

## The FTC's Procedural Advantage in Discovering Concerted Action

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This panel<sup>1</sup> considers whether Section 5 of the Federal Trade Commission Act<sup>2</sup> can or should be interpreted to reach more conduct than Section 1 of Sherman Act.<sup>3</sup> Rather than attempt to formulate a general answer to this question, I will limit my remarks to conscious parallelism and its relationship to unlawful concerted action. I argue that Section 1 and Section 5 have the same substantive reach within this domain, but that the FTC may have a procedural advantage over private plaintiffs in discovering concerted action, particularly after the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>4</sup>

The dilemma in the treatment of conscious parallelism is often posed by some version of the following hypothetical:<sup>5</sup> 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

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<sup>1</sup> These remarks were presented at the "Workshop on Section 5 of the FTC Act as a Competition Statute," at the Federal Trade Commission in Washington D.C., on October 17, 2008.

<sup>2</sup> 15 U.S.C. § 45 (2007).

<sup>3</sup> 15 U.S.C. § 1 (Supp. IV 2004).

<sup>4</sup> 127 S. Ct. 1955 (2007).

<sup>5</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 128 (2005); Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors:*

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.

You might say that the gas stations in this scenario have formed “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.<sup>6</sup> Moreover, some of the Supreme Court’s traditional definitions of concerted action under Section 1—a “conscious commitment to a common scheme”<sup>7</sup> or a “meeting of minds”<sup>8</sup>— might literally apply, because the station owners come to share a common goal in taking their respective actions.<sup>9</sup> Courts have not, however, interpreted Section 1 in this way. Under *Matsushita*,<sup>10</sup> 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.<sup>11</sup> They must, in other words, produce some evidence that is consistent only with agreement or concerted action. In reaching this result, 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

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<sup>6</sup> 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.”).

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

<sup>8</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781, 796 (1946).

rationality by taking account of each other's likely responses to their respective actions; and (b) not regulable, because the courts could only interdict the practice by direct price regulation.<sup>12</sup> Contrary to Turner, the courts have reached upheld conscious parallelism even if the firms have achieved a noncompetitive result with the assistance of independently adopted "facilitating practices," like delivered pricing or most favored customer clauses.<sup>13</sup>

Courts have also refused to extend Section 5 of the FTC Act to consciously parallel conduct, with or without facilitating practices, for similar reasons.<sup>14</sup> 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, as the previous paragraph shows, 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. There is no reason to think conscious parallelism is "incipient" concerted action.<sup>15</sup> Consequently, both Section 5 and Section 1 are properly interpreted to require proof of concerted action. There is no substantive gap.

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<sup>12</sup> Donald F. Turner,

After *Twombly*, however, there may be a procedural gap between Section 5 and Section 1, as those statutes are most commonly enforced. *Twombly* extends

communications will usually only be available through discovery. Some courts do allow some pre-answer discovery on the merits.<sup>20</sup> I have argued elsewhere that 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. 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 economic evidence, can decide whether to conduct furt

investigation.”<sup>23</sup> This provision allows the FTC to conduct what amounts to civil discovery before it has issued a complaint. Obviously, such a sweeping power raises risk of imposing undue costs on businesses. The FTC’s own internal standards, however, provide procedural safeguards, which should be used to avoid abuses.<sup>24</sup>

If the FTC finds evidence of concerted action, it can file a complaint<sup>25</sup> or, in the case of naked price fixing or market allocation, refer the case to the Antitrust Division for possible criminal prosecution.<sup>26</sup> Private parties may, in appropriate cases, file follow-on suits, relying on the additional information the FTC developed in order to satisfy the demands of *Twombly*.<sup>27</sup> One might argue that this division of responsibility is efficient. *Twombly* may provide a useful screen against “impositional discovery”<sup>28</sup> by private plaintiffs, who necessarily consider only their private interest in deciding whether to sue.<sup>29</sup> If, however, Justice Stevens is correct that the screen will catch legitimate lawsuits, the FTC provides a forum to decide whether further discovery is justified on public interest grounds.

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<sup>23</sup> 15 U.S.C. § 49. See also FTC OPERATING MANUAL, § 3.6.7.5.2 (describing criteria for issuance of subpoenas).

<sup>24</sup> FTC OPERATING MANUAL, § 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).

<sup>25</sup> Id. at § 4.2.2.

<sup>26</sup> Id. at § 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>