

2007

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Recommended Citation

Michael J. Freed, *Comments on Professor Page's Discussion of Matsushita: Plaintiff's Perspective*, 38 Loy. U. Chi. L. J. 461 (2007).

Available at: <http://lawcommons.luc.edu/lucj/vol38/iss3/4>

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Comments on Professor Page's Discussion of *Matsushita*: Plaintiffs' Perspective

Michael J. Freed*

For the past sixty years or so, courts have struggled to articulate what constitutes illegal concerted behavior under the Sherman Act based on the Supreme Court's formulation that such conduct requires only "a unity of purpose or a common design and understanding, or a meeting of the minds."¹ In many instances, the courts' analysis centers on the issue of whether and when rivals' parallel conduct is, in fact, a product of illegal price fixing. That challenge did not end with the Supreme Court's statement of the standard for surviving summary judgment in an antitrust case, first articulated in *Monsanto Co. v. Spray-Rite Service Corp.*,² that a plaintiff must present evidence "that tends to exclude the possibility" that alleged conspirators acted independently.³ And since the time *Matsushita* cited that standard and added the gloss that plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents,"⁴ courts and commentators have formulated a variety of analyses that attempt to explain the kind and amount of evidence necessary to meet the *Matsushita* standard.

Professor Page's recent article addressing the problem is one in a long line of commentaries that suggest analyses designed to provide courts with a more concrete framework within which to view the voluminous evidence typical in antitrust cases. However, in my view, his central conclusion, that courts should include in the definition of

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1. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).
2. 465 U.S. 752 (1984).
3. *Id.* at 764.
4. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

“concerted action” a requirement that plaintiffs show “communication among rivals”—both of intentions and of rivals’ reliance on their counterparts’ actions in choosing a course of action—fails to clarify the analysis. It also has the potential inadvertently to raise the bar for proof of antitrust conspiracies, which, as courts have noted many times, are inherently self-concealing.⁵

Professor Page’s comprehensive analysis of the issue and his discussion of recent cases actually highlights the inadvisability of introducing “communication” as an essential element of proof. In the three recent cases Professor Page discusses, the courts attempt to determine whether the evidence that plaintiffs have been able to develop to resist summary judgment, viewed as a whole, is sufficient to show that the inference of conspiracy was reasonable. To require evidence of “communication” would not clarify the courts’ task, however; rather, such a requirement would create yet another definitional morass: What is a “communication”? Jury instructions can run to many pages just attempting to guide prospective jurors about this. Further, such a requirement, at least as Professor Page presents it, carries the significant danger that courts will simplify the effort and look *only* for conversations among rivals explicitly reflecting intention on the one hand and competitors’ reliance on the other hand, ignoring the inferences that arise from the totality of the evidence.

Nowhere was this problem highlighted better than in the Seventh Circuit’s opinion in the *High Fructose Corn Syrup Antitrust Litigation*.⁶ In that opinion, Judge Posner discussed three traps defendants typically lay for courts that must determine whether a price-fixing case should survive summary judgment: (1) invading the province of the jury by weighing conflicting evidence; (2) concluding that the evidence as a whole cannot defeat summary judgment if no single item of evidence points unequivocally to conspiracy; and (3) “failing to distinguish between the existence of a conspiracy and its efficacy.”⁷ Imposing a communication requirement increases the danger of springing at least

5. See, e.g., *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (holding that “summary procedures should be used sparingly in complex antitrust litigation where . . . the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”); *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 312 (D.N.J. 2004); *Jung v. Ass’n of Am. Med. Coll.*, 300 F. Supp. 2d 119, 157 (D.D.C. 2004). See also *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981) (holding price-fixing conduct inherently self-concealing); *In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 371 (D.N.J. 2001) (stating that “the self-concealing conspiracy concept is established in the antitrust case law.”).

6. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002).

7. *Id.* at 655–56.

two of the traps with even less effort by defendants. First, imposing a communication requirement will not just *invade* the province of the jury; such a requirement threatens to swallow the jury's duty whole. There is the risk that courts may look at and weigh *only* evidence of communication, determine whether it is the "right" kind of communication, and ignore everything else.

Second, imposing a communication requirement may exacerbate courts' tendency to fall into the trap of granting summary judgment in circumstances where each individual piece of evidence fails to point to conspiracy, rather than viewing the record as a whole (including communication and noncommunication evidence). Again, courts may only seek the existence of communication and ignore everything else.⁸

As a result, a communication requirement may well become an unintended shortcut to summary judgment because courts may look only for traditional, explicit "communication" of intent and agreement; i.e., Company A telling Company B it intends to raise its prices and Company B verbally or in writing agreeing to do the same. Add to this a requirement that plaintiffs also produce evidence of communication demonstrating conspirators' reliance on their co-conspirators' intentions, then the hurdle for plaintiffs to survive summary judgment effectively would be set at the level of *direct* evidence of conspiracy, akin to defendants' admission that they agreed to fix prices. This would reverse almost a century of the courts' interpretations of Sherman Act section 1.

In reality, a communication requirement does little to assist courts in determining whether plaintiffs have satisfied their burden on the issue

8. I note that Professor Page, contrary to the Supreme Court's standard of viewing the evidence as a whole, *see Matsushita*, 475 U.S. at 587, appears to assert the propriety of considering the inferences raised by each individual piece of evidence. *See* William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 417 (2007) (stating that despite the principle of *Continental Ore*, courts should not compartmentalize the evidence, "[n]evertheless, each component must have some tendency to support the inference of concerted action"). Professor Page goes further, however, invoking Judge Posner's statement in *Fructose* that "zero plus zero equals zero" in support of this view. I submit, however, that this is not Judge Posner's position, as the next statement in his opinion reveals. He continues that, because evidence can be susceptible of different interpretations, the question for the jury is, "when the evidence was considered as a whole," whether "it was more likely that defendants had conspired to fix prices than that they had not conspired to fix prices." *Fructose*, 295 F.3d at 655-56. Professor Page later recognizes this, *see Page supra*, at 448, but qualifies the statement by saying (and attributing to Judge Posner) that courts should not reject individual bits of evidence because each individually is insufficient to avoid summary judgment, "so long as bits of evidence are not wholly without weight on the issue of agreement." *Page supra*, at 448. This does not appear to be Judge Posner's qualification, however; he says only that "[t]he question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." *Fructose*, 295 F.3d at 661.

of concerted action. If antitrust law is to continue to permit plaintiffs to prove agreement with circumstantial evidence, courts still will be faced with the dilemma of how much and what kind of evidence is sufficient to infer that “communication” occurred. Professor Page ultimately concedes the point in the second half of his article, where he analyzes three recent cases decided on summary judgment, *Fructose*, *Flat Glass*, and *Williamson Oil*. He begins his discussion with the observation that “[i]ncluding communication of intentions and reliance in the definition of concerted action does not tell us what sorts of communications satisfy the definition, nor does it tell us what evidence would be sufficient to prove that the requisite communications had taken place.”⁹ His following analysis appears to differ little from the current standard requiring courts to consider the record as a whole rather than focus on the probative value of a single piece of evidence. For example, in discussing the probative value of private information exchanges, Professor Page asserts that the meaning of particular communications will often depend on other evidence in the case,¹⁰ and the various case citations that follow in the article uniformly examine competitors’ behavior as a whole, including communications, to determine whether there is sufficient evidence to raise an inference of agreement.¹¹

Perhaps by advocating a communication requirement, Professor Page really is not advocating anything new, but simply is trying to standardize what is necessarily a fact-intensive analysis. The danger of such standardization is clear, however. Courts may be tempted to abandon the admonition of *Continental Ore*¹² and attempt to determine the relative worth of each piece of conflicting evidence to satisfy the communication requirement rather than commending that task to the jury. In short, the perceived problem with the *Matsushita* standard may

9. Page, *supra* note 8, at 440.

10. *Id.* at 454.

11. I note that, in his discussion of *Fructose*, Professor Page cites Judge Posner as “stress[ing] at several points [in the *Fructose* opinion] that any agreement must have involved secret communications to reach consensus on list prices.” Page, *supra* note 8, at 450–51. There is no citation to the *Fructose* opinion for this proposition, and while Judge Posner refers to “communications” early in the opinion, he does not appear to modify that term with “secret.” This is an important point because it illustrates the ease with which the word “communication” can be misused to set the proof bar too high, and thus demonstrates the danger of introducing “communication” as an essential element of proof.

12. *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (holding that “[i]n cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components, . . . the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole, . . . and in a case like [this], the duty of the jury was to look at the whole picture and not merely at the individual figures in it”) (citations omitted).

remain unsolved, but a communication requirement would simply graft onto the old standard a new, unnecessary, and confusing standard, which may be misperceived as providing certainty at the expense of a history of legal interpretation that, by and large, has served well in civil antitrust litigation.