

# COMMENTS

## THE CREATION OF A SEPARATE RULE OF REASON: ANTITRUST LIABILITY FOR THE EXCHANGE OF PRICE INFORMATION AMONG COMPETITORS

In cases brought under the Sherman Act,<sup>1</sup> the courts have developed a two-tier standard for evaluating the legality of the challenged business practice. The "per se" test is reserved for certain oft-encountered practices that are presumed to be illegal without further inquiry. The rule of reason is a more extensive test that seeks to find whether the particular practice, on balance, tends to promote or suppress competition.<sup>2</sup> According to standard antitrust analysis, the exchange of price information among competitors should be viewed under the rule of reason unless a specific agreement to fix prices is disclosed. For an accurate determination of the effect of price information exchanges on competition,<sup>3</sup> it would seem that the rule of reason analysis should include an examination of the economic characteristics of the market in which the price information dissemination occurs.<sup>4</sup>

Recent decisions by the Supreme Court, however, have refused to include an investigation of market structure in the rule of reason analysis. By so doing they have abandoned the standard of an earlier deci-

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### THE FOLLOWING CITATION WILL BE USED IN THIS COMMENT:

R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976) [hereinafter cited as R. POSNER].

1. 15 U.S.C. §§ 1-7 (1976).

2. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 73 (1977).

3. In this Comment, the term "price information exchange" includes all exchanges of prices between competitors, except agreements or conspiracies with the specific intent to fix prices. Exchange of price information exemplifies Chief Justice Burger's statement that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978).

4. Price fixing or price stabilization can lead to the equivalent of monopoly conditions in terms of both profits and reduced output, especially in more concentrated markets. Thus, price stability can be indicative of a noncompetitive market. *See* E. MANSFIELD, *MICROECONOMICS* 325-29, 347-48 (2d ed. 1975); F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 158-82 (1970). The Supreme Court, in an opinion written by Mr. Justice Douglas, has noted that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." *United States v. Container Corp.*, 393 U.S. 333, 338 (1969). In addition, for both antitrust enforcement agencies and the consumer, price is the most obvious and measurable parameter in most instances.

sion, *United States v. Container Corp.*<sup>5</sup> This trend first became evident in a pair of decisions condemning the pricing policies of professional organizations, *Goldfarb v. Virginia State Bar*<sup>6</sup> and *National Society of Professional Engineers v. United States*.<sup>7</sup> Previously, it had been assumed that the activity of a professional association, such as the distribution of an advisory fee schedule, was exempt from prosecution under the antitrust laws.<sup>8</sup> Although the Supreme Court, in the *Goldfarb* and *Society of Professional Engineers* cases renounced an unlimited exemption from Sherman Act liability for the learned professions, it clearly recognized some form of distinction between professional and commercial practices.<sup>9</sup> Yet, the *Society of Professional Engineers* Court flatly refused to allow any distinction when the alleged violation involved competitive pricing, indicating that the Supreme Court intends to deal harshly with price information exchanges.

The issue of permissible exchanges of price information was addressed by the Supreme Court most recently in *United States v. United States Gypsum Co.*<sup>10</sup> Once again, the insights offered by the *Container Corp.* decision were ignored and the rule of reason analysis employed by the Court was limited to a discussion of the details of the specific practice without consideration of market characteristics. Moreover, the Court rejected an exception to Sherman Act liability created by the lower courts. This exception had exempted competitors from charges of price fixing when they engaged in a system of price verification for purposes of complying with the good faith requirement of the "meeting competition" defense to Robinson-Patman Act liability.<sup>11</sup> The implication is that the rule of reason used for price information exchange is

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5. 393 U.S. 333 (1969).

6. 421 U.S. 773 (1975).

7. 435 U.S. 679 (1978).

8. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 775 (1975). See text accompanying note 77 *infra*.

9. See *Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17.

10. 438 U.S. 422 (1978).

11. 15 U.S.C. § 13(b) (1976). The thrust of the Robinson-Patman Act, 15 U.S.C. §§ 13-13c, 21a (1976), is to prevent price discrimination by sellers negotiating with buyers. Two types of injury to competition are intended to be avoided: primary-line injury (injury to competition among sellers) and secondary-line injury (injury to competition among buyers). U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 4-5 (1977). The chief intention of Congress was to prevent the latter form of injury, since prior to enactment of the Robinson-Patman Act, many large retail buyers had forced large price concessions from sellers to the detriment of smaller buyers. 16B J. VON KALINOWSKI, BUSINESS ORGANIZATIONS—ANTITRUST LAWS AND TRADE REGULATION §§ 21.03-.06 (1977). Section 2(b) of the Act establishes the meeting competition defense, which permits a seller to lower his price for a particular buyer to the exclusion of other buyers if he has a good faith belief that the buyer has been offered such a lower price elsewhere. *Id.* § 22.03.

confined to a preliminary inquiry into the details of the dissemination and excludes evidence of any other competitive justification.

The purpose of this Comment is to evaluate the rule of reason standard applied by the Supreme Court to practices involving exchanges of price information among competitors. In so doing, the discussion will identify the weaknesses in the procedure adopted by the Court and will explore the import of the Supreme Court holdings for the future of price information exchanges.

## I. THE RULE OF REASON AND THE PER SE RULE—APPLICATION IN THE PRICE INFORMATION EXCHANGE CONTEXT

The modern rule of reason involves, in theory, four basic steps of analysis:<sup>12</sup> (1) identifying the practice involved,<sup>13</sup> (2) determining the purpose of the practice,<sup>14</sup> (3) identifying the likely effects of the practice,<sup>15</sup> and (4) determining whether, on balance, the restriction impeded

12. See L. SULLIVAN, *supra* note 2, § 68.

13. This Comment concentrates on those situations in which the particular practice, some form of price information exchange, is clearly identified; the main concern is the remaining components of the modern rule of reason. However, identifying the actual collusive practice, particularly when the anticompetitive restraint is a form of collusive pricing, can be very complex. This problem arises quite often in oligopolistic industries where tacit collusion can have the same effects as explicit pricing agreements. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962). Turner claims that due to the interdependent nature of oligopoly pricing (oligopolistic firms base their pricing decisions on the anticipated reaction of their competitors), tacit collusion among oligopolists in refraining from lowering prices is rational economic behavior. Consequently, he argues that this entire spectrum of relatively ambiguous behavior should be beyond the scope of section 1 of the Sherman Act, as there is no remedy that will promote efficient, rational economic behavior. However, it has been argued that this conceals many crucial factual assumptions, that tacit collusion can actually be established by extrinsic evidence, and hence, that it is not beyond the scope of the Sherman Act. See Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1575-93 (1969).

14. Under the rule of reason, it is generally held that a violation of section 1 of the Sherman Act can be established by demonstrating either an unlawful purpose or an anticompetitive effect. *United States v. United States Gypsum Co.*, 438 U.S. at 436 n.13. But the *Gypsum* Court decided that in the case of a criminal prosecution, the government must demonstrate both an intent and an anticompetitive effect. *Id.* at 435-43. See text accompanying notes 129-35 *infra*. Even where both factors are not conjunctively necessary for a violation, the purpose with which the practice is engaged may indicate the true effect of the conduct. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). In addition, a nonprohibitive, beneficial intent to promote the legislative objective of a competitive economy will influence the courts to look favorably on the challenged practice, despite some currently adverse competitive results. See J. VAN CISE, *THE FEDERAL ANTI-TRUST LAWS* 24 (3d rev. ed. 1975).

15. The rationale for allowing an anticompetitive effect alone to establish a violation is that when an interference with competition occurs, it is little comfort that the defendants had other purposes. L. SULLIVAN, *supra* note 2, § 71. A key factor in the evaluation of anticompetitive effect is the market power of the defendants. See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373, 389-90 (1966). This becomes a critical issue in the recent application of the rule of reason to price information exchange cases.

competition.<sup>16</sup> This four-step process is the means by which most challenged practices are analyzed. However, there are certain pernicious practices that are, upon identification, presumed to be illegal without further analysis.<sup>17</sup> These practices, having a long history of judicial analysis under the antitrust laws, are said to be subject to the per se rule, which is an abbreviated version of the rule of reason.<sup>18</sup> The rationale for this standard is that such a practice, if effective, will normally cause substantial injury to competition<sup>19</sup> and an inquiry into

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16. The rule of reason involves the balancing of various factors to determine if the practice is an "undue restraint." This standard has been interpreted as relying on competition as the determinative factor in the reasonableness of the restraint. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). A report of the Attorney General's Staff put the issue succinctly: "[The rule of reason] permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect; it makes obsolete once prevalent arguments, such as whether monopoly arrangements would be socially preferable to competition in a particular industry. . . ." U.S. DEPT OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 11 (1955).

Justice Brandeis, in the *Chicago Board of Trade* case, gave the classic formulation of the test as "whether the restraint imposed . . . promotes competition or whether it is such as may suppress or even destroy competition." 246 U.S. at 238. However, the case itself seems to suggest that a restraint on competition can be justified by certain social gains resulting from the restraint, such as the creation of leisure time for commodity traders. *Id.* at 241. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). Although the Court has apparently given consideration to social gains in these cases, it has repeatedly emphasized that arguments attempting to justify a restraint based upon its value as a social tool "are not reasons that satisfy the Rule." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 694 (1978). *But see id.* at 699, 700-01, 700 n.\* (Blackmun and Rehnquist, JJ., concurring in part). See text accompanying notes 98-99 & 106-10 *infra*.

Some commentators have argued that alternative social policies should be considered as goals of the antitrust laws. For example, Professor Bork has advocated consideration of consumer wealth maximization by measuring total economic efficiency—an approach that would permit, in some instances, the maintenance of a monopoly or facilitation of an oligopolistic market. See R. BORK, *THE ANTITRUST PARADOX* 41-47 (1978); Bork, *supra* note 15, (pt. 1), 74 *YALE L.J.* 775, 829-35 (1965). This position has also been advanced by Professor Posner. See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 *U. CHI. L. REV.* 1, 15 (1977). Posner states that Justice Brandeis' formulation is unhelpful:

To be told to look to the history, circumstances, purposes and effects of a challenged restriction is not to be provided with visible criteria of illegality. If Justice Brandeis had said that the test was whether the restriction was on balance pro- or anti-competitive, this would at least have excluded criteria unrelated to competitiveness. . . . Yet arguably competition should not be the exclusive determinant of an unreasonable restraint of trade. This formulation would prohibit those restraints that, while reducing competition, on balance increase efficiency. For example, it would bar a merger that gave the acquiring firm a monopoly but, in so doing, reduced the costs of serving the market to such an extent that the monopoly price after the merger was lower than the competitive market price had been before it.

*Id.*

17. Traditional per se violations include price fixing, tying arrangements, group boycotts, and division of markets. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

18. The per se rule requires only that the practice be identified (or labeled) as belonging to one of the traditional per se categories in order to be found illegal. See note 15 *supra*.

19. A purpose and effect analysis is technically employed in the labeling process. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23 (1940) (a combination formed for the

whether the particular practice under review will be injurious to competition would necessarily be lengthy, complex, and expensive.<sup>20</sup>

### A. *The Labeling Process.*

In any given case, the decision of the court as to which of the two standards is applicable will hinge upon an initial determination of the nature of the price information exchange.<sup>21</sup> This constitutes, in essence, a labeling process.<sup>22</sup> If, upon initial inspection, the evidence indicates a purpose or effect to set or stabilize prices, then the practice is labeled "price fixing," and the *per se* rule is applied. Consequently, the practice is held to be illegal without further inquiry into its competitive effects. If the evidence does not support labeling the practice as "price fixing," then a rule of reason analysis is applied.

A description of this labeling process was given in a recent decision involving a criminal charge of conspiracy to fix prices, *United*

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purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing prices is illegal *per se*). However, the finding of an agreement to fix prices will suffice for a *per se* price fixing violation, since "such agreements interfere with the 'freedom of traders, and thereby restrain their ability to sell in accordance with their own judgment.'" *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)).

20. L. SULLIVAN, *supra* note 2, § 70. When the likely effects of a practice are anticompetitive and a complete review under the rule of reason would be costly, the so-called judicial efficiency principle warrants that the practice be termed illegal *per se*. *Id.* This conclusive presumption of unreasonableness follows from the "pernicious effect" of such activity. *United States v. Northern Pac. Ry.*, 356 U.S. 1, 5 (1958).

The trial process of an antitrust violation begins with a court determination of whether the facts presented by the plaintiffs, without sufficient contradiction by the defendants, indicate no plausible theory demonstrating a substantial capacity for increasing competitive efficiency. If no acceptable theory is demonstrated, the *per se* rule is operable; if a plausible theory is stated, the trial should proceed to a consideration of purpose and effect. Bork, *supra* note 15, at 388-89.

21. The *Socony-Vacuum* case, which established the *per se* doctrine, especially for price fixing, did not involve a clear cut agreement and thus required some interpretation of the purpose of the arrangements. See L. SULLIVAN, *supra* note 2, § 74. However, this labeling analysis is not confined to price information exchanges and has been applied to other Sherman Act violations. See Comment, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 NW. U.L. REV. 818 (1977).

22. Since purpose is not always evident on the face of a price information exchange, the court must array and evaluate the evidence in making this preliminary inquiry. This labeling process has been described as follows:

[A]lthough the *per se* theory short circuits the exhaustive fact finding required by the rule of reason, it should not be invoked without at least the minimal indicia of anticompetitive purpose or effect. In this case, preliminary assessment of the industry would have revealed that the minimal indicia were absent.

*Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 653 (5th Cir. 1977) (complaint alleged section 1 Sherman Act restraint of trade and section 2 Sherman Act monopolization). See note 20 *supra* for a discussion of the trial process.

*States v. Continental Group, Inc.*<sup>23</sup> There the Justice Department presented incriminating, detailed evidence establishing a conspiracy to set monopoly-level prices for the consumer bag industry.<sup>24</sup> The court's first step was to conduct a preliminary inquiry into the nature and purpose of the conspiracy,<sup>25</sup> whereby it found that the defendants knowingly participated in the formation of a conspiracy to fix prices. In so finding, the court required the government to show "that the overall objects, aims or goals of the conspiracy were consciously agreed to and that the defendants knowingly participated in the agreement or conspiracy to achieve the agreed upon goals . . . ."<sup>26</sup>

Under this approach, only the purpose<sup>27</sup> of the price information exchange will be considered; there is no indication that any consideration of the likely competitive effects of the practice will be included. This standard of analysis can be justified by the fact that a preliminary consideration of the evidence concerning the effects of the practice would be cumbersome and would sacrifice the judicial efficiency that is the chief object of the per se rule.<sup>28</sup> In short, for price information exchanges, per se liability will be imposed only when there is an agreement that indicates an unlawful purpose to fix or stabilize prices, that is, when the practice is labeled as price fixing.<sup>29</sup> Absent such an agreement, which essentially requires a conspiracy to violate the Sherman Act, the labeling process will dictate a more thorough analysis of the exchange of price information under the rule of reason.

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23. 456 F. Supp. 704 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979).

24. 456 F. Supp. at 708-14.

25. *Id.* at 714-15.

26. *Id.* at 716.

27. In *Continental Group*, the court stated that proof of specific intent to violate the Sherman Act is not required. The "knowingly participated" intent only mandates a finding that the defendant "intended the necessary and direct consequences of his acts." *Id.* The *Gypsum* Court limited this requirement solely to criminal violation cases also evidencing a harmful effect. 438 U.S. at 444-45. In civil violation cases, the appropriate intent remains an unlawful purpose. See notes 129-35 *infra* and accompanying text.

28. An exception to the review of purpose only came in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In *Goldfarb*, the Court did not decide whether the attorney fee schedule constituted a per se violation until after it had discussed the deleterious effect of the schedule; in "restraining competition and harming consumers," the fee schedule was found "unusually damaging." *Id.* at 782. However, it is quite likely that this greater preliminary showing was not imposed upon the plaintiff because of the nature of the exchange of price information, but rather because the defendants were professional associations. See Note, *The Antitrust Liability of Professional Associations After Goldfarb: Reformulating the Learned Professions Exemption in the Lower Courts*, 1977 DUKE L.J. 1047, 1049-50.

29. A great deal of confusion followed *United States v. Container Corp.*, 393 U.S. 333 (1969), as both courts and commentators were uncertain whether a per se standard or a rule of reason test had been applied by the Court. See notes 55, 59, 86 & 88 *infra* and text accompanying notes 55-59 & 86-88 *infra*.

B. *Viewing the Rule of Reason in the Price Information Exchange Context.*

The rule of reason extends the scope of analysis to cover evidence concerning the actual competitive effect of the practice. In order adequately to determine whether an exchange of price information is, on balance, procompetitive or anticompetitive, it is necessary to assess the market conditions in which the exchange has occurred.

1. *The Underlying Economic Theory.* Where a market is composed of many small competitors purveying a homogeneous product, each seller is, theoretically, powerless to affect the price of the product since demand is assumed to be infinitely elastic.<sup>30</sup> This assumption of perfect competition, in turn, rests upon the assumption that each market participant possesses "perfect knowledge of the relevant economic and technological data."<sup>31</sup> Of course, information is not costless, and no market exists where all participants can freely obtain complete knowledge of all the relevant figures. Under an antitrust policy that seeks to foster competition, it is clear that in markets consisting of many sellers with identical products, the exchange of price information will serve to effectuate the policy of fostering competition.

Price information exchange may have an adverse effect<sup>32</sup> in markets that are more concentrated and interdependent. In an oligopolistic industry, participants will possess a sufficient share of the market to be able to influence the price of the product,<sup>33</sup> creating interdependence and sensitivity to each other's actions in the pricing decision.<sup>34</sup> While any firm individually could gain from a reduction in price through the

30. E. MANSFIELD, *supra* note 4, at 103-05, 234-35; G. STIGLER, *THE THEORY OF PRICE* 87-91 (3d ed. 1966).

31. E. MANSFIELD, *supra* note 4, at 235. In addition to the conditions of homogeneity of product, sellers small relative to the entire market, and perfect information, perfect competition also requires that all resources be completely mobile. *Id.* In the long run, perfect competition cannot be maintained if there are barriers to entry to the market to new firms, either in the form of large initial capital investments or possession of essential resources or technological knowledge. *See* W. SHEPHERD, *THE TREATMENT OF MARKET POWER; ANTITRUST, REGULATION AND PUBLIC ENTERPRISE* 45-50 (1975).

32. *See* notes 45-53 *infra* and accompanying text. *Container Corp.* was a recognition of the potential adverse effect.

33. *See* E. MANSFIELD, *supra* note 4, at 303-09. This interdependence can result from several factors, including small numbers, high fixed costs, barriers to entry, excess capacity, inelastic demand for the products of the industry, and high cross-elasticities within the market. D. O'BRIEN & D. SWANN, *INFORMATION AGREEMENTS, COMPETITION AND EFFICIENCY* 117 (1969).

However, mere similarity in sales prices is not indicative of any price fixing. This would be a condition found in any market, perfectly competitive or highly concentrated, that was in equilibrium. The courts have recognized this situation and disregard evidence of comparable prices. *See* *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973).

34. D. O'BRIEN & D. SWANN, *supra* note 33, at 115.

increased demand that reduction brings, the interests of all firms as a group will be to avoid any active price competition.<sup>35</sup> This principle derives from the awareness of all oligopolists of their interdependence,<sup>36</sup> which encourages coordination of their activities. The thrust of the antitrust laws has always been to prevent this collusion when it is manifested in an explicit agreement. In the case of an extremely concentrated market, a price information exchange system lends itself to the avoidance of all price competition, and hence, even in the absence of a specific agreement to fix prices, to de facto price stabilization.

2. *The Historical Rule of Reason in Price Information Exchange Cases.* In view of the importance of economic data on markets in understanding the effect of a price information exchange system, the rule of reason as developed by the Supreme Court has been an inadequate measure of the effect upon competition. In *American Column & Lumber Co. v. United States*,<sup>37</sup> the initial decision of the Supreme Court concerning the validity of a price information exchange, the Court used the rule of reason to invalidate a trade association program that provided for the daily reporting of prices.<sup>38</sup> By emphasizing the frequency and currency of the information dissemination program, the Court left the obvious implication that some forms of price information exchange would be permissible under the Sherman Act. Shortly thereafter, the Supreme Court did sustain inter-seller price exchange practices in two cases, *Maple Flooring Manufacturers Association v. United States*,<sup>39</sup> and *Cement Manufacturers Protective Association v. United States*.<sup>40</sup> In both cases the Court employed a purpose and effect rule of reason analysis<sup>41</sup> that emphasized the particulars of the trade association plan of

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35. The presence of an oligopolistic industry does not ensure price fixing since "noncompetitive pricing by oligopolists is not compelled, although it is facilitated, by the structure of the market." Posner, *supra* note 13, at 1605. There are several valid reasons for actively engaging in price reductions in a concentrated industry. See note 160 *infra*.

36. D. O'BRIEN & D. SWANN, *supra* note 33, at 110-17; F. SCHERER, *supra* note 4, at 157.

37. 257 U.S. 377 (1921).

38. *American Column & Lumber* involved a hardwood trade association that constituted 33% of the total industry. The Court invalidated a plan that included the exchange of a voluminous amount of general industry data in addition to the reporting of current prices. *Id.* at 394-99, 411. See also *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923) (a case involving a similar plan).

39. 268 U.S. 563 (1925).

40. 268 U.S. 588 (1925).

41. Since no specific agreement to fix prices was found under the labeling process in either case, the rule of reason was invoked to determine whether the exchange of price information was unreasonable. In *Maple Flooring*, despite a finding by the trial court that such activity had the tendency to destroy competition, the Court ruled that certain characteristics of the program supported the inference that the dissemination was not an undue restraint of competition. 268 U.S. at 575, 582. The trade association, which produced almost 70% of the output of the industry, dissem-

dissemination of price and other data.

By focusing upon the particular details of the program, this early line of cases used the rule of reason to create a checklist by which lower courts were to judge the competitive effect of price information exchanges.<sup>42</sup> To find a violation of the Sherman Act under this application of the rule of reason, the courts had to find program details that could facilitate de facto price fixing, such as exchanges of current price information and evidence of significant price stabilization.<sup>43</sup> The economic consequences of the exchange of price information within the particular industry structure were given no consideration in the determination of whether an anticompetitive effect was a likely result.<sup>44</sup> In

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inated price information, freight rates, average costs, and quantities sold. Nonetheless, the Court upheld this program, noting that the data dealt only with past transactions, the parties to specific transactions were not identified, and most of the information was available to the public as well. *Id.* at 582-86.

Similarly, the *Cement Mfrs.* decision relied on certain details of the trade association information exchange plan to support the view that the dissemination practice was not anticompetitive. Although the Court gave no indication of the relative size of the trade association to the total market, the elements of the program found to be indicative of the reasonableness of the restraint on trade were, first, that no commitment was made to comply with published prices, second, that individual transactions were not identified, and finally, that information was disseminated to all buyers. 268 U.S. at 602-06. *Accord*, *Tag Mfrs. Inst. v. FTC*, 174 F.2d 452 (1st Cir. 1949).

The Court in *Cement Mfrs.* also provided an alternative ground for upholding the association's verification of price based upon the indication of fraud by cement purchasers in reporting competitors' prices. 268 U.S. at 603-04. See Note, *Price Verification Under Robinson-Patman: The Creation of an Unnecessary "Controlling Circumstance"*, 58 B.U. L. REV. 127, 132-33 (1978). This led to the creation of a partial exemption from Sherman Act liability. See notes 65-76 & 136-54 *infra* and accompanying text.

42. See *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936), as another example of price data dissemination by a trade group. There the members agreed all sales should be publicly announced and made at open prices. The practice was found not to violate the Sherman Act, since the program essentially followed the checklist of approved elements established by *Maple Flooring*. *Id.* at 597-98.

43. See, e.g., *Salt Producers Ass'n v. FTC*, 134 F.2d 354 (7th Cir. 1943).

44. The early decisions almost blindly ignored the actual or potential impact of market structure. In *American Column & Lumber*, the members of the trade association controlled only 33% of the industry. This may have been less than the market power necessary to create a potential danger of price stabilization. Nevertheless, the dissemination of data was found to be a violation of the Sherman Act without discussion of market power. The trade association required all members to (1) estimate production for the next two months, (2) indicate whether a plant shutdown was likely, and (3) state the firm's outlook on the general market conditions. 257 U.S. at 394-98. While the Court said this constituted coordination and led to a rise in market prices, it totally disregarded any probability that this communication had led the industry to the level of prices that would have prevailed with perfect competition. R. POSNER 137-42.

By contrast, the defendants in *Maple Flooring* controlled 70% of their market, 268 U.S. at 566, and the defendants in *Sugar Institute* possessed a 70-80% market share. 297 U.S. at 572. Yet, even with the presence of a large market share, the Court did not consider the potential inference of collusion in either case. R. POSNER 142. The obvious potential for price stabilization or collusion that exists in a concentrated market was not addressed by the Supreme Court, as the exchange of price information was allowed to continue in each instance.

addition, the emphasis of both the courts and the enforcing agencies was upon formal trade association arrangements to exchange price information, and did not extend to informal arrangements that may have achieved the same end.

3. *United States v. Container Corp.* Critical consideration of the relevant market structure in assessing the competitive impact of an exchange of price information, as well as recognition that an informal exchange of price data can stabilize prices, was at last incorporated into the rule of reason by the Supreme Court in *United States v. Container Corp.*<sup>45</sup> That case did not involve a formal trade association agreement to publish price lists and other data. The defendants had agreed only to exchange information about the most recent price charged or quoted to individual customers, when asked by a competitor, with an expectation of reciprocity. In finding a section 1 violation, the Court gave considerable weight to the market structure of the industry in question.<sup>46</sup>

The implication of this decision was that in applying the rule of reason, the courts must consider, in addition to the details of the price information exchange practice being challenged, the market structure and relevant elasticities of the industry. However, *Container Corp.* left a great deal of confusion over whether the Court applied a per se or rule of reason standard.<sup>47</sup> This ambiguity resulted from a reference in the majority opinion of Justice Douglas to the use of the per se rule for interferences with the setting of price by free market forces.<sup>48</sup> Although several commentators argued that a per se standard was enforced be-

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45. 393 U.S. 333 (1969).

46. Defendants were 18 manufacturers of corrugated containers who were responsible for approximately 90% of the shipments of such containers in the southeastern United States. *Id.* at 336. In finding that the exchange of price information tended to stabilize prices at a downward level, *id.*, the Court recognized that the structure of the market facilitated this result, but that it might not in other markets:

Price information exchanged in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers only place orders for immediate, short-run needs. The exchange of price data tends towards price uniformity.

*Id.* at 337.

47. See text accompanying notes 56-64 *infra* for a discussion of the confusion in lower courts on whether *Container Corp.* applied a per se standard.

48. 393 U.S. at 337. The reference in question also cited *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which imposed per se liability. However, the concurrence by Justice Fortas stressed that only a rule of reason standard was being applied. 393 U.S. at 338-40 (Fortas, J., concurring). An alternative reading of this language, expressing the idea that a "free market" does not exclude all information-sharing among competitors, would indicate that the court was merely stressing that such sharing of price information may be prohibited where market conditions are favorable to collusive behavior. R. POSNER 144-45.

cause of the novel approach concerning industry structure and the precedent cited,<sup>49</sup> subsequent interpretation has revealed that a rule of reason approach to exchanges of price information is necessary.<sup>50</sup> The importance of *Container Corp.* is that it expanded the scope of inquiry by the courts under the rule of reason from the mere consideration of the details of the exchange of information to include the relevant economic characteristics of the industry structure. Thus, *Container Corp.* was a recognition that the impact of exchanges of price information will vary depending upon the market in which the exchanges take place.<sup>51</sup>

Few industries fit smoothly into the theoretical constructs of pure competition or a highly concentrated oligopoly. Firms within an industry may differ by size, product, cost structure, and other factors placing the market somewhere between these two poles of analysis.<sup>52</sup> Precisely for this reason, the rule of reason, rather than a per se rule, should be applied in price information exchange cases, provided no explicit price-fixing agreement is discovered. Under the rule of reason, the litigants should be given the opportunity to introduce evidence of the relevant market structure,<sup>53</sup> which might indicate the propensity of a price in-

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49. See 16J J. VON KALINOWSKI, *supra* note 11, §§ 77.02[2][a]-[b]; Monroe, *Practical Antitrust Considerations for Trade Associations*, 1969 UTAH L. REV. 622, 626 n.24; Note, *Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?*, 63 VA. L. REV. 639, 654 (1977); Note, *Guidelines for Data Dissemination Through Trade Associations*, 10 WASHBURN L.J. 93, 102 (1970). *Contra*, Kefauver, *The Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?*, 57 CORNELL L. REV. 777, 791 (1972); Note, *Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 MICH. L. REV. 720, 737 (1970).

50. *Gypsum* clearly indicates that the per se rule is inappropriate to exchanges of price information. 438 U.S. at 441 n.16. Apparently, the Justice Department itself did not view *Container Corp.* as utilizing a per se standard. U.S. DEP'T OF JUSTICE, *THE PRICING AND MARKETING OF INSURANCE* 111 (1977). However, many lower court cases did not interpret *Container Corp.* in this manner. See text accompanying notes 56-64 *infra*.

51. See notes 30-36 *supra* and accompanying text. See Note, 63 VA. L. REV., *supra* note 49, at 656. *Container Corp.* was cited by the Fifth Circuit in *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). The Fifth Circuit's opinion declared that the "Supreme Court, in determining if the exchange of price information was illegal, has considered whether an industry was 'dominated by relatively few sellers.'" 573 F.2d at 303.

52. See generally E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (8th ed. 1962).

53. Professor Richard A. Posner has suggested a two-stage inquiry under this rule of reason test: first, identify those markets in which conditions are favorable for collusion, and second, determine whether collusive pricing exists in fact. R. POSNER 55.

Under the first stage of inquiry, Posner would focus attention upon a list of conditions that facilitate collusion (that is, represent indicators of those markets where collusion would be very possible). These factors include the following: a concentrated market on the selling side (measured by the aggregate share of the four to eight largest firms); no fringe of small sellers that would constitute a limitation on the power of the colluding sellers over market price; an inelastic demand at a competitive price; strong barriers to entry; low concentration on the buying side, as this gives

formation exchange to restrict price competition, particularly in view of any actual effect on the market. The rule proposed by *Container Corp.* is to infer an actual agreement to fix prices from a price information exchange in a particularly collusive market structure. A simultaneous finding of actual, anticompetitive harm to prices would produce a Sherman Act violation. This is not a departure from the previous emphasis on competition, which would allow arguments stressing countervailing social gains to be considered as well,<sup>54</sup> but a recognition that a rule of reason standard must scrutinize all critical economic factors if a judgment on competitive effect is to be made.

4. *Ignoring the Insight of Container Corp.* Following *Container Corp.*, several lower court rulings attempted to interpret and follow its directives concerning price information exchanges. In most of these cases, however, the courts ignored the market power of the defendants and the market structure of the industry. Rather than inferring agreement from the concentration of the market controlled by the defendants as the Court did in *Container Corp.*, they sought instead to find an illegal purpose evidenced by an agreement.<sup>55</sup>

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the sellers more power to collude in their negotiation; a standardized product that would make price the most critical form of competition; and the industry's antitrust "record." *Id.* 55-62. See also D. O'BRIEN & D. SWANN, *supra* note 33, at 115-17. The second stage looks for evidence of actual collusive behavior. If it is found that the market structure is favorable to collusion, Posner concludes that exchanges of price information will be strong evidence of price fixing. R. POSNER 65-66, 147. For a viewpoint that this two-stage analysis cannot be implemented, see Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 YALE L.J. 974, 982-83 (1977) (reviewing R. POSNER). For the view that economic evidence can be used to identify likely markets for collusion and to determine whether such collusion has taken place, see Calvani, *Mr. Posner's Blueprint for Reforming the Antitrust Laws*, 29 STAN. L. REV. 1311, 1316-18 (1977) (reviewing R. POSNER).

Price information is not always distributed through trade associations or even by loosely organized agreements for infrequent price verification. If the first-stage inquiry reveals a propensity for collusive behavior (that is, a highly concentrated market), then evidence of price leadership may indicate a communication of prices among competitors yielding price stabilization. See generally F. SCHERER, *supra* note 4, at 164-73.

Price leadership within an industry may serve pro-competitive purposes by communicating valuable information that can lead an industry to a competitive equilibrium; however, where the industry is shown under a second-stage analysis to provide the principal firms with a considerable amount of pricing discretion, and where all members recognize their common interest in pricing, collusive price leadership is possible. *Id.* 166.

54. See note 16 *supra*.

55. See, e.g., *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359-60 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 208-09 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Gray v. Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 182 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Webster v. Simclair, Ref. Co.*, 338 F. Supp. 248, 251-52 (S.D. Ala. 1971); *Wall Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295, 315-16 (N.D. Cal. 1971); *Di-Wal Inc. v. Fibreboard Corp.*, 1970 Trade Cas. ¶ 73,155, at 88,554, 88,556 (N.D. Cal. 1970).

This misunderstanding is partially attributable to the uncertainty of the lower courts as to whether *Container Corp.* imposed a per se standard on price information exchanges in a concentrated market. In *Gray v. Shell Oil Co.*,<sup>56</sup> seven oil companies, controlling approximately eighty percent of the Western market, exchanged price information, although not under any systematic agreement, to determine whether to provide financial support for service station dealers engaged in gasoline price wars. The court interpreted *Container Corp.* as mandating a per se standard,<sup>57</sup> and therefore engaged in a labeling process effort to find a conspiracy to fix prices. No unlawful purpose was discovered and *Container Corp.* was distinguished as involving a specific agreement to exchange information.<sup>58</sup> Confusion over the test used in *Container Corp.* led the court to search for an actual agreement to fix prices, and to ignore the importance of the holding in *Container Corp.* that certain market conditions themselves may support an inference of an agreement to restrain price competition.<sup>59</sup>

Even the Supreme Court has failed to follow the *Container Corp.* decision consistently. In *United States v. Citizens & Southern National Bank*,<sup>60</sup> the defendants operated separately incorporated banks as de facto branches to avoid a Georgia restriction against branch banking, and in so doing, exchanged information among branches concerning prices, interest rates, and services. The Court attempted to clarify the standard applied in *Container Corp.* by stating that "the dissemination of price information is not itself a per se violation of the Sherman Act"<sup>61</sup> and by citing Justice Fortas' concurring opinion in *Container Corp.*, which argued that a per se standard was not intended for that case.<sup>62</sup> Nonetheless, the Court did not examine the relevant market structure, even though the trial court had found that the exchange did contribute to a "lack of significant price competition."<sup>63</sup> However, *Citi-*

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56. 469 F.2d 742 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973).

57. 469 F.2d at 746-47.

58. *Id.*

59. See Note, 63 VA. L. REV., *supra* note 49, at 657-61. *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973), is typical of other lower court rulings that misinterpreted *Container Corp.* See *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.) (potato bargaining association claimed seller's trade association conspired to fix prices; court ruled no agreement could be found, even though seller's trade association controlled the market, and distinguished *Container Corp.* as involving a specific agreement), cert. denied, 419 U.S. 999 (1974); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.) (court distinguished *Container Corp.* on the particulars of the practice involved, employing an analysis similar to that used in early Supreme Court decisions), cert. denied, 408 U.S. 928 (1972).

60. 422 U.S. 86 (1975).

61. *Id.* at 113.

62. *Id.* See notes 47-50 *supra* and accompanying text.

63. 422 U.S. at 114.

*zens & Southern* need not necessarily be interpreted as a rejection of the *Container Corp.* extension of the rule of reason standard, since the opinion seemed to limit the case to its own peculiar facts.<sup>64</sup>

### C. Lower Court Interpretation: The Creation of an Exception.

An important development in the lower court rulings subsequent to *Container Corp.* was the creation of an exception to Sherman Act liability for interseller price verification. Justice Douglas, in *Container Corp.*, referred to the fraud exception of *Cement Manufacturers*<sup>65</sup> as a "controlling circumstance" in the exchange of prices to specific customers,<sup>66</sup> but made absolutely no mention of the Robinson-Patman Act section 2(b) "meeting competition" defense.<sup>67</sup> Subsequently, in *Wall Products v. National Gypsum Co.*,<sup>68</sup> the district court read the "controlling circumstances" language of *Container Corp.* and then combined the *Cement Manufacturers* buyer fraud exception with interseller price verification under section 2(b) of the Robinson-Patman Act to create a broad exception to Sherman Act liability.<sup>69</sup> This exception disregarded any anticompetitive effect of price verification, and relied upon the good faith of the seller.<sup>70</sup> The attempt to comply with the Robinson-Patman Act provisions was held to be a valid purpose, similar to that in *Cement Manufacturers*, and subject to similar exception.<sup>71</sup> This exception was thereafter recognized by several other lower courts.<sup>72</sup> Conse-

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64. Essentially, the Supreme Court found that the Georgia restriction against branch banking was itself an anticompetitive restraint, as it amounted to a compulsory market division. *Id.* at 118. In regard to the practice of the defendants, the Court stated: "By providing new banking options to suburban Atlanta customers, while eliminating no existing options, the *de facto* branching program of [Citizens and Southern] has plainly been pro-competitive." *Id.* at 119. See Note, 63 VA. L. REV., *supra* note 49, at 659.

65. See note 41 *supra* and accompanying text.

66. 393 U.S. at 335.

67. 15 U.S.C. § 13(b) (1976).

68. 326 F. Supp. 295 (N.D. Cal. 1971).

69. *Id.* at 312-14. The exception was stated very broadly:

From this language, it is clear that in *Cement Mfrs.* the Supreme Court held lawful, and not in violation of the Sherman Act, an exchange between sellers of price information relating to specific customers, *even under circumstances amounting to an agreement*, where the purpose of the exchange was to safeguard against fraud and deception, and *even though prices might be affected thereby*.

*Id.* at 314 (emphasis in original).

70. The concept of a "good faith" attempt comes directly from the act itself, 15 U.S.C. § 13(b)(1976). However, the availability of the defense is judged in terms of reasonable belief. *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945). See text accompanying notes 146-50 *infra*.

71. 326 F. Supp. at 314.

72. See, e.g., *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.) (defendants found to have complied with "good faith" defense), *cert. denied*, 408 U.S. 928 (1972); *Webster v. Sinclair Ref. Co.*, 338 F. Supp. 248 (S.D. Ala. 1971) (defendants found to comply with Robinson-Patman Act

quently, the rule of reason was eliminated entirely at times, as the scope of the inquiry was limited under the labeling process to a search for compliance with the Robinson-Patman Act.

The application of this standard totally undermined the *Container Corp.* approach by allowing an exception for any program of price verification so long as it complied with the "good faith meeting competition" defense. The complete disregard for competitive effects, particularly given an interdependent market, will often lead to anticompetitive results.<sup>73</sup> Other criticisms of the "controlling circumstances" exception are that (1) the extension of the *Cement Manufacturers* fraud exception was unwarranted,<sup>74</sup> (2) the good faith requirement is overinclusive,<sup>75</sup> and (3) the need for interseller price verification for a "controlling circumstance" exception has not been substantiated.<sup>76</sup> The creation of this exception provided the background for the *Gypsum* decision, but a different exception involving the learned professions reached the Supreme Court first and laid the framework for the Court's treatment of price information exchange.

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and therefore fell within the exemption); *Di-Wal, Inc. v. Fibreboard Corp.*, 1970 Trade Cas. ¶ 73,155 (N.D. Cal. 1970) (defendants within the good faith defense).

73. In an oligopolistic market, if sellers can ascertain the prices charged by their competitors, especially under a price verification plan, price diversity and market competition can be avoided. This lessens downward pressure on prices. No explicit agreement to collude upon prices is necessary in a concentrated market with price verification; tacit collusion will suffice. See, e.g., *Wall Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295, 316 (N.D. Cal. 1971); R. POSNER 71-73 & n.51. See notes 30-36 *supra* and accompanying text.

74. *Cement Manufacturers* involved a post-contract verification, while the "controlling circumstances" cases involve pre-contract verifications. Pre-contract verification creates a greater possibility of price collusion. See Note, *supra* note 41, at 136-37. More importantly, *Container Corp.* did not expand the narrow holding of *Cement Manufacturers*. Note, *Price Information Exchanges May Be Justified Despite Anticompetitive Effects*, 50 TEX. L. REV. 369, 372 (1972).

75. To meet a good faith requirement, a seller should exercise all diligence to ascertain the veracity of a reported price, without consulting a competitor for verification. Good faith can be established short of actual interseller communication. When good faith is established, a seller can lower his prices to meet the competition. Note, 50 TEX. L. REV., *supra* note 74, at 373-74. See Note, *supra* note 41, at 144-45.

In an oligopoly, buyers are quite often unreliable. Nonetheless, good faith in such circumstances has been argued to require only proof of the buyer's reputation in reporting prices and not verification of the reported price with the other seller. *Id.* 146-47. Section 2(f) of the Robinson-Patman Act imposes liability on buyers who knowingly induce or receive a price discrimination. 15 U.S.C. § 13(f) (1976). This section is receiving increased attention. See notes 137 & 151 *infra*.

76. The Robinson-Patman Act does grant a substantive right for a seller to meet competition, but good faith compliance must be proven in court. Any seller claiming the protection of the exception should have to introduce substantial evidence of consistent victimization by customer fraud and show that interseller price verification was the only pragmatic resolution to the problem. See Kefauver, *supra* note 49, at 791.

## II. ELIMINATION OF THE LEARNED PROFESSIONS EXEMPTION— EFFECT ON THE STANDARD OF ANALYSIS FOR PRICE INFORMATION EXCHANGES

Professional associations, by virtue of their public service and social status, were thought to be protected from liability under the Sherman Act by the so-called "learned professions exemption."<sup>77</sup> Consequently, it was the practice of professional organizations to distribute advisory fee schedules openly among their members as well as to promulgate ethical norms concerning competitive practices. In many respects, the learned professions engaged in the exchange of price information or in closely analogous activities.

Recent decisions of the Supreme Court have looked behind the protective veil of the learned professions exemption and have imposed Sherman Act liability upon professional organizations. This trend would seem to indicate that price information exchanges involving professional associations should be analyzed under the extended rule of reason employed in *Container Corp.*<sup>78</sup> However, despite the previous protection accorded the learned professions, price information exchange has recently been subjected to a more restricted analysis.

### A. Goldfarb: *End of an Absolute Learned Professions Exemption.*

The unlimited exemption from antitrust policing that the learned professions had long enjoyed was renounced by the Supreme Court in *Goldfarb v. Virginia State Bar.*<sup>79</sup> In that case, a class action suit was brought against the state and county bar associations on a claim of price fixing in violation of the Sherman Act. The claimants had unsuccessfully tried to find an attorney who would perform a title examination for less than the fee prescribed in a minimum fee schedule published by the county bar. After eliminating several obstacles that would have prevented the suit,<sup>80</sup> the Supreme Court held that the fee schedules constituted a price-fixing violation, since they were not purely advisory but rather established a rigid price floor.<sup>81</sup>

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77. See *Levin v. Doctors Hosp., Inc.*, 233 F. Supp. 953 (D.D.C. 1964), *rev'd on other grounds*, 354 F.2d 515 (D.C. Cir. 1965).

78. See notes 45-54 *supra* and accompanying text.

79. 421 U.S. 773 (1975).

80. The Supreme Court found (1) that the interstate commerce requirement was satisfied, since a significant amount of the funds furnished for financing the purchase of homes came from outside the state and title examination was an essential part of this process, (2) that a title examination is a service that constitutes "commerce," and (3) that no "state action" exemption applied to the bar associations since their activities were not compelled by the authority of the state acting as sovereign. *Id.* at 783-92.

81. *Id.* at 781-83. This left open the question of the status of a purely advisory fee schedule,

While the *Container Corp.* case concerned "an agreement that may be inferred from an exchange of price information,"<sup>82</sup> the fee schedule in *Goldfarb* was a "naked agreement . . . [whose] effect on prices is plain."<sup>83</sup> However, before declaring the fee schedule to be "a classic illustration of price fixing,"<sup>84</sup> the Court went beyond looking for the predictable effect of the activity and discussed the actual effect of "restraining competition and harming consumers."<sup>85</sup> While no elaborate study was conducted, the Court in essence incorporated a rule of reason into the labeling process.<sup>86</sup>

This extension of the labeling process to include a balancing approach was most likely intended by the Court to be limited to learned professions exemption cases.<sup>87</sup> Footnote seventeen of *Goldfarb* states that some acts by professional organizations may not be Sherman Act violations though they could be found to be violations in a different context.<sup>88</sup> By indicating that the learned professions exemption continued to exist in some form, and by extending the scope of the labeling process, the *Goldfarb* Court seemed to be indicating that price information exchanges might still find some extra protection in the learned professions exemption and would therefore receive a more full-blown

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which the Court declined to answer. *Id.* at 781. Presumably, it would be considered under the rule of reason in a manner similar to any price information exchange. This was indicated by the Court's reference to the *American Column* and *Maple Flooring* cases.

82. *Id.* at 782.

83. *Id.* (footnote omitted).

84. *Id.* at 783.

85. *Id.* at 782.

86. See notes 21, 22, 27, & 28 *supra* and text accompanying notes 21-29 *supra* for discussion of the labeling process. See Martyn, *Lawyer Advertising: The Unique Relationship Between First Amendment and Antitrust Protections*, 23 WAYNE L. REV. 167, 181-83 (1976), for the proposition that *Goldfarb* applied an "across the board" rule of reason test. *But see* Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475 (1977). The authors suggest that competitive market restraints of learned professions do not have greater justification to counterbalance inhibition of competition and therefore should not merit full consideration under the rule of reason. "[T]he question to be considered under the rule of reason is whether the public benefit from the enforcement of the present prohibitions against attorney advertising and solicitation is outweighed by the resulting competitive harm. . . . An examination of these [public benefit] justifications, however, reveals that the restraints are either unlikely or unnecessary to achieve their purported goals." *Id.* at 509-10.

87. See Note, *supra* note 28, at 1050.

88. 421 U.S. at 788-89 n.17. The footnote reads in full:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

*Id.*

analysis. However, *Goldfarb* itself gave no further explanation of the distinctive treatment given learned professions.<sup>89</sup>

B. *Non-Price-Fixing Violations by the Learned Professions.*

*Goldfarb's* ambiguous treatment of the learned professions exemption led the lower courts to consider a subsequent Supreme Court decision concerning the state action exemption,<sup>90</sup> *Cantor v. Detroit Edison Co.*<sup>91</sup> In *Cantor*, private retailers challenged a private utility's practice of supplying free light bulbs to its residential customers. The utility claimed exemption from Sherman Act liability because the practice had been approved by the Michigan Public Service Commission, the state regulator of utilities. However, the utility was held not to be exempt because state action is limited to action by a state official<sup>92</sup> and, subsequently, the practice was held to be in violation of the Sherman Act. Nevertheless, the Supreme Court did recognize a further exception to Sherman Act coverage. This limited exemption extends to a state regulatory standard protecting the public interest whenever it conflicts with the competitive standard imposed by the antitrust laws.<sup>93</sup>

Relying upon this *Cantor* exemption, the Ninth Circuit adopted a similar public interest exemption for the learned professions in *Boddicker v. Arizona State Dental Association*.<sup>94</sup> In *Boddicker*, an action was brought by licensed dentists against the state dental association alleging that an anticompetitive tying arrangement in violation of the Sherman Act resulted from an agreement to require membership in the national dental association before one could be a member and participate in the local dental associations. Though a tying arrangement is characteristically a per se violation,<sup>95</sup> the Court concluded that a profession will not be liable provided the "particular practice, rule or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, [serves] the purpose for which the profession exists, viz. to serve the public. That is, it must contribute directly to improving service to the public."<sup>96</sup>

Not only did the court fail to apply a per se standard to a practice

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89. For a list of possible interpretations, see Note, *supra* note 28, at 1056.

90. *Id.* 1052-55.

91. 428 U.S. 579 (1976).

92. *Id.* at 589-91.

93. *Id.* at 597.

94. 549 F.2d 626 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1978).

95. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

96. 549 F.2d at 632. This could be interpreted as following the standard advocated by Professor Bork on consumer welfare maximization. See R. BORK, *supra* note 16, at 81-89.

generally accorded such scrutiny, but it also took a more expansive view of possible justifications for the practice. *Boddicker* indicates that, as compared with other business, learned professions will be accorded a greater opportunity to demonstrate the beneficial effect of their practices on competition and the public interest by removing the normal per se rule and substituting a rule of reason test.<sup>97</sup>

Taken together, *Goldfarb* and *Boddicker* suggest that alleged anti-trust violations will receive more extensive analysis in the context of the learned professions, either through an extended labeling process as suggested in *Goldfarb*, or through a greater range of factors considered under the rule of reason as suggested in *Boddicker*. This further indicates that the *Container Corp.* "market structure" rule of reason will be applied to professional price information exchanges that do not constitute price fixing. However, the fact that the *Boddicker* court was willing to consider more factors in the context of a tying arrangement than were considered by the *Goldfarb* Court in the context of price fixing was an early indication that courts would treat price information exchanges in general more strictly than other alleged offenses. This was soon confirmed in the Supreme Court's next major learned professions exemption decision.

### C. National Society of Professional Engineers.

The Supreme Court gave the learned professions exemption its most thorough examination in *National Society of Professional Engineers v. United States*.<sup>98</sup> Section 11(c) of the Canon of Ethics of the National Society of Professional Engineers prohibited competitive bidding by its members. They were not to discuss the fee to be charged a client until after the prospective client had selected the engineer for a particular project. If a prospective client demanded disclosure of fees as a precondition to a contract, the canon dictated that the engineer withdraw from consideration for that job. The Justice Department sought an injunction against enforcement of the canon, alleging that its observance violated section 1 of the Sherman Act. The society put forth a *Boddicker*-type public benefit argument, claiming that the canon was reasonable since competitive bidding would adversely affect the quality of engineering, thereby creating a danger to public health, safety, and welfare.<sup>99</sup>

Although the prohibition against bidding was not an exchange of

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97. See Branca & Steinberg, *supra* note 86, at 507-09; Note, *supra* note 28, at 1060-61.

98. 435 U.S. 679 (1978).

99. *Id.* at 684-85.

price information, the alleged effect was identical, since it suppressed price competition among the members of the society.<sup>100</sup> Therefore, the same issue confronted the Court as in a price information exchange context: that is, whether a practice among competitors that concerned the price charged to purchasers operated to suppress price competition and thereby to stabilize prices in the industry. This case invited the Court to test the two considerations isolated by *Goldfarb* and *Boddicker*: the distinction between price-related and non-price-related violations of the Sherman Act and the public benefit defense under the learned professions exemption.

1. *Ending an Exemption or Forcing Price Competition?* In rejecting the society's public benefit argument, the Supreme Court found the canon to be an unreasonable restraint on competition. While the Court stressed that it was evaluating the ban on competitive bidding under the rule of reason, it nevertheless declared that "an agreement that 'interfere[s] with the setting of price by market forces' is illegal on its face . . . [and that] [w]hile [the ban on competitive bidding] . . . is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."<sup>101</sup> If, as the Court claimed, the agreement was illegal on its face, it is unclear why the Court professed to invoke the rule of reason, particularly in view of its statement that a per se violation applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed."<sup>102</sup>

Given that the Canon of Ethics was not an agreement to fix prices charged by competitors, it does appear that the rule of reason was the proper standard to apply. *Society of Professional Engineers* defined the rule of reason to be the correct test for "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."<sup>103</sup> The opinion is devoid of an "elaborate study" of the industry, and the Court found the ban on competitive bidding illegal under a rule of reason test that was limited to an analysis of the predictable effects of the ban, without any specific finding of a stabilization of prices.<sup>104</sup> This was in actuality no more than a labeling pro-

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100. *Id.* at 684.

101. *Id.* at 692.

102. *Id.*

103. *Id.*

104. The district court did find that the ban impeded "the ordinary give and take of the market place, [depriving the customer of] the ability to utilize and compare prices in selecting engineering services." *Id.* at 692-93 (quoting 404 F. Supp. at 460). This is not so much a finding of an

cess,<sup>105</sup> identical in substance to that used in the context of price fixing by the *Goldfarb* Court. The clear implication is that any restraint on price competition will be viewed with a jaundiced eye, and will receive either per se or very truncated rule of reason analysis.

*Society of Professional Engineers* does cite the footnote in *Goldfarb*<sup>106</sup> as recognizing that "professional services may differ significantly from other business services, and, accordingly, [that] the nature of the competition in such services may vary."<sup>107</sup> However, the Court remained steadfast in adhering to the "suppress or promote" competition standard, overruling the society's attempted public benefit justification, and finding the restriction on competitive bidding to be in direct contravention of the Sherman Act policy on competition.<sup>108</sup>

*Society of Professional Engineers*, on its face, indicates that the learned professions exemption is all but eliminated despite *Boddicker's* intimation that a learned profession's practice may be justified by a showing of public benefit.<sup>109</sup> However, the ruling is not quite that broad. When read in conjunction with *Goldfarb* and *Cantor*, the harsh standard imposed by *Society of Professional Engineers* does not indicate Court dissatisfaction with the learned professions exemption. Instead, the Court is formulating a distinction based upon the nature of the alleged antitrust violation. As noted previously, the society's ban on competitive bidding, like the advisory fee schedule in *Goldfarb*, was a form of price restraint. The standard used in both *Goldfarb* and *Soci-*

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actual anticompetitive effect as it is a characterization of any restraint on competition. There is no explicit finding of a tendency to stabilize or fix prices. Moreover, the district court did not invoke the rule of reason, but instead found the ban on competitive bidding to be a per se violation of the Sherman Act. *United States v. National Soc'y of Professional Eng'rs*, 404 F. Supp. 457, 460-61 (D.D.C. 1975), *aff'd*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978). Since the district court was implying a per se test, its statement (as quoted by the Supreme Court) was not a factual finding of actual anticompetitive effect.

105. See 435 U.S. at 699, 699-701 (Blackmun and Rehnquist, JJ., concurring in part). But see notes 112-14 *infra* and accompanying text.

106. See notes 88-89 *supra* and accompanying text.

107. 435 U.S. at 696.

108. *Id.* "Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason." *Id.* *Society of Professional Engineers* interprets footnote 17 in *Goldfarb* as a recognition that since professional services differ in some respects from other business services, the competitive effect of a restraint on professional services may be different. Miles & Russell, *Economic Competition and the Supreme Court: Decisions in the 1977 Term*, 13 U. RICH. L. REV. 1, 21-22 (1978).

109. This ruling is mourned in Justice Blackmun's dissent in *Society of Professional Engineers*: "[T]here may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering." 435 U.S. at 700 (Blackmun and Rehnquist, JJ., concurring in part). See also Branca & Steinberg, *supra* note 86, at 507-09. In fact, the Fifth Circuit held that *Society of Professional Engineers* does equate public interest with injury to competition. *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

ety of *Professional Engineers* demonstrates that the Supreme Court clearly will not allow any interference with the pricing mechanism for the services of a learned profession. In contrast, *Society of Professional Engineers* reiterates footnote seventeen of *Goldfarb*, indicating that the activities of a learned profession are distinct, in some way, for antitrust purposes. The decision in *Boddicker*, allowing a defendant to justify a traditional per se violation not involving prices under the public benefit rule, illustrates the vitality of this distinction outside the price restraint area. In short, the following guidelines have emerged for the learned professions: if the alleged antitrust violation is an interference with competitive pricing, even though not explicit price fixing, the Court will impose liability under a narrow rule of reason similar to the labeling process for the per se test. If the alleged antitrust violation is not related to price fixing, the Court will allow the learned profession to justify the restraint as an important public service.<sup>110</sup> The Supreme Court, in final analysis, exhibits a strong intolerance for any activity that impedes active price competition.

2. *An Implication for the Rule of Reason Applicable to Price Information Exchanges.* The *Society of Professional Engineers* Court, in finding a Sherman Act violation under the rule of reason, relied on the district court finding of an anticompetitive effect based on an interference from the ordinary give and take of the market. As noted previously, however, the district court actually applied a per se standard,<sup>111</sup> which obviates the requirement of finding actual harm to competition. This implies that the district court never reached the conclusion assumed by the higher court. In short, the holding may mean that exchanges of price information will be tested under a truncated rule of reason test involving only a labeling process—in effect, a per se rule—so as to create a strong presumption of illegality for any exchange of price information.<sup>112</sup>

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110. The decision in *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628 (D.D.C. 1979), is entirely consistent with this analysis. In that case, the ethical standard of an architects' association prohibited architects from attempting to obtain, offering to undertake, or accepting a commission for which another architect had been selected or employed. The plaintiff, an individual architect, charged that the ethical standard constituted a group boycott, a recognized per se violation of the Sherman Act. See note 17 *supra*. Nevertheless, the court declined to characterize the standard as a per se violation, noting that, in the case of professional associations, "the attempt [to limit competition is not made] in circumstances where the potential for effectuation of a true explicit boycott . . . is serious enough to warrant a *per se* approach." 474 F. Supp. at 638 n.19. Therefore, as in *Boddicker*, the court proceeded to examine the challenged activity of a learned profession under the rule of reason. See text accompanying notes 95-97 *supra*.

111. See note 104 *supra* and accompanying text.

112. Despite the Court's insistence that it invoked the rule of reason, it seems clear that a per

However, a different interpretation of *Society of Professional Engineers* could yield a more positive answer for the future of price information dissemination. The Supreme Court did not explicitly consider the market structure of the profession, and the failure to do so results in the further implication that the analysis used in *Container Corp.* is no longer in force. This creates another potential limitation upon data dissemination. In *Society of Professional Engineers*, the Court's definition of the rule of reason does include consideration of "the facts peculiar to the business," but then the Court, in examining the ban on competitive bidding, announced that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."<sup>113</sup> An alternate interpretation is that the Court took notice of an assumed concentration inherent in the engineering profession and, as in *Container Corp.*, implied an agreement to stabilize prices. If correct, this interpretation would give rebirth to the *Container Corp.* doctrine and restore the rule of reason to include a complete analysis of economic criteria in determining harm to competition.

This interpretation cannot be so easily accepted, however, since

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se standard was applied. See Miles & Russell, *supra* note 108, at 23 n.123. A recent district court case involving an almost identical restraint invoked the per se rule. *United States v. Texas Bd. of Pub. Accountancy*, 464 F. Supp. 400 (W.D. Tex. 1978), *modified*, 529 F.2d 919 (5th Cir. 1979) (Board rule prohibited accountants from submitting competitive bids).

In another price-fixing prosecution involving a professional association, however, the court found that *Society of Professional Engineers* "indicated that conduct of professions allegedly in violation of the antitrust laws may be subjected to a Rule of Reason analysis." *Arizona v. Maricopa County Medical Soc'y*, 1979-1 Trade Cas. ¶ 62,694, at 77,896 (D. Ariz. 1979). In *Maricopa County Medical Society*, a physicians' foundation set the maximum fees paid by insurance companies underwriting foundation approved plans for services performed on patients covered by the foundation-approved plans. The significance of the holding is that it sanctioned a *Boddicker*-type public benefit defense under the rule of reason, permitting "the defendants to show how the challenged conduct promoted the improvement of professional services to the public . . ." *Id.* at 77,897. Since *Society of Professional Engineers* did employ a truncated rule of reason, *Maricopa County Medical Society* represents the only professional price-fixing case to protect the special status of the learned professions. However, a possible distinction may be that maximum fee price-setting is not categorized as a per se violation. See Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 DUKE L.J. 645, 666-68.

Likewise, in *United States v. American Soc'y of Anesthesiologists*, 473 F. Supp. 147 (S.D.N.Y. 1979), the pricing activity of a professional association was examined under the rule of reason, but only after the court had concluded that there was no evidence of an illegal purpose. The American Society of Anesthesiologists disseminated "relative value guidelines," which were designed to provide assistance to local anesthesiologist societies or individual anesthesiologists who participated in the development of local fee schedules. *Id.* at 153. The court found that this activity was not a violation of the Sherman Act, since the guides contained no suggestion as to the monetary value of any procedure and, therefore, did nothing more than describe the relative difficulty of certain anesthesia procedures. *Id.* at 159. In short, the prosecution failed to demonstrate any evidence of a likely or actual effect of price fixing.

113. 435 U.S. at 692.

the opinion in *Society of Professional Engineers* contains no reference to *any* study of the engineering profession. Such a study would be necessary for the conclusion that the industry is interdependent. In fact, it is by no means clear that the *Society* situation involved a concentrated industry from which a *Container Corp.* conclusion of an anticompetitive agreement can be inferred.<sup>114</sup> In this light, *Society of Professional Engineers* returns to its position as a potentially large obstacle to the exchange of price information.

#### D. *Vertical Price Restrictions: Another Crackdown on Price.*

The recent case of *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>115</sup> rejected the per se test in regard to a vertical restraint<sup>116</sup> that prevented the retailer from selling outside a particular location. Instead, the Supreme Court invoked the rule of reason as the proper scope of inquiry for all vertical non-price restraints.<sup>117</sup> This decision has been

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114. To determine whether a particular industry is sufficiently interdependent to warrant a conclusion that a price information exchange would subject the industry to a strong possibility of collusion, it is necessary to examine those conditions that are favorable to the facilitation of collusion. See R. POSNER 135-67 for a general outline of these factors.

A professional organization that can extract compliance from its members is equivalent to a market with relatively few sellers. Cohesiveness will depend to a large extent upon the benefits and possible sanctions that the organization can confer upon its members. This, in turn, may be directly related to a second factor, the strength of entry barriers, and the existence of statutorily required professional licensing. A third consideration is the homogeneity of the service, which in the professional context may often be high due to the skilled nature of the work—though this was not true in *Goldfarb* where the title examinations were fairly standardized. The elasticity of demand for the services of a given profession is difficult to measure and may ultimately depend upon the particular service that is being performed. For example, demand for a title examination is less elastic than demand for an advocate to represent a defendant in traffic court. Finally, the prior history of the exchange of price information in a profession, by a fee schedule or otherwise, is important. This is especially so when the exchange was accompanied by penalties for variation.

It is not inandatory that all engineers who consult on a fee basis register with the National Society of Professional Engineers. Of approximately 325,000 engineers who are registered with state regulatory bodies, only 69,000 are also members of the National Society. 435 U.S. at 681-82. This evidences a lack of control over the profession as a whole and therefore does not indicate an interdependent and cohesive profession. The stated purpose of the National Society is simply to offer the rather ambiguous benefits of promoting the professional, social, and economic interests of its members. *Id.* Apparently the district court found that sanctions were imposed through direct and indirect communications with members and prospective clients. *Id.* at 684 n.5. Engineering work would characteristically not be standardized due to the high degree of precision required. Since five percent of total construction costs are engineering fees, *id.* at 682, total market demand may be inelastic. Certainly it is unlikely in light of these facts that the Supreme Court could out-of-hand conclude that the National Society is a highly interdependent industry subject to a strong possibility of collusion. That sort of finding would require a more detailed examination.

115. 433 U.S. 36 (1977).

116. A vertical restraint is one placed by the seller on the next party in the line of distribution, be it a wholesaler or retailer.

117. 433 U.S. at 57-59. In so doing, the Court rejected an earlier distinction made in *United*

hailed as a step toward greater recognition of economic factors that ultimately determine the effect of the vertical restriction.<sup>118</sup>

However, the *Sylvania* decision did not remove application of the per se rule to vertical price restrictions (that is, resale price maintenance).<sup>119</sup> The Court presented no apparent justification for this distinction and its removal has been advocated.<sup>120</sup> The implication for price information exchange is that price is again being regarded as a key area that the courts will protect from manipulation more stringently than any other economic factor. The encouragement of competition remains the goal of antitrust laws, and the Supreme Court has chosen price as its central concept, limiting any possible form of restraint on price competition.

### III. *UNITED STATES V. UNITED STATES GYPSUM CO.*: PRICE VERIFICATION UNDER THE ROBINSON-PATMAN ACT

Although the learned professions exemption decisions left a strong implication that communication concerning price among competitors would rarely be tolerated, the presence of the learned professions issue clouded the Court's treatment of the exchange of price information. Subsequently, in *United States v. United States Gypsum Co.*,<sup>121</sup> the issue of permissible price information exchanges confronted the Supreme Court in a different context. In attempting to formulate a standard for the dissemination of price data, just as in the learned professions exemption cases, the *Gypsum* Court initially addressed a purported exemption to the Sherman Act, the controlling circumstances exception.<sup>122</sup>

The defendants in *Gypsum* included the four largest producers of gypsum board, which together with the next four largest producers comprise more than ninety-four percent of the national market. Gypsum board is widely used in the construction of buildings and residences. The product itself is essentially standardized, so that price is

*States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 368-69 (1967), which invoked the rule of reason when the seller retains the title to the goods, though distributed to the buyer, and applied a per se test if the restriction accompanies an actual sale.

In a recent application of the *Sylvania* rule of reason test, the Fifth Circuit stressed the usual effect on competition, but also stated that market structure is to be emphasized. *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 570-71 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979).

118. See Note, *Future of the Per Se Rule Against Vertical Price Restrictions*, 12 GA. L. REV. 612 (1978). But see Posner, *supra* note 16, at 16.

119. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 270 U.S. 373 (1911); *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir.), cert. denied, 424 U.S. 942 (1975).

120. See Posner, *supra* note 16, at 7-9; Note, *supra* note 118, at 638-39.

121. 438 U.S. 422 (1978).

122. See notes 65-76 *supra* and accompanying text.

generally the main consideration in the purchaser's choice. The demand for gypsum board is derivative to the demand for the construction industry as a whole, however, and aggregate sales of gypsum board are therefore not greatly affected by price fluctuations.

Members of the gypsum industry developed the practice of verifying a competitor's price by telephoning that competitor. They claimed that this exchange of price information was necessary in order to comply with the Robinson-Patman Act. Section 2(b) of that Act allows a seller to lower his price to a particular customer if he has a good faith belief that a competitor has lowered his price.<sup>123</sup> The defendants claimed that consultation with the competitor was necessary to meet the good faith requirement.<sup>124</sup> Nevertheless, the Justice Department obtained an indictment charging a criminal price-fixing conspiracy under the Sherman Act, arguing that the Robinson-Patman Act meeting competition defense imposed no duty to verify by checking with the competitor. Despite the contentions of the defendants that their interseller price verifications fell within the controlling circumstances exception to the Sherman Act, the district court instructed the jury that the purpose was irrelevant if they found that the effect of verification was to stabilize prices.<sup>125</sup> The jury returned a guilty verdict, but the circuit court reversed and remanded the case, finding that the trial court instruction was erroneous. According to the circuit court, a valid meeting competition defense would exempt the price verifications from Sherman Act liability.<sup>126</sup> The Supreme Court affirmed the decision to remand, but on the grounds of improper "*ex parte* communications between the trial judge and the jury foreman"<sup>127</sup> and an overly restrictive jury instruction regarding withdrawal from the conspiracy.<sup>128</sup>

The Supreme Court, employing a rule of reason analysis, disagreed with the circuit court's declaration that such interseller price verification was a legitimate exception (or "controlling circumstance") to Sherman Act liability. This announcement left significant doubt

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123. 15 U.S.C. § 13(b) (1976).

124. See note 11 *supra*.

125. 438 U.S. at 429-30.

126. 550 F.2d 115, 126 (3d Cir. 1977). The Third Circuit imposed the following requirements to show the verification practices were not unlawful:

(1) [T]he [defendants] engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue.

*Id.*

127. 438 U.S. at 459.

128. *Id.* at 459-65.

about the future of price information exchanges between competitors. For the purpose of this Comment, three considerations need exploration: (1) criminal price fixing under the Sherman Act, (2) the end of the "controlling circumstances" exception, and (3) the future of price information exchanges and the rule of reason.

A. *Criminal Price Fixing Under the Sherman Act.*

The Supreme Court in *Gypsum* ruled that the "effects alone" test proposed by the district court jury instructions was improper. Wishing to avoid the imposition of a strict liability offense under the antitrust laws, the Court required that some purpose to restrain competition be found in criminal cases to satisfy the criminal mens rea requirement.<sup>129</sup> Therefore, in applying the rule of reason to a criminal charge under the Sherman Act, both a purpose and an effect of injuring competition must be established for a finding of criminal liability.<sup>130</sup> This requirement does not change the usual rule for a civil antitrust action that a "violation can be established by proof of either an unlawful purpose or an anticompetitive effect."<sup>131</sup>

The requisite intent established by the Supreme Court for a criminal prosecution is "knowledge of probable consequences." This, coupled with an anticompetitive effect, will suffice for a criminal conviction.<sup>132</sup> Under the per se rule, this lesser standard of intent

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129. *Id.* at 435-38. After the commencement of the *Gypsum* case, Congress increased the criminal penalties for violation of the Sherman Act. Criminal violations are now treated as felonies and are punishable by a fine not to exceed \$1,000,000 or imprisonment or both. 15 U.S.C. § 1 (1976). The Fourth Circuit subsequently refused to recognize any change in the substantive elements of a price-fixing violation as the result of this amendment, stating: "In increasing the penalties for violating § 1 and redefining the offense as a felony, Congress did not intend to change the elements of the offense." *United States v. Foley*, 598 F.2d 1323, 1335 (4th Cir. 1979); *accord*, *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979). For a recommendation that imprisonment for Sherman Act violations be eliminated and penalties be assessed commensurate with the probable harm to competition, see R. POSNER 221-36.

130. *See* 438 U.S. at 438-40, 444. The rule of reason standard is appropriately applied to a price information exchange case, like *Gypsum*, where no unlawful agreement is found. *Id.* at 441 n.16.

131. *Id.* at 436 n.13. *Accord, id.* at 446 n.22.

132. *Id.* at 444. This does not preclude a finding of criminal liability when a specific intent to violate the Sherman Act is found, but no evidence of an actual anticompetitive effect is introduced. *Id.* at 444 n.21. Under this standard, the defendant's sophistication may become important. Large corporations may be more likely to be found to have knowledge of the consequences of their actions. *See Miles & Russell, supra* note 108, at 17.

Moreover, a recent district court decision found the "knowledge of probable circumstances" test applicable to civil antitrust actions as well. *City of Mishawaka, Inc. v. American Elec. Power Co.*, 465 F. Supp. 1320, 1334 (N.D. Ind. 1979) ("If intent can be inferred from conduct in criminal antitrust cases, it obviously can be inferred in civil actions . . .").

should not be sufficient, and it should be necessary to establish an agreement with an unlawful purpose on the part of the defendants to violate the Sherman Act.<sup>133</sup>

Ostensibly, criminal prosecutions would be brought only for the more serious and sinister violations. The defendants in *Gypsum* claimed they were acting under the assumption of a controlling circumstance exception and for the lawful purpose of complying with the Robinson-Patman Act. Although it appears that the defendants were acting with the knowledge that prices could be stabilized, they were not found to have arranged a price-fixing conspiracy.<sup>134</sup> *Gypsum* is the first major price information exchange case before the Supreme Court to involve a criminal prosecution. The case indicates that the Justice Department is taking a tough stance on price information exchange, view-

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133. Refusing to treat antitrust violations as strict liability crimes, 438 U.S. at 438, the Supreme Court requires a finding of intent for a criminal prosecution. A per se conviction does not require the finding of an actual anticompetitive effect. See notes 27-29 *supra* and accompanying text. Since *Gypsum* allows a criminal conviction on a finding of unlawful purpose, see note 132 *supra*, the per se rule should require this same degree of intent, and the lesser standard of "knowledge of probable consequences" should be insufficient. Nevertheless, the per se rule used in a recent criminal case did employ this lesser standard of intent, without any specific finding of anticompetitive effect. *United States v. Continental Group, Inc.*, 456 F. Supp. 704, 716-18, 722-23 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979) (if the court had searched for actual harm, it would not have been applying the per se rule but rather a rule of reason). This decision misinterprets the *Gypsum* decision. To obtain a criminal conviction under the per se rule, "the government [is] obligated, under *Gypsum*, to prove that defendants possessed a specific intent to produce such an effect." 603 F.2d at 469 (Hunter, J., concurring).

Some commentators have asserted that the use of the per se test is unconstitutional for a criminal antitrust prosecution. See, e.g., C. KAYSEN & D. TURNER, *ANTITRUST POLICY* 256 (1959) ("There is more than a little merit in the complaint that criminal sanctions are inappropriate for those areas of antitrust law where violations depend on essentially economic judgments on which reasonable Supreme Court justices may and do differ"); Brosnahan & Dowling, *The Constitutionality of the Per Se Rule in Criminal Antitrust Prosecutions*, 16 SANTA CLARA L. REV. 55 (1975). However, this view has not been adopted by any court. See *United States v. Continental Group, Inc.*, 456 F. Supp. at 718; *United States v. Brighton Bldg. & Maintenance Co.*, 435 F. Supp. 222, 227-28 (N.D. Ill. 1977), *aff'd*, 598 F.2d 1101 (7th Cir. 1979). Furthermore, a recent statement by the then Deputy Attorney General, presently Attorney General, Benjamin Civiletti emphasized that "per se violations of the antitrust laws are those [violations] which the Department prosecutes criminally . . ." Remarks by Benjamin R. Civiletti at the Annual Meeting of the Rock-Tenn. Co. (Oct. 21, 1978). While the statement makes it clear that the per se rule is still considered viable by the Department of Justice for criminal violations, it is particularly confusing because Civiletti was basing his remarks upon the recent *Gypsum* decision, which purported not to apply a per se test.

However, two recent circuit court decisions have ruled that, in the case of a criminal per se price-fixing violation, the intent requirement will be satisfied by proof of the price-fixing conspiracy alone. *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101 (7th Cir. 1979); *United States v. Gillen*, 599 F.2d 541 (3d Cir. 1979).

134. According to the statements of Civiletti, this should not, therefore, be a criminal prosecution, since it was not a per se price-fixing case. Civiletti Remarks, *supra* note 133.

ing it as the near equivalent of a price-fixing conspiracy.<sup>135</sup>

B. *The End of the Controlling Circumstance Exception for the Robinson-Patman Act.*

As discussed previously, the lower federal courts interpreted a phrase in *Container Corp.*, referring to a "controlling circumstance" in the *Cement Manufacturers* case, as creating an exception to Sherman Act liability for interseller price verification under the Robinson-Patman Act.<sup>136</sup> The so-called "controlling circumstances exception," which originated in *Cement Manufacturers* because of persistent buyer fraud,<sup>137</sup> was not entirely eliminated by *Gypsum*, but the opinion undeniably abrogates any exception to the Sherman Act for interseller verification under the meeting competition defense of section 2(b) of the Robinson-Patman Act, and, at most, leaves only a narrow exception deriving from *Cement Manufacturers*.<sup>138</sup>

In *Gypsum*, the Supreme Court found no conflict between the Sherman Act and the Robinson-Patman Act to warrant the exception claimed by the defendants, which would permit unlimited exchanges of price information between sellers. Instead, the Court asserted that a proper accommodation could be found for both acts.<sup>139</sup> However, the two laws do not have the same emphasis in the price information exchange context, and therefore, their goals will not always coincide. The purpose of the Robinson-Patman Act was to prevent price discrimination by a seller that would injure both competitors (primary-line injury) and buyers not receiving the discrimination in price (secondary-line injury).<sup>140</sup> Although prevention of the latter injury was the main objective of the act,<sup>141</sup> section 2(b) seeks to allow a seller an opportunity to

135. In his remarks, Civiletti stated that the Justice Department has two goals in using criminal sanctions to deter violations:

(1) [W]e want to uncover existing price fixing and stop its disastrous effects on honest businessmen and consumers alike; and (2) [W]e want to make sure that present and would-be price fixers know that they run a large risk and will have to pay a heavy price if they are found out—we must try to deter this destructive conduct.

Civiletti Remarks, *supra* note 133, at 7. The second condition does not seem to fit the *Gypsum* facts, which did not involve a covert arrangement to fix prices.

136. See text accompanying notes 65-76 *supra*.

137. The Robinson-Patman Act attempts to proscribe buyer fraud in section 2(f). 15 U.S.C. § 13(f) (1976). This section makes it unlawful for a buyer to knowingly induce or receive a price discrimination that would otherwise be unlawful for the seller to grant under section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) (1976).

138. 438 U.S. at 448-59.

139. *Id.* at 452-53. *Contra*, Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, 1 ABA ANTITRUST SECTION 60, 62 (1952).

140. U.S. DEP'T OF JUSTICE, *supra* note 11, at 4-5.

141. *Id.* 5.

maintain a sales relationship with a particular client when the seller has a good faith belief that his client has received a lower offer from a competitor. This implies a duty to verify the lower price offered by his competitor, and the courts do speak of a duty "to investigate or verify."<sup>142</sup> Thus, under this defense, the Robinson-Patman Act would encourage price information exchange. Equally clear is the fact that the Sherman Act prohibits the exchange of price information that stabilizes prices, and therefore, the Sherman Act would discourage the exchange of price information in many instances. This evaluation does demonstrate an uneasy combination of the two laws arising in the *Gypsum* case.

The accommodation of these laws finds the Sherman Act favored by legal and economic critics,<sup>143</sup> the Justice Department,<sup>144</sup> and the Supreme Court, both previously<sup>145</sup> and now in *Gypsum*. The *Gypsum* Court reaffirmed the standard it adopted in *FTC v. A.E. Staley Manufacturing Co.*,<sup>146</sup> which had provided that a valid "good faith meeting competition" defense requires the seller to "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."<sup>147</sup> Yet to satisfy this standard, the Court finds that no "direct discussions of price between competitors are required"<sup>148</sup> and in fact, that even where the seller has "vague, generalized doubts about the reliability of [the purchaser],"<sup>149</sup> the seller can satisfy the standard "by efforts falling short of interseller verification . . ."<sup>150</sup> In a sweeping announcement based on the assumption of a highly concentrated market, the Court concludes that interseller price verification cannot solve the problem of inadequate information and could lead to the stability of prices.<sup>151</sup> This, for all practical purposes, ends the meeting

142. *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945).

143. The Robinson-Patman Act has come under a barrage of criticism and many have advocated its repeal. See generally R. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* (1976); U.S. DEP'T OF JUSTICE, *supra* note 11, at 8-101, 210-51; Cooper, *Price Discrimination Law and Economic Efficiency*, 75 MICH. L. REV. 962 (1977); *America's 40-Year Wrangle*, *THE ECONOMIST*, Aug. 26, 1978, at 61. Meanwhile, the Sherman Act receives plaudits.

144. See U.S. DEP'T OF JUSTICE, *supra* note 11, at 58-59.

145. See *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953) (stating that the Robinson-Patman Act should be interpreted to achieve compliance with "the broader antitrust policies that have been laid down by Congress").

146. 324 U.S. 746 (1945).

147. *Id.* at 759-60.

148. 438 U.S. at 453.

149. *Id.* at 454.

150. *Id.*

151. With the elimination of interseller price verification, *Gypsum* indicates in a footnote that

competition defense as a controlling circumstances exception:

To recognize even a limited "controlling circumstance" exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby. . . . [E]xchanges of price information—even when putatively for purposes of Robinson-Patman Act compliance—must remain subject to close scrutiny under the Sherman Act.<sup>152</sup>

Following the broad sweep of *Gypsum*, the viability of the original buyer fraud exception of *Cement Manufacturers* is also in serious doubt. *Gypsum* did not explicitly overrule *Cement Manufacturers* nor any of the lower court decisions purporting to follow it via the *Container Corp.* "controlling circumstance" dicta. However, it is pal-

verification by buyers, supervised by section 2(f) of the Robinson-Patman Act, will become the chief method of complying with the good faith requirement of the meeting competition defense. See note 137 *supra*. In footnote 30, the Court stated:

It may . . . turn out that sustained enforcement of § 2(f) of the . . . Robinson-Patman Act, which imposes liability on buyers for inducing illegal price discounts, will serve to bolster the credibility of buyer's representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2(b).

438 U.S. at 455 n.30.

Enforcement of this section may be imperative to afford sellers a good faith belief to lower their price under section 2(b); otherwise, buyer misrepresentation could be widespread. See generally Curtis, *Buyer Liability Under the Robinson-Patman Act*, 42 ANTITRUST L.J. 345 (1973); Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970's*, 7 IND. L. REV. 962 (1974); Note, *The Evolving Duty of an Innocent Buyer to Inquire into His Bargain Under Section 2(f) of the Robinson-Patman Act*, 49 IND. L.J. 348 (1974).

The Supreme Court recently interpreted section 2(f) in *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979) (A & P). A & P solicited a lower price by telling the seller that only a substantial reduction in his offer would put him "in the ball park" of the competition. The seller told A & P that it could only justify the lower price under a meeting competition defense. A & P, upon accepting the new offer, did not notify the buyer that its price had not merely met the competition but had beaten it. The Supreme Court reversed an FTC order finding A & P in violation of section 2(f) for knowingly inducing an illegal price. *Id.* at 85. A buyer who has done no more than accept the lowest price competitively offered does not violate the Robinson-Patman Act if the seller has a meeting competition defense, which the seller in *A & P* did. *Id.* at 81.

*A & P* represents a desire to avoid price stability. A duty of affirmative disclosure of all offers received by the buyer would frustrate competitive bidding by eliminating all uncertainty in the negotiating process. See *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 56 (1st Cir. 1964) (stating that "neither the buyer nor seller expects . . . , or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place"), *cert. denied*, 380 U.S. 906 (1965); Comment, *Interseller Price Verification and Hard Bargaining: Reconciliation of the Sherman Act, Robinson-Patman Act and the Forces of Competition*, 46 FORDHAM L. REV. 824, 870 (1978).

*A & P* did not disturb the holding in *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). *Kroger* established that where a buyer misrepresents to an innocent seller that he has a lower offer from a competitor, buyer liability is independent of seller liability. 438 F.2d at 1377. *A & P* distinguishes *Kroger* as a "lying buyer" situation. 440 U.S. at 81-82 n.15.

152. 438 U.S. at 458-59.

pable that those lower court decisions formulated the same controlling circumstances exception eliminated by *Gypsum*. *Cement Manufacturers* pre-dated the enactment of the Robinson-Patman Act and to a large extent addressed the same issue: the ability of a buyer to induce a lower price through a fraudulent report. Under the *Gypsum* decision, therefore, only a very narrow limitation, at most, could remain under *Cement Manufacturers* designed to prevent buyer fraud by permitting verification.<sup>153</sup>

*Gypsum* quite obviously eliminates a significant area of price information exchange, and given the continued existence of the Robinson-Patman Act, it also ends one of the more prominent uses of price information exchange. Once again the Court is cautiously guarding the goal of price competition, and although *Gypsum* recognizes the value of price information exchange,<sup>154</sup> the decision does not explicitly exempt any form of price information dissemination from Sherman Act liability. Therefore, it is necessary to interpret the rule of reason applied by *Gypsum* to predict the future of price information exchanges.

### C. *The Future of Price Information Exchange and the Rule of Reason.*

As discussed previously,<sup>155</sup> the Supreme Court, in *Society of Professional Engineers*, did not extend Sherman Act immunity under the learned professions exemption to the professional engineering association.<sup>156</sup> Similarly, the *Gypsum* Court eliminated the controlling circumstances exception for price verification among competitors. In both cases, therefore, the Court examined the challenged price restraint under the rule of reason, unimpeded by any exemptions to the Sherman Act. The future scope of permissible price information exchanges will be determined by the breadth of this rule of reason.

1. *The Rule of Reason in Gypsum.* In *Gypsum*, the Court clarified the decision of *Container Corp.* as endorsing a rule of reason standard and then went one step further in citing that case for the proposition that the rule of reason should consider "[a] number of factors including most prominently the structure of the industry involved and the nature of the information exchanged . . . [to divine] the procompetitive or anticompetitive effects of this type of interseller com-

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153. See *id.* at 446-47 n.22.

154. *Id.* at 441 n.16.

155. See text accompanying notes 98-102 *supra*.

156. 435 U.S. at 696.

munication."<sup>157</sup> If followed faithfully, this would be the first Supreme Court decision since *Container Corp.* to examine price information exchange by a market structure analysis to determine the true effect of the restraint on competition. In fact, Chief Justice Burger's opinion does proceed to analyze the effect of interseller price verification in a highly concentrated market structure and concludes that "[p]rice concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concessions are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process."<sup>158</sup> This theoretical discourse was said to be applicable for both infrequent, one-shot verifications<sup>159</sup> and for an explicit agreement among competitors for reciprocal verification.<sup>160</sup>

The earlier discussion of markets<sup>161</sup> fully supports the *Gypsum* Court's conclusion that "in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions."<sup>162</sup> The evidence adduced by the trial court concerning the structure of the gypsum board industry identified it as one of the industries that could facilitate, explicitly or tacitly, super-competitive

157. 438 U.S. at 441 n.16. For earlier discussion of the *Container Corp.* test, see notes 47-50 & 55-64 *supra* and accompanying text.

158. 438 U.S. at 456.

159. Chief Justice Burger states:

[I]f one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused. . . . Thus verification, if undertaken on a one-shot basis for the sole purpose of complying with the § 2(b) defense, does not hold out much promise as a means of shoring up buyers' representation.

*Id.* at 456-57.

160. The opinion reads:

[A]n agreement, either tacit or express, providing for reciprocity among competitors in the exchange of price information . . . would make little economic sense . . . if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants [since] each seller would know that his price concession could not be kept from his competitors and no seller participating in the information-exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry.

*Id.* at 457.

This belief is not universally accepted. Although a seller may know of a price reduction by his competitor, he may not immediately be able to meet his competitor's price because, for example, of production restraints. *See* R. POSNER 44. Furthermore, by lowering his price, a seller could create new growth in the market depending on the elasticity of demand. This may not only bring in more sales directly, but also may produce benefits from lower costs achieved through economies of scale. *Id.* 44-45. *See* Posner, *supra* note 13, at 1566-69.

161. *See* notes 30-36 *supra* and accompanying text.

162. 438 U.S. at 457.

pricing.<sup>163</sup> Therefore, it would appear that *Gypsum* may have returned to the use of economic criteria in looking for evidence of price stabilization.

However, it would be too hasty a conclusion to say that there has been an actual return to the standard proposed in *Container Corp.* The rule of reason approach of *Gypsum* did discuss market structure in depth, but the Court equated the oligopoly situation with that of all markets. By foregoing any examination of the competitive structure of the market, the Court generalized from the specific facts of *Gypsum* that interseller price verification is inherently unreasonable. As a result of this belief, the majority of the Court decided effectively to terminate this substantial form of price information exchange. In so doing, the *Gypsum* Court did not adopt the insights offered by market structure analysis as applied in *Container Corp.* The rule of reason for price dissemination remains limited in scope to the details of the particular plan of verification.

In assuming an interdependent and possibly collusive market structure as its standard of analysis for price verification, the Court in *Gypsum* in effect applied a per se test to price information exchanges. The test imposed by the *Gypsum* decision is whether the competitors' "knowledge of probable circumstances" of their price verification would disclose an anticompetitive effect.<sup>164</sup> In a preliminary inquiry equivalent to the labeling process, this required intent would be easy to find, once the Court assumed an oligopolistic industry in which competitors are particularly aware of one another's actions.<sup>165</sup> This conclusion, viewed together with the trends exposed by the learned professions exemption decisions, indicates a limited future for the exchange of price information.

## 2. *The Standard for the Exchange of Price Information.* Although

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163. For the characteristics of a market susceptible to collusive pricing, see note 53 *supra*. Posner's first stage analysis would identify the *Gypsum* situation as a likely candidate for potential collusion.

The gypsum board industry is highly concentrated (the eight largest firms have 94% of the market). No substantial fringe of small sellers exists that could limit the defendant's power. Further, demand for gypsum board is derivative to that for construction, so that price fluctuations in gypsum are largely ignored (inelastic demand). There is low concentration on the buying side and the product itself is fungible. Finally, the industry's antitrust record is not without prior civil lawsuits. All these factors identify the industry as one with a potential for price collusion.

164. See notes 132-33 *supra* and accompanying text.

165. See *Penne v. Greater Minneapolis Area Bd. of Realtors*, 5 TRADE REG. REP. (CCH) ¶ 62,820 (8th Cir. 1979). The publication of prices by the board of realtors was not ruled to be a per se violation. Moreover, the court did not assume the presence of an interdependent market, but, instead, remanded the case for a finding of the actual effect of the publication.

no Supreme Court decision has enunciated a specific standard for the treatment of price information exchanges, the trend of the Court is clearly to establish a substantial barrier to their permissibility. Two critical observations emerge from the language of the opinions: first, Sherman Act enforcement is preeminent and uncompromised by any other antitrust law or public benefit; second, the rule of reason for price information exchanges lacks the essential balancing of effects on competition to determine the existence of real price stabilization.

Section 1 of the Sherman Act, in unqualified terms, prohibits any business activity that operates as a restraint of trade.<sup>166</sup> The Supreme Court is interpreting this statute broadly, as discouraging any arrangement between competitors that has a tendency to affect the competitive pricing system. In both *Goldfarb* and *Society of Professional Engineers*, the Court ruled that the defendant professional organizations violated the Sherman Act, despite contentions that the advisory fee schedule and ban on competitive bidding actually served to promote the public interest. Since it appears very likely that some form of the learned professions exemption continues,<sup>167</sup> these decisions demonstrate that the Court is looking to the nature of the restraint in deciding whether to enforce the Sherman Act strictly. If the restraint is one affecting price, the learned professions exemption will not apply.

Likewise, the *Gypsum* Court held that Sherman Act discouragement of price information exchanges takes priority over Robinson-Patman Act emphasis on verification of a competitor's offer under the meeting competition defense. This pressure against price dissemination is even stronger when the action brought for price fixing is a criminal one.<sup>168</sup> In short, both the learned professions exemption and Robinson-Patman Act justifications are ineffective in countering the Court's concern for policing pricing activities through the Sherman Act.

In addition to distinguishing price information exchanges by eliminating all exemptions to the Sherman Act for these communications, the Court has fashioned an abbreviated rule of reason for use in these situations. Unlike the *Container Corp.* standard, which looks to the economic circumstances surrounding the exchange of price information, the approach used in *Society of Professional Engineers* and *Gypsum* involved an inquiry no broader than a labeling process. Although nominally applying a "rule of reason," each case failed to examine the structure of the relevant market in which the pricing-related activity

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166. 15 U.S.C. § 1 (1976).

167. See text accompanying notes 90-97 *supra*.

168. See Civiletti Remarks, *supra* note 133.

occurred.<sup>169</sup> Without this exploration, no court can find the true reasonableness of the restraint: that is, whether the restraint, on balance, promotes or suppresses competition.<sup>170</sup> This leaves nothing more than a per se test.

By rejecting all justifications for a price information exchange and by reducing the scope of its inquiry to a mere labeling process, the Supreme Court is exhibiting extreme disapproval of exchanges of price information.<sup>171</sup> Apparently, only those exchanges of prices that are sufficiently removed in time and directness to eliminate the taint of a potential agreement or conspiracy to violate the Sherman Act will be permitted. Therefore, under the *Gypsum* and *Society of Professional Engineers* rule of reason approach, the elements of a permissible price dissemination would probably include the use of historical data,<sup>172</sup> information given voluntarily and published only to be advisory,<sup>173</sup> information made available to the public,<sup>174</sup> and information published by an association without any direct profit incentive.<sup>175</sup>

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169. See notes 111-14 & 157-65 *supra* and accompanying text.

170. See note 16 *supra*.

171. The Supreme Court has subsequently indicated that an exchange of price information is impermissible in *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979). See note 151 *supra*. While warning against the danger of price stability, the Court stated that “[b]ecause of the evils of collusive action, the Court has held that the exchange of price information by competitors violates the Sherman Act.” 440 U.S. at 80.

172. Obviously, current price information carries a greater potential for price fixing. See Note, 63 VA. L. REV., *supra* note 49, at 667. Recent cases have regarded this factor differently in formulating consent decrees. See *United States v. Wholesale Tobacco Distribs., Inc.*, 5 TRADE REG. REP. (CCH) ¶ 62,588 (S.D.N.Y. 1979) (consent decree enjoined distribution of proposed and current prices, except as necessary to bona fide sales between the competitors themselves); *United States v. Enderle Metal Prods. Co.*, 5 TRADE REG. REP. (CCH) ¶ 62,517 (N.D. Cal. 1979) (consent decree enjoined distribution of future and proposed prices, but not the price obtained in a bona fide transaction); *United States v. Owensboro River Sand & Gravel Co.*, 5 TRADE REG. REP. (CCH) ¶ 62,519 (W.D. Ky. 1979) (stipulation identical to that in *Enderle*); *United States v. Arrow Overall Supply Co.*, 1978-2 Trade Cas. ¶ 62,275 (E.D. Mich. 1978) (consent decree prohibited exchanging price information without qualification at the time the price is quoted to buyers); *United States v. Great W. Sugar Co.*, 1978-2 Trade Cas. ¶ 62,235 (N.D. Cal. 1978) (consent decree enjoined exchange of information concerning future prices by sellers and their trade association, but not to proposed or actual bona fide sales). Another district court decision took a compromise approach. See *United States v. Dixo Co.*, 1978-2 Trade Cas. ¶ 62,353, at 76,128 (E.D.N.Y. 1978) (final judgment order enjoined all exchanges of price information with any other distributor “concerning any actual or proposed price, price change or discount . . . prior to communication of such information to the public or to customers generally”). *Accord*, *United States v. Kliegman Bros.*, 5 TRADE REG. REP. ¶ 62,428 (E.D.N.Y. 1978).

173. This qualification was indicated in *Goldfarb*, which stated that “[a] purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint of trade would present us with a different question . . . .” 421 U.S. at 781.

174. This was a primary feature of the price dissemination plans upheld by the Supreme Court in *Maple Flooring* and other early cases. See notes 39-44 *supra* and accompanying text.

175. Trade associations, which are not controlled by the major producers in the industry, are

## IV. CONCLUSION

The rule of reason is the standard of analysis adopted by the courts to determine whether a particular business practice, which is not overtly pernicious, is a violation of the Sherman Act. Under that test, the critical inquiry is whether the challenged activity tends to promote or suppress competition. Economic theory discloses that it is essential to examine the structure of the market in which the dissemination is conducted in order to determine whether a practice of price information exchange violates section 1 of the Sherman Act by stabilizing prices. In *Container Corp.*, the Supreme Court formulated a rule of reason for price information exchange that took market structure into account.

Beginning with the learned professions exemption decisions of *Goldfarb* and *Society of Professional Engineers*, the Supreme Court has significantly curtailed the scope of investigation under the rule of reason. The *Goldfarb* Court refused to find a learned professions exemption in price-related cases, but the Court has indicated that special treatment to the learned professions in non-price situations is appropriate. In *Boddicker*, a Ninth Circuit case, this special treatment took the form of a public benefit assessment closely akin to the state action exemption. *Society of Professional Engineers* emphatically denied a public benefit assessment to a ban on competitive bidding. In so doing, the Supreme Court, while claiming to apply a rule of reason test, implied two important conclusions: that the *Container Corp.* rule of reason is no longer in use and that any restraint that interferes with the competitive pricing mechanism cannot be justified.

*Gypsum* removed any ambiguity concerning the future of price information exchange. It rejected the meeting competition defense of the Robinson-Patman Act as an exception to Sherman Act enforcement. While giving lip service to the *Container Corp.* standard, the Supreme Court avoided the task of examining the economic characteristics of the industry by assuming a concentrated and potentially collusive market structure. Price verification in that sort of market can quite easily lead to price stabilization, but it may lead to a more efficient ordering in a less concentrated market. Since *Gypsum* was a criminal prosecution, the Court required a finding that the defendants had "knowledge of probable consequences" of the price verification. However, given the assumption of a highly interdependent market structure, every defendant will be found to have the requisite intent.

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not likely to be attempting to fix prices by publishing general industry data for the public's information.

The new rule of reason for price information exchange, in disregarding potential competitive and legislative justifications, is actually only a labeling process, examining the details of the particular practice only to decide whether to apply per se liability. Under that standard, the exchange of price information will rarely be permissible, regardless of the purpose and circumstances of conveyance.

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