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Antitrust—Summary Judgment—Discovery—First Nat'l Bank v. Cities Service Co

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plan terminations—could qualify as being causally connected with the reorganization. If this is so, and if these reorganizations can qualify as separations from the service under the new *Gittens* test, then capital gains relief will be available. This new approach appears more rational than the older more formal approach to causation, since it considers what Congress surely intended that it consider: the actual cause for a distribution.

Conclusion: Even though *Gittens* has liberalized the test for determining the cause of a distribution when the distribution is made after an adoption by a successor corporation, it is clear that the net effect of the decision is the drastic curtailment of capital gains relief for employees receiving lump-sum distributions made in a reorganization situation. The new test rules out capital gains relief in a great number of corporate reorganizations. Except in reorganizations where a substantial change in the make-up of employees occurs, capital gains treatment will be denied. With this restrictive view of separation from the service, the liberal changes made by the case in the area of causation have almost no practical effect. One may assume that corporate reorganizations will only rarely produce section 402(a)(2) relief for employees in the future.

Congress, in its anxiety to protect against possible abuses under section 402, apparently desired the result reached in *Gittens*. But such broad-brush treatment is of doubtful wisdom. *Gittens* makes manifest the need for legislative reappraisal of section 402(a)(2).

JOHN P. BIRMINGHAM, JR.

Antitrust—Summary Judgment—Discovery—*First Nat'l Bank v. Cities Service Co.*[1]—On June 11, 1956, Gerald B. Waldron, hereinafter referred to as petitioner, instituted a private antitrust action under the Sherman Act against seven large oil companies.[2] Petitioner had an agreement to purchase oil from the National Iranian Oil Company (NIOC), which had been organized to handle the nationalized oil holdings of the Anglo-Iranian Oil Company.[3] He was in turn negotiating to sell this oil to Cities Service Co., one of the defendants. Petitioner accused Cities of joining in a conspiracy already established by the six other defendant companies to boycott Iranian oil. The purpose of the alleged boycott was to compel NIOC to return the property to Anglo-Iranian.

Cities was in need of substantial amounts of crude oil and had long desired an independent supplier in the Middle-East.[4] Petitioner's original claim was that Cities could satisfy this need by purchasing from him the oil which he commanded under his agreement with NIOC. However, according to petitioner, as the result of a bribe from the other defendant com-

[1] 391 U.S. 253 (1968). The majority opinion was written by Mr. Justice Thurgood Marshall.

[2] Id. at 259.

[3] Id. at 259-60.

[4] Id. at 275.

panies, Cities did not purchase the oil and joined in the conspiracy.[5] It was petitioner's further contention that the bribe consisted of a contract for the purchase by Cities of Kuwait oil from Gulf Oil and Anglo-Iranian at a price below petitioner's price for Iranian oil. In addition, it was alleged that Cities had been offered a share in the Consortium[6] established by the six other defendants to handle the distribution of all Iranian oil products.

The facts showed that one Jones, the president of Cities, had gone to Iran at the invitation of the petitioner to evaluate the petitioner's offer. When in Iran, Jones made a secret side trip to Kuwait, a fact which was denied by Cities as late as 1960, and was not revealed until 1964 when the petitioner was allowed to examine some of Jones' associates.[7] Although Cities prepared a memorandum favorably evaluating the Iranian situation,[8] petitioner was later told that Cities had decided not to purchase the oil. Other facts presented by the petitioner showed that Jones had been under extreme pressure at the time when Cities decided not to purchase the Iranian oil. Jones was to receive a medal as oilman of the year from the American Petroleum Institute, but the medal was not awarded to him, and at that meeting the oil companies threatened to cut off Cities' supplies of oil if it continued to deal in Iranian oil.[9] Evidence was introduced to show also that the major oil companies were putting pressure on all who dealt in Iranian oil.[10] On the basis of these facts the petitioner contended that Cities was a conspirator in the boycott of Iranian oil.

In response to the complaint Cities moved to depose the petitioner and requested that, because of the complexity of the issues, its answer be postponed. Both motions were granted, and because of the then existing "priority rule" in the Southern District of New York whereby the party who first moved to examine his adversary was permitted to complete all of his examination before the other party was allowed to begin, petitioner was denied discovery until Cities had completed its discovery.[11] From September 1956 until May 1962 depositions were taken for a period of 153 days, of which 7 were attributable to Cities.[12]

In 1960, Cities moved for summary judgment on the grounds that the theory proposed by petitioner, *i.e.*, that Cities had joined the conspiracy as the result of a bribe, had been conclusively disproved. Cities had presented evidence showing that it had entered into negotiations for the purchase of Kuwait oil before it was ever approached by petitioner to purchase Iranian oil.[13] As for its share in the Consortium, Cities stated that it was so small that

[5] Id. at 260.

[6] It appears that "Consortium" was simply the term used by the Court to represent the cartel established by the defendants.

[7] 391 U.S. at 301 (dissenting opinion).

[8] Id.

[9] Id.

[10] Id. at 278.

[11] This rule has since been superseded by a new Civil Rule 4 which became effective on July 1, 1962, and put the taking of depositions on a concurrent rather than priority basis. See 4 J. Moore, Federal Practice ¶ 26.13[3] (2d ed. 1967) (hereinafter cited as Moore).

[12] 391 U.S. at 263.

[13] Id. at 263-64.

it had transferred its share to the Richfield Oil Corp.[14] In response to Cities' motion, petitioner reiterated his contention that Cities had received a bribe, and again requested that he be granted discovery. On March 30, 1961, in the district court, Judge Herlands postponed decision on the motion for summary judgment, at the same time permitting the petitioner only limited discovery for the purpose of resisting summary judgment.[15] The judge's basis for so limiting petitioner's discovery was that petitioner's claim against Cities was not substantial enough to merit "carte blanche" discovery.[16]

Petitioner was allowed to depose Cities' vice-president, Hill, because the judge felt that Hill was in the best position to provide information regarding the alleged conspiracy.[17] Petitioner objected to this order on the ground that Jones, who had made the secret side trip to Kuwait, was in the best position to provide the needed information. The judge, however, did not change his order, and only Hill was to be deposed.

At this time petitioner altered his theory of the case and adopted the position that Cities' motive for entering into the alleged conspiracy was basically irrelevant for purposes of determining whether or not summary judgment should be granted.[18] In effect, petitioner contended that Cities' abrupt ending of negotiations with petitioner was sufficient evidence in itself to withstand a motion for summary judgment. It was urged also by petitioner that the circumstances warranted the granting of discovery which would reveal the reason for the sudden end to the negotiations.[19] However, the judge confined his order to the limited discovery set out above. The deposition of Hill was to commence when Cities had completed deposition of petitioner's associates, which was not completed for over a year. Finally, Hill was deposed between September 10, 1962, and February 27, 1963, for a period of six days.[20]

In May of 1963, petitioner moved for additional discovery and Cities renewed its motion for summary judgment. In June petitioner filed an amended complaint which presented more general allegations of conspiracy than had been formerly alleged. In place of the specific allegations petitioner alleged generally that Cities had joined the conspiracy at a time and in a manner not known to the petitioner, and that the other defendants had " 'secretly threatened, induced and conspired with defendant Cities Service to break off all dealings with plaintiff.' "[21]

For over a year Judge Herlands held off ruling on Cities' motion for summary judgment while he considered motions for summary judgment against the petitioner made by the other defendants. Finally, on June 23, 1964, he again postponed judgment on Cities' motion and granted the petitioner further discovery. This order allowed petitioner to depose all persons who had dealings concerning Iranian oil, and ordered the production of

[14] Id. at 264. Cities held a minority stock interest in Richfield.
[15] Id. at 265. The Court based discovery on Fed. R. Civ. P. 56(f).
[16] Id.
[17] Id.
[18] Id. at 265-66.
[19] Id. at 266.
[20] Id. at 267.
[21] Id. at 268.

all documents and memoranda relating to (a) the Kuwait and Consortium issues, (b) conversations and communications between it and any other defendant between June 11, 1952, and October 1, 1952, concerning petitioner, his associates, and Cities' dealings in connection with Iranian oil, (c) conversations and communications between Cities and any other defendant between June 11, 1953, and September 30, 1953, pertaining to negotiations between Waldron and the Richfield Oil Corp. concerning the purchase by Richfield of Iranian oil, and (d) conversations and communications between any deponent for Cities and any other Cities' employee involving the subject matter described in the preceding categories.[22]

The deposing of Cities' executives was completed in August of 1964. In September petitioner moved for additional discovery, and in October Cities renewed its motion for summary judgment. On September 8, 1965, Judge Herlands granted Cities' motion[23] on the ground that petitioner had failed to comply with Rule 56(e)[24] by failing to show that there was a genuine issue of material fact for trial.[25] He also denied the petitioner's motion for further discovery on the basis that past experience indicated that additional discovery would only permit the petitioner to conduct a "fishing expedition."[26]

The Court of Appeals for the Second Circuit affirmed.[27] After a rather detailed review of the prior proceedings of the case, the Supreme Court, by a vote of 5-3,[28] HELD: the abrupt ending by Cities of negotiations with petitioner for the purchase of Iranian oil was insufficient, in light of other evidence, to raise a genuine issue of material fact for trial as to whether Cities participated in an alleged conspiracy to boycott the purchase of oil from the petitioner.[29] Thus, summary judgment was properly entered against petitioner.

According to the Court, all that is needed to resist summary judgment

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[22] Id. at 268-69.

[23] Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965).

[24] Fed. R. Civ. P. 56(e) states:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[25] 391 U.S. at 270.

[26] Id.

[27] 361 F.2d 671 (2d Cir. 1966).

[28] Majority: Justices Fortas, Harlan, Marshall, Stewart and White. Minority: Chief Justice Warren, Justices Black and Brennan.

[29] 391 U.S. at 284.

is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."[30] Since Cities, in the mind of the Court, had conclusively shown that the facts petitioner relied upon to support his allegations were not susceptible to the interpretation which he sought to give them, petitioner was then required to produce further evidence of conspiracy if he wished to avoid summary judgment.[31] This, the Court concluded, petitioner had failed to do.

The Court stated further: "[N]ot only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable."[32] In other words, the decision not to buy oil from petitioner was *more probably* motivated by an awareness by Cities of a variety of unpleasant business consequences awaiting it if it should deal with petitioner than by the receipt of a bribe.[33] Therefore, it would appear that the test applied by the Court is one under which summary judgment will be granted when the inference sought to be drawn from the evidence by the moving party is more probable than that sought to be drawn by the non-moving party.

By incorporating a "probability factor" the test applied in *First* differs significantly from the often suggested test for summary judgment. Under the suggested test, if after assuming all ambiguities and credibility factors in favor of the non-moving party a jury could not reasonably find for the non-moving party, summary judgment would be granted.[34] Furthermore, prior case law[35] and treatise writers[36] indicate that the decision to grant summary judgment should be made purely as a matter of law, and that a court should not weigh the evidence.[37] However, in regard to the evidence of Cities' motives produced by petitioner, the Court stated, "[U]ndoubtedly, given no contrary evidence, a jury question might well be presented as to Cities' mo-

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[30] Id. at 288-89.

[31] Id. at 289.

[32] Id. at 280.

[33] Id. at 279-80.

[34] See, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Well Surveys, Inc. v. Perfo-Log, Inc., 396 F.2d 15, 18 (10th Cir. 1968), cert. denied, 37 U.S.L.W. 3185 (Nov. 18, (1968); Caylor v. Virden, 217 F.2d 739, 741-42 (8th Cir. 1955); 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1235 (C. Wright ed. 1958) (hereinafter cited as Barron & Holtzoff); 6 Moore ¶ 56.17[5] (2d ed. 1966); see also Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944); Sarkes Tarzian Inc. v. United States, 240 F.2d 467, 470 (7th Cir. 1957); Summary Judgment Under Federal Rule of Civil Procedure 56—A Need for a Clarifying Amendment, 48 Iowa L. Rev. 453, 454 (1963).

[35] See, e.g., Palmer v. Chamberlin, 191 F.2d 532, 540 (5th Cir. 1951); Bartle v. Travelers Ins. Co., 171 F.2d 469, 471 (5th Cir. 1948); Silvray Lighting, Inc. v. Versen, 10 F.R.D. 507, 508 (D.N.J. 1950).

[36] See 3 Barron & Holtzoff §§ 1234, 1247; 6 Moore ¶ 56.15[1.-0] (2d ed. 1966).

[37] See, e.g., Gauck v. Meleski, 346 F.2d 433, 435-36 (5th Cir. 1965); Van Alen v. Aluminum Co. of America, 43 F. Supp. 833, 837 (S.D.N.Y. 1942); Fed. R. Civ. P. 56(c); 3 Barron & Holtzoff § 1234; 6 Moore ¶ 56.15[1.-0] (2d ed. 1966).

tives in not dealing with Waldron. . . ."[38] The Court then went on to say that the probative force of this evidence was negated by the overwhelming amount of contrary evidence of Cities' motives.[39] If summary judgment were to be granted, a jury question could not have remained unanswered. Consequently the only conclusion to be reached is that the Court decided the question. Since questions of law are not decided by a jury, it is fair to assume that the jury question referred to by the Court was a question of fact, and that in answering this question the Court weighed the evidence and made its own findings of fact.

Although any decision that allows the judge to act as the jury is subject to question, *First* is especially susceptible to doubt in that the practice of looking at the evidence in the light most favorable to the non-moving party suggests that the Court's reasoning is illogical. By its statement that inferences of non-conspiratorial motives were more probable than inferences of conspiratorial motives,[40] the Court felt that it had shown that a jury question did not exist, and that summary judgment could be granted. However, although one inference is less probable than another, it does not logically follow that the less probable inference is not probable. A less probable inference could be considered one that is *not as* believable[41] as another inference, yet it is nonetheless believable, whereas a non-probable inference is considered *not* believable. Thus, when the Court looked at petitioner's evidence, if it had done so in the light most favorable to him, it should have believed his less probable inference rather than making an assumption in favor of the inference offered by Cities.

Even though a court may make an assumption in favor of the non-moving party's explanation of the facts, it does not necessarily follow that these facts will raise a jury question.[42] In *First*, however, if the Court had made the proper assumptions, the evidence that the Court had considered insufficient to raise a clear jury question would have raised that question, and served as a basis for denying summary judgment. Thus, unless the *First* Court meant to sanction the practice whereby the judge acts as the trier of fact and makes assumptions in favor of the party opposing a motion for summary judgment, the result reached by the Court cannot be sustained. It is recognized and accepted that where it can be shown that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law, summary judgment should be granted.[43] However, here, under the guise of determining whether a controversy over a genuine material fact existed, the Court decided how that controversy should be resolved.

The *First* Court's analysis of the summary judgment procedure would

[38] 391 U.S. at 277.

[39] Id. at 277-78.

[40] Id. at 280.

[41] Black's Law Dictionary 1365 (4th ed. 1951) defines probable as "supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely."

[42] See 3 Barron & Holtzoff § 1234.

[43] See, e.g., Bartle v. Travelers Ins. Co., 171 F.2d 469, 471 (5th Cir. 1948); Lindsey v. Leavy, 149 F.2d 899, 902 (9th Cir. 1945), cert. denied, 326 U.S. 783 (1945); 3 Barron & Holtzoff § 1234.

also appear susceptible to the criticism that it permits the judge to decide questions relative to both the burden of evidence production[44] and the burden of persuasion,[45] with the anomalous result that the burden of persuasion shifted the burden of production. Normally, a decision as to whether the burden of persuasion has been met would not arise until all questions relative to the burden of production had been settled by the judge, and the case had been given to the jury.[46] Here, however, the Court stated that after Cities had "conclusively" proved that the bribe could not correctly be inferred from the facts,[47] the petitioner had the burden of presenting evidence to substantiate his claim of conspiracy.[48] What the Court in effect said was that since the defendant had *persuaded* the Court that its interpretation of the facts was more plausible than petitioner's, the petitioner had to now *produce* additional evidence to withstand summary judgment. Thus, the conclusion that the burden of persuasion was permitted to shift the burden of production seems inescapable.

The introduction of a probability factor into the summary judgment decision making process also presents the opportunity for the judge to make factual determinations based solely on the pleadings. Since under the *First* test the inferences attributed to the evidence by the moving party are required to be only more probable than those offered by the non-moving party, rather than having to be more probable than *any* other explanations, it is possible that summary judgment will be granted because of a failure on the part of the non-movant to plead a possible theory of recovery. Thus, even though the facts may possibly warrant recovery under an established theory of law, unless the party has properly brought this to the attention of the trial court, summary judgment may be granted. Such a situation was presented in *First*.

The Court stated that although the petitioner could have argued that Cities' acquiescence in the threats of the other defendants was sufficient participation in the conspiracy to warrant recovery,[49] his failure to argue this theory in the trial court prevented him from asserting it for the first time in his Supreme Court brief.[50] The fact remains that in the instant case an attorney's failure to plead the theory that would include Cities in the conspiracy resulted in denial to the petitioner of a trial of his case. One court

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[44] "Burden of producing evidence of a fact means the burden which is discharged when sufficient evidence is introduced to *support a finding* that the fact exists." (Emphasis added.) Model Code of Evidence rule 1(2) (1942).

[45] "Burden of persuasion of a fact means the burden which is discharged when the tribunal which is to determine the existence or non-existence of the fact is pursuaded by sufficient evidence *to find* that the fact exists." (Emphasis added.) Model Code of Evidence rule 1(3) (1942).

[46] In order for a jury to act it needs sufficient evidence to support its determination. Thus, the judge would first have to decide whether there was sufficient evidence to support a jury decision before allowing the jury to make any findings of fact.

[47] 391 U.S. at 289.

[48] Id.

[49] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). It should be noted that both of these cases were decided after petitioner had pleaded his original theory of conspiracy.

[50] 391 U.S. at 280 n.16.

has held that even after a trial has been held and the case is on appeal, the court may of its own volition supply the proper theory to the facts of the case, and reverse the lower court decision.[51] This court suggests that the trial should not be regarded as a game, but as a method of arriving at a just result.[52] In *First*, by refusing to consider the petitioner's new theory, the Court not only failed to recognize this rationale, but went so far as to uphold summary judgment in the face of an admittedly viable theory of recovery because it was not properly pleaded.[53] Furthermore, the Court's decision that the petitioner's new theory was advanced too late is somewhat ironic since the very facts that the petitioner relied upon for his new theory of conspiracy, *i.e.*, intimidation of Cities by the other defendants, were heavily relied upon by the Court to support its conclusion that the theory of bribery initially advanced by the petitioner was not sufficiently plausible to withstand summary judgment.[54]

Aside from the issue of the theoretical soundness of the test set forth in *First*, the case is also significant when considered in light of prior case law. In the 1962 case of *Poller v. Columbia Broadcasting System, Inc.*,[55] the plaintiff alleged that CBS had entered into a conspiracy with some third parties to drive him out of business. The immediate purpose of this alleged conspiracy was to give CBS a monopoly of UHF stations in the area, and the ultimate purpose was the elimination of all UHF competition in the area for CBS's VHF stations. To substantiate these claims the plaintiff introduced evidence that CBS had cancelled its affiliation contract with plaintiff's UHF station, and had purchased the station of one of his competitors. As a result of having to compete with CBS the plaintiff was driven out of business, and shortly thereafter CBS terminated the operation of its UHF station.

In opposing the plaintiff's interpretation of the facts, CBS relied on evidence consisting mainly of affidavits and depositions of its executives, who claimed that the actions taken by CBS resulted from business decisions rather than conspiratorial motives. The basic issue, therefore, was the motive for CBS's actions. The district court granted summary judgment[56] and the court of appeals affirmed.[57] The Supreme Court reversed, and in doing so stated:

> It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been

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51 Diemer v. Diemer, 8 N.Y.2d 206, 209, 211-12, 168 N.E.2d 654, 656-58 (1960).

52 In his dissent in *First*, Justice Black refers to the error of treating a lawsuit as a game. 391 U.S. at 306. See also L. Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 60 (1953).

53 391 U.S. at 280 n.16.

54 Id. at 278-80.

55 368 U.S. 464 (1962).

56 Poller v. Columbia Broadcasting System, Inc., 174 F. Supp. 802 (D.D.C. 1959).

57 Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599 (D.C. Cir. 1960).

> 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."[58]

In *First* it was an uncontroverted fact that Cities was negotiating with petitioner for the purchase of Iranian oil, and that those negotiations were abruptly terminated. Though alone that fact indicates nothing, it becomes very significant when Cities' motive is considered. As in *Poller*, the establishment of a conspiratorial motive for the defendant's behavior is crucial to the petitioner's case, and thus *Poller* would appear to be a precedent applicable in *First*.

The Court, however, distinguished *Poller* on the ground that there, because of the competitive relationship between CBS and the plaintiff, it was plausible to argue that CBS had entered into a conspiracy, whereas in *First*, because of the business relationship of the parties, it was "much more plausible to believe that Cities' interests coincided, rather than conflicted, with those of petitioner."[59] Apart from the fact that the Court in *Poller* did not base its decision on the plausibility added to the plaintiff's evidence by its competitive relationship with the defendant, the *First* Court's distinction would appear to involve a doubtful assumption.[60] The Court assumes that the business relationship of the petitioner and Cities is noncompetitive,[61] in that petitioner was a supplier and Cities was a prospective purchaser. In this limited sense their interests do coincide. However, in view of the fact that Cities remained dependent upon oil from the other defendant producers, it is conceivable that its interests would be most adequately protected, in the long run, if the boycott of Iranian oil succeeded. Under this latter state of facts, Cities' interests are adverse to those of the petitioner, regardless of whether in a normal business context their relationship is noncompetitive. It would appear that this "adversity of interest" in the particular transaction complained of is a more proper basis upon which to determine the plausibility of the plaintiff's argument. Furthermore, in *Poller* the relevant fact is that the parties' interests were adverse, and not simply that this adversity was attributable to competition. Adversity of interest was no less present in *First*, and thus the cases would not appear distinguishable on these grounds.

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[58] 368 U.S. at 472-73.

[59] 391 U.S. at 285.

[60] After having distinguished the two cases, the Court referred to Rule 56(e) as stating that one may not rest on the allegations in his complaint to resist summary judgment, and, since the petitioner had made only mere allegations, summary judgment could be granted. It should be noted, however, that Rule 56(e) refers to mere allegations. Thus, the proved fact of the abrupt termination of negotiations, though attributed to non-conspiratorial motives by the defendant, would seem to be more than just a mere allegation, and sufficient to resist summary judgment.

[61] 391 U.S. at 285.

In his dissent in *First*, Justice Black, who was joined by the Chief Justice and Justice Brennan, adopted the position that *Poller* and *First* "cannot possibly be reconciled."[62] He felt that the warning in *Poller* against using summary judgment in complex antitrust litigation was explicitly directed to cases such as *First*.[63] Although he acknowledged the fact that termination of the negotiations could be attributed to motivations that were not illegitimate,[64] in light of *Poller* he did not believe that the Court could properly create a standard to determine which motivation was more probable.[65] He stated that summary judgment, as applied in *First*, was not being used as a time saving device, but rather as a method of permitting the judge to "take over the jury trial of cases."[66] Such discretion greatly increases the chance that a case will not reach the jury, and, according to Justice Black, it amounts to "depriving the parties of their constitutional right to trial by jury."[67] In light of the eleven years of litigation involved in *First*, and the obvious factual determinations made by the Court, it appears that Justice Black's observations are correct.

Justice Black was critical also of the district court's limitation of the petitioner's discovery. In *First*, the only discovery afforded petitioner was that available to him under Rule 56(f).[68] This Rule, unlike the full discovery provisions of Rule 26,[69] allows discovery only for the purpose of resisting summary judgment. Since the old New York "priority rule" has been repealed,[70] the chance that future plaintiffs will be denied full discovery under Rule 26 has been substantially reduced. The fact remains that summary judgment was entered against the petitioner even though he was denied full discovery. In an attempt to justify the apparent inequity created by the strict limitation of petitioner's discovery, the Court placed great weight on the fact that much of petitioner's case was based on information found

[62] Id. at 303.

[63] Id.

[64] Id. at 305.

[65] Id.

[66] Id. at 304.

[67] Id.

[68] Fed. R. Civ. P. 56(f) states:

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[69] Fed. R. Civ. P. 26 states in part:

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

[70] See note 11, supra.

in the depositions taken of himself and his associates by the defendants.[71] Thus, in the Court's opinion, petitioner's discovery was not in fact unduly limited because he was able to utilize his adversaries' discovery. The obvious error in this line of reasoning is that the information gained by the defendants through discovery was already in the possession of petitioner and undoubtedly would have been introduced at trial without the aid of defendants' depositions. In addition, when Judge Herlands refused petitioner's request to depose Jones, he did so on the ground that Hill was in a better position to give information about Cities' dealings in Iranian oil.[72] The fact is that petitioner already knew what had transpired between Cities and himself. What he did not know was what had happened between Cities and the Kuwait oil interests, information which Jones did have. Thus, the most important party to petitioner's case, the individual who could most likely give information of any possible bribes offered or threats made, was not made available to the petitioner.

The Court dismissed this entire question as moot on the basis that petitioner did not in fact begin to depose Hill until after Jones' death.[73] The Court went on to say that the testimony of Jones' associates revealed no further information of conspiracy, and, furthermore, that it was reasonable to assume that his associates knew all that he could have known.[74] Neither reason would appear sufficient to justify the basic error of the district court in so limiting discovery. The former reason does not consider the fact that petitioner may have responded more quickly to an opportunity to depose Jones rather than Hill, and the latter reason amounts more to speculation than to substantiated fact. There would appear to be little reason for the assumption that the president of a company would necessarily inform his associates that his action was motivated by an illegal purpose rather than business considerations.

Regrettable as these factual determinations may be, more particular attention should be directed to a statement in the decision that could have far reaching effects on the future conduct of discovery. The Court did point out that one is not barred from changing his theory of the case in response to information received from discovery.[75] However, it went on to state that, when the defendant is tangential, and the original allegations by which he was linked to the other defendants are later found to be incorrect, the party seeking discovery has the burden of showing a significant likelihood that discovery of the other defendants would reveal something different regarding the particular defendant's relationship to the other defendants.[76] The Court's use of the word "tangential" suggests that the party in question is not involved and/or is unimportant, but in both instances a judgment has been made that "begs the question." He is considered uninvolved and unimportant because he is tangential, yet in order to be considered tangential the deter-

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[71] 391 U.S. at 291.
[72] Id. at 265.
[73] Id. at 272.
[74] Id. at 295.
[75] Id. at 293-94.
[76] Id. at 294.

mination had to have already been made that he is unlike the other defendants and not as important to the case as they are. Accordingly, it would appear that the defendant party hardest to link to the conspiracy and against whom discovery would be most needed is in the best position to avoid detection.

Although this discussion has dealt separately with the motion for summary judgment and the motion for discovery, it is obvious that the two are for practical purposes interrelated. Thus, when a less restrictive test to determine summary judgment is employed, justice demands that the non-moving party have available adequate discovery.[77] However, in *First*, where the test for summary judgment decidedly favored the moving party, the non-moving party was bound by strict discovery restrictions.

This decision can be most mercifully described as unwise. In "one fell swoop" the Court has created a test for summary judgment that permits the judge to assume the role of the trier of fact. By refusal to apply a theory not properly included in the pleadings but merited on the facts, the Court has retreated somewhat from the more enlightened view that the pleadings should be liberally construed. In addition, the Court has sanctioned a rule for discovery which in application insulates from detection the party to the alleged conspiracy whose relationship to the other defendants is least likely to be known by the plaintiff.

It has long been recognized that summary judgment can perform a valuable service in antitrust and other complex cases.[78] However, if *First* is an example of how courts will react in complex cases when confronted with a motion for summary judgment, consideration of the abolition of summary judgment would seem merited.[79] Although it may be said that the abolition of summary judgment will force the courts to adopt more rigid pleading requirements as an alternative method of dismissing cases early in litigation, it must be remembered that the *First* Court already requires one to stand on his pleadings while the Court determines, from the weight of the evidence, whether summary judgment should be granted. As long as summary judgment is associated with such an improper test, the procedure lies open to abuse. Thus, in order to save this valuable procedural device and safeguard the rights of plaintiffs, it is recommended that the Court return to the view of summary judgment expressed in *Poller*.

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[77] See generally L. Yankwich, supra note 52, at 49.

[78] See, e.g., 3 Barron & Holtzoff § 1247; 6 Moore ¶ 56.15[1.-0] (2d ed. 1966); H. Korn & G. Paley, Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-Trial Procedures, 42 Cornell L.Q. 483 (1957).

[79] See 391 U.S. at 304 (dissenting opinion).