Volume 82 | Issue 2 Article 10

December 1979

Gypsum Intent and Felonious Conspiracies under Section 1 of the Sherman Act: U.S. v. Gillen

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GYPSUM INTENT AND FELONIOUS CONSPIRACIES UNDER SECTION 1 OF THE SHERMAN ACT: *U.S. v. GILLEN*

Cases involving violations of section 1 of the Sherman Act[1] have acquired a new dimension since the United States Supreme Court's decision of *United States v. United States Gypsum.*[2] The Supreme Court held in *Gypsum* that ". . . the criminal offenses defined by the Sherman Act should be construed as including intent as an element."[3] Post *Gypsum* convictions under section 1 of the Sherman Act invariably have been appealed where intent was not incorporated into the jury instructions as an essential element of the offense.[4] In reality, however, post *Gypsum* criminal antitrust cases have not substantively or procedurally changed much in the wake of the Supreme Court's apparent mandate requiring the government to prove that the accused possessed knowledge of the probable consequences of his acts.[5] *United States v. Gillen,* having held that intent is not an element of criminal antitrust offenses classified as illegal per se, is illustrative of the confusion that has followed the *Gypsum* decision.[6]

Thomas J. Gillen was among a group charged with conspiring to fix, stabilize, and maintain prices of anthracite coal in unreasonable restraint of interstate trade and commerce in violation of section 1 of the Sherman Act during the period from 1966 to 1973.[7] The defendants were engaged in the mining and processing of anthracite coal and virtually controlled the entire national anthracite coal market.[8] The Anthracite Producers Advisory Board, composed of representatives of the major producers, met monthly from

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[1] 15 U.S.C. § 1 (1976).

[2] 438 U.S. 422 (1978).

[3] *Id.* at 443.

[4] *See, e.g.,* United States v. Brighton Bldg. & Maintenance, 598 F.2d 1101 (7th Cir. 1979); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979). These cases deal with antitrust activity which, prior to *Gypsum,* would have undoubtedly been regarded illegal per se.

[5] Prior to the *Gypsum* holding, jury instructions generally included a conclusive presumption of intent upon a showing of a conspiracy to fix prices. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), and specifically, United States v. Griffith, 334 U.S. 100, 105 (1948).

[6] 599 F.2d 541 (3rd Cir. 1979).

[7] *Id.* at 541-42.

[8] *Id.* at 542.

1961 through November of 1973 to consider the total anthracite production quota as provided in the federally authorized Production Control Plan for the Anthracite Industry.[9] After these "authorized" meetings, these same persons would discuss prices four or five times a year, and reach a consensus as to current price as well as contemplated future changes in price.[10]

After tentative agreements were reached, the members of the Board would secure approval of the planned price activity from their superiors. The prices were then circulated via "anthracite price circulars".[11] There was ample evidence that defendant Gillen knew of, and in fact approved the price agreements.[12] Gillen was tried in United States District Court for the Middle District of Pennsylvania and found guilty of conspiring to fix prices in violation of section 1 of the Sherman Act.[13]

Gillen appealed his conviction to the United States Court of Appeals for the Third Circuit urging that (1) the district court erred in not making specific findings of intent, and (2) that the evidence was insufficient to support the verdict.[14] The court of appeals affirmed the conviction in holding (1) that the offense committed by Gillen was illegal per se and as a result no showing of intent was required, and (2) that the evidence did support the verdict.[15] It is the purpose of this article to examine the court of appeals, holding that intent *was not* an element of the purported violation of the Sherman Act. With respect to this holding, the court of appeals stated:

> Thus in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy.[16]

It is this language in particular, and similar language in other post *Gypsum* cases which must be reconciled with the *Gypsum* holding.

In developing this analysis it is necessary to (1) briefly develop

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[9] *Id.*

[10] *Id.* These "after meetings" were outside the federally authorized activities of the Board.

[11] *Id.*

[12] *Id.* at 543.

[13] 458 F. Supp. 887 (M.D. Pa. 1978).

[14] 599 F.2d 541 (3rd Cir. 1979).

[15] *Id.* at 548.

[16] *Id.* at 545.

the history of and the purpose for the per se doctrine, (2) review the recent amendment to section 1 of the Sherman Act and evaluate its significance to the present issue, and (3) evaluate *Gillen* in light of this analysis and the Supreme Court's holding in *Gypsum*.

Development of the Per Se Doctrine

Due to the Sherman Act's lack of specificity,[17] any analysis of the expansive field of antitrust is necessarily difficult, and for this reason, the courts, for the most part, have been uninhibited in formulating the scope of antitrust enforcement. The resulting case law, at least with respect to section 1 violations, is not particularly helpful in forecasting a court's decision in a given set of circumstances.[18] While the Sherman Act does not facilitate predictability, it has fostered the protection of unfettered competition through its inherent flexibility.[19]

The courts, responding to Congress' failure to delineate the activities outlawed by the Sherman Act, came to rely heavily on the rule of reason.[20] The rule of reason is best understood when viewed on a continuum. One end of that continuum comprises those activities clearly not prohibited by the Act.[21] On the other end of the continuum lie those activities, which because of "their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. . . ."[22] In between these extreme classifications of activity lie those activities subject to the rule of reason, i.e., a weighing of "all of the circumstances of a case in deciding whether a restrictive

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[17] *E.g.*, 15 U.S.C. § 1 (1976), reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[18] *See generally* Comment, *United States v. United States Gypsum Co.: Putting a Lid on Container*, 45 BROOKLYN L. REV. 417, 422-24 (1979). Many factors such as market structure, market power, the characteristics of the good or service in question, etc., play an important role in the courts' disposition of antitrust cases.

[19] *Id.* at 422.

[20] The rule of reason, as it pertains to antitrust litigation, was formulated in Standard Oil Co. v. United States, 221 U.S. 1 (1911). *See* Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977), for a good discussion of the Supreme Court's current viewpoint on *rule of reason* analysis.

[21] Sullivan has said, "Congress could not have meant literally to ban every contract which in any sense restrains trade. Virtually every contract does this to some extent." L. SULLIVAN, ANTITRUST 165 (1976 ed.).

[22] Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

practice should be prohibited as imposing an unreasonable restraint on competition."[23] The distinguishing point between per se rules and the rule of reason is that application or formulation of a per se rule obviates the need for future litigation regarding that particular practice. More simply, formulation or application of a per se rule will "require the Court to make broad generalizations about the social utility of particular commercial practices."[24] As a result, "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[25] Rule of reason analysis, on the other hand, encompasses the balancing process alluded to above.

Per se illegality was firmly established in the field of antitrust law in the Supreme Court's decision in *United States v. Trenton Potteries.*[26] The Court, while addressing the issue of price-fixing, stated that, "[a]greements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without necessity of minute inquiry whether a particular price is reasonable or unreasonable. . . ."[27]

Any questions left unsettled by *Trenton Potteries* on the issue of per se illegality[28] were answered by the United States Supreme Court in *United States v. Socony-Vacuum Oil Co.*[29] The Court held in *Socony* that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stablizing the price of a commodity in interstate commerce is illegal per se."[30]

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[23] 433 U.S. 36, 49 (1977).

[24] *Id.* at n.16.

[25] 433 U.S. at 49-50.

[26] 273 U.S. 392 (1927). Corporations engaged in the manufacturing of vitreous pottery and controlling 82% of the market formed a cartel which had the effect of fixing prices and limiting sales.

[27] *Id.* at 397.

[28] Two such questions left open by *Trenton Potteries* were (1) could the government sustain its burden of proof by merely showing an agreement to fix prices, or must they also prove that those in agreement possessed substantial market power to effect prices, and (2) whether alternative social gains may be metered off against the harm to competition. *See* L. SULLIVAN, ANTITRUST 183-84 (1976 ed.).

[29] 310 U.S. 150 (1940). Several major oil companies entered a concerted program aimed at controlling the supply of gasoline in an attempt to stabilize its price.

[30] *Id.* at 223. The court points out by footnote that the combination alone is illegal, without a showing of purpose and effect.

The reasoning advanced in the *Trenton Potteries* case, as articulated by *Socony,* has effectively dominated antitrust law dealing with price-fixing for the past half-century. These two cases were used to support the court of appeals holding in the *Gillen* case.[31]

Recently, through passage of the Antitrust Procedures and Penalties Act,[32] Congress substantially increased the penalties levied against Sherman Act violators. An analysis of this amendment to the Sherman Act will suggest that the per se rule should no longer apply to criminal prosecutions under its terms.[33]

The Antitrust Procedures and Penalties Act of 1974

The Antitrust Procedures and Penalties Act made drastic changes in the penalties levied against those found in violation of the antitrust laws. The Act (1) reclassified violations of the Sherman Act from misdemeanors to felonies, (2) increased the maximum fines against violators from $50,000 to $1 million for corporations and $100,000 for any other person, and (3) increased the possible prison term from one year to three years.[34] Congress' motive for enacting this portion of the amendment was to "beef-up" the consequences of antitrust activity so as to deter such activity.[35] The Act clearly manifests Congress' increasing disfavor with antitrust violations.[36]

Because of these more stringent criminal sanctions, those prosecuted for criminal antitrust violations should be afforded greater protection. The United States Supreme Court recently agreed. In *United States v. United States Gypsum,* the Court, referring to the Antitrust Procedures and Penalties Act, stated, "The severity of these sanctions provides further support for our conclusion that the

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[31] 599 F.2d 541 (3rd Cir. 1979).

[32] 15 U.S.C.A. § 1 (1976).

[33] *See* text *infra,* n.31-45.

[34] *Id.* In addition to increasing the penalties for Sherman Act violations, the Antitrust Procedures and Penalties Act made considerable changes in the much used consent decree process and the appellate process as it concerns antitrust litigation. *See generally,* 93rd Cong., 2d Sess., U.S. CODE CONG. & AD. NEWS 1962.

[35] In the words of one Senator: "This increase is designed to deter those who might conspire to fix prices or to monopolize a given market." 120 CONG. REC. 36340 (1974).

[36] Id. at 36337-46.

Sherman Act should not be construed as creating strict-liability crimes."[37]

This recent amendment to the Sherman Act and its subsequent interpretation in *Gypsum* evidence the need to reevaluate the proper role of mens rea in criminal prosecutions under the Act.[38] The following two reasons would require greater deference to mens rea in criminal prosecutions under the antitrust laws, and therefore, would form the basis of such a reevaluation.

The reclassification of criminal antitrust violations from misdemeanors to felonies brings such violations in parity with other felonious conspiracies against the United States. Thus, absent strong public policy reasons to substantiate the discrepancy, those prosecuted under the antitrust laws should be given the same protection as those prosecuted under 18 U.S.C. section 371. 18 U.S.C. section 371 makes it illegal to conspire to commit an offense against, or to defraud, the United States, as compared to 15 U.S.C. section 1, which deals specifically with conspiracies in restraint of trade.

A comparison of the respective sanctions of the two United States Code sections further supports the analogy. Violations of 18 U.S.C. section 371 subject the convicted to not more than $10,000 in fines and not more than five years in prison. Persons convicted of conspiracies under the Sherman Act, as a result of the recent amendment, are subjected to not more than $100,000 in fines and not more than three years in prison. Although Sherman Act violators are subjected to two less years in prison, they stand to be fined tenfold the amount of those committing general conspiracy offenses. Arguably then, since those being prosecuted under the respective acts may suffer equally severe consequences, they should be afforded equal protection[39] from those consequences.

It is well settled that in prosecutions under 18 U.S.C. section 371, the government must prove that each defendant charged with

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[37] 438 U.S. 422, 442 (1978). It should be noted that the increased penalties of the 1974 amendment did not apply to the *Gypsum* case. This is significant in that the Court saw a need to grant greater protection to those prosecuted under the Sherman Act even under the pre-1974 penalties.

[38] United States v. Nu-Phonics, 433 F. Supp. 1006, 1015 (E.D. Mich. 1977).

[39] Equal protection is used here in the general sense and is not to be confused with "equal protection" as it relates to the 14th Amendment to the United States Constitution.

the conspiracy had the criminal intent necessary to meet the requirements set forth in the substantive offense.[40] Following this analogy to its necessary conclusion, the government should have the burden of proving that those prosecuted for criminal violations of section 1 of the Sherman Act had a specific intent to restrain trade.

But, the Supreme Court in *Gypsum* directly rejected the suggestion that specific intent must be shown to sustain *misdemeanor* convictions under the antitrust laws.[41] However, the 1974 amendment did not apply to the facts of that case; hence, it cannot be said that the *Gypsum* holding was intended to limit the degree of intent required for *felony* convictions under the Act.

The contrary view is that judicial economy may be one justification for labeling certain antitrust activities per se illegal.[42] As a result, judicial economy may be a valid public policy reason for allowing the per se rule to maintain its current state in criminal antitrust litigation. It has been said that those engaged in a conspiracy which necessarily and directly restrains trade "must be held to have intended the necessary and direct consequences of their acts. . . ."[43] By allowing these conclusive presumptions of intent, the government's burden of proof has been lighter and this has facilitated the fight against restraints of trade. However, while it might be argued that saddling the government with proving the "elusive" element of mental state, or intent, would unnecessarily burden them and hinder their ability to bring successful criminal prosecutions, this is not the case. By use of inferences,[44] which are usually easily drawn in cases of blatant violations, the government

[40] United States v. Young, 575 F.2d 828, 830 (10th Cir. 1978).

[41] 438 U.S. at 446. The court states: "A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome."

[42] *See, e.g.*, Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 50 n. 16 (1977).

[43] United States v. Patten, 226 U.S. 525, 543 (1919).

[44] Black's Law Dictionary notes that: "[a] 'presumption' and an 'inference' are not the same thing, a presumption being a deduction which the law requires a trier of facts to make, an inference being a deduction which the trier may or may not make, according to his own conclusions; a presumption is mandatory, an inference permissible." It is the *presumptions* of intent and not inferences on the issue of intent which the U.S. Supreme Court struck down in *Gypsum*.

may well meet its burden of proof, while at the same time affording the accused the requisite protection. The United States Supreme Court laid the base for this reasoning in *Gypsum* by (1) declaring all conclusive presumptions on the issue of intent illegal, and (2) by providing for proof of intent through "evidence and inferences drawn therefrom."[45]

In sum, a reevaluation of the role of mens rea in criminal antitrust litigation suggests the government should be required to prove the accused had a specific intent to restrain trade.[46] Judicial economy will not suffer substantially since the liberal use of inferences will lighten the otherwise heavy burden normally associated with proving criminal intent.

A second reason supporting the premise that specific intent should be a necessary element of all criminal antitrust offenses is found in the Sherman Act's very nature: its lack of specificity. Referring to the ambiguous language in the Sherman Act, it has been stated that "[a]ntitrust policy touches fields and boundaries which recede as you approach them and disappear each time you try to stake them out."[47] As a result of this ambiguity, some examinations of Sherman Act violations closely resemble the analysis used under the *void for vagueness* doctrine.[48] While the constitutionality of the Sherman Act is unquestioned here, the point is that since the defendants charged thereunder do not benefit from an *a priori* legislative determination of the acts considered unlawful, greater protection of these defendants, through proof of specific intent, is desirable. This position coincides with the traditional "fair notice" principle of criminal law that "conduct may not be treated as criminal unless it has been so defined by an authority

[45] 438 U.S. at 435.

[46] This increased burden of proof would apply only to *individuals* charged with *criminal* violations of the Sherman Act. The burden of proof in civil cases and in the prosecution of corporations would remain unchanged.

[47] Statement made by Thurmon Arnold as cited in S. Kadish, *Some Observations on the Use of Criminal Sanctions In Enforcing Economic Regulations,* 30 U. CHI. L. REV. 423, 427 (1963).

[48] The Sherman Act has previously been attacked for its vagueness in Nash v. United States, 229 U.S. 373, 376-78 (1913), but the Court, speaking through Justice Holmes, upheld the statute noting that the Act's indeterminate standards did not constitute a fatal constitutional objection. However, this factor (the Act's vagueness) has been deemed particularly relevant by those people charged with enforcing the Sherman Act's criminal and remedial sanctions. *See* United States v. U.S. Gypsum, 438 U.S. 422, 439 (1978).

having the institutional competence to do so before it has taken place."[49]

The Sherman Act's bare compliance with the "fair notice" doctrine, especially when considering the Act's severe criminal penalties, strongly supports the premise that specific intent should be an element of all criminal antitrust offenses.

United States v. Gillen

Despite the holding in *Gillen*[50] that intent need not be considered an element of per se violations of the Sherman Act as it relates to the Administrative Procedures and Penalties Act, the *Gillen* case must also be evaluated in view of the Supreme Court's decision in *United States v. United States Gypsum.*[51] This bifurcated analysis is required since the *Gypsum* decision dealt with a misdemeanor, and not a felony conviction.

Upon Gillen's assertion that his conviction be reversed due to the lower court's failure to make "specific findings of intent",[52] the Third Circuit held:

> Thus in price fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy.[53]

In addition to being erroneous, or undesirable, when viewed in light of the Administrative Procedures and Penalties Act, the *Gillen* holding also conflicts with the *Gypsum* decision.

The *Gillen* decision managed to circumvent the *Gypsum* holding in two separate ways. First, in distinguishing *Gypsum,* the Third Circuit stated that "[t]he Court did not intend any extraordinary change in the rules of law on price-fixing cases because, by its very citation of *Socony Vacuum,* the court acknowledged that price-fixing cases are an exception."[54] This is a very strained interpretation of the *Gypsum* holding, especially in view of that court's unequivocal statement that "[c]riminal offenses defined by the

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[49] H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79 (1968).
[50] 599 F.2d 541 (3rd Cir. 1979).
[51] 438 U.S. 422 (1978).
[52] 599 F.2d at 542.
[53] *Id.* at 545.
[54] 599 F.2d at 544.

Sherman Act should be construed as including intent as an element."[55]

The Supreme Court did not infer that *any* criminal anitrust offenses should be excused from their holding.[56] The *Gypsum* Court elicited their general disfavor for non-mens rea offenses, and applied this to the Sherman Act specifically when they stated, "We are unwilling to construe the Sherman Act as mandating a regime of strict-liability offenses."[57]

In holding that price-fixing cases were excluded from the *Gypsum* holding, the Third Circuit stated:

> We believe the Supreme Court's statement in *Gypsum* on intent was born out of a concern for borderline violations and was not meant to modify past precedent on price-fixing conspiracies. . . .[58]

In support of this statement the Third Circuit quoted an excerpt from the *Gypsum* opinion.[59] While an isolated reading of this quoted material might be read in accordance with the Third Circuit's conclusion, the impact of the *Gypsum* opinion, when read in its entirety, supports the contrary conclusion—that intent is an essential element of all criminal antitrust offenses, price-fixing conspiracies included.

For example, the Supreme Court stated in *Gypsum* that

> intent is an element of a criminal antitrust offense . . . and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent. . . .[60]

Verifying this statement the Court noted its general disfavor towards strict liability offenses. Going further, the *Gypsum* court states that the general requirement of mens rea in criminal statutes is "at least equally salient in the antitrust context."[61] It is

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[55] 438 U.S. at 443.

[56] 599 F.2d at 548. (Concurring opinion of Judge Adams).

[57] 438 U.S. at 436.

[58] 599 F.2d at 544.

[59] *Id.* at 544. The excerpt quoted described antitrust activity as behavior "difficult to distinguish from the gray zone of socially accepted and economically justifiable business conduct." In the process of describing this bulk of antitrust activity the Court distinguished, as an exception, that conduct "regarded as *per se* illegal because of its unquestionably anti-competitive (side) effects."

[60] 438 U.S. at 435.

[61] *Id.* at 440.

obvious that the Supreme Court had no intentions of excepting price-fixing conspiracies from their ultimate holding that intent must be shown to sustain criminal convictions under the antitrust laws.

A final point in support of this conclusion is found in the Supreme Court's dichotomy of civil and criminal prosecutions under the Sherman Act. The Court notes that their holding in the *Gypsum* case is not intended to *change* the rule that a civil violation may be proven without a showing of intent.[62] This evidences the Court's intention to *change* the law relating to criminal prosecution in general and controverts the Third Circuit's statement that "the Court did not intend any extraordinary change in the rules of law on price-fixing cases. . . ."[63]

Secondly, the Third Circuit managed to circumvent the *Gypsum* holding by directly contradicting that holding with respect to jury instructions in antitrust cases. *Gypsum* involved a set of jury instructions where the lower court allowed a conclusive presumption on the issue of intent.[64] The Supreme Court held that intent "cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent. . . ."[65] *Gypsum* held in short that intent was an element of criminal antitrust offenses and the presence or absence of this element must ultimately be decided by the jury.

In apparent contradiction, the *Gillen* court held that "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."[66] This is the very type of instruction that was ruled improper in the *Gypsum* case.[67]

In spite of the obvious deficiences in the *Gillen* decision, the Third Circuit probably reached the correct decision. The correct reasoning was espoused by Judge Adams, who disagreed totally

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[62] *Id.* at 436.

[63] 599 F.2d at 544.

[64] 438 U.S. at 430. The instructions stated in part: "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."

[65] 438 U.S. at 435.

[66] 599 F.2d at 545.

[67] *See* n.60, *supra.*

with the majority's reasoning on the intent issue yet concurred in the final decision. Judge Adams reasoned that the trial judge's failure "to make an explicit determination regarding intent did 'not affect the substantial rights of Gillen.' "[68] The trial court sat without knowledge of the *Gypsum* holding and Gillen's acts were so blatant that a reversal, where inferences on the issue of intent are so easily drawn, is unnecessary.

Judge Adams strongly supports the premise that intent is now an element of all criminal antitrust offenses, and further states his disagreement with the majority's approval of conclusive presumptions on the issue of intent in price-fixing cases.[69] Judge Adams' analysis and reasoning coincides with much of the analysis and reasoning appearing in this article.

Gillen, while being subjected to a gross misreading of the current state of the law as it relates to antitrust litigation, was not substantially prejudiced by the final decision of the Third Circuit. Gillen's attempt to perfect an appeal to the United States Supreme Court ended when the Supreme Court denied his application for a writ of certiorari.

Conclusion

While the *Gillen* case involved a misstatement of the law rather than an improper verdict, the premise that the government should be required to prove specific intent in all criminal antitrust cases remains intact. This premise is buttressed by the *Gypsum* holding and further by the severe consequences of the Administrative Procedures and Penalties Act of 1974. An analysis of the severe penalties which this Act levies against antitrust violators suggests that they be afforded greater protection in the way of making specific intent a required element. Finally, support is found for the premise in the very nature of the Sherman Act. Its bare compliance with the "fair notice" doctrine makes affording these defendants greater protection particularly desirable. In light of all this it is imperative that courts begin to redefine the role of mens rea in criminal antitrust litigation.

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[68] 599 F.2d at 548.
[69] *Id.* at 548-51.