

The Supreme Court Celebrates The 20th Anniversary Of *Matsushita* By Agreeing To Hear A Case That May Supplant It

This year marks the twentieth anniversary of one of the Supreme Court's most seminal antitrust decisions, *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). While antitrust practitioners gather in

JAMES MORSCH

Chicago later this month at Loyola University's Institute for Consumer Antitrust Studies to discuss the impact and wisdom of *Matsushita*, the Supreme Court will be wrestling with a case that might well supplant *Matsushita* in procedural importance.

On June 26, 2006, the Supreme Court granted certiorari on the Second Circuit's decision in *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005). The issue presented in *Twombly* is whether a plaintiff is required to plead something more than consciously parallel conduct by defendants to make out a claim for a horizontal conspiracy to restrain competition under Section I of the Sherman Act. The Court's ultimate decision in the case may have as much to say about whether corporations are inundated with antitrust claims as the much ballyhooed decision in *Matsushita* twenty years ago.

In *Matsushita*, the Supreme Court addressed the quantum and type of evidence plaintiffs need to produce in order to survive summary judgment on a conspiracy claim under Section I of the Sherman Act. The Court held that where there is no direct, "smoking gun" evidence of a conspiracy, the plaintiff's theory of collusion must make economic sense and the plaintiff must point to evidence from which a reasonable fact finder could infer the existence of an illegal conspiracy. Conduct that is as consistent with competition as with collusion, according to the Court, would not suffice because such evidence does not tend to exclude the possibility that each of the alleged conspirators acted independently.

In the aftermath of *Matsushita*, courts held that evidence of parallel conduct by the defendants – even consciously parallel conduct – would not, in and of itself, allow a plaintiff to get to a jury on its conspiracy claims because parallel pricing is as consistent with vibrant competition as with collusion. The plaintiff accordingly would need to show the existence of additional circumstances, often referred to as "plus factors," from which the fact-finder could infer a conspiracy. Different courts recognized different plus factor evidence that would permit a plaintiff to survive summary judgment, from evidence of a common motive to conspire, to frequent communications between the defendants, to parallel conduct that was against the independent economic self-interest of the alleged conspirators.

Practically speaking, the "plus factor" analysis utilized by *Matsushita* and its progeny made it difficult for many plaintiffs to survive summary judgment in antitrust cases. In cases alleged price-fixing, plaintiffs often could point to parallel pricing among alleged conspirators but usually lacked direct evidence that the defendants had colluded on prices or other compelling circumstantial evidence of collusion. To the dismay of plaintiff's lawyers, consumer protection advocates and some of the elder statesmen of the antitrust bar, many antitrust cases were dismissed before trial that one previously would have expected to have gone to a jury. Others were settled on very favorable terms to defendants. The defense bar and corporations named in Section I cases were, not surprisingly, elated by this development and began to tout *Matsushita* as standing for the proposition that antitrust cases were governed by "special rules", namely rules favorable to defendants on summary judgment.

Slowly over the past ten years, courts have disabused

parties and antitrust practitioners of the notion that *Matsushita* set up some sort of special summary judgment rule for antitrust cases. While most courts continue to apply the “plus factor” analysis, increasingly the line between direct and indirect or circumstantial evidence of a conspiracy has been blurred by the courts. And while courts continue to press plaintiffs for explanations as to why their theories of collusion make economic sense, many courts now routinely deny motions for summary judgment if the plaintiff’s theory of conspiracy is plausible and a rational jury would be capable of inferring a conspiracy from the plaintiff’s admittedly ambiguous circumstantial evidence.

Many would say today that *Matsushita*’s influence on whether antitrust cases are filed or prosecuted through trial has waned. Others would say that, despite the fact *Matsushita* has been on the books for twenty years now, it is unclear today exactly what standards apply on summary judgment in Sherman Act, Section 1 claims. In *Twombly*, the Supreme Court has an opportunity to clarify the standards applicable to antitrust claims before they reach trial, or for that matter, even the discovery phase of the case.

The plaintiff in *Twombly* filed a class action complaint alleging a conspiracy between telecommunication providers to exclude competition in local telephone and high-speed Internet markets following passage of the Telecommunications Act of 1996. According to the complaint, the defendants reacted to passage of the Telecommunications Act, which was designed to promote competition in local markets, by agreeing not to compete against each other in certain markets and conspiring to exclude new competitors from entering their markets. The District Court dismissed the complaint at the initial pleading stage on the ground that the plaintiff had only alleged parallel conduct by the defendants and not any direct or plus factor type evidence of collusion. The Second Circuit Court of Appeals reversed, holding that the district court improperly applied *Matsushita*’s summary judgment rules to a motion to dismiss.

The Supreme Court could resolve the issues raised in *Twombly* in at least three different ways. The Court could affirm the Second Circuit’s holding that *Matsushita* applies only on summary judgment, in which case antitrust plaintiffs would continue to file claims unabated in light of the relatively lax notice pleading requirements of the Federal

Court. Alternatively, the Court could affirm the District Court’s ruling that plaintiffs must plead either direct evidence of a conspiracy or plus factor evidence of collusion between the defendants beyond simply parallel conduct in the marketplace such as pricing. In that event, it is likely that substantially fewer antitrust claims would be filed because very rarely do plaintiffs have possession of evidence of a conspiracy before taking discovery of defendants. For those claims plaintiffs did file, Defendants would no longer have to worry about summary judgment because they could move to dismiss on essentially the same grounds as *Matsushita* as soon as they were served with the complaint. A third possibility – and one that most intrigues most antitrust practitioners – is that the Supreme Court could use the *Twombly* case to revisit, explain or update its decision of twenty years ago in *Matsushita*. If that occurs, it is very possible that *Twombly* may supplant *Matsushita* as the most seminal antitrust case of our time dealing with how antitrust claims must be handled procedurally.

While it is too early to make a prediction as to what route the Court will take with *Twombly*, corporations with experience as antitrust defendants or, as increasingly is the case, as opt-out antitrust plaintiffs would be well advised to watch developments in the case carefully. Who knows? Twenty years from now we may be sitting down talking about the legacy of *Twombly*. Hopefully, if we do, it will be with a greater sense of clarity than we have on this 20th anniversary of the *Matsushita* decision.

James A. Morsch is a partner at Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. He concentrates his practice in counseling companies and litigating antitrust and other competition law matters and regularly advises clients on distribution issues. The views expressed in this article are personal to the author.



BUTLER RUBIN
excellence in litigation™