CONSPIRACY, THE BUSINESS ENTERPRISE, WHITE COLLAR CRIME AND FEDERAL PROSECUTION: A PRIMER FOR PRACTICE

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INTRODUCTION

Conspiracy prosecutions of the business enterprise and those individuals associated with it can take two forms. In the first type of case, the business enterprise and its associates are prosecuted for the inchoate crime of planning and agreeing to commit a substantive offense or for the completed agreement to commit a substantive offense. In a second type of case, the business enterprise and its associates are prosecuted for a substantive offense which

is defined by statute as an agreement to attain some specific objective. The former type of prosecution has been properly criticized for its vagueness and its broad sweep in providing the basis for prosecution where it is asserted that the proper ends of the criminal law would best be served by limiting prosecution to the offense itself. The latter type of prosecution of business enterprises for agreements which are themselves defined as illegal involve situations where, despite difficulties with the inference of intent and concern with possible chilling effects on otherwise desirable associational activity, society has proscribed these agreements because of their harm to the functioning of the social or economic order.


2. See Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 413-414 (1959), where the author observes: That a crime marked by so little procedural and evidentiary rigor would prove a favorite of prosecutors was to be expected. It was, of course, unlikely that so gross a justification as expediency would be offered for treating conspiracy as a crime punishable separately from, and in addition to, the sanction which could be imposed for accomplishment of the unlawful purpose. A more elaborate rationale was fashioned, principally in the cases which refused to hold that conspiracy merged in the completed conduct which was its object. Building on the assumption that a group is more to be feared than individuals acting separately, courts concluded that a plan by two or more persons to commit crimes brings with it an increased likelihood that: the participants will reinforce each other’s determination to carry out the criminal object; the object will be successfully attained; the extent of the injury to society will be large; those who commit it will escape detection; and the group’s planning will have a long-term educative effect on its members, with schooling in crime the result. The potency of some or all of these theories is attested by the fact that conduct is occasionally classed as criminal when planned by two which would not be a crime even if accomplished by one. “Conspiracy to defraud the United States” is the outstanding example, for federal law knows no substantive crime of “defrauding the United States.” See also Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137 (1973).

3. See, e.g., Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958) where the Supreme Court noted the purpose of the Antitrust Laws and the significance of the proscription of conspiracy to restrain trade: The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competitive as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits “Every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States.
is an actual power to fix prices and regardless of whether the prices fixed are reasonable.4

This article will review the substantive law of criminal conspiracy as it applies to the business enterprise. Both the general use of conspiracy as a charge against the business enterprise6 will be considered, as well as specific statutory provisions which make particular agreements illegal.6 For the most part, this discussion will be limited to conspiracy prosecutions under federal law since state agencies have not used conspiracy prosecutions to control business behavior to any great degree and, to the extent they have, states have adopted approaches analogous to those used by federal authorities.7 The nature of white collar crime first will be consid-


This aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. . . . Agreements 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 . . . .

5. The major statutory basis for federal conspiracy prosecutions is 18 U.S.C. § 371.

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

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

There are twenty-six other conspiracy provisions in Title 18, but these are directed at such specific conduct as conspiracy to bribe in sporting contests; (§ 224) and conspiracy to kidnap (§ 1201).


ered and the application of general conspiracy provisions to such
criminal activity shall be examined. Following the general discus-
sion, a significant amount of attention will be given to the elements
of the specific crimes of conspiracy to restrain trade and to monopo-
lize. Finally, consideration will be given to the use of the general
conspiracy law to deal with the specific charges of conspiracy to
violate the federal securities laws and the Internal Revenue Code.

It is the purpose of the article to identify the nature and varia-
tions in the charge of conspiracy as it involves the business enter-
prise. The hope is that not only will knowledge be gained of the
elements of the various conspiracy charges, but that a comparison
of the various uses of conspiracy will assist in identifying the great
variety of problems which seem to be associated with differing con-
spiracy charges in order to aid law reform efforts in distinguishing
those uses of conspiracy theory which aid effective regulation of
business activity from those uses which make little contribution to
effective regulation and provide opportunity for substantial prose-
cutorial abuse.

1. THE BUSINESS ENTERPRISE AND WHITE COLLAR CRIME—GENERALLY

The term "white collar crime" does not appear in any criminal
code of this country, nor does it have legal significance in the
criminal courts. Yet the concept has gained significance as

replace the vague specification of criminal agreement which makes it a
crime to agree "to commit any act injurious to the public health, to public
morals, or to prevent or obstruct justice, or the due administration of the
laws" (Cal. Penal Code § 182(5) [West 1970]), with a more limited specifi-
cation of agreement to commit a crime (M.P.C. § 5.03(1) (a) (Proposed Of-
official Draft, 1962). The reform approach generally makes it a crime for
a person to agree to proceed in the prohibited manner, and avoids the prob-
lem presented by a requirement of an agreement between two or more per-
sons which might be affected by the acquittal or nonprosecution of one
offender. Under the reform provisions, it is generally required that the
conspirator have acted with the purpose of promoting or facilitating com-
misson of the object crime, this requires specific intent to engage in certain
conduct as opposed to simple knowledge which may serve as the basis for
a finding of guilt of the substantive offense. Most of the states revising
their conspiracy law have departed from the common law and now require
an overt act in pursuance of an agreement to commit a crime as a pre-
requisite for a conspiracy conviction. (See, e.g., N.Y. PENAL LAW § 105.20
(McKinney, 1975)). For a general discussion of the status of the law of
conspiracy in state codes and the movement of statutory reform of con-
spiracy law, see generally Note, Conspiracy: Statutory Reform Since the

8. See text accompanying notes 6 to 48.
9. See text accompanying notes 49 to 182.
10. See text accompanying notes 183 to 214.
11. Introduction to a Symposium: White Collar Crime 11 THE AM.
efforts have been made to include within the penal law provisions to control social and economic conduct such as monopolization, securities fraud and consumer fraud.\textsuperscript{12}

"White collar crime" has been most usefully defined as "an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."\textsuperscript{13} A classification of white collar or business crimes has been developed which suggests that, outside of the context of organized crime, these crimes may be variations of the standard property crimes or may involve violations of various statutory schemes designed to control specific business behavior. White collar crime can of course involve a single individual as in the classic case of the bank teller who embezzles. White collar criminal activity is as likely to involve, however, individuals in group collaboration who either jointly plan and execute the crime, or who participate at separate stages of a plan.

A classification of white collar crime has been developed which is helpful in determining whether a white collar crime should be viewed (1) as a crime which only incidentally involves a group effort, such as credit fraud, or (2) as a crime which by its nature requires collaborative effort such as many forms of antitrust violations.\textsuperscript{14} This classification is:

A. \textit{Crimes by persons operating on an individual basis or by a group of individuals} operating on an ad hoc basis (e.g., credit fraud, individual income tax violations, bankruptcy fraud and welfare and social security fraud);

B. \textit{Crimes in the course of their occupations by those operating inside business, government or other establishments, in violation of their duty of loyalty and fidelity to employer or client} (e.g., commercial bribery and kickbacks, bank violations by officers or employees, union embezzlement, securities fraud by in-

\textsuperscript{12} Id.

\textsuperscript{13} H. Edelhertz, The Nature, Impact and Prosecution of White Collar Crime 3 (1970). This definition avoids the social judgment and overly restrictive effect of the definition offered by Edwin Sutherland in his classic work on white collar crime in which he stated "may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation." E. Sutherland, White Collar Crime 9 (1949).

\textsuperscript{14} This classification system is adopted from "Appendix A" of H. Edelhertz, The Nature, Impact and Prosecution of White Collar Crime 73-75 (1970). A more complete development of this classification can be found in that work. This system does not include organized crime.
siders, employee larceny, fraud against government by padding payrolls or false claims or conflicts of interest);  

C. Crimes incidental to and in furtherance of business operations, but not constituting the central purpose of the business (e.g., tax violations, antitrust violations, commercial bribery, food and drug violations, false weights violations of Truth-in-Lending Act, Securities Act violations, physician and pharmaceutical violation of drug laws, immigration fraud, housing code violations, deceptive advertising, false claims or statements to government, labor violations, commercial espionage);  

D. White collar crime as a business or as the central activity (e.g., medical fraud, bankruptcy fraud, securities fraud, chain referral schemes, debt consolidation schemes, merchandise swindles, land frauds, personal improvement schemes, credit card fraud, insurance fraud, false security frauds, F.H.A. frauds, AID frauds, coupon redemption frauds, mail order swindles).  

The first two categories of crime only incidentally involve group collaboration, and one may question the propriety of using conspiracy law to prosecute such crimes where prosecution for the substantive offense or aiding and abetting may suffice. In the latter two categories of crime, group or collaborative effort is often necessary for successful completion of a course of criminal activity and the availability of the conspiracy charge seems more appropriate for dealing with group agreements or collaborative efforts.  

2. Conspiracy and White Collar Crime—Generally  

A conspiracy is an agreement between two or more persons to commit a criminal act or to use unlawful means to accomplish what would otherwise be lawful. Conspiracy may be the sole basis of a prosecution, or it may be joined in a separate count with the prosecution of a substantive offense that is the object of the conspiracy. Moreover, conspiracy is punishable even though it may entirely fail of its object.


17. See, e.g., Heike v. United States, 227 U.S. 131 (1913).  

The elements of a crime of conspiracy include agreement,\textsuperscript{19} intent,\textsuperscript{20} knowledge and unlawful object.\textsuperscript{21} An agreement is essential to a crime of conspiracy.\textsuperscript{22} Absent a controlling statute, an overt act is not a necessary element of the crime.\textsuperscript{23} There cannot, however, be a conspiracy without specific intent in the minds of at least two parties to the conspiracy.\textsuperscript{24} The fact that a party commits illegal acts that further the object of a conspiracy does not create liability as a conspirator absent knowledge of the conspiracy.\textsuperscript{25} However, knowledge of a conspiracy can be inferred from an expression of criminal intent or from an action whether in itself criminal or not.\textsuperscript{26} There need not be knowledge of the entire scope of the conspiracy, nor knowledge of all the parties to the conspiracy; what is required is that the conspirator know of an illegal agreement and choose to become part of it.\textsuperscript{27} While the object of a conspiracy need not be criminal itself if unlawful means are being used to attain an otherwise legal object, the United States Supreme Court has evidenced concern with vagueness and overbreadth with statutes attempting to make criminal combinations injurious to public health or morals or to trade or commerce.\textsuperscript{28}

The form that the most general business conspiracy takes is

\textsuperscript{19} See generally Cousens, Agreement as an Element of Conspiracy, 23 VA. L. REV. 898 (1937).
\textsuperscript{20} See generally Harno, Intent in Criminal Conspiracy, 89 U. PA. L. REV. 624 (1941).
\textsuperscript{21} See generally Sayre, Criminal Conspiracy, 35 HARV. L. R. 393 (1922). See also W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 470 (1972), where the authors observe:

Under the traditional definition of conspiracy, the objective need not be criminal; it is sufficient if it is "unlawful," a term which is broad enough to encompass a variety of non-criminal objectives harmful to individuals or the public. . . . Several persons may be parties to a single conspiracy even if they have never directly communicated with one another; the question is whether they are aware of each other's participation in a general way and have a community of interest.

\textsuperscript{22} United States v. Zuideveld, 316 F.2d 873, 878 (7th Cir. 1963), cert. denied, 376 U.S. 916 (1964). See also W. LAFAVE & A. SCOTT, supra note 21, at 460: "[T]he agreement itself is the requisite act."


\textsuperscript{24} United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941). See generally Cousens, Agreement as an Element in Conspiracy, 23 VA. L. REV. 898 (1937).


\textsuperscript{26} Direct Sales Co. v. United States, 319 U.S. 703 (1943).

\textsuperscript{27} Marino v. United States, 91 F.2d 691, 699 (9th Cir. 1937).

\textsuperscript{28} Musser v. Utah, 333 U.S. 95 (1948).
that of a conspiracy to defraud. An indictment charging a conspiracy to defraud does not need to allege in detail the fraudulent means utilized to achieve the purpose of the conspiracy. While it is necessary to specify the particular fraud contemplated, it has been held for instance, that in an indictment charging conspiracy involving land fraud committed against the United States, it was not necessary to specify any particular tract of land. The statute prohibiting conspiracies to defraud the United States encompasses not only conspiracies that might involve loss of government funds, but also any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.

3. LIABILITY OF THE BUSINESS ENTERPRISE AS A CONSPIRATOR

To constitute a conspiracy, there must be a combination of two or more persons. Obviously, the individuals that form the business enterprise may conspire among themselves, but for the enterprise to be liable as a conspirator, it must have a legal identity. This limits conspiracy prosecutions of business enterprises to those which the law recognizes as entities such as the corporation or independent subsidiaries. Since there must be at least two guilty parties, acquittal of all persons with whom the defendant is alleged to have conspired prevents his conviction. While this traditional view predominates, some courts have observed that it rests on the faulty premise that a not guilty verdict is a declaration of innocence rather than an indication of the absence of guilt beyond a reasonable doubt.

31. Hamner v. United States, 134 F.2d 592, 594-95 (5th Cir. 1943).
If two or more persons enter into a conspiracy, any act done by any of them in furtherance of the agreement is deemed the act of each of them for which they are jointly responsible. Liability follows not only from any act originally agreed to, but also to any act in furtherance of the original purpose agreed to. A defendant is not liable to punishment as a member of a conspiracy if he withdraws before the overt act has been committed. To escape liability it is necessary to give notice to all confederates by an affirmative act that would be sufficient to inform a reasonable person of withdrawal. One can join an existing conspiracy either by actual agreement or by committing an overt act with knowledge and in furtherance of an existing conspiracy. One who joins a conspiracy after its formation is equally culpable with all original conspirators.

Although a corporation may be indicted as a conspirator, problems arise where the alleged conspiracy involves a corporation and its officers, directors or employees. There has been a suggestion that there can be conspiracy among the directors of a corporation acting in their official capacity. Moreover, when a corporation commits a crime, the officers and directors who participated in the unlawful act are guilty of criminal conspiracy. While some courts have held that a conspiracy cannot exist between a corporation and one of its agents, it has generally been held that a corporation can conspire with its agents and officers to accomplish an unlawful purpose. Moreover, separate corporate subsidiaries or a parent corporation and a subsidiary can conspire. However,

42. Marino v. United States, 91 F.2d 691, 696 (9th Cir. 1937).
44. United States v. Yellow Cab Co., 332 U.S. 218 (1947); accord, United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941). See also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, rehearing denied, 310 U.S. 658 (1940).
46. Barron v. United States, 5 F.2d 799, 802 (1st Cir. 1925).
47. Union Pacific Coal Co. v. United States, 173 F. 737, 745 (8th Cir. 1909).
49. Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th
courts have held that separate divisions of a single corporation cannot be held to conspire.\textsuperscript{50}

Since a conspiracy involves an agreement in furtherance of a common objective, the relationship of buyer and seller, standing alone, will not support a charge of conspiracy since the desires to buy and to sell are diametrically opposed.\textsuperscript{51} However, a buyer who enters into a continuing relationship may become a conspirator, since a buyer of stolen property who agrees to further purchases may be agreeing to become part of a distribution scheme.\textsuperscript{52} Moreover, a buyer who is understood to be a middleman will be liable as a conspirator in a distribution scheme where the subject matter of the transition is illegal, as in the case of stolen interstate automobiles or in the case of narcotics.\textsuperscript{53}

4. Contract, Combination or Conspiracy to Restrain Trade

Section 1 of the Sherman Act\textsuperscript{54} provides 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 hereby declared to be illegal . . . .

Section 1 does not attempt to define the types of conduct which constitute a “contract,” “combination” or “conspiracy” in “restraint of trade.” Courts have held that they must be given the same general meaning and construction as under the common law.\textsuperscript{55} The modifying term “every” has to be construed to mean unreasonable contract, combination, or conspiracy in restraint of trade.\textsuperscript{56} Section 1 imposes criminal liability for violation of its provisions and


\textsuperscript{51} United States v. Falcone, 311 U.S. 205 (1940).

\textsuperscript{52} United States v. Varelli, 407 F.2d 735, 748-49 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972).


\textsuperscript{55} Apex Hosiery Co. v. Leader, 310 U.S. 469, 498 (1940).

\textsuperscript{56} Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59-60 (1911). See also Appalachian Coals Inc. v. United States, 288 U.S. 344, 359-60 (1933), where the Court said:

As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial.
currently authorizes sanctions of (1) a fine, not exceeding $50,000; (2) imprisonment, not exceeding one year; and (3) both fine and imprisonment. When this provision is invoked by the government, defendants may be held liable in either civil or criminal proceedings. A private party may bring an action for either equitable relief or damages or both; if for damages, a recovery of up to treble damages can be obtained.

(A) "Plurality" under Section 1 of the Sherman Act

Section 1 of the Sherman Act requires concerted action of two or more persons, and is thus distinguished from Section 2 of the Sherman Act which applies to individuals who monopolize or attempt to monopolize as well as to group action in the form of a conspiracy to monopolize or attempt to monopolize. While the terms "contract," "combination" and "conspiracy" have been used interchangeably, there have been efforts to distinguish their use which suggest that the standard of proof of a contract or a combination is less exacting than that required to show the existence of a conspiracy. A contract involves a binding agreement; a combination involves an association of at least two persons seeking a common end; and a conspiracy refers to a plurality of actors who agree either to act unlawfully or seek an unlawful objective in a manner which can give rise to imputed liability.

A single corporation cannot violate Section 1. Currently, courts hold that a corporation and its employees acting within the

61. See text at notes 119-41 infra.
65. Union Pacific Coal Co. v. United States, 173 F. 737, 745 (8th Cir. 1909).
scope of their employment will not be viewed as two or more parties for purposes of finding a conspiracy in violation of Section 1.\textsuperscript{68} However, if the acts of a corporate employee are outside his scope of duty and are performed for his own private interests, the employee can be deemed to be acting on his own behalf and capable of conspiring with the corporation that employs him.\textsuperscript{69} Moreover, the fact that a corporation and its employees may be viewed as a single entity does not exclude liability of officers, directors or employees since they are liable under Section 1, if they have authorized, ordered or knowingly participated in violations of Section 1 in conjunction with persons or entities other than their own corporations.\textsuperscript{70} Thus, both a corporation and its officers can be found liable under a conspiracy count involving other corporations or other natural persons.

The requirement of a plurality imposed by Section 1 can be satisfied by showing a conspiracy within a multi-corporate enterprise.\textsuperscript{71} In the parent-subsidiary situation\textsuperscript{72} or where there are affiliated corporations,\textsuperscript{73} there may be a plurality required for a Section 1 conspiracy. However, it has been held that a corporation and its unincorporated divisions, without any other corporation's involvement, does not constitute a plurality for purposes of Section 1.\textsuperscript{74}

\textbf{(B) "Acting in Concert" under Section 1 of the Sherman Act}

Section 1 of the Sherman Act requires, in addition to plurality, action in concert which is established by showing consensus or agreement either directly or by inference.\textsuperscript{76} While direct evidence

\begin{footnotesize}
\textsuperscript{69} Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).
\textsuperscript{70} United States v. Wise, 370 U.S. 405, 416 (1962).
\textsuperscript{72} Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951).
\textsuperscript{73} United States v. Yellow Cab Co., 332 U.S. 218 (1947).
\end{footnotesize}
of agreement clearly satisfies this requirement,\textsuperscript{76} in the absence of such agreement, concerted action can be inferred from conduct in furtherance of a common objective or by a uniformity of conduct.\textsuperscript{77} Inference of concerted action can be drawn from such facts as a course of dealing, pricing and production control, or territorial market divisions.\textsuperscript{78}

(C) \textit{Intent Required under Section 1 of the Sherman Act}

In order to satisfy the requirement of plurality and concerted action, it is necessary to show that the parties intended to conspire, contract or combine, to restrain trade.\textsuperscript{79} While the intent to restrain trade must be proven either directly or by influence, the motives of parties charged with conspiracy to restrain trade are irrelevant.\textsuperscript{80} There is, however, no need to prove specific intent to restrain trade; the requirement of intent is satisfied by establishing general intent—the defendants intended their acts to have the consequences that they did have.\textsuperscript{81} Such general intent can be implied\textsuperscript{82} as long as there is a showing of knowledge that at least one other party would act in concert.\textsuperscript{83} Such knowledge can also be implied from facts which indicate that the parties should have known that concerted action was contemplated.\textsuperscript{84}

(D) \textit{Behavior Constituting Unreasonable Restraint on Trade}

Only unreasonable restraints of trade are within the reach of Section 1 of the Sherman Act. The classic formulation of the "rule of reason" was provided by Justice Brandeis in \textit{Chicago Board of Trade v. United States}\textsuperscript{85} where it was observed that every contract or agreement has a restraining effect on trade: "To bind, to

\textsuperscript{76} United States v. Trenton Batteries Co., 273 U.S. 392, 397-98 (1926).
\textsuperscript{77} American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).
\textsuperscript{78} Eastern States Retail Lumber Dealer's Ass'n v. United States, 234 U.S. 78 (1914).
\textsuperscript{80} Id. at 146.
\textsuperscript{81} United States v. Patten, 226 U.S. 525-543 (1913); accord, United States v. General Motors Corp., 384 U.S. 127 (1966).
\textsuperscript{83} United States v. Paramount Pictures, 334 U.S. 131, 142 (1948).
\textsuperscript{85} 246 U.S. 231 (1918).
restrain, is of the very essence. 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.\footnote{United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, reh. denied, 310 U.S. 658 (1940). See generally Bork, The Rule of Reason and the Per Se Concept; Price Fixing and Market Division, 74 Yale L.J. 775 (1965) and 75 Yale L.J. 373 (1966); Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U.L. Rev. 137 (1962); and Comment, The Per Se Illegality of Price-Fixing sans Power, Purpose or Effect, 19 U. C. I. L. Rev. 837 (1952).} In making the determination of whether a restraint “suppresses” competition, or is unreasonable, the nature of the industry and the market in which a party operates must be taken into consideration:

“[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.”\footnote{United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, reh. denied, 310 U.S. 658 (1940). See generally Bork, The Rule of Reason and the Per Se Concept; Price Fixing and Market Division, 74 Yale L.J. 775 (1965) and 75 Yale L.J. 373 (1966); Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U.L. Rev. 137 (1962); and Comment, The Per Se Illegality of Price-Fixing sans Power, Purpose or Effect, 19 U. C. I. L. Rev. 837 (1952).}

(i) Price-fixing

Price-fixing and any arrangement to control prices is \textit{per se} illegal,\footnote{United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, reh. denied, 310 U.S. 658 (1940). See generally Bork, The Rule of Reason and the Per Se Concept; Price Fixing and Market Division, 74 Yale L.J. 775 (1965) and 75 Yale L.J. 373 (1966); Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U.L. Rev. 137 (1962); and Comment, The Per Se Illegality of Price-Fixing sans Power, Purpose or Effect, 19 U. C. I. L. Rev. 837 (1952).} this includes any agreement to set, maintain, stabilize, raise, depress, fix or peg the price of goods or services.\footnote{United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, reh. denied, 310 U.S. 658 (1940). See generally Bork, The Rule of Reason and the Per Se Concept; Price Fixing and Market Division, 74 Yale L.J. 775 (1965) and 75 Yale L.J. 373 (1966); Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U.L. Rev. 137 (1962); and Comment, The Per Se Illegality of Price-Fixing sans Power, Purpose or Effect, 19 U. C. I. L. Rev. 837 (1952).} The rationale for applying the \textit{per se} rule to price-fixing agreements is that such agreements can have no purpose except the elimination or reduction of price competition.\footnote{United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, reh. denied, 310 U.S. 658 (1940). See generally Bork, The Rule of Reason and the Per Se Concept; Price Fixing and Market Division, 74 Yale L.J. 775 (1965) and 75 Yale L.J. 373 (1966); Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U.L. Rev. 137 (1962); and Comment, The Per Se Illegality of Price-Fixing sans Power, Purpose or Effect, 19 U. C. I. L. Rev. 837 (1952).} In criminal cases, all the prosecution need establish is the presence of a price-fixing agreement and an overt act in its furtherance.\footnote{United States v. Trenton Batteries Co., 273 U.S. 392, 397-98 (1926).} In civil treble-damage suits, the plaintiff must, in addition, prove that an overt act in furtherance of the conspiracy was the proximate cause of his damage.\footnote{Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961).} The only possible defenses in a Section 1 case involving price-fixing are either a showing that the restraint in question does not constitute price-fixing\footnote{Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918). See also United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).} or an attack on the existence of interstate commerce. However, the latter attack is limited by the judicial determination that the scope of commercial activity to which
the Sherman Act applies is as broad as the commerce clause. Moreover, the amount of interstate or foreign trade involved is not material since Section 1 of the Sherman Act brands as illegal the character of the restraint and not the amount of commerce affected.

(ii) Division of Markets

Like price-fixing agreements, agreements among competitors to divide markets or allocate customers are illegal per se. Market divisions among competitors are regarded as having no purpose other than elimination of competition. Even vertical market divisions imposed by a manufacturer on wholesalers or retailers have been held illegal per se if the manufacturer has sold his product to the distributors. The use of a trademark licensing arrangement will not suffice to justify a division of territories by potential competitors. A finding of a restraint of trade may also result from an agreement with a potential competitor not to sell a particular product line to a specified customer.

(iii) Concerted Refusals to Deal or Group Boycotts

While a unilateral refusal to deal, without more and absent a showing of any purpose to create a monopoly, is not an unlawful restraint on trade, a group boycott or a concerted refusal to deal is almost always a per se violation of Section 1 of the Sherman Act. The anticompetitive evil of concerted refusals to deal lies in their tendency to eliminate competition.

in the fact that their only purpose is to coerce parties who are not members of a combination or conspiracy to follow a prescribed course of action.\textsuperscript{103} An illegal concerted refusal to deal may be directed against customers\textsuperscript{104} or toward competitors.\textsuperscript{105} Concerted refusals to deal may take the form of exclusive membership clauses in trade associations,\textsuperscript{106} agreements between competitors to boycott those who will not conform to prescribed practices,\textsuperscript{107} or agreements between manufacturers and certain distributors limiting sales to competing distributors to sales made at a discriminatorily high price.\textsuperscript{108}

(iv) Tying Arrangements

Tying arrangements are frequently treated as per se violations of Section 1 of the Sherman Act.\textsuperscript{109} Tying arrangements are contracts in which a seller or lessor conditions the sale or lease of goods or services on the purchase of another product.\textsuperscript{110} Tying arrangements are of concern because they may force buyers into giving up the purchase of substitutes for the tied product and they may destroy free access of competing suppliers of the tied product to the consuming market.\textsuperscript{111}

(v) Reciprocal Dealing

Assuming the requisite impact upon commerce, all agreements for reciprocal dealing are illegal per se. Such agreements include both specific reciprocity agreements and reciprocity resulting from the coercion of one party.\textsuperscript{112} Reciprocal dealing involves ar-

\begin{itemize}
  \item \textsuperscript{103} Eastern States Retail Lumber Ass'n v. United States, 234 U.S. 600, 610-11 (1914).
  \item \textsuperscript{104} Fashion Originator's Guild v. FTC, 312 U.S. 457, 461-62 (1941).
  \item \textsuperscript{106} Associated Press v. United States, 326 U.S. 1, 4 (1945).
  \item \textsuperscript{107} Fashion Originators Guild v. FTC, 312 U.S. 457, 481 (1941).
  \item \textsuperscript{110} International Business Machines Corp. v. United States, 298 U.S. 131, 133-35 (1936).
  \item \textsuperscript{111} United States v. Loew's Inc., 371 U.S. 38, 45 (1962).
\end{itemize}
rangements by which sellers using their buying power obtain purchase commitments from their suppliers.\textsuperscript{113} Proof of a voluntary practice of reciprocal dealing will not suffice to preclude a successful charge of violation of Section 1. Reciprocity is an anticompetitive practice because it reduces competition based on the merits of the products involved.\textsuperscript{114}

5. COMBINATION OR CONSPIRACY TO MONOPOLIZE

Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monop-
olize, or combine or conspire with any other person or per-
sons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.\textsuperscript{115}

This section of the Sherman Act deals with actual monopolization, attempts to monopolize, and combinations and conspiracies to monopolize.\textsuperscript{116} The commentary following this general discussion is restricted to a consideration of the conspiracy offense.

The three crimes specified in Section 2 are not mutually exclusive and a defendant's action may be found to be in violation of each of the offenses.\textsuperscript{117} A defendant found guilty of any one offense can be subjected to (1) a fine not to exceed $50,000; (2) a prison term not exceeding one year; or (3) both the fine and prison term.\textsuperscript{118} Any private party injured as a result of any of the three acts specified in Section 2 can bring a private treble-damage action.\textsuperscript{119}

Unlike Section 1, those portions of Section 2 which deal with


\textsuperscript{116} United States v. Shapiro, 103 F.2d 775, 776 (2d Cir. 1939). See generally Turner, Antitrust Monopoly and the Cellophane Case, 70 HARV. L REV. 281 (1956); see also Mason, Current Status of the Monopoly, 62 HARV. L REV. 1265 (1949).

\textsuperscript{117} American Tobacco Co. v. United States, 328 U.S. 781 (1946).


actual monopolization or attempted monopolization can be the basis for liability based on unilateral action. The Section requirement of plurality also applies to actions brought under Section against combinations and conspiracies to monopolize. It is not necessary that actual monopolization be obtained or approached to find a Section 2 conspiracy; all that is needed is a showing of concerted action with a specific intent to achieve monopolization of a substantial part of commerce plus some overt act in furtherance of the conspiracy.

(a) "Plurality" Requirement under Section 2 of the Sherman Act

To support an action brought for combination or conspiracy to monopolize under section 2 of the Sherman Act it is necessary to establish the existence of collaborative activity involving two or more persons. A combination to monopolize has been defined as a consensual union of two or more persons which has as its purpose the fixing of prices or the exclusion of competition from the market. Such a conspiracy is by definition a consensual union to accomplish a lawful purpose by unlawful means or an unlawful purpose by lawful means.

For a combination or conspiracy to exist, there must be concerted action; no combination or conspiracy can be predicated on individual action alone. The establishment of concerted action presents special problems where the alleged conspirators are connected with the same business enterprise. Under the present law, parent corporations and their subsidiaries can conspire to monopolize in violation of the Sherman Act if they

are held out as competitors, or if they act in concert to coerce or restrain third parties, but not if they merely act collectively to decide how they should conduct their own affairs. Neither joint activities between a company and its unincorporated divisions, nor joint action by officers and employees of a single business enterprise operating within their scope of duty, constitute a conspiracy.

Section 1 of the Sherman Act it should be noted, does not make a restraint of trade by a single corporation an offense, so it may be argued that officers and employees of a single corporation cannot conspire with the corporation to commit the offense. The corporation itself can violate Section 2, however, by monopolizing or attempting to monopolize. Moreover, it can be argued that officers and employees of a corporation can conspire with it to violate Section 2.

(b) Inferring the Existence of a Conspiracy to Monopolize

A conspiracy to violate Section 2 can rarely be established by direct evidence; it must, therefore, be indirectly established from words, acts or a course of conduct. However, once the existence of a conspiracy is established, it takes little direct evidence to connect a conspirator with the conspiracy and subject him to

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136. See, e.g., Minonshohn v. United States, 101 F.2d 477 (3d Cir. 1939) and State v. Parker, 114 Conn. 354, 158 A. 797 (1932).

liability under Section 2.\textsuperscript{138} Once a party is established to have joined a conspiracy to monopolize, it is liable for everything done during the period of its existence regardless of the exact time of its participation.\textsuperscript{139}

Ordinarily, a conspiracy must be inferred from surrounding circumstances.\textsuperscript{140} Such inference can be drawn from actions taken;\textsuperscript{141} an early example of such a conspiracy established by inference is that of a retail lumber dealers association which engaged in concerted, systematic and periodic circulation of reports giving confidential information including the names of wholesale lumber dealers reported as selling to local consumers.\textsuperscript{142} An inference of conspiracy can also be drawn from a course of dealings,\textsuperscript{143} an exchange of words,\textsuperscript{144} a tacit understanding or agreement,\textsuperscript{145} business behavior,\textsuperscript{146} or the acts or words of co-conspirators.\textsuperscript{147}

(c) \textit{Requirement of an Overt Act for Violation of Section 2 of the Sherman Act}

Proof of at least one overt act in furtherance of a combination or conspiracy is an essential element as the courts have construed the requirement of a Section 2 offense.\textsuperscript{148} The necessary overt act may be found in such practices as price-fixing,\textsuperscript{149} price discrimination,\textsuperscript{150} territorial allocation,\textsuperscript{151} boycotts,\textsuperscript{152} tying arrange-
ments,\textsuperscript{153} cross-licensing agreements,\textsuperscript{154} or exclusive buying arrangements.\textsuperscript{155}

Since a conspiracy is defined alternatively as a combination to accomplish a lawful end by unlawful means or an unlawful end by lawful means, it it not necessary that the overt act necessary to satisfy the Section 2 requirement be an unlawful act although in most cases the acts cited have involved predatory or coercive practices.\textsuperscript{156} It should be noted that in establishing a Section 2 combination or conspiracy of attempt to monopolize, the showing of a specific intent by agreement to monopolize establishes the required showing of dangerous probability of success.\textsuperscript{157} Where acts fall short of actual monopoly, an intent to acquire that monopoly is necessary to produce a dangerous probability that it will in fact occur, and when the intent and consequent dangerous probability exist, a violation of the Act is established.\textsuperscript{158} There is, therefore, no requirement that the overt acts proven be shown to actually create a dangerous probability of monopolization.\textsuperscript{159}

(d) Requirement of Specific Intent to Monopolize for Violation of Section 2 of the Sherman Act

To establish the offense of conspiracy to monopolize, there must be a specific, subjective intent to gain an illegal degree of monopoly power.\textsuperscript{160} Specific intent to monopolize may be established by direct evidence such as by showing an express agreement\textsuperscript{161} or

\begin{enumerate}
\item \textsuperscript{153} Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953).
\item \textsuperscript{155} United States v. Griffith, 334 U.S. 100, 107 (1948).
\item \textsuperscript{156} American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946). See also United States v. New York Great A & P Tea Co., 137 F.2d 459, 463-64 (5th Cir.), cert. denied, 320 U.S. 783 (1943).
\item \textsuperscript{157} See Swift & Co. v. United States, 196 U.S. 375, 396 (1905).
\item \textsuperscript{158} Compare United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961) with Lessig v. Tidewater Pit Co., 327 F.2d 459, 474 (9th Cir.), reh. denied, 327 F.2d 478 (9th Cir.), cert. denied, 377 U.S. 993 (1964), and other cases where the charge is attempt to monopolize requiring a showing of dangerous probability of success. See generally Hibner, Attempts to Monopolize: A Concept in Search of Analysis, 34 ABA ANTITRUST L.J. 165 (1967); and Smith, Attempts to Monopolize: Its Element and Their Definition, 27 Geo. Wash. L. Rev. 227 (1950).
\item \textsuperscript{159} United States v. Consolidated Laundries Corp., 291 F.2d 563, 572-73 (2d Cir. 1961).
\end{enumerate}
by actual words expressing intent. However, specific intent can be inferred from circumstantial evidence. Specific intent can be inferred from illegal, predatory or coercive business practices such as price-fixing, boycotts and tie-ins, a course of dealing, or from a showing of dangerous probability of monopoly power which provides a basis for concluding what might otherwise be considered ordinary business conduct is itself engaged in for purposes of gaining monopoly power. In sum, specific intent will be inferred upon a showing of a combination or conspiracy to engage in unlawful or coercive practices, or of unfair or unethical business practices. Where the proof rests on unfair or unethical business practices, however, it has been required that a showing be made of sufficient market power to pose a threat of achieving actual monopoly.

(e) Requirement of Substantial Amount of Commerce for Violation of Section 2 of the Sherman Act

Section 1 of the Sherman Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of commerce affected. Section 2 of the Act makes it unlawful to conspire to monopolize "any part" of interstate commerce without specifying how large a part must be affected. The words "any part" have been construed to mean that a substantial amount of commerce must be affected by the combination or conspiracy to restrain trade. There is authority for the proposition that

166. Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), reh. denied, 327 F.2d 473 (9th Cir.), cert. denied, 377 U.S. 993 (1964).
when the charge is a combination or conspiracy there is no need to determine a relevant product or geographical market.\textsuperscript{173} This authority is based on the theory that where the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent, to monopolize.\textsuperscript{174} A review of case authority suggests that a showing of any amount of commerce which is not \textit{de minimis} will satisfy the requirement of showing an "appreciable" or "substantial" amount of commerce under the combination or conspiracy provision of Section 2.\textsuperscript{175}

6. RELATIONSHIP OF CONSPIRACIES SUBJECT TO PROSECUTION UNDER SECTIONS 1 AND 2 OF THE SHERMAN ACT

Commentators have properly suggested that the conspiracy condemned under Section 2 differs from that covered by Section 1;\textsuperscript{176} while a Section 1 conspiracy involves restraint of trade, a Section 2 conspiracy is a conspiracy of which monopolization is the primary end, whether it specifically restrains trade or not.\textsuperscript{177} Yet a single combination or conspiracy can involve action or a plan of action which will result in liability under both sections.\textsuperscript{178} The Supreme Court has at times treated the two sections as both being directed against restraints of trade, with Section 2 having a somewhat broader reach. Section 2 was read as a supplement to Section 1, "to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded."\textsuperscript{179}

The two sections differ in the degree of proof required. Since there must be a showing of actual or potential monopoly to constitute monopolization or a dangerous probability of monopolization to qualify as an attempt to monopolize under Section 2, the degree of proof of competitive effect under Section 2 is greater than under Section 1.\textsuperscript{180} Section 1, however, always requires a showing of

\begin{itemize}
\item \textsuperscript{173} United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956). See also Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.) reh. denied, 327 F.2d 478 (9th Cir.), cert. denied, 377 U.S. 993 (1964).
\item \textsuperscript{174} United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961).
\item \textsuperscript{175} Id. at 572. ($523,000 was appreciable although representing only 1 per cent of the industry's total volume); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (5,000 licensed taxicabs in four cities).
\item \textsuperscript{176} See, e.g., E. Kintner, \textit{An Antitrust Primer} 108-09 (2d ed. 1973).
\item \textsuperscript{177} Smith, \textit{Attempts to Monopolize: Its Elements and Their Definition}, 27 GEO. WASH. L. REV. 227 (1950).
\item \textsuperscript{178} See e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, reh. denied, 310 U.S. 658 (1940).
\item \textsuperscript{179} Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).
\item \textsuperscript{180} United States v. Socony-Vacuum Oil Co., 310 U.S. 150, reh. denied, 310 U.S. 658 (1940).
\end{itemize}
concerted activity, while section 2 monopolization or attempts to monopolize may involve unilateral action. Only that part of Section 2 dealing with combinations or conspiracies requires concerted action.

7. Conscious Parallelism—Conspiracy Inferred from Uniform Action

The doctrine of "conscious parallelism" has been developed to account for the type of circumstantial evidence which will establish a conspiracy under the Sherman Act. The doctrine was established in Interstate Circuit, Inc. v. United States where the Supreme Court held that acceptance by competitors, without previous agreement, of an invitation to participate in a plan, which if carried out will result in a restraint of trade is sufficient to establish an unlawful conspiracy under the Sherman Act. Yet proof of agreement remains necessary; proof of parallel business behavior alone does not conclusively establish agreement. Conscious parallelism is admissible circumstantial evidence from which the fact finder may infer agreement and thus help support a finding of conspiracy, but alone it is not enough. However, conspiracy may be inferred from proof of substantially uniform business behavior unrebutted by defendants in a position so to do. While evidence of conscious parallelism is not conclusive, it is evidence which is to be weighed heavily. The Attorney General's National Committee to Study the Antitrust Laws established criteria for determining whether any uniformity of action is sufficient to permit an inference of conspiratorial action: the pervasiveness of the uni-

189. Morton Salt Co. v. United States, 235 F.2d 573, 577 (10th Cir. 1956).
formity, the areas of uniformity and whether it extends beyond price to cover other terms and conditions of sale, the extent of uniformity, the period of time over which uniformity can be observed, the time lag, if any, between a change by one competitor and that of another, the homogenuity or differentiation of production, the pattern of price changes and any business justification for the uniformity of behavior.\textsuperscript{191}

8. Prosecutions Under the Federal Securities Law

The federal securities laws encompass the Securities Act of 1933,\textsuperscript{192} the Securities Exchange Act of 1934,\textsuperscript{193} the Public Utility Holding Act of 1935,\textsuperscript{194} the Trust Indenture Act of 1939,\textsuperscript{195} the Investment Company Act of 1940,\textsuperscript{196} the Investment Advisers Act of 1940,\textsuperscript{197} and the Securities Investor Protection Act of 1970.\textsuperscript{198} With the exception of the last Act, the Securities Exchange Commission has primary responsibility for the administration and enforcement of all federal securities laws; it can investigate, institute civil and administrative enforcement actions or refer cases to the Department of Justice for criminal prosecution.\textsuperscript{199} The federal securities statutes generally do not contain specific provision indicating that any acts or failures to act will constitute a criminal offense. Rather, with the exceptions of the Investment Advisers Act\textsuperscript{200} and Securities Investor Protection Act,\textsuperscript{201} each statute includes: \textsuperscript{202} a general proscription making willful violation of any substantive provision of the statute or of any rule or regulation promulgated thereunder a crime; a specific proscription making certain willful false filings pursuant to the statute a crime; and a section setting forth maximum penalties to be imposed upon conviction. While most prosecutions under the federal securities laws have been brought under the 1933 or 1934 Acts, indictments often

\textsuperscript{191} Id. at 39.
include charges of false statements,\textsuperscript{203} mail and wire fraud,\textsuperscript{204} and conspiracy.\textsuperscript{205} Charges of conspiracy to violate the securities laws, of course, hinge on a showing of a violation of the underlying substantive law. Both the 1933 and 1934 Act require a "willful" violation of one of the substantive provisions of the respective Acts or any rule or regulation promulgated thereunder in order to constitute a crime; the term "willful" means only that the act was done deliberately so that a person can willfully violate an S.E.C. rule even if he does not know of its existence.\textsuperscript{206}

(a) \textit{Conspiracy Prosecutions for Federal Securities Law Violations}

Prosecutions for conspiracy to violate the federal securities laws are brought under the general criminal conspiracy provision in the federal code.\textsuperscript{207} Conspiracy charges can be employed to join multiple defendants and otherwise unconnected offenses arising out of an over-all scheme to defraud.\textsuperscript{208} The conspiracy charge enables the prosecution to use evidence that might otherwise be excluded under the hearsay rule; declarations of co-conspirators made in furtherance of the conspiracy are admissible against all persons who are proven by independent evidence to be members of the conspiracy.\textsuperscript{209} Moreover, the prosecution may obtain the testimony of witnesses who are named as unindicted co-conspirators.\textsuperscript{210}

(b) \textit{The Problem of a Charge of Single Conspiracy Under the Securities Law}

Indictments in securities cases are often lengthy since they deal with complex schemes extending over several years involving numerous conspirators.\textsuperscript{211} The majority of S.E.C. criminal prosecutions allege a single overall conspiracy. This gives rise to one of the most troublesome points in the conspiracy prosecution area, that is, the proper number of conspiracy counts and the precise

\textsuperscript{206} United States v. Peltz, 433 F.2d 48, 54 (2d Cir. 1970).
\textsuperscript{208} See, e.g., United States v. Borelli, 336 F.2d 376 (2d Cir. 1964).
\textsuperscript{209} See, e.g., United States v. Wolfson, 437 F.2d 862 (2d Cir. 1970).
\textsuperscript{210} See, e.g., United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).
\textsuperscript{211} Id.
scope of the conspiracy or conspiracies to be charged in the indictment.\textsuperscript{212} The number of conspiracies and the precise nature or scope of each, are questions of fact for the jury.\textsuperscript{213} The precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects.\textsuperscript{214} If there is a single agreement between conspirators, only one conspiracy exists no matter how diverse the object and no matter how many the collaborators; however, if conspirators enter into more than one agreement, then each agreement can constitute a separate conspiracy. In \textit{Kotteakos v. United States},\textsuperscript{215} the Supreme Court reversed a conviction on a single conspiracy count on the basis of material variance with the indictment where eight or more conspiracies were actually proven at the trial; the Court held such material variance prejudicial.\textsuperscript{216} Courts have held, however, that a single conspiracy charge can cover a range of conduct such as efforts to fraudulently gain control of the issuer and efforts to distribute worthless, unregistered securities where there was a finding of a central plan to effect the issuance and sale of worthless or grossly over-priced unregistered securities.\textsuperscript{217} There is authority for the proposition that in complex financial fraud prosecutions, with respect to conspirators who participate in almost every aspect of a scheme, it will not be material if a single conspiracy is alleged and a multiple conspiracy is found by the jury.\textsuperscript{218}

A related problem arises from the charging of a number of conspirators, some of whom only participated in one aspect of an overall securities scheme. The possible unfairness to minor participants in complex conspiracy cases, in associating them with an entire scheme has led courts to hold minor conspirators only liable for that portion of the overall conspiracy of which he has or should have had knowledge.\textsuperscript{219}

\textsuperscript{212} See, e.g., \textit{Kotteakos v. United States}, 328 U.S. 750 (1946).
\textsuperscript{215} 328 U.S. 750 (1946).
\textsuperscript{216} Id. at 772. See generally Note, \textit{Federal Treatment of Multiple Conspiracies}, 57 COLUM. L. REV. 387 (1957).
\textsuperscript{217} United States v. Crosby, 294 F.2d 929, 945 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).
9. Conspiracy to Defraud the United States by Fraudulent Conduct in Violation of the Internal Revenue Code

Conspiracy to violate the Internal Revenue Code is prosecuted under section 371 of the Criminal Code, which provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.\(^\text{220}\)

One of the most troublesome problems arising in conspiracy prosecutions for tax fraud is the tolling of the statute of limitations for criminal prosecution of the fraud which is three years as provided in the Criminal Code:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried or otherwise punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed.\(^\text{221}\)

Problems arise because other actions brought under the Internal Revenue Code have longer periods of limitations; tax liability for omitted income may be brought within six years,\(^\text{222}\) and assessments for amounts not taxed on account of fraud are subject to no statute of limitations.\(^\text{223}\)

(a) Completed or Continuing Conspiracy in Violation of the Internal Revenue Code

Grunewald v. United States\(^\text{224}\) dealt with the question of whether a tax fraud case would be affected by continuing efforts of concealment so that the statute of limitations would not be tolled. The defendants had used improper influence to obtain "no prosecution" rulings for certain taxpayers in 1948 and 1949, dates outside the three year statute of limitations,\(^\text{225}\) but had engaged


\(^{222}\) Int. Rev. Code of 1954, § 6501(e).

\(^{223}\) Int. Rev. Code of 1954, § 6501(c)(1).


in acts of concealment up to 1954, the time of the indictment. The government contended that the conspiracy was of a continuing nature and that the subsequent act of concealment which took place within three years of the date of the indictment rendered the charge timely. In reversing the conviction, the Supreme Court held that once the central purpose of the conspiracy had been attained, the statute began to run, and that a subsequent conspiracy to conceal could not be implied from circumstantial evidence. The Court, in Grunewald, therefore, appears to have accepted the notion that a subsequent agreement to conceal may be a basis for finding that a conspiracy continues beyond the commission of the underlying offense, but the burden exists of proving a subsidiary agreement. This burden is not met by showing acts of concealment as a basis of inferring conspiratorial agreements to conceal. What appears to be required is “direct evidence of an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.” So that if the conspiracy in Grunewald was not merely to obtain “no prosecution” rulings but “to block collection of the tax,” then the conspiracy could continue indefinitely since there is no statute of limitations on a government action to collect taxes in the case of a false or fraudulent return. The Supreme Court remanded in Grunewald to have a determination of fact as to the purpose of the original conspiracy.

CONCLUSION

The economic effect of corporate crime in the form of fraud, antitrust violation and income tax invasion appears to be much greater than that of personally committed offenses. But more than this, business crime strikes at the heart of the laissez faire economy. As Chief Justice J. Cullen Ganey of the United States District Court for the Eastern District of Pennsylvania said in his pre-sentence statement in the electrical antitrust case:

The conduct of the corporate and individual defendants alike . . . have flagrantly mocked the image of that economic system of free enterprise which we profess to the country and destroyed the model which we offer today as a free world alternative to state control and eventual dictatorship. Some extent of the vastness of the schemes of price fixing, bid rigging and job allocations can be gleaned from the fact that the annual corporate sales covered by these

226. Grunewald at 404.
227. Id. at 415. See also Forman v. United States, 361 U.S. 416 (1960).
bills of indictment represent a billion and three-quarter dollars.\textsuperscript{228}

Conspiracy law is a potent weapon in the hands of the prosecutor of business crimes. Federal conspiracy prosecutions can be brought under special statutes or under a general provision of the Criminal Code which provides for the prosecution of the agreement to commit an offense in addition to prosecution for the commission of an offense. The breadth of the law of conspiracy and the degree to which this charge seems to provide a second basis for prosecuting the underlying substantive offense gives rise to serious criticisms of its use.

However, in the area of antitrust law, the law of conspiracy has been developed into a substantive charge in which the elements have been set out in statute and elaborated upon by courts to the extent that specific agreements can be seen to be illegal. Antitrust conspiracy law properly aims at behavior of business which is dangerous in its anticompetitive effect, and agreements, which can have no other purpose than to reduce competition. Moreover, in antitrust prosecution much of the behavior which follows the agreement may involve no substantive criminal law violation; it is the agreement itself which is illegal. The difficulty and danger in antitrust law is one of fact, that is the extent to which one can properly infer an agreement from behavior and surrounding circumstances.

Prosecution for conspiracy to violate the securities law and the Internal Revenue Code, again provide examples of the use of conspiracy law to augment the prosecution of an underlying substantive offense. The broad sweep of these laws, the ability to assign vicarious liability, and efforts to extend the statute of limitations are prosecutorial objectives achieved by the addition of a charge of conspiracy. As with the general use of conspiracy law, one may question the propriety of the use of this additional charge in face of the availability of prosecution for the underlying substantive offense and the aiding and abetting of its commission.