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Copperweld Corporation v. Independence Tube Corporation: The Death of a Doctrine

I. Introduction

In *Copperweld Corp. v. Independence Tube Corp.*,[1] a divided Supreme Court[2] held that a corporation and its wholly owned subsidiary are legally incapable of conspiring to restrain trade in violation of section one of the Sherman Antitrust Act.[3] In doing so, the Court clarified a previously confused area of antitrust law and expressly repudiated the intraenterprise conspiracy doctrine.[4] Under the intraenterprise conspiracy doctrine,[5] enunciated in earlier Supreme Court decisions, common ownership of separately incorporated entities did not exempt the actions of those entities from section one scrutiny, which prohibits contracts, combinations, or conspiracies in restraint of trade.[6]

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1. 104 S. Ct. 2731 (1984).

2. Chief Justice Burger's opinion for a five to three majority was joined by Justices Blackmun, Powell, Rehnquist, and O'Connor. Justice Stevens filed a dissenting opinion joined by Justices Brennan and Marshall. Justice White took no part in the consideration or decision of the case.

3. 15 U.S.C. § 1 (1982). In pertinent part, section one states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal."

4. *Copperweld*, 104 S. Ct. at 2745.

5. Intraenterprise conspiracy refers to a conspiracy between separately incorporated units of a parent-subsidiary enterprise. Conspiracies among separate divisions, officers, or directors of a single corporation are labeled *intra-corporate* conspiracies. The two terms are often used interchangeably. See Note, *Intra-Enterprise Conspiracy under section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 717 n.4 (1977); *see also* Note, *All in the Family: When Will Internal Discussion be Labeled Intra-Enterprise Conspiracy*, 14 DUQ. L. REV. 63, 64 (1975).

6. Section one reaches unreasonable restraints of trade caused by a "contract, combination, or conspiracy" between separate entities. It does not reach conduct that is wholly unilateral. Albrecht v. Herald Co., 390 U.S. 145, 149 (1968). Thus, in order to find a section one violation there must be a plurality of actors. The intraenterprise conspiracy doctrine suggests that a parent and its subsidiary, because they are separately incorporated, constitute a plurality of actors subject to section one liability. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). In dictum, the Court stated that the key question was whether there was an unreasonable restraint of trade, and if that was found, the combination (entity) could not escape section one liability because of its chosen corporate form. *Id.* at 377. Relying on this dictum in United States v. Yellow Cab

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The broad language of the Court's decisions gave rise to uncertainty with regard to the reach of section one of the Sherman Act.

Part II of this Note discusses the development of the intraenterprise conspiracy doctrine in the Supreme Court, including the scholarly commentary and criticism of the doctrine. Part III sets forth the facts of *Copperweld* and the decisions of the district court and circuit court of appeals. Part IV presents the Supreme Court's majority and dissenting opinions. Part V analyzes the Supreme Court's decision, including the Court's reasons for repudiating the doctrine and the arguments advanced by the dissent for retaining the doctrine. Part VI concludes that *Copperweld* was correct in repudiating the intraenterprise conspiracy doctrine, because the doctrine served no useful antitrust purpose.

II. Background

A. *The Sherman Antitrust Act*

The Sherman Antitrust Act[7] was intended to prevent unreasonable restraints of interstate commerce.[8] The general purpose of the Sherman Act is to preserve a system of free trade in order to protect the public from the evils thought to flow from undue restraints and monopolies by encouraging competition and precluding combinations that tend to defeat it.[9] Section one of the

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Co., 332 U.S. 218 (1947), the Court held that common ownership did not exempt separately incorporated entities from section one liability for conspiring to restrain trade. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), the Court, citing *Yellow Cab*, stated that common ownership would not relieve the defendants from liability under the antitrust laws, especially when they hold themselves out as competitors. In Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), the Court merely stated that prior decisions established that common ownership could not exempt the defendant from antitrust liability. The Court in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), seemed to limit the *Yellow Cab* holding that common ownership could not relieve the defendants from any obligations that the law imposed upon separate entities by stating that, in any event, the petitioner could charge a combination between himself and the defendants. Thus, the Court may have used the intraenterprise conspiracy doctrine as an alternative ground upon which liability could be found.

7. 15 U.S.C. §§ 1-7 (1982).

8. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).

9. *See* United States v. E.I. DuPont de Nemours & Co., 118 F. Supp. 41, 50-51 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956); Northwestern Oil Co., v. Socony-Vacuum Oil Co.,

Act prohibits any contract, combination, or conspiracy in restraint of trade.[10] The Supreme Court, however, has concluded that only "unreasonable" restraints of trade or commerce are prohibited under section one.[11] In determining whether a restraint is unreasonable, courts generally apply a "rule of reason," which involves considering all of the factors and circumstances in each given situation.[12] Certain agreements or practices, however, because of their "pernicious effect on competition and lack of any redeeming virtue," are considered to be unreasonable per se violations of section one.[13]

A violation of section one requires a plurality of actors.[14] In order to find a "conspiracy" under section one, there must be an "agreement" between the parties to the conspiracy. This "agreement" need not be express or formal; it is sufficient that concerted action is contemplated and that the defendants conform to the arrangement.[15] In contrast, the actions of a single firm or

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138 F.2d 967, 970 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

10. 15 U.S.C. § 1 (1982).

11. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

12. The rule of reason analysis includes "consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the reasons for its adoption." United States v. Topco Assocs., 405 U.S. 596, 607 (1972). The "rule of reason" is employed in cases in which the restraint may have a tendency to suppress competition but may also have certain redeeming features that, under appropriate circumstances, will save it from condemnation under section one. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); *see also* Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958).

13. *See* Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958) (Price fixing, group boycotts, and tying arrangements were among the practices that were illegal per se under the Sherman Act.). *See also* Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 458 (W.D. Pa. 1968) (Price fixing, retail price maintenance enforced by concerted action without aid of fair trade laws, concerted boycotts or refusal to deal, secondary boycotts, or tying patent to use of unpatented materials are per se unreasonable.).

14. Albrecht v. Herald Co., 390 U.S. 145, 149 (1968). "Section 1 of the Sherman Act reaches unreasonable restraint of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities. It does not reach conduct that is 'wholly unilateral.' " *Id. See also* Knutson v. Daily Review, Inc., 548 F.2d 795, 801 (9th Cir. 1976) (Section one can only be violated by two separate entitites acting in concert.), *cert. denied*, 433 U.S. 910 (1977); United States v. Reading Co., 183 F. 427, 455 (3d Cir. 1910) ("To violate the act, there must be a contract combination or conspiracy, which in purpose or effect tends to restrain trade . . . . [T]here must be the meeting of the minds of two or more, to accomplish some common purpose directly violative of the act.").

15. *See* United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

entity are governed by section two of the Sherman Act, which prohibits monopolization or attempts to monopolize whether accomplished through joint action or unilaterally.[16]

The Sherman Act contains this basic distinction between concerted and independent action for several reasons. Congress treated concerted activity more strictly than unilateral activity because "concerted activity is inherently fraught with anticompetitive risks."[17] The conduct of a single firm is judged less stringently because of the difficulty in distinguishing "robust competition" from long run anticompetitive behavior.[18] Because of the ambiguity and the anticompetitive risks inherent in concerted activity, the burden of proof for a section one violation is less than the burden of proof for a section two violation.[19]

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16. 15 U.S.C. § 2 (1982). "Every person who shall monopolize, or attempt to monopolize . . . trade or commerce . . . shall be deemed to be guilty of a felony. . . ." *Id.* Section two thus prohibits not only the actions of a single firm that does monopolize trade but also *attempts* to monopolize trade by a single entity. To establish a prima facie case of attempted monopolization, a plaintiff must prove three elements: (1) specific intent to control prices or destroy competition with respect to a part of commerce, (2) predatory conduct directed at accomplishing the unlawful purpose, and (3) a dangerous probability of success. Janich Bros. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir.), *cert. denied*, 439 U.S. 829 (1978); Bartleys Town & Country Shops, Inc. v. Dillingham Corp., 530 F. Supp. 499, 504 (D. Hawaii 1982).

17. *See* 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). In National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905), the Court said:

> It is the power to control prices which makes the inducement of combinations . . . . It is such power that makes it the concern of law to prohibit or limit them . . . . [C]ompetition not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interests, and the power such unification gives.

Id. at 129. In United States v. Joint Traffic Ass'n., 171 U.S. 505 (1898), the Court noted that "[i]t is the combination of these large and powerful corporations . . . that constitutes the alleged evil." *Id.* at 571. Because in any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one, for their common benefit, Congress viewed conspiracies as far more dangerous to competition than the actions of a single firm to restrain trade. Although mergers between separate entities may lead to efficiencies which benefit the consumer, the anticompetitive potential of mergers is great enough to warrant strict scrutiny even in the absence of an incipient monopoly. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2741 (1984).

18. Thus, it is not enough to show that a single firm's behavior is "restraining trade" in order to be subject to antitrust sanctions; the single firm's activity must reach a level of threatening monopolization. United States v. Whiting, 212 F. 466, 478 (D. Mass. 1914). "There may be . . . an unreasonable restraint of trade which does not constitute a monopoly." *Id. See also Copperweld*, 104 S. Ct. at 2740 n.13.

19. *See* Handler & Smart, *The Present Status of the Intracorporate Conspiracy*

Section one's focus on concerted behavior leaves a "gap" in the Sherman Act's proscription against unreasonable restraints of trade: the anticompetitive actions of a single firm, which do not threaten monopolization proscribed by section two, are permitted by section one, even though the anticompetitive actions of a single firm may be indistinguishable in economic effect from the conduct of two firms subject to section one liability.[20] The intraenterprise conspiracy doctrine seems to have been established in an attempt to address this supposed "gap" between sections one and two.[21]

B. *Supreme Court Recognition of the Intraenterprise Conspiracy Doctrine*

The intraenterprise conspiracy doctrine subjects the activity of a parent corporation and its wholly owned subsidiary to the proscriptions of section one of the Sherman Act. The doctrine establishes that a parent and its subsidiary constitute two legally separate entities capable of conspiring to restrain trade in violation of section one. Under the doctrine, the common ownership of the parent and subsidiary does not shield them from section one liability for activities which, if engaged in by two separately owned entities, would violate section one of the Sherman Act. The intraenterprise conspiracy doctrine has been gleaned from a series of Supreme Court decisions subjecting the actions of a parent and subsidiary to section one prohibitions.[22]

United States v. Yellow Cab Co.,[23] was the first Supreme

Doctrine, 3 CARDOZO L. REV. 23, 67 (1981). The authors state:

> To recover under section 1 a plaintiff must show (1) the existence of a contract, combination or conspiracy; (2) constituting unreasonable restraint of trade resulting therefrom; and (3) causing antitrust injury. [Under section 2 the plaintiff must show] (1) specific intent to monopolize; conduct designed to implement that intent; and a dangerous probability of success; or (2) possession of monopoly power and willful acquisition or maintenance of that power.

Id.

20. *Copperweld*, 104 S. Ct. at 2744.

21. *See, e.g.*, Handler & Smart, *supra* note 19, at 67. The intraenterprise conspiracy doctrine "has served principally as a tool for plaintiffs in private treble damage actions to attempt to reach behavior not covered by section 2 and which is actionable under section 1 only if engaged in by two or more entities." *Id.*

22. *See supra* note 6.

23. 332 U.S. 218 (1942).

Court decision expressly to recognize that commonly owned corporations could "conspire" in restraint of trade within the meaning of section one.[24] In *Yellow Cab*, the controlling shareholder of the Checker Cab Manufacturing Corp. also controlled, primarily through acquisition or merger, numerous companies operating taxi cabs in four cities. The complaint alleged conspiracies in restraint of trade that violated sections one and two of the Sherman Act. The alleged conspiracy "restrained trade" by forcing the several operating companies to purchase their cabs from the Checker Cab Manufacturing Corp.[25] The court concluded that combinations and conspiracies of the type alleged violated the Sherman Act.[26]

The Court, in concluding that section one of the Sherman Act was applicable, stated that the test of illegality under the Sherman Act was the presence or absence of an "unreasonable restraint of trade," and such a restraint could be as easily effectuated by a conspiracy between commonly owned affiliated entities as by a conspiracy among otherwise independent entities.[27] Relying on *Appalachian Coals, Inc. v. United States*,[28] the Court in *Yellow Cab* concluded that "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."[29] This broad language gave rise to the intraenter-

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24. *Id.* at 227.

25. *Id.* at 225. This arrangement excluded all other cab manufacturers from 86% of the Chicago market, 15% of the New York market, 100% of the Pittsburgh market, and 58% of the Minneapolis market. *Id.* at 224.

26. *Id.* at 226. The Court stated that "[b]y excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act." *Id.*

27. *Id.* at 227.

28. 288 U.S. 344 (1933). The Court stated that the Sherman Act is aimed at substance rather than form. Thus, the corporate interrelationships of the conspirators are not determinative of the applicability of the Sherman Act. *Id.* at 360-61, 376-77.

29. United States v. Yellow Cab Co., 332 U.S. at 227. The Court noted that the complaint charged that the restraint of trade was not only affected by the combination of the appellees but was the primary object of the combination. The Court, citing United States v. Crescent Amusement Co., 323 U.S. 173 (1944), stated that if that theory were proved, a plain violation of the Act had occurred. Thus, it was unclear whether this theory would have to be proved on remand in order for a section one violation to be found, or whether the violation, as suggested by the decision, could be based upon the

prise conspiracy doctrine, and has been subject to many differing interpretations, resulting in confusion in the lower courts and much criticism from scholars.[30]

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[31] the Court invoked the broad language of *Yellow Cab* and held that two wholly owned subsidiaries of Seagram's had violated section one of the Sherman Act by jointly refusing to supply a wholesaler who refused to comply with a maximum resale pricing scheme.[32] The Court rejected the respondents' claim that "their status as mere instrumentalities of a single manufacturing-merchandising unit makes it impossible for them to have conspired in a manner forbidden by the Sherman Act."[33] The Court maintained that such a contention was inconsistent with previous decisions, such as *Yellow Cab*, which held that common ownership and control would not liberate corporations from the impact of the antitrust laws.[34] The Court went on to observe that "the rule is especially applicable where, as here, respondents hold themselves out as competitors."[35] This language added to the confusion surrounding the intraenterprise conspiracy doctrine.[36]

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conspiracy between the already affiliated corporations. United States v. Yellow Cab Co., 332 U.S. at 228.

In *Crescent Amusement*, the Court found violations of sections one and two by commonly owned film exhibitors. In finding a conspiracy, the Court viewed the affiliated entities as the conspirators. But, in affirming an order for divestiture, the Court noted that such a remedy was appropriate when "creation of the combination is itself the violation." United States v. Crescent Amusement Co., 323 U.S. at 189.

30. *See infra* notes 46-50, 94 and accompanying text.

31. 340 U.S. 211 (1951).

32. *Id.* at 212. *See also Copperweld*, 104 S. Ct. at 2738 n.9.

33. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. at 215.

34. *Id.* (discussing United States v. Yellow Cab Co., 332 U.S. at 227).

35. *Id.* at 215. This language caused even more speculation as to the applicability of the doctrine. It was unclear whether the Court intended this "holding out as competitors" to be a definite limitation on the reach of the doctrine or simply one instance in which the doctrine could be invoked. Some courts and commentators have supported the "holding out" test as a way to limit the potentially broad reach of the intraenterprise conspiracy doctrine. *See, e.g.*, Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 n.1 (3d Cir. 1972); *see also* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968).

36. *See, e.g*, Kempf, *Bathtub Conspiracies: Has "Seagram" Distilled A More Potent Brew?*, 24 BUS. LAW 173, 175-76 (1968) (calling *Kiefer-Stewart* a "troublesome" decision and "the highwater-mark" of the doctrine); Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661, 668 (1982) (noting that several lower courts adopted the "holding out" language as a limit on the intraenterprise con-

Shortly thereafter, the Court relied upon *Yellow Cab* and *Kiefer-Stewart* to apply the intraenterprise conspiracy doctrine, in *Timken Roller Bearing Co. v. United States.*[37] *Timken* involved restrictive horizontal agreements between a United States based parent corporation and two overseas corporations in which it owned thirty and fifty percent interests.[38] The Court rejected the appellants' contention that the trade restraints were merely incidental to an otherwise legitimate joint venture, holding that prior decisions clearly established that the trade restraints existing in this case were illegal under the Sherman Act whether effected by affiliated or nonaffiliated corporations.[39]

Finally, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[40] the complaint alleged a conspiracy between a parent corporation and three subsidiaries to restrict illegally the franchisee plaintiffs and lessen substantially competition in certain automobile parts sales in violation of section one of the Sherman Act.[41] The Supreme Court held that, based on the intraenterprise conspiracy doctrine, the petitioners' Sherman Act claim was not barred by the common ownership of the defendants.[42] Citing *Timken* and *Yellow Cab*, the Court stated that because the respondents had availed themselves of the privilege of doing business through separately incorporated units, their common ownership would not operate to exempt them from the obligations placed upon separate entities by the Sherman Act.[43] This

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spiracy doctrine and that the Court failed to give any guidelines for application of the language).

37. 341 U.S. 593 (1951).

38. *Id.* at 595, 601.

39. *Id.* at 598. Some commentators have argued that this holding is not as broad as the language may suggest. *See* Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977). The Note suggests that the holding in *Timken* may be narrower than the language seems. The intraenterprise holding may merely be an alternative holding because there is language in the case to support a finding that the initial combination of the firms and their subsequent activities were illegal because they effectuated a previous conspiracy among the firms. *Id.* at 722. Thus, it may be that *Timken* supports only a narrow interpretation of the intraenterprise conspiracy doctrine, namely, that it is only applicable when the initial combination itself was in violation of antitrust laws. *See supra* note 29. *See also* Handler & Smart, *supra* note 19, at 32-33; Willis & Pitofsky, *supra* note 35, at 46-48.

40. 392 U.S. 134 (1968).

41. *Id.* at 135.

42. *Id.* at 141-42.

43. *Id.* (citing Timken Roller Bearing Co. v. United States, 341 U.S. at 598; United

decision contained language suggesting that the doctrine may only have been used as an alternative holding.[44] The Court stated, that "[i]n any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreement . . . or between Midas and other franchise dealers."[45] The intraenterprise conspiracy doctrine has caused some confusion in lower federal courts attempting to apply the doctrine articulated by the Supreme Court in these decisions.

C. *Application of the Intraenterprise Conspiracy Doctrine in the Lower Courts.*

Federal courts have struggled to give definition to the intraenterprise conspiracy doctrine as it has been broadly enunciated by the Supreme Court. The broad, sweeping language of the Supreme Court's intraenterprise conspiracy cases left the circuit courts the task of limiting the scope of the doctrine. Different tests and limitations have developed in each of the federal circuit courts that have considered the issue.[46]

The First, Third, and Fifth Circuits have adopted an approach much like that of the Supreme Court. That is, a parent and a wholly owned subsidiary, by their separate incorporation, provide the plurality of actors required by section one.[47]

States v. Yellow Cab Co., 332 U.S. at 227).

44. *Id.* at 142. *See also supra* notes 29, 39 and accompanying text; Handler & Smart, *supra* note 19, at 34 ("Inclusion of these alternative holdings strongly suggests that the intracorporate conspiracy holding was unnecessary on the facts presented."); Note, *supra* note 39, at 726 n.56 (arguing that, based upon a reading of the separate opinions of Justices Harlan, Stewart, White, Fortas, and Marshall, the section one violation rested not on the intraenterprise conspiracy doctrine, but rather on the "arrangement" of "agreement" between the plaintiffs and the defendant enterprise).

45. Perma Life Muffler, Inc. v. International Parts Corp., 392 U.S. at 142 (citing Albrecht v. Herald Co., 390 U.S. at 150 n.6 and Simpson v. Union Oil Co., 377 U.S. 13 (1964)).

46. The Fourth, Sixth, and Tenth Circuits, and the Court of Appeals for the District of Columbia have not expressly considered the issue.

47. *See, e.g.,* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974) (holding that the intraenterprise conspiracy doctrine embracing parents and wholly owned subsidiaries was conclusively established by the Supreme Court's adherence to *Yellow Cab*), *cert. denied,* 421 U.S. 1004 (1975); Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp., 579 F.2d 20, 33 (3d Cir.) (holding that the prerequisites of a conspiracy under section one were fulfilled by the presence of two or more legally distinct corporations), *cert. denied,* 439 U.S. 876 (1978); Battle v. Liberty Nat'l

This formalistic approach has been rejected by other circuit courts as elevating form over substance. Thus, the Second, Seventh, Eighth, and Ninth Circuits have developed a more "substantive" test.[48] This test requires that the court analyze all of the facts and circumstances in each case to determine whether the corporations are in fact a "single entity." The factors to be examined include: the extent of the integration of ownership, whether the two corporations have separate managerial staffs, the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.[49] If, based on a review of these factors, the corporations do in fact constitute a single entity, conspiracy under section one cannot be found.[50]

Faced with a conflict among the circuits concerning the proper application of the intraenterprise conspiracy doctrine, *Copperweld* presented the Supreme Court with an opportunity to address the Seventh Circuit's functional analysis and to reconsider the intraenterprise conspiracy doctrine.

Life Ins. Co., 493 F.2d 39, 44 (5th Cir. 1974) (citing Timken Roller Bearing Co. v. United States, 341 U.S. at 598) ("It is well established that a corporation can combine and conspire with its wholly owned subsidiary in violation of § 1 of the Sherman Act."), *cert. denied*, 419 U.S. 1110 (1975).

48. Initially, the Second Circuit seemed to limit the liability of affiliated corporations for intraenterprise conspiracy to situations in which they "held themselves out" as competitors. *See* Triebwasser & Katz v. A.T.&T., 535 F.2d 1356, 1358 n.1 (2d Cir. 1976). But recently the Second Circuit seems to have adopted the "single entity" substantive approach of the Seventh, Eighth, and Ninth circuits. *See* Brager & Co. v. Leumi Sec. Corp., 429 F. Supp. 1341, 1345-46 (S.D.N.Y. 1977), *aff'd mem.*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981). *See also* Ogilvie v. Fotomat Corp., 641 F.2d 581, 588 (8th Cir. 1981); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Knutsen v. Daily Review, Inc., 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

49. Photovest Corp. v. Fotomat Corp., 606 F.2d at 726.

50. *Id.* at 727.

III. *Copperweld Corporation v. Independence Tube Corporation*: Factual Setting and Lower Court Opinions

A. *The Facts*

In 1968, Lear Siegler, Inc. purchased the Regal Tube Co., a manufacturer of steel tubing, and made it an unincorporated division of Lear Siegler, Inc. David Grohne, who had been the vice-president of Regal Tube Co., became the president of the division.[51] In 1972, Copperweld, Inc. purchased Regal from Lear Siegler and organized it as a separately incorporated wholly owned subsidiary.[52] Under the sale agreement, Lear Siegler and its subsidiaries agreed not to compete with Regal in the United States for five years.[53] Shortly before the sale, David Grohne joined the Lear Siegler management.

In May of 1972, while continuing to work for Siegler, David Grohne established Independence Tube Corp., which was to manufacture steel tubing. The Yoder Co. of Cleveland, Ohio, agreed to sell a tubing mill to Independence, and in December of 1972, Independence gave Yoder a purchase order, calling for delivery of the mill by December, 1973.[54]

Officials at Copperweld felt that Independence's activities were in violation of the noncompetition agreement they had with Lear Siegler.[55] They sent a letter warning Yoder of their concern, stating that they would take any and all steps necessary to protect the corporation's rights under the purchase and sale agreement with Lear Siegler.[56] As a result of Copperweld's warning letter, Yoder voided its acceptance of Independence's

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51. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 313 (7th Cir. 1982).

52. *Id.* at 313-14.

53. *Id.* at 313. The companies were in the business of manufacturing steel tubing. Thus Lear Siegler, under the agreement, was not to compete with Regal in the manufacture and sale of steel tubing for use in heavy equipment, cargo vehicles, and construction.

54. *Id.* at 314.

55. *Id.* Grohne had hired eight key former employees of Regal to work for Independence. Officials at Copperweld believed these hirings posed a threat of luring away key Regal employees and allowing Independence to obtain Regal's proprietary information and know-how from these employees. *Id.*

56. *Id.* The stated purpose of the letter was to prevent third parties from developing reliance interests in dealings with Grohne and Independence that might later make a court reluctant to enjoin Grohne's activities at Copperweld's behest. *Id.*

purchase order.[57]

In 1976, Independence filed suit in federal district court in Chicago against Copperweld, Regal, and Yoder.[58] The complaint charged, inter alia, violations of sections one and two of the Sherman Act and sought compensatory and punitive damages and preliminary and permanent injunctive relief.[59] The defendants denied all of the allegations and counterclaimed, charging violation of the Lear Siegler agreement and unfair competition.[60]

B. *The Lower Court Opinions*

The case was tried to a jury in the United States District Court for the Northern District of Illinois.[61] In a bifurcated trial, the jury found that Copperweld and Regal had conspired in violation of section one, but that Yoder had not been involved in the conspiracy.[62]

On appeal to the Seventh Circuit Court of Appeals, the defendants argued that they could not, as a matter of law, have conspired in violation of section one of the Sherman Act because

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57. *Id.*

58. The district court opinion is unreported. Philip Smith, the Chief Executive Officer of Copperweld Corporation, was named as a defendant in the original complaint. Before trial he was dropped as an individual defendant from all counts. *Id.* at 315.

59. *Id.* Specifically, the complaint charged that Copperweld, Regal, Smith, and Yoder had conspired to restrain trade in the steel structural tubing market in violation of section one of the Sherman Act; that Copperweld, Regal, and Smith had attempted to monopolize the steel tubing market in violation of section two of the Sherman Act; that Yoder breached its contract with Independence; that Copperweld, Regal, and Smith had interfered with Independence's contractual relationship with Yoder and business relationship with Deere Plow & Planter Works (Deere); and that Copperweld, Regal, and Smith had slandered and libeled Independence with Deere. Before trial, Independence dismissed its section two monopolization claim. *Id.*

60. *Id.* The unfair competition claim stemmed from Independence's hiring of several key Regal employees. Copperweld and Regal also charged that Independence and Grohne interfered with prospective contractual and other business relationships of the defendants in filing their lawsuits on the eve of a thirty million dollar debenture offering by Copperweld. *Id.*

61. *Id.*

62. *Id.* The jury found Yoder to be liable for breach of its contract with Independence. It also found that Copperweld had interfered with Independence's contractual relationship with Yoder, that Regal had interfered with Independence's business relationship with Deere, and that Regal had slandered Independence to Deere. Treble damages were entered against Copperweld and Regal on the antitrust violation. A directed verdict was entered against Copperweld and Regal on all of their counterclaims. The defendant's motion for a judgment notwithstanding the verdict was denied. *Id.*

they were not sufficiently distinct entities under the test developed in *Photovest Corp. v. Fotomat Corp.*[63] Specifically, the defendants argued that the trial judge's jury instruction was defective because it failed to enumerate specifically the factors established in *Photovest*,[64] and that the evidence adduced at trial was insufficient, under the *Photovest* criteria, to support a finding that the defendants were in fact "separate entities."[65]

In affirming the judgment of the district court, the court of appeals stated its adherence to the functional analysis developed in *Photovest*,[66] holding that liability under section one is appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible."[67] The court concluded that, although the trial judge's instructions failed to enumerate specifically the factors developed in *Photovest*, "the charge emphasized to the jury that they were looking for real, rather than merely formal distinctness."[68] The court also concluded that the evidence was clearly sufficient to support a jury finding of true separateness between Copperweld and Regal.[69]

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63. Copperweld Corp. v. Independence Tube Corp., 691 F.2d at 315-16 (discussing Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)). In *Photovest*, the Seventh Circuit applied a functional test to determine whether two commonly owned separately incorporated firms could conspire in violation of section one. The test involves an inquiry into the actual relationship between the two corporations based on several factors. *See supra* notes 48-50 and accompanying text. If, upon a weighing of all the factors, the corporations are found to be in fact separate entities, then they may properly be subject to section one scrutiny. Photovest Corp. v. Fotomat Corp., 606 F.2d at 726.

64. For a listing of the factors, see *supra* text accompanying note 49.

65. Independence Tube Corp. v. Copperweld Corp., 691 F.2d at 318.

66. *Id.* The court said that "[i]n short, *Photovest* represents a reasonable and pragmatic approach to the intra-enterprise conspiracy problem, and we intend in what follows to adhere to it." *Id.*

67. *Id.*

68. *Id.* at 319.

69. *Id.* at 320. The plaintiff submitted evidence from which the jury could have found that Copperweld intended to keep its ongoing business and continue to serve the market and customers it was serving; Regal management had real autonomy; Regal's expenses and revenues were segregated and Regal's operating managers' compensation was based primarily on Regal's profitability; Regal maintained a separate sales force and clientele and made its own arrangements with suppliers of raw materials and equipment. *Id.*

IV. The Supreme Court Opinions

A. *The Majority*

Chief Justice Burger, writing for the majority,[70] reversed the Seventh Circuit and held that a parent and its wholly owned subsidiary were legally incapable of conspiring with each other under section one of the Sherman Act.[71] Initially, the Court noted that it had never before considered the merits of the intraenterprise conspiracy doctrine in depth, stating that "[a]lthough the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result."[72] Tracing the origins of the doctrine in its decisions from *Yellow Cab* to *Perma Life*, the Court dismissed the broad language in each instance as a mere alternative rationale.[73]

Noting the basic Sherman Act distinction between concerted and independent action,[74] the Court reasoned that it was plain that an agreement to implement the policies of a single, unitary firm did not raise the antitrust dangers that section one was designed to police.[75] Thus, the coordination between a corporation and its *division* does not warrant scrutiny under section one[76] because the coordination does not represent a joining of two independent sources of economic power that had previ-

70. *See supra* note 2.

71. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2745 (1984).

72. *Id.* at 2736. The instance that the Court refers to is Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

73. *Id.* at 2736-39. The Court stated that in *Yellow Cab* the affiliation of the defendants was irrelevant because the original acquisitions were themselves illegal; in *Timken*, as in *Yellow Cab*, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices; in *Perma Life Mufflers*, each plaintiff could allege a combination between the defendants or between the defendants and other franchise dealers. Thus, the Court concluded that in each of these cases the intraenterprise conspiracy doctrine was "at most" an alternative holding. *Id.*

74. *Id.* at 2740 (citing Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984)).

75. *Id.* at 2741. The Court stated that Congress' reasons for treating concerted behavior more strictly than unilateral behavior was readily appreciated because concerted activity was inherently fraught with anticompetitive risk. *See supra* notes 17-18 and accompanying text.

76. *See* Cliff Food Stores v. Kroger, Inc., 417 F.2d 203, 205-06 (5th Cir. 1969); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 83-84 (9th Cir.), *cert. denied*, 396 U.S. 1062 (1969).

ously pursued separate interests.[77] Furthermore, the majority observed that a rule subjecting such coordinated activity to section one liability would frustrate antitrust objectives by depriving consumers of the efficiencies achieved through decentralizing management.[78]

Similarly, the Court asserted that a parent and its wholly owned subsidiary constitute a single enterprise for purposes of section one of the Sherman Act because both share a complete unity of interest.[79] Moreover, the majority maintained that this unity of interest makes an agreement in Sherman Act terms between a parent and its wholly owned subsidiary meaningless; if a wholly owned subsidiary departs from the common corporate design, the parent may assert full control.[80]

Finally, the Court concluded that the intraenterprise conspiracy doctrine focused on the form of an enterprise's structure and ignored the reality; a corporation's choice of a particular corporate structure should not increase its exposure to antitrust liability because the decision involves questions of business judgment aimed at efficiency of control and economy of operations, goals which are not inherently anticompetitive.[81]

B. *The Dissent*

The dissent's main objection was that the Court established a per se rule that a wholly owned subsidiary is incapable of conspiring with its parent under section one of the Sherman Act. For the dissent, the appropriate inquiry was whether the coordinated activity of a parent and its wholly owned subsidiary may ever have anticompetitive effects.[82] Stating that repudiation of prior cases was not a step that should be taken lightly, the dis-

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

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 2743. Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intraenterprise conspiracy doctrine "impose[s] grave legal consequences upon organizational distinctions that are of *de minimus* meaning and effect." *Id.* (quoting Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29 (1962) (emphasis in original)).

82. *Id.* at 2746 (Stevens, J., dissenting). Justice Stevens stated that "[i]f, as seems to be the case, the challenged conduct was manifestly anticompetitive, it should not be immunized from scrutiny under § 1 of the Sherman Act." *Id.*

sent argued that the better course of action was to continue to rely on the "Rule of Reason[, which] has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of § 1."[83] Noting that the majority's per se rule was inconsistent with at least seven previous Supreme Court decisions applying the intracorporate conspiracy doctrine,[84] the dissent argued that the plain language of several of the prior decisions showed that the intraenterprise conspiracy doctrine was not merely an alternative rationale.[85] In rebutting the majority's characterization of the intraenterprise conspiracy doctrine as a mere alternative rationale in the preceding cases, the dissent raised several points. First, the dissent noted that in *Yellow Cab*, "the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it *already* owned in themselves violated § 1."[86] The dissent noted further that the holding in *Kiefer-Stewart* was clear and unequivocal, and that, in *Kiefer-Stewart* the Court considered and rejected the claim that *Yellow Cab* was confined to cases in which the acquisitions themselves were illegal.[87] The dissent argued that stare decisis is particularly important in the area of statutory construction because if Congress disagrees with the courts' construction, it is free to change the statute at any time. Because Congress had accepted the intraenterprise conspiracy doctrine for so many years, the dissent clearly believed that Congress agreed with this interpretation of section one. Thus, the dissent argued that "[a]t a minimum there should be a strong presumption against the approach taken today by the Court."[88]

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83. *Id.*

84. *Id.* at 2748. The seven cases referred to are: Perma Life Mufflers, Inc. v. United States, 392 U.S. 134 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Yellow Cab Co., 332 U.S. 218 (1947); United States v. Crescent Amusement Co., 323 U.S. 173 (1944). *Copperweld*, 104 S. Ct. at 2746-48 (Stevens, J., dissenting).

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

86. *Id.* at 2746-47 & n.2 (emphasis in original).

87. *Id.* at 2748 n.4.

88. *Id.* at 2749.

The dissent also disagreed with the majority's interpretation of the Sherman Act, saying that it was clear from the language of the Act that section one was intended to cover agreements between a parent and its wholly owned subsidiary. In passing the Sherman Act, Congress was particularly concerned with "trusts" that consisted of affiliated corporations, whose object was to restrict competition to the detriment of the consumer. Thus, the dissent reasoned that Congress specifically intended that agreements between affiliated corporations that restrict competition would be subject to section one.[89] The dissent rejected the majority's argument that the intraenterprise conspiracy doctrine unnecessarily elevated form over substance. Although in many circumstances the argument can be made, there are instances in which such conspiracies do restrain trade and have an anticompetitive result. Thus, according to the dissent, the Court's per se rule is too broad.[90] The dissent reasoned that the doctrine had an economic justification in antitrust law because it addressed a gap in antitrust enforcement. The intraenterprise conspiracy doctrine reached anticompetitive agreements between affiliated corporations that had sufficient market power to restrain marketwide competition but not sufficient power to be considered monopolists within the ambit of section two.[91] The dissent concluded that the doctrine served a useful antitrust purpose, and reached conduct that was within the intended scope of the Sherman Act. Thus, the intraenterprise conspiracy doctrine should not have been abolished by a per se rule of legality such as the one adopted by the majority.[92]

V. Analysis

The Supreme Court's repudiation of the intraenterprise conspiracy doctrine has been heralded as long overdue.[93] Aca-

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89. *Id.* at 2751 & nn.17-18. In support of this position the dissent cited speeches made by Senators in support of the Act, in which "trusts" were cited as a primary concern of the Act. *See* 21 Cong. Rec. 2457, 2569 (1890) (statements of Sen. Sherman).

90. *Copperweld,* 104 S. Ct. at 2751 (Stevens, J., dissenting).

91. *Id.* at 2752.

92. *Id.* at 2754-55.

93. McDavid, *The Courts Welcome Demise of the "Bathtub" Conspiracy Doctrine,* 6 NAT'L L.J. 22 (1984).

demic commentary on the doctrine has been uniformly critical.[94] It is important, however, to recognize the principles upon which the Court based its decision and to determine the reasons for the Court's willingness to repudiate the doctrine and overrule a long line of prior decisions.

The Court based its repudiation of the doctrine on three distinct grounds. First, in previous cases, the doctrine was unnecessary to the end result and was merely an alternative rationale.[95] Second, a section one violation requires an agreement between two or more entities, and for antitrust purposes, a parent and its wholly owned subsidiary are a single entity.[96] Finally, Congress intended that there be a certain "gap" between section one and section two proscriptions, and there was no justification for a rule that attempted to fill that "gap."[97]

A. *Handling of Prior Precedent*

The majority's handling of *Yellow Cab* and it's progeny was somewhat cursory given the circumstances. As the dissent noted, "any departure from the doctrine of *stare decisis* demands special justification" especially in the area of statutory construction.[98]

The Court distinguished the prior decisions upon which the

94. *See, e.g,* Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983) (concluding that the doctrine has little basis in antitrust logic or policy); Handler & Smart, *supra* note 19 (The intracorporate conspiracy doctrine advances no discernable antitrust goals.); Kempf, *supra* note 36, at 173 (stating that intraenterprise conspiracy is an ill-conceived legal doctrine); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955) (Within the present Sherman Act, there is no place for a doctrine of intraenterprise conspiracy.); Willis & Pitofsky, *supra* note 35, at 52 (The collateral disadvantages of a broad intraenterprise conspiracy doctrine more than outweigh the occasional advantage it may furnish the government or a private plaintiff in a particular case.); Note, *supra* note 39, at 681 (The existing intraenterprise conspiracy doctrine promotes behavior inconsistent with antitrust goals.); Note, *supra* note 36, at 729 (suggesting that the doctrine, as presently applied to the Courts, fails to further any antitrust policy). *See also* Barndt, *Two Trees or One? — The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158 (1962); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963).

95. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2736-39 (1984). *See supra* note 73 and accompanying text.

96. *Copperweld*, 104 S. Ct. at 2742. *See supra* text accompanying notes 79-80.

97. *Copperweld*, 104 S. Ct. at 2740-43. *See supra* text accompanying notes 94-99.

98. *Copperweld*, 104 S. Ct. at 2746 (Stevens, J., dissenting).

intraenterprise conspiracy doctrine had been based, stating that those cases actually stood for a more narrow rule.[99] After quoting the passage in *Yellow Cab* that gave rise to the doctrine,[100] the Court stated that the passage "more accurately [stood] for a quite different proposition."[101] The majority's reading of *Yellow Cab* was that the affiliation of the defendants was irrelevant because the original acquisitions were illegal under section one since they constituted a combination in restraint of trade, especially when the original anticompetitive purpose of the combination was evidenced by the subsequent actions of the affiliated entities.[102] Although this interpretation of *Yellow Cab* may be justified upon a close inspection of the decision and has been advocated by certain commentators,[103] the language in *Yellow Cab* was equivocal. It was not entirely clear that the basis for the holding was the illegality of the initial acquisitions. If *Yellow Cab* actually stood for this narrower rule,[104] the Court had several opportunities to make this clear.

In fact, in *Kiefer-Stewart, Timken,* and *Perma Life,* the Court merely cited the broad language of *Yellow Cab,* concluding that common ownership did not exempt corporations from

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99. *Copperweld,* 104 S. Ct. at 2736-39. *See supra* note 93 and accompanying text.

100. In *Yellow Cab,* the Court stated that "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." *Copperweld,* 104 S. Ct. at 2737 (quoting United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)).

101. *Id.* at 2737. Thus, the Court rejected the broad interpretation of this passage adopted in decisions subsequent to *Yellow Cab.* That interpretation subjected concerted activity of a parent and its subsidiary to section one scrutiny based solely upon their separate incorporation. *See e.g.,* notes 33-45 and accompanying text.

102. *Copperweld,* 104 S. Ct. at 2737 n.4. The Court stated that "our 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." *Id.*

103. *See* Note, *supra* note 39, at 719. The author noted that the Court in *Yellow Cab* had initially observed that restraint of trade was the primary objective of the combination. Thus, if this was a combination that effectuated a prior conspiracy among independent firms the initial combination would be a violation of section one. The subsequent combination could then be attacked as the fruit of that conspiracy, and common ownership would clearly be no defense to the antitrust attack. *Id. See also* Handler & Smart, *supra* note 19 at 28-29 (concluding that *Yellow Cab* stood for the proposition that a series of acquisitions, if they resulted in an unreasonable restraint of trade, may constitute a violation of section one); McQuade, *supra* note 94, at 194-95 (interpreting *Yellow Cab* to hold that the process of intergrating may be a conspiracy when the affiliation has as its object restraint of trade, thus the "entity" is a result of the conspiracy).

104. For the "narrower rule" *see supra* notes 39, 44, 102 and accompanying text.

section one liability.[105] In addition, the Court demonstrated its acquiescence to the doctrine by declining to grant certiorari in a number of recent cases that based liability on the intraenterprise conspiracy doctrine.[106]

Was the doctrine, in fact, an alternative rationale in the cases following *Yellow Cab*? Because *Kiefer-Stewart* did not involve a situation in which there was an initial acquisition which could serve as the basis for section one liability, the intraenterprise conspiracy doctrine was the sole basis for a finding of liability.[107] The *Copperweld* majority states that in *Timken*, because there was evidence that the initial acquisitions were designed to effectuate restrictive practices, reliance on the intraenterprise conspiracy doctrine was unnecessary to the result.[108] In support of this contention, the majority states that three judges upholding antitrust liability were of the view that Timken's "interests in the [foreign] companies were obtained as part of a plan to promote the illegal trade restraints."[109] The statement quoted was not the basis for those Justices' findings of Sherman Act liability. That statement was made in support of upholding the divestiture decree entered by the circuit court.[110] In initially deciding that section one of the Sherman Act had been violated, these three Justices made no mention of the initial acquisitions; they merely cited *Kiefer-Stewart* for the proposition that common ownership did not liberate the corporations from the impact of the antitrust laws.[111] Thus, the *Timken* Court did not, as the majority suggests, uphold antitrust liability on the fact that the initial acquisitions were violative of section

105. Kiefer-Stewart Co. v. Joseph E. Segram & Sons, 340 U.S. at 215 (citing cases). *See supra* 29-45 and accompanying text.

106. *See e.g,* Williams Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th cir. 1979), *cert. denied,* 445 U.S. 917 (1980); Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp., 579 F.2d 20 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978).

107. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

108. *Copperweld,* 104 S.Ct. at 2739.

109. *Id.* at 2739 n.11 (quoting Timken Roller Bearing Co. v. United States, 341 U.S. at 600-01).

110. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 600 (1951).

111. *Id.* at 598 (citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. at 213).

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Similarly the majority characterized the intraenterprise conspiracy doctrine as "at most an alternative holding" in *Perma Life*.[112] The language cited by the majority in support of its "alternative rationale" proposition[113] seems, on the contrary, to indicate that the intraenterprise conspiracy doctrine was the primary basis for a finding of liability, because in *Perma Life*, the plaintiff's did not charge a combination between itself and the defendants or between the defendant and other franchise dealers. Thus, the fact that such a charge could have supported a finding of section one liability is more likely the alternative rationale.

Thus, arguably, in *Yellow Cab* and the subsequent decisions, the Court did not view the intraenterprise conspiracy doctrine as unnecessary or merely an alternative rationale. The majority's characterization of the doctrine as unnecessary in the prior cases stems from its analysis of the scope of section one. The majority's conclusion that the doctrine had no justification in antitrust law or section one of the Sherman Act made it necessary for them to distinguish the earlier decisions to attempt to minimize the significance of overruling the doctrine.

B. *The Scope of Section One*

The majority concluded that section one was never intended to govern the activities of a parent and its wholly owned subsidiary.[114] The majority reasoned that the intraenterprise conspiracy doctrine did nothing to further the purpose of section one because agreements between a parent and a subsidiary do not bring together economic resources that had previously served

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112. *Copperweld*, 104 S. Ct. at 2739. The majority bases this statement on the fact that, after citing *Yellow Cab* and *Timken* in support of the intraenterprise conspiracy doctrine, the *Perma Life* Court added " '[i]n any event' each plaintiff could clearly charge a combination between itself and the defendants or between the defendants and other franchise dealers." *Id.*

113. *See supra* note 112.

114. *Copperweld*, 104 S. Ct. at 2740-44. "In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." *Id.* at 2740.

different interests.[115] Additionally, the Court found that the doctrine lacked utility in antitrust enforcement because it would merely encourage parent corporations to restructure their subsidiaries into unincorporated divisions. From an economic standpoint there are many benefits to be had from conducting business through wholly owned subsidiaries as opposed to unincorporated divisions,[116] and no valid antitrust purpose is served by subjecting a corporation to antitrust liability based upon the type of organizational structure adopted by that corporation.[117]

The dissent, however, claimed the doctrine had economic justification in that it addressed a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations that have sufficient market power to restrain marketwide competition but not sufficient power to be considered monopolists under section two of the Act.[118] Turning to legislative history, the dissent concluded that the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed.[119] The dissent felt it was clear that the conduct that Congress sought to proscribe went further than mere acquisitions and that section

115. *Id.* at 2742. As noted earlier, *see supra* notes 17, 18, 75 and accompanying text, the reason Congress treated concerted activity more strictly than unilateral activity was that in concerted activity there is a "joining" of previously separate interests to pursue common goals, and this "joining" of resources created great anticompetitive risk. Thus, since the intraenterprise conspiracy doctrine was applied to cases where there was no such "joining," the majority reasoned that the doctrine served no valid antitrust purpose. *Copperweld*, 104 S. Ct. at 2742. A parent and its wholly owned subsidiary are already working toward a common objective and, with or without an agreement, the subsidiary by nature acts for the benefit of the parent. Thus they cannot have "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," upon which a section 1 agreement between conspirators can be found.) *Id.* (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)).

116. *See* Areeda, *supra* note 94, at 453. Separate incorporation may reduce federal or state taxes, facilitate compliance with regulatory or reporting laws, allow investors or lenders to specialize in one aspect of a conglomerate's business, and allow for different accounting practices when necessary. *Id.*

117. *Copperweld*, 104 S. Ct. at 2742-43.

118. *Id.* at 2751-52 (Stevens, J., dissenting).

119. *Id.* at 2750-51. Citing the remarks of several Senators in favor of passage of the Act, including Senator Sherman, the dissent noted that "trusts" consisted of affiliated corporations, and that the inclusions of "trusts" in the language of section one evidence Congress' intent that the actions of affiliated corporations, when in restraint of trade, would be governed by section one. *Id.* (citing 21 CONG. REC. 2457, 2569 (1890)).

one prohibitions were intended to apply equally to existing "trusts."[120] The majority points out that the passages cited by the dissent explicitly refer to combinations created for the purpose of restraining trade, and any section one liability placed upon those trusts for post-acquisition conduct would be predicated on the illegality of the acquisition.[121] Thus, although both views draw support from the legislative history, it appears that the majority's position is more concretely supported by that history. A review of the debates contained in the Congressional Record reveals that Congress' chief concern was the combination of previously independent resources with the purpose to prevent competition.[122] Thus, section one of the Act was aimed at preventing such combinations.[123] Implicit in a parent-subsidiary relationship is a common goal: maximization of corporate profits and growth for the subsidiary and the parent; the economic well-being of the "organization" as a whole. The actions of a parent and subsidiary in pursuit of this common goal may, at times, restrain trade. The Sherman Act's distinction between concerted activity and unilateral activity is clear.[124] The purpose of the Act, to promote and encourage free trade and competition while discouraging activity that restrains trade and competition,[125] is clearly furthered by such a distinction.[126] Because of the difficulty of distinguishing between anticompetitive activity and mere "robust competition," the actions of a single entity are judged more leniently than the concerted activity of more than one entity.[127] The actions of a single entity must reach a level of monopolization or attempts to monopolize in order to constitute antitrust violations.[128] It is logical from an antitrust standpoint,

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120. *Id.* at 2751 n.18.

121. *Copperweld*, 104 S. Ct. at 2744 n.23. The majority, quoting Sen. Sherman, noted that "[i]t is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." *Id.* (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)).

122. *See* 21 Cong. Rec. 2455-57, 2569 (1890).

123. *Id.* at 2457 (statement of Sen. Sherman). "This bill . . . [seeks] to prevent . . . combinations, made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." *Id.*

124. *See supra* notes 14-16 and accompanying text.

125. *See supra* text accompanying note 9.

126. *See supra* notes 17-18 and accompanying text.

127. *See supra* note 18 and accompanying text.

128. 15 U.S.C. § 2 (1982). Activities of a single entity which monopolize or attempt

that the actions of a parent and its subsidiary must be viewed as actions of a single entity. Although legally distinct by way of their separate incorporation, a parent and its subsidiary must be treated as single entity for antitrust purposes in order to further the goals of the Sherman Act. Because a parent and its subsidiary are necessarily working toward common goals, concerted activity between the two does not raise the specter of "inherent anticompetitive risk" sought to be tempered by section one, since it does not involve the pooling of resources toward a common goal of two entities that previously pursued their own interest separately.[129] In fact, evaluating the activities of a parent and its subsidiary under section two furthers the goal of the Act to promote robust competition within the market place. Only when robust competition reaches a level that threatens monopoly should it be prohibited — and then by invocation of section two of the Sherman Act.

Although the dissent claimed that the intraenterprise conspiracy doctrine was useful for addressing a "gap" between section one and section two enforcement, the majority was convinced that the doctrine, which penalized actions of a parent and subsidiary which, if engaged in by a division and its home office, would be legal, was simply out of step with the reality of corporate America. A distinction based on organizational structure simply had no logical justification in today's world of multifaceted business enterprise.

VI. Conclusion

The Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*[130] should be applauded. Years of attempting to apply the intraenterprise conspiracy doctrine left the lower courts in disagreement. The Supreme Court, recognizing this, agreed to re-examine the entire doctrine from basis to effect in order to clear the waters muddied by *Yellow Cab* and its progeny. The benefits of the doctrine were clearly outweighed by the burdens it created. The Court's recognition that the doctrine served no plausible antitrust goal is bolstered by the fact that

to monopolize are proscribed. *Id. See supra* note 16 and accompanying text.

129. *See supra* note 17 and accompanying text.

130. 104 S. Ct. 2731 (1984).

the government agencies entrusted with antitrust enforcement have been extremely reluctant to rely on the theory.[131] The doctrine, as it evolved from *Yellow Cab*, was susceptible of so many differing interpretations that the Court would have been ill-advised simply to attempt to formulate a test to limit the doctrine. Due to the lack of truly meaningful antitrust purposes served by the doctrine, and its potentially broad reach, the best course available to the Court was full repudiation, thus obviating any future problems and returning a sense of reality to antitrust policy. No longer will section one liability be founded on a firm's choice of organization.

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131. The FTC has not charged an enterprise with illegal conspiracy based solely on internal discussions or agreements since 1954. *See* Willis & Pitofsky, *supra* note 35, at 31-32; Note, *supra* note 39, at 729. The Justice Department has "never brought an action against a parent and its subsidiary corporations . . . charging a conspiracy solely in restraint of the trade of the affiliated defendants."). *Id. See also* Turner, *Address before the American Bar Association*, 10 ANTITRUST BULL. 685, 687 (1965). "We should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest." *Id.*