



## US Supreme Court signals interest in circuit split on Section 1 summary judgment burden—analysis

14 June 2017 | 16:49 EDT

- High court seeks response on cert. petition challenging application of *Matsushita's* 'tends to exclude' standard
- Law professors' pro-petitioner amicus brief highlights 7-4 federal circuit split
- Pro-defendant decision from SCOTUS's conservative majority could make cartel cases harder to settle

One of the first significant antitrust decisions with Justice Neal Gorsuch on the US Supreme Court (SCOTUS) bench may resolve a 7-4 circuit split over the proper summary judgment standard in conspiracy cases where the existence of an agreement is in dispute, lawyers say.

A pro-defendant decision by the conservative majority potentially benefits financial institutions such as Bank of America, CitiGroup and Morgan Stanley, embroiled in a swarm of financial benchmark-manipulation cases in the Southern District of New York.

SCOTUS has extended to 17 July its deadline for a defense response to a plaintiffs' petition for certiorari in a case involving a concerted refusal to deal. The defendants initially waived their response on 30-31 March, but on 16 May the high court specifically requested that responses be provided, which lawyers say indicates its potential interest in granting the certiorari petition.

Evergreen Partnering Group, a polystyrene recycler, alleged that the five largest converters of polystyrene products, all polystyrene food service products manufacturers, agreed through the American Chemistry Council, not to deal with Evergreen, as to prevent polystyrene recycling from becoming a viable threat to their manufacturing operations. On summary judgment, the district court held that Evergreen failed to present evidence that "tended to exclude the possibility" that each manufacturer independently chose not to partner with Evergreen and the US First Circuit Court of Appeals affirmed.

Evergreen argues that both the trial court and the US First Circuit Court of Appeals misapplied SCOTUS's standard in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986).

In *Matsushita*, SCOTUS held—after finding that the defendants had no rational economic motive to conspire and having identified that their conduct was pro-competitive in nature—that the plaintiff carries the burden on summary judgment of presenting evidence that "tends to exclude the possibility" that



**Sector:** Other  
**Topics:** Cartels & Horizontal Agreements

**Grade:** Strong Evidence

### Companies

Morgan Stanley  
Citi  
Evergreen Partnering  
Bank Of America, National Association  
American Chemistry Council

### Agencies

US Supreme Court

There are no files associated with this Intelligence

the defendants acted independently. But when this standard is applied absent findings of no rational motive and pro-competitive conduct, it imposes an unreasonably difficult burden on antitrust plaintiffs trying to defeat Rule 56 motions for summary judgment, lawyers say.

Under Rule 56 of the Federal Rules of Civil Procedure if, at the summary judgment phase, a court finds no dispute as to any material fact, it may grant the moving party judgment as a matter of law.

### Summary judgment key

John Kirkwood, a former official with the Federal Trade Commission (FTC) Bureau of Competition who teaches at Seattle University School of Law, noted that summary judgment is an important matter. “Few cases go to trial, and it matters a great deal whether the plaintiffs can survive summary judgment,” he said.

Class plaintiffs’ success at defeating summary judgment is often a key component in settling cartel cases. Conversely, the *Matsushita* standard as applied in some circuits makes it nearly impossible for plaintiffs to survive summary judgment, Kirkwood said, thus reducing their chances to obtain settlements.

SCOTUS enunciated a less restrictive standard in *Eastman Kodak Industry v. Image Technical Services* (1992) six years later, which some lower courts cite as holding that *Matsushita* does not apply where the anticompetitive conduct was rational and not evidently procompetitive.

Kirkwood said his “big-picture understanding” is that *Kodak* says plaintiffs can overcome a summary judgment motion and get to a jury, if a reasonable jury looking at the evidence as a whole could find for the plaintiff. This makes it a “reasonable jury” standard, not a preponderance standard, he said.

“But if you are looking at the evidence as a whole, you should not be saying, ‘Well, the only time the plaintiff can survive summary judgment is if the evidence as a whole supports the plaintiff rather than the defendant,’ that is, if there is a preponderance. That’s too strong. That means a plaintiff can’t get to a jury unless it can already win, in the court’s view,” Kirkwood said.

An amicus brief submitted in the Evergreen case by a dozen law professors on Evergreen’s behalf highlights the circuit split. Among the circuits, the First, along with the Fourth, Eighth and Eleventh Circuits, apply the *Matsushita* summary judgment standard in all Sherman Act Section 1 cases, while the Second, Third, Fifth, Sixth, Seventh, Ninth and Tenth circuits only apply it as provided by *Kodak*. Kirkwood, who joined the brief, said that a circuit split like the one here is the “number one reason” for SCOTUS to take cases.

A stricter universal standard may embolden certain civil antitrust defendants, such as those in the financial benchmark cartel cases, which are before the Southern District of New York in the Second

Circuit and many of which are built on limited hard evidence of agreements. A high burden of proof on summary judgment—that is, *Matsushita* without *Kodak*'s limitation—would increase the defendants' chances of avoiding trial and decrease their incentives to settle.

By contrast, a decision that confirms the *Kodak* limitation could benefit Valspar in *The Valspar Corporation and Valspar Sourcing v E.I. Dupont de Nemours and Company*, where a Delaware federal district judge applied the *Matsushita* standard without *Kodak*, granting summary judgment to DuPont in an opt-out titanium dioxide cartel case. A federal district judge in Maryland earlier had denied summary judgment, applying *Kodak*, in the related class case from which Valspar had opted out, a major contributing factor in the USD 163.5m settlement which followed.

Lawyers say SCOTUS should clarify how the summary judgment standard in its *Matsushita* decision applies in summary judgment rulings, but some are concerned about the strength of the case at hand and the bench's conservative majority.

Keith Hylton, who teaches at Boston University School of Law, said that the conservative majority on the court would lead him to predict that the court will go for the tougher standard.

Hylton said that if SCOTUS takes the case, he expects that they will favor the *Matsushita* standard, but believes that it should restate *Matsushita*'s “tends to exclude the plausibility of individual conduct”, as “tends to exclude the plausibility that the parties were acting on the basis of individual rationality.”

Or in other words, to make it clear to plaintiffs that they need to present a certain kind of evidence in order to survive a motion for summary judgment, Hylton said.

#### Steps to certiorari

Stephen Calkins, who teaches law at Wayne State University and has served on the Competition Authority of Ireland and the FTC, said that from a procedural point of view, the fact that SCOTUS asked the defense to respond to Evergreen's cert. petition means only that one or more justices wanted to see a defense response.

In general, respondents may waive a response to a petition for certiorari as a “strategy call” as they did in this case, Calkins said. If the court is not interested in the case, it denies cert. and the defense does not have to go to the effort and expense of filing a brief, he said.

The fact that at least one justice wanted to see a response is “better than nothing”, Calkins said. He added that the court's interest in the case may have been aided by the amicus brief on Evergreen's behalf drafted by a dozen law professors. Calkins declined to join this opinion, he said.

The next telling step will be whether four justices will vote to call for the views of the Solicitor General (SG), Calkins said, adding that it is unlikely that SCOTUS would grant cert. without seeking

the SG's view.

Clearly Gorsuch is interested in antitrust, so the odds are better than they would have been before he was confirmed, he said. And it will be interesting to see how the lawyers representing the defendants choose to oppose certiorari, Calkins said.

However, Calkins expressed concern “that the combination of a conservative Supreme Court and Solicitor General's office raises the chances of getting fairly conservative rulings.”

The cases are: *Evergreen Partnering Group v Pactiv Corp. et al.*, no. 16-1148, in the US Supreme Court and *The Valspar Corporation and Valspar Sourcing v E.I. Dupont De Nemours and Company*, no. 16-1345 in the US Third Circuit Court of Appeals.

by Peter Geier in Washington DC

© 2017 MERGERMARKET GROUP ALL RIGHTS RESERVED.

To be used for the internal business of the assigned users only. Sharing, distributing or forwarding the entirety or any part of this article in any form to anyone that does not have access under your agreement is strictly prohibited and doing so violates your contract and is considered a breach of copyright. Any unauthorised recipient or distributor of this article is liable to Mergermarket for unauthorised use and copyright breach.