

2/6/80

Matsushita

My op

n 21 p 20  Monsanto Co v. 5 Procs. etc - if weak  
conspiracy cases go to jury, pro-  
competitive conduct may be deterred.

AT&T  
case  
Charlie  
Brown

- Here only ambiguous conduct is  
at issue - ~~concluded~~ conduct as consistent  
with competition as it is with illegal  
conspiracy.

"Strong disincentives to engage in  
the alleged conspiracy"

Harlan in Albrecht 390 US at 156

Fixing "Price ceilings" ("max prices") differs from  
fixing "minimum prices".

A conspiracy to fix "max prices" ~~is~~ states  
a Sherman Act violation. But to win, the PT must  
prove: ~~1.~~ Existence of the conspiracy ("combination"),  
and the ~~defendant~~ defendant must be unable ~~to~~  
to ~~show~~ "justification" either by virtue  
of a per se rule or by failure of proof.

It is error to "conclude that no justification  
for fixing max. prices can be found  
simply because there is no justification  
for fixing min. prices." p 157

Omit citation to Maricopa (4 to 3)  
It was decided on sum. judgment as  
a per se violation. I argued Rule of Reason



*Bill: Can we say this  
in light of the opinions below  
as to the evidence? If so,  
there may be a better way to*

lfp/ss 02/07/86

Rider A, p. 17 (Matsushita)

*say it,*

MAT17 SALLY-POW

The courts below <sup>*identified*</sup> ~~found~~ no evidence of any such success,

and - as indicated above - the facts actually are to the

contrary: RCA and Zenith have continued to have the

largest share of the American retail market. The findings

before us do not reveal the extent of petitioners'

Japanese profits or whether there is any relationship

between such profits and what rationally could be expected

in the way of profits from the alleged conspiracy here.

In the absence of any such proof by respondents, the

possible existence of supra <sup>*(?)*</sup> competitive profits in

Japan simply cannot overcome the economic obstacles to the


ultimate success of this alleged predatory conspiracy.<sup>18</sup>

lfp/ss 02/07/86

Rider A, p. 5 (Matsushita)

MAT5 SALLY-POW

The inference that respondents seek to draw from this conduct defies economic reality: petitioners are said to have joined a decades-long conspiracy to drive from the American market all the leading manufacturers of television sets, and yet respondents have shown no basis for hope of recovering the losses such a plan would entail. The conduct cited by the CA arguably may be consistent with the alleged conspiracy (as it is consistent with other, more plausible explanations), but it falls far short of <sup>relevant</sup> direct evidence of <sup>alleged</sup> ~~the conspiracy~~ in light of the strong disincentives to engage in the alleged predatory pricing conspiracy at issue here.





On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently <sup>un</sup>ambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence at least must "tend[] to exclude the possibility" that petitioners underpriced respondents for the rational purpose of competing for business, rather than to implement an unlawful and economically hazardous conspiracy. Monsanto, 465 U.S., at \_\_\_\_\_. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

816

(Revised by Bill)

lfp/ss 02/08/86

Rider A, p. 17 (Matsushita)

MAT17 BILLS-POW

The courts below found no evidence of any such success, and--as indicated above--the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. The record before us does not establish the ~~precise~~ amount of petitioners' <sup>in Japan?</sup> ~~Japanese~~ profits. More important, there is nothing to suggest <sup>any</sup> relationship between <sup>petitioners'</sup> ~~the amount of~~ profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome



the economic obstacles to the ultimate success of this  
alleged predatory conspiracy.<sup>18</sup>