

Summary judgment in antitrust cases: understanding *Monsanto* and *Matsushita*

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I. Introduction

The 1980's witnessed tremendous changes in the scope and application of the antitrust laws. Two of the most significant changes involved redefinition of the line between conduct that is illegal per se and conduct judged under the rule of reason,¹ and

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¹ This redefinition has two components. First, the Court has reclassified as rule of reason cases certain types of behavior formerly

use of procedural means to achieve substantive antitrust goals.² The subject of this article—summary judgment standards in antitrust cases—implicates both of these changes. We argue that the procedural summary judgment standard developed by the Court in *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*³ serves to bolster the substantive line the Court has drawn between the rule of reason and the per se rule.⁴ Unfortunately, lower courts have misunderstood *Matsushita*, and have applied the Court's summary judgment opinion inconsistently and inaccurately.⁵ The purpose of this article is to provide courts and antitrust practitioners a coherent theoretical framework for deciding what summary judgment standards to apply in antitrust cases.

In *Matsushita*, the Supreme Court affirmed a grant of summary judgment for the defendants in an antitrust case that had alleged a 20-year predatory pricing conspiracy by Japanese firms in the consumer electronics industry. In its opinion, the Court

held to be per se illegal. *Compare* *Business Elec. Corp. v. Sharp Elec. Corp.*, 108 S. Ct. 1515 (1988) and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (vertical nonprice restraints). Second, the Court has narrowed the difference between the per se rule and the rule of reason by requiring additional proof even in "per se" cases. *Northwest Wholesale Stationers v. Pacific Stationery & Printing*, 472 U.S. 284, 289-98 (1985); *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-24 (1979); see also Calkins, *The October 1989 Supreme Court Term and Antitrust: Power, Access and Legitimacy*, 59 ANTITRUST L.J. (1990), at 47-49.

² One significant procedural rule not discussed here is the antitrust injury doctrine, which greatly restricts the ability of private parties to bring an antitrust action. See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1890 (1990); *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104 (1986).

³ 475 U.S. 574 (1986).

⁴ See *infra* notes 97-105 and accompanying text.

⁵ For a comprehensive discussion of those lower court cases, see DeSanti & Kovacic, *Matsushita: Its Construction and Application by Lower Courts*, 59 ANTITRUST L.J. 609, 618-53 (1990).

stated that the *plaintiff* “must present evidence that tends to exclude the possibility that defendants acted independently” if the plaintiff is to avoid summary judgment.⁶ The Court’s new

⁶ 475 U.S. at 588. The Court derived this test from *Monsanto v. Spray-Rite Corp.*, 465 U.S. 752, 763–64 (1985), which involved a conspiracy to set resale prices.

Matsushita was not the only summary judgment case on the Supreme Court docket. In 1986, the United States Supreme Court decided a trio of cases that had a profound effect on the law of summary judgment in federal courts. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court held that a defendant making a summary judgment motion need not produce evidence to negate the nonmovant’s claim, at least where the moving party would not have the burden of proof on that issue at trial. *Id.* at 322–24. In *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), the Court concluded that the amount of evidence a plaintiff must show to defeat a motion for summary judgment will vary with the standard of proof for the issue at trial. *Id.* at 252–54. Specifically, the Court noted that “more facts in evidence are needed for the judge to allow reasonable jurors to pass on a claim when the proponent is required to establish the claim not merely by a preponderance of the evidence but beyond a reasonable doubt.” *Id.* at 253 (quoting *United States v. Taylor*, 464 F.2d 240, 242 (2d Cir. 1972)). Taken together, these cases demonstrate the Court’s new-found belief in the proposition that “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

In many respects, *Matsushita* does not line up well with *Celotex* and *Anderson*. First, *Matsushita* is the only case of the three that is specific to a substantive area of law, i.e. antitrust, while both *Celotex* and *Liberty Lobby* created rules of general applicability in interpreting Fed. R. Civ. P. 56, which governs summary judgment proceedings in federal court. Second, both *Celotex* and *Liberty Lobby* are at least nominally content-neutral. That is, they allow for easier use of summary judgment by plaintiffs or defendants. The effect of *Matsushita*, on the other hand, is to make summary judgment easier for defendants than for plaintiffs.

Antitrust scholars are divided on the effect of the *Matsushita* opinion on summary judgment burdens (and thus on whether it creates a “neutral” burden on all parties opposing summary judgment or a burden solely on plaintiffs). Compare Austin, *Predatory Pricing Law Since Matsushita*, 58 ANTITRUST L.J. 895, 897–98 (1989) (*Matsushita* and

summary judgment standard is a far cry from the Court's earlier pronouncement that "summary procedures should be used sparingly in complex antitrust litigation."⁷

The *Matsushita* decision has generated a great deal of commentary, much of it negative.⁸ The critics generally fall into two camps. One group of commentators attacks the Court for cutting

Celotex combine to relax the standard needed for summary judgment in all cases); Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (same) and Warren & Cranston, *Summary Judgment After Matsushita*, 1 ANTITRUST 12, 13-14 (1986) (describing *Liberty Lobby* and *Celotex* as "a refrain of *Matsushita*") with Note, *Summary Judgment in Antitrust Cases—Is the Standard Changing?* 20 ARIZ. ST. L.J. 591, 593, 596-600 (1987) ("This note concludes that *Matsushita* does not change the burden of proof for parties opposing summary judgment.") [hereinafter Watchman] and with Sherman, *The Matsushita Case: Tightened Concepts of Conspiracy and Predation?* 8 CARDOZO L. REV. 1121, 1123 (1987) ("the tenor of Justice Powell's opinion is decidedly pro-defendant."). We think that *Matsushita* clearly is not neutral, because it establishes a standard that only antitrust plaintiffs must meet. However, for reasons we develop in this article, we believe this "bias" is justified by the goals of *Matsushita*.

⁷ Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962).

⁸ See, e.g. Ponsoldt & Lewyn, *Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illogic of Matsushita*, 33 ANTITRUST BULL. 575 (1988) (suggesting that *Matsushita* undermines the right to jury trial in antitrust cases established by *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), and creates a perverse standard of proof in civil antitrust cases); Ordovery & Wall, *Proving Predation After Monfort and Matsushita: What the "New Learning" Has to Offer*, 1 ANTITRUST 5, 5-6 (1986) (describing the Chicago school view of predation adopted by the Court as "controversial" and not uniformly shared by economists); Sherman, *supra* note 6, at 1123 (*Matsushita* reverses summary judgment rules and is slanted towards defendants); Comment, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 501-507 (1988) (broad reading of *Matsushita* contradicts current summary judgment rules and virtually eliminates trials) [hereinafter Collins].

(footnote 8 continued)

back on the role of juries in antitrust cases and for curtailing the likelihood that antitrust plaintiffs will be successful.⁹ These commentators generally accuse the Court of interjecting its own bias against plaintiffs by altering the procedural rules governing such antitrust cases. A second group criticizes the Court for its discussion of the economics¹⁰ and substantive law of long-term predatory pricing conspiracy claims.¹¹

Overt criticism of the new summary judgment standards has not been confined to commentators. At least one state court has refused to apply *Celotex* and cast doubt on *Matsushita* in interpreting state antitrust and unfair competition law. *Biljac Assoc. v. First Interstate Bank*, 58 ANTITRUST & TR. REG. RPT. 495 (Cal. Ct. App. 1990).

Even those commentators who have endorsed the Court's increased willingness to use summary judgment have generally focused on *Celotex*, all but ignoring the role of the *Matsushita* decision. *See, e.g. Louis, Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. REV. 1023, 1041-52 (1989). *But see Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986) (discussing increasing willingness of courts to grant summary judgment in antitrust cases even before *Matsushita*).

⁹ Ponsoldt & Lewyn, *supra* note 8, at 576-77, take this approach. There may be some merit to this complaint. For example, the Court's standard—requiring plaintiffs to exclude the possibility that defendants were acting legally—would seem to suggest that in all cases where defendants cannot win on a summary judgment motion, *plaintiffs* should win on summary judgment, since they have successfully excluded the possibility that defendants acted legally. *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 438 (9th Cir. 1990) (rejecting a broad reading of *Matsushita* because it “would lead to a dramatic judicial encroachment on the province of the jury.”). Such a result would seem particularly likely in cases brought under section 1 of the Sherman Act, in which conspiracies once proven are per se illegal.

¹⁰ The Court devoted substantial time to the economics of predatory pricing. *See Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-93 (1986) (concluding that “[t]he predation recoupment story therefore does not make sense”).

¹¹ Ordover & Wall, *supra* note 8, at 5-7 dispute the “consensus” of economists cited by the Court as condemning predatory pricing theories.

(footnote 11 continued)

We address neither of these criticisms directly. We argue that the *Matsushita* decision served primarily to explicate the summary judgment standard set by the Court 2 years before in *Monsanto Co. v. Spray-Rite Corp.*¹² Read together, these two cases protect a central division in antitrust law, between conduct that is per se illegal and conduct that is judged under the rule of reason, by inhibiting plaintiffs whose cases should be judged under the rule of reason from manipulating their claims to benefit from the per se illegality standard.¹³

It should be noted that a number of commentators have endorsed the *Matsushita* decision precisely because of its impact on predatory pricing claims. See, e.g. Austin, *supra* note 6, at 895 (“[*Matsushita* and *Cargill*] have had a significant and salutary effect on the lower courts’ analysis of Section 2 cases alleging predatory pricing”); Fisher, *Matsushita: Myth v. Analysis in the Economics of Predation*, 64 CHI.-KENT L. REV. 969, 970 (1988) (asserting that the Supreme Court “recognized the [predatory pricing] fairy tale for what it was”); Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052 (1986) (reviewing 55 lower court predatory pricing cases between 1975 and 1986 and concluding that “not one of the cases is a real predatory pricing case.”); see also Calvani & Lynch, *Predatory Pricing After Matsushita*, 1 ANTITRUST 22 (1986) (considering future of predatory pricing law after *Matsushita*). As we argue in part III, *infra*, the *Matsushita* Court’s extensive discussion of predatory pricing, while central to the holding in that case, was in large measure incidental to the standard the case set for future antitrust decisions. See *infra* notes 101–102 and accompanying text.

¹² 465 U.S. 752 (1985). One author has described *Monsanto* accurately as “the true naissance of the *Matsushita* standard.” Note, *The Evolving Summary Judgment Standard for Antitrust Conspiracy Cases*, 12 J. CORP. L. 503, 533 (1987) [hereinafter Heninger]. For a differing view, suggesting that taking *Monsanto* out of the context of vertical restraints was inappropriate, see Calkins, *supra* note 8, at 1125.

¹³ While commentators have discussed the extent of the *Matsushita* holding, see Collins, *supra* note 8, at 501–11 (arguing against a broad reading); cf. Heninger, *supra* note 12, at 533 (the Court “has not given any indication of the circumstances under which this approach is appropriate.”), and how the decision has been applied, see DeSanti & Kovacic, *supra* note 5, at 610–11, no one to date has attempted a systematic study of the circumstances under which the Court’s reasoning should apply. We attempt such an analysis *infra* part III.

In application, though, the Court's standard is unravelling fast. Some courts have interpreted the *Monsanto-Matsushita* rule to require a heightened summary judgment standard in all antitrust cases, whether or not the per se rule is invoked. For example, in *In re Apollo Air Passenger Computer Reservation Systems*,¹⁴ the district court held that, to survive summary judgment, every antitrust plaintiff must "exclude the possibility that defendant's conduct was consistent with competition."¹⁵ Other courts have made the application of the rule turn on distinctions between "direct" and "indirect" evidence of conspiracy.¹⁶ Still others have read the rule as an invitation to evaluate the plaintiff's economic theories themselves on summary judgment.¹⁷

This doctrinal confusion is unfortunate and unnecessary. In this article, we provide a framework for applying the *Monsanto-Matsushita* rule that is based on the context and reasoning of the decisions themselves, and that finds support in subsequent Court pronouncements on the subject. We believe that the Court had two basic goals in the *Monsanto* and *Matsushita* cases: to avoid abuse of the antitrust laws by plaintiffs who attempt to gain the benefit of the per se rule by alleging a conspiracy; and to protect competition by deterring claims which characterize procompetitive conduct as an antitrust violation. The *Monsanto-Matsushita* rule ought to be applied only when both of these concerns are present—that is, when a plaintiff seeks to characterize as illegal per se conduct that is likely to be procompetitive. In addition, *Matsushita* further limits the scope of this rule by requiring that the plaintiff's claim be implausible before the higher summary judgment standard is applied. We proceed to demonstrate how our interpretation of the *Monsanto-Matsushita* rule would apply

¹⁴ 1989-2 Trade Cas. (CCH) ¶ 61,736 (S.D.N.Y. Aug. 28, 1989).

¹⁵ *Id.* at 6.

¹⁶ See *infra* note 138 and accompanying text (cases reading the rule as drawing a bright line between direct and indirect evidence of conspiracy).

¹⁷ See *infra* note 132 and accompanying text (cases applying *Matsushita* where plaintiff's claim is implausible under economic theory).

to different types of antitrust claims. Finally, we evaluate judicial performance to date in applying the rule.

Part II of this article will discuss the *Matsushita* and *Monsanto* opinions, briefly reviewing the facts of those cases and focusing on the Court's language and reasoning. In part III, we propose what is, in our view, the most appropriate reading of the *Monsanto-Matsushita* rule.¹⁸ We argue that *Matsushita* served the limited purpose of refining the broader *Monsanto* standard in a factual context that is unlikely to recur. We rely, therefore, on *Monsanto* for the general parameters of the Court's summary judgment doctrine. We conclude that an expansive reading of *Matsushita*—that is, one that takes the decision out of its factual context—is inappropriate.

Finally, in part IV, we examine a number of lower court cases that have interpreted and applied *Matsushita*, concentrating on those cases that have given the case an expansive interpretation. The reasoning of cases on both sides of this dispute will be examined, with particular attention paid to the congruence between the reasoning of the Supreme Court in *Monsanto* and *Matsushita* and the results actually achieved in the lower courts. Analysis of these cases leads us to conclude that neither "side" has it exactly right, and that lower courts could benefit from the systematic evaluation and framework that we suggest for the *Monsanto-Matsushita* rule.

¹⁸ While DeSanti & Kovacic, *supra* note 5, at 609, provide a comprehensive evaluation of lower court decisions interpreting *Matsushita*, their paper is largely descriptive rather than normative. By contrast, we suggest what we believe is the most appropriate way for courts to read *Matsushita*. In spite of the abundant literature on the subject, particularly in the wake of *Matsushita*, to the best of our knowledge the reading we suggest is new.

II. *Monsanto* and *Matsushita*: summary judgment in an antitrust context

Until recently, summary judgment was of limited utility to defendants in antitrust cases. In *Poller v. Columbia Broadcasting System*, the Supreme Court made clear its support for a judicial "hands-off" approach to antitrust claims: "We believe 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."¹⁹ While the *Poller* Court did not explain how "sparingly" summary judgment was to be used in antitrust cases, some of its language²⁰ indicates that it would rarely be effective as a procedural device for taking antitrust issues away from the trier of fact.²¹

¹⁹ 368 U.S. 464, 473 (1962); *accord* *Norfolk Monument Co. v. Woodlawn Mem. Gardens*, 394 U.S. 700, 704 (1969). It is interesting to note a grammatical ambiguity in the language of these cases. There are two possible readings of the quoted passage. First, it can be read as holding that summary judgment should be used sparingly in all antitrust cases because they contain credibility issues, hostile witnesses, etc. Alternatively, the Court could have meant to use summary judgment sparingly only in those antitrust cases where the listed elements (motive, intent, hostile witnesses, etc.) are present. Indeed, the absence of a comma after "complex antitrust litigation" suggests the latter interpretation. In any event, the Court never took steps to resolve this ambiguity, at least in that era.

²⁰ *E.g.* 368 U.S. at 472 ("It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that it is quite clear what the truth is."); *id.* ("All of this may not be sufficient to warrant the finding that Poller contends for on this charge, but it does indicate more than fantasy"). Obviously, broad application of these phrases as tests (particularly the "fantasy" standard) would leave virtually no room for summary judgment in antitrust cases.

²¹ Until recently, this apparently has been the case. *See* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 765 (1974); Louis, *Summary Judgment and the Actual Malice*

In 1984, after a long hiatus, the Supreme Court returned to the issue of summary dispositions in antitrust cases in *Monsanto Co. v. Spray-Rite Corp.*²² Spray-Rite, a distributor of herbicides for Monsanto, was terminated in 1968, allegedly for discounting resale prices. Spray-Rite sued, alleging that Monsanto had conspired with a number of its other distributors to fix the resale

Controversy in Constitutional Defamation Cases, 57 S. CAL. L. REV. 707, 710 n.21, 721 (1984) and cases cited therein. Louis is quite critical of these limits on summary judgment, and in fact cites the unwillingness of courts to grant summary judgment in antitrust cases as one of the most significant problems with the Federal Rules. Louis, *supra* note 8, at 1030.

Only one Supreme Court case from this era upheld a grant of summary judgment in an antitrust case. In *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253 (1968), the Court upheld a grant of summary judgment for an antitrust defendant in spite of the plaintiff's evidence of conspiracy, largely because of the perceived inadequacy of that evidence. While the plaintiff had produced some evidence of conspiracy, the Court relied on the fact that "the record in this case contains an overwhelming amount of . . . contrary evidence of Cities' motives." *Id.* at 277. As a result of this evidence, the Court concluded that the inference of conspiracy was less probable than the contrary inference of independent business conduct. *Id.* at 280.

It is interesting to note that *Cities Service* is the only case from this era that *Matsushita* even mentions. See 475 U.S. 574, 586-88 (1986). *Cities Service* does indeed set the stage for *Matsushita's* theory of economic plausibility. The *Cities Service* Court distinguishes *Poller* on the grounds that "[i]n *Poller* the competitive relationship between CBS and the plaintiff was such that it was *plausible* for the plaintiff to argue that CBS had embarked on a plan to drive him out of business." 391 U.S. at 285 (emphasis added). Nonetheless, even *Cities Service* was a long way from the *Monsanto-Matsushita* rule. Compare *id.* at 277 ("undoubtedly, given no contrary evidence, a jury question might well be presented . . . notwithstanding that such a failure to deal conceivably might also have resulted from a whole variety of non-conspiratorial motives") with *Matsushita*, 475 U.S. at 588 ("To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.").

²² 465 U.S. 752 (1984). A brief but useful discussion of the facts and history of *Monsanto* may be found in Heninger, *supra* note 12, at 516-22.

price of herbicides and to terminate the plaintiff.²³ The plaintiff's claim survived a motion for directed verdict, and prevailed before a jury.²⁴ Monsanto appealed the denial of directed verdict to the Seventh Circuit Court of Appeals, which affirmed.²⁵ Monsanto then appealed again to the Supreme Court.²⁶

The Supreme Court affirmed the verdict, but rejected the Seventh Circuit's reasoning. The Court began by noting two "important distinctions that are at the center of this and any other distributor-termination case."²⁷ Those distinctions are, first, between concerted action to terminate a distributor, which is illegal at least in some cases,²⁸ and individual action, which is

²³ 465 U.S. at 757.

²⁴ *Id.* at 758.

²⁵ *Spray-Rite Serv. Co. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982).

²⁶ Thus, unlike most other cases discussed in this article, *Monsanto* did not arise on a defense motion for summary judgment, but rather on a motion for directed verdict. This does not affect our analysis, because the standards for granting the two motions are virtually identical. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). See R. MARCUS, M. REDISH & E. SHERMAN, *CIVIL PROCEDURE: A MODERN APPROACH* 367 (1989) ("the inquiry made on the two motions is similar"); C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2713.1 (1983) ("Both motions . . . call upon the court to make basically the same determination"); but cf. *Heninger*, *supra* note 12, at 509 n.54 (citing circuit court cases before *Liberty Lobby* that hold a plaintiff to a higher standard in directed verdict motions). In any event, *Monsanto* is relevant both as evidence of the Court's concerns in the antitrust field and because its language was adopted two years later in *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

²⁷ 465 U.S. at 760-61.

²⁸ Concerted action to terminate a distributor is illegal per se if it is part of a conspiracy to fix retail prices, *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 404-409 (1911), but is judged under the rule of reason if it results solely from concerted nonprice restrictions. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 (1977).

afforded a safe harbor by the courts.²⁹ Second, the Court distinguished between concerted action imposing price restraints and actions imposing nonprice restraints.³⁰ After *Continental T.V., Inc. v. GTE Sylvania, Inc.*,³¹ only the former is per se illegal; the latter is judged under the “rule of reason.”

The Court considered these distinctions particularly important, since they affected the legal standard to be applied at trial. If a plaintiff were allowed to infer a conspiracy to set resale prices from highly ambiguous evidence, it could invoke the per se standard, and “there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.”³² A corollary problem with allowing such an inference of conspiracy, in the Court’s view, was that it “could deter or penalize perfectly legitimate conduct”—namely, the independent action protected by *Colgate*.³³

Thus, the *Monsanto* Court required “something more” from a plaintiff alleging a vertical conspiracy to fix retail prices. Specifically, it demanded “evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.”³⁴ Such evidence could be direct or

²⁹ See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

³⁰ 465 U.S. at 760–61.

³¹ 433 U.S. 36 (1977); see *supra* note 28. As we discuss in more detail in part III, *infra*, these distinctions are crucial to understanding the standards the Court set forth in *Monsanto* and *Matsushita*.

³² 465 U.S. at 763.

³³ *Id.* at 763, 764. This overdeterrence problem is particularly acute in antitrust cases because antitrust plaintiffs can get treble damages upon proof of a violation. Clayton Act § 4, 15 U.S.C. § 11 (1982). As the Court put it, allowing such inferences to stand alone would “inhibit management’s exercise of its independent business judgment.” 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

³⁴ 465 U.S. at 764. It is this sentence, portions of which were quoted in *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S.

circumstantial; the Court was merely concerned about questionable inferences of conspiracy from dealer complaints.³⁵ The Court quite naturally believed that direct evidence of conspiracy would be more probative than circumstantial evidence.³⁶ In fact, the Court went on to find that ample evidence, both direct and circumstantial, existed in *Monsanto* to support Spray-Rite's resale price conspiracy theory.³⁷ It did not, however, hold that direct evidence was always sufficient (or necessary) to overcome this higher standard of proof. That issue was left to be resolved in *Matsushita*.

In choosing to limit the inferences that could be drawn from ambiguous evidence of conspiracy, the *Monsanto* Court appears to have been motivated by two interrelated concerns: the ease with which a plaintiff could benefit from a per se rule by alleging a price conspiracy,³⁸ and the likelihood that such a rule would deter procompetitive business conduct.³⁹ It would therefore seem rational in interpreting this decision to take note of the presence or absence of these two elements: the applicability of a per se rule, and the "error costs" of possibly punishing legitimate competition by mistaking it for an antitrust violation.⁴⁰ These

574, 588 (1986), which encapsulates the new summary judgment standard, and which has created the firestorm of controversy surrounding *Matsushita*.

³⁵ 465 U.S. at 763-64.

³⁶ *Id.* at 763-65.

³⁷ *Id.* at 765-68.

³⁸ See *supra* note 32 and accompanying text; see also *Business Elec. Corp. v. Sharp Elec. Co.*, 485 U.S. 717, 723 (1988) (describing a judicial "presumption" in favor of applying the rule of reason).

³⁹ 465 U.S. at 763; see *id.* at 764 ("To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.").

⁴⁰ For a discussion of error costs in the context of horizontal mergers, see Fisher, Johnson & Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777 (1989).

concerns are separate, although related. Misuse of the per se rule involves mischaracterizing defendants' actions as a conspiracy. Error costs, on the other hand, arise when a defendant is punished precisely because it competed vigorously. Error costs can (but need not) arise in the context of a conspiracy. In this limited sense, therefore, the *Monsanto* decision is fact-specific.⁴¹ In part III, we discuss in greater detail the circumstances in which this heightened evidence standard ought to be applied.

Two years later, in *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*,⁴² the Supreme Court used a similar approach in reviewing a motion for summary judgment. In *Matsushita*, a group of American corporations that sell consumer electronic products alleged that their 21 Japanese counterparts had engaged in a 20-year conspiracy to price below cost in the United States in the hope of expanding market share.⁴³ The district court entered summary judgment for defendants, reasoning that what evidence of conspiracy the plaintiffs did present was not direct, and any inference of conspiracy that could be drawn from such evidence

⁴¹ We do not mean to suggest by this that the decision should be confined to its particular factual circumstances. For an example of this error, see *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 600 (1986) (White, J., dissenting) ("*Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury."). Indeed, in part III we suggest a test for the general applicability of the *Monsanto-Matsushita* rule. We do claim that the *Monsanto* opinion should be interpreted in light of the concerns it raises, rather than applied across the board to all antitrust cases. While this suggestion might seem uncontroversial in the abstract, as we demonstrate in part IV it has been anything but that in practice.

⁴² 475 U.S. 574 (1986).

⁴³ *Id.* at 577-78. This alleged predatory pricing conspiracy, which would necessarily be unprofitable in the short term, was linked to a conspiracy by the same defendants to charge higher prices in Japan, according to the plaintiffs. *Id.* at 583-84.

was simply not plausible.⁴⁴ The court of appeals reversed, concluding that an inference of conspiracy could be drawn from the facts as presented to the district court.⁴⁵

The Supreme Court reinstated summary judgment for the defendants. It first identified plaintiff's sole antitrust theory as that of a long-term conspiracy among all Japanese market participants to price predatorily.⁴⁶ Since the plaintiffs claimed the

⁴⁴ *In re Japanese Elec. Prods. Antitrust Litigation*, 513 F. Supp. 1100, 1125-27 (E.D. Pa. 1981). The district court explicitly considered what competing inferences could more reasonably be drawn from the same evidence, an approach in apparent conflict with the then-existing rules of summary judgment. See *Norfolk Monument Co. v. Woodlawn Mem. Gardens*, 394 U.S. 700, 704 (1969); *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464, 473 (1962).

⁴⁵ *In re Japanese Elec. Prods. Antitrust Litigation*, 723 F.2d 238, 304-311 (3d Cir. 1983). For a discussion of the fascinating details of the litigation itself, see Elzinga, *Collusive Predation: Matsushita v. Zenith*, in *THE ANTITRUST REVOLUTION* 241 (J. Kwoka, Jr. & L. White eds. 1989).

⁴⁶ 475 U.S. 574, 583-85 (1986). In so doing, the Court dodged one interesting issue entirely and tackled another only summarily. First, the Court dismissed all the nonpredatory elements of plaintiffs' allegations—including several which suggested that the Japanese firms had created a cartel to raise prices, both by the use of price and nonprice restraints, see 723 F.2d at 310—on the grounds that a competitor could not be injured by such a conspiracy, and therefore could not have standing to recover damages. 475 U.S. at 583. In so doing, the Court touched—without great consideration—on one of the fiercest debates in antitrust law today, that of standing to bring an antitrust action. See *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104 (1986); *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). The *Matsushita* opinion suggests that competitors have standing only to allege pricing below cost. This limitation, combined with the Court's evident distaste for predatory pricing claims in general, see *infra* notes 48-55 and accompanying text, may well mean that competitors will play only a minor role in enforcing antitrust law in the future. This, and not the oft-cited summary judgment standard, justifiably might be viewed as the most enduring aspect of the *Matsushita* decision.

Second, the Court disposed of the issue of what conduct constitutes predatory pricing simply, by asserting that "predatory pricing means pricing below some appropriate measure of cost." 475 U.S. at 584-85 n.8 (citing *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 698-

benefit of the per se rule (by alleging a conspiracy in violation of section 1), and since what might be termed “error costs” are uniquely high in the context of an alleged predatory pricing conspiracy, the Court applied the *Monsanto* standard: to survive summary judgment, plaintiffs must “present evidence that tends to exclude the possibility that the alleged conspirators acted independently.”⁴⁷

This application of *Monsanto* seems clearly to be justified. The plaintiffs in *Matsushita* alleged that the defendants were cutting their prices. While such price cutting may in certain circumstances be evidence of predatory pricing, it may also be what the Court termed “the very essence of competition”—reducing prices in fierce competition for business with other suppliers.⁴⁸ The Court was clearly concerned with deterring pro-competitive conduct by erroneously finding a predatory pricing conspiracy: “mistaken inferences in cases such as this one are

702 (1967)). While the Court noted the substantial academic literature that has developed over how to define “cost” for predatory pricing purposes, 475 U.S. at 585 nn.8–9; see Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 709–18 (1975) (developing short-run average variable cost as a surrogate for marginal cost in predatory pricing cases), it did not resolve that conflict by settling on an appropriate measure of cost, claiming that “[w]e need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case.” *Matsushita*, 475 U.S. at 585 n.8. It is not clear what the Court meant by this statement, unless it intended to suggest that a conspiracy to set prices is illegal regardless of the price set. See *F.T.C. v. Superior Court Trial Lawyers Assn.*, 110 S. Ct. 768, 774–78 (1990) (reasonableness of prices no defense to per se rule against conspiracies). In any event, the Court has continued to dodge the issue of when a price is predatory. See *ARCO v. USA Petroleum Co.*, 110 S. Ct. 1885, 1893 n.10 (1990); Calkins, *supra* note 1, at 47–49. As a corollary, of course, the Court refused to decide the closely related issue of whether “limit pricing”—pricing above marginal cost but with intent to predate—can ever violate the antitrust laws. 475 U.S. at 585 n.9.

⁴⁷ *Id.* at 588, quoting *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752, 764 (1984).

⁴⁸ *Id.* at 594.

especially costly, because they chill the very conduct the antitrust laws are designed to protect.’’⁴⁹

Such a danger was particularly great in *Matsushita*. Predatory pricing is linked to monopolization, and therefore normally arises in the section 2 context. Section 2 cases are subject to the rule of reason,⁵⁰ which means that a defendant will have a chance to defend its conduct as procompetitive. Because the plaintiffs in this case alleged a conspiracy to price below cost, however, their claim arises under section 1 and is subject to a per se rule.⁵¹ Thus, the very fact that makes plaintiffs’ claim less plausible as a matter of economic theory⁵²—that several competitors were required to act together against their short-run self-interest—makes it far more likely to succeed in court, because a per se standard will be applied if an agreement is found.

The *Matsushita* Court found that the potential for such error costs affects the strength of the evidence plaintiffs must produce to survive a motion for summary judgment. The Court once again cited *Monsanto*: “In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is

⁴⁹ *Id.*

⁵⁰ 15 U.S.C. § 2 (1982). While not the original interpretation of the Sherman Act, this rule was established firmly as long ago as 1911. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60–61 (1911).

⁵¹ 15 U.S.C. § 1 (1982). *See* 475 U.S. at 584–85. This is true even where the conspiracy or combination is one to set maximum rather than minimum prices. *Albrecht v. Herald Co.*, 390 U.S. 145, 152–53 (1968); *Kiefer-Stewart v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). The Court recently reaffirmed the application of the per se rule to maximum price fixing (both horizontal and vertical) in *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 342–48 (1982).

⁵² *See infra* notes 62–67 and accompanying text.

often to deter procompetitive conduct.”⁵³ It seemed reasonable to the Court to limit inferences in favor of antitrust plaintiffs where such inferences entailed significant risks of error.⁵⁴ The presence of both the per se rule and high error costs associated with claims of predatory pricing conspiracies compelled the Court to require evidence tending “to exclude the possibility that petitioners underpriced respondents to compete for business.”⁵⁵

As *Monsanto* demonstrated incontrovertibly, though, applying this standard does not end the inquiry.⁵⁶ In *Matsushita*, the plaintiffs did present evidence of a conspiracy by Japanese electronics manufacturers to raise prices and limit output in Japan.⁵⁷ The *Matsushita* Court, however, did not accept this evidence as automatically satisfying the higher standard of proof of a conspiracy to lower prices in the United States. Instead, it evaluated this evidence to determine whether it presented a plausible claim of conspiracy (and thus a plausible argument for the application of the per se rule). The Court concluded that the evidence plaintiffs had presented was insufficient to meet the

⁵³ 475 U.S. at 593 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762–64 (1984)). As discussed below, *see infra* notes 101–102 and accompanying text, economic implausibility plays a limited role in the Court’s doctrine. That economic implausibility should not be confused with the Court’s (admittedly unfortunate) use of the word implausible to describe the inferences here.

⁵⁴ 475 U.S. at 593–95.

⁵⁵ *Id.* at 597. It is useful to compare this standard to the standard the Court concedes is traditionally applicable in deciding a summary judgment motion, even in an antitrust case; namely, whether “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” 475 U.S. at 587 (citing *First Nat’l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

⁵⁶ *Monsanto* found for the plaintiffs even applying this higher standard of proof. 465 U.S. 752, 764–68 (1984).

⁵⁷ 475 U.S. at 583–84.

Monsanto-Matsushita rule because plaintiffs' claim was implausible.⁵⁸

The Court noted its initial skepticism concerning any predatory pricing claim, citing a "consensus" among academic commentators that "predatory pricing schemes are rarely tried, and even more rarely successful."⁵⁹ The Court relied on the economic analyses of these academic commentators. For example, the Court found that "the success of such schemes is inherently uncertain"⁶⁰ because the predatory pricer is giving up short-run profits (by pricing below cost) in the hope of monopolizing the market and making such profits back in the future. Even if monopolization is successful, the predatory pricer must continue that monopoly for a substantial period of time, since "[t]he future flow of profits, appropriately discounted, must then exceed the present size of the losses" in order for it to come out ahead.⁶¹

In *Matsushita*, the factual circumstances made plaintiffs' predatory pricing claim even less than normally believable, for several reasons. First, plaintiffs alleged not that a single firm was using predatory pricing to monopolize the market, but that 21 independent firms had conspired together to cartelize it. As the

⁵⁸ *Id.* at 588-95.

⁵⁹ 475 U.S. at 589 (citing, among others, R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 149-55 (1978); Areeda & Turner, *supra* note 46, at 699; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); Koller, *The Myth of Predatory Pricing—An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 295-97 (1980)). While the Court's claim that this is the consensus view is certainly open to question, see Campbell, *Predation and Competition in Antitrust: The Case of Non-Fungible Goods*, 87 COLUM. L. REV. 1625 (1987); Ordovery & Wall, *supra* note 8, at 5-7, it is clear that a substantial number of commentators are in fact skeptical of predatory pricing claims. In addition to those cited by the Court, see Liebler, *supra* note 11, at 1052 (virtually all predatory pricing claims are false).

⁶⁰ 475 U.S. at 589.

⁶¹ R. BORK, *supra* note 59, at 145.

Court noted, “[s]uch a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator.”⁶² Indeed, since such a conspiracy has some of the classic features of a cartel, similar incentives to cheat exist at two different times: during the predatory pricing phase, when conspirators will have an incentive either to raise their prices or to cut production in order to avoid losses incurred on behalf of the cartel as a whole, and during the monopolization phase, when they will have the traditional incentive to cheat by expanding production.⁶³

The conspiracy alleged in *Matsushita* is even less plausible because of the length of time it has supposedly been in operation—well over 20 years.⁶⁴ Indeed, this conspiracy is still in the predatory pricing phase: that is, plaintiffs alleged that the defendants had been pricing below cost for over 20 years. Leaving aside the practical difficulties that inhere in maintaining a cartel for that length of time, especially with no return, there remains the problem that the conspiracy will have to continue substantially longer, with market power, in order to give defendants an adequate return. The Court quotes Judge Easterbrook’s law review article on the case as saying that “the cartel would need to last at least thirty years” to recoup the losses incurred to date.⁶⁵ While this is not strictly accurate,⁶⁶ it is clear that it would

⁶² 475 U.S. at 590.

⁶³ See, e.g., R. BLAIR & D. KASERMAN, *ANTITRUST ECONOMICS* 121–24, 141–45 (1985) (providing a clear economic explanation of cheating incentives in a cartel); but see D. GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 273–80 (1984) (rejecting the view that incentives to cheat destroy most cartels).

⁶⁴ 475 U.S. at 591 & n.13 (citing plaintiffs’ complaints as to the starting date of alleged conspiracy, which set dates as early as 1953).

⁶⁵ 475 U.S. at 591–92 n.15 (quoting Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 26–27 (1984)). While the Court does not commit itself to a number, it does say that “because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup.” 475 U.S. at 592.

⁶⁶ Judge Easterbrook apparently based this rough calculation on repayment through higher prices, adjusted for the time value of money. Easterbrook, *supra* note 65, at 26–27. This computation assumes a

take defendants a substantial period of time to recoup their losses. Indeed, market share data cited by the Court seem to suggest that the conspiracy must continue to predate for an even longer period, since it has not yet monopolized the market.⁶⁷

The Court concluded that the fact that the conspiracy has so far failed “is strong evidence that the conspiracy does not in fact exist.”⁶⁸ The Court found the inherent implausibility of plaintiffs’

rough equity in scale between the money lost during the predatory pricing phase and the money gained during the cartel phase. In fact, though, by nature of the conspiracy, defendants would have started with relatively small market share, and their individual (and collective) shares will have grown over the course of the conspiracy. Thus, each defendant would have been paying a smaller total cost in the predatory pricing phase, and receiving a greater total benefit in the cartel phase, thereby cutting the total recovery time. The precise recovery time would require calculations beyond the scope of this article. It is interesting that the Court apparently recognized this effect, *see* 475 U.S. at 593 n.17 (“The predators’ losses must actually *increase* as the conspiracy nears its objective . . . an increase in market share also means an increase in predatory losses.”) (emphasis in original), but failed to follow it through to its logical conclusion—that recovery time will be lessened for the same reason by an even greater amount.

⁶⁷ *See* 475 U.S. at 591 (conspirators’ collective market share rose from 20% to 50% over the course of the alleged conspiracy). Plaintiffs themselves alleged that the predatory pricing phase of the conspiracy was still ongoing, suggesting that defendants had not yet achieved market power.

⁶⁸ 475 U.S. at 592. Because of the sunk-costs problem, this is not necessarily the case. There is an alternative explanation that makes sense: a failed conspiracy to predate. If defendants had in fact intended to engage in a conspiracy along the lines plaintiffs suggest, and then 10 or 15 years later determined that it could never pay for itself, they would act rationally only by disregarding those past expenditures as sunk costs, and deciding whether the projected future expenditures to complete the conspiracy would be compensated by total recovery after monopolization. In this way, a seemingly irrational conspiracy, once entered into, may be rational to continue.

(footnote 68 continued)

allegations highly relevant, particularly where, as here, plaintiffs had relied solely on inferences to be drawn from ambiguous evidence.⁶⁹ The Court reasoned that the reasonableness of those inferences was determinative of whether the trier of fact reasonably could draw them and therefore whether summary judgment was appropriate. It concluded that “if the factual context renders respondents’ claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”⁷⁰

III. Applying *Monsanto-Matsushita*: the focus on meaning

A. *A proposed framework for applying Monsanto-Matsushita*

Our interpretation of the rules governing summary judgment in antitrust cases after *Matsushita* is relatively straightforward:

1. The traditional rules that apply to all summary judgment adjudications—whether there is a “genuine issue of material fact” for trial⁷¹—apply to most antitrust cases, and constitute a default rule.

Leaving aside the question of whether a failed conspiracy to reduce prices below cost has injured anyone but the participants, the Court may not have been particularly concerned about punishing a predatory pricing conspiracy, since the minimum-price cartel that must follow is independently illegal under § 1 of the Sherman Act, 15 U.S.C. § 1 (1982). *See, e.g.* 475 U.S. at 595 (suggesting that conspiracies of this sort “can be identified and punished once they succeed.”). While such continued antitrust liability may affect the possibility of success of a predatory pricing scheme *ex ante*, there are obvious reasons to stop the conspiracy before it achieves its immediate goal of cartelization. Markets in the real world are not normally characterized by immediate, perfect entry, and there is a lot to be said for breaking up such a conspiracy (if it exists) while other competitors can still take over.

⁶⁹ 475 U.S. at 588 (“Antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.”).

⁷⁰ *Id.* at 587.

⁷¹ FED. R. CIV. P. 56(c).

2. If a plaintiff's claim is of a type that would impose substantial error costs on society if wrongly decided—that is, where an erroneous finding of liability would punish or deter procompetitive conduct—and if that claim will be judged under the per se rule, then the plaintiff must meet a higher standard of proof. Specifically, the plaintiff must offer evidence that tends to exclude the possibility that the defendants acted independently.⁷²
3. If the plaintiff offers such evidence, then the court will evaluate that evidence based in part on whether the plaintiff's theory seems economically plausible.⁷³ This “second-order” plausibility inquiry is *Matsushita*'s refinement to the original *Monsanto* standard.

Two additional factors should be noted at the outset to avoid confusion. First, the heightened summary judgment test applies only to evidence that a plaintiff presents that raises the twin concerns of abuse of the per se rule and error costs. This largely means evidence of agreement in the horizontal context and evidence of agreement on prices in the vertical context. Other aspects of a plaintiff's case remain unaffected.⁷⁴ Second, “direct” evidence is neither necessary nor sufficient to meet the burden set by the *Monsanto-Matsushita* rule.⁷⁵

⁷² All actions subject to the per se rule involve a conspiracy by two or more market participants. Because proof of conspiracy is the central factor distinguishing such cases from rule of reason claims, the *Monsanto-Matsushita* rule is phrased in terms of claims that the defendants conspired.

⁷³ In a sense, this higher standard applies at trial as well. Because plaintiffs who do not meet the *Matsushita* standard where it applies will not survive summary judgment, and would in any event be subject to directed verdict if they did make it to trial, *see supra* note 26, as a practical matter only cases in which the evidence meets that higher standard will ever be evaluated by a jury.

⁷⁴ Thus, in *Palmer v. BRG of Georgia*, 111 S. Ct. 401 (1990), the Court properly did not apply the *Monsanto-Matsushita* rule to a horizontal market division case because there was no dispute over the existence of the agreement. *See infra* note 126 and accompanying text.

⁷⁵ *See Matsushita*, 475 U.S. at 582–83 (direct evidence of conspiracy in Japan insufficient to prove conspiracy in the United States); *Mon-*

As we discussed in part II, our interpretation finds support not only in the results reached by the Court in *Monsanto* and *Matsushita*, but, more importantly, in the Court's reasoning.⁷⁶ Attempts to divine the Court's meaning, however, need not rely solely on the language and factual circumstances of those cases, although we believe that such evidence is important. It is also significant that the three United States Supreme Court decisions since 1986 that rely upon *Monsanto* or *Matsushita* all do so in factual contexts quite similar to *Monsanto* and *Matsushita*.⁷⁷ The way in which the "*Monsanto-Matsushita* rule" is cited by the Court in subsequent cases is consistent with our reading of the scope of that rule.⁷⁸

In *Cargill, Inc. v. Monfort of Colo.*,⁷⁹ the Court concluded (for reasons not relevant here) that a competitor had standing to challenge a merger only if it alleged that the merged entity would engage in predatory pricing.⁸⁰ The Court rejected any predatory

santo, 465 U.S. at 765-68 (plaintiffs overcame heightened standard of proof).

⁷⁶ See *supra* notes 27-70 and accompanying text.

⁷⁷ See *infra* notes 79-96 and accompanying text.

⁷⁸ By explicating the Court's view of antitrust law and the role of summary judgment, we do not intend to assert that this is the only possible conclusion the Court could have drawn concerning these issues. See, e.g. Collins, *supra* note 8, at 491; Ordovery & Wall, *supra* note 8, at 5; Ponsoldt & Lewyn, *supra* note 8, at 575 (all criticizing the Court's decision). It is sufficient for our purposes to examine the Court's own reasoning in order to evaluate recent lower court decisions applying the *Monsanto-Matsushita* rule, and to predict future Court behavior.

⁷⁹ 479 U.S. 104 (1986).

⁸⁰ *Id.* at 113-17. The Court concluded that a competitor of the defendants would not be injured by a conspiracy to raise prices, and would in fact benefit from such a conspiracy, since its competitors would have reduced output and raised their prices. *Id.* Thus, only a conspiracy that lowered a competitor's prices could inflict "antitrust injury" upon Monfort.

pricing argument before it on procedural grounds,⁸¹ but went on to discuss predatory pricing in general in a footnote. The Court quoted *Matsushita* for the propositions that “predatory pricing schemes are rarely tried, and even more rarely successful,”⁸² and that in such cases “mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”⁸³ The Court drew from *Matsushita* the lesson that “[c]laims of threatened injury from predatory pricing must . . . be evaluated with care.”⁸⁴

The next year, in *324 Liquor Corp. v. Duffy*,⁸⁵ the Supreme Court held that a New York law allowing alcohol distributors to set resale prices was inconsistent with section 1 of the Sherman Act.⁸⁶ The New York Court of Appeals had upheld the statute, arguing that it was consistent with the Sherman Act in part because it helped prevent retail predatory pricing.⁸⁷ The Court made short work of this argument, citing *Matsushita* for the proposition that “predatory pricing schemes are ‘rarely tried, and

⁸¹ The Court concluded that Monfort had not alleged predatory pricing before the district court, and was therefore barred from alleging it before the Supreme Court. *Id.* at 119.

⁸² *Id.* at 121 n.17 (quoting *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

⁸³ *Cargill*, 479 U.S. at 121 n.17. (ellipsis in original).

⁸⁴ *Id.*

⁸⁵ 479 U.S. 335 (1987).

⁸⁶ *Id.* at 343. Since § 1 long has been read to make such resale price maintenance illegal per se in most cases, see *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 404–409 (1911), the conflict between the federal and state laws in this instance was obvious. The resolution of this case turned on whether the antitrust laws applied to conduct sanctioned by state action. 479 U.S. at 343–45; cf. *Parker v. Brown*, 317 U.S. 341 (1943).

⁸⁷ *J.A.J. Liquor Store v. New York State Liquor Auth.*, 64 N.Y.2d 504, 520 (1985).

even more rarely successful,'⁸⁸ and concluding in this case that "the possibility of success is practically nonexistent."⁸⁹

Both *Cargill* and *Duffy* demonstrate the Court's continuing preoccupation with the implausibility of predatory pricing claims.⁹⁰ Of course, implausibility was a factual predicate for the Court's holding in *Matsushita*. But it is significant for our purposes that the Court did *not* apply the *Monsanto-Matsushita* rule in *Cargill* and *Duffy*, even though both cases presented implausible claims similar in nature to those rejected by *Matsushita*. Under our interpretation of *Monsanto-Matsushita*, the reason for this seeming discrepancy is quite simple: neither *Cargill* nor *Duffy* involved efforts by plaintiffs to take advantage of the per se rule. Thus, while the Court noted the implausibility of the plaintiff's claims in each case, it did not require a higher standard of proof. Thus, contrary to the impression of some lower courts,⁹¹ implausibility alone should not be sufficient to trigger *Matsushita*'s higher standard of proof.

Finally, in *Business Elec. Corp. v. Sharp Elec. Corp.*,⁹² the Court decided that the rule of reason (rather than a rule of per se

⁸⁸ 479 U.S. at 343 n.5 (quoting *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

⁸⁹ *Duffy*, 479 U.S. at 343 n.5.

⁹⁰ While it is true that neither case involved an alleged conspiracy to price below cost, in both cases the factual circumstances contributed to the inherent implausibility of the predatory pricing claim. Thus, in *Cargill*, plaintiffs alleged that allowing a merger would lead the resulting firm to raise prices; an allegation that it would lower them as well seems highly unlikely, if not incoherent. 107 S. Ct. at 493-94. In *Duffy*, the state court conjectured that the statute might prevent predatory pricing, but provided no evidence that such pricing might actually take place in its absence. Indeed, New York law in that case limited liquor retailers to a single outlet, making an attempt to monopolize essentially impossible. 107 S. Ct. at 725 n.5. The reasoning of *Matsushita*—that the Court should be less willing to accept implausible economic theories—therefore seems fully applicable in this case.

⁹¹ See *infra* notes 154-179 and accompanying text.

⁹² 485 U.S. 717 (1988).

illegality) applied to a claim that a manufacturer and a dealer had conspired to cut off a second, discounting dealer, because the vertical agreement was not concerned solely with resale price maintenance.⁹³ This decision was simply the most recent in a line of Supreme Court rulings limiting the application of the per se rule to alleged vertical restraints.⁹⁴ The decision is significant not only for its holding, but for its open assertion that the Court presumptively favors a rule of reason standard in antitrust cases. For that proposition, the Court cited *Monsanto*: "Our approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard."⁹⁵ *Business Electronics* and the line of cases limiting the per se rule in the vertical restraints context therefore demonstrate the Court's continuing commitment to a rule of reason approach where an erroneous finding of antitrust liability may deter vigorous competition.⁹⁶

⁹³ *Id.* at 727-28.

⁹⁴ See, e.g. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (per se rule does not apply to vertical nonprice restraints), *overruling* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379-80 (1967) (per se rule applied to all post-sale restraints on distributors and resellers).

⁹⁵ *Business Electronics*, 485 U.S. at 726.

⁹⁶ *Business Electronics* may also be read as providing inferential support for the second-order nature of the economic implausibility evaluation. After setting up the presumptive rule of reason standard, the Court went on to hold that "departure from that standard must be justified by demonstrable economic effect." 485 U.S. at 726. While it is possible to read this test as abolishing the per se rule entirely by requiring proof of harm to competition (a rule of reason test) before invoking the per se rule, it is unnecessary to impute such circularity to the Court. An alternative reading of this language is that where the Court has set up the rule of reason as the governing standard of law, plaintiffs will not be able to evade that standard and claim the benefit of the per se rule unless their claims make economic sense. This reading is consistent with *Matsushita*, which upheld summary judgment against a claim which did not pass this test.

The distinction between per se and rule of reason analysis is critical to understanding the *Monsanto-Matsushita* rule. In cases that allege predatory pricing or resale price maintenance, the conduct at issue will receive very different treatment under the antitrust laws,⁹⁷ depending upon whether the plaintiff can fit the claims into the per se illegality box, rather than the rule of reason. Rule of reason analysis generally will require a plaintiff to prove that the defendant possesses market power and that its conduct has harmed consumers or competition. Further, defendants are entitled to justify their actions under the rule of reason. To avoid the substantial burdens of rule of reason analysis, plaintiffs will often craft their allegations in a manner that brings their claims within the purview of the per se rule. As a result, when antitrust law treats rather similar conduct differently because it results from a conspiracy, the *Monsanto-Matsushita* rule operates to require substantial proof of that conspiracy.⁹⁸

⁹⁷ Predatory pricing by an individual is analytically similar to a predatory pricing conspiracy. Indeed, for reasons noted above, *see supra* notes 62-67 and accompanying text, a predatory pricing conspiracy is harder to maintain and therefore less likely to occur than individual action. Nonetheless, predatory pricing alone is judged under the rule of reason and is therefore not illegal without proof of injury to competition. *See Wm. Inglis & Sons Baking v. ITT Continental Baking Co.*, 668 F.2d 1014, 1039-42 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). A predatory pricing conspiracy, by contrast, is judged illegal without regard to its potential for lessening competition.

In the area of vertical restraints, resale price maintenance creates a similar concern. As discussed *infra* note 123, both vertical price and nonprice restraints are motivated by similar concerns, including a desire to restrict free riding and promote interbrand competition. Nonetheless, such restraints are treated differently based on whether they involve price limits. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977). A second dimension to this problem is that even price restraints are per se legal if imposed unilaterally. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Thus, the difference between unilateral and conspiratorial action is particularly significant in this context.

⁹⁸ The Court is also concerned with the error costs associated with applying the per se rule erroneously. *See supra* notes 53-55 and

Thus, the *Monsanto-Matsushita* rule provides an important, if ancillary, weapon in the Court's battle against unwarranted antitrust claims. As long as the per se rule continues to exist—which seems likely⁹⁹—plaintiffs may be expected to attempt to obtain the benefits of the per se rule by alleging a conspiracy, even when such a claim may be quite implausible.¹⁰⁰ *Monsanto-Matsushita*'s tougher summary judgment standard, limited as it is to per se cases where there is reason for concern, provides the first line of defense against such “crossover” claims. The *Matsushita* case itself is a good example, since predatory pricing is usually alleged against individual firms and therefore judged under the rule of reason.¹⁰¹ But it was plaintiffs' allegations of conspiracy that gave rise to the possibility of per se illegal treatment. The Court went even further in *Matsushita* and crafted its second-order test, which evaluates the economic plausibility of a claim of conspiracy. By creating a stricter standard for plaintiffs whose claims are inherently implausible, the Court can “fine-tune” its application of the per se and reason rules to more specific types of claims.¹⁰²

accompanying text. Collins notes the Court's concern with error costs, and suggests that subsequent decisions by lower courts be read in that light. Collins, *supra* note 8, at 507–12 & n.93.

⁹⁹ It is important to note that in our interpretation, the need for the *Monsanto-Matsushita* rule is largely a function of the line between the per se rule and the rule of reason. If the Court were to abolish the per se rule entirely and judge all conduct on its competitive merits, there would be no need for the *Monsanto-Matsushita* rule, and we expect that it would disappear.

¹⁰⁰ For an interesting attempt to recharacterize § 1 claims as conspiracies to monopolize in order to benefit plaintiffs, see Crew, *Continuing Vitality of Pursuing “Traditional” Cases and New Litigation Theories*, 58 ANTITRUST L.J. 289 (1989).

¹⁰¹ Indeed, it is somewhat ironic that the very fact that made the plaintiffs' claim so implausible there—the fact that it alleged a vast conspiracy to lower prices—was also what brought it within the ambit of the per se rule. The *Matsushita* decision sought to prevent this sort of result because of its potential for abuse by opportunistic plaintiffs seeking to gain the benefits of the per se rule.

¹⁰² At first blush, it might appear that this theory would imply as a corollary that the Court should create a looser legal standard for claims

Such “fine-tuning” and sensitivity to the differences between traditional per se and rule of reason analysis can be seen in earlier Supreme Court cases as well. Over the past 10 years, the Court has developed an intermediate test, the “quick look” or “truncated rule of reason.”¹⁰³ This test evaluates market power and competitive justifications to a certain extent before deciding whether to impose a per se rule. We agree with Professor Calkins that the development of this new test provides antitrust law with needed flexibility.¹⁰⁴ The test may screen out some inappropriate conspiracy claims. To that extent, it may obviate the need for the *Monsanto-Matsushita* rule. However, as long as there is some benefit to plaintiffs from characterizing their antitrust claim as a conspiracy, the concerns raised by *Monsanto* and *Matsushita* will remain. We would therefore treat such “mixed” per se/rule of reason cases as per se cases for the purpose of applying *Matsushita*.¹⁰⁵

that are inherently plausible, but that are grouped under the rule of reason. In fact, however, the asymmetry in the Court’s treatment of these types of cases can be justified by the fact that the rule of reason, because it allows (indeed mandates) consideration of competitive impact of an alleged antitrust violation, contains its own built-in fine-tuning mechanism. The Court can (and has in a variety of fields, *see, e.g.* *National Collegiate Athletic Assn. v. University of Oklahoma*, 468 U.S. 85 (1984); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963)) condemned an anticompetitive act judged under the rule of reason, but it was very difficult before *Matsushita* to protect a benign act which fell within the ambit of the per se rule.

¹⁰³ *See, e.g.*, *National Collegiate Athletic Assn. v. University of Oklahoma*, 468 U.S. 85 (1984); *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Vogel v. American Soc’y of Appraisers*, 744 F.2d 598 (7th Cir. 1984); *General Leaseways, Inc. v. National Truck Leasing Assn.*, 744 F.2d 588 (7th Cir. 1984). For a discussion of this intermediate test, *see* Calkins, *supra* note 1, at 17–21.

¹⁰⁴ *See* Calkins, *supra* note 1, at 17–18.

¹⁰⁵ Of course, as we discuss below, *Matsushita* itself will not apply to all conspiracy claims. *See infra* notes 112–19 and accompanying text.

B. Applications of the proposed framework

What implications does our framework have for the future application of the *Monsanto-Matsushita* rule? The Court can be expected to apply the rule in situations where an alleged practice is subject to the per se rule and where the threat of false positives¹⁰⁶ is likely to deter procompetitive conduct that should not be discouraged. One category thus can be removed immediately from the scope of the rule: cases already judged under the rule of reason. There is no reason for the Court to apply the *Monsanto-Matsushita* rule in such cases, since the rule of reason itself provides the Court with a mechanism to weed out both implausible and socially risky claims. In this context, it is significant that both *Monsanto*¹⁰⁷ and, by implication, *Matsushita*¹⁰⁸ rely on the fact that the claims there would be judged under a per se rule. All Sherman Act section 2 cases, therefore, as well as Clayton Act section 7 cases¹⁰⁹ and those Sherman Act section 1 cases that are already judged under the rule of reason,¹¹⁰ should remain unaffected by *Matsushita*.¹¹¹

¹⁰⁶ That is, type II error (β) in statistics parlance—where the court finds an antitrust violation to have occurred, but none in fact occurred. See L. OTT & W. MENDENHALL, UNDERSTANDING STATISTICS 194–95 (4th ed. 1985).

¹⁰⁷ 465 U.S. at 763 (“it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment.”).

¹⁰⁸ See 475 U.S. at 584–85. The existence of a per se rule in *Matsushita* also underlies the Court’s decision, since under a rule of reason the Court could simply have used its implausibility and error costs theories to bar recovery on the merits.

¹⁰⁹ 15 U.S.C. § 18 (1982).

¹¹⁰ See *supra* note 1 and accompanying text (discussing the Court’s expanded use of the rule of reason in the vertical restraints area).

¹¹¹ Some commentators disagree and argue that the Court’s extensive discussion of the irrationality of predatory pricing in *Matsushita*

A second class of cases that should not be affected by the rule are those cases where there is no real danger of error costs. This is the necessary corollary of *Monsanto-Matsushita*. Where it is entirely plausible that defendants would benefit from an alleged violation of the antitrust laws, and where procompetitive conduct cannot easily be mistaken for the alleged violation, a rule of per se illegality is appropriate.

Traditional cartels engaging in horizontal minimum price fixing are a paradigm example. Cartelization is by no means implausible. Abundant examples of cartelization exist in the history of antitrust law, especially in the early part of that

means that the Court would apply the *Monsanto* standard to § 2 predatory pricing claims as well. See Watchman, *supra* note 6, at 622 ("there is nothing in the opinion to indicate any analytical difference between a predatory pricing claim under section 1 of the Sherman Act and one under section 2").

Our model challenges this assumption. We do not dispute the implausibility of many predatory pricing claims. While analysis of the factors examined by *Matsushita* contains some ambiguity, since unilateral predatory pricing is more rational than group predatory pricing and would be subject to the rule of reason at trial, it seems likely that the Court would reach a similar conclusion about the plausibility of claims of predatory pricing by individual defendants. Predatory pricing is a special case where error costs are concerned. While it might be possible for an inappropriate finding of antitrust liability to deter legitimate conduct in other contexts, nowhere else is there such a high likelihood of deterring procompetitive conduct. Because a plaintiff in a predatory pricing case is alleging that the defendant cut prices, the potential for punishing someone who did something beneficial to competition (as opposed to merely consistent with competition) is uniquely high. This is the point Easterbrook makes in his article. Easterbrook, *supra* note 65, at 26.

One should not conclude from this, however, that § 2 predatory pricing claims will be subject to the same summary judgment standard applied to § 1 claims. If the Court believes a § 2 predatory pricing claim is implausible, it can address that claim on the merits under the rule of reason standard. Only where a plaintiff claims the benefit of the per se rule in such a situation is the *Monsanto-Matsushita* standard triggered, because in that instance, once the plaintiff proves agreement, the trier of fact is not permitted to evaluate the efficient or procompetitive aspects of the defendant's behavior.

history,¹¹² and the motive for such a conspiracy is obvious.¹¹³ While some economists have questioned the stability of cartels,¹¹⁴ it is unquestionable that they are highly profitable if properly enforced. Allegations of cartelization are also highly unlikely to produce significant error costs from false positives.

The legal behavior that might be confused with a cartel is an oligopolistic interdependent pricing.¹¹⁵ Whether such parallel pricing is conscious¹¹⁶ or unconscious,¹¹⁷ it does not serve competi-

¹¹² E. FOX & L. SULLIVAN, ANTITRUST LAW 282-350 (1989) (citing cases); see also R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 39 (1976) ("cartels were a common phenomenon of American industry" at one time).

¹¹³ Basic economic theory teaches that "cartels may raise prices and profits sharply" by allowing a group of firms in an oligopolistic industry to exact some or all of the rents a monopolist could charge. D. GREER, *supra* note 63, at 263. Thus, a cartel is more profitable than simple oligopoly, and there is a strong incentive for market participants to set one up. See *id.* at 263-80; Asch & Seneca, *Is Collusion Profitable?* 1976 REV. ECON. & STAT. 1 (Feb. 1976) (yes).

¹¹⁴ R. BLAIR & D. KASERMAN, *supra* note 63, at 141-45; R. POSNER, *supra* note 112, at 52-54 (both focusing on the strong incentive of cartel participants to cheat by expanding production at the higher price or by discounting secretly to increase market share).

¹¹⁵ Such a scenario is characterized by escalatory price followership—all firms in an industry set their prices together. Such a situation can be distinguished from competition primarily in that prices tend to rise rather than fall together (suggesting that firms are responding to each other rather than market forces), and that prices are perfectly synchronized. Several authors have identified the airline industry as one in which interdependent pricing predominates. See, e.g. Lemley, *Structure and Conduct in the Airline Industry Since Deregulation* (unpublished thesis 1988); cf. Reed & Waldman, *Mergers and Air Fares: 'Contestable Markets' in the Airline Industry*, 20 ANTITRUST L. & ECON. REV. 15 (Fall 1989).

¹¹⁶ The traditional economic model of conscious parallelism is the Stackelberg Price Leadership model. This model assumes strategic decisionmaking on the part of market participants. Stackelberg proved that there is an incentive for each player to assume leadership, since supercompetitive rents are distributed asymmetrically in favor of lead-

(footnote 117 on next page)

tion policy by providing economic benefits to society, and thus there seems no particular reason to worry about overdetering interdependent pricing.¹¹⁸ For these reasons, the *Monsanto-*

ers. However, if each firm acts as a leader, neither benefits. Thus, an oligopoly with strategic behavior takes on the characteristics of a prisoner's dilemma (for the firms). W. NICHOLSON, *INTERMEDIATE MICRO-ECONOMICS AND ITS APPLICATION* 434-36 (1983); H. VON STACKELBERG, *THE THEORY OF THE MARKET ECONOMY* 195-204 (1952).

Of course, the Stackelberg model assumes a duopoly with equal distribution of power and access to information. It also assumes no collusion. If we relax these assumptions, it is possible that one firm could assume a natural leadership position. In such a circumstance, the Stackelberg model could present a viable picture of oligopolistic behavior. *Cf.* *Interstate Circuit Co. v. United States*, 306 U.S. 208 (1939). While the idea that conscious parallelism without actual collusion is illegal under the antitrust laws is probably dead, *see* Sherman, *supra* note 6, at 1133 ("it is now accepted antitrust doctrine that conscious parallelism, without more, is insufficient to avert a motion for summary judgment"), such behavior can hardly be characterized as procompetitive, any more than monopoly pricing is procompetitive. It is simply not illegal.

It is interesting to note that, contrary to what might appear a reasonable assumption, a Stackelberg equilibrium actually produces smaller total profits for market participants than a Cournot (non-leadership) equilibrium (discussed *infra* note 117). *See* W. NICHOLSON, *supra*, at 435 table 14A.1.

¹¹⁷ The Cournot-Nash equilibrium predicts the outcome of oligopoly pricing by firms aware of each other's starting positions, but that do not engage in strategic behavior. This equilibrium is stable, and is equivalent to all firms in a Stackelberg model assuming follower roles. W. NICHOLSON, *supra* note 116, at 432-34; A. COURNOT, *RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH* (1897). This equilibrium produces lower profits than if the firms had priced and set output collusively; hence the incentive to form a cartel. Nonetheless, it is clearly not as beneficial for society as a competitive solution.

¹¹⁸ There are cases in which horizontal restraints may be efficient. For example, a horizontal agreement setting price and quantity may substantially reduce transactions costs by serving as a clearinghouse for suppliers who might not otherwise produce efficiently. *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 4-5 (1979) (clearinghouse for copyright owners to license music nationwide); *cf.* *National Coll. Ath. Ass'n v. University of Okla.*, 468 U.S. 85, 88-94

Matsushita rule should not apply to horizontal minimum price-fixing.¹¹⁹

Putting these two categories aside, there remain a number of antitrust claims that would seem ripe for the application of the *Monsanto-Matsushita* rule. First, the rule should be applied in cases alleging a predatory-pricing conspiracy, the precise claim involved in *Matsushita* itself.¹²⁰ Predatory pricing is easily confused with vigorous competition. Further, the allegation that individual firms conspired to predate, rather than doing so independently, increases the economic implausibility of the claim. Thus, a higher summary judgment standard is warranted.

(1984) (organization scheduling competition between college football teams and bargaining for press coverage for the organization as a whole). A second example involves research and development joint ventures in the context of innovation. See Jorde & Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, 4 J. ECON. PERSPECTIVES 75 (Fall 1990); Jorde & Teece, *Innovation, Cooperation and Antitrust: Balancing Competition and Cooperation*, 4 HIGH TECH. L.J. 1 (1988). The Court has tended to treat such horizontal arrangements under the rule of reason, see *NCAA*, 468 U.S. at 100-101; *Broadcast Music*, 441 U.S. at 18-19; National Cooperative Research Act of 1984, 15 U.S.C. § 4302 (Supp. 1986); see also Wright, *The National Cooperative Research Act of 1984: A New Antitrust Regime for Research and Development Joint Ventures*, 1 HIGH TECH. L.J. 133, 137-44 (1986). Thus, the *Monsanto-Matsushita* rule does not (and should not) apply in such cases.

¹¹⁹ Private plaintiffs, particularly competitors, may find it difficult successfully to allege horizontal minimum price fixing, due to the Court's new antitrust injury requirement for standing. In *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1890 (1990), the Court asserted in dictum that, since a conspiracy to raise prices could only benefit competitors, "a competitor may not complain of conspiracies that set *minimum* prices at any level," quoting *Matsushita*, 475 U.S. at 585 n.8 (emphasis in original). Nonetheless, it is still significant that the *Monsanto-Matsushita* rule does not apply in those cases. Public enforcement of the antitrust laws, or private actions by noncompetitors, should suffer no such standing problem. Thus, by not applying the *Monsanto-Matsushita* rule to cartels, the Court has left some room for effective enforcement of § 1.

¹²⁰ 475 U.S. at 597-98.

A second obvious category to which the rule should be applied is a vertical conspiracy¹²¹ between manufacturer and dealer to set minimum resale prices. It was to this type of claim that *Monsanto* originally applied the rule.¹²² Resale price maintenance is per se illegal, and it implicates error costs that stem from the desirability of manufacturer control over distribution.¹²³

Third, the related practice of a limit-pricing conspiracy can safely be added to the list. Limit pricing is a form of predatory pricing in which prices never drop below costs. Thus, while predatory pricing has high error costs because it is hard to distinguish from competition, limit pricing is impossible to distinguish from competition.¹²⁴

¹²¹ Recall that resale price maintenance is legal if done independently; it is per se illegal only if part of a conspiracy. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); see *supra* notes 28–29.

¹²² 465 U.S. at 764. The Court reasoned that, since a conspiracy was illegal per se while independent action was legal per se, evidence of such a conspiracy must survive a high standard of proof because of the great error costs associated with punishing a manufacturer for terminating a dealer (a normal business practice). *Id.*; see *supra* notes 32–33 and accompanying text.

¹²³ A substantial body of economic literature discusses the efficiency of manufacturer control. See, e.g., R. BORK, *supra* note 59, at 280–98; R. POSNER, *supra* note 112, at 196–201. The basic theory behind such efficiencies is that interbrand competition is much more important to consumers than intrabrand competition. Giving manufacturers control over product distribution assures sale and service quality, prevents free-riding or deception under brand name advertising, and prevents discounters from taking short-term advantage which hurts the brand in the long run. R. POSNER, *supra* note 112, at 196–201; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Combination Decisions*, 75 COLUM. L. REV. 282, 294 (1975).

¹²⁴ Limit pricing is a scheme involving horizontal maximum price fixing. The difference between limit pricing and predatory pricing is that

Fourth, the rule ought to apply to a vertical maximum resale price maintenance conspiracy.¹²⁵ The analysis of such a conspiracy

the latter involves pricing below cost, while the former involves price reductions to a level which is still above cost. *See Areeda & Turner*, *supra* note 46, at 709-18. Thus, limit pricing is less dangerous to competition, and more likely to produce significant error costs, than is predation. Indeed, apart from elements of collusion, a limit pricing conspiracy is completely indistinguishable from vigorous competition.

The legal status of limit pricing is unclear. Two United States Supreme Court cases have applied a rule of per se illegality to maximum vertical price fixing, *see infra* note 125 and accompanying text, in instances where the conspiracy had horizontal elements as well. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). More recently, though, the Court has questioned not only whether limit pricing causes antitrust injury, but whether it is illegal at all. *USA Petroleum*, 110 S. Ct. at 1892-93 n.10, citing *Matsushita*, 475 U.S. at 585-86 & n.8.

If the Court continues to consider limit pricing illegal, and therefore a limit pricing conspiracy illegal per se, it seems an excellent choice for the application of the *Monsanto-Matsushita* rule. As noted above, the error costs associated with a limit pricing conspiracy are, if anything, greater than those associated with an allegation of predation. The Court has recognized that "rivals cannot be excluded in the long run by a nonpredatory maximum price scheme unless they are relatively inefficient," *USA Petroleum*, 110 S. Ct. at 1891 n.7, in which case they presumably would suffer the same fate under competition. And while *Matsushita* did not directly rule on the standard to be applied to limit pricing, the Court did mention in passing that "as a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as [limit pricing]." 475 U.S. at 585 n.9. This is the same sort of "strong inference" that has led in the past to invocation of the *Monsanto-Matsushita* rule.

¹²⁵ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) is the seminal case involving a vertical maximum price fixing (resale price "maintenance" in a loose sense) scheme. The Court there held that such a scheme was illegal per se, and it recently reaffirmed that conclusion in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982). While the Court to date has not applied the *Monsanto-Matsushita* rule to vertical maximum price fixing, the extension is a logical one for the Court. Setting a

is similar to that of vertical minimum resale price maintenance (the *Monsanto* case), but the parties are allegedly conspiring to reduce prices.

Finally, because many territorial division claims have both horizontal and vertical elements, we suggest that the *Monsanto-Matsushita* rule ought to apply to horizontal market division cases that include some vertical elements.¹²⁶

maximum resale price is an act perfectly consistent with competition, since it is a means for a manufacturer to prevent its dealers from charging monopoly profits at its ultimate expense. Vertical maximum price fixing is like horizontal maximum price fixing (limit pricing) in this respect. *See supra* note 124. Indeed, two Supreme Court cases contained elements of both vertical and horizontal maximum price fixing. *Mari-copa*, 457 U.S. at 348 n.18; *Kiefer-Stewart*, 340 U.S. at 213. Since maximum price fixing is, if anything, less dangerous to competition and punishing it a greater hazard to legitimate behavior than either limit pricing or minimum resale price maintenance, and since the *Monsanto-Matsushita* rule applied to both of those practices, it seems logical that it should apply to this practice as well.

¹²⁶ An agreement among horizontal competitors to divide markets by territory is illegal per se. *Palmer v. BRG of Georgia*, ____ U.S. ____, 111 S. Ct. 401, 402 (1990); *United States v. Topco Assoc.*, 405 U.S. 596, 606-608 (1972). A vertical agreement to do so, on the other hand, would be a vertical nonprice restraint judged under the rule of reason. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988). As noted above, *see supra* note 123, there are substantial efficiencies associated with vertical nonprice restraints, and thus there are error costs associated with mistakenly classifying a market division horizontal rather than vertical. This problem is particularly severe because many cases have both vertical and horizontal dimensions. *See, e.g., Palmer*, 111 S. Ct. at 401-402; *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

In its most recent pronouncement on the subject, the Supreme Court unanimously reaffirmed the per se rule against horizontal market division. *Palmer*, 111 S. Ct. at 402. Two things are notable about the case. First, the Court emphasized that the "purpose and effect" of the market division was to raise prices and reduce competition. *Id.* at 402-403. The division at issue there therefore took on many of the aspects of a cartel. Second, the Court reversed summary judgment for the defendants, citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) for the proposition that all inferences are to be drawn in the plaintiffs'

Those five practices basically exhaust the scope of likely application of the *Monsanto-Matsushita* rule. A second class of cases is indeterminate under our standard because the Court's analysis has tended to mix elements of the per se rule and the rule of reason. These cases include price discrimination, boycotts, and tying arrangements.¹²⁷ Because each of these claims requires some proof of market power, or injury to competition, or permits defenses and justifications, we would not extend *Monsanto-Matsushita* to such claims. Moreover, in those cases unilateral conduct is unlikely to be recharacterized by plaintiffs as a conspiracy in order to take advantage of per se rules. Any other practice reached by the antitrust laws is either treated under the rule of reason, or is not subject to the dangers that led the Court to invoke the *Monsanto-Matsushita* rule in the first place. And it is important to remember as well that it is possible to overcome the strict standard set up by the rule. Indeed, in *Monsanto*, the

favor. *Palmer*, 111 S. Ct. at 402 n.5. Nowhere did the Court even mention *Matsushita*. In *Palmer*, though, there was no dispute over the existence of a horizontal market division, only over how the law should treat it, so the *Monsanto-Matsushita* rule was inapplicable.

¹²⁷ It is not clear whether the Court would be willing to extend the *Monsanto-Matsushita* rule to these cases. In tying cases, the Court has created a market power hybrid in which the practice is "per se" illegal, but only if the defendant has a certain threshold of market power. *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 9-15 (1984). Price discrimination, on the other hand, is "per se" illegal, but subject to several affirmative defenses. The defenses of cost differentials and meeting competition, Robinson-Patman Act §§ 2(a)-(b), may reduce expected error costs somewhat, conceivably making the rule inapplicable. The existence of these defenses, and of the market power requirements in tying and boycotts, takes these cases out of the realm of the per se rule. In our opinion, the *Monsanto-Matsushita* rule should therefore be inapplicable.

The Eighth Circuit has applied *Matsushita* to price discrimination claims under Robinson-Patman in *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1343-46 (8th Cir. 1987), and it reaffirmed that conclusion in *Lomar Wholesale Grocery v. Dieter's Gourmet Foods*, 824 F.2d 582, 595-600 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). We are skeptical of this application of the rule.

very case that established the rule, the plaintiff prevailed before the Court even under the higher standard.¹²⁸

Thus, while the *Monsanto-Matsushita* rule is an important part of the Court's reworking of the antitrust laws in the past decade, its scope is by no means unlimited. Indeed, examination of the reasoning behind these two cases has shown that the rule applies only in five fairly narrow classes of antitrust violations. Part IV of this article will examine the treatment that *Matsushita* has received in the lower courts, with an eye towards critiquing those (numerically fewer) cases that have given the rule an expansive reading that we think is unwarranted.

IV. The *Monsanto-Matsushita* rule in the lower courts

While the United States Supreme Court is the "court of last resort" for antitrust claimants, as the system currently is constituted no one can expect access to that Court with any degree of confidence.¹²⁹ While the Court can be expected to articulate antitrust policy, the lower courts have the burden of carrying out those policies. Unfortunately, most lower courts left to interpret *Monsanto* and *Matsushita* have done so in ways which deviate—both in result and in reasoning—from the interpretation we suggest in part III. This divergence takes two forms: courts that have interpreted *Monsanto-Matsushita* narrowly, but not cor-

¹²⁸ 465 U.S. at 765. At least one lower court has applied the rule and nonetheless found for the plaintiffs as well, suggesting further that the rule is by no means insurmountable. *Tunis Brothers v. Ford Motor Co.*, 823 F.2d 49, 51 (3d Cir. 1987) (holding that *Matsushita* requires only a "reasonable inference" of anticompetitive conduct, and that such a reasonable inference was present in this dealer termination/resale price maintenance case). See also *infra* note 140 (citing other cases).

¹²⁹ The United States Supreme Court receives between 4,000 and 5,000 petitions for certiorari annually. This number of course excludes all parties who do not choose to pursue their case that far. From these, the Court hears between 200 and 300 cases on the merits per term. *The Supreme Court, 1987 Term: Leading Cases*, 102 HARV. L. REV. 143, 354 table II (1988). In other words, the Court hears about 6% of the cases presented to it.

rectly; and courts that have given the rule too expansive a reading. For several reasons, we are more concerned about the latter category.¹³⁰ Nonetheless, the fact that systematic errors are occurring on both sides suggests that the courts are foundering in their attempt to chart the waters of antitrust summary judgment.

A. Limited readings

The majority of lower courts interpreting *Matsushita* have read this new antitrust summary judgment standard narrowly.¹³¹ While we agree that the *Monsanto-Matsushita* rule is of limited applicability, we do not agree with the standards these courts have articulated. The courts generally have limited *Matsushita* in one of four ways. First, several courts have found *Matsushita* applicable only where the plaintiffs made economically implausible claims.¹³² As we noted in part III, such an approach essentially

¹³⁰ In part III, *supra*, we suggested that the *Monsanto-Matsushita* rule be given fairly limited application to a few specialized types of claims. As a result, as a statistical matter, the courts that have read *Matsushita* narrowly have more often achieved the correct result than those that applied the rule broadly. More importantly, because all these cases arise on summary judgment, the costs associated with making an error are asymmetrical. A plaintiff who loses his case at the summary judgment stage because of a broad application of the rule has lost irretrievably (barring appeal), while a defendant who loses because the rule is applied too narrowly has an opportunity to prevail at trial.

¹³¹ See *infra* notes 132–153 and accompanying text (discussing cases).

¹³² In *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir. 1987), plaintiff, who was denied a GMC dealer franchise, alleged that existing dealers in the area had conspired horizontally to deny him a franchise by using their local market power successfully to lobby GMC. The court refused to apply the heightened *Matsushita* standard, saying: “We need not resort to the type of learned treatises referred to in *Matsushita* to recognize that here, unlike in that case, there was a plausible motive for the alleged concerted action, i.e., to have one less competitor in a limited market.” Note that it is likely this

reverses that taken by the Court. In *Matsushita*, the Court first decided whether the higher standard of proof was appropriate, and then used implausibility only in applying that standard.¹³³ Second, at least one court has followed the reasoning of *Matsushita* and *Monsanto* by applying the higher summary judgment standard only where error costs are high.¹³⁴ As indicated below,

case would be within the rule under our interpretation. *See supra* notes 124–26 and accompanying text (discussing the confusion between horizontal and vertical market division).

In *Instructional Systems Dev. Co. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 646 (10th Cir. 1987), the court found the *Monsanto-Matsushita* rule inappropriate because the alleged practices there were not obviously economically costly to the conspirators as was the predatory pricing scheme alleged in *Matsushita*. The plaintiff there claimed that two competitors agreed to a product-based division of the market as part of a scheme to drive the plaintiff out of the market. The court found that plaintiff's theory's credibility was bolstered by the fact that the plaintiff actually was driven out of the market.

Most recently, in *Hayden Co. v. Siemens Med. Systems*, 879 F.2d 1005, 1019 (2d Cir. 1989), the court applied *Matsushita* to § 1 claims but not to § 2 claims. *Compare* the district court's opinion, 672 F. Supp. 724, 733 & n.12 (S.D.N.Y. 1987), in which the court found a resale price maintenance scheme to be plausible and therefore chose not to invoke *Matsushita*. This opinion, while showing a sensitivity to the importance of implausibility, is too restrictive in applying that concept. *See supra* notes 101–102 and accompanying text.

Interestingly, DeSanti & Kovacic, *supra* note 5, at 644–45, suggest that *Matsushita* has not significantly affected the success of predatory pricing claims, a result that is consistent with our views.

¹³³ *See supra* notes 101–102 and accompanying text.

¹³⁴ *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990). Four western states, including California, sued virtually all of the major oil companies, alleging that they had conspired to fix prices to dealers and to customers by coordinating and limiting discounts from a set price, called the tankwagon price. Applying *Matsushita's* error costs rationale with abundant reference to both *Matsushita* and *Monsanto*, the court concluded that “*Matsushita* establishes that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where

however, that court erred in elaborating the standards for applying the rule to particular cases.

Third, a few courts have narrowed the scope of the *Monsanto-Matsushita* rule by limiting its application to Sherman Act § 1 cases.¹³⁵ In addition, numerous cases have noted in passing the fact that the Court itself suggested the rule was limited to § 1 cases.¹³⁶ As we have noted, such a limit, while certainly consistent with the Court's test, provides a necessary but not a sufficient condition for applying the rule.¹³⁷ A large number of lower courts have distinguished *Matsushita* where the plaintiffs have produced direct evidence of a conspiracy, concluding that

to do so would have the effect of deterring significant procompetitive conduct." *Id.* at 439 (emphasis added). Judge Nelson's opinion discusses the *Monsanto-Matsushita* rule in depth, and is considered in more detail *infra* notes 141-53 and accompanying text.

¹³⁵ See *Hayden Co. v. Siemens Med. Systems*, 879 F.2d 1005, 1019 (2d Cir. 1989) ("the special hurdles of the *Monsanto-Matsushita* rule [are] directed by [their] terms only to § 1 conspiracies."), *Key Financial Planning v. ITT Life Ins. Co.*, 828 F.2d 635, 642-43 (10th Cir. 1987) (applying *Matsushita* standard to all § 1 cases involving ambiguous evidence, but conducting a separate inquiry not involving *Matsushita* for § 2 cases); *Instructional Systems Dev. Co.*, 817 F.2d at 639 (applying the *Matsushita* test to plaintiff's § 1 claims, but not to its § 2 claims), and *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 613 n.1 (9th Cir. 1986) (*Matsushita* standard does not apply to § 2 predatory pricing claim, where no conspiracy is alleged).

¹³⁶ *E.g. Arnold Pontiac*, 826 F.2d at 1335; *Tunis Bros. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987); *Hayden Co.*, 672 F. Supp. at 724; *Power Conversion v. Saft America*, 672 F. Supp. 224 (D. Md. 1987); *Broker's Ass't v. Williams Real Estate*, 646 F. Supp. 1110 (S.D.N.Y. 1986); *Apex Oil v. DiMauro*, 641 F. Supp. 1246 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 822 F.2d 246 (2d Cir. 1987). The language used in *Matsushita* itself indicated the rule's inapplicability to non § 1 claims. 475 U.S. at 588.

¹³⁷ See *supra* notes 112-19 and accompanying text (discussing classes of claims, such as cartels, which fall under § 1 but will not be subject to the *Monsanto-Matsushita* rule).

the rule did not apply in such cases.¹³⁸ We think that this approach, while understandable given some of the language in *Monsanto*, simply misses the point of *Matsushita*. *Matsushita* removed any lingering suspicions that direct evidence always would suffice to meet the *Monsanto* standard.¹³⁹ Finally, some courts have found that the plaintiffs presented evidence sufficient to overcome the higher standard *Matsushita* requires.¹⁴⁰ It is clear

¹³⁸ See, e.g. *Petroleum Products Antitrust Litigation*, 906 F.2d at 440 (“the concerns highlighted in *Matsushita* and *Monsanto* arise only in the context of whether to permit inferences from circumstantial evidence. Accordingly, the *Matsushita* standards do not apply when the plaintiff has offered direct evidence of conspiracy.”); *McLaughlin v. Liu*, 849 F.2d 1205, 1207 (9th Cir. 1988) (in *Matsushita*, “the Court was not speaking of direct evidence, but of circumstantial evidence.”); *Arnold Pontiac v. Budd Baer Inc.*, 826 F.2d 1335, 1338–39 (3d Cir. 1987) (limiting the *Matsushita* standard to cases of indirect evidence); *Instructional Systems, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 646 (10th Cir. 1987) (limiting the *Matsushita* standard to cases where the evidence is ambiguous and indirect); *Power Conversion, Inc. v. Saft America, Inc.*, 672 F. Supp. 224, 227–28 (D. Md. 1987) (finding *Matsushita* inapplicable because direct evidence of conspiracy exists).

¹³⁹ See *supra* notes 56–58 and accompanying text. Application of a “direct evidence” test is problematic in any event, largely because it is by no means clear what direct evidence is. For example, the plaintiffs in *Matsushita* presented “direct” evidence of another conspiracy by the defendants in that case, and asked the courts to draw an inference of a parallel conspiracy in their suit. 475 U.S. at 582. Would such evidence be considered “direct” enough to satisfy the *Matsushita* rule? Other examples of these practical problems abound.

¹⁴⁰ *Long Beach v. Standard Oil of Calif.*, 872 F.2d 1401, 1407 (9th Cir. 1989) (“an inference of collusive action reasonably and plausibly may be made” on the evidence here; noting that this case, unlike *Matsushita*, did not involve legitimate price competition or implausibility); *Harkins Amusement Ent. v. General Cinema Corp.*, 850 F.2d 477, 485 (9th Cir. 1988) (ambiguous evidence nonetheless sufficient to survive summary judgment under *Monsanto*), *cert. denied*, 109 S. Ct. 817 (1989); *Tunis Bros. v. Ford Motor Co.*, 823 F.2d 49, 51 (3d Cir. 1987) (stricter standard met by proof of a “reasonable inference” of anticompetitive conduct); *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 1990-2 Trade Cas. (CCH) ¶ 69,141 (D. Ariz. July 25, 1990) (plaintiff’s evidence of conspiracy survives *Matsushita* stan-

that the *Monsanto-Matsushita* rule should not operate in practice as an absolute bar to antitrust claims. In *Monsanto* itself, where the Court first developed the stricter evidence standard, it nonetheless found that the plaintiff had met that stricter standard with direct evidence of conspiracy.

One recent Ninth Circuit case deserves particular attention for its thoughtful consideration of the *Monsanto-Matsushita* rule. In *Petroleum Products Antitrust Litigation*,¹⁴¹ the Ninth Circuit reversed the district court's grant of summary judgment for several oil companies who were defending an antitrust action brought by the states of Arizona, California, Oregon and Washington.¹⁴² The plaintiffs alleged that the major oil producers had conspired to fix both wholesale and retail gasoline prices. The court's opinion firmly rejected the argument that the "tends to exclude the possibility" standard of the *Monsanto-Matsushita* rule applied in this case.¹⁴³

Petroleum Products is significant in this context for three reasons. First, the court adopts the error costs rationale of *Matsushita*, reasoning that the tougher summary judgment standard applies only where "mistaken inferences [may] chill the very conduct the antitrust laws are designed to protect."¹⁴⁴ The court concludes that "*Matsushita* establishes that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct."¹⁴⁵ Applying this interpretation of the *Monsanto-Matsushita* rule, the court found that

dard even though "more than one reasonable but competing inference can be drawn from the evidence in the record").

¹⁴¹ 906 F.2d 432 (9th Cir. 1990).

¹⁴² *Id.* at 436.

¹⁴³ *Id.* at 437-41.

¹⁴⁴ *Id.* at 439 (quoting *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

¹⁴⁵ *Petroleum Products*, 906 F.2d at 439.

evidence of interdependent pricing alone as proof of a section 1 claim would trigger the rule because it might punish legitimate competitive conduct.¹⁴⁶ Direct evidence of a conspiracy to raise prices, on the other hand, entailed no such error costs, and was therefore sufficient to withstand summary judgment under *Matsushita*.¹⁴⁷ Thus, the *Petroleum Products* decision picks up the error costs rationale from *Matsushita*, but wrongly associates the concept with the direct/indirect evidence dichotomy.¹⁴⁸

Second, and most important for our purposes, *Petroleum Products* specifically considered and rejected a reading of *Matsushita* that would give courts discretion to evaluate plausibility on summary judgment in all instances. After discussing *Matsushita* in detail, the court said:

We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible. Allowing the district court to make that decision would lead to a dramatic judicial encroachment on the province of the jury.¹⁴⁹

¹⁴⁶ *Id.* at 445 (“To permit an antitrust violation to be based on the sawtooth price pattern in this case, without more, would require a company making wholly independent pricing decisions to consider that the possible responses of its competitors might render it liable for treble damages. . . . It thus appears that permitting an inference of conspiracy from the parallel pricing evidence alone would result in an anticompetitive dislocation by distorting independent pricing decisions.”); see also *In re Beef Industry Antitrust Litigation*, 1990-2 Trade Cas. (CCH) ¶ 69,122 (5th Cir. Aug. 1, 1990) (finding *Matsushita* rule applicable to claims of conscious parallelism). As noted above, we think this conclusion is incorrect as a matter of substantive law. The “error costs” associated with parallel or interdependent pricing are in fact quite low. See *supra* notes 112-19 and accompanying text.

¹⁴⁷ See *Petroleum Products*, 906 F.2d at 450-60.

¹⁴⁸ *Id.* at 440. In short, *Petroleum Products* read the error costs rationale to refer to the chance an error would occur, while in fact it refers to the consequences of such an error.

¹⁴⁹ *Id.* at 438.

Instead, the court continued, “we think that the key to the proper interpretation of *Matsushita* lies in the Court’s emphasis on the dangers of permitting inferences from certain types of ambiguous evidence”—namely, those that entail large error costs.¹⁵⁰ The court also noted correctly that “*Monsanto* itself clearly indicates that circumstantial evidence may be sufficiently unambiguous to survive summary judgment,”¹⁵¹ a conclusion that would be difficult to reconcile with expanding *Matsushita* to change the summary judgment standard in all antitrust cases.

Unfortunately, the court limited the application of the rule to those cases where the plaintiff did not come forward with direct evidence of conspiracy, asserting that “the concerns highlighted in *Matsushita* and *Monsanto* arise only in the context of whether to permit inferences from circumstantial evidence.”¹⁵² Thus, while the decision in *Petroleum Products* was correct in refusing to apply the *Monsanto-Matsushita* rule to a cartel, it contains language that wrongly suggests that a plaintiff can survive the application of the rule by presenting *any* direct evidence. As discussed above, this ignores the holding of *Matsushita*, in which a plaintiff presenting direct evidence nonetheless lost on summary judgment.¹⁵³ Nonetheless, the *Petroleum Products* decision represents a significant step toward a correct interpretation of *Matsushita*, one that we hope will be endorsed by other courts.

B. Broad readings

Several recent lower court decisions have erroneously read the *Monsanto-Matsushita* rule to create a higher burden of proof in all antitrust cases. We think that these broad readings are unwarranted, and are based upon a misunderstanding of the facts of

¹⁵⁰ *Id.* at 439.

¹⁵¹ *Id.* (citing *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752, 764 (1984)).

¹⁵² *Petroleum Products*, 906 F.2d at 441.

¹⁵³ *See supra* notes 56–58 and accompanying text.

those cases and the Supreme Court's reasoning. Their impact is particularly pernicious because an error in favor of the defendant at this stage is not self-correcting.¹⁵⁴ We briefly examine several cases that have the potential for undermining the summary judgment rules in this way.

Perhaps the most flagrant abuse of the *Monsanto-Matsushita* standard is *In re Apollo Air Passenger Computer Reservation Systems*.¹⁵⁵ In that case, System One—the airline computer reservation system (CRS) owned by Texas Air—had challenged the exclusionary contracts used by Apollo—United's CRS—to maintain dominance in the CRS market, alleging that they constituted exclusive dealing arrangements with travel agencies and that they facilitated Apollo's monopolization of the market. Apollo had in turn claimed against travel agents who had switched to System One, alleging breach of contract.¹⁵⁶ While acknowledging the existence of contracts that might have excluded competition, Judge Pollack granted summary judgment for United, in essence because the contracts *could have been* consistent with permissible competition.¹⁵⁷

In so doing, Judge Pollack designed his own version of the *Monsanto-Matsushita* summary judgment standard. He held that

¹⁵⁴ If a defendant succeeds in his summary judgment motion, the plaintiff's claim is dead, while if the defendant fails, he still has other opportunities to win on the merits. This is why it traditionally has been hard to get summary judgment in antitrust cases. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), and why it remains difficult except in special circumstances (such as where a defendant will be unable to litigate effectively on the merits at trial because of the per se rule).

¹⁵⁵ 720 F. Supp. 1068 (S.D.N.Y. 1989). The authors wish to note that they were involved in this litigation on behalf of System One. The case settled while on appeal to the Second Circuit.

¹⁵⁶ *Id.* at 1071-72.

¹⁵⁷ *See id.* at 1077.

“an antitrust plaintiff must present evidence that tends to exclude the possibility that defendant’s conduct was consistent with competition.”¹⁵⁸ Further, “evidence”—not just circumstantial evidence, or ambiguous evidence, or evidence of conspiracy—“that is as consistent with permissible competition as with illegal anticompetitive conduct will not, standing alone, support an inference of violation of the antitrust laws.”¹⁵⁹ This standard applied not only to all Sherman Act section 1 claims, but to section 2 claims as well—in fact, to all antitrust claims.¹⁶⁰

Matsushita does not support this standard. On the contrary, *Matsushita* required plaintiffs to produce evidence “that tends to exclude the possibility that defendants acted independently.”¹⁶¹ In rephrasing the *Monsanto-Matsushita* test, Judge Pollack has expanded the standard from one that covered predatory pricing conspiracies to one that covers all antitrust claims. Judge Pollack’s decision ignores the point of the *Matsushita* opinion, where the Court analyzed the plausibility of predatory pricing conspiracies and the error costs associated with a mistaken finding of liability.¹⁶² Finally, despite *Apollo*’s lip service to *Celotex* and *Liberty Lobby*,¹⁶³ its reading of *Matsushita* would leave the antitrust summary judgment standard in gross disparity with the standard in normal cases, with no reason given for the difference.¹⁶⁴

¹⁵⁸ *Id.* at 1073.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 1077–79 (discussing System One’s § 2 claims).

¹⁶¹ 475 U.S. 574, 588 (1986).

¹⁶² *See supra* notes 53–55 and accompanying text. *Apollo* never even suggests that System One’s allegations were implausible. Thus, even under the *Monsanto* standard, System One should have survived summary judgment by presenting evidence to support its claims.

¹⁶³ *See Apollo*, 720 F. Supp. at 1072–73.

¹⁶⁴ Indeed, the court has set the summary judgment standard so high that if a plaintiff succeeds in surviving a defense motion for summary

A second lower court case that has expanded *Matsushita*, albeit somewhat less categorically than *Apollo*, is *Florida Fuels v. Belcher Oil Co.*¹⁶⁵ That case applied the *Monsanto-Matsushita* test (once again altered without explanation to require evidence excluding the possibility of permissible competition, not independent action)¹⁶⁶ to an essential facilities claim under section 2 of the Sherman Act. The court specifically held that “these standards are not limited to antitrust conspiracy actions.”¹⁶⁷ As noted above, though, there are good reasons that the Supreme Court did not apply the *Monsanto-Matsushita* rule to rule of reason cases.¹⁶⁸

Florida Fuels did recognize the importance of the factual context of the antitrust claim, noting that *Matsushita* applies only if “the antitrust claim is implausible or makes no economic sense.”¹⁶⁹ By missing the context within which the rule is applied in the first place, the *Florida Fuels* approach would give lower

judgment (by excluding the possibility that the defendant did not violate the antitrust laws), the plaintiff itself should be awarded summary judgment! These errors, plus a highly questionable issue preclusion ruling, *see Apollo* at 3, suggest that the court might merely have been sloppy, rather than engaging in a deliberate attempt to expand the *Monsanto-Matsushita* rule beyond its boundaries. Nonetheless, it is important to demonstrate the errors in Judge Pollack’s opinion, lest they be adopted by other lower courts. In addition, the fact that more than one lower court has made a similar error, *see infra* notes 165–79 and accompanying text, suggests the seriousness of the problem.

¹⁶⁵ 717 F. Supp. 1528 (S.D. Fla. 1989).

¹⁶⁶ *Id.* at 1531 (“in an antitrust claim, a plaintiff must present evidence that tends to exclude the possibility that defendant’s conduct was as consistent with permissible competition as with illegal conduct.”).

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* notes 106–111 and accompanying text.

¹⁶⁹ *Id.* at 1531, citing *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

courts a license to evaluate the plausibility of a plaintiff's economic theory in every case on summary judgment.¹⁷⁰

Two circuit court cases that have suggested a broad reading of the Court's test deserve mention here as well. In both *Indiana Grocery v. Super Valu Stores*¹⁷¹ and *McGahee v. Northern Propane Gas*,¹⁷² the courts applied the *Matsushita* standard to section 2 predatory pricing claims. Both courts noted the significance of error costs to the Court's analysis,¹⁷³ a factor that was certainly implicated by a predatory pricing claim. However, both courts also restated the rule in a way that suggested its applicability to all antitrust claims.¹⁷⁴ It was these broader restatements that were later quoted, outside the context of predatory pricing in which both cases (as well as *Matsushita*) arose, by *Apollo* and *Florida Fuels*.¹⁷⁵

In *Apex Oil Co. v. DiMauro*,¹⁷⁶ the court claimed that in *Matsushita* "the Court promulgated a general rule for all anti-

¹⁷⁰ *Petroleum Products*, 906 F.2d 432, 438 (9th Cir. 1990) ("Allowing the district court to make that decision [on the plausibility of specific factual claims] would lead to a dramatic judicial encroachment on the province of the jury. . . . This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.'").

¹⁷¹ 864 F.2d 1409 (7th Cir. 1989).

¹⁷² 858 F.2d 1487 (11th Cir. 1988).

¹⁷³ *Indiana Grocery*, 864 F.2d at 1412; *McGahee*, 858 F.2d at 1493. See *supra* notes 53-55.

¹⁷⁴ *Indiana Grocery*, 864 F.2d at 1412-13; *McGahee*, 858 F.2d at 1493.

¹⁷⁵ *Apollo*, 720 F. Supp. at 1073, citing *Indiana Grocery*, 864 F.2d at 1409; *Florida Fuels*, 717 F. Supp. at 1531, citing *McGahee*, 858 F.2d at 1487.

¹⁷⁶ 641 F. Supp. 1246, 1255 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 822 F.2d 246 (2d Cir. 1987). The Second Circuit, while accepting the applicability of *Matsushita* to the case before it, limited the *Matsushita* doctrine by reading it in light of *Adickes* and a number of other summary judgment cases. The court concluded that plaintiff's

trust conspiracy cases.”¹⁷⁷ To support this proposition, the court quoted language from *Matsushita* and completely ignored the context and reasoning of the opinion. For reasons discussed in part III, interpreting *Matsushita* as establishing a rule for all section 1 cases is unwarranted.¹⁷⁸ Finally, a number of cases have adopted a two-part “burden-shifting” approach, under which the *Monsanto-Matsushita* rule applies in all cases in which the plaintiff tries to prove a section 1 claim by using “ambiguous evidence.”¹⁷⁹ We think this approach, while closer to the mark than *Apollo* and *Florida Fuels*, ignores the Court’s evident concern with error costs and with abuse of the per se rule.

V. Conclusion

There is certainly room to disagree with the *Matsushita* Court’s conclusions that conspiracies to predate are “rarely tried and even more rarely successful,” and that they “make no economic sense.”¹⁸⁰ But that discussion is not central to the *Matsushita* opinion. Instead, the central goal of the Court’s new antitrust summary judgment test is to preserve the line between the per se rule and the rule of reason. The *Monsanto-Matsushita* rule protects existing antitrust rules from encroachment by opportunistic plaintiffs by focusing attention on the costs that a

claim was plausible, at least in part, and proceeded to affirm summary judgment on only two of plaintiff’s three claims. *Apex Oil*, 822 F.2d at 252–53.

¹⁷⁷ *Id.* at 1255.

¹⁷⁸ See *supra* notes 71-105 and accompanying text.

¹⁷⁹ See, e.g., *Market Force, Inc. v. Wauwatosa Realty*, 1990-2 Trade Cas. (CCH) ¶ 69,094 (7th Cir. July 11, 1990); *Riverview Invs. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990); *Dreiling v. Peugeot Motors*, 850 F.2d 1373, 1380 (10th Cir. 1988); *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987); P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 281–82 (Supp. 1989).

¹⁸⁰ *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 589 (1986).

mistaken finding of liability may have on competition, applying the rule only where an alleged action is illegal per se, and even then evaluating the economic plausibility of a plaintiff's claim.

At the same time, however, the *Monsanto-Matsushita* rule was not intended and should not operate as a bar to all antitrust claims. In several cases in which the courts have applied the rule, plaintiffs have nevertheless survived summary judgment.¹⁸¹ Indeed, the plaintiffs in *Monsanto* themselves survived the directed verdict motion.¹⁸² And the number of lower court cases discussed in part IV suggests that attempts to prove conspiracy by way of inference have proceeded apace and will continue.

Because the rule is designed to act as a deterrent to specific types of behavior by plaintiffs, the *Monsanto-Matsushita* rule must be applied correctly. Our evaluation has shown that the lower courts, left without clear guidance concerning the reasons behind the rule, are moving in several different directions. As a result, the rule is unravelling fast. By providing a coherent theoretical basis for the rule, and demonstrating how this framework would apply in practice, we hope that we can help salvage *Monsanto-Matsushita*.

¹⁸¹ See, e.g., *In re Beef Industry Antitrust Litigation*, 1990-2 Trade Cas. (CCH) ¶ 69,122 (5th Cir. Aug. 1, 1990); *Petroleum Products Antitrust Litigation*, 1990 U.S. LEXIS 10456 (9th Cir. June 22, 1990); *Long Beach v. Standard Oil of Calif.*, 872 F.2d 1401 (9th Cir. 1989); *Harkins Amusement Ent. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988); *Tunis Bros. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987); *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 1990-2 Trade Cas. (CCH) ¶ 69,141 (D. Ariz. July 25, 1990).

¹⁸² *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752, 765 (1984).

