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Antitrust - Repudiation of the Intraenterprise Conspiracy Doctrine - Copperweld Corp. v. Independence Tube Corp.

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INTRODUCTION

The Sherman Antitrust Act (the Act) was designed to promote free competition in the marketplace by prohibiting anticompetitive commercial conduct. The Sherman Act prohibits 1) every contract, combination or conspiracy in restraint of trade, and 2) monopolization, attempts to monopolize, or conspiracies or combinations to monopolize.

The Sherman Act contains a clear distinction between independent acts of a single party and concerted acts of two or more parties. Unilateral conduct of a single party is governed by section 2 of the Act and is declared unlawful only when it actually threatens monopolization. Concerted conduct effected through a “contract, combination . . . or conspiracy” is governed by section 1 of the Act and is scrutinized under a Rule of Reason analysis—a

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


3. 15 U.S.C. § 1 provides in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”

4. 15 U.S.C. § 2 provides in pertinent part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”


more exacting scrutiny than under section 2.7 As a result, determining whether the alleged anticompetitive conduct is "unilateral" or "concerted" is a primary threshold analysis in applying the Sherman Act.

Analysis becomes complex when the parties to an alleged "concert of actions" in violation of section 1 of the Act are a parent corporation and its wholly owned subsidiary.8 The intraenterprise conspiracy doctrine evolved from attempts to define the manner of concert required for a section 1 violation, and provides that section 1 liability is not foreclosed merely because the parties acting in concert are parent and subsidiary corporations subject to common ownership.9 Although the existence of the doctrine is attributed to declarations made by the Supreme Court, the Court had not considered the merits of the doctrine until certiorari was granted in Copperweld Corp. v. Independence Tube Corp.10

In Copperweld, the Court squarely confronted the issue of whether a parent corporation and its wholly owned subsidiary are capable of conspiring together in violation of section 1 of the Sherman Act. In a five to three decision, the Court held that, for antitrust purposes, the coordinated activities of such corporations must be viewed as those of a single enterprise and therefore cannot violate section 1.11 By so holding, the majority renounced the intraenterprise conspiracy doctrine. Three justices dissented, arguing that the anticompetitive acts alleged were manifestly illegal and that the defendant corporations should not be immunized from lia-

7. The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 2741.


9. 104 S. Ct. at 2736.


11. Id.
bility because of their common ownership.\textsuperscript{12}

The purpose of this Note is to examine the effects of the \textit{Copperweld} holding on antitrust regulation and enforcement. The Note traces the development of the intraenterprise conspiracy doctrine and assesses its impact on past antitrust actions. It also addresses the question of whether the repudiation of the intraenterprise conspiracy doctrine will weaken antitrust enforcement in the corporate arena. The \textit{Copperweld} Court concludes that its decision will not cripple antitrust enforcement due to the existence of other policing measures.\textsuperscript{13} The Note will suggest, however, that in the \textit{Copperweld} decision, the majority displayed an alarming willingness to elevate form over substance by ignoring the effects of the anticompetitive conduct. Liability for manifestly anticompetitive conduct should not depend wholly on the corporate form of the defendant. The intraenterprise conspiracy doctrine has a valid place in the realm of antitrust enforcement and its repudiation was unnecessarily premature.

\textbf{THE CASE}

In 1972, the Copperweld Corporation, a manufacturer of structural steel tubing, purchased the Regal Tube Company,\textsuperscript{14} an unincorporated division of Lear Siegler, Inc.\textsuperscript{15} By the terms of the sales agreement, Lear Siegler and its subsidiaries were bound not to compete with Regal in the United States for five years.\textsuperscript{16} Copperweld immediately transferred the division assets to a newly formed, wholly owned Pennsylvania corporation, the Regal Tube Co.\textsuperscript{17}

Shortly before the sale, Regal division president David Grohne

\textsuperscript{12} Id.; see infra notes 74-79 and accompanying text.
\textsuperscript{13} A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 STAT. 731, 15 U.S.C. § 18. Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 28 STAT. 719, 15 U.S.C. § 45.
\textsuperscript{14} Id. at 2745.
\textsuperscript{15} The predecessor to Regal Tube Co. was incorporated in Chicago in 1955 to manufacture structural steel tubing. From 1955 to 1968 it operated as a wholly owned subsidiary of the C.E. Robinson Co. Lear Siegler purchased Regal Tube in 1968 and operated it as an unincorporated division. Id. at 2734.
\textsuperscript{16} Id.
\textsuperscript{17} The new subsidiary conducted business in Chicago, but shared Copperweld's corporate headquarters in Pittsburgh. Id.
accepted a position as a corporate officer of Lear Siegler. After the sale and while continuing to work for Lear Siegler, Grohne established his own steel tubing business and formed the Independence Tube Corp. The new corporation ordered a tubing mill from the Yoder Co., and began to compete with Regal in the manufacture of steel tubing. Attorneys for Regal and Copperweld advised that Grohne was not bound by the agreement not to compete, but that Copperweld could probably obtain an injunction to prevent the use of any technical information or trade secrets belonging to Regal. The attorneys drafted a letter that Copperweld sent to many persons and businesses with whom Grohne attempted to deal. The letter warned that Copperweld would be “greatly concerned if [Grohne contemplated] entering the structural tube market” in competition with Regal and promised to take “any and all steps” which were necessary to protect the know-how and trade secrets purchased from Lear Siegler. Copperweld also made contacts with a number of banks, real estate firms, suppliers and customers to discourage them from doing business with Independence.

The Yoder Co. voided its acceptance of Independence’s order for a tubing mill after receiving one of the warning letters from Copperweld. Grohne’s efforts to preserve the deal failed, but he arranged to have a mill supplied by another company which also received, but ignored, a warning letter from Copperweld. Had Yoder performed under the original agreement, Independence could have begun tubing manufacture nine months earlier.

Independence Tube Corp. brought suit against Copperweld, Regal and Yoder alleging anticompetitive behavior in violation of

18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Copperweld contended that the letter was intended only to prevent third parties from developing reliance interests which might make a court reluctant to enjoin Grohne’s operations. Id.
26. Id.
27. Id.
28. Id. at 2735.
29. Id.
30. Id.
INTRAENTERPRISE CONSPIRACY

Sherman section 1. A jury found Copperweld and Regal guilty of conspiracy to violate Sherman section 1. At a separate damages hearing, the jury awarded Independence $2,499,009 which was trebled to $7,497,027. The court awarded attorneys’ fees and costs. Motions for judgment notwithstanding the verdict and a new trial were denied. The Seventh Circuit Court of Appeals affirmed, holding that there was enough separation between Copperweld and Regal to treat them as separate actors.

The Supreme Court granted certiorari for the purpose of reviewing the intraenterprise conspiracy doctrine by answering the question of whether coordinated acts of a parent corporation and its wholly owned subsidiary can constitute a combination or conspiracy under section 1 of the Sherman Act. The Court rejected the notion of intraenterprise conspiracy and reversed.

BACKGROUND

Prior to granting certiorari in Copperweld Corp. v. Independence Tube Corp., the Supreme Court had not assessed the merits of the intraenterprise conspiracy doctrine in light of the objectives of antitrust law. The intraenterprise conspiracy doctrine evolved from a narrow rule first espoused in United States v. Yellow Cab Co. In Yellow Cab, the Yellow Cab Co. allegedly conspired in violation of the Sherman Act to restrain and control the

31. The Chairman of the Board and Chief Executive Officer of Copperweld and Regal was also named as a defendant. The defendants were also charged with an attempt to monopolize the market for structural steel tubing in violation of Sherman § 2. Those assertions were dismissed before trial.

The defendants counterclaimed that the plaintiffs and Grohne used proprietary information that belonged to Regal, competed unfairly and interfered with prospective business relationships. The court directed a verdict in favor of the plaintiffs on the defendants’ counterclaims prior to the close of the evidence. Id.

32. The jury found that Yoder was not a participant in the conspiracy. Id.

33. Id.

34. Id.

35. Id.


37. Id. at 318.

38. 104 S. Ct. at 2736.

39. Id.

40. 104 S. Ct. 2731.

41. Id. at 2736.

42. 332 U.S. 218 (1947).
purchase and operation of taxicabs by the principal companies operating taxicabs in Chicago, New York City, Pittsburgh, and Minneapolis. The majority of the operating companies in those cities, formerly independent, came under Yellow Cab's control by acquisition or merger. In discussing the mergers, the Court introduced the intraenterprise conspiracy doctrine by stating:

The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.

And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint is that "dominating power" over the cab operating companies "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 purchase for control."

In Keifer-Stewart Co. v. Joseph E. Seagrams & Sons, Inc., the Court summarily disposed of the defendants' argument that they were "mere instrumentalities of a single manufacturing-merchandising unit" by citing Yellow Cab. In Keifer, two wholly owned subsidiaries were found liable under Sherman section 1 for imposing maximum resale prices on customers. The Supreme Court affirmed the jury's verdict by stating that the defendants'
argument was counter to past decisions declaring that common ownership and control did not protect corporations from the impact of antitrust laws, especially when the defendants held themselves out as competitors.\textsuperscript{49}

In \textit{Timken Roller Bearing Co. v. United States},\textsuperscript{50} the Supreme Court upheld the antitrust liability of an Ohio corporation for conspiring in violation of Sherman section 1 through restrictive agreements with its partly owned European affiliates.\textsuperscript{51} The Court undertook little analysis of the doctrine apart from a citation to \textit{Keifer} supporting their conclusion that "the fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of antitrust laws."\textsuperscript{52}

The Court continued its use of the doctrine in \textit{Perma Life Mufflers, Inc. v. International Parts Corp.}\textsuperscript{53} In \textit{Perma Life}, the plaintiffs alleged a conspiracy between a parent corporation and three subsidiaries to impose illegal restrictions on franchisees.\textsuperscript{54} The Court upheld liability, stating that since the defendants had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."\textsuperscript{55}

The Supreme Court clearly made use of the intraenterprise conspiracy doctrine prior to the \textit{Copperweld} decision.\textsuperscript{56} However, although it appeared to have the Court's acceptance, the doctrine was never given a primary role in Sherman Act decisions.\textsuperscript{57} As a result, the Court never articulated the underlying antitrust rationales of the doctrine\textsuperscript{58} or developed an analysis for determining in-

\textsuperscript{49} Id. at 215.
\textsuperscript{50} 341 U.S. 593 (1951).
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 598.
\textsuperscript{53} 392 U.S. 134 (1968).
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 141-42.
\textsuperscript{56} See Schine Chain Theatres Inc. v. U.S., 334 U.S. 110, 116 (1948) (citing \textit{Yellow Cab} for the proposition that the affiliated companies were capable of conspiracy); U.S. v. Griffith, 334 U.S. 100 (1948) (holding that the concerted acts of parents and subsidiaries were unlawful conspiracies).
\textsuperscript{57} "Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intraenterprise conspiracy was in all but perhaps one instance unnecessary to the result." \textit{Copperweld}, 104 S. Ct. at 2736.
traenterprise liability. Only one rule was clear—separately incorporated subdivisions could conspire with their parent corporations.

**ANALYSIS**

In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court held that the coordinated acts of a parent corporation and its wholly owned subsidiary fell outside the reach of Sherman section 1. Writing for the majority, Chief Justice Burger traced the history of the intraenterprise conspiracy doctrine from the language of *Yellow Cab*, through the holding in *Perma Life*, and concluded that although the cases displayed support for the doctrine, it was never a necessary element for the imposition of antitrust liability. He found that the corporate affiliation of the *Yellow Cab* defendants was irrelevant because the original mergers involved were illegal, the *Keifer-Stewart* and *Perma Life* defendants were guilty of illegally combining with other outside parties, and majority ownership was lacking between the conspirators in *Timken*. Supreme Court cases involving the intraenterprise conspiracy doctrine therefore condemned acts that were unlawful under standard antitrust doctrines.

The Court grounded its reasoning on the distinction between unilateral and concerted conduct, and the relationship the distinction has to the terms "contract, combination . . . or conspiracy" in section 1. The Court held that the coordinated activity of a par-

59. Id.
60. Id. at 1744.
62. Id.
63. 332 U.S. 218 (1947).
64. 392 U.S. 134 (1968).
65. *Copperweld*, 104 S. Ct. at 2737.
66. Id. at 2738-39.
67. Id. at 2739.
69. Wholly unilateral acts cannot result in a contract, combination or conspiracy. As a result, agreements among officers or employees of the same firm to implement a unified firm policy are not within the reach of Sherman § 1. There is also general agreement that internally coordinated conduct of a corporation and one of its unincorporated divisions is conduct of a single actor and thus, also outside the reach of Sherman § 1. Coordination within a single corporate enterprise does not represent a sudden joining of two independent sources of economic
ent and its wholly owned subsidiary must be viewed as that of a single enterprise for antitrust purposes because there are no separate entities to provide the plurality of actors required in a section 1 violation. Since "[a] parent and its wholly owned subsidiary have a complete unity of interest," there is no sudden joinder of disparate economic resources and interest to justify section 1 scrutiny.

Justices Brennan and Marshall joined Justice Stevens in dissent. Justice Stevens argued strongly that the majority, by announcing a *per se* rule that a parent and a wholly owned subsidiary were incapable of conspiring under section 1, denounced a general rule of law recognized by the commentators, the lower courts, and the Supreme Court itself. By holding that agreements between parent and subsidiary merely involved unilateral conduct, the majority rejected its own traditional understanding of conspiracies, and the objectives of the Sherman Act.

The dissent urged the Court to look at the actual conduct of the defendant corporations, the purpose of which was to exclude a competitor from the market. The dissenting Justices expressed

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power previously pursuing separate interests. To hold such conduct out as inviting liability for antitrust violations would discourage corporations from creating divisions with their presumed benefits and deprive consumers of the efficiencies that decentralized management bring. *Copperweld*, 104 S. Ct. at 2741-42.

70. *Id.* at 2742. See generally *Contractor Util. Sales Co. Inc.* v. *Certain-teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981) ("to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design . . . .").

71. *Copperweld*, 104 S. Ct. at 2742.
72. *Id.*
73. *Id.* at 2745.
76. See *supra* notes 40-61 and accompanying text.
77. 104 S. Ct. at 2750.
78. *Id.* at 2752-55.
little doubt that the anticompetitive actions of the defendants would be manifestly illegal under Sherman section 1 if the parties were not interrelated.\textsuperscript{79} As a result, they should not be immunized from antitrust liability because of their corporate form.\textsuperscript{80}

The dissenting opinion is correct because it supports the objectives of antitrust legislation, and it follows a line of cases that undeniably indicates that a parent corporation and its wholly owned subsidiaries can conspire in violation of section 1. The majority opinion fell short, not in its analysis of the substantive unity of interest between a parent and a subsidiary, but in its failure to address the significance of the anticompetitive conduct engaged in by the defendants. The majority acted prematurely by repudiating the intraenterprise conspiracy doctrine without attempting to develop a workable standard for applying the doctrine in light of the objectives of antitrust legislation. The dissent, however, undertook a positive analysis of the intraenterprise conspiracy doctrine that carefully upholds the purposes of the Sherman Act.

The majority criticized the intraenterprise doctrine for focusing on the structure of an enterprise while ignoring the reality of shared interests.\textsuperscript{81} However, by announcing a \textit{per se} rule, the majority also elevates form over substance. In any antitrust suit, the reality is the restraint of trade. The majority's holding that a parent corporation cannot conspire with its wholly owned subsidiaries automatically elevates the form of the corporation over the reality of the substantial restraint of trade. In the Court's own words, "[a]ntitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary."\textsuperscript{82}

Multi-faceted enterprises often have valid economic and legal reasons for choosing to operate through incorporated subsidiaries.\textsuperscript{83} They should be free to structure themselves to promote corporate economy and efficiency.\textsuperscript{84} The majority, however, interprets the intraenterprise conspiracy doctrine as creating a presumption

\textsuperscript{79} Id. at 2755.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 2743; Areeda, \textit{supra} note 68, at 451, 473.
\textsuperscript{82} \textit{Copperweld}, 104 S. Ct. at 2743.
\textsuperscript{83} A corporation may adopt the subsidiary form of organization for valid management purposes. Separate incorporation can improve management, avoid special tax problems arising from multistate operations or serve other legitimate interests. \textit{Id}.
\textsuperscript{84} \textit{Id}.
of antitrust liability that arises when subsidiaries incorporate. It speaks in terms of "increased exposure" to antitrust liability which allegedly results in a harsher treatment of incorporated subsidiaries under the doctrine.

In reality, there is nothing inherently anticompetitive about incorporated subsidiaries. The Court agreed that they pose no imminent threat to competition. Subjecting incorporated subsidiaries to the terms of Sherman section 1 imposes on them no greater threat of antitrust liability than it does on every other "person" covered by the Act. There is no presumption of conspiracy between the parent and the subsidiary. Plaintiffs alleging intraenterprise conspiracies to violate section 1 retain the burden of proving an agreement to unreasonably restrain trade. Frivolous challenges to reasonable conduct incident to desirable, legal integration will fail on their own for lack of merit.

The majority opinion held that the coordinated activities of a parent corporation and its subsidiaries must be viewed as those of a single enterprise, for antitrust purposes, because of their complete unity of interest and therefore cannot violate Sherman section 1. The majority concluded that these coordinated activities were "wholly unilateral" in nature. However, in order to justify the majority's holding, it is necessary to conclude that the majority placed an arbitrary limit on the legal significance of the act of incorporation. The majority creates its own underlying assumption that, for purposes of antitrust regulation, incorporating a subsidiary does not result in the creation of a new and separate legal entity.

The act of incorporating a subsidiary should not be given a limited legal effect for antitrust purposes and, presumably, full legal effect for managerial or tax purposes. The act of incorporating

85. Id.
86. Id.
87. Id. at 2744.
88. Id. at 2743.
89. "The intracorporate doctrine applies, if at all, only to intracorporate conduct that can be characterized as predatory or coercive vis-a-vis outsiders." C. Hills, Antitrust Advisor 14 (2d ed. 1978).
90. See ABA Antitrust Section, Antitrust Law Developments 2-14 (2d ed. 1984).
91. Copperweld, 104 S. Ct. at 2751 (Stevens, J., dissenting).
92. Id.
93. Id. at 2742.
a subsidiary creates a separate legal entity which, when acting in concert with the parent corporation, is governed by section 1 of the Sherman Act. The Court, itself, has declared that an enterprise which chooses to accept the benefits of separate incorporation must face the possibility of being treated as entities capable of conspiring in antitrust law.94

A close reading of the Sherman Act's distinction between unilateral and concerted conduct and the section 1 focus on concerted behavior reveals a gap in the proscription against unreasonable restraints of trade.95 Section 1 prohibits unreasonable restraints of trade caused as the result of a contract, combination, or conspiracy.96 It is also possible, however, for a single firm to unreasonably restrain trade if it possesses sufficient market power.97 Therefore, short of threatened monopolization, the Sherman Act does not reach the anticompetitive conduct of a single firm, even though its effects may be indistinguishable from the effects of a two-firm conspiracy.98 When a parent corporation and its wholly owned subsidiaries are deemed to be a single enterprise, they are effectively immunized against antitrust liability for even blatantly anticompetitive conduct. Corporate executives will then rush to avoid all section 1 liability by incorporating their subdivisions. Such a reading of the Sherman Act would serve to obliterate its basic antitrust purposes, and can not have been the intent of Congress.99

Chief Justice Burger concluded that the effect of the Copperweld holding on the enforcement of antitrust laws will be slight.100 Indeed, the anticompetitive activities of corporations and their wholly owned subsidiaries will continue to be policed through application of other antitrust measures.101

The majority also concluded that its holding will have the

94. "[S]ince [defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations the law imposes on separate entities." 392 U.S. at 141-42.
95. 104 S. Ct. at 2744, 2752 (Stevens, J., dissenting).
97. 104 S. Ct. at 2752 (Stevens, J., dissenting).
98. Id. at 2744.
99. Id.
100. Id. at 2745.
101. See supra note 13.
beneficial effect of eliminating frivolous treble damage suits. It is unfortunate, however, that the majority chose to sacrifice the significant deterrent effects of the possibility of treble damages judgments in antitrust suits for the sake of expediency. Frivolous lawsuits will inevitably fail on their merits, and courts can easily impose costs in the event that a suit is found to be baseless.

CONCLUSION

In Copperweld Corp. v. Independence Tube Corp., the Supreme Court held that parent corporations and their wholly owned subsidiaries are incapable of conspiring together in violation of section 1 of the Sherman Act. The holding effectively overruled many of the Court's decisions in prior Sherman Act cases and summarily repudiated the intraenterprise conspiracy doctrine. The Court found that parent and wholly owned subsidiary corporations are completely unified in their interests and, therefore, do not provide the plurality of actors necessary for a section 1 violation. The effect of Copperweld is to immunize the coordinated acts of parent and wholly owned subsidiary corporations from antitrust liability regardless of whether the acts are manifestly illegal or unreasonable under standard antitrust regulations and in light of traditional antitrust objectives.

The Court acted prematurely, choosing to eliminate the doctrine rather than to develop a workable standard for its application. The majority opinion suffers from the same defect that the majority finds in the intraenterprise conspiracy doctrine—it focuses too much on corporate form. A per se ruling that incorporated subsidiaries cannot conspire to violate Sherman section 1 with their parent corporation is as blindly unrealistic as the view that incorporated subsidiaries are inherently anticompetitive. The Court moved from one extreme to the other by losing sight of the purposes of antitrust law—preventing and punishing anticompetitive behavior. Although an in-depth discussion of the matter

102. 104 S. Ct. at 2745.
103. 104 S. Ct. 2731.
104. Id.
105. Id.
106. Id.
107. See supra notes 98-102 and accompanying text.
108. See supra notes 80-84 and accompanying text.
109. See supra notes 85-90 and accompanying text.
110. See supra note 2.
is beyond the scope of this Note, the Court needs to develop a workable intraenterprise conspiracy standard.111 Until that time, courts should examine the facts of each individual case to determine intraenterprise capacity to conspire.112

In circumstances where intraenterprise activities are anticompetitive in nature and result in unreasonable restraints of trade, the courts should treat the actors as separate legal entities and look for an agreement to restrain trade unreasonably. Such a standard would subject intracorporated enterprises to the very same scrutiny as independent, unrelated corporations.113

Both of the opinions in Copperweld acknowledged the presence of a gap in the Sherman Act’s enforcement of antitrust policy.114 Short of monopolization or attempts to monopolize, large diversified organizations are virtually immune from the effects of antitrust liability and the deterrent check of treble damage judgments.115 Perhaps it is time for Congress to fill in the gap and create a Sherman-type check on the anticompetitive behavior of individual, yet multi-faceted, corporate entities.

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111. See, e.g., Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979) (holding that Section 1 liability should be invoked on a test of “sufficient independence.”);

The courts have avoided formulating a specific test for determining whether an intra-enterprise conspiracy exists, looking instead to factors such as the degree to which management of the corporations is integrated, whether the corporations hold themselves out as competitors, whether the concerted action restrains the trade of outsiders to the corporate family, the motive for separate incorporation, and whether the coordinated behavior results in substantial efficiencies.

ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 12-13 (2d ed. 1984); Comment, supra note 58.


113. See supra notes 85-92 and accompanying text.

114. 104 S. Ct. at 2744, 2752 (Stevens, J., dissenting).

115. Id.