

## Antitrust Law Blog

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### Allegations That Domestic Steel Producers Violated Section 1 Of The Sherman Act Through Reciprocal Calls For "Production Discipline" And Output Reduction Constitute "Plus Factors", And Survive *Twombly* Attack

Standard Iron Works v. Arcelormittal, N.D. ILL., No. 08 C 5214, June 12, 2009

Plaintiff Standard Iron Works ("Standard") commenced a class action against domestic steel producers, as a direct purchaser of steel products. Standard alleged a multi-year antitrust conspiracy to enhance price levels by the coordinated reduction of industry output of steel products in the United States. According to the complaint, each defendant implemented, and pre-announced, coordinated production cuts through express communications at numerous trade association meetings. The complaint alleged that the statements were made for the express purpose of coordinating production cuts for the purpose of raising the price of steel products. To circumvent the application of Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007), plaintiffs alleged that the trade association statements of the need for "discipline" constituted "plus factors" or the "something more" required as "facilitating practices" to transform "interdependent" behavior within a concentrated, fungible product industry into an actionable Sherman 1 violation. See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) and Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Monsanto and Matsushita built upon the Supreme Court's decision in Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) that "something more" than "conscious parallelism" was required before an agreement could be found under the Sherman Act. Thus, the analysis focused on the "something more" necessary before conscious parallel activity can be found to imply actionable concerted activity. The Theatre Enterprises court was concerned that, otherwise, aggressive competition based upon rational economic decisions expected from rivals would defer innovation and further activity in a market seeking competitive equilibrium. The fine line of where "conscious parallelism" ends and mutates into tacit coordination, and thus collusion, has been the grist of horizontal agreement analysis for over 70 years. See generally, Darryl Snider & Irving Scher, *Conscious Parallelism or Conspiracy?* ABA Section Of Antitrust Law, Issues In Competition Law And Policy 1143 (2008).

In Standard Iron Works the court found the "something more" bright line to be a series of

comments by industry leaders at a number of trade association meetings calling for "discipline", and thus inviting coordinated pricing and output behavior. In the context of Twombly, this was found to be "plausible". In distinguishing the facts of Twombly itself, the Standard Iron Works court found that, in addition to a market structure ripe for collusion, a "telling" plus factor was that the coordinated supply cuts represented an abrupt departure from each firm's prior behavior. This behavior, the court noted, occurred at a time when pricing was well above cost and when domestic demand for steel far exceeded domestic supply. Thus, the "disciplined" output reductions were contrary to the independent competitive interest of each of the defendants, in the Matsushita sense.

In addition, the court resurrected the specter of Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 699 (1962). In Continental Ore, the Supreme Court noted that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts. 370 U.S. at 699. To the extent that this restates the axiom usually credited to Aristotle that "the whole is greater than the sum of its parts", it is arguably contrary to the analysis of Monsanto and Matsushita. One must ponder how one could determine the presence or absence of "plus factors" or the "something more" that differentiates lawful oligopolistic interdependence from tacit collusion, without an examination of the constitute parts of an alleged conspiracy. Perhaps the teaching of Standard Iron Works might be "while lots of people do it, not everybody talks about it."

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