CHAPTER I

SECTION 1 OF THE SHERMAN ACT AND THE PER SE RULE

This chapter provides an overview of Section 1 of the Sherman Act and analyzes the criminal ramifications of per se violations of the Sherman Act, including price fixing, bid rigging, and allocation of markets or customers. This chapter also discusses the international reach of the Sherman Act and the application of the Sherman Act to corporate entities, and concludes with a review of other types of anticompetitive conduct that can lead to criminal liability.

A. Section 1 of the Sherman Act and the Per Se Rule

Enacted in 1890, the Sherman Act[1] is the United States' primary federal antitrust statute. It contains two principal substantive provisions: Section 1 and Section 2. Section 1 broadly prohibits agreements between distinct actors that unreasonably restrain trade.[2] It provides: "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."[3]

Section 1 imposes both criminal and civil liability for violations. For criminal violations, Section 1 provides:

> 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 $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[4]

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1. 15 U.S.C. §§ 1-7.
2. Section 2 of the Sherman Act prohibits unilateral action and combinations and conspiracies that monopolize or attempt to monopolize trade or commerce. 15 U.S.C. § 2.
3. 15 U.S.C. § 1.
4. *Id.*

The Supreme Court has explained that, despite its literal wording, Section 1 does not prohibit *every* type of agreement in restraint of trade.[5] Rather, Section 1 only prohibits agreements that restrain trade unreasonably.[6] To determine whether a restraint of trade is unreasonable, and thus prohibited by the Sherman Act, courts have traditionally applied one of two modes of analysis: the rule of reason and the per se rule of illegality.[7] The rule of reason is the presumptive test under Section 1.[8] Courts applying the rule of reason conduct a detailed analysis of the challenged conduct by weighing its perceived anticompetitive effects against its procompetitive efficiencies.[9]

The per se rule of illegality is an exception to the rule of reason, under which certain conduct is considered categorically anticompetitive and therefore illegal under Section 1 without extensive analysis.[10] Application

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5. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 189 (2010) ("[E]ven though, 'read literally,' § 1 would address 'the entire body of private contract,' that is not what the statute means."); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("This Court has not taken a literal approach to this language, however.").
6. Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911); *see also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885 (2007) ("While § 1 could be interpreted to proscribe all contracts . . . the Court has never taken a literal approach to its language . . . Rather, the Court has repeated time and time again that § 1 outlaws only unreasonable restraints.") (citations omitted); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[T]his Court has long recognized that Congress intended to outlaw only unreasonable restraints.").
7. In recent decades, courts have also begun to apply an intermediate standard of analysis, often referred to as the "quick look" or "truncated rule of reason analysis." This method of analysis is often used when a full-scale rule of reason analysis is inappropriate, but the challenged conduct would not trigger traditional per se treatment. *See* JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 12.01(3) (2d. ed. 2018).
8. *Dagher*, 547 U.S. at 5 ("[T]his Court presumptively applies rule of reason analysis."); Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726 (1988) ("[T]here is a presumption in favor of a rule-of-reason standard.").
9. Nat'l Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679, 691 (1978) (explaining that the "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition").
10. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on

of the per se rule is limited to conduct whose "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[11] The per se rule typically applies to horizontal price-fixing,[12] bid-rigging,[13] and market-allocation agreements among competitors.[14] Such agreements are considered per se illegal under Section 1 without regard to the offender's market power or the conduct's anticompetitive effects or procompetitive benefits.[15] At times, courts have also applied the per se rule to tying

competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.")

11. NCAA v. Bd. of Regents, 468 U.S. 85, 103-04 (1984).
12. Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 347 (1982) ("We have not wavered in our enforcement of the per se rule against price fixing."). Per se treatment is not limited to agreements that literally *fix* the final price charged to customers. Rather, courts will apply per se treatment to various types of horizontal agreements insofar as they directly affect prices. *See, e.g.,* Catalano, Inc. v. Target Sales, 446 U.S. 643, 648 (1980) ("An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing.").
13. United States v. Bensinger Co., 430 F.2d 584, 589 (8th Cir. 1970) (holding that a bid-rigging agreement "is a price-fixing agreement of the simplest kind, and price-fixing agreements are per se violations of the Sherman Act.").
14. United States v. Topco Assocs., 405 U.S. 596, 608 (1972) ("One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.").
15. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940) ("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."); *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 909 (6th Cir. 2003) ("[T]he virtue/vice of the per se rule is that it allows courts to presume that certain behaviors as a class are anticompetitive without expending judicial resources to evaluate the actual anticompetitive effects or procompetitive justifications in a particular case.").

agreements[16] and horizontal group boycotts[17]; however, the per se rule will only apply to such conduct under certain circumstances. The Supreme Court has held that the per se rule no longer applies to vertical group boycotts[18] or vertical price restraints.[19]

Once a plaintiff or prosecutor demonstrates that a defendant has engaged in conduct that is per se illegal, liability attaches, and courts are not required to undertake a detailed inquiry into the conduct's precise harm or business purpose.[20] Nor do courts engage in the balancing test as performed in regard to rule of reason matters.[21] Accordingly, litigation involving per se illegal conduct, at least with respect to liability, centers on whether an illegal agreement exists, rather than on the agreement's purpose or effects.[22]

B. Elements of the Offense

To establish a violation of Section 1, a plaintiff must prove three elements: (1) the existence of concerted action among at least two distinct actors, (2) that unreasonably restrains trade, and (3) that affects interstate or foreign commerce of the United States.[23] Because this Handbook concerns criminal cartel activity presumed to be unreasonable under the per se rule, this chapter focuses on the first element of a Section 1 offense: the existence of concerted action between distinct actors, otherwise known as the element of agreement.

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16. *See* Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 462 (1992) (holding that per se rule may apply to tying arrangements, but only when the party imposing the tie has market power in the tying product market).
17. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432 (1990) ("Respondents' boycott thus has no special characteristics meriting an exemption from the per se rules of antitrust law.").
18. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998).
19. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 907 (2007).
20. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985).
21. *Id.*
22. However, a plaintiff seeking damages in a private civil action must also prove the existence and extent of antitrust injury. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).
23. T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 632-33 (9th Cir. 1987).

Section 1 does not prohibit unilateral activity by a single actor or between actors within the same firm.[24] Rather, to establish a Section 1 violation, there must be concerted activity between "separate economic actors pursuing separate economic interests."[25] The determination of whether conduct involves separate actors does not turn on legal formalities, but on "a functional consideration of how [the parties] actually operate."[26] Actions undertaken by a single corporation and its employees, agents, unincorporated divisions, or wholly owned subsidiaries are generally considered unilateral and will not give rise to Section 1 liability.[27] The same is true for the actions of a fully integrated joint venture.[28] However, business arrangements that join together "independent centers of decision making," such as nonintegrated joint ventures, professional organizations, and trade groups, are capable of engaging in concerted activity under Section 1.[29]

Concerted activity (i.e., a "contract," "combination," or "conspiracy") occurs when there is "a conscious commitment to a common scheme designed to achieve an unlawful objective."[30] Put differently, distinct actors must share "a unity of purpose or a common design and understanding, or a meeting of minds."[31] An express agreement need not be proved to establish a violation Section 1.[32] Concerted activity may be

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24. Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986) ("Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement."). Unilateral activity is subject to scrutiny under Section 2 of the Sherman Act. 15 U.S.C. § 2.
25. Am. Needle, Inc. v. NFL, 560 U.S. 183, 184 (2010) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).
26. *Id.*
27. *Copperweld*, 467 U.S. at 769-74 (rejecting the doctrine of intra-enterprise conspiracy).
28. Texaco Inc. v. Dagher, 547 U.S. 1, 5-6 (2006).
29. *Am. Needle*, 560 U.S. at 183-84.
30. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (citation omitted).
31. Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).
32. United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, (1966) ("[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.").

accomplished tacitly, even without verbal or written communication.[33] Similarly, offenders need not have identical motives,[34] nor is it a defense that a party simply acquiesced in illegal conduct or was coerced into participating.[35] When a conspiracy is alleged, Section 1 does not require that the parties take any overt act in furtherance of the conspiracy or have the means of accomplishing its goals.[36] The act of conspiring is itself sufficient to constitute concerted activity under Section 1.

Section 1 does not, however, prohibit competitors from engaging in parallel conduct based on independent business judgement, so long as it is not purely based on concerted activity. This so-called conscious parallelism is not itself unlawful,[37] and courts recognize that prices among competitors may rise or coalesce in concentrated markets without the presence of concerted activity.[38]

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33. Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965) ("A knowing wink can mean more than words.").
34. Spectators' Commc'n 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.").
35. MCM Partners v. Andrews-Bartlett & Assocs., 62 F.3d 967, 973 (7th Cir. 1995) ("[T]he 'combination or conspiracy' element of a section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion."); United States v. Paramount Pictures, 334 U.S. 131, 161 (1948) ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one").
36. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940) ("[I]t is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring.").
37. Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028, 1032-33 (8th Cir. 2000) ("Evidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws.").
38. *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 359 (3d Cir. 2004) ("[F]irms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action.").