CHAPTER 1

RESTRAINTS OF TRADE

A. Introduction

Section 1 of the Sherman Act provides that “[c]very 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.”¹ The U.S. Supreme Court explained the statute’s purpose in *Northern Pacific Railway v. United States:*²

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. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.³

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1. 15 U.S.C. § 1. Both criminal and civil sanctions may be imposed for § 1 violations. The statute provides that a § 1 violation is a felony for which convicted individuals may be imprisoned for up to 10 years and fined $1 million, and for which convicted corporations may be fined up to $100 million. *See id.* The Department of Justice (DOJ) has obtained fines from convicted criminal defendants far in excess of these statutory maxima under the theory that those defendants are liable for twice the pecuniary gain that they derived from the offense or twice the pecuniary loss suffered by victims. *See 18 U.S.C. § 3571(d).* Criminal enforcement is discussed in Chapter 10. Violations of § 1 may be enjoined under § 4 of the Sherman Act, 15 U.S.C. § 4, and § 16 of the Clayton Act, 15 U.S.C. § 26. Persons injured in their business or property by reason of a violation may recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. Private antitrust actions are discussed in Chapter 9.


3. *Id.* at 4; *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (“The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . .”); *Standard Oil Co. v. United States,* 221 U.S. 1, 52 (1911). Certain courts have interpreted this to mean that the sole purpose of the Sherman Act is to promote allocative efficiency. *See, e.g., Schachar v. Am. Acad. of Ophthalmology,* 870 F.2d 397, 399 (7th Cir. 1989) (“[A]ntitrust law is about consumers’ welfare and the efficient organization of production. It condemns reductions in output that drive up prices as consumers bid for the remaining supply.”). Other courts have recognized broader purposes. *See, e.g., McGahee v. N. Propane Gas Co.,* 858 F.2d 1487, 1497-98 (11th Cir. 1988) (“In passing antitrust legislation, Congress’s purpose was not only an economic one, but was also a political one, a purpose of curbing the power some individuals and corporations had over the economy.”).
Read literally, Section 1 would prohibit all concerted activity in restraint of trade. The Supreme Court has recognized, however, that “the 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.” Consequently, the Court has construed Section 1 to render unlawful only those restraints that restrict competition unreasonably.

This chapter considers a variety of practices that may be challenged under Section 1, including horizontal arrangements such as price fixing, bid rigging, and boycotts, and vertical agreements such as resale price maintenance, tying, and exclusive dealing. It also addresses the applicability of Section 3 of the Clayton Act to the last two practices.

B. Elements of a Section 1 Violation

Regardless of the nature of the practice challenged, a violation of Section 1 requires proof of three elements: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce.

This chapter first considers the standards for establishing each of these elements and then follows with an examination of specific practices challenged under Section 1 of the Sherman Act or Section 3 of the Clayton Act.


6. See Standard Oil, 221 U.S. at 58. After reviewing the legislative history of the Sherman Act and common-law rules relating to restraints of trade, the Court concluded that Congress did not intend to prohibit contracts that caused insignificant or attenuated restraints of trade but only those agreements “which were unreasonably restrictive of competitive conditions.” Id. The Supreme Court has repeatedly reaffirmed the principle that § 1 prohibits only unreasonable restraints of trade. See, e.g., California Dental Ass’n v. FTC, 526 U.S. 756, 769-81 (1999); NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998); NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984); Professional Eng’rs, 435 U.S. at 687-91; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

7. Horizontal agreements are those among competitors at the same level of the market structure (e.g., between two manufacturers), while vertical agreements are those among persons at different levels of the market structure (e.g., between a manufacturer and its distributors). See part D of this chapter; Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 & n.4 (1988).


9. See, e.g., Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011); In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 314-15 (3d Cir. 2010); American Ad Mgmt. v. GTE Corp., 92 F.3d 781, 788 (9th Cir. 1996); Maric v. St. Agnes Hosp. Corp., 65 F.3d 310, 313 (2d Cir. 1995). In addition, a private plaintiff seeking damages or injunctive relief must prove that, respectively, he has suffered or is likely to suffer antitrust injury. See Chapter 9.B.3.
1. **Proof of a Contract, Combination, or Conspiracy**

   a. **Defining "Agreement": Distinguishing Unilateral from Concerted Action**

   To prevail under Section 1 of the Sherman Act, a plaintiff must establish a "contract, combination . . . or conspiracy" that unreasonably restrains trade.\(^{10}\) Section 1 does not proscribe independent action by a single entity, regardless of its purpose or effect on competition.\(^{11}\) As the Supreme Court has stated:

   The Sherman Act contains a “basic distinction between concerted and independent action.” The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. . . . Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a “contract, combination . . . or conspiracy” between separate entities. It does not reach conduct that is “wholly unilateral.”\(^{12}\)

   An express agreement can, of course, show concerted action,\(^{13}\) but a formal contract is not necessary.\(^{14}\) Early Supreme Court decisions, such as *American Tobacco Co. v. United States*,\(^{15}\) defined agreement as “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.”\(^{16}\) Later decisions established that such understandings may be tacit and

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\(^{10}\) 15 U.S.C. § 1; see also *Standard Oil*, 221 U.S. at 59-60 (§ 1 prohibits only those contracts or combinations that constitute an undue restraint on trade).

\(^{11}\) See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Anderson News L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012). Unsuccessful attempts to reach an anticompetitive agreement, which are not subject to § 1 because of the lack of concerted action, are sometimes prosecuted under wire fraud and other statutes. See part C.I.d of this chapter and Chapter 10.B.2 As described in more detail in Chapter 8.A.3, the FTC also has authority, under § 5 of the FTC Act, 15 U.S.C. § 45, to investigate conduct that falls short of the agreement required for a § 1 violation. In *United States v. American Airlines*, 743 F.2d 1114, 1119 (5th Cir. 1984), the Fifth Circuit accepted the Justice Department’s theory that attempted price fixing can violate § 2 of the Sherman Act.


\(^{14}\) See, e.g., *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966) (“it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy”); *Toledo Mack Sales & Serv. v. Mack Trucks*, 530 F.3d 204, 220-22 (3d Cir. 2008) (testimony introduced by plaintiff of “unwritten” or “gentlemen’s” agreements among Mack dealers to refrain from price competition was sufficient direct evidence from which a jury could find an agreement); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000 (3d Cir. 1994); *ES Dev. v. RWM Enters.*, 939 F.2d 547, 553 (8th Cir. 1991); *Gainesville Utils. Dep’t v. Fla. Power & Light Co.*, 573 F.2d 292, 301 (5th Cir. 1978).

\(^{15}\) 328 U.S. 781 (1946).

\(^{16}\) *Id. at 810; accord Copperweld*, 467 U.S. at 771 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).
can arise without verbal communication.\(^{17}\) As one court stated, “[a] knowing wink can mean more than words.”\(^{18}\) The requisite plurality of conduct can be found even when the parties expressly denied reaching an agreement, as when one party announced the price that he intended to charge and declared that “he did not care what the others did.”\(^{19}\) That the parties to an agreement did not have identical motives, or that one party to the agreement was coerced to participate, does not negate the finding of an agreement for purposes of Section 1, so long as the parties share a commitment to a common scheme.\(^{20}\)

In *Monsanto Co. v. Spray-Rite Service Corp.*\(^{21}\) the Supreme Court established the modern formula under which courts evaluate evidence bearing on concerted action:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.\(^{22}\)

A “conscious commitment to a common scheme” by definition must be more than mere parallel conduct undertaken by competitors. Absent agreement, competitors

\(^{17}\) Mayor & City Council of Balt., Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013) ("[i]n many antitrust cases, [a] ‘smoking gun’ can be hard to come by, especially at the pleading stage. Thus a complaint may, alternatively, present circumstantial facts supporting the inference that a conspiracy existed.").

\(^{18}\) Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965).

\(^{19}\) United States v. Foley, 598 F.2d 1323, 1332 (4th Cir. 1979).

\(^{20}\) See, e.g., Perma Life Mufflers v. Int’l Parts Co., 392 U.S. 134, 142 (1968), overruled on other grounds by Copperweld, 467 U.S. at 765-66; Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968), overruled on other grounds by State Oil Co. v. Khan, 522 U.S. 3 (1997); United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960); United States v. Apple Inc., 791 F.3d 290, 317-18 (2d Cir.), cert. denied, 136 S. Ct. 1376 (2015) (explaining that conspirators did not need “identical” motives and that their “independent reasons” for their respective conduct can still be “interdependent” and thus will not necessarily negate a conspiracy); Spectators’ Commc’ns Network v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001) (“Antitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy.”); MCM Partners v. Andrews-Bartlett & Assocs., 62 F.3d 967, 973-75 (7th Cir. 1995); Fineman v. Armstrong World Indus., 980 F.2d 171, 213 (3d Cir. 1992); Isaksen v. Vt. Castings, 825 F.2d 1158, 1163 (7th Cir. 1987); Duplan Corp. v. Deering Milliken, Inc., 594 F.2d 979, 982 (4th Cir. 1979); Harold Friedman Inc. v. Thorofare Mkt., 587 F.2d 127, 143 n.64 (3d Cir. 1978). *But see* Garshman v. Universal Res. Holding, 625 F. Supp. 737, 742-43 (D.N.J. 1986) (expressing reluctance to find a conspiracy because alleged coconspirator’s actions resulted from coercion). As one court has stated, “there is no specific requirement under § 1 that the alleged conspirators have a complete ‘mutuality of interest.’ A plaintiff must simply allege sufficient facts to demonstrate that the alleged coconspirators had a plausible reason to participate in the conspiracy.” Rochez Bros. v. N. Am. Salt Co., 1994 U.S. Dist. LEXIS, at *11 (W.D. Pa. 1994). Acquiescing to an illegal agreement is also actionable under § 1. See, e.g., United States v. Paramount Pictures, 334 U.S. 131, 161 (1948) (“acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one”); Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 156 F.3d 535, 541 (4th Cir. 1998) (“it is sufficient that [defendant], regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects”).


\(^{22}\) *Id.* at 768; *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (applying *Monsanto* standard in horizontal context).
may rationally undertake parallel conduct that maintains or enhances their market position without running afoul of Section 1.\textsuperscript{23}

Under Monsanto, mere acquiescence in a unilateral demand is not actionable under Section 1.\textsuperscript{24} Some courts have extended that principle to hold that acquiescence does not constitute “concerted action” even if the demanded terms are memorialized in a contract.\textsuperscript{25}

b. PROVING “AGREEMENT”: PROOF OF HORIZONTAL AND VERTICAL AGREEMENTS

Courts have wrestled with what evidence is needed to establish the existence of an agreement. Different problems arise when considering the existence of horizontal and vertical agreements. This subpart describes the typical issues that arise in proving a horizontal agreement in a criminal case, in proving a horizontal agreement in a civil case (including proof of a hub-and-spoke conspiracy), and then of proving a vertical agreement in a civil case.

(1) Proving Horizontal Agreement in a Criminal Case

Proving the existence of an agreement in a criminal case presents special challenges. First, there is the high burden of proof applicable in criminal cases—proof beyond a reasonable doubt. Second, there are various challenges to the admissibility of evidence, for example, challenges based on the Fourth Amendment. Third, unlike in civil cases, the government generally may not ask jurors to consider an individual’s exercise of his or her Fifth Amendment right not to be called as a witness or to testify.\textsuperscript{26}

Criminal cases also differ from civil cases in that, particularly in recent years, the use of direct evidence is more common. Direct evidence may consist of recordings by a confidential informant,\textsuperscript{27} videotapes taken covertly of the alleged conspirators

\textsuperscript{24} See Monsanto, 465 U.S. at 752, 761 (“A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. . . . And a distributor is free to acquiesce in the manufacturer’s demand in order to avoid termination.”).
\textsuperscript{25} See, e.g., Toscano v. Prof’l Golfers’ Ass’n, 258 F.3d 978, 984 (9th Cir. 2001) (contracts between PGA Tour and local sponsors were not “evidence of concerted action to restrain trade” where “the local sponsors had no involvement in the establishment or enforcement of the allegedly anticompetitive provisions of the contracts”); American Airlines v. Christensen, 967 F.2d 410, 413-14 (10th Cir. 1992) (“No evidence in the record suggests that [an airline] did not independently set the terms under which it would offer its travel awards, and the mere fact that its members accepted those terms does not generate the kind of concerted action needed to violate Section 1.”); see also Insulate SB, Inc. v. Advanced Finishing Sys., Inc., 797 F.3d 538, 541-44 (8th Cir. 2015) (manufacturer’s announcement of its unilateral interpretation that carrying “an additional competitive product line” would implic ate the “best efforts” clause of written distributor agreements “did not transform a prior innocuous distributor agreement into a contract for exclusive dealing”).
\textsuperscript{26} Griffin v. California, 380 U.S. 609, 615 (1965). But see United States v. Robinson, 485 U.S. 25, 31-32 (1988) (holding that prosecutor’s comments in response to defense counsel’s argument that defendant had not had been provided an opportunity to explain was permissible).
\textsuperscript{27} See, e.g., Obron Atl. Corp. v. Barr, 990 F.2d 861, 864-65 (6th Cir. 1993) (recognizing that recordings made by confidential informants at the direction of government investigators may be used in trials and grand jury proceedings).
meeting,\textsuperscript{28} or documents directly showing the existence of the conspiracy. Most common, however, is eyewitness testimony.

To a large degree, this reflects the increasing effect of the Antitrust Division’s Corporate Leniency Policy,\textsuperscript{29} and to some degree the Sentencing Guidelines,\textsuperscript{30} both of which provide incentives for companies to report their wrongdoing and cooperate with the Division.\textsuperscript{31} Thus, most modern criminal trials involve testimony by one alleged coconspirator against another.\textsuperscript{32} Federal Rule of Evidence 801(d)(2)(E) provides that if offered against a party, an out-of-court statement is not hearsay, if it was made “by a coconspirator . . . during the course” of and “in furtherance of the conspiracy.”\textsuperscript{33} In determining whether proffered testimony of an alleged conspirator is admissible, the court is to make a preliminary factual determination as to whether a conspiracy existed and the witness participated in it,\textsuperscript{34} and may consider the statement itself, hearsay, and other inadmissible evidence in making the preliminary determination.\textsuperscript{35}

\textit{(2) Proving Horizontal Agreement in a Civil Case}

Both direct and circumstantial evidence may be used to prove the existence of a horizontal agreement. Some cases feature direct evidence of a conspiracy, such as videotapes of meetings among competitors or admissions by participants.\textsuperscript{36} When the

\textsuperscript{28} See United States v. Andreas, 1998 U.S. Dist. LEXIS 6195, at *10-19 (N.D. Ill. 1998) (allowing admission of tapes over objection that they were only of “selective” conversations), aff’d, 216 F.3d 645 (7th Cir. 2000).


\textsuperscript{30} See 18 U.S.C. § 3553(a)(4) (providing that courts are to determine sentences pursuant to \textit{Sentencing Guidelines} promulgated by the U.S. Sentencing Commission).

\textsuperscript{31} \textit{CORPORATE LENIENCY POLICY}, supra note 29; U.S.S.G. § 3E1.1.

\textsuperscript{32} See, e.g., United States v. Hsiung, 778 F.3d 738, 762 (9th Cir. 2015) (upholding jury’s verdict finding AU Optronics and two of its employees guilty for participating in a horizontal price-fixing conspiracy that led to a $500 million financial gain for AU Optronics and its coconspirators as a result of overcharges on TFT-LCD panels). The trial evidence in \textit{Hsiung} included coconspirator statements and testimony about defendants’ participation in meetings to discuss price increases. See United States’ Sentencing Memorandum at 1, 6, United States v. AU Optronics Corp., (2012) (No. CR-09-0110 SI), \textit{available at www.justice.gov/atr/cases/auopt.htm}. The Antitrust Division may also elect to immunize one participant in a conspiracy in order to obtain that participant’s testimony against another participant. See Kastigar v. United States, 406 U.S. 441, 462 (1972) (government may compel testimony despite Fifth Amendment privilege when witness is granted immunity from use of testimony and derivative evidence). This issue is discussed in Chapter 10.C.7.

\textsuperscript{33} \textit{FED. R. EVID. 801(d)(2)).

\textsuperscript{34} See, e.g., Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1081 (10th Cir. 2006) (concluding that district court failed to make the necessary preliminary factual determination).

\textsuperscript{35} \textit{FED. R. EVID. 104(a); id. 801(d) (“The statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it under (E).”).

\textsuperscript{36} See, e.g., United States v. Andreas, 216 F.3d 645, 652 (7th Cir. 2000). The Third Circuit has described direct evidence in this context as “evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.” Superior Offshore Int’l, Inc. v. Bristow Grp., 490 F. App’x 492, 497 (3d Cir. 2012) (quoting \textit{In re Baby Food Antitrust Litig.}, 166 F.3d 112, 118 (3d Cir. 1999)); accord \textit{In re Citric Acid Litig.}, 191 F.3d 1090, 1093 (9th Cir. 1999); see also \textit{In re Aftermarket Filters Antitrust Litig.}, 2009 U.S. Dist. LEXIS 104114, at *18-21 (N.D. Ill. 2009) (denying motion to dismiss where complaint alleged actual agreement witnessed by
plaintiff presents direct evidence that reasonably can be read to support a conspiracy, the question of "how to view that evidence should be left to the jury."  As courts have recognized, however, "[o]nly rarely will there be direct evidence of an express agreement" in conspiracy cases. Absent direct evidence, an agreement may be inferred from circumstantial evidence. It is ordinarily the factfinder's responsibility to interpret circumstantial evidence and draw inferences from it. But the need to rely on circumstantial evidence to distinguish concerted action from unilateral action has led to challenges for the courts, which have relied on a variety of approaches to avoid making mistaken inferences.

In Matsushita Electric Industrial Co. v. Zenith Radio Corp., the Supreme Court held:

\[\text{[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. . . . [A claimant], in other words, must show that the inference of conspiracy is reasonable in light of the participant in the price-fixing conspiracy;}\]


37. Toledo Mack Sales & Serv. v. Mack Trucks, 530 F.3d 204, 220 (3d Cir. 2008); see also id. at 223 ("Because we conclude that Toledo's direct evidence [including testimony from a former Mack executive] is sufficient to allow a jury to conclude that a conspiracy not to compete existed among Mack dealers, we need not apply the rules restricting inferences drawn from circumstantial evidence."); Tunica Web Adver. v. Tunica Casino Operators Ass'n, 496 F.3d 403, 410-11 (5th Cir. 2007) (reversing a grant of summary judgment for defendants and holding that statements by defendants' employees were sufficient direct evidence to create an issue of fact as to whether an agreement to boycott plaintiff existed).

38. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 720 (1965); see also Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012) ("[C]onspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through 'inferences that may be drawn from the behavior of the alleged conspirators'" (quoting Michelman v. Clark–Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976))); Toledo Mack, 530 F.3d at 219 (direct evidence is "frequently difficult for antitrust plaintiffs to come by" (quoting Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998))).

39. See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 765-66 (1984) (report in distributor's newsletter detailing efforts to get market in order was circumstantial evidence of agreement to maintain prices); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252-54 (1940); In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 396 (3d Cir. 2015) (holding in the context of an alleged horizontal price-fixing conspiracy that "proof may come in the form of direct evidence . . . or circumstantial evidence"); North Carolina State Bd. of Dental Examiners v. FTC, 717 F.3d 359, 373 (4th Cir. 2013) (concluding that there was a "'wealth' of circumstantial evidence," including consistent discouragement of the non-dentists' practices by board members and cease-and-desist letters sent by the board to nondentists, that "pointed to concerted action"); Citric Acid, 191 F.3d at 1094 (when plaintiff relies entirely on circumstantial evidence, defendant may rebut by showing plausible business reason for conduct, which shifts burden to plaintiff to provide evidence that excludes the possibility that defendant had engaged in independent, permissible competitive behavior).

40. See, e.g., Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987) ("the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder").

41. 475 U.S. 574 (1986).
competing inferences of independent action or collusive action that could not have harmed it.\textsuperscript{42}

Citing its earlier decision in \textit{First National Bank v. Cities Service Co.},\textsuperscript{43} the Court in \textit{Matsushita} identified two separate inquiries that are relevant to this issue: (1) whether the defendant had “any rational motive” to join the alleged conspiracy and (2) whether the defendant’s conduct “was consistent with the defendant’s independent interest.”\textsuperscript{44} The Court stated that “if [the defendants] had no rational motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.”\textsuperscript{45}

Both inquiries require a court “to consider the nature of the alleged conspiracy and the practical obstacles to its implementation,” as well as the substantive offense being charged.\textsuperscript{46} For instance, extensive contacts among defendants, which might be deemed suspicious if they involve competitors, are to be expected when they take place between a manufacturer and distributor.\textsuperscript{47} Evidence that is probative of an agreement to terminate a distributor is not necessarily probative of an agreement between the manufacturer and the remaining distributors to set prices at a particular

\textsuperscript{42} \textit{Id.} at 588 (citations omitted); \textit{see also} United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir.), \textit{cert. denied}, 136 S. Ct. 1376 (2015) (\textit{Monsanto} does not require plaintiffs to “disprove all nonconspiratorial explanations for the defendants’ conduct,” but instead requires only that the evidence be “sufficient to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not” (internal quotation marks omitted)); \textit{see also} Burtch v. Milberg Factors, Inc., 662 F.3d 212, 229-30 (3d Cir. 2011) (affirming dismissal of complaint in the absence of allegations that defendants’ “decision to limit or refuse credit to [plaintiff] was against each [defendant] company’s interest rather than a natural response to [plaintiff’s] declining financial situation”); Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271-72 (5th Cir. 2008) (affirming summary judgment upon finding that the “facts in the record fail[ed] to show any collusion among or simultaneous actions taken by the defendants [and did] not lend any support to a conclusion that the defendants acted other than independently”); \textit{In re Flat Glass Antitrust Litig.}, 385 F.3d 350, 357 (3d Cir. 2004) (“This higher threshold is imposed in antitrust cases to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition.”); American Chiropractic Ass’n v. Trigon Healthcare, 367 F.3d 212, 217 (4th Cir. 2004) (upholding summary judgment when plaintiff chiropractors failed to demonstrate that defendant insurance company had any rational motive to conspire with doctors to exclude the “more cost-effective” chiropractors from its provider network); \textit{Citric Acid}, 191 F.3d at 1094 (plaintiff must produce evidence that tends to exclude the possibility that defendant was engaging in independent and permissible competitive behavior). Some courts have interpreted \textit{Matsushita} to mean that the importance of circumstantial evidence varies according to the type of concerted business conduct at issue: special care is said to be necessary where the challenged behavior is facially anticompetitive.

\textsuperscript{43} 391 U.S. 253, 288-89 (1968).

\textsuperscript{44} 475 U.S. at 587.

\textsuperscript{45} \textit{Id.} at 596-97.

\textsuperscript{46} \textit{Id.} at 588.

\textsuperscript{47} \textit{See} \textit{Monsanto Co. v. Spray-Rite Serv. Corp.}, 465 U.S. 752, 762 (1984) (“A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.”); cf. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1013 (3d Cir. 1994) (“Communications alone, although more suspicious among competitors than between a manufacturer and its distributors, do not necessarily result in liability.”).
When a conspiracy is economically implausible, a higher quantum of proof may be necessary. Some courts have framed the issue in terms of burdens of proof, holding that once a defendant proves that the challenged conduct was in its independent self-interest, then the burden shifts to the plaintiff to adduce evidence tending to exclude the possibility of independent action.

Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which the courts often refer to as “conscious parallelism.” “Conscious parallelism is the process ‘not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests.’” To prove a conspiracy for purposes of Section 1, however, a plaintiff must prove more than that the defendants acted in parallel; it must prove that they did so pursuant to an agreement.

In *Interstate Circuit, Inc. v. United States*, the Supreme Court held that a pattern of uniform conduct among eight motion picture distributors that had imposed nearly
identical restraints at the behest of an exhibitor was sufficient to permit the factfinder to infer the existence of an agreement to fix minimum movie admission ticket prices and to limit the distribution of second-run feature films. The Court cited several factors supporting this inference. First, the exhibitor’s letter requesting the action had listed all eight distributors as addressees; hence, each distributor knew about the involvement of the others. Second, the distributors had a strong motive for concerted action: “Each was aware that all were in active competition and that without substantially unanimous action . . . there was risk of a substantial loss of the business and good will . . . but that with it there was the prospect of increased profits.”

Third, the action “involved a radical departure from the previous business practices of the industry.” Finally, the defendants offered no alternative reason for their parallel behavior, leaving the Court “unable to find in the record any persuasive explanation, other than agreed concert of action, of the singular unanimity of action on the part of the distributors.”

Seven years later, in American Tobacco Co. v. United States, the Court again sustained a finding of conspiracy based on a pattern of otherwise unexplained parallel conduct. The defendants were the three leading tobacco companies that, as a group, accounted for nearly 90 percent of total U.S. cigarette production. The evidence showed a course of improbable parallel conduct for which the defendants offered “[n]o economic justification”: the defendants had held list prices and discounts absolutely identical for twenty years and had raised prices in lockstep fashion, often on the very same day, even during the Depression, when their costs were declining.

Later, in Theatre Enterprises v. Paramount Film Distributing Corp., the Court clarified that parallel behavior, standing alone, is insufficient to prove a conspiracy. There, the Court affirmed a verdict for the defendant motion picture distributors, all of which had refused to grant the plaintiff the right to show first-run features in its suburban theater. Observing that the defendants had denied any collaboration and had explained the economic considerations that had led each of them to arrive at the same decision independently, the Court observed that “[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read

55.  Id. at 222.
56.  Id.
57.  Id. at 223.
58.  328 U.S. 781 (1946).
59.  Id. at 805.
60.  346 U.S. 537 (1954). In the 1980s, the Federal Trade Commission tried to proscribe parallel conduct that did not arise from an agreement but “facilitated” oligopolistic coordination by declaring such conduct an unfair method of competition under § 5 of the Federal Trade Commission Act. In E.I. duPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), however, the Second Circuit reversed the FTC’s decision, finding that “before business conduct in an oligopolistic industry may be labeled ‘unfair’ within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose . . . or (2) the absence of an independent legitimate business reason for its conduct.” Id. at 139. The court explained that the requirement to demonstrate “indicia of oppressiveness” is comparable to the requirement to demonstrate the plus factors necessary to infer a conspiracy from consciously parallel business conduct under the Sherman Act. Id. at 139 n.10. The FTC’s recent attempt to revive this theory as a basis for liability under § 5 of the FTC Act (15 U.S.C. § 45) is discussed in Chapter 8.A.3.a.
61.  346 U.S. at 541.
conspiracy out of the Sherman Act entirely." The Court reaffirmed the importance of the distinction between lawful unilateral conduct and unlawful conspiracies most recently in Bell Atlantic Corp. v. Twombly, when the Court held that a failure to plead more than parallel conduct (or conscious parallelism) was grounds for dismissing a Section 1 claim.

Following these Supreme Court decisions, lower courts consistently have held that conscious parallelism, by itself, will not support a finding of concerted action. The plaintiff typically must prove other facts and circumstances (often referred to as "plus factors") in combination with conscious parallelism to support an inference of concerted action. The courts emphasize that these plus factors should not be viewed in a vacuum but rather should be considered in their entirety as the backdrop against which the alleged behavior takes place.

62. Id. (footnote omitted).
64. Id. at 557.
65. In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397-98 (3d Cir. 2015) ("[E]vidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy."); Evergreen Partnering Grp. v. Pactiv Corp., 720 F.3d 33, 45 (1st Cir. 2013) ("[I]f no direct evidence of agreement is alleged, it is insufficient to exclusively allege parallel conduct at the pleadings stage."). See, e.g., White v. R.M. Packer Co., 635 F.3d 571, 580-81 (1st Cir. 2011) (affirming summary judgment because allegedly chronic susceptibility to conscious parallelism insufficient to establish agreement); In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 905 (6th Cir. 2009) (upholding dismissal of § 1 claims against airlines, in part, because allegations that airlines "adopted uniform commission cuts" was merely a "bare assertion[ ] of . . . parallel conduct"); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047-48 (9th Cir. 2008) (holding that "merely charging, adopting or following the fees set by [competitors] is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act"); Paycom Billing Servs. v. MasterCard Int'l, 467 F.3d 283, 292 (2d Cir. 2006) (upholding dismissal when plaintiff alleged only parallel conduct among acquiring banks and failed to allege any basis to believe that parallel conduct was the result of agreement).
66. See In re Chocolate Confectionary, 801 F.3d at 397-98 (identifying a nonexhaustive list of plus factors); In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004) (identifying various plus factors, but cautioning that no finite set of factors exists); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003) ("Although our caselaw has identified some specific plus factors . . . . any showing by [a plaintiff] that tend[s] to exclude the possibility of independent action can qualify as a plus factor." (second alteration in original) (internal citations and quotations omitted)); Blomkest Fertilizer, Inc. v. Potash Corp., 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) (explaining the additional facts or factors required as a prerequisite to finding that parallel pricing amounts to a conspiracy); In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999); City of Tuscaloosa v. Harcros Chems, Inc., 158 F.3d 548, 572 (11th Cir. 1998) (plus factors are facts that tend to exclude the possibility that defendants' conscious parallelism was lawful, such as if defendants' conduct would not have been in their legitimate economic self-interest if they had not been conspiring); Petruzzi’s IGA Supermarkets v. Darling-Del. Co., 998 F.2d 1224, 1232 (3d Cir. 1993) ("[I]n a conscious parallelism case, a plaintiff also must demonstrate the existence of certain ‘plus’ factors, for only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently."). But cf. In re Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445 n.9 (9th Cir. 1990) ("parallel pricing alone may be all the proof that is required" to show a Sherman Act violation "when [the] market is highly unconcentrated") (dictum); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 439 (3d Cir. 1977) (upholding complaint alleging a "course of interdependent consciously parallel action").
67. See, e.g., Twombly, 550 U.S. at 569 n.14 ("complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible"); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (courts must avoid "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each"); Champagne Metals v. Ken-Mac Metals Inc., 458 F.3d 1073, 1087 (10th Cir. 2006) (reversing a grant of summary