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## The 2011 Bernstein Lecture at St. John's University School of Law

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**THE 2011 BERNSTEIN LECTURE AT  
ST. JOHN'S UNIVERSITY  
SCHOOL OF LAW**

HON. PAUL A. CROTTY<sup>†</sup>

Good afternoon. I am glad to be here at St. John's. I want to thank Professor Cavanagh for the invitation and for helping me prepare. As always, his comments were insightful and helpful.

Lewis Bernstein served his country in war and in peace. For thirty years, he headed the Special Litigation Unit at the Department of Justice's Antitrust Division. Chief among his cases were the IBM case and the broad spectrum antibiotic drug cases. The tenor of his work is celebrated by his co-workers and acolytes who learned from the master. He is the embodiment of the wisdom that public service, when done well and honestly, is the noblest of all professions.

I am honored to receive this award and humbled by it. Yet, I am bold enough to try to add my thoughts to the Bernstein Lectures, which have shed so much illumination on the intricacies of our antitrust laws.

I do not want to slight any of the distinguished graduates of St. John's by not mentioning them, but I would be remiss if I did not mention Hugh Leo Carey, who graduated from St. John's Law School, and became the man who saved New York. He was succeeded in the Governor's seat by another great man, Mario M. Cuomo. For two decades, from 1974 to 1994, our state was blessed with leaders who recognized the common good and were dedicated to achieving it. They were inspired leaders, and St. John's Law School proudly claims them as its graduates.

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My mentor when I first started to practice, and continuing until he passed away in 1998, was Owen McGivern. He was a member of the State Assembly; a Naval Officer, who fought with the O.S.S. during World War II; a Judge on the Court of General Sessions and Supreme Court; and, eventually, Presiding Justice of the First Department of the Appellate Division. Judge McGivern was not the only great judge St. John's Law School can be proud of: Judge on the New York Court of Appeals and Dean Emeritus of the Law School, Joseph Bellacosa; Judge Carmen Ciparick on the New York Court of Appeals; Ray Dearie, who just stepped down as Chief Judge in the Eastern District of New York; and, in the Southern District, the late John Sprizzo, and P. Kevin Castel, who presides with great intelligence and a firm grasp on reality. It is an honor to serve with Judge Castel. Other alumni include, Bob McGuire, our former Police Commissioner; Charles "Joe" Hynes, the Brooklyn District Attorney; and Congressman Charles Rangel. They embody the very best in public service.

I want to talk about antitrust law and motions for summary judgment, but it will be helpful to put these two matters in context with what we do in federal courts throughout the United States.

The United States Courts are established by Article III of the Constitution and the Judiciary Act of 1789.<sup>1</sup> We play an important role in American society, but to be fair, most citizens do not have a firm grip on what we do. Too often, the response to a court decision is "well, who gave him or her that power?" or "who is she or he to do something like that?" As a matter of fact, Mr. Justice Breyer's recent book, *Making Our Democracy Work*,<sup>2</sup> tries to explain how and why the public accepts a judicial pronouncement as legitimate, or rejects it as illegitimate.

It is important for the bar, and for judges, to maintain the public's confidence in how the courts work in interpreting the Constitution, applying statutory law, and deciding cases—civil and criminal—that come before us. How do we do that? We must retain our independence, and there must be transparency to the working of the courts, fairness in the process, and justice in the result.

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<sup>1</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>2</sup> See generally STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010).

Much of our work involves issues of constitutional dimensions. The issues arise everyday, mostly in criminal law: Was a search unreasonable; was a confession truly voluntary; did the defendant have effective assistance of counsel?

How do you balance the right to assemble with the need for public order and safety? Much more of our work requires statutory analysis and statutory application in patents, trademarks, copyrights, and securities law cases.

Of course, litigants and the courts have a need for speed, for efficiency, and for a just result, with the lowest transaction costs. We must be conscious of the world in which we live. The world is shrinking; we are now a global economy. While you will find English to be the primary language of the global economy, not everyone believes that the Anglo-American method of disposing of civil disputes is their cup of tea. It is expensive, takes too long, and is unpredictable.

A businessman in Japan, or in China, or even in Kazakhstan, could ask: Why do you take twelve people, who know nothing of the dispute, and probably nothing about business, and then entrust them with a decision that determines questions involving millions of dollars?

The American answer is that jury trials are the critical ingredient in disposing of the business that comes before us. When you read the Declaration of Independence, you will note that the far greater portion of the document deals with a listing of grievances, which Jefferson said, had to be “submitted to a candid world,”<sup>3</sup> as the justification for separation and independence. Many of the grievances dealt with how judges were selected and how colonial juries were avoided. The colonists wanted to participate in the governance of their communities, and juries were a vital part of that participation. When “We the People” adopted the Constitution a decade later, the right to a jury trial was embedded in Article III. But that was deemed insufficient. The state ratification conventions demonstrated a continuing concern that juries always be available to resolve disputes. Juries are featured in the Fourth, Fifth, Sixth Amendments, and, especially, the Seventh Amendment of the Bill of Rights.

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<sup>3</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Juries are not going away; the plain fact is that the overwhelming majority of cases are not disposed of by juries, but by settlement or disposition by way of judicial order. Indeed, very few civil cases, less than two percent, go to trial. Today, I want to discuss antitrust law and the granting of summary judgment.

The Federal Rules of Civil Procedure govern all court actions in United States District Courts. The goal of the rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>4</sup> The rules follow the order of litigation and begin with how to commence an action, serve papers, move to dismiss, engage in discovery, proceed with trial, and end with judgments.

We are going to focus on Rule 56 dealing with summary judgment.

Summary judgment is applicable to claims made by plaintiff and defenses raised by defendant. The movant is required to show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>5</sup> Rule 56 requires the court to "state on the record the reasons for granting or denying the motion."<sup>6</sup>

As you will see, this requirement is important to a judge. He or she can easily state that the motion is denied; there is a genuine dispute as to material facts.

The material facts in dispute do not have to be specified. A decision like this is virtually bullet proof; it is not final, and hence, not reviewable. On the other hand, higher courts reviewing a grant of summary judgment would not accept an order which states in words or substance: "The Court has reviewed the parties' submissions and after due consideration it has determined there are no genuine disputes as to any material facts. Accordingly, judgment will be entered for plaintiff." That clearly does not fly.

From a judicial viewpoint, granting a motion for summary judgment requires a careful review of the facts, as well as a careful consideration of the law. It may take the judge days indeed weeks to carefully review an extensive record to resolve

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<sup>4</sup> FED. R. CIV. P. 1.

<sup>5</sup> *Id.* at 56(a).

<sup>6</sup> *Id.*

the issues. The question arises: Is it worth the time to go through the exercise, or is it simpler for the judge to set the matter down for trial?

As you can tell from my short précis of the rules, a plaintiff does not file a complaint and immediately report to the defendant's cashier's window. The pleadings can be tested by motions addressed to their sufficiency and adequacy.

In days of yore, motions to dismiss were not granted, except in rare cases. This was due to the standard for assessing the adequacy of the pleadings. Rule 8 required three things: (1) a statement of the basis for jurisdiction; (2) "a short and plain statement of the claim showing that the pleader is entitled to relief"; and (3) a demand for relief.<sup>7</sup> *Conley v. Gibson*,<sup>8</sup> decided in 1957, set forth the pleading standard for the next fifty years. Plaintiff must give the defendant fair notice of what the claim is and the grounds upon which it rests. If you wish to get an idea of how things used to be, and still are for some types of claims, read the forms which, incidentally, have not changed.

The following is all you have to allege on a complaint form: (1) (Statement of jurisdiction); (2) On (Date) at (Place), defendant negligently drove a motor vehicle against the plaintiff; (3) As a result, promptly was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$\_\_\_\_\_.<sup>9</sup>

In a commercial loan transaction, the requirements are just as brief in Form 10: (1) Jurisdiction; (2) On (Date), the defendant executed and delivered a note promising to pay the plaintiff on (Date) the sum of \$\_\_\_\_\_ with interest at the rate of \_\_\_\_%. A copy of the note is attached; (3) Defendant has not paid the amount owed.<sup>10</sup>

There is an evolving standard in complex cases. And not to disclose too much of my talk too soon; I will tell you that there used to be close to a special set of rules for summary judgment in antitrust cases. That is gone now. Summary judgment is as available in antitrust cases as it is in any kind of case. The net

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<sup>7</sup> *Id.* at 8(a).

<sup>8</sup> *Conley v. Gibson*, 355 U.S. 41 (1957), *overruled in part by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

<sup>9</sup> FED. R. CIV. P. Form 11.

<sup>10</sup> FED. R. CIV. P. Form 10.

effect for antitrust cases is that it is tougher to plead a viable antitrust claim and easier to obtain summary judgment on an antitrust action.

Let us spend a moment on the evolution of pleading requirements.

On a motion to dismiss, the facts are assumed to be true and all favorable inferences are drawn in favor of the opponent of the motion to dismiss. As I said not too long ago, all the complaint had to do was put the defendant on notice and then we were off on discovery, perhaps slowed down by an occasional motion for a more definite statement.

Discovery was readily available on most every claim. Some of the claims are absurd on their face. For example, people complaining of receiving negative messages from the CIA on the fillings in their molars. And the worst is, in some of these cases, the plaintiff has paid the filing fee. That means the complaint does not have to meet the standards for *in forma pauperis* complaints—frivolous and malicious claims may not be brought *in forma pauperis*.<sup>11</sup>

The standard for dismissal at least as set forth in *Conley* was that claims were not to be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>12</sup>

But after fifty years, *Conley* was interred or at least put into intensive care—the Almighty’s departure lounge. The Supreme Court has advised us that *Conley* is “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”<sup>13</sup>

Now, in complex cases, you cannot plead “labels or conclusions”; “formulaic recitation of the elements of a cause of action will not do.”<sup>14</sup> Instead, the factual allegations must be sufficient to raise a right to relief above the speculative level. The complaint must demonstrate that the claim for relief is not just possible, but rather, plausible.<sup>15</sup>

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<sup>11</sup> 28 U.S.C. § 1915 (2006).

<sup>12</sup> *Conley*, 355 U.S. at 45–46.

<sup>13</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

<sup>14</sup> *Id.* at 555.

<sup>15</sup> *Id.*

*Bell Atlantic Corp. v. Twombly* dealt with the Telecommunications Act of 1996.<sup>16</sup> In order to gain access to the long distance market, the local telephone monopoly had to open up its local market to competition. Twombly was a phone subscriber who claimed to want better service. He alleged that phone companies—also known as the Baby Bells or the incumbent local exchange carriers (“ILECs”)—engaged in a conspiracy (1) to inhibit the growth of competitive local exchange carriers (“CLECs”) and (2) to refrain from competing against one another in contiguous markets—one CEO said competing in one another’s ILEC territory did not seem right.<sup>17</sup>

At the heart of the *Twombly* complaint is that the Baby Bells or the ILECs engaged in parallel conduct, or matching behavior. There was no allegation of actual agreement among the Baby Bells, although an agreement by inference was asserted.

The allegation of parallel conduct was not sufficient because the parallel conduct, when viewed in light of common economic experience, did not amount to an agreement. Rather than illegal conduct based on an agreement by inference, which plaintiffs alleged, the natural, unilateral action of each individual company was intent on preserving its regional dominance. As to the decision of each ILEC not to enter another ILEC’s territory, certainly there was parallel conduct, but not a conspiracy, “if history teaches anything.” The ILECs were born into a world of monopoly and were used to sitting tight and expecting their monopolist neighbor to do the same. Remember, in antitrust there is no duty to aid competitors, as stated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.<sup>18</sup>

The Supreme Court denied it was creating a heightened pleading standard of requiring specific facts. Rather, the Court was requiring only enough facts to state a claim to relief that is plausible on its face. Plausibility had to take on the requirements of the antitrust law where parallel conduct is not sufficient to demonstrate a conspiracy.

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<sup>16</sup> *Id.* at 549.

<sup>17</sup> *Id.* at 550–51. You should not conclude that CLECs were simply upstarts. The largest CLEC was AT&T which was intent on preserving its exclusive position in the long distance market. Other CLECs were Time Warner and Cablevision, large companies that sought to expand their exclusive franchise in the cable market.

<sup>18</sup> 540 U.S. 398, 411 (2004).

So now, except in run-of-the-mill cases, and certainly in antitrust cases and securities cases, you have the requirement to allege facts sufficient to show plausibility before you are entitled to get discovery on your claim.

What justified this sea change in pleading for antitrust and other complex cases? The Court offered its own explanation: Antitrust discovery can be expensive. So, it is a cautionary rule: Before cost is imposed, let us be sure we have a claim that has a plausible chance of prevailing. The proposed class in *Twombly* had ninety percent of all customers and dealt with an unusual variety of antitrust violations which occurred over a seven year period. It would have been a case with high discovery costs.

The traditional answer that the wheat would be separated from the chaff without undue expense and time by a wily judge's following the Federal Rules of Civil Procedure for discovery and the Manual for Complex Litigation was not a satisfactory answer. Indeed, experience has demonstrated, it is a vain hope.

So now we know that you have to allege enough facts so that a pleading is nudged from the speculative to the plausible. Does that mean the plaintiff can report to the defendant's cashier's window? The answer is not quite yet.

In most cases involving summary judgment, there has been discovery where documents have been produced, depositions taken, affidavits filed, and issues have been fully explored. But, there is nothing in the rules that restrict a summary judgment motion to a post-discovery environment. It can be brought in much sooner, and Rule 12(d) provides a mechanism for conversion of a Rule 12(b)(6) or 12(c) motion to a motion for summary judgment where "matters outside the pleadings are presented to . . . the court."<sup>19</sup>

Summary judgment, pursuant to Rule 56, provides for the prompt disposition of a case in which there are no genuine issues as to any material fact or in which only a question of law is involved.

By addressing assertions of unwarranted claims, or getting rid of sham defenses, summary judgment allows the parties to get expedited justice and some pressure on court dockets is relieved. Even if only partial summary judgment on a claim or

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<sup>19</sup> FED. R. CIV. P. 12(d).

defense is granted, that may very well save trial time by removing a claim or defense. It may also contribute to the settlement of the action.

Expedition and efficiency are important, but the chief requirement is that justice be done. Nonetheless, if matters can be expedited, and unnecessary trials avoided—for example, there are no genuine issues of material facts which have been raised—there is no good reason to deny a motion for summary judgment.

Now, what is the difference between a Rule 12 and Rule 56 motion? It is a subtle distinction which eludes the general public, law students, and sometimes professors and their students. Judges have to be included too!

Rule 12 motions address the sufficiency of the pleadings, not whether there is an actual claim that is meritorious. The question is does a claim exist as alleged in the complaint looking only at the complaint?

Summary judgment is usually based on far more than the pleadings—affidavits, depositions, and documents—the fruits of discovery. Considering all of them together, the moving party argues, that given the state of the record, there is no genuine issue as to any material fact, and, accordingly, the moving party is entitled to judgment on the merits as a matter of law.

One of the reasons for the lack of clarity in distinguishing between Rule 12 and Rule 56 motions is the way in which judges handle these motions.

Remember Rule 1—judges should interpret the rules to effect the just, speedy, and inexpensive determination and resolution of every action. If you can get rid of a case or a defense, does it make any difference how the motion and route to a decision is denominated? To paraphrase Shakespeare, can't a rose by any other name be just as sweet?

The following are some distinctions which might be helpful. First, a Rule 12(b)(6) motion is addressed to the face of the complaint. Second, a Rule 12(c) motion is restricted to the contents of the pleadings as supplemented by certain facts outside the pleadings. Third, a Rule 56 motion, testing whether any genuine issue of material fact is present for a claim or a defense, is based on a fuller record of facts.

The timing is another key indicator. Rule 12(b)(6) and 12(c) motions are typically made at the commencement of the proceeding. And Rule 56 motions are normally made post-discovery.

Unlike the Criminal Rules which contemplate one “omnibus” motion, keep in mind that the Civil Rules allow “seriatim” motions. If you make a Rule 12(b) motion, after discovery you can move for summary judgment under Rule 56; and if the initial Rule 56 motion is denied because there is an issue, for example, of credibility, a party can still move under Rule 50 for a directed verdict on the same issue on which summary judgment was denied.

Remember that partial summary judgment and denials of summary judgment are not final orders and may not be appealed.

I want to say a word here about the right to a jury trial. Notwithstanding that fewer and fewer cases go to trial, much of the literature and scholarship on Rule 12 and Rule 56 must be analyzed from the perspective of the constitutional preference for jury trials.

In a Rule 12(b)(6) motion to dismiss, the facts as alleged are presumed to be true, and all inferences favorable to the pleadings must be drawn. On that basis, we test the legal sufficiency of the complaint. The bias is towards preserving the claim so that it may be adjudicated at trial.

Similarly, when considering an issue on summary judgment, the district court must read the record in the light most favorable to the party opposing the motion. The opposing party gets the benefit of the doubt.

This thumb on the scales of justice can be understood only in light of our respect for the right to a jury trial. That right cannot be denied, unless the court is satisfied that there is no cognizable claim. There is no genuine issue of material fact.

Let's continue our discussion of the requirements of a good motion for summary judgment.

The movant is entitled to file affidavits in support of the motion. The movant wants to demonstrate that upon due consideration of the merits of the dispute, the moving party is entitled to judgment. While the rules do not require that affidavits be submitted in response, the plain fact is that the non-moving party must file papers in response. While the rules specify the times for making the required responses, many judges

allow the parties to set their own schedule. I know that I do as a matter both of courtesy and practicality. The slightly longer periods I allow produce hopefully better, more succinct, concise, and focused papers.

A motion for summary judgment is perhaps more urgent than a motion to dismiss, although I do not mean to suggest that a motion to dismiss should be taken lightly. Motions to dismiss, however, are frequently accompanied by leave to replead. Circuit courts look on this form of relief as appropriate. While the pleading cycle cannot be endless, motions denying leave to replead are closely scrutinized on appeal. A district court judge had better have a good reason for denying leave to replead.

With summary judgment, there is no second chance. The pleadings state a claim; but now the facts are in if there is no genuine issue of material fact and the claim or defense cannot be established, then judgment is entered and the case is ended. There is no leave to replead.

Local Rule 56.1<sup>20</sup> here in the Southern and Eastern Districts of New York elaborates on Rule 56's procedural requirements and aims to highlight the material facts as to which there are no genuine issues. The paragraphs have to be supported by citations to specific evidence—for example, depositions, documents, affidavits.

But the practice with regard to Rule 56 has not been helpful. The Southern District of New York has recently adopted pilot rules for case management techniques for complex civil cases.<sup>21</sup> Antitrust cases are defined as complex, and so are subject to these new pilot rules.

You will be interested to learn that in the Southern District of New York, the busiest and most active court in the federal system, is not exactly overwhelmed by antitrust cases. In 2009, forty-nine antitrust cases were filed, in 2010, fifty-two, and this year through the end of August, forty-one.

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<sup>20</sup> E.D.N.Y. R. 56.1; S.D.N.Y. R. 56.1.

<sup>21</sup> See generally *Project Pilot Hopes To Tame Complex Civil Cases*, THE THIRD BRANCH (Dec. 2011), [http://www.uscourts.gov/News/TheThirdBranch/11-12-01/Pilot\\_Project\\_Hopes\\_to\\_Tame\\_Complex\\_Civil\\_Cases.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-12-01/Pilot_Project_Hopes_to_Tame_Complex_Civil_Cases.aspx); see REPORT OF THE JUDICIAL IMPROVEMENTS COMMITTEE: PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES 1–14 (Oct. 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Ta b%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Li tigation.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Ta b%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf).

In contrast, intellectual property cases—patent and trademark cases—are far higher by a multiple of eight—more than 400. Securities and commodities cases are four to five times higher—200 to 250.

In any event, for these complex cases, 56.1 statements are no longer mandatory and do not need to be filed if the parties so request and the court approves. But if the court requires 56.1 statements, they may not exceed twenty pages per party.

Let me interpret this for you. Local Rule 56.1 statements can be useful, if they are short and concise. Their utility to the court diminishes with volume. It is not a case of the more the merrier, it is the opposite: The more there is, the less help. Concision counts and it is the most effective way to prevail.

Lawyers generally have to restrain their habit of trying to trace every legal principle back to the invention of money as an instrument of trade. Get to the point.

From a personal standpoint, I prefer 56.1 statements. I find them very helpful—if done well.

A good 56.1 statement forces the parties to set forth and address material facts about which there is no dispute. Even if there is a dispute, there are probably fewer after a 56.1 exercise than before. So, it is not an idle exercise. And, even if summary judgment is not granted, the fact that some material facts were agreed to means that there has been some improvement in judicial efficiency and economy.

But, if the parties do not contain themselves, the utility of the 56.1 statement erodes rapidly. Let me give you an example: A separately numbered paragraph asserts a fact, and in support of that fact there is a reference to three or four depositions and an affidavit, none of which support the separately numbered paragraph, but rather, require a reading of all three or four depositions, together with the affidavit, and the drawing of an inference by the court based on circumstantial evidence. You can imagine what is going to happen here: The game is not worth the candle. Does the judge really want to become the thirteenth juror? When you take your depositions, you have to be mindful of the opportunities for use in a motion for summary judgment or at trial.

You will recall, I talked about the bias embedded in Rule 12(b) and Rule 56 motions to preserve the right to jury trials. How does that work in practice, and how does it work in

antitrust cases? To chart the evolution of this, let us start with *Poller v. Columbia Broadcasting System, Inc.*,<sup>22</sup> decided over fifty years ago. I consider this to be a recent case because it occurred within my lifetime, although it was before cable.

Poller owned a UHF TV Station in Milwaukee. Columbia Broadcasting System (“CBS”) exercised its contract right to cancel Poller’s affiliation agreement. Poller alleged a conspiracy to drive UHF stations out of business in favor of VHF which CBS utilized. Pursuant to the conspiracy, CBS acquired another UHF competitor, converted it to VHF, and left Poller high and dry. Poller went out of business. Justice Harlan in his dissent—with Frankfurter, Whittaker and Stewart—described the case as one of those “not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms.”<sup>23</sup> But the majority was not swayed—most particularly because the district court had granted CBS’s motion for summary judgment.

The Supreme Court—Clark, Warren, Douglas, Black, and Brennan—held:

We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that [summary judgment] should not have been granted. 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. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of “even handed justice.”<sup>24</sup>

You will note the bias in favor of jury trials and the wonders of cross examination.

A quarter century later, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>25</sup> another five to four decision, the Court charted a course 180 degrees from the *Poller* holding. Justice Powell, who wrote the majority opinion, was joined by

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<sup>22</sup> 368 U.S. 464 (1962).

<sup>23</sup> *Id.* at 474 (Harlan, J., dissenting).

<sup>24</sup> *Id.* at 473 (majority opinion) (emphasis added).

<sup>25</sup> 475 U.S. 574 (1986).

Burger, Rehnquist, Marshall, and O'Connor. Justice Powell was appointed by Richard Nixon, after a distinguished career representing major corporate interests. He was open to antitrust doctrine which promoted efficiency. Mr. Justice White dissented, joined by Blackmon, Brennan, and Stevens. Justice Brennan was in the majority in *Poller*; he was consistent, and so he ended up with the dissenters in *Matsushita*.

Plaintiffs in *Matsushita* alleged that the Japanese electronic products manufacturers—mostly TV sets—maintained and fixed continually high prices in Japan, and at the same time fixed and maintained low prices here in the United States. The Japanese manufacturers conspired in this way in order to drive American manufacturers out of business.

At the end of a prolonged period of discovery in which there was voluminous document production, the district court ordered the parties to file statements listing all the documents that would be offered at trial. The judge then found most of the materials offered by the American manufacturers—the plaintiffs—were inadmissible. Further, he found, based on the admissible evidence, that there was no genuine issue of material fact as to the existence of a conspiracy, and that any inference of a conspiracy was unreasonable. Accordingly, the district court granted summary judgment in favor of the Japanese defendants.

The Third Circuit reversed, finding there was evidence of a conspiracy. The Supreme Court reversed and remanded for further proceedings. On remand, the Third Circuit entered an order dismissing the complaint of the American manufacturers.

What happened in the intervening twenty-five years after *Poller*? Well, one thing is obvious. With the exception of Mr. Justice Brennan, it was a new court. And while it was a five to four decision, you cannot say it was a liberal or conservative split. In *Matsushita*, Justice Marshall was in the majority; Justice Brennan, in the minority. Justice Powell was in the majority; Justice White, in the minority.

The language of Rule 56 had not changed. It still permitted summary judgment where there was no genuine issue of material fact. And, if there were genuine issues, there had to be a trial. The *Matsushita* majority recognized that summarizing the facts, given “this case’s long history” was a “daunting task.” So, rather than engage in that task which they found to be “unnecessary,”

the majority analyzed instead the appropriate standard for reviewing a voluminous record and decided whether summary judgment should be awarded in an antitrust case.

During the intervening twenty-five years, antitrust law continued its development. The antitrust cases post-World War II to the mid-70s were dominated by per se rules. Allegations of price fixing set off fire alarms, per se. Starting in the mid-70s, there was a drawing away from the per se approach, and instead the rule of reason became more prevalent. Courts were called on to analyze the economic effects of the conduct being evaluated under the antitrust laws. Courts began to recognize that firms, even dominant firms, should have considerable freedom to choose product pricing and new product development. For example, Kodak's right even as a putative monopolist to introduce new and different products.<sup>26</sup>

And while we are talking about developments on antitrust law, let me observe that industrial, manufacturing, and technological developments have a great impact on the application of antitrust law. In addition to procedure and the substantive law, you must consider what is happening in the industry or market you are considering.

I mentioned Kodak. Its monopoly dealt with silver halide crystals embedded in micro-thin layers of dyes and gelatins coated on an acetate base—it is better known as film. Film has been done in by digital photography. Kodak's monopoly evaporated and today it is discussing the possibility of bankruptcy.

I mentioned *Twombly*. The Baby Bells had a monopoly on local service because they controlled the last mile of wiring from the central office to the customer's premises. But the Baby Bells wanted to get into the far more lucrative long distance market where prices ran up to fifteen cents per minute. This price was the result of regulatory tinkering in which long distance subsidized local pricing and business subsidized residential. By the time that Baby Bells demonstrated that the local markets were open to competition, the high-priced, long distance market had disappeared.

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<sup>26</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979).

Cellular technology had developed to the point where it was approaching a critical mass; it needed one more boost to the traffic on its network. And here, it was pricing all phone calls the same whether it was local or long distance. Cellular phones adopted the bucket of minutes approach; all phone calls—local and long distance—were priced the same. It boosted phone traffic so the cellular network was economically viable. And it forced the local phone companies—the Baby Bells—to follow suit. The Baby Bells lost out on the long distance market which motivated its giving up its “last mile” monopoly.

Let me examine another industry, the oil and gas industry. In the early 80s, the major oil companies went on a binge of proposed mergers. Why? Well stock prices of oil companies were falling so that it was actually cheaper to buy a competitive oil company with proven oil reserves, than it was to spend the money to find or explore for your own reserves. In other words, finding oil got to be more expensive than the cost of acquiring a company in a stock deal. All of the attempts were enjoined under the antitrust laws. One oil company found its white knight in DuPont, another in U.S. Steel. What happened next?

Well less than two decades later Exxon and Mobil merged to form a corporation of unbelievable size—both traced their beginnings to the Standard Oil Company which was broken up in 1916. And what did Exxon and Mobil have to do? They had to divest themselves of their retail gas station businesses; that divestiture was not the lucrative end of the business. Both companies were glad to be rid of the retail businesses. Indeed getting rid of those gas stations was the antitrust equivalent of Brer Rabbit being asked to be thrown into the briar patch.

Let us return now to *Matsushita* which looked at both antitrust law and the electronics manufacturing industry.

The majority in *Matsushita* looked at the American manufacturers' allegations and concluded they did not make much sense from a United States antitrust perspective. First of all, the alleged conspiracy to keep prices high in Japan was of no concern to the United States. The United States' antitrust policy protected American interests in the United States. Our laws do not regulate the competitive conditions of other nations' economies.

Similarly, a conspiracy to keep prices artificially high would violate the antitrust laws, but it would not be a source of injury to the plaintiffs. They would not suffer an antitrust injury. Indeed, they would gain from the prices set at an artificially high level.

With respect to low cost predatory pricing, Justice Powell said that did not make any economic sense. The American plaintiffs contended that the high profits in Japan put the Japanese manufacturers in a position where they could price below market levels in the United States. In order to enjoy any benefit from below cost pricing, however, these low prices would have to be sustained until competition was driven out of the market; and only then could the new found monopolist raise prices to recoup all that had been lost on the predatory pricing phase, plus interest. Of course, the American manufacturers also assumed that no new entity would enter the market to drive down the recently increased prices. How likely was that? Not very, especially on the facts of that case where the alleged conspiratorial behavior had gone on for two decades. Indeed, the prolonged period suggested there could be no conspiracy.

Justice Powell required the plaintiffs to show more than a conspiracy in violation of the antitrust laws, they had to show that they had been injured by the illegal conduct. And the injury had to be an antitrust injury. For example, conspiracy to raise prices, while illegal, could not have injured the plaintiffs.

To defeat summary judgment, plaintiffs have to do more than cast a doubt on defendants' behavior. They have to show specific facts demonstrating there is a genuine issue for trial.

Given the facts and Justice Powell's antitrust analysis, the plaintiffs' claims were "implausible"—note the word. That is, they make no economic sense. In these circumstances, plaintiffs have to make a stronger showing of the need for a trial. After discovery, you are not entitled to a trial on the hopes that something will pop up or that counsel will deliver a withering cross-examination or a devastating summation.

In terms of drawing inferences from the evidence, it is not possible to infer a conspiracy merely from parallel conduct. The plaintiffs' evidence must be compelling enough to exclude the possibility that the alleged conspirators acted independently.

The Court found that an alleged predatory pricing conspiracy was inherently speculative. For the conspiracy to be rational, the conspirators must have a goal of recoupment, or recovery of all the losses they experienced with below-cost pricing, together with interest. This is, by definition, an uncertain scheme. The only sure thing is the loss attributed to the below-cost pricing. And low-cost pricing by itself might not be sufficient to win in the market place. The domestic competitors may have deep pockets, brand loyalty, territorial preferences, which could frustrate low-cost pricing. But, even if the desired monopoly is obtained, it must be maintained thereafter. Justice Powell said that the commentators had reached a consensus: Predatory pricing schemes are rarely tried and, even more rarely, successful.

You should not infer conspiracy when such inferences are “implausible”—again, note the word. And there is a good reason not to draw such inferences, it deters pro-competitive conduct. And the plaintiffs’ complaint dealt with low prices for good television. That is an antitrust goal—good products sold at competitive prices.

Cutting prices to increase business is the very essence of competition. Inferring a conspiracy from low prices chills the precise conduct the antitrust laws are supposed to protect.

After *Matsushita*, it is clear that there is no big case, or *Poller*-like, restriction on summary judgment in antitrust cases. Summary judgment is now clearly available.

The same date that the Supreme Court decided *Matsushita*, it also decided two other cases: *Anderson v. Liberty Lobby, Inc.*<sup>27</sup> and *Celotex Corp. v. Catrett*.<sup>28</sup> Cites to *Anderson* and *Celotex* are now standard fare in Rule 56 motions.

*Anderson* sets “rules of the road” for granting summary judgment. First, the standard for granting summary judgment “mirrors” that for determining a directed verdict motion pursuant to Rule 50—judgment as a matter of law. Second, the non-moving party cannot defeat a summary judgment motion by showing a scintilla of evidence in support. Rather, the non-moving party must show that there is substantial evidence. Substantial means enough evidence to support a jury verdict.

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<sup>27</sup> 477 U.S. 242 (1986).

<sup>28</sup> 477 U.S. 317 (1986).

Third, and finally, if the standard of proof is clear and convincing, then proof on the motion for summary judgment must meet that standard.

*Celotex* picks up where *Anderson* left off with respect to the showings that the moving, and non-moving, party must make.

Assuming the moving party does not bear the burden of persuasion, the moving party can satisfy its burden on the motion for summary judgment by showing the lack of factual support for an essential element of the non-moving party's claim. If the moving party's burden is met, the non-moving party must introduce specific facts supporting its claim. Failure to do so means that the moving party prevails.

We know now that summary judgment is as appropriate in antitrust cases as it is in any other case. A recent antitrust case in the Second Circuit decided in August 2011 shows you how commonplace summary judgment has become.

The City of New York sued GHI and HIP over their proposed merger claiming that the combined entity would wield too much power over prices in the healthcare insurance market. The Second Circuit did not bother citing to *Matsushita*, *Anderson*, or *Celotex*. It got right down to business. The City had to allege a "plausible," "relevant" market. Of course, the relevant market must be defined as a necessary predicate to determine if the merger of the two insurers would substantially lessen competition. The market has to include all the products reasonably interchangeable by consumers.

The City failed to do that. Instead, it defined a market based on the two insurers it chose to do business with. A single purchaser's preference, however, does not define a market, the court held.

The interesting issue in this case was the court's refusal to permit the City to amend. The court held, correctly in my view, that it was too late.

Remember, with motions to dismiss, it is not unusual to allow for a new pleading. But here, the City moved to enjoin the merger, and the Judge who denied the application pointed out the flaw in the City's market definition. The City did not attempt to amend until after the motion for summary judgment was made. This points out, again, the difference between a

motion to dismiss and a motion for summary judgment. The run up to a motion for summary judgment may take longer, but the result is more final and complete.

Let me close with some advice on what you should not do and what you should do when you are contemplating a summary judgment motion.

First, do not overburden the court. I think the one thing I dread most is the lawyer who writes in and says: "This matter is too complicated. Give me leave to file fifty pages." I interpret this to mean "Judge, you are a dim bulb; I will enlighten you, but given your limitations, it will take me longer than twenty-five pages."

Second, don't rely on the pleadings. As I tried to explain, usually the summary judgment motion is long past the time for testing the adequacy of the pleadings. You must recognize you are dealing with a different portion of the rule book.

Third, do not just quote the rules. And it does not do much to complain that the rules have been violated. For example, I was supposed to get the papers on Monday, but he didn't serve them until Tuesday at 9:00 a.m., or the type size was wrong. What the court needs is analyses of how the law applies to these facts to yield a rational, legally defensible result. So, what should you do?

First, be specific, precise, and concise. The shorter and more pointed your brief is, the better off you will be. If you have a weak spot do not bury it. Address it. Candor counts; it lends judicial confidence to the quality of your advocacy. A district judge may very well think, how is this going to look on appeal; can this advocate protect the correct decision I want to make?

Second, spend time identifying the big facts and applicable law. Marshal all the evidence. Make sure the references are clear, precise, and correct.

Third, be prepared to take advantage of the motion process even if you do not prevail. Remember, that a denial can have a silver lining. Perhaps the court specifies the legal standard it will apply and what the proof requirements are to meet that standard. It certainly creates the law of the case. It may resolve certain facts which will expedite the trial. Sometimes, even if a motion for summary judgment is only granted in part, there is

little left to try, and the parties may settle. You may be able to use the decision to file in limine motions before trial and Rule 50 motions after trial.

I hope I have answered some of your questions and given you an overview of some of the strategies and basic concerns about making a motion for summary judgment in an antitrust case. You should not be hesitant about doing so. But you should be prepared to invest the time, effort, and brain power to take maximum advantage of the opportunity.

Remember that you are one of three hundred civil cases, plus fifty criminal cases. The judge is busy. He or she will appreciate your good efforts to boil it all down so that the issue may be properly addressed.