Intra-Entity Conspiracies and Section I of the Sherman Act: Filling the Gap after *Copperweld Corp. v. Independence Tube Corp.*

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Intra-Entity Conspiracies and Section I of the Sherman Act: Filling the "Gap" after 
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**INTRODUCTION**

Section I of the Sherman Antitrust Act prohibits and declares unlawful "[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States." The Supreme Court has interpreted this section as sanctioning the concerted action of two or more firms or entities that unreasonably restricts trade or competition. The conduct of a single corporation or other business unit is almost exclusively exempted from application of this provision, primarily because most courts have held that the actions of a single firm lack the "plurality of actors" necessary to a finding of contract, combination or conspiracy; in essence, the courts have refused to recognize intra-corporate conspiracies.

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There was, however, a well recognized exception to this general rule—the so-called intra-enterprise conspiracy doctrine.² Basically the doctrine provided that where two entities were separately incorporated, common ownership or control would not excuse them from liability for conduct in violation of section 1.³ Thus, while the coordinated acts of a corporation and its unincorporated subdivisions were outside the breadth of section 1 due to the judiciary's treatment of intra-corporate conspiracy,⁴ the identical conduct of a parent corporation and its wholly owned subsidiaries remained subject to the prohibitions of this section under the intra-enterprise conspiracy doctrine. As many lower courts⁵ and scholars⁶ have commented, this led to an artificial distinction.

4. The term "intra-enterprise conspiracy" has traditionally been used to refer to alleged conspiracies between closely affiliated but separately incorporated firms. For example parent/subsidiary dealings are included within this term, as are those cases in which the two corporations are subject to common ownership or control by a third party. "Intra-corporate conspiracies," on the other hand, refer to those situations where the alleged conspirators are members of the same legal entity—i.e., officers or employees of a single corporation, or its unincorporated divisions.

As used in this Comment, the term "intra-entity conspiracy" is used to denote conspiracy within a single economic, rather than legal, unit and as such encompasses both the "intra-enterprise" and "intra-corporate" notions of conspiracy, as well as all other situations featuring conspirators who are members of the same economic group.


in the application of the antitrust laws based solely on the form of incorporation, rather than upon any relevant substantive concerns. In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court rejected the intra-enterprise conspiracy doctrine. The Court held that for purposes of section 1 of the Sherman Act, the actions of a single enterprise (i.e., affiliated corporations in which a parent owns 100% of its subsidiary's stock) are now exempt. Individual actors within such a corporate structure are said to have complete "unity of purpose or a common design;" when acting "alone," this entity fails, as a matter of law, to satisfy the plurality of actors required to establish a conspiracy in violation of section 1.

There are, however, certain situations in which "unilateral" action results in activity that could otherwise be classified as an unreasonable restraint of trade. In many instances a single entity can inhibit free trade and competition as effectively as two firms acting in concert. Yet, because the courts have declined to recognize intra-entity conspiracies, single entity action has been placed beyond the reach of section 1.

Section 2 of the Sherman Act, in contrast, imposes sanctions

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9. *Copperweld*, 104 S. Ct. 2731 (1984). Chief Justice Burger authored the majority opinion while Mr. Justice Stevens was joined by Mr. Justice Brennan and Mr. Justice Marshall in his dissent. Mr. Justice White did not participate.

10. The *Copperweld* decision expressly limits its holding to the situation where the subsidiary is wholly owned. *See id.* at 2740. The obvious question then arises as to how a case will be treated in which the subsidiary is less than wholly owned. For a discussion of this question, *see infra* note 73.

Two recent circuit court decisions have extended the *Copperweld* rationale to situations presenting slightly different corporate structures. In *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012 (5th Cir. 1984), the Fifth Circuit relied upon *Copperweld* in concluding that two wholly owned subsidiaries of a common parent were incapable of conspiring for purposes of section 1. In *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984), the Fifth Circuit found that two corporations under common ownership and control by three individual shareholders were also incapable of conspiring in violation of section 1.


12. *See infra* note 163 and accompanying text.

13. *See infra* note 137 and accompanying text.
against a person who monopolizes or attempts to monopolize any part of trade or commerce.\textsuperscript{14} It also prohibits combinations or conspiracies which monopolize or attempt to monopolize any part of trade or commerce. This section is thus said to reach \textit{both} unilateral and concerted activity. While monopolization of a particular market or industry is a "restraint of trade or commerce" in the broader sense\textsuperscript{15} it usually implies activities by a firm with a substantial market share which evince intentional misuse or accumulation of market power.\textsuperscript{16} A restraint of trade under section 1, on the other hand, may have a somewhat more limited impact on overall market conditions.\textsuperscript{17}

The current practice, then, of excluding the conduct of single firms and enterprises from the scope of section 1, leaves a significant "gap" in Sherman Act coverage.\textsuperscript{18} This "gap" is defined by single entity conduct which unreasonably restrains trade or commerce, but which does not amount to monopolization or attempts to monopolize under section 2.

The question addressed by this Comment is whether or not single firm or enterprise activity should, as a matter of law, be excluded from scrutiny under section 1. This Comment will argue that neither single firm nor single enterprise activity should be \textit{per se} excluded from prosecution under the Act. Rather, such con-


\textsuperscript{15} Cf. Northern Securities Co. v. United States, 193 U.S. 197 (1904) (Holmes, J., dissenting). Justice Holmes seems to suggest that monopolization (or an attempt to monopolize) is a single firm restraint of trade or competition because it is aimed at outsiders, and is the same or equal to two firms combining to restrain trade or competition between them. \textit{See id.} at 405-06.

\textsuperscript{16} A claim of monopolization under § 2 generally requires proof of two elements: (1) possession of monopoly power in the relevant market; and (2) intentional acquisition or protection of that power unassociated with a superior product or business acumen. \textit{In re} Municipal Bond Reporting Antitrust Litig., 672 F.2d 436, 441 (5th Cir. 1982). In turn "[m]onopoly power means the ability to affect or control the price and output of a given product in a certain product market." \textit{Comment, Copperweld Corp. v. Independence Tube Corp.: Has the Supreme Court Pulled the Plug on the "Bathtub Conspiracy"?}, 18 Loy. L.A.L. REV. 857, 861-62 n.26 (1985) [hereinafter cited as Comment, \textit{Has the Supreme Court Pulled the Plug}]. \textit{See generally P. Areeda, ANTITRUST ANALYSIS} 146-237 (3d. ed. 1981).

\textsuperscript{17} Proof of a violation under Section 1 requires establishment of the following elements: (1) a contract, combination or conspiracy; that (2) unreasonably restrains trade; and (3) is in or affects interstate or foreign commerce. \textit{SECTION ON ANTITRUST LAW, ABA, ANTITRUST LAW DEVELOPMENTS} 2 (2d ed. 1984) [hereinafter cited as ABA].

\textsuperscript{18} The Supreme Court in \textit{Copperweld} acknowledges that this "gap" exists, but argues that it is the result of deliberate congressional action. \textit{Copperweld}, 104 S. Ct. at 2744. \textit{See infra} notes 88-91 and accompanying text.
duct should be subject to examination on its merits, and judged by application of the rule of reason. 19

Part I briefly explores the underlying purpose and aim of the Sherman Act, and some of the policies embraced therein. Part II presents the Supreme Court's decision in Copperweld Corp. v. Independence Tube Corp. with a critique of the majority and dissenting opinions. Part III considers the issue of intra-corporate conspiracy and further examines the arguments for the intra-entity exemptions raised in the Copperweld decision. Finally, Part IV presents a suggested analysis that would include "unilateral" activity within the realm of section 1.

I. PURPOSES OF THE SHERMAN ACT

The initial bills, reports and debates in Congress which led to the birth of the Sherman Antitrust Act in 1890 reflected the changing social, political and economic conditions that existed in the United States, and indeed the world. 20 The industrial revolution had reached maturity, and large scale corporate capitalism had solidified its reign over the American business scene. Because of the government's laissez-faire policies, large firms had been able to amass tremendous economic power and market control. 21 These firms used their ingenuity and influence to thwart competition in their respective industries and to manipulate markets, thereby increasing their own wealth and power at the expense of consumers and smaller businesses.

19. Other commentators have also embraced this or a similar point of view. See, e.g., Barndt, supra note 8, at 199 ("the permissible course of conduct for any corporation should be determined by an evaluation of the nature of the undertaking itself . . . [applying] the 'rule of reason' concept" (footnote omitted)); Kramer, Does Concerted Action Solely Between a Corporation and its Officers Acting on its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?, 11 Fed. Bus. J. 130, 142 (1951) (any exception of conduct from section 1 "should be founded upon the conclusion that the restraint is not, as a matter of economics, 'substantial' or 'unreasonable'").


21. 1 E. KINTNER, FEDERAL ANTITRUST LAW 126 (1980).
A. The Theory of Free Competition

Free competition has been shown, in theory, to be the most efficient method of allocating resources. In a perfectly competitive economy, individuals' material satisfaction is maximized in the aggregate by means of the price mechanism. Market forces interact to determine the price and quantity for a particular good. Sellers produce to the point where the marginal cost for producing another unit is equal to the price consumers are willing to pay for that unit. Where this equilibrium exists, firms realize only a "normal" profit, which represents a normal rate of return on their investment.

The perfectly competitive economy is characterized by free, unimpaired access to market opportunity—i.e., no barriers to entry—and by an efficient allocation of economic resources.

In contrast, where free trade or competition is inhibited, imperfect competition exists. Prices for the affected goods or services would then be higher than "perfectly competitive" prices, while the quantities produced would be less than optimal. This is because a firm in an imperfectly competitive market desires to produce at a price and quantity in which its marginal cost is equal to its marginal revenue; however, since its marginal revenue is usually significantly below the price consumers are willing to pay, the resulting market equilibrium price creates excess or "monopoly" profits for the firm.

Further, imperfect competition that is created by the actions of market participants is usually characterized by barriers to entry which deter or even entirely eliminate access to market opportunity, thereby fostering an inefficient allocation of economic


For a general introduction and explanation of the principles of welfare economics, see P. Samuelson & W. Nordhaus, Economics 482-88, 517-20 (12th ed. 1985). For a more specific discussion of competition and monopoly, see P. Areeda, supra note 16, at 7-43.

23. P. Samuelson & W. Nordhaus, supra note 22, at 485-86.

24. See id. at 516-17.

25. See Johnson & Ferrill, supra note 22, at 587.

26. See id. at 590-91.

27. See P. Samuelson & W. Nordhaus, supra note 22, at 518-19.

28. See id. at 516. Marginal revenue is less than the price consumers are willing to pay because the firm has the power to affect the market price through its production decisions.

29. See id. at 520.
resources.\textsuperscript{30}

The ramifications of a highly imperfect market system are twofold: First, consistent excess profits represent a shift in the distribution of wealth within society from consumers to producers;\textsuperscript{31} producers' overall net worth is increased at the expense of consumers' economic well-being. Second, because an inefficient allocation of resources exists, the economy as a whole suffers to some degree. This results in a "dead-weight loss" to society, representing a reduction in overall wealth and material well-being.\textsuperscript{32}

In addition to economic considerations, free competition presents other, more intrinsic benefits to our society. For instance, free competition has been viewed as consonant, and even necessary, to our democratic way of life.\textsuperscript{33} In markets where there are large numbers of buyers and sellers, and competitive forces are at work, income and resources are allocated impersonally and thus nondiscriminatorily.\textsuperscript{34} Further, in competitive settings, economic power (and resulting political power) tends to be dispersed among the many, rather than concentrated among the few.\textsuperscript{35} Economic competition can, in this manner, provide a fair and efficient method of social control.\textsuperscript{36}

B. Adoption of the Sherman Act

The main concern leading to the enactment of the Sherman Act, therefore, was the rapid destruction of competitive forces in national and international markets, and the effect of the resulting suboptimal market performance on the economic well-being of the American people.\textsuperscript{37} The major aim and purpose of the Act

\begin{itemize}
\item 30. See Johnson \& Ferrill, supra note 22, at 592-93.
\item 31. See id. at 593-94.
\item 32. See P. Samuelson \& W. Nordhaus, supra note 22, at 518-20.
\item 33. See, e.g., Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958) (unrestrained competitive forces provide an environment conducive to the preservation of our "democratic political and social institutions").
\item 34. Johnson \& Ferrill, supra note 22, at 589.
\item 35. See id. at 588-89.
\item 36. See id. at 589.
\item 37.
\end{itemize}

The sole object of such a combination [trust] is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist . . . . The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the
was to reverse this trend by preserving and protecting economic competition in interstate and foreign markets.38

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.39

Congress must have recognized, however, the difficulties associated with such a formidable undertaking. Novel anticompetitive schemes were being implemented by business entities at an alarming rate. The legislators realized that a broad, all encompassing statute was necessary to ensure effective compliance with their mandate.40 Thus, they enacted the sweeping language of section consumer . . .

They [trusts and other combinations limiting competition] increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of speculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.

21 Cong. Rec. 2457, 2461 (1890) (statements of Senator Sherman).

38. See Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951). See also Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("the policy unequivocally laid down by the [Sherman] Act is competition"); REPORT OF THE ATTORNEY GENERAL'S NAT'L COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955) [hereinafter cited as ATTORNEY GENERAL'S REPORT] ("[t]he general objective of the antitrust laws is promotion of competition in open markets"); 1 H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE U.S. § 4.4, at 96 (1949) (the clear aim and purpose of the Act is: "(1) to protect commerce against unlawful restraints and monopolies; and (2) to preserve freedom of competition"); Johnson & Ferrill, supra note 22, at 585 (purpose to "prohibit unreasonable restraints on competition").


40. [I]n view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form . . . by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.
"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." The breadth of this language was intended to bring all forms of restraint on competition within the Act's prohibitions. "It does not go into detailed definitions which might either work injury to legitimate enterprise or, through particularization, defeat its purposes by providing loopholes for escape." The details of the Act were left to be worked out by the courts. However, judicial interpretation of section 1 has yielded some incongruity in its application. A number of these inconsistencies will be developed and discussed throughout the remainder of this Comment, beginning with an examination of one of the latest and most significant judicial interpretations of section 1—the Supreme Court's decision in Copperweld Corp. v. Independence Tube Corp.

II. COPPERWELD CORP. V. INDEPENDENCE TUBE CORP.

On June 19, 1984, a divided Supreme Court handed down its decision in Copperweld Corp. v. Independence Tube Corp., placing to rest the controversy and confusion surrounding the intra-enterprise conspiracy doctrine. In Copperweld, the Court held that, as

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

Of course, this ambiguity was both intentional and necessary. Given the near-infinite variety of possible commercial relationships, and the unpredictability of the consequences of any particular arrangement in a given commercial and economic context, a precise statutory enumeration of all lawful and unlawful business conduct simply would be impracticable.

Johnson & Ferrill, supra note 22, at 585. See Standard Oil, 221 U.S. at 59-60.
44. See P. Areeda & D. Turner, Antitrust Law § 106, at 15 (1978) (the antitrust statutes require the federal courts to develop an "antitrust law," much in the manner of the common law courts).
45. Prior to Copperweld, problems related to the doctrine were clearly evident: circuit courts had settled on several conflicting tests for invoking the intraenterprise principle; commentators had condemned the concept for decades; and the Supreme Court had provided little guidance in the area with a scattered line of ill-defined precedents.
a matter of law, a parent and its wholly owned subsidiary are incapable of conspiring with each other in violation of section 1 of the Sherman Act.\textsuperscript{46} The decision equates the acts of a single firm or corporation and the acts of closely affiliated corporations:\textsuperscript{47} with respect to section 1, the anticompetitive conduct of both a single corporation and of a single business enterprise consisting of related corporations is thereby exempt, notwithstanding the fact that identical conduct by two or more unaffiliated firms might constitute an unreasonable restraint of trade.

A. Facts

In 1955, the Regal Tube Co. was established as a wholly owned subsidiary of C.E. Robinson Co., and was engaged in the manufacture of structural steel tubing used in heavy equipment, cargo vehicles and construction. In 1968, Regal was purchased by Lear Siegler, Inc., which operated it as an unincorporated division. David Grohne, previously vice president and general manager of Regal, became its division president after the purchase. In 1972, Copperweld Corp. purchased the Regal division of Lear Siegler and transferred its assets to a new, wholly owned Pennsylvania corporation. The sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Shortly before Regal's sale to Copperweld, Grohne became an officer of Lear Siegler, and thereafter made plans to establish his own structural steel tubing business. This new establishment would operate in the same markets as Regal, and thus directly compete with it. Grohne formed the Independence Tube Corp. in May 1972, and soon secured an offer from a tubing mill supplier to have a mill ready by December 1973.

When executives of Regal and Copperweld became aware of Grohne's plans they consulted counsel. Their attorney informed them that they could only enjoin Independence's operation if Grohne had employed technical information or trade secrets belonging to Regal. This was because Independence was clearly outside the scope of the non-competition agreement. Instead of taking legal action within the scope of their rights, however, Cop-

\textsuperscript{46} \textit{Copperweld}, 104 S. Ct. at 2745.

\textsuperscript{47} See id. at 2741-42.
perweld and Regal contacted potential suppliers, customers and financiers of Independence, and discouraged them from dealing with the new firm. A letter stated that Copperweld would be "greatly concerned if [Grohne] contemplates entering the structural tube market . . . in competition with Regal Tube." It further said that Copperweld intended to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc.,” which Copperweld had purchased from Lear Siegler.

The tubing mill supplier received one of these letters two days after entering the agreement with Independence and promptly voided its acceptance of the deal. Independence tried to re-establish the agreement but failed; by the time it finally secured another contractor to construct a mill, operations had been set back nine months. 48

In 1976, Independence brought suit. Its complaint named Copperweld Corporation, Phillip E. Smith (Copperweld's chief executive officer), Regal Corporation and the original mill supplier, Yoder Corporation, as defendants. The complaint alleged that (1) Copperweld, Regal, Smith and Yoder had conspired to restrain trade in the structural steel tubing market in violation of section 1 of the Sherman Act, (2) Copperweld, Regal and Smith had attempted to monopolize the market for steel tubing in violation of section 2, (3) Yoder had breached its contract with Independence, (4) Copperweld, Regal and Smith had interfered with Independence's contractual relationship with Yoder and another corporation, and (5) Copperweld, Regal and Smith had slandered and libeled Independence. 49

Before trial, Independence withdrew its monopolization claim and dropped Smith as an individual defendant. The District Court, by jury, found that Copperweld and Regal had conspired to violate section 1 of the Sherman Act, but that Yoder was not a part of the conspiracy. The court also found that both Regal and Copperweld had individually interfered with Independence's contractual relations, that Regal had slandered Independence, and that Yoder was liable for its breach. The jury awarded damages of

48. See id. at 2734-35.
$2,499,009 against Copperweld and Regal jointly and severally for the antitrust violation and the claim that Copperweld induced Yoder to breach its contract with Independence. This amount was trebled to $7,497,027.\textsuperscript{50}

The Court of Appeals for the Seventh Circuit affirmed the lower court’s decision, although it questioned the rationale behind subjecting Copperweld and Regal to antitrust liability for a conspiracy in violation of section 1, especially where a corporation and its unincorporated division would escape liability for the same acts.\textsuperscript{51}

The Supreme Court granted certiorari “to determine whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under § 1 of the Sherman Act.”\textsuperscript{52}

B. The Majority Opinion

Chief Justice Burger begins the Copperweld opinion by noting that the Court had never considered the merits of the intra-enterprise conspiracy doctrine.\textsuperscript{53} He then states that “[a]lthough the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.”\textsuperscript{54} This statement is in direct reference to four prior Supreme Court cases that gave rise to the intra-enterprise conspiracy doctrine.

1. Examination of Precedents. In United States v. Yellow Cab Co.,\textsuperscript{55} Morris Markin owned and controlled taxi cab companies with substantial market shares in four large American cities.\textsuperscript{56} Markin was also the controlling shareholder in the Checker Cab Manufacturing Corp. (CCM), which manufactured and distributed taxi cabs. The government’s complaint alleged that Markin, the various cab companies, and CCM, had all conspired in violation of

\textsuperscript{50} Id. at 315.
\textsuperscript{51} Id. at 316-18.
\textsuperscript{52} Copperweld, 104 S. Ct. at 2734.
\textsuperscript{53} Id. at 2736.
\textsuperscript{54} Id.
\textsuperscript{55} 332 U.S. 218 (1947).
\textsuperscript{56} The respective companies owned 100% of the available taxi cab licenses in Pittsburgh, 86% of the licenses in Chicago, 58% of the licenses in Minneapolis, and 15% of the licenses in New York. Id. at 221.
section 1 by means of an arrangement in which the operating companies purchased cabs exclusively from CCM. In its opinion, the Court noted that an unreasonable restraint "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent . . . . The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." Thus, the Court found that an unreasonable restraint of trade existed, stating that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." The Supreme Court went on to reverse the lower court's dismissal of the complaint and hold that the defendants had conspired in violation of section 1.

In Copperweld, however, the Court concluded that the intra-enterprise conspiracy doctrine was irrelevant to the decision in Yellow Cab. It asserted that the original acquisitions of the taxi cab companies by Markin were themselves illegal. (All the operating companies had at some time been independent and had come under Markin's control by acquisition or merger.) Chief Justice Burger distinguished the Yellow Cab holding by claiming that the "restraint of trade was 'the primary object of the [initial] combination [of the corporations],' which was created in a 'deliberate, calculated' manner," and thus any findings later of a conspiracy between the now affiliated corporations were irrelevant. While it seems that perhaps in hindsight this was a plausible conclusion, it is not at all clear that this was a finding or part of the rationale of the Yellow Cab Court.

The next case to come before the Supreme Court involving this issue was Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. The Court, in this case, held that two wholly owned subsidiaries of a liquor distillery, who acted as the distillery's distributors, violated section 1 of the Sherman Act by jointly refusing to supply a

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57. The complaint also alleged a conspiracy under § 2 but the Court did not reach this claim. See id. at 233.
58. Id. at 227.
59. Id.
60. Copperweld, 104 S. Ct. at 2737.
61. Id. (footnote omitted).
62. Accord id. at 2746-47 (Stevens J., dissenting).
wholesaler. The action was brought by the wholesaler who had declined to abide by a resale price maintenance scheme which fixed prices at an excessive level. The trial court found that the subsidiaries had conspired to fix prices, but the court of appeals reversed on the theory that such closely affiliated corporations could not conspire under section 1 of the Act. Citing Yellow Cab, but adding no further discussion, the Supreme Court reversed the court of appeals’ ruling, noting that its decision “runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws.”

Chief Justice Burger in Copperweld states that Kiefer-Stewart is “the one case giving support to the intra-enterprise conspiracy doctrine,” but then goes on to note that if decided today, the same holding could arise through a finding of conspiracy between the subsidiaries and other wholesalers who agreed to the scheme.

The next decision discussed in Copperweld is Timken Roller Bearing Co. v. United States. This case involved restrictive horizontal agreements between an American corporation and two foreign corporations operating in France and Great Britain. The American corporation, however, owned only a 50% and a 30% interest, respectively, in the foreign corporations. The Copperweld Court dismissed the significance of the Timken analysis in light of the fact that American Timken had less than a majority or controlling interest in each of the foreign subsidiaries. The Court also noted that, like the situation in Yellow Cab, there was evidence that the original stock acquisitions themselves were violations of the Act.

Perma Life Mufflers, Inc. v. International Parts Corp. is the last case which the majority discusses in its assault on intra-enterprise conspiracy precedent. This case involved a suit brought by franchised dealers of the Midas muffler chain alleging a conspir-
acy between a parent corporation and its three wholly owned subsidiaries, in violation of section 1 of the Sherman Act. The dealers argued that agreements obligating them to sell at fixed retail prices, to purchase only Midas mufflers and parts, to operate only within fixed territories, etc., constituted undue restraints of trade. The Court stated that because the defendants "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."

Although the Perma Life Mufflers opinion employs the language of the doctrine, the Copperweld majority points out that each plaintiff could have charged a conspiracy between the defendants and itself or between the defendants and other franchised dealers. Thus, the Court concluded that a finding of a violation of section 1 need not have rested upon application of the intra-enterprise conspiracy doctrine to the affiliated corporations.

2. Arguments for Exempting Unilateral Conduct. The Copperweld majority basically advances two related arguments for exempting conduct of affiliated corporations from section 1. First, they contend that, like the situation where officers or employees of a single corporation act on that corporation's behalf (i.e., intra-corporate conspiracy), there are "not separate economic actors . . . previously pursuing divergent goals" suddenly being brought together through agreement. There is no threat to competition between affiliated corporations because there is no competition to begin with—such affiliated entities always represent a "complete unity of [economic] interest" and "purpose." Second, the Court be-

69. The lower court dismissed the complaint, in pari delicto. The Supreme Court in reversing and remanding for a trial on the merits stated that the common law doctrine has no application to treble damage actions for antitrust violations. Id. at 137-38. "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." Id. at 139.
70. Id. at 141-42.
71. Id.
72. Copperweld, 104 S. Ct. at 2741.
73. Id. at 2742.

A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.
lieves there is only a minimal threat posed to competitive conditions by the actions of a single enterprise. This threat is clearly outweighed by the possibility that subjecting the activities of such an organization to section 1 scrutiny would hamper its legitimate, pro-competitive decisionmaking ability, and generally expose the entity to unwarranted liability for otherwise lawful acts.

The Court attempts to bolster its first claim by exposing a Congressional mandate said to exist within the Sherman Act which distinguishes between "concerted" activity (covered by section 1) and "unilateral" activity (covered by section 2).74 "The conduct of a single firm . . . is unlawful only when it threatens actual monopolization.”75 The Court reasons that the Congress enacting the Sherman Act recognized that "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects,”76 and thus incorporated this distinction.

However, such an interpretation of Congressional intent appears unsupported by the legislative history of the Sherman Act.77

... With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

... They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

Id.

This line of reasoning adds insight to the question raised earlier as to what result would ensue where the challenged activity is precipitated by an agreement between a parent and a partially owned subsidiary. See supra note 67. Inherent in the Court's analysis is the notion that the parent of a wholly owned subsidiary always has the power to control the course of conduct followed by the subsidiary—the subsidiary acts at the will and for the benefit of its majority shareholder. It would seem, therefore, that a court faced with a set of facts involving a partially owned subsidiary could apply Copperweld's rationale where the parent's holding in the subsidiary gave it power to exercise control over that subsidiary, i.e., where the parent had a sufficient interest in the subsidiary by virtue of owning the amount of shares necessary, given the current shareholder configuration, to exert managerial control over the corporation. As one commentator noted before Copperweld, "[a]s long as the parent holds more than 50%, control is being exercised through ownership rather than through an agreement.” McQuade, supra note 8, at 212. In fact, a recent New York district court decision supports this proposition. See Magnum Force Distribs. v. Bon Bon Co. of Am., Inc., No. 84-2629 (E.D.N.Y. 1984) (an order dismissing a section 1 claim where one corporation had a controlling 60% interest in the firm with which it was alleged to have conspired).

74. See Copperweld, 104 S. Ct. at 2740 (quoting Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984)).
75. Copperweld, 104 S. Ct. at 2740.
76. Id.
77. See Comment, Has the Supreme Court Pulled the Plug, supra note 16, at 878-90. The
Rather it reflects a choice of the majority to emphasize the evidentiary problems associated with an action under section 1 at the expense of promoting substantive antitrust objectives.\textsuperscript{78}

The majority further claims that the reason Congress chose this bifurcated analysis of anticompetitive conduct is readily observable:

Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.\textsuperscript{79}

Clearly this is true where the agreement restrains trade or competition \textit{between} or \textit{among} the conspirators. Where, on the other hand, the restraint is aimed at \textit{outsiders to the conspiracy}, the Court's analysis simply does not apply. This latter type of restraint is the one presented to the Court in \textit{Copperweld}; it leads to the deprivation of an independent center of decisionmaking in the marketplace to the same degree as the former type of restraint. Such deprivation, however, does not arise from a coming together, through agreement or otherwise, of multiple entities that previously pursued their own courses of dealing. Rather, it results from the exclusionary activities of one economic entity to the detriment of another. Thus, contrary to the majority's contention, \textit{unilateral} conduct may be just as fraught with anti-competitive risk as is concerted action.

The majority also takes the position that by subjecting single firm or entity conduct to section 1 scrutiny, an enterprise would be exposed to antitrust liability for what are essentially internal managerial decisions. In addition, by following such a course, the "competitive zeal" desired of business firms would be destroyed.

two-party requirement inserted to amend the original draft of section 1 was included in response to jurisdictional concerns rather than from a desire to insulate single-firm activity from the proscriptions of section 1. \textit{See id.} at 880.

\textit{Cf.} Barndt, \textit{supra} note 8, at 175 n.90 (the statute does not mandate the corporation as the unit of conspiracy); \textit{Developments in the Law—Criminal Conspiracy}, 72 HARV. L. REV. 920, 1003 (1959) [hereinafter cited as \textit{Developments—Conspiracy}] ("[a]lthough the legislators were immediately concerned with the activities of the classic trusts, there is nothing in the legislative history to indicate that Congress intended the actions of a single corporation to be exempt from conspiracy prosecution").

\textsuperscript{78} \textit{See Copperweld}, 104 S. Ct. at 2752 n.20 (Stevens, J., dissenting).

\textsuperscript{79} \textit{Id.} at 2741.
“Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.”

Clearly, the result this "parade of horribles" rationale portends would never likely be reached. The motivations of modern business enterprises are influenced by a host of diverse economic and social factors. It would appear to be overreaching speculation to proclaim that a contrary interpretation of the antitrust laws would have such a profound effect on business activity. Further, not "every action" would be subject to liability—internal coordination efforts of a firm would remain sufficiently insulated. As long as all such situations are at least given a cursory examination on their merits, and a significant body of case law develops, business entities can plausibly guide their operations without substantial antitrust insecurity, and the ultimate aims and objectives of the Act would be better preserved.

3. Repudiation of the Doctrine. In specifically addressing the intra-enterprise conspiracy doctrine, the majority notes that a major criticism of the doctrine is that it emphasizes form over substance. It is said to give undue significance to the form of a corporate enterprise by distinguishing the acts of a corporation and its unincorporated divisions (which had always been exempt) and the acts of a parent corporation and its wholly owned subsidiary (which had been subject to scrutiny).

Advocates of this position have noted that “there is nothing inherently anticompetitive about the use of corporate subsidiaries,” separately incorporated subdivisions are normally formed in response to totally unrelated considerations (e.g., achieving economic efficiencies or other production advantages). Hence, under the intra-enterprise conspiracy doctrine, application of section 1 is said to hinge upon the nature of the enterprise's structure, thereby creating a distinction that does not foster any substantive antitrust goals.

80. Id. at 2744.
81. See infra note 94 and accompanying text.
82. See infra text accompanying notes 167-71.
83. Copperweld, 104 S. Ct. at 2740.
84. See generally supra note 8.
85. Handler & Smart, supra note 8, at 62. See Copperweld, 104 S. Ct. at 2743 & n.19.
86. See Copperweld, 104 S. Ct. at 2743.
87. See id. at 2743; Areeda, supra note 8, at 452.
These arguments and observations are undoubtedly correct. In the antitrust context, any distinction between an unincorporated division and a wholly owned subsidiary is artificial and does not promote any substantive policies—allowing diverse treatment in such a situation is simply not justified. It will be argued below, however, that the proper course requires including the intra-corporate situation in actions under section 1, instead of excluding intra-enterprise arrangements.

The majority, in its analysis, also acknowledges the existence of the "gap" in Sherman Act coverage resulting from its definitions of "unilateral" and "concerted" activities. It recognizes that "[a]n unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms." Nonetheless, the majority concludes that because section 1 does not prohibit all unreasonable restraints, but only those implemented by contract, combination or conspiracy, the anticompetitive conduct of a single firm or entity is thus excluded from the realm of section 1.

Finally, the Court characterizes its role as one of determining whether the logic underlying the Congressional intent (as the Court has interpreted it) to exclude "unilateral" activity from section 1 is applicable to the activity of a parent and its wholly owned subsidiary. Having decided earlier that the behavior in question did not meet the requirement of concerted conduct between two or more independent economic entities, the majority "can only conclude" that it should not be included within the class of conduct which is prohibited by section 1.

The obvious problem with the Court's analysis and ultimate

89. *Id.*
90. *Id.* A major rhetorical roadblock to a finding of section 1 violations by single economic entities goes as follows: under the Sherman Act, restraining trade is not in itself illegal—it is only illegal to contract, combine or conspire to restrain trade. See ATTORNEY GENERAL'S REPORT, supra note 38, at 50-51. As will be discussed in Part III, however, an agreement is not characterized as a "conspiracy" under section 1 unless it is determined to have resulted in an unreasonable restraint of trade. See infra notes 114-16 and accompanying text. The proposition forwarded above then "assumes the thing to be proved and reasons in a circle; viz., there is no unlawful restraint unless there is a conspiracy, and there can be no conspiracy unless there is an unlawful restraint." Kramer, supra note 19, at 134.
92. *Id.* at 2745.
conclusion is that it fails to deal adequately with the facts presented in the *Copperweld* case. It does not distinguish between situations where two otherwise rival firms join forces to limit competition between them, and those cases in which a business entity, through some form of economic coercion, inhibits the ability of a competitor to operate within a given market. The dissent, on the other hand, does make this distinction.

C. The Dissenting Opinion

Justice Stevens’ dissent first questions the need for a new *per se* rule or redefinition of the word “conspiracy” based upon the facts presented in the *Copperweld* case:

Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary . . . are not prohibited by § 1 . . . .

In contrast, the case before us today presents the type of restraint that has precious little to do with effective integration between parent and subsidiary corporations. Rather, the purpose of the challenged conduct was to exclude a potential competitor of the subsidiary from the market.93

Justice Stevens notes that the existing rule of reason analysis provides the courts with an adequate means of identifying and distinguishing between procompetitive internal decisionmaking and conduct which works an unreasonable restraint on marketwide competition; thus, he feels that the formulation of a new rule is not necessary to protect internal integration efforts.94

The dissent also is at odds with the majority’s repudiation of prior case law. It notes that, regardless of the majority’s attempts to distinguish prior decisions based upon possible alternative holdings, each case does in fact rest on a section 1 conspiracy theory among related parties.95

Turning to the adoption of the Sherman Act, the dissent calls attention to the intentionally broad, all-encompassing nature of the statute. Early judicial interpretation placed emphasis on the substance of the alleged violation, rather than the form through which it was effectuated.96 Justice Stevens also notes that the stat-

93. *Id.* at 2746 (Stevens, J., dissenting).
94. *Id.*
95. See *id.* at 2746-49.
96. See *id.* at 2749 (passage citing Standard Oil Co. v. United States, 221 U.S. 1, 59-60
ute was written against the background of the common law, which recognized conspiracies among affiliated corporations as well as among the officers or employees of a single corporation.\textsuperscript{97} Ironically, he concludes, the majority's holding now frees from section 1 those corporate structures most similar to the original trusts which spurred adoption of the Act in the first place.\textsuperscript{98}

The dissent also questions the majority's economic interpretation of the plurality of actors requirement embodied in the terms "contract, combination or conspiracy." The majority's requirement of two independent entities is not the result of "any economic principle."\textsuperscript{99} If Congress had been guided by economic theory in formulating section 1, it would have focused on the existence of market power, rather than upon a plurality of actors.\textsuperscript{100} It can thus be seen that the majority's emphasis on independent economic entities has little true economic significance.\textsuperscript{101} Insightfully, the dissent suggests that the intra-enterprise conspiracy doctrine was adopted to address the statute's failure to consider the effect of unilateral market power generated by closely affiliated firms.\textsuperscript{102}

Finally, the dissent recognizes the distinction that the majority failed to acknowledge between internal and external restraints: "When conduct restrains trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from procompetitive integration."\textsuperscript{103} Where the conduct of the alleged conspirators "raised barriers to entry and imposed an appreciable marketwide restraint," the form or relationship among the organizational actors should not control the application of section 1: "If, as seems to be the case, the challenged conduct was manifestly anticompetitive, it should not be immunized from scrutiny under § 1 of the Sherman Act."\textsuperscript{104}

\footnotesize{(1911)).

97. \textit{Copperweld}, 104 S. Ct. at 2750 (Stevens, J., dissenting).
98. \textit{Id.} at 2750-51.
99. \textit{Id.} at 2752.
100. \textit{Id.}
101. \textit{Id.} at 2752 n.20.
102. See \textit{id.} at 2752.
103. \textit{Id.} at 2754.
104. \textit{Id.} at 2746.
III. INTRA-CORPORATE CONSPIRACIES

The majority opinion in *Copperweld* bases, to a large extent, its analysis of intra-enterprise conspiracy on the existing law of intra-corporate conspiracy. Previously, many of the lower courts had held that the plurality of actors requirement of section 1 was not satisfied by the conduct of the personnel of a single firm or corporation. The rule had thus been established that a single corporation was incapable of conspiring in violation of section 1. The *Copperweld* Court equates intra-enterprise and intra-corporate conspiracy because both involve closely related actors working for the benefit of the same economic entity.

A. Origin of the Rule

The notion that the personnel of a single firm are incapable of conspiring in violation of section 1 appears to have its origins in the 1952 court of appeals decision of *Nelson Radio and Supply Co. v. Motorola, Inc.* In this case, the plaintiff was a wholesaler and distributor of the defendant's products in certain counties of Alabama and Florida. The parties operated under a distributors' agreement renewable each year. For the year 1948, Motorola modified the agreement so as to prohibit the plaintiff from selling Motorola communication equipment or any communication equipment manufactured by Motorola's competitors. Motorola,

105. See supra note 3. Note that *Copperweld* represents the first time that the Supreme Court has given approval to the intra-corporate exemption. See Note, Conspiring Entities, supra note 8, at 662-63.

106. See, e.g., supra note 3. For a list of additional examples, see Note, Conspiring Entities, supra note 8, at 661 n.2. The rule that officers or agents of a single corporate entity cannot conspire in violation of section 1 is not absolute, however. For instance, at least one case has held that where corporate insiders have an "independent personal stake" in the outcome of the alleged conspiracy, the court can find the requisite plurality of actors, notwithstanding that all are members of the same business entity. Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974).

In addition, some cases apply different treatment where an "outside" corporate agent is involved. See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1055 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1257-58, 1266 (8th Cir. 1980), cert. denied, 449 U.S. 1063 (1980) (conspiracy between corporation and its advertising agency).

107. See *Copperweld*, 104 S. Ct. at 2741-42.

however, could distribute such equipment itself or enlist another to do the same within plaintiff's assigned territory. In negotiation of an agreement for the next year, plaintiff sought to have these restrictions removed, since communications equipment had become a very lucrative and growing category of sales. The defendant refused to yield, and on February 10, 1949, terminated its contract and business relations with the plaintiff.

In its complaint, plaintiff alleged that “[s]ince November, 1947, said defendant [Motorola], and Paul V. Calvin, the president and a director of defendant's corporation, and William H. Kelly, its sales manager, and its officers, employees, representatives and agents . . . unlawfully have engaged . . . in a conspiracy in restraint of the . . . trade and commerce among the several states in Motorola and said communication equipment . . . .”

The complaint then went on to allege, specifically, the acts and means by which the conspiracy was carried out. In upholding the lower court's dismissal of the complaint for failure to state a claim, the court of appeals indicated that the complaint was deficient because it contained merely the general allegation of conspiracy which is but "the allegation of a legal conclusion." The opinion, however, went on to state that

apart from this infirmity we think that the allegation claiming the existence of a conspiracy under Section 1 contains a more fundamental defect. It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, its president, . . . its sales manager, . . . and its officers, employees, representatives and agents who have been actively engaged in the management, direction and control of the affairs and business of defendant. This is certainly a unique group of conspirators.

While at first the court's logic seems appealing, the analysis is not entirely correct. The inquiry should not be whether a corporation can conspire "with" itself or an employee. Rather, the relevant question is whether the firm can be held liable for a conspiracy "among" the members of the intra-corporate family. For instance, if two corporate officers have implemented a plan to

110. *Id.* at 914.
111. *Id.*
foreclose a potential competitor from participation in the market, then although the corporation must necessarily act through its agents, it has not conspired "with itself." One may alternatively claim that the officers have conspired with "each other," and for the sake of furthering important antitrust policy, impute liability for the acts of the agents to the corporation vicariously. Thus, the discussion of this issue in Nelson Radio should have centered on "whether a conspiracy can exist between the officers of a corporation acting among themselves in its behalf; and if so, whether the corporation can be held liable." Any analysis or reasoning based on the corporation's inability to conspire "with itself" is completely misguided.

Further, it is clear that the majority opinion in Nelson Radio fails to recognize the relationship between "conspiracies" and "restraints of trade" under section 1. Practically speaking, the question of whether a "conspiracy" exists for the purposes of section 1 is inextricably linked to the issue of whether the conduct complained of results in an unreasonable restraint of trade. The parties to a valid, otherwise lawful agreement, for instance, are not classified as "conspirators" even though they have agreed to follow some concerted course of action; only when the agreement is perceived as imposing an undue burden on trade or competition in contravention of the Act does the question of conspiracy arise. As one commentator has duly noted, "the purpose of

112. Compare Professor Barndt's discussion:

[It appears to me that where . . . the cases speak of a "conspiracy solely between a corporation and its officers . . ." [they are] failing to analyze the problem carefully . . . . The corporation through its officers may conspire with other parties . . . and the officers of a corporation may conspire among themselves on behalf of their corporation, but it is logically impossible for them to conspire with their own corporation.]

Barndt, supra note 8, at 180.

113. Id. at 184.

114. It has been noted that the terms of the statute—"contract, combination . . . or conspiracy"—represent what is in reality a single concept embracing the notion of "concerted action." See Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445-46 (3d Cir. 1977) (quoting L. Sullivan, Law of Antitrust 912 (1977)). The term "conspirators" in the text is not used in this light. Rather, it is used in the classic sense to illustrate actors gathering and agreeing to follow an unlawful course of conduct.

115. Accord Barndt, supra note 8, at 182. ("It is . . . essential that the nature of the conduct be evaluated, since only if the conduct is such as to impose an unreasonable restraint on trade is it necessary to determine whether the means of imposing that restraint was by contract, combination, or conspiracy.").
characterizing a relationship as a conspiracy is to control or forbid it." That the Nelson Radio Court fails to make this distinction is evidenced by the following passage:

Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act.117

By characterizing the activities of the defendant and its employees as such, it dismisses the possibility of any conspiracy by first dismissing the possibility of any unreasonable restraint of trade. The majority viewed the officers' conduct as nothing more than "their day to day jobs in formulating and carrying out its [Motorola's] managerial policy," and eventually found that the defendant's conduct amounted to no more than a "mere refusal to deal further with the plaintiff."118 In contrast, Judge Rives in his dissent appeared convinced that the acts of the defendant's officers and agents were in contravention of the antitrust laws.119 Note that in the vast majority of cases following Nelson Radio the courts failed to give any indication that the conduct complained of was in any way unreasonable or in contravention of the Act.120

Arguably, then, the Court's decision in Nelson Radio need not, and indeed should not, have considered the issue of conspiratorial capacity. Rather, the claim should have been analyzed by the majority on the basis of its sufficiency in alleging facts evincing an unreasonable restraint of trade.

The majority's position in Nelson Radio is an excellent example of the failure of the relevant judicial decisions to properly ad-

116. Areeda, supra note 8, at 454.
117. Nelson Radio, 200 F.2d at 914.
118. Id. at 914-15. It is also possible that at least initially the court may have felt constrained to find a conspiracy "among" only one named defendant. See id.
119. See id. at 916 (Rives, J., dissenting).
120. See, e.g., Morton Bldgs. of Nebraska v. Morton Bldgs. Inc., 531 F.2d 910 (8th Cir. 1976); Chapman v. Rudd Paint Co., 409 F.2d 635 (9th Cir. 1969); Brehm v. Gobel Brewing Co., 1952-1953 Trade Cas. (CCH) ¶ 67,431 (W.D. Mich. 1953); Marion County Coop. Ass'n v. Carnation Co., 114 F. Supp. 58 (W.D. Ark. 1953). See also Barndt, supra note 8, at 182 n.152 ("note [none] of the cases which issued the blanket statement that an intra-corporate conspiracy is an impossibility have involved fact situations which have put the question to the test. In all, the court has been dealing with a situation in which the conduct was not considered detrimental to the public interest").
dress the difference between the economic requirements of a "restraint of trade" and the legal requirements of a "conspiracy." A single firm or corporation cannot restrain trade "with itself"—two or more distinct economic units are needed for there to be competition, and thus for there to be any restraint thereof.\textsuperscript{121} However, two independent economic entities are \textit{not} necessary for a finding of an ordinary conspiracy; any two legal persons can conspire.\textsuperscript{122} In other contexts, the courts regularly

\begin{enumerate}
\item Consider Professor Sullivan's analysis:
\begin{quote}
Picture . . . a family business which operates one retail store in each of three or four adjacent communities. All of the stores are managed as a unit by one individual, the founder of the business who sets policy, does all the buying, decides on all the advertising, sets prices, and hires and fires all employees other than family members. . . . If there is, as a practical matter, an integrated ownership and management, this small business is a single firm. And a single firm cannot compete with itself. Hence it cannot restrain price competition with itself, or divide markets with itself, . . . or otherwise restrain competition with itself, regardless of how many separate corporations the single firm [enterprise] may . . . be divided into.
\end{quote}
\item Generally, in the law of conspiracy no special requirements as to the nature of the conspirators themselves are necessary for a conspiracy to exist. Rather any limitations focus on the act of conspiring itself. \textit{See}, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), \textit{cert. denied}, 451 U.S. 911 (1981) (conspiracy requires "conscious commitment to a common scheme designed to achieve an unlawful objective") (citations omitted).
\end{enumerate}

The Supreme Court stated the classic definition of conspiracy in \textit{American Tobacco Co. v. United States}, 328 U.S. 781, 810 (1946) as "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement . . . ." Note that even in this quintessential antitrust case no overt qualifications as to the nature of the conspirators were included. \textit{See id. See also} Welling, \textit{Intracorporate Plurality in Criminal Conspiracy Law}, 33 \textit{Hastings L.J.} 1155, 1166-67 (1982). Professor Sullivan provides some insight as to how the current confusion over the term "conspiracy" could have been avoided and how a court should proceed when faced with the intra-entity situation:

\begin{enumerate}
\item We have in [alleged intra-entity conspiracy cases] two related questions. Is there a conspiracy? Is trade unreasonably restrained? We need at least two legal persons for a conspiracy and they may be related units. Also, we need at least two firms for trade to be restrained. They may be competitors acting together, or one may be the victim of exclusionary conduct of the other; . . . . \textit{Courts need not take the same test of plurality for both aspects of the problem.}
\end{enumerate}
L. SULLIVAN, supra note 121, at 327 (emphasis added); \textit{see also} supra note 121. However, this is exactly what the courts have done. They have formulated a definition of "conspiracy" in the context of section 1 which can only be satisfied when \textit{conspirators} are also the \textit{competitors} affected by the restraint of trade. In other words, section 1 is only satisfied in the situation where two or more otherwise rival firms operating in the same relevant market get together and agree on some course of action to limit competition between them.

However, "[s]ection 1 prohibits two types of restraint of trade: the unreasonable impairment of competition among the parties to an agreement, \textit{and} the adverse effect on the
find that the officers or employees of a single corporation are ca-

rights of third parties resulting from joint action." Developments—Conspiracy, supra note 77, at 1004 (emphasis added) (citing Standard Oil Co. v. United States, 211 U.S. 1, 59 (1911)). In the latter situation the conspirators are not necessarily the same as the competitors affected by the restraint of trade.

The current definition of "conspiracy" followed by the courts, then, as espoused in the Copperweld case (i.e., that only separate economic entities can satisfy the plurality of actors necessary for a section 1 conspiracy) obliterates this distinction.

The majority in Copperweld was concerned with insulating internal decisionmaking of the firm, and guarding against unlimited liability for such decisions. The proper focus, however, should have been on whether a restraint of trade exists rather than the presence of a "conspiracy." See L. Sullivan, supra note 121, at 328 ("[c]oconcerted action" by two "legal persons" which is limited solely to the internal management of a single firm does not restrain competition; but "concerted action" by two "legal persons" which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade).

The following examples serve to illustrate the distinction between the plurality required for a restraint of trade and for a conspiracy. (Assume A, B, and C are distinct economic and legal entities and all are operating or seeking to operate in the same relevant market).

1) A and B enter an arrangement whereby they agree to sell their otherwise competing goods for a set price. This agreement represents a classic case of price fixing. It eliminates price competition as between A and B—they are no longer free to charge whatever price the market will allow for their commodities—while it burdens trade in general by artificially setting a price for the offered goods.

Because A and B would otherwise be competitors in the same market and are independent entities, they provide the plurality required to find that a restraint of trade exists. Further because A and B represent separate legal entities they too satisfy the plurality for a finding of conspiracy.

2) A and B enter an arrangement whereby A agrees to buy from B and B agrees to sell to A, widgets for one year. This arrangement too represents a restraint of trade. A is prohibited from transacting with other widget sellers, while B is prohibited from transacting with other widget buyers. The ability of both parties to trade with those outside the contract is thereby restrained. Analysis of the pluralities here is reserved for the moment.

3) A and B enter an arrangement whereby they agree to erect barriers to C's entrance into their market. Here again there is an obvious restraint of trade and competition. If A and B's efforts are successful, C is precluded from competing in this market, at least temporarily. Thus, the acts of A and B have restrained marketwide competition by eliminating a potential competitor, and restricted possible trade with C by others within the market. But note that, unlike example (1), the same entities do not satisfy the plurality requirements of conspiracy and restraint of trade. In example (3), while A and B supply the conspiracy plurality, A, B and C; A and C; or B and C, all supply the plurality necessary for "restraint of trade."

4) A acting alone, through two of its unincorporated divisions, erects barriers to C's entrance to its market. Once again, there is a restraint. It is identical to that in example (3), although it's initiated by different actors. C is precluded from competing in the market, inhibiting marketwide trade and competition. Here, however, the officers or agents of A satisfy the conspiracy plurality, while A and C provide the restraint of trade plurality.
pable of conspiring with each other or with the corporation. The Copperweld Court itself recognized that "[n]othing in the literal meaning of [conspiracy] excludes coordinated conduct among officers or employees of the same company." It does not seem,  

Recall example (2) above. In the scenario presented, A and B make up the independent entities necessary for a "restraint of trade." But is there a conspiracy? If it is an otherwise lawful agreement between the parties, then the restraint appears "reasonable." Do we characterize the parties to a valid contract as "conspirators?" Obviously not. But herein lies the point: whether or not a court is willing to find that a conspiracy exists is inextricably entwined with, and must necessarily be preceded by, a determination of whether or not the restraint is "unreasonable." See supra notes 114-20 and accompanying text. Cf. Welling, supra, at 1166-67 ("[w]hile the rule [exemption of intra-corporate conspiracy] has been endorsed because an alternative may lead to unlimited liability, it has been suggested that the potential of limitless liability could be avoided with more direct approaches based on the substantive antitrust law rather than on the definition of plurality") (citations omitted).  


124. Copperweld, 104 S. Ct. at 2741. Cf. Developments—Conspiracy, supra note 77, at 1002-03 (citation omitted): [I]t does not appear unreasonable to suggest that a finding of Sherman Act conspiracy within a single corporation may in some instances be warranted. It seems that the legislature, having employed a word that has a common-law meaning, should be presumed to have intended its common-law meaning unless it appears that such a construction is not in accord with the purposes of the statute.  

There is an alternative argument supporting the notion that Congress intended to include intra-corporate conspiracies in section 1. Consider the use of the word "conspire" in section 2. See 15 U.S.C. § 2 (1982). Can the officers or agents of a single entity "conspire" under section 2? The Attorney General's Report seems to take the position they can. See Attorney General's Report, supra note 38, at 30-31. But it is unlikely that Congress would adopt such disparate meanings between the words "conspiracy" in section 1 and "conspire" in section 2—i.e., recognize intra-corporate conspiracies in the latter but not in the former. Further if the actors within a single entity could not conspire in violation of section 2, the inclusion of the word "conspire" in section 2 would be entirely superfluous. Concerted conduct by unrelated entities is covered by section 1. See Developments—Conspiracy, supra note 77, at 1003.  

Perhaps the best rationale for including intra-corporate conspiracies in section 1 is simply as follows: The purpose of the statute was to foster a sound competitive economy, and it seems that the act should be construed to prohibit not only those combinations which at the time of its passage posed the greatest threat to competition, but also any other means producing the undesirable market conditions which Con-
however, that this failure to perceive the differences in the legal and economic requirements of "conspiracy" and "restraint of trade" is necessarily the result of judicial ineptness; it is more likely the result of a confused attempt at implementation of judicial policy. As one commentator noted while discussing Nelson Radio,

\[\text{[t]he court's analysis ... is confusing. First, although it may be characterized as "basic" that conspiracy requires two persons in the sense of two minds, it is not basic to all forms of conspiracy that two entities or two persons, in the sense of two business associations, be involved. If the court meant that two [economic] entities are basic to conspiracy under the antitrust laws, to avoid confusion it should have stated this explicitly.}\]

In fact it seems that this is the case: the current definition of the term "conspiracy" in section 1, as embraced by the Court in Copperweld, is really based upon considerations of economic policy which the Court felt were necessary for the equitable and efficient application of the antitrust laws.

B. Policy Considerations

As noted in the above analysis of Copperweld, one of the major contentions against a finding of both intra-corporate and intra-enterprise conspiracy rests upon the concern that by allowing such a determination, neither a single corporation nor affiliated corporations could function as integrated business units.

\[\text{These attempted to prevent, if the words of the statute will linguistically bear such an interpretation.}\]

\[\text{Id.}\]

125. Welling, supra note 122, at 1162-63 (emphasis original).

126. See McQuade, supra note 8, at 186-87; Rahl, Conspiracy and the Anti-trust Laws, 44 Ill. L. Rev. 743, 765-66 (1950); Willis & Pitofsky, supra note 8, at 26.

There is also the closely related concern that allowing recognition of intra-entity conspiracy would effectively subject business entities to unlimited liability under section 1. "If a finding of section 1 conspiracy could be based on intracorporate agreements, practically any unilateral firm action would be open to attack." Note, Conspiring Entities, supra note 8, at 664. See Stengel, supra note 8, at 8. See also Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors Ltd., 416 F.2d 71, 84 (9th Cir. 1969) (there is no "logical or practical way to avoid holding that all intra-corporate agreements are or may be found to be conspiracies in restraint of trade").

This line of reasoning, however, completely ignores the fact that section 1 only penalizes "unreasonable" restraints of trade. See infra notes 172-76 and accompanying text. Thus only those agreements worthy of antitrust scrutiny after a rule-of-reason analysis would be subject to liability; procompetitive activities would be insulated. See infra note 134 and accompanying text.
Many essential business procedures would, supposedly, be prohibited as *per se* violations of the Sherman Act. These *per se* violations include agreements to fix prices, control production, divide markets, and initiate boycotts. Once such agreements are proven, a presumption arises that they unreasonably restrain trade and are illegal. A recognition of intra-corporate or intra-enterprise conspiracy... would effectively preclude the necessary consultation among corporate officers regarding prices, markets, production, and the like.¹²⁷

However, the slightest exercise of judicial "common sense" and discretion could obviate these concerns entirely. In the intra-entity context, blanket application of a *per se* rule should be precluded: "[c]orporate officers *must* coordinate the activities of divisions and subsidiaries; discussions and decisions on prices, production, and markets are essential to the business enterprise."¹²⁸ Courts, for precisely this reason, should not allow scrutiny of such activity under a *per se* rule; the existing class of *per se* violations all arose in the context of competing economic entities agreeing among themselves to limit competition. Because this is not the case in factual settings such as the one presented in *Copperweld*, a *per se* rule simply should not be applied.¹²⁹

Another somewhat related concern behind the current rule arises from a fear of misidentifying the effect of certain courses of action where only one firm is involved. Two independent firms acting in concert in accordance with an agreement between them will *always* evidence a restraint of trade; the inquiry then becomes whether or not it is unreasonable.¹³⁰ The nature of single firm conduct, however, short of attempts to monopolize, is said to be more difficult to define. For instance, the internal decisionmaking of the leading firm in a market may have external effects on its competitors.¹³¹ In this sense, it is "difficult to distinguish robust competition from conduct with long-run anti-competitive effects..."¹³² Thus, excluding single firm or enterprise conduct from

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¹²⁷ Comment, *Corporate Liability*, supra note 8, at 249 (citing Stengel, *supra* note 8, at 23).

¹²⁸ Comment, *Corporate Liability*, supra note 8, at 252 (emphasis added).

¹²⁹ *Cf. Developments—Conspiracy*, supra note 77, at 1004. "The fact that certain activities may be *per se* unreasonable when done by competitors should not preclude the courts from a more detailed examination in the case of a single enterprise in order to determine whether the activities in question are in fact unreasonable." *Id.* (emphasis added).

¹³⁰ See infra notes 172-76.

¹³¹ See Note, *Has the Supreme Court Pulled the Plug*, supra note 16, at 886.

¹³² *Copperweld*, 104 S. Ct. at 2740.
section 1 “reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.”

As was noted earlier, however, difficulty in identifying anticompetitive conduct or fear of thwarting “competitive zeal” does not seem adequate justification for restructuring the scope of the term “conspiracy.” In the antitrust context, the rule-of-reason analysis would adequately identify anticompetitive conduct, and safeguard against any unjustified prosecution under the Act. Only those restraints manifestly anti-competitive would be punished.

C. Economic Considerations

The majority in Copperweld seems to imply that its current interpretation of section 1 requiring concerted action by distinct economic units has economic justification. However, as the dissent points out, this is simply not the case. Rather, from an economic standpoint, the presence of market power should be the overriding factor. “Unilateral conduct by a firm with market power has no less anticompetitive potential then conduct by a plurality of actors which generates or exploits the same power, and probably more, since the unilateral actor avoids the policing problems faced by cartels.”

The following example helps illustrate this position: A parent corporation and its wholly owned subsidiary operate, respectively, a newspaper and a radio station in the same city. Assume that the radio station, which has no local competitors, were to deny advertising to a local business because the latter advertised in a rival newspaper. Such practices by the parent/subsidiary entity clearly restrain free trade and competition in the newspaper mar-

133. Id.
134. See Copperweld, 104 S. Ct. at 2745 (Justice Stevens’ discussion of the “Court’s New Rule”). See also Nelson Radio, 200 F.2d at 918 (Rives, J., dissenting). But see Note, Has the Supreme Court Pulled the Plug, supra note 16, at 884.
135. See Copperweld, 104 S. Ct. at 2752 (Stevens, J., dissenting).
136. Id. The determination of relative “market power” and its sources is of primary concern in an action brought under § 2. For a brief overview of the economic considerations involved, see Johnson & Ferrill, supra note 22, at 612 n.96. “Market power” is also considered in assessing the competitive impact of vertical nonprice restraints. See ABA, supra note 7, at 19-20.
137. Copperweld, 104 S. Ct. at 2752 (Stevens, J., dissenting).
138. L. Sullivan, supra note 121, at 327.
ket. As the illustration points out, however, it is not the concerted action here involved which necessarily gives rise to the restraint of trade; it is rather action “utilizing such market power as is possessed by the firm... in order to erect a competitive barrier in front of a competitor” that creates the restraint on competition.

D. Alternative Means of Policing Unilateral Activity

The final argument against section 1 findings of intra-entity conspiracies concerns the necessity of such a theory in current antitrust enforcement. Single firm conduct, it is argued, is adequately policed by other sections of the law. For instance section 5 of the Federal Trade Commission Act empowers the Commission to forbid “unfair methods of competition.” Supposedly, this provision enables the FTC to prohibit single entity conduct which is harmful or potentially harmful to business competition whether or not otherwise culpable under the antitrust laws. Unlike the Sherman Act, however, the Federal Trade Commission Act does not provide criminal penalties for violations, nor does it establish a private right of action. Further, the FTC as a matter of policy, only pursues those cases affected with a significant “public interest.” Hence, the overall deterrent effect of FTC action in the context of the present discussion is open to question. There is also evidence that, in general, government enforcement of the antitrust laws, be it action by the FTC or Justice Department, is necessarily limited in both span of coverage and

139. Id. (emphasis added).
140. See Copperweld, 104 S. Ct. at 2745; Areeda, supra note 8, at 456; Handler & Smart, supra note 8, at 70-71.
142. For example, in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972), the Supreme Court decided that under § 5, the FTC had the power “to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws...”
143. See P. Areeda, ANTITRUST ANALYSIS 69 (3rd ed. 1981). The primary means through which agency action is accomplished is through “cease and desist” administrative orders. See id. In addition, an FTC action must involve the “public interest,” not merely a private dispute between competitors. FTC v. Klesner, 280 U.S. 19, 21 (1929).

Other provisions of the law are also pointed up by critics as deterring single-entity activity. See Note, The Long Awaited Death Knell of the Intra-Enterprise Doctrine, 30 VILL. L. REV. 521, 562 n.162 (1985). Close examination, however, reveals these sections are really of de minimis effect upon single entity activity after initial combinations and short of attempts to monopolize. See id.
overall effect.\textsuperscript{144} This has sparked one commentator to note: "The limited time and resources of the government reduce the effectiveness of the Federal Trade Commission Act and point up the desirability of permitting private litigants to attack anticompetitive schemes through the doctrine of intra-corporate conspiracy."\textsuperscript{145}

Similarly, critics point to the existence of state common law actions for unfair competition or interference with contract as means of keeping the anticompetitive activity of unilateral actors in check.\textsuperscript{146} State actions, however, typically impose a much greater evidentiary burden upon private plaintiffs than do proceedings under the federal antitrust laws.\textsuperscript{147} In addition, the potential for recovery under the two types of actions is greatly disparate. A successful plaintiff under section 1 is entitled to recover treble damages for his injuries, whereas the state law plaintiff has no such right.\textsuperscript{148} Irrespective of the specifics of state law remedies differentiating recovery between two plaintiffs solely on the basis of whether related or unrelated entities have acted seems completely unjustified. Where the substantive acts are the same, recoveries too should be identical.

Moreover, private antitrust suits, and the accompanying threat of treble damage recovery, have long been recognized for


\textsuperscript{145} Comment, Corporate Liability, supra note 8, at 254.

\textsuperscript{146} See Handler & Smart, supra note 8, at 71; Note, Has the Supreme Court Pulled the Plug, supra note 16, at 879-81.

Most states also have constitutional or other statutory antitrust provisions. However, because of their similar construction to the Sherman Act, intrastate conspiracies follow the same general rules as interstate violations. See 54 AM. JUR. 2D Monopolies §§ 458, 623.

\textsuperscript{147} For instance, in most state common law actions for interference with contract, plaintiffs must show that the defendant acted knowingly and intentionally to disrupt its contractual relationships. See Note, Antitrust Treatment of Competitive Torts: An Argument for a Role of Per Se Legality Under the Sherman Act, 58 TEX. L. REV. 415, 419 (1980) [hereinafter cited as Note, Antitrust Treatment of Competitive Torts]. Many state actions, in addition, still require that the causal connection between the acts complained of and the injuries alleged be clearly shown. The federal antitrust laws on the other hand often allow a jury to infer that injury suffered by the plaintiff was caused by the Defendant's acts. See Note, The Pick-Barth Doctrine: Should Unfair Competition Belong Under the Sherman Act?, 31 BAYLOR L. REV. 253, 261 (1979).

\textsuperscript{148} Section 4 of the Clayton Act provides that any private person "injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1982).
the important role they play in overall antitrust enforcement: "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever present threat to deter anyone contemplating business behavior in violation of the anti-trust laws." 149

It can also be argued that, at least in certain instances, the substantive acts of restraint of trade and unfair competition are really not that different. For instance, in many cases involving section 1, the specific practices in question bear a remarkable resemblance to those activities culpable under the common law of unfair competition. 150 The key distinction would seem to lie in the end result: acts having a "substantially adverse" effect on competition within the relevant market 151 would qualify as unreasonable re-

150. In the landmark antitrust case of Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Justice Department successfully engaged the Sherman Act to combat such activities as local price cutting, establishment of bogus independents, preferred customer rebates, and espionage. In Patterson v. United States, 222 F. 599 (6th Cir.), cert. denied, 238 U.S. 635 (1915), the Sherman Act was used to punish acts such as espionage, enticement of competitor's employees, the manufacture of inferior imitations of competitors' products, threatening infringement suits in bad faith, maintaining bogus independents, inducing breach of contract, circulating false reports of competitor's financial standing and commercial disparagement. Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879 (1st Cir. 1960) involved a claim brought under section 1 alleging that the defendant and several individuals had conspired to destroy plaintiff's business. In carrying out the conspiracy the defendants were alleged to have interfered with the employment relations of plaintiff, stolen trade secrets, disparaged plaintiff and its products, instituted a suit in bad faith against plaintiff, and interfered with plaintiff's source of raw materials. In this case, the First Circuit went so far as to say "[w]e believe that the complaint in the instant case alleges a conspiracy to destroy a competitor by means so inimical 'to free and full flow of interstate trade' as to constitute a per se violation of section 1 of the Sherman Act." Id. at 884. But see George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975), which severely curtailed and possibly eliminated the potential use of the per se approach in such cases.

Though the activities described above were all attacked under the proscriptions of the Sherman Act and ultimately held to be violations of the antitrust laws, they bear a remarkable resemblance to many activities commonly brought into question in state common law actions for unfair competition or as they are more commonly known, "competitive torts." See Comment, A Reexamination of Pick-Barth Per Se Illegality Under Section 1 of the Sherman Antitrust Act, 38 U. PITT. L. REV. 87 (1976). "Competitive torts" include such things as "commercial disparagement, false advertising, product imitation, interference with business relationships, trademark and trade name infringement, misappropriation of intangible commercial property, and wrongful establishment of a competing business." Id. at 87 n.2.

151. The Court has developed a standard for defining the relevant market: "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of trade or commerce' monopoliz-
INTRA-ENTITY CONSPIRACIES

straints of trade; acts having a "de minimis" or "insignificant" effect on competition, while not punishable under the antitrust laws,162 would likely still be actionable under state common law. Applying a rule-of-reason analysis to the exclusionary conduct of a single firm would necessarily segregate conduct into one of these two categories,163 and thus allow a court to treat such conduct accordingly. If the evidence in a particular case revealed only injury to plaintiff's business, without a significant anticompetitive affect in the relevant market, the plaintiff would rightly be limited to its common law tort claims.164 Thus, fear that recognition of intra-entity conspiracy would provide treble damages "for state tort suits masquerading as antitrust actions"165 is completely unfounded.

E. Form Over Substance

One final point regarding the current exclusion of single entity activity from section 1 seems necessary. In Copperweld, the Court noted that "[t]he intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality."166 But isn't this precisely what the intra-entity exclusion from section 1 now does? Whether the two corporate actors in a particular case are related or unrelated will be the determining factor in whether section 1 is applied, regardless of the substantive nature or
tion of which may be illegal." United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377, 395 (1956) (the Court concluded that cellophane's interchangeability with numerous other materials suffices to make it a part of the market for flexible packaging materials). The relevant market is defined in geographic terms as well as product terms. L. SULLIVAN, supra note 121, at 41.

152. See infra notes 184-85 and accompanying text. But see Note, Antitrust Treatment of Competitive Torts, supra note 147, at 425-27 (certain competitive acts, though unfair, are procompetitive and should not be attacked under antitrust laws for restraining competition).

153. See infra notes 182-85 and accompanying text.


Where, as here, an antitrust plaintiff alleges nothing more than that a competitor in interstate commerce has by means of unfair business practices deprived plaintiff of key employees, business and confidential records or information, but does not allege any public injury resulting from the defendant's conduct plaintiff must seek relief at common law and not under § 1 of the Sherman Act. Id. at 1261 (footnote omitted).

155. Copperweld, 104 S. Ct. at 2745.

156. Id. at 2743.
effect of the conduct complained of.

As noted earlier, section 1 proscribes every conspiracy in restraint of trade.\textsuperscript{157} The Supreme Court in \textit{United States v. American Tobacco Co.}\textsuperscript{158} stated:

all the difficulties suggested by the mere \textit{form} in which the assailed transactions are clothed become of no moment . . . . This follows because . . . [the Sherman Act] embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed.\textsuperscript{159}

Yet this is essentially what both the intra-corporate, and now intra-enterprise, exemptions do: make application of section 1 contingent upon the corporate inter-relationship or structure of the actors rather than upon the nature of the challenged conduct. The law thus places the organizational \textit{form} of the violators over the \textit{substance} of the acts themselves.

IV. \textbf{Suggested Analysis}

Bearing in mind that first and foremost the goal of the Sherman Act is to foster, preserve and protect competition in national and international markets,\textsuperscript{160} the question then becomes how to best identify and evaluate the conduct of a single firm or enterprise which is suspected of having anticompetitive ramifications falling within the directives of section 1. The suggested analysis requires an initial inquiry to determine (1) if a restraint of trade is present at all, and (2) whether the defendant's conduct had a substantially adverse effect on competition in the relevant market. If the plaintiff satisfies this initial showing,\textsuperscript{161} then, applying a rule-of-reason analysis, a court would evaluate the substance of the acts in question to determine on the merits if they constitute an unreasonable restraint.

\textsuperscript{157} See \textit{supra} text accompanying note 41. See also \textit{supra} notes 42-43 and accompanying text.

\textsuperscript{158} 221 U.S. 106 (1911).

\textsuperscript{159} \textit{Id.} at 180-81.

\textsuperscript{160} See \textit{supra} text accompanying note 39.

\textsuperscript{161} More than likely such an action will be challenged on the sufficiency of the pleadings and/or in a motion for summary judgment. See \textit{Fed. R. Civ. P.} 12(c) & 56 respectively. Thus whether or not the party bringing the action has made a sufficient showing to allow the action to proceed will be judged under the requirements of these rules. See \textit{id}. 


A. Restraints of Trade

Nowhere in the Sherman Act is the phrase "restraint of trade" defined; Congress left this chore to the judiciary.\textsuperscript{162} It has been interpreted to cover a broad range of conduct which in some way limits or binds the free activity of the market.\textsuperscript{163} Moreover, the Act does not explicitly limit who can violate section 1: it clearly states that "every person" is subject to liability for activity in contravention of its provisions.\textsuperscript{164} Any such limitation, therefore, is necessarily the result of judicial interpretation.

Where there are two or more competitors\textsuperscript{165} within a given market, a restraint may arise in either of two ways: (1) the would-be rivals act together to limit competition that would otherwise exist between them, or (2) one firm becomes subject to the exclusionary conduct of another.\textsuperscript{166} In the intra-entity context, it is only the latter type of restraint with which we are concerned. Thus, where a complaint alleges intra-entity conspiracy, a court’s primary focus should be on whether the conduct of a defendant adversely affected the trade of others.\textsuperscript{167} The true single-firm defense is not concerned with conspiracy at all: it is grounded in the proposition that, absent monopoly, restraints within the confines of a single enterprise (e.g., internal price and distribution policies) have no harmful effects on competition. "The crucial question is whether the competitive prospects of market participants are re-

\textsuperscript{162} See Developments—Conspiracy, supra note 77, at 1004.

\textsuperscript{163} Restraints under section 1 have been held to include such things as horizontal and vertical price agreements, territorial or customer allocation, group boycotts and other refusals to deal, joint ventures, reciprocal dealing, tying arrangements and exclusive dealing, see ABA supra note 17, at 1-12, as well as activity which is designed to eliminate an existing or potential competitor from a firm’s market. See Northwest Power Products, Inc. v. Omark Industries, 576 F.2d 83, 89 (5th Cir. 1978), cert. denied, 430 U.S. 1116 (1979); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 562 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975); Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879, 884 (1st Cir. 1960).


\textsuperscript{165} See supra note 121 and accompanying text.

\textsuperscript{166} L. SULLIVAN, supra note 121, at 927.

\textsuperscript{167} See Note, Intra-Enterprise Conspiracy, supra note 8, at 732-34. But see Sprunk, supra note 12, at 732-34. It is suggested that such an “external effect” theory is unworkable because “it is likely that every significant intra-enterprise arrangement has some external effects.” Id. at 733. Cf. ATTORNEY GENERAL’S REPORT, supra note 38, at 54-55. (the intra-enterprise conspiracy doctrine is only to be invoked where conduct has “for its purpose or effect coercion or unreasonable restraint on the trade of strangers”).
strained, which depends on the effect of defendant’s conduct on suppliers, customers, and competitors.”

It is not enough, however, for a court to determine that a party’s ability to compete is somehow improperly impaired. It must thereafter shift its focus to the question of whether competition has been adversely affected by a defendant’s activity within the market. Thus, a complaining party must establish that the challenged acts yield significant adverse affects on competition within the relevant market, as opposed to merely placing a plaintiff at a competitive disadvantage. Where there is no viable issue of fact regarding anticompetitive impact, a court should rightly uphold the defendant’s motion to dismiss.

B. Rule of Reason

Once a court has determined that in fact a party has been competitively restrained, and that there is a substantial likelihood that competition has been adversely affected, the second part of the analysis consists of applying the rule of reason.

1. Development of the Rule. Originally the Sherman Act was interpreted so as to apply its literal meaning—it declared illegal all contracts, combinations or conspiracies in restraint of trade. It soon became clear, though, that such an interpretation was not feasible for, in reality, even legitimate, procompetitive agreements necessarily restrain trade. Thus, the Supreme Court recognized that “some standard” was necessary to determine if the Act had been violated. Reviewing the common law existing at the

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169. See supra notes 150-55 and accompanying text.
170. The antitrust laws are intended to protect “competition, not competitors.” Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original). In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) the Supreme Court noted that plaintiffs, in order to recover under the antitrust laws, must show injury reflecting the “anticompetitive effects” of a violation. See supra note 154.
171. See supra note 161.
172. See United States v. Trans-Missouri Freight Assoc., 166 U.S. 290, 312 (1897).
173. See Board of Trade v. United States, 246 U.S. 231, 238 (1918). See also National Soc’y of Professional Engrs v. United States, 435 U.S. 679, 688 (1978) (“read literally, § 1 would outlaw the entire body of private contract law”). See also supra note 122 (Example (2)) and accompanying text.
174. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).
175. For a discussion of the common law regarding restraints of trade, see generally 1 E. KINTNER, supra note 21, at 65-76.
time of the Sherman Act's adoption, the Court held that the standard was the "standard of reason." As a result, although absent from the explicit language of the text, section 1 of the Sherman Act is commonly read to prohibit only unreasonable restraints of trade.

The Supreme Court's decision in Board of Trade of Chicago v. United States first identified the pertinent commercial considerations to be utilized in a rule-of-reason analysis:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may supress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. This history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Later, in Continental T.V., Inc. v. GTE Sylvania, Inc., the Court stated that under the rule of reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." A year later in National Society of Professional Engineers v. United States, however, the Court sought to limit this "all of the circumstances" test: "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." In other words, any analysis utilizing the rule is concerned only with the "competitive significance" of the restraint—i.e., the "market impact" of the conduct. Nevertheless, the "market impact" of the restraint must represent a significant restriction on trade or competition

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176. Standard Oil, 221 U.S. at 60.
177. 246 U.S. 231 (1918).
178. Id. at 238.
180. Id. at 49.
182. Id. at 688.
183. Id., at 691 & n.17 (discussing Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).
within the relevant market—it must be "substantially adverse before the Act will proscribe it." Activities which have only an insignificant or "de minimis" effect on competition are not unlawful.

In determining the degree of the restraint's effect on competition, the court may examine its impact on price, output, or product quality, as well as the structure of the defendant's industry. An important dimension of market structure is the number of firms operating within the relevant market. Obviously, the degree of competition is directly related to the number of competitors within any given market. Finally, the "purpose" of a restraint may also be relevant in a rule-of-reason analysis. The defendant's intent, as inferred by a court, may provide insights to the likely effect of such conduct on competition.

2. Application of the Rule to the Facts of the Copperweld Case. A


185. See United States v. Topco Assocs., 405 U.S. 596, 606 (1972) (the Act was not intended to inhibit conduct which "in some insignificant degree" restricts competition). See also Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 297 (5th Cir. 1981) (no "appreciable" anticompetitive effect); Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440, 448 (3d Cir.), cert. denied, 439 U.S. 866 (1978) (must exist as more than a "de minimis" restraint); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978) (must show more than "de minimis" anticompetitive effect).


court applying the rule to the facts of the Copperweld case\textsuperscript{189} could plausibly reach the following results. Before the restraint was imposed at least one more firm was prepared to enter the market, thus increasing the number of competitors and competition accordingly. After the restraint, Independence was delayed over nine months in beginning its operations in the market. The actual effect of Regal and Copperweld’s conduct was to preclude Independence’s operations within Regal’s industry for this period, depriving the marketplace of Independence’s supply of goods and its demand for raw materials and labor. Thus, it is likely this decrease in the level of competition would have a negative effect on prices, output and product quality.\textsuperscript{190}

The conduct of Copperweld and Regal could easily be viewed as serving no procompetitive purpose. Sending out letters discouraging other firms from dealing with Independence definitely had anticompetitive connotations. Considering that Copperweld and Regal were aware they had no legal right to enjoin Independence’s operation, the purpose of their actions must be seen as an unlawful attempt to keep Independence out of the industry.\textsuperscript{191} Although discussion of the concentration of producers and the overall structure of Regal’s market is sparse,\textsuperscript{192} the trial court found, and the court of appeals affirmed, that Copperweld and Regal’s

\textsuperscript{189} See supra notes 45-52 and accompanying text. Obviously the district court and court of appeals did utilize a rule-of-reason approach in rendering their decisions. The following is simply an exercise, using the Copperweld facts, to illustrate how the specifics of the rule might be applied.

\textsuperscript{190} Examination of the trial record indicates that Regal had been the “price leader” in several of the segments serviced by its product lines. See Record at 2482-83, Copperweld. (maintained “orderly market” for several of its products). However, when Independence was finally able to begin operations in the market, it was able to lower prices on at least three occasions. See id. at app. 363, 6678-79. Thus it appears that Independence’s exclusion from Regal’s markets negatively affected at least product prices within those markets.

\textsuperscript{191} The record makes clear that, in fact, Copperweld’s and Regal’s concerns of losing trade secrets or customer lists had no basis in fact. Id. at app. 677. It is also clear that the specific intent of the officers involved was to keep Independence out of Regal’s market. See id. at app. 598 (letter of Phillip Smith).

\textsuperscript{192} Certain inferences as to market structure can be drawn from the record. The existence of a price leader and the fact that Independence was able to reduce prices on at least three occasions, see supra notes 190 & 191, indicates that prices were not determined by a freely competitive market solution. See supra notes 22-36 and accompanying text. Rather, it is much more likely that an oligopolistic market structure existed. However, the fact that a claim under section 2 was not pursued suggests that Regal’s market share was not an overly large percentage of the total and that a number of other producers existed in the industry.
conduct had a significant adverse effect on competition in the structural steel tubing market. There were independent findings of "harm to Independence and harm to competition," based on the instructions to the jury.

Clearly, then, the Supreme Court, applying the rule-of-reason standard to the facts of the Copperweld case, could have concluded that Copperweld's and Regal's conduct constituted an unreasonable restraint of trade under section 1. Such a result would have been true to the Sherman Act's purpose and aim of fostering, preserving and protecting free competition.

CONCLUSION

This Comment has sought to demonstrate that single entity conduct can have significant anticompetitive impact in the form of unreasonable restraints of trade. Yet as the law stands today, such conduct is placed beyond the reach of the Sherman Act, thereby leaving a significant "gap" in the Act's coverage. The Supreme Court's decision in Copperweld significantly broadens the category of actors which fall into this exemption. By holding that, as a matter of law, affiliated corporations are always incapable of conspiring in violation of section 1, the Court expands the intra-corporate exemption into the realm of affiliated corporations.

The recurring theme throughout this Comment has been a call to abandon the current reliance on a strict, overly formalistic interpretation of the term "conspiracy" when dealing with single entity activity under section 1. The clear Congressional mandate of fostering and preserving economic competition as embodied in the Sherman Act is simply not honored by such an interpretation. Rather, a flexible case by case analysis of the substance of challenged conduct would more appropriately promote this essential national interest in free competition. As one commentator has concluded, "[i]f the nature of the conduct is first looked to and a determination made that it imposes an unreasonable restraint of trade, it should be struck down if such can be done by a reasonable construction of the enabling statutes." It has been shown

194. Id. at 322.
195. Barndt, supra note 8, at 198.
that, a "reasonable construction" of section 1 includes the notion that officers or employees of a single corporation, as well as actors present in affiliated corporations, can constitute the required plurality necessary for a Sherman Act conspiracy.

The arguments for exempting single entity activity, as a matter of law, are not persuasive. Challenged practices which do not appear to carry with them significant anticompetitive effect can easily be removed from continued scrutiny under section 1. Those acts that do appear to generate substantial antitrust injury, however, would remain subject to comprehensive examination on their merits. Thus, decisionmaking truly internal to the firm or enterprise would be sufficiently insulated. Moreover, relegating antitrust plaintiffs to state law actions solely because the defendants were in some way affiliated is simply not justified. The same substantive acts should receive similar penalties. Finally, other provisions of the antitrust laws or federal administrative laws do not adequately deter or compensate the types of conduct discussed herein.

The purpose of the Sherman Act is to foster a sound competitive economy, thereby promoting consumer welfare. By excluding, as a matter of law, such a broad range of activity posing a real and substantial anticompetitive threat, the present holdings frustrate clearly defined antitrust policy and work a grave injustice, not only on the parties that are direct victims of such acts, but upon all businesses and consumers ultimately affected by such activity.

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