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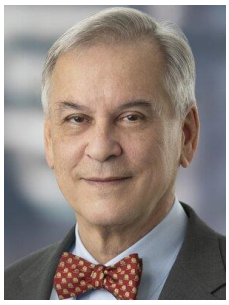
It's Time To Revisit Mens Rea In Criminal Price-Fixing Cases

By **John Siffert and Lise Rahdert** (February 16, 2023, 3:02 PM EST)



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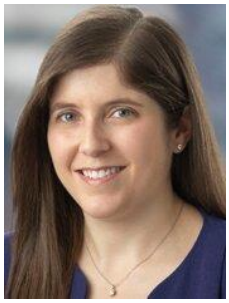

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It is time to revisit the common law rule in criminal price-fixing cases that the government need not prove the defendant intended to reduce competition or harm the market.

The low standard for mens rea in price-fixing cases that has been in place for the past 45 years should be reconsidered after two U.S. Supreme Court decisions from recent years, Rehaif v. U.S. and Ruan v. U.S., and the government's expansion of its enforcement agenda in antitrust cases, which shows no signs of slowing down in 2023.

The current mens rea standard is insufficient to ensure that only consciously wrongful conduct is punished, and it poses the risk of harming market competition by overdeterring pro-competitive conduct.

Criminal Intent for Per Se Antitrust Offenses

Section 1 of the Sherman Antitrust Act makes it a felony punishable by up to 10 years in prison and a $1 million fine for individuals to enter into agreements that unreasonably restrain trade.[1]

Section 1 is worded generally, but courts have interpreted it as proscribing two types of restraints of trade: agreements that are illegal per se, and agreements analyzed under the rule of reason.[2]

The offenses that are most commonly prosecuted criminally — price-fixing, bid-rigging, market allocation and other horizontal agreements among competitors — fall within the per se rule.

As the U.S. Court of Appeals for the Second Circuit **held** last year in U.S. v. Aiyer, such agreements are considered "categorically unreasonable restraints on trade, given their inherently anticompetitive nature."[3]

Unlike rule-of-reason cases, per se cases ordinarily do not involve any analysis of whether the alleged agreement in fact unreasonably restrained competition or harmed the relevant market. That harm to competition is presumed. It is no defense that an agreement to fix prices can be pro-competitive or beneficial to the market.

By contrast, rule-of-reason cases require the fact-finder to determine whether the challenged agreement in fact imposed an unreasonable restraint on trade, taking into account all the circumstances, as the Aiyer court wrote, including information about the "relevant business, its condition before and after the restraint was imposed," the history of the restraint, and its effects.[4]

Until now, courts have held that the government need not prove an intent to harm competition in per se cases. Instead, the government need only prove that the defendant knowingly and voluntarily entered into an agreement to fix prices.

In rule-of-reason cases, the standard is different: The government must prove that the defendant knew that anti-competitive effects were the probable result of the charged agreement.

Whatever logic supported omitting a requirement of knowledge of harm to competition in per se cases, that reasoning needs to be reexamined, because price-fixing cases can and have been brought in a broad array of matters that go well beyond competitors agreeing to raise prices.

Price-fixing encompasses more than merely agreeing on an artificially high price or a price range. Instead, any agreement that raises, depresses, fixes, pegs or stabilizes a price is charged as being per se illegal.[5] That includes agreements that have an indirect effect on price, no matter what precise machinery is employed to effect the agreement.[6]

Price-fixing also includes agreements related to terms that affect price, such as credit terms,[7] because "fixing of a component of price violates the antitrust laws," as the Second Circuit articulated in its 2016 Gelboim v. Bank of America Corp. decision.[8] Any agreement among competitors that can have an indirect impact on the price — even if the price charged goes down — can be prosecuted as illegal price-fixing under the per se rule.

The omission of a charge requiring jurors to find an intent to cause anti-competitive harm is therefore particularly concerning, because — like conspiracies generally — the government need not prove that the agreement to fix prices succeeded.[9]

Section 1 of the Sherman Act is silent about the mens rea required to commit the offense. In 1978, the Supreme Court held that at least rule-of-reason cases require proof of scienter.

In U.S. v. U.S. Gypsum Co.,[10] the court reviewed a misdemeanor Section 1 conviction for agreeing to share pricing information, which was analyzed under the rule of reason.

The court affirmed the reversal of the conviction, in part because the jury was instructed that if it found that the agreement affected price, then it could presume that the defendant intended that result.

In reaching its decision, the Gypsum court distinguished between rule-of-reason offenses and per se offenses, writing that rule-of-reason offenses can be difficult to discern, whereas per se illegal conduct is easy to distinguish because it has "unquestionably anticompetitive effects."[11]

The court implied in dicta that it was not necessary to prove that a defendant knew that such anti-competitive effects were likely in order to convict for per se offenses.[12]

In discussing the need for scienter in rule-of-reason cases, the Gypsum court highlighted the

government's policy of criminally charging only flagrant violations of the Sherman Act.[13]

The court implied that more egregious violations inherently involve conscious wrongdoing, unlike borderline violations that may result from the exercise of good faith business judgment.

The low standard for mens rea in price-fixing cases — where harm to competition is presumed — persists to this day.[14] Since Gypsum, courts have repeatedly held that although intent is a necessary element of a criminal antitrust violation, "[w]here per se conduct is found, a finding of intent to conspire to commit the offense is sufficient," in the words of the Second Circuit's 1981 U.S. v. Koppers Co. decision.[15]

In other words, according to the Aiyer court, because of the per se presumption, the government does not need to prove that the defendant "was consciously aware that anticompetitive effects would most likely result from his alleged misconduct."[16]

The Supreme Court's Decisions in Rehaif and Ruan

Recent Supreme Court decisions suggest that it is time to question Gypsum's dicta that mens rea is not required in per se cases.

In Ruan v. U.S.,[17] the court in June 2022 **emphasized** the importance of scienter in ensuring that innocent conduct is not prosecuted.

There, the court considered what state of mind is required in drug trafficking cases where the principal defense of the accused was that his prescriptions of opioids constituted authorized medical treatment.

The court held that the government had the burden of proving beyond a reasonable doubt that the defendant knowingly distributed drugs in an unauthorized manner.

The court reasoned that requiring knowingly wrongful misconduct was consistent with the general principle that "criminal law seeks to punish the 'vicious will,'" and with "few exceptions, 'wrongdoing must be conscious to be criminal.'"[18]

That principle has caused the court to read into statutes that are silent on mens rea the intent that "is necessary to separate wrongful conduct from otherwise innocent conduct."[19]

The Ruan court explained that requiring the jury to determine whether there was an authorized prescription "plays a 'crucial' role in separating innocent conduct — and, in the case of doctors, socially beneficial conduct — from wrongful conduct."[20]

Indeed, the court quoted Gypsum in discussing this issue, noting that issuing invalid prescriptions is, like rule-of-reason antitrust conspiracies, "often difficult to distinguish from the gray zone of socially acceptable conduct" of issuing valid prescriptions.[21]

Without mentioning per se cases, the Ruan court wrote:

> A strong scienter requirement helps diminish the risk of "overdeterrence," i.e., punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line.[22]

Three years earlier in Rehaif v. U.S.,[23] the Supreme Court similarly held that a person could not be convicted of illegally possessing a firearm unless the government proved that he knew both of his possession of the weapon and his legal status that rendered the firearm possession criminal.

Although the court's decision was based on statutory construction, the outcome was animated by the same concerns that the court articulated subsequently in Ruan.

The relevant statute, Title 18 of the U.S. Code, Section 922(g), prohibits several categories of individuals from possessing a firearm, including people with felony convictions and those who are in the U.S. illegally.

A separate provision identified the punishment, at the time stating that anyone who knowingly violates Section 922(g) can be imprisoned for up to 10 years.

The issue in Rehaif was whether the "knowingly" requirement in the penalty provision applied both to the possession of the firearm and to the defendant's status that makes it a crime to possess a firearm.

In holding that "knowingly" applied to the status element as well as the possession element, Rehaif highlighted foundational principles of criminal law favoring consciousness of wrongdoing, explaining that scienter requirements "[help] to 'separate those who understand the wrongful nature of their act from those who do not.'"[24]

The court noted that the scienter was required in part because the gun offense carries a harsh potential penalty of up to 10 years,[25] which is the same maximum penalty as antitrust offenses.

Enhancement of Penalties For Antitrust Convictions Warrants Revisiting Mens Rea

An instruction requiring the jury to find an intent to harm competition in per se cases is warranted because of the severe possible penalty for Section 1 violations.

The Gypsum court was reviewing a misdemeanor conviction that had occurred before the Sherman Act was a felony. Since then, Congress has increased the penalties substantially.

Shortly before Gypsum was decided, the penalty was raised to three years in prison.[26] Today, a defendant faces 10 years in prison, and fines of $1 million for individuals and $100 million for corporations.[27]

Scholars have questioned whether Gypsum's reasoning makes sense for a felony offense with more severe possible penalties and increased collateral consequences.[28] Rehaif and Ruan sharpen this point and emphasize that a severe penalty calls for a stricter scienter standard.[29]

The Risk of Overdeterrence Warrants a Heightened Mens Rea Requirement

The government's enforcement agenda has expanded beyond mere flagrant violations of the antitrust laws. A willingness to bring tough cases equates to a willingness to bring cases where the evidence is circumstantial, and the government does not have strong, direct proof of an intent to fix prices.

In such cases, Gypsum's discussion of the risk of overdeterrence is instructive. Gypsum examined why an

agreement to exchange prices — subject to the rule of reason — required heightened scienter, noting that price-sharing can have beneficial pro-competitive effects, and there is a risk of overdeterrence if mens rea is not required.

The court explained that

> [t]he imposition of criminal liability on a corporate official ... for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence.[30]

This is because pro-competitive conduct can be chilled by the fear of potential criminal exposure.

The Supreme Court's warning about overdeterrence in Section 1 cases is even more relevant today, where the government's enforcement agenda has broadened considerably.

The government's prosecution of borderline offenses means that people legitimately doing their jobs may stumble into conduct that arguably constitutes price-fixing.

That risk exists in industries where competitors need to communicate regularly in the ordinary course of business,[31] since the government often argues that the mere fact that competitors talked to each other is evidence of an illegal agreement.

Such innocent conduct may therefore subject a person to criminal prosecution even when there was no intent to harm competition or otherwise engage in wrongful conduct.

Like overdeterring doctors from writing drug prescriptions in Ruan, overly constricting socially beneficial business conduct does harm to critical aspects of our economy.

Ironically, as the Supreme Court warned in Gypsum, overpolicing allegedly per se illegal agreements can have the effect of harming the very market the government seeks to protect by deterring individuals from engaging in pro-competitive business activity that is arguably close to the line of conduct subject to the Sherman Act.

In revisiting the intent requirement in per se prosecutions, courts should require the government to prove an intent to harm competition, especially in instances where indirect price-fixing is alleged or where the government argues that the jury should infer an agreement to fix prices from circumstantial evidence, such as exchanges of pricing information.

The notion of intent to harm as part of mens rea is not new. Wire fraud exemplifies when the government must prove an intent to harm the target of the fraudulent scheme.[32] Requiring an intent to harm competition in price-fixing cases would ensure that antitrust prosecutions are limited to violations that are conscious rather than inadvertent.

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[1] 15 U.S.C. § 1.

[2] United States v. Aiyer, 33 F.4th 97, 114 (2d Cir. 2022).

[3] Id.

[4] Id.

[5] Id. at 115.

[6] United States v. Apple, Inc., 791 F.3d 290, 327 (2d Cir. 2015).

[7] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980).

[8] Gelboim v. Bank of Am. Corp., 823 F.3d 759, 771 (2d Cir. 2016).

[9] Leonard B. Sand et al., Modern Federal Jury Instructions, 19-2.

[10] United States v. U.S. Gypsum Co., 438 U.S. 422, 440–45 (1978).

[11] Id. at 440.

[12] Id.

[13] Id. at 439.

[14] See Matthew G. Sipe, The Sherman Act and Avoiding Void-for-Vagueness, 45 Fla. St. U. L. Rev. 709, 751 (2018).

[15] United States v. Koppers Co., 652 F.2d 290, 296 n.6 (2d Cir. 1981); Sipe, The Sherman Act and Avoiding Void-for-Vagueness, 45 Fla. St. U. L. Rev. at 751 (collecting cases).

[16] Aiyer, 33 F.4th at 124-25.

[17] Ruan v. United States, 142 S. Ct. 2370 (2022). For additional analysis of Ruan's holding and potential impact, see Elkan Abramowitz and Jonathan Sack, Ruan v. United States Reinforces Importance of Mens Rea in Federal Criminal Law, New York Law Journal (Nov. 1, 2022), https://www.law.com/newyorklawjournal/2022/11/01/ruan-v-united-states-reinforces-importance-of-mens-rea-in-federal-criminal-law/.

[18] Ruan, 142 S. Ct. at 2376 (quotation marks omitted).

[19] Id. at 2377.

[20] Id.

[21] Ruan, 142 S. Ct. at 2377-8 (cleaned up).

[22] Id. at 2378.

[23] Rehaif v. United States, 139 S. Ct. 2191 (2019).

[24] Id. at 2196.

[25] Id. at 2197.

[26] Gypsum, 438 U.S. at 442 n.18.

[27] 15 U.S.C. § 1.

[28] See, e.g., Sipe, The Sherman Act and Avoiding Void-for-Vagueness, 45 Fla. St. U. L. Rev. at 751; Jan Loughlin, Mens Rea and Felony Violations Under the Sherman Act, 11 Loy. U. Chi. L.J. 161, 171 (1979).

[29] See Abramowitz and Sack, Ruan v. United States Reinforces Importance of Mens Rea in Federal Criminal Law, at 2.

[30] Gypsum, 438 U.S. at 441.

[31] See generally Kleen Prod. LLC v. Georgia-Pac. LLC, 910 F.3d 927, 938-39 (7th Cir. 2018).

[32] United States v. Rybicki, 354 F.3d 124, 151 (2d Cir. 2003).