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Predatory Pricing Conspiracies After *Matsushita Industrial Co. v. Zenith Radio Corp.*: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?

I. The Facts

Zenith Radio Corporation and National Union Electric Corporation (NUE) initiated a lawsuit, in 1974, against twenty-one corporations that manufacture or sell Japanese "consumer electronic products" (CEPs), which consist primarily of television sets.[1] The plaintiffs claimed that the defendants violated sections 1 and 2 of the Sherman Act,[2] section 2(a) of the Robinson-Patman Anti-Discrimination Act,[3] section 73 of the Wilson Tariff Act,[4] and the Antidumping Act of 1916[5] by illegally conspiring to drive the plaintiffs out of the American consumer electronics market. Specifically, the plaintiffs alleged that the defendants conspired to set artificially high prices for television sets the defendants sold in Japan and simultaneously to set low prices for television sets sold in the United States. According to the plaintiffs, the defendants began this conspiracy as early as 1953 and fully implemented the scheme by the late 1960s.

After several years of extensive discovery, the defendants filed motions for summary judgment on all claims. Pursuant to the district court's di-

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1. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981). Zenith and NUE filed separately but the two cases were consolidated in 1974.
2. 15 U.S.C. §§ 1, 2 (1982).
3. *Id.* § 13(a).
4. *Id.* § 8.
5. *Id.* § 72.

rection, the plaintiffs filed "Final Pre-trial Statements," which contained all the documentary evidence the plaintiffs planned to offer if the case went to trial. In response to the defendants' motions challenging the admissibility of the plaintiffs' evidence, the district court held the majority of that evidence inadmissible.[6]

Based on the admissible evidence, the district court found that no genuine issue of material fact existed to support the plaintiffs' conspiracy theory.[7] Hence, the court granted summary judgment on the Sherman Act section 1 claims and on the claims under the Wilson Tariff Act.[8] The court also dismissed the Sherman Act section 2 claims and ruled for the defendants on the Robinson-Patman Act claims.[9]

On appeal, the Court of Appeals for the Third Circuit reversed.[10] The Third Circuit held much of the evidence excluded by the district court admissible.[11] By examining the previously excluded evidence, the appellate court found the district court's ruling on the summary judgment improper.[12] Contrary to the district court's opinion, the Third Circuit held that a fact finder could reasonably conclude from the evidence that a conspiracy existed to "depress prices in the American market in order to drive out American competitors, which conspiracy was funded by

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6. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1135–39 (E.D. Pa. 1981).

7. *Id.* at 1332.

8. *Id.*

9. *Id.*

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

11. *Id.* at 259–303. The evidence included the following conclusions:

(1) The Japanese market for CEPs was characterized by oligopolistic behavior, with a small number of producers meeting regularly and exchanging information on price and other matters. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese government imposed significant barriers to entry.

(2) Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to operate at something approaching full capacity in order to make a profit.

(3) Petitioners' plant capacity exceeded the needs of the Japanese market.

(4) By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. The parties refer to these prices as the "check prices," and to the agreements that required them as the "check price agreements."

(5) Petitioners agreed to distribute their products in the United States according to a "five-company rule": each Japanese producer was permitted to sell only to five American distributors.

(6) Petitioners undercut their own check prices by a variety of rebate schemes. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check price agreements.

Matsushita Elec. Indus., 475 U.S. at 580-81 (citations omitted).

12. *Id. In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d at 306–09.

excess profits obtained in the Japanese market."[13] In addition, the Third Circuit found it unnecessary to rule on the defendants' claim that a foreign sovereign (Japan) compelled their action, thereby relieving the defendants from liability.[14]

The United States Supreme Court granted certiorari to determine whether the court of appeals had used the proper standard to evaluate the district court's ruling on the motion for summary judgment and to ascertain whether the defendants could be held liable under the antitrust laws for a conspiracy partially compelled by a foreign sovereign.[15] By a five-to-four decision, the Court reversed and remanded on the first issue,[16] but failed to reach the second. The Court held that the court of appeals erred by relying on evidence with little, if any, relevance to the alleged conspiracy and for failing to consider the absence of a plausible motive on the defendants' part to engage in such a conspiracy.[17] Because no rational motive to conspire existed, the Court found the evidence did not suffice to create "a genuine issue for trial."[18] On remand, however, the Supreme Court allowed the court of appeals "to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that the petitioners conspired to price predatorialy for two decades despite the absence of any apparent motive to do so."[19] *Held, reversed and remanded:* In the absence of a rational motive to conspire, the plaintiffs' evidence of predatory pricing was insufficient to create a genuine issue for trial and therefore could not preclude summary judgment. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

On remand, the Court of Appeals for the Third Circuit concluded that no evidence existed other than that on which the court had previously relied. The court, therefore, affirmed the summary judgment on the Sherman Act claims and the Antidumping Act claims.[20]

II. The Legal Background

A. Standards for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure does not distinguish between a motion for summary judgment in an antitrust case and in any other civil case.[21] When the record shows that no genuine issue as to a

13. *Id.* at 309.
14. *Id.* at 315.
15. *Id.*, *cert. granted,* 471 U.S. 1002 (1985) (grant limited to two issues).
16. 475 U.S. 574, 598 (1986).
17. *Id.* at 595.
18. *Id.* at 597.
19. *Id.*
20. *In re* Japanese Elec. Prod. Antitrust Litig., 807 F.2d. 44, 48–49 (3d Cir. 1986).
21. Fed. R. Civ. P. 56.

material fact exists, and the party opposing the motion fails to support its claim, the motion will be granted.[22] Although summary judgments can be useful in complex antitrust cases,[23] historically courts have been reluctant to grant them.[24]

This reluctance to grant summary judgments in complex antitrust litigation can be traced back to the United States Supreme Court's decision in *Poller v. CBS*.[25] In that case the Court reversed a grant of summary judgment for the defendant, stating that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles."[26] In *Poller* the Court found that the plaintiff presented substantial factual evidence that tended to show the existence of a conspiracy, and that the witnesses' credibility was crucial to a final determination of the issues, therefore making summary judgment improper.[27]

The Supreme Court again found summary judgment improper in *White Motor Co. v. United States*.[28] In that case the United States brought suit to restrain alleged Sherman Act violations by a truck manufacturer. The United States contended that the defendants violated sections 1 and 3 of the Sherman Act by placing territorial restrictions in their franchise contracts.[29] The Court held that the legality of the restrictions should be determined only after a full trial because the Court could not determine the actual impact of the restrictions based solely on the documentary evidence.[30]

In *Norfolk Monument Co. v. Woodlawn Memorial Gardens*[31] the Supreme Court again reversed a summary judgment granted by the district court in favor of the defendants. The Court held "that the alleged conspiracy had not been conclusively disproved by pretrial discovery and that there remained material issues of fact which could only be resolved by the jury after a plenary trial."[32] This language has been interpreted to mean that summary judgment should not be granted against a plaintiff once the plaintiff's evidence would support a jury verdict in its favor, unless the defendant can produce evidence sufficiently conclusive to warrant a directed verdict in its favor.[33]

22. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288 (1968); FED. R. CIV. P. 56(e).
23. *See* First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968).
24. *See* Norfolk Monument Co. v. Woodlawn Memorial Gardens, 394 U.S. 700 (1969); White Motor Co. v. United States, 372 U.S. 253 (1963); Poller v. CBS, 368 U.S. 464 (1962).
25. *Id.*
26. *Id.* at 473.
27. *Id.*
28. 372 U.S. 253 (1963).
29. *Id.* at 255–56.
30. *Id.* at 261–64.
31. 394 U.S. 700 (1969).
32. *Id.* at 704.
33. 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 316 (1978).

The Supreme Court's reluctance to grant motions for summary judgment in antitrust cases has waned in recent cases. For example, in *First National Bank v. Cities Service Co.*[34] the Court affirmed the court of appeals' grant of a motion for summary judgment for the defendants because the plaintiff failed to show sufficient evidence of a conspiracy to raise a genuine issue for trial.[35] The plaintiff alleged, inter alia, that the defendant oil companies conspired to boycott Iranian oil, thereby interfering with the plaintiff's ability to sell Iranian oil it had purchased under contract.[36] The Court distinguished *Poller* by finding that it was plausible to believe the defendants' interest coincided in *Cities Service,* whereas in *Poller* the relationship between the plaintiff and the defendant made it plausible to believe the defendant conspired to drive the plaintiff out of business.[37] To have survived the defendant's motion for summary judgment, the plaintiff would have had to show that the evidence to be introduced at trial would be more consistent with the inference that the defendant's conduct resulted from an alleged conspiracy than the inference that the defendant acted independently.[38] The Court paid only lip service to *Poller* to reach its decision.

The Court's decisions in *Cities Service,* and more recently in *Zenith v. Matsushita,* illustrate that the language in *Poller* is not always a bar to summary judgment in antitrust cases.[39] The Supreme Court did not even cite *Poller* in reaching its decision in *Zenith.* This oversight may have been intentional, indicating that *Poller* may have lost its once strong influence.

B. Predatory Pricing

The goal of antitrust law is to protect competition, not competitors.[40] Generally, lower prices are a desirable result of that competition, but under certain conditions firms may lower prices for an anticompetitive purpose.[41] For this reason, "predatory pricing" is an offense within both the Sherman Act[42] and the Robinson-Patman Act.[43]

34. 391 U.S. 253 (1968).
35. *Id.* at 254–55.
36. *Id.* at 259–60.
37. *Id.* at 285.
38. *Id.*
39. *See* 2 P. Areeda & D. Turner, *supra* note 33, ¶ 316.
40. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
41. Areeda & Turner, *Predatory Pricing and Related Activities Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697, 697 (1975). For example, a firm that sells at below cost prices in order to drive out or exclude rivals is exhibiting anticompetitive behavior. *Id.*.
42. 15 U.S.C. § 2 (1982).
43. *Id.* § 13(a); *see* Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards,* 66 Cornell L. Rev. 738, 765–66 (1981).

While the courts have not developed a definitive test for predatory pricing, the practice is generally characterized as an attempt by a firm with substantial market power to drive out or exclude its rivals by selling at artificially low prices.[44] To succeed, the firm must have "(1) greater financial staying power than [its] rivals, and (2) a very substantial prospect that the losses [it] incurs in the predatory campaign will be exceeded by the profits to be earned after [its] rivals have been destroyed."[45] Without these two factors, predation would ordinarily be economically irrational.[46]

Before 1975, predatory pricing cases were rare.[47] Following the publication of an article by Areeda and Turner in 1975 the number of cases increased dramatically.[48] Areeda and Turner developed a standard, set forth in their article, that lays out a series of presumptions to distinguish competitive from anticompetitive pricing in a Sherman Act section 2 case.[49] A price higher than the firm's marginal cost is deemed lawful, while any price below marginal cost is conclusively presumed illegal.[50]

Although no court has completely embraced the Areeda-Turner test, most of the federal courts have adopted some of the test's elements.[51] For example, in *Barry Wright Corp. v. ITT Grinnell Corp.* the First Circuit relied on the fact that the defendant's prices remained above cost even after its price cuts; those cuts therefore were not predatory.[52] To hold such price cuts unlawful, the court reasoned, would " 'chill' highly desirable precompetitive price cutting."[53]

The Ninth Circuit has used a different approach to establish predatory pricing. Under the "*Inglis-Transamerica*" test the plaintiff must prove "that the anticipated benefits of the prices, at the time they were set,

44. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 n.8.

45. Areeda & Turner, *supra* note 41, at 698.

46. 3 P. Areeda & D. Turner, Antitrust Law ¶ 711d, at 153 n.11 (1978).

47. Libeler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita,* 61 Notre Dame L. Rev. 1052, 1052 (1986).

48. *Id.* at 1053.

49. Areeda & Turner, *supra* note 41, at 732–33.

50. *Id.* at 733. Areeda and Turner divided a firm's costs into several categories: (1) fixed costs—costs that do not vary with output; (2) variable costs—costs that do vary with output; (3) marginal costs—the additional cost that results from producing an additional unit of output; (4) average total costs—total cost (fixed and variable) divided by output; and (5) average variable costs—total variable cost divided by output. *Id.* at 700–01.

51. *See, e.g.,* Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d. 427, 431 (7th Cir. 1980); Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977); National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 637 n.34 (D.C. Cir.), *cert. denied,* 425 U.S. 992 (1976).

52. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) ("modern antitrust courts look to the relation of price to 'avoidable' or 'incremental' costs as a way of segregating price cuts that are 'suspect' from those that are not.").

53. *Id.* at 235.

depended on their anticipated destructive effect upon competition and the consequent enhanced market position of the defendant."[54] The court, however, did not totally reject the cost/price standard espoused by Areeda and Turner, for it adopted a cost-based test to shift the burden of proof.[55] Once the plaintiff proves that the defendant cut prices to below "average variable cost,"[56] "the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors."[57] The Ninth Circuit in effect added the extra element of intent to the Areeda-Turner test.[58]

The Supreme Court has yet to consider the Areeda-Turner test, or any other test for predatory pricing. The Court has discussed predatory pricing in many cases, as it does in *Matsushita,* without ruling on what constitutes the offense.[59] Despite skepticism as to whether such schemes are ever attempted, the Court did acknowledge, after *Matsushita,* that the practice of predatory pricing does occur, albeit infrequently.[60]

III. The Court's Analysis—*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*

Justice Powell, writing for the Court, began the opinion by emphasizing the claims for which the plaintiffs could not recover. Justice Powell established at the outset that the plaintiffs could not recover antitrust damages based on an alleged cartelization of the Japanese market because the Sherman Act cannot regulate the conduct of other nations except when that conduct has an effect on American commerce.[61] Second, the

54. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1034 (9th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982); *see also* Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir. 1983).

55. *Inglis,* 668 F.2d at 1036.

56. Average variable cost is defined as total variable cost divided by output. Areeda & Turner, *supra* note 41, at 700.

57. *Inglis,* 668 F.2d at 1036.

58. *See* Southern Pac. Communications v. Am. Tel. & Tel. Co., 740 F.2d 980, 1004 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 1359 (1985) (discussing test used by Ninth Circuit in *Inglis* and *Transamerica*).

59. *See, e.g.,* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

60. Cargill, Inc. v. Montfort of Colorado, Inc., 107 S. Ct. 484, 493 (1986).

61. 475 U.S. at 582 (citing United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)); *see also* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 612 (9th Cir. 1976), *cert. denied,* 472 U.S. 1032 (1985). In *Matsushita,* the plaintiffs alleged that the defendants' supracompetitive pricing in Japan had an effect on U.S. commerce as a result of artificially depressed prices for consumer electronic products in the U.S. The Court, however, stated that the alleged cartelization of the Japanese market could not have caused that effect for twenty years. Once the defendants decided to reduce output and raise prices in Japan, as the plaintiffs alleged, the next logical step was to sell more goods in other markets to increase profits, a decision that does not flow from cartelization of the Japanese market. 475 U.S. at 583 n.6.

plaintiffs could not recover for a conspiracy to charge higher than competitive prices in the United States because the plaintiffs would not suffer an antitrust injury as a result of such a conspiracy.[62] Finally, the plaintiffs could not recover for a conspiracy to impose non-price restraints that raise market price or limit output because again, such restraints would not injure the plaintiffs.[63] The Court found that since the plaintiffs could not recover on the above claims standing alone, the Third Circuit erred to the extent it found evidence of the above alleged conspiracies to be direct evidence of a conspiracies to injure the plaintiffs.[64]

Even though evidence of the above conspiracies could not be used to recover antitrust damages, the plaintiffs argued that the evidence could be used to support the claims of conspiracy by the defendants to monopolize the United States market by pricing below market level.[65] The court of appeals found that if the plaintiffs proved this allegation, it would be a per se violation of section 1 of the Sherman Act.[66] Since the defendants did not appeal from that conclusion, the only issue for decision became whether the plaintiffs presented sufficient probative evidence to survive the defendants' motion for summary judgment.[67]

A. Summary Judgment Analysis

In the third part of the Court's opinion Justice Powell stated the conventional standard for surviving a motion for summary judgment.[68] To defeat the motion, the plaintiffs had to show that a genuine issue of material fact existed as to whether the defendants entered into an illegal conspiracy which caused the plaintiffs' injury.[69] According to the Court, this showing consisted of two parts. First, the plaintiffs had to show that they suffered an antitrust injury.[70] Only evidence of the alleged conspiracy to monopolize the American market through predatory pricing could be

62. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488–89 (1977). Before a plaintiff can recover damages under the antitrust laws, the plaintiff must show it suffered an injury by reason of something against the antitrust laws. *See id.* at 489.

63. 475 U.S. at 583. As the Court pointed out, these types of restrictions would actually benefit competitors by making supracompetitive pricing more attractive. *Id.*

64. *Id.; see In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 304–05 (3rd Cir. 1983).

65. 475 U.S. at 583.

66. 723 F.2d at 306. Courts have described various agreements as unlawful per se under section 1 of the Sherman Act because of "their necessary effect." *See generally* 2 P. Areeda & D. Turner, *supra* note 33, ¶ 314; Standard Oil Co. v. United States, 221 U.S. 1 (1911). These per se offenses include price-fixing, boycotts and tying arrangements.

67. 475 U.S. at 585.

68. *Id.* at 585-86.

69. *Id.* at 586.

70. *Id.*

used to satisfy this requirement, since the other alleged conspiracies could not have caused the plaintiffs to suffer such an injury.[71] Second, the plaintiffs had to show that a "genuine" issue of fact existed.[72] Citing *Cities Service,* the Court stated that if the entire record "could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'. "[73]

Expanding on conventional summary judgment principles, the Court reasoned that the factual context of each case must be considered when determining the quantum of proof necessary to support a plaintiff's claim.[74] Because Zenith's claim did not make sense economically, the Court determined that the plaintiffs must present more persuasive evidence than usually necessary to support the claim.[75] Only if the evidence " 'tends to exclude the possibility' that the alleged conspirators acted independently," could the plaintiffs defeat the motion for summary judgment.[76] In order to evaluate the evidence, the Court had to "consider the nature of the alleged conspiracy and the practical obstacles to its implementation."[77]

B. Predatory Pricing Conspiracies

To elucidate the "nature of the alleged conspiracy," Justice Powell launched into an analysis of predatory pricing.[78] Throughout the discussion, the Court expressed skepticism that a predatory pricing conspiracy would ever arise.[79] To reach this conclusion, the Court relied for the most part on the commentators, among whom "there is a consensus . . . that predatory pricing schemes are rarely tried, and even more rarely successful."[80]

Predatory pricing schemes are inherently risky because the predatory firm always loses profits in the short run and any gain in the long run depends upon successfully driving out the competition.[81] Not only must the predatory firm achieve monoply power, it must maintain that power long enough to recover its losses and earn additional profits.[82] To succeed,

71. *Id.* According to the Court, the other alleged conspiracies actually benefitted the plaintiffs. *Id.*

72. *Id.* ("When the moving party has carried its burden under rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnotes omitted)).

73. *Id.* at 587 (citing *Cities Serv.*, 391 U.S. at 289).

74. *Id.*

75. *Id.*

76. *Id.* at 588.

77. *Id.*

78. *Id.* at 588–89.

79. *Id.* at 589.

80. *Id.*

81. *Id.*

82. *Id.*

"[t]he predator must make a substantial investment with no assurance that it will pay off."[83]

The Court further expressed skepticism that such a conspiracy would ever exist among a cartel, as the plaintiffs alleged in *Matsushita*.[84] In that situation, success depends upon each firm's "willingness to endure losses for an indefinite period."[85] This gives "each conspirator . . . a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds."[86]

The Court further discounted the likelihood of the claimed conspiracy by pointing to the fact that twenty years after the alleged conspiracy began, RCA and the plaintiffs held the two largest shares of the retail television market, not the defendants.[87] Furthermore, those shares did not appreciably decline during the existence of the alleged conspiracy.[88] Because the prospect of recouping their losses by achieving and maintaining monopoly power was so slight, the Court reasoned that the defendants were especially unlikely to engage in a predatory pricing conspiracy.[89]

The Court next focused on whether the defendants had any motive to engage in such a conspiracy.[90] In order simply to break even, defendants would have to sustain their cartel for years.[91] Their ability to do that depended on the continued cooperation of all the conspirators, the inability of new competitors to enter the market, and the conspirators' ability to escape antitrust liability for price-fixing after they achieved a monopoly.[92] The fact that the defendants may have made supracompetitive profits in Japan did not lessen the economic hurdles to success the defendants faced in the United States.[93] Based on the obstacles before the defendants,

83. *Id.* (quoting Easterbrook, *Predatory Strategies and Counter-Strategies*, 48 U. CHI. L. REV. 263, 268 (1981)).

84. 475 U.S. at 589. A cartel is a combination of producers of a product who join together to control production, sale, and price and to obtain a monopoly in any particular industry or commodity. BLACK'S LAW DICTIONARY 195 (5th ed. 1979).

85. 475 U.S. at 585.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 592–93.

92. *Id.* The Court pointed out that to recoup their losses, defendants would have to engage in some form of price-fixing after they had gained a monopoly because of the large number of firms involved. Section 1 of the Sherman Act forbids such price-fixing. *Id.* at 592 n.16 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)).

93. *Id.* at 592.

the Court could find no motive on the defendants' part to engage in such a conspiracy.[94]

Given this lack of motive, the Court relied on *Cities Service* and *Monsanto* to find that if the defendants had no motive to conspire and the conduct was subject to equally valid explanations, the conduct did not support an inference of conspiracy.[95] The Court reasoned that to allow courts to infer conspiracies when such inferences were implausible would serve to deter competition.[96] After balancing the need to protect legitimate price competition[97] against the desire to punish illegal conspiracies,[98] the Court found that granting summary judgment in cases with ambiguous evidence would not encourage such conspiracies.[99]

C. The Dissenting Opinion

The dissent, written by Justice White, found the majority's holding "indeed remarkable."[100] Specifically, Justice White criticized the majority opinion on three grounds.[101] First, he took issue with the Court's statements about the standard for summary judgment.[102] Second, he felt the Court's analysis invaded the fact finder's province.[103] Finally, Justice White stated that the Court faulted the Third Circuit for "nonexistent" error and remanded the case unnecessarily.[104]

Justice White agreed with the Court's initial discussion of the standards for summary judgment, but he felt that the Court eventually departed from traditional summary judgment doctrine.[105] According to Justice White, the majority strayed from tradition by interpreting *Monsanto* to stand for the proposition that courts should not allow fact finders to infer

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94. *Id.* at 593. The ease of entry into the CEP market further supports the Court's finding of no motive to conspire. Even if successful, defendant would continuously be faced with new entrants into the market.

95. *Id.* at 593–95; *see Cities Serv.*, 391 U.S. at 278–80; Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–64 (1983).

96. 475 U.S. at 593 (citing *Monsanto*, 465 U.S. at 762-64).

97. *Id.*

98. *Id.*

99. *Id.* at 595. The Court stated that unlike other schemes that violate antitrust laws, failed predatory pricing schemes are costly to conspirators. Therefore, such schemes are self-deterring. *Id.*; *see* Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26 (1984). If successful, predatory pricing schemes involving many firms can easily be detected and punished because to be of benefit, some type of minimum price-fixing agreement would be needed. 475 U.S. at 595.

100. 475 U.S. at 598–99.

101. *Id.* (White, Brennan, Blackmun, and Stevens, JJ., dissenting).

102. *Id.* at 599.

103. *Id.*

104. *Id.*

105. *Id.*

conspiracies when such an inference would be implausible.[106] According to Justice White, *Monsanto* simply held that "a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury."[107] By requiring a judge in an antitrust case to decide if the inference of conspiracy is more probable than not, the Court invaded the province of the fact finder, thereby overturning settled law.[108]

Justice White also disagreed with the assumptions the majority made to define what the plaintiffs had to show to recover under section 1 of the Sherman Act.[109] The Court found that to recover the plaintiffs had to show that the defendants had conspired to drive them out of the relevant markets by pricing below the level necessary to sell the defendants' products or pricing below cost.[110] This argument assumed that any other type of agreement could not have injured the plaintiffs.[111] The testimony of one of the plaintiffs' expert witnesses, excluded erroneously by the district court, directly contradicted this assumption.[112] The expert testified that defendants' conduct had harmed the plaintiffs. Justice White found this testimony alone sufficient to create a genuine factual issue.[113] By ignoring the expert's report, and assuming that the defendants favored profit-maximization over growth, the Court invaded the province of the fact finder.[114]

Finally, unlike the majority, Justice White found nothing wrong with the Third Circuit's disposition of the case.[115] The Court claimed that the court of appeals erred by treating evidence of price-fixing in Japan, the five-company rule, and check prices, as direct evidence of a conspiracy.[116] The Third Circuit, however, simply found after reviewing this evidence that a fact finder could reasonably conclude that the five-company rule

106. *Id.* at 600.
107. *Id.*
108. *Id.* at 601.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* The expert, Dr. DePodwin, produced a report that the Third Circuit partially relied upon. In his report Dr. DePodwin indicated that the plaintiffs were harmed in two ways without reference to whether the defendants priced their products below cost or below the "level necessary to sell their products." First, by raising prices in Japan, the defendants sold fewer of their goods in that country. This resulted in increased exports to the United States, which in turn depressed prices in the U.S. and injured the plaintiffs. Second, DePodwin asserted that the defendants entered into agreements with other companies to avoid competition among the group in the U.S. market. These agreements caused the plaintiffs to lose business they otherwise would have had, had the defendants continued competing with one another. *Id.* at 601-02.
113. *Id.* at 603.
114. *Id.* at 604.
115. *Id.*
116. *Id.*; see *supra* note 14 for an explanation of the "five-company rule" and "check prices."

was not used solely to raise prices,[117] and therefore, raised an issue of material fact. Justice White also faulted the Court for seeming to require the Third Circuit to "engage in academic discussions about predation."[118] The court's role is to decide, after viewing the evidence in the light most favorable to the plaintiffs, whether a fact finder could conclude that the defendants engaged in long-term, below-cost sales.[119] This path is precisely the one the Third Circuit took, and Justice White found it pointless to remand the case so that it could repeat the process.[120]

IV. Practical Implications

The Supreme Court's holding in *Matsushita* will undoubtedly have a great impact on the disposition of future antitrust conspiracy cases as well as on competition itself. By raising the standard of proof necessary to show a genuine issue of material fact in a predatory pricing conspiracy suit, the Court has both furthered and subverted the goals of antitrust law. On the one hand, the Court's decision will encourage competitors to lower prices without fear of reprisal. At the same time, however, those who have suffered an antitrust injury as a result of a truly predatory conspiracy will be discouraged from seeking redress unless they possess direct evidence of the alleged conspiracy.

V. Conclusion

Matsushita presented to the Supreme Court an opportunity to announce a definitive test for predatory pricing and thereby resolve a split among the circuits. Instead of seizing this chance, the Supreme Court chose to raise the standard of proof necessary to infer such a conspiracy without defining the offense. By doing so, the Court usurped the jury's role and left lower courts and businessmen dangling.

Why the Court raised the standard of proof and avoided defining predatory pricing may be the result of several factors. First, antitrust conspiracy cases are complex, expensive, and extremely time-consuming. The Supreme Court's decision makes it easier for the lower courts to dispose summarily of these cases. Also, this decision discourages businessmen from bringing suit because of the extra volume of evidence and extra expense needed to prevail. Thus, the efficiency of the court system is enhanced. Second, a test for predatory pricing would of necessity have to be based on economic calculations, in themselves open to many inter-

117. 475 U.S. at 605.
118. *Id.* at 606.
119. *Id.*
120. *Id.*

pretations. The Justices may well have decided that courts should avoid the minefield of conflicting economic theories and instead focus on such factors as motive to decide whether the evidence created a genuine issue of fact. Finally, the decision may have been the result of the Court's reluctance to accept the fact that a conspiracy to price predatorily could ever exist among a cartel. That the conspiracy had allegedly been in force for twenty years with no evidence of success in the United States market heavily influenced the court.

Granted, conspiracies to price predatorily may be rare. Yet, when such behavior occurs, it must be punished. The Court suggests that the firms may be punished only after they have succeeded.[121] By then, however, many small competitors may have been driven out of business. By failing to take the lead and create a test for predatory pricing, the Supreme Court has left those small businesses with no practicable way to stop such predatory behavior before it is too late.

121. *Id.* at 593.