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The Intra-Enterprise Conspiracy Doctrine: Toward an Equitable Approach

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COMMENT

THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE: TOWARD AN EQUITABLE APPROACH

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy that restrains trade.[1] These interchangeable terms[2]—contract, combination, and conspiracy—all connote the general requirement that a plurality of actors is needed to find a section 1 violation. On the other hand, section 2 of the Sherman Act prohibits monopolization and attempts to monopolize, whether by unilateral or joint conduct.[3] Thus, under the Sherman Act, a unilateral restraint of trade is not, in itself, a substantive offense.

This seemingly clear distinction between sections 1 and 2 becomes blurred, however, by the complex web of modern corporate structures. Such structures raise questions concerning the appropriate legal standard for defining a single entity within the meaning of section 1's plurality requirement. Present day corporate affiliation ranges from closely-knit, unincorporated divisions to loosely-knit, incorporated subsidiaries.[4] A holding company may

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1. Section 1 of the Sherman Act provides:

> [E]very 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. . . .

Sherman Antitrust Act, 15 U.S.C. § 1 (1976).

Section 8 of the Sherman Act provides in pertinent part, "The word 'person' or 'persons' wherever used in Sections 1 to 7 of this title shall be deemed to include corporations. . . ." 15 U.S.C. § 7 (1982).

2. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968) (referring to contracts and combinations as "particular theories of conspiracy"). *See generally* Rahl, *Conspiracy and the Antitrust Laws,* 44 ILL. L. REV. 743, 744 n.5 (1950) (noting that a desire to advance sensible distinctions has been abandoned); Note, *Combinations in Restraint of Trade: A New Approach to Section 1 of the Sherman Act,* 1966 UTAH L. REV. 75, 76-77 (explaining that while the word *contract* carries its modern day meaning, attempts to construe *combination* as separate from *conspiracy* remain fruitless).

The Supreme Court has defined conspiracy as "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921).

3. Section 2 provides, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (1982).

4. Noting the variety of corporate affiliation, one scholar has commented:

> [I]n a case in which one corporation owns a controlling stock interest in another it has [not] by that fact alone made a single enterprise out of two different ones.

govern a large conglomerate with myriad corporations selling different products in diverse markets. Conversely, a vertically integrated parent company may strictly control its distributorship subsidiaries. Agreements between these related firms can range from advertising arrangements to boycotts, or from territorial restrictions to tying arrangements.[5] Should courts recognize these variations of agreements and structure when applying the section 1 plurality requirement?

The Supreme Court is now faced with this troublesome question.[6] The issue concerns what is known as the intra-enterprise conspiracy doctrine. This doctrine seeks to ascertain when affiliated corporations should be considered distinct entities and, thus, have the capacity to conspire to restrain trade in violation of section 1 of the Sherman Act. Providing no easy answer, this doctrine has generated a plethora of academic discussion.[7] Yet, as the

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> The controlling corporation has a choice. It can, if it chooses, elect to permit, or perhaps require, its subsidiary to manage its own affairs, make its own decisions, and operate as a separate enterprise, the parent retaining only an investor's interest. Or it can integrate the operations of the subsidiary with its own, in whole or in part, thereby bringing the two operations into a single enterprise entity. There is no compulsion on it to adopt or refrain from either course; but the legal consequences vary with the choice.

Berle, *The Theory of Enterprise Entity,* 47 COLUM. L. REV. 343, 357 (1947).

The use of the corporate subsidiary has grown enormously since 1900. *See* P. BLUMBERG, LAW OF CORPORATE GROUPS 463 (1983).

5. Tying arrangements exist when a firm agrees to sell a product or service contingent upon the buyer's acceptance of another product or service, or upon the buyer's agreement not to purchase the product or service from another supplier. Such arrangements are considered per se illegal under the Sherman Act. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947).

6. On December 5, 1983, the Supreme Court heard oral arguments in Copperweld Corp. v. Independence Tube Corp., 691 F.2d 310 (1982), *cert. granted,* 103 S. Ct. 3109 (1983). The Court had specifically asked the parties to address the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly-owned subsidiary in violation of the Sherman Act. The Court also invited the Solicitor General to present the views of the United States. In addition, many business lobby groups, including the American Iron and Steel Institute, the National Association of Manufacturers, the Chamber of Commerce, and the Kaiser Aluminum Corporation, filed amicus curiae briefs urging repeal of the intra-enterprise conspiracy doctrine. In support of the respondent, Independence Tube Corp., 31 states and the District of Columbia urged the Court to adopt a modified version of the doctrine which comports substantially with the standard suggested in this Comment.

7. Calling it a "weird concept," Professor Handler has been a principle advocate of repealing the intra-enterprise conspiracy doctrine. *See* Handler, *Twenty-Five Years of Antitrust,* 73 COLUM. L. REV. 415, 452 (1973); Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review,* 57 CALIF. L. REV. 182 (1969) [hereinafter cited as Handler, *Antitrust Looking Glass*]; Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 CARDOZO L. REV. 23 (1981); Handler, *Annual Review of Antitrust Developments,* 10 THE RECORD 332 (1955); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review,* 76 YALE L.J. 92 (1966); *see also* Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy,* 23 MONT. L. REV. 158, 199 (1962) (supporting a more limited view of the doctrine that would evaluate the nature of the undertaking, but refusing to allow corporations to "erect technical and artificial barriers in an effort to furnish immunity"); Kempf, *Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?,* 24 BUS. LAW. 173 (1968) (finding the doctrine unnecessary, while counseling that it may be disregarded unless coercion

basis for a multitude of antitrust actions[8] raising the often devastating potential for treble damage awards,[9] this doctrine is clearly no mere academic problem.

A literal reading of section 1 appears to prohibit every combination in restraint of trade. Nonetheless, courts have recognized that a corporation can act only through its employees. Thus, it is generally agreed that a corporation cannot conspire with its directors,[10] officers,[11] or agents,[12] unless

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of outsiders is involved); McQuade, *Conspiracy, Multicorporate Enterprises and Section 1 of the Sherman Act,* 41 VA. L. REV. 183, 216 (1955) (asserting that there is "no place" in the Sherman Act for the doctrine as it provides "no logical stopping point"); Rahl, *Conspiracy and the Antitrust Laws,* 44 ILL. L. REV. 743, 767-68 (1950) (emphasizing the "senseless distinctions" of the doctrine for the vertically integrated enterprise, while leaving open application of it to the conglomerate enterprise until more economic data reflect the potential coercive power of conglomerate affiliates); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act,* 35 MISS. L.J. 5, 27 (1963) (likening a section 1 violation in the intra-enterprise context to "condemning the bi-sexual oyster for incest"); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries,* 42 N.Y.U. L. REV. 20 (1968) (suggesting that section 1 liability attach only when subsidiaries publicly adopt a competitive posture or are used for the specific purpose of achieving an anticompetitive result); Comment, *All in the Family: When Will Internal Discussion Be Labelled Intra-Enterprise Conspiracy?,* 14 DUQ. L. REV. 63 (1975) (summarizing academic discussion and concluding that the doctrine should be limited by exempting enterprises owned and operated by a single individual, refusing to apply per se rules in the related firm context, and applying section 1 to noncompeting affiliates only when formed with the specific intent to restrain trade) [hereinafter cited as Comment, *All in the Family*]; Comment, *Intra-Enterprise Conspiracy Under the Sherman Act,* 63 YALE L.J. 372 (1954) (concluding that the crucial question for liability is whether third-party trade was restrained; if merely internal trade, then concerted activity should not violate section 1) [hereinafter cited as Comment, *Intra-Enterprise Conspiracy*]; Note, *"Conspiring Entities" Under Section 1 of the Sherman Act,* 95 HARV. L. REV. 661 (1982) (recommending complete abrogation of the doctrine because it is inconsistent with antitrust goals and because it encourages firms to select less efficient and more centralized structures) [hereinafter cited as Note, *Conspiring Entities*]; Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard,* 75 MICH. L. REV. 717 (1977) (suggesting that the doctrine be limited to situations in which the parent firm controls the day-to-day operations of its subsidiaries) [hereinafter cited as Note, *Suggested Standard*].

8. More than 190 cases have, in one way or another, dealt with the intra-enterprise conspiracy doctrine. *See* Appellant's Petition for Writ of Certiorari at app. H., Copperweld Corp. v. Independence Tube Corp., 691 F.2d 310 (7th Cir. 1982) (compendium of decisions), *cert. granted,* 103 S. Ct. 3109 (1983).

9. Under § 4 of the Clayton Act, private litigants may receive damages in an amount equal to three times actual damages for injuries caused by a violation of the antitrust laws. Clayton Act § 4, 15 U.S.C. § 15 (1982).

10. *See, e.g.,* United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970) (although member of board of directors was held personally liable for conspiracy to fix prices with competitors in plumbing fixtures market, no conspiracy was found between director and employer firm), *cert. denied,* 401 U.S. 948 (1971).

11. Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960) (president and sole shareholder could not conspire with the president's corporation); Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808 (E.D. Pa. 1975) (corporation could not conspire with its president); GAF Corp. v. Circle Floor Co., 329 F. Supp. 823 (S.D.N.Y. 1971) (chairman of the board and major shareholders are insufficient plurality to constitute conspiracy), *aff'd,* 463 F.2d 752 (2d Cir. 1972), *cert. denied,* 413 U.S. 901 (1973).

12. For cases discussing types of agents that are unable to conspire with a corporation,

such individuals perform the challenged acts for personal gain.[13] Most courts further agree that a corporation cannot conspire with its unincorporated divisions,[14] because such divisions are absorbed into the legal status of their parent; stated differently, a corporation cannot conspire with itself.

Incorporated subsidiaries, however, whether wholly or partially owned, enjoy a separate legal existence from their parent and other affiliated corporations.[15] As a result, incorporated subsidiaries are treated as distinct

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see Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979) (general agents of insurance company); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d Cir.) (general brokers), *cert. denied,* 444 U.S. 917 (1979); Miller v. International Dairy Queen, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,593 (D. Minn. 1979) (manufacturing agent); Cory Food Serv., Inc. v. United Vending Serv., Inc., 1976-2 Trade Cas. (CCH) ¶ 61,068 (D. Utah 1976) (former employee of competitor); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975) (non-lessee service station operator), *aff'd,* 554 F.2d 623 (4th Cir.), *cert. denied,* 434 U.S. 923 (1977); Freeman v. Eastman-Whipstock, Inc., 390 F. Supp. 685 (S.D. Tex. 1975) (common employee of two corporations); Goldinger v. Boron Oil Co., 375 F. Supp. 400 (W.D. Pa. 1974) (non-lessee service station operator), *aff'd mem.,* 511 F.2d 1393 (3d Cir.), *cert. denied,* 423 U.S. 834 (1975); Herren Candy Co. v. Curtiss Candy Co., 153 F. Supp. 751 (N.D. Ga. 1957) (route salesman).

13. *See* H & B Equip. Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953); Wahl v. Rexnord, Inc., 481 F. Supp. 573 (D.N.J. 1979); Tapeswitch Corp. of Am. v. Recora Co., 1977-2 Trade Cas. (CCH) ¶ 61,584 (N.D. Ill. 1977); *see also* Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974) (exceptions to general rule of incapacity to conspire beween corporation and officers justified when officer has an independent personal stake in achieving the corporation's illegal objective).

Nelson is the seminal case for the proposition that since a corporation can only act through its agents, there can be no conspiracy between the corporation and its agents. The *Nelson* court declared that 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, and it is the general rule that the acts of the agent are the acts of the corporation." 200 F.2d at 914.

14. *See, e.g.,* H & B Equip. Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978) (unincorporated company store bearing parent's name unable to conspire with parent); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978) (four unincorporated producing divisions of same parent could not conspire), *cert. denied,* 440 U.S. 939 (1979); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969) (unincorporated grocery store division incapable of conspiring with grocery chain parent).

In the leading case of Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970), the court of appeals reversed a widely criticized district court decision which held that a corporation and its unincorporated divisions, acting alone, could constitute the requisite plurality of actors to form a conspiracy. The Ninth Circuit concluded that "if the doctrine of intra-corporate conspiracy is accepted, there is no logical or practical way to avoid holding that all intra-corporate agreements are or may be found to be conspiracies in restraint of trade." *Id.* at 84; *cf.* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 469 n.4 (1962) (declining to decide whether a corporation could conspire with its allegedly autonomous unincorporated divisions since an independent third party supplied the requisite plurality).

15. The concept of a corporation as a separate entity has been expressed in the following manner:

> The corporation is endowed with "legal entity." It is an artificial person in the eyes of the law, separate from the persons of any shareholders, and as such can make contracts, incur debts, sue and be sued in the courts, and perform such other

entities in many areas of the law.[16] For purposes of section 1 analysis, the Supreme Court has consistently held that common ownership and control will not liberate corporations from the impact of section 1.[17] Accordingly,

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> legally controlled commercial acts as a natural person might be entitled to do. It can do all of these things in its own name, without the direct participation of any or all of the shareholding owners.

J. BAIN, INDUSTRIAL ORGANIZATION 65 (2d ed. 1968). It has also been noted that "[t]he private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships.*" Jensen & Meckling, *Theory of the Firm: Managerial, Agency Costs and Ownership Structure,* 3 J. FIN. & ECON. 305, 311 (1976) (emphasis in original).

16. The respondent's brief in the *Copperweld* case detailed the various areas of the law in which incorporated subsidiaries are considered distinct from their parent companies: taxation, labor, ownership of securities, bankruptcy, contract liability, jurisdiction and venue, service of process, indispensible parties, standing, judgments, and garnishment. Brief for Respondent at 42-43 n.34, Copperweld Corp. v. Independence Tube Corp., *cert. granted,* 103 S. Ct. 3109 (1983). For cases in which taxation served as a basis for distinguishing incorporated subsidiaries from the parent corporation, see F.W. Woolworth Co. v. Taxation and Revenue Dep't, 102 S. Ct. 3128, 3134 (1982) (autonomous operation of parent and wholly-owned subsidiary prevented taxing the corporations as single enterprise); *In re* Chrome Plate, Inc., 614 F.2d 990, 996 (5th Cir.) (parent and wholly-owned subsidiary separate taxable entities despite filing consolidated tax returns), *cert. denied,* 449 U.S. 842 (1980). For a case involving labor law, see United Paperworks v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978) (parent not bound by collective bargaining agreement between wholly-owned subsidiary and union). For a case dealing with ownership of securities, see Engel v. Teleprompter Corp., 703 F.2d 127, 134 (5th Cir. 1983) (stock acquired by wholly-owned subsidiary is not that of the parent corporation). For a case focusing on bankruptcy, see *In re* Gibraltor Amusements, Ltd., 291 F.2d 22 (2d Cir.) (parent and wholly-owned subsidiary are separate creditors under the Bankruptcy Act), *cert. denied,* 368 U.S. 925 (1961). For a case involving contract liability, see CM Corp. v. Oberer Dev. Co., 631 F.2d 536, 538 (7th Cir. 1980) (stock ownership, shared directors, and other formal indicia of affiliation not sufficient to impose liability on parent for breach of subsidiary). Courts often distinguish between a parent and a subsidiary in jurisdiction and venue. *See, e.g.,* Hargrave v. Fireboard Corp., 710 F.2d 1154, 1160 (5th Cir. 1983) (court must consider "[a]ll the relevant facts and circumstances surrounding the operations of the parents and subsidiary"); Quarles v. Fuqua Indus., Inc., 504 F.2d 1358, 1364 (10th Cir. 1974) (a parent's "exercise of, not the opportunity to exercise, control is determinative"). Similarly, courts distinguish parents from their subsidiaries for purposes of service of process. *See, e.g.,* Stoehr v. American Honda Motor Co., 429 F. Supp. 763, 766 (D. Neb. 1977) (service on subsidiary is not service on parent despite total ownership and common officers and directors because no exercise of control). For a case involving indispensible parties under FED. R. CIV. P. 19, see Glenny v. American Metal Climax, Inc., 494 F.2d 651 (10th Cir. 1974) (wholly-owned subsidiary held to be an indispensible party in action brought against parent corporation). For a case dealing with standing, see Alcan Aluminum, Ltd. v. Franchise Tax Bd., 558 F. Supp. 624, 627 (S.D.N.Y. 1983) (parent corporation does not have standing to challenge wholly-owned subsidiary's tax liability). For a case in which judgments served as a basis for distinction, see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-12 (1969) (judgment against wholly-owned subsidiary does not bind parent). For a case involving garnishment, see Dunn v. Printing Corp., 245 F. Supp. 875 (E.D. Pa. 1965) (property of wholly-owned subsidiary is not the property of parent subject to garnishment).

17. The theoretical foundation for the intra-enterprise conspiracy doctrine rests principally in the following four Supreme Court decisions: Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947). For a discussion of these cases, see *infra* notes 46-64 and accompanying text.

it has been possible for a section 1 conspiracy to be committed by an incorporated subsidiary and its parent.

This notion of an intra-enterprise conspiracy[18] is the subject of great debate. On one extreme are those who believe that, as a matter of law, a parent and its wholly-owned subsidiary cannot conspire because they are necessarily a single enterprise.[19] Conversely, those on the other extreme believe that the mere fact of separate incorporation is enough to find the plurality of actors needed for a section 1 conspiracy.[20] Amidst this dispute lie subtle distinc-

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18. Writers have labeled conspiracies among related firms a number of ways. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (1st Cir. 1974) ("thin"); Adelman, *Integration and Antitrust Policy,* 63 HARV. L. REV. 27, 51 (1949) ("corporate self-abuse"); Handler & Smart, *supra* note 7, at 23 ("intra-corporate"); Kempf, *supra* note 7, at 173 ("bathtub"); Wilberding, *An Ominious Warning for Antitrust Law: The Disposition of the "Bathtub" Conspiracy—As Applied to Unincorporated Divisions—May Have Left a Tell-Tale Ring Around the Tub,* 32 OHIO ST. L.J. 43, 45 (1971) ("bathtub"); Comment, *Corporate Liability for Intra-Corporate Conspiracy in Restraint of Trade,* 1968 U. ILL. L.F. 248, 248 ("intra-corporate"). This Comment uses the term *intra-enterprise conspiracy* to refer only to alleged agreements between related, but separately incorporated, firms. Further, this Comment assumes that the subsidiaries involved in the alleged conspiracy are either wholly or substantially owned by the parent corporation. When subsidiaries are only substantially owned, it is further assumed that minority shareholders own stock only for investment purposes. Implicit in this assumption is that partially-owned corporations normally operate independently of minority stockholders and can even compete with minority affiliates. Other commentators have made similar assumptions. *See* Barndt, *supra* note 7, at 188; Note, *Conspiring Entities, supra* note 7, at 662 n.6; Note, *Suggested Standard, supra* note 7, at 717 n.3. This Comment vehemently opposes adoption of specific percentages of ownership as a means for determining section 1 liability. *See infra* note 206. *But see* Handler & Smart, *supra* note 7, at 30 (suggesting immunity to section 1 liability for related firms where parent maintains majority stock ownership).

19. *See* Handler & Smart, *supra* note 7; McQuade, *supra* note 7; Stengel, *supra* note 7; Note, *Conspiring Entities, supra* note 7. Some critics observe that there is little difference between a division that cannot conspire with its parent and a subsidiary that can. *See, e.g.,* Handler & Smart, *supra* note 7, at 72 (noting that attempts to distinguish between unincorporated divisions and corporate subsidiaries "exalts form over substance without providing any countervailing antitrust benefits"). Further, it has been argued that application of section 1 to incorporated subsidiaries unduly penalizes legitimate choices of corporate form. *See, e.g.,* P. AREEDA, ANTITRUST ANALYSIS 399-400 (3d ed. 1981). Areeda declares, "The business, tax, social or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." *Id.; see also* McQuade, *supra* note 7, at 183 ("the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units"). Thus, some courts and commentators have attempted to restrict the intra-enterprise conspiracy doctrine to situations that more accurately reflect the reality of corporate autonomy. *See infra* notes 142-90 and accompanying text; Note, *Suggested Standard, supra* note 7.

20. *See, e.g.,* Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33-34 & n.49 (3d Cir.) (despite showing that subsidiary was merely the vertical sales arm of its parent, plurality of actors was present), *cert. denied,* 439 U.S. 876 (1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244-45 (5th Cir. 1978) (parent firm and its leasing subsidiary capable of conspiracy); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., 508 F.2d 547, 557 (1st Cir. 1974) (capacity to conspire found notwithstanding evidence of vertical corporate interrelationship among affiliated swimming pool recirculation system firms). *But cf.* White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982) (affirming summary judgment in

tions that rest on the particular facts and circumstances of the often complex scenarios found in antitrust litigation.[21]

In short, a definitive pronouncement as to what constitutes distinct and separate entities is sorely needed. In enunciating a proper standard, the Supreme Court must be wary of adopting an interpretation that would render section 1 impotent to prevent unreasonable, anticompetitive restraints of trade by affiliated corporations. To hold that a parent firm lacks the capacity, under any circumstances, to conspire with its subsidiary, would eviscerate section 1 and allow significant anticompetitive conduct to hide behind the corporate shield.

This Comment asserts that the intra-enterprise conspiracy doctrine should be limited to situations in which (1) the affiliated corporations function as distinct economic units; and (2) the affiliated corporations' concerted efforts are directed toward restraining the trade of unrelated third parties. When corporations are functionally nondistinct, or when agreements between the related firms concern internal policy with only secondary effects on third parties, section 1 should be inapplicable. Nevertheless, when two functionally distinct corporations combine the leverage of their separate business relationships to restrain the trade of unrelated third parties, corporate form should not preclude section 1 liability. Courts should not allow form to prevail over substance by blindly exempting affiliated corporations' conduct from the reach of section 1. Rather, courts should undertake a preliminary factual inquiry to determine whether treating the affiliated firms as distinct entities is sensible.

It is essential to note that this inquiry is only a prelude to section 1 analysis. Merely because firms have the capacity to conspire does not mean that the challenged activity is the result of joint conduct. A parent corporation may dictate its orders to a subsidiary, or a subsidiary may restrain trade without waiting for its parent's agreement. Further, a finding of capacity to conspire is not proof of a section 1 violation. The Supreme Court has interpreted the Sherman Act to prohibit only those combinations that unreasonably restrain trade.[22] Thus, once capacity to conspire is found to exist, the

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favor of newspaper and its wholly-owned distribution subsidiary because appellants failed to allege specific conspirators); Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094-95 & n.1 (3d Cir. 1972) (per curiam) (dictum in footnote found lack of plurality from evidence that the related firms did not hold themselves out as competitors).

21. For a typical weighing of the various factors used to determine whether subsidiaries are separate units capable of violating section 1, see Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982), *cert. granted,* 103 S. Ct. 3109 (1983). In that case, the court of appeals considered the following:

> [T]he extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.

Id. at 318 (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977)).

22. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

section 1 analysis proceeds to determine whether there was a restraint of trade and whether that restraint was unreasonable. Firms need not worry about section 1 liability unless they have unreasonably restrained trade. In this light, the intra-enterprise conspiracy doctrine becomes a useful tool to promote—not hinder—robust competition.

This Comment's suggested limitation on the intra-enterprise conspiracy doctrine comports with antitrust objectives identified in legislative history, judicial precedent, and economic reality. By tracing the Supreme Court origins of this doctrine, this Comment will analyze its present status in the lower courts and reveal the inadequacy of alternative methods to reach unreasonable restraints of trade by affiliated corporations. Finally, an examination of the suggested standard as applied to various scenarios will illustrate its utility to the bar, bench, and business community.

SECTION 1: LEGISLATIVE INTENT AND JUDICIAL INTERPRETATION

Whether affiliated corporations are capable of engaging in a section 1 conspiracy should depend upon a consideration of the Sherman Act's legislative history and, particularly, a consideration of "the particular evils at which the legislation was aimed."[23] A review of the Act's history and interpretation reveals that it was aimed not at form, but at reaching underlying restraints of trade. That review also indicates that the Act's framers intended that any corporation, regardless of its affiliated nature, be considered distinct and, therefore, subject to section 1 liability.

The Sherman Act was enacted in response to the accelerated concentration of wealth and industry during the Industrial Revolution.[24] Laissez-faire capitalism had resulted in enormous aggregations of power, and Congress responded by adopting the Sherman Act, which totally prohibited combina-

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23. Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940). In this case, the Supreme Court recognized:

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that the courts should interpret its word in light of the legislative history and of the particular evils at which the legislation was aimed.

Id. (footnotes & citations omitted).

24. Senator Sherman, who helped draft the original bill and provided a major impetus behind the Sherman Act, made the following observations:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.

CONG. REC. 2,460 (1890) (statement of Sen. Sherman). The legislative history of the Sherman Act can also be found in E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978).

tions in restraint of trade.[25] Nevertheless, some members of Congress did not consider these combinations to be inherently evil. As Senator Sherman explained:

> I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objects; but when they combine with a purpose to prevent competition, so that if a humble man starts a business in opposition to them . . . they will crowd him down . . . and when that is established by evidence that can not be questioned, then it is the duty of the courts to intervene and prevent it by injunction and by the ordinary remedial rights afforded by the courts.[26]

Essentially, section 1 of the Act was intended to preserve competition by prohibiting combinations that restrict competition between business units that otherwise would compete, and by prohibiting concerted efforts to restrict competitive opportunity or the commercial freedom of others.[27] Accordingly, Senator Sherman's original bill explicitly condemned "all arrangements, contracts, agreements, trusts, or combinations *between persons or corporations* made with a view . . . to prevent full and free competition. . . ."[28] In defending his bill on jurisdictional grounds, Senator Sherman viewed corporations as "distinct and separate personalities. . . ."[29] Moreover, as Senator Teller declared, "Each corporation is a creature by itself."[30] Finally, upon revision of the bill, the Senate Judiciary Committee changed the phraseology to its present form, but inserted section 8 to make it clear that "the term 'person' was intended to apply to corporations."[31]

After passage of the Sherman Act, the Court interpreted its legislative purpose to be the prohibition of combinations that unreasonably restrict competitive conditions.[32] In an often quoted passage from *Northern Pacific Railway v. United States,*[33] the Supreme Court declared that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition."[34] Nevertheless, competition was not given the free-wheeling mandate of nineteenth-century laissez-

25. The Sherman Act "was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911).

26. 21 CONG. REC. 2,569 (1890) (statement of Sen. Sherman).

27. Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911); *see also* Weston, *The Application of the Sherman Act to "Integrated" and "Loose" Industrial Combinations,* 7 LAW & CONTEMP. PROBS. 42, 51 (1940) (distinguishing "self-imposed" restraints between two or more persons and "coercive" restraints by common action against third persons).

28. S. 3445, 50th Cong., 1st Sess. (1888) (emphasis added).

29. E. KINTNER, *supra* note 24, at 23 n.1.150. Section 8 of the Sherman Act provides that "[t]he word 'person' shall be deemed to include corporations. . . ." 15 U.S.C. § 7 (1976).

30. 21 CONG. REC. 2571 (1890) (statement of Sen. Teller) (referring to the affiliated corporations in the Standard Oil Trust).

31. *Id.* at 2,464 (1890) (statement of Sen. Sherman).

32. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

33. 356 U.S. 1 (1958).

34. *Id.* at 4.

faire ideology. Accordingly, the Supreme Court has noted that a fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public from monopolistic and conspiratorial attempts to distort market forces.[35]

While recognizing the goals of the Sherman Act, the Court has maintained that the form of a party's enterprise could not serve as a shield from Sherman Act liability. For example, in *Appalachian Coals v. United States,*[36] the Court declared that the Act "does not go into detailed definitions which might work either injury to legitimate enterprise or through particularization defeat its purposes by providing loop holes for escape."[37] Instead, the Act called for "vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce. . . ."[38] As one antitrust scholar has concluded, Congress intended the Act to be flexible to preclude "restrainers of trade" from finding "subterfuge behind new forms of combinations or methods. What mattered was whether trade *was restrained.*"[39] Hence, legislative history and judical interpretation reflect a cognizance of the corporation as a distinct entity for purposes of section 1 liability and an emphasis on the anticompetitive effects of concerted actions, regardless of whether the actors are affiliated corporations.

FORMULATION OF THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE

In 1941, the Seventh Circuit decided *United States v. General Motors Corp.,*[40] the first case to support expansive judicial authority to reach anticompetitive conduct by affiliated corporations under section 1. That case involved General Motors (GM) and three of its wholly-owned subsidiaries: GM Sales, GM Acceptance Corporation (GMAC), and GMAC of Indiana. These subsidiaries were convicted of violating section 1 because they coordinated tying agreements to coerce individual GM dealers to finance purchases through GM, and because they forced customers to finance their purchases through GMAC.[41] The asserted coercive efforts included acceptance of GMAC as a condition precedent to franchising a new dealership, threats

35. *See* Charles A. Ramsay Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923) ("The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through . . . combinations in restraint of trade.").

36. 288 U.S. 344 (1933).

37. *Id.* at 360. The Court further emphasized its disdain for legal niceties in Northern Securities Co. v. United States, 193 U.S. 197 (1904), by explaining that the Act "does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and *whoever may be parties to it,* which directly or necessarily operates in restraint of trade. . . ." *Id.* at 331 (emphasis added).

38. Appalachian Coals v. United States, 288 U.S. 344, 360 (1933).

39. H. THORELLI, THE FEDERAL ANTITRUST POLICY 229 (1955) (emphasis in original).

40. 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618 (1941).

41. *Id.* at 412.

of franchise cancellation, delays in delivery, and shipment of nonconforming goods.[42]

GM argued that the corporations were essentially a single enterprise and, thus, did not have the capacity to conspire.[43] Disagreeing, the court declared that by accepting the benefits of separate incorporation, GM could no longer escape liability under the Sherman Act.[44] The Seventh Circuit reasoned that a violation of section 1 hinged not so much on the form of the corporate relationship as it did on the presence or absence of a restraint of trade.[45]

Six years later, the Supreme Court closely parallelled the Seventh Circuit's *General Motors* opinion when it addressed the issue of affiliated corporations' capacity to conspire under section 1. In *United States v. Yellow Cab,*[46] the government claimed that the defendants violated sections 1 and 2 of the Sherman Act by conspiring to restrain and monopolize interstate trade in selling taxicabs in Chicago, Pittsburgh, New York, and Minneapolis, and in providing cab services in the Chicago area.[47] Reversing the district court's dismissal, the *Yellow Cab* Court stressed that Sherman Act liability depended on the presence of an unreasonable restraint of trade, not on corporate interrelationships.[48] Thus, the affiliated nature of the various cab companies was not an impediment to finding a conspiracy in *Yellow Cab.*

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42. *Id.* at 392-97.

43. *Id.* at 404.

44. The Seventh Circuit stated:

> [T]he appellants [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. *The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence of restraint of trade and commerce.*

Id. (emphasis added).

Some commentators have suggested that the italicized portion of the preceding quote is an erroneous interpretation of the law which, if taken literally, would subject commonplace decisions of cooperative pricing and market allocation between the parent and subsidiary to per se illegality under section 1. *See* Handler & Smart, *supra* note 7, at 27; McQuade, *supra* note 7, at 191; Stengel, *supra* note 7, at 11. Yet this view represents a strained construction of the Seventh Circuit's holding. At face value, the holding reflects more concern over the evils of restraints on trade than over the technical niceties of corporate organization—hardly a novel idea in antitrust law.

45. 121 F.2d at 404.

46. 332 U.S. 218 (1947).

47. *Id.* at 220. The complaint alleged that one stockholder who originally owned a taxicab manufacturing company, and his associates who jointly held controlling interests of varied amounts in five affiliated corporations, were requiring their companies to purchase taxicabs from the manufacturing affiliate. *Id.* at 220-24.

48. The Court declared that "any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships . . . are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form." *Id.* at 227.

Once again, commentators have sought to avoid the rather explicit language of *Yellow Cab. See, e.g.,* Handler & Smart, *supra* note 7, at 29 ("the opinion stands for the proposition that a series of acquisitions, if they result in an unreasonable restraint of trade, may constitute a violation of section 1"); Kempf, *supra* note 7, at 175 (*Yellow Cab* means that section 1

In 1951, the Court solidified this expansive intra-enterprise conspiracy doctrine in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons.*[49] In *Kiefer-Stewart,* a wholesale druggist brought a private treble damage action against Seagram and Calvert, two wholly-owned subsidiaries of Distiller Corporation Seagram, Ltd., of Canada (Distiller). The plaintiff charged that the Distiller subsidiaries pursued a policy of limiting liquor sales to those wholesalers who would resell at prices fixed by Seagram and Calvert.[50] The Court, in a majority opinion authored by Justice Black, rejected the defendants' argument that their status as mere instrumentalities of a single manufacturing-merchandising unit made it impossible for them to conspire within the meaning of section 1.[51] Citing *Yellow Cab,* the Court found that the defendants' contention "runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws."[52] In so doing, the *Kiefer-Stewart* decision reiterated the Court's reluctance to allow related firms to gain exemption from section 1 liability.

That same term, the Court issued another opinion that is significant to the intra-enterprise conspiracy doctrine. *Timken Roller Bearing Co. v. United States*[53] affirmed a district court holding that a domestic corporation conspired with two of its foreign affiliated corporations to restrain trade in the manufacture and sale of antifriction bearings.[54] In *Timken,* the United States brought suit against a domestic corporation (American Timken), alleging a conspiracy between American Timken, British Timken, Ltd. (British Timken), and Societe Anonyme Francaise Timken (French Timken) to eliminate competition in the world market for the antifriction bearings.[55] As affirmed by the Supreme Court, the district court found[56] that the affiliated corporations had engaged in a series of comprehensive agreements dating back to 1909 to divide markets, to fix prices of products of one corporation sold in the territory of the others, to cooperate to protect their markets and eliminate outside competition, and to participate in cartels to restrict American

is transgressed when disparate owners form a parent to effectuate a preconceived objective to restrain trade); Willis & Pitofsky, *supra* note 7, at 40 (interpreting *Yellow Cab* to mean that otherwise lawful business practices may violate the antitrust laws when undertaken for the purpose of monopolizing). While the commentators note that at times the Court appeared to be referring to section 2's prohibition against conspiracies to monopolize, rather than the more lenient section 1 which rarely requires anticompetitive intent, the language concerning the capacity of affiliated corporations to conspire is unavoidably explicit.

49. 340 U.S. 211 (1951).

50. *Id.* at 212.

51. *Id.* at 215.

52. *Id.* As with *General Motors* and *Yellow Cab,* commentators have sought to avoid the plain language of the *Kiefer-Stewart* opinion. *See, e.g.,* Willis & Pitofsky, *supra* note 7, at 45 (finding third-party wholesaler in *Kiefer-Stewart* to supply the needed plurality of actors). Yet, not even Professor Handler can agree that the intra-enterprise conspiracy issue was unnecessary to reach the *Kiefer-Stewart* result. *See* Handler & Smart, *supra* note 7, at 31.

53. 341 U.S. 593 (1951).

54. *Id.* at 605.

55. *Id.* at 596.

56. *See* United States v. Timken Roller Bearing Co., 185 F. Supp. 284, 287 (N.D. Ohio 1949).

imports and exports.[57] In rejecting the defendants' contention that they were merely operating a single enterprise, the *Timken* Court relied on *Kiefer-Stewart* for the proposition that corporations are not liberated from the impact of the antitrust laws as a result of their common ownership or control.[58] Further, the Court was not persuaded by the defendants' argument that the agreements escaped liability because they were only part of a joint venture. The Court reasoned that any combination between separately incorporated firms could probably be labeled a "joint venture."[59]

Nevertheless, the defendants' arguments in *Timken* did not go completely unnoticed. Justice Reed, in a concurring opinion joined by Chief Justice Vinson, admitted the "strange" result of finding a conspiracy between affiliated corporations in foreign markets.[60] Yet, Justice Reed acknowledged that to hold otherwise "would open wide the doors for violation of the Sherman Act at home and in foreign fields."[61]

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57. 341 U.S. at 595-96. The *Timken* Court traced the historical and legal relationships among the affiliated corporations. Control in the affiliated firms varied. Originally, American Timken and an English businessman named Dewar purchased the stock of British Timken. After British Timken sold some of its stock to the public, American Timken's shares were diluted to 30% and Dewar's to 24%. American Timken and Dewar then organized French Timken and divided the stock equally between them. Dewar died while appeal of the case was pending, leaving American Timken with an option to purchase his stock in British and French Timken. If exercised, the option would have brought American Timken's control to 54% of British Timken and 100% of French Timken. *Id.* Thus, American Timken had potential and effective control over the related firms.

58. *Id.* at 597-98. The Court reasoned that merely labeling an agreement as a "joint venture" could not remove its trade restraining characteristics. *Id.* at 598.

59. *Id.* at 598.

60. *Id.* at 601-02 (Reed, J., concurring).

61. *Id.* (Reed, J., concurring). Justice Jackson, in a dissenting opinion, found the characteristics of foreign markets to warrant special consideration. *Id.* at 606-08 (Jackson, J., dissenting). Justice Jackson noted that many forms of trade restraints already existed in foreign markets. *Id.* at 607 (Jackson, J., dissenting). Moreover, he argued that many foreign governments restrict business operations on their soil unless they become separately incorporated; accordingly, it was unfair to attach too much weight to labels. *Id.* (Jackson, J., dissenting). In sum, Justice Jackson found application of the intra-enterprise conspiracy doctrine to be equitable in domestic markets, while its application in foreign markets failed to recognize the complexity of the many legal and economic factors comprising the decision to incorporate foreign subsidiaries separately. *Id.* at 608 (Jackson, J., dissenting).

Under the Sherman Act, there are special considerations for foreign subsidiaries. For example, the *Alcoa* doctrine provides that conspiratorial efforts involving foreign operations must have an effect on trade within the United States before section 1 will be applied. United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945). For Supreme Court cases utilizing the effects test, see Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. American Tobacco Co., 221 U.S. 106 (1911). Furthermore, in its guide for international operations, the Justice Department has endorsed a more restrictive view of the intra-enterprise doctrine. *See* ANTITRUST DIV., U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977). According to that guide, the Antitrust Division will attack only "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." *Id.* at 12 n.26. This view substantially comports with the second prong of this Comment's suggested standard, which recommends application of section 1 when related firms are distinct economic units and their conduct is directed toward

The doctrine lay dormant until 1968, when the Court reiterated its support for an expansive intra-enterprise conspiracy doctrine in *Perma Life Mufflers, Inc. v. International Parts Corp.*[62] In *Perma Life,* the Court reversed a summary judgment against a franchisor (Midas) and its parent (International) for alleged restraints imposed on Midas franchisees in violation of section 1.[63] The petitioners, operators of "Midas Muffler Shops," attacked provisions of their sales agreement with Midas which, among other things, mandated exclusive purchasing from Midas and placed territorial restrictions upon the franchisees.[64] The district court had rejected the petitioners' private treble damage action against Midas, International, two other subsidiaries, and various corporate officers and agents.[65] The court of appeals, however, while reversing the judgment on other antitrust grounds, held that the petitioners' Sherman Act claim was barred because Midas and International were part of a single business entity and, therefore, were entitled to cooperate without creating a conspiracy.[66]

The Supreme Court, in another majority opinion written by Justice Black, reversed the Seventh Circuit's *Perma Life* holding with respect to the Sherman Act claim.[67] In its most explicit and sweeping endorsement of the intra-enterprise conspiracy doctrine, the Court suggested that separate incorporation in itself is reason enough to treat affiliated corporations as distinct entities capable of conspiring under section 1.[68] The *Perma Life* Court noted that Midas and International received the benefits of separate incorporation and, thus, were bound to accept its accompanying responsibilities.[69] The Court bolstered its holding by stating that alternative theories of conspiracy equally supported a finding of liability.[70] Consequently, some scholars believe that

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restraining the trade of unrelated third parties. *See infra* notes 195-218 and accompanying text. Interestingly, a European scholar recently endorsed a similar view with respect to the conspiracy requirement for the competition policy embodied in Article 85 of the Rome Treaty, the European Economic Community's founding charter. *See infra* note 132. For more exhaustive analysis of the antitrust consequence of using foreign subsidiaries, see K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (3d ed. 1982); E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER (1974).

62. 392 U.S. 134 (1968).

63. *Id.* at 135. Professor Handler has pointed out that Midas, a wholly-owned subsidiary of International, was a family controlled corporate venture that was wholly owned by a father and son. *See* Handler, *Antitrust Looking Glass, supra* note 7, at 184.

64. 392 U.S. at 135. The complaint also alleged retail price fixing and tying arrangements for Midas-related products. *Id.*

65. *Id.* at 135-36.

66. 376 F.2d 692, 699 (7th Cir. 1967), *rev'd,* 392 U.S. 134 (1968).

67. 392 U.S. at 142.

68. The Court declared, "But since respondents Midas and International availed themselves of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Id.* at 141-42 (citing *Timken* and *Yellow Cab*).

69. *Id.*

70. The Court observed that "[i]n any event each petitioner can clearly charge a combination between Midas and himself . . . or between Midas and other franchise dealers. . . ." *Id.* at 142 (citations omitted).

the precedential value of *Perma Life* is suspect because the basis for the Court's decision is unclear.[71] Yet, the Court's pronouncements in *Perma Life, Yellow Cab, Kiefer-Stewart,* and *Timken* are unequivocal. Viewed in the aggregate, these cases irrefutably proclaim that a parent firm and its separately incorporated subsidiaries, or affiliated corporations, have the capacity to conspire under section 1 of the Sherman Act.

The far-reaching scope of these pronouncements has dangerous implications; if a literal meaning is given to the Court's words, all cooperation beween affiliated corporations is exposed to section 1 liability. Because many agreements among related firms can affect trade, of either the related firms themselves or of third parties, there is a vast potential for spurious lawsuits alleging section 1 violations by affiliated corporations. As a result, lower courts and commentators have suggested more limited approaches to the intra-enterprise conspiracy doctrine.

Lower Court Restrictions

The lower courts have struggled in applying the broad language of the Supreme Court decisions establishing the intra-enterprise conspiracy doctrine. Consequently, they have issued widely divergent opinions that have, in themselves, been harmful to antitrust concerns.[72] The uncertainty and con-

71. *See, e.g.,* Handler & Smart, *supra* note 7, at 33. Subsequent Supreme Court decisions reinforce a more modified version of the intra-enterprise conspiracy doctrine. For instance, in Sunkist Growers, Inc. v. Winkler & Smith Citrus Prod. Co., 370 U.S. 19 (1962), the Court examined the reach of the Capper-Volstead agricultural exemption from the antitrust laws. *Sunkist Growers* involved a section 1 claim against agricultural cooperatives. Upon examining the economic reality of the combination, the Court found no indication that the use of separate corporations had economic significance in itself, or that outsiders considered and dealt with the agricultural entities as independent organizations. *Id.* at 29. The Court stated that, in the context of the agricultural exemption, "grave legal consequences [should not rest] upon organizational distinctions that are of *de minimis* meaning and effect." *Id.* It therefore appears logical that the Court would be willing to impose legal consequences when the use of separate corporations does have economic significance. In any event, *Sunkist Growers* reflects the Court's willingness to consider the operational realities of corporate structure.

The Court similarly considered the economic reality of organizational structure in United States v. Citizens & So. Nat'l Bank, 422 U.S. 86 (1975). In *Citizens & Southern,* the Court was faced with a § 1 conspiracy claim brought by the United States against a large bank and a group of de facto branch banks, which it had established with five percent ownership. Once again, the Court reiterated its well-established view that corporate "interrelationships . . . are not determinative of the applicability of the Sherman Act." *Id.* at 116 (quoting *Yellow Cab,* 332 U.S. 218, 227 (1947)). Nevertheless, the Court considered the economic reality of the corporate relationships and the alleged activities. Based on this examination, the Court reasoned that the challenged conduct related only to internal management of the correspondent branches and, because the banks were not independent competitors, the Court was unwilling to penalize such necessary cooperation. *Id.* at 117-18. Thus, while neither *Sunkist Growers* nor *Citizens & Southern* directly involved the classic intra-enterprise situations, *see supra* note 18, these decisions indicate that the Court is replacing formalistic distinctions with distinctions based on substance and economic reality.

72. Willis & Pitofsky succinctly summarized the effect of these decisions: "The net result is thorough-going uncertainty—on the part of the enforcement agencies, and the courts—leaving

fusion generated by these opinions demands comprehensive resolution by the Supreme Court. An analysis of cases representing the various lower court approaches sheds considerable light on both the underlying theory of the intra-enterprise doctrine and the complexity of the judicial task.

A. *The Expansive Theory*

A literal interpretation of the Supreme Court's intra-enterprise conspiracy doctrine recognizes that when firms incorporate separately, and thereby avail themselves of the privilege of doing business through separate corporations, the fact of common ownership will not save them from section 1 liability.[73] The Third Circuit adopted such a reading of the doctrine and suggested that common ownership or control would not liberate firms from the reach of section 1.[74] In *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*,[75] the court of appeals held, as a matter of law, that Kaiser Aluminum & Chemical Corp. and its wholly-owned subsidiary Kaiser Aluminum & Chemical Sales, Inc., were capable of conspiring.[76] The defendants argued that while legally distinct, the two firms were in reality a single enterprise incapable of conspiring.[77] Notwithstanding this evidence of unity, the court

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no one able to point with confidence to the location of the boundary beween legal and illegal business conduct in this area of the law." Willis & Pitofsky, *supra* note 7, at 21. This observation was made in 1968. Since then, over 125 decisions dealing with the issue have exacerbated the confusion.

73. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968).

74. By doing so, the Third Circuit joined the First and Fifth Circuits in adopting an expansive approach. For First Circuit decisions, see George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (1st Cir. 1974) (related swimming pool recirculation system corporations), *cert. denied*, 421 U.S. 1004 (1975). *But see* White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982) (newspaper and distribution subsidiary). For Third Circuit decisions, see Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20 (3d Cir.) (aluminum producer and sales subsidiary), *cert. denied*, 439 U.S. 876 (1978); Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72 (3d Cir. 1977) (automobile manufacturer and dealer subsidiaries), *cert. denied*, 436 U.S. 913 (1978); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501 (3d Cir. 1976) (parent petroleum firm and nuclear/chemical materials subsidiary); *cf.* Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808, 810 (E.D. Pa. 1975) (dicta) ("it is no defense that the corporations are, in reality a single economic entity") (quoting Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82 (9th Cir. 1969)); Rea v. Ford Motor Co., 355 F. Supp. 842, 864 (W.D. Pa. 1973) (automobile manufacturer and corporate subsidiary dealer development and factory stores), *vacated on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). *But see* Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094-95 n.1 (3d Cir. 1972) (technology parent and electronics subsidiary) (per curiam). For Fifth Circuit decisions, see H & B Equip. Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978) (construction equipment manufacturer and leasing subsidiary); *cf.* Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 786 (S.D. Tex. 1971) (holding that a section 2 conspiracy to monopolize is possible between a parent insurance credit reporting firm and its subsidiary credit bureaus), *aff'd*, 476 F.2d 989 (5th Cir. 1973).

75. 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

76. *Id.* at 33.

77. Besides sharing joint management on several levels of operation, Kaiser Sales appeared to act as the exclusive distributor of Kaiser Corp., a manufacturer of aluminum sheet and coil, and had a long and extensive history of internal expansion through Kaiser Corp.'s direction. *Id.* at 23, 33.

refused to exempt from section 1 those separately incorporated subsidiaries that might comprise a single economic enterprise with their parents. Instead, the *Columbia Metal* court reaffirmed the viability of the intra-enterprise conspiracy doctrine and held that Kaiser Aluminum and its sales subsidiary constituted the requisite plurality of actors needed to form a conspiracy.[78]

Interestingly, although the *Columbia Metal* court affirmed the doctrine, it explained in a footnote that if limitations to the doctrine were deemed necessary, a comprehensive set of factors weighing the particular facts and circumstances of each case was both appropriate and consistent with precedent.[79] The court explained that such an approach recognized a line beyond which a diminished level of business integration between two related corporations warrants a conclusion that they are distinct entities, even though elements of common ownership and control exist.[80] Presumably, however, the court believed that Supreme Court precedent mandated the approach it adopted.

In addition to the Third Circuit, the Fifth Circuit advocated an expansive intra-enterprise conspiracy doctrine in *H & B Equipment Co. v. International Harvester Co.*[81] The plaintiff, H & B, had alleged that a somewhat obscure subsidiary of International Harvester, Harco, had conspired with its parent to drive H & B out of the construction equipment market.[82] Despite reaffirming the well-established doctrines that a corporation cannot conspire with its unincorporated divisions[83] or with its own employees,[84] the court was reluctant to apply similar rules to the incorporated subsidiary relationship. Instead, the Fifth Circuit accepted the plaintiff's initial contention on the issue of capacity to conspire. Echoing *Yellow Cab* and its progeny, the court emphasized the privilege of doing business as a separate corporation and, thus, found that Harco and International Harvester could conspire to restrain trade.[85] Nevertheless, the court refused to hold that the related firms *did* in fact conspire to restrain trade.[86]

78. *Id.* at 33.

79. *Id.* at 33-34 n.49 (quoting L. SULLIVAN, LAW OF ANTITRUST 328 (1977) and citing REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 34 (1955)).

80. *Id.*

81. 577 F.2d 239 (9th Cir. 1978).

82. *Id.* at 244. Harco Leasing Co. indirectly affected the plaintiff by making equipment sales to a third party at a price below plaintiff's cost. Essentially, H & B was attempting to reach International Harvester's unilateral conduct of severing ties with H & B, its former distributor. After terminating the distributorship with H & B, International Harvester opened a "company store" (division) in direct competition with H & B. The competition proved to be too much for H & B, which left the market a year after the "company store" opened.

83. *Id.; see supra* note 14 and accompanying text.

84. 577 F.2d at 244; *see supra* notes 10-12 and accompanying text. The court also reaffirmed the "personal gain" exception. 577 F.2d at 244.

85. The court reasoned, "The parent's choice of form is important. Having availed itself of separate incorporation for Harco, International Harvester marked it off as a distinct entity, and the antitrust laws treat it as such." 577 F.2d at 245.

86. *Id.*

Critics of the expansive approach[87] argue that overly formalistic distinctions result from finding the requisite plurality of actors merely on account of separate incorporation.[88] These commentators note that unincorporated divisions can often exercise as much, if not more, automomy than a wholly-owned subsidiary.[89] Further, they assert that to hold the incorporated subsidiary liable, but not the unincorporated division, is to draw lines where none exist.[90] Moreover, these commentators note that many legitimate reasons exist for choosing the incorporated status for affiliates;[91] they argue that punishing that choice illogically attaches antitrust significance to this legitimate preference.

In addition, these commentators question whether application of per se antitrust liability rules would subject everyday agreements, such as those concerning price and market allocations between a parent and its subsidiary, to Sherman Act treble damages.[92] Critics also argue that application of the

87. *See supra* note 7 for a summary of the approach's recent critics. As the Seventh Circuit recently noted, commentators have been "almost uniformly critical" of the doctrine. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 316-17 (7th Cir. 1982), *cert. granted,* 103 S. Ct. 3109 (1983).

88. *See* Handler & Smart, *supra* note 7, at 44-46; Note, *Conspiring Entities, supra* note 7, at 665; Note, *Suggested Standard, supra* note 7, at 728. *See generally* P. Areeda, Antitrust Analysis, 397-99 (3d ed. 1982) (criticizing the doctrine's allegedly formalistic distinctions); Comment, *All in the Family, supra* note 7, at 67-68 (summarizing criticism of the commentators).

89. For a list of these authorities, see *supra* note 88.

90. *See, e.g.,* McQuade, *supra* note 7, at 210-11 ("Antitrust policy steps out of its field when it forces business to operate in the form of a single corporation with branches rather than in a more convenient multicorporate form."); Note, *Conspiring Entities, supra* note 7, at 667-68 ("it is inconsistent with antitrust goals to make section 1 liability turn on the firm's choice of organizational form").

91. For an analysis of the various economic reasons to incorporate subsidiaries, see *infra* notes 172-86.

92. Section 1 of the Sherman Act declares illegal every restraint of trade by two or more persons. Yet, in early constructions of the Act this seemingly absolute mandate was given its common law interpretation; only "unreasonable" restraints of trade were illegal. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The Court reaffirmed this construction in the intra-enterprise context presented in United States v. Yellow Cab Co., 332 U.S. 218 (1947), by declaring that "[t]he test of illegality under the [Sherman] Act is the presence or absence of an unreasonable restraint of interstate commerce." *Id.* at 227.

Nevertheless, the Court has since observed that

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). This statement has formed the basis of the per se doctrine in antitrust law. Under this doctrine, several types of agreements between competitors are presumed to violate § 1. *See* United States v. Loew's, Inc., 371 U.S. 38, 44-46 (1962) (tying agreements); United States v. Parke, Davis & Co., 362 U.S. 29, 45-47 (1960) (agreements to effectuate a resale price maintenance scheme); International Salt Co. v. United States, 332 U.S. 392, 396 (1947) (territory allocation agreements); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (agreements to fix prices); Eastern States Retail Lumber Dealer's Ass'n v. United States, 234 U.S. 600, 612-14 (1914) (agreements to boycott third parties).

intra-enterprise conspiracy doctrine violates congressional intent and has, in actuality, been used as a stopgap measure to reach essentially unilateral conduct that does not rise to an attempt to monopolize or to the level of monopolization.[93] Finally, they find solace in alternative antitrust remedies that the plaintiff can utilize to prevent anticompetitive conduct.[94] They conclude that it is no wonder that enforcement agencies have been hesitant to apply the broad language of *Yellow Cab, Kiefer-Stewart, Timken,* and *Perma Life.*

In sum, these critics, now joined by the Justice Department and the Federal Trade Commission (FTC),[95] urge the Court to retreat from its earlier holdings by repealing the intra-enterprise conspiracy doctrine. Nevertheless, it must be proven why the alleged problems of the doctrine demand abrogation, and not simply limitation. Surely, the courts and Congress have not been unaware of the doctrine's serious drawbacks; yet, neither has chosen to eliminate it. Abrogation is both unnecessary and dangerous. Hence, it is essential to develop a new and more equitable standard for evaluating corporate affiliations. Although courts and scholars have grappled with limiting theories and produced a myriad of creative solutions, none of these solutions, standing alone, has resolved the problem.

B. The Competitor Theory

The basis for the competitor theory is derived from the language of the Supreme Court's opinion in *Kiefer-Stewart Co. v. Joseph T. Seagram & Sons.*[96] The *Kiefer-Stewart* Court, in holding that common ownership does not liberate corporations from the Sherman Act's conspiracy rule, stated that "[t]he rule is especially applicable where, as here, respondents hold themselves out as competitors."[97] Yet, the Court offered no explanation for this unsolicited statement.

Lower courts have latched onto the *Kiefer-Stewart* Court's statement as standing for the proposition that the presence of competition between affiliated corporations, or the appearance of competition, will be a significant factor, if not the dispositive factor, in determining capacity to conspire.[98]

93. *See* Handler & Smart, *supra* note 7, at 67-68; Willis & Pitofsky, *supra* note 7, at 22.

94. *See, e.g.,* Handler & Smart, *supra* note 7, at 66-72 (suggesting that significant restraints of trade that harm competition be checked by the antimonopoly provisions of § 2 and the FTC's prohibition of unfair methods of competition in § 5).

95. The Justice Department and the Federal Trade Commission joined as amicus curiae supporting the petitioners in Copperweld Corp. v. Independence Tube Corp., 691 F.2d 310 (7th Cir. 1982), *cert. granted,* 102 S. Ct. 3109 (1983).

96. 340 U.S. 211 (1951).

97. *Id.* at 215.

98. Courts appear to be genuinely baffled by the significance of the presence or absence of competition. When the competitor theory is employed, courts often overemphasize the theory without articulating why it is important. *See, e.g.,* J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 795 (5th Cir. 1983) (manufacturing companies and affiliated regional warehouses); University Life Ins. Co. v. Unimarc, Ltd., 699 F.2d 846, 852 (7th Cir. 1983) (insurance company and insurance affiliates); Triebwasser & Katz v. AT&T, 535 F.2d 1356, 1358-59 & n.1

For example, in *Call Carl, Inc. v. BP Oil Corp.*,[99] a district court posited a corollary to *Kiefer-Stewart*'s "holding out" approach. In *Call Carl*, an independent service station operator claimed a section 1 conspiracy to fix prices between a parent gasoline marketer and its subsidiary. Adding a new twist to the *Kiefer-Stewart* caveat, *Call Carl* found a *lack* of competition dispositive of the capacity issue.[100] Because the plaintiff failed to prove that the parent and subsidiary were competitors, the court treated the related firms as a single enterprise and, consequently, directed a verdict for the defendants.[101]

Recently, this "noncompetitor" theory was employed by Judge Posner of the Seventh Circuit in *University Life Ins. Co. v. Unimarc, Ltd.*[102] The defendants in *Unimarc* were affiliated corporations charged with forming a conspiracy to restrain the trade of the plaintiff-insurance company. Ignoring the Seventh Circuit's "economic reality" theory, used in a similar case[103] only months earlier, Judge Posner relieved the defendants of section 1 liability by applying the *Call Carl* version of the competitor theory. Because the plaintiffs' complaint did not allege that the Unimarc defendants held themselves out as competitors, Judge Posner rejected the conspiracy claim and stated that the competitor test was "probably required" before a conspiracy could be found.[104]

(2d Cir. 1976) (AT&T and subsidiary telephone corporation); Aaron E. Levine & Co. v. Calhraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976) (paper distributor and paper mill subsidiary); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975) (Standard Oil parent and gasoline marketing subsidiary), *aff'd in relevant part*, 554 F.2d 623, 628 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970) (fire extinguisher manufacturer and wholly-owned subsidiary), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972).

Other courts have specifically stated that evidence that an entity was "holding itself out" as a competitor bears little relevance to potential liability. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054-55 (9th Cir. 1981) (lack of competition between related firms militates against finding of capacity to conspire, but not conclusive), *cert. denied*, 103 S. Ct. 57 (1982); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 511-12 (3d Cir. 1976) (appearance of competition between related firms "irrelevant" to section 1 liability); Diehl & Sons v. International Harvester Co., 426 F. Supp. 110, 117 (E.D.N.Y. 1976) ("[w]hether or not the affiliated corporations are competing or non-competing is not dispositive; even non-competing affiliated corporations may act in *concert* to adversely affect free market competition") (emphasis in original).

99. 403 F. Supp. 568 (D. Md. 1975), *aff'd*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

100. *Id.* at 572-73.

101. *Id.* at 573.

102. 699 F.2d 846, 852 (7th Cir. 1983).

103. *See* Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982), *cert. granted*, 103 S. Ct. 3109 (1983). *Unimarc* was decided less than four months after *Copperweld*. Nevertheless, Judge Posner failed to even mention the Seventh Circuit's previous decision in *Copperweld*.

104. 699 F.2d at 852. Besides being inconsistent with *Copperweld*, the statement appears to be an erroneous articulation of the law. Judge Posner relied on United States v. Citizens & So. Nat'l Bank, 422 U.S. 86, 116 (1975), to support his proposition that a finding of "holding out" as a competitor was necessary for a per se violation of section 1. Yet, *Citizens & Southern*

Further support for the competitor theory can be found in scholarly commentary. In particular, an influential article by Professors Willis and Pitofsky advocated the competitor theory.[105] Under their theory, related firms that publicly adopt a competitive posture should be treated as separate entities capable of conspiring under section 1.[106] Other commentators, however, have rejected this theory, noting that there is no articulated justification as to why "competing" firms should incur additional antitrust liability.[107] In today's world of large conglomerate enterprises, many firms have subsidiaries with dual product lines that compete in the marketplace; to hold such "competitors" especially subject to liability focuses myopically on irrelevant details.[108] In analyzing conspiracy cases, courts should focus on the degree of control exercised by the parent and the underlying restraint of trade—not on the amount of competition, or lack thereof.

C. *The Sole Decisionmaker Theory*

The sole decisionmaker theory is often applied as an exception to the intra-enterprise doctrine. According to this exception, when affiliated corporations are owned and controlled by a single individual, no conspiracy can be found.[109] The seminal case on this point is *Harvey v. Fearless Farris*

neither involved an intra-enterprise conspiracy nor relied solely on the competitor theory. *See supra* note 71. Judge Posner completely ignored *Yellow Cab* and its progeny, which held that corporate interrelationships are not determinative of Sherman Act liability. Moreover, the dicta in *Kiefer-Stewart,* from which the competitor theory arose, stated that competitors are "especially liable"; it did not state that the absence of competition will *immunize* related firms from section 1. *See* 340 U.S. at 215.

The practical effect of Judge Posner's approach is to "eliminate a whole category of lawsuits where plaintiffs have attempted to gain treble damages by alleging conspiracy between a parent and a subsidiary which do not compete." Handler & Smart, *supra* note 7, at 54-55. It is unfortunate that judges must go to such great lengths to express their disapproval of binding Supreme Court precedent. By twisting Supreme Court language and wholly ignoring precedent, Judge Posner violated both the spirit of the Sherman Act and the principle of stare decisis. For a critical analysis of Judge Posner's attempts to replace the rule of law with his own ideology, see Comment, *Changing Configurations of Antitrust Law: Judge Posner's Applications of His Economic Analysis to Antitrust Doctrine,* 32 DEPAUL L. REV. 839 (1983).

105. *See supra* note 7.

106. The Willis & Pitofsky article also recommends the doctrine's application to actions by firms incorporated for anticompetitive purposes. *Id.*

107. Handler & Smart, *supra* note 7, at 53-55; McQuade, *supra* note 7, at 214-15; Stengel, *supra* note 7, at 22.

108. "No social objective would be attained were subsidiaries enjoined from agreeing not to compete with each other or with their parent. To demand internal competition within and between the members of a single firm is to invite chaos without promotion of the public welfare." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 34 (1955) [hereinafter cited as ATTORNEY GENERAL'S REPORT].

109. Due to its limited scope, the sole decisionmaker theory has rarely been utilized and has been employed more as an adjunct to other approaches. *See, e.g.,* Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979) (related hotel-casinos), *cert. denied,* 447 U.S. 906 (1980); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979) (petroleum products wholesaler and service station subsidiaries); Rayco Mfg. v. Dunn, 234 F. Supp. 593, 598 (N.D. Ill. 1964) (sole stockholder of automobile accessory manufacturers); Windsor Theatre

Wholesale, Inc.,[110] in which the Ninth Circuit affirmed a district court's summary judgment absolving the defendants of Sherman Act liability. In *Fearless Farris,* the owner of a gasoline service station alleged that five gasoline stations and a petroleum products wholesaler, all wholly owned by an individual named Lind, conspired to halt gasoline shipments to the plaintiff during a nationwide gas shortage.[111] Because Lind was the sole owner and major decisionmaker for the group of affiliated corporations, the Ninth Circuit held that the case fell under the "one man show" exception.[112] The court noted that under this rule, affiliated corporations owned and controlled by a single individual are incapable of conspiring.[113] Thus, when one person is at the helm making all the decisions, a conspiracy cannot be found.

Another Ninth Circuit decision, *Las Vegas Sun, Inc. v. Summa Corp.,*[114] expanded the "one man show" exception to include situations in which the sole decisionmaker is not the sole owner. In *Las Vegas Sun,* the plaintiff-newspaper brought antitrust actions against Summa Corporation, Hughes Television Network, and Hotel Properties, Inc., all corporations owned and controlled by the late Howard Hughes.[115] Through these corporations and a sole proprietorship, the Silver Slipper Casino, Hughes controlled six hotel casinos in Las Vegas. The complaint alleged that the corporations and various individuals conspired to ruin the newspaper's business by withdrawing the hotel casino's advertising from the paper.[116]

As a preliminary matter, the *Las Vegas Sun* court observed that to conspire under the Sherman Act, the corporate entities must be "sufficiently independent of each other for their concerted action to raise antitrust concerns."[117] After weighing the particular facts and circumstances of the case, the court found that the chief executive officer of the parent firm made

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Co. v. Walbrook Amusement Co., 94 F. Supp. 388 (D. Md. 1950) (two motion picture theater corporations owned and controlled by same person), *aff'd,* 189 F.2d 797 (4th Cir. 1951). *But see* United States v. Metro MLS, Inc., 1974-2 Trade Cas. (CCH) ¶ 75,311 (E.D. Va. 1973) (individual members of multiple listing service corporation could conspire).

110. 589 F.2d 451 (9th Cir. 1979).

111. *Id.* at 452-53.

112. *Id.* at 455-56 & n.8.

113. *Id.* at 456 n.8.

114. 610 F.2d 614 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980).

115. *Id.* at 616.

116. *Id.* at 615. The hotel-casinos were considered unincorporated divisions for antitrust analysis, even though they were controlled by the separately incorporated subsidiaries. *Id.* at 616. Relations between the Sun and Hughes soured after Hughes fired the head of his Nevada operations who had maintained a close relationship with the Sun. *Id.* The Hughes employee established a $500,000 prepaid advertising account with the Sun for the six resorts. Shortly after this advance, the Sun's owner testified in favor of issuing multiple licenses to Hughes before the Nevada Gaming Commission. Upon the employee's discharge, the Sun's editorial policy became hostile toward Hughes and his businesses. Shortly thereafter, the prepaid account was terminated and no new ads were placed in the Sun for the resorts. *Id.* at 617. The district court found that the termination was prompted by legitimate business considerations. *Id.* at 616-17.

117. *Id.* at 617.

the decision to terminate the prepaid advertising account with the Sun, a decision subsequently implemented by various personnel at the six hotel casinos. The *Las Vegas Sun* court quoted extensively from its decision in *Harvey v. Fearless Farris Wholesale, Inc.*,[118] concerning the legal significance of a single decisionmaker. This factor,[119] coupled with the district court's finding that the casinos were not held out as competitors, and did not actually compete, allowed the court to hold that the alleged actions were those of a single entity and, therefore, not subject to section 1 liability.[120]

In sum, lower courts utilize the sole decisionmaker theory in two ways. First, a conspiracy will not be found if the decisions raising potential antitrust liability are made by one person who is also the sole owner. Second, even if the sole decisionmaker is not the sole owner, a presumption of incapacity will arise; this presumption may then be rebutted by other facts and circumstances. Nevertheless, the sole decisionmaker theory poses an unnecessary complication to the intra-enterprise conspiracy doctrine. When invoked, this theory merely questions whether the challenged affiliated corporations function as distinct economic units. Consequently, the sole decisionmaker theory can be subsumed under the first prong of the test suggested by this Comment, which questions whether the affiliated corporations function as distinct economic units.

D. *The Anticompetitive Purpose Theory*

Some courts agree that when companies form separately incorporated subsidiaries to achieve anticompetitive results, the intra-enterprise conspiracy doctrine bars them from hiding behind the guise of a single entity.[121] The foundation for this theory rests in the *Yellow Cab* decision. In that case it appeared that the defendant-subsidiaries were combined not to carry out the legitimate business of the parent, but to effectuate a preconceived plan to corner the taxicab market in major urban areas.[122] Since the companies were

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118. 589 F.2d 451 (9th Cir. 1979).

119. The *Las Vegas Sun* court observed that sole decisionmaking was only one factor, albeit a major one, in weighing the totality of circumstances. 610 F.2d at 618.

120. *Id.*

121. Similar to the sole decisionmaker theory, the anticompetitive purpose theory is rarely utilized. *See, e.g.*, Olgilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981) (parent film processor legitimately established nearby franchises to previous franchisee); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979) (parent film processor legitimately established franchises near previous franchisee), *cert. denied*, 445 U.S. 917 (1980); Brager & Co. v. Leumi Sec. Corp., 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977) (Israeli bank and banking subsidiaries), *cert. denied*, 451 U.S. 987 (1981); I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868 (S.D.N.Y. 1973) (no conspiracy found because fruit auctioneers' sole reason for forming separate corporation for forwarding and loading fruit was to accommodate employees' separate union status and fringe benefits, and not to effectuate an anticompetitive scheme).

122. As the *Yellow Cab* Court stated, control "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchases for control." 332 U.S. 218, 227-28 (1947) (quoting United States v. Reading Co., 253 U.S. 26, 57 (1920)). The Court subsequently confirmed this reading

formed with this anticompetitive intent, the *Yellow Cab* Court reasoned that a conspiracy finding was appropriate. Thus, prosecution under section 1 of the Sherman Act has been advocated whenever restraint of trade is the primary object of the separate incorporation.[123]

The anticompetitive purpose theory actually relates more to the unreasonableness of the trade restraint than to the capacity to conspire. The practical problems in applying such a theory are self-evident. By emphasizing intent to discover the primary object of the combination, this theory unnecessarily complicates section 1 and raises difficult obstacles for plaintiffs.[124] Moreover, if the purpose of a corporate formation is to diminish competition substantially, as in *Yellow Cab,* redress should be sought under the Clayton Act,[125] not under the Sherman Act. Finally, the resultant affiliated corporations should function as distinct units in order to satisfy section 1's plurality requirement. Absent such separateness, the actions amount to unilateral restraints, which are not violative of the Sherman Act.

E. The External Effect Theory

Another limitation proposed to eliminate the harshness of the intra-enterprise conspiracy doctrine is the external effect theory. Under this approach, section 1 may be violated when the activities of affiliated corporations are designed to restrict the trade of third parties.[126] Conversely, the

of *Yellow Cab* in United States v. Columbia Steel Co., 334 U.S. 495, 520-23 (1948); *see also* Kempf, *supra* note 7, at 175 (discounting the importance of *Yellow Cab*). For a more detailed discussion of *Yellow Cab,* see *supra* text accompanying notes 46-48.

123. *See* United States v. Yellow Cab, 332 U.S. 218 (1947); *see also* Willis & Pitofsky, *supra* note 7, at 35 (urging adoption of a limited doctrine that embraces the anticompetitive purpose theory).

124. Intent is a more determinative factor under section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

125. Section 7 of the Clayton Act bars such mergers. 15 U.S.C. § 18 (Supp. V 1981). The plaintiff might also proceed under section 2 of the Sherman Act for an attempt to monopolize, monopolization, or a conspiracy to monopolize. An attempt to monopolize, however, generally requires a significant share of the market, anticompetitive intent, and a dangerous probability of success. Lorain Journal Co. v. United States, 342 U.S. 143 (1951). Monopolization exists when a substantial market share exists and the firm commits acts in furtherance of maintaining the monopoly. *Id.; see* Handler & Steven, *Attempts to Monopolize and No-Fault Monopolization,* 129 U. PA. L. REV. 125, 125-26 (1980).

126. Courts appear reluctant to adopt the external effect approach. *See, e.g., Olgilvie,* 641 F.2d at 588 n.20; Note, *Conspiring Entities, supra* note 7, at 673 n.70. *But see* Thomsen v. Western Elec. Co., 512 F. Supp. 128, 132-33 (N.D. Cal. 1981) (actions relating only to internal operations of common enterprise inherently have a legitimate business purpose, lack anticompetitive effects and, thus, do not violate section 1), *aff'd,* 680 F.2d 1263 (9th Cir.), *cert. denied,* 103 S. Ct. 348 (1982); REA Express, Inc. v. Alabama Gr. S. R.R., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976) (because agreements between railroads and subsidiaries affected only the related parties, no conspiracy found), *aff'd mem. sub nom.* Sowerine v. United States, 431 U.S. 961 (1977); Sulmeyer v. Seven-Up Co., 411 F. Supp. 635 (S.D.N.Y. 1976) (actions of a soft drink syrup manufacturer and its export subsidiary failed to have an impact either within the United States or on its foreign trade; therefore, no conspiracy was found to exist); Chastain v. AT&T, 401 F. Supp. 151, 160 (D.D.C. 1975) (telephone operating company and sub-

theory permits a parent and its subsidiaries to enter into agreements that are directed toward a related firm, such as territorial restrictions that have only a secondary effect on outsiders.

The impetus behind this theory came in 1955 from the distinguished report of the Attorney General's National Committee to Study the Antitrust Laws.[127] This report, upon which the Court has often relied,[128] interpreted the Supreme Court's intra-enterprise doctrine as standing for the proposition that section 1 prohibited only those actions by affiliated corporations that had for their "purpose or effect coercion or unreasonable restraint" on the trade of outside parties.[129] Thus, rather than ascertaining the functional distinctness of related firms, this approach adopts an ad hoc analysis by examining the alleged actitivies underlying the section 1 claim. When the activities are directed at unrelated competitors, customers, or suppliers, section 1's plurality requirement is satisfied under the external effect theory.[130]

Similarly, some scholars contend that the potential effects of related firm conduct upon outsiders neccessitate a finding of section 1 liability. Professor von Kalinowski, for example, states that related firm "immunity" from section 1 is "inappropriate."[131] Professor Sullivan draws a distinction between concerted action limited solely to internal management, and action which erects barriers to entry by another firm, competitor, or potential competitor; in the latter situation, Professor Sullivan would apply section 1 to the challenged conduct of the related entities.[132]

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sidiaries' action had no external effect on competition; therefore, action was not violative of section 1).

127. *See* ATTORNEY GENERAL'S REPORT, *supra* note 108, at 30-36. This committee consisted of prominent practitioners, law professors, and economists who were "specialists in the antitrust or cognate fields." *Id.* at IV. Co-chairman of the committee was Stanley N. Barnes, former Assistant Attorney General in charge of the antitrust division. The Chairman of the Federal Trade Commission was also a member of the committee.

128. For examples of cases citing the report, see Falls City Indus., Inc. v. Vanco Beverage, Inc., 103 S. Ct. 1282, 1294-95 (1983); United States v. United States Gypsum Co., 438 U.S. 422, 439-40 (1978); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690-92 (1978); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 176 (1964).

129. ATTORNEY GENERAL'S REPORT, *supra* note 108, at 34. The report further noted that the Department of Justice only enforced the intra-enterprise conspiracy doctrine to the extent of external effect:

> The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by section 1. . . . This interpretation is not inconsistent with any case thus far instituted by the Antitrust Division.

Id.

130. *Id.*

131. J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 6.01 (2)(c)(i), at 6-28 to 6-31 (1983) ("Although the plurality of actors consists only of related entities, an immunity from antitrust liability is inappropriate because of the effect of the challenged conducts on outsiders.").

132. L. SULLIVAN, LAW OF ANTITRUST § 114, at 328 (1977) ("concerted action by two 'legal' persons which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade"); *see also* F. EASTERBROOK & R. POSNER, ANTITRUST LAW

While some critics have summarily dismissed the external effect theory as "unworkable,"[133] closer inspection of the theory's analytical premise reveals its practical advantages. The Attorney General's Committee referred to *unreasonable* restraints on trade that have a coercive effect on outsiders.[134] Critics worry that application of the doctrine will expose affiliated firms to substantial liability for ordinary decision making.[135] Yet, these critics can find comfort in this theory because the committee itself specifically adopted the view that a parent corporation may allocate territories or set prices for

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730 (2d ed. 1981) ("Activity within a firm or family of commonly-owned corporations is of legitimate concern only when the entity is able to exclude competition by other economic units . . . the proper question is whether there has been an exclusionary practice.").

At this point, a useful analogy can be drawn from our European counterparts. In article 85 of the Rome Treaty, the competition policy of the European Economic Community is detailed. Similar to § 1 of the Sherman Act, Article 85(1) prohibits agreements that have as their object or effect an impediment to competition. The same plurality issue arises, therefore, in the intra-enterprise context. In response to inquiry whether Article 85 was applicable to concerted practices between a parent and its subsidiary licensees over territorial restrictions, the European Court of Justice stated that Article 85

> is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between undertakings.

Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, 1167.

The author of a recent article on this subject confirms that

> [t]wo tests to be applied cumulatively seem to be relevant for considering the application of Article 85(1) to intra-concern practices. The first relates to the existence of an economic unity between the companies belonging to the same group. Such an economic unity exists where affiliated companies have no real freedom to determine their course of conduct on the market, but where one company has power of control over the other companies and actually exercises that power. . . .
>
> . . . The second test is . . . to what extent the intra-group practices restrict the competition between concern companies and others. Agreements or concerted practices between companies belonging to the same group do not fall under Article 85(1). . . . If, however, competition between those companies and other companies is involved, Article 85(1) is applicable.

van Rijn, *Intra-Enterprise Conspiracy and Article 85 of the EEC Treaty,* in ESSAYS IN EUROPEAN LAW AND INTEGRATION 123, 129-30 (D. O'Keeffe & H. Schermers eds. 1982).

In sum, it appears that the European community is already applying the two pronged test suggested by this Comment.

133. *See* Handler & Smart, *supra* note 7, at 49-51; McQuade, *supra* note 7, at 213; Stengel, *supra* note 7, at 22-27; Willis & Pitofsky, *supra* note 7, at 48-49; Note, *Suggested Standard, supra* note 7, at 732-34.

134. *See* ATTORNEY GENERAL'S REPORT, *supra* note 108, at 34.

135. *See* authorities cited *supra* note 133. These critics claim that every agreement between a parent firm and its subsidiary has the potential to restrain trade and, thus, have external effects. *See* Handler & Smart, *supra* note 7, at 50-51; McQuade, *supra* note 7, at 213; Stengel, *supra* note 7, at 22-23; Willis & Pitofsky, *supra* note 7, at 48-49; Note, *Suggested Standard, supra* note 7, at 732-34. Since traditional antitrust policy subjects agreements to fix prices and allocate territories to per se condemnation, everyday business decisions might be subject to § 1. *See supra* note 92.

the subsidiaries under its control.[136] By exempting such actions, which are traditionally considered per se violations in the intra-enterprise context, the committee implicitly adopted the consistent use of the rule of reason approach[137] for agreements between affiliated corporations. Thus, actions relating only to internal management, which do not have an effect on competition, do not violate section 1 under the external effect approach; this conclusion appears to be consistent with the Justice Department's past position. In its Antitrust Guide for International Operations, the Antitrust Division of the Department of Justice reiterated the government's view that it would only use section 1 to "reach coercive attempts by members of a corporate group to drive third parties out of business or out of markets."[138]

Consequently, contrary to the views of critics who believe that adoption of the external effect theory would lead to abusive litigation over commonplace restrictions upon subsidiaries,[139] the theory appears to be a pragmatic step toward limiting the intra-enterprise conspiracy doctrine on a principled basis. To avoid confusion over the different variations of this theory,[140] and to respond to critics who argue that any agreement has external effects, the Court should adopt a clarified version of this theory as part of its section 1 plurality analysis. Under this Comment's suggested approach, the second prong of the plurality requirement is a determination of whether the concerted efforts of the related firms are directed toward restraining the trade of unrelated third parties. This form of the external effect theory, used in combination with the economic reality theory,[141] should alleviate any fear that the intra-enterprise conspiracy doctrine would be used to reach essentially unilateral conduct relating only to internal policy. Therefore, cooperation and restrictive agreements among related firms should be of little concern to antitrust law, unless the combined power of two distinct entities coercively restrains the trade of third parties.

F. The Economic Reality Theory

Under the economic reality approach, a court examines the particular facts and circumstances of each case to ascertain whether the two entities that are alleged to have conspired were, in reality, economically distinct.[142] Due

136. The committee report declared, "It seems inconceivable to hold per se illegal the mere fixing by a parent of a subsidiary's prices or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal." ATTORNEY GENERAL'S REPORT, *supra* note 108, at 35.

137. *Id.* For a discussion of the historical foundation of the rule of reason, see *infra* note 239.

138. ANTITRUST DIV., U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 12 n.26 (1977).

139. *See supra* note 135.

140. *See supra* notes 128-32.

141. *See infra* text and accompanying notes 142-218.

142. If any trend can be discerned from the intra-enterprise cases it is the growing tendency of the courts of appeals to examine the economic reality of the parent-subsidiary relationship and the particular agreement at issue. By engaging in such a thorough analysis, the circuits are following the Supreme Court's admonition that "each case arising under the Sherman Act

to its detailed nature, economic reality analysis is necessarily fact-intensive. Currently, three circuits[143] have adopted this approach.

In *Olgilvie v. Fotomat Corp.*,[144] the Eighth Circuit utilized the economic reality theory to decide whether a photo processing franchisor and its wholly-owned subsidiary constituted a single economic entity incapable of conspiracy. The plaintiffs in *Olgilvie* were separately incorporated franchisees of the parent Fotomat.[145] After being granted franchises to operate Fotomat processing centers, the parent Fotomat infringed upon the plaintiffs' territorial markets by establishing nearby processing centers.[146] The plaintiffs brought various actions, including a section 1 suit against Fotomat and Fotomat Labs alleging a conspiracy to eliminate the plaintiffs as competitors.[147] The jury

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must be determined upon the particular facts disclosed by the record." Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579 (1925).

For Seventh Circuit decisions adhering to this admonition, see Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982), *cert. granted*, 103 S. Ct. 3109 (1983); Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); United States v. New York Atlantic & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949); United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

For Eighth Circuit opinions following the economic reality approach, see Olgilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981); Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973); *see also* TV Signal Co. v. AT&T, 1981-1 Trade Cas. (CCH) ¶ 63,944 (D.S.D. 1981).

For Ninth Circuit cases following this standard, see Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979); Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

143. *See supra* note 142. The Tenth Circuit also appeared to adopt the economic reality theory in Blankenship v. Herzfield, 661 F.2d 840 (10th Cir. 1981). The court of appeals was not willing to rule on the intra-enterprise issue because more detailed fact findings were required. *Id.* at 846. Instead, the court remanded the issue "in view of the store's separate corporate structures, the composition of their stock ownership, and the assertions made by plaintiff." *Id.* at 847.

In addition, the Fifth Circuit recently adopted a splintered version of the economic approach in J.T. Gibbons, Inc. v. Crawford Fittings Co., 704 F.2d 787 (1983). The *Gibbons* case exemplifies the utter confusion that prevails in the lower courts. In *Gibbons*, the court utilized a strange combination of the theories presented in finding that a valve and pipe manufacturer and its regional warehousing subsidiaries could not conspire. The court initially recognized that related firms may form a conspiracy. *Id.* at 795. Upon examining the "particular facts," however, the court found that the corporations did not compete or "hold themselves out as competitors." *Id.* Moreover, the court reasoned, the alleged conspiracy was actually the "unilateral decision of the two men who own[ed]" the corporations. *Id.* The court, therefore, held that the related firms could not conspire. *Id.*

Consequently, the Fifth Circuit managed to invoke the economic reality theory to utilize the competitor theory, adding the sole decisionmaker theory to buttress its holding. While this shotgun approach may have helped the court to arrive at its holding, it remains rather puzzling how two persons can make a "unilateral decision."

144. 641 F.2d 581 (8th Cir. 1981).

145. *Id.* at 583.

146. *Id.* at 584.

147. *Id.*

awarded treble damages to the plaintiffs, and the defendants appealed.[148]

Addressing the conspiracy issue, the *Olgilvie* court initially noted that legally distinct corporations may be capable of a conspiracy.[149] The mere fact of separate incorporation, however, was not dispositive of the conspiracy issue.[150] The court was hesitant to impose section 1 liability on what actually was a single enterprise; to do so, the court reasoned, would "imprudently blur" the distinction between conspiratorial conduct under section 1 and unilateral conduct under section 2.[151] Accordingly, the court joined the Seventh and Ninth Circuits by adopting the economic reality theory.[152]

The *Olgilvie* court then articulated evidence indicative of a single enterprise: identical name reference; interlocking officers; profit-incentives based on the parent's profit; similar headquarters; consolidated external financial statements; and a legitimate purpose of incorporation.[153] Conversely, evidence of separateness was meager: statements as to separate identity by executives; separate personnel, equipment, machinery and costs; and separate billing.[154] In view of these facts, the court concluded that Fotomat Labs was the "corporate alter ego" of Fotomat and, thus, unable to conspire under section 1 of the Sherman Act.[155]

The economic reality approach was also employed by the Ninth Circuit in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*[156] Once again, the particular facts of the case were critical to a determination of whether the corporate entities were separate enough to be capable of conspiring.[157] The defendants in *Inglis* were a parent corporation, ITT, and its subsidiary, Continental. The subsidiary was engaged in the production and sale of bread; the parent was not. Nevertheless, both were charged with

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148. *Id.* The defendant, Fotomat, was also found liable on a fraud count. On appeal, it sought reversal of both the conspiracy and fraud charges and reduction of damages and attorneys' fees.

149. *Id.* at 587.

150. *Id.* at 588.

151. *Id.* at 589. The court also rejected the external effect theory. *Id.* at 589 n.20.

152. *Id.* at 588. *Olgilvie's* immediate predecessor, Photovest v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), involved a fact pattern that was nearly identical to the situation presented in *Olgilvie.* In *Photovest,* a franchisee of the drive-through photo-finishing kiosks brought various actions, including a section 1 claim, against Fotomat. Despite initially recognizing the Supreme Court's intra-enterprise cases, the court reasoned that separate incorporation was not conclusive proof of the plurality of actors required for a § 1 conspiracy. *Id.* at 726. Instead, the court declared that it must examine the particular facts to determine whether Fotomat and its chemicals subsidiary, Fotomat Labs, were functionally distinct. Employing this analysis, the *Photovest* court found that Fotomat Labs acted "merely as the processing arm of the enterprise." *Id.* at 727. Accordingly, the Seventh Circuit ruled that the two related firms were actually a single entity incapable of conspiracy. *Id.*

153. 641 F.2d at 589.

154. *Id.* at 589 n.27.

155. *Id.* at 590.

156. 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 58 (1982).

157. *Id.* at 1054. The court stated that the purpose of examining the particular facts of each case was to determine whether the corporations had antitrust significance as separate economic units. *Id.*

a conspiracy to restrain trade in the wholesale bread market. The district court found that ITT was neither a competitor, manufacturer, nor supplier to Continental.[158] Thus, the court granted summary judgment on the conspiracy issue, but the Ninth Circuit reversed.[159]

The *Inglis* appellate court noted that ITT performed no other business function than that of a holding company for a conglomeration of businesses.[160] Therefore, the court reasoned that *Inglis* was unlike situations in which agreements between the affiliated corporations were internal and did not affect the trade of outside parties.[161] Similarly, the case did not involve vertically related operating companies that would tend to establish a single enterprise.[162] Thus, the central question for the Ninth Circuit was whether the two related corporations functioned as a single economic unit.[163] The record in *Inglis,* however, contained no reliable evidence of such a relationship. Because the lower court granted summary judgment on the conspiracy issue, it had failed to examine the intricacies of economic reality. Although the existing evidence indicated two distinct entities,[164] the court refused to rule on such a meager record. Instead, it remanded the conspiracy issue to the district court for a determination of the separateness of the two related firms.[165]

The Seventh Circuit's recent decision in *Independence Tube Corp. v. Copperweld Corp.*[166] is another example of the economic reality theory. The complicated fact scenario in *Copperweld* reflects both the complexity of the judical task and the need for a definitive standard for limiting the intra-enterprise conspiracy doctrine. The *Copperweld* case involved a 7.5 million dollar treble damage award to Independence Tube Corp. against the Copperweld Corp. and its wholly-owned subsidiary, Regal Tube Co., for conspiring to restrain trade in the structural steel tubing market.[167] Independence alleged that the concerted actions of Copperweld and Regal caused a third company, Yoder

158. *Id.* at 1055.

159. *Id.* at 1058.

160. *Id.* at 1054.

161. *Id.* (citing Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 641 (9th Cir. 1979), *cert. denied,* 447 U.S. (1980); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977); DeVoto v. Pacific Fidelity Life Ins. Co., 516 F.2d 1 (9th Cir.), *cert. denied,* 423 U.S. 894 (1975)).

162. *Id.* (citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); United States v. Yellow Cab Co., 332 U.S. 218 (1947); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979)).

163. *Id.* at 1055. Evidence failed to indicate that ITT had directed Continental's pricing policy in the relevant submarket. Interestingly, the court believed that the evidence indicated that the subsidiary enjoyed "considerable operating autonomy." *Id.*

164. *Id.*

165. *Id.* at 1058.

166. 691 F.2d 310 (7th Cir. 1982), *cert. granted,* 103 S. Ct. 3109 (1983).

167. *Id.* at 313. The jury also assessed damages for tortious inducement to breach a contract and commercial defamation counts. Those issues, however, are not currently before the Court and were decided adversely to Copperweld. *Id.*

Co., to breach its contract to provide Independence with a steel tubing mill. As a result of the breach, Independence's entry into the structural steel tubing market was delayed by nine months.[168] After its entry, Independence led a substantial price reduction in the market, which had been characterized by high prices and high profit margins.[169]

Independence's complaint rested on various grounds,[170] one of which alleged a conspiracy by Copperweld, Regal, and Yoder to restrain trade in the structural steel tubing market. At trial, the jury found that Copperweld and Regal had conspired, but that Yoder had not been a party to the conspiracy.[171] Damages were assessed at $2,499,009 (trebled to $7,497,027)[172] on the antitrust claim against Copperweld and Regal. An appeal to the Seventh Circuit followed.

In an opinion authored by Chief Judge Cummings, the Seventh Circuit affirmed the judgment in all respects.[173] Part III of that opinion[174] contained

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168. *Id.* at 314.

169. This effect on competition was never developed fully at trial. *See* Brief for Respondent at 7, Copperweld Corp. v. Independence Tube Corp., *cert. granted,* 103 S. Ct. 3901 (1983). The facts in *Copperweld* illustrate the changing nature of corporate affiliation. Regal began its existence as the wholly-owned subsidiary of C.E. Robinson Company. 691 F.2d at 313. Thirteen years later, Regal was sold to, and became an unincorporated division of, Lear Siegler, Inc. At the time, David Grohne was general manager for Regal; he became president of the new division under Lear Siegler.

After four years under Lear Siegler, Regal was sold to Copperweld and once again became a wholly-owned subsidiary with a separate corporate status. *Id.* at 313-14. Regal continued to conduct its manufacturing operations in Chicago, while it shared corporate headquarters in Pittsburgh with Copperweld. *Id.* at 314. Meanwhile, Grohne remained with Lear Siegler and began to pursue the possibility of establishing his own steel tubing business. In furtherance of this goal, he solicited investors and presented a financing proposal to a large Chicago bank. Shortly afterwards, Grohne left Siegler, incorporated Independence Tube, and gave Yoder Co. a purchase order for construction of a steel tubing mill.

When Copperweld learned of Grohne's plans, it first thought that an existing noncompetition agreement with Lear Siegler barred Grohne's efforts to establish a competing business. This agreement, however, only barred Lear Siegler and each of its subsidiaries from competing with Regal anywhere in the United States for five years. *Id.* at 313. Thus, Copperweld's counsel advised that an injunction was possible in the event that Grohne made use of any of Regal's technical expertise, which Copperweld had purchased from Lear Siegler. Copperweld's lawyer then drafted a letter that was sent to numerous firms dealing with Independence, vowing to take "any and all steps which are necessary to protect our rights. . . ." *Id.* What "rights" Copperweld had were questionable. The company's stated rationale for sending the letter was to prevent third parties from developing reliance interests with Independence that might prove difficult to terminate upon future infringement by Grohne.

In any event, the letter deterred dealings with Grohne and resulted in Yoder's decision to cancel its contract to provide a mill to Independence. Independence finally found a firm to supply a mill, but their entry into the steel tubing market was delayed by nine months. *Id.* As a result, the price decline corresponding to Independence's entry into the market might have resulted earlier through increased competition.

170. 691 F.2d at 315.

171. *Id.*

172. *Id.* The addition of attorneys' fees brought the judgment close to nine million dollars.

173. *Id.* at 313.

174. *Id.* at 316-20.

a comprehensive review of the intra-enterprise conspiracy doctrine. The court noted that had it not been for the jury's exoneration of Yoder,[175] the case would have been an ordinary conspiracy case. Because of Yoder's exoneration, however, the jury's finding of a conspiracy between two related firms posed the difficult problem of intra-enterprise conspiracy.

The *Copperweld* court admitted that in a formal sense the requisite plurality of actors was present.[176] Nevertheless, it also realized that little difference might exist between a wholly-owned subsidiary, such as Regal, and a fully integrated division.[177] The court reasoned that when differences between the two are trivial, section 1 liability should not hinge on the corporate status of the subsidiary.[178] After noting academic criticism of the intra-enterprise conspiracy doctrine,[179] the Seventh Circuit focused on judicial attitudes toward the doctrine. The court declared that judicial treatment of the doctrine was necessarily more constrained because federal judges could not ignore the precedential value of the Supreme Court's language in *Yellow Cab* and its progeny.[180]

Examining the practical operating relationship between parent and subsidiary, the Seventh Circuit reiterated its support for the economic reality theory.[181] The *Copperweld* court reasoned that a totality of circumstances must be weighed before a finding of capacity to conspire is upheld. Despite admitting the ambiguous and unsettled nature of this fact-intensive standard,[182] the court maintained that it had focused on the proper question: whether the distinction between affiliation and integration is significant or trivial.[183]

The court of appeals acknowledged that it sought a compromise between the harsh academic criticism of the intra-enterprise conspiracy doctrine and the sweeping Supreme Court language.[184] In seeking that compromise, the court examined the district judge's jury instructions, which had relied on a previous Seventh Circuit decision, *Photovest Corp. v. Fotomat Corp.*[185]

175. *Id.* at 316.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 316-17. The court summarized the "almost uniformly critical" academic discussion of the intra-enterprise conspiracy doctrine.

180. *Id.* at 317.

181. *Id.* at 318. The court employed a variety of factors to "decide when there is enough separation between the two entities to make treating them as two independent actors sensible." *Id.*

182. *Id.* The court declared that the "test is admittedly in an early and unsettled stage of development, as is inevitable with: (a) any test that involves the presence or absence of various unranked factors, (b) the possibility that the list will expand or contract, and (c) as yet limited application." *Id.* The court stated, however, that present uncertainties would be obviated as the test was applied and refined. *Id.*

183. *Id.* The court gauged its standard "[i]n terms of evidence that is empirical, readily furnished, and amenable to development at trial." *Id.*

184. *Id.*

185. 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980). In *Photovest,* the court utilized a set of factors enunciated by Professor Sullivan to determine the historical and opera-

The *Copperweld* court reasoned that the jury should examine the historical and actual relationship between the related firms, the economic efficiency, and the degree of synergy[186] resulting from the coercive forces of the two firms acting together. By scrutinizing the lower court's jury instructions, the Seventh Circuit found that the charge substantially complied with the factors enunciated in *Photovest*.[187] In addition, by employing a "clearly erroneous" standard to review the jury's determination on the control issue,[188] the court agreed that the jury could have found the following factors to be dispositive: Regal's previous separate existence; Copperweld's intent to retain Regal's autonomy in daily policy decision making; managerial incentive plans for Regal employees based on Regal's profitability; the existence of a separate Regal sales force and clientele; and separately arranged Regal supplies.[189] Accordingly, the court stated that the independent business contacts of the related firms were relevant to the defendants' ability to coerce others to a greater degree than any one of the firms could exert by itself.[190]

Overall, the Seventh Circuit found a much greater basis for supporting the jury verdict in *Copperweld* than in either *Photovest*[191] or *Olgilvie*.[192] While the economic reality of both *Photovest* and *Olgilvie* revealed a single enterprise, the economic reality of *Copperweld* revealed two entities; the *Copperweld* court found the parent and subsidiary sufficiently distinct.

Analysis and Impact

The decision of the court of appeals in *Copperweld* is notable in many respects. First, the court made no attempt to hide its cynicism toward the intra-enterprise conspiracy doctrine. Although it dutifully adhered to the Supreme Court precedent, the Seventh Circuit painstakingly identified the doctrine's numerous flaws. Noting that academic discussion of the doctrine was uniformly critical,[193] the court stated that "while Supreme Court intra-

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tional independence of the related firms. *Id.* at 726. The *Copperweld* court declared:

> [W]e must decide each case on its particular facts. Some relevant factors to consider include "the extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms."

691 F.2d at 315 (quoting Photovest Corp. v. Fotomat Corp., 606 F.2d at 726 (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977))).

186. *Id.* Synergism is defined as "cooperative action of discrete agencies . . . such that the total effect is greater than the sum of the two or more effects taken independently." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2,320 (1976).

187. 691 F.2d at 319.

188. *Id.*

189. *Id.* at 320.

190. *Id.* If the two firms could have effectuated the same result by independent conduct, they would not have needed to combine their efforts.

191. 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980).

192. 641 F.2d 581 (8th Cir. 1951).

193. 691 F.2d at 316-17.

enterprise decisions need not be read with complete literalism, of course they cannot be ignored."[194]

Secondly, unlike *Columbia Metal*,[195] *Fearless Farris*,[196] *Las Vegas Sun*,[197] *Photovest*,[198] and *Olgilvie*,[199] but similar to *Inglis*,[200] *Copperweld* involved vastly different firms in a conglomerate enterprise. Regal Tube Company, acquired as an ongoing concern in the structural steel tubing market, exercised and operated an entirely different product line than Copperweld.[201] Furthermore, Regal and Copperweld shared no common customers. Essentially, Regal's contribution to its parent was gauged in profit—not product. Most other economic reality cases have involved links in the same ultimate market, such as partners in a vertical conspiracy[202] or competitors in a horizontal conspiracy.[203] Cooperation would be expected between corporations in a vertically integrated enterprise or related competitors.[204] Indeed, management's strategic planning would be remiss *not* to consider subsidiaries that, in some way or another, operate in the same market;[205] vast inefficiencies might result from overlapping production or marketing. Antitrust policy should be circumscribed to the extent that it inhibits necessary coordination among related competitors or vertically related firms.

Like *Inglis*, however, *Copperweld* poses an entirely different situation. Regal and Copperweld were functionally and operationally independent. In economic terms, Regal "was a firm or a subunit of a firm that had sufficient resources and autonomy to act on its own behalf in the marketplace."[206]

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194. *Id.* at 317. The court appeared to agree with one commentator who maintained that Supreme Court precedent precluded it from considering whether related corporations lack the capacity to conspire, under any circumstance. *See* Note, *Conspiring Entities*, *supra* note 7.

195. 577 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

196. 577 F.2d 239 (9th Cir. 1978).

197. 589 F.2d 451 (9th Cir. 1979).

198. 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

199. 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

200. 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

201. 691 F.2d at 313-14. No evidence indicated that Copperweld acquired Regal with plans of forward integration or future competition.

202. *See, e.g.*, Olgilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979); Columbia Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20 (3d Cir. 1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978).

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

204. *See* Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

205. *See* Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 860 (N.D. Cal. 1979) (recognizing that "common ownership or control of corporations will inevitably bring about communications, understandings, and common actions among them in areas reached by Section 1 such as production, distribution, and price"), *aff'd*, 658 F.2d 1256 (9th Cir. 1981).

206. R. RUMELT, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE 33 (1974); *see also*, van Rijn, *supra* note 132, at 129 (describing economic unity where related firms have "no real freedom to determine their course of conduct on the market," and where "one company

In other words, besides its separate legal charter, Regal was a distinct economic unit. The Sherman Act should not be blind to this legal and economic reality. Antitrust policy should apply when the coercive power of independent, related firms is heightened by coordination and utilized to restrain the trade of outsiders.[207]

This latter element of *Copperweld,* restraint on an outsider's trade, highlights the utility of a combined economic reality/external effects test. The *Copperweld* decision perfectly satisfies this Comment's suggested standard. Regal and Copperweld functioned as distinct economic units that independently exercised their business relationships to put pressure on firms not to deal with Independence, an unrelated party. Such actions could not possibly be labeled internal policy; rather, they were specifically directed toward eliminating or restraining the trade of a potential entrant to Regal's market.[208] To further this goal, Regal utilized its relationships with mill manufacturers, real estate firms, and steel suppliers. Meanwhile, Copperweld utilized its own contacts with steel suppliers and banks. Consequently, the parent firm and its subsidiary in *Copperweld* were able to exercise greater coercion than would have been possible had they acted individually. *Copperweld,* therefore, serves as a perfect example of why courts should not ignore the synergetic effects of combinations merely because corporations have chosen the subsidiary form.

The utility of this Comment's bifurcated test is further illustrated by applying it to other decisions involving the intra-enterprise conspiracy doctrine. In *Columbia Metal*[209] and *H & B Equipment,*[210] the challenged corporations

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has power of control over the other companies and *actually exercises that power*"). Actual exercise of control, rather than some arbitrary percentage of stock ownership, should be the essential inquiry. One scholar has noted that stock ownership is not the equivalent of control in a realistic economic sense:

> [O]wnership of capital should not be confused with ownership of the firm. Each factor in a firm is owned by somebody. The firm is just a set of contracts covering the way inputs are joined to create outputs and the way receipts from outputs are shared among inputs. In this "nexus of contracts" perspective, ownership of the firm is an irrelevant concept. Dispelling the tenacious notion that a firm is owned by its security holders is important because it is a first step toward understanding that control over a firm's decisions is not necessarily the province of security holders.

Fama, *Agency Problems and the Theory of the Firm,* 88 J. POL. & ECON. 288, 290 (1980).

207. A primary fear of combinations is that they will enhance the potential for success in achieving an unlawful objective. *See* Callanan v. United States, 364 U.S. 587, 593-94 (1961). Of course, the immediate purpose underlying the Sherman Act was to eliminate trusts, a particular form of conspiracy in which industrial giants pooled resources into a trust in which each owned shares. *See generally* Bork, *Legislative Intent and the Policy of the Sherman Act,* 91 LAW & ECON. 7 (1966).

208. 691 F.2d at 320.

209. 571 F.2d 20 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978). *Columbia Metal* involved an alleged conspiracy between Kaiser Aluminum and its sales subsidiary. *See supra* notes 76-80 and accompanying text.

210. 577 F.2d 239 (5th Cir. 1978). *H & B Equipment* involved an alleged conspiracy between International Harvester and its small leasing subsidiary, Harco. *See supra* notes 81-86 and accompanying text.

were links in vertically integrated enterprises. Moreover, their activities were directed toward related third parties; both were former outlets of the parents' product. The activities restrained were internal in nature and coordination should have been expected. Thus, these decisions were incorrectly decided for holding that the related firms could conspire. Conversely, *Fearless Farris,*[211] *Olgilvie,*[212] and *Photovest*[213] were correctly decided because the vertically related firms in those decisions were merely extensions of the parents' production line; furthermore, the activities alleged in both *Olgilvie* and *Photovest* were directed toward *related* third parties. Therefore, a finding of capacity to conspire was appropriate in these cases.

A case that is questionable under this analysis, however, is *Las Vegas Sun.*[214] That decision appears to have been decided incorrectly because the alleged conspirators, members of a conglomerate enterprise,[215] were able to combine their separate business relationships to exercise more power than would have been possible if they had acted independently. Moreover, these activities were directed at an unrelated third party, the plaintiff-newspaper.[216] Nevertheless, the presence of a single decisionmaker[217] in *Las Vegas Sun* militates against a finding that the related firms were distinct entities. Yet, the intent of the Sherman Act counsels that concern for the underlying restraint of trade should overcome the presumption of incapacity due to the presence of single decisionmaker.[218] In any event, the suggested test's adaptability to *Copperweld* and other decisions reveals its potential for effectuating the intent underlying section 1.

THE EFFECT OF ABROGATION

The *Copperweld* court noted that while various circuits have adopted several limiting approaches, no court of appeals has abolished the intra-enterprise doctrine "root and branch."[219] While this statement may be true today, there

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211. 589 F.2d 451 (9th Cir. 1979). *Fearless Farris* involved an alleged conspiracy among five gasoline stations and a petroleum products wholesaler, all owned by one individual. The action was brought by a former franchisee. *See supra* notes 110-13 and accompanying text.

212. 641 F.2d 581 (8th Cir. 1951). *Olgilvie* involved an alleged conspiracy between a photo processing franchisor, Fotomat, and its subsidiary film chemicals firm, Fotomat Labs. *See supra* notes 144-55 and accompanying text.

213. 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980). *Photovest,* like *Olgilvie,* involved an alleged conspiracy between the parent, Fotomat, and its subsidiary, Fotomat Labs. In both cases, the § 1 claim was brought by disgruntled franchisees of the Fotomat film kiosks. *See supra* note 152.

214. 610 F.2d 614 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980).

215. *Id.* at 616. *Las Vegas Sun* involved a holding company, Summa Corp., a television network, and six hotel-casinos all owned by the late Howard Hughes. *See supra* notes 130-36 and accompanying text.

216. The various Hughes corporations withdrew all advertising from the newspaper, prompting the § 1 claim by the Las Vegas Sun. 610 F.2d at 617.

217. For a discussion of the sole decisionmaker theory, see *supra* text accompanying notes 109-20.

218. *See supra* notes 23-39 and accompanying text.

219. 691 F.2d at 318.

has recently been a clarion call for abolishing the doctrine. The Reagan administration has joined forces with various business associations to urge its repeal.[220] In urging abolition, these groups point to the doctrine's overly formalistic distinctions between subsidiary and division, the harsh effects of per se rules, the widespread failure to enforce the doctrine, and the availability of antitrust alternatives. Nonetheless, complete abrogation of the intra-enterprise conspiracy doctrine is unnecessary, inequitable, and inconsistent with the goals of antitrust policy.

A. *Properly Drawn Distinctions*

Critics of the doctrine consistently extol the redeeming virtues of corporate subsidiaries.[221] They identify several legitimate reasons for separate incorporations: managerial[222] and financial flexibility,[223] federal tax advantages,[224] favorable equity financing,[225] foreign market entry,[226] production and distribution efficiency,[227] ease of accounting,[228] and maintenance of morale.[229] Additionally, a parent firm can limit its contractual and tort liability by separately incorporating its subsidiaries,[230] and can limit its civil liability, if it does business in other states, by creating a subsidiary to prevent service of process on the parent corporation.[231]

Yet the Supreme Court has never indicated that internal corporate effi-

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220. The Justice Department, joined by the Federal Trade Commission, the United States Chamber of Commerce and other business lobbies, wrote briefs in support of the petitioner, Copperweld, to abrogate the intra-enterprise conspiracy doctrine in Copperweld Corp. v. Independence Tube Corp., *cert. granted,* 103 S. Ct. 3901 (1983).

221. *See* Handler & Smart, *supra* note 7, at 62 n.193; Stengel, *supra* note 7, at 9.

222. *See* H. LEIBENSTEIN, BEYOND ECONOMIC MAN 165-68 (1976).

223. If a particular operation is risky, that unit can be incorporated to isolate that risk. Conversely, if one of the parent's operations is of greater interest to investors than to others, it too can be incorporated to raise capital. *See* Stengel, *supra* note 7, at 9.

224. Recent changes have largely eliminated the tax benefits of separate incorporation. *See* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 15-1 to 15-5 (4th ed. 1979); Note, *Conspiring Entities, supra* note 7, at 668.

225. *See* Comment, *Intra-Enterprise Conspiracy, supra* note 7, at 381.

226. Separate incorporation allows a firm to avoid "insuperable barriers to foreign trade like high tariffs, quota restrictions, and currency controls." *Id.* Some countries insist on the corporate form to do business within their boundaries. *See* McQuade, *supra* note 7, at 196.

227. Modern management theory stresses the many benefits that can result from delegating significant authority to local management. *See* P. DRUCKER, MANAGEMENT 575, 579-80 (1974); T. PETERS & R. WATERMAN, IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES, 200-34 (1982). Of course, this does not necessarily imply that one must employ the separately incorporated subsidiary form to achieve decentralization. The choice of control and any ensuing efficiencies are usually derived from the manner in which a division or subsidiary is structured, rather than from the fact of separate incorporation. *See* O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 151-54 (1975); R. RUMELT, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE 38-40 (1974).

228. *See* Willis & Pitofsky, *supra* note 7, at 27.

229. *See id.* at 28.

230. Stengel, *supra* note 7, at 9.

231. *Id.*

ciency will supercede the Sherman Act's objective of protecting competition.[232] Moreover, the Court has emphasized that the privileges and benefits of separate incorporation will not absolve firms from Sherman Act liability simply because the firms are commonly controlled.[233] Having accepted the benefits of separate incorporation, related firms must also accept the drawbacks, one of which is exposure to such liability.

Critics argue that there is nothing inherently anticompetitive about the use of corporate subsidiaries, and thus the doctrine wrongly punishes this legitimate structure.[234] This argument, however, fails to reach the core of the issue. Admittedly, no anticompetitive scheme is inferred from the mere use of the corporate subsidiary. The concern only arises when, and if, the parent and subsidiary unreasonably restrain the trade of outside firms. A finding that two firms have the *capacity* to conspire does not necessarily mean that those firms *did* conspire and unreasonably restrained trade. Consequently, corporate form by itself is not dispositive of section 1 violations. Instead, the primary concern of the Sherman Act is the result of the concerted action.[235]

B. *Per Se Rules Are Inapplicable*

Historically, certain agreements among firms have been eschewed for lacking any positive benefit. Courts, therefore, apply per se rules to categorize such activies as automatically unreasonable. Although such rules eliminate certain problems of proof,[236] critics assert that this legal expediency imposes harsh consequences upon the strategic planning of affiliated corporations.[237] These critics maintain that because everyday decisions concerning prices and market allocation have the potential to fall under the per se rubric, the doctrine places the chilling specter of treble damages upon ordinary decision making.[238]

Nevertheless, even if it exists, this specter is easily eliminated. The judicially created rule of reason approach[239] can be expanded or contracted by the

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232. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 68-69 (1977) (White, J., concurring) (expressing reservations about focusing solely upon economic efficiency at the expense of more "deeply embedded" principles). Similarly, under § 7 of the Clayton Act, and according to the Justice Department's merger guidelines, efficiency considerations do not present obstacles to preserving competition. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); UNITED STATES DEP'T OF JUSTICE, MERGER GUIDELINES 42-43 (1982).

233. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968).

234. Handler & Smart, *supra* note 7, at 62.

235. *See supra* notes 23-39 and accompanying text.

236. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392, 396 (1947) (foreclosure of access to market is per se illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (agreements between competitors to control price are per se illegal).

237. *See* McQuade, *supra* note 7, at 215 (noting that per se rules are "antithetical" to the complex economics of related firm conduct).

238. *Id.*

239. The classic formulation of the rule of reason approach to antitrust law was articulated by Justice Brandeis:

> Every agreement concerning trade, every regulation of trade, restrains. To bind,

courts.[240] As other commentators have recommended, any harsh consequences that per se applications may pose do not mandate abrogation of the doctrine.[241] Rather, the common sense solution is simply not to apply per se rules in the intra-enterprise context. When confronted with an alleged conspiracy between affiliated corporations, courts can be directed to engage in the more thorough rule of reason approach. Essentially, a court would be forced to balance the competitive and anticompetitive consequences of the related firms' conduct.[242] Alternatively, and preferably, the per se rule problem can be eliminated by utilizing this Comment's suggested approach. When decisions are internal in nature and, therefore, are not directed at unrelated third parties, section 1 should not be applicable. This approach would alleviate corporate concerns that the Sherman Act might apply to anything other than unreasonable restraints of trade.

C. *The Relevancy of Enforcement*

The intra-enterprise conspiracy doctrine's impropriety is often tied to its apparent lack of enforcement.[243] The FTC seems to ignore it,[244] and commentators have emphasized past antitrust administrators' isolated statements indicating a more limited reading of Supreme Court decisions.[245] Notwith-

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> to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

240. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977) (overruling the use of the per se doctrine for resale location restrictions and adopting the rule of reason approach).

241. *See* Comment, *Corporate Liability for Intra-Corporate Conspiracy in Restraint of Trade*, 1968 U. ILL. L.F. 248 (recommending exclusive use of the rule of reason approach to intra-enterprise situations) [hereinafter cited as Comment, *Corporate Liability*]; *see also* Comment, *All in the Family, supra* note 7 (recommending that the principle of per se liability be abandoned for related firm conduct).

242. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

243. *See* Handler & Smart, *supra* note 7, at 66; Willis & Pitofsky, *supra* note 7, at 30-32.

244. Two early FTC proceedings gave credence to the doctrine by issuing consent orders to prohibit parent firms from conspiring with their subsidiaries or affiliated corporations. *See In re* Schenley Indus., 50 F.T.C. 747, 751-52 (1954); *In re* Distillers Corp.-Seagrams, Ltd., 50 F.T.C. 738, 743-44 (1954). Over a decade later, the Commission rejected Schenley's request for modification. United States v. Schenley Indus., 1966 Trade Cas. (CCH) ¶ 71,987 (S.D.N.Y.). Since then, the FTC has been largely unsympathetic to appeals to invoke the doctrine. *See* Handler & Smart, *supra* note 7, at 66 n.207.

245. "[W]e should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt

standing such perceptions, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws adopted the external effect theory.[246] In 1977, the Antitrust Division of the Justice Department again adopted a similiar view in its guide for international operations.[247] Currently, the Attorney General and the FTC agree with those seeking to repeal the doctrine.[248]

This apparent inconsistency and inattention is neither conclusive nor surprising. The broad discretionary powers that Congress has delegated to administrative bodies have fostered both neglect and abuse.[249] While it is not within the scope of this Comment to detail the fluctuating rigor of administrative enforcement, suffice it to note that substantive changes in existing law should not be left to the whims of executive prerogative. If changes in the doctrine are needed, either Congress or the judiciary is the proper institution to effect such changes.

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to push the intracorporate conspiracy doctrine as far as a free wheeling interpretation of the *Timken* case might suggest." Turner, *Address Before the American Bar Association,* 10 ANTITRUST BULL. 685, 687 (1965).

246. *See supra* notes 127-30 and accompanying text.

247. *See supra* note 138 and accompanying text.

248. Both parties joined as amicus curiae urging repeal of the intra-enterprise conspiracy doctrine in the *Copperweld* case. *See supra* note 220.

249. It may be somewhat cynical to observe that antitrust enforcement may be influenced by executive whims. But observe, for instance, the following dialogue between former President Nixon and White House Special Assistant Ehrlichman concerning the status of the ITT-Grinnell appeal in 1971:

> Ehrlichman: Well, they filed a notice of appeal. If we do not file a statement on jurisdiction by tomorrow the case is dead, and, uh—
>
> President: Who?
>
> Ehrlichman: The Justice Department.
>
> President: They're not going to file.
>
> Ehrlichman: Well, I thought that was your position.
>
> President: Oh, hell.
>
> Ehrlichman: I've been trying to give, I've been trying to give them signals on this, and, uh, they've been horsing us pretty steadily. Uh, uh, Geneen [President of ITT]. . .
>
> President: I don't want to know anything about the case. I don't want to know about Geneen. I've met him and I don't know—I don't know whether ITT is bad, good, or indifferent. But there is not going to be any more antitrust actions as long as I am in this chair. . . .

Statement of Information: Hearings Before the House Comm. on the Judiciary Pursuant to H.R. Res. 803, 93d Cong. 2d Sess., Book V, pt. 1, at 313-14, *reprinted in* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 154-55 (1979).

Unfortunately, state enforcement authorities and private plaintiffs are playing an ever-increasing role in the enforcement of the national antitrust policy established by Congress. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572-73 & n.10 (1982); *see Number of Private Actions Rises, As Number of Government Suits Falls,* ANTITRUST & TRADE REG. REP. (BNA) No. 1132, at 412 (Sept. 22, 1983). It is one thing for the Justice Department and the FTC to exercise their prosecutorial discretion in declining to enforce the antitrust law; but it is an entirely different and dangerous matter when the executive branch actively seeks major changes in legal rules that would deny the ability of private plaintiffs to seek redress for antitrust wrongs before the courts. *See* Litvak, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division,* 60 TEXAS L. REV. 649 (1982).

The Court should not minimize the importance of stare decisis, which "demands respect in a society governed by the rule of law."[250] In situations involving statutory construction, the Court has declared that "considerations of stare decisis weigh heavily."[251] If Congress decides that over thirty-five years of consistent judicial interpretation of the intra-enterprise conspiracy doctrine is misguided, then it is within Congress's province to change the law, as it has in other areas of antitrust.[252] By analogy, the reasoning implicit in the lack of enforcement argument would probably condemn the efficacy of environmental programs and civil rights laws whenever one administration neglects to enforce these laws vigorously. Moreover, the judiciary should not be the vehicle for espousing popular economic theory. Thus, the Court's unequivocal statements present difficult hurdles for those desiring to repeal the doctrine. In short, the Court should not replace sound legal reasoning with the ebb and flow of economic ideology.

D. *The Inadequacy of Antitrust Alternatives*

Various commentators have stated that the intra-enterprise conspiracy doctrine was invented and utilized as a stopgap measure to prohibit essentially unilateral conduct which does not rise to an attempt to monopolize, or to the level of monopolization, or to a conspiracy to monopolize which would be covered by section 2.[253] Moreover, they note that other antitrust laws are available to prohibit anticompetitive conduct.[254] Thus, some commentators argue that subjecting an intra-enterprise conspiracy to section 1 is both unnecessary and duplicitous.

Conversely, other commentators follow Justice Reed's admonition[255] that failure to apply the intra-enterprise conspiracy doctrine will result in a wide

250. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2487 (1983); *see also* TVA v. Hill, 437 U.S. 153, 194-95 (1978) (stare decisis promotes evenhanded, consistent, and predictable application of legal rules).

251. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); *see also* Patsy v. Board of Regents, 457 U.S. 496, 517 (1982) (White, J., concurring) (to overrule long-held precedent in statutory interpretation, petitioner must make a strong showing that the court misread statute and history).

252. *Compare* Pfizer, Inc. v. India, 434 U.S. 308 (1978) (foreign governments entitled to treble damages) *with* Foreign Government Damage Recoveries Act of 1982, Pub. L. No. 97-392, § 2, 96 Stat. 1964 (1982) (amending section 4 of the Clayton Act to limit foreign governments to single damages).

Moreover, it remains the prerogative of Congress to exempt related firms from § 1, just as it has exempted certain industries from the full reach of the Act. *See, e.g.,* 7 U.S.C. §§ 291, 292 (Capper-Volstead Act, agricultural cooperatives); 15 U.S.C. §§ 1011-1013 (McCarran-Ferguson Act, insurance); 15 U.S.C. § 1801 (newspaper joint operating agreements); 49 U.S.C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); *see also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354-55 (1982) (refusing to exempt fee-for-service medicine plan by physicians from per se rule against price fixing and leaving open the possibility for Congress to consider the exception that the Court was "unable to read into the statute").

253. *See* Willis & Pitofsky, *supra* note 7, at 22.

254. *See* Handler & Smart, *supra* note 7, at 66-72.

255. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 601 (1951) (Reed, J., concurring).

variety of anticompetitive conduct that raises significant antitrust concerns though it is beyond the scope of section 2.[256] Suits brought under section 1 may have strategic and procedural advantages over other forms of antitrust relief,[257] including criminal penalties,[258] treble damages, private actions, avoidance of market analysis,[259] and elimination of certain defenses.[260] Further, because conspiracies are often difficult to prove and detect, courts allow proof to be circumstantial and will not toll the statute of limitations until the conspiracy is abandoned.[261]

The main antitrust alternative suggested by commentators is the Federal Trade Commission Act's prohibition of "unfair methods of competition" and "unfair and deceptive acts."[262] The major drawback of this statute, however, is its lack of the powerful deterrents of private actions and treble damages.[263] Because the FTC must bring suit, it is subject to laxity of enforcement according to the whims of the executive branch.[264] In addition, the FTC Act's main forms of relief, cease and desist orders and injunctions, completely fail to redress the past effects of anticompetitive conduct.[265] Furthermore, the Act is riddled with exemptions of entire industries.[266] Finally, the federal government's limited time and resources undercut the FTC's efforts to monitor competitive behavior in most private sector markets.[267]

Other prohibitions, such as the substantial diminution of competition through merger under section 7 of the Clayton Act,[268] false advertising and price discrimination under the Robinson Patman Act,[269] and tying agreements and boycotts under section 3 of the Clayton Act,[270] are too specialized to provide an adequate substitute for the more comprehensive Sherman Act. The various defenses and exceptions that exist under these alternatives are not found in section 1 of the Sherman Act. Overall, the alternatives suggested by the commentators are wholly inadequate.

256. ATTORNEY GENERAL'S REPORT, *supra* note 108, at 34; *see* Barndt, *supra* note 7, at 186-87.

257. *See* McQuade, *supra* note 7, at 184-88; Comment, *Intra-Enterprise Conspiracy, supra* note 7, at 373-74.

258. Section 1 violations by individuals can be prosecuted as felonies. 15 U.S.C. § 1 (1976).

259. Section 2 cases involve complex searches to define the relevant submarket in which to gauge market concentration. *See, e.g.,* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (engaging in exhaustive analysis of "virgin" and "secondary" aluminum ingot market in monopolization claim).

260. *See* McQuade, *supra* note 7, at 185 n.12.

261. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 342 (1897).

262. 15 U.S.C. § 45(a)(1) (1976).

263. *See* Comment, *Corporate Liability, supra* note 241, at 254. The FTC Act is not considered "antitrust law" under § 4 of the Clayton Act; therefore, treble damages are not available. Clayton Act § 4, 15 U.S.C. § 12, 15 (1976).

264. *See supra* note 249.

265. FTC actions are in the form of injunctive relief, while the Sherman Act provides compensatory relief.

266. *See* 15 U.S.C. § 45 (6) (exempting, inter alia, the airline, trucking, meat, and banking industries). Sherman Act exemptions are both fewer and more divergent. *See supra* note 252.

267. *See* Comment, *Corporate Liability, supra* note 241.

268. 15 U.S.C. § 18 (1976).

269. *Id.* § 13(a).

270. *Id.* § 14.

CONCLUSION

Restriction of the intra-enterprise conspiracy doctrine is long overdue. Courts and commentators have grappled with the Supreme Court's language, upon which the doctrine is based, for over three decades. Unquestionably, *Yellow Cab* and its progeny have not succeeded in articulating a workable doctrine to govern the anticompetitive activities of affiliated corporations.

Nonetheless, the Court should be reluctant to adopt a new standard that might sanction significant restraints on trade and render section 1 a mere carcass. Some critics would have the Court do just that by carving out an exemption to section 1 for related, but separately incorporated, firms.[271] Apparently, such an exemption would apply to all related firms, regardless of whether the subsidiary maintains operative independence, was recently acquired, is a sizeable firm in a loosely-knit conglomerate, or has an entirely different product line in distant markets.[272] Presumably, the Court should

271. *See, e.g.*, Handler & Smart, *supra* note 7; Note, *Conspiring Entities, supra* note 7.

272. Consider, for example, a multinational conglomerate whose prior history and success were based primarily on retail merchandising. At present, it operates primarily as a holding company for four separately incorporated subsidiaries: *A*, an insurance company; *B*, a real estate company; *C*, a financial investment firm; and *D*, a retail merchandising firm. Each corporation has an overlapping board of directors yet maintains considerable autonomy and separate headquarters. Within each subsidiary are other unincorporated divisions and incorporated subsidiaries engaged in businesses similar to those of their immediate parent. While daily activities of the smaller corporations are directed by their hierarchical parent, the four main subsidiaries rarely interact except in their long-range strategic planning.

Firm *A* encounters stiff competition and, as a result, seeks to harm its major competitor by refusing to deal with any customers who also hold policies with that competitor. Furthermore, Firm *A*'s president contacts *C*, the financial investment firm. *C*'s president agrees to release a market newsletter discrediting the competitor's financial solvency; this prompts a sharp decline in the competitor's stock price and massive policy cancellations.

Firm *A* also contacts the president of its regional insurance subsidiary, Pacific *A* Insurance Corp. Firm *A*'s president, a member of Pacific *A*'s board of directors, tells its subsidiary to decrease its premium prices uniformly to the level of Firm *A* in order to compete more effectively. As a result, Firm *A*'s competitor suffers a large decrease in its regional market share.

Firm *A*'s national market share is 20% of all policies held, while Pacific *A*'s market share in the region is 15%. The harmed competitor brings Sherman Act claims charging conspiracy to restrain trade and monopolize between Firm *A* and its president, Firm *A* and Firm *C*, and Firm *A* and Pacific *A*.

Based on these rudimentary facts, a few observations are noteworthy. First, market power does not exist. Thus, the competitor could not utilize § 2. Second, because the president was acting in the scope of his duties with no apparent personal stake in the outcome of the alleged conspiracy, the § 1 claim against Firm *A* and its president would also fail. Third, by combining its efforts with Firm *C*, Firm *A* was able to wield much greater power than would have been possible if it had acted alone. Moreover, the two main subsidiaries are engaged in entirely different businesses, each maintaining what appears to be a significant degree of operative independence from one another, and might, therefore, be viewed as functionally distinct economic units. Thus, the first prong of the test presented in this Comment is satisfied.

In addition, the related firm's coercive efforts were directed toward restraining the trade of the competitor—an unrelated outside party. Thus, the second prong of this Comment's test is satisfied. Thus, it appears that it is appropriate to find a capacity to conspire between Firms *A* and *C*. To exempt Firms *A* and *C* from § 1 would unjustifiably immunize the anticompetitive actions of two economically distinct entities. Such a result would be oppugnant to the Sherman shut its eyes to combinations that seriously restrain or even eliminate the trade of outside parties, so long as the concerted action does not rise to an attempt to monopolize or to the level of monopolization.

This approach would be a "subterfuge of form" that would eviscerate the true purpose of the Sherman Act.[273] A more reasonable limitation is suggested by the Report of the Attorney General's National Committee to Study the Antitrust Laws, and the economic reality theory articulated by some lower courts. Under this approach, if the particular facts and circumstances of a case indicate that the affiliated corporations function as distinct economic units and their concerted efforts are directed toward the trade of unrelated third parties, a finding of capacity to conspire is appropriate. This standard alleviates the harsh effects of condemning internal agreements or actions by essentially single enterprise firms. At the same time, the suggested approach enforces the intent of the Sherman Act, respects stare decisis, and refuses to disregard significant combinations in restraint of trade.

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Act. Finally, Firm *A* and Pacific *A* are engaged in similar businesses with control vested primarily in Firm *A*. In essence, Pacific *A* seems to be merely the regional sales arm or corporate alter ego of Firm *A*. Also, the agreement between the two firms concerned basic pricing policy that should be expected beween related firms in the same business, but different markets. Consequently, a finding of incapacity to conspire seems warranted.

It is once again essential to note that a determination of a capacity to conspire is only the first step to finding a § 1 violation. The court must then proceed to examine the activity resulting from the conspiracy to determine whether the concerted actions were actually unreasonable; absent such a finding, § 1 is not violated.

273. The Supreme Court noted that

> the first and second sections of the [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. . . . [I]n view of the general language of the statute and public policy which it manifested, there was no possibility of frustrating that policy by resort to any disguise or subterfuge of form, since resorting to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.

United States v. American Tobacco Co., 221 U.S. 106, 181 (1911).