

The FTC's Procedural Advantage in Discovering Concerted Action

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Scholars have long argued that Section 5 of the Federal Trade Commission Act¹ can or should be interpreted to reach more conduct than Section 1 of Sherman Act²—whether, in other words, there are gaps in the coverage of Section 1 that allow certain forms of anticompetitive conduct that Section 5 should condemn.³ One potential difference in coverage lies in how the two antitrust statutes draw the line between lawful conscious parallelism and unlawful concerted action.

I argue here that there is no substantive gap between the two antitrust statutes on this issue—both statutes prohibit (and permit) the same conduct. There may, however, be a procedural gap. Particularly after the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,⁴ the FTC has an advantage over private plaintiffs in the procedures at its disposal for discovering unlawful concerted action.

The dilemma in the treatment of conscious parallelism is often posed by some version of the following hypothetical⁵: There are four independently owned gas stations at the same street corner in a remote town. Without a wholesale price increase, one station owner decides to raise his prices in the hope that the others will follow. When the first mover posts the new prices, his rivals realize they have an opportunity to increase sales at the old price. Nevertheless, each decides to match the price increase, in the belief that doing so is more likely to enhance long-run profit. The stations have achieved a noncompetitive price by a series of consciously parallel decisions.

One might argue that the gas stations in this scenario have formed a “contract, combination . . . or conspiracy” under Section 1. The first station's price increase is arguably an offer and the other stations' matching price increases are arguably acceptances.⁶ Moreover, some of the Supreme Court's traditional definitions of concerted action under Section 1—a “conscious com-

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¹ 15 U.S.C. § 45.

² 15 U.S.C. § 1.

³ See, e.g., Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871 (1999) (“The FTC and Clayton Acts were intended to refine and extend the Sherman Act and better implement its basic goals by filling in the gaps in its coverage.”).

⁴ 127 S. Ct. 1955 (2007).

⁵ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 128 (2005); Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 423, 428–29 (1997); George A. Hay, *Facilitating Practices: The Ethyl Case*, in *THE ANTITRUST REVOLUTION* 182 (John E. Kwoka Jr. & Lawrence J. White eds., 3d ed. 1999); William H. Page, *Communication and Concerted Action*, 37 LOYOLA U. CHI. L.J. 405, 411–12 (2007).

⁶ See, e.g., *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) (Posner, J.) (“If a firm raises price in the expectation that its competitors will do likewise, and they do, the firm's behavior can be conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices.”).

mitment to a common scheme”⁷ or a “meeting of minds”⁸—might literally apply, because the station owners come to share a common goal in taking their respective actions.⁹ Courts have not, however, interpreted Section 1 in this way. Under *Matsushita*,¹⁰ evidence of consciously parallel conduct, by itself, is not enough to avoid summary judgment. The plaintiff must produce evidence that tends to exclude the possibility that the defendants’ parallel actions were the product of either independent or merely interdependent decisions.¹¹ In other words, a plaintiff must have some evidence that is consistent only with an agreement or concerted action among the defendants.

In requiring more than conscious parallelism to establish a Section 1 violation, the courts have agreed with Donald Turner that simple conscious parallelism is (a) not culpable, because firms that engage in the practice are only acting rationally by taking account of each other’s likely responses to their respective actions; and (b) not subject to regulation, because the courts could only interdict the practice by direct price regulation.¹² Contrary to Turner, the courts have held that conscious parallelism is lawful even if the actors are able to maintain noncompetitive prices only with the aid of “facilitating practices,” like delivered pricing or most favored customer clauses.¹³

Courts have also refused to extend Section 5 of the FTC Act to consciously parallel conduct, with or without facilitating practices, for similar reasons.¹⁴ Unlike Section 1, Section 5 does not require an agreement; it requires only that the defendants have engaged in an unfair method of competition. But courts have refused to extend Section 1 to consciously parallel conduct because they believe that to do so would represent bad antitrust policy, not because they believe that the literal language of the statute forecloses that result. The same antitrust policy concerns apply in the interpretation of the broad language of Section 5. Courts are unwilling to infer that firms are engaged in concerted action if they are able to maintain noncompetitive prices by facilitating practices that also provide clear consumer benefits.¹⁵ Consequently, both Section 5 and Section 1 are properly interpreted to require proof of concerted action rather than simple conscious parallelism. There is no substantive gap.

After *Twombly*, however, there may be a procedural gap between Section 5 and Section 1, as those statutes are most commonly enforced. *Twombly* extends *Matsushita*’s summary judgment rationale to the pleading stage of a Section 1 claim. Under *Twombly*, to avoid dismissal for failure to state a claim, a private plaintiff must plead more than simple conscious parallelism; it must allege enough factual detail about the defendants’ conduct to make it “plausible” to believe that

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⁷ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

⁸ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

⁹ See, e.g., William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 24–25 (1993).

¹⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

¹¹ *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 571 n.35 (11th Cir. 1998).

¹² Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665, 669 (1962).

¹³ William H. Page, *Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act*, in ANTITRUST LAW AND ECONOMICS (Keith Hylton ed., forthcoming 2009). See, e.g., *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1274–75 (N.D. Ga.), *aff’d sub nom. Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003). Of course, an express agreement to adopt a facilitating practice is likely to be held per se illegal. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649–50 (1980).

¹⁴ See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 133–34, 140–42 (2d Cir. 1984).

¹⁵ *Id.* at 136–37 (holding that Section 5 may bar “incipient” violations of the antitrust laws).

they conspired.¹⁶ The Court rested this pleading standard on its fear of discovery: “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim.”¹⁷ Justice Stevens, in dissent, condemned this rationale because the evidence necessary to allege agreement is usually in the possession of defendants, and thus only accessible through discovery.¹⁸ Thus, he feared, the Court’s standard might shield some unlawful conduct.

The decisions of the lower federal courts since *Twombly* lend some support to Justice Stevens’ concerns because they generally require allegations of fairly specific communications among rivals in order to state a Section 1 claim.¹⁹ Those kinds of communications will usually only be available through discovery. Some courts do allow limited pre-answer discovery on the merits.²⁰ This sort of discovery is appropriate, particularly where the allegations suggest that a focused factual inquiry might confirm whether the plaintiff could make sufficient allegations.²¹ But, to the extent that courts do not allow sufficient pre-answer discovery, the FTC might fill the procedural gap in appropriate cases by exercising its administrative powers of investigation.

Private parties who believe that they have been injured by concerted action, but who lack sufficiently detailed information to plead a violation of Section 1 under *Twombly*, can bring their evidence to the FTC either before filing suit or after dismissal of their action in federal court. The FTC, using its expertise in evaluating both economic and noneconomic evidence, can decide whether to conduct further investigation. The FTC “was granted in its enabling statute broader powers of investigation than almost any other department or agency in the federal government.”²² For example, the FTC can informally request information from firms.²³ More important, under Section 9 of the FTC Act, the Commission may “require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.”²⁴ This provision allows the FTC to conduct what amounts to civil discovery before it has issued a complaint. Obviously, such a sweeping power raises the risk of imposing undue costs

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¹⁶ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).

¹⁷ *Id.* at 1966–67.

¹⁸ *Id.* at 1975 (Stevens, J., dissenting) (quoting earlier decisions holding that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators’ . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly”) (citations omitted).

¹⁹ See, e.g., *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (requiring allegations that identify “specific actions by a particular defendant at a particular time”); *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 492 (D. Conn. 2008) (“Although the complaint repeatedly refers to these alleged ‘clandestine meetings’ among certain defendants, it states no specific examples of the defendants’ conduct in the meetings, other than general allegations of conspiracy.”); see generally William H. Page, *Twombly and Communication: the Emerging Definition of Concerted Action Under the New Pleading Standards* (Oct. 19, 2008) (examining post-*Twombly* rulings on motions to dismiss Section 1 claims), available at <http://ssrn.com/abstract=1286872>.

²⁰ See, e.g., *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (reporting, without criticism, that the district court allowed limited discovery after a dismissal of the complaint with leave to amend).

²¹ Page, *supra* note 19, § IV(C).

²² Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 214 (2005). See generally Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy*, 35 REAL EST. L.J. 33 (2006) (surveying FTC investigative mechanisms).

²³ FTC OPERATING MANUAL § 3.3.6.6.1 (request for access letters), § 3.3.6.6.4 (interviews), available at <http://www.ftc.gov/foia/ch03investigations.pdf>.

²⁴ 15 U.S.C. § 49. See also FTC OPERATING MANUAL, *supra* note 23, § 3.6.7.5.2 (describing criteria for issuance of subpoenas).

on businesses. The FTC's own internal standards, however, provide procedural safeguards, which should be used to avoid abuses. For example, there are prior and subsequent internal review procedures for any use of compulsory process.²⁵

If the FTC finds evidence of concerted action, it can file a complaint²⁶ or, in the case of naked price fixing or market allocation, refer the case to the Antitrust Division for possible criminal prosecution.²⁷ Private parties may, in appropriate cases, file suits after the FTC investigation, relying on the additional information the FTC developed in order to satisfy the demands of *Twombly*.²⁸ One might argue that this division of responsibility between public and private enforcers is efficient. *Twombly* may provide a useful screen against "impositional discovery"²⁹ by private plaintiffs, who necessarily consider only their private interest in deciding whether to sue.³⁰ If, however, Justice Stevens is correct that the screen will filter legitimate lawsuits, the FTC provides a forum and a mechanism to decide whether further discovery is justified on public interest grounds. In these kinds of cases, the FTC can use its procedural advantage to discover evidence of concerted action that would otherwise lie hidden. ●

²⁵ FTC OPERATING MANUAL, *supra* note 23, § 3.6.7.3 (requiring clearance and approval by a Bureau Director for compulsory process), § 3.6.7.5.7 (providing for petitions to quash or limit subpoenas).

²⁶ *Id.* § 4.2.2.

²⁷ *Id.* § 3.6.9; ANTITRUST DIVISION MANUAL VII-8 (2008) ("When a matter is before the FTC and the FTC determines that the facts may warrant criminal action against the parties involved, the FTC will notify the Division and make available to the Division the files of the investigation following an appropriate access request."), available at <http://www.usdoj.gov/atr/public/divisionmanual/chapter7.pdf>.

²⁸ See Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1166-70 (1986).

²⁹ Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

³⁰ William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 23 (1995) (observing that "private plaintiffs, particularly competitors, have every incentive to bring suit whenever the prospect of treble damages exceeds the costs of suit, regardless of the economic consequences").