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C. Paul Rogers III.
Southern Methodist University, Dedman School of Law

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Summary Judgments in Antitrust Conspiracy Litigation

C. PAUL ROGERS III*

INTRODUCTION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted, prior to trial, on the basis of affidavits, depositions and other materials showing, "that there is no genuine issue as to any material fact and that the moving party is entitled to relief as a matter of law."[1] The purpose of the rule is to determine whether the parties have evidence justifying the burden of a trial.[2] Thus, summary judgment is employed against litigants who lack sufficient evidence to reach a jury and will therefore probably suffer a directed verdict at trial.

The Supreme Court views the use of summary judgment in antitrust conspiracy litigation with skepticism.[3] The Court believes that claims of conspiracy to violate the antitrust laws raise peculiar problems which counsel in favor of limited use of summary judgment procedures. The purpose of this article is to investigate and analyze the typical methodology the federal courts use in considering and reviewing motions for summary judgment in these cases. The article also attempts to determine whether the apparent judicial reluctance to grant summary judgment in antitrust conspiracy litigation can be justified in a strict legal sense or in some other rational

* Assistant Professor of Law, Loyola University of Chicago; B.A. 1970, J.D. 1973, University of Texas; LL.M. 1977, Columbia University; member, Pennsylvania Bar. The author acknowledges the useful help of two Loyola students, Rich Cozzola and Shelly Kulwin, at various stages of this project.

1. FED. R. CIV. P. 56(c). *See* Asbill & Snell, *Summary Judgment Under the Federal Rules — When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143 (1953); Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958); Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952); Guiher, *Summary Judgments — Tactical Problem of the Trial Lawyer*, 48 VA. L. REV. 1263 (1962); Korn & Paley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-Trial Procedures*, 42 CORNELL L.Q. 483 (1957); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

2. *See* F. JAMES & G. HAZARD, CASES AND MATERIALS ON CIVIL PROCEDURE 219-21 (2d ed. 1977).

3. This article will deal primarily with defendants' motions for summary judgment in antitrust conspiracy litigation. The Supreme Court in particular, and courts in general have been less skeptical of summary judgment in cases where the plaintiff makes a motion for summary judgment and "the defendant's conduct falls unambiguously within a rule of per se illegality." 2 P. AREEDA & D.F. TURNER, ANTITRUST LAW, 59, 68 (1978). *See* International Salt Co. v. United States, 332 U.S. 392 (1947).

manner. Initially, however, it is necessary to consider the difficulties in establishing an antitrust conspiracy generally.

Proving Antitrust Conspiracies by Indirect Evidence

Section One of the Sherman Act prohibits "contract, combination . . . , or conspiracy" in restraint of trade.[4] In *Interstate Circuit, Inc. v. United States*,[5] the Supreme Court determined that direct evidence of the existence of a conspiracy was not essential to support a Section One action. Rather, the Court held, evidence of a conspiracy for antitrust purposes can be shown by indirect or circumstantial proof that raises an "inference of agreement" among the alleged co-conspirators.[6] Such an inference may be raised by conscious parallel business conduct.[7]

For example, in *Interstate Circuit* two movie theater chains sent eight film distributors identical letters that demanded that the distributors cease supplying first-run films to exhibitors who refused to meet a schedule of minimum prices or who showed first-run films as part of a double feature.[8] Subsequently the distributors were individually contacted by an agent of the theater chains. The eight distributors acquiesced separately to the chains' demands and each put the requested restrictions into effect.[9]

The Court pointed out that the proposal was couched so that if all agreed, the distributors would gain increased profits.[10] Further,

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4. 15 U.S.C.A. §1 (1975).

5. 306 U.S. 208 (1939).

6. *Id.* at 221, 225.

7. Proof of conspiratorial conduct is also important in some Section 2 litigation. It is a separate offense under Section 2 for two or more persons to conspire to monopolize. The proof of conspiracy must be coupled with evidence of specific intent to accomplish a monopoly, although typically the intent is inferred from the conduct which establishes the conspiracy. Thus, if firms with large shares of a market conspire to engage in some form of anticompetitive activity, it may be inferred that they intended to monopolize. United States v. Griffith, 334 U.S. 100, 107 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Schine Theatres v. United States, 334 U.S. 110 (1948); Salco Corp. v. General Motors, 517 F.2d 567, 576 (10th Cir. 1975); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 851 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Lewis v. Pennington, 400 F.2d 806, 811 (6th Cir. 1968). *See* L. Sullivan, Handbook of the Law of Antitrust 132-33 (1977).

8. The two theater chains had dominant control in many of the markets in which they operated theaters. For example, Interstate Circuit had a complete monopoly on first-run theaters in five major Texas cities. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 215 (1939). The two chains each contributed more than 74 percent of the license fees paid by the theaters in the respective territories in which they operated. Thus the exhibitors' demands were of immediate concern to the distributors.

9. The initial letters to the distributors had disclosed the names of all the addresses, so each recipient knew that similar demands were being made on its competitors. *Id.* at 216. The letter itself is reproduced at 215-16 n.3.

10. *Id.* at 222.

each distributor would risk a substantial loss of business to subsequent-run and independent film exhibitors if it alone accepted the proposal: the exhibitors would then purchase films from distributors not requiring the restrictive showing practices and raised admission prices.[11] Even though no direct proof of a conspiracy existed, the Court found that "it taxe[d] credulity" to believe that the distributors would have independently initiated, "such far reaching changes in their business methods without some understanding that all were to join."[12]

But in *Theatre Enterprises v. Paramount Film Distributing Corp.*,[13] the Court found that mere conscious parallel business conduct was not enough to support an inference of a conspiracy. There it was alleged that certain motion picture producers and distributors had violated Section One by conspiring to restrict first-run motion pictures to downtown Baltimore theaters, thus confining suburban theaters to subsequent runs. The plaintiff, a suburban theater, had been separately and uniformly denied first-run films by the defendant distributors. Although no direct evidence of an illegal agreement existed, the plaintiff asserted that the conscious parallel business conduct of the eight distributors raised an inference that the distributors had tacitly agreed to exclude plaintiff from the first-run motion picture market.[14]

In response, the defendants argued that it was economically unsound to place first-run pictures in suburban theaters because those theaters were not easily accessible by public transportation and consequently had a drawing power of less than one-tenth of a downtown theater. Thus, the downtown theaters offered a far greater opportunity for widespread advertisement and exposure of newly released films.

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11. The defendant distributors distributed about 75 percent of all first-class films exhibited in the United States. Since the market was oligopolic in structure, each distributor was acutely aware of the practices of its major competitors. *See generally* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 665, 658-70 (1962).

12. Interstate Circuit v. United States, 306 U.S. 208, 223 (1939). The Court found it significant that the defendants had failed to call as witnesses corporate officers who were in a position to know whether their company had acted pursuant to agreement. Once the proof supported the inference of concerted action, the Court placed the burden upon the defendants to refute the evidence by their own affirmative proof. *See also* United States v. United States Gypsum Co., 333 U.S. 364, 393, 401 (1948); FTC v. Cement Institute, 333 U.S. 683 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Masonite Corp., 316 U.S. 265 (1942); *see generally* Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950); Note, *The Nature of a Sherman Act Conspiracy*, 54 COLUM. L. REV. 673 (1958).

13. 346 U.S. 537 (1954).

14. *Id.* at 539-40.

In ruling for the defendants, the Court stated that the crucial question was whether the defendants' conduct stemmed from independent business decisions or from a tacit or express agreement to exclude the plaintiff from the first-run market.[15] The defendants had introduced evidence of local market conditions which, they asserted, precluded suburban theaters from generating the revenue and exposure of first-run films showing in downtown theaters. On this basis, the Court found that the conscious parallel refusal to license the plaintiff did not raise an inference that would support a finding of conspiracy. The uniform action was attributed to individual business judgment motivated by the distributors' desire for maximum revenue.[16] Unlike the situation in *Interstate Circuit*, the Court here found that no interdependence existed among the alleged conspirators.[17]

The *Theatre Enterprises* decision demonstrated that conscious parallel conduct, without additional evidence, neither establishes the existence of an illegal agreement nor itself constitutes a violation of the Sherman Act. Justice Clark, writing for the *Theatre Enterprises* majority, concluded that "conscious parallelism has not yet read conspiracy out of the Sherman Act entirely."[18] Thus, *Theatre Enterprises,* reduced conscious parallelism to merely another, albeit potentially significant, form of circumstantial evidence.[19]

Underlying the Court's reluctance to equate conscious parallelism with conspiracy is the judicial disinclination to interfere with internal business decisions.[20] The lower courts have followed a similar policy of requiring additional circumstantial proof, labeled "plus factors," to raise an inference of an illegal agreement where no direct evidence of conspiracy exists.[21] For example, in *C-O-Two Fire Equipment Co. v United States,*[22] conscious parallelism was estab-

15. *Id.* at 540.

16. *See also* Pevely Dairy Co. v. United States, 178 F.2d 363, 369 (8th Cir. 1949).

17. Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1953).

18. *Id.*

19. *See* Note, *Summary Judgment in Antitrust Litigation — Probative Force of a Refusal to Deal,* 49 B.U.L. REV. 368, 372 (1969).

20. *See, e.g.,* Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925). One lower court expressed the view that the judiciary should confine itself to determining whether the actions of the parties violate the law and should avoid dictating to the management of a business how to conduct its affairs. Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 778 (D.D.C. 1970).

21. *See, e.g.,* Synfy Enterprises v. National Gen. Theatres, Inc., 575 F.2d 233 (9th Cir. 1978); Gainesville Utilities v. Florida Power & Light Co., 573 F.2d 292, 301 (5th Cir. 1978); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977); Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309 (3d Cir. 1975); FTC v. Lukens Steel Co., 454 F. Supp. 1182 (D.D.C. 1978).

22. 197 F.2d 489 (9th Cir.), *cert. denied,* 344 U.S. 892 (1952).

lished by the existence of identical prices throughout the industry. Additional plus factors inferentially established the existence of a conspiracy. These factors included artificial standardization of products, the raising of prices at a time when a surplus existed in the industry, the submission of identical bids to public agencies and the policing of dealers to maintain minimum prices.[23]

JUDICIAL RELUCTANCE TO GRANT SUMMARY JUDGMENT IN ANTITRUST CONSPIRACY CASES

In view of the judicial refusal to equate conscious parallel business activity with conspiracy, summary judgment procedure in antitrust conspiracy litigation would seem rather straightforward. An antitrust plaintiff attempting to establish a *prima facie* inferential conspiracy, and thereby defeat a motion for summary judgment, would have to exhibit to the court some factors indicating an agreement in addition to knowing parallel conduct. The Supreme Court, however, has been reluctant to sanction a summary judgment unless the plaintiff can offer virtually no evidence to support the existence of a conspiracy.[24] Some appellate courts have followed suit and held that summary judgment should not be granted if there is the "slightest doubt" as to any material fact.[25]

The foundation of the judicial aversion to summary judgments in antitrust litigation apparently lies in *Poller v. Columbia Broadcasting System, Inc.*[26] In *Poller*, CBS had a network agreement with a Milwaukee UHF station.[27] Anticipating an amendment to the Federal Communications Commission Regulations that would permit networks to own additional UHF stations, CBS acquired an option to purchase another, unsuccessful Milwaukee UHF station

23. *Id.* at 497; *see also* Milgram v. Loew's Inc., 192 F.2d 579, 583 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

24. *See* text accompanying notes 26-38, *infra*.

25. The slightest doubt test actually antedates *Poller*. Lower federal courts have applied the test to a variety of factual situations in the summary judgment context. *See, e.g.*, Devex Corp. v. Houdaille Indus., Inc., 382 F.2d 17, 21 (7th Cir. 1967); Armco Steel Corp. v. Realty Investment Co., 273 F.2d 483, 484 (8th Cir. 1960); Cox v. American Fidelity & Casualty Co., 249 F.2d 616, 618 (9th Cir. 1954); Gottlieb v. Isenman, 215 F.2d 184, 186 (1st Cir. 1954); Shafer v. Reo Motors, 205 F.2d 685, 688 (3d Cir. 1953); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945). Recently, however, the "slightest doubt" approach has been characterized as "an unwarranted gloss on the 'genuine issue' requirement." Report of the National Commission for the Review of Antitrust Laws and Procedures, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 897 at 21. The use of the test appears to be declining. The Second Circuit, for example, has expressly rejected the standard found in earlier decisions. Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972); Dressler v. MV Sandpiper, 331 F.2d 130, 132-34 (2d Cir. 1964).

26. 368 U.S. 464 (1962).

27. *Id.* at 465-66. The UHF station was actually the assignor of the plaintiff.

in a straw man transaction. When the FCC amendment went into effect, CBS exercised the option and terminated the network agreement with plaintiff. The disaffiliated station was forced to sell its equipment and facilities to CBS at an inexpensive price since it had been left without a network agreement. Subsequently, CBS terminated operation of the purchased UHF station, leaving no UHF station in Milwaukee.[28]

The plaintiff alleged that CBS's actions constituted a conspiracy to force plaintiff out of business and eliminate all UHF competition in the area for CBS's VHF stations. CBS filed a motion for summary judgment and supported its motion with affidavits from its executives denying the existence of a conspiracy, and asserting that their actions arose from a legitimate business decision. Thus, the motives of CBS in terminating its network affiliation with the plaintiff were at issue. The Supreme Court, viewing the record in the light most favorable to the party opposing the motion, reversed the trial court's grant of summary judgment and concluded:

> 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.[29]

Although the plaintiff in *Poller* failed to prove conclusively that a conspiracy existed, it did present evidence indicating that its contentions were "more than fantasy."[30] For example, a deposition of one Holt, an alleged co-conspirator, showed that Holt knew that the "obvious purpose and necessary effect" of CBS's cancellation of the affiliation and its subsequent purchase of another UHF station would be to eliminate independent UHF stations in Milwaukee, and that this result would work to Holt's personal benefit.[31] Further, other evidence supported the theory that CBS preferred VHF to

28. *Id.* at 467.

29. *Id.* at 473. *See also* Six Twenty-Nine Prod. v. Rollins Telecasting, 365 F.2d 478 (5th Cir. 1966); Harlem River Consumers Co-Op, Inc. v. Associated Grocers of Harlem, Inc., 53 F.R.D. 691, 693 (S.D.N.Y. 1971). It should be noted that federal courts are generally reluctant to grant summary judgment in any situation in which motive and intent are involved. *See* Cross v. United States, 336 F.2d 431 (2d Cir. 1964) (disputed tax deduction for educational trip); Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962) (conversion action); Bragen v. Hudson County News Co., 278 F.2d 615, 618 (3d Cir. 1960) (antitrust conspiracy alleged). *Cf.* Lunden v. Cordner, 354 F.2d 401 (8th Cir. 1966); Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952).

30. 368 U.S. at 472.

31. *Id.* at 470.

UHF stations and previously had abandoned other UHF stations in favor of VHF outlets.[32]

Subsequently, in *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens*,[33] the Supreme Court reaffirmed its skepticism of the propriety of permitting summary judgments in antitrust conspiracy litigation. In *Norfolk*, the plaintiff, retailer of burial monuments and bronze grave markers, sued a manufacturer of grave markers and five cemetery operators. The plaintiff alleged that the defendants were engaged in a conspiracy to discourage the sales of its grave markers for installation in the conspirator's cemeteries.[34] The Court, in a *per curiam* opinion, reversed the trial court's grant of summary judgment for defendants.[35] Although the plaintiff had produced no evidence of any communications among the defendants that showed concerted action, the Court found that the parallel conduct of defendants raised questions from which a jury could infer the existence of a conspiracy.[36] The plaintiff had disputed the business justifications for defendants' parallel conduct in a sufficient manner to raise a material question of fact for a jury. Thus, the Court concluded that "the alleged conspiracy had not been conclusively disproved by pretrial discovery."[37]

It is apparent from *Poller* and *Norfolk Monument* that the Court, perhaps because of its reluctance to conclude antitrust conspiracy cases before a jury trial, is placing the burden of proof squarely on the summary judgment movant. *Norfolk Monument* indicates that to gain summary judgment a defendant movant must rebut conclusively any inferences of the existence of concerted action that the plaintiff raises in its allegations. An antitrust conspiracy, however, can be shown by indirect or inferential proof.[38] Thus, the resulting burden on a movant defendant to show that no genuine issue exists about a possible inferential conspiracy is formidable.

However in *First National Bank of Arizona v. Cities Service Co.*,[39] a case decided between *Poller* and *Norfolk Monument*, the Court affirmed a grant of summary judgment for defendants denying the existence of a conspiracy to violate the antitrust laws. The suit alleged that seven large oil companies had maintained a world-

32. *Id.* at 472.
33. 394 U.S. 700 (1969).
34. *Id.* at 701.
35. *Id.* at 704.
36. *Id.* at 701-03.
37. *Id.* at 704.
38. *See* text accompanying notes 4-23, *supra*.
39. 391 U.S. 253 (1968).

wide oil cartel since 1928 and more recently had conspired to boycott Iranian oil in all markets.[40] The conspiracy allegedly had begun in 1951 in response to the nationalization by the Iranian government of the properties of the Anglo-Iranian Oil Co. It was asserted that six of the defendants, excluding Cities Service, agreed to boycott Iranian oil throughout the world until Iran returned Anglo-Iranian's property and concession rights.[41]

Subsequent to the nationalization, plaintiff had succeeded in obtaining a contract to purchase 15 million metric tons of oil from the National Iranian Oil Company (NIOC), the Iranian government's successor to Anglo-Iranian. The plaintiff asserted that the six defendants had conspired to prevent him from selling any of the oil he was entitled to sell under his contract with NIOC. Cities Service, following lengthy negotiations with plaintiff, allegedly joined the conspiracy to boycott plaintiff after receiving a bribe of a large supply of oil from Kuwait at a price lower than that offered by plaintiff.[42] Subsequently, the defendants avowedly entered into a consortium agreement to allot the Iranian oil production among themselves.[43] The plaintiff claimed that the conspiracy completely thwarted his ability to sell oil under his contract with NIOC and sued for treble damages.[44]

In 1965, almost ten years after plaintiff filed his original complaint, Cities Service was granted a summary judgment.[45] In affirm-

40. *Id.* at 259-61.

41. *Id.* at 260.

42. *Id.*

43. In 1963, while the motion for summary judgment by Cities Service was pending, the plaintiff amended his complaint by replacing the specific references to the Kuwait oil transaction and the consortium agreement with allegations of boycott and conspiracy. *Id.* at 267.

44. *Id.* at 260-61.

45. Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965). The trial judge had postponed ruling on Cities Service's summary judgment motion for some time. Although plaintiff was permitted additional discovery under Rule 56(f) of the Federal Rules of Civil Procedure, the court limited the extent of the discovery because it considered the claim against Cities Service to be insubstantial. *Id.* at 173. As a result, plaintiff was not permitted to depose the president of Cities Service, who allegedly was the only person with full knowledge of the events upon which the alleged conspiracy was founded. 391 U.S. at 303. (Black, J., dissenting).

On appeal to the Supreme Court, plaintiff claimed that the district court's limitation to discovery under Rule 56(f), which prevented his deposition of Cities Service's president, improperly limited the discovery permitted him prior to the rendering of a summary judgment. Plaintiff pointed out that the president had made a trip to Kuwait while considering plaintiff's offer of Iranian oil. After this trip, where Cities Service allegedly agreed to buy its oil from Gulf and join the oil consortium, the defendant was no longer interested in dealing with plaintiff. In addition, plaintiff, hoping to raise an inference of conspiracy, pointed out that Cities Service had tried to keep this trip secret for a number of years (1952-1964). Plaintiff claimed that in limiting discovery under Rule 56(f), the district court had prevented

ing, the Supreme Court found that the one unequivocal fact produced by plaintiff which supported a conspiracy theory, Cities Service's failure to contract with plaintiff for the purchase of Iranian Oil, was not sufficiently probative of the existence of a conspiracy to defeat summary judgment.[46] The Court found that the other evidence relied upon by plaintiff to raise the inference of a conspiracy, aside from the simple failure to deal, was also inadequate.[47] In addition, Cities Service produced substantial evidence rebutting the inference the plaintiff sought to establish.

In determining that Cities' refusal to deal with plaintiff did not raise a sufficient inference of an illegal agreement to get to the jury, the Court considered the inferences that could reasonably be drawn from the parallel behavior of Cities and the other defendants, i.e., the refusal to buy plaintiff's oil. The Court found that the record contained an overwhelming amount of evidence that Cities' motives in refusing to deal with the plaintiff sprung from independent business decisions and business judgment.[48] For example, the plaintiff argued that Cities' refusal to purchase plaintiff's oil on attractive terms suggested improper motives. But the Court held that the probability that such a purchase would engender ill will among companies competing with Cities, with attendant unfavorable business consequences to Cities, rebutted any inferences of conspiratorial intent.[49] The Court concluded that "not 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 conspir-

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discovery of what had happened on the Kuwait trip.

The Court, in a detailed analysis of the facts, ruled that plaintiff "has had sufficient discovery either to substantiate his claims of conspiracy to the extent of raising a material issue of fact thereon, or of providing a basis for investigation of his own to gather additional evidence during the five years for which Cities' motion was pending below." *Id.* at 298. *But see id.* at 305-07 (Black, J., dissenting).

46. 391 U.S. at 286-88.

47. Plaintiff had been unable to obtain any indication from depositions of Cities Service executives that any of them knew of a conspiracy to refuse to deal with plaintiff. As noted, plaintiff was unable to depose the president of Cities Service, allegedly the only person who could have known of the existence of such a conspiracy. *See* note 45, *supra*. Further, the president had died by the time the trial court granted summary judgment. 391 U.S. at 268 n.7.

48. *Id.* at 277.

49. *Id.* at 279-80. After nationalization, the depossessed company, Anglo-Iranian, publicly announced its intention to bring lawsuits against any purchaser of Iranian oil. Other major oil companies supported Anglo-Iranian, since they were afraid of nationalization of their properties in countries in which they held concessions if the Iranian take-over went unchecked. Many oil purchasers, in addition to Cities, subsequently refused to purchase Iranian oil. The Court found this explanation of Cities' conduct more plausible than plaintiff's theory of a boycott directed against him, particularly in view of the fact that Cities produced evidence that the alleged Kuwait pay-off was arranged long before nationalization. *Id.* at 278.

acy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable."[50] Thus, as in *Theatre Enterprises*, evidence supporting independent business decision-making rebutted an inference supporting conspiratorial motive raised by conscious parallel business behavior.

The Court believed that its decision in *Cities Service* was consistent with *Poller v. Columbia Broadcasting System, Inc.*, even though it reached divergent results in cases that, at least superficially, contained substantial factual similarities.[51] Each case is centrally concerned with the motives of the defendant in failing to conclude a business deal with the plaintiff. Nonetheless, the Court believed that factual differences concerning the relationship of the parties substantially altered the inferences of motive that can be reasonably drawn from each set of circumstances.[52]

In the Court's view, *Poller* was distinguishable from *Cities Service* because the plaintiff and defendant were competitors; therefore, it was plausible to argue that CBS planned to eliminate the plaintiff as a competitive factor.[53] In contrast, the Court in *Cities Service* found that the parties were not competitors since the plaintiff was a supplier of oil and the defendant was a purchaser.[54] The Court also determined that Cities was not in the same competitive position as the other alleged co-conspirators since Cities was neither a member of defendants' international cartel to control foreign oil nor had a large supply of foreign oil readily available as did the other defendants.[55]

The *Cities Service* Court, in affirming the grant of summary judgment, decided that the most probable inferences from the facts failed to support a theory of conspiracy.[56] Arguably the *Cities*

50. *Id.* at 280.

51. *Id.* at 285.

52. *Id.* at 287.

53. *Id.* at 285. The court found *Interstate Circuit* distinguishable for the same reasons. There, as in *Poller*, all the alleged co-conspirators were shown to have the same motive to enter into a tacit agreement. *Id.* at 287. *See* text accompanying notes 11 & 12, *supra*.

54. 391 U.S. at 285.

55. *Id.* at 279. *But see* Note, *First National Bank v. Cities Service Co.*, 10 B.C. IND. & COM. L. REV. 196, 204 (1968) [hereinafter cited as *First National Bank* Note]. Justice Black vigorously dissented in *Cities Service* and stated his belief that the majority's holding could not possibly be reconciled with *Poller*. 391 U.S. at 303. To him the *Poller* warning against the use of summary judgment in antitrust litigation was directed explicitly to situations exemplified by *Cities Service*. He did not believe that *Poller* permitted the court to create a standard whereby the granting of summary judgment depended upon which party's inferences were most probable. Such an approach resulted in the judge usurping the role of the jury and "depriv[ed] parties of their constitutional right to trial by jury." *Id.* at 304.

56. *See* Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 32 (1976).

Service approach constitutes a lesser standard than that articulated in *Poller* and subsequently affirmed in *Norfolk Monument,* where the Court required the movant to disprove conclusively factual inferences supporting the existence of concerted action. Further, it is questionable that the *Cities Service* Court viewed the record in the light most favorable to the party opposing the motion, thus ignoring *Poller's* requirement that any balancing of probable inferences take place only after ambiguities are resolved in favor of the non-moving party.[57]

More recently in *Adickes v S.H. Kress & Co.,*[58] a civil rights case in which plaintiff alleged a conspiracy between defendant restaurant and the Hattiesburg, Mississippi, police, the Court reaffirmed the *Poller* requirement that the movant for summary judgment show the absence of a genuine issue as to any material fact as viewed in the light most favorable to the opposing party.[59] The *Adickes* Court distinguished *Cities Service* since the *Adickes* movant had "failed to show conclusively that a fact alleged by [the non-moving party] was 'not susceptible' of an interpretation that might give rise to an inference of conspiracy."[60] In contrast, according to the Court, the non-moving party in *Cities Service* received the burden of producing evidence of a conspiracy only after the moving party met the initial burden of successfully refuting the inferences of conspiracy relied upon by the non-movant.[61]

Viewed in this manner, *Cities Service* may be reconcilable with the other Supreme Court summary judgment conspiracy cases. The burden of proof remains on the movant until the movant can show successfully that the facts taken in the light most favorable to the opposing party fail to raise an inference of conspiracy.[62] Once the movant satisfies this requirement, the burden of persuasion then

57. 368 U.S. 464, 473 (1961); *see also* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

58. 398 U.S. 144 (1970).

59. *Id.* at 157.

60. *Id.* at 160 n.22. Plaintiff charged that the defendant, in conspiracy with the police, had refused to serve her at defendant's lunch counter. Although defendant submitted the deposition of its store manager and the affidavits of several policemen, all denying the conspiracy, and plaintiff admitted that she had no direct evidence of a conspiracy, the Supreme Court reversed the trial court's grant of summary judgment for defendant. Defendant had apparently discharged its burden with respect to the existence of a conspiracy before plaintiff entered the store but had failed to deny that an agreement was reached after plaintiff entered the store. The inference raised by plaintiff's allegations that a conspiracy arose after she entered the store was not adequately refuted by defendant and summary judgment could not properly issue.

61. *Id.* at 160 n.22, *citing* 391 U.S. at 289.

62. *See* FED. R. CIV. P. 56(e), Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56.

shifts to the opposing party to bring forth additional evidence of the existence of a conspiracy. Summary judgment results if no additional facts supporting an inference of concerted activity are forthcoming.[63] Thus, in *Cities Service* the movant successfully showed that the inferences raised by plaintiff's factual allegations did not support a conspiracy theory. The plaintiff then failed to come up with additional facts to support a finding of conspiracy; as a result summary judgment was granted to the defendant.

Perhaps the troublesome aspect of *Cities Service* is not the methodology of the decision, but the Court's analysis of the facts and its conclusion that no inference of conspiracy was raised. One commentator has suggested that Cities' dependency for oil upon other defendant producers who were boycotting Iranian oil could indicate Cities' interest in the ultimate success of the boycott of plaintiff's sale of Iranian nationalized oil. Cities' refusal to deal with plaintiff could then be seen as the result of concerted action.[64] Under this interpretation, the non-competitive business relationship of plaintiff and defendant Cities, as supplier and prospective purchaser, fails to legitimize Cities' refusal to buy plaintiff's oil.[65]

Thus, the existence of a conspiracy in *Cities Service* could easily be inferred. Under this view, Cities failed to meet the *Poller* and *Norfolk Monument* standard of conclusively rebutting the inferences of conspiracy raised by the non-moving party. The *Cities Service* Court's affirmation of the grant of summary judgment based upon the inference deemed more probable from the failure to deal is apparently irreconcilable with the *Poller* and *Norfolk Monument* summary judgment requirements.[66]

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63. *See* FED. R. CIV. P. 56(e).

64. *First National Bank* Note, *supra* note 55, at 204. The Court noted that plaintiff could have argued at the trial level that Cities' acquiescence, because of the threatening conduct of others, in an illegal scheme carved out by the others for their own benefit, ties Cities in as a member of the illegal combination. *See* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Because plaintiff did not properly raise the argument before the trial court it could not be considered on appeal. 391 U.S. at 280 n.16.

65. Thus, Cities' interests would be adverse to plaintiff even though they were not competitors in a normal business sense. Adversity of interest could then be said to exist in *Cities Service* just as it did in *Poller*, even though the adversity there was attributable to the fact that the parties were competitors. However, the reason for the adversity would not seem to be controlling; the salient inference which must be drawn from plaintiff's allegations is that there did exist an adversity of interest between the parties, regardless of their respective positions as competitors. *See First National Bank* Note, *supra* note 55, at 204.

66. 391 U.S. at 280. Curiously, while *Poller* advises against the use of summary judgment in "complex antitrust litigation where motive and intent play leading roles," the Court approved the grant of summary judgment only in the most complex factual and inferential case.

More recently the Supreme Court reaffirmed *Poller's* "concededly rigorous standard" with

BURDEN OF PROOF

Cities Service illustrates the difficulties inherent in deciding a motion for summary judgment when the movant has the burden of disproving all inferences of conspiracy raised by the opposing party. This burden is so substantial that almost any antitrust conspiracy case in which the court grants summary judgment can be questioned. Interestingly, the standard imposes a greater burden upon defendant at the summary judgment level than exists at trial where the plaintiff must present more than mere evidence of conscious parallel conduct to get to the jury. Further, the placement of this type of burden upon movants in antitrust cases is discordant with normal summary judgment standards.

Generally, under Rule 56(c), the party who will bear the burden of proof at trial must establish all essential elements of his claim or defense in order to obtain summary judgment.[67] Where, however, the moving party does not bear the burden of proof at trial, he can obtain summary judgment by showing that an essential element of the opposing party's claim is missing. In either situation the ultimate task for the court is to determine whether a "genuine issue of fact" exists as to the presence of any of the essential elements of the case. As a practical matter, however, the federal courts typically place the burden of establishing the absence of any issue of material fact upon the movant, even where the non-movant party would have the burden to show the existence of that fact at trial.[68] Thus, as the

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regard to dismissals of antitrust suits in a slightly different context. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976). There the court overturned a trial court's dismissal of an antitrust suit for failure to state a cause of action upon which relief could be granted. FED. R. CIV. P. 12(b)(6). At issue was whether the allegations in the complaint were adequate to support a conclusion that the alleged anticompetitive activity was occurring in interstate commerce. The court found that the allegations, fairly read, would support proof that the alleged conspiracy resulted in "unreasonable burdens on the free and uninterrupted flow" of interstate commerce. 425 U.S. at 746. *Poller* warranted reversal even though "further proceedings in [the] case [might] demonstrate that respondents' conduct in fact involves no violation of law, or indeed no substantial effect on interstate commerce." *Id.* at 747 n.5. *See also* Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). For a discussion as to whether the *Poller* admonitions apply in the directed verdict context, *see* Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Santa Clara Valley Distrib. Co. v. Pabst Brewing Co., 556 F.2d 942, 944 n.1 (9th Cir. 1977). *See also* Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958), *aff'd on other grounds*, 360 U.S. 395 (1959); Winchester Theatre Co. v. Paramount Film Distributing Corp., 324 F.2d 652 (1st Cir. 1963).

67. Typically, the one bearing the burden of proof at trial is either the plaintiff or a defendant asserting an affirmative defense. *But see* FED. R. CIV. P. 8(d).

68. *See, e.g.*, 6 J. MOORE, FEDERAL PRACTICE ¶ 56.15[3], at 56-473 (3d ed. 1976); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2727, at 525 (1973).

Court specifically noted in *Adickes,* summary judgment will be denied where the movant's evidence is insufficient to establish the absence of a genuine issue of material fact, even where the opposing party presents no evidence in his favor.[69]

Rule 56(e) requires that an adverse party to a motion for summary judgment must bring forth specific facts beyond the allegations contained in his pleadings to defeat the motion. The rule specifies that the adverse party "may not rest upon the allegations or denials of his pleading" when a motion for summary judgment is "supported as provided in this rule."[70] This language, added by a 1963 amendment to Rule 56, requires affirmative action by an adverse party beyond his pleadings once the proponent produces evidence establishing the lack of any triable issue of fact.[71]

However, the requirement in *Norfolk Monument,* which is implicit in *Poller,* that the movant must disprove conclusively the existence of a conspiracy to prevail appears to be an unduly restrictive reading of Rule 56(e). Rule 56(e) was amended to permit a court to pierce the allegations contained in the pleadings when determining whether a genuine issue of material fact exists.[72] The requirement that the movant disprove conclusively the allegations of the pleadings before the adverse party must come forth with evidence effectively negates the purpose of the amendment, since a great many cases will still be decided by reference to the pleadings.[73]

The Supreme Court itself, in *Cities Service,* rejected the conten-

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69. 398 U.S. at 160, *citing* FED. R. CIV. P. 56(e), Advisory Committee Notes.

70. FED. R. CIV. P. 56(e) provides in pertinent part as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the 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.

71. 1 MOORE'S FEDERAL PRACTICE RULES PAMPHLET at 1034 (1975); *see also* Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules,* 69 HARV. L. REV. 839 (1956); REPORT OF PROPOSED AMENDMENTS TO CERTAIN RULES OF CIVIL PROCEDURES FOR UNITED STATES DISTRICT COURTS, 31 F.R.D. 621, 648 (1962) [hereinafter cited as REPORT OF PROPOSED AMENDMENTS]; Note, *Summary Judgment Under Federal Rule of Civil Procedure 56 — A Need for a Clarifying Amendment,* 48 IOWA L. REV. 453 (1963).

72. MOORE, note 71, *supra.*

73. In *Adickes,* the Court pointed out that the 1963 amendment was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue of fact. 398 U.S. 144, 159-60. Thus, summary judgment will be denied "even if no opposing evidentiary matter is presented" where the evidence supporting the motion does not establish the absence of a genuine issue of fact. *Id.* at 160. Certainly, however, *conclusive* proof of the absence of a material fact was not contemplated by the amendment, in light of its avowed purpose to prohibit a non-movant from escaping summary judgment if his pleadings simply contradict the moving party's affidavits concerning the material factual issue. *See* REPORT OF PROPOSED AMENDMENTS, *supra* note 71 at 648.

tion that Rule 56(e) should be excluded in antitrust cases, recognizing that a litigant should not be entitled to a trial on the merits absent "significant probative evidence" tending to support a valid complaint.[74] However, the Court may be paying only lip service to the Rule 56(e) affirmative proof requirement where the movant has not successfully rebutted the factual inferences of concerted action arising from the non-movant's complaint.[75] For example, the Court in *Adickes* refused to require the plaintiff to support its allegations of conspiracy because the movant had not disproved conclusively plaintiff's factual allegations of conspiracy.[76]

In general, the judicial reluctance to grant summary judgments liberally may be best explained by the fear of unjust dismissals and a concomitant faith in the ability of a trial on the merits to achieve a proper result in a majority of cases.[77] These notions were candidly expressed by the Court in *Poller* where the added complication of the presence of an inferential conspiracy was at issue.[78] Thus, because problems of intent and motive were entwined with complex factual situations, the Court suggested that even greater caution be

74. First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968).

75. Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970).

76. *Id.* at 159-61.

77. *See, e.g.*, Chubbs v. City of New York, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971), where a trial court expressed the problem as follows: "Since courts are composed of mere mortals they can decide matters only on the basis of probability, never on certainty. The 'slightest doubt' test, if it is taken seriously, means that summary judgment is almost never to be used — a pity in this critical time of overstrained legal resources." *See* note 81, *infra*. *See also* United Rubber Workers v. Lee Nat'l Corp., 323 F. Supp. 1181 (S.D.N.Y. 1971) (court denied defendant's motion for summary judgment even while asserting that plaintiff's claim would be dismissed at trial on the same record); Northwestern Auto Parts v. Chicago B. & Q. R.R., 240 F.2d 743, 746 (8th Cir.), *cert. denied*, 355 U.S. 815 (1957); Dale Hilton, Inc. v. Triangle Publications, Inc., 27 F.R.D. 468, 470 (S.D.N.Y. 1961). *See generally* Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977).

However, some courts have specifically recognized the utility of summary judgment procedures in antitrust litigation. For example, the Seventh Circuit recently stated:

> the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation. . . . The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.

Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978). In another context the D.C. Circuit noted that summary judgment functions to avoid spurious litigation and curb "the danger that the threat of such litigation will be used to harass or to coerce a settlement." Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) (libel case); *see also* Mintz v. Mathers Fund, Inc. 463 F.2d 495, 498 (7th Cor. 1972).

78. 368 U.S. at 473. *See* text accompanying note 29, *supra*.

used in granting summary judgment in antitrust conspiracy litigation.[79]

It is important to note, however, that despite the merit of the Court's concern about unjust dismissals in antitrust or conspiracy cases, Rule 56 makes no special provision for those types of case. The Court's concern about fairness thus is at odds with the legal strictures of Rule 56. In essence, the Court has revamped the Rule 56(e) requirements for a particular type of case. In so doing the Court has given notice that the policies underlying the rule are inadequate to assure equitable adjudications in antitrust cases.[80]

79. *Cf.* White Motor Co. v. United States, 372 U.S. 253, 259 (1963). The position of the *Poller* Court is surprising in view of the 1963 amendment to Rule 56(e). *See* text accompanying notes 71-72, *supra*. Professor Wright predicted that the Rule 56(e) amendment would curtail the refusal of courts to employ summary judgment in "cases in which decision must turn on motive or intent. . . ." Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839, 856 (1956).

Poller's reluctance to permit summary judgment in deference to the role that the demeanor and credibility of witnesses play in conspiracy litigation has also come under attack. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 765 n.94 (1974). Professor Louis points out that the credibility and demeanor of defendant's witnesses are irrelevant at trial unless plaintiff meets his burden of establishing defendant's improper state of mind. Even if no one believes the defendant's denials of the existence of a conspiracy, the plaintiff cannot reach the jury without affirmative evidence. *Id., citing* Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952). Professor Louis concludes that a plaintiff should be required to produce affirmative evidence of the existence of a conspiracy in response to a motion for summary judgment since at trial he will have the same burden before credibility and demeanor of witnesses become germane to the outcome. If affirmative evidence is shown then the motion should be denied, since at trial plaintiff would reach the jury.

80. In contrast, the original Advisory Committee note to Rule 56 provides that the rule "is applicable to *all* actions." FED. R. CIV. P. 56 (1938), Advisory Committee Note (emphasis added). Congress has, of course, specifically granted the Supreme Court the authority to promulgate rules of civil procedure. 28 U.S.C. §2072 (1966). However, no rule can take effect until it has been reported to Congress by the Chief Justice. Thus, if the Court is amending Rule 56 by judicial fiat in *Poller*, it is transgressing the rule-making authority granted by Congress.

Arguably, however, the Court is not judicially amending Rule 56 but only stating that the standards for applying the rule in antitrust cases should be more exacting. But in other situations, Congress has taken special action to resolve procedural problems posed by certain classes of cases. For example, in 1968, an act was passed to facilitate the handling of pretrial procedure in complex litigation such as antitrust and class action suits. 28 U.S.C. §1407 (1968). The legislation established a Judicial Panel on Multidistrict Litigation for permitting the transfer of related civil actions pending in different federal courts to a single district for the consolidation of pretrial proceedings. *See* Withrow & Larm, *supra* note 56; McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 687-89 (1977); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (Moore's ed. 1977); Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Away?*, 70 F.R.D. 199 (1976).

Contrast the controversy that has brewed from time to time over the role of pleadings in cases containing complex factual issues. Some federal courts have asserted that a separate, more vigorous standard of pleading should be required in those cases. *See, e.g.*, Bain & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 109-10 (S.D.N.Y. 1956). However, the majority of federal courts refuse to give special treatment to the pleadings in complex or "big" cases

LOWER FEDERAL COURT USE OF SUMMARY JUDGMENT IN ANTITRUST CONSPIRACY LITIGATION

It is noteworthy that, in spite of the obstacles that *Poller, Norfolk Monument* and *Adickes* pose, lower federal courts frequently grant summary judgment to defendants challenging claims of concerted action to violate the antitrust laws.[81] In allowing these motions, the courts appear to waiver from a strict requirement that the movant bear the burden of disproving all inferences of conspiracy that arise from plaintiff's allegations, while seemingly placing, at some point, the onus upon the opposing party to produce further evidence in support of its factual allegations of conspiracy. Of course, this approach is in general keeping with Rule 56(e) which mandates affirmative action by a party opposing a motion for summary judgment.[82]

For example, in *Lamb's Patio Theatre, Inc. v. Universal Film Exchange,*[83] the Seventh Circuit affirmed the trial court's grant of summary judgment against a theater that had brought suit challenging a motion picture distributor's decision to reject the theater's bid for a certain motion picture. The defendant had rejected bids by plaintiff and other theaters in favor of continuing the Chicago area run of "The Sting" at another theater, at allegedly less favorable terms than offered by plaintiff.

The district court granted defendant's motion for summary judgment holding that it had legitimate business considerations for rejecting plaintiff's offer for the movie and noting a "complete ab-

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simply because the Federal Rules of Civil Procedure do not provide for it. *See* Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3 (9th Cir. 1963); Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957). *See generally* REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES, 13 F.R.D. 62, 66-68 (1953); Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45 (1958); Freund, *The Pleading and Pre-Trial of an Antitrust Claim,* 46 CORNELL L.Q. 555 (1961); Note, *Improved Definition of Discovery Relevance: A Path Out of the Antitrust Procedural Quagmire,* 30 U. FLA. L. REV. 751 (1978).

81. *See, e.g.*, Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163 (7th Cir. 1978); Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 579 F.2d 484 (9th Cir. 1978); Javelin Corp. v. Uniroyal Inc., 546 F.2d 276 (9th Cir. 1976); Ark Dental Supply Co. v. Cavitron, 461 F.2d 1093 (3d Cir. 1972); Gould v. Control Laser Corp., 462 F. Supp. 685 (M.D. Fla. 1978); Natrona Serv. Inc. v. Continental Oil, 435 F. Supp. 99 (D. Wyo. 1977) (summary judgment granted "[W]here the court has permitted extensive discovery, and where the requirements of Rule 56 . . . are satisfied"); Kendall Elevator Co. v. L.B.C. & W. Assoc. of South Carolina, 350 F. Supp. 75 (D.S.C. 1972); Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

82. *See* Akron Pressform Mold Co. v. McNeil Corp., 496 F.2d 230, 235 (6th Cir.), *cert. denied,* 419 U.S. 997 (1974); Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973); Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972); American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1086 (S.D. Miss. 1976); Gasperi v. Cinemette Corp., 391 F. Supp. 826, 832-33 (W.D. Pa. 1975).

83. 582 F.2d 1068 (7th Cir. 1978).

sence of facts" from which a conspiracy could be inferred.[84] The Seventh Circuit, in affirming *per curiam*, ruled that, "it was up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment was to be avoided."[85] The court rejected plaintiff's contention that defendant's alleged bad faith in continuing to license the film with another theater for less favorable terms leads to an inference that the licensing was the product of a conspiracy.[86] Specifically, the court ruled that even if the terms were less favorable, a departure from a competitive bidding scheme was insufficient to prove a conspiracy.[87] The Seventh Circuit also found the plaintiff, in the two and one-half years since the filing of the suit, had failed to produce any evidence to counterbalance defendant's sworn denial of the existence of a conspiracy.[88]

Finally, the *Lamb's Patio Theatre* court determined that a departure from competitive bidding, standing alone, did not raise an inference of conspiracy. The defendant, under the *Colgate* doctrine,[89] was free to reject plaintiff's bid for any reason as long as the decision was a unilateral one. Accordingly, the court concluded that, under these circumstances, a plaintiff must supply further evidence to raise an inference of conspiracy. Thus, until such an inference is raised, the movant is relieved of his burden to rebut the plaintiff's allegations as required by *Poller* and *Norfolk Monument.*

A more difficult situation occurs when plaintiff's allegations, standing alone, do raise an inference of concerted action. Then, typically, the lower courts have required the moving party to rebut the inferences by its own affirmative evidence.[90] If this is success-

84. 1977-1 Trade Cases ¶ 61,517 (N.D. Ill. 1977).

85. 582 F.2d at 1070.

86. *Id., citing* Brown v. Western Mass. Theatres, Inc., 288 F.2d 302, 304 (1st Cir. 1961).

87. *Id.*

88. The situation where the non-movant utilizes discovery extensively and fails to obtain inferential proof of a conspiracy is analogous to an opposing party's failure to employ available discovery in prosecution of his claim. *See* Note, *Factors Affecting the Grant or Denial of Summary Judgment,* 48 COLUM. L. REV. 780, 782 (1948). In neither case is a genuine issue of fact left for resolution. *See* note 99, *infra.*

89. In United States v. Colgate, 250 U.S. 300, 307 (1919), the Supreme Court ruled that one party may unilaterally refuse to deal with another for any reason without violating the antitrust laws. *See also* Bell v. Speed Queen, 407 F.2d 1022, 1027 (7th Cir. 1969); Dart Drug Corp. v. Parke, Davis & Co., 221 F. Supp. 948 (D.D.C. 1963), *aff'd,* 344 F.2d 173 (D.C. Cir. 1965). The doctrine permitting unilateral refusals to deal has been carefully limited by the Supreme Court. *See* United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921).

90. *See* Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977);

fully accomplished, the party in opposition must come forth with additional evidence of conspiracy in order to raise a genuine issue of material fact necessary to defeat a motion for summary judgment.

Thus, in *Solomon v. Houston Corrugated Box Co.*,[91] the Fifth Circuit affirmed a grant of summary judgment when the plaintiff failed to adequately support his allegations of a conspiracy after the defendant successfully rebutted the inferences raised by the pleadings. The plaintiff was engaged in the corrugated carton business and brought suit against his major used-carton supplier and his major competitor, alleging a conspiracy to eliminate all of plaintiff's sources of supply for used cartons. Implicit in the alleged conspiracy was the existence of an exclusive selling arrangement between the co-defendants. The court, however, found that the defendants had rebutted the charges of conspiratorial exclusivity "by substantial, sworn, reasonable, and believable evidence concerning business dealings and judgment."[92] Since plaintiff failed to present evidence to support its bare assertions of concerted action, the court found summary judgment appropriate.

A similar approach was adopted by the Eighth Circuit in *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*[93] There, the plaintiff filed suit alleging that defendants had engaged in a conspiracy to prevent the importation of the drug furazolidone into the United States for the purpose of maintaining the price of the drug at anticompetitive levels in the domestic market.[94] On a motion for summary judgment, one defendant established that it did not distribute furazolidone during the period in question.[95] When the plaintiffs failed to introduce any additional evidence of defendant's participation in the alleged conspiracy, the trial court granted defendant's motion.[96] The Eighth Circuit affirmed, stating that the defendant was not in a position to violate the antitrust laws if it no longer sold furazolidone.[97]

ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52 (9th Cir. 1975); Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976).

91. 526 F.2d 389 (5th Cir. 1976).

92. *Id.* at 395.

93. 520 F.2d 289 (8th Cir. 1975).

94. *Id.* at 292.

95. *Id.* at 296.

96. *Id.* Plaintiffs had filed affidavits under Rule 56(f) to demonstrate that the entry of summary judgment prior to discovery would be premature. But the court held that plaintiffs had failed to establish any cause for postponement of consideration of the motion for summary judgment. "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious." *Id.* at 297.

97. *Id.*

It is apparent that under this approach the burden of proof shifts to the non-moving party once the movant has rebutted the inferences of conspiratorial conduct with evidence supporting an alternative interpretation of its conduct. At that point, the opposing party can no longer be complacent to stand upon uncorroborated allegations of concerted activity.

The shifting of the burden of proof once the non-movant's inferences are rebutted is consistent with the earlier analysis of the *Cities Service* decision.[98] It may be that the lower courts in permitting summary judgment are not consciously considering the facts in the light most favorable to the non-movant. And instead of following the *Poller, Norfolk Monument, Adickes* requirement that all inferences of conspiracy be conclusively disproved for summary judgment to issue, the lower courts may be showing a reluctance to permit the non-movant to merely rest on his allegations when the movant presents *some,* albeit not necessarily conclusive, evidence rebutting the existence of a conspiracy.[99] Such an approach is in keeping with Rule 56(e).[100]

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98. *See* text accompanying notes 61-62, *supra.*

99. Further clouding the picture are the non-movant's typical arguments that he has not yet had sufficient discovery to establish his case. Rule 56(f) permits a court to allow additional discovery before ruling on a pending motion for summary judgment. The *Willmar* court viewed the problem as follows:

> Where there has been no opportunity for discovery or it is yet to be undertaken or is incomplete, the courts have applied this [*Poller*] policy to prohibit altogether summary judgment on the merits in antitrust litigation. . . . On the other hand, where there has been ample opportunity for discovery, summary judgment is appropriate in antitrust litigation, just as in any other litigation, upon a showing by the movant of an absence of any genuine issue of material fact.

520 F.2d at 293. The *Willmar* Court believed that only when the ground for summary judgment is a defense going to the merits (e.g., statute of limitations) or where the non-movant relies solely on his pleadings and submits no affirmative evidence to show that an issue of material fact does exist should summary judgment be granted before the non-movant has had discovery. *See* Frey v. Pine Hill Concrete Mix Corp., 554 F.2d 551 (2d Cir. 1977) (refusal to grant summary judgment before discovery completed); National Fire Ins. v. Soloman, 529 F.2d 59 (2d Cir. 1975).

Where the non-movant has made use of discovery but failed to establish the existence of a material issue of fact in opposition to the proof submitted in support of a motion for summary judgment, the courts will grant the motion. *See* Modern Home v. Hartford Accident & Indemnity Co., 513 F.2d 102 (2d Cir. 1975) (no issue of material fact after eight years and five thousand pages of discovery by plaintiff); Clark v. United Bank of Denver, 480 F.2d 235 (10th Cir.), *cert. denied,* 414 U.S. 1004 (1973); Natrona Serv., Inc. v. Continental Oil Co., 435 F. Supp. 99 (D.C. Wyo. 1977). Thus, it can be surmised that discovery alleviates, at least to some extent, the fear of trial by affidavit alluded to by the *Poller* Court.

In Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978), the court permitted summary judgment where the non-movant delayed in discovery but claimed insufficient discovery to avoid summary judgment, ruling that "[P]laintiff must bear the consequences of its decision to proceed with discovery piecemeal." *Id.* at 1190.

100. *See* text accompanying notes 71-72, *supra.*

Thus, as a practical matter, many courts follow the *Cities Service* approach and balance the most probable inferences in determining whether the movant has successfully discharged his burden and has rebutted the inferences of illicit agreement. Under this approach, a court must at some point consider whether the movant's rebuttal evidence is strong enough to eliminate the existence of a genuine issue of fact. In cases in which the non-movant raises an inference only by bare allegations, with no supporting evidence, plausible rebuttal proof of the movant's conduct makes the court's task quite complex. In that circumstance it is unlikely that balancing the inferences adduced from the proof put forth by the adversaries will result in a conclusion that no genuine issue of fact remains for trial.

Policy Considerations

Underlying a court's analysis of the varying inferences, and indeed, underlying Rule 56(c)'s requirement that no genuine issue of fact remain for trial, is the finality of summary judgment to a plaintiff's lawsuit. The failure of a proponent of a summary judgment motion to prevail has the result of forcing him to regroup for a trial on the merits. Yet, failure of the opposing party to defeat such a motion deprives him of his constitutional right to a trial by jury and effectively sends him packing.[101] Further, the circumstantial or indirect evidence, which is at the heart of inferential conspiracy cases, may inherently leave genuine issues of fact to be resolved at trial, assuming both sides present at least a modicum of evidence about defendant's behavior. Typically, inferential proof presents interpretation problems which are the particular province of the jury. For these reasons, the imposition of the initial burden of persuasion on the movant appears reasonable.[102]

Further, the burden placed upon the movant in a summary judgment proceeding does not differ greatly from the burden of a defendant to an alleged inferential conspiracy at the trial level. *Theatre Enterprises* established that a plaintiff must do more than provide mere proof of conscious parallel business behavior to raise an inference of conspiracy.[103] However, both *Theatre Enterprises* and

101. U.S. Const. amend. VII; *see* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1958); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 29 (1915); Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 383 F.2d 97 (9th Cir. 1967); Ring v. Spina, 166 F.2d 546 (2d Cir. 1948); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970); Hartford Empire v. Glenshaw Glass Co., 3 F.R.D. 50 (W.D. Pa. 1943).

102. *See* note 79, *supra.*

103. As a practical matter, plaintiff at trial must present evidence in addition to parallel conduct that a conspiracy existed to get past the directed verdict stage and reach a jury. *See* L. Sullivan, Handbook of the Law of Antitrust 317 (1977). However, it is not clear

Interstate Circuit indicate that once inferences strong enough to warrant a finding of conspiracy are raised the defendant must come forth with evidence rebutting the inferences; that is, evidence establishing non-conspiratorial motives for the defendant's actions.[104] The jury then must weigh the plausibility of the inferences raised by the conflicting evidence much as a judge does at the summary judgment level.[105]

Thus, at trial the plaintiff must do more than rest upon bare allegations to reach a jury, but while he is defending a motion for summary judgment, the necessary inferences can apparently be drawn from the allegations themselves. There, defendant has the initial burden to rebut the inferences; subsequently the plaintiff must present probative evidence of the conspiracy only if defendant is successful in producing evidence showing alternative reasons for his behavior.[106] Thus, while defendant must at some point bear the burden of rebuttal in both situations, the plaintiff has a more difficult initial burden at trial. It is submitted that the differences analyzed here accurately reflect the varying degrees of importance

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whether mere proof that the parallel conduct was conscious, that is, proof that each alleged conspirator knew of the similar actions of others, is enough to get plaintiff to the jury.

One court has used this analysis in holding that plaintiffs in opposition to motions for summary judgment in a Sherman Act case could not rely on conscious parallelism alone to create an inference of conspiratorial conduct by defendant in order to defeat their motions. Romae Resources, Inc. v. Hartford Accident & Indem. Co., 378 F. Supp. 543, 552 (D. Conn. 1974), *affirmed sub nom.*, Modern Home Inst., Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102 (2d Cir. 1975).

Areeda and Turner describe conscious parallel behavior, as well as other 'rules' of antitrust law (such as the *per se* illegality of price-fixing and boycotts) as creating substantive presumptions. As such, the 'rules' create presumptions a defendant moving for summary judgment must overcome to receive a summary judgment. Thus, the *Norfolk Monument* decision can be seen more as "[a] view about the probative significance of parallel action" than as a statement on summary judgment. The *Norfolk Monument* Court, under such an analysis, would give much weight to the parallel behavior found in that case. AREEDA & TURNER, note 3, *supra*.

104. For example, in *Interstate Circuit* defendants' failure to present witnesses in a position to deny the conspiracy may have been fatal to their defense. The Court stated that "[w]hen the proof supported, as we think it did, the inference of such concert, the burden rested on [defendants] of going forward with the evidence to explain away or contradict it." 306 U.S. at 225-26. In *Theatre Enterprises* the defendants successfully rebutted the inferences raised of concerted activity by producing evidence of local economic conditions which supported their position that their refusal to license first-run films to plaintiff's theater was the result of "individual business judgment motivated by the desire for maximum revenue." 346 U.S. at 542.

105. Of course, evidence which conclusively establishes either the existence or nonexistence of a conspiracy takes the case from the jury. The trial judge must then direct a verdict for the party with the conclusive evidence since no questions of fact remain for the jury to determine.

106. This burden is typically imposed despite the requirements of Rule 56(e). *See* note 70 and accompanying text, *supra*.

and finality to each litigant of summary judgment proceedings and trial on the merits.

In analyzing the role of the litigants in summary judgment adjudication, the value of summary procedures in complex antitrust litigation should not be forgotten. It has been asserted that summary judgment can help define the issues, reduce the scope of discovery, shorten the length of trial and increase the prospect of settlement.[107] Certainly the judiciary should be urged to realistically and effectively use summary judgments to scale down and simplify the complex, interminable antitrust litigation that plagues the federal courts.

Thus, the strong justifications for imposing the initial burden of persuasion upon the moving party do not counsel in favor of the *Poller, Norfolk Monument, Adickes* view. The burden on a movant to rebut all possible inferences raised by the plaintiff's allegations not only undercuts Rule 56(e), but substantially impairs the utility of summary judgment procedure to rid the courts of frivolous claims and expedite the adjudication of lengthy, involved antitrust suits.

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107. *See* REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *reprinted in*, ANTITRUST & TRADE REG. REP. (BNA) No. 897 at 21.