

PROSECUTING FAILED ATTEMPTS TO FIX PRICES AS VIOLATIONS OF THE MAIL AND WIRE FRAUD STATUTES: ELLIOT NESS IS BACK!

I. INTRODUCTION

Forbes magazine called them "Tough Guys."¹ Referring to the Justice Department's Antitrust Division, a recent *Forbes* article described the aggressive posture of federal prosecutors in going after unsuccessful antitrust violators.² The "trustbusters," as *Forbes* labeled the Justice Department attorneys, have begun to prosecute individuals who merely attempt to establish price-fixing agreements.³

Notably, these aggressive U.S. Attorneys have not used federal antitrust law to prosecute antitrust attempts. While § 1 of the Sherman Antitrust Act⁴ prohibits price-fixing between two or more individuals, it does not prohibit a mere attempt to fix prices.⁵ Instead, the U.S. Attorneys are prosecuting unsuccessful solicitations to fix prices under the federal mail⁶ and wire⁷ fraud statutes.⁸ The mail and wire fraud statutes prohibit "any scheme or artifice to defraud" through use of the United States mails or interstate wires.⁹ The Justice Department attorneys, and at least one federal

1. James Lyons, *Tough Guys*, FORBES, Apr. 15, 1991, at 94.

2. *Id.* This Note is primarily concerned with the Justice Department's policy of prosecuting individuals who have attempted to fix prices in an industry under the mail and wire fraud statutes rather than under the Sherman Act.

3. *Id.*

4. 15 U.S.C. § 1 (1988 & Supp. V 1993).

5. *Id.* Section 1 of the Sherman Act reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. By its very language, § 1 of the Sherman Act requires an agreement between two or more individuals or corporations. An individual or corporation acting alone cannot violate § 1. *See infra* notes 41-44 and accompanying text.

6. 18 U.S.C. § 1341 (1988 & Supp. V 1993).

7. 18 U.S.C. § 1343 (1988 & Supp. V 1993).

8. *See, e.g.*, United States v. Ames Sintering Co., 927 F.2d 232 (6th. Cir. 1990); United States v. Critical Indus., No. 90-318, slip op. (D.N.J. July 24, 1990).

9. 18 U.S.C. § 1341 (1988 & Supp. V 1993); 18 U.S.C. § 1343 (1988 & Supp. V 1993).

court of appeals,¹⁰ argue that when an individual asks another to fix prices, but is refused, such solicitation constitutes a “scheme to defraud” within the meaning of the mail and wire fraud statutes.¹¹ However, this argument disregards the fact that Congress, in drafting the Sherman Act, specifically chose not to prohibit this type of conduct.

Section 1 of the Sherman Antitrust Act proscribes any “contract, combination . . . or conspiracy” in restraint of trade.¹² This provision contains broad language deliberately designed to allow expansion to meet the changing realities of the American market and the creative minds of those who seek to manipulate it.¹³ Yet, by placing unilateral attempts to fix prices beyond the reach of the statute, Congress implied that such attempts do not present the same dangers presented by successful acts of price-fixing.¹⁴ And clearly it is the Sherman Act that speaks most directly to antitrust attempts. While defendants who attempt price-fixing clearly possess an evil intent and, therefore, should receive criminal punishment, the federal mail and wire fraud statutes are not the appropriate tool for meting out this punishment. Rather, the government should look to the Sherman Act to prosecute such defendants.

This Note will explore the application of the mail and wire fraud statutes to attempts to violate § 1 of the Sherman Act. Part II provides an overview of the Sherman Act and highlights its limited prohibition of attempts under § 2. Part III discusses the general principles of criminal attempt and solicitation law. Part IV provides an overview of the mail and wire fraud statutes and explains that these statutes, because they are not written clearly, have great potential for abuse. Part V criticizes the current

10. See *Ames Sintering*, 927 F.2d 232.

11. *Id.* at 235.

12. 15 U.S.C. § 1 (1988 & Supp. V 1993).

13. See *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911) (calling the Sherman Act an “all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation”); *United States v. American Tobacco Co.*, 221 U.S. 106, 181-82 (1911) (“[T]he first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed.”).

14. Attempts and completed crimes are mutually exclusive concepts. In all attempts, the ultimate goal of completing the crime is not realized. Virtually every general attempt statute requires that the crime attempted was not completed. Without this requirement, prosecutors could tack on an attempt charge to every criminal prosecution. Possibly, Congress believed that when an individual attempts to fix prices, but fails to obtain the agreement of another party, the individual presents no significant threat to the integrity of the market. Only when the individual achieves a contract, combination or conspiracy is there a sufficient level of danger to the free market to justify prosecution.

Department of Justice policy of prosecuting § 1 attempts under the mail and wire fraud statutes. Part V also shows how the application of the mail and wire fraud statutes to § 1 attempts is inconsistent with the Sherman Act and the law of fraud, and how anomalies result from such an application. Finally, Part VI provides a solution to the problems created by the Department of Justice's policy by proposing that Congress amend § 1 to prohibit attempts.

II. THE SHERMAN ANTITRUST ACT AND THE LEGAL EVOLUTION OF SECTIONS 1 AND 2

On July 2, 1890, Congress enacted the Sherman Antitrust Act,¹⁵ calling it "[a]n act to protect trade and commerce against unlawful restraints and monopolies."¹⁶ The Sherman Act was enacted in response to the country's increasing fear of the concentration of capital in large business combinations.¹⁷ These combinations increased inequality of wealth and opportunity and decreased market competition.¹⁸ The business combinations dominated

15. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209.

16. *Id.*; see also *Charles A. Ramsey Co. v. Associated Bill Posters of United States & Canada*, 260 U.S. 501, 512 (1923) ("The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade."). In *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958), the Supreme Court stated:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. . . . [T]he policy unequivocally laid down by the Act is competition.

Id. at 4-5. For a comprehensive discussion of the Sherman Act, see 1-5 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978); 1 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* § 4 (1980).

17. Referring to fears of the populace, Senator Sherman commented on the problems facing American society: "[N]one is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." 21 CONG. REC. 2560, 2455-73 (1890); see also *supra* note 16.

18. 21 CONG. REC. 2558 (1890). During deliberations over the Antitrust Act, Senator James L. Pugh of Alabama stated:

[T]he existence of trusts and combinations to limit the production of articles of consumption entering into interstate and foreign commerce for the purpose of destroying competition in production and thereby increasing prices to consumers has become a matter of public history, and the magnitude and oppressive and merciless character of the evils resulting directly to consumers and to our interstate and foreign commerce from such organizations are known and admitted everywhere

Id.

particular industries¹⁹ and wielded virtually unchecked economic power, manipulating both prices and output of goods. The victims of this new form of business entity were individual consumers who no longer derived the benefits of a truly competitive marketplace,²⁰ and small businesses who could not survive alongside these massive business conglomerates.²¹ Through the Sherman Act, Congress sought to restore competition to the marketplace: keeping supply and prices at market-determined levels and allowing individual business owners to compete in a given market.

A. Section 1

The Sherman Act contains two basic sections.²² Section 1 prohibits any "contract, combination . . . or conspiracy, in restraint of commerce among the several states."²³ Early courts interpreted this language literally and held that any contract or combination that had the effect of restraining trade violated § 1.²⁴ Soon, however, courts began to realize that virtually every business contract or combination restrains commerce to some degree.²⁵

19. Some of the more well known trusts existed in the sugar refining industry, *see* *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), tobacco industry, *see* *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), and oil industry, *see* *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

20. *See* generally PAUL A. SAMUELSON, *ECONOMICS* (8th ed. 1970) for a textbook discussion on basic economic theory.

21. Senator Sherman only opposed those combinations that sought to prevent competition: I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objects; but when they combine with a purpose to prevent competition, so that if a humble man starts a business in opposition to them, solitary and alone, in Ohio or anywhere else, they will crowd him down and they will sell their product at a loss or give it away in order to prevent competition . . . then it is the duty of the courts to intervene and prevent it by injunction

21 CONG. REC. 2569 (1890).

22. *See* 15 U.S.C. §§ 1, 2 (1988 & Supp. V 1993). The Sherman Act actually contains seven sections. However, the remaining five sections of the Act deal only with the procedural, jurisdictional and remedial aspects of the Act.

23. 15 U.S.C. § 1 (1988 & Supp. V 1993).

24. *See* *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897). *Trans-Missouri Freight* provides the clearest example of the Court's literal interpretation of § 1:

When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Id. at 328.

25. *See* *Board of Trade v. United States*, 246 U.S. 231 (1918). In *Board of Trade*, the Supreme Court recognized that "[t]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Id.* at 238.

Consequently, later cases looked to the legislative history of § 1 to determine precisely what type of restraint Congress sought to proscribe. A general rule emerged: only those contracts or combinations which unduly²⁶ or unreasonably²⁷ restrain interstate commerce are proscribed by § 1.

In *Standard Oil Co. v. United States*,²⁸ the Supreme Court adopted a Rule of Reason standard to determine whether a particular business arrangement unduly or unreasonably restrains interstate commerce.²⁹ The Rule of Reason calls for a reviewing court to scrutinize particular business conduct with one eye towards existing common-law formulations of restraint of trade³⁰ and the other towards the underlying policy of the Act.³¹ Because the primary goal of the Antitrust Act is to maintain competition in the market,³² the Rule of Reason standard is essentially a framework for determining when a specific type of restraint serves to suppress or destroy competition.³³

While the Rule of Reason provides the starting point for § 1 analysis, the Supreme Court has deemed certain types of anticompetitive conduct as

26. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) ("The statute under this view evidenced the intent not to restrain the right to make and enforce contracts . . . which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference that is an undue restraint.").

27. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). The *Northern Pacific* Court stated that a § 1 violation depends upon "whether a particular restraint has been unreasonable." *Id.* at 5.

28. 221 U.S. 1 (1911).

29. *Id.* at 59-62. The Court stated:

[T]he standard of reason which had been applied at common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

Id. at 60.

30. *Id.* at 60-61.

31. *Id.* at 60-62.

32. *See supra* note 16.

33. *See Board of Trade v. United States*, 246 U.S. 231, 238 (1918). In *Board of Trade*, Justice Brandeis described the appropriate factors for a court to consider in applying the Rule of Reason. In determining whether specific conduct serves to suppress or destroy competition,

the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id.

illegal per se.³⁴ Horizontal price-fixing³⁵ is one type of conduct³⁶ the Court has declared to be a per se violation of § 1.³⁷ In the Court's view, the act of fixing prices is so inherently anticompetitive that resort to the Rule of Reason³⁸ is unwarranted.³⁹ Thus, any concerted action to control the level of prices in a given market violates § 1, regardless of the conspirators' ability to accomplish the price-fix or to control the market once their agreement is carried out.⁴⁰

34. The per se doctrine was first articulated by the Supreme Court in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). In *Trenton Potteries*, the Court held that price-fixing agreements necessarily seek to eliminate competition and are never reasonable, regardless of the price set by the participants. *Id.* at 397-98.

35. Horizontal price-fixing refers to "price-fixing agreements between or among independent entities which compete on the same levels of product or service distribution." 2 KINTNER, *supra* note 16, § 10.3, at 74. Vertical price-fixing is also a per se violation of § 1. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). This Note, however, deals primarily with horizontal price-fixing.

36. Other types of conduct the Supreme Court has declared as potential per se violations of § 1 include group boycotts, see, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294-98 (1985), tying arrangements, see, e.g., *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 12-18 (1984), resale price maintenance, see, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951), *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-09 (1911), and horizontal market division, see, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 607-11 (1972). See also 1 KINTNER, *supra* note 16, § 8.3.

37. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In *Socony-Vacuum*, the Supreme Court clearly articulated the doctrine of per se illegality under § 1. The Court stated: "[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *Id.* at 223.

38. See *supra* notes 28-33 and accompanying text for a discussion of the Rule of Reason standard.

39. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). In *Trenton Potteries*, the Supreme Court discussed the peculiar evils of price-fixing and rejected the Second Circuit's holding that courts should consider the reasonableness of a particular agreement. The Court stated:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints

Id. at 397.

40. *Socony-Vacuum*, 310 U.S. at 224. In the now-famous footnote 59, Justice Douglas articulated the principle that price-fixing agreements are per se illegal even absent consideration of other factors such as market power, actual reduction in competition, or ability to carry out a price-fixing agreement:

[A] conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. . . . Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members

In order for a horizontal price-fixing violation to exist, however, § 1 requires the concerted action of at least two individuals.⁴¹ In drafting § 1, Congress chose to prohibit only a “contract, combination . . . or conspiracy.”⁴² Each of these terms clearly envisions some form of concerted action between two or more individuals.⁴³ Thus, § 1 does not appear to encompass any activities, even if anticompetitive, conducted solely by an individual.⁴⁴

B. Section 2

Section 2 of the Sherman Antitrust Act states that it shall be unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize” any part of interstate commerce.⁴⁵ Congress

of the combination . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

Id. at 224 n.59. *But see* Comment, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose or Effect*, 19 U. CHI. L. REV. 837, 857-59 (1952) (stating that footnote 59 is purely dictum and unnecessary to the Court’s decision); 2 KINTNER, *supra* note 16, § 10.2, at 74 n.63 (calling into question the soundness of footnote 59’s declaration that no inquiry into the defendant’s market power is required for price-fixing cases).

41. *See* 15 U.S.C. § 1 (1988 & Supp. V 1993); *see also infra* notes 42-43, 66-68.

42. 15 U.S.C. § 1 (1988 & Supp. V 1993). There is virtually no commentary as to why Congress chose to employ this language in formulating § 1 of the Sherman Act. Congress certainly could have utilized even broader language. For instance, § 1 might have prohibited any action undertaken in restraint of trade by any individual. This alternative formulation avoids the requirement of concerted action, reaching the activity of individuals acting alone. Moreover, it reaches the activity of individuals who cannot be prosecuted under § 2 because they lack monopoly power. Congress may have felt that, in the absence of monopoly power, an individual acting alone does not pose a degree of danger to the market that would warrant criminal liability. If indeed the absence of an attempt provision is based on this belief, then perhaps the Justice Department should not actively prosecute individuals for attempted price-fixing under different federal laws. Whatever its reasons, Congress deliberately chose to exclude the actions of a single individual acting alone, no matter how anticompetitive, from the parameters of § 1.

43. *See* *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (“[D]ecisional law . . . makes it clear there must be an *element of agreement*—that an agreement is the gist of the offense of price-fixing.”) (emphasis added). In his treatise on the antitrust laws, Earl W. Kintner, former Chairman of the Federal Trade Commission, stated that “[s]ince the proscribed activities of contracting, combining or conspiring cannot be performed by a single person acting alone, it is well-established that two or more persons are necessary to form an actionable contract, combination or conspiracy in restraint of trade.” 2 KINTNER, *supra* note 16, § 9.7, at 19 (footnote omitted).

44. Compare the discussion of § 2, *infra* notes 53-59 and accompanying text.

45. 15 U.S.C. § 2 (1988 & Supp. V 1993). The statute provides in relevant part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .” *Id.*

enacted § 2 to address concerns about the aggregation of economic power in the hands of any one individual or entity.⁴⁶ Like § 1, § 2 prevents the acquisition of monopoly power because such power is inherently anticompetitive.⁴⁷ A monopoly allows a seller to dictate both the price at which it sells its product and the quantity of product it places in the market.⁴⁸ Moreover, due to the lack of competitors in the industry, the monopolistic seller has little incentive to improve the quality or safety of its product.⁴⁹ Such conduct defeats the primary goal of the Sherman Act: “free and unfettered competition.”⁵⁰ Thus, § 2 complements and supports the goals pursued in § 1⁵¹ by prohibiting anticompetitive conduct not only by groups, but also by individuals.⁵²

The most significant difference between §§ 1 and 2 of the Sherman Act is that while § 2 prohibits attempted monopolization, § 1 does not contain any attempt provisions.⁵³ In *American Tobacco Co. v. United States*,⁵⁴ the Supreme Court found that an attempted monopolization must present a certain level of danger to the market before it violates § 2.⁵⁵ The Court defined attempted monopolization as the “employment of methods, means

46. See 2 KINTNER, *supra* note 16, § 11.1.

47. See *supra* notes 15-21 and accompanying text.

48. See 2 KINTNER, *supra* note 16, § 11.3.

49. *Id.*

50. *Northern Pacific Ry.*, 356 U.S. at 4-5.

51. In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court discussed the relationship between §§ 1 and 2 of the Sherman Act:

[H]aving by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about . . . be not embraced within the general enumeration of the first section.

Id. at 61.

52. See 2 KINTNER, *supra* note 16, § 11.2. Looking at the legislative history of § 2, Kintner noted, “Congressional debates also state that the purpose of Section 2 was to condemn any individual who restrained trade by himself, because such behavior was ‘just as offensive and injurious to the public [interest] as if two had combined to do it.’” *Id.* at 304 (alteration in original) (citing 21 CONG. REC. 3152 (1890)).

53. 15 U.S.C. § 2 (1988 & Supp. V 1993). The existence of an attempt provision in § 2 is not the only difference between the first two sections of the Sherman Act. As discussed above § 1 requires the concerted action of two or more individuals while § 2 reaches the conduct of individuals acting alone. Additionally, §§ 1 and 2 provide for different remedies and punishments in criminal actions. For the purposes of this Note, however, the absence of an attempt provision in § 1 is the most important difference between the two sections.

54. 328 U.S. 781 (1946).

55. *Id.* at 784-86.

and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it"⁵⁶ Thus, attempted monopolization exists when an individual or group of individuals,⁵⁷ possessing sufficient power to monopolize the market,⁵⁸ acts to achieve monopoly power through deliberately anticompetitive conduct.⁵⁹

The Fifth Circuit further defined the concept of attempted monopoliza-

56. *Id.* at 785. The offense of attempted monopolization requires proof of three essential elements: (1) predatory or anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 886 (1993). In *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand described the element of specific intent: "[C]onduct falling short of monopoly is not illegal unless it is part of a plan to monopolize To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent'" *Id.* at 431-32; see also *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

In *Swift & Co. v. United States*, 196 U.S. 375 (1905), Justice Holmes applied criminal law formulations of attempt to attempted monopolization under the Sherman Act: "Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law." *Id.* at 402. *But see* *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.) ("We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. . . . [T]he specific intent itself is the only evidence of dangerous probability the statute requires" (citations omitted), *cert. denied*, 377 U.S. 993 (1964)).

57. It is well established that two or more individuals may be convicted of attempted monopolization if their combination would result in monopoly power for a given market. See *infra* notes 60-68 and accompanying text.

58. Fear of this ability to monopolize the market may have prompted Congress to include attempts in § 2 but not § 1. If an individual or entity has such a significant share of a market that, either acting alone or with the cooperation of another competitor, it can monopolize that particular market, danger exists as soon as the individual or entity takes steps towards monopolization. On the other hand, if an individual or entity does not possess sufficient power to create a monopoly, it presents no real threat to the market and does not endanger the effective working of market forces. For this latter type of individual or entity, the Sherman Act requires concerted action (a contract, combination, or conspiracy) with another entity before liability attaches. In the absence of monopoly power, Congress may have believed that, prior to an agreement, no danger exists. Therefore, in accordance with general attempt doctrine, the individual or entity has not yet taken sufficient steps towards completing the crime.

59. See *Swift & Co. v. United States*, 196 U.S. 375 (1905). In *Swift*, Justice Holmes stated: Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

Id. at 396 (citations omitted).

tion in *United States v. American Airlines, Inc.*⁶⁰ In *American Airlines*, the Fifth Circuit held that a mere solicitation to monopolize constitutes attempted monopolization,⁶¹ if acceptance of the solicitation would have created monopoly power.⁶² The court attached little significance to the fact that the solicitation was rejected, because attempted monopolization does not require an agreement between two parties.⁶³ Rather, the court examined the hypothetical aggregate market share of the two companies and found that acceptance of the defendant's offer would have created monopoly power.⁶⁴ Thus, liability under § 2 turns not on the evil intent of the defendant, but solely on the defendant's power to monopolize the market.⁶⁵ In the course of its opinion, the Fifth Circuit made it clear that the defendant's failed solicitation to fix prices did not also violate § 1 because § 1 requires concerted action⁶⁶ and has no attempt provision.⁶⁷ Therefore, the defendant's failed solicitation violated only § 2 of the Sherman Antitrust Act.⁶⁸

60. 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985). In *American Airlines*, Robert Crandall, president of American, called Howard Putnam, the president of Braniff, and proposed that both airlines raise their prices at the Dallas-Fort Worth International Airport (DFW) in order to squeeze out the other airlines at DFW. *Id.* at 1115-16. Together, the two airlines controlled 90% of flights passing through DFW. *Id.* at 1116. Putnam rejected Crandall's offer and gave the government a recording of the telephone call in which Crandall proposed his scheme. *Id.*

61. *Id.* at 1121.

62. *Id.* at 1118.

63. *Id.* at 1122. The District Court held that an agreement was necessary for attempted monopolization. *United States v. American Airlines, Inc.*, 570 F. Supp. 654, 659 (N.D. Tex. 1982). The Fifth Circuit rejected the District Court's construction of § 2 and stated that under such a reading, an individual is given a strong incentive to propose the formation of cartels. If the proposal is accepted, monopoly power is achieved; if the proposal is declined, no antitrust liability attaches. If section 2 liability attaches to conduct such as that alleged against Crandall, naked proposals for the formation of cartels are discouraged and competition is promoted. *American Airlines*, 743 F.2d at 1122.

64. The Fifth Circuit succinctly stated that "if Putnam had accepted Crandall's offer, the two airlines, at the moment of acceptance, would have acquired monopoly power." *Id.* at 1118.

65. *See supra* notes 58-59 and accompanying text.

66. 743 F.2d at 1122; *see also supra* notes 41-44 and accompanying text.

67. 743 F.2d at 1122.

68. *Id.* The court stated: "That [Crandall] was not able to price fix and thus, has no liability under Section 1, has no effect on whether his unsuccessful efforts to monopolize constitute attempted monopolization." *Id.*

II. THE LAW OF CRIMINAL ATTEMPT AND SOLICITATION

A. Attempt

Individuals who undertake to commit a crime but who fail in their efforts are often prosecuted under general attempt statutes. The prohibition of attempts reflects society's belief that those who attempt to commit a crime, but do not complete it, are morally culpable and should not escape punishment merely because their criminal efforts were unsuccessful.⁶⁹ Similarly, solicitation statutes punish individuals who seek to encourage others to commit crimes. While the solicitor is not the actual perpetrator, he or she clearly possesses an evil intent to accomplish an illegal act.

In deciding cases of attempted monopolization, courts frequently look to general principles of criminal attempt law. However, courts consistently struggle to define the precise character of an "attempt." Describing the difficulty inherent in the notion of attempt, the Second Circuit stated that "[t]he determination whether particular conduct constitutes . . . [an attempt] is so dependent on the particular facts of each case that, of necessity, there can be no litmus test to guide the reviewing courts."⁷⁰ Nonetheless, most formulations of attempt tend to focus on the intention of the actor and the actions taken in furtherance of the crime.⁷¹ Generally, an attempt occurs when a defendant takes some action constituting a "substantial step" towards the commission of a crime.⁷²

69. See *infra* note 218.

70. *United States v. Ivic*, 700 F.2d 51, 66 (2d Cir. 1983) (citing *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980)).

71. See *State v. Young*, 271 A.2d 569 (N.J. 1970), *cert. denied*, 402 U.S. 929 (1971). In *Young*, the New Jersey Supreme Court noted: "[G]enerally a line is sought to be drawn between an 'attempt' and mere 'preparation,' preparation itself not being punishable as an attempt." *Id.* at 578. The court distinguished from attempt the notion of conspiracy, which punishes a mere agreement, unaccompanied by any conduct: "The conspiracy was itself punished, realistically, not because the act of agreeing to seek an unlawful end was itself hurtful, but rather because the combination of the wills of several was 'much more likely to result in evil consequences than the mere intent of only one person.'" *Id.* (quoting 3 BURDICK, LAW OF CRIME § 984, at 435 (1946)).

72. See, e.g., *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974) (stating that, to constitute criminal attempt, "the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime"), *cert. denied*, 419 U.S. 1114 (1975); *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976) (adopting the substantial step test articulated in *Mandujano*); MODEL PENAL CODE § 5.01(1) (1985) (stating that a person is guilty of an attempt if he "purposely does or omits to do anything that . . . is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime"). See generally SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 651 (Richard A. Epstein et al. eds.,

Many federal and state criminal statutes contain specific attempt provisions that prohibit attempts of particular crimes.⁷³ In addition, the vast majority of state criminal codes contain general attempt provisions unconnected to any particular crime.⁷⁴ These general attempt statutes essentially provide that it is unlawful to attempt to commit any crime described in that state's criminal code.⁷⁵ However, the term "crime" refers only to violations of state law, not federal law.⁷⁶ Therefore, federal prosecutors may not use state general attempt statutes to prosecute individuals for attempting to violate § 1 of the Sherman Act. Moreover, no parallel federal general attempt statute exists. Therefore, attempted price-fixing, without further illegal conduct, is not a punishable offense.

B. Solicitation

Related to the notion of criminal attempt is the act of solicitation to commit a criminal offense. At common law, the solicitation of another to commit any crime is, in itself, a crime.⁷⁷ However, the majority of state criminal codes do not classify general solicitation as an independent offense.⁷⁸ Rather, most state codes criminalize only the solicitation of

5th ed. 1989) (noting that approximately one-half of the states and two-thirds of the federal circuits have adopted some form of the substantial step test).

73. For example, some states simply include an attempt provision within the actual statutory definitions of robbery, kidnapping or other serious crimes. In these states, prosecutors may only charge an individual with an attempt to commit a crime if the statutory definition of the crime itself provides for its illegality.

74. See, e.g., CAL. PENAL CODE § 664 (West Supp. 1994) ("Every person who attempts to commit any crime, but fails . . . is punishable . . . where no provision is made by law for the punishment of such attempts . . ."); COLO. REV. STAT. ANN. § 18-2-101(1) (West Supp. 1994) ("A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense."); FLA. STAT. ANN. § 777.04 (West Supp. 1994) ("A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense . . . commits the offense of criminal attempt . . ."); IDAHO CODE § 18-306 (1994) ("Every person who attempts to commit any crime, but fails . . . is punishable, where no provision is made by law for the punishment of such attempts . . ."); ILL. REV. STAT. ch. 38, para. 8-4 (Supp. 1994) ("A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense."); VA. CODE ANN. § 18.2-26 (Michie Supp. 1994) ("Every person who attempts to commit an offense which is a noncapital felony shall be punished . . .").

75. See *supra* note 74.

76. Therefore, were price-fixing a state crime, state prosecutors could indict individuals for attempted price-fixing. Of course, the conduct of the individual would have to meet the general requirements for an attempt; that is, the individual would have to have taken a substantial step towards completion of the crime. See *supra* note 70 and accompanying text.

77. KADISH & SCHULHOFER, *supra* note 72, at 657.

78. *Id.*

specific crimes.⁷⁹

In contrast to the majority of state criminal codes, the Model Penal Code contains a provision prohibiting solicitation generally.⁸⁰ The Model Penal Code takes the position that an individual who solicits another to commit a crime possesses evil intent and has undertaken substantial efforts to carry out a crime.⁸¹ Generally, criminal law does not punish an evil intent alone but rather requires some *actus reus*, or conduct towards the commission of a crime. In the crime of solicitation, the soliciting words constitute the *actus reus*.⁸² Thus, according to the Model Penal Code, someone who solicits another to commit a crime is a person whom the state should punish.

Thus, notions of criminal attempt and criminal solicitation reflect society's concern with individuals other than the successful perpetrator of criminal acts. Attempt provisions evince a desire to punish those who attempt to commit a crime but fail in their efforts. Solicitation statutes express society's concern with those who seek out others to either join them in the commission of a crime or to commit a crime for them.

IV. THE HISTORY AND INTERPRETATION OF THE MAIL AND WIRE FRAUD STATUTES

Congress enacted the mail fraud statute⁸³ in 1872 in an effort to revise

79. *Id.*

80. MODEL PENAL CODE § 5.02 (1985).

81. MODEL PENAL CODE § 5.02 cmt. 1 (1985). Comment one states that "[p]urposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to call for liability. Moreover, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability" *Id.*

82. Sanford H. Kadish and Stephen J. Schulhofer articulated this firmly established principle in their comprehensive textbook on criminal law:

It should be remembered that while the common law requires an act as well as an accompanying state of mind (*mens rea*) . . . words are a kind of act and are treated as such for some purposes. In cases of . . . solicitation, conspiracy, or aiding and abetting another to commit a crime through instruction or encouragement . . . words are sufficient to constitute the *actus reus* of the crime.

KADISH & SCHULHOFER, *supra* note 72, at 198 n.3. The authors also questioned whether this principle is consistent with the notion that individuals should not be held criminally liable for evil thoughts alone. *Id.* at 198 n.4.

83. The mail fraud statute was originally enacted as only one section in a broad act addressing changes in the post office. See Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323. The mail fraud statute was later codified separately as the Act of June 25, 1948, ch. 645, 62 Stat. 763 (codified as amended at 18 U.S.C. § 1341 (1988)). For a comprehensive analysis of the history of the mail fraud statute, see Jed S. Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 DUQ. L. REV. 771 (1980).

existing laws related to the post office.⁸⁴ In response to modern communication technologies, Congress later enacted the wire fraud statute⁸⁵ to reach frauds perpetrated through the use of interstate wires.⁸⁶ Since the enactment of the wire fraud statute, courts and commentators have consistently treated each statute as prohibiting essentially the same conduct.⁸⁷ The statutory language is nearly identical,⁸⁸ the only difference is the method through which fraud is accomplished.⁸⁹ To avoid unnecessary repetition, this Note will focus upon the mail fraud statute. This Note's analysis and conclusions, however, apply with equal force to the wire fraud statute.

Congress enacted the mail fraud statute⁹⁰ to bring various types of fraudulent conduct under federal control.⁹¹ The mail fraud statute prohibits

84. See Rakoff, *supra* note 83, at 779.

85. 18 U.S.C. § 1343 (1988 & Supp. V 1993) (originally added to Mail Fraud Act in Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722).

86. The federal wire fraud statute requires the use of some form of interstate wire in execution of the fraudulent scheme. *Id.* Interstate wires include such things as telephone lines, television, radio, and internet computer lines.

87. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); 2 KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* § 8:60 (2d ed. 1991) (noting that "statutes that are *in pari materia* should be given parallel construction").

88. Compare 18 U.S.C. § 1343 (1988 & Supp. V 1993) with 18 U.S.C. § 1341 (1988 & Supp. V 1993).

89. See John E. Gagliardi, Comment, *Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346*, 68 WASH. L. REV. 901, 902 n.4 (1993). While the mail fraud statute requires use of the U.S. mails to further a fraudulent scheme, the wire fraud statute requires use of the interstate communication wires. *Id.*

90. 18 U.S.C. § 1341 (1988 & Supp. V 1993). The mail fraud statute provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both . . .

Id.

91. See Rakoff, *supra* note 83, at 779-80. Rakoff identified two main factors that prompted the extension of federal authority into the area of common fraud, an area previously governed by the states. First, a national economy developed, resulting in increased large-scale financial fraud and swindles. Because these fraudulent schemes extended beyond state borders, state laws were ill-equipped to deal with them. Thus, federal action appeared necessary to fill the gaps in state fraud law. Second, after the Civil War, the reconstructionist government perceived itself as having expansive power and, accordingly, promulgated its statutes with broad, sweeping language. *Id.* (citing W. DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC* 224-37 (1962); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 406 (1959)).

any "scheme or artifice to defraud" executed through use of the U.S. mails.⁹² Since the statute's enactment courts have struggled to discern what Congress intended to encompass within the term "scheme to defraud."⁹³ The only available legislative history is a statement by Congressman Farnsworth, the House sponsor of the statute.⁹⁴ Congressman Farnsworth stated that Congress intended the mail fraud statute "to prevent the frauds which are mostly gotten up in large cities . . . by thieves, forgers, and rascallions generally, for the purposes of deceiving and fleecing the innocent people in the country."⁹⁵ Unfortunately, this broad, overarching statement gives little assistance to courts in attempting to define the boundaries of the statute. As a result, courts have largely fashioned their own interpretations of the appropriate scope of the statute.⁹⁶

The original version of the mail fraud statute was entitled "Penalty for Misusing the Post-Office Establishment."⁹⁷ The statute contained extensive references to the post office, leading the Supreme Court to declare that one of the elements of mail fraud is the intent to effectuate the fraud through the postal system.⁹⁸ Consequently, early interpretations of the mail fraud statute concluded that use of the United States mails, rather than the underlying fraud, was the "gist of the offense."⁹⁹

Consistent with this focus on use of the mails, early courts interpreted the mail fraud statute as an area of the law in which Congress' authority was plenary. Indeed, in *Badders v. United States*,¹⁰⁰ the Supreme Court held that Congress' may prohibit any act which affects the postal system

92. 18 U.S.C. § 1341 (1988 & Supp. V 1993). The remainder of this Note will use "scheme or artifice to defraud" and "scheme to defraud" interchangeably. The statutory language is "scheme or artifice to defraud," but courts and commentators frequently use the shorthand version, "scheme to defraud," when referring to both the mail and wire fraud statutes.

93. See Rakoff, *supra* note 83, at 789.

94. See, e.g., *McNally v. United States*, 483 U.S. 350, 356 (1987) (citing to Congressman Farnsworth's statement in analyzing the proper scope of the mail fraud statute); Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 424 (1983). In fact, Farnsworth's bill failed in the 41st Congress, but was reintroduced during the 42nd Congress and was subsequently enacted into law in 1872. See Hurson, *supra*, at 424 n.8.

95. Hurson, *supra* note 94, at 424 n.8 (citing CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870)).

96. See Rakoff, *supra* note 83, at 789-90.

97. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

98. See *Stokes v. United States*, 157 U.S. 187, 188-89 (1895).

99. See *Milby v. United States*, 120 F. 1, 3 (6th Cir. 1903); *United States v. Clark*, 121 F. 190, 191 (M.D. Pa. 1903); see also *United States v. Young*, 232 U.S. 155, 159 (1914); *Badders v. United States*, 240 U.S. 391, 393 (1916).

100. 240 U.S. 391 (1916).

and which it deems contrary to public policy, whether or not Congress can prohibit the underlying conduct itself.¹⁰¹ Under this interpretation, courts could avoid defining the scope of "scheme or artifice to defraud" by concluding that the substance of mail fraud is misuse of the mails.¹⁰² Indeed, a number of courts relied on *Badders* to find summarily that even if conduct does not violate general common-law concepts of fraud, it is still punishable under the mail fraud statute.¹⁰³

In 1909, Congress amended the mail fraud statute¹⁰⁴ and removed a substantial portion of the language that emphasized the use of the mails.¹⁰⁵ After the amendment, the statute no longer required an intent to effectuate a fraudulent scheme through the use of the mails.¹⁰⁶ Rather, the use of the mails could be an incidental, even insignificant, aspect of a defendant's fraudulent scheme.¹⁰⁷ In effect, use of the mails was reduced to a bare "jurisdictional" element¹⁰⁸ and fraud became the "gist of the offense."¹⁰⁹

101. *Id.* at 393. Justice Holmes quickly disposed of the defendant's constitutional challenge that the mail fraud statute as applied was beyond the reach of Congress' power. *Id.*

102. See Rakoff, *supra* note 83, at 818-19. Rakoff noted that:

[T]o those courts that desired to give the statute a broad application, there was great advantage in . . . declaring that the "gist" of the offense was the misuse of the mails, for it seemed to follow that one did not have to inquire too deeply into the nature and scope of the schemes to defraud or into whether they were appropriate or intended subjects of federal criminal concern.

Id.

103. See, e.g., *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied* 417 U.S. 909 (1974) (stating that the mail fraud statute is designed to prohibit the misuse of the mails and thus "scheme to defraud" is to be construed broadly). See generally Rakoff, *supra* note 83, at 818-19 (citing cases which "blindly reiterat[e]" the idea of the mailing as the gist of the offense to avoid defining scheme to defraud).

104. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130.

105. See Rakoff, *supra* note 83, at 816. Rakoff noted that the 1909 amendment reduced the mailing aspect of the crime to the "bare third element." *Id.*

106. *Id.* at 816-17.

107. *Id.* at 817. Rakoff summarized the effect of the 1909 amendment by stating:

[I]t no longer made sense to say that the statute aimed to deter the abuse of the mail system, because the defendant no longer had to intend any use of the mails whatsoever; the minimal use of the mails that would trigger the statute could, within broad limits, be an incidental or even accidental accompaniment of the defendant's fraudulent scheme.

Id. at 816-17.

108. *Id.* at 819. Commenting on the effect of the 1909 amendment, Rakoff concluded that "at least since the 1909 amendment, the sole genuine purpose of the mail fraud statute has been to prosecute fraud and the mailing has served primarily as a basis for invoking federal jurisdiction." *Id.*

109. Not every court has abandoned the view that mailing is the "gist of the offense." Some still adhere to the old interpretation of the statute and ignore the fraud element of the crime. See *supra* note 102-03 and accompanying text.

Upon this shift of focus from use of the mails to fraud, courts began to address the proper scope of the term scheme to defraud.¹¹⁰ This has proven to be the most difficult and controversial task for courts interpreting the mail fraud statute.¹¹¹ Early courts defined scheme to defraud broadly, in part because they still viewed the use of the mails as the substance of the offense.¹¹² The Fifth Circuit went so far as to say that the concept of fraud "needs no definition."¹¹³ Similarly, Chief Justice Burger termed the mail fraud statute the "first line of defense"¹¹⁴ against new types of fraud because the statute can be used as a "stop-gap" device to deal with such fraud until the government has time to respond with specific legislation.¹¹⁵

This broad formulation of the term scheme to defraud is not unanimously accepted, however. Some courts have expressed concern with the expansive definitions of the term and have refused to apply the statute to particular conduct.¹¹⁶ Typically, these courts argue that the mail fraud statute is primarily a jurisdictional statute, and, thus, courts should look to common law and statutory law to determine proper boundaries of the statute.¹¹⁷

110. See *infra* notes 111-27 and accompanying text. For a comprehensive discussion of the current status of the mail fraud statute, see 2 BRICKEY, *supra* note 87, §§ 8:32-8:41.

111. Remarking on the difficulty inherent in defining "scheme to defraud," the Eighth Circuit noted, "[Because] the forms of fraud are as multifarious as human ingenuity can devise . . . [it is] difficult, if not impossible, to formulate an exact, definite and all-inclusive definition [of it]." *Isaacs v. United States*, 301 F.2d 706, 713 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962).

112. See Rakoff, *supra* note 83, at 798-99.

113. *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.), *reh'g denied*, 314 U.S. 687 (1941).

114. *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

115. *Id.* at 405-06. Burger stated, "The criminal mail fraud statute must remain strong to be able to cope with the new varieties of fraud that the ever-inventive American 'con-artist' is sure to develop." *Id.* at 407.

The notion that the mail and wire fraud statutes can be used to prosecute unique and newly developing forms of fraudulent conduct may give rise to constitutional challenges to the statute. Defendants may claim that the statute is unconstitutionally vague or that they were not given fair notice that their conduct violated the law. In most cases, however, the defendants will have to struggle mightily to convince a judge that they were unaware their actions violated the law. See John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 7 (1983). Coffee noted that courts that have expanded the statute beyond its intended scope justify their expansions by stating that the defendant's conduct so clearly fell short of a "common social duty" that the defendant may not claim a belief that the behavior was legally proper. *Id.* As Coffee put it, "[C]ourts have often shown little sympathy for those who overstep clear civil or moral lines in the belief that their conduct fell just short of conduct classified as criminal." *Id.*

116. See, e.g., *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Pisani*, 773 F.2d 397 (2d Cir. 1985).

117. These courts seem to believe that Congress merely used the mail fraud statute to create federal jurisdiction for certain crimes that were formerly within the sole province of state law. Under this

Where the underlying conduct is not prohibited by state statute or common law, these courts decline to use the mail fraud statute to criminalize such conduct.¹¹⁸ As stated by the Supreme Court in *McNally v. United States*:¹¹⁹

It may well be that Congress could criminalize using the mails to further [the defendant's conduct] But if state law expressly permitted or did not forbid [the defendant's conduct] . . . it would take a much clearer indication than the mail fraud statute evidences to convince us that [such conduct] . . . defrauds the State and is forbidden under federal law.¹²⁰

That is, because the mail fraud statute primarily confers federal jurisdiction, if conduct does not reflect typical notions of fraud, courts must resort to other law to determine whether the conduct is indeed a "scheme to defraud."¹²¹

Notwithstanding this conflict over the precise scope of the mail and wire fraud statutes, the statutes have been used to prosecute a wide range of conduct that allegedly defrauds another of money, property, or the right to honest services.¹²² In some cases the statutes appear to have been applied to situations not envisioned by Congress. For example, in *United States v. Condolon*,¹²³ the Fourth Circuit sustained a wire fraud conviction for a

interpretation, Congress did not intend to create a new substantive crime of fraud but merely to federalize already illegal conduct. Possibly, these courts believe that if Congress had really meant to create more than a jurisdictional statute, it would have defined "scheme to defraud." On the other hand, Congress may have really felt that it had overarching power and may have truly intended to create a generic fraud statute.

118. In *Pisani*, the defendant was a state senator charged with multiple counts of mail fraud. 773 F.2d at 400. The district court convicted the defendant of mail fraud in connection with the diversion of campaign funds to pay for the defendant's personal and family expenses. *Id.* The Second Circuit reversed and held that, because New York state law did not expressly prohibit personal use of campaign funds, the defendant's conduct was not a fraudulent scheme proscribed by the mail fraud statute. *Id.* at 409-11.

119. 483 U.S. 350 (1987).

120. *Id.* at 361 n.9. *But cf. id.* at 377 n.10 (Stevens, J., dissenting) (arguing that the mail fraud statute is a self-supporting statute that prohibits specific substantive conduct, apart from any other state law).

121. Other courts have expressly rejected the proposition that the mail fraud statute only reaches conduct already prohibited under other statutory or common law. *See United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980) (holding that the mail fraud statute does not require a violation of some other state or federal law); *United States v. Lindsey*, 736 F.2d 433, 436 (7th Cir. 1984) (reiterating and relying on the holding of *Kreimer*); *see also McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting).

122. 2 BRICKEY, *supra* note 87, §§ 8:42-8:56.

123. 600 F.2d 7 (4th Cir. 1979).

fraudulent scheme to seduce women.¹²⁴ In *United States v. Bronston*,¹²⁵ the Second Circuit upheld a wire fraud conviction for what amounted to little more than a conflict of interest between a lawyer and a client.¹²⁶ It is precisely these types of cases which demonstrate the problems inherent in the overly broad language of the mail and wire fraud statutes.¹²⁷

V. APPLICATION OF THE MAIL AND WIRE FRAUD STATUTES TO § 1 BEHAVIOR

A. Current Policy at the Antitrust Division

Over the past several years, the Department of Justice's Antitrust Division has adopted an increasingly aggressive posture towards unsuccessful antitrust violators.¹²⁸ Frequently, conduct leading to an antitrust

124. *Id.* at 8-9. In *Condolon*, the Fourth Circuit upheld a wire fraud conviction for what was essentially an elaborate scheme through which the defendant met and seduced women. *Id.* at 8. The defendant established a bogus talent agency and represented to various women that he could place them in acting and modeling jobs. In return for his efforts, the defendant requested sexual favors. However, the defendant never fleeced them of money or property; sexual favors were the quid pro quo. The Fourth Circuit stated that "[the defendant's] enterprise was solely a scheme to satisfy his sexual desires." *Id.* at 8. Nevertheless, the court upheld the wire fraud convictions because the women were defrauded of their time, effort, and money in pursuing employment through the defendant. *Id.* at 9.

One could argue that the scheme in *Condolon* is tantamount to a young man or woman's efforts to win over an object of affection by pretending to have a worldly occupation or significant family wealth. If such representations were untrue, and made over the telephone during the courtship, would the government have a case of wire fraud on their hands? Could the admired realistically claim that she was defrauded of her time and effort just as the victims in *Condolon* were defrauded of their time and effort? Admittedly, the facts in *Condolon* are far more egregious and morally reprehensible than those in the hypothetical courtship. Yet, the logic and reasoning of *Condolon* appear to permit the imposition of criminal liability on the hypothetical young admirer. Clearly, this liability is not what Congress had in mind when drafting the mail and wire fraud statutes. Unfortunately, Congress' drafting of the statutes allows such an anomalous result.

125. 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982).

126. *Id.* at 927. In *Bronston*, an attorney was convicted of mail fraud when he assisted a client in obtaining a franchise from the City of New York while his law firm was simultaneously representing competing investors. *Id.* at 922-26.

127. Commentators have argued that Congress should limit the scope of the statutes. See, e.g., Hurson, *supra* note 94, at 424. In his article calling for legislative action to limit the scope of the mail fraud statute, Hurson stated that "the federal mail fraud statute . . . has been expansively interpreted to invite federal prosecution of virtually every type of untoward activity known to man." *Id.* Also calling for the contraction of the mail fraud statute, Professor Coffee commented that "the reach of the statute continues to be extended further into sensitive areas not previously thought to be subject to the criminal law of fraud." Coffee, *supra* note 115, at 3; see also Rakoff, *supra* note 83, at 777-79 (stating that the overly broad language of the mail fraud statute renders it susceptible to irrational and unpredictable applications, and hence, to abuse).

128. See Gary Spratling & Phillip R. Malone, *Including Both Antitrust and Non-Antitrust Counts in Indictments: The Effect on the Prosecution and Defense of Criminal Cases*, in THE ANTITRUST

violation involves the commission of other federal crimes, such as mail and wire fraud,¹²⁹ false statements,¹³⁰ and tax evasion,¹³¹ among others.¹³² For instance, in fiscal year 1990, forty-seven percent of all antitrust indictments contained at least one related federal charge.¹³³ Aggregating federal offenses with Sherman Act violations has become the norm at the Department of Justice.¹³⁴

However, the aggressive stance of the Antitrust Division has not stopped at the inclusion of additional federal offenses. Antitrust prosecutors have charged defendants with mail and wire fraud alone when the defendant's conduct, while clearly in the nature of antitrust behavior, does not amount to a Sherman Act violation.¹³⁵

In *United States v. Ames Sintering Co.*,¹³⁶ federal prosecutors charged the defendants with two counts of wire fraud¹³⁷ and one count of conspiracy to commit wire fraud.¹³⁸ General Motors (GM) solicited bids from two companies to manufacture pressure plates to be installed in GM automobiles.¹³⁹ The defendant, Ames Sintering,¹⁴⁰ telephoned the vice president of its competitor, Deco-Grand, and proposed that they "rig" their

DIVISION AND THE FTC SPEAK ON CURRENT DEVELOPMENTS IN FEDERAL ANTITRUST ENFORCEMENT 1992, at 515 (PLI 1992 Corp. Law & Practice Course Handbook Series No. B-795, 1992) [hereinafter CURRENT DEVELOPMENTS].

129. 18 U.S.C. §§ 1341, 1343 (1988 & Supp. V 1993).

130. 18 U.S.C. § 1001 (1988 & Supp. V 1993).

131. 26 U.S.C. § 7201 (1988 & Supp. V 1993).

132. For a listing of other federal offenses frequently charged alongside Sherman Act violations, see Spratling & Malone, *supra* note 128, at 523.

133. *See id.* at 522.

134. *See, e.g.,* *United States v. Rubin*, 999 F.2d 194 (7th Cir. 1993) (defendant charged with one count of price-fixing under 15 U.S.C. § 1 and two counts of wire fraud).

135. *See infra* text accompanying notes 136-57.

136. 927 F.2d 232 (6th Cir. 1990).

137. *Id.* at 235. The indictment charged that the defendants did "knowingly and willfully transmit . . . by means of wire communications . . . signs, signals, or sounds in furtherance and execution of a scheme and artifice to defraud GM of money and property in violation of Title 18, United States Code, Section 1343." *Id.*

138. *Id.* at 234.

139. *Id.* at 233. In previous years, two companies provided General Motors (GM) with sintered pressure plates to use in its power steering systems. Defendant Ames previously supplied 40% of the sintered pressure plates to GM, and a competitor, Deco-Grand, Inc., provided GM with the remaining 60%. GM then requested bids from each company to supply GM with all of its pressure plates. In response, Ames' engineering manager telephoned the vice president of Deco-Grand and proposed that each company set its bid quote at a level at which each company could retain its previous share of GM's business. *Id.*

140. The indictment also charged Ames Sintering's engineering manager, the employee who proposed the price-fixing. *Id.* at 234.

bids to General Motors.¹⁴¹ The competitor's vice president decided to reject Ames' offer to fix prices and subsequently informed the government of Ames' suggestion.¹⁴² Unable to charge the defendants with a violation of the Sherman Act because no contract, combination, or conspiracy was formed,¹⁴³ the government instead indicted the defendants on two counts of wire fraud and one count of conspiracy to commit wire fraud.¹⁴⁴

The Sixth Circuit sustained the wire fraud convictions, holding that the defendant intended to defraud GM of money and property and used interstate wires to further its scheme.¹⁴⁵ The court noted that actual success is not an element of wire fraud,¹⁴⁶ because the wire fraud statute prohibits "scheme[s] to defraud," rather than fraud itself.¹⁴⁷

In *United States v. Critical Industries*,¹⁴⁸ the government returned an indictment charging wire fraud for an unsuccessful attempt to fix prices.¹⁴⁹ The United States District Court for the District of New Jersey upheld the wire fraud indictment, stating that an attempt to fix prices at

141. *Id.* at 233.

142. *Id.*

143. A mere attempt to fix prices does not violate § 1 of the Sherman Act. The statute requires a contract, combination, or conspiracy. *See supra* notes 22-44 and accompanying text.

144. *Ames Sintering*, 927 F.2d at 234. Although bid-rigging schemes are frequently prosecuted under § 1 of the Sherman Act, the government has also successfully prosecuted such schemes under the mail and wire fraud statutes. *See, e.g.*, *Moore v. United States*, 865 F.2d 149 (7th Cir. 1989) (scheme to rig bids on a City of Chicago contract prosecuted under the mail fraud statute, without a Sherman Act count); *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988) (scheme to rig bid for a state contract prosecuted under the mail fraud statute without a Sherman Act count), *cert. denied*, 488 U.S. 1029 (1989).

145. *Ames Sintering*, 927 F.2d at 235-36.

146. *Id.* The court rejected the defendant's argument that no liability should attach because Deco-Grand's vice president never intended to carry out the proposed bid rigging. The court stated: "It is of no consequence that [the vice president's] cooperation with the government made the plan impossible to complete. The fact is, appellants developed a plan intending to deceive GM, and used interstate wire communications to execute it." *Id.* at 236. This holding and explanation by the Sixth Circuit seems close to the punishment of an evil intent alone. Clearly, the plan was not executed. This is not very different from an individual who asks his friend to help rob a bank, but the friend rejects the suggestion. Should this individual be subjected to criminal penalties for such a suggestion?

147. *Id.* at 236. The court cited *United States v. O'Malley*, 535 F.2d 589 (10th Cir.), *cert. denied*, 429 U.S. 960 (1976), for its description of wire fraud:

[It] is well established that in a prosecution under 18 U.S.C. § 1343 . . . the prosecution need not prove that the scheme was successful or that the intended victim suffered a loss or that the defendant secured a gain. The gist of the offense is a scheme to defraud and the use of interstate communications to further that scheme.

Ames Sintering, 927 F.2d at 235 (citing *O'Malley*, 535 F.2d at 592).

148. No. 90-318 (D.N.J. July 24, 1990).

149. The *Critical Industries* holding is discussed in Robert E. Connolly, *Do Schemes to Rig Bids and/or Fix Prices Constitute Fraud?*, in *CURRENT DEVELOPMENTS*, *supra* note 128.

inflated levels constitutes a scheme to defraud.¹⁵⁰ *Ames Sintering* and *Critical Industries* reflect the current aggressive intent of the Antitrust Division to prosecute anyone who even attempts to violate the Sherman Act. Moreover, court approval of these prosecutions suggests that the Justice Department's current policy will continue into the future.¹⁵¹

Neither the *Ames Sintering* nor the *Critical Industries* court articulated exactly why an unsuccessful attempt to fix prices constitutes a scheme or artifice to defraud.¹⁵² However, general principles of antitrust law,¹⁵³ help to illuminate how the courts found fraud in each case. Completed price-fixing defrauds the consumer¹⁵⁴ because the consumer believes that the price of each good has been set by the normal interplay of market forces.¹⁵⁵ If price-fixing is occurring, producers have agreed to set the price of their products at artificial levels. Thus, consumers pay more for the product than they would have in an open and free market.¹⁵⁶

However, in both *Ames Sintering* and *Critical Industries*, the defendants did not actually engage in fraudulent conduct.¹⁵⁷ The defendants merely proposed to engage in fraudulent conduct. Nonetheless, each court apparently relied on the "scheme" portion of the wire fraud statute to justify the convictions.

B. Limiting the Use of the Mail and Wire Fraud Statutes

In *McNally v. United States*,¹⁵⁸ the Supreme Court established a check

150. *Id.*

151. By sustaining these convictions for mail and wire fraud under the theory that the defendants conduct constitutes a "scheme to defraud," the federal courts have given the green light to federal prosecutors to aggressively pursue would-be antitrust violators.

152. See *United States v. Ames Sintering Co.*, 927 F.2d 232, 234-37 (6th Cir. 1990).

153. See *supra* Part II for a discussion of the Sherman Act.

154. For an analysis of how price-fixing and bid-rigging constitute fraud against the consumer, see Connolly, *supra* note 149.

155. *Id.* at 506. Connolly posits that bid-rigging and price-fixing defraud the consumer because "the consumer believes there is a competitive situation which in fact does not exist." *Id.* Using a purchaser of gasoline at a local filling station as an example, Connolly argues that such an individual justly believes that the price she is paying was set on the basis of supply and demand. When the price is set by a secret agreement, this gasoline purchaser is "the victim of a fraud." *Id.* at 509.

156. See generally SAMUELSON, *supra* note 20, at 37-69.

157. In both cases the defendants solicited other producers to join them in a price-fixing agreement. Both solicited parties rejected the defendants' offers and instead informed the government of the defendants' proposals. It appears that the solicited parties' actions in informing the government were not motivated by a sense of civic duty, but more likely were viewed as an effective method of harming the competition.

158. 483 U.S. 350 (1987).

on the seemingly limitless expansion of the mail and wire fraud statutes.¹⁵⁹ In *McNally*, the Court held that the mail fraud statute did not protect intangible rights, such as an individual's right to honest government.¹⁶⁰ In a concluding footnote, the Court articulated a principle that appeared to limit the overall expansion of the mail and wire fraud statutes: because the defendant's conduct did not violate a law other than the mail fraud statute, the Court would not construe the mail fraud statute to criminalize the defendant's behavior.¹⁶¹ This footnote suggests that the Court viewed the statute as essentially jurisdictional and, therefore, required violation of another law to support the notion that the defendant's underlying conduct was fraudulent.¹⁶²

Responding to the *McNally* decision, Congress enacted 18 U.S.C. § 1346, which expressly provides that the mail and wire fraud statutes protect intangible rights as well as property rights.¹⁶³ This provision in no way limits the force of the Court's reasoning in the *McNally* footnote, however, and is likely the response that the *McNally* Court envisioned as the appropriate method for expanding the scope of the mail and wire fraud statutes.¹⁶⁴ The *McNally* Court appeared to invite Congress to determine the proper scope of the statutes because it refused to allow use the mail fraud statute to prosecute conduct which the Court or Justice Department believed was bad in some moral sense.¹⁶⁵ Thus, the *McNally* Court's footnote still applies to limit the scope of the mail and wire fraud statutes.

159. See *supra* notes 122-27 and accompanying text.

160. *McNally*, 483 U.S. at 360-61.

161. *Id.* at 361 n.9.

162. Some may argue that the Court did not find the statute to be essentially jurisdictional. Under this analysis, the Court merely found that the defendant's conduct in *McNally* was not a scheme to defraud and, thus, the mail fraud statute should not apply. Yet, when one looks at the defendant's underlying conduct in *McNally*, it appears that the defendant actively perpetrated a fraud on the people of the state and the other companies that provided insurance to the government. *Id.* at 352-53. Indeed, if one compares the alleged fraud in *McNally* with the alleged frauds in *Critical Industries* and *Ames Sintering*, it is difficult to discern any substantive difference. If, in *McNally*, the Court only intended to state that "scheme to defraud" did not encompass defendants' conduct, then the Court would have found that "scheme to defraud" did not encompass the defendants' conduct in *Ames* and *Critical Industries*.

163. 18 U.S.C. § 1346 (1988). Thus, through legislative enactment, Congress nullified the holding of *McNally*. See *supra* notes 161-62 and accompanying text (discussing the holding in *McNally*).

164. The Court may have been disturbed by lower courts' unwarranted and unlimited expansion of the mail and wire fraud statutes to situations that Congress did not likely intend. Thus, the Court probably limited the scope of the statutes substantially in order to force Congress, if it desired, to protect intangible rights through legislation.

165. Because the language of the mail and wire fraud statutes is so general and imprecise, the Court deferred to Congress to articulate precisely what forms of behavior the statutes prohibit.

1. *The Sherman Act as a Limitation*

The difficult question is to what extent the mail and wire fraud statutes should be limited. The defendants in *Critical Industries* and *Ames Sintering* were found to have violated only the mail and wire fraud statutes. More importantly, through the Sherman Act, Congress has already spoken as to whether the defendants' conduct should be deemed to violate federal law. Because the defendants' conduct most closely resembles an antitrust violation, one must examine the antitrust laws to determine whether Congress intended to prohibit such conduct.

Congress spoke volumes when it deliberately left an attempt provision out of § 1 of the Sherman Act. By omitting attempts from § 1 (but criminalizing them in § 2), Congress indicated that attempts to fix prices do not violate the Sherman Act.¹⁶⁶ The conduct at issue in *Ames Sintering* and *Critical Industries* was deliberately excluded from the ambit of the antitrust laws. Yet, it is the Sherman Act which most directly addresses the defendants' behavior in *Ames Sintering* and *Critical Industries*.¹⁶⁷ Thus, because Congress, in drafting the Sherman Act, decided not to prohibit attempts to fix prices, utilizing the fraud statutes to criminalize such behavior seems to circumvent Congressional intent.¹⁶⁸

2. *The Concept of Fraud as a Limitation*

When Congress enacted the mail and wire fraud statutes it clearly intended to punish various types of fraudulent conduct.¹⁶⁹ Common-law definitions of fraud provide a good starting point to discern precisely what Congress intended prohibit.¹⁷⁰ The typical elements of common-law fraud

166. See *supra* notes 22-68 and accompanying text for a general discussion on the exclusion of attempts from § 1.

167. See *United States v. Rubin*, 999 F.2d 194, 199 (7th Cir. 1993) (holding that where defendant is indicted for wire fraud in connection with a price-fixing conspiracy, the antitrust section of Sentencing Guidelines should be applied because the essence of the defendant's conduct is antitrust in nature); see also *infra* notes 189-93 and accompanying text.

168. This is not to say, however, that attempts should not be prosecuted at all. See *infra* note 212.

169. See *supra* text accompanying notes 90-95. Although the legislative history on the enactment of the mail fraud statute is sparse, Congressman Farnsworth's statement gives some insight, albeit quite limited, into what Congress believed it was prohibiting through the statute.

170. Common-law formulations of fraud by misrepresentation require that the defendant engage in some form of active misrepresentation and that the misrepresentation be directed toward some individual or group of individuals. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 727-29 (5th ed. 1984). The defendant must act in an effort to deceive another and thereby gain something of value. *Id.* It is likely that in enacting the mail and wire fraud statutes Congress had such

include: a representation; its falsity; its materiality; the perpetrator's knowledge of its falsity or ignorance of its truth; the perpetrator's intent that the hearer will act upon the statement; the hearer's ignorance of the statement's falsity and reliance thereon; and resulting proximate injury.¹⁷¹ This formulation describes a victim who is deceived by another's fraudulent representation, and who is injured through reliance on that representation.¹⁷² Clearly, the victim's awareness of the false representation is necessary for a claim of fraud.

In enacting the mail and wire fraud statutes, it is unlikely that Congress sought to deviate from the common-law notion of fraud and eliminate the need for a misrepresentation or other deceit.¹⁷³ Indeed, until a misrepresentation is directed at a victim, no danger to any particular individual exists.¹⁷⁴ Yet, both the Sixth Circuit in *Ames Sintering*¹⁷⁵ and the New Jersey District Court in *Critical Industries*¹⁷⁶ upheld as a violation of the wire fraud statute a mere proposal to make a future misrepresentation.

Ames Sintering involved the defendant's solicitation of a competitor to rig the bids on a contract with General Motors.¹⁷⁷ *Critical Industries* involved the defendant's solicitation of a competitor to fix the prices at which each party would sell its product.¹⁷⁸ In neither case did the

common-law formulations of fraud in mind and sought to prevent individuals from carrying out these schemes through the use of the mails and interstate wires.

Admittedly, the scope of the mail and wire fraud statutes is not specifically limited to common-law definitions of fraud. See *Badders v. United States*, 240 U.S. 391, 393 (1916). Nonetheless, in attempting to give meaning to a statute which addresses fraud at its core, it seems appropriate to look to contemporary formulations of fraud to extrapolate such meaning.

171. *E.g.*, *St. Louis Union Trust Co. v. Merrill Lynch*, 562 F.2d 1040, 1054 (8th Cir.), *cert. denied*, 435 U.S. 925 (1977); *Merit Ins. Co. v. Colao*, 603 F.2d 654, 658 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

172. A typical scenario might involve an individual who mails out letters that inform the readers of a valuable investment opportunity in a particular piece of real estate. The letters solicit money from the readers with the promise that the real estate will reap substantial profits over time. In reality, however, the real estate does not exist and the sender has no intention of returning the investors' money, let alone any profits.

173. See *supra* text accompanying note 171 for a listing of the general elements of common-law fraud.

174. Misrepresentation is the essence of a fraud claim. Misrepresentation occurs when an individual, through conduct or language, makes a representation which in fact is false and, through reliance on this fraudulent representation, others are injured. Prior to the false representation, no individual could possibly be injured. An individual cannot rely on a representation that has not been made.

175. See *United States v. Ames Sintering Co.*, 927 F.2d 232, 233 (6th Cir. 1990).

176. See *United States v. Critical Indus.*, No. 90-318 (D.N.J. July 24, 1990).

177. See *supra* notes 136-47 and accompanying text.

178. See *supra* notes 148-51 and accompanying text.

defendant undertake any action directed at the potential victim of the fraud, the consumer.¹⁷⁹ The defendants never reached the point of misrepresentation. Rather, the defendants merely made proposals for future misrepresentations. Clearly, the defendants' behavior does not amount to actual fraud. Moreover, it is questionable whether this behavior even amounts to a "scheme to defraud" under the mail and wire fraud statutes.

One could argue that by employing the language "scheme to defraud," Congress intended to prohibit not only common-law fraud and its notion of misrepresentation, but, in addition, the very idea of fraudulent activity.¹⁸⁰ Yet misrepresentation is the essence of the term "defraud," and it is unlikely that Congress abandoned the requirement of misrepresentation by simply inserting the language "scheme to."¹⁸¹ Indeed, the remainder of the mail fraud statute itself prohibits the use of the U.S. mails for the purpose of "executing" a scheme to defraud.¹⁸² Congress' use of the verb "execute" implies that some action must be undertaken in furtherance of a fraud and certainly implies the need for more than the mere contemplation of fraudulent activity. Thus, the language and legislative history of the mail fraud statute do not support the theory that Congress intended the mail and wire fraud statutes to prohibit an individual's *proposal* to engage in future

179. See *supra* notes 152-56 and accompanying text for a discussion of how the consumer is a victim of fraud in the instant cases.

In *Ames Sintering*, it seems quite clear that General Motors was also a victim of the defendant's fraudulent intentions. General Motors clearly was deceived about the process by which the potential contractors submitted their bids. Yet, even though GM was a victim of the defendant's fraudulent scheme, the defendant made no representation, fraudulent or truthful, to GM. Rather, the defendant merely suggested to his competitor that they make a fraudulent representation *in the future*. *United States v. Ames Sintering Co.*, 927 F.2d 232, 233 (6th Cir. 1990).

180. See *supra* Part IV for a discussion of the mail and wire fraud statutes and the meaning of the term "scheme to defraud."

181. Far more plausible is the argument that in utilizing the language "scheme to," Congress intended to ensnare those individuals who merely attempted to carry out their fraud through mailings or interstate communications. Arguably, this was Congress' way of ensuring that efforts to carry out fraudulent schemes through mailings and phone calls would violate the statutes. Success in the fraud was immaterial.

For example, a conviction for common-law fraud requires an actual misrepresentation, the victim's receipt of that misrepresentation, and the victim's reliance on such representation. See *supra* text accompanying note 171. This definition does not reach the person who sent out letters enticing readers to invest their money in some nonexistent property until the letters are actually received and relied upon by specific individuals. See *supra* note 174 and accompanying text for a discussion of this hypothetical. However, the term "scheme to" encompasses anyone who utilizes the mails or interstate wires in trying to effectuate a fraudulent enterprise. This terminology gives the statute a far broader scope than typical notions of common-law fraud.

182. See 18 U.S.C. § 1341 (1988 & Supp. V 1993).

fraudulent conduct.¹⁸³

C. *Anomalies and Inconsistencies: The Application of the Mail and Wire Fraud Statutes to Antitrust Behavior*

Several anomalies result when attempts to fix prices or rig bids are prosecuted under the mail and wire fraud statutes. First, the Sherman Act provides for imprisonment for a maximum of three years.¹⁸⁴ The mail and wire fraud statutes, on the other hand, provide for a maximum sentence of five years in prison.¹⁸⁵ Thus, an individual who successfully convinces a competitor to agree to fix prices will be subject to a maximum of three years incarceration while an individual who uses the phone to solicit a competitor, but fails to reach any sort of agreement, will face up to five years behind bars.¹⁸⁶ In other words, failure to consummate the crime subjects a defendant to more severe punishment than successfully completing the crime.¹⁸⁷

This anomaly remains uncorrected despite the Justice Department's recent practice of combining wire and mail fraud counts and § 1 Sherman Act counts.¹⁸⁸ One might presume that the inclusion of wire fraud counts in an indictment subjects a defendant to the wire fraud jail term. However,

183. Indeed, how is a person's conduct in sending out letters about nonexistent property, *see supra* note 181, any more criminal than a person who calls an acquaintance on the phone and suggests that they rob the corner liquor store? At this point, is the letter-sender guilty of a crime? Under most formulations of criminal law, the phone call suggesting a robbery would not be enough to indict the potential thief. Conceivably, some formulations of criminal *attempt* law would encompass the phone call. But neither the prosecutors nor the courts in *Ames Sintering* and *Critical Industries* convicted the defendants for *attempted* mail or wire fraud.

184. *See* 15 U.S.C. §§ 1, 2 (1988 & Supp. V 1993).

185. *See* 18 U.S.C. §§ 1341, 1343 (1988 & Supp. V 1993); *see also supra* note 90 for the text of the mail fraud statute.

186. The anomaly is in its purest form where a price-fixing agreement is completed without the use of the mails or interstate wires. For example, if the agreement is consummated at a business lunch, the government cannot tack on a mail or wire fraud violation. Thus, the defendant faces a maximum of three years in prison. However, if the defendant has the misfortune (or lack of foresight) of calling a competitor on the telephone to suggest the agreement, and the competitor rejects the suggestion, this defendant faces up to five years behind bars.

187. Why should a person who succeeds in violating the antitrust laws be subject to less severe punishment than someone who fails to consummate any agreement but uses the telephone? This result is wholly inconsistent with the culpability levels of each individual; the successful price-fixer is undeniably deserving of equal, if not greater, punishment than the unsuccessful counterpart.

188. *See supra* notes 128-35 and accompanying text. The Antitrust Division of the Justice Department has openly professed satisfaction with its policy of including mail and wire fraud counts in Sherman Act indictments and has stated its intention to continue this policy in the future. Spratling & Malone, *supra* note 128, at 520-21.

the federal Sentencing Guidelines dictate otherwise.¹⁸⁹ In the fraud section of the Sentencing Guidelines, Application Note 13¹⁹⁰ states that in certain cases, "the mail or wire fraud statutes . . . are used primarily as jurisdictional bases for the prosecution of other offenses."¹⁹¹ In such situations, the Guidelines direct the sentencing judge to apply the sentencing guideline which more "aptly" covers the substantive offense.¹⁹² Thus, even when the Justice Department tacks mail and wire fraud counts on to § 1 prosecutions, a defendant will be sentenced to a Sherman Act jail term.¹⁹³ As a result, a successful antitrust violator will be subject to less jail time than if he failed to reach an agreement.

A second inconsistency resulting from the Antitrust Division's recent policy can be demonstrated with a simple hypothetical. Suppose a business owner calls a competitor on the telephone and suggests a price fix, but the competitor rejects the offer. The business owner cannot be convicted under § 1 of the Sherman Act because no agreement has been reached.¹⁹⁴ The owner can however, be convicted of wire fraud because he used the

189. See *infra* notes 190-93 and accompanying text.

190. Application Note 13 is found in Chapter 2, Part F of the Sentencing Guidelines. The exact title of Part F is "Offenses Involving Fraud or Deceit." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2F1.1 (1993) [hereinafter GUIDELINES].

191. *Id.* § 2F1.1, cmt. at n.13. Such explicit recognition by the United States Sentencing Commission that the wire and mail fraud statutes are frequently used as jurisdictional bases strongly suggests that the mail and wire fraud statutes should not have been used to prosecute the defendants in *Ames Sintering* and *Critical Industries* if the Sherman Act did not prohibit their conduct. This argument is even more persuasive when one considers *United States v. Rubin*, 999 F.2d 194, 199 (7th Cir. 1993), which held that the antitrust section of the Sentencing Guidelines should be applied when a defendant has been convicted of mail fraud for a price-fixing conspiracy. See *infra* note 193. In *Rubin*, the court found that the defendant's conduct was antitrust in nature, but the antitrust laws failed to prohibit the defendant's conduct. Nonetheless, the court sentenced the defendant under the Antitrust Offenses Guidelines. *Rubin*, 999 F.2d at 199.

192. GUIDELINES, *supra* note 190, § 2F1.1, cmt. at n.13.

193. See, e.g., *Rubin*, 999 F.2d at 199. In *Rubin*, the district court applied the Fraud Section of the Sentencing Guidelines (§ 2F1.1) for the two mail fraud counts and the Antitrust Section of the Guidelines (§ 2R1.1) for the single price-fixing count. *Id.* The defendant appealed the sentencing procedure and argued that by applying the Fraud Section of the Guidelines the court gave him a stiffer sentence than he would have received under the Antitrust Section. *Id.* at 196. On appeal, the Seventh Circuit reversed the district court and held that the district court should have applied the Antitrust Section of the Guidelines to the two counts of mail fraud. *Id.* at 199. Noting that the mail fraud counts were inseparable from the price-fixing count, the court relied on Application Note 13 to hold that the Antitrust Section of the guidelines more "aptly" covered the defendant's conduct. *Id.* at 197.

194. To violate § 1, there must be some form of agreement between two or more parties: a "contract, combination . . . or conspiracy." 15 U.S.C. § 1 (1988 & Supp. V 1993); see also *supra* notes 41-44 and accompanying text.

telephone.¹⁹⁵ Suppose instead that same business owner saw the competitor at lunch one day and made the exact same suggestion in person. Again, the owner did not violate § 1 of the Sherman Act because no agreement was reached.¹⁹⁶ Moreover, the business owner would not be guilty of wire fraud because he did not use interstate wires to make his proposal. Thus, the mere use of a telephone determines the owner's liability for price-fixing.

Such a difference in liability could be justified only if use of the mail or telephone substantively increased the potential negative effects of the defendant's behavior. However, because the mail and wire fraud statutes are merely jurisdictional, the substantive conduct is not different. Admittedly, the mail fraud statute was enacted to protect the integrity of the U.S. mails and, thus, the gist of an offense under that statute may be the mailing.¹⁹⁷ But what similar argument can be made for the wire fraud statute? It is unlikely that in enacting the wire fraud statute, Congress sought to preserve the integrity of the interstate wires.

VI. A SOLUTION TO THE JUSTICE DEPARTMENT'S PROSECUTORIAL PROBLEM?

One alternative to the use of mail and wire fraud to prosecute unsuccessful antitrust violators¹⁹⁸ is to amend the antitrust laws.¹⁹⁹ Such an amendment would be consistent with the policies underlying the Sherman Antitrust Act. In the late 1800s, Congress perceived the need for free and unfettered competition in the American market.²⁰⁰ To this end, Congress enacted the antitrust laws.²⁰¹ Section 1 of the Sherman Act prohibits any contract, combination or conspiracy which unreasonably restrains trade.²⁰² Section 2 prohibits any individual or group of individuals from monopolizing or attempting to monopolize a given market of a product or service.²⁰³

195. See *supra* note 136-51 and accompanying text for examples in the *Ames Sintering* and *Critical Industries* cases.

196. See *supra* note 194.

197. See *supra* notes 90-99 and accompanying text.

198. See *supra* text accompanying notes 184-97.

199. This Note's proposal to amend § 1 of the Sherman Act to include an attempt provision is not intended to be the sole solution to the problem addressed by this Note. Rather, this proposal is a conceivable possibility: a logical and internally consistent proposal based on general theories of criminal law and antitrust policies.

200. 21 CONG. REC. 2456 (1890).

201. See *supra* notes 15-21 and accompanying text.

202. 15 U.S.C. § 1 (1988 & Supp. V 1993). See *supra* note 5 for the full text of § 1.

203. 15 U.S.C. § 2 (1988 & Supp. V 1993). See *supra* note 45 for the text of § 2.

The legislative history gives no indication as to why Congress chose to omit an attempt provision from § 1. Indeed, if the fundamental goal of the Sherman Act is to prevent unreasonable restraints of trade, Congress should prohibit individuals from attempting to restrain trade.²⁰⁴

The new version of § 1 would retain the present language of the first sentence verbatim.²⁰⁵ The second sentence of § 1, however, would be amended to read: "Every person who shall make any contract, or attempt to make any contract, or who shall engage in any combination or conspiracy, or attempt to engage in any combination or conspiracy, hereby declared to be illegal shall be deemed guilty of a felony"

The standards governing an attempt under the new version of § 1 would essentially mirror § 2's standards for attempted monopolization. Attempted monopolization under § 2 requires that a defendant specifically intend to monopolize a given market.²⁰⁶ Similarly, under the amended § 1, a defendant must have specific intent to make an agreement which restrains trade. Additionally, § 1 attempt doctrine would require that the restraint of trade be unreasonable.²⁰⁷ Only those attempts which, if successful, would

204. Adding an attempt provision to § 1 of the Sherman Act would be simple. As currently written, the first sentence of § 1 sets forth those agreements which are deemed illegal. Case law further restrains § 1 by providing that only those agreements which unreasonably restrain trade will violate § 1. The second sentence of § 1 states that every person who makes an agreement which unreasonably restrains trade violates the Act. Similarly, § 2 of the Sherman Act provides that monopolization is illegal and declares that each person who accomplishes a monopoly violates the Act. However, § 2 is broader than § 1 because it declares that any person who even *attempts* to achieve monopoly power violates the Sherman Act. Legislators could easily insert such an attempt clause into the second sentence of § 1. Thus, the sections would be consistent in setting forth the prohibited end and then punishing those who either achieve or *attempt to* achieve the prohibited end.

205. See 15 U.S.C. § 1 (1988 & Supp. V 1993) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.")

206. See *Spectrofuge Corp. v. Beechum Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

207. The courts could likely utilize the Rule of Reason standard espoused in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), to measure whether a § 1 attempt would have unreasonably restrained trade. Rule of Reason analysis requires the reviewing court to decide whether the particular contract, combination, or conspiracy unreasonably restrains trade. *Id.* at 66. Most formulations of the Rule of Reason standard call for the reviewing court to look at the actual agreement entered into and decide, based on all relevant facts, whether the particular agreement either actually, or *probably*, would unreasonably restrain trade. See, e.g., *Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Thus, courts already look at agreements and predict the probable effect of the agreements on the market.

The same type of hypothetical, forward-looking analysis could logically be done in § 1 attempt cases. Courts would simply look at the proposed agreement and then assess the likely effect on the market if the agreement were carried out. If the parties involved possess sufficient market power so that their agreement would have unreasonably restrained trade in the relevant market, attempt liability would

unreasonably restrain trade would be prohibited by § 1.²⁰⁸ Finally, courts should impose a common-law rule that only those agreements held per se illegal under Sherman Act case law²⁰⁹ would be subject to the attempt provision.²¹⁰ Courts have designated certain business activities, such as horizontal price-fixing and group boycotts, as per se illegal under § 1.²¹¹ For these activities, liability attaches irrespective of the activities' resultant effect on the market. In strengthening § 1, Congress should proscribe only the attempt to engage in per se illegal conduct. This limitation would ensure that only conduct that has been clearly delineated as illegal under the Sherman Act would be prohibited under the new § 1 attempt provision.²¹²

attach. Indeed, this is precisely the type of analysis courts undertake in attempted monopolization cases. *See, e.g., United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985). Furthermore, this type of analysis would exclude from liability, for example, two shopowners who possess no combined ability to affect the market and, therefore, are not necessarily desirable targets of the antitrust laws. Although it may be difficult for Congress to insert the Rule of Reason standard into the statute itself, courts could clearly develop this type of requirement as a matter of common law.

208. The courts could establish a standard under which the government need only show that a defendant intended to reach a particular agreement, but not that the defendant intended the agreement to unreasonably restrain trade. Currently, knowledge of the unreasonableness of a restraint of trade is not an element of a § 1 violation. *See Board of Trade v. United States*, 246 U.S. 231 (1918). It would therefore be consistent with the principles of § 1 to merely require that the defendant intend to make the agreement, with the court deciding in retrospect whether such agreement is an unreasonable restraint of trade.

209. *See supra* notes 34-40 and accompanying text for a list and discussion of those agreements held per se illegal under the Sherman Act.

210. Admittedly, courts may encounter difficulty in applying this per se rule because some agreements have received inconsistent treatment under Sherman Act case law. Some of the agreements generally held to be per se violations of § 1 have received immunity from the courts in specific and unique factual situations. For a discussion of such exceptions to the per se doctrine, see 2 KINTNER, *supra* note 16, § 10.31.

211. *See supra* notes 34-40 and accompanying text for a list and discussion of those business practices declared per se illegal under § 1. Along with horizontal price-fixing and group boycotts, vertical price maintenance, tying arrangements, and horizontal market division are also per se illegal under current antitrust law. Horizontal price-fixing and group boycotts are used in the text by way of illustration only and are not intended to be the only business practices that may be subject to the proposed attempt provision. Indeed, all of the practices held to be per se illegal would be subject to the proposed attempt provision.

212. By limiting the attempt doctrine to arrangements that are per se illegal, the Justice Department would effectively insulate itself from potential claims that the statute does not provide defendants with notice of what constitutes a crime under the new version of § 1. Defendants would be hard pressed to argue that they lacked notice of the criminality of their conduct if the agreement into which they sought to enter had been deemed per se illegal under the antitrust laws. *See also supra* note 115 (discussing another justification for courts to deny lack of notice claims).

The Fifth Circuit's decision in *United States v. American Airlines, Inc.*²¹³ supports the inclusion of an attempt provision in § 1. *American Airlines* involved a defendant's solicitation of a business competitor to fix their respective airline fares.²¹⁴ If the competitor had accepted the defendant's offer, the two airlines would have acquired monopoly power. However, the competitor rejected the offer.²¹⁵ Nonetheless, the government prosecuted the defendant for attempted monopolization, and the Fifth Circuit held for the prosecution.²¹⁶ In holding that the mere solicitation to fix prices constitutes attempted monopolization, the court stated that "[t]he application of § 2 principles to defendants' conduct will deter the formation of monopolies at their outset when the unlawful schemes are proposed, and thus, will strengthen the [Sherman] Act."²¹⁷ If deterring the formation of price-fixing arrangements is desirable and enhances the effectiveness of the Act,²¹⁸ then why should the deterrent be limited to those arrangements which would result in monopoly power?²¹⁹ Would it

213. 743 F.2d 1114 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985).

214. *Id.* at 1116-17.

215. *Id.* at 1116.

216. *Id.* at 1121.

217. *Id.* at 1122. Moreover, the court's holding that a mere solicitation to fix prices constitutes attempted monopolization was apparently one of first impression. *Id.* at 1122 n.14. The court found that classifying a mere solicitation by an individual with potential monopoly power as an attempted monopolization was consistent with the purposes behind the Sherman Act. *Id.* at 1121-22.

218. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 129-32 (1968). In his book on criminal punishment, Hart argues:

It is perfectly true that those who commit crimes intend to succeed, but this does not show that punishing a man for an unsuccessful attempt will not increase the efficacy of the law's threats, or that failure to punish him would not often diminish their efficacy. This is so for two reasons: first, there must be many who are not completely confident that they will succeed in their criminal objective, but who will be prepared to run the risk of punishment if they can be assured that they have to pay nothing for attempts which fail; whereas if unsuccessful attempts were also punished the price might appear too high. Again, there must be many cases where men might with good or bad reason believe that if they succeed in committing some crime they will escape, but if they fail they may be caught. . . . [U]nless attempts were punished, there would, in such cases, be no deterrent force in the law's threat attached to the main crime [T]here seems to be no difference in wickedness, though there may be in skill, between the successful and the unsuccessful attempt

Id. at 129.

219. Attempt provisions can strengthen the deterrent effect of a particular statute. They are premised on the theory that the culpability of an individual should not turn on the success of the individual in carrying out the intended crime. See *supra* note 218. Specific intent to commit a particular crime and some substantial step towards the commission of the crime are enough to impose criminal liability. See *supra* notes 69-75, 80-82 and accompanying text. For those types of behavior deemed per se illegal under § 1, Congress should similarly impose criminal liability on those individuals who intend to engage in the prohibited conduct and who take any substantial step towards committing the crime. Congress should deter the formation of § 1 illegal arrangements, and can do so most effectively by

not be desirable to extend this deterrent beyond the context of monopolization to that of inherently anticompetitive behavior?

Indeed, without liability for the solicitation of agreements to fix prices, an individual has little to lose by proposing illegal conduct.²²⁰ If a competitor agrees to an offer, the individual gains an anticompetitive arrangement and, at that point, hopes that the agreement will not be discovered. On the other hand, if the competitor rejects the offer, no liability can attach.²²¹ Because current law clearly encourages individuals to propose price-fixing agreements, Congress should discourage such proposals by adding an attempt provision to § 1.

Obviously, some agreements, even if carried out, present no significant dangers to the market. For example, the parties to the agreement may possess such a small fraction of the market share that their concerted conduct will not affect the market. As to these individuals, it may be unnecessary or undesirable for the government to prosecute under the Sherman Act.²²² As with any criminal prosecution, however, the government would have wide discretion in deciding what conduct and which individuals to prosecute.²²³ If Congress includes attempts in § 1 of the Sherman Act, the government should not waste its time and resources prosecuting people who present no real danger to the market.

VII. CONCLUSION

The Justice Department's policy of charging individuals who attempt to fix prices with mail and wire fraud may be admirable from a moral and civic standpoint. From a legal standpoint, however, it is inconsistent and unsound. Clearly, the defendants in *Ames Sintering* and *Critical Industries* are culpable in a moral sense and are appropriate targets for criminal

criminalizing the proposal to form the arrangement, instead of just the arrangement itself. See *American Airlines*, 743 F.2d at 1122.

220. See *American Airlines*, 743 F.2d at 1122.

221. *Id.*

222. In fact, if the absence of an attempt provision in § 1 is based on a belief that entities with significantly less than monopoly power cannot harm competition, then perhaps the Justice Department should not be actively prosecuting these entities under the mail and wire fraud statutes. The absence of an attempt provision could reasonably be interpreted as Congress' determination that such behavior does not warrant criminal liability. If we accept this proposition, the policy of prosecuting such individuals for mail and wire fraud seems wholly inconsistent with congressional intent.

223. It is a well-established principle of constitutional law that government prosecutors have virtually unchecked discretion in deciding whom to prosecute and when to initiate prosecutions. Only if a particular group of individuals is singled out for prosecution based on constitutionally impermissible criteria would the government be subject to claims of prosecutorial abuse. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

prosecution.²²⁴ However, the practice of prosecuting such individuals under the mail and wire fraud statutes is not an appropriate method for achieving this goal.

Although Congress designed the mail and wire fraud statutes in a deliberately broad fashion, the statutes should not be unlimited in their application. That is, the statutes should not be vehicles by which a particular prosecutor or court can punish any morally reprehensible behavior. In *McNally v. United States*, the Supreme Court implied that, where a defendant's behavior does not violate any independent provision of law, the Court would scrutinize closely the use of the mail and wire fraud statutes to reach varied forms of questionably illegal behavior.²²⁵ This does not mean that, in order to convict someone for mail or wire fraud, another law must prohibit the defendant's conduct. Instead, it was offered merely to point out the Court's recognition that abuse was inherent in the application of mail and wire fraud to increasingly varied forms of behavior.

In *Ames Sintering and Critical Industries*, the defendants intended to violate the Sherman Act.²²⁶ However, because their proposals to fix prices were rejected, their conduct fell short of a cognizable antitrust violation.²²⁷ The statute specifically enacted to address the defendants' behavior, the Sherman Act, excludes such behavior from its reach. The Justice Department nevertheless prosecuted these defendants under the mail and wire fraud statutes. The Justice Department should not be permitted to circumvent the Sherman Act by prosecuting anticompetitive behavior under other federal laws.

Moreover, persons who attempt to fix prices but fail and who are prosecuted under the mail fraud statutes are subjected to potentially greater punishment than those who succeed in fixing prices and who are prosecuted under the Sherman Act. This clearly fails to reflect the true culpability of each individual. Defendants indicted under such a theory will likely assert this inconsistency as well as others arising out of the Justice Department's

224. The defendants in each case deliberately set out to violate the antitrust laws and would have carried through with the violations if not for the whistle-blowing of their solicitees. See *supra* notes 136-51 and accompanying text. Most would agree that such behavior calls for some form of criminal punishment. Indeed, many state legislatures have deemed such conduct illegal through the use of solicitation statutes.

225. See *McNally v. United States*, 483 U.S. 350, 361 n.9 (1987); *supra* notes 116-21 and accompanying text.

226. See *supra* notes 136-51 for a discussion of *Ames Sintering and Critical Industries*.

227. See *supra* notes 41-44 and accompanying text for a discussion of § 1's requirement of a completed agreement between two or more parties.

convoluted theory of fraud.

In order to prosecute these individuals appropriately, the Justice Department should look to Congress for a change in the antitrust law. Congress could insert an attempt provision into § 1, similar to the one that already exists in § 2, and thereby reach the conduct of those individuals who attempt to consummate price-fixing agreements, but who fail in their efforts. If the goal of antitrust law is to prevent the formation of anticompetitive agreements, prohibiting attempts to form these agreements will only help to achieve this goal. This attempt provision would reach the solicitous conduct of the defendants in *Ames Sintering* and *Critical Industries* and would be a direct expression by Congress that the antitrust laws are intended to punish this form of behavior.

Michael D. Paley

