1977

**Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard**

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Antitrust and Trade Regulation Commons, and the Legislation Commons

**Recommended Citation**


Available at: https://repository.law.umich.edu/mlr/vol75/iss4/4

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."\(^1\) By its very nature, a contract, combination or conspiracy necessitates more than one actor; each requires the concerted action of two or more "minds." Thus, a restraint of trade achieved by a single corporate entity lacks the plurality of participants necessary for a section 1 violation.

Neither officers, directors, employees nor divisions within a single corporation have ever been held to have conspired with either the corporation or with one another.\(^2\) However, there remains a question of the extent to which coordinated activity, arrangements, or agreements between a parent corporation and its subsidiaries\(^3\) or among the subsidiaries themselves can be a "contract, combination, or conspiracy" in violation of section 1 of the Sherman Act. A theory of intra-enterprise conspiracy\(^4\) has arisen from a series of Supreme Court decisions\(^5\) suggesting that the mere fact of separate incorporation in a parent-subsidiary organization is sufficient to create the plurality necessary for a finding of conspiracy between the entities. Although the government has been reluctant to press this theory in antitrust enforcement,\(^6\) it has provided a basis for private actions\(^7\) and could potentially be applied to virtually all parent-subsidiary relations.\(^8\)

---

3. For purposes of this Note, it is assumed that the subsidiaries are created and either wholly owned or substantially owned by the parent corporation. If not wholly owned, then it is further assumed that the minority owners hold only for investment. For the problems that might be presented if these assumptions are not met, see text at notes 35-36 infra.
6. See text at notes 73-77 infra.
8. Because of its potential for broad application, commentators have been critical
Section I of this Note analyzes the cases in which the Supreme Court has implied a doctrine of intra-enterprise conspiracy. Section II then sets forth the theoretical and practical difficulties that such a doctrine entails. Section III, in turn, considers previous proposals for limiting the scope of the intra-enterprise conspiracy doctrine and examines their deficiencies. Finally, section IV presents an alternative analysis of the intra-enterprise conspiracy issue and proposes a standard for determining when application of section 1 of the Sherman Act to parent-subsidiary relations is inappropriate.

I. GENESIS OF THE DOCTRINE

There are four major cases in which the Court has developed a doctrine of intra-enterprise conspiracy: United States v. Yellow Cab Co.,\(^9\) Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,\(^10\) Timken Roller Bearing Co. v. United States,\(^11\) and, most recently, Perma Life Mufflers, Inc. v. International Parts Corp.\(^12\) These decisions share several features: Each suggests the validity of an intra-enterprise conspiracy theory without extensively analyzing it\(^13\) and without defining the scope of its application. Moreover, in each case there was at least one alternative basis for finding an antitrust violation by the defendant. Hence, the novel theory of intra-enterprise conspiracy was not necessary for a finding of substantive liability.

United States v. Yellow Cab Co.\(^14\) is the seminal case on the issue of intra-enterprise conspiracy. In 1929, Morris Markin, who was president, general manager, and controlling shareholder of the Checker Cab Manufacturing Corporation (CCM), began to acquire control of taxicab companies in various cities. These companies of the intra-enterprise conspiracy doctrine and have sought to limit its application. See Barndt, Two Trees or One?—The Problem of Intra-Enterprise Conspiracy, 23 Mont. L. Rev. 158 (1962); Handler, Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review, 57 Calif. L. Rev. 182 (1969); Kempf, Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?, 24 Bus. Law. 173 (1968); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183 (1955); Stengel, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act, 35 Miss. L.J. 5 (1963); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L. Rev. 20 (1968); Note, supra note 4; Note, Intra-Enterprise Conspiracy Under the Sherman Act, 63 Yale L.J. 372 (1954).

13. [T]he remarkable thing about each of the ... cases which might be construed as supporting a theory of conspiracy within a multicorporate enterprise is the scant attention they devote to the point. Each opinion tends to ignore the requirement of duality and to concentrate on a consideration of predatory practices. In some cases the single enterprise defense was only faintly argued, or not even raised. McQuade, supra note 8, at 188.
were then compelled to buy their cabs from CCM, and the access of other cab manufacturers to these purchasers was thus foreclosed.\textsuperscript{15} The government charged CCM, its sales subsidiary, and various operating companies with conspiring in violation of sections 1 and 2 of the Sherman Act.\textsuperscript{16}

In reversing the lower court's dismissal of the complaint, the Supreme Court held that the alleged facts supported a charge of conspiracy under section 1.\textsuperscript{17} The Court stated that an unreasonable restraint of trade

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 . . . . \textit{[T]he common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.}\textsuperscript{18}

Although this language implies that affiliates in a parent-subsidiary organization are entirely unprotected from a finding of conspiracy, a close reading of the case indicates that such an implication is not necessary to its holding.

First, the Court observed that the restraint of trade "was the primary object of the combination."\textsuperscript{19} From this and other language\textsuperscript{20} it may be inferred that various independent firms had conspired in creating the combination itself. If indeed this was a combination that effectuated a prior conspiracy among independent entities, then common ownership and affiliation in the resulting arrangement would clearly be no defense to an antitrust attack: The initial conspiracy itself would be a violation of section 1 of the Sherman Act and the subsequent combination could be attacked as the "fruit" of that conspiracy.\textsuperscript{21}

\textsuperscript{15} 332 U.S. at 221-24. At the time of the suit, the defendants, through acquisition and stock purchases, controlled 5,000 cab licenses. They held 100\% of the licenses issued in Pittsburgh, 86\% in Chicago, 58\% in Minneapolis, and 15\% in New York. 332 U.S. at 224.
\textsuperscript{16} 332 U.S. at 220.
\textsuperscript{17} 332 U.S. at 227-28.
\textsuperscript{18} 332 U.S. at 227 (emphasis added).
\textsuperscript{19} 332 U.S. at 227.
\textsuperscript{20} For example, the Court argued that "any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators . . . ." 332 U.S. at 227 (emphasis added). The Court emphasized this point by stating that "the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy. . . . ." 332 U.S. at 229 (emphasis added).
\textsuperscript{21} See Beacon Fruit & Produce Co. v. H. Harris & Co., 152 F. Supp. 702 (D. Mass. 1957), affd. per curiam, 260 F.2d 958 (1st Cir. 1958), cert. denied, 359 U.S. 984 (1959). In that case the court refused to find that the defendants were merely parts of a single corporate entity incapable of conspiring. It implied that a conspiracy could be found if the plaintiffs substantiated their claim that "in fact the individual defendants here conspired to form the defendant corporation as a mere
Thus, in situations such as *Yellow Cab*, in which a conspiracy is alleged between separate “persons” who subsequently combine to effectuate their conspiracy, a court’s language attacking that arrangement might appear to support an intra-enterprise conspiracy theory. However, what might really be of concern to the court is not a conspiracy subsequent to combination, but the conspiracy among independent “persons” that produced the combination. This view suggests that the Court in *Yellow Cab* was not necessarily announcing a broad intra-enterprise conspiracy theory.

A second factor in *Yellow Cab* that undercuts the implication of a broad theory of intra-enterprise conspiracy is the lack of common ownership. Evidence that common ownership dipped as low as eighteen per cent suggests that a parent-subsidiary relation did not exist, but rather that the combination was among independent concerns, with the “parent” merely holding some shares in each. Clearly, such a limited degree of common ownership does not grant immunity under the Sherman Act to agreements or conspiracies between independent business units.22

Thus, if the gravaman of *Yellow Cab* was a conspiracy among independent entities, either preceding the combination or occurring after the combination if the “parent’s” stock ownership was not controlling or, perhaps, was a section 2 “attempt to monopolize,”23 then the Court’s result would be correct because subsequent common ownership, affiliation, or integration would not operate as a defense to the charge of conspiracy. However, this result would not support the implication that formally separate parent and subsidiary company incantum to take over the partnership business as a step in securing control of the market and imposing a restraint of trade for their individual benefit.” 152 F. Supp. at 704. In addition, see Northern Sec. v. United States, 193 U.S. 197 (1904), in which the Supreme Court reached a similar finding of section 1 illegality based on the “combination” language of the section.


23. It has been suggested that *Yellow Cab* involved an “attempt to monopolize” violation under section 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. V 1975), which prohibits monopolization, attempts to monopolize, or conspiracy to monopolize. See, e.g., Stengel, supra note 8, at 12; Willis & Pitofsky, supra note 8, at 40-41. Support for this argument is found in United States v. Columbia Steel Co., 334 U.S. 495 (1948), where the Court stated that in *Yellow Cab* “the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business. . . .” 334 U.S. at 522 (emphasis added).

If, as the Court in United States v. Columbia implies through its emphasis on “intent” and “purpose” to monopolize, *Yellow Cab* is in fact an “attempt to monopolize” case, then the conspiracy language in the case could have applied to a “conspiracy to monopolize” violation under section 2. Unlike the conspiracy element of section 1, a conspiracy to monopolize under section 2 might be found even among directors, officers, or employees of a single corporation, as well as among affiliated firms in a parent-subsidiary enterprise. REPORT OF THE UNITED STATES ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 30-31 (1955) [hereinafter cited as ATTORNEY GENERAL’S COMMITTEE REPORT]; Stengel, supra note 8, at 26.
rations could provide the plurality of participation necessary for the finding of a conspiracy. 24

A similar analysis is applicable to *Timken Roller Bearing Co. v. United States*, 25 in which the Supreme Court also implied a finding of intra-enterprise conspiracy. The Timken Roller Bearing Company (American Timken) was the dominant producer of tapered roller bearings in the United States. In 1928, American Timken and one Dewar, an English businessman, cooperated in purchasing the stock of British Timken, Ltd. (British Timken), a former licensee of American Timken, and in organizing Societe Anonyme Francais Timken (French Timken). American, British, and French Timken then began a series of “business agreements” to fix prices, to allocate world markets, and to limit competition. 26

In its defense to a section 1 antitrust suit, American Timken argued that the agreements were reasonable because they were ancillary both to a joint venture between itself and Dewar and to its trademark licenses with British Timken and French Timken. 27 The Court clearly rejected this position:

> "Our prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Act . . . . The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."

28

In a vigorous dissent Justice Jackson interpreted the Court's opinion as holding that the mere fact of separate incorporation of parent and subsidiary firms provided the plurality for a section 1 conspiracy:

> "It is admitted that if Timken had, within its own corporate organization, set up separate departments . . . "that would not be a conspiracy; we must have two entities to have a conspiracy." . . . The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are "separate persons," and any agreement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy.

. . . [Timken] is forbidden thus to deal with and utilize subsidiaries to exploit foreign territories, because "parent and subsidiary corporations must accept the consequences of maintaining separate corporate entities," and that consequence is conspiracy to restrain trade."

29

24. The authors of the *ATTORNEY GENERAL'S COMMITTEE REPORT*, supra note 23, at 32, offer another analysis of *Yellow Cab* that limits this implication. They state that the enterprise “grew out of mergers of previously independent competitors, thus making them 'combinations' within the meaning of the Act.”

27. 341 U.S. at 597.
28. 341 U.S. at 598 (citations omitted).
29. 341 U.S. at 606-07.
However, given the facts of the case, Jackson was overly broad in his interpretation of the Court's holding. As was the case with Yellow Cab, the Court's conclusion in Timken might have been based on two alternative rationales. First, the district court found that American Timken's ownership in the foreign firms, and the restrictive agreements among them, were the product of a conspiracy between the independent entities American Timken and Dewar. The arrangement merely perpetuated the license restrictions that had begun in 1909; it eliminated competition that might have arisen between the separate firms upon expiration of Timken's patent monopoly. Just as in Yellow Cab, the very combination of firms into a single formal enterprise and the subsequent activities of that enterprise were objectionable because they effectuated a previous conspiracy among independent entities. Second, the degree of American Timken's ownership and control of the various corporations did not support Jackson's view that the foreign firms were actually subsidiaries of the parent. Although American Timken owned thirty per cent of British Timken and fifty per cent of French Timken, Dewar controlled the day-to-day actions of the foreign firms, and, as the lower court stated, "British Timken and French Timken retained their corporate independence and jealously guarded their interests in dealing with [American Timken]." 

Timken, like Yellow Cab, therefore actually involved a conspiracy between independent entities—American Timken and the individual Dewar—and the arrangement only resembled a parent-subsidiary relation. Thus, not only was the arrangement a continuation of a conspiracy between independent "persons," but the corporations, despite some common ownership, were indeed independent firms providing a plurality of participants for conspiracy. The decision, therefore, should not be seen as holding that agreements among affiliated firms in a genuine parent-subsidiary organization can result in a finding of conspiracy.

These cases highlight the importance of two factors that must be noted when considering the possibility of intra-enterprise conspiracy. First, a distinction should be made between subsidiaries created by the parent (i.e., internal expansion) and those formed by merger, by acquisition, or in arrangement with other independent persons (i.e., joint ventures). Subsidiaries formed in the second manner create

---

30. See text at notes 19-24 supra.
32. See 83 F. Supp. at 289-95.
33. See text at notes 19-21 supra.
34. See 83 F. Supp. at 311.
35. The Court in Yellow Cab noted this difference when it implied that there was a distinction between subsidiaries "obtained by normal expansion to meet the
a substantial risk that a conspiracy will be found between the previously independent units even when they are subsequently acting as parts of a single enterprise. The combination and arrangement between the “parent” and “subsidiary” may then be seen, as in *Timken* and *Yellow Cab*, as effectuating a conspiracy between these independent “persons.”

Secondly, if independent “persons” share in the ownership of the “subsidiary,” then a conspiracy might be found among the two or more independent persons holding the shares. The conspiracy could relate to the purpose in forming the subsidiary, if the others join in forming it, or to agreements and arrangements among the independent shareholders with respect to the operations of the jointly owned corporation. Both of these problems were present in *Timken*.

Because these two factors provide a basis for liability that is independent of a theory of intra-enterprise conspiracy, the parent–subsidiary organization considered throughout this Note is assumed to be one in which the subsidiaries were organized and created solely by the parent, and were not formed through merger or acquisition, or otherwise in cooperation with others. It is also assumed that the subsidiary is either wholly or substantially owned by the parent, with the minority owners holding only for investment. These assumptions eliminate the risk that a conspiracy can be found among “persons” other than the parent and the subsidiary corporations and allow a direct consideration of the implications of a theory of intra-enterprise conspiracy.

*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* was the first major case in which the subsidiaries were indeed internally created and wholly owned. Kiefer-Stewart Co., an Indiana liquor wholesaler, brought a treble damage action against Joseph E. Seagram & Sons, Inc. (Seagram), two wholly owned subsidiaries of Seagram (Seagram Sales and Calvert), and a wholly owned subsidiary of Calvert (Calvert Sales). The complaint alleged that Seagram and Calvert had conspired in violation of the Sherman Act by agreeing to sell their products only to Indiana wholesalers who would resell at prices fixed by the defendants.
As a defense to the conspiracy charge, the defendants urged that "their status as 'mere instrumentalities of a single manufacturer-merchandizing unit' [made] it impossible for them to have conspired in a manner forbidden by the Sherman Act."40 The Court, however, rejected this argument:

Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers . . . .

... But this suggestion [that their status was as a single business unit, incapable of conspiring] runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E. g. United States v. Yellow Cab Co. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors.41

Thus, solely on the basis of Yellow Cab, which has been shown to be questionable authority,42 the Court upheld in one brief paragraph the proposition that affiliates in a parent-subsidiary organization can conspire.

In two early cases, the Federal Trade Commission (FTC) read Kiefer-Stewart expansively to support the conclusion that agreements or discussions among parent and subsidiary corporations, followed by concerted action, could constitute a conspiracy.43 Many commentators, however, have criticized this finding and noted the feebleness of its theoretical support.44 They have suggested that the requisite plurality was, or could have been, found in vertical agreements between the members of the Seagram enterprise and the independent wholesalers.45

_a_The Court held that such an arrangement did violate section 1. 340 U.S. at 213, revg. 182 F.2d 228 (7th Cir. 1950).

40. 340 U.S. at 215. The issue of whether the wholly owned subsidiaries could conspire with one another or with the parent had not been decided by the lower courts. The parties presented it to the Court, however, and, because it was a question of law, the Court considered it. See Stengel, supra note 8, at 14.


42. See text at notes 18-24 supra.

43. In the most expansive application of the Court's implication the Federal Trade Commission instituted two actions that resulted in consent decrees barring agreements as to price among affiliates in two parent-subsidiary organizations. In neither case did the FTC charge that other "persons" outside of the corporate family were involved in the alleged conspiracy. See Distillers Corp.-Seagrams, Ltd., 50 F.T.C. 738 (1954); Schenley Indus., Inc., 50 F.T.C. 747 (1954); Note, supra note 8, at 383-84.

44. See, e.g., McQuade, supra note 8, at 206-07; Stengel, supra note 8, at 14.

45. See Willis & Piotofsky, supra note 8, at 45. The argument is that the Seagram enterprise was not protected by the doctrine developed in United States v. Colgate & Co., 250 U.S. 373 (1911), because its activities involved more than unilateral action. In Colgate, the Supreme Court refused to find a plurality of actors in a resale price maintenance scheme. Instead, it rejected the existence of a section 1 violation by claiming that the scheme had been unilaterally adopted and policed by the defendant manufacturer. However, this suggested explanation of Kiefer-Stewart
The most recent case in which the Supreme Court has considered the intra-enterprise conspiracy question is *Perma Life Mufflers, Inc. v. International Parts Corp.* The plaintiffs, dealers who had operated "Midas Muffler Shops," alleged that International Parts Corp. and three of its internally created and wholly owned subsidiaries had conspired to fix retail prices and to require exclusive dealing. The lower courts had found for defendants on the basis of an *in pari delicto* defense and alternatively on the theory that the various concerns, "while operated through a multi-corporate structure, [were] a single business entity . . . and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 . . . ."

Justice Black, writing for the Court, first rejected the *in pari delicto* defense, and then, in one brief paragraph, citing *Timken* and *Yellow Cab*, also reversed the lower courts' holding that the separate corporations were a single business entity, incapable of conspiring: "[S]ince respondents Midas and International 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."

Although one noted commentator has interpreted this to be an unequivocal commitment of the Court to the proposition that the fact of separate corporate identities allows a finding of conspiracy among affiliates in a parent-subsidiary organization, the decision need not be interpreted so broadly. It is important to recognize that the Court did not have to reach the intra-enterprise conspiracy issue. The franchise agreements executed between Midas and the various plaintiffs explicitly carried the resale price fixing, exclusive dealing, and tying provisions. Such provisions in the franchise con-
tracts, executed by obviously distinct entities, were sufficient to satisfy the "contract, combination . . . or conspiracy" requirement of section 1. Therefore, a determination against the in pari delicto defense was dispositive of the case. It was for this reason that the concurring opinions did not have to agree with Justice Black on the intra-enterprise conspiracy; indeed, none of the five Justices writing separate opinions even discussed the theory. By their language, the concurring opinions appear to have taken the view that the section 1 violation rested on the franchise agreement between the opposing parties rather than on a conspiracy among the defendants. Even Justice Black recognized this other basis for meeting the plurality requirement of section 1. His comment "that in any event [there were several] alternative theories of conspiracy" indicates, perhaps, a discomfort with his broad language on intra-enterprise conspiracy. At the very least, it permitted Justice Black to reach the ultimate result without a full exposition of the issue.

Although some have interpreted the cases discussed above as support for an expansive theory of intra-enterprise conspiracy, this Note has so far shown that such a doctrine was not needed to find the plurality required for a conspiracy under section 1. In Yellow Cab and Timken, a conspiracy of independent persons preceded the combination that the defendants argued was a parent-subsidiary organization. In Kiefer-Stewart, the decision most strongly supporting an implication of intra-enterprise conspiracy, the alleged conspirators were indeed wholly owned affiliates of a common parent, but it has

54. See Handler, supra note 8, at 187.

55. Justice White concurred in the opinion, Justices Fortas and Marshall concurred in the result, and Justice Harlan, joined by Justice Stewart, concurred in part and dissented in part. Although Justice White claimed to join the opinion of the Court, 392 U.S. at 142, his separate opinion indicates that, unlike Justice Black, he did not see the section 1 violation as resting on the alleged intra-enterprise conspiracy. See note 56 infra.

56. Their four separate opinions make it clear that Justices White, Fortas, Marshall, Harlan and Stewart did not view the section 1 violation as resting on an intra-enterprise conspiracy but rather on the "arrangement" or "agreement" between the plaintiffs and the defendant enterprise. For example, Justice White saw the violation as an "illegal arrangement" between the petitioners and respondents. 392 U.S. at 143. Before posing the hypotheticals intended to clarify his position on the in pari delicto question, he stated the issue as "what is the situation when one party to the combination sues the other." 392 U.S. at 144. Justice Fortas recognized that the violation rested on particular clauses "of the Agreement." 392 U.S. at 148. According to Justice Marshall, the violation of section 1 was based on the franchise agreement. 392 U.S. at 149-50. Justice Harlan, joined by Justice Stewart, also considered the violation to rest on the "agreement" between the opposing parties. 392 U.S. at 156.

57. Justice Black stated that "each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with . . . the agreements." 392 U.S. at 142.

58. 392 U.S. at 142.

59. See Kempf, supra note 8, at 176.
been argued that section 1 liability could have rested upon the vertical agreements between the enterprise and independent wholesalers. Finally, in *Perma Life*, the Court spoke only in conclusory terms with no analysis of the issue and itself recognized an alternative basis for its holding. The next section of this Note explores the practical and theoretical difficulties of such an expansive theory of conspiracy.

**II. CRITICISMS OF AN EXPANSIVE THEORY OF CONSPIRACY**

Application of a theory of conspiracy to arrangements among separately incorporated affiliates in a parent-subsidiary organization might be reasonable if such arrangements engendered particular antitrust problems, but they do not. As already noted, it is settled law that directors, officers, employees, or divisions within a single corporation, when acting in behalf of the enterprise, are not deemed to conspire either with the corporation or with one another in violation of section 1. As some critics have pointed out, to find a conspiracy between separate corporations of a multi-corporate enterprise, when one cannot be found between functionally similar, separate divisions of a single corporation, is to exalt form over substance, and, perhaps, to substitute convenience for logical analysis.

As a practical matter, antitrust enforcement under an expansive intra-enterprise conspiracy doctrine would make conduct taking place in almost every parent-subsidiary organization illegitimate. Any discussions, agreements, or coordinated actions with respect to pricing, market or customer allocation, or a host of other issues, could result in a finding of conspiracy. Given such a finding,

---

60. See note 45 supra.

61. Willis & Pitofsky argue that the expansive intra-enterprise conspiracy doctrine is being used to fill perceived "gaps" between sections 1 and 2 of the Sherman Act. They claim that the acceptance of this doctrine is not the appropriate method to remedy such inadequacies in the Sherman Act. Willis & Pitofsky, supra note 8, at 28-30. Handler concurs with this view: "One looks in vain in *Perma Life* or in any of the cases on which it relies for any policy justifying a doctrine which on its face is repugnant to common sense. Certainly the use of corporate subsidiaries offends no recognized antitrust policy." Handler, supra note 8, at 187.

62. See text at note 2 supra.


64. Ironically, the Court has asserted that substance should prevail over form in this area of the law. See United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

65. The Supreme Court has indicated that coordinated action can support a finding that there was a tacit agreement and, therefore, a conspiracy. See, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939).

66. Discussions among affiliates in a parent-subsidiary enterprise would certainly support a finding of conspiracy under an expansive intra-enterprise conspiracy doc-
coupled with per se rules against such activities as price fixing or market allocation, most parent-subsidiary enterprises would be in continuous violation of the Sherman Act.

Yet there are many legitimate reasons why an enterprise might structure its business in the form of a parent corporation with separately incorporated subsidiaries. Operating a multi-corporate structure—as opposed to conducting business through distinct divisions of a single corporate entity—may, through decentralization, achieve efficiencies in production, distribution, or management; it may maintain the good will associated with a particular part of the over-all enterprise; may increase the marketability on the capital markets of a particular aspect of the enterprise; or may avoid disadvantages of operating in a particular area as a foreign corporation. Thus, especially with the loss of tax advantages, a multi-corporate organization may attain some “real” efficiencies that, in the aggregate, are beneficial to society. Hence, because the motives for such business decisions may be totally independent of any antitrust concern,

trine. As Justice Douglas stated: “It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and the defendants conformed to the arrangement.” United States v. Paramount Pictures, 334 U.S. 131, 142 (1948).

67. Such efficiencies may arise simply from the creation or maintenance of esprit de corps resulting from the mere fact of separateness in corporate form. See Willis & Pitofsky, supra note 8, at 28.

68. Separate incorporation may enable the firm to attract more easily equity or debt financing. Furthermore, it may create a more fluid market for the possible transfer of a component of an enterprise. Id. at 27-28.

69. See, e.g., Interstate Transit Lines v. Commissioner, 319 U.S. 590 (1943) (Nebraska corporation created California subsidiary to avoid state law restricting intrastate transportation business to California corporations). For a discussion of such problems in foreign commerce, see the arguments made by Timken in Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

70. Whereas formerly a primary reason for separate incorporation was the tax benefits that were gained thereby, the 1969 amendments to the Internal Revenue Code substantially eliminated these advantages. See Wilberding, An Ominous Warning for the Antitrust Law: The Disposition of the "Bathtub" Conspiracy—as Applied to Unincorporated Divisions—May Have Left a Tell-Tale Ring Around the Tub, 32 OHIO ST. L.J. 43, 47 (1971), which notes that the advantages of the multiple surtax exemption and the ability to reduce exposure to the unreasonable accumulations tax for amounts accruing to a multi-corporate enterprise were largely eliminated by the provisions of the 1969 tax amendments.

71. “Real” efficiencies is used here in its economic sense to mean resource savings. For example, in the short run, income tax advantages of a multi-corporate organization that arose prior to 1969 resulted solely in an allocation of funds between the enterprise and the government. The tax savings here are only a financial advantage for the enterprise, not a “real” efficiency. The same holds true for the benefit of limited liability achieved through separate incorporation. Advantages resulting from a multi-corporate form that create cost savings, such as managerial efficiencies, are “real” efficiencies, in that the same “goods” are being produced with fewer resources. The ability to enter a foreign market through a subsidiary, see note 69 supra, presumably increases economic efficiency and benefits the public by facilitating the transfer of resources to increase competition in an activity from which abnormal profit is presently being earned.
the multi-corporate form does not necessarily raise any unique anti-trust issue that cannot be reached by substantive doctrines other than an expansive intra-enterprise conspiracy theory. Courts should be reluctant to apply a broad rule that not only might inhibit the achievement of real efficiencies but also might, in fact, fail to further any antitrust policy.

Despite, or perhaps because of, the wide potential for applying a theory of intra-enterprise conspiracy, both antitrust enforcement agencies and the courts have been reluctant to rely on the theory. Except for two early actions, the FTC has not charged an enterprise with illegal conspiracy based solely on internal discussions or agreements. Leading officials of the Antitrust Division have also recently counseled hesitation in applying such a theory and, in fact, the Justice Department has “never brought an action against a parent and its subsidiary corporations . . . charging a conspiracy solely in restraint of the trade of the affiliated defendants.” This position is also evident in many consent decrees which, by their terms, do not apply to activities among affiliates in a parent-subsidiary organization.

The Supreme Court itself has contradicted the broad conspiracy implication often drawn from Yellow Cab, Kiefer-Stewart, and Timken. In Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., a decision preceding Perma Life, the Court refused to find a conspiracy among Sunkist, its wholly owned subsidiary Exchange Orange, and Exchange Lemon, the members of which all belonged to the Sunkist organization. Writing for a unanimous Court, Justice Clark stated:

We are squarely presented, then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered indepen-

---

72. The claim that the obligations of separateness must be accepted if one has availed himself "of the privilege of doing business through separate corporations," Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968), again exalts form over substance. Conspiracy liability should result from the mere fact of separate incorporation of parent and subsidiary firms, given its structural advantages, only if it raises peculiar antitrust problems. See note 61 supra.

73. See note 43 supra and accompanying text.

74. See Willis & Pitofsky, supra note 8, at 31-32.

75. Id. Shortly after he took office as Assistant Attorney General for the Antitrust Division, Donald Turner claimed that the Department of Justice would not press the Court's language in Timken to its full implications: "[W]e should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the Timken case might suggest." 10 Antitrust Bull. 685, 687 (1965).

76. Attorney General's Committee Report, supra note 23, at 34. See Willis & Pitofsky, supra note 8, at 30.

77. See Willis & Pitofsky, supra note 8, at 30 n.32.

dent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. . . .

. . . [W]e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect . . . .

The Court looked at the substance of the arrangement80 and declined to find a conspiracy based on the mere fact that the parent and its subsidiaries were formally separate entities.81

Thus, Sunkist contradicts the broad theory of intra-enterprise conspiracy that may be implied by earlier decisions. Unfortunately, in Perma Life, neither the majority opinion of Justice Black nor the separate opinions addressed this contradiction or attempted to reconcile Sunkist with the conclusory language of Perma Life.82 It thus appears that the Supreme Court itself may have provided authority for rejecting the validity of intra-enterprise conspiracy and has at least been equivocal about its application; the results of Sunkist and Perma Life surely suggest that other factors may be isolated to provide a basis for distinguishing these cases.

Lower courts have also hesitated to find a conspiracy among firms in a parent-subsidiary enterprise merely because of their separate incorporation.83 For example, in I. Haas Trucking Corp. v. New York

---

79. 370 U.S. at 29. Although the exemptions granted to agricultural cooperatives by section 6 of the Clayton Antitrust Act, 15 U.S.C. § 17 (1970), and the Capper-Volstead Act of 1922, 7 U.S.C. § 291 (1970), played a part in the decision, they were not controlling, and the holding is not so limited. The Court's language quoted in the text applies to any parent-subsidiary enterprise and indicates, as this Note has argued, that substance rather than mere form is the key factor in judging whether an intra-enterprise arrangement violates section 1. For support of this view that the Court's reasoning is applicable to the general intra-enterprise conspiracy question, see Sulmeyer v. Seven-Up Co., 411 F. Supp. 635, 640-41 (S.D.N.Y. 1976), discussed in text at notes 147-53 infra; Kempf, supra note 8, at 180; Stengel, supra note 8, at 20; Willis & Pitofsky, supra note 8, at 38 n.59.

80. "There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." 370 U.S. at 29.

81. 370 U.S. at 29.

82. See text at note 51 supra.

Fruit Auction Corp., the New York Fruit Auction Corporation (Auction) organized a subsidiary to take over functions in the fruit auction business that had been performed inefficiently by the plaintiff and other independent firms. The district court refused to accept the contention that the defendants—Auction and its subsidiary—could be found to conspire:

For the purposes of Section 1, the two defendants must properly be regarded as a single entity—and therefore incapable as a matter of law, of concerted activity, conspiracy or contracting with each other . . . . They are clearly parts of an integral operation, so unified that they cannot be regarded as separate in any but the most perfunctory and technical manner.

This language clearly rejects a broad application of an intra-enterprise conspiracy doctrine.

Thus, the positions of antitrust enforcement agencies and of the courts themselves indicate that the doctrine of intra-enterprise conspiracy is not seen as definitive law and that its broad, literal application to all parent-subsidiary relationships is clearly viewed as inappropriate. The following section analyzes previously proposed theories for limiting the scope of this doctrine.

III. PREVIOUSLY PROPOSED LIMITATIONS

Some writers have argued that an intra-enterprise conspiracy can exist only when arrangements or agreements among affiliates have the purpose or effect of a restraint of trade on outsiders, while others have contended that affiliates in a parent-subsidiary organization can conspire only when they hold themselves out as competitors. It is submitted here that neither of these theories is accept-


85. 364 F. Supp. at 870-72.
86. 364 F. Supp. at 873.
87. The Haas Trucking case presents a concrete example of the formation of a subsidiary for valid business purposes unrelated to any antitrust concern. Rather than being organized as a division, the subsidiary was separately incorporated because the employees of the two firms belonged to separate labor unions and enjoyed different fringe benefits. 364 F. Supp. at 873.
88. See ATTORNEY GENERAL'S COMMITTEE REPORT, supra note 23, at 34.
89. See Willis & Pitofsky, supra note 8, at 36-38. Some commentators suggest that courts should reject the application of per se rules to agreements among affiliates in a parent-subsidiary organization and instead apply a rule of reason standard to such arrangements. See, e.g., E. KINTNER, AN ANTITRUST PRIMER 29 (2d ed.
able and that an alternative doctrine, proposed in the final section of this Note, should be recognized as the appropriate theory of intra-enterprise conspiracy.

A. The "External Effect" Theory

One theory limiting the Court's implication of intra-enterprise conspiracy was proposed in the highly regarded report of the United States Attorney General's National Committee to Study the Antitrust Laws. The Committee recognized the dangers of such a broad conspiracy theory and argued that "[t]o demand internal competition within and between the member of a single business unit is to invite chaos without promotion of the public welfare." Thus the Committee interpreted the opinions of the Supreme Court narrowly:

The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1.

Based on this interpretation of the Court's opinions, a majority of the Committee went on to "disapprove any application of this doctrine to joint action between members of a corporate family not intended to or resulting in coercive undue restraint on their customers or competitors."

In the statements quoted above, the Committee used the words "purpose" and "effect." However, it did not explain how these concepts might be the basis for an effective and meaningful limitation on the intra-enterprise conspiracy doctrine. It is especially unclear how a standard that is based upon the enterprise's "purpose" can add much to the prohibitory scope of the antitrust statutes. Purposeful predatory conduct is, after all, already covered by the doctrines developed from the attempt to monopolize language of section 2 of the Sherman Act, where "purpose" plays a dominant role.

1973); Comment, Corporate Liability for Intra-Corporate Conspiracy in Restraint of Trade, 1968 U. ILL. L.F. 248, 253 (1968). Although this proposal addresses the problem created by the Court's broad implication in Perma Life, it does so from a different perspective. This approach assumes that affiliates can be found to conspire and merely proposes that such conspiracies be judged by a rule of reason.

90. ATTORNEY GENERAL'S COMMITTEE REPORT, supra note 23, at 34-35.
91. Id. at 34 (emphasis added).
92. Id. at 34.
93. See Willis & Pitofsky, supra note 8, at 40-41. Willis and Pitofsky suggest that the predatory intent that the Attorney General's Committee considers crucial
Whereas the intra-enterprise conspiracy theory is designed to satisfy the plurality requirement of section 1, plurality is not at issue in section 2; an attempt to monopolize does not require a multiplicity of actors.

On the other hand, many commentators have focused solely upon the "effect" concept. The Committee apparently thought that an intra-enterprise conspiracy could be found in cases in which an agreement or arrangement among the parent and subsidiaries had an effect upon outsiders. But this theory seems unworkable, for it is likely that every significant intra-enterprise arrangement has some external effects. Illustrative are the common arrangements among parents and subsidiaries to set prices or to allocate territories and products among the firms within the organization. If taken literally, the external-effect test could make these and possibly all other such arrangements illegal. This result hardly constitutes the limitation on the intra-enterprise conspiracy theory sought by the Committee itself. The real problem, of course, is to develop principled standards that can distinguish between innocent effects (or a lack of any effects) on the one hand, and substantial effects—sufficient to trigger a finding of conspiracy—on the other. Yet proponents of the test have suggested no such standard that would provide the lower courts with a principled basis for determining liability. The external-effect test is thus untenable because its results are unpredictable and because it would condemn virtually all intra-enterprise decisionmaking to unacceptable uncertainty.

This lack of a principle by which to assess liability is evident in Chastain v. American Telephone & Telegraph Co. The district court considered whether AT&T (the parent) and its various operating subsidiaries conspired in violation of section 1 in refusing to provide services to plaintiffs, distributors of mobile telephones. The court did not apply the broad theory of intra-enterprise conspiracy suggested by the Supreme Court but rather seemed to accept the to a finding of conspiracy is really a matter of concern under section 2 of the Sherman Act. An anticompetitive intent to harm outsiders would be an "attempt to monopolize" violation under section 2 rather than an intra-enterprise conspiracy.

94. See, e.g., McQuade, supra note 8, at 213; Stengel, supra note 8, at 22-23; Willis & Pitofsky, supra note 8, at 48-49.

95. See McQuade, supra note 8, at 213; Stengel, supra note 8, at 22-23; Willis & Pitofsky, supra note 8, at 48-49. Stengel observed:

Such a distinction would be meaningless because it could always be shown that the trade of outsiders was restrained. Any agreement between members of a corporate family with respect to prices, division of markets, and such, would obviously affect the trade of customers and competitors. Therefore, restricting the intra-enterprise conspiracy doctrine to cases in which there is external restraint would create an illusory limitation.

Stengel, supra note 8, at 22-23.


97. See 401 F. Supp. at 160.
analysis of the Attorney General's Committee. The court stated:

The cases in the last two categories mentioned [one where a conspiracy was found and the other where it was not] suggest what seems to this court the proper approach to the intra-corporate conspiracy issue. In those cases the courts decided whether or not to treat the defendant companies as conspirators only after determining, on the basis of all the facts, whether the companies' actions amounted to, in purpose and effect, a conspiracy in restraint of trade.

The court articulated no standard for assessing when parent-subsidiary agreements—which commonly are designed to achieve some measure of competitive advantage and will almost always affect outsiders—transgress the bounds of legality. In essence, the language quoted above implies that a conspiracy will be found when the court thinks one should be found. The "effect" theory, as it is currently expounded, thus fails to provide a sound principle upon which to rest a rule of law.

B. The "Holding Out" Theory

The most influential theory for limiting application of the intra-enterprise conspiracy doctrine was proposed by Everett Willis and Robert Pitofsky. This theory draws upon Justice Black's opinion in Kiefer-Stewart: "[C]ommon ownership and control does not liberate corporations from the impact of the antitrust laws. . . . The rule is especially applicable where . . . respondents hold themselves out as competitors." The proponents of this "holding out" theory extend this proposition and claim that an intra-enterprise conspiracy should only be found in cases, like Kiefer-Stewart, in which two or more corporations in a parent-subsidiary enterprise publicly adopt a competitive posture vis-à-vis one another. Some lower courts have apparently accepted this theory, although its application has been primarily used to limit, rather than to support, application of the conspiracy doctrine.

98. See 401 F. Supp. at 159-60. The court, like the Attorney General's Committee, expressed willingness to find a conspiracy where there was predatory purpose or intent underlying actions directed at outsiders. See 401 F. Supp. at 159 n.35.

99. 401 F. Supp. at 160 (emphasis added).

100. Willis & Pitofsky, supra note 8, at 35-38.


102. Willis & Pitofsky, supra note 8, at 35-38. The exception to this general rule is that a conspiracy can be found; as in the Yellow Cab case, where the enterprise chooses to do business through corporate components with the specific intent of achieving some anticompetitive result. Id. at 35.

The "holding out" theory is deficient in two respects. First, the elements of behavior that constitute "holding out" have never been precisely delineated. Justice Black merely stated his conclusion in Kiefer-Stewart with no analysis, while lower courts claiming to accept the "holding out" limitation have done so only in dicta.104 If the subsidiaries in Kiefer-Stewart are to serve as the paradigm, then presumably "holding out" is present when affiliated firms separately market and promote products that appear, in the public's view, competitive with one another.

If this is the appropriate situation for the application of the "holding out" theory, then it exposes a more fundamental defect in the theory: the lack of a clear relationship of such a factual pattern to antitrust concerns. Indeed, Willis and Pitofsky recognize this lack of theoretical justification in Kiefer-Stewart:

"There is no indication in the opinion as to why affiliated companies holding themselves out as competitors should incur additional antitrust liability. The Supreme Court may have had some concept of estoppel in mind, but ordinarily an estoppel doctrine requires a finding that someone relying on appearances changed his position to his disadvantage. There is no indication in the Supreme Court opinion that anyone relied to his disadvantage on the apparent fact that Calvert and Seagram were competitors."105

Thus, there appears to be no identifiable antitrust significance in the mere fact that affiliates of a multi-firm enterprise hold themselves out as competitors. The only apparent justification for the theory is that the "holding out" language in Kiefer-Stewart provides a convenient method to limit the intra-enterprise conspiracy doctrine. Limitation is indeed a desirable objective, but it should be achieved in a manner consistent with the basic purposes of the antitrust laws and not by means of an unreasoned, and hence arbitrary, formula. The next section of this Note proposes an alternative theory of limitation that actually subsumes any reasoned principles that might support the "holding out" theory.106

IV. A PROPOSED THEORY OF LIMITATION

In this section, a new theory of limitation is proposed that focuses upon the degree of managerial control the parent exercises over its subsidiary. It will be shown that such an approach is consistent both with Supreme Court pronouncements and with sound antitrust policy, and that lower courts have applied a similar approach.

The proposed theory of limitation is as follows: If a parent firm controls the day-to-day operations of its subsidiaries, a conspiracy

105. Willis & Pitofsky, supra note 8, at 37 (emphasis added).
106. See text at notes 130-31 infra.
should not be found on the basis of agreements or coordinated activity among them. Even though a fictional plurality exists in separate corporate identities, a multi-corporate enterprise that is integrated with the parent exercising control should be viewed as "one mind," whose various parts are incapable of conspiring with one another. This proposal is designed to create a "safe-harbor" rule within which intra-enterprise relations will not be subject to liability for conspiracy under section 1 of the Sherman Act.

The analysis suggested by this theory is reasonable on several grounds, two of which have been presented in previous sections. First, an enterprise with subsidiaries controlled by the parent does not differ functionally or substantively from a single corporation with distinct divisions. Since a finding of conspiracy among separate divisions of a single corporation has never been upheld, it exalts form over substance to subject tightly controlled corporations within a single enterprise to antitrust liability solely because they are formally separate. Secondly, the parent-subsidiary organization raises no special antitrust concerns peculiar to that form of enterprise; indeed, as argued above, there may be valid business reasons for a company to structure itself along these lines. Allowing a

107. However, an explicit contract between the management of the parent and subsidiary may suggest that the parent does not control the day-to-day operations of the subsidiary. See note 118 infra.

108. Again it is assumed that the parent created the subsidiaries and the latter either are wholly owned by the parent or are substantially owned by the parent with minority owners holding only for investment. This assumption eliminates the possibility of a conspiracy of the nature discussed in text at notes 35-36 supra.

109. This Note only suggests the factual situations that should not support a finding of an intra-enterprise conspiracy and thus does not analyze whether a conspiracy should be found in other circumstances. In essence, this Note offers a "safe-harbor" rule. In contrast, Willis and Pitofsky propose a general rule that states that affiliates in a parent-subsidiary enterprise cannot be found to conspire with each other. They offer the "holding out" and "anticompetitive intent" theories as limited exceptions to their general rule. See Willis & Pitofsky, supra note 8, at 35. Thus, the theory proposed in this Note suggests a situation where a conspiracy should not be found, while Willis and Pitofsky suggest exceptional circumstances which would support a finding of conspiracy.

110. See text at notes 61-64 supra.


112. In Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 272 F. Supp. 915 (D. Hawaii 1967), revd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970), the Ninth Circuit reversed a trial court holding that, because Seagrams restructured itself merely to avoid the result that had occurred in Kiefer-Stewart, and because the substance of the organization had not changed, the distinct divisions could be found to have conspired with each other.

113. See notes 67-72 supra and accompanying text. The contrary theory, announced by Justice Black in Perma Life, is that because a parent-subsidiary enterprise gains some benefits from such organization, such as limited liability for each firm, it must as well accept any resulting costs, which in this context would include the ability of its constituent parts to conspire with one another. 392 U.S. at 142. However, this analysis simply begs the question. The real issue, is after all, whether mere separate incorporation should be enough to support a finding of conspiracy.
finding of conspiracy among affiliated firms when the parent controls the operations of the subsidiaries would likely discourage firms from seeking the socially beneficial advantages that can be achieved with this form of organization.

Although the full contours of an intra-enterprise conspiracy doctrine under section 1 of the Sherman Act remain subject to debate, its scope clearly should not extend to the proposed “safe harbor.” A standard based upon day-to-day control is consistent with the central purpose of section 1 of the Sherman Act, which is to prohibit concerted action among two or more independent entities. While section 2 of the Act controls undesirable single-firm size and power, the conspiracy element of section 1 prohibits arrangements and agreements that reduce the competitive forces among the conspiring firms. Section 1, then, is concerned with preventing a reduction in the number of units with market discretion. Underlying this purpose is the expectation that the more firms that exist with decision-making power concerning pricing or output, the more likely it is that the market result will be socially desirable.

---

114. See, e.g., Handler, supra note 8; Willis & Pitofsky, supra note 8. It is submitted that the following standard may be derived from the criticism of the intra-enterprise conspiracy doctrine: The separate firms in a parent-subsidiary organization cannot be found to have conspired in violation of section 1 unless a factual situation similar to that found in *Yellow Cab* or *Timken* is presented. In other words, there can be no such conspiracy unless (1) the very combination of firms into a parent-subsidiary structure results from a prior conspiracy between independent “persons,” as in *Yellow Cab*, or (2) the “parent” does not completely own the “subsidiary,” and the independent owners are furthering a conspiracy among themselves, as in *Timken*. Thus, under this rule, an internally created and wholly owned subsidiary cannot conspire with its parent. Such a standard would reject the holdings, though perhaps not the results, of *Kiefer-Stewart* and *Perma Life*, which were both cases in which the Court held that internally created and wholly owned subsidiaries had conspired with the parent.

However, while the standard suggested above does have theoretical appeal, its acceptance by the judiciary is unlikely. No court has ever adopted this position; moreover, it conflicts with rather explicit language in *Kiefer-Stewart* and *Perma Life*. Thus, given these constraints to reform in this area, the control theory suggested by this Note is offered as the preferred method to remedy the intra-enterprise conspiracy problem. The proposed control standard is consistent with the decisions, both of the Supreme Court and lower courts, that have considered this issue. Unlike the “external effects” and “holding out” theories, see text at notes 90-106 supra, this standard would promote sound antitrust policy.

115. See, e.g., United States v. Citizens & S. Natl. Bank, 422 U.S. 86, 116 (1975), where the Court observed: “The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors.”

116. See Stengel, supra note 8, at 12; Willis & Pitofsky, supra note 8, at 40-41.

117. Where independent firms agree to set prices, they reduce the number of economic units with market price discretion. Allocative inefficiency occurs where, for example, firms eliminate their discretion and agree to set prices above the marginal cost of production, which is the level toward which prices tend to move if many firms within the market freely compete with one another. Section 1 should
Thus, implicit in the section 1 prohibitions is the notion that the conspiracy must be among independent, competitive units—that is, the agreement of two or more separate "minds" on concerted action or restraint.

However, when a parent corporation creates, wholly owns, and controls the day-to-day operations of one or more subsidiary corporations, two or more independent "minds" do not exist. Actual control, rather than mere ownership by the parent of the subsidiary's shares, is what demonstrates that the management of the subsidiary is not autonomous. Where such control exists, it is incongruous to claim that a subsidiary can conspire with the parent or with other, similarly controlled, subsidiaries for there is no meeting of independent "minds." Moreover, it would be absurd to expect that by creating liberal standards of intra-enterprise conspiracy, affiliates in a parent-subsidiary organization will be forced to compete with one another, increasing the number of units in the market with market discretion. Instead, the enterprise would probably consolidate into a single corporate entity and forgo the advantages that may be derived from a multi-corporate structure.

\[118\] Actual control can occur if the management of the subsidiary is composed of officers, directors, or other employees of the parent and they in fact effectuate the policies of the parent. One may infer that Kingman Brewster, Jr., would attack a standard based on day-to-day control, for he has suggested that it seems "absurd to have antitrust legality turn on the particular form chosen for the exercise of [ownership] control, be it by vote, by informal directive, by management contract, by license, or by restrictive agreement." K. BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 185 (1955). However, under the standard suggested in this Note, a restrictive agreement or contract, as was found in \textit{Timken}, indicates that in fact the parent does not control the management of the subsidiary; rather, the former must resort to a contract in order to curb the latter's autonomy. Brewster recognized that the form by which ownership control is exercised may be important when, prior to the passage quoted above, he noted that "the natural government rejoinder to the one-happy-family defense is that if the family ties are so strong, why use the shackles and bonds of 'heads of agreement'?" K. BREWSTER, JR., supra, at 185.


\[120\] On the other hand, when the parent does not exercise day-to-day control, and thus the autonomous subsidiary operates with market discretion, there is a stronger argument that the plurality element of section 1 is met. Furthermore, since such autonomous subsidiaries could operate independently without parental ownership and affiliation, the claim that such an organizational structure serves socially desirable and valid business purposes is weakened.

\[121\] See \textit{United States v. Citizens & S. Natl. Bank}, 422 U.S. 86, 116 (1975); McQuade, supra note 8, at 213.

\[122\] \textit{United States v. Citizens & S. Natl. Bank}, 422 U.S. 86 (1975), appears to preclude the finding that such integration would violate section 7 of the Clayton Act. See text at notes 131-41 infra.
Support for a theory based upon control may be found in cases that focus upon whether a parent (or other majority shareholder) of a corporation can be held liable for antitrust violations of that corporation. If day-to-day control exists, the courts will look through the form of independent existence and, on the basis of the substance of the relationship, hold the parent responsible. Acceptance of a control standard in this context supports its application to intra-enterprise conspiracy, for it would be inconsistent to consider the parent and subsidiary as independent entities only for the purpose of creating plurality (and therefore imposing liability) under section 1.

As was argued in Section I of this Note, Yellow Cab, Timken, and Perma Life do not support the proposition that separately incorporated affiliates in a parent-subsidiary enterprise provide the required plurality for a finding of conspiracy. It was suggested that in each case the conspiracy rested on the agreements or actions of independent entities: in Yellow Cab, between Markin or Checker Cab and the later-acquired operating cab companies; in Timken, between American Timken and the Englishman Dewar; and in Perma Life, among the parties who entered into the explicit contract.

For one wishing to limit the Supreme Court's implication of an intra-enterprise conspiracy doctrine, Kiefer-Stewart presents the most problems. Although some have suggested that the basis of Seagram's liability may have been its establishment of a resale price maintenance scheme (where the "agreement" for section 1 purposes was between the defendant subsidiaries and the independent wholesalers), the argument is not compelling and the language of the case suggests that Justice Black did not have this rationale in mind. The weakness of this argument provides some explanation for the emergence of the "holding out" theory; some have

123. See National Dairy Prods. Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965), vacated on other grounds, 384 U.S. 883 (1966). In that case the parent firm was held responsible for the subsidiary's price fixing agreements because the latter was not an "independent subsidiary" of the former but rather was operated by the parent "in accordance with . . . [its] policies and objectives and with independent existence in form only." Compare United States v. Aluminum Co. of America, 148 F.2d 416, 442 (2d Cir. 1945), with United States v. General Elec. Co., 82 F. Supp. 753, 843 (D.N.J. 1949), where the different results reached were based on the extent of control exercised by the parent over the day-to-day operations of the subsidiary.

124. See text at notes 14-36, 46-60 supra.

125. The control standard suggested in this Note could be used to explain Timken in another fashion. Although American Timken had ownership control of the two foreign firms, the latter were operated autonomously, as Dewar controlled the day-to-day operations of both of them. Thus, under the standard proposed here, the parent and the subsidiaries were independent enterprises and would not be protected from a finding of conspiracy.

126. See text at notes 46-60 supra.

127. See note 45 supra.
seen it as the only apparent limitation to Justice Black's expansive holding. However, the facts of the case are consistent with the control rationale proposed in this Note. Furthermore, the existence of day-to-day control might even be the implicit concern in situations where affiliates "hold themselves out as competitors."

Both the Calvert and Seagram subsidiaries of Kiefer-Stewart determined their own policies and ran their day-to-day operations without direction or interference from the parent firm. Thus, the two subsidiaries each made independent market decisions. Rather than the single source of discretion that would have resulted had the parent controlled their operations, there were two "minds," two competitive forces, in the market. Because the parent did not control the operations of the subsidiaries, the entire enterprise was not protected from a finding that its various parts conspired. In short, the defendant enterprise in Kiefer-Stewart failed to come within the "safe-harbor" rule proposed here.

Relying on Kiefer-Stewart, proponents of the "holding out" theory claim that an intra-enterprise conspiracy can only be found where affiliates are acting as competitors. But no antitrust problem is raised by the mere fact that affiliates so hold themselves out, especially if no one is misled. The holding out theory only makes sense if it is understood that the implicit concern over affiliates who hold themselves out as competitors in fact involves the issue of day-to-day control. What seems crucial in such situations is that competing affiliates given the relevant market two or more sources of market discretion. If Kiefer-Stewart is a case of "holding out," it is one in which the two subsidiaries were autonomous and management was completely decentralized. Any agreement or coordination between such affiliates eliminated one such source of discretion, thereby eliminating a competitive force in the market. If the parent had controlled the operations of its subsidiaries to the point of depriving them of autonomy, then the entire enterprise would have presented the market with only one source of discretion—one "mind."

Hence, the "holding out" theory only masks the real concern with day-to-day control. Using Kiefer-Stewart as guidance, where affiliates are holding themselves out as competitors, giving the market more than one source of market discretion, it is probably the case that the parent does not control the day-to-day operations of its offspring. Thus, the "holding out" theory should be subsumed under the control analysis proposed in this Note.

Support for the control theory suggested here is reflected in recent cases decided both in the Supreme Court and in federal district courts. Although these courts have not expressly articulated a

---

128. See text at notes 100-06 supra.
129. See McQuade, supra note 8, at 206.
130. See text at notes 105-06 supra.
theory of control, it is clear that this was the primary basis for their decisions.

In *United States v. Citizens & Southern National Bank*, the Supreme Court addressed alleged violations of both section 1 of the Sherman Act and section 7 of the Clayton Act. Citizens & Southern National Bank (Citizens) had organized a system of de facto branch banks to avoid a Georgia law prohibiting branch banking. Through the sponsorship and initiative of Citizens, five banks were founded, with five per cent of the shares of each held by Citizens and most of the rest held by parties friendly to Citizens. Citizens, however, controlled the day-to-day operations of the banks. After Georgia changed its branch-banking law, Citizens attempted to acquire the outstanding shares of the de facto branch banks to make them de jure branches. The Department of Justice then brought suit charging that the proposed acquisition violated section 7 of the Clayton Act and that the relations between Citizens and the de facto branches had violated section 1 of the Sherman Act.

Although the evidence indicated that there were substantial ties among the banks, that the banks followed similar pricing and service policies, and that they refrained from active competition with one another, the Supreme Court refused to find a conspiracy in violation of the Sherman Act. The de facto branches were considered to be part of a unitary organization, essentially a parent-subsidiary group with Citizens at the head: "Were we dealing with independent competitors having no permissible reason for intimate and continuous cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a conspiracy . . . ."  

---

131. 422 U.S. 86 (1975).

132. A sixth bank operated as a de facto branch had been previously independent. Because the Court and the FDIC considered this arrangement to present problems different from those involved with the other five banks, the Court's subsequent analysis was not applied to this bank. See 422 U.S. at 111 n.21. The problem posed by the sixth bank is precisely the difficulty avoided by the assumption made throughout this Note that the parent created and wholly owned the subsidiaries. See text at notes 35-36 supra.

133. At one point, the court implied that the de facto branch banks had discretion in their operations and thus were not controlled by Citizens. See 422 U.S. at 113. If this was so, then the case goes further than the standard suggested in this Note as to what situations are protected from a finding of conspiracy. However, the facts suggest that Citizens found it unnecessary to resort to explicit agreements with the managers of the de facto banks because it had chosen the banks' principal executive directors and had participated in the selection of their other directors, as well as supervised the operations and governance of each de facto branch bank. See 422 U.S. at 93. Such day-to-day control by the parent is precisely the most appropriate form of control to exempt the enterprise from a finding of an intra-enterprise conspiracy. See 422 U.S. at 131-32 (Brennan, J., dissenting); note 118 supra.

134. 422 U.S. at 90.

135. See 422 U.S. at 113.

136. 422 U.S. at 113-14 (emphasis added).
This reasoning implies the acceptance of a control theory such as that suggested here. Because the de facto branch banks were created and controlled by Citizens, and were not independent competitors, no conspiracy was found.\textsuperscript{137} Had the de facto branch banks not been organized and controlled by Citizens but rather been independent entities the evidence would, in the Court's view, have precluded a finding that there was no conspiracy.\textsuperscript{138} The crucial elements appeared to be creation and control, not the fact of ownership, since Citizens only owned five per cent of the shares of the de facto branches.\textsuperscript{139}

The Court's rationale in finding no violation of section 7 of the Clayton Act also supports the proposed control standard. In attacking the permanent union of separate firms when the effect of such union is to restrain competition at the horizontal level, section 7 addresses the same issues presented by a case under section 1 of the Sherman Act, which prohibits agreements among competitors that have an anticompetitive result.\textsuperscript{140} In \textit{Citizens} the Court said, in essence, that because Citizens created and controlled the other banks, the separate legal entities presented the market with only one competitive force, only one source of discretion. Thus, the act of becoming wholly owned subsidiaries would "extinguish no present competitive conduct or relationships"\textsuperscript{141} and therefore would not violate section 7. This is precisely the argument supporting the proposed control standard: the parent's exercise of day-to-day control presents the market with only one decision-making unit. Hence, just as it would be inappropriate to apply the conspiracy provision of the Sherman Act, section 7 should not preclude the mergers in this case. Both provisions logically require the existence of at least two independent decision-making units.

Two recent federal district court cases have also utilized an analysis such as that proposed here. In \textit{In re Penn Central Securities Litigation v. Pennsylvania Co.},\textsuperscript{142} the Pennsylvania Company (Penco) had acquired a large majority of the shares of three inde-

\textsuperscript{137} See 422 U.S. at 114.
\textsuperscript{138} 422 U.S. at 113-14. See note 132 supra.
\textsuperscript{139} 422 U.S. at 93.
\textsuperscript{140} However, the very language of section 7 of the Clayton Act distinguishes the relations between parent and subsidiaries from other situations: Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition. Clayton Act § 7, 15 U.S.C. § 18 (1970). Thus, unlike section 1 of the Sherman Act, section 7 explicitly views a parent-subsidiary corporation in a different light.
\textsuperscript{141} 422 U.S. at 121.
dependent real estate development companies. Pennco used its ownership to elect a majority on each board of directors, all of the members of which were officers or directors of Pennco or of its parent, Penn Central Company. Pennco then used its control of the management to effectuate its policies by allocating markets, territories, and customers among the three subsidiaries. It is clear that had the parties not been affiliated at the time, or had the court accepted the Supreme Court's broad implication of intra-enterprise conspiracy, the market allocation arrangement would have been a conspiracy in violation of section 1.\textsuperscript{143}

In assessing whether there existed the "requisite multiplicity of actors necessary to form a conspiracy," the court concluded that the market allocation was merely "the normal internal management of a corporation which has chosen to operate through separately incorporated subsidiaries"\textsuperscript{144} and thus not a section 1 violation. At the very least, this indicates a refusal by the court to accept the broad implication of the intra-enterprise conspiracy doctrine. Although there is some suggestion that the court in part embraced some version of the "effect" theory,\textsuperscript{145} its analysis clearly focused upon the common directors and officers of the companies and the implementation of policies that would contribute to the well-being of the whole Pennco enterprise.\textsuperscript{146} These factors were found to render the entire enterprise a single decision-making unit, incapable of conspiring within itself. This approach embraces the essence of the proposed control theory.

In the second recent case, Sulmeyer v. Seven-Up Company,\textsuperscript{147} the plaintiff alleged that Seven-Up and its subsidiary, Seven-Up Export, had conspired in violation of section 1 of the Sherman Act to reduce the export sales of plaintiff's competing soft drink syrup. Export had been created solely to be the agent of Seven-Up for foreign sales,\textsuperscript{148} and "[w]ith two exceptions, all of the directors

\begin{flushright}
\textsuperscript{143} See 367 F. Supp. at 1166. Because the parent and subsidiaries had been previously independent, the court might have found a conspiracy under the theories that are suggested to be the basis for Yellow Cab and Timken. See text at notes 35-36 supra.
\textsuperscript{144} 367 F. Supp. at 1166.
\textsuperscript{145} The court considered it important to the resolution of the case that "no conspiracy directed at outsiders to the corporate family is alleged." 367 F. Supp. at 1166. For a discussion of the "effect" theory, see text at notes 90-99 supra.
\textsuperscript{146} The court noted:

Through this majority ownership it was able to elect the directors it desired and through them could put into action policies which would contribute to the corporate health of the whole Pennco enterprise. . . . We fail to see why this must be viewed as anything other than the normal internal management of a corporation which has chosen to operate through separately incorporated subsidiaries.

367 F. Supp. at 1166.
\textsuperscript{147} 411 F. Supp. 635 (S.D.N.Y. 1976).
\textsuperscript{148} See 411 F. Supp. at 640.
\end{flushright}
of Export have been either officers or directors of Seven-Up. . . . [There was also] evidence that Export never functioned as an independent entity." Had the court accepted the broad intraenterprise conspiracy doctrine implied by the Supreme Court, it would have found that the legally separate entities provided the requisite plurality for a conspiracy. Instead, the court clearly rejected any such implication:

[W]e are directed by the Supreme Court to look at substance over form [Yellow Cab], and while Export and Seven-Up did avail themselves of separate corporate status, Export was the subsidiary and agent of Seven-Up. "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect . . . ."

On this basis, the court held that Seven-Up and Export constituted one business entity and therefore dismissed the section 1 conspiracy allegations. It is clear that the court followed the logic of the suggested standard. Because of Seven-Up's control, Export was a mere agent of its parent. Therefore, the formally separate firms did not constitute a plurality of actors required for a finding of conspiracy: there was only one source of market discretion—that is, only one "mind."

149. 411 F. Supp. at 640.
152. Seven-Up and Export had an "Agency Agreement" that governed the operations of the subsidiary. 411 F. Supp. at 639-40. It might be argued that this evidenced a lack of control on the part of Seven-Up. See note 118 supra. On the whole, however, the facts indicated that Seven-Up did control the day-to-day operations of Export, see 411 F. Supp. at 640, and that the agency agreement merely outlined Seven-Up's purposes in forming the subsidiary.