

**Pound Civil Justice Institute  
2008 Forum for State Appellate Court Judges**

**Summary Judgment on the Rise: Is Justice Falling?**

**THE ASCENT OF SUMMARY JUDGMENT AND ITS  
CONSEQUENCES FOR STATE COURTS AND STATE LAW**

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**Executive Summary**

*Professor Miller begins by placing the efforts to liberalize non-trial adjudication in the context of the numerous “reforms” made in response to perceptions of a “litigation explosion.” These include changes to substantive tort law, enhanced sanctions against attorneys, and procedural changes that facilitate disposition of cases short of trial on the merits. He agrees that greater efficiency for the courts is a laudable goal, but he cautions that courts must be sensitive to litigants’ rights to have their day in court and to have their cases heard by juries.*

*In Section II, Professor Miller recounts briefly the history of expedited disposition, including early English and American procedures. He reviews the development of federal Rule 56 and its early reception in the courts, where moving parties initially were required to show the absence of issues of fact, and trials could be had if there was the “slightest doubt” as to the facts.*

*Section III looks at the popular perceptions that emerged in the 1970s that modern civil litigation carries with it heavy social costs. Professor Miller catalogues a number of procedural changes made in response to those perceptions, including amendments to federal Rules 8, 9, 11, 16, and 26, and some special legislation like the Private Securities Litigation Reform Act. Although those procedural changes addressed specific concerns around the edges of litigation, none of them offered the definitive advantages of final judgment on the merits. Hence the emerging interest in more liberal use of summary judgment to achieve early case dispositions without the expense and uncertainty of trial.*

*In Section IV, Professor Miller reviews the well-known “trilogy” of summary judgment cases decided by the U.S. Supreme Court in 1986. Matsushita introduced into summary judgment practice the necessity of reviewing the entire record in the case to determine whether or not the nonmoving parties’ allegations are plausible. Anderson required reference to the standard of proof at trial in the underlying substantive law. Celotex allowed a moving party who did not have the burden of proof at trial to obtain summary judgment by showing that there was no evidence to support the nonmoving party’s case—and, in so doing, it made federal summary judgment practice more friendly to defendants. The result has been a statistically significant increase in the number of summary judgment motions made, the number granted, and the rate of*

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\* The author has benefited greatly from the work of Garrett Coyle of the New York University School of Law class of 2008.

*affirmance on appeal—a phenomenon Professor Miller has elsewhere called “the pretrial rush to judgment.”*

*Section V is devoted to developments in the state courts, in which Professor Miller notes a developing friendliness to non-trial adjudication that parallels the trend in the federal courts. Only three states have brought their procedures into line with federal doctrine through formal rule changes, but 31 have done so through judicial interpretation of existing state summary judgment rules. Only a small minority of state courts preserve the federal courts’ pre-trilogy “slightest doubt about the facts” standard.*

*In Section VI, Professor Miller considers the effect of the emerging prominence of summary judgment on the principle that litigants are entitled to their “day in court” and the right to trial by jury, which are universally acknowledged as staples of American justice and occupy prominent places in the laws of every state. He expresses concern that these principles may be undermined by increasingly frequent judicial characterization of outcome-determinative questions as matters of law, not fact. He calls for more detailed, reasoned analysis by trial judges in applying the law-fact distinction, coupled with restraint in granting summary judgment based on stated concerns about the ability of jurors to deal with complex cases, the need for uniformity in applying governing law, and efficiency in avoiding trial of cases that rest on “implausible” theories. Appellate courts, Professor Miller urges in conclusion, must insist that trial courts justify grants of summary judgment with “explicit, detailed, and reasoned analyses to facilitate careful appellate review.”*

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## I. INTRODUCTION

Despite the inconclusive nature of the evidence offered to indicate the existence of the so-called “litigation explosion,” several well publicized cases have become the catalyst for a number of proposed, and in some jurisdictions, adopted “reforms” of aspects of the civil justice system. These modifications include changes to substantive tort law, increased availability and severity of sanctions against attorneys, and procedural changes designed to advance the disposition of cases to the early stages of the litigation. Summary judgment, because it operates as a final adjudication on the merits, recently has become an attractive vehicle for those seeking to relieve overcrowded dockets and promote efficiency and economy by weeding out unmeritorious claims.

Some of these goals are certainly laudable, but courts seeking to achieve them through more frequent grants of summary judgment must be aware that the practice is not without its dark side. The close relationship between summary judgment, on one hand, and litigants’ rights to a day in court and jury trial, on the other, counsels in favor of a heightened sensitivity to the rationales for and effects of this increased use of summary judgment. Thus, understanding the pluses and minuses of the procedure and making sure the former exceeds the latter is of great significance.

## II. EARLY SUMMARY JUDGMENT PRACTICE

### A. Historical Development of Summary Judgment

The summary judgment motion has become so common in American civil litigation today that it is easy to forget its relatively recent vintage. It did not exist at common law; indeed, the origin of the procedural device traces to mid-nineteenth century England, more than sixty years after the adoption of the American Constitution, in the Bills of Exchange Act of 1855.<sup>1</sup> Interestingly, the 1855 Act envisioned the use of summary judgment primarily as a plaintiff's remedy, designed to be invoked in debt actions as a procedure for preventing the debtor from disputing the existence of an agreement for the provision of goods or services, the fact that the goods or services were provided, and the fact of nonpayment.<sup>2</sup>

Eighteen years later, England's Supreme Court Judicature Act extended the availability of the summary judgment motion to additional areas of substantive law.<sup>3</sup> In particular, the Judicature Act authorized summary judgment in contract and implied-contract actions for liquidated damages and in actions by landlords to recover land from tenants for nonpayment of rent.<sup>4</sup> The Act required the motion to be accompanied by an endorsement making the defendant aware of the claims leveled against him and satisfying the requirements for stating a cause of action.<sup>5</sup> A defendant wishing to contest the entry of summary judgment could do so in one of two ways: by raising an issue of material fact or by raising a difficult question of law.<sup>6</sup> If the defense was questionable, the defendant was required to post a bond. If he successfully established the defense at trial, the defendant would recover the bond; if not, the bond would go to the plaintiff automatically.<sup>7</sup>

Although an American precursor to today's summary judgment motion can be traced to eighteenth-century Virginia, it was not until the early twentieth century that the motion became widely available in the United States.<sup>8</sup> As in England, in the United States the motion originally was permitted only in certain types of actions,<sup>9</sup> and was intended, in the United States Supreme

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<sup>1</sup> The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.).

<sup>2</sup> See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 136 (1988).

<sup>3</sup> Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.), as amended in Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77, sched. 1, Order III, R. 6 & Order XIV, R. 1-6 (Eng.).

<sup>4</sup> See Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 425, 427-28 (1929).

<sup>5</sup> See *id.* at 424-35.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 463; see also 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 2711.

<sup>9</sup> In most states, the motion was available in the same actions in which the motion was available under the English rule. In a few states, the motion was available in other, often uniquely American, actions. See generally Clark & Samenow, *supra* note 4, at 440-69.

Court's words more than one hundred years ago, to "preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands."<sup>10</sup> In accordance with this intent, the motion was successful only in unambiguous cases in which the nonmoving party was unable to point to the existence of a factual conflict on a material issue.<sup>11</sup> The motion did not permit the court to evaluate the plausibility or support for either party's facts or legal theories.<sup>12</sup>

Two features characterized early summary judgment practice in this country. First, despite its growing availability as the years passed,<sup>13</sup> the motion was invoked infrequently and granted even less frequently. Second, the motion was successful in only the clearest of cases. This second characteristic was in part a response to concerns that the procedure was possibly inconsistent with the Seventh Amendment's jury trial guarantee in civil cases.<sup>14</sup> The Supreme Court addressed these concerns in 1902, explaining that the jury trial right attached only upon the presence of a contested factual issue.<sup>15</sup> As a result, summary disposition of actions with no contested issues raised no Seventh Amendment difficulty.<sup>16</sup> This view remains settled law today.<sup>17</sup>

## **B. Federal Rule of Civil Procedure 56**

Although the Conformity Act of 1872 made the summary judgment motion available in federal court if the motion was available in the courts of the state in which the federal court sat,<sup>18</sup> it did not become available in all federal courts until 1938, when Civil Rule 56 was promulgated.<sup>19</sup> It has had considerable influence beyond the federal courts, however, since state

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<sup>10</sup> *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902).

<sup>11</sup> See Stempel, *supra* note 2, at 137-38. Indeed, at the time they wrote Clark and Samenow found that only two states, Connecticut and Virginia, viewed the motion favorably. See Clark & Samenow, *supra* note 4, at 440-41, 463-65, 470.

<sup>12</sup> See Stempel, *supra* note 2, at 137-40.

<sup>13</sup> Although the motion was available in the majority of actions at law across the United States by 1938, it remained unavailable for several actions in tort and in breach of contract for marriage disputes. See 10A WRIGHT, MILLER & KANE, *supra* note 8, § 2711.

<sup>14</sup> U.S. CONST. amend. VII.

<sup>15</sup> *Fidelity & Deposit Co.*, 187 U.S. at 320. In the Court's words, summary judgment "prescribe[d] the means of making an issue." *Id.*

<sup>16</sup> See 10A WRIGHT, MILLER & KANE, *supra* note 8, § 2714.

<sup>17</sup> *Id.*

<sup>18</sup> Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872).

<sup>19</sup> The full text of Federal Rule 56, reflecting the general restyling of the Federal Rules in 2007, reads:

### **Rule 56. Summary Judgment**

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

- (1) 20 days have passed from commencement of the action; or

procedural systems generally have standards that are linguistically the same or are functionally equivalent to the Rule 56 “genuine issue of material fact” formulation.

Despite its relatively simple language, Rule 56 has generated serious disagreement as to the proper scope of its application to particular cases. An appeal to the Second Circuit in a copyright infringement action, a few years after the Rule became effective, against famed songwriter Cole

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- (2) the opposing party serves a motion for summary judgment.
- (b) *By a Defending Party.* A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.
- (c) *Serving the Motion; Proceedings.* The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
- (d) *Case Not Fully Adjudicated on the Motion.* □
- (1) *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.
- (2) *Establishing Liability.* An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
- (e) *Affidavits; Further Testimony.*
- (1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.
- (2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.
- (f) *When Affidavits Are Unavailable.* If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.
- (g) *Affidavit Submitted in Bad Faith.* If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Porter provided the first forum for both sides of the debate.<sup>20</sup> Although the majority found the plaintiff's theory of plagiarism exceedingly implausible, the court concluded that summary judgment could not be granted when, in the words of Judge Jerome N. Frank, there was the "slightest doubt as to the facts."<sup>21</sup> In Judge Frank's view, four reasons compelled this "slightest doubt" standard. Any less demanding standard, he reasoned, would threaten to usurp the jury's role as factfinder;<sup>22</sup> would favor the better lawyer, as opposed to the case with a stronger grounding in the facts and the law;<sup>23</sup> and would be in tension with the then-existing rules governing the admissibility of evidence, which disfavored reliance on written testimony.<sup>24</sup> Finally, only the "slightest doubt" standard was sufficient to protect litigants' day in court, with its attendant benefits.<sup>25</sup> Applying this "slightest doubt" standard, the majority denied the defendant's Rule 56 motion on the ground that the plaintiff's theory raised an issue of credibility appropriate for a jury.<sup>26</sup>

Judge Charles E. Clark, perhaps the chief architect of the Federal Rules, in dissent, attacked the majority's "slightest doubt" standard, concluding that such a difficult-to-satisfy standard would mean that litigants would face incentives to settle vexatious cases, despite their lack of merit, due to the costliness, time-intensiveness, and inconvenience of defending against them.<sup>27</sup> Despite the vigorous disagreement between Judges Clark and Frank, both agreed that the motion was not available in cases in which the litigants contested a material fact.<sup>28</sup> Thus, even Judge Clark, the greater proponent of the procedure, believed that judges could not "assess the worth of either side's evidence in ruling on summary judgment motions."<sup>29</sup>

The terms of the argument did not change significantly when the debate moved to the Supreme Court in 1962 in *Poller v. CBS, Incorporated*.<sup>30</sup> In a private antitrust conspiracy case in which illicit motive was a necessary element of liability, the Court reversed the grant of the defendant's summary judgment motion.<sup>31</sup> In the Court's restrained view of the motion's applicability,

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<sup>20</sup> *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

<sup>21</sup> *Id.* at 468.

<sup>22</sup> *Id.* at 469-70.

<sup>23</sup> *Id.* at 471.

<sup>24</sup> *Id.*

<sup>25</sup> *Cf. Broadcast Music, Inc. v. Havana Madrid Rest. Corp.* 175 F.2d 77, 80 (2d Cir. 1949) (discussing importance of jury's ability to see and react to witnesses' demeanor); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487-88 (2d Cir. 1952) (highlighting benefits of oral testimony).

<sup>26</sup> *Arnstein*, 154 F.2d at 469-70.

<sup>27</sup> *Id.* at 479 (Clark, J., dissenting).

<sup>28</sup> *See Stempel, supra* note 2, at 135-37 (noting that the cases relied upon by Judge Clark uniformly denied the motion when the nonmoving party had introduced contrary facts).

<sup>29</sup> *Id.* at 144.

<sup>30</sup> 368 U.S. 464 (1962).

<sup>31</sup> *Id.*

summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of “even handed justice.”<sup>32</sup>

Four Justices dissented in *Poller*, arguing that, as Rule 56 was transsubstantive on its face, there was no reason summary judgment should be less available in antitrust cases than in cases involving other areas of law.<sup>33</sup> Indeed, in their view, due to the frequency with which harassing, unmeritorious antitrust claims arose, antitrust presented an especially attractive case for recognizing the “full legitimate sweep” of the Rule.<sup>34</sup>

Regardless of the strength of the competing arguments and the closeness of the vote in *Poller*, the effect of the case and others like it was clear. Summary judgment was used sparingly in federal courts through the 1970s.<sup>35</sup>

### C. Evolving Judicial Views of Summary Judgment

Despite an apparent retreat in one case from its strong statements in *Poller* on the limited availability of summary judgment in antitrust conspiracy actions,<sup>36</sup> the Supreme Court clarified matters (at least until 1986) several years later in *Adickes v. S.H. Kress & Co.*, a civil rights action alleging an unlawful conspiracy between a private restaurant and state police officers.<sup>37</sup> In the affidavits filed in response to the defendant’s summary judgment motion, the plaintiff’s only evidence of the existence of a conspiracy was the undisputed fact that a police officer had entered the restaurant before the defendant asked the plaintiff to leave and the undisputed fact that the police officer subsequently arrested the plaintiff.<sup>38</sup>

The Supreme Court interpreted Rule 56(e) to require the moving party to “show [] the absence of any genuine issue of fact.”<sup>39</sup> Importantly, under this standard, the moving party did not have to *negate* the allegations of the nonmoving party. Rather, the moving party had to show

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<sup>32</sup> *Id.* at 473 (footnote omitted).

<sup>33</sup> *Id.* at 478 (Harlan, J., dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1023-24 nn.227-28 (2003) (citing cases).

<sup>36</sup> See *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253 (1968).

<sup>37</sup> 398 U.S. 144 (1970).

<sup>38</sup> *Id.* at 154-57.

<sup>39</sup> *Id.* at 153.

only that no factual question existed that necessitated a trial.<sup>40</sup> The logical corollary to this standard was that if the moving party failed to satisfy his burden, the nonmoving party could defeat the summary judgment motion solely through reliance on the contrary statements in her complaint. Only in the event that the moving party satisfied his burden was the nonmoving party required to introduce affidavits or other evidence showing that a disputed material factual issue justified trial.

*Adickes* represented the Supreme Court's last direct statement on summary judgment for sixteen years. In the meantime, however, other—larger—forces were at work that had the effect of shifting the terms of the debate about how the civil justice system should function.

### III. THE “LITIGATION EXPLOSION”: PERCEPTIONS AND RESPONSES

#### A. Perceptions

Against this historical development of the summary judgment procedure, the past thirty years have witnessed (and continue to witness) a trend toward louder and more insistent critiques lamenting the social costs of modern civil litigation. The increased volume of litigation, the critics of the civil justice system argue, yields increased systemic costs and delay and imposes liability burdens on American industry and, ultimately, on consumers.

Principal among the causes of this increased volume of litigation, the story goes, is the rise in the number of frivolous and marginal cases and a possible litigiousness in the American personality. Despite the lack of empirical support for these claims, proponents of reform have been galvanized by highly visible cases, like the tort suit by an elderly lady burned by McDonald's coffee when she dropped it on her lap;<sup>41</sup> the actual evidence indicated that the coffee was too hot. That some of these stories about “outrageous lawsuits” have been fabricated or embellished has not detracted significantly from their resonance with “reform” proponents who decry the “liability crisis” and blame rapacious lawyers.<sup>42</sup>

A second factor contributing to the admittedly unacceptably high costs of the civil litigation system is said to be its antiquated (and some would add “misguided”) reliance on the jury. Several empirical studies indicating significant increases in the average size of jury awards have lent credence to the perception that the jury system is outmoded, or at least unduly burdensome.<sup>43</sup>

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<sup>40</sup> See generally Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 80 & n.39 (1990); 10B WRIGHT, MILLER & KANE, *supra* note 8, § 2739.

<sup>41</sup> See Edmund M. Brady, Jr., *The U.S. Chamber's Attack on Trial Lawyers*, 77 MICH. B.J. 380, 382 (1998); Liane E. Leshne, *Shedding New Light*, TRIAL, Oct. 1998, at 32, 34.

<sup>42</sup> See, e.g., Tortious Torts, *available at* <http://www.snopes.com/legal/lawsuits.htm>.

<sup>43</sup> See, e.g., Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349 (1986) (reporting more than ten-fold increase in number of awards exceeding \$1 million from 1960s to 1980s); Mark A. Peterson, *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois*, at 21 tbl.3.2 (RAND Inst. for Civil Justice 1987) (reporting mean verdicts in medical malpractice cases above \$1 million in both San Francisco and Cook counties).

The strain on the civil litigation system caused by the reported rise in Americans' litigiousness and the shortcomings of the jury system is only part of the critics' story. Unrelated factors, including the federalization of large portions of criminal law, new rules giving priority to criminal cases over civil cases, and the creation of new substantive rights and remedies, both in the economic sphere and in the context of civil rights, have exacerbated the problem.

A more careful appraisal of the empirical evidence regarding the existence of the "litigation explosion" reveals a less drastic picture. Despite some evidence indicating an increasing number of lawsuits filed,<sup>44</sup> there is an absence of evidence of an increasing ratio of suits filed to injuries, which is a much more relevant measure of the claim that Americans are becoming a more litigious bunch.<sup>45</sup> And the indictment of the jury system loses some of its force in the face of evidence suggesting substantial stability in jury awards.<sup>46</sup> Moreover, an adequate appraisal of the situation must take account of the nation's increased commitment to social justice, the heightened complexity of modern life, which produces more toxic substances, mass disasters, and sophisticated wrongdoing, environmentalism, consumerism, and the unique economic aspects of American litigation.<sup>47</sup>

## B. Responses

Nevertheless, critics of the "litigation explosion" have been successful in propelling a number of changes in the civil justice process. The common theme of these "procedural reforms" has been an effort to advance the resolution of cases closer to their commencement—early termination.

Amendments to Federal Rule of Civil Procedure 16 in 1983<sup>48</sup> and 1993<sup>49</sup> resulted in an increase in the case management powers and attitudes of district judges at all stages of a case. A comparable trend is now well established in many states. Although the motivating concern underlying these reforms was the prompt and efficient resolution of cases, in practice the rule

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<sup>44</sup> See, e.g., Terence Dungworth & Nicholas M. Pace, *Statistical Overview of Civil Litigation in the Federal Courts* 74-75 (RAND Inst. for Civil Justice 1990).

<sup>45</sup> See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985). Additionally, the significant rise in domestic relations cases, which reflects more fundamental social changes, accounts for much of the increase in civil filings that critics cite as evidence of Americans' increased propensity to sue. See Brian J. Ostrom, Neal B. Kauder & Robert C. LaFountain, *Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project* 36-42 (Nat'l Ctr. for State Courts 2001).

<sup>46</sup> See Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321, 325 (1986) (finding no evidence of an increase in the success rate of plaintiffs over a five-year period); see also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 145 (2002) (finding that in products liability and medical malpractice cases, bench trials resulted in a higher rate of victory for plaintiffs than did jury trials) In many parts of the country, actual jury trials have become relatively rare.

<sup>47</sup> See Miller, *Pretrial Rush to Judgment*, *supra* note 35, at 992-95.

<sup>48</sup> E.g., FED. R. CIV. P. 16(b) (mandating scheduling order by district court).

<sup>49</sup> E.g., FED. R. CIV. P. 16(c)(5) (encouraging district court to use Rule 56 to narrow the scope of trial).

changes have given the trial judge a much more active managerial role in cases—especially in the early stages—in contrast to the traditional conception of the judge as passive umpire of a proceeding controlled by adversarial parties. The effect of the growth in case management is difficult to measure accurately in the face of substantial differences across districts, but the theoretical basis for this shift in judicial functions is not without its critics.<sup>50</sup>

A second avenue of change in response to the so-called “litigation explosion” has been in the area of sanctions. The amendment of Federal Rule 11 in 1983 gave the Rule significant bite by providing that an attorney’s signature on a court document certified that his knowledge, information, and belief were “formed after reasonable inquiry,” that the document is “well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose.”<sup>51</sup> Although the Rule was softened in 1993, this “stop and think” principle was retained.

Additionally, a series of changes to the standards governing the discovery system increased the district court’s control over the discovery process and has limited it to some degree.<sup>52</sup> Thus, for example, at least as a formal matter the number of depositions and interrogatories has been limited, as has the length of depositions. Court orders controlling the sequencing and timing of discovery are now common. Automatic disclosure of certain basic matters is now mandated by Federal Rules.

Moreover, despite several clear expressions over a fifty-year period by the Supreme Court to the contrary,<sup>53</sup> many courts attempted to constrain litigation—particularly in certain substantive contexts—by requiring heightened pleading requirements,<sup>54</sup> notwithstanding Rule 8(a)(2)’s

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<sup>50</sup> See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982); Judith Resnik, *Managerial Judges: The Potential Costs*, 45 PUB. ADMIN. REV. 686 (1985).

<sup>51</sup> FED. R. CIV. P. 11.

<sup>52</sup> Rule 26, the principal rule governing the discovery process, was amended in 1983, see, e.g., FED. R. CIV. P. 26(b)(1) (as amended in 1983) (requiring limits on “redundant” or “disproportionate” discovery); 1993, see, e.g., FED. R. CIV. P. 26(a)(1) (requiring disclosure of certain information as prerequisite to any discovery); FED. R. CIV. P. 26(a)(2) (requiring increased access to opponent’s experts before trial); and 2000, see, e.g., FED. R. CIV. P. 26(b)(1) (confining the scope of discovery to anything “relevant to a claim or defense in the action”). See generally 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2003.1 (2008).

<sup>53</sup> E.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding, in a case against a municipality, that “heightened pleading” requirements are inconsistent with Rule 8); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (holding, in action against correctional officer in which defendant’s improper motive was necessary element of liability, plaintiff need not adduce clear and convincing evidence of improper motive to defeat official’s motion for summary judgment); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (rejecting requirement that plaintiff plead facts necessary to establish a prima facie case as inconsistent with Rule 8).

<sup>54</sup> See, e.g., *Elliot v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985) (requiring plaintiffs bringing civil rights complaints against government officials to plead the basis of the claim with “factual detail and particularity,” including “why the defendant-official cannot successfully maintain the defense of immunity”); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 379 (7th Cir. 1984) (requiring plaintiffs bringing antitrust complaints to allege facts sufficient to establish requisite nexus with interstate commerce); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (employing heightened pleading requirement in constitutional tort actions in which subjective intent is element of liability); see generally Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002).

requirement of a “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>55</sup> Like the other “procedural reforms,” these attempts at heightened pleading requirements have sought to advance resolution of decisionmaking to the very beginning of the litigation.

Recently, moreover, the Supreme Court revisited the question of what level of particularity Rule 8 requires. In *Bell Atlantic Corp. v. Twombly*, the Court announced that (at least with respect to antitrust conspiracy claims) a complaint must allege “enough facts to state a claim to relief that is plausible on its face” in order to survive a motion to dismiss pursuant to Rule 12(b)(6).<sup>56</sup> This formulation of what Rule 8 requires forced the Court to address *Conley v. Gibson*, a 50-year-old seminal case that applied “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>57</sup> The *Twombly* Court concluded that, as an interpretation of the Rule 8 pleading standard, *Conley*’s “no set of facts” standard had “earned its retirement.”<sup>58</sup> The Court also observed, as it has since, that unless a case is terminated early, the defendant’s costs increase, as does the pressure for settlement. Although the *Twombly* opinion contains mixed signals as to the reach of its “plausibility” standard, the majority of federal courts have applied it to other areas of civil law.<sup>59</sup> It is far too soon to be certain of what the full effect of this shift will be.

Heightened pleading requirements have been erected through more formal channels in two other areas of substantive law. Rule 9(b) requires particularization of claims alleging fraud or mistake<sup>60</sup> and the Private Securities Litigation Reform Act of 1995 requires the same for certain

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<sup>55</sup> FED. R. CIV. P. 8(a)(2).

<sup>56</sup> 127 S.Ct. 1955, 1973 (2007).

<sup>57</sup> 355 U.S. 41, 45-46 (1957).

<sup>58</sup> *Twombly*, 127 S.Ct. at 1969.

<sup>59</sup> *E.g.*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (applying *Twombly*’s “plausibility” standard to statutory and constitutional civil rights claims); *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.*, 511 F.Supp.2d 1 (D.D.C. 2007) (trademark dispute); *Steelman v. Prudential Ins. Co. of Am.*, 2007 WL 2009805, at \*6 (E.D. Cal. 2007) (ERISA); *Walker v. S.W.I.F.T. SCRL*, 491 F.Supp.2d 781 (N.D. Ill. 2007) (unreasonable search and seizure and Right to Privacy Act); *Hogue v. Palisades Collection, LLC*, 494 F.Supp.2d 1043 (S.D. Iowa) (Fair Debt Collection Practices Act); *Reid v. Purkey*, 2007 WL 1703526, at \*1-\*2 (E.D. Tenn. 2007) (excessive force); *ATSI Comm., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007) (securities fraud); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210 (10th Cir. 2007) (invasion of privacy and intentional infliction of emotional distress) (*dicta*); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174 (10th Cir. 2007) (motion to vacate arbitration award); *Bartronics v. Power-One, Inc.*, 245 F.R.D. 532 (S.D. Ala. 2007) (patent validity); *Pearson’s Pharmacy, Inc. v. Express Scripts, Inc.*, 505 F.Supp.2d 1272 (M.D. Ala. 2007) (fraud, suppression, and unjust enrichment); *Rattigan v. Gonzales*, 503 F.Supp.2d 56 (D.D.C. 2007) (employment discrimination); *Hicks v. Association of Am. Med. Colls.*, 503 F.Supp.2d 48 (D.D.C. 2007) (retaliatory termination); *Craine v. International Longshoremen’s Ass’n*, 2007 WL 2010783, at \*1 (M.D. Fla. 2007) (mental anguish damages).

<sup>60</sup> *See* FED. R. CIV. P. 9(b) (requiring plaintiff to state “the circumstances constituting” fraud or mistake “with particularity”).

securities claims.<sup>61</sup> As a result, the pleadings constitute a very significant access barrier with its concomitant motion and appellate costs.

Although the intent of these procedural changes has been to reduce the pressure on the civil justice system by advancing the resolution of cases to the earliest stages of the litigation, each, in a sense, is an imperfect weapon, for none is the equivalent to a final judgment on the merits. As a result, summary judgment, which not only has the effect of terminating litigation at an early juncture but also can yield a final judgment on the merits, has drawn increasing attention in the battle to ferret out frivolous litigation.

#### IV. THE 1986 SUPREME COURT “TRILOGY” AND ITS EFFECT ON FEDERAL SUMMARY JUDGMENT PRACTICE

The Supreme Court’s 1986 trilogy of decisions interpreting the summary judgment standard—*Matsushita*,<sup>62</sup> *Anderson*,<sup>63</sup> and *Celotex*<sup>64</sup>—has given the advocates of early terminations a powerful procedural weapon.

##### A. *Matsushita*

The first decision in the trilogy arose out of an exceedingly complex antitrust conspiracy claim advanced by American manufacturers of televisions and other electronics, alleging that Japanese manufacturers had formed a conspiracy to use profits earned as a result of power in the Japanese market to finance the sale of their products below cost in the American market and thereby drive out American producers.<sup>65</sup> The district court granted the defendants’ summary judgment motion, but the Third Circuit reversed.<sup>66</sup>

The Supreme Court read the plaintiffs’ complaint as permitting rival inferences as to the lawfulness of the defendants’ behavior. Despite the possibility that a jury could infer the existence of a conspiracy, the Court reasoned that such an inference was “implausible,” given the “consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”<sup>67</sup> As a result, the Court concluded, “if the factual context renders [the plaintiffs’] claim implausible—if the claim is one that simply makes no economic sense—[the

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<sup>61</sup> The Act requires complaints to enumerate each allegedly misleading statement and explain why each is misleading. In the case of allegations made on information and belief, the PSLRA requires the complaint to state with particularity all facts on which that belief is formed. Additionally, the complaint must plead facts that give rise to a “strong inference” that the defendant acted with scienter. 15 U.S.C. § 78u-4(b)(1), (2) (2000). *See also* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499 (2007) (interpreting “strong inference” standard as requiring that inference be cogent and compelling in light of competing inferences).

<sup>62</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>63</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>64</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>65</sup> *Matsushita*, 475 US. at 577-78.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 589.

plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”<sup>68</sup> In the context of a summary judgment motion, this standard required the plaintiffs to “show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [them].”<sup>69</sup>

The Court’s opinion signaled that the standard it applied derived from antitrust law, not necessarily from a new interpretation of Rule 56. The Court invoked the familiar standard that “[o]n summary judgment the inference to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion,”<sup>70</sup> but quickly added that “antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Antitrust Act] § 1 case.”<sup>71</sup> When no permissible inferences exist that support the nonmoving party’s theory, there is no genuine issue of fact requiring jury determination. These passages seem to indicate that the *Matsushita* Court may well have believed its opinion would be limited to (or at least have its greatest applicability in) the antitrust arena.<sup>72</sup> Nonetheless, the concept of “plausibility” seems fairly embedded in federal summary judgment practice.

Two aspects of *Matsushita* are significant for the development of the summary judgment procedure. First, in contrast to the weight of historical practice, *Matsushita* made available—indeed, interpreted Rule 56 as *requiring* in certain circumstances—summary judgment in complex cases in which the defendant’s motive is an element of liability. Second, and more importantly, the Court held that, for a nonmoving party to defeat a summary judgment motion, it is insufficient for that party to introduce facts that, by themselves, give rise to the inferences necessary for a judgment for the nonmoving party. Rather, the nonmoving party can defeat the motion only if those inferences remain reasonable when examining the entire record—not just the facts that favor the nonmoving party’s theory.

## **B. *Anderson***

The second case in the trilogy, *Anderson v. Liberty Lobby, Inc.*,<sup>73</sup> arose out of a libel suit against a magazine that published a series of articles that, according to the plaintiff group, falsely portrayed it as “neo-Nazi, anti-Semitic, racist, and Fascist” as a result of the magazine’s malicious failure to verify its sources. The defendants moved for summary judgment, arguing that because the plaintiffs were “limited purpose public figures,” the Supreme Court’s First Amendment caselaw would permit relief only if they could prove by clear and convincing evidence that the defendants published the articles with actual malice.<sup>74</sup> In response to the

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<sup>68</sup> *Id.* at 587.

<sup>69</sup> *Id.* at 588.

<sup>70</sup> *Id.* at 587-88.

<sup>71</sup> *Id.* at 588.

<sup>72</sup> Many commentators agree. *See, e.g.*, William W. Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HASTINGS L.J. 1, 6-7 (1993); Lisa Meckfessel Judson, Note, *Kodak v. Image Technical Services: The Taming of Matsushita and the Chicago School*, 1993 WIS. L. REV. 1633, 1648.

<sup>73</sup> 477 U.S. 242 (1986).

<sup>74</sup> *Id.* at 245.

defendants' motion, the plaintiffs introduced evidence indicating that the defendants' sources were disreputable, that the defendants failed to verify the information before publishing the articles, and that one of the editors of the magazine considered the articles to be of exceedingly poor quality.<sup>75</sup> The district court granted the defendants' summary judgment motion, and the District of Columbia Circuit reversed.

The Supreme Court reversed the court of appeals, holding that summary judgment was proper. The Court reasoned that a "genuine issue of material fact" exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"<sup>76</sup>—and that this inquiry cannot be answered in the abstract, but must integrate the standard of proof required at trial by the underlying substantive law.<sup>77</sup> Thus, in the context of the particular action before the Court, the plaintiffs could defeat the defendants' summary judgment motion only if they could show that a reasonable jury could find actual malice *by clear and convincing evidence*.

### C. *Celotex*

Rounding out the trilogy, *Celotex Corp. v. Catrett*<sup>78</sup> was a products liability action alleging that the plaintiff's husband died as a result of exposure to the defendant manufacturer's products, which contained asbestos. When the latter moved for summary judgment, the plaintiff was unable to identify any witnesses who could testify that her husband had been exposed to the defendant's products, despite her introduction of documents that allegedly "demonstrate[d] that there is a genuine material factual dispute" as to the exposure issue.<sup>79</sup> The district court granted the defendant's motion, but the Court of Appeals for the District of Columbia Circuit reversed on the ground that the defendant failed to introduce evidence supporting its position on the exposure issue.<sup>80</sup>

The Supreme Court rejected the court of appeals' requirement that the moving party introduce evidence showing the absence of a genuine issue of material fact, at least on issues as to which the moving party does not have the burden of persuasion at trial.<sup>81</sup> Instead, in the Court's view, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."<sup>82</sup>

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<sup>75</sup> *Id.* at 246.

<sup>76</sup> *Id.* at 248.

<sup>77</sup> *Id.* at 250-57. This standard, the Court held, had to mirror the standard applicable to a motion for a directed verdict (the precursor to Rule 50's "judgment as a matter of law"). *Id.* at 250. Thus viewed, *Anderson* is entirely consonant with *Matsushita*, which requires the district judge to look to the underlying substantive law to determine the reasonableness of particular inferences.

<sup>78</sup> 477 U.S. 317 (1986).

<sup>79</sup> *Id.* at 320.

<sup>80</sup> *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184-85 (D.C. Cir. 1985).

<sup>81</sup> *Celotex*, 477 U.S. at 322-23.

<sup>82</sup> *Id.* at 325.

Although the *Celotex* opinion professed fidelity to the *Adickes* principle that the burdens of production and persuasion rested with the moving party, the Court's directive to look at which party has the burden of persuasion at trial effectively made the summary judgment motion more friendly to defendants.<sup>83</sup> Whereas under *Adickes*, a defendant moving for summary judgment would have to introduce evidence negating the plaintiff's claim, under *Celotex*, the defendant would not be obliged to introduce any evidence at all (assuming the plaintiff has the burden of persuasion at trial). Instead, the defendant could "point[] out to the district court" the lack of evidence supporting the plaintiff's claim.

*Celotex*'s reference to the placement of the burden of persuasion at trial may have harmonized summary judgment practice with other phases of the litigation,<sup>84</sup> but realistically it represents a marked departure from pre-1986 summary judgment practice, which, as traced in Section II above, uniformly required the moving party to demonstrate the absence of any material issues of fact. Moreover, *Celotex* expressly articulated a far greater judicial receptivity and acceptance of the summary judgment motion than hitherto had been expressed by the Supreme Court.

#### **D. The Significance of the Supreme Court Trilogy**

At first glance, the mere fact that in one Term the Supreme Court three times held that federal courts of appeals had applied overly stringent standards when considering summary judgment motions seems to indicate an overt attempt to vitalize the motion. A closer examination of the holdings of the three cases confirms this observation. As I have noted elsewhere, "*Celotex* has made it easier to make the motion"—because the moving party is relieved in many instances of the obligation to come forward with evidence negating the nonmoving party's allegations—"and *Anderson* and *Matsushita* have increased the chances that it will be granted"—because the standards enunciated in those cases (particularly the notion of "plausibility") envision a smaller number of cases in which a reasonable jury could find for the nonmoving party.<sup>85</sup> Not surprisingly, invocation of the motion is now commonplace in federal practice and it is given far greater investment by the parties on both sides of the "v."

But the trilogy has had other effects as well. In cases in which the nonmoving party has the burden of persuasion at trial, *Celotex* makes clear that in order to defeat the moving party's summary judgment motion the party opposing the motion must point to the evidence that she will use at trial. As a strategic matter, this requirement presents the possibility that a defendant will use the motion to force the plaintiff to reveal her trial strategy, even if the defendant is aware

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<sup>83</sup> The *Celotex* standard is *pro-defendant*—not merely *pro-moving party*—because in the vast majority of cases, plaintiffs who move for summary judgment will retain the burden of negating the defendant's evidence, due to the fact that in most cases the underlying substantive law places the burden of persuasion at trial on the plaintiff.

<sup>84</sup> Indeed, the *Celotex* majority viewed this reason as important to its conclusion. *See id.* at 324.

<sup>85</sup> Miller, *Pretrial Rush to Judgment*, *supra* note 35, at 1041.

that the motion is unlikely to convince the court to grant summary judgment.<sup>86</sup> This potential counsels in favor of careful judicial oversight.

The effects of the 1986 trilogy on federal summary judgment practice have been chronicled elsewhere,<sup>87</sup> and only a brief overview is necessary here. Although the empirical studies since 1986 paint a far from complete picture, they show a statistically significant increase in the number of summary judgment motions made, the frequency with which district courts grant the motion, and the rate of appellate affirmance of district court grants of the motion.<sup>88</sup> Judicial opinions since 1986 refer explicitly to the trilogy as permitting—indeed *requiring*—more frequent grants of summary judgment motions.<sup>89</sup> In short, the trilogy has had a “decidedly prodefendant effect.”<sup>90</sup> In accordance with the directive of *Anderson*, lower courts have aligned the summary judgment standard with the standard for judgment as a matter of law, despite the crucial differences in the timing of the two motions<sup>91</sup> and the form of evidence on which the two motions are based.<sup>92</sup> This increasingly friendly judicial attitude toward summary judgment threatens to result in paper trials or trials by affidavit, thereby compromising litigants’ day in court and jury trial rights.

Although the foregoing evidence is confined to the effects of the 1986 trilogy on practice in the federal courts, these effects can inform state systems that are contemplating adopting the federal summary judgment standard as well as individual state judges who may look to federal precedents as to the consequences that may flow from that adoption. It is to a closer examination of state summary judgment practice that this paper now turns.

## V. SUMMARY JUDGMENT PRACTICE IN STATE COURTS: A SURVEY OF THE LANDSCAPE

Intuition initially may suggest that the foregoing story has little to do with state courts. Some might argue that the so-called “litigation explosion” has affected federal dockets to a greater extent than state dockets, so the pressure to use the summary judgment procedure to weed out cases before trial may be less significant in state court systems.<sup>93</sup> And the 1986 trilogy was a

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<sup>86</sup> See Issacharoff & Loewenstein, *supra* note 40, at 110-11 (defendants use the motion not to “seek[] information about the potential sources of liability but about plaintiff’s ability to arrange and present that information so as to obtain a tactical advantage at trial”).

<sup>87</sup> See the sources cited in Miller, *Pretrial Rush to Judgment*, *supra* note 35, at 1048-74.

<sup>88</sup> See *id.* at 1048-50.

<sup>89</sup> See *id.* at 1050, n.365 (citing cases).

<sup>90</sup> *Id.* at 1049.

<sup>91</sup> A summary judgment motion may be made as early as twenty days after the commencement of the action. A motion for judgment as a matter of law may not be made by the defendant until the close of the plaintiff’s case or by either party until the close of all the evidence. See *id.* at 1061.

<sup>92</sup> The summary judgment motion is presented on documentary evidence, while the motion for judgment as a matter of law comes after live testimony has been presented. See *id.*

<sup>93</sup> However, to the extent that the burden on federal dockets allegedly caused by the supposed “litigation explosion” has signaled to plaintiffs that federal court may be a slower avenue for resolution of their claims, they may face a stronger incentive to file in state court.

series of interpretations of Federal Rule 56, which, of course, does not govern summary judgment practice in state courts, even though many state rules are modeled after the Federal Rule.

Nevertheless, many state courts have exhibited a willingness to link state summary judgment practice to the increasingly friendly federal attitude toward the procedure reflected in the 1986 trilogy and its progeny. For example, despite a statement disclaiming the “wholesale adoption” of federal summary judgment practice, the California Supreme Court issued its own “trilogy” of summary judgment decisions in 2000 and 2001,<sup>94</sup> bringing California summary judgment rules “extremely close to the federal standard.”<sup>95</sup>

California is hardly the only state to follow the 1986 trilogy. Fifteen years after the trilogy was decided, it was reported that 34 states plus the District of Columbia had adopted it or cited it approvingly.<sup>96</sup> Interestingly, only three of the 34 states—California, Louisiana, and New Jersey—adopted the trilogy through a formal rule change.<sup>97</sup> The other 31 altered course through judicial interpretation of the state summary judgment rule.<sup>98</sup>

Moreover, even among the states that purport to reject the 1986 trilogy, some have adopted it through the back door, not through the reinterpretation of the traditional standard for summary judgment, but instead through the creation of new procedural devices. For example, the Texas Supreme Court has maintained that a traditional summary judgment motion by the party who does not bear the burden of persuasion at trial shifts the burden to that party (at the summary judgment stage) to show that no genuine issue of material fact exists.<sup>99</sup> Formally, therefore, Texas has rejected the 1986 trilogy. However, in 1997, the Texas state legislature promulgated Texas Rule of Civil Procedure 166a(i), which created the “no-evidence motion for summary

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<sup>94</sup> *Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089 (Cal. 2000); *Saelzler v. Advanced Group 400*, 23 P.3d 1143 (Cal. 2001); *Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493 (Cal. 2001).

<sup>95</sup> Glenn S. Koppel, *The California Supreme Court Speaks Out on Summary Judgment in its Own “Trilogy” of Decisions: Has the Celotex Era Arrived?*, 42 SANTA CLARA L. REV. 483, 483 (2002). Koppel notes the revolutionary nature of this change, given that as recently as 1988 the California Supreme Court characterized summary judgment as a “drastic measure.” *Id.* at 492 n.54 (citing *Molko v. Holy Spirit Ass’n*, 762 P.2d 46, 53 (Cal. 1988)).

One remaining difference between California practice and federal practice is that in California, the moving party actually must “present” evidence to support her motion, a requirement more stringent than the standard expressed in *Celotex*, which requires only that the moving party “point[] out to the district court” that there is no evidence to support the nonmoving party’s case. *Cf. Aguilar*, 24 P.3d at 506, with *Celotex*, 477 U.S. at 325.

<sup>96</sup> See Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 FLA. B.J. 20, 29 appx. (Feb. 2002) (citing cases). The states are: Alabama, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and West Virginia.

<sup>97</sup> *Id.* at 27.

<sup>98</sup> *Id.* at 27.

<sup>99</sup> *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30, 32 (Tex. 2002).

judgment.”<sup>100</sup> The Rule allows a party, “without presenting summary judgment evidence,” to move for summary judgment “on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.”<sup>101</sup> The Texas Supreme Court has made it clear that, unlike the traditional summary judgment motion, this new motion places the burden of showing the existence of a factual issue on the nonmoving party.<sup>102</sup>

One Illinois court’s formulation of the state summary judgment standard is a good example of the reasoning expressed by states that have adopted the federal standard. In *Ray Dancer, Inc. v. DMC Corporation*, the Appellate Court of Illinois for the Second District confronted an antitrust claim against a distributor of home sewing products.<sup>103</sup> In concluding that the trial court’s grant of the defendant’s motion for summary judgment on the antitrust claim was proper, the court wrote that “[a]lthough the usual caveat to use summary judgment sparingly in cases where questions of motive and intent are foremost remains valid, summary judgment is still appropriate when it is clear that the plaintiff will be unable to establish an element of a claim and, thus, a trial would serve no useful purpose.”<sup>104</sup>

Another exemplar among the states that have adopted the federal standard is Wisconsin. In *Yahnke v. Carson*, the Wisconsin Supreme Court reviewed a grant of summary judgment in a medical malpractice action.<sup>105</sup> In response to the defendants’ motion for summary judgment, the plaintiffs submitted an affidavit from an expert witness that allegedly contradicted the expert’s prior deposition testimony.<sup>106</sup> However, the affidavit contained the expert’s explanation as to why the affidavit was not inconsistent with his prior testimony.<sup>107</sup> The Wisconsin Supreme Court began its review of the trial court’s grant of summary judgment by decrying “the ability to create trial issues by submitting affidavits in direct contradiction of deposition testimony,” which “reduces the effectiveness of summary judgment as a tool for separating the genuine factual disputes from the ones that are not, and undermines summary judgment’s purpose of avoiding unnecessary trials.”<sup>108</sup> The Wisconsin Supreme Court noted that its decision that summary judgment was proper in these circumstances was in keeping with “[t]he purpose of summary judgment motions—‘to weed out unfounded claims, specious denials, and sham defenses’—[which] is served by a rule that prevents a party from creating issues of credibility by allowing

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<sup>100</sup> See TEX. R. CIV. P. 166a(i) (1997); see generally Kurt H. Kuhn, *An Overview of Summary Judgment Practice in Texas State Court*, Appellate Boot Camp (State Bar of Texas 2004), available at [http://www.tex-app.org/articles/57986\\_01.pdf](http://www.tex-app.org/articles/57986_01.pdf).

<sup>101</sup> TEX. R. CIV. P. 166a(i).

<sup>102</sup> See *Mariner Fin. Group, Inc.*, 79 S.W.3d at 32.

<sup>103</sup> 594 N.E.2d 1344, 1347 (Ill. App. 2d Dist. 1992).

<sup>104</sup> *Id.* at 1351 (citations omitted).

<sup>105</sup> 613 N.W.2d 102 (Wis. 2000).

<sup>106</sup> *Id.* at 105.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 106.

one of its witnesses to contradict his own prior testimony” and thereby “subject the moving party to the burden of trial.”<sup>109</sup>

Not all states have hewn to federal practice, however. Florida, for example, even though the text of its summary judgment rule is substantially similar to the text of Federal Rule 56, continues to adhere to a standard akin to Judge Frank’s “slightest doubt” approach.<sup>110</sup> Likewise, Florida has remained especially reluctant to grant the motion in actions in which summary judgment procedures historically have been disfavored.<sup>111</sup> In *Stephens v. Dichtenmueller*,<sup>112</sup> Justice Drew, in a special concurring opinion, summarized the rationale underlying the rules governing Florida summary judgment practice: “The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact.”<sup>113</sup> Justice Drew recognized, however, that pertinacious pursuit of this meritorious goal could have serious costs; he therefore emphasized the limited circumstances in which the motion may be granted:

But the facts admitted, in order to justify a summary judgment, must be the ultimate facts as distinguished from evidentiary facts. It not infrequently happens that there is actually no conflict in evidence as to what was done or said, but the inferences of ultimate fact to be drawn from these evidentiary facts may be quite different. It is peculiarly within the province of the jury to draw these inferences and determine the ultimate facts.<sup>114</sup>

Recognizing this distinction, Justice Drew reasoned, is key to ensuring that summary judgment serve its laudable purposes without infringing litigants’ fundamental rights to a day in court and jury trial:

The rules providing for summary judgments and summary final decrees have served a most salutary purpose in the administration of justice. Such rules will continue to do so [*sic*] long as the courts exercise restraint in applying them. Summary judgments should never be granted on the mere weight of the evidence or the number of affidavits on one side as against the number on the other nor

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<sup>109</sup> *Id.* at 107-08 (citation omitted).

<sup>110</sup> *See* *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *see also* *Holland v. Verheul*, 583 So.2d 788, 789 (Fla. Dist. Ct. App. 1991) (“If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.”).

<sup>111</sup> *See, e.g.,* *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29, 30 (Fla. 1977) (“Movant’s burden is even more onerous in negligence actions where summary judgment procedures historically have been employed with special care.”) (citations omitted).

<sup>112</sup> 216 So.2d 448 (Fla. 1968).

<sup>113</sup> *Id.* at 450, 451 (Drew, J., concurring specially) (quoting *National Airlines, Inc. v. Florida Equip. Co. of Miami*, 71 So.2d 741, 744 (Fla. 1954)).

<sup>114</sup> *Id.*

should they ever be granted merely because of the view of the trial judge that “the record shows an absence of legal liability.”<sup>115</sup>

This view, however, has come under substantial attack from those who advocate a more expansionist view of the application of summary judgment,<sup>116</sup> and, as a result, it must be recognized that Florida is among the minority of states that adhere to this pre-Supreme Court trilogy practice.

## **VI. THE EFFECT OF SHIFTING SUMMARY JUDGMENT PRACTICE ON THE RIGHT TO A DAY IN COURT AND THE RIGHT TO JURY TRIAL**

### **A. The Interaction of the Day-in-Court Principle, the Jury Trial Right, and Summary Judgment**

The increasing friendliness of both federal and state courts to the summary judgment procedure in the years since the 1986 trilogy raises very significant questions about the effect on litigants’ rights to a day in court and to jury trial. Efficiency is certainly a laudable goal, but its quest should not be permitted to erode these fundamental rights through a judicial redefinition of what constitutes a “genuine issue of material fact” that is appropriate for presentation at trial and jury determination.

Deemed by Blackstone to be “the glory of the English law,”<sup>117</sup> the jury trial enjoys a similarly sacrosanct status in American law.<sup>118</sup> The Supreme Court has protected the right diligently, holding, for example, that in mixed law-equity cases, the Seventh Amendment affords litigants the right to have factual issues common to both the equitable and legal aspects of the case heard first by a jury, with the jury’s determination having preclusive effect on the equitable aspects of the case.<sup>119</sup> The Court held that this issue-by-issue approach extends to any element of the legal aspect of the case, even if the issue arises in the context of an action that historically would have been heard in the courts of equity.<sup>120</sup> Similarly, the Court has extended jury trial to post-1791 statutory rights of action, giving the right a dynamic quality.<sup>121</sup> These decisions illustrate the exalted pedestal on which the law places the jury trial right, even in the face of competing efficiency concerns. And although the Seventh Amendment does not apply directly to

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<sup>115</sup> *Id.* at 451 (quoting *Rivaux v. Florida Power & Light Co.*, 78 So.2d 714, 715, 717 (Fla. 1955) (Drew, J., dissenting)).

<sup>116</sup> *See, e.g.*, Logue & Soto, *supra* note 96; Leonard D. Pertnoy, *Summary Judgment in Florida: The Road Less Traveled*, 20 ST. THOMAS L. REV. 69 (2007).

<sup>117</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*379.

<sup>118</sup> *See, e.g.*, *Sioux City & P. Ry. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (Story, J.) (“It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”).

<sup>119</sup> *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

<sup>120</sup> *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1963).

<sup>121</sup> *See Curtis v. Loether*, 415 U.S. 189, 192-93 (1974) (finding that parties in action under § 812 of Civil Rights Act of 1968 are entitled to jury trial).

state courts, the right is recognized at the state level by innumerable constitutional and statutory provisions. Moreover, the “reverse *Erie*” doctrine mandates that state courts provide litigants with a jury trial in certain circumstances.<sup>122</sup>

Also relevant from the perspective of state summary judgment practice is the right to a day in court, which, as an element of due process protected in both state and federal civil litigation by the Fourteenth Amendment and corresponding state constitutional provisions, applies transsubstantively in both state and federal courts. Courts therefore must be especially sensitive that docket pressures and the goals of efficiency and economy do not erode something so fundamental as a litigant’s right to present evidence in open court to a jury drawn from the community.<sup>123</sup>

Even if the Supreme Court’s direction to “carve at the joint” is followed assiduously, summary judgment practice has the potential to undermine the day-in-court and jury trial rights from another direction. Because the day-in-court and jury trial rights do not attach to questions of law, judicial characterization of an issue as legal or factual is a serious matter in the summary judgment context. Unfortunately, however, the principles governing this determination are far from clear, and their application seems to lack consistency.<sup>124</sup>

The traditional wisdom is that questions of law—that is, the resolution of principles that apply generally to a class of cases—are for the judge;<sup>125</sup> questions of fact are for the jury;<sup>126</sup> and mixed questions of law and fact—the application of historical facts to legal principles—are generally for the jury, with several exceptions.<sup>127</sup> For present purposes, the most important exception arises when the historical facts to be applied to the applicable legal principles are undisputed. In this situation, summary judgment allows the trial court to apply the undisputed historical facts to the applicable legal principles without transgressing the day-in-court or jury trial rights. What appears to be happening is that courts are expanding this exception by using the conclusory words “implausible” or “clear” to resolve matters on the motion in order to terminate cases.

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<sup>122</sup> See *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363 (1952) (“[T]he right to trial by jury is too substantial a part of the rights accorded by the [Federal Employers’ Liability] Act to permit it to be classified as a mere ‘local rule of procedure.’”).

<sup>123</sup> Cf. *Holl*, 191 So.2d at 47 (explaining that, when the party against whom the trial court granted summary judgment petitions for rehearing, “every disposition should be indulged in favor of granting the motion. Only after it has been conclusively shown that the party moved against cannot offer proof to support his position on the genuine and material issues in the cause should his right to trial be foreclosed.”).

<sup>124</sup> See generally 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 2588-2589; Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1867-68 (1966).

<sup>125</sup> See Weiner, *supra* note 124, at 1869-70.

<sup>126</sup> See *Townsend’s Case*, 75 Eng. Rep. 173, 178-79 (K.B. 1554) (“For the office of 12 men is no other than to enquire of matters of fact, and not to adjudge what the law is ....”).

<sup>127</sup> See James B. Thayer, “*Law and Fact*” in *Jury Trials*, 4 HARV. L. REV. 147, 170 (1890); see also Weiner, *supra* note 124. The special verdict procedure, encompassed in Federal Rule 49(a), is an exception to this general rule.

The enormous importance of the law-fact distinction and of the allocation of decisionmaking function should be obvious. To the extent that the past two decades have witnessed a trend toward more frequent determination of mixed questions of law and fact at the summary judgment stage or more frequent characterization of matters as issues of law rather than fact, it is being done at the expense of the two great rights under discussion. Thus, it has become especially important to ensure that adequate safeguards exist to protect the great guarantees of a day in court and jury trial. At a minimum, trial courts must see to it that their grants of summary judgment motions take account of these concerns and are accompanied by detailed, reasoned analysis to facilitate robust appellate review of the law-fact boundary, despite the fact that currently there is a paucity of guidance on the precise location of that boundary.<sup>128</sup>

### **B. A Closer Examination of the Rationales for Restrictions on the Day-in-Court Principle and Jury Trial Right**

Unfortunately, the needed detailed, reasoned analysis in applying the law-fact distinction is all too often not provided. In the minority of cases in which the trial court does explain its conclusion, however, three strands of justifications for avoiding trial appear repeatedly. First, the trial court may express doubts about the institutional and cognitive capacity of jurors to decide complex factual questions. Second, the trial court may emphasize the importance of uniformity in the application of the governing law, which may be undermined by allowing juries to apply the facts to the applicable legal principles. Third, the trial court may highlight the efficiency of preventing the plaintiff from taking to trial a theory that is believed to be implausible as a matter of law. Given the importance of the day-in-court principle and the jury trial right, the bona fides of each of these rationales must be questioned and the motivations for invoking them scrutinized. At a minimum their applicability to particular cases must be constrained.<sup>129</sup>

## **VII. CONCLUSION**

The just resolution of claims at the earliest possible stage doubtlessly saves valuable judicial and litigant resources; admittedly, summary judgment is a powerful weapon in the procedural arsenal that can help achieve this goal. But given the paramount importance of litigants' rights to a day in court and jury trial, courts pursuing these efficiency objectives must remain vigilant to the rationales for and the possible deleterious effects of expanded use of the practice. These high stakes counsel in favor of appellate courts' insistence that trial courts accompany grants of summary judgment with explicit, detailed, and reasoned analyses to facilitate careful appellate review.

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<sup>128</sup> See, e.g., *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985). The law-fact distinction is important not only to the allocation of authority between judge and jury. As a result of the deferential standard of appellate review afforded to jury determinations—as compared to the less deferential review given to the trial judge's determinations on questions of law—the distinction also implicates the allocation of authority between trial courts and appellate courts. Hence, it is of paramount importance for appellate courts to be sensitive to the fundamental nature of the rights at stake, even though recognition of the full scope of those rights may restrict the scope of review in the appellate bench.

<sup>129</sup> See *Miller, Pretrial Rush to Judgment*, *supra* note 35, at 1094-1132.