No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONERS

R. HEWITT PATE
Counsel of Record
PAUL S. HAYES
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds an unadorned assertion that defendants were participants in a "conspiracy," without alleging any facts that, if later proved true, would establish the existence of a conspiracy under the applicable legal standards.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors and scholars who teach and write on economics and, in particular, on the economics of industrial organization and antitrust policy. They include William Baumol, Michael Boskin, Robert Crandall, Kenneth Elzinga, David S. Evans, Gerald Faulhaber, Franklin Fisher, Luke

[1] The parties have consented to the submission of this brief and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. *Amici* and their counsel were not compensated in any way.

Froeb, Richard Gilbert, Paul Joskow, Michael Katz, Paul Milgrom, Thomas Moore, Janusz Ordover, Robert Pindyck, Robert Porter, Frederic Scherer, Richard Schmalensee, Marius Schwartz, David Sibley, Vernon Smith, Edward Snyder, Michael Spence, Pablo Spiller, Alan Sykes, David Teece, and Michael Whinston. A summary with titles and affiliations appears in the Appendix at the end of this brief. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated. *Amici* have not been retained by any party with regard to this action.

PRELIMINARY STATEMENT

Two or more firms, selling in the same market, price their product "in similar ways" over time (or otherwise act similarly). Is that fact, together with a claim that the sellers conspired to fix prices (or agreed on some other dimension of competition), enough for a plaintiff to survive a motion to dismiss and set the wheels of litigation in motion under Section 1 of the Sherman Act, at least until summary judgment?

As we read the Second Circuit's decision, the answer is "yes, that is enough." This court of appeals decided that rivals acting in parallel in a manner that would be illegal if the result of conspiracy, together with an unsupported assertion of conspiracy, was sufficient to survive a motion to dismiss. Parallel behavior in this case concerned ***not*** taking a particular business action, in particular ***not*** entering certain geographic markets. The Second Circuit's decision therefore pertains to situations in which two or more firms, similarly, act or do not act.

Parallel behavior is a common feature of the dynamic competitive market processes. Market forces such as demand and supply shifts, changes in consumer preferences, and technological change move equilibrium prices up or down, make new product features more or less attractive, and make

particular geographic markets more or less appealing. The efficient response to these market forces is usually for firms to "behave in similar ways" including taking or not taking similar actions. Firms would, at the margin, be discouraged from responding efficiently to market signals in ways that might seem to be mimicking the conduct of rivals if they faced the prospect that actions similar to those taken by competitors could support at least the discovery phase of antitrust claims filed by various parties.

The undersigned economists believe the Second Circuit has taken antitrust enforcement in a misguided direction by adopting its "parallel behavior is enough" standard and in failing to require that a complaint contain facts sufficient to support an inference of conspiracy. This standard would impose direct costs on business firms (in the form of diverted management time) and deadweight costs on the economy (through resources used up in rent-seeking litigation). More significantly, in our view, pricing, entry, marketing, and other business decisions would be colored by a dismissal rule that, in effect, opens U.S. businesses to unsubstantiated allegations of conspiracy to restrain trade.

INTRODUCTION AND SUMMARY

This matter poses two alternative standards for allowing a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act to go forward.

The first is the one adopted by the district court in *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd* 425 F.3d 99 (2d Cir. 2005), and applied, as we understand it, by the Courts of Appeals for the First, Sixth, and Tenth Circuits: a claim of conspiracy can survive a motion to dismiss only if the allegations in the complaint, if proven to be true, tend to exclude the possibility that the claimed conspirators acted independently. (*See* Pet. for a Writ of Cert., *Bell Atlantic Corp. v. Twombly* (No. 05-

1126), at 19-20.) The fact of parallel behavior, standing alone, does not tend to exclude the possibility of independent action: firms that compete with one another often behave like one another in at least some respects. Therefore, under this standard, a claim can proceed only if there is something more than parallel behavior, requiring what is sometimes called "plus factors." Applying this "plus factor" standard the district court dismissed the plaintiffs' case because the court could not infer a conspiracy from the allegations in the complaint. *See Twombly*, 313 F. Supp. 2d at 189 ("The allegations of plaintiffs' complaint provide no reason to believe that defendants' parallel conduct was reflective of any agreement. The complaint therefore alleges nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators.").

The second is the one adopted by the Second Circuit (and by no other court of appeals to our knowledge): a claim can proceed based on allegations of parallel behavior and an assertion that this parallel behavior is the result of conspiracy. *See Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005) ("But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."). To do otherwise, reasoned the Second Circuit, "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* It is hard to imagine a court being able to reach such a conclusion in a real case. And, applying this "parallel behavior is enough" standard, the Second Circuit reversed the dismissal without examining, for all intents and purposes, whether the facts alleged supported to any extent an inference of conspiracy.

The observation that the defendants engage in parallel behavior is not a sound basis on which to infer collective conduct. The district court reasoned correctly that "parallel action is a common and often legitimate phenomenon, be-

cause similar market actors with similar information and economic interests will often reach the same business decisions." *Twombly,* 313 F. Supp. 2d at 179. Economic analysis supports this: competing firms often act similarly because they respond to the same demand and supply forces.[2] The Second Circuit's reasoning, on the other hand, could sustain a conspiracy claim against thousands of farmers who receive the same price for their wheat (or who decide not to plant a new variety of wheat), because one cannot exclude with absolute certainty that they conspired to charge the same price (or conspired not to adopt a new variety of wheat).

The "parallel behavior is enough" standard would enable plaintiffs to claim that sellers in the same alleged market engaged in a conspiracy in restraint of trade on the basis of the fact that they acted (or have not acted) in similar ways, such as increasing or decreasing prices around the same time, entering or not entering certain markets, introducing or not introducing similar competing products, and so forth. The sweeping nature of the standard is seen in the case at hand. According to the Second Circuit, the parallel failure of the defendants to enter each other's territories—their failure to take an action—along with an unsupported assertion that this parallel failure was the result of conspiracy was sufficient for the case to proceed to discovery. *See Twombly,* 425 F. 3d at 117-18.

This "parallel behavior is enough" standard would impose significant costs on the economy and, thus, on consumers. Plaintiffs could pursue class action cases against companies based on only garden-variety economic behavior such as raising prices in response to higher demand or reducing capacity in response to shrinking demand. Rather than incurring the cost of discovery and litigation, and facing the risks

---

[2] *See* Paul A. Samuelson & William D. Nordhaus, ECONOMICS 51-53, 152-57 (18th ed. 2005).

always attendant in litigation even for innocent defendants, companies will often settle these lawsuits. That will provide further incentives to file frivolous cases. The direct costs to businesses resulting from this cycle of litigation and settlement costs are likely to be substantial in the aggregate.

However, these visible costs could be just the tip of the iceberg. Expected litigation and settlement costs are one of the factors that businesses consider in making decisions. Businesses will face a so-called "tax" in making the same efficient decisions as their competitors. At the margin, this tax will deter businesses from responding efficiently to changes in costs, demand, or technology. Over time it will reduce economic wealth and economic productivity.

The "plus factor" standard provides wide latitude for plaintiffs to pursue claims that businesses have conspired to restrain trade while limiting the disincentive that businesses would face under the "parallel behavior is enough" standard for taking the same competitive actions as their rivals. Under the "plus factor" standard, the courts inquire whether the facts pled tend to support an inference of conspiracy. (We take no view on exactly how strong this support should be.) This standard would require plaintiffs to allege behavior that tends to exclude the possibility of normal competitive behavior. For example, in the current case, courts would examine whether the failure to enter each other's markets tends to exclude the possibility of normal competitive behavior. The district court concluded it was not.

The Second Circuit concluded that the district court should not even have addressed this question. However, it recognized that its "parallel behavior is enough" standard could impose "colossal" costs that would induce defendants to settle "meritless claims":

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs them-

> selves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.

Twombly, 425 F. 3d at 117.

We urge the Supreme Court to recalibrate the balance selected by the Second Circuit and avoid the "colossal" costs on the economy recognized by that court.

ARGUMENT

I. PARALLEL BEHAVIOR AMONG NON-CONSPIRING FIRMS IN THE SAME INDUSTRY IS NORMAL AND COMMON

Firms that operate in the same market commonly make similar business decisions—including not considering or pursuing the myriad possibilities open to any business—for several reasons well known to economists.

To begin with, consider the textbook example of a market for a homogeneous commodity in which many small firms face the same demand and cost conditions.[3] In such a perfectly competitive market, all firms charge the same price at all times, so that all change price in parallel. Price in this idealized situation is determined not by collusion, but by the forces of supply and demand as they affect competitors acting independently. A change in demand (perhaps because of a

[3] *See* Samuelson & Nordhaus, *supra* note 2, at 147-48; Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 56-58 (4th ed. 2005); N. Gregory Mankiw, PRINCIPLES OF MICROECONOMICS 290 (3d ed. 2004).

rise in gross domestic product (GDP)) or a change in supply (perhaps because of a fall in the cost of an input) will change the market price. All firms in the market, therefore, would change their price accordingly. Thus, in perfect competition without collusion, economists expect that all competing firms will act in parallel with each other. (These sorts of changes may also lead some firms to enter or exit the business.)

Of course, few, if any, real-world markets are perfectly competitive. However, the process just described applies broadly. Competing firms may end up charging different prices because they differentiate their products or they have some market power over some group of customers. However, because they face similar demand and cost conditions, an industry-wide change in demand or cost that leads one firm to change its prices will ordinarily lead its rivals to change their prices in the same direction for the same reason.

The proposition that firms in the same market commonly act in parallel in the absence of any sort of conspiracy is not restricted to prices. Competing firms make product design, entry, location, marketing, and other business decisions based on similar market conditions and information. Not surprisingly, because they are all seeking to maximize profit subject to similar constraints, they tend to make similar decisions.

Economists have identified several other factors that lead to firms in the same market engaging in parallel behavior.[4] Suppose firm A sees firm B do something that affects its market position (e.g., change the package size it sells). Firm A may follow firm B for three reasons. First, it may believe

[4] *See* Marvin Lieberman & Shigeru Asaba, *Why do Firms Imitate Each Other*, 31 ACADEMY MGMT REV. 2: 366-85 (2006); S. Bikhchandani, D. Hirshleifer & I. Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 3:151-70 (1998); D. Scharfstein & J.C. Stein, *Herd Behavior and Investment*, 80 AMER. ECON. REV. 3: 465-79 (1990).

that firm B has superior information. In fact, much innovation gets diffused through industries precisely because of this imitative behavior.[5] Second, firm B's action may give it a competitive advantage; firm A can limit that competitive advantage by copying firm B. Third, it is possible that firm A and firm B, without conspiring, have decided to follow each other's changes in this arena. This sort of "conscious parallelism" is not a conspiracy and it is our understanding that it is not illegal. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

Of course, firms may also engage in parallel behavior as a result of a conspiracy. But, because there are other, more common sources of parallel behavior, merely observing parallel behavior does not, as a matter of logic, tend to exclude the possibility of independent action.

II. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD PERMIT CLAIMS OF CONSPIRACY TO RESTRAIN TRADE AGAINST ALMOST ALL FIRMS

The "parallel behavior is enough" standard would allow conspiracy claims against firms that have engaged in routine competition to survive a motion to dismiss. As we understand it, a plaintiff could sue two or more firms for conspiring to restrain trade in violation of Section 1 of the Sherman Act by

---

[5] Jan Rivkin, *Imitation of Complex Strategies*, 46 MGMT SCI. 6: 824-44 (2000); Boyan Jovanovic & Glenn MacDonald, *Competitive Diffusion*, 102 J. POL. ECON. 1: 24-52 (1994); Paul Segerstrom, *Innovation, Imitation and Economic Growth*, 99 J. POL. ECON. 4: 807-27 (1991); R. Nelson & S. G. Winter, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 265, 267-68 (Belknap Press, 1982).

(a) alleging that these firms made similar competitive business decisions (including not taking specific actions such as entering particular markets) that would be illegal if they were the result of a conspiracy, and (b) asserting, without offering any facts to support it, that this parallel behavior is in fact the result of a conspiracy.

Because under this standard plaintiffs need not have any evidence that the behavior was the result of a conspiracy and may simply claim this, the only part of the standard that could limit the universe of potential defendants is whether it is possible to plead facts (that must be taken as true) that support (a) above. Virtually all firms in the economy will be at risk under this standard. Incumbents will have changed price in parallel in response to demand and cost changes. Firms may have all lowered price when significant entry occurred. They will have relied on the same information and analysis of the same business conditions, to enter markets, chose business locations, design products, invest in innovation, and make other decisions that affect market outcomes—including not availing themselves of a myriad of possible business opportunities and therefore taking no action at all. Many firms will also have imitated rivals for a variety of reasons.

As we understand the Second Circuit's standard for dismissing a claim of conspiracy in restraint of trade, it would be possible for plaintiffs to assert a claim that would survive dismissal against virtually any set of two or more competing firms in the economy. (We have used the qualification "virtually" only because we cannot logically exclude the possibility of an exception.) Because a showing of market power is not a requirement for a Sherman Act Section 1 claim, the more than 24 million businesses[6] in the United States

[6] According to the U.S. Census Bureau the total number of U.S. businesses was 24,416,241 in 2003, *available at* http://www.census.gov/csd/susb/susb03.htm.

could, in principle, be subject to claims that could not be dismissed under the "parallel behavior is enough" standard.

III. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD POSES A SIGNIFICANT ISSUE OF JUDICIAL AND PUBLIC POLICY

Economists have long recognized that conspiracies to restrain trade can cause significant economic losses through higher prices and reduced output.[7] Although agreements among competitors may promote economic efficiency, conspiracies, in which the members have suppressed the existence of an agreement among themselves, seldom, if ever, serve any competitive and efficiency-enhancing purpose. Conspiracies can also impose significant costs on society and are, by design, secret and hard to detect. Hence, there are sound economic reasons to impose substantial penalties to discourage firms from conspiring to restrain trade. The undersigned believe that antitrust law—and the courts—should be tough on cartels.

Economists have also recognized, however, that the legal system can impose significant costs on businesses, reduce economic efficiency, and ultimately harm consumers through higher prices and poorer products.[8] Unfortunately, some lawyers—or the plaintiffs they represent—abuse the legal system by filing cases that ultimately lack merit but impose significant costs and risks on business defendants.[9] Research

---

[7] *See* Adam Smith, THE WEALTH OF NATIONS 148 (Modern Library, 1994) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

[8] *See* W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, ECONOMICS OF REGULATION & ANTITRUST 39-40 (4th ed. 2005).

[9] For a discussion of the use of antitrust litigation as a means of achieving anticompetitive results, *see* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 247 (1985).

indicates that private antitrust enforcement efforts already involve many claims that appear to be without merit.[10] This underscores the problem noted by the Second Circuit. *See Twombly*, 425 F.3d at 114-17. Some plaintiffs' lawyers use litigation to extract money from businesses that find it is cheaper and less risky to settle than to litigate.[11] Class certification litigation is sometimes used to extort companies into writing large checks that often inure to the benefit of the lawyers.

In determining the appropriate standard for dismissal of a claim of conspiracy to restrain trade, society faces a tradeoff, as do the courts. On the one hand, making it easier for plaintiffs to pursue claims and obtain discovery will increase the likelihood that plaintiffs will uncover conspiracies in restraint of trade. An easier standard will, more importantly, discourage conspiracies in the first place because they are more likely to be detected and punished. On the other hand, making it easier for plaintiffs to file claims and pursue discovery will encourage plaintiffs to bring cases that lack merit in the hope of a settlement or verdict and, in the process, consume judicial and business resources. Moreover, firms would face a disincentive to engage in parallel behavior

---

[10] *See* E. Snyder & T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 551-603 (1991); T. Kauper & E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement*, 74 GEO. L. REV. 1163 (1986); Baumol & Ordover, *supra* note 9, at 252-53 (footnote omitted) ("[T]here is evidence that in antitrust suits private plaintiffs have a relatively low probability of winning their cases.") (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365 (1970), and National Economic Research Associates, *Statistical Analysis of Private Antitrust Enforcement, Final Report* (1979)).

[11] *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that "class certification creates an insurmountable pressure on defendants to settle, whereas individual trials would not"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (discussing the implications of the plaintiffs' claims lacking legal merit).

with their rivals because that behavior will make it more likely that they will be embroiled in litigation. Therefore, they will engage in less parallel behavior even when this behavior is efficient.

IV. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN GREATER EXPENDITURE OF JUDICIAL AND BUSINESS RESOURCES

The "parallel behavior is enough" standard would encourage plaintiffs to file and pursue claims that companies have engaged in restraints of trade in violation of Section 1 of the Sherman Act. This likely would include plaintiffs adding gratuitous conspiracy charges to complaints in unrelated matters (breach of contract cases for example) to increase the costs of the litigation to defendants and put additional pressure on the defendants to settle. The direct cost of this standard and the behavior it would encourage includes costs to the judiciary as well as to businesses.

Additional judicial resources would be spent handling cases with conspiracy claims that meet the "parallel behavior is enough" standard. These include expenditures for personnel and other judicial resources. They also include the opportunity cost of the federal judiciary's time. Assuming the federal courts (and their facilities and staff) cannot expand to meet the additional litigation that would result under the "parallel behavior is enough" standard, the federal court dockets would become more congested. Other matters would receive less attention from the courts. The litigants in these other matters, and ultimately society, would suffer from the diversion of judicial resources to unmeritorious conspiracy claims. Businesses would also spend resources defending unfounded conspiracy claims. These costs would include direct litigation expenses such as hiring lawyers and handling document production. More importantly, they would include

the opportunity cost of management and staff time spent on litigation rather than on business matters.[12]

V. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN REDUCED ECONOMIC EFFICIENCY AS FIRMS LIMIT EFFICIENT PARALLEL BEHAVIOR

Under the "parallel behavior is enough" standard, plaintiffs could claim conspiracy in restraint of trade against a firm by pleading facts that the firm acted in a way similar to its rivals and simply alleging that it did so as part of a conspiracy. The inclusiveness of the standard is best seen in the case at hand. Each of the incumbent local exchange carriers (ILECs) was accused of conspiring with the other local exchange carriers not because of any parallel action they took but because of parallel inaction they took. Each was alleged to have failed to avail itself of a provision of the Telecommunications Act of 1996 that could enable each ILEC to enter the other ILECs' territories and obtain interconnection privileges. Under the Second Circuit's view at least, the "parallel behavior is enough" standard would include actions in which two or more firms took similar actions or, alternatively, both decided not to take an action. In the case at hand, one can easily imagine the plaintiffs claiming conspiracy in restraint of trade if all of the ILECs had in fact entered each other's territories; then the claim could have been that the ILECs did that to preempt competition from the competing local exchange carriers (CLECs).

Any of the following similar actions by two or more firms could be considered parallel behavior:

---

[12] The processing time of complex antitrust requests was 484 days in 2005. S*ee* U.S. Department of Justice, "Chapter VII. Compliance with Time Limits/Status of Pending Requests" *in Freedom of Information Act (FOIA) Report for Fiscal Year 2005, available at* http://www.usdoj.gov/oip/annual_report/2005/05foiapg7.htm.

- entering a geographic area
- not entering a geographic area
- charging similar prices
- raising prices
- not raising prices
- lowering prices (in response to entry, say)
- introducing a new product line
- not introducing a new product line
- filing for a patent
- not filing for a patent
- adopting a particular new technology
- failing to adopt a particular new technology

The list is limited only by the ingenuity of the plaintiffs and their lawyers.

Economists have long recognized that competition among firms tends to lead to economic efficiency as firms seek advantages over one another.[13] Competing firms try to reduce their costs and seek unmet demand. Each, however, is responding to demand, costs, technological opportunities, information, public policies, and risk in the marketplace. In independently striving to lower costs and expand sales, rivals often mimic each other, just as prominent athletic teams do, as they compete in the marketplace. When one firm takes an action before its competitors do, the competitors typically examine that action to understand whether this leader secured a competitive advantage that they should also seek to share. This leads firms to imitate one another, though innovative firms often secure short-run benefits before their rivals catch on. This dynamic process of competition, which is the source of much of the growth in productivity and product improvement, is built, in great part, on behavior that at least appears parallel.

Economists and the courts are aware that firms also may follow each other in order to reduce rivalry. For example, a

---

[13] *See* Samuelson & Nordhaus, *supra* note 2, at 158-59, 216, 283; Carlton & Perloff, *supra* note 3, at 69-71.

firm may choose not to reduce price because it knows its rivals will reciprocate with lower prices as well. The courts have recognized, however, that it is difficult to distinguish competitive behavior from conscious parallelism. Therefore, they have decided that the costs of discouraging conscious parallelism outweigh the benefits of discouraging competitive parallel behavior that promotes efficiency. As noted above, it has long been established that conscious parallelism, even if it results in parallel behavior, does not violate Section 1 of the Sherman Act or any other rule of U.S. antitrust law.[14]

A similar tradeoff is at the heart of the policy issue that is posed by the alternative standards for dismissing a claim of conspiracy in restraint of trade. Allowing plaintiffs to pursue claims of conspiracy that meet the "parallel behavior is enough" standard may unearth some conspiracies that would not be detected under the "plus factor" standard (just as any discovery "fishing expedition" may by chance uncover evidence that could lead to a valid claim). The "parallel behavior is enough" standard, however, will impose a tax on the dynamic process of competition that will tend to discourage firms from engaging in efficient behavior. From the standpoint of economics, the policy issue presented by the alternative dismissal standards for a conspiracy in restraint of trade is whether the additional conspiracies uncovered and deterred by the less exacting standard is worth the resulting loss in dynamic competition and efficiency.

The undersigned have not conducted any studies of the loss in social welfare that would result from the "parallel behavior is enough" tax and it may be difficult, if not impossible, to quantify the loss. However, we believe the Court should be

---

[14] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

cognizant of potential costs resulting from this tax in assessing the tradeoff we have discussed above.

Parallel behavior can involve a wide variety of business actions and inactions, as we mentioned above. For each of those actions or inactions, businesses would face an additional direct and indirect cost of litigation—the tax—if those actions or inactions were similar to actions or inactions taken by one or more competitors. The tax is (roughly) equal to the additional probability of being sued times the cost of litigation if sued. For many small and medium-sized firms, the tax would probably be quite small, because the probability that any such firm would be sued on the basis of parallel conduct would be low. (The tax probably would not be zero, however, since plaintiffs could, at little cost, add a conspiracy charge to many garden-variety claims.) On the other hand, for the large firms that account for the bulk of gross domestic product, the tax could be significant. Such firms face a significant likelihood of being sued, and the cost of litigating an antitrust case in terms of lost management time is likely to be significant.

This tax will tend to discourage firms from taking the sorts of efficient actions that make up dynamic competition. Firms compare the costs and benefits of taking actions. The tax makes the costs of certain kinds of actions higher. Imposing it, therefore, will lead firms not to take certain efficiency-enhancing actions. The tax will, in particular, tend to discourage firms from engaging in the imitative behavior that underlies the diffusion of information and technology in the marketplace. In addition, because the "parallel behavior is enough" standard can be applied to the parallel failure to take actions, firms will be encouraged to take some actions that they might not have otherwise taken.

The overall effect of the tax on the economy is based on summing the effect of the tax on discouraging efficient business behavior across all firms in all markets that would be

affected by the "parallel behavior is enough" standard. We would expect that most large firms that do business nationally would be subject to the tax if the Second Circuit decision stands, because plaintiffs would seek to file cases with claims of conspiracy in restraint of trade in that circuit. The efficiency losses resulting from adopting the "parallel behavior is enough" standard would also need to be summed over time for as long as this standard remained law in the Second Circuit or other circuits.

Thus, the costs of the "parallel behavior is enough" standard would very likely be substantial even if it remains the law only in the Second Circuit.

VI. THE "PLUS FACTOR" STANDARD STRIKES A REASONABLE BALANCE BETWEEN DETECTING AND DETERRING CONSPIRACIES AND LIMITING THE INCENTIVES OF FIRMS TO ENGAGE IN NORMAL PRO-COMPETITIVE BEHAVIOR

The "plus factor" standard would seem to us, as economists, to impose a low hurdle for plaintiffs that wish to pursue a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. Plaintiffs need only allege facts that would tend to exclude the possibility of independent action to survive a motion to dismiss a claim of conspiracy. The plaintiffs would not have the burden of proffering evidence of an actual conspiracy, and neither the court nor the defendant could question the facts. Plaintiffs would, however, be required to explain why the alleged behavior is likely to result from collusion. Under the "plus factor" standard, the court is only permitted to assess whether that logical explanation tends to exclude the possibility that the alleged conspirators acted independently.[15] As a matter of first

[15] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

impression the "plus factor" standard would seem to us to strike a sensible balance because it requires plaintiffs to have facts that tend to suggest a conspiracy or some reason for the court to believe that the allegation of conspiracy is not simply a device to get to discovery. We therefore endorse the "plus factor" approach as the more reasonable insofar as it recognizes that one must have more than "parallel behavior" for a credible claim of conspiracy in restraint of trade under Section 1 of the Sherman Act.

CONCLUSION

The "parallel behavior is enough" standard cannot assist the courts in distinguishing horizontal agreements to restrain trade from normal competition. It would very likely impose significant costs on the economy by distorting competitive incentives and encouraging meritless litigation designed mainly to induce financial settlements.

Respectfully submitted,

R. HEWITT PATE
Counsel of Record
PAUL S. HAYES
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

APPENDIX

LIST OF *AMICI*

William J. Baumol
Harold Price Professor of Entrepreneurship and Academic Director of the Berkeley Center for Entrepreneurial Studies
Stern School of Business, New York University

Michael J. Boskin[1]
Senior Fellow, Hoover Institution
T.M. Friedman Professor of Economics
Stanford University
Former Chairman, President's Council of Economic Advisers, 1989-1993

Robert W. Crandall
Senior Fellow, Economic Studies
Brookings Institution

Kenneth G. Elzinga
Robert C. Taylor Professor of Economics
University of Virginia

David S. Evans
Executive Director, Jevons Institute for Competition Law and Economics and Visiting Professor
University College London

Gerald R. Faulhaber
Business and Public Policy Department
Professor of Business and Public Policy, Management, and Law
Wharton School, University of Pennsylvania
Former Chief Economist, Federal Communications Commission, 2000-2001

---

[1] Dr. Boskin is an expert on macroeconomics and public finance but has extensive experience in antitrust policy.

Franklin M. Fisher
Jane Berkowitz Carlton and Dennis William Carlton
Professor of Economics, Emeritus
Massachusetts Institute of Technology
John Bates Clark Award for top economist under the
age of 40, 1973

Luke M. Froeb
William C. and Margaret W. Oehmig Associate Professor in
Entrepreneurship and Free Enterprise
Owen Graduate School of Management, Vanderbilt
University
Former Director, Bureau of Economics, Federal Trade
Commission, 2003-2005

Richard J. Gilbert
Professor of Economics
University of California, Berkeley
Former Deputy Assistant Attorney General for Economics,
U.S. Department of Justice, Antitrust Division, 1993-1995

Paul L. Joskow
Elizabeth and James Killian Professor of Economics and
Management
Department of Economics and Sloan School of Management
Massachusetts Institute of Technology

Michael L. Katz
Sarin Chair in Strategy and Leadership
Haas School of Business and Department of Economics
University of California, Berkeley
Former Deputy Assistant Attorney General for Economic
Analysis, U.S. Department of Justice, Antitrust Division,
2001-2003

Paul Milgrom
Leonard and Shirley Ely Jr. Professor of Economics
Stanford University

Thomas Gale Moore
Senior Fellow, Hoover Institution
Stanford University
Former Member, President's Council of Economic Advisers, 1985-1989

Janusz A. Ordover
Professor of Economics and Director, Masters of Economics Program
New York University
Former Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Antitrust Division, 1991-1992

Robert S. Pindyck
Bank of Tokyo-Mitsubishi Professor of Economics and Finance
Sloan School of Management
Massachusetts Institute of Technology

Robert H. Porter
William R. Kenan, Jr. Professor of Economics
Northwestern University, Evanston, IL

Frederic M. Scherer
Aetna Professor Emeritus
John F. Kennedy School, Harvard University
Former Director, Bureau of Economics, Federal Trade Commission, 1974-1976

Richard Schmalensee
John C Head III Dean and Professor of Management and Economics
Sloan School of Management
Massachusetts Institute of Technology
Former Member, President's Council of Economic Advisers, 1989-1991

Marius Schwartz
Professor of Economics
Georgetown University, Department of Economics
Former Acting Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Antitrust Division, 1999

David S. Sibley
John Michael Stuart Centennial Professor of Economics
University of Texas at Austin
Former Deputy Assistant Attorney General for Economic Analysis, U.S. Department of Justice, Antitrust Division, 2003-2004

Vernon L. Smith
Professor of Economics and Law
George Mason University
Nobel Prize winner in Economics, 2002

Edward A. Snyder
George Pratt Shultz Professor of Economics
Graduate School of Business, University of Chicago

A. Michael Spence
Senior Fellow, Hoover Institution
Philip H. Knight Professor Emeritus of Management
Graduate School of Business, Stanford University
Nobel Prize winner in Economics, 2001

Pablo T. Spiller
Jeffrey A. Jacobs Distinguished Professor of Business & Technology
University of California, Berkeley

Alan O. Sykes
The Herman Phleger Visiting Professor of Law
Stanford Law School

David J. Teece
Mitsubishi Bank Professor of International Business
and Finance
University of California, Berkeley

Michael D. Whinston
Robert E. and Emily King Professor of Business Institutions
Northwestern University, Evanston, IL