

# THE PRETRIAL RUSH TO JUDGMENT: ARE THE “LITIGATION EXPLOSION,” “LIABILITY CRISIS,” AND EFFICIENCY CLICHÉS ERODING OUR DAY IN COURT AND JURY TRIAL COMMITMENTS?

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*Although there are demands for procedural “reform” in the face of a perceived “litigation explosion” and “liability crisis,” little empirical research has been done to determine if those fears are legitimate even though a multitude of solutions are being proposed and some have been promulgated. This Article examines the use of summary judgment and the motion to dismiss in light of these increasing concerns about the efficiency of the federal judicial system. Professor Miller analyzes the 1986 Supreme Court summary judgment trilogy and its effect in transforming the procedural device into a method frequently used to dispose of litigation before trial. He studies decisionmaking in the federal courts with regard to the trilogy and expresses concern that courts have extended the use of summary judgment and the motion to dismiss to resolve disputes that are better left to trial and the jury. Courts, Professor Miller argues, too often appear to be placing their interests in the efficient resolution of disputes, concerns about jury capability, and other matters above litigants’ rights to a day in court and jury trial, and he suggests that judicial restraint as well as further Supreme Court guidance is needed to prevent trial courts’ discretion from eclipsing these fundamental rights of litigants.*

INTRODUCTION .....	984
I. THE “LITIGATION EXPLOSION” AND PROCEDURAL REFORM .....	985
A. <i>The “Litigation Explosion”</i> .....	985
B. <i>Procedural “Reform” as a Response to the “Litigation Explosion”</i> .....	996
C. <i>Trends Relating to the Federal Rules of Civil Procedure</i> .....	1003
1. <i>Case Management</i> .....	1003
2. <i>Other Rules: Sanctions, Pleading Requirements, and Discovery</i> .....	1007

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3. <i>Summary Judgment as the Focal Point of Modern Litigation</i> .....	1016
II. SUMMARY JUDGMENT .....	1016
A. <i>History</i> .....	1016
B. <i>Debates About the Application of Federal Rule 56</i> .....	1019
C. <i>The Shifting Judicial Attitudes Regarding Summary Judgment</i> .....	1024
D. <i>The 1986 Supreme Court Trilogy</i> .....	1026
1. <i>The Matsushita Decision</i> .....	1029
2. <i>The Anderson Decision</i> .....	1034
3. <i>The Celotex Decision</i> .....	1037
E. <i>The Significance of the 1986 Trilogy</i> .....	1041
III. THE EFFECT OF THE 1986 TRILOGY ON SUMMARY JUDGMENT PRACTICE .....	1044
A. <i>The Reception Given to the 1986 Trilogy</i> .....	1044
B. <i>Increased Use of the Summary Judgment Motion</i> ...	1048
C. <i>Application of the Judgment as a Matter of Law (Directed Verdict) Standard</i> .....	1057
D. <i>Transformation of Summary Judgment into Paper Trials</i> .....	1062
E. <i>The Effect of the Trilogy on the Motion to Dismiss</i> .....	1073
IV. SUMMARY JUDGMENT AND THE RIGHTS TO A DAY IN COURT AND TO JURY TRIAL .....	1074
A. <i>The Jury Trial Right</i> .....	1077
1. <i>History</i> .....	1077
2. <i>Motions to Dismiss, Summary Judgment, the Law-Fact Distinction, and the Jury Trial Right</i> ..	1082
B. <i>An Evaluation of the Justifications for Restricting the Jury Trial Right</i> .....	1094
1. <i>An Illustrative Case as a Vehicle for Evaluating the Reasons for Restricting Jury Trial</i> .....	1095
(a) <i>The Case</i> .....	1095
(b) <i>The Court's Law-Fact Distinctions and Its Summary Judgment Decision</i> .....	1097
2. <i>Practical Abilities and Limitations of Jurors; the Meaning of Complexity</i> .....	1104
3. <i>Efficiency and Uniformity</i> .....	1110
4. <i>Individual Judicial Perspectives, Implausibility, and the Adoption of Certain Economic Theories as Law</i> .....	1114

C. *Judicial Restriction of the Jury Trial Right in Other Contexts* ..... 1126  
 CONCLUSION ..... 1132

INTRODUCTION

The loudly trumpeted (but as yet unproven) “litigation explosion” and its metaphorical twin, the “liability crisis,” have energized court “reform” efforts in recent years on both the local and national levels. Critics maintain that excessive and frivolous litigation overwhelms the judicial system’s capacity to administer speedy and efficient justice, leads to higher costs for litigants and society at large, and even hinders America’s competitive position in the global economy. By way of timely illustration, as this Article moves toward publication, a noisy debate over medical malpractice litigation is underway around the nation.

In the federal court system, lawmakers and judges have responded to these criticisms through legislation and by refashioning the language and administration of several of the Federal Rules of Civil Procedure to emphasize efficiency and conservation of judicial resources. Because so few cases actually are tried, these efforts understandably have concentrated on the pretrial process. Indeed, the core of American civil litigation and the quest for “reform” are now centered on the period anterior to trial.

Summary judgment in particular has emerged as the focal point of much of the recent change. In 1986, the now-famous Supreme Court “trilogy”—*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>1</sup> *Anderson v. Liberty Lobby, Inc.*,<sup>2</sup> and *Celotex Corp. v. Catrett*<sup>3</sup>—transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation. Since then, federal courts have employed summary judgment, and more recently the motion to dismiss for failure to state a claim, in cases that before the trilogy would have proceeded to trial, or at least through discovery.

This Article first examines the supposed “litigation explosion” and the changes that have occurred on the civil side of the federal courts in reaction to its imagery. It then explores the Supreme Court trilogy and its impact on the administration of summary judgment and, to some degree, the motion to dismiss, by lower federal courts, focusing on the dangers that post-trilogy practice poses to a litigant’s

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<sup>1</sup> 475 U.S. 574 (1986).  
<sup>2</sup> 477 U.S. 242 (1986).  
<sup>3</sup> 477 U.S. 317 (1986).

ability to reach trial and realize the Seventh Amendment jury trial guarantee. To illustrate the heightened vulnerability of these aspects of our civil justice system to the new pretrial disposition tendencies, the Article concludes by focusing on recent cases that show how an expansive reading of the trilogy encroaches upon traditional litigation values.

## I

### THE “LITIGATION EXPLOSION” AND PROCEDURAL REFORM

#### A. *The “Litigation Explosion”*

Civil litigation has long been criticized as costly and inefficient.<sup>4</sup> The contemporary perception of a crisis in the judicial system first became prominent in the 1970s. Alternately characterized as “hyperlexis,” the “adversary society,” and now, most popularly, the “litigation explosion,” the phenomenon described in the literature involves increasing rates of litigation.<sup>5</sup> For example, former Vice President Dan Quayle, speaking as the head of the President’s Council on Competitiveness, maintained that federal civil litigation had almost tripled between 1960 and 1990, and that in 1989 alone eighteen million new lawsuits were filed—almost one lawsuit for every ten American adults.<sup>6</sup>

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<sup>4</sup> The charge transcends time and geography. Hamlet decried “the law’s delay.” William Shakespeare, *Hamlet, Prince of Denmark*, act 3, sc.1. The great poet Goethe abandoned the German legal profession out of frustration with cases that had lingered unresolved in the courts for hundreds of years. And Charles Dickens in *Bleak House* described a classic example of English legal ineptitude—Jarndyce and Jarndyce. See generally Charles Dickens, *Bleak House* (Modern Library 2002) (1853). He also suggested that members of the profession “might even improve the world a little, if we got up early in the morning, and took off our coats to the work.” Charles Dickens, *David Copperfield* 443 (Modern Library 1998) (1850).

<sup>5</sup> See, e.g., Comm. on Revision of the Fed. Judicial Sys., U.S. Dep’t of Justice, *The Needs of the Federal Courts* 1-2 (1977); Howard James, *Crisis in the Courts* (1968); Maurice Rosenberg, *Let’s Everybody Litigate?*, 50 *Tex. L. Rev.* 1349, 1349 (1972). There is a general consensus that at least up through the early 1960s, litigation played a balanced and moderate role in dispute resolution. See Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 *Rutgers L. Rev.* 319, 320 (1985); see also Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 *Tex. L. Rev.* 285, 285-87 (2002) (noting decline in per capita litigation from 1880s to 1960s).

<sup>6</sup> President’s Council on Competitiveness, *Agenda for Civil Justice Reform in America* 1 (1991) [hereinafter *President’s Council on Competitiveness*] (citing new civil cases filed in state and federal courts). The Vice President’s statistics have been powerfully criticized as inaccurate and misleading. See, e.g., Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness’ Agenda for Legal Reform*, 75 *Judicature* 244, 245-48 (1992) (characterizing report’s statistics as empirically shaky and “at best incomplete and at worst misleading”).

The recent outcry in this country over the social costs of civil litigation is unprecedented in its decibel level and sense of urgency,<sup>7</sup> bringing together a coalition of politicians, lawmakers, business people, and scholars that often bridges traditional lines between conservative and liberal ideologies. It has engaged the attention of all three branches of the federal government as well as many state legislatures. In addition, an avalanche of literature, both professional and popular, has addressed the problem and advanced numerous overlapping solutions.<sup>8</sup>

Increased litigation is said to result in substantial costs and delay.<sup>9</sup> One study of the expenditures in asbestos litigation in the federal court system found that only thirty-seven cents of each dollar

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<sup>7</sup> See, e.g., Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 *Harv. J.L. & Pub. Pol'y* 953, 953 (2002) (discussing frequent invocation of "tort reform" by corporations, politicians, and lawyers over past decade). For example, just three days after taking office in January 1995, then-Governor George W. Bush called an emergency session of the Texas state legislature to take up tort reform. By June 1995, Governor Bush had signed seven tort reform bills into law, prompting one probusiness lobbyist to declare that the new laws represented "more tort reform in one session than any state in the country in the last 15 to 20 years." George Lardner Jr., "Tort Reform": Mixed Verdict: Bush's First Priority in Office Pleased Business, Spurred Donations and Cut Public's Remedies, *Wash. Post*, Feb. 10, 2000, at A6 (quoting Ralph Wayne, President of Texas Civil Justice League) (reporting history of Bush tort reform bills); see also, e.g., Mary Brigid McManamon, *Is the Recent Frenzy of Civil Justice Reform a Cure-all or a Placebo? An Examination of the Plans of Two Pilot Districts*, 11 *Rev. Litig.* 329, 330 (1992) (discussing "frenzy" of reform activity in recent years).

<sup>8</sup> See, e.g., Steven Flanders, *Fed. Judicial Ctr., Case Management and Court Management in United States District Courts* (1977); John A. Goerdt, *Nat'l Ctr. for State Courts, Reexamining the Pace of Litigation in 39 Urban Trial Courts* (1991); John A. Martin & Elizabeth A. Prescott, *Appellate Court Delay: Structural Responses to the Problems of Volume and Delay* (1981) (addressing problems of delay in state appellate courts); Dale Anne Sipes, *Nat'l Ctr. for State Courts, On Trial: The Length of Civil and Criminal Trials* (1988); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 *Harv. L. Rev.* 1808 (1986); Diana G. Culp, *Fixing the Federal Courts*, 76 *A.B.A. J.* 62, 64 (1990); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *Fordham L. Rev.* 1 (1990); Dan Quayle, *Civil Justice Reform*, 41 *Am. U. L. Rev.* 559 (1992).

For examples of books aimed at the general public, see generally Carl T. Bogus, *Why Lawsuits are Good for America* (2003); Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (1988); Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991).

<sup>9</sup> See, e.g., A.B.A., *Attacking Litigation Costs and Delay: Final Report of the Action Commission to Reduce Court Costs and Delay* (1984) (reporting results of five-year study of various procedural reforms conducted in state courts); Brookings Inst., *Justice for All: Reducing Costs and Delay in Civil Litigation 1* (1989); Lawyers Conference Task Force on Reduction of Litig. Cost and Delay, A.B.A., *Defeating Delay: Developing and Implementing a Court Delay Reduction Program 1* (1986); Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 *Md. L. Rev.* 40, 40 (1986); Robert D. Raven, *ADR: New Options for Clients*, 75 *A.B.A. J.* 8 (1989).

expended by defendants and insurers went to the victim, with legal fees and other transaction costs consuming the remainder.<sup>10</sup> Accompanying this rise in costs seems to be an increase in the length of time it takes to adjudicate or otherwise dispose of a dispute.<sup>11</sup> Other problems allegedly associated with the “litigation explosion” are the harassment of innocent defendants,<sup>12</sup> people not entering the medical profession or leaving it because of the high cost of insurance or the fear of litigation, and, paradoxically, the denial of effective relief to deserving claimants.<sup>13</sup>

Along with the perception of increased litigation and a concomitant rise in associated time and expense, much of the increase is attributed to frivolous cases. Proponents of tort reform have relied on anecdotal evidence of excessiveness, calling attention to situations in which plaintiffs with allegedly marginal claims bring suit for an amount portrayed as grossly disproportionate to the injury. Many of

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<sup>10</sup> James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, RAND Inst. for Civil Justice, *Costs of Asbestos Litigation* 39-40 (1983) [hereinafter *Costs of Asbestos Litigation*] (stating that for every dollar paid to plaintiffs, defendant expends one dollar on litigation and plaintiffs expend seventy-one cents on litigation); see also Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 44 (1986) [hereinafter *Tort Policy Working Group*] (citing 1983 RAND study results for victim compensation per average tried claim). A recent interim report indicates that litigation expenditures have moderated somewhat and claimants now receive approximately forty-three percent of the amount expended. RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* 60-61 (2002).

<sup>11</sup> One study revealed that almost one-half of all tort cases in certain state trial courts located in urban or metropolitan areas took more than two years to resolve. See Barry Mahoney, Larry L. Sipes & Jeanne A. Ito, Nat'l Ctr. for State Courts, *Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings from Current Research* 9, tbl.II.2 (1985) (finding that approximately forty percent of tort cases in Boston, Pittsburgh, and Providence took more than two years to resolve; in contrast, Phoenix and Jersey City courts resolved ninety percent of such cases within two years).

<sup>12</sup> Civiletti, *supra* note 9, at 40 (“Today innocent or near blameless defendants are too frequently put at the mercy of happenstance and the vagaries and passions of the jurors.”).

<sup>13</sup> See President's Council on Competitiveness, *supra* note 6, at 1-3; Maurice Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 L. & Soc'y Rev. 473, 479-80 (1981). This argument frequently is advanced in the context of securities fraud litigation. See, e.g., Bryan Amendment: Hearings on S. 543 Before the Sec. Subcomm. of the Senate Banking, Hous. and Urban Affairs Comm., 102d Cong., 1st Sess. (statement of Harvey L. Pitt, then-Managing Partner, Fried, Frank, Harris, Shriver & Jacobson, and more recently, Chairman of the Securities and Exchange Commission) (“Already, the costs of director and officer liability insurance and the risks individuals must bear to work in corporate America are taking their toll on the ability of corporations to attract and retain executives with the experience necessary to guide companies.”). But see Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 Ariz. L. Rev. 717, 737-40 (1998) (concluding that serious investigation has produced little evidence to support claims that litigation has significantly damaged nation's prosperity or ability to compete).

these cases have been highlighted by the media and made to appear silly;<sup>14</sup> in several instances, however, the facts of the cases either have been distorted or unduly simplified when described, as was true of the now legendary McDonald's coffee case.<sup>15</sup> Given the distorted portrayal, it is not surprising that several polls confirm that some Americans believe that their fellow citizens are too inclined to sue for frivolous purposes.<sup>16</sup>

In addition to focusing on the increase in litigation, "tort reform" proponents criticize the jury system, characterizing juries as unsophisticated bodies more concerned with compensating sympathetic victims than with administering consistent justice.<sup>17</sup> Some empirical evidence indicates that awards in tort cases have increased significantly and that the number of million-dollar awards has risen sharply over a thirty-year period,<sup>18</sup> most dramatically in the areas of medical malpractice<sup>19</sup>

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<sup>14</sup> See, e.g., John Berendt, *The Lawsuit*, Esquire, May 1993, at 37 (opening with story of \$1.5 million verdict for widow of man who electrocuted himself on transit rail while drunk); Jesse Birnbaum, *Crybabies: Eternal Victims*, Time, Aug. 12, 1991, at 16, 16-17 (summarizing several lawsuits and jury verdicts alleged to be frivolous); *The Tort Explosion*, New Republic, Nov. 18, 1985, at 4 (describing ten-million-dollar jury verdict in case following plaintiff's contracting polio after his daughter received Sabin oral polio vaccine instead of Salk vaccine, despite fact that Sabin vaccine is officially preferred vaccine; however, in 1986, Kansas Supreme Court overturned this verdict, *Johnson v. Am. Cyanamid Co.*, 718 P.2d 1318 (Kan. 1986)). See generally Max Boot, *Out of Order: Arrogance, Corruption, and Incompetence on the Bench* ch. 6 (1998) (attacking judges who developed modern tort doctrines and those who currently allow large awards, reciting several examples of "outrageous" cases; asserting that litigation has become far too frequent and expensive).

<sup>15</sup> See Edmund M. Brady, Jr., *The U.S. Chamber's Attack on Trial Lawyers*, 77 Mich. B.J. 380, 382 (1998), in which the author points out that on the facts of the case, most notably McDonald's practice of superheating its coffee well beyond safe levels, the verdict was not ridiculous. He also adds that the damages were reduced by remittitur to \$480,000, and the victim and McDonald's subsequently entered into a postverdict settlement. *Id.* Liane E. Leshne, *Shedding New Light, Trial*, Oct. 1998, at 32, 34, also addresses the McDonald's coffee case, adding the information that the plaintiff, who required eight days' hospitalization as a result of her burns, attempted to settle her claim for \$20,000, but McDonald's refused despite having received hundreds of burn claims in the prior decade. See also *infra* note 57. A number of widely circulated "outrageous lawsuits" have proven to be complete fabrications. Some of them have been debunked in *Tortuous Torts*, at <http://www.snopes.com/legal/lawsuits.htm>.

<sup>16</sup> See Olson, *supra* note 8. In at least two polls, approximately two-thirds of the respondents indicated that they believed that more lawsuits were brought than should be. *Id.*

<sup>17</sup> An oft-cited study conducted by the Institute for Civil Justice of the RAND Corporation found that mean jury awards in tort cases rose threefold in Cook County, Illinois and fivefold in San Francisco over a twenty-year period. Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik & Mark A. Peterson, *RAND Inst. for Civil Justice, Trends in Tort Litigation: The Story Behind the Statistics* 17 (1987).

<sup>18</sup> See Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 *Just. Sys. J.* 349, 349 (1986) (reporting that number of million-dollar awards grew from "single digits" in 1960s to "double digits" in 1970s, and to "triple digits" in 1980s).

and products liability.<sup>20</sup> Critics blame this rise in verdict amounts on the increased prevalence of punitive damages and a larger trend towards increased litigiousness in general.<sup>21</sup>

“Reformers” cite a variety of explanations for the “crisis.” One frequently advanced explanation is the litigious nature of the American people, as exemplified by Chief Justice Warren Burger’s statement that “mass neurosis . . . leads people to think courts were created to solve all the problems of society.”<sup>22</sup> Other cited explanations include the extraordinary expansion of federal criminal law;<sup>23</sup> enhanced societal hazards caused by the increased industrialization and complexity of modern society;<sup>24</sup> preoccupation with the “war on

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<sup>19</sup> In the early eighties, the average jury verdict in medical malpractice cases tried in Chicago and San Francisco reached \$1.2 million in each city. Paul C. Weiler, *Medical Malpractice on Trial 3* (1991) (citing Mark A. Peterson, RAND Inst. for Civil Justice, *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois*, at 21 tbl.3.2 (1987) (reporting mean verdicts of \$1.18 million and \$1.16 million in Cook and San Francisco County courts, respectively)). One of the striking findings of a related study done by Professor Weiler is the low rate of litigation by (and therefore the undercompensation of) victims of apparent medical malpractice. See Paul C. Weiler, Howard H. Hiatt, Joseph P. Newhouse, William G. Johnson, Troyen A. Brennan & Lucian L. Leape, *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation 70* tbl.4.1 (1993) (finding ratio of 7.6 negligent injuries per claim filed in New York between 1984 and 1989). Congress has responded to this perceived problem of excessive medical malpractice awards: On March 13, 2003, the House of Representatives passed legislation imposing a \$250,000 limit on jury awards for pain and suffering in medical malpractice cases, arguing that frivolous lawsuits are driving medical liability premiums out of control and forcing doctors out of business. See Sheryl Gay Stolberg, *House Backs Limit on Malpractice Awards*, N.Y. Times, March 14, 2003, at A24.

<sup>20</sup> In a survey of reported state court jury verdicts in forty-three counties in ten different states from the period 1981 to 1985, two commentators found that of forty sites reporting at least one products liability verdict, thirty-four had median awards over \$100,000 and six had median awards over \$1,000,000. Stephen Daniels & Joanne Martin, *Jury Verdicts and the “Crisis” in Civil Justice*, 11 *Just. Sys. J.* 321, 339 (1986).

<sup>21</sup> See, e.g., Erik Moller, RAND Inst. for Civil Justice, *Trends in Civil Jury Verdicts Since 1985*, at xviii-xix, 34 (1996) (reporting increases in punitive damages awards from 1985-89 and 1990-94, and that business cases account for 47% of all punitive damages awards; only 4.4% of total punitive damages were awarded in products liability cases and only 2% in medical malpractice cases); Tort Policy Working Group, *supra* note 10, at 45 (noting increase in number of tort suits and level of damages). But see *infra* notes 54-57 and accompanying text.

<sup>22</sup> Chief Justice Urges Greater Use of Arbitration, N.Y. Times, Aug. 22, 1985, at A21.

<sup>23</sup> In an interview, District Judge Weinstein opined that the increasing criminal caseload made it “very difficult for any judge to find the time to try civil cases.” Kenneth P. Nolan, *Weinstein on the Courts, Litig.*, Spring 1992, at 24; *Culp*, *supra* note 8, at 64 (maintaining that federal sentencing guidelines have decreased number of plea bargains, and, consequently, have increased number of criminal trials). The enactment of the Violent Crime Control and Law Enforcement Act of 1994, see *infra* notes 37-38 and accompanying text, only exacerbates this phenomenon.

<sup>24</sup> Kaufman, *supra* note 8, at 4 (arguing that growth of complex industrial society has created new and more widely dispersed risks in such areas as toxic chemicals, carcinogens, and nuclear power plants, and consequently, broadened our modern conception of legal

drugs”;<sup>25</sup> lawyer advertising, and a substantial increase in the number of attorneys who either are competing with each other for business or trying to survive economically by pursuing more marginal claims or providing legal services to those previously unable to obtain representation;<sup>26</sup> the underfunding and understaffing of the court system;<sup>27</sup> and the difficulty of attracting and retaining personnel for judicial positions, as well as the political system’s recurrent inability to fill vacancies promptly.<sup>28</sup>

A number of these supposed causes, of course, are not attributable to any growth in civil litigation, but they have had an effect on the system’s ability to handle it. For example, the increasing federalization of criminal law has burdened the federal judicial system and reduced its capacity to administer civil justice in at least three respects. First, crimes that were traditionally dealt with by state penal law have been turned into federal offenses with harsher sentences.<sup>29</sup> The enactment in 1986—the year of the summary judgment trilogy—of the Anti-Drug Abuse Act,<sup>30</sup> for example, turned exclusively state drug-related crimes into federal offenses as well.<sup>31</sup> As a result, the availability of stiffer mandatory minimum sentences has routed more

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rights and remedies); Thomas B. Marvell, *There Is a Litigation Explosion*, Nat’l L.J., May 19, 1986, at 13, 42 (noting that increases in economic activity lead to increases in caseload).

<sup>25</sup> See, e.g., Talbot D’Alemberte, *Restarting Engine of Law Reform*, 77 A.B.A. J. 8, 8 (1991) (noting that judges have been overwhelmed by drug cases); Kaufman, *supra* note 8, at 5 (“To a frightening degree, the federal courts are ‘becoming drug courts.’” (quoting now-Chief Judge Edward R. Becker of Third Circuit, in Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. Times, Dec. 29, 1989, at A1)).

<sup>26</sup> See, e.g., Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 4-5 (1984) (noting increasing number of “public interest” lawyers and increasing use of advertising to lure potential plaintiffs to sue).

<sup>27</sup> See, e.g., D’Alemberte, *supra* note 25, at 8 (asserting that court system is underfunded drastically and comprises only three percent of federal budget); McManamon, *supra* note 7, at 342 (noting “persistent shortage of judicial personnel” leading to increased delay in civil litigation in two federal district courts); Thomas J. Meskill, *Caseload Growth: Struggling to Keep Pace*, 57 Brook. L. Rev. 299, 299-300 (1991) (observing that in one appellate court, number of cases filed in one year increased by one hundred percent; at same time number of judges only increased from nine to thirteen).

<sup>28</sup> See, e.g., Culp, *supra* note 8, at 64 (stating that vacancies in some jurisdictions remain open for as long as three years and relatively low salaries make attraction and retention of personnel even more difficult). At this writing, there are more than sixty vacancies on the federal bench. Linda Greenhouse, *Chief Justice Calls for Higher Salaries and More Judges*, N.Y. Times, Jan. 2, 2003, at A15.

<sup>29</sup> See *Crime in the Streets: Must It Produce Congestion in the District Courts?*, in *Proceedings of the Fifty-Second Judicial Conference of the District of Columbia Circuit*, 140 F.R.D. 481, 589, 590-92 (1992) (stating that federal mandatory minimums led to reduction in plea bargains and increase in number of drug trials, which have crowded courts “to the point that the civil calendar is not given any attention”).

<sup>30</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986).

<sup>31</sup> See Robert D. Raven, *Keep Federal Courts Out of War on Crime*, *Legal Times*, Aug. 10, 1992, at 24.

drug cases into the federal courts.<sup>32</sup> Not surprisingly, between 1980 and 1992, federal court drug filings increased by 280%.<sup>33</sup>

Second, accompanying the federalization of state crimes have been procedural regulations to expedite the processing of criminal cases. The promulgation of Federal Rule of Criminal Procedure 50(b) in 1972 and the passage of the Speedy Trial Act of 1974,<sup>34</sup> both delay-reduction initiatives, gave docket priority to criminal cases.<sup>35</sup> Forced to process an increasing number of criminal cases within strict time periods, resource-shy federal courts must delay their civil dockets. A report from the Judicial Conference of the United States Criminal Law Committee warned: "Federal courts do not have the resources to deal with the anticipated massive increase in cases. . . . Indeed, the resources available in the state courts dwarf those of their federal counterparts."<sup>36</sup>

Third, the passage of the Violent Crime Control and Law Enforcement Act of 1994<sup>37</sup> may further exacerbate this problem, as crimes involving domestic abuse, sexual violence, and the use of a firearm have now become federal offenses.<sup>38</sup> Yet to be felt is the

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<sup>32</sup> See, e.g., *Is U.S. Justice System in a State of Crisis?*, Nat'l L.J., Aug. 2, 1993, at 23 (quoting prominent lawyers who maintain that federalization of traditionally state criminal cases burdens dockets of federal courts). See generally Stuart Taylor, Jr., *A Quiet Crisis in the Courts*, Legal Times, Jan. 20, 1992, at 23 ("The courts have been deluged by criminal trials and appeals, in large part because harsh penalties have increased defendants' incentives to go to trial rather than plead guilty. The new sentencing process is so complex and hypertechical that it takes judges roughly 25 percent more time than before.").

Also, the Sentencing Reform Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1837, eliminated traditional sentencing by judicial discretion and instituted sentencing guidelines with strict minimum sentences for all federal criminal trials. This Act also has increased the workload of the federal courts, since prosecutors have less discretion with plea bargaining and defendants face the same sentence whether or not they go to trial. As a result, a five-percent drop in guilty pleas has caused a thirty-three percent increase in new federal criminal trials. See Raven, *supra* note 31, at 24.

<sup>33</sup> Raven, *supra* note 31, at 24.

<sup>34</sup> Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. §§ 3152-3156, 3161-3174 (2000)).

<sup>35</sup> Criminal Rule 50(b) requires each district court to set time limits for pretrial procedures, the trial itself, and sentencing. Likewise, the Speedy Trial Act requires that all federal criminal cases be disposed of in no more than one hundred days from the date of arrest. 18 U.S.C. § 3161; see also Joel H. Garner, *Delay Reduction in the Federal Courts: Rule 50(b) and the Federal Speedy Trial Act of 1974*, 3 J. Quantitative Criminology 229, 231-33 (1987).

<sup>36</sup> John F. Rooney, *Federal Judges Launch New Salvo at Crime Bill*, Chi. Daily L. Bull., Mar. 14, 1994, at 1 (quoting paper written by Criminal Law Committee of Judicial Conference of the United States).

<sup>37</sup> Pub. L. No. 103-322, 108 Stat. 1796.

<sup>38</sup> See generally William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 Rutgers L. Rev. 1139 (1996) (focusing on civil cause of action created by Subtitle C of Violence Against Women Act, known as Civil Rights Remedies for Gender-Motivated

effect of the extraordinarily complex anti-terrorism legislation that followed the September 11, 2001 tragedy and the equally swift congressional reaction to the collapse of Enron, WorldCom, and other corporate entities.<sup>39</sup>

In addition, the creation of numerous legal rights and remedies by Congress, state legislatures, and the courts from the 1950s to the 1970s increased the attractiveness of law as a profession and promoted greater public awareness of legal rights. In 1990, the Federal Courts Study Committee noted that 195 federal substantive statutes had been enacted in the preceding four decades,<sup>40</sup> and that all of them impacted the workload of the federal courts.<sup>41</sup> These phenomena coupled with heightened media attention to the law—both as news and as entertainment—certainly may have contributed to the sense of a “litigation explosion.”

It should be noted that these developments have little—and in some cases nothing—to do with the supposed litigiousness of Americans or their propensity to institute sham or frivolous litigation, factors so often pointed to by “reform” advocates. Moreover, in spite of these phenomena, there is contrary evidence indicating that the claims of the alleged “litigation explosion” are exaggerated; indeed, that evidence casts doubt on the very existence of a significant increase.<sup>42</sup> Considerable research shows that any trend towards litiga-

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Violence Act, contending that Act attempts to federalize crimes better managed by states and thus is needless drain on federal resources, and discussing why issues of gender-motivated and domestic violence are better handled by states with aid of federal funding).

<sup>39</sup> See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>40</sup> See, e.g., Miller, *supra* note 26, at 11 (“[T]he growing phenomenon of court-awarded attorneys’ fees under approximately one hundred federal statutes . . . offers a sweetener . . . and one begins to recognize that there is a substantial economic incentive to litigate . . .”).

<sup>41</sup> See *id.* at 5-8 (discussing creation of new statutory rights of action and resultant increase in number of federal actions).

<sup>42</sup> For example, the same RAND Institute for Civil Justice study that showed a marked increase in litigation over the years also indicated that the district courts as a whole did not suffer from a problem of increasing delay, although it was careful to point out that considerable interdistrict variation existed. Terence Dungworth & Nicholas M. Pace, RAND Inst. for Civil Justice, *Statistical Overview of Civil Litigation in the Federal Courts 74-75* (1990); see also 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, 501 (2002) (discussing changes in judicial attitudes toward summary judgment). See generally Galanter, *supra* note 13, at 717-20 (noting that socioeconomic elites bear greatest animus toward litigation); Marc Galanter, *The Day After the Litigation Explosion*, 46 *Md. L. Rev.* 3 (1986) [hereinafter Galanter, *The Day After*] (critically examining assumptions that Americans are overly litigious and that caseloads are skyrocketing); 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) [hereinafter Galanter, *Reading the Landscape*] (proposing “contextual” reading of litigation trends as alternative to “litigation explosion” view); Patrick Johnston,

tion growth has been stabilizing if not reversing.<sup>43</sup> The National Center for State Courts, for example, found that overall tort filings were stable from 1985 to 2000, and actually declined from 1991 to 2000.<sup>44</sup> Furthermore, although the overall U.S. litigation rate has increased since the 1950s, it is not higher than it has been during other periods of American history,<sup>45</sup> and, per capita, is in the same range as

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Civil Justice Reform: Juggling Between Politics and Perfection, 62 *Fordham L. Rev.* 833 (1994) (criticizing as misplaced focus that reform advocates place on amount of time it takes to resolve dispute); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *Stan. L. Rev.* 1393 (1994) (tracing development of common perception of "litigation explosion" and widespread discovery abuses and illustrating lack of evidence behind these perceptions); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *U. Pa. L. Rev.* 1147 (1992) (reviewing empirical literature on tort litigation and illustrating disconnect between perception and reality); Sarat, *supra* note 5, at 319 (discussing empirical data contradicting litigation explosion hypothesis).

<sup>43</sup> See, e.g., Weiler, *supra* note 19, at 2 (explaining that ratio of malpractice claims filed declined from high of seventeen per one hundred doctors in mid-1980s to approximately thirteen per one hundred at end of 1980s); Galanter, *The Day After*, *supra* note 42, at 6 (stating that per capita rates of civil cases filings actually declined from 1981 to 1984), 27 (noting that median time from filing to disposition of all federal civil cases, including those disposed of before trial, actually declined from nine months in 1975 to seven months in 1984); Order in the Tort, *Economist*, Jul. 18, 1992, at 11 (stating that products liability suits declined by thirty-six percent between 1985 and 1992 not counting asbestos cases). Leshne, *supra* note 15, at 33-34, cites further evidence casting doubt on the litigation explosion. She quotes findings in a study by Brian J. Ostrom and Neal B. Kauder, *Nat'l Ctr. for State Courts, Examining the Work of State Courts, 1996: A National Perspective From the Court Statistics Project* (Brian J. Ostrom & Neal B. Kauder eds., 1997), as showing no evidence that the number of tort cases is increasing, and that in effect civil filings grew more slowly (growth of thirty-one percent) than criminal (forty-one percent), juvenile (sixty-four percent), or domestic relations (seventy-four percent) filings. Leshne, *supra* note 15, at 34. Leshne cites the same study as showing there has been no medical malpractice or products liability explosion. *Id.* She adds that the real culprit is business litigation, with contract disputes comprising the single largest category of lawsuits filed in the federal courts. *Id.* (citing Milo Geyelin, *Suits by Firms Exceed Those by Individuals*, *Wall St. J.*, Dec. 3, 1993, at B1). Leshne also attacks other assertions made by proponents of "self-appointed industry tort 'reformers.'" *Id.* at 32. Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 *Ariz. L. Rev.* 781, 817 n.99 (1998), notes that civil litigation growth in the federal courts during the 1980s and 1990s has been only about one-third as fast as it was during the 1960s and 1970s. Federal court diversity litigation declined by fifteen percent between 1990 and 2000. See Office of the U.S. Courts, *Judicial Business of the United States Courts tbl.C-2* (2000).

<sup>44</sup> Brian J. Ostrom, Neal B. Kauder & Robert C. LaFountain, *Nat'l Ctr. for State Courts, Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project 26* (2001) (examining statistics from thirty states representing seventy-two percent of U.S. population); see also *Nat'l Ctr. for State Courts, State Court Caseload Statistics: Annual Report 1992*, at 16-17 (1994). A Massachusetts report in 2000 found that civil filings in the Commonwealth's general trial court, the Superior Court, had declined in each of the preceding five years. *Annual Report on the State of the Massachusetts Court System: Fiscal Year 2000*, at 160 (2001).

<sup>45</sup> Galanter, *The Day After*, *supra* note 42, at 3, 5 (asserting that studies demonstrate that per capita rates of civil litigation were higher in nineteenth and early twentieth centu-

other industrialized countries' rates.<sup>46</sup> Finally, statistics that purport to show the frequency of litigation often are inflated by the inclusion of cases that reflect broader and deeper social changes—most notably matrimonial matters—rather than an increased propensity to sue.<sup>47</sup>

Similar analysis specifically focused on the workload of the federal courts reveals that the magnitude of litigation and its motivation are overstated. Professor Marc Galanter, a prominent critic of "tort reform" efforts and the accompanying rhetoric, argues that of the five categories of federal court cases showing the greatest increase, three—recovery of federal overpayments, social security cases, and prisoner petitions—cannot be said to evince a greater tendency towards litigiousness on the part of Americans.<sup>48</sup> Within the tort field, much of the increase in claims filed in recent years can be attributed to a growth in certain types of products liability litigation,<sup>49</sup> especially involving particular products, such as asbestos.<sup>50</sup>

Finally, although some evidence indicates that the volume of litigation has increased, there is little demonstrating that the proportion

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ries); see also Molly Selvin & Patricia A. Ebner, RAND Inst. for Civil Justice, *Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court 28-34* (1984).

<sup>46</sup> Although many countries do have lower rates of litigation, Canada, Australia, New Zealand, England, Denmark, and Israel have per capita litigation rates in the same range as the United States. Galanter, *The Day After*, supra note 42, at 7; see also Galanter, *Reading the Landscape*, supra note 42, at 55-58 (observing that U.S. litigation rates are "in the same range as England, Ontario, Australia, Denmark, New Zealand, somewhat higher than Germany or Sweden, and far higher than Japan, Spain or Italy" and rejecting idea that higher or lower litigation rates necessarily relate to "contentiousness" in culture and pointing out that Italy, hardly noted for lack of contentiousness, may have lower litigation rate than Japan, which is often cited as nation that favors conciliatory dispute resolution); Alschuler, supra note 8, at 1817-18 (citing Galanter as support for assertion that Americans have not rushed into court in unusual numbers; asserting that "crisis in our courts that observers decry may be the product of an inadequate supply of adjudication rather than of the excessive litigiousness of our society"); Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 *Md. L. Rev.* 274, 279 (1986) (observing that U.S. litigation rates are comparable with other industrialized countries and asserting danger of relying merely on filing rates to measure litigiousness).

<sup>47</sup> The National Center for State Courts estimates that of the 19.6 million civil cases filed in state courts in 1992, domestic relations, small claims, and estate cases accounted for over one-half of the total. See *Nat'l Ctr. for State Courts*, supra note 44. Domestic relations cases, in fact, have increased substantially over the years, accounting for a large part of the increase in civil case filings. See Ostrom, Kauder & LaFountain, supra note 44, at 36-42; see also Galanter, *The Day After*, supra note 42, at 14.

<sup>48</sup> See Galanter, *The Day After*, supra note 42, at 15-17.

<sup>49</sup> See *id.* at 20-21 (observing that almost two-thirds of increase in tort filings in district courts between 1975 and 1984 is result of products liability). It has been argued that many of the figures showing a great number of products cases are inaccurate and the result of misinformation or a lack of information. See Galanter, supra note 5, at 300-01 & nn.83-88.

<sup>50</sup> See Galanter, *The Day After*, supra note 42, at 24-25.

of lawsuits to actionable injuries has grown over the years.<sup>51</sup> According to one scholar who conducted an exhaustive empirical study of tort litigation, the majority of actionable injuries do not give rise to lawsuits, and only “a small fraction of the costs” suffered by the victims are compensated by the injurers.<sup>52</sup> In the controversial field of medical malpractice, one study concluded that of every eight potentially valid claims, only one claim actually was filed, and of these it was estimated that no more than half eventually resulted in the plaintiff receiving compensation.<sup>53</sup> Any increase in litigation frequency, or the perception thereof, merely may reflect phenomena other than a greater propensity of people to resort to the courts.

The statistics suggesting a rise in high jury awards also require closer examination. Aside from occasionally large jury verdicts in medical malpractice and products liability cases, such as tobacco cases, there is little systemic evidence indicating that jury verdicts as a whole are increasing or that jurors have a proplaintiff bias.<sup>54</sup> For example, a RAND Institute of Civil Justice study<sup>55</sup> finding that *mean* jury verdicts increased in Cook County and San Francisco also found that the *median* jury verdict figures, when certain procedural changes in San Francisco were accounted for, actually remained “strikingly stable” over the twenty-five-year period.<sup>56</sup> Moreover, jury awards considered excessively high often are reduced by the court or by the parties themselves by way of settlement, or are reversed altogether on appeal.<sup>57</sup>

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<sup>51</sup> See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 *Cornell L. Rev.* 119, 135 (2002) (asserting that very few grievances ripen into claims).

<sup>52</sup> Saks, *supra* note 42, at 1287. The major exception to this is automobile accidents. See *id.* at 1274. A significant underassertion of actionable claims can produce less than optimal deterrence and create disincentives to undertaking precautions against risks. If true, a shortfall in the litigation needed to optimize deterrence may be undesirable for society in general and individuals in particular. See generally David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 *Harv. L. Rev.* 831 (2002); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *Tex. L. Rev.* 1801 (1997).

<sup>53</sup> Weiler, *supra* note 19, at 13.

<sup>54</sup> See Daniels & Martin, *supra* note 20, at 325. Daniels and Martin conclude that “[t]he data on jury verdicts . . . do not provide evidence for the characterization of the current insurance crisis presented by the reformers.” *Id.* at 347. Over a five-year period, they found no upward increase in the success rate of plaintiffs, evidence that would have tended to refute the assertion that juries are becoming more proplaintiff. *Id.* at 344-45. A recent study concluded that plaintiffs in products liability and medical malpractice cases prevailed at a much higher rate before judges (forty-eight percent) than juries (twenty-eight percent). Clermont & Eisenberg, *supra* note 51, at 145. The authors offer several possible explanations. See *id.* at 145-47.

<sup>55</sup> Hensler, Vaiana, Kakalik & Peterson, *supra* note 17.

<sup>56</sup> *Id.* at 15-16.

<sup>57</sup> For example, the RAND Institute for Civil Justice study found that courts reduced jury awards of over one million dollars by an average of forty percent. *Id.* at 22. And as

The foregoing shows that the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition. Thus, one should be cautious and refrain from trumpeting conclusions on the subject lest it distract us from serious inquiry.<sup>58</sup>

Yet despite the lack of a solid foundation for it, the perception of a "litigation explosion" or "liability crisis" drives the "reform" movement. A 1986 poll of adult Americans found that the majority disagreed with the statement: "The [civil justice] system provides timely resolutions of disputes without major delays." Nearly one-half of those surveyed felt that fundamental changes were necessary.<sup>59</sup> A 1988 poll of lawyers found that, with the exception of district court judges, a majority felt that time delay was the biggest problem with the current litigation system, and that delays had increased "greatly" or "somewhat" in the preceding ten years.<sup>60</sup> These perceptions of the nation being awash in litigation and excessive verdicts undoubtedly are formed, at least in part, by the media's fixation with large jury awards and its underreporting of defense verdicts.<sup>61</sup>

### *B. Procedural "Reform" as a Response to the "Litigation Explosion"*

Seeking to ease the burdens of litigation, critics of the "litigation explosion" advocate both procedural and substantive transforma-

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one example, the highly publicized \$2.7 million punitive damages verdict in the McDonald's coffee case was reduced by the judge. See Brady, *supra* note 15, at 382.

<sup>58</sup> See Dungworth & Pace, *supra* note 42, at 1 ("[S]ystematic empirical analysis of the effect of rising caseloads on the activities of the courts has been lacking."); Stephen B. Burbank, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1468 (1987) ("The rhetorical tendency of the 'litigation explosion' story is to deflect attention from values other than efficient administration in the effort to end the 'crisis,' dam the 'flood,' or stem the 'avalanche.'"); Saks, *supra* note 42, at 1288 ("[O]ur society has been unable to produce research that is even minimally adequate to answer our most basic questions about the behavior of the civil justice system.").

<sup>59</sup> Johnston, *supra* note 42, at 863-64. The poll referred to was conducted by Louis Harris & Associates for Aetna Life & Casualty, and was based on interviews with approximately 2000 adult Americans. However, Johnston feels that the study's indications of popular discontent have been overstated: "The Harris/Aetna survey may strongly support the conclusion that Americans want a 'better version' of the civil justice system. However, it seems an extreme characterization of the poll results to say that the survey demonstrates broad support for a revolutionary program of delay reduction." *Id.* at 863-65 (citations omitted).

<sup>60</sup> *Id.* at 866-67. This poll was conducted by Louis Harris & Associates for the Foundation for Change. The survey sample consisted of 250 private plaintiff attorneys, 250 defense attorneys, 200 public interest litigators, 300 corporate general counsel, and 147 district court judges. Again, the author questions the significance of the findings. See *id.* at 868.

<sup>61</sup> See, e.g., Galanter, *supra* note 5, at 300-02.

tions.<sup>62</sup> These changes aim to promote active judicial case management, to streamline and limit the discovery process, and to encourage nonjury—indeed, nonjudicial—methods of dispute resolution. Given the direct link between the length of court dockets and how procedural rules are employed and applied, judges and politicians who are mindful of public perceptions naturally have tended to favor quicker and less resource-intensive dispute resolution techniques.

The use of procedural change to promote efficiency—and deter litigation—received considerable executive branch attention during the administration of the first President Bush. The since-disbanded Council on Competitiveness released a set of fifty recommendations, several of which were endorsed in Executive Order 12,778<sup>63</sup> and essentially had the effect of creating statutory requirements for government lawyers. Although the Clinton administration rejected the Council's policy agenda,<sup>64</sup> it continued White House involvement in the effort to make the federal courts efficient. President Clinton's Executive Order 12,988, like his predecessor's, sought to encourage the use of Alternative Dispute Resolution (ADR) as a means of controlling litigation costs<sup>65</sup> and continued forwarding the policies begun under Executive Order 12,778.<sup>66</sup>

Although Executive Order 12,988 directed the government's lawyers to "make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control,"<sup>67</sup> it lacked the restrictions on expert witnesses and "junk science" that defined the discovery provisions of Executive Order 12,778. President Clinton's order also modified the Bush administration's policy on

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<sup>62</sup> Olson, *supra* note 8, for example, proposed several procedural changes, most prominently the adoption of a fee-shifting system based on the English model, to combat the supposed litigation problem. See generally James W. Smith, *The Litigation Explosion*, 24 Boston B.J., Dec. 1980, at 5, for a discussion of various proposals for procedural change to reduce cost and delay.

<sup>63</sup> 3 C.F.R. 359 (1991), reprinted in 28 U.S.C. § 519 (1994). The Clinton administration revoked Executive Order 12,778 in Executive Order 12,988, 3 C.F.R. 157, 163 (1997). See *infra* notes 64-68 and accompanying text.

<sup>64</sup> See *Democrats Begin Anew on Civil Justice Reform*, 3 No. 16 DOJ Alert 4, Dec. 6, 1993, WL 3 No. 16 DOJALT 4.

<sup>65</sup> 3 C.F.R. 157; see also Executive Order Recommends Litigation Alternatives, 10 No. 5 Inside Litig. 6 (1996), WL 10 No. 5 INLIT 6.

<sup>66</sup> The Bush administration's order included several controversial Council proposals, including a requirement of a precomplaint notice of a party's intent to sue, mandatory use of Alternative Dispute Resolution (ADR) techniques in certain circumstances, limitations on punitive damages, increased restrictions on expert witnesses to ensure that their testimony is based on "widely accepted theories" rather than "junk science," and stronger sanctions against attorneys who file frivolous lawsuits. See Exec. Order No. 12,778, 3 C.F.R. 359.

<sup>67</sup> 61 Fed. Reg. 4729, at §1(d) (Feb. 5, 1996).

attorney sanctions, stressing conciliation between attorneys prior to seeking sanctions rather than their increased use.<sup>68</sup> Even though the Clinton administration dropped many of the Council's more controversial proposals, its order did not reject the views of those calling for an end to the "litigation explosion." The order remains in effect; the current administration has not issued any executive order dealing with civil justice.

Congress also has been a significant presence in the quest for reform: In 1990, concerned about civil litigation abuse—particularly during discovery—increasing costs and delay, and overexpansive access to the federal courts,<sup>69</sup> Congress passed the Civil Justice Reform Act (CJRA).<sup>70</sup> The CJRA required that every federal district court promulgate a civil justice expense and delay reduction plan to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."<sup>71</sup> The statute also emphasized the importance of early involvement by a judicial officer in planning a case's progress and controlling discovery. Finally, the CJRA required each district court to conduct an annual docket assessment and to determine the effect its plan had on reducing cost and delay.

Although the plans issued by the ninety-four districts<sup>72</sup> shared many basic features, there was a large variation in the specific procedures that different districts adopted.<sup>73</sup> They typically provided for differentiated case management,<sup>74</sup> including in many instances a sepa-

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<sup>68</sup> *Id.* at §1(e). The order was supplemented three times, by Executive Order 13,083, 63 Fed. Reg. 27,651 (May 14, 1998) (suspended by Exec. Order 13,095, 63 Fed. Reg. 42,565 (Aug. 5, 1998)), Executive Order 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) (revoked by Exec. Order 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000)), and Executive Order 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999), in ways not relevant to this Article.

<sup>69</sup> See Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 Wash. & Lee L. Rev. 89, 90 (1993); see also ABA Litig. Section, *Report of the Task Force on the Civil Justice Reform Act* (1992); Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Delay Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 Rev. Litig. 165, 172-73 (1992).

<sup>70</sup> Pub. L. No. 101-650, §§ 101-106, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-482).

<sup>71</sup> § 103, 104 Stat. 5089 (codified at 28 U.S.C. § 471).

<sup>72</sup> Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 Mont. L. Rev. 235, 235 (1994) (noting that all ninety-four federal district courts had issued civil justice plans).

<sup>73</sup> Edward D. Cavanagh, *Bumps on the Road to Speedier Civil Justice*, *Legal Times*, Jan. 3, 1994, at 22, 22 ("By encouraging local experimentation, the CJRA has already spawned procedures that vary from court to court, thereby further balkanizing federal practice.").

<sup>74</sup> Twenty-six of thirty-four Early Implementation District Courts (EIDCs) adopted some form of differentiated case management. See *Judicial Conference of the U.S., Civil Justice Reform Act Report: Development and Implementation of Plans by Early Imple-*

rate system for tracking various types of cases,<sup>75</sup> limitations on the use and scope of discovery as well as mandatory disclosure requirements,<sup>76</sup> greater use of ADR programs and settlement assistance,<sup>77</sup> and stricter enforcement of motion deadlines.<sup>78</sup> The CJRA no longer is in effect, having been sunset in 1997, and it is impossible to say what long-term effects the work product and experience it generated will have on federal civil litigation.<sup>79</sup>

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mentation Districts and Pilot Courts 10 (Jun. 1, 1992) [hereinafter CJRA Report]. See, e.g., U.S. Dist. Court for the Dist. of Mass., Expense and Delay Reduction Plan (Nov. 18, 1991), summarized in Rauma & Stienstra, Fed. Judicial Ctr., *The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook* 83 tbl.4 (1995); U.S. Dist. Court for the Dist. of S.C., Expense and Delay Reduction Plan (Nov. 24, 1993) [hereinafter South Carolina Plan], summarized in Rauma & Stienstra, *supra*, at 83 tbl.4.

<sup>75</sup> Cases typically were tracked according to their nature, complexity, and/or individual characteristics. See, e.g., U.S. Dist. Court for the E. Dist. of Tex., Expense and Delay Reduction Plan (Dec. 31, 1991), as amended by Gen. Order 92-28 [hereinafter Texas Plan], summarized in Rauma & Stienstra, *supra* note 74, at 83 tbl.4 (proposing six tracks for cases involving different levels of discovery).

<sup>76</sup> Twenty-one of thirty-four EIDCs adopted mandatory disclosure requirements for certain kinds of information, and many required that discovery plans be formulated in advance. CJRA Report, *supra* note 74, at 12; see, e.g., South Carolina Plan, *supra* note 74, in Rauma & Stienstra, *supra* note 74, at tbl.5 (expanding information subject to automatic disclosure and authorizing judges to order further disclosure of basic information); Texas Plan, *supra* note 75, in Rauma & Stienstra, *supra* note 74, at 105 tbl.5 (adopting automatic disclosure requirements similar to those adopted in 1993 amendments to Federal Rules, setting time limits for responses, and creating duty to supplement information given); see also William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 *Tex. Tech L. Rev.* 261, 261-303 (1994) (critiquing discovery reforms effected in Texas under CJRA and Federal Rules). In effect, the CJRA added a layer of procedural structure to federal civil practice and can be criticized for that and for promoting increased procedural diffusion.

<sup>77</sup> For example, the "great majority" of the thirty-four EIDCs implemented one or two ADR procedures, and "nearly all" offered some form of settlement assistance. CJRA Report, *supra* note 74, at 7.

<sup>78</sup> See, e.g., South Carolina Plan, *supra* note 74, in Rauma & Stienstra, *supra* note 74, at 179 tbl.7; Texas Plan, *supra* note 75, in Rauma & Stienstra, *supra* note 74, at 179 tbl.7.

<sup>79</sup> For an evaluation of the Act's effect, see generally *Costs of Asbestos Litigation*, *supra* note 10; Judicial Conference of the U.S., *The Civil Justice Reform Act of 1990: Final Report*, 175 *F.R.D.* 62 (1997). The report concluded that the Act had indeed spurred efforts by the judiciary to improve efficiency and case management, as much in response to its implicit policies as to its explicit directives. See *id.* at 66. However, the Judicial Conference acknowledged the importance of assuring that justice not be sacrificed in the name of speed. See *id.* at 72.

The Act attempted to encourage judges to carry out its objectives by requiring the Director of the Administrative Office of the United States Courts to prepare a semiannual report that disclosed the number of bench trials each judge had pending for more than six months and the number of cases not terminated within three years of their filing date. *Id.* at 78 (citing 28 U.S.C. § 476 (2000)). Thus, Congress was responding to the perception of a litigation crisis by proposing legislation that not only encouraged speedy disposition, but also sought to exert pressure on those judges whose semiannual reports suggested that they allowed actions to linger in the system.

Another example of legislative activity was the Common Sense Legal Reforms Act of 1995,<sup>80</sup> which originated as one of the ten major pieces of legislation the Republican Party promised to pursue in the 104th Congress as part of its "Contract with America" campaign pledge.<sup>81</sup> The proposal mandated restrictions on punitive damages in products liability cases, limited them to the greater of three times the actual damages or \$250,000, and made them several, rather than joint.<sup>82</sup> The bill also called for attorney's fees to be awarded to the prevailing party in federal diversity litigation.<sup>83</sup> The Republican Congress was unable to pass the entire proposal, but two major portions were severed and passed individually. The first was repackaged as the Common Sense Product Liability Legal Reform Act of 1996,<sup>84</sup> which also limited punitive damages in the products field on the theory that products cases are the paradigm of "frivolous litigation" feeding the "litigation explosion,"<sup>85</sup> a perception that clearly was motivating Congress. President Clinton vetoed this legislation, declaring that it would "mean more unsafe products in our homes" and "would let wrongdoers off the hook."<sup>86</sup>

In 1995, Congress passed the second piece of legislation, the Private Securities Litigation Reform Act of 1995 (PSLRA),<sup>87</sup> over President Clinton's veto. The law, a compromise between the House and the Senate,<sup>88</sup> affords forward-looking corporate projections accompanied by "meaningful cautionary statements" a "safe harbor," and also

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<sup>80</sup> H.R. 10, 104th Cong. (1995).

<sup>81</sup> The "Contract with America" was signed by 345 Republican candidates before the 1994 congressional elections. See Editorial, *The Coming Attack*, *Indianapolis Star*, Nov. 22, 1994, at A8. Among the ten promises for legislative action was a pledge to enact "common sense legal reform" including "reasonable limits on punitive damages." *Id.*; see also *Republican Contract With America*, at <http://www.house.gov/house/Contract/CONTRACT.html> (last visited May 20, 2003).

<sup>82</sup> H.R. 10, §§ 103(c), (d).

<sup>83</sup> H.R. 10, § 101(a).

<sup>84</sup> H.R. 956, 104th Cong. (1996).

<sup>85</sup> See Max Boot, *Rule of Law: Stop Appeasing the Class Action Monster*, *Wall St. J.*, May 8, 1996, at A15 (opining that "the opportunity for windfall fees" in products liability cases leads lawyers to "dream up ever-more imaginative claims"); Maggie Gallagher, *Junk Science and Scare Stories*, *St. Louis Post-Dispatch*, Jan. 2, 1997, at 7B (criticizing trial lawyers pressing breast implant claims); Jennifer Washburn, *Bill Hogties Tort Limits*, *Plain Dealer (Cleveland)*, Apr. 2, 1996, at 9B (arguing that bill's supporters present no evidence of litigation explosion).

<sup>86</sup> James Cahoy, *Tort Reform Legislation Since 1994*, *West's Legal News*, Dec. 6, 1996, 1996 WL 699299.

<sup>87</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77-78 (2000), 18 U.S.C. § 1964(c) (2000)).

<sup>88</sup> See Stephen M. Muniz, Note, *The Private Securities Litigation Reform Act of 1995: Protecting Corporations From Investors, Protecting Investors From Corporations, and Promoting Market Efficiency*, 31 *New Eng. L. Rev.* 655, 692 (1997).

extends protection to forward-looking projections not accompanied by cautionary statements unless the defendant had actual knowledge that the projections were false or misleading.<sup>89</sup> Congress specifically intended the PSLRA to encourage the summary disposition of meritless claims by imposing substantially heightened pleading requirements and restraining discovery until the motions to dismiss are decided.<sup>90</sup> Some commentators felt the PSLRA would have little effect even on frivolous lawsuits;<sup>91</sup> others asserted that Congress had gone too far and weakened private enforcement of the securities laws.<sup>92</sup> The PSLRA has resulted in significant changes in securities

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<sup>89</sup> *Id.* at 692-93. The Act provides defendants a defense to claims based on statements about the future that may well be vague, misleading, or inaccurate.

<sup>90</sup> *Id.* at 702; see also Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1301.1 (3d ed., to be published early 2004); *infra* text accompanying notes 160-63.

<sup>91</sup> See, e.g., Julia C. Kou, *Closing the Loophole in the Private Securities Litigation Reform Act of 1995*, 73 N.Y.U. L. Rev. 253, 256-57 (1995) (observing that securities litigation has simply moved to state courts); Thomas W. Antonucci, *Comment, The Private Securities Litigation Reform Act and the States: Who Will Decide the Future of Securities Litigation?*, 46 Emory L.J. 1237, 1238-41 (1997) (arguing that although Act has succeeded in decreasing numbers of federal securities lawsuits, it has done so at cost of shifting them to states). Congress has now responded to concerns about forum shopping with the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. §§ 77-78 (2000)), effectively requiring securities litigation to be brought in the federal courts. § 2(5), 112 Stat. at 3227.

<sup>92</sup> See Patrick J. Coughlin, *The Private Securities Litigation Reform Act of 1995—30 Months Later: Securities Class Action Litigation Under the Private Securities Litigation Reform Act 9* (PLI Corp. L. & Prac. Course Handbook Series No. 1070, 1998).

The resulting changes were a bonanza for public companies and their insiders, investment bankers and financial accounting firms, i.e., the normal defendants in securities cases. Higher pleading standards, automatic discovery stays, a “safe harbor” (that arguably permits corporate executives to lie about future results even while insiders are trading), damage limitations, elimination of joint and several liability for reckless conduct and—for good measure—a mandatory sanction review procedure upon termination of every case, that threatens plaintiff’s counsel with 100 percent of defendants’ fees in every case lost on dismissal or summary judgment. Basically, the New Act amounted to a defense lawyer’s ‘wish list’ of new tools and tactics to delay and defeat securities fraud claims and harass and intimidate plaintiffs’ counsel.

*Id.* at 12; see also William S. Lerach, *The Private Securities Litigation Reform Act of 1995—27 Months Later: Securities Class Action Litigation Under the Private Securities Litigation Reform Act’s Brave New World*, 76 Wash. U. L.Q. 597, 644 (1998) (positing that although it is necessary to wait for judicial interpretation before making predictions as to Act’s effect, if courts accept interpretations of it being urged by defendants, “the resulting gutting of the federal securities laws will, when combined with the effect of the elimination of any alternative forum for class actions in the state courts, have disastrous consequences for our nation’s investors and perhaps, ultimately, on its capital markets”); Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 959, 962 (1996) (noting that impact of Act remains to be seen, but arguing that it was based in first place on erroneous data).

litigation practice, but it has not reduced the number of cases instituted.<sup>93</sup>

On November 2, 2002, the Multiparty, Multiforum Trial Jurisdiction Act<sup>94</sup> became law. It gives the district courts original jurisdiction based on minimal diversity of citizenship in actions involving single-event accidents in which at least seventy-five people die at what the statute terms “a discrete location.”<sup>95</sup> The Act does not apply when a “substantial majority of all plaintiffs” are citizens of a single state of which the primary defendants are also citizens and the claims asserted will be governed primarily by the laws of that state.<sup>96</sup> A second provision in the Act creates corresponding federal removal jurisdiction.<sup>97</sup>

In addition, the House of Representatives passed in the last session the Class Action Fairness Act of 2002,<sup>98</sup> although the corresponding Senate measure was never voted upon. Similar bills have been introduced in this term in both the House<sup>99</sup> and the Senate,<sup>100</sup> with the Senate bill having already received a favorable vote in the Senate Judiciary Committee.<sup>101</sup> The proposed legislation would amend diversity of citizenship jurisdiction by creating a minimal diversity standard for instituting class actions in the federal courts substantially. Original federal jurisdiction would be proper for any class action in which: (1) the aggregated claims of individual class members exceed two million dollars and (2) any member of a plaintiff class is a

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<sup>93</sup> See Mukesh Bajaj, Sumon C. Mazumdar & Atulya Sarin, *Securities Class Action Settlements: An Empirical Analysis*, Nov. 16, 2000, available at [http://securities.stanford.edu/research/studies/20001116\\_SSRN\\_Bajaj.pdf](http://securities.stanford.edu/research/studies/20001116_SSRN_Bajaj.pdf) (finding that although number of federal securities filings dropped immediately following passage of Private Securities Litigation Reform Act (PSLRA), that trend reversed itself by 1998); Sharp Increase in Securities Litigation Raises Questions About Reform Act, 7 No. 19 *Andrews Sec. Litig. & Reg. Rep.* 12 (2002) (“The data indicate that there has been no material decrease in the volume of [securities] litigation activity since the passage of the [PSLRA].” (quoting Professor Joseph Grundfest)), WL 7 No. 19 ANSLRR 12.

<sup>94</sup> Pub. L. No. 107-273, 116 Stat. 1826, § 11020 (2002) (codified as amended at 28 U.S.C. §§ 1369, 1391, 1441, 1697, 1785 (2000)). The Act, which first appeared as H.R. 860, 107th Cong. (1991), was part of an appropriations bill and drew very little attention.

<sup>95</sup> The core of the Act appears in 28 U.S.C. § 1369. Subdivision (a) contains certain other restrictions on the statute’s applicability.

<sup>96</sup> See § 1369(b).

<sup>97</sup> This is accomplished by the insertion of a new subdivision (e) in § 1441.

<sup>98</sup> H.R. 2341, 107th Cong. (2002). A related earlier proposal that passed the House, H.R. 860, would have amended several sections of the Judicial Code and added a new section, § 1369, to create jurisdiction in multiparty, multiforum cases.

<sup>99</sup> H.R. 1115, 108th Cong. (2003).

<sup>100</sup> S. 274, 108th Cong. (2003).

<sup>101</sup> Keith Perine, *Class Action Lawsuit Measure Advances amid Heavy Lobbying, Concern over State Law*, 2003 CQ Wkly. 882, 882.

citizen of a state different from any defendant.<sup>102</sup> The Act also would provide for removal of most state-court-initiated class actions when any member of the plaintiff class is a citizen of a state different from any defendant.<sup>103</sup> As commentators have noted, the proposal would result in the removal of virtually every mass tort class action, effectively eliminating a wide range of state class actions.<sup>104</sup> Far from easing the burden on federal courts, the legislation inevitably would lead to an increased number of complex cases being lodged in those courts.<sup>105</sup> Since the Republicans gained control of both houses of Congress in November 2002, the chances of the Class Action Fairness Act as well as other “reform” legislation being enacted during the Bush presidency have increased markedly,<sup>106</sup> as evidenced by the favorable vote on the Act by the Senate Judiciary Committee.<sup>107</sup>

The explicit use of procedural modifications to promote efficiency values undoubtedly influences the way judges use their discretionary powers, reorients civil litigation objectives, and inevitably affects other systemic values. As one commentator noted after examining the practices emerging from the district courts: “One could fairly conclude that factfinding by trial . . . is not a central topic”<sup>108</sup> on the agenda of would-be reformers of the contemporary justice system. A cynic might say, therefore, that “getting it right” no longer is near the top of the priority list; indeed, it may rank well below “getting it over with.”

### *C. Trends Relating to the Federal Rules of Civil Procedure*

#### *1. Case Management*

Federal district judges began utilizing management techniques on an ad hoc basis in the years following the Second World War. These

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<sup>102</sup> H.R. 1115, § 4 (proposed amendment § 1332(d)(2)); S. 274, § 4 (same). The Act also would implement a number of regulations pertaining to proposed settlements. H.R. 1115, § 3 (proposed amendments §§ 1711-1715); S. 274, § 3 (same).

<sup>103</sup> H.R. 1115, § 5 (proposed amendment § 1453); S. 274, § 5 (same).

<sup>104</sup> See, e.g., John Conyers, Jr., Howard L. Berman, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila J. Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt & Tammy Baldwin, *Dissenting Views to H.R. 2341, “The Class Action Fairness Act of 2001”* (2001), available at [http://www.house.gov/judiciary\\_democrats/hr2341dissenting107cong.pdf](http://www.house.gov/judiciary_democrats/hr2341dissenting107cong.pdf).

<sup>105</sup> See *id.*; see also Thomas M. Woods, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. Rev. 507, 522 (2000).

<sup>106</sup> See generally Marcia Coyle, *In Washington, Old Fights Are New Again*, Nat'l L.J., Nov. 18, 2002, at A1; Adam Liptak, *Shot in the Arm for Tort Overhaul*, N.Y. Times, Nov. 17, 2002, § 3, at 1.

<sup>107</sup> See *supra* note 101 and accompanying text.

<sup>108</sup> Judith Resnik, *Finding the Factfinders*, in *Verdict: Assessing the Civil Jury System* 503 (Robert E. Litan ed., 1993).

experimental procedures were organized under the aegis of the Handbook of Recommended Procedure for the Trial of Protracted Cases and then the Manual on Complex Litigation, which first appeared in the 1960s. Their principles were given greater prominence and officially sanctioned in 1983, and then embellished further in 1993 by amendments to Rule 16; prior to these amendments the Rule described a discretionary and rather simple eve-of-trial conference.<sup>109</sup> Given that by the early 1980s only an estimated six percent of cases actually reached trial and the lion's share of resource expenditures occurred pretrial, the Rule was of little help in reducing the institution-to-termination litigation timeframe, let alone achieving any systemic economy.<sup>110</sup> Recognizing that judicial intervention should occur shortly after commencement, Rule 16 was transformed into a provision that encouraged—and in time effectively mandated—judicial management throughout the pretrial proceedings.<sup>111</sup>

The clear purpose of the revised Rule is to maximize efficiency and hasten resolution of the dispute through heightened judicial involvement.<sup>112</sup> The effect, in conjunction with other contemporary changes in practice, has been to transform the presiding judge's role from that of neutral arbiter to case supervisor.<sup>113</sup> The court's power is enhanced by the fact that management often occurs beyond public

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<sup>109</sup> For a more detailed discussion of Rule 16, see Arthur R. Miller, *Fed. Judicial Ctr., The August 1983 amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* 19-36 (Jan. 20, 1984); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* §§ 1521-1531 (2d ed. 1990).

<sup>110</sup> See Miller, *supra* note 109, at 20. Between 1990 and 2000, the number of federal civil trials declined by thirty-seven percent. Office of the U.S. Courts, *Judicial Business of the United States Courts*, tbl.C-4 (2000); Office of the U.S. Courts, *Judicial Business of the United States Courts*, tbl.C-4 (1990); see also Clermont & Eisenberg, *supra* note 51, at 137 (asserting that civil trial has all but disappeared).

<sup>111</sup> See Fed. R. Civ. P. 16(b) (requiring court to issue scheduling order within 120 days of suit being filed, unless local rules permit otherwise); Fed. R. Civ. P. 16(c) (conferring wide discretion on judge to shape course of litigation through use of pretrial conferences, which may include formulating and simplifying issues, eliminating frivolous claims and defenses, and setting limits on discovery and use of evidence).

<sup>112</sup> In particular, Rule 16(a) lists the following as objectives of pretrial conferences: "expediting the disposition of the action;" "establishing early and continuing control so that the case will not be protracted because of lack of management;" "discouraging wasteful pretrial activities;" and "facilitating the settlement of the case." Fed. R. Civ. P. 16(a). Also, the Advisory Committee Note to Rule 16 states that early judicial intervention is conducive to a disposition through settlement that is more efficient, less costly, and less time-consuming. For further discussion of the pretrial process, see Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 *Harv. L. Rev.* 427, 445-63 (1991) (describing increased judicial management at pretrial stage).

<sup>113</sup> But see Humphrey Taylor & Gary L. Schmerund, *Louis Harris & Associates, Inc., Foundation for Change, Inc., Procedural Reform of the Civil Justice System* 30 (1989) for the criticism that judges have failed to discharge their management obligations adequately.

scrutiny, is largely undocumented by written records or formal opinions, and generally escapes appellate review.<sup>114</sup> Ideally, management permits judges to assume greater control, allocate system resources efficiently, and shepherd the litigants along expeditiously.<sup>115</sup> Judicial involvement has obvious implications for the traditional view that ours is an adversary system and that control of civil litigation rests in the hands of the advocates. These appear to be trappings of times past.

However, there is little empirical data to support the assumption that management in fact reduces cost and delay.<sup>116</sup> Effective evaluation is hampered because valid comparisons among districts are difficult in light of differences in caseloads, local rules, and substantive circuit law.<sup>117</sup> In particular, Professor Judith Resnik questions the emphasis on reducing delay in light of other values that the system seeks to preserve. She writes:

[T]he claim that “the more dispositions, the better,” raises difficult valuation tasks; decisionmaking must be assessed not only quantitatively, but also qualitatively. On any given day, are four judges who speak with parties to sixteen lawsuits and report that twelve of those cases ended without trial more “productive” than four judges who preside at four trials?<sup>118</sup>

Elsewhere, she discusses the problems with measuring judicial accomplishment through case disposition, asking at one point: “Is it relevant to an assessment of ‘productivity’ that . . . in the one case tried to conclusion, the judge writes a forty-page opinion on a novel point of law that is subsequently affirmed by the Supreme Court and thereafter affects thousands of litigants?”<sup>119</sup> Professor Resnik’s work thus draws into question both the effect of increased judicial management on overall systemic efficiency and its impact on the social values the civil justice system is supposed to reflect.

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<sup>114</sup> See Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374, 378-80 (1982). Professor Resnik expresses concern over the potential for judges to abuse their discretionary power under a case management regime. *Id.*

<sup>115</sup> See generally Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 *Hastings L.J.* 505 (1984) (critiquing Resnik’s description of managerial judges and arguing that judicial management is beneficial). The revision of Rule 23 scheduled to take effect in December 2003 is designed to give district judges greater control and supervision of class actions.

<sup>116</sup> See, e.g., Resnik, *supra* note 114, at 380; Judith Resnik, *Managerial Judges: The Potential Costs*, 45 *Pub. Admin. Rev.* 686 (1985).

<sup>117</sup> See Resnik, *supra* note 114, at 419-20.

<sup>118</sup> *Id.* at 422.

<sup>119</sup> *Id.*

Regardless of whether case management accomplishes its stated goals, its aggressive use clearly facilitates pretrial disposition.<sup>120</sup> Rule 16 conferences, for example, often clarify what factual or legal issues may be in dispute, thus permitting focused discovery and identification of claims and defenses suitable for summary resolution.<sup>121</sup> In addition, a judge who actively participates throughout the pretrial phase and is familiar with the dispute's facts and theories may be more inclined to believe that having the same evidence presented at trial is unnecessary and to resolve the case on summary judgment.<sup>122</sup>

The text of Rule 16 itself shows a linkage with summary judgment: Rule 16(c)(11) authorizes the court to enter orders concerning "the disposition of pending motions,"<sup>123</sup> and Rule 16(c)(5), as amended in 1993, explicitly refers to "the appropriateness and timing of summary adjudication under Rule 56."<sup>124</sup> Thus, "[a]ll pretrial conferences hold the potential for employing summary judgment."<sup>125</sup> In fact, under Rule 16(c)(1), the district court may dispose of "frivolous" claims in the course of a pretrial conference,<sup>126</sup> which effectively is the equivalent of partial summary judgment.<sup>127</sup> Hence, the interrelationship between the increasing use of case management and the pressures for efficient—and rapid—resolution of litigation promotes the employment of motions to dismiss and summary judgment practice.<sup>128</sup>

A dramatic illustration of the synergistic potential of Rule 16 and Rule 56 is *Jacobson v. Cohen*,<sup>129</sup> a complex, multi-party securities fraud case. The district court issued a pretrial scheduling order *sua sponte*, directing each plaintiff and each defendant with an affirmative

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<sup>120</sup> See Edward Brunet, Martin H. Redish & Michael A. Reiter, *Summary Judgment: Federal Law and Practice* 38 (2d ed. 2000).

<sup>121</sup> See William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 498-99 (1992).

<sup>122</sup> See Alschuler, *supra* note 8, at 1835. The notion that effective management and discovery prepares some cases for early disposition may well have been the design of Professor Sunderland, the chief architect of the relevant Federal Rules. See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 *Tenn. L. Rev.* 737, 753 (1939).

<sup>123</sup> Fed. R. Civ. P. 16(c)(11).

<sup>124</sup> Fed. R. Civ. P. 16(c)(5).

<sup>125</sup> Brunet, Redish & Reiter, *supra* note 120, at 46.

<sup>126</sup> Fed. R. Civ. P. 16(c)(1).

<sup>127</sup> See 6A Wright, Miller & Kane, *supra* note 109, § 1529, at 299-300; see also *Ward v. Oliver*, Nos. 92-3406, 92-3407, 1994 WL 66653, at \*2 (7th Cir. Mar. 4, 1994) ("The elimination of a claim pursuant to Rule 16(c)(1) on the ground that there is no triable issue of fact is tantamount to the grant of summary judgment pursuant to Federal Rule of Civil Procedure 56."); *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375 n.6 (11th Cir. 1983) ("The district court possesses [power to dismiss if no issue of material fact exists] under Rule 16 . . . and need not wait for a party to move for summary judgment.").

<sup>128</sup> See Brunet, Redish & Reiter, *supra* note 120, at 37-38.

<sup>129</sup> 151 F.R.D. 526 (S.D.N.Y. 1993).

defense to produce evidence sufficient to withstand summary judgment and set a timetable as well as guidelines to ensure that the evidence was susceptible to efficient review. The court justified its order in terms of Rules 1<sup>130</sup> and 16, which it said were given “additional impetus”<sup>131</sup> by the Supreme Court’s 1986 summary judgment trilogy. But the question remains: Is this quest for efficiency through management promoting pretrial dispositions at the expense of other values long thought central to the goals of the civil justice system?

## 2. *Other Rules: Sanctions, Pleading Requirements, and Discovery*

Until 1983, Rule 11 was of little significance because it merely provided that an attorney’s signature on a pleading or motion certified that he or she had read the document and that to the best of the signer’s knowledge, information, and belief (judged subjectively), it was supportable and not interposed for delay. In that year, however, the Rule was amended to give the signature requirement content by providing that it certifies that the signer’s knowledge, information, and belief were “formed after reasonable inquiry,” that the pleading or motion 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>132</sup> Thus, the Rule now requires an attorney to engage in additional investigation before signing—to “stop, think and investigate”<sup>133</sup> and ensure that he is knowledgeable of the facts and law prior to “shooting paper arrows in the air.”<sup>134</sup>

The strengthening of Rule 11 created a theoretically significant barrier to entering the judicial system. To the extent that the Rule simply inhibited the initiation of sham or frivolous litigation, one could not quarrel with its intent. Indeed, the Advisory Committee Note explicitly qualified the use of Rule 11 by saying that it was not meant to “chill” creative litigation.<sup>135</sup> Nonetheless, the 1983 Rule was criticized for having a disproportionate impact, particularly in areas of

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<sup>130</sup> The court found significant the then-proposed 1993 amendment to Rule 1, which provides that the Federal Rules be “administered” as well as “construed” in order to achieve “the just, speedy, and inexpensive determination of every action.” *Id.* at 528 n.1.

<sup>131</sup> *Id.* at 528.

<sup>132</sup> See generally 5A Wright & Miller, *supra* note 90, § 1334.

<sup>133</sup> Joan M. Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640, 1641 (1983) (quoting Advisory Committee Note). For a discussion of the 1983 amendments, see 5A Wright & Miller, *supra* note 90, §§ 1331-1332.

<sup>134</sup> Miller, *supra* note 109, at 16.

<sup>135</sup> Fed. R. Civ. P. 11 advisory committee’s note, reprinted in 97 F.R.D. 165, 199 (1983); 12A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure: Civil app. C* (2d ed. 2002).

the law considered “disfavored” by some, such as civil rights cases,<sup>136</sup> which arguably was tantamount to the feared chilling effect.<sup>137</sup> After several years of extraordinary activity under the Rule, a comprehensive study by the Federal Judicial Center (FJC) revealed that Rule 11 motions were filed much more frequently by defendants, that defendants’ motions were granted with greater frequency,<sup>138</sup> and that Rule 11 motions were filed disproportionately more often in civil rights cases, although the grant rate was not necessarily higher.<sup>139</sup>

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<sup>136</sup> See, e.g., Stephen B. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 65* (1989) (revealing that plaintiffs were sanctioned at disproportionate rate); Leslie Griffin, *The Lawyer’s Dirty Hands*, 8 *Geo. J. Legal Ethics* 219, 241 (1995) (describing Rule 11 sanctions as weapon against civil rights plaintiffs); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 37 *Trial Law. Guide* 137, 167-73 (1993) (noting that study of cases filed in Eastern District of Washington revealed that plaintiffs were sanctioned disproportionately, and nonprisoner civil rights plaintiffs faced disproportionate number of Rule 11 motions); Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 *Judicature* 147, 150 (1990) (stating that fourteen percent of attorneys surveyed reported not having accepted case they considered meritorious because of threat of Rule 11 sanctions); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 *Ind. L.J.* 171, 171 (1994) (noting inconsistent application of Rule 11, with courts frequently enforcing Rule against civil rights plaintiffs); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 *F.R.D.* 189, 200 (1988) (revealing that plaintiffs were sanctioned more frequently than defendants); Karen Kessler Cain, *Comment, Frivolous Litigation, Discretionary Sanctioning and a Safe Harbor: The 1993 Revision of Rule 11*, 43 *U. Kan. L. Rev.* 207, 215 (1994) (citing empirical research showing disproportionate impact on civil rights plaintiffs); Philip Carrizosa, *Rights Lawyers Most Frequent Rule 11 Targets*, *L.A. Daily J.*, Sept. 25, 1992, at 1 (reporting that Ninth Circuit study found that civil rights cases represented 22.5% of cases in which Rule 11 sanctions were imposed, highest among types of cases; this finding is consistent with findings of surveys performed by Fifth and Seventh Circuits); see also Saul M. Kassir, *Fed. Judicial Ctr., An Empirical Study of Rule 11 Sanctions* 4 (1985), 1985 *WL* 71555 (finding that survey of district judges revealed significant interjudge disagreement over appropriateness of sanctions in different situations).

<sup>137</sup> See Burbank, *supra* note 136, at 84 (stating that twenty-six percent of attorneys surveyed reported that Rule 11 has had chilling effect on development of law); Hess, *supra* note 136, at 167 chart 23 (noting that fifteen percent of federal attorneys surveyed reported refusing meritorious case for fear of sanctions); Nelken, *supra* note 136 at 150; Carrizosa, *supra* note 136, at 2 (stating that 27.8% of lawyers who considered possibility of sanctions said they did not raise particular claim or defense as result of that possibility, and 7% said they advised client not to pursue meritorious suit); see also Daniel E. Lazaroff, *Foreword: The Third Annual Fritz B. Burns Lecture on Rule 11 Reform: Progress or Retreat on Attorney Sanctions?*, 28 *Loy. L.A. L. Rev.* 1, 2 (1994); Tobias, *supra* note 136, at 172-73; Cain, *supra* note 136, at 215.

<sup>138</sup> See Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, *The Federal Judicial Center’s Study of Rule 11*, 2 *FJC Directions* 3, 20 tbl.11 (1991) (revealing that in five district courts studied, sixty-one to eighty-one percent of all Rule 11 sanctions imposed on party were imposed on plaintiff). At least three other studies reached similar conclusions. See, e.g., Burbank, *supra* note 136, at 65; Hess, *supra* note 136, at 168; Vairo, *supra* note 136, at 200.

<sup>139</sup> Wiggins, Willging & Stienstra, *supra* note 138, at 21-23. The Hess study reached a similar conclusion with respect to nonprisoner civil rights plaintiffs. Hess, *supra* note 136, at 171-72. The Burbank study reached the inverse conclusion. It found that although civil

The 1993 amendment, although moderating Rule 11 in some significant respects, retains the presigning investigation requirement and the objective standard for determining when a party or attorney is in breach of the Rule's obligations.<sup>140</sup> An FJC study found that only a very small percentage of attorneys and judges felt that the 1993 amendment has caused an increase in groundless litigation, and most support the inclusion of the safe-harbor provision in Rule 11(c)(1)(A), permitting a challenged document to be withdrawn within twenty-one days without consequences.<sup>141</sup> Certainly, activity under the Rule has declined.

Rule 11 complements pretrial disposition because it provides another mechanism by which to control the expenditure of system and litigant resources.<sup>142</sup> Sanction motions, not surprisingly, have been made in combination with summary judgment motions.<sup>143</sup> Thus, Rule 11 can be used against a party who brings a frivolous pretrial disposition motion, and may serve to deter them.<sup>144</sup>

Another method by which courts have attempted to combat the "litigation explosion" is by creating heightened pleading burdens even though Rule 8(a)(2) only requires "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>145</sup> Despite a rich history of judges interpreting that language with great liberality, some

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rights plaintiffs were not targeted much more frequently than other plaintiffs, they were far more likely to be sanctioned when a motion was made against them. Burbank, *supra* note 136, at 68-69. The Vairo study found that the rate at which plaintiffs were targeted as compared to defendants was higher in civil rights cases than in other types of cases. Vairo, *supra* note 136, at 200-01. See generally Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 Conn. L. Rev. 155 (1999) (concluding that Rule 11 sanctions discriminated against civil rights claims).

<sup>140</sup> Although the amendment made Rule 11 sanctions discretionary, Congress, in enacting the PSLRA, made a Rule 11 review mandatory at the conclusion of securities actions. 15 U.S.C. § 77z-1(c)(1) (2000).

<sup>141</sup> John Shapard, George Cort, Marie Cordisco, Thomas Willging, Elizabeth Wiggins & Kim McLaurin, Fed. Judicial Ctr., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure 3 tbl.2, 4 tbl.3 (1995), available at [http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url\\_r=pages/556&url\\_l=index](http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index).

<sup>142</sup> See Brunet, Redish & Reiter, *supra* note 120, at 5-6.

<sup>143</sup> *Id.* at 6; see, e.g., *Chambers v. Am. Trans Air, Inc.*, 17 F.3d 998 (7th Cir. 1994) (granting summary judgment on certain claims and imposing Rule 11 sanctions on plaintiff's attorney); *Estiverne v. Sak's Fifth Ave. & JBS*, 9 F.3d 1171 (5th Cir. 1993) (same); *Gaskell v. Weir*, 10 F.3d 626 (9th Cir. 1993) (same).

<sup>144</sup> See Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, 1 FJC Directions 11, 16-17, 19 n.10 (1991) (noting that threat of Rule 11 sanctions might be serving as deterrent against bringing cases that otherwise would be ultimately thrown out on summary judgment, and that conversely, risk of receiving Rule 11 sanctions for filing frivolous summary judgment motion would deter attorneys from filing such motions in borderline cases).

<sup>145</sup> Fed. R. Civ. P. 8(a)(2). A comprehensive treatment of the subject appears in Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551 (2002).

courts adopted the view that the degree of pleading specificity required varies according to the complexity and/or the supposedly "disfavored" character of the litigation or underlying substantive law, making some cases more vulnerable to dismissal under Rule 12(b)(6) than others.<sup>146</sup>

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>147</sup> an action arising under Section 1983 of Title 42, the Supreme Court unequivocally held that "heightened pleading" requirements are impermissibly at odds with the language of Rule 8, at least in cases brought against municipalities. The Court's opinion emphasized "the liberal standard of 'notice pleading'" established by the Federal Rules,<sup>148</sup> but explicitly left open the possibility that a heightened pleading requirement might be justified in an action brought against an individual law enforcement officer. Thus, some federal courts have interpreted *Leatherman* narrowly.<sup>149</sup>

Then, in *Crawford-El v. Britton*,<sup>150</sup> the Supreme Court rejected an attempt by the District of Columbia Circuit to require a heightened

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<sup>146</sup> See, e.g., *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (adopting heightened pleading standard in cases in which subjective intent is element of constitutional tort action); *Elliot v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985) (requiring that civil rights complaints against government officials state with "factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity"); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 379 (7th Cir. 1984) (requiring complaint under Sherman Antitrust Act to include sufficient facts to establish that defendant's conduct constituted "interstate commerce" or "has a substantial and adverse effect" on interstate commerce); *Kirihara v. Bendix Corp.*, 306 F. Supp. 72, 76 (D. Haw. 1969) (holding that in potentially complex cases, particularly those involving antitrust laws, plaintiff must go beyond requirements of Rule 8).

<sup>147</sup> 507 U.S. 163 (1993).

<sup>148</sup> *Id.* at 168. The Court's holding is consistent with a number of cases that had shown a greater liberality in pleading complex claims. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (civil rights action); *Frazier v. S.E. Pa. Transp. Auth.*, 785 F.2d 65 (3d Cir. 1986) (employment discrimination action); *Fusco v. Xerox Corp.*, 676 F.2d 332, 337 n.7 (8th Cir. 1982) (antitrust case); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 948 (E.D. Mich. 1981) (Sherman Antitrust action); cf. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984) (refusing to find lower pleading requirement in Title VII).

<sup>149</sup> See, e.g., *Branch v. Tunnell*, 14 F.3d 449, 455-56 (9th Cir. 1994); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993); cf. *Feliciano v. DuBois*, 846 F. Supp. 1033, 1042-43 (D. Mass. 1994) (declining to rule on whether holding of *Leatherman* should be extended to cases brought against individual officials, but noting that even if it did, court still would be able to make "an early case management order requiring that, *in some form of written submission to the court* (an amended complaint being only an allowable form and not a required form), the plaintiff clarify ambiguous claims"). But see *Cherry v. Crow*, 845 F. Supp. 1520, 1523-24 (M.D. Fla. 1994) (giving broad interpretation to *Leatherman*); *Loftus v. S.E. Pa. Transp. Auth.*, 843 F. Supp. 981, 984 (E.D. Pa. 1994) (same); *Miller v. Phelan*, 845 F. Supp. 1201, 1207 (N.D. Ill. 1993) (same). See generally Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 *Cath. U. L. Rev.* 59 (1994) (reviewing lower federal court application of *Leatherman*).

<sup>150</sup> 523 U.S. 574 (1998).

proof standard to survive summary judgment, which had developed out of a line of decisions requiring more detailed pleading in Section 1983 cases alleging an official's unconstitutional motive.<sup>151</sup> The Court specifically remarked that "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."<sup>152</sup>

The message of *Leatherman* and *Crawford-El* was reiterated and buttressed in 2002 in *Swierkiewicz v. Sorema N.A.*,<sup>153</sup> an employment discrimination case. The Court unanimously rejected the lower courts' conclusion that the plaintiff had to plead facts establishing a prima facie case as inconsistent with Rule 8(a) and noted that the Rule's standard applies "to all civil actions" and that the purpose of the simplified pleading system is "to focus litigation on the merits of a claim."<sup>154</sup> The Court went on to reinforce the principle that the pleading standard operates "without regard to whether a claim will succeed on the merits,"<sup>155</sup> a statement that casts doubt on the way Rule 12(b)(6) has been employed in some recent cases, a subject to be discussed below.<sup>156</sup>

Rule 9(b), however, does impose a heightened pleading requirement in two specific instances, requiring that "the circumstances constituting" fraud and mistake be stated with "particularity."<sup>157</sup> Especially in litigation alleging certain types of fraud, most notably securities cases or RICO violations, Rule 9(b) motions, often in conjunction with Rule 12(b)(6) motions, appear to be made routinely, and courts are now demanding more specificity and granting the motions with greater frequency than in the past or in other legal contexts.<sup>158</sup> Clearly, the more stringent application of Rule 9(b) reflects

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<sup>151</sup> *Id.* at 594-95. For additional discussion of this case and its historical context, as well as a more general discussion of summary judgment and other litigation barriers facing plaintiffs, see Patricia M. Wald, *Federal Practice and Procedure Symposium: Summary Judgment at Sixty*, 76 *Tex. L. Rev.* 1897, 1923-26 (1998).

<sup>152</sup> *Britton*, 523 U.S. at 595.

<sup>153</sup> 534 U.S. 506 (2002).

<sup>154</sup> *Id.* at 513-14.

<sup>155</sup> *Id.* at 515.

<sup>156</sup> See discussion *infra* notes 478-82 and accompanying text.

<sup>157</sup> Fed. R. Civ. P. 9(b). For a criticism of the particularity requirement, see generally William M. Richman, Donald E. Lively & Patricia Mell, *The Pleading of Fraud: Rhymes Without Reason*, 60 *S. Cal. L. Rev.* 959 (1987).

<sup>158</sup> See, e.g., 5 Wright & Miller, *supra* note 90, § 1297, at 613-14 ("In recent years, some courts have shown a tendency to be more demanding in their application of Rule 9(b). This has been most noticeable in securities fraud actions and claims under the Racketeer Influenced and Corrupt Organizations Act."); Lisa A. Heustis, *RICO: The Meaning of "Pattern" Since Sedima*, 54 *Brook. L. Rev.* 621, 623 n.9 (1988) (noting significant increase in civil RICO litigation and subsequent judicial efforts to limit these actions by, *inter alia*,

the concern that courts are overly burdened with disputes, and that in the fraud and RICO contexts, lawsuits are instituted too easily.<sup>159</sup> Because plaintiffs must provide more information in the complaint regarding the factual and legal underpinnings of a fraud case to satisfy Rule 9(b), some judges may believe they have sufficient information to determine that no triable issue exists or that any issues presented can be satisfactorily resolved without resorting to a full-blown trial.

Congress, moreover, created a super-heightened pleading standard in 1995 for securities litigation in the Private Securities Litigation Reform Act.<sup>160</sup> The statute requires that the complaint specify each statement alleged to have been misleading and give the reason or reasons why each is misleading. In addition, if an allegation is made on information and belief, all facts on which that belief is formed must be stated with particularity.<sup>161</sup> Finally, facts giving rise to a “strong inference” that the defendant acted with scienter must be stated with particularity. Exactly what these heightened pleading requirements demand remains an unsettled question despite having been heavily

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strict adherence to Rule 9(b)); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 447 (1986) (explaining that many courts have responded to proliferation of securities fraud actions by requiring plaintiffs to plead detailed facts); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 Brook. L. Rev. 1, 26 (1988) (noting that courts are requiring rigid pleading rules in civil rights, antitrust, securities, and RICO claims); see also 5 Wright & Miller, *supra* note 90, § 1301.1.

Illustrative cases include *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) (dismissing securities fraud claim under Rule 9(b) because it did not specify “in any detail what misrepresentations were made by the defendant . . . or how these misrepresentations furthered the alleged fraudulent scheme”); *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990) (dismissing securities fraud claim, saying that: “time, place and nature of the misrepresentations must be set forth so that the defendant’s intent to defraud, to employ any scheme or artifice to defraud, to make any untrue statement of a material fact, or to engage in any act or course of business that would operate as a fraud under the securities laws is revealed”); *Oppenheimer v. Novell, Inc.*, 851 F. Supp. 412, 414-15 (D. Utah 1994) (enforcing Rule 9(b) strictly in securities fraud case); *In re Integrated Res. Real Estate Ltd. P’ships Sec. Litig.*, 850 F. Supp. 1105, 1139-40 (S.D.N.Y. 1993) (holding that Rule 9(b) should be strictly enforced in securities fraud cases); *In re Urcarco Sec. Litig.*, 148 F.R.D. 561, 566 (N.D. Tex. 1993) (dismissing securities fraud claim, holding that to meet particularity requirement, circumstances must be stated “in detail,” and facts pleaded “must give rise to a strong inference of the requisite intent”).

<sup>159</sup> For example, Judge Weinstein has remarked that “the increasing amount of litigation has caused problems since the early 1970s, and one remedy for these problems has been to restrict access to the courts. Belief in broad pleadings has declined . . . . It is believed by some that specificity in pleadings helps reduce the costs of discovery and trial.” Weinstein, *supra* note 158, at 26.

<sup>160</sup> See *supra* notes 87-93 and accompanying text.

<sup>161</sup> 15 U.S.C. § 78u-4(b)(1), (2) (2000). The statute also stays discovery until any motions to dismiss are resolved. § 78u-4(b)(3)(B).

litigated,<sup>162</sup> but courts have been demanding far more specificity in securities actions than in the past, leading to the dismissal of many actions because of a failure to meet the statute's standard.<sup>163</sup>

Deprived of their ability to use heightened pleading requirements in most substantive areas, federal courts may shift the focus to—and apply pressure on—other pretrial procedures. The Supreme Court acknowledged—and perhaps even endorsed—this result in *Leatherman* by asserting that “federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”<sup>164</sup>

Finally, Rule 26, the centerpiece of the discovery process, has undergone dramatic revisions as a result of amendments in 1983, 1993, and 2000 that provide for greater judicial control over the discovery process and set limitations on the availability of discovery. The initial—somewhat tentative—step in 1983 directed the district court to set limits on “redundant” or “disproportionate” discovery<sup>165</sup> and imposed a good-faith and reasonable-inquiry standard on attorneys

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<sup>162</sup> See Marian P. Rosner & Andrew E. Lencyk, Pleading Motions Under the Private Securities Litigation Reform Act of 1995, in *Securities Litigation 1998*, at 188 (PLI Corp. L. & Prac. Course Handbook Series No. 1070, 1998); Ryan G. Miest, Note, Would the Real Scientist Please Stand Up: The Effect of the Private Securities Litigation Reform Act of 1995 on Pleading Securities Fraud, 82 *Minn. L. Rev.*, 1103, 1106 (1998). The PSLRA's pleading requirements generally are understood to encompass and go beyond those of Rule 9(b). See, e.g., *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 741-42 (8th Cir. 2002) (holding that PSLRA supersedes Rule 9(b) by requiring particular pleading of both falsity and scienter); *Lipton v. Pathogenesis Corp.* 284 F.3d 1027, 1034 & n.12 (9th Cir. 2002) (same); *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1255 & n.13 (10th Cir. 2001) (finding conclusory allegations of scienter insufficient under both Rule 9(b) and PSLRA); cf. *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 531 & n.5 (3d Cir. 1999) (noting that securities fraud claims must satisfy both Rule 9(b) and PSLRA, but holding that PSLRA supersedes Rule 9(b) in actions brought under Rule 10b-5).

<sup>163</sup> See Rosner & Lencyk, *supra* note 162, at 188-90; see also *Fanni v. Northrop Grumman Corp.*, 23 *Fed. Appx.* 782, 784 (9th Cir. 2001) (dismissing securities fraud claim under PSLRA because plaintiff “fails to state the sources of its information, any corroborating details, or other indicia of the reliability of its assertions”); *In re OfficeMax Sec. Litig.*, No. 1:00-CV-2432, slip op. at 12 n.2 (N.D. Ohio, July 26, 2002) (questioning wisdom of enacting PSLRA in light of “recent events”); *infra* notes 670-73, 673, 680.

<sup>164</sup> *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1992); see also *Jordan by Jordan v. Jackson*, 15 F.3d 333, 340 (4th Cir. 1994) (“[*Leatherman*] . . . is manifestly not intended to denigrate, much less displace, the procedural tools that have been deliberately strengthened in recent years not only by the drafters of the Federal Rules but by the Supreme Court itself for checking the explosion of meritless lawsuits in the federal court system.”).

<sup>165</sup> Fed. R. Civ. P. 26(b)(1) (as amended in 1983), amendment reprinted in 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C. The history of amendments to Rule 26 is described in 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure: Civil* § 2003.1 (2d ed. 1994).

for all discovery motions, requests, and responses similar to that applicable to the Rule 11 signing requirement.<sup>166</sup>

The 1993 amendments were much more dramatic, mandating automatic disclosure of certain basic information before any discovery could be undertaken,<sup>167</sup> greater pretrial access to an opponent's experts,<sup>168</sup> a meeting of counsel to formulate and submit a discovery plan to the court, including an identification of the issues and a timetable,<sup>169</sup> and a heightened duty to supplement information provided in the discovery process.<sup>170</sup> In addition, the Rules now set presumptive limits on the number of depositions<sup>171</sup> and interrogatories<sup>172</sup> each party is allowed, requiring court approval to exceed these numbers. The purpose of these changes was to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."<sup>173</sup> Each district, however, was permitted to opt out of the automatic disclosure scheme by local rule; approximately one-third of them did so, creating a lack of federal court uniformity.<sup>174</sup>

Work continued on the discovery rules and in 2000 the automatic disclosure practice was revised and became mandatory in all districts and additional limitations on discovery emerged. Perhaps most significant is the modification of the language of the scope-of-discovery provision, which since 1938 had embraced anything "relevant to the

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<sup>166</sup> See Fed. R. Civ. P. 26(g). The 1993 amendment retained the basic structure and standard of Rule 26(g). See Fed. R. Civ. P. 26 advisory committee's note, reprinted in 137 F.R.D. 99, 106 (1991) (draft for comment), and in 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C.

<sup>167</sup> Fed. R. Civ. P. 26(a)(1).

<sup>168</sup> Fed. R. Civ. P. 26(a)(2).

<sup>169</sup> Fed. R. Civ. P. 26(f).

<sup>170</sup> Fed. R. Civ. P. 26(e).

<sup>171</sup> Fed. R. Civ. P. 30(a).

<sup>172</sup> Fed. R. Civ. P. 33(a).

<sup>173</sup> Fed. R. Civ. P. 26 advisory committee's note (1993 amendment), reprinted in 137 F.R.D. 99, 106 (1991) (draft for comment), and in 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C. For a critique that the Rule will not accomplish its purpose because lawyers will use the new provision for tactical benefit and time-consuming arguments will arise over what documents and witnesses are "relevant to disputed facts alleged with particularity in the pleadings," see Carl Tobias, *Collision Course in Federal Civil Procedure*, *Legal Times*, Oct. 19, 1992, at 43. For a general commentary on Rule 26, see 8 Wright, Miller & Marcus, *supra* note 165, §§ 2001-2054.

<sup>174</sup> The extent to which individual districts adopted disclosure varied between the different provisions of the Rule; for example, only forty-nine districts adopted Rule 26(a)(1) in some form, while eighty adopted Rule 26(a)(2). Donna Stienstra, *Fed. Judicial Ctr., Summary of Actions Taken by Federal District Courts in Response to Recent Amendments to Federal Rules of Procedure*, at 26 (Apr. 20, 1994, revised Mar. 30, 1998), tbl.1. However, even in districts that did not adopt part or all of the disclosure procedure, a similar effect could have been achieved through local rule or at an individual judge's discretion. *Id.*

subject matter of the action” but now reads anything “relevant to a claim or defense in the action.”<sup>175</sup> The advisory committee note indicates that the change “signals” to judges their “authority to confine discovery.”<sup>176</sup> Although some courts have noted that the amendment was intended to narrow the scope of discovery,<sup>177</sup> it does not appear that the change has been used to alter the ambit of discovery in any meaningful way.<sup>178</sup>

Especially in conjunction with Rule 16, the amended discovery rules give the judge substantially greater control over the process. The three sets of changes ensure that judges are privy to the litigation’s factual disputes well in advance of trial, and therefore can be expected to make them receptive to disposing of claims believed resolvable without trial, even though a triable issue may be present. Thus, the combined effect of almost universal acceptance of case management, greater judicial control over discovery, more demanding application of Rule 9(b), and greater prefiling inquiry obligations under Rule 11—all set against an emotionally charged debate about the litigation environment and the rhetoric of “explosion” and “crisis”—is to facilitate, if not promote, the use of early dispute resolution devices by bringing the specific factual disputes into sharper (but not necessarily fully elaborated) focus at the pretrial stage.

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<sup>175</sup> Fed. R. Civ. P. 26(b)(1). The advisory committee note to the 2000 amendment is reprinted in 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C. The scope of discovery defined in Rule 26(b)(1) and its history are discussed in 8 Wright, Miller & Marcus, *supra* note 165, §§ 2007-2015 and the pocket parts to those sections.

<sup>176</sup> See 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C.

<sup>177</sup> See, e.g., *Johnson Matthey, Inc. v. Research Corp.*, No. 01 CIV.8115(MBM)(FM), 2002 WL 31235717, at \*2 (S.D.N.Y. Oct. 3, 2002) (noting that Rule 26(b)(1) was amended to narrow scope of discovery).

<sup>178</sup> See, e.g., *Beauchem v. Rockford Prods. Corp.*, No. 01 C 50134, 2002 WL 31155088, at \*3 (N.D. Ill. Sept. 27, 2002) (holding that new Rule “does not mean that a fact must be alleged in a pleading for the party to be entitled to discovery . . . concerning that fact”); *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002) (noting that under new Rule, court still may order discovery of any matter relating to subject matter involved in action, so long as there is showing of good cause); *Phalp v. City of Overland Park*, No. 00-2354-JAR, 2002 WL 1162449, at \*3 n.3 (D. Kan. May 8, 2002); *Garret v. Sprint PCS*, No. 00-2583-KHV, 2002 WL 181364, at \*1 n.2 (D. Kan. Jan. 31, 2002); *Thompson v. Dep’t of Hous. & Urban Dev.*, 199 F.R.D. 168, 172 (D. Md. 2001) (“[T]he practical solution to implementing the new rule changes may be to focus more on whether the requested discovery makes sense in light of the Rule 26(b)(2) factors, than to attempt to divine some bright line difference between the old and new rule.”). See generally Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 *Tenn. L. Rev.* 13 (2001) (concluding that early experience under scope change suggests it will only play “modest role”).

### 3. *Summary Judgment as the Focal Point of Modern Litigation*

The procedural changes discussed thus far were intended to promote the efficient and speedy resolution of cases, but none of them has the powerful, dispositive effect of a summary judgment grant. Rule 11 sanctions may deter the filing of claims (and dismissal is a permitted sanction), but they do not represent an adjudication on the merits when granted. Although a dismissal for failure to satisfy Rule 9(b) can have *res judicata* effect when it leads to the entry of judgment, the motion is ineffective as a device to pierce the pleadings when they are facially sufficient to state a claim.<sup>179</sup> Management techniques typically are tools to formulate the issues and facilitate litigation and/or settlement; even though meritless claims and issues can be identified under Rule 16(c)(1), the procedure for eliminating them is usually summary judgment. Finally, a Rule 12(b)(6) grant typically is with leave to replead, although dismissals with prejudice appear to be occurring with greater frequency recently. In sum, "none of the existing motions that could conceivably rival Rule 56 as a dispositive device provides a viable procedural alternative."<sup>180</sup> Surveys confirm that judges view prompt rulings on summary judgment and Rule 12(b)(6) motions as the most effective procedural devices for filtering out frivolous litigation.<sup>181</sup> Summary judgment, therefore, has moved to the center of the litigation stage as plaintiffs struggle to survive the motion in order to reach trial as defendants increasingly invoke it in an attempt to prevent them from doing so.

## II

### SUMMARY JUDGMENT

#### A. *History*

Summary judgment was unknown in common law and early code practice. It originated in England in the Bills of Exchange Act of 1855,<sup>182</sup> well after our Constitution was adopted. The motion initially

<sup>179</sup> That seems to be one of the implications of the Supreme Court's *Swierkiewicz* decision, discussed *supra* at notes 153-53 and accompanying text. But there do seem to be signs of judges using the motion to dismiss beyond its traditional boundaries. See discussion *infra* notes 478-82 and accompanying text.

<sup>180</sup> Brunet, Redish & Reiter, *supra* note 120, at 7.

<sup>181</sup> See Wiggins, Willging & Stienstra, *supra* note 138, at 31 (stating that prompt rulings on motions for summary judgment and for dismissal were rated as "very effective" by over fifty percent of judges surveyed); Carrizosa, *supra* note 136, at 1 (stating that in survey of Ninth Circuit judges, prompt rulings on Rule 12(b) motions to dismiss and motions for summary judgment were rated as most effective weapons against meritless litigation).

<sup>182</sup> The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.). See generally Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* 237-50 (1952); Charles E. Clark & Charles U. Samenow, *The Summary Judgment*,

was designed to facilitate debt actions by expediting recovery on overdue bills and notes when the debtor could not dispute the existence of an agreement to provide goods or services, the provisions thereof, and the fact of nonpayment.<sup>183</sup> Thus, the procedure was invoked primarily by plaintiffs.

The 1873 successor to the 1855 Act<sup>184</sup> expanded the motion's utility by making it available in actions for liquidated demands for fixed sums of money in contract and implied-contract actions, as well as in landlord-tenant actions for the recovery of land for nonpayment of rent.<sup>185</sup> The motion also had to be made with an endorsement, which apprised the defendant of the claims against him and fulfilled the requirements for stating a cause of action. The defendant could not delay judgment with technicalities, but instead had to show the existence of a defense justifying a trial by raising an issue of fact or a difficult question of law. Both the plaintiff and defendant had to support their positions with affidavits. If a defendant presented a questionable defense, a security deposit would be posted that would be returned if the defense was established at trial; if the defense failed, the plaintiff received the money without further inquiry.<sup>186</sup>

A primitive form of summary judgment appeared in the United States as early as 1732 in Virginia,<sup>187</sup> but the motion was not widely used until the early 1900s.<sup>188</sup> In the federal courts it was available under the Conformity Act of 1872 if it existed in the forum state's procedure.<sup>189</sup> Consistent with the English rule limiting the motion to actions for fixed monetary amounts, summary judgment was available only at law. Most of the early versions of the motion in this country either embraced the same actions as did the English rule or were mod-

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38 Yale L.J. 423 (1929) (portraying summary judgment as important remedy for delays in legal system because it serves multiple functions of simplifying and speeding up judicial process as well as promptly disposing of "bona fide issues of law [and] sham defenses").

<sup>183</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). For the procedure's early history, see *id.* at 133-40.

<sup>184</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.). For the text of the current summary judgment rules in England, see 1 Civil Procedure, Part 24 (Autumn 2002).

<sup>185</sup> See Clark & Samenow, *supra* note 182, at 425, 427-28 (explaining that Judicature Act did not specifically denote landlord-tenant actions and summary judgment was available only if dispute could be categorized as one in contract).

<sup>186</sup> These procedural matters are described by Clark and Samenow. *Id.* at 424-35.

<sup>187</sup> *Id.* at 463.

<sup>188</sup> See 10A Wright, Miller & Kane, *supra* note 109, § 2711, at 192.

<sup>189</sup> Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872); see also 10A Wright, Miller & Kane, *supra* note 109, § 2711, at 192.

estly more extensive.<sup>190</sup> For example, many states permitted the motion in purely American types of action, such as suits against public officers or against private citizens acting in a quasi-fiduciary relationship with the plaintiff.<sup>191</sup>

In 1902, the Supreme Court indicated that the purpose of summary judgment was “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>192</sup> The motion was intended only for use in clear-cut cases,<sup>193</sup> and was not to be employed in complicated lawsuits, such as landlord-tenant disputes involving the “devolution of land titles.”<sup>194</sup> Furthermore, summary judgment did not allow the court to assess the comparative probability or weight of either side’s facts or theories.<sup>195</sup> Potentially successful motions, especially under the English rule, typically involved a high degree of factual certainty, so the motion continued to be an efficient procedure in debt collection cases.<sup>196</sup> Not surprisingly, judges refrained from granting summary judgment when the nonmovant introduced material revealing a factual conflict.<sup>197</sup>

By 1938, summary judgment was available in virtually all actions at law in most parts of the country.<sup>198</sup> The procedure’s utility was magnified by the federal courts’ adoption of simplified pleading when Rule 8(a) replaced what essentially had been fact pleading in code states under the Conformity Act.<sup>199</sup> Although the federal pleading

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<sup>190</sup> By 1928, Connecticut and Virginia had rules that were more extensive than the English rule. New Jersey, New York, Michigan, and Washington, D.C. had rules that were quite similar to the English rule. The rules in Delaware, Pennsylvania, and West Virginia were the most limited in scope. See Clark & Samenow, *supra* note 182, at 440-65.

<sup>191</sup> In these cases, the procedure was intended to be punitive in nature. See *id.* at 466-69.

<sup>192</sup> *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902).

<sup>193</sup> For example, the motion was used to eliminate time-barred claims and cases involving clear immunity from liability. See Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 *Dick. L. Rev.* 25, 25 (1989).

<sup>194</sup> See Clark & Samenow, *supra* note 182, at 427.

<sup>195</sup> See Stempel, *supra* note 183, at 137-40.

<sup>196</sup> See Clark & Samenow, *supra* note 182, at 471.

<sup>197</sup> Stempel, *supra* note 183, at 137-38 (examining cases referred to by Clark and Samenow). Indeed, apparently only Connecticut and Virginia viewed the motion as one to be favored by the courts. Clark & Samenow, *supra* note 182, at 440-41 (Connecticut), 463-65 (Virginia), 470.

<sup>198</sup> Some actions for tort and breach of contract for marriage were excluded. See 10A Wright, Miller & Kane, *supra* note 109, § 2711, at 192.

<sup>199</sup> Under Rule 8(a) the complainant need only set forth “a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks.” Fed. R. Civ. P. 8(a). For a further discussion of Rule 8, see generally 5 Wright & Miller, *supra* note 90, §§ 1215-1254, at 136-65. See also the discussion

regime has the virtue of simplicity and abjures technicalities, it has permitted cases initiated with ambiguous, extremely broad, and, occasionally, frivolous complaints to survive into the discovery phase. To deal with pleadings of this character and the dramatic expansion of claim and party joinder, the contemporaneously adopted Rule 56 was designed to provide a mechanism by which unsupportable claims can be terminated before trial.<sup>200</sup>

Despite the theoretical efficacy of summary judgment, its use has raised concerns because of possible encroachment upon the Seventh Amendment right to trial by jury in civil cases.<sup>201</sup> The Supreme Court addressed that tension in 1902 and concluded that the motion simply “prescribe[d] the means of making an issue.”<sup>202</sup> Stated differently, the presence of a contested issue (or, in the words of Rule 56(c), “genuine issue of material fact”) determines whether trial and a jury have to be provided. According to the Court, once the judge concludes that there are no disputed material facts and therefore no triable issues, he can invoke and apply the governing legal principles without depriving anyone of a jury trial.<sup>203</sup> The validity of summary judgment has been well accepted since this decision and few cases have challenged the Rule on constitutional grounds.<sup>204</sup>

### B. Debates About the Application of Federal Rule 56

Since its promulgation, Rule 56 has been the subject of periodic debate,<sup>205</sup> as first exemplified in the 1940s by the opinions of two extremely distinguished Second Circuit judges, Charles E. Clark and Jerome N. Frank, in *Arnstein v. Porter*,<sup>206</sup> an action charging one of America’s greatest songwriters with the infringement of musical copyrights of an apparently litigious plaintiff. Judge Frank, writing for the majority, decided against summary judgment and in favor of trial, stating that the “[p]laintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the ‘crucial test of credi-

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of the relationship between specificity of pleading and summary judgment supra notes 145-63 and accompanying text.

<sup>200</sup> See Weakland, supra note 193, at 28.

<sup>201</sup> U.S. Const. amend. VII; see infra notes 483-91 and accompanying text.

<sup>202</sup> *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902).

<sup>203</sup> See 10A Wright, Miller & Kane, supra note 109, § 2714, at 252.

<sup>204</sup> See id. § 2714, at 250.

<sup>205</sup> For a declaration that the summary judgment debate has a new winner as a result of the 1986 trilogy and a good discussion of traditional summary judgment analysis, see Marcy J. Levine, Comment, Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court, 37 Emory L.J. 171 (1988).

<sup>206</sup> 154 F.2d 464 (2d Cir. 1946). See generally Koppel, supra note 42, at 492-94 (discussing dialogue between Judges Clark and Frank).

bility'—in the presence of the jury."<sup>207</sup> Although finding composer Ira Arnstein's theory about Cole Porter's plagiarism to be highly implausible, Judge Frank held that it raised a credibility question requiring a jury's determination, and that summary judgment should not be granted when there was the "slightest doubt as to the facts."<sup>208</sup> He was concerned that liberal utilization of the motion would allow judges to usurp the role of juries,<sup>209</sup> and would "favor unduly the party with the more ingenious and better paid lawyer."<sup>210</sup> Judge Frank viewed trial by paper to be retrogressive, reminiscent of the abolished equity practice of relying on written testimony, and sought to interpret Rule 56 in line with the then-existing text of Rule 43(a), which governed procedural matters relating to the admission of evidence before the adoption of the Federal Rules of Evidence in 1975, so that all testimony on the motion would be taken in open court absent exceptional circumstances.<sup>211</sup> He also expressed the sentiment that use of summary procedures in the name of clearing crowded dockets unjustly deprived litigants of their day in court.<sup>212</sup>

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<sup>207</sup> *Arnstein*, 154 F.2d at 469-70 (footnotes omitted); accord *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627-29 (1944); *Subin v. Goldsmith*, 224 F.2d 753, 758-59 (2d Cir. 1955) (Frank, J.); *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949) (Frank, J.); *Fleetwood Acres, Inc. v. Fed. Hous. Admin.*, 171 F.2d 440, 442 (2d Cir. 1948) (Frank, J.); *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 363 (5th Cir. 1945); *Chem. Found., Inc. v. Universal-Cyclops Steel Corp.*, 2 F.R.D. 283, 285 (W.D. Pa. 1942).

<sup>208</sup> *Arnstein*, 154 F.2d at 468 (citing *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945)); accord *Devex Corp. v. Houdaille Indus., Inc.*, 382 F.2d 17, 21 (7th Cir. 1967); *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213, 216 (8th Cir. 1951); *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657-58 (1st Cir. 1948) (discussing use of scintilla rule); *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580, 581 (3d Cir. 1948) (holding that affidavit cannot be treated as proof contradictory to well-pleaded facts of complaint); *Bozant v. Bank of N.Y.*, 156 F.2d 787, 790 (2d Cir. 1946); *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971); *Doman v. Moe*, 183 F. Supp. 802, 807 (S.D.N.Y. 1959); *Purofied Down Prods. Corp. v. Travelers Fire Ins. Co.*, 171 F. Supp. 399, 400 (S.D.N.Y. 1959); see also 10A Wright, Miller & Kane, *supra* note 109, § 2727, at 465-67.

<sup>209</sup> See *Arnstein*, 154 F.2d at 469-70; Douglas M. Towns, Note, Merit-Based Class Action Certification: Old Wine in a New Bottle, 78 Va. L. Rev. 1001, 1020-28 (1992); see also *Ramirez v. Nat'l Distillers & Chem. Corp.*, 586 F.2d 1315, 1318 (9th Cir. 1978); *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951); *Frederick Hart*, 169 F.2d at 583; *Firemen's Mut.*, 149 F.2d at 363 (finding that issues of credibility of witnesses were still open and opportunity to cross-examine was essential even though criminal arson trial record was available).

<sup>210</sup> *Arnstein*, 154 F.2d at 471.

<sup>211</sup> Much of the text of Rule 43(a) was eliminated in 1975 when the Federal Rules of Evidence were adopted. See generally 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* §§ 2401-2414, at 520-601 (2d ed. 1995).

<sup>212</sup> Cf. *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487-88 (2d Cir. 1952) (discussing merits of oral testimony); *Broad. Music, Inc. v. Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) (finding ability to see and react to witness demeanor very important).

Conversely, Judge Clark argued that summary judgment was “more necessary in the system of simple pleading now enforced in the federal courts”<sup>213</sup> to avoid useless and unnecessary trials.<sup>214</sup> He disagreed with an across-the-board limitation on summary judgment that would prevent it from being granted whenever credibility issues were crucial, and he accused his colleague of judicially amending the Rules, stating that “the clear-cut provisions of F.R. 56 conspicuously do not contain either a restriction on the kinds of actions to which it is applicable (unlike most state summary procedures) or any presumption against its use.”<sup>215</sup> He also mounted a vigorous assault on Judge Frank’s “slightest doubt” standard, commenting in a later writing that “a slight doubt can be developed as to practically all things human.”<sup>216</sup> A narrow construction of the Rule, in his view, would encourage trials for the purpose of harassment and mean that the federal courts were endorsing the “obvious tendency to force settlement of the claim not because it is just, but because contesting it has become too costly or too inconvenient.”<sup>217</sup>

One should not mistakenly assume, however, that Judge Clark would have endorsed the expanded summary judgment practices that have emerged since 1986. Despite his relative receptivity to the procedure’s use in *Arnstein*, his advocacy of the motion was strictly confined to cases in which the material facts were not contested by either party.<sup>218</sup> Thus, “Clark’s criticisms of reluctance by his colleagues to

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<sup>213</sup> *Arnstein*, 154 F.2d at 479 (Clark, J., dissenting). As Reporter to the original Advisory Committee on Civil Rules, Judge Clark was one of the architects of the Federal Rules of Civil Procedure.

<sup>214</sup> See, e.g., *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *Minn. Mining & Mfg. Co. v. U.S. Rubber Co.*, 279 F.2d 409, 415 (4th Cir. 1960) (finding summary judgment efficient tool for expediting business of courts when merits have been fully explored in prior litigation between same parties); *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 472-73 (2d Cir. 1943); *Victory Pipe Craftsmen, Inc. v. Faberge, Inc.*, 582 F. Supp. 551, 554 (N.D. Ill. 1984) (deciding that overburdened judiciary provides compelling reason for use of summary judgment whenever possible); *Topp-Cola Co. v. Coca-Cola Co.*, 185 F. Supp. 700, 708 (S.D.N.Y. 1960).

<sup>215</sup> *Arnstein*, 154 F.2d at 479; see also *Nestle Co. v. Chester’s Market, Inc.*, 571 F. Supp. 763, 768-69 (D. Conn. 1983); cases cited *infra* note 230.

<sup>216</sup> Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 *Vand. L. Rev.* 493, 504 (1950).

<sup>217</sup> *MacDonald v. Du Maurier*, 144 F.2d 696, 703 (2d Cir. 1944) (Clark, J., dissenting); see also *United States v. Gen. Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975) (noting summary judgment’s importance in preventing harassing litigation); *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (same); *Cardillo v. Doubleday & Co.*, 366 F. Supp. 92, 94-95 (S.D.N.Y. 1973), *aff’d*, 518 F.2d 638 (2d Cir. 1975) (noting chilling effect of expense of litigating First Amendment rights).

<sup>218</sup> See Stempel, *supra* note 183, at 142-44. The author observes that the cases Judge Clark cited on English practice covered situations in which the court refused summary judgment whenever the nonmovant had introduced contrary facts. *Id.* at 135-37.

grant summary judgment never suggested that judges assess the worth of either side's evidence in ruling on summary judgment motions."<sup>219</sup>

The Supreme Court seemed to adopt Judge Frank's philosophy of discouraging summary judgment by urging courts to apply it cautiously, keeping in mind the importance of jury trial, and calling for even greater restraint in lawsuits involving state-of-mind questions and complex issues.<sup>220</sup> The paradigm case, *Poller v. CBS, Inc.*, involved a private antitrust action brought against CBS alleging conspiracy to restrain and monopolize trade in violation of the Sherman Act by canceling its affiliation with a UHF station to drive the plaintiff out of business.<sup>221</sup> The District of Columbia District Court granted the defendant's summary judgment motion alleging lack of the illicit motive required to prove a Sherman Act violation.<sup>222</sup> The Court of Appeals for the District of Columbia affirmed,<sup>223</sup> but the Supreme Court reversed, with Justice Clark writing that:

[S]ummary procedures should be used sparingly in complex anti-trust 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>224</sup>

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<sup>219</sup> *Id.* at 144.

<sup>220</sup> See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (commenting that actual malice involves proof of state of mind and "does not readily lend itself to summary disposition"); *Norfolk Monument Co. v. Woodlawn Mem'l Gardens, Inc.*, 394 U.S. 700, 704 (1969); *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 623-24 (1944); *Charbonnages de France v. Smith*, 597 F.2d 406, 414-15 (4th Cir. 1979) (holding summary judgment to be inappropriate in determining whether there was meeting of minds for contract); *Bouchard v. Washington*, 514 F.2d 824, 826-28 (D.C. Cir. 1975) (reversing summary judgment on issue of good faith); *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968); *Ala. Great S. R.R. v. Louisville & Nashville R.R.*, 224 F.2d 1, 5 (5th Cir. 1955); *Paine-Henderson v. E. Greyhound Lines, Inc.*, 320 F. Supp. 1138, 1140 (D.S.C. 1970). For a discussion of state-of-mind issues as they relate to summary judgment, see generally David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw. U. L. Rev. 774 (1983); Kyle M. Robertson, Note, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C. L. Rev. 747 (1987). See also *infra* note 228 and text accompanying *infra* notes 244-45, 383-84, 468.

<sup>221</sup> 368 U.S. 464 (1962).

<sup>222</sup> *Poller v. CBS, Inc.*, 174 F. Supp. 802, 804-05 (D.D.C. 1959).

<sup>223</sup> *Poller v. CBS, Inc.*, 284 F.2d 599 (D.C. Cir. 1960).

<sup>224</sup> *Poller*, 368 U.S. at 473 (footnote omitted). The Court allowed the case to proceed to trial because even though CBS's response to the complaint was that there simply was no evidence of conspiracy, the issue was disputed in the pleadings and remained undetermined. *Id.* at 473-74.

Echoing Judge Clark's views in *Arnstein*, four dissenting Justices responded that the Rule's purpose was to avoid trial if, after pleadings and discovery, no triable issues remained. The dissenters claimed that this was true in *Poller* since the conduct alleged was lawful absent extrinsic evidence of a conspiratorial purpose.<sup>225</sup> In addition, the dissenters found nothing in Rule 56 indicating that an antitrust conspiracy action should be less subject to summary judgment than other cases and expressed the view that, given the tendency for vexatious litigation in the antitrust arena, that field of law was especially ripe for giving the Rule "its full legitimate sweep."<sup>226</sup> Whatever the merits of these arguments, *Poller* had a decidedly dampening effect on summary judgment in the federal courts;<sup>227</sup> indeed, the reported decisions

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<sup>225</sup> According to Justice Harlan's dissenting opinion, the plaintiff in *Poller* had complete access to all potential witnesses by means of pretrial discovery, yet failed to produce any evidence that would support his claim of improper motive. *Id.* at 478. In his view, if the case had proceeded to trial it could not have been permitted to go to the jury because the plaintiff presented no extrinsic evidence of an unlawful purpose, and CBS had denied any unlawful motive. The plaintiff "should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence." *Id.* at 480. In some respects Justice Harlan's opinion foreshadowed the Court's thinking in the 1986 trilogy.

<sup>226</sup> *Id.* at 478 (Harlan, J., dissenting). Seventeen years prior to *Poller*, in *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court had affirmed summary judgment in a Sherman Act monopolization case. A number of post-*Poller* cases did indicate that summary judgment was particularly useful in certain substantive contexts. See, e.g., *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 855 (8th Cir. 1979) (noting importance of summary judgment to limit chilling effect of litigation in libel and First Amendment cases); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976) (same); *United States v. Gen. Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975) (holding that in product safety case, lengthy trial itself endangers vindication of fundamental interests at issue); *Wash. Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) (noting summary judgment's importance in First Amendment cases because of possibility of harassment).

<sup>227</sup> Numerous other courts followed *Poller*'s lead in favoring trial over summary judgment when issues of motive and intent were involved. See, e.g., *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (stating that "inferences contrary to those drawn by the trial court might be permissible" and suggesting that judge may have invaded jury's realm); *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627-29 (1944) (describing important role of jury in judging witness credibility); *Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680-81 (1st Cir. 1978) (establishing need to use "great circumspection" when judging conspiracy); *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485, 490-91 (4th Cir. 1973) (urging sparing use of summary judgment when findings of wanton or willful misconduct are dispositive); *Brunswick Corp. v. Vineburg*, 370 F.2d 605, 612 (5th Cir. 1967) (finding that "summary judgment is a lethal weapon" and that "courts must . . . beware of overkill in its use"); *Devex Corp. v. Houdaille Indus., Inc.*, 382 F.2d 17 (7th Cir. 1967) (discussing *Poller*'s cautions in complex patent case); *Kirkpatrick v. Consol. Underwriters*, 227 F.2d 228 (4th Cir. 1955) (reversing summary judgment because of issue of intention of contracting parties); *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213 (8th Cir. 1951) (finding issue of fact when acceptance of order is at issue).

reveal few cases of any complexity adjudicated under Rule 56 during the succeeding two decades.<sup>228</sup>

### C. *The Shifting Judicial Attitudes Regarding Summary Judgment*

Yet, only a few years later the Supreme Court seemed to retreat from its strong expression disfavoring summary judgment in *Poller*. In *First National Bank of Arizona v. Cities Service Co.*,<sup>229</sup> the Court showed its willingness to uphold a grant of summary judgment in a complex antitrust conspiracy case involving an issue of intent comparable to the one in *Poller*.<sup>230</sup> Despite the apparent similarity between the cases, the *Cities Service* Court distinguished *Poller* on the ground that the inference of conspiracy to be drawn in *Poller* was reasonable, making that case trialworthy.<sup>231</sup> In *Cities Service*, however, since both

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<sup>228</sup> See *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) (reversing summary judgment on case involving product tying agreement); *Broad. Music, Inc. v. CBS, Inc.*, 55 F.R.D. 292 (S.D.N.Y. 1972) (denying summary judgment in case involving antitrust conspiracy claim based on "extraordinary" payments to plaintiff's sole competitor); cases cited supra notes 220 and 227. But cf. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) (granting Rule 12(b)(6) motion to dismiss without leave to amend; finding that sweeping language of *Poller* simply means that questions of intent and purpose should be resolved after trial if antitrust claim has been stated adequately in complaint); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1110-11 (5th Cir. 1979) (maintaining that *Poller*'s language indicating summary judgment is unsuitable in antitrust cases is mere dicta and agreeing with dissent; concluding that Rule 56 does not state that antitrust actions should apply summary judgment sparingly).

<sup>229</sup> 391 U.S. 253 (1968).

<sup>230</sup> *Cities Service* is interesting because the plaintiff had been allowed only limited discovery, yet previously had been deposed for over 150 days by several defendants in order to clarify his allegations. *Id.* at 299 (Black, J., dissenting). Nor had defendants answered the complaint. *Id.* (Black, J., Dissenting). Justice Black, dissenting, argued that the grant of summary judgment was not "just" under Rule 56(f) in these circumstances. *Id.* at 306. Compare *id.* at 299-307 (Black, J., dissenting), with *Smith v. N. Mich. Hosps., Inc.*, 703 F.2d 942, 948-49, 954-56 (6th Cir. 1983) (affirming summary judgment as to restraint-of-trade allegations regarding hospital emergency room staffing contract; reversing summary judgment as to monopoly claim against clinic staffing emergency room because issues of product and geographic area definition were not fully developed); *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991 (9th Cir. 1980) (affirming summary judgment for defendants in noncomplex antitrust restraint-of-trade case involving exclusive right to sell certain products in hotel store); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) (affirming summary judgment for defendants in case alleging price discrimination between manufacturer and wholesalers and anticompetitive effect of contracts between manufacturer and large retail chain stores). See also *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257 (9th Cir. 1983) (affirming summary judgment for defendants as to alleged antitrust price-fixing conspiracy between manufacturer and retailers); *AT&T v. Delta Communications Corp.*, 408 F. Supp. 1075 (S.D. Miss. 1976) (granting summary judgment to defendants in case involving alleged antitrust conspiracy to drive UHF stations out of business; holding that in circumstantial evidence case, it is not enough for plaintiff to show conclusory parallels indicative of harm suffered; plaintiff must allege specific parallelism probative of conspiracy or joint action).

<sup>231</sup> *Cities Service*, 391 U.S. at 277.

the plaintiff's and the defendant's interests converged, the inference of conspiracy was unreasonable, and direct evidence or significant probative evidence tending to support the claim, rather than circumstantial evidence, would be required to defeat the motion.<sup>232</sup> The Court thus expressly rejected a broad interpretation of *Poller* that prohibited summary judgment in all antitrust litigation.<sup>233</sup> Nevertheless, the Court at least nominally stood by *Poller*, limiting it to its facts.<sup>234</sup>

Two years later, in *Adickes v. S.H. Kress & Co.*, the Court established the burden of persuasion on Rule 56 motions that prevailed until the 1986 trilogy.<sup>235</sup> It is noteworthy that in doing so, the Court eschewed any anti-summary judgment rhetoric or reference to Judge Frank's emphasis on the importance of a live trial.<sup>236</sup> *Adickes* was a civil rights case in which a white female was refused service in a restaurant when she entered in the company of several of her African American students. To recover under the federal statute, the plaintiff had to establish that the defendant, a private entity, had conspired with state police officials.<sup>237</sup> Both parties submitted affidavits on the defendant's summary judgment motion; however, since no affidavits were submitted by the waitresses who actually refused to serve the

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<sup>232</sup> *Id.* at 290.

<sup>233</sup> Justice Black's dissent maintained a cautious attitude toward summary judgment motions and expressed dismay at the majority's use of a reasonableness standard. See *id.* at 305. Justice Black further commented that *Cities Service* was in direct conflict with the *Poller* Court's negative view of summary judgment in complex cases. *Id.* at 299. He expressed concern that judges were infringing on the jury's domain in granting summary judgment, stating that the Court "concludes that despite the possible illegitimate motivations, evidence now in the record suggests that other motivations were, in the Court's opinion, more probable." *Id.* at 305.

<sup>234</sup> Other federal courts were more openly critical of *Poller*. See, e.g., *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982) (holding summary judgment appropriate when "the record [in an antitrust case] clearly indicates that there are no circumstances under which plaintiff can prevail"); *Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982) ("[A] trial would be a waste of time. This is as true in an antitrust case as in any other type of case."); *Weit v. Cont'l Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981) (interpreting Rule 56 as neutral device for eliminating needless trials and holding that no greater caution or concern was required for antitrust litigation than in other substantive areas of law); *Aladdin Oil v. Texaco, Inc.*, 603 F.2d 1107, 1110 (5th Cir. 1979) ("The facile notion pressed upon us that antitrust cases are typically unsuited for summary procedures can be traced to *obiter dictum* in [*Poller*]."). Commentators also have criticized the exclusion of certain types of cases from summary judgment. See, e.g., Martin B. Louis, Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases, 57 S. Cal. L. Rev. 707, 716 (1984); Sonenshein, *supra* note 220.

<sup>235</sup> 398 U.S. 144 (1970).

<sup>236</sup> Justice Harlan delivered the opinion of the Court. Only Justice Black, in his concurrence, quoted *Poller* and expounded the virtues of trial by jury. *Id.* at 176.

<sup>237</sup> *Id.* at 147-48.

plaintiff, the possibility that one of them might have had an understanding with a police officer was left open. Thus, the sole evidence of conspiracy was that a police officer had entered the restaurant before the plaintiff was asked to leave and subsequently arrested her.<sup>238</sup>

In interpreting Rule 56(e) and the moving party's burden of production, the Supreme Court specified that the movant must "show[ ] the absence of any genuine issue of fact."<sup>239</sup> The Court did not require the movant to *negate* the nonmovant's allegations, but merely had to *show* the absence of a factual question worthy of trial. However, if the movant failed to satisfy this burden, which the Court found to be true in *Adickes*,<sup>240</sup> then the nonmovant would not have to supply any opposing evidence and could rely simply on the contrary statements in her complaint.<sup>241</sup> The Supreme Court did not speak directly to summary judgment practice for sixteen years following *Adickes*.

#### D. The 1986 Supreme Court Trilogy

##### Prior to the 1986 Supreme Court trilogy, summary judgment

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<sup>238</sup> See *id.* at 154-57.

<sup>239</sup> *Id.* at 153.

<sup>240</sup> The Court seemed reluctant to grant summary judgment and, drawing upon arguably tenuous circumstantial evidence in the complaint, found a sufficient basis for identifying a factual question for the jury. The plaintiff's evidence may have been quite slim; indeed, Justice Black's concurrence stated that the "petitioner may have had to prove her case by impeaching the store's witnesses and appealing to the jury to disbelieve all that they said was true in the affidavits." *Id.* at 176. Justice Black appeared to adopt the view that a moving party has an obligation under Rule 56 to come forward with some information that will justify summary judgment. To the extent that this information contains potential testimony of witnesses before a jury, he felt that it gives rise to a constitutional right to cross-examine those witnesses before a jury; because the moving party's witnesses might not only be disbelieved, but even reveal information that would give respondent enough evidence to carry its burden of proof, summary judgment must be denied. *Id.* The problem with Justice Black's position is that it "would make summary judgment impossible except in an infinitesimal number of cases where the responding party conceded the existence of all facts that would otherwise have to be established by the testimony of witnesses, including facts which establish the authenticity of documents that, if genuine, would justify summary judgment." Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 *Notre Dame L. Rev.* 770, 772-73 (1988).

*Adickes* has been interpreted widely as requiring the movant to foreclose the possibility that the nonmovant will prevail at trial. See Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun—Hopefully*, 14 *Am. J. Trial Advoc.* 441, 461 (1991); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *Yale L.J.* 73, 80 & n.39 (1990).

<sup>241</sup> But if the movant had demonstrated the absence of a triable issue, the nonmovant would have had to come forward with affidavits or other evidence showing that a question of fact existed. See generally 10B Wright, Miller & Kane, *supra* note 109, § 2739.

practice was inconsistent among the federal courts of appeals.<sup>242</sup> One commentator who examined a series of published cases decided in 1973<sup>243</sup> concluded that the decisions were marked by “extreme vigilance against treading on contested fact issues or mixed questions of law and fact—even arguable ones—reserving them for evidentiary hearings. . . . This was especially true in cases applying indeterminate

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<sup>242</sup> For example, the Second and Fifth Circuits had the reputation, based on their published opinions, of being anti-summary judgment. See *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (noting prior “perception that this court is unsympathetic to [summary judgment] motions and frequently reverses grants of summary judgment”); *Rebozo v. Wash. Post Co.*, 637 F.2d 375 (5th Cir. 1981) (reversing summary judgment when liability depended on state of mind); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970) (“This court has not lagged behind other circuit courts in holding that summary judgment should be granted only when it is quite clear what the truth is.”) (finding summary judgment rarely appropriate in negligence actions); see also *Roberts v. Browning*, 610 F.2d 528, 537 (8th Cir. 1979) (reversing summary judgment when record deemed “incomplete and unsatisfactory” but cautioning that court should not be too restrictive in its use); *Tomalewski v. State Farm Life Ins. Co.*, 494 F.2d 882, 884 (3d Cir. 1974) (supporting “slightest doubt” doctrine); *Harman v. Diversified Med. Invs. Corp.*, 488 F.2d 111 (10th Cir. 1973); *Empire Elecs. Co. v. United States*, 311 F.2d 175 (2d Cir. 1962) (reversing summary judgment even in nonjury case in which judge is factfinder); *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915-16 (4th Cir. 1951) (explaining undesirability of summary judgment, even when judge believes directed verdict will be necessary); *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580, 581 (3d Cir. 1948) (noting affidavits not to be used to decide factual issue); *Croxen v. U.S. Chem. Corp. of Wis.*, 558 F. Supp. 6, 7 (N.D. Iowa 1982) (describing summary judgment as “an extreme and treacherous remedy”); cases cited *supra* notes 226-27. But see *Berry v. Atl. Coast Line R.R.*, 273 F.2d 572, 582 (4th Cir. 1960) (upholding summary judgment when parties concede facts and disagree only as to application of law and noting that “[w]hile this court has been reluctant to grant summary judgment in negligence cases, it has not precluded that possibility”); *United States for Use of Edward E. Morgan Co. v. Maryland Cas. Co.*, 147 F.2d 423, 425 (5th Cir. 1945) (noting summary judgment “looked upon with favor”). Other circuits were more inclined to use summary judgment. See, e.g., *Smith v. N. Mich. Hosps., Inc.*, 703 F.2d 942, 948-49 (6th Cir. 1983) (upholding summary judgment against antitrust conspiracy allegations); *Fadell v. Minneapolis Star & Trib. Co.*, 557 F.2d 107 (7th Cir. 1977) (affirming summary judgment in libel action); *Dewey v. Clark*, 180 F.2d 766 (D.C. Cir. 1950); *Schreffler v. Bowles*, 153 F.2d 1, 3 (10th Cir. 1946) (finding general denial of allegations in complaint insufficient to withstand summary judgment motion); see also 10A *Wright, Miller & Kane*, *supra* note 109, § 2727, at 463-67 (discussing divergent views regarding utility and application of summary judgment and slightest-doubt doctrine); *Clark*, *supra* note 216, at 504-05 (stating that summary judgment generally is overly restricted, but sometimes is used with eye only to case at hand without blanket restriction); *Koppel*, *supra* note 42 (discussing divergent views of Rule 56 in context of California state summary judgment jurisprudence). There continues to be a division of authority on whether a district judge has discretion to deny a summary judgment motion when the prerequisites for granting it have been met. See generally *Jack H. Friedenthal & Joshua E. Gardner, Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 *Hofstra L. Rev.* 91 (2002).

<sup>243</sup> In evaluating statistical studies, care must be taken regarding whether only published or both published and unpublished opinions have been included in the survey, as well as whether trial and appellate cases are considered. As to the latter, for example, the results may be quite different since affirmances are less likely to be reported in accessible sources than are reversals. See *Clermont & Eisenberg*, *supra* note 51, at 125-26.

legal standards, such as reasonableness.”<sup>244</sup> State-of-mind issues, according to this study, were virtually always sent to a jury; questions of intent, malice, and credibility simply were not resolved through summary judgment in the sample of cases.<sup>245</sup>

Although the overall frequency of summary judgment grants apparently was modest following *Poller*, it has been suggested by some writers that the lower federal courts were becoming more amenable to granting the motion even before the 1986 trilogy,<sup>246</sup> and there is some evidence of this in the case law.<sup>247</sup> By way of example, in an attempt to encourage litigants to use the motion more aggressively, the 1984 Second Circuit Judicial Conference recommended that the notion that summary judgment was disfavored be dispelled, a note the court itself sounded two years later.<sup>248</sup> A year after the trilogy, the view was expressed by one member of the court that the trilogy would merely “enhance the already receptive attitude by the Second Circuit toward the disposition of certain cases.”<sup>249</sup> The possible existence of a receptive trend is not surprising given the increasingly management-oriented approach of the federal judiciary in the years preceding the trilogy and the 1983 amendments to the Federal Rules codifying that philosophy.<sup>250</sup>

But even if that trend existed, the 1986 Supreme Court trilogy is striking because of the strong pro-summary judgment language found throughout the Court’s three opinions. Indeed, the mere fact that the

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<sup>244</sup> Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 147 (2000).

<sup>245</sup> See *id.* at 149.

<sup>246</sup> See Stempel, *supra* note 183, at 160. See also Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 Hastings L.J. 53, 53 (1988).

<sup>247</sup> See, e.g., *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980); *Judge v. City of Buffalo*, 524 F.2d 1321, 1322 (2d Cir. 1975) (stating that summary judgment is useful to avoid vexatious litigation, but trial by affidavit must be avoided); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975) (acknowledging that slightest-doubt standard has been abandoned in favor of approach more in line with spirit of Rule 56); *Freeman v. Cont’l Gin Co.*, 381 F.2d 459 (5th Cir. 1967) (approaching summary judgment favorably); *Ayers v. Pastime Amusement Co.*, 283 F. Supp. 773, 785 (D.S.C. 1968) (noting purpose of amending Rule 56 was to encourage summary judgment); *Seago v. N.C. Theatres, Inc.*, 42 F.R.D. 627 (E.D.N.C. 1966).

<sup>248</sup> See *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (discussed *infra* at notes 366-69 and accompanying text); Lawrence W. Pierce, *Foreword, Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 Brook. L. Rev. 279, 281 (1987) (describing recommendations by judicial committee that Second Circuit dispel misconception). Some earlier cases actually had been supportive of the use of summary judgment. See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967); *Dressler v. MV Sandpiper*, 331 F.2d 130, 132-33 (2d Cir. 1964) (responding to 1963 amendments to Rule 56).

<sup>249</sup> Pierce, *supra* note 248, at 281 (encouraging use of summary judgment).

<sup>250</sup> For an in-depth discussion of these topics, see *supra* Part I.C.

Court discussed the motion in depth in three cases during the same Term makes the trilogy significant,<sup>251</sup> suggesting that the subject may well have been on the agenda of some of the Justices. Moreover, even if the situation is viewed as having been in flux at the time, there is no doubt that the decisions break with the Court's prior attitude in *Poller* and *Adickes*. The departure is so striking that the Court's majority has even been criticized for effectively amending Rule 56 by judicial fiat rather than through the procedure prescribed by the Rules Enabling Act, a viewpoint that appropriately has few adherents.<sup>252</sup>

The views presented in the cases have their roots in the history of summary judgment. Indeed, some of the arguments in the majority and dissenting opinions resemble those advanced by Judges Clark and Frank forty years earlier. The trilogy undoubtedly has made it more attractive to seek summary judgment and, depending on the applicable standard of proof at trial, has increased the likelihood of its being granted and sustained on appeal. But even if one accepts that the three cases represent a significant departure from the previously prevailing cautious approach to summary judgment, the question remains: Have the lower federal courts taken them too far?

### 1. *The Matsushita Decision*

*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>253</sup> was a massive, complex action brought by American electronics manufacturers under Section 1 of the Sherman Antitrust Act. The plaintiffs alleged that Japanese importers were conspiring to fix artificially high prices for television sets in Japan in order to finance their policy of setting and maintaining low prices in the United States in an attempt to drive American manufacturers from the market.<sup>254</sup> The Supreme

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<sup>251</sup> See Stempel, *supra* note 183, at 100. One scholar, however, suggests that the significance of the cases could be diminished by the number of dissents and the historical inconsistency of the Supreme Court in decisions about summary judgment. See Friedenthal, *supra* note 240, at 771. Nevertheless, the Court addressed the logical framework used to decide those motions; in the past, courts usually had skirted the hard questions implicated by the motion and simply denied it. See *id.* at 787.

<sup>252</sup> See Stempel, *supra* note 183, at 99, 181-87 (arguing that changes wrought by trilogy should have been instituted by advisory committee through amendment process because that process is more public and results in better and more substantial information to profession than unilateral action by Supreme Court); see also Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 *Notre Dame L. Rev.* 321, 327-30, 360-62 (1989) (discussing summary judgment as one example of its assertion that courts are inserting caseload concerns into formulation of jurisdictional doctrines and by doing so, treading on legislature's territory; arguing that if caseload problem is institutional, then reform should come from legislature).

<sup>253</sup> 475 U.S. 574 (1986).

<sup>254</sup> *Id.* at 577-78.

Court reviewed the Third Circuit's reversal of summary judgment and held that the district court had acted properly in evaluating the nonmovants' claim against the movants, writing that "if the factual context renders [the plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."<sup>255</sup> Therefore, to survive summary judgment, the plaintiffs "must 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>256</sup>

The majority found the plaintiffs' predatory pricing theory highly "implausible"—it made no sense for the twenty-one defendant companies to continue to sell products in this country below their marginal cost without any guarantee of either capturing the market or recouping the significant losses incurred over more than twenty years. This conclusion derived from a "consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."<sup>257</sup> Despite the testimony of five expert witnesses, the plaintiffs failed to persuade the Court that their theory was rational enough to survive pretrial disposition.<sup>258</sup> The Court remanded with directions to grant the motion unless the plaintiffs could present unambiguous evidence supporting their conspiracy allegations, by which it appeared to mean direct evidence that was not consistent with lawful behavior.<sup>259</sup>

The significance of the Supreme Court's reasoning was subtle. In holding the plaintiffs' economic theory to be implausible and requiring a heightened level of proof to survive the Rule 56 motion, the Court probably was basing its decision on underlying substantive antitrust law rather than employing a new summary judgment stan-

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<sup>255</sup> Id. at 587. Unfortunately, the Court did not explain what type of evidence is required of the nonmovant to satisfy this higher proof requirement. The Court, however, did cite *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), a case allowing the use of circumstantial evidence to show a theory's reasonableness. See *infra* notes 261-62 and accompanying text.

<sup>256</sup> *Matsushita*, 475 U.S. at 588.

<sup>257</sup> Id. at 589.

<sup>258</sup> The Court also endorsed the use of economic theories to justify court rulings on procedural motions. For a useful discussion of the role expert testimony played in the *Matsushita* litigation, see Stempel, *supra* note 183, at 108-14; Weakland, *supra* note 193, at 34 & n.45.

The Court has been criticized for its use of economic analysis. Two commentators accused it of tampering with the right to jury trial, preferring economic "illusion" to the reality of the pretrial record. See James F. Ponsoldt & Marc J. Lewyn, *Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illog of Matsushita*, 33 *Antitrust Bull.* 575, 576-77 (1988).

<sup>259</sup> Ponsoldt & Lewyn, *supra* note 258, at 597-98.

dard, but there are those who have expressed contrary opinions.<sup>260</sup> The decision relied heavily on the Court's earlier opinion in *Monsanto Co. v. Spray-Rite Service Corp.*,<sup>261</sup> another case under Section 1 of the Sherman Antitrust Act that addressed the standard of proof required to find a vertical price-fixing conspiracy.<sup>262</sup> The Court explicitly quoted the usual standard that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion,"<sup>263</sup> but qualified this principle in the context of the case before it by noting that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."<sup>264</sup> It justified its finding for petitioners on the ground that "there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies."<sup>265</sup> These references suggest that the Court intended the opinion to be read as primarily or exclusively applicable to the antitrust context.<sup>266</sup>

The Supreme Court clarified its *Matsushita* holding about an increased burden on the nonmovant when a claim is economically "implausible" in *Eastman Kodak Co. v. Image Technical Services, Inc.*,<sup>267</sup> which was characterized by the majority as "yet another case that concerns the standard for summary judgment in an antitrust controversy."<sup>268</sup> Interpreting *Matsushita*, Justice Blackmun wrote:

The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is eco-

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<sup>260</sup> See James Joseph Duane, The Four Greatest Myths About Summary Judgment, 52 Wash. & Lee L. Rev. 1523, 1569-70 (1996). Articles taking the opposing viewpoint are cited *infra* note 270.

<sup>261</sup> 465 U.S. 752 (1984).

<sup>262</sup> *Id.* at 755.

<sup>263</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

<sup>264</sup> *Id.* at 588.

<sup>265</sup> *Id.* at 595.

<sup>266</sup> But see Duane, *supra* note 260, at 1569 n.173 (rejecting contention that *Matsushita's* plausibility requirement was meant to be limited to antitrust cases).

<sup>267</sup> 504 U.S. 451 (1992).

<sup>268</sup> *Id.* at 454.

nomically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.<sup>269</sup>

As that passage intimates, the reference to “implausible” in *Matsushita* can be viewed as a surrogate for the historic notion that there not be any genuine issue of material fact when a reasonable jury could not find for the nonmoving party. Thus, there are compelling arguments that the Supreme Court’s holding in *Matsushita*, declaring the plaintiffs’ requested inference implausible, was mandated by substantive antitrust law and the traditional conception of summary judgment, not by any heightened standard to be generally imposed on parties defending against the motion.<sup>270</sup> In other words, inferences drawn in determining Rule 56 motions must be reasonable,<sup>271</sup> but the contours of what is reasonable can be limited and defined by the underlying substantive law.

Although *Matsushita*’s significance appears to be limited, especially if its methodology is articulated as in the preceding paragraph and cabined accordingly, its approach to determining the reasonableness of the plaintiffs’ inference is significant in one respect: The Court held in *Matsushita* that a nonmovant could not survive a summary judgment motion simply by advancing facts that, standing alone, support the inferences needed for a finding in its favor. Instead, the inferences to be drawn must be reasonable in light of the *entire* record, not simply that portion of it favorable to the nonmoving party.<sup>272</sup> Thus,

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<sup>269</sup> Id. at 468-69 (footnote omitted).

<sup>270</sup> See, e.g., William W. Schwarzer & Alan Hirsch, Summary Judgment After *Eastman Kodak*, 45 Hastings L.J. 1, 6-7 (1993) (“*Matsushita*, . . . rather than making a statement about implausible inferences in summary judgment motions generally, rests on a specific point of antitrust law: Plaintiffs cannot prevail if their case requires inferring a price-fixing conspiracy from normal business activity (specifically, price cutting) that, standing alone, is consistent with lawful competition.”); Thomas M. Jorde & Mark A. Lemley, Summary Judgment in Antitrust Cases: Understanding *Monsanto* and *Matsushita*, 36 Antitrust Bull. 271, 273 n.6 (1991) (arguing for specific, not broad application of *Matsushita*); Schwarzer, Hirsch & Barrans, *supra* note 121, at 491-92; Lisa Meckfessel Judson, Note, *Kodak v. Image Technical Services: The Taming of Matsushita and the Chicago School*, 1993 Wis. L. Rev. 1633, 1648 (stating that “*Matsushita* appeared to establish a new summary judgment standard in antitrust civil litigation”). But see Duane, *supra* note 260, at 1569 n.173 (citing this same passage as evidence that *Matsushita* was not intended to be limited to antitrust cases).

<sup>271</sup> This requirement existed long before *Matsushita*, although it never was stated that explicitly. In *Poller*, for example, the Court was weighing the plausibility of theories. Even cases that are part of the Clark-Frank debate refer to “fantastic” assertions, which clearly indicates some weighing of the evidence. Judges Clark and Frank frequently disagreed on just what was “fantastic” and what was deserving of trial. See *supra* notes 206-19 and accompanying text.

<sup>272</sup> Prior to the trilogy, some courts held that on a directed verdict motion, the court should look only at the evidence favorable to the nonmovant and disregard all other evidence. See Stempel, *supra* note 183, at 158; see also Steven Alan Childress, A New Era for

the district court no longer should ignore adverse factual information in the record.<sup>273</sup> To satisfy this burden, the Court required the plaintiff-manufacturers to present evidence tending to exclude the possibility that the alleged conspirators acted independently.<sup>274</sup>

*Matsushita* also is noteworthy because it marks a significant departure from the Court's prior cautious approach to summary judgment in complex cases involving issues of motive and intent. The Court found that summary judgment not only was appropriate in a complex antitrust case, but also was mandated unless the plaintiff could adduce a plausible economic motive for the defendants to conspire in addition to persuasive evidence tending to exclude the possibility of permissible competitive behavior.<sup>275</sup> However, even though the Court's opinion supports the proposition that complex cases involving issues and contexts previously thought to have been beyond summary judgment in fact are not automatically precluded from its ambit, the complexity of the case and the particular field of law are still material and can serve as restraining influences.<sup>276</sup>

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Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183, 186-87 (1987) (noting that, prior to trilogy, existence of competing inferences would preclude grant of summary judgment; now, if competing inferences are presented and show nonmovant's theory to be "unreasonable," nonmovant must show that his or her theory is not unreasonable).

<sup>273</sup> In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Court held that the Administrative Procedure Act required substantial evidence on the entire record. Thus, trial courts no longer simply could find evidence that, if examined outside of the context of the entire administrative record (which could include contradicting evidence or evidence from which conflicting inferences could be drawn), supports the conclusion arrived at by the agency.

<sup>274</sup> This reading is consistent with *Monsanto*, which involved a directed verdict. Both cases expressed a concern about deterring legal conduct, and therefore required a heightened burden of production that tends to preclude inferences of illegal conduct when the facts also reasonably could support an inference of legal conduct. See generally Daniel P. Collins, Note, Summary Judgment and Circumstantial Evidence, 40 Stan. L. Rev. 491 (1988). Also, the heavy reliance on *Monsanto* in *Matsushita* and the extensive language similar to that used on directed verdict motions may have signaled the principle established three months later in *Anderson*, discussed *infra* at notes 280-300 and accompanying text, under which the summary judgment standard was declared to mirror that of the directed verdict.

<sup>275</sup> See Robertson, *supra* note 220, at 750, 776.

<sup>276</sup> For example, one reason that the Court refused summary judgment in *Eastman Kodak* was because it was unwilling to encourage conduct that appeared illegal. See also 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 308b, at 81 (2d ed. 2000) (arguing that many judges have limited experience with complexities and nuances in antitrust law, and those who doubt their own grasp of subject "would rather not decide the sharply focused legal questions" presented by summary judgment motion); 9A Wright & Miller, *supra* note 211, § 2526 (observing that in Federal Employers' Liability Act (FELA) cases, action almost always survives to trial).

Not surprisingly, of the 1986 cases, *Matsushita* provoked the strongest dissenting language. Justice White, for example, wrote that by allowing the district court to decide the plausibility of the non-movant's theory relative to the movant's theory of what happened, the Court was making "assumptions that invade the factfinder's province."<sup>277</sup> Indeed, the dissent argued that in light of the plaintiffs' proffered expert testimony it was logically impossible to find the plaintiffs' predatory pricing theory too implausible to survive summary judgment.<sup>278</sup> Justice White went on to say that the majority's "language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff."<sup>279</sup> In essence the Justice believed that the majority opinion's reference to plausibility had expanded the judge's province under Rule 56 beyond that which was historically permissible.

## 2. *The Anderson Decision*

*Anderson v. Liberty Lobby, Inc.* was a public-figure libel action against a magazine publisher, its Chief Executive Officer, and the writer of the offending articles.<sup>280</sup> The plaintiff organization alleged that the magazine published articles falsely portraying it as a neo-Nazi, racist group, and did so maliciously by relying on unreliable sources and failing to verify its information adequately.<sup>281</sup> The defendants moved for summary judgment on the basis that the plaintiffs were "limited purpose public figures" and thus had to prove actual malice by clear and convincing evidence to prevail at trial.<sup>282</sup> In response, the plaintiffs presented evidence that several of the defendants' sources were unreliable, that the information was not verified prior to publication, and that another editor of the magazine considered the articles "terrible" and "ridiculous."<sup>283</sup> The district court granted summary judgment apparently because it believed the defendants had acted with sufficient care in producing the articles to preclude a finding of malice.<sup>284</sup> The court of appeals reversed in part,<sup>285</sup>

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<sup>277</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986).

<sup>278</sup> *Id.* at 605-06.

<sup>279</sup> *Id.* at 600 (White, J., dissenting) (commenting in response to majority's ignoring expert testimony supporting nonmovants' conspiracy theory).

<sup>280</sup> 477 U.S. 242 (1986).

<sup>281</sup> *Id.* at 244-45.

<sup>282</sup> *Id.* at 245.

<sup>283</sup> *Id.* at 246.

<sup>284</sup> *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201 (D.D.C. 1983).

<sup>285</sup> *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984).

finding the quality of the defendants' care to be a matter open to reasonable dispute.

The Supreme Court found nothing actionable and reinstated summary judgment. The Court's opinion, written by Justice White, included three key elements that effected significant changes in summary judgment practice. It held that the standard should mirror that applicable on a directed verdict motion (now designated a motion for "judgment as a matter of law" by Rule 50), that the standard of proof required at trial applies to summary judgment as well, and that a nonmovant must respond to a properly supported motion with affirmative evidence and cannot simply assert that the jury might disbelieve the movant.<sup>286</sup> The Court also reaffirmed *Matsushita's* references to a reasonable jury, but stressed that it was not overruling *Poller* by requiring a nonmovant to have sufficient evidence to support a favorable jury verdict in order to avoid summary judgment.<sup>287</sup>

The Court began its analysis by stating that Rule 56(e) provides that the mere existence of "some" alleged factual dispute is not enough to defeat summary judgment. Instead, there must be a genuine issue as to a material fact.<sup>288</sup> Thus, the trial judge first should ask if the disputed fact is material to deciding the case, looking to the applicable substantive law to determine which facts meet the materiality test; then she should ascertain if the fact genuinely is in dispute.<sup>289</sup> The Court defined a dispute as "genuine" if, given the standard of proof that would be applicable at trial,<sup>290</sup> "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>291</sup> The Court said that this standard mirrored that governing under Rule 50(a), which, the Court stated, requires a trial judge to "direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."<sup>292</sup> Thus, like *Matsushita*,

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<sup>286</sup> See *Anderson*, 477 U.S. at 250-57.

<sup>287</sup> See *id.* at 256. As a result, the trial court is deciding what a reasonable jury would be permitted to decide.

<sup>288</sup> See *id.* at 247-48.

<sup>289</sup> See *id.* at 248.

<sup>290</sup> The applicable burden of persuasion was established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)—clear and convincing evidence of actual malice, which means knowledge of the statement's falsity or reckless disregard for the truth. *Id.* at 279-80, 285-86.

<sup>291</sup> *Anderson*, 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . ." *Id.* at 252.

<sup>292</sup> *Id.* at 250. The Court reaffirmed the nexus between the two motions in *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000). In determining what is a material fact, the substantive law will apply to the extent that it defines what the critical elements of the claim and defenses are, but standard-of-proof requirements imposed by the substantive

*Anderson* looks to the substantive law to determine the range of permissible inferences.

Some commentators have concluded that the methodologies set forth in *Anderson* were designed to increase the likelihood of summary judgment<sup>293</sup> and that they mark a definite change in the motion's character from a procedure similar to that used on a Rule 12(b)(6) motion to dismiss to one equivalent to a sufficiency-of-the-evidence motion.<sup>294</sup>

To be sure, like *Matsushita*, *Anderson* does represent a departure from prior practice. Before the decision, most courts permitted cases to proceed to trial as long as the record contained some nonfrivolous dispute about the existence or interpretation of a fact, and refrained from predicting a reasonable jury's response.<sup>295</sup>

Yet despite the new inquiries *Anderson* requires the trial judge to make, the Court purported to leave the jury's role unchanged. Justice White emphasized that:

[The Court] by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.<sup>296</sup>

Thus, the fundamental roles of a live trial and a jury determination, as well as the liberal application of the Federal Rules in favor of the nonmovant, supposedly were to remain intact. The Court also reassured that in order to prevent the undermining of these rights, if reasonable minds could differ regarding the interpretation of impor-

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law are not considered in this inquiry (they are used to determine the genuineness of the disputed issue). The Court's equation of summary judgment and directed verdict reinforces the notion that the burden of production is a function of the burden of persuasion. See generally John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 Harv. L. Rev. 1382 (1955).

<sup>293</sup> See, e.g., Stempel, *supra* note 183, at 150 (stating that Court ventured far beyond hornbook law "in its zeal to grant summary judgment"); The Supreme Court, 1985 Term, *Leading Cases*, 100 Harv. L. Rev. 100, 252, 255 (1986).

<sup>294</sup> See Childress, *supra* note 272, at 184.

<sup>295</sup> See Stempel, *supra* note 183, at 114-15.

<sup>296</sup> *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) and *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)).

tant evidence, a summary judgment motion should fail, as would a directed verdict motion (or one for judgment as a matter of law).<sup>297</sup>

The dissenting Justices attacked the majority on several grounds. Justice Brennan objected to the invocation of the directed verdict standard as unprecedented, and thought it would invite judges to weigh the evidence and “transform what is meant to provide an expedited ‘summary’ procedure into a full-blown paper trial on the merits.”<sup>298</sup> He also criticized the majority for giving mixed signals, telling judges not to weigh evidence yet also instructing them to anticipate what a reasonable jury would do.<sup>299</sup> The dissent by Justice Rehnquist, joined by Chief Justice Burger, argued that using the trial burden at the summary judgment point would be unhelpful because the lines separating a preponderance of the evidence, clear and convincing evidence, and evidence beyond a reasonable doubt were too thin to provide meaningful distinctions.<sup>300</sup> The Rehnquist-Burger dissent predicted that the result would produce more erratic and unpredictable decisions on motions in libel cases.

### 3. *The Celotex Decision*

In *Celotex Corp. v. Catrett*,<sup>301</sup> the Court focused its attention on the defendant’s burden of production in supporting its summary judgment motion, an issue previously addressed in *Adickes*.<sup>302</sup> The plaintiff’s products liability suit alleged that her husband had died as a result of exposure to asbestos products manufactured by Celotex, among others.<sup>303</sup> In response to the first of the defendant’s two sum-

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<sup>297</sup> See the discussion of the directed verdict/judgment as a matter of law standard *infra* text accompanying notes 393-426.

<sup>298</sup> *Anderson*, 477 U.S. at 266-67.

<sup>299</sup> *Id.* at 266 (“[T]he Court’s opinion is . . . full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would . . .”). In fact, it is difficult to see how the jury’s role has been left unchanged, Justice White’s assertions notwithstanding. If, as he suggests, judges are not to weigh facts in deciding summary judgment motions, how are they to find “sufficient” evidence before denying the motion, and how are they to measure concepts like “reasonable” and “significantly probative,” as its equation of summary judgment and directed verdict seems to require? See Stempel, *supra* note 183, at 115-16; Weakland, *supra* note 193, at 26.

<sup>300</sup> There is some empirical evidence that juries do not properly distinguish between even the two polar standards of “preponderance of the evidence” and “beyond a reasonable doubt.” See Collins, *supra* note 274, at 516 & nn.126-27. Justice Rehnquist’s dissent also suggested that, although these standards do make some nebulous difference to the factfinder in deciding a case, “[t]he Court’s decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment . . . will do great mischief with little corresponding benefit.” 477 U.S. at 272 (Rehnquist, J., dissenting).

<sup>301</sup> 477 U.S. 317 (1986).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 319.

mary judgment motions, the plaintiff produced three documents that she claimed “demonstrate[d] that there is a genuine material factual dispute” whether the decedent had ever been exposed to Celotex asbestos products but failed to identify in answers to interrogatories any witness who could testify that the deceased had been exposed to that company’s products.<sup>304</sup>

The Court of Appeals for the District of Columbia, reversing the district court’s summary judgment grant, held that Celotex’s motion was defective because it had made no effort to present evidence supporting it. According to the court, Celotex had an affirmative duty to demonstrate that the decedent had not been exposed to its asbestos.<sup>305</sup> The Supreme Court rejected this analysis, holding that the party seeking summary judgment need not adduce evidence demonstrating the lack of a material trialworthy issue. The Court held:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim.<sup>306</sup>

Although purporting to honor the *Adickes* formulation of the movant’s burden, *Celotex* represents a clear departure from the earlier case, effectively recasting the motion in terms much more favorable to the moving party. Under *Adickes*, the party seeking summary judgment bore the burdens of both production and persuasion for purposes of the motion regardless of what burden it would have at trial.<sup>307</sup> In contrast, after *Celotex*, if the movant does not have the burden of persuasion at trial, it no longer is obliged to present affidavits or other pieces of evidence that negate the nonmovant’s claim; it

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<sup>304</sup> These were: decedent’s deposition transcript in a worker’s compensation proceeding; a letter from a former employer; and a letter from an insurance representative of another defendant. These items were challenged as inadmissible. *Id.* at 320. A product-exposure witness was identified in a supplemental interrogatory answer, but that was not filed until after the second summary judgment motion was under submission. Yet, Celotex did acknowledge that it knew before the second motion of the intent to call the witness at trial. *Id.* at 336 (Brennan, J., dissenting).

<sup>305</sup> See *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184-85 (D.C. Cir. 1985).

<sup>306</sup> *Celotex*, 477 U.S. at 322-23.

<sup>307</sup> See *supra* notes 235-41 and accompanying text. *Adickes* was viewed as requiring a movant to “foreclose the possibility” that the nonmovant might prevail at trial. *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982); see also *Smith v. Hudson*, 600 F.2d 60, 64 (6th Cir. 1979) (“[T]he burden of establishing the nonexistence of a material factual dispute always rests with the movant.”); *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 808 (7th Cir. 1973).

was the majority's view that "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>308</sup> The Court's underlying rationale was that since the claimant bears the ultimate burden of proving its claim at trial, requiring the nonclaimant movant to present evidence at the Rule 56 stage would place the burden of proof improperly on the defending party.<sup>309</sup> In short, the burden of proof should remain with the claimant at all phases of the litigation, summary judgment included.<sup>310</sup>

To support its decision, the Court further noted that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."<sup>311</sup> It simply would be unfair to impose a higher burden on the moving party when the court itself could decide the motion with less information.

*Celotex* unfortunately fails to provide clear guidance on what is required of the movant to satisfy the initial burden of production on a Rule 56 motion.<sup>312</sup> Justice White, concurring, attempted to elaborate more precisely what the movant's burden would be, but may have confused matters by stating cryptically that "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."<sup>313</sup> This statement rejects the majority's conclusion that the movant is free simply to show that the nonmovant's case is not supported by record evidence. The dissent did not dispute the majority's legal analysis, but noted that the majority had failed to identify what was required of the moving party, and disagreed with the outcome on the case's facts, finding sufficient evidence to create a genuine issue of material fact requiring a jury trial.<sup>314</sup>

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<sup>308</sup> *Celotex*, 477 U.S. at 325. The Court thereby clarified the *Adickes* Court's use of the word "show."

<sup>309</sup> See *id.* at 324.

<sup>310</sup> Justice Brennan, in dissent, also addressed the situation in which the movant does have the burden of persuasion at trial. *Id.* at 331 (Brennan, J., dissenting). In that instance, the motion must be supported with credible evidence using Rule 56 materials. *Id.* It is doubtful that in this situation the movant can support the motion with evidence in a form that would be inadmissible at trial. See Nelken, *supra* note 246, at 74-77.

<sup>311</sup> *Celotex*, 477 U.S. at 326.

<sup>312</sup> According to Justice Brennan's dissent, there are two aspects to the movant's burden on a summary judgment motion: (1) the initial burden of production, which shifts to the nonmovant if the movant provides enough to satisfy this element, and (2) the ultimate burden of persuasion, which remains with the movant. See *id.* at 330.

<sup>313</sup> *Id.* at 328 (White, J., concurring).

<sup>314</sup> In fact, the Court has been criticized for overlooking important aspects of the *Celotex* record in its eagerness to promote the summary judgment motion. See Stempel, *supra* note 183, at 108.

Compounding the uncertainty, the Court also stated that the non-moving party need not produce rebuttal evidence in a form that would be admissible at trial, but could use any of the materials described in Rule 56.<sup>315</sup> This statement is somewhat confusing because it can be read as not entirely consistent with the directed verdict standard held applicable in *Anderson* or with the text of Rule 56(e), which states that “[s]upporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence.”<sup>316</sup> One commentator has warned that this break with the Rule’s literal text will encourage the nonmovant to submit unsworn, unauthenticated materials in order to survive summary judgment even though the party probably ultimately will lose for lack of admissible evidence.<sup>317</sup> But that seems to overlook the difference between the form in which the material opposing the motion is presented—which the Court appears to have been talking about—and the factual content of that material.

The significance of *Celotex* resides in its strong advocacy of summary judgment as a tool to promote judicial efficiency and its fundamental reconfiguration of the balance of power between plaintiffs (typically the nonmovant) and defendants (typically the movant). Justice Rehnquist, writing for the majority, explicitly embraced the motion as a valuable screening mechanism, stating that “[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.”<sup>318</sup> He sharpened this point by adding that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy, and inexpensive determination of every action.’”<sup>319</sup>

Of particular practical importance is the fact that the Court’s analysis relieves movants of any significant burden of demonstrating that there are no disputed materially factual issues. Justice Rehnquist defended this apparent prodefendant shift in summary judgment philosophy by admonishing that:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in

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<sup>315</sup> See *Celotex*, 477 U.S. at 324.

<sup>316</sup> Fed. R. Civ. P. 56(e) (critical language was added by 1963 amendment); see also 10B Wright, Miller & Kane, *supra* note 109, § 2738, at 328 n.3.

<sup>317</sup> See Nelken, *supra* note 246, at 73.

<sup>318</sup> *Celotex*, 477 U.S. at 323-24.

<sup>319</sup> *Id.* at 327 (quoting Fed. R. Civ. P. 1).

fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.<sup>320</sup>

*Celotex* thus completes the Supreme Court's transformation of summary judgment from a somewhat disfavored and seldom successful motion to one that is to be shunned no longer. The changes in the motion's administration have proven to be potent both as a strategic weapon, particularly for defendants, and, as subsequent history demonstrates, as a tool for disposing of a wide range of cases short of trial. But have courts gone too far?

### E. *The Significance of the 1986 Trilogy*

The 1986 trilogy usefully restates summary judgment in terms of its function and intended result, which is helpful to trial court judges in divining what they reasonably may do.<sup>321</sup> And its stated goal—filtering out cases not worthy of trial—is, of course, unobjectionable. On a practical level, the three decisions collectively forge a new, stronger role for the motion. *Matsushita* requires that the moving party's evidence be sufficient to render the plaintiff's claim implausible. *Anderson* allows the trial court to enter judgment if the evidence produced by the plaintiff is not sufficient, under the applicable standard of proof, to convince the judge that a reasonable jury could return a verdict in his favor. And *Celotex* has made it easier to shift the burden of adducing support for the nonmovant's legal position on a Rule 56 motion and effectively obliges the plaintiff to come forward, on the defendant's motion, with her case before trial. Stated differently, *Celotex* has made it easier to make the motion, and *Anderson* and *Matsushita* have increased the chances that it will be granted.

But one must remember that the Court's opinions contain qualifying language reaffirming the significance of trials and juries, indicating that the three cases are not a carte blanche to the district courts; rather, these passages indicate that safeguards against the unconstrained use of summary judgment are necessary if other values are to be protected. Given the importance of these values, appellate supervision of the motion's administration seems especially appropriate to prevent Rule 56 from becoming an inappropriate docket-

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

<sup>321</sup> See Clark, *supra* note 216, at 494-96 (arguing that to grant judges power by rules of procedure, rules must be considered from perspective of those who will have to apply them).

clearing mechanism or a way of preempting trial and jury determination.<sup>322</sup>

The need for oversight is accentuated because the Court has infused summary judgment with considerably more strategic significance than it ever has had. As a result, a defendant is likely to resort to the motion more readily if she fears a jury will be sympathetic to the plaintiff or the claims asserted. Moreover, if judges are more receptive to granting summary judgment, defendants naturally will be encouraged to invoke the procedure. Indeed, the "new" motion has been perceived as a "ruthlessly efficient interception device,"<sup>323</sup> especially since "some plaintiffs with prospects for success at trial cannot readily or economically assemble a prima facie case before trial."<sup>324</sup>

This vitalized summary judgment motion has several other tactical ramifications. First, it can be employed as a tool for pre-empting an opponent's trial strategy more than it could in the past.<sup>325</sup> Because the standard for judgment as a matter of law has been incorporated into Rule 56, the motion now also may be used as a discovery device,<sup>326</sup> as it requires the nonmovant with the ultimate burden of

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<sup>322</sup> See Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. Rev. 1023, 1036 (1989) (arguing that appellate supervision is needed to prevent judicial backlash). One commentator has marshaled evidence that appellate supervision has played a significant role in summary judgment practice. See Weakland, *supra* note 193, at 29 & n.17 (finding that in 1986, approximately forty percent of published appellate decisions reviewing district court grants of summary judgment reversed lower courts' holdings and noting that figure might be quite different if unpublished dispositions were taken into account).

<sup>323</sup> Louis, *supra* note 322, at 1048.

<sup>324</sup> *Id.* at 1049.

<sup>325</sup> See Issacharoff & Loewenstein, *supra* note 240, at 110-11 (suggesting that defendants are not really "seeking 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>326</sup> The interaction between summary judgment and discovery remains unclear. See John F. Lapham, Note, *Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f)*, 24 U. Mich. J.L. Reform 253 (1990), for a discussion of a proposed amendment to Rule 56(f) to clarify the parameters of granting continuances for discovery when a summary judgment motion has been made. The author discusses the confusion and inconsistency of lower courts in applying the Rule. He suggests that satellite litigation has created a chilling effect on summary judgment motions, and the phenomenon, compounded by liberal grants of continuances and the resultant failure to economize at the discovery stage, defeats the motion's purpose. *Id.* at 281-82. Lapham's proposed reform would have the Rule specify what the party seeking a continuance must show and require that the district court grant the continuance if the party makes the required showing. *Id.* at 283-84.

Since Rule 56(f) leaves the grant of continuances to the trial court's discretion, inconsistency in its application in different types of actions can be expected. Additionally, some so-called disfavored actions could be prevented from going forward at all by denying discovery before deciding the motion, creating the danger of terminating meritorious cases

persuasion to come forth with the evidence he or she intends to use at trial or risk the action being terminated under Rule 56 and not reaching the jury. A properly supported summary judgment motion, moreover, shifts the cost of building a sufficient record to defeat the motion to the party who bears the burden at trial,<sup>327</sup> allowing the movant (typically the defendant) a relatively “free ride” while the opposing party (typically the plaintiff) is incurring litigation costs.<sup>328</sup>

Second, although difficult to appraise, the post-1986 practice may not provide any incentive to settle because of mutual optimism.<sup>329</sup> Clearly, the motion may alter the dynamics and settlement value of cases in which it has been made. Initially, the heightened threat that summary judgment will be granted may motivate the plaintiff’s acceptance of a lower amount than would have been acceptable in the past. If the motion is denied, the nonmovant may increase any settlement demands in hopes of recouping the cost of defeating the motion and because of the increased trial risk confronting the unsuccessful moving party.<sup>330</sup> Although these consequences always may have been present to some extent, they seem to have become accentuated in light of the accommodating post-trilogy judicial attitude and the equation between Rule 56 and the Rule 50 trial motion.

Third, the new motion also adds a layer to the strategy of the repeat litigant. In situations in which a defendant anticipates having to defend numerous similar suits, the fear of losing the summary judgment motion in the initial case, raising the specter of nonmutual issue preclusion, has a magnifying effect on the importance of a Rule 56 proceeding. Thus, the defendant may expend a significant amount of resources on the motion in an early case, making it very costly to defend against. Another, related possible effect of a repeat litigant’s development of a reputation for aggressiveness with regard to sum-

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and stifling the development of law in certain substantive areas. See generally 10B Wright, Miller & Kane, *supra* note 109, §§ 2740-2741.

<sup>327</sup> See Issacharoff & Loewenstein, *supra* note 240, at 93.

<sup>328</sup> See Friedenthal, *supra* note 240, at 776 (suggesting that unsupported motion could be used by movant to harass nonmovant). But see Weakland, *supra* note 193, at 30 n.19 (asserting that threats of summary judgment have become less intimidating because of frequent use of motion and that instead litigants use Rule 11 sanction motions to threaten opposing parties). Weakland’s argument seems less plausible since the 1993 revision of Rule 11, see *supra* notes 140-44 and accompanying text, which occurred after his article was published.

<sup>329</sup> As both sides acquire more information, they may tend to become even more optimistic that they will prevail. Therefore, the information gained by a summary judgment motion will not necessarily promote settlement; rather, it could increase each side’s overconfidence and lessen the desire to settle. See Issacharoff & Loewenstein, *supra* note 240, at 111-13. Of course, empirical evidence might prove the converse is true.

<sup>330</sup> See *id.* at 113.

mary judgment may be to intimidate or inhibit other potential plaintiffs who may not have the resources to invest in costly litigation.<sup>331</sup>

### III

#### THE EFFECT OF THE 1986 TRILOGY ON SUMMARY JUDGMENT PRACTICE

##### A. *The Reception Given to the 1986 Trilogy*

A steady stream of writing, much of it positive, emerged following the 1986 trilogy. Commentators who support the Supreme Court's decisions have focused on summary judgment's ability to cut litigation costs and reduce court dockets,<sup>332</sup> while noting that the procedure is consistent with federal court management trends.<sup>333</sup> Professor Martin B. Louis, for example, has suggested that the trilogy corrects a former proclaimant bias.<sup>334</sup> Another commentator, preferring summary judgment to other procedural possibilities, expressed both the view that the decisions revived Rule 56 and the hope that they would increase the trial courts' comfort level with the motion.<sup>335</sup> And yet another writer stated—three years after the decisions—that

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<sup>331</sup> See *id.* at 109-10.

<sup>332</sup> See William O. Bertelsman, Views from the Federal Bench—Significant Developments in the Law of Summary Judgments, *Ky. Bench & Bar*, Winter 1987, at 19 (approving trilogy as reaffirmation of purpose of summary judgment); Childress, *supra* note 272, at 194 (asserting new summary judgment standard reflects desire for efficiency in court system); William W. Schwarzer, Summary Judgment and Case Management, 56 *Antitrust L.J.* 213 (1987) (approving summary judgment as encouraging settlement and better case management); Stephen A. Bullington, Comment, Justice Delayed is Justice Denied: Summary Judgment Following *Anderson v. Liberty Lobby, Inc.*, 30 *Ariz. L. Rev.* 171 (1988); Robert L. Laufer, New Standards for Summary Judgment in Federal Courts, *N.Y.L.J.*, June 17, 1986, at 1 (describing new summary judgment standard as means of curbing litigation); Neal R. Stoll & Shepard Goldfein, Economic Sense in the Supreme Court, *N.Y.L.J.*, April 15, 1986, at 1 (describing *Matsushita* as "judicial bombshell" and discussing antitrust aspect of *Matsushita* and Court's use of economic evidence). One Louisiana practitioner also viewed the change as an opportunity to streamline the litigation process and control costs. William R. Forrester, Jr., *Civil Procedure*, 48 *La. L. Rev.* 233, 242-43 (1987).

<sup>333</sup> See Pierce, *supra* note 248, at 290-93; see also Bratton, *supra* note 240, at 479 (stating that summary judgment supplements, complements, and reinforces, while posing no more risk than, Rules 11, 12, 16, 26(c), 26(f), 41(b), and 50(a)). Professor Carrington argues that the attempt of the 1983 amendments to increase the amount of judicial management and sanctioning power was motivated by the historical failure of Rule 56 to fulfill its mission of reducing litigation. See Paul D. Carrington, Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure, 137 *U. Pa. L. Rev.* 2067, 2090-92 (1989).

<sup>334</sup> Louis, *supra* note 322, at 1034. This correction is seen in the context of other Rule changes, but the author cautions that overcorrection is a danger; see also Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 *Geo. L.J.* 1065, 1117 (1986) (arguing that new summary judgment practice removes misleading judicial supplementations to rule).

<sup>335</sup> See Carrington, *supra* note 333, at 2092-94.

summary judgment is “working superbly at the Supreme Court level,” but expressed dissatisfaction that some lower courts have been slow to embrace the trilogy.<sup>336</sup> He suggested rewriting the Rule to bring it into accord with Supreme Court decisions, and noted that the linkage between Rule 16 and Rule 56 would increase trial judges’ authority to grant full or partial summary judgment at the pretrial conference and provide Rule 16 with a real bite.<sup>337</sup> In addition, an experienced Ohio district judge, Thomas D. Lambros, welcomed the 1986 trilogy as giving “greater vitality” to the 1983 Rule amendments and their spirit of judicial management and control,<sup>338</sup> opining that the trilogy does not discourage access to the courts, but merely establishes a threshold for entering the courtroom, thereby compelling enforcement of the Rules by allowing only meritorious cases to gain entrance.<sup>339</sup>

Critics of the trilogy have argued that the Court conferred too much discretion upon trial judges, essentially transforming them into pretrial factfinders.<sup>340</sup> It has been contended that this has upset the carefully calibrated balance of power between judges and juries—a result that has broad implications for the administration of civil justice<sup>341</sup>—and, it should be added, shifted the balance between trial and pretrial adjudication. It also has been asserted that the trilogy (1) has

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<sup>336</sup> John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. Pa. L. Rev. 1883, 1894 (1989).

<sup>337</sup> *Id.* at 1889.

<sup>338</sup> Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. Pitt. L. Rev. 789, 794 (1989); see also Bratton, *supra* note 240, at 443.

<sup>339</sup> See Lambros, *supra* note 338, at 795. Bratton has also stated that it does not shift the balance of power to defendants, but simply “bring[s] litigation to a more realistic footing.” Bratton, *supra* note 240, at 478.

Other commentators have not lined up on either side of the debate. See, e.g., Levine, *supra* note 205, at 214 (cautioning that expansive interpretation of trilogy could be dangerous).

<sup>340</sup> See Collins, *supra* note 274, at 493 (arguing that trilogy confers on judges too much discretion to determine what reasonable jury would find); cf. Issacharoff & Loewenstein, *supra* note 240, at 93 (stating that trilogy represents “expansive view of the role of the trial court in determining what issues merit presentation to the ultimate trier of fact”); Weakland, *supra* note 193, at 52 (arguing that trilogy has given district courts “license to look beyond the evidence of record and impose [their] own beliefs based on outside information or studies when ruling on summary judgment motions”); Robertson, *supra* note 220, at 779 (“The heightened burden of proof at the summary judgment stage requires not only more from plaintiffs, but also from judges.”).

<sup>341</sup> For example, juries arrive at their decisions in a different analytical way than judges, usually incorporate more notions of what is equitable, and exercise greater flexibility in applying legal doctrine to the facts. See Stempel, *supra* note 183, at 165; see also Levit, *supra* note 252, at 329 (arguing that trilogy invites “judicial delving into and weighing of evidence”); Weakland, *supra* note 193, at 35 (“The [*Matsushita*] opinion appears to be crafted not by a judge searching for an issue of fact for trial, but by a panel of factfinders trying to determine a verdict.”).

altered the power balance between the parties in favor of defendants, who as a class tend to be wealthier and more powerful than plaintiffs and typically the beneficiaries of summary judgment;<sup>342</sup> (2) may have other unanticipated significant deleterious consequences;<sup>343</sup> and (3) has created a “gaping opportunity for motions made primarily for the purpose of harassment.”<sup>344</sup> In addition, some writers have expressed the fear that there may be less accuracy in the resolution of disputes because summary judgment can be granted on a less complete record than either a judgment as a matter of law or a jury verdict.<sup>345</sup> Further, some argue that a mechanism for disposing of cases before trial is simply an inappropriate solution to the “litigation explosion”<sup>346</sup> and

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<sup>342</sup> Stempel, *supra* note 183, at 160, argues that summary judgment was used often and successfully by defendants before the trilogy, which means that the trilogy has made the motion even more favorable towards defendants. Additionally, he claims that the trilogy clearly is antiplaintiff and prodefendant. See *id.* at 148-51; see also Levit, *supra* note 252, at 362-64 (asserting that Court’s current approach is elitist and detrimental to poor, powerless, and marginal groups).

<sup>343</sup> Two writers warn that the greater availability of summary judgment increases the costs and risks to plaintiffs at the pretrial stage, while lowering both for defendants. This, they suggest, will depress the expected settlement value of disputes and thus inhibit filings and transfer wealth from plaintiffs to defendants. The result is an incentive for defendants to abuse—or, at least, overuse—the motion. See Issacharoff & Loewenstein, *supra* note 240, at 103-05. But see Robertson, *supra* note 220, at 779, who argues that the revised standards inject a new element of fairness into the summary judgment process because of their predictability. Because the new standard parallels that of judgment as a matter of law, a plaintiff who has successfully opposed a summary judgment motion would in all likelihood defeat a Rule 50(a) motion. In this way, the standard recognizes the interests of plaintiffs by enabling them to avoid a trial in which they risk having a directed verdict entered against them. It also offers a more accurate estimate of their chances of reaching a jury to those plaintiffs who survive a Rule 56 motion. See also Issacharoff & Loewenstein, *supra* note 240, at 107-08 (positing that if summary judgment motion is denied, scales tip in favor of plaintiff because settlement value of suit will increase and suggesting that summary judgment is not good tool for defendants with weak case). Ignored in the Robertson approach is the possibility, discussed *infra* at notes 393-426 and accompanying text, that despite the Court’s unification of the summary judgment and judgment as a matter of law standards, there may be a tendency to abort cases at the former stage that would be allowed to pass to the jury at the latter.

<sup>344</sup> Friedenthal, *supra* note 240, at 779.

<sup>345</sup> See Richard L. Marcus, *Completing Equity’s Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 *U. Pitt. L. Rev.* 725, 739-74 (1989) (discussing trend away from jury trials to summary proceedings and resulting accuracy concerns). Professor Marcus suggests that even though the goal of our judicial system is conflict resolution rather than accuracy, the Rules are written with an eye to accuracy. *Id.* at 735. He discusses at length the benefits of a live jury trial. *Id.* at 757-70; see also Stempel, *supra* note 183, at 173 (“Inevitably, summary judgment is granted or denied based on a record less informative than that achieved through trial. Consequently, one should always be less confident in the result obtained through summary judgment than that obtained at later stages of trial.”).

<sup>346</sup> See Marcus, *supra* note 345, at 788 (attempting to start dialogue on current trend toward summary proceedings in effort to reduce overload in judicial system and concluding that focus of systemic reform should be on trial and making it more efficient rather than on

that the Supreme Court abused its power by effecting a major change in longstanding summary judgment practice without going through the rulemaking process because affected groups had no opportunity to express their concurrence or disagreement, or to offer suggestions.<sup>347</sup>

Finally, many critics have questioned whether the decisions really will produce gains in efficiency, pointing out that summary judgment motions take time to prepare, support, and decide (realities that are likely to have been increased by the motion's post-1986 vitality), often slow a case's forward progress, and typically save time only when granted.<sup>348</sup> Moreover, if making the motion becomes the normal—perhaps dominant—practice and their grant frequently is reversed on appeal, the resulting added cost and delay must be weighed against the efficiency gains from successful summary judgment grants that are upheld.<sup>349</sup> After discussing the tactical, cost, and delay aspects of summary judgment, Magistrate Judge and former trial lawyer Morton Denton observed: “Even when summary judgment is granted, the perception of justice may suffer if the losing party feels frustrated in never having seen the judge, a jury, or even the courtroom.”<sup>350</sup> And when the motion is denied, the case's forward progress has been stalled, which may obstruct settlement possibilities since some parties refuse to discuss that subject while the motion is pending.<sup>351</sup> Even

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finding ways to avoid trial in effort to provide speedier resolution of disputes); see also Levit, *supra* note 252, at 329-30, 360-61 (questioning propriety of using administrability concerns to formulate jurisdictional theories and viewing summary judgment as valuable procedure for courts who simply wish to clear their dockets only when it “do[es] not tinker with jurisdictional doctrines and in no way affect[s] substantive rights”).

<sup>347</sup> See, e.g., Stempel, *supra* note 183, at 162.

<sup>348</sup> See, e.g., *id.* at 172 (noting that extensive development of case required to determine summary judgment motion can be “counterproductive” because of repetition and expense required).

<sup>349</sup> Cf. John Guinther, *The Jury in America*, in *The American Civil Jury* 45, 61-62 (1987) (arguing that little evidence exists indicating juries prolong cases). In Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 *Employee Rts. & Employment Pol’y J.* 63 (1997), the author presents statistics for published decisions from 1992-96 showing that although summary judgment cases dominated the Seventh Circuit's employment docket, the reversal rate is very close to the average reversal rate for all employment cases. *Id.* at 65. However, he notes, “[i]n 1992, the published appeals from summary judgment and trials were in rough parity. By 1995, there were two summary judgment appeals reported for every trial appeal reported. And by 1996, there were nearly four published summary judgment decisions for every published appeal from a trial.” *Id.* at 76. Furthermore, all of the summary judgment reversals represent cases in which resources have been expended on the summary judgment motion itself, on appeal, and now must still be expended on a trial. See generally Mollica, *supra* note 244 (recounting numerous reversals of summary judgment).

<sup>350</sup> Morton Denlow, *Summary Judgment: Boon or Burden?*, *Judges’ J.*, Summer 1998, at 26.

<sup>351</sup> Furthermore, it has been argued that plaintiffs only can lose under the 1986 trilogy because it transforms summary judgment from a device for weeding out unmeritorious

summary judgment proponents acknowledge the difficulty of reconciling the motion's efficiency goal with Rule 56(f), which reflects the need to allow parties an opportunity to engage in discovery before ruling on summary judgment.<sup>352</sup>

Given these concerns, the supposed salutary effects of increasing the utility of the summary judgment motion should not go unquestioned; a meaningful debate, however, requires empirical evidence to evaluate the direct and indirect effects of enhancing the Rule 56 procedure. This need is all the more urgent given that the efficiency gains offered to justify promoting use of summary judgment may be offset by negative effects on other system values, such as accuracy, fairness, the day-in-court principle, and the jury trial right.

### *B. Increased Use of the Summary Judgment Motion*

As observed earlier,<sup>353</sup> by 1986 summary judgment may have been undergoing a transition from its post-*Poller* disfavored status to one of greater judicial receptivity. The motion may not have been either as neglected or its grant as difficult to secure as the general perception indicated. A study conducted by the FJC in 1991 supports these observations. It found an increase in Rule 56 motions from thirteen percent of the nonprisoner cases in 1975 to seventeen percent in 1986, which is statistically significant.<sup>354</sup> The same FJC study, however, showed no statistically significant increase in summary judgment motions immediately after the trilogy.<sup>355</sup> However, some types of liti-

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cases to "a full dress-rehearsal for trial with legal burdens and evidentiary standards to match those that would apply at trial." Issacharoff & Loewenstein, *supra* note 240, at 87.

<sup>352</sup> See, e.g., Schwarzer & Hirsch, *supra* note 270, at 15 ("[F]ailure to limit discovery . . . defeats the purpose of summary judgment—to help bring about the expeditious and economical resolution of cases that do not require a trial.").

<sup>353</sup> See *supra* notes 246-50 and accompanying text.

<sup>354</sup> Cecil, *supra* note 144, at 13. The study focused on a random sample of cases in 1974-75, 1985-86, 1987-88, and 1989 in six district courts. It appears to contradict the conclusions of an earlier Federal Judicial Center study conducted in 1987, which found that the percentage of cases terminated by summary judgment halved between 1975 and 1986. Joe S. Cecil & C.R. Douglas, *Summary Judgment Practice in Three District Courts 2* (1987). However, the 1991 survey was more comprehensive than the 1987 study in that it incorporated data from the dockets of the same district courts for the same time periods, but included three additional district courts and two additional time periods. Mollica, *supra* note 244, at 163, also suggests that the trilogy may simply have "consolidate[d] a movement already underway."

<sup>355</sup> Cecil, *supra* note 144, at 12-13. The rate for filing motions for summary judgment only increased from seventeen percent in 1986 to nineteen percent in 1988 and fell back to seventeen percent in 1989. *Id.* at 14. One weakness of this study, of course, was that it focused on the years immediately following the trilogy, which may have been too proximate to the decisions and therefore too early to reflect their full effect. The author acknowledges this, but notes that the fact that the 1989 cases surveyed showed no increase in summary judgment was meaningful in that those cases came sufficiently after the trilogy

gation experienced significant increases in Rule 56 activity; for example, the number of motions filed in products liability cases increased from twenty-four percent in 1986 to thirty-one percent in 1988 to forty-one percent in 1989.<sup>356</sup>

A subsequent FJC study found an apparent increase in summary judgment motions after 1986, but noted that this increase might reflect an unusual number of terminated asbestos cases in 1988.<sup>357</sup> Significantly, the study also showed that the percentage of cases in which one or more Rule 56 motions were granted increased from six percent in 1975 to twelve percent in 2000.<sup>358</sup> Furthermore, the percentage of cases terminated by summary judgment was 3.7% in 1975 and grew to 7.7% in 2000.<sup>359</sup>

Another study, although limited in scope, reached a conclusion consistent with that of the FJC. The research, using data for the period 1986 to 1991, found that particular district courts granted significantly more summary judgments after the trilogy.<sup>360</sup> Studying practice in the Eastern District of Pennsylvania and the District of Maryland, the author found that the Pennsylvania judges granted summary judgment two-thirds more often, and those in Maryland granted it more than twice as often as before the trilogy.<sup>361</sup> The study also found an increase in appellate affirmances—sixty-seven percent, in whole or in part, after the trilogy as opposed to fifty-one percent before it.<sup>362</sup>

An empirical review of summary judgment opinions in Ohio's federal district courts supports the view that the trilogy has had a decidedly prodefendant effect. Between 1979 and 1985, when only one party moved for summary judgment, the plaintiffs were successful on seventy-four percent of their motions, while defendants prevailed

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that they could be expected to reflect its full effect. However, the Berkowitz study discussed below, see *infra* notes 360-62 and accompanying text, does find a significant increase in summary judgment grants following the trilogy.

<sup>356</sup> Cecil, *supra* note 144, at 14.

<sup>357</sup> See Joe S. Cecil, Dean P. Miletich & George Cort, Fed. Judicial Ctr., Trends in Summary Judgment Practice: A Preliminary Analysis (2001).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> See Sean Berkowitz, Summary Judgment After the Supreme Court Trilogy: Lower Courts' Responses to *Celotex*, *Anderson*, and *Matsushita* 28-29 (1992) (unpublished manuscript, on file with *New York University Law Review*) (reporting rates of granting summary judgments increased from forty-five percent in 1985-86 to seventy-five percent in 1987-90 in Eastern District of Pennsylvania and from thirty-seven percent to eighty-two percent in District of Maryland).

<sup>361</sup> *Id.* at 28-29.

<sup>362</sup> *Id.* at 35-36.

on fifty-nine percent of theirs.<sup>363</sup> However, from 1987 through 1992, the defendants' success rates rose to seventy-nine percent, while the plaintiffs' success rates only increased slightly to seventy-seven percent.<sup>364</sup>

Although these studies are not comprehensive, there is additional evidence that a definite change in attitude toward summary judgment has occurred. Numerous judicial opinions since 1986 have referred explicitly to the Supreme Court trilogy as a mandate to grant summary judgment motions more readily.<sup>365</sup> In one commonly cited case

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<sup>363</sup> Gregory A. Gordillo, Summary Judgment and Problems in Applying the *Celotex* Trilogy Standard, 42 Clev. St. L. Rev. 263, 279 (1994). This study included decisions reported on Westlaw, and the author acknowledged that it is not exhaustive in scope. *Id.* at 277 n.104, 278 n.106.

<sup>364</sup> *Id.*

<sup>365</sup> See, e.g., *Estate of Zimmerman v. S.E. Pa. Transp. Auth.*, 168 F.3d 680, 684 (3d Cir. 1999) (citing *Anderson* for summary judgment standard and need for nonmovant to present sufficient, not merely "colorable," evidence); *Nicely v. McBrayer, McGinnis, Leslie & Kirkland*, 163 F.3d 376, 380 (6th Cir. 1998) (stating that trilogy "taken in the aggregate, lowered the movant's burden on a summary judgment motion") (citing *Barrett v. Harrington*, 130 F.3d 246, 251 (6th Cir. 1997)); *Rand v. Rowland*, 154 F.3d 952, 956-57 (9th Cir. 1998) (reversing grant of summary judgment, but remarking that Supreme Court "pave[d] the way toward mainstream acceptance of the summary judgment procedure with its trilogy of summary judgment cases in the mid-1980s" and noting that prior to trilogy, Ninth Circuit had viewed summary judgment as "drastic"); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988) (abandoning earlier cases setting forth strict summary judgment standard by noting that "a trilogy of . . . Supreme Court opinions demonstrates that we should be somewhat more hospitable to summary judgments than in the past"); *Calif. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (stating that trilogy "has increased the utility of summary judgment" and "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment"); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (holding that judge has affirmative obligation to prevent unsupported claims from going to trial); *Antonian v. City of Dearborn Heights*, 224 F. Supp. 2d 1129, 1136 (E.D. Mich. 2002) (asserting that trilogy "in the aggregate, lowered the movant's burden on a summary judgment motion"); *Smith v. CGU*, 179 F. Supp. 2d 425, 428 (M.D. Pa. 2001) (citing trilogy as having "encouraged greater use and acceptance of summary judgment motions" and decreased moving party's burden when opposing party bears burden of proof); *Smith v. Williams Hospitality Mgmt. Corp.*, 950 F. Supp. 440, 442-44 (D.P.R. 1997) (discussing importance of summary judgment in age of increasing litigation and citing number of state court cases that cited trilogy as liberalizing summary judgment standards); *Alpha Lyracom Space Communications, Inc. v. Comsat Corp.*, 968 F. Supp. 876, 891-92 (S.D.N.Y. 1996) ("[S]ummary judgment is not disfavored in antitrust actions. On the contrary, recognizing that summary judgment is not a substitute for trial, current Supreme Court and Second Circuit cases have 'tended to encourage its use in complex cases such as this one.'" (quoting *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1986)); *United States v. Real Prop. in Mecklenburg County, N.C.*, 814 F. Supp. 468, 472 n.8 (W.D.N.C. 1993) ("The Court repudiated the former hostility to summary judgment which had required denial on 'the slightest doubt' and encouraged use of Rule 56, even when there are factual disputes." (quotations omitted)); see also *Pfeifer v. Lever Bros. Co.*, 693 F. Supp. 358, 362-63 (D. Md. 1987); *Pratt v. Delta Air Lines, Inc.*, 675 F. Supp. 991, 993-94 (D. Md. 1987); *Apex Oil Co. v. DiMauro*, 641 F. Supp. 1246, 1255-57 (S.D.N.Y.), *aff'd in part and rev'd in part*, 822 F.2d 246.

decided the same year as the trilogy, *Knight v. U.S. Fire Insurance Co.*,<sup>366</sup> the Second Circuit stated that “[p]roperly used, summary judgment permits a court to streamline the process for terminating frivolous claims and to concentrate its resources on meritorious litigation.”<sup>367</sup> The court, citing statistics drawn from both published and unpublished opinions for a two-year period showing a high rate of affirmances of Rule 56 grants, rejected the perception (perhaps based on the court’s published opinions) that it was hostile towards summary judgment and quoted the passage in *Celotex* stating that the motion was no longer a disfavored procedure.<sup>368</sup> Furthermore, the trilogy is widely seen by members of the bar as having had a broad impact on state court summary judgment practice.<sup>369</sup>

The increase in summary judgment activity also is evidenced by the recent growth of local district court rules regulating the procedure,<sup>370</sup> and in their stepped-up enforcement.<sup>371</sup> These rules tend to

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However, not all courts have responded in this manner. The Eleventh Circuit, in particular, has taken a negative view of *Celotex*. In *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606-08 (11th Cir. 1991), the court relied on *Adickes* to hold that the moving party did not meet its burden and distinguished *Celotex* on the ground that it was an exception dealing with situations in which neither party can prove or disprove an essential element of the claim. See also *Jones v. City of Columbus*, 120 F.3d 248, 254 (11th Cir. 1997) (holding in Fair Labor Standards Act case that district court improperly shifted summary judgment burden from moving party to nonmoving party).

The Seventh Circuit in *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997), cited the trilogy but cautioned that although the same summary judgment standards apply to employment cases:

We have pointed out on a number of occasions that because employment discrimination cases often turn on questions of intent and credibility, courts in these cases must take care as they weigh summary judgment motions not to invade the province of the factfinder by attempting to resolve swearing contests and the like.

*Id.* However, it should be noted that the Seventh Circuit upheld summary judgment in this case and sanctioned the employee, who had been terminated after striking a coworker, for filing a frivolous appeal. For a discussion of the Seventh Circuit’s reversal of summary judgment in *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002), see *infra* notes 559-66 and accompanying text.

<sup>366</sup> 804 F.2d 9 (2d Cir. 1986).

<sup>367</sup> *Id.* at 12.

<sup>368</sup> *Id.*

<sup>369</sup> See, e.g., *Childress*, *supra* note 272, at 185; *Forrester*, *supra* note 332, at 242-43 (asserting that Louisiana could decide to follow Supreme Court trilogy since its summary judgment rule is modeled after Federal Rule 56); Mark C. Wilson, *Massachusetts Adopts the Federal Summary Judgment Standard*, 26 *Suffolk U. L. Rev.* 191 (1992) (discussing Massachusetts Supreme Judicial Court adoption of *Celotex* standard, thereby making it easier to grant summary judgment); see also *Williams Hospitality*, 950 F. Supp. at 443-44 (citing state court cases that discuss trilogy with approval).

<sup>370</sup> See *Brunet, Redish & Reiter*, *supra* note 120, at 55 (“Local rules drafted to ease the judicial task of ruling on Rule 56 motions would never have been adopted in the era when summary judgment motions were discouraged or only infrequently filed.”).

focus on improving the efficiency of motion practice, for example, by requiring separate filings identifying controverted and uncontroverted facts.<sup>372</sup> In addition, practical advice on appropriate strategies to employ under Rule 56 has proliferated.<sup>373</sup> The Manual for Litigation Management and Cost and Delay Reduction, for example, encourages attorneys and judges to make better use of summary judgment and provides guidelines for doing so.<sup>374</sup>

Finally, increased use of summary judgment has become marked in certain substantive law areas. In particular, it has been used with greater (and in some contexts almost Pavlovian) frequency in the post-trilogy years in antitrust,<sup>375</sup> libel,<sup>376</sup> RICO,<sup>377</sup> securities fraud,<sup>378</sup>

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<sup>371</sup> See Wald, *supra* note 151, at 1936-37 (describing anecdotal reports of stricter district court application).

<sup>372</sup> See Brunet, Redish & Reiter, *supra* note 120, at 55-57.

<sup>373</sup> See, e.g., *id.* at 323-44 (commenting on various tactics practitioners should consider); Lynne C. Hermle, Summary Judgment Motions in Discrimination Cases: Bringing, Defending and Appealing, at 1127 (PLI Litig. & Admin. Pract. Course Handbook Series No. 592, 1998); Childress, *supra* note 272, at 191-93 (suggesting that movants would find their task easier after 1986 trilogy and giving specific ideas for what to include in their papers); David Hittner & Lynne Liberato, Summary Judgments in Texas, 54 Baylor L. Rev. 1 (2002) (providing advice on Texas summary judgment procedure); Pierce, *supra* note 248, at 290-92 (suggesting ways for using other Federal Rules to optimize utility of summary judgment); Robertson, *supra* note 220, at 780 (stating that trilogy clarifies purpose of rule by drawing lines on merits of particular claim or defense rather than type of litigant who is asserting that claim or defense).

<sup>374</sup> See Fed. Judicial Ctr., Manual for Litigation Management and Cost and Delay Reduction 27-28 (1992).

<sup>375</sup> 6 Areeda & Hovenkamp, *supra* note 276, § 1405, at 23 (reading *Matsushita* to require summary judgment when evidence is merely consistent with conspiracy); see, e.g., *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998) (partially upholding grant of summary judgment and citing *Matsushita* for proposition that “[b]y avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces, summary judgment serves a vital function in the area of antitrust law”); *Apex Oil Co. v. DiMauro*, 641 F. Supp. 1246, 1256 (S.D.N.Y. 1986) (stating that *Monsanto* and *Matsushita* signaled departure from previous reticence to grant summary judgment in complex antitrust cases).

<sup>376</sup> See Summary Judgment Update Part II, Summary Judgment Motions in Defamation Actions: 1986-1994, LDRC Bull., July 31, 1995, discussed in Susan M. Gilles, Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation, 58 Ohio St. L.J. 1753, 1775 nn.75-76 (1998) (stating that summary judgment awards increased 79.5% for 1980-86 period, 79.9% for 1986-89 period, and 86.7% for 1990-94 period and noting that those grants are “overwhelmingly upheld when appealed” and that “in cases where the court cited *Anderson’s* requirement that the plaintiff produce clear and convincing evidence at the summary judgment stage, the defendants were successful in 96.9% of trial court motions”).

<sup>377</sup> See John T. Soma & Andrew P. McCallin, Summary Judgment and Discovery Strategies in Antitrust and RICO Actions after *Matsushita v. Zenith*, 36 Antitrust Bull. 325 (1991) (arguing that, as in antitrust cases, civil RICO defendants will be aided in obtaining summary judgment by Supreme Court trilogy); see, e.g., *Beatty v. N. Cent. Cos.*, 282 F.3d 602, 604 (8th Cir. 2002) (upholding summary judgment grant in RICO case because plaintiff’s tax theories were “without merit”); *Primary Care Investors, Seven, Inc. v. PHP*

civil rights,<sup>379</sup> products liability,<sup>380</sup> and age discrimination actions.<sup>381</sup>

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Healthcare Corp., 986 F.2d 1208, 1215-16 (8th Cir. 1993) (holding that ten to eleven months is not sufficiently "substantial" period of time to establish pattern of racketeering activity under RICO); Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991) (holding that plaintiff failed to establish RICO enterprise distinct from corporate defendants and failed to establish proximate causation); Griffin v. NBD Bank, 43 F. Supp. 2d 780, 787-90 (D. Mich. 1999) (granting summary judgment on RICO claims because plaintiff failed to satisfy continuity and relatedness requirements); Downing v. Halliburton & Assocs., Inc., 812 F. Supp. 1175 (M.D. Ala. 1993) (finding that plaintiff failed to show that firms were "enterprise," that they engaged in pattern of racketeering activity, and that they were liable as aiders and abettors).

<sup>378</sup> See, e.g., Tse v. Ventana Med. Sys., Inc., 297 F.3d 210 (3d Cir. 2002) (upholding summary judgment grant because plaintiffs had been unable to prove causation); In re Digi Int'l, Inc. Sec. Litig., 14 Fed. Appx. 714 (8th Cir. 2001) (finding that no reasonable jury could have found necessary requirement of scienter); Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997) ("Summary judgment may be defeated in a securities fraud derivative suit only by showing a genuine issue of fact with regard to a particular statement by [the company] or its insiders." (quotations omitted)); Krim v. BancTexas Group, 989 F.2d 1435, 1446 (5th Cir. 1993) (finding no evidence that information not disclosed was known to defendant or that it was material, and no evidence of scienter); *Primary Care Investors*, 986 F.2d at 1213-14 (finding that plaintiff did not have Section 10b-5 claim because it did not have contractual or fiduciary-duty right to conversion of ownership units into common stock and because failure by defendants to give notice of their intent to issue common stock was not material); Aschinger v. Columbus Showcase Co., 934 F.2d 1402, 1409-11 (6th Cir. 1991) (noting that plaintiff could not establish either material omission or misstatement); Nat'l W. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 112 F. Supp. 2d 292 (S.D.N.Y. 2000) (holding that plaintiff had not met its burden to respond to summary judgment motion with persuasive evidence of contested material facts); Rubenberg v. Hydronic Fabrications, Inc., 775 F. Supp. 56, 63 (E.D.N.Y. 1991) (holding that plaintiff acted recklessly and therefore is barred by due diligence defense); In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 782 F. Supp. 1382 (D. Ariz. 1991) (granting summary judgment due to plaintiff's failure to present evidence of scienter). But see Fla. State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645 (8th Cir. 2001) (holding that grant of motion to dismiss based on implausibility of plaintiff's economic theory was inappropriate in light of scienter allegations).

<sup>379</sup> See Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 208 (1993); see, e.g., *Blades v. Schuetzle*, 302 F.3d 801 (8th Cir. 2002) (affirming grant of summary judgment in § 1983 action); *Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760 (7th Cir. 2002) (affirming holding that evidence presented by plaintiff could not support conclusion that defendant had acted with deliberate indifference); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082 (5th Cir. 1994) (finding that plaintiff failed to show evidence of gender bias or that she was qualified for position she was denied); *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (holding that plaintiff failed to establish hostile work environment for purposes of sexual harassment claim); *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990) (affirming grant of summary judgment in sexual harassment claim); *Moore v. Nutrasweet Co.*, 386 F. Supp. 1387 (N.D. Ill. 1993) (finding that employer had legitimate, nondiscriminatory reason for excluding plaintiff from bonus program and terminating plaintiff in action alleging race and sex discrimination); *Bernard v. Bethlehem Steel Corp.*, 837 F. Supp. 215 (E.D. Tex. 1993) (holding that plaintiff failed to show that employer's reason for terminating him was pretextual); see also *Mollica*, supra note 349, at 65, 70-72, 75-92.

<sup>380</sup> See supra note 356 and accompanying text; see, e.g., *Crawford v. Sears Roebuck & Co.*, 295 F.3d 884 (8th Cir. 2002) (holding that summary judgment was appropriate because plaintiff had not proved violation of specific safety standard); *Stahl v. Novartis Pharm.*

In the age discrimination context, for example, many practitioners believe that the case is won or lost on summary judgment, because juries are thought to be sympathetic to older workers claiming discrimination.<sup>382</sup> There is little doubt that much of the increased

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Corp., 283 F.3d 254, 264-65 (5th Cir. 2002) (stating that plaintiff had to “go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial to defeat summary judgment” (quotations omitted)); *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027 (7th Cir. 1997) (affirming district court grant of summary judgment on ground that plaintiff had failed to present enough evidence of negligence to create triable issue); *Zettle v. Handy Mfg. Co.*, 998 F.2d 358 (6th Cir. 1993) (finding that manufacturer was not negligent because decedent’s injury was not foreseeable and plaintiff failed to establish causation); *Lockart v. Kobe Steel Ltd. Constr. Mach. Div.*, 989 F.2d 864, 865 (5th Cir. 1993) (holding that plaintiff’s use of excavator was not “reasonably anticipated use” within meaning of products liability statute, and that warning was sufficient); *Satcher v. Honda Motor Co., Ltd.*, 984 F.2d 135 (5th Cir. 1993) (holding that alleged defect was open and obvious and thus barred plaintiff’s recovery); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909 (5th Cir. 1992) (finding that plaintiff did not establish that warning was insufficient and that its insufficiency was cause of decedent’s injury); *Slaughter v. S. Talc Co.*, 919 F.2d 304 (5th Cir. 1990) (affirming district court’s refusal to accept plaintiff’s expert affidavit alleging causality); *Whetstine v. Gates Rubber Co.*, 895 F.2d 388 (7th Cir. 1990) (noting that plaintiff could not overcome defendant’s evidence that it was not product that caused his injury); *Lyons v. Garlock, Inc.*, 12 F. Supp. 2d 1226, 1229-30 (D. Kan. 1998) (granting summary judgment on grounds that plaintiff failed to establish that defendant’s product caused death).

<sup>381</sup> See Frank J. Cavaliere, *The Recent “Respectability” of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court’s Summary Judgment “Prism,”* 41 *Clev. St. L. Rev.* 103 (1993); McGinley, *supra* note 379; Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 *Employee Rel. L.J.* 245 (1992). See, e.g., *Gonzalez v. El Dia, Inc.*, 304 F.3d 63 (1st Cir. 2002) (holding that summary judgment was appropriate because plaintiff had provided insufficient evidence); *Wallace v. O.C. Tanner Recognition Co.*, 299 F.3d 96 (1st Cir. 2002) (affirming summary judgment because employer’s decision was not motivated by age discrimination); *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 428 (8th Cir. 1999) (holding that plaintiff must present affirmative evidence of age discrimination, not simply assert that jury might disbelieve witnesses; citing *Anderson*); *Hoffman v. MCA, Inc.*, 144 F.3d 1117 (7th Cir. 1998) (finding summary judgment proper because plaintiff failed to establish pretext); *Henn v. Nat’l Geographic Soc’y*, 819 F.2d 824 (7th Cir. 1987) (holding that plaintiffs did not establish that defendant’s early retirement plan was vehicle for age discrimination).

<sup>382</sup> See Darrel S. Gay, *Litigating Employment Discrimination Cases: 1996: The Importance of Summary Judgment*, in *Defending Civil Rights Cases* 69 (PLI Litig. & Admin. Pract. Course Handbook Series No. 542, 1996) (arguing that summary judgment is valuable tool for ending litigation and curtail costs and, even if it fails, it assists defense counsel in evaluating claims and defenses); Cavaliere, *supra* note 381, at 104; Alison M. Donahue, *Recent Case, Issues in the Third Circuit: Employment Law—Ramifications of St. Mary’s Honor Center v. Hicks: The Third Circuit’s Revival of the “Pretext-Only” Standard at Summary Judgment: Sheridan v. E.I. Dupont De Nemours & Co., Brewer v. Quaker State Oil Refining Co.*, 41 *Vill. L. Rev.* 1287, 1299 n.15 (1996) (citing several cases and commentators for proposition that age discrimination cases are won or lost on summary judgment); see also Darrell S. Gay, Susan A. Romero & Craig A. Butler, *Litigating Employment Discrimination Cases 1997: How to Plan and Prepare for Critical Depositions* 24, 29, 32-35, 565 (PLI Litig. & Admin. Pract. Course Handbook Series No. 565, 1997) (providing specific advice for taking depositions with view towards summary judgment and advising that

activity in these areas is attributable to the fact that many federal courts have abandoned the historical reluctance to grant the motion in complex actions<sup>383</sup> or actions turning on state of mind.<sup>384</sup> Apparently, they have taken the Supreme Court's willingness to grant summary judgment in a complex antitrust action involving conspiracy (*Matsushita*), a defamation case involving actual malice (*Anderson*), and a multiparty products liability action (*Catrett*) as a signal to be receptive to the motion in contexts that historically were considered inappropriate.<sup>385</sup>

Thus, even though the use of summary judgment to dispose of cases may not have increased in all legal fields, it undoubtedly has increased in many and in the aggregate.<sup>386</sup> Clearly, Rule 56 has

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defense counsel begin comprehensive investigation of facts as soon as he or she is retained).

<sup>383</sup> See, e.g., *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 521 (5th Cir. 1999) (affirming summary judgment in case involving monopolization provision of Sherman Act and rejecting notion that summary judgment is disfavored in certain categories of cases); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) (stating that nonmoving party's burden is not affected by type of case); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478-79 (6th Cir. 1989) ("Complex cases are not necessarily inappropriate for summary judgment."); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274 (8th Cir. 1988) (claiming that Supreme Court unequivocally rejected idea that different, heightened standard applies for summary judgment motions raised in complex antitrust cases); see also *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475-76 (7th Cir. 1988); *Aetna Cas. & Sur. Co. v. Neff*, 30 F. Supp. 2d 990, 993 (S.D. Ohio 1998).

<sup>384</sup> See *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61-62 (2d Cir. 1998) (holding that summary judgment should be used sparingly when state of mind is at issue, but plaintiffs may not avoid it merely by declaring that state of mind is at issue). But see *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987) (noting that Supreme Court has not abandoned presumption that summary judgment is disfavored in complex antitrust cases involving state of mind). See also *Blades v. Schuetzle*, 302 F.3d 801 (8th Cir. 2002); *Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760 (7th Cir. 2002); *Wallace v. O.C. Tanner Recognition Co.*, 299 F.3d 96 (1st Cir. 2002); *In re Digi Int'l, Inc. Sec. Litig.*, 14 Fed. Appx. 714 (8th Cir. 2001); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 n.3 (5th Cir. 1993) ("[S]ummary judgment is *never* precluded when state of mind is at issue."); *Sammons v. Taylor*, 967 F.2d 1533, 1545 (11th Cir. 1992); *Street*, 886 F.2d at 1478-79; *Corrugated Paper Prods., Inc. v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989); *Morgan v. Harris Trust & Sav. Bank of Chi.*, 867 F.2d 1023, 1026 (7th Cir. 1989); *Herbst v. Sys. One Info. Mgmt., L.L.C.*, 31 F. Supp. 2d 1025, 1032 (N.D. Ohio 1998); *Aetna*, 30 F. Supp. 2d at 993; *Parkerson v. Fed. Home Life Ins. Co.*, 797 F. Supp. 1308, 1315 (E.D. Va. 1992); *Goldberg v. Whitman*, 743 F. Supp. 943, 957 (D. Conn. 1990).

<sup>385</sup> See, e.g., 10B Wright, Miller & Kane, *supra* note 109, § 2730, at 7 ("Inasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable people might differ—a function traditionally left to the jury—summary judgment often will be an inappropriate means of resolving an issue of this character."); 10B *id.* § 2732.2, at 152 ("Cases premised on alleged violations of the constitutional or civil rights of plaintiffs frequently are unsuitable for summary judgment.").

<sup>386</sup> One area in which there is little evidence that summary judgment has increased is negligence cases, at least outside the products liability or mass torts contexts. Many courts express a reluctance to grant summary judgment in negligence actions because of the gen-

evolved from a “toothless tiger”<sup>387</sup> into a powerful tool for judges to control dockets and respond to the supposed “litigation explosion.”<sup>388</sup> On occasion, federal courts have acknowledged openly the role docket concerns have played in their use of summary judgment.<sup>389</sup>

In *Shager v. Upjohn Co.*,<sup>390</sup> for instance, Seventh Circuit Judge (now Chief Judge) Richard Posner stated:

The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures in general and to the pressure of the criminal docket in particular, makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the non-moving party, if such a verdict is highly unlikely as a practical matter because the plaintiff's case . . . is marginal.<sup>391</sup>

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eral belief that the jury is better equipped to determine whether or not given conduct conforms to the reasonable-person standard. See, e.g., *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970); *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887 (1951). See generally 10 Wright, Miller & Kane, *supra* note 109, § 2729. However, there appears to be a recent trend towards granting summary judgment in negligence cases when the action can be disposed of on the basis of the plaintiff's assumption of risk or contributory negligence. See generally *infra* notes 613-21 and accompanying text.

<sup>387</sup> See Miller, *supra* note 109, at 8.

<sup>388</sup> See *Mullin v. Raytheon Co.*, 164 F.3d 696, 698 (1st Cir. 1999) (“Summary judgment is a device that ‘has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways.’” (quoting *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991))); *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 171 (D.P.R. 1999) (same); *Delaria v. Am. Gen. Fin., Inc.*, 998 F. Supp. 1050, 1056 (S.D. Iowa 1998) (same).

<sup>389</sup> See, e.g., *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1091-92 (9th Cir. 2001); *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 475-76 (7th Cir. 1997); *Knox v. McGinnis*, 998 F.2d 1405, 1408 (7th Cir. 1993) (upholding district court's refusal to accept plaintiff's tardy response to summary judgment motion because in “today's climate of crowded dockets and limited judicial resources, a district court is not required to accept and to consider a response that is submitted after the court has ruled on a motion”); *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993) (stating that trilogy “has an important, and ever increasing, role in stemming the tide of explosive litigation, greatly congested dockets, increasing delay in claims being adjudicated, and spiraling—indeed, unimaginable—litigation costs”); *Palucki v. Sears Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989) (“The workload crisis of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment.”); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988) (“The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact.”); *Jones v. Becker Group of O'Fallon Div.*, 38 F. Supp. 2d 793, 794 (E.D. Mo. 1999); *Buchanan v. Tower Auto., Inc.*, 31 F. Supp. 2d 644, 650 (E.D. Wis. 1999).

<sup>390</sup> 913 F.2d 398 (7th Cir. 1990).

<sup>391</sup> *Id.* at 403.

Although somewhat unusual—but refreshing—for its bluntness, this statement expresses a sentiment undoubtedly shared by numerous federal judges and practitioners alike.<sup>392</sup>

*C. Application of the Judgment as a Matter of Law  
(Directed Verdict) Standard*

Until *Anderson*, the consensus among commentators, trial judges, and practitioners had been that summary judgment and directed verdict (now the motion for judgment as a matter of law) were distinct in theory and in practice.<sup>393</sup> The virtual unification of the standards mandated by *Anderson* requires some analysis of the purpose and application of the latter motion, now designated the motion for judgment as a matter of law in Rule 50.

Directed verdict is best understood as a jury control device that permits the judge to limit the jury's freedom to find facts and apply them to the law. Historically, the procedure has been viewed as a minimal intrusion on the jury's prerogatives that has been used only when there is no reasonable basis for disagreement about the facts to avoid results that are unreasonable or at variance with the applicable law.<sup>394</sup> The intensity of judicial oversight through the employment of the motion varies depending on a number of factors, including the nature of the consequences of possible jury error,<sup>395</sup> the need for uniformity in applying the governing substantive law, the complexity of the issues, the extent to which the acceptability of the case's outcome depends on a jury decision, and the degree to which the claims are routine or outside the normal experience of jurors.<sup>396</sup>

Three basic restrictive rules that judges traditionally have followed on the motion are that the evidence is to be viewed in the light most favorable to the nonmovant,<sup>397</sup> the credibility of witnesses is not

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<sup>392</sup> See, e.g., Kenneth P. Nolan, Weinstein on the Courts, Litig., Spring 1992, at 24, 26 (quoting Judge Weinstein as describing increased use of summary judgment as "part of a general door-closing tendency designed to keep people who want to have their rights adjudicated out of the courts"); see also Jeffery W. Stempel, Contracting Access to the Courts: Myth or Reality? Boon or Bane?, 40 Ariz. L. Rev. 965, 992 (1998) (arguing that increase in summary judgment since 1986 trilogy is sign of trend away from full-fledged adjudication on merits).

<sup>393</sup> See, e.g., Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, Civil Procedure § 4.16 (4th ed. 1992); 11 James Wm. Moore & Jo Desha Lucas, Moore's Federal Practice ch. 56 (3d ed. 1997).

<sup>394</sup> See Edward H. Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903, 921 (1971).

<sup>395</sup> See *id.* at 990.

<sup>396</sup> See *id.* at 922-24.

<sup>397</sup> See 9A Wright & Miller, *supra* note 211, § 2524, at 256-57 & n.11; see also McDowell v. Rogers, 863 F.2d 1302, 1303 (6th Cir. 1988); Kinnel v. Mid-Atlantic Mausoleums, Inc.,

to be evaluated,<sup>398</sup> and contradicting evidence is not to be weighed.<sup>399</sup> Various standards exist for determining whether the nonmovant has presented sufficient evidence to survive the motion and reach the jury; the two most significant are the scintilla rule<sup>400</sup> and the reasonable-jury rule. The federal courts decline to use the scintilla rule,<sup>401</sup> following instead the principle that the nonmovant must have presented enough evidence for a reasonable jury to reach a verdict in its favor.<sup>402</sup> The reasonable-jury standard is difficult to elaborate upon or further define, and judges have invoked a number of “buzzwords” in struggling to articulate and apply it.<sup>403</sup> Not surprisingly, the resulting analysis is very case specific, and it is hard to draw a straight line through the decisions.<sup>404</sup>

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850 F.2d 958, 961 (3d Cir. 1988); *Overman v. Fluor Constructors, Inc.*, 797 F.2d 217, 218 (5th Cir. 1986); *Wilkins v. Hogan*, 425 F.2d 1022, 1024 (10th Cir. 1970). Bearing this in mind, it is striking that the Court in fact rejected as too remote the inferences relied on by the *Matsushita* and *Anderson* plaintiffs. See Stempel, *supra* note 183, at 150.

<sup>398</sup> See 9A Wright & Miller, *supra* note 211, § 2524, at 256 & n.9; 9A *id.* § 2527; see also *Moxness Prods., Inc. v. Xomed, Inc.*, 891 F.2d 890, 892 (Fed. Cir. 1989); *Thieman v. Johnson*, 257 F.2d 129, 132 (8th Cir. 1958); *Frabutt v. New York, C. & St. L.R. Co.*, 88 F. Supp. 821, 825 (W.D. Pa. 1950).

<sup>399</sup> See 9A Wright & Miller, *supra* note 211, § 2524, at 255 & n.8; see also *Cockrum v. Whitney*, 479 F.2d 84, 85-86 (9th Cir. 1973); *MacKay v. Costigan*, 179 F.2d 125, 127-28 (7th Cir. 1950).

<sup>400</sup> Under the scintilla test, the judge may deny the motion and refer the case to the jury if there is any—“a scintilla of”—evidence on which the jury possibly might render a verdict for the nonmovant. See Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 12.3, at 564-65 (3d ed. 1999).

<sup>401</sup> See 9A Wright & Miller, *supra* note 211, § 2524, at 253 & n.5; see also *A.B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254 (1925); *Beaty Shopping Ctr., Inc. v. Monarch Ins. Co. of Ohio*, 315 F.2d 467, 469 (4th Cir. 1963); *Newman v. Exxon Corp.*, 722 F. Supp. 1146, 1148 (D. Del. 1989). Cf. *infra* note 417.

<sup>402</sup> See 9A Wright & Miller, *supra* note 211, § 2524, at 263 n.16; see also *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1163 (10th Cir. 1985); *Gulf Ins. Co. v. Kolob Corp.*, 404 F.2d 115, 118 (10th Cir. 1968); *Texas Co. v. Savoie*, 240 F.2d 674, 675 (5th Cir. 1957).

<sup>403</sup> “[T]he facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion.” *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978) (quoting *Johnson v. J.H. Yost Lumber Co.*, 117 F.2d 53, 61 (8th Cir. 1941)); see also *Boeing Co. v. Shipman*, 411 F.2d 365, 374 n.15 (5th Cir. 1969) (listing various formulations used by courts, including evidence “overwhelmingly on one side,” no “mere speculation,” when “there can be but one reasonable conclusion,” “substantial evidence,” “rational basis in the record,” need “conflict in substantial evidence,” “would rationally support a verdict” for nonmoving party (citations omitted)).

<sup>404</sup> See *Galloway v. United States*, 319 U.S. 372, 395 (1943) (“[S]tandards . . . cannot be framed wholesale for the great variety of situations in respect to which the question [of standards of proof required for submission of evidence to jury] arises.”); *Cooper*, *supra* note 394, at 908 (finding that there are no clear limitations, only helpful guidelines); see also *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941), in which the Fourth Circuit tried to explain the concept using the descriptor “substantial evidence.” The court stated that a directed verdict could not be granted if there was substantial evidence supporting the nonmovant’s case; a verdict could be directed only when there was no substan-

In *Brady v. Southern Railway Co.*,<sup>405</sup> the Supreme Court described the standard using a reasonable-jury measure as follows:

When the evidence is such that without weighing the credibility of the witnesses there can be but one *reasonable* conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury . . . .<sup>406</sup>

Under this formulation, if there is substantial evidence supporting the nonmovant's case, judgment as a matter of law will not be granted; a primary goal is to prevent the jury from merely speculating in the absence of probative facts.<sup>407</sup>

One important case that helped define a district judge's discretion in deciding the motion was *Dyer v. MacDougall*.<sup>408</sup> It presented the Second Circuit with a unique question regarding credibility determinations in a slander case in which the plaintiff had not heard the alleged remarks and his own witnesses, as well as the defendant, denied their utterance.<sup>409</sup> The court had to determine whether the possibility of the trier's disbelief of the testimony against the nonmovant could satisfy his burden of proof.<sup>410</sup> Judge Learned Hand, writing for the court, concluded that it could not; the factfinder may not disregard the uncontradicted, unimpeached testimony of a disinterested witness.<sup>411</sup> Although the court found that demeanor evidence is important and the jury technically could have decided that all the witnesses not only were lying but that the opposite of their testimony was true, a directed verdict for the defendant nonetheless was appropriate.<sup>412</sup> Concurring, Judge Frank added that the court should view the evidence in the light most favorable to the nonmovant and

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tial evidence to support the nonmovant or when the evidence was all or overwhelmingly against the nonmovant. *Id.* at 354.

<sup>405</sup> 320 U.S. 476 (1943).

<sup>406</sup> *Id.* at 479-80 (emphasis added) (overturning jury verdict for plaintiff in negligence suit against railway whose employee brakeman was killed in rail yard when engine he was on derailed while moving railcars onto storage tracks). The Court specifically stated that the scintilla rule did not apply to FELA cases. *Id.* at 479.

<sup>407</sup> See *Galloway*, 319 U.S. at 395; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 115-16 (3d Cir. 1980); *Admiral Theatre*, 585 F.2d at 883.

<sup>408</sup> 201 F.2d 265 (2d Cir. 1952).

<sup>409</sup> *Id.* at 266-67.

<sup>410</sup> See *id.* at 268.

<sup>411</sup> *Id.* at 269. However, when confronted with interested testimony, the decision of whether to send the issue to the jury is highly dependent on the existence and strength of corroborating evidence as well as contradictory evidence. See *Cooper*, *supra* note 394, at 929-40 (disinterested witnesses); *id.* at 941-46 (interested witnesses).

<sup>412</sup> *Dyer*, 201 F.2d at 269.

draw inferences that are reasonable and justifiable therefrom.<sup>413</sup> He went on to quote the Supreme Court's *Brady* standard permitting a directed verdict when only one reasonable conclusion can be drawn from the evidence.<sup>414</sup>

Even though *Dyer v. MacDougall* defines one boundary of the trial judge's discretion, there remains a large zone in which the sufficiency standard is not well settled. Some courts phrase the test in terms of whether the trial judge would have to set aside a verdict for the party against whom the motion is made.<sup>415</sup> Other courts say that if the nonmovant presents any evidence supporting her or his case, the motion will be denied.<sup>416</sup> Whether these semantic formulations are of much practical utility is open to serious doubt, since the first is simply a restatement of the question being asked, and the second appears to be another way of articulating the largely abandoned scintilla test.<sup>417</sup>

In light of *Anderson's* equation of the summary judgment and directed verdict motions, the scintilla rule has no place in summary judgment practice. Even if the *Brady* standard is administered with varying degrees of tolerance for marginal theories, more than a "scintilla" of evidence will be required to defeat a Rule 56 motion.<sup>418</sup> But this does not mean that the court should make findings as to which inferences are *more* reasonable.<sup>419</sup> The right to jury trial is at stake on both the summary judgment and directed verdict motions. Therefore,

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<sup>413</sup> *Id.* at 271 (Frank, J., concurring); see also *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 132-33 (4th Cir. 1967); *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958); *Riss & Co. v. Ass'n of Am. R.Rs.*, 187 F. Supp. 306, 312 (D.D.C. 1960).

<sup>414</sup> *Dyer*, 201 F.2d at 271 (Frank, J., concurring).

<sup>415</sup> See 9A Wright & Miller, *supra* note 211, § 2524, at 266 & n.23.

<sup>416</sup> *Id.* at 266 & n.21.

<sup>417</sup> FELA cases present a special scenario. Even though in *Brady* the Supreme Court explicitly stated that FELA cases should not apply the scintilla rule, three years later the Court appeared to do exactly that in *Lavender v. Kurn*, 327 U.S. 645 (1946), discussed *infra* at notes 632-40 and accompanying text, stating that "[o]nly when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Id.* at 653 (Murphy, J.). The Court, reversing the Supreme Court of Missouri decision overturning a state jury's verdict for the plaintiff, found sufficient evidence to send the case to the jury when two plausible, competing theories had been presented. According to the Court, "fair-minded" jurors could disagree on which inference was the most reasonable. *Id.* Either the *Lavender* Court was using the scintilla rule, or it found that both theories were reasonable, and applied its *Brady* standard. It is not clear whether *Lavender* is limited to FELA cases. See 9A Wright & Miller, *supra* note 211, § 2526, at 277-82; see also Cooper, *supra* note 394, at 919 (observing that FELA seems to be only area of law in which scintilla rule applies).

<sup>418</sup> See Friedenthal, Kane & Miller, *supra* note 400, § 12.3, at 565; Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 218-19 (1961). Referring to scintilla rule as "judicial legend," Professor James commented: "[I]f there ever was such a notion all that remains of it today is its universal repudiation." *Id.*

<sup>419</sup> See Cooper, *supra* note 394, at 967.

the same reasons for judicious application of the latter motion apply equally—indeed, as will be discussed, probably more so—to summary judgment.

The difficulty of equating summary judgment with directed verdict lies in the radical difference in the timing and context of the two motions. Summary judgment may be sought as early as the expiration of twenty days from commencement of the action; a directed verdict motion is made by the defendant at the close of the plaintiff's case or by either party at the close of all the evidence.<sup>420</sup> The case obviously is at a dramatically different stage of maturity at these very disparate times. Moreover, *Anderson* requires the litigants to package their evidence into documentary form so that it can be placed before the court on a summary judgment motion.<sup>421</sup> Thus, under Rule 56, evidence that would be offered at trial as live testimony subject to cross-examination will be presented in the form of affidavits, depositions, or interrogatory responses. It is difficult to square this reality with the same Court's admonishment against trial by affidavit.<sup>422</sup> Moreover, the timing of the summary judgment motion raises serious concerns that are not present on a motion for judgment as a matter of law because, in the former context, the judge decides what is fact, law, or the application of fact to law without the benefit of hearing fully developed testimonial evidence in a trial setting.<sup>423</sup> As a result, the law-fact distinctions that trial courts must make on summary judgment motions take on a new significance post-trilogy and implicate trial and jury rights, a subject to be discussed later.<sup>424</sup>

Proponents of equating summary judgment and directed verdict may argue that the lack of a trial buffer is of little concern with regard to the former because full discovery is available under Rule 56(f) to enable the nonmoving party to oppose the motion.<sup>425</sup> It is likely, how-

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<sup>420</sup> Theoretically, a trial motion for judgment may be made as early as the opening statement, see Fed. R. Civ. P. 50(a), 56(a), but that is a rarity. See generally 9A Wright & Miller, *supra* note 211, § 2533; 10A Wright, Miller & Kane, *supra* note 109, § 2719.

<sup>421</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

<sup>422</sup> See James, Hazard & Leubsdorf, *supra* note 393, § 4.16, at 219 (asking "whether it is right to compare evidence submitted in documentary form prior to trial (as in summary judgment) with evidence submitted by live testimony (as at trial) and, if so, how precise a comparison can be made").

<sup>423</sup> This is one reason why some courts deny summary judgment in cases in which a directed verdict might be granted. See Friedenthal, *supra* note 240, at 780.

<sup>424</sup> See *infra* Part IV.

<sup>425</sup> Federal Rule 56(f) provides that if the party opposing the motion cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

ever, that in many situations, full discovery, or full consideration by the judge of the evidence revealed through discovery, is not a reality. But even if full discovery is completed, summary judgment is a paper proceeding, making evaluation of demeanor and credibility impossible. Similarly, there are many reasons why counsel may choose not to engage in vigorous cross-examination of a particular deponent, and there will be absolutely no opportunity to cross-examine material presented by affidavit or party interrogatory answer rather than by deposition. Similar constraints apply to the testing of documents that are presented on a Rule 56 motion. Applying the law of unintended consequences, it may be that the effect of equating the two motions is to oblige counsel to increase the time and expense devoted to discovery in order to guard against vulnerability to an early pretrial motion that might dispose of the case.

The Supreme Court's equation of the two motions has been met with a degree of scholarly approval<sup>426</sup> and has the practical appeal of providing a unified dispositive motion standard. However, the difference in timing of the motions and, concomitantly, the different form the evidence takes and the degree of its completeness call for considerable judicial caution rather than automatic or inflexible application of the Rule 50 standard to summary judgment motions. One would expect that some significant attention would have been devoted to adjusting the trial motion practice to the pretrial motion context. That does not appear to have happened, however; at least there is no evidence of it in judicial opinions.

#### *D. Transformation of Summary Judgment into Paper Trials*

The increased summary judgment activity following the trilogy is not surprising, given the perception that *Celotex* mandated that result<sup>427</sup> and the reality that all three cases facilitate use of the motion. The trilogy, however, also contained a number of passages that have been the source of confusion for courts and commentators. Some

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See generally 10B Wright, Miller & Kane, *supra* note 109, §§ 2740-2741. The Private Securities Litigation Reform Act, however, stays discovery until after the resolution of the motions to dismiss, which now appear inevitable in cases under the Act. See, for example, *In re MCI Worldcom, Inc. Sec. Litig.*, 191 F. Supp. 2d 778 (S.D. Miss. 2001) (on appeal; sub judice), discussed *infra* at notes 478-80 and accompanying text. To counteract the unavailability of discovery, counsel for the plaintiff often must engage in expensive preinstitution private investigation. Given the contingent nature of the practice in the securities field, this cost can be borne by only a limited number of law firms.

<sup>426</sup> See, e.g., James, Hazard & Leubsdorf, *supra* note 393, § 4.16, at 218-19. But see Koppel, *supra* note 42, at 490.

<sup>427</sup> See *supra* notes 318-20 and accompanying text; see also *infra* notes 429-31 and accompanying text.

judges have interpreted these ambiguities as giving even greater strength to summary judgment as an instrument for controlling dockets. In doing so, they may well have ignored the restraining passages in the Court's opinions and overstepped the boundaries set by the trilogy itself, transforming summary judgment from a limited-purpose procedural tool designed to screen out cases not worthy of trial to the "trial on affidavits" that the Court itself warned against.<sup>428</sup>

One source of confusion is the precise standard by which the moving party discharges its burden of showing the absence of a genuine issue of material fact. As noted earlier,<sup>429</sup> the Supreme Court did not address this question, and Justice White's statement in his *Celotex* concurrence that the moving party cannot meet its burden without some form of support or with a conclusory assertion only confused the issue further.<sup>430</sup> Courts have taken this lack of guidance as a signal that their inquiry into the moving party's burden need only be cursory, or at least need not be explicitly described in their opinions or orders. One study of federal cases involving summary judgment motions, for example, found that in sixty percent of the instances in which it was granted, there was no discussion of the sufficiency of the movant's production on the motion.<sup>431</sup> The same study showed that in twelve percent of the cases the court did not even talk about the movant's evidence or documentation, but focused solely on the insufficiency of the nonmovant's presentation.<sup>432</sup> It appears to be rare for a court to find that the party seeking summary judgment has failed to discharge its initial burden of showing the absence of a genuine issue of material fact.<sup>433</sup> Thus, the *Celotex* Court's failure to define the

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<sup>428</sup> See *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

<sup>429</sup> See *supra* note 312 and accompanying text.

<sup>430</sup> See discussion *supra* note 313 and accompanying text.

<sup>431</sup> The study looked at published federal court opinions involving summary judgment motions from the first quarter of 1988, excluding those cases that involved crossmotions. Issacharoff & Loewenstein, *supra* note 240, at 91-94.

<sup>432</sup> *Id.* at 92; see also *Aragon v. King Soopers, Inc.*, 19 Fed. Appx. 806, 810 (10th Cir. 2001) (affirming summary judgment because plaintiff failed to meet initial burden); *Hughes v. Ortho Pharm. Corp.*, 177 F.3d 701, 705-06 (8th Cir. 1999) (agreeing with district court that plaintiffs failed to create genuine issue of material fact on questions of pretext and racial animus); *Sherwood v. Mulvihill*, 113 F.3d 396, 402 (3d Cir. 1997) (holding that plaintiff failed to meet initial burden of alleging violation of constitutional right).

<sup>433</sup> There are several cases in which the court has held that the movant failed to discharge this burden. E.g., *Mo. Pac. R.R. Co. v. Harbison-Fischer Mfg. Co.*, 26 F.3d 531, 539-40 (5th Cir. 1994) (finding that record indicated defendant intended only to challenge plaintiff's state law claims, and therefore dismissal of plaintiff's federal claim was improper); *Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 22 F.3d 1260, 1272-73 (3d Cir. 1994) (concluding that it was unclear whether defendant's motion was one for dismissal for failure to state claim or for summary judgment, and plaintiffs should have been given opportunity to conduct further discovery); *Roseman v. Premier Fin. Servs.-East, L.P.*, 1998

movant's burden of production adequately has not impaired the ability of courts to decide summary judgment motions.

Another source of confusion arises from the longstanding requirements that, on a motion for judgment as a matter of law, the judge will not weigh evidence but will draw all inferences—including credibility—in favor of the nonmoving party. According to well-established principles, the court's primary inquiry on the motion focuses on whether a reasonable jury could find for the nonmoving party. That requires a nonmovant who has the burden of persuasion to come forth with more than a mere "scintilla" of evidence; it cannot rely simply on the hope that the movant's witnesses will be disbelieved at trial. In addition, the nonmovant's evidence is to be evaluated in light of the entire record, including the opponent's evidence, to determine whether it is sufficient to enable a reasonable jury to return a verdict in its favor. Although this tension between the procedure's screening value and the desire to "bend over backwards" to protect the nonmovant always has been present under Rule 50,<sup>434</sup> it is heightened in the Rule 56 context because of the more limited evidentiary record and the lack of any opportunity to evaluate witness credibility and demeanor.

Some courts in the post-trilogy years appear to have encroached on the factfinder's role in deciding Rule 56 motions.<sup>435</sup> For example, one scholar who examined the application of summary judgment in Title VII and Age Discrimination in Employment Act cases concluded that courts in these cases routinely weigh evidence, draw inferences in favor of the moving party (typically the employer-defendant), and make credibility determinations.<sup>436</sup> She also expressed the belief that courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their

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WL 966064 (E.D. Pa. 1998) (denying motion for summary judgment on case brought under Equal Opportunity Act because genuine issues of material fact remained as to whether signature was required on promissory note and if defendant had constructive notice of another creditor's violation); *Marshall Indep. Sch. Dist. v. U.S. Gypsum Co.*, 790 F. Supp. 1291, 1299-1301 (E.D. Tex. 1992) (finding that defendant's summary judgment motion only addressed plaintiff's failure to produce evidence regarding fraudulent concealment, but not failure to produce evidence regarding willful misconduct, and thus it was possible for plaintiff to foreclose at trial defendant's assertion of statutory defense).

<sup>434</sup> See *supra* notes 397-404 and accompanying text.

<sup>435</sup> This point is developed through three illustrative cases *infra* Part IV.

<sup>436</sup> McGinley, *supra* note 379, at 229. The author noted that her article was not an empirical study but stated that practitioners have observed that courts have become more aggressive in granting summary judgment in civil rights cases since the trilogy. *Id.* at 208.

cumulative effect.<sup>437</sup> Unfortunately, the courts' usurpation of the factfinder's role, as observed by this particular writer, does not appear to be limited to employment discrimination cases.<sup>438</sup>

Two cases illustrate the extent to which some courts feel emboldened to draw inferences from the motion papers. In *Aschinger v. Columbus Showcase Co.*,<sup>439</sup> a retired director of a small, family-run corporation brought a securities fraud action against his brother, another director of the company, alleging that he sold his stock for fifty dollars per share to other family members in reliance on his brother's assurance that it was a fair price and that he would "take the same deal" himself.<sup>440</sup> Five years later, his brother sold the stock for \$338 per share. The plaintiff claimed that his brother's statement was materially misleading in that it suggested that he eventually would sell his shares for a comparable price when in fact he had no such intention.<sup>441</sup>

The Sixth Circuit, in affirming summary judgment, rejected the plaintiff's argument and held that the statement was not material because it is common knowledge that stock prices are inherently variable and thus estimations of future selling prices would not be considered important to a reasonable investor.<sup>442</sup> The court also concluded, using the same type of thinking, that reliance on the brother's statement was not reasonable. In addition, the court held that the plaintiff

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<sup>437</sup> *Id.* at 233-36.

<sup>438</sup> See, e.g., *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 121-32 (3d Cir. 1999) (citing *Matsushita* in affirming grant of summary judgment against plaintiffs after discounting plaintiffs' expert testimony and asserting that ordinary business practices were just as likely explanations for exchanges of pricing information, discovery of competitors' memoranda in defendants' files, and "truce" between defendants); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993) (finding that plaintiff provided insufficient testimony of four expert witnesses, including two medical experts, in support of proposition that defendant's product was proximate cause of decedent's death); *Zettle v. Handy Mfg. Co.*, 998 F.2d 358, 362-63 (6th Cir. 1993) (affirming summary judgment in products liability case in part because plaintiff failed to prove that death by electrocution was foreseeable result of defendant's use of metal instead of plastic handle on its electric washer, despite plaintiff's deposition of defendant's engineer who admitted that company was aware that some of their customers tended to use out-of-date wiring systems, which would heighten risk that electric currents would flow through handle); see also *Wonder Labs, Inc. v. Procter & Gamble Co.*, 728 F. Supp. 1058, 1064-66 (S.D.N.Y. 1990), in which the court granted summary judgment in a trademark action by a toothbrush manufacturer with the registered mark "Dentist's Choice" against a toothpaste manufacturer that used the term "dentist's choice" in its advertising in part because the plaintiff could not provide sufficient evidence of the likelihood of confusion. In doing so, the court accepted inferences against the plaintiff. See also *Issacharoff & Loewenstein*, *supra* note 240, at 89-91 (discussing two federal cases in which courts engaged in factfinding).

<sup>439</sup> 934 F.2d 1402 (6th Cir. 1991).

<sup>440</sup> *Id.* at 1409.

<sup>441</sup> *Id.*

<sup>442</sup> See *id.* at 1410.

did not provide any evidence of the defendant's intent to defraud, because the price disparity in the stock, by itself, was not enough to establish that the defendant made the statement knowing of its falsity.<sup>443</sup>

In finding the statement immaterial, the court in essence was improperly drawing inferences in favor of the movant and making a factual determination that should have been left for the jury. The test for materiality focuses on what a reasonable investor would have perceived. Certainly it does not appear manifestly unreasonable to rely on a brother's statement that he intends to sell stock at the same price at which he is proposing to buy it or to view the representation as material. And the fact that the stock was sold at a very large profit may give rise to the fair inference that the brother was lying when he made the statement, and therefore was guilty of misrepresentation even though there was a passage of time between the brother's statement and the sale of his stock. As long as this inference is within the boundaries of "rationality" or "reasonableness," the plaintiff should have been entitled to it for purposes of withstanding summary judgment. Similarly, the court's conclusion that estimates of a stock's future price would not be considered important to a reasonable investor also intrudes on the jury's province and defies both the realities of the marketplace, which is filled with projections of precisely that character, and human nature.

In another case, *Williams v. Borough of West Chester, Pennsylvania*, the court of appeals upheld a grant of summary judgment essentially by making its own factual findings in a Section 1983 action against the borough and individual officials for the death of the plaintiff's family member while in police custody.<sup>444</sup> The police failed to remove the decedent's belt, as was customary procedure, and the decedent subsequently committed suicide by hanging himself with it.<sup>445</sup> To establish a Section 1983 cause, the plaintiffs had to demonstrate that the defendants acted with deliberate indifference towards the possibility of suicide, a heavy burden to be sure.<sup>446</sup> The plaintiffs' evidence showed that the decedent had a history of suicide attempts, that this history was widely known among the thirty-five officers who made up the police department, that it was part of the record and read at roll call for the platoon the defendants were members of, and that the civilian dispatcher on duty that night knew the history.<sup>447</sup> On the

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<sup>443</sup> See *id.*

<sup>444</sup> 891 F.2d 458 (3d Cir. 1990).

<sup>445</sup> *Id.* at 462.

<sup>446</sup> See *id.* at 464.

<sup>447</sup> *Id.* at 461.

other hand, defendants testified on deposition that they had no knowledge of his suicide attempts and the police chief, who did know the history, indicated that he would not be surprised if the officers in question did not know of the decedent's suicide attempts, because the two most bizarre attempts had occurred six years before the events in litigation.<sup>448</sup>

The court admitted twice in its opinion that the case was "extremely close,"<sup>449</sup> but concluded that the plaintiff did not provide enough evidence for a reasonable jury to find that the officers knew of the decedent's suicidal tendency. It stated:

[T]he circumstantial evidence mentioned above, which at first glance seems not insignificant, becomes quite tenuous when viewed in a broader context. A thirty-five member force is small, but not tiny. West Chester has a population of approximately 18,000 people. Aberrant behavior presumably is reported to the police on a regular basis. Ronald's two most bizarre suicide attempts occurred six years before Ferriola and Chesko arrested him.<sup>450</sup>

The court acknowledged the difficulty of determining whether a non-movant's evidence is sufficient to meet the *Anderson* standard,<sup>451</sup> but invoked the trilogy to support the proposition that it should emphasize the "salutary policies underlying Rule 56"—the speedier disposition of cases—over the right to present one's case to a jury.<sup>452</sup>

In effect, the *Williams* court's decision relied heavily on weighing the evidence. Its reasoning essentially juxtaposed the defendants' evidence with the plaintiffs' and found that the former was more credible, a process that goes well beyond the limited Rule 56 inquiry as to the existence of a genuine issue of material fact. The very fact that the court found it a "close call" should have been a signal that summary judgment was inappropriate, as probably would have been the conclusion in times past. Furthermore, the court's readiness to credit the officers' testimony is troubling given the highly specific grounds on

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<sup>448</sup> Id.

<sup>449</sup> Id. at 461, 466.

<sup>450</sup> Id. at 466.

<sup>451</sup> Id. at 461 ("Whether the quantum of circumstantial evidence in any particular case is enough to meet the *Liberty Lobby* standard sometimes requires us to make difficult, fact-specific, perhaps somewhat arbitrary judgments.").

<sup>452</sup> Id. at 466.

Although the line we draw today is, as I have said, not easy to place, the line must be drawn somewhere, and somewhere that adequately protects the salutary policies underlying Rule 56. Of course the right to present one's claims to a jury provides competing, no less important policies to be considered, but the upshot of the Supreme Court's summary judgment trilogy is that the former must not be sacrificed entirely to the latter.

Id.

the record to doubt it. If the plaintiffs were able to raise a doubt as to the defendants' testimony based on documentary evidence alone on the Rule 56 motion, they should have been entitled to subject the officials to cross-examination at trial and have a factfinder evaluate their credibility. With the benefit of live testimony and cross-examination, a jury or a judge would have been in a better position following trial to decide the question of what the defendants knew or should have known than was the judge at the pretrial stage with only papers before her.

A more obvious form of judicial intrusion into the factfinder's realm occurs when courts invoke *Matsushita* as a license to label a plaintiff's claim "implausible" and require the plaintiff to come forth with stronger evidence, usually "direct" as opposed to "circumstantial," to survive a Rule 56 motion. As discussed earlier, *Matsushita* required additional evidence tending to negate competing inferences of lawful conduct because it found the plaintiffs' economic theory implausible, something that seems specific to the antitrust context.<sup>453</sup> There is some scholarly authority<sup>454</sup> and a number of lower court decisions that apparently have taken a similarly restrictive view, interpreting the Supreme Court's opinion as simply saying that the inferences drawn must be reasonable in light of the applicable substantive law.<sup>455</sup>

However, some lower courts have drawn on *Matsushita* as an independent summary judgment standard to heighten the non-movant's obligation to present enough in response to the motion to satisfy its burden of production at trial by characterizing that party's theory as implausible.<sup>456</sup> This has been most notable in RICO<sup>457</sup> and

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<sup>453</sup> See supra notes 253-66 and accompanying text. In fact, within antitrust law, *Matsushita* probably is limited to the narrow class of cases dealing with conspiracy based on predatory pricing. See Jorde & Lemley, supra note 270, at 313-15 (arguing that many lower courts have applied *Matsushita* analysis erroneously to all antitrust cases). But see Duane, supra note 260, at 1568-69 (asserting that Supreme Court clearly meant *Matsushita* to apply to all cases, and that *Matsushita* approach simply requires judge to assess non-movant's proof to determine whether it is substantial enough to support jury verdict).

<sup>454</sup> See Jorde & Lemley, supra note 270, at 311. But see *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (applying "implausibility" analysis to heighten burden of tort suit victors to hold defendant's homeowner's insurance company liable to indemnify defendant's torts).

<sup>455</sup> See, e.g., *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 743 (11th Cir. 1993); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 441 (9th Cir. 1990); *United Steelworkers of Am. v. Phelps Dodge*, 865 F.2d 1539, 1542 (9th Cir. 1989); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). But see, e.g., *TW Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987) (interpreting *Matsushita* as specific to antitrust cases).

<sup>456</sup> See Richard Salomon & Alexander Ewing, Summary Judgment: A Notable Departure From the Court, *Legal Times*, Sept. 1, 1986, at 12 (arguing that under *Matsushita*

securities fraud<sup>458</sup> cases, but it also has occurred in contract,<sup>459</sup> tort,<sup>460</sup> employment discrimination,<sup>461</sup> civil rights,<sup>462</sup> and other contexts, as well.<sup>463</sup>

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plaintiffs must satisfy preponderance of evidence standard to clear hurdle to trial despite four-Justice dissent criticizing majority for not resolving all doubts in favor of nonmovant and for failing to allow jury to decide what is more likely than not); see also Andrew I. Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 *Antitrust L.J.* 663, 688-98 (1997) (examining role of expert economists under “implausibility” standard in antitrust litigation).

<sup>457</sup> See, e.g., *Soma & McCallin*, supra note 377, at 326, 348.

<sup>458</sup> See infra notes 572-711 and accompanying text for a discussion of one such case. See also *Schuster v. Symmetricon, Inc.*, 2000 Fed. Sec. L. Rep. (CCH) 95,027 (N.D. Cal.); *In re Allergan, Inc. Sec. Litig.*, 1993 Fed. Sec. L. Rep. (CCH) 98,574, 98,589 (C.D. Cal.) (citing *Matsushita* and holding that defendants’ purchasing behavior made plaintiffs’ claims implausible, thus imposing “heightened burden of proof” on them in order to withstand summary judgment motion); *Jacobson v. Cohen*, 151 F.R.D. 526, 528-29 (S.D.N.Y. 1993) (holding in securities fraud case that “where claim or defense is ‘implausible,’” proponent must submit “more persuasive evidence than would otherwise be necessary, pursuant to *Matsushita*”).

<sup>459</sup> See, e.g., *Knigh v. Sharif*, 875 F.2d 516, 523 (5th Cir. 1989) (finding that plaintiff could not provide plausible interpretation of disputed documents); *United States v. King Features Entm’t, Inc.*, 843 F.2d 394, 398-99 (9th Cir. 1988) (finding plaintiff’s proposed interpretation of contract implausible); *Durable, Inc. v. Twin County Grocers Corp.*, 839 F. Supp. 257, 259 (S.D.N.Y. 1993) (finding plaintiff’s argument that contract was formed implausible).

<sup>460</sup> See, e.g., *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.*, 865 F.2d 492-93 (2d Cir. 1989) (holding that plaintiff could not prove causation in breach-of-duty action).

<sup>461</sup> See the discussion of *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998), infra at notes 713-30 and accompanying text. See, e.g., *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 191 (2d Cir. 1991) (arguing that once movant has discharged burden in age discrimination suit, burden shifts to nonmovant to show that claim is not implausible). In addition, one commentator has argued that courts in age discrimination cases may dismiss cases on summary judgment motions using what is essentially a *Matsushita* analysis without explicitly referring to that case. See *Cavaliere*, supra note 381, at 118-21 (discussing *Connell v. Bank of Boston*, 924 F.2d 1169 (1st Cir. 1990)).

<sup>462</sup> See, e.g., *Cuesta v. Sch. Bd.*, 285 F.3d 962, 970 (11th Cir. 2002) (concluding that defendant did not need to introduce evidence contradicting plaintiff’s argument because argument itself was implausible); *Swarner v. United States*, 937 F.2d 1478, 1483 (9th Cir. 1991) (holding plaintiff’s charge that Army regulation was viewpoint-based discrimination implausible); *Tanner v. Heise*, 879 F.2d 572, 577-78 (9th Cir. 1989) (rejecting plaintiff’s argument that city officer acted in absence of jurisdiction as implausible).

<sup>463</sup> See, e.g., *Stitt v. Williams*, 919 F.2d 516, 523-24 (9th Cir. 1990) (holding that factual predicate for plaintiff’s argument that defendant was equitably estopped from asserting statute of limitations defense was implausible); *Alaska v. Brown*, 850 F. Supp. 821, 827 (D. Alaska 1994) (rejecting plaintiff’s proposed interpretation of congressional motivation as implausible). For a discussion of the various contexts in which lower courts have applied the *Matsushita* rationale, see *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1480 n.21 (6th Cir. 1989).

When the district court has become more demanding, the result often has been fatal to the plaintiff.<sup>464</sup> For example, in a Rule 10b-5 fraud action under the Securities Exchange Act of 1934,<sup>465</sup> the plaintiff bears the burden of proving the defendant's scienter.<sup>466</sup> If the court holds that the plaintiff must present "more persuasive evidence" on a summary judgment motion than normally would be required to permit a jury to infer scienter, however, the plaintiff is not likely to prevail because that evidence is usually in the defendant's exclusive control or knowledge. The plaintiff's predicament is even more dire when the challenge comes on a Rule 12(b)(6) motion because of the PSLRA's inhibition on discovery until the resolution of motions to dismiss.<sup>467</sup> The difficulty of providing direct evidence of a party's intent or motive, in fact, was what underlay the federal courts' pre-trilogy reluctance to grant summary judgment in cases involving state of mind.<sup>468</sup> Under the guise of characterizing the plaintiff's case as "implausible," therefore, a trial court actually may redefine the scope of the substantive law by destroying the viability of certain theories of recovery it believes should be "disfavored" or by simply preventing state-of-mind questions from reaching juries on the unstated premise that the judge is avoiding speculation.

Finally, in instances in which courts are called upon to exercise their discretion in deciding a summary judgment motion, they some-

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<sup>464</sup> See Pensoldt & Lewyn, *supra* note 258, at 576-78 (suggesting that *Matsushita* undermines right to jury trial in antitrust cases established by *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), see *infra* notes 503-07 and accompanying text, and creates perverse standard of proof in civil antitrust cases); Soma & McCallin, *supra* note 377, at 348 ("The new summary judgment standard, therefore, presents a formidable obstacle for a plaintiff pressing an antitrust conspiracy or RICO claim where only circumstantial evidence is available."); see also Janusz A. Ordovery & Daniel M. Wall, *Proving Predation After Monfort and Matsushita: What the "New Learning" Has to Offer*, 1 *Antitrust* 5, 5 (1987) (arguing that in light of Supreme Court decisions, antitrust lawyers must revisit economics of predation); Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 *Stan. L. Rev.* 491, 501-07 (1988) (arguing that broad reading of *Matsushita* contradicts current summary judgment rules and virtually eliminates trials).

<sup>465</sup> 15 U.S.C. § 77k (2000).

<sup>466</sup> See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (noting that 10b-5 plaintiff must prove scienter); cf. *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (holding that plaintiff in Age Discrimination and Employment Act case must "prov[e] that the discriminatory plan provision actually was intended to serve the purpose of discriminating").

<sup>467</sup> § 78u-4.

<sup>468</sup> See *supra* notes 220-45 and accompanying text; see also 10B Wright, Miller & Kane, *supra* note 109, § 2732.1, at 111-20 ("Antitrust . . . actions are by their very nature poorly suited for disposition by summary judgment . . . . In antitrust cases, questions of motive or intent, credibility, and conspiracy frequently prevent summary judgment from being entered, since these issues involve subjective questions regarding state of mind that only can be decided after a full trial."). See generally Sonenshein, *supra* note 220.

times will invoke the Supreme Court trilogy as a mandate to exercise that discretion in favor of granting the motion.<sup>469</sup> For example, in the previously discussed *Williams* case,<sup>470</sup> the court invoked the trilogy as the decisive factor in determining that the nonmovants did not meet their burden of identifying a genuine issue of material fact. Thus, perhaps the trilogy's greatest significance is that the lower federal courts have read it as a directive to be more receptive to summary judgment in ways that are more striking than anything actually articulated in the three cases.

Overly enthusiastic use of summary judgment means that tri-worthy cases will be terminated pretrial on motion papers, possibly compromising the litigants' constitutional rights to a day in court and jury trial. That is a risk the trilogy has created. Another concern is that by reducing—if not altogether sidestepping—any inquiry into the moving party's burden of production, courts on a Rule 56 motion may proceed directly to the question of whether the nonmoving party has presented sufficient evidence to avoid judgment as a matter of law. When viewing the material on a pretrial motion without the safeguards and environment of a trial setting, courts may be tempted to treat the evidence in a piecemeal rather than cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party's evidence by weighing it against contradictory evidence. Judges are human, and their personal sense of whether a plaintiff's claim seems “implausible” can subconsciously infiltrate even the most careful analysis. Encouraged by systemic concerns suggesting that summary judgment is desirably efficient, judges may be motivated to seek out weaknesses in the nonmovant's evidence, effectively reversing the historic approach. The effect is exacerbated when the court also imposes a heightened evidentiary requirement on the nonmovant by characterizing its theory as “implausible.” All of this is reinforced by the “litigation explosion” and “liability crisis” rhetoric and a culture of management that gives the judge a sense of familiarity with the dispute that emboldens pretrial disposition.

The Federal Rules were designed to be transsubstantive—applied uniformly across the legal firmament. In practice, of course, the reality is short of that ideal, as evidenced by the now repudiated judicial practice of creating heightened pleading standards for certain cat-

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<sup>469</sup> See *Historic Pres. Guild of Bay View v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989) (interpreting Supreme Court trilogy as encouraging granting of summary judgment); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475-76 (7th Cir. 1988) (citing trilogy as not only permitting but encouraging use of summary judgment in some circumstances, including antitrust cases).

<sup>470</sup> 891 F.2d 458 (3d Cir. 1990). See *supra* notes 444-52 and accompanying text.

egories of cases, apparently as a way of screening the wheat from the chaff or because those cases were deemed disfavored for one reason or another.<sup>471</sup> Admittedly, even without firm empirical evidence, one must wonder whether the post-trilogy pretrial disposition activity does not reflect, at least in part, the same judicial attitudes and habits regarding certain types of substantive claims formerly seen at the pleading stage.

That would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross-examination.<sup>472</sup> Indeed, although these elements are not guaranteed in all circumstances, they are considered aspects of what often is referred to as a "day in court,"<sup>473</sup> with due process embracing notions of a fair trial before an impartial tribunal.<sup>474</sup> Even though that does not mean that dispositive pretrial motion procedures are vulnerable to constitutional challenge on their face, it has been forcefully argued that there is a "constitutional bulwark against capricious use of summary judgment."<sup>475</sup> Thus, however well motivated and functionally useful, procedural rules are subject to constitutional limitations.<sup>476</sup> Because a cause of action has been recognized as property,<sup>477</sup> it should not be extinguished without care and caution. The frequently voiced and long-standing distrust of paper trials or trials by affidavit should be reaffirmed and heeded.

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<sup>471</sup> See *supra* notes 145-56 and accompanying text.

<sup>472</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1947). That preference represents a reaction to the belief that the historic equity practice of taking testimony by deposition was abusive and, arguably, was reinforced by the Supreme Court's expansion of jury trial discussed below. See *infra* notes 492-516 and accompanying text; see also 9 *Wright & Miller*, *supra* note 211, § 2301.

<sup>473</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that pretermination evidentiary hearing is necessary to provide welfare recipient with due process); see also *Morgan v. United States*, 298 U.S. 468 (1936) (finding full evidentiary hearing prerequisite to valid order of Secretary of Agriculture fixing rates for market agencies).

<sup>474</sup> See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (holding that Federal Rules of Evidence require judge to permit impeachment of civil witness with evidence of prior convictions).

<sup>475</sup> *Mollica*, *supra* note 244, at 195.

<sup>476</sup> See *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) ("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.").

<sup>477</sup> See, e.g., *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)) (characterizing cause of action for unpaid bill as interest in property protected by Fourteenth Amendment).

### E. *The Effect of the Trilogy on the Motion to Dismiss*

Some of the concerns that are the subject of this Article have manifested themselves in the context of grants of motions to dismiss under Rule 12(b)(6). For example, in *In re MCI Worldcom, Inc. Securities Litigation*,<sup>478</sup> the plaintiff class complaint alleged in great detail material misrepresentations and omissions in violation of the Securities Exchange Act. The district court granted the defendants' motion to dismiss, which almost seems whimsical given more recent public revelations about the company apparently burying billions of dollars of costs with accounting machinations to create a false picture of the company's profits and sales.<sup>479</sup> The court properly invoked the heightened pleading requirements of Rule 9(b) and the PSLRA, but insisted on far more than is appropriate on a motion to dismiss. At one point in the opinion the plaintiffs are faulted for not presenting any "direct evidence," which is not required on a motion challenging the sufficiency of a pleading; elsewhere the court draws inferences against the plaintiffs, again contrary to the well-established rules of pleading construction on a Rule 12(b)(6) motion.<sup>480</sup> Also striking is that the dismissal was with prejudice, the judge denying a request for leave to replead. In practical effect, the court seems to have demanded that the plaintiffs establish their case at the pleading stage.<sup>481</sup>

Any trend in this direction—and there are some signs other than *Worldcom* that elements drawn from the trilogy are being brought back along the litigation time line from summary judgment to the motion to dismiss<sup>482</sup>—not only would be unfortunate, but would be

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<sup>478</sup> 191 F. Supp. 2d 778 (S.D. Miss. 2002). This case has been appealed and is sub judice as this Article awaits publication.

<sup>479</sup> See Neil Weinberg, *Asleep at the Switch*, Forbes, July 22, 2002, at 38 (recounting detailed character of plaintiffs' pleading and work that went into preparing it).

<sup>480</sup> *In re MCI Worldcom*, 191 F. Supp. 2d at 787, 790-91. See 5A Wright & Miller, *supra* note 90, § 1357; see also 5A *id.* §§ 1217, 1286; 5A *id.* § 1364.

<sup>481</sup> Despite all of the public revelations concerning Worldcom and its admissions of irregularities, the district judge denied a motion for relief from judgment on the theory that the postcomplaint disclosures did not cure the original complaint's failure to satisfy the stringent PSLRA pleading requirements. The court, without explanation or reference to Federal Rules 1, 15, or 60(b), simply asserted that the "[p]laintiffs are not entitled to amend their complaint." *In re MCI Worldcom, Inc. Sec. Litig.*, Civ. No. 3:00-cv-833BN (S.D. Miss. filed March 6, 2003).

<sup>482</sup> *Romine v. Axiom Corp.*, 296 F.3d 701 (8th Cir. 2002) (affirming judgment following grant of Rule 12(b)(6) motion on ground that inflation of earnings and failure to disclose adverse effect of new contract were not material); *Abrams v. Baker Hughes, Inc.*, 292 F.3d 424 (5th Cir. 2002) (granting motion because allegations of misleading statements concerning internal fiscal control did not provide facts creating strong inference of scienter); see also, e.g., *In re USEC Sec. Litig.*, 190 F. Supp. 2d 808 (D. Md. 2002) (discussed *infra* notes 705-13 and accompanying text); *In re Tyco Int'l, Ltd. Sec. Litig.*, 185 F. Supp. 2d 102

completely inconsistent with the philosophy and principles of the Federal Rules in general and the pleading rules in particular.

#### IV

#### SUMMARY JUDGMENT AND THE RIGHTS TO A DAY IN COURT AND TO JURY TRIAL

The foregoing provides the background of the debate surrounding summary judgment—a debate, incidentally, not much different today from that conducted by Judges Clark and Frank of the Second Circuit fifty years ago.<sup>483</sup> One aspect in need of fuller exploration is the impact greater use of the Rule 56 motion will have on the right to an adjudicative procedure that comports with due process and the jury trial guarantee.<sup>484</sup> To honor those rights, federal courts are obliged to exercise restraint and refrain from deciding factual issues or, according to some, even applying the law to undisputed facts at the summary judgment stage, leaving those matters for the trial.<sup>485</sup>

Given the increased summary judgment activity since the trilogy, the need for a clear delineation between the roles of the judge and the

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(D.N.H. 2002) (granting defendants' motion to dismiss investors' securities fraud class action on ground that plaintiffs failed to plead Exchange Act violations with particularity required by PSLRA). The onerousness of the pleading requirements of the PSLRA, particularly as construed by some courts, has made the Rule 12(b)(6) motion terminal in some cases and obscured the reality that issues of fact arguably are being decided in the guise of enforcing the pleading standard. See, e.g., *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 387 (9th Cir. 2002) (affirming judgment on motion to dismiss based on court's interpretation that pleading alleged negligence or gross negligence rather than scienter). One hopes that the courts of appeals will nip any tendency to resolve facts on a Rule 12(b)(6) motion in the bud. See, e.g., *Garbini v. Prot. One, Inc.*, No. 01-56965, 2002 WL 31395954 (9th Cir. 2002) (unpublished opinion) (reversing Rule 12(b)(6) dismissal on merits of 1933 Securities Act § 11 case because "fact-intensive inquiries normally aided by the testimony of expert witnesses, are best left to trial or summary judgment, and not to a motion to dismiss"). That process, of course, will involve the expenditure of resources.

<sup>483</sup> See *supra* notes 206-19 and accompanying text.

<sup>484</sup> For representative discussions of the relationship between summary judgment and the Seventh Amendment, see Brunet, Redish & Reiter, *supra* note 120, at 9-13; Stempel, *supra* note 183, at 162-70; see also Mollica, *supra* note 244, at 195-205; Schwarzer, Hirsch & Barrans, *supra* note 121.

<sup>485</sup> These judge-jury/law-fact discussions were a concern even when the common law demurrer to the evidence was used to filter out actions not worthy of trial:

In handling this keen-edged instrument, the demurrer to evidence, it is more than likely that the just line between the duties of court and jury was often overstepped by assuming that what the court thought the right inference was the only one allowable to the jury. Nothing is more common, even to-day, than the assumption that nothing but a question of law remains, when in reality, the most important and even necessary inferences of fact are still to be drawn. In this way much which belongs to the jury passes over, unnoticed, into the hands of the judges.

James B. Thayer, "Law and Fact" in *Jury Trials*, 4 *Harv. L. Rev.* 147, 163 (1890).

jury has become more critical. Even though there are gaps in the empirical data as to the frequency of successful Rule 56 motions before and after the Supreme Court's decisions, there is sufficient evidence to conclude that practice under the Rule has been on the rise and the ambit of motion grants has expanded.<sup>486</sup> To a degree, this simply may reflect a well-intentioned effort to use the motion to enhance efficiency. Moreover, given the perception of a "litigation explosion," the rhetoric about a "liability crisis" and frivolous litigation, and the assumption that federal dockets are overburdened, the increased disposition of cases by summary judgment may be rooted in a belief that faster and more economical resolution of cases serves the ends of justice. Nonetheless, these premises and Rule 56 practice should be examined to see if the current pursuit of speed and efficiency is being sought at the expense of other values.

The proper use of Rule 56 is "the sine qua non of its utility."<sup>487</sup> But as the Supreme Court itself made clear, the motion must be employed consistently with a litigant's right to a day in court and our constitutional commitment, echoed in Federal Rule 38, that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute . . . shall be preserved to the parties inviolate."<sup>488</sup> To the extent that summary judgment grants deny litigants access to jury trial, it obviously unhinges the judge-jury decisionmaking balance.<sup>489</sup> Conversely, as elaborated below, if no "genuine issue of material fact" exists and the movant is entitled to judgment "as a matter of law," pretrial disposition does not raise questions of constitutional dimensions. The dichotomy between law and fact thus is critical.

Prior to the trilogy, the lack of a clear law-fact delineation did not raise pressing concerns with regard to summary judgment practice. Indeed, the apparent low frequency of motion grants during those years and the rather restrictive standard used by the federal courts protected the jury trial right against encroachment and obviated any need for a detailed exploration of the law-fact distinction. However,

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<sup>486</sup> See 2 Areeda & Hovenkamp, *supra* note 276, ¶ 308c, at 89 (stating that since *Matsushita*, lower courts have been more willing to grant directed verdicts and summary judgments against antitrust conspiracy claims when evidence was merely consistent with existence of conspiracy); *supra* notes 353-92 and accompanying text.

<sup>487</sup> Schwarzer, Hirsch & Barrans, *supra* note 121, at 452.

<sup>488</sup> Fed. R. Civ. P. 38.

<sup>489</sup> According to the notes of the advisory committee on civil rules to the 1963 amendment to Rule 56(e), reprinted in 31 F.R.D. 648 (1963): "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." See also 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C.

the expansion of summary judgment practice following the trilogy, coupled with the recent increase in the successful use of the Rule 12(b)(6) motion, has reversed the judicial propensity to err in favor of the nonmoving party. This means that the question of when a court may determine a case before trial "as a matter of law" has taken on greater significance—one that reaches some of our system's most cherished traditions. Absent sensitivity to the appropriate judge-jury balance, lower courts may curtail litigants' access to trials—and obviously a jury—through arbitrary, result-oriented, or efficiency-motivated determinations at the pretrial motion stage.

Using conclusory labels raises concerns not only because it may intrude on the trial and jury rights, but also because the actual basis for terminating an action may not be articulated clearly enough to permit effective appellate review, which is an essential safeguard against an improper pretrial disposition. Although both Rule 12(b)(6) and Rule 56 decisions are subject to *de novo* review, the appellate court is limited to the record before it. Thus, a motion grant should be accompanied by a clear and reasoned analysis of why, under the relevant standard, a particular pleading does not state any claim for relief or why the district judge believes that she, rather than a jury, and without live testimony subject to cross-examination, should decide one or more issues as a matter of law. Moreover, it is essential to provide litigants an opportunity to develop a full record through discovery before deciding a Rule 56 motion to ensure that their appellate rights are viable and meaningful. Given the growing judicial affinity for pretrial dispositions, appellate courts must be relied upon to guarantee that litigants' Fifth and Seventh Amendment rights are not infringed by judicial overeagerness. This requires an analytical framework for applying the law-fact distinction that focuses on whether a dispute is trial- or jury-worthy. It also means defining more precisely than in the past the proper allocation of decisionmaking power between judge and jury.

Obviously, the efforts just described consume a great deal of resources and time. If what motivates the apparent rise in pretrial motion grants are so-called efficiency concerns,<sup>490</sup> then one must

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<sup>490</sup> See, e.g., Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570 (1974); Guinther, *supra* note 349, at 45, 61-62; David W. Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956); David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 457-58 (1971); Robert K. Smits, *Comment, Federal Summary Judgment: The New Workhorse for an Overburdened Federal Court System*, 20 U.C. Davis L. Rev. 955, 957, 985 (1987). But see D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35, 41 n.27 (1988) (arguing that summary judgment practice does not promote efficiency because

study the expenditure of these labors along with the frequency of appeals of Rule 12(b)(6) and Rule 56 grants and the reversal rate. These factors are all quite relevant to appraising cost-effectiveness. As already noted, the purported “efficiency” of the expanded availability of summary judgment practice deserves much closer scrutiny than it has been given,<sup>491</sup> lest judicial haste simply produce systemic waste.

### A. *The Jury Trial Right*

#### 1. *History*

Jury trial is both unique and central to the American legal system.<sup>492</sup> It has been revered as a method of establishing the truth and as a safeguard against both the imposition of a morality by the elite and a tyranny of the state.<sup>493</sup> The essential values of jury trial have been the secret deliberations and the rendering of relatively impartial decisions by a group of citizens representing society rather than deferring to the opinions, reasoning, and conclusions of a single judge. As Blackstone explained:

[A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This

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it “routinely creates the necessity for two trials . . . the first one on paper as a precondition to trying one to a jury”).

<sup>491</sup> See, e.g., Guinther, *supra* note 349, at 45, 61-62; Koppel, *supra* note 42, at 559 (comparing recent trilogy of cases in California to Supreme Court’s trilogy and arguing that, although California has not adopted federal summary judgment practice wholesale, these decisions extend reach of summary judgment to resolve issues traditionally reserved for jury determination).

<sup>492</sup> See, e.g., 3 William Blackstone, *Commentaries* \*379 (stating that jury trial is “the glory of the English law”). For the history of the jury trial right, see, for example, Phylis Skloot Bamberger, *Democratizing the Supreme Court: 300 Years of the Jury*, N.Y. St. B.J., May/June 1991, at 30; George B. Johnston, *The Development of the Civil Trial by Jury in England and the United States in Light of Lord Hailsham’s Hamlyn Revisited*, 4 *Simon Greenleaf L. Rev.* 71 (1984); John V. Singleton, *Jury Trial: History and Preservation*, 32 *Trial Law. Guide* 273 (1988); Peter W. Sperlich, *Was There a Complexity Exception to Trial by Jury in 1791?*, 65 *Judicature* 396 (1982); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639 (1973).

<sup>493</sup> Trial by jury also was known as trial per pais. This translates into trial “by country.” See 3 William Blackstone, *Commentaries* \*349; Sir Frederick Pollock & Frederick William Maitland, 2 *The History of English Law Before the Time of Edward I* 626 (2d ed. 1968) (explaining that unanimous verdict was thought of as “voice of the country”).

therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decisions of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments.<sup>494</sup>

Although the value of jury trial no longer commands unanimous agreement and the frequency of its use appears to be on the decline in many places and contexts,<sup>495</sup> the commitment to this institution as expressed by Blackstone has continued in this country, and, absent a constitutional amendment, the jury trial right must be preserved in the national court system<sup>496</sup> and in those of virtually all the states.

The Supreme Court repeatedly has expressed the value of resolving fact disputes by citizens who represent the community at large,<sup>497</sup> and has periodically reaffirmed the federal system's respect for the jury institution.<sup>498</sup> The question, therefore, is not whether jury

<sup>494</sup> 3 William Blackstone, Commentaries \*380.

<sup>495</sup> See 9 Wright & Miller, *supra* note 211, § 2301; see also Ellen E. Sward, *The Decline of the Civil Jury* (2001); Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53 (2001); William G. Young, *America's Civil Juries . . . Going, Going, Gone?*, 4 No. 2 HCFA Legal Network News 1 (1998). There is something of a tradition of disdaining juries. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 968-69 (1987).

<sup>496</sup> U.S. Const. amend. VII. The commitment to the jury trial institution is particularly strong in the criminal context under the Sixth Amendment, as evidenced by the Supreme Court's recent decision that jurors, not judges, determine the presence of aggravating factors in death penalty cases, see *Ring v. Arizona*, 536 U.S. 584 (2002), and the effort in some states to empower jurors to consider acquitting an accused based on the "validity" of the criminal statute, which would validate a form of jury nullification, see Adam Liptak, *A State Weighs Allowing Juries to Judge Laws*, N.Y. Times, Sept. 22, 2002, § 1 at 1. See also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that other than fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and found beyond reasonable doubt).

<sup>497</sup> See, e.g., Justice Story's encomium in *Sioux City & P. Ry. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) ("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."). The great growth in the size and diversity of the nation's population casts doubt on the representativeness of any particular jury, especially when it has six rather than twelve members. Consequently, a more realistic description of the American jury emphasizes the value of citizen participation in the process. See 2 Alexis de Tocqueville, *Democracy in America* 378-79 (Phillips Bradley ed., Knopf 1945) (1835).

<sup>498</sup> See, for example, *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958), in which the Court stated:

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

trial is a useful procedure or whether the federal system should be committed to it, but whether this constitutional right is being protected with sufficient vigilance given its elevated status. To answer this question in the pretrial disposition context, the scope of the jury trial right must be understood, with particular attention given to two facets of this right.

First, the jury trial right depends to a significant degree upon the historical origins of the issue in question.<sup>499</sup> For many years after the fusion of law and equity, courts invoked history to determine whether a jury trial right existed. If the action had a precursor at common law when the Seventh Amendment was adopted, the jury right could be invoked; if the action historically was equitable, the Seventh Amendment was not triggered. This relatively straightforward analysis proved insufficient in the federal courts—especially after the 1938 promulgation of the Federal Rules, which merged the two litigation forms into a single civil action and sharply expanded claim and party joinder.<sup>500</sup> Thereafter, “mixed” legal and equitable actions appeared with ever increasing frequency and complexity. To the extent that federal judges were willing to characterize these “mixed” cases as predominantly equitable, or to use the ancient equity “clean-up” doctrine,<sup>501</sup> jury trial was constricted. In a series of opinions in the late 1950s and early 1960s, however, the Supreme Court generally expanded the jury trial right in mixed law-equity cases.<sup>502</sup>

The Court’s seminal decision in *Beacon Theatres, Inc. v. Westover*<sup>503</sup> addressed the often troublesome problem of the relationship between an issue’s historical origins and the Seventh Amendment. The case was initiated by a movie theater operator as a declaratory judgment action,<sup>504</sup> seeking a ruling on whether the petitioner’s first-run movie exhibition contracts violated the Sherman and Clayton Antitrust Acts, and a preliminary injunction to prevent Beacon from filing an antitrust claim against the theater operator until

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Id. See also *Simler v. Connler*, 372 U.S. 221, 222 (1963) (“The federal policy favoring jury trials is of historic continuing strength.”).

<sup>499</sup> 9 Wright & Miller, *supra* note 211, § 2302.

<sup>500</sup> See Fed. R. Civ. P. 2. See generally 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* §§ 1041-1045 (3d ed. 2002).

<sup>501</sup> Under this doctrine, an equity court having proper jurisdiction over a matter could complete the adjudication of a dispute—“clean-up”—even if that required deciding issues properly heard by a jury in a law court. See 9 Wright & Miller, *supra* note 211, § 2302, at 20.

<sup>502</sup> See *infra* notes 503-16 and accompanying text.

<sup>503</sup> 359 U.S. 500 (1959).

<sup>504</sup> See 9 Wright & Miller, *supra* note 211, § 2302.1, at 25-29 for a discussion of *Beacon Theatres*. The jury trial right in the declaratory judgment context is discussed in 9 *id.* § 2313.

the latter's action was decided. Beacon interposed an antitrust counterclaim seeking treble damages and demanded a jury.<sup>505</sup>

The Supreme Court ultimately ruled that jury triability in a mixed law-equity case must be determined issue-by-issue rather than on the basis of an overall characterization of the action as either legal or equitable.<sup>506</sup> Moreover, the jury right on a legal issue was held not to be defeated simply because an action began as an equitable proceeding or because that issue also had to be decided as part of the case's equitable aspect. Indeed, the Court decided that these "common" issues must be heard first by the jury, whose determination would then be binding on the court when it turned to the case's equity aspects.<sup>507</sup>

Three years later, in *Dairy Queen, Inc. v. Wood*,<sup>508</sup> the Supreme Court interpreted *Beacon Theatres* as extending the jury trial right to any legal issue even though it arises in an action that historically would have been heard in equity.<sup>509</sup> Plaintiffs sought temporary and permanent injunctions against the defendant's use of a trademark it had licensed from plaintiffs, an accounting, and an injunction preventing the defendant from collecting receipts until the accounting was completed. The defendant counterclaimed under the antitrust laws and demanded a jury.<sup>510</sup>

Writing for the majority, Justice Black concluded that the jury trial right did not turn on the "choice of words used in the pleadings."<sup>511</sup> That the complaint sought an accounting was not determinative because it also could be construed as a plea for damages for trademark infringement. Since the matter was not so complicated as to render an accounting beyond the competence of jurors, the Court held that the defendant was entitled to a jury trial on all issues related to monetary relief.<sup>512</sup>

Vital to understanding *Dairy Queen* is the fact that historically an accounting was purely an equitable proceeding with a judge, not a jury, determining the factual issues. Most jurors in times past were illiterate and the necessary examination of record books and calcula-

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<sup>505</sup> *Beacon Theatres*, 359 U.S. at 502-03.

<sup>506</sup> *Id.* at 508-09.

<sup>507</sup> *Id.*

<sup>508</sup> 369 U.S. 469 (1963). But see *Katchen v. Landy*, 382 U.S. 323 (1966) (holding plaintiff not entitled to jury on issue that arose as part of bankruptcy proceeding).

<sup>509</sup> See 9 Wright & Miller, *supra* note 211, § 2302.1, at 31. See generally John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. Pa. L. Rev. 1 (1967).

<sup>510</sup> *Dairy Queen*, 369 U.S. at 478.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 479.

tions was beyond their competence. With the merger of law and equity, federal courts were empowered by Rule 53(b) to appoint a master to assist jurors,<sup>513</sup> which the Supreme Court felt enabled the federal courts to carry out *Beacon Theatres*'s constitutional commitment to jury trial. The effort to educate and otherwise assist jurors also reflects the *Beacon Theatres* presumption that jury trials are a reliable and preferred means of adjudication that should be employed whenever improvements in the civil justice system enable jurors to deal with subjects that were once thought beyond their abilities. Thus, a court's use of a master often will compensate for whatever knowledge and guidance the jury might need to supplement its ability to make a rational decision when the issues are complicated.

Commentators have interpreted *Beacon Theatres* and *Dairy Queen* as signaling the expansion of the jury trial right regardless of historical restraints.<sup>514</sup> That certainly is borne out by later Supreme Court decisions validating the constitutional basis for jury trial when legal claims are asserted in the context of procedural vehicles that historically were purely equitable in origin<sup>515</sup> or in actions involving statutory rights created after the adoption of the Seventh Amendment in 1791.<sup>516</sup> Collectively, these cases represent an extraordinary commitment by the Court to the civil jury institution.

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<sup>513</sup> Federal Rule 53(a) gives the court discretion to appoint a special master, and Rule 53(b), cited in *Dairy Queen*, provides: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . ." See generally 9A Wright & Miller, *supra* note 211, §§ 2601-2604. A completely rewritten Rule 53 is slated to take effect in December 2003, and although the new Rule was designed to restrict the use of masters generally, it appears to offer enough flexibility to enable the court to appoint someone to assist the jury. The new Rule and the accompanying advisory committee note can be found at <http://www.uscourts.gov/rules/newrules.6html> (last visited May 21, 2003).

<sup>514</sup> See, e.g., 9 Wright & Miller, *supra* note 211, § 2302.1, at 32 & n.23; Mary Kay Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 *Hastings L.J.* 1, 32 n.138 (1977). Presumably magistrates and court-appointed experts could be used to assist the jury.

<sup>515</sup> See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 532-33 (1970) (holding that right to jury trial attaches to derivative suits).

<sup>516</sup> See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363, 374-75 (1974) (holding that right to jury trial extends to actions to recover property under D.C. Code section dating back to 1864); *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); see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (discussed *infra* notes 538-43 and accompanying text and in *Leading Cases*, 113 *Harv. L. Rev.* 200, 297-306 (1999)); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353-55 (1998) (holding that Seventh Amendment jury trial right attaches to determination of statutory damages in copyright cases); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-64 (1989) (holding that jury trials are permitted in fraudulent conveyance actions).

## 2. *Motions to Dismiss, Summary Judgment, the Law-Fact Distinction, and the Jury Trial Right*

The second difficulty in determining whether there is a jury trial right in a particular context does not turn solely on an historical inquiry requiring identification of the common law or equity antecedents of issues presented by modern substantive claims. Rather, even when an issue has been categorized as jury triable under *Beacon Theatres* and *Dairy Queen*, it still must be determined whether it is one of law, one of fact, or one of applying the law to the facts before it can be decided whether that issue should be assigned to a judge or a jury for resolution.

A reasoned and principled approach to this allocative decision is vital to prevent judicial encroachment on the jury's prerogative. That requires understanding the manner by which courts decide whether to take issues from a jury, either by pretrial disposition or at trial. The subject is an important one. Although historically "law" and "fact" were little more than classification labels, they now serve as surrogates for assigning decisionmaking authority as between judges and juries—a matter of constitutional magnitude. Without a framework for analyzing and delineating the respective functions of judges and juries, we risk distortion of our day-in-court principle and jury trial guarantee, and meaningful appellate review becomes difficult, if not impossible. Unfortunately, the subject is frustrating because the jurisprudential canvas is extremely indistinct and, in many respects, blank.<sup>517</sup>

In differentiating between judge and jury questions, the accepted wisdom about the law-fact spectrum<sup>518</sup> is that judges determine the law and juries the facts.<sup>519</sup> Implicit in the Supreme Court's *Anderson* equation of summary judgment and directed verdict is the notion that

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<sup>517</sup> See, e.g., Schwarzer, Hirsch & Barrans, *supra* note 121, at 454 ("What is a 'fact' for summary judgment purposes is neither intuitively obvious nor easily determined. . . . The distinction between fact and law has long bedeviled common-law courts. . . . Although judicial opinions frequently characterize a particular matter as one of fact or one of law, purporting to distinguish categorically between the two, these characterizations rarely provide much guidance for future cases." (footnote omitted)); see also Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867, 1867-68 (1966). See also 9A Wright & Miller, *supra* note 211, §§ 2588-2589 for a discussion of the difficulties of distinguishing between questions of law, questions of fact, and mixed questions for purposes of appellate review of bench trials.

<sup>518</sup> See Schwarzer, Hirsch & Barrans, *supra* note 121, at 455.

<sup>519</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 . . ."); see also Sir Edward Coke, 3 A Commentary upon Littleton 460 (Thomas ed. 1818) (1628) ("The most usual trial of matters of fact is by twelve such men; for ad quaestionem facti non respondent iudices; and matters in law the judges ought to decide and discuss; for ad quaestionem juris non respondent juratores.").

in the former context judges may decide only those issues that need not be submitted to a jury because they do not present a genuine issue of material fact; stated differently, they cannot be issues a reasonable jury might decide in favor of either litigant. It is unsettling that in a significant number of contemporary summary judgment decisions, the question of judge or jury authority seems to have been made on the basis of conclusory assertions as to what is fact and what is law, without any apparent reasoning or inquiry as to the appropriate judge-jury equilibrium.<sup>520</sup> As elsewhere, the invocation of labels does not suffice, especially given the stakes.

If an issue involves the resolution of principles generally applicable to a class of cases, the matter usually is said to pose a question of law for the court.<sup>521</sup> For example, identifying the applicable time period governing a statute of limitations defense typically is treated as a question of law. In a run-of-the-mine case, the choice of the proper limitations period involves a legal inquiry and does not require an assessment of past events by jurors.<sup>522</sup> As to what is a fact, one commentator explained:

When there is a dispute as to what acts or events have actually occurred, or what conditions have actually existed, the jury has the task of resolving the conflict. Its role is to evaluate the evidence and to reconstruct what took place, as it would have appeared to an objective on-the-scene observer.<sup>523</sup>

In other words, at a minimum the jury is the master of “historical” facts.

By way of contrast, the division of responsibility between judge and jury in resolving mixed questions of law and fact always has been shrouded in uncertainty.<sup>524</sup> Negligence is the paradigmatic mixed question of law and fact. As Professor Thayer wrote in an article on the subject over one hundred years ago, mixed questions of law and fact are

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<sup>520</sup> Different judicial approaches are shown in the cases described *infra* in notes 570-740 and accompanying text.

<sup>521</sup> See Weiner, *supra* note 517, at 1869.

<sup>522</sup> Even in this context, questions of fact can arise, as, for example, when it is necessary to determine when the plaintiff “discovered” something, such as fraud or her medical impairment, thereby triggering commencement of the applicable limitations period. Some judges have left these matters to a jury. See, e.g., *Haugh v. Allstate Ins. Co.*, 322 F.3d 227 (3d Cir. 2003); see also *Sadtler v. Jackson-Cross Co.*, 587 A.2d 727 (Pa. Super. 1991).

<sup>523</sup> Weiner, *supra* note 517, at 1869-70.

<sup>524</sup> The law-fact distinction is the subject of Thayer, *supra* note 485. See also Pollock & Maitland, *supra* note 493, at 629-30. A more recent and highly informative discourse on the distinction is found in Weiner, *supra* note 517.

mere matters of fact. The circumstance that in order to deal with them it is necessary to know what the legal definition is, does not really affect the matter. . . . [W]here the courts or statutes have fixed the legal standard of reasonable conduct, e.g., as being that of the prudent man, the determination of whether any given behavior conforms to it or not is a mere question of fact. That in reaching their conclusion the jury must reason, and must "judge the facts," is not material, as we have already seen; always they must do that; the difference in this respect between these cases of reasonableness and others is simply one of more or less.<sup>525</sup>

Since every human act or series of related acts arguably is unique to the circumstances presented, it is apparent why the question of reasonableness of conduct has been left to the ad hoc determination of juries.<sup>526</sup> But it is important to understand that in this context, the jury is not simply determining "what happened"—the historical facts—it also is determining the legal effect of its findings as to "what happened."

Thus, the centrality of the question of who applies the law to the facts is obvious. If mixed questions of law and fact are being determined with increasing frequency at the pretrial motion stage, the decision no longer is being made in the context of a live trial or by a jury. This possibility, no matter how laudable the motivation may be, makes it particularly important for trial courts to support the grant of dispositive pretrial motions with reasoned analysis so that appellate courts can determine whether the judge-jury, law-fact lines have been crossed.

The appropriate treatment of mixed questions may depend upon the particular combination of law and fact questions posed on a given summary judgment motion. Some mixed questions may involve an undisputed legal standard and disputed historical facts. In this situation, the motion must be denied because the dispute about the facts has to be left to a jury. The ultimate question is whether the jury also should be allowed to reason from its fact findings and determine whether those findings satisfy the applicable legal standard. Professor Thayer's analysis indicates that the answer is yes and that view generally has held sway, although the special verdict procedure in Rule

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<sup>525</sup> Thayer, *supra* note 485, at 170.

<sup>526</sup> See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser & Keeton on The Law of Torts* 175 (W. Page Keeton ed., 5th ed. 1984) ("The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what the reasonable person would do under the same or similar circumstances." (quotations omitted)).

49(a) is in conflict with that conclusion,<sup>527</sup> which led Justices Black and Douglas to call for its repeal in 1963.<sup>528</sup>

Other mixed-question situations involve undisputed historical facts that control the case's resolution. In these cases, is it within the constitutional province of the jury to apply those facts to the applicable legal principles, as described by the judge? If the answer is yes, summary judgment also is theoretically inappropriate. Yet, this situation represents a paradigm of when the pretrial motion is appropriate and is perhaps the most common basis for its grant. If it were otherwise, the Rule 56 procedure would lack any utility except when the law dictates an incontrovertible result.

The preceding makes it clear that the secondary question of when a fact is "in dispute" or, conversely, is so clear that it can be decided as a matter of law, is another critical variant, one obviously left to the discretion of the bench. Part of the difficulty in defining who should resolve mixed questions of law and fact and determining when a fact is in dispute may stem from the subject's inherently amorphous and contextual nature and the lack of any past imperative to confront it. The absence of a clear analytical framework either in the lower federal court opinions or in the Supreme Court's jurisprudence also contributes to the ambiguity.

The allocation of judge and jury authority probably cannot be subjected to a rule of universal application; however, it can be clarified beyond the uninformative labels courts generally invoke. Two major influences are at work. One is the strength and substance of the federal judiciary's commitment to adjudication by trial and the jury institution, which usually is in a state of flux because of a range of external and internal forces on the judiciary and requires periodic assessment and definition. The second is the set of values expressed in the Constitution and in the Federal Rules.

A comparison of the Supreme Court's Seventh Amendment jurisprudence at the time of *Beacon Theatres* and *Dairy Queen* with a number of its more recent decisions demonstrates the law's pendular

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<sup>527</sup> See generally 9A Wright & Miller, *supra* note 211, §§ 2505-2510; Charles Alan Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199 (1965) (discussing frequency and propriety of use of Rule 49(a) special verdicts); Robert Dudnik, *Comment, Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 Yale L.J. 483 (1965) (analyzing lack of standards given to judge in Rule 49 to determine how and when to use special verdicts and general verdicts with interrogatories).

<sup>528</sup> See *Order Amending Rules of Civil Procedure*, 374 U.S. 861, 868 (1963) (Black & Douglas, JJ., dissenting). See generally Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 Fordham L. Rev. 1837 (1998) (discussing importance of format of jury instructions and need for analysis of effects of changes to judge-jury structure).

action and reveals a possible diminution in the High Court's earlier, almost unqualified, respect and support for what some might call a mechanism of "direct democracy." For example, in *Miller v. Fenton*<sup>529</sup> the Supreme Court spoke in pragmatic, rather than philosophical, terms:

[T]he decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.<sup>530</sup>

Although this passage was written in the context of habeas corpus, it indicates that the Court is comfortable with leaving the delineation of fact and law to the largely unfettered discretion of the lower courts (something it did not seem willing to do in *Beacon Theatres* in the law/equity context), without providing them with any analytical framework beyond an intimation that in some instances a judge may be "better positioned" than a jury to decide a particular issue, or vice versa.<sup>531</sup>

At the heart of the equation of the law-fact and judge-jury dichotomies lies the scope to be given to the jury trial right. Despite the significance of this question, until recently the Court has provided little guidance. Whether the distribution of decisionmaking authority is to be decided on the basis of an ad hoc determination of what is just, efficient, logical, traditional, or in conformity with a global principle has not been directly and clearly addressed by the Court, and there has been surprisingly little discussion of it in the case law and commentaries.

One exception is *Markman v. Westview Instruments, Inc.*,<sup>532</sup> in which the Court provided some footprints when it held that the interpretation of a patent claim, which defines the scope of the patentee's rights and often presents a central litigation issue, is for the bench, not the jury.<sup>533</sup> After a long exploration of history that proved inconclusive on the question of decisionmaking authority, Justice Souter concluded:

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<sup>529</sup> 474 U.S. 104 (1985).

<sup>530</sup> *Id.* at 113-14 (citations omitted).

<sup>531</sup> The law-fact distinction also is relevant to the vertical distribution of authority between the federal district and appellate courts.

<sup>532</sup> 517 U.S. 370 (1996).

<sup>533</sup> See *id.* at 388.

Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art. . . . So it turns out here, for judges, not juries, are the better suited to find the acquired meaning of patent terms.

The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in particular “is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be.” Such was the understanding nearly a century and a half ago, and there is no reason to weigh the respective strengths of judge and jury differently in relation to the modern claim: quite the contrary, for “the claims of patents have become highly technical in many respects as the result of special doctrines relating to the proper form and scope of claims that have been developed by the courts and the Patent Office.”

Markman would trump these considerations with his argument that a jury should decide a question of meaning peculiar to a trade or profession simply because the question is a subject of testimony requiring credibility determinations, which are the jury’s forte. . . . In the main, we expect, any credibility determinations will be subsumed within the necessarily sophisticated analysis of the whole document, required by the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole. Thus, in these cases a jury’s capabilities to evaluate demeanor, to sense the “mainsprings of human conduct,” or to reflect community standards, are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent. The decisionmaker vested with the task of construing the patent is in the better position to ascertain whether an expert’s proposed definition fully comports with the specification and claims and so will preserve the patent’s internal coherence.<sup>534</sup>

A critical question, of course, is whether *Markman* is to be limited to its facts and context or whether it has ramifications beyond patent construction. If the latter is true, the consequences for jury trial are potentially enormous. If the Court’s opinion is taken literally, however, the factors referred to in the quoted passage that might lead a judge to withdraw issues from the jury come into play only “where history and precedent provide no clear answers.”<sup>535</sup> But since that could be true in innumerable contexts, the potential exists for the

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<sup>534</sup> Id. at 388-90 (citations omitted).

<sup>535</sup> Id. at 388.

wide-angle application of the factors mentioned by the Court. That broader reading would represent a significant shift in jury trial availability.

A perusal of *Markman* and a few other comparatively recent decisions<sup>536</sup> leads one to ask whether the presumption in favor of jury trial that seemed to animate Justice Black's opinions in *Beacon Theatres* and *Dairy Queen* is still in place. Perhaps a partial answer was provided two years after *Markman* when the Court adhered to its commitment to jury trial in post-1791 statutory actions when there was a common law analogue.<sup>537</sup> Then, one year later, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>538</sup> four Justices, joined by Justice Scalia, concluded that an inverse condemnation case under Section 1983 of Title 42 was "an action at law within the meaning of the Seventh Amendment," analogizing it to a tort action.<sup>539</sup> Justice Kennedy's plurality opinion carefully distinguished eminent domain proceedings, which are not jury triable—a view rejected by four Justices in an opinion by Justice Souter, who saw no difference between inverse condemnation and eminent domain.<sup>540</sup>

The *Del Monte* opinion, although quoting *Markman*, performed a traditional analysis, emphasizing history, the substance of the jury trial right, and the importance of leaving factual issues for the jury. The central issues—whether the landowner had been "deprived of all economically viable use of his property" and whether "the land-use decision substantially advances legitimate public interests"—were held to be "essentially fact-bound."<sup>541</sup> The absence of any discussion comparable to that in *Markman* has led at least one writer to conclude that

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<sup>536</sup> See, e.g., *Tull v. United States*, 481 U.S. 412, 425-27 (1987) (holding that Seventh Amendment does not guarantee jury trial for assessment of penalties under Clean Water Act); *Lehman v. Nakshian*, 453 U.S. 156, 160-69 (1981) (finding no right to jury trial in action against federal government under Age Discrimination in Employment Act of 1967 because Congress did not specifically grant one in statute); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449-61 (1977) (holding that Seventh Amendment does not prohibit Congress from assigning task of adjudicating Occupational Safety and Health Administration claims to administrative agency rather than juries). See generally Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 *Geo. Wash. L. Rev.* 183 (2000) (examining changes in Supreme Court decisions regarding role of juries with particular attention to impact and effect of *Markman* decision).

<sup>537</sup> *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-55 (1998) (holding Seventh Amendment jury trial right attaches to determination of statutory damages in copyright cases because Court could find analogies to actions at common law).

<sup>538</sup> 526 U.S. 687 (1999).

<sup>539</sup> *Id.* at 709.

<sup>540</sup> See *id.* at 734 (Souter, J., concurring).

<sup>541</sup> *Id.* at 720-21.

*Del Monte* is evidence that *Markman* is essentially a patent case.<sup>542</sup> That conclusion seems sound, and is faithful to the jury trial presumption reflected in *Beacon Theatres* and the cases following it.

The Supreme Court's 2001 decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>543</sup> however, further called into question its jury trial commitment. The Court held that setting a punitive damages award is not part of the fact process and therefore can be reviewed by the court of appeals de novo.<sup>544</sup> *Leatherman* involved claims of trade dress infringement, unfair competition, and false advertising.<sup>545</sup> After a full trial, the jury returned a verdict that answered several special interrogatories, and made an affirmative finding that "Leatherman [has] shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights."<sup>546</sup>

Because it reached this conclusion, the jury was instructed to determine the amount of punitive damages that should be awarded to Leatherman, and fixed that amount at \$4.5 million.<sup>547</sup> The district court considered and rejected arguments that the punitive damages were "grossly excessive."<sup>548</sup> On review, the court of appeals employed the "abuse of discretion" standard in affirming this punitive damages award against a claim that the Oregon constitution, which had been interpreted to prohibit punitive damages for torts that impose liability for speech, precluded the jury's award.<sup>549</sup>

The Supreme Court vacated and remanded the case after deciding that courts of appeals should apply a de novo standard of review when passing on a district court's determination of the constitutionality of a punitive damages award.<sup>550</sup> Because the jury's award of punitive damages does not constitute a finding of "fact" but is an

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<sup>542</sup> See Moses, *supra* note 536, at 256. In another recent article, Professor Moses examined three recent Supreme Court cases and concluded that if applied broadly, *Markman* would reduce the right to jury trial significantly, but that "any change in Seventh Amendment jurisprudence caused by the *Markman* decision did not have major significance outside of the narrow area of patent claim construction." Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. Rev. 561, 589 (2001).

<sup>543</sup> 532 U.S. 424 (2001).

<sup>544</sup> See *id.*

<sup>545</sup> *Id.* at 428.

<sup>546</sup> *Id.* at 429.

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> *Id.* at 430-31.

<sup>550</sup> *Id.* at 436.

“expression” of “moral condemnation,”<sup>551</sup> the Court reasoned, appellate review of the district court’s determination that a jury’s punitive damage determination is consistent with due process does not implicate Seventh Amendment concerns.<sup>552</sup> The Court rejected the argument that the deterrent function of punitive damages renders the amount of such damages a “fact” found by the jury, stating that “it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages.”<sup>553</sup> As in *Markman*, the Court also cited “differences in the institutional competence of trial judges and appellate judges.”<sup>554</sup> *Cooper Industries*, like *Markman*, raises the question of whether it is contextually bound or is open to expansion.

The Supreme Court’s apparent willingness to leave the law-fact distinction to lower-court discretion<sup>555</sup> and its determinations of relative competence<sup>556</sup> makes one wonder whether these phenomena, in connection with the 1986 trilogy, can be read as a signal of the present Court’s diminished concern with the preservation of jury trial. Indeed, it is not difficult to see how they might have indirect—if not direct—negative effects on jury trial. For example, by incorporating the directed verdict inquiry into the pretrial summary judgment process in *Anderson* and leaving law-fact allocations to the district judge, the Court may have downgraded, intentionally or unintentionally, the historic truth-seeking advantages of a trial and citizen decisionmaking. By equating a district court’s ability to decide at the summary judgment stage whether a reasonable jury could find in favor of the non-movant as a matter of law with its ability to decide that question at the end of trial, the Supreme Court effectively discounted (1) the importance of a jury’s evaluation of witnesses, (2) the greater sensory impact on the trier of live testimony, and (3) the value of trial cross-examination based on a completed pretrial discovery phase and a full presentation of the evidence.

Concern over the loss of these dynamic trial elements is precisely why pretrial dispositions are characterized as “paper trials” or “trials by affidavit.” Because the directed verdict standard originally was formulated with the understanding that it would be applied after both the judge and jury had the benefit of one or both parties’ full evidentiary presentations, a party’s rights to a day in court and resolution by

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<sup>551</sup> *Id.* at 432.

<sup>552</sup> *Id.* at 437.

<sup>553</sup> *Id.* at 438-39.

<sup>554</sup> *Id.* at 440.

<sup>555</sup> See *supra* notes 529-31 and accompanying text.

<sup>556</sup> See *supra* notes 532-34 and accompanying text.

a jury were not threatened by the Rule 50(a) motion. Rather, the trial was over, or at least the nonmoving party had completed her case and the case would not be withdrawn from the jury unless the court found—as a matter of law—that only one reasonable verdict was possible. Even though the jury did not render that verdict, the directed verdict standard only deprived the losing party of the possibility of an unreasonable verdict, a deprivation that never has been deemed to violate the Constitution.<sup>557</sup>

It is true that summary judgment and directed verdict have a common motivation—to filter out cases not worthy of full trial or jury consideration—and both reflect a certain degree of tolerance for judicial control of the jury. However, there is a danger in becoming enamored with the simple equation of the two motions and expanding the judge's decisionmaking authority based on assumptions about relative competence. A judge's determination that summary judgment should be granted because there is no genuine issue of material fact may be based—although it should not be—upon material that is not in an admissible form and does not consider the value of the temporal buffer zone afforded by allowing the maturation of a case or the possible effect of the trial dynamic. At a minimum, application of the “no reasonable juror” standard to summary judgment motions demands greater restraint than its application to end-of-trial motions for judgment as a matter of law. Similarly, courts must exercise restraint in distilling matters of law from those of fact based on the perception that they are more competent as to various matters than are juries.

When there truly is no genuine issue of material fact, the court's equation of the two motions may not be objectionable, since there is utility to filtering out claims that do not warrant the further expenditure of systemic and litigant resources. But even when the facts are undisputed, “fair-minded men may honestly draw different conclusions from them, [so] the question is not one of law but of fact to be settled by the jury.”<sup>558</sup>

Thus, there is a significant difference between allowing a judge to dispose of a case by applying a determinative legal principle to undisputed facts and allowing a judge to decide a factual issue because he

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<sup>557</sup> See *Galloway v. United States*, 319 U.S. 372, 396 (1943) (finding that directed verdicts do not controvert parties' right to trial by jury when plaintiff has not supplied sufficient facts to prove case).

<sup>558</sup> *Best v. Dist. of Columbia*, 291 U.S. 411, 415 (1934). There is substantial authority that summary judgment is inappropriate when competing inferences may be drawn from undisputed facts. See, e.g., *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992); *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985); *Frey v. Woodard*, 748 F.2d 173, 176 (3d Cir. 1984).

or she believes the evidence allows only one conclusion. A judge always decides the former. As to the latter, if one or more facts are in dispute or different inferences may be drawn from undisputed facts, a jury should be allowed to find for either party.

Some courts appear to ignore the distinction between these two situations and seem to equate them by labeling both questions of law for the court. That conflates what should be separate inquiries, obscures a vital part of the law-fact analysis in the pretrial motion context, and may mask a liminal or subliminal quest for efficiency through the rapid disposition of cases, assumptions about the supposed "litigation explosion" and fears of a "liability crisis," or attitudes toward certain "disfavored" actions. It bears repeating, therefore, that determinations of whether a dispute over a factual issue exists or whether an issue is one of law or fact are absolutely central to the protection of the jury trial right.

These decisions often require great delicacy and, not surprisingly, can produce judicial disagreement. This is well illustrated by *In re High Fructose Corn Syrup Antitrust Litigation*, a price-fixing conspiracy action against suppliers of high fructose corn syrup in which the district court and the court of appeals reached opposite results in evaluating the same evidence on a summary judgment motion.<sup>559</sup> District Judge Mihm, after reciting the applicable Rule 56 principles in catechistic fashion, as many courts do, engaged in an element-by-element analysis, concluding in each instance that the evidentiary item presented to oppose the motion either was inadmissible or insufficient to "exclude the possibility" that the defendants had acted independently and legally.<sup>560</sup> The court saw only "opportunities to conspire"<sup>561</sup> and was unwilling to conclude that a jury should be permitted to draw "reasonable inferences"<sup>562</sup> of concerted action. The opinion left this reader with the impression that the court was weighing the evidence and was unwilling to accept those inferences that favored a conspiratorial-activity theory rather than the competing independent-action theory.

The Seventh Circuit reversed. Judge Posner, in an opinion exhibiting laudable respect for trials and juries, began his analysis by stating that a court must avoid "three traps."<sup>563</sup> First, it must not weigh conflicting evidence. Second, just because no single item of evidence points unequivocally to conspiracy, that does not necessarily mean

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<sup>559</sup> 295 F.3d 651 (7th Cir. 2002), rev'g 156 F. Supp. 2d 1017 (C.D. Ill. 2001).

<sup>560</sup> *In re High Fructose Corn Syrup*, 156 F. Supp. 2d at 1030.

<sup>561</sup> *Id.* at 1035, passim.

<sup>562</sup> *Id.* at 1030, passim.

<sup>563</sup> *In re High Fructose Corn Syrup*, 295 F.3d at 655.

that the evidence as a whole cannot properly defeat summary judgment. Third, the court must distinguish between the existence of a conspiracy and its efficacy.<sup>564</sup>

Turning to the evidence, Judge Posner concluded that the plaintiffs had presented “some evidence” that was inconsistent with appropriate competitive behavior.<sup>565</sup> The court distinguished between what is needed to prove a conspiracy—a preponderance of the evidence—and what is needed to avoid summary judgment—merely enough evidence to enable a reasonable jury to infer an explicit rather than merely a tacit agreement to fix prices.<sup>566</sup> Ultimately, the court concluded that there was sufficient evidence to support the price-fixing conspiracy hypothesis and that summary judgment could not be premised on a competing hypothesis that might seem more plausible to the district judge.<sup>567</sup> All in all, the opinion projects sensitivity toward the need to differentiate fact and law, what is determinable on a pre-trial motion and what should be left for trial, and the respective roles of judges and juries.

Given the fact that hyperactive use of pretrial motions threatens long-standing constitutional values, courts should err on the side of the use of a trial and a jury. In order to justify disposition by summary judgment, let alone by motion to dismiss, considerations such as the uniform administration of statutory schemes, the practical limitations of juries in complex litigation, the implausibility of certain substantive or factual claims, the efficient management of overcrowded dockets, or, as in *Markman*, the relative competence of the judge and the jury in certain substantive and factual contexts must be established with considerable certainty in order to “justify” compromising those rights. That caution seems appropriate because, as previously noted, the asserted “efficiency” of summary judgment compared to trial has simply been assumed but has yet to be proven.<sup>568</sup> Conversely, as the Supreme Court indicated in *Markman*, the jury’s strengths in evaluating demeanor, sensing the “mainsprings of human conduct,”<sup>569</sup> and reflecting community standards, must be respected whenever the trial judge is presented with situations in which a choice of trier must be made.

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<sup>564</sup> See *id.* at 655-56.

<sup>565</sup> See *id.* at 660.

<sup>566</sup> See *id.* at 661.

<sup>567</sup> See *id.* at 662.

<sup>568</sup> See *supra* notes 348-52 and accompanying text.

<sup>569</sup> *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996) (quoting *Comm’r v. Duberstein*, 363 U.S. 278, 289 (1960)).

*B. An Evaluation of the Justifications for  
Restricting the Jury Trial Right*

In most instances, courts do not articulate the bases for their law-fact determinations. They simply voice conclusions, without significant analysis, that a question is either for the judge or the jury.<sup>570</sup> However, when courts do provide justifications for allocating decisionmaking authority to themselves, three arguments seem to recur. First, there may be an explicit or thinly veiled lack of confidence in jurors and their ability to comprehend and digest the complex technical, scientific, or economic facts and concepts needed to render a fair verdict in a specific case or on certain issues.<sup>571</sup> This rationale raises two considerations: the justification for the lack of faith in jurors' competence and the question of what is meant by "complex issues" or "complex litigation." Second, courts may believe that the need for uniform application of the law is paramount, which they posit can be achieved most effectively through judicial determination. Finally, a judge's philosophy or perspective may lead to decision-making by the bench on "efficiency" grounds or a conclusion that the plaintiff's theory is "implausible" as a matter of law, or that the substantive law does not extend to the harm alleged, or a feeling that the particular claim should be disfavored. Whether any of these rationales justify removing issues from the jury warrants careful scrutiny.

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<sup>570</sup> That the law-fact distinction is nothing more than a surrogate for the judge-jury division has long been noted. See, e.g., Thayer, *supra* note 485, at 147 ("The discrimination of law and fact, in its relation to jury trials, is often identified by practitioners, judges, and law-writers, with the question of what matter is for the court and what for the jury."); see also Schwarzer, Hirsch & Barrans, *supra* note 121, at 458.

[C]ourts determining whether such a question should be treated as one of fact or law do not often find direct assistance in precedent. Not only do courts often fail to explicate reasoning on this aspect of summary judgment, but the question arises in the shadowy middle ground between fact and law where decisions may be too fact-driven to be entitled to much precedential weight.

*Id.*

<sup>571</sup> For a counterargument that "[d]espite the popular tendency to disparage juries, the empirical evidence that does exist indicates that juries do a good job at an inherently complex and difficult task," see Thornburg, *supra* note 528, at 1868. The article cites the University of Chicago jury project as finding that "in civil cases judges and juries agreed on liability in seventy-nine percent of the cases." *Id.* The article also provides empirical evidence that this rate of agreement compares favorably to the rate of agreement among others, such as employment interviewers and practicing physicians, who make complex decisions, as well as to the rate of consistency among judges. See *id.* at 1868 & n.111.

## 1. *An Illustrative Case as a Vehicle for Evaluating the Reasons for Restricting Jury Trial*

In *In re Software Toolworks, Inc. Securities Litigation*,<sup>572</sup> a California district court provided a roadmap exemplifying the increased use of summary judgment motions, setting forth various justifications for allocating certain decisionmaking to the bench and disposing of a securities action without a trial. The case provides an excellent lens through which to examine whether an expanded Rule 56 practice is intruding upon the rights to a day in court and jury trial.

### (a) *The Case*

*Software Toolworks* was a pre-PSLRA investor class action against the underwriters of a public offering of common stock, Montgomery Securities and Paine Webber, Inc. (Underwriters), and the accounting firm responsible for the prospectus, Deloitte & Touche (Accountants), for securities fraud under Section 11 and Section 12(a)(2) (then designated Section 12(2)) of the Securities Act of 1933<sup>573</sup> and Section 10(b) of the Securities Exchange Act of 1934.<sup>574</sup> The 1933 Act allows any purchaser of a registered security<sup>575</sup> to bring suit against various defendants<sup>576</sup> including any person who offered or sold securities “by means of a prospectus . . . which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading.”<sup>577</sup>

The Underwriters moved for summary judgment, arguing that (1) with regard to the Section 11 and Section 12(a)(2) claims, they had satisfied the statutory due diligence standard of investigating the accuracy of what is said in the prospectus and eliminating false and misleading statements from the prospectus, and (2) with regard to the Section 10(b) claims, the plaintiffs had not and could not establish scienter. The plaintiffs responded that the prospectus was materially false and misleading, that the Underwriters had failed to make a rea-

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<sup>572</sup> 789 F. Supp. 1489 (N.D. Cal. 1992), rev'd in part, 50 F.3d 615 (9th Cir. 1994) (opinion amended 1995). The case has been selected because of Judge Fern M. Smith's explanation of her jury concerns. The author feels some distress about the choice because she is a superb jurist who has labored long and hard for the improvement of civil justice, as most recently evidenced by her stewardship of the Federal Judicial Center.

<sup>573</sup> 15 U.S.C. §§ 77k, 77l (2000).

<sup>574</sup> § 78j.

<sup>575</sup> Securities Act § 11(a), 15 U.S.C. § 77k.

<sup>576</sup> Securities Act § 11(a)(1)-(5).

<sup>577</sup> Securities Act § 12(a)(2).

sonable investigation as to its accuracy, and that the evidence presented on the motion raised triable issues of fact.<sup>578</sup>

The district court held that the plaintiffs had the burden of producing direct evidence of the absence of due diligence with respect to the prospectus's statements to withstand summary judgment on the Section 11 and Section 12(a)(2) claims<sup>579</sup> and the burden of establishing scienter on the Section 10(b) claim.<sup>580</sup> It granted summary judgment on all of the claims filed against the Underwriters.<sup>581</sup> The court decided the due diligence defense to the Section 11 and Section 12(a)(2) claims as a matter of law by employing the law-fact distinction,<sup>582</sup> and the Section 10(b) claim by heightening the plaintiffs' burden on the issue of scienter.<sup>583</sup>

In contrast to the claims against the Underwriters, the court denied the Accountants' Rule 56 motion on the portion of plaintiffs' Section 11 claims challenging the audit of Toolworks's Original Equipment Manufacturer revenue recognition. According to the court:

Section 11 requires a "reasonable" investigation by accountants. . . . This means that accountants are expected to investigate, to various degrees, facts supporting and contradicting inclusions in registration statements. They must undertake that investigation which a reasonably prudent man in that position would conduct. . . . If accountants establish a reasonable investigation under the circumstances of the case, they are entitled to the statutory due diligence defense.<sup>584</sup>

Judge Smith found that the record was full of "genuine issues of material fact" as to whether the Accountants had complied with the Generally Accepted Auditing Standards and the Generally Accepted Accounting Principles. She distinguished the Accountants' unsuccessful summary judgment request on its due diligence defense from the Underwriters' successful motion based on the same defense in a footnote:

[S]ummary judgment is appropriate for the Underwriters since there are no genuine issues of material historical fact with regard to the due diligence they performed; instead, the disagreement there is as to whether the due diligence performed entitles the Underwriters to a statutory defense as a matter of law. It is not the merits of the

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<sup>578</sup> See *In re Software Toolworks, Inc. Sec. Litig.*, 789 F. Supp. 1489, 1494 (N.D. Cal. 1992), rev'd in part, 50 F.3d 615 (9th Cir. 1994) (opinion amended 1995).

<sup>579</sup> See *id.* at 1497-98.

<sup>580</sup> *Id.* at 1499.

<sup>581</sup> *Id.* at 1512.

<sup>582</sup> *Id.* at 1494-96.

<sup>583</sup> *Id.* at 1498-99.

<sup>584</sup> *Id.* at 1510 (citations omitted).

defense that separate the Underwriters from Deloitte; rather, it is the fact/law distinction.<sup>585</sup>

(b) *The Court's Law-Fact Distinctions and Its Summary Judgment Decision*

*Software Toolworks* appears to have compromised the jury trial right applicable to statutory damage actions established by the Supreme Court in cases like *Beacon Theatres*<sup>586</sup> and *Curtis v. Loether*.<sup>587</sup> The court's use of the law-fact distinction is particularly troublesome. To sustain their due diligence defenses at trial,<sup>588</sup> the defendants would have had to have shown by a preponderance of the evidence that they had satisfied standard professional procedures in releasing the prospectus so as to override the plaintiffs' claim that by ignoring numerous "red flags" indicating the issuer's financial instability and alleged dishonesty, the Underwriters and the Accountants had failed to meet the standard required by the statute.

The presentation on the summary judgment motion suggests that the subject was trialworthy. For example, the plaintiffs presented expert affidavits to the effect that the defendants' failure to investigate the risks evident from the "red flags" constituted professional misconduct.<sup>589</sup> Judge Smith dismissed that evidence as unreliable, however, because it came from hired experts<sup>590</sup> and allocated to herself the application of the "undisputed" facts as to the statutory due diligence standard, concluding that the Underwriters had discharged their professional duties with regard to the public offering.<sup>591</sup>

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<sup>585</sup> Id. at 1511 n.61 (citation omitted). Note that part of the summary judgment grant in favor of the Underwriters on the Section 11 claims was reversed on appeal. See infra note 602.

<sup>586</sup> 359 U.S. 500 (1959); see supra notes 503-07.

<sup>587</sup> 415 U.S. 189, 191 (1974). For a general discussion of the jury trial right and statutory causes of action, see 9 Wright & Miller, supra note 211, § 2302.2.

<sup>588</sup> The court treated the Section 11 and Section 12(a)(2) claims as equivalent in its opinion. *Software Toolworks*, 789 F. Supp. at 1496. Under Section 11(b)(3) the defendants must show that they conducted a reasonable investigation and did not learn of the error in the statement. 15 U.S.C. § 77k(b)(3) (2000). Under Section 12(a)(2) the standard is negligence; the seller must not have known and could not have known of the untruth or omission. § 77l(a)(2). The two statutes are discussed in *In re Software Toolworks, Inc.*, 50 F.3d 615, 621 (9th Cir. 1994). See generally Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation* 1128 (4th ed. 2001).

<sup>589</sup> The plaintiffs argued that jury triable issues existed regarding the misleading character of the prospectus as to the company's sales performance, that there was overreliance on management assurances, that the due diligence investigation was not reasonable, that the financial statements were materially misleading, and that Deloitte & Touche (Accountants) acted with scienter. See *Software Toolworks*, 789 F. Supp. at 1494, 1502.

<sup>590</sup> Id. at 1496-98; see infra notes 597-598 and accompanying text.

<sup>591</sup> The court enumerated the claims of fraud with respect to Montgomery Securities and Paine Webber, Inc. (Underwriters) and found that their "diligent[ ] investigat[ion]" and

The question of whether the defendants exercised adequate professional care in investigating and verifying the statements was treated as a “mixed question of law and fact” by the court.<sup>592</sup> But since Judge Smith concluded that there were no disputes about “genuine issues of material historical” facts, she found that the issue presented a question of law for the bench.<sup>593</sup> Since due diligence is analogous to—if not the statutory codification of—negligence, allocating this subject to the court is questionable.

Probably sensing this difficulty with her allocation, Judge Smith listed several justifications for her decision. First, she reasoned that because the defense springs from a statute, “consistency, uniformity and predictability” in its application to undisputed historical facts can be assured only by a judge.<sup>594</sup> Second, the court concluded that judicial determination of issues affecting a class of individuals, such as due diligence, is appropriate.<sup>595</sup> Third, she argued that since the common experience of most jurors provides little insight into what due diligence is, the subject is better left to a judge.<sup>596</sup> Fourth, Judge Smith stated that if left to a jury, the due diligence question becomes “a battle of experts” who are “basically . . . paid advocates,”<sup>597</sup> thus raising serious policy implications.<sup>598</sup> The resulting uncertainty regarding jury decisionmaking, she said, would “increase litigation against deep pocket defendants (such as underwriters) and encourage collusion between plaintiffs and the issuer, who will often be in a precarious financial situation already.”<sup>599</sup> Given this potential increase in litigation, the court concluded that the balance favored summary judgment “as the preferred means of resolution.”<sup>600</sup> Finally, Judge Smith asserted that treating the statutory due diligence defense as a question of law would “apportion the risk more appropriately, encourage set-

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plaintiffs’ failure to proffer facts showing the Underwriters’ knowledge of any material misstatements or omission precluded a finding of scienter. *Id.* at 1499.

<sup>592</sup> *Id.* at 1494-95.

<sup>593</sup> *Id.* at 1495.

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *Id.* at 1495-96.

<sup>597</sup> *Id.* at 1496.

<sup>598</sup> See *id.*

<sup>599</sup> *Id.*

<sup>600</sup> *Id.* The court of appeals agreed that in some cases, summary judgment on the issue of due diligence would be appropriate, but said that summary judgment on the “reasonableness” standard applicable to due diligence determinations was limited to cases in which “the undisputed facts leave no room for a reasonable difference of opinion.” *In re Software Toolworks, Inc. Sec. Litig.*, 50 F.3d 615, 621-22 (9th Cir. 1994) (opinion amended 1995).

tlement at early stages and lead to more equitable and consistent results.”<sup>601</sup>

The Ninth Circuit affirmed on most issues but reversed on a few that it felt presented an issue of material fact.<sup>602</sup> The court of appeals did not comment on the district court’s reasons for favoring a judicial determination over that of a jury, choosing instead to look at each of the matters that the plaintiffs contended presented genuine issues of material fact. The court did indicate that it was “mindful” that “materiality and scienter are both fact-specific issues which should ordinarily be left to the trier of fact, [although] summary judgment may be granted in appropriate cases.”<sup>603</sup>

It is not usual for a court to list any, let alone a substantial number, of justifications for allocating decisionmaking power to itself,<sup>604</sup> which makes Judge Smith’s *Software Toolworks* opinion particularly interesting. Moreover, her enumeration and arguments indicate a philosophical stance regarding the competence of juries in complex litigation, show the influence of the perception that there is a “litigation explosion” that might engender a “liability crisis,” and reflect a certain prodefendant or corporate orientation that manifests itself in her unwillingness to allow jurors to apply a legal standard to

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<sup>601</sup> *Software Toolworks*, 789 F. Supp. at 1496. But see 10A Wright, Miller & Kane, supra note 109, § 2729, at 551-55.

It is even more difficult for defendant to prevail on a Rule 56 motion when defendant’s motion is based on the assertion that there is no factual dispute with regard to an issue of negligence or contributory negligence, inasmuch as these questions are thought of as being within the special competence of the jury. But . . . there are some instances in which, even if the facts are as plaintiff asserts them to be, the presence or absence of negligence or contributory negligence can be found as a matter of law and the entry of summary judgment for defendant is proper.

Id. (citations omitted).

<sup>602</sup> A portion of the Section 11 claims against the Underwriters and some of the Rule 10b-5 claims against both the Underwriters and Accountants were reinstated and remanded for a trial on the merits. *Software Toolworks*, 50 F.3d at 625-29. See supra note 349 and accompanying text for a brief discussion of the extent to which appellate reversals might undermine the efficiency rationale for summary judgment.

<sup>603</sup> *Software Toolworks*, 50 F.3d at 620 (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1412 (9th Cir. 1994)). Although other courts have echoed the truism that materiality and scienter are fact-specific issues, they proceed to decide them as a matter of law in circumstances that strongly suggest that triable issues of fact actually are present but are being obscured by the conclusory classification. See, e.g., *Romine v. Axiom Corp.*, 296 F.3d 701, 710 (8th Cir. 2002) (Bye, J., dissenting) (criticizing 8-1 decision for treating question of fact as matter of law); *Freedman v. Value Health, Inc.*, 135 F. Supp. 2d 317, 331 (D. Conn. 2001), aff’d, 34 Fed. Appx. 408 (2d Cir. 2002) (proceeding to treat issue of materiality as matter of law).

<sup>604</sup> See, e.g., *Baker v. Citibank (South Dakota) N.A.*, 13 F. Supp. 2d 1037, 1041 (S.D. Cal. 1998) (supplying no justification for assertion that whether language violates Fair Debt Collection Practices Act is question of law).

“historical” facts.<sup>605</sup> Thus, the articulated justifications invite exploration of the propriety of the district court’s initial labeling of the Section 11 and Section 12(a)(2) due diligence issues as matters of law and the attempt to distinguish between the Underwriters and the Accountants.

Judge Smith appears to be of the opinion that only if there are disputed “historical” facts will a jury be asked to decide due diligence, even though the Section 11 inquiry is whether under the circumstances a “reasonably prudent” individual would have investigated as did the defendant, a classic jury issue.<sup>606</sup> Moreover, it seems inconsistent to allow jurors to apply the law to the facts only if they first must decide disputed facts, but to give the court power to declare facts to be undisputed and then apply the law to those “facts.” It also appears to be at odds with the notion that even when the facts are undisputed—which appears to have been the case in *Software Toolworks*—it is for the jury to choose between competing inferences.<sup>607</sup> Might it be more coherent either to leave the application of the law to the facts to the jury in all cases—as is done in most negligence cases—or to submit a special verdict to the jury on the factual issues and then have the judge apply the jury’s factual findings to the law in all cases? The determination of what is due diligence then always would be left either to a group of decisionmakers who represent the community or to a single legally trained judge in the hope of achieving uniform application of the statute.

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<sup>605</sup> Justice Charles M. Leibson of the Kentucky Supreme Court discussed the problem of judicial bias inherent in taking negligence cases from the jury:

The judicial decision of which issues presented in a case should be treated as factual issues for the jury to decide and which as legal issues for the court to decide is crucial to the development of tort law. The more the interpretative function of the decision making process is left to the jury, the greater the potential scope and application of such concepts as reasonable conduct, negligence and gross negligence. To the extent the role of the jury is limited, the concepts involved are limited in scope and controlled by the policies of the court. Thus, deciding which issues are questions of law and which are questions of fact becomes an important tool of judicial policy making, bearing consequences in expanding or narrowing potential liability. . . . As one Kentucky opinion explained: “The more judges take cases [and issues] away from juries, the more the concepts of reasonable conduct, negligence and gross negligence become synonymous with the view of the judge or judges on that court. Likewise, the more the interpretative power is delegated to juries, the more these concepts become the aggregate of discrete findings by juries.”

Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 Ky. L.J. 1, 3 & n.8 (1986-87) (citations omitted) (alteration in original) (quoting *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985)).

<sup>606</sup> See *Software Toolworks*, 789 F. Supp. at 1510.

<sup>607</sup> See *supra* note 558 and accompanying text.

Even if the court's characterization of the facts as "undisputed" with respect to the Underwriters and "disputed" with respect to the Accountants is accurate, the law-fact distinction used to justify granting summary judgment on the Underwriters' defense was predicated in part on the need for "uniformity," which the court posited is better attained by judicial than by jury determination.<sup>608</sup> Yet although the desirability of consistent administration of the federal statute applies to accountants as well as underwriters, the court's view of the facts relating to each prevented the judge from according the two the same treatment.

Judge Smith's comparison of the Underwriters' and Accountants' claims seems to suggest that with respect to the former, the question was what constitutes due diligence, but with respect to the latter, the question was what was done. She did not take the analysis one step further to justify why she apparently was willing to allow a jury to apply the law to the facts for the Accountants' defense, but was unwilling to do the same for the Underwriters' defense. Since the only justification provided was a rather Delphic footnote reference to "the fact/law distinction,"<sup>609</sup> the decisionmaking allocation must have been premised on her belief that the facts relating to the Underwriters were not in dispute. Arguably, the jury should have been allowed to find and apply the facts in both instances. Although there has been some judicial concern for uniformity in the administration of various federal statutes,<sup>610</sup> as well as a concern with the ability of juries to decide complex matters,<sup>611</sup> matters to be discussed below, these apprehensions seem inapposite to the *Software Toolworks* case and the district court's decision to allocate decisionmaking authority to itself runs counter to time-honored jurisprudence in the analogous negligence field.<sup>612</sup>

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<sup>608</sup> But see Thornburg, *supra* note 528, at 1864, 1868 (observing that juries are more consistent than judges in decisionmaking, and that judges may use law-fact distinction to appropriate power from juries).

<sup>609</sup> *Software Toolworks*, 789 F. Supp. at 1511 n.61.

<sup>610</sup> See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 788 F. Supp. 78, 95 (D. Mass. 1992), *rev'd on other grounds*, 49 F.3d 807 (1st Cir. 1995), *aff'd* by an equally divided court, 516 U.S. 233 (1996) (discussed *infra* notes 656-61 and accompanying text).

<sup>611</sup> See, e.g., *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 66-70 (S.D.N.Y. 1978) (denying demand for jury trial in class action for restraint of trade through denial of copyrights to music written by plaintiffs for movies and television programs because complexity of issues deemed beyond competence of jurors). But see Oliver Wendell Holmes, Jr., *The Common Law* 129 (photo. reprint, Dover Publications 1991) (1881) ("The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination.").

<sup>612</sup> See 10A Wright, Miller & Kane, *supra* note 109, § 2729, at 556-72.

A party defending against Section 11 or Section 12(a)(2) claims on the basis of due diligence must establish “that he did not know, and in the exercise of reasonable care could not have known,” that the prospectus or registration statement in question contained false information or failed to disclose material facts.<sup>613</sup> As the statute makes clear, due diligence, like negligence, asks if the challenged behavior was reasonable under the circumstances.<sup>614</sup> Whether courts have labeled the question of negligence as one “of fact”<sup>615</sup> or have distinguished between questions of historical facts and of reasonable care,<sup>616</sup> all American jurisdictions—with the possible exception of North Carolina<sup>617</sup>—appear to follow the general rule that negligence is within the jury’s province.<sup>618</sup> Although due diligence is statutory

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[E]ven when there is no dispute as to the facts, it usually is for the jury to decide whether the conduct in question meets the reasonable-person standard. Accordingly, courts have denied motions for summary judgment on issues of negligence, proximate cause, *res ipsa loquitur*, assumption of risk, contributory negligence, and pain and suffering. Summary judgment is particularly inappropriate when resolving the question of negligence requires an inquiry into defendant’s state of mind, as, for example, when an issue exists as to the willfulness of defendant’s conduct or as to whether defendant knew or should have known that its property presented some danger.

Id. (citations omitted).

<sup>613</sup> See Loss & Seligman, *supra* note 588, at 1128.

<sup>614</sup> Thus, 15 U.S.C. § 77k(c) (2000) establishes the following standard of reasonableness: “In determining . . . what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.”

<sup>615</sup> See, e.g., *Johnson v. W. Air Express Corp.*, 114 P.2d 688, 696 (Cal. 1941).

<sup>616</sup> See, e.g., *Bryant v. Hall*, 238 F.2d 783, 787 (5th Cir. 1956); *Heimer v. Salisbury*, 142 A. 749, 750 (Conn. 1928).

<sup>617</sup> See *Weiner*, *supra* note 517, at 1886-87 & nn.96-102 and accompanying text.

<sup>618</sup> Even when the “facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.” *R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873). But see *Holmes*, *supra* note 611, at 124-25, arguing that negligence questions should be determined by judges to allow for consistency.

It has often been said, that negligence is pure matter of fact, or that, after the court has declared the evidence to be such that negligence *may* be inferred from it, the jury are always to decide whether the inference shall be drawn. . . .

. . . .

. . . [T]he courts have been very slow to withdraw questions of negligence from the jury, without distinguishing nicely whether the doubt concerned the facts or the standard to be applied. Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury, and only cases falling on this doubtful border are likely to be carried far in court. Still the tendency of the law must always be to narrow the field of uncertainty.

Id. (footnotes omitted). See generally Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *Fordham L. Rev.* 407, 424-39 (1999) (arguing that jury’s power to make normative judgments in negligence cases often goes beyond role as factfinder).

and negligence derives from the common law, it seems difficult to distinguish the two—both require a determination of whether the defendant acted as a reasonably prudent person in the context of a given set of events.<sup>619</sup> The same, of course, can be said of numerous other federal statutes that embrace some form of the reasonable conduct standard. Since due diligence codifies the common law reasonable person standard, *Software Toolworks* seems inconsistent with the historic practice of submitting issues requiring the application of that standard to a jury on the presumption that a group of citizens is the appropriate—and perhaps the most qualified—body to decide what human conduct is acceptable under a given set of circumstances.

If a federal jury must determine whether a driver was reasonable in driving on a certain road at a certain speed without stopping at a certain intersection, it is difficult to see why a jury should not determine whether an underwriter was reasonable in investigating certain financial statements but not others, and in making certain assertions without further investigating other questionable activities or reports about the company, before issuing the prospectus associated with a public offering. The reasons given in *Software Toolworks* for allocating decisionmaking power to the bench suggest either that the district court did not view due diligence as comparable to negligence, without articulating why, or that it effectively invoked a uniformity or complexity exception to the Seventh Amendment (possibly because of the defense's statutory character). Another explanation is that the court simply did not wish to permit a trial and lay jury adjudication because of various reasons that usually go unarticulated; some courts seek to avoid the perceived risks discussed earlier and alluded to by Judge Smith.<sup>620</sup> The net effect, of course, is that these judicial inhibi-

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<sup>619</sup> See Keeton, Dobbs, Keeton & Owen, *supra* note 526, at 173-75. According to Professors Prosser and Keeton: "The courts have dealt with [negligence] by creating a fictitious person, who never has existed on land or sea: the 'reasonable man of ordinary prudence.' . . . [H]e is . . . a personification of a community ideal of reasonable behavior, determined by the jury's social judgment." *Id.* at 174-75. According to Professors Loss and Seligman: "The key word is 'reasonable.' There is not much law on how this [due diligence] defense may be established." Loss and Seligman, *supra* note 588, at 1128. And according to Wright, Miller, and Kane:

Although a motion for summary judgment under Rule 56 may be made in any civil action, it is not commonly interposed, and even less frequently granted, in negligence actions. This is not surprising given the fact that the judge and jury each have a specialized function in negligence actions. Indeed, particular deference has been accorded the jury in this class of cases in light of its supposedly unique competence in applying the reasonable person standard to a given fact situation.

10A Wright, Miller & Kane, *supra* note 109, § 2729, at 533; see also Restatement (Second) of Torts §§ 328B, 328C (1965) (specifying functions of court and jury in negligence actions).

<sup>620</sup> See *supra* notes 572, 594-601 and accompanying text.

tions abrogate constitutional principles in favor of judicial predilections.

## 2. *Practical Abilities and Limitations of Jurors; the Meaning of Complexity*

The *Software Toolworks* district court clearly exhibited a lack of confidence in juries to apply the legal standard to the facts in a consistent and rational manner. This combined with both the court's doubt that the common experience of most jurors would be helpful in evaluating what constitutes due diligence and its assertion that the jury's evaluation of a so-called "battle of experts" would be unreliable or inconsistent probably reflects Judge Smith's perception that jury trial is inappropriate in complex litigation. That view may have been accentuated by the action's regulatory context.<sup>621</sup>

It is difficult to accept the court's aversion to a "battle of experts" as a justification for trumping the jury trial right since it always has been within the jury's province to listen to, weigh, accept, or reject expert testimony in a wide range of cases.<sup>622</sup> Indeed, modern actions involving product failures, mass disasters, and toxic substances often present the jury with conflicting expert testimony about difficult issues such as general and individual causation, product defect, and state of the art. Nonetheless, jurors have been relied upon to absorb and appraise this type of testimony in rendering their verdicts.<sup>623</sup> More-

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<sup>621</sup> The district court drew upon Ninth Circuit precedent in determining whether the jury was competent to hear a securities regulation case. In an action for violation of state and federal securities laws, common law fraud, and negligence, the court of appeals previously had held that there was no complexity exception to the jury trial right. See *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 431 (9th Cir. 1979). The court defended the jury institution, reasoning that it has yet to be shown that the knowledge of a judge is superior in any context to the collective experience and common sense jurors bring to a case. See *id.* Thus, to a degree, the *Software Toolworks* court seems to have deviated from Ninth Circuit case law on jury trial availability.

<sup>622</sup> See, e.g., Thayer, *supra* note 485, at 154-55.

[Consider] the case of expert witnesses to fact. What is their function? It is just this, of judging facts. They are called in because they are men of skill and can interpret phenomena which other men cannot, or cannot safely interpret. . . . It is perfectly well settled in our law that such opinions or judgments are merely those of a witness, they are to aid the jury or the judge of fact, and not to bind them; the final judgment is for the jury, and, unquestionably, the judgment is one of fact.

*Id.* (footnote omitted).

<sup>623</sup> In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993), the Court made district judges "gatekeepers" regarding the foundation and relevance of an expert's testimony. So-called *Daubert* hearings are now common, and when they lead to the disqualification of one party's experts, summary judgment may follow. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-45 (1999); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 98 F. Supp. 2d 729, 731, 740 (W.D. Va. 2000) (excluding plaintiffs' only antitrust

over, as observed in one court of appeals decision, the district court has the power under Federal Rule of Evidence 706 to appoint its own expert witness and avoid being “at the mercy of the parties’ warring experts.”<sup>624</sup>

But a question does exist as to whether there is a complexity exception to the Seventh Amendment. The debate on this subject usually begins with the Supreme Court’s footnote in *Ross v. Bernhard*<sup>625</sup> announcing a three-prong jury-triability test: “As our cases indicate, the ‘legal’ nature of an issue is determined by considering, first, the pre-merger [of equity and law] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.”<sup>626</sup>

According to some commentators, the third part of this test may create an exception to the Seventh Amendment.<sup>627</sup> Their argument proceeds in three related stages. First, a comparable exception existed at the time the Seventh Amendment was adopted. Second, if the jury trial right is seen as a symbol of the commitment to fair trials, then the justification for employing it should not turn on whether the historical antecedent of a particular claim was legal rather than equitable. Instead, the constitutional right should be preserved only if a jury will render a fair decision. Third, some argue that the reference to the “practical abilities and limitations of juries” in the *Ross* footnote sug-

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economic evidence), partial summary judgment granted in part and denied in part, 108 F. Supp. 2d 549 (W.D. Va. 2000). Thus, it falls to the courts of appeals to take a “hard look” at the district court’s utilization of the *Daubert*-Rule 56 combination. At least the Third Circuit has done so. See *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 416-18 (3d Cir. 1999); *In re Paoli R.R. Yard PCB Sec. Litig.*, 35 F.3d 717, 732-33 (3d Cir. 1994).

<sup>624</sup> *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (discussed supra notes 559-69 and accompanying text). Professor Burbank argues that complexity should not be used as an excuse to deny jury trial but that the system should use its procedural tools to aid jurors. Burbank, supra note 58, at 1480-82.

<sup>625</sup> 396 U.S. 531 (1970).

<sup>626</sup> *Id.* at 538 n.10. The first two elements noted by the Court reaffirm the historical tests articulated in *Beacon Theatres*, see supra notes 503-07 and accompanying text, and *Dairy Queen*, see supra notes 508-13 and accompanying text. Mindful of the fact that courts historically asserted equity jurisdiction only when the legal remedy was inadequate, the Court held that the growth of modern legal remedies and procedures, the fusion of law and equity, and the availability of parajudicial officers and experts to aid jurors, diminished equity jurisdiction and increased jury trial availability.

<sup>627</sup> See Frank M. Loo, A Rationale for an Exception to the Seventh Amendment Right to a Jury Trial: *In re Japanese Electronic Products Antitrust Litigation*, 30 *Clev. St. L. Rev.* 647, 653-55, 657-58 (1981); Note, The Right to a Jury Trial in Complex Civil Litigation, 92 *Harv. L. Rev.* 898, 903 (1979). See generally 9 Wright, Miller & Kane, supra note 109, § 2302.1, at 39-42 (outlining judicial interpretations of *Ross* in complex cases); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 *Colum. L. Rev.* 43 (1980) (discussing historical background of *Ross* consideration of jury competence).

gests a Fifth Amendment due process exception to the Seventh Amendment.<sup>628</sup> If the facts and legal issues are so complex that the average juror either could not comprehend them or could not separate out the important facts and legal issues bearing on each claim, or if the duration of a complex trial is so extended that the average juror could not absorb, retain, and apply all of the relevant information, then giving the case to the jury would violate the parties' fair trial rights.<sup>629</sup>

Some especially skeptical commentators have taken the argument so far as to suggest that, even if jurors do comprehend the facts and issues, the "common sense of an average person" is insufficient to evaluate highly technical concepts and patterns of behavior familiar only to professionals.<sup>630</sup> "Without experience on which to draw . . . the jury can resolve such a factual issue only by speculation."<sup>631</sup> However, this lack of faith in jury capability is based on untested (and somewhat elitist) assumptions about lay people and would require case-by-case line drawing that would be burdensome, if not impossible, and subject the jury trial right to the subjective judgments of individual judges. Moreover, it runs counter to the Supreme Court's

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<sup>628</sup> Since the Supreme Court has never incorporated the Seventh Amendment into the Fourteenth Amendment and imposed it on the states, civil jury trial has never been declared fundamental to our conception of ordered liberty. See *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("A trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge."). It is argued, therefore, that the due process commands of the Fifth Amendment supersede the right to jury trial when the two Amendments directly conflict. See Joel B. Harris & Lenore Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.L. Sch. L. Rev. 611, 620-30 (1979) (arguing that "[t]raditional trial procedures—including trial by jury—must be altered when necessary to afford the parties due process"); Jeffrey Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. Miami L. Rev. 243, 285-89 (1980) ("[I]f the jury trial does not offer [the protections of a fair hearing], it is suggested that due process considerations should outweigh the right to jury trial."). But see Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 Mich. L. Rev. 68, 87-88 (1981) (pointing out that many consider due process to be synonymous with entire Bill of Rights). By way of analogy, the Supreme Court has used due process to constrain jury freedom regarding punitive damages. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003); *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>629</sup> According to Paul W. Mollica, due process requires that litigants have the benefit of a presumption that trial is available to them. Mollica, *supra* note 244, at 183. He argues that: (1) federal courts are obliged to observe due process; (2) civil causes of action constitute property rights and therefore are protected by the Fourteenth Amendment's due process clause; (3) under traditional conceptions of due process, litigants' right to present live testimony should be highly valued; and thus (4) on balance, courts always should err on the side of a hearing at which witnesses can be presented before a jury. *Id.* at 183-95.

<sup>630</sup> Note, *supra* note 627, at 910.

<sup>631</sup> *Id.* at 910.

Seventh Amendment jurisprudence, particularly cases like *Dairy Queen* and others that bear on the scope of the jury's province.

One example of the Court's past deference to jury trial is its willingness to allow juries to speculate. One of many illustrations is provided by *Lavender v. Kurn*, an action under the Federal Employers' Liability Act (FELA) brought in a Missouri state court by the administrator of the estate of a railroad switch tender killed near the tracks at night.<sup>632</sup> The decedent was found with a fractured skull caused by a blow to the back of the head.<sup>633</sup> The issue at trial was whether he had been murdered, in which case the estate could not recover under FELA, or whether he had been struck on the head and killed by an improperly secured mail hook protruding from a passing train, in which case the estate could recover.<sup>634</sup> The jury found for the plaintiff, but the Missouri appellate courts reversed.<sup>635</sup> The Supreme Court reversed and held that the matter was one for the jury because there was evidence that it was mathematically and physically possible for the decedent to have been struck by the hook.<sup>636</sup> As to the contrary evidence, the Court said:

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.<sup>637</sup>

The willingness to allow juries to resolve issues when the competing elements of proof or the competing inferences that might be drawn from the evidence seem in equilibrium, and there is no apparent basis for choosing between variant interpretations, reflects the nature of a jury verdict. "[A]s we use the phrase 'trial' and 'trial by jury' now, we mean a rational ascertainment of facts, and a rational

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<sup>632</sup> 327 U.S. 645, 652-53 (1946). FELA actions are unique in that the case law has made it virtually impossible to take a case away from a jury. However, the Supreme Court's willingness to allow the jury to "speculate" is not unique to the FELA context.

<sup>633</sup> *Id.* at 648.

<sup>634</sup> See *id.* at 646-47.

<sup>635</sup> *Id.*

<sup>636</sup> *Id.* at 652.

<sup>637</sup> *Id.* at 652-53.

ascertainment and application of rules.”<sup>638</sup> Thus, as long as a jury’s determinations are reasonable, it is irrelevant that the judge might have interpreted the facts differently. It is the very essence of the jury’s role to resolve factual ambiguity through inference or reasoning. This is the jury’s prerogative even when, as in *Lavender*, the apparent lack of any basis for choosing between competing interpretations of the facts might appear to allow the jurors to speculate.

However, courts skeptical of juror capacity to handle complex or technical disputes may be motivated to decide mixed law-fact questions themselves or conclude that a factual matter is not in dispute and resolve it as a matter of law on a pretrial motion. But a judge may be no better equipped, or even less suited, than a group of lay people to evaluate complex material,<sup>639</sup> making the automatic allocation of decisionmaking authority to the bench inappropriate and no less an exercise in speculation. Not surprisingly, the lack of a firm foundation for the assumption that a judge has superior capacity to decide a certain matter accurately has led some courts to leave complex matters to the jury.<sup>640</sup>

The less confident a court is in a jury’s ability to comprehend, retain, and apply quantities of technical, scientific, and economic information, or to distinguish intertwined legal and factual issues, the more disposed it may be to use the occasion of a summary judgment motion to decide mixed law and fact questions and those it labels “beyond dispute.” Thus, the court may tend to believe that its own determination will be more rational than that of a jury.<sup>641</sup> However, jurors should not be assumed incompetent or unable to comprehend issues posed by difficult cases. In fact, the ability to employ court-

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<sup>638</sup> Thayer, *supra* note 485, at 157.

<sup>639</sup> See, e.g., Lempert, *supra* note 628, at 86-94 (arguing that although there is no point in frustrating law with irrationality if jurors cannot, but judges can, make rational decisions, there is no complexity exception to Seventh Amendment or due process right to bench trial if judge is no more capable than jury of rendering rational decision).

<sup>640</sup> See, e.g., *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 429-31 (9th Cir. 1979). Other commentators argue that a blue-ribbon jury would be better suited than a judge or a regular jury. See generally Note, *The Case for Special Juries in Complex Civil Litigation*, 89 *Yale L.J.* 1155 (1980). But because making ad hoc judgments as to the relative competence of a particular judge and a particular jury to decide a particular issue would be consumptive of resources, protract the proceedings, and inevitably breed inconsistencies, this technique has not received serious consideration.

<sup>641</sup> As has been noted earlier, it is unclear whether the increase in summary judgment practice began before the Supreme Court’s 1986 trilogy. See *supra* notes 246-50 and accompanying text. If this is the case, the Supreme Court’s suggestion in *Matsushita* that summary judgment should not be avoided entirely in antitrust litigation may have been the impetus for some courts becoming more activist in disposing of issues or for other courts constraining their expansion of certain substantive law areas by following their personal predilections, rather than allowing juries to decide issues.

appointed experts or masters under Rule 53 to assist a jury when issues are complex exhibits the Rules' presumption of juror competence.

As illustrated by *Software Toolworks*, the jury competence issue has arisen most frequently in antitrust and securities litigation.<sup>642</sup> Yet before *Matsushita*, the Supreme Court had said that summary judgment "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."<sup>643</sup> However, it later qualified that position, asserting that the motion may be used appropriately in antitrust litigation when the complaint is unsupported by evidence.<sup>644</sup> *Matsushita*, therefore, is an example of one complex antitrust scenario<sup>645</sup> thought resolvable under Rule 56, not because of any expressed doubt about jury competence but because the plaintiffs' economic theory was deemed implausible. The subsequent decision in *Eastman Kodak*<sup>646</sup> also may be viewed as one in a continuing line of cases that explains when it is and is not appropriate to dispose of antitrust claims anterior to trial.

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<sup>642</sup> See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1090 (3d Cir. 1980), *aff'd* in part and *rev'd* in part on other grounds following summary judgment, 723 F.2d 238 (3d Cir. 1983), *rev'd* sub nom. on other grounds, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (vacating lower court's order for remand to determine whether antitrust lawsuit was complex enough to require dispensing with jury trial); *In re U.S. Fin. Sec. Litig.*, 609 F.2d at 431 (refusing to allow lower court to deny jury trial on basis that securities issues in consolidated cases were too complex for jurors); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 942 (E.D. Pa. 1979) (denying that complexity of antitrust and antidumping case was grounds to strike jury trial demand); see also 10B Wright, Miller & Kane, *supra* note 109, § 2732, at 104 ("[A]ntitrust and patent litigation are two fields that most frequently are cited as requiring especially cautious handling of summary-judgment motions."); Loo, *supra* note 627, at 654 ("The complex nature of antitrust and securities cases has caused courts to question the abilities of juries to rationally decide these cases."); Oakes, *supra* note 628, at 300 ("It is already apparent that a majority of the complex suits will be filed in large commercial centers . . ."); Note, *supra* note 627, at 899 ("[E]vidence in antitrust or securities cases may involve concepts of which the average juror has no knowledge . . ."). In more recent years, toxic tort and products liability cases raising difficult questions of science or technology, often related to causation issues, have involved similar concerns about jury competence.

<sup>643</sup> *Poller v. CBS*, 368 U.S. 464, 473 (1962) (discussed *supra* notes 221-26).

<sup>644</sup> *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968) ("[W]e are not prepared to extend [litigants' rights to jury trial] to the point of requiring that anyone who files an antitrust complaint . . . be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.").

<sup>645</sup> According to the Supreme Court's opinion, the parties in *Matsushita* filed a forty-volume appendix of evidence with the Court, the court of appeals opinion was sixty-nine pages long, and the district court opinion was over two hundred pages in length. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576-77 (1986).

<sup>646</sup> 504 U.S. 451 (1992). This case is discussed *supra* notes 267-69 and accompanying text.

Although the pressure for a complexity exception seems to have lessened in recent years, it is possible that fears about giving these types of questions to a jury are now being masked by the implausibility standard or the classification of issues as purely legal or factual but determinable by the court as a matter of law. Moreover, the Supreme Court's reference in *Miller v. Fenton* and *Markman* to the relevance of who is "better positioned," the judge or jury, to decide a particular matter might be read as a resurrection of the *Ross* reference to the "abilities and limitations of juries." Since *Markman* did not cite *Ross*, however, the Court did not seem to intend that.

### 3. *Efficiency and Uniformity*

The *Ross* footnote does not mention either an efficiency or a uniformity exception to the jury trial right. Nonetheless, some participants in the allocation debate have argued that "if uniformity of regulation is especially important in order to foster a particular policy," then a judge should look for any available "evidence that jury verdicts in the area, or in similar fields, have been haphazard"<sup>647</sup> to justify judicial decisionmaking. Courts have relied on both of these concepts to justify displacement of the jury,<sup>648</sup> and to some extent these concerns influenced the allocation of decisionmaking power to the court in *Software Toolworks*.

First, Judge Smith expressed the view that the presumed inconsistency of jury determinations would "increase litigation against deep pocket defendants (such as underwriters) and encourage collusion between plaintiffs and the issuer, who will often be in a precarious financial situation already."<sup>649</sup> She concluded that the implications of this potential increase favored summary judgment, which she believed would "apportion the risk more appropriately, encourage settlement at early stages and lead to more equitable and consistent results."<sup>650</sup> These hypothesized policy objectives, presumed results, and concerns for defendants reflect a mindset premised on the assumption that early resolution is the most efficient method of disposing of cases. No one can quarrel with the desirability of early resolution—assuming the gain is not offset by increased appeals or heightened investment in

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<sup>647</sup> Kane, *supra* note 514, at 32-33.

<sup>648</sup> See, e.g., Nelken, *supra* note 246, at 53 ("As courts and commentators seek solutions to the perceived litigation explosion of recent years, summary judgment has gained renewed appeal as a means of terminating litigation without the expense and delay of trial." (citations omitted)). The assumption that judge-trying cases are processed more rapidly than jury-trying cases is challenged in Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 *Judicature* 176 (1996).

<sup>649</sup> *In re Software Toolworks, Inc. Sec. Litig.*, 789 F. Supp. 1489, 1496 (N.D. Cal. 1992).

<sup>650</sup> *Id.*

pretrial motion practice or a distortion of the litigation playing field in favor of one group at the expense of another. But early disposition is not always consistent with other system values or the goals of the relevant substantive law,<sup>651</sup> although the court's remarks may reflect its view that the action before it is part of a disfavored class of litigation or more general apprehensions about a "litigation explosion" and a "liability crisis."

Second, Judge Smith argued that a uniform judicial determination of issues such as due diligence that affect a class of individuals is desirable, although she did not enunciate a standard for achieving that objective. However, the due diligence question almost by definition involves a consideration of various acts, omissions, and facts set in a particular context. Whether the sum total of all of the underwriters' conduct satisfies due diligence is such a case-specific inquiry that it is difficult to see how uniformity would be promoted by having a scattergram of trial judges rather than multiple juries deciding the issue, although the availability of multiple district court opinions followed, over time, by court of appeals decisions might afford some stability.<sup>652</sup> Of course, a uniform due diligence standard should be articulated in the jury instructions in all cases, and if certain conduct constitutes "negligence per se" under the terms of a statute as interpreted by the courts, that should bind the jury once the trial judge finds as a matter of fact that those actions or omissions occurred. And if the court wants to be certain that the jury adheres to the general standards, she always can use one of the verdict procedures provided for in Rule 49.<sup>653</sup>

In *Markman* the Supreme Court did address the possibility of a uniformity exception explicitly, stating that "the importance of uniformity in the treatment of a given patent" was "an independent

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<sup>651</sup> Changes in the nature of litigation, including periodically crowded dockets, complex litigation, and new management techniques may alter our notions of what is an efficient and just procedural system. As Professor Judith Resnik notes in *Managerial Judges*, 96 *Harv. L. Rev.* 374, 380 (1982), "[M]anagerial judging may be redefining sub silentio our standards of what constitutes rational, fair, and impartial adjudication." As the nature of the adjudicatory process evolves, the meaning of the precatory language in Federal Rule 1 that the objective is to "secure the just, speedy, and inexpensive determination of every action" may have to be transformed as well. Fed. R. Civ. P. 1. The cost of litigation and the size of awards also may affect our perception of what constitutes the inexpensive resolution of suits and the system's willingness to invest resources in each case on the docket. These are issues of enormous magnitude requiring the attention of the entire profession rather than being left to the type of adventitious "judicial one-degree-itis" that results from numerous ad hoc decisions.

<sup>652</sup> One is reminded of the inability of the federal courts to achieve uniformity in generating federal common law under the ninety-six-year regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which ended with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>653</sup> See Fed. R. Civ. P. 49 (enabling courts to use special verdicts and interrogatories).

reason to allocate all issues of construction to the court," and that "treating interpretive issues as purely legal will promote (though it will not guarantee) intrajurisdictional certainty."<sup>654</sup> The patent context is unique, however, because the need for national uniformity in the legal status of a particular invention is an essential characteristic of the statutory framework and its effectiveness, as evidenced by the creation of the Court of Appeals for the Federal Circuit and the special provision for exclusive federal subject-matter jurisdiction.<sup>655</sup>

Even before *Markman*, the value of decisional consistency in the intellectual property field was addressed in *Lotus Development Corp. v. Borland International, Inc.*<sup>656</sup> In determining the copyrightability of elements of a computer software program, a distinguished district judge, Robert E. Keeton, characterized the issue as "more closely analogous to traditional judicial lawmaking to fill the interstices of statutes than to traditional factfinding."<sup>657</sup> In choosing to resolve the question itself, the court emphasized that even if jury verdicts might fall into a consistent pattern over time, in the interim the consequent inability of lawyers to protect their clients by accurately predicting outcomes supported establishing copyrightability standards.<sup>658</sup> The court was careful to distinguish judge-made copyrightability from negligence, explaining, in a passage that previsions Justice Souter's in *Markman*, that copyrightability requires

an evaluative mixed law/fact determination, as distinguished from a bright-line rule calling for a finding about disputed historical facts such as who did what, where, and when. Moreover, [the copyrightability] standard is far more heavily loaded with public policy implications than most other standards more commonly used in law, of which the negligence standard is an example.<sup>659</sup>

Underlying the passage may be a confidence in judicial wisdom and a lack thereof in that of jurors, as well as a possible unstated desire to constrict the jury function as narrowly as possible. But the words may be limited to the particular case before the court. Special policy concerns implicated in the allocation of mixed law-fact issues in the copyright (as in the patent) context may distinguish it from other substantive areas of the law. Unfortunately, as *Software Toolworks*

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<sup>654</sup> *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390-91 (1996).

<sup>655</sup> See 28 U.S.C. § 1338(a) (2000).

<sup>656</sup> 788 F. Supp. 78, 95 (D. Mass. 1992), rev'd on other grounds, 49 F.3d 807 (1st Cir. 1995), aff'd by an equally divided court, 516 U.S. 233 (1996).

<sup>657</sup> *Id.*

<sup>658</sup> *Id.*

<sup>659</sup> *Id.* See also 10B Wright, Miller & Kane, *supra* note 109, § 2732, at 104 ("[S]ummary judgment has been found unsuitable in copyright cases.").

and the cases discussed later in this Article<sup>660</sup> illustrate, there is a danger of allowing a judge to withhold a case from a jury simply because its resolution is regarded as turning on policy questions that the court is unwilling to entrust to a jury.<sup>661</sup> Thus, the impulse that animated *Markman* and *Lotus* must be constrained.

In substantive environments not impacted by a comparable national uniformity imperative, it seems that consistency in jury instructions, the availability of posttrial corrective procedures, appellate review, and due process protections provide as much uniformity as any litigant can expect in a system committed to jury trial. Some lack of consistency is inevitable when reliance is placed on a neutral, ad hoc body of citizen decisionmakers who represent the community,<sup>662</sup> although that may be less tolerable in certain contexts than in others.

If the increased use of summary judgment, pressure to avoid trials, lack of confidence, fear of a “liability crisis,” or efficiency concerns reflect a weakened commitment to the jury, that should be acknowledged by judges so that the issue can be illuminated by professional discussion. Indeed, if that is what is afoot, the magnitude of the issue makes it incumbent upon the Supreme Court to reverse that trend or at least to provide some guidance by redefining jury triability in light of the enhanced role of pretrial disposition. But since the Court has, for the most part, reaffirmed its commitment to trial and jury trial (even in the trilogy opinions), great care must be taken to ensure that we do not go in an opposite direction inadvertently or indirectly, let alone by individual judicial predilection. The law-fact distinction admittedly always has been unclear and issues generally have been assigned to the judge or jury without extensive analysis. But the Court’s willingness thus far to leave the allocation of issues to

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<sup>660</sup> See *infra* notes 713-42 and accompanying text.

<sup>661</sup> See *In re Software Toolworks, Inc. Sec. Litig.*, 789 F. Supp. 1489, 1495-96 (N.D. Cal. 1992) (holding judge better suited than jury to determine adequacy of due diligence defense).

<sup>662</sup> See Weiner, *supra* note 517, at 1925.

The willingness of the law to condone inconsistency in the negligence sphere is explainable by judicial deference toward trial by jury. This deference may stem from the prevailing view that application of the due care standard presents a question of fact, and is constitutionally a jury function. With respect to the competing policies under consideration, one leading jurist cautioned that “if trial by jury is as valuable as it seemed to the founders of our institutions, the danger of holding a matter of fact to be a matter of law outweighs the inconvenience of any uncertainty likely to be produced by verdicts of juries . . . .”

*Id.* (quoting *Gray v. Jackson*, 51 N.H. 9, 37 (1871)); see also Thornburg, *supra* note 528, at 1837, 1868 (noting societal skepticism of jury verdicts, then citing statistics showing that jury verdicts compare favorably with judicial decisions in terms of uniformity).

trial court discretion for purposes of motions to dismiss or summary judgment does not mean that federal judges are free to assume decisionmaking power and to shift the delicate judge-jury balance in the name of seeking uniformity of treatment of a particular matter. Any such development is constitutionally suspect and should be resisted.<sup>663</sup>

#### 4. *Individual Judicial Perspectives, Implausibility, and the Adoption of Certain Economic Theories as Law*

Some lower courts have heightened the nonmovant's burden at the pretrial stage by drawing on *Matsushita* and characterizing a party's liability theory as implausible. By declaring that the theory makes "no economic sense," for example, courts require plaintiffs to "come forward with more persuasive evidence to support their claim than would otherwise be necessary."<sup>664</sup> When a plaintiff bears the burden of establishing a defendant's state of mind at trial,<sup>665</sup> as she does, for example, in a Section 10(b) fraud action under the Securities Exchange Act of 1934,<sup>666</sup> and in certain antitrust contexts, advancing that burden and demanding that it be met at the pretrial motion stage—by demonstrating plausibility—often can prove fatal.<sup>667</sup> A

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<sup>663</sup> Decisions withdrawing decisionmaking power from juries are immediately problematic since they contravene the general trend of the Supreme Court's Seventh Amendment jurisprudence. According to Dean Mary Kay Kane:

By and large, the trend in the Court has been to expand the scope of the constitutional guarantee and to find a right to jury trial in doubtful cases. . . . Thus, it is not without some justification that two commentators have concluded, "[A]ny close question—and sometimes one that is not so close—is resolved in favor of the jury trial right without serious analysis of history, precedent, or policy."

Kane, *supra* note 514, at 6-7 (quoting David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 442 (1971)) (footnotes omitted).

<sup>664</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

<sup>665</sup> Some courts have held that summary judgment is inappropriate whenever a party's state of mind is at issue. E.g., *Petro v. McCullough*, 385 N.E.2d 1195, 1196 (Ind. App. 1979). However, since *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), presented the malice issue in the defamation context, it seems that a categorical determination that summary judgment is inappropriate any time someone's state of mind is at issue cannot be reconciled with the Supreme Court's jurisprudence. See also Sonenshein, *supra* note 220, at 786-95 (characterizing Supreme Court's pre-*Anderson* decisions on issue of summary judgment in cases involving state of mind as "mistaken analysis . . . creat[ing] a climate that singles out such cases as being wither incapable of resolution by summary judgment, or at least inappropriate in most situations for such resolution").

<sup>666</sup> 15 U.S.C. § 78j(b) (2000).

<sup>667</sup> See, e.g., Ponsoldt & Lewyn, *supra* note 258, at 576-77 & n.5 (suggesting that *Matsushita* undermines right to jury trial in antitrust cases—as established by *Beacon Theatres*—and creates perverse standard of proof in civil antitrust cases); see also Janusz A. Ordover & Daniel M. Wall, *Proving Predation After Monfort and Matsushita: What the "New Learning" Has to Offer, Antitrust*, Summer 1987, at 5 (arguing that *Matsushita*

threshold judicial determination that the claimant's antitrust theory is implausible creates a virtually insurmountable hurdle for a plaintiff facing a defendant's properly supported summary judgment motion, or even a motion to dismiss.<sup>668</sup> That is typically because the "more persuasive evidence" needed to allow a jury properly to infer the defendant's state of mind or the unreasonableness of its conduct often is within the exclusive knowledge or control of the defendant. Thus, according to one treatise:

Antitrust . . . actions are by their very nature poorly suited for disposition by summary judgment. . . . In antitrust cases, questions of motive or intent, credibility, and conspiracy frequently prevent summary judgment from being entered, since these issues involve subjective questions regarding state of mind that only can be decided after a full trial.<sup>669</sup>

According to the *Software Toolworks* opinion, the plaintiffs' burden on the Section 10(b) claim required them to establish scienter through direct evidence. Under then-existing Ninth Circuit case law, the established definition of scienter required either reckless disregard for, or actual knowledge of, a statement's falsity.<sup>670</sup> Because the district court concluded that the plaintiffs' theory was implausible, it required the plaintiffs to present direct evidence of the defendants' state of mind to avoid summary judgment. No inferences of recklessness from circumstantial evidence were allowed to be drawn in the plaintiffs' favor: "Plaintiffs are not entitled to the benefit of the doubt

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seems to hold that "there is an 'impossibility' defense to predation claims: if the alleged predation scheme is not economically sensible [as Chicago School theorists maintain virtually all predation schemes are not], the claim fails"; Collins, *supra* note 274, at 501-04 (1988) (arguing that broad reading of *Matsushita* contradicts traditional summary judgment rules and impermissibly infringes upon jury's power to weigh evidence and inferences).

<sup>668</sup> Under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the defendant must show that the plaintiff has failed to present any evidence regarding the defendant's state of mind. See *supra* notes 305-09 and accompanying text.

<sup>669</sup> 10B Wright, Miller & Kane, *supra* note 109, § 2732.1, at 111-20.

<sup>670</sup> See, e.g., *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-70 (9th Cir. 1990). The question of what a plaintiff must plead to create a "strong inference" of scienter under the PSLRA has been decided inconsistently by a number of federal courts. Compare *Novak v. Kasaks*, 216 F.3d 300, 310-11 (2d Cir. 2000) (holding that PSLRA adopts Second Circuit "strong inference" standard requiring only that plaintiffs set forth facts showing simple recklessness or motive and opportunity to commit fraud), with *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (holding that PSLRA elevates pleading requirement above Second Circuit's, and that plaintiffs must state facts demonstrating intent or deliberate recklessness to establish scienter). The Ninth Circuit appears to take the most demanding approach in the nation on this subject. See generally William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders*, 8 Stan. J.L. Bus. & Fin. 69, 87 (2002) (reporting that Ninth Circuit "has thrown 18 consecutive securities fraud suits by investors out of court").

with respect to inferences from circumstantial evidence—only reasonable and non-speculative inferences under the circumstances of the case need be accepted.”<sup>671</sup> In effect, the court, relying on *Matsushita*, heightened the plaintiffs’ pretrial evidentiary burden to require the production of direct evidence of defendants’ actual knowledge of the falsity of certain statements in the prospectus. Some courts of appeals have declined to do so.<sup>672</sup>

The district court’s reliance on *Matsushita* for the proposition that when the plaintiffs’ claim is implausible they “must . . . come forward with more persuasive evidence to support their claim than would otherwise be necessary”<sup>673</sup> or suffer summary judgment, may be an over-extension of the Supreme Court’s holding.<sup>674</sup> This is especially true given the complex nature of the antitrust claims in *Matsushita*, the fact that what it found “implausible” was the applicability of an economic theory in the context of certain unusual and uncontradicted facts, and the Court’s clarification of *Matsushita* in *Eastman Kodak*. The Ninth Circuit’s demanding scienter standard—one that continues under the PSLRA<sup>675</sup>—guided and might well justify Judge Smith’s importation of *Matsushita*. Nonetheless, by reducing *Matsushita* to the word “implausible,” the district court circumvented the directed verdict analysis that seems to be required under *Anderson*.

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<sup>671</sup> In re Software Toolworks, Inc. Sec. Litig., 789 F. Supp. 1489, 1499 (N.D. Cal. 1992). The PSLRA requires a plaintiff to plead facts giving rise to a strong inference of the defendant’s scienter, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2002), which has led some courts to conclude that all inferences to be drawn from the allegations of the complaint must be considered, including those unfavorable to the plaintiff, thus overturning the general rule that on a motion to dismiss only inferences favorable to the pleader should be considered, e.g., No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp., 320 F.3d 920 (9th Cir. 2003); Gompper v. VISX, Inc., 298 F.3d 893, 897 (9th Cir. 2002) (“[T]he court must consider *all* reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs.”); cf. Helwig v. Vencor, Inc., 251 F.3d 540, 553 (6th Cir. 2001) (drawing inferences in favor of plaintiff, but only when “most plausible of competing inferences”), cert. dismissed, 536 U.S. 935 (2002). Other courts, however, appear to continue to apply the traditional rule of construction. See, e.g., Aldridge v. A.T. Cross Corp., 284 F.3d 72, 79 (1st Cir. 2002) (“We take the plaintiff’s allegations to be true and draw inferences in the plaintiff’s favor.”); In re K-Tel Int’l, Inc. Sec. Litig., 300 F.3d 881, 889 n.6 (8th Cir. 2002) (rejecting standard on inferences articulated in *Helwig*).

<sup>672</sup> See cases cited supra note 671.

<sup>673</sup> *Software Toolworks*, 789 F. Supp. at 1499 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (quotations omitted).

<sup>674</sup> Cf. Schwarzer, Hirsch & Barrans, supra note 121, at 492 (finding that rationale of *Matsushita* limiting scope of permissible inferences from circumstantial evidence “may apply in other areas in which the drawing of adverse inferences from ambiguous conduct may have undesirable social or economic consequences” and offering example of employment discrimination).

<sup>675</sup> See supra note 670.

Moreover, reliance on *Matsushita* was a poor substitute for much needed further explanation from the court, which gave the reader little more than the conclusory cliché that the Underwriters would not commit fraud since crime does not pay, an observation that seems rather quaint in light of the recent revelations concerning various high-level corporate officers and marketplace activities.<sup>676</sup> According to the district court, the *Software Toolworks* defendants lacked any motive to defraud investors and any claim to the contrary was “implausible” as a matter of law. Given that mindset, the judge did not consider the plaintiffs’ evidence of misconduct as a whole and did not follow the Supreme Court’s apparent mandate to determine whether the evidence, in toto, “tends to exclude the possibility”<sup>677</sup> that defendants either were reckless or had actual knowledge of the falsity of statements in the prospectus. By labeling the plaintiffs’ theory “implausible,” the district court effectively rejected anything but direct evidence of actual knowledge as unpersuasive, thereby depriving the plaintiffs of any opportunity to have a jury infer recklessness from the circumstantial evidence.

According to Judge Smith, “an allegation that professionals committed fraud in order to obtain professional fees is not a persuasive motive to establish scienter”<sup>678</sup> since “fees for [an offering] could not approach the losses [the underwriting firm] would suffer from a perception that it would muffle a client’s fraud.”<sup>679</sup> The court’s factual assumption as well as its conclusory—and quite possibly wrong—statement about human motivation (a subject rife with factual ele-

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<sup>676</sup> See, e.g., Amy Borrus & Mike McNamee, How Bankers and Brokers Could Get Bruised, *Bus. Wk.*, Oct. 7, 2002, at 44 (reporting Salomon Smith Barney fined five million dollars for star analyst publicly recommending telecom stock about which he privately expressed doubts); Jake Keaveny, Giant IPO Suit Hinges on Defense Motion, *L.A. Times*, Sept. 30, 2002, at C3 (describing lawsuit against Wall Street brokerage houses and their corporate clients for rigging hundreds of initial public offerings); Ben White, Merrill Lynch to Pay Fine, Tighten Rules on Analysts, *Wash. Post*, May 22, 2002, at A1 (reporting that Merrill Lynch agreed to pay one-hundred-million-dollar fine to settle charges by New York State Attorney General that firm misled investors by publicly recommending stocks that were privately noted by analysts to be “junk” and “crap”); see also discussion of Initial Public Offering (IPO) allocation accusations *infra* note 680.

<sup>677</sup> *Matsushita*, 475 U.S. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

<sup>678</sup> *Software Toolworks*, 789 F. Supp. at 1499 n.16.

<sup>679</sup> *Id.* (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990)); see also Schwarzer, Hirsch & Barrans, *supra* note 121, at 495 (“The question arises whether *Matsushita* . . . stand[s] for the proposition that summary judgment is in order whenever two inconsistent inferences can be drawn and the court considers them of equal force or finds no evidence tending to exclude one or the other.”). The authors conclude that since *Matsushita* turned on antitrust law rather than summary judgment procedure it was not intended to be generalized. *Id.*

ments) totally ignores the reality that underwriters may have a wide range of objectives in orchestrating public offerings. Underwriters undoubtedly gain value from issuers' perceptions of their ability to maximize the returns from an offering and the investors' confidence in the quality of its representations in prospectuses and registration statements. Nevertheless, underwriters also may have a strong desire (1) to maximize the price per share of the issuer's stock; (2) to assure a favorable market reception to the new security, even if that may involve misleading investors as to the risks attached to the securities being offered, as has been charged and is now being litigated; or (3) actually to rig the market for the securities being issued.<sup>680</sup> The

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<sup>680</sup> Revelations of possible accounting manipulations continue to appear. See, e.g., Peter Behr & Carrie Johnson, *Enron Booked \$250 Million Profit in One Day After Chapter 11 Filing*, Wash. Post, Jan. 8, 2003, at E1 (reporting allegations that Enron's \$250 million booked profit from 2001 West Coast energy trading operations likely resulted from accounting manipulation); Neil Buckley, *Ahold Probe Spreads to Larger Suppliers*, Fin. Times, Apr. 4, 2003, at 15 (reporting on investigation into wide range of financial misconduct); Kathleen Day, *Xerox Restates 5 Years of Revenue: '97-'01 Figures Were Off by \$6.4 Billion*, Wash. Post, June 29, 2002, at A1; Kurt Eichenwald & Seth Schiesel, *S.E.C. Files New Charges on WorldCom*, N.Y. Times, Nov. 6, 2002, at C1 (reporting charges of additional earnings inflation of two billion dollars bringing total to over nine billion dollars); Brooke A. Masters, *SEC Files Civil Suit Against KPMG*, Wash. Post, Jan. 30, 2003, at E1 (reporting allegations against accounting firm concerning its 1997-2000 audits of Xerox Corp.); Deborah Solomon, *Ann Carrns & Chad Terhune, HealthSouth Faked Profits, SEC Charges*, Wall St. J., Mar. 20, 2003, at C1 (reporting \$1.4 billion overstatement of earnings since 1999).

In what may prove to be the biggest scam of all, many of the world's largest investment banks have been accused of offering shares of initial public offerings to corporate executives and otherwise manipulating the market, presumably in order to curry favor with them so that the executives would bring the investment banks future corporate business and to obtain undisclosed kickbacks. These allegations have now survived a motion to dismiss. *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 293-98 (S.D.N.Y. 2003).

In order for the initial public offering shares to be of value to the executives and to the persons paying the kickbacks, the share price in the offerings would have to rise above the initial public offering price. It has now been alleged that to stimulate the market, prominent firms allocated stock in "hot" IPOs to investors who indicated they would buy additional shares after the securities started trading ("laddering") or to executives or directors of companies in exchange for their investment-banking business ("spinning"). See *SEC v. Credit Suisse First Boston Corp.*, 2002 U.S. Dist. LEXIS 2416 (D.D.C. Jan. 29, 2002), Complaint at ¶ 1 (alleging that "CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB"), available at <http://www.sec.gov/litigation/complaints/compl17327.htm>, final judgment awarding permanent injunction and monetary relief available at <http://www.sec.gov/litigation/complaints/judglr17327.htm>; Susan Pulliam & Randall Smith, *Trade-Offs: Seeking IPO Shares, Investors Offer to Buy More in After-Market*, Wall St. J., Dec. 6, 2000, at A1 (explaining how expression of interest in after-market orders are consideration in determining allocation of IPO shares); Randall Smith, *SEC 'Laddering' Inquiry Reaches Two Firms*, Wall St. J., Nov. 6, 2002, at C1 (reporting investigations of Goldman Sachs Group, Inc. and J.P. Morgan Chase & Co. for "laddering"). See generally Walter Hamilton & Debora Vrana, *Dot-Com Clients Got Hot '90s IPOs*, L.A. Times, Oct. 3, 2002, at C1 (alleging that executives of Internet firms received shares from Goldman Sachs);

*Software Toolworks* court also ignored the reality that making money, whether in the form of fees or by profiting from buying or selling the stock, securing a competitive advantage, or being perceived as a “winner” by one’s peers in the marketplace, often overpowers individual or institutional incentives. Numerous marketplace events in the Bosky-Keating-Milken years preceding Judge Smith’s comment, let alone the startling revelations in more recent times, demonstrate as much.<sup>681</sup>

Moreover, the court’s assumptions about the implausibility of the plaintiffs’ allegations seem too broad from a policy perspective. Its assertion that an underwriter always would be so concerned with

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Daniel Kadlec, Citi Slicker, *Time*, Oct. 7, 2002, at 67-68 (describing allegations against Salomon Smith Barney unit of Citigroup of offering shares in hot IPOs to WorldCom executives in “bribelike manner”); Geoffrey Smith, Heather Timmons & Emily Thornton, *Why Credit Suisse Could Dodge a Bullet*, *Bus. Wk.*, Oct. 7, 2002, at 43, 43 (reporting allegations that Credit Suisse First Boston engaged in “spinning” by awarding shares in exchange for future business).

The fact that most initial public offerings rose quickly in value on the first day of trading, as well as indications that those receiving the allocations quickly sold, or “flipped” them for an immediate profit, has led to the suggestion that the underwriters may have been underpricing the shares so that they would have something of value to offer important clients, which would mean that the IPO companies did not receive the full value for their shares that the market was willing to pay. See, e.g., Michael Casey, *Dot-Com IPO Pricing Baffles Economists*, *Wall St. J.*, Sept. 30, 2002, at A2 (citing study finding that average underpricing of IPOs—defined as difference between offering and closing prices on first day of trading—grew from seven percent in the 1980s to fifteen percent from 1990-98, and then to sixty-five percent from 1999-2000, and estimating that issuers left twenty-seven billion dollars on table from 1990-98, and sixty-six billion dollars from 1999-2000). See generally Tim Loughran & Jay R. Ritter, *Why Don’t Issuers Get Upset About Leaving Money on the Table in IPOs?*, 15 *Rev. of Fin. Stud.* 413 (2002).

<sup>681</sup> See generally Connie Bruck, *The Predators’ Ball: The Junk-Bond Raiders and the Man Who Staked Them* (1988) (portraying some of most notorious events of takeover phenomenon of 1980s and some leading players in game); Jesse Kornbluth, *Highly Confident: The Crime and Punishment of Michael Milken* (1992) (recounting story of Michael Milken); Martin Mayer, *The Greatest-Ever Bank Robbery: The Collapse of the Savings and Loan Industry* (1990) (describing savings and loan industry debacle).

The questionable nature of Judge Smith’s assertion that it is implausible to think underwriters would defraud investors became particularly apparent once informal inquiries were initiated by the Securities and Exchange Commission to determine whether Wall Street firms routinely hire brokers with a record of defrauding investors. After the 1987 stock market crash the incidence of investor complaints against such firms rose dramatically; the 6500 cases filed for arbitration of brokerage disputes in 1991 represented a five-fold increase from 1981. *S.E.C. Inquiry on Brokers*, *N.Y. Times*, Jul. 28, 1992, at D2. Of course, the more recent revelations of complex motivations in the contexts of corporate accounting, tax manipulations, initial public offering profiteering, and self-dealing in the investment and brokerage communities simply add an exclamation point to the doubts about Judge Smith’s conclusion and the wisdom of taking questions of human behavior and motivation away from the jury. The spate of guilty pleas entered by high corporate officials further confirms those doubts. See, e.g., *Ex-CFO at HealthSouth to Plead Guilty*, *L.A. Times*, April 9, 2003, at C3; *Andrew Pollack, Partial Plea of Guilty Seen for Ex-Chief of ImClone*, *N.Y. Times*, Oct. 15, 2002, at C1.

investors' confidence that it never would risk its reputation by defrauding them renders actions against underwriters, as a matter of law, "implausible." This distorts the burden of persuasion in such cases and is inconsistent with the legislative judgments made by Congress in enacting the nation's securities laws.<sup>682</sup>

The district court's analysis, relegated to a footnote, actually contravenes the logic of *Matsushita* on a more general level, given the Supreme Court's statement that granting summary judgment in similar cases would not encourage the anticompetitive behavior targeted by the Sherman Antitrust Act.<sup>683</sup> However, the district court's *Software Toolworks* holding undermines the statutory purpose of Section 11 and Section 12(a)(2) of the 1933 Act, as well as Section 10(b) of the 1934 Act, to protect investors.<sup>684</sup> If courts determine as a matter of law that fraud claims against underwriters and accountants are "implausible," an environment is fostered that actually might increase the likelihood that people in the financial community would perpetrate fraud. Similarly, if courts view these fraud actions with disapproval and are willing to immunize conduct by treating motive or due diligence as questions of law, the deterrence value of the federal statutes is debilitated because the risk to those willing to secure short-run financial advantages from fraudulent public offerings, misleading company statements, and overly aggressive corporate accounting is reduced significantly.<sup>685</sup>

Judge Smith's approach goes too far in yet another respect. Employing her logic, it seems "implausible" that many unavoidable forms of negligent activity would occur. For example, drivers—especially professionals—would never operate their vehicles, whether automobiles, buses, trains, watercraft, or aircraft, other than diligently because the risk of an accident—with the attendant possibilities of civil or criminal liability, license revocation, or job loss—is too great. But accidents do happen, in part because motivation and other aspects of human behavior are far more complicated than *Software Toolworks*

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<sup>682</sup> See Loss & Seligman, *supra* note 588, at 7-8 (describing legislative intent behind securities laws as targeting problem of unscrupulous underwriters and dealers).

<sup>683</sup> See *supra* note 265.

<sup>684</sup> See, e.g., Loss & Seligman, *supra* note 588, at 1118 (describing provisions of 1933 Act).

<sup>685</sup> See Kurt Eichenwald, Pushing Accounting Rules to the Edge of the Envelope: Numbers Can Be Legal and Still Be Misleading, *N.Y. Times*, Dec. 31, 2002, at C1. The number of large corporations that have been restating their financial reports in recent years has been increasing. See, e.g., U.S. Gen. Accounting Office, GAO-03-138, Report to the Chairman, Senate Committee on Banking, Housing, and Urban Affairs, Financial Statement Restatements: Trends, Market Impacts, Regulatory Responses, and Remaining Challenges 14, 103, 108 (2002) (covering, *inter alia*, Tyco's financial restatements).

acknowledges; yet no one suggests that because negligent conduct seems “implausible” we should not permit juries to evaluate the circumstances of individual cases and decide whether the defendant failed to meet the due care standard. Indeed, given the commitment to jury trial, these are precisely the types of cases we always have thought should be the subject of communal judgment. Similarly, it seems “implausible” that a great manufacturing enterprise would vend a deleterious drug, insulating material, or a dangerous consumer product given the risks. Yet, again, the questions of responsibility, causation, and damages raised in products liability cases are appropriately within the jury’s province.

The problem of foreclosing trial based on judicial assumptions about human conduct and motivation is exacerbated in a context such as securities fraud because the PSLRA stays discovery until motions to dismiss are decided. Furthermore, as pointed out earlier,<sup>686</sup> the exportation of *Matsushita* beyond the antitrust field is questionable since the Court’s opinion rests more on substantive antitrust law than on generalizations about Rule 56 procedure, and some commentators have construed it that way.<sup>687</sup> This inevitably suggests that pretrial motion practice may have to develop as a series of ad hoc schema applicable to different substantive areas. Consider, for example, the *Matsushita* conclusion that the plaintiffs’ predatory pricing theory was “implausible,” which the Court’s opinion seems to define as one that “makes no economic sense.”<sup>688</sup> Because the Court determined that it would be “economically irrational” and “practically infeasible”<sup>689</sup> for so many companies to conspire to maintain artificially low prices for more than twenty years, it found the defendants lacked a motive to commit an antitrust violation; thus, the claims were “implausible.”<sup>690</sup>

Although the implausibility finding required the plaintiffs to produce evidence that “the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents,”<sup>691</sup> the Court did not hold that inferences from circumstantial evidence could not be drawn in favor of the nonmoving party. Indeed, the Court explicitly quoted precedent to support the settled principle that “[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be

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<sup>686</sup> See *supra* notes 270-71 and accompanying text.

<sup>687</sup> See *Jorde & Lemley*, *supra* note 270, at 273 n.6 (arguing for specific, not broad, application of *Matsushita*).

<sup>688</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

<sup>689</sup> *Id.* at 588.

<sup>690</sup> *Id.* at 587.

<sup>691</sup> *Id.* at 588.

viewed in the light most favorable to the party opposing the motion.”<sup>692</sup> The Court qualified this principle by noting that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.”<sup>693</sup> Thus, it has been argued that:

*Matsushita* culminates a line of antitrust cases establishing limitations on the inferences juries are permitted to draw from acts consistent with lawful business conduct. . . . [The decision also] defines the limits of permissible inferences to be drawn from circumstantial evidence where the imposition of antitrust liability would deter procompetitive conduct and threaten disruption of markets.<sup>694</sup>

The Court justified finding for petitioners since “there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.”<sup>695</sup> These passages and the case’s striking facts suggest that the Court’s opinion should be limited to the antitrust context as discussed in an earlier portion of the Article.<sup>696</sup>

The Supreme Court’s more recent—but less frequently cited—decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, discussed earlier,<sup>697</sup> also provides an indication of what the Court intended in *Matsushita*.<sup>698</sup> If *Eastman Kodak* is read as a counterpoint to *Matsushita*—indicating when it is not appropriate to dispose of antitrust claims summarily—two considerations are raised. First, what are the significant differences between the theories and facts of the two cases that led the Supreme Court to allow summary judgment in one but not the other? Unlike the changes in Justices in the years between *Beacon Theatres* and the trilogy, the Court’s composition had not changed dramatically between *Matsushita* and *Eastman Kodak*. Thus, the differences between the two cases arguably reflect not varying but rather consistent judicial approaches to summary judgment in the antitrust context. Yet, if *Eastman Kodak* presupposes juror competence and *Matsushita* suggests the opposite in complex antitrust claims, the two are logically inconsistent or context dependent. One writer has characterized *Eastman Kodak* as having “pulled the stinger out of *Matsushita*” in its holding that the implausibility standard was “not intended to ratchet up the summary judgment stan-

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<sup>692</sup> *Id.* at 587-88 (alterations in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

<sup>693</sup> *Id.* at 588.

<sup>694</sup> Schwarzer, Hirsch & Barrans, *supra* note 121, at 491-92.

<sup>695</sup> *Matsushita*, 475 U.S. at 595.

<sup>696</sup> See *supra* notes 260-66. But see Duane, *supra* note 260, at 1555-76 (arguing for broader application of *Matsushita*).

<sup>697</sup> See *supra* notes 267-69 and accompanying text.

<sup>698</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468-69 (1992).

dard in antitrust cases, but only to expose occasional instances where irrational legal theories were unlikely to produce viable factual disputes.”<sup>699</sup> *Eastman Kodak*, however, has not been given the attention accorded to the trilogy by the lower federal courts; thus it has not moderated the latter’s reduced threshold for granting summary disposition.

It is interesting to note that the *Matsushita* dissent criticized the majority for disregarding the respondents’ expert evidence in favor of the petitioner’s evidence.<sup>700</sup> By doing so, the Supreme Court, in effect, ruled that predatory pricing schemes are so unlikely to occur that unless a plaintiff can establish that it is more likely than not that price-fixing was orchestrated for noncompetitive rather than procompetitive motives, antitrust predatory pricing claims will be disposed of summarily. In other words, the Court adopted one theory of economics and held that a jury would not be allowed to adopt another in deciding certain antitrust claims. Why a judge, and not a jury, should be allowed to decide between or among competing economic theories is unclear.<sup>701</sup> When compared to the previously discussed *FELA* example, in which the Court held that a jury may choose between two theories about a worker’s death,<sup>702</sup> it becomes even more difficult to reconcile *Matsushita* with either the Court’s prior Seventh Amendment jurisprudence or *Eastman Kodak*.

Perhaps the lack of consistency in treatment stems from an unarticulated, or even unconscious, sense that although the experiences of jurors may lead them to the truth as to whether a man was murdered or the victim of an on-the-job accident, even when the choice between the two may involve an element of speculation, jurors have no special qualities or experiences that would lead to an efficient, just, or truthful adoption of one economic theory over another. Economic or scientific theories rely on theoretical models and approximations of reality that often fall far from the mark, whereas determinations as to the

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<sup>699</sup> Mollica, *supra* note 244, at 164.

<sup>700</sup> See *Matsushita*, 475 U.S. at 601 (White, J., dissenting).

<sup>701</sup> In a different, but not irrelevant, context, Justice Holmes wrote that:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.

*Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that legislature, not judiciary, should debate economic theories).

<sup>702</sup> See *supra* notes 632-39 and accompanying text.

accuracy of a cause-of-death theory or of a car accident depend largely on collective instinct and reasoning developed through common daily experience. But when a choice between theories turns on the credibility of competing witnesses—even experts—it is difficult to harmonize the judiciary's willingness to allow juror freedom in tort actions with its avowed disapproval of seemingly similar freedom in certain "complex" economic or regulatory cases, especially since juror comprehension of the technicalities may be assisted by a master or even a court-appointed expert. One suspects that some judges are simply selling the good faith and collective wisdom of juries short.

A tenable justification for allocating these questions to the bench rather than the jury in some contexts seems to be that judges believe they must administer a statutory scheme efficiently and consistently in compliance with congressional intent. To allow juries to adopt theories in opposition to those upon which the legislature relied risks debilitating the underlying premises of the law.<sup>703</sup> This rationale makes permitting the bench to choose between or among economic or scientific theories to protect legislative policies seem defensible because it is based on more than a conclusory assertion that judges inherently are more competent than juries on these matters.

On the other hand, by allowing judges unfettered discretion to adopt economic or scientific theories as a matter of law—rather than limiting that authority to cases in which it is clear that Congress mandated a particular economic or scientific theory in enacting the legislation—the Supreme Court implicitly may be authorizing federal courts to act not as interstitial lawmakers in furtherance of a legislatively directed scheme, but rather as original law givers. Moreover, the effect of adopting one economic theory as law may be to cut off certain avenues of exploration and research, since claims in those areas never will be advanced once they are labeled "implausible."

Jury verdicts adopting different theories in different antitrust cases have no precedential value. As exemplified by *Software Toolworks*, courts may fear that this hypothesized inconsistency will lead to more litigation, presumably because some plaintiffs will be willing to expend the resources necessary to bring their cases despite earlier adverse verdicts in other actions, hoping that they will be the beneficiaries of an unusual or untested result. But so long as a verdict adopting such a result passes the rationality standard, those litigants are entitled to their day in court, and the jury results are protected

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<sup>703</sup> See *Katchen v. Landy*, 382 U.S. 323, 339-40 (1966) (noting that "[i]n neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury").

because of a systemic procedural choice of decisionmakers sanctified by the Constitution. Moreover, the events actually may have occurred as found by a later jury. It simply is improper to deny litigants the opportunity to present claims judicially deemed unlikely that are not entirely unreasonable or unsupported.<sup>704</sup>

In that connection, it is troublesome that some lower federal courts also have treated questions of what are materially false and misleading statements in the securities context as issues of law. For example, *In re USEC Securities Litigation*<sup>705</sup> was a class action brought on behalf of shareholders who had purchased the company's common stock based on the belief that it would deploy a profitable new technology, as stated in a prospectus. When USEC announced that it had abandoned the plan to implement the technology, the stock plummeted. The action asserted violations of Sections 11 and 15 of the Securities Act of 1933, claiming that the prospectus was "materially false and misleading" since it failed to state that the decision to abandon the technology had already been made but was not disclosed.<sup>706</sup> A Maryland district court granted two Rule 12(b)(6) motions to dismiss.<sup>707</sup>

The court acknowledged that "[t]he question of materiality is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."<sup>708</sup> In examining the plaintiff's arguments, the court relied on a "reasonable investor" standard, questioning whether (1) the omitted information (the announcement by

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<sup>704</sup> If the administration of a statute or statutory scheme requires the maintenance of certain standards to attain the legislative purpose, and if jury verdicts impede this consistency, then it may be more justifiable for a court to allocate determination of certain issues to itself rather than the jury when Congress has not indicated that a jury trial right exists. However, all of this must be qualified by the Supreme Court's holding in *Curtis v. Loether*, 415 U.S. 189, 194 (1974), that the Seventh Amendment provides for jury trial in adjudicating statutory rights if the cause of action is "enforceable in an action for damages in the ordinary courts of law."

<sup>705</sup> 190 F. Supp. 2d 808, 814 (D. Md. 2002), appeal docketed, No. 02-1459 (4th Cir. argued April 4, 2003). After this Article was written and cite-checked, the author was asked to present the oral argument on appeal on behalf of the class. This case is now sub judice.

<sup>706</sup> *Id.* A number of other nondisclosures were alleged.

<sup>707</sup> The parties relied on facts established by documents that were not part of the amended complaint, but the court explicitly treated the pending motions as motions to dismiss rather than for summary judgment, viewing the extrinsic material as public documents. *Id.* at 812-13.

<sup>708</sup> *Id.* at 815. Indeed, the Supreme Court has said materiality depends on a "reasonable investor" test and "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); see also *Basic Inc. v. Levinson*, 485 U.S. 224, 236 (1988) (quoting *TSC Industries's* "reasonable shareholder" test); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 178 (3d Cir. 2000) (deciding that materiality "is generally best left to the trier of fact").

USEC that it was discontinuing its business plan) would have been significant in a reasonable investor's decision to buy the stock, and (2) disclosure of the information would have changed the view of a reasonable investor.<sup>709</sup> Despite the longstanding tradition of referring objective questions to the jury, especially in tort litigation in which a jury is intended to be a surrogate for the "reasonable person," the court deemed it appropriate to resolve questions about *reasonable* investors and *reasonable* shareholders on a Rule 12(b)(6) motion. The court concluded that "there is not a substantial likelihood that the disclosure of the alleged actual or omitted facts would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available,"<sup>710</sup> and dismissed without leave to replead.

What a reasonable investor might think or be motivated to do had she been informed that the technology had been abandoned seems to be a question that epitomizes the type of evaluation of the "mainsprings of human conduct"<sup>711</sup> that should be entrusted to jurors or at least justify further inquiry by way of discovery. The district court's displacement of the plaintiffs' day in court and their jury trial right in *USEC* seems like the proverbial rush to judgment.

### C. *Judicial Restriction of the Jury Trial Right in Other Contexts*

*Software Toolworks* provides an instructive illustration of summary judgment preventing a securities case from reaching a jury. Other courts have used the motion in different substantive contexts to filter out actions by pretrial disposition in a manner reminiscent of the now discredited attempts by some courts to impose heightened pleading standards.<sup>712</sup> It is impossible to ascertain with confidence whether these courts are tilting at the windmills of the "litigation explosion" and "liability crisis," or are questing after efficiency or uniformity, or doubt the competence of jurors, or view the actions as "disfavored," or simply dislike jury trial. Two appellate court decisions, *Adler v. Wal-Mart Stores, Inc.*<sup>713</sup> and *Colston v. Barnhart*<sup>714</sup> illustrate the contemporary willingness of federal courts to grant summary judgment, even when the judges hearing the appeal offer starkly divergent descriptions of the case's material facts. Unlike Judge

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<sup>709</sup> *In re USEC Sec. Litig.*, 190 F. Supp. 2d at 815.

<sup>710</sup> *Id.* at 826.

<sup>711</sup> *Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960), quoted in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996).

<sup>712</sup> See the discussion *supra* notes 145-63 and accompanying text.

<sup>713</sup> 144 F.3d 664 (10th Cir. 1998).

<sup>714</sup> 130 F.3d 96 (5th Cir. 1997).

Smith, however, the judges favoring summary judgment failed to offer any justifications for taking the case from the jury. The reader will have to draw his or her own conclusions about the results in these cases.

In *Adler*, the plaintiff, who had worked in the maintenance department at a Wal-Mart distribution center, brought a Title VII action alleging a hostile work environment because of sexual harassment.<sup>715</sup> Over a period of several months, she complained a number of times to various management-level employees; Wal-Mart quietly took action against the allegedly offending employees after at least some of these complaints.<sup>716</sup> *Adler*, however, eventually quit and filed suit.<sup>717</sup> Wal-Mart successfully moved for summary judgment on the grounds that Wal-Mart lacked knowledge of the unreported harassment incidents, that no perpetrators repeated their actions, and that Wal-Mart's response to the harassment was adequate despite the later harassment of the plaintiff by other employees.<sup>718</sup> The Tenth Circuit affirmed but the majority and dissenting judges reached entirely opposite conclusions as to whether Wal-Mart's response was adequate to insulate it from liability.<sup>719</sup>

Some of the disagreement between the two opinions stems from the differing legal standards for employer liability espoused by their authors.<sup>720</sup> Naturally, questions of law are the domain of judges and are admirably suited to resolution by pretrial motion. But beyond their different legal approaches, the disparate attitudes of the two opinions represent a contrasting view of the mixed law-fact question of whether the failure to publicize the discipline rendered Wal-Mart's

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<sup>715</sup> *Adler*, 144 F.3d at 668.

<sup>716</sup> *Id.* at 669.

<sup>717</sup> *Id.* at 670.

<sup>718</sup> *Id.* at 673-79.

<sup>719</sup> *Id.* at 672-89.

<sup>720</sup> The majority adopted a test used by several other circuits, focusing on whether the "remedial and preventative action was 'reasonably calculated to end the harassment.'" *Id.* at 676. The majority cited cases from the Third, Seventh, and Eighth Circuits. *Id.* Although the court conceded the relevancy of whether other potential harassers were deterred, it dismissed that concern by saying that the plaintiff had failed to come forward with any evidence "that any future harasser knew of, or was at all motivated by, any prior Wal-Mart response." *Id.* at 678. The dissent, which placed a heavier emphasis on general deterrence in determining whether the employer's remedial measures qualified as effective, actually turned the inquiry around to support the plaintiff's contentions of inadequate employer response. See *id.* at 684 (Briscoe, J., concurring and dissenting). "The discipline given to [two harassers] . . . was not severe and was not widely known among the employees. Not even *Adler* knew they had been disciplined." *Id.* at 685 (Briscoe, J., concurring and dissenting). "Although the remedial measures again succeeded in stopping harassment by the particular harassers," others joined in the harassment. *Id.* The dissent believed this was evidence of the ineffectiveness of the company's remedy. See *id.*

response inadequate. *Adler* thus provides an example of the dangers inherent in a system that paints a bright line between “law” and “fact” for purposes of full-trial eligibility, when the professionals whose job it is to decide on which side of that line a particular case falls can disagree in good faith.

It seems obvious that in some situations, remedial measures aimed at one or two individuals would be sufficient to constitute an effective response.<sup>721</sup> However, it seems equally obvious that in other situations, comparable measures that failed to deter a workplace-wide culture of harassment would cause someone to quit long before the employer’s after-the-fact action against each complained-of employee breaks the pattern.<sup>722</sup>

Given that reality and the need to sense the “mainsprings of human conduct,” whether an employer’s remedial action was adequate is a highly fact-specific inquiry, and the question easily translates into whether a reasonable person would consider the response adequate in the circumstances existing at the Wal-Mart distribution center. That determination, like any “reasonable person” determination, is one that members of the community, drawing on their own experience in their various workplaces, are better suited to make than an individual judge. Furthermore, live cross-examination of the relevant company managers and those employees the company’s remedy was intended to affect has obvious value in reaching an accurate resolution.

Considering how important the facts are to an evaluation of Wal-Mart’s response, the extent to which the two judicial opinions differ in interpreting the same record is striking. Admittedly, part of the factual disagreement between the majority and the dissent rose from differences as to the proper procedure on the motion.<sup>723</sup> However, the

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<sup>721</sup> For example, if the harassment was by only a few employees, or if the victim’s job only brought her into contact with a handful of other employees, remedial action aimed at those employees could be “effective.”

<sup>722</sup> The majority pointed out the difficulties inherent in “hold[ing] employers strictly liable for failing to broadcast sensitive disciplinary matters to their entire workforces.” *Adler*, 144 F.3d at 679. But the dissent responded that when other employees see no evidence that sexually harassing conduct has been disciplined, they are not likely to see any reason why they should refrain from engaging in that conduct.

When an employee is subjected to recurring sexual harassment by multiple coworkers, incident-by-incident measures aimed at particular harassers may be sufficient to stop harassment by those individuals but insufficient to deter others. Measures that stop some harassers but do not deter others are small comfort to the victim.

*Id.* at 684 (Briscoe, J., concurring and dissenting).

<sup>723</sup> The majority declared that it would limit its review to the evidence referenced by *Adler* in the court below. The partial dissent responded:

majority and dissent disagreed even when examining the same incidents, suggesting that summary judgment was granted despite the presence of triable issues of material fact. For example, at one point the majority stated: “Other coworkers harassed Plaintiff in various additional incidents, but Plaintiff either did not report them, or cannot recall specifically when or what she may have said to anyone about them.”<sup>724</sup> But the partial dissent contended that “Adler could not recall exactly what comments she reported, but she recalled that she complained generally about sexual comments. . . . The majority [held] Adler to an unrealistically high standard of precise recall” and asserted that “[w]hether Adler’s supervisors were aware of the ongoing harassment was a question of material fact.”<sup>725</sup> As another example, the majority and the dissent disagreed about whether Adler presented evidence that one of her coworkers was a supervisor when he overheard a harassing comment.<sup>726</sup>

These matters clearly are material to the questions of whether Wal-Mart’s response was adequate and whether management knew or should have known of the harassing incidents. Since summary judgment should be granted only if there “is no genuine issue as to any material fact,” and one of three Tenth Circuit judges felt these disputed fact questions could be resolved in favor of Adler, perhaps she should have been given the opportunity to present the matter with live testimony and allow a jury—rather than a panel of appellate judges—to evaluate credibility and draw the necessary inferences.

The detailed record citation insisted upon by the majority also indicates the extent to which a party must have its case prepared before trial, simply to get to trial. Although subdivision (e) of Rule 56 requires that a party “set forth specific facts” showing a triable issue,<sup>727</sup> the majority and the dissent in *Adler* seem to differ on the extent to which this passage requires the nonmoving party to list in detail specific incidents supporting the allegations in its papers. Also,

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There is no indication in the [district] court’s ruling that it looked only at record pages specifically cited by the parties. The District of Colorado has no local rule requiring parties to refer with particularity to those portions of the record on which they rely in support of or in opposition to motions for summary judgment.

*Id.* at 680 n.1 (Briscoe, J., concurring and dissenting). That confrontation has obvious relevance as to how careful counsel should be in preparing Rule 56 motion papers, but it should not be permitted to interfere with the plaintiff’s jury trial right.

<sup>724</sup> *Id.* at 669.

<sup>725</sup> *Id.* at 682 (Briscoe, J., concurring and dissenting) (citation omitted) (demonstrating again importance of “law” or “fact” characterization).

<sup>726</sup> *Id.* at 681-82 (Briscoe, J., concurring and dissenting).

<sup>727</sup> This portion of Federal Rule 56(e) was added in 1963 to improve the Rule’s utility. See 10A Wright, Miller & Kane, *supra* note 109, § 2711.

the strategic disadvantages of having to lay out one's entire case in advance of trial to survive summary judgment are apparent, particularly since under *Celotex*, the movant need only point to a failure of proof on an issue on which the nonmovant has the trial burden to trigger the nonmovant's obligation to respond with positive evidence.<sup>728</sup>

In the second case, *Colston v. Barnhart*, policeman Bryan Barnhart shot Lorenzo Colston in the course of an otherwise routine traffic stop after a lengthy verbal and physical altercation.<sup>729</sup> Colston filed a Section 1983 action alleging that Barnhart violated his Fourth Amendment rights by using excessive force.<sup>730</sup> Barnhart moved for summary judgment on the ground of qualified immunity, which shields government officials performing discretionary functions if their actions were objectively reasonable in light of clearly established substantive law.<sup>731</sup> The district court concluded that there were material issues of fact and denied the motion.<sup>732</sup>

The Fifth Circuit, with one judge dissenting, held that Barnhart was entitled to immunity as a matter of law "after accepting all of Colston's factual allegations as true."<sup>733</sup> In effect, the Court of Appeals determined that Barnhart's actions were objectively reasonable in light of clearly established law. The majority relied heavily on a video recording of the incident made by a recorder mounted on the patrol unit. After describing the traffic stop and the ensuing fight that led to the shooting, the court concluded that:

At the time Barnhart drew his weapon and fired the first shot, Colston was standing between Barnhart and Langford [the other responding officer] in a position to inflict serious harm on the officers with or without a weapon. . . . Barnhart had no way to know whether Colston intended to flee or inflict further injury or death on the officers.<sup>734</sup>

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<sup>728</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

<sup>729</sup> Barnhart, a white state trooper, had pulled over the car in which Colston, a black man, was a passenger, for having a defective headlight. The driver had an outstanding warrant and was placed under arrest. Barnhart then asked Colston a series of questions, which Colston refused to answer or to which he gave inconsistent answers. A county deputy sheriff also arrived on the scene to aid Barnhart. Eventually, Barnhart instructed Colston to kneel on the ground with his hands over his head. Colston refused and physically resisted the officers as they tried to force him down. Colston was able to knock both officers to the ground, at which point Barnhart drew his weapon and fired three times at Colston, hitting him twice. *Colston v. Barnhart*, 130 F.3d 96, 97-98 (5th Cir. 1997).

<sup>730</sup> See *id.* at 98.

<sup>731</sup> *Id.*

<sup>732</sup> *Id.* at 100.

<sup>733</sup> *Id.* at 98-99.

<sup>734</sup> *Id.* at 99-100.

This interpretation of the events led the majority to conclude that Barnhart had acted within the law and justified summary judgment.<sup>735</sup>

The dissenting opinion, also relying on the same tape recording, described a very different scene. It noted that the majority disingenuously purported to accept all of Colston's factual allegations as true, but actually drew numerous inferences in Barnhart's favor.<sup>736</sup> The dissent concluded that the district court's summary judgment denial should be affirmed because "a jury's determination that Barnhart's conduct was not reasonable could be supported by the summary judgment record."<sup>737</sup>

The *Colston* case seems particularly appropriate for a jury determination of reasonableness according to community standards. Given the divergent descriptions that the two opinions attribute to the events on the video tape, it probably would have been more appropriate to allow a jury to watch it, listen to live testimony, and apply those standards and decide whether "a reasonable officer in Barnhart's place would not have believed that Colston posed an immediate danger of serious bodily harm or death to Barnhart or [the other officer]," as the majority believed,<sup>738</sup> or conclude that "it is not too much to expect that police officers be prepared to subdue an unruly detainee without having to resort to the use of a firearm," as the dissent argued.<sup>739</sup> As in *Adler*, the disagreements as to what happened and the legal significance of the events suggest that leaving the matter for trial and a jury would have been more consonant with our civil justice system's traditional values.

If court of appeals judges can disagree so sharply as to the inferences to be drawn from the "facts," the summary judgments in *Adler* and *Colston* appear questionable. Although appellate rulings on pre-trial dispositions need not be unanimous, the clear disagreement among "reasonable people" in both cases suggests that to some degree the judges were both finding the facts and applying the law based on "paper" presentations and that the merits should have been left until trial, when the record would be more fully developed and the

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<sup>735</sup> See *id.*

<sup>736</sup> See *id.* at 102-03 (DeMoss, J., dissenting) (noting that although Colston's complaint was framed in terms of excessive force in preventing his escape from police abuse, majority describes scene "in which Colston violently resisted the police, physically overpowered them, and then remained on the scene, standing ready to inflict serious injuries had Barnhart not resorted to using his firearm").

<sup>737</sup> *Id.* at 103 (DeMoss, J., dissenting).

<sup>738</sup> *Id.* at 100.

<sup>739</sup> *Id.* at 103 (DeMoss, J., dissenting).

trier better equipped to evaluate witness credibility.<sup>740</sup> After all, both cases involved questions of human behavior, reasonableness, and state of mind, matters historically considered at the core of the province of jurors, whose primary function has been to make determinations about people's conduct based on objective standards. The cases further indicate that lawyers had best be prepared to set forth a strong and thorough defense against a Rule 56 motion, and should not rely on the traditional notion that the evidence always will be viewed in the light most favorable to the nonmovant.

#### CONCLUSION

*Anderson*, *Celotex*, and *Matsushita* have been interpreted by some to be defendant-oriented, pro-summary judgment decisions.<sup>741</sup> That perception presumably is based on the statement by Justice Rehnquist, writing for the *Celotex* majority that:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.<sup>742</sup>

By equating the plaintiff's rights to a day in court and jury trial with the defendant's opportunity under Rule 56 to establish that a trial is unnecessary,<sup>743</sup> the *Celotex* Court did convey a pro-summary judgment message and may have shifted the balance in favor of defendants, who are the primary employers of the motion. Combined with the majority's emphasis that the amendments to Rule 56(e)<sup>744</sup> were "designed to *facilitate* the granting of motions for summary judg-

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<sup>740</sup> The partial dissent in *Adler* contended that the majority impermissibly engaged in credibility determinations on several occasions, and had forgotten its obligation to view the record in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 682 (10th Cir. 1998) (Briscoe, J., concurring and dissenting).

<sup>741</sup> See Risinger, *supra* note 490, at 39, 42 ("The Supreme Court . . . has introduced a procedure which is asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant. . . . [The procedure] is bound to lead to many summary judgments improvidently granted in favor of defendants . . ."); compare *id.*, with Cecil, *supra* note 144, at 11 (analyzing dockets of various federal courts and finding no significant increase in rates of summary judgment after trilogy of *Celotex*, *Anderson*, and *Matsushita*).

<sup>742</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

<sup>743</sup> See, e.g., Risinger, *supra* note 490, at 42 n.29 (opining that this is least defensible passage in opinion and stating that "[n]o one has a constitutional right to a summary judgment, but everyone has a constitutional right to a jury trial under the seventh amendment. Since we cannot eliminate error, we are obliged to structure our procedures to err on the side of the Constitution.").

<sup>744</sup> The advisory committee note to the 1963 amendment of Rule 56(e) is reprinted in 12A Wright, Miller, Kane & Marcus, *supra* note 135, app. C. See generally 10B Wright, Miller & Kane, *supra* note 109, § 2739.

ment,”<sup>745</sup> it is not surprising that *Celotex* has been read as an instruction to the lower courts to increase the disposition of cases under Rule 56 either to protect defendants or to achieve systemic efficiency.

On the other hand, far from granting district judges unbridled discretion, the *Anderson* opinion articulated the same warning historically directed at all, and heeded by most, lower courts. The Court claimed it was not “suggest[ing] that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.”<sup>746</sup> Justice White explicitly stated that properly granted summary judgments “do[ ] not denigrate the role of the jury,”<sup>747</sup> since “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”<sup>748</sup>

In sum, the trilogy sends mixed signals, but, as noted, the cases certainly can be read in a way that does not intrude on the jury right or constrict a litigant’s ability to secure a full hearing.<sup>749</sup> It is the trilogy’s improper extension and the lack of any reasoned law-fact analysis by lower federal courts, therefore, that appear to pose the danger. Unfortunately, today’s rhetoric about the “litigation explosion,” a “liability crisis,” sham or frivolous litigation, and undue burdens on the business community may be encouraging district courts and courts of appeals to rely on the trilogy to justify resorting to pretrial disposition too readily because they believe that there is a need to alleviate overcrowded dockets or because they disfavor certain substantive claims.

This Article’s principal theme has been that an unfettered commitment to “efficiency” in the pretrial disposition context—whatever its motivation or however articulated—will erode other systemic values. To honor the rights to a day in court and to jury trial, the equation of the summary judgment and judgment as a matter of law standards demands that the pretrial disposition of cases, whether under Rule 12(b)(6) or Rule 56, be closely scrutinized and constricted since the safety valve of an opportunity to present one’s case in a complete and live format is absent in the pretrial context. The task may not be an easy one because many judges do not articulate their rea-

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<sup>745</sup> *Celotex*, 477 U.S. at 325-26.

<sup>746</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985).

<sup>747</sup> *Id.*

<sup>748</sup> *Id.* at 249.

<sup>749</sup> But see, e.g., Stempel, *supra* note 183, at 162 (arguing that trilogy shifted “power from juries to judges in derogation of the seventh amendment”).

soning for determining whether an issue is one of law or of fact, taking matters from the jury without any or only a limited explanation, thereby making appellate oversight difficult. But the law-fact distinction must be policed; it is a problematic distinction because the boundary between the two and the proper method of resolving mixed questions of law and fact never have been clearly prescribed.

This Article also has argued that invocations of complexity or uniformity exceptions or assumptions as to efficiency and policy preferences, let alone resort to the "litigation explosion" and "liability crisis" bromides, as rationales for limiting access to trial and jury adjudication must be cabined, and the district courts must provide, and appellate courts must demand, better reasoning. Taking decision-making authority from juries runs counter to basic and long-cherished principles of our system. One primary function of the jury has been to make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards, the paradigm being the reasonable person standard. Since the Supreme Court trilogy, there is evidence that these responsibilities have been taken away from juries by pretrial disposition even when none of the possible justifications for restricting jury trial discussed in this Article are present. Given the existing, convoluted jurisprudence, it is imperative that the Supreme Court provide some clarity rather than leaving the matter entirely to the genial anarchy of trial court discretion.