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UNITED STATES GYPSUM: PRICE VERIFICATION:
CONTROLLING CIRCUMSTANCES OR
CONTROLLING PRICES

H. KENNETH KUDON†

I. INTRODUCTION

FOR MORE THAN HALF A CENTURY teachers and students of antitrust law, practitioners, and businessmen alike marched to the beat of the same drummer: price fixing is illegal “per se,” and, as such, it is inadvisable for businessmen to exchange price information with their competitors. Once in a while it appeared that the drummer had missed a beat,¹ but he always picked up the cadence — and the beat went on . . . until recently, when the United States Court of Appeals for the Third Circuit rendered what some consider to be an off-beat decision in *United States v. United States Gypsum Co.*²

In *Gypsum*, the Third Circuit reversed a jury verdict of section 1 Sherman Act violations by four gypsum manufacturers and certain officers of gypsum firms.³ Those defendants and nine others had been indicted by a federal grand jury for conspiring, among other things, to raise, fix, maintain and stabilize the prices of gypsum board or “wall board” as it is commonly known.⁴

The wall board industry is oligopolistic; the corporate appellants together account for more than seventy-five percent of national wall board sales.⁵ Wall board has replaced plaster as the principal component of interior walls in buildings.⁶ It was established at trial that the product was fairly standardized in quality and appearance, and that demand was inelastic with respect to price.⁷ Accordingly,

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1. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

2. 550 F.2d 115 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977).

3. 550 F.2d at 117-18. Section one of the Sherman Act reads in pertinent 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.” 15 U.S.C. § 1 (1976).

4. 550 F.2d at 117.

5. *Id.*

6. *Id.*

7. *Id.*

price was the dominant factor in the buyers' decisions to purchase the product.⁸

The Government offered proof at trial that the defendants had used numerous methods to fix prices in violation of the Sherman Act.⁹ One of these alleged methods was an exchange of price information pursuant to which an official of one company would verify a competitor's pending price offer to a specific customer by telephoning an official of the competitor.¹⁰ The defendants conceded the existence of such calls during the statute of limitations period, but asserted that they were for the lawful purpose of ensuring compliance with the Robinson-Patman Price Discrimination Act (Robinson-Patman Act),¹¹ which prohibits sellers from discriminating in price to different purchasers of the same commodity. The defendants argued that the verifications were intended to establish the section 2(b) Robinson-Patman Act defense which excuses discriminatory price offerings where the "lower price . . . was made in good faith to meet an equally low price of a competitor . . ."¹²

The Government presented evidence that during the period when these exchanges took place, prices rose and remained stable notwithstanding overcapacity conditions in the industry.¹³ The trial judge charged that if the jury found the appellants' telephone verifications had the effect of stabilizing prices, the defendants would be guilty under the Sherman Act, and the purpose for the verifications, such as promoting compliance with the Robinson-Patman Act was irrelevant.¹⁴ The Third Circuit reversed the trial court, and held that the jury was not properly apprised that "controlling circumstances" can exempt price information ex-

8. *Id.* In the words of the Third Circuit, "[b]ecause of the homogeneity of the different brands, a buyer's decision to purchase one particular brand is generally based on price. Price discounts and changes in credit terms are the most important form of competition in the industry." *Id.*

9. *Id.* at 118, 120.

10. *Id.* at 120. The court stated: "The Government contends that the purpose of verification was to enable competitors to stabilize prices and 'police' agreed-upon increases, that the calls involved broad discussions of present and future pricing policies, that the appellants verified daily, and that they continued to do so until 1973." *Id.*

11. *Id.* at 121, citing the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13c, 21a (1976).

12. 550 F.2d at 121, quoting 15 U.S.C. § 13(b) (1976). The defendants claimed that they had three choices: (1) offer the reduced price on the basis of the purchaser's unconfirmed report and risk Robinson-Patman liability; (2) forego the price cut and risk losing the sale; or (3) call the competitor, verify his offer, and establish a section 2(b) defense to any Robinson-Patman charge concerning the price cut. 550 F.2d at 122.

13. 550 F.2d at 127.

14. See *id.* at 120-21, 126-27.

changes from the proscriptions of section 1 of the Sherman Act under *United States v. Container Corp. of America*.¹⁵ According to the Third Circuit, the jury should have been instructed that defendants' conduct would not violate the Sherman Act if their motive was compliance with the Robinson-Patman Act, the defendants believed their buyers were lying about lower price offers by other competitors, they were unable to obtain independent corroboration of their buyers' representations, and their communication was strictly limited to such verification.¹⁶ The Supreme Court has granted certiorari to *United States v. United States Gypsum Co.*,¹⁷ and may decide whether compliance with the Robinson-Patman Act justifies price exchanges and thus constitutes a valid defense against price fixing.¹⁸

The purpose of this article is to examine the underpinnings of the court of appeals decision in *Gypsum*, to determine whether the result was consonant with the objectives of the antitrust laws as expressed by Congress, and finally to recommend a means of reconciling the Sherman and Robinson-Patman Acts.

II. THE PER SE RULE IN PRICE-FIXING CASES

An understanding of the tension in the case law which has resulted from the Third Circuit decision in *Gypsum* requires a basic review of the per se rule in price fixing cases. Although *United States v. Trenton Potteries Co.*¹⁹ was the first case to rule that price fixing is a per se violation of the Sherman Act, irrespective of the effect on competition, it was by no means the first case to hold price fixing agreements illegal.²⁰ Among the earliest price-fixing cases to involve price information exchanges was *American Column & Lumber Co. v. United States*.²¹ In that case the Government challenged an "Open Competition Plan" adopted by an association of hardwood manufacturers.²² The plan called for daily reporting of

15. *Id.* at 127. For a discussion of *United States v. Container Corp. of America*, 393 U.S. 333 (1969), see text accompanying notes 112-34 *infra*.

16. 550 F.2d at 126.

17. 98 S. Ct. 52 (1977).

18. See 550 F.2d at 123 & n.9.

19. 273 U.S. 392 (1927).

20. See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

21. 257 U.S. 377 (1921).

22. *Id.* at 391. The significance of the association's policy on competition is demonstrated by the fact that association members produced one-third of the total production in the United States, although they operated only one-twentieth of the mills engaged in hardwood manufacturing. *Id.*

production inventory and price lists for regular dissemination to association members, supplemented by monthly meetings to discuss the disseminated information.²³ The plan was found illegal because, taken as a whole, it caused concerted action of competitors to control prices.²⁴ Significantly, there was much evidence that the purpose of the agreement was to raise prices.²⁵ A solicitation appeal to hardwood manufacturers to join in the Open Competition Plan stated: "Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels."²⁶

The price information exchange agreement in *United States v. American Linseed Oil Co.*²⁷ was more stringent in its requirements. Failure to abide by the agreement was punishable by forfeiture of bonds which had been deposited by the participants.²⁸ After discussing the economic effects of the agreement, the Supreme Court found it to be unlawful.²⁹ In the words of the Court, the association members' "manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties."³⁰

In the foregoing cases, it is submitted, the Supreme Court exhibited restraint in failing to flatly condemn the price exchange agreements based upon their probable consequences. Instead, the Court took pains to scrutinize the purpose of the agreements.³¹ When

23. *Id.* at 393-99.

24. *Id.* at 400. In the Supreme Court's analysis:

It has been repeatedly held by this court that the purpose of the . . . [Sherman Act] is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the act and is unlawful.

Id.

25. *Id.* at 411-12. In *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925), the Supreme Court later held that trade association activities which included the exchange of information on average costs, freight rates, and inventory, without the identification of specific customers, were reasonable and thus not in violation of the Sherman Act. *Id.* at 586. *Maple Flooring* distinguished the trade association activity in *American Column & Lumber* on the basis of the earlier case's anticompetitive purpose. *Id.* at 577. In the later case, *Maple Flooring*, the Court found the record "barren of evidence tending to establish that there [was] . . . any agreement or purpose or intention on the part of defendants to produce any effect upon commerce . . ." *Id.* The *Maple Flooring* Court also indicated that there was no evidence tending to show the trade association activities actually affected prices. *Id.* at 567.

26. 257 U.S. at 393.

27. 262 U.S. 371 (1923).

28. *Id.* at 382.

29. *Id.* at 390.

30. *Id.*

31. See, e.g., *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 577 (1925); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 390 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 411-12 (1921).

it was satisfied that not only the effect but also the purpose of the agreements was anticompetitive, the Court declared the agreements unlawful under the Sherman Act.³²

The Court's concern for the purpose of the agreements in *American Column and Lumber* and *American Linseed Oil* demonstrates the influence of Justice Brandeis' preoccupation with the element of "purpose."³³ Brandeis wrote the majority opinion in *Chicago Board of Trade v. United States*,³⁴ where the Government sued to enjoin the use of a "Call" rule employed by the defendants.³⁵ Under the rule, grain futures prices were frozen at the end of each business day; after the Board had closed, members could purchase certain grain only at that day's closing bid.³⁶ In the trial court,

[t]he defendants admitted the adoption and enforcement of the Call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago.³⁷

The Government's motion to strike from the record the defendants' allegations with respect to purpose was granted.³⁸ After an evidentiary hearing at which the Government proved the existence of the rule and its application, the trial court granted the injunction.³⁹ The Supreme Court reversed the trial court's decision.⁴⁰

32. See, e.g., *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

33. See, e.g., *American Column & Lumber Co. v. United States*, 257 U.S. 377, 415 (Brandeis & McKenna, JJ., dissenting). Here Justice Brandeis stated in dissent "it was neither the aim of the Plan, nor the practice under it, to regulate competition in any way. Its purpose was to make rational competition possible by supplying data not otherwise available and without which most of those engaged in the trade would be unable to trade intelligently." *Id.* This was the primary reason that the dissenters would have upheld the Open Competition Plan. *Id.* at 416.

One report suggests that the prevailing view in the early 20th Century was that trade associations served a worthwhile purpose by collecting statistics and other information for the improvement of the industry. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 17 (1955) [hereinafter cited as ANTITRUST LAWS]. See also *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

34. 246 U.S. 231 (1918).

35. *Id.* at 237.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 237-38.

40. *Id.* at 241.

In an oft-quoted passage of the opinion,⁴¹ Brandeis stated:

The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices . . . is an illegal restraint of trade under the . . . Sherman Act. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁴²

The Court concluded that the trial court had erred in striking the defendants' allegations with respect to purpose and "in later excluding evidence on that subject."⁴³

Justice Brandeis' "rule of reason" analysis of Sherman Act cases was found inapplicable in price-fixing situations by *United States v. Trenton Potteries Co.*⁴⁴ In that case, the existence of an agreement to fix prices and limit sales was not disputed.⁴⁵ The defendants, however, sought to introduce exonerating evidence, *e.g.*, proof that the specific prices set by the agreement were "reasonable," and therefore, not an unreasonable restraint of trade in violation of the Sherman Act.⁴⁶ The trial court had instructed the jury that if it found the existence of agreements or combinations as alleged by the government, it could return a guilty verdict without regard to the reasonableness of the prices fixed or the good

41. See, *e.g.*, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374-75 (1967). See also *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 116, *citing Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

42. 246 U.S. at 238.

43. *Id.* at 238-39.

44. 273 U.S. 392 (1927).

45. *Id.* at 394. The 20 individual and 23 corporate defendants collectively accounted for 82% of the manufacture and distribution of vitreous pottery fixtures in the United States. *Id.* at 393-94.

46. *Id.* at 395.

intentions of the participants.⁴⁷ The trial court refused the defense request to charge the jury as follows: "The essence of the law is injury to the public. It is not every restraint of competition . . . that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful."⁴⁸ The trial court also refused to include in the charge to the jury Justice Brandeis' passage on the rule of reason from *Chicago Board of Trade*.⁴⁹

The United States Supreme Court upheld the trial court and reversed the court of appeals in *Trenton Potteries*, holding that price fixing is per se unlawful, and inquiry into the reasonableness of the prices agreed to is irrelevant.⁵⁰ The Court reasoned that the danger inherent in the power to fix prices was sufficient to find all such agreements unreasonable, and therefore per se illegal.⁵¹ In reaching its decision, the Court also stated that the basic assumption of the Sherman Act was that the public could best be protected from the evils of monopoly and price control by the maintenance of unrestrained competition.⁵² The natural effect of price fixing, in the Court's view, was to lessen competition.⁵³

The holding in *Trenton Potteries* stemmed from the conceded fact that the defendant had agreed with others to control the price of sanitary pottery.⁵⁴ There was no question that the defendants' purpose in joining the agreement was to fix prices.⁵⁵ Thus, there was

47. *Id.* The Supreme Court agreed with this jury instruction. In the words of Justice Stone, "[t]he power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." *Id.* at 397.

48. *Id.* at 395. The defendants had encouraged the trial judge to instruct the jury that the agreements to fix prices and limit sales would not be unlawful unless they unreasonably restrained trade. *Id.*

49. *Id.* See note 42 and accompanying text *supra*.

50. 273 U.S. at 397-98.

51. *Id.* The Court distinguished *Chicago Board of Trade*, where an agreement to fix prices during certain hours of the day in a closed market was upheld under the rule of reason approach. See 246 U.S. at 238-39. See also text accompanying notes 34-43 *supra*. In the words of the *Trenton Potteries* Court, in *Chicago Board of Trade*:

The purpose and effect of the agreement . . . was to maintain for a part of each business day the price which had been that day determined by open competition on the floor of the Exchange. That decision, dealing as it did with a regulation of a board of trade, does not sanction a price agreement among competitors in an open market such as is presented here.

273 U.S. at 401.

52. *Id.* at 397.

53. *Id.* The Court concluded, "[a]greements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed." *Id.*

54. *Id.* at 394.

55. See *id.* at 396-97.

no issue raised as to whether the agreement itself constituted a "contract, combination . . . or conspiracy" for purposes of the Sherman Act,⁵⁶ or whether the defendants were entitled to rebut the existence of such a contract, combination, or conspiracy with evidence that their conduct was for an entirely lawful purpose.⁵⁷ The only substantive issue raised was whether the price fixing agreement unreasonably restrained trade.⁵⁸

In *United States v. Socony-Vacuum Oil Co.*,⁵⁹ the seminal price-fixing case, the United States Supreme Court reiterated the per se approach adopted in *Trenton Potteries*.⁶⁰ In *Socony-Vacuum*, the course of conduct by defendant oil companies had the effect of increasing the price levels of gasoline.⁶¹ Unlike *Trenton Potteries*, the existence in *Socony* of an agreement to fix prices was not conceded. Instead, it was an element of the offense required to be proven by the Government.⁶² Pursuant to a program which had its genesis in the National Industrial Recovery Act (N.I.R.A.) period, but continued after the N.I.R.A. was declared unconstitutional,⁶³ the principal integrated oil companies doing business in the Midwest purchased the surplus gasoline of their independent competitors at or below the prevailing spot price.⁶⁴ Although this gasoline constituted 17% of the amount marketed in the Midwest,⁶⁵ the program established a floor under the spot market level through the removal of gasoline which otherwise would have sold at distress

56. *Id.* at 394. For the text of § 1 of the Sherman Act, see note 3 *supra*.

57. It is submitted that once a plaintiff establishes the existence of price fixing, the defendants should not be permitted to show the reasonableness of the restraint. The *Trenton Potteries* Court, however, declined to remove that issue from the purview of the trial court.

58. See 273 U.S. at 395-402.

59. 310 U.S. 150 (1940), *rev'd*, 105 F.2d 809 (7th Cir. 1939).

60. *Id.* at 210-12. Although 27 corporations and 56 individuals were originally brought to trial, the respondents in the Supreme Court appeal numbered only 12 corporations and 5 individuals. *Id.* at 165 n.1.

61. *Id.* at 174.

62. *Id.* at 167-68.

63. See National Industrial Recovery Act, 48 Stat. 195 (1933); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (presidential power to establish codes of fair competition under § 3 of the N.I.R.A. constitutes excessive delegation of legislative power); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (presidential power to prohibit transportation of unlawfully produced "hot oil" under § 9(c) of the N.I.R.A. unconstitutional).

64. 310 U.S. at 166. The standard forms of trading are "spot sales" — those for immediate delivery from a local producer or distributor, "future sales" — agreements for delivery in a future month, and sales "to arrive" — agreements to deliver on arrival a product or commodity in transit. See also *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 236 (1918).

65. 310 U.S. at 195.

prices.⁶⁶ It was argued that the defendants' actions were justified because they were countenanced by officers of the federal government,⁶⁷ eliminated competitive evils,⁶⁸ and were not the primary cause of price increases in the industry.⁶⁹ The trial court charged the jury that it was a violation of the Sherman Act for a group of individuals or corporations to act together to raise the prices to be charged for the commodity which they manufactured where they "controlled a substantial part of the interstate trade and commerce in that commodity."⁷⁰ The trial court further instructed that the reasonableness of prices, the existence of other reasons for the price inflation, the knowledge or acquiescence of government officers, and the good intentions of the members of the combination were irrelevant to the question of guilt or innocence.⁷¹ The United States Court of Appeals of the Seventh Circuit held the charge to be reversible error, since the reasonableness of the defendants' conduct had not been submitted to the jury.⁷²

Justice Douglas in his majority opinion distinguished *Chicago Board of Trade*, stating that "no attempt was made [in that case] to show that the purpose or effect of the rule was to raise or depress prices."⁷³ He went on to point out that in *Socony* there was ample evidence that the combination had the purpose to raise prices and that the program contributed to a price increase.⁷⁴ Justice Douglas devoted considerable space to the argument, frequently advanced by defendants, that their actions were aimed at eliminating competitive evils and not competition.⁷⁵ Justice Douglas looked to our economic system and the purposes the Congress expected to serve in enacting the Sherman Act,⁷⁶ and warned of the evil of any group's power to

66. *Id.* at 220. "Distress gasoline" was defined by Justice Douglas as "gasoline which the refiner could not store, for which he had no regular sales outlets and which therefore he had to sell for whatever price it would bring." *Id.* at 171.

67. *Id.* at 225-26. The Court stated that although Congress could legitimately utilize the same methods for the same objectives as the defendants, this did not mean that they or anyone else could do so without Congressional approval. *Id.*

68. *Id.* at 163.

69. *Id.* The Court noted that the distressed oil industry was so acutely harmed by overproduction that Congress enacted §9(c) of the N.I.R.A. to prohibit the transportation of unlawfully produced oil. *Id.* at 171-73. For the subsequent history of §9(c), see note 63 *supra*.

70. 310 U.S. at 210.

71. *Id.* at 210-11.

72. *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809, 827 (7th Cir. 1939).

73. 310 U.S. at 217.

74. *Id.* at 219. Justice Douglas stated, moreover, that it was immaterial whether other factors might have contributed to the rise and stability of the spot market prices. *Id.*

75. *Id.* at 220-21.

76. *Id.* at 220-23.

maintain an administered price system.⁷⁷ But he also made clear that the *per se* rule is not limited to combinations which exercise or possess monopoly power over pricing.⁷⁸ In his words, “[a]ny combination which tampers with price structures is engaged in an unlawful activity. . . . Congress has not left with us the determination of whether or not particular price fixing schemes are wise or unwise, healthy or destructive.”⁷⁹

Although it is widely acknowledged that *Socony* broadened the scope of unlawful price fixing to include any concerted action which tampers with price structures,⁸⁰ there is language in the decision which could arguably lead one to conclude that Justice Douglas was using the word “combination” only as a simple means of reference to the participants in the unlawful restraint of trade, and that in order to establish the unlawful combination or conspiracy it is necessary to establish “purpose” and “effect.”⁸¹ After discussing the evils of price maintenance, Justice Douglas states: “Under the Sherman Act 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*.”⁸²

However, Justice Douglas wrote elsewhere in the opinion that “[p]roof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the *completion* of a price fixing conspiracy”⁸³ He also explained that since an antitrust violation could be found even where the conspiracy had fallen short of its objective, it was not necessary to prove both anticompetitive purpose and the power to fix prices.⁸⁴

It can thus be concluded that Justice Douglas did not believe both purpose and effect were necessary to establish an unlawful price fixing conspiracy. Whether Justice Douglas would have found

77. *Id.* at 221. The Court further stated that “[e]ven though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.” *Id.*

78. *Id.*

79. *Id.*

80. ABA ANTITRUST LAW DEVELOPMENTS at 3 & n.9 (1975) [hereinafter cited as ANTITRUST DEVELOPMENTS], quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

81. See 310 U.S. at 223.

82. *Id.*

83. *Id.* at 224 (emphasis added).

84. *Id.* at 224, 224-25 n.59. Justice Douglas noted, “it is well established that a person ‘may be guilty of conspiring although incapable of committing the objective offense.’” *Id.* at 224-25 n.59, quoting *United States v. Rabinowitz*, 238 U.S. 78, 86 (1915).

an unlawful price fixing conspiracy if the effect, but not the purpose, were to fix prices is less clear. It can be argued that the plaintiff has the burden of proving the combination was formed or utilized for the purpose of fixing prices before the court can apply the per se rule excluding evidence of purpose. In other words, once an unlawful conspiracy is proven, justifications for or defenses against the conspiracy should not be entertained. Until such proof is offered, however, defendants would be free to introduce any evidence which would tend to disprove the alleged existence of a price fixing conspiracy, or show that the purpose of the concerted action is not illegal.⁸⁵

This interpretation of *Socony* would, in practical effect, require the trier of fact to find that 1) a combination has been formed, 2) for an unlawful purpose which if translated into action, 3) would have affected pricing, in order to reach a guilty verdict under section 1 of the Sherman Act.⁸⁶ In contrast, mere findings that 1) a combination

85. See Respondents' Joint Brief in Opposition to Certiorari at 13 n.11, *United States v. United States Gypsum Co.*, 98 S. Ct. 52 (1977).

86. See *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *Accord*, *Checker Motor Corp. v. Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969). In *Colgate*, the Court refused to find a price-fixing agreement when the seller terminated a customer who would not adhere to resale prices dictated by the seller. 250 U.S. at 306. In *Checker*, the court upheld a plan offering a cash rebate by the manufacturer to purchasers of taxicabs from authorized dealers. 405 F.2d at 320, 324. Although the *Checker* opinion did not expressly rule out the existence of a combination, it avoided the issue by concentrating on the dealers' freedom to determine the retail price, and by deemphasizing the importance of the dealers in administering the rebate program. *Id.* at 322.

See also *United States v. Nu-Phonics, Inc.*, 433 F. Supp. 1006 (E.D. Mich. 1977). There, the trial court denied the Government's motion to exclude certain exonerating evidence on the ground that it was irrelevant in light of the per se rule. *Id.* at 1013. The court, concerned that the defendants be given a fair trial under the new felony provisions of the Sherman Act, 15 U.S.C. § 1 (1976), distinguished between direct and indirect price-fixing agreements for purposes of applying the per se rule. 433 F. Supp. at 1011. In *Nu-Phonics*, Detroit hearing aid dealers had allegedly refused to quote prices for their goods in response to telephone inquiries or to advertise prices, and had imposed a uniform charge of \$180 over cost for all state business. *Id.* at 1010. There was, however, no allegation that defendants explicitly agreed to fix prices for hearing aids in the Detroit area. The court acknowledged that when it can be proven that prices are tacitly or expressly agreed upon, a direct price-fixing agreement exists and thereafter the per se rule can appropriately be applied. *Id.* at 1011-12. Nevertheless, the court concluded that where, as in *Nu-Phonics*, there was no tacit agreement, the Government must prove both a purpose to fix prices and an effect upon prices in order to establish the existence of an illegal price fixing conspiracy. *Id.* at 1012. According to the *Nu-Phonics* court, the antitrust laws do not warrant the creation of a notion of "constructive price-fixing." *Id.* at 1013. Rather, proof of an anticompetitive purpose is an essential ingredient of indirect price fixing cases, and such a purpose cannot be irrebuttably presumed. Thus, the court held that "[t]he defendants may rebut the government's evidence of anticompetitive purpose with any relevant evidence of their own." *Id.* But see *United States v. Jack Foley Realty, Inc.*, 1977-2 Trade Cases ¶61,678 (D. Md. 1977) (the court rejected a vagueness challenge to the new felony provisions of the Sherman Act, holding that the change did not alter or invalidate the standards or elements of proof in price-fixing cases).

has been formed and 2) its acts, if carried out, would have affected pricing or, alternatively, actually did affect pricing, would not result in a guilty verdict. Nevertheless, United States Supreme Court decisions in the aftermath of *Socony* must be analyzed before any meaningful conclusions about the legality of price verification can be reached.

Shortly after *Socony*, the Supreme Court decided the case of *United States v. Masonite Corp.*⁸⁷ The trial court had found that the defendants other than Masonite each had entered into agreements with Masonite independently of the others.⁸⁸ As the arrangement continued each defendant became familiar with its purpose and scope.⁸⁹ Justice Douglas, again writing for the majority, found a price-fixing combination in violation of the Sherman Act. He observed that:

Here, as in *Interstate Circuit Inc. v. United States*, "It was enough that, knowing that concerted action was contemplated and invited, [they] . . . gave their adherence to the scheme and participated in it." . . . And as respects statements of various appellees that they did not intend to join a combination or to fix prices, we need only say that they "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."⁹⁰

Although there are references to "purpose" in Justice Douglas' *Masonite* opinion, proof of purpose, in practical fact, was accomplished by substituting proof of the logical consequences of the several agreements.⁹¹ This is in accord with the reasoning of *Interstate Circuit Inc. v. United States*,⁹² quoted in part by the Court in *Masonite*.⁹³ Indeed, *Interstate Circuit* went so far as to say that an unlawful conspiracy under the Sherman Act is formed if, without more, competitors accept an invitation to participate in a plan "the necessary consequence of which, if carried out," is the restraint of

87. 316 U.S. 265, *rehearing denied*, 316 U.S. 713 (1942). *Masonite* involved an arrangement by which a patentee made a series of independent *del credere* agency agreements with its competitors and utilized the marketing system of those competitors to market the patented product at fixed prices. 316 U.S. at 269-71.

88. 316 U.S. at 274-75.

89. *Id.* at 275.

90. *Id.* (citations omitted), quoting *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939), and *United States v. Patten*, 226 U.S. 525, 543 (1913).

91. 316 U.S. at 275.

92. 306 U.S. 208 (1939).

93. 316 U.S. at 275, quoting *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). See text accompanying note 90 *supra*.

trade.⁹⁴ Yet it is possible to presume too much by relying solely on *Interstate Circuit*, because in that case the agreements, by their terms, would have resulted in price tampering.⁹⁵ The only issue was whether the evidence was sufficient to support a finding that each participant in the agreements had unlawfully combined with the other participants, though each had separately entered into the same form of agreement.⁹⁶ So *Interstate Circuit*, and therefore *Masonite*, arguably are inconclusive on the issue of whether anticompetitive purpose is an element of the offense of price fixing.

The United States Supreme Court also gave short shrift to the anticompetitive purpose element in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*⁹⁷ and *Timken Roller Bearing Co. v. United States*.⁹⁸ In each case, subsidiaries of the same parent allegedly engaged in price fixing and other trade restraints.⁹⁹ The Court found that the parties formed unlawful combinations notwithstanding the intracorporate nature of their activities.¹⁰⁰ In light of the Court's more recent decision in *United States v. Citizens & Southern National Bank*,¹⁰¹ which also involved an alleged intraenterprise conspiracy, the rationale of *Seagrams* and *Timken* is applicable only in situations where the complained of acts by design or result curtail

94. 306 U.S. at 227.

95. *Id.* at 217.

96. *Id.* at 226-27.

97. 340 U.S. 211, *rehearing denied*, 340 U.S. 939 (1951). This case has been cited for the proposition that an agreement to fix maximum resale prices "no less than those to fix minimum prices" violates the Sherman Act. *E.g.*, Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693, 707 (1974).

98. 341 U.S. 593 (1951).

99. *See* 341 U.S. at 595-96; 340 U.S. at 212.

100. 341 U.S. at 598; 340 U.S. at 215. *See* ANTITRUST LAWS, *supra* note 33, at 33.

101. 422 U.S. 86 (1975). In an attempt to circumvent the state law of Georgia which restricted city banks in opening suburban branches, Citizens & Southern National Bank (C & S) created a holding company whereby C & S owned a percentage of the stock of each suburban branch with the remainder owned by "friendly" parties. *Id.* at 89. All the participants in the arrangement assumed C & S would acquire these branches outright when either the city limits were extended or the state law was "altered so as to permit the accomplishment of this end." *Id.* at 89-90. Although no express price-fixing agreement was entered, C & S and the suburban branches did not behave "as active competitors . . ." *Id.* at 112. The Court stated that C & S and the branch banks were not independent competitors with "no permissible reason for intimate and continuous cooperation," rather, they participated in a "correspondent associate program" which is permissible under the Sherman Act. *Id.* at 113-14. The Court upheld the district court's decision that "the lack of significant price competition" flowed not from an unlawful tacit agreement, but "was an indirect, unintentional and formally discouraged result of a sharing of . . . information which was at the heart of the correspondent associate programs." *Id.* at 114 (citations omitted).

competition of unrelated businesses.¹⁰² Nevertheless, these cases would appear to stand for the proposition that a finding of combination merely requires the participation of two or more entities; and that the combination's activities for Sherman Act purposes may be adjudged by their competitive consequences, even if the purpose of the combination is benign or neutral at best.

The United States Supreme Court has continued to place heavy emphasis on competitive consequences, and to deemphasize the element of anticompetitive purpose. In *Simpson v. Union Oil Co.*,¹⁰³ the Court scrutinized consignment-agency agreements between Union Oil and over 3,000 of its dealers, pursuant to which the retail price of gasoline was controlled by Union Oil.¹⁰⁴ The defendant maintained that such agreements were valid under contract law,¹⁰⁵ and were also within the rule established in *United States v. General Electric Co.*,¹⁰⁶ that retail prices can be determined by the manufacturer if he has a genuine consignment-agency relation with his dealers.¹⁰⁷ Mr. Justice Douglas, again writing for the Court, was unimpressed by these arguments. After referring to congressional testimony on the competitive surroundings of the agreements in question,¹⁰⁸ Justice Douglas observed that the evil of the program was "its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline,"¹⁰⁹ and concluded that it had no legitimate business purpose outside of price fixing.¹¹⁰

Like the agreement in *Trenton Potteries*, the *Simpson* agreement expressly incorporated a price-fixing provision.¹¹¹ The defendant, nevertheless, raised significant arguments which might have negated the existence of an unlawful conspiracy in a more sympathetic Court. Justice Stewart, in dissent, thought that *General Electric* legitimized the defendant's conduct.¹¹² The majority's

102. ANTITRUST DEVELOPMENTS, *supra* note 80, at 3 (1975); ANTITRUST LAWS, *supra* note 33, at 34.

103. 377 U.S. 13 (1964).

104. *Id.* at 14-15.

105. *Id.* at 18.

106. 272 U.S. 476 (1926).

107. 377 U.S. at 22, *citing* *United States v. General Elec. Co.*, 272 U.S. 476 (1926).

108. 377 U.S. at 18-19, *citing* H. R. REP. NO. 1157, 85th Cong., 1st Sess. 6-7 (1956).

109. 377 U.S. at 21.

110. *Id.* *But see* *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (consignment plan which had no price-fixing element was found to have a lawful purpose).

111. 377 U.S. at 15. *See* *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394 (1927). For a discussion of *Trenton Potteries*, *see* notes 44-58 and accompanying text *supra*.

112. 377 U.S. at 26 (Stewart, J., dissenting).

overriding concern, however, was with the competitive consequences of price fixing, a consideration which became more apparent in the Court's most recent pure price fixing decision, *United States v. Container Corp. of America*,¹¹³ rendered nearly a decade ago.¹¹⁴

In *Container Corp.*, the Court seems to have come full circle from its earliest price fixing decisions. The opinion signals a subtle but perhaps significant departure from previous price-fixing and data dissemination cases. Justice Douglas' majority opinion has been construed as establishing a per se rule in price exchange cases,¹¹⁵ although Justice Fortas' concurring opinion flatly refutes such a proposition.¹¹⁶

In *Container Corp.*, the Government alleged that leading members of the highly concentrated corrugated container industry had engaged in price fixing.¹¹⁷ The charge was based upon the existence of an agreement to exchange price information pertaining to specific sales in the industry.¹¹⁸ There was, however, no agreement to adhere to any price schedule.¹¹⁹ In fact, the trial court found that there was no uniformity of price among defendants,¹²⁰ prices had declined despite increases in costs,¹²¹ and the ultimate pricing decisions of the various defendants had been made independently.¹²² The trial court concluded that the government had failed to meet its burden of proving that defendants had engaged in a mutual understanding to use the exchanged price information "for the purpose [and with the effect] of maintaining substantially identical price quotations"¹²³

113. 393 U.S. 333 (1969).

114. In recent years, the Court has demonstrated its concern with the anticompetitive effects of price-fixing in cases involving regulated industries and professions. See *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *United States v. National Soc'y of Professional Eng'rs*, 46 U.S.L.W. 4356 (1978).

115. See 393 U.S. at 340 (Marshall, J., dissenting). See also *L.C.L. Theatres Inc. v. Columbia Pictures Indus. Inc.*, 421 F. Supp. 1090, 1106 (N.D. Tex. 1976), *aff'd in part, rev'd in part and remanded*, 566 F.2d 494 (5th Cir. 1978); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 414 F. Supp. 1088 (N.D. Tex. 1976).

116. 393 U.S. at 340 (Fortas, J., concurring).

117. *Id.* at 336-37.

118. *Id.* at 336.

119. *Id.* at 334. This distinguishes *Container Corp.* from other cases where the parties agreed to a price schedule. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 183 (1940); *Sugar Inst. Inc. v. United States*, 297 U.S. 553, 601 (1936).

120. *United States v. Container Corp. of America*, 273 F. Supp. 18, 58-59 (M.D.N.C. 1967).

121. *Id.* at 61.

122. *Id.* at 60.

123. *Id.* at 67.

According to Justice Douglas, the fact that defendants agreed to exchange price information was sufficient to establish a "combination" under section 1 of the Sherman Act.¹²⁴ After finding conclusive evidence of a combination, and drawing an "irresistible" inference that an anticompetitive effect had resulted from defendants' communications,¹²⁵ the Supreme Court invoked the *per se* rule of *Socony-Vacuum*.¹²⁶ In the words of the Court, "[t]he limitation or reduction of price competition brings the case within the bar, for as we held in *United States v. Socony-Vacuum Oil Co.*, . . . interference with the setting of price by free market forces is unlawful *per se*."¹²⁷ Nowhere in the opinion, however, does it appear that the Court ever attempted to find that an illegal purpose prompted the defendants' action.

The dominant focus of the majority opinion is upon the supposed economic realities in the container industry. Justice Douglas noted that the agreement "seemed to have the effect of keeping prices within a fairly narrow ambit."¹²⁸ The oligopolistic nature of the industry and the fungible nature of the product suggested that price was the principal form of competition.¹²⁹ Justice Douglas concluded that the agreements constituted price-fixing because "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."¹³⁰ In other words, the effect of the price exchange agreements was to restrain competition, and was therefore illegal *per se*.

Although the concurring and dissenting opinions in *Container Corp.* agreed that the exchange of price information is proscribed if either the purpose or the effect is to restrain price competition,¹³¹ such a test does not flow automatically from the case law. Yet, it is precisely this development in the context of price information exchanges which has created the tension in the law of price fixing.

In *Container Corp.*, the Court indirectly acknowledged that mere exchanges of price information are not *per se* illegal by explicitly

124. 393 U.S. at 337.

125. *Id.*

126. *Id.*, citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940). See text accompanying note 79 *supra*.

127. 393 U.S. at 337 (citation omitted). The Court pointed out that although the exchange of price information may have no effect on competitive prices in certain markets, "the corrugated container industry is dominated by relatively few sellers," and thus the exchange of such information tends to create uniform prices. *Id.*

128. *Id.* at 336.

129. *Id.* at 337.

130. *Id.* at 338 (footnote omitted).

131. *Id.* at 338-39 (Fortas, J., concurring); *id.* at 340 (Marshall, J., dissenting).

recognizing that legal exchanges of such information have existed and may continue to exist.¹³² The Court noted without elaboration that lawful price exchanges may occur when a “controlling circumstance” exists which justifies them.¹³³ In support, the Court cited *Cement Manufacturer’s Protective Association v. United States*,¹³⁴ where the Supreme Court upheld the conduct of sellers who were exchanging price information in order to protect themselves from the fraudulent acts of their buyers.¹³⁵ Whether the court cited *Cement* as one example of “controlling circumstances” — implying that there are others — or as a single exception to actions which would otherwise be illegal is open to question.

The unique facts in *Cement* constituted a “controlling circumstance” which exempted that case from the doctrine that price information exchanges are per se unlawful. It is uncertain, however, whether a continuing, if not frequent, practice of price verification for the avowed purpose of ensuring good faith compliance with section 2(b) of the Robinson-Patman Act is also a “controlling circumstance.”

III. EXCEPTIONS TO THE PER SE RULE IN PRICE FIXING CASES

Certain federal regulatory statutes embody policies which are at odds with the objectives of the Sherman Act. The United States Supreme Court has made clear that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the

132. *Id.* at 335.

133. *Id.*

134. 268 U.S. 588 (1924). See 393 U.S. at 335.

135. 268 U.S. at 603-06. In *Cement*, the Government did not allege the existence of an agreement to fix prices, but argued only that the effect of defendants’ conduct — uniformity in prices — made it unlawful. *Id.* at 603. The Government simply asked the trier of fact to deduce the existence of an illegal purpose from the defendants’ conduct. *Id.* The court rejected the Government’s approach, holding that the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, and which they are free to act upon or not as they choose, is not an unlawful restraint of commerce. *Id.* at 603-04.

In *Socony-Vacuum*, the *Cement* case was distinguished because there was no agreement to fix prices in the earlier decided case, and a majority of the *Cement* Court had found that the defendants’ conduct had not unlawfully restrained trade. 310 U.S. at 217. It can be argued that the *Cement* Court failed to find a price-fixing agreement because of the absence of an anticompetitive purpose in the defendants’ activities. See 268 U.S. at 601. This argument is bolstered by Justice Douglas’ statement in *Container Corp.* that the defendants in *Cement* exchanged prices “to protect themselves from delivering to contractors more cement than was needed for a specific job” 393 U.S. at 335.

antitrust and regulatory provisions."¹³⁶ In *United States v. National Association of Securities Dealers, Inc.*,¹³⁷ the Supreme Court found that certain agreements which would otherwise have been characterized as resale price maintenance, and thus illegal per se, were not unlawful when undertaken in compliance with Security Exchange Commission (SEC) regulations, because "Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated"¹³⁸ Likewise in patent infringement cases, "the limits of the patent are narrowly and strictly confined to the precise terms of the grant. . . . It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid"¹³⁹ A patentee cannot use his patent to create another, nonstatutory monopoly¹⁴⁰ because the public policy behind the antitrust laws supersedes the narrow objectives of the patent grant.¹⁴¹

State law exceptions to per se price fixing violations are not as explicitly delineated in the case law. In *Parker v. Brown*,¹⁴² for example, the Court construed the Sherman Act as being inapplicable to state regulatory programs.¹⁴³ The regulation complained of in *Parker* — California's program for marketing raisins — was specifically designed to restrict competition among raisin growers and thereby stabilize prices.¹⁴⁴ When the state is not promulgating a state-wide program for the benefit of the public, but is merely approving or acquiescing in, while not requiring the implementation of private industrial programs, the state is really a neutral force in the program, and its approval or acquiescence is not sufficient to

136. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963) (footnotes omitted).

137. 422 U.S. 694 (1975).

138. *Id.* at 729.

139. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944).

140. *See, e.g., id.* at 666; *United States v. Masonite Corp.*, 316 U.S. 265, 277 (1942).

141. *See, e.g., Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665-66 (1944); *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942).

142. 317 U.S. 341 (1943).

143. *Id.* at 350-51. In the words of Justice Stone,

[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers from activities directed by its legislature.

Id.

144. *Id.* at 359.

protect the parties from antitrust liability.¹⁴⁵ But where the state or its instrumentalities¹⁴⁶ require conduct otherwise prohibited by the Sherman Act, the state's overriding policy becomes manifest.¹⁴⁷

In sum, the recognized exceptions to the per se rule in price fixing cases are well-defined, strictly construed, and uniformly grounded upon a judicial determination that the conflicting policy plainly overrides the policies embodied in the antitrust laws.

IV. THE SHERMAN AND ROBINSON-PATMAN ACTS: A RECONCILIATION WITHOUT COMPROMISE

In the *Gypsum* case, the defendants have contended that their price information exchanges are significant, but not necessarily required, in order to comply with the defense in section 2(b) of the Robinson-Patman Act.¹⁴⁸ The defendants argue that "[i]n the absence of sufficient data confirming the customer's claim [of a competitive offer], direct verification with competitors was regarded as legally important before extending a discriminatorily low price to the customer. Such verification avoided violations of the Robinson-Patman Act" ¹⁴⁹

The Robinson-Patman Act was enacted during an era when large retail chains with their extensive buying power had become a threat to the survival of smaller competitors.¹⁵⁰ The chains' ability to buy products more cheaply than smaller competitors enabled them to undercut the prices offered by their smaller rivals.¹⁵¹ Congress intended the act to supplement the existing antitrust laws by closing loopholes which encouraged predatory price undercutting by larger

145. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (utility company's program of giving free light bulbs to its customers, approved by state commissioner, was challenged by light bulb retailer as a tying arrangement).

146. In the Supreme Court's recent decision of *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977), it was held that the affirmative command of a state's highest court is as compelling as a state's legislative enactments, and thus constitutes state action for purposes of the Sherman Act exemption. *Id.* at 2696-98.

147. 317 U.S. at 351. In the words of the *Parker* Court, "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Id.* (emphasis added).

148. See text accompanying notes 11-12 *supra*.

149. Respondents' Joint Brief in Opposition to Certiorari at 8, *United States v. United States Gypsum Co.*, 98 S. Ct. 52 (1977).

150. See ANTITRUST LAWS, *supra* note 33, at 155.

151. *Id.* According to one study, "[a] Federal Trade Commission investigation, instituted to analyze the causal market forces in the 'independents' decline and to propose appropriate legal remedies, concluded that discriminatory concessions from suppliers were in part responsible for the mass distributor's competitive advantage." *Id.* See M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 1096-98 (1975).

chains.¹⁵² Congress' aim was to maintain a competitive economy by abetting the survival of small competitors.¹⁵³

Section 2(b) of the Act was designed to accommodate competition by allowing a seller to equal his rival's price offer to a specific customer, but not to permit him to undercut the offer.¹⁵⁴ Too literal an interpretation of the "good faith" requirement of section 2(b) would inevitably result in formalized price information exchange programs in entire industries for the ostensible purpose of preventing price discrimination resulting from customer dishonesty.

During the last generation, the Supreme Court has generally been guided by "commercial reality" in deciding antitrust cases.¹⁵⁵

152. ANTITRUST LAWS, *supra* note 33, at 156. In March 1936, the House Committee on the Judiciary issued its report on the bill that became the Robinson-Patman Act. The report indicated that the purpose of the statute was to strengthen existing antitrust laws:

The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.

To accomplish its purpose, the bill amends and strengthens the Clayton Act by prohibiting discriminations in price between purchasers where such discriminations cannot be shown to be justified by differences in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which such commodities are to such purchasers sold and delivered.

H.R. REP. NO. 2287, 74th Cong., 2d Sess. 3 (1936).

During the debates on the Robinson-Patman bill, the view that the bill was intended to strengthen existing antitrust policy was expressed repeatedly. Senator Logan quoted with approval the testimony of Mr. H. B. Teegarden given at a hearing held before the House Committee on the Judiciary:

The bill has nothing to do with the fixation of prices. It says nothing whatever as to the prices to be maintained or the price relationship to be maintained as between the seller and another.

It governs only the relationship to be maintained by a seller between his various customers. It requires him to treat them on an equal basis, subject only to those differentials which are justified by differences in cost involved in the differing methods of quantities in which the goods are sold or delivered.

80 CONG. REC. 3118 (1936) (remarks of Sen. Logan). Responding to criticism of the bill regarding encouragement of price fixing, Senator Logan made the following statement:

Those of us who advocate the passage of the Robinson [-Patman] bill have been seeking in every way we could to keep away from fixing and regulating prices. The enemies of the bill have sought all over the country to intimate that it is a price-fixing bill, but there is nothing in it even remotely resembling price-fixing. . . . The bill points out the evils of price-fixing.

Id. at 6287 (remarks of Sen. Logan).

153. See ANTITRUST LAWS, *supra* note 33, at 155.

154. *Id.* at 180. Section 2(b) was intended "to permit a seller in good faith to meet but not beat an actual competitor's equally low price." *Id.* (emphasis in original). See 15 U.S.C. § 13(b) (1976); text accompanying note 12 *supra*.

155. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). In *Brown Shoe*, the Court observed that the relevant geographic market in a section 7 Clayton Act case must "correspond to the commercial realities of the industry . . ." *Id.* at 336

Where price is the decisive factor in securing business, as is generally the case in oligopolistic markets characterized by product uniformity, the surest means of securing business is the secret price concession. Open announcements have the effect of discouraging price concessions because sellers realize that they are inviting competitors to join them at the lower price with no advantage to any of them. Price verification, for whatever avowed purpose, is tantamount to an open announcement of a price concession. If the seller who offered the concession is honest with inquiring competitors, prices will tend toward uniformity. More importantly, the tendency will be for prices to remain stable, because there would be no perceived advantage in granting secret concessions. In contrast, if a competitor's strategy is to compete on the basis of price to achieve market penetration, it will not be in that competitor's interest to exchange price information with his competitors. Logically, the "price" competitors will either remain silent or fabricate price information in response to inquiries from competitors who seek verification.¹⁵⁶

Commercial and economic reasons dictate that a continuing program of price verification would frustrate the objectives of the Sherman Act. The Supreme Court has addressed the potential for economic policy conflict presented by the Robinson-Patman Act and has stated that it is the duty of the court system "to reconcile . . . [interpretations of the Robinson-Patman Act], except where Congress has told . . . [them] not to, with the broader antitrust policies that have been laid down by Congress."¹⁵⁷ In *Automatic Canteen Co. of America v. Federal Trade Commission*,¹⁵⁸ the Court read a requirement of scienter into section 2(f) of the Robinson-Patman Act to uphold the Sherman Act's broad policy of promoting unfettered competition in a free market system.¹⁵⁹ The Court observed that

(footnote omitted), quoting *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1958). See 15 U.S.C. § 18 (1976). The Third Circuit has recently based an antitrust decision on the "economic reality" in the industry in which the alleged violation took place. See *J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 565 F.2d 264 (3d Cir. 1977) (vacated summary judgment where district court found insufficient interstate commerce in local rubbish removers' case).

156. For an excellent discussion of this subject, see Note, *Meeting Competition under the Robinson-Patman Act*, 90 HARV. L. REV. 1476, 1481-87 (1977). See also ANTITRUST LAWS, *supra* note 33, at 182 (antitrust policy is not furthered by price information programs).

157. *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 74 (1953).

158. 346 U.S. 61 (1953).

159. *Id.* at 73-74. Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f) (1976), states in pertinent part "it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." *Id.*

“sturdy bargaining” between buyers and sellers fosters active competition,¹⁶⁰ and thus should be limited only under the most specific and necessary circumstances.¹⁶¹ Since the application of section 2(f) without the scienter element would have frustrated the parties’ ability to bargain, the Robinson-Patman Act was narrowly construed.

Whether the Third Circuit in *Gypsum*, and courts in other cases that have countenanced the price verification defense in price fixing cases,¹⁶² have successfully met their obligation to construe the Robinson-Patman Act consistently with the Sherman Act is open to serious question. Of the courts which would permit the defense, only the Third Circuit has devised a stringent test for determining its applicability.¹⁶³ Although the Third Circuit has properly carried out its responsibility in attempting to reconcile the two antitrust laws, it unfortunately has failed to come to grips with a number of economic and practical problems in its approach.

As previously suggested, a continuing, if not frequent, practice of price verification in concentrated industries is likely to result in an orderly marketplace.¹⁶⁴ If this occurs at the primary level of competition, that is, at the manufacturer level, the competitive process will be arrested or restrained. No matter how fair and nondiscriminatory the competition at other levels of distribution, it cannot conceivably compensate for the damage which will have been done to the competitive process at the primary, manufacturer level, thus frustrating perforce the *raison d’etre* of the antitrust laws. The potential for price tampering as a consequence of verification seems infinitely greater than the potential for substantially anticompetitive price discrimination in the absence of such verification.

160. 346 U.S. at 73-74.

161. *Id.*

162. See *Treasure Valley Potato Bargaining Ass’n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Webster v. Sinclair Ref. Co.*, 338 F. Supp. 248 (S.D. Ala. 1971); *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971). In *Wall Products*, the court analyzed the same verification practices as were present in *Gypsum* and held that “the defendants’ *duty* to establish good faith adherence to the dictates of the Robinson-Patman Act, [constituted] . . . a circumstance equally as compelling and controlling as that found in *Cement*.” 326 F. Supp. at 313 (emphasis added). For a discussion of the controlling circumstance in *Cement*, see notes 132-34 and accompanying text *supra*.

163. See text accompanying note 16 *supra*.

164. See text accompanying 155 & 156 *supra*.

Aside from these economic difficulties, the Third Circuit's determination in *Gypsum* also generates certain practical problems for courts, prosecutors, and private attorneys general. The dubious benefit of price verification even under the Third Circuit's stringent test must be weighed carefully against the unquestionably heavy burden imposed upon the courts by the massive evidentiary inquiry necessitated under the most stringent test.¹⁶⁵ The availability of a price verification defense to price fixing, notwithstanding the Third Circuit's stringent test, may encourage some corporate executives to take chances, reckoning that it is probably less difficult to raise doubt as to the customer's honesty in reporting a competitor's lower price than it is to prove that an executive's conversation was not limited to price verification. In short, the availability of a price verification defense to price-fixing charges inevitably would so delay and complicate prosecution as to discourage government and private enforcement efforts.

Furthermore, price verification presents problems for the antitrust counselor. Preventive law, like preventive medicine, is beneficial both to society and to the client, and is more efficiently administered if it is not unduly complex or onerous. In recognition of these practical principles, antitrust lawyers generally take the hard line and advise clients not to communicate with competitors about price information under any circumstances. The hard line promotes compliance with the Sherman Act. On the other hand, advising a client that communication with competitors is permissible under certain circumstances is fraught with peril for the client.¹⁶⁶ When he attempts to put such advice into practice he will have to exercise a legal judgment and not a business judgment. The probable consequences for the business community and the public sector must be weighed against the hypothetical economic benefits of price verification.

165. See Petitioner's Brief for Certiorari at 10; *United States v. United States Gypsum Co.*, 98 S. Ct. 52 (1977). This argument should be appealing to the Supreme Court in light of the Court's recent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, rehearing denied, 98 S. Ct. 243 (1977), in which the Court held that indirect purchasers of products, the prices of which are affected by antitrust violations, are not persons injured under section 4 of the Clayton Act. 431 U.S. at 735. One of the policy reasons underlying the Court's decision was that establishing damages for indirect purchasers could severely protract and complicate litigation to the detriment of antitrust enforcement. *Id.* at 741.

166. ANTITRUST DEVELOPMENTS, *supra* note 80, at 4. Legal counsel for the defendants in *Gypsum* advised each of them that verification was legally permissible. Respondents' Joint Brief in Opposition to Certiorari at 8-9, *United States v. United States Gypsum Co.*, 98 S. Ct. 52 (1977).

Even good faith price verification within the standard established by the Third Circuit may have an injurious effect on the competitive process in a concentrated industry.¹⁶⁷ The question remains whether this anticompetitive effect should be excused because the purpose for the price exchanges, arguably to promote compliance with the Robinson-Patman Act, is not anticompetitive. The answer, it is submitted, if not provided by commercial reality, is provided in the price-fixing cases of the last generation. In each case where price-fixing violations were found, the United States Supreme Court reviewed the industrial and economic environment in which the allegedly unlawful pricing activities operated.¹⁶⁸ In those cases the Supreme Court found price-fixing conspiracies only after it concluded that the practice was anticompetitive in purpose or effect.¹⁶⁹ In each case where the Court recognized an exemption to the antitrust laws, it has conducted a thorough analysis of the congressional, constitutional, or state policy which arguably conflicted with the economic policy embodied in the Sherman Act.¹⁷⁰ The Court has exempted practices from the Sherman Act only when it was satisfied that the policies supporting those practices outweighed the policies behind the antitrust laws.¹⁷¹

167. See *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971). In *Wall Products* the court found that price verification had the actual effect of stabilizing or retarding the downward trend of prices in the gypsum industry. *Id.* at 310. Under the *Container Corp.* standard, illegal price fixing would have been established. See text accompanying notes 124-31 *supra*. If there had been no such effect but the purpose of the exchanges had been to accomplish such an effect, illegal price-fixing would also have been established. However, price exchanging without more would not have been illegal per se. See text accompanying note 132 *supra*.

168. See, e.g., *United States v. Container Corp.*, 393 U.S. 333, 337 (1969).

169. See, e.g., *id.* at 338-39 (Fortas, J., concurring).

170. See, e.g., *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

171. See text accompanying notes 135-49. Conceptually, the immunity recognized in the *Parker* line of cases, and "controlling circumstances" under *Container Corp.* are different in an evidentiary sense. In the words of the Court, "[a] claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to be unlawful." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600 (1976). Thus, in claiming that state action immunizes its conduct, a defendant would have to introduce evidence to support the conclusion that its otherwise unlawful conduct is mandated by state action. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Such proof would be a bar to Sherman Act liability. *Id.* In defending a price fixing charge based upon price exchanges, on the other hand, a defendant would have to introduce evidence to prove that its conduct was legal because justified by "controlling circumstances" which preclude the conclusion that the exchanges were for the purpose of unreasonably restraining trade. See *United States v. Container Corp.*, 393 U.S. 333, 335 (1969). Such analysis would perforce go directly to the merits of the charge or claim against the defendant, contrary to the normal *Parker* situation in which the evidence goes to the collateral issue of state-action and not to determining whether the elements of a Sherman Act violation have been satisfied. In *Gypsum*, therefore, the type of "controlling circumstances" which assertedly exists

In *Gypsum*, the Government presented evidence that during the period of price information exchanges, the industry was highly concentrated, price was the decisive factor in the buyer's purchasing determination, and prices tended toward uniformity and rose despite a condition of demand elasticity.¹⁷² The defendants argued that the price exchanges did not result in anticompetitive effects.¹⁷³ Moreover, they presented evidence that on the advice of counsel they were merely avoiding violation of the Robinson-Patman Act.¹⁷⁴ Nevertheless, under the standard suggested in *Container Corp.* — that price information exchanges with anticompetitive effects violate the Sherman Act — the jury found the defendants guilty of price fixing beyond a reasonable doubt after digesting months of testimony and literally hundreds of exhibits.¹⁷⁵ The Third Circuit reversed, holding that price verification may be justified when it is intended to promote compliance with the Robinson-Patman Act and the defendant establishes his need for the price exchanges, by showing that he disbelieved his buyers' reports of lower price offers by his competitors, that he was unable to obtain independent corroboration of his buyers' representations, and that his communications with competitors were strictly limited to such verification.¹⁷⁶

V. CONCLUSION

Reconciliation of the Sherman Act and the Robinson-Patman Act must be guided by the policy of advancing unfettered competition. If price verification is salutary to the competitive process, it is nevertheless Congress' prerogative to make it lawful. For some forty years, Congress has failed to exercise this prerogative. Until Congress does, price verification should not be viewed as a justification for price tampering. Any endorsement of price verification, even under the stringent test established by the Third Circuit in *Gypsum*, goes far toward striking price-fixing from the Sherman Act.

may be regarded not as an immunity or as an affirmative defense under the Sherman Act, but instead, as a business justification which would legitimize the price information exchanges, not simply excuse them.

172. 550 F.2d at 117.

173. *Id.* at 130.

174. *Id.* at 120.

175. *Id.* at 118.

176. *Id.* at 126.