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have to answer numerous questions regarding the procedure of collective bargaining for wages, hours, and working conditions. By not limiting the scope of the antitrust laws, the Court concluded that the inherent benefits of collective bargaining would be in jeopardy. Moreover, the Court noted that nonexpert judges or juries may premise antitrust liability on a premeditated agreement of uniform behavior on the part of the employers or on the lack of an independent decision of a competing employer.

Justice Stevens's dissent — an exemption from the exemption

In his dissent, Justice Stevens pointed out that an accommodation must exist for the Congressional policy favoring collective bargaining and the Congressional policy favoring free competition in

business markets. Although Justice Stevens conceded that a nonstatutory exemption from the antitrust laws is necessary in certain circumstances, he indicated that the unique nature of the professional sports industry warrants a nonapplication of the exemption from the antitrust laws.

Justice Stevens noted that all salaries in the professional sports industry are individually negotiated—a practice which does not exist in any other industry. He emphasized that this practice existed both before and after a 1982 collective bargaining agreement which granted players an express right to negotiate their respective salaries individually with club owners. However, because this “developmental squad” introduces a new expansion of the traditional salaried players, he maintained that the current imposition of fixed wages on a player's benefits

package was not foreseeable during the original 1982 collective bargaining agreement. Thus, Justice Stevens found the “developmental squad” to warrant special attention. In agreeing with the district court, he concluded that the “developmental squad” is a novel idea which was not entertained by the 1982 agreement between the players and the NFL. Therefore, Justice Stevens determined that the antitrust exemption, normally intrinsic to a collective bargaining agreement, should not apply because the Association did not negotiate the players' rights in the original 1982 agreement. Thus, Justice Stevens concluded that the antitrust exemption, coupled with the lack of a mutually agreed upon collective bargaining agreement, would infringe upon the Association's freedom to contract and would contradict the very purpose of the exemption—the ability to negotiate freely.

Independent service organizations survive Kodak's motion for summary judgment on Sherman Act claims

by Patrick McGovern

In *Eastman Kodak v. Image Technical Service, Inc.*, 504 U.S. 451 (1992), the Supreme Court affirmed a lower court's ruling that a genuine issue of material fact existed as to whether Kodak possessed market power in the relevant market for service and parts for its machines even though Kodak lacked market power in the relevant market for the sale of its copying equipment. The Court held as a matter of law that a single brand of product or service can be a relevant market under the Sherman Act. Further, the Court clarified its earlier standard for summary judgment enunciated in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), by stating that a plaintiff in an antitrust case does

not carry a special burden to defeat a motion for summary judgment. The Court referred to its decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which held that a nonmoving party can survive a motion for summary judgment if the court finds that the party's inferences are reasonable.

Kodak's policy to maintain own products

Kodak manufactured and sold copiers and micrographic equipment and replacement parts for its equipment and offered service for Kodak equipment. Kodak provided 80% to 95% of the service for Kodak ma-

chines; however, several independent service organizations ("ISOs") competed against Kodak in the market for servicing and supplying parts for the Kodak equipment. Kodak adopted a policy designed to limit the availability of parts to the ISOs in order to make it more difficult for the ISOs to compete with Kodak in servicing Kodak equipment. Kodak implemented a policy of selling replacement parts for its machines only to buyers of Kodak equipment who used Kodak services or repaired their own machines.

In 1987, eighteen ISOs sued Kodak in the United States District Court for the Northern District of California, alleging that Kodak's policies violated the Sherman Act, 15 U.S.C. § 1 *et. seq.* (1996). The ISOs claimed that Kodak unlawfully tied the sale of service for its machines to the sale of parts, in violation of Section 1 of the Sherman Act and unlawfully monopolized and attempted to monopolize the sale of service and parts for its machines in violation of Section 2 of the Sherman Act. After limited discovery, the district court granted summary judgment in favor of Kodak, holding that the ISOs failed to provide evidence of a tying arrangement between Kodak equipment and Kodak service or parts. The court held that, although Kodak possessed a natural monopoly over the market for its parts, Kodak's unilateral refusal to sell those parts to the ISOs did not violate Section 2.

On appeal, a divided Court of Appeals for the Ninth Circuit reversed, finding that the ISOs "had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets, and rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market" with respect to the Section 1 claim. The Ninth Circuit also considered the three business justifications Kodak offered for its restrictive parts policy: (1) guarding against inadequate service; (2) lowering inventory costs; and (3) preventing the ISOs from free-riding on Kodak's investment in the copier and micrographic industries. The court rejected these arguments, stating, *inter alia*, that the trier of fact might find that a less restrictive means existed for achieving Kodak's quality-related goals. Further, the court found Kodak's free-rider argument legally insufficient.

Addressing the Section 2 claim, the Ninth Circuit concluded that sufficient evidence existed to support a claim that Kodak's parts policy was anticompetitive and

involved a specific intent to monopolize. In addition, the court held that the ISOs had submitted enough evidence to disprove Kodak's business justifications for summary judgment purposes.

Supreme Court affirms denial of summary judgment

Court determines sufficient evidence of tying arrangement exists

The Supreme Court first addressed Kodak's defense that its activities did not constitute a tying arrangement. The Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958). The Court explained that for the ISOs' claim of a tying arrangement to prevail over Kodak's motion for summary judgment, a reasonable trier of fact would have to find (1) that service and parts are two distinct products, i.e., sufficient consumer demand exists so that it is efficient for a firm to provide parts separately from service; and (2) that Kodak tied the sale of service and parts. The Court found that sufficient evidence existed to establish that service and parts were sold separately and that efficiencies were evident in a separate services market.

Kodak argued that there cannot be two markets without a separate demand for parts (from service), e.g., an individual services market and an individual parts market. The Court rejected Kodak's unified market claim, concluding that this issue was for a trier of fact to decide. Finally, the Court held that the ISOs had submitted sufficient evidence of a tie between service and parts because Kodak would only sell parts to third parties if they agreed not to buy service from any ISOs.

ISOs present sufficient evidence of Kodak's market power

After finding sufficient evidence of a tying arrangement, the Court examined whether Kodak possessed market power in the tying market. The Court explained that "market power is the power to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466

U.S. 2, 14 (1983). In attempting to show Kodak's market power, the ISOs contended that Kodak possessed sufficient power in the parts market to force purchasers to buy unwanted service. For example, the ISOs offered evidence indicating that Kodak forced consumers to switch to Kodak service although consumers preferred the ISOs' service(s). Many of Kodak's coercive techniques, the ISOs asserted, forced the ISOs out of business. The Court further held that the ISOs submitted sufficient evidence to entitle them to a trial on their claim of Kodak's market power.

Court clarifies *Matsushita*

The Court next addressed Kodak's argument that it could not exercise the necessary market power for Section 1 purposes even if it possessed a monopoly share of the parts market because competition existed in the equipment market. Kodak argued that if it charged monopolistic prices in the service and parts market, the profits gained from that market would be offset by a corresponding loss in the equipment sales market because consumers would purchase equipment with lower service costs rather than buy Kodak products. According to Kodak, there would be no genuine issue of material fact on the market power issue. Kodak further asserted that if the Court adopted the presumption that equipment competition precludes a finding of the exercise of monopoly power in the aftermarket of service and parts, the Court's adoption of this presumption against a finding of market power would be consistent with its holding in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This is primarily because the existence of market power in the service and parts market without power in the equipment market would not make any economic sense.

Expressing skepticism regarding Kodak's argument, the Court stated that it preferred to examine actual economic realities of the market rather than legal presumptions that rest on formalistic distinctions in determining market power. The Court disagreed with Kodak's assertion that *Matsushita* introduced a special burden upon plaintiffs facing summary judgment in antitrust cases, reaffirming its requirement in *Matsushita* that a plaintiff's claims must make economic sense. The Court explained that *Matsushita* only requires that the nonmoving party's inferences be reasonable in order to

reach the jury. The Court indicated that summary judgment should be granted in the defendant's favor when the plaintiff's theory is economically senseless.

After delineating the standard for summary judgment, the Court applied this standard to Kodak's motion. Despite evidence of Kodak's increased prices and exclusion of competition, the Court stated that Kodak must show that an inference of market power is unreasonable.

The Court began its analysis of whether Kodak met its burden for summary judgment by reviewing "cross-elasticity of demand" in the relevant market. Cross-elasticity of demand is "[t]he extent to which one market prevents exploitation of another market depending on the extent to which consumers will change their consumption of one product in response to a price change in another." *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 400 (1956). Claiming cross-elasticity of demand in its markets, Kodak argued that any increase in prices above competitive levels in the parts or service market would discourage potential customers from buying Kodak equipment and, consequently, injure Kodak's competitive abilities in the future. According to Kodak, this was an "economic reality." Thus, Kodak urged the Court to accept, as a matter of law, that competition in the equipment market automatically foreclosed market power in the service or parts market.

The Court rejected Kodak's "economic reality" argument, concluding that Kodak could compensate for the loss in equipment sales by charging high prices in the aftermarkets. The Court stated that Kodak's claim that a long-term disaster would occur if it charged monopolistic prices in the aftermarkets ignored the availability of an "optimum price"—which is somewhere between a competitive price and a ruinous one. According to the Court, although the equipment market may restrain prices in the aftermarkets, the fact did not disprove the existence of market power in those markets. Thus, the Court concluded that no rule exists which holds that competition in the equipment market cannot coexist with market power in the aftermarkets.

Market reality contradicts Kodak's theory

Upon finding that the ISOs' assertion that Kodak possessed market power in the aftermarkets was possible, the Court addressed whether such an assertion

was unreasonable given actual market behavior.

In assessing the market, the Court found that Kodak had adopted a restrictive sales policy designed to eliminate ISO service and raised service prices for Kodak customers without suffering reduced equipment sales. According to the Court, this market reality contradicted Kodak's theory. Furthermore, the Court rejected Kodak's attempt to explain the market reality by claiming that it adopted a marketing strategy which resulted in an overall competitive price. The Court explained that the significant information and switching costs involved in the complex, durable equipment at issue undermined Kodak's argument.

Kodak failed to show ISO inference was unreasonable

In summarizing its holding with respect to the Section 1 claim, the Court concluded that Kodak failed to show the inference that Kodak possessed market power in the aftermarkets was unreasonable. Emphasizing that the ISOs offered direct evidence of Kodak's ability to raise prices and to drive out competition in the aftermarket, the Court found that the inference that Kodak possessed market power in the aftermarkets was reasonable and that the ISOs' allegations made economic sense. Accordingly, the court held that Kodak was not entitled to summary judgment on the ISOs' Section 1 claim.

ISOs present sufficient evidence for Section 2 claim to survive

The Court stated that two elements are necessary to show a Section 2 Sherman Act violation: 1) the possession of monopoly power, which is greater than market power in the relevant market; and 2) the willful acquisition and maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Sufficient evidence of monopoly power

Due to Kodak's control of nearly 100% of the parts market and at least 80% of the service market, the Court held that sufficient evidence existed with regard to

Kodak's monopoly power to defeat a motion for summary judgment as to the first element of the Section 2 claim. Moreover, the Court rejected Kodak's contention that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act.

Kodak's use of monopoly power: A factual question

Next, the Court addressed the second element of a Section 2 claim: the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor. Having already determined that the ISOs had presented evidence of Kodak's monopolistic behavior, the Court examined whether Kodak possessed any legitimate business reasons for its actions. The Court held that factual questions existed, (i.e., Kodak's desire for quality control, lower inventory costs, and the prevention of free-riding by ISOs). In holding that summary judgment was inappropriate, the Court, nonetheless, questioned many of Kodak's claimed business justifications, and allowed the ISOs to proceed to trial with their Sherman Act claims.

Dissent

Justice Scalia, joined by Justice O'Connor and Justice Thomas, dissented. The dissent disagreed with the majority's finding that single-brand market power over aftermarket products constitutes sufficient "market power" to permit an antitrust plaintiff to invoke the per se rule against tying. Moreover, the dissent disagreed that market power could be found in the record in this case, arguing that the majority's opinion would lead to increased litigation and harm genuine competition. Finally, the dissent argued that the majority's application of the per se tying prohibition and monopolization doctrine to a seller's behavior in its single-brand aftermarkets is misplaced where the seller lacks power at the inter-brand level.