ANTITRUST — SHERMAN ACT — PARENT CORPORATION AND ITS WHOLLY OWNED SUBSIDIARY INCAPABLE OF CONSPIRING IN VIOLATION OF SECTION ONE OF SHERMAN ACT — *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

The broadly drafted language of section one of the Sherman Act[1] has made that provision readily susceptible to judicial interpretation.[2] Aimed at promoting free competition,[3] the section prohibits all contracts, combinations, or conspiracies that restrain interstate commerce.[4] An alleged violation of section one must be based upon the conduct of two or more persons or entities.[5] The Act, however, provides no definition of what constitutes this requisite plurality of actors,[6] and, therefore, courts have been obliged to determine whether certain relationships in the business world are subject to section one regulation.[7]

In the past, the United States Supreme Court has considered whether the combined conduct of a parent corporation and its subsidiaries violates section one of the Sherman Act[8]—that is,

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[1] Section one states in pertinent 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." 15 U.S.C. § 1 (1976).

[2] The United States Supreme Court has refused to construe the Sherman Act literally in analyzing a restraint of trade. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940); *see also* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (interpreting section 1 as invalidating only unreasonable restraints); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (same); Standard Oil Co. v. United States, 221 U.S. 1 (1911) (same).

[3] *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). Finding that the Sherman Act was designed to preserve economic liberty, the Court in *Northern Pacific* reasoned that such free competition would not only "yield the best allocation of our economic resources" and result in lower prices, but would also play a crucial role in safeguarding American democracy. *Id.*

[4] 15 U.S.C. § 1.

[5] *See* Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) ("It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can. . . ."), *cert. denied*, 345 U.S. 925 (1953). See also *infra* notes 40-43 and accompanying text for a more detailed analysis of this concept.

[6] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 n.10 (1940) (drafters of Sherman Act deliberately omitted "precise and all-inclusive definitions").

[7] *See infra* text accompanying notes 41-47.

[8] In a number of cases, the Supreme Court found that common ownership, in and of itself, did not preclude a finding of conspiracy. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 215 (1950); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947). *But cf.* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113-14 (1975) (no conspiracy where there was "intimate and continuous

whether such affiliated "actors" can be found to have participated in what has been referred to as an "intra-enterprise" or "bathtub" conspiracy.[9] Until very recently, the Court had answered that question in the affirmative.[10] In *Copperweld Corp. v. Independence Tube Corp.*,[11] however, the Court reversed its position and held that a parent corporation and its wholly owned subsidiary are incapable of conspiring in violation of section one.[12]

From 1955 to 1968, Regal Tube Company (Regal) was a wholly owned subsidiary of C.E. Robinson Company and was engaged in the manufacture of structural steel tubing used in heavy equipment, cargo vehicles, and construction.[13] Regal was purchased in 1968 by Lear-Siegler, Inc. (Lear-Siegler), a California corporation, which then operated it as an unincorporated division.[14] Following the acquisition, David Grohne, who had been vice president and general manager of Regal, became its president.[15]

In 1972, Copperweld Corporation (Copperweld), a Pennsylvania corporation that was also engaged in the production and sale of structural steel tubing,[16] purchased the Regal division from Lear-Siegler.[17] Under the terms of the sales agreement, Lear-Siegler and its subsidiaries were prohibited from competing against Regal anywhere in the United States for a period of five years.[18] Copperweld then transferred all of Regal's assets to a newly formed Pennsylvania corporation, which also bore the

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cooperation and consultation" between commonly owned entities); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30 (1962) (where common ownership existed and affiliates acted as one entity, Court found no conspiracy).

9 For thorough descriptions and analyses of this "intra-enterprise," or "bathtub," conspiracy doctrine, see Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981); Kempf, Jr., *Bathtub Conspiracies: Has* Seagram *Distilled a More Potent Brew?*, 24 BUS. LAW. 173 (1968); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 42 N.Y.U. L. REV. 20 (1968).

10 *See, e.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 450 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227-28 (1947); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 205-06 (5th Cir. 1969).

11 104 S. Ct. 2731 (1984).

12 *Id.* at 2745.

13 *Id.* at 2734.

14 *Id.*

15 *Id.*

16 Independence Tube Corp. v. Copperweld Corp., 74 F.R.D. 462, 464 (N.D. Ill. 1977), *aff'd*, 691 F.2d 310 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

17 *Copperweld*, 104 S. Ct. at 2734.

18 *Id.*

name Regal Tube Company.[19] David Grohne, however, did not remain with Regal as its president. Instead, he accepted a position with Lear-Siegler as its corporate secretary and served in that capacity from February to July of 1972.[20] During that period, Grohne took active steps to establish his own steel tubing business[21] and in May 1972, he formed Independence Tube Corporation (Independence).[22]

Independence began to solicit bids for a tubing mill supplier and by late October 1972, it had secured an offer from Yoder Company (Yoder).[23] Yoder, however, cancelled the purchase order upon receipt of a letter from Copperweld.[24] In that letter, Copperweld warned that it did not favor Independence's entry into the structural tube market, and it promised to take all steps necessary to protect its interests under the noncompetition agreement.[25] Yoder's breach forced Independence to look elsewhere for a tube mill supplier.[26] Independence subsequently secured a contract with Abbey Etna Machine Company (Abbey), which enabled it to begin operations in September 1974, nine months later than it would have if Yoder had performed as re-

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19 *Id.* Hence, Regal became a wholly owned incorporated subsidiary of Copperweld. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 313 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984). Although Regal shared corporate headquarters with Copperweld in Pittsburgh, it continued manufacturing operations in Chicago. *Copperweld*, 104 S. Ct. at 2734.

20 *Copperweld*, 104 S. Ct. at 2734. Grohne, however, continued working for Lear-Siegler through September of 1972 in order to finish certain projects. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 314 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

21 *Copperweld*, 104 S. Ct. at 2734. Grohne presented a financing proposal to the Continental Illinois National Bank in Chicago in the spring of 1972 and also procured several dozen investors. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 314 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

22 *Copperweld*, 104 S. Ct. at 2734.

23 *Id.* In December of 1972, Independence gave Yoder a purchase order stipulating delivery at the mill by the end of December 1973. *Id.*

24 *Id.*

25 *Id.* Copperweld's chairman and general manager believed that the noncompetition agreement with Lear-Siegler should preclude Grohne from engaging in such conduct. *Id.* Copperweld's attorney, however, informed them that the agreement was not binding on Grohne and advised them that their only possible legal recourse was to seek an injunction against Grohne if they could prove that he had used any of Regal's trade secrets or technical information. *Id.* Copperweld's counsel then drafted a letter containing this opinion, copies of which were forwarded by Copperweld to third parties, such as Yoder, with whom Grohne might have business dealings. *Id.* Copperweld later alleged that it sent those letters only to prevent such third parties from developing reliance interests in Grohne's activities. *Id.*

26 *Id.* at 2735.

quired under the earlier agreement.[27]

Alleging that the conduct of Copperweld, Regal, and Yoder had constituted a conspiracy in restraint of trade in violation of section one of the Sherman Act, Independence instituted an action in the United States District Court for the Northern District of Illinois.[28] A jury concluded, *inter alia*, that Copperweld and Regal had violated section one, but that Yoder had not been involved in the violation.[29] As a result of the verdict, Independence was awarded treble damages.[30]

The United States Court of Appeals for the Seventh Circuit affirmed all of the trial court's findings.[31] In analyzing the claim that Copperweld and Regal had conspired to restrain trade, the court observed that because Yoder had been exonerated from antitrust liability, the only parties remaining in the conspiracy were a parent corporation and its wholly owned subsidiary.[32] Due to the relationship between those defendants, the primary issue in the case became whether such an "intra-enterprise conspiracy" constituted a violation of section one of the Sherman Act.[33]

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27 Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 314 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984). Abbey had also received a letter from Copperweld. *Id.* See *supra* note 25 and accompanying text for discussion of the letters sent by Copperweld.

28 Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 314-15 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984). In the suit, Independence also asserted the following: (1) that Copperweld and Regal had violated § 2 of the Sherman Act; (2) that Yoder had breached its contract with Independence; (3) that Copperweld and Regal had interfered with the contractual relationship between Independence and Yoder; and (4) that Copperweld and Regal had libeled and slandered Independence to one of its potential customers. *Id.* The claim brought under § 2 of the Sherman Act was dismissed before trial. *Id.* at 315.

29 *Id.* The jury also found that Yoder was liable for breach of the contract with Independence, that Copperweld had interfered with Independence's contractual relationship with Yoder, and that Regal had slandered Independence to a potential customer. *Id.*

30 *Copperweld*, 104 S. Ct. at 2735. The legal basis for awarding treble damages in antitrust suits is found at 15 U.S.C. § 15 (Supp. V 1981), which provides in part that "any person . . . injured in his business or property by reason of anything forbidden in anti-trust laws may sue therefore . . . without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

31 Independence Tube Co. v. Copperweld Corp., 691 F.2d 310, 331 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

32 *Copperweld*, 104 S. Ct. at 2734.

33 Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 316 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984). The court used the term "intra-enterprise conspiracy" to refer to the relationship between a parent corporation and its subsidiary. *Id.* For a more detailed discussion of the development of that doctrine, see *infra* notes 46-80 and accompanying text.

The court of appeals reasoned that because a corporation and its unincorporated division actually constituted a single entity, the requisite plurality of actors was absent, and, accordingly, the two were incapable of forming a conspiracy.[34] The appeals court explored whether that principle should be applied to a corporation and its wholly owned subsidiary, because, "as a practical matter there may be little difference between" the two forms of corporate affiliation.[35] Nevertheless, the court found a sufficient separation between Copperweld and its wholly owned subsidiary, Regal, to justify a finding that a conspiracy had existed.[36] On petition by Copperweld and Regal, the United States Supreme Court granted certiorari to decide whether a parent corporation and its wholly owned subsidiary were legally capable of conspiring in violation of section one of the Sherman Act.[37] In reversing the Seventh Circuit's decision, and holding that a parent and its wholly owned subsidiary are incapable of so conspiring, the Supreme Court disapproved of and overruled its prior inconsistent holdings.[38]

Prior to *Copperweld*, courts generally had found it unnecessary to reach the question of whether a conspiracy violative of section one had existed unless they had first determined that the defendants' agreement amounted to an "unreasonable" restraint of trade.[39] In those cases in which courts found that the defendants had unlawfully restrained trade, it became essential to examine the words "contract, combination, or conspiracy" in order

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34 Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 316 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

35 *Id.*

36 *Id.* at 320. Relying on a previous Seventh Circuit holding that the existence of an intra-enterprise conspiracy depended upon the "separateness" of the entities, the court of appeals in *Copperweld* concluded that "Regal was not 'merely a service arm of [its parent] [but was instead] more like a . . . separate corporate entity.' " *Id.* (quoting Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 727 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)).

37 *Copperweld*, 104 S. Ct. at 2734.

38 *Id.* at 2745.

39 *See generally* 2 E. KINTNER, FEDERAL ANTITRUST LAW § 9.1, at 4-5 (1980) (there must be an initial finding that effect and object of business arrangement is to unlawfully restrain trade). The "reasonableness" standard arose out of the United States Supreme Court's decision in Standard Oil Co. v. United States, 221 U.S. 1 (1911). In construing the words "in restraint of trade," Justice White, writing for the *Standard Oil* majority, stated that the common law "reasonableness" standard, or rule of reason, was the appropriate standard for analyzing conduct under § 1. *Standard Oil*, 221 U.S. at 58-60; *see also* United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911) (reaffirming application of the "reasonableness" standard in antitrust suits). For a related discussion of the principle of *per se* unreasonableness, see *infra* note 76.

to ascertain whether the Sherman Act had been violated.[40] Because the Act itself does not clearly specify when affiliated business associations are to be considered separate entities for purposes of section one, determining whether affiliated entities could conspire in violation of that provision became a long-standing and problematic issue among the courts.[41] Since it was clear that the conduct of a single entity could not be found illegal,[42] related corporate enterprises often raised the single entity, or single trader, defense in response to accusations of section one violations.[43] Courts generally agreed that a corporation and its unincorporated division could use that defense to avoid liability,[44] although the United States Supreme Court never addressed the issue.[45] In contrast, where the affiliates were incorporated, the Supreme Court, as well as lower courts, often found them capable of conspiring in violation of section one.[46] Predicting

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40 *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975) (to "make out a Sherman Act violation," there first must be finding that defendants' conduct restrained competition, and then, that they unlawfully conspired within meaning of § 1).

41 *See* Handler & Smart, *supra* note 9, at 26 (Supreme Court decisions involving claims of intra-enterprise conspiracy were "aberrant" and their progeny produced "confused and mischievous adjudications"); Kempf, *supra* note 9, at 181 (law surrounding intra-enterprise conspiracy labeled "fickle" as a jealous mistress); Willis & Pitofsky, *supra* note 9, at 21 (application of intra-enterprise conspiracy doctrine created "thorough-going uncertainty").

42 *See, e.g.*, United States v. Colgate, 250 U.S. 300, 307 (1919).

43 *See, e.g.*, Ogilvie v. Fotomat Corp., 641 F.2d 581, 584 (8th Cir. 1981); Knutson v. Daily Review, Inc., 548 F.2d 795, 801-08 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Brager & Co. v. Leumi Sec. Corp., 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977), *aff'd mem.*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 2322 (1981).

44 *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd., 416 F.2d 71, 83-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (court reasoned that single entity defense essential to preserve corporations' internal management and administration); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 245 (5th Cir. 1978) (corporation which merely adopts "organizational division of labor" should not be penalized with treble damages); Poller v. CBS, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

45 The Supreme Court in *Copperweld* noted that it had never before addressed the question of whether the Sherman Act could be violated by "coordinated conduct of a corporation and one of its unincorporated divisions." *Copperweld*, 104 S. Ct. at 2742. That Court went on to find that such conduct must be construed as that of a "single actor." *Id.*

46 *See, e.g.*, Perma Life Mufflers, Inc. v. United States, 392 U.S. 134, 141-42 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab, 332 U.S. 218, 229 (1947). For decisions by Federal circuit courts on this issue, see 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 (1978).

when a court would render a finding of such an "intra-enterprise" conspiracy, however, was often difficult.[47]

In *United States v. Yellow Cab Co.*,[48] decided in 1947, the Supreme Court first recognized that corporate affiliates were capable of engaging in an intra-enterprise conspiracy.[49] In that case, the defendant, a taxicab manufacturer, had acquired a controlling interest in a number of independent taxicab companies.[50] The complaint alleged that because the manufacturer and its affiliated cab companies had entered into an exclusive selling arrangement, they had engaged in anticompetitive conduct, which had an adverse effect on the interstate trade of taxicabs.[51]

Confronted with the issue of whether the complaint stated a claim under section one, the *Yellow Cab* Court began its analysis by declaring that the "test of illegality under the [Sherman] Act is the presence or absence of an unreasonable restraint on interstate commerce."[52] The Court observed that if it could be proven that the defendants' primary object in combining had been to restrain trade, then a clear violation of section one had occurred,[53] and the mere fact that the defendants had become affiliated could not immunize them from antitrust sanctions.[54] In dicta, the Court expounded upon this proposition by declaring that the Sherman Act was aimed at "substance, not form,"[55] and, therefore, "[t]he common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act."[56] Because the defendants had been independently owned prior to the alleged wrongful

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47 *See generally* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661, 661-62 (1982) (rules for determining when entities were capable of section 1 conspiracy were "characterized by confused and arbitrary distinctions"); Comment, *All in the Family: When Will Internal Discussion Be Labeled Intra-Enterprise Conspiracy?*, 14 DUQ. L. REV. 63, 64-65 (1975) (no "ultimate answers," only "patterns" appeared to exist).

48 322 U.S. 218 (1947).

49 *See* Kempf, *supra* note 9, at 175.

50 *Yellow Cab*, 332 U.S. at 220-23. The manufacturer, however, did not wholly own all of the subsidiaries. For example, he had acquired only 15% ownership of one of the companies. *Id.* at 221.

51 *Id.* at 224-25.

52 *Id.* at 227.

53 *Id.* at 227-28.

54 *Id.* at 229.

55 *Id.* at 227 (citing Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61, 376-77 (1933)). *But see Copperweld*, 104 S. Ct. at 2738 (also citing *Appalachian Coals*, and declaring that "it is the intra-enterprise conspiracy doctrine itself that 'makes but an artificial distinction' at the expense of substance").

56 *Yellow Cab*, 332 U.S. at 227.

conduct, it was apparently unnecessary for the *Yellow Cab* Court to recognize an intra-enterprise conspiracy doctrine.[57]

Similarly, in *Timken Roller Bearing Co. v. United States*,[58] a 1951 decision, the defendants—an American company and two foreign firms—were unaffiliated prior to the unlawful combination,[59] thus rendering any discussion of the intra-enterprise conspiracy doctrine superfluous. Nevertheless, the *Timken* Court relied upon that doctrine in reaching its decision.[60] In that case, the Federal district court had found that the American corporation had acquired a partial interest in the two foreign companies solely for anticompetitive purposes and that the affiliates had engaged in price fixing and allocation of markets among themselves.[61] The defendants contended that they had merely engaged in a "joint venture" among themselves and therefore that they could not be held to have violated the Sherman Act.[62] Justice Black, writing for the *Timken* majority, not only rejected that defense,[63] but he also demonstrated his adherence to the intra-enterprise conspiracy doctrine by stating that merely because "there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."[64]

Seventeen years later, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[65] the Court reaffirmed its adherence to the intra-enterprise conspiracy doctrine.[66] In that case, the plaintiffs

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57 Handler & Smart, *supra* note 9, at 26 & n.16. In their article, which was written prior to the *Copperweld* decision, Handler and Smart note that in all of the Supreme Court's section 1 decisions, liability could have been found without invoking an intracorporate conspiracy doctrine, with the exception of Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), wherein the doctrine "may have been necessary to the result reached." Handler & Smart, *supra* note 9, at 268 n.16; *see also* McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 195 (1955) (erroneous to say that decision in *Yellow Cab* turned on intra-enterprise conspiracy, since enterprise was *product* of conspiracy).

58 341 U.S. 593 (1951).

59 *Id.* at 595. The district court in *Timken* noted that "[e]ach company was a manufacturer and distributor, independent of the others, but joined for the sole and only purpose of mutual benefits." United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 306 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951).

60 *See Timken*, 341 U.S. at 594.

61 *Id.* at 595-96.

62 *Id.* at 597-98.

63 *Id.* at 598. In rejecting the defendants' contention the Court stated: "[O]ur prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Act." *Id.* (citations omitted).

64 *Id.*

65 392 U.S. 134 (1968).

66 *Id.* at 141-42 (citing *Timken* and *Yellow Cab*).

were franchised dealers of the defendants—a parent corporation and its subsidiaries.[67] The plaintiffs alleged that, since the defendants had refused to remove certain restrictive, anticompetitive provisions from their franchise agreement, and instead had acted pursuant to those provisions, the defendants' conduct constituted an illegal conspiracy in restraint of trade.[68] The United States Court of Appeals for the Seventh Circuit accepted the defendants' assertion that, because they composed a "single business entity," they could cooperate without violating the Sherman Act.[69] The Supreme Court rejected that defense, however, and held that since the parent and its subsidiaries had "availed themselves of the privilege of doing business through separate corporations," common ownership was insufficient to free them from the obligations that separate entities owed under the antitrust laws.[70] The Court noted, however, that each plaintiff could have alleged the existence of a conspiracy among the defendants and other franchise dealers that were not participating in the suit, or even among itself and the defendants.[71] Therefore, as in *Timken* and *Yellow Cab*, analysis by the Court of the intra-enterprise conspiracy doctrine was unnecessary.

In contrast to the foregoing cases, in which the intra-enterprise conspiracy doctrine proved unnecessary to the Court's ultimate finding of liability, in the 1951 case of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[72] there was no alternative basis upon which the Court's decision could be premised.[73] In that case, the defendants were wholly owned and internally created subsidiaries, which sold and distributed liquor that was manufac-

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67 *Id.* at 135.

68 *Id.* at 137. Specifically, the plaintiffs contended that several of these anticompetitive provisions prevented them from purchasing from other suppliers, forced them to sell other products manufactured by the defendants, and required them to sell at fixed prices. *Id.* The plaintiffs maintained that, rather than complying with their request to delete such anticompetitive terms, the defendants had not only refused, but had threatened to terminate the agreements if the terms were not adhered to. *Id.*

69 Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692, 694 (7th Cir. 1967), *rev'd*, 392 U.S. 134 (1968).

70 *Perma Life Mufflers*, 392 U.S. at 141-42 (citing *Timken* and *Yellow Cab*).

71 *Id.* at 142. Interestingly, the district court and the court of appeals held that, because the plaintiffs had acquired the subject franchises with full knowledge of the provisions in the agreement, they were barred from bringing the suit by virtue of the *in pari delicto* doctrine. *Id.* at 137-38. The Supreme Court, however, disagreed, reasoning that an *in pari delicto* defense was inappropriate to antitrust treble damage actions. *Id.* at 138.

72 340 U.S. 211 (1951).

73 *See* Handler & Smart, *supra* note 9, at 26 n.16.

tured by their parent corporation.[74] They were accused of violating section one of the Sherman Act, in that they conspired to sell liquor only to those wholesalers who would resell it at prices fixed by them.[75] Inquiring first into the "reasonableness" of the defendants' activity, the *Kiefer-Stewart* Court found that their price-fixing scheme was illegal *per se* under the Act.[76] The Court then evaluated the nature of the defendants' affiliation, as well as their argument that they were "mere instrumentalities" of a single unit and therefore incapable of conspiring.[77] Relying on its earlier decision in *Yellow Cab*, the Supreme Court observed that common ownership alone did not preclude a finding of conspiracy in violation of section one.[78] Moreover, Justice Black, in his majority opinion, declared that such antitrust regulation was especially applicable where, as in the case before him, the defendants "held themselves out as competitors."[79]

Although the Supreme Court clearly established the existence of the intra-enterprise conspiracy doctrine, it failed to explain in its subsequent opinions when the doctrine was properly applicable.[80] Rather, the Court made only broad statements indicative of the principle that common ownership did not create immunity against antitrust sanctions.[81] As a result, some circuits concluded that, as a general rule, so long as there were separate, incorporated entities, the requisite plurality of actors was pres-

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74 *Keifer-Stewart*, 340 U.S. at 212. For a more detailed description of the relationship between the affiliates, see Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 229 (7th Cir. 1950), *rev'd*, 340 U.S. 211 (1951).

75 *Keifer-Stewart*, 340 U.S. at 212-13.

76 *See id.* at 213. Justice Black, writing for the majority, reasoned that such an arrangement "cripple[d] the freedom of traders and thereby restrain[ed] their ability to sell in accordance with their own judgment." *Id.* at 213.

The principle of *per se* unreasonableness arose out of the widespread belief among many courts that "some business practices, because of their severe anticompetitive impact and lack of countervailing economic benefit, should be conclusively presumed to result in an undue or unreasonable restraint of trade." 2 E. KINTNER, *supra* note 39, § 8.3, at 362-63. The Supreme Court first expressly adopted this *per se* doctrine in 1927 in United States v. Trenton Potteries Co., 237 U.S. 392, 397 (1927), wherein the Court indicated that because the aim and result of every price-fixing agreement is to eliminate competition, such agreements must necessarily be found unlawful. 2 E. KINTNER, *supra* note 39, § 8.3, at 365-66. Thus, the *Keifer-Stewart* Court's articulation that the subject price-fixing scheme was *per se* illegal clearly conformed to the precedent established in *Trenton Potteries*.

77 *Keifer-Stewart*, 340 U.S. at 215.

78 *Id.* (citing *Yellow Cab*).

79 *Id.*

80 *See, e.g.*, *Perma Life Mufflers*, 392 U.S. 134; *Timken*, 341 U.S. 593; *Keifer-Stewart*, 340 U.S. 211; *Yellow Cab*, 332 U.S. 218.

81 *See generally* Handler & Smart, *supra* note 9, at 38-39.

ent, even if those entities constituted a parent and its wholly owned subsidiary.[82] Other courts, however, followed the approach taken by the Supreme Court in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*[83]

In *Sunkist*, which was decided in 1962, the conduct at issue was that of an agricultural cooperative, its wholly owned subsidiaries, and an affiliated cooperative.[84] An action was brought against those parties based upon their alleged conspiracy to restrain and monopolize trade in violation of sections one and two of the Sherman Act.[85] In assessing the nature of the defendants' relationship, the *Sunkist* Court was influenced by section six of the Clayton Act, which, under certain circumstances, immunizes agricultural organizations from antitrust liability;[86] and by the Capper-Volstead Act's detailed enumerations of the activities permitted by such organizations.[87] The Court concluded that those provisions supported the defendants' contention that they should be treated as a single entity, and therefore were incapable of conspiring in violation of section one.[88] Using the "substance over form" principle that it had adopted in *Yellow Cab*, the Court in *Sunkist* reasoned that to inflict liability merely because the defendants were separately incorporated "would be to impose grave legal consequences upon organizational distinctions that

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82 *See supra* note 46 and accompanying text.

83 370 U.S. 19 (1962).

84 *Id.* at 20.

85 *Id.* Specifically, the plaintiffs asserted that, as a result of the defendants' control of the orange supply in the California-Arizona market, not only had trade been restrained but also, in effect, the plaintiffs had been eliminated as competitors in the sale of fruit juices. *Id.* at 22-23.

86 *Id.* at 27-30. Section 6 of the Clayton Act provides in part:

> 'Nothing contained in the antitrust laws shall be construed to forbid the existence . . . of . . . agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.'

Id. at 27 n.7 (quoting § 6 of the Clayton Act, which is currently codified at 15 U.S.C. § 17 (1982)).

87 *Id.* at 27-30. The Capper-Volstead Act provides in part that " 'persons engaged in the production of agricultural products . . . may act together in associations, corporate, or otherwise . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.' " *Id.* at 28 (quoting portion of Capper-Volstead Act that is currently codified at 7 U.S.C. § 291 (1982)).

88 *Sunkist*, 370 U.S. at 29-30. The Court declared that "the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities." *Id.* at 29.

are of *de minimis* meaning and effect."[89]

The Supreme Court's decision in *Sunkist* subsequently induced several circuit courts to consider the facts and circumstances of each particular case before reaching a decision with respect to the conspiratorial capacity of affiliated entities.[90] For example, in *Photovest Corp. v. Fotomat Corp.*,[91] the Seventh Circuit followed such an approach. In that case, a parent corporation and its wholly owned subsidiary were allegedly engaged in an unlawful combination and were attempting to force independent dealers out of business.[92]

The *Photovest* court first examined the defendants' conduct and found that it constituted an unreasonable restraint of trade in violation of section one of the Sherman Act.[93] The court then focused upon the nature of the relationship between the parent corporation and its wholly owned subsidiary in order to determine whether they were sufficiently independent to be capable of conspiring.[94] Like the Supreme Court in *Sunkist*, the *Photovest* court considered more than merely the defendants' affiliation; it also took into account "the extent of integration of ownership, whether the two corporations had separate managerial staffs . . . and the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms."[95] Based upon that analysis, the *Photovest* court determined that the defendants were not sufficiently distinct to constitute conspirators within the contemplation of section one, and thus it concluded that an "intra-enterprise" conspiracy had not existed.[96]

Prior to the Supreme Court's decision in *Copperweld*, courts followed either one of two approaches in determining whether affiliated entities were capable of conspiring. One approach was to reach a finding solely on the basis of the fact that the affiliated parties were separately incorporated, as the Supreme Court apparently did in *Yellow Cab*, *Timken*, *Perma Life Mufflers*, and *Kiefer-Stewart*.[97] The other approach was to invoke the "substance over

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89 *Id.*

90 *See* Handler & Smart, *supra* note 9, at 35 n.62.

91 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

92 *Id.* at 707.

93 *Id.* at 726.

94 *Id.*

95 *Id.* (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977)).

96 *Id.* at 727.

97 *See supra* notes 48-80 and accompanying text.

form" principle and to consider the particular facts of each case, a method of analysis employed by the Supreme Court in *Sunkist* and by the Seventh Circuit in *Photovest*.[98]

In a marked deviation from both approaches, the *Copperweld* Court established a *per se*[99] rule for use in analyzing the conspiratorial capacities of a parent corporation and its wholly owned subsidiary.[100] Declining to assess either the reasonableness of the conduct at issue or the nature of the defendants' relationship, the *Copperweld* Court held that a parent and its wholly owned subsidiary are to be treated as a single entity, incapable of conspiring in violation of section one of the Sherman Act.[101] Consequently, the intra-enterprise conspiracy doctrine is now inapposite to that relationship.[102]

In *Copperweld*, the Court first declared that its object was to resolve the issue of whether the coordinated activities of a parent corporation and its wholly owned subsidiary constitute conduct that falls within the purview of section one of the Sherman Act, in order to determine whether the intra-enterprise conspiracy doctrine is applicable in such a situation.[103] The Court recognized that the intra-enterprise conspiracy doctrine had been expressly approved in a number of its prior decisions, but it noted that because the doctrine's application had been unnecessary in all but one of those cases, the "merits" of the doctrine had never been examined in depth.[104]

Chief Justice Burger, writing for the majority, began his analysis by observing that section one of the Act is aimed only at concerted activity and does not govern "wholly unilateral" conduct, which is regulated instead by section two of the Act.[105] He

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98 *See supra* notes 83-96 and accompanying text.

99 *Per se* as used herein should not be confused with the antitrust principle of *per se* unreasonableness, *see supra* note 76, but is instead borrowed from Justice Stevens's choice of words. *See Copperweld*, 104 S. Ct. at 2746 (Stevens, J., dissenting).

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

101 *Id.* at 2745.

102 *See id.* Chief Justice Burger, writing for the *Copperweld* majority, observed that in situations involving a parent corporation and its wholly owned subsidiary, "antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine." *Id.*

103 *Id.* at 2736.

104 *Id.* See also *supra* notes 72-79 and accompanying text for a discussion of *Kiefer-Stewart*, the one case where the doctrine's application was necessary.

105 *Copperweld*. 104 S. Ct. at 2740. Section two of the Sherman Act provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed

noted that, because concerted activity "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," concerted behavior is to be scrutinized more rigorously than unilateral conduct.[106] In analyzing the two sections of the Act, Chief Justice Burger stated that a "gap" exists between them,[107] which immunizes an entity whose anticompetitive, "unilateral" conduct satisfies neither the concerted activity requirement of section one nor the "monopolization" requirement of section two.[108] Hence, the Court deduced that the threshold inquiry is to determine whether the allegedly wrongful conduct falls within that gap and thereby exempts the entity from antitrust liability.[109] Chief Justice Burger further observed that where, as in the case before him, a section one violation is alleged, the Court must ascertain whether the conduct constitutes "concerted activity" within the meaning of that provision.[110]

Reiterating that section one does not apply to "wholly unilateral" activity, the Chief Justice expressed agreement with a series of decisions in which the requisite plurality of actors was found to have been absent in instances involving activity between

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guilty of a felony." 15 U.S.C. § 2 (1982). The *Copperweld* Court observed that "Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between *separate* entities. It does not reach conduct that is 'wholly unilateral.' " *Copperweld*, 104 S. Ct. at 2740 (emphasis in original) (citing Albrecht v. Herald Co., 390 U.S. 145 (1968)).

106 *Copperweld*, 104 S. Ct. at 2740-41. The majority noted, however, that the rigorous scrutiny applied to concerted behavior is more limited where the conduct is found to be illegal *per se*, such as horizontal price fixing and market allocation. *Id.* at 2740. The *Copperweld* Court declared that the degree of scrutiny applied to other concerted behavior such as mergers, joint ventures, and vertical agreements was to be governed by the rule of reason, under which the actual effect of such conduct would be assessed. *Id.* at 2740-41.

107 *Id.* at 2744. Chief Justice Burger decided that such a gap was intentionally created by Congress. *Id.* He observed that Congress had "sound" reasons for immunizing from antitrust liability the conduct of a single entity, since the underlying objective of the Sherman Act was to promote competition. *Id.* Moreover, the *Copperweld* Court noted that Congress would not have included language such as "contract, combination, or conspiracy" if it had intended that section one of the Sherman Act apply to "unilateral conduct," especially since the entirety of section two would thereby be rendered "superfluous." *Id.*

108 *Id.* See *supra* note 105 for a recitation of the monopolization requirement of section two of the Sherman Act.

109 *Copperweld*, 104 S. Ct. at 2744-45.

110 *Id.* at 2740-42, 2745. Pursuant to determining whether the alleged wrongful conduct constituted "concerted activity," Chief Justice Burger focused upon not only the terms "contract, combination . . . or conspiracy" of section one but also that section's underlying purpose of promoting effective competition. *Id.* at 2741-42.

officers or employees of the same firm,[111] as well as instances of activity between a parent corporation and its unincorporated division.[112] He reasoned that in both situations the combined or coordinated activity did not constitute the amalgamation of separate sources of economic power, but merely entailed consolidation of the actors' common interests.[113] The Court further observed that coordination within a business enterprise, whether among employees or among the parent and its unincorporated divisions, was likely to make that firm more competitive, ultimately to the benefit of the public.[114]

Having determined that the activity of entities that are committed to commonly shared interests does not constitute "concerted activity" within the meaning of section one of the Sherman Act, the *Copperweld* Court concluded that the same rationale should apply to the conduct of a parent corporation and its wholly owned subsidiary.[115] Chief Justice Burger reasoned that a parent and its subsidiary, like a corporation and its divisions, share common objectives and, thus, "their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."[116] He added that a parent and its wholly owned subsidiary "*always* have a 'unity of purpose or a common design,' " regardless of the degree of separateness or amount of control the parent exercises,[117] and thus, they al-

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111 *Id.* at 2741 n.15.

112 *Id.* at 2742 n.16.

113 *Id.* at 2741. Assessing the nature of the relationship between a company and its officers or employees, the Court concluded that "[t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* The Court similarly noted that a parent corporation and its unincorporated division share common economic interests. *Id.* at 2742. Although the Court in *Copperweld* admitted that it had not yet directly decided upon the antitrust implications of that relationship, it stated that there could be "little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor." *Id.* at 2742.

114 *Id.* Chief Justice Burger explained that punishing companies for delegating power to its subunits would "deprive consumers of the efficiencies decentralized management may bring." *Id.*; *see also* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 1, 421 U.S. 616, 623 (1975) ("competition based on efficiency is a positive value that the antitrust laws strive to protect").

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

116 *Id.* In describing the relationship between a parent corporation and its wholly owned subsidiary, the Court stated that it was "not unlike a multiple team of horses drawing a vehicle under the control of a single driver." *Id.*

117 *Id.* (emphasis in original) (quoting American Tobacco Co. v. United States, 328 U.S. 781 (1946)). The Court observed that a parent and its wholly owned subsidiary "share a common purpose whether or not the parent keeps a tight rein over

ways compose a "single entity" and are incapable of conspiring in violation of section one.[118]

The *Copperweld* Court further observed that there is no justifiable basis for finding the existence of conspiratorial conduct in the relationship between a parent and its wholly owned subsidiary when courts generally have agreed that a parent and its unincorporated division cannot engage in such conduct.[119] Chief Justice Burger explained that, because a corporation is free to organize a subunit either as an unincorporated division or as a wholly owned subsidiary, it should not be penalized for choosing the type of structure that is best suited to its business purposes.[120] He reasoned that if antitrust liability were founded upon the "garb in which a corporate subunit [is] clothed," corporations would be induced to structure their subunits as unincorporated divisions, rather than as wholly owned subsidiaries and thus "deprive[] consumers and producers of the benefits that the subsidiary form may yield."[121] The Court therefore concluded that antitrust liability should not depend on the manner in which a subsidiary is structured.[122] To illustrate that point, Chief Justice Burger considered the case at bar, wherein the nature of the activity in which Regal engaged as a wholly owned subsidiary of Copperweld was no different, competitively or otherwise, from its previous activity as an unincorporated division of Lear-Siegler.[123]

Having determined that the conduct of a parent corporation and its wholly owned subsidiary does not constitute concerted activity within the meaning of section one of the Sherman Act, on

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the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Id.* (footnote omitted).

118 *Id.* at 2742 n.18. Prior to this decision, business entities had invoked a "single entity" defense. *See supra* notes 42 & 43 and accompanying text.

119 *Copperweld*, 104 S. Ct. at 2741-43.

120 *Id.* at 2743. Noting that an entity often incorporates its subdivision for valid management and business purposes, Chief Justice Burger pointed out that special tax problems are avoided as a result of such separate incorporation. *Id.* at 2743 & n.20.

121 *Id.* at 2743. The Court observed that there was "nothing inherently anticompetitive about a corporation's decision to create a subsidiary," and, in fact, such separate incorporation served "efficiency of control" and "economy of operations." *Id.*

122 *Id.* at 2744.

123 *Id.* at 2743-44. The Court observed that the only distinction between either arrangement was the company from which Regal's economic power was derived; first from Lear-Siegler while it was an unincorporated division, and then from Copperweld, as its wholly owned subsidiary. *Id.* at 2744.

the bases of both the underlying policies of the Act[124] and the nature of the entities' relationship,[125] the Court referred again to the " 'gap' in the Act's proscription against unreasonable restraints of trade."[126] Chief Justice Burger stated that the concerted behavior of a parent and its wholly owned subsidiary, which does not amount to a monopoly within the meaning of section two, falls within that gap.[127] The Court therefore concluded that application of the intra-enterprise conspiracy doctrine is effectively precluded in the context of such a relationship.[128]

Referring to its previous decisions in which the doctrine had been applied to the parent-subsidiary relationship, the *Copperweld* Court emphasized the fact that liability could have been premised in those cases without resort to the doctrine.[129] Observing that "not a single holding of antitrust liability by [the] Court would today be different in the absence of an intra-enterprise conspiracy doctrine," the Court expressly disapproved and overruled all of its "prior, inconsistent holdings."[130]

Justice Stevens, in a dissenting opinion,[131] declared that the majority mistakenly had disregarded the important principles

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124 See *supra* notes 105-10 and accompanying text for a discussion of the underlying policies of the Act.

125 See *supra* notes 119-23 and accompanying text for a discussion of the nature of the entities' relationship.

126 *Copperweld*, 104 S. Ct. at 2744. See *supra* notes 107-09 and accompanying text for a discussion of this "gap."

127 *Copperweld*, 104 S. Ct. at 2745. Chief Justice Burger declared that "[u]nless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly-owned subsidiary falls outside the reach of that provision." *Id.*

128 *Id.* The Court added that antitrust remedies, other than the intra-enterprise doctrine, could be applied to the anticompetitive conduct of a parent and its wholly owned subsidiary. *Id.* Such remedies include application of section one of the Sherman Act and section seven of the Clayton Act to the "initial" combination by an entity, as well as application of section two of the Sherman Act and section five of the Federal Trade Commission Act to any subsequent conduct by the entity. *Id.* See *infra* notes 147-54 and accompanying text for a more detailed discussion of these remedies.

129 *Copperweld*, 104 S. Ct. at 2736-39. The Court cited *Yellow Cab* and *Timken* for the proposition that the intra-enterprise conspiracy doctrine "does not pertain to corporations whose initial affiliation was itself unlawful." *Id.* at 2738. The *Copperweld* majority also noted that, since a conspiracy could have been charged between the defendants and independent parties in *Perma Life Mufflers*, application of the doctrine in that case was unnecessary. *Id.* at 2739. Similarly, Chief Justice Burger observed that, in *Kiefer-Stewart*, the same result could have been reached "on the ground that the subsidiaries conspired with wholesalers other than the plaintiffs." *Id.* at 2738 (footnote omitted).

130 *Id.* at 2745.

131 Justices Brennan and Marshall joined in Justice Stevens's dissent.

that underlay the Supreme Court's holdings on "at least seven previous occasions."[132] The dissent maintained that the majority's decision to overrule those cases was not justified.[133] Justice Stevens claimed that the earlier cases had focused on the true issue—the relative market power held by the concerned entities.[134] Advocating an approach that would focus upon the reasonableness of the restraint, Justice Stevens reasoned that the intra-enterprise doctrine addresses the "gap" that exists between section one and section two of the Sherman Act and permits imposition of section one liability when the market power held by the entities restrains marketwide competition.[135]

Justice Stevens agreed with the majority's assertion that integration between affiliates often is desirable, but he could not justify protecting such integration when the effect would be to promote anticompetitive conduct.[136] Moreover, he explained that his view was supported both by common law doctrines[137] and by the legislative history of the Act.[138] The evidence, he ob-

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132 *Copperweld*, 104 S. Ct. at 2748 (Stevens, J., dissenting). The decisions he referred to were *Perma Life Mufflers*; *Timken*; *Kiefer-Stewart*; Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); *Yellow Cab*; and United States v. Crescent Amusement Co., 323 U.S. 173 (1944). *See Copperweld*, 104 S. Ct. at 2746-48 (Stevens, J., dissenting).

133 *Copperweld*, 104 S. Ct. at 2748-49 (Stevens, J., dissenting). Quoting from Arizona v. Rumsey, 104 S. Ct. 2305 (1984), Justice Stevens recognized that "any departure from the doctrine of *stare decisis* demands special justification." *Copperweld*, 104 S. Ct. at 2746 (Stevens, J., dissenting).

134 *Copperweld*, 104 S. Ct. at 2752 & n.19 (Stevens, J., dissenting).

135 *Id.* at 2752-53 (Stevens, J., dissenting). Additionally, Justice Stevens noted that the intra-enterprise doctrine could be applied to affiliated conspirators who attempt to harm a third party who refuses to join them and to situations in which affiliated businesses controlled by organized crime threaten monopolization through "violence or intimidation of competitors." *Id.* at 2753 & nn.23-24 (Stevens, J., dissenting).

136 *Id.* at 2751-52 (Stevens, J., dissenting). Justice Stevens observed that the "problem with the Court's new rule is that it leaves a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration." *Id.* at 2752 (Stevens, J., dissenting).

137 *Id.* at 2750 (Stevens, J., dissenting). The dissent noted that at common law, a corporation always has been recognized as a separate legal entity and that Congress had indicated its acquaintance with that common law rule. *Id.* (citing 21 CONG. REC. 2571 (1890) (remarks of Sen. Teller)).

138 *Id.* at 2750-51 (Stevens, J., dissenting). Justice Stevens maintained that the Court had "long recognized" that Congress intended section one to have a "broad sweep." *Id.* at 2749 (Stevens, J., dissenting). He drew special attention to the fact that when the Act was drafted, Congress had been particularly concerned with the anticompetitive conduct of what it termed "trusts," that is, a combination consisting of affiliated corporations. *Id.* at 2750 (Stevens, J., dissenting). *But see id.* at 2744 n.23 (language relied upon by dissent "refer[s] to combinations created for the very purpose of restraining trade"; "post-acquisition conduct" of such entities, the

served, indicated that the defendants' conduct had "precious little to do with effective integration between parent and subsidiary corporations."[139] In effect, he decided that the defendants' conduct was "manifestly anticompetitive" and should not have been "immunized from scrutiny under [section one] of the Sherman Act."[140] The dissent criticized the majority for its failure to explain why the mere fact of the defendants' affiliation should immunize conduct that produces a marketwide restraint on competition.[141] Justice Stevens, in conclusion, reasoned that a *per se* rule of antitrust immunity that ignores the competitive impact of the conduct at issue is just as undesirable as a *per se* rule of antitrust liability.[142]

In the dissent's view a court should examine the defendant's conduct and determine whether it constitutes an unreasonable restraint of trade before assessing the nature of the relationship involved.[143] By contrast, under the analysis adopted by the majority, an initial inquiry is made into the relationship of the parties—that is, whether the defendants accused of conspiring in violation of section one are a parent and its wholly owned subsidiary.[144] While in past cases that consideration was secondary in determining whether section one had been violated, under *Copperweld* that relationship alone can preclude liability under section one, regardless of the competitive impact of the defendants' conduct.[145]

Subsequent to *Copperweld*, in cases in which the defendants' relationship is that of parent and wholly owned subsidiary, a section one claim against them cannot be sustained.[146] Consequently, a complainant who wishes to bring an antitrust suit against a parent corporation and its wholly owned subsidiary must now predicate its claim on some other provision of the anti-

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type of conduct present in *Copperweld*, not addressed by Congress and impliedly lawful).

139 *Id.* at 2746 (Stevens, J., dissenting).

140 *Id.* The dissent reasoned that the effect of the conduct by Copperweld and Regal "was to exclude a potential competitor of [Regal] from the market" through economic coercion of potential suppliers and customers. *Id.*

141 *Id.* at 2755 (Stevens, J., dissenting).

142 *Id.*

143 *Id.* at 2746 (Stevens, J., dissenting). Justice Stevens observed that "the Court would be better advised to continue to rely on the Rule of Reason." *Id.*

144 *See id.* at 2740-45.

145 *See id.* at 2755 (Stevens, J., dissenting) (noting that *Copperweld* majority's holding was a *per se* rule, unaffected by considerations of economic impact of conduct at issue).

146 *See id.* at 2745.

trust laws. For example, section two of the Sherman Act may be applied if the defendants' activities constitute monopolization or an attempt to monopolize.[147] If the conduct at issue, however, is "unilateral" in nature and does not "threaten monopolization," thereby falling within the "gap" between sections one and two,[148] a complainant must ground its assertion of liability on other antitrust laws. Section five of the Federal Trade Commission Act,[149] for example, may furnish the appropriate ground for relief. That provision grants the Federal Trade Commissioner authority to declare the conduct of "persons, partnerships, or corporations" unlawful if it constitutes use of an "unfair method of competition" and "deceptive acts affecting commerce."[150] In addition, activity characterized by acquisitions of stock or assets in another company may fall within the purview of section seven of the Clayton Act.[151] That section prohibits one entity from acquiring the stock or assets of another entity or entities engaged in commerce where the effect of the transaction "may be to substantially lessen competition" or to "create a monopoly."[152] Fi-

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147 *Id.* See *supra* note 105 for the relevant text of section two.

148 See *supra* notes 107 & 108 and accompanying text for a discussion of the "gap."

149 Section five of the Federal Trade Commission Act provides, in part, that:

> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45 (1982).

150 *See id.*

151 Section seven of the Clayton Act provides in part that:

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

Id. § 18. Interestingly, use of the word "may" has been held to establish a lower standard of proof, requiring only a "probability of anti-competitive effects." *See* Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962). Hence, the scope of this section may be much broader than other antitrust regulations of stock or asset acquisitions, including sections one and two of the Sherman Act. *But see* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975) (defendant's acquisition of outstanding shares of system of branch banks in which it owned 5% interest and with which it engaged in continuous cooperation and consultation upheld under both § 1 of Sherman Act and § 7 of Clayton Act because anticompetitive effects of defendant's conduct were not probable but only ephemeral possibilities).

152 15 U.S.C. § 18 (1982).

nally, if the combination of entities is motivated by and is the product of an anticompetitive purpose, section one of the Sherman Act is still available as an antitrust remedy.[153]

Because of the limited scope of these remedies,[154] however, there is no real assurance that, absent application of section one of the Sherman Act, the conduct of a parent corporation and its wholly owned subsidiary can be reached through alternative antitrust provisions. Considering this fact, the *Copperweld* Court's justification for eliminating the intra-enterprise conspiracy doctrine[155] is less convincing. Nonetheless, the Court's decision was not unexpected, in light of the widespread criticism of the doctrine and the manner in which it had been applied.[156] One criticism, which was widely expressed by commentators, was that the doctrine produced much uncertainty in the business community which, it was feared, not only would hinder disposition of claims,[157] but might also encourage "nuisance suits" by parties tempted by the possibility of a treble damage award.[158]

In addition, because courts generally found unincorporated divisions and their parent companies incapable of conspiring,[159] the doctrine was viewed as a deterrent to decentralized corporate

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153 *See Copperweld*, 104 S. Ct. at 2745.

154 For example, section five of the Federal Trade Commission Act does not apply to banks, certain described savings and loan institutions, certain common carriers and air carriers, or certain persons, partnerships, and corporations subject to the Packers and Stockyards Act. *See* 15 U.S.C. § 45(a)(2) (1982). In addition, section seven of the Clayton Act is limited to stock or asset acquisitions. *See id.* § 18. Furthermore, section two of the Sherman Act is aimed at monopolization and attempts to monopolize. *See id.* § 2 (1982). Finally, section one of the Sherman Act may be applied to affiliated entities only where their initial combination was in restraint of trade. *See id.* § 1.

155 See *supra* note 128 and accompanying text for a discussion of this justification.

156 *See, e.g.*, Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5, 27 (1963) ("It is submitted that the intra-enterprise conspiracy doctrine —which has also been called 'corporate self-abuse' and 'bath tub conspiracy'—should be rejected in its entirety.") (footnotes omitted); Note, *supra* note 47, at 681 ("These [antitrust] goals would be best served by a Court ruling that related corporations are legally incapable of conspiring among themselves in violation of section 1.").

157 *See* McQuade, *supra* note 57, at 211 (uncertainty produced by doctrine hampers business, without providing assurance of offsetting advantage to the community); *see also* Comment, *supra* note 47, at 87 (without any authoritative ruling by Supreme Court setting forth proper scope of intra-enterprise conspiracy doctrine, defense attorneys will be forced to muster enough decisional law and sound policy arguments to avoid broad application of § 1).

158 *See* Note, *supra* note 47, at 672 (increase in "nuisance" suits caused by application of intra-enterprise doctrine would, in effect, "discourage potential defendants from competing aggressively").

159 *See supra* note 44 and accompanying text.

structuring.[160] Discouraging decentralization, however, does not necessarily further antitrust objectives, because, in most instances, an entity's decision to decentralize has nothing to do with market power considerations.[161] Corporations often incorporate their divisions in order to acquire tax benefits,[162] to comply with foreign laws,[163] to better evaluate a specific business operation, and even to establish a certain psychological effect among employees, who are given titles in the substructure.[164] In sum, because legitimate business objectives are often hampered by the adverse effects of the doctrine's application, it follows that the doctrine did not necessarily further the antitrust goal of efficiency in the competitive market.[165]

Despite the undesirable effects of utilizing the intra-enterprise conspiracy doctrine, the question remains whether the *Copperweld* Court's response, in the form of a *per se* rule, is more advantageous. The unpredictable manner in which the doctrine has been applied previously is not unlike the uncertain and undefinable scope of the *Copperweld* decision. Because *Copperweld* addresses only the conduct of a parent corporation and its wholly owned subsidiary, it is not clear whether the decision can or will be extended to encompass other business relationships. The Court's dicta indicates that a parent and its unincorporated division are incapable of conspiring,[166] yet the majority failed to address the conspiratorial capacity of partially owned subsidiaries or that of wholly owned entities sharing common ownership. Although Chief Justice Burger distinguished *Copperweld* from several cases involving such relationships,[167] the Court nevertheless agreed with the holdings,[168] explaining that application of the in-

160 *See* Willis & Pitofsky, *supra* note 9, at 26 (because doctrine discouraged company from "decentralizing" or incorporating its divisions, requirement of "plurality" under § 1 relegated to mere "technicality").

161 *See* Kempf, *supra* note 9, at 178 (whether or not to decentralize is "organizational" decision which often promotes competition); Willis & Pitofsky, *supra* note 9, at 26-27 (corporate subsidiaries usually established for reasons totally distinct from market considerations).

162 *See* Willis & Pitofsky, *supra* note 9, at 27 (tax advantages include multiple surtax exemptions only available to separate corporations, reduction in exposure to unreasonable tax accumulations, and expedition of more suitable accounting periods and tax credit elections).

163 *See id.* at 28 & n.24.

164 *See id.* at 28 & n.25.

165 *See* Note, *supra* note 47, at 681 (doctrine "inconsistent with the goals of promoting competition and economic efficiency").

166 *See supra* notes 112 & 113 and accompanying text.

167 *See Copperweld*, 104 S. Ct. at 2736-39.

168 *Id.* at 2745.

tra-enterprise conspiracy doctrine was not necessary to the results reached therein.[169]

Perhaps the only means of predicting the future application of the *Copperweld* rule is to consider the Court's emphasis on its theory that a parent corporation and its wholly owned subsidiary share common objectives and interests, regardless of the degree of control exercised by the parent company.[170] That theory would apply logically to wholly owned subsidiaries, commonly owned by a corporate parent, because the entire "family" of entities would share the same objectives.[171] It is also arguable that when a parent corporation owns a majority interest[172] in a subsidiary, the two entities share common goals and act with one "corporate consciousness"[173] and, thus, they should be immune from application of the intra-enterprise conspiracy doctrine. A strong minority interest in the corporate structure may exist, however, as where the minority shares are held by a potential competitor of the parent,[174] and when such affiliated entities have possibly conflicting economic goals, their combined conduct would not be truly "unitary" in nature.

Despite the ambiguities with respect to the scope of the *Copperweld* decision, it is clear that the *per se* rule enunciated therein will protect the conduct of parents and their wholly owned subsidiaries from section one liability. At least until the scope of the *Copperweld* rule is further clarified, however, other relationships between affiliated entities no doubt will be subjected to the methods of evaluation utilized prior to *Copperweld*. The *Copperweld* decision may lead courts to determine more frequently that the intra-enterprise doctrine is inapplicable to certain forms of affiliation. Consequently, where it is clear that the partially owned entities and their parent corporation are acting as "one corporate

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169 *Id.* at 2738-39.

170 *Id.* at 2741-42.

171 *See id.* at 2742-43 (analyzing common interests shared by entity and its unincorporated division as analogous to those shared by parent company and its wholly owned subsidiary).

172 Determination of what would constitute the requisite majority interest for application of the *Copperweld* ruling is yet another element inviting resolution.

173 *See Copperweld*, 104 S. Ct. at 2742 (describing "one corporate consciousness" theory).

174 *See, e.g., Timken*, 341 U.S. at 598 (American ball bearing manufacturer owning 30% interest in British ball bearing manufacturer and 50% interest in French ball bearing manufacturer held to have conspired in violation of § 1). *But cf.* United States v. Pan Am. World Airways, Inc., 193 F. Supp. 18, 38 (S.D.N.Y. 1961) (airline with 50% interest in air carrier held not to have conspired in violation of § 1), *rev'd on other grounds*, 371 U.S. 296 (1963).

consciousness" with a "unity of purpose and design," courts may find the intra-enterprise conspiracy doctrine inapposite.

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