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Mens Rea and Felony Violations Under The Sherman Act

INTRODUCTION

Section One of the Sherman Act¹ prohibits conduct that effects a restraint of trade. The section does not specifically define prohibited conduct, and is silent as to a requisite mental element for violation. Accordingly, courts did not traditionally require proof of intent in determining whether certain conduct violated Sherman One.² However, in *United States v. United States Gypsum Co.*,³ the Supreme Court held that intent is a necessary element in a Sherman One criminal offense.

Since *Gypsum* is such a significant decision, creating new law, several questions arise as to the breadth of its application. The case involved a misdemeanor offense because the illegal conduct had occurred prior to the amendment which elevated a Sherman One criminal violation to felony status.⁴ Thus, it is not clear whether the level of intent established in *Gypsum* is sufficient to sustain a felony conviction or whether some higher level should be required. In addition, since *Gypsum* involved an indirect price-fixing scheme, it is unclear what, if any, mental element is required in direct price-fixing cases.

The resolution of these issues will require the consideration of two important policies. First, Congress sought a deterrent effect from the severe sanctions it established in a 1974 amendment to the Act.⁵

1. 15 U.S.C. § 1 (1976). Section One of the Sherman Antitrust Act [hereinafter referred to as Sherman One] provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony"

2. See text accompanying notes 12 through 19 *infra*.

3. 438 U.S. 422 (1978).

4. The Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974)(amending 15 U.S.C. § 1 (1976)).

5. The 1974 amendment upgraded the status of the offense to a felony and increased the maximum prison sentence from one to three years. Potential fines were increased from \$50,000 to \$1 million for corporations, and \$100,000 for individuals. Through this elevation in status and increase in criminal sanctions, Congress intended to enhance Sherman One's deterrent effect as well as to impress upon the courts the Congressional attitude toward the gravity of the offense. See letter from Assistant Attorney Gen. W. Vincent Rakestraw to Rep. Peter W. Rodino Jr., Chairman, Comm. on the Judiciary, House of Representatives, Washington D.C. (Nov. 8, 1974)[hereinafter referred to as Letter from Assistant Attorney Gen.], reprinted in 120 CONG. REC. H10,760 (daily ed. Nov. 19, 1974). For many years the Antitrust Division had sought unsuccessfully to have significant jail sentences imposed upon convicted

Second, when the Supreme Court read an intent element into a Sherman One criminal offense, it emphasized the need to protect defendants from unwarranted punishment.⁶ Because Sherman One defendants are now facing felony convictions, courts must determine whether the *Gypsum* level of intent provides the accused sufficient protection.

This article will briefly survey early Sherman One decisions that did not require proof of intent. The *Gypsum* opinion and its subsequent interpretation by three courts of appeals will then be discussed. Finally, an appropriate mental element will be suggested for post-*Gypsum* felony cases.

MENS REA AND SHERMAN ONE PRIOR TO *Gypsum*

Unlike most criminal statutes, Sherman One does not clearly define the conduct it prohibits. The statute simply describes a harm or effect which is to be prevented.⁷ In addition, Sherman One neither mentions nor refers to a requisite state of mind for violation.⁸ Thus, both civil and criminal sanctions are authorized with regard to any concerted activity in restraint of trade.⁹

Since Congress failed to specify the conduct prohibited, the precise scope of Sherman One was left for judicial determination. Early courts refused to articulate specific parameters of the conduct and instead resorted to a "rule of reason." This judicially-created standard judged each defendant's acts on a case-by-case basis in light of all surrounding circumstances and consequences to determine whether the acts "unreasonably" restrained trade.¹⁰ Relevant fac-

defendants. With a maximum sentence of one year the largest sentences which had been imposed were for thirty days and those sentences were usually suspended. 120 CONG. REC. H10,766 (daily ed. Nov. 19, 1974) (remarks of Rep. Danielson). It was hoped that the increase to a three year maximum would yield at least one year sentences. Letter from Assistant Attorney Gen., *supra* at H10,760.

6. See text accompanying note 37 *infra*.

7. 15 U.S.C. § 1 (1976). See note 1 *supra* for text of Sherman One.

8. *Id.*

9. Although Sherman One flexibility permits the government to restrict all forms of concerted activity in restraint of trade, the adaptability of the Act also creates practical problems in deciding whether to pursue criminal prosecution. The courts and the Justice Department have recognized that the businessman cannot always "tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures." *United States v. United States Gypsum Co.*, 438 U.S. at 439, *quoting* Report of the Attorney General's National Committee to Study the Antitrust Laws. To avoid criminal punishment for innocent business judgments, the Attorney General has concluded that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." *Id.* (This report was approvingly cited in *Gypsum*, 438 U.S. at 439).

10. The rule of reason was first applied to Sherman One in *Standard Oil of N.J. v. United*

tors in the rule of reason test included the purpose of the arrangement, the power of the parties to implement the plan, the effect of their actions, and, if price-fixing was involved, the reasonableness of the price.¹¹

In *United States v. Trenton Potteries*,¹² the Supreme Court rejected the rule of reason in a direct price-fixing case.¹³ Since "(t)he reasonable price today may through economic and business changes become the unreasonable price of tomorrow,"¹⁴ the Court held that agreements to fix prices were illegal per se, whether the current price was reasonable or not. Surrounding circumstances and consequences were no longer relevant.¹⁵

After a brief return to the rule of reason in a Depression-era decision,¹⁶ the Supreme Court abandoned the standard in another price tampering case. The defendants in *United States v. Socony Vacuum Oil Co.*¹⁷ were a group of major oil refining companies. In response to a depressed demand and an increased supply of gasoline, they agreed to purchase surplus gasoline from independent refiners to avoid gas wars and to stabilize retail prices. Although the oil companies did not fix prices, the Court reasoned that to the extent the

States, 221 U.S. 1 (1911). Although recognizing that some conduct might be inherently unreasonable, the Court read Sherman One as condemning only "unreasonable" restraint of trade. Relying on this rule of reason, the Court in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), elaborated on factors to be considered:

(T)he 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. The history of the restraint, the evil believed to exist, the reason for adapting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

11. *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1911).

12. 273 U.S. 392 (1927).

13. Eighty percent of the makers of toilets and other bathroom products fixed the prices of sanitary pottery. Directly at issue in *Trenton Potteries* was whether or not the reasonableness of the price was relevant in a Sherman One prosecution.

14. *Id.* at 397.

15. The *Trenton Potteries* Court reasoned that the necessity of day to day inquiry as to whether a price, reasonable yesterday, is still reasonable today, would be too great a burden to place on the courts. Since fixed prices remain unchanged under such an agreement, the agreement itself creates market control and is illegal per se. *Id.* at 397-98.

16. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). In response to a devastated coal industry, defendant coal companies formed a new company to act as an exclusive selling agent for the member firms. The agent company attempted to obtain the best possible prices as well as a fair allocation of orders for the member companies. The district court held the activities to be illegal per se, relying on *Trenton Potteries*. The Supreme Court, perhaps responding to the deplorable market conditions in the coal industry at this time, returned to the rule of reason and upheld the agreement. "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it." *Id.* at 360.

17. 310 U.S. 150 (1940).

defendants stabilized prices they were directly interfering with the "free play of market forces."¹⁸ Accordingly, the Court held the agreement to be illegal per se and it refused to consider whether defendants were in a position to control the market or whether the scheme was "wise or unwise, healthy or destructive."¹⁹

Nearly thirty years later in *United States v. Container Corp.*,²⁰ a civil antitrust action, the Court considered whether an exchange of price information between competitors without a specific agreement to adhere to a price schedule violated Sherman One. Since the exchange had the effect of stabilizing prices, it was held to be illegal. Although the Court did not label the price verification a per se violation, the majority opinion seemed to consider intent to be immaterial.²¹

After the *Container* decision, many commentators believed that whenever challenged conduct had either the effect or the purpose of restraining trade, the activity was illegal per se.²² The government relied on this postulation of the law in *United States v. United States Gypsum Co.*²³ However, the Supreme Court determined that a more difficult burden of proof is required, at least in criminal cases.

United States Gypsum Co.: MENS REA IS AN INHERENT ELEMENT OF SHERMAN ONE

The decision in *United States v. United States Gypsum Co.*²⁴ is significant because it is the first case in which the Court treated a

18. *Id.* at 221.

19. *Id.*

20. 393 U.S. 333 (1969).

21. Although the "effects alone" test in the *Container* opinion would seem to constitute a per se standard, the *Gypsum* Court subsequently characterized *Container* as a rule of reason case, citing Justice Fortas' concurring opinion. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). If *Container* was based on a rule of reason, neither the majority opinion nor the concurring opinion used the rule of reason analysis as elaborated in *Chicago Board of Trade*. See note 10 *supra*.

22. *The Supreme Court, 1968 Term—Price Information Exchanges by Competing Manufacturers*, 83 HARV. L. REV. 227, 233-34 (1969); Note, *Antitrust: Agreement to Exchange Price Information Violates Sherman Act*, 54 MINN. L. REV. 206, 211-12 (1969); Note, *Antitrust Law—Reciprocal Price Information Exchanges*, 47 N.C. L. REV. 881, 886 (1969); Note, *Guidelines for Data Dissemination Through Trade Associations*, 10 WASHBURN L.J. 93, 102 (1970). *Contra*, Kefauver, *The Legality of Dissemination of Market Data By Trade Associations: What Does Container Hold?* 57 CORNELL L. REV. 777, 785 (1969); Note, *Exchange of Price Information Among Sellers as to the Latest Price Charged or Quoted to Individual Customers Pursuant to an Informal Agreement Is a Violation of the Sherman Act*, 14 VILL. L. REV. 526 (1969).

23. 438 U.S. 422 (1978).

24. *Id.*

criminal antitrust violation differently from a civil one and because the Court read an intent requirement into the criminal offense.²⁵ Although the case was decided subsequent to the 1974 amendment which elevated a Sherman One violation to a felony, *Gypsum* involved a misdemeanor offense because the activity in question occurred prior to enactment of the amendment.

In *Gypsum*, six major manufacturers of gypsum board and several of their corporate officials were charged with a conspiracy to restrain trade in violation of the Sherman Act. The defendants had engaged in a practice of telephoning one another to determine the prices each was offering on gypsum board to its customers. The Government contended that this interseller price verification system had the effect of stabilizing prices²⁶ and was therefore a per se violation under the *Container* decision.²⁷ Defendants argued that they were not in violation since the exchanges were for the purpose of complying with the Robinson-Patman Act.²⁸

The trial judge instructed the jury that the purpose of the price exchange was irrelevant if the effect of that concerted activity was to "raise, fix, maintain or stabilize prices."²⁹ The government contended this instruction was consistent with the Court's longstanding rule that price verification violates Sherman One if either the purpose or the effect is to fix or stabilize prices.³⁰

The Court of Appeals for the Third Circuit reversed the convictions and held that in certain "limited circumstances"³¹ a purpose

25. *Id.* at 435. Like *Container*, *Gypsum* involved price verification, a form of indirect price-fixing. The effect of the conduct in both cases was characterized as a restraint of trade. Although such effect was sufficient to constitute a civil violation in *Container*, the Court in *Gypsum* held that an additional element, knowing intent, was necessary for a criminal conviction under Sherman One.

26. *Id.* at 428. The gypsum board industry is a highly concentrated or oligopolistic industry, with the eight largest companies accounting for 94% of national sales. *Id.* at 426. A reciprocal price information exchange system in such an industry reduces the incentive for a price reduction: If one oligopolist were to lower his prices, all competitors would be informed of the decrease and could then promptly match the price cut. That parallel activity would destroy any advantage to be gained by offering the lower price. In such an industry, therefore, reciprocal price verification stabilizes prices. See generally Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 288, 289-93 (1978).

27. 393 U.S. 333 (1969). See text accompanying notes 21 and 22 *supra*.

28. 15 U.S.C. § 13(a) (1976). Section 2(a) of the Robinson-Patman Act prohibits price discrimination between buyers which results in injury to competition. The most important exception to the § 2(a) prohibition is found in § 2(b), which provides that a prima facie case of price discrimination can be rebutted by showing that the lower price was made in a good faith effort to meet the equally low price of a competitor. Defendants in *Gypsum* contended that their practice of price verification was for the purpose of complying with this exception.

29. 438 U.S. at 429-30.

30. *Id.* at 435.

31. The Third Circuit articulated four conditions for invocation of the Robinson-Patman

of complying with the Robinson-Patman Act would constitute "controlling circumstances"³² warranting exemption from Sherman One liability. Consequently, an instruction directing the jury to ignore the purpose of the challenged activity could not be sustained.

Although the Supreme Court agreed with the court of appeals that an effect on price alone could not sustain a criminal conviction under Sherman One, it did not predicate its conclusion on a conflict between the Sherman Act and the Robinson-Patman Act.³³ Instead, the Court relied heavily on *Morissette v. United States*³⁴ and the traditional common law requirement that *mens rea* be an element of a criminal offense.³⁵ The Court acknowledged that strict liability offenses were not unknown in criminal law, but it noted that those offenses were very limited and generally disfavored by both legislatures and courts.³⁶ Since it is often difficult to distinguish acceptable

defense: 1) The practice was solely to comply with Robinson-Patman; 2) there was reason to doubt the buyer's veracity as to the competitor's price; 3) other means had been tried and failed; and 4) the communication was limited to one price and one buyer. *United States v. United States Gypsum Co.*, 550 F.2d 115 at 126.

32. *Id.* at 123-26. In *Cement Mfgs. Protective Assn. v. United States*, 268 U.S. 588, (1924), the Court exempted from Sherman One liability an exchange of price information among competitors because such exchange was necessary to protect the cement manufacturers from fraudulent practices by contractors. The *Container* Court distinguished the *Cement* holding because of the "controlling circumstances" present there but it did not elaborate on the exact scope of these circumstances. *United States v. Container Corp.*, 393 U.S. 333, 335 (1969).

33. 438 U.S. at 435.

34. 342 U.S. 240 (1952). The Supreme Court in *Morissette* reversed a conviction for a violation of a federal statute forbidding the conversion of government property. The defendant had taken bomb casings that he had found on a government reservation and asserted the defense that he had no intention of stealing the casings but thought the property had been abandoned. The trial court refused to allow the defense based on the belief that the failure of Congress to explicitly express a mental element meant that no such mental element was required. While recognizing the validity of existing strict liability offenses, the Supreme Court held that *mens rea* was presumptively to be implied in the statutory redefinition of offenses taken over from the common law. The *Morissette* Court further observed that a relationship between some mental element and punishment for a harmful act is "almost as instinctive as the child's exculpatory 'But I didn't mean to . . .'" *Id.* at 250-51. 438 U.S. at 436-38.

35. 438 U.S. at 436-38.

36. *Id.* at 437-38. Early American common law was characterized by its unqualified acceptance of the need for some mental element in order to constitute a crime. Where omitted from the statute itself, intent was judicially read into the crime. Exceptions to this rule in the form of strict liability offenses were brought about by the increasing need for social regulation to protect the public welfare during the Industrial Revolution. *Morissette v. United States*, 342 U.S. at 235-55.

Thus, as it has evolved, when the legislature makes no mention of mental element, it is for the courts to determine whether intent should be required. If the offense is not in the nature of a public welfare crime, courts usually read intent into the statute. This is particularly true when the offense is one which descends from a common law offense, since Congress is presumed to legislate against the background of the common law. *Id.*

business practice from illegal conduct, the Court reasoned that strict criminal liability was unwarranted.³⁷ The congressional silence on intent, thus, was interpreted to include *mens rea* as an inherent element of a criminal violation.

The Court then referred to the four classifications of intent enumerated in the ALI Model Penal Code³⁸ to determine which level would be sufficient for a Sherman One conviction. It rejected the highest level of intent which would require that the conduct be undertaken with a "conscious object" of producing illegal effects.³⁹ Instead, the Court held that "knowledge that the proscribed effects would most likely follow"⁴⁰ is a sufficient mental state, because business behavior is "normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks."⁴¹

37. The Court recognized that, particularly in the gray area of indirect price-fixing, some borderline impermissible conduct is hard to distinguish from conduct which is actually procompetitive in effect. The Court reasoned that the imposition of strict criminal liability on such conduct, which only after the fact is determined to violate Sherman One because of its anticompetitive effects, might result in overdeterrence. Corporate officers might shun permissible procompetitive conduct due to uncertainty as to possible criminal sanctions. 438 U.S. at 441.

38. MODEL PENAL CODE § 2.02 (Prop. Official Draft, 1962), in pertinent part, provides as follows:

(1) *Minimum Requirements of Culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) *Kinds of Culpability Defined.*

(a) *Purposely.*

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

...
(b) *Knowingly.*

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

39. 438 U.S. at 444-46.

40. *Id.* at 444. This "knowing" standard is actually less stringent than that of the MODEL PENAL CODE which would require knowledge that the effects were "practically certain" to follow. See note 38 *supra*.

41. 438 U.S. at 445-46.

POST-*Gypsum* FELONY CASES

The *Gypsum* Court's incorporation of the "knowing" intent requirement into Sherman One was technically an interpretation of the pre-1974 amendment Sherman Act. Although the Court noted that violations occurring subsequent to the amendment would be of felony status,⁴² it did not discuss the application of its holding to felony cases. Relying on this absence of a definitive statement, several defendants have argued in subsequent cases that the *Gypsum* Court's refusal to adopt the more stringent standard of specific intent should be limited to misdemeanor prosecutions and that the level of intent applicable to felony cases is still in dispute. In addition, defendants charged with direct price-fixing violations have argued that the *Gypsum* holding should not be limited to indirect price-fixing cases. However, these arguments have been unsuccessful in several of the courts of appeals.

Indirect Price-Fixing

The Courts of Appeals for the Third and Fourth Circuits have expressly rejected the contention that Sherman One felony offenses require proof of specific intent. The Fourth Circuit case is illustrative of the analysis both courts used in resolving the issue.⁴³

In *United States v. Foley*,⁴⁴ six real estate brokerage firms and three of their officials were charged with conspiring to fix commission rates on sales of residential property in violation of Sherman One. The alleged conspiracy began at a dinner party hosted by Foley at which the other defendants were guests. There, Foley announced that his firm was planning to increase its commission rate from the prevailing rate of six per cent to seven per cent. Although no one explicitly agreed to match the rate change, it was discussed and all the defendants did adopt the increase.⁴⁵

42. 438 U.S. at 442-43 n.18.

43. *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3461 (U.S. Jan. 22, 1980). *Accord*, *United States v. Continental Group, Inc.*, 456 F. Supp. 704 (E.D. Pa 1978), *aff'd*, 603 F.2d 444 (3rd Cir. 1979). The *Continental Group* defendants were charged with conspiring to raise, fix, maintain, and stabilize the prices of consumer bags. The conspiracy involved a price list which set forth the various components of a job and established a price for each. Although there was evidence of a conspiracy as early as 1950, the grand jury charged that the activity extended beyond December 21, 1974, thus bringing it under the felony provision of the Sherman Act. Although *Continental Group* involved direct price-fixing, it was cited by *Foley* for its reasoning that since Congress declined to alter a substantive element of Sherman One when it amended the statute in 1974, the court was subsequently without the power to so alter the Act.

44. 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3461 (U.S. Jan. 22, 1980).

45. 598 F.2d at 1327.

The trial court's instructions to the jury conformed to the "knowing" standard articulated in *Gypsum* and a guilty verdict was entered in judgment. On appeal, the brokers urged that the *Gypsum* scienter requirement is not stringent enough to sustain a felony conviction and that instead, it must be found that the brokers conspired with the specific intent to accomplish a restraint of trade.⁴⁶ In support of their claims, the defendants argued both that the constitution mandated the higher level of intent and that since Congress increased the status and penalty for a violation, the implied element of intent also should be elevated.⁴⁷

The Fourth Circuit noted that although specific intent may be constitutionally mandated "with respect to offenses impinging highly protected realms of conduct such as speech," the same is not true in the area of commercial regulation.⁴⁸ In rejecting defendants' other argument, the court simply stated that Congress could have, but did not amend the elements of the offense; only the penalty for violation was increased.⁴⁹ Congress' failure to act was considered dispositive and the conviction was upheld.

Direct Price-Fixing: Per Se Violations

Although *Gypsum* involved indirect price-fixing, some defendants have since claimed that the broad holding should be read to imply an intent requirement for direct price-fixing offenses as well. Recent decisions in the Third and the Seventh Circuits, however, hold to the contrary.

The Seventh Circuit case, *United States v. Brighton Bldg. & Maint. Co.*,⁵⁰ involved an allegation that defendants engaged in a bid-rigging conspiracy⁵¹ in competition for state construction contracts. Since the trial was held prior to *Gypsum*, the jury instructions failed to include as an essential element of proof that defendants had "knowledge that the proscribed effects would most likely follow."⁵²

Defendants appealed their convictions and objected not only to the omission of the "knowing" requirement, but urged that specific

46. *Id.* at 1335.

47. *Id.*

48. *Id.*

49. *Id.* The court cited *Continental Group*. See note 43 *supra*.

50. 598 F.2d 1101 (7th Cir. 1979).

51. See *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977), where a conspiracy to submit collusive, noncompetitive, rigged bids was held to be a per se violation of Sherman One.

52. *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978).

intent be required for the felony offense.⁵³ The court of appeals rejected both arguments and held that if the government proves the existence of a direct agreement to fix prices or to rig bids, then the agreement is by definition for an anticompetitive purpose and therefore illegal per se.⁵⁴

In a Third Circuit case, *United States v. Gillen*,⁵⁵ the defendant on appeal objected to the trial court decision that intent was not an element of a criminal direct price-fixing offense. The court of appeals upheld the conviction and distinguished *Gypsum* as a case which involved indirect price-fixing and, thus, a case in which an anticompetitive purpose was not readily apparent. In contrast, the court reasoned, such purpose is obvious if the government proved an agreement to directly fix prices.⁵⁶ The *Gillen* court further stated that even if *Gypsum* does apply to direct price-fixing cases, the intent requirements will always be met. "If the defendant intends to fix prices, he necessarily intends to restrain trade."⁵⁷

These post-*Gypsum* decisions demonstrate that the courts have found the *Gypsum mens rea* standard to provide sufficient protection for defendants, even though the potential punishment is now more severe. In direct price-fixing cases, the courts have reasoned that the *Gypsum* standard is met even if no intent instruction is given to the jury, since intent is inherent in an agreement to fix prices. In cases involving indirect price-fixing, the lower courts have not required any greater showing of intent for felony prosecutions than that mandated by the *Gypsum* decision. However, in light of the serious consequences resulting from a felony conviction, the protection afforded defendants charged with indirect price-fixing appears to be less than adequate.

53. *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1105 (7th Cir. 1979).

54. *Id.* at 1106.

55. 599 F.2d 541 (3rd Cir. 1979).

56. *Id.* at 544-46.

57. *Id.* at 545. *Accord*, *United States v. Continental Group, Inc.*, 603 F.2d 444 (3rd Cir. 1979). In *Continental Group*, the court upheld the following jury instruction in a direct price-fixing case: "If these acts knowingly done resulted in an agreement of the type forbidden by the Sherman Act, the law presumes that the person so acting intended that result as being the necessary and natural consequences of those acts." *Id.* at 461. Acknowledging that *Gypsum* would render this instruction inadequate if given to a jury deciding an indirect price-fixing case, the court nevertheless held that when the acts involve a knowing attempt to directly fix prices, criminal intent could be presumed. The crucial distinction between the indirect and the direct price-fixing violation, according to the court, was that "(a)n agreement to exchange prices, by itself, is not illegal; an agreement to fix prices is." *Id.* at 462.

58. 598 F.2d 1323 (4th Cir. 1979).

SPECIFIC INTENT SHOULD BE AN ELEMENT OF SHERMAN ONE CRIMINAL OFFENSES INVOLVING INDIRECT PRICE-FIXING

The *Gypsum* Court recognized that "the behavior proscribed by the Sherman Act is difficult to distinguish from the gray zone of socially acceptable and economically justifiable conduct."⁵⁹ When this uncertainty under the law is coupled with the potential sanctions and collateral consequences of a felony conviction, *Gypsum's* knowing standard does not provide adequate protection for felony defendants. Yet, the lower courts' rationale in refusing to require the higher level of intent is not compelling. As the following discussion demonstrates, the *Gypsum* standard warrants reconsideration.

Collateral Consequences of a Felony Conviction

Proponents of the 1974 Sherman Act amendment sought to deter Sherman One violations by transforming public regard for the crime from that of a "mere technical violation"⁶⁰ to one of a serious crime.⁶¹ By elevating the violation to felony status in the name of deterrence, Congress not only significantly increased the maximum sanctions but also exposed convicted violators to all the collateral consequences associated with a felony conviction.

Adversities suffered by convicted felons in some jurisdictions include disbarment,⁶² revocation of a medical or dental license,⁶³ the prohibition of running for public office⁶⁴ or the removal there-from,⁶⁵ and even disenfranchisement.⁶⁶ In some states, a felony conviction

59. 438 U.S. at 440-41.

60. See Letter from Assistant Attorney Gen., *supra* note 5, at H10,760.

61. *Id.* Stressing the serious nature of Sherman One violations, the injury caused thereby was compared to that of "auto theft, armed robbery, and embezzlement." *Id.*

62. Some states statutes require disbarment for the conviction of a felony or a misdemeanor involving moral turpitude. In such jurisdictions the question of whether to disbar often revolves around the issue of moral turpitude. In other states, however, disbarment is mandatory following the conviction of any felony. See, e.g., *Re Greenhill*, 21 App. Div. 2d 79, 248 N.Y.S.2d 452 (1964); *Re Sullivan*, 246 App. Div. 393, 286 N.Y.S. 318 (1936). See generally 18 A.L.R. 3d 1408 (1968).

63. Some jurisdictions provide by statute for the revocation of a medical or dental license following a felony conviction. *Robinson v. Board of Regents*, 4 App. Div. 2d 359, 164 N.Y.S.2d 863 (1957); *Tonis v. Board of Regents*, 295 N.Y. 286, 67 N.E.2d 245 (1946). Where revocation is required upon the commission of a crime involving moral turpitude, the quality rather than criminal status of the crime is primarily at issue.

64. The right to hold public office is usually limited by statute to qualified voters. Since convicted felons are disqualified from voting in most states by either statute or state constitution, see note 66 *infra*, they are consequently ineligible to seek public office. See, e.g., *Trent v. State*, 195 Tenn. 350, 259 S.W.2d 657 (1953); *State ex rel DeConcini v. Sullivan*, 66 Ariz. 348, 188 P.2d 592 (1948). See generally 21 AM. JUR. 2d *Criminal Law* §23 (1965).

65. *Id.*

66. Although the right of suffrage is guaranteed by the United States Constitution, such

constitutes grounds for divorce.⁶⁷ In addition, at common law a felon was automatically disqualified as a witness in a trial.⁶⁸ Although most jurisdictions have statutorily removed this disability, the laws often provide that a prior felony conviction may effect the credibility of the witness.⁶⁹

In light of the considerable change in the status of a Sherman One criminal violation, the possible imposition of a three year prison term, as well as the collateral consequences involved, *Gypsum's mens rea* standard warrants reconsideration. Although the Supreme Court did not require specific intent in *Gypsum*, it should be more inclined to do so when faced with the issue in a felony case.

The 1974 Amendment: Congressional Omission of Specific Intent Does Not Negate Its Necessity

In deciding that a higher level of intent was not mandated by the 1974 amendment, the appellate court in *United States v. Foley*⁷⁰ noted that Congress had only altered the penalty and had not amended the elements of the offense.⁷¹ This congressional action was summarily interpreted to demonstrate that Congress did not intend to change the elements of the offense. In support of this conclusion, the court cited *United States v. Continental Group, Inc.*⁷²

In *Continental Group*, the court recognized that *Gypsum's* knowing standard was limited to misdemeanor cases. However, the court reasoned that since Congress "neither expressly nor impliedly" amended the substantive elements of the offense when it clearly had the power to do so, "federal courts are without power to constructively alter those substantive elements."⁷³

guarantee is subject to the imposition of reasonable state standards which are neither discriminatory nor in violation of Congressional restrictions. It has thus been recognized that a state may deprive a person convicted of an infamous crime of his right to vote. *Lassiter v. Northampton Election Board*, 360 U.S. 45, 51 (1959). Furthermore, a felony conviction has been found to fall within the definition of "infamous crime" within the meaning of a constitutional provision calling for the disenfranchisement of persons convicted of "infamous crimes." *Truchon v. Toomey*, 116 Cal. App. 2d 736, 254 P.2d 638 (1953). *Accord*, *State ex rel. Dean v. Haubrich*, 248 Iowa 978, 83 N.W.2d 451 (1957). See generally 21 AM. JUR. 2d *Criminal Law* §23 (1965).

67. 21 AM. JUR. 2d *Criminal Law* §23 (1965). See, e.g., Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40, § 401 (1977).

68. 21 AM. JUR. 2d *Criminal Law* §23 (1965).

69. See FED. R. EVID. 609(a); see also 21 AM. JUR. 2d *Criminal Law* §23 (1965).

70. 598 F.2d 1323 (4th Cir. 1979).

71. *Id.* at 1335. See note 43 *supra*.

72. 456 F. Supp. 704 (E.D. Pa. 1978). See note 43 *supra*.

73. 456 F. Supp. at 717.

The reasoning of the courts is troublesome for two reasons. First, the *Gypsum* Court certainly altered the substantive elements of Sherman One by adding the intent requirement. It is not clear why the *Continental Group* court concluded that it was without such power. Second, the 1974 amendment was enacted prior to *Gypsum*, so an intent requirement had not yet been judicially mandated. Thus, the *Foley* court attributes to Congress an intent not to change an element which had not even been created. This interpretation of congressional intent is highly questionable and should not be the basis of a decision that only a knowing intent is required in felony cases.

Specific Intent: The Effect on Deterrence

An argument against increasing the level of intent necessary for felony antitrust convictions is that to do so would decrease the probability of conviction and thereby impair the deterrent effect of the 1974 amendment to the Sherman Act. However, even though the probability of conviction might be reduced by requiring proof of specific intent, deterrence would not necessarily suffer if more substantial fines and sentences were imposed upon those convicted. This conclusion is supported by a paper which was presented in the Senate subcommittee hearings on the proposed amendment.⁷⁴

The paper advances a risk-analysis theory of business management to determine the deterrent effect of Sherman One. In the theory, the concepts of risk-aversion and risk-preference are distinguished. The risk-averse person prefers "the large probability of the small loss to the small probability of the large loss," while the risk-preferer chooses "the small probability of the large loss [instead of] the larger probability of the smaller loss."⁷⁵ The paper concludes that modern American business management is cautious and tends toward risk-aversion, particularly in the nation's oligopolies which are the "firms most subject to antitrust scrutiny."⁷⁶

Given this risk-aversion tendency in business management, the amount of the penalty imposed for Sherman One violations should be a more influential deterrence factor than is the likelihood of

74. Breit and Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973).

75. *Id.* at 699.

76. *Id.* at 704. This conclusion was based upon similar observations made by various economists: R. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 271-351 (1945); J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 121-63 (3d ed. 1950); J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 11-178 (2d ed. 1971); R. MARRIS, *THE ECONOMIC THEORY OF "MANAGERIAL" CAPITALISM* 1-109, 204-88 (1964).

conviction. Business management will be very apprehensive of a severe sanction, even though the likelihood of conviction might be low. Therefore, any reduction in the conviction rate incurred as a result of the increased intent requirement would only require a proportionate increase in fine or sentence to maintain a given deterrence level.⁷⁷

A consideration of post-amendment felony cases has indicated a judicial willingness to view direct price-fixing violations as serious offenses warranting substantial criminal sanctions.⁷⁸ However, the same cannot be said for violations involving indirect price-fixing.⁷⁹ Perhaps the judicial reluctance to invoke serious sanctions for indirect price-fixing violations stems from an awareness that the knowing intent standard may impute guilt to one who is innocent in mind. This problem would be prevented if specific intent were required for conviction. Courts should then be more willing to view the violators as guilty felons and sentence them accordingly. Thus, under the risk-analysis theory, the harsher punishment would become an important deterrence factor.

United States v. Nu-Phonics, Inc.: A Proper Approach

One year prior to *Gypsum*, a federal district court was presented an issue similar to that in *Gypsum*, but in a felony, rather than a misdemeanor case. In *United States v. Nu-Phonics, Inc.*,⁸⁰ the court considered whether a defendant has the right to present evidence explaining the business justifications for his conduct. The court's resolution of the issue both foreshadowed the *Gypsum* decision and properly considered the severity of a felony sanction.

Defendants in *Nu-Phonics* were hearing aid dealers charged with

77. Of course, when referring to penalty, the reference is to sanctions actually imposed rather than the available maximum statutory penalty.

78. *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101 (1979); *United States v. Continental Group, Inc.*, 456 F. Supp. 704 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3rd Cir. 1979). In *Brighton Bldg.*, where violators were convicted of bid rigging, a form of direct price-fixing, the highest individual penalty was \$75,000; the highest corporate penalty was \$600,000; the longest sentence was 30 months. (Statistics were provided by the Clerk of the U.S. Dist. Ct. N.D. Ill. E.D.) In *Continental Group*, another direct price-fixing case, the highest corporate penalty was \$600,000; the highest individual penalty was \$40,000; the longest sentence was 32 months probation. (Statistics were provided by the Clerk of the U.S. Dist. Ct. E.D. Pa.).

79. In *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), where no direct agreement to fix prices was evident, the largest corporate penalty was \$50,000 (the maximum penalty is \$1 million); the largest individual penalty was \$25,000 (\$100,000 maximum); and the longest sentence was three years probation. 838 ANTITRUST & TRADE REG. REP. (BNA) A-12 (Nov. 10, 1978).

80. 433 F. Supp. 1006 (E.D. Mich. 1977).

both direct⁸¹ and indirect price-fixing.⁸² Relying on the apparent *per se* rule of *Container*,⁸³ the government moved to exclude as irrelevant defense evidence which would negate the alleged anticompetitive purpose of defendants' acts. In considering this motion, the court first noted that the recent elevation of Sherman One to felony status not only increases the potential penalty for conviction but also subjects a convicted defendant to collateral consequences.⁸⁴ Accordingly, the court reasoned that Sherman One defendants should be "given the same protections as persons charged with more traditional felonies."⁸⁵

On the issue before it, the court concluded that the "same protections" meant that the government must prove each element of the offense: the existence of a conspiracy; a purpose to fix or stabilize prices; and an anticompetitive effect on prices.⁸⁶ For direct price-fixing, the court reasoned that if an express agreement to fix prices is proved, then the anticompetitive purpose is apparent. Thus, no other proof of illegal purpose is necessary and no rebuttal evidence is permitted.⁸⁷

With respect to indirect price-fixing, the *Nu-Phonics* court held that illegal purpose cannot be presumed and that the defendants have a right to rebut prosecution evidence with any relevant evidence of their own.⁸⁸ In summarizing its decision, the court suggested that in light of the increased penalty for conviction, the Sherman Act should require the same elements of proof as the conspiracy statute in the federal criminal code.⁸⁹ The federal statute, like its common law predecessor,⁹⁰ requires proof of specific intent for a

81. It was alleged that the dealers had expressly agreed to charge specific prices for hearing aids.

82. The dealers were charged with agreeing to refuse to advertise or quote prices over the phone.

83. See notes 20 through 22 *supra* and accompanying text.

84. 433 F. Supp. at 1015. See text accompanying notes 62 through 69 *supra*.

85. 433 F. Supp. at 1010.

86. *Id.* at 1012.

87. *Id.* at 1011.

88. *Id.* at 1013. To the extent that this holding contradicted *Container*, the court distinguished *Container* as a civil case. *Id.* at 1015 n.1.

89. *Id.* at 1015. The statute, 18 U.S.C. §371 (1972), provides:

If two or more persons conspire either to commit any offense against the United States, . . . or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

90. Conspiracy was an offense known to early English common law prior to any legislative enactments. It was defined as "a combination between two or more persons by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." 15A C.J.S. *Conspiracy* §35(1) (1967). As con-

felony conspiracy conviction.

The *Nu-Phonics* court's decision to treat direct and indirect price-fixing differently is based on sound reasoning. Since both specific and knowing intent are inherent in a direct agreement to fix prices, the inclusion of either standard in an instruction to the trier of fact is unnecessary in a direct price-fixing case. This conclusion has been reached by the courts of appeals which have confronted the issue subsequent to the *Gypsum* decision⁹¹ and it should be followed. However, in light of the broad range of innocuous business activity which might cause an indirect price fix, the *Gypsum* knowing standard should be reconsidered. Since violations falling in this "gray area"⁹² of the law may result in severe sanctions and significant, detrimental collateral consequences, defendants should receive the full protection of a specific intent requirement. Sherman One is essentially a conspiracy offense and it is now also a felony; it should be strictly construed to conform with the general conspiracy statute.⁹³

CONCLUSION

The *Gypsum* Court made a significant advancement in providing Sherman One defendants with protection normally afforded criminal defendants. However, the *Gypsum* knowing intent standard is not commensurate with the potential sanctions and other detrimental consequences which may be suffered by Sherman One felony defendants. Instead, the Supreme Court should require the same elements of proof for a conspiracy to restrain trade that are required under the federal conspiracy statute. Unfortunately, the Court passed up an opportunity to resolve this issue when it denied *certiorari* in *United States v. Foley*.

Contrary to the reasoning of the courts which have declined to mandate specific intent, congressional action or inaction in amending the Sherman Act should not preclude the judicial imposition of the higher intent level. Further, even if the burden of proving specific intent would result in fewer convictions, the deterrence effect of the Act would not necessarily be diminished if those who were convicted were punished severely. Since a more stringent intent

spiracy statutes were adopted, those which did not define the essential elements of the crime were dependant on the common law definition. *Id.* Although the validity of conspiracy statutes has been upheld, those provisions which were in derogation of the common law were usually strictly construed. *Id.*

91. See notes 50 through 57 *supra* and accompanying text.

92. See note 37 *supra* and accompanying text.

93. See *Morissette v. United States*, 342 U.S. 246 (1952), for the theory that statutes should be interpreted against their common law background. See note 35 *supra*.

standard might encourage the imposition of more severe sanctions, the standard might actually enhance deterrence and contribute to, rather than negate, the expressed congressional objective of informing the public and the courts that Sherman One violations are to be viewed as serious criminal offenses. Specific intent should be a requisite element for conviction of felony, indirect price-fixing under Sherman One.

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