The Burger Court Opinion Writing Database

United States v. United States Gypsum Co.

438 U.S. 422 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 22 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1560

United States, Petitioner, v. United States Gypsum Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the following questions: (a) the extent to which intent is an element of a criminal antitrust offense; (b) whether an exchange of price information for purposes of compliance with the Robinson-Patman Act is exempt from Sherman Act scrutiny; (c) the adequacy of jury instructions on membership in and withdrawal from the alleged conspiracy; and (d) the propriety of an *ex parte* meeting between the trial judge and the foreman of the jury.

I

Gypsum board, a laminated type of wall board composed of paper, vinyl or other specially treated coverings over a gypsum core, has in the last 30 years substantially replaced wet plaster as the primary component of interior walls and ceilings in residential and commercial construction. The product is essentially fungible; differences in price, credit terms and delivery services largely dictate the purchasers' choice between competing suppliers. Overall demand, however, is governed by the level of construction activity and is only marginally affected by price fluctuations.

The gypsum board industry is highly concentrated with the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1978

Re: 76-1560 - United States v. United States Gypsum Co.

Dear John:

I have just a few brief comments in response to your letter.

The trial judge instructed the jury that in order to prove that a defendant became a member of the conspiracy, it must be shown both that the conspiracy was knowingly formed (the intent to agree), and that a defendant participated in the scheme with the intent to advance or further some object or purpose of the conspiracy (the intent to further criminal objective of the conspiracy). It is this second type of intent, a requisite for proof of a conspiracy, see LaFave & Scott, Criminal Law, 464-65 (1972), which the trial judge allowed the jury to presume as a matter of law from proof of an effect on prices, and it is this aspect of the instruction which I address in Part II of the opinion. The quoted section of the instructions in your letter does not, on my view, respond to this problem.

While it is possible to argue that the intent element was simply incorrectly described in the instruction, the position of the government and, to a lesser extent, of the Court of Appeals suggests that they take a broader view of the question. Indeed, the government explicitly defends this aspect of the charge on the ground that an effect on prices, without more, is a sufficient predicate for criminal liability under the antitrust laws; it also contends that this Court has taken such a position in the past. The Court of Appeals apparently did not generally disagree with this view, but saw the need for a limited "controlling circumstance" exception for exchanges of price information undertaken for purposes of compliance with the Robinson-Patman Act. These considerations lead me to conclude that the question of the proper role of intent in a criminal antitrust prosecution does require discussion here, and that is the position I understood the Conference to have taken.

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1978

Re: 76-1560 - United States v. United States Gypsum Company, et al.

MEMORANDUM TO THE CONFERENCE:

I have a few stylistic changes to make in this case but one which is more than stylistic. The latter is an effort to focus on the real vice of the ex parte meeting with the jury foreman and unawareness of counsel as to the details of the conversation.

The following will replace the carry-over paragraph on pages 36 and 37. When the Print Shop catches up, we will circulate the final, full draft.

"Finally, the absence of counsel from the meeting and the unavailability of a transcript or full report of the meeting aggravates the problems of having one juror serve as a conduit for communicating instructions to the whole panel. While all counsel acquiesced to the judge's ex parte conference with the jury foreman, they did so on the express understanding that the judge merely intended -- as no doubt at the time he did -- to receive from the foreman a report on the state of affairs in the jury room and the prospects for a verdict. Certainly none of the parties waived the right to a full and accurate report of what transpired at the meeting nor did they agree that the judge was to repeat the instructions as to his understandable reluctance to accept the jury's inability to reach a verdict. Because neither counsel received a full report from the judge, they were not aware of the scope of the conversation between the foreman and the judge, of the judge's statement that the jury should continue to deliberate in order to reach a verdict, or of the real risk that the foreman's impression was that a verdict 'one way or the other' was required. Counsel were thus denied any opportunity to clear up the confusion regarding the judge's direction to the foreman, which could readily have been accomplished by requesting that the whole jury be called into

the courtroom for a clarifying instruction. See Rogers v. United States, 422 U.S. 35, 38; Fillippon v. Albion Vein State Co., 250 U.S. 76, 81 (1919). Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing along, -- undesirable as that procedure is -- which constitutes the error; rather, it is the fact that the ex parte discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling."

Regards,

WEB.
jr

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1978

Re: 76-1560 - United States v. United States Gypsum Co.

Dear Bill:

Your changes have the approval of the "opposition" so far as I am concerned!

But let me point out some errors: (a) it is 220 million not 250; (b) most of them do know you are a gentle soul and a secret, closet bleeding heart.

More significantly, I did not "sprinkle" the Model Penal Code references; I "placed" them in a coldly calculated manner designed to undermine your opinion as much as possible.

Your reference to "end-of-Term syndrome" recalls Bill Brennan's story how Hugo came to him and told him to go home and get away from the "pressure cooker" June atmosphere of the Court.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

CJ
I am with you
WEB

V

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1978

Re: 76-1560 - United States v. Gypsum

MEMORANDUM TO THE CONFERENCE:

There is one minor housekeeping detail in this case which I want to bring to your attention.

We granted certiorari in Gypsum on the Solicitor General's petition which challenged the Court of Appeal's reversal of the antitrust convictions and remand for a new trial. In a cross-petition from the decision of the Court of Appeals, No. 76-1556, two of the individual defendants contended that the evidence was insufficient to link them to the conspiracy and further that the Court of Appeals gave retroactive effect to our decision in United States v. Container Corp., 393 U.S. 333 (1969), thereby denying them adequate notice of the prohibited conduct. These arguments were also raised in support of the judgment in response to the Solicitor General's petition and argument on the merits. The cross-petition was held. In the course of affirming the Court of Appeal's decision in this case, we have treated the notice question, see note 22, but like the Court of Appeals we have not addressed the sufficiency issue.

I will vote to deny the cross-petition since the sufficiency issue is not certworthy. I bring this matter to your attention at this point only because were we to take a different course with regard to the cross-petition, it might alter our disposition of this case, which at this point will take the form of an outright affirmance.

Absent dissent, I will proceed along these lines.

Regards,

WEB

CHANGES AS MARKED:

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 12 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1560

United States, Petitioner, v. United States Gypsum Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the following questions: (a) whether intent is an element of a criminal antitrust offense; (b) whether an exchange of price information for purposes of compliance with the Robinson-Patman Act is exempt from Sherman Act scrutiny; (c) the adequacy of jury instructions on membership in and withdrawal from the alleged conspiracy; and (d) the propriety of an *ex parte* meeting between the trial judge and the foreman of the jury.

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The gypsum board industry is highly concentrated with the

See 37+46

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated JUN 20 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1560

United States, Petitioner, *v.* United States Gypsum Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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The gypsum board industry is highly concentrated with the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1978

Re: Cases Held for 76-1560 - United States v. United States Gypsum

MEMORANDUM TO THE CONFERENCE:

As I indicated in my letter of June 13, the only case held for United States Gypsum was the cross-petition of two of the individual defendants. No. 76-1556 - Brown v. United States. Two claims are made in the cross-petition -- first, that the evidence was insufficient to sustain the conviction, and second, that our decision in United States v. Container Corp., 393 U.S. 333 (1969), was erroneously given retroactive effect by the Court of Appeals. The latter issue was addressed in footnote 22 of the United States Gypsum opinion: the sufficiency of the evidence claim is not independently certworthy. Thus, as I indicated previously, I will vote to deny certiorari on the cross-petition.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1978

RE: No. 76-1560 United States v. United States Gypsum Co.

Dear Chief:

I think this is a fine opinion and join but hope you may see your way clear to accommodating the following suggestions:

1. At page 16 the carryover sentence at the top of the page. The sentence concludes "may be of particular salience in the antitrust context." May I suggest the substitution of "are at least equally salient in the antitrust context."

2. Page 21, the last sentence on the page. May I suggest an additional sentence before the last sentence reading something like "Therefore it would be correct to instruct the jury that they may infer intent from an effect on prices." I suggest this because the instruction actually given, quoted by you at page 5, was similar and I think it would be desirable to indicate that that part of it is not disapproved.

3. Page 32. Are the last sentence of the carryover paragraph and footnote 31 really necessary? I am concerned that lower courts may consider this dictum approval of the case cited about which I at least have some question.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1978

RE: No. 76-1560 United States v. Gypsum

Dear Chief:

I would vote to deny the cross-petition. I also agree that note 22 should remain.

Sincerely,

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1978

Re: No. 76-1560, United States v. United States Gypsum Co.

Dear Chief,

As I said at our Conference discussion of this case, I would give minimal attention to the issue arising out of the trial judge's meeting with the foreman of the jury, relegating it at most to a brief noncommittal footnote. This view is based upon the unique factual pattern of the incident and the extreme unlikelihood of its recurrence at a second trial. Accordingly, I would eliminate most of Part I-C, Part IV, and the Appendix.

It is quite likely, however, that a majority will agree with you that this material should remain in the opinion. If so, I shall not be able to join Part IV, which concludes that the meeting of the judge and the jury foreman in and of itself resulted in prejudicial error sufficient to reverse the convictions. While the question is not an easy one, my difficulty in agreeing with this conclusion stems from the fact that all counsel acquiesced in the proposed meeting.

I have a few verbal suggestions with respect to the balance of the opinion, some of which are quite important to me, but which are basically so minor that, instead of listing them here, I have asked my law clerk Jay Spears to communicate them to one of your law clerks. Upon the assumption that you will find these suggestions generally acceptable, I shall be glad to join all but Part IV of your opinion for the Court in its present form.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 13, 1978

Re: No. 76-1560, United States v.
United States Gypsum Company

Dear Chief,

I should appreciate your adding the following at the foot of your opinion:

MR. JUSTICE STEWART joins all but Part IV of this opinion.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1978

No. 76-1560, U. S. v. U. S. Gypsum

Dear Chief,

I agree with you that the cross petition should be denied, that footnote 22 in your opinion should be retained, and that the judgment in this case should be an outright affirmance.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

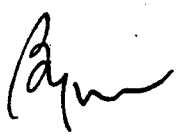
May 23, 1978

Re: 76-1560 - United States v. United States Gypsum Company

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 31, 1978

Re: No. 76-1560 - U. S. v. U. S. Gypsum Co.

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 14, 1978

Re: No. 76-1560 - U.S. v. U.S. Gypsum Co.

Dear Chief:

I am still with you.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1978

Re: No. 76-1560 - U.S. v. U.S. Gypsum Co.

Dear Chief:

At the end of your opinion would you please add the usual recital that I took no part in the consideration or decision of this case.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1978

Re: No. 76-1560 - U.S. v. U.S. Gypsum Co.

Dear Chief:

I should also be marked out of the cross petition, No. 76-1556.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 8, 1978

No. 76-1650 United States v. U.S. Gypsum

Dear Chief:

I should have let you hear from me sooner, but only this week did I find the consecutive time to read with care this long and important opinion. In addition, I have considered the various letters that have been exchanged, some of which suggest changes in your circulated draft of May 22.

In summary, my conclusions - subject to considering such changes in the draft as may be made - are as follows:

I will join Parts I and II.

Part III gives me some difficulty, for the reasons indicated below.

Although I quite understand your disapproval of the judge's private meeting with the jury forman, it did occur with the consent of all counsel. Moreover, this part of your opinion is not necessary. On balance, I would prefer not to join it.

I will join Part V gladly if you carry the discussion to its logical conclusion. In my view, the instruction on "withdrawal" was plainly erroneous. As this case is likely to be retried, the withdrawal issue (unlike the problem arising out of the judge's conference with the jury forman) could arise on retrial. If you prefer not to hold the instruction erroneous, I will file a brief concurring statement to this effect.

Section III is a bit difficult for me to understand. I agree with much of what you say about the Robinson-Patman defense. But your opinion appears to hold

that where a seller makes every reasonable effort to verify a buyer's claim of a lower price offer, short of direct price verification, and remains unable to form a "good faith" belief that the buyer is telling the truth, the seller does not have a good Robinson-Patman defense. Moreover, if the seller goes ahead and gets in touch directly with his competitor for verficiation purposes, and this is later found by a jury to have anticompetitive effect, the seller would be liable under the Sherman Act.

This does not seem right to me. As you state as the first sentence in subpart C on page 28:

> "A good faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to invoke the Robinson-Patman §2(b) defense."

It seems to me to follow that where a seller has exhausted all reasonable means of verification, short of direct communication with his competitor, he would have demonstrated a good faith belief that entitles him to the defense.

If I am correct in my understanding of your opinion on this point, I am inclined to write separately on the Part III issue. I would agree with much of what you say, except as indicated above.

* * *

Where an opinion is long and complex, with many footnotes I suppose all of us have "itchy fingers" with respect to some of the statements that are made. Rather than trying in a letter to identify the few that seem to me to have some substance, I am asking my clerk Jim Alt to discuss these with your clerk. I will say that note 26 (p. 25) seems gratuitous and unnecessary, and I hope you will consider omitting it.

Despite these extended comments, I commend you on a scholarly opinion - dealing with questions of importance that are far from easy.

If you think there is no probability of our getting together on my concerns as to Part III and V, I will circulate promptly a brief concurring opinion as to these.

Sincerely

L Lewis

The Chief Justice

lfp/ss

cc: The Conference

LFP/lab 6/17/78

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 16 JUN 1978

Recirculated: _____

No. 76-1560 United States v. United States Gypsum Co.

MR. JUSTICE POWELL, concurring.

I join the judgment and Parts I, II, and V of the Court's opinion. 1/ I also join so much of Part III as holds that a seller's intention to establish a meeting competition defense under § 2(b) of the Robinson-Patman Act is not in itself a "controlling circumstance" excusing liability under § 1 of the Sherman Act for otherwise unlawful direct price verification practices.

I do not join those portions of Part III, however, that might be read as suggesting that there are cases where the

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 19 JUN 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1560

United States, Petitioner, *v.* United States Gypsum Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June —, 1978]

MR. JUSTICE POWELL, concurring.

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I do not join those portions of Part III, however, that might be read as suggesting that there are cases where the § 2 (b) defense is unavailable even though a seller made every reasonable, lawful effort to corroborate his buyer's report that a competitor had offered a lower price before reducing his own price to that buyer. See, *e. g., ante,* at 31, 34 n. 32.[2] In my view, a proper accommodation between the policies of the Robinson-Patman Act and the Sherman Act would result in recognition of the § 2 (b) defense in such cases. Otherwise, sellers sometimes would face the unenviable choice of reducing prices to one buyer and risking Robinson-Patman Act liability, refusing to do so and losing the sale, or reducing prices to all buyers.

[1] Because the issue discussed in Part IV of the Court's opinion is unlikely to arise at any retrial, I find it unnecessary to express a view as to it.

[2] I do not understand the Court to take a firm position on this issue. See *ante,* at 31 n. 31.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnq.

No. 76-1560 - United States v. United States Gypsum Co. Circulated: JUN 1 197

Recirculated: _____

MR. JUSTICE REHNQUIST concurring in part and dissenting in part.

I concur in Part I and in the first portion of Part V of the Court's opinion approving the jury instruction on participation in the conspiracy. I dissent from the remaining portions of the opinion, and set forth as briefly as possible my reasons for doing so.

Part II of the Court's opinion uses as its point of departure jury instructions on price fixing which the Court correctly characterizes as "not without ambiguity." Ante, p. 10. But these jury instructions are to Part II of the Court's opinion only what Lake Itasca is to the Mississippi River: a starting point for a long and tortous journey over countless miles of legal terrain which, in my opinion, are best left uncharted in this case.

I do not find it necessary to decide the intent which Congress required as a prerequisite for criminal liability

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqu

1st PRINTED DRAFT

Circulated: JUN 5 197

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

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[June —, 1978]

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I do not find it necessary to decide the intent which Congress required as a prerequisite for criminal liability under the Sherman Act, because I believe that the instructions given by the District Court, when considered as a whole and in connection with the objections made to them, are sufficiently close to respondent's tendered instructions so as to afford respondents no basis upon which to challenge the verdict. The jury instructions in this case take up some 40 pages of the record and are both detailed and complex. The judge noted that the petitioners contended that they exchanged price information

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 13, 1978

Re: No. 76-1560 United States v. United States Gypsum Co.

Dear Chief:

After reading your most recent circulation of the Court opinion in this case, I have decided to delete two comments in my dissenting opinion which, upon reflection, strike me as bearing signs of end-of-Term acerbity. While no one who knows what a nice guy I am would make any such imputation, this is after all a nation of 250 million people, and not all of us can be known personally to one another. The changes I propose to make are these:

Page 1: Substitute for the present second sentence in the second paragraph, following the phrase "ante, page 10." the following sentence: "But these jury instructions are but a starting point for the discourse in Part II of the Court's opinion dealing with the element of intent in a criminal case, a discourse which I believe goes beyond any reasoning necessary to dispose of the contentions with respect to that point in this case."

Page 3: In place of the last full sentence on this page and the sentence following it,

which begins on page 3 and carries over to page 4, substitute the following: "I feel bound to say that while I am willing to respectfully defer to the views of the distinguished authors of the American Law Institute's Model Penal Code, and to the authors of law review articles such as those sprinkled throughout the text of Part II of the Court's opinion, I have serious reservations about the undiscriminating emphasis and weight which the Court appears to give them in this case."

Sincerely,

Hugh

The Chief Justice

Copies to the Conference

pp 143

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens.

From: Mr. Justice Rehnqui

Circulated: _____

Recirculated: JUN 15 197

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1560

United States, Petitioner, v. United States Gypsum Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June —, 1978]

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I do not find it necessary to decide the intent which Congress required as a prerequisite for criminal liability under the Sherman Act, because I believe that the instructions given by the District Court, when considered as a whole and in connection with the objections made to them, are sufficiently close to respondent's tendered instructions so as to afford respondents no basis upon which to challenge the verdict. The jury instructions in this case take up some 40 pages of the record and are both detailed and complex. The judge noted that the petitioners contended that they exchanged price information

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-1560 - United States v. United States Gypsum Co.

Further reflection has persuaded me that we may have overlooked a critical fact in discussing the validity of the instruction on pages 1721-1722 of the appendix. The court was considering the legality of an agreement among all of the defendants--rather than a series of individual, ad hoc, agreements--to exchange information about future prices. An overall agreement that each participating company would tell its competitor about its individual offers whenever requested is, I believe, plainly unlawful if it has the effect described in Container. Such an industry-wide agreement is quite different from an agreement to report past transaction prices to a central reporting agency.

I would agree that the critical instruction was not as clear as it should have been, and that, when combined with the erroneous withdrawal instruction and the coercion of the jury, a new trial is probably justified, but I hope the Court will avoid placing its approval on an industry-wide agreement to exchange future price information directly between competitors.

Respectfully,

John

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 23, 1978

Re: 76-1560 - United States v. United States Gypsum Co.

Dear Chief:

Although I can join Parts III, IV, and V, I have some problems with Part II. I am tentatively of the view that if the instruction was erroneous, it would also have been erroneous in a treble damage action.

I am also persuaded that the question is not whether intent is an element of the offense, but rather whether the intent element was correctly described in the instruction. The district judge did instruct the jury that a defendant could not be found guilty unless he wilfully entered into the overall agreement to exchange prices upon request.*/ In sum, I

*/ "What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to accomplish the same object or purpose of the conspiracy as charged in [14,872] the indictment, that two or more persons, including one or more of the Defendants, were knowing members of the conspiracy.

* * *

"Before the jury may find that a defendant or any other person has become a member of a conspiracy, evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. To act or participate knowingly means to act or participate voluntarily and intentionally and not because of mistake or accident or other innocent reason, so, if a defendant or any other person, understanding the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he, therefore, becomes a knowing participant, a conspirator." A-1729.

believe I will wait to see what Bill Rehnquist writes and may add a paragraph or two of my own.

Respectfully,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

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76-1560 - United States v. United States Gypsum Company

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

There are three reasons why I am unable to subscribe to the bifurcated construction of § 1 of the Sherman Act which the Court adopts in Part II of its opinion.

In 1955 I subscribed to the view that criminal enforcement of the Sherman Act is inappropriate unless the defendants have deliberately violated the law.1/ I adhere to that view today. But since 1890 when the Sherman Act was enacted, the statute has had the same substantive reach in criminal and civil cases. No matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact.

If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law

1/ Report of the Attorney General's National Committee to Study the Antitrust Laws, 349-351 (1955).

— p. 2

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SUPREME COURT OF THE UNITED STATES

No. 76–1560

United States, Petitioner, v. United States Gypsum Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June —, 1978]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

There are three reasons why I am unable to subscribe to the bifurcated construction of § 1 of the Sherman Act which the Court adopts in Part II of its opinion.

In 1955 I subscribed to the view that criminal enforcement of the Sherman Act is inappropriate unless the defendants have deliberately violated the law.[1] I adhere to that view today. But since 1890 when the Sherman Act was enacted, the statute has had the same substantive reach in criminal and civil cases. No matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact.

If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law rather than mere knowledge that the defendants' agreement has had an adverse effect on the market.[2] Under the lesser standard adopted by the Court, I believe MR. JUSTICE REHNQUIST is quite right in viewing the error in the trial judge's instruc-

[1] Report of the Attorney General's National Committee to Study the Antitrust Laws, 349–351 (1955).

[2] The distinction between the two standards is explained *ante*, at 19–20. The Report of the Attorney General's Committee recommended that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report, *supra*, n. 1, at 349.