

117TH CONGRESS  
2D SESSION

# H. R. 8777

To specify the standards governing claims of consciously parallel pricing coordination in civil actions under the Sherman Act, and to clarify the meaning of contract, combination in the form of trust or otherwise, or conspiracy under the Sherman Act.

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## IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 6, 2022

Ms. PORTER (for herself, Mr. NADLER, Mr. CICILLINE, Ms. JAYAPAL, and Mr. JEFFRIES) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To specify the standards governing claims of consciously parallel pricing coordination in civil actions under the Sherman Act, and to clarify the meaning of contract, combination in the form of trust or otherwise, or conspiracy under the Sherman Act.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Competitive Prices  
5 Act”.

1 **SEC. 2. PURPOSE.**

2 The purpose of this Act is to clarify and amend the  
3 law with respect to—

4 (1) the illegality of consciously parallel pricing  
5 coordination under sections 1 and 3(a) of the Sher-  
6 man Act (15 U.S.C. 1, 3(a)); and

7 (2) the concerted-action requirement for  
8 claimed violations of section 1 or 3(a) of the Sher-  
9 man Act.

10 **SEC. 3. FINDINGS.**

11 (a) CONSCIOUSLY PARALLEL PRICING COORDINA-  
12 TION.—

13 (1) The American economy is built on the foun-  
14 dations of open markets and fair competition. These  
15 core principles of economic freedom are what stimu-  
16 late innovation, improve the quality of products and  
17 services, and ensure that prices are competitive.

18 (2) The antitrust laws are designed to ensure  
19 American consumers and businesses are afforded the  
20 benefits of competition throughout the economy. The  
21 supreme evil of antitrust law is, accordingly, collu-  
22 sion among market rivals. Such collusion under-  
23 mines competitive markets, stifles innovation, and  
24 results in degraded quality and prices that are dic-  
25 tated by competitors' agreement rather than com-  
26 petitors' rivalry.

1           (3) Sections 1 and 3(a) of the Sherman Act (15  
2           U.S.C. 1, 3(a)) categorically prohibit—as the most  
3           pernicious types of contracts, combinations in the  
4           form of trust or otherwise, or conspiracies, in re-  
5           straint of trade or commerce—naked agreements  
6           among actual or potential competitors to fix prices,  
7           rig bids, or allocate markets. An agreement to fix  
8           the quantity of products or services bought or sold  
9           is a form of agreement to fix prices. These agree-  
10          ments are per se unlawful.

11          (4) Courts have been unduly hostile to claims of  
12          price fixing that are based on tacit agreement  
13          among competitors. They have, at times, declined to  
14          recognize tacit agreement as a contract, combination  
15          in the form of trust or otherwise, or conspiracy; they  
16          have held that allegations or evidence, taken as a  
17          whole, that are as consistent with “conscious par-  
18          allelism” as with agreement are generally insuffi-  
19          cient to survive a motion to dismiss or motion for  
20          summary judgment; and they have concluded a  
21          claimant must offer allegations or evidence tending  
22          to exclude the possibility of independent action. See,  
23          e.g., *Brooke Grp. Ltd. v. Brown & Williamson To-*  
24          *bacco Corp.*, 509 U.S. 209, 227 (1993); *Matsushita*  
25          *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

1 574, 588 (1986); *Monsanto Co. v. Spray-Rite Serv.*  
2 *Corp.*, 465 U.S. 752, 764 (1984).

3 (5) Section 4 of this Act rejects the judicial de-  
4 cisions that have prevented meritorious price-fixing  
5 cases from advancing to trial and judgment. It does  
6 so by providing that, in civil actions, consciously par-  
7 allel pricing coordination—as defined by this Act—  
8 is a “contract, combination in the form of trust or  
9 otherwise, or conspiracy, in restraint of trade or  
10 commerce” under sections 1 and 3(a) of the Sher-  
11 man Act.

12 (6) Section 4 of this Act does not supersede the  
13 law governing price fixing. It instead supplements  
14 and complements that law. It does not apply to  
15 criminal prosecutions.

16 (b) CONCERTED ACTION.—

17 (1) The words “contract, combination in the  
18 form of trust or otherwise, or conspiracy” in sections  
19 1 and 3(a) of the Sherman Act require some form  
20 of agreement between two or more persons, but that  
21 agreement need not be expressly made. A tacit  
22 agreement also qualifies. Accordingly, the words  
23 “contract, combination in the form of trust or other-  
24 wise, or conspiracy” encompass both express and  
25 tacit agreements.

1           (2) Although consciously parallel behavior alone  
2 does not constitute a contract, combination in the  
3 form of trust or otherwise, or conspiracy under sec-  
4 tions 1 and 3(a) of the Sherman Act, consciously  
5 parallel behavior can be evidence of an agreement.  
6 And once the consciously parallel behavior crosses  
7 the line into consciously parallel coordination, the  
8 behavior qualifies as tacit agreement—that is, a con-  
9 tract, combination in the form of trust or otherwise,  
10 or conspiracy.

11           (3) In *Bell Atlantic Corp. v. Twombly*, 550  
12 U.S. 544, 548–49, 553–57, 564–70 (2007), the Su-  
13 preme Court held that a complaint alleging that  
14 competitors engaged in parallel, anticompetitive con-  
15 duct did not do enough to exclude the possibility  
16 that the competitors engaged in independent action  
17 and therefore failed to plausibly plead the existence  
18 of a conspiracy under section 1 of the Sherman Act.  
19 In so holding, the Court understated the significance  
20 of consciously parallel behavior as evidence of agree-  
21 ment and left little or no room for tacit agreements  
22 in the meaning of “contract, combination in the  
23 form of trust or otherwise, or conspiracy”.

24           (4) Section 5 of this Act rejects the Twombly  
25 Court’s cramped reading of the Sherman Act’s lan-

1 guage, clarifies that the words “contract, combina-  
2 tion in the form of trust or otherwise, or conspiracy”  
3 encompass tacit agreements, and specifies the stand-  
4 ards for pleading and proving a contract, combina-  
5 tion in the form of trust or otherwise, or conspiracy  
6 under sections 1 and 3(a) of the Sherman Act.

7 **SEC. 4. CONSCIOUSLY PARALLEL PRICING COORDINATION.**

8 (a) DEFINITIONS.—

9 (1) The term “consciously parallel pricing co-  
10 ordination” means a tacit agreement among two or  
11 more persons to raise, lower, change, maintain, or  
12 manipulate pricing for the purchase or sale of rea-  
13 sonably interchangeable products or services.

14 (2) The term “person” has the meaning given  
15 the term in subsection (a) of the first section of the  
16 Clayton Act (15 U.S.C. 12(a)).

17 (b) CONSCIOUSLY PARALLEL PRICING COORDINA-  
18 TION.—In a civil action, including an action brought by  
19 the United States or by a State attorney general, or by  
20 the Federal Trade Commission under section 5 of the Fed-  
21 eral Trade Commission Act (15 U.S.C. 45), consciously  
22 parallel pricing coordination is a “contract, combination  
23 in the form of trust or otherwise, or conspiracy, in re-  
24 straint of trade or commerce” under sections 1 and 3(a)  
25 of the Sherman Act (15 U.S.C. 1, 3(a)).

1 (c) PRIMA FACIE CASE.—

2 (1) A claimant establishes a prima facie case of  
3 consciously parallel pricing coordination by dem-  
4 onstrating that two or more persons—

5 (A) engaged in substantially similar action,  
6 within a substantially similar time period, with  
7 respect to pricing for reasonably interchange-  
8 able products or services; and

9 (B) had a substantially similar motivation  
10 to coordinate their efforts to raise, lower,  
11 change, maintain, or manipulate pricing for the  
12 purchase or sale of reasonably interchangeable  
13 products or services.

14 (2) A claimant asserting a claim of consciously  
15 parallel pricing coordination in violation of section 1  
16 or 3(a) of the Sherman Act bears the burden of  
17 proving the prima facie case described in paragraph  
18 (1) by a preponderance of evidence, at which point  
19 the burden of production shifts to the defending  
20 party as set forth in subsection (d).

21 (d) BURDEN OF REBUTTING PRIMA FACIE CASE.—

22 The defending party bears the burden of rebutting a prima  
23 facie case of consciously parallel pricing coordination by  
24 producing evidence, sufficient to raise a genuine dispute  
25 of material fact, that the defending party's action de-

1 scribed in paragraph (1)(A) of subsection (c) was moti-  
2 vated by business judgment that is economically rational  
3 in the absence of any consciously parallel pricing coordina-  
4 tion. Evidence of this nature may include, but is not lim-  
5 ited to, evidence that the defending party acted rationally  
6 in response to or in anticipation of changing conditions  
7 affecting the market for or the marketability of the prod-  
8 ucts or services concerned.

9 (e) **ULTIMATE BURDEN.**—If the defending party re-  
10 buts the prima facie case, the burden shifts back to the  
11 claimant to prove, by a preponderance of the evidence,  
12 that the defending party entered a tacit agreement among  
13 two or more persons to raise, lower, change, maintain, or  
14 manipulate pricing for the purchase or sale of reasonably  
15 interchangeable products or services. The claimant may do  
16 so by means that include, but are not limited to, proving  
17 that—

18 (1) the business judgment described in sub-  
19 section (d) was not—

20 (A) economically rational in the absence of  
21 consciously parallel pricing coordination; or

22 (B) the predominant motivating factor for  
23 the defending party’s action described in para-  
24 graph (1)(A) of subsection (c);



1           (2) the defending party, knowing that coordi-  
2 nated action to raise, lower, change, maintain, or  
3 manipulate pricing for the purchase or sale of rea-  
4 sonably interchangeable products or services was  
5 contemplated and invited by a competitor, adhered  
6 to the scheme and participated in it; or

7           (3) based on circumstantial evidence implying a  
8 traditional conspiracy, it is more likely than not that  
9 the defending party entered an agreement among  
10 two or more persons to raise, lower, change, main-  
11 tain, or manipulate pricing for the purchase or sale  
12 of reasonably interchangeable products or services.

13       (f) AFFIRMATIVE DEFENSE.—It is an affirmative de-  
14 fense to a claim of consciously parallel pricing coordina-  
15 tion, on which the defending party bears the burden of  
16 proof by a preponderance of the evidence, that any affirm-  
17 ative defense to price fixing applies.

18 **SEC. 5. CLARIFYING THE MEANING OF CONTRACT, COM-**  
19 **BINATION IN THE FORM OF TRUST OR OTH-**  
20 **ERWISE, OR CONSPIRACY.**

21       (a) MEANING OF CONTRACT, COMBINATION IN THE  
22 FORM OF TRUST OR OTHERWISE, OR CONSPIRACY.—A  
23 tacit agreement is a form of “contract, combination in the  
24 form of trust or otherwise, or conspiracy” under sections  
25 1 and 3(a) of the Sherman Act (15 U.S.C. 1, 3(a)).

1 (b) STANDARDS OF PLEADING AND PROOF.—In a  
2 civil action, including an action brought by the United  
3 States or by a State attorney general, or by the Federal  
4 Trade Commission under section 5 of the Federal Trade  
5 Commission Act (15 U.S.C. 45)—

6 (1) a complaint—

7 (A) plausibly pleads a “contract, combina-  
8 tion in the form of trust or otherwise, or con-  
9 spiracy” under sections 1 and 3(a) of the Sher-  
10 man Act if the complaint contains factual alle-  
11 gations, which may consist of allegations of con-  
12 sciously parallel conduct, demonstrating that  
13 the existence of the alleged contract, combina-  
14 tion in the form of trust or otherwise, or con-  
15 spiracy is among the realm of plausible possi-  
16 bilities; and

17 (B) need not allege facts tending to ex-  
18 clude the possibility of independent action to  
19 plausibly plead the existence of a “contract,  
20 combination in the form of trust or otherwise,  
21 or conspiracy” under sections 1 and 3(a) of the  
22 Sherman Act; and

23 (2) a claimant—

24 (A) demonstrates a genuine dispute of ma-  
25 terial fact that a defending party entered a

1 “contract, combination in the form of trust or  
2 otherwise, or conspiracy” under sections 1 and  
3 3(a) of the Sherman Act by offering evidence,  
4 which may be direct or circumstantial, that is  
5 sufficient to allow a trier of fact to reasonably  
6 conclude that the defending party entered the  
7 contract, combination in the form of trust or  
8 otherwise, or conspiracy; and

9 (B) need not offer evidence tending to ex-  
10 clude the possibility of independent action to  
11 demonstrate a genuine dispute of material fact  
12 that a defending party entered a “contract,  
13 combination in the form of trust or otherwise,  
14 or conspiracy” under sections 1 and 3(a) of the  
15 Sherman Act; although, at trial, the trier of  
16 fact may consider the existence or absence of  
17 evidence tending to exclude the possibility of  
18 independent action when determining whether a  
19 defending party entered the contract, combina-  
20 tion in the form of trust or otherwise, or con-  
21 spiracy.

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