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DEFINING A SINGLE ENTITY FOR PURPOSES OF SECTION 1 OF THE SHERMAN ACT POST COPPERWELD: A SUGGESTED APPROACH†

Section 1 of the Sherman Act proscribes joint activity between independent business entities that restrains trade. The Supreme Court has traditionally held that parents and subsidiaries are independent entities capable of violating section 1. These holdings, much criticized by commentators, created the intra-enterprise conspiracy doctrine. Recently, the Court reconsidered the doctrine and ruled that a parent and wholly owned subsidiary were a single entity and were, therefore, incapable of violating section 1. This Comment briefly examines the intra-enterprise conspiracy doctrine, examines the various approaches used by the circuits to determine when affiliated corporations should be considered a single entity, and evaluates two possible alternatives to these tests. Finally, a new approach is proposed which would provide a meaningful alternative to the tests currently used by the circuits.

INTRODUCTION

Section 1 of the Sherman Act prohibits “contract[s], combination[s], . . . or conspiracies” that restrain trade.1 These prohibited activities require at least two persons or entities.2 Antitrust litigation often involves the issue of whether affiliated corporations3 constitute

† The author would like to thank his parents for their unending support and encouragement and Professor Ralph H. Folsom for his advice and assistance in the preparation of this article.

2. Id. at § 8. “Section 1 can be violated only by two [or more] separate entities acting in concert, by a ‘contract, combination, or conspiracy’ in restraint of trade.” L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, § 108, at 311 (1977).
3. An affiliate is a corporation directly or indirectly related to one or more other corporations by stockholding or other means of control. The term includes not only a parent or a subsidiary, but also firms related by a smaller percentage of ownership. See BLACK’S LAW DICTIONARY 54 (rev. 5th ed. 1979).
a single entity or multiple entities for antitrust enforcement purposes. Determining the definition of a single entity, which is implicitly excluded from section 1 liability, has been a point of dispute in the United States over the last thirty years.4

Courts are in general agreement that the unincorporated divisions and other internal units of one corporation comprise a single entity and are incapable of conspiring among themselves within the scope of section 1.5 Where the structure of a corporation is that of a parent6 and a subsidiary,7 however, the Supreme Court has traditionally held that the parent and subsidiary constitute the plurality of entities necessary to conspire within the meaning of section 1.8 The Court's long-standing treatment of parents and subsidiaries as separate entities for section 1 purposes is known as the intra-enterprise conspiracy doctrine.9

Unfortunately, the Supreme Court opinions10 on intra-enterprise conspiracy are quite vague and have created confusion among the circuits in defining the doctrine's limits. As a result, the circuits have split on the breadth they attribute to the intra-enterprise decisions of the Court. Additionally, the tests used to determine whether affiliated corporations are a single entity differ dramatically among these


6. A parent company owns more than fifty percent of another company's shares of voting stock. See BLACK'S LAW DICTIONARY 1004 (rev. 5th ed. 1979).

7. A subsidiary is a company in which another company owns at least fifty percent of its shares, and thus has control. See BLACK'S LAW DICTIONARY 1280 (rev. 5th ed. 1979).

8. See cases cited supra note 4; see also Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981); Hunt-Vesson Foods, Inc. v. Rogu Foods, 627 F.2d 419 (9th Cir. 1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979); H & B Equipment Co., 577 F.2d at 244-45; Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp., 579 F.2d 20, 33-34 n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs. Inc., 508 F.2d 547, 557 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975).


10. See cases cited supra note 4.
Defining a Single Entity
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Recently, the Supreme Court once again addressed the intra-enterprise conspiracy doctrine in *Copperweld Corp. v. Independence Tube Co.* In *Copperweld*, the Court overturned thirty-seven years of precedent in holding that a parent and a wholly owned subsidiary were incapable of conspiring within section 1 because they constituted a single entity. The Court reasoned that, in reality, a parent and wholly owned subsidiary always have a unity of purpose or a common design, and that "[t]he intra-enterprise doctrine looks to the form of an enterprise's structure and ignores the reality." It is important to note that the Court expressly limited its holding to parents and wholly owned subsidiaries; it never considered whether a parent and an affiliated corporation, which the parent does not completely own, may be capable of conspiring under section 1. Therefore, the continued viability of the intra-enterprise conspiracy doctrine is unsettled in affiliated corporate situations after *Copperweld*.

This Comment briefly examines the intra-enterprise conspiracy doctrine, examines the various tests currently used by the circuits, and evaluates two possible alternatives to these tests. Additionally, a new approach is suggested to determine when affiliated corporations should be considered a single entity. This approach would provide a meaningful alternative to the tests currently being used by the circuits, which are ill-devised efforts to define a single entity, and should be abandoned.

The following five hypothetical business relationships will be presented to analyze whether single or multiple entities exist for section 1 purposes: (1) a parent corporation owns all of the stock of a subsidiary corporation; (2) a parent corporation owns a majority of the stock of a subsidiary corporation; (3) a corporation owns less than a majority of the stock of another corporation, but owns a block large enough to claim the ability to exercise effective control; (4) a

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12. *Id.* at 2745.
13. *Id.* at 2743.
14. *Id.* at 2740.
15. One commentator believes that in the elaborate effort of the majority to distinguish prior intra-enterprise conspiracy doctrine cases in *Copperweld*, it may have inadvertently suggested that the doctrine may retain viability, thereby creating future uncertainty. See *6 NAT'L L.J.* 22 (July 23, 1984).
16. For purposes of this Comment, control is constituted by all the rights and contracts which, either separately or jointly, legally, or in practice, make it possible for one corporation to determine how another shall operate.
corporation owns a small percentage of the stock of another corporation but, because of widespread public holdings, is able to exercise effective control over it; and (5) a corporation does not own any of the stock of another corporation, but through licensing or loan agreements is able to exercise effective control.

THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE

Congress' purpose in passing the Sherman Act (the Act) was to preserve and promote free competition. The premise of the Act was that unrestrained competition produces the best allocation of resources. The Act prohibits conduct that Congress and the courts have identified as a significant threat to competition and distinguishes between concerted business conduct and unilateral, or single firm, conduct.

The least intrusive standard or regulation is applied to unilateral activity. Such activity is subject only to section 2 of the Act, which is violated only when the market power of a firm is such that its conduct would create a dangerous probability of monopolization. Concerted conduct, on the other hand, is subject to the stricter standard of section 1, which prohibits conduct that creates unreasonable restraints of trade without requiring any danger of monopolization. Section 1 provides: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." Every "person" who makes a contract or engages in any combination or conspiracy declared illegal by the Act is guilty of a felony. The divergence in scope between sections 1 and 2 reflects a Congressional policy decision to encourage competition by imposing a stricter standard of liability on concerted conduct.

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18. Id.
19. Concerted business conduct is integrated activity by two or more independent firms. Unilateral conduct is the activity of a single firm.
22. Id.
23. Id.
24. Id. at 8.
25. Id. at § 1. Congress' determination to impose more stringent Sherman Act sanctions on concerted conduct is consistent with the stricter punishment for multiparty conduct as reflected in the common law treatment of conspiracies. See, e.g., United States v. Feola, 420 U.S. 671, 693-94 (1975); Callanan v. United States, 364 U.S. 587, 593-94 (1961).
Liability under section 1 requires at least two entities, because the provision implicitly excludes unilateral conduct. The lower courts agree that officers and employees of the same firm do not provide the plurality of actors required for a section 1 violation. The courts also generally hold that section 1 is not violated by the internal coordinated conduct of a corporation and its unincorporated divisions. The more difficult question is whether a parent and subsidiary can conspire under section 1. Over the years, the Supreme Court handed down a series of decisions which answered the question affirmatively, creating the intra-enterprise conspiracy doctrine.

28. See, e.g., H & B Equipment Co., 577 F.2d at 239; Joseph E. Seagram & Sons, Inc., 416 F.2d at 83.
29. The first judicial recognition of the notion that there can be a conspiracy between parents and wholly owned subsidiaries occurred in United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).
30. Four Supreme Court cases generally are considered to be the major intra-enterprise conspiracy doctrine cases.

United States v. Yellow Cab, 332 U.S. 218 (1947), is viewed as the source of the intra-enterprise conspiracy doctrine. In that case, the government charged Morris Markin with having conducted an anti-competitive operation in which he attained ownership and control over taxicab operations in four major cities, and then restrained trade by requiring the operating companies to purchase their vehicles from a single manufacturer controlled by Markin. Markin owned one hundred percent of the stock of Cab Sales and Parts Corporation and a controlling interest in Checker Cab Manufacturing Corporation (CCM). Markin's associates controlled Checker Taxi Company. CCM held sixty-two percent of the stock in Parmalee Transportation Company, which in turn owned a controlling interest in the Chicago Yellow Cab Company and one hundred percent of several other cab operating companies. Id. at 221-22. Markin controlled one hundred percent of the Pittsburgh market, eighty-six percent of the Chicago Market, fifty-eight percent of the Minneapolis market, and fifteen percent of the New York market. Id. at 224. He attempted to avoid the charge on the grounds that they were a single business entity. The Supreme Court upheld the charge, holding that an unlawful 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 . . . . The corporate interrelationships of the conspirators, in other words, are not determinative of the Sherman Act. That statute is aimed at substance rather than form." Id. at 227.

Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, 340 U.S. 211 (1951), involved a new type of intra-enterprise conspiracy. There, both of the parent's manufacturing subsidiaries refused to deal with a wholesale purchaser who would not sell their products below a maximum price set by the parent. Id. at 212. The Court held that the subsidiaries had entered into an illegal conspiracy to fix prices. It rejected the defendant's claim
though the gist of these holdings is that separate incorporation alone establishes separate entities capable of violating section 1, the Court has never clearly defined the confines of the doctrine.\footnote{31} Notably, the doctrine has been much criticized by commentators.\footnote{32}

**Intra-Enterprise Conspiracy Doctrine in the Circuits**

Without guidance by the Supreme Court as to what limitations, if any, there should be on the intra-enterprise conspiracy doctrine, confusion ensued among the circuits. They split on the weight to be given to the Court’s intra-enterprise conspiracy decisions. Accordingly, divergent decisions have been rendered with respect to what constitutes a single entity, and corporations have been held to inconsistent standards. Some circuits reached a formalistic conclusion by reading the precedents literally and holding that separate incorporation, in and of itself, is sufficient to establish that a parent and wholly owned subsidiary are separate entities capable of conspiring.\footnote{33} On the other hand, a few circuits attempted to narrow and

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\footnote{31} See Copperweld, 104 S. Ct. at 2739 (noting that the justifications and consequences for such a doctrine have never been explored or analyzed).

\footnote{32} See authorities cited supra note 9.

\footnote{33} See, e.g., Columbia Metal Culvert Co., 579 F.2d at 33-34 n.49; H & B Equipment Co., 577 F.2d at 244-45; George R. Whitten, Jr., Inc., 508 F.2d at 557. But see White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982); Ark Dental Supply Co. v. Cavi-
define the doctrine's scope through limiting tests or rules,\textsuperscript{34} which define a single entity in a more economic sense. Although several rules have been advanced, efforts to temper the intra-enterprise conspiracy doctrine have been largely unsuccessful.\textsuperscript{35} The employment of divergent tests by the circuits illustrates their inability to develop a definition of a single entity that is sound in both principle and practice.

Commentators point to five tests or rules adopted by the circuits to either implement or restrict the intra-enterprise conspiracy doctrine. They are generally referred to as: (1) the absolute rule; (2) the holding out as competitors rule; (3) the sole decision-maker rule; (4) the third party restraint test; and (5) the all the facts test.

\textit{The Absolute Rule}

The First, Third, and Fifth Circuits have employed the so-called absolute rule. These circuits hold that separate incorporation is sufficient to support a ruling that related corporations are capable of conspiring in violation of section 1.\textsuperscript{36} Under this rule, defendant corporations are not allowed to defend on the ground that they are a single enterprise and therefore beyond the ambit of section 1.\textsuperscript{37} These circuits apply the Supreme Court decisions literally and do not attempt to limit the application of the intra-enterprise conspiracy doctrine.\textsuperscript{38}

This literal, inflexible approach was used in \textit{H & B Equipment Co. v. International Harvester}.\textsuperscript{39} In this case, commenced by a terminated dealer against International Harvester and its subsidiary, the court stated: "The parent's choice of form is important. Having availed itself of separate incorporation for [the subsidiary], [the parent] marked it off as a distinct entity, and the antitrust laws treat it

\textsuperscript{34} An example of such a standard is the "all the facts" test used by the Seventh, Eighth and Ninth Circuits. \textit{See, e.g., Ogilvie, 641 F.2d at 581; Hunt-Wesson Foods, Inc., 627 F.2d at 419; Photovest Corp., 606 F.2d at 704.}

\textsuperscript{35} \textit{See, e.g., Note, supra note 9, at 681 (arguing that vague rules were resulting in more litigation and actually deterring desirable behavior).}

\textsuperscript{36} Courts using this rule read the Supreme Court opinions literally and find that a parent and a wholly owned subsidiary are always capable of conspiracy. They reason that the broad language of the intra-enterprise conspiracy doctrine cases leave them no room to maneuver; they must therefore conclude that separate incorporation creates separate entities. \textit{See, e.g., George R. Whitten, Jr., Inc., 508 F.2d at 557.}

\textsuperscript{37} \textit{See Handler & Smart, supra note 9, at 40.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} 577 F.2d at 239.
as such.\textsuperscript{40}

The absolute rule is the approach most often criticized by commentators,\textsuperscript{41} who focus primarily on its use of form over substance.\textsuperscript{42} This criticism appears to have merit when one considers that a parent of a wholly owned subsidiary could easily reorganize its subsidiary into an unincorporated division and, by this formality, avoid section 1 liability. In fact, Seagram used this solution after the adverse holding in \textit{Kiefer-Stewart v. Joseph E. Seagram \& Sons, Inc.}.\textsuperscript{43} In the \textit{Kiefer-Stewart} case, two wholly owned subsidiaries of Seagram refused to sell their products to the plaintiff, a wholesale liquor dealer, who continuously violated a maximum price ceiling set by the parent. The Supreme Court ruled that the subsidiaries violated section 1 by entering into an illegal conspiracy to fix prices.\textsuperscript{44} By reorganizing its subsidiaries into divisions, the corporation was subsequently able to avoid liability in \textit{Joseph E. Seagram \& Sons, Inc. v. Hawaiian Oke and Liquors}.\textsuperscript{45} Although the district court found that the divisions were, in substance, the same entities that existed at the time of the \textit{Kiefer-Stewart} decision, the circuit court found no section 1 violation because the divisions were components of a single entity.\textsuperscript{46}

This decision not only demonstrates how the absolute rule promotes form over substance, it also shows how the rule artificially discourages subsidiary formation by penalizing separate incorporation with section 1 liability exposure.\textsuperscript{47} Further, the case discloses how susceptible the rule is to manipulation\textsuperscript{48} by defendants intent on avoiding antitrust liability.\textsuperscript{49}

\textbf{The Holding Out As Competitors Rule}

In an effort to limit the intra-enterprise conspiracy doctrine, some circuits have adopted a holding out as competitors test.\textsuperscript{50} This test

\begin{itemize}
  \item \textsuperscript{40} \textit{Id.} at 245.
  \item \textsuperscript{41} See, e.g., Handler \& Smart, \textit{supra} note 9, at 44; Note, \textit{supra} note 9, at 667-68; Comment, \textit{Intra-enterprise Antitrust Conspiracy, supra} note 9, at 1745.
  \item \textsuperscript{42} See Handler \& Smart, \textit{supra} note 9, at 44.
  \item \textsuperscript{43} 340 U.S. at 211.
  \item \textsuperscript{44} \textit{Id.} at 215. For further discussion of \textit{Kiefer-Stewart, see supra} note 30.
  \item \textsuperscript{45} 416 F.2d at 71.
  \item \textsuperscript{46} \textit{Id.} at 73.
  \item \textsuperscript{47} See, Note, \textit{supra} note 9, at 666; Comment, \textit{Intraenterprise Antitrust Conspiracy, supra} note 9, at 1745.
  \item \textsuperscript{48} For further discussion on this point, see Comment, \textit{Intra-enterprise Antitrust Conspiracy, supra} note 9, at 1745-46.
  \item \textsuperscript{49} Commentators have also criticized the absolute rule because it allows private plaintiffs to attack essentially unilateral behavior under section 1 which, for lack of danger of monopolization, fails to meet the threshold requirement of section 2.
limits section 1 liability to those instances where the affiliated corporate defendants have held themselves out as competitors. Circuits using this approach have focused on the Supreme Court’s statement in *Kiefer-Stewart* that “[t]he rule [common ownership does not relieve section 1 liability] is especially applicable where . . . [corporations] hold themselves out as competitors.” Although some commentators regard such a containment of the doctrine with favor, they acknowledge that the test is quite unpredictable because the courts have failed to precisely delineate what type of activity constitutes holding out. Furthermore, no court has explained why section 1 liability should turn on whether related corporations hold themselves out as competitors.

**The Sole Decision-Maker Rule**

Other courts employ the sole decision-maker rule, which presumes that, when one person owns, controls, and makes decisions for separate corporations, the organizations are incapable of conspiring because a person is unable to conspire with himself. This rule was used in *Harvey v. Fearless Farris Wholesale, Inc.* The defendants, Fearless Farris Wholesale and five separately incorporated retail gasoline stations, were all owned by one person. The defendants were alleged to have violated section 1 by refusing to supply plaintiffs with gasoline. The Ninth Circuit ruled that, because the sole owner was the only decision-maker, “no meeting of two or more minds [had] occurred.” Therefore, there had been no conspiracy.

The sole decision-maker rule is sensible when one person makes joint decisions for related corporations. The rule focuses on control, rather than on formal corporate organization. The applicability of

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52. See Handler & Smart, supra note 9, at 54-55; Willis & Pitofsky, supra note 9, at 37-38; Note, supra note 9, at 735 (“the elements of behavior that constitute ‘holding out’ have never been precisely delineated”).
53. See, e.g., cases cited supra note 48.
55. 589 F.2d at 451.
56. Id. at 457.
the rule is limited, however, to those situations where one person owns, controls, and makes the decisions—a rare occurrence, because most corporations have many shareholders and decisions are usually made by a board of directors.

The Third Party Restraint Test

Courts have also used the third party restraint test to limit the scope of the intra-enterprise conspiracy doctrine.\textsuperscript{57} The rule distinguishes between conduct aimed at outside competitors, which would be actionable, and concerted action directed only at subsidiaries or affiliates themselves, which would not. The courts which employ this approach, however, have failed to provide clear guidelines to determine when conduct should be considered internal or external.\textsuperscript{58} Additionally, commentators criticize this rule because almost any change aimed only at the subsidiaries will have an effect on outside competitors as well.\textsuperscript{59} Moreover, the basis of the rule appears questionable because it focuses on the impact of the conduct of the affiliated corporations, and not on whether the corporations are capable of conspiring.\textsuperscript{60}

The All The Facts Test

The most widely used limitation on the intra-enterprise doctrine has been the all the facts test.\textsuperscript{61} Under this doctrine, courts look beyond separate incorporation and examine all the facts and circumstances regarding the relationship of the corporations in question to determine whether they are acting as independent entities capable of conspiring. All relevant evidence is taken into consideration, but decisions using this test have set forth a list of the most significant relevant factors. These include the degree of cooperative production,\textsuperscript{62} shared business solicitation,\textsuperscript{63} joint labor negotiations,\textsuperscript{64}


\textsuperscript{58} See cases cited supra note 57.

\textsuperscript{59} See, e.g., McQuade, supra note 9, at 213; Willis & Pitofsky, supra note 9, at 48-49.

\textsuperscript{60} See Handler & Smart, supra note 9, at 51-52, n.156.

\textsuperscript{61} The test has been used by the Seventh, Eighth and Ninth Circuits. E.g., Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726-27 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-19 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980); Ogilvie v. Fotomat Corp., 641 F.2d 581, 588 (8th Cir. 1981). For a more extensive list of cases, see Handler & Smart, supra note 7, at 55.


\textsuperscript{63} Las Vegas Sun, 610 F.2d at 618.
shared locations,\(^6\) consolidated corporate tax returns,\(^6\) common corporate logo,\(^7\) shared research and development resources,\(^8\) and intra-enterprise exchange of personnel.\(^9\)

The first case to use this approach was *Knutson v. Daily Review, Inc.*\(^7\) The defendants, a parent and its wholly owned subsidiary, published five newspapers. After independent distributors challenged provisions in the dealer agreement, the defendants replaced the independent distributors with employee distributors. The independent distributors brought an action alleging a conspiracy to restrain trade between the parent and subsidiary. The Ninth Circuit found that, although the parent and subsidiary were separately incorporated, they were a single entity. The court held that "[t]he relationship between them far exceeds mere ownership [by the parent] of the subsidiary's stock, and therefore, this is not a case of parent and independent subsidiary, but of a single business unit separated only by the technicality of separate incorporation."\(^7\) This decision has been followed by many courts in the Seventh, Eighth and Ninth Circuits.\(^7\)

This approach is an analytical improvement over other tests used by the circuits because it focuses on the factual indicia of subsidiary autonomy to measure the separateness of parents and subsidiaries. Additionally, the all the facts test is less likely to be manipulated by defendants than the absolute rule, because the factors on which the courts appraisal will rely are established long before the prospect of litigation arises.\(^7\)

Nevertheless, the all the facts test has also been justifiably criticized by the commentators.\(^7\) The major criticism involves the confusion created by the courts in their opinions concerning the important factors bearing upon this theory. While the courts who use this approach have mentioned many criteria\(^7\) that should be examined to

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64. *Thomsen*, 680 F.2d at 1267.
67. Id. at 1267.
68. Id.
69. Id.
70. 548 F.2d at 795.
71. Id. at 802.
72. See cases cited supra note 61.
73. See supra notes 61-67 and accompanying text.
74. See, e.g., *Handler & Smart*, supra note 9, at 60; Comment, *Intraenterprise Antitrust Conspiracy*, supra note 9, at 1751-52; Note, supra note 9, at 671-73.
75. See cases cited supra notes 61-66.
determine separateness, no court has assigned relative weights to the different factors. This vagueness regarding the importance of each factor makes the outcome of each case quite difficult to determine,\textsuperscript{76} and creates uncertainty for corporations because there are no general guidelines under which to operate without fear of a section 1 violation.\textsuperscript{77} The more control a parent imposes on a subsidiary under this test, the less exposure there will be to a section 1 violation. Conversely, increased delegation of authority increases that exposure. This rule, therefore, forces parent corporations to maintain control over their subsidiaries that may not otherwise be required or desired in the course of regular operations, in order to avoid section 1 liability.\textsuperscript{78}

**COPPERWELD CORP. v. INDEPENDENCE TUBE CORP.**

The Supreme Court once again dealt with the single entity question in *Copperweld Corp. v. Independence Tube Corp.*\textsuperscript{79} In 1972, Copperweld purchased Regal Tube Company from Lear Siegler, Inc.\textsuperscript{80} The sale agreement contained a non-competition clause which prohibited Lear Siegler and its subsidiaries from competing with Regal in the United States for five years. Although Regal had been operated as an unincorporated division by Lear Siegler, Copperweld decided to incorporate Regal as a wholly owned subsidiary to avoid double taxation.\textsuperscript{81} Regal continued its manufacturing operations in Chicago but moved its corporate headquarters to Copperweld headquarters in Pittsburgh.

Shortly after the sale, David Grohne, president of Regal while it was a division of Lear Siegler, and who became a Lear Siegler officer after the sale to Copperweld, formed a new corporation known as Independence Tube Corporation. In December 1972, Independence contracted with the Yoder Company to build a plant.\textsuperscript{82} Copperweld and Regal learned of Grohne's plans and also discovered that the non-competition clause did not bind Grohne. On advice from counsel, Copperweld and Regal sent letters threatening legal action to Yoder and other potential suppliers to protect the "know-

\begin{itemize}
\item \textsuperscript{76} Factfinders face an undifferentiated, unranked list of elements which are used to determine corporate integration.
\item \textsuperscript{77} Enterprises attempting to operate within the confines of the Sherman Act find it difficult to assess what conditions they must meet to avoid liability.
\item \textsuperscript{78} For further discussion on this point, see Comment, *Intraenterprise Antitrust Conspiracy*, supra note 9, at 1752.
\item \textsuperscript{79} 104 S. Ct. 2731 (1984).
\item \textsuperscript{80} Regal had been operated as a wholly owned subsidiary by its original parent who subsequently sold the company to Lear Siegler. *Id.* at 2734.
\item \textsuperscript{81} Copperweld and Regal were avoiding taxation by both Illinois and Pennsylvania.
\item \textsuperscript{82} Yoder was to complete the plant by December of 1973. *Id.* at 2734.
\end{itemize}
how, technical information, designs, plans, drawings, trade secrets or
inventions of Regal” which Copperweld had purchased. 83

After receiving such a letter in February 1973, Yoder terminated its contract with Independence. Independence negotiated a contract with another tubing mill manufacturer and the resulting plant went into operation in September 1974, nine months later than if Yoder had built the plant as agreed. Independence sued Copperweld, Regal, and Yoder, claiming that they had violated section 1.

At trial, the jury found that Copperweld and Regal, but not Yoder, had conspired in violation of section 1. At a subsequent trial on the issue of damages, the jury awarded two and a half million dollars against Copperweld and Regal on the section 1 claim. These damages were then trebled. 84 Attorney’s fees and costs were also awarded. 85

On appeal, the Seventh Circuit affirmed the jury’s finding that Copperweld had conspired with its wholly owned subsidiary. The court applied the all the facts test it had developed in previous cases 86 and concluded that the jury was properly instructed and thus could reasonably have found that Copperweld and Regal had violated section 1 by conspiring to prevent Independence from entering the steel tubing market.

The circuit court noted, however, that there were difficulties with the intra-enterprise conspiracy doctrine. The court observed that in “a purely formal sense” a conspiracy was possible, because “there are two corporations and hence two actors,” but, “as a practical matter there may be little difference between a wholly owned subsidiary and a fully integrated division.” 87 The court also acknowledged the almost universal academic criticism of the intra-enterprise conspiracy doctrine, 88 but deemed itself constrained by previous Supreme Court decisions. 89

Upon granting certiorari, the Supreme Court was presented with several alternatives in Copperweld. 90 In its opinion, the Court dis-

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83. Counsel advised this to prevent third parties from developing a reliance interest which a court might not want to disturb later. Id. at 2374.
84. Id.
85. Id. at 2735.
86. Copperweld challenged the instructions given by the district court since they included nine factors, while the test developed by earlier circuit cases had used five factors. Independence Tube Corp., 691 F.2d at 318-19.
87. 691 F.2d at 316.
88. Id.
89. Id.
90. 104 S. Ct. at 2731. As one commentator pointed out, the Supreme Court had
cussed at some length each of its prior decisions in which the intra-enterprise conspiracy doctrine had been invoked. It reasoned that the doctrine was always an alternative holding except in Kiefer-Stewart, and even that case could have been decided identically on different grounds. The Court noted that “while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule.” The Court then reversed the court of appeals decision in a five to three opinion written by Chief Justice Burger. In the process, the Court created a new rule, holding that a parent and a wholly owned subsidiary are incapable of conspiring with each other for the purposes of section 1 of the Sherman Act.

The principal focus of the Copperweld opinion was on the distinction between unilateral and concerted activity, the former being governed by section 2 of the Sherman Act, and the latter falling under section 1. The Court, agreeing with many commentators, noted that the central criticism of the intra-enterprise conspiracy doctrine is that it “gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of single enterprise.”

The Court found that the Seventh Circuit’s all the facts test was inadequate because, realistically, a parent and a wholly owned subsidiary always have a unity of interest or a common design. In effect, these organizations share a common purpose whether or not the parent keeps a tight rein over the subsidiary, because “the parent may

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four choices in Copperweld. It could: “(1) accede to the Seventh Circuit’s standard, (2) reject it as inconsistent with the Court’s own separate incorporation standard, (3) adopt an entirely new standard, or (4) repudiate altogether the doctrine of intraenterprise conspiracy.” Comment, Intraenterprise Antitrust Conspiracy, supra note 9, at 1734-35.


92. The Court felt that in each of the intra-enterprise conspiracy doctrine cases, with the exception of Kiefer-Stewart, the defendant’s activities were such that the doctrine was not necessary to the decision. For example, the Court reasoned that in Yellow Cab Co., 332 U.S. at 218, the defendant’s original acquisitions of its affiliated companies were the result of an illegal conspiracy and, therefore, any post-acquisition conduct violated the Sherman Act. Thus, the Court could have used this alternative reasoning to reach the same result. See Copperweld, 104 S. Ct. at 2736-37.

93. 104 S. Ct. at 2739. Noting that Kiefer-Stewart strayed beyond the Yellow Cab holding, the Court pointed out that the same result would now be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff.

94. Id.
95. Id. at 2745.
97. 104 S. Ct. at 2740.
assert full control at any moment if the subsidiary fails to act in the
parent’s best interest.”98 The Court believed the Seventh Circuit’s
approach measured the separateness of the parent and subsidiary;99
however, if a subsidiary is wholly owned, “these factors are not suffi-
cient to describe a separate economic entity for purposes of the Sher-
man Act.”100

Several points emerge from the Copperweld holding. The Court
appears ready to look beyond the legal formalities of separate incor-
poration to the economic realities of business structures before deter-
mining what constitutes a single entity. The Court realized that sep-
are incorporation does not alter the unity of legal and economic
interests, and does not make wholly owned subsidiaries independent
in any meaningful antitrust sense. Additionally, the Court recog-
nized that the economic goal of increased profits for the larger eco-
nomic enterprise is the same regardless of how the enterprise decides
to structure itself.

The new rule seems consistent with the statutory scheme of the
Sherman Act and antitrust laws generally. Section 1 is concerned
with collaborative practices in which economic resources of one en-
tity are joined with those of another. In applying other provisions of
the antitrust laws, the courts and enforcement agencies have recog-
nized that a parent corporation and its wholly owned subsidiary con-
stitute a single economic entity.101

The issue of when affiliated corporations constitute a single entity
remains unsettled after Copperweld. While the Court has demon-
strated its concern for defining a single entity in more economically
realistic terms, it avoided determining if and when affiliated corpora-
tions will constitute a single entity.102 This issue may soon become a
critical question in the lower courts.103 Given the Supreme Court’s
new, realistic view, how should the lower courts determine when af-

98. Id. at 2742.
99. Id. at 2742 n.18.
100. Id.
101. See infra notes 136-38 and accompanying text.
102. “We limit our inquiry to the narrow issue squarely presented: whether a par-
    ent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the
    Sherman Act. We do not consider under what circumstances, if any, a parent may be
    liable for conspiring with an affiliated corporation it does not completely own.” 104 S.
    Ct. at 2740.
103. It is fair to presume that in the near future affiliated corporate defendants
    charged with section 1 violations, noting the new posture of the Court, will begin to
defend on the ground that they are a single entity. The lower courts will then be forced
to decide this issue.
filiated corporations constitute a single entity? The Supreme Court has not, as yet, set forth explicit guidelines for the lower courts to follow.\(^\text{104}\)

The circuits, when confronted with affiliated corporate situations, may apply the various divergent tests, discussed above, that have been used to define a single entity in intra-enterprise conspiracy cases,\(^\text{105}\) or may develop alternative tests. In any event, it is valuable to examine two alternative tests, one that has been used outside the United States and another that has been suggested by interested authorities.

**THE COMMON MARKET APPROACH**

The Treaty of Rome, signed in 1957, created the European Economic Community (EEC), or European Common Market.\(^\text{106}\) The Treaty has antitrust provisions very similar to sections 1 and 2 of the Sherman Act.\(^\text{107}\) The EEC, like the United States, has had to establish methods or tests to determine what constitutes a single entity for antitrust purposes. It is, therefore, useful to examine the approaches used by the EEC.

The EEC seeks to integrate ten national economies into a single economic community. One of the essential elements of a free economy is the existence of unrestrained competition. To maintain vigorous competition, the EEC has specific rules which regulate, and provide sanctions for, agreements or practices that have an adverse effect on competition within the EEC. The EEC Commission and the Court of Justice are the two entities that compel the observance of the Treaty. The Commission is an administrative arm in charge of enforcing the Treaty, while the Court of Justice ensures the obser-

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104. While the Court offered no explicit guidance, the *Copperweld* opinion implicitly signals to the lower courts that they should make their single entity determinations mindful of the realities of business relationships.

105. *See supra* notes 33-77 and accompanying text.

106. The European Economic Community (EEC), or European Common Market, was established by the Treaty of Rome in 1957, signed on March 25, 1957, and effective on January 1, 1958. There are currently ten member countries. The original six member countries are Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and The Netherlands. Three more countries became members in 1973: the United Kingdom, Ireland, and Denmark. Greece became the tenth member in 1981. The general objective of the EEC is the creation of a union of European states solidified by common economic purposes. The specific objectives of the EEC are harmonious expansion, greater economic and financial stability, a faster rise in the standard of living, and closer relations between the members. The Treaty provides that the EEC will be of unlimited duration and have its own personality and legal capacity. Four institutions carry out the governing tasks of the EEC: an Assembly, a Council of Ministers, a Commission, and a Court of Justice. For a more extensive discussion of the structure of the EEC, see D. BAROUNOS, D. HALL, AND J. JAMES, EEC ANTI-TRUST LAW (1975); W. ALEXANDER, THE EEC RULES OF COMPETITION (1973).

107. Articles 85 and 86 of the Treaty were patterned after sections 1 and 2 of the Sherman Act, and generally have the same scope.
vance of the law by interpreting and applying the Treaty. Both of
these bodies issue decisions applying the Treaty.108

The basic competition provisions of the EEC are article 85109 and
article 86110 of the Treaty. Article 86 prohibits any “improper ad-
vantage” of dominant market position.111 Article 85 prohibits “any
agreements between enterprises, any decisions by associations of en-
terprises and concerted practices which are likely to affect trade be-
tween the Member States and which have as their object or result
the prevention, restriction or distortion of competition within the
Common Market.”112

An agreement between at least two undertakings is a prerequisite
to the application of article 85. It follows that a single undertaking,
unless it is dominant and therefore subject to article 86, can conduct
its business as it sees fit, although the result may be to restrain com-
petition. For purposes of article 85, an “undertaking” is identified
with the legal entity owning it; hence, in a group of companies there
can be as many undertakings as there are members of the group.
Conversely, where several businesses are operated by a single com-
pany, through divisions, for example, only one undertaking exists
and article 85 does not prohibit restrictive practices within the com-
pany.113 Like the Sherman Act, this approach makes the formal
structure chosen by a corporation the focal point in determining
whether article 85 has been violated. Contrary to the experience in
the United States, however, this anomalous result has been mitigated
by decisions of the Commission, and judgments of the Court of
Justice.

In Re Christiani and Nielsen114 article 85 was held inapplicable
to a market sharing agreement between a parent and its wholly
owned subsidiary. Noting the absence of competition between the
parent and subsidiary, the Commission held that article 85 does not
regulate agreements between a parent and its subsidiary because
such agreements constitute “only a distribution of tasks within a sin-
gle economic entity” and do not have as an object or result a re-

4, 155, 177, 298 U.N.T.S. 11.
109. Id. at art. 85.
110. Id. at art. 86.
111. Id.
112. Id. at art. 85.
113. Read literally, article 85 seems to apply a form over substance approach simi-
lar to that of the intra-enterprise conspiracy doctrine.
straint of competition within the EEC. The Commission reasoned that although the subsidiary had a legal personality of its own, it was in fact economically and physically an integral part of the parent company. Therefore, the agreement allocating markets had neither the object nor the effect of preventing, restricting, or distorting competition.

In *Re Kodak* the parent adopted uniform sales conditions for its subsidiaries operating within the EEC. The Commission found that the uniform conditions were outside the scope of article 85. It reasoned that where subsidiaries are wholly subservient to their parent company, and the latter in fact exercises its power of control by issuing precise instructions to them, it is impossible for them to act independently. Therefore, according to the Commission, internal arrangements ensuing from parental directives are not the result of an agreement or concerted practice.

In another case, *Bequelin Import Co. v. G.L. Import-Export SA*, a parent transferred part of its sole distribution rights to a subsidiary. The Court of Justice held that article 85 prohibits agreements whose object or effect is to restrict competition. The court found, however, that an exclusive distribution contract, which transferred distribution rights from a parent to a subsidiary, did not have the object or effect of restricting competition. This decision was based on the fact that the subsidiary lacked economic autonomy, though it technically had its own legal identity.

The Court of Justice initiated a new approach in *Imperial Chemical Industries, Ltd. v. EC Commission*. The court, which in its previous decisions had focused on whether competition was affected or on whether an agreement was present, stated that the key inquiry was whether a subsidiary has autonomy in determining its conduct.

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115. *Id.* at D39. Although the result of the case is correct, some commentators are critical of the reasoning of the Commission because it seems to require competition between the parent and subsidiary before article 85 is violated. See D. BAROUNOS, D. HALL, & J. JAMES, *supra* note 106, at 69; W. ALEXANDER, *supra* note 106, at 13.
117. *Id.*
119. *Id.* at D24.
120. *Id.* at D21.
121. Commentators have criticized the holding, because the Commission focused on a lack of an “agreement” between the parties, while a better rationale would have been that there was only one economic unit and therefore, only one enterprise. See H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* at 3-97, 3-98 (1981).
123. This decision may be criticized for the same reasons as *Christiani and Nelson*. See *supra* note 111.
within the market. Under this approach if the parent exercises control over the subsidiary and the subsidiary lacks self-determination in its market conduct, even though it is legally a separate entity, article 85 is inapplicable to the relationship between the two, as they form a single economic unit.\textsuperscript{126}

The Court of Justice has continued to utilize this approach in subsequent cases. The court has ruled that the conduct of a subsidiary may be imputed to its parent company, regardless of the legal personality of the subsidiary if the former is unable to determine its market conduct autonomously but rather follows instructions of its parent.\textsuperscript{126} Similarly, the court has held that article 85 is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary. This is true, however, only if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action in the market.\textsuperscript{127}

This current approach of the EEC on the question of what constitutes a single entity or undertaking is to examine the economic relationship of the corporations in question. The degree of economic dependence existing among them, rather than the question of legal personality, is the determining factor in analyzing whether or not two entities exist within the meaning of article 85. Intra-enterprise conspiracy has not been a problem in EEC antitrust law due to this economic, rather than legalistic, approach. The test, established by the Court of Justice to determine whether a single entity is present, is to ask whether one company has the power of control over another and actually exercises that power. If both answers are affirmative, the companies constitute a single entity.

The EEC test looks past the form over substance approach traditionally followed by the Supreme Court and many of the circuits in intra-enterprise conspiracy doctrine cases.\textsuperscript{128} The EEC examines the economic reality behind a particular factual situation before determining whether single or multiple entities are present for purposes of its antitrust provisions. In this sense, the test can be viewed as an

\begin{itemize}
  \item \textsuperscript{125} Id. at 567-70. Similarly, the conduct of a subsidiary can be attributed to the parent with which it forms a single entity, for article 86 purposes.
  \item \textsuperscript{128} See supra notes 30, 33-49, 57-60 and accompanying text.
\end{itemize}
improvement over many of the circuit tests.

The EEC test is, however, very similar to the all the facts test used by several circuits. Both tests look beyond separate incorporation and examine how the corporations are in fact operating. Additionally, each standard addresses the question of control in operation. The EEC approach, therefore, is subject to the same criticism as the all the facts test—in some instances, it may require parents to maintain more control over subsidiaries than would otherwise be necessary in the course of normal operations.

While the all the facts and EEC tests are similar, it is important to note that they are distinguishable. A relevant distinction between the two is the evidentiary analysis utilized. Under the all the facts approach, a broad range of evidence is examined. Almost any evidence which will support the proposition that the corporations in question are separate entities may be introduced. On the other hand, the EEC standard examines only the evidence which goes to the issue of effective management control. The EEC court must first determine that one company has the power to control another company; the examination then shifts to whether control has in fact been exercised. The scope of the examination is therefore limited to analyzing how management procedures and decisions (long term, short term, and day to day) are resolved. Hence, extrinsic evidence, such as whether the corporations have a common corporate logo and conduct joint labor negotiations, while clearly within the ambit of the all the facts test, is beyond the scope of the EEC examination.

COMMON CONTROL TEST

Another suggested standard for determining whether affiliated corporations constitute a single entity is the common control test. The Justice Department, in an amicus curiae brief filed in Copperweld urged the Supreme Court to treat commonly controlled corporations as a single entity for purposes of Sherman Act. This approach views ownership as the determinant of control. Therefore, majority ownership is treated the same as complete ownership. In the majority ownership situation, a single entity for section 1 purposes is assumed. Under this view, not only are a parent and wholly

129. See supra notes 61-78 and accompanying text.
130. See supra notes 75-78 and accompanying text.
131. See supra notes 62-69 and accompanying text. See also Independence Tube Corp., 691 F.2d at 331-32 (where the circuit court affirmed the instructions given by the district court to the jury which included nine factors to be considered).
132. See supra notes 61-73 and accompanying text.
133. See supra notes 124-25 and accompanying text.
134. See supra notes 62-69 and accompanying text.
135. Brief for the United States as Amicus Curiae Supporting Petitioners at 14 n.29, Copperweld, 104 S. Ct. at 2731.
owned subsidiary commonly controlled corporations, but so are two wholly owned subsidiaries of the same parent. Additionally, common control is presumed where parent ownership exceeds fifty percent of a subsidiary’s stock.

A corporation may decide to operate through separately incorporated subsidiaries and grant them a considerable degree of operational independence. In some cases, several subsidiaries may appear to compete with one another or with their parent. Despite this appearance, however, corporations under common control cannot properly be viewed as independent units or competitors in an economic or antitrust context. The relationship between the subsidiaries will be the result of management decisions by the parent company. The controlling entity will determine the extent of competition or operational independence of each subordinate unit, based on its conclusions about how to maximize the profits of the aggregate enterprise.

A common control approach would have two principal benefits. First, it would be consistent with the general antitrust enforcement scheme. In applying other provisions of the antitrust laws, courts and enforcement agencies recognize that the formal corporate structure of single economic entities is irrelevant to issues of anticompetitive effect. For example, parent corporations and separately incorporated subsidiaries are considered as one for the purpose of determining market power in section 2 cases. Subsidiaries are also analyzed in determining whether an acquisition results in such an increase in concentration of market power that it violates section 7 of the Clayton Act. Additionally, under Federal Trade Commission regulations implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, an acquisition made through a separate subsidiary is subject to the pre-merger reporting requirements of the Act to the

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136. The fact that a parent corporation and its controlled subsidiaries are held out as, or appear to the public to be, competitors does not provide an antitrust policy rationale to treat them as independent economic decision-makers. Basing liability on a “holding out” theory suggests that some misrepresentation causes injury to the public.


138. For an economic analysis of decision making by commonly controlled firms, see Hirshleifer, Economics of the Divisionalized Firm, 30 J. Bus. 96 (1957).


141. Id. at § 18(a).
same extent as an acquisition made directly by the parent.142 In addition, the regulations define as a single “person” the parent entity and all entities it controls directly or indirectly.143 These practices are consistent with the principle, articulated by the Supreme Court, that the antitrust laws look to economic substance rather than form.144

Second, the common control approach would promote judicial efficiency by allowing courts to automatically find that a single entity exists when one corporation owns a majority of another corporation’s stock. Any time a parent owns fifty-one percent or more of a subsidiary, courts would assume that they constitute a single entity, rather than engaging in a factual analysis and employing one of the many circuit court tests necessary to define a single entity.145

On the other hand, the principal weakness of the common control approach would be its narrowness. It would only be effective where the affiliated corporate relationship is that of a parent which is the majority owner of a subsidiary. It would be unusable where one corporation owns less than a majority of another corporation’s stock but for some reason exercises effective control over the latter. The common control approach, therefore, is an incomplete answer to the larger question of how to determine what constitutes a single entity in various business structures.

142. Id.

143. 16 C.F.R. § 801.1(a)(1) (1984). Mergers of commonly controlled corporations will not lessen competition because they do not alter control. For this reason, creation of, or merger of, wholly owned subsidiaries of the same parent are expressly exempted from the premerger notification rules of the commission. See id. at §§ 802-30.


A SUGGESTED APPROACH

Policy Considerations

Ideally, developing a standard to determine whether affiliated corporations constitute a single entity for section 1 purposes should be accomplished with the policy of the antitrust laws in mind. The Sherman Act was intended to preserve and promote competition.\textsuperscript{146} The function of section 1 within the Act is to promote independent centers of decision-making. To accomplish this, certain contracts, combinations, and conspiracies that restrain trade are declared to be illegal.\textsuperscript{147} If it appears that competition is restrained by a contract, combination, or conspiracy, section 1 should apply when entities are involved that from an economic point of view, are distinct, although perhaps not unrelated.

Any proposed test should have at least two goals beyond being consistent with the intent of the antitrust scheme. First, given the various factual situations arising in complex business relationships, the approach must have the flexibility to determine in each instance whether affiliated corporations constitute a single entity. In making this determination, any useful test must go beyond legal formalities and examine whether the corporations in question are distinct participants in the economic process, each capable of determining its own market conduct. Second, the test must be simple to apply and produce consistent results.

The Proposed Test

The approach advocated by this Comment is a hybrid test, combining common control and effective management control tests. Neither test has been used explicitly by the courts in the United States.\textsuperscript{148} While this approach combines the two tests, each test may be considered a distinct portion or tier of the hybrid approach, having mutually exclusive areas of application. In those situations where one corporation owns more than fifty percent of the stock of another corporation, the common control tier of the test would apply. Where one corporation owns less than fifty percent of the stock of another


\textsuperscript{148} But cf. Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 739 n.123 (1977) (support for an approach similar to an effective management control standard can be found in several cases).
but the holding corporation\textsuperscript{149} claims for some reason to be a single entity with the distributing corporation,\textsuperscript{150} the effective management control tier of the test would be utilized. For illustrative purposes, assume that charges of section 1 violations have been filed against corporate defendants in each of the five hypothetical business relationships presented in the introduction to this Comment.

In the first hypothetical, the parent and wholly owned subsidiary situation, the \textit{Copperweld} case provides a definitive rule of law.\textsuperscript{151} Nevertheless, for the purposes of examining the operation of the hybrid test, it will be applied to this hypothetical. Courts faced with such a situation need only determine that the parent owns at least a majority of the stock of the subsidiary. At that point, the examination ends; majority ownership is deemed to create common control, thus the two corporations are a single entity for section 1 purposes. The outcome of this approach is consistent with the \textit{Copperweld} ruling. The justifications for such an approach are generally the same as those presented in \textit{Copperweld}.\textsuperscript{152} Further, one of the goals of the advocated approach is to apply section 1 only where the corporations in question are distinct participants in the economic process, each capable of determining its own market conduct. A wholly owned subsidiary is not capable of determining its own market conduct, because the parent can exercise control at any time, even in instances where the subsidiary is a separate legal entity and has the freedom to manage its own day-to-day affairs.\textsuperscript{153}

In the second hypothetical situation, where a parent is the majority owner of a subsidiary, courts once again need only determine that the parent owns a majority interest. Once majority ownership is shown, common control is assumed and the corporations are considered to be a single entity. Many of the justifications for this approach have been presented above.\textsuperscript{154} Additionally, as was true with a parent and wholly owned subsidiary, in those situations where the parent has a majority of voting stock, the distributing subsidiary has no real autonomy in its business conduct. The controlling entity will determine the extent of operational independence of the subsidiary, basing its conclusions on how to maximize the profits of the aggre-
In other words, a subsidiary is not a separate entity in relation to the parent, who controls a majority of its voting stock, but rather, the two form an economic unit.

In the third, fourth, and fifth hypothetical situations, the effective management control tier of the test would be applicable. It is a question of fact whether a company in which a holding corporation does not own a majority interest is economically independent. Courts faced with these types of situations must engage in a two step examination. First, they must determine whether the holding company has power to control the decisions of another corporation. Second, if the answer is affirmative, the courts then must determine whether this power has in fact been exercised. If the second inquiry is also answered affirmatively, the corporations in question should be considered a single entity.

Courts should find the first step of the examination—determining whether the power to control exists—easily satisfied. In most situations, the scope of inquiry during this phase of the examination should be limited to whether it is conceivable for the holding corporation to possess the power it claims. If it is, the focus should turn to the more important second step.

In the second step of the examination, courts will examine the pattern of decision-making within the distributing corporation to determine whether it has market autonomy. The courts will analyze how long-term and short-term goals are set, how day-to-day decisions are made, whether standard operating practices are determined by the holding corporation, and how the company makes decisions in routine and emergency situations.

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155. See supra notes 136-38 and accompanying text.
156. This two step process is quite similar to the approach used by the EEC.
157. If the answer is negative, there are two independent centers of economic decision-making. If the corporations combine or conspire to restrain trade in some way, section I should apply, because it declares illegal collaborative practices in which the economic resources under one source of control are joined with those of another.
158. This, of course, would require the court to perform its fact-finding function.
159. Defendants invoking the single entity defense would have the burden of proof in both steps of this examination. There are two reasons which warrant this approach. First, the burden in meeting the first step of the examination is quite trivial. Second, the defendants are in a much better position to obtain the relevant data needed to determine whether control has been exercised.
160. If it is entirely impossible for the holding corporation to possess any power of control over the distributing corporation, the corporations should be considered separate entities and subject to section I liability.
161. While a wide array of data concerning decision-making will be examined, other extrinsic factors which would be considered in the all the facts test are clearly beyond the scope of this test.
joy enough autonomy to determine their own long-term goals and to operate without interference from the holding corporation will be deemed separate entities for section 1 purposes. Because the holding corporation does not control either the long-term planning or day-to-day operation of the distributing corporation, each is indeed a distinct entity in the economic process. A distributing corporation should not be deemed a distinct entity, however, simply because it has been granted some operational decision-making responsibilities. The holding corporation may allow the distributing corporation to determine day-to-day operational decisions and even set short-term goals, but within a framework of broad long-term goals established by the holding corporation. In these instances, the two corporations are not distinct participants in the economic process because the holding corporation is in reality determining the market conduct of both.

In the third hypothetical, the holding corporation owns less than a majority of shares in the distributing corporation, but owns a large enough block to claim effective control. Plaintiffs who initiate antitrust suits in these situations will attempt to demonstrate that the commercial decisions of the distributing corporation are reached by its governing body, fully independent of the other corporation, and without regard to its share holdings or rights of control. On the other hand, defendants will attempt to prove that the holding corporation has the power to control the decisions of the distributing corporation and that this power has in fact been exercised. As a practical matter, if the block of shares owned by the holding corporation is large, approaching forty to fifty percent, the possible existence of power to control is easily seen. Therefore, this question will play a less important role. Instead, the focus of the examination will be on the more difficult question of whether control has in fact been exercised.

In the fourth hypothetical, only a small percentage of the stock of the distributing corporation is owned by the holding corporation, but, because of widespread public holdings, effective control is possible. Once again, the parties to the suit will be making the contentions outlined above and the court will be employing the same examination. Determining whether the holding corporation has the power to control will take on added importance in these instances. Instead of concluding summarily that this power exists, the courts must carefully review the relationship between the corporations to determine whether it is conceivable that the holding corporation exercises control, given its limited shareholdings. Only after careful examination of this question should they examine the decision-making procedures of the distributing corporation.

The fifth and final hypothetical, where a corporation may exercise control over another corporation through loan or licensing agree-
ments, presents the most difficult circumstance for making a determination of whether two corporations are a single entity.\textsuperscript{162} Courts in these situations will need to conduct a scrupulous examination of the agreements which represent the potential basis of the power to control. Initially, it would seem that a corporation would never enter into an agreement by which it relinquishes its autonomy to another corporation; however, this does in fact occur. For example, a corporation with a large outstanding debt that cannot meet its obligations as they come due, may solicit a bank or other corporation to pay off the debt and become its creditor, usually with the understanding that the new creditor will control the direction of the debtor.

After determining that the power to control the debtor corporation has been passed to a creditor, the courts must examine the decision-making procedures of the debtor to determine if the creditor has exercised control. If it is determined that the creditor corporation has exercised control, there is in reality only one source of decision-making. Therefore, because there is only one true economic participant, the corporations should be considered a single entity for section 1 purposes.

Advantages of the Suggested Approach

The advocated approach fulfills the goals of a proposed test as set forth above. First, the test is flexible enough that it can be effectively applied to any type of business relationship to determine whether the parties constitute a single entity. Second, the approach is easy to apply and will produce consistent results because it limits the number and types of facts considered in determining the capacity of the actors to conspire. Courts need only apply one of the two tiers of the test, depending on the facts. Third, the approach has a sound economic basis. The goal of the test is to determine how many distinct participants capable of autonomous market conduct are involved. Its premise is that every autonomous participant should be considered a separate entity for purposes of section 1.

This approach is an improvement over the tests currently used in the circuits to define a single entity. It improves on the absolute rule\textsuperscript{163} because it looks beyond the legal formality of separate incorporation to matters of economic substance in determining whether the plurality needed to violate section 1 exists. This focus on eco-

\textsuperscript{162} The parties involved will make the same contentions as they would in the third hypothetical. See supra text accompanying notes 161-62.

\textsuperscript{163} See supra notes 36-49 and accompanying text.
nominate substance is also its major advancement over the holding out as competitors\textsuperscript{164} and third party restraint\textsuperscript{165} tests, which focus on the impact of corporate behavior on outsiders instead of on whether the corporations are capable of conspiring. Additionally, the approach is an improvement over the all the facts\textsuperscript{166} test, because it recognizes the economic reality of common control in parent and majority owned subsidiary situations. Moreover, where control is difficult to determine from ownership, this test limits the number and type of facts considered to only those which reflect the decision-making process.

The standard advocated also represents an improvement over application of the common control\textsuperscript{167} and effective management control\textsuperscript{168} approaches as alternatives. Because the test utilizes both, it has the advantages of each and, correspondingly, fewer weaknesses. The advantage of this test over a common control approach is its flexibility; it may be employed in examining any possible business relationship, while a common control approach is only useful in a parent-subsidiary situation. It is an improvement over the effective management control approach because it recognizes the economic reality that commonly controlled corporations constitute a single entity.

**Conclusion**

The purpose of the Sherman Act is to promote and protect competition.\textsuperscript{169} The goal of section 1 of the Act is to promote independent centers of decision-making by declaring combinations in restraint of trade illegal.\textsuperscript{170} While the Supreme Court has traditionally articulated the principle that antitrust laws look to economic substance rather than form,\textsuperscript{171} its past decisions were often based on artificial legal formalities. The Court thwarted its own efforts, in effect, by creating the intra-enterprise conspiracy doctrine, which emphasized the structure of an enterprise and ignored its actual substance.\textsuperscript{172} The circuits, forced to operate within the vaguely articulated confines of the doctrine, developed various tests, each with inherent weaknesses, to discern what constitutes a single entity within the scope of the doctrine.

\textsuperscript{164}. See supra notes 50-53 and accompanying text.
\textsuperscript{165}. See supra notes 57-60 and accompanying text.
\textsuperscript{166}. See supra notes 61-78 and accompanying text.
\textsuperscript{167}. See supra notes 135-45 and accompanying text.
\textsuperscript{168}. See supra notes 125-34 and accompanying text.
\textsuperscript{172}. 104 S. Ct. 2731, 2743 (1984).
In *Copperweld*, the Supreme Court demonstrated its desire to look beyond legal formalities to economic realities when determining whether affiliated corporations constitute a single entity. Accordingly, the circuits must now embody this economic approach in their determination of what will constitute a single entity. Unfortunately, the tests used by the circuit courts are constrained within the scope of the intra-enterprise conspiracy doctrine. These courts must now either modify their old tests or develop new ones.

To create a sensible resolution to the single entity issue, the tests currently used by the circuits should be abandoned and replaced by a new approach. The hybrid test advocated, which goes beyond the legal formalities of separate incorporation, is sensitive to modern business realities. Additionally, the test is judicially efficient, where majority ownership exists, because it recognizes the economic reality of common control and presumes a single entity. Moreover, it is fact sensitive in those situations where there is less than majority ownership but control nevertheless exists, because it examines whether one company has the power to control another and actually exercises that power. These aspects of the test make it superior to the others examined. Without the adoption of a realistic approach, the circuits will continue to use the same tests based on theories created before *Copperweld* — tests that have been unable to develop a single entity definition that is both theoretically and practically sound.

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173. *Id.* at 2731.