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## *Matsushita* at Twenty: A Conference Introduction

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On September 29, 2006, the Institute for Consumer Antitrust Studies<sup>1</sup> hosted a symposium at Loyola University Chicago School of Law exploring the legacy of the Supreme Court's seminal decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>2</sup> This is the latest in a long series of antitrust symposia at Loyola dating back to the founding of the Institute in 1994. Since that time, the Institute has been fortunate to present symposia organized around important, timely, and controversial topics in antitrust and consumer protection. These symposia have included antitrust and health care;<sup>3</sup> antitrust and the new millennium;<sup>4</sup> competition, consumer protection and energy deregulation;<sup>5</sup> and the future of private rights of action in antitrust.<sup>6</sup>

### I. THE CASE

The *Matsushita* decision has had a profound effect on both antitrust and civil procedure law. As an antitrust decision, *Matsushita* has changed the basic ground rules for proof of conspiracy, summary judgment, and the role of the economist. As a civil procedure decision,

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1. The Institute is a nonpartisan, independent academic center designed to explore the impact of antitrust and consumer protection enforcement on the individual consumer and the public, and to shape policy issues. For more information about the Institute and its mission, see <http://www.luc.edu/antitrust>. The symposium was also cosponsored by Butler Ruben Saltarelli & Boyd, LLP, the CCH Trade Regulation Reporter, and the Loyola University Chicago Law Journal which is publishing this special symposium of the papers and selected comments from the conference.

2. 475 U.S. 574 (1986).

3. Symposium, *Can Antitrust Law Cure Health Care?*, 8 LOY. CONSUMER L. REP. 76 (1995).

4. Symposium, *Antitrust Law for the New Millennium: An Examination of Leading Issues in Antitrust Enforcement Policy for the Approaching Age*, 9 LOY. CONSUMER L. REP. 97 (1997).

5. Symposium, *Competition, Consumer Protection & Energy Deregulation*, 33 LOY. U. CHI. L.J. 749 (2002).

6. Symposium, *The Future of Private Rights of Action in Antitrust*, 16 LOY. CONSUMER L. REV. 295 (2004).

*Matsushita* was part of the so-called summary judgment trilogy,<sup>7</sup> which for better or worse, reinvigorated summary judgment in antitrust and continued the trend toward the vanishing trial in civil litigation generally. Our 2006 conference thus focused on the effect of *Matsushita* and the ensuing twenty years of lower court decisions on the proof of conspiracy, summary judgment, and the role of the economist both in price-fixing litigation and antitrust more broadly.

The key to understanding *Matsushita* and its legacy is to determine to what extent the decision transcends its peculiar factual setting and almost unprecedented scope. The case involved an allegation of a long-running conspiracy among the entire Japanese electronics industry with respect to the sales of televisions in the United States. The case concerned events stretching from the 1950s through the 1970s, and the litigation itself spanned from 1970 through the Supreme Court's decision in 1986, which granted summary judgment to the defendants on the principal, but not the only, claims in the case.<sup>8</sup>

The basic gist of the case was that the plaintiffs, American television manufacturers, alleged an agreement by the Japanese industry to price high in Japan and price low in the United States to capture the U.S. market. While there was indisputable evidence that the defendants had conspired to raise prices in Japan, there was no direct evidence of any actionable agreement with respect to the U.S. market. There was also very little circumstantial evidence of any agreement with respect to the U.S. market, beyond parallel low prices. Following extensive discovery, protracted discovery battles, and extensive evidentiary rulings, the district court granted summary judgment for the defendants on the core antitrust counts.<sup>9</sup> After allowing in certain evidence excluded by the trial court, the Third Circuit reversed, denying summary judgment, and holding that there was sufficient circumstantial evidence for a jury to infer an unlawful conspiracy aimed at the U.S. market to warrant a trial.<sup>10</sup>

The Supreme Court granted certiorari and awarded summary judgment to the defendants in a 5–4 opinion written by Justice Powell. The Court held that summary judgment in an antitrust conspiracy case was proper unless the plaintiff could show some evidence that tended to

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7. See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

8. The litigation itself continued until the Third Circuit granted summary judgment to the defendants on the remaining issues in the case following the remand from the Supreme Court. *In re Japanese Elec. Prod. Antitrust Litig.*, 807 F.2d 44, 49 (3d Cir. 1986).

9. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980).

10. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 319 (3d Cir. 1983).

exclude the possibility of independent action. Under the facts of the case, the Court refused to allow any inference of unlawful conspiracy sufficient to defeat summary judgment grounds. First, the plaintiff's theory made little economic sense to the five-member majority, and the Court suggested that the plaintiffs bore a higher burden of production under such circumstances.<sup>11</sup> Second, the Court was concerned that the case represented an attack on behavior akin to the normal price competition encouraged by the antitrust laws, and thus summary judgment should be appropriate absent a genuine issue of material fact that the defendant engaged in true predatory pricing.<sup>12</sup>

Given the nature of *Matsushita* as one of the few cases about an alleged long-running and unsuccessful predatory pricing *conspiracy*, its impact on more garden-variety price-fixing litigation is more difficult to discern. On the one hand, cases like *Flat Glass*<sup>13</sup> and *High Fructose Corn Syrup*<sup>14</sup> suggest that *Matsushita* does not have much to add to the normal standards for summary judgment. According to those cases, plaintiffs have no special burden where their underlying legal theories make economic sense and the real question is whether there is a sufficient quantum of direct and circumstantial evidence to warrant a trial. Indeed, both cases can be read broadly to rejuvenate theories of conscious parallelism beyond anything the Supreme Court has endorsed since its *Interstate Circuit* decision in 1939.<sup>15</sup> On the other hand, cases like the Eighth Circuit's *Potash* decision<sup>16</sup> suggest that *Matsushita* may have raised the bar substantially for avoiding summary judgment in a case where the plaintiff's case has just about everything except the proverbial smoking gun.

Another way of looking at this issue is to examine whether *Matsushita* is, or should be, limited to its status as a summary judgment case. For example, since Justice Rehnquist voted in the majority of

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11. *Matsushita*, 475 U.S. at 595–97.

12. *Id.* at 588–93.

13. *In re Flat Glass Antitrust Litig.*, 288 F.3d 83 (3d Cir. 2002).

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

15. *Compare Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“While the District Court’s finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions . . . was not a prerequisite to an unlawful conspiracy.”) *with Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (“Circumstantial evidence of consciously parallel may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”).

16. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc.*, 203 F.3d 1028 (8th Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

both *Matsushita* and the 1992 *Kodak* decision,<sup>17</sup> there is some evidence that he and others took the procedural postures of both cases very seriously.

The Supreme Court has now granted certiorari in a case called *Twombly*<sup>18</sup> where the question arises as to how much detail is required in a complaint regarding the existence of a conspiracy in order to survive a motion to dismiss for failure to state a cause of action under rule 12(b)(6) of the Federal Rules of Civil Procedure. If a heightened pleading standard is imposed in *Twombly* for antitrust cases under section 1 of the Sherman Act, then *Matsushita* will have transcended its status as a summary judgment case and the Supreme Court will have taken an important step in a new direction in civil procedure law, one the Court has not been willing to take so far in any other substantive area of the law.<sup>19</sup> If the standard for notice pleading remains unchanged after *Twombly*, then *Matsushita*'s centrality will be reinforced, and discovery and summary judgment will be reinforced as the twin workhorses in our procedural system in separating out the meritorious from the losing cases.

## II. THE CONFERENCE

Our panelists addressed these issues and more at the conference itself. Professor William Page, the Marshall M. Criser Eminent Scholar at the University of Florida Levin College of Law, began with a thought-provoking paper that sought to reconceptualize the issue of proof of conspiracy under *Matsushita* as one inherently involving some form of communication between the parties in order to distinguish between actionable agreements and mere conscious parallelism.<sup>20</sup> Michael Freed and Mark McLaughlin explored the implications of Professor Page's proposal in their comments and discussion during the symposium. They have provided written comments addressing both Professor Page's proposal and the general question of proof of

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17. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

18. *Bell Atlantic Corp. v. Twombly*, 126 S. Ct. 2965 (2006) (granting certiorari to review *Twombly v. Bell Atl. Corp.*, 425 F. 3d 99 (2d Cir. 2005)).

19. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (no heightened pleading standards for employment discrimination cases); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (notice pleading standard for civil rights cases). *See also* *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (analyzing notice pleading standards of Federal Rules of Civil Procedure in opinion by the principal drafter of Federal Rules). Under the Federal Rules of Civil Procedure, only cases alleging fraud or mistake require a higher degree of specificity. *See* FED. R. CIV. P. 9(b).

20. William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405 (2007).

conspiracy from their perspectives as distinguished practitioners representing primarily plaintiffs and defendants respectively.<sup>21</sup>

The second panel shifted the focus partially from the legal to the economic issues underlying *Matsushita*, and focused on the changing role of the economist and the way that economic expertise is used and misused in preparing and conducting antitrust litigation. Dr. Michael Salinger, the Director of the Bureau of Economics of the Federal Trade Commission, presented the principal paper discussing the role of the economist more generally in the wake of *Matsushita*, emphasizing the predatory pricing aspects of the case.<sup>22</sup> David Marx and Daniel Shulman offer written comments in their roles as sophisticated practitioners and users of economic testimony as to the proper role of the economist in price-fixing litigation.<sup>23</sup> James Morsch and James Langenfeld, the moderators for the conference panels, team up to offer a final written comment regarding the role of the economist on the issue of proof of conspiracy itself.<sup>24</sup>

The conference ended on a high note with a lunch keynote address from Judge Diane Wood of the United States Court of Appeals for the Seventh Circuit, a leading jurist and scholar in both procedure and antitrust. Judge Wood's remarks summed up most of the themes of the panels and explored the dilemma of *Matsushita* for the lower courts and litigants.

On behalf of the Institute for Consumer Antitrust Studies, and all the other cosponsors of the symposium, we are proud to present this special issue of the Law Journal devoted to both the conference and antitrust

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21. Michael J. Freed, *Comments on Professor Page's Discussion of Matsushita: Plaintiffs' Perspectives*, 38 LOY. U. CHI. L.J. 461 (2007); T. Mark McLaughlin, *Comments on Professor Page's Discussion of Matsushita*, 38 LOY. U. CHI. L.J. 467 (2007). Mr. Freed is a name partner in the firm of Freed Kanner London & Millen LLC where he represents primarily plaintiffs in class action antitrust and securities fraud litigation. Mr. McLaughlin is a partner in the firm of Mayer Brown Rowe & Maw LLP where he represents primarily defendants in antitrust and other types of business litigation, including class actions.

22. Michael A. Salinger, *The Legacy of Matsushita: The Role of Economics in Antitrust Litigation*, 38 LOY. U. CHI. L.J. 475 (2007).

23. David Marx, Jr, *The "Proper"—And by That I Mean Limited—Role for Economists in Price-Fixing Litigation*, 38 LOY. U. CHI. L.J. 491 (2007); Daniel R. Shulman, *Matsushita and the Role of Economists with Regard to Proof of Conspiracy*, 38 LOY. U. CHI. L.J. 497 (2007). Mr. Marx is the head of the Chicago antitrust practice for the firm of McDermott Will & Emery where he represents primarily defendants in antitrust counseling and litigation matters. Mr. Shulman is a partner in the Minneapolis firm of Gray Plant & Mooty where he represents both plaintiffs and defendants in antitrust litigation.

24. James Langenfeld & James Morsch, *Refining the Matsushita Standard and the Role Economics Can Play*, 38 LOY. U. CHI. L.J. 507 (2007). Dr. Langenfeld is an economist and director at LECG and Mr. Morsch is the Chair of the Antitrust and Competition Group at Butler Rubin Saltarelli & Boyd LLP, one of the cosponsors of the conference.

law more generally. The symposium and other lead articles present a snapshot of the vital issues of the day in a critical area of the law for both consumers and producers alike.