Antitrust Law - The Requirement of an Instruction on Intent in Per Se Criminal Violations of Section 1 of the Sherman Act

Andy Susko

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ANTITRUST LAW—THE REQUIREMENT OF AN INSTRUCTION ON INTENT IN PER SE CRIMINAL VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT.

United States v. Gillen (1979)

Gillen, president and chief executive officer of Blue Coal Corporation (Blue Coal), along with four other individuals and six major anthracite corporations,¹ was prosecuted under section 1 of the Sherman Act (Act) for conspiring to fix the price of anthracite coal.² From 1961 through 1973—during the latter half of which period Gillen was president of Blue Coal—executives of the major coal producers in northeastern Pennsylvania met three to four times per year as the Anthracite Producer’s Advisory Board (APAB) to establish “production quotas” as authorized by the federally approved Production Control Plan for the Anthracite Industry.³ Following these conferences, the executives held “after meetings” to discuss and agree on price lists for the sale of coal to dealers not located in the respective companies’ vicinity.⁴ Sales representative Carl Tomaine attended those meetings on behalf of Blue Coal.⁵

Tomaine, the government’s chief witness in this nonjury case, testified before the United States District Court for the Middle District of Pennsylvania that he had reported to Gillen that the executives at the after meetings, including himself, were “discussing prices” and that “they agreed to go along on certain prices” to be printed in the price list.⁶ He also informed Gillen that Blue Coal was going to charge the agreed-upon prices.⁷

The district court found Gillen guilty of engaging in a conspiracy to fix prices because he “knew of the existence of the conspiracy and . . . because

². 458 F. Supp. at 889. For a discussion of the statutory provisions of the Sherman Act, see note 13 infra.
³. 458 F. Supp. at 891.
⁴. Id. At the meetings subsequent to the APAB meetings, tentative agreements on prices, to be printed in “price circulars,” were reached by the sales representatives of the respective companies. Id. Upon each representative’s receiving his superior’s approval of the agreed-upon price, the price circulars were sent to non-local purchasers of coal. Id. at 892. At times, however, the companies did sell above the circular price. Id. at 891. When sales were made at a price below that quoted in the circular, “the circular price was used as the level from which discounts were determined.” Id.
⁵. Id. at 892. Tomaine was vice-president of sales for Blue Coal from 1966 to mid-1973. Id.
⁶. Id. at 895. Tomaine was named as an unindicted co-conspirator in the indictment and later agreed to testify as a government witness. Id. at 892.
⁷. Id. The court noted that “some of the prices printed by one or more of them could, at times, vary somewhat from the others if necessary to compensate for a peculiar market or inventory situation or other problems that a producing company might be encountering.” Id. at 891.

(952)
he knowingly participated in it." On appeal, the United States Court of Appeals for the Third Circuit affirmed, holding 1) that knowing participation in a conspiracy to fix prices is sufficient to sustain criminal liability, and 2) that the elevated level of intent to effectuate an anticompetitive effect required by the Supreme Court in United States v. United States Gypsum Co. was not required for per se antitrust violations.

Section 1 of the Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade." Since the 1974 amendments, violations of the Act constitute a felony for which "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal" is criminally liable.

The parameters of the conduct prohibited by the broad and nonspecific language of section 1 were developed in a long line of judicial opinions.

8. Id. at 893-94. Gillen testified that he had never been involved with the marketing aspects of coal mining. Id. at 893. Gillen further testified that he had given authority to Tomaine to price the company's coal, and that Tomaine had never told him that the other companies had agreed to "fix" the price of coal. Id. The district court, however, believed Tomaine's testimony and found that Gillen was a knowing participant in the conspiracy. Id. at 894. Having found that a conspiracy existed, the district court convicted Gillen, finding that his help with, or authorization of, the agreement was sufficient involvement. Id. For a discussion of the level of intent required by the Third Circuit, see notes 55-59 and accompanying text infra.


11. The district court opinion was issued on June 18, 1978. 458 F. Supp. at 887. Less than two weeks later, on June 29, 1978, the United States Supreme Court handed down the Gypsum decision. See 438 U.S. at 422. Thus, the district court decided Gillen without considering the intent requirement enunciated in Gypsum. See 599 F.2d at 543. For a discussion of per se violations of the Act, see notes 25-40 and accompanying text infra.


13. Id. § 1. The penalties for § 1 offenses were upgraded to felony status by the Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1708 (codified at 15 U.S.C. § 1 (1976)). Included in the upgraded status were increases in maximum fines which could be imposed—up to $1 million for corporate defendants and $100,000 for individual defendants—and in prison sentences—up to three years for individual defendants. 15 U.S.C. § 1 (1976).

Additionally, the government is empowered to bring injunctive actions to have certain agreements, or parts thereto, prohibited. Id. § 4. See, e.g., United States v. Topco Assocs., Inc., 405 U.S. 596, 597 (1972) (injunction against exclusive territorial agreements); United States v. Container Corp. of America, 393 U.S. 333, 334 (1969) (injunction against intradistrict exchange of price information); Appalachian Coal, Inc. v. United States, 288 U.S. 344, 378 (1933) (unsuccessful attempt to enjoin coal producers from marketing coal through common association).


14. See Standard Oil Co. v. United States, 221 U.S. 1 (1910). As noted by the Supreme Court, "the contracts or acts embraced in the provision [i.e., § 1] were not expressly defined since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made. ..." Id. at 60.

15. See id. The Standard Oil Court stated:

[1] It inevitably follows that [§ 1] necessarily called for the exercise of judgment which
In an early decision, the Supreme Court concluded that not all conduct resulting in restraint of trade is illegal.\textsuperscript{16} Rather, as established in \textit{Standard Oil Co. v. United States},\textsuperscript{17} a contract, combination, or agreement must "unreasonably" restrain trade in order to be within the prohibitions of section 1.\textsuperscript{18}

The elements of a section 1 criminal antitrust offense, as established in \textit{United States v. Patten},\textsuperscript{19} are the following: 1) the defendant must have been a member of a conspiracy; and 2) such combination or agreement must have caused an unreasonable restraint of trade.\textsuperscript{20} Although criminal conspir-
acy generally requires both the intent to agree—necessary to establish the existence of the conspiracy itself—and the intent to effectuate the object of the conspiracy, the Patten Court explained the absence of an intent requirement in the antitrust context by concluding that the defendants “must be held to [intend] the necessary and direct consequences of their acts.” After Patten, then, the burden of proof on the intent element required to establish a criminal violation is no greater than that necessary to find a civil violation.

Further simplifying the elements of a criminal antitrust violation, the Supreme Court held, in United States v. Trenton Potteries Co., that certain agreements are, as a matter of law, an unreasonable restraint of trade. These per se illegal combinations or agreements, such as an agreement to fix prices, are considered so clearly anticompetitive that their


22. 226 U.S. at 543. The Court asserted that an allegation of specific intent is not necessary:

[The conspirators] must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.

Id. With regard to the particular facts presented, the Patten Court agreed with the court of appeals that, although the raising of prices in markets other than the Cotton Exchange in New York “was in itself no part of the scheme,” the . . . ‘prices of cotton are so correlated that it may be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country.’” Id. at 539, quoting United States v. Patten, 187 F. 664, 671 (1911).

23. See United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13, 446 n.22 (1978). The Gypsum Court noted that restraint of competition as a direct result of a combination has been a sufficient legal basis upon which to predicate both criminal and civil liability. Id. at 447, citing United States v. Container Corp. of America, 393 U.S. 333, 337 (1969). See also Crane, supra note 21, at 651-54 (contended, pre-Gypsum, that intent should be an element in criminal antitrust cases).

24. 273 U.S. 393 (1927). In Trenton Potteries, the indictment charged 20 individuals and 23 corporations, who controlled 82% of the manufacturing and distributing markets of vitreous pottery in the United States, with, among other things, combining to fix and maintain uniform prices for the sale of such pottery. Id. at 393-94.

25. Id. at 397-98. Although the Court framed the issue of the case in terms of whether it was necessary to consider the reasonableness of the particular restraint charged, it upheld the trial court’s instruction to the jury “that if it found the agreements or combinations complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed [or] . . . whether the prices were actually lowered or raised . . ., since [the] agreements of themselves were unreasonable restraints.” Id. at 395. See also Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

The Court in Northern Pacific explained that, “there are certain agreements or practices which by their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” Id. at 5. The advantages of allowing per se findings of unreasonableness include added certainty as to those restraints proscribed by the Act, and elimination of the need for “complicated and prolonged economic investigation.” Id.
anticompetitive market effect is presumed and it is unnecessary to prove an unreasonable restraint of trade.  

Later, in United States v. Socony-Vacuum Oil Co.,27 the per se illegal price-fixing rule enunciated in Trenton Potteries was expanded to include not only direct price agreements between competitors on prices to be offered in the market but also agreements to influence the market price indirectly.28 In Socony-Vacuum gasoline producers agreed to purchase “distress gasoline” which was creating an oversupply in the market and, consequently, depressing and destabilizing market prices.29 The Court held that “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se.”30

Since Trenton Potteries and Socony-Vacuum, other types of agreements or combinations have also been held to be per se violations of section 1.31 In United States v. Topco Associates Inc.,32 for example, the defendant competitors’ agreement to divide and allocate market shares—i.e., horizontal territorial market division—was held to be per se illegal.33 Other

26. 273 U.S. at 398-99, 401. The Trenton Potteries Court held that membership in an agreement to fix prices was sufficient evidence on which to predicate criminal liability. Id. at 401. The Court reasoned: “The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and fix arbitrary and unreasonable prices.” Id. at 397.

27. 310 U.S. 150 (1940).

28. Id. at 221-23. The Court declared that “[a]ny combination which tampers with price structures is engaged in an unlawful activity.” Id. at 221.

29. Id. at 167, 177-210. Among other things, the indictment charged that certain major oil companies selling gasoline in the mid-western United States agreed to raise and fix the tank car prices of gasoline artificially through the purchase of excess gasoline on the market. Id. at 166-67. The excess gasoline was purchased from independent refiners. Id.

30. Id. at 223. Defendants argued that their agreement was unlike the one in Trenton Potteries because, in Socony-Vacuum, the companies involved remained free and able to compete on the basis of price. Id. at 159, 222. The Court, however, denied the existence of any legal distinction between an agreement on prices to be charged and an agreement the purpose of which is to raise prices through concerted action of some sort. Id. at 222-23. As stated by the Court:

[It] is [not] important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. . . . An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever the machinery for price-fixing was used.

Id. at 222. But see Flittie, The Sherman Act § 1 Per Se—There Ought to Be a Better Way, 30 Sw. L.J. 523, 533-35 (1976). Professor Flittie suggests that the distinction between agreeing on prices—direct price-fixing—and agreeing to do that which will effectuate an increase in market prices—indirect price-fixing—is significant and that, in the latter case, an abbreviated evidentiary hearing is not sufficient to prove a § 1 violation. Id. at 533.


32. 405 U.S. 596 (1972).

33. Id. at 601-06. In Topco, the defendants had agreed not to compete with each other’s allocated market in common “Topco”-label products. Id. at 599 n.3. The scheme was designed
agreements also found to be per se illegal under section 1 include group boycotts, bid rigging, and tying arrangements. On the other hand, combinations involving vertical territorial restrictions, once held to be per se illegal, are now subject to the "rule of reason" analysis, requiring actual proof of an anticompetitive market effect.

The fact that an unreasonable restraint of trade is presumed in per se violations of section 1 relieves the government of the burden of proving that the alleged conspiracy caused an anticompetitive effect and that the effect was an unreasonable restraint of trade. Given this presumption of the prohibited market effect and considering that the defendant's specific intent to make Topco products competitive with comparable, more popular private-label products sold by the larger food chains. Id. The Court held that the agreement in Topco was a per se violation of § 1 because the defendants had agreed to reduce intradefendant competition in terms of the Topco product through horizontal division of the markets. Id. at 608-09. The Court, in response to defendants' argument that their purpose was to increase competition between the defendants and the larger food chains, stated:

Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products. Without territorial restrictions, Topco members may indeed "cut each other's throats." But, we have never found this possibility sufficient to warrant condoning horizontal restraints of trade. Id. at 610-11, quoting White Motor Co. v. United States, 372 U.S. 253, 278 (1963) (Clark, J., dissenting) (bracketed matter supplied by the Topco Court). See also 405 U.S. at 605.

34. See Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941). The Court held that an agreement among manufacturers of women's garments and textiles to refuse to deal with other manufacturers and retailers who copied their designs was illegal per se. Id. at 468. Accord, United States v. General Motors Corp., 384 U.S. 127, 146-47 (1966).

35. See United States v. Brighton Bldg. & Maint. Co., 598 F.2d 1101 (7th Cir.), cert. denied, 444 U.S. 840 (1979). The Seventh Circuit held that an agreement among competitors to allow a designated party to be the lowest bidder was per se illegal under § 1 of the Sherman Act. Id. at 1106. Accord, United States v. Flom, 558 F.2d 1179 (5th Cir. 1977); United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir.), cert. denied, 434 U.S. 938 (1977); United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir.), cert. denied, 423 U.S. 893 (1975).


37. See United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). In Schwinn, the government brought a civil action to enjoin the "Schwinn Plan" which, among other things, limited the locations in which, and the persons to whom, its franchised retailers could sell Schwinn bicycles. Id. at 370-71. The Court held that Schwinn's scheme "to restrict and confine areas or persons with whom an article may be traded after the manufacturer (Schwinn) has parted with dominion (title) over it" was per se illegal. Id. at 379 (citations omitted). The Court enjoined sales by Schwinn made to "any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." Id. at 378.

38. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). In Continental T.V., which was decided ten years after Schwinn, the Court overruled Schwinn and held that vertical territorial restrictions, where title to the merchandise had passed to the retailers, were not per se violative of § 1. Id. at 58. The Court concluded that "[w]hen anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act." Id. at 59. See generally Comment, The Legal and Economic Status of Vertical Restrictions, 23 Vill. L. Rev. 547, 575-79 (1979).

39. See notes 24-36 and accompanying text supra.
to produce such an effect need not be proven, a section 1 violation could be made out by simply proving that the defendant “knowingly participated” in, or had the intent to agree to, a conspiracy found to be per se illegal.\(^4\)

That a director or other corporate official could be held accountable for his acts as a representative of the corporation was established in \textit{United States v. Wise}.\(^4\) The Wise Court rejected the defendant director's argument that a corporate official should not be considered a “person” under section 1 because he was acting for the corporation.\(^4\) Rather, the Court held that a corporate officer or director is subject to section 1 liability whenever he “knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime. . . .”\(^4\)

The 1978 decision of the Supreme Court in \textit{United States v. United States Gypsum Co.},\(^4\) however, signaled a change in the traditional elements required to prove a criminal antitrust offense, thus modifying the degree of participation necessary for imposing criminal liability upon corporate officials.\(^4\) Focusing on the intent to effectuate the object of the conspiracy—

\(^{40}\) See United States v. United States Gypsum Co., 438 U.S. at 446-47 n.22. See also notes 22-26 and accompanying text \textit{supra}.

\(^{41}\) 370 U.S. 405, 416 (1962). In \textit{Wise}, a grand jury returned an indictment charging Wise, and the corporation of which he was a director, with engaging in a conspiracy to eliminate price competition with the defendant corporation’s competitors. \textit{Id.} at 406. Wise moved to dismiss on the ground that the Sherman Act did not apply to the activities of an officer or director, acting on behalf of the corporation, no matter how illegal or culpable the activities were. \textit{Id.} at 407. Wise contended that his activities were chargeable to the corporation as the principal, and not to him individually, because he was acting solely for his corporation. \textit{Id.}


\(^{43}\) 370 U.S. at 416. For a discussion of the application of the Wise standard in \textit{Gillen}, see notes 59 & 88-89 and accompanying text \textit{infra}.

\(^{44}\) 438 U.S. 422 (1978). Six manufacturers of gypsum board, along with 11 individual defendants, were indicted as members of "a continuing agreement, understanding and concert of action . . . to (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board." \textit{Id.} at 427. The government relied almost exclusively on evidence of interdefendant telephone conversations in which exchanges of price information occurred. \textit{Id.} at 428. At trial, the jury had been charged that if the effect of the interseller price information exchange was to raise, fix, maintain, or stabilize prices, then the defendants were presumed, as a matter of law, to have intended that result. \textit{Id.} at 434. On appeal to the Third Circuit, the defendants’ § 1 convictions were reversed, with the court refusing to uphold the "effects alone" instruction. \textit{Id.} at 435. The basis for the Third Circuit’s holding was that a "controlling circumstance" existed in that the defendants had acted for the purpose of complying with the Robinson-Patman Act, and, hence, they should be immunized from Sherman Act liability. United States v. United States Gypsum Co., 550 F.2d 115, 126 (3d Cir. 1977), \textit{aff’d}, 438 U.S. 422 (1978).

\(^{45}\) See 438 U.S. at 436 n.13, 446-47 n.22. The \textit{Gypsum} Court, although affirming the Third Circuit’s decision, refused to apply a "controlling circumstance" exception to § 1 liability on the facts of the case. \textit{See id.} at 458-59. For a discussion of \textit{Gypsum}’s impact on the "controlling circumstance" defense, see Note, 48 U. CIN. L. REV. 179 (1979).
as distinguished from the intent to agree which indicates the conspiracy—the Gypsum Court held that intent to produce an anticompetitive effect is an element of a criminal antitrust offense and could no longer be presumed, as a matter of law, in section 1 violations. The Court emphasized that non-mens rea offenses, with their corresponding presumptions of intent, are disfavored, and noted that Congress had recently upgraded section 1 violations from misdemeanor to felony status.

The particular level of intent to effectuate the object of the conspiracy required depends upon whether anticompetitive effects are shown. When anticompetitive effects are proven, the government need only show that the defendant acted “with knowledge of the probable consequences of his acts.” When anticompetitive effects are not proven, however, Gypsum requires an elevated standard of intent—i.e., a showing that the defendant acted “with the ‘conscious object’ [or purpose] of producing such effects.”

The Third Circuit framed the issue in the Gillen appeal in terms of whether Gypsum had elevated the government’s burden of proof on the issue of intent to restrain trade in per se offenses and hence effected a change in the “long-established rule of law on price-fixing.” The Gillen court highlighted a specific passage in the Gypsum decision in which the

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46. 438 U.S. at 443 n.20. For a brief discussion of the two levels of intent traditionally required in proving criminal conspiracy, see note 23 and accompanying text supra.
47. 438 U.S. at 435-36. As stated by the Gypsum Court:
A defendant’s state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. . . . We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses.
Id. at 435 (citation omitted).
49. 438 U.S. at 442-43 n.18. For a discussion of the recent upgrading of § 1 offenses, see note 13 supra.
50. 438 U.S. at 444-47.
51. Id. at 444. The Court noted that “action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient basis upon which to predicate criminal liability under the antitrust laws.” Id. The Court concluded that a conscious object is unnecessary where anticompetitive effects are proven, noting that there is “good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.” Id. at 445, citing W. LAFAVE & A. SCOTT, supra note 21, at 197. The Court emphasized that some level of intent to produce the effect was necessary because, when “dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place.” 438 U.S. at 444. See also id. at 444-45 & n.21. The Court did not discuss whether a per se presumption of anticompetitive effect would constitute sufficient proof of such an effect for purposes of the lesser standard of intent. Id. at 444. For an analysis of the Third Circuit’s interpretation of the application of the lesser standard of intent in per se cases, see notes 59, 63 & 75 and accompanying text infra.
52. 438 U.S. at 444 n.21. The Court noted that it did “not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass.” Id., citing United States v. Griffith, 334 U.S. 100, 105 (1948). Cf. United States v. Crescent Amusement Co., 323 U.S. 173 (1944) (Sherman Act violation exists when purpose of agreement is to destroy one’s competitors).
53. 599 F.2d at 544.
Supreme Court buttressed its rationale for requiring proof of specific intent: "With certain exceptions for conduct regarded as per se illegal because of its unquestionably anticompetitive [side] effects, . . . the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." The Third Circuit concluded that *Gypsum* had excepted per se illegal agreements from its holding and that the Supreme Court had not intended to require proof of intent in per se offenses.

The *Gillen* court reasoned that, since the act of fixing prices is illegal per se, "no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy." Alternatively, the court concluded that the *Gypsum* level of intent to effectuate a conspiracy would always be met in a price-fixing conspiracy because one who intends to fix prices necessarily intends to restrain trade.

The *Gillen* court also reviewed whether there was substantial supportive evidence that Gillen had "knowingly participat[ed] in effecting the illegal contract, combination, or conspiracy." The court affirmed the conviction on the basis of the district court's findings that Gillen knew of the conspiracy

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54. *Id.*, quoting United States v. United States Gypsum Co., 438 U.S. at 440-41 (citation omitted) (bracketed matter supplied by the *Gillen* court).

55. See 599 F.2d at 544. The Third Circuit noted that the Supreme Court's decision in *Gypsum* to include intent as an element of a criminal antitrust offense was born out of concern for conduct that was only questionably anticompetitive. *Id.* The court reasoned that "the [Supreme] Court did not intend an extraordinary change in the rules of law on price-fixing because, by its very citation of Socony-Vacuum, the court [sic] acknowledged that price-fixing cases are an exception." *Id.*, citing 438 U.S. at 440-41, citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The *Gillen* court concluded that *Gypsum* had not changed the "long-established rule of law on price-fixing cases by requiring a more stringent burden of proof on the issue of intent." 599 F.2d at 544.

56. 599 F.2d at 545. The *Gillen* majority distinguished *Gypsum* on the ground that it concerned an agreement to exchange past or current price information—conduct which was not in and of itself illegal—and that such circumstances necessarily warranted a further inquiry into the intent of the defendants. *Id.* But see United States v. Container Corp. of America, 393 U.S. 333 (1969) (agreement to exchange current price information violates § 1). Agreement as to future prices, as occurred in *Gillen*, has been found to constitute price-fixing and has been held to be illegal per se. *See United States v. Trenton Potteries Co.*, 226 U.S. at 536. In addition, the majority in *Gillen* reasoned that, as in this case, when defendants agree to fix prices, the agreement is itself illegal—i.e., "the criminal act is the agreement." 599 F.2d at 545.

57. 599 F.2d at 545. The court noted that "the mere existence of a price-fixing agreement establishes a defendant's illegal purpose." *Id.* Further, the court declared that "[p]rice-fixing is an area of the law in which people either can or ought to be able to predict the legal consequences of their actions." *Id.* at 544. The *Gillen* court concluded that, "even if read to apply here, *Gypsum* does not require a reversal because the intent requirements will always be met in a case involving a price-fixing conspiracy. If a defendant intends to fix prices, he necessarily intends to restrain trade." *Id.* at 545.

58. *Id.* at 546-48. Apparently equating "knowing participation" with "intent to agree," the court considered "whether there [was] substantial evidence for the district court's finding on the ultimate factual question of guilt." *Id.* at 546, citing United States v. Delerme, 457 F.2d 156, 160 (3d Cir. 1972). For a discussion of the legal standard of liability used by the Third Circuit in examining the sufficiency of the evidence, *see* notes 19-22 and accompanying text *supra*; text accompanying notes 66 & 86-87 *infra*.
and that he was in a position to stop Blue Coal’s price-fixing activity but did not do so.59

Further, the Gillen court distinguished Gypsum by concluding that Gypsum concerned whether the alleged exchange of price information having the market effect of fixing, stabilizing, and maintaining market prices constituted price-fixing, whereas Gillen concerned the proof necessary to sustain a conviction for an express agreement to fix market prices.60

Judge Adams, although concurring in the judgment of the court,61 rejected the majority’s reasoning on the issue of intent and would have held that, after Gypsum, a jury instruction on intent, when requested, is mandatory.62 According to Judge Adams the question of intent is a question of fact in all criminal antitrust cases, and, as such, “cannot be taken from the trier of fact through reliance on a legal presumption.”63 Judge Adams concluded, however, that the lack of such a jury instruction was harmless error in this case since he was satisfied “that the defendant [had] a rudimentary awareness of economic cause and effect” tantamount to knowledge of probable anticompetitive consequences of his actions.64

59. 599 F.2d at 546. The court affirmed the district court’s findings and its application of the “knowing participation” standard of corporate director responsibility under Wise. Id. The Third Circuit noted that Gillen’s opportunity to halt the conspiracy was crucial to sustain his liability, stating that “[w]hen a company president has knowledge that his company is involved in a price-fixing conspiracy and takes no action to stop it, he may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates.” Id. at 547, citing United States v. Wise, 370 U.S. 405 (1962). For a discussion of Wise, see notes 41-43 and accompanying text supra. For a discussion of the impact of the Gypsum decision on the Wise standard, see notes 88-89 and accompanying text infra.

60. See 599 F.2d at 543, note 56 supra.

61. 599 F.2d at 548, 551 (Adams, J., concurring).

62. Id. at 548 (Adams, J., concurring). Noting the Supreme Court’s express inclusion of intent to effectuate the object of the conspiracy as an element of a criminal antitrust violation, and further noting the Court’s unwillingness to accept strict liability in the antitrust context, Judge Adams concluded that the majority’s “stance [in Gillen] cannot be squared with the explicit conclusion arrived at in Gypsum.” Id., citing United States v. United States Gypsum Co., 438 U.S. at 435-36.

63. 599 F.2d at 548-50 (Adams, J., concurring). Judge Adams maintained that Gypsum “clarified an unsettled area of [antitrust] law” and overruled those cases which had developed from Patten. Id. He observed that: Patten had been regarded, first, as negating a requirement of specific intent in criminal antitrust cases. Indeed, it had been thought, as the district court’s jury charge in Gypsum attests, that no intent whatever need be established in criminal antitrust cases when it is shown that the defendant’s conduct had anticompetitive effects. Patten has also been cited for the proposition that it may be conclusively presumed that a defendant intends the necessary and direct consequences of his acts. Neither of these interpretations of Patten would appear to survive Gypsum intact. The first—that proof of specific intent is not required—now applies only to cases where anticompetitive effects have been demonstrated. The second—that a defendant may be conclusively presumed to intend the necessary consequences of his acts—has been discarded altogether.

599 F.2d at 549 (Adams, J., concurring) (citations omitted). For a discussion of Patten, see notes 19-23 and accompanying text supra. For an analysis of the Third Circuit’s presumption of intent to effectuate the object of the conspiracy in per se cases, see notes 65-66, 86-87 and accompanying text infra.

64. 599 F.2d at 550 (Adams, J., concurring).
Gillen stands for the proposition that a defendant may be convicted of a section 1 offense without a finding that he knew, at the time of his participation, that anticompetitive effects would probably result from the conspiracy.65 This holding that proof of "knowing participation" in a per se illegal agreement is sufficient to sustain guilt is, however, based upon the apparently discarded Patten test concerning the intent element of criminal antitrust liability.66 In contrast, the Supreme Court in Gypsum recently required more than the "intent to agree"—i.e., scienter, some level of "intent to effectuate the object of the conspiracy," is required.68

Furthermore, Gypsum specifically states that, even when anticompetitive effects are shown, a defendant, to be liable, must at least have had knowledge of the probable consequences of his acts in furtherance of the alleged conspiracy.69 The thrust of the Third Circuit's Gillen opinion, however, is that a member of a per se illegal combination cannot be heard to say that he did not know the probable anticompetitive effects of his acts because, by definition, a per se offense necessarily has anticompetitive effects within the meaning of section 1.70

As historically developed, the per se presumption simply obviates the need to demonstrate anticompetitive effects.71 This presumption of an anticompetitive market effect, however, bears no relation to the element of intent to effectuate the object of the conspiracy.72 The Third Circuit, how-

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65. See notes 55-57 and accompanying text supra. This presumption of intent to restrain trade was historically applied in both civil and criminal cases. See generally United States v. United States Gypsum Co., 438 U.S. at 436 n.13, 445 n.21, 446-47 n.22. For a discussion of prosecution policy under the Sherman Act, see Kramer, Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy, 48 CLE. L. J. 530 (1966).

66. See notes 56-59 and accompanying text supra. For a discussion of the Patten test and how the Gypsum decision has apparently limited it, see notes 19-23 & 63 and accompanying text supra; notes 67-68 and accompanying text infra.

67. See notes 44-51 and accompanying text supra. The Court in Gypsum declared: "[W]e conclude that the criminal offenses defined by the Sherman Act should be construed as including intent as an element." 438 U.S. at 443. "Our discussion here focuses only on [the intent to effectuate the object of the conspiracy]." Id. at 443 n.20. It is submitted that Gypsum signaled a change in the elements of a criminal antitrust offense in order to draw a legal distinction between criminal and civil offenses as well as between their respective burdens of proof. See 438 U.S. at 436 n.13. For a discussion of the parallel historical development of criminal and civil antitrust offenses prior to Gypsum, see id. at 446-47 n.22.

68. 438 U.S. at 443 n.20. See note 47 and accompanying text supra.

69. See notes 51-52 and accompanying text supra.

70. 599 F.2d at 545. The court declared that "[t]he act of agreeing to fix prices is in itself illegal; the criminal act is the agreement." Id.

71. See notes 24-36 and accompanying text supra.

72. See United States v. Foley, 598 F.2d 1323, 1335 n.13. (4th Cir.), cert. denied, 444 U.S. 1082 (1979). The Fourth Circuit noted that Gypsum . . . involved a rule of reason offense rather than a per se violation of section 1 such as the price-fixing here alleged. While the Court's analysis is in part dependent on the relative lack of notice provided by rule of reason offenses, the rule announced [in Gypsum] is framed in terms of all § 1 criminal prosecutions.

Id. (emphasis added).

The presumption of a market effect in per se cases emanated from an era in which the prosecution was merely required to assert that a defendant intended the necessary and direct consequences of his acts. See notes 19-40 and accompanying text supra. Simply a tool of judicial
ever, in presuming that a defendant intends the necessary consequences of his per se illegal conduct,\textsuperscript{73} has extended the per se presumption of anticompetitive market effects and has contravened the Supreme Court’s holding that intent cannot be presumed in a criminal antitrust case.\textsuperscript{74}

It is submitted that it is unrealistic to assume that, because per se offenses are anticompetitive as a matter of law, a defendant necessarily has an awareness of the anticompetitive effect.\textsuperscript{75} Significantly, the Supreme Court itself has been inconsistent in delimiting the conduct that constitutes a per se offense,\textsuperscript{76} only recently overruling its prior characterization of vertical ter-

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\textsuperscript{73} See United States v. United States Gypsum Co., 438 U.S. at 435, 446. The Supreme Court in \textit{Gypsum} held that the defendant’s state of mind or intent is an element of a criminal antitrust offense and, as such, cannot be taken from the trier of fact through reliance on a legal presumption. \textit{Id.} at 435. In so holding, the Court referred to the presumption of an intent to produce an anticompetitive effect based on proof of an effect on prices. \textit{Id.} It is submitted that the fact that the anticompetitive effect is conclusively presumed in per se offenses is irrelevant to the decision whether or not to apply the \textit{Gypsum} instruction on intent.

The Court in \textit{Gypsum} expressed concern that defendants were unable to argue that they did not have an intent to produce an anticompetitive effect. \textit{Id.} at 438. The Court noted that “a conclusive presumption of intent which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.” \textit{Id.} at 446, quoting Morissette v. United States, 342 U.S. 246, 274-75 (1952). \textit{Accord}, Sandstrom v. Montana, 442 U.S. 510, 522-26 (1979).

In \textit{Sandstrom}, the Court expressly reaffirmed \textit{Gypsum}, holding that, because the jury may have interpreted the instruction that a defendant is presumed to intend the necessary and direct consequences of his acts as conclusive of the issue whether the defendant acted knowingly, the jury instruction violated the due process requirement that the state prove every element of a criminal offense. \textit{Id.} at 524. \textit{See also} Mulaney v. Wilbur, 421 U.S. 684 (1975) (instruction unconstitutionally shifted burden of proving element of criminal offense to defendant).

\textsuperscript{74} See notes 76-78 and accompanying text infra. \textit{But see} United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979) (Third Circuit expressly upheld holding in \textit{Gillet}). In \textit{Continental}, the defendants agreed to offer their products to their respective manufacturer purchasers at specified prices, and it was reasonable to conclude that the defendants, at least tacitly, agreed that the actual prices charged would vary in only the slightest degree. \textit{Id.} at 447-48. In such an agreement, it is suggested, the defendants have agreed, and may by inference be held to intend, not to compete on the basis of price. As this inference appears overwhelming in \textit{Continental}, it is submitted that the error committed by the Third Circuit in failing to apply the intent standard required by \textit{Gypsum} was harmless. \textit{See id.} at 488 (Hunter, J., concurring). It is contended that \textit{Gillet}, however, highlights that problem which the \textit{Gypsum} Court sought to remedy and that the Third Circuit’s failure to apply the \textit{Gypsum} intent standard was not necessarily harmless in \textit{Gillet}. It is submitted that a \textit{Gypsum}-type instruction, requiring the jury to find that, at the time Gillen himself acted, he had subjective knowledge that his acts would probably produce anticompetitive effects, might have resulted in Gillen’s acquittal. \textit{See notes} 76-83 and accompanying text infra. For a discussion of Gillen’s testimony as to his involvement in the conspiracy, see note 8 supra.

\textsuperscript{75} See notes 37-38 and accompanying text supra. Prior to \textit{Gypsum}, agreements to exchange current and/or future price information had been held to be in violation of § 1 without clear
ritorial restrictions as per se violations of section 1.77 Moreover, some per se offenses are not as clearly anticompetitive as price fixing—a per se offense, in Topco, who had agreed to honor exclusive territory rights for the purpose of increasing competition between Topco and large chain stores, did not realize the anticompetitive effect of his conduct.79 Notwithstanding the likelihood that a defendant in a Topco conspiracy would have a "rudimentary knowledge" of the intradefendant anticompetitive effect of his conduct, Gypsum mandates that the prosecution prove, and the trier of fact find, subjective awareness or knowledge specific to each defendant.80 In excerpting per se offenses from the Gypsum requirement of intent, the Third Circuit appears to have read the Supreme Court's decision out of context.81 The Supreme Court's distinction between per se offenses and

proof of an anticompetitive effect. See, e.g., United States v. Container Corp. of America, 393 U.S. 333 (1969) (tacit agreement to readily exchange current prices charged violates §1 irrespective of whether it unreasonably restrained trade); Sugar Inst. v. United States, 297 U.S. 553 (1936) (agreement requiring adherence to price increase is per se violative of §1); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (agreement to exchange detailed price information where defendant's purpose was to raise prices is violative of §1). The Court has held, however, in factually analogous situations, that such exchanges are not violative of §1 unless a clear showing of an unreasonable restraint of trade is made. See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925) (agreement to exchange price information resulting in a stabilization of market prices is not a restraint of trade within §1). It is submitted that, until judicially determined, it is not always clear whether particular conduct constitutes a per se violation. See Flittie, supra note 30, at 530. See also C. RAYSEN & D. TURNER, ANTITRUST POLICY 142-43 (1959).

77. See notes 37-38 and accompanying text supra. For a detailed discussion of the abandonment of the per se rule against vertical territorial restrictions, see Flittie, supra note 18, at 829-39. See also note 30 supra.

78. So, too, some price-fixing activity may not always be clearly anticompetitive to the defendant-perpetrator. In Socony-Vacuum, for example, the defendants, in response to a market destabilized in terms of price, agreed to purchase the excess supply responsible for the destabilization. 310 U.S. at 170-210. It is submitted that defendants in this type of situation, acting to rectify market instability negatively impacting upon their business interests, cannot fairly be presumed in every case to have an awareness of the anticompetitive effects of their actions. Further, in per se price-fixing situations similar to that in Socony-Vacuum, the defendants continue to compete in terms of the market price they will ultimately charge. Id. at 218-19. It is submitted that the Court's response in Socony-Vacuum that defendants' purpose was to stabilize prices does not focus on the individual defendant's knowledge of the probable anticompetitive effects of his acts.

79. See also notes 32-33 & 76 and accompanying text supra.

80. See notes 50-52 and accompanying text supra. As the Gypsum Court explicitly noted, the fundamental difference between criminal liability and civil liability is that a criminal defendant's intent must be proven and not simply presumed. See 438 U.S. at 432; note 74 supra.

81. See 438 U.S. at 440-41. The passage in question reads as follows:

[T]he same basic concerns which are manifested in our general requirement of mens rea in criminal statutes . . . are at least equally salient in the antitrust context.

Close attention to the type of conduct regulated by the Sherman Act buttresses this conclusion. With certain exceptions for conduct regarded as per se illegal because of its unquestionably anticompetitive effects, see, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.

438 U.S. at 440-41. It is submitted that the Court's comparison of conduct regulated by the Sherman Act merely "buttresses" the Court's conclusion that intent must be inquired into in criminal antitrust cases, and does not purport to make any conclusive statement concerning per se illegal conduct. See id. at 440.
borderline violations was made, it is submitted, simply to emphasize that anticompetitive effects are not always clear to those engaging in conduct resulting in such effects.\textsuperscript{82} The Court did not suggest that intent instructions could be omitted in per se cases nor that a defendant's state of mind could be presumed.\textsuperscript{83}

The conclusive presumption in \textit{Gillen}, emanating from the per se illegal agreement, relieves the government of the burden of proving intent to effectuate the object of the conspiracy which is required by \textit{Gypsum}.\textsuperscript{84} In light of the fact that the defendant now faces a felony charge for section 1 violations, this presumption of intent apparently contravenes the fundamental constitutional requirement that every element of a criminal offense be proven beyond a reasonable doubt.\textsuperscript{85}

More specifically, in finding \textit{Gillen} liable as a director based on his "knowing participation,"\textsuperscript{86} the Third Circuit effectively convicted him simply for what it found to be his intent to agree.\textsuperscript{87} This standard for corporate directors' liability enunciated in \textit{Wise}—that a conviction is sustainable upon proof that a director has knowledge "be he one who authorizes, orders, or

\textsuperscript{82} See 438 U.S. at 441. See also notes 75-79 and accompanying text supra.

\textsuperscript{83} For the \textit{Gypsum} Court's discussion of intent, see notes 44-52 and accompanying text supra.

\textsuperscript{84} See note 57 and accompanying text supra. As evaluated by the \textit{Gillen} court, knowingly participating in, authorizing, or helping in a per se illegal conspiracy is sufficient to sustain criminal liability. 599 F.2d at 546-47. Thus, the Third Circuit currently holds that a defendant need not have any particular intent that his acts be in furtherance of the presumed anticompetitive effects. \textit{Id}. at 545. Accord, \textit{United States v. Continental Group, Inc.}, 603 F.2d 444, 462 (3d Cir. 1979). But see \textit{United States v. United States Gypsum Co.}, 438 U.S. at 446, citing Morissette v. United States, 342 U.S. 246, 274-75 (1952); note 74 supra.

\textsuperscript{85} See 438 U.S. at 442; notes 73-74 and accompanying text supra; Petitioner's Brief for Certiorari at 8, \textit{United States v. Gillen}, 444 U.S. 866 (1979). Clearly, \textit{Gypsum} negates any reading of the Sherman Act as primarily regulatory in nature. 438 U.S. at 442. Generally, regulatory statutes have been interpreted to exclude proof of an intent to further the object of a conspiracy as an element of the offense. \textit{Id}. The \textit{Gypsum} Court stated: "[W]hile in certain cases we have imputed a regulatory purpose to Congress in choosing to employ criminal sanctions, the availability of a range of nonpenal alternatives to the criminal sanction of the Sherman Act negates the imputation of any such purpose to Congress in the instant context." \textit{Id}. (citations omitted). The Court distinguished § 1 violations from statutes that clearly have regulatory purposes. \textit{Id}. at 436-38, citing \textit{Dennis} v. United States, 341 U.S. 494, 500 (1951). For examples of such regulatory statutes, see, e.g., \textit{United States v. Freed}, 401 U.S. 601, 613 (1971) (Brennan, J., concurring) (non-mens rea offense appropriate where defendant violates National Firearms Act by possessing unregistered hand grenades); \textit{United States v. Dotterweich}, 320 U.S. 277 (1943) (defendant held to be strictly accountable and vicariously liable for violations of the Food and Drug Act by shipping unadulterated and misbranded drugs); \textit{United States v. Balint}, 258 U.S. 250, 251-53 (1922) (unlawful sale of drugs in violation of the Narcotic Act).

The \textit{Gypsum} Court further noted that statutes in which the element of intent is not expressly included by Congress will nevertheless be read with an interpretative presumption that mens rea is required. \textit{Id}. Furthermore, the Court suggested that mere congressional omission of intent as an expressed element is not a sufficient justification for strict liability criminal offenses. \textit{Id}. at 437-38. For a discussion of the constitutional invalidity of presuming the elements of an offense, see notes 73-74 and accompanying text supra.

\textsuperscript{86} See notes 8 & 55-59 and accompanying text supra.

\textsuperscript{87} See notes 56-57 and accompanying text supra.
helps perpetrate the crime"—was, it is submitted, implicitly overruled by the Gypsum decision.89

To conclude, the Third Circuit in Gillen, in construing Gypsum as excepting per se violations from its requirement of an instruction on intent in criminal antitrust violations, does not appear to have sufficiently heeded the Gypsum Court's concern that a defendant does not always have a subjective awareness of the necessary and direct legal consequences of his acts.90 Although the requirement of an instruction on intent may leave the outcome of most per se cases unchanged, it is submitted that susceptibility to a felony conviction, with its corresponding sanction of up to three years imprisonment,91 is sufficient to warrant treating the question of a defendant's intent as one of fact rather than one of law.92 While a conclusive presumption that some conduct always has anticompetitive effects exists, it is suggested that a further conclusive presumption, making irrelevant any inquiry into the subjective state of mind of each defendant in a per se case, cannot stand after Gypsum.93

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88. 370 U.S. at 416. For a brief discussion of Wise, see notes 41-43 and accompanying text supra.

89. Because it required a showing of intent to effectuate the object of the conspiracy, rather than simply intent to agree, to prove § 1 criminal violations, the Gypsum decision clearly cannot sustain a conviction of a director upon evidence that he merely helped in an agreement which produced anticompetitive effects. See 438 U.S. at 436-43. In fact, the Gypsum Court explicitly juxtaposed the Dotterweich standard of liability upon which the Wise Court relied with § 1 Sherman Act offenses in general. Id. at 437-38. See notes 42-43 and accompanying text supra. In explaining past Court holdings which indicated that a criminal conviction under § 1 could be sustained upon a Dotterweich or Wise showing, the Court noted that pre-Gypsum decisions had not construed the Sherman Act as if it were primarily a criminal statute. Id. at 439, quoting Appalachian Coal., Inc. v. United States, 288 U.S. 344, 359-60 (1933). For a discussion of the intermingling of proofs for both civil and criminal violations, see 438 U.S. at 446-47 n.22. Additionally, the Court explicitly rejected any notion of criminal liability based upon theories of negligence or even recklessness. Id. at 444. In so doing, it implicitly reversed the Wise standard of liability which itself was predicated upon the inapposite regulatory cases, such as Dotterweich, which were distinguished by the Gypsum Court. See id. at 437-38, note 85 supra.

90. See 438 U.S. at 438-43. For a discussion of the rationale of the per se rule and its consequent undermining of the Gypsum holding, see notes 25-26, 61-63 & 71-74 and accompanying text supra.

91. For a discussion of the recent upgrading of the penalties for § 1 violations, see note 13 supra.

92. See United States v. United States Gypsum Co., 438 U.S. at 436-46. Other concerns expressed by the Gypsum Court included 1) the use of conclusive presumptions which preclude the defendant from introducing evidence to rebut the presumption; 2) the broad and imprecise language of the Act which does not clearly define the conduct it proscribes; 3) the existing rules of law which allow criminal convictions on a coextensive basis with civil violations; 4) the available array of noncriminal sanctions for, and the upgrading to felony status of, antitrust violations; and 5) a general disfavoring of the non-mens rea approach to criminal antitrust law. Id. It is submitted that these concerns are equally salient in per se cases.

93. See notes 72-74 and accompanying text supra.