever the Supreme Court’s actual intent, lower courts and commentators acknowledged the doctrine’s existence, although they greeted its arrival with a tepid embrace.”); Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1131 (3d Cir. 1995) (“Until the Supreme Court’s decision in [*Copperweld*], related corporations were generally perceived as separate entities capable of concerted activity ...”).

<sup>157</sup> See McNamara, *supra* note 23, at 1246 (calling the Supreme court opinions “quite vague” and creating confusion). See also Keyte, *supra* note 84, at 859 (describing the situation prior to *Copperweld* as “long-standing confusion and controversy”); Thomson, *supra* note 60, at 199 (“confusing line of Supreme Court decisions”).

<sup>158</sup> See *Copperweld*, 467 U.S. at 766 (“[W]hile this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played a minor role in the Court’s Sherman Act holdings.”). See also Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 473 (“[The intra-enterprise conspiracy doctrine] rests ... on language drawn out of context from *Yellow Cab*, perpetuated by simple repetition in subsequent cases, and substantially qualified by *Sunkist* and *Citizens*.”); Neri, *supra* note 20, at 952 (noting that the Court had never explained when the doctrine was properly applicable).

<sup>159</sup> See Keyte, *supra* note 84, at 859.

<sup>160</sup> With respect to the ambiguous holding of *Yellow Cab* see, for example, McQuade, *supra* note 112, at 194 (arguing that because action was brought under both section 1 and 2, and because the Court treated

opinions, which set the doctrine up, tend to ignore the plurality of actors requirement and concentrate on a consideration of predatory practices instead.<sup>161</sup> Scholars have condemned the concept of intra-enterprise conspiracy long since.<sup>162</sup>

As a result, circuit courts settled on several different tests for finding intra-enterprise conspiracies, often trying to limit the scope of the doctrine. Some courts relied on *Perma Life* to find separate incorporation sufficient to establish capacity to conspire as a matter of law (sometimes called the absolute rule). Under a rule of reason approach, agreements were sometimes either found not unreasonable because of affiliation or only subject to the rule of reason instead of the per se rule. Other courts followed the approach the Supreme Court seemed to have taken in *Citizens & Southern*<sup>163</sup> and adopted an all-the-facts-and-circumstances or single entity test weighing numerous factors to determine whether the separate incorporation is economically significant or a mere formality. A few courts relied on the ‘holding out’ language found in *Kiefer-Stewart* and considered whether the corporations held themselves out as competitors.<sup>164</sup>

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separate allegations in blurred, hazy manner, it is impossible to distinguish what portion of the Court’s language refers to section 1 and which to section 2).

<sup>161</sup> McQuade, *supra* note 112, at 188.

<sup>162</sup> See, e.g., Areeda, *Intraenterprise Conspiracy*, *supra* note 9; Handler & Smart, *supra* note 17; McQuade, *supra* note 112; Willis & Pitofsky, *supra* note 20. See also *Copperweld Corp. v. Independence Tube Corp.*, 691 F.2d 310, 316-17 (7th Cir. 1982), *rev’d on other grounds*, 467 U.S. 752 (1984) (“Academic discussion ... almost uniformly critical.”). Martin, *supra* note 67, at 430 calls this a “resource-laden constituency” of “[c]onservative scholars, business interests and well-paid advocates” “with substantial vested interests in the result”.

<sup>163</sup> In *Citizens & Southern* the Court examined all facets of the relationship between the subsidiary banks and C&S, including efforts by C&S to insure that the outstanding stock of the de facto branches remained in ‘friendly’ hands, the access the branches had to the C&S logogram, C&S’s open assurance of financial support on the charter applications of the branch banks, C&S’s control over the directors, officers, and locations of the branches, C&S’s efforts to provide the subsidiary banks with ‘advisory information’ on interest rates, service charges, and other banking practices, and the branches’ efforts to compensate their employees at a level comparable to C&S’s employees. See *United States v. Citizens & Southern Nat’l Bank*, 422 U.S. 86, 92-93 (1975).

<sup>164</sup> Especially the Seventh, Eighth and Ninth Circuits seemingly relied on analysis similar to *Citizens & Southern* (all-the-facts or single entity test), while the First, Third and Fifth Circuit strictly applied the intra-enterprise conspiracy doctrine (absolute rule). The Second Circuit seemed to follow the holding out rule

As an observer described it, “[t]he pre-Copperweld intra-enterprise conspiracy doctrine was a blessing to litigators (who billed countless hours applying it) and scholars (who won attention largely by lamenting it), but a curse to students trying to understand it and counselors trying to apply it.”<sup>165</sup> It was in this unsettled controversy that the Supreme Court decided to reconsider the application of the intra-enterprise conspiracy doctrine.

## II. The About-face: Copperweld

In *Copperweld Corp. v. Independence Tube Corp.*<sup>166</sup> the Supreme Court held that a parent and its wholly owned subsidiary are legally incapable of conspiring with each

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but has moved towards the single entity test. In addition, some courts recognized a rule that even given conspiratorial capacity related businesses will be considered one entity where a single decision maker exists who owns and controls both companies (so-called sole decision maker rule). But not even within the same circuit were the approaches applied consistently. See Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 463; Prell, *supra* note 9, at 1159-61; Jennifer Stewart, Comment, *The Intra-Enterprise Conspiracy Doctrine After Copperweld Corp. v. Independence Corp.*, 86 COLUM. L. REV. 198, 200 n.13 (1986); Thomson, *supra* note 60, at 204-05. For the different standards of the lower courts see 1 ABA, DEVELOPMENTS, *supra* note 97, at 22 (citing cases for the different standards); POTRAFKE, *supra* note 32, at 37-45 (discussing the different standards and citing cases); Assant, *supra* note 121, at 73-74 (same); Brown, *supra* note 60, at 788-89 (same); Keyte, *supra* note 84, at 885-87 (same); McNamara, *supra* note 23, at 1250-56; Neri, *supra* note 20, at 954-55; Penn, *supra* note 9, at 371; Steinberg, *supra* note 17, at 542-44. See also *infra* Ch. Four II. C., D. 4. & 5.

<sup>165</sup> Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345, 345 (1995) [hereinafter Calkins, *Copperweld in the Courts*]. See also Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 462 (“The main effects of the intra-enterprise conspiracy doctrine have been to confuse litigants and courts and to lengthen and complicate litigation.”).

<sup>166</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). For the important role the Solicitor General’s and the Government’s amicus briefs played in this case see Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 649 (2001); Calkins, *Copperweld in the Courts*, *supra* note 165, at 347-49.

other for purposes of section 1 of the Sherman Act.<sup>167</sup> To the extent that prior decisions were contrary to this holding, the Court overruled them.<sup>168</sup>

### A. The Facts and the Decision

#### *1. Facts of the Case*

The facts of the case were these.<sup>169</sup> Regal Tube Co., a steel tubing manufacturer, initially established as a subsidiary, was acquired first by Lear Siegler, Inc., which operated it as an unincorporated division, and then by Copperweld Corp., which operated it as a wholly owned subsidiary again. Under the sale agreement, Lear and its subsidiaries were bound not to compete with Regal for five years. Grohne, former president of the Regal division and with Lear then, formed his own steel tubing business, Independence Tube Corp., to compete with Regal. Even though counsel advised them that Grohne was not bound by the noncompetition agreement, Copperweld and Regal sent out letters warning that Copperweld would be “greatly concerned if [Grohne] contemplates entering the structural tube market ... in competition with Regal” and promising to take “any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.”<sup>170</sup> These letters were sent to prospective suppliers and customers of

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<sup>167</sup> It seems noteworthy that just as the rise of the intra-enterprise conspiracy doctrine can be interpreted as a product of its time – *see supra* Ch. Two II. B. 2. – so can its fall. Overruling the doctrine freed corporate contacts within an enterprise from the reach of the federal antitrust laws and limited the range of executive and judicial intervention – a result courts thought beneficial during the Reagan years. *See* Martin, *supra* note 67, at 429. *See also* Goodwin, *supra* note 31 (explaining the *Copperweld* decision as Chicago School-influenced and based solely on efficiency concerns). It should be noted however, that the Court in *Copperweld* – contrary to Goodwin, *supra* note 31, at 773 – did not find Copperweld’s and Regal’s conduct efficiency-inducing, but only not in violation of section 1.

<sup>168</sup> *See Copperweld*, 467 U.S. at 777. *See also* Thomson, *supra* note 60, at 215-17 (discussing to what extent *Copperweld* affects the precedents).

<sup>169</sup> *See* 467 U.S. at 755-59.

<sup>170</sup> Copperweld and Regal asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne’s operations. *See* 467 U.S. at 757.

Independence, as well as banks that were considering financing Independence's operations and real estate firms that were considering providing plant space. Upon receipt of such a letter, Yoder Co., which had agreed to supply a tubing mill to Independence, voided Independence's order. Independence's entry into the market was thus delayed by nine months.

Confronted with these facts, the district court applied the all-the-facts-and-circumstances test and found that Copperweld and Regal had conspired to violate section 1 of the Sherman Act, but that Yoder was not part of the conspiracy.<sup>171</sup> The court awarded treble damages.<sup>172</sup> The court of appeals noted that the exoneration of Yoder from antitrust liability left a parent and its wholly owned subsidiary as the only parties to a section 1 conspiracy. Questioning the wisdom of the intra-enterprise conspiracy doctrine, the court nevertheless affirmed based also on the all-the-facts test.

## 2. *The Supreme Court's Decision*

In a five to three decision the Supreme Court reversed.<sup>173</sup> Proceeding in five steps, the Court first analyzed its precedents and found that it had never analyzed the intra-enterprise conspiracy in depth and that a finding of intra-enterprise conspiracy was in "all

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They also claimed that they were concerned about Regal's proprietary information and know-how because Independence hired eight key employees away from Regal. *See Copperweld Corp. v. Independence Tube Corp.*, 691 F.2d 310, 314 (7th Cir. 1982), *rev'd on other grounds*, 467 U.S. 752 (1984).

<sup>171</sup> The jury also found that Copperweld, but not Regal, had interfered with Independence's contractual relationship with Yoder; that Regal, but not Copperweld, had interfered with Independence's relationship with a potential customer; and that Yoder had breached its contract to supply a tubing mill. Independence originally also charged an attempt to monopolize in violation of section 2, but dismissed this claim prior to trial.

<sup>172</sup> Damages were awarded identically for the antitrust violation and the inducement of the Yoder contract breach. The jury awarded \$2,499,009 on the antitrust claim, which was trebled to \$7,497,027 plus attorney's fees and costs.

<sup>173</sup> Justice White took no part in the decision. *See Copperweld*, 467 U.S. at 777. One commentator has suggested that his absence was a key factor. Because Justice White would probably have voted against the majority Chief Justice Burger might then have drafted the opinion a little more narrowly, out of fear of losing the fifth vote. *See Calkins, Copperweld in the Courts*, *supra* note 165, at 348 n.23.

but perhaps one instances unnecessary to the result.”<sup>174</sup> The dissent disagreed with this understanding of the precedent<sup>175</sup> and it must be granted to the dissent, that the intra-enterprise conspiracy has been viewed as a settled rule prior to *Copperweld*.<sup>176</sup> The reason for the Court to spend so much effort on distinguishing and limiting the scope of precedent is the doctrine of stare decisis. Especially in the area of statutory construction, where Congress can overcome the Court’s interpretation, the Court will overrule prior cases only for a good cause.<sup>177</sup> “[A]ny departure from the doctrine of stare decisis demands special justification.”<sup>178</sup> However, it surely does not mean that the Court has to continue to adhere to a doctrine it realized to be wrong.<sup>179</sup> Nevertheless, it would have been preferable had the majority explicitly addressed the issue of stare decisis when limiting the precedent.

The Court went on to discuss the basic distinction in the Sherman Act between section 1 and 2.<sup>180</sup> It stressed the limited scrutiny of unilateral action and its justification in the need not to discourage vigorous competition.

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<sup>174</sup> 467 U.S. at 760-66. For an analysis of the precedents see *supra* Ch. Three I.

<sup>175</sup> See 467 U.S. at 783 (Stevens, J., dissenting) ([T]he rule announced today is inconsistent with what this Court held on at least *seven* previous occasions.”) (emphasis provided). See also Brown, *supra* note 60, at 798-99 (insisting that *Kiefer-Stewart* cannot be distinguished).

<sup>176</sup> See *supra* Ch. Three I. G. See also Eskridge, *supra* note 108, at 1378-79 (“The Court ... characterized the original statement of the doctrine as dictum and argued that Supreme Court decisions that had followed the doctrine could have been decided the same way on other grounds. The dissent, however, pointed out that the Court had thoroughly considered the intra-enterprise conspiracy doctrine, after briefing, on several occasions, and had made the doctrine the explicit holding of no less than five precedents.”).

<sup>177</sup> See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (“[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”). See also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 769 (1984) (Brennan, J., concurring).

<sup>178</sup> *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). See also *Copperweld*, 467 U.S. at 779 (Stevens, J., dissenting) (“Repudiation of prior cases is not a step that should be taken lightly.”).

<sup>179</sup> Cf. Eskridge, *supra* note 108, at 1379. See also Steinberg, *supra* note 17, at 557.

<sup>180</sup> *Copperweld*, 467 U.S. at 767-69. For an analysis of this distinction and its justification see *supra* Ch. Two II. A.

Third, the Court pointed out that in interpreting the plurality of actors requirement in section 1, there is consensus that the statute does not cover coordinated conduct among employees or unincorporated divisions within a single firm, even though the literal understanding of the statute's language would allow to do so.<sup>181</sup> This is because coordination within a business entity is likely to make that firm more competitive which is to the ultimate benefit of the consumers. Thus, the plurality of actors requirement is not met unless there is more than one independent source of economic power.

Fourth, extending this logic, the Court held, “for similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise.” A “parent and its wholly owned subsidiary have a complete unity of interest.”<sup>182</sup> Because the organizational form of an enterprise reflects valid management purposes without increasing any anticompetitive potential,<sup>183</sup> and because the forms of a wholly owned subsidiary and a division are fully interchangeable, antitrust liability should not depend on this formal distinction. In other words, reality, not form, must control.

Finally, the Court argued that this may create a gap in the coverage of the Sherman Act, but any such gap is likely to be modest and results from Congress' decision.<sup>184</sup> Anticompetitive behavior of corporate families may be policed adequately without resort to the intra-enterprise conspiracy doctrine.

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<sup>181</sup> *Copperweld*, 467 U.S. at 769-71. *See supra* Ch. Two II. B. 1.

<sup>182</sup> 467 U.S. at 771.

<sup>183</sup> *See supra* Ch. Two I. A.

<sup>184</sup> 467 U.S. at 774-77.

Three Justices dissented, urging for the application of the rule of reason to intra-enterprise conspiracies to distinguish effective, functional integration from exclusionary conduct as presented in *Copperweld*.<sup>185</sup> For the dissent, the presence of market power rather than the plurality of actors is critical to section 1.<sup>186</sup> However, this is incorrect insofar as it implies that market power of a unilateral actor is sufficient to trigger section 1.<sup>187</sup> Furthermore, the dissent's order of analysis is backwards.<sup>188</sup> It focuses initially on whether there has been a restraint of trade; however, the capacity to conspire is the natural starting point and the first hurdle to overcome in a section 1 claim.<sup>189</sup> If there is no plurality of actors, the inquiry ends.

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<sup>185</sup> *Id.* at 778-79, 792-93 (Stevens, J., dissenting).

Copperweld and Regal had purposefully and successfully delayed Independence entry into the market. With respect to the competitive impact, the record indicates that Regal had been the price leader in several of the segments covered by its product lines. Prices had been relatively stable as had Regal's market share. When Independence was finally able to enter the market, it was able to lower prices on at least three occasions. Overall, after Independence's entry output expanded, prices dropped and Regal lost market share to Independence. *See* *Copperweld Corp. v. Independence Tube Corp.*, 691 F.2d 310, 323 (7th Cir. 1982), *rev'd on other grounds*, 467 U.S. 752 (1984); Goodwin, *supra* note 31, at 773-74. Therefore, Copperweld's and Regal's exclusionary conduct resulted in reduced output and higher prices to consumers for at least the nine month period that Independence's entry was delayed. *See also* Gavil, *supra* note 64, at 90-92. But, while the standard produces a clear result here, its applicability to other cases seems doubtful. *See* Thomas A. Smart, *Intracorporate Conspiracy*, in 3 ANTITRUST IN TRANSITION 1064, 1067 (Milton Handler ed., 1991) ("How will the courts distinguish between an external effect that is merely 'incident to integration' and an unreasonable restraint of trade unrelated to the efficiencies associated with integration?").

<sup>186</sup> 467 U.S. at 789 (Stevens, J., dissenting). *See also* Alessandria, *supra* note 55, at 581 (same).

<sup>187</sup> *See also* Handler & Smart, *supra* note 17, at 27 (arguing to the same extent with respect to the somewhat comparable statement in *United States v. General Motors*, 121 F.2d 376, 404 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941) that "[t]he test of illegality ... is the presence or absence of restraint of trade ..."); Steinberg, *supra* note 17, at 531 n.31 (same); Keyte, *supra* note 84, at 864 n.37 (same, "section 1 necessarily requires combination or conspiracy in addition to restraint of trade").

At the risk of oversimplification, one could state that the anticompetitive use of market power is generally more a concern to section 2 of the Act.

<sup>188</sup> *See* Penn, *supra* note 9, at 375. *See also* Neri, *supra* note 20, at 961.

<sup>189</sup> *See supra* Ch. Two II. A. *See also* Steinberg, *supra* note 17, at 557 ("The majority ... concluded that it was imperative to discover whether the behavior of a parent and a wholly owned subsidiary fell into either the unilateral or concerted category before analyzing its effects on competition.").



## B. Analysis of the Decision

To evaluate the Court's decision, the analysis will inspect the importance of separate incorporation for the capacity to conspire and for anticompetitive behavior, the legal history of the Sherman Act, the consequences of the intra-enterprise conspiracy doctrine, the doctrine's fitting into the concept of section 1, and whether its rejection will leave a significant gap in antitrust enforcement. The analysis will show that the Supreme Court was correct in overruling the intra-enterprise conspiracy doctrine.

### *1. The Substance Over Form Argument*

The Court started off with a fundamental observation. It noted the “central criticism is that the doctrine gives undue significance to the fact” of separate incorporation and “thereby treats as concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise.”<sup>190</sup> The argument is that the intra-enterprise conspiracy doctrine evaluates form over substance<sup>191</sup> and thereby ignores the economic realities. In finding a conspiracy, the doctrine looks to the distinct legal persons of separately incorporated parties without taking into account the substance of economic unity within the affiliated corporations.

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<sup>190</sup> *Copperweld*, 467 U.S. at 766-67. The court rephrases a cite from *Sunkist Growers* when it states “the intra-enterprise conspiracy doctrine ‘impose[s] grave legal consequences upon organizational distinctions that are of de minimis meaning and effect.’” *See Copperweld*, 467 U.S. at 773. *See also* Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 451 (“[Intra-enterprise conspiracy] doctrine induces unsuccessful suits that would not otherwise occur, complicates and lengthens independently meritorious suits, confuses judges and juries, and sometimes leads to the condemnation – without justification in antitrust policy – of unilateral behavior.”).

<sup>191</sup> *See, e.g.*, Alessandria, *supra* note 55, at 553; Prell, *supra* note 9, at 1158; Steinberg, *supra* note 17, at 542 n.72. *But see* Gregg, *supra* note 31, at 378 (arguing that the majority opinion values form over substance); Keyte, *supra* note 84, at 883 (arguing that *Copperweld* is no less formalistic than the intra-enterprise conspiracy doctrine). *See generally* Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451, 466-67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”).

Moreover separate incorporation under corporate law does not logically entail conspiratorial capacity in the very different area of antitrust law.<sup>192</sup> Unique antitrust policy considerations call for a determination of conspiratorial capacity with respect to these goals rather than for an unquestioned borrowing of a standard from another area of law. A view to the treatment of individuals within a firm is also helpful here. Although human beings are ordinarily understood to be able to conspire, composing a business entity and coordinating their behavior within it is not found to be a conspiracy. This handling of individuals shows that statutory purpose rather than formal legal personality determines conspiratorial capacity.<sup>193</sup> Hence, it becomes less surprising that corporations, which are separate legal persons for many legal issues, can be seen as an entity for Sherman Act purposes. By failing to recognize that separate incorporation is a necessary but not sufficient condition for an agreement, the intra-enterprise conspiracy doctrine places “to much weight on labels.”<sup>194</sup>

## 2. *The Legislative History of the Sherman Act*

Both, the majority opinion and the dissent tried to support their view with the legislative history. The dissent attempted to exploit this source to make inroads into the majority’s holding.

The dissent argued that references to trusts in the legislative history show the intention to govern the conduct of all affiliated corporations because of their similarity to

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The whole debate derives from *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947) where the Court stated that the Sherman Act is “aimed at substance rather than form.” (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 361, 376, 377 (1933), the Court erroneously cited 228 U.S. 344).

<sup>192</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 240; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453. But see Gregg, *supra* note 31, at 379-80.

This is indeed a limit on the significance of the act of separate incorporation, but contrary to Gregg, *supra* note 31, at 379, this limitation is by no means arbitrary, but well reasoned.

<sup>193</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464a at 233.

trusts.<sup>195</sup> But while a trust involves affiliated corporations, a classic trust substitutes competing firms for a controlling central management.<sup>196</sup> The trust was used by corporations in the same line of business to restrict competition by setting prices and outputs for all participants while circumventing state law limitations on corporations.<sup>197</sup> This organizational form resembles a strictly organized cartel and has nothing in common with an existing firm's decision to do part of its business through a separately incorporated subsidiary.<sup>198</sup> Moreover, in the case of a trust, the initial acquisition could regularly be attacked as contrary to section 1, because the trusts referred to in the Sherman Act were formed for the illegal purpose of restraining competition.<sup>199</sup> This situation is hardly comparable to a lawfully formed corporate group.

The dissent's second historic argument is that the Congress, which passed the Sherman Act, was familiar with a common law rule of intracorporate and intra-enterprise conspiracies.<sup>200</sup> Even if that were so,<sup>201</sup> that does not mean that corporations have conspiratorial capacity for Sherman Act purposes. As already seen with respect to the

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<sup>194</sup> *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 607 (1951) (Jackson J. dissenting).

<sup>195</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 787-88 (1984) (Stevens, J., dissenting). See also Brown, *supra* note 60, at 798. The majority, however, thought that less clear. See 467 U.S. at 774 n.23 ("None of the ... debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful.").

<sup>196</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464b at 234. See also 21 CONG. REC. 2457 (1890) (statement of Senator Sherman) ("[T]rusts, that seek to avoid competition by combining the controlling corporations, partnerships, and individuals ... The sole object of such a combination is to make competition impossible.").

<sup>197</sup> See ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 27-28 (1989); Penn, *supra* note 9, at 366; Steinberg, *supra* note 17, at 558.

<sup>198</sup> Cf. Smart, *supra* note 185, at 1066.

<sup>199</sup> See Smart, *supra* note 185, at 1066; Penn, *supra* note 9, at 375; Keyte, *supra* note 84, at 880.

<sup>200</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 786-87 (1984) (Stevens, J., dissenting). But see Prell, *supra* note 9, at 1168 n.130 (arguing that the dissent fails to explain why the Court should keep the intra-enterprise conspiracy doctrine when antitrust law has already rejected an intracorporate doctrine contrary to the common law).

<sup>201</sup> The majority thought it less clear whether such a rule had been established. See id. at 775. See also Steinberg, *supra* note 17, at 554 n.127.

individuals in a single firm, the capacity to conspire generally and to conspire for Sherman Act purposes can differ.<sup>202</sup>

On the whole, the legal history is somewhat ambiguous and there are arguably statements in Congress' debate for either side's point of view.<sup>203</sup> By phrasing the breadth of sections 1's language, Congress purposefully left many details to be worked out by the courts,<sup>204</sup> and corporate law as well as corporate structure were still in their childhood in 1890 and have developed since then. It might be that Congress simply did not consider whether the Sherman Act should apply to intra-enterprise conspiracies.<sup>205</sup> Fitting contemporary means of business organizations into the Act's distinction of unilateral and concerted action would then be the task of the courts. In the end, "[i]t would take more explicit language than appears in section 1 to suggest that Congress meant to reach 'every' internal 'agreement' within an enterprise."<sup>206</sup>

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<sup>202</sup> See also 467 U.S. at 775 n.24 ("Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with section 1 is sufficient to refute the dissent's suggestion that Congress intended to incorporate such a definition.").

<sup>203</sup> See Keyte, *supra* note 84, at 879-81. But see Brown, *supra* note 60, at 797 (asserting that majority opinion lacks basis in legislative history).

<sup>204</sup> Cf. Alessandria, *supra* note 55, at 558; Keyte, *supra* note 84, at 881. See 21 CONG. REC. 2460 (1890) (statement of Senator Sherman) ("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."). See also *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (Sherman Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

<sup>205</sup> See Keyte, *supra* note 84, at 881 ("The issue of the conspiratorial capacity of affiliated corporations only arose when business structures became more complex than the common trust or classic combination."); Meyers, *supra* note 14, at 1401 ("[I]n the face of a changing corporate culture, courts have been faced with interpretive questions that most likely were beyond the purview of the statute's creators."); Prell, *supra* note 9, at 1158 n.53; Steinberg, *supra* note 17, at 558 ([T]he modern parent-subsidiary structure was only in its infancy when Congress passed the Sherman Act ...).

<sup>206</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 236-37. See also Steinberg, *supra* note 17, at 558 & n.145. See generally I PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (Rev. ed. 1997) ¶ 103d1 at 59 ("What policy implications is one to draw from this inconsistent and generally unilluminating legislative history? ... We believe that the legislative history itself should be deserving relatively little weight, even on central questions ...").

### 3. Consequences of the Intra-enterprise Conspiracy Doctrine

The intra-enterprise conspiracy doctrine confronts the business world with uncertainty as to what extent corporations can instruct subsidiaries and use their influence in affiliated corporations.<sup>207</sup> It has been said that the doctrine led to more confusion than competition.<sup>208</sup> This uncertainty is serious as it is backed up with the threat of a treble damage verdict. Strictly applied, it might even force businesses to refrain from incorporating subsidiaries and to dissolve those already existing to evade liability.<sup>209</sup>

As explored earlier, separate incorporation has a number of benefits such as limited shareholder liability, corporate decentralization and the resulting enhanced productivity, overseas implantation, tax advantages, employees' enhanced loyalty and better allocation of tasks and efficiency within the enterprise.<sup>210</sup> Enhanced efficiency in particular is generally recognized as being procompetitive.<sup>211</sup> By hampering these economic benefits deriving from affiliated groups, the intra-enterprise conspiracy doctrine perverts the goals of antitrust laws. By inducing large companies into operating through unincor-

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<sup>207</sup> Counsel, enforcement agencies and the courts have been unable to clarify the boundaries of the doctrine during the whole duration of its existence. See Willis & Pitofsky, *supra* note 20, at 21. See also Steinberg, *supra* note 17, at 541 n.68. But see Goodwin, *supra* note 31, at 778-79 (calling the degree of uncertainty "overstated"). However, it is not particularly helpful to announce, "that uncertainty exists for all business planning activity." See id. at 779. That does not warrant the maintenance of additional (unnecessary) uncertainty.

<sup>208</sup> Keyte, *supra* note 84, at 882.

<sup>209</sup> See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773 (1984); Smith, *Original Intent*, *supra* note 81, at 1177; Steinberg, *supra* note 17, at 541 n.70, 542 n.71. This is what Seagram did. After the decision in *Kiefer-Stewart* Seagram turned the two wholly owned subsidiaries there involved into unincorporated divisions. See Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915, 920-921 (D. Haw. 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969).

<sup>210</sup> See supra Ch. Two I. A. See also Assant, *supra* note 121, at 75. Even proponents of the intra-enterprise conspiracy doctrine must admit these benefits. See, e.g., Brown, *supra* note 60, at 800 ("Clearly, the efficiencies available from the use of the subsidiary form, but not from the divisional form, are an organizational distinction of some import.").

<sup>211</sup> See 467 U.S. at 789 (Stevens J. dissenting) ("[T]he affiliation of corporate entities often is procompetitive precisely because ... it enhances efficiency."). Nevertheless it should be noted that this is not necessarily the case. If efficiency gains are not passed on to the next market level and finally the consumer, the

porated divisions rather than through separate subsidiaries, the doctrine misallocates resources, deprives the community of a diversified pattern of business implantation, and further increases enterprise centralization without any conceivable benefit to competition.<sup>212</sup>

While the intra-enterprise conspiracy doctrine thus discourages legitimate intra-corporate activity and leads to the loss of efficiencies from integration, this unfavorable result standing alone would not necessarily force the immunization of internal conduct of a corporate group from section 1 scrutiny. After all, section 1 is not only concerned with efficiency, but also and primarily with maintaining a competitive market.<sup>213</sup> Yet the resulting undesirable consequences are by no means the only argument against the intra-enterprise conspiracy doctrine.

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market is no more competitive than before and those who achieved efficiency gains simply retain a higher profit margin. See Ponsoldt, *Enrichment of Sellers*, *supra* note 34, at 1168.

<sup>212</sup> *Copperweld*, 467 U.S. at 773-74; Assant, *supra* note 121, at 75. See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 238, ¶ 1468 at 276 (“[D]elegations of authority and coordination within the enterprise, which are both inevitable and desirable, would be discouraged by finding intra-enterprise conspiracies ...”); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 454; Keyte, *supra* note 84, at 882 (calling the limitation of procompetitive conduct the doctrine’s greatest risk); Neri, *supra* note 20, at 964. Cf. Howard Shelanski, Comment, *Robinson-Patman Act Regulation of Intraenterprise Pricing*, 80 CAL. L. REV. 247, 258-59 (1992) (making a similar argument in the context of the Robinson-Patman Act).

The dissent in *Copperweld* argues that a parent corporation will include the potential antitrust liability in the decision whether to implement a separately incorporated subsidiary. See 467 U.S. at 792 n.26 (Stevens, J., dissenting). But this gives a false incentive and may in certain cases tip the scales against separate incorporation where it would make economic sense but for the risk of antitrust liability caused by the intra-enterprise conspiracy doctrine. One could argue that if a firm can escape liability by making the subsidiary a division without affecting its market power, “there seems to be no reason for not letting the firm benefit from separate incorporation when it finds it desirable to do so.” See Shelanski, *supra* note 212, at 258 n.78. See also Goodwin, *supra* note 31, at 766 n.53 (arguing that the Court could resolve the disincentive by extending liability to divisions rather than by eliminating the intra-enterprise conspiracy doctrine).

Gregg, *supra* note 31, at 380 argues that the extinction of the intra-enterprise conspiracy doctrine will lead corporate executives to separately incorporate their divisions to avoid section 1 liability. This argument, however, makes no sense, because the antitrust liability for a firm with separately incorporated subsidiaries is in no way smaller than that of a firm made up of divisions.

<sup>213</sup> See Professor Ponsoldt’s warning in Ponsoldt, *Enrichment of Sellers*, *supra* note 34, at 1167: “Those who rely primarily upon the alleged efficiency goals of antitrust – even if their reliance is justified in particular cases – ignore history and political science to our long-term disadvantage.” See also Ponsoldt, *Refusals to Deal*, *supra* note 60, at 508 n.23 ([T]he primary goals of antitrust laws are to inhibit monopoly pricing and to promote innovation and productivity through maintenance of a competitive process”).

#### 4. The Antitrust Concepts of Agreement and Restraint of Trade

Section 1's concerns for competition is expressed in the concerted action requirement. As discussed, collaboration by unrelated firms is inherently dangerous to competition and hence prohibited unless warranted by some procompetitive virtue.<sup>214</sup> It "deprives the market place of the independent centers of decision-making that competition assumes and demands."<sup>215</sup> Furthermore, collaboration aggregates market power in a potentially dominant and thereby anticompetitive force. What is basic to this concept is that conspirators must be able to pursue distinct economic interests.

However, this is exactly the reason why agreements between corporate affiliates do not conflict with the purpose of section 1.<sup>216</sup> Members of a corporate group do not constitute such "independent centers of decision-making."<sup>217</sup> They are not opposite numbers in competition but participants in the realization of a common economic plan. Their interests are not disparate<sup>218</sup> and thus affiliates cannot join to unite them.<sup>219</sup> Even if a subsidiary had separate interests, it could not compete or even disagree with its parent corporation in a way relevant to antitrust law, because the parent always has the last word.<sup>220</sup> The parent has various means to effectively discipline its subsidiary such as giving

<sup>214</sup> See *supra* Ch. Two II. A. See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 236.

<sup>215</sup> *Copperweld*, 467 U.S. at 769.

<sup>216</sup> For a similar reasoning in the area of European competition law see Holger Fleischer, *Konzerninterne Wettbewerbsbeschränkungen und Kartellverbot*, 42 DIE AKTIENGESellschaft [AG] 491, 495 (1997).

<sup>217</sup> Sommer, *supra* note 1, at 278 calls the "ultra-formalistic notion of inter-enterprise conspiracy" an example for the "myth of subsidiary independence." See also VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 515 ("[O]ne economic unit ... no combination of different competitors.").

<sup>218</sup> See 467 U.S. at 771 ("[Parent and subsidiary's] general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."). Marsha C. Huie, *The Intra-Enterprise Conspiracy Doctrine in the United States and the European Economic Community*, 36 AM. J. COMP. L. 307, 321 (1988) calls parent and wholly-owned subsidiary "merely branches of the same tree."

<sup>219</sup> See Steinberg, *supra* note 17, at 561 ("Two separate corporations that initially share a unity of interest cannot possibly act, or combine, to create a unity of interest ...").

directives, replacing the subsidiary's officers and directors or even dissolving the subsidiary into an unincorporated division. With or without an agreement the subsidiary acts for the benefit of its shareholder, the parent corporation.<sup>221</sup> Due to the corporate state of dependence, a subsidiary lacks the freedom to make independent economic decisions. Thus, a parent corporation and its wholly owned subsidiary cannot be considered separate economic actors for antitrust purposes. They operate under a single general design whether the subsidiary receives day-to-day instructions or only general guidelines from its parent corporation.<sup>222</sup> When they 'agree' on a common course their 'agreement' brings no sudden joining of formerly independent economic resources about and it does not reduce the number of independent actors in the marketplace.<sup>223</sup> Rather their agreement lacks a basic element of a conspiracy: a meeting of independent minds.<sup>224</sup> Their agreement is not of the same significance as an agreement between unrelated actors. It presents no threat to competition, because there is no competition in the first place. Furthermore, coordination can occur differently between affiliated corporations than between unrelated corporations. Tasks such as controlling and planning the subsidiary's activities, or coordinating it generally with the rest of the group can be effectuated due to the parent's position as the decisive shareholder of the subsidiary and its resulting power to pick the directors and

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<sup>220</sup> Cf. *Copperweld*, 467 U.S. at 771-72 (“[T]he parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interest.”).

<sup>221</sup> See *id.* at 771. See also *McNamara*, *supra* note 23, at 1259.

<sup>222</sup> *Assant*, *supra* note 121, at 75. *Copperweld*, 467 U.S. at 771 gives the picture of “a multiple team of horses drawing a vehicle under the control of a single driver.” For the relevance of actual and potential control see *infra* Ch. Four II. D. 4., 5.

<sup>223</sup> Cf. *Copperweld*, 467 U.S. at 771; *Thomson*, *supra* note 60, at 214.

<sup>224</sup> See 467 U.S. at 771 (“[T]he very notion of an ‘agreement’ ... lacks meaning. ... [A] parent and a wholly owned subsidiary always have a ‘unity of purpose or a common design.’”). See also *McNamara*, *supra* note 23, at 1259 (“wholly owned subsidiaries [not] independent in any meaningful antitrust sense”).



officers. In this case, the coordination rather appears to be an internal process within the subsidiary than a concerted action of two distinct entities.

To sum it up in the words of the *Copperweld* Court, a parent and a subsidiary “always have a unity of purpose or a common design” so that “the notion of an ‘agreement’ in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning.”<sup>225</sup>

That said one must be cautious not to confuse the plurality of actors requirement with the restraint of trade. Long since has it been accepted that a restraint of trade need not necessarily be effected among the conspirators themselves.<sup>226</sup> It is therefore true that the missing economic independence of the conspirators would not foreclose the finding of a restraint of trade. *Copperweld* can serve as an example where the restraint achieved by the conspiracy does not occur between the conspirators but is imposed on a third party. Nevertheless, to trigger scrutiny under section 1, the conspirators have to be economically distinct to fulfill the conspiracy requirement. It goes back to the distinction between section 1 and 2 to note that while separate market participants replacing competition with collaboration are inherently suspicious to antitrust, the same cannot be said about a single entity’s behavior. Rather the Sherman Act’s goal of preserving independent economic decisions assumes cooperation inside economic entities.<sup>227</sup> Even if unilateral conduct restrains another party this can simply be a part of the competitive process. It is therefore of less concern to the antitrust laws and needs more careful evaluation prior

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<sup>225</sup> *Copperweld*, 467 U.S. at 771. See also VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 515 (“Antitrust conspiracy law has no application to the internal operations of a single economic unit, whatever the organizational or legal forms in which it is conducted.”).

<sup>226</sup> See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911).

<sup>227</sup> *Smith, Original Intent*, *supra* note 81, at 1180.

to condemnation. The intra-enterprise conspiracy doctrine is not sensible to this distinction. It would render the plurality of actors requirement as well as section 2 superfluous.<sup>228</sup>

### 5. *The Ratio of Separate Incorporation to Anticompetitive Conduct*

Since doing business through subsidiaries is both lawful and procompetitive, or at least competitively neutral,<sup>229</sup> contacts within the corporate group that form a necessary part of the normal relationship should not be considered an anticompetitive conspiracy.<sup>230</sup> This is supported by the fact that the reasons for separate incorporation are ordinarily not connected with anticompetitive ends.<sup>231</sup> Not surprisingly, in the typical intra-enterprise conspiracy case “the alleged conspiracy has little if any connection with the alleged restraint.”<sup>232</sup> For example, in none of the Supreme Court’s precedent was anticompetitive conduct caused or facilitated by separate incorporation.<sup>233</sup> The choice of business form was unconnected to the implemented restraint. Many cases, where an intra-enterprise conspiracy was alleged, involved refusals to deal or business torts. In these cases, the internal

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<sup>228</sup> 467 U.S. at 775. See also *supra* note 94 and accompanying text; McQuade, *supra* note 112, at 216 (“The effect is to read the requirement of conspiracy out of the Act, and to make the presence or absence of restraint the only criterion of violation.”); Steinberg, *supra* note 17, at 560.

<sup>229</sup> See *supra* Ch. Two I. A. and Ch. Three II. B. 3.

<sup>230</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 236.

<sup>231</sup> See *supra* Ch. Two I. A. The *Copperweld* case itself may serve as an example. The reason why Copperweld incorporated Regal separately was to avoid double taxation by both Illinois and Pennsylvania. See McNamara, *supra* note 23, at 1256 n.81. This motivation has no connection to the later anticompetitive conduct of Regal and Copperweld.

<sup>232</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462b at 223. See also *id.* ¶ 1464a at 233 (“[C]onceivable connections between separate incorporation and anticompetitive effects are ... questionable and surely rare.”).

The dissent in *Copperweld* is certainly right to notice, “when conduct restraints trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from the procompetitive integration.” See 467 U.S. at 794 (Stevens, J., dissenting). But again, the mere fact of separate incorporation does not bring about the “competitive significance” of such conduct.

<sup>233</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462b at 223, ¶ 1464d at 239 (doubting, in addition, that separate incorporation has caused or facilitated the anticompetitive behavior in any significant antitrust case).

coordination of a manufacturer with its own credit-granting or distribution subsidiary will add little to the manufacturer's behavior.<sup>234</sup> This is especially true when one of the alleged co-conspirators has complete control over the others and can fully implement the alleged restraint without the other conspirators' consent.<sup>235</sup> The economic reason why separate incorporation is not a relevant factor in causing or facilitating anticompetitive conduct is that neither separate incorporation nor coordination within an otherwise lawful enterprise create any additional market power.<sup>236</sup> In the *Copperweld* case itself, Regal was first operated as a division of Lear and then as a subsidiary of Copperweld without any meaningful difference.<sup>237</sup> Nothing suggests that it has been a greater threat to competition as a subsidiary, and for the complained acts the fact of separate incorporation was irrelevant. Still the dissent tries to give an example of a situation where separate incorporation could increase the likelihood of anticompetitive behavior. "A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks."<sup>238</sup> As one commentator noticed, this example is built on a number of unusual assumptions. A predator would have to take into account its own bankruptcy, he would further have to be able to finance the predatory conduct by outside creditors, and such creditors would then have to be unable to pierce the corporate veil to

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<sup>234</sup> See *id.* ¶ 1462b at 223. In such a case the alleged conspiracy is also implausible because it is unnecessary to the termination, which can be effected by the manufacturer alone. See *id.* ¶ 1468 at 276.

<sup>235</sup> See *id.* ¶ 1462b at 223.

<sup>236</sup> See *id.* ¶ 1462b at 222.

<sup>237</sup> See *Copperweld*, 467 U.S. at 774. The dissent's criticism that the Court does not assess the competitive significance of the conduct in the case is therefore unwarranted. Cf. 467 U.S. at 795-96 (Stevens, J., dissenting). See also Gregg, *supra* note 31, at 378 (same critique). As is true with most intra-enterprise conspiracy cases the court found no connection between Regal's status as a subsidiary rather than a division and the anticompetitive conduct of the corporate group. This status did indeed neither influence the content nor the impact of the letters Copperweld and Regal sent.

<sup>238</sup> 467 U.S. at 794 (Stevens, J., dissenting).

collect the subsidiary's losses from the parent.<sup>239</sup> Moreover, since it has turned out that predation is often hard to distinguish from competitive practices, it might not be a wise choice to attempt to do so at all absent actual or prospective monopoly power.<sup>240</sup>

Thus, the cases thought to be intra-enterprise conspiracy cases regularly do not turn on the existence of commonly owned corporations. This makes the intra-enterprise conspiracy doctrine's lack of a sound policy justification all the more apparent.

Even worse, the doctrine can cover other policy considerations underlying a decision.<sup>241</sup> The conduct addressed by the intra-enterprise conspiracy doctrine is subject to scrutiny under section 2 when the actor is a monopolist or attempts to acquire monopoly power. Where it is found lawful after scrutiny "any failure to control the monopolist's behavior reflects policy judgments about the proper boundaries of the law."<sup>242</sup> While one might disagree with these judgments, there is little use in labeling such behavior an intra-enterprise conspiracy instead. That neither replaces the need for a policy judgment nor its content.<sup>243</sup> Presenting a policy justification for its holding is exactly what the doctrine fails to do.<sup>244</sup> Instead it raises the risk that courts might fail to face the policy issue when implementing the intra-enterprise conspiracy doctrine.<sup>245</sup>

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<sup>239</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 238-39.

Since the parent in this example caused the losses for its own benefit, it has arguably abused the corporate form, which should in turn give creditors a strong case when it comes to piercing. Piercing the corporate veil is further discussed *infra* Ch. Four I. F. 1.

<sup>240</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 239.

<sup>241</sup> Compare *id.* ¶ 1464e at 242 (arguing that the decision whether a resale price maintenance agreement with a dealer existed should not be hidden behind an intra-enterprise conspiracy among a manufacturer and its subsidiary).

<sup>242</sup> *Id.* ¶ 1464e at 243; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 456.

<sup>243</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 243; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 456.

<sup>244</sup> See Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 453.

<sup>245</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 243-44 (discussing *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) and finding, "Focusing on intra-enterprise conspiracy diverted the court's attention from inquiring into antitrust

## 6. The Intra-enterprise Conspiracy Doctrine and the Enforcement Gap

An important last point to address is the so-called enforcement gap. The impulse for finding a conspiracy in typical intra-enterprise conspiracy cases has often been a desire to give a remedy to a plaintiff complaining about essentially unilateral behavior. The idea of a conspiracy among affiliated corporations is thus used to fill a perceived gap in the Sherman Act between monopolization and concerted action.<sup>246</sup> The position that the intra-enterprise conspiracy doctrine is needed at least to fill gaps between section 1 and section 2 is articulated in the following statement:

The rule of *Yellow Cab* thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations, which have sufficient market power to restrain marketwide competition, but not sufficient power to be considered monopolists within the ambit of section 2 of the Act. The doctrine is also useful when a third party declines to join a conspiracy ... among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party, only an agreement between the affiliated corporations can be the basis for section 1 inquiry.<sup>247</sup>

The doctrine enables courts to reach anticompetitive behavior not threatening monopolization and not otherwise constituting a conspiracy. However, the mere fact that the doctrine is able to cover situations not otherwise covered by the antitrust laws is not by itself sufficient to legitimize it, because it does not show that the antitrust laws were

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policy. The court's apparent belief that the defendant had committed some tort-like offense deserving the punishment of treble damage led it to rush to judgment without any legal standard, other than the pretense of a conspiracy, for unilateral action."); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 463 n. 41 (same).

<sup>246</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1462b at 223, ¶ 1464e at 240; Willis & Pitofsky, *supra* note 20, at 22.

The interpretation of Oklahoma's equivalent to section 1 Sherman Act to include unilateral restraints of trade effectively closes this gap. *See* Smith, *Two to Tango*, *supra* note 60, at 421, 423. However, the Oklahoma Antitrust Act's broader reach results from the statute's different wording. *See supra* note 60.

<sup>247</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 790-91 (1984) (Stevens, J., dissenting). *See also* Alessandria, *supra* note 55, at 554 ("significant 'gap' ... defined by single entity conduct which unreasonably restraints trade or commerce, but which does not amount to monopolization or attempts to monopolize under section 2."); Goodwin, *supra* note 31, at 764-65 (realizing a gap and doubting the appropriateness of alternative provisions).

meant to cover these situations. To argue that affiliates must be seen as individual corporations able to conspire instead of as single entities since otherwise they could not conspire with each and thereby fulfill section 1 is close to circular reasoning. Whether the affiliated group is to be observed as one entity or as several is the very point at issue. That a certain conduct can only be treated as collective if the actors are independent entities is a logical consequence of a corresponding classification of these actors, but it cannot explain why this classification is right. It does not substituted reasons why affiliated corporations should be regarded as independent corporations rather than as a single entity.

A typical situation where the need for a gap-filler is felt are concerted refusals to deal by affiliates.<sup>248</sup> A corporate group might refuse to supply would-be dealers because they would not obey a pricing scheme, patronized rival suppliers, or because the group decided to distribute products itself or through different dealers. Under the *Colgate* doctrine,<sup>249</sup> section 1 sanctions only collective refusals to deal. So it is said that without the intra-enterprise conspiracy doctrine, the boycotting affiliates would be seen as a single entity, which is generally free to choose with whom and on what terms to deal as long as it does not have monopoly power. Dealers, distributors, or franchisees attempted to circumvent *Colgate* by using the intra-enterprise conspiracy doctrine against vertically integrated manufacturers, which had their distribution branch separately incorporated.<sup>250</sup>

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<sup>248</sup> For examples of such situations see *Sancap Abrasives Corp. v. Swiss Indus. Abrasives Group*, 68 F. Supp. 2d 853 (N.D. Ohio 1999); *S.O. Textiles Co., Inc. v. A & E Products Group, Inc.*, 18 F. Supp. 2d 232 (E.D. N.Y. 1998); *Lambtek Yogurt Machines v. Dreyer's Grand Ice Cream, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,891 (N.D. Cal. 1997); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125 (3d Cir. 1995); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012 (5th Cir. 1984).

<sup>249</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>250</sup> See *Handler & Smart*, *supra* note 17, at 68-69; *Steinberg*, *supra* note 17, at 541 n.69. For concerted refusals to deal plaintiffs would then rely on *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

However, in many of these cases the doctrine is not necessary to invoke section 1. Even without the intra-enterprise conspiracy doctrine courts have limited *Colgate* “virtually to the point of extinction.”<sup>251</sup> A conspiracy will often be found between the supplier and the refused dealer during the time the dealer was complying with the supplier’s demand.<sup>252</sup> Alternatively, a conspiracy might exist between the supplier and its other dealers or third parties which aided the supplier. If the refusal to deal turns out to be wholly unilateral, then it is and should not be covered by section 1.<sup>253</sup>

Other types of conduct involved in intra-enterprise conspiracy cases are various types of claimed unfairness toward different market participants. However such conduct will often be reached by state law as an effective alternative. For example, with regard to Copperweld’s unfair competition practices everyone seemed “to agree that this conduct was tortious as matter of state law.”<sup>254</sup>

A final group of cases may be summarized as involving predatory pricing or exclusionary conduct. The dissent suggested that conduct such as excessive advertising or

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There the Court stated, “[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.” *Id.* at 212.

<sup>251</sup> Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 455 n.7. See also Assant, *supra* note 121, at 76 (arguing to the same extent). See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

<sup>252</sup> Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 455; Assant, *supra* note 121, at 76.

<sup>253</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 242-43 (“In the absence of monopoly power or its prospect, the manufacturer choosing his own distribution network ... *should* be left undisturbed by anti-trust courts. The fortuitous presence of the credit-granting subsidiary, even one with which the parent manufacturer ‘agrees,’ is simply irrelevant ...”); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 455. See also Assant, *supra* note 121, at 76 (“[T]he demise of the doctrine would have a de minimis effect upon refusal to deal cases.”).

This is unlike saying refusals to deal are procompetitive. To the contrary, since rejecting a transaction within the normal sphere of the market is antithetical to the marketplace paradigm a refusal to deal is normally not in accord with the idea of free and open markets. See Ponsoldt, *Refusals to Deal*, *supra* note 60, at 509. But for the aforementioned reasons unilateral refusals to deal are not (and should not be) covered by section 1 of the Act. For a possible application of section 2 see *infra* notes 275-92 and accompanying text.

<sup>254</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 779 (1984) (Stevens J. dissenting).

annual style changes could be reached through use of the intra-enterprise conspiracy.<sup>255</sup> This example shows the difficulty of the approach. The criterion of excessiveness is extremely vague,<sup>256</sup> and vagueness is a general problem with the dissent's approach. For example, the dissent claims it does not want to police the pricing of affiliated corporations by finding it not unreasonable because such pricing does not eliminate any competition that would otherwise occur. This, of course, can be said about all intra-enterprise contacts.<sup>257</sup> The dissent fails to present a coherent standard that could practically distinguish anticompetitive from neutral conduct within an enterprise.<sup>258</sup>

Turning back to the gap, these examples show that any gap created by rejecting the intra-enterprise conspiracy is modest at most.<sup>259</sup> A corporation's initial acquisition of control will always be scrutinized under section 1 of the Sherman Act and section 7 of the Clayton Act. This inquiry takes into account that the then affiliated corporations will cease competing with each other as a result of the acquisition. This reveals another inconsistency of the intra-enterprise conspiracy doctrine: because approval of the merger reflects a judgment that coordinating the operations of the two firms is more likely to result in beneficial efficiencies than in harm to competition, calling such coordination a conspiracy later would be contradictory and prevent the very efficiencies that justified the merger.<sup>260</sup> In addition to this initial control, an enterprise's ongoing conduct is fully subject to section 2 of the Sherman Act and section 5 of the Federal Trade Commission

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<sup>255</sup> *Id.* at 791 n.22 (Stevens, J., dissenting).

<sup>256</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464c at 237.

<sup>257</sup> *Id.* ¶ 1464c at 237 and *supra* Ch. Three II. B. 4.

<sup>258</sup> See also *supra* note 185 and accompanying text.

<sup>259</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464a at 233, ¶ 1464e at 241. See also Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 455 (doubting that any significant gap exists); Smart, *supra* note 185, at 1066 (same).

<sup>260</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466d at 253-54.



Act.<sup>261</sup> Even though tending to be liberal, state law of unfair competition offers yet another control mechanism. That these possibilities are adequate is supported by the fact, that none of the Supreme Court cases would come out differently today without the intra-enterprise conspiracy doctrine.<sup>262</sup>

Thus, rejecting the intra-enterprise conspiracy doctrine does not leave victims of anticompetitive practices without a remedy. To be sure, federal antitrust law, offering treble damages, attorney's fees, loose pleading, generous discovery, and a federal forum, is often more attractive for plaintiffs than state law. Such features, however, are not essential parts of justice.<sup>263</sup> Moreover, the Sherman Act was not made to cover every unfair, anticompetitive, or even criminal act, and it is unnecessary to stretch its boundaries to reach conduct adequately dealt with by contract, tort, or criminal law.<sup>264</sup>

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<sup>261</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984). See also Steinberg, *supra* note 17, at 561-62.

In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972), the Supreme Court held that under section 5 of the FTC Act the Federal Trade Commission has the power "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." Nevertheless the provision has some important limitations. It does not provide criminal penalties, or treble damage awards, nor does it establish a private right of action, and an FTC action must involve the public interest. Furthermore, entire industries are excluded. See Neri, *supra* note 20, at 963 n.154; Goodwin, *supra* note 31, at 764 n.46; *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1157 n.21 (La. 1986). Commentators have also noticed that section 5 of the Federal Trade Commission Act has not been used to reach unilateral restraints of trade. See Smith, *Two to Tango*, *supra* note 60, at 407.

<sup>262</sup> *Copperweld*, 467 U.S. at 777; Robberson, *supra* note 23, at 791.

<sup>263</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 245; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 456. See also 467 U.S. at 777 ("Elimination of the intra-enterprise conspiracy doctrine ... will simply eliminate treble damages from private state tort suits masquerading as antitrust actions."); Meyers, *supra* note 14, at 1426 ("Plaintiffs often try to formulate and plead non-antitrust claims in antitrust terms so that they will reap the treble damage awards and attorneys' fees recoverable under antitrust law."). Treble damage awards are not even an inevitable part of antitrust law. This can be seen from the fact that not all state and hardly any foreign antitrust law provides them.

Furthermore, while the treble damage provision is designed to deter antitrust violations and to encourage private parties to engage in costly and uncertain litigation the intra-enterprise conspiracy provides an example where the treble damage provision creates the possibility of frivolous or misdirected suits. Cf. Smith, *Two to Tango*, *supra* note 60, at 417; Meyers, *supra* note 14, at 1426. But see Brown, *supra* note 60, at 800-01 (arguing that deterrence effect intra-enterprise conspiracy gained from threat of treble damages was efficiency creating).

<sup>264</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 244-45; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 456. See also Meyers, *supra* note 14, at 1427.

All of that notwithstanding, if a need is felt for a tighter antitrust control on single firm conduct, the intra-enterprise conspiracy doctrine is simply not the right device.<sup>265</sup> Even if the doctrine were able to reach anticompetitive conduct by single enterprises it would do so only episodically and fortuitously.<sup>266</sup> Because separate incorporation is not significantly linked to competitive impact,<sup>267</sup> the doctrine reaches conduct by chance. The same conduct with identical effects could not be sanctioned if it were undertaken by a divisional organized enterprise without separately incorporated subsidiaries. Even within a corporate group, coordination could only be objected if it occurred through means of an agreement, not if a parent corporation used its influence as a shareholder of its subsidiaries to coordinate them. Therefore, the intra-enterprise conspiracy doctrine treats similarly situated enterprises differently. But justice demands similar treatment for actors who are not significantly different.<sup>268</sup> Antitrust liability should not turn on interchangeable forms of organization.<sup>269</sup> Judging the same behavior differently based on the – from the viewpoint of competition – coincidence of separate incorporation is not persuasive.<sup>270</sup>

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<sup>265</sup> Compare Keyte, *supra* note 84, at 882 (calling it an underlying policy question, whether it is wise to use section 1 to combat anticompetitive conduct of single firm). See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 245 (arguing that there is no need for an intra-enterprise conspiracy doctrine in order to control significant anticompetitive behavior).

<sup>266</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464d at 238, ¶ 1464e at 242; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 454. See also Smart, *supra* note 185, at 1067 (“fortuitous basis ... whether a corporation has organized itself into divisions or subsidiaries”); Robberson, *supra* note 23, at 788 n.44.

<sup>267</sup> See *supra* Ch. Two I. A. and Ch. Three II. B. 5.

<sup>268</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e 241. See also *id.* ¶ 1464e at 242 n.24 (giving the example that it seems unjust to condemn one out of two competing cereal makers for “annual style changes” or “excessive advertising” [practices the *Copperweld* dissent wants to challenge, see *Copperweld*, 467 U.S. at 791 n.22 (Stevens, J., dissenting) and *supra* note 255 and accompanying text] because only one of them happens to operate through subsidiaries).

<sup>269</sup> See 467 U.S. at 772; Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1131-32 (3d Cir. 1995).

<sup>270</sup> A division can enjoy as much (or as few) freedom in its business as a subsidiary. In *Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915, 924 (D. Haw. 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969) the court in its finding of a conspiracy among different divisions of Seagram was apparently confused by the fact that Seagram’s divisions were as independent and competitive as they were when they were subsidiaries. See *id.* at 920 n.17.

Furthermore, the distinction between collective and unilateral conduct is at the very heart of the Sherman Act. Labeling unilateral conduct as collective to fill a supposed gap should not circumvent it. It has been said that using the intra-enterprise conspiracy doctrine to fill such gaps is an illegitimate use of judicial power.<sup>271</sup> Congress was aware of that distinction when it drafted the Sherman Act. Any observed gap in the Act's coverage is "less an unfortunate legislative oversight than a statutory design subjecting a single enterprise to Sherman Act scrutiny only where monopoly is present or threatened."<sup>272</sup> The courts must recognize such a gap if it stems from the plain language and the purpose of the statute. Any attempt to bridge the gap between the two sections would usurp the legislative power of Congress, which had over a century to close the gap if it felt the need to do so.<sup>273</sup> Thus, it would be up to Congress, not the courts, to fill the gap and provide a remedy for single firm conduct short of attempted monopolization.<sup>274</sup>

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See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464a at 233-34. But see Alessandria, *supra* note 55, at 569 (agreeing that the distinction between unincorporated division and wholly owned subsidiary is artificial, but concluding that therefore section 1 should reach intracorporate conspiracies, too).

<sup>271</sup> Assant, *supra* note 121, at 76.

<sup>272</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464a at 234. See also *id.* ("It is sensible to treat an enterprise differently from horizontal or vertical agreements among unrelated firms even when its power exceeds that of many illegal cartels."); *Copperweld*, 467 U.S. at 775 ("Congress left this 'gap' for eminently sound reasons."); Smart, *supra* note 185, at 1066; Thomson, *supra* note 60, at 211 ("[The drafters of the Sherman Act] intentionally left an 'enforcement gap' between sections 1 and 2 of the Act to promote competition by encouraging efficient, coordinated business activity within a single corporate entity.").

<sup>273</sup> See Assant, *supra* note 121, at 76. See also Smith, *Original Intent*, *supra* note 81, at 1180 ("[B]y construing section 1 too broadly, courts would be circumventing both the statutory scheme and the will of Congress ...").

<sup>274</sup> See Smart, *supra* note 185, at 1066-67.

A prudent step short of new legislation might be to reconsider the scope of the attempted monopolization offense pursuant to section 2.<sup>275</sup> While a complete review of this standard is beyond the scope of this paper, a few things should be noticed.

First, it is somewhat unclear how significant a difference between the two sections remains today. At least one commentator suggests that the gap recognized in *Copperweld* has vanished.<sup>276</sup> According to this point of view, it has become increasingly difficult to distinguish cases prosecuted under section 1 and 2.<sup>277</sup> Economic concepts such as market power have made their way into section 1. Direct evidence of market power, such as actual exclusion, lower output, or higher prices, is given greater weight in both sections and erodes different thresholds based on market share.<sup>278</sup> Finally, persistently raised requirements of proof for section 1 bring the two sections further in line with each other.<sup>279</sup>

Others, however, still observe significant differences. They point to the difficulty of proving the required monopolistic intent, and they expect the evidentiary burden for a

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<sup>275</sup> See, e.g., SULLIVAN & GRIMES, *supra* note 11, at 185-86; Assant, *supra* note 121, at 76; Ponsoldt, *Refusals to Deal*, *supra* note 60, at 511-12 (“[For courts accepting a single entity defense] ... a renewed look at the unilateral refusal-to-deal theory, and a reawakening of the traditional monopolization doctrine is appropriate.”). See also James F. Ponsoldt, *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of 'Dangerous Probability of Success'*, 61 NOTRE DAME L. REV. 1109, 1113 (1986) [hereinafter Ponsoldt, *Clarifying the Attempt*] (stating that together with section 1 limitations on section 2’s attempt prohibition created the gap).

If compared with new legislation revisiting section 2 might also be the more efficient solution. See generally Ponsoldt, *Enrichment of Sellers*, *supra* note 34, at 1167 (“[L]egislatures will ... impose more intrusive, less efficient forms of regulation if traditional antitrust policing does not occur or is unsuccessful.”).

<sup>276</sup> See Gavil, *supra* note 64. But see *Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451, 481 (1992) (“Monopoly power under section 2 requires, of course, something greater than market power under section 1.”).

<sup>277</sup> Gavil, *supra* note 64, at 88. Even though this might go a little far the result would strengthen the point that significant anticompetitive behavior will not slip through a gap in the Sherman Act’s coverage – simply because there is no such gap according to this analysis.

<sup>278</sup> *Id.* at 89. See also Ponsoldt, *Refusals to Deal*, *supra* note 60, at 515 (suggesting that just as *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85 (1984) and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) recognized that market definition structural analysis is but a surrogate for the unreasonableness of a restraint in section 1, so has *Kodak* recognized that direct evidence of control over prices or the power to exclude competition is sufficient to proof monopoly power).

<sup>279</sup> Gavil, *supra* note 64, at 106-07.

section 2 claim to be higher.<sup>280</sup> It is still true today, that section 2 normally requires proof of a dominant market share in a relevant market.<sup>281</sup> Ironically, *Copperweld* seems to have reinforced the trend in the lower courts to limit section 2. The Supreme Court's language discussing the distinction between concerted and unilateral action was partially understood to reserve section 2 for selected occasions.<sup>282</sup> Thus, it seems that a gap between section 1 and section 2 still exists.

Second, in order to reach conduct not yet covered, one suggestion is to construe the attempted monopolization offense so as to forbid all blatantly anticompetitive single firm conduct.<sup>283</sup> In this context, it might be worth recalling the structure-conduct continuum courts have recognized for evaluating challenged behavior for its legality under section 2.<sup>284</sup> "Under that continuum, the more economic power the defendant possesses, the less overtly predatory its conduct must be to violate section 2, and vice versa."<sup>285</sup> The last words are important. While ordinarily discussed with respect to arguably ambiguous

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<sup>280</sup> Cf. Willis & Pitofsky, *supra* note 20, at 22 (monopolistic intent); Thomson, *supra* note 60, at 199 (evidentiary burden). See also Ponsoldt, *Refusals to Deal*, *supra* note 60, at 511 (pointing out that even without direct evidence concerted action is usually not too difficult to prove based on circumstantial evidence); Robberson, *supra* note 23, at 782 (stating that the lighter burden of proof in a section 1 action is one of the main attractions of using a conspiracy theory rather than a unilateral conduct theory).

<sup>281</sup> Ponsoldt, *Refusals to Deal*, *supra* note 60, at 510. This has been a major incentive for plaintiffs in refusal to deal cases to allege concerted action and rely on a boycott theory under section 1.

<sup>282</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 367-71 (discussing cases that used *Copperweld* to limit section 2).

Especially the court's words that a single firm's conduct is prohibited "only when it threatens actual monopolization", *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984), and that the Sherman Act permits scrutiny "of single firms only when they pose a danger of monopolization" *id.* at 768, have been used to limit section 2 to actual and probable monopolization. See Calkins, *Copperweld in the Courts*, *supra* note 165, at 368-370. However, Professor Calkins is right to notice, "[e]verything in a section 1 opinion about section 2 is dictum." *Id.* at 369-70. See also *Carl Hize & Sons, Inc. v. Browning-Ferris Industries, Inc.*, 590 F. Supp. 1201, 1202 (D. Colo. 1984) (holding that *Copperweld* does not undermine a section 2 claim).

<sup>283</sup> See SULLIVAN & GRIMES, *supra* note 11, at 185. See also *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

<sup>284</sup> See Ponsoldt, *Refusals to Deal*, *supra* note 60, at 512 (dating the continuum back to at least *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911)).

<sup>285</sup> Ponsoldt, *Refusals to Deal*, *supra* note 60, at 512.

conduct of a firm with a high market share,<sup>286</sup> the other extreme of the scale is of greater interest here. It would lie in the logic of the continuum that an entity with a much smaller market share could nevertheless be liable of attempted monopolization if its conduct is all the more predatory, i.e. blatantly anticompetitive. The Supreme Court in *Kodak* expressed an increased willingness to consider a defendant's power to control prices or exclude competition to infer market power.<sup>287</sup> Furthermore, this approach would neither conflict with the requirement of an overt act constituting anticompetitive conduct nor would it abstain from the required specific intent to monopolize. However, the Supreme Court has also established a dangerous probability of success as an additional requirement of the attempt offense.<sup>288</sup> Not only does that place the burden of a structural case on the plaintiff,<sup>289</sup> a dangerous probability of success will also be hard to show in a case like *Copperweld*.<sup>290</sup> Even though clearly exclusionary, it is doubtful whether a court would

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<sup>286</sup> See, e.g., *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>287</sup> See Ponsoldt, *Refusals to Deal*, *supra* note 60, at 516; *Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451, 469 (1992) (“[KODAK] must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable.”).

<sup>288</sup> See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). See also *Horst v. Laidlaw Waste Sys., Inc.*, 917 F. Supp. 739, 742 (D. Colo. 1996) (“Courts insist that such a showing [of a dangerous probability of success] be made because otherwise the Sherman Act could unwittingly be expanded into an unfair competition statute.”). But see Ponsoldt, *Clarifying the Attempt*, *supra* note 275, at 1139-42 (arguing that a dangerous probability requirement is only appropriate in cases involving ambiguous practices able to serve either anticompetitive or legitimate business purposes). Professor Ponsoldt gives as an example where he thinks a probability of success requirement superfluous “conduct which cannot serve any purpose other than restricting competition, i.e., barring entry.” *Id.* at 1142-43. Thus, according to this approach a dangerous probability of success would not be necessary where a firm – like *Copperweld* – successfully excluded its rival.

<sup>289</sup> See *Spectrum Sports*, 506 U.S. at 456, 459 (“[D]emonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market.” *Id.* at 459). See also, e.g., *Laidlaw Waste Sys.*, 917 F. Supp. at 742-43 (“The likelihood of successful monopolization is typically evaluated by examining the defendant’s share of the relevant market.”).

<sup>290</sup> See, e.g., *Sancap Abrasives Corp. v. Swiss Indus. Abrasives Group*, 68 F. Supp. 2d 853, 860 (N.D. Ohio 1999) (holding that a dangerous probability of success requires market power that approaches monopoly power and “market power is often indicated by market share”). See also Assant, *supra* note 121, at 76 (suggesting that the Supreme Court may eliminate the dangerous probability of success requirement in order to sanction unilateral anticompetitive behaviors).

find the conduct Copperweld and Regal engaged in to employ “methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close to create a dangerous probability of it.”<sup>291</sup> Copperweld’s market share was apparently relatively small and the temporary exclusion of Independence did not bring it close to monopoly.<sup>292</sup> It seems that until courts are willing to infer market power from conduct even without outstanding market shares, it will be difficult to invoke section 2 against anticompetitive behavior of a single firm.

## 7. Result

The clarity of arguments shows that the Supreme Court was right to overrule the intra-enterprise conspiracy doctrine with respect to parents and wholly owned subsidiaries.

Lower courts, often reluctant to apply the intra-enterprise conspiracy doctrine before,<sup>293</sup> quickly picked up the Court’s holding and refer to it routinely.<sup>294</sup> Commentators,

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<sup>291</sup> American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946).

<sup>292</sup> The situation in *Copperweld* is not quite clear. The circumstances that Regal has been the price leader in a market with relatively stable prices, which Independence lowered on three occasions after its entry all indicate a noncompetitive market with a probably oligopolistic structure. See Goodwin, *supra* note 31, at 774 (arguing to the same extent). However, in the petition for writ of certiorari (No. 82-1260, Jan. 28 1983) petitioners Copperweld and Regal argued that it was undisputed that the affected market was at all times highly competitive. Whatever the market structure was, Regal’s market share seems to have been relatively low for the section 2 claim was dropped prior to trial.

<sup>293</sup> See *supra* Ch. Three I. G.; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 462-63; Robberson, *supra* note 23, at 786.

<sup>294</sup> Recent cases applying *Copperweld*, i.e. finding a parent and a subsidiary incapable of conspiring, include, Eichorn v. AT & T Corp., 248 F.3d 131, 138-39 (3d Cir. 2001) (finding internal restrictions between a corporation and its wholly owned subsidiary not in violation of section 1 of the Sherman Act even though the corporations were in the process of becoming separate entities); Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1000 (3d Cir. 1994); Sancap Abrasives, 68 F. Supp. 2d at 859; S.O. Textiles Co., Inc. v. A & E Products Group, Inc., 18 F. Supp. 2d 232, 242 (E.D. N.Y. 1998); Lambtek Yogurt Machines v. Dreyer’s Grand Ice Cream, Inc., 1997-2 Trade Cas. (CCH) ¶ 71,891 (N.D. Cal. 1997); Mitsubishi Elec. Corp. v. IMS Technology, Inc., No. 96 C 499, 1997 WL 630187, at \*4-5 (N.D. Ill. Sept. 30, 1997); Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 748 (D. Md. 1997), *aff’d*, 141 F.3d 1162 (4th Cir. 1998); West Bolyston Cinema Corp. v. Paramount Pictures Corp., No. Civ. A. 98-00252, 2000 WL 1468513, at \*12 (Mass. Super. Sept. 21, 2000). See also Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc., 671 F. Supp. 1525, 1544 n.24 (C.D. Cal. 1987) (“[*Copperweld*’s] holding has been uniformly followed in this and other

which had been mostly critical of the doctrine, applauded the Court's decision.<sup>295</sup> Some though continue to criticize it<sup>296</sup> or agreed with the dissenting opinion.<sup>297</sup> For example, one commentator argued that *Copperweld* is too far a step in the other direction again disregarding economic realities.<sup>298</sup> According to this source, if a wholly owned subsidiary can take independent action, it is able to conspire with its parent.<sup>299</sup> However, this observed freedom of the subsidiary is illusory because of the subsidiary's inability to act contrary to its parent's will.<sup>300</sup> The parent always has at least potential control over its subsidiary even if the parent decides not to exercise this power.

This criticism notwithstanding, the Supreme Court settled most of the dispute in the area. It correctly found section 1 inapplicable to what is economically a single entity. The antitrust law has no reason to control or prohibit communication and coordination between commonly owned corporations.<sup>301</sup> The language and purpose of the Sherman Act bar the application of section 1 to inter-enterprise conduct.

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Circuits.”); II EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW 31 n.107j (Supp. 2000) (citing numerous cases applying *Copperweld*).

<sup>295</sup> See, e.g., VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464e at 245 (“The invention of an intermediate category of unilateral conduct that may be condemned without the discipline of section 2 when separate corporations happen to be involved is largely unnecessary, contrary to the statutory scheme, unjust, and probably ineffective. *Copperweld* was correctly decided.”); VI BLUMBERG & STRASSER, LCG – STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 515; Eskridge, *supra* note 108, at 1379; Smart, *supra* note 185, at 1064, 1066; Sommer, *supra* note 1, at 278; McNamara, *supra* note 23; Penn, *supra* note 9; Steinberg, *supra* note 17; Thomson, *supra* note 60.

<sup>296</sup> See, e.g., Huie, *supra* note 218, at 325-27 (calling *Copperweld* an “unfortunate” decision “that seems to ignore the legislative purpose behind the Sherman ... Act” and urging to focus on “impermissibly anticompetitive behavior instead of percentages of ownership”); Brown, *supra* note 60; Goodwin, *supra* note 31 (calling the majority’s approach inflexible and Chicago-minded and urging for a rule of reason approach and new legislation to cover single-firm conduct); Neri, *supra* note 20.

<sup>297</sup> See, e.g., Alessandria, *supra* note 55 (arguing for a case by case approach based on the rule of reason); Gregg, *supra* note 31 (reasoning backwards that where intra-enterprise activities restraint trade unreasonably, courts should treat the actors as separate legal entities and *look* for an agreement) (emphasis provided).

<sup>298</sup> Prell, *supra* note 9.

<sup>299</sup> *Id.* at 1170-71.

<sup>300</sup> See *supra* Ch. Three II. B. 4.

<sup>301</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1468 at 275.



### C. Prospect of the Further Analysis

The Court limited its holding to parent corporations and wholly owned subsidiaries.<sup>302</sup> It did not deal with the requirements of a single entity generally. The central issue, however, is: when do affiliated corporations constitute a single entity?<sup>303</sup> Or in other words: when are entities sufficiently separate that Sherman Act conspiracy is possible? Therefore the need for a broader solution based on a consistent concept remains, and *Copperweld* can merely be the starting point. In this capacity, it nevertheless gives some important hints. What is clear from the decision is that economic substance rather than corporate form is the proper focus for the conspiratorial capacity question.<sup>304</sup> Furthermore, the Court suggested to be decisive whether the related corporations have a “unity of purpose and common design,”<sup>305</sup> whether there is a “sudden joining” of independent sources of economic power which previously pursued separate interests,<sup>306</sup> and whether a lack of “independent centers of decision-making” existed.<sup>307</sup> Thus, to constitute a single entity, a corporate group has to have common economic objectives and one part of the group has to be able to guide the economic forces of the rest.<sup>308</sup> The standard any single

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<sup>302</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (“We limit our inquiry to the narrow issue ... whether a parent and its wholly owned subsidiary are capable of conspiring in violation of section 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.”).

<sup>303</sup> See, e.g., McNamara, *supra* note 23, at 1259 (calling this issue unsettled after *Copperweld*).

<sup>304</sup> See, e.g., Keyte, *supra* note 84, at 884; McNamara, *supra* note 23, at 1260 n.104 (lower courts should by “mindful of the realities of business relationships”).

<sup>305</sup> *Copperweld*, 467 U.S. at 771. This, however, is basically just a restatement of the conspiracy definition. What is meant is that the affiliated corporations have one mind and a common purpose *before* they join for the alleged conspiracy.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 769.

<sup>308</sup> See, e.g., Keyte, *supra* note 84, at 884 (“[*Copperweld*] 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.”).

entity concept has to refer to is the unitary firm.<sup>309</sup> An affiliation that closely resembles a standard single firm should be eligible for a single entity exemption while only loosely affiliated corporations should not.

Any proposed standard has to fight some inherent tension. In order to be just to the myriad of differently structured modern corporate groups, it tends to be fact-intensive while efficiencies in litigation and predictability for the business world call for a simple rule.<sup>310</sup> Moreover, an ideal standard should be resistant to easy manipulation and sensitive to the goals of antitrust such as promoting independent centers of initiative.<sup>311</sup>

The following chapter will examine to what situations *Copperweld* can be expanded and will then continue to suggest a standard with a broader applicability as to how a single entity can be determined in the corporate context. Before turning to this issue, it is worth pausing a moment to examine the development in the European Union.

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<sup>309</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1476d at 262 (single corporation is “the model for the single economic unit that the courts are seeking”).

<sup>310</sup> See generally Ponsoldt, *Enrichment of Sellers*, *supra* note 34, at 1170-71 (mentioning as advantages of the per se rule that it “creates predictability and provides notice to the business community ... thereby eliminating inefficiency caused by uncertainty; and ... creates efficiencies in litigation, making it less expensive and time consuming to resolve controversies ...”).

<sup>311</sup> See Penn, *supra* note 9, at 376 n.74; Steinberg, *supra* note 17, at 568.

### III. The Situation in the European Union

Although a literal construction of article 81 of the EC Treaty,<sup>312</sup> the functional equivalent of section 1 of the Sherman Act, would not bar its application to affiliated corporations,<sup>313</sup> the Court of Justice of the European Communities never recognized an intra-enterprise conspiracy doctrine. Nevertheless, there was some inconsistency in the Court's case law as to when affiliated corporations or groups of undertakings would be exempted from article 81.<sup>314</sup> The landmark case of *Viho Europe*<sup>315</sup> brought clarification – at least in part – and left the European law in a position roughly comparable to that of American law.

In this case, Viho Europe BV, a Dutch wholesaler, importer and exporter of office equipment, unsuccessfully attempted to enter into business relations with the English company Parker Pen Limited, a manufacturer of writing utensils. Parker was selling its products throughout Europe through either wholly owned subsidiaries or independent distributors. Sales, marketing and staff policy of the subsidiaries were controlled by

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<sup>312</sup> TREATY ESTABLISHING THE EUROPEAN COMMUNITY (AMSTERDAM CONSOLIDATED VERSION), Nov. 10, 1997, O.J. (C 340) 173 (1997) [hereinafter EC TREATY] article 81, formerly article 85, provides in pertinent part “(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, ... (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void. (3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of: ... [concerted action] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

<sup>313</sup> See Opinion of the Advocate General Lenz in Case C-73/95 P, *Viho Europe BV v. Commission*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419, para. [59] (E.C.J. 1996) (“[T]he view taken by the Court of First Instance presupposes that agreements within a single economic unit can never fall under article 85 [now article 81]. That certainly cannot be deducted from the wording of article 85 alone.”).

<sup>314</sup> See, e.g., Opinion of the Advocate General Lenz in [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419, para. [48] (“Considered as a whole, the decisions ... present an inconsistent picture.”).

<sup>315</sup> Case C-73/95 P, *Viho Europe BV v. Commission*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 (E.C.J. 1996).

Parker. Viho had tried to obtain Parker products upon the same terms as Parker's subsidiaries and independent distributors. However, it was Parker's distribution policy to refer all customers' requests to the subsidiary, which has its place of business in the country in which the customer is established. This policy restricted Parker's subsidiaries to their allocated territories and prevented Viho from obtaining supplies freely within the Common Market from the subsidiary of its choice. Viho went on to lodge a complaint with the Commission alleging that Parker's market allocation and territorial restraints constituted an infringement of article 81 (1), and prohibited the exports of Parker products, thereby dividing the Common Market along national borders and maintaining artificially high prices for Parker products on those national markets.<sup>316</sup> Upon rejection of the complaint concerning the practices within the Parker group, Viho brought an action before the Court of First Instance,<sup>317</sup> which it afterwards appealed to the Court of Justice.

The Court of Justice affirmed the lower court's decision, which had in turn affirmed the Commission's decision. Reciting prior cases, the Court of Justice held that Parker and its subsidiaries "form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them."<sup>318</sup> The Court

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<sup>316</sup> Dividing markets along national borders is regarded as a major evil in European law for it is contrary to the Community's central feature of establishing a Common Market. See EC TREATY art. 2 ("The Community shall have as its task, by establishing a common market ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities ...") and art. 3 (c) & (g) ("For the purposes set out in Article 2, the activities of the Community shall include ...(c) an internal market characterized by the abolition, as between the Member States, of obstacles to the free movement of goods, persons, services and capital ... (g) a system ensuring that competition in the internal market is not distorted ..."). The competition law serves to give added support to this goal of a Common Market.

<sup>317</sup> See Case T-102/92, *Viho Europe BV v. Commission*, [1995] E.C.R. II-17, [1997] 4 C.M.L.R. 469 (CFI 1995).

<sup>318</sup> *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [16]. Similar phraseology can be found in Case 66/86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs*, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102, para. [35] (E.C.J. 1989) ("[A]ccording to the case law of the

found article 81 inapplicable to the distribution policy of such an entity even though it recognized that Parker's policy divided national markets between its subsidiaries and could impair the competitive position of third parties. Instead the Court noted that unilateral conduct is subject to review under article 82 of the EC treaty.<sup>319</sup>

The European Court of Justice, the Court of First Instance, and the Commission all had invoked the concept of a single economic entity prior to *Viho Europe*, even though such statements were often offhanded and never so compelling as in this case.<sup>320</sup> After *Viho Europe*, it is clear that separate legal personalities are not sufficient to trigger article 81.<sup>321</sup> Rather economically independent entities are required. Moreover, a central issue was whether the exclusion of a single entity depended upon further requirements.

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Court Article 85 [now Article 81] does not apply where the concerted practice in question is between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market.”); Case 30/87, *Bodson v. Pompes funèbres des régions libérées*, [1988] E.C.R. 2479, [1989] 4 C.M.L.R. 984, para. [19] (E.C.J. 1988); Case 16/74, *Centrafarm v. Winthrop*, [1974] E.C.R. 1183, [1974] 2 C.M.L.R. 480, para. [32] (E.C.J. 1974); Case 15/74, *Centrafarm v. Sterling Drug*, [1974] E.C.R. 619, [1974] C.M.L.R. 557, para. [41] (E.C.J. 1974); Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, [1972] E.C.R. 619, [1972] C.M.L.R. 557, paras. [132]-[135] (E.C.J. 1972) (“The fact that the subsidiary has a distinct legal personality does not suffice to dispose of the possibility that its behavior might be imputed to the parent company. Such may be the case in particular when the subsidiary, although having a distinct legal personality, does not determine its behavior on the market in an autonomous manner but essentially carries out the instruction given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, the prohibitions imposed by Article 85 (1) may be considered inapplicable in the relations between the subsidiary and the parent company, with which it then forms one economic unit. In view of the unity of the group thus formed, the activities of the subsidiaries may, in certain circumstances, be imputed to the parent company.”). See also Decision 69/195, *Re Christiani & Nielsen*, 1969 O.J. (L 165) 12, 1969 C.M.L.R. D36 (Commission 1969) (In the first decision to address the matter in European law the European Commission regarded a wholly-owned subsidiary and its parent as one for the purpose of Community competition law despite their separate legal identities where as a matter of fact the subsidiary was not able to engage in economic action autonomous of its parent company.).

<sup>319</sup> *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [17]. EC TREATY art. 82, formerly art. 86, provides in pertinent part “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. ...”

<sup>320</sup> For examples see *supra* note 318.

<sup>321</sup> See, e.g., opinion of the Advocate General Fennelly in Joined Cases C-395/95P and C-396/96P, *Compagnie Maritime Belge Transports SA v. Commission*, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076,

Particularly, the Court sometimes mentioned that any agreement within an economic unit had to serve an internal allocation of tasks within the group to be excluded;<sup>322</sup> however, the Court never considered the merits of this requirement or specified what types of agreements it would exclude. Thus, it was unclear whether conduct within a single economic unit would be excluded if it restricted the competitive freedom of third parties.<sup>323</sup> In *Viho Europe*, Viho pushed the argument that Parker's territorial restraints went beyond a mere allocation of tasks, and the Advocate General discussed the pros and cons of the additional requirement at length. However, in its brief opinion the Court did not explicitly address the issue. However, since the Court excluded Parker from article 81, it is reasonable to assume that the Court does not consider internal allocation of tasks to be an additional limiting requirement.<sup>324</sup> To the contrary, the Court said that the practice at bar was not subject to article 81 even though it had the potential to impair the competitive position of third parties.<sup>325</sup>

The Court also did not address how the concept of a single economic entity is tied to article 81. Three elements can be construed to exclude coordination within a group of

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para. [21] (E.C.J. 2000) ("Article 85 is concerned with concerted or consensual behavior between *economically* independent undertakings ..." (emphasis provided)).

<sup>322</sup> This requirement can be found in three of the five cases dealing with the application of Article 81 on corporate groups, namely *Bodson*, [1988] E.C.R. 2479, [1989] 4 C.M.L.R. 984; *Centrafarm II*, [1974] E.C.R. 1183, [1974] 2 C.M.L.R. 480; and *Centrafarm I*, [1974] E.C.R. 619, [1974] C.M.L.R. 557, while it is not mentioned in the other two, *Ahmed Saeed Flugreisen*, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102; and *I.C.I.*, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

<sup>323</sup> See, e.g., Assant, *supra* note 121, at 69 (assuming that internal allocation of tasks is a limiting requirement).

<sup>324</sup> See opinion of the Advocate General Fennelly in *Compagnie Maritime*, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076 at para. [24 n.25]; Fleischer, *supra* note 216, at 493.

<sup>325</sup> *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [17]. See also Opinion of the Advocate General Lenz in Case C-73/95 P, *Viho Europe BV v. Commission*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419, paras. [65]-[74] (E.C.J. 1996) (arguing against an additional requirement of internal allocation of tasks); Fleischer, *supra* note 216, at 496 (same). Because the Court's own statement in *Viho Europe* is somewhat short the Advocate General's opinion provides a useful background. For example only in the Advocate General's opinion can the argument – already familiar from the American context – be found that

affiliates from the article's scope. First, the term "undertaking" can be understood in the sense of economic units.<sup>326</sup> Second, even though affiliated corporations might be seen as undertakings, they can be seen as not sufficiently independent to meaningfully agree. Coordination within a corporate group would then not fulfill the element of an agreement or a concerted practice, which presupposes a meeting of minds between undertakings. Third, because there can be no competition between the parent corporation and its subsidiaries in a group the former controls, there is no competition which needs to be protected within the group.<sup>327</sup> After all, the parent corporation can achieve the same result by exercise of its position as a shareholder or other means of control such as directives. Thus, there is no restraint of competition due to a lack of preexisting competition. All three alternatives have their proponents, and often the different opportunities are not even clearly distinguished.<sup>328</sup> The Court of Justice never upheld a position in the dispute before and continued not to do so in *Viho Europe*.<sup>329</sup>

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firms could achieve the competitive impact of subsidiaries through the use of divisions or dependent branches, which are undoubtedly not separate subjects of competition law. *Cf. id.* at para. [69].

<sup>326</sup> See, e.g., opinion of the Advocate General Fennelly in *Compagnie Maritime*, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076 at para. [24] ("[C]oordinated behavior within a group. Such behavior under the control of a parent company does not normally come within Article 85. Rather, the several entities will be treated as a *single undertaking* ...") (emphasis provided).

This is an opportunity apparently not present in American antitrust law since section 1 is framed without that term. See also Fleischer, *supra* note 216, at 494 (arguing that this difference in the statutes' language shows the inappropriateness of an approach built on the term undertaking).

<sup>327</sup> See opinion of the Advocate General Lenz in *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [67].

<sup>328</sup> See, e.g., opinion of the Advocate General Lenz in *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [66] ("Since, according to settled case law, Article 85 is based on a conception of undertakings as economic units, this suggests that in a case such as the present there is not even an agreement or concerted practice.")

<sup>329</sup> Meanwhile the Court might have joined those who think that the concept of an undertaking presupposes economic independence. See Joined Cases C-395/95P and C-396/96P, *Compagnie Maritime Belge Transports SA v. Commission*, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076, para. [35] (E.C.J. 2000) (in the context of Article 82 the Court states "... that the concept of 'undertaking' in the chapter of the Treaty devoted to the rules of competition presupposes the economic independence of the entity concerned.").

This case leaves European competition law at a point close to that of the American antitrust law after *Copperweld*.<sup>330</sup> In both jurisdictions, certain groups of affiliated corporations are excluded from the scope of the antitrust prohibition upon concerted action. The primary argument in both cases was the subsidiary's lack of economic independence and ability to decide and act independently, which renders the corporate group an inadequate subject for a provision that protects economically independent actors in the competitive process. To put it simply, where there is no freedom and no competition, the law cannot protect any. Instead, similar to the Supreme Court in *Copperweld*, the European Court of Justice in *Viho Europe* acknowledged that conduct of a corporate group could be scrutinized under the provision establishing a check on the abuse of market power.<sup>331</sup>

However, what is equally common to both jurisdictions are the limitations of their approaches. Just as in *Copperweld*, the corporate group in *Viho Europe* was made up by a parent and its wholly owned subsidiaries.<sup>332</sup> Furthermore, the Court of Justice did not

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<sup>330</sup> In his opinion, Advocate General Lenz explicitly mentions that the suggested approach – which the Court picked up – is in harmony with *Copperweld*. See opinion of the Advocate General Lenz in *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [73]. That the Court did not explicitly acknowledge this fact is probably only due to the fact that the Court of Justice seldom cites authorities but its own judgments. See also Fleischer, *supra* note 216, at 497-98 (pointing to the similarities of *Viho Europe* with *Copperweld*).

<sup>331</sup> Here section 2 of the Sherman Act and there EC TREATY art. 82. The similarity becomes even more obvious if one considers the following statement from the opinion of Advocate General Lenz in *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [79]: “[T]he approach ... in no way results in the relations between group undertakings being wholly removed from the Community competition rules. It is not disputed that Article 86 [now Article 82] may be applied in such cases. ... The view expressed here does not therefore lead to a gap in the applicability of the Treaty's competition provisions which is incompatible with the scheme of those provisions.” (emphasis provided). See also Case T-102/92, *Viho Europe BV v. Commission*, [1995] E.C.R. II-17, [1997] 4 C.M.L.R. 469 para. [54] (CFI 1995) (“It is not for the Court ... to apply Article 85 to circumstances for which it is not intended in order to fill a gap which may exist in the system of review laid down by the Treaty”).

<sup>332</sup> Even though the Court did not address the details of the corporate relationship, the Advocate General explicitly limited his opinion to the factual circumstances of a wholly owned subsidiary. See opinion of the Advocate General Lenz in *Viho Europe*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 at para. [61] (“[T]he



specify its formula as to when a group of affiliated corporations will be considered a single economic entity. When, for instance, has a subsidiary “no real freedom to determine its course of action on the market?”<sup>333</sup> Therefore, it remains uncertain in Europe, as well as in the United States, what is needed exactly to trigger the single economic entity or single economic unity exception.

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present case concerns relations between a company and its wholly controlled subsidiaries. ... [M]y deliberation will be based *exclusively* on those factual circumstances.” (emphasis in original)).

However, a recent case suggests that at least in the context of attribution, the fact that a subsidiary is wholly owned is not by itself sufficient to treat the corporate group as a single entity. See opinion of the Advocate General Mischo in Case C-286/98P, *Stora Kopparbergs Bergslags AB v. Commission*, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12, para. [A40]-[48] (E.C.J. 2000) (“I am, however, of the opinion that a mere 100 per cent shareholding does not in itself suffice as a ground for the parent company’s liability. ... Something more than the extent of the shareholding must be shown, but it may be in the form of indicia.” *Id.* at paras. [A40], [A48]. In its decision, the Court of Justice seemingly picked up the Advocate General’s concept. The Court found “the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. ... As that subsidiary was wholly owned, the Court of First Instance could legitimately *assume* ... that the parent company in fact exercised decisive influence over its subsidiary’s conduct ... it was for the [parent company] to *reverse that presumption*.” Case C-286/98P, *Stora Kopparbergs Bergslags AB v. Commission*, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12, para. [28]-[29] (E.C.J. 2000) (emphasis provided). Thus, it seems as if – at least for attributing conduct – complete share ownership only establishes a presumption of a single economic unit, which can be rebutted. This would be a deviation from the U.S. standard in *Copperweld*, where the Supreme Court found the affiliated corporations incapable of conspiring as a matter of law.

<sup>333</sup> For an attempt to clarify the standard to some extent see opinion of the Advocate General Mischo in *Stora Kopparbergs*, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12 at para. [A37] (discussing the application of *Viho Europe* in the related area of liability and stating: “It does not follow ... that, in all cases, equally tight links [as in *Viho Europe*] are a necessary condition for holding a parent company liable for its subsidiary’s conduct.”).

## CHAPTER FOUR

### TOWARDS A BROADER SOLUTION

#### **I. Extrapolations of *Copperweld***

Even prior to defining a generally applicable standard as to when coordination within groups of affiliated corporations does not pose a threat to competition, some conclusions can be drawn from the rationale of *Copperweld*. The analysis in *Copperweld* can be applied to other situations not directly governed by its narrow holding.<sup>334</sup> Most of these expansions of the *Copperweld* holding are uncontroversial or at least widely accepted. A first group of expansions deals with types of corporate relationships other than that between a parent and its subsidiary (A. through C.). Later subsections consider *Copperweld's* application to provisions other than section 1 Sherman Act (D. through E.) and in different contexts (F. through G.).

##### A. Sister Corporations

The first expansion is the application of *Copperweld* to the relationship between siblings. As laid out in the Supreme Court's decision, the substance of corporate arrangements, i.e. the existence of a complete unity of interest, rather than separate corporate form must be decisive.<sup>335</sup> This reasoning, as well as the Court's equal treatment of

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<sup>334</sup> See, e.g., Michael D. Belsley, Comment, *The Vatican Merger Defense - Should Two Catholic Hospitals Seeking to Merge be Considered a Single Entity For Purposes of Antitrust Merger Analysis?*, 90 NW. U. L. REV. 720, 740 (1996) ("When read narrowly, *Copperweld* applies only to a section 1 Sherman Act conspiracy between a parent and its wholly owned subsidiary. However, the opinion suggests that a broader reading of its decision is intended.").

<sup>335</sup> See *Advanced Health-Care Services, Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990), *on remand*, 846 F.Supp. 488 (W.D. Va. 1994); *Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 764 (D. N.J. 1995); *D'Last Corp. v. Ugent*, 863 F. Supp. 763, 768 (N.D. Ill. 1994), *aff'd*, 51

wholly owned corporations and unincorporated divisions, applies with equal strength to sister corporations.<sup>336</sup> If the coordination between a parent and its wholly owned subsidiary does not restrain trade, then the same must be true for the coordination between two (or more) sister corporations of a common parent. Under *Copperweld*, the parent cannot conspire with either one of the sister corporations. Since both of them have a unity of purpose and a common design with their parent, ultimately their purpose and economic interests are concurring, too.<sup>337</sup> As is true for agreements between a parent and its subsidiary, agreements among sister corporations do not reduce the number of independent decision-makers in the market. Sister corporations act for the benefit of the same shareholder, the parent company, who defines the common goals for the whole corporate group.<sup>338</sup> Therefore, agreements between two sister corporations of the same parent are not a sufficient basis for a finding of conspiracy.<sup>339</sup> A different view would create a substantial loophole in the *Copperweld* holding because conspiracies are often charged on the horizontal as well as on the vertical level of the organizational structure of a corporate

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F.3d 275 (7th Cir. 1995). See also *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995) (“[The Supreme Court] encouraged the courts to analyze the substance, not the form, of economic arrangements when faced with allegations of intra-corporate conspiracies ...”).

<sup>336</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464f at 245-46; *Gucci v. Gucci Shops, Inc.*, 651 F. Supp. 194, 197 n.\* (S.D. N.Y. 1986).

<sup>337</sup> See *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (“*Copperweld* teaches us that because [sister corporations] share a common purpose with [their parent] they cannot conspire with their parent in violation of the Sherman Act. By the same token, neither can they conspire with one another.”); *Bell Atl. Bus. Sys. Services v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 707 (N.D. Cal. 1994) (“[Parent and sister corporations] all act pursuant to the same interests and goals ...”); *Cohen v. Primerica Corp.*, 709 F. Supp. 63, 65 (E.D. N.Y. 1989) (“If a wholly owned subsidiary is not independent of its parent corporation, then wholly owned subsidiaries of one parent corporation are not independent of each other.”).

<sup>338</sup> See *Smart*, *supra* note 185, at 1068; *Penn*, *supra* note 9, at 376. See also *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1496 (5th Cir. 1985) (parent corporation and its sister companies “must be viewed as one economic enterprise”).

<sup>339</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1464f at 245-46, ¶ 1465b at 248; VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 516; Calkins, *Copperweld in the Courts*, *supra* note 165, at 351 (calling this conclusion “obvious”); KINTNER & BAUER, *supra* note 294, at 33; *Smart*, *supra* note 185, at 1068; *Penn*, *supra* note 9, at 376; *Robberson*, *supra* note 23, at 792. See also *Fleischer*, *supra* note 216, at 499-500 (reaching the same result for European competition law).

group.<sup>340</sup> Courts have considered these arguments and almost unanimously held that sister corporations are incapable of conspiring in violation of section 1 of the Sherman Act.<sup>341</sup>

This result is also relevant in the merger law arena. If the parent company and its subsidiaries are considered as one economic actor, then a merger between the siblings does not raise antitrust concerns. Since they are already perceived as one actor, the

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<sup>340</sup> See Robberson, *supra* note 23, at 792.

<sup>341</sup> *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Garshman v. Universal Res. Holding Inc.*, 824 F.2d 223, 230 (3d Cir. 1987); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127, 1133 (3d Cir. 1995); *Advanced Health-Care Services, Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146-147 (4th Cir. 1990), *on remand*, 846 F.Supp. 488 (W.D. Va. 1994); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987) (“*Copperweld* precludes a finding that two wholly-owned sibling corporations can combine for the purpose of section 1”); *Greenwood Utilities*, 751 F.2d at 1496-1497; *Hood*, 739 F.2d at 1015; *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1480 (9th Cir. 1984); *Polydyne, Inc. v. Kirk*, No. 3:98 CV 7287, 1999 WL 894301, at \*11-12 (N.D. Ohio Feb. 17, 1999), *aff’d in part and remanded in part*, 238 F.3d 423 (6th Cir. 2000); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997) (“It is now clear that if a unity of interest exists between related corporations, such as ... ‘sister’ subsidiaries of a common parent, they are incapable of conspiring for purposes of section 1 of the Sherman Act.”); *Horst v. Laidlaw Waste Sys., Inc.*, 917 F. Supp. 739, 741-42 (D. Colo. 1996); *D’Last*, 863 F. Supp. at 768-769; *Bell Atl.*, 849 F. Supp. at 706-07 (wholly owned and partially owned subsidiary of a common parent); *Primerica Corp.*, 709 F. Supp. at 64-65; *Carlock v. Pillsbury Co.*, Nos. Civ. 4-87-517, Civ. 4-87-586, 1988 WL 404839, at \*3-4, 1993-1 Trade Cas. (CCH) ¶ 70,282 (D. Minn. Oct. 13, 1988); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987); *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525, 1544 (C.D. Cal. 1987); *H.R.M., Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 2d 645, 647-48 (D. Colo. 1987); *Novatel Commun., Inc. v. Cellular Tel. Supply, Inc.*, No. Civ. A. C85-2674A, 1986 WL 15507, at \*6, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. Dec. 23, 1986) (wholly owned and partially owned subsidiary of a common parent); *Carl Hize & Sons, Inc. v. Browning-Ferris Industries, Inc.*, 590 F. Supp. 1201, 1202 n.2 (D. Colo. 1984). See also 1 ABA, DEVELOPMENTS, *supra* note 97, at 23-24; ERIC HEITZER, KONZERNE IM EUROPÄISCHEN WETTBEWERBSRECHT UNTER VERGLEICHENDER BERÜCKSICHTIGUNG IHRER WETTBEWERBSRECHTLICHEN BEHANDLUNG DURCH AUFSICHTSBEHÖRDEN UND GERICHTE IN DEN USA 239 (1999); Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 322-23 (“In the case of subsidiaries and sister companies ... the enterprise principles of *Copperweld* have been applied uniformly”). But see *Ray Dobbins Lincoln Mercury, Inc. v. Ford Motor Co.*, 604 F. Supp. 203, 205 (W.D. Va. 1984), *aff’d on other grounds*, 813 F.2d 402 (4th Cir. 1985) (holding that *Copperweld* does not extend to a conspiracy between two subsidiaries of the same parent corporation unless the parent is also an alleged co-conspirator). The Fourth Circuit, however, has subsequently disapproved this decision with its decision in *Advanced Health-Care*, 910 F.2d at 146. See also PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (Supp. 1997), ¶ 1464 f at 652 (“The ... conclusion in *Ray Dobbins* was wrong.”); VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.3 at 520 (calling *Ray Dobbins* “a curious variation of ... formalistic thinking”).

merger between the subsidiaries will not change the number of firms in the market.<sup>342</sup>

Therefore, the market concentration does not change, which in turn minimizes any anti-trust concerns.<sup>343</sup>

## B. Multistage Corporate Groups

The *Copperweld* rationale can also be expanded further on the vertical level. When a corporation cannot conspire with its wholly owned subsidiary and the subsidiary in turn cannot conspire with its subsidiary, it follows logically that the parent cannot conspire with its subsidiary's subsidiary, i.e. its grandchild. The whole corporate family constitutes one economic actor even if the group extends over several stages of related corporations. All of the courts that have considered the issue have held in this way.<sup>344</sup>

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<sup>342</sup> Cf. McNamara, *supra* note 23, at 1266 n.143 (“Mergers of commonly owned corporations will not lessen competition because they do not alter control.”).

<sup>343</sup> Belsley, *supra* note 334, at 726-27, 740-42. See also, e.g., Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325 (7th Cir. 1985). Here the court found that a merger did not raise any antitrust concerns because the two merging parties had “for more than 30 years acted as one company.” While the court acknowledged that “[a] merger, like a cartel, may ‘deprive ... the marketplace of the independent centers of decision-making that competition assumes and demands,’” it found that because of the merging entities’ unity “[t]heir merger did not change the conditions of competition in the market.” *Id.* at 1337 (citing *Copperweld*).

The government’s Hart-Scott-Rodino filing instructions, 16 C.F.R. § 802.30 (2001), specifically exempt the merger of two wholly owned subsidiaries from having to comply with the Hart-Scott-Rodino Act’s requirements. (“An acquisition ... in which, by reason of holdings of voting securities, the acquiring and acquired persons are ... the same person, shall be exempt from the requirements of the act. Examples: 1. Corporation A merges its two wholly owned subsidiaries S1 and S2. The transaction is exempt under this section. 2. Corporation B creates a new wholly owned subsidiary. The transaction is exempt under this section.” See *id.*).

<sup>344</sup> See Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1463 (9th Cir. 1993), *cert. denied*, 511 U.S. 1142 (1994) (affirming district court’s holding that parent company, subsidiary and subsidiary of the subsidiary cannot conspire; “Under *Copperweld*, companies under common ownership and control cannot initiate Sherman Act conspiracy violations among themselves.”); Trugman-Nash, Inc. v. New Zealand Dairy Board, 942 F. Supp. 905, 916 (S.D.N.Y. 1996); Horst v. Laidlaw Waste Sys., Inc., 917 F. Supp. 739, 741-42 (D. Colo. 1996) (“[F]ederal courts have consistently applied *Copperweld* to preclude the finding of antitrust conspiracies within a corporate family ... Thus, whether Defendants are sister corporations or one is the wholly-owned ‘grandchild’ of the other, they are incapable of conspiring under the Sherman Act.” *Id.* at 742); Coast Cities Truck Sales, Inc. v. Navistar Int’l Transp. Co., 912 F. Supp. 747, 763 (D. N.J. 1995) (subsidiary of subsidiary incapable of conspiring with either subsidiary or parent corporation); Cohen v. Primerica Corp., 709 F. Supp. 63, 64-65 (E.D. N.Y. 1989) (finding corporations that were “part of a wholly-owned subsidiary chain of” a common parent to be one entity and incapable of conspiring); Satellite Fin. Planning Corp. v. First Nat’l Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986), *modified on*

### C. Common Ownership and Control

A third situation to which courts extended *Copperweld's* rationale that section 1 “should be applied only to those agreements that bring formerly independent economic actors into a common plan”<sup>345</sup> is when two or more corporations are under common ownership and control of one or more individuals. In these situations where corporations are owned by identical shareholders, courts have relied on *Copperweld* to find such entities incapable of conspiring in violation of section 1.<sup>346</sup> An example is the Fifth Circuit’s ruling in *Century Oil Tool, Inc. v. Production Specialties, Inc.*:

Given *Copperweld*, we see 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 all affairs of the two corporations. A contract between them does not join formerly distinct economic units.<sup>347</sup>

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*other grounds*, 643 F. Supp. 449 (D. Del. 1986); *West Bolyston Cinema Corp. v. Paramount Pictures Corp.*, No. Civ. A. 98-00252, 2000 WL 1468513, at\*12 (Mass. Super. Sept. 21, 2000). See also *Orion Tire Corp. v. General Tire, Inc.*, No. CV 92-2391AAH(EEX), 1992 WL 295224, at \*2, 1992-2 Trade Cas. (CCH) ¶ 69,957 (C.D. Cal. Aug. 17, 1992) (corporation incapable of conspiring with “two other members of its corporate family”); *HEITZER*, *supra* note 341, at 239; *KINTNER & BAUER*, *supra* note 294, at 32.

<sup>345</sup> *Fishman v. Estate of Wirtz*, 807 F.2d 520, 576 (7th Cir. 1987) (Easterbrook, C.J., dissenting).

<sup>346</sup> See, e.g., *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992) (two racetracks legally incapable of conspiring when owned by separate corporations, but shareholders of both corporations are identical), *cert. denied*, 506 U.S. 1053 (1993); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984); *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 748 (D. Md. 1997), *aff'd*, 141 F.3d 1162 (4th Cir. 1998) (precise relationship among the corporate entities unclear, but plaintiff had alleged that they were controlled by the same individual; see also AMERICAN BAR ASSOCIATION, 1998 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 15 (1999)); *D'Last Corp. v. Ugent*, 863 F. Supp. 763, 769 (N.D. Ill. 1994), *aff'd*, 51 F.3d 275 (7th Cir. 1995) (a complete unity of interest exists where individual defendant is sole or controlling shareholder of each of the corporate defendants); *Orson v. Miramax Film Corp.*, 862 F. Supp. 1378, 1385 (E.D. Pa. 1994) (two corporations with identical ownership and president which were operated as a single entity incapable of conspiring); *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 677-78 (S.D. N.Y. 1987) (dismissing complaint alleging that two firms were under common ownership and control); *Gucci v. Gucci Shops, Inc.*, 651 F. Supp. 194, 197 (S.D. N.Y. 1986) (holding two corporations with identical stockowners and effectively controlled by the same individual to be legally incapable of conspiring with each other). See also *AREEDA & HOVENKAMP*, *supra* note 341, ¶ 1464'f at 652; *Calkins, Copperweld in the Courts*, *supra* note 165, at 354; *KINTNER & BAUER*, *supra* note 294, at 33.

<sup>347</sup> *Century Oil Tool*, 737 F.2d at 1317. The two corporations in this case were “commonly owned by three men, two of whom owned 30 percent of each corporation and one of whom owned the remaining 40 percent of each corporation. All three men served as directors and officers of each corporation.” See id. The corporations operated from the same physical plant and would have merged but for tax reasons. *Id.*

However, in *Fishman v. Estate of Wirtz*,<sup>348</sup> the Seventh Circuit refused to extend this line of cases beyond situations with identical ownership. The court found that two corporations lacked a complete unity of interest when there was only a partial overlap in the shareholders, it was unclear as a matter of fact whether the corporations could be controlled by the overlapping shareholder, and the actors in the two corporations had despairing economic interests.<sup>349</sup> While the finding seems appropriate given this factual situation, the dissent is right to point out that control rather than a complete overlap in shareholders is decisive for conspiratorial capacity.<sup>350</sup> Without getting further into the details of a proposed standard at this moment, it is safe to say a logical extension of the *Copperweld* rationale shows that members of corporate families consisting of parents and wholly owned subsidiaries (or corporations with identical ownership and control) lack the capacity to conspire within the group on either a horizontal or a vertical level.

#### D. State Antitrust Law

In addition to different corporate relations, *Copperweld* has also been extended to provisions other than section 1 of the Sherman Act. One area where this issue arose is within the antitrust laws of the various states. Virtually all states have adopted some form of antitrust legislation, and most of them use language similar to the Sherman Act.<sup>351</sup> Not surprisingly, federal cases interpreting the Sherman Act have been found useful for construing these provisions. Thus, these interpretations have been adopted often as persua-

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<sup>348</sup> 807 F.2d 520 (7th Cir. 1987).

<sup>349</sup> *See id.* at 541 n.19 (distinguishing *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984). The dissent mainly disagrees on this factual matter. Stating that “[the two corporations] have common investors and are under common control” and that they “never have been independent economic actors” the dissent assumes that they are under common control. *See* 807 F.2d at 576 (Easterbrook, C.J., dissenting).

<sup>350</sup> *See id.* at 576-77 (Easterbrook, C.J., dissenting) and *infra* Ch. Four II. D. 3, 5.

<sup>351</sup> VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.01 at 509-10.

sive authority by judicial decision or sometimes by statute.<sup>352</sup> As might be expected, in this situation, the decision in *Copperweld* has heavily influenced the development of state law in the area, and most states have followed the Supreme Court's lead.<sup>353</sup> Confronted with the situation of an alleged agreement between a parent and its wholly owned subsidiary or allegedly conspiring sister corporations, the vast majority of decisions adopted the *Copperweld* rule for state antitrust law.<sup>354</sup> The arguments presented were the obvious

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<sup>352</sup> *Id.* at 510.

See, e.g., *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1480 n.8 (9th Cir. 1984) (recognizing that state courts found federal cases applicable to California antitrust law); *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525, 1550 (C.D. Cal. 1987) (same); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 856 F. Supp. 990, 1005 (E.D. Pa. 1994), *aff'd*, 54 F.3d 1125 (3d Cir. 1995) (Maryland statute states that interpretations by federal courts should guide and state court acknowledged guidance); *Carlock v. Pillsbury Co.*, Nos. Civ. 4-87-517, Civ. 4-87-586, 1988 WL 404839, at \*5-8, 1993-1 Trade Cas. (CCH) ¶ 70,282 (D. Minn. Oct. 13, 1988) (finding statutory provision calling for consideration of federal decisions in Oregon and Washington and judicial decisions to the same extent in California, Colorado, Idaho, and Minnesota); *American Credit Card Tel. Co. v. National Pay Tel. Corp.*, 504 So. 2d 486, 488 n.1 (Fla. Dist. Ct. App. 1987) (Florida statute calls for "due consideration and great weight be given" to Sherman Act cases); *Kenneth E. Curran, Inc. v. Auclair Transportation, Inc.*, 128 N.H. 743, 748, 519 A.2d 280, 284 (N.H. 1986) (New Hampshire statute authorizes courts to be guided by interpretations of the Sherman Act); *Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 286, 367 S.E.2d 751, 755 (W. Va. 1988) (West Virginia statute provides that state law should be interpreted "in harmony" with federal antitrust statutes); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 429, 430 n.8, 405 N.W.2d 354, 367 & n.8 (Wis. Ct. App. 1987) (federal antitrust decisions are persuasive authority and control interpretation of state statute in Wisconsin).

<sup>353</sup> VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 516. The authors also notice a general tendency for federal judges to allow, "the standards and rationales of federal case law to dominate the analysis for federal and state claims alike" in suits involving both types of claims. *See id.* at 512. This they find especially true in the area of intra-enterprise conspiracies. *See id.* An example for this practice might be *Carlock*, 1988 WL 404839 where the district court applied its analysis of the federal antitrust claim to six different state antitrust statutes without mentioning any possible policy considerations genuine to the states' statutes.

<sup>354</sup> Affirmative decisions are reported from the following fourteen states:

California: *Lake Commun.*, 738 F.2d at 1480 (*Copperweld* "likely to be persuasive to the Supreme court of California in interpreting state antitrust statutes."); *Newport Components*, 671 F. Supp. at 1550 (applying *Copperweld* "by analogue" to state law claim and finding "California case law suggests that *Copperweld* will be persuasive in interpreting the Cartwright Act" [California's antitrust act]); *Yamaha Int'l Corp. v. ABC Int'l Traders, Inc.*, No. 86-7892 RSWL, 1989 WL 206429, at \*15-16, 1989-2 Trade Cas. (CCH) ¶ 68,874 (C.D. Cal. Aug. 11, 1989), *aff'd in part*, 940 F.2d 1537 (9th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992) (same); *Carlock*, 1988 WL 404839, at \*5-6 (finding application of *Copperweld* appropriate because state courts "routinely rely heavily on federal [antitrust] rulings"). *See also* *Macmanus v. A.E. Realty Partners*, 241 Cal.Rptr. 315, 318 n.4 (Cal. Ct. App. 1987) (reserving whether the *Copperweld* rule would apply in California).

Colorado: *Carlock*, 1988 WL 404839, at \*6-7.

Hawaii: *Robert's Haw. Sch. Bus, Inc. v. Laupahoe Transp. Co.*, 91 Haw. 224, 253, 982 P.2d 853, 882 (Haw. 1999).



ones, namely that the respective state law was shaped after the Sherman Act, that federal authority has been held to be persuasive for interpretation of the state statute before, and that no consideration of state antitrust policy calls for a different rule in this situation.<sup>355</sup>

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Idaho: *Carlock*, 1988 WL 404839, at \*6.

Maryland: *Siegel Transfer*, 856 F. Supp. at 1005.

Massachusetts: *West Bolyston Cinema Corp. v. Paramount Pictures Corp.*, No. Civ. A. 98-00252, 2000 WL 1468513, at \*12 (Mass. Super. Sept. 21, 2000).

Minnesota: *Carlock*, 1988 WL 404839, at \*5 (“Given the fact that Minn.Stat. § 352D.51 tracks the language of [section 1 of the Sherman Act] and the dearth of decisions interpreting Minnesota’s antitrust statutes, it is reasonable to rely on federal decisions in this area.”).

New Hampshire: *Kenneth E. Curran*, 128 N.H. at 749, 519 A.2d at 284 (sister corporations and commonly owned and controlled corporations cannot conspire).

New York: The situation is somewhat unclear in New York. While courts agree that the Donnelly Act, New York’s antitrust statute, is modeled after and should generally be interpreted in accordance with the Sherman Act, they disagree as to whether the *Copperweld* rule applies. An early lower court decision held the sweep of the Donnelly Act to be broader than the Sherman Act and concluded, “even if corporations are wholly owned, they will still fall under the Donnelly Act as individual *economic* entities.” *See* *People v. Schwartz*, No. 1557/86, 1986 WL 55321, at \*2-3, 1987-1 Trade Cas. (CCH) ¶67,581 (N.Y. Sup. Ct. Oct. 17, 1986), *aff’d on other grounds*, 554 N.Y.S.2d 686, 160 A.D.2d 964 (N.Y. App. Div. 1990) (emphasis provided). However, the court seems to misinterpret *Copperweld* since commonly owned corporations are still separate legal entities but not separate economic actors. Moreover, the cited statement was dictum as the court went on to distinguish the case from a pure intra-enterprise matter. Therefore, more weight should be given to a recent District Court decision finding *Copperweld* applicable to the Donnelly Act because there were no “considerations of New York State policy, differences in statutory language, nor legislative history that would warrant interpreting the Donnelly Act more broadly than the federal antitrust laws in this case.” *See* *S.O. Textiles Co., Inc. v. A & E Products Group, Inc.*, 18 F. Supp. 2d 232, 244 (E.D. N.Y. 1998). *See also* VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.4 at 521-22.

Oregon: *Carlock*, 1988 WL 404839, at \*7; *Johnson v. Con-Vey/Keystone, Inc.*, 814 F. Supp. 931, 934-35 (D. Or. 1993).

Virginia: *Ray Dobbins Lincoln Mercury, Inc. v. Ford Motor Co.*, 604 F. Supp. 203, 204-05 (W.D. Va. 1984), *aff’d*, 813 F.2d 402 (4th Cir. 1985).

Washington: *Carlock*, 1988 WL 404839, at \*7-8.

West Virginia: *Marshall County Bd. of Educ.*, 179 W. Va. at 286-87, 367 S.E.2d at 755-56 (issue was intracorporate conspiracy, court cited *Copperweld* at length and found itself bound by the *Copperweld* decision).

Wisconsin: *Stepp v. Ford Motor Credit Co.*, 623 F. Supp. 583, 593 (E.D. Wis. 1985); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 426-30, 405 N.W.2d 354, 366-67 (Wis. Ct. App. 1987) (court cited *Copperweld* at length and adopted it for state antitrust statute in dictum; the related statute involved in the case was also controlled by *Copperweld* because the core of the complaint claimed an anticompetitive conspiracy).

*See also* *American Credit Card Tel. Co. v. National Pay Tel. Corp.*, 504 So. 2d 486, 488 (Fla. Dist. Ct. App. 1987) (corporation cannot conspire with outside counsel under Florida antitrust statute).

*See generally* VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, 14.03.2 at 516-19; Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 323; Calkins, *Copperweld in the Courts*, *supra* note 165, at 372 n.156.

<sup>355</sup> *See, e.g., Carlock*, 1988 WL 404839, at \*5-8 (state statutes track the language of section 1 Sherman Act, state courts rely on federal decisions as persuasive authority, and no showing of differing state authority); *Newport Components*, 671 F. Supp. at 1550 & n.29 (state courts regularly apply federal cases and no opposing state authority present); *Stepp*, 623 F. Supp. at 593 (state statute comparable to Sherman Act); *Ray*

One state case, however, has directly rejected *Copperweld*.<sup>356</sup> In *Louisiana Power and Light Company v. United Gas Pipe Line Company*, the Louisiana Supreme Court decided that, under Louisiana law, a parent company can conspire with a wholly owned as well as with a partially owned subsidiary.<sup>357</sup> The court held so even though the state statute is a counterpart to section 1 of the Sherman Act; therefore federal interpretation of the Sherman Act generally is of persuasive influence.<sup>358</sup> However, emphasizing the distinct legal entities the court in *Louisiana Power* stated: “[t]he separate corporate forms of a subsidiary and a parent should surely provide the necessary plurality of actors unless some compelling policy consideration were to persuade us to disregard the plain language of §51:122 [Louisiana’s Antitrust Act] and the broad scope of the prohibition enacted (and no doubt intended) by the Legislature.”<sup>359</sup> In addition to the statute’s language,<sup>360</sup> the court relied on a 1931 state decision establishing the intra-enterprise conspiracy doctrine in Louisiana and on the Supreme Court cases before *Copperweld*.<sup>361</sup> Moreover, the state court argued that a broad exemption of parent/subsidiary relations is too inflexible of an approach, especially since intra-enterprise coordination can have the same effect as a conspiracy between independent firms and would divest Louisiana courts “of the au-

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*Dobbins*, 604 F. Supp. at 205 (*Copperweld* logic must control where uncontradicted by any state authority); *Lyons*, 137 Wis. 2d at 429, 430 n.8, 405 N.W.2d at 367 & n.8 (interpretation of state antitrust law controlled by decisions under the Sherman Act as persuasive authority).

<sup>356</sup> See also *L.C. Williams Oil Co., Inc. v. Exxon Corp.*, 625 F. Supp. 477, 488 n.10 (M.D.N.C. 1985) (suggesting in dictum that while no ruling on the issue has been, made the broad language in North Carolina’s antitrust statute “perhaps was used ... precisely to fill in such ‘gaps’ as that noted by the Supreme Court in [*Copperweld*].”).

<sup>357</sup> *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149 (La. 1986).

<sup>358</sup> See *Louisiana Power*, 493 So. 2d at 1158. See also *Free v. Abbott Laboratories, Inc.*, 176 F.3d 298 (5th Cir. 1999) (applying federal antitrust law rule to state law and distinguishing *Louisiana Power*’s deviation from federal authority).

<sup>359</sup> *Louisiana Power*, 493 So. 2d at 1155.

<sup>360</sup> See *id.* at 1160 (“[T]he unqualified statutory language ... in our view, commands such an application.”).

<sup>361</sup> See *id.* at 1155-56, 1158.

thority which reposes in them by virtue of [the] legislation.”<sup>362</sup> Finally, the court noted that the political goals of antitrust as well as the economic purpose of allocative efficiency are best served by applying the intra-enterprise conspiracy doctrine. The latter statement most likely provokes dissent. Moreover, by upholding the intra-enterprise conspiracy doctrine, the court values corporate form over economic substance.<sup>363</sup> It fails to note that single firm conduct is governed by a different part of the antitrust laws, that is section 2 of the Sherman Act and its state law equivalent.<sup>364</sup> Nevertheless the case must be noted as existing state law precedent.

#### E. Conspiracy to Monopolize and Exclusive Dealing

The concept of conspiracy appears not only in section 1 of the Sherman Act, but also in another federal antitrust provision. Section 2 of the Sherman Act, which is generally recognized to prohibit monopolization and attempts to monopolize, proscribes as its third offense a conspiracy to monopolize. To establish a conspiracy to monopolize, a plaintiff must show, in addition to the conspiracy itself, intent, purpose to exercise monopoly power, and an overt act in furtherance of the conspiracy.<sup>365</sup> While the first two offenses of section 2 can be completed unilaterally, the notion of a conspiracy to monopolize is guided by the same concept as in section 1 thus requiring a plurality of ac-

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<sup>362</sup> *Id.* at 1159.

<sup>363</sup> VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.2 at 519. See also Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 323 n.96 (“[The Louisiana Supreme Court] approached the problem in conceptualist terms and applied traditional notions of entity law.”).

<sup>364</sup> VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.2 at 519.

<sup>365</sup> *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); SULLIVAN & GRIMES, *supra* note 11, at 136. Actual monopoly power or even a dangerous probability of success is not required here. See also *Appraisers Coalition v. Appraisal Inst.*, 845 F. Supp. 592, 603 (N.D. Ill. 1994) (“To prove a conspiracy to monopolize, a plaintiff must prove: (1) the existence of a combination or conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. ... [It] does not require a proof of market power in a relevant market.”).

tors.<sup>366</sup> As a result courts extended the *Copperweld* rationale to section 2 of the Sherman Act, foreclosing claims of alleged conspiracies to monopolize within a corporate family.<sup>367</sup> Corporations which form an economic entity such as a parent and its wholly owned subsidiary or two subsidiaries of the same parent are incapable to conspire in violation of section 1 as well as section 2 of the Sherman Act.

One court further extended *Copperweld* to section 3 of the Clayton Act. This section provides in pertinent part:

It shall be unlawful for any person engaged in commerce ... to lease or make a sale or contract for sale of goods ... on the condition, agreement or under-

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<sup>366</sup> *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 574 (6th Cir. 1986) (“[Section] 2 conspiracy to monopolize claims require proof of concerted activity, just as section 1 conspiracy claims do ...”); *D’Last Corp. v. Ugent*, 863 F. Supp. 763, 769 (N.D. Ill. 1994) (section 1 and 2 do not differ “as to the nature of the conspiracy” and “require the same threshold showing”) *aff’d*, 51 F.3d 275 (7th Cir. 1995); *H.R.M., Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 2d 645, 648 (D. Colo. 1987) (“Although section 2 does make illegal purely unilateral conduct, ... a claim under section 2 for conspiracy to monopolize, like a claim under section 1, requires at least two participants.”); *Robert’s Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co.*, 91 Haw. 224, 252 n.29, 982 P.2d 853, 881 n.29 (Haw. 1999); SULLIVAN & GRIMES, *supra* note 11, at 137.

Due to the additional requirements of a section 2 conspiracy claim (showing of intent, overt act, monopoly as result of a successful conspiracy), proving conspiracy under section 2 is often perceived to be more difficult than under section 1. SULLIVAN & GRIMES, *supra* note 11, at 137.

<sup>367</sup> See *Advanced Health-Care Services, Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990), *on remand*, 846 F.Supp. 488 (W.D. Va. 1994); *Potters Med. Ctr.*, 800 F.2d at 574; *MCI Telecommunications Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 131 (D.N.J. 1995); *Valet Apart. Services, Inc. v. Atlanta Journal & Constitution*, 865 F. Supp. 828, 833 (N.D. Ga. 1994) (“The *Copperweld* principle applies also to section 2 conspiracy claims.”); *D’Last*, 863 F. Supp. at 769; *Aerotech, Inc. v. TCW Capital*, No. 93 Civ. 1987 (CSH), 1994 WL 775439, at \*4, 1994-1 Trade Cas. (CCH) ¶ 70,616 (S.D. N.Y. Apr. 20, 1994); *Appraisers Coalition*, 845 F. Supp. at 603; *Total Benefits Services, Inc. v. Group Ins. Admin., Inc.*, No. Civ. A. 92-2386, 1993 WL 15671, at \*2, 1993-1 Trade Cas. (CCH) ¶ 70,148 (E.D. La. Jan. 7, 1993); *Pudlo v. Adamski*, 789 F. Supp. 247, 252 (N.D. Ill. 1992); *Levi Case Co. v. ATS Products, Inc.*, 788 F. Supp. 428, 430 (N.D. Cal. 1992); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1074 (D. Colo. 1991), *aff’d sub nom.*, *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Vollrath Co. v. Sammi Corp.*, No. CV 85-820 MRP, 1989 WL 201632, at \*15, 1990-1 Trade Cas. (CCH) ¶ 68,955 (C.D. Cal. Dec. 20, 1989), *aff’d*, 9 F.3d 1455 (9th Cir. 1993), *cert. denied*, 511 U.S. 1142 (1994); *H.R.M.*, 653 F. Supp. 2d at 648; *Stepp v. Ford Motor Credit Co.*, 623 F. Supp. 583, 593 (E.D. Wis. 1985); *Robert’s Haw. Scho. Bus*, 91 Haw. at 253, 982 P.2d at 882 (same holding for similar Hawaiian antitrust statute). See also AREEDA & HOVENKAMP, *supra* note 341, ¶ 1462’ at 650; HEITZER, *supra* note 341, at 240; KINTNER & BAUER, *supra* note 294, at 37; SULLIVAN & GRIMES, *supra* note 11, at 137 n.2.

Even before *Copperweld*, courts tried to achieve consistent results as to the conspiracy issues in section 1 and 2. See, e.g., *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 n.5 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) (“[W]e note that a finding of incapacity to combine and conspire under section 1 would mandate the same result with regard to the section 2 conspiracy to monopolize claim.”).

standing that the lessee or purchaser thereof shall not use or deal in the goods ... of a competitor or competitors of the lessor or seller, where the effect ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce.<sup>368</sup>

The Supreme Court has interpreted section 3 of the Clayton Act to mean that exclusive dealing agreements are not per se illegal, but are prohibited only if performance of the agreement would foreclose competition in a substantial share of the affected line of commerce.<sup>369</sup> The Fourth Circuit in *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, held that if there can be no conspiracy between two corporations under *Copperweld*, “it follows, likewise, that there cannot be an illegal exclusive dealing arrangement within the corporate enterprise.”<sup>370</sup>

Finally, a few courts have extended *Copperweld* to other statutes closely analogous to the Sherman Act,<sup>371</sup> such as section 73 of the Wilson Tariff Act<sup>372</sup> and the Automobile Dealer’s Day in Court Act.<sup>373</sup>

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<sup>368</sup> 15 U.S.C. § 14 (2000).

<sup>369</sup> See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

<sup>370</sup> *Advanced Health-Care*, 910 F.2d at 152. See also HEITZER, *supra* note 341, at 240.

<sup>371</sup> See *Nissan Motor Acceptance Corp. v. Schaumburg Nissan, Inc.*, Nos. 93 C 2701, 92 C 6089, 1993 WL 360426, at \*8-9 (N.D. Ill. Sept. 15, 1993); *Yamaha Int’l Corp. v. ABC Int’l Traders, Inc.*, No. 86-7892 RSWL, 1989 WL 206429, at \*14, 1989-2 Trade Cas. (CCH) ¶ 68,874 (C.D. Cal. Aug. 11, 1989), *aff’d in part*, 940 F.2d 1537 (9th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992) (Wilson Tariff Act); *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525, 1547 (C.D. Cal. 1987) (same). See also Calkins, *Copperweld in the Courts*, *supra* note 165, at 372.

Yet another issue is what influence *Copperweld* has on the Robinson-Patman Act’s prohibition of certain price discrimination with respect to its application to intra-enterprise pricing. This highly disputed question is beyond the scope of this paper. See *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994) (applying *Copperweld* to the Robinson-Patman Act’s single seller doctrine); AREEDA & HOVENKAMP, *supra* note 341, ¶ 1462’ at 650 n.2; Calkins, *Copperweld in the Courts*, *supra* note 165, at 378-97; Huddleston, *supra* note 32; Keyte, *supra* note 84, at 888 n.183; Shelanski, *supra* note 212, at 248 n.6, 257.

<sup>372</sup> 15 U.S.C. § 8 (2000). The provision provides in pertinent part: “Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom ... is engaged in importing any article from any foreign country into the United States, and when such combination ... is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article ... imported or intended to be imported into the United States”

<sup>373</sup> 15 U.S.C. § 1221 (2000).

## F. Imputation: Extension of Copperweld to Other Sherman Act Purposes

If a parent and its wholly owned subsidiary cannot conspire because they form a single economic unit then that raises the question whether their unity is only relevant for the purpose of conspiracy. It might be logical to assign consequences to the single economic unit for other matters of the Sherman Act, too. For example, can the market share of two commonly owned subsidiaries engaged in the same line of business be added up for purposes of a section 2 monopolization claim or in a rule of reason analysis under section 1?<sup>374</sup> Can the conduct of a subsidiary be attributed to its parent company in a claim against the latter? Is a corporation a repeat offender if, prior to its own violation of section 1, its sister corporation has done the same?

### *1. The Single Economic Unit and Piercing the Corporate Veil*

Generally speaking, courts have declined to rely on *Copperweld* to impose liability on a parent corporation for acts of subsidiaries.<sup>375</sup> Since the corporations in a corporate family are distinct legal entities, a parent corporation is ordinarily not directly liable for its subsidiary's violation of law. In rare cases<sup>376</sup> however, a plaintiff might be able to reach a parent corporation. The standard for this is defined by various forms of an "alter

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<sup>374</sup> For *Copperweld*'s influence on enhancing the role of market power in section 1 rule of reason cases see Calkins, *Copperweld in the Courts*, *supra* note 165, at 365-67 (discussing cases).

<sup>375</sup> Calkins, *Copperweld in the Courts*, *supra* note 165, at 376-77, 393. *See, e.g.*, Bell Atl. Bus. Sys. Services v. Hitachi Data Sys. Corp., 849 F. Supp. 702, 707 (N.D. Cal. 1994); Kacprzycki v. A.C. & S., Inc., No. 88-34-JRR, 1990 WL 605604, at \*4 (D. Del. Oct. 31, 1990) (*Copperweld* is "expressly and unambiguously limited to conspiracies to restrain trade under section 1 of the Sherman Antitrust Act"); Masa Inc. v. ICG Keeprite Corp., No. 88 C 2133, 1989 WL 75196, at \*3 n.3 (N.D. Ill. June 29, 1989) (declining to apply *Copperweld* in piercing case); United Nat'l Records, Inc. v. MCA, Inc., 616 F. Supp. 1429, 1433 (N.D. Ill. 1985) ("[P]laintiff's reliance upon *Copperweld* ... is misplaced. ... The *Copperweld* decision ... did not overrule state corporate law which provides for limited liability of a parent corporation.").

<sup>376</sup> *See* I BLUMBERG, LCG - PROCEDURAL LAW, *supra* note 2, §1.02 at 7 ("[F]or courts accepting the entity view, there is a heavy presumption that the separate corporate entity be respected for all purposes.

ego” or “piercing the corporate veil” doctrine under state corporate law.<sup>377</sup> While the concept in detail is rather vague, unpredictable and often disregards economic criteria,<sup>378</sup> it is at least clear that stock ownership alone is not sufficient.<sup>379</sup> Thus, a corporate relationship as presented in *Copperweld* would not suffice to pierce the corporate veil.

Moreover, piercing the veil turns on different considerations than those that determine whether a Sherman Act conspiracy is possible.<sup>380</sup> An important factor for piercing the corporate veil is some kind of abuse of the corporate form leading to an unjust

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They fortify the rule by generally agreeing that disregarding of entity is proper only in ‘drastic’ or ‘exceptional’ cases.”).

<sup>377</sup> See, e.g., *Walkovszky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (N.Y. 1966) (declining to pierce the corporate veil of a taxicab corporation to the individual stockholder of this and nine other taxicab corporations but leaving the chance to pierce the veil as to its sister corporations; see III PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS - TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* § 12.02 at 246-52 (1987) (discussing the decision); Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 334 n.139 (same)); *Robert's Haw. Sch. Bus. Inc. v. Laupahoehoe Transp. Co.*, 91 Haw. 224, 241-42, 982 P.2d 853, 870-71 (Haw. 1999) (discussing requirements for piercing and citing lengthy list of factors courts have weighed in determining whether to pierce). See generally I BLUMBERG, *LCG - PROCEDURAL LAW*, *supra* note 2, § 1.02-02.1 at 6-20 (summarizing various versions of the tests). Each of the various piercing doctrine uses a somewhat formalistic laundry list, comparable to the all-the-facts-and-circumstances test in the intra-enterprise conspiracy context.

<sup>378</sup> See, e.g., VII AREEDA, *ANTITRUST*, *supra* note 8, ¶ 1467g at 272 (“hopelessly vague”); I BLUMBERG, *LCG - PROCEDURAL LAW*, *supra* note 2, § 1.02 at 4-6 (sharply criticizing the doctrine as a “jurisprudence by metaphor or epithet” that manages to be simultaneously formalistic and incoherent); RÜTSCH, *supra* note 60, at 78; Calkins, *Copperweld in the Courts*, *supra* note 165, at 377 (“The corporate case law tends to rely less on reason than on buzz words ...”); Sommer, *supra* note 1, at 238 (“The actual case-law criteria for piercing the veil generally disregard the economic criteria.”), 240 (“[T]he law of veil-piercing is chaotic. It ... often yields unpredictable results.”).

<sup>379</sup> RÜTSCH, *supra* note 60, at 77. See, e.g., *Bell Atl.*, 849 F. Supp. at 707 (“[A] parent is not liable for the wrongful acts of its subsidiary simply because the parent wholly-owns the subsidiary.”); *United Nat'l Records*, 616 F. Supp. at 1431 (“Under California law, a parent corporation is not liable for the wrongful acts of its subsidiary simply because it is a wholly-owned subsidiary.”).

<sup>380</sup> *Bell Atl.*, 849 F. Supp. at 707 (Untroubled by plaintiff's claim that defendants “are attempting to ‘have it both ways’” the court stated: “Plaintiff's attempt to equate section 1 liability with alter ego liability fails because section 1 deals with federal antitrust policies and the alter ego doctrine is governed by California corporation law. The two legal principles have different purposes and policy considerations. It does not follow that because [corporations forming a single economic unit] are legally incapable of conspiring in violation of federal antitrust laws, that [the parent] is the alter ego of its subsidiaries.”); VII AREEDA, *ANTITRUST*, *supra* note 8, ¶ 1467g at 272 (alter ego test “unconnected to antitrust policy”); Calkins, *Copperweld in the Courts*, *supra* note 165, at 377.

See also *Masa Inc. v. ICG Keeprite Corp.*, No. 88 C 2133, 1989 WL 75196, at \*3 n.3 (N.D. Ill. June 29, 1989) (“This court fails to see the propriety of applying case law concerning federal antitrust law to this Illinois tort action.”).

result.<sup>381</sup> These factors are neither necessarily present in a *Copperweld*-like single economic unit nor relevant for its definition. More generally speaking, while piercing the corporate veil is a sanction for a perceived wrongdoing, noting that a single economic unit cannot conspire internally simply acknowledges the identical economic interest present, which makes proscribing coordination within the unit redundant for an adequate protection of competition. It is not meant to sanction the corporate group, rather to the contrary, it is built on the premise that separate incorporation within a single economic unit can serve legitimate interests such as limited liability under state law.<sup>382</sup> Thus defining a single economic unit for purposes of economically orientated antitrust law and piercing the corporate veil in corporate law should be distinguished.<sup>383</sup>

It should not remain unnoticed that piercing the corporate veil is not an unquestioned doctrine. There is a tendency to increase the weight given to economic factors in

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<sup>381</sup> See RÜTSCH, *supra* note 60, at 77-78; Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 331 ([‘Instrumentality’ doctrine and ‘alter ego’ doctrine] rest on the excessive exercise of ‘control’ by the dominant parent or shareholder ... and the existence of fraud or conduct that is ‘morally culpable,’ ‘fundamentally unjust’ or ‘inequitable.’). See, e.g., *Robert’s Haw. Scho. Bus.*, 91 Haw. at 241-42, 982 P.2d at 870-71 (“[A] corporation will be deemed the alter ego of another ‘where recognition of the corporate fiction would bring about injustice and inequity or when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim.’” See also the cited list of relevant factors. *Id.*); *Walkovszky*, 18 N.Y.2d at 417, 223 N.E.2d at 7, 276 N.Y.S.2d at 587 (“[T]he courts will disregard the corporate form, or ... ‘pierce the corporate veil’, whenever necessary ‘to prevent fraud or to achieve equity’.”).

<sup>382</sup> Cf. *United Nat’l Records*, 616 F. Supp. at 1433 (“In fact, the [*Copperweld*] Court noted that separate incorporation of a parent and subsidiary often serves legitimate business and legal interests. ... One such legitimate interest is undoubtedly the limited liability a parent corporation enjoys under state law.”).

<sup>383</sup> See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467g at 272 n.58 (arguing against application of veil piercing test to antitrust law; such test “merely removes the potential obstacle of limited liability ... from the path to adequate recovery for a clear substantive wrong. In the antitrust field, on the other hand, the test determines whether the defendant’s action is a legal wrong at all.”); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 469 n.64 (same). See also Michael P. Waxman, *Fraser v. MLS, L.L.C.: Is There a Sham Exception to the Copperweld Single Entity Immunity?*, 12 MARQ. SPORTS L. REV. 487, 493 (2001) (“*Copperweld* has nothing to do with piercing the corporate veil ...”). Compare Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 299 (arguing for different standards for intra-enterprise attribution shaped after the different needs in various areas of law). But see Huie, *supra* note 218, at 323 (arguing in the context of European competition law “[a]pplication of the Economic Unit Theory ... involves piercing the corporate veil ... If affiliated corporations are one and same for the purpose of attributing liability to the parent for activities of the subsidiary, or for grounding jurisdiction, then it necessary follows that the courts may unravel the corporate veil in other contexts.”).



imposing liability on parent corporations.<sup>384</sup> In particular, the so-called enterprise theory, being less solicitous of the separation between parent and subsidiary, would focus on the corporate group as a unit.<sup>385</sup> This theory tends to disrespect the legal distinction when the parent substantially controls the subsidiary but rather assigns legal consequences to the enterprise that has created them.<sup>386</sup> This approach is very similar to a single economic unit standard based on *Copperweld*.<sup>387</sup>

## 2. The Single Economic Unit and Attribution in Antitrust Law

Even though the single economic unit concept is different from veil piercing and need not be extended to corporate law in general,<sup>388</sup> it might still be worth considering its extension to Sherman Act issues other than conspiracy. Courts have been reluctant here as well. They have found parent corporations no more liable directly when their subsidi-

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<sup>384</sup> See, e.g., Blumberg, *Recognition of Enterprise Principles*, *supra* note 2; Sommer, *supra* note 1, (arguing against subsidiaries' limited liability and encouraging to routinely pierce the corporate veil in contract cases); Keyte, *supra* note 84, at 891-94 ("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?" *Id.* at 891.).

<sup>385</sup> See I BLUMBERG, LCG - PROCEDURAL LAW, *supra* note 2, § 1.03 at 23-25; Blumberg, *Recognition of Enterprise Principles*, *supra* note 2 (reviewing areas of law where enterprise principles have been recognized). See also Sommer, *supra* note 1, at 269 ("Intellectually, the enterprise theory is far preferable to the old-fashioned entity theory, with its ritualistic veil-piercing formulations of 'alter ego' or 'instrumentality' taken so far that a subsidiary has 'no separate mind, will or existence of its own.'"); Keyte, *supra* note 84, at 892-94.

<sup>386</sup> I BLUMBERG, LCG - PROCEDURAL LAW, *supra* note 2, § 1.03 at 23-24.

<sup>387</sup> See I PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS - PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 1.03 at 5 (Supp. 1988) (stating that the Supreme Court has firmly adopted enterprise principles in *Copperweld*). See also Keyte, *supra* note 84, at 893 ("The *Copperweld* decision indirectly supports the enterprise theory ... 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*.").

<sup>388</sup> Quite likely Professor Calkins is right to notice, "[g]iven the many different purposes of different bodies of law, consistency is impossible." See Calkins, *Copperweld in the Courts*, *supra* note 165, at 394. See also Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 299 ("The great range of jurisprudential concept and outcome in considering the intra-enterprise attribution of rights and obligations among the members of a corporate group in various areas of the law is not only inevitable but appropriate.").

aries violate the Sherman Act than when they violate other laws.<sup>389</sup> And recently, the notion of a broader scope for *Copperweld* has been rejected in *Mitchael v. Intracorp., Inc.*<sup>390</sup> The plaintiffs tried to extend *Copperweld* “to hold that a subsidiary and its parent, or a subsidiary and a sister subsidiary, can be considered one entity for all section 1 purposes, and either one can be liable for conspiring to restrain trade, even where there is no evidence that both were involved in the challenged conduct.”<sup>391</sup> The Tenth Circuit refused to apply *Copperweld* as sword rather than shield and rejected the claim. The court did not address the common economic interests in a single economic unit, but focused on the coordinated activity present in *Copperweld*. Thus the court held that in the absence of coordinated activity, *Copperweld* does not dictate to view a parent and its subsidiary as a single enterprise for all section 1 purposes, such that an alleged agreement with the subsidiary of a competitor was necessarily a horizontal conspiracy.<sup>392</sup> In another case, a district court declined to rely on *Copperweld* to attribute a subsidiary’s violation of section 2 Sherman Act automatically to its parent.<sup>393</sup> The court found “*Copperweld* is a section 1

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<sup>389</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 379; 10A WILLIAM M. FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5029 (perm. ed., rev. vol. 1999, cum. sup. 2000) (“A parent corporation is generally not liable or legally responsible for antitrust misconduct of its subsidiary corporation”). See, e.g., H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1549 (8th Cir. 1989) (parent not liable for subsidiary’s Sherman Act violations where no evidence showed that subsidiary “was a mere instrumentality or alter ego” of the parent or that the subsidiary was “a sham corporation formed to shield [the parent] from liability”).

<sup>390</sup> 179 F.3d 847 (10th Cir. 1999).

<sup>391</sup> See *Mitchael*, 179 F.3d at 857 (citing plaintiffs’ argument).

<sup>392</sup> See *id.* (“In the absence of any specific evidence of coordinated activity, we will not consider [the subsidiary] as an insurance company on the same horizontal level as the Insurers merely because it happens to be the wholly owned subsidiary of a company ... which owns other subsidiaries which are insurance companies.”). See also AMERICAN BAR ASSOCIATION, 1999 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 27 (2000).

<sup>393</sup> *BellSouth Adver. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc.*, 719 F. Supp. 1551 (S.D. Fla. 1988), *rev’d on other grounds*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 510 U.S. 1101 (1994). See also AREEDA & HOVENKAMP, *supra* note 341, ¶ 1462’ at 650 n.2 (“[S]uch liability was neither discussed nor implicated by the rationale of *Copperweld* ...”).

case and that opinion only addressed the issue of separate corporate entities as it related to allegations of conspiracy.”<sup>394</sup>

This, however, might be too limited a reading of *Copperweld*. In fact, the counter-claimant in the last case might have been right to argue “that the ‘flip side’ of abolishing the intra-enterprise conspiracy doctrine is that a family of corporations is an ‘enterprise’ ... which is to be treated under section 2.”<sup>395</sup>

As we have seen, courts already expanded *Copperweld* to issues well beyond section 1 conspiracies.<sup>396</sup> In some cases prior to *Copperweld*, courts have attributed a subsidiary’s anticompetitive conduct to the parent corporation without reaching the level otherwise necessary to pierce the corporate veil or without employing piercing language at all.<sup>397</sup> Finally, when applying other provisions of the antitrust laws, courts and enforcement agencies have recognized that corporate form is irrelevant to issues of anticompetitive effect.<sup>398</sup> Thus, parent corporations and separately incorporated subsidiaries are considered as one entity for determining market power in section 2 cases.<sup>399</sup> In the context of mergers, subsidiaries are taken into account in determining whether an

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<sup>394</sup> *BellSouth Adver.*, 719 F. Supp. at 1568.

<sup>395</sup> *See id.* at 1567.

<sup>396</sup> *See supra* Ch. Four I. D., E. *See also* *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 751 (1st Cir. 1994) (finding “it appropriate to apply *Copperweld*’s reasoning outside Sherman Act section 1.”).

<sup>397</sup> *See* RÜTSCH, *supra* note 60, at 75-77 (discussing cases). *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (allowing treble damage action against parent corporation for exclusionary conduct of its subsidiary); *National Dairy Products Corp. v. United States*, 350 F.2d 321, 326-27 (8th Cir. 1965) (holding a parent company liable for its subsidiary’s conspiratorial conduct based on the parent’s active and permanent control over the subsidiary; while the court stated that their relationship “was not one of stock ownership alone” and that the subsidiary “was merely an operating division ... in corporate form” it did not mention an abuse of corporate form nor phrases the issue as one of alter ego or piercing the corporate veil).

<sup>398</sup> *McNamara, supra* note 23, at 1265.

<sup>399</sup> *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 566-67 (1966) (adding up market shares of partially owned subsidiaries to determine market share of parent corporation). *See also* *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1345-46 (D.D.C. 1981).

acquisition results in an increase in market power to the point that it violates section 7 of the Clayton Act.<sup>400</sup> Furthermore, an acquisition made by a subsidiary is subject to the per-merger reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act to the same extent as an acquisition by its parent.<sup>401</sup> The parent corporation and all entities it controls are treated as one person in the notification instructions.<sup>402</sup>

Thus, courts have recognized the significance of larger economic units in the anti-trust context. Therefore, it seems appropriate to extend the single economic unit standard deriving from *Copperweld* (and further developed in the next subchapter) to resolve other antitrust issues. If corporations are under common control to the extent that they cannot conspire because their economic forces are already joined and commonly guided, it is consistent to treat them as one for antitrust purposes that consider the economic relationship. For example, when a predatory pricing scheme is examined it makes a significant difference whether the alleged predator is a small corporation, likely to run out of business rather than to succeed, or whether the financial resources of the rest of the larger corporate group it is a part of are considered, too. The piercing the corporate veil doctrine on the other hand is not only not shaped with respect to the structure of modern business

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<sup>400</sup> 15 U.S.C. § 18 (2000). Section 7 of the Clayton Act provides in pertinent part: “No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

<sup>401</sup> 15 U.S.C. § 18(a) (2000) (b) (3) (B) (“The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person *and each affiliate thereof*.” (emphasis provided)).

<sup>402</sup> 16 C.F.R. § 801.1(a)(1) (2001) (“[T]he term ‘person’ means an ultimate parent entity and all entities which it controls directly or indirectly. Examples: 1. In the case of corporations, “person” encompasses the entire corporate structure, including all parent corporations, subsidiaries and divisions ..., and all related corporations under common control with any of the foregoing.”) See also *id.* § 801.1(a)(3), § 802.30; *supra* note 343.

structures such as multicorporate groups and might therefore not adequately deal with their specifics,<sup>403</sup> it is also unresponsive to the economic concept of competition.

A corporate group that is structured like a unitary firm, with the opportunity to control its affiliates, should be treated as such by antitrust law. Moreover, it would be unjust to treat a parent and its subsidiary as one as long as it works in their favor, but let them enjoy the benefits of their legal separation for other similarly orientated questions.<sup>404</sup> As a result, it should be possible to attribute conduct within a corporate group to the entity responsible for its initiation, and to consider the market power of a single economic unit as a whole where relevant rather than only that of the acting entity. Finally, the concept can be used to assert jurisdiction over foreign parents of domestic subsidiaries violating the antitrust laws.<sup>405</sup>

This approach is consistent with the path European competition law has taken. There, matters of attribution have been a major field for the application of the European standard of an economic unit.<sup>406</sup> The European Court of Justice recently came to reaffirm this line of cases when it held “the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent

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<sup>403</sup> See I BLUMBERG, LCG - PROCEDURAL LAW, *supra* note 2, § 1.01.2. at 4-6; Blumberg, *Limited Liability*, *supra* note 1.

<sup>404</sup> See Keyte, *supra* note 84, at 894 (“Multicorporate enterprises should enjoy the burdens of their associations as well as the benefits.”). See also opinion of the Advocate General Mischo in Case C-286/98P, *Stora Kopparbergs Bergslags AB v. Commission*, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12, paras. [A25]-[A26] (E.C.J. 2000) (explaining that the European concept of a single economic unit “does not work in only one direction,” but that it is used to impute conduct to the parent company as well as to take certain conduct outside the scope of EC TREATY art. 81).

<sup>405</sup> In Europe, the single economic unit theory has been used repeatedly to assert extraterritorial application of European competition law. See, e.g., Case 6/72, *Europemballage Corp. & Continental Can Co. Inc. v. Commission*, [1973] E.C.R. 215, [1973] C.M.L.R. 199, paras. [15]-[16] (E.C.J. 1973). American law too is not unfamiliar with employing enterprise principles to claim jurisdiction. See Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 336 (“A significant number of courts have relied on enterprise principles to uphold the assertions of jurisdiction over foreign parents (and subsidiaries) of domestic subsidiary (or parent) corporations.”).

company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.”<sup>407</sup>

### G. Limitations of the Copperweld Rule

There are two significant limitations to the applicability of the *Copperweld* rule that a single economic unit is incapable of conspiring.

The Supreme Court pointed out the first in the decision itself. “It has long been clear that a pattern of acquisitions may itself create a combination illegal under section 1, especially when an original anticompetitive purpose is evident from the affiliated corporations’ subsequent conduct. ... An affiliation ‘flowing from an illegal conspiracy’ would not avert sanctions.”<sup>408</sup> Thus, corporations that would otherwise qualify for the rule’s protection are not shielded by *Copperweld* if their initial acquisition creating the relationship occurred in violation of section 1. This merely results from a straightforward application of section 1 Sherman Act (and section 7 Clayton Act) to mergers and acquisitions.

In *Rio Vista Oil, Ltd. v. Southland Corp.* a district court went on to find that if a combination is formed for the purpose of restraining trade, the parties to this combination remain separate for purposes of section 1.<sup>409</sup> In such a case, their subsequent coordinated

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<sup>406</sup> See *supra* Ch. Three III. for a description of this standard.

<sup>407</sup> Case C-286/98P, *Stora Kopparbergs Bergslags AB v. Commission*, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12, para. [26] (E.C.J. 2000). See also Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, [1972] E.C.R. 619, [1972] C.M.L.R. 557, paras. [132]- [135] (E.C.J. 1972) (see *supra* note 318); Case 52/69, *Geigy v. Commission*, [1973] E.C.R. 787, [1972] C.M.L.R. 557, para. [44] (E.C.J. 1972); *Europemballage & Continental Can*, [1973] E.C.R. 215, [1973] C.M.L.R. 199 at para. [15] (“The fact that the subsidiary has its own legal personality cannot rule out the possibility that its conduct may be imputed to its parent company. This is particularly the case where the subsidiary does not determine its market behavior autonomously but mainly follows the instructions of the parent company.”).

<sup>408</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 761 (1984).

<sup>409</sup> *Rio Vista Oil, Ltd. v. Southland Corp.*, 667 F. Supp. 757, 761 (D. Utah 1987).

action could be part of the original illegal scheme.<sup>410</sup> However, it is the initial combination that restrains trade illegally, not the coordinated activity within the new entity. This original combination can be attacked under section 1 (and possibly 2) of the Sherman Act and section 7 of the Clayton Act and should be distinguished from the subsequent coordinated conduct. Systematically, a court should judge the latter irrespective of the acquisition's purpose.<sup>411</sup> This notwithstanding, the district court's holding might well have interpreted the language in *Copperweld* correctly.<sup>412</sup>

A second, closely related limitation to the application of *Copperweld* is that a single economic unit has to exist at the moment the coordination in question comes about.<sup>413</sup> Otherwise parties could try to justify their anticompetitive conduct with a later merger. In *International Travel Arrangers v. NWA Inc.*,<sup>414</sup> the Eight Circuit approved a jury's finding that two firms, unrelated so far, became incapable of conspiring when they agreed in principle to merge.<sup>415</sup> However, at this point in time, the firms still remain unrelated and

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<sup>410</sup> See *id.*

<sup>411</sup> HEITZER, *supra* note 341, at 241. See also AREEDA & HOVENKAMP, *supra* note 341, ¶ 1464'e at 651 (*Copperweld* interpreted *Yellow Cab* to hold "that the illegal conspiracy was the merger itself, not subsequent behavior within the merger enterprise."); Assant, *supra* note 121, at 79 (arguing that plaintiff "presumably already had a chance to seek relief" against the acquisition); Brown, *supra* note 60, at 798 ("[I]mposing section 1 liability against a parent and its wholly owned subsidiary only upon a later showing of an original anticompetitive intent in acquisition provides a questionable basis for section 1 liability.").

<sup>412</sup> See 467 U.S. at 761 (discussing *Yellow Cab* and finding "[c]ommon ownership and control were irrelevant because restraint of trade was 'the primary object of the combination'..." ) & n.5 ("[O]ur point is that the illegality of the initial acquisition was a predicate for [the *Yellow Cab* Court's] holding that *any* post-acquisition conduct violated the Act.") (emphasis provided). See also *Fiberglass Insulators, Inc. v. Dupuy*, No. Civ. A. 84-1244-1, 1986 WL 13356, at \*5, 1986-2 Trade Cas. (CCH) ¶ 67, 316 (D.S.C. Sept. 30, 1986) (denying to apply *Copperweld* where plaintiffs allegedly conspired before forming a common corporation and corporation was claimed to be mere instrumentality to achieve the objects of the conspiracy); KINTNER & BAUER, *supra* note 294, at 38-39. But see AREEDA & HOVENKAMP, *supra* note 341, ¶ 1464'e at 651 (arguing that *Rio Vista* misread *Copperweld*).

<sup>413</sup> HEITZER, *supra* note 341, at 240.

<sup>414</sup> 991 F.2d 1389 (8th Cir. 1993), *cert. denied*, 510 U.S. 932 (1993).

<sup>415</sup> *Id.* at 1397-98. But see also *Lantec, Inc. v. Novell, Inc.*, 146 F. Supp. 2d 1140, 1150 (D. Utah 2001) ("Because a jury could find [merging parties] maintained independent economic consciousness after they decided to merge but before the merger was complete it was not impossible for them to conspire within the meaning of the Sherman Act.").

thus are expected to guard their own, supposedly diverse interests until the merger is consummated. As will be shown later, a relationship based on stock ownership is a prerequisite for granting a *Copperweld*-like immunity from section 1 scrutiny.<sup>416</sup> Furthermore, the decision in *International Travel Arrangers* is likely to create confusion as to when exactly the parties become incapable of conspiring.<sup>417</sup> *Copperweld*'s bright line rule based (existing) on ownership is therefore preferable.

## II. Determination of a Single Economic Unit

In *Copperweld*, the Supreme Court dealt with the relatively clear situation of a wholly owned subsidiary. This allowed the Court to leave open a quite central question: “under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.”<sup>418</sup> The Court was not required to develop a broader, more general test that would be applicable to other intercorporate relationships. Thus it remained uncertain what requirements exactly must be fulfilled to find a single economic unit.<sup>419</sup> However, as one commentator has put it, “[i]t is necessary to draw the line between exculpatory and irrelevant affiliations.”<sup>420</sup> How much influence and control must a parent corporation be able to exercise to find it and its affiliates incapable to conspire in violation of the Sherman Act?<sup>421</sup>

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<sup>416</sup> See *infra* Ch. Four II. D. 7. See also Calkins, *Copperweld in the Courts*, *supra* note 165, at 362 (“*Copperweld*'s ... rule ... probably should not apply until ownership is final.”).

<sup>417</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 362. See also AREEDA & HOVENKAMP, *supra* note 341, ¶ 1464'e at 651 (arguing that the court in *International Travel Arrangers* misread *Copperweld*).

<sup>418</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

<sup>419</sup> Cf. Belsley, *supra* note 334, at 740 (“The Court did not offer a test nor explicit guidance for how the lower courts should determine the existence of a single entity.”).

<sup>420</sup> Assant, *supra* note 121, at 76. See also *Copperweld Corp. v. Independence Tube Corp.*, 691 F.2d 310, 318 (7th Cir. 1982), *rev'd on other grounds*, 467 U.S. 752 (1984) (“[P]roper question ... when the distinction between affiliation and integration is trivial and when it is significant.”).

<sup>421</sup> For some preliminary thoughts see *supra* Ch. Three II. C.



### A. Partially Owned Subsidiaries in the Courts

Some commentators think that *Copperweld* laid the ground for further evolution in the direction of lower percentages of ownership.<sup>422</sup> Post *Copperweld*, lower courts have repeatedly dealt with partially owned subsidiaries. The results they settled on are neither uniform nor consistent.<sup>423</sup> Based on *Copperweld*'s complete "unity of purpose or interest" language,<sup>424</sup> courts have employed different approaches or sometimes simply announced whether the particular corporations have such a unity of purpose or not without engaging an in-depth analysis.

Several courts have held the *Copperweld* reasoning applicable only when the deviation from a 100 percent ownership is de minimis.<sup>425</sup> Courts applying this rule have found ownerships of 99.92 percent,<sup>426</sup> more than 99 percent,<sup>427</sup> 97.5 percent,<sup>428</sup> and 91.9

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<sup>422</sup> See, e.g., Assant, *supra* note 121, at 72.

<sup>423</sup> See Meyers, *supra* note 14, at 1407.

<sup>424</sup> Compare KINTNER & BAUER, *supra* note 294, at 34 ("The cases involving a parent corporation and its partly-owned affiliate are framed in terms of whether the corporation and affiliate share a unity of purpose and a common corporate consciousness.").

<sup>425</sup> Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1133 (3d Cir. 1995) ("[D]ifference between [parent's] 99.92% ownership and the 100% ownership in *Copperweld* is *de minimis*."; however, court noticed that other courts "have extended [*Copperweld*'s] principles to situations where parental ownership was in the 80% to 91.9% range," and court also employed control test. See *id.* See also Belsley, *supra* note 334, at 1410-11 (discussing the case and finding it "did relatively little to produce a definitive standard."); Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605, 608-09 (D. Or. 1990) (however, the court also applies a "force to merge" test and might not be constrained to the de minimis standard); Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987) ("[O]nly corporations which are owned 100% in common, or a *de minimis* amount less than 100%, are covered by the *Copperweld* rule." The court claimed to adopt this standard from *Sonitrol of Fresno, Inc. v. American Tel. & Tel. Co.*, No. Civ. A. 83-2324, 1986 WL 953, 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. April 30, 1986), but nowhere in *Sonitrol* does the court mention or employ a de minimis standard. To the contrary *Sonitrol* arguably advocates a control approach. See Meyers, *supra* note 14, at 1409 n.54 and *infra* note 435); Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986), *modified on other grounds*, 643 F. Supp. 449 (D. Del. 1986) ("[T]he *de minimis* [sic!] difference between [the parent's] percentage of ownership and 100 percent ownership does not diminish *Copperweld*'s applicability."). But see Meyers, *supra* note 14, at 1427 (criticizing this approach as stopping "short of effectuating the underlying themes of *Copperweld*").

<sup>426</sup> *Siegel Transfer*, 54 F.3d at 1133.

<sup>427</sup> *Satellite Fin. Planning*, 633 F. Supp. at 395.

<sup>428</sup> *Aspen Title*, 677 F. Supp. at 1486.

percent<sup>429</sup> a de minimis difference not foreclosing the applicability of *Copperweld*. Ownerships of 75 percent,<sup>430</sup> and 60 percent<sup>431</sup> were said to be not de minimis, thus leaving the corporations able to conspire in violation of section 1 Sherman Act. It is unclear, what would qualify as a de minimis amount under this approach: there is no clear line and courts have never spoken to that extent.<sup>432</sup>

A slightly more liberal test sometimes used is the parent's ability to force its subsidiary to merge with the parent corporation.<sup>433</sup> Under this "forced merger" test, a parent-subsidiary relationship is immune from section 1, if the parent has a sufficient equity interest in the subsidiary to force it to merge with the parent at any time without shareholder approval (so-called freeze-out merger). The threshold level of equity required under this standard hinges upon the law in the subsidiary's state of incorporation.<sup>434</sup>

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<sup>429</sup> *Leaco Enterprises*, 737 F. Supp. at 608-09.

<sup>430</sup> *Aspen Title*, 677 F. Supp. at 1486.

<sup>431</sup> *Id.*

<sup>432</sup> See Meyers, *supra* note 14, at 1409, 1411.

<sup>433</sup> *Leaco Enterprises*, 737 F. Supp. at 609 (parent owned 91.9 percent of the stock, under the law of the subsidiary's jurisdiction of incorporation (Canada), only 67% ownership was required to force the subsidiary to merge). See also *Sonitrol of Fresno, Inc. v. American Tel. & Tel. Co.*, No. Civ. A. 83-2324, 1986 WL 953, at \*2 n.2, 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. April 30, 1986) (citing Special Master's Recommendation that found 90 percent owned subsidiaries incapable of conspiring and concluded "subsidiaries in which [parent corporation] owned more than the percentage of stock that permitted it, under the law of incorporation of the subsidiary, to force a merger of the subsidiary into [the parent] over the objections of minority shareholders, and only during that time, those corporations shall be treated as if they were wholly owned by *Copperweld* purposes.").

<sup>434</sup> See, e.g., MODEL BUS. CORP. ACT § 11.05 (1999) ("(a) A domestic parent corporation that owns shares of a domestic or foreign subsidiary corporation that carry at least 90 percent of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary, or merge itself into the subsidiary, without the approval of the board of directors or shareholders of the subsidiary, unless the articles of incorporation of any of the corporations otherwise provide, and unless, in the case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.") See also *infra* note 602-03 and accompanying text.

Other courts have relied on a broader test based on control.<sup>435</sup> Under this approach, the inquiry centers on the parent's ability to legally control the subsidiary. "[T]he entity with legal control effectively dictates the policies and direction of its subsidiary. Anytime the subsidiary ceases to act in the best interest of the parent, the parent can assert full control over the subsidiary. In this respect, the parent and subsidiary act with a unity of purpose."<sup>436</sup> While this test mainly relies on percentage of stock ownership,<sup>437</sup> the district court in *Coast Cities Truck Sales, Inc. v. Navistar International Transportation Co.*<sup>438</sup> showed a willingness to consider a wider variety of factors. It held that as to partially owned subsidiaries:

a court must ... determine whether the parent and subsidiary are inextricably intertwined in the same corporate mission, are bound by the same interests which are affected by the same occurrences, and exist to accomplish essentially the same objectives. ... [A] parent that does not wholly own a subsidiary but nevertheless asserts total dominion over its actions, by way of management control, contractual obligations, economic incentives, or otherwise, is probably incapable of conspiring with that subsidiary for purposes of section 1 of the Sherman Act.<sup>439</sup>

Even though the decision – after a quite intensive analysis – eventually turned on the parent's ability to “dictate the objectives and actions of each” subsidiary through the

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<sup>435</sup> *Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 764-66 (D. N.J. 1995); *Bell Atl. Bus. Sys. Services v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 705-06 (N.D. Cal. 1994); *Novatel Commun., Inc. v. Cellular Tel. Supply, Inc.*, No. Civ. A. C85-2674A, 1986 WL 15507, at \*6, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. Dec. 23, 1986); *Sonitrol*, 1986 WL 953, at \*4-5. See also *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1133 (3d Cir. 1995) (employing de minimis standard, but stating that parent “had complete control over” subsidiary). Cf. AREEDA & HOVENKAMP, *supra* note 341, ¶ 1467 f at 653 (“The lower courts have given increasing weight to the legal power to control.”); KINTNER & BAUER, *supra* note 294, at 35 (“Where the difference is significant, the corporation's ability to exert full control over the affiliated company is an important factor in the court's analysis.”).

<sup>436</sup> *Bell Atl.*, 849 F. Supp. at 706. See also *Novatel Commun.*, 1986 WL 15507, at \*6 (“The 51% ownership retained by [the parent company] assured it of full control over [the subsidiary] and assured it could intervene at any time that [the subsidiary] ceased to act in its best interests.”).

<sup>437</sup> Cf. Meyers, *supra* note 14, at 1414 (“[T]raditional control approach focuses only upon the percentage ownership of stock or voting stock.”).

<sup>438</sup> 912 F. Supp. 747 (D. N.J. 1995).

<sup>439</sup> *Coast Cities Truck Sales*, 912 F. Supp. at 765.

control of voting shares and its influence through the corporate governance structure,<sup>440</sup> one commentator has suggested that the court's language might stretch to reach de facto control.<sup>441</sup> The only court so far to address de facto control coupled with a minority interest found it insufficient.<sup>442</sup> It found the board of the minority owned subsidiaries to retain legal control, because the board had both the legal ability and the legal duty to act in the best interests of their particular corporation and all of their shareholders.<sup>443</sup> Overall, under a control based test, ownerships of 80 percent,<sup>444</sup> 70 percent,<sup>445</sup> and even 51 percent<sup>446</sup> were found to establish control with minority interests of 23.9 percent<sup>447</sup> and 32.6 percent<sup>448</sup> being insufficient. However, another case that might fall in this category, found 54 percent of stock ownership to be insufficient to create a single economic unit even though the court found the majority owner to have control.<sup>449</sup> The court argued the minority shareholders had diverging economic interests,<sup>450</sup> and yet the circumstances of the case were indeed exceptional: While serving as directors, the majority shareholders set up a competing business, and favored their new business, which they wholly owned at the

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<sup>440</sup> *Id.* at 765-66.

<sup>441</sup> See Meyers, *supra* note 14, at 1414. See also Rohlffing v. Manor Care, Inc., 172 F.R.D. 330, 344 (N.D. Ill. 1997) ("Even in a case where the parent's ownership interest is not strong, unity of interest may be established if the economic objectives of the corporations are interdependent or if the management of one company exerts almost complete control over the other."). But "[n]o court has actually used the fact-sensitive control approach to determine the outcome of a case." Meyers, *supra* note 14, at 1414.

<sup>442</sup> Sonitrol of Fresno, Inc. v. American Tel. & Tel. Co., No. Civ. A. 83-2324, 1986 WL 953, at \*4-5, 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. April 30, 1986).

<sup>443</sup> Sonitrol, 1986 WL 953, at \*5.

<sup>444</sup> Bell Atl. Bus. Sys. Services v. Hitachi Data Sys. Corp., 849 F. Supp. 702, 706 (N.D. Cal. 1994).

<sup>445</sup> Coast Cities Truck Sales, 912 F. Supp. at 765 (finding parent "has owned at all relevant times enough of the voting shares" to be incapable to conspire with its subsidiary where parent had 100 percent ownership most of the time and 70 percent ownership for a period of approximately three years).

<sup>446</sup> Novatel Commun., Inc. v. Cellular Tel. Supply, Inc., No. Civ. A. C85-2674A, 1986 WL 15507, at \*6, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. Dec. 23, 1986).

<sup>447</sup> Sonitrol, 1986 WL 953, at \*4-5.

<sup>448</sup> *Id.*

<sup>449</sup> American Vision Centers, Inc. v. Cohen, 711 F. Supp. 721, 723 (E.D.N.Y. 1989). For a more detailed discussion of the case see *infra* notes 607-10 and accompanying text.

<sup>450</sup> American Vision, 711 F. Supp. at 723.

expense of the one in which they held only a majority share.<sup>451</sup> Based on this conflict of interest, the court found the majority shareholders not to be allowed to treat the two companies as one and keep the majority owned company from competing.<sup>452</sup>

A corporate relationship qualifying for an exemption from section 1 under the de minimis test will almost certainly also qualify under a control based approach, because the percentage of ownership to assume control is generally lower than the percentages held to suffice the de minimis standard.<sup>453</sup> However, a relationship where the parent corporation controls its subsidiary does not necessarily satisfy the de minimis standard, and one of the decisions implementing a de minimis standard explicitly rejected a standard based on control, “noting that a controlling shareholder having less than all shares might lack a unity of purpose and interest with the controlled corporation.”<sup>454</sup> Thus, in this situation courts might arrive at differing results based on which approach they invoke. Courts that have not invoked any of the aforementioned approaches, but have simply decided whether the corporations share a unity of purpose based mainly on ownership and sometimes additional factors make up a last group.<sup>455</sup> Here, courts found

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<sup>451</sup> *Id.* at 722.

<sup>452</sup> *Id.* at 722-23. See also HEITZER, *supra* note 341, at 243 (stating that the economic interest in a competitor is an important argument against the finding of a single economic unit).

<sup>453</sup> See Meyers, *supra* note 14, at 1412 and the percentages mentioned in the text.

<sup>454</sup> *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987). However, this decision might have been undercut by the court’s subsequent decision in *Leaco Enterprises, Inc. v. General Elec. Co.*, 737 F. Supp. 605 (D. Or. 1990). See *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 n.21 (N.D. Ill. 1997) (arguing to this extent).

<sup>455</sup> *Computer Identics Corp. v. Southern Pac. Co.*, 756 F.2d 200, 204-05 (1st Cir. 1985) (approving instruction that if jury finds as a matter of fact that parent and subsidiary “acted as a single entity sharing common management which made decisions controlling all”, no conspiracy took place); *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1216-17 (S.D. Ga. 1997) (parent company owned 51 percent of subsidiary and managed it); *Rohlfing*, 172 F.R.D. at 343-45 (in addition to ownership court stated that it found no “manner in which the interests of [parent] and its subsidiaries might diverge” and that corporations were interdependent since parent provided essential services to a subsidiary); *Total Benefit Services, Inc. v. Group Ins. Admin., Inc.*, 875 F. Supp. 1228, 1239 (E.D. La. 1995) (stating that a 95 percent ownership does not “require a different result”); *Rosen v. Hyundai Group (Korea)*, 829 F. Supp. 41, 45 n.6

ownerships of 95 percent,<sup>456</sup> 85 percent,<sup>457</sup> 82.3 percent,<sup>458</sup> 82 percent,<sup>459</sup> 80 percent,<sup>460</sup> and even 51 percent<sup>461</sup> to be sufficient to establish a unity of purpose and immunize the corporations from section 1 scrutiny. One court stated more generally, “a unity of interest is very likely to be found when the parent owns a substantial majority of the subsidiary’s stock.”<sup>462</sup> Another district court seemingly presumed a parent corporation and its majority owned subsidiary constituted a single entity unless the plaintiff makes an evidentiary showing to the contrary.<sup>463</sup> On the other hand, a decision dealing with state antitrust law held an unlawful agreement possible between a parent corporation and its 78 percent-owned subsidiary.<sup>464</sup> And an early decision held *Copperweld* to be inapplicable to a parent-subsidiary relationship, where the parent corporation owned 79 percent of the equity

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(E.D.N.Y. 1993), *aff’d without opinion sub nom.*, *Rosen v. Samick*, 22 F. 3d 1091 (2d Cir. 1994) (finding “a complete unity of interest” where parent controlled 80% of subsidiary with the remaining 20% being controlled by one of its managing directors); *Total Benefits Services, Inc. v. Group Ins. Admin., Inc.*, No. Civ. A. 92-2386, 1993 WL 15671, at \*2, 1993-1 Trade Cas. (CCH) ¶ 70,148 (E.D. La. Jan. 7, 1993), (citing *Leaco Enterprises*, 737 F. Supp. 605 and *Novatel Commun., Inc. v. Cellular Tel. Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986), two cases that stand for different approaches); *Viacom Int’l Inc. v. Time Inc.*, 785 F. Supp. 371, 383-84 (S.D.N.Y. 1992) (“Plaintiffs do not appear to dispute Defendants’ assertion that [the defending affiliated corporations including partially owned subsidiaries] represent a single enterprise for purposes of the Sherman Act section 1 analysis.”). See also *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1159-60 (La. 1986).

<sup>456</sup> *Total Benefit Services*, 875 F. Supp. at 1239.

<sup>457</sup> *Total Benefit Services*, 1993 WL 15671, at \*2.

<sup>458</sup> *Rohlfing*, 172 F.R.D. at 344.

<sup>459</sup> *Viacom Int’l*, 785 F. Supp. at 384-85 (Parent owned 82 percent of subsidiary’s stock and 93% of the voting power. See id. at 374 n.6).

<sup>460</sup> *Computer Identities*, 756 F.2d at 204-05 (upholding jury verdict that corporation did not conspire with 80% owned subsidiary); *Rosen*, 829 F. Supp. at 45 n.6.

<sup>461</sup> *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997).

<sup>462</sup> *Rohlfing*, 172 F.R.D. at 344. But see *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1159-60 (La. 1986) (“A parent and its partially owned subsidiary need not be a single economic entity. The parent may not have control, and a parent and its partially owned subsidiary may not have a complete unity of interest.”).

<sup>463</sup> See *Direct Media*, 989 F. Supp. at 1217 (“Plaintiff has not presented any evidence that defendants had any distinct business interests. . . . Plaintiff failed to provide evidence to suggest that Defendants were separate business entities with independent business interests.”). See also AMERICAN BAR ASSOCIATION, 1997 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 18 (1998) (calling the court’s conclusion “surprising”).

<sup>464</sup> *Bevilacqua v. Ford Motor Co.*, 125 A.D.2d 516, 518-19, 509 N.Y.S.2d 595, 598 (N.Y. App. Div. 1986).

stock and all of the voting stock.<sup>465</sup> However, the court in this latter decision failed to give any explanation for its reasoning, and it has been criticized widely.<sup>466</sup>

Finally, while courts have not agreed on the relevant factors, different courts have stated various factors they find worth considering. One, for example, found “[t]he court may consider various factors in determining whether corporations share a unity of purpose: 1) the legal relationship between the corporations; 2) the makeup of the board of directors of the subsidiary; 3) the corporate purposes of each of the corporations; and 4) the amount of autonomy exercised by the subsidiary.”<sup>467</sup> Another court mentioned “the interests and objectives of each company, the significant decision makers, and who will receive the benefit of the activity” as relevant factors to determine whether a given conduct is unilateral or concerted.<sup>468</sup>

It adds to the potential confusion about the adequate substantive test that courts also disagree as to whether the inquiry into a corporations ability to conspire with its partially owned subsidiary is a factual one<sup>469</sup> or can be decided as a matter of law.<sup>470</sup>

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<sup>465</sup> *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1495 n.20 (3d Cir. 1985), *vacated and remanded on other grounds*, 475 U.S. 1105 (1986), *order reinstated and opinion largely readopted*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988), *and on remand to* 696 F. Supp. 1056 (E.D. Pa. 1988). *See also* *People v. Schwartz*, 554 N.Y.S.2d 686, 686, 160 A.D.2d 964, 964 (N.Y. App. Div. 1990) (finding individual and three corporations individual owned to up to 75 percent able to conspire) However, the court in the latter decision did not focus on the intra-enterprise issue, but on bid rigging and a fraudulent use of the subsidiaries in this context. The court found the three corporations were maintained “for the express purpose of submitting multiple bids.” *See* 554 N.Y.S.2d at 687, 160 A.D.2d at 964-65.

<sup>466</sup> *See, e.g., Rohlfsing*, 172 F.R.D. at 344 n.21 (calling the outcome in *Tunis Bros.*, 763 F.2d 1482 “particularly questionable”); Meyers, *supra* note 14, at 1409 n.50, 1411 n.66. The precedential value of *Tunis Bros.* might be limited in light of the Third Circuit’s subsequent decision in *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125 (3d Cir. 1995). *See Rohlfsing*, 172 F.R.D. at 344 n.21 and *supra* note 425.

<sup>467</sup> *Leaco Enterprises, Inc. v. General Elec. Co.*, 737 F. Supp. 605, 608 (D. Or. 1990). *See also* *Total Benefits Services, Inc. v. Group Ins. Admin., Inc.*, No. Civ. A. 92-2386, 1993 WL 15671, at \*2, 1993-1 Trade Cas. (CCH) ¶ 70,148 (E.D. La. Jan. 7, 1993) (mentioning that controlling shareholder is also president and director of subsidiaries).

<sup>468</sup> *Direct Media*, 989 F. Supp. at 1216.

<sup>469</sup> *Computer Identics Corp. v. Southern Pac. Co.*, 756 F.2d 200, 204-05 (1st Cir. 1985) (holding that where a parent corporation did not wholly own an affiliated corporate entity, a jury must find as a matter of fact that defendants acted as one entity to avoid a finding of plurality of actors); *Bevilacqua*, 125 A.D.2d at

Overall, the situation is an unpleasant one. Courts have not yet managed to agree on a uniform standard that corporate groups can rely on.<sup>471</sup> Thus, corporate groups are confronted with the risk of different outcomes in factually identical situations. This makes it more complicated for them to run a corporate group in accordance with the law and thereby to predict liability.<sup>472</sup> Furthermore, the different treatment of corporate groups across different jurisdictions creates a potential for forum shopping.<sup>473</sup>

### B. Restraint on Third Party

One approach that has been suggested to limit the scope of immunity assigned to corporate families is not to exempt intra-enterprise agreements that cause external effects. According to this view, if an internal coordination imposes a restraint on third parties, for example if it restrains the competitive ability of outsiders or coerces strangers, it should be characterized as a “conspiracy in restraint of trade,” if its effects are limited to the corporate family it should not.<sup>474</sup> The idea of a third party restraint test seems to be inspired

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518-19, 509 N.Y.S.2d at 598 (finding *Copperweld* limited to wholly-owned subsidiaries and therefore issue whether parent company and 78 percent owned subsidiary could conspire a question of fact and not of law). See also KINTNER & BAUER, *supra* note 294, at 34 (“Although courts often adopt the ‘unity of purpose [or interest]’ language of *Copperweld*, whether such unity exists is treated as a fact issue which *Copperweld*’s rule of law does not govern.”); McNamara, *supra* note 23, at 1269 (“It is a question of fact whether a company in which a holding corporation does not own a majority interest is economically independent.”).

<sup>470</sup> Bell Atl. Bus. Sys. Services v. Hitachi Data Sys. Corp., 849 F. Supp. 702, 706 (N.D. Cal. 1994) (“Under the reasoning of *Copperweld* and its progeny, it is not necessary to conduct a factual inquiry to determine whether a parent and a subsidiary over which the parent has legal control can conspire in violation of section 1 of the Sherman Act. ... Accordingly, the Court finds that as a matter of law, ...”). See also Steinberg, *supra* note 17, at 564 (“[D]etermine as a matter of law whether the parent is able to exert full control over the subsidiary though it were a division or a fully owned subsidiary ...”).

<sup>471</sup> Cf. HEITZER, *supra* note 341, at 245-46 (criticizing the courts failed to develop reliable criteria).

<sup>472</sup> See id. at 246; Meyers, *supra* note 14, at 1403.

<sup>473</sup> See Meyers, *supra* note 14, at 1403.

<sup>474</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 792-93 (1984) (Stevens, J., dissenting) (“[I]f the behavior at issue is unrelated to any functional integration between the affiliated corporations and imposes a restraint on third parties of sufficient magnitude to restraint marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a ‘combination or conspiracy in restraint of trade.’” (emphasis provided)); *Thomsen v. Western Elec. Co.*, 512 F. Supp. 128, 131-33 (N.D. Cal. 1981), *aff’d*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 459 U.S. 991 (1982) (“Since actions of affiliated companies which relate strictly to the internal operations of the common enter-



by the idea that certain coordinated conduct is immanent in organizing and running a corporate group and therefore unavoidable, while other conduct exceeds the level of inherent coordination. The main group of cases categorized as outside restraints have been business torts, as in *Copperweld*, or refusals to deal, as in *Kiefer-Stewart*.<sup>475</sup> The same idea is discussed under the term ‘internal allocation of tasks’ in European competition law, where the European Court of Justice in *Viho Europe* – most probably – rejected this concept.<sup>476</sup>

Scholars have criticized that a third party restraint test focuses on the impact of the conduct of the affiliated corporations rather than on whether the corporations are capable of conspiring.<sup>477</sup> Besides, not every conduct that may affect third parties adversely

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prise inherently have a legitimate business purpose and lack anticompetitive effects (because they are not directed at outsiders to the corporate family), such actions cannot constitute a section 1 violation.”); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd.*, 467 F. Supp. 841, 859-60 (N.D. Cal. 1979) *aff’d on other grounds sub. nom.*, *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *REA Express, Inc. v. Alabama Great S. R.R. Co.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff’d sub. nom.*, *Sowerwine v. U.S.*, 431 U.S. 961 (1977) (“The agreement was between the railroads and their wholly-owned subsidiary; the interests of no other person were affected. ... The ... proposition that agreements between parents and subsidiaries effecting only their internal relationship violate the Sherman Act has been repudiated by several commentators ...”); *In re REA Express, Inc., Private Treble Damage Antitrust Litig.*, 412 F. Supp. 1239, 1256-57 (E.D. Pa. 1976); *Penn Cent. Sec. Litig. v. Pennsylvania Co.*, 367 F. Supp. 1158, 1166 (E.D. Pa. 1973) (“[N]o conspiracy directed at outsiders to the corporate family is alleged.”); Huie, *supra* note 218, at 325 n.72 (“[T]he focus ... should have been on the effect upon third parties ...”), 327 (“Treatment and judgment under antitrust statutes ought ... to hinge ... upon the beam of anticompetitive harm done to innocent third parties.”); Alessandria, *supra* note 55, at 567, 571, 587-88 (but stressing that in addition an adverse effect on competition as a whole is necessary). See also *Chastain v. American Tel. & Tel. Co.*, 401 F. Supp. 151, 159-60 (D.D.C. 1975) (critical issue is whether the policy of the corporate family “exerted an effect substantially similar to that of a conspiracy among independent companies in restraint of trade.”). But see *Handler & Smart*, *supra* note 17, at 51 (calling *Chastain* “essentially meaningless,” because the court “provides no guideline as to how one determines whether the anticompetitive effect alleged is substantially similar to that of a conspiracy among independent competitors in restraint of trade when the Sherman Act also permits restraints by single enterprises that would be unlawful if engaged in by two competitors.”).

<sup>475</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1469b at 279.

<sup>476</sup> Case C-73/95 P, *Viho Europe BV v. Commission*, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 (E.C.J. 1996). See *supra* Ch. Three III.

<sup>477</sup> *Handler & Smart*, *supra* note 17, at 51; *Keyte*, *supra* note 84, at 886; *McNamara*, *supra* note 23, at 1254; *Penn*, *supra* note 9, at 378 n.81. See also *Ulmer*, *supra* note 36, at 171 (an external restraint cannot replace the conspiracy requirement). As *Handler and Smart* notice, “[t]he critical question is not what is the effect of the restraint, but whether defendants are in fact separate entities.” *Id.*

is banned by section 1 of the Sherman Act.<sup>478</sup> More importantly, distinguishing agreements with external effects and an internal allocation of tasks is extremely difficult.<sup>479</sup> Every agreement within an affiliated group will have some outside effect, whether its primary purpose is to internally allocate tasks or not.<sup>480</sup> The market allocations in *Timken*, for example, may qualify as both internal organization steps and conspiracies restraining outside trade.<sup>481</sup> If a parent and its subsidiary agree on the latter's resale price, they affect the subsidiary's customers, but the conduct nevertheless has not been characterized as a restraint on outsiders.<sup>482</sup> The (re)organization of a group's distribution policy by assigning certain territories to particular subsidiaries, or by bundling all distribution activities within one subsidiary, or by switching from a distribution through subsidiaries to one based on an incorporated distribution division are arguably all measures of internal allocation of certain tasks.<sup>483</sup> Nevertheless they all influence outside competition: affiliates agree to withhold from certain actions, the measures limit the choice of the opposing market side, and probably affect the firm's competitors. After all why would a group

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<sup>478</sup> See Handler & Smart, *supra* note 17, at 51 (“[E]mphasis on the effect on third parties is misplaced because it ignores the fact that section 1 permits a variety of single firm behavior which may harm third parties.”).

<sup>479</sup> Cf. Ulmer, *supra* note 36, at 171; McNamara, *supra* note 23, at 1254 (“[C]ourts ... have failed to provide clear guidelines”). See also Fleischer, *supra* note 216, at 496 (analyzing European law and finding that there too proponents failed to give a concrete meaning to the term ‘internal allocation of tasks’).

<sup>480</sup> Assant, *supra* note 121, at 77; Fleischer, *supra* note 216, at 497; Handler & Smart, *supra* note 17, at 50; Willis & Pitofsky, *supra* note 20, at 49 (“Any cooperation or coordination between components of a multi-corporate enterprise can adversely affect the trade of outsiders if those outsiders happen to be suppliers, customers, or competitors of the corporate unit.”); Keyte, *supra* note 84, at 886. See also VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1469b at 279 (“Of course, the restraint might be ‘within the family’ and also affect outsiders.”).

<sup>481</sup> Assant, *supra* note 121, at 77.

<sup>482</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1469b at 279.

<sup>483</sup> See, e.g., Penn Cent. Sec. Litig. v. Pennsylvania Co., 367 F. Supp. 1158, 1166 (E.D. Pa. 1973) (market allocation among subsidiaries is “merely internal management of a single business enterprise”); Fleischer, *supra* note 216, at 496 (arguing that market allocation in *Viho Europe* can be seen as a division of labor). See Willis & Pitofsky, *supra* note 20, at 49.

reorganize its structure, if not to position itself better within competition, i.e. to cause an outside effect.

If almost all internal conduct can show external effects, it becomes highly ambiguous what conduct qualifies as restraint on outsiders under this approach. The differentiation between outside effects and internal allocation of tasks could at best be one of degree. But then the question becomes how much effect on outside competition is permissible. Such a test would be difficult to apply and inherently unpredictable. Moreover, it would be highly manipulative and primarily turn on the court's opinion as to what *should* be qualified as a restraint on outsiders. Thus, the test would again use intra-enterprise conspiracies to fill a supposed gap in the Sherman Act's coverage.<sup>484</sup> Finally, a test based on restraints imposed on a *third* party gets close to a circular reasoning. It implies what it pretends to prove: that the members of the corporate group provide for two entities.<sup>485</sup> Since no court has applied this standard after *Copperweld*, its inadequacy has probably been realized by now.

### C. Holding out as Competitors

Another potential criterion derives from dictum in the *Kiefer-Stewart* case where the Supreme Court held, "the rule [that common ownership and control does not liberate corporations from the impact of the antitrust laws] is especially applicable where, as here, respondents hold themselves out as competitors."<sup>486</sup> Thus, one might argue that section 1 should be applicable, where different corporations in a corporate group hold themselves

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<sup>484</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1469b at 279-80.

<sup>485</sup> Fleischer, *supra* note 216, at 497.

<sup>486</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). See also *supra* Ch. Three I. B. In this case, Calvert followed an independent pricing policy and acted as a competitor for its parent's products. See *supra* and Ulmer, *supra* note 36, at 166.

out as competitors, i.e. create a facade of independence.<sup>487</sup> The idea seems to be that a court may treat the corporations as separate if they act so. Proponents of the approach argue that it is reasonable to find expanded liability when subsidiaries publicly adopted a competitive attitude.<sup>488</sup> “Failure of disclosure might well contribute to the kind of restrictive, single-firm conduct that is difficult to reach under the antitrust laws.”<sup>489</sup>

The dissent in *Copperweld* gives an example for this idea: “A wholly owned subsidiary might market a ‘fighting brand’ or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved.”<sup>490</sup> However, as this example illustrates, it is once again not separate incorporation that makes the difference. The example would work just as well with two

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<sup>487</sup> See, e.g., *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) (“It is ... an acknowledged principle that a corporation may ‘conspire’ within the meaning of the Sherman Act with its subsidiaries, provided that the organizations are held out as distinct legal entities.”). Cf. *General Bus. Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983) (“[J]ointly owned corporations that compete in the marketplace, hold themselves out to the public as competing organizations, and set policy independently are as capable of conspiring ... as unrelated corporations.”). See also cases that require actual competition between the affiliated corporations to find a conspiracy: *Aaron E. Levine & Co., Inc. v. Calkraft Paper Co.*, 429 F. Supp. 1039, 1043-44 (E.D. Mich. 1976) (“[A] parent and its incorporated subsidiary cannot conspire in violation of section 1 where they are not in actual competition in the market.”); *Call Carl, Inc. v. BP Oil Corp.*, 403 F. Supp. 568, 572 (D. Md. 1975), *aff’d in part and reversed in part on other grounds*, 554 F.2d 623 (4th Cir. 1977), *cert. denied*, 434 U.S. 923 (1977) (“[A] parent and subsidiary cannot conspire in violation of section 1 of the Sherman Act if they are not in actual competition in the market.”); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff’d per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1971). This latter variation of the test is especially troublesome because it takes competition as the basis of an antitrust violation.

<sup>488</sup> See *Willis & Pitofsky*, *supra* note 20, at 38.

<sup>489</sup> *Willis & Pitofsky*, *supra* note 20, at 38. However, by focusing on the disclosure of the relationship the authors limit the application of the holding out rule to situations where the affiliated corporations conceal their affiliation. They do not argue that the mere fact of competition between the affiliated corporations should be sufficient. See *POTRAFKE*, *supra* note 32, at 49 n.163.

<sup>490</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 795 (1984) (Stevens, J., dissenting) (giving an example how separate incorporation can restrain trade). See also *Willis & Pitofsky*, *supra* note 20, at 38 (giving similar example). But see *POSNER & EASTERBROOK*, *supra* note 32, at 729-30 (“Kellogg may hold out Sugar Frosted Flakes and Special K as competing for the breakfast cereal dollar, but that does not make Kellogg’s internal structure a conspiracy in restraint of trade.”); *Areeda, Intraenterprise Conspiracy*, *supra* note 9, at 459 n.23 (“No court would find a conspiracy to be involved in the case of single corporation that markets rival brands of a product, promotes them separately, and conveys every impression that they compete.”).

independently lead divisions.<sup>491</sup> Thus, the separate incorporation is not decisive, but rather the concealment of the common ownership, of a situation without competition, i.e. some sort of estoppel<sup>492</sup> or fraudulent conduct.<sup>493</sup>

However, just because affiliated corporations hold each other out as competitors does not mean that they have concealed their affiliation and tried to deceive competitors or customers.<sup>494</sup> Furthermore, fraud or estoppel are hardly connected with common ownership and generally not a concern for the antitrust laws.<sup>495</sup> Arguably an exception is a classical bid-rigging situation, where it constitutes a wrong when competitors agree not to compete but only to simulate competition: they cease competing in violation of section 1 and defraud the other side into believing that their contractual terms result from a genuinely competitive situation. While the latter can be sanctioned on contract or tort grounds such as fraud, estoppel, or unfair competition, including section 5 of the Federal Trade Commission Act,<sup>496</sup> the former is not relevant among affiliates, because they were not able to genuinely compete with each other in the first place. Generally, an outsider's

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<sup>491</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1465a at 247 (“[C]ustomer belief that two divisions of a corporation are competitors cannot impose upon the divisions the legal duty to refrain from price or other coordination. Separate incorporation differs only in the somewhat greater likelihood that such beliefs will occur.”).

<sup>492</sup> Commentators have noticed, however, that estoppel requires “that someone relying on appearance changed his position to his disadvantage,” but that this factor was neither mentioned nor present in *Kiefer-Stewart*. See Willis & Pitofsky, *supra* note 20, at 37; Handler & Smart, *supra* note 17, at 53.

<sup>493</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1465a at 247.

<sup>494</sup> See Handler & Smart, *supra* note 17, at 54. The authors go on to argue that in *Kiefer-Stewart*, “there is no suggestion that any of Seagram’s competitors or customers were unaware of the affiliation between Seagram and Calvert ... or that Seagram was attempting to conceal this fact from the industry to gain some advantage,” and that the affiliation was “apparently well-known in the industry.” *Id.*

Modern regulations on accounting and balance sheets that require a parent to include corporations that it controls in its annual balance further reduce the likelihood of such schemes.

<sup>495</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1465a at 247-48; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 468 n.62.

<sup>496</sup> Cf. Willis & Pitofsky, *supra* note 20, at 37 (discussing an old line of cases in which the FTC found that a similar use of subsidiaries was an unlawful trade practice).

belief about a firm's independence is irrelevant in antitrust law. Professor Areeda gives the striking example of a garden-variety price-fixing cartel that remains illegal "notwithstanding the widespread and erroneous belief, however reasonable, that its members are wholly owned in common."<sup>497</sup> Rather a proper inquiry for antitrust in the example of the fighting brands might be whether the conduct constitutes an exclusionary practice, but that again is not related to the fact of separate incorporation.<sup>498</sup>

In confusing an antitrust conspiracy with the fraudulent non-disclosure of a no-competition situation, the holding out test puts antitrust laws to an inappropriate and unnecessary use.<sup>499</sup>

The test also has significant practical problems. It has never been specified what exactly constitutes 'holding out as competitors.'<sup>500</sup> Is it sufficient, if the affiliated companies sell the same product? Do they have to act in the same geographical market? Do they have to market different brands? In separate advertisements? What if affiliated corporations do not intend to compete, but employ separate sales forces or advertise separately so that they seem to compete?<sup>501</sup>

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<sup>497</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1465a at 246-47.

<sup>498</sup> See POSNER & EASTERBROOK, *supra* note 32, at 729-30 ("[I]t should make no difference how the enterprise is organized internally or how it holds itself out. ... Activity within a firm or family of commonly-owned corporations is of legitimate concern only when the entity is able to exclude competition by *other* economic units. In other words, the proper question is whether there has been an exclusionary practice." (emphasis in original)).

<sup>499</sup> Assant, *supra* note 121, at 77. See also VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 2, § 14.03.4 at 522 (distinguishing the fraudulent use of subsidiaries from the antitrust conspiracy issue).

<sup>500</sup> Handler & Smart, *supra* note 17, at 55. See also Willis & Pitofsky, *supra* note 20, at 37 ("[T]he [Kiefer-Stewart] Court does not spell out how the plaintiff in that proceeding was misled into thinking that Calvert and Seagram were actual competitors; indeed, it is hard to conceive how a deceptive competitive posture could have been maintained with respect to an experienced distributor in the business.").

<sup>501</sup> See Handler & Smart, *supra* note 17, at 55.

The systematical flaw of the approach is that it fails to explain why the capacity to conspire should turn on whether related companies hold themselves out as competitors.<sup>502</sup>

As a result, whether commonly owned corporations intended to act independently or appear to be unrelated does not influence their conspiratorial (in-)capacity.<sup>503</sup> As with the restraint on third parties, courts seem to have acknowledged the test's inappropriateness in view of the fact that the test has not been applied since *Copperweld*.

#### D. Control Based Tests

A test to determine a single economic unit “should seek to preserve independent centers of decision-making when they exist, but should classify strictly unilateral decisions as those of a single entity.”<sup>504</sup> A test must not reduce the competitive pressure where it exists, but it must also be sensitive to the economic realities and accept an economic unit between a parent and its (partially owned) subsidiary where it finds one.

##### 1. Professor Areeda's Approach

A very detailed approach to achieve these goals is provided by Professor Areeda. Since his analysis is still the most thoroughly reasoned one, it shall serve as an introduction and a starting point for a suggested approach. Professor Areeda observes that a minority interest does not necessarily prevent two firms from constituting a single economic

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<sup>502</sup> See Handler & Smart, *supra* note 17, at 53; Willis & Pitofsky, *supra* note 20, at 37; McNamara, *supra* note 23, at 1253.

<sup>503</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1465 at 246; McNamara, *supra* note 23, at 1265 n.136 (“The fact that a parent corporation and its controlled subsidiaries are held out as, or appear to the public to be, competitors does not provide an antitrust policy rationale to treat them as independent economic decision-makers.”). See also POTRAFKE, *supra* note 32, at 66 (suggesting that the Supreme Court impliedly rejected the holding out concept in *Copperweld*, because it is irrelevant to the question of whether related corporations have a unity of purpose); Keyte, *supra* note 84, at 886 (same).

<sup>504</sup> Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 794 (1989). See also McNamara, *supra* note 23, at 1267 (“The function of section 1 within the Act is to promote independent centers of decision-making. ... section 1 should apply when entities are involved that from an economic point of view, are distinct, although perhaps not unrelated.”).

unit.<sup>505</sup> The required protection of the minority interest does not force the two corporations to make their decisions separately rather than together.<sup>506</sup> Efficiencies through cooperation – often the motivation for a corporation to acquire the majority of another – could not be realized if coordination were treated as a conspiracy for antitrust purposes.<sup>507</sup> Furthermore, Professor Areeda finds the minority interest in a majority owned subsidiary to be identical with the majority most of the time, and usually unrelated to the alleged anticompetitive conduct in the sense that what brings about such anticompetitive conduct is regularly not the existence of a minority interest.<sup>508</sup> Nevertheless, he sees the necessity to separate a degree of ownership sufficient to constitute a single economic unity from an insufficient degree.<sup>509</sup>

Rejecting a distinction based on ‘substantial’ ownership for its vagueness, he finds more appeal in a super-majority requirement because of its proximity to total ownership.<sup>510</sup> This notwithstanding, he suggests legal control based on majority ownership to provide a clear cut, the “most ‘natural’ dividing line.”<sup>511</sup> So Professor Areeda proposes that majority ownership “with its centralized power to control” should constitute a single economic unit.<sup>512</sup> Whether this control is exercised in detail on a day-to-day basis should not be decisive,<sup>513</sup> because whether control is sufficiently exercised is merely a question of degree. What is more, a parent corporation can control a subsidiary without exercising

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<sup>505</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466d at 253.

<sup>506</sup> *Id.* ¶ 1466d2 at 253.

<sup>507</sup> *Id.*

<sup>508</sup> *Id.* ¶ 1466d3 at 254, ¶ 1467b at 260. See also Stewart, *supra* note 164, at 206 (“[P]erhaps most parent corporations and their subsidiaries are ‘one entity’ ...”).

<sup>509</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467f2 at 267.

<sup>510</sup> See *id.* ¶ 1467f2 at 268.

<sup>511</sup> *Id.*

<sup>512</sup> See *id.* ¶ 1467a at 259.

<sup>513</sup> *Id.* ¶ 1467a at 259; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 466.



actual control.<sup>514</sup> In addition, Professor Areeda suggests de facto control could be sufficient in limited circumstances, such as those present in the *Citizens & Southern* case or when foreign regulations require a parent to place a majority of the stock with nationals of the foreign country with the parent nevertheless controlling the subsidiary.<sup>515</sup> He concludes that if a court rejects to base its decision solely on majority ownership, the court is left only with an alter ego test – which has serious limitations even in its field of origin, the law of corporations, and turns on different considerations than antitrust<sup>516</sup> – or a day-to-day control test – which is hopelessly vague.<sup>517</sup>

Thus, to formulate a result of Professor Areeda’s analysis, “unified power to control coupled with at least majority ownership should establish a single entity without conspiratorial capacity. To take account of the many complexities of partial ownership, such a test could properly be made presumptive rather than conclusive.”<sup>518</sup> Thus, he suggests majority ownership to be decisive unless a party proves another factor to overcome the presumption. Courts that operate under this test should be able to decide the issue of legal control without a jury.<sup>519</sup> Where control is achieved with minority ownership, he suggests “a more fact-specific inquiry” to be appropriate.<sup>520</sup>

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<sup>514</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e at 264-65.

<sup>515</sup> See *id.* ¶ 1466a at 249, ¶ 1467f2 at 270.

<sup>516</sup> See *supra* Ch. Four I. F. 1.

<sup>517</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467g at 272; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 469 & n.64.

<sup>518</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467g at 273.

<sup>519</sup> *Id.* The author also provides a brief overview of pre-*Copperweld* cases that decided the single unit issue as a matter of law as well as such that emphasized the fact-bound character of the issue. See *id.* at 273-74.

<sup>520</sup> *Id.* ¶ 1467g at 273.

## 2. *The Relevance of the Minority Interest*

An approach that encompasses partially owned subsidiaries has to be aware of the peculiarities of these entities. As Professor Areeda properly points out, the key difference between a wholly owned subsidiary and a partially owned subsidiary is that the parent cannot operate the latter entirely as it likes.<sup>521</sup> It has to respect the minority interest. “Majority ownership carries the power to control, but subject to the duty not to injure minority shareholders.”<sup>522</sup>

The presence of this independent minority interest can affect the parent’s ability to control the subsidiary in various ways and different directions. In some cases, minority ownership may simply be brought about by the parent’s decision to raise capital through issuing new shares of the subsidiary. This setting should not drive a wedge between the parent and its subsidiary. More generally, the lack of a complete overlap in ownership notwithstanding, a parent and its majority owned subsidiary can still create efficiencies by coordinating some of their actions in order to reduce transaction costs and share resources.<sup>523</sup> But on the other hand, minority shareholders might have independent interests at odds with the interests of the parent.<sup>524</sup> Thus, a parent corporation might not be able to fully exercise its potential influence. Alternatively, it might refrain from exercising its control voluntarily if the parent company needs the cooperation of the minority share-

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<sup>521</sup> *Id.* ¶ 1466d at 252.

<sup>522</sup> *Id.* See also Stewart, *supra* note 164, at 204, 210 (“[A] parent’s control over its partially owned subsidiary may be limited by its fiduciary duty to other stockholders.” *Id.* at 204).

<sup>523</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466c at 252.

<sup>524</sup> See *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1160 (La. 1986) (“[A] parent and its partially owned subsidiary may not have a complete unity of interest.”); Stewart, *supra* note 164, at 206.

holders to assure the subsidiary's success, or due to other business concerns.<sup>525</sup> As a result, the two firms have to deal at arm's length or in other words as if they were unrelated whenever the minority interest (or the parent's preference) requires it.<sup>526</sup> In fact, the investment in a corporation might be based on the understanding of the public that its parent will always deal with the corporation at arm's length.<sup>527</sup> Things might as well be the other way around with the public investing in the subsidiary based on the assumption that the subsidiary will not compete with its parent but operate as an integrated facility.<sup>528</sup> After all, predominant ownership is mostly understood to allow integrated operations.<sup>529</sup> Moreover, even though the majority shareholder, i.e. the parent, has to respect the minority interest, it will often be in the minority's best interest to coordinate the subsidiaries behavior with the parent to maximize joint gains.

So Professor Areeda is right to notice that the presence of a minority interest that must be respected does not by itself hinder the finding of a single economic unit. A parent and its partially owned subsidiary can have a unity of purpose. At the same time, the discussion already indicated that diverging minority interests can exist. In this context, it is worth distinguishing different situations.

In case of a horizontal relationship, the interests of both corporations, parent and subsidiary, are in fact presumably identical since they both profit from the coordination of prices or product lines.<sup>530</sup> However, in a vertical relationship, the situation is more

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<sup>525</sup> See I BLUMBERG, LCG - PROCEDURAL LAW, *supra* note 2, § 22.03.3 at 433 n.3; Stewart, *supra* note 164, at 205.

<sup>526</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466d at 252-53.

<sup>527</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467b at 259.

<sup>528</sup> See *id.* ¶ 1466d at 253.

<sup>529</sup> *Id.* ¶ 1467b at 259.

<sup>530</sup> See *id.* ¶ 1466d3 at 254.

complicated. A majority owned retail subsidiary might be willing to accept some limitations on its profits in turn for keeping the parent from introducing additional competition at the retail level.<sup>531</sup> Yet Professor Areeda goes on to argue that even if the parent shifts the profit margin in its own favor, i.e. if it forces the subsidiary either to accept a profit margin below the market level for its sales, or to sell to the parent below market price, the parent's conduct would raise no antitrust implications.<sup>532</sup> The minority shareholders were only able to complain about the majority shareholder's abuse under corporate law. This analysis, however, seems questionable. In a situation like that, the interests of the parent and its subsidiary are no longer identical. At least the minority shareholders' interests are not represented when the parent tries to achieve gains at the expense of its subsidiary.<sup>533</sup> Professor Areeda focuses too much on whether the existence of a minority interest in the subsidiary brings about or aides the anticompetitive conduct in any way a wholly owned subsidiary would not;<sup>534</sup> however, the point is not whether the minority interest furthers the anticompetitive impact. Rather it is whether a unity of economic sources of power and a common interest exist that allow for the finding of a single economic unit.

Corporate law expects the board of directors to act on behalf of the corporation as a whole, not only in the interest of a certain group of shareholders even if this group holds the majority of the shares.<sup>535</sup> This expectation implies a corresponding fiduciary

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<sup>531</sup> See id. ¶ 1466d3 at 255.

<sup>532</sup> See id.

<sup>533</sup> Compare Brown, *supra* note 60, at 802 ("If minority shareholders own even a small percentage of the shares, a parent corporation can conceivably achieve gains at the expense of these minority shareholders by exercising its control over the subsidiary in a manner which favors the parent.").

<sup>534</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466d3 at 255-56.

<sup>535</sup> See *Sonitrol of Fresno, Inc. v. American Tel. & Tel. Co.*, No. Civ. A. 83-2324, 1986 WL 953, at \*5 (D.D.C. April 30, 1986); HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 652 (3rd ed. 1983) ("Since directors, with respect to their exercise of their management functions, owe fiduciary duties to the corporation to exercise unbiased judgment in the

duty of the board. In addition, it is widely accepted that even a majority shareholder, i.e. the parent, can be subject to a fiduciary duty towards the minority.<sup>536</sup> So, if the minority shareholders have diverging interests, then that is something the board has to take into account, and if it finds that the subsidiary's interests as a whole differ significantly from the parent's, it has to act in the best interest of the subsidiary notwithstanding the parent's interests.<sup>537</sup> The suppression of strongly diverging minority interests by the parent-controlled board can arise to a breach of fiduciary duties. Thus, corporate law requires

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best interests of the corporation as a whole, any attempt by the directors to favor one intracorporate group to the detriment of another breaches such duties to the corporation ..."); Steinberg, *supra* note 17, at 564; Stewart, *supra* note 164, at 204-05, 211.

<sup>536</sup> See, e.g., *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 108, 460 P.2d 464, 471 (Cal. 1969) ("[M]ajority shareholders ... have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. ... Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately ..."); *Singer v. Magnavox Co.*, 380 A.2d 969, 976 (Del. 1977) ("It is a settled rule of law in Delaware that ... the majority shareholder ... owed to the minority stockholders ... a fiduciary obligation in dealing with the latter's property."); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1160 n.26 (La. 1986) (mentioning a fiduciary duty for the majority shareholder in dictum); HENN & ALEXANDER, *supra* note 535, at 654; FRANKLIN A. GEVURTZ, *CORPORATION LAW* 346-51 (2000) ("[C]ontrolling shareholders pick up the directors' duty of loyalty when the controlling shareholders tell the directors what actions to take." *Id.* at 348); Brown, *supra* note 60, at 802 ("The majority shareholder's fiduciary duty to the corporation and to minority shareholders demonstrates that the interests of a parent and its partially owned subsidiary are potentially if not actually divergent."); Meyers, *supra* note 14, at 1425-26; Steinberg, *supra* note 17, at 564-65 ("[T]he parent owes [the minority shareholders] the fiduciary duty of preventing oppression of their interests, as well as of avoiding 'fraudulent, bad faith, or unfair results.'"); Stewart, *supra* note 164, at 204, 211 ("As the majority shareholder, a parent is obligated to operate the subsidiary for the benefit of all subsidiary stockholders." *Id.* at 204).

Two bases have been found for imposing fiduciary duties on controlling shareholders: (1) a direct approach, based on the theory that the relationship of the controlling shareholders to the minority shareholders is a fiduciary relationship, because the former hold a position of superiority and influence over the interests of the latter, or (2) an indirect approach "to the effect that if the ... directors owe fiduciary duties, the controlling shareholders who dominate the corporation through their influence over the directors ... are subject to analogous duties." See HENN & ALEXANDER, *supra* note 535, at 654.

<sup>537</sup> Cf. Steinberg, *supra* note 17, at 564 ("[T]he subsidiary's board of directors or even the parent itself may owe allegiances to the minority which precludes the board from managing the subsidiary in accordance with the parent's demands."), 565 ("[T]here may be some instances in which a less than wholly owned subsidiary may exercise independent judgment and may pursue its own parochial interests to the extent that it constitutes a separate economic entity from the parent."). See also Calkins, *Copperweld in the Courts*, *supra* note 165, at 353 (picking up *Copperweld's* picture of a parent and its subsidiary being "not unlike a multiple team of horses drawing a vehicle under the control of a single driver" to point out, "[c]orporate law makes clear, however, that when reins are shared no driver can steer without regard for other drivers.").

considering the minority interest, and if as a result the interests of parent and subsidiary differ significantly, the two corporations cannot compose a single economic unit.<sup>538</sup>

The situation is even more problematic when a competitor, supplier, or customer holds the minority interest rather than the general public. The problem is not a reduction in potential competition due to the shared ownership of the subsidiary, because any such concerns can adequately be considered in merger analysis the moment the acquisition comes about.<sup>539</sup> For example, if competitor *C* of parent *P* acquires 25% in *P*'s resale subsidiary *S* – possibly in return for giving up its own distribution division – the acquisition is subject to section 1 of the Sherman Act and section 7 of the Clayton Act, and a possible reduced competition between *C* and *P* has to be taken into account in this inquiry. Rather, even though the majority owning parent can still direct its subsidiary, the likelihood that diverging interests in the subsidiary exist rises substantially if the minority shareholder is a competitor, supplier, or customer of the parent.<sup>540</sup>

Thus, while a parent and its majority owned subsidiary can principally form a single economic unit, diverging minority interests can hinder this outcome sometimes.

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<sup>538</sup> Cf. Meyers, *supra* note 14, at 1425 (“Under state corporate laws, the minority shareholder will likely have recourse for corporate decisions that benefit the parent at the expense of the subsidiary because of the fiduciary duty owed them by the directors.”); Steinberg, *supra* note 17, at 565 n.176 (“Although the parent may substantially control its subsidiary and thus their interest may be similar, the two corporations may still lack a unity of purpose where the minority shareholders exist. This is evidenced by the fact that the parent may be prevented from causing the subsidiary to do acts detrimental to the subsidiary, although beneficial to the parent, by malcontent minority shareholders.”).

<sup>539</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466e at 257.

<sup>540</sup> Cf. Neri, *supra* note 20, at 965 (“[W]here the minority shares are held by a potential competitor of the parent, and when such affiliated entities have possibly conflicting economic goals, their combined conduct would not be truly ‘unitary’ in nature.”); Stewart, *supra* note 164, at 211 (“If a minority interest is held by a competitor, for example, the parent may be especially limited in its potential control.”).

### 3. Control as the Appropriate Standard

Considering these insights, it is apparent that any adequate standard will probably need some exceptions, but as such a standard control is appropriate.<sup>541</sup> Typically control is defined functionally as the “power (however obtained) to command or direct the command of the management or policies of a corporation.”<sup>542</sup> “Control normally rests on the ownership of a majority of the voting stock of the subsidiary, but where shares are widely distributed, control can arise from ownership of a substantial minority of the voting stock.”<sup>543</sup> Thus, majority ownership and control entail the power to direct the subsidiary corporation.<sup>544</sup> As in the context of a wholly owned subsidiary the ability to direct the subsidiary seems to be inconsistent with the notion of conspiracy.<sup>545</sup> In addition,

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<sup>541</sup> See *Fishman v. Estate of Wirtz*, 807 F.2d 520, 576 (7th Cir. 1987) (Easterbrook, J., dissenting) (“That the overlap of investment is not complete is irrelevant; ‘control’ is what matters for purposes of *Copperweld* ...”); *West Bolyston Cinema Corp. v. Paramount Pictures Corp.*, No. Civ. A. 98-00252, 2000 WL 1468513, \*12 (Mass. Super. Sept. 21, 2000) (finding common control sufficient); Meyers, *supra* note 14, at 1403, 1414; Penn, *supra* note 9, at 376-77; Prell, *supra* note 9, at 1179; Steinberg, *supra* note 17, at 568 (“‘unity of interest,’ as measured by power to control, is the appropriate yardstick”); Stewart, *supra* note 164, at 210. See also the cases that use a control based test, cited *supra* note 435; SULLIVAN & GRIMES, *supra* note 11, at 185 (“majority’s language suggests reliance on a control test”); Huie, *supra* note 218, at 325 (finding a control based test for partially owned subsidiaries is likely to derive from *Copperweld*); Smith, *Original Intent*, *supra* note 81, at 1178 (arguing the Court in *Copperweld* identified control as a relevant factor); Robberson, *supra* note 23, at 790-91.

For the use of control standards in various statutes see Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 304-07. Professor Blumberg contends that control is an increasingly used standard in modern regulatory statutes, that these statutes consider the realities of the corporate relationship rather than corporate form, and that many of these statutes find even clear minority stock ownership sufficient to establish control. See *id.* Even though these statutes turn on their respective considerations and cannot be determinative for antitrust, they show at least that control is an increasingly recognized standard to assess the realities of corporate groups.

<sup>542</sup> Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 298 n.6. See, for example the control definition in the Bank Holding Company Act, 12 U.S.C. § 1841 (2000). *Id.* at (a)(2).

<sup>543</sup> I BLUMBERG, LCG - PROCEDURAL LAW, *supra* note 2, § 22.02.01 at 425. See also the definition of control in the filing instructions for the Hart-Scott-Rodino Antitrust Improvements Act, 16 C.F.R. § 801.1(b) (2001) (“The term control ... means: (1) ... (i) Holding 50 percent or more of the outstanding voting securities of an issuer or ... (2) Having the contractual power presently to designate 50 percent or more of the directors of a corporation ...”) and in section 2 of the Canadian Competition Act (cited in relevant part *supra* note 5).

<sup>544</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467c at 261.

<sup>545</sup> See *supra* Ch. Two II. B. 2.; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467c at 261.

Professor Areeda points out, “[w]ith the legal power to control comes the power to transform an affiliated corporation into a mere division or the power to substitute direction for contracts or market transaction.”<sup>546</sup> Therefore, when the parent can control the subsidiary, the two normally share a unity of purpose, and their coordination is likely to have greater procompetitive rather than anticompetitive effects.<sup>547</sup> The reason is that at this point there is no genuine competition left within the corporate group that could be protected by anti-trust law. The controlled subsidiary is not an independent center of decision-making. It has lost its ability to compete with the parent against the parent’s will, because as the controlling shareholder the parent can use its influence within the subsidiary internally to keep the subsidiary from competing. Instead the adequate way to protect any potential or existing competition within the corporate group is through merger law before the parent’s acquisition of a controlling interest. Once a controlling interest exists, the coordination between the parent and the controlled subsidiary can bring about procompetitive effects by creating efficiencies due to vertical integration and economies of scale. In a competitive market the savings due to such efficiencies will be passed on to consumers.<sup>548</sup>

#### *4. Actual Control*

With accepting control as the standard the next question then becomes whether control needs to be exercised, i.e. whether the parent has to make actual use of its power in order to find a single economic unit, or whether the parent’s potential to control the subsidiary is sufficient.

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<sup>546</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467f2 at 268.

<sup>547</sup> See Meyers, *supra* note 14, at 1422.

<sup>548</sup> See *id.*



Under the single entity or all-the-facts-and-circumstances test developed by the Ninth and also used by the Seventh and Eight Circuit prior to *Copperweld*<sup>549</sup> actual control exonerated affiliated corporations from the capacity to conspire.<sup>550</sup> This approach has received some commendatory support, too.<sup>551</sup> Likewise the Supreme Court decided *Citizens & Southern*<sup>552</sup> in part on the ground that the defendant managed its de facto branches on a day-to-day basis.

As to the all-the-facts test in general, several of the factors courts employ in an all the facts standard seem to be quite irrelevant for determining a single economic unit. For example, several courts deemed consolidated financial statements or tax returns to indicate a single unit.<sup>553</sup> However, this is neither related to the question whether the corporations share a unity of interest, nor does it show whether or not they constitute only one single decision-maker if a multicorporate group keeps its accounts on a corporation-wide, line of business, or enterprise-wide basis.<sup>554</sup> Another factor often used is whether

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<sup>549</sup> See *supra* Ch. Three I. G. See also, e.g., *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 588-89 (8th Cir. 1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 802-03 (9th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977).

<sup>550</sup> See *General Bus. Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983); *Thomsen v. Western Elec. Co.*, 680 F.2d 1263, 1266 (9th Cir. 1982), *cert. denied*, 459 U.S. 991 (1982); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 n.5 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Island Tobacco Co. v. R. J. Reynolds Indus., Inc.*, 513 F. Supp. 726, 740 (D. Haw. 1981) ("The degree of control the parent exercises over its subsidiary is a determining factor ... A multi-corporate enterprise with the parent exercising control over the operations and policy of its subsidiaries should logically be viewed as 'one mind' whose parts are incapable ... of conspiring with each other."); *Brager & Co., Inc. v. Leumi Sec. Corp.*, 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977), *aff'd*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981).

<sup>551</sup> See *Prell*, *supra* note 9, at 1174, 1179 (arguing for the all the facts test used by the Seventh, Eighth, and Ninth Circuits prior to *Copperweld*); *Steinberg*, *supra* note 17, at 565, 568 (suggesting this same test should be used to measure situations of actual control by a parent over its majority owned subsidiary); *Thomson*, *supra* note 60, at 213, 217 (suggesting that courts should focus on ownership and the extent to which day-to-day operations are intertwined, a factor deriving from *Citizens & Southern*).

<sup>552</sup> *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975). See also *supra* Ch. Three I. F.

<sup>553</sup> *Ogilvie*, 641 F.2d at 589; *Photovest*, 606 F.2d at 726-27.

<sup>554</sup> Cf. VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1476d at 262 ("irrelevant for competitive purposes"; making the additional argument that otherwise enterprises would combine their records to protect them-

affiliated corporations share common offices or officers.<sup>555</sup> However, as much as a single corporation can have several offices and different officers for different branches or divisions without being able to conspire internally, so can a corporate group have different officers and offices.<sup>556</sup> It is not crucial that corporations share as many employees or office space as possible, but only whether they are directed in common. Common direction does not require shared officers. What is, however, relevant to some extent is common management. While the absence of overlapping management is not inconsistent with a single economic unit, the presence of similar decision-makers directing the operations of commonly owned corporations indicates a single enterprise.<sup>557</sup> Therefore, the composition of the board of directors is instructive, but regularly not determinative, because even if the directors overlap, the corporations can still be lead independently.<sup>558</sup> “Given that the makeup of boards of directors does not dictate the degree of actual or potential integration, directorial overlap should not be required to find a single enterprise.”<sup>559</sup> It is

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selves and thus the benefits of discrete bookkeeping would be sacrificed); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 464-65 (“Consolidated financial reports ... should not be essential to a finding that a single economic unit exists.”).

<sup>555</sup> See, e.g., *General Bus. Sys.*, 699 F.2d at 980; *Thomsen*, 680 F.2d at 1267; *Ogilvie*, 641 F.2d at 589; *Photovest*, 606 F.2d at 726; *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977).

<sup>556</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467d at 262; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 465.

<sup>557</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467d at 262-63; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 465. This was already recognized before *Copperweld* in the sole decision maker test, which found a single economic unit where one person owns, controls, and makes the decisions for several corporations. See, e.g., *General Bus. Sys.*, 699 F.2d at 980. See also *supra* Ch. Four I. C. The argument is that a person cannot conspire with itself. See, e.g., *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-57 (9th Cir. 1979); *McNamara*, *supra* note 23, at 1253-54. However, this test was limited to the rare cases where one person makes the decisions.

<sup>558</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467d at 263; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 465. A director has the duty to act in the best interest of its corporation. See *supra* note 535 and accompanying text.

<sup>559</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467d at 263. In Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 465 Professor Areeda used the stronger expression “directorial overlap should be deemed irrelevant to the question of conspiratorial capacity.” This, however, would mean to let a possibly helpful piece of information slip given that useful inferences can be drawn from the makeup of the decision-makers.

nevertheless a collateral factor a court might take into account when it examines the situation of a given corporate group, especially in the case of a minority owned subsidiary. In sum the all-the-facts test as a whole suffers from the almost inherent problem that simply not all facts are relevant for the finding of a single economic unit.<sup>560</sup>

Turning back to the very question of the relevance of actual control, it first has to be said that this standard misapprehends the real independence of the subsidiary. The test assumes that a subsidiary is free to compete and disagree with its parent, and is therefore able to conspire with it, as long as the subsidiary enjoys independence from its parent in its management. However, even in the absence of actual control such independence is independence by the grace of the parent. The parent company can take over actual control overnight erasing any seeming independence.<sup>561</sup> Hence, the subsidiary's freedom is illusory. This type of freedom on a leash cannot reasonably be the basis for an antitrust agreement.<sup>562</sup>

Furthermore, an actual control standard creates anticompetitive results. It favors integrated corporate groups by exempting them from antitrust liability. Thus, it promotes

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<sup>560</sup> Other factors of doubtful relevance that were considered include joint labor negotiations, or a common corporate logo. See *Thomsen v. Western Elec. Co.*, 680 F.2d 1263, 1267 (9th Cir. 1982), *cert. denied*, 459 U.S. 991 (1982). Approaches to cut this test down to the issue of effective management control are therefore certainly praiseworthy. Cf. *McNamara*, *supra* note 23, at 1272 (stressing as an advantage of his own approach that it considers "only those [facts] which reflect the decision-making process.").

<sup>561</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984) ("The parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."). See also *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 750 (1st Cir. 1994) ("Any claimed instance of truly 'independent,' owner-hostile, subsidiary decision-making would meet with the skeptical question, 'But, if the subsidiary acts contrary to its parent's economic interests, why does the parent not replace the subsidiary's management?'").

<sup>562</sup> *Assant*, *supra* note 121, at 77.

centralized decision-making and discourages independent initiative at the subsidiary's level with its presumptively procompetitive consequences.<sup>563</sup>

Practically speaking, the actual control test puts the affiliates in a difficult situation. Since a conspiracy requires some degree of coordination, there is a nexus between conspiracy and actual control.<sup>564</sup> The same evidence that a group may use to show a sufficient level of actual control can also serve to prove their conspiracy in case that they fail to establish the exemption.<sup>565</sup> If a corporate defendant for example shows that its officers met with those of the parent on a regular basis in the hope that such meetings will convince a jury of the defendant's lack of independence, the defendant runs the risk of substantiating the allegation of concerted anticompetitive practices.

Furthermore, a test based on actual control is difficult to apply because courts are required to take into account various indicia to determine whether a subsidiary is under actual control by its parent or whether the parent only has the potential to control its

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<sup>563</sup> See Assant, *supra* note 121, at 78; Fleischer, *supra* note 216, at 501; McNamara, *supra* note 23, at 1256 ("This rule ... forces parent corporations to maintain control over their subsidiaries that may not otherwise be required or desired in the course of regular operations, in order to avoid section 1 liability."); Stewart, *supra* note 164, at 209 ("[T]his approach encouraged the parent to exercise tight control over the subsidiary, thereby precluding the potential benefits accompanying decentralized operations."). Cf. Penn, *supra* note 9, at 377 n.79 ("The short-term decision-making 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.").

<sup>564</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e3 at 265-66.

<sup>565</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467a at 259, ¶ 1467e3 at 266-67 ("[A] standard emphasizing the degree of 'exercised control' harbors the underlying paradox that evidence of a 'conspiracy' between the parent and a subsidiary simultaneously demonstrates an exertion of control over the subsidiary that itself may preclude finding conspiratorial capacity."); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 464, 467-68 (same); Assant, *supra* note 121, at 77. See, e.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 557 (1st Cir. 1974) (finding vertical integration sufficient to establish a conspiracy). Cf. *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (since court found the corporations to constitute a single economic unit evidence introduced to show a conspiracy was deemed to be "[a]n internal agreement ... to further a single goal" that "does not create an actionable conspiracy"). But see Prell, *supra* note 9, at 1173 ("[P]roof of such coordination does not necessarily demonstrate unity between a parent and its subsidiary. A parent corporation can permit independent action by its subsidiary without obviating the possibility of joint action on mutually beneficial matters.").

subsidiary but has not actually exercised it. Furthermore, this is not as much a bright line distinction as it is a question of degree as to the control exercised by the parent. But what degree of exercised control is sufficient?<sup>566</sup> So far, neither the degree of actual control required to negate conspiratorial capacity nor the evidence and its relative weight that would establish sufficient control have been specified.<sup>567</sup> As a result, corporate groups would be confronted with unpredictable outcomes in litigation.

Finally, this test disregards that a well-managed subsidiary can operate with a minimum of actual control. Infrequent, general policy directives from the parent or informal, periodic discussions and meetings might be sufficient to keep the subsidiary's management aware of the interests of the larger entity.<sup>568</sup> Thus, the absence of direct involvement in the subsidiary's day-to-day business need not indicate that the parent corporation is a separate entity, able to conspire with its subsidiary.<sup>569</sup>

These flaws have not remained unnoticed by the courts. In *Copperweld*, the Supreme Court rejected an all-the-facts test based on such factors as the subsidiary's control over its day-to-day business, separate officers, or separate headquarters.<sup>570</sup> At least for wholly owned subsidiaries, the Court found these factors insufficient to establish a

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<sup>566</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e2 at 264 (“[H]ow much centralization is necessary to establish that integration? ... futility of searching for exercised day-to-day control”); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 466 (same).

<sup>567</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467g at 272; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 469. “We cannot pretend that the jury is a magic box for the resolution of questions which the judges themselves find difficult to decide. Telling the jury that it is looking for a ‘distinct’ entity says nothing, for the questions ‘how distinct’ or ‘distinct in what sense or for what purpose’ are left unanswered.” VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467g at 272-73. See also Fleischer, *supra* note 216, at 501; McNamara, *supra* note 23, at 1256.

<sup>568</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e2 at 265; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 466.

<sup>569</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e2 at 265; Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 466.

<sup>570</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 n.18 (1984). The Court stated that these factors “simply describe the manner in which the parent chooses to structure a subunit of itself.” *Id.*

separate entity because they could not overcome the fact that the interests of the subsidiary and the parent are identical.<sup>571</sup>

Thus, while the detailed exercise of actual control on a day-to-day basis shows a degree of control sufficient to find a single economic unit, such actual control is not necessary for the finding of a single economic unit.<sup>572</sup> As Professor Areeda puts it, “the *power* to centralize decision-making is more crucial than the apparent *exercise* of that power.”<sup>573</sup>

### 5. Potential Control

Even if the parent decides not to exercise its power to control, conspiratorial capacity should not be found given the parent's ability to control the subsidiary at any time. The parent company will set up its subsidiaries with as much independence and vigor to compete with other members of the group as it deems appropriate to maximize the profits of the corporate group as a whole.<sup>574</sup> But the application of the antitrust laws should not turn on management intentions.<sup>575</sup>

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<sup>571</sup> *Id.*

<sup>572</sup> *Cf.* *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 750 (1st Cir. 1994) (“[W]e do not see how a case-specific judicial examination of ‘actual’ parental control would help achieve any significant antitrust objective.”).

<sup>573</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e2 at 264 (emphasis in original); Areeda, *Intraenterprise Conspiracy*, *supra* note 9, at 466 (same).

<sup>574</sup> *See* *McNamara*, *supra* note 23, at 1265 & 1268-69.

<sup>575</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467e2 at 265.

The Supreme Court in *Copperweld* seemed to imply that potential control is sufficient.<sup>576</sup>

[A] parent and a wholly owned subsidiary *always* have a ‘unity of purpose or a common design.’ They share a common purpose whether or not the parent keeps a tight reign 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>577</sup>

According to the Court, a unity of purpose exists regardless of the parent’s exercise of its influence, because of the mere ability to control the subsidiary. The Court’s emphasize on the power to control as opposed to its actual exercise is not limited to the context of a wholly owned subsidiary.<sup>578</sup> It can be used as the basis for a broader standard. Accordingly many commentators find potential control appropriate.<sup>579</sup> A test based on potential control evaluates directly the source of a parent’s control over its subsidiary

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<sup>576</sup> See, e.g., VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.1 at 516 (“[T]he Court declined even to examine the actual exercise of control by the parent.”); Fleischer, *supra* note 216, at 501; Goldman, *supra* note 504, at 794-95 (“*Copperweld* found single entity status based on ... legal control”); Sommer, *supra* note 1, at 279 (calling *Copperweld* a case where the Court has accepted the “obvious fact that parents usually control their subsidiaries to the extent that it is efficient to do so.”); Alessandria, *supra* note 55, at 565 n.73; Belsley, *supra* note 334, at 728 (interpreting the Court to mean potential control); Keyte, *supra* note 84, at 875, 884 (“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.” *Id.* at 875); Neri, *supra* note 20, at 965 (interpreting the “*Copperweld* rule” to be “that a parent corporation and its wholly owned subsidiary share common objectives and interests, regardless of the degree of control exercised by the parent company”); Prell, *supra* note 9, at 1177-78.

<sup>577</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984).

<sup>578</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467f at 267; Smart, *supra* note 185, at 1068; Penn, *supra* note 9, at 378; Prell, *supra* note 9, at 1178 (finding this extension “entirely consistent with the majority’s rationale.”). See also Robberson, *supra* note 23, at 791 (arguing that the Court’s reasoning applies to partially owned subsidiaries, especially because the Court did not distinguish *Yellow Cab* and *Timken* based on the fact that the subsidiaries there were only partially owned). But see Stewart, *supra* note 164, at 206 (“The unity of interest present in *Copperweld* depended entirely upon the parent’s ownership of all the subsidiary’s stock.”).

<sup>579</sup> See, e.g., Assant, *supra* note 121, at 78; Fleischer, *supra* note 216, at 501; Goldman, *supra* note 504, at 795 (“right to exercise day-to-day control”); Belsley, *supra* note 334, at 728; McNamara, *supra* note 23, at 1268 (for wholly and majority owned subsidiaries); Meyers, *supra* note 14, at 1418; Penn, *supra* note 9, at 376-77; Stewart, *supra* note 164, at 211 (suggesting to balance “the parent’s potential control against the actual limitations imposed by the nature and extent of minority interests”). See also VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.4 at 521 (enterprise analysis appropriate where effective control over the subsidiary exists); Smart, *supra* note 185, at 1068 (proposing a rule that corporations are incapable to conspire “whenever one corporation has sufficient voting control over the other that it can change the corporate form of the subsidiary if it so desires or dictate its management policies.”). See also the cases employing a test based on potential control, cited *supra* note 435.

as opposed to a mere indirect assessment of this control's effects and manifestations in terms of actual control.<sup>580</sup>

Therefore, it should be sufficient, if the parent can assert full control over its subsidiary to find them incapable of conspiring. A controlling level of equity, typically a simple majority of the outstanding shares, provides a parent with such an ability to control the subsidiary at any time.<sup>581</sup> Through a controlling interest in the subsidiary's voting stock, the parent corporation can elect the majority of the directors of the corporation, who in turn will determine the officers of the corporation. With a majority of the voting stock the parent also controls a majority in a vote on those fundamental matters that are put to a shareholder vote.<sup>582</sup> In a corporation with different classes of stock, a parent should additionally own the majority of the subsidiary's common stock to ensure the parent's interest in the subsidiary's economic success, and that the parent and the subsidiary share a common economic interest.<sup>583</sup> A parent owning only a majority of the voting

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<sup>580</sup> Assant, *supra* note 121, at 78.

<sup>581</sup> See Belsley, *supra* note 334, at 772-73; Penn, *supra* note 9, at 377 ("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."); Prell, *supra* note 9, at 1178; ("Typically, a parent owning 100% of a subsidiary enjoys no greater control over its subsidiary than a parent owning 51%."); Stewart, *supra* note 164, at 210. See also Assant, *supra* note 121, at 78 ("[P]otential control is ... the parent's power to sanction the subsidiary's possible competition with other members of the group. ... A parent corporation may generally keep its subsidiary in line with the group's policies if it holds a sufficient share of the subsidiary's capital to control its board of directors."). If the parent controls at least 50 percent of the subsidiaries voting securities any further acquisitions of the parent are also assumed to be of de minimis competitive relevance and therefore are exempted from pre-merger notification requirements under 15 U.S.C. § 18(a) (2000) (c) (3). See also section 2 of the Canadian Competition Act (defining the degree of control sufficient to exclude corporations from the scope of the conspiracy provision under the Canadian Competition Act) (cited in relevant part *supra* note 5).

<sup>582</sup> See Meyers, *supra* note 14, at 1415. In most states, "fundamental matters" requiring shareholder approval include mergers, amendments of the articles of incorporation, the sale of substantially all the corporation's assets, and liquidation. See GEVURTZ, *supra* note 536, at 195-96. See also, e.g., MODEL BUS. CORP. ACT §§ 10.03 (amendment of articles of incorporation); 11.01 (a) (merger); 12.02(a) (sale of substantially all assets); 14.02 (dissolution) (1999); DEL. CODE ANN. tit.8, §§ 242 (amendment of certificate of incorporation); 251 (merger); 271(a) (sale of substantially all assets); 275 (dissolution) (2001).

<sup>583</sup> See Meyers, *supra* note 14, at 1415-16, 1420 ("A parent owning a majority of the common stock will have the incentive to maximize the subsidiary's wealth.").



stock but not of the common stock would have an incentive to disfavor the subsidiary for its own benefit.<sup>584</sup> The higher the level of the parent's ownership interest, the stronger its interest in the subsidiary's economic success gets.<sup>585</sup> The economic goals of parent and subsidiary become more closely related, and the incentive to abuse the subsidiary drops as the parent becomes the primary owner and bears the management risk.

Thus, a majority share of the subsidiary's voting stock and common stock normally provides the parent corporation with potential control. However, internal and external restraints can increase or decrease a parent's ability to control the subsidiary.<sup>586</sup> Such internal restraints are the articles of incorporation, or the bylaws of the subsidiary.<sup>587</sup> They might set up a supermajority requirement for shareholder voting,<sup>588</sup> or establish cumulative voting as the method of voting for directors.<sup>589</sup> Cumulative voting is

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<sup>584</sup> See *id.* at 1416, 1418 ("risk of strategic behavior").

<sup>585</sup> See *id.* at 1419. However, unless the subsidiary is wholly owned a parent corporation can always increase its own profits and stock value at the subsidiary's costs successfully, because – given that gains and loss in profits and stock value mirror each other – the parent can always let the minority shareholder participate at the subsidiary's loss without sharing the gains. But the higher the parent's share of the common stock, the smaller this possible profit becomes. See also *id.* at 1419 n.119 (arguing that a rational parent would sell the major part of its common stock prior to engaging in activities harmful to the subsidiary). This, however, might not allow be feasible.

<sup>586</sup> See Belsley, *supra* note 334, at 773; Stewart, *supra* note 164, at 205-06.

<sup>587</sup> See Stewart, *supra* note 164, at 205.

<sup>588</sup> See, e.g., DEL. CODE ANN. tit.8, § 216 (2001) ("[T]he certificate of incorporation or bylaws of any corporation ... may specify the number of shares ... which shall be present ... in order to constitute a quorum."); MODEL BUS. CORP. ACT § 7.27(a) (1999) ("The articles of incorporation may provide for greater quorum or voting requirement for shareholders ... than is provided by this Act."). Many corporations have adopted a "hybrid" voting structure that means a supermajority quorum for fundamental matters and a majority quorum for everything else. See Meyers, *supra* note 14, at 1415.

<sup>589</sup> See, e.g., DEL. CODE ANN. tit.8, § 214 (2001) ("The certificate of incorporation ... may provide that at all elections of directors ... each holder of stock ... shall be entitled to as many votes as shall equal the number of votes which ... he would be entitled to cast for the election ... with respect to his shares of stock multiplied by the number of directors to be elected by him, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for ... as he may see fit."); MODEL BUS. CORP. ACT § 7.28(b) & (c) (1999) ("(b) Shareholders to not have a right to cumulate their votes for directors unless the articles of incorporation so provide. (c) [cumulative voting] means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates."). See also Prell, *supra* note 9, at 1178. Same jurisdictions set cumulative voting as the default rule, i.e. they allow shareholders to employ cumulative voting unless the articles of

meant to provide the minority shareholders representation on the board.<sup>590</sup> Under cumulative voting, it takes more than mere majority ownership to guarantee the election of the majority of the board.<sup>591</sup> The shareholders can also limit or enhance their respective influence through management agreements.<sup>592</sup> External restraints limiting a parent's control include consent decrees, regulations, statutes, and restraints imposed by foreign governments.<sup>593</sup>

Therefore, a per se rule that a parent owning a majority of its subsidiary's stock is always incapable of conspiring with its subsidiary would not be justified even though it would be easy to apply.<sup>594</sup> Rather, courts have to engage in a case-by-case analysis to determine the situation of the corporate group at hand.<sup>595</sup> For this analysis, majority

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incorporation deny shareholders this right. See, e.g., 15 PA. CONS. STAT. § 1758(c) (1992). Sometimes, cumulative voting is even mandatory. See Az. Const. Art. 14 § 10 (state constitution requiring corporations to allow cumulative voting).

<sup>590</sup> See GEVURTZ, *supra* note 536, at 481.

<sup>591</sup> For the way cumulative voting operates see DEL. CODE ANN. tit.8, § 214 (2001); MODEL BUS. CORP. ACT § 7.28 (c) (1999), both cited *supra* note 589; GEVURTZ, *supra* note 536, at 481-83. The number of shares needed to elect a given number of directors (x) is determined by the following formula:

$$x = \frac{s * d}{D + 1} + 1$$

With s being the number of shares present at the meeting, d being the number of directors the shareholder wants to elect, and D being the number of directors that will be elected at the meeting. See also Assant, *supra* note 121, at 78 n.75 (giving an example).

<sup>592</sup> Cf., e.g., Stewart, *supra* note 164, at 205 (discussing a case where an agreement prevented the majority shareholder from appointing more than six of the thirteen directors).

<sup>593</sup> Stewart, *supra* note 164, at 205. The author gives an example of a parent corporation that was forbidden to vote its stock in the subsidiary or to have common officers due to an antitrust consent decree. This rendered the parent impossible to control the subsidiary. See *id.* at 205-06.

<sup>594</sup> Calkins, *Copperweld in the Courts*, *supra* note 165, at 353; Steinberg, *supra* note 17, at 564 ("determination [whether parent and subsidiary can conspire] will depend upon the circumstances of each case"); Stewart, *supra* note 164, at 198, 204, 206-07. See also Search Int'l, Inc. v. Snelling & Snelling, Inc., 168 F. Supp. 2d 621, 625 (N.D. Tex. 2001) (interpreting Copperweld to hold "that the substance of each corporate relationship must be examined to ensure that Congress's intent to distinguish between unilateral and concerted conduct is furthered in the given case instead of applying a per se rule to certain corporate structures – an approach that might frustrate Congressional intent."). But see Keyte, *supra* note 84, at 889-90 ("no reason to differentiate between 100 percent ownership ... and a majority ownership. ... [A] corporation which is majority owned by another necessarily has a unity of purpose and common design"); Penn, *supra* note 9, at 377 (per se rule based on majority ownership would be "well reasoned and easy applied").

<sup>595</sup> See VI BLUMBERG & STRASSER, LCG - STATUTORY LAW STATE, *supra* note 3, § 14.03.4 at 520 ("the facts of each case must be examined to determine the extent of minority ownership and the nature of

stockownership should establish a rebuttable presumption that the parent and the subsidiary are part of one and the same economic entity.<sup>596</sup> Conversely, where the parent<sup>597</sup> does not own the majority of the subsidiary's stock, there should be a rebuttable presumption that the two can conspire.<sup>598</sup> The use of rebuttable presumptions guarantees the required flexibility to cover the variety of possible situations. In the case of a less than majority owned subsidiary, the corporations claiming to constitute a single economic unit would have the burden to prove that they in fact have a common economic interest. This is appropriate since the affiliated corporations are in a much better position to produce the relevant data needed to determine their relationship.<sup>599</sup>

These presumptions can be rebutted if the control situation is unlike the presumptions assume it to be, that is if a parent does not have the potential to control a subsidiary even though it owns a majority share, or if a parent controls a subsidiary even though it holds an insufficient share of the subsidiary's stock. The goal of this inquiry must be to assess who really controls the subsidiary corporation, i.e. the economic reality of the corporate structure.

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the subsidiary's integration with operations of the parent and the group."); Prell, *supra* note 9, at 1178 (giving examples why a per se rule is inappropriate); Stewart, *supra* note 164, at 198, 208.

<sup>596</sup> See Fleischer, *supra* note 216, at 499 (suggesting the same standard for European competition law); Assant, *supra* note 121, at 78 (suggesting a rebuttable presumption based on "sufficient share ... to control a majority of ... [the] subsidiary's board."). See also Calkins, *Copperweld in the Courts*, *supra* note 165, at 352-53 (calling a rebuttable presumption based on control "an attractive suggestion" *Id.* at 352.).

<sup>597</sup> Technically speaking it is not quite correct to call a corporation that does not own a majority of the voting stock a 'parent' corporation. See *supra* note 14; BLACK'S LAW DICTIONARY 344 (7th ed. 1999) (defining parent corporation to mean "[a] corporation that has a controlling interest in another corporation ... through ownership of more than one-half the voting stock.>").

<sup>598</sup> See Assant, *supra* note 121, at 78 (presumption of capacity to conspire where parent "does not hold enough voting shares of the [subsidiary] to control its board of directors."); Keyte, *supra* note 84, at 891 ("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 decision-making power and control."). Cf. McNamara, *supra* note 23, at 1267-68 (arguing for a test with a per se rule for majority owned subsidiaries and based on actual control in case of minority owned subsidiaries).

<sup>599</sup> See Keyte, *supra* note 84, at 891; McNamara, *supra* note 23, at 1269 n.159.

With respect to the first presumption, the one in favor of a parent's control, several factors can issue such a rebuttal. For example, when the articles of incorporation of the subsidiary provide for cumulative voting, a parent must hold a share that allows it to elect at least a majority of the subsidiary's board to control the subsidiary. Thus, the presumption of control can be rebutted if a parent owns a majority share but not a high enough share to get a majority on the board. If a supermajority vote is required, a parent's share must also be higher than a mere majority to ensure its potential control of the subsidiary – at least if the supermajority requirement extends to fundamental matters, as it usually does.<sup>600</sup> A lower share can rebut the presumption even though the parent still holds the majority. Another situation when it would be appropriate to rebut the presumption of conspiratorial incapacity would be when the parent does not control the subsidiary as a result of a voting agreement among the subsidiary's shareholders.<sup>601</sup>

If, on the other hand, the parent's percentage of stockownership is high enough to transform the subsidiary into a division at any time by ways of a freeze-out merger, then it is hard to imagine how the presumption of unity can be rebutted.<sup>602</sup> In these situations,

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<sup>600</sup> See Meyers, *supra* note 14, at 1415.

<sup>601</sup> Assant, *supra* note 121, at 78. An example might be the situation in *Timken*, where the substantial (even though not majority) holdings of the parent corporation in its subsidiaries notwithstanding another shareholder was entitled to manage both subsidiaries due to different classes of shares and voting agreements. See *supra* Ch. Three I. C. See also DEL. CODE ANN. tit.8, § 218 (2001); MODEL BUS. CORP. ACT § 7.31 (1999) (“Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose.”).

<sup>602</sup> Every state's corporate law contains provisions authorizing mergers without the necessity of unanimous shareholder approval – usually by majority vote. In addition, some state statutes include a provision for a so-called short-form or freeze-out merger, which allows a parent corporation owning the required percentage of outstanding shares to unilaterally eliminate the minority shareholders of the subsidiary. The required percentage varies; the Delaware General Corporation Law and the Model Business Corporations Act both call for at least 90%. See DEL. CODE ANN. tit.8, § 253 (2001); MODEL BUS. CORP. ACT § 11.05 (1999) (text of the latter cited *supra* note 434). See also MODEL BUS. CORP. ACT § 11.04 (1984) (“A parent owning at least 90 percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.” This is the version still adopted by many states.).

the parent's power to control the subsidiary is absolute. It can control the board of the subsidiary due to its high percentage of stock and can convert the subsidiary into a wholly owned subsidiary or a division any time it desires to do so. The parent's possibility to freeze-out the minority eliminates the significance of the minority's interests.<sup>603</sup>

The minority's interest is the catchword for the most difficult factor to assess: whether the parent and the subsidiary in fact share a common interest. Strongly diverging minority interests can hinder the parent from controlling the minority and can obscure the common interest. If the party alleging a conspiracy can establish that the interests of the subsidiary as a whole differ, the presumption in favor of a single economic unit should be rebutted. In order to do so, the minority interests may be assessed in terms of the makeup of the minority shareholders.<sup>604</sup> In situations where the nature of the shareholders, other than the parent, is unlikely to interfere with the parent's interests the presumption should not be rebutted. Examples include situations where the remaining shares are owned by stockholders of the parent or other corporations of the same corporate family, or by the directors or employees of the parent, the subsidiary or other corporations of the same group.<sup>605</sup> This is also true to a lesser extent where the remaining shareholders consist of individuals or institutions holding the stock solely for investment purposes. In this latter

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These provisions allow the parent corporation to take over the minority owned shares at any time to become the sole owner of the corporation. The minority shareholders are usually only entitled to the fair value of their shares. The short-form merger statutes allow the board of directors to effectuate the merger without first obtaining shareholder approval of either the parent or the subsidiary. Judicial intervention is limited to disputes concerning the fair value of the minority interest but is unavailable to avoid the merger itself. See generally GEVURTZ, *supra* note 536, at 724-43. See also the cases that use a forced merger standard, cited *supra* notes 433-34 and accompanying text.

<sup>603</sup> See Steinberg, *supra* note 17, at 567. See also Handler & Smart, *supra* note 17, at 73.

<sup>604</sup> Cf. Steinberg, *supra* note 17, at 565 (suggesting that the "characteristics of the minority stockholders" should be relevant to determine whether the parent controls a majority owned subsidiary).

<sup>605</sup> See *id.* at 566.

category, however, the investors have an interest to maximize the subsidiary's value as opposed to the value of the corporate group as a whole. Thus, a course that would be beneficial for the parent or other corporations of the corporate group, but not for the subsidiary itself is not likely to be in their best interest. The parent "may not distort intra-enterprise dealings to increase its own profits at the expense of the subsidiary by forcing the subsidiary to sell its supplies at below-market prices."<sup>606</sup>

An instructive example for diverging minority interests, though not in the context of a corporate group, can be found in *American Vision Centers, Inc. v. Cohen*.<sup>607</sup> Three individuals named Cohen held a majority of together 54 percent in American Vision, a corporation operating and franchising retail stores for optical products. They used their stockownership to name themselves directors and officers, and while serving as those , they owned 100 percent of the stock, and were directors and officers of a directly competing corporation.<sup>608</sup> The court found that they ran the two companies to favor their wholly owned business, diverted to it corporate opportunities of American Vision, and prevented American Vision from opening stores or granting franchises in those states where their own business was already present.<sup>609</sup> In this situation the court was right to reject a single entity defense, because the remaining 46 percent of American Vision's shareholders had no interest whatsoever in the Cohen's competing company, but were kept from competing with it.<sup>610</sup> However, it should be noted that this case is of limited applicability since it draws on special circumstances in two respects. First, the two corporations at issue were

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<sup>606</sup> VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1466d at 252.

<sup>607</sup> 711 F. Supp. 721 (E.D.N.Y. 1989). See also *supra* notes 449-52 and accompanying text.

<sup>608</sup> See *id.* at 722.

<sup>609</sup> See *id.*

<sup>610</sup> See *id.* at 723.

linked through individuals and not as parts of a corporate group. So, they were not subject to a common plan that could benefit all members of the group in the long term even though it might disfavor certain corporations at one time. A situation like that could have changed the analysis. Secondly, the conspiracy in *American Vision* was a conspiracy by the majority shareholders and a company under their control against the majority owned company. That this is not in the best interest of the latter is almost obvious.

The second presumption, which assumes that a parent does not control its less than majority owned subsidiary, should be rebutted, if the parent does in reality control the subsidiary. This is the situation of de facto control as opposed to legal control. When the shareholders of a corporation are dispersed, even a minority shareholder with a substantial number of shares is usually able to elect a majority of the corporation's directors and direct the corporation's course. Thus, a minority shareholder can achieve de facto control of a corporation if the rest of the shares he faces are widely split.<sup>611</sup> Antitrust law has recognized this fact in the area of merger control, where any acquisition likely to achieve control triggers the control provisions of section 7 of the Clayton Act and for this matter section 1 of the Sherman Act.<sup>612</sup> From this perspective, Professor Areeda's argument that "ownership sufficient to transform two firms into one for merger purposes should also create a single entity for conspiracy purposes"<sup>613</sup> is a strong one. It provides a consistent concept for merger and conspiracy purposes. It also recognizes that the rationale for treating de facto control as a merger is the expectation that even though a minority

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<sup>611</sup> Stewart, *supra* note 164, at 211, suggests vice versa that where a minority interest is highly concentrated even a majority shareholder might have problems to fully display its potential influence.

<sup>612</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467f2 at 269. See also *id.* ¶ 1466d2 at 254 (Section 7 of the Clayton Act applicable to partial acquisitions).

<sup>613</sup> *Id.* ¶ 1467f2 at 269.

interest remains the acquired and the acquiring corporation will cease competing with each other thereafter but cooperate.<sup>614</sup> If they were expected to act as if they were unrelated, there would be little need to make the acquisition subject to merger control. However, merger control has a strong emphasis on prophylaxes, which might well require a stricter standard.<sup>615</sup> Recognizing de facto control in the conspiracy context will certainly evoke some uncertainty and complicate litigation to a limited extent. In addition, one commentator suggested that a corporation and another corporation under its de facto control can never have a unity of interest, because the dispersed shareholders could unite at any time against the controlling shareholder who could therefore never unilaterally force the subsidiary to pursue a certain course of action.<sup>616</sup> However, the practical problems of forming such a coalition among the dispersed shareholders will often render this possibility a theoretical one: the percentage of stockholders present at a meeting is generally not high enough to outvote a shareholder with a substantial though minority share, the dispersed stockholders might well pursue different interests that keep them from allying, and for owners of small portions of share who keep their stock for investment purposes, the effort for organizing or even participating in such a coalition might not be worth it. These shareholders would rather sell their shares than participate actively in the determination of the corporation's course. Finally, it is neither clear nor persuasive, why a parent should not have a unity of purpose with a de facto controlled subsidiary simply because it could

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<sup>614</sup> See *id.* ¶ 1467f2 at 269, ¶ 1466d2 at 254.

<sup>615</sup> See *id.* ¶ 1467f2 at 269-70 ("The law's willingness to bear this burden [of an uncertain standard] to satisfy the prophylactic purpose of section 7 need not extend to the conspiracy issue.").

<sup>616</sup> See Meyers, *supra* note 14, at 1417-18.



lose its control at same time later. In *Citizens & Southern*<sup>617</sup>, the Supreme Court has recognized that de facto control can be sufficient to find corporations incapable of conspiring in certain circumstances. Therefore, continued and unopposed de facto control – but not for example a one time narrow victory in the board’s election – should be accepted as a possibility to rebut the presumption of conspiratorial capacity in the context of a minority owned subsidiary.<sup>618</sup> An example for this situation can be found in *Sonitrol of Fresno, Inc. v. American Telephone & Telegraph Co.*<sup>619</sup> There the parent held minority ownerships of 32.6 percent and 23.9 percent in two subsidiaries, and the court found that this ownership “as compared to the stock ownership of others, was sufficient as a practical matter so that it would be extremely difficult for dissident stockholders to join together to elect a board of directors that would have acted independently of [the parent’s] wishes.”<sup>620</sup> This notwithstanding, the district court found the subsidiaries capable of conspiring with their parent, emphasizing the boards’ legal ability to act independently and their duty to act in favor of the respective subsidiary.<sup>621</sup> Although this point of view is true in theory, it ignores the economic reality of the corporate relationship. When de facto control exists in the way described by the court, and the subsidiaries have historically followed the parent’s lead, as they did in this case, a court should find the corporations incapable to conspire.

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<sup>617</sup> *United States v. Citizens & Southern Nat’l Bank*, 422 U.S. 86 (1975). *See supra* Ch. Three I. F.; VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467f2 at 270.

<sup>618</sup> *See* Assant, *supra* note 121, at 78-79.

<sup>619</sup> Civ. A. No. 83-2324, 1986 WL 953, 1986-1 Trade Cas. (CCH) ¶67,080 (D.D.C. April 30, 1986).

<sup>620</sup> *See id.* at \*4.

<sup>621</sup> *See id.* at \*5.

Another way for a minority shareholder to control a corporation without holding a majority share is due to a voting agreement, which entitles him to manage the corporation.<sup>622</sup> Finally, in the situation where foreign governmental regulations limit an investing parent company to a minority share of a subsidiary the parent company should be allowed to establish that it nevertheless controls the subsidiary.

Generally speaking, in a situation where the parent does not own a legally controlling share of the subsidiary, the inquiry tends to be more fact intensive. To establish de facto control, a parent company might be required to show such things as that the parent and the subsidiary follow a common course on the market, that they unified their long term business policy and goals,<sup>623</sup> or that the parent bears the management risk of both entities.

The result under both presumptions should be that if a parent can control a subsidiary and any difference in interest is insignificant at best, the two corporations form a single economic unit incapable of conspiring.<sup>624</sup> This single economic unit includes not only parent and subsidiary, but also all corporations either of the two corporations controls, is controlled by, or is under common control with. However, when a parent cannot control the subsidiary, or when the interests of the parent corporation and the subsidiary are significantly different, the two do not constitute a single economic unit and should be found capable of conspiring. It should be noted that this does not necessarily mean that

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<sup>622</sup> See Assant, *supra* note 121, at 78-79. See, e.g., the situation in *Timken*, discussed *supra* at note 601 and in Ch. Three I. C.

<sup>623</sup> Cf. McNamara, *supra* note 23, at 1269-70 (suggesting to examine the pattern of decision-making within the subsidiary to assess whether it has autonomy in its actions, especially in setting its long term goals). The author also suggests that some freedom in making operational decisions should not be decisive if it is in reality the parent corporation that determines the market conduct for both. See *id.* at 1270. His standard seems to be influenced by the European practice.

<sup>624</sup> See Stewart, *supra* note 164, at 209-10 (proposing a similar result).

the related corporations have lost the case. It simple means that they can conspire in violation of section 1 with one another. A restraint of trade still has to be shown and within this requirement their common stock interests can influence a rule of reason analysis.<sup>625</sup>

#### *6. Bright Line Rule v. Fact Intensive Standard*

One possible argument against the just suggested test has to be addressed in advance. What is recommended is not a bright line rule in the sense that a certain percentage of stockownership always operates as the dividing line. Rather the inquiry as it was just described tends to be more detailed and fact intensive, even though it considers a by far more limited scope of factors than the all-the-facts-and-circumstances test and uses rebuttable presumptions to ease its application. The disadvantage of every such test is that it can be very open ended.<sup>626</sup> As the number of relevant factors increases, the predictability of the outcome decreases. In addition, several of the aspects in the suggested test would hinge on corporate law, which varies throughout the different states. However, there is a trade-off between an easily applicable bright line distinction and a more precise, fact intensive approach. With respect to the conspiratorial capacity of corporate groups, the one easy to apply and always-accurate test does not exist. In the continuum between strictly centrally controlled and decentralized corporate groups any dividing line necessarily contains a degree of arbitrariness.<sup>627</sup> Therefore the question is, how much arbitrariness is acceptable, and there a more fact intensive approach certainly has the pros on its

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<sup>625</sup> See Meyers, *supra* note 14, at 1422.

<sup>626</sup> See VII AREEDA, ANTITRUST, *supra* note 8, ¶ 1467g at 271. In *Copperweld* the jury was invited to consider “any other facts that you find that are relevant” to decide whether the defendant corporations “are separate and distinct companies capable of conspiring with each other.” *Copperweld Corp. v. Independence Tube Corp.*, 691 F.2d 310, 332 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984).

<sup>627</sup> Cf. Fleischer, *supra* note 216, at 494-95; Meyers, *supra* note 14, at 1420 (“[A]ny bright line rule of common stock ownership will certainly have a degree of arbitrariness.”).

site.<sup>628</sup> Furthermore, predictability and ease of application are not in themselves sufficient reasons to establish a rule, where the situations covered call for a differentiated analysis.<sup>629</sup> Finally, as to the relevance of state corporate law, “the congress enacting the Sherman Act certainly was aware that states give life to corporations and thus have the power to supervise and regulate them.”<sup>630</sup> Therefore, a Sherman Act analysis might well turn on state corporate law. In *Copperweld*, the Supreme Court ruled that total ownership establishes a single entity as a matter of law. Nevertheless, for partially owned subsidiaries a more detailed test is necessary to be just to the different types of corporate groups and to take the minority interests into account.<sup>631</sup> After all, the suggested approach based on control is not endless in what it takes into account but considers only factors relevant to the issues of control and common interest.<sup>632</sup>

### 7. Two Distinguishing Requirements: Complete Control and Structural Relationship

Two limitations on the announced rule should be noticed.<sup>633</sup> First, according to the Supreme Court in *Copperweld*, “a parent and a wholly owned subsidiary have a

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<sup>628</sup> Cf. Michael L. Denger, *Antitrust Overview and Horizontal Restraints of Trade*, 1040 PLI/CORP 7, 96 (1998) (“Given the different types of corporate formation and the different degrees of control retained by a parent corporation over a non-wholly owned subsidiary, courts may do better to adjudicate the *Copperweld* issue on the facts of each agreement, rather than by a bright-line rule that 51% or greater subsidiaries cannot conspire with their parents.”).

<sup>629</sup> Cf. *United States v. Topco*, 405 U.S. 596, 622 (1972) (Burger, C.J., dissenting) (arguing against the formulation of per se rules “with no justification other than the enhancement of predictability and the reduction of judicial investigation.”).

<sup>630</sup> Steinberg, *supra* note 17, at 567 n.182. See 21 CONG. REC. 4093 (1890) (statement of Congressman Wilson) (“The States, not Congress, grant the charters for these corporations. It is at once their duty, as it is clearly within the sphere of their lawful power, to supervise the creatures which they bring into being, so as to prevent the franchises granted by the people [from] being used for the oppression and detriment of the people.”).

<sup>631</sup> Cf. Prell, *supra* note 9, at 1178 (arguing against a per se rule); Stewart, *supra* note 164, at 198, 207-08 (arguing for an assessment on a case-by-case basis). But see Meyers, *supra* note 14, at 1421 (arguing for his own bright line test).

<sup>632</sup> Cf. Assant, *supra* note 121, at 78 (calling his similar control based test “easily administrable”).

<sup>633</sup> Other issues, which have gained some attention but are beyond the scope of this paper, are the application of *Copperweld* to sport leagues, joint ventures and cooperatives.

With a few considerable exceptions, courts and commentators have been reluctant to label league activities and joint ventures single entities based on *Copperweld*. Though their members must cooperate in some respects, leagues have usually been found to constitute joint ventures of independent actors. Joint ventures with separate economic interests in turn have been found capable of conspiring. With cooperatives the courts have been somewhat more leniently.

See, e.g., *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op.*, 838 F.2d 268, 274-77 (8th Cir. 1988) (electric cooperative consisting of three tiers of cooperatives with interlocking ownership was held to be a single entity pursuing a common goal, even though some diverse interests existed among the separate but interdependent members; unlike a parent-subsidiary relationship, a finding of a unitary actor in the form of a cooperative can be rebutted by the government upon a showing that any of the cooperative members “pursued interests diverse from those of the cooperative itself.” *Id.* at 276. Diverse interests are those that “tend to show that any of the [members] are, or have been, actual or potential competitors.” *Id.*); *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 942 F. Supp. 905, 916-19 (S.D.N.Y. 1996) (adopting *City of Mt. Pleasant*’s analysis and finding that corporate group and fifteen dairy cooperatives formed to act in concert with the head of the corporate group constitute a single economic enterprise unless the cooperatives or their members pursue diverse interests); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1367 (N.D. Ga. 1986), *aff’d on other grounds*, 844 F.2d 1538 (11th Cir. 1988) (electric cooperatives that jointly formed generation and transmission cooperative were incapable of conspiring with the entity they formed, see also Calkins, *Copperweld in the Courts*, *supra* note 165, at 360 n.96 (criticizing the decision)); *Freeman v. San Diego Ass’n of Realtors*, 77 Cal. App. 4th 171, 191, 91 Cal. Rptr. 2d 534, 550 (Cal. Ct. App. 2000).

With respect to sports leagues see, for example, *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-59 (1st Cir. 2002) (distinguishing the MLS from the situation in *Copperweld* because its legal entities possess distinct entrepreneurial interests and its operator/investors are not servants of the MLS but control it; “the present case is not *Copperweld* but presents a more doubtful situation; MLS and its operator/investors comprise a hybrid arrangement, somewhere between a single company ... and a cooperative arrangement between existing competitors.” *Id.* at 58; although the court did not decide the single entity question, it found an assessment of the question under the rule of reason “more straightforward” and based on developed law; the court cautioned, “[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases.” *Id.* at 59); *Eleven Line, Inc. v. North Tex. State Soccer Ass’n*, 213 F.3d 198, 205 (5th Cir. 2000) (national soccer organization and its regional members associations were a single economic unit incapable of conspiring with each other; court left open whether the players’ parents and the regional member associations could conspire); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996) (fact of divergent interests among a league’s franchises does not preclude finding that the franchises could function as a single entity for some activities; *Copperweld* dictated no single characterization of sports leagues, but might rather require a determination “one league at a time – and perhaps even one facet of a league at a time” *Id.* at 600); *Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) (NFL teams can conspire under section 1 Sherman Act because they all “pursued interests diverse from those of the cooperative itself,” and “NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise”); *McNeil v. National Football League*, 790 F. Supp. 871, 879-80 (D.Minn.1992) (holding that *Copperweld* did not apply to the NFL and its member clubs and finding the clubs to be separate entities capable of conspiring together under section 1).

See also 1 ABA, DEVELOPMENTS, *supra* note 97, at 25-26; SULLIVAN & GRIMES, *supra* note 11, at 186 (arguing against the extension of the single entity concept to sports leagues, joint ventures and cooperatives); HEITZER, *supra* note 341, at 242 (criticizing *Chicago Professional Sports*; since there were no structural relations between the franchises but various conflicting interests the case could not be resolved under *Copperweld*, and rather should have been addressed under the rule of reason); Calkins, *Copperweld in the Courts*, *supra* note 165, at 358-60; Goldman, *supra* note 504 (*Copperweld* does not support a broad single entity defense for sports leagues); McChesney, *supra* note 32 (suggesting that the MSL can be characterized as a single entity because it has a unity of purpose, owns its teams, and has a preexisting unity of economic interest); Waxman, *supra* note 383 (arguing for a sham exception in single entity cases “to pre-

complete unity of purpose.”<sup>634</sup> Such an (at least almost) complete unity of interest plus a parent’s potential control that is in theory global or complete is needed to distinguish the corporate group from a classical cartel where participants share a limited interest, say for example in excluding price competition. The members of a cartel might even give limited powers to a shared institution, such as a common selling agency, to achieve this goal. This notwithstanding, their overall interests stay diverse, and the power and control of the central institution of a cartel is never of the degree that a parent has over its subsidiary.<sup>635</sup> Thus, a limited overlap in interests is not sufficient to satisfy the suggested standard. Nor is a control potential that only covers certain limited areas. Apart from that, a cartel can always be attacked for being a combination or conspiracy to bring about but an anticompetitive end.

A second noteworthy limitation arises where the relationship between the actors only rests on a contract. There are three situations when the courts have rejected allegations of conspiracy between entities without any ownership relation.

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vent the use of ... incorporation as an anticompetitive weapon that will be used solely, or primarily, as an artifice to evade the antitrust laws, rather than as a way to create a real corporation” *Id.* at 497); Timothy R. Deckert, Casenote, *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. 73 (1998); Karen Jordan, Note, *Forming a Single Entity: A Recipe for Success for new Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC 235 (2001) (arguing that upcoming sports leagues as opposed to the established leagues could and should have a single entity structure). See also *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85 (1984) (holding that because joint ventures consist of multiple entities, they are legally capable of violation section 1; “joint ventures have no immunity from the antitrust laws.” *Id.* at 113).

<sup>634</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

<sup>635</sup> But see *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 377 (1933) (“The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal – that one is a legitimate enterprise and the other is not – makes but an artificial distinction.”).

First, some courts have found single entities due to franchise agreements. In *Williams v. I.B. Fischer Nevada*,<sup>636</sup> a district court found a franchisor and a franchisee incapable of conspiring because of a commonality of interest between them and because of the franchisor's contractual right to exercise a high degree of control. Without mentioning *Copperweld* the court held, "[f]or two separate corporations to act as a single entity, it is not necessary that one be owned, wholly or in part, by the other corporation. The presence of a parent and subsidiary relationship is not an essential element."<sup>637</sup> This holding has been picked up by another district court.<sup>638</sup> And recently, in *Search International, Inc. v. Snelling & Snelling, Inc.*,<sup>639</sup> a district court found that a franchisor and its franchisees form a single economic unit and have a unity of interest where the franchise agreement gave the franchisor "almost complete control."<sup>640</sup> The court was apparently unimpressed by a potential conflict of interest in the relationship due to the franchisor's operation of stores in competition with its franchises.<sup>641</sup> Yet, the *Williams* court – and also the *Search International* court – reasoned from the degree of control embodied in the franchise agreement, that the agreement itself was not a conspiracy.<sup>642</sup> However, the agreement is at best what brings the single entity about and is therefore subject to scrutiny under section 1 even under *Copperweld*, which excluded the initial acquisition.

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<sup>636</sup> 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

<sup>637</sup> *Id.* at 1032.

<sup>638</sup> See *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1548 (S.D. Fla. 1995) (finding franchisor and franchisee incapable of conspiring with each other for section 1 purposes, citing *Williams*). See also Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 344 ("Franchisors and franchisees which today represent a major segment of the American economy most strongly raise the issue of the application of enterprise principles to collective undertakings resting on contract. Other examples include licensors and licensees, and contractors and subcontractors or others in an integrated contractual chain.").

<sup>639</sup> 168 F. Supp. 2d 621 (N.D. Tex. 2001).

<sup>640</sup> *Id.* at 625-26.

<sup>641</sup> See *Id.* at 626.

<sup>642</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 357 (calling this reasoning of "bootstrapping nature").

*Levi Case Co. v. ATS Products, Inc.*<sup>643</sup> presents the second situation. A district court held a patent holder and a sublicensee incapable of conspiring in violation of the antitrust laws. The court's argument was that by virtue of the exclusive license they could not compete as to the patent.<sup>644</sup> Because "[t]he grant of an exclusive license excludes even the patent holder himself from exercising the rights conveyed by the license" patent holder and sublicensee "were not independent sources of economic power."<sup>645</sup> However, the grant of an exclusive license does not prevent a patent holder from competing with the licensee in general; it just prevents him from competing through use of the patented technology.<sup>646</sup> What is more, this case as well as *Williams* seemed to assume that only competitors could conspire.<sup>647</sup> But *Copperweld* has not limited the coverage of section 1 to agreements among competitors.<sup>648</sup>

Finally, in *Aerotech, Inc. v. TCW Capital*<sup>649</sup> another District Court found a single unit between a debtor and a debtholder based on the latter's financing for a leveraged

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<sup>643</sup> 788 F. Supp. 428, 431-32 (N.D. Cal. 1992).

<sup>644</sup> See *id.* at 432.

<sup>645</sup> See *id.* at 431, 432. But see *Townshend v. Rockwell Int'l Corp.*, No. C99-0400SBA, 2000 WL 433505, at \*5-6, 2000-1 Trade Cas. (CCH) ¶ 72,890 (N.D. Cal. Mar. 28, 2000) (finding licensor and licensee not legally incapable of conspiring where they had "independent motivations" *Id.* at \*6; distinguishing and limiting *Levi Case*; "The [*Copperweld*-] Court expressly limited its holding to parent companies and their subsidiaries and has not extended this holding to the licensor/licensee context ..." *Id.* at \*5).

<sup>646</sup> Calkins, *Copperweld in the Courts*, *supra* note 165, at 357.

<sup>647</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 357. Cf. *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026, 1031 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993) (emphasizing that franchisor did not compete with his franchises and tried to minimize competition among them); *Levi Case*, 788 F. Supp. at 432 ("[T]here was no opportunity for them to compete. Thus, they could not 'conspire' in violation of the antitrust laws.").

<sup>648</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 358. But see *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 191, 91 Cal. Rptr. 2d 534, 550 (Cal. Ct. App. 2000) ("[W]hen independent entities combine through an agreement that controls or restraints trade in products ... *in which they previously had been actual or potential competitors*, there is a 'joining of two independent sources of economic power previously pursuing separate interests.'" (citing *Copperweld*) (emphasis provided)).

<sup>649</sup> No. 93 Civ. 1987 (CSH), 1994 WL 775439, 1994-1 Trade Cas. (CCH) ¶ 70,616 (S.D.N.Y. April 20, 1994).



buyout. The court held the distinction between the position of a parent corporation and a debtholder to be “without a difference in antitrust analysis.”<sup>650</sup>

The approach suggested in this subchapter derives its shape from the context of corporate groups. Therefore, it is essential under this standard that control is established due to a structural relationship based on equity. A mere contractual relationship is not sufficient. More generally, courts should hesitate to find conspiratorial incapacity based on contracts.<sup>651</sup> Contracts are usually formed among parties with opposing interests on the basis of reciprocity. The fact that one party may be interested in the other party’s economic success in order to benefit from the contract should not be misunderstood to mean that a contract completely surmounts every opposing interest among the contracting parties so that they share their economic resources and a common interest from now on. In a contract based relationship, rather than assuming the parties lack the separateness to conspire, courts should employ the flexibility of the rule of reason, which provides the appropriate tool to determine when an agreement has no anticompetitive effect.<sup>652</sup>

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<sup>650</sup> See *id.* at \*2. See also McNamara, *supra* note 23, at 1270-71 (arguing for the possibility to find a single entity between a debtor corporation and its creditor).

<sup>651</sup> See Calkins, *Copperweld in the Courts*, *supra* note 165, at 358. But see Blumberg, *Recognition of Enterprise Principles*, *supra* note 2, at 343 (“Whether or not linked by stock or by contract, when parties join in the collective conduct of an integrated economic activity, much the same pressure for application of enterprise principles are present.”). See also *Montgomery County Ass’n of Realtors v. Realty Photo Master Corp.*, 878 F. Supp. 804, 816 (D. Md. 1995), *aff’d*, 91 F.3d 132 (4th Cir. 1996) (“Courts have generally held that associations, being ‘a group of persons or entities which have joined together for a common purpose,’ can form the requisite conspiracy under the Sherman Act.”); *Spence v. Southeastern Alaska Pilots’ Ass’n*, 789 F. Supp. 1014, 1022 (D. Alaska 1992) (“[Association] and its members, as independent contractors, [for whom the association acts as an agent and] who but for their association ... would be potential competitors, are capable of conspiring with each other.”).

<sup>652</sup> Cf. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58-59 (1st Cir. 2002) (noticing a choice of approach between expanding upon *Copperweld* and a reshaping of the rule of reason in doubtful situations including franchise cases, where “a close but not complete integration of separate entities under separate entrepreneurial control” exists; the court cautions the lack of a stopping point when expanding *Copperweld*, while it finds the rule of reason approach “more straightforward” and drawing on developed law).

## CHAPTER FIVE

### CONCLUSION

Corporate groups are a common feature of our modern economy. The reasons for separate incorporation are wide-ranging and generally competitively neutral or even pro-competitive. Yet, once a separately incorporated affiliate exists it will inevitably coordinate itself with other members of the corporate family. Antitrust law, especially section 1 of the Sherman Act, takes a critical view on this tendency towards cooperation as it does on all forms of concerted action among different actors.

For almost half a century, the answer to this confusing conflict has been the intra-enterprise conspiracy doctrine, which allowed for the finding of a conspiracy between affiliated corporations. When the Supreme Court finally overruled the doctrine in *Copperweld*, it had ample reason to do so. The doctrine relied heavily on form but never evaluated whether legal separateness is sufficient to establish separate actors for antitrust purposes. In consequence the intra-enterprise conspiracy doctrine caused confusion and inconsistent standards in the courts, complicated litigation, and confronted corporate groups with an unpredictable legal environment for their business. However, section 1 of the Sherman Act is designed to protect independent centers of decision-making and economic power. The cooperation between a parent and its subsidiary presents no such joining of independent sources of power, because their interest and purpose is already joined since the moment the affiliation come about. Thus, a parent and its wholly owned subsidiary constitute essentially one actor, a single economic unit, and should not be subject

to scrutiny under a provision designed to monitor concerted action by a plurality of actors. Any gap in the Sherman Act's coverage that this might produce is modest at best and can adequately be covered by other provisions – if necessary in an adapted interpretation.

Thus, the outcome the Supreme Court arrived at is that a parent and its wholly owned subsidiary cannot conspire in restraint of trade. Arriving at a similar point, the European Court of Justice too exempted the relationship between a parent and a wholly owned subsidiary from the provision banning concerted action under European Competition Law. However, a broader standard to define a single economic unit is needed to give guidance to the remaining relations and situations within a corporate group.

In virtually unopposed extensions of the Supreme Court's result, sister corporations and relationships stretching over several generations of corporations have been immunized. *Copperweld* has also been applied to state antitrust law, the conspiracy to monopolize offense in section 2 of the Sherman Act, and section 3 of the Clayton Act. Courts have struggled, however, with the task of partially owned subsidiaries.

This paper suggests that a more fundamental approach should be based on a parent's potential control over its subsidiary. This control, and with it the existence of a single economic unit, has to derive from a structural relationship based on equity. It should be presumed when the parent corporation owns a majority of the subsidiary's voting as well as common stock. When the parent's share of ownership is lower, a presumption that the parent and the subsidiary do not compose a single economic unit and therefore can conspire should be used. Both presumptions should be made rebuttable depending on who in fact has the ability to control the subsidiary and on the minority interest in the

subsidiary. Thus, diverging minority interests may obstruct the finding of a single economic unit, while in another case de facto control in a minority owned subsidiary can suffice to establish a single economic unit. This standard tries to take the diversity of corporate groups into account and is still sufficiently administrable to be of practical use to the courts.

Where a single economic unit is found to exist between a parent and its subsidiary it stretches to all corporations either of the two controls, is controlled by, or is under common control with. On the other hand, labeling a corporate group a single economic unit should not only shield its internal conduct from scrutiny under section 1 of the Sherman Act, but might also be used to impute conduct within a corporate group to the entity responsible for its initiation, and to treat the corporate group as one unit when market power is considered.

## TABLE OF CASES

United States Supreme Court

Albrecht v. Herald Co., 390 U.S. 145 (1968)

American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)

American Tobacco Co. v. United States, 328 U.S. 781 (1946)

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)

Arizona v. Rumsey, 467 U.S. 203 (1984)

Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)

Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451 (1992)

Fisher v. City of Berkley, 475 U.S. 260 (1986)

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)

FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972)

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)

Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959)

Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925)

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)

National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984)

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958)

Northern Securities Co. v. United States, 193 U.S. 197 (1904)

Palmer v. BRG of Georgia, 498 U.S. 46 (1990)

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)

Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)

Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911)

Sunkist Growers Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962)

Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961)

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)

United States v. Citizens & Southern National Bank, 422 U.S. 86 (1978)

United States v. Colgate & Co., 250 U.S. 300 (1919)

United States v. Columbia Steel Co., 334 U.S. 495 (1948)

United States v. Container Corp., 393 U.S. 333 (1969)

United States v. Crescent Amusement Co., 323 U.S. 173 (1944)

United States v. Griffith, 334 U.S. 100 (1948)

United States v. Grinnell Corp., 384 U.S. 563 (1966)

United States v. Parke, Davis & Co., 362 U.S. 29 (1960)

United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964)

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)

United States v. Topco, 405 U.S. 596 (1972)

United States v. Yellow Cab Co., 332 U.S. 218 (1947)

### Federal Courts of Appeals

Advanced Health-Care Services, Inc. v. Radford Community Hospital, 910 F.2d 139 (4th Cir. 1990), *on remand*, 846 F.Supp. 488 (W.D. Va. 1994)

Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996 (3d Cir. 1994)

Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1997)

Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, 784 F.2d 1325 (7th Cir. 1985)

Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978)

Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745 (1st Cir. 1994)

Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316 (5th Cir. 1984)

Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 95 F.3d 593 (7th Cir. 1996)

City of Mt. Pleasant, Iowa v. Associated Electric Co-op., 838 F.2d 268 (8th Cir. 1988)

Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978)

Computer Identics Corp. v. Southern Pac. Co., 756 F.2d 200 (1st Cir. 1985)

Copperweld Corp. v. Independence Tube Corp., 691 F.2d 310 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984)

Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F.2d 606 (6th Cir. 1987)

Eichorn v. AT & T Corp., 248 F.3d 131 (3d Cir. 2001)

Eleven Line, Inc. v. North Texas State Soccer Ass'n, 213 F.3d 198 (5th Cir. 2000)

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1987)

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002)

Free v. Abbott Laboratories, Inc., 176 F.3d 298 (5th Cir. 1999)

Garshman v. Universal Resources Holding Inc., 824 F.2d 223 (3d Cir. 1987)

General Business Systems v. North American Philips Corp., 699 F.2d 965 (9th Cir. 1983)

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974)

Greenwood Utilities Commission v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985)

Guzowski v. Hartman, 969 F.2d 211 (6th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993)

H.J., Inc. v. International Telephone & Telegraph Corp., 867 F.2d 1531 (8th Cir. 1989)

Harold's Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533 (10th Cir. 1996), *cert. denied*, 519 U.S. 928 (1996)

Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979)

Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)

Hood v. Tenneco Texas Life Insurance Co., 739 F.2d 1012 (5th Cir. 1984)

Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981)

International Travel Arrangers v. NWA Inc., 991 F.2d 1389 (8th Cir. 1993), *cert. denied*, 510 U.S. 932 (1993)

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970)

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 231 (7th Cir. 1950), *rev'd*, 340 U.S. 211 (1951)

Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977)

Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984);

Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561, 564 (7th Cir. 1951)

Mitchael v. Intracorp., Inc., 179 F.3d 847 (10th Cir. 1999)

National Dairy Products Corp. v. United States, 350 F.2d 321 (8th Cir. 1965)

Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953)



Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21 (1st Cir. 1988)

Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981)

Patterson v. United States, 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915)

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

Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568 (6th Cir. 1986)

Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125 (3d Cir. 1995)

Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995)

Systemcare, Inc. v. Wang Lab. Corp., 117 F.3d 1137 (10th Cir. 1997)

Thomsen v. Western Electric Co., 680 F.2d 1263 (9th Cir. 1982), *cert. denied*, 459 U.S. 991 (1982)

Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985), *vacated and remanded on other grounds*, 475 U.S. 1105 (1986), *order reinstated and opinion largely readopted*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988), *and on remand to* 696 F. Supp. 1056 (E.D. Pa. 1988)

United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985)

United States v. General Motors, 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941)

Vollrath Co. v. Sammi Corp., 9 F.3d 1455 (9th Cir. 1993), *cert. denied*, 511 U.S. 1142 (1994)

### Federal District Courts

Aaron E. Levine & Co., Inc. v. Calkraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976)

Aerotech, Inc. v. TCW Capital, No. 93 Civ. 1987 (CSH), 1994 WL 775439, 1994-1 Trade Cas. (CCH) ¶ 70,616 (S.D. N.Y. Apr. 20, 1994)

American Vision Centers, Inc. v. Cohen, 711 F. Supp. 721 (E.D.N.Y. 1989)

Appraisers Coalition v. Appraisal Institute, 845 F. Supp. 592 (N.D. Ill. 1994)

- Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477 (D. Or. 1987)
- Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1971)
- Bell Atlantic Business Systems Services v. Hitachi Data Systems Corp., 849 F. Supp. 702 (N.D. Cal. 1994)
- BellSouth Advertising and Publishing Corp. v. Donnelley Info. Publishing, Inc., 719 F. Supp. 1551 (S.D. Fla. 1988), *rev'd*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 510 U.S. 1101 (1994)
- Brager & Co., Inc. v. Leumi Securities Corp., 429 F. Supp. 1341 (S.D.N.Y. 1977), *aff'd*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981)
- Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975), *aff'd in part and reversed in part*, 554 F.2d 623 (4th Cir. 1977), *cert. denied*, 434 U.S. 923 (1977)
- Carl Hizel & Sons, Inc. v. Browning-Ferris Industries, Inc., 590 F. Supp. 1201 (D. Colo. 1984)
- Carlock v. Pillsbury Co., Nos. Civ. 4-87-517, Civ. 4-87-586, 1988 WL 404839, 1993-1 Trade Cas. (CCH) ¶ 70,282 (D. Minn. Oct. 13, 1988)
- Chastain v. American Telephone & Telegraph Co., 401 F. Supp. 151 (D.D.C. 1975)
- Coast Cities Truck Sales, Inc. v. Navistar International Transportation Co., 912 F. Supp. 747 (D. N.J. 1995)
- Cohen v. Primerica Corp., 709 F. Supp. 63 (E.D. N.Y. 1989)
- Direct Media Corp. v. Camden Telephone & Telegraph Co., 989 F. Supp. 1211 (S.D. Ga. 1997)
- D'Last Corp. v. Ugent, 863 F. Supp. 763, 768 (N.D. Ill. 1994), *aff'd*, 51 F.3d 275 (7th Cir. 1995)
- Fiberglass Insulators, Inc. v. Dupuy, No. Civ. A. 84-1244-1, 1986 WL 13356, 1986-2 Trade Cas. (CCH) ¶ 67, 316 (D.S.C. Sept. 30, 1986)
- Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345 (N.D. Ga. 1986), *aff'd on other grounds*, 844 F.2d 1538 (11th Cir. 1988)
- Gucci v. Gucci Shops, Inc., 651 F. Supp. 194 (S.D. N.Y. 1986)
- H.R.M., Inc. v. Tele-Communications, Inc., 653 F. Supp. 2d 645 (D. Colo. 1987)

Hall v. Burger King Corp., 912 F. Supp. 1509 (S.D. Fla. 1995)

Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Haw. 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969)

Horst v. Laidlaw Waste Systems, Inc., 917 F. Supp. 739 (D. Colo. 1996)

Island Tobacco Co. v. R. J. Reynolds Industries, Inc., 513 F. Supp. 726 (D. Haw. 1981)

Johnson v. Con-Vey/Keystone, Inc., 814 F. Supp. 931 (D. Or. 1993)

Kacprzycki v. A.C. & S., Inc., No. 88-34-JRR, 1990 WL 605604 (D. Del. Oct. 31, 1990)

L.C. Williams Oil Co., Inc. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985)

Lambtek Yogurt Machines v. Dreyer's Grand Ice Cream, Inc., 1997-2 Trade Cas. (CCH) ¶ 71,891 (N.D. Cal. 1997)

Lantec, Inc. v. Novell, Inc., 146 F. Supp. 2d 1140 (D. Utah 2001)

Leaco Enterprises, Inc. v. General Electric Co., 737 F. Supp. 605 (D. Or. 1990)

Levi Case Co. v. ATS Products, Inc., 788 F. Supp. 428 (N.D. Cal. 1992)

Masa Inc. v. ICG Keeprite Corp., No. 88 C 2133, 1989 WL 75196 (N.D. Ill. June 29, 1989)

MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126 (D.N.J. 1995)

McNeil v. National Football League, 790 F. Supp. 871 (D.Minn.1992)

Mitsubishi Electric Corp. v. IMS Technology, Inc., No. 96 C 499, 1997 WL 630187 (N.D. Ill. Sept. 30, 1997)

Montgomery County Ass'n of Realtors v. Realty Photo Master Corp., 878 F. Supp. 804 (D. Md. 1995), *aff'd*, 91 F.3d 132 (4th Cir. 1996)

Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd., 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd on other grounds sub. nom.*, Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982)

Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc., 671 F. Supp. 1525 (C.D. Cal. 1987)

Nissan Motor Acceptance Corp. v. Schaumburg Nissan, Inc., Nos. 93 C 2701, 92 C 6089, 1993 WL 360426 (N.D. Ill. Sept. 15, 1993)

Novatel Commun., Inc. v. Cellular Telephone Supply, Inc., No. Civ. A. C85-2674A, 1986 WL 15507, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. Dec. 23, 1986)

Orion Tire Corp. v. General Tire, Inc., No. CV 92-2391AAH(EEX), 1992 WL 295224, 1992-2 Trade Cas. (CCH) ¶ 69,957 (C.D. Cal. Aug. 17, 1992)

Orson v. Miramax Film Corp., 862 F. Supp. 1378 (E.D. Pa. 1994)

Penn Central Securities Litigation v. Pennsylvania Co., 367 F. Supp. 1158 (E.D. Pa. 1973)

Polydyne, Inc. v. Kirk, No. 3:98 CV 7287, 1999 WL 894301 (N.D. Ohio Feb. 17, 1999), *aff'd in part and remanded in part*, 238 F.3d 423 (6th Cir. 2000)

Pudlo v. Adamski, 789 F. Supp. 247 (N.D. Ill. 1992)

Ray Dobbins Lincoln Mercury, Inc. v. Ford Motor Co., 604 F. Supp. 203 (W.D. Va. 1984), *aff'd*, 813 F.2d 402 (4th Cir. 1985)

REA Express, Inc. v. Alabama Great Southern Railroad Co., 427 F. Supp. 1157 (S.D.N.Y. 1976), *aff'd sub. nom.*, Sowerwine v. U.S., 431 U.S. 961 (1977)

*In re* REA Express, Inc., Private Treble Damage Antitrust Litigation, 412 F. Supp. 1239 (E.D. Pa. 1976)

Rio Vista Oil, Ltd. v. Southland Corp., 667 F. Supp. 757 (D. Utah 1987)

Rohlfing v. Manor Care, Inc., 172 F.R.D. 330 (N.D. Ill. 1997)

Rosen v. Hyundai Group (Korea), 829 F. Supp. 41 (E.D.N.Y. 1993), *aff'd without opinion sub nom.*, Rosen v. Samick, 22 F. 3d 1091 (2d Cir. 1994)

S.O. Textiles Co., Inc. v. A & E Products Group, Inc., 18 F. Supp. 2d 232 (E.D. N.Y. 1998)

Sancap Abrasives Corp. v. Swiss Indus. Abrasives Group, 68 F. Supp. 2d 853 (N.D. Ohio 1999)

Satellite Financial Planning Corp. v. First National Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986), *modified on other grounds*, 643 F. Supp. 449 (D. Del. 1986);

Search International, Inc. v. Snelling & Snelling, Inc., 168 F. Supp. 2d 621 (N.D. Tex. 2001)

Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674 (S.D. N.Y. 1987)

Siegel Transfer, Inc. v. Carrier Express, Inc., 856 F. Supp. 990 (E.D. Pa. 1994), *aff'd*, 54 F.3d 1125 (3d Cir. 1995)

Sonitrol of Fresno, Inc. v. American Telephone & Telegraph Co., No. Civ. A. 83-2324, 1986 WL 953, 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. April 30, 1986)

Spence v. Southeastern Alaska Pilots' Ass'n, 789 F. Supp. 1014 (D. Alaska 1992)

Stepp v. Ford Motor Credit Co., 623 F. Supp. 583 (E.D. Wis. 1985)

Thomsen v. Western Elec. Co., Inc., 512 F. Supp. 128 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 459 U.S. 991(1982)

Total Benefit Services, Inc. v. Group Insurance Administration, Inc., 875 F. Supp. 1228 (E.D. La. 1995)

Total Benefits Services, Inc. v. Group Insurance Administration, Inc., No. Civ. A. 92-2386, 1993 WL 15671, 1993-1 Trade Cas. (CCH) ¶ 70,148 (E.D. La. Jan. 7, 1993)

Townshend v. Rockwell International Corp., No. C99-0400SBA, 2000 WL 433505, 2000-1 Trade Cas. (CCH) ¶ 72,890 (N.D. Cal. Mar. 28, 2000)

Trugman-Nash, Inc. v. New Zealand Dairy Board, 942 F. Supp. 905 (S.D.N.Y. 1996)

TV Communications Network, Inc. v. ESPN, Inc., 767 F. Supp. 1062 (D. Colo. 1991), *aff'd sub nom.*, TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992);

United National Records, Inc. v. MCA, Inc., 616 F. Supp. 1429 (N.D. Ill. 1985)

United States v. American Telephone & Telegraph Co., 524 F. Supp. 1336 (D.D.C. 1981)

United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949) *aff'd as modified* 341 U.S. 593 (1951)

United States v. Yellow Cab Co., 69 F. Supp. 170, 175 (N.D. Ill. 1946), *rev'd*, 332 U.S. 218 (1947)

Valet Apart. Services, Inc. v. Atlanta Journal & Constitution, 865 F. Supp. 828 (N.D. Ga. 1994)

Viacom International Inc. v. Time Inc., 785 F. Supp. 371 (S.D.N.Y. 1992)

Vollrath Co. v. Sammi Corp., No. CV 85-820 MRP, 1989 WL 201632, 1990-1 Trade Cas. (CCH) ¶ 68,955 (C.D. Cal. Dec. 20, 1989), *aff'd*, 9 F.3d 1455 (9th Cir. 1993), *cert. denied*, 511 U.S. 1142 (1994)

Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993)

Yamaha International Corp. v. ABC International Traders, Inc., No. 86-7892 RSWL, 1989 WL 206429, 1989-2 Trade Cas. (CCH) ¶ 68,874 (C.D. Cal. Aug. 11, 1989), *aff'd in part*, 940 F.2d 1537 (9th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992)

Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997), *aff'd*, 141 F.3d 1162 (4th Cir. 1998)

### State Courts

American Credit Card Telephone Co. v. National Pay Telephone Corp., 504 So. 2d 486 (Fla. Dist. Ct. App. 1987)

Bevilacqua v. Ford Motor Co., 125 A.D.2d 516, 509 N.Y.S.2d 595 (N.Y. App. Div. 1986)

Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 405 N.W.2d 354 (Wis. Ct. App. 1987)

Freeman v. San Diego Ass'n of Realtors, 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534 (Cal. Ct. App. 2000)

Gray v. Marshall County Board of Education, 179 W. Va. 282, 367 S.E.2d 751 (W. Va. 1988)

Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464 (Cal. 1969)

Kenneth E. Curran, Inc. v. Auclair Transportation, Inc., 128 N.H. 743, 519 A.2d 280 (N.H. 1986)

Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149 (La. 1986)

Macmanus v. A.E. Realty Partners, 241 Cal.Rptr. 315 (Cal. Ct. App. 1987)

People v. Schwartz, 554 N.Y.S.2d 686, 160 A.D.2d 964 (N.Y. App. Div. 1990)

People v. Schwartz, No. 1557/86, 1986 WL 55321, 1987-1 Trade Cas. (CCH) ¶67,581 (N.Y. Sup. Ct. Oct. 17, 1986), *aff'd*, 554 N.Y.S.2d, 686, 160 A.D.2d 964 (N.Y. App. Div. 1990)

Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportaion Co., 91 Haw. 224, 982 P.2d 853 (Haw. 1999)

Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977)

Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (N.Y. 1966)

West Bolyston Cinema Corp. v. Paramount Pictures Corp., No. Civ. A. 98-00252, 2000 WL 1468513 (Mass. Super. Sept. 21, 2000)

Court of Justice of the European Communities (including the Advocate General), Court of First Instance and European Commission

Case 66/86, Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102 (E.C.J. 1989)

Case 30/87, Bodson v. Pompes funèbres des régions libérées, [1988] E.C.R. 2479, [1989] 4 C.M.L.R. 984 (E.C.J. 1988)

Case 15/74, Centrafarm v. Sterling Drug, [1974] E.C.R. 619, [1974] C.M.L.R. 557 (E.C.J. 1974)

Case 16/74, Centrafarm v. Winthrop, [1974] E.C.R. 1183, [1974] 2 C.M.L.R. 480 (E.C.J. 1974)

Decision 69/195, Re Christiani & Nielsen, 1969 O.J. (L 165) 12, 1969 C.M.L.R. D36 (Commission 1969)

Joined Cases C-395/95P and C-396/96P, Compagnie Maritime Belge Transports SA v. Commission, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076 (E.C.J. 2000)  
Opinion of the Advocate General Fennelly in Compagnie Maritime Belge Transports SA v. Commission, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076 (E.C.J. 2000)

Case 6/72, Europemballage Corp. & Continental Can Co. Inc. v. Commission, [1973] E.C.R. 215, [1973] C.M.L.R. 199 (E.C.J. 1973)

Case 52/69, Geigy v. Commission, [1973] E.C.R. 787, [1972] C.M.L.R. 557 (E.C.J. 1972)

Case 48/69, Imperial Chemical Industries Ltd. v. Commission, [1972] E.C.R. 619, [1972] C.M.L.R. 557 (E.C.J. 1972)

Case C-286/98P, Stora Kopparbergs Bergslags AB v. Commission, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12 (E.C.J. 2000)  
Opinion of the Advocate General Mischo in Stora Kopparbergs Bergslags AB v. Commission, [2000] E.C.R. I-9925, [2001] 4 C.M.L.R. 12 (E.C.J. 2000)

Case T-102/92, Viho Europe BV v. Commission, [1995] E.C.R. II-17, [1997] 4 C.M.L.R. 469 (CFI 1995)

Case C-73/95 P, Viho Europe BV v. Commission, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 (E.C.J. 1996)

Opinion of the Advocate General Lenz in Viho Europe BV v. Commission, [1996] E.C.R. I-5457, [1997] 4 C.M.L.R. 419 (E.C.J. 1996)



## BIBLIOGRAPHY

Articles and Books

- Alessandria, Peter J.                      Comment, *Intra-Enterprise Conspiracies and Section I of the Sherman Act: Filling the 'Gap' After Copperweld Corp. v. Independence Tube Corp.*, 34 BUFF. L. REV. 551 (1985)
- AMERICAN BAR ASSOCIATION ANTITRUST LAW DEVELOPMENTS (4th Ed. 1997 Vol. 1)
- AMERICAN BAR ASSOCIATION 1997 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (1998)
- AMERICAN BAR ASSOCIATION 1998 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (1999)
- AMERICAN BAR ASSOCIATION 1999 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (2000)
- Areeda, Phillip                              *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983)
- AREEDA, PHILLIP E. &  
HOVENKAMP, HERBERT              ANTITRUST LAW (Rev. Ed. 1997 Vol. 1)
- AREEDA, PHILLIP E.                      ANTITRUST LAW (1986 Vol. 6)
- AREEDA, PHILLIP E.                      ANTITRUST LAW (1986 Vol. 7)
- AREEDA, PHILLIP E. &  
HOVENKAMP, HERBERT              ANTITRUST LAW (Supp. 1997)
- Assant, Gilles                              *Anti-trust Intracorporate Conspiracies: A Comparative Study of French, EEC and American Laws*, 2 ECLR 65 (1990)
- Belsley, Michael D.                      Comment, *The Vatican Merger Defense - Should Two Catholic Hospitals Seeking to Merge be Considered a Single Entity For Purposes of Antitrust Merger Analysis?*, 90 NW. U. L. REV. 720 (1996)

- BLACK'S LAW DICTIONARY (7th ed. 1999)
- BLUMBERG, PHILLIP I. THE LAW OF CORPORATE GROUPS - PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (1983 Vol. 1)
- BLUMBERG, PHILLIP I. THE LAW OF CORPORATE GROUPS - PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (Supp. 1988)
- BLUMBERG, PHILLIP I. THE LAW OF CORPORATE GROUPS - TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (1987 Vol. 3)
- BLUMBERG, PHILLIP I. & STRASSER, KURT A. THE LAW OF THE CORPORATE GROUPS - PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATE STATUTORY LAW (1995 Vol. 6)
- Blumberg, Phillip I. *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986)
- Blumberg, Phillip I. *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996)
- BORK, ROBERT H. THE ANTITRUST PARADOX (1978)
- Brown, David J. Comment, *Antitrust Law - The Demise of the Intraenterprise Conspiracy Doctrine: Copperweld Corp. v. Independence Tube Corp.*, 10 J. CORP. L. 785 (1985)
- Calkins, Stephen *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345 (1995)
- Calkins, Stephen *The Antitrust Conversation*, 68 ANTITRUST L.J. 625 (2001)
- Deckert, Timothy R. Casenote, *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. (1998)
- Denger, Michael L. *Antitrust Overview and Horizontal Restraints of Trade*, 1040 PLI/CORP 7 (1998)
- Eskridge, William N., Jr. *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988)

- Fleischer, Holger *Konzerninterne Wettbewerbsbeschränkungen und Kartellverbot*, 42 AG 491 (1997)
- FLETCHER, WILLIAM M.  
ET AL. FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm. ed., rev. vol. 1999, cum. sup. 2000 Vol. 10A)
- FOX, ELEANOR M. &  
SULLIVAN, LAWRENCE A. CASES AND MATERIALS ON ANTITRUST (1989)
- Gavil, Andrew I. *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87 (2000)
- GEVURTZ, FRANKLIN A. CORPORATION LAW (2000)
- Goldman, Lee *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989)
- Goodwin, S. John Recent Development, *The Demise of the Intra-Enterprise Conspiracy Doctrine: Flexible Antitrust Enforcement Policy Abandoned in a Maze of Economic Certainty* - *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984), 60 WASH. L. REV. 757 (1985)
- Gregg, Ellen M. Note, *Antitrust - Repudiation of the Intraenterprise Conspiracy Doctrine* - *Copperweld Corp. v. Independence Tube Corp.*, 7 CAMPBELL L. REV. 369 (1985)
- Handler, Milton &  
Smart, Thomas A. *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981)
- Harms, Wolfgang *Intra Enterprise Conspiracy?*, 1 EUR 230 (1966)
- HARMS, WOLFGANG KONZERNE IM RECHT DER WETTBEWERBSBESCHRÄNKUNGEN (1968)
- HEITZER, ERIC KONZERNE IM EUROPÄISCHEN WETTBEWERBSRECHT UNTER VERGLEICHENDER BERÜCKSICHTIGUNG IHRER WETTBEWERBSRECHTLICHEN BEHANDLUNG DURCH AUFSICHTSBEHÖRDEN UND GERICHTE IN DEN USA (1999)
- HENN, HARRY G. &  
ALEXANDER, JOHN R. LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES (3rd ed. 1983)

- Huddleston, John      Comment, *Can Subsidiaries Be 'Purchasers' From Their Parents Under the Robinson-Patman Act? A Plea for a Consistent Approach*, 63 WASH. L. REV. 957 (1988)
- Huie, Marsha C.      *The Intra-Enterprise Conspiracy Doctrine in the United States and the European Economic Community*, 36 AM. J. COMP. L. 307 (1988)
- Jordan, Karen      Note, *Forming a Single Entity: A Recipe for Success for new Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC (2001)
- KINTNER, EARL W.      THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978 Vol. 1)
- KINTNER, EARL W. & BAUER, JOSEPH P.      FEDERAL ANTITRUST LAW (Supp. 2000 Vol. 2)
- Keyte, James A.      Note, *Copperweld Corp. v. Independence Tube Corp.: Has the Supreme Court Pulled the Plug on the 'Bathtub Conspiracy'?*, 18 LOY. L.A. L. REV. 857 (1985)
- Martin, Shaun P.      *Intracorporate Conspiracies*, 50 STAN. L. REV. 399 (1998)
- McChesney, Brad      *Professional Sports Leagues and the Single Entity Defense*, 6 SPORTS LAW. J. 125 (1999)
- McNamara, Thomas W.      Comment, *Defining a Single Entity for Purposes of Section 1 of the Sherman Act Post Copperweld: A Suggested Approach*, 22 SAN DIEGO L. REV. 1245 (1985)
- McQuade, Lawrence C.      *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955)
- Meyers, Ryan P.      Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U. CHI. L. REV. 1401 (2001)
- Neri, Joan M.      Note, 15 SETON HALL L. REV. 943 (1985)
- Penn, Linda T.      Case Note, 15 U. BALT. L. REV. 366 (1986)
- Ponsoldt, James F.      *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of 'Dangerous Probability of Success'*, 61 NOTRE DAME L. REV. 1109 (1986)

- Ponsoldt, James F. *The Enrichment of Sellers as a Justification for Vertical Restraints: A Response to Chicago's Swiftian Modest Proposal*, 62 N.Y.U. L. REV. 1166 (1987)
- Ponsoldt, James F. *Refusals to deal in "locked-in" Health Care Markets Under Section 2 of the Sherman Act After Eastman Kodak Co. v. Image Technical Services*, 1995 UTAH L. REV. 503
- POSNER, RICHARD A. & EASTERBROOK, FRANK H. ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIAL (1981)
- POTRAFKE, CHRISTIAN KARTELLRECHTSWIDRIGKEIT KONZERNINTERNER VEREINBARUNGEN UND DARAUF BERUHENDER VERHALTENSWEISEN (1991)
- Prell, Owen T. Note, *Copperweld Corp. v. Independence Tube Corp.: An End to the Intraenterprise Conspiracy Doctrine?*, 71 CORNELL L. REV. 1151 (1986)
- Prisbe, John T. Comment, *The Intracorporate Conspiracy Doctrine*, 16 U. BALT. L. REV. 538 (1987)
- Robberson, Julie K. Note, 59 TUL. L. REV. 781 (1985)
- RÜTSCH, CLAUS-JÖRG STRAFRECHTLICHER DURCHGRIFF BEI VERBUNDENEN UNTERNEHMEN? (1987)
- Shelanski, Howard Comment, *Robinson-Patman Act Regulation of Intraenterprise Pricing*, 80 CAL. L. REV. 247 (1992)
- Smart, Thomas A. *Intracorporate Conspiracy*, in 3 ANTITRUST IN TRANSITION 1064 (Milton Handler ed., 1991)
- Smith, Douglas G. *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125 (1996)
- Smith, Eric S. Note, *Antitrust: Harold's Dillard: It Takes Two to Tango - Except in Oklahoma: The Tenth Circuit Interprets Oklahoma Antitrust Law to Reach Unilateral Activity*, 50 OKLA. L. REV. 405 (1997)
- Sommer, Joseph H. *The Subsidiary: Doctrine without a Cause?*, 59 FORDHAM L. REV. 227 (1990)

- Sprunk, James A. *Intra-enterprise Conspiracy*, 9 ABA ANTITRUST SECTION REP. 20 (1956)
- Steinberg, James M. Note, *The Long Awaited Death Knell of the Intra-Enterprise Doctrine*, 30 VILL. L. REV. 521 (1985)
- Stengel, George W. *Intra-Enterprise Conspiracy under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963)
- Stewart, Jennifer Comment, *The Intra-Enterprise Conspiracy Doctrine After Copperweld Corp. v. Independence Corp.*, 86 COLUM. L. REV. 198 (1986)
- SULLIVAN, LAWRENCE A. HANDBOOK OF THE LAW OF ANTITRUST (1977)
- SULLIVAN, LAWRENCE A. & GRIMES, WARREN S. THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK (2000)
- Thomson, John A., Jr. Case Comment, *Copperweld Corp. v. Independence Tube Corp.: The Changing Complexion of Intra-Enterprise Conspiracy Under the Sherman Antitrust Act*, 19 GA. L. REV. 189 (1984)
- Ulmer, Peter *"Wettbewerbsbeschränkende Absprachen" im Rahmen von Unternehmenszusammenschlüssen*, 10 WUW 163 (1960)
- Waxman, Michael P. *Fraser v. MLS, L.L.C.: Is There a Sham Exception to the Copperweld Single Entity Immunity?*, 12 MARQ. SPORTS L. REV. 487 (2001)
- Willis, Everett I. & Pitofsky, Robert *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968)

### Constitutions, Treaties and Statutes

Az. Const. Art. 14 § 10

Competition Act, section 2, R.S.C. ch. 34 (1985), ch. 19 (2nd Supp. 1988) (Can.)  
 Competition Act, section 45, R.S.C. ch. 34 (1985), ch. 19 (2nd Supp. 1988) (Can.)

EC TREATY art. 2  
 EC TREATY art. 3  
 EC TREATY art. 81  
 EC TREATY art. 82

7 U.S.C. § 291 (2000)  
 12 U.S.C. § 1841 (2000)  
 15 U.S.C. § 1 (2000)  
 15 U.S.C. § 2 (2000)  
 15 U.S.C. § 7 (2000)  
 15 U.S.C. § 8 (2000)  
 15 U.S.C. § 14 (2000)  
 15 U.S.C. § 17 (2000)  
 15 U.S.C. § 18 (2000)  
 15 U.S.C. § 18(a) (2000)  
 15 U.S.C. § 1221 (2000)

DEL. CODE ANN. tit.8, § 214 (2001)  
 DEL. CODE ANN. tit.8, § 216 (2001)  
 DEL. CODE ANN. tit.8, § 218 (2001)  
 DEL. CODE ANN. tit.8, § 242 (2001)  
 DEL. CODE ANN. tit.8, § 251 (2001)  
 DEL. CODE ANN. tit.8, § 253 (2001)  
 DEL. CODE ANN. tit.8, § 271 (2001)  
 DEL. CODE ANN. tit.8, § 275 (2001)

15 PA. CONS. STAT. § 1758(c) (1992)

#### Federal Regulations and Model Acts

16 C.F.R. § 801.1 (2001)  
 16 C.F.R. § 802.30 (2001)

MODEL BUS. CORP. ACT § 7.27 (1999)  
 MODEL BUS. CORP. ACT § 7.28 (1999)  
 MODEL BUS. CORP. ACT § 7.31 (1999)  
 MODEL BUS. CORP. ACT § 10.03 (1999)  
 MODEL BUS. CORP. ACT § 11.01 (1999)  
 MODEL BUS. CORP. ACT § 11.04 (1984)  
 MODEL BUS. CORP. ACT § 11.05 (1999)  
 MODEL BUS. CORP. ACT § 12.02 (1999)  
 MODEL BUS. CORP. ACT § 14.02 (1999)

#### Legislative Materials

21 CONG. REC. 2457 (1890) (statement of Senator Sherman)  
 21 CONG. REC. 2460 (1890) (statement of Senator Sherman)  
 21 CONG. REC. 4093 (1890) (statement of Congressman Wilson)