

Copperweld Corp. v. Independence Tube Corp.: An End to the Intraenterprise Conspiracy Doctrine

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NOTES

COPPERWELD CORP. v. INDEPENDENCE TUBE CORP.: AN END TO THE INTRAENTERPRISE CONSPIRACY DOCTRINE?

INTRODUCTION

In *Copperweld Corp. v. Independence Tube Corp.*,¹ the United States Supreme Court held that a parent corporation is incapable of conspiring, within the meaning of section 1 of the Sherman Antitrust Act,² with its wholly owned subsidiary. This holding reversed a line of Supreme Court cases utilizing the “intraenterprise conspiracy doctrine” to treat commonly owned or controlled corporations as separate legal entities which could be held liable for conspiring to restrain trade under the Sherman Act.

Courts and commentators criticized the intraenterprise conspiracy doctrine long before *Copperweld*. Despite this dissatisfaction with the doctrine, questions remain concerning the scope of the *Copperweld* decision and the desirability of rejecting the doctrine outright instead of creating a more refined intraenterprise test. This Note reviews the Supreme Court cases that developed the intraenterprise conspiracy doctrine³ and explores possible interpretations of these cases.⁴ The Note discusses criticisms of the doctrine⁵ and evaluates an alternative intraenterprise test developed by several circuit courts.⁶ After discussing *Copperweld*'s factual and legal background,⁷ the Note examines the Court's rationale for overturn-

¹ 467 U.S. 752 (1984).

² 15 U.S.C. § 1 (1982). This section provides in part:

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 any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Section 1 liability requires an illegal conspiracy between two or more parties. Illegality of the agreement turns on a finding of restraint of trade. This Note concerns only the threshold determination of whether a plurality of parties exists. The plurality of parties requirement distinguishes § 1 from § 2 because § 2 proscribes unilateral monopolistic behavior. For the text of § 2, see *infra* note 51.

³ See *infra* notes 12-29 and accompanying text.

⁴ See *infra* notes 30-48 and accompanying text.

⁵ See *infra* notes 49-52, 54-56 & 60-64 and accompanying text.

⁶ See *infra* notes 56-75 and accompanying text.

⁷ See *infra* notes 76-96 and accompanying text.

ing the doctrine⁸ and suggests that *Copperweld* does not fulfill its stated rationale. The Note further argues that although *Copperweld* overrules the intraenterprise conspiracy doctrine when applied to a parent and its wholly owned subsidiary, lower courts remain free to apply, and should apply, a modified version of the doctrine when the parent owns less than one hundred percent of the subsidiary.⁹ Thus, *Copperweld* does not spell the end of the intraenterprise conspiracy doctrine.

I

BACKGROUND

A. *Yellow Cab*: Introduction of the Intraenterprise Conspiracy Doctrine¹⁰

A conspiracy in violation of section 1 of the Sherman Act requires an agreement between two or more parties to restrain trade.¹¹ In *United States v. Yellow Cab Co.*,¹² the Supreme Court found section 1 liability where one individual owned or controlled separately incorporated conspiring companies.¹³ The alleged conspiracy consisted of agreements between a taxicab manufacturer and several taxicab operators, all of whom were controlled by a single individual.¹⁴ The defendants maintained that they could not be lia-

⁸ See *infra* notes 97-118 and accompanying text.

⁹ See *infra* notes 152-58 & 173-78 and accompanying text.

¹⁰ *Yellow Cab* was not the first case to address a conspiracy between units of a corporation. In *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), the Seventh Circuit rejected a single entity defense presented by General Motors, whose divisions were then vertically integrated, separately incorporated subsidiaries. The court stated: "[The corporations cannot] enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader." *Id.* at 404. For a discussion of vertical integration, see *infra* note 15.

¹¹ 15 U.S.C. § 1 (1982). Antitrust liability for a conspiracy in restraint of trade may arise under either of two tests. First, a restraint may be "per se" illegal if it is so inherently anticompetitive that an analysis into underlying motives, purposes, or effects is unnecessary. See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (tying arrangement whereby party agrees to sell product on condition that buyer purchases different product is illegal per se). Second, a restraint may be illegal under the "rule of reason" when an analysis into all relevant circumstances reveals that its tendency to suppress competition outweighs legitimate interests. See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (price fixing during business hours when grain market was not in session by Board of Trade not illegal; all agreements restrain competition, so courts should examine history, rationale, and facts relevant to restraint).

¹² 332 U.S. 218 (1947).

¹³ *Id.* at 227.

¹⁴ Morris Markin controlled the majority of shares in the Checker Cab Manufacturing Corporation and served as its president and general manager. *Id.* at 221. Markin also owned all outstanding shares in Cab Sales and Parts Corporation. *Id.* at 221-22. In addition, Markin controlled, either personally or through other corporations, numerous taxicab companies in cities around the country. *Id.* at 222. In the Chicago area alone,

ble because the vertically integrated subsidiary corporations constituted a single entity which was inherently incapable of forming a multiparty conspiracy.¹⁵

The *Yellow Cab* Court rejected the single entity status defense, ruling that unlawful restraints "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."¹⁶ The Court adverted to the Sherman Act's concern with substance rather than form, concluding that common corporate ownership and control did not preclude section 1 liability.¹⁷

Although previous Supreme Court decisions had held affiliated corporations liable under section 1 of the Sherman Act,¹⁸ *Yellow Cab* formally introduced the intraenterprise conspiracy doctrine. The *Yellow Cab* holding strongly influenced subsequent Supreme Court and lower court decisions. Indeed, one commentator characterized the Court's language as having taken on a "talismanic quality."¹⁹ Courts and commentators questioned both the scope of the Court's holding in *Yellow Cab*²⁰ and the validity of the intraenterprise conspiracy doctrine.²¹ Despite this criticism, *Yellow Cab* had a substantial impact on later intraenterprise conspiracy cases.²²

Markin held the beneficial controlling interests in three of the largest taxicab companies. *Id.* at 222-23.

¹⁵ *Id.* at 227. Vertical integration exists when an enterprise owns or controls subunits that perform different levels of production, such as the manufacture, distribution, financing, sales, or service of a given product. A vertically integrated business may gain efficiency from the division of labor and specialization in this organizational structure. Businesses vertically integrate by using unincorporated divisions, separately incorporated subsidiaries, or some combination of these methods. See R. GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 8.01 (1984).

¹⁶ 332 U.S. at 227.

¹⁷ *Id.* (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 377 (1933), in which the Court stated, "The restrictions the [Sherman] Act imposes are not mechanical or artificial"; "the Anti-Trust Act aims at substance.").

¹⁸ In *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), the Court held that affiliated film distributors with interlocking ownership conspired in violation of the Sherman Act. In companion cases decided within a year of *Yellow Cab* the Court held that the practices of affiliated film theatres constituted a conspiracy in violation of § 1. *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948). *Schine* cites both *Yellow Cab* and *Crescent Amusement* for the proposition that affiliated status does not immunize corporations from Sherman Act liability. 334 U.S. at 116.

¹⁹ Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 458 (1983) (referring to *Yellow Cab* Court's language that "common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." 332 U.S. at 227).

²⁰ See *infra* notes 30-48 and accompanying text.

²¹ See *infra* notes 49-52, 54-56 & 60-64 and accompanying text.

²² See *infra* notes 23-29 and accompanying text.

B. *Yellow Cab's* Progeny: Reaffirmation of the Intraenterprise Conspiracy Doctrine

The Supreme Court expressly reaffirmed the intraenterprise conspiracy doctrine in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*²³ In *Kiefer-Stewart*, the Court addressed an agreement between two wholly owned subsidiaries of Seagram to fix retail liquor prices.²⁴ The subsidiaries maintained that their status as part of the Seagram organization precluded liability. In rejecting this argument, the Court cited *Yellow Cab* for the proposition that "mere instrumentalities of a single manufacturing-merchandizing unit" could conspire unlawfully.²⁵ The Court suggested that the intraenterprise conspiracy doctrine is "especially applicable" when conspirators hold themselves out to be competitors.²⁶

The Supreme Court also applied the intraenterprise conspiracy doctrine in *Perma Life Mufflers, Inc. v. International Parts Corp.*²⁷ In *Perma Life*, the Court overturned the court of appeals's alternative holding that the companies, as parts of a single business entity,

²³ 340 U.S. 211 (1951).

²⁴ The agreement took place between Calvert Sales and Seagram Sales, both of which were wholly owned subsidiaries of Seagram of Indiana. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 182 F.2d 228, 229 (7th Cir. 1950), *rev'd*, 340 U.S. 211 (1951). *Kiefer-Stewart Company*, a wholesale liquor distributor, sought damages resulting from resale price limits imposed upon Indiana liquor wholesalers by defendants. *Kiefer-Stewart*, 340 U.S. at 212.

²⁵ 340 U.S. at 215.

The Court relied upon *Kiefer-Stewart* in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). In *Timken*, the Court rejected an argument that an American parent corporation holding one-third ownership interest in a British subsidiary and one-half interest in a French subsidiary was exempt from § 1 liability because the parent and its subsidiaries operated as a joint venture. *Id.* at 598. The Court held that anticompetitive agreements between legally separate corporations could not be justified "by labeling the project a 'joint venture.'" The Court suggested that "[p]erhaps every agreement and combination to restrain trade could be so labeled." *Id.* Joint venture status has also been alleged as a defense to § 1 conspiracy in professional sports antitrust litigation, usually with little success. See, e.g., *Radovich v. NFL*, 352 U.S. 445, 449-52 (1957); *Mackey v. NFL*, 543 F.2d 606, 619-21 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 484 F. Supp. 1274 (C.D. Cal.), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir. 1980); see also *North Am. Soccer League v. NFL*, 670 F.2d 1249, 1256-58 (2d Cir.) (necessity of league affiliation to successful production and marketing of member's businesses does not warrant treating league as single entity), *cert. denied*, 459 U.S. 1074 (1982).

²⁶ 340 U.S. at 215. The Court did not explain the relevance of the subsidiaries' holding themselves out to be competitors. Presumably, the Court was concerned about possible damages incurred in reliance on the apparent independence of corporations. See H. BLAKE & R. PITOFKY, *CASES AND MATERIALS ON ANTITRUST LAW* 438 (1967) (notion of expanded antitrust liability where affiliated companies adopt competitive posture consistent with old line of cases under § 5 of FTC Act); cf. U.S. Dep't of Justice, Antitrust Division, *Antitrust Guide for International Operations* 11-14 (1977) (even if alleged conspirators hold themselves out as competitors, focus on whether they were originally such, were created by a common parent, or are under 100% common ownership).

²⁷ 392 U.S. 134 (1968).

could not illegally conspire to restrict competition in the muffler business.²⁸ The Supreme Court ruled that because these corporations "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."²⁹

C. The Strength of the Court's Adherence to the Intraenterprise Conspiracy Doctrine

Despite the Supreme Court's reaffirmation of *Yellow Cab's* intraenterprise conspiracy doctrine in *Kiefer-Stewart* and *Perma Life*, the strength of the Court's adherence to the doctrine remained uncertain. Language in *Yellow Cab* suggests that the Court's holding rested on its perception of an anticompetitive acquisition, rather than a conspiracy.³⁰ Furthermore, *Yellow Cab's* progeny did little more than reiterate the earlier holding, without providing new analysis of the doctrine.³¹ Finally, the Court declined to apply the doctrine in more recent intraenterprise conspiracy cases.³²

The *Yellow Cab* Court focused its antitrust attack on the original corporate acquisitions, rather than on the resulting enterprise's structure.³³ Under a narrow interpretation, the case simply holds that if a series of acquisitions leads to an unreasonable restraint of trade, common ownership will not preclude section 1 liability.³⁴

A restricted interpretation of *Yellow Cab* diminishes the signifi-

²⁸ *Perma Life*, 392 U.S. at 141-42. The parent, International Parts Corporation, conspired with its wholly owned subsidiaries to fix retail prices and condition the sale of mufflers. *Perma Life*, one of International Part's franchisees, sued to recover damages incurred because of these arrangements. *Id.* at 135.

²⁹ *Id.* at 141-42 (citations omitted).

³⁰ See *infra* notes 33-34 and accompanying text.

³¹ See *infra* notes 35-36 and accompanying text.

³² See *infra* notes 38-48 and accompanying text.

³³ The Court's language suggesting this interpretation reads: "The theory of the complaint . . . is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion . . . but by deliberate, calculated purchase for control.'" *Yellow Cab*, 332 U.S. at 227-28 (quoting *United States v. Reading Co.*, 253 U.S. 26, 57 (1920)).

³⁴ 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." Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 29 (1981) (footnote omitted). According to another commentator, "That unlawful merger was the theory of the case is clear from the case's ultimate resolution." Areeda, *supra* note 19, at 458. On remand, the district court found that the defendant taxicab companies had not been illegally acquired. *United States v. Yellow Cab*, 80 F. Supp. 936 (N.D. Ill. 1948), *aff'd*, 338 U.S. 338 (1949). The Supreme Court subsequently affirmed that result. 338 U.S. 338 (1949).

Yellow Cab's precedential force, however, is not limited to acquisition cases. Despite the Court's failure to analyze the intraenterprise conspiracy doctrine in later cases, see

cance of later Supreme Court cases applying the intraenterprise conspiracy doctrine because those cases rely solely on *Yellow Cab's* precedential value for support. For example, the *Perma Life* Court states the rule without further analysis.³⁵ Furthermore, alternative explanations relying upon antitrust grounds other than intraenterprise conspiracy can form the basis for each of the post-*Yellow Cab* decisions,³⁶ with the exception of *Kiefer-Stewart*.³⁷

Supreme Court decisions after *Perma Life* also call into question the strength of the intraenterprise conspiracy doctrine.³⁸ In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*,³⁹ the Court declined to apply *Yellow Cab* to an alleged conspiracy between Sunkist and two affiliated agricultural cooperative corporations.⁴⁰ The Court found no section 1 violation "even though [the cooperatives had] formally organized themselves into three separate legal entities."⁴¹ The Court observed that "[t]here 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."⁴²

infra text accompanying notes 35-36, the reaffirmation of *Yellow Cab* in these nonacquisition cases extends the intraenterprise conspiracy doctrine beyond *Yellow Cab's* facts.

³⁵ See *Perma Life*, 392 U.S. at 141-42.

³⁶ In *Timken*, for example, American Timken did not have any control over the business conduct of either British or French Timken. *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 311-12 (N.D. Ohio 1949), *modified*, 341 U.S. 593 (1951). Thus, while it would be incorrect to characterize the corporations as unrelated parties, they might be considered independent for intraenterprise conspiracy purposes. See also P. AREEDA, *ANTITRUST ANALYSIS* ¶ 337 (1974) (*Timken* intraenterprise holding unnecessary because "defendant's acquisition of its shares in British Timken was probably illegal" as perfection of 20 year old unlawful agreement between the originally independent British Timken and American Timken). In *Perma Life*, the Court itself suggested an alternative holding on the basis of illegal agreements between the defendants and franchise dealers, including the plaintiff. 392 U.S. at 142. Although their compliance was somewhat coerced, the franchise dealers nevertheless acquiesced to the defendant's restrictive franchise agreements.

³⁷ Commentators generally regard *Kiefer-Stewart* as the one case in which antitrust liability can only be explained by reference to the intraenterprise conspiracy doctrine. See, e.g., Areeda, *supra* note 19, at 459 & n.22. But see Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 45 (1968) (*Kiefer-Stewart* can be understood as simply a case of coerced resale price maintenance between plaintiff and defendant).

³⁸ See E. SULLIVAN & H. HOVENKAMP, *ANTITRUST LAW POLICY AND PROCEDURE* 233 (1984).

³⁹ 370 U.S. 19 (1962).

⁴⁰ Twelve thousand citrus growers formed Sunkist. Exchange Orange was a wholly owned subsidiary of Sunkist. The members of a third corporation, Exchange Lemon, were also members of Sunkist, but some Sunkist members were not involved with Exchange Lemon. *Id.* at 20-21.

⁴¹ *Id.* at 29.

⁴² *Id.* One commentator suggests that the Court in *Sunkist* "meant to fashion an exception to intraenterprise conspiracy doctrine for agricultural cooperatives." Areeda, *supra* note 19, at 460-61 & n.33 (noting the interpretation offered in *Columbia Metal*

The Supreme Court also declined to find a conspiracy in *United States v. Citizens & Southern National Bank*.⁴³ Although the Court cited *Yellow Cab* in arguing that corporate interrelationships do not determine potential antitrust liability,⁴⁴ the Court permitted "the sharing of expertise and information"⁴⁵ between a bank and pseudo-branch offices in which it owned five percent interests⁴⁶ despite stringent state restrictions against branch operation.⁴⁷ The Court, distinguishing the situation from one in which "independent competitors hav[e] no permissible reason for intimate and continuous cooperation and consultation," found no section 1 conspiracy.⁴⁸

These later Supreme Court cases do not overrule *Yellow Cab* and its progeny. They do, however, vitiate the intraenterprise conspiracy doctrine's vitality. Coupled with the possibility of a restrictive interpretation of the *Yellow Cab* cases, the doctrine's decline has encouraged critics who challenge the doctrine's wisdom.

D. Shortcomings of the Intraenterprise Conspiracy Doctrine

A major criticism of the intraenterprise conspiracy doctrine is that the doctrine does nothing to promote competition or otherwise advance the purposes of the Sherman Act.⁴⁹ Corporations routinely make legitimate business arrangements through the use of unincor-

Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 & n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978)). This interpretation is plausible in light of § 1 of the Capper-Volstead Act, 7 U.S.C. § 291 (1982), which confers certain antitrust exemptions upon such organizations. Professor Areeda also points out, however, that "the Court has in other cases taken pains to construe special cooperative legislation narrowly . . ." Areeda, *supra* note 19, at 461 (footnote omitted).

⁴³ 422 U.S. 86 (1975).

⁴⁴ *Id.* at 116.

⁴⁵ *Id.* at 114.

⁴⁶ *Id.* at 92. In addition to the five percent ownership by Citizens Bank, the bank's employees and officers also owned considerable stock in the "branches."

⁴⁷ *Id.* at 118. The Court noted that the Georgia antibranch law "amounted to a compulsory market division" which the bank's multiple ownership effectively defeated. *Id.*

⁴⁸ *Id.* at 113. The Court's approach in *Sunkist* and *Citizens* may be viewed as a transitional step between *Yellow Cab* and *Copperweld*. In *Yellow Cab* and its progeny, the Court focused on the legal status of the entities and ignored their economic relationship. In *Copperweld*, the Court considered economic factors to the exclusion of legal ones. See *infra* notes 141-50 and accompanying text. Arguably, *Sunkist* and *Citizens* permit courts to treat corporations as legally separate only after economic analysis reveals them as such. Under this approach, these cases serve as a precursor to the Ninth Circuit's single economic unit test described at *infra* notes 56-74 and accompanying text.

⁴⁹ See Handler & Smart, *supra* note 34, at 24. For other criticisms of the doctrine, see Areeda, *supra* note 19; Handler & Smart, *supra* note 34; Kempf, *Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?*, 24 Bus. Law 173 (1968); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Stengel, *Intra-Enterprise Conspiracy under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963); Willis & Pitofsky, *supra* note 37.

porated divisions. Such corporations are treated as discrete, single legal entities which are immune from liability under section 1 of the Sherman Act.⁵⁰ These corporations are subject to antitrust liability only if they become large enough to constitute a monopoly under section 2 of the Sherman Act.⁵¹ Arguably, a parent corporation with a wholly owned subsidiary is no different from a corporation comprised of unincorporated divisions.

Critics endorsing the corporate division analogy argument point to language in *Yellow Cab* to support their position: The Sherman Act is "aimed at substance rather than form."⁵² These critics agree with this principle, but argue that *Yellow Cab* and its progeny distorted its meaning. The *Yellow Cab* Court used this phrase to justify disregarding common corporate ownership or control in favor of focusing on the economic realities forming substantive antitrust violations. Critics claim that *Yellow Cab* and its progeny exaggerated substance (the restraint of trade) and ignored form (the de facto unity of a corporate enterprise). The critics argue that these cases thus proscribe any interference with market competition without first requiring that a plurality of independent actors be present.

Proponents of the intraenterprise conspiracy doctrine counter that its abandonment would leave an undesirable gap in antitrust law. Without the intraenterprise conspiracy doctrine, corporate arrangements which harm competition but do not rise to the level of monopolistic behavior would go unfettered solely because the corporations have common ownership or control. Neither section 1 nor section 2 would apply to such arrangements. Proponents of the doctrine argue that Congress did not intend to leave such a gap in the Sherman Act.⁵³

Gaps have, however, become established in antitrust common law. For example, an arrangement between a corporation and its unincorporated division cannot create an illegal conspiracy, even if it produces anticompetitive effects.⁵⁴ Furthermore, officers and em-

⁵⁰ See *infra* note 54 and accompanying text.

⁵¹ 15 U.S.C. § 2 (1982). This section provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

⁵² *Yellow Cab*, 332 U.S. at 227.

⁵³ The definition of a "person" under the Sherman Act includes both an individual and a corporation. 15 U.S.C. § 7 (1982). The legislative history of the Act, however, contains no explicit discussion of the ramifications of utilizing this definition to proscribe conspiracies between interrelated corporations. Proponents of the intraenterprise conspiracy doctrine must therefore rely solely on a plain language interpretation of the statute.

⁵⁴ See, e.g., *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978) (unincorporated division cannot conspire with corporation even though separate books kept, because not separately incorporated); *Cliff Food Stores, Inc. v. Kroger*,

ployees of the same company, who make agreements on the company's and not their own behalf, are not considered separate persons for the purpose of section 1 of the Sherman Act.⁵⁵ Critics of the intraenterprise conspiracy doctrine point to these recognized gaps in the Sherman Act to refute the argument that the intraenterprise conspiracy doctrine is necessary to close a perceived gap in antitrust law.

E. Lower Court Modifications of the Intraenterprise Doctrine

The leading lower court modification of the intraenterprise conspiracy doctrine is the "single economic unit," or "SEU," test adopted by the Seventh, Eighth, and Ninth Circuits.⁵⁶ This test involves examining numerous factors concerning the corporation, its subsidiary, and their operations to determine whether their separate incorporation is economically significant or is a mere formality. An-

Inc., 417 F.2d 203, 205-06 (5th Cir. 1969) (corporation cannot conspire with unincorporated division even though latter is assumed name under which corporation does business, because division is not a separate legal corporate entity); *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83-84 (9th Cir. 1969) (reversible error to treat unincorporated division as separate entity capable of conspiring with corporation even though separately incorporated before), *cert. denied*, 396 U.S. 1062 (1970); *Poller v. Columbia Broadcasting Sys.*, 284 F.2d 599, 603 (D.C. Cir. 1960) (charge that corporation conspired with unincorporated division constitutes charge that corporation conspired with itself), *rev'd on other grounds*, 368 U.S. 464 (1962).

⁵⁵ See, e.g., *Poller v. Columbia Broadcasting Sys.*, 284 F.2d 599, 603 (D.C. Cir. 1960) (claim of conspiracy between corporation and employees just as unsound as claim of conspiracy between corporation and unincorporated division), *rev'd on other grounds*, 368 U.S. 464 (1962); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (corporation cannot conspire with employees because they are corporation's agents and corporation cannot conspire with itself), *cert. denied*, 345 U.S. 925 (1953); see also *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978) (exception to general rule that corporation cannot conspire with own employee when employee has individual stake in achieving object of conspiracy).

⁵⁶ The circuits vary in their approaches to the doctrine. The Third Circuit has continued a full application of the intraenterprise conspiracy doctrine. See, e.g., *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 & n.16 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The First and Fifth Circuits have also adopted an absolute intraenterprise rule. See, e.g., *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). The Second Circuit has moved towards the SEU test developed by the Ninth Circuit. See *Fuchs Sugars & Syrups Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030-31 & n.5 (2d Cir.) (economic realities must be examined to determine whether principal and agent are capable of conspiring), *cert. denied*, 444 U.S. 917 (1979). A district court within the Second Circuit belatedly applied the SEU test one day after the Supreme Court issued its *Copperweld* decision. *Reborn Enters., Inc. v. Fine Child, Inc.*, 590 F. Supp. 1423, 1437 (S.D.N.Y. 1984) (economic realities reveal no capacity to conspire between parent and wholly owned subsidiary), *aff'd*, 754 F.2d 1072 (2d Cir. 1985). The Fourth Circuit has affirmed a lower court's utilization of a control-based test similar to the Ninth Circuit's SEU test. See *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951).

trust liability is possible only if the court finds the parent and the subsidiary to be meaningfully independent. If the court finds no meaningful independence, the companies are treated as a single economic unit.

In *Knutson v. Daily Review, Inc.*,⁵⁷ the Ninth Circuit upheld a finding of no conspiracy between a parent and its wholly owned subsidiary, both of which were newspaper publishers. The plaintiff, an independent distributor, claimed that a conspiracy in violation of the antitrust laws occurred when both corporations terminated their independent dealers and shifted to an employee distribution network.⁵⁸ The Ninth Circuit relied on the lower court's finding that no conspiracy had taken place⁵⁹ and added a discussion of the distinction between separate legal entities and separate economic entities.⁶⁰ The *Knutson* court considered separate incorporation to be but one factor when deciding whether concerted action between distinct economic entities constitutes a violation of antitrust law. The court noted that separate incorporation "may be significant in an antitrust sense or it may be only a technicality, a byproduct of decisions with no antitrust impact."⁶¹ The court concluded that actual, rather than legal, corporate structure determines whether the court will treat the arrangement as one entity or as separate units.⁶²

⁵⁷ 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

⁵⁸ *Knutson*, 548 F.2d at 799-801. The parent corporation, Daily Review, Inc., published a daily morning paper and a daily evening paper, as well as a "greensheet" advertising circular. Its wholly owned subsidiary, Bay Area Publishing Co., published a daily morning paper and a periodic evening paper. *Id.*

⁵⁹ *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, 1359 (N.D. Cal. 1974), *aff'd in part and rev'd in part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

⁶⁰ See *Knutson*, 548 F.2d at 801.

⁶¹ *Id.* at 802.

⁶² *Id.* The Ninth Circuit undertook a factual analysis and found as a matter of law that the defendant corporations should be treated as a single entity for antitrust purposes. The court considered the following facts conclusive in its finding that the defendants constituted a single economic unit: (a) The subsidiary was wholly owned by the parent; (b) The controlling shareholder of the parent was the president of both newspaper companies and the publisher of all five newspapers; (c) Both corporations had the same individuals in charge of important operations, including circulation; (d) The alleged individual co-conspirators were either employees or officers of both firms; (e) The three daily papers significantly shared news, features, editorials, and advertising; (f) All composition work for the common features was done at one plant; (g) The corporations did not compete or hold themselves out to be competitors. *Id.* at 802.

Two subsequent Ninth Circuit decisions refer to the single economic unit test. In the first, *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977), the defendant was a vertically integrated organization consisting of the Putnam Management Company and its subsidiaries. Mutual Fund Investors, Inc., a competitor, alleged a conspiracy among the Putnam corporations to restrain trade. The Ninth Circuit relied on the district court's finding that, as a matter of law, no fact finder could reasonably infer a conspiracy from the evidence. *Id.* at 625-26. Nevertheless, the circuit court reiterated its *Knutson* dictum, stating that "[s]eparate incorporation, like the lack of

In *Las Vegas Sun, Inc. v. Summa Corp.*,⁶³ the Ninth Circuit held that unilateral action on the part of a parent corporation, even though implemented by separately incorporated subsidiaries, cannot violate section 1 without a plurality of economic agents.⁶⁴ In *Las Vegas Sun*, a newspaper sued the Summa Corporation and six Summa-controlled hotel-casinos for terminating advertising contracts with the paper.⁶⁵ The Ninth Circuit upheld the district court's ruling that Summa's decision to cancel its contract and Summa's direction to its hotel-casinos to do likewise was unilateral action beyond the scope of the section 1 prohibition.⁶⁶ The Ninth Circuit thereby modified the intraenterprise conspiracy doctrine by examining the economic realities of the situation⁶⁷ to determine if a corporation's control over its subsidiaries elevated the group to single economic unit status.

The Seventh Circuit adopted the Ninth Circuit's SEU test in *Photovest Corp. v. Fotomat Corp.*⁶⁸ In *Photovest*, the court reversed the district court's finding of a section 1 conspiracy between Fotomat and its wholly owned subsidiary Fotomat Labs, Inc.⁶⁹ The *Photovest* court found that legitimate business reasons motivated Fotomat Labs to incorporate separately.⁷⁰ The court further based its holding on factors indicating that Fotomat and Fotomat Labs operated

intraenterprise competition, is not dispositive of the question, but only one factor in the calculus." *Id.* at 626.

In the second, *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979), a gasoline retailer whose supplies were terminated during the 1973 gasoline shortage sued a gasoline wholesaler with six wholly owned subsidiaries. *Id.* at 452. As in *Knutson* and *Mutual Fund*, the Ninth Circuit relied on the lower court's finding that no conspiracy had occurred. The Ninth Circuit went on to observe that no conspiracy would be possible because an officer of the defendant wholesaler made the termination decision, and officers in the subsidiary corporations merely complied with that decision. *Id.* at 457.

⁶³ 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

⁶⁴ *Las Vegas Sun*, 610 F.2d at 618.

⁶⁵ *Id.* at 617. The advertising contracts provided for a pool of \$500,000 prepaid to the Sun for the use of any of Summa's hotel-casinos. Howard Hughes, Summa's owner, made the advance in return for a favorable editorial policy. Summa, however, became dissatisfied with its editorial treatment by the Sun. When the pool was nearly depleted, Summa ordered all hotel-casinos under its control to cancel existing Sun advertising and to purchase no new advertising from the Sun. *Id.* at 616-17.

⁶⁶ *Id.* at 618. Although the Ninth Circuit recognized the Supreme Court's repeated holdings reaffirming the intraenterprise doctrine, the court considered *Mutual Fund*, *Knutson*, and *Harvey* sufficient precedent for an exception when separate incorporation is a mere formality rather than a practical reality. *Id.* at 617-18.

⁶⁷ *See supra* note 62.

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

⁶⁹ *Photovest*, 606 F.2d at 727. Fotomat and Fotomat Labs sought to deceive and coerce Photovest into using a print processing plant from which Fotomat received profits. Fotomat aimed to keep Photovest within the Fotomat system and, ultimately, to acquire Photovest. *Id.* at 726.

⁷⁰ The court deemed separate incorporation a legitimate attempt to "minimize po-

as one company.⁷¹ Thus, by examining the realities of the overall enterprise, the *Photovest* court determined that Fotomat and Fotomat Labs constituted one economic entity.

The Eighth Circuit applied the SEU test in *Ogilvie v. Fotomat Corp.*⁷² In this action, independent Fotomat franchisees alleged that Fotomat conspired with Fotomat Labs to eliminate the plaintiffs as competitors by setting up Fotomat-owned franchises in the same markets.⁷³ Employing an analysis very similar to the Seventh Circuit's *Photovest* opinion, the Eighth Circuit in *Ogilvie* found no capacity to conspire between Fotomat and Fotomat Labs.⁷⁴

The circuit courts' adoption of the SEU test as a modification of the intraenterprise conspiracy doctrine set the stage for the *Copperweld* litigation. The *Copperweld* suit was brought in a district court within the Seventh Circuit. The district court, pursuant to the Seventh Circuit's direction in *Photovest*, applied the SEU test.⁷⁵

II

COPPERWELD CORP. v. INDEPENDENCE TUBE CORP.

A. Factual Background

The *Copperweld* litigation arose out of a series of incidents following the Copperweld Corporation's 1972 purchase of Regal Tube, an unincorporated division of Lear Siegler.⁷⁶ Copperweld placed the Regal assets in a newly formed Pennsylvania corporation named Regal Tube Company.⁷⁷ As part of the sale, Lear Siegler agreed not to compete with Regal and not to allow any of its subsidiaries to so compete anywhere in the United States for a period of five years.⁷⁸

tential for labor relations friction which might arise from the disparity in benefits between employees of photo processing labs and existing Fotomat personnel." *Id.*

⁷¹ *Id.* at 726-27. The court considered such factors as the overlap of the executive management of Fotomat and Fotomat Labs; the absence of corporate offices for Fotomat Labs; the calculation of the subsidiary's profit-related compensation by reference to the profitability of the parent; and the consolidation of the two companies for the purposes of tax returns and financial information statements. *Id.*

⁷² 641 F.2d 581 (8th Cir. 1981).

⁷³ *Id.* at 583-84.

⁷⁴ *Id.* at 590.

⁷⁵ See *infra* notes 87-94 and accompanying text.

⁷⁶ See *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 314-15 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984). From its formation in 1955 until 1968, Regal was a wholly owned subsidiary of C. E. Robinson Company, which manufactured structural steel tubing for use in heavy equipment, cargo vehicles, and construction. In 1968, Robinson sold Regal to Lear Siegler, Inc., a California-based manufacturer. *Id.* at 313.

⁷⁷ *Id.* at 313. Regal continued to manufacture steel tubing in Chicago, but shared Copperweld's headquarters in Pittsburgh.

⁷⁸ *Id.*

David Grohne, the president of Regal from 1968 to 1972,⁷⁹ remained with Lear Siegler after Regal was sold to Copperweld. In May of 1972, Grohne formed his own steel tubing business, Independence Tube Corporation.⁸⁰ In December, he ordered a tubing mill from Yoder of Cleveland for 1973 delivery.⁸¹

Copperweld and Regal management sought legal advice about whether Grohne's action in creating Independence constituted a violation of Lear Siegler's purchase agreement with Copperweld. Counsel for Copperweld and Regal suggested that although an injunction might be available to prevent Independence's use of any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal" purchased from Lear Siegler, the noncompetition agreement did not prevent the new enterprise.⁸²

Copperweld and Regal sent letters to all parties with whom Grohne attempted to deal, warning that Copperweld would take all steps possible under the terms of its purchase agreement to protect its assets in Regal.⁸³ Copperweld maintained that the letters' purpose was to prevent third parties dealing with Independence from developing reliance interests that might later make a court reluctant to enjoin Independence's activities. The letter sent to Yoder caused the supplier to back out of Independence's purchase order for a tubing mill.⁸⁴ Although Independence subsequently purchased a tubing mill from another manufacturer, Yoder's cancellation delayed commencement of business for nine months.⁸⁵ In 1976 Independence filed suit in federal district court against Copperweld, Regal, Copperweld's Chief Executive Officer, and Yoder. The complaint alleged in part that the parent and subsidiary had conspired against Independence in violation of section 1 of the Sherman Act.⁸⁶

B. District and Circuit Court Treatment

The complaint chiefly alleged a section 1 conspiracy between Copperweld and Regal.⁸⁷ The district court applied the Seventh

⁷⁹ Grohne joined Regal in 1959. He became vice president and general manager in 1968 and served as president when Regal was an unincorporated division of Lear Siegler. *Id.*

⁸⁰ *Id.* at 314.

⁸¹ *Id.*

⁸² *Id.* Independence lured eight key employees away from Regal. Regal and Copperweld regarded this not only as corporate raiding, but also as an attempt to obtain Regal's proprietary information and know-how. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Copperweld*, 467 U.S. at 757, 758 n.1. The complaint also charged the defendants

Circuit's version of the SEU test,⁸⁸ instructing the jury to look for an economically significant, rather than legally formal, separation between Copperweld and Regal.⁸⁹ On special interrogatories, the jury found that Copperweld and Regal had conspired in violation of section 1⁹⁰ and awarded Independence \$2.5 million in damages, which the court trebled to \$7.5 million.⁹¹

Copperweld and Regal appealed to the Seventh Circuit, arguing that in light of the Seventh Circuit's ruling in *Photovest* they lacked the capacity to conspire as a matter of law.⁹² The Seventh Circuit reaffirmed its holding in *Photovest*, stating that "*Photovest* represents a reasonable and pragmatic approach to the intra-enterprise conspiracy problem"⁹³ The court upheld the jury's implicit finding of capacity to conspire by holding that the district court had complied with *Photovest* and that sufficient evidence supported the jury's finding of fact.⁹⁴

C. The Supreme Court Decision

The Supreme Court granted certiorari in *Copperweld* to reexamine the intraenterprise conspiracy doctrine.⁹⁵ Reversing the Seventh

with monopolization in violation of § 2 of the Sherman Act and breach of contract against Yoder. 691 F.2d at 315.

⁸⁸ *Copperweld*, 691 F.2d at 319 (noting congruence of district judge's instructions in *Copperweld* and *Photovest* test); see *Photovest*, 606 F.2d at 725 (applying SEU test).

⁸⁹ *Copperweld*, 691 F.2d at 319. The judge instructed the jury that:

The rule is that a parent like Copperweld and a subsidiary like Regal are capable of combining or conspiring together unless they are operated in such a way as to, in effect, constitute just one company. . . . If you find from the evidence that Regal Tube Company is not sufficiently distinct from Copperweld as an economic entity, then you must consider them as a single person

Id. The jury also received nine specific instructions pertaining to the capacity of Copperweld and Regal to conspire. *Id.*

⁹⁰ *Id.* at 320.

⁹¹ *Id.* at 315.

⁹² *Id.* at 315-16.

⁹³ *Id.* at 318.

⁹⁴ *Id.* at 319-20. The jury heard evidence that: (1) when Copperweld purchased Regal from Lear Siegler, "Copperweld intended Regal to 'keep its ongoing business and keep serving the market and customers it was already serving'"; (2) the Regal acquisition "established Copperweld in an entirely new line"; (3) Regal's management had "real autonomy in both day-to-day and policy decisions"; (4) "Regal's operating manager's compensation was based primarily on Regal profitability"; and (5) until 1979, Regal had a separate sales force, a separate clientele, and made its own arrangements with suppliers of equipment and raw materials—"a fact relevant to the ability of [Copperweld and Regal] to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division." *Id.* at 320.

⁹⁵ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759 (1984). Counsel for Copperweld argued in its petition for certiorari that the intraenterprise conspiracy doctrine was in "disarray among the circuits." Petition for Writ of Certiorari at 9, Jan. 28, 1983, *Copperweld*, 467 U.S. 752 (1984).

Circuit and overturning the *Yellow Cab* line of cases, the Court held that Copperweld was incapable of conspiring with its wholly owned subsidiary as a matter of law.⁹⁶

Chief Justice Burger wrote the *Copperweld* opinion for the five justice majority.⁹⁷ The Chief Justice minimized the significance of *Yellow Cab* and its progeny by arguing that prior Supreme Court intraenterprise cases, with the exception of *Kiefer-Stewart*, could be explained without reference to the intraenterprise conspiracy doctrine.⁹⁸ The majority found that *Yellow Cab* merely stands for the proposition 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."⁹⁹ The finding of an illegal conspiracy in *Yellow Cab* was irrelevant because "the original acquisitions were themselves illegal."¹⁰⁰

The *Copperweld* majority noted that subsequent intraenterprise cases merely reiterated the *Yellow Cab* holding without further analysis.¹⁰¹ The Court concluded that "the [intraenterprise conspiracy] doctrine has played . . . a relatively minor role in the Court's Sherman Act holdings."¹⁰²

The Court's eschewal of *Yellow Cab*'s precedential force cleared the way for a complete reexamination of the intraenterprise conspiracy doctrine. The Court first noted the widespread criticism of the doctrine by commentators.¹⁰³ The Court rephrased the central criticism: "[T]he doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise."¹⁰⁴ To support this criticism, the Court cited cases holding corporate officers, employ-

⁹⁶ 467 U.S. at 777.

⁹⁷ Justices Blackmun, Powell, Rehnquist, and O'Connor joined the Chief Justice. *Id.* at 778.

⁹⁸ *Id.* at 759-66. The Court echoed similar attempts by critics of the intraenterprise conspiracy doctrine. See, e.g., Areeda, *supra* note 19, at 458-59; see also *supra* notes 30-47 and accompanying text.

⁹⁹ 467 U.S. at 761 (footnote omitted).

¹⁰⁰ *Id.* (emphasis in original) (footnote omitted).

¹⁰¹ *Id.* at 764 ("Later cases involving the intra-enterprise conspiracy doctrine do little more than cite *Yellow Cab* or *Kiefer-Stewart*, and in none of the cases was the doctrine necessary to the result reached.")

¹⁰² *Id.* at 766. Although the Court correctly noted that later cases did little more than rely on *Yellow Cab* for precedential support, the Court failed to separate this substantive concern from the precedential weight of *Yellow Cab*'s progeny. The Court should have undertaken its substantive analysis of the *Yellow Cab* line of cases only after it resolved the stare decisis issue. See also *supra* note 34.

¹⁰³ 467 U.S. at 776 n.12.

¹⁰⁴ *Id.* at 766-67.

ees, and unincorporated divisions incapable of conspiring with their corporations.¹⁰⁵ Reasoning by analogy, the Court held that a parent and its wholly owned subsidiary should not be treated as a plurality of actors merely because of their separate incorporation. The Court concluded that “[a] parent and its wholly owned subsidiary have a complete unity of interest,”¹⁰⁶ and likened the situation to a “multiple team of horses drawing a vehicle under the control of a single driver”¹⁰⁷ because the entities, though separate, have common objectives and one corporate consciousness.

The Court rejected the SEU test because the test presupposes a degree of freedom in a subsidiary’s behavior, depending upon the extent of the parent’s control. According to the majority, the unity of purpose between a corporation and its subsidiary remains intact no matter how much freedom the subsidiary enjoys. Even if a subsidiary enjoys separate headquarters and separate officers who exercise day-to-day control, “the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.”¹⁰⁸

The Court acknowledged that its new ruling would render parent and subsidiary anticompetitive behavior not rising to the level of monopolistic market control immune from the Sherman Act’s prohibitions, but the Court denied that this would leave an impermissible void between sections 1 and 2 of the Sherman Act.¹⁰⁹ The Court observed that the same result follows if one company wielding the same market power as a parent and subsidiary restrains trade below the amount section 2 proscribes.¹¹⁰ The Court concluded that Congress intended to leave a gap between sections 1 and 2 of

¹⁰⁵ *Id.* at 769-71. For the incapacity of officers and employees of the same firm to conspire in contravention of § 1, the Court cited, among other cases, *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); *Tose v. First Pa. Bank, N.A.*, 648 F.2d 879, 893-94 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981). *Copperweld*, 467 U.S. at 769 & n.15. For the lack of conspiratorial capacity between a corporation and one of its unincorporated divisions, the Court cited *Cliff Food Stores, Inc. 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. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Poller v. Columbia Broadcasting Sys.*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev’d on other grounds*, 368 U.S. 464 (1962). *Copperweld*, 467 U.S. at 770 n.16; *see also supra* notes 54-55.

¹⁰⁶ *Copperweld*, 467 U.S. at 771.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 771-72. The Court expressly limited its *Copperweld* holding to a parent’s inability to conspire with its wholly owned subsidiary. *Id.* at 767. Thus, the Court left open the possibility of finding a conspiracy between a parent and a partially owned affiliate. *See infra* text accompanying notes 173-78 for a discussion of the SEU test in cases of less than total ownership.

¹⁰⁹ 467 U.S. at 775.

¹¹⁰ *Id.*

the Sherman Act.¹¹¹

The majority reasoned further that Congress intended to treat concerted activity differently from unilateral conduct.¹¹² Congress realized that a conspiracy between actors raises anticompetitive dangers distinct from those created by the unilateral exertion of negative market power. Because the intraenterprise conspiracy doctrine "obliterate[s] the . . . distinction between unilateral and concerted conduct, contrary to the clear intent of Congress,"¹¹³ the Court rejected it.

The Court countered the dissent's objection¹¹⁴ that significant antitrust behavior would escape prosecution under the Court's ruling by pointing to other measures filling the gap between sections 1 and 2 of the Sherman Act.¹¹⁵ Section 1 of the Sherman Act and section 7 of the Clayton Act always require scrutiny of the initial acquisition of a subsidiary.¹¹⁶ Furthermore, section 2 of the Sherman Act and section 5 of the Federal Trade Commission Act hold the new corporate affiliation accountable for monopolistic behavior.¹¹⁷ Finally, a plaintiff who cannot utilize any federal remedy might seek relief under state contract, tort, and criminal provisions.¹¹⁸

¹¹¹ *Id.* at 775-76.

¹¹² *Id.*

¹¹³ *Id.* at 776. Another possible reason for the distinction is that natural, competitive unilateral market behavior is difficult to distinguish from improper unilateral behavior.

¹¹⁴ 467 U.S. at 790-91 (Stevens, J., dissenting); see also *infra* notes 134-35 and accompanying text.

¹¹⁵ 467 U.S. at 777; see also R. GIVENS, *supra* note 15, § 16.03, at 16-12 (1984) (agreements with external parties, even if coerced, can trigger § 1 scrutiny).

¹¹⁶ 467 U.S. at 777. For the relevant part of § 1 of the Sherman Act, see *supra* note 2. Section 7 of the Clayton Act reads:

No person engaged in commerce . . . shall acquire, directly or indirectly, the whole or any part of the stock . . . and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the . . . assets of another person engaged also in commerce . . . , where in any line of commerce or in any activity affecting commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1982).

¹¹⁷ 467 U.S. at 777. For the relevant part of § 2 of the Sherman Act, see *supra* note 51. Section 5 of the Federal Trade Commission Act provides, in part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45 (1982).

¹¹⁸ 467 U.S. at 777. The Illinois antitrust statute, for example, states:

Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy

D. The Supreme Court Dissent

Justice Stevens, joined by Justices Brennan and Marshall, dissented.¹¹⁹ Justice Stevens argued that the majority's rejection of the intraenterprise conspiracy doctrine contravened the principle of stare decisis,¹²⁰ the language¹²¹ and purpose¹²² of section 1 of the Sherman Act, and the sound antitrust policy behind the intraenterprise conspiracy doctrine.¹²³

Justice Stevens's dissent viewed *Yellow Cab* and its progeny as strong reasons to uphold the intraenterprise conspiracy doctrine in *Copperweld*.¹²⁴ In contrast to the majority's interpretation, the dissent found the Court's previous intraenterprise holdings "plain and unequivocal"¹²⁵ in their reliance upon the intraenterprise conspiracy doctrine rather than upon possible "other grounds."¹²⁶ The dissent argued that the majority ignored at least seven prior decisions.¹²⁷ To the dissent, the weight of precedent created a strong presumption in favor of retaining the intraenterprise conspiracy doctrine.¹²⁸

The dissent argued further that the Sherman Act's language and legislative history support the intraenterprise conspiracy doctrine. After an analysis of the legislative history of section 1, Justice Stevens concluded that Congress intended the statute to "have a broad sweep, reaching any form of combination."¹²⁹ The dissent further observed that the statute was written within a common law context, and common law conspiracy views corporations as separate legal entities.¹³⁰

with, any other person who is, or but for a prior agreement would be, a competitor of such person:

- (a) for the purpose [of price fixing];
- (b) [for the purpose of fixing the sale or supply of any commodity];
- (c) [for the purpose of allocating markets]; or
- (2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce

ILL. ANN. STAT. ch. 38, § 60-3 (Smith-Hurd 1985).

¹¹⁹ Justice White took no part in the *Copperweld* decision. *Copperweld*, 467 U.S. at 778.

¹²⁰ See *infra* notes 124-28 and accompanying text.

¹²¹ See *infra* notes 129-30 and accompanying text.

¹²² See *infra* notes 131-33 and accompanying text.

¹²³ See *infra* notes 134-35 and accompanying text.

¹²⁴ *Copperweld*, 467 U.S. at 779-84 (Stevens, J., dissenting).

¹²⁵ *Id.* at 781 (Stevens, J., dissenting).

¹²⁶ *Id.* at 782 (Stevens, J., dissenting). Justice Stevens noted that "the *Kiefer-Stewart* Court considered and rejected exactly the same argument embraced by today's majority." *Id.* at n.4.

¹²⁷ *Id.* at 783 (Stevens, J., dissenting).

¹²⁸ *Id.* at 784 (Stevens, J., dissenting).

¹²⁹ *Id.* at 785 (Stevens, J., dissenting).

¹³⁰ *Id.* at 786 (Stevens, J., dissenting). The dissent asserted that Congress used the common law definition of conspiracy when it enacted § 1 of the Sherman Act. The dissent further stated that the law of conspiracy holds officers of a single corporation capa-

The dissenting opinion contends that the majority's holding is inconsistent with the Sherman Act's underlying concern,¹³¹ namely, trusts consisting of affiliated corporations.¹³² Of these affiliated corporations, "the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed."¹³³ The dissent therefore viewed the majority's holding in *Copperweld* as violating both express and implied congressional purposes behind the Sherman Act.

The dissent also criticized the elimination of the intraenterprise conspiracy doctrine on policy grounds. Justice Stevens agreed with the majority that conduct between affiliated corporations that "is merely an incident of the desirable integration that accompanies such affiliation"¹³⁴ poses no threat. Justice Stevens took issue, however, with the majority's treatment of affiliated corporate conduct which unreasonably restrains trade. The dissent reasoned that courts should invoke section 1 against such conduct because failure to do so would leave "a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration."¹³⁵

III

ANALYSIS

The Supreme Court responded in *Copperweld* to the legitimate criticism that the intraenterprise conspiracy doctrine, by focusing on the formal incident of separate incorporation and ignoring economic and business reality, elevates form over substance.¹³⁶ The Court's response, however, went too far in the other direction. By completely overruling the doctrine as applied to parents and their

ble of conspiring with each other or the corporation. *Id.* This definition of conspiracy goes too far, however, in the context of antitrust law. Given that courts applying § 1 have consistently rejected such an extreme application of the statute, *see supra* note 55 and accompanying text, the dissent's definition of conspiracy fails to explain why the Court should not further limit *antitrust* conspiracy by excluding combinations between corporations and their wholly owned subsidiaries.

¹³¹ *Id.* at 787 (Stevens, J., dissenting).

¹³² The dissent quoted Senator Sherman: "The combination is always of two or more . . . corporations, all bound together by a link which holds them under the name of trustees, who are themselves incorporated under the laws of one of the States." *Id.* (quoting 21 CONG. REC. 2569 (1890) (remarks of Sen. Sherman)).

¹³³ *Id.* at 788 (Stevens, J., dissenting) (footnote omitted).

¹³⁴ *Id.* at 789 (Stevens, J., dissenting). "[A]ffiliation of corporate entities often is procompetitive precisely because, as the [majority] explains, it enhances efficiency." *Id.*

¹³⁵ *Id.* The dissent failed to clarify the distinction between conduct that is merely incident to desirable integration and affiliated corporate conduct that unreasonably restrains trade. Presumably the dissent would view all anticompetitive corporate conduct as subject to § 1 scrutiny. Under this view, if no anticompetitive effects occur the conduct would never be questioned.

¹³⁶ *See infra* note 140 and accompanying text.

wholly owned subsidiaries, the Court again disregarded complex economic relationships in favor of examining corporate form.¹³⁷ Nonetheless, the Court left open the possibility that lower courts may apply the SEU analysis in cases of less than total subsidiary ownership.¹³⁸ Such an approach by lower courts would comport with the majority's underlying goal to permit substance to ascend above form by exempting corporations with a unity of purpose from section 1 scrutiny.¹³⁹

A. The Supreme Court's Rejection of the Intraenterprise Conspiracy Doctrine

The *Copperweld* Court correctly perceived the conflict between the intraenterprise conspiracy doctrine's focus on the legal status of a corporation and the Sherman Act's concern for economic realities.¹⁴⁰ Under a rigorous construction of the intraenterprise conspiracy doctrine, concerted activity between a parent and a subsidiary might qualify as a conspiracy, while the same activity performed unilaterally by a corporation and one of its divisions would not. The unincorporated division analogy demonstrates an inherent flaw in the intraenterprise conspiracy doctrine: *Copperweld* could have escaped section 1 liability by operating Regal as an unincorporated division. Regal's separate incorporation did not render the parent and subsidiary more able to conspire. *Copperweld* could have been equally effective in intimidating Independence's suppliers if Regal had remained an unincorporated division.

The Court's decision to discard the intraenterprise conspiracy doctrine responded too zealously to the doctrine's flaw. After *Copperweld*, a corporation is incapable of conspiring with its wholly owned subsidiary as a matter of law. The response commits the same mistake as the doctrine it overrules—it elevates form over substance. Under *Copperweld*, the capacity of a parent and its subsidiary truly to conspire is no longer relevant; if total ownership exists, for antitrust purposes the corporations are deemed to be incapable of conspiring.

The *Copperweld* rule assumes the general proposition that a complete unity of interest exists between a parent and its wholly owned subsidiary. This premise is valid only if the parent-subsidiary relationship precludes independent action by a subsidiary. If a

¹³⁷ See *infra* notes 141-51 and accompanying text.

¹³⁸ See *infra* notes 173-78 and accompanying text.

¹³⁹ See *infra* text accompanying notes 173-74.

¹⁴⁰ The *Yellow Cab* Court noted that the Sherman Act is "aimed at substance rather than form." 332 U.S. at 227 (echoing similar observation made in *Appalachian Coals, Inc. v. United States*: "The restrictions the Act imposes are not mechanical or artificial." 288 U.S. 344, 360 (1933)).

wholly owned subsidiary *can* take independent action, then a parent and a subsidiary can meaningfully conspire. Thus, the *Copperweld* majority's total rejection of the doctrine is ill-advised unless independent action by a wholly owned subsidiary is not possible.

B. The Independence of a Wholly Owned Corporate Subsidiary

The *Copperweld* Court asserted that "a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design.'" ¹⁴¹ The Court reasoned that even if the parent encourages the subsidiary to act freely, it may reassert full control if the subsidiary fails to act in the parent's best interests. ¹⁴² Thus, a unity of purpose exists whether or not the parent keeps "a tight rein" over the subsidiary.

Professor Phillip Areeda, a noted antitrust commentator and critic of the intraenterprise conspiracy doctrine, similarly distinguishes between acting in agreement with another entity, which gives rise to section 1 liability, and acting at the direction of that entity, which does not. ¹⁴³ Professor Areeda notes that the concept of agreement implies a notion of choice. ¹⁴⁴ He argues that a subsidiary does not have such freedom of choice for four reasons. First, a parent would only instruct its subsidiary to act independently if it believed that this directive would promote efficient operation. Such a grant of independence, however, implies that the subsidiary must coordinate with the parent when beneficial to the parent; hence the subsidiary's freedom is illusory. Second, the grant can be qualified or repealed by practice or tacit understanding. Thus, a parent that periodically instructs or agrees with its subsidiary surreptitiously modifies its previous instruction. ¹⁴⁵ Third, one cannot reasonably presume that parents would intend a delegation of independence to be so categorical as to create antitrust liability. ¹⁴⁶ Finally, denying coordinated conduct between parent and subsidiary negates the very conspiracy at issue. As Professor Areeda states, "There can be

¹⁴¹ *Copperweld*, 467 U.S. at 771 (emphasis in original) (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

¹⁴² *Id.* at 771-72.

¹⁴³ See Areeda, *supra* note 19, at 467. The *Copperweld* majority cited Professor Areeda's article twice, 467 U.S. 766 n.12, 773 n.20, and adopted his views in support of its holding. Professor Areeda perspicaciously noted in his article that the Supreme Court had accepted certiorari in *Copperweld*, "afford[ing] itself an opportunity to reassess, in light of the proper objectives of antitrust law, the deleterious and anomalous consequences of its scattered pronouncements on intraenterprise conspiracy." Areeda, *supra* note 19, at 452.

¹⁴⁴ Areeda, *supra* note 19, at 470-71.

¹⁴⁵ *Id.* at 467.

¹⁴⁶ *Id.*

no effective agreement without coordinated action. Proof of such coordination, however, simultaneously proves active integration between a parent and its subsidiary."¹⁴⁷

Professor Areeda's arguments err in treating direction and choice as absolutes. The concept of freedom is relative, even in the context of complete corporate ownership. A parent's direction need not totally control its subsidiary; rather, a corporate subsidiary may possess a degree of freedom dependent on the extent of delegated decisionmaking authority. Addressing each of Professor Areeda's four arguments will demonstrate that the independence enjoyed by a corporate subsidiary is not an "all or nothing" proposition.

Professor Areeda first argues that a grant of independence might implicitly require that the subsidiary coordinate with its parent when beneficial to the parent. Yet a parent might place sufficient value on its subsidiary's independence to outweigh the discrete benefit derived from particular coordinated action. For example, the parent might decide that operating its subsidiaries independently induces subsidiary managers to perform well and increase their responsibility and freedom accordingly. The parent accepts occasional losses incurred when joint action would have proved more profitable, but reaps an aggregate gain from its subsidiaries' increased productivity. Coordinated action could still occur, but not as a result of an implicit command.

Second, Professor Areeda notes that a parent may tacitly or overtly qualify or repeal a previous grant of subsidiary autonomy. On the other hand, the parent could grant independence by more formal means. For example, the subsidiary's articles of incorporation or by-laws might include provisions such as the staggering of board members' terms to discourage complete reelection of the board of directors.¹⁴⁸ Such procedures slow the process whereby a parent brings its previously independent subsidiary back into the corporate fold. The parent would only attempt to regain control if it believed that the detrimental impact of the subsidiary's actions outweighed the advantages derived from subsidiary independence. Even if the parent repealed its delegation of independence, decisions made during the period of subsidiary freedom would still retain their independent character.

¹⁴⁷ *Id.* at 467.

¹⁴⁸ Shareholders cannot remove management until a majority of the directors have been reelected. Although staggering board members' terms might appear detrimental to the parent, and therefore unlikely to be approved, it is plausible in the context of merger agreements. Target corporations wary of losing control to their new parents often exact guarantees of independence in return for approving the articles of merger.

Third, Professor Areeda presumes that parents would rarely allow their subsidiaries to exercise sufficient independence to risk antitrust liability. However, they may inadvertently do so. A parent wishing to give its subsidiary free reign might not recognize the threat of antitrust liability. Although corporations cannot predict when antitrust liability might arise, they nonetheless are liable if their conduct strays over the threshold of impermissibility.¹⁴⁹

Finally, Professor Areeda argues that a section 1 conspiracy requires coordinated action, and that the presence of coordinated action indicates active integration between a subsidiary and its parent. Yet proof of such coordination does not necessarily demonstrate unity between a parent and its subsidiary.¹⁵⁰ A parent corporation can permit independent action by its subsidiary without obviating the possibility of joint action on mutually beneficial matters. To assert that agreement necessarily implies control begs the question. The real issue is whether a wholly owned subsidiary possessing a grant of independence has sufficient freedom to choose to agree with its parent. Furthermore, section 1 conspiracy can exist when the agreement is less than an explicit "meeting of minds."¹⁵¹

¹⁴⁹ See *Nash v. United States*, 229 U.S. 373 (1913), in which the Court upheld a Sherman Act criminal indictment against a defense of statutory vagueness. Writing for the majority, Justice Holmes recognized that the statutory crime "contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men." *Id.* at 376. *But see* *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223-24 (1914) (Justice Holmes, again writing for Court, distinguished *Nash* and struck down state antitrust statute containing unconstitutionally vague term "real value" because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.").

¹⁵⁰ Professor Areeda points to *Triebwasser & Katz v. AT&T*, 1976-1 Trade Cas. (CCH) 60,769 (S.D.N.Y.), *rev'd on other grounds*, 535 F.2d 1356 (2d Cir. 1976), to illustrate the nexus between conspiracy and integration. Areeda, *supra* note 19, at 467-68. In *Triebwasser*, the court held AT&T capable of conspiring with a wholly owned subsidiary to refuse to publish certain types of advertisements in the local yellow pages. Professor Areeda notes that the court explicitly rested its holding on the parent's claim that the subsidiary was free to accept or reject any national AT&T policy on the matter in dispute. Professor Areeda argues that "if the subsidiary was free to act as it pleased, its definition of acceptable advertising matter would not have reflected a conspiracy with anyone." Areeda, *supra* note 19, at 468. This is not necessarily true. The subsidiary might have agreed with AT&T's yellow pages policy and formalized the agreement to serve some ulterior motive. Professor Areeda's assertion also encounters difficulty outside the context of vertical integration. When a parent and subsidiary engage in totally different types of business, agreements ancillary to the corporations' chief business are less likely to indicate control. If the parent's business differs in type from its subsidiary's, the parent will have less inclination to coerce its subsidiary into operating according to the parent's guidelines.

¹⁵¹ See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.").

C. The Single Economic Unit Test as Applied to the Independence of Corporate Subsidiaries

Given that subsidiaries can be sufficiently independent to meaningfully conspire with their parents, determining whether that independence exists in a particular case turns on several factors. For example, a court might consider the common ownership, control, and management of the two firms in question.¹⁵² However, a court deciding whether a parent and its subsidiary are truly capable of conspiring must consider more concrete factors in order to make a proper determination. Prior to *Copperweld*, courts responded to this problem by formulating the single economic unit test. The SEU test considers such factors as: the unity of directors, officers, employees, offices, and corporate headquarters between the two firms; the parent's power to control its subsidiary; and the amount of control actually exercised.¹⁵³ Although the SEU test acknowledges the possibility of collusion between a parent and its wholly owned subsidiary and therefore directly conflicts with the majority's holding in *Copperweld*, the test is actually closer to *Copperweld*'s view of conspiratorial capacity than to the *Yellow Cab* view.¹⁵⁴

The Seventh, Eighth, and Ninth Circuits developed the SEU test to mitigate the harsh formalism of the intraenterprise conspir-

¹⁵² See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 326 (1977). Professor Sullivan also argues that the historical integration of the two firms is relevant. *Id.* at 326-27. He notes that in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), the Court refused to treat two corporations with partially common ownership as a single firm partly because each had a history of independent existence and competition. L. SULLIVAN, *supra*, at 328.

Logically, an intraenterprise conspiracy test that ignores common corporate ownership and examines parental control over a subsidiary could lead to a finding of § 1 conspiracy between a corporation and its unincorporated division. Indeed, one court reached such a result. See *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons*, 272 F. Supp. 915 (D. Haw. 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Professor Sullivan addresses this situation and notes that "[s]o far as effect on competition is concerned, the issues are not different from those pertaining to a corporation and its employees or a parent and its subsidiary." L. SULLIVAN, *supra*, at 328-29. Professor Sullivan continues, however, "[b]ut when we have two divisions of one corporation instead of two corporations, it is hard to see that there are present the two legal persons needed for a conspiracy." L. SULLIVAN, *supra*, at 329.

Courts could extend substantive intraenterprise analysis to employees of a corporation acting within the scope of their employment. To do so, however, would make it impossible for a corporation to conduct its affairs because, it can only act through its officers and employees. See ATTORNEY GEN. NAT'L COMM. TO STUDY THE ANTITRUST LAWS, REPORT 30-31 (1955). Courts recognize that a corporation and its employee have conspiratorial capacity when the employee acts on his own behalf. See *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978) (noting but declining to apply exception).

¹⁵³ See *supra* notes 56-75 and accompanying text.

¹⁵⁴ See *infra* notes 155-58 and accompanying text.

acy doctrine.¹⁵⁵ Although these courts recognized that *Yellow Cab* and its progeny were controlling precedent,¹⁵⁶ they argued that the Supreme Court "ha[d] not foreclosed a single enterprise defense to section 1 liability for related, although separately incorporated, companies."¹⁵⁷ These circuits expressly sought to negate rigid application of the intraenterprise conspiracy doctrine because it compelled finding capacity to conspire in the legal form of two corporations rather than in the economic substance of their relationship.

Most decisions applying the SEU test prior to *Copperweld* found no capacity to conspire.¹⁵⁸ This pattern further demonstrates congeniality between the SEU test and *Copperweld*'s concern with elevating form over substance.

IV

THE FUTURE OF THE INTRAENTERPRISE CONSPIRACY DOCTRINE

Under *Copperweld*, courts may no longer hold corporations with common ownership capable of conspiring in violation of section 1 of the Sherman Act. By foreclosing a case by case analysis into whether capacity to conspire exists, this blanket rule commits the same error as the intraenterprise conspiracy doctrine it overrules. The *Copperweld* holding may nonetheless have its advantages.

One apparent advantage of the *Copperweld* Court's approach is its ease of application: courts need not undertake detailed analyses of economic relationships in order to determine whether conspiratorial capacity is present. Henceforth, courts will regard commonly owned corporations as united, regardless of their separate legal incorporation, and thereby deem them outside the grasp of section 1

¹⁵⁵ See *supra* notes 56-75 and accompanying text.

¹⁵⁶ See, e.g., *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981) ("We must start with the Supreme Court's repeated statements that related corporations, because legally distinct, may be capable of conspiracy.").

¹⁵⁷ *Id.* at 588. The Eighth Circuit stated, "We believe a holding that the formality of separate incorporation forecloses such a defense elevates form over substance in a manner inconsistent with the intent of the antitrust laws." *Id.* (footnote omitted).

¹⁵⁸ The Ninth Circuit either held, or indicated that it would hold were the issue not moot, that the defendant corporations were incapable of conspiring in *Las Vegas Sun*, *Harvey*, *Mutual Fund*, and *Knutson*. See *supra* notes 57-66 and accompanying text. Similarly, the Seventh and Eighth Circuits declined to find conspiratorial capacity in *Ogilvie* and *Photovest*, respectively. See *supra* notes 68-74 and accompanying text. The only pre-*Copperweld* application of the SEU test finding capacity to conspire is *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 859 (N.D. Cal. 1979) (commonly owned and controlled corporations historically separate and competitive deemed liable for illegal boycott agreement which each pursued independently), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

liability.¹⁵⁹

Furthermore, corporate enterprises may now operate freely, without fear of section 1 liability for acting in unison within the enterprise. Efficiency should increase because parents can now avail themselves of the legitimate benefits of separate subsidiary incorporation¹⁶⁰ without first weighing the benefits against potential anti-trust liability.

Although the *Copperweld* rule is easily applied to parents and wholly owned subsidiaries, its simplicity is illusory because the Supreme Court expressly limited its holding to cases involving wholly owned subsidiaries.¹⁶¹ The decision does not address situations involving less than total ownership; hence, lower courts have no guidance in such circumstances.¹⁶²

Three possible interpretations of *Copperweld* are possible regarding the application of the intraenterprise conspiracy doctrine to cases of less than total ownership. The first interprets the *Copperweld* language to suggest that the Court only overruled the intraenterprise conspiracy doctrine in the context of wholly owned subsidiaries.¹⁶³ Second, the Court's discussion of parent-subsidiary unity of purpose might indicate that the intraenterprise conspiracy doctrine is also overruled whenever parents control their subsidiaries.¹⁶⁴ Finally, one might interpret the Court's underlying rationale to imply that when ownership is less than total, lower courts are free to apply the single economic unit test to determine whether meaningful

¹⁵⁹ See, e.g., *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (*Copperweld* forecloses § 1 liability between two wholly owned subsidiaries of common parent); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1316-17 (5th Cir. 1984) (*Copperweld* forecloses § 1 liability between two corporations commonly owned and managed by three individuals).

¹⁶⁰ The *Copperweld* Court acknowledged that "[s]eparate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests." 467 U.S. at 772-73. For example, it may serve to reduce state and federal taxes, facilitate compliance with regulatory or reporting laws, increase a corporation's identification with a locality, appeal to investors with particularized interests, and permit separate accounting, profit-sharing, and pension plan arrangements. *Id.* at 773 n.20 (citing *Areeda*, *supra* note 19, at 453).

¹⁶¹ "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." 467 U.S. at 767.

¹⁶² Despite the *Copperweld* Court's insistence that it did not consider "under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own," *id.*, the Fifth Circuit utilized *Copperweld*'s reasoning to demonstrate the impropriety of a per se standard with respect to agreements between insurance companies with no common ownership. *Plueckhahn v. Farmers Ins. Exch.*, 749 F.2d 241, 245 (5th Cir.) ("unity of purpose" among commonly owned corporations forecloses horizontal competition needed for per se violation), *cert. denied*, 105 S. Ct. 3527 (1985). In *Plueckhahn*, the court found the defendant's restrictive employment policy legal under a rule of reason analysis. *Id.* at 246-47.

¹⁶³ See *infra* text accompanying note 166.

¹⁶⁴ See *infra* text accompanying notes 167-72.

capacity to conspire exists.¹⁶⁵ This Note endorses the third interpretation.

A. *Copperweld's* Application Limited to Wholly Owned Subsidiaries

Under the first interpretation, *Copperweld's* express limitation to the complete ownership setting implies that parents and their less than wholly owned subsidiaries are fully capable of conspiring. The final paragraph in the majority's opinion buttresses this analysis. There, the Court states, "To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled."¹⁶⁶ Under this interpretation, *Copperweld* only overrules that portion of *Yellow Cab* and its progeny which holds that parents cannot conspire with their wholly owned subsidiaries. With less than total ownership, however, the line of precedent upholding the intraenterprise conspiracy doctrine still applies, thus permitting a finding of capacity to conspire.

Although initially plausible, this interpretation of *Copperweld's* holding ignores both the decision's express limitation and its rationale. The majority explicitly narrowed its holding to cases of total ownership and left open the intraenterprise liability issue in cases of less than total ownership.¹⁶⁷ This precludes concluding that the intraenterprise doctrine automatically applies to cases of less than complete ownership. One might as easily argue that the Court meant to overrule the intraenterprise conspiracy doctrine, whatever the degree of parental control.

In addition, the *Copperweld* Court's rationale is inconsistent with the view that less than total ownership negates the capacity to conspire. The majority presumed that a parent and its wholly owned subsidiary have a complete unity of interest.¹⁶⁸ This unity of interest stems from the parent's power to "assert full control at any moment if the subsidiary fails to act in the parent's best interests."¹⁶⁹ This ability, however, is no less present when a parent owns less than all the subsidiary's stock, but still enough to exert control. In many instances, ownership of a simple majority of a corporation's outstanding shares entitles the stockholder to direct all corporate activities.¹⁷⁰ Often a shareholder with a small plurality of shares has working control of a widely-held corporation. Therefore, presum-

¹⁶⁵ See *infra* text accompanying notes 173-78.

¹⁶⁶ *Copperweld*, 467 U.S. at 777 (emphasis added).

¹⁶⁷ See *supra* note 161.

¹⁶⁸ 467 U.S. at 777; see also *supra* notes 106-08 and accompanying text.

¹⁶⁹ 467 U.S. at 771-72.

¹⁷⁰ This assumes that the articles of incorporation and their by-laws do not require a super-majority shareholder vote in order to elect the board of directors.

ing that less than total ownership permits a finding of capacity to conspire is entirely inconsistent with the Court's holding in *Copperweld* if the facts show control exists.

B. *Copperweld's* Application to Controlled Subsidiaries

An alternate interpretation of *Copperweld* is that a corporation is incapable of conspiring as long as it is controlled by a shareholder, even when ownership is less than complete. Indeed, petitioner *Copperweld* urged the Court to rule that a finding of capacity is precluded "whenever a parent owns more than 50% of a subsidiary."¹⁷¹ As noted above, this is entirely consistent with the majority's rationale. Typically, a parent owning 100% of a subsidiary enjoys no greater control over its subsidiary than a parent owning 51%.¹⁷² Therefore, the rationale underlying the majority's decision apparently overrules the intraenterprise conspiracy doctrine in all cases where common ownership or control exists.

In practice, however, automatically extending the *Copperweld* holding to cases of less than total ownership would further elevate form over substance by ignoring the possible independence of the subsidiary. For example, a parent owning a majority of its subsidiary's stock might permit cumulative voting for directors¹⁷³ and take a passive role in the subsidiary's management, thus permitting minority shareholders to elect one or more directors and effectively run the corporation. If applied, *Copperweld* would foreclose section 1 liability even though the passive parent could meaningfully conspire with the minority-run subsidiary. At the other extreme, a parent which barely owns a plurality of a corporation's stock might effectively control it if the other shareholders are sufficiently dispersed and disinterested. Here, *Copperweld* would permit a finding of collusion, even though only one economic interest is truly represented. Thus, as noted above,¹⁷⁴ unity of purpose actually turns on the economic realities of the enterprise in question. Moreover, the nature

¹⁷¹ Petition for Writ of Certiorari at 20, Jan. 28, 1983, *Copperweld*, 467 U.S. 752 (1984).

¹⁷² The larger percentage of ownership gives the parent an increased equity stake in the subsidiary and eliminates minority shareholders to whom the parent would have obligations, such as permitting inspection of corporate records and otherwise respecting fiduciary duties. These differences, however, do not reflect a greater ability to direct the subsidiary's behavior. *But see supra* note 170.

¹⁷³ Regular voting allows shareholders to vote all shares for each director. Cumulative voting enables minority shareholders to elect at least one director by cumulating votes for each seat on the board. While a minority shareholder can never elect a majority of the board, the power to elect one or more directors enables the shareholder to exercise greater control over corporate decisions than if voting were noncumulative. *See generally* R. HAMILTON, *CASES AND MATERIALS ON CORPORATIONS* 375-76 (2d ed. 1981).

¹⁷⁴ *See supra* notes 141-53 and accompanying text.

of control is particularly crucial in the context of less than total corporate ownership because the extent of ownership may vary. The parent's ability to exert control decreases and its ability to delegate control increases when its degree of ownership lessens. Therefore, applying the *Copperweld* holding to majority controlled and wholly owned corporations and their parents is improper.

C. *Copperweld* Permits Utilizing the Single Economic Unit Test in Cases of Less Than Total Subsidiary Ownership

Given the inadequacies of these two derivations of the *Copperweld* holding, the third and best interpretation incorporates the SEU test in cases of less than total ownership. This interpretation is consistent with both the language and rationale of the Court's opinion. It comports with the language in *Copperweld* because the majority left open the intraenterprise conspiracy issue between a parent and a less than wholly owned subsidiary.¹⁷⁵ The Court found the SEU test inadequate because the test analyzes the extent of unity between parent and subsidiary—an inquiry rendered superfluous by the Court's premise that total ownership implies unity of purpose.¹⁷⁶ The Court expressly rejected the SEU test “[a]s applied to a wholly owned subsidiary.”¹⁷⁷ The Court further observed, “At least when a subsidiary is wholly owned, [the SEU factors] are not sufficient to describe a separate economic entity for purposes of the Sherman Act.”¹⁷⁸ Thus, the Court rejected the SEU test only in the context of complete subsidiary ownership, implying that it might apply to less than complete ownership.

Finally, this third interpretation is consistent with the rationale behind the majority's holding. The SEU test determines whether unity of purpose in fact exists. Lower courts should continue to apply the SEU test, examining factors to discover whether a parent has sufficient control over its subsidiary to prevent the latter from acting freely. Such control is a necessary predicate to parental capacity to conspire with a subsidiary. Lower courts would thereby serve the *Copperweld* majority's professed desire to elevate economic substance over legal form.

CONCLUSION

The Supreme Court ruled in *Copperweld* that, as a matter of law, a parent corporation is incapable of conspiring with its wholly owned subsidiary in violation of section 1 of the Sherman Act. *Cop-*

175 See *supra* note 161.

176 See *supra* notes 141-42 and accompanying text.

177 467 U.S. at 772 n.18 (emphasis added).

178 *Id.* (emphasis added).

perweld reversed a line of Supreme Court cases treating separately incorporated corporations as unique legal entities fully capable of conspiring. In reaching its decision, the *Copperweld* Court claimed to elevate substance over form, arguing that a parent necessarily controls its wholly owned subsidiary and that the two corporations have a unity of purpose. The Court's holding correctly overruled the intraenterprise conspiracy doctrine derived from *Yellow Cab* and its progeny. Just as the doctrine it criticizes, however, the Court's decision also elevates substance over form by ignoring the parent's ability to delegate control to such a degree that the two corporations can meaningfully conspire. The Court limited its holding to the context of total ownership, yet provided no explicit guidelines to lower courts applying section 1 to corporations with less than complete ownership. This Note proposes that lower courts apply the SEU test in such circumstances. Furthermore, the SEU test comports with the underlying message of the majority's decision: to examine economic realities rather than legal formalities. Instead of eliminating the intraenterprise conspiracy doctrine, *Copperweld* only limits its application to cases of less than total ownership where two corporations lack the requisite unity of purpose.

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