

MATSUSHITA AT THIRTY: HAS THE PENDULUM SWUNG TOO FAR
IN FAVOR OF SUMMARY JUDGMENT?

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INTRODUCTION

The Supreme Court’s ruling in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*¹ marked the end of judicial hostility to Rule 56 motions and effectively legitimized the use of summary judgment in antitrust cases.² The 5-4 decision dramatically altered the antitrust litigation landscape both procedurally and substantively. Procedurally, the decision underscored the trans-substantive nature of summary judgment, making clear that summary judgment is as appropriate in complex antitrust cases as in any other area of the law.³ *Matsushita* also made clear that the legal standards for summary judgment mirror the legal standards for directed verdict at trial.⁴ In addition, the decision instructs that to create a “genuine issue for trial” under Rule 56, the non-moving party must do more than create “metaphysical doubt.”⁵ That is, the non-movant must adduce sufficient evidence about which reasonable people could disagree; absent such a showing, “there is no ‘genuine issue for trial.’”⁶

Perhaps even more important were the Court’s rulings on substantive antitrust issues. *Matsushita* limits the range of inferences that can be drawn from ambiguous evidence of an antitrust conspiracy.⁷ Evidence that is as consistent with independent activity as with antitrust conspiracy fails as a matter of law to create a genuine issue for trial.⁸ If the factual context makes the claim implausible, the non-movant must come forward with especially persuasive evidence to avoid summary dismissal.⁹ The Court concluded that defendants had no rational motive to agree to sustain sales losses for over 20 years with no end in sight in order to drive Zenith from

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¹ 475 U.S. 574 (1986).

² Stephen J. Calkins, *Summary Judgment, Motions to Dismiss and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 Geo. L.J. 1065, 1119 (1986); William Kolasky, *Antitrust Litigation: What’s Changed in Twenty-Five Years*, 27 Antitrust 9, 11 (Fall 2012) (*Matsushita* “marked a watershed in the history of antitrust litigation”).

³ Calkins, *supra*, n. 2 at 1122-23, see Edward J. Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 S.M.U. L. Rev. 493, 509 (*Matsushita* “completely ignored its earlier *Poller* decision and thereby exorcized the homily that antitrust conspiracy claims were questionable candidates from summary judgment.”); see also *Manual for Complex Litigation*, §11.34 at 47 (4th ed. 2004) (summary judgment is “as appropriate in complex litigation as in routine litigation”).

⁴ *Matsushita*, 475 U.S. at 588.

⁵ *Id.* at 586.

⁶ *Id.* at 586-87.

⁷ *Id.* at 588.

⁸ *Id.*

⁹ *Id.* at 592-93.

the field.¹⁰ The enhanced factual showing necessary to defeat summary judgment where the claim is implausible suggests that the Court has strong reservations about the viability of predatory pricing claims under the antitrust laws.¹¹

Not surprisingly, *Matsushita* rekindled interest in summary judgment among lower courts and emboldened courts to grant summary judgment in antitrust cases where they had once hesitated to do so, thereby advancing dispositive rulings to a point earlier in the litigation time line.¹² *Matsushita* was also transformative in another significant respect: it encouraged courts to find mechanisms to advance antitrust dispositions to points even earlier in the lives of cases through pretrial evidentiary rulings, determinations on class certification, and decisions on motions to dismiss.¹³

As a result, fewer and fewer antitrust cases ever come to trial. These developments have given rise to criticism among judges, scholars, and lawyers who question both the (largely assumed) efficiencies of summary disposition as well as the fairness of the process in antitrust cases and whether that process comports with an overall goal of the Federal Rules of Civil Procedure¹⁴ that meritorious litigants have their day in court.¹⁵

This article will analyze the benefits and burdens of summary judgment in the post-*Matsushita* era and discuss how Rule 56 can be implemented consistent with the policies underlying the Federal Rules to ensure litigants receive both the perception of fairness and fairness in fact. *Matsushita* was clearly a step forward to the extent that it held that Rule 56 applies across the board to all substantive claims. But the case for especially aggressive use of summary disposition in antitrust cases is flawed. The argument for such an approach is that it: (1) reduces costs; (2) eliminates coerced settlements; and (3) minimizes the problem of false positives. The reality is much different. First, summary judgment, where granted, may indeed reduce costs by eliminating the trial. However, the cost of the motion itself plus the cost of discovery in support of the motion *adds* significantly to litigation expenses. Moreover, the cost of litigation alone tells us little; all litigation entails some cost. The appropriate metric is cost of litigation relative to the stakes involved. Therefore, cost reduction itself is not necessarily a virtue if it comes at too high a price to the truthseeking process.

Second, summary disposition may eliminate coerced settlements. However, defendants' ability to avoid all liability through a motion to dismiss or a motion for summary judgment drastically alters the dynamics of settlement and provides strong disincentives for defendants to conduct any settlement talks until those motions have been played out. Of course, defendants are aware that summary judgment motions are not risk-free. Settlement values increase where their

¹⁰ *Id.*

¹¹ See Edward J. Brunet, John T. Parry and Martin Redish, *Summary Judgment: Federal Law and Practice* § 9.6 (Thomson Reuters 2016).

¹² See Stephen J. Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 *Antitrust L.J.* 269, 298 (1993) (“*Matsushita* emboldened the courts to address the merits at an early stage.”).

¹³ See, *infra*, nn. 192-195 and accompanying text.

¹⁴ See Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 *Okla. City U.L. Rev.* 231 (2011); Patricia M. Wald, *Summary Judgment at Sixty*, 76 *Tex. L. Rev.* 1897 (1998); Morton Denlow, *Summary Judgment: Boon or Burden?*, 37 *The Judges' Journal* 26 (Summer 1998); John Bronsteen, *Against Summary Judgment*, 75 *Geo. Wash. Rev.* 522 (2007); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 *N.Y.U. L. Rev.* 982 (2003); Paul Mollica, *Federal Summary Judgment at High Tide*, 84 *Marq. L. Rev.* 141 (2001); Samuel Isaacharoff and George Lowenstein, *Second Thoughts About Summary Judgment*, 100 *Yale L.J.* 73 (1990).

¹⁵ Fed. R. Civ. P. 1.

dispositive pretrial motions are unsuccessful, but the chance to escape from a case unscathed may make them reluctant to broach settlement prior to seeking summary adjudication. Third, summary dispositions may minimize false positives; but they may also give rise to false negatives. Eliminating one problem by creating another is hardly sound policy. In short, the skeptics have a point: the pendulum may well have swung too far in favor of summary disposition in antitrust cases.

I. BACKGROUND

A. WHAT IS SUMMARY JUDGMENT?

The summary judgment procedure embodied in Rule 56 of the Federal Rules is a tool for the courts to filter out those cases where trial is unnecessary, i.e., to identify cases where there is no genuine issue of material fact so that one party is entitled to judgment as a matter of law without a trial.¹⁶ Summary judgment pierces the pleadings to ascertain whether there is evidentiary support for the parties' allegations sufficient to justify a trial.¹⁷ Unlike a motion to dismiss where only the complaint is properly before the court, the judge in ruling on a summary judgment motion may consider all the pleadings plus materials developed in the course of discovery, including depositions, interrogatory answers, admissions, physical and documentary evidence, and affidavits.¹⁸ Whereas the motion to dismiss focuses on the burden of pleading, the summary judgment motion turns on the burden of production.

Summary judgment is thus “put up or shut up” time for the parties.¹⁹ They must come forward with evidence supporting their claims and defenses or face adverse judgment. Rule 56 is party-neutral—either plaintiff or defendant may seek summary judgment.²⁰ Nevertheless, summary judgment is quintessentially a defendant's weapon.²¹ Plaintiffs generally do not seek summary judgment, especially in antitrust cases where summary adjudication in the plaintiff's favor rarely occurs.²² As a rule, plaintiffs simply want the opportunity to present their case to a jury and are not looking for summary adjudication. Defendants, on the other hand, use summary judgment to avoid trial altogether. Both plaintiffs and defendants also use summary judgment motions to posture for settlement.

B. SUMMARY JUDGMENT IN ANTITRUST CASES

¹⁶ *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) (summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial).

¹⁷ *See Matsushita*, 475 U.S. at 587; *Holmes Prods. Corp. v. Dana Lighting Inc.*, 958 F. Supp. 27, 31 (D. Mass. 1997) (“The role of summary judgment is ‘to pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial’”); *Chambers v. Walt Disney World Co.*, 132 F. Supp. 2d 1356, 1363 (M.D. Fla. 2001).

¹⁸ Fed. R. Civ. P. 56.

¹⁹ *See Wood*, *supra*, n. 14 at 249.

²⁰ Fed. R. Civ. P. 56

²¹ *See Denlow*, *supra*, n. 14 at 26 (“Although plaintiff has equal recourse to summary judgment under Rule 56, the motion has largely become a defendant's weapon.”).

²² This is not to say that plaintiffs never seek or win summary judgment. They do. *See Palmer v. BRG, Inc.*, 498 U.S. 46 (1990) (granting partial summary judgment for plaintiff in horizontal market division case); *Associated Press v. United States*, 326 U.S. 1 (1946) (upholding summary for the United States judgment in group boycott case).

The summary judgment procedure has been part of the Federal Rules from day one of their adoption in 1938. Nevertheless, courts in the early days of the Federal Rules were hesitant to grant summary judgment.²³ This reluctance may have been due in part to concern among some judges that summary disposition under Rule 56 would thwart the fundamental goal of the Federal Rules that litigants with meritorious claims should have their day in court.²⁴ Additionally, some courts were concerned that summary judgment was not an appropriate tool for disposing of complex cases, including antitrust cases.²⁵

The root of this concern can be traced to the Supreme Court's ruling in *Poller v. Columbia Broadcasting Sys., Inc.*²⁶ There, the Court stated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."²⁷ Precisely what the Court meant to convey by this language is unclear. Did the Court mean that antitrust cases are inherently complex, inevitably involve issues of motive and intent, and proof is ordinarily in the hands of the wrongdoers? Or, did the Court say something much narrower, i.e., that in those antitrust cases that are in fact complex and involve issues of motive and intent with proof in the hands of the conspirators, the courts must be cautious in granting summary judgment? The former construction would strongly discourage summary disposition in all antitrust cases. The latter, while suggesting caution, would give antitrust courts much more leeway to grant summary judgment.

Many trial courts adopted the former construction and routinely denied summary judgment in antitrust cases.²⁸ That approach was consistent with rulings outside the antitrust sphere that denied summary judgment where there was the "slightest doubt" as to whether a jury question existed.²⁹ This narrow view of summary judgment persisted in the lower courts, even though the Supreme Court unequivocally rejected it six years after the *Poller* ruling in *Cities Service*, where the Court upheld summary judgment dismissing plaintiff's group boycott claim.³⁰ Apart from the ambiguities in *Poller*, Rule 56 itself is not a model of clarity. Nowhere does the rule define "genuine issue" or "material fact"; nor does the rule itself assign the respective burdens on the parties in the summary judgment context.³¹

²³ See *Avrick v. Rockmountain Envelope Co.*, 155 F.2d 568, 571 (10th Cir. 1946) ("The power to lift the flimsy and transparent factual veil should be cautiously used lest abuse reap nullification"); *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940) (courts should avoid using summary judgment "as a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial"); see generally William W. Schwarzer, Alan Hirsch and David Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 448 (1991).

²⁴ *Whitaker*, 115 F.2d at 307.

²⁵ See II Phillip Areeda and Herbert Hovenkamp, *Antitrust Law* (hereafter "Areeda and Hovenkamp"), ¶ 308b at 150-52 (4th ed. 2014) (discussing obstacles to summary judgment in antitrust cases); 10A Charles Alan Wright, Arthur Miller and Mary Kay Kane, *Federal Practice and Procedure* (hereafter "Wright and Miller") § 2732.1 at 111 ("Antitrust and patent actions are by their very nature poorly suited for disposition by summary judgment.").

²⁶ 368 U.S. 464 (1962).

²⁷ *Id.* at 472.

²⁸ See, e.g., *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279-80 (2d Cir. 1967) (reversing summary judgment on the basis of *Poller*).

²⁹ See *Arnstein v. Porter*, 154 F. 2d 464, 468 (2d Cir. 1946) (denying summary judgment in a copyright infringement case where plaintiff adduced no evidence of defendant's access to allegedly copied material because the jury may choose to disbelieve defendant's testimony).

³⁰ See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 285 (1968).

³¹ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bog of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 20167, 2097 (1989).

Given the ambiguities in Rule 56 and the uncertainty about the reach of *Poller*, antitrust courts were understandably hesitant to dismiss cases at the summary judgment stage.³² As a result, defendants began to lose faith in the court system and the willingness of judges to weed out unworthy cases through summary judgment.³³ Concerns about judicial reluctance to use summary judgment were compounded by the increasingly high cost of antitrust litigation fueled by the skyrocketing costs of discovery.³⁴ Antitrust defendants felt like victims with no way out; rather than risk potentially enormous treble damage judgments, they chose to settle antitrust claims, irrespective of their merit.³⁵ The Advisory Committee on Federal Civil Rules, responding to these concerns, began a comprehensive review of Rule 56 in 1985.³⁶

During this same period, the Supreme Court decided a series of cases that significantly limited the rights of plaintiffs to recover in private treble damaged actions.³⁷ Concerns about false positives³⁸ and the cost effectiveness³⁹ of private treble damages claims became an integral part of the Court's analysis. In spring 1986, before the Advisory Committee completed its study of Rule 56, the Supreme Court decided *Matsushita*, which clarified and revitalized the role of summary judgment in federal civil litigation cases generally and in antitrust cases in particular. Thus, the *Matsushita* decision can be understood as the confluence of two trends—one in the development of substantive antitrust doctrine and one in the broader world of civil procedure.

II. MATSUSHITA—MODERN ERA OF SUMMARY JUDGMENT

A. THE DECISION

The *Matsushita* ruling in March 1986 ushered in the modern era of summary judgment jurisprudence in antitrust cases. The case provided the Supreme Court with perhaps an ideal vehicle to clarify the uncertainties that had arisen in the wake of *Poller* and its progeny. Whereas the *Poller* record involved significant disputed material facts, justifying denial of summary judgment,⁴⁰ plaintiff's evidence of wrongdoing in *Matsushita*—sales at low prices—was at best

³² See Brunet, et al., *supra* n. 11 at § 9.4 (noting the general reluctance of courts to dismiss antitrust claims on summary judgment motions post *Poller*); see also, Wood, *supra*, n. 14 at 239 (“before 1986, the federal courts overwhelmingly took the position that Rule 56 was to be used sparingly”); Areeda and Hovenkamp, *supra*, n. 25.

³³ See Schwarzer et al., *supra*, n. 23 at 450 (“Perceived judicial hostility to summary judgment motions and the onerous burdens of proof imposed on a moving party discouraged the use of summary judgment, even in cases in which it might have been appropriate”); see also Carrington, *supra*, n. 31 at 2097 (“Rule 56 has been enfeebled by courts reluctant to take responsibility for assessing the genuineness of contentions”).

³⁴ See Schwarzer et al., *supra*, n. 23 at 450 (“As Rule 56 approached its fiftieth anniversary...some courts and commentators thought the time ripe for recognizing the potential of summary judgment to deal with increasingly crowded dockets and rising litigation cost”); see also Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986).

³⁵ See Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, *The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9-12 (1971).

³⁶ See Carrington, *supra*, n. 31 at 1092.

³⁷ See, e.g. Continental T.V., Inc. v. GTE Sylvania Inc. 433 U.S. 36 (1977) (non-price vertical restraints are not subject to per se condemnation); Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) (antitrust injury doctrine); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (direct purchaser rule); see also Spray-Rite Serv. Corp. v. Monsanto Co. 465 U.S. 752 (1984) (complaints about a rival's discounting followed by termination of discounter are insufficient as a matter of law to create a jury issue on conspiracy).

³⁸ *Sylvania*, 433 U.S. at 54-56 (noting procompetitive benefits of vertically imposed territorial restraints).

³⁹ *Illinois Brick*, 431 U.S. at 730-31 (noting high cost of tracing overcharges through the chain of distribution).

⁴⁰ See Brunet, et al., *supra*, n. 11 at § 9:5.

ambiguous and failed to establish any rational motive for defendants to conspire to incur losses indefinitely.⁴¹ In granting summary judgment, the Court articulated a legal standard that required review of a massive record and an assessment of factual inferences before allowing a case to proceed to trial—an exercise totally at odds with the *Poller* holding. Although *Matsushita* made no mention of *Poller*, there can be little doubt that the Court was dispatching *Poller* to the scrap heap.⁴²

First, the court found the plaintiff's predatory pricing claim was suspect both as a matter of economic theory and as a matter of fact.⁴³ Zenith alleged that defendants, Japanese electronics manufacturers, had conspired for over two decades to sell at a loss and drive Zenith from the field.⁴⁴ That claim was at odds with the wealth of economics literature arguing that such a business strategy would make no economic sense.⁴⁵ For-profit companies are in business to make, not lose, money. To succeed, Zenith would have to convince the fact finder that the defendants had agreed to incur red ink for over 20 years, with no end in sight, to drive Zenith from the field.⁴⁶ Furthermore, Zenith would have to prove that defendants, in pursuing this course, consciously assumed the risk that once Zenith was eliminated as a competitive threat, another American company might rise up to take its place and start the cycle of below-cost pricing anew. Zenith would also have to explain how the defendants could maintain order in the conspiratorial ranks while suffering losses year after year.⁴⁷

Second, Zenith's proof of conspiracy was weak. Direct evidence of conspiracy was sparse. Zenith argued that conspiracy could be inferred from the low prices charged by defendants.⁴⁸ Charging low prices, however, would also be consistent with the exact opposite inference—that defendants were engaged in aggressive price competition to win consumer sales and thus behaving precisely how the antitrust laws prescribe.⁴⁹

Third, Zenith offered no proof as to how or when defendants would recoup their losses incurred through below cost sales. In short, the conspiracy that Zenith alleged "seemed so unlikely to pay off for the defendants that the Court doubted their motive to enter that conspiracy."⁵⁰ In upholding summary judgment, the Supreme Court concluded that Zenith had failed to come forward with sufficient facts to justify a trial on its claims.⁵¹ At heart, *Matsushita* is a ruling on substantive antitrust law.⁵² The decision has important implications for (1) the viability of predatory pricing claims and (2) proof of conspiracy. The question of the appropriate

⁴¹ *Matsushita*, 475 U.S. at 592-93.

⁴² See *Apex Oil*, 641 F.Supp. at 1256.

⁴³ *Matsushita*, 475 U.S. at 588-89 (noting that "[a] predatory pricing scheme is by nature speculative" and that "there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful").

⁴⁴ *Id.* at 577-78.

⁴⁵ *Id.* at 588-89.

⁴⁶ *Id.* at 590.

⁴⁷ *Id.* at 590-92.

⁴⁸ *Id.* at 594.

⁴⁹ *Id.* ("cutting prices in order to increase business often is very essence of competition").

⁵⁰ See Areeda & Hovenkamp, *supra*, n. 25 ¶ 308g at 174.

⁵¹ *Matsushita*, 475 U.S. at 596-97.

⁵² See William W. Schwarzer and Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 *Hastings L.J.* 1, 6-7 (1993) ("*Matsushita*...rather than making a statement about implausible inferences in summary judgment motions generally, rests on a specific point of antitrust law: Plaintiffs cannot prevail if their case requires inferring a price-fixing conspiracy from normal business activity (specifically price cutting) that, standing alone, is consistent with lawful competition.") (citations omitted).

substantive standard for predatory pricing is analytically distinct from the standard for evaluating the legal sufficiency of a claim of conspiracy. Zenith alleged a conspiracy to *reduce* prices; but, as the Court observed, “cutting prices in order to increase business after is the very essence of competition.”⁵³ To condemn price cutting creates a significant risk of the false positives “by discouraging legitimate price competition.”⁵⁴ Accordingly, courts must be suspicious of all predatory pricing claims.⁵⁵ That defendants’ conduct in *Matsushita* resulted in lower prices was undisputed, and the benefit of lower prices to consumers is obvious.⁵⁶

Matsushita also addresses the issue of sufficiency of proof of conspiracy at the summary judgment phase. As to predatory pricing, the Court observed that defendants had no rational motive to conspire and therefore that Zenith’s predatory pricing conspiracy claim must be viewed with skepticism.⁵⁷ The Court stated unequivocally that notwithstanding the general rule that on summary judgment all evidence “must be viewed in a light most favorable” to the opposing party, “antitrust law limits the range of inferences that can be drawn from ambiguous evidence,”⁵⁸ lest sellers’ incentives to engage in procompetitive conduct be chilled. The Court also reiterated its earlier holding in *Monsanto* that “conduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of antitrust conspiracy.”⁵⁹ The fact that prices were declining suggests that the defendants were engaged in robust competition, making Zenith’s claim of conspiracy simply not reasonable.⁶⁰

In addition, the Court’s reliance on *Monsanto* underscores a key procedural aspect of the *Matsushita* opinion: the Court equated the standards to survive a motion for summary judgment with the standards for defeating a motion for directed verdict.⁶¹ More importantly, to withstand a motion for summary judgment, the plaintiff must do more than simply create “metaphysical doubt,” it must come forward with facts showing a genuine issue for trial.⁶² In a *Matsushita*-like case, where the factual context renders the plaintiff’s claim implausible, it is incumbent on the plaintiff to adduce more persuasive evidence of conspiracy than would otherwise be necessary.⁶³ The plaintiff must come forward with evidence “that tends to exclude the possibility” that defendants acted independently.⁶⁴ In other words, plaintiff 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 [plaintiffs].”⁶⁵

Whether the “tends to exclude” language in *Matsushita* applies only where there is reason to question the plausibility of a conspiracy allegation or has broader application is a question that has divided the lower courts.⁶⁶ That language is borrowed from *Monsanto*,⁶⁷ where the plaintiff’s

⁵³ *Matsushita*, 475 U.S. at 594.

⁵⁴ *Id.* (“mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws were designed to protect”).

⁵⁵ *Id.* at 594-95.

⁵⁶ *Id.* at 594.

⁵⁷ *Id.* at 588-92.

⁵⁸ *Id.* at 587-88.

⁵⁹ *Id.* at 588.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 586-87.

⁶³ *Id.* at 587.

⁶⁴ *Id.* at 588.

⁶⁵ *Id.*

⁶⁶ For cases holding that *Kodak* limits *Matsushita* “tends to exclude” language, see *Superior Products Partnership v. Gordon Auto Body Parts Co.*, 784 F. 3d 311, 319 (6th Cir. 2015); In re Publication Paper Antitrust Litigation, 690

claim of conspiracy was not implausible and where the Court, in fact, found a conspiracy.⁶⁸ However, the Court in *Kodak*⁶⁹, decided six years after *Matsushita*, made clear that *Matsushita*'s "tends to exclude" language should not be read broadly to apply to every antitrust case in which a plaintiff opposes summary judgment.⁷⁰ In *Kodak*, the Court reasoned that *Matsushita* did not impose special burdens on plaintiffs challenging summary judgment.

The Courts requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.⁷¹

Thus, the *Matsushita* holding is inextricably intertwined with the facts therein, namely, (1) lack of any plausible motive for defendants to collude; and (2) evidence of defendants' aggressive price competition during the period of the alleged conspiracy.⁷² By setting a high bar for *Zenith* to defeat summary judgment, *Matsushita* assured that procompetitive conduct would not be chilled.

In marked contrast to the implausible claims of conspiracy in *Matsushita*, plaintiffs in *Kodak* adduced evidence of "increased prices and excluded competition," which would necessitate a trial in absence of a showing by *Kodak* "that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable."⁷³ In so ruling, *Kodak* never referenced *Matsushita*'s "tends to exclude" language, thereby suggesting that language was not relevant to its analyses.

Because the procedural issues are intertwined with questions of substantive antitrust law, courts must be cautious in relying on *Matsushita* in cases outside the antitrust realm and in certain antitrust cases as well. For example, were courts under *Matsushita* to impose on the non-moving party the burden of producing sufficient proof that its claim is "plausible", courts may be tempted to engage in issue determination at the summary judgment stage, which not only goes

F. 3d 51, 62-63 (2d Cir. 2012); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651, 661 (7th Cir. 2002); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F. 2d 1224, 1232 (3d Cir. 1993); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F. 2d. 432, 439 (9th Cir. 1990); *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*, 817 F. 2d 639, 646 (10th Cir. 1987). For cases holding that *Kodak* does not limit *Matsushita*'s "tends to exclude" language, *see Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 832 F. 3d 1, 7-8 (1st Cir. 2016); *Williamson Oil Co. v. Philip Morris USA, Inc.*, 346 F. 3d 1287, 1302-03 (11th Cir, 2003); *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F. 3d 1028, 1032 (8th Cir. 2000); *Merck-Medco Managed Care, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 459 (D. Md. 1998), *aff'd*, *without opinion*, 201 F.3d 436 (4th Cir. 1999).

⁶⁷ *Monsanto*, 465 U.S. at 764.

⁶⁸ *Id.* at 765-68.

⁶⁹ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1993).

⁷⁰ *Id.* at 468-69

⁷¹ *Id.*

⁷² See *Petruzzi's* 998 F. 2d at 1232 ([T]wo important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiff's theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances 'would have the effect of deterring significant procompetitive conduct' (citations omitted).

⁷³ *Kodak*, 504 U.S. at 469.

beyond the traditional strictures of summary judgment jurisprudence, but also threatens the parties' Seventh Amendment right to trial by jury.⁷⁴ Even in antitrust cases, *Matsushita* is not a license to grant summary judgment willy-nilly, as the Supreme Court in *Kodak* subsequently ruled.⁷⁵ *Matsushita* teaches that summary judgment motions must be viewed in their factual context. Where a claim “makes no economic sense,” such as the predatory pricing claim in *Matsushita*, trial courts should be skeptical and require plaintiffs to come forward with “more” evidence.⁷⁶ However, as more fully discussed below,⁷⁷ that skepticism is not warranted in a run-of-the-mill minimum price-fixing case; and courts should be free to draw broader factual inferences from ambiguous evidence in such cases.

B. THE COMPANION CASES: *ANDERSON* AND *CELOTEX*

Shortly after it announced its *Matsushita* decision in March 1986, the Supreme Court ruled on two additional summary judgment cases, *Anderson v. Liberty Lobby, Inc.*⁷⁸ and *Celotex Corp. v. Catrett*.⁷⁹ In *Anderson*, a defamation case, the Court stated explicitly what had been implicit in *Matsushita*—that *Poller* was no longer good law and that Rule 56 applies trans-substantively, that is, to all cases litigated in federal courts:

Poller should not be understood to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice.⁸⁰

Elaborating further on Rule 56, the Court in *Anderson* re-affirmed that the standards for summary judgment mirror the standards for directed verdict.⁸¹ Specifically, plaintiff must adduce the same quantum of evidence to defeat a summary judgment motion that it would have to adduce to prevail on a motion for directed verdict.⁸² If a plaintiff at the summary judgment stage cannot adduce evidence sufficient to defeat a motion for a directed verdict, then a trial serves no purpose. In this respect, summary judgment eliminates costly and unnecessary trials, including antitrust trials.

Similarly, in *Celotex*, an asbestos case, the Supreme Court emphasized that a “principal purpose of the summary judgment role is to isolate and dispose of factually unsupported claims

⁷⁴ See Brunet, et al., *supra*, n. 11, § 9.6 at 420; see Richard A. Posner, *The Federal Courts: Challenge and Reform* 179, n. 37 (1996).

⁷⁵ *Kodak*, 504 U.S. at 468.

⁷⁶ *Matsushita*, 475 U.S. at 589.

⁷⁷ See, *infra*, nn. 136-138 and accompanying text.

⁷⁸ 477 U.S. 242 (1986).

⁷⁹ 477 U.S. 317 (1986).

⁸⁰ *Anderson*, 477 U.S. at 256.

⁸¹ *Id.* at 250-51.

⁸² *Id.*

or defenses.”⁸³ The Court in *Celotex* also emphasized that summary judgment is not a trap for the unwary but instead is consistent with the overall scheme of the Federal Rules:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.”⁸⁴

This was the Court’s most explicit entreaty to resuscitate summary judgment as a managerial tool. The Court further emphasized that in deciding summary judgment motions, the trial courts must consider the rights of defendants as well as the rights of plaintiffs:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.⁸⁵

The Court thus demonstrated sensitivity to concerns that neither defendants nor courts should be obliged to spend time and money on cases that lack substance.

C. SUMMARY JUDGMENT POST-*MATSUSHITA*

Given that the Court in *Matsushita* and its companion cases was analyzing the same Rule 56 that it had analyzed in *Poller* two decades earlier, it is clear that the Court’s renewed emphasis on the virtues of summary judgment is far more important than any technical changes in Rule 56 construction.⁸⁶ Commentators have described *Matsushita* as a “celebration”⁸⁷ or a “ceremonial crowning”⁸⁸ of summary judgment. Judge Patricia Wald has observed that the message of the trilogy to the lower courts was to “go forth and grant summary judgment,”⁸⁹ a message that the trial courts have taken “very seriously.”⁹⁰ Judge Wald has further noted that the trilogy has incentivized trial judges to find ways to dispose of dubious cases without trial.⁹¹

Some courts, in what can be described only as post-*Matsushita* euphoria, have suggested that summary judgment is the preferred vehicle for resolving antitrust cases.⁹² The Supreme

⁸³ *Celotex*, 477 U.S. at 323-24; *Apex Oil Co. v. DiMauro*, 641 F. Supp. 1246, 1257 (S.D.N.Y. 1986) (*Celotex* “reaffirmed the principle that the summary judgment procedure should be used to dispose of cases that should not be tried”), *aff’d*, 822 F. 2d 246 (2d Cir. 1987).

⁸⁴ *Celotex*, 477 U.S. at 327.

⁸⁵ *Id.*

⁸⁶ Brunet et al., *supra*, n. 11 § 6.4 at 206 (“It is interesting to note how largely irrelevant the text of Rule 56... was to the analysis in [the Trilogy].”).

⁸⁷ See Calkins, *supra*, n. 12 at 1114-15.

⁸⁸ Mollica, *supra* n. 14 at 164.

⁸⁹ Wald, *supra*, n. 14 at 1926; see Wright and Miller, *supra*, n. 25 § 2727 at 468-69 (“it is important to note that, taken together, these three cases signal lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials, and the lower courts have responded accordingly”).

⁹⁰ *Id.*, see Knight v. U.S. Fire Ins. Co., 804 F. 2d 9, 12 (2d Cir. 1986) (it is “inaccurate” to say that the Second Circuit is unsympathetic to summary judgment motions).

⁹¹ Wald, *supra*, n. 14 at 1926.

⁹² See, e.g., *PepsiCo., Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002) (in antitrust cases, “summary judgment is particularly favored because of the concern that protracted litigation will chill procompetitive market

Court, however, has never gone that far and in 1992 took steps to rein in such rogue views of summary judgment in *Eastman Kodak Co. v. Image Technical Services, Inc. (Kodak)*.⁹³ Plaintiffs in *Kodak* were independent service organizations (ISOs) that provided maintenance services for high-tech Kodak copiers in competition with Kodak itself.⁹⁴ Kodak had initially permitted its customers to choose their own maintenance providers, and many customers opted for ISOs because their services were cheaper and better than those provided by Kodak.⁹⁵

Subsequently Kodak announced a new policy whereby customers were advised that if they wanted to purchase Kodak spare parts for their machines, they would have to agree to buy Kodak's maintenance services.⁹⁶ Customers had little choice but to accede to this demand, since their machines could not operate without spare parts. Almost overnight, the ISOs went out of business and sued Kodak, alleging monopolization and unlawful tying.⁹⁷

After some targeted pretrial discovery, Kodak moved for summary judgment.⁹⁸ Relying on *Matsushita*, Kodak argued that because it had only 20 percent of the copier market, plaintiffs could not prove that Kodak had sufficient market power to commit the violations charged. The trial court agreed and granted summary judgment, but the Ninth Circuit reversed.⁹⁹

The Supreme Court, affirming the court of appeals, rejected Kodak's argument and its reading of *Matsushita*.¹⁰⁰ Kodak had maintained that given its lack of power in the primary market for copiers, any claim of market power in the secondary market for service and parts "simply makes no economic sense."¹⁰¹ The Court ruled that to sustain its summary judgment motion, Kodak would bear the "substantial burden" of showing that despite an evidence of increased prices and excluded competition, the inference of market power is unreasonable.¹⁰² The Court then methodically disassembled Kodak's factual assumptions and concluded that Kodak's theoretical model did not jibe with the factual record, and that Kodak had failed to adduce evidence linking its lack of power in the equipment market to its claimed lack of market power in the markets for maintenance and replacement parts.¹⁰³ As discussed above,¹⁰⁴ the court in so ruling made clear that Kodak was wrong in arguing that *Matsushita* placed special burdens on plaintiffs opposing summary judgment.

Kodak marks the last time that the Supreme Court directly addressed the issue of summary judgment standards in antitrust cases. Some commentators have suggested that *Kodak* offered "a subtle shift in the philosophy underlying *Matsushita*,"¹⁰⁵ perhaps raising a caution flag

forces"); *accord*, *American Banana Co. v. J. Bonafide Co.*, 407 Fed. Appx. 520 (2d Cir. 2010); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003).

⁹³ 504 U.S. 451 (1992).

⁹⁴ *Id.* at 457-58.

⁹⁵ *Id.* at 457.

⁹⁶ *Id.* at 458.

⁹⁷ *Id.*

⁹⁸ *Id.* at 456.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 467-71.

¹⁰¹ *Id.* at 467.

¹⁰² *Id.* 468-69.

¹⁰³ *Id.*

¹⁰⁴ *See, supra*, n. 71 and accompanying text. Significantly, the Court, although cautioning against an expansive reading of *Matsushita*, also makes clear that its ruling applies to all antitrust cases and is not limited to those involving only conspiracy issues.

¹⁰⁵ Brunet, et al., *supra*, n. 11 § 9:7 at 434.

regarding the use of summary judgment in antitrust cases.¹⁰⁶ Others view *Kodak* as merely a clarification of, and not a retreat from, *Matsushita*.¹⁰⁷ In any event, summary judgment has flourished in the wake of those decisions.¹⁰⁸ Trial courts have granted summary judgment in a variety of antitrust contexts, beyond those raised by the facts of *Matsushita*.¹⁰⁹

This post-*Matsushita* expansion of summary judgment use in antitrust cases is not in itself bad. Certain antitrust issues do lend themselves to summary treatment. Judge Schwarzer has maintained that “[a]ntitrust cases present the paradigm for use in complex litigation,”¹¹⁰ and that “[d]espite their often complex and fact bound nature, many antitrust cases can be resolved by summary judgment.”¹¹¹ Antitrust issues that are “pivotal or dispositive and do not turn on disputed evidentiary facts are well-suited to summary adjudication.”¹¹² Thus, courts have granted summary judgment on a variety of antitrust issues,¹¹³ including standing,¹¹⁴ antitrust injury,¹¹⁵ the statute of limitations,¹¹⁶ and defendant’s exempt status.¹¹⁷ Since the underlying facts regarding the application of these legal principles are rarely disputed and the governing legal principles are generally clear, there is no need for a trial.¹¹⁸ In summary judgment jargon, the law content of these issues is fairly high, and the fact content is relatively low, thus making their resolution by a judge on pretrial motion appropriate. Equally important, because these threshold issues are outcome determinative, the need for consistency is critical; and that consistency can best be achieved by using the judge rather than the jury as decisionmaker.

More troublesome, however, is summary treatment of other antitrust issues, including the existence of a conspiracy,¹¹⁹ market definition,¹²⁰ and market power.¹²¹ Unlike standing and antitrust injury, these issues are heavily fact-bound and likely to vary from case to case. These are precisely the kinds of issues that traditionally have been resolved only after a full trial on the merits. Yet, in the wake of *Matsushita*, trial judges have routinely scoured massive factual records in search of implausible antitrust claims that create no genuine issue(s) of material fact. This exercise is fraught with peril.

¹⁰⁶ See Calkins *supra*, n. 12 at 298 (“*Kodak* cautions against excessive enthusiasm”); Mollica, *supra*, n. 14 at 142 (*Kodak* “reeled in almost as much as *Matsushita* paid out”).

¹⁰⁷ Brunet, et al., *supra*, n. 11 § 9:7 at 433.

¹⁰⁸ Professors Areeda and Hovenkamp have argued that “[s]ummary judgment is particularly important in antitrust cases because of the fearful dimensions that such cases can assume and because of the powerful incentives to offer claims and defenses of little merit.” See Areeda & Hovenkamp, *supra*, n. 25 ¶ 308, at 148; Arthur Miller, *Simplified Pleading, Meaningful Days in Court and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 311 (2013) (“The summary judgment motion has taken on an Armageddon-like significance; it has become both the centerpiece and end point for many (perhaps too many) cases.”).

¹⁰⁹ See, *infra* nn. 110-122.

¹¹⁰ See William W. Schwarzer, *Summary Judgment and Case Management*, 56 Antitrust L.J. 213, 222 (1987).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 222-25.

¹¹⁴ Sullivan v. Tagliabue, 828 F.Supp. 114, 120 (D. Mass. 1993), *aff’d*, 25 F.3d 43 (1st Cir. 1994).

¹¹⁵ Doctor’s Hospital of Jefferson, Inc. v. SE Med. Alliance, Inc., 123 F.3d 301, 303 (5th Cir. 1997).

¹¹⁶ Berkson v. Del Monte Corp., 743 F.2d 53 (1st Cir. 1984).

¹¹⁷ California Aviation Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986).

¹¹⁸ Schwarzer, *supra*, n. 110 at 221-22.

¹¹⁹ See Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028 (8th Cir. 2000).

¹²⁰ See, e.g., U.S. Horticultural Supply v. Scott Co., 36 Fed. Appx. 305, 311 (3d Cir. 2010).

¹²¹ See, e.g., Foam Supplies, Inc. v. Dow Chemical Co., 2007 WL 4210354 at *4-8 (E.D. Mo. Nov. 27, 2007).

First, when is a claim “implausible”? *Matsushita* says that an implausible claim is one that “makes no economic sense.”¹²² Making that determination requires a detailed analysis of the facts. The Court concluded that Zenith’s claim that defendants had conspired to drive a rival from the field by selling at a loss for over 20 years, with no end in sight, and no plan to recover losses, made no economic sense.¹²³ In so holding, the Court was aware that the resulting low prices were as consistent with aggressive competition as with conspiracy,¹²⁴ and that predatory pricing schemes are rarely tried and even more rarely successful.¹²⁵ Condemning defendants’ conduct could very well chill legitimate procompetitive behavior. As discussed,¹²⁶ “antitrust law limits the range of permissible inferences” that can be drawn from ambiguous evidence.¹²⁷ Accordingly, the Court ruled that Zenith would have to come forward with “more persuasive” evidence to warrant a trial; it would have to come forward with evidence tending to exclude the possibility of independent action.¹²⁸ However, that does not mean that on summary judgment, evidence of conspiracy can be disregarded merely because it is ambiguous. *Matsushita* “further holds that the range of inferences that may be drawn from [ambiguous] evidence depends on the plausibility of the plaintiff’s theory.”¹²⁹ Where plaintiff’s theory is implausible, “it takes strong direct or circumstantial evidence to satisfy *Matsushita*’s ‘tends to exclude’ standard.”¹³⁰ On the other hand, “broader inferences are permitted, and the ‘tends to exclude’ standard is more easily satisfied, when the conspiracy is economically sensible to undertake and ‘the challenged activities could not reasonably be perceived as procompetitive’.”¹³¹

The notion that on summary judgment ambiguous evidence must be evaluated on a sliding scale is further supported by the unique circumstances of the *Monsanto* case from which the “tends to exclude” standard was derived.¹³² There, the Court ruled that a dealer’s complaints to its seller about a rival’s discounting practices followed by the discounting rival’s termination are insufficient as a matter of law to create a jury question on the issue of conspiracy.¹³³ In so ruling, the Court was focused on a seller’s right independently to select its customers and set terms of sale.¹³⁴ In other situations, for example, where rival dealers get together and jointly demand imposition of resale price maintenance, the “tends to exclude” standard is hard to justify. *Monsanto* thus bolsters the argument that specialized standards should not be used loosely outside of their original contexts. As discussed above,¹³⁵ *Matsushita*, in raising the bar for

¹²² *Matsushita*, 475 U.S. at 587.

¹²³ *Id.* at 588-93.

¹²⁴ *Id.* at 594.

¹²⁵ *Id.* at 588-89.

¹²⁶ *See, supra*, nn. 7-9 and accompanying text.

¹²⁷ *Matsushita*, 475 U.S. at 588.

¹²⁸ *Id.*

¹²⁹ *See In re Publication Paper Antitrust Litigation*, 690 F. 3d 51, 63 (2d Cir. 2012), *citing Matsushita*, 475 U.S. at 588.

¹³⁰ *Id.* (internal citations omitted).

¹³¹ *Id.* (internal citations omitted); *see In re Titanium Dioxide Antitrust Litigation*, 659 F. Supp. 2d 799, 821 (D. Md. 2013) (“when a plausible conspiracy has been alleged a plaintiff need not ‘disprove all nonconspiratorial explanation for the defendants’ conduct’ to prevail at summary judgment”) (citations omitted).

¹³² *Monsanto*, 465 U.S. at 764.

¹³³ *Id.*

¹³⁴ *Id.* (“to permit the inference of concerted action on the basis of receiving complaints alone and thus expose the defendant to treble damage liability would both inhibit management’s exercise of its independent business judgment and emasculate the terms of the statute”) (citations omitted).

¹³⁵ *See, supra*, n. 72

plaintiffs opposing summary judgment, was driven by two concerns: the plausibility of plaintiff's claim and whether permitting plaintiff's claim to go forward would chill procompetitive behavior. Together, these two factors create a sliding scale for courts to determine whether a case should move forward to trial or be dismissed on summary judgment.

For example, garden variety price fixing, which entails overcharges on each transaction, is a far cry from predatory pricing, which involves sales below cost.¹³⁶ It is hard to see how imposition of overcharges would be procompetitive, and, unlike predatory pricing, the remedy is not court-ordered increases in prices. Garden variety price fixing is, as a general proposition, a more plausible business strategy than predatory pricing. The more plausible the conduct, the broader the range of inferences that can be drawn from ambiguous evidence.¹³⁷ As Judge Posner ruled:

More evidence is required the less plausible the charge of collusive conduct. In *Matsushita*, for example, the charge was that the defendants had conspired to lower prices below cost in order to drive out competitors, and then to raise prices to monopoly levels. This was implausible for a variety of reasons, such as that it would mean that losses would be incurred in the near term in exchange for the speculative possibility of more than making them up in the uncertain and perhaps more remote future-when, moreover, the competitors might come right back into the market as soon as (or shortly after) prices rose above cost, thus thwarting the conspirators' effort at recouping their losses with a commensurate profit. But the charge in this case involves no implausibility. The charge is of a garden-variety price-fixing conspiracy orchestrated by a firm, ADM, conceded to have fixed prices on related products (lysine and citric acid) during a period overlapping the period of the alleged conspiracy to fix the prices of HFCS.¹³⁸

Unfortunately, some courts have read *Matsushita* to require plaintiffs in all horizontal conspiracy cases to come forward with evidence that excludes the possibility of independent action.¹³⁹ That is not a fair and sensible reading of *Matsushita*. To require a plaintiff to exclude the possibility of independent action imposes too heavy a burden.¹⁴⁰ *Matsushita* requires "only that the non-moving party's inferences be reasonable in order to reach that jury."¹⁴¹ Thus, where the evidence is ambiguous, "the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference."¹⁴² As the Second Circuit has observed:

It is important not to be misled by *Matsushita*'s statement... that the plaintiff's evidence, if it is to prevail, must "tend... to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all non-conspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear

¹³⁶ See *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651, 661 (7th Cir. 2002).

¹³⁷ *Areeda and Hovenkamp*, *supra*, n. 25 ¶ 308c at 161.

¹³⁸ *Fructose*, 295 F. 3d at 661 (Citations omitted).

¹³⁹ See, e.g., *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F. 3d 1028 (8th Cir. 2000); see, *supra*, n.66.

¹⁴⁰ *Publication Paper*, 690 F.3d at 63.

¹⁴¹ *Eastman Kodak Co.v. Image Technical Servs., Inc.*, 504 U.S. 451, 468 (1992).

¹⁴² *Publication Paper*, 690 F.3d at 63.

that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.¹⁴³

Second, and equally important, once a court has thoroughly examined the record, it faces a strong temptation to weigh the evidence.¹⁴⁴ The court's function on summary judgment, however, is issue spotting, not issue determination;¹⁴⁵ weighing evidence is a cardinal sin, or what Judge Posner has described as a summary judgment "trap."¹⁴⁶ It is one thing for a court to examine a detailed record on summary judgment and conclude that plaintiff in opposition has adduced no evidence on an issue, such as market definition, upon which it bears the burden of proof at trial. In such cases, summary judgment is warranted under *Celotex*. It is quite another thing for a court faced with disputed issues of material fact to decide those issues and grant summary judgment. In that case, the summary judgment motion must be denied. Still, *Matsushita's* "plausibility" language, which is relative and subject to varying conclusions about reasonable inferences, makes the temptation to weigh evidence an especially serious threat.

Instances where courts on summary judgment have ignored record facts or disregarded them after weighing them against facts adduced by the movant abound, but the following two examples serve to illustrate the problem. First, in *Blomkest Fertilizer, Inc. v. Potash Corp., Inc.*,¹⁴⁷ plaintiffs brought a class action suit alleging that the producers of potash, an essential ingredient in fertilizers, conspired to fix prices. Plaintiffs had no direct evidence of conspiracy but did introduce abundant circumstantial evidence of price fixing. Among other things, plaintiffs offered proof that (1) the potash industry was an oligopoly, (2) following a lengthy price war, the price of potash rose dramatically, and (3) stabilized at those higher levels.¹⁴⁸ In addition to parallel pricing, plaintiffs adduced significant "plus factors" suggesting conspiracy, including: (1) that the oligopolistic market for potash was conducive to collusion due to barriers to entry, inelastic demand, and a standardized product; (2) documentary evidence of a joint action plan proposed by one defendant; (3) solicitations by various defendants to enter into a price-fixing agreement; (4) communication among defendants about each other's pricing practices, including complaints about discounting practices; (5) publication of price lists and exchanges among high level executives seeking verification of pricing on specified transactions; (6) documentary evidence of a joint program to punish discounters for "cheating" on the cartel; (7) advanced knowledge of rivals price moves; and (8) absence of any procompetitive justification for defendants' conduct.¹⁴⁹

Nevertheless, the Eighth Circuit, sitting en banc, rejected the above evidence as probative of conspiracy for three reasons. First, the majority maintained that price verification evidence went only to past transactions, not future transactions and hence was not evidence of a price-

¹⁴³ *Id.*, citing Phillip Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law*, §14.03(b) at 14-25 (4th ed. 2011) (footnotes omitted).

¹⁴⁴ See Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. Pa. L. Rev. 261, 315 (2010) ("the *Matsushita* decision invites federal judges to weigh the evidence"). Professor Leslie further argues that *Matsushita* encourages judges to consider the likelihood of plaintiff's claims and then "essentially instructs judges to utilize their own conceptions of business rationality as a lens through which to view the evidence that supports a plaintiff's case." *Id.* at 316.

¹⁴⁵ See, e.g., *Anderson*, 477 U.S. at 249 (on summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"); *Scanlon v. Travelers Ins. Co.*, 849 F.Supp. 836, 839 (N.D.N.Y. 1994).

¹⁴⁶ *Fructose*, 295 F. 3d at 655.

¹⁴⁷ 203 F.3d 1028 (8th Cir. 2000).

¹⁴⁸ *Id.* at 1031-32.

¹⁴⁹ *Id.* at 1044-47 (Gibson, J. dissenting).

fixing agreement.¹⁵⁰ That misconceived the thrust of plaintiffs’ argument and failed to grasp the economic significance of the evidence. As the dissent argued, verification evidence was not introduced as direct evidence of an isolated conspiratorial sale but rather as circumstantial evidence of a broader price-fixing scheme in which verification was used to identify any cheating by cartel participants.¹⁵¹

Second, the majority argued that communications among defendants had no effect on price levels because prices eventually declined.¹⁵² That does not necessarily mean that there was no agreement; it could very well mean that prices would have only fallen farther but for the defendants’ agreement. More fundamentally, the court erred by confusing the existence of the conspiracy with the efficacy of the conspiracy.

Third, the majority dismissed the communications on price as sporadic.¹⁵³ That argument goes only to the quantity of proof, not its quality. Nor is it surprising that communications among defendants were sporadic, given that the evidence shows that defendants tended to communicate only where one of them was suspected of cheating on the cartel.¹⁵⁴

The dissent precisely identified two errors in the majority’s analysis:

In sum, the class has adduced evidence of a market structure ripe for collusion, a sudden change from price war to supra-competitive pricing, price-fixing overtures from one competitor to another, voluntary disclosure of secret price concessions, an explicitly discussed cheater punishment program, and advance knowledge of other producers’ price moves. Taken together, this list of “plus factors” adds up to evidence that satisfies the *Monsanto* standard [for creating a jury issue].¹⁵⁵

Blomkest is a classic example of improper issue weighing at the summary judgment stage. As Areeda and Hovenkamp point out, the complaints, apologies, and express solicitations among defendants in *Blomkest* were “all highly suspicious”¹⁵⁶ and “should have been sufficient to create a fact issue of conspiracy.”¹⁵⁷ Areeda and Hovenkamp further argue that the majority in *Blomkest* erred in concluding that because the market at issue was concentrated and firms could observe each other’s pricing behavior and act accordingly, no agreement was necessary; and therefore summary judgment was appropriate.¹⁵⁸ That result is perverse; it means the more conducive the market structure is to collusion, the more difficult it is for plaintiffs to prove conspiracy.¹⁵⁹

Blomkest also illustrates that summary judgment outcomes turn on how broadly *Matsushita* is read. The majority read it as far more demanding than the dissent, and hence was unwilling to draw inferences that the dissent viewed as reasonable. Clearly, reasonable people can differ on what constitutes “plausibility” and that fact alone counsels caution in granting summary judgment.

¹⁵⁰ *Id.* at 1033-37.

¹⁵¹ *Id.* 1047 (Gibson, J. dissenting).

¹⁵² *Id.* 1033-34.

¹⁵³ *Id.* at 1034.

¹⁵⁴ *Id.* at 1049-51 (Gibson, J. dissenting).

¹⁵⁵ *Id.* at 1051 (Gibson, J. dissenting).

¹⁵⁶ VI Areeda & Hovenkamp, *supra*, n. 25 ¶ 1417 at 121.

¹⁵⁷ *Id.* ¶ 1419 at 137.

¹⁵⁸ *Id.* ¶ 1432 b2 at 242.

¹⁵⁹ XII Areeda & Hovenkamp, *supra*, n.25 ¶ 2002a at 13-14 and n.2.

The Third Circuit committed similar transgressions in *In re Baby Food Antitrust Litigation*.¹⁶⁰ There, plaintiffs, purchasers of baby food, sued for price fixing manufacturers Gerber, Heinz, and Beech-Nut, who together controlled nearly 100 percent of baby food sales.¹⁶¹ Responding to defendants' motion for summary judgment, plaintiffs adduced substantial direct and circumstantial evidence of price fixing. Testimonial and documentary evidence showed periodic reciprocal exchanges of price information and future price moves among rivals by Heinz sales personnel.¹⁶² This information was regularly passed up the chain of command to Heinz management.¹⁶³ Beech-Nut similarly required its sales representatives to gather and report on pricing data from rivals.¹⁶⁴ Plaintiffs' supporting evidence also shows that defendants often had in their files confidential information on future pricing moves by rival sellers.¹⁶⁵ In addition, plaintiffs relied on an internal Heinz memorandum indicating that any efforts to expand the number of distributors was likely to be thwarted by the "truce" in effect among rival sellers.¹⁶⁶

Notwithstanding abundant evidence suggesting conspiracy, the Third Circuit upheld the grant of summary judgment against plaintiffs. Viewing defendants' acts in isolation, the court proceeded to dismantle plaintiffs' evidence piece by piece, marginalizing claims of wrongdoing and offering harmless explanations of defendants' conduct. In so doing, the court erred; it is well-settled that on a motion for summary judgment the evidence of conspiracy must be viewed as a whole and not in isolation.¹⁶⁷ More fundamentally, the Third Circuit in *Baby Food*, like the Eighth Circuit in *Blomkest*, erred by weighing contested evidence and making factual determinations at the summary judgment stage that are properly the province of the fact finder at trial. Particularly troublesome were the court's dismissiveness of evidence of defendants' routine exchange of price information as "shop talk"¹⁶⁸ and its willingness to elide over the fact that such information filtered up to the highest echelons of defendants' management.¹⁶⁹

Third, courts have finessed the Rule 56 ban on issue determination in more subtle ways. For example, definition of relevant market, a key element of most antitrust claims, is a quintessential issue of fact.¹⁷⁰ Indeed "there is no subject matter in antitrust law more confusing than market definition."¹⁷¹ Yet, plaintiffs are often unable to "deflect the swing of the summary judgment scythe."¹⁷² Courts can effectively engage in issue weighing, simply by excluding, ignoring, or marginalizing factual evidence. Courts have granted summary judgment to defendants on the issue of market definition on a number of grounds, including that plaintiff's evidence is "conclusory,"¹⁷³ "vague,"¹⁷⁴ "cumulative,"¹⁷⁵ "narrow,"¹⁷⁶ not "probative or

¹⁶⁰ 166 F.3d 112 (3d Cir. 1999).

¹⁶¹ *Id.* at 116-17.

¹⁶² *Id.* at 118-19.

¹⁶³ *Id.* at 119.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 119-20.

¹⁶⁶ *Id.* at 127-28.

¹⁶⁷ *Fructose*, 295 F. 3d at 655-56 ("The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it is more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices").

¹⁶⁸ *See, Baby Food*, 166 F.3d at 125.

¹⁶⁹ *Id.* at 118-121.

¹⁷⁰ *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048, 1075 (D. Colo. 2004).

¹⁷¹ *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F. 3d 1124, 1130 (10th Cir. 2002).

¹⁷² *Mulvihill v. Top Flite Golf Co.*, 335 F.3d 15, 19 (1st Cir. 2003).

¹⁷³ *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1369 (Fed Cir. 2002).

credible,”¹⁷⁷ “implausible,”¹⁷⁸ and “an awkward attempt to conform their theory to the facts they allege.”¹⁷⁹ Courts have also summarily dismissed claims where plaintiffs adduced no expert testimony on market share¹⁸⁰ or where that testimony had been stricken.¹⁸¹ Similarly, the Third Circuit upheld a grant of summary judgment on the issue of conspiracy, notwithstanding plaintiff’s proof of (1) a contemporaneous conspiracy among Canadian chocolate sellers, (2) defendants’ possession of information of rivals’ future price moves, (3) improper communications and opportunities for improper communications among rivals, and (4) defendants’ pretextual explanation for price increases.¹⁸² The court of appeals dismissed this proof, ruling that “[e]vidence of a disconnected foreign conspiracy, limited possession of advance pricing information, mere opportunities to conspire without suspect meetings or conversations about pricing, conduct that is consistent with pre-conspiracy conduct, and a weak showing of pretext do not support a reasonable inference of conspiracy.”¹⁸³ Ironically, although courts now require pleading facts in more detail to avoid a motion to dismiss, they seem reluctant to find genuine issues of material facts warranting a trial at the summary judgment stage.¹⁸⁴

This is not to suggest that all courts have fallen off-base in ruling on summary judgment motions post-*Matsushita*. Judge Posner’s decision in *In re High Fructose Corn Syrup Antitrust Litigation*, discussed above,¹⁸⁵ provides a valuable roadmap for deciding summary judgment motions in antitrust cases. First, judges must understand their proper role in ruling at the summary judgment stage: (1) their job is issue spotting, not issue weighing;¹⁸⁶ (2) evidence must be viewed as a whole and not in isolation;¹⁸⁷ and (3) they must distinguish between the existence of a conspiracy and its efficacy.¹⁸⁸

Second, circumstantial evidence of conspiracy, including ambiguous evidence “[is] not to be disregarded because of [its] ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for trial.”¹⁸⁹ Third, where the conspiratorial conduct is plausible, *Matsushita* permits a greater range of inferences to be drawn from ambiguous evidence.¹⁹⁰

D. MATSUSHITA’S IMPACT BEYOND SUMMARY JUDGMENT

¹⁷⁴ *Flovac, Inc. v. Airvac, Inc.*, 84 F. Supp. 2d 95, 103 (D.P.R. 2005), *aff’d*, 817 F. 3d 849 (1st Cir. 2016).

¹⁷⁵ *Id.* at 104.

¹⁷⁶ *Levine v. Cent. Florida Med. Affiliates*, 72 F. 3d 1538, 1551-53 (11th Cir. 1996) (“Plaintiff’s narrow definition of the relevant product market does not satisfy his burden of presenting prima facie evidence of the relevant market”).

¹⁷⁷ *Disenos Artisticos E Industriales, S.A. v. Work*, 714 F. Supp. 46, 48-49 (E.D.N.Y. 1989).

¹⁷⁸ *Belfiore v. New York Times Co.*, 826 F. 2d 177, 180 (2d Cir. 1987).

¹⁷⁹ *Id.*

¹⁸⁰ *Flovac*, 84 F. Supp. 2d at 102-03 (lack of economic evidence); *All-Star Casts & Vehicles, Inc. v. BFI Canada Income Fund*, 887 F. Supp. 2d 448, 458-59 (E.D.N.Y. 2002) (reliance on lay witnesses for market definition insufficient).

¹⁸¹ *AFMS LLC v. United Parcel Service Co.*, 105 F. Supp. 1051, 1076-77 (C.D. Cal. 2015).

¹⁸² *In re Chocolate Confectionary Antitrust Litigation*, 801 F.3d 383, 402-11 (3d Cir. 2015).

¹⁸³ *Id.* at 412.

¹⁸⁴ *See Wald, supra*, n. 14 at 1942.

¹⁸⁵ *See, supra*, nn. 136-138 and accompanying text.

¹⁸⁶ *Fructose*, 295 F.3d at 655.

¹⁸⁷ *Id.* at 655-56.

¹⁸⁸ *Id.* at 656.

¹⁸⁹ *Id.* at 662.

¹⁹⁰ *Id.* at 661.

The foregoing discussion illustrates that *Matsushita* has led to increased use of summary judgment in antitrust cases. *Matsushita*, however, has had a much broader impact. It has encouraged trial courts not only to resolve antitrust issues at the summary judgment stage, but also to find other procedures to decide antitrust cases earlier and earlier in the litigation timeline through motions to dismiss,¹⁹¹ rulings on expert testimony,¹⁹² and class certification decisions.¹⁹³ The two principal drivers of this trend are concerns about the high cost of litigation and lack of confidence in juries (and judges) to reach reasoned results after full trials on the merits.¹⁹⁴ This translates into concerns about false positives and greater incidence of coerced settlements. It may well be that these procedures make litigation more cost-efficient and eliminate cases that are not trial-worthy. Nevertheless, their increased use raises serious questions as to whether courts are now ignoring the incidence and consequences of false negatives—by summarily dismissing meritorious cases before trial—and failing to consider the cost of litigation in relation to the potential scope of harms caused by antitrust violations. In other words, are courts now invoking a type of one-sided decision theory?

In addition, this trend toward pretrial disposition of cases can short-circuit the right to trial by jury and may undermine the fundamental goal of the Federal Rules of Civil Procedure that meritorious litigants have their day in court. This trend also raises issues of basic fairness for litigants by forcing the plaintiff to jump through multiple hoops to get to trial. Essentially, the plaintiff has to win its case four times to even get its day before a jury by defeating (1) the motion to dismiss, (2) the summary judgment motion, (3) *Daubert* challenges, and (4) opposition to class certification.¹⁹⁵

Daubert challenges may be brought separately but may also accompany summary judgment motions or motions involving class certification. The unfairness arises from the fact that plaintiff must succeed at every juncture to win the litigation, but the defendant is victorious if it wins at any one point. Imagine a playoff system in any sport that would require one side to win multiple games (and not lose any) but require the other side to only win one game to secure a championship. The playing field in that case would hardly be level.

1. *Motions to Dismiss: Twombly and its Progeny*

Just as *Matsushita* reshaped the litigation landscape regarding summary judgment, *Twombly* was a game changer with respect to motions to dismiss. *Twombly* was a class action suit on behalf of nearly 90 percent of subscribers to local phone services or high-speed internet services against the four providers of local telephone services (referred to by the Court as incumbent local exchange carriers or ILECs), alleging that the ILECs had conspired to thwart entry into local services and had agreed not to compete with each other for local services in violation of Section 1 of the Sherman Act.¹⁹⁶ The 1984 Consent Decree that settled the Justice Department’s monopolization suit against AT&T, established seven (now four as a result of

¹⁹¹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁹² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¹⁹³ *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013).

¹⁹⁴ See *Twombly*, 550 U.S. at 558 (deficiencies in claims should “be exposed at the point of minimum expenditure of time and money by the parties and the court”); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) (applying the Sherman Act is a “daunting task”).

¹⁹⁵ See Edward D. Cavanagh, *Making Sense of Twombly*, 63 S. Car. L. Rev. 97, 119 (2011).

¹⁹⁶ *Twombly*, 550 U.S. at 550-51.

subsequent mergers) local exchange carriers.¹⁹⁷ These ILECs were regulated monopolies in local service and were not permitted to offer long distance services.¹⁹⁸ That changed in 1996 with the enactment of the Telecommunications Act of 1996 in which Congress decreed that local phone service would be subject to competition.¹⁹⁹ The Act required that ILECs cooperate with new entrants into local phone markets by providing interconnect services.²⁰⁰

The complaint contained no allegations of agreement among the defendants; rather, it alleged only parallel conduct from which the plaintiffs argued that a conspiracy could be inferred. The trial court dismissed the complaint, agreeing with the defendants that a complaint that alleges only parallel conduct cannot as a matter of law make out a conspiracy in violation of Section 1 of the Sherman Act.²⁰¹ The Second Circuit reversed, holding that the Federal Rules of Civil Procedure do not authorize an enhanced pleading requirement.²⁰²

The Supreme Court reversed and held that the trial court had properly dismissed the complaint, although its reasoning was different from that of the district court judge.²⁰³ The Court held that to meet the requirements of Rule 8(a)(2) and to withstand a motion to dismiss, a complaint alleging a conspiracy that violates the Sherman Act must contain “enough factual matter (taken as true) to suggest that an agreement was made.”²⁰⁴ This means not that plaintiffs must show a probability of conspiracy at the pleading stage but rather “it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²⁰⁵ Allegations of parallel conduct are merely consistent with conspiracy and do not by themselves suffice to plausibly suggest agreement and thus fail to meet the threshold requirement of Rule 8(a)(2) that the “plain statement ‘possess enough heft’ to sho[w] that the pleader is entitled to relief.”²⁰⁶

In upholding dismissal, the Supreme Court pointed to the “potentially enormous expense of discovery”²⁰⁷ in antitrust cases and the burden on the courts and defendants when “a largely groundless claim” is permitted to “take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”²⁰⁸ The Court then stated that where a complaint “could not raise a claim of entitlement to relief” then “this basic deficiency should... be exposed at the point of minimum expenditure of time and money by the parties and the court.”²⁰⁹

Cabining litigation costs was at the heart of the *Twombly* rationale, but cost management is not the only impact of summary dismissal. Granting a motion to dismiss, like granting a motion for summary judgment, both ends the litigation and assures that a jury will never decide the case. This outcome has not been lost on federal judges. In recent years, there has been

¹⁹⁷ *Id.* at 549.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 552.

²⁰² *Id.* at 553.

²⁰³ *Id.*

²⁰⁴ *Id.* at 556.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 557.

²⁰⁷ *Id.* at 559.

²⁰⁸ *Id.* at 546.

²⁰⁹ *Id.* at 558.

significant criticism of the use of juries in antitrust cases.²¹⁰ Federal courts have largely refrained from direct criticism of juries but have done so indirectly by questioning whether generalist trial judges are capable of reaching good outcomes in complex antitrust cases.

Trinko provides an apt illustration of such doubts about the abilities of federal judges.²¹¹ *Trinko* was a monopolization case against Verizon that arose on essentially the same facts as *Twombly*.²¹² Plaintiff, following the enactment of the Telecommunications Act of 1996, contracted with AT&T to provide local phone service.²¹³ Verizon, however, dragged its feet in providing the legislatively-mandated interconnect services; and AT&T was consequently unable to provide local telephone services to the plaintiff, who then sued, alleging monopolistic exclusion by Verizon.²¹⁴ Reversing the Second Circuit, the Supreme Court dismissed the complaint and ruled that Verizon, a lawful monopolist, had not engaged in any illicit conduct that would render it an unlawful monopolizer.²¹⁵ In so ruling, the Court observed that it is a “daunting task for a generalist antitrust court” to analyze duties to deal in the ever-changing field of high tech telecommunications.²¹⁶ These concerns about the difficulties in assessing duties are closely tied to the Court’s fear that trial courts will err and wrongly condemn conduct that is, in fact, procompetitive, thereby creating false positives and ultimately hindering instead of promoting competition.²¹⁷ Of course, if judges are likely to make mistakes in deciding antitrust cases, so, too, are juries.

The summary judgment and motion to dismiss procedures share many common attributes. Both have always been part of the Federal Rules of Civil Procedure. Both provide gateways to the next phase of litigation—motion to dismiss to discovery and summary judgment to trial. Both were viewed initially with some suspicion by trial courts. However, *Matsushita* made clear that summary judgment was as appropriate in antitrust cases as in any other case in the federal docket when Rule 56 standards have been met, antitrust cases should be summarily dismissed. Once courts got comfortable in granting judgment in antitrust cases on a truncated record, *Twombly* and the closer scrutiny of antitrust complaints at the outset of a case became almost inevitable. *Matsushita* provided the template for *Twombly*, and, without *Matsushita*, there probably would be no *Twombly*.

Another shared attribute of summary judgment motions and motions to dismiss is the “plausibility” standard that each embraces. As discussed above,²¹⁸ that term is relative and subject to varying interpretations. Since it relates to both facts and inferences from facts, a serious danger exists that courts may view it in both settings as an invitation to invade the province of the fact finder.

2. *Daubert: Rulings on Expert Evidence*

²¹⁰ See, e.g., Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 63 (2005); Daniel Crane, *Antitrust Antifederalism*, 96 Cal. L. Rev. 1 (2008); Donald F. Turner, *The Durability, Relevance and Future of American Antitrust Policy*, 75 Cal. L. Rev. 1, 35 (2008).

²¹¹ *Verizon Communications Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²¹² *Id.* at 402-05.

²¹³ *Id.* at 404-05.

²¹⁴ *Id.*

²¹⁵ *Id.* at 410-11.

²¹⁶ *Id.* at 414.

²¹⁷ *Id.*

²¹⁸ See, *supra*, n. 122 and accompanying text.

Another example of how the federal courts have moved the decision-making process to an earlier point on the litigation timeline post-*Matsushita* is the Supreme Court’s 1993 decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*²¹⁹ In *Daubert*, the Court substantially revised the legal standards for the admission of expert scientific and technical evidence in federal courts, holding that decisions on the admissibility of expert evidence are governed by Rule 702 of the Federal Rules of Evidence²²⁰ and not under common law standard set forth in *Frye v. United States*.²²¹ Under *Frye*, only expert evidence that was “generally accepted” as reliable in the scientific community would be admissible.²²² *Daubert* introduced a multifactor test to replace the *Frye* standard. Among other things, district courts in making admissibility rulings on expert evidence were to consider (1) whether the theory or technique has been, or can be, tested, (2) whether the theory or technique has been subject to peer review, (3) the known or potential error rate, and (4) whether the theory or technique has general acceptance in the scientific community.²²³

Daubert both facilitated and limited the admissibility of expert evidence. By eliminating *Frye*’s all or nothing “generally accepted” test, *Daubert* made it easier to get into the trial record cutting edge data that while arguably reliable, lacked a significant track record and could not be said to have gained general acceptance among scientists.²²⁴ DNA evidence is a classic example of such evidence. On the other hand, *Daubert* made admissibility of expert evidence more difficult by making district courts gatekeepers, assigned the task of screening out of the trial record “junk science” and assuring that the proof that does reach the jury was both relevant and reliable.²²⁵ The *Daubert* standard was later extended to all expert evidence, including economic evidence offered by experts.²²⁶ Subsequently, the *Daubert* approach was embodied in the Federal Rules of Evidence.²²⁷

Not surprisingly, *Daubert* has given rise to battles of the experts in antitrust litigation.²²⁸ Since *Daubert*, issues are typically raised via motions *in limine*; decisions on admissibility expert economic experts are made well in advance of trial. Unlike motions for summary judgment or motions to dismiss, free-standing *Daubert* motions are not dispositive in nature. Yet, a decision on whether expert economic testimony should be admitted or excluded can clearly be outcome determinative in antitrust cases.²²⁹

²¹⁹ 509 U.S. 579 (1993).

²²⁰ *Id.* at 588.

²²¹ 293 F. 1013 (U.S. App. D.C. 1923).

²²² *Id.* at 1014.

²²³ *Daubert*, 509 U.S. at 592-95.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

²²⁷ See Fed R. Evid. 702.

²²⁸ See Kolasky, *supra*, n. 2 at 12 (“Because expert economic testimony is critical to most antitrust disputes, the admissibility of that testimony under *Daubert* has become a key battleground in many trials.”).

²²⁹ See *AFMS LLC v. United Parcel Service Co.*, 105 F. Supp. 3d 1061, 1076-77 (C.D. Cal. 2015) (After striking testimony of plaintiff’s expert on definition of relevant market, granting defendant’s summary judgment motion because “[w]ithout any expert testimony to opine on the scope of the relevant market, it is difficult to see how plaintiff could meet its evidentiary burden”); see also *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev. Inc.*, 371 Fed. Appx. 719, 721 (9th Cir. 2010) (finding insufficient evidence to uphold a jury verdict on market definitions after expert evidence stricken); *In re Live Concert Antitrust Litigation*, 863 F. Supp. 2d 966, 1000 (C.D. Cal. 2012) (without expert evidence, plaintiff has failed to define a proper product market).

Daubert motions are frequently made in tandem with summary judgment motions. Expert evidence is often needed at the summary judgment stage in order to meet the burden of production. Expert evidence is especially important in today's antitrust cases, given that the courts are demanding more and more economic data from the parties to support their claims and defenses. Accordingly, parties are at risk if they attempt to litigate antitrust cases without the benefit of expert economists. But, even where experts are retained, they still must pass scrutiny under *Daubert*. Their vulnerability can lead to an adverse summary judgment ruling. A ruling that excludes evidence offered by an economic expert may halt an antitrust suit dead in its tracks, or it may lead a defendant to seek a settlement rather than run the risk of a trial. In either case, a full-blown trial is avoided.

3. Class Certification Rulings

Class certification rulings are similar to rulings on *Daubert* motions in important respects. Neither is by its nature dispositive, but both may have profound impact on outcomes in antitrust cases. The class action is a powerful tool in the toolbox of private antitrust plaintiffs that promotes both compensation of victims and deterrence of wrongdoing. The class action remedy permits prosecution of cases that may not be cost-efficient to pursue on an individual basis. Antitrust violations, especially price fixing, may give rise to nominal damages to individual victims but enormous damages to consumers in the aggregate. The availability of the class action not only makes such cases cost-efficient to pursue but also assures that antitrust defendants will not retain their ill-gotten gains.²³⁰ In price-fixing cases involving consumer goods, damages will invariably be diffused. Absent an effective class action mechanism, there can be no meaningful deterrence in such cases.

Critics of the class action argue that it is a powerful sword that can be used to coerce settlement even in cases that are weak on the merits.²³¹ The class action is indeed a powerful tool, but it can be implemented only after a court determines that the standards of Rule 23²³² have been met.

A claim may not go forward as a class action until a court certifies that the case meets the requirements of Rule 23 of the Federal Rules of Civil Procedure.²³³ Accordingly, “[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact etc.”²³⁴ The threshold question of certification must be addressed “at an early practicable time” in the action, in other words early on in the litigation but not too early.²³⁵ Although certification motions do not address the merits of the litigation, they do, in some respects, function like summary judgment motions. Denial of class certification in a price-fixing action where damages for individual defendants are nominal is likely to strike the death knell to the litigation because it makes no economic sense for a victim to proceed on an individual

²³⁰ See Lawrence Sullivan and Warren Grimes, *The Law of Antitrust: An Integrated Handbook*, §17.6 (2d ed. 2006) (“Class actions became a significant force because they allowed aggregation of individual claims, too small to warrant individuals plaintiff bringing an action.”).

²³¹ See Handler, *supra*, n. 35 at 9-12.

²³² Fed. R. Civ. P. 23.

²³³ Fed. R. Civ. P. 23 (c).

²³⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011).

²³⁵ Fed. R. Civ. P. 23 (c).

basis.²³⁶ Granting class certification also has significant consequences, especially for defendants, who know that at the very least they will be spending large amounts of money on discovery and may therefore choose to settle the case rather than defend it further.²³⁷

A class may be certified only where “the trial court is satisfied, *after rigorous analysis*, that the prerequisites” of Rule 23 have been met.²³⁸ Plaintiffs’ assertions that they intend to adduce facts satisfying Rule 23 standards are insufficient;²³⁹ rather, plaintiffs must come forward with proof of demonstrating compliance with Rule 23, and the certification order must include factual findings by the court supporting its decision to grant or to deny class certification.²⁴⁰ The process of “rigorous analysis” may require courts to address the merits of plaintiffs’ underlying claim at the class certification stage.²⁴¹ That this process will involve “some overlap with the merits of plaintiffs’ underlying claims... cannot be helped.”²⁴² The process may also require trial courts to confront and resolve a “battle of the experts,” since “[w]eighing conflicting expert testimony at the certification stage is not only permissible, it may be integral to the rigorous analysis that Rule 23 demands.”²⁴³

The Supreme Court has also warned that “Rule 23 grants no license to engage in free-ranging merits inquiries at the certification stage.”²⁴⁴ Still, the more detailed inquiries now undertaken by trial courts under the aegis of Rule 23 have led to frequent denials of class certification, effectively dooming the underlying antitrust actions.

Matsushita encouraged courts to grant summary judgment in antitrust cases, but it also inspired judges to use other procedural mechanisms to dispose of cases before trial—directly through motions to dismiss and indirectly through *Daubert* hearings and class certification proceedings. Each of these procedures shares common roots with *Matsushita*. The same concerns that drove *Matsushita*—false positives and containments of litigation costs in antitrust cash—underlie these procedures. All these procedures reflect common concerns about the cost of private treble damages actions and their efficacy.

III. ASSESSMENT

A. BENEFITS

Although not without controversy, *Matsushita*, together with its companion cases *Anderson* and *Celotex*, has benefitted the federal civil justice system generally and antitrust litigation in particular. First, these cases revived Rule 56 from its dormancy and restored summary judgment to its proper role in the Federal Rule’s procedural scheme—to provide a

²³⁶ Blair v. Equifax Check Services, Inc., 181 F.3d 832, 833 (7th Cir. 1999) (For some cases, the denial of class status “sounds the death knell of the litigation.”).

²³⁷ *Id.* at 834 (“just as denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success is slight.”).

²³⁸ *Wal-Mart*, 131 S.Ct. at 2551.

²³⁹ *Id.* (“A party seeking class certification must affirmatively demonstrate his compliance with the rules—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact etc.”).

²⁴⁰ Fed. R. Civ. P. 23 (c).

²⁴¹ Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1433 (2013).

²⁴² *Id.*

²⁴³ *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 323 (3d Cir. 2008).

²⁴⁴ *See*, *Amgen v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1194-95 (2013).

mechanism for disposal of cases not worthy of trial. Second, they helped judges overcome any psychological barriers to summary judgment by making clear that summary judgment, far from being a trap for the unwary, is an integral part of the Federal Rules and consistent with their goal “to secure the just, speedy and inexpensive determination of every action and proceeding.”²⁴⁵

Third, they disavowed the *Poller* notion that summary judgment should be used sparingly in antitrust cases and made clear that summary judgment is just as appropriate in antitrust cases as it is in any other area of substantive law. Fourth using summary judgment as a management tool, a court can significantly narrow and perhaps simplify the issues before it, even if the case as a whole is not dismissed.²⁴⁶ Fifth, even if the summary judgment motion is ultimately unsuccessful, it has the ancillary benefit of focusing the parties and the court on the legal issues and marshalling the facts, all of which may facilitate settlement or the presentation of evidence at trial.²⁴⁷

B. DOWNSIDE OF *MATSUSHITA*

Despite the foregoing benefits, the revolution wrought by *Matsushita* and its progeny has a dark side and has its critics. Indeed, these cases have generated a significant backlash among judges and scholars who are concerned that courts under the authority of *Matsushita* have undertaken extreme analytical gymnastics to dismiss cases that deserve a full trial.²⁴⁸

1. *Has Matsushita Gone Too Far?*

When all the underbrush is cleared away, the *Matsushita* holding is really quite narrow and inextricably intertwined with antitrust doctrine. The Court, although suspicious of predatory pricing claims, never said these claims by their very nature were not deserving of trial. The essential question in *Matsushita* was whether the jury could infer a decades-long predatory pricing conspiracy from the circumstantial evidence of agreement in the record.²⁴⁹ Subsequently, in *Kodak*, the court stressed that *Matsushita* requires only that plaintiff’s inferences be reasonable to get to a jury.²⁵⁰ *Matsushita* was largely silent on the procedural virtues of summary judgment in terms of managing dockets and controlling costs. Interestingly, it was the companion *Celotex* case where the Court stated that a purpose of Rule 56 was to weed out cases that did not deserve to be tried.²⁵¹

Nevertheless, as discussed above,²⁵² the lower courts in the wake of *Matsushita* have applied *Matsushita*’s implausibility rubric broadly to issues far beyond conspiracy, including monopolization, market definition, and market power. This expansion of *Matsushita* into Section 2²⁵³ issues is questionable. The issues that arise in determining monopolization, market definition, and market power are distinct from those at play in *Matsushita*. The central issue in

²⁴⁵ Fed. R. Civ. P. 1.

²⁴⁶ Schwarzer, *supra*, n. 110 at 213.

²⁴⁷ *Id.*

²⁴⁸ *See* Wald, *supra*, n. 14. (“A reassessment of Rule 56 and its erratic history may be in order, lest it develop too casually into a stealth weapon for clearing calendars.”)

²⁴⁹ *Matsushita*, 475 U.S. at 596-97.

²⁵⁰ *Kodak*, 504 U.S. at 510.

²⁵¹ *Celotex*, 477 U.S. at 323-24.

²⁵² *See, supra*, nn. 119-121 and accompanying text.

²⁵³ 15 U.S.C. § 2.

Matsushita was the issue of conspiracy to fix prices.²⁵⁴ Courts have long held that parallel pricing, even consciously parallel pricing, is not unlawful; proof of agreement is the sine qua non of a Section 1 violation.²⁵⁵ This past history of protecting parallel behavior and requiring proof of agreement underlay the reluctance of the Court in *Matsushita* to allow the case to proceed to trial. That past history is lacking where the issues involve monopolization, market definition, and market power. Put another way, the factors that led the Court in *Matsushita* to rule as it did are narrow and unique to conspiracy cases. This is not to suggest that summary judgment standards should be different outside of the pricing context. Monopolization cases raise a plethora of factual issues that, at first blush, make summary disposition inappropriate. The danger here is that courts in fact-bound monopolization cases will fall into the summary judgment trap and go beyond their proper role as issue spotters and engage in issue determination at the summary judgment stage to dismiss before trial cases that they view as doubtful. Equally important, the very existence of the summary judgment procedure may stack the deck against an antitrust plaintiff.²⁵⁶ Faced with a Rule 56 motion, a court is well aware that granting the motion means that the case goes away, but denying the motion may well mean a lengthy and costly trial, the threat of which may lead to a coerced settlement. The parties may reach an accord following the denial of a summary judgment, but there is no guarantee that a settlement will be reached and a trial obviated.²⁵⁷ Given those options, a court has an incentive to grant the motion simply to avoid the risk of a costly trial.²⁵⁸ As a result, antitrust plaintiffs are at inherent disadvantage at the summary judgment stage.²⁵⁹

2. Cost of Summary Judgment

Proponents of expanded use of summary judgment in antitrust cases stress the cost savings achieved by avoiding trial.²⁶⁰ Unquestionably, where summary judgment is granted and the need for trial eliminated, litigation costs would be reduced.²⁶¹ Already overburdened judges would then be able to tend to other matters on their docket. But, these purported cost savings may be illusory. Discovery costs, already substantial in antitrust cases, are pushed even higher as the parties position themselves for summary judgment.²⁶² Indeed, the inevitable Rule 56 motion in antitrust cases—not the trial itself—is a principal driving force for ever-increasing discovery costs.²⁶³ Ready access to pretrial discovery may create perverse incentives for movants to engage in abusive tactics.²⁶⁴ As Judge Posner has noted: “a litigant could impose heavy costs on an

²⁵⁴ *Matsushita*, 475 U.S. at 585-86.

²⁵⁵ *Twombly*, 550 U.S. at 553-54.

²⁵⁶ See Bronsteen, *supra*, n. 14 at 542.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* (“So every time a Judge adjudicates a summary judgment motion, there is a thumb on the scale in favor of the defendant.”).

²⁶⁰ Edward Brunet, *The Efficiency of Summary Judgment*, 43 Loy. Chi. L.J. 689, 690 (2012); see Gary T.

Foremaster, *The Movant’s Burden in a Motion for Summary Judgment*, 1987 Utah L. Rev. 731, 734 (“Summary judgment, therefore, alleviates the waste of time, the expense, and the burden of needless trials”).

²⁶¹ See Bronsteen, *supra*, n. 14 at 524.

²⁶² See Wood, *supra*, n. 14 at 240. (Litigants “redouble their investment in discovery to avert untimely demise of their cases”).

²⁶³ *Id.* at 240, 246 (noting that nearly half the lawyers surveyed viewed the primary use of discovery as preparing for summary judgment, not trial).

²⁶⁴ See Isaacharoff and Lowenstein, *supra*, n. 14 at 119.

opponent at very little cost to himself, by demanding information in an amount and form very costly for the other party to supply.”²⁶⁵ This is not to suggest that discovery conducted with an eye toward summary judgment is necessarily abusive. A summary judgment motion raises the stakes in the litigation, and attorneys do not want to see their clients on the losing end of such a motion because they failed to pursue a given avenue of discovery.²⁶⁶

Apart from discovery costs, summary judgment motions take time for the parties to prepare and for the courts to decide.²⁶⁷ Some courts by local rule require a party seeking summary judgment to file a statement listing all material facts that it contends are undisputed; the non-movant must then respond and also provide additional material facts that it claims are disputed.²⁶⁸ This point/counterpoint exercise can be tedious and expensive.²⁶⁹

As a result, the summary judgment process “can stall and complicate a case.”²⁷⁰ In addition, summary judgment motions may impede settlement by delaying settlement discussions between the parties and by making settlement more expensive.²⁷¹ Because summary disposition gives the defendants one shot at getting out of a case unscathed, they have little incentive to engage in serious discussion talks until after the summary judgment motion has been filed and decided.²⁷² If the motion is unsuccessful, the stakes have already been raised at least by the cost of the motion itself. Cases that otherwise might have settled may not now settle; or, if they settle, they settle at a higher cost. This is not to suggest that summary judgment eliminates settlements. Both plaintiffs and defendants have risks at the summary judgment stage that they may want to avoid; and certainly where discovery leading to a summary judgment motion is expensive, that fact alone can create incentives to settle. Of course, if the summary judgment motion is denied, there will be no cost savings for the parties or the courts, only more costs for trial and appeal. Thus, the cost savings trumpeted by summary judgment proponents seem largely illusory. In the wake of *Matsushita*, summary judgment is center stage in every antitrust case that has survived a motion to dismiss. That process may well have filtered out anemic cases and has likely even discouraged the filing of weak cases. At the same time, it has increased substantially the cost of this middle phase of litigation, especially when the high costs of expert economic witnesses and of accessing and producing electronically stored information is taken into account. Although discovery costs for electronically stored information may be trending downward with the introduction of predictive coding, still, at the end of the day, *Matsushita* may well have imposed a net cost on the federal civil justice system.

3. *Deciding Cases On Paper Records*

As Judge Wald has observed, “federal jurisprudence is largely the product of summary judgment in civil cases.”²⁷³ Outcomes are thus based on selective pretrial records, instead of fully developed trial records, where witnesses have been subject to cross-examination and the fact

²⁶⁵ Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 433 (1973); Isaacharoff and Lowenstein, *supra*, n. 14 at 119.

²⁶⁶ See Wood, *supra*, n. 14 at 240.

²⁶⁷ Miller, *supra*, n. 14 at 1047; Denlow, *supra*, n. 14 at 28.

²⁶⁸ See, e.g., Local Rule 56.1 (S.D.N.Y.).

²⁶⁹ See Wood, *supra*, n. 14 at 247-48 (criticizing the point/counterpoint approach as “the stuff of nightmare”).

²⁷⁰ Denlow, *supra*, n. 14 at 28.

²⁷¹ Bronsteen, *supra*, n. 14 at 532-36; Denlow, *supra*, n. 14 at 28.

²⁷² See Bronsteen, *supra*, n. 14 at 532-36.

²⁷³ Wald, *supra*, n. 14 at 1897.

finder has had the opportunity to assess the demeanor and credibility of witnesses. Judge Wald has recognized these dangers:

With summary judgment ruling the roost, the prototypical mode of lawmaking involves applying legal principals to incomplete, often anemic, factual scenarios. The complexity of real-life situations, which require judges to recognize the ways in which existing legal principles may not account for the multifarious possibilities of life—and accordingly to adjust or temper the law as necessary—risks going by the book.²⁷⁴

Summary judgment records in antitrust cases tend to be voluminous and complicated, not anemic. Still, Judge Wald’s sentiments ring true. Paper records created on summary judgment, not subject to the discipline and rigors of trial presentation, may prove unwieldy for judges. Resolving issues on unwieldy paper records may prove as challenging for the courts as deciding cases on anemic records.

Summary dispositions also threaten to erode public confidence in the judicial process, thereby threatening the legitimacy of court decisions.²⁷⁵ In *Casey*, the Supreme Court observed that it “cannot buy support for its decisions...and, except to a minor degree, it cannot independently coerce obedience to its decrees.”²⁷⁶ Instead, its “power lies...in its legitimacy, a product of substance and perception that shows the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”²⁷⁷ When parties feel that they have been given short shrift through summary disposition, the legitimacy of the courts is undermined. It may well be that “rough justice” is achieved through summary disposition of dubious cases that would be costly and inefficient for the courts and the parties to try. But, where judicial outcomes are driven largely by efficiency concerns, they do not necessarily reflect the “complexity and ambiguity of life.”²⁷⁸ And good cases will inevitably be tossed out with the bad, creating a serious problem of false negatives.

4. Freezing Out Juries

More fundamentally, summary judgment is a vehicle that defendants (and courts) can use to avoid juries. Critics of the use of juries in antitrust cases have argued that lay jurors are simply not up to the task of fact-finding in complex antitrust cases.²⁷⁹ Lower courts, however, have largely rejected the notion that some antitrust cases may be too complex for lay jurors;²⁸⁰ the Supreme Court has been conspicuously silent on this issue.

That is not to say that the federal courts have been totally unsympathetic to concerns about lay jurors deciding complex antitrust issues. Rather, courts have found other ways—equilibrating mechanisms—to skirt juries, including, of course, summary judgment, motions to

²⁷⁴ *Id.* at 1944.

²⁷⁵ *Cf.* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 835 (1992).

²⁷⁶ *Id.* at 865.

²⁷⁷ *Id.*

²⁷⁸ Wald, *supra*, n. 14 at 1897.

²⁷⁹ *See* Hovenkamp, *supra*, n. 202 at 61, 63 (stating that “[j]ury trials are a truly unfortunate way to decide most contested issues in complex antitrust cases” and describing antitrust juries as “the weak link in a system where most of the relevant evidence is economic and technical”).

²⁸⁰ *See, e.g.*, *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 423 (9th Cir. 1979) (rejecting complexity exception); *but see* *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1088 (3d Cir. 1980) (recognizing a complexity exception).

dismiss, *Daubert* hearings, and class certification proceedings. Each of these proceedings can effectively result in a disposition short of trial. In addition, trial courts may avoid juries simply by characterizing questions as a matter of “law” for the courts rather than as a matter of “fact” for a jury. The line separating questions of fact and questions of law is difficult to draw. The Supreme Court has long recognized “the vexing nature of the distinction between questions of fact and questions of law” and concluded that it knew of no “rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”²⁸¹ The Supreme Court’s observation on the fact/law distinction is especially relevant in the context of *Matsushita*’s plausibility standard. What is plausibility? If plausibility is meant to be a measure of probability, it would seem to be more of an issue of fact than a question of law. Yet, *Matsushita* treated the question as a matter of law.²⁸²

In the antitrust context, judges often apply legal standards to factual settings in defining relevant markets, deciding whether the *per se* standard governs, and in determining whether the state action defense governs. Commentators have argued in favor of this allocation of fact-finding to the courts to assure consistency and to avoid arbitrary results:

The process of deciding some issues regarding substantive antitrust doctrine involves application of a legal rule to a set of facts. Rather than have a group of lay jurors make a very difficult and technical decision, these cases demonstrate that matters of policy emphasis are to be analyzed by a court capable of fine tuning matters of economic policy when disposing of summary judgment. Allocation of such complicated questions of great policy significance to a jury would lead to arbitrary results and certain inconsistency. Professors Areeda and Hovenkamp correctly assert that “elaborating the criteria of reasonableness is also clearly a matter of law-declaration to be made by the court.” One trial court articulated the reasoning behind this principle when it noted that “there seems less logic in entrusting to laymen economic and legal problems which are wound in strange and confounding theories familiar only to that small set of lawyers and judges who have spent years trying to unravel and settle its mysteries.”²⁸³

On the other hand, any diminution of the jury’s role in antitrust litigation would add to what Professors First and Waller have appropriately described as antitrust’s “democracy deficit.”²⁸⁴ They wrote that “[p]ublic and private antitrust enforcement were set up to enforce the law in a way that would advance democratic goals—to deal with concentrations of economic power and to police business behaviors that exploited consumers and excluded competitors.”²⁸⁵ The use of juries and fact finders promotes the democratic goals created by Congress.²⁸⁶ Still, the question of whether a judge or jury should be the fact finder is separate from the question of whether there is no genuine issue for trial. Where a genuine issue exists, decision after a full trial would seem preferable to a decision based on a paper record.

²⁸¹ *Pullman-Standard Inc. v. Swint*, 456 U.S. 273, 288 (1982).

²⁸² *Matsushita*, 475 U.S. at 587.

²⁸³ Brunet, et al. *supra*, n.11 § 2:2 at 72-73 (footnotes omitted); *but see* Bronsteen, *supra* n. 14 at 538 (questioning whether summary judgment is beneficial only because judges are better decision makers than juries); *see also* Frank Easterbrook, *Monopolization: Past, Present, and Future*, 61 *Antitrust L.J.* 99, 109 (1992) (“Jurors are amateurs and so are judges.”).

²⁸⁴ *See* Harry First and Spencer Waller, *Antitrust’s Democracy Deficit*, 81 *Fordham L. Rev.* 2543, 2552 (2013).

²⁸⁵ *Id.* at 2573.

²⁸⁶ *Id.* at 2552.

IV. WHAT TO DO

Summary judgment has evolved, and today is a far cry from the procedure introduced in 1938 to dispose of relatively straightforward commercial disputes expeditiously and efficiently. As Judge Hornby has noted, summary judgment in the twenty-first century is neither summary nor cheap.²⁸⁷ This is especially true in antitrust cases, where courts must pore over reams of paper in deciding summary judgment motion. As *Matsushita* matures into its thirties, the potential downside of summary judgment in antitrust cases has become more pronounced. It is far too late to suggest that the courts should radically alter summary judgment procedure or that summary judgment itself is unconstitutional.²⁸⁸ Nor is the Advisory Committee on Federal Civil Rules likely substantially to overhaul Rule 56.

The question, then, is how to maximize the benefits of summary judgment while minimizing its burdens. Realistically, any attempts to significantly change current practices under Rule 56 face two formidable obstacles: the practicing bar and the judiciary. Some lawyers might be concerned that efforts to limit summary judgment would also limit opportunities to generate legal fees. However, it would be both cynical and unfair to suggest that the legal profession at large is motivated by self interest and not by the public good. The real concern among lawyers is how any changes to the present system would impact their professional responsibility. As Judge Wood has stated, “[n]o one wants to be the lawyer who failed to ask one more question, to take one more deposition, or to review one more document that would have made the difference between success and failure.”²⁸⁹ Perhaps more importantly, summary judgment has become deeply embedded in our litigation culture. Defense lawyers in particular see summary judgment as a relatively low risk window of opportunity to avoid a full-fledged trial. Any attempt to close that window would likely meet strong opposition. Similarly, a once hesitant judiciary has grown much more comfortable with summary disposition. As caseloads expand and litigation costs escalate, judges will continue to use summary judgment to manage their dockets.

That said, the process is far from perfect and could be improved. The proposals set forth below are admittedly modest. They are precatory, not mandatory, and in the nature of “best practices” as opposed to hard and fast rules. Their implementation could achieve incremental benefits for the parties, the courts, and the civil justice system.

First, summary judgment should be an agenda item at all pretrial conferences in antitrust matters from the beginning of the case.²⁹⁰ The goal here is to discuss the feasibility and timing of

²⁸⁷ D. Brock Hornby, *Summary Judgment Without Illusions*, 13 Green Bag 2d 273 (2010).

The term “summary judgment” suggests a judicial process that is simple, abbreviated, and inexpensive. But the federal summary judgment process is none of those. Lawyers say it’s complicated and that judges try to avoid it. Clients say it’s expensive and protracted. Judges say it’s tedious and time consuming. The very name for the procedure is a near-oxymoron that creates confusion and frustrates expectations.

²⁸⁸ See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139 (2007); Bronsteen, *supra*, n. 14 at 551 (“Summary Judgment might be wonderful procedure were it not inefficient, unfair, and unconstitutional”). These arguments, while interesting, are not likely to gain a foothold in the courts. See, e.g., *Calvi v. Knox County*, 470 F.3d 422 (1st Cir. 2006) (rejecting Seventh Amendment argument); see generally Wright and Miller, *supra*, n. 25 § 2714 at 249 (“The question of the constitutionality of the summary judgment procedure generally was answered affirmatively before the adoption of Rule 56 in 1938.”).

²⁸⁹ Wood, *supra*, n. 14 at 250.

²⁹⁰ See Schwarzer, *supra*, n. 110 at 220-21.

the motion for summary judgment.²⁹¹ For example, the court may inquire as to whether, and on what grounds, the defendant intends to move for summary judgment. If the defendant intends to challenge standing or antitrust injury, for example, pretrial inquiries can be directed at those issues. Discovery can proceed more efficiently, and the summary judgment motion can be brought on relatively early in the litigation, thereby saving costs. Some courts have already adopted this practice; ideally, the practice would become universal.

Second, and related to the first proposal, before actually filing a summary judgment motion, the moving party should confer with the court.²⁹² The purpose of this conference is not to seek the court's permission to file for summary judgment. A party could insist on making the motion even if the court counseled otherwise but then would not be surprised if the motion were denied.²⁹³ Rather, the purpose of the conference is to give the court an opportunity for input to steer the movant to focus on issues that are pivotal or dispositive and also to weed out motions that would otherwise be dead on arrival before the court,²⁹⁴ thereby saving the court burdens and the parties both time and money.

Third, a court should be allowed some discretion to deny a summary judgment motion if it believed that a trial would be a better mechanism for resolving the case.²⁹⁵ Whether a court retains discretion to deny a summary judgment motion because a full trial would be preferable is a matter of some debate.²⁹⁶ *Celotex* suggests that if the requirements of Rule 56 have been met, then summary judgment is mandatory.²⁹⁷ On the other hand, *Anderson* states that a court has leeway to deny summary judgment if justice is better served by a full trial.²⁹⁸ Nevertheless, a majority of lower courts has ruled that judges have discretion to deny summary judgment even where the movant has seemingly discharged its burden of showing that there is no genuine issue for trial.²⁹⁹ Arming the court with this discretionary power is especially important "where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of

²⁹¹ *Id.* ("Face to face communication ... preceded by thorough preparation, clarified by reciprocal questioning, and sharpened by the judge's participation, is an effective tool for formulation and simplification of issues.")

²⁹² See Wood, *supra*, n. 14 at 250; see also Manual for Complex Litigation § 11.34 (4th ed. 2004) (To avoid unproductive motions, "a court may require a pre-filing conference to ascertain whether issues are appropriate for summary judgment, whether there are disputed facts, and whether the motion, even if granted would expedite the termination of the litigation").

²⁹³ See Weitzner v. Cynosure, Inc., 802 F. 3d 307, 313-14 (2d Cir. 2015) (suggesting that a judge's practice barring filing of a motion is at odds with the Federal Rules); but see Wood, *supra*, n. 14 at 250 (arguing that judges could bar filing of a summary judgment motion).

²⁹⁴ See Schwarzer, *supra*, n. 103 at 222-23.

²⁹⁵ See Wood, *supra*, n. 14 at 250.

²⁹⁶ Jack H. Friedenthal and Joshua Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 104-08 (2001).

²⁹⁷ *Celotex*, 477 U.S. at 322 (Rule 56 "mandates summary judgment" where plaintiff has failed to adduce evidence establishing a key element of its case).

²⁹⁸ *Anderson*, 477 U.S. at 255 (a court can "deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial").

²⁹⁹ Andrew v. Clark, 561 F.3d 261, 271 (4th Cir. 2009); Lind v. United Parcel Serv., 254 F.3d 1281, 1285 (11th Cir. 2001); Marcus v. St. Paul Fire & Marine Ins. Co., 651 F.2d 379, 382 (5th Cir. 1981); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1382-83 (10th Cir. 1980); McClain v. Meier, 612 F.2d 349, 356 (8th Cir. 1979); Western Chain Co. v. American Mut. Liab. Ins. Co., 527 F.2d 986, 990 n. 5 (7th Cir. 1975); American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 280 (2d Cir. 1967); Chevron Corp. v. Donziger, 2013 WL 4452691 at 4-5 (S.D.N.Y. Aug. 22, 2013), citing United States v. Bethlehem Steel Corp., 157 F. Supp. 877, 879-80 (S.D.N.Y. 1958). See generally Wright & Miller, *supra*, n. 25 at 525-26.

law, which remain in the case.”³⁰⁰ The harder question is how that discretion should be exercised. As a general matter, the answer should be left to the experience and judgment of individual judges. However, some guidelines might be helpful. First, as discussed above,³⁰¹ certain threshold questions, such as standing and antitrust injury are ordinarily good candidates for summary disposition. Second, as also discussed above,³⁰² issues that are largely factual, such as whether an agreement exists or market definition, or where the economic impact of any judgment would be widespread, a decision to forego summary adjudication may be appropriate.

Thus, for example, in *United States v Bethlehem Steel Co.*,³⁰³ a merger case, the court concluded that “[u]pon further close study of the record, briefs and arguments of counsel and considering the size of the industry, the vast amount of factual material to be analyzed and reviewed in reaching a decision, the multitude of problems in the case, the likely impact of a decision upon the iron and steel industry in particular, and upon the economy of the country in general... a decision after trial will be the more desirable procedure in the matter.”³⁰⁴ The Court further observed that “summary procedures however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.”³⁰⁵ In any event, given the ease of finding issues of fact, it is fair to say that summary judgment is “inherently discretionary.”³⁰⁶

Fourth, interlocutory appellate review of orders denying summary judgment should be facilitated.³⁰⁷ The procedure could be modeled after the existing procedure for appeals in class certification cases.³⁰⁸ Getting the case to an appellate forum, sooner rather than later, can speed the ultimate resolution of the case, especially where threshold issues, such as standing, antitrust injury, or exemptions are the basis of the motion.

Fifth, in non-jury cases, judges may find it more efficient to proceed directly to trial without entertaining summary judgment motions. For example, direct testimony can be submitted by affidavit, potentially duplicative briefing can be minimized, and difficult questions as to what is an issue of law and what is an issue of fact can be avoided by simply trying the case.³⁰⁹

Sixth, and perhaps most important, trial judges must be cognizant of their proper role on summary judgment and avoid the three summary judgment “traps” described by Judge Posner: (1) weighing of conflicting evidence;³¹⁰ (2) evaluating evidence of antitrust conspiracy item by

³⁰⁰ See *American Mfrs. Mut. Ins. Co.*, 388 F.2d at 280.

³⁰¹ See, *supra*, nn. 113-117 and accompanying text.

³⁰² See, *supra*, nn. 119-121 and accompanying text.

³⁰³ 157 F. Supp. 877, 879-80 (S.D.N.Y. 1958).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See Brunet et al., *supra*, n. 11 § 2.1 at 37 (summary judgment is “inherently discretionary”).

³⁰⁷ Cf. 28 U.S.C. § 1292(b).

³⁰⁸ Fed R. Civ. P. 23(f).

³⁰⁹ New York State Bar Association Antitrust Section, see *Judicial Perspectives On Antitrust Trials*, January 26, 2017 (New York City) at 9, remarks of Hon. P. Kevin Castel:

In the nonjury case summary judgment isn’t a common device in my courtroom. That’s because we can try the case faster, more easily with direct testimony by affidavit, put on the case. And you have a final judgment that’s appealable, rather than the metaphysical debate on whether there was a material issue of fact in dispute. So it’s quite different in the bench trial.

³¹⁰ *Fructose*, 295 F. 3d at 655.

item instead of looking at evidence as a whole;³¹¹ and (3) “failing to distinguish the existence of a conspiracy and its efficacy.”³¹² In addition, once a genuine issue for trial is presented, courts must deny summary judgment, even if they believe that the plaintiff’s claim is doubtful.

CONCLUSION

Matsushita, together with *Anderson* and *Celotex*, revived summary judgment and restored Rule 56 to its intended role within the Federal Rules of Civil Procedure. *Matsushita* may be celebrated as a step forward in resolving civil cases generally and antitrust cases in particular. At the same time, that decision is a cause for concern because it heralded a trend that has led federal judges to dispose of more and more cases short of trial. This rush to judgment is not what the drafters of the Federal Rules had in mind in creating a procedural system that aspired to give meritorious litigants their day in court. Now, thirty years after the *Matsushita* ruling, the pendulum may have swung too far in favor of summary disposition.

Summary judgment is here to stay and will continue to be an important managerial tool as dockets expand and litigation costs soar. The courts need to heed the rising chorus of criticism of summary judgment and find a proper balance between summary disposition and disposition by full trial.

³¹¹ *Id.* at 655-56.

³¹² *Id.* at 656.

This suggests that the pendulum has already swung too far; from the terrible Bill Clinton days when it was ultimately no big deal for the President of the United States to be sexually involved with a young female intern to the Patrick Brown days of appalled excoriation of a male politician who has been a jerk, but little more. As I said, I'm not bemoaning Patrick Brown's fate. All the talk of his due process rights being violated seems overblown: the concept of due process is generally used in the context of the judicial system (hence "due process of law"). The further you get from a judicial Of course this sort of attitude has not completely disappeared. I still run into the occasional rude business owner or curt customer service staffer. But overall, expectations have changed. These days "no doubt at least partly in response to Yelp and the whole universe of social media" most businesses bend over backwards for customers, or at least try to give the appearance of doing so. I certainly appreciate this change. Years ago I became a loyal customer of American Express in part because of their (quite justified) reputation for excellent customer service. More recently, when Trader Joe