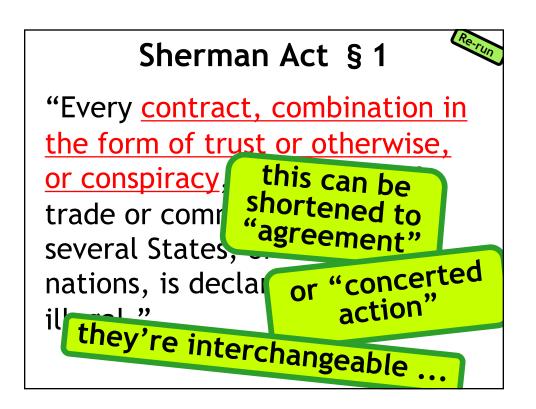


Sherman Act § 1

"Every <u>contract</u>, <u>combination in</u> <u>the form of trust or otherwise</u>, <u>or conspiracy</u>, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."



Finding a horizontal agreement

- Often there is direct evidence that is pretty much out in the open. In that case, it's easy. For example:
 - Association rules (NCAA v. OU, California Dental, Fashion Originators)
 - Cooperative's bylaws (Northwest Stationers)
 - A regular out-in-the-open joint venture (*Texaco*)
- But often there is no direct evidence of an agreement. We can predict this to be the case in straight-out price fixing and other clearly per-se violations - because the participants don't want to be sued or sent to jail.
 - What we see, instead, is **parallel conduct**.

Parallel conduct

- It's theoretically true that without an agreement, there's no liability.
- But the law can infer an agreement without direct evidence.
- So, in practice, it's not about whether or not there's an agreement in reality, it's about whether or not there is conduct that allows an agreement to be inferred.

The economic sense test

- Parallel conduct that is equally consistent with what firms would do independently, regardless of what other firms would be doing, will not permit an inference of agreement.
- Parallel conduct that would be irrational and unprofitable unless other firms were engaging in the same conduct <u>might</u> allow an inference of an agreement. But mere parallelism isn't a §1 agreement. <u>The court</u> <u>looks for plus factors.</u>

Plus factors

For conduct that's irrational/unprofitable unless others engage in it also, plus factors suggest an actual agreement:

- The parallel conduct is unlikely absent a hidden agreement, because it's against individuals' economic self interest: An agreement can be inferred.
- The parallel conduct follows secret meetings or common invitations: An agreement can be inferred.
- There's a pattern of exchanges of price information: An agreement can be inferred.
- There's what looks like cartel enforcement behavior, e.g., evidence of refusals to deal or predatory pricing directed at one actor followed by a return to parallel pricing: An agreement can be inferred.
- <u>But</u> "mere" parallelism even with awareness and strategic calculation is not a §1 agreement.

Finding vertical agreements

Courts are even more skeptical of finding vertical agreements than horizontal agreements. For example, exchanges of information between companies on different rungs of a vertical structure is to be expected. So that's not much of a plus factor. Bottom line: Courts are very skeptical of finding vertical agreements.