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Comments on Professor Page's Discussion of *Matsushita*

T. Mark McLaughlin*

I. INTRODUCTION

The Supreme Court's decision in *Matsushita*¹ was a decidedly positive development, both as a substantive antitrust decision and as a sound application of Rule 56 of the Federal Rules of Civil Procedure.² Like all decisions in the antitrust field, it is part of the common law development of antitrust principles. Professor Page's remarks illustrate that the common law continues to evolve as the courts apply *Matsushita* to the widely varying fact patterns that come before them.

I have a number of follow-up observations to Professor Page's productive and insightful observations on the law as it continues to evolve. These are offered from the perspective of someone who regularly consults with businesses, often in concentrated industries, about conducting their affairs in a way that emphasizes that all of their conduct is unilateral, and who often defends antitrust cases involving claims of conspiracy.

II. *MATSUSHITA* AS A CIVIL PROCEDURE CASE

My first comment relates to the civil procedure component of the *Matsushita* decision, and focuses on *Matsushita* as an emphatic statement by the Supreme Court that Rule 56 has a significant role to play in antitrust cases. The fact that such cases often are complicated, requiring an understanding of an entire industry, an analysis of conduct that has taken place over many years, and substantial expert testimony, does not exempt them from the standards of Rule 56.

Indeed, one lesson from *Matsushita* and the cases that have applied it is that the unwieldy nature of antitrust cases makes it all the more

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1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. FED. R. CIV. P. 56 (prescribing the procedure for summary judgment motions).

important to the orderly administration of justice that courts ensure that the plaintiff has raised a genuine issue of material fact in support of its claim before sending the case, with all of its complexity, to a jury. The district court in the *Citric Acid* case, which applied *Matsushita* to grant summary judgment (in an opinion which the Ninth Circuit affirmed), phrased the issue in practical terms by noting that the “quantity” of material that a plaintiff develops in the course of discovery cannot substitute for the “quality” of evidence that it must present in order to sustain a claim.³

One way to gain some perspective on the civil procedure component of *Matsushita* is to view it as one of a series of decisions over the past twenty years in which the Supreme Court has emphasized the serious and often-difficult role of the district court as a gatekeeper, making sure that only meritorious disputes proceed to trial.

Matsushita itself was one of three separate decisions that the Court issued in 1986 relating to summary judgment. The other two were *Anderson v. Liberty Lobby, Inc.*⁴ (a libel case) and *Celotex Corp v. Catrett*⁵ (an asbestos case). Together, the three decisions emphasize that Rule 56 plays a meaningful role in *all* federal civil litigation, and that the complexity of a case does not exempt it from the requirements of Rule 56. The Supreme Court also emphasized the gatekeeper role of the district court in its decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁶ *General Electric Co. v. Joiner*,⁷ and *Kumho Tire Co. v. Carmichael*,⁸ noting the responsibility of the district court to make sure that proffered expert testimony truly is expert in nature, and fits the case at hand, before permitting that testimony to be offered at trial.

Another reminder by the Supreme Court that the district court has substantial gatekeeper responsibilities was its 2004 decision in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*⁹ The plaintiffs there were persons who bought vitamins abroad, seeking to recover damages (trebled under U.S. antitrust laws) in the form of overcharges resulting from a price-fixing conspiracy. The Supreme Court held that under the

3. *In re Citric Acid Litig.*, 996 F. Supp. 951, 956 (N.D. Cal. 1998), *aff'd*, 191 F.3d 1090 (9th Cir. 1999).

4. 477 U.S. 242 (1986).

5. 477 U.S. 317 (1986).

6. 509 U.S. 579 (1993).

7. 522 U.S. 136 (1997).

8. 526 U.S. 137 (1999).

9. 542 U.S. 155 (2004).

Foreign Trade Antitrust Improvements Act,¹⁰ plaintiffs who suffer an injury abroad, independent of any injury suffered domestically, may not sue under the federal antitrust laws. In the many recent cases under that Act, the courts have emphasized that the district court must determine whether the plaintiff has suffered the requisite domestic injury as a preliminary matter of subject matter jurisdiction, *before* the plaintiff may proceed with its claim.

In each of these areas, the district court has the often-difficult role of serving as a gatekeeper. I believe that the decisions in these areas have been very positive events, promoting the principled development of the law.

III. *MATSUSHITA* AS AN ANTITRUST CASE

Although *Matsushita* has a civil procedure component, and fits comfortably in the flow of Supreme Court cases relating to the administration of complex cases of all types, at its core it is an antitrust case, because substantive antitrust law, and not any feature of Rule 56, provided the basis for the decision. That is, section 1 of the Sherman Act¹¹ prohibits contracts, combinations, and conspiracies in unreasonable restraint of trade. It does not prohibit unilateral conduct. In section 1 cases, as in all civil cases, the test on summary judgment is whether the plaintiff has raised a genuine issue of material fact in support of its claims. The range of issues that are genuine and material will depend entirely on the elements of the claim that plaintiff must prove. The *Matsushita* test is an application of Rule 56, tailored to the elements of a section 1 claim, to allow the district court to determine, in fulfilling its responsibility under Rule 56, whether the evidence would permit a reasonable jury to find that there had been a conspiracy.

Contrary to some suggestions, I do not believe that *Matsushita* and the cases that have applied it over the last twenty years can be construed as creating a "special rule" that somehow unduly favors defendants in conspiracy cases.

IV. DIFFICULTIES IN APPLYING *MATSUSHITA*

Notwithstanding the solid substantive basis for *Matsushita* and its soundness as a reminder that even big cases are subject to the requirements of Rule 56, history has shown that the *Matsushita* test is often difficult to apply.

10. 15 U.S.C. § 6(a) (2006).

11. 15 U.S.C. §§ 1-7 (2006).

The test is worded broadly, first of all. The search that the district court must undertake in each case is for evidence that “tends to exclude the possibility” of unilateral action. That test needs to be applied to the mountains of evidence that the parties necessarily develop in antitrust cases, and to the inferences that the parties seek to draw from that mountain of facts and from the always-complicated economic evidence regarding industry structure and performance. As applied in any particular case, the test can seem like an abstraction, and one that may lead a district court to wonder at what point along an apparent spectrum the evidence “tends to exclude” the possibility that the defendants acted unilaterally.

That is why Professor Page’s focus on the issue of communications among the alleged conspirators is appropriate. In cases involving application of the *Matsushita* standard, I have found it helpful to provide a reminder to the court of the basic definition of conspiracy from prior cases—that is, the need for plaintiff to show that the alleged conspirators engaged in a “conscious commitment to a common scheme designed to achieve an unlawful objective.”¹² Reference to that standard helps to make the inquiry more concrete and helps focus the attention of the court on the need for the plaintiff to demonstrate the who/what/when/where/how of an alleged conspiracy, and on questions like when the supposed conspiracy began, who started it, and what is the proof that each alleged member joined the conspiracy and thereby made the required “conscious commitment to a common scheme” with the other alleged participants. Those are the kinds of basic questions that keep the inquiry focused, concrete, and tailored to the facts of the particular case. As Professor Page notes, that inquiry will require proof of communication among the participants in the alleged concerted course of conduct.

I believe that it is worth noting, though, that Professor Page’s observation that it would promote clarity and consistency in the treatment of summary judgment motions on section 1 cases for the courts to hold plaintiffs to the burden of coming forward with evidence of communications among the alleged conspirators (or evidence that makes sense only in the context of a conspiracy, such that an inference that communications reflecting an agreement took place is reasonable) is a helpful reminder of the law as it *already exists*, and not a call for adoption of a new legal standard.

12. *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)), *cert. denied*, 451 U.S. 911 (1981).

The plaintiff's burden in a section 1 case is, as it always has been, to show a contract, combination, or conspiracy, as "[t]he existence of an agreement is '[t]he very essence of a section 1 claim.'"¹³ As the ABA Civil Antitrust Jury Instructions emphasize, a section 1 claim requires proof of "an agreement by two or more persons to accomplish some unlawful purpose or to accomplish a lawful purpose by unlawful means."¹⁴ They go on to state that for a conspiracy to be present "two or more persons must enter into an agreement that they will act together," that "the alleged members of the conspiracy in some way came to an agreement to accomplish a common purpose," or (stated another way) "that the parties knowingly worked together to accomplish a common purpose."¹⁵

By emphasizing the need for an agreement in a section 1 case, the ABA Model Instructions, in my view, reinforce the necessity for proof of communication to reach the prohibited agreement. To be sure, the Model Instructions, and the cases, reflect that the communications that demonstrate the existence of an agreement can take many forms. But the key point here is that section 1 cases demand proof of an agreement, and agreements necessarily come into place following communications. As a result, focusing on the evidence of communications among the alleged conspirators is a helpful and necessary aspect of judicial inquiry at the summary judgment stage under existing law.

V. THE FUTURE

So much for the past and present. My last point addresses the future. As Professor Waller mentioned in his introduction, a prominent event on the horizon will be the Supreme Court's decision in the *Twombly* case that it will hear this term.¹⁶

The issue in *Twombly* is the level of detail required under Rule 8¹⁷ to plead an antitrust conspiracy. The district court in that case (Judge Lynch in New York City) dismissed a complaint in which the plaintiff alleged a conspiracy by incumbent local telephone companies (the Baby Bells) to thwart emerging competition. The complaint noted that none

13. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (quoting *Alvord-Polk, Inc. v. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)).

14. ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES B-2 (2005).

15. *Id.*

16. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006) (note that my firm is involved in the case, for one of the defendants).

17. FED. R. CIV. P. 8.

of the Baby Bells had licensed emerging competing local exchange carriers to use the incumbent's network elements (as mandated by the Telecommunications Act of 1996), and that none of the Baby Bells had moved into a neighboring incumbent's area. In addition to that allegation of parallel conduct by the Baby Bells, the complaint alleged, without any supporting factual detail, that they had conspired against the emerging local exchange carriers.

Judge Lynch dismissed that complaint, and noted that it contained no allegation of "plus factors" that would show that the parallel conduct of the incumbents was the fruit of conspiracy rather than unilateral conduct. The Second Circuit reversed the dismissal and found that a plaintiff need not allege "plus factors" in order to state a claim. Rather, according to the Second Circuit, the plaintiff simply needed to outline the alleged conspiracy and conclude that one existed. As long as conspiracy was *one* of the possible explanations for the alleged parallel conduct, the court held that the complaint would survive a motion to dismiss, and the case would proceed to discovery. The Second Circuit emphasized that once the case proceeded past the motion to dismiss stage, in order to create a genuine issue of material fact in support of its claim and to avoid summary judgment under *Matsushita*, the plaintiff would need to develop "plus factor" evidence that "tended to exclude the possibility of unilateral conduct." However, according to the Second Circuit in *Twombly*, pleading under Rule 8 of the Federal Rules did not require an allegation of the plus factors in the first instance.

In June of 2006 the Supreme Court granted certiorari in *Twombly*. In addition to the briefs by the parties, there were several amicus briefs filed in the matter by the Solicitor General, the ABA, several states, the Chamber of Commerce, and twenty-four renowned economists. All of those briefs are very thought-provoking for people in our line of work. Consistent with my role here to provide the defendant's perspective, let me leave you with the thought that the briefs submitted by and in support of the defendants lay out a straightforward and well-supported case for the proposition that Rule 8, while not requiring the plaintiff to plead all of its evidence, *does* require a plaintiff to allege enough facts to show that, if it proves them, it will be entitled to relief. That is, because section 1 of the Sherman Act requires the plaintiff to prove conspiracy—and, when the evidence is ambiguous, requires the plaintiff to come forward, under *Matsushita*, with evidence that "'tends to exclude the possibility' that the alleged conspirators acted independently"—Rule 8 should require a plaintiff to allege enough

facts, in the words of Rule 8, to “show[] that the pleader is entitled to relief.”¹⁸

Others, of course, may have a different perspective on *Twombly*. We are all likely to agree, though, that whatever the Supreme Court does, we are very likely to see plenty of citations to *Matsushita* in its opinion.

Thank you for the opportunity to participate in this discussion.

18. FED. R. CIV. P. 8.