NOTES

THE PERSONAL LIABILITY OF CORPORATE OFFICERS IN PRIVATE ACTIONS UNDER THE SHERMAN ACT:
MURPHY TUGBOAT IN DISTRESS

INTRODUCTION

The proposition appears straightforward, implicit to antitrust law: an officer of a corporation that has violated the Sherman Act may be held liable for that corporate violation.

1. An officer is an agent for the corporation with the authority to execute and administer its policies. See H. Henn & J. Alexander, Laws of Corporations § 219, at 586 (3d ed. 1983). As agents, officers' acts are governed by the principles of agency law. See id. Officers are usually the president, vice president, treasurer and secretary, see H. Ballantine, Ballantine on Corporations § 49, at 137 (1946), but also may include general managers, division vice presidents and general counsel. See H. Henn & J. Alexander, supra, § 219, at 587 ("only the more important of such executive personnel are officers; the inferior grades of executive personnel are not") (footnote omitted).

2. This Note assumes that the corporation has violated the Sherman Act, 15 U.S.C. §§ 1-7 (1982). It examines the circumstances under which a private plaintiff can hold an officer personally liable for that corporate violation. Compare Monarch Marking Sys. v. Duncan Parking Meter Maintenance Co., No. 82 C 2599, slip op. at 5-6 (N.D. Ill. Mar. 12, 1986) (LEXIS, Genfed library, Dist file) (officer liable when she has "responsible share" in violative conduct (quoting United States v. Wise, 370 U.S. 405, 409 (1962))) with Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 852-53 (N.D. Cal. 1979) (officer liable when she knowingly participates in "inherently wrongful" conduct), aff'd on other grounds sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). This Note does not explore specific conduct that gives rise to an antitrust violation.


The question of officer liability for corporate violations generally arises in one of the following ways. A private plaintiff may seek relief from the defendant officer and corporation simultaneously. See, e.g., Murphy Tugboat, 467 F. Supp. at 846 (suit against individual and corporate defendants for violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1982)); cf. Restatement (Second) of Agency § 217 B.(1) (principal and agent can be joined in action regarding agent's tortious conduct). The private plaintiff also may bring a suit against the officer and corporation following a government judgment against them. See United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D.N.Y. 1949) (government and private suits "may proceed simultaneously or in disregard of each other"). The Sherman Act enables a private plaintiff to use a final judgment or decree obtained by the government in a prior civil or criminal antitrust action to establish a prima facie case against the same defendant in a subsequent civil action. See 15 U.S.C. § 16(a) (1982). Regarding the use of the government judgment by the private plaintiff to establish a prima facie case against the officer, see infra note 113.


Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination
personally liable in a private action for treble damages. Theoretically, it is an established part of the law, yet controversy exists regarding what triggers personal liability of officers in cases that involve antitrust violations that are not unlawful per se. The controversy is traceable to a...
conflict inherent in antitrust law\(^9\) that has been articulated in a criminal liability context.\(^10\) Indeed, the controversy stems from the civil antitrust application of two criminal antitrust cases involving corporate officers.\(^11\) This conflict reflects competing policy concerns that determine the role of intent in evaluating an officer's conduct under the antitrust laws.\(^12\)

In this controversy, one court asserted that a broad view of personal

op. at 6 (rejecting Murphy Tugboat standard but noting that officer may be personally liable where she engaged in per se violation).

Antitrust offenses are judged under either a per se rule or a “rule of reason” analysis. A per se rule generally condemns conduct without considering the actor’s legitimate objectives and without proof of market power, anti-competitive effects, or purpose. See 7 P. Areeda, Antitrust Law, § 1509, at 409, § 1510, at 414-15 (1986); see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33 (1984) (O’Connor, J., concurring) (“Under the usual logic of the per se rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect.”); Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332, 343-44 (1982) (“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.”); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (considering effort and costs associated with rule of reason inquiry, courts have adopted rules that judge certain conduct per se illegal).

Activity that may fall under the per se rules includes price fixing, market division, group boycotts and tying arrangements. See Maricopa County, 457 U.S. at 344 n.15 (quoting Northern Pacific, 356 U.S. at 5); United States v. Container Corp. of Am., 393 U.S. 333, 340-41 (1969) (Marshall, J., dissenting); see also 7 P. Areeda, supra, § 1510, at 414 (discussing per se rules).

The rule of reason analysis requires the “factfinder to decide whether under all the circumstances the ... practice imposes an unreasonable restraint on competition.” Maricopa County, 457 U.S. at 343. The essence of this analysis is whether the alleged restraint enhances competition. See NCAA v. Board of Regents, 468 U.S. 85, 104 (1984); Container Corp., 393 U.S. at 339 (Fortas, J., concurring). Although there is no single test to evaluate conduct, see Container Corp., 393 U.S. at 339 (Fortas, J., concurring), the rule of reason looks to the challenged act's harm to competition, its benefit to society and the parties, and whether alternative conduct is preferable. See 7 P. Areeda, supra, § 1500, at 363; see also Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (listing other factors involved in rule of reason analysis).

9. The conflict is between deterring the commission of acts that damage the competitiveness of the marketplace and encouraging highly aggressive conduct in the same marketplace by actors whose behavior might border on a violation of the antitrust laws. See infra note 18. Compare infra note 16 and accompanying text (Sherman Act seeks to prevent occurrence of restraints of trade) with infra note 17 and accompanying text (Sherman Act aims to encourage aggressive competition).


12. The Murphy Tugboat approach effectively requires that the officer demonstrated a mens rea to commit the offense to be held liable. See infra notes 71 & 75 and accompanying text; see also 7 P. Areeda, supra note 8, § 1504, at 378 n.3 ("perhaps [mens rea] should also be required before imposing the punishment of treble damages"). The Mon-
liability will cause corporate officers to shy away from the bold competitive tactics deemed essential to a vital marketplace, as their own pocketbooks would be at risk. Another court argued, however, that an officer immune from personal liability will employ the corporation and its resources to violate the Sherman Act, thereby harming the competitive balance of the market. Such an officer would consider the fines or judgments levied against the corporation as a cost of doing business. Because each court addressed certain aims of the Sherman Act, the decision when to attach personal liability for corporate officers requires balancing these opposing views.

Part I of this Note presents two conflicting policy goals of antitrust law and their treatment in two Supreme Court criminal antitrust opinions that involve corporate officers and bear on the controversy over personal civil antitrust liability. Part II examines the basis of an officer’s private civil antitrust liability and the dispute over when that liability should accrue. This Part argues that, because of their incorrect reliance on the two criminal liability cases, the conflicting approaches of two federal district courts ill-serve the policy concerns associated with officer liability. Part III proposes an approach to personal liability for officers that better balances the conflicting goals of antitrust law. This proposal allows corporate officers to engage in strenuous competition while deterring them from injuring the marketplace.

I. CONFLICTING GOALS OF ANTITRUST LAW: ENCOURAGEMENT OF ZEALOUS COMPETITION AND DETERRENCE OF ANTICOMPETITIVE CONDUCT

The Sherman Act promotes competition in two distinct ways. First, it deters behavior that harms the marketplace. Second, the Act protects

arch approach only requires the officer to have had a responsible role in the violation, without explicit reference to intent. See infra note 27 and accompanying text.

13. See Murphy Tugboat, 467 F. Supp. at 853.

14. See Monarch, slip op. at 5-6. In an earlier decision by a different judge, however, the same court substantially adopted a Magistrate’s report and recommendation that implicitly endorsed the Murphy Tugboat view. See Unity Ventures v. County of Lake, 1984-1 Trade Cas. (CCH) ¶ 65,883 (N.D. Ill. 1983).

15. See id.

16. The Sherman Act’s concern with deterring behavior that unreasonably restrains trade is evident in the antitrust law’s proscriptive application, the purposes of treble damages actions and congressional increases in the criminal penalties under the Act.


The purposes behind treble damages in private civil antitrust actions are to deter violators, to deprive them of their unlawfully obtained gains and to compensate those injured by the antitrust violation. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); see
aggressive behavior that earns a legitimate commercial advantage for the actor—the essence of competition.\(^\text{17}\) Although they are complementary, the two aims may conflict.\(^\text{18}\)

These policies are articulated in the criminal antitrust context. Since the early days of the Sherman Act, officers have been indicted for their own alleged violations.\(^\text{19}\) Courts also determined that an officer could be held criminally liable under the Act when acting as the corporation's

also Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) (treble damages actions play important role in deterring wrongdoing, although legislative history shows these actions were designed primarily to serve as remedy); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) ("purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws"); Mulvey v. Samuel Goldwyn Prod., 433 F.2d 1073, 1075 (9th Cir. 1970) (treble damages actions implement policies of antitrust law by deterring potential violators from undertaking forbidden conduct), cert. denied, 402 U.S. 923 (1971). But see 2 P. Areeda & D. Turner, Antitrust Law § 311b, at 33-34 (1978) (punishment aspect dominates nature of treble damages).


The Clayton Act\textsuperscript{21} codified an officer's liability for her corporation's criminal antitrust violations.\textsuperscript{22} Because the Clayton Act specifically holds officers liable for corporate antitrust violations, while the Sherman Act provides that "[e]very person" shall be liable for a violation,\textsuperscript{23} some courts argued that the Clayton Act was the exclusive antitrust remedy against corporate officers.\textsuperscript{24}

In determining that officers are "persons" under the Sherman Act, the Supreme Court dictated a plain reading of the Act. In \textit{United States v. Wise},\textsuperscript{25} the Court held criminally liable all officers who had a "responsi-

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\textsuperscript{20} Courts rejected the argument that officers acting as corporate agents should be excused from antitrust liability. See \textit{United States v. MacAndrews & Forbes Co.}, 149 F. 823, 832-33 (C.C.S.D.N.Y. 1906) (Sherman Act's usage of "person" applied to corporations and to "all those who personally aid or abet in its commission"), \textit{appeal dismissed}, 212 U.S. 585 (1908); \textit{United States v. Winslow}, 195 F. 578, 581 (D. Mass. 1912) (all participants in illegal act, "whether agents or not, are principals," as "neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor"), \textit{aff'd}, 227 U.S. 202 (1913).


\textsuperscript{22} \textit{Clayton Act}, 15 U.S.C. § 24 (1982). Section 24 reads in pertinent part: "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting ... such violation . . . ."

Conviction of an officer under this statute requires additional proof of the corporation's penal violation beyond that ordinarily required for an individual conviction under the Sherman Act. See \textit{United States v. North Am. Van Lines}, 202 F. Supp. 639, 644-45 (D.D.C. 1962). Regardless of its requirements, this statute seldom is used and so has little impact on antitrust laws. See \textit{Whiting, Antitrust and the Corporate Executive}, 47 Va. L. Rev. 929, 942 & n.53 (1961) (government brief shows that as of early 1960's "no corporate official has yet been brought to trial" under this statute). My research indicates that the statute rarely is mentioned in case law.


Similarly, an argument by officers that this section of the Clayton Act was the exclusive remedy against them, exempting them from civil liability, was rejected in \textit{Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc.}, 146 F. Supp. 300, 301-02 (S.D.N.Y. 1956), \textit{appeal dismissed per curiam}, 243 F.2d 795 (2d Cir. 1957). In rejecting the officers' claim, the court stated the argument was "utterly without support in the Congressional debates." \textit{Id.} at 302. Considering the broad purposes of the antitrust laws, "[i]f Congress had intended to exempt from liability in treble damage suits, 'persons acting for the corporation within the scope of their employment,' it must be assumed . . . that it would have used language appropriate to make that intention clear." \textit{Id.} (footnote omitted).

\textsuperscript{25} 370 U.S. 405 (1962).
ble share" in the violation.\textsuperscript{26} This "responsible share" approach apparently required only the officer's participation in the wrongful act, not conscious wrongdoing, to trigger liability.\textsuperscript{27}

\begin{footnote}
\textsuperscript{26} Id. at 409 (citing United States v. Dotterweich, 320 U.S. 277 (1943)).
\textsuperscript{27} Although the Court never expressly stated that it was applying a strict liability approach, the precedents used by the \textit{Wise} Court strongly suggest this. The \textit{Wise} Court relied on its earlier opinion in United States v. Dotterweich, 320 U.S. 277 (1943), for its reading of an officer's criminal liability under the Sherman Act. \textit{See Wise}, 370 U.S. at 409 ("Following \textit{Dotterweich}, we construe § 1 of the Sherman Act in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction.") (emphasis added). The \textit{Wise} Court's reliance on \textit{Dotterweich} demonstrates that \textit{Wise} holds officers strictly liable for their participation in the corporation's violative conduct.

In \textit{Dotterweich}, the Supreme Court held that a corporate officer could be personally liable for the corporation's criminal violation of the Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (current version at 21 U.S.C. §§ 301-92 (1982 & Supp. 1985)). \textit{See Dotterweich}, 320 U.S. at 278, 282-84. Similar to the argument later offered by the officer defendant in \textit{Wise}, \textit{see Wise}, 370 U.S. at 407-09, the defendant in \textit{Dotterweich} asserted that the corporation was liable and that he was not, as he was not a "person" under a statute that dispensed with the "conventional requirement for criminal conduct—awareness of some wrongdoing." \textit{See Dotterweich}, 320 U.S. at 281-82. The Court held that personal liability will be imposed on all officers who have "a responsible share in the furtherance of the transaction which the statute outlaws ...." \textit{Dotterweich}, 320 U.S. at 284 (emphasis added). Whether the officer shares "responsibility in the [violative] business process" would be the only evidentiary question. \textit{Id}. The \textit{Dotterweich} Court noted that there were hardships under a statute that imposes liability "though consciousness of wrongdoing be totally wanting." \textit{Id}. The Court stated, however, it was "[i]n the interest of the larger good [to put] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." \textit{Id}. at 281. The \textit{Dotterweich} Court's imposition of strict liability was based on its construction of the statute. \textit{See id.} at 280-81.

The \textit{Wise} Court also cited an earlier opinion where it upheld the indictment of corporate officers for the corporation's shipment of filled milk in interstate commerce, even though the products were "sold without fraud." \textit{See Carolene Prod. Co. v. United States, 323 U.S. 18, 21 (1944), cited in Wise, 370 U.S. at 409. As with \textit{Dotterweich}, the \textit{Carolene} Court imposed liability based on its view of the officers as "persons" under the statute. \textit{See Carolene, 323 U.S. at 214 & n.4.}

Although the \textit{Wise} Court's citations to \textit{Dotterweich} and \textit{Carolene} indicate an intent to apply strict liability, other language appears at first glance to require additional culpability by the officer. \textit{See Wise}, 370 U.S. at 416 (criminal liability will be imposed on an officer who "knowingly participates in effecting the illegal contract, combination, or conspiracy"). The term "knowingly" refers, however, to the commission of the act, not its criminal nature. This is illustrated by the \textit{Wise} Court's reference to the legislative history of the antitrust laws. The Court noted that proponents of the Sherman Act agreed that the Act applied to "officers whose conduct constituted the offense," yet legislators feared that the Act "did not cover officers who merely authorized or ordered the commission of the offense." \textit{Wise}, 370 U.S. at 413.

This interpretation of "knowingly" accords with earlier cases in which the Court looked to the actor's awareness of participation in the act, not an awareness of its illegal status. \textit{See, e.g., United States v. Griffith, 334 U.S. 100, 105 (1948) ("It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated."); United States v. Masonite Corp., 316 U.S. 265, 275 (1942) (Court disregarded appellees' statements that they "did not intend to join a combination or to fix prices," and required only that they "intended the necessary and direct consequences of their acts") (quoting United States v. Patten, 226 U.S. 525, 543 (1913))); United States v. Patten, 226 U.S. 525, 543 (1913) ("by purposely
Wise effectively asserted that to excuse officers from criminal antitrust liability was to invite acts that would threaten the overall competitiveness of the marketplace and thereby threaten the common good. Free from personal risk, officers of corporations would violate the Sherman Act, submitting to the resultant fines as "mere license fees" for their transgressions. Wise thus voices one aim of antitrust law: deterring wrongdoers from committing harmful, violative acts.

Without referring to its earlier decision in Wise, the Supreme Court subsequently established a different standard in United States v. United States Gypsum Co. The Court stressed the benefit of highly competitive conduct bordering on an antitrust violation. Under a strict liability standard for criminal antitrust offenses, officers would become overly cautious in their business activities because of the uncertainty of antitrust law coupled with an unacceptable risk of criminal punishment. Strict liability would cause the public to lose the benefits of aggressive competition.

Regarding a criminal violation that is not per se unlawful, the Gypsum Court held that the government must establish the occurrence of anticompetitive effects and, by "evidence and inferences drawn therefrom,"

engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result".

28. See United States v. Wise, 370 U.S. 405, 409 (1962); see also infra note 29 (explaining significance of Court's "license fee" concern).

29. See Wise, 370 U.S. at 409 (citing United States v. Dotterweich, 320 U.S. 277 (1943)). In Dotterweich, the Court refused to exempt the officer from liability under the statute, as "[c]orporations carrying on an illicit trade would be subject only to what the House Committee described as a 'license fee for the conduct of an illegitimate business.'" Dotterweich, 320 U.S. at 282-83 (quoting H. R. Rep. No. 2139, 75th Cong., 3d Sess. 4 (1905)). The Dotterweich Court, and the congressional report it cites, apparently thought that imposing fines on corporations alone would not deter them from violating the law. See id. at 282-83 & n.2.

The "license fees" theory is that violators will profit by their illegal acts as the costs they impose on the market exceed the penalties they risk. See Wise, 370 U.S. at 409 (requiring Sherman Act liability extend to officers as well as corporations, so that fines serving deterrent purpose do not become a mere cost of an illegitimate business operation); Remarks by Donald I. Baker, Assistant Attorney General, Antitrust Division, To Make the Penalty Fit the Crime: How to Sentence Antitrust Felons, Tenth New England Antitrust Conference (Nov. 20, 1976) (noting opinion of one corporate officer that "[w]hen you're doing $30 million a year and stand to gain $3 million by fixing prices, a $30,000 fine doesn't mean much") (quoting Bus. Week, June 2, 1975, at 48), reprinted in 2 J. Clabault & M. Block, Sherman Act Indictments, 1955-1980, at 531 (1981). The violator's profit from an illegal restraint of trade is the difference between the market advantage gained and the penalty suffered. See S. Rep. No. 618, 84th Cong., 1st Sess. 2, reprinted in 1955 U.S. Code Cong. & Admin. News 2322, 2323. This behavior directly contravenes the Sherman Act's aim to prevent public injury from antitrust violations. See D.R. Wilder Mfg. Co. v. Corn Prod. Ref. Co., 236 U.S. 165, 174 (1915); see also supra note 16 (cases discussing prophylactic aim of Sherman Act).

31. See id. at 440-42 & n.16.
32. See id. at 441.
33. See id.
that the defendant acted with criminal intent.\textsuperscript{34} Intent, therefore, cannot be presumed as a matter of law, as the Sherman Act is not a strict liability statute.\textsuperscript{35} The rule of reason analysis requires consideration of evidence of a defendant's proper motivation or good faith excuse.\textsuperscript{36}

Thus, Wise and Gypsum demonstrate a contradiction within antitrust law central to the question of an officer's personal liability for her corporation's Sherman Act violation. An unencumbered, productive economy is premised on the aggressive pursuit of advantage.\textsuperscript{37} That pursuit, however, also may undermine the marketplace as it confers an individual advantage. The line between an antitrust violation and legitimate zealous competition is thin.\textsuperscript{38} The question, then, is whether a standard of personal liability can deter competitors from resorting to proscribed behavior without forcing them to forgo highly competitive behavior.

II. OPPOSING APPROACHES TO PERSONAL CIVIL LIABILITY OF CORPORATE OFFICERS

A. The Basis of Liability

Whereas the early criminal antitrust cases largely relied on criminal law theories in holding corporate officers personally liable,\textsuperscript{39} the decisions in civil cases relied on a tort-based approach. The courts employed a combination of tort liability and agency principles to form the basis of an officer's civil antitrust liability.\textsuperscript{40} An officer is not exempt from tort

\textsuperscript{34}. See id at 435-36. The Court rejected a mens rea requirement that the defendant act with the "conscious object" to produce anti-competitive effects. Id. at 444. Instead, the Court required that, along with actual anticompetitive effects, the action was undertaken with "knowledge that the proscribed effects would most likely follow." Id.

\textsuperscript{35}. See id. at 434-36. The Court struck down jury instructions that would have directed the jury to convict the officer defendants, regardless of their purpose, if their conduct was shown to affect prices. See id. at 446.

\textsuperscript{36}. See id. at 441. The defendant's motive or mistake does not excuse any offensive conduct but assists the court using a rule of reason analysis to understand the nature of the defendant's act. See supra note 8.

\textsuperscript{37}. See supra notes 17 & 18 and accompanying text.

\textsuperscript{38}. See Gypsum, 438 U.S. at 440-41 (noting gray zone of socially acceptable conduct that borders on antitrust violation).


liability simply because she acts as an agent on behalf of the corporation. On the other hand, her liability must be based on her actual participation in the wrongful conduct. Liability is not imputed to her solely because of her position in the corporation or because her fellow agents commit wrongs in which she had no part.

The relationship between tort and antitrust law thus provides a use-

In a criminal antitrust action, the officers' acts also have been described in such terms. See United States v. Winslow, 195 F. 578, 581-82 (D. Mass. 1912) (referring to agency only), aff'd, 227 U.S. 202 (1913).

Other courts have not referred to the officers as agents and emphasize only their participation in the antitrust offense. See Lorain Journal Co. v. United States, 342 U.S. 143, 145 n.2 (1951) (individual officers and employees named in complaint regarding attempt to monopolize); Hartford-Empire Co. v. United States, 323 U.S. 386, 403-04 (1945) (officers may be enjoined for their participation in or authorization of corporation's antitrust violation); Phelps Dodge Ref. Corp. v. Federal Trade Comm'n, 139 F.2d 393, 397 (2d Cir. 1943) (officer liable if she personally voted for, or participated in, antitrust violation); Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808, 810 (E.D. Pa. 1975) (officer personally liable for damages when she participated in, acquiesced to, or ratified violative conduct (citing Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300, 301-02 (S.D.N.Y. 1956), appeal dismissed per curiam, 243 F.2d 795 (2d Cir. 1957))); Bergians Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 482 (E.D. Mo. 1965) (officers personally liable for participation in corporate antitrust violation), aff'd, 368 F.2d 679 (8th Cir. 1966).

Similarly, commentators have viewed officers as agents bound by principles of agency law for the torts they have committed. See, e.g., Restatement (Second) of Agency § 343 (1957) (agent who commits tort is liable for her act although it is done at principal's behest); H. Ballantine, supra note 1, § 112, at 275 (officer generally liable for torts committed on behalf of corporation); H. Henn & J. Alexander, supra note 1, § 230, at 607-08 (officers personally liable for torts regardless whether acting within scope of employment).

Arguably, opinions that impose officer liability without relying specifically on principles of agency and tort law view the officer's violation as an individual violation coincidental to, but not concurrent with, the corporation's offense. Cf. United States v. Wise, 370 U.S. 405, 420 n.3 (1962) (Harlan, J., concurring) (arguing that agency law does not pertain to earlier opinions holding officers criminally liable). This conclusion, however, does not account for the merger of officer and corporate interests. Antitrust law considers the interests of officers and corporations unified; as a matter of law, an officer cannot conspire with her corporation. See University Life Ins. Co. v. Unimare Ltd., 699 F.2d 846, 852 (7th Cir. 1983); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978). If, for Sherman Act violation purposes, an officer cannot constitute the second party essential to a conspiracy, it seems incongruous to consider that the officer's violative act is distinct from the corporation's.


42. See Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1144 (4th Cir. 1975); Davis H. Elliot Co. v. Caribbean Util. Co., 513 F.2d 1176, 1182 (6th Cir. 1975) (per curiam); Restatement (Second) of Agency § 343 (1957); H. Ballantine, supra note 1, § 112.

43. See Martin v. Wood, 400 F.2d 310, 313 (3d. Cir. 1968); Armour & Co. v. Celci, 294 F.2d 432, 439 (2d Cir. 1961); Restatement (Second) of Agency § 344 comment a (1957).

ful starting point for an analysis of the role of intent in officer liability.\textsuperscript{45} Despite the differences between Sherman Act violations and business torts,\textsuperscript{46} the requisite intent in business torts is relevant to the controversy regarding officer liability. Although some of these torts require malice by the wrongdoer,\textsuperscript{47} those most analogous to an antitrust violation require only an awareness of likely anticompetitive effects.\textsuperscript{48} Similarly, Sherman Act violations do not require malice to impose liability.\textsuperscript{49}


46. The Sherman Act does not afford a remedy for business torts unless a restraint of trade is involved. See, e.g., Hunt v. Crumboch, 325 U.S. 821, 826 (1945) ("[Sherman] Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce"); Havco v. Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) ("unfair competition is still competition, and will be actionable under the antitrust laws generally only where a defendant with substantial market power uses the unfair means to . . . create the risk of a monopoly"); Hill v. A-T-O, Inc., 535 F.2d 1349, 1355-56 (2d Cir. 1976) (fraudulent misrepresentation fails to constitute claim under federal antitrust statutes); Richard Hoffman Corp. v. Integrated Bldg. Sys., 610 F. Supp. 19, 22-23 (N.D. Ill. 1985) (rule of reason analysis does not consider whether alleged antitrust violations are unfair or tortious).

47. Regarding unfair competition offenses under the common law, "[i]t has been a traditional view that if the defendant acts from sufficiently bad motive and to gratify some desire unrelated to competition, liability might be imposed." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 130, at 1014 (5th ed. 1984) [hereinafter Prosser & Keeton]. See Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 838 (2d Cir. 1980) (interference with advantageous business relations requires intent to inflict injury); Memphis Steam Laundry-Cleaners v. Lindsey, 192 Miss. 224, 239, 5 So. 2d 227, 232 (1941) (en banc) (ruination of rival not actionable unless dominant purpose is to destroy or injure competitor's business); Tuttle v. Buck, 107 Minn. 145, 151, 119 N.W. 946, 948 (1909) (actionable wrong where defendant acts without profit motive, as sole purpose is to drive competitor out of business).

48. The common law torts of monopoly and restraint of trade are the tort offenses most similar to an antitrust violation. See Prosser & Keeton, supra note 47, § 130, at 1023. Regarding boycotts, the courts have looked for a business combination that aims to obtain monopolistic control. See id. at 1024-25. This aim, however, is not a form of malice by the wrongdoer, but merely an awareness of the conduct's likely anti-competitive effects. See Grillo v. Board of Realtors, 91 N.J. Super. 202, 226-29, 219 A.2d 635, 643-45 (1966) (applying federal antitrust law in adjudicating common law claim of restraint of trade; awarding plaintiff damages without requiring proof that defendants' motive was spiteful).

49. An actor's malice toward a specific competitor is irrelevant under antitrust law. See, e.g., Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971) (threat to drive plaintiff out of business not violation without evidence of anticompetitive conduct); Scott
The courts, however, only alluded to tort concepts of responsibility when they held that corporate officers are personally liable for antitrust violations if they participated in the allegedly violative conduct. Beyond the consensus that the officer somehow must be involved personally in the violation, until recently the courts failed to elaborate on the circumstances, in particular the degree of intent, that trigger liability.

B. Two Conflicting Approaches to Civil Antitrust Liability of Corporate Officers

To determine the proper approach to an officer's personal civil liability in private antitrust actions, considerations of the overall policies of antitrust law, the propriety of employing criminal law standards in a civil area and the role of intent in civil antitrust violations must be examined. Two courts have considered these factors, but reached different results.

In *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, the...
District Court for the Northern District of California departed from prior case law by holding that an officer is personally liable for the corporation's civil antitrust violation only if the officer knowingly engages in or ratifies acts that are "inherently wrongful." Although the court held that an act may qualify as "inherently wrongful" when it is a per se antitrust violation, the court did not equate specifically the two terms. The Murphy Tugboat approach seems to preclude personal liability for rule of reason violations. Liability is conditioned on proof of the officer's direct participation in or ratification of these "positively wrongful" acts. Murphy Tugboat required that the conduct be "inher-
ently wrongful” to reduce the uncertainty occasioned by the Sherman Act’s generality. Murphy Tugboat expressly relied on Gypsum’s overdeterrence concerns to support its approach to civil liability.

In Monarch Marking Sys. v. Duncan Parking Meter Maintenance Co.,61 the District Court for the Northern District of Illinois recently rejected the Murphy Tugboat approach and its overdeterrence rationale. The court stated that Murphy Tugboat mistakenly relied on “some comments” in Gypsum.62 The Monarch court asserted that Gypsum applies only to criminal antitrust offenses, noting that the Gypsum Court expressly stated that it did not intend to change the standard of liability for civil antitrust violations.63 Under Monarch’s approach, all corporate officers are personally liable if they had “a responsible share” in the prohibited conduct.64 Monarch echoes the concerns and language of Wise to justify an approach that strongly implies strict liability.65 The Monarch court denounced the Murphy Tugboat approach because, in effect, it leaves plaintiffs to seek relief solely from the officer’s corporation. Considering corporate resources, these damage awards would be “mere li-

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59. Murphy Tugboat, 467 F. Supp. at 853.
60. Id. (“judicial elaboration of the [Sherman] Act [has not] always yielded the clear and definitive rules of conduct which the statute omits” and that “the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct” (quoting United States v. United States Gypsum Co., 438 U.S. 422, 438, 440-41 (1978))).
62. See id. at 4.
63. See id. (“[P]owering the [Gypsum] Court’s injection of an intent requirement into criminal antitrust was the very strong tradition that criminal statutes always require intent. No comparable justification exists for rewriting the requirements of a civil Sherman Act suit.”) (citation omitted). Monarch noted that if the rationale behind the Murphy Tugboat approach applies to officers, it “applies equally to corporate liability, which application would result in a fundamental change in the Sherman Act’s scope.” Monarch, slip op. at 5 (footnote omitted).
64. Monarch, slip op. at 4-5 (quoting United States v. Wise, 370 U.S. 405, 409 (1962)).
65. Monarch, slip op. at 5. The officer is liable whenever she orders, authorizes, or knowingly participates in effecting the illegal contract, combination, or conspiracy. Id. (quoting Wise, 370 U.S. at 416). In other words, liability is imposed on “all officers who have a responsible share in the proscribed transaction.” Monarch Marking, slip op. at 5 (quoting Wise, 370 U.S. at 409).

One commentator takes a position similar to that of the Monarch court. Stating that an antitrust action sounds in tort, the commentator asserts “it is [no] defense that the officer did not have an intention of violating the statute, or that he acted in good faith or with good intentions.” W. Knepper, supra note 6, § 6.10, at 149-50. Knepper’s chief concern regarding strict liability for antitrust violations is its effect on officers who did not participate in the violation, rather than a question of the applicability of such a standard to the participants. See id. § 6.10, at 39 (Supp.) (citing American Soc’y of Mech. Eng’rs v. Hydrolevel Corp., 456 U.S. 556 (1982)). Once the corporation has been found to have committed an illegal act, Knepper and the precedent on which he relies suggest that the officer is personally liable for gross negligence or culpable mismanagement. See W. Knepper, supra note 6, § 6.10 at 149 (citing Parish v. Maryland & Va. Milk Prod. Ass’n, 250 Md. 24, 76, 242 A.2d 512, 541 (1968)).
The Murphy Tugboat and Monarch courts agree that an officer is personally liable when she participates—that is, she orders, authorizes or assumes a direct role—in per se illegal conduct. The approaches disagree, however, regarding the circumstances that trigger liability when the officer participates in a corporation's violation that falls under the rule of reason. The disagreement stems from their interpretation of the conflicting Supreme Court precedent and the weight these courts accord to antitrust goals.

C. Analysis of the Mens Rea and Strict Liability Approaches

A practical and consistent approach to imposing corporate officer civil antitrust liability may be derived from an analysis of the divergent Murphy Tugboat and Monarch approaches to the role of intent in civil antitrust. First, it must be determined whether the intent implicitly required under the Murphy Tugboat approach is applied legitimately to civil antitrust liability. Second, the desirability of applying Monarch's approach—effectively a strict liability approach—in antitrust law must be considered along with the issue of overdeterrence. Third, it must be ascertained whether, in view of other public and private actions, imposing civil liability on corporate officers is necessary to deter violative conduct.

1. Intent Under the Murphy Tugboat Approach

Antitrust cases preceding Murphy Tugboat alluded to tort concepts of responsibility when determining officers' civil liability. Although professing merely to clarify the circumstances in which officers could be liable in a civil context, Murphy Tugboat effectively requires a level of intent higher than that of the prior antitrust case law.

66. Monarch, slip op. at 6 (quoting Wise, 370 U.S. at 409).

67. Compare Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 852 (N.D. Cal. 1979) (participation defined as direct action in inherently unlawful conduct or approval or ratification of such conduct), aff'd on other grounds sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) with Monarch, slip op. at 3, 5 (participation consists of ordering, authorizing or helping to perpetrate the illegal contract, combination, or conspiracy).

68. See Murphy Tugboat, 467 F. Supp. at 853 (implying per se conduct is inherently wrongful, triggering personal liability); Monarch, slip op. at 6 (per se violation sufficient for personal liability).

69. See supra note 40 (cases discussing officers' personal liability for antitrust violations).

70. Murphy Tugboat, 467 F. Supp. at 851. The Murphy Tugboat court asserted that this clarification was required as there was no guidance from the facts or opinions cited in Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n, 358 F.2d 115, 118 (9th Cir. 1966). Murphy Tugboat, 467 F. Supp. at 851.

The court also stated it did not intend "to suggest that proof of unlawful intent is necessary to impose civil liability on officers." Id. at 853 n.7. As if the Murphy Tugboat court anticipated the Monarch court's criticism, it asserted "there is no warrant in the authorities previously discussed to impose a requirement which would in effect equate the standard of proof for civil and criminal liability." Id.
Careful scrutiny demonstrates that *Murphy Tugboat* incorrectly imposes a mens rea standard of intent\(^7\) in the civil antitrust context. Businesses do not act without considering the costs, benefits and risks associated with their acts.\(^7\) The illegal nature of inherently or per se wrongful conduct is obvious.\(^7\) To participate willingly in “inherently wrongful conduct” necessarily entails mens rea. Under the ALI Model Penal Code (proposed Official Draft 1962), relied on by the Supreme Court for guidance in this area, see United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978), the highest of four possible levels of criminal culpability is to act with “purpose.” When acting with “purpose,” it is the actor’s “conscious object” to engage in conduct that by its nature or results will constitute a “material element” of an offense under the law. See ALI Model Penal Code § 2.02(2)(a)(i) (proposed Official Draft 1962). If there are circumstances connected to the conduct that may constitute the “material element” of the offense, the actor is either aware of their existence or believes or hopes that they will exist. See id. § 2.02(2)(a)(ii). It logically follows that the officer who participates in “inherently wrongful” conduct acts with a “conscious object to engage in conduct” that is an antitrust offense or causes a result the antitrust law prohibits. See id. § 2.02(2)(a)(i). The officer must be aware of any attendant circumstances or believe or hope they exist. See id. § 2.02(2)(a)(ii).

At the next lower level of culpability, a person may act “knowingly.” An actor is “knowingly” culpable if she acts while aware that her conduct by its nature or its attendant circumstances constitutes a “material element” of an offense. See id. § 2.02(2)(b)(i). If the result of her conduct will constitute the “material element,” she must be aware that it is “practically certain” that her conduct will have those results. See id. § 2.02(2)(b)(ii). Something that is “inherently wrongful” logically requires that the participating actor’s awareness of her conduct, or its attendant circumstances, involves an element of the offense and a practical certainty that the conduct will cause a proscribed result. See id. § 2.02(2)(b)(i)-(ii). An officer must be certain that “inherently unlawful” activity is unlawful if *Murphy Tugboat*’s aim of clarity is to be achieved. See Murphy Tugboat, 467 F. Supp at 851, 853. For a straightforward illustration of the four levels of criminal culpability, see P. Johnson, Criminal Law 68 (3rd ed. 1985).

71. See Counterplaintiff’s Brief Opposing Counterdefendant Loemker’s Motion for Dismissal at 7 n.5, Monarch Marking Sys. v. Duncan Parking Meter Maintenance Co. (N.D. Ill. Mar. 12, 1986) (No. 82 C 2599) (stating that *Murphy Tugboat* approach incorporates criminal standard of corporate officer liability); cf. Memorandum of Law in Support of Motion of Counterdefendant Thomas R. Loemker for Dismissal of Counterclaim Against Him at 6, Monarch Marking Sys. v. Duncan Parking Meter Maintenance Co. (N.D. Ill. Mar. 12, 1986) (No. 82 C 2599) (arguing it is inappropriate to hold officer personally liable except where officer’s conduct is egregiously wrongful or criminal act).

72. United States v. United States Gypsum Co., 438 U.S. 422, 445-46 (1978) (“business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks”).

73. A per se offense is conduct the courts have determined to have a “`pernicious effect on competition and [to] lack . . . any redeeming virtue.’” United States v. Container Corp. of Am., 393 U.S. 333, 340 (1969) (Marshall, J., dissenting) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)); see also Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332, 351 (1982) (anticompetitive potential inherent to activities prohibited as per se illegal); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556 (E.D. Pa. 1960) (per se rule invoked because no foreseeable situation could make challenged conduct reasonable), aff’d mem., 365 U.S. 567 (1961). Logically, an actor’s familiarity with the circumstances attendant to the conduct are evident as the “inferences are irresistible.” See Container Corp., 393 U.S. at 337. The Supreme Court, however, may decide not to apply a per se prohibition against conduct that would ordinarily receive one, if the conduct is essential to the defendant’s product. See NCAA v.
wrongful conduct, therefore, necessarily implies the officer's awareness of the conduct's nature. To assert that an officer would engage in obviously prohibited conduct without expecting a worthwhile return assumes highly illogical behavior by the actor. Only an officer divested of her senses would engage in price-fixing, for example, without realizing that there must be—and hoping that there will be—a concerted effort among otherwise independent entities to set prices artificially.

Moreover, Murphy Tugboat's mens rea requirement exceeds the level of culpability required to impose criminal liability under Gypsum. Gypsum specifically excluded civil liability from its requirement that criminal intent must be established to hold an officer criminally liable under the Sherman Act. Gypsum left unchanged the general requirement that civil liability entails either an unlawful purpose or anticompetitive effects. To determine civil liability, courts inquire into the actor's intent to assess the nature and effect of the allegedly violative conduct. Evidence of intent, then, usually is not an element of a Sherman Act civil liability required to impose criminal liability under the Sherman Act. Gypsum imposes criminal liability for "knowing participation in a price-fixing conspiracy." 


82. Gypsum, 438 U.S. at 436 n.13.
violation, but an evaluative tool to determine the reasonableness of the defendant's conduct.\textsuperscript{81} Congress' view of antitrust law demonstrates the impropriety of bringing a criminal standard into a civil antitrust context. The Sherman Act's legislative history indicates that Congress wished to treat civil and criminal offenses differently.\textsuperscript{82} Any exculpation of officers from antitrust liability requires clear direction from Congress.\textsuperscript{83} Accordingly, \textit{Murphy Tugboat}'s concern with the negative effects of overdeterrence fails as a rationale for imposing a mens rea approach into an area traditionally viewed as separate from criminal antitrust law.

2. Strict Liability and Overdeterrence in Civil Antitrust

\textit{Murphy Tugboat}'s misuse of \textit{Gypsum} notwithstanding, \textit{Gypsum}'s clear condemnation of a strict liability approach in criminal antitrust\textsuperscript{84} raises questions regarding the applicability of that approach in a civil context. A per se offense is not a strict liability violation, but a restraint presumed unreasonable by the courts when they already have considered and rejected the proffered purpose behind the conduct.\textsuperscript{85} The rule of reason analysis is the antithesis of strict liability.\textsuperscript{86} A strict liability approach forbids consideration of an officer's purpose or good faith mistake,\textsuperscript{87} which may illuminate the nature of the conduct at issue.\textsuperscript{88} Unlike strict liability law,\textsuperscript{89} antitrust places competitive conduct on a sliding scale of scrutiny as it successively applauds, weighs and then condemns business

\textsuperscript{81}. See 7 P. Areeda & D. Turner, \textit{supra} note 8, § 1506, at 391-92 (An actor's intent does not determine liability but may explain "an otherwise uncertain effect, benefit, or virtue. . . . By putting before the tribunal their intent to reduce costs, improve quality, or otherwise promote competition, the defendants claim a justification, which will then be appraised. . . . If they fail to suggest any [benefits], the court is entitled to assume there are none.") (footnote omitted).

\textsuperscript{82}. See United States v. United States Gypsum Co., 438 U.S. 422, 443 n.19 (1978) (colloquy between Sen. Sherman and Sen. George "indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the [Sherman Act]").

\textsuperscript{83}. See United States v. Wise, 370 U.S. 405, 409 (1962); \textit{cf supra} note 24 (discussing rejection of implied exculpation in Clayton Act decisions).

\textsuperscript{84}. See \textit{Gypsum}, 438 U.S. at 436 ("We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses.").

\textsuperscript{85}. See \textit{Arizona v. Maricopa County Medical Soc'y}, 457 U.S. 332, 343-44 (1982); \textit{see also supra} note 8.

\textsuperscript{86}. \textit{See supra} note 8.

\textsuperscript{87}. See United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978) (rejecting strict liability embodied in trial court instructions that directed jury to convict individual officers based on their conduct without consideration of their purpose); \textit{id.} at 441 (to treat antitrust violations as strict liability offenses would preclude consideration of a "good-faith error of judgment"), United States v. Dotterweich, 320 U.S. 277, 284 (1943) (all who participate in proscribed transaction are liable "though consciousness of wrongdoing be totally wanting").

\textsuperscript{88}. \textit{See supra} note 8.

\textsuperscript{89}. A strict liability approach seeks to instill such caution into the actor that she will avoid conduct that could result in a violation. \textit{See Gypsum}, 438 U.S. at 441 n.17; United States v. Park, 421 U.S. 658, 671-92 (1975); \textit{Dotterweich}, 320 U.S. at 285.
activity on a fact-specific basis, that, by its nature, must vary if it is to keep current and flexible.90

If it is unwise to adopt a strict liability approach in antitrust law, it is equally unsound to adopt an approach that goes too far in the opposite direction. Because it results in a mens rea requirement, Murphy Tugboat's reliance on Gypsum's overdeterrence concerns91 in a civil area is misplaced. Under Gypsum, overdeterrence occurs by imposing strict liability in a criminal antitrust context. This overdeterrence arises from the possibility of imprisonment.92 Gypsum links the need to establish criminal intent to traditional notions of criminal law and the individual's risk of imprisonment.93 Murphy Tugboat, however, operates in a civil context, where the risk is wholly financial. It is questionable that the vagueness of the antitrust law overly deters zealously competitive conduct. Undeniably, officers and corporations face some uncertainty whether a given activity violates the Sherman Act.94 The vagueness of antitrust law, however, stems from its flexibil-

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90. See supra notes 8, 17, 18 and accompanying text.
91. See Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 853 (N.D. Cal. 1979) (generality of Sherman Act, "uncertain line between proper and improper conduct, and the social interest in not deterring economically useful conduct by the imposition of excessive risks—all of which the Supreme Court recognized in United States Gypsum—make it appropriate to limit personal liability to cases of participation in inherently wrongful conduct"), aff'd on other grounds sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).
92. See Gypsum, 438 U.S. at 442 n.18 (noting congressional increase of duration of prison sentences and fines for Sherman Act violations). The Court also cited one commentator who argues that strict liability is inappropriate when the defendant may receive a prison sentence. See id. (citing Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933)).
93. Gypsum relied on Morissette v. United States, 342 U.S. 246 (1952), for its holding that intent is required under a statute that threatens criminal penalties. See Gypsum, 438 U.S. at 436-37. The Morissette Court, however, noted that "[i]n the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant." Morissette, 342 U.S. at 270. In Morissette the Court noted the connection between imprisonment and a wrongdoer's "evil state of mind." See id. at 264 & nn.23-24. Morissette thus affirms the distinction between criminal and civil offenses and their respective requirements.
94. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978) (gray zone of conduct between violative and procompetitive behavior); United States v. Topco Assocs., 405 U.S. 596, 610 n.10 (1972) (without per se rules, courts "ramble through the wilds of economic theory in order to maintain a flexible approach"); Brown v. Donco Enters., 783 F.2d 644, 646 (6th Cir. 1986) (per curiam) (quoting "gray zone" language from Gypsum). The vagueness of antitrust law and its possible enforcement have long been recognized. See 21 Cong. Rec. 2455, 2460 (1890) (remarks by Sen. Sherman conceding vagueness of line between lawful and unlawful combinations).

It is argued that antitrust violations occur "more often through ignorance than through intent" and that "many businessmen and lawyers had a thirst for knowledge concerning those laws but were bewildered by their complexity." I E. Kinter, The Legislative History of the Federal Antitrust Laws and Related Statutes xi (1978). A different view of this argument, however, was voiced during the legislation of antitrust laws. "They [the monopolists] sometimes want the law to be weak and obscurely written and leave it for the courts to construe, so delay may come while they continue to pursue their own hard methods, and then would have friendly courts write decisions wherever possi-
The general wording of the Sherman Act and Congress' desire that the courts weigh the facts of each case against the Act's goals demonstrate an emphasis on flexibility. This emphasis allows antitrust law to evolve according to the prevailing views of the marketplace; views that also may favor zealous competitors. For example, aggressive price-cutting, once suspect as a predatory tactic, has been lauded recently as the type of activity the Sherman Act seeks to protect. The courts evaluate conduct flexibly by inquiring into the actor's purpose and the conduct's economic benefits in all but the most egregious of circumstances.

The complexity in business structures and transactions presents an additional difficulty for officers. See Gypsum, 438 U.S. at 439. ("The Sherman Act, inevitably perhaps, is couched in language broad and general. . . . Thus, it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal structures." (quoting Report of the Attorney General's National Committee to Study the Antitrust Laws 349 (1955))).

The Supreme Court viewed the Sherman Act in these terms:

As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.


For example, the Supreme Court has been flexible in scrutinizing conduct involving restraints that are arguably competitive or essential to the product. See NCAA v. Board of Regents, 468 U.S. 85, 117 (1984) (not invoking per se prohibitions regarding horizontal restraints on competition as restraints are crucial to existence of product); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 21-23 (1979) (noting substantial benefits and unique character of blanket license in its decision not to prohibit it per se); White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (vertical territorial limitation not under per se rule as Court lacks sufficient information regarding its potential benefits).


The Court looked to "economic realities that tend to make predatory pricing conspiracies self-detering: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators." Id. The Court stated "cutting price in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one of predatory pricing are especially costly, because they chill the very conduct the antitrust laws are designed to protect." Id.

100. Unless conduct falls into the narrow categories of per se prohibitions, it is ana-
Murphy Tugboat's approach seeks to avoid deterring "economically useful conduct,"101 and thereby may permit conduct the Sherman Act was intended to prevent. In evaluating conduct under the Sherman Act, courts do not look only to its efficiency.102 Consideration must be given to the basic purpose of the antitrust laws: the preservation of competition in the marketplace.103

The Murphy Tugboat approach, which shields officers from personal civil liability,104 is justifiable only if there are other effective checks on their conduct to avoid "license fees." If officers and their corporations are not concerned with the antitrust ramifications of their behavior, then another approach is needed to replace the Murphy Tugboat approach to personal liability.

3. Ineffectiveness of Deterrents to Anticompetitive Behavior Other than Personal Liability

Careful evaluation demonstrates the ineffectiveness of various alternative checks on the behavior of officers and the corporations they lead. Equitable actions brought by the government against the corporation do not bind the acts of individual officers.105 An injunctive decree seldom

lyzed under the rule of reason, which permits consideration of procompetitive benefits. See supra note 8.


102. See Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351 (1982) (rejecting defendant's claim of procompetitive justifications due to "anticompetitive potential inherent in all price-fixing agreements"); United States v. Container Corp. of Am., 393 U.S. 333, 338 n.4 (1969) (looking beyond short-term efficiencies to long-term anticompetitive effects); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-21 (1940) (Sherman Act emasculated if so-called competitive evils were allowed to justify pricing program).

103. See supra note 16 and accompanying text.

104. See Murphy Tugboat, 467 F. Supp. at 852-53. The impact of Murphy Tugboat is evident in two recent opinions that have adopted its approach. See Brown v. Donco Enter., 783 F.2d 644, 646-47 (6th Cir. 1986) (attorney personally liable only if exceeded role as advisor, exerted influence over the corporation, and intentionally furthered anti-competitive goals). In GVF Cannery Inc. v. California Tomato Growers Ass'n, 511 F. Supp. 711 (N.D. Cal. 1981), individual defendants were deemed not to have engaged in violative behavior of picketing, boycotting, coercion, price discrimination, and payment of secret rebates. The court observed that "[e]ven if the Sherman Act claims against the association were adequate, the claims against the individual defendants fail to satisfy the [intent] standard" required under Murphy Tugboat. Id. at 716-17.

The result in Murphy Tugboat demonstrates the implications of the approach. The court noted that, although the "record amply supports the jury's verdict for plaintiff" regarding the corporation's attempt to monopolize, Murphy Tugboat, 467 F. Supp. at 851, and the officer "must be assumed" to have knowingly affirmed the violative behavior, he is not personally liable. Id. at 853. The court reasoned that the officer's conduct was "simply evidence of monopolization or an attempt to monopolize," and "cannot be said to be inherently wrongfu." Id. Exempting the officer under these circumstances suggests that, apart from a per se violation, the officer need not fear liability.

names officers because it sufficiently binds the corporation. Officers are restricted by the decree only if they remain with the corporation it governs. No evidence exists to suggest that private suits seeking injunctive relief are any more effective. Although a court may demand that an officer resign, that solution has been used rarely apart from situations involving interlocking directorships. The problem with equitable relief is that it results only in the cessation of the offensive conduct. Accordingly, equitable actions have little deterrent value as the offending party only faces the loss of further ill-gotten gains after the injunction issues. Moreover, in a subsequent private treble damages action, an injunction against the corporation does not establish a prima facie case against the officer, so the officer need not fear any personal loss.

Analysis suggests that government civil suits also offer little or no deterrence to an antitrust violation. The government brings more criminal suits than civil suits. The Justice Department has conceded that its

106. See id. at 434.
107. See id. at 434.
109. See Whiting, supra note 22, at 951 n.82. Regarding the lack of deterrent effects from such suits, see infra note 111.
110. See Whiting, supra note 22, at 962.
112. Cf. Monarch Marking Sys. v. Duncan Parking Meter Maintenance Co., No. 82 C 2599, slip op. at 5-6 (N.D. Ill. Mar. 12, 1986) (without significant penalties, corporate officers will violate the antitrust laws in course of business).
113. A private plaintiff may use a final judgment or decree rendered against a defendant in a government antitrust suit to establish a prima facie case against the same defendant. See 15 U.S.C. § 16(a) (1982); see also City of Burbank v. General Elec. Co., 329 F.2d 825, 830-31 (9th Cir. 1964) (citing 15 U.S.C. 16(a) (1982)); General Elec. Co. v. City of San Antonio, 334 F.2d 480, 485 (5th Cir. 1964) (same). This evidence, however, can be rebutted. See 2 P. Areeda & D. Turner, supra note 16, § 324(c), at 118. The plaintiff, however, cannot use against a defendant a consent decree or a decree entered before testimony is given. See id. An officer's plea of nolo contendere prior to a guilty verdict falls within the statute's consent judgment exclusion. See, e.g., Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 n.12 (3d Cir. 1973); City of Burbank, 329 F.2d at 834-35; Commonwealth Edison Co. v. Allis-Chalmers Mfg., 323 F.2d 412, 416-17 (7th Cir. 1963), cert. denied, 376 U.S. 939 (1964); United States v. Brighton Bldg. & Maintenance Co., 431 F. Supp. 1118, 1120 (N.D. Ill. 1977). It is doubtful that a government judgment solely against the corporation could be used to establish a prima facie case against the officer. See Whiting, supra note 22, at 973 n.183.
114. In 1985, the federal government commenced 30 civil and 60 antitrust criminal suits in federal district court. See Annual Report of the Director of the Administrative Office of the United States Courts 156 (1985). In 1984, the government began 24 civil and 77 criminal cases. See id. From 1975 to 1983, civil suits commenced by the federal government declined from 56 to 21, whereas the criminal suits increased from 36 in 1975 to 74 in 1983. See Annual Report of the Director of the Administrative Office of the
investigative machinery is better suited for criminal rather than civil actions.\textsuperscript{115} In addition, government civil suits provide no independent deterrent as they usually encompass the same acts and defendants prosecuted in the criminal actions.\textsuperscript{116} The deterrent effect of a government civil suit to a great extent, therefore, rests on the use of the judgment against the defendant in a subsequent private treble damages action.\textsuperscript{117}

To deter corporate criminal violations effectively, the law also must deter the criminal violations committed by corporate officers.\textsuperscript{118} The threat of criminal actions against individuals, however, is ineffective. The impact of personal fines imposed on officers is slight, leaving only the threat of prison.\textsuperscript{119} Possible imprisonment poses only a remote threat to corporate officers. Historically, few officers have received prison sentences\textsuperscript{120} and even fewer have served their time.\textsuperscript{121} Recent statistics

United States Courts 128 (1983); see also Remarks by Donald I. Baker, Assistant Attorney General, Antitrust Division, \textit{To Indict or Not to Indict — A Question of Prosecutorial Discretion Under the Sherman Act}, Antitrust Law Briefing Conference (Feb. 28, 1977), reprinted in 2 J. Clabault & M. Block, supra note 29, at 577, 583 (noting larger share of Antitrust Division resources devoted to criminal enforcement).

115. See Report of the Attorney General's National Committee to Study the Antitrust Laws 345 (1955) (Justice Department machinery more suited for criminal than civil antitrust actions).

116. See Whiting, supra note 22, at 982 & 951 n.82.

117. See \textit{ supra} note 113.


Considering the size of the fine an officer may receive, committing a violation may be worth the risk. In 1981 dollars, the average criminal antitrust fine levied against an officer from 1955 to 1980 was $10,934.08. See 2 J. Clabault & M. Block, supra note 29, at 795. The highest average fines—$23,565.72—were levied in 1978. \textit{Id.}

120. In the first fifty years of the Sherman Act, only 24 cases of the 252 criminal prosecutions resulted in jail sentences, 11 of which involved businessmen. See K. Elzinga & W. Breit, \textit{The Antitrust Penalties: A Study in Law and Economics} 31 (1976). Of these 11 cases, 10 involved acts of violence or threats, the remaining jail sentence was suspended. See \textit{id.}

It is interesting that the officers involved in the two major criminal antitrust opinions discussed here received very light punishment. The officer in United States v. Wise, 370 U.S. 405 (1962), whom the Supreme Court held could be personally criminally liable under the Sherman Act although he acted as a corporate agent, ultimately had his fine set aside and his convictions vacated "to prevent their use by treble damage plaintiffs in subsequent civil actions." See 1 Clabault and Block, supra note 29, at 83-84. The officer also had been sentenced to three months in jail for each of his two violations of the Sherman Act, but the sentences were suspended. See \textit{id.} at 83. The officers who had their jury conviction overturned on appeal and affirmed by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422 (1978), as well as those who pleaded nolo contendere and did not appeal, originally were given suspended sentences of either 30 days or six months in jail. See \textit{id.} at 287-88. The defendants who did not appeal agreed to personally pay fines of either $40,000 or $20,000 as a condition to their probation and to avoid being held in contempt. See \textit{id.} at 287-89 & n.2. These fines may seem
show that officers are more likely to receive probation than a prison sentence.\textsuperscript{122} Furthermore, any actual jail sentence will be fairly light.\textsuperscript{123} Considering that the government's prosecution of criminal suits focuses on per se or clearly intentional violations,\textsuperscript{124} the threat of prosecution followed by prison is reduced further. Finally, although much has been made of the stigma associated with criminal antitrust indictment as a deterrent to individuals,\textsuperscript{125} no supporting evidence has been produced.\textsuperscript{126}

Corporate conduct also demonstrates that officers are not deterred by the prospect of criminal prosecution. The increases in the prison sentences and fines under the Sherman Act are based on congressional notice that officers view antitrust violations as good business risks with potentially high rewards.\textsuperscript{127} The recidivism of corporate violators\textsuperscript{128} re-

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\textsuperscript{121} From 1940 to 1955, of those 11 prison sentences imposed, almost all were suspended. See K. Elzinga & W. Breit, supra note 120, at 31. From 1950-1960, 39 corporate officers received jail sentences; all but twelve were suspended. That decade showed the heaviest number of criminal sentences to that point, nearly three times as many as before. See Whiting, supra note 22, at 943, 957.

The jail sentences in 107 of the 142 antitrust cases completed between mid-1955 and the end of 1980 either were completely or partially reversed or suspended. See 2 J. Clabault & M. Block, supra note 29, at 645-49 (includes cases in which concurrent sentences were imposed).

\textsuperscript{122} In 1985, of the 131 defendants who were sentenced, 71 received only a fine and 41 received a sentence of only probation for an average of 32.4 months. See Annual Report of the Director of the Administrative Office of the United States Courts 382-83 (1985). In 1984, of the 173 defendants who were sentenced, 93 received only a fine and 46 received only probation for an average of 30 months. See Annual Report of the Director of the United States Courts 356-57 (1984).

\textsuperscript{123} In 1985, of the 131 defendants sentenced, only 19 were sentenced to prison, for an average of 7.1 months. See Annual Report of the Director of the Administrative Office of the United States Courts 382-83 (1985). In 1984, 33 of the 173 defendants received a prison sentence, for an average of 4.7 months. See Annual Report of the Director of the Administrative Office of the United States Courts 356-57 (1984).

\textsuperscript{124} The government's prosecution of criminal suits is highly particular and restricted. Proof of the violation must be clear and the law settled. See Report of the Attorney General's National Committee to Study Antitrust Laws 351 (1955). The government has a long held policy of concentrating its resources on per se violations or intentional violations. See Antitrust Division Manual, U.S. Dept. of Justice, III-11 (1979); Report of the Attorney General's National Committee to Study the Antitrust Laws 351 (1955); Leddy, supra note 77, at 1551-52.

\textsuperscript{125} See Whiting, supra note 22, at 949.

\textsuperscript{126} See K. Elzinga & W. Breit, supra note 120, at 42.


Congress later increased the maximum fine allowable from $50,000 to $100,000 for individuals and non-corporate enterprises and to $1,000,000 for corporations. See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974)
reflects the futility of focusing antitrust enforcement on profit-maximizing corporations. One Supreme Court justice frankly admitted the absurdity of trying to deter large corporations with criminal fines.129 Because of the lack of effective deterrents, corporations continue to commit violations after carefully considering the possible returns versus the risks of prosecution and conviction.

In view of a corporation's resources, treble damages actions may offer only the limited deterrence of "license fees."130 Indeed, one commentator has stated that unless private antitrust actions force corporate officers to pay a portion of the damages, the actions are poor deterrents to corporate violations.131 Studies of treble damages actions are limited and ambiguous regarding their effect on potential violators.132

Effective civil liability for officers promotes compensatory aims as well as deterrence objectives. A plaintiff first seeks her remedy from the corporation and turns to its officers if the corporation is defunct or bankrupt.133 Although a government judgment rendered in a prior action may aid the plaintiff in establishing her case, she will find it difficult to obtain judgment from an officer who has since left the corporation or serves a corporation in bankruptcy.134 Further, the officer's liability is

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128. See 2 J. Clabault & M. Block, supra note 29, at 901-11 (study of Sherman Act indictments from 1955 to 1980 shows that twenty corporations were named defendants in four or more criminal antitrust actions and were convicted at least twice); see also Posner, A Statistical Study of Antitrust Enforcement, 13 J. Law & Econ. 365, 394-95 (1970) (46 of 320 corporations convicted in cases brought between 1964 and 1968 had been convicted of same offense in prior civil or criminal case).

129. See United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 591 n.11 (1944) (Jackson, J., dissenting in part) (Antitrust sanctions have had negligible impact on resources of corporate violators. In one instance, 15 of 17 convicted corporations had ratio of fines to capital and surplus of 1/100 to 1.).


132. See ABA Antitrust Section, Monograph 13, Treble-Damages Remedy 21-24 & n.23 (1986) (recent studies do not address question of deterrence or distinguish between claims that are dismissed or settled, which together constitute over 80 percent of the private actions); Wheeler, supra note 131, at 1319 ("No study has yet verified the deterrent and compensatory effects so freely attributed to treble-damage actions . . ."); Whiting, supra note 22, at 973 ("there are no readily available statistics showing the number of private suits in which officers and directors are also made defendants, but it is believed that this percentage is relatively small").

133. See Whiting, supra note 22, at 957; Note, The Antitrust Laws and the Corporate Executive's Civil Damage Liability, 18 Vand. L. Rev. 1938, 1940 (1965).

134. On the corporation's dissolution, the civil plaintiff may find that she cannot re-
distinct from the corporation's, leaving a judgment against a defunct corporation probably useless. As contribution is not allowed in private Sherman Act suits, the officer may walk away from antitrust litigation unscathed as the plaintiff may suffer without compensation.

Courts have a legitimate and substantial concern that they currently cover from the officers. Cf. United States v. Memphis Retail Package Stores Ass'n, 334 F. Supp. 686, 688, 690 (W.D. Tenn. 1971) (government unsuccessfully sought to enforce antitrust fine against officers of dissolved corporation).

135. The limited liability associated with the corporate structure, if the structure is valid, outweighs the plaintiff's sole source of remedy. See Memphis Retail, 334 F. Supp. at 689-90. Plaintiff may reach officers only when a sham corporation is involved. See id. at 689.


137. The officer may not be wholly excused from damages, however, depending on the courts' treatment of two issues that must be addressed subsequent to resolving the proper approach to personal liability for officers. These issues, which respectively may pose problems of overdeterrence and underdeterrence, are whether the officer will be held jointly liable for the corporation's violation and whether the officer should be indemnified by the corporation if she is found personally liable.

Antitrust violators are jointly and severally liable for the entire amount of damages they cause. See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) (noting judicial determination that defendants should be jointly and severally liable (citing City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, 26 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906)); Burlington Indus. v. Deering Milliken & Co., 690 F.2d 380, 391 (4th Cir. 1982) (tradition of treating violations as tort actions leads to application of common law rule that violators were tortfeasors acting in concert and therefore jointly and severally liable), cert. denied, 461 U.S. 914 (1983); Hydrolevel Corp. v. American Soc'y of Mech. Engr's, 635 F.2d 118, 130 (2d Cir. 1980) (as joint tortfeasors, each antitrust defendant is liable for total damages irrespective of fault), aff'd on other grounds, 456 U.S. 556 (1982); Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.) (clear intent of Congress to use treble damages to combat illegal business practices requires joint liability), cert. denied, 355 U.S. 835 (1957).

The possibility that an officer may be responsible for the corporation's share of damages, however, may chill her legitimate aggressive behavior. Cf. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 636-37 (1981) (allowing contribution among joint tortfeasors could lead to overdeterrence). That need not be the case, as joint liability attaches only to those "who, in pursuance of a common plan or design to commit a tortious act, actively take part in it . . . or ratify and adopt" it. Prosser & Keeton, supra note 47, § 46, at 323. Liability is not charged to those who lack an intent to commit the tort. See id. at 324. Although they may further the tortious act, if the actor performed innocently, she is not acting in concert with the wrongdoer and therefore escapes liability. See id. Under the proposed approach, see infra notes 139-166 and accompanying text, an officer who does not disregard the possible injury to the marketplace and proceeds after carefully considering the chances of that injury are limited, is arguably an innocent party. This is not a common law defense that thwarts the purpose of treble damages actions. See Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 140 (1968) (barring common law defense of in pari delicto to treble damage actions). If the officer comports with the proposed standard, she escapes personal liability, as she has not "proceeded tortiously, which is to say with the intent requisite to committing a tort." See Prosser & Keeton, supra note 47, § 46, at 324.

have no way to deter corporations from viewing antitrust liability as a cost of doing business. The Monarch and Murphy Tugboat approaches both fail, as each emphasizes one of the major concerns of antitrust law to the exclusion of the other. The Monarch approach, however well-founded its policy concern, presents a problem of overdeterrence by injecting a strict liability approach of doubtful origin into a vague area of the law. Murphy Tugboat excuses liability by setting its standard of intent too high and thereby encourages a “license fees” view of antitrust liability. A different means of imposing personal civil antitrust liability on corporate officers must be fashioned to accommodate the policy concerns of Murphy Tugboat and Monarch but avoid their limitations.

III. A Proposed Standard

This Note proposes an approach to personal liability of officers acting on behalf of the corporation in private civil antitrust actions that draws

L. Rev. 513, 516; see also Wheeler, supra note 131, at 1345-46, 1349-50 (shareholders who reaped no benefits from violative conduct may pay penalty for officers' misconduct).

If personal penalties are necessary to deter antitrust violations, it follows that courts should exercise their power to prohibit indemnification for proven violations. See Koster v. Warren, 297 F.2d 418, 423 (9th Cir. 1961) (“public policy would strike down... any arrangement whereby a corporate officer could with immunity from personal liability involve his company in antitrust violations”); Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173, 180 (8th Cir. 1955) (contractual provision that could absolve party from future antitrust liability is against public policy and so considered void); Oesterle, supra, at 579-80 (“if the personal penalties of corporate officials for creating public injury are reasonable, indemnification for any adverse judgment should ordinarily be prohibited”).

Insurance may cover those areas where the corporation may not be able to indemnify the officer. See M. Feuer & J. Johnston, Jr., Personal Liabilities of Corporate Officers and Directors 208-09 (2d ed. 1974) (wrongful acts are insured except those that constitute conflict of interest or breach of duty of loyalty to corporation). Accordingly, coverage similarly should be restricted to maintain the deterrence value of personal liability. See Oesterle, supra, at 579 n.223. This may occur without judicial or legislative intervention, as insurers increasingly exclude antitrust claims from policy coverage. See W. Knepper, supra note 6, § 20.12, at 208 (Supp. 1985).

Refusal to indemnify the officer under the proposed standard comports with public policy. It is against the public interest to indemnify an officer who acts recklessly. See Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 955 (S.D.N.Y. 1975) (indemnity barred where plaintiff shows defendant had actual knowledge of violative conduct or such reckless disregard for truth as to equal knowledge); Globus v. Law Research Serv., Inc., 287 F. Supp. 188, 199 (S.D.N.Y. 1968) (“wanton indifference” to one’s obligations and rights of others preclude enforcement of indemnification contract), aff’d in part and rev’d in part, 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970). Recklessness is a form of intentional conduct that may require liability. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976) (dictum). Only if an officer has no reason to believe she may violate the Sherman Act should she be indemnified. Cf. Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 204, 38 N.Y.S.2d 270, 273 (N.Y. Sup. Ct. 1942) (directors must exercise reasonable care and act in good faith that they will not violate Sherman Act), aff’d mem. 267 A.D. 890, 47 N.Y.S.2d 589 (1st Dep’t 1944).

It is in the public interest not to chill the procompetitive behavior of officers or to force them to fully litigate every antitrust claim to escape liability. See Oesterle, supra, at 580. Officers, therefore, should be reimbursed for defense expenses when they are found innocent of the violation and when they settle a suit, provided they have not “in fact violated the substantive legal standard in issue.” Oesterle, supra, at 581.
from *Monarch* and *Murphy Tugboat.* This proposed approach aims to satisfy the conflicting aims of antitrust law: to deter conduct injurious to the competitiveness of the marketplace and to encourage the aggressive pursuit of advantage essential to a competitive marketplace. This approach conditions personal liability both on the officer's participation in the anticompetitive conduct and on an awareness that the conduct violates the Sherman Act or presents a strong possibility of doing so.\(^\text{138}\)

A. Participation

This proposed approach follows the view that an officer cannot have liability imputed to her merely because of her position in the corporation.\(^\text{139}\) Liability will be imposed on the officer, however, for her direct participation in the violative conduct or her objective ratification or direction of the conduct. A reasonable person's view of the meaning of the officer's manifestations regarding the conduct would serve as the perspective used to decide whether the officer ratified the conduct.\(^\text{140}\) That ratification of unlawful conduct constitutes participation is an established principle in antitrust law.\(^\text{141}\) An officer should be required to take an affirmative act to escape the liability that otherwise would be imposed for her ratification of the violative conduct.\(^\text{142}\) The ratifying act can be the officer's approval of the conduct after its discovery or the failure to take action commensurate with her position in the corporation to withdraw from, take a clear position against, or prevent the conduct.\(^\text{143}\)

\(^{138}\) See Wheeler, *supra* note 131, at 1343-44 ("The most effective deterrent to antitrust violations may flow from legislation or procedures ensuring that individual managers who decide to violate the antitrust laws will pay for their transgressions.").


\(^{142}\) See Phelps Dodge Ref. Corp. v. FTC, 139 F.2d 393, 396-97 (2d Cir. 1943); Alaska S.S. Co. v. International Longshoremen's Ass'n, 236 F. 964, 972 (W.D. Wash. 1916).

\(^{143}\) Ratification is defined as the possession of knowledge that the corporation is violating or about to violate the law. It is also the possession of authority to prevent the violation or report it to another representative able to stop it, and the failure to exercise that authority. See Kramer, *Liability of Corporate Officers and Directors Under the Antitrust Laws,* 17 Bus. Law 897, 902-03 (1962); Rooks, *Personal Liabilities of Officers and Directors for Antitrust Violations and Securities Transactions,* 18 Bus. Law. 579, 586 (1963); cf. United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1978) ("Affirmative acts inconsistent with the object of the conspiracy and communicated in a man-
attempt to prevent the recurrence of violative conduct also is ratification. An officer directs the conduct when she proposes, implements or monitors its execution. If the officer is aware that a violation may result, but delegates the supervision or control of the conduct to another, then she has constructively directed the conduct.144

By conditioning liability on the officer's participation, this proposed approach follows *Murphy Tugboat* and the prior decisions that require direct involvement or approval of the conduct.145 It thus remains true to the tort basis of an officer's civil antitrust liability.146 Adoption of *Monarch's* "responsible share" approach, on the other hand, could widen liability beyond its intended scope of a general civil tort standard of officer liability.147 Requiring the officer's objective manifestation of approval compensates for *Monarch's* overbreadth.

**B. Awareness**

An officer is deemed aware that the conduct violates the Sherman Act if she takes part in the conduct, regardless of whether she possesses actual knowledge that it will result in a violation or has a reasonable possibility of doing so.148 Further, should the officer unjustifiably disregard the possibility of a violation by acting, without first exploring the conduct's potential antitrust ramifications,149 she will have demonstrated
sufficient awareness under this test.

An officer who acts despite her knowledge that the conduct arguably is violative has acted with an unlawful purpose and should be liable in a civil action against her. If the officer engages in per se violative behavior, her knowledge is ordinarily presumed. When the conduct is not unlawful per se, the officer is liable if she is aware of the irresistible inferences that the conduct will chill the vigor of competition. A previous determination by any court that the conduct violates the Sherman Act puts the officer on notice of this risk. The officer, therefore, acts with

1145-46 (4th Cir. 1975) (corporate officer may not discriminate racially with impunity after she exercised due diligence by relying on counsel's interpretation of law), it will help the courts to understand the nature of the officer's conduct. Obtaining such legal advice before initiating corporate programs is commonplace. See Upjohn Co. v. United States, 449 U.S. 383, 392-93 (1981) (corporations regularly "go to lawyers to find out how to obey the law" (quoting Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969)).

150. One court has held in a private antitrust action that:

if a person charged with making a decision (which may or may not be a violation of law, dependent upon the intent and purpose and effect which accompanies it) is willing to rest such decision on surmise, suspicion, conjecture, and intuition, he has that right, but so acts at his peril.

Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 284 F.2d 1, 27 (9th Cir. 1960), rev'd on other grounds, 370 U.S. 19 (1962); see also United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969) (liability imposed where "inferences are irresistible" that conduct would chill price competition); Affiliated Capital Corp. v. City of Houston, 700 F.2d 226, 237 (5th Cir. 1983) (municipal official's uncertainty regarding law's view of his possible personal liability for antitrust violation irrelevant); cf. Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 205, 38 N.Y.S.2d 270, 274 (1942) (as defendants "did not know or believe or have reason to believe that their participation in the buying program was prohibited by the Sherman Act, they cannot be held personally liable for damages"), aff'd mem. 267 A.D. 890, 47 N.Y.S.2d 589 (1st Dep't 1944).

151. See supra note 8.

152. See Container Corp., 393 U.S. at 337 (price data dissemination). The Supreme Court has often drawn inferences from defendants' acts. It noted that:

[to pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a 'new form of competition' and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn . . . .

American Column & Lumber Co. v. United States, 257 U.S. 377, 410 (1921); see also United States v. American Linseed Oil Co., 262 U.S. 371, 389-90 (1923) (Defendant competitors suddenly surrendered "their freedom of action by requiring each to reveal to all the intimate details of its affairs . . . . Obviously they were not bona fide competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing.").

153. See Counterplaintiff's Brief Opposing Counterdefendant Loemker's Motion for Dismissal at 7 n.5, Monarch Marking Sys. v. Duncan Parking Meter Maintenance Co. (N.D. III. Mar. 12, 1986) (No. 82 C 2599) ("A corporate officer should be absolved of personal liability only if the antitrust violation . . . was unprecedented so that he had no notice that he was participating in a violation.").

An officer considering a data dissemination plan among competitors and customers, for example, would find after a short investigation that because of the possibility of procompetitive benefits, these plans have not been prohibited under the per se rules but so far have been found violative only under the rule of reason analysis. See, e.g., United States
knowledge that there is a reasonable possibility that the conduct again will be considered a violation and hence should be held accountable for her participation.

An officer, however, should be able to rebut this presumption of acting with knowledge.\(^{154}\) An officer acts with sufficient knowledge to be held personally liable if she engages in the conduct despite the opinion of counsel or other expert advisors that the conduct violates the Sherman Act or presents a reasonable possibility of doing so. An opinion that the conduct does not present a reasonable possibility of being a violation, however, should be considered under an approach similar to the rule of reason to ascertain the officer's motive behind the conduct.\(^{155}\) Opinion-

v. Container Corp. of Am., 393 U.S. 333 (1969); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); see also United States v. United States Gypsum Co., 438 U.S. 422, 446-47 n.22 (1978) (defendants’ lack of notice claim rejected by the Court); Report of the Attorney General’s National Committee to Study the Antitrust Laws 350 (1955) (Justice Department felt free to indict defendants who knew that practices similar to theirs had been held in prior civil suits to be Sherman Act violations).

Conduct must be evaluated for its impact on the marketplace rather than subjective notions of morality. See 7 P. Areeda, supra note 8, at § 1506, at 390-91 ("emphasizing purpose frequently masks a failure to analyze the conduct"); Hawk, Attempts to Monopolize—Specific Intent as Antitrust’s Ghost in the Machine, 58 Cornell L. Rev. 1121, 1142 (1973) ("inclusion of a subjective intent standard permits the introduction of a greater variety of evidence than is relevant to the legitimate business purposes of a defendant"). The notice provision of the proposed standard, however, provides the factfinder with objective criteria.

154. This Note suggests that on the occasion of a corporation’s antitrust violation, the officer who participated in that corporate conduct will be presumed to have considered and disregarded the risk that the conduct would injure the competitiveness of the marketplace. The officer’s personal liability for that injury would thereby be triggered.

The presumption should apply absent proof offered by the officer that she had not disregarded the risks associated with her conduct. The effect of the presumption accords with Professor Bohlen’s description of rebuttable presumptions. See Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. Pa. L. Rev. 307, 309 n.6 (1920). The defendant officer should be able to assert that she considered the antitrust ramifications of her conduct and proceeded only after ascertaining that the risk of violation was slight. The officer, however, must introduce evidence of actual persuasive effect. “If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing.” Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933) (addressing presumptions in general). Thus the presumption can be defeated but it should “continue to operate unless and until the evidence persuades the trier [of fact] at least that the non-existence of the presumed fact is as probable as its existence.” Id. at 83.

The rationale behind a presumption that is rebuttable under the burden of persuasion, is to ensure that the officer weighs the antitrust ramifications prior to acting. If the presumption were rebuttable more easily, for example, by the burden of production, then, in view of the officer’s “desire to take a step he considers profitable, he will often indulge the impulse to believe and later to claim a reasonable belief that the act was lawful.” See 2 P. Areeda & D. Turner, supra note 16, § 321, at 93 (suggesting judicial discretion in awarding lower damages where the defendant is reasonably mistaken).

155. See Note, supra note 133, at 1942, 1954. That author recommends that consultation with counsel should immunize an officer who acts in good faith and whose conduct does not constitute a per se violation. See id. at 1942. The approach proposed here
shopping can be discouraged by subjecting the experts to in-court scrutiny, which in turn could lead to their personal liability.\(^\text{156}\)

An officer acts recklessly by undertaking the activity without expert consultation. Corporations generally evaluate new business activities for their risks, including legal risks.\(^\text{157}\) Many corporations have antitrust compliance programs to minimize these risks.\(^\text{158}\) If an officer is a part of an entity that normally consults on antitrust matters, but fails to do so, she has disregarded the risk of violation. If she is part of an organization that normally does not obtain antitrust advice, she must rebut the presumption of recklessness\(^\text{159}\) by demonstrating a significant burden that would have precluded consultation or by asserting a good faith reason for not seeking any expert advice.

The officer need not manifest specific intent as a condition for liability, differs in that the consultation is only one factor in determining the officer's intent, thereby more in keeping with the rule of reason analysis.

\(^\text{156}\) See Brown v. Donco Enters., 783 F.2d 644, 646 (6th Cir. 1986) (per curiam) (attorney is personally liable for antitrust violation if she exceeds role as legal adviser and "becomes an active participant in formulating policy decisions . . . to restrain competition"). The attorney also could be liable for fraudulently giving an opinion that the conduct would not violate the antitrust laws. Cf. Goodman v. Kennedy, 18 Cal. 3d 335, 346, 556 P.2d 737, 744-45, 134 Cal. Rptr. 375, 383 (1976) (attorney acting in capacity as legal counsel can be liable to third party for fraudulent omissions); R. Mallen & V. Levit, Legal Malpractice § 107, at 187 (2d ed. 1981) ("fraud is one of the few widely accepted bases for which an attorney can be liable to a party other than his client").

The attorney must survey the law prior to giving a report to the officer regarding the possible legal ramifications of the proposed conduct. An attorney can be liable to her client for a conscious "reckless disregard" of the truth of her representation to her client. See R. Mallen & V. Levit, supra, § 107, at 186. Moreover, "[l]iability may exist for errors of judgment concerning interpretation of the appropriate state or federal antitrust laws." Id. § 438, at 499.


\(^\text{158}\) One corporation's antitrust compliance program consisted of a manual, a signed statement by each employee that she had read the manual, seminars with trained counsel regarding antitrust issues in daily business operations and special guidance to employees where antitrust exposure was highest, such as those who dealt with trade associations. See Hatfield, The Impact of Antitrust Requirements on Corporate Activities Today, 48 Antitrust L.J. 211, 212-23 (1979) (According to the corporation's president, the "benefit [of the program] to the shareholders, employees and the general public far exceeds its costs.").

The president also noted that the program does not guarantee that the corporation will not be named as a defendant, but the "risks are minimized and even when an action is brought, the corporation's intent not to engage in unlawful behavior as evidenced by the program is pretty persuasive." Id. at 213.

\(^\text{159}\) The presumption of liability arising from failure to seek counsel or advice regarding the practice does not impose an onerous burden as it would impute liability only where the executive was grossly or perhaps willfully negligent in her failure to become informed. The question whether the entity was such that it reasonably could have consulted counsel for advice would be a question of fact. Consultation would not act as a grant of immunity but, as it may shed light on the officer's intent. That intent should be considered to divine the nature of the anticompetitive conduct. Cf. United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978) (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).
only the knowledge, either constructive or actual, that the conduct has a deleterious effect on market competition.\textsuperscript{160} Basing liability on the officer's recklessness, presumed by a failure to obtain expert advice, stops short of strict liability, as the defenses of good faith and impracticability may be considered.\textsuperscript{161} This requirement that the officer obtain counsel to evaluate the antitrust impact of the suggested conduct is not a strict liability approach and thus avoids the overdeterrence problem foreseen by \textit{Murphy Tugboat}.

The awareness requirement satisfies the competing concerns of deterrence and vigorous competition. The informed officer would forgo activity that she calculates would create an unreasonable risk of violation. Armed with the opinions of experts and legitimate business reasons for the conduct, the officer is able to participate without reservation in highly competitive conduct that falls short of a violation but improves the corporation's individual advantage. If one proposed activity bears an inordinate risk of liability, and therefore must be cancelled, the officer can find another means of competing that would pose a lesser threat to herself\textsuperscript{162} and, more important, a lesser threat of injury to the marketplace.\textsuperscript{163}

Accordingly, reliance on informed advice reduces the negative impact of the Sherman Act's vagueness.\textsuperscript{164} Although antitrust law is imprecise, it has a workable content that is sufficiently ascertainable to guide the officer and her experts in plotting the corporation's path.\textsuperscript{165} Given a better idea of the boundary between permitted and violative conduct, the officer will adjust the conduct to minimize risks. In addition, the officer's consultation with experts may enable juries to evaluate the officer's motives and goals should a suit over the conduct arise.

\textsuperscript{160} This awareness requirement parallels the common law restraint of trade requirement that is closest to antitrust law. See \textit{supra} note 48.

\textsuperscript{161} Cf. Restatement (Second) of Agency § 343 comment b (agent may be excused from personal liability for some torts committed on behalf of principal where principal gives agent reason to believe that certain facts exist to make an act privileged).

\textsuperscript{162} Louis Brandeis, prior to serving on the Supreme Court, testified before Congress that antitrust law should allow prospective violators to know there is a risk involved with their conduct, "so that a man, in respect to the Sherman law as in respect to a great many other things, would keep away from the danger line .... Now, under the Sherman law, as it exists to-day, men have been going near the danger line because apparently there was no danger to it." Hearings of Trust Legislation Before the House Comm. on the Judiciary, 63d Cong., 2d Sess. (1914), \textit{reprinted in part in} 2 E. Kintner, \textit{supra} note 94, at 1002.

\textsuperscript{163} See \textit{supra} note 16.

\textsuperscript{164} See \textit{supra} note 153.

\textsuperscript{165} The proposed standard actually works to the benefit of individual officers and their corporations by forcing the officers to consider fully the antitrust ramifications of their acts. The officer's examination of a plan to exchange price information will disclose that, although it is not considered a \textit{per se} offense, \textit{see} United States v. Container Corp. of Am., 393 U.S. 333, 339-40 (1969), such plans have "consistently been held to violate the Sherman Act." United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978). On the other hand, an officer will find price-cutting schemes now are unlikely to be viewed as predatory, \textit{see} Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593-95 (1986), and may be endorsed as furthering antitrust competition goals.
The consultation requirement is not burdensome to those larger entities that pose a greater threat of injury to the competitiveness of the market. It is flexible regarding smaller entities lacking the resources to obtain admittedly costly expert advice. Moreover, on an individual level, the proposed approach ensures that individuals who choose to take such risks act at their own peril, hardly a radical or unwelcome concept in the law.\textsuperscript{166}

**Conclusion**

The best approach to personal liability of corporate officers in private antitrust actions must steer between the possibility of deterring the aggressively competitive conduct antitrust law favors and the possibility of encouraging violative conduct by default. Considering these policy concerns, their proper interpretation in a civil antitrust context, and the reality of antitrust deterrents, a standard based on elements of the *Murphy Tugboat* and *Monarch* approaches is a whole greater than the sum of its parts. That standard would impose liability on an officer who participates in the offensive conduct while knowing or choosing to ignore that the conduct is likely to result in a violation of the Sherman Act. The alternatives are to excuse officers from liability and invite their violative conduct or to broaden their liability to the point where they may fear to compete.

*Gregory Walker*

\textsuperscript{166} President Wilson's Message to Congress, 51 Cong. Rec. 9079, 9074 (Jan. 20, 1914) ("Every act of business is done at the command or upon the initiative of some ascertainable group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they made illegal use.").