The Sedona Conference Journal

Volume 5 2004

Grunts, Winks & Nods: What Meets the Agreement Element of a Section 1 Claim?

Robert L. Hubbard

Recommended Citation: Robert L. Hubbard, *Grunts, Winks & Nods: What Meets the Agreement Element of a Section I Claim?*, 5 SEDONA CONF. J. 99 (2004).

For this and additional publications see:
https://thesedonaconference.org/publications

GRUNTS, WINKS, & NODS: WHAT MEETS THE AGREEMENT ELEMENT OF A SECTION 1 CLAIM?

Robert L. Hubbard[1]
Director of Litigation, Antitrust Bureau
New York Office of the Attorney General,
New York, NY

I have an antitrust plaintiffs perspective on what should satisfy the agreement element of a Section 1 claim. Far too many antitrust concerns are ignored because of how the agreement element of the antitrust claim is analyzed by courts. For want of direct evidence demonstrating that conspirators conveyed agreement with a grunt, a wink, or a nod, a course of conduct that unreasonably restrains trade far too often fails to meet the agreement element of a Section 1 claim.

Independent Decision Making Is an Important Antitrust Theme

I begin with the reminder that agreement is of course a fundamental tenet of Section 1 claims. As the United States Supreme Court explained in *Copperweld Corp. v. Independence Tube Corp.*,[2] Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is "wholly unilateral."[3] The Court emphasized that Congress treated concerted activity more strictly than unilateral conduct because concerted activity deprives the marketplace of the independent centers of decision making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.[4]

The fundamental value is to preserve separate independent decision makers on core competitive issues and foster competition on the merits as determined by the choices made by purchasers, as opposed to competition as defined by an agreement.[5]

Yet, separate decision makers do not necessarily make separate decisions. Of course and as a matter of overview antitrust theory, everybody doing the same thing -- even on core competitive issues like pricing -- is usually not an antitrust violation. As to commodities, everybody pricing the same may indicate a competitive market generating a market price. For oligopolies, one firm must pay attention to and often follow (and certainly respond to) the prices charged by another firm. That dynamic often leads to the same pricing.

1 Director of Litigation, Antitrust Bureau, New York State Department of Law. The opinions expressed here are my own views, and not necessarily the views of the Antitrust Bureau, New York Attorney General Eliot Spitzer, New York State, or any other state.
2 467 U.S. 752 (1984).
3 467 U.S. at 768 (emphasis in original).
4 467 U.S. at 768-69.
5 Recently, in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, No. 02-682, slip op. at 8 (U.S. Jan. 13, 2004), the Court characterized collusion as "the supreme evil of antitrust."

Similarly, many retailers will use the retail price suggested by the manufacturer. Thus, the challenge is to identify when decisions are not being made separately, without relying solely on evidence that the decisions are the same.

Agreement is a Hard Element to Establish

Defendants prefer any discussion of agreement to begin and end with *Matsushita Electric Industrial Co. v. Zenith Radio Corp*.[6] This preference is perfectly understandable, because the defendants in *Matsushita* prevailed on summary judgment and plaintiffs were not allowed to submit their case to a fact finder, despite plaintiffs offering significant evidence of agreement. The Court's summary of evidence offered and the result the defendants obtained illustrate the point:

> In sum, . . . neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial."

Matsushita, 475 U.S. at 597.

Plaintiffs do not salute and try to temper defendants' reliance on Matsushita. One of the cases I cite for that purpose is also a Supreme Court case, *Brown v. Pro Football*, a decade more recent, and an 8-1 decision (as opposed to *Matsushita's* 5-4):

> Antitrust law . . . sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, see, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966); *United States v. Foley*, 598 F.2d 1323, 1331-1332 (4th Cir. 1979), or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision, see, e.g., *American Tobacco Co. v. United States*, 328 US 781, 809-10 (1946); *United States v. Masonite Corp.*, 316 US 208, 226-27 (1939); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 27 (1939). See generally Philip Areeda, Antitrust Law Section 1416-1427 (1986); Donald Turner, The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).[7]

Another one of my favorites is a Judge Posner decision, *Isaksen v. Vermont Casting, Inc.*: When a conspirator warns a non-complying dealer to "raise your prices or else" and the distributor "merely grunts but complies," there is an agreement.[8]

Despite my preferences, courts cite and rely on *Matsushita* much more than *Brown* and *Isaksen*. Using Judge Posner's words from *Isaksen*, plaintiffs can often prove the "conspirator's warning" and the "distributor's compliance." Yet, for want of the "grunt," even when the opportunity and motive to "grunt" is present, Section 1 cases are lost.[9] Indeed, the standard sometimes seems so high and businesses seem to have become so oblivious to the risk of antitrust liability that plaintiffs can gather evidence sufficient to

6 475 U.S. 574 (1986).
7 518 U.S. 231, 241 (1996).
8 825 F.2d 1158, 1164 (7th Cir. 1987).
9 The more legalistic definition by the Supreme Court of the agreement element is a "conscious commitment to common scheme," which in a resale price maintenance case could be shown by evidence that the manufacturer sought and distributor "communicated its acquiescence or agreement" to prices "suggested" by the manufacturer. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 n.9 (1984).

make and prevail on motions for summary judgment on liability.[10] That is, the evidence that a plaintiff needs to survive summary judgment is sometimes enough not only to overcome defendants' denials but also enough to establish summarily the agreement.

States[11] and other plaintiffs can blunt the force of *Matsushita* by arguing that *Matsushita* applies only when the economic theory asserted by plaintiffs is implausible.[12] In *Matsushita*, the Court considered plaintiffs' allegations that defendants agreed to price below costs in the United States over a 20-year period, with the goal of eliminating U.S. competitors. The Court found this theory "irrational" and "implausible," and ruled in favor of defendants. Again as phrased by the Court, but this time with the ellipsis filled in:

> In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial."

Matsushita, 475 U.S. at 597 (emphasis added).

Elsewhere in the opinion, the five judge majority in *Matsushita* described what it meant by "the absence of any rational motive to conspire." The Court limited "rationality" to economics, stating that an "implausible" claim is a claim "that simply makes no economic sense."[13] The Court further limited its discussion of "economic" motive to "profit" motive. The Court stated that plaintiffs' claim was that "monopoly profits" would ultimately compensate the defendants.[14]

Matsushita's conclusion that defendants lacked "any rational motive" is flawed as a matter of statutory construction, economic theory, and fact. Illegal agreements in restraint of trade should not be limited to agreements for which the defendants can expect to profit or otherwise benefit economically. The question simply should be whether Section 1 was violated. Section 1 does not require the defendant to profit. Murder, jay-walking, and pollution need not be profitable (or even economically rational) to be illegal, and neither should unreasonable restraints on trade.

Moreover, as a matter of theory, plausibility should not turn on the economic profitability for the defendant.[15] Various economic theories, like game theory, could explain the conspiracy alleged by the plaintiffs in *Matsushita*.[16] But from my perspective and more fundamentally, the people who make and implement decisions for businesses, act for reasons other than the profit to be made by the business.[17] Scientists who are not economists have long explained human behavior in the workplace without assuming that only behavior that is economically profitable to the business can occur.

---

10 *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 682 (E.D. Mich. 2000), aff'd, 332 F.3d 896 (6th Cir. 2003); *New York v. St. Francis Hospital*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000).

11 In addition to arguments in various briefs in their litigations, States have addressed the agreement element of a section 1 claim in amici briefs in support of petitions for certiorari, which petitioners were denied. Brief of Amici Curiae States in Support of Petition for Certiorari, *Halmaman Albrecht, Inc. v. Potash Corp. of Saskatchewan Inc.*, 531 U.S. 815 (2000) (No. 99-1844); Brief of California in Support of Petition for Certiorari, *Gangi Bros. Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000) (No. 99-1218). These amici are available on the advocacy portion of the webpage of the State Enforcement Committee of the ABA's Antitrust Section: http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html.

12 E.g., *Ezzo"s Investments, Inc. v. Royal Beauty Supply, Inc.*, 94 F.2d 1032, 1035-36 (6th Cir. 1996).

13 475 U.S. at 587.

14 475 U.S. at 584.

15 I should probably admit that I have long been skeptical of relying too heavily on economic analysis, as opposed to relying on case law analysis, in antitrust cases. *Robert Hubbard, Potential Production*: A Supply Side Approach for Relevant Product Market Definitions, 48 Fordham L. Rev. 1199, 1204 n. 22 (1980), reprinted in XIV J. Reprints For Antitrust L. & Econ. 621, 626 (1984).

16 E.g., Charles E. Koob, Whither Predatory Pricing? The Divergence Between Judicial Decisions and Economic Theory: The American Airlines and Virgin Atlantic Airways Cases, 3 Sedona Conference J. 9 (2002).

17 Even accepting a limitation to only economic incentives, the decision makers for businesses are motivated by economic incentives other than the overall profitability of the business, such as the profitability of his or her part of the business, his or her compensation or job security, or the scope of the executive's domain.

Finally and as a matter of fact, if behavior occurs, that behavior by definition is plausible.[18] Indeed, the Court may have come around on this point. In *Matsushita*, when the Court's theory did not mesh with the alleged facts, the Court refused to allow plaintiffs to submit their allegations to a fact finder. Six years later in *Image Technical*, the Court declared that an economic theory that "does not explain the actual market behavior revealed in the record" should be rejected.[19] When the economic theory did not mesh with the facts, the Court appropriately allowed the plaintiff to present those facts.

Indeed, some of the cases illustrate that the plausibility of the plaintiff's economic theory should not be a basis for rejecting a plaintiff's claim if plaintiff's claim is otherwise permissible. Like pornography, economic plausibility can be in the eye of the beholding judge, and judges behold differently. For example, in *Potash* the six-judge *en banc* majority responded to plaintiffs' theory that the agreement could be inferred in part from companies following a price leader as "ridiculous," reasoning that of course one firm's price rise would be followed in an oligopolistic market.[20] Relying on facts, the five-judge dissent listed various price rises that had not been followed prior to the alleged conspiracy.[21] Similarly, the *Potash* majority held that direct communications by competitors on price after the price had been quoted, as a matter of "common sense," did not support a finding of agreement.[22] The dissent in *Potash* accepted the economic theory that such communications could be found to demonstrate the monitoring and enforcement of an agreement on price, much like a theory deemed "plausible" by the Third Circuit in *Petruzzi's*.[23]

A More Nuanced Read of Matsushita *Is Appropriate*

All this is not to say that plaintiffs should have prevailed in *Matsushita,* or even that plaintiffs should have been permitted to present their case to the fact-finder. Antitrust law should be skeptical of businesses complaining that competitors are charging too little because such allegedly predatory acts look a lot like aggressively competitive acts. Perhaps the result in *Matsushita* reflects that skepticism: the Court refused to allow a finding of an illegal agreement to be based on defendants' price-cutting, which "the Court characterized as 'the very essence of competition.'"[24] And perhaps the agreement element of a Section 1 claim was the only way to express that skepticism. For example, defendants had not appealed the holding that a horizontal predatory pricing conspiracy was *per se* illegal.[25]

The Court also has paused when presented with inferences of an agreement in resale price maintenance cases. The Court in *Monsanto* recognized that communications between suppliers and distributors was a necessary and useful part of the competitive process. Accordingly, the Court held that a retailer's complaint to the supplier about a competing retailer's prices and the supplier's termination of the competing retailer, without

---

18 Perhaps the most cogent rebuttal to the Court's conclusion in *Matsushita* that the claim was economically implausible is that the ultimate goal of the conspiracy alleged by the plaintiffs in *Matsushita* appears to have been achieved. U.S. manufacturers of consumer electronics are simply not the competitive force they once were and the defendants' profitability appears to have been enhanced by the demise of those U.S. manufacturers. In addition, the victory may have contributed to the manufacturers of consumer electronics being insensitive to their obligations under the antitrust laws as relates to resale price maintenance. E.g., *Maryland v. Mitsubishi Electronics America, Inc.*, 1992-1 Trade Cas. (CCH) Section 69,743 (D. Md. 1992) (fifty states and D.C., $8 million settlement); *New York v. Nintendo of America, Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991) (50 states and D.C., more than $29 million settlement); *New York v. Matsushita Elec. Corp.*, 89 Civ. 0368 (S.D.N.Y.1989) (50 states, $16 million settlement).

19 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 2085 (1992).

20 *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1034 (8th Cir. 2000) (en banc) ("In the face of these circumstances and with the price leadership of PCS in this oligopolistic industry, it would have been ridiculous for the remaining companies to not also raise their prices in a parallel fashion." (emphasis added)).

21 *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1039-40 (8th Cir. 2000) (en banc) (dissent) ("In fact, [four separate companies] had each tried to increase prices unilaterally during 1986 and were forced to rescind the increases when the other producers undercut them.").

22 Id. at 1034.

23 Id. at 1042-43; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (a cartel needs enforcement mechanisms).

24 *InterVest, Inc. Bloomberg, L.P.,* 340 F.3d 144, 162 (3d Cir. 2003) (quoting *Matsushita*, 475 U.S. at 594).

25 475 U.S. at 584-85 ("The Court of Appeals found that respondentsí allegation of a horizontal conspiracy to engage in predatory pricing, if proved, would be a per se violation of section 1 of the Sherman Act. Petitioners did not appeal from that conclusion."(citation and footnotes omitted)).

more, was not enough evidence of a resale price agreement to survive summary judgment.[26] Yet, any sort of link between the complaints and the termination was. The specific evidence held adequate by the Court in *Monsanto* included Monsanto telling price cutters that they would not get supplies, which the Court labeled direct evidence of the alleged agreement.[27] In addition, the Court pointed to "arguably more ambiguous" evidence, consisting of a newsletter from a distributor to his dealer-customers reporting on a meeting with Monsanto discussing "efforts to get the market in order" and that "every effort will be made to maintain a minimum market price level."[28] Despite the propriety of communications between suppliers and distributors, the "ambiguity" of the evidence, and Monsanto's letter six weeks later "disavow[ing] any intent to enter into an agreement on resale prices," the Court held that interpretation of this evidence "properly was left to the jury."[29]

The challenge is to apply a rule that incorporates the Court's skepticism in *Matsushita* and the pause in *Monsanto.*[30] The Ninth Circuit's phrasing of the rule begins to meet the challenge: 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."[31] Yet, most cases lack the nuance used in that phrasing.

Rather, far too many courts do not permit an inference of an agreement from circumstantial evidence where to do so would have the effect of deterring arguably procompetitive conduct, or, even worse, mere arguably permissible conduct. In applying that relaxed rule, these cases contrast sharply with articulation of the applicable law in *Brown,* which was quoted more fully above:

> Antitrust law . . . sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision.[32]

The most problematic of these cases are circuit court decisions addressing allegations of *per se* illegal agreements among horizontal competitors. One plaintiff lost on summary judgment despite evidence that a questionnaire on how to compete was completed by competitors and everyone's completed questionnaire was distributed by a trade association. The general conclusion of those questionnaires was that defendants "could best compete" by enforcing exclusivity provisions in their contracts, which the competitors later did.[33] Using the Ninth Circuit's rule, I do not see a procompetitive benefit of conveying and conferring about competitive strategies at a trade association meeting and would not shield this activity from potential antitrust liability. Similarly, one of the defendants secured

---

26 *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984). In a footnote, the Court added "We do not suggest that evidence of complaints has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy" Id. at 764 n.8.
27 465 U.S. at 765.
28 465 U.S. at 765-66 & n.10.
29 465 U.S. at 766 n.11.
30 This rule would be something other than the usual concepts that arise when asking whether adequate evidence has been presented by the plaintiffs to continue the litigation. The rule would apply only if plaintiffs presented some evidence of the agreement.
31 *In re Petroleum Products Antitrust Litigation*, 906 F.2d 432, 439 (9th Cir. 1990).
32 *Brown v. Pro Football*, 518 U.S. 231, 241 (1996).
33 *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1324 (4th Cir. 1995).

summary judgment despite sufficient evidence from which to infer a market allocation agreement among two other companies in the industry, all three companies competing only for new accounts, direct communications including socializing between the prevailing defendant and the conspiring defendants, and other evidence.[34] Again, I do not see the procompetitive benefits of socializing with your competitors and do not think antitrust law should shield that activity from potential antitrust liability. My final example is a grant of summary judgment to one defendant, while other defendants had already pled guilty to a price-fixing agreement. The evidence against the prevailing defendant included nearly identical price lists as those of the conspiring defendants, the conspiring defendants' price lists in the prevailing defendant's files, meetings and telephone conversations between the prevailing defendant and the conspiring defendants (including conversations about prices), and other evidence that "could be interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light."[35] Again, I do not see the procompetitive benefits of communications among competitors that we need to protect, and permitting the inference of an agreement is neither anticompetitive or substantially anticompetitive.

34 *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1234-37, 1241, 1246 (3d Cir. 1993).
35 *In re Citric Acid Litigation,* 191 F.3d 1090, 1102-06 (9th Cir. 1999).