STRESS FRACTURES: THE NEED TO STOP AND REPAIR THE GROWING DIVIDE IN CIRCUIT COURT APPLICATION OF SUMMARY JUDGMENT IN ANTITRUST LITIGATION

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Abstract

A growing circuit split among courts regarding the utility of granting summary judgment in antitrust litigation is threatening severe inefficiencies among businesses as they are forced to comply with diverging interpretations of antitrust law. This article examines the nature of this widening division, and why it is particularly concerning in the antitrust realm where businesses face substantial compliance and litigation costs. The U.S. Supreme Court, through a variety of landmark summary judgment decisions, has stressed the importance of granting summary judgment when the claims have little to no factual basis. Yet a few circuits continue to denounce summary judgment as an undesirable procedural option in the antitrust context, contravening the meaning and intent of Congress in creating a single body of antitrust legislation, as well as well-established Supreme Court precedent on the matter. Compounding upon that issue is a further circuit split that has significant bearing on antitrust litigation outcomes: whether a plaintiff may benefit from a presumption of causation when defending against a summary judgment motion. By allowing this presumption, these circuits are potentially exacerbating the enormous time and resource costs that antitrust defendants already face. This article argues that a uniform interpretation of antitrust law and less variance in the summary judgment analysis among circuits will better serve the purposes underlying U.S. antitrust legislation. This would be most effectively accomplished by the Supreme Court granting certiorari for cases in circuits that disfavor summary judgment in order to eliminate this circuit split and facilitate the efficient functioning of our antitrust regime.

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I. Introduction

Antitrust laws, in order to best carry out their purpose, need to be uniform. These laws can best serve that purpose when courts apply the same standards and rules across the various jurisdictions and organizations that they regulate. Antitrust laws in particular have a special interest in being uniform and being applied uniformly. This special interest in the antitrust context stems from the very purpose and goals of antitrust legislation. I argue that the need for uniformity in the application of antitrust law means there should be a special awareness of potential division amongst the circuit courts on the application of antitrust law; that is, because antitrust trust law has a unique vulnerability to division, circuit court disagreement should be examined even more closely than in other areas of law. This special awareness calls for reviewing current circuit court jurisprudence to detect whether antitrust law is being uniformly applied. An analysis of the way the different circuit courts currently apply antitrust law reveals that there is a growing divide on how Rule 56 on summary judgment should be applied as a tool to resolve antitrust cases earlier in the litigation process. I endeavor to show that summary judgment has a special significance in the realm of antitrust law. This growing divide is a danger to effectiveness of our antitrust law regime, and needs to be addressed.

I will show in Part II that there is a special need for uniformity in the area of antitrust law. Part III explains the value of summary judgment to antitrust litigation through an analysis of its business protecting and cost saving features. In Part IV I analyze the circuit court disagreement in two areas of antitrust summary judgment as an example to demonstrate circuit court division in this area. First, I examine whether the circuit courts disfavor summary judgment in general or specifically in antitrust litigation. Second, I examine the circuit court division over whether there is a presumption of causation for the plaintiff when looking at defendant motions for summary judgment for antitrust cases. At the heart of these examples lies the fundamental disagreement over whether the circuits should decide summary judgment with some special reluctance in the antitrust context or use it freely as appropriate. The circuit court cases presented are provided as an example of disagreement of even the fundamental application of summary judgment in the antitrust context.

Finally, in Part V, I will argue that this growing split in the circuit courts should be cut short by the Supreme Court, reaffirming their

standards for the application of summary judgment as an effective tool to promote the efficiency of our courts. Without reliable consistency in summary judgment in the antitrust context, the circuit courts will be unable to unify their approach to this issue. In closing, I argue that the Supreme Court should reiterate that summary judgment is not disfavored in any context, particularly in antitrust, and that there is no presumption of causation when examining defendants' motions for summary judgment.

II. Antitrust Laws Need to be Uniform in Order to Effectively Carry Out Their Purpose

A. Antitrust Law and Compliance Costs

Businesses and firms incur significant costs as they work to comply with antitrust laws.[2] Firms must bear an "enormous deadweight" in order to carry out ordinary business activities while complying with multiple regulatory schemes.[3] Though certainly some level of cost is to be expected from complying with any sort of law, antitrust law's costs can be extreme.[4] These costs are magnified when firms attempt to comply with varying or disparate sets of rules.[5] A single regime could reduce these costs.[6] Firms that operate across multiple circuits are exposed to those circuits' different interpretations of antitrust law. Firms can accrue compliance costs both in the monetary loss resulting from following various rules, and in ensuring they have the expert knowledge necessary to comply with potentially overlapping rules and regulations.[7] Compliance costs in money and expert knowledge are deadweight for firms, in that they are costs which do not add to the production of value or otherwise

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[2] William Sugden, *Global Antitrust and the Evolution of an International Standard*, 35 VAND. J. TRANSNAT'L L. 989, 991 (2002) (discussing that, in the context of global firms having to comply with different national organizations' antitrust laws, costs are accrued through compliance that would be all but eliminated by a single antitrust standard).

[3] *Id*.

[4] *Id.*

[5] *Id*. at 1017.

[6] *Id*.

[7] Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 386 (1997) (remarking that compliance with varying or conflicting antitrust regulations can "make for fascinating work for competition lawyers, but great frustration for business planners").

benefit the firm. This injures competition both within and outside the United States, although historically the United States has been seen as attractive due to its singular body of federal antitrust regulations.[8]

Historically, on an international level, the Sherman Act can be seen as a successful unification of disparate state antitrust standards, which replaced conflicting and ineffective regulations.[9] However, the advantages of reducing costs by switching to a uniform federal antitrust system rather than disparate state antitrust systems could be lost if that federal system were no longer uniform. The costs of compliance are magnified when conforming to overlapping laws or different interpretations of the same law, as firms could struggle to correctly understand which actions are allowed and which are not according to different interpretations of conflicting laws.[10]

Complying with different interpretations of federal antitrust law could certainly inflict the same kind of costs that complying with different countries' or states' individual antirust regimes do. Conflicting circuit court application of antitrust law would not differ significantly from contradictory state or international antitrust laws. These magnified costs would hinder and limit competition amongst firms.[11] Applying antitrust laws in a way that would hinder competition would be directly in conflict with the goals Congress intended to further when promulgating federal antitrust law, which largely centered around freedom of trade, increased competition, and consumer protection through healthy markets.[12]

The costs of antitrust litigation are not merely an abstract fear or forgettable cost of doing business. The costs of compliance with antitrust policy do not exist in a vacuum, but are instead often passed on to consumers.[13] These costs mean that any inefficiencies in the antitrust system potentially impact every consumer of an affected

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[8] *Id*. at 352-3.

[9] *Id*. ("[S]tate antitrust . . . laws were fundamentally incapable of addressing the scope of anticompetitive conduct that crossed jurisdictional boundaries. . . [T]he Sherman Act . . . almost completely federalized American competition law.").

[10] *Id.* at 386.

[11] *See id*.

[12] *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 560-62 (2012).

[13] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 1, 8 (2010).

industry.[14] This also supports the idea that division amongst the circuits in interpretation of federal antitrust legislation has a special impact greater even than the normal costs of circuit confusion in other areas of law.

Antitrust law was intended by Congress to promote and encourage competition in order to benefit consumers—"designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade"—so the courts should endeavor to interpret the law in the way that most effectively achieves this goal.[15] Specifically, courts should interpret the law uniformly, which will reduce the deadweight costs necessary for firms to comply with the laws.[16] A uniform interpretation would reduce the number of standards with which firms that operate in different circuits need to comply. A clear and universal interpretation of federal law would allow the law to better serve its purpose of increasing market freedom and encourage the unrestricted but fair competition that was Congress' goal.[17]

B. Forum Shopping

As federal antitrust laws were intended to promote fair competition and protect consumers, as discussed above, antitrust law should be applied to prevent forum shopping, which is an insidious danger.[18] Forum shopping inherently degrades confidence in the legal system.[19] It also increases systemic costs of administering the judicial system, by expending time and money arguing questions that may have already been settled in another jurisdiction.[20] Further, forum shopping's greatest risk is compromising business', or any legal actors', ability to know which behaviors it may permissibly engage

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[14] *Id*. (stating that an increase in antitrust fines induces firms to make excessive investments in monitoring and prevention, and such costs are passed on to consumers).
[15] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
[16] Sugden, *supra* note 2, at 991.
[17] *N. Pac. Ry. Co.*, 356 U.S. at 4.
[18] Sanford Caust-Ellenbogen, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1082-3 (1984) (discussing the negative implications of forum shopping, including an increase in systemic costs and difficulty determining which law applies).
[19] *Id*. at 1083.
[20] *Id*.

in.[21] This last aspect is especially applicable to those actors that operate in multiple jurisdictions.[22] Forum shopping can also cause confusion for regulators who must abide by court decisions, potentially leading to circuit splits.[23] Forum shopping is specifically encouraged when firms operate across multiple jurisdictions that apply different or differently interpreted antitrust laws.[24] It is important to note that as antitrust laws so often implicate large firms that have operations in many different areas, they would be particularly vulnerable to the dangers of forum shopping, since "a corporation doing business nationally can be sued in the district courts of most or all circuits."[25]

While state antitrust law may still apply specific variations of antitrust law to different states, federal law should be interpreted uniformly in order to prevent unfair forum shopping for two main reasons:

> Intercircuit conflicts by definition mean a lack of uniformity in federal law. The desire for greater uniformity underlies many of the proposals to change the structure of the federal system. Uniformity is perceived as a legitimate goal for at least two reasons. The first is that similarly situated people should be treated similarly. As the Hruska Commission lamented, 'Where differences in legal rules applied by the circuits result in unequal treatment of citizens . . . solely because of differences in geography, the circumstance is admittedly an unhappy one.'
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> A second reason to strive for uniformity is to correct error. If there is only one 'correct' interpretation of federal law, a conflict between two courts means

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[21] *Id*.
[22] *Id*. at 1083-84.
[23] *Id*. at 1084.
[24] Caust-Ellenbogen, *supra* note 18, at 1084 ("For example, a corporation doing business nationally can be sued in the district courts of most or all circuits. If there is an intercircuit conflict, the smart litigant ordinarily will sue in the circuit that has taken a position most favorable to his claim. Even if there is no conflict, one or more circuits may have issued unfavorable rulings, and the litigant will try to avoid those forums.").
[25] *Id*. at 1082.

> that one court is in error. The conflict must be resolved to correct the error.[26]

The second reason given above—that there is only one way to correctly and accurately interpret federal law—is particularly convincing in the antitrust context, given the incredible costs of complying with conflicting regulatory regimes as different circuits interpreting federal antitrust law differently incentivizes forum shopping for different rulings or interpretations.[27] The closing line, that "the conflict must be resolved[,]" goes to the very heart of this note and serves to illustrate why the circuit court confusion demonstrated below is important.[28]

In antitrust law, federal law is the primary law since "the Sherman Act . . . almost completely federalized American competition law."[29] State law is secondary and complementary, but not the primary source of antitrust regulation.[30] As the primary source of antitrust regulation, federal law should be interpreted uniformly in order to prevent antitrust litigation from being vulnerable to forum shopping.[31] If the primary source of law in the antitrust area were interpreted in conflicting ways, any advantages gained from unifying disparate state laws into a single federal antitrust system would be lost. Even different interpretations of the same law, rather than applying different laws, can lead to unwanted forum shopping.[32]

Antitrust circuit court uniformity would be a major bar to the most damaging sort of forum shopping commonly seen in antitrust litigation—that is, forum shopping across the incredibly wide range of jurisdictions—which is harmful by its very nature. Not only is this important in the general application of federal law, but antitrust law specifically is usually applied to large firms and inflicts large compliance costs. A uniform interpretation of federal antitrust law would encourage the sort of market freedom that is at the very heart

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[26] *Id*. at 1084-85 (quoting Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, *reprinted in* 67 F.R.D. 195, 206-7 (1975)).
[27] *Id*.
[28] *Id*.
[29] Waller, *supra* note 7, at 352-53.
[30] *Id*.
[31] Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002).
[32] Caust-Ellenbogen, *supra* note 18, at 1084-85.

of federal antitrust regulations. To summarize, if antitrust law is not being applied the same way across jurisdictions, it is potentially causing more harm than good and directly contravening its own purpose. As discussed below, summary judgment is a key aspect of federal antitrust law and should be interpreted uniformly across the circuits.

III. Summary Judgment Carries a Special Importance in the Antitrust Law Context

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation.[33] Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions.[34] In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation.[35] These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.[36]

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation.[37] The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment.[38] The court's language here supports

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[33] *See generally* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887 (2003); Robert H. Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 STAN. J. L. BUS. & FIN. 1 (2005) ("[A]ntitrust class actions sometimes involve complicated, highly individualized issues relating to injury and damages—issues that could make a trial unmanageable.").
[34] Wagener, *supra* note 33, at 1893.
[35] *Id*.
[36] *Id*. at 1894-96.
[37] *Id*. at 1893.
[38] Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166-67 (7th Cir. 1978).

the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process.[39] Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation.[40] Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery."[41] The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery.[42] This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.[43]

Second, antitrust litigation is normally a slow process that takes a great deal of time.[44] The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm.[45] The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect

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[39] *See* Bell Atlantic Co. v. Twombly, 550 U.S. 544, 560 n.6 (2007).
[40] Wagener, *supra* note 33, at 1894-96.
[41] FED. R. CIV. P. 56(b).
[42] FED R. CIV. P. 56(d).
[43] *See* Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1178 (2010) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986)).
[44] *See* Bell Atlantic Co. v. Twombly, 550 U.S. at 560 n.6; Stucke, *supra* note 12, at 553 n.15 (quoting Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004)).
[45] *See* Wagener, *supra* note 33, at 1899.

back on the plaintiff.[46] These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs.[47] Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

> A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?[48]

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[46] *Id*.
[47] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989).
[48] *Id*.

Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants—not to mention costs to the state—during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims."[49] Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation.[50] As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable."[51] Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

B. Summary Judgment Can Protect Legitimate Business Conduct

The purpose of antitrust law is to protect the consumer by promoting fair competition amongst firms.[52] Thus, litigation that restricts or limits fair competition is directly contradictory to Congress' purpose in promulgating antitrust laws and regulations. The Supreme Court has acknowledged that summary judgment is a valuable tool in protecting legitimate competition that antitrust laws are designed to encourage, stating that

> Mistaken inferences in cases such as this one are especially costly, because they chill the very

[49] Brunet, *supra* note 43, at 1172.
[50] *Lupia*, 586 F.2d at 1167.
[51] Klonoff, *supra* note 33, at 1.
[52] 58 C.J.S. Monopolies § 7 (2015).

> conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies.[53]

That is, without summary judgment as a readily available option, the costs of litigation can deter business activity that should otherwise be encouraged. The costs of litigation aimed against otherwise fair competition are especially high because those businesses that comply with antitrust laws will be forced to deal with both the costs of compliance as well as the costs of litigation— an "especially costly" double burden.[54] For the reasons discussed above, summary judgment is an especially valuable tool in antitrust litigation due to its especially high cost saving abilities.

Summary judgment is a valuable tool in balancing the otherwise onerous burden placed on defendants in antitrust litigation to imbalanced costs.[55] Even firms that limit their operations only to legitimate business activities remain vulnerable to strategic litigation imposing significant legal costs associated with defending against antitrust claims and later discovery motions. Businesses that have not violated antitrust laws should be able to rely on summary judgment as a powerful defense against strategic or mistaken litigation.

IV. Circuit Courts are Increasingly Divided on Defendant Summary Judgment Motions in the Antitrust Context

As I have shown that antitrust law has a special need for uniform application and that summary judgment is an essential part of that uniform jurisprudence, the following discussion of two areas where circuit courts are divided on summary judgment application in the antitrust context should raise some concerns. First, circuit courts cannot agree on whether summary judgment is a generally disfavored action or a valid tool to be applied in the antitrust context.[56] As an

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[53] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 575 (1986).
[54] *Id*. at 594.
[55] Wagener, *supra* note 33, at 1920.
[56] *See* Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 583-84 (2012) (describing how federal appeals courts seem to be taking conflicting, divisive interpretations of summary judgment standards rather than applying

example, existing Supreme Court case law and guidance has failed to unify the courts' approach to applying existing case law and, in fact, "some federal judges do not seem to acknowledge, understand, or apply the elaborate Celotex conceptual framework . . . . [I]n at least as many cases, federal judges—as they did pre-Celotex—continue to decide summary judgment motions on a kind-of gestalt 'tennis match' mode of analysis."[57] Further, as yet another example of circuit court confusion on summary judgment in the antitrust context, there is a growing divide amongst the circuit courts concerning whether or not in summary judgment motions by a defendant, the element of causation connecting defendant's alleged actions and plaintiff's damages may be presumed from other evidence.[58] Some courts have clearly stated that there is no such presumption, and that plaintiffs must present evidence of causation to survive summary judgment; others have deemed a showing of the sort of damages that type of activity tends to cause as sufficient, and the remaining courts fall somewhere in between these standards.[59] As discussed above, in the arena of federal antitrust litigation there is a special need for circuit

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Supreme Court case law); *see also* Petition for Writ of Certiorari at 18, Dean Foods Co. v. Food Lion, LLC, 135 S. Ct. 676 (2014) (No. 14-110), *cert. denied*. (arguing that growing division amongst the circuit courts on summary judgment, especially in antitrust cases, is an issue calling for Supreme Court resolution and reintroduction of clear standards similar to the Court's previous issuing of the Summary Judgment Trilogy). This Petition was likely denied not for misidentifying a growing divide between the circuits, but for misinterpreting the 6th Circuit's review of plaintiff's evidence. Brief in Opposition at 23-25, *In re* Southeastern Milk Antitrust Litigation*,* 739 F.3d 262, 286 (6th Cir. 2014) (No. 14-110), *cert. denied*. 135 S. Ct. 676 (2014).

[57] Mullenix, *supra* note 56, at 584.

[58] *Compare* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060 (8th Cir. 2000) ("The boat builders have not shown that a reasonable jury could have found that Brunswick's programs, which were not exclusionary, caused harm in the first instance, or that they were a "material cause" of any harm allegedly suffered." (quoting National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found., 64 F.3d 1130, 1135 (8th Cir. 1995))), *with In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 940, 184 L. Ed. 2d 725 (2013) ("In other words, if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, we are entitled—in the tort context at least—to presume that such an injury, if it occurred, was caused by the act.").

[59] *See supra* note 57, and accompanying text.

court uniformity, and circuit disagreement on summary judgment standards could quickly grow into a major split particularly injurious to the antitrust arena.[60]

A. Circuit Courts Disagree on Whether Summary Judgment is Disfavored Generally or Specifically in an Antitrust Context

Circuits are currently experiencing the beginning of a divide on even some of the most fundamental aspects of summary judgment.[61] Courts disagree on whether or to what degree summary judgment should be disfavored in an antitrust or other context. The Supreme Court has addressed these concerns before in the famous Summary Judgment Trilogy,[62] but courts have already begun to deviate from the summary judgment standards that the Supreme Court there set forth.

Many circuits stress that the summary judgment standard should be applied uniformly rather than differ depending on the underlying substantive law at issue.[63] These courts rely on the

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[60] *See supra* Parts II and III.

[61] *See generally* Mullenix, *supra* note 56 (discussing the failure of Supreme Court case law to unify the different circuit courts' application of summary judgment standards).

[62] That is, Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding that under Fed. R. Civ. P. 56, the party moving for summary judgment need only inform the court of the basis of its motion, which then shifts the burden to the party that will bear the burden of proof at trial to introduce evidence showing the existence of the element essential to its claim); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (emphasizing that motions for summary judgment are to be decided by the same substantive evidentiary standard of proof as would be applicable to the matter at trial); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (clarifying that courts may consider the persuasiveness of the nonmovant's proferred evidence when deciding whether to grant or deny summary judgment motions). *See infra* Part V(A)(1) for further discussion.

[63] *In re* Wholesale Grocery Prods. Antitrust Litig., 752 F.3d 728, 732-33 (8th Cir. 2014) ("We apply the same standard—whether the record reveals a genuine dispute of material fact—to antitrust and non-antitrust cases alike, neither favoring nor disfavoring summary judgment, but simply following the evidence (or lack thereof) and the law wherever they lead."); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166-67 (7th Cir. 1978) ("Although the strict standards for grant of summary judgment, and the complex legal and factual nature of antitrust cases have made many courts

Supreme Court's overturning of earlier precedents that did disfavor applying summary judgment.[64]

Bias for or against applying summary judgment can be difficult to identify given that a significant portion of summary judgment rulings are both unpublished and unreported.[65] However, looking at the application of summary judgment in available decisions can reveal different approaches amongst circuits or their district courts. Specifically, the First, Fourth, Seventh, Eight, and Eleventh circuits all appear to apply summary judgment without any special favor or disfavor in its application.[66]

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reluctant to grant summary judgment in antitrust cases, technically there is no requirement that judges exercise greater caution in granting summary judgment in these cases than in any other. The Advisory Committee note accompanying Fed.R.Civ.P. 56 (1938) states that '[t]his rule [governing summary judgment motions] is applicable to *all* actions.' Indeed, the very nature of antitrust litigation would encourage summary disposition of such cases when permissible.") (emphasis supplied).

[64] Ramallo Bros. Printing, Inc. v. El Dia, Inc., 392 F. Supp. 2d 118, 128-9 (D.P.R. 2005) (explaining the clear standards for applying summary judgment to be that the "moving party carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden 'may be discharged by showing' . . . that there is an absence of evidence to support the nonmoving party's case." (citing *Celotex*, 477 U.S. 317, 325, 331 (1986))); Witter v. Abell-Howe Co., 765 F. Supp. 1144, 1147 (W.D.N.Y. 1991) ("[C]ourts should not be reluctant to grant summary judgment in appropriate cases since '[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims.'" (citing *Celotex*, 477 U.S. 317, 323-24)).

[65] *See* Mullenix, *supra* note 56, at 567-68, 574.

[66] *See, e.g.*, *In re* Wholesale Grocery Prods., 752 F.3d at 732-33 ("We apply the same standard-whether the record reveals a genuine dispute of material fact-to antitrust and non-antitrust cases alike, neither favoring nor disfavoring summary judgment, but simply following the evidence (or lack thereof) and the law wherever they lead."); Gulf States Reorganization Grp., Inc. v. Nucor Corp., 822 F. Supp. 2d 1201, 1209 (N.D. Ala. 2011) ("The cases which indicated that summary judgment is disfavored in antitrust cases have been disavowed."), *aff'd*, 721 F.3d 1281 (11th Cir. 2013); *Ramallo Bros. Printing*, 392 F. Supp. 2d at 128-29 ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition." (citing Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 55 (2d Cir. 1979))); Knight v. Am. Nat. Fire Ins. Co., 831 F. Supp. 1284, 1285 (D.S.C. 1993) ("Although summary judgment is an extreme remedy, the courts

1. Circuits Not Disfavoring Summary Judgment in the Antitrust Context

The First Circuit standard can be seen in *Ramallo Bros. Printing v. El Dia, Inc.,* which cites *Celotex* and other cases to unambiguously state that summary judgment may be especially useful in the antitrust context[67]. *Ramallo* involved a variety of antitrust claims based around a bundled pricing scheme that the plaintiff claimed violated antitrust laws.[68] The court, in granting the defendant's summary judgment motion, clearly noted that summary judgment is invaluable in the antitrust context because price competition and normal market forces that are perfectly legal can injure the competition; actual antitrust injury is a prerequisite to recovery.[69] The First Circuit's approach here clearly shows no bias against summary judgment in antitrust cases.

The Fourth Circuit's District of South Carolina notes in *Knight v. American Nat. Fire Ins. Co*. that "courts should not be reluctant to grant summary judgment."[70] *Knight* is not an antitrust case, but the court relies heavily on Supreme Court antitrust case law to explain its willingness to apply summary judgment.[71] The court cites Supreme Court case law, specifically the Summary Judgment Trilogy, to note that summary judgment in antitrust law has been "consistently affirmed."[72] The court goes so far as to state that summary judgment is not only appropriate, but "is mandated where appropriate."[73] Another district court in the Fourth Circuit notes that "the former judicial reluctance to use the summary-judgment tool in antitrust cases has been replaced by a new judicial willingness to enter summary judgment" in granting an antitrust summary judgment

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should not be reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate."); *Witter*, 765 F. Supp. at 1147 ("[O]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims."); *Lupia*, 586 F.2d at 1166-67 (describing that summary judgment, although subject to a strict standard, should not be used sparingly in complex antitrust litigation).

[67] *Ramallo Bros. Printing*, 392 F. Supp. 2d at 128-29.

[68] *Id*. at 137-39.

[69] *Id*. at 129 (quoting Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F. 2d 1325, 1338 (7th Cir. 1986)).

[70] *Knight*, 831 F. Supp. at 1285.

[71] *Id*. at 1286.

[72] *Id*.

[73] *Id*. at 1285-86.

claim for the defendant.[74] Like the First Circuit, the Fourth Circuit clearly holds no special bar against applying summary judgment in the antitrust context, especially given their use of antitrust cases to show their willingness to apply summary judgment to even non-antitrust cases.[75]

The Seventh Circuit may perhaps even lean towards *favoring* summary judgment, as it has clearly maintained that "the very nature of antitrust litigation would encourage summary disposition of such cases when permissible" since before even *Celotex*.[76] In *Lupia v. Stella D'Oro Biscuit Co., Inc.*, the court affirmed a grant of summary judgment dismissing a variety of antitrust claims while making a very strong argument for the application of summary judgment in antitrust cases.[77] The court makes explicit reference to discovery costs, the "special temptation" of treble damages, the time consumptive nature of antitrust litigation, and very real danger of damage to innocent parties in defending the value of summary judgment in the antitrust context.[78] The Seventh Circuit's language in this case unambiguously shows that antitrust cases carry no special shield against the application of summary judgment.[79]

The Eighth Circuit claims "neither favor[] nor disfavor[]" in regards to the application of summary judgment, in the antitrust context or any other.[80] The court in *In re Wholesale Grocery Products* clearly describes the evolution of the Supreme Court's take on summary judgment in antitrust cases, making reference to the older guidance that "summary judgment should be rare in antitrust cases" giving way to the modern standard that there is "an error of law in the imposition of a heightened standard for summary judgment in a complex antitrust case."[81] The courts' explanation of this evolving standard clearly lands on there being no special barrier to applying summary judgment in the antitrust context today.

The Eleventh Circuit affirmed a district court case clearly stating that "the cases which indicated that summary judgment is

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[74] Carpenter v. Dreschler, No. CIV. A. 89-0066-H, 1991 WL 332766, at *10 (W.D. Va. May 7, 1991) *aff'd.* 19 F.3d 1428 (4th Cir. 1994).
[75] *Knight*, 831 F. Supp. at 1286.
[76] Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166-67 (7th Cir. 1978).
[77] *Id*. at 1167.
[78] *Id*.
[79] *See generally id.*
[80] *In re* Wholesale Grocery Products, 752 F.3d at 732-33.
[81] *Id*. at 732.

disfavored in antitrust cases have been disavowed."[82] In *Williamson Oil Co., Inc. v. Philip Morris USA*, the Eleventh Circuit Court of Appeals walks through a careful breakdown of *Matsushita*, clearly explaining the summary judgment standard in antitrust cases and remarking that there is no "special burden" on plaintiff or defendant in applying summary judgment in that context.[83] Though the analysis provided in *Williamson Oil Co.* is slightly less clear than the above cases, the careful explanation of the standard at no point introduces a special barrier to summary judgment in antitrust cases and does not express any special concerns with summary judgment in that context.

The Second Circuit has taken a uniquely strong stance that summary judgment is not disfavored in antitrust litigation, going so far as to state "[i]n the context of antitrust cases, however, summary judgment is particularly favored."[84] The court's language here leaves no room for any belief that summary judgment might somehow be disfavored in the antitrust context in the Second Circuit.

It is clear that these circuit courts at the least do not apply some disfavor to summary judgment in the antitrust context. Instead, some of them even go so far as to favor it, given the advantages noted above. These circuits stand in sharp contrast to those discussed below, which apply varying degrees of disfavor to the application of summary judgment in the antitrust context. This disagreement is an area of sincere concern in attempting to develop an effective antitrust regime.

2. Circuits Disfavoring Summary Judgment in the Antitrust Context

Some circuit courts apply a "disfavored" or "reluctant" approach in applying summary judgment, either in general or specifically in an antitrust context.[85] The Sixth Circuit's position is

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[82] Gulf States Reorganization Grp., Inc. v. Nucor Corp., 822 F. Supp. 2d 1201, 1209 (N.D. Ala. 2011).

[83] Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1302 (11th Cir. 2003) (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468 (1992)).

[84] PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 104 (2d Cir. 2002).

[85] *E.g.,* Expert Masonry, Inc. v. Boone Cty., 440 F.3d 336, 341 (6th Cir. 2006) ("In this circuit, courts are generally reluctant to use summary judgment dispositions in antitrust actions. . . ."); MetroNet Servs. Corp. v. U.S. W. Commc'ns, 329 F.3d 986, 1000 (9th Cir. 2003) *cert. granted*, *judgment vacated sub nom.* Qwest Corp. v. MetroNet Servs. Corp., 540 U.S.

clearly stated in *Expert Masonry, Inc. v. Boone County*, explaining "[i]n this circuit, courts are generally reluctant to use summary judgment dispositions in antitrust actions. . . ." in affirming the grant of summary judgment for the defendant in an antitrust litigation.[86] Though the court makes reference to *Matsushita Industrial Co. v. Zenith Radio Corp.* and the Supreme Court precedent on summary judgment in the antitrust context, the court's concerns over the "role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference" lead it to clearly state its disfavor of summary judgment in the antitrust context.[87] In *Food Lion, LLC v. Dean Foods Co.*, the court goes on to not only cite the same language supporting a reluctance to apply summary judgment in antitrust cases, but goes further to describe that there is a general lack of agreement amongst the circuits in adjudicating antitrust claims, making no reference to available Supreme Court case law on antitrust litigation until some time later when ultimately reversing the grant of summary judgment.[88]

The Ninth Circuit has also clearly stated that summary judgment is disfavored in some circumstances.[89] Though the case was ultimately vacated on other grounds, the language used in *MetroNet Services Corp. v. U.S. West Communications* leaves no room to doubt that the Ninth Circuit is willing to "place a thumb on the scale" when dealing with complex antitrust litigation where there are hostile witnesses, motive and intent are at issue, and evidence is in the opposing party's hands.[90] Compare this language with the Eighth Circuit's statement that there is "an error of law in the imposition of a heightened standard for summary judgment in a

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1147, 124 S. Ct. 1144, 157 L. Ed. 2d 1040 (2004) (clearly stating that summary judgment is "disfavored" in complex antitrust litigations) (vacated on other grounds); Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997) ("We note that in a broad sense, summary judgment in antitrust cases should be used sparingly"); Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F. Supp. 1350, 1360 (D. Colo. 1996) ("Summary judgment in antitrust cases is generally disfavored.").

[86] *Expert Masonry, Inc.*, 440 F.3d at 341 (quoting Smith v. N. Mich. Hosp., Inc., 703 F.2d 942, 947 (6th Cir. 1983)).

[87] *Id*.

[88] Food Lion, LLC v. Dean Foods Co. (*In re* Se. Milk Antitrust Litig.), 739 F.3d 262, 270 (6th Cir. 2014).

[89] *See MetroNet Servs. Corp.*, 329 F.3d 986 at 1000 (quoting High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 989 (9th Cir. 1993)).

[90] *Id*.

complex antitrust case" for a clear example of the circuits' disagreement.[91]

The Tenth Circuit has also made its reluctance to apply summary judgment in the antitrust context clear.[92] Though the court notes in *Sports Racing Services, Inc. v. Sports Car Racing Club of America, Inc.* that it applies the "usual rules", it is explicit that summary judgment in the antitrust context "should be used sparingly."[93] The court cites to an earlier case that goes so far as to "recognize the prevailing sentiment that summary judgment should be used sparingly in antitrust cases."[94] Compare this language with the Seventh Circuit's claim that "the very nature of antitrust litigation would encourage summary disposition of such cases when permissible" for another clear example of circuit court confusion on the treatment of summary judgment in antitrust litigation.[95]

The courts disfavoring summary judgment look to either the litigation-truncating nature of summary judgment or the complexity of applying it to antitrust litigation in order to justify their reluctance to apply summary judgment.[96] However, these courts often overcome this reluctance, as demonstrated by *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.* or *Toscano v. PGA*,[97] but a circuit split in the application of a legal motion is insidious because it is difficult to pin down clearly.[98] Even looking only to the explicit language that the courts in these circuits use, and ignoring the actual litigation

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[91] *City of Mt. Pleasant*, 838 F.2d at 274.
[92] *See Sports Racing Servs., Inc.*, 131 F.3d at 882.
[93] *Id*.
[94] *Id.* (citing City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 646 (10th Cir. 1992)).
[95] Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166-67 (7th Cir. 1978).
[96] *See, e.g.*, MetroNet Servs. Corp. v. U.S. W. Commc'ns, 329 F.3d 986, 1000 (9th Cir. 2003) *cert. granted*, *judgment vacated sub nom.* Qwest Corp. v. MetroNet Servs. Corp., 540 U.S. 1147, 124 S. Ct. 1144, 157 L. Ed. 2d 1040 (2004).
[97] *See, e.g.*, Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 862 (6th Cir. 2007) (affirming summary judgment stating: "In this circuit, motions for summary judgment are disfavored in antitrust litigation."); Toscano v. PGA, 258 F.3d 978, 980 (9th Cir. Cal. 2001) (affirming summary judgment while stating "[s]ummary judgment is disfavored in complex antitrust litigation where motive and intent are important, proof is largely in the hands of the alleged conspirators, and relevant information is controlled by hostile witnesses.").
[98] *See* Mullenix, *supra* note 56.

outcomes, the comparison reveals a stark disagreement on the treatment of summary judgment compared to those using language avowing any disfavor.

As can be seen from cases across different circuits and a broad range of time, there are sincere discrepancies in the application of summary judgment, especially in the antitrust context, where there is a special sensitivity to circuit court disagreement. Supreme Court case law on summary judgment in antitrust has clearly failed to unify circuit courts in this area, exemplified by the Sixth Circuit's proclaimed want of guidance in In Re *Southeastern Milk Antitrust Litigation*.[99] Recalling the dangers of differing applications of antitrust law discussed earlier, the dangers of circuit court disagreement in this area should be clear. Circuit court disagreement of this magnitude calls for further examination in any context, but in an area as sensitive as antitrust law, the need for correction and uniformity is even greater.

B. Circuit Courts Disagree on Whether a Plaintiff May Benefit from a Presumption of Causation when Defending Against Defendant's Motion for Summary Judgment

As further evidence of circuit court confusion in regards to summary judgment, in addition to division over the general nature of applying summary judgment and what level of "favor" may apply, there is further discrepancy concerning the elements of a summary judgment motion that a plaintiff must produce evidence for in order to survive.[100] Specifically, some courts have allowed a plaintiff to benefit from a presumption of causation where the plaintiff can show other elements of antitrust injury.[101] Others have allowed this

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[99] Food Lion, LLC v. Dean Foods Co. (*In re* Se. Milk Antitrust Litig.), 739 F.3d 262, 270 (6th Cir. 2014) ("Unfortunately, there is no general agreement on the exact standards to use when resolving antitrust cases. As much as we might wish that a precise process with clear elements existed, antitrust cases in this circuit, and in others, apply various approaches to adjudicating antitrust claims.").

[100] *See* Petition for Writ of Certiorari, Dean Foods Co. v. Food Lion, LLC, 135 S. Ct. 676 (2014) (No. 14-110) (*denied* 2014).

[101] *See In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 940, 184 L. Ed. 2d 725 (2013) ("In other words, if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, we are entitled—in the tort context at least—to

presumption in contexts outside of antitrust litigation.[102] This disagreement goes to further show that the circuits are divided and confused on how summary judgment should be treated in antitrust litigation. Circuit court division on antitrust summary judgment will only exacerbate those issues explained in Parts II and III of this paper.

1. Circuits Allowing a Presumption of Causation in Summary Judgment Cases

As an example of circuit court disagreement, the Second Circuit has explicitly claimed the ability to presume causation in some antitrust contexts, specifically those where a wrong that increases the chances of a certain harm is alleged.[103] In *In re Publication Paper Antitrust Litigation*, the court first notes that in order to succeed in their antitrust action, the plaintiffs must show that the defendant's alleged action is a *but for* cause of their antitrust injury.[104] However, rather than requiring plaintiffs to show causation to survive summary judgment, the court turns to a tort law analysis to find that that "if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury. . . [the court may] presume that such an injury. . . was caused by the act."[105] The court then allows a "strong" causal link to be presumed, given evidence of an illegal agreement and an alleged injury, ultimately vacating and remanding part of the summary judgment earlier granted.[106] The court cites to a RICO case in the Seventh Circuit

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presume that such an injury, if it occurred, was caused by the act."); BCS Servs. v. Heartwood 88, LLC, 637 F.3d 750, 758 (7th Cir. Ill. 2011) ("Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation."); Harden Mfg. Corp. v. Pfizer, Inc. (*In re* Neurontin Mktg. & Sales Practices Litig.), 712 F.3d 60, 68 (1st Cir. Mass. 2013) ("Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, the burden shifts to the defendant to rebut this causal inference." (citing Carlson v. Chisholm-Moore Hoist Corp., 281 F.2d 766, 770 (2d Cir. 1960))).

[102] *See* Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1168 (9th Cir. Cal. 2013) (quoting *BCS Servs.,* 637 F.3d at 75).

[103] *See In re* Publ'n Paper Antitrust Litig., 690 F.3d at 66.

[104] *Id*.

[105] *Id*. at 66-67.

[106] *Id*. at 67-68.

which states that presenting evidence of the sort of harm that would result from the alleged wrong is enough to survive summary judgment.[107]

Another example of this presumption being allowed is found the Sixth Circuit *In re Southeastern Milk Antitrust Litigation* case.[108] The court here permitted evidence of antitrust injury and antitrust violations that increase the likelihood of that injury to suffice for direct evidence of causation sufficient to survive summary judgment.[109] Though the respondent argued that this was not a presumption of causation, there is clearly a divide from the approach taken in the other circuits shown below.[110] Although the Supreme Court ultimately elected not to hear the case, even the plaintiff-respondent argued that the case did not turn on whether or not there was a circuit split, but rather an interpretation of certain expert evidence.[111] Certainly, this case at least served to illustrate another area where the circuits differ clearly in their language, if not in their meaning, and given the special need for uniformity in antitrust law, even a difference in language can be dangerous.

2. Circuits Requiring Proof of Causation in Summary Judgment Cases

Other courts have explicitly disallowed this presumption, and still others are unclear or have not addressed causation in an antitrust injury summary judgment motion.[112] The Third Circuit has required plaintiffs to show an explicit causal link between alleged actions and suffered harms as an element of analysis for surviving summary

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[107] *Id*. at 66-67 (citing BCS Servs. v. Heartwood 88, LLC, 637 F.3d 750, 758 (7th Cir. Ill. 2011)).

[108] *In re* Southeastern Milk Antitrust Litigation*,* 739 F.3d 262, 286 (6th Cir. 2014)

[109] *Id*. at 285-86; Petition for Writ of Certiorari, *supra* note 56, at 14-16.

[110] *Id.* at 270; Brief for the Respondent, *supra* note 56, at 5.

[111] Brief for the Respondent, *supra* note 56, at 13.

[112] *See, e.g.*, Deaktor v. Fox Grocery Co., 475 F.2d 1112, 1116-17 (3d Cir. 1973) (examining as part of an antitrust summary judgment claim as a separate element the ability of plaintiff to show a "specific cause" for causation rather than a "conjectural" link between action and damages); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056-60 (8th Cir. 2000) (Finding no evidence connecting the action of an antitrust law violation and the alleged damages, without any regard for the tendency of those actions to cause a violation).

judgment.[113] The Third Circuit Court of Appeals required a separate analysis of causation, even assuming that the alleged antitrust violations of price fixing were true.[114] The court here affirmed a grant of summary judgment on the basis that merely showing price fixing violations and a loss of profits is not enough to survive a summary judgment claim on causation.[115] Whether classified as a presumption or simply a different form of analysis, this is a clear difference from the Second and Sixth circuit approaches discussed above.[116]

The Eighth Circuit has specifically called for the plaintiff to show a direct causal link between alleged wrongs and suffered harms, regardless of any tendency for a certain action to cause a certain type of harm.[117] The court in *Concord Boat Corp. v. Brunswick Corp.* required not only a showing of an antitrust violation, but that the violation "caused harm in the first instance, or that they were a 'material cause' of any harm allegedly suffered."[118] The court notes that in order to overcome summary judgment, the plaintiffs must "account for 'numerous intervening economic and market factors which . . . may have been the actual cause of the plaintiffs' injuries.'"[119]

Though the distinction between these two methods of analysis may not be incredibly dangerous alone, it serves as another example of a circuit court divide on the treatment of summary judgment claims in the antitrust context. Given the fame of the Supreme Court rulings on this issue, such a level of circuit court division is surprising. This disagreement is troubling, because as noted earlier in Parts II and III there are significant and special concerns as to why the issues present in antitrust summary judgment require careful attention.[120]

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[113] *See Deaktor*, 475 F.2d at 1116-17.
[114] *Id*.
[115] *Id.*
[116] *See* Part IVA-B, *infra*.
[117] *See Concord Boat Corp.*, 207 F.3d at 1056-60.
[118] *Id.* at 1060 (citing National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found., 64 F.3d 1130, 1135 (8th Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996)).
[119] *Id.* (quoting Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402 (7th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994)).
[120] *See* Parts II and III, *infra*.

V. The Supreme Court Should Address the Growing Circuit Disagreements and Reaffirm Their Summary Judgment Holdings that Summary Judgment is Not Disfavored and There is No Presumption of Causation

As addressed in Parts II and III, there are compelling reasons for the Supreme Court to preserve and restore the uniformity of federal antitrust law.[121] Disagreement amongst the circuit courts, as identified and explained in Part IV, calls for a clear and concise explanation of the proper application of summary judgment, as the Summary Judgment Trilogy has failed to unify the circuit courts in either their disposition towards summary judgment or the particulars of its application.[122] If circuit courts are divided, is it due to a lack of guidance? Below is an analysis of Supreme Court case law on summary judgment in the antitrust context, followed by a concluding call for the Supreme Court to clearly reiterate its standard and unify the circuit courts in order to avoid the damages caused by antitrust law's special sensitivity to court division and summary judgment law.

A. Supreme Court Summary Judgment Case Law

1. The Summary Judgment Trilogy

The Summary Judgment Trilogy has dominated the teaching of summary judgment, perhaps greater than its actual influence over the law would indicate.[123] Though perhaps somewhat overblown, these three cases present a clear view of the basic Supreme Court understanding of summary judgment in antitrust litigation. Though generally understood as opening the door wider to summary judgment actions in antitrust cases, a more specific understanding is useful.[124] *Matsushita, Anderson,* and *Celotex* each leave their own impact on summary judgment jurisprudence.

Celotex Corp. v. Catrett is famed for its burden-shifting framework in summary judgment cases.[125] The case itself is not an antitrust case, however it is essential to understanding Supreme Court case law in the area. *Celotex* was a wrongful death suit notable not for the facts or peculiarities of the case itself, but for the language

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[121] *See* Parts II and III, *infra*.
[122] *See* Part IV, *infra*.
[123] Mullenix, *supra* note 56, at 885-86.
[124] *Id*. at 561.
[125] *Id.* at 565.

used in describing the usage of summary judgment.[126] Much of the language used in this case encourages the use of summary judgment. For example, in reaffirming that summary judgment is an essential part of our judicial system, the court describes summary judgment as "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[127]

The court definitively states that summary judgment is essential to the rights of those accused without a factual basis and that

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[128]

This is not merely an affirmation of the role of summary judgment, but a statement that goes so far as to compare the right to summary judgment, where justified, to the same right plaintiffs have to trial. Making a rights-based argument on the place of summary judgment at least cements its role somewhere in the antitrust arena as a necessary tool that is, explicitly, not "disfavored."[129]

We turn next to an examination of *Anderson v. Liberty Lobby, Inc.*[130] This case, like *Celotex,* is not itself an antitrust case. However, also like *Celotex*, it has value in examining the Supreme Court approach to summary judgment. *Anderson* was a libel case that determined that when adjudicating a summary judgment motion, the judge should consider the underlying substantive law's standards.[131] That is, as the court explains, "clear and convincing" and "reasonable doubt" as standards for evidence apply not only to jury

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[126] *See Celotex*, 477 U.S. at 317.
[127] *Id.* at 327 (quoting Fed. R. Civ. P. 1).
[128] *Id*.
[129] *Id*.
[130] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
[131] *Id.* at 252.

deliberations at trial, but to the presiding judge's determination of the fate of a summary judgment motion.[132]

Another interesting proposition in *Anderson* on the standard of evidence in summary judgment is that the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . ." to survive a summary judgment motion.[133] These statements are useful in examining various aspect of summary judgment in the antitrust context. For example, in discussing issues of whether any presumption *should* be allowed (leaving aside the question of *are* courts presuming certain facts), the idea that a "scintilla" of evidence will not suffice indicates that there is some level of evidence, of debatable size, that cannot endure summary judgment. If some amount of actual evidence cannot suffice, is there a place for claims that rely on a mere presumption? This question weighs especially heavy in light of the fact that *Anderson* requires courts to apply the same evidentiary burden at summary judgment as they would at trial.[134] Thus, if a presumption would not be allowed at the trial stage, is there a place for it at the summary judgment stage? *Anderson*, it seems, would indicate that there is not.

To finish our look at the Trilogy, we turn to *Matsushita*.[135] Finally, we have a Supreme Court case concerning summary judgment in the antitrust context. *Matsushita* was an antitrust litigation concerning 20 years of alleged price fixing and conspiracy.[136] The court here ultimately reversed the lower court's denial of a motion for summary judgment.[137] This case features some of the strongest language defending the usage of summary judgment in the antitrust context, especially compared to Supreme Court language from before the trilogy.

For example, the court here famously argues that overzealous application of antitrust law can "chill the very conduct" that is at the heart of antitrust legislation.[138] The court goes on to describe the need for balancing the costs of failure to catch illegal conspiracies with the costs inflicted on legitimate business interests

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[132] *Id.*
[133] *Id.* at 252.
[134] *Id.*
[135] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 575 (1986).
[136] *Id*.
[137] *Id*.
[138] *Id*. at 594.

by antitrust litigation.[139] Much of the court's analysis explains that the alleged conspiracy was not an economically illegal arrangement, but was rather the exact sort of price competition that antitrust laws are designed to encourage.[140] The arguments made in *Matsushita* establish a strong basis for defending the need for summary judgment in antitrust litigation, as the elimination of implausible claims through summary judgment not only saves money and time, but protects businesses from baseless litigation. The Summary Judgment Trilogy as a whole clearly shows the Supreme Court sought to expand the use of summary judgment beyond its previous scope, contradicting those circuits that still rely on older arguments disfavoring summary judgment.

2. Other Supreme Court Case Law

Looking backwards from *Matsushita*, we can examine *Monsanto Co. v. Spray-Rite Service Corp.* for additional information on Supreme Court interpretation of summary judgment in the antitrust context.[141] In this case, which the *Matsushita* court made multiple references to, distributor-producer conflict led to antitrust allegations.[142] In this earlier case, predating the bolder pro-summary judgment claims of the 1986 Summary Judgment Trilogy, the court advanced several arguments that illustrate the role summary judgment should play in the antitrust context. Valuable inferences can be drawn by looking at *Monsanto* through the lens of *Matsushita*, even though *Monsanto* did not involve summary judgment.

First, the court expresses similar concerns as those in *Matsushita* that antitrust law should encourage, rather than restrict, legitimate competitive conduct.[143] Though outside of the summary judgment context, there is reference to the special nature of antitrust law in encouraging competition, and a warning that antitrust law, its interpretation, and especially its evidentiary standards must all work together to avoid an antitrust regime that "could deter or penalize perfectly legitimate conduct."[144] Second, although it does not speak directly to the issue of presumption discussed in Part III, the court

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[139] *Id*.
[140] *Id*. at 592.
[141] Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 752 (1984).
[142] *Id*. at 755-57.
[143] *Id*. at 763.
[144] *Id*.

warns about the dangers of inferring antitrust violations from other conduct.[145] The court explains that "there must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently."[146] Noteworthy here is that the evidence must "*exclude"* the possibility of innocent action, not merely create a situation where it is possible.[147] Though not directly analogous, this standard is comparable to the discussion in Part II, arguing that a presumption or inference could link action to harm in antitrust litigation. Further, these concerns about damaging legitimate business expressed *before* the Summary Judgment Trilogy count against those circuits so reluctant to apply summary judgment in the antitrust context.

Looking to the future from the Summary Judgment Trilogy, we find ourselves looking at *Eastman Kodak Co. v. Image Technical Services, Inc*.[148] This case is another Supreme Court antitrust summary judgment case, and thus provides valuable insight into what the circuit courts should be striving towards.[149] The case concerned an illegal product-tying arrangement and monopoly allegations wherein the Supreme Court ultimately affirmed denial of summary judgment.[150] The case serves as explaining the limits of *Matsushita* and the standards set forth in that case.

Kodak attempted to stretch the economic plausibility requirement elaborated in *Matsushita* as an additional requirement on the plaintiff to survive a summary judgment claim.[151] In response, the court clearly explained that *Matsushita* did not introduce any additional tests or burdens for the plaintiff; rather, it served only to explain that a reasonableness requirement, necessary to prevail in a jury trial, be met at the summary judgment stage.[152] It is significant in this case that the court did not back down from *Anderson*, which made clear that the burden at trial should correlate to the burden at

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[145] *Id*. at 763-64.
[146] *Id*. at 764.
[147] *Id*.
[148] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).
[149] *Id*. at 454.
[150] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 486 (1992).
[151] *Id*. at 467-68.
[152] *Id*. ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.").

the summary judgment stage.[153] Neither did the court limit *Matsushita's* bold encouragement of summary judgment or temper its arguments for summary judgment's value in the antitrust context: it remarked that *Matsushita* served to protect and encourage competitive behavior, the very soul of antitrust legislation, whereas *Kodak*'s proposed theory allowed conduct that was "facially anticompetitive."[154] *Kodak* references bitg *Monsanto* and *Matsushita* at length, always with the continuous theme that antitrust law, and summary judgment's purpose in antitrust law, is to protect and encourage competition.[155] The court firmly invokes the same balance of protecting innocent conduct and allowing illegal behavior to escape that resonates throughout *Matsushita* and *Monsanto*.[156] The court's rejection of *Kodak*'s theory can serve as an example that although the court clearly believes summary judgment should not be *disfavored* in the antirust context, there is no rush to apply it when the court's goals are out of balance.[157]

Looking at all of the above Supreme Court case law it seems clear that summary judgment is, at least, considered a valid tool and not an abusive shortcut. The Summary Judgment Trilogy's themes are clearly pro-summary judgment, building off of existing themes of encourage competitive conduct and balancing the risk of allowing illegal behavior. It is also clear that the court will require some evidence be produced to survive summary judgment, as it showed in explaining the right to avoid trials not based in fact in *Celotex*.[158] The Supreme Court has been consistent in insisting that summary judgment should not be disfavored, which lends guidance to how the discussed circuit split should be mended.

B. Supreme Court Case Law Indicates Summary Judgment Should Not be Disfavored

Summary judgment is a necessary tool in and outside of the antitrust context.[159] The Supreme Court has been clear in the past that

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[153] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).
[154] *Kodak*, 504 U.S. at 478.
[155] *Id*.
[156] *Id*. at 479.
[157] *Id*.
[158] Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).
[159] *See* Brunet, *supra* note 43.

its application is essential to efficient functioning of our judicial system.[160] In *Celotex*, the Supreme Court unequivocally stated that

> Summary judgment procedure is properly *regarded not as a disfavored procedural shortcut*, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, *but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis*.[161]

Again, the trilogy of *Celotex, Anderson,* and *Matsushita*, have been nearly universally cited in academic literature as a broad encouragement of the use of summary judgment, as pointed out in Professor Mullenix's analysis of the impact:

> Famously, members of the academy and other legal seers opined that the Supreme Court, in issuing the summary judgment trilogy, was telegraphing a message to federal judges to make enhanced usage of summary judgment to expedite legal proceedings and to intercept and dismiss factually deficient litigation before trial. The not-so-veiled purpose of the summary judgment trilogy, then, was to nudge federal judges out of their normal predisposition against summary judgment.[162]

Courts disfavoring summary judgment go against the intention of Supreme Court precedent, especially in the antitrust

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[160] *Celotex*, 477 U.S. at 327.
[161] *Id.* (emphasis added).
[162] Mullenix, *supra* note 56, at 562.

context.[163] As the Eighth Circuit stated shortly after *Matsushita*, "[t]he Supreme Court has, we think, unmistakeably [sic] (though not explicitly) rejected" the idea of a heightened standard in applying summary judgment to antitrust cases.[164] This interpretation leaves little room for those circuits to be so reluctant to apply summary judgment in antitrust cases.

Thus, Supreme Court affirmation that courts should not perceive summary judgment in a negative light will not place an undue burden on plaintiffs or defendants in an antitrust context. Even without disfavoring summary judgment, plaintiffs may still have the upper hand in strategic litigation of antitrust claims, as

> [t]he availability of summary judgment to defendants is not by itself an adequate safeguard against frivolous antitrust litigation; although having a case dismissed prior to trial will save a defendant some money, by the time a summary judgment motion is entertained, significant discovery will have taken place and years may have passed.[165]

Summary judgment is already a standard that is very generous to the opposing party, given that the very nature of its analysis explicitly favors the non-movant. The Supreme Court has clearly stated that even without a disposition for or against summary judgment, "inferences . . . drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."[166] Especially in the antitrust context, summary judgment should be seen as a particularly valuable tool, rather than one of last resort when courts must determine whether there is a genuine issue of material fact or not.[167] Later Supreme Court cases have built off of this perception of summary judgment as a tool, extending a similar view to dismissal in later cases.[168]

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[163] Brunet, *supra* note 43, at 1172 ("The post-Matsushita antitrust decisions emphasizing caution appear contrary to the spirit and mechanics of the 1986 trilogy.").
[164] City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 274 (8th Cir. 1988).
[165] Wagener, *supra* note 33, at 1920.
[166] United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).
[167] *See* Mullenix, *supra* note 56, at 565 n. 15.
[168] *Id.*

The Supreme Court, in consistently deeming summary judgment a useful tool that is not to be avoided or disfavored, has had opportunity to develop significant case law on the application of summary judgment. Though the Court has not addressed presumption of any elements of summary judgment specifically, ample case law exists to extract the appropriate standard for reviewing the issue.[169]

In addressing antitrust claims, the Supreme Court has been consistent in expressing that antitrust litigation should act as more of a protector of business competition than a barrier.[170] The Supreme Court has also noted unequivocally that litigants have a *right* to demonstrate, before trial, that the opposing claims are not based in fact.[171] Presuming the existence of any facts at the summary judgment stage denies this right to litigants. Summary judgment procedures already consider any facts in the light most in favor of the non-movant.[172] While this favorable light standard of review is certainly different from a pure attempt at ascertaining objective fact, it is a far cry from presuming the existence of facts that lack evidence or other proof. An additional presumption of any facts beyond this concession is an unfair advantage to the non-movant in violation of the same right the Federal Rules of Procedure guarantee the movant.

VI. Conclusion

Antitrust law bears a particular sensitivity to uneven application. Businesses must comply with federal antitrust law across any circuit court jurisdiction in which it operates. Treble damages, high litigation costs, and protracted litigations are all factors inflicting heavy compliance costs on firms. Discovery costs in antitrust litigation can serve as a powerful sword against otherwise innocent firms. These costs are magnified when working across

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[169] *See, e.g.*, notes 14, 38, 52, and 61, *supra* and the cases cited therein.
[170] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 1360 (1986).
[171] Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.").
[172] United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

borders where the same law is applied or interpreted differently. As summary judgment is especially significant in antitrust litigation, given its high costs and potentially uneven playing field, diverging interpretations of Federal Rule of Civil Procedure 56 can greatly increase compliance costs to the point that competition and legitimate business activity are unduly damaged.

The Supreme Court should take up cases appealing from summary judgment motions contrary to the spirit of their past holdings. Antitrust law in particular must be safeguarded from divisive circuit court understanding of the relevant laws. The level of uniformity necessary for antitrust law to efficiently serve its purpose precludes any circuit court disagreement on the application or interpretation of federal antitrust law. Increased business costs and reduced competition as the result of conflicting application of federal antitrust law are in direct contradiction to congressional intent. Protecting antitrust law from being divided into individual circuit court precedent honors not only the basic ideas of uniform application of federal law, but also the exact purpose antitrust laws were meant to carry out.

Circuit courts that have fallen away from clear Supreme Court precedent on the application of summary judgment should align themselves with others before the divide grows to an overly damaging degree. As the Supreme Court has both famously and continuously maintained, summary judgment is valid and freely usable tool to address claims lacking a factual basis. Disfavoring the application of summary judgment cannot be mere dicta, as it goes against clearly stated rights the Supreme Court has stated litigants have. Presuming facts, or disfavoring the application of summary judgment in general, begins to dangerously split interpretation of many aspects of federal law, but few areas are so sensitive to an uneven hand then federal antitrust law. Therefore, the Supreme Court should take on a case to clarify the role of summary judgment in antitrust cases as soon as possible.