

Antitrust Resource Manual

- 1. Elements of the Offense
- 2. Identifying Sherman Act Violations
- 3. Contact Information and Criminal/Section Territories

1. Elements of the Offense

1. Elements of the Offense

To establish a criminal violation of Section 1 of the Sherman Act (15 U.S.C. § 1), the government must prove three essential elements:

- A. The charged conspiracy was knowingly formed and was in existence at or about the time alleged;
- B. The defendant knowingly joined the charged conspiracy; and
- C. The charged conspiracy either substantially affected interstate or foreign commerce or occurred within the flow of interstate or foreign commerce.

Conspiracy or Agreement: The conspiracy or agreement to fix prices, rig bids or allocate markets is the key element of a Sherman Act criminal case. In effect, the conspiracy must comprise an agreement, understanding or meeting of the minds between at least two competitors or potential competitors, for the purpose or with the effect of unreasonably restraining trade. The agreement itself is what constitutes the offense; overt acts in furtherance of the conspiracy are not essential elements of the offense and need not be pleaded or proven in a Sherman Act case.

In a Sherman Act criminal case, general intent must be proven. Customarily, however, proof of the existence of a price fixing, or bid rigging or market allocation agreement is sufficient to establish intent to do what the defendants agreed among themselves to do.

The agreement need not be embodied in express or formal contractual statements. It must merely constitute some form of mutual understanding that the parties will combine their efforts for a common, unlawful purpose. The ultimate success of the venture is immaterial as long as the agreement is in fact formed.

Knowingly Joining the Conspiracy: To find the defendant acted knowingly, it must be shown that the defendant acted voluntarily and intentionally rather than because of a mistake, accident, or other innocent reason. The defendant must have joined the conspiracy with the intent to assist or advance the object or purpose of the conspiracy. The government need not show that the defendant knew all the details or members of the conspiracy nor that the defendant participated in all the conspiratorial acts. Also, it is not necessary for the defendant to have participated in the origination of the conspiracy. Of course, mere knowledge of the conspiracy without participation in the conspiracy does not make a defendant a member of the conspiracy. In addition, a defendant who knowingly directs another person to participate in the conspiracy is responsible for the conduct s/he directed just as if s/he directly participated in the conduct. If a defendant is shown to have joined a conspiracy, the defendant is presumed to remain a member of the conspiracy until the conspiracy has been completed or abandoned or until the defendant has withdrawn from the conspiracy.

Per Se Rule: Price fixing, bid rigging and market allocation are among the group of antitrust offenses that are considered “per se” unreasonable restraints of trade. The courts have reasoned

that these practices, which invariably have the effect of raising prices to consumers, have no legitimate justification and lack any redeeming competitive purpose and should, therefore, be considered unlawful without any further analysis of their reasonableness, economic justification, or other factors. For most other antitrust offenses, the courts have established an analytical approach labeled the “rule of reason.” Under the “rule of reason,” the courts must undertake an extensive evidentiary study of (1) whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive justifications relating to the restraint. Under the “rule of reason,” if any anticompetitive harm would be outweighed by the practice’s procompetitive effects, the practice is not unlawful. Virtually all antitrust offenses likely to be prosecuted by a United States Attorney’s office will be governed by the “per se” rule.

Interstate or Foreign Trade and Commerce: Finally, the restraint must be shown to be in the flow of, or to affect, interstate or foreign trade or commerce. For interstate commerce, this test is ordinarily satisfied by demonstrating that products involved in the case were shipped across state lines that services involved interstate activities, or that significant federal funding was involved. For foreign commerce, this test can be satisfied by showing that the conduct involved import trade or import commerce or, if not, that the conduct had a direct, substantial and reasonably foreseeable effect on trade that is not export commerce or on a person engaged in export trade or export commerce in the United States.

Single versus Multiple Conspiracies: In addition to proving the elements of the offense, it is always necessary to determine the scope of the conspiracy and the companies or individuals who participated in it. The most difficult issue in many of these cases involves the determination of what constitutes the conspiracy. In antitrust criminal cases, it is especially important to determine whether a single, continuing conspiracy was in existence involving numerous price changes, bid awards, or markets allocated, or whether certain isolated price changes, bid awards, or markets allocated were the subjects of separate conspiracies.

[added November 2017]

2. Identifying Sherman Act Violations

The most common violations of the Sherman Act and the violations most likely to be prosecuted criminally are price fixing, bid rigging, and market allocation among competitors (commonly described as “horizontal agreements”). This section will identify and describe the various types of horizontal price fixing, bid rigging and market allocation agreements, as well as describe the methods of detecting these violations. These descriptions should be useful for investigative planning by U.S. Attorneys, Special Agents of the Federal Bureau of Investigation, and other federal investigators. For further guidance, see An Antitrust Primer for Federal Law Enforcement Personnel and related primers, which can be found here: <https://www.justice.gov/atr/criminal-enforcement>. Vertical resale price maintenance, which is an agreement on price between a manufacturer and its distributors (or a distributor and its retailers), may not be prosecuted criminally, although such agreements are “per se” unlawful, because of the difficulty of distinguishing between vertical price agreements and other vertical restraints, such as exclusive territories, that are judged under the “rule of reason.”

Identifying Price-Fixing Activities: Price fixing generally involves any agreement between competitors to tamper with prices or price levels, or terms and conditions of sale (e.g., interest rates for consumer credit), for commodities or services. Generally speaking, price fixing involves an agreement by two or more competing producers of a specific commodity, or competing providers of a particular service, in a defined geographic area, to raise, set or maintain prices for their goods or services. It may take place at either the wholesale or retail level and, although it need not involve every competitor in a particular market, it usually involves most of the competitors in the particular market.

In its most common form, price fixing is an agreement to raise the price of a product or service to or by a specific amount, e.g., all widget manufacturers agree to a 5 percent increase in price effective June 1. Other manifestations of price fixing include the following:

- A. Agreements to establish or adhere to uniform price discounts;
- B. Agreements to eliminate discounts to all customers or certain types of customers;
- C. Agreements to adopt a specific formula for the computation of selling prices;
- D. Agreements on terms and conditions of sale, including uniform freight charges, quantity discounts, or other differentials that affect the actual price of the product; and
- E. Agreements not to advertise prices or to refuse to sell the product through any bidding process.

The fact that all competitors charge the same price, or use the same terms of sale, is not, by itself, evidence of a price-fixing conspiracy because similar prices may in fact be the outcome of competition. However, where price increases are announced by all competitors at the same time, or prior to a uniform effective date, there is a substantial likelihood of collusion.

Further, the fact that all prices are not identical does not indicate the absence of a conspiracy. For example, one company may have traditionally sold at a price lower than the others and, when a general increase in price occurs, the company with the lower price may adopt the same percentage or absolute increase as the others.

Records of changes or prices, including price lists, price-change notices and company memoranda relating to price analysis, are all helpful in determining the existence of a price fixing conspiracy. In addition, evidence of competitors' meetings or communications raise the possibility of collusion, and such evidence usually comprises the most effective circumstantial form of proof in price fixing cases. Antitrust conspiracy cases, however, like other conspiracy cases, generally require testimony from a member of the conspiracy.

Identifying Bid-Rigging Activities: Bid rigging generally involves an agreement or arrangement among companies to determine the successful bidder in advance of a bid letting at a price set by the successful bidder. The agreed-upon winning bidder customarily advises the other potential bidders of a bid amount they must exceed (usually the amount of the winning bid or a certain amount above that bid). The higher bids submitted by the other bidders are generally known as complementary bids. (In the case of offers to buy, the complementary bids will generally be lower than the winning bid.) Also, some potential bidders may agree to refrain from bidding on a particular project. In most bid rigging situations, the conspirators endeavor to submit three or more bids on the project to create the appearance that competitive bidding has occurred.

In other situations, the potential bidders may agree to (a) rotate the projects among themselves, thereby ensuring that each gets some work, (b) allocate geographic areas, or (c) divide the project by granting subcontracts to complementary bidders for portions of the work. Where companies that submitted high bids on a specific project are later identified as project subcontractors, the bids should be analyzed carefully.

The Antitrust Division has worked with many federal and state agencies to identify the most effective methods of detecting bid rigging. Based on experience in this area, the most useful bid analysis techniques usually require careful study of records of the bid, including an initial screening of bid submissions to determine:

Whether there was any cost estimate for the project prepared by the governmental or private authority letting the bids, and if so, whether the low bidder's final price exceeded the estimate. It is also important to know whether the bidders and potential bidders were aware of the cost estimate prior to bidding since the bidders could use that information to set their agreed-upon low bid at or not too far above the estimate without serious danger that the bids will be rejected as too high. Bidders ordinarily know the percentile range above the estimate of cost that the bidding authority is likely to accept before the bidding authority would recommend rejecting the bids and rebidding the project; and

Whether there was a small number of proposed bidders for a project. As a practical matter, when there are a large number of bidders, e.g., more than six, for a project, it is more difficult, although not impossible, to rig the bids.

After this initial screening, suspicious bids should be analyzed for the following practices, which are frequently indicia of collusion:

- A. Qualified bidders fail to bid or, more specifically, the logical bidders for the job fail to bid;
- B. Certain contractors repeatedly bid against one another or, conversely, certain contractors never bid against one another;
- C. Successful bidders repeatedly subcontract work to companies that submitted higher bids on the same project, or to companies that requested or received proposals for bids but did not submit bids;
- D. Different groups of contractors appear to specialize in winning bids from certain kinds of customers to the exclusion of others, suggesting that customers have been allocated among the bidders;
- E. A particular contractor appears to bid substantially higher on some bids than on other bids within the same period of time and geographic area (where there would be little or no difference in material, manpower, or transportation costs for the projects). This can be detected if the bids are submitted with item-by-item cost listings (line-item basis) rather than by a single price;
- F. A particular contractor always wins the projects in a certain geographic area and there are no obvious competitive reasons why this should be so;
- G. Certain contractors submit bids frequently in a given geographic area but never win there;
- H. Identical bid amounts on particular line items are submitted by two or more contractors. In some instances, identical line-item bids can be explained, since suppliers often quote the same prices to several bidders. However, a large number of identical bid items, or identical bids on any service-related item, should be viewed critically;
- I. Contractors previously convicted of bid rigging in other states or areas submit bids;
- J. Joint-venture bids are submitted where either contractor in the venture could have bid individually as the prime contractor; and
- K. The original bidders fail to rebid when the original bids were rejected for being too far over estimate, or a rebidding results in the same bidders being ranked in the same order as on the original bidding.

In addition to the analysis of data that is essential in a bid rigging investigation, the most important evidence to be developed relates to meetings or other communications regarding bids among the competing bidders. It is frequently necessary to rely on the testimony of participants in the conspiracy who are willing to testify.

Identifying Market Allocation Activities: In addition to price fixing and bid rigging, market allocation agreements among competitors may be detected. These are horizontal customer allocation and territorial allocation agreements.

Horizontal customer allocation is an agreement among competitors at the same level of distribution of a product or service that each will service certain designated customers or classes of customers and will not attempt to compete, or will limit the manner in which they will compete, for the business of customers allocated to a competitor.

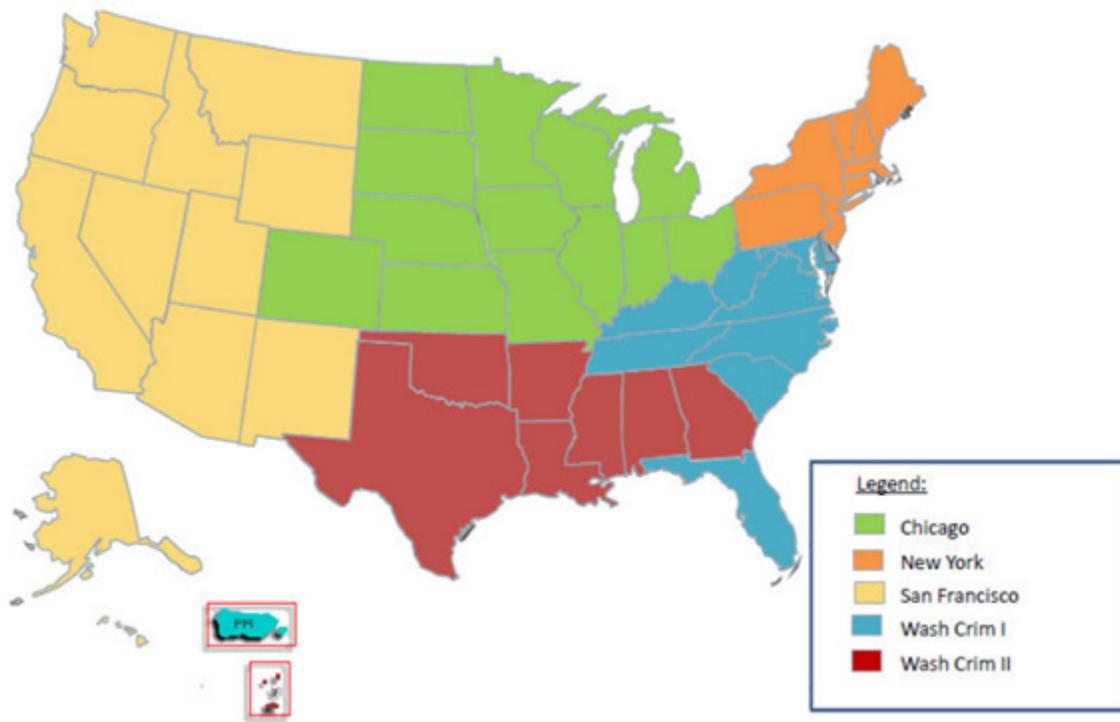
Horizontal territorial allocation is an agreement among competitors at the same level of distribution of a product or service to solicit or service customers only within a certain geographic area. The competitors who agree to this type of arrangement will often reject business from customers in another's territory. Both customer and territorial allocation schemes result in an absence of competition in prices and choice of products for the affected customers.

[added November 2017]

3. Contact Information and Criminal/Section Territories

Authorization to investigate possible violations of the antitrust laws can be found in Title 7: Antitrust (JM 7-3.100 – Authorization to Investigate).

Further information about the five offices and sections dedicated to the Antitrust Division’s criminal enforcement efforts can be found in Title 7: Antitrust (JM 7-1.320 – Criminal Offices and Sections). A current list of names, titles, and contact information for individuals in these offices and sections can be found here: <https://www.justice.gov/atr/contact-information>.



* District of Columbia is shared by Wash Crim I and Wash Crim II

Additional information about the Antitrust Division and investigating and prosecuting antitrust offenses can be found here: JM Title 7: Antitrust and <https://www.justice.gov/atr>.

[added November 2017]