Proof of Concerted Action or Agreement for Sherman Act § 1

Antitrust
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Sherman Act § 1

"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."

Sherman Act § 1

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this can be shortened to "agreement"

or "concerted action"

they're interchangeable ...

Are the defendants separate entities?

- Any arrangement between a corporation and its wholly owned subsidiary cannot form a § 1 agreement. *Copperweld v. Independence Tube* (U.S. 1984).
- Two sister subsidiaries that are wholly owned by the same parent corporation cannot form a § 1 agreement. *Advanced Health-Care v. Radford Community Hospital* (4th Cir. 1990).

These are easy, bright-line rules you should know.

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- Otherwise, the test is "whether the agreement joins together 'independent centers of decisionmaking.'" *American Needle v. NFL* (U.S. 2010).

American Needle v. NFL

From the case's syllabus: "In determining whether there is concerted action under § 1, the Court has eschewed formalistic distinctions, such as whether the alleged conspirators are legally distinct entities, in favor of a functional consideration of how they actually operate. ... The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of them is a substantial, independently owned, independently managed business, whose 'general corporate actions are guided or determined' by 'separate corporate consciousnesses,' and whose 'objectives are' not 'common.' They compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. Directly relevant here, the teams are potentially competing suppliers in the market for intellectual property."

American Needle v. NFL

Continuing: "When teams license such property, they are not pursuing the 'common interests of the whole' league, but, instead, the interests of each 'corporation itself.' It is not dispositive ... that, by forming NFLP, they have formed a single entity ... and market their NFL brands through a single outlet. ... While teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."

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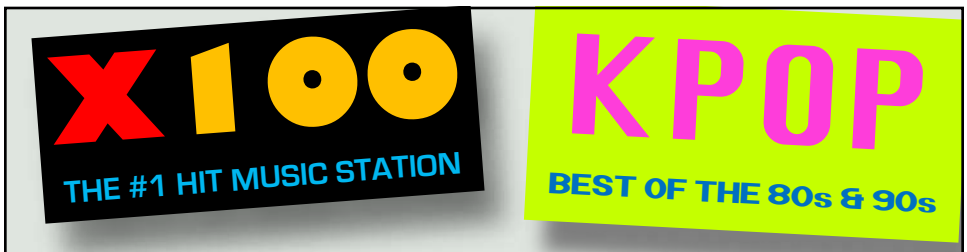
Bottom line: If there are "independent centers of decisionmaking" even within ostensibly one entity, those independent centers of decisionmaking can have § 1 agreements with each other.



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- Can X100 conspire with KPOP in violation of § 1 of the Sherman Act?
- Can Radio Mountain Media form an agreement with KPOP in violation of Sherman Act § 1?

X100 and KPOP are both wholly owned subsidiaries of Radio Mountain Media.

- Can X100 conspire with KPOP in violation of § 1 of the Sherman Act? No.
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Re-run

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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 might allow an inference of an agreement. But mere parallelism isn't a § 1 agreement. The court looks for plus factors.

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.
- ***But*** "mere" parallelism – *even with awareness and strategic calculation* – is not a § 1 agreement.

Bell Atlantic v. Twombly

"An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy."

Bell Atlantic v. Twombly

"The ILEC's ... doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."

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 illicit vertical agreements without direct evidence.