

# Conscious Parallelism in the Use of Delivered Pricing Systems: A Modified Per Se Standard of Review Under the Federal Trade Commission Act

Alan M. Anderson

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Alan M. Anderson, *Conscious Parallelism in the Use of Delivered Pricing Systems: A Modified Per Se Standard of Review Under the Federal Trade Commission Act*, 66 Cornell L. Rev. 1194 (1981)  
Available at: <http://scholarship.law.cornell.edu/clr/vol66/iss6/5>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## NOTES

### CONSCIOUS PARALLELISM IN THE USE OF DELIVERED PRICING SYSTEMS: A MODIFIED PER SE STANDARD OF REVIEW UNDER THE FEDERAL TRADE COMMISSION ACT

The legality of conscious parallelism<sup>1</sup> long has been a debated issue in antitrust law.<sup>2</sup> Commentators similarly have debated the treatment of delivered pricing systems<sup>3</sup> under the antitrust laws, although the subject has not received much recent attention.<sup>4</sup> Courts have consistently held agreements to use identical delivered pricing systems violative of the antitrust laws.<sup>5</sup> Although most commentators maintain that the antitrust laws do not proscribe conscious parallelism,<sup>6</sup> two courts have established different standards of review for determining whether conscious parallelism in the use of an identical delivered pricing system violates the Federal Trade Commission (FTC) Act.<sup>7</sup>

In *Triangle Conduit & Cable Co. v. FTC*,<sup>8</sup> the Seventh Circuit enunciated a per se standard of review, which fueled a national

---

<sup>1</sup> " 'Conscious parallelism' refers to the interdependent behavior on the part of firms that, while not explicitly colluding, still take account of one another's actions when making their business decisions." Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 257 (1980). Conscious parallelism generally occurs in highly concentrated or oligopolistic industries. *Id.* See note 30 and accompanying text *infra*. For a basic introduction to the economics of conscious parallelism, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 152-60 (2d ed. 1980). Commentators also term conscious parallelism "oligopolistic interdependence" or "tacit collusion." R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 40 (1976).

<sup>2</sup> See, e.g., Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y. L. SCH. L. REV. 881 (1979); Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227 (1977).

<sup>3</sup> See notes 13-23 and accompanying text *infra*.

<sup>4</sup> See, e.g., Hilder, *The Attack Upon Delivered Price Systems*, 14 GEO. WASH. L. REV. 397 (1946); Mund, *The Development and Incidence of Delivered Pricing in American Industry*, 15 LAW & CONTEMP. PROB. 141 (1950); Sheehy, *The Legal and Factual Content of Recent Geographic Pricing Cases*, 37 GEO. L.J. 183 (1949); Note, *Price Systems and Competition: The Basing-Point Issues*, 58 YALE L.J. 426 (1949).

<sup>5</sup> See notes 46-63 and accompanying text *infra*.

<sup>6</sup> See, e.g., Turner, *supra* note 2, at 663-73. *But see* R. POSNER, *supra* note 1, at 39-77.

<sup>7</sup> 15 U.S.C. §§ 41-58 (1976 & Supp. III 1979). Section 5 of the FTC Act states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 45(a)(1).

<sup>8</sup> 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

controversy concerning delivered pricing systems.<sup>9</sup> Thirty years later, the Ninth Circuit's decision in *Boise Cascade Corp. v. FTC*<sup>10</sup> established a standard of review requiring the FTC to demonstrate an effect on prices in order to invalidate a consciously parallel delivered pricing system.<sup>11</sup> In *Boise Cascade*, the FTC argued for a standard of review that would require the FTC to show only the artificiality of the challenged delivered pricing system.<sup>12</sup> Thus, three potential standards of review for determining the legality of conscious parallelism in the use of delivered pricing systems have arisen from these two decisions. An analysis of the three approaches indicates that courts should adopt a modified per se rule similar to the one enunciated more than thirty years ago by the Seventh Circuit in *Triangle Conduit*.

## I

## DELIVERED PRICING SYSTEMS

In a delivered pricing system the price paid to a producer includes both the price at the point of production (the mill price) and a freight charge to the point of delivery.<sup>13</sup> Producers who use a delivered pricing system, however, do not charge most buyers the actual freight on their shipments; some buyers pay more, and others pay less.<sup>14</sup> The primary alternative to a delivered price is a free on board (f.o.b.) mill price. Under this arrangement, the producer quotes only a mill price, and the buyer selects the mode and route of transportation and pays the actual freight charge to the delivery destination.<sup>15</sup>

---

<sup>9</sup> See notes 74-79 and accompanying text *infra*.

<sup>10</sup> 637 F.2d 573 (9th Cir. 1980).

<sup>11</sup> See notes 80-87 and accompanying text *infra*.

<sup>12</sup> See notes 87 & 88-92 and accompanying text *infra*.

<sup>13</sup> Landon, *Geographic Price Structures*, 15 LAW & CONTEMP. PROB. 125, 131 (1950); Note, *supra* note 4, at 427 & n.4. Buyers can pay the delivered price only at the point of delivery. See *id.* at 427.

Many commentators have studied the economics of delivered pricing systems. See, e.g., F. MACHLUP, *THE BASING POINT SYSTEM* 91-247 (1949); Clark, *Basing Point Methods of Price Quoting*, 4 CAN. J. ECON. & POL. SCI. 477 (1938); Kaysen, *Basing Point Pricing and Public Policy*, 63 Q.J. ECON. 289 (1949); Smithies, *Aspects of the Basing Point System*, 32 AM. ECON. REV. 705 (1942).

<sup>14</sup> Landon, *supra* note 13, at 131; Note, *supra* note 4, at 427 & n.4. See notes 17-23 and accompanying text *infra*. When a buyer pays more than the actual freight charge, the surplus is "phantom freight." F. SCHERER, *supra* note 1, at 328; Note, *Basing-Point Pricing and Antitrust Policy*, 55 YALE L.J. 558, 559 (1946). "Freight absorption" occurs when a buyer pays less than the actual freight charge and the producer absorbs the difference. F. SCHERER, *supra* note 1, at 328; Note, *supra*, at 559.

<sup>15</sup> Landon, *supra* note 13, at 129. Normally, producers who adopt f.o.b. mill pricing systems permit the buyer to pick up the product at the mill. Alternatively, the seller may quote

### A. *Types of Delivered Pricing Systems*

American industries employ two types of delivered pricing systems: basing point systems and zone pricing systems.<sup>16</sup> Under a basing point system, the delivered price consists of a mill price<sup>17</sup> plus a transportation charge from a basing point to the buyer's destination.<sup>18</sup> Under a single basing point system, the cost of the product to the customer consists of the mill price plus a freight charge from a single production point or base.<sup>19</sup> Under a multiple basing point system, a producer establishes several production points as bases, and the price of the product to the customer consists of the mill price plus a freight charge from the basing point that results in the lowest delivered price.<sup>20</sup> Under a zone pricing system, sellers quote an identical price to all buyers within a designated geographical zone, regardless of the actual transportation costs.<sup>21</sup> Under a single zone or "postage stamp" system, producers quote a single, uniform delivered price to

---

a delivered price that incorporates the actual mode and route selected by the buyer and then not allow the customer to pick up the product at the mill. This would not be a delivered pricing system. See note 14 and accompanying text *supra*.

<sup>16</sup> Wright, *Collusion and Parallel Action in Delivered Price Systems*, 37 GEO. L.J. 201, 202 (1949). Other categorizations are possible. See, e.g., Kaysen, *supra* note 13, at 292-93 (single basing point systems and universal freight equalization systems); Landon, *supra* note 13, at 126-29 (basing point systems, zone pricing systems and freight equalization systems).

<sup>17</sup> Sellers may quote the mill price from any production point.

<sup>18</sup> R. POSNER, *supra* note 1, at 70; Wright, *supra* note 16, at 202; Note, *supra* note 14, at 558-59. For examples of basing point systems, see notes 19 & 20 *infra*. Numerous industries, including the steel, lead, plywood, and sugar industries, have employed basing point systems. F. SCHERER, *supra* note 1, at 327. For a more extensive discussion of industries that have employed a basing point system, see F. MACHLUP, *supra* note 13, at 61-90.

<sup>19</sup> F. SCHERER, *supra* note 1, at 327; Note, *supra* note 14, at 559. For example, if Chicago were the basing point for the steel industry, a steel company in Pittsburgh, quoting a price to a buyer in Denver, would add the freight cost from Chicago to Denver to the mill price, rather than the actual freight from Pittsburgh to Denver. The steel industry employed the most famous single basing point system—"Pittsburgh plus"—until 1924, when the FTC declared it an unfair method of competition. See *United States Steel Corp.*, 8 F.T.C. 1 (1924).

<sup>20</sup> F. SCHERER, *supra* note 1, at 328; Note, *supra* note 14, at 559. For example, if Chicago and Denver were the only basing points for the steel industry, a steel company in Pittsburgh, quoting a price to a buyer in New York, would add the freight cost from Chicago to New York, rather than the freight cost from Denver to New York, because the Chicago-New York freight cost would be lower. The cement industry employed probably the most famous multiple basing point system until 1948 when the Supreme Court declared it unlawful. See *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

<sup>21</sup> Landon, *supra* note 13, at 139; Wright, *supra* note 16, at 202. For examples of zone pricing systems, see notes 22 & 23 *infra*. Numerous industries, including the hardware, aluminum, soap, and paper industries, have employed zone pricing systems. Landon, *supra* note 13, at 140.

all buyers.<sup>22</sup> Under a multiple zone system, producers quote an identical delivered price only to buyers within the same zone.<sup>23</sup>

### B. *Industry Characteristics that Foster Delivered Pricing Systems*

Industries that develop delivered pricing systems<sup>24</sup> tend to share several common characteristics.<sup>25</sup> First, the products are generally homogeneous.<sup>26</sup> Second, transportation costs frequently constitute a substantial portion of the delivered price.<sup>27</sup> Third, efficient operation usually requires a large scale of production.<sup>28</sup> Fourth, producers and buyers commonly are scattered geographically.<sup>29</sup> Finally, the industry is typically oligopolistic.<sup>30</sup>

If an industry has these traits but lacks a delivered pricing system, any producer can charge a lower price in a nearby market because his transportation costs to the nearby market are less than those incurred by more distant sellers. If the producer wants to expand his business by acquiring customers in a distant market, he must

<sup>22</sup> F. SCHERER, *supra* note 1, at 326; Landon, *supra* note 13, at 139. For example, a steel producer in Pittsburgh would quote the same delivered price to a buyer in Chicago and a buyer in Denver. The delivered price is high enough to cover total freight charges, but close buyers pay more than the actual freight costs and distant buyers pay less. F. SCHERER, *supra* note 1, at 326; Landon, *supra* note 13, at 139.

<sup>23</sup> F. SCHERER, *supra* note 1, at 326; Landon, *supra* note 13, at 139. For example, assume the United States were divided into two price zones—east and west of the Mississippi River—with the delivered price to the west zone higher than the delivered price to the east zone. A steel producer in Chicago would quote the same delivered price to buyers in New York and Pittsburgh, but a higher delivered price to a buyer in St. Louis, even though the producer is closer to St. Louis.

<sup>24</sup> See notes 18 & 21 *supra*.

<sup>25</sup> These industry characteristics also foster collusion and price fixing. See R. POSNER, *supra* note 1, at 54-71.

<sup>26</sup> Kaysen, *supra* note 13, at 290; Note, *supra* note 4, at 431; Note, *supra* note 14, at 560. Therefore, the output of one producer can substitute for the output of another, and buyers prefer one seller's product over another's primarily on the basis of price. *Id.*

<sup>27</sup> Kaysen, *supra* note 13, at 290; Note, *supra* note 4, at 431; Note, *supra* note 14, at 560. The relatively large transportation costs are often attributable to the low price per volume of the product.

<sup>28</sup> Kaysen, *supra* note 13, at 291; Note, *supra* note 4, at 431; Note, *supra* note 14, at 560. This factor encourages competition because producers normally want to maintain as high a level of production as possible.

<sup>29</sup> Kaysen, *supra* note 13, at 290-91; Note, *supra* note 4, at 431; Note, *supra* note 14, at 560-61. This feature, often termed "spatial differentiation," F. SCHERER, *supra* note 1, at 325, is crucial to the creation and eventual anticompetitive effects of delivered pricing systems. See notes 38 & 44 and accompanying text *infra*.

<sup>30</sup> Kaysen, *supra* note 13, at 291; Note, *supra* note 4, at 430; Note, *supra* note 14, at 561. Oligopoly, or "producer interdependence," is a prerequisite to the formation of a delivered pricing system. See notes 31-36 and accompanying text *infra*. One commentator has suggested that the presence of large buyers also facilitates the development of a delivered pricing system. Note, *supra* note 4, at 431-32.

charge a lower price in the distant market than is charged by the distant sellers.<sup>31</sup> In order to underprice the distant sellers, the producer must accept a lower net mill price because his transportation costs to the distant market exceed those incurred by the distant sellers. In an oligopolistic industry, however, if one producer cuts prices, the other sellers normally follow.<sup>32</sup> This behavior results in "a general erosion of the price structure . . . and perhaps even outright price warfare."<sup>33</sup> "In short, price competition . . . becomes financial disaster."<sup>34</sup> To prevent this breakdown in oligopoly discipline, delivered pricing systems typically develop,<sup>35</sup> thereby allowing all producers to quote identical delivered prices to any individual buyer.<sup>36</sup>

### C. *Anticompetitive Effects*

The industry-wide adoption of a delivered pricing system produces several anticompetitive effects, the most important of which are the elimination of price competition<sup>37</sup> and the promotion of price

<sup>31</sup> See note 26 *supra*.

<sup>32</sup> F. SCHERER, *supra* note 1, at 326-27; Note, *supra* note 4, at 432.

<sup>33</sup> F. SCHERER, *supra* note 1, at 327.

<sup>34</sup> Note, *supra* note 4, at 432.

<sup>35</sup> F. SCHERER, *supra* note 1, at 327.

<sup>36</sup> F. SCHERER, *supra* note 1, at 329; Kaysen, *supra* note 13, at 291. One of the purposes of a delivered pricing system is to facilitate collusion by implementing identical prices—the system's "outstanding feature," *id.*—thus reducing the possibility of disagreement over price and cartel breakdown. R. POSNER, *supra* note 1, at 70; F. SCHERER, *supra* note 1, at 171. A delivered pricing system, however, does not preclude firms from making secret discounts.

High transportation costs and geographic dispersion give producers "freight advantage territories" in which they have delivered price advantages. *Id.* at 326, 330. The industry-wide uniformity of delivered prices, however, allows producers to compete in geographic markets in which they would otherwise be unable to compete. *Id.* at 330. In this regard, a delivered pricing system allows market interpenetration and is procompetitive. *Id.* Producers achieve market interpenetration, however, through "passive acceptance of prices ordained by the system"; thus, the market structure fails to encourage greater price competition as a result of the increased interfirm contact. *Id.*

<sup>37</sup> Mund, *supra* note 4, at 155 ("Basing point and zone delivered pricing systems operate . . . to eliminate price competition. . . ."); Smithies, *supra* note 13, at 709 ("[T]he basing point system is inconsistent with [price] competition."); Note, *supra* note 4, at 434 ("The ultimate function of a [delivered pricing system] is to establish price levels that are stable. . . ."); Note, *supra* note 14, at 654 ("One of the most significant effects of a basing-point system is a suppression of price competition."). "Competition is impaired because basing point pricing systems reduce what would be an incredibly complicated price quotation problem, if executed independently, to a relatively simple matter of applying the right formula." F. SCHERER, *supra* note 1, at 329. For example, in 1936, eleven cement firms submitted sealed bids for the delivery of 6,000 barrels of cement; every firm bid \$3.286854 per barrel. FTC v. Cement Inst., 333 U.S. 683, 713 n.15 (1948).

Delivered pricing systems also cause higher price levels than would result from independent pricing by each seller. Note, *supra* note 4, at 435. For a more detailed discussion of this effect, see F. MACHLUP, *supra* note 13, at 202-13.

discrimination.<sup>38</sup> Furthermore, because all producers quote the same price to any one buyer, a buyer has no incentive to trade with a nearby rather than a distant seller; thus, society suffers the cost of excessive cross-hauling.<sup>39</sup> A delivered pricing system also distorts industrial location decisions by forcing producers and buyers to choose between basing point and nonbasing point locations.<sup>40</sup> In addition, delivered pricing schemes retard the adjustment of capacity in response to demand shifts in the industry by, for example, allowing producers to reallocate output from nearby regions where demand has

---

<sup>38</sup> F. SCHERER, *supra* note 1, at 329 (“[B]asing point pricing . . . is discriminatory.”); Note, *supra* note 4, at 435 (“All delivered price policies involve geographical price discrimination by individual sellers.”). *But cf. id.* at 434-36 (suggesting that this effect is justified as a complaint against delivered pricing systems only in certain circumstances). Price discrimination occurs when sellers receive different net prices (delivered price less actual freight cost) from different buyers for the same product. *Id.* at 435. Only f.o.b. mill pricing avoids price discrimination. *Id.* See also note 15 and accompanying text *supra*.

An essential condition for price discrimination is the ability to separate markets. Unless a producer can prevent resale, customers buying at a lower delivered price can over-buy and then sell the surplus to other customers, thereby eliminating the price discrimination. High transportation costs and geographic dispersion of customers provide natural barriers to resale and allow the maintenance of a delivered pricing system. Note, *supra* note 4, at 435 n.29. See also notes 27 & 29 and accompanying text *supra*. For a more detailed discussion of this effect, see F. MACHLUP, *supra* note 13, at 137-81; Wooden, *The Concept of Unlawful Discrimination as It Applies to Geographic Prices*, 37 GEO. L.J. 166 (1949).

<sup>39</sup> For example, a New York buyer may purchase from a Chicago firm, while a Chicago buyer purchases from a New York firm. Note, *supra* note 4, at 434.

Delivered pricing systems also foster excessive transportation costs because they generally assume rail freight, thus discouraging more economical and more efficient methods of transportation. F. SCHERER, *supra* note 1, at 331-32; Note, *supra* note 4, at 434; Note, *supra* note 14, at 559. Producers are reluctant to use cheaper methods of transportation because their customers then might demand a rebate, the payment of which would disrupt the pricing system. F. SCHERER, *supra* note 1, at 332. For a more extensive discussion of the excessive transportation costs delivered pricing systems engender, see F. MACHLUP, *supra* note 13, at 190-202.

<sup>40</sup> F. SCHERER, *supra* note 1, at 332-33; Note, *supra* note 14, at 567-68. *But see* Note, *supra* note 4, at 437-38 (suggesting delivered pricing systems have little or no effect on sellers' location decisions). Depending on such factors as “geographic distribution of customers and basing points, the structure of freight rates, the nonprice advantages (such as more rapid delivery) of greater proximity to customers, and the costs of producing at alternative locations,” a delivered pricing system may affect a seller's locational decision. F. SCHERER, *supra* note 1, at 333. For example, under a single basing point system, a seller may choose to locate at a nonbase location if the benefits from nearby sales (on which the seller realizes phantom freight) exceed the losses from distant sales (on which the seller must absorb freight charges). *See id.* On the other hand, a delivered pricing system may affect a buyer's locational decision. For example, commentators claim that the “Pittsburgh plus” system retarded the development of the steel fabricating industry in the South and West because fabricators (the buyers) chose to locate near Pittsburgh, the single basing point. F. MACHLUP, *supra* note 13, at 236-37; Kaysen, *supra* note 13, at 300-06. For more extensive discussions of the effect of a delivered pricing system on locational decisions, see F. MACHLUP, *supra* note 13, at 233-47; Johnson, *The Restrictive Incidence of Basing Point Pricing on Regional Development*, 37 GEO. L.J. 149 (1949).

decreased to distant regions where demand has remained constant.<sup>41</sup> Finally, a delivered pricing system fosters concentration in an industry by encouraging intra-industry mergers and by impeding the expansion of existing firms as well as the entrance of new firms.<sup>42</sup>

A delivered pricing system will produce these anticompetitive effects, however, only when specific conditions exist. First, every seller must adopt the same delivered pricing system.<sup>43</sup> Second, the producers and buyers must be geographically dispersed.<sup>44</sup> Finally, buyers must not have the option to purchase on an f.o.b. mill pricing basis.<sup>45</sup>

## II

### CONSCIOUS PARALLELISM AND DELIVERED PRICING SYSTEMS UNDER THE FTC ACT

Challenges to delivered pricing systems have arisen under three federal antitrust statutes: section 1 of the Sherman Act,<sup>46</sup> section 13 of the Robinson-Patman Act,<sup>47</sup> and section 5 of the FTC Act.<sup>48</sup> As a

<sup>41</sup> F. SCHERER, *supra* note 1, at 333. *But see* Note, *supra* note 4, at 438 (suggesting delivered pricing systems do not cause excess capacity). The same excess capacity exists when a producer reallocates output from nearby regions where demand has remained constant to distant regions where demand has increased. In both situations, the delivered pricing system allows the producer to compete with distant sellers notwithstanding his larger transportation costs, thus permitting the producer to maintain total output. For a more detailed discussion of this phenomenon, see F. MACHLUP, *supra* note 13, at 221-33.

<sup>42</sup> F. MACHLUP, *supra* note 13, at 215. *See also* Edwards, *Geographic Price Formulas and the Concentration of Economic Power*, 37 GEO. L.J. 135 (1949).

<sup>43</sup> "An individual seller's delivered price policy becomes significant as an anti-competitive device only when every other seller is using the same formula, and when all sellers are confident that gladly or reluctantly everyone will stick to it." Note, *supra* note 4, at 434.

<sup>44</sup> In fact, "the whole set of freight pricing practices aris[es] in response to differences in the geographic distance separating producers from their customers." F. SCHERER, *supra* note 1, at 325. *See* note 29 and accompanying text *supra*; note 38 *supra*.

<sup>45</sup> Otherwise, a buyer could avoid the anticompetitive effects of a delivered pricing system.

<sup>46</sup> 15 U.S.C. §§ 1-7 (1976). Section 1 states, in part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." The government has used § 1 to combat the price effects of delivered pricing systems. *See, e.g.*, Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

<sup>47</sup> 15 U.S.C. §§ 13-13b, 21a (1976). This Act declares that "[i]t shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . ." *Id.* § 13(a). The government has used this Act to redress the price discrimination effects of delivered pricing systems. *See, e.g.*, Corn Prods. Refining Co. v. FTC, 324 U.S. 726 (1945); FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945).

<sup>48</sup> 15 U.S.C. §§ 41-58 (1976 & Supp. III 1979); *see* note 7 *supra*. The FTC has used § 5 to attack both the effect on prices and the price discrimination effects of delivered pricing systems. *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683 (1948); Fort Howard Paper Co. v. FTC, 156 F.2d 899 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946); Salt Producers Ass'n v. FTC, 134 F.2d 354 (7th Cir. 1943).

result of these challenges, an agreement to use a delivered pricing system constitutes a per se illegal form of price fixing.<sup>49</sup> A single standard of review for determining whether the consciously parallel use of a delivered pricing system violates these antitrust statutes, however, does not exist.

### A. *The Early Cases*

The Supreme Court first analyzed the legality of delivered pricing systems in 1925. In *Maple Flooring Manufacturers Association v. United States*<sup>50</sup> and *Cement Manufacturers Protective Association v. United States*,<sup>51</sup> the Court held that the basing point systems under attack did not violate the Sherman Act.<sup>52</sup> In each case, the Court premised its holding on the government's failure to allege or prove the existence of an agreement to use a delivered pricing system.<sup>53</sup> In *Maple Flooring*,

<sup>49</sup> Herbert, *Delivered Pricing As Conspiracy and As Discrimination: The Legal Status*, 15 LAW & CONTEMP. PROB. 181, 184-85 (1950) ("[C]oncerted use of the basing point system . . . [is] unlawful under Section 1 of the Sherman Act."); Note, *supra* note 14, at 574 ("[C]oncerted action in maintaining a basing-point system is a type of price-fixing.") (footnote omitted). Concerted action in the use of a zone pricing system also eliminates price competition and is per se illegal. Mund, *supra* note 4, at 151-52.

Price fixing agreements have long been held per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity."). See also *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). A court may infer an agreement from the facts where no direct evidence of agreement exists. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225 (1939); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 612 (1914). See generally L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 109 (1977). Conscious parallelism along with some "plus factors" is enough to find agreement. *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 497 (9th Cir.), cert. denied, 344 U.S. 892 (1952). Sufficient "plus factors" include proposals for joint action, identical responses, direct communication, failure to deny agreement, and situations in which a producer would benefit only if all producers participated in an agreement. L. SULLIVAN, *supra*, § 110.

Initially, commentators disagreed over whether an agreement to use a delivered pricing system was per se illegal or whether illegality depended on a showing of an unreasonable restraint of trade. See Herbert, *supra*, at 183 n.8.

<sup>50</sup> 268 U.S. 563 (1925). The delivered pricing system in *Maple Flooring* actually existed as part of a much broader information exchange arrangement. Under this arrangement, the manufacturers' association compiled and distributed statistics on average costs for all members, freight books based on freight from Cadillac, Michigan, and sales information. *Id.* at 566-67. Producers would then quote delivered prices using Cadillac as the basing point. *Id.* at 570-71.

<sup>51</sup> 268 U.S. 588 (1925). The delivered pricing system in *Cement Manufacturers* also existed as part of a broader information exchange agreement, *id.* at 591-93, which facilitated the multiple basing point system employed by the industry. See *id.* at 597.

<sup>52</sup> *Maple Flooring*, 268 U.S. at 586; *Cement Manufacturers*, 268 U.S. at 606.

<sup>53</sup> *Maple Flooring*, 268 U.S. at 567 ("[I]t is neither alleged nor proved that there was any agreement among the members of the Association. . . ."); *Cement Manufacturers*, 268 U.S. at

however, the Court did suggest that a Sherman Act violation would exist if producers used a delivered pricing system as the basis of a price fixing agreement.<sup>54</sup>

The Court returned to this theme nine years later in *Sugar Institute, Inc. v. United States*,<sup>55</sup> in which it held that the existence of a basing point system coupled with an agreement to maintain prices constituted an illegal restraint of trade under the Sherman Act.<sup>56</sup> After the *Sugar Institute* decision, the Federal Trade Commission (FTC) replaced the Department of Justice as the primary enforcer of the antitrust laws in the field of delivered pricing systems.<sup>57</sup> Despite many successful challenges of delivered pricing systems,<sup>58</sup> each subsequent FTC challenge contained an allegation and proof of agreement.<sup>59</sup>

605 ("[T]he Government does not rely on any agreement or understanding. . ."). Section 1 of the Sherman Act requires an agreement to support a finding of guilt. *See Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) ("'[C]onscious parallelism' has not yet read conspiracy out of the Sherman Act. . .").

Even though the Court premised its holdings on the lack of an agreement among the manufacturers, the specific characteristics of the delivered pricing systems in both cases were not likely to produce anticompetitive effects. In *Maple Flooring*, the producers were not geographically dispersed and would quote f.o.b. mill prices to customers. 268 U.S. at 570-71. In *Cement Manufacturers*, the basing point system was a "natural" expedient adopted by the producers "in order to compete." 268 U.S. at 598. Significantly, the *Cement Manufacturers* Court found that the evidence did not indicate price rigidity, *i.e.*, prices changed frequently and price uniformity resulted only from competitors meeting those changes. *Id.* at 605.

<sup>54</sup> It cannot, we think, be questioned that data as to the average cost of flooring . . . when combined with a calculated freight rate . . . plus an arbitrary percentage of profit, could be made the basis for fixing prices or for an agreement for price maintenance, which, if found to exist, would . . . constitute a violation of the Sherman Act.

268 U.S. at 572 (dictum).

<sup>55</sup> 297 U.S. 553 (1936).

<sup>56</sup> *Id.* at 601. In *Sugar Institute*, the sugar refiners had used a basing point system as part of an intricate price fixing plan. *Id.* at 578 *passim*. The refiners had adopted a "Code of Ethics" that required refiners to sell sugar "only upon open prices and terms publicly announced." *Id.* at 579. This "Code of Ethics" included a delivered pricing system and denied buyers the right to purchase at an f.o.b. mill price. *Id.* at 590. Although the Court found that the refiners had not entered an agreement to use the delivered pricing system, it did find that the refiners had agreed to *maintain* the delivered pricing system. *Id.*

<sup>57</sup> Note, *supra* note 4, at 445. The FTC had attempted to attack the anticompetitive effects of delivered pricing systems much earlier. In 1924, for example, it issued a cease and desist order against the single basing point system used in the steel industry. *United States Steel Corp.*, 8 F.T.C. 1 (1924). Thereafter, however, the FTC withdrew from the field, apparently under the impression that *Maple Flooring* and *Cement Manufacturers* prevented any effective action. *See* Note, *supra* note 4, at 445.

<sup>58</sup> *See, e.g.*, *Fort Howard Paper Co. v. FTC*, 156 F.2d 899 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946) (zone pricing system); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478 (7th Cir. 1946) (basing point system); *United States Maltsters Ass'n v. FTC*, 152 F.2d 161 (7th Cir. 1945) (basing point system); *Salt Producers Ass'n v. FTC*, 134 F.2d 354, 356 (7th Cir. 1943) (zone pricing system).

More than ten years after the *Sugar Institute* decision, however, the Court intimated that the FTC Act does not necessarily require a finding of agreement in order to invalidate a delivered pricing system. In *FTC v. Cement Institute*,<sup>60</sup> members of a cement industry trade association had maintained a multiple basing point delivered pricing system that enabled association members to quote identical prices and terms of sale at any given destination.<sup>61</sup> Although the Court found the evidence of conspiracy to adopt a multiple basing point system among the cement firms sufficient to invalidate the scheme,<sup>62</sup> it stated that “[w]hile we hold that the Commission’s findings of combination were supported by evidence, that does not mean that existence of a ‘combination’ is an indispensable ingredient of an ‘unfair method of competition’ under the Trade Commission Act.”<sup>63</sup>

The FTC also successfully pursued violators of the price discrimination prohibition of the Robinson-Patman Act. *See, e.g.*, *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945); *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945). *See generally* Note, *supra* note 4, at 446-48.

<sup>59</sup> *Fort Howard Paper Co. v. FTC*, 156 F.2d 899, 901-03 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 480-82 (7th Cir. 1946); *U.S. Maltsters Ass’n v. FTC*, 152 F.2d 161, 163-64 (7th Cir. 1945); *Salt Producers Ass’n v. FTC*, 134 F.2d 354, 356 (7th Cir. 1943). The Seventh Circuit, however, decided to infer an agreement to employ a delivered pricing system. *See, e.g.*, *Fort Howard Paper Co. v. FTC*, 156 F.2d 899, 907 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946) (“[T]he artificiality and arbitrariness of the zone structure [employed here] is so apparent it cannot withstand the inference of agreement.”) (dictum); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 482 (7th Cir. 1946) (“[I]t taxes our credulity to believe . . . that petitioners employed this [basing point] system without any agreement or plan among themselves.”) (dictum).

<sup>60</sup> 333 U.S. 683 (1948).

<sup>61</sup> *Id.* at 709-11.

<sup>62</sup> *Id.* at 720.

<sup>63</sup> *Id.* at 721 n.19 (citation omitted) (dictum). To support its contention that a § 5 violation does not necessarily require an “agreement,” the Court relied on *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922). In *Beech-Nut*, the Court held that a producer’s unilateral efforts to reduce competition among retail distributors violated § 5 because they were “as effectual as agreements express or implied intended to accomplish the same purpose.” *Id.* at 455. Thus, the *Beech-Nut* Court impliedly held that an anticompetitive practice might constitute an unfair method of competition under the FTC Act even though it did not also violate the Sherman Act.

The *Cement Institute* Court also reasoned that “individual . . . or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an ‘unfair method of competition’” if the conduct might grow into a Sherman Act violation if left unrestrained. 333 U.S. at 708. This rationale, later known as the incipiency standard—*see, e.g.*, *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953) (“[T]he Federal Trade Commission Act was designed to supplement and bolster the Sherman Act . . . to stop in their incipiency acts and practices which, when full blown, would violate [the Sherman Act].”) (citation omitted)—appears to differ from the *Beech-Nut* rationale. Under the *Beech-Nut* rationale, anticompetitive conduct could violate the FTC Act even if it might never “blossom” into a Sherman Act violation.

An administrative law judge has summarized the reach of § 5 as follows:

Section 5 has been construed to reach a variety of market activity. First, action which violates the letter of the antitrust laws may also be condemned under Section

## B. Triangle Conduit

Sixteen days after the *Cement Institute* decision, the Seventh Circuit in *Triangle Conduit & Cable Co. v. FTC*<sup>64</sup> held that section 5 of the FTC Act does not require proof of an agreement in order to declare a delivered pricing system illegal.<sup>65</sup> In its complaint, the FTC alleged that producers of rigid steel conduit had violated section 5 “ ‘through their concurrent use of a formula method of making delivered price quotations with the knowledge that each did likewise, with the result that price competition between and among them was unreasonably restrained.’ ”<sup>66</sup> The FTC did not rest this allegation upon a theory of combination or conspiracy;<sup>67</sup> rather, it argued that the concurrent use of the basing point pricing system was *per se* illegal.<sup>68</sup>

5 “. . . since nominally that section registers violations of the Clayton and Sherman Acts.” . . . Section 5 also reaches activities which threaten incipient violations of the Sherman and Clayton Acts, or activities which could ripen into conspiracy, monopolization or attempted monopolization if full blown . . . .

Section 5 has also been construed to extend to cases where the “spirit” of the Sherman Act is violated even though the activity is not illegal at common law, or condemned by the Sherman Act specifically. . . .

Finally, the Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972), held that the Commission has authority under Section 5 to “consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”

*In re Ethyl Corp.*, No. 9128, 129 (Aug. 5, 1981) (Barnes, Administrative Law Judge) (citations omitted), summarized in ANTITRUST & TRADE REG. REP. (BNA) No. 1027, at A-15 (Aug. 13, 1981).

<sup>64</sup> 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

<sup>65</sup> 168 F.2d at 181.

<sup>66</sup> *Id.* at 176. This was the second count of the FTC's complaint. The first count alleged an agreement to use the delivered pricing system. *Id.* The producers of rigid steel conduit employed a multiple basing point system, using Chicago and Pittsburgh as the bases. Publication of freight rates and delivery charges facilitated identity of delivered prices. *Id.* at 177.

<sup>67</sup> In its brief the FTC stated: “Under Count II the issue is simply whether the concurrent use of the basing point practice—constitutes . . . an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.” Brief for FTC, *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949), quoted in Herbert, *supra* note 49, at 197. *Triangle Conduit* marked the first case in which the FTC alleged that conscious parallelism in the use of a delivered pricing system violates § 5. Sheehy, *supra* note 4, at 199 (“There has been no geographic pricing case in which the Commission has predicated an order solely upon facts comparable with those alleged in Count II of the *Conduit* case.”).

<sup>68</sup> “Count II . . . [is] frankly directed against the basing point practice as being *per se* an unfair method of competition, even though not predicated on combination and conspiracy.” Brief for FTC, *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949), quoted in Herbert, *supra* note 49, at 197. “The principle of the second count of the *Conduit* case is undoubtedly equally applicable to the parallel use of the zone system by a number of sellers.” Herbert, *supra* note 49, at 201.

The Seventh Circuit concluded that conscious parallelism in the use of the basing point system violates section 5 of the FTC Act.<sup>69</sup> Although some of the court's language signifies that the court adopted a strict per se standard,<sup>70</sup> close examination of the opinion indicates that the court invoked the per se rule only because the circumstances surrounding the industry-wide adoption of the delivered pricing sys-

---

<sup>69</sup> 168 F.2d at 181. The court concluded that the issue presented was "identical with the one the Supreme Court considered in the *Federal Trade Commission v. Cement Institute case*." *Id.*; see note 63 and accompanying text *supra*. In finding a § 5 violation, the court stated: [E]ach conduit seller knows that each of the other sellers is using the basing point formula; each knows that by using it he will be able to quote identical delivered prices and thus present a condition of matched prices under which purchasers are isolated and deprived of choice among sellers so far as price advantage is concerned. Each seller must systematically increase or decrease his mill net price for customers at numerous destinations in order to match the delivered prices of his competitors. Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation.

.....  
In light of [*Cement Institute*], we cannot say that the Commission was wrong in concluding that the individual use of the basing point method as here used does constitute an unfair method of competition.

168 F.2d at 181.

The Seventh Circuit also determined that direct evidence of the conspiracy alleged in the first count existed and that even if direct evidence had not existed, sufficient evidence existed to infer conspiracy. *Id.* at 180 ("We think there was direct proof of the conspiracy, but whether there was or not, in determining if such a finding is supported, it is not necessary that there be direct proof of an agreement. Such an agreement may be shown by circumstantial evidence."). Because the court found a conspiracy under the first count, some commentators argue that the second count must be read in light of the first, that is, that the FTC can bring a charge of conscious parallelism only if evidence of a conspiracy also exists. A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 88-89 (3d ed. 1980); Sheehy, *supra* note 4, at 195; Zlinkoff & Barnard, *Basing Points and Quantity Discounts: The Supreme Court and a Competitive Economy, 1947 Term*, 48 COLUM. L. REV. 985, 1005 (1948). Others maintain that the court's language reveals that it never reached the issue of the legality of conscious parallelism in the use of a delivered pricing system, and that the holding was based on conspiracy or collusion. See Herbert, *supra* note 49, at 196. "[T]o construe th[e] second count of the case as based upon the conspiracy found under the first count," however, "is to make it meaningless and mere surplusage." *Id.* at 197.

<sup>70</sup> For example, the court apparently rejected the producers' argument that "individual freight absorption is not illegal per se," 168 F.2d at 180, and thus, implicitly at least, accepted the per se theory proposed by the FTC, see note 68 and accompanying text *supra*. Moreover, the court never required the Commission to establish an actual anticompetitive effect in order to prove a § 5 violation. Thus, many commentators interpreted the *Triangle Conduit* case as declaring all industry-wide delivered pricing systems per se illegal. See, e.g., Herbert, *supra* note 49, at 196-97. In fact, the congressional furor that arose after the *Triangle Conduit* case, see notes 74-78 and accompanying text *infra*, resulted from this perceived interpretation of the case. See *Petition for Rehearing and Suggestion for Rehearing En Banc* at 12-13, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

tem were likely to produce anticompetitive effects.<sup>71</sup> In other words, rather than requiring the FTC to prove an actual anticompetitive effect under the "rule of reason,"<sup>72</sup> the *Triangle Conduit* court adopted a modified per se rule requiring the FTC to prove only the existence of certain industry characteristics likely to produce anticompetitive effects.<sup>73</sup>

---

<sup>71</sup> In finding a § 5 violation, the court stated: "[W]e cannot say that the Commission was wrong in concluding that the individual use of the basing point method *as here used* does constitute an unfair method of competition." 168 F.2d at 181 (emphasis added). This passage suggests that the court would invoke the per se rule not to invalidate all delivered pricing systems, but to invalidate only those schemes in which the industry traits indicate a natural tendency to decrease competition. The findings made by the Commission at the administrative level support the conclusion that the natural tendency of the pricing scheme adopted by the conduit producers was to affect prices:

Pursuant to Count II of the complaint herein, the Commission concludes from the evidence of record, and therefore finds, that *the capacity, tendency, and effect* of the use by each respondent named therein of the basing-point, delivered-price formula to determine price quotations and prices which will be made to conduit purchasers at any given destination concurrently with similar use of the same pricing formula by other of the said respondents *has been, and is, to hinder, lessen, and restrain competition in price* in the sale and distribution of conduit; to deprive purchasers of the benefits of competition in price; to unfairly discriminate among purchasers; and to create in each of said respondents a dangerous tendency toward a monopolistic control over price in the sale and distribution of conduit.

Rigid Steel Conduit Ass'n, 38 F.T.C. 534, 593 (1944), *enforced sub nom. Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949) (emphasis added). Thus, the per se standard invoked by the *Triangle Conduit* court more closely resembles a modified per se rule akin to the one invoked by the Supreme Court in *United States v. Container Corp.*, 393 U.S. 333 (1969). See note 73 and accompanying text *infra*.

<sup>72</sup> The Federal Trade Commission has summarized the rule of reason as follows:

The test of legality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Professional Engineers*, . . . 435 U.S. [679], 691 [(1978)]. To assess the legality of the restrictions under a rule of reason analysis, we must examine their nature, purpose and effect on competition, including in the calculus any possible procompetitive impact. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

American Medical Ass'n, 94 F.T.C. 701, 1003-04 (1979), *modified and enforced sub nom. American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981).

<sup>73</sup> Although the court did not detail the industry characteristics necessary to invoke the per se standard, it did note that the sellers were geographically dispersed, 168 F.2d at 177, that the sellers refrained from using f.o.b. mill pricing, *id.*, and that the sellers uniformly matched prices, *id.* As noted above, these industry characteristics must exist before a delivered pricing system produces anticompetitive effects. See notes 43-45 and accompanying text *supra*.

Similarly, in *United States v. Container Corp.*, 393 U.S. 333 (1969), a majority of the Court apparently invoked a modified per se standard. The *Container Corp.* Court was willing to infer a per se price-fixing violation of the Sherman Act from the industry characteristics:

[A]s we held in *United States v. Socony-Vacuum Oil Co.*, [310 U.S. 150, 224 n.59 (1940),] interference with the setting of price by free market forces is unlawful *per se*. Price information exchanged in some markets may have no effect on a truly

The *Cement Institute* and *Triangle Conduit* decisions provoked a national controversy over the treatment of delivered pricing systems under the antitrust laws. Critics charged that the FTC and the courts were forcing producers to adopt f.o.b. mill pricing.<sup>74</sup> A Senate subcommittee investigated the matter,<sup>75</sup> and congressmen introduced bills to immunize delivered pricing systems from the antitrust laws.<sup>76</sup> The FTC initially resisted this pressure,<sup>77</sup> but eventually succumbed

---

competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers place orders only for immediate, short-run needs. The exchange of price data tends toward price uniformity. For a lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return. Stabilizing prices as well as raising them is within the ban of § 1 of the Sherman Act. As we said in *United States v. Socony-Vacuum Oil Co.*, *supra*, at 223, "in terms of market operations stabilization is but one form of manipulation." The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.

*Id.* at 337.

<sup>74</sup> See, e.g., Hilder, *supra* note 4, at 397-98; Kittelle & Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 15 LAW & CONTEMP. PROB. 227, 227-29 (1950). But see Note, *supra* note 4, at 455-56 (applauding the decisions).

<sup>75</sup> The Capehart Committee investigated the impact of the *Cement Institute* decision on consumers and businesses. *Hearings Before the Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S. Res. 241*, 80th Cong., 1st Sess. (1948). See generally Latham, *The Politics of Basing Point Legislation*, 15 LAW & CONTEMP. PROB. 272, 272-80 (1950).

<sup>76</sup> See, e.g., H.R. 2222, 81st Cong., 1st Sess., 95 CONG. REC. 778 (1949); S. 236, 81st Cong., 1st Sess., 95 CONG. REC. 42 (1949); S. 1008, 81st Cong., 1st Sess., 95 CONG. REC. 1356 (1949). See generally Latham, *supra* note 75, at 280-308. House Bill 2222 and Senate Bill 236 would have declared temporary moratoriums on the prosecution of delivered pricing systems. See 95 CONG. REC. 42, 778 (1949). Senate Bill 1008 would have amended the FTC Act and the Robinson-Patman Act to permit conscious parallelism in delivered pricing systems; Congress passed it on June 2, 1950, but President Truman vetoed it on June 16, 1950. Stoking, *The Law on Basing Point Pricing: Confusion or Competition*, 2 J. PUB. L. 1, 21 (1953).

Interestingly, Congress had previously attacked, rather than supported, delivered pricing systems. The Robinson-Patman Act originally included a provision that would have outlawed basing point pricing. Congress dropped the provision, however, before it passed the Act. 80 CONG. REC. 8223-24 (1936). During the same session, Congress considered, but failed to enact, two bills aimed solely at outlawing basing point systems. Note, *The Cement Decision and Basing-Point Pricing Systems*, 2 VAND. L. REV. 63, 64 (1948). A bipartisan congressional committee also recommended in 1941 that Congress enact legislation outlawing basing point systems. See TEMPORARY NATIONAL ECONOMIC COMMITTEE, FINAL REPORT AND RECOMMENDATIONS, SEN. DOC. NO. 35, 77th Cong., 1st Sess. 33 (1941).

<sup>77</sup> In a notice to its staff, the FTC stated:

In the *Rigid Steel Conduit* case, the Commission found, and the circuit court agreed, that adherence to an industry-wide basing point formula, with the knowledge that other concerns are adhering to it also, constitutes in itself a violation of the Federal Trade Commission Act by the individual adhering companies when price competition is thereby eliminated. It would have been possible to describe this state of facts as a price conspiracy on the principle that, when a number of enterprises follow a parallel course of action in the knowledge and contemplation of

before the Senate subcommittee.<sup>78</sup> Consequently, the FTC did not challenge conscious parallelism in the use of delivered pricing systems for the next twenty-five years.<sup>79</sup>

### C. Boise Cascade

In 1974, the FTC issued a complaint against Boise Cascade and other southern plywood manufacturers, alleging that they had pursued a consciously parallel course of business behavior in the use of a zone pricing system.<sup>80</sup> The FTC subsequently found the delivered pricing system violative of section 5 on these grounds.<sup>81</sup> In reviewing the FTC's determination, the Ninth Circuit recognized that this was "the first case since *Triangle Conduit* in which the Commission ha[d] grounded its ruling on a finding of conscious parallelism."<sup>82</sup> Al-

the fact that all are acting alike, they have, in effect, formed an agreement. Instead of phrasing its charge in this way, the Commission chose to rely on the obvious fact that the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion, and, for this reason, the Commission treated the conscious parallelism of action as violation of the Federal Trade Commission Act.

F.T.C., Notice to the Staff: *In re: Commission Policy Toward Geographic Pricing Practices* (1948), reprinted in G. SAGE, *BASING-POINT PRICING SYSTEMS UNDER THE FEDERAL ANTITRUST LAWS* 335-36, app. B (1951). See *STUDY OF FEDERAL TRADE COMMISSION PRICING POLICIES: INTERIM REPORT ON STUDY OF FEDERAL TRADE COMMISSION PRICING POLICIES*, SEN. DOC. NO. 27, 81st Cong., 1st Sess. 41-42 (1949) ("The Commission appears to have formally concluded that the use of a pricing practice similar to that of the seller's competitor through 'conscious parallel action' is equally violative of the Federal Trade Commission Act as is conspiracy to use such a pricing practice.").

<sup>78</sup> The Commission "appears to have written off the theory that 'conscious parallel action,' absent conspiracy, constitutes an unfair method of competition. . . ." *STUDY OF FEDERAL TRADE COMMISSION PRICING POLICIES: INTERIM REPORT ON STUDY OF FEDERAL TRADE COMMISSION PRICING POLICIES*, SEN. DOC. NO. 27, 81st Cong., 1st Sess. 62 (1949). See Herbert, *supra* note 49, at 198-99.

<sup>79</sup> See R. POSNER, *supra* note 1, at 71 & n.46. Subsequent prosecutions by the FTC involved allegations of agreements to use delivered pricing systems. See *id.* See, e.g., *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957) (zone pricing system); *Chain Inst., Inc. v. FTC*, 246 F.2d 231 (8th Cir. 1957) (basing point pricing system). The FTC, in fact, dismissed one action for failure to demonstrate concerted action. *Crouse-Hinds Co.*, 46 F.T.C. 1114 (1950).

<sup>80</sup> The FTC's complaint alleged that the manufacturers had "for a number of years . . . used and pursued parallel courses of business behavior constituting unfair methods of competition . . . [including] establishing and maintaining a system of delivered prices . . . ." *Boise Cascade Corp.*, 91 F.T.C. 1, 5 (1978), *enforcement denied*, 637 F.2d 573 (9th Cir. 1980). Southern plywood producers would quote a delivered price based on their mill prices plus freight from the West Coast. *Id.* at 34. Producers computed this freight factor on the basis of concentric zones running eastward from Portland, Oregon. *Id.* at 30. The publication of freight rate books and industry-wide use of commercial price reporters for setting mill prices facilitated the delivered pricing system. *Id.* at 4, 32-34.

<sup>81</sup> *Id.* at 102-03.

<sup>82</sup> *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 576 (9th Cir. 1980). See note 79 and accompanying text *supra*.

though the court acknowledged that the zone pricing system "ha[d] the same potential to stabilize prices as basing-point systems,"<sup>83</sup> it declined to follow a per se standard of review as suggested by the *Triangle Conduit* court.<sup>84</sup> Instead, the court employed another standard, holding that "in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices."<sup>85</sup> Because the FTC had failed to demonstrate that the delivered pricing system had affected prices,<sup>86</sup> the court refused to enforce the Commission's order. In addition, the court implicitly rejected the Commission's argument

---

<sup>83</sup> 637 F.2d at 575. The plywood industry contained many of the classic characteristics that enable a delivered pricing system to produce anticompetitive effects: an oligopolistic market structure, the unavailability of f.o.b. mill pricing, freight factors based on railroad rates, and payments of phantom freight. *Boise Cascade Corp.*, 91 F.T.C. at 14, 29, 45-46, 51. See notes 14, 30, 39, 45 and accompanying text *supra*.

<sup>84</sup> "[I]n view of the approach we have chosen it is not necessary . . . to resolve whether conscious parallelism might ever support a Section 5 violation." 637 F.2d at 576; see note 86 and accompanying text *infra*. The court interpreted *Triangle Conduit* as establishing a strict per se rule and refused to follow the rule because of the FTC's concessions to the Senate after *Triangle Conduit*, see note 78 and accompanying text *supra*, and because of the FTC's failure to bring any cases based solely on conscious parallelism in the interim, see note 79 and accompanying text *supra*. 637 F.2d at 576. The court apparently failed to recognize that *Triangle Conduit* established, at most, a modified per se theory. See notes 70-73 and accompanying text *supra*. Moreover, the FTC never actually argued for the adoption of a strict per se standard; rather, the FTC argued that *Triangle Conduit* permitted a finding of illegality under § 5 if the conscious parallelism resulted in an extremely artificial pricing scheme. See Brief for Respondent at 59-69, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); note 87 and accompanying text *infra*.

The Ninth Circuit also rejected a standard based on § 1 of the Sherman Act. The court stated that it would not "follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a per se violation of section 5 by analogy to section 1 [of the Sherman Act] price-tampering cases." 637 F.2d at 581. The FTC, however, had rejected this approach in its decision, *Boise Cascade Corp.*, 91 F.T.C. at 102 & n.15, and did not advance it on appeal, *Petition for Rehearing and Suggestion for Rehearing En Banc* at 2 n.1, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980). This standard requires that courts infer an agreement to fix prices, and thus a per se violation of § 1 of the Sherman Act, from the artificiality of the delivered pricing system. See *Boise Cascade Corp.*, 91 F.T.C. at 101-02. When presented with this standard, the Commission stated that it did not need to consider the argument because § 5 "permit[ted] a more direct approach." *Id.* at 102. This argument represents a fourth possible standard of review, but it is simply the argument the FTC did advance under § 5 of the FTC Act rather than § 1 of the Sherman Act. See notes 87-89 and accompanying text *infra*. As such, this standard suffers from the same infirmities as the FTC's argument. See notes 90-92 and accompanying text *infra*.

<sup>85</sup> 637 F.2d at 577.

<sup>86</sup> "There is a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect." *Id.* at 579. The FTC had not presented any economic testimony and the court rejected the FTC's contention that costs and profits in the plywood industry indicated an effect on prices. *Id.* at 580. The court also attached some significance to the lack of buyers' objections to the delivered pricing system. *Id.*

that section 5 of the FTC Act enables the FTC to invalidate a delivered pricing system because of its "extreme artificiality."<sup>87</sup>

### III

#### RESOLVING THE CONFLICT: A MODIFIED PER SE STANDARD OF REVIEW

The *Triangle Conduit* and *Boise Cascade* cases reveal three possible standards of review for determining the legality of conscious parallelism in the use of delivered pricing systems under the FTC Act. Each of the three standards allows the FTC to challenge consciously parallel pricing schemes, but each requires a different evidentiary showing by the FTC. Of the three, the modified per se rule enunciated in *Triangle Conduit* best comports with the purposes and goals of the Act.

##### A. *The Degree-of-Artificiality Standard*

The standard upon which the FTC had based its decision in *Boise Cascade*, and which it urged the Ninth Circuit to adopt, does not require a showing of agreement. This standard focuses instead on the

---

<sup>87</sup> The court stated that it "was not persuaded that a different result [was] warranted by the unique features of the FTCA." *Id.* at 581. The FTC had argued that "the extreme artificiality of the formula pricing involved in [the] case" justified its determination that the noncollusive adoption by competitors of a delivered pricing system violated § 5. *Boise Cascade Corp.*, 91 F.T.C. at 102-03. *See* Brief for Respondent at 59-69, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980). In so holding, the Commission had concluded that *Triangle Conduit* permitted it to find conscious parallelism in the use of a delivered pricing system violative of § 5. *Boise Cascade Corp.*, 91 F.T.C. at 103. The Commission did not adopt a per se standard of review, but instead adopted a rule based on the degree of artificiality of the delivered pricing system. *See* notes 88-89 and accompanying text *infra*.

Under this degree-of-artificiality standard, the FTC maintained that "although it [was] not possible to demonstrate what the level of prices would have been in the absence of the . . . [delivered] pricing system," Brief for Respondent at 14, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980), "[t]he record support[ed] the conclusion that the practice ha[d] the tendency to cause plywood to be sold to some customers at prices higher than would have otherwise existed," *id.* at 13. To support its contention that the delivered pricing system resulted in artificially high prices, the FTC introduced voluminous evidence detailing the intricacies of the pricing scheme, including the industry-wide adoption of west coast freight prices, the discouragement of f.o.b. mill pricing, and the geographic dispersion of manufacturers, which allowed for "phantom freight." *See id.* at 19-39. From these facts, the FTC argued for "a *prima facie* inference that the use of a pricing formula based upon west coast freight affected the price levels of southern pine plywood." *Id.* at 15. Thus, in some ways, the degree-of-artificiality standard resembles the modified per se standard advanced in this Note. *See* notes 103-17 and accompanying text *infra*. Unlike the modified per se standard, however, the FTC degree-of-artificiality standard would permit a defendant to rebut the *prima facie* showing by demonstrating the absence of anticompetitive effect. *See* Brief for Respondent at 15, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

degree of artificiality in the delivered pricing system under review.<sup>88</sup> Under the degree-of-artificiality standard, if a delivered pricing system is so artificial that "its results are likely to depart from competitive norms and . . . its use has little redeeming commercial justification," the FTC may declare it an unfair method of competition.<sup>89</sup>

The degree-of-artificiality standard, however, offers inadequate guidance to courts for determining the legality of a delivered pricing system. It begs the question of how much is *too* artificial and therefore illegal, a question the FTC left unanswered.<sup>90</sup> Although the degree-of-artificiality standard could reach a delivered pricing system that presents all the requisites for anticompetitiveness,<sup>91</sup> the vague and imprecise nature of the standard leaves too much to chance in the antitrust laws. Unlike the modified *per se* rule, the degree-of-artificiality standard fails to promote certainty and predictability in the antitrust laws,<sup>92</sup> and is thus an inappropriate test for determining the legality of conscious parallelism in the use of a delivered pricing system.

### B. *The Effect-on-Prices Standard*

In *Boise Cascade*, the Ninth Circuit held that the FTC Act does not require a showing of agreement in order to prove a violation of section 5.<sup>93</sup> The court stated that in the absence of an agreement to use a delivered pricing system, the government must show that the pricing plan "has the effect of fixing or stabilizing prices."<sup>94</sup> For several reasons, this standard is also an inappropriate one for determining the legality of conscious parallelism in the use of a delivered pricing system.

---

<sup>88</sup> "[O]ur conclusion . . . depends importantly upon the extreme *artificiality* of the pricing formula involved in this case." *Boise Cascade Corp.*, 91 F.T.C. at 103 (emphasis added); *see* note 87 *supra*. Notably, the FTC stated that its decision depended upon the artificiality of the delivered pricing system "in this case." (The Commission also suggested that the degree of artificiality would "depend[] upon the circumstances" of each case. *Id.* at 103.) This statement suggests that the determination of artificiality depends on the facts of each case. Otherwise, the FTC standard could mean that *all* delivered pricing systems are extremely artificial, and therefore *all* delivered pricing systems are illegal. If this were so, the artificiality standard would simply be another way of stating a strict *per se* standard of review.

<sup>89</sup> *Id.* at 103. Under the degree-of-artificiality standard, however, a defendant could rebut the FTC's showing of a tendency toward anticompetitiveness by demonstrating a lack of actual anticompetitiveness. *See* note 87 *supra*.

<sup>90</sup> "There is no occasion here . . . for us to decide how much artificiality is too much. . . ." *Boise Cascade Corp.*, 91 F.T.C. at 103.

<sup>91</sup> *See* notes 43-45 and accompanying text *supra*.

<sup>92</sup> *See* note 108 and accompanying text *infra*.

<sup>93</sup> 637 F.2d at 577. The Sherman Act, however, still requires a finding of agreement. *See* note 53 *supra*.

<sup>94</sup> 637 F.2d at 577. *See* text accompanying note 85 *supra*.

First, the effect-on-prices standard thrusts an extremely difficult and costly burden of proof upon the FTC. Typically, it requires a detailed economic analysis. The Commission first must establish the price that would have existed without a delivered pricing system;<sup>95</sup> usually, the Commission will introduce the previously existing price for this purpose. Next, the Commission must establish a causal relationship between the delivered pricing system and the adverse effect on prices;<sup>96</sup> because industry conditions may have changed since the inception of the delivered pricing system, the government must effectively refute the contention that extraneous factors have caused the adverse effect on prices.<sup>97</sup> Even though the anticompetitive effects of industry-wide delivered pricing systems are numerous and well documented,<sup>98</sup> the practical problems in establishing such anticompetitive effects in each case are overwhelming. Thus, the effect-on-prices standard seriously impairs the FTC's ability to enforce the Act.<sup>99</sup>

Moreover, the effect-on-prices standard demands more of the government than the FTC Act requires. The legislative history of the Act indicates that Congress did not intend to require a showing of present harm to competition.<sup>100</sup> Rather, "[t]he purpose of the Fed-

<sup>95</sup> Numerous difficulties exist in establishing such a price. See II P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 344, at 230 (1978) (discussing some of the difficulties in computing a comparison price for purposes of determining damages); Kruse, *Deconcentration and Section 5 of the Federal Trade Commission Act*, 46 GEO. WASH. L. REV. 200, 208 n.49 (1978) (discussing some of the difficulties in proving anticompetitive effects in the context of the FTC's case against major cereal manufacturers).

<sup>96</sup> Cf. II P. AREEDA & D. TURNER, *supra* note 95, ¶ 344, at 229 (In order to determine damages "[a]fter an illegal price-fixing conspiracy, one would compare the agreed price, or the actual price resulting from an agreed formula or other misbehavior, with the price that would have prevailed in the absence of the illegal conduct." (footnote omitted)).

<sup>97</sup> Such factors include changes in supply and demand, price levels, productivity, and substitutes. See *id.* at 230.

<sup>98</sup> See notes 37-42 and accompanying text *supra*.

<sup>99</sup> But see *In re Ethyl Corp.*, No. 9128 (Aug. 5, 1981) (Barnes, Administrative Law Judge), summarized in *ANTITRUST & TRADE REG. REP.* (BNA) No. 1027, at A-15 (Aug. 13, 1981), in which the administrative law judge had little difficulty in finding an effect on prices: "Thus, with knowledge that each knew the other was using delivered pricing, the communicative value and effect of the practice is manifest; the practice enabled respondents to match prices and avoid the rigors of competition." *In re Ethyl Corp.*, No. 9128, at 152.

<sup>100</sup> The following Senate debate on the FTC Act supports this conclusion:

MR. McCUMBER. [A complainant] would have to prove that the competition was unfair. Then he would have to prove some kind of a result from that unfair competition. What result would he have to establish under the provisions of [this] bill?

.....

MR. NEWLANDS. I presume the Senator would not contend that the result must be proven if we prove that this practice was indulged in with the intent to injure or destroy.

eral Trade Commission Act is to prevent potential injury by stopping unfair methods of competition in their incipency."<sup>101</sup> Thus, the standard under section 5 should require the government to show, at most, that the likelihood of an anticompetitive effect resulting from the challenged conduct is somewhere between a "reasonable possibility" and a "probability."<sup>102</sup> The effect-on-prices standard would frustrate this congressional purpose.

### C. *The Modified Per Se Standard*

The modified per se standard enunciated by the Seventh Circuit in *Triangle Conduit*<sup>103</sup> is preferable to either the degree-of-artificiality or the effect-on-prices standard, and should be adopted as the test for determining the legality of conscious parallelism in the use of a delivered pricing system. Courts should employ a per se rule only when convinced that a course of conduct is presumptively anticompetitive and when the economic analysis otherwise required to prove the unreasonable restraint of trade is certain to be complex, if not fruitless.<sup>104</sup> Nevertheless, the numerous and well documented anticom-

MR. McCUMBER. The offense certainly must result in something, else you could not say that it was unfair competition. In the end, it is competition and the character of competition that is to be proven, is it not?

MR. NEWLANDS. Then the Senator's idea is that the complainant should have no remedy at all until the destruction is complete?

MR. McCUMBER. No. . . .

MR. NEWLANDS. [A]ll you would have to prove would be an unfair method of competition whose tendency was to stifle competition. I do not think you would have to wait until the destruction was complete in order to entitle you to make the complaint. I presume the commission would inquire into the general tendency of the practice. . . .

51 CONG. REC. 12217 (1914). One commentator has noted that the FTC has never brought a § 5 case without alleging harm to competition. Howrey, *Utilization By The FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161, 178 (1960). Nevertheless, this does not mean the FTC is required to do so. Averitt, *supra* note 1, at 248.

<sup>101</sup> E.B. Muller & Co. v. FTC, 142 F.2d 511, 517 (6th Cir. 1944) (citation omitted). See also note 63 *supra*.

<sup>102</sup> See Averitt, *supra* note 1, at 249. In this respect, both the degree-of-artificiality standard and the modified per se standard comply with the congressional purpose underlying the FTC Act, because both are premised on the theory that certain conduct has a "tendency" to produce anticompetitive effects. See note 87 and accompanying text *supra*; notes 104-05 and accompanying text *infra*.

<sup>103</sup> See notes 70-73 and accompanying text *supra*.

<sup>104</sup> The guidelines for adopting a per se standard of review were stated in *United States v. Northern Pac. Ry.*, 356 U.S. 1, 5 (1958):

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se*

petitive effects of industry-wide delivered pricing systems,<sup>105</sup> as well as the FTC Act's requirement that challenged conduct only have a tendency to produce anticompetitive effects,<sup>106</sup> justify a modified per se standard when conscious parallelism creates the delivered pricing system. Under the modified per se standard, a court should invalidate a delivered pricing system only when the FTC has established the existence of certain industry characteristics that experience and economic theory have proven likely to produce anticompetitive effects.<sup>107</sup>

The uniform adoption of a modified per se standard would add more certainty and predictability—goals of the antitrust laws<sup>108</sup>—to the law of delivered pricing systems than would either the degree-of-artificiality or effect-on-prices standard. Furthermore, a per se approach is appropriate to determine the legality of conscious parallelism in the use of a delivered pricing system because of the likelihood that the producers have already entered into an agreement. General consensus is that industry-wide adoption of a delivered pricing system requires an agreement to make it work for any length of time.<sup>109</sup>

unreasonableness not only makes the type of restraints which are proscribed . . . more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

*See also* United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 n.10 (1972) (suggesting that the per se rule exists so that courts will not have to "ramble through the wilds of economic theory").

<sup>105</sup> See notes 37-42 and accompanying text *supra*.

<sup>106</sup> See notes 101-02 and accompanying text *supra*.

<sup>107</sup> See notes 112-17 and accompanying text *infra*.

<sup>108</sup> See United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 n.10 (1972) ("Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.").

<sup>109</sup> Edwards, *supra* note 42, at 135-36 ("Implicit in the industry-wide use of a basing point pricing system is an understanding. . ."); Herbert, *supra* note 49, at 216 ("[S]ome sort of conspiracy or concerted action is essential to the effective functioning of a basing point system of pricing.") (footnote omitted); Sheehy, *supra* note 4, at 200 ("[T]here appears to be a strong probability that geographic pricing systems will not function successfully in the absence of unlawful conspiracies."); Wright, *supra* note 16, at 214 ("[B]asing point systems . . . seem necessarily to require collusion. . ."); Note, *supra* note 4, at 441 ("As a practical matter, the maintenance of a rigid delivered pricing system over any length of time requires some form of agreement among the producers.").

Two schools of thought exist as to the significance of conscious parallelism in delivered pricing systems. The "conspiracy school" believes that conscious parallelism is itself evidence of conspiracy. The "spontaneous evolution school" believes that identical delivered pricing systems can arise from businessmen acting independently to avoid ruinous competition. *See generally* Stocking, *The Economics of Basing Point Pricing*, 15 LAW & CONTEMP. PROB. 159 (1950) (analyzing the two theories and concluding that the conspiracy theory is better).

Proving the existence of such an agreement, however, is difficult.<sup>110</sup> Because an actual agreement is so likely, conscious parallelism in the use of a delivered pricing system should suffice to establish a per se violation of the FTC Act.<sup>111</sup>

#### IV

##### APPLYING THE MODIFIED PER SE STANDARD OF REVIEW

Some commentators have criticized a per se standard of review because it would outlaw all delivered pricing systems.<sup>112</sup> The modified per se rule suggested here, however, would invalidate a delivered pricing system only when an industry has the characteristics necessary to produce anticompetitive effects: the industry-wide adoption of the identical pricing scheme, the geographic dispersion of buyers and sellers, and the unavailability of f.o.b. mill prices.<sup>113</sup> Thus, the modified per se rule would allow certain delivered pricing schemes.<sup>114</sup> Furthermore, a modified per se rule would permit pro-

---

<sup>110</sup> "To prove conspiracy may be difficult. Businessmen who conspire to restrain trade do not ordinarily leave a trail pointing directly and specifically to their conspiracy. The agreement may be an informal understanding arrived at through a general discussion of the industry's problems and ways of solving them." Stocking, *supra* note 76, at 3.

<sup>111</sup> For two commentaries arguing that conscious parallelism in the use of delivered pricing systems should not support a finding of conspiracy, see Kittelle & Lamb, *supra* note 74, at 236, and Wright, *supra* note 16, at 215. Even Professor Turner, however, who generally believes that conscious parallelism does not constitute an unlawful conspiracy, believes that conscious parallelism in the use of delivered pricing systems should be illegal. Turner, *supra* note 2, at 675.

The likelihood of actual agreement suggests that the Department of Justice might attack conscious parallelism in the use of a delivered pricing system under the Sherman Act. A court might consider the fact that competitors have adopted the same delivered pricing system as the "plus factor" from which to infer an agreement. See note 49 *supra*. Two factors, however, suggest that the FTC Act and the FTC are better suited to combat conscious parallelism in the use of a delivered pricing system. First, the FTC's administrative nature and wider economic expertise suggests that it can better analyze the facts and economic evidence concerning a delivered pricing system. Second, the FTC Act contains no criminal penalties, and a finding of a violation of § 5 does not constitute prima facie evidence in a private treble damages suit under the Act. See 15 U.S.C. §§ 57b(a), 57b(b) (1976); II P. AREEDA & D. TURNER, *supra* note 95, ¶ 324b, at 116.

<sup>112</sup> See, e.g., Hilder, *supra* note 4, at 397-98; Kittelle & Lamb, *supra* note 74, at 227-28.

<sup>113</sup> See notes 43-45 and accompanying text *supra*. Part of the proposed relief in the *Boise Cascade* case would have required producers to quote f.o.b. mill prices as an alternative to delivered prices. See *Boise Cascade Corp.*, 91 F.T.C. at 110.

<sup>114</sup> For example, a locational monopolist who attempts to compete with distant firms for distant buyers could use a delivered pricing system without running afoul of the modified per se rule. Although the locational monopolist can demand a monopolistic price in the nearby market, he can compete for customers close to his distant competitors only by matching their price. If the monopolist cannot offer the distant customers a delivered price, but must offer f.o.b. mill prices, distant customers can purchase goods at the mills and then resell them to the

ducers to *indiscriminately* absorb freight charges in order to compete in a market. Indeed, "unsystematic discriminatory freight absorption appears to be the best compromise . . . when market structures are oligopolistic."<sup>115</sup> The FTC Act allows unsystematic discrimination,<sup>116</sup> and commentators generally agree that it is the best pricing system.<sup>117</sup>

### CONCLUSION

Delivered pricing systems represent an area in which the anti-trust laws should reach consciously parallel behavior. Conscious parallelism in the use of delivered pricing systems reduces competition as much as a price fixing agreement and causes distortions and inefficiencies in the economy. A standard of review based on the degree of artificiality of the delivered pricing system is too vague and uncertain. A standard that requires a showing of an effect on prices does not comport with the legislatively and judicially declared purposes of the FTC Act and creates a difficult burden of proof. A modified per se

monopolist's nearby customers. Thus, the monopolist can maintain his locational rents only by adopting a delivered pricing system. Because the monopolist would be the only seller using such a system, no anticompetitive effects should occur, and the modified per se rule need not apply.

In addition, the modified per se rule should not apply when local competitors cannot supply the local demand. Whether the distant producers are vigorously competing or not, the distant producers effectively set prices in such a situation. The FTC Act should permit the local producers to adopt the industry's delivered pricing system in the local market. An example of this situation occurred initially in the *Boise Cascade* case. When southern plywood production began, the southern producers could not meet local demand, even operating at full capacity. Consequently, prices were effectively set by the west coast plywood producers. In response, the southern producers adopted the delivered pricing system of the west coast producers in order to meet those prices. See *Boise Cascade Corp.*, 91 F.T.C. at 55. If local producers cannot meet local demand, they do not actually use a delivered pricing system because they are selling at only one location. If they have enough output to sell at some distance from their plant, however, the modified per se standard would prevent them from employing a delivered pricing system in any market.

<sup>115</sup> F. SCHERER, *supra* note 1, at 330. Delivered pricing systems typically occur in oligopolistic industries. See note 30 and accompanying text *supra*. Unsystematic discrimination allows market interpenetration and increases the probability of a breakdown of the oligopoly structure. F. SCHERER, *supra* note 1, at 330. See also note 36 *supra*.

<sup>116</sup> "Under the Federal Trade Commission Act, where there is neither conscious parallel action which eliminates price competition nor monopolistic position maintained through unfair methods, a single enterprise is free to adopt any geographic pricing practice." F.T.C., Notice to the Staff: *In re: Commission Policy Toward Geographic Pricing Practices* (1948), reprinted in G. SAGE, *BASING-POINT PRICING SYSTEMS UNDER THE FEDERAL ANTITRUST LAWS* 338, app. B (1951).

<sup>117</sup> See, e.g., F. SCHERER, *supra* note 1, at 330; Kaysen, *supra* note 13, at 313; Stocking, *supra* note 76, at 27-28. But see F. MACHLUP, *supra* note 13, at 249-51 (favoring uniform f.o.b. mill pricing).

standard of review, however, would be consistent with the reasons for applying a per se rule, would add certainty and predictability to the law of delivered pricing systems, and would still allow market interpenetration. For these reasons, courts should adopt the modified per se rule when determining the legality of conscious parallelism in the use of delivered pricing systems under section 5 of the FTC Act.

*Alan M. Anderson*