Copperweld: What To Do With the Stepchildren of Parent Corporations?

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“If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities.”

Introduction

Picture a market where there are two firms, Firm Minas and Firm Braswell. These firms collude and act in a manner that restrains trade. Generally, this behavior is considered anticompetitive behavior and is made illegal by section one of the Sherman Antitrust Act. But, what happens if Firm Braswell is a wholly owned subsidiary of Firm Minas? The Supreme Court considered this exact question in 1984. In Copperweld Corporation v. Independence Tube Corporation, the Court held that an intra-enterprise conspiracy between a parent corporation and its wholly owned subsidiary, even when trade was restrained, was not an activity prohibited by section one. Rather, section one distinguished between concerted action and independent action. In the instant case, activities between a parent company and its wholly owned subsidiary are considered the actions of one entity and allowable under the first section of the Sherman Antitrust Act. Therefore, a plaintiff must charge a section two violation in which the Defendant must threaten actual monopolization or attempted monopolization because the action of one entity cannot be a violation of section one.

Picture another market where there are two firms, Firm Neff and Firm Mayerfeld. These firms also collude and act in a manner that restrains trade. However, in this instance, Firm Mayerfeld is only a partially owned subsidiary of Firm Neff. Is this concerted action of multiple entities disallowed by section one of the Sherman Act or is it the independent actions of a single entity that is not prohibited by section one? On its face, the actions of Firms Neff and Mayerfeld do not look like the actions of a single entity. What have the courts decided about the issue of parent corporations and non-wholly owned subsidiaries? The courts are split on whether or not this activity is prohibited by the first section of the Sherman Antitrust Act. Unfortunately, more
and more courts are deeming partially owned subsidiaries incapable of conspiring with their parent corporation.

Why is this unfortunate? It is unfortunate because activities that should be proscribed by the first section of the Sherman Act are actually shielded from liability under section one because courts have started to unjustifiably expand the Copperweld doctrine. Under the Sherman Act, there are two different types of activities that are prohibited. Section one prohibits collusive behavior between various entities that is often referred to as cartel behavior.\[4\] Section one of the Sherman Act does not prohibit the unilateral action of one entity. Rather, it proscribes only concerted action that imposes an unreasonable restraint on trade.\[5\] Section two deals with attempts to monopolize or actual monopolization generally focusing on the actions of individual entities.\[6\] The threshold to prove a violation of section two is substantially greater than the threshold to prove a violation of section one. To prove a violation of section 2, the Plaintiff must either prove actual monopolization or an attempt to monopolize.

To prove actual monopolization, the Plaintiff must prove two elements.\[7\] The first element that the Plaintiff must prove is that the defendant possesses monopoly power in the relevant market, which means the defendant can either exclude competitors or raise prices without worrying about any additional competition.\[8\] To satisfy this prong, the Plaintiff must prove three different elements. First, they must prove the relevant product market. The relevant product market is composed of products “of such a character that substitute products must also be considered, as customers may turn to them if there is a slight increase in the price of the main product.”\[9\] Another way to look at the relevant product market is to define it as the market made up of commodities reasonably interchangeable for the same purposes with the product in question.\[10\] After the relevant product market is defined, the plaintiff must next show the relevant geographic market. The relevant geographic market is defined as the area from which customers come to purchase a good and the area from which suppliers of the same good come.\[11\] Once the relevant geographic market is established, the Plaintiff must show that the defendant had monopoly power within the market created by the intersection of the relevant
geographic and product markets. Generally, this element requires the plaintiff to prove that that the alleged monopolist has a certain percentage of market share and that there are barriers to entry that prevent other suppliers from producing the same good the alleged monopolist produces.

The second element in proving a section two violation is proving that the defendant engaged in monopoly conduct. Monopoly conduct is the willful acquisition of monopoly power as opposed to natural growth or accident. This can be shown by the historical development of the defendant’s market power within the relevant market and whether or not the defendant used unlawful and exclusionary practices to attain the market power. This is the burden on a plaintiff trying to prove actual monopolization in violation of section 2 of the Sherman Act.

To prove attempted monopolization, the plaintiff must prove three elements. To prove attempted monopolization, a plaintiff must prove that the defendant has engaged in predatory or anticompetitive conduct. Second, the defendant must have had a specific intent to monopolize when it engaged in this anticompetitive conduct. Finally, the plaintiff must prove that there was a dangerous probability that the defendant would achieve monopoly power. This is the burden on a plaintiff trying to prove attempted monopolization in violation of section 2 of the Sherman Act.

On the other hand, the burden on a plaintiff trying to prove a section 1 violation is significantly lesser than the burden on a plaintiff trying to prove a section 2 violation. To prove a section 1 violation, the plaintiff must prove three elements. First, the plaintiff must prove that there was concerted action or an agreement amongst the colluding entities. Second, this concerted action unreasonably restrained trade. Third, this concerted action affected interstate commerce. Fourth, the plaintiff must prove that it has suffered an antitrust injury i.e. an injury due to the suppression of competition. Generally, once the plaintiff can prove a concerted action, there is no need to prove the effect on interstate commerce. The courts assume there was an effect on interstate commerce. To determine if there was an unreasonable restraint of trade,
the courts look to the alleged concerted activity. If the concerted action falls within certain categories such as price fixing amongst competitors or territorial divisions amongst competitors, the action is deemed to have unreasonably restrained trade and has been per se illegal since the beginning of antitrust enforcement.\[^{24}\] If the action does not fall into one of these per se illegal activities or involves non-price restrictions, then the courts look at all the factors under a rule of reason analysis to determine if the trade within a relevant market has been restrained.\[^{25}\] The bottom line is that it is significantly easier to prove a section 1 violation because the plaintiff must only prove that there was an agreement that restrained trade. It is the joint plan to restrain trade that is prohibited by section 1.\[^{26}\] Therefore, the burden on the plaintiff is lower when trying to prove a section 1 violation versus a section 2 violation of the Sherman Act.

This paper will address why parent corporations and non-wholly owned subsidiaries should be treated as independent entities capable of conspiring with each other. Part I will introduce the intra-enterprise conspiracy doctrine and the cases that breathed life into this doctrine.\[^{27}\] Part II of this article will deal with the facts and the holding of the Siegler v. Copperweld Corporation case which modified the understanding of the intra-enterprise conspiracy doctrine. Part III deals with the interpretation of the Copperweld doctrine when a court decides cases in which the subsidiary is partially owned by the parent company and what courts have done since the Copperweld decision was announced. Part IV argues that the cases which have expanded the Copperweld doctrine to cases involving a parent corporation and its partially owned subsidiary were incorrectly decided because there is no “unity of interest” between a parent corporation and its partially owned subsidiary based on principles of corporation law. Finally, Part V will propose that Copperweld is an exception that should only be applied in situations where the parent corporation has complete ownership interest in a subsidiary.
Part I. The Intra-enterprise Conspiracy Doctrine

The intra-enterprise doctrine is of uncertain etiology. Some argue that it was part of the common law when Congress initially approved the Sherman Antitrust Act. Others argue that the doctrine comes from declarations of the Supreme Court. The intra-enterprise conspiracy doctrine allows for section one liability even in situations in which a parent and a subsidiary corporation are under common ownership. The doctrine is enunciated in four cases beginning with United States v. Crescent Amusement Co. and continuing through Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.

A. United States v. Crescent Museum Co.

The first case that suggested the intra-enterprise doctrine was US v. Crescent Museum Co. Crescent involved seven affiliated motion picture executives and one major distributor of motion pictures that were charged with conspiracy that unreasonably restrained interstate trade and commerce in motion-picture films in violation of section 1 of the Sherman Act. The defendants were also charged with conspiracy to monopolize the exhibition of films in violation of both sections 1 and 2 of the Sherman Act.

The Government argued that the combination of exhibitors used its buying power to eliminate competitors and acquire a monopoly. The Court held that the joint action by the combination of defendant exhibitors to obtain an agreement that caused the suppression or restraint of trade is a conspiracy prohibited by the Sherman Act. The Court, in holding that there was a conspiracy, found that the joint action and agreement came about because the companies were affiliated. Further, the instrument in bringing about the unity of purpose and action in making the conspiracy effective was common control. This marked the Supreme Court’s first foray into the intra-enterprise doctrine.
B. United States v. Yellow Cab

The first case that substantially breathed life into the intra-enterprise doctrine was US v. Yellow Cab. This case involved defendants that engaged in a combination and conspiracy to restrain trade in the sale of motor vehicles for use as taxicabs and in providing cab services in Chicago, Pittsburgh, New York city and Minneapolis. In Chicago, Yellow Cab Company and Checker Taxicab Company held 77% of the taxicab licenses. In addition, Checker Cab Manufacturing Corporation manufactured taxicabs. The president, general manager, and controlling shareholder of CCM was also the active manager and sole shareholder of Cab Sales and Parts Corporation. CCM was also the controlling shareholder of Parmelee Transportation Company since it owned 62% of Parmelee’s stock. Parmelee had a controlling interest in Chicago Yellow Cab Company. Chicago Yellow Cab Company held all of the capital stock of Yellow.

By 1929, there were 5,289 taxicab licenses that were outstanding. Of these outstanding licenses, Yellow had 2,335 and Checker had 1,750. Later that year, the City of Chicago implemented an ordinance that prevented the issuances of any new licenses unless it was found to be necessary to provide public services. In response, Yellow and Checker voluntarily agreed to reduce the number of their combined licenses to 3,000 with Yellow holding 1,500 licenses and Checker holding 1,000 licenses. In addition, Yellow, Chicago Yellow, Parmelee, Cab Sales, Checker, CCM all required their cab drivers to purchase exclusively from CCM. This agreement excluded other manufacturers from 15% of the New York City market, 58% of the Minneapolis market, 86% of the Chicago market, and 100% of the Pittsburgh Market.

The United States brought an action against Yellow, Chicago Yellow, Parmelee, Cabs Sales, Checker, and CCM companies as well as Morris Markin. The Court stated that these types of combination and conspiracies fell within the ban of the Sherman Act. Further, the Court stated that in reference to this combination, the Sherman Act was never construed to sanction such a conspiracy to restrain interstate commerce. The Court also addressed the
defendants’ argument that vertical integration removes the defendants from the purview of the Sherman Act. The Court stated that the fact that cab companies’ restraints occurred in a vertically integrated setting does not render the Sherman Act inapplicable. Rather, the focus is upon whether or not there exists an unreasonable restraint on interstate commerce and this restraint can come from corporations integrated under common ownership or from corporations that are independent. Also, the type of corporate interrelationship does not determine if the Sherman Act applies to actions. Based on the foregoing reasons, the Court held that the common ownership and control of the various corporate defendants in this case “are impotent to liberate the alleged combination and conspiracy from the impact” of the Sherman Act.

C. Schine Chain Theatres v. United States

One year later, the Court again addressed the validity of the intra-enterprise conspiracy doctrine in Schine Theatres. The Defendants were a parent corporation, officers of the corporation, and five of the corporation’s wholly owned subsidiaries. The Court in upholding most of the lower court’s rulings, rejected the defendants’ arguments that their activities were protected because of the fact that the defendants were a parent corporation and its wholly owned subsidiaries. The Court stated that the concerted action was not immunized simply because the parent company and its subsidiaries were closely affiliated rather than independent corporations.

D. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.

The Supreme Court heard the fourth case in this quartet four years later in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. The defendants, Seagram and Calvert, were affiliated companies that sold alcohol to wholesalers in Indiana. The Court found that the defendants had violated the Sherman Act. In reaching this holding, the Court rejected the defendants’ argument that they were unable to conspire because the defendants formed a single manufacturing-merchandising unit. In rejecting this argument, the Court stated that the
defendants’ argument is contrary to Supreme Court precedent. The Court also stated, “common ownership and control does not liberate corporations from the impact of the antitrust laws.” This was the law that all the circuits followed for over three decades.

**Part II. Copperweld**

In 1984, the Supreme Court shifted the antitrust taxicab into reverse after it had been happily humming along in drive for 33 years. The Court addressed the issue of whether or not a parent and a wholly owned subsidiary could conspire under section 1 of the Sherman Antitrust Act in *Copperweld Corp. v. Independence Tube Corp.*

In 1972, Copperweld Corporation purchased one of Lear Siegler’s divisions, Regal. Lear Siegler was a separate corporation and not involved in this matter. In the purchase agreement between Copperweld and Lear Siegler, Lear Siegler and its subsidiaries agreed not to compete against Regal in the United States for a period of five years. Shortly after the purchase, Copperweld transferred all of Regal’s assets into a newly formed and wholly owned corporation called Regal Tube Co. and continued its predecessor’s operations.

At this time, one of the officers of Lear Siegler started his own tube company, Independence Tube Corp. Independence needed a tubing mill and secured an offer from Yoder Co. However, when Copperweld and Regal found out about Yoder’s offer, Copperweld sent a letter to Yoder that threatened to take all steps necessary to preserve Copperweld and Regal’s perceived interest in preventing Independence from competing against them. Two days after Yoder accepted Independence’s offer, Yoder voided the acceptance due to the letter sent by Copperweld. Yoder was then forced to secure a tubing mill from another source and this caused a nine-month delay in the commencement of Independence’s tubing mill operations. Copperweld did not stop there. Copperweld also approached banks that were considering financing Independence and real estate agents who were considering finding available space and suppliers for Independence as well.
The Court held that the anticompetitive behavior of Copperweld and Regal was not in violation of section one of Sherman Antitrust Act because “a parent and its wholly owned subsidiary always have a complete unity of interest.” If the Court found that it did violate section one, then parent corporations would be forced to convert subsidiaries into unincorporated divisions and the Court found that this “incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary may yield.” The Court also states that the parent and the subsidiary must be viewed as a single economic unit because the ultimate interests of the parent and the subsidiary are identical. To violate section 1, there needs to be multiple actors. In this case, there is only one economic unit. However, the Court was clear that it was only dealing with one narrow issue. It explicitly stated that “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.”

Part III. Post-Copperweld: What have other courts done?

Since Copperweld was decided in 1984, courts have struggled with applying the decision to situations where there exists a parent corporation and a subsidiary that is only partially owned. There are three lines of cases. First, there are cases dealing with only de minimis departures from 100% parental ownership and control of a subsidiary corporation. The next two lines of cases deal with situations in which the parent corporation’s ownership and control of its subsidiary is greater than a de minimis departure from 100%. Courts have reached opposite conclusions on this issue. However, the vast majority of courts still find that as long as there is at least 51% ownership, it is enough to maintain a complete unity of interest to prevent section one antitrust liability.

A. De Minimis Departures from 100% by the parent corporation

In the cases dealing with de minimis departures from 100% ownership of the subsidiary by the parent corporation, the cases are unanimous. If the departure is de minimis, then the
Copperweld exception is expanded to shield the collusive activities of the parent corporation and its subsidy from section 1 antitrust scrutiny. The greater issue in these cases is what constitutes a de minimis departure and what does not. The Courts that have dealt with the issue agree that anything greater than 99% ownership constitutes a de minimis departure from 100% ownership. One court has found that 91.9% of parental ownership of a subsidiary constitutes a de minimis departure from 100% parental ownership.

B. Cases where the Copperweld exception has been extended to shield collusive activities between a parent corporation and its subsidiary when the departure is greater than De Minimis from 100% ownership by the parent corporation

The next set of cases deal with parent corporations that have less than complete ownership of the subsidiary corporation and the minority ownership of the subsidiary is greater than de minimis ownership and yet, the courts have found the collusive activities to be shielded from section 1 liability. The courts that have handled this issue have dealt with parental ownership of their subsidiary that has ranged from 95% ownership all the way to 51% ownership. Four circuits have held that a greater than de minimis departure of 100% ownership by a parent corporation does not prevent Copperweld from shielding the corporations from section 1 antitrust liability. The general holding of most courts has been that as long as the parent corporation has greater than 51% ownership of the subsidiary, there is a complete unity of interest between the parent and the subsidiary. This, in effect, means that there is only one entity and the parent corporation and its subsidiary can commit no violation of section 1 of the Sherman Antitrust Act.

C. Cases where the Copperweld exception has not been extended to shield collusive activities between a parent corporation and its subsidiary when the departure is greater than De Minimis from 100% ownership by the parent corporation
The last line of cases is the line of cases in which the courts have held that Copperweld only applies if there is complete ownership and control of the subsidiary corporation by the parent corporation. These cases have been few and far between and only one circuit has adopted this approach. The parent corporations’ ownership in these cases have ranged anywhere from 75% to 54%. The only circuit that has found no unity of interest unless there is complete parental ownership of a subsidiary is the Fifth Circuit. In *Free v. Abbott Laboratories, Inc.*, the Fifth circuit found that Copperweld does not expressly exclude federal antitrust liability when the conspirator is a partially owned subsidiary.

Part IV: The Courts that have Expanded the Copperweld Doctrine have Interpreted the Doctrine Incorrectly

Cases that have expanded the Copperweld exception to shield parent corporations and non-wholly owned subsidiaries from section one liability are incorrectly decided for three reasons. First, it contravened previous Supreme Court decisions on this issue. Second, the expansion of Copperweld is contrary to the purposes of the Sherman Act and antitrust law in general. Last, but not least, there is no “unity of interest” between a parent corporation and a non-wholly owned subsidiary and the “unity of interest” was the foundation for the Copperweld holding.

How does the expansion of Copperweld contravene precedent? In Copperweld, the Court’s decision only applied to the specific facts before the court. The opinion expressly limited the Court’s opinion to parent corporations and their wholly owned subsidiaries. Further, Copperweld only overruled the cases that were inconsistent with its holding. Therefore, the Copperweld decision does not affect any cases that dealt with the intra-enterprise conspiracy doctrine between parent corporations and non-wholly owned subsidiaries. There is still only one Supreme Court opinion that deals with the intra-enterprise doctrine and non-wholly owned subsidiaries and that case is *US v. Yellow Cab*. In *US v. Yellow Cab*, the parent and the non-wholly owned subsidiary were not shielded from section 1 liability.
even though they were closely affiliated. Since *US v. Yellow Cab* has not been overruled, it is still good law and any cases that expanded the Copperweld doctrine contravened Supreme Court precedent.

The second reason why expanding the Copperweld doctrine is improper is because it conflicts with the goals of antitrust law. There are two evils that antitrust law attempts to obliterate. First, antitrust law tries to eliminate the concentration of power in the hands of the relative few. The possession of unchallenged economic power stifles initiative within a market. Naturally, the concentration of economic power would correspond with concentration of political power as well. The focus of the Sherman Antitrust Act was to eliminate this concentration of power. By allowing the Copperweld doctrine to be expanded, the courts would be encouraging the concentration of economic and political power and this is precisely the reason why the Sherman Act was enacted in the first place. In fact, the corporate subsidiary was one of the chief evils that the Sherman Act was attempting to eliminate. By allowing the courts to expand the Copperweld doctrine, “the corporate devices most similar to the original ‘trusts’ are now those which free an enterprise from antitrust scrutiny.”

The second evil that antitrust law attempts to minimize is inefficient markets due to the suppression of competition. The free market competitive system without the restraint of trade is supposed to allocate resources in the most efficient manner. However, some courts have found that the market is more efficient when the parent corporation is allowed to collude with its subsidiary. What this translates to is, if the court believes that the parent corporation and its non-wholly owned subsidiary have produced an efficient product at an efficient price, then there has been no section 1 violation of the Sherman Antitrust Act in these cases. This is the justification for the expansion of the Copperweld doctrine to include parent corporations that do not have complete ownership of a subsidiary.

The response to the efficiency argument is rather simple. If a corporation has reached the most efficient allocation of resources, then the market itself would have reached the same result as the individual conglomerates. Secondly, competition is a stimulant to industrial
progress. Further, competitors within any market driven by their eagerness to profit will be able to detect opportunities for efficiency and new shifts in production much quicker than any individual conglomerate or court.

The third reason why the cases that have expanded the Copperweld exception have been decided incorrectly is because there is no unity of interest between a parent corporation and a non-wholly owned subsidiary corporation. The unity of interest of a parent corporation and its wholly owned subsidiary was the cornerstone of the bridge between the parent and the wholly-owned subsidiary that made them one legal entity incapable of violating section of the Sherman Act. The lack of the complete unity of interest is illustrated in American Vision Centers v. Cohen.

American Vision Centers v. Cohen

In American Vision Centers, the defendants owned 54% of the stock of American Vision while the general public owned the remaining 46%. American Vision was an optical products retailer. Concurrently, the defendants were 100% owners of another corporation, Cohen Fashions, which competed directly against American Vision. The defendants ran the two companies to favor Cohen fashions and diverted opportunities from American Vision. Further, the defendants prevented American Vision from opening stores or granting franchises where there were already Cohen Fashion stores.

The court found that Copperweld was inapplicable in the instant case. Even though the defendants had economic control because they were the majority shareholders, there was no unity of interest between the defendants’ corporation and American Vision. The court found that the stockholders held the ultimate economic interest of American Vision. This included the minority shareholders who represented economic interests different from that of the defendants. The court found that the failures or success of the parent corporation was of no interest to the minority shareholders. Therefore, the court held that for the purposes of antitrust laws, the two corporations would not be treated as one entity because this would have
allowed the defendants to prevent competition because they controlled a competing corporation.¹⁹⁷¹

**Part V. Proposal**

Based on the foregoing analysis, the Copperweld doctrine should only be strictly limited to two situations. The first instance occurs when there is a parent corporation and a wholly owned subsidiary. The second instance occurs when there is a parent corporation with less than 100% ownership and the amount not owned by parent is de minimis. However, any minority ownership that constitutes a greater than a de minimis departure from complete ownership by a parent corporation means that there is no complete unity of interest between the parent corporation and the wholly owned subsidiary. If there is no complete unity of interest, then there is not a single economic actor. Therefore, the actions of the parent corporation and the partially owned subsidiary corporation would be the actions of independent economic actors. Consequently, section 1 would prohibit collusion between a parent corporation and a partially owned subsidiary. By interpreting Copperweld as elucidated above, it would meet the purposes of antitrust law and still allow the marketplace to drive forward.

There are many benefits to applying this bright line rule. This rule would provide businesses with guidance in determining whether or not its activities with their subsidiaries are subject to antitrust liability. The parent corporation would not have to guess as to whether or not its activities with its partially owned subsidiary are subject to section 1 antitrust scrutiny. Courts would not have to set arbitrary limits on the percentage of parental ownership of a subsidiary that would constitute a complete unity of interest. Further, by not expanding the Copperweld doctrine, society and minority shareholders would be served because parent corporations are not shielded from section 1 antitrust liability when it engages in behavior contrary to the subsidiary’s interest while suppressing competition as the parent corporation did in *American Vision Centers v. Cohen*. 
In addition, the broader goals of antitrust law will be served as well. This proposal would prevent the business organizations most akin to the trusts of the late 1800’s and early 1900’s from evading antitrust liability. It would also help to ensure that the corporations that get ahead in the marketplace do so due to their efficiency and skill, not due to illegal agreements or actions. Finally, this proposal is one step in preventing the concentration of economic and political power in a few mega-corporations.

Conclusion

When corporations succeed due to their innovation, experience, and efficiency, the American economic system moves forward at breathtaking speeds. However, when corporations succeed due to monopoly conduct and agreements that restrain competition, all except the monopolist are hurt. The economy will only move forward at the pace dictated by the monopolists. It will be these same monopolists who will dictate the price of goods and the amount of goods produced, not the consumers. If that is the world for which we strive, then the Copperweld doctrine should be expanded to shield parent corporations and partially owned subsidiaries from section 1 antitrust liability. If we want to go back to the early part of the 20th century and the end of the 19th century where there were trusts that basically ran the economy, then the Copperweld doctrine should be expanded to shield parent corporations and their partially owned subsidiaries from section 1 antitrust liability. However, if the world for which we strive is based on the idea that innovation and efficiency are valued over monopoly conduct, then the Copperweld doctrine should only shield parent corporations and their wholly owned subsidiaries from section 1 antitrust liability.

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Senator John Sherman in the Congressional Debates. 21 Cong. Record, 2457.


§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Only a cursory analysis of the attempted monopolization standard is done here due to the fact that there is no clear standard set out by the Supreme Court on an attempted monopolization claim. Further, the burden on the plaintiff when proving an attempted monopolization claim is similar to that of the burden on a plaintiff trying to prove actual monopolization. Therefore, the burden is greater when trying to prove attempted monopolization trying to prove a violation of section one.


Copperweld, 467 U.S. at 789 (Stevens, J., Dissenting).

The initial suit was brought against nine affiliated exhibitors, eight major motion picture distributors, and certain officers of these companies. However, the trial court dismissed against five of the distributors. Only one of the remaining three was found to have violated Sherman. Further, of the nine exhibitors, only seven were found to have violated the Sherman Act. Crescent, 323 U.S. at 176.

Crescent, 323 U.S. at 181.

Pressed cut, 183-184.

Yellow Cab Company will be referred to as “Yellow” henceforth.

Checker Cab Company will be referred to as “Checker” henceforth.

Checker Cab Manufacturing Corporation will be referred to as “CCM” henceforth. It should not be confused with the Checker Cab Company. However, it should be noted that the two were under common ownership.

Cab Sales and Parts Corporation will be referred to as “Cab Sales” henceforth.

Parmelee Transportation Company will be referred to as “Parmelee” henceforth.

Yellow Cab, 332 U.S. at 221-222.
1500 + 1000 = 2500, not 3000. However, the agreement called for 3000 combined licenses.

Morris Markin was the controlling shareholder of CCM and sole shareholder of Cab Sales.

Yellow Cab, 332 U.S. at 226.


Kiefer-Stewart Co. V. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)

The defendant, Seagram, holding all of the stock of the defendant, Calvert. Though not in the Supreme Court’s opinion, this information can be found in the Seventh Circuit Court of Appeals opinion that is at Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 182 F.2d 228 (1950).

The Copperweld Corporation will be referred to as “Copperweld” henceforth.


The Independence Tube Company will be referred to as “Independence” henceforth.

Copperweld, 467 U.S. at 756-757.

Id. at 758.
Id. at 772.

Id. at 767.


Leaco v. GE, 737 F. Supp. 605, 609 (D.Or. 1990) (holding that 91.9 percent ownership is sufficient allow Copperweld to apply because it was de minimis)

Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1135 (3d Cir.1995); Williams v. I.B. Fischer Nevada, 999 F.2d 445, 447 (9th Cir.1993); City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 276-77 (8th Cir.1988); Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir.1984).

Rohlfing v Manor Care, Inc, 172 FRD 330, 344-45 (N.D. Ill 1997) (holding that 82.3 percent ownership of a subsidiary is enough to prevent antitrust liability); Total Benefit Services, 875 F. Supp. 1228, 1239 (E.D. La. 1995) (holding that 95 percent ownership prevent liability); Seabury Management, Inc. v. Professional Golfers’ Association of America, Inc., 878 F.Supp. 771, 777 (D. Md.1994); Rosen v. Hyundai Group, 829 F.Supp. 41, 45 (E.D. N.Y. 1993) (80% ownership by parent corporation is enough to allow Copperweld to apply); Novatel v. Cellular Telephone, 1986 WL 15507, *6 (N.D. Ga. 1986) (51% parental ownership was sufficient for Copperweld to apply)

Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F.Supp. 1477, 1486 (D. Or. 1987) (holding that 75% parental ownership is insufficient for Copperweld to apply); Tunis Brothers Company v. Ford Motor Co, 763 F.2d 1482, 1495 (Pa. 1985) (holding that Copperweld does not apply with 75% parental ownership); American Vision Centers, Inc. v. Cohen, 711 F.Supp. 721, 723 (E.D. N.Y 1989) (holding that 54% parental ownership was not enough to allow Copperweld to apply; this case will be more fully explored later.


Copperweld, 467 U.S. at 767

United States V. Aluminum Company of America, 148 F.2d 416, 427 (2d Cir. 1945)

Copperweld, 467 U.S. at 788 (Stevens, J., Dissenting).
