

# Federal Summary Judgment Doctrine: A Critical Analysis

Martin B. Louis†

In 1855 the English Parliament passed Keating's Act,<sup>1</sup> which provided a summary proceeding for collection of bills of exchange.<sup>2</sup> This predecessor of modern federal summary judgment procedure was designed primarily to identify before trial debtors who sought delay through spurious defense.<sup>3</sup> In contemporary American federal practice, however, summary judgment is employed more frequently to identify claimants who lack evidence sufficient to reach the jury and who will therefore probably suffer a directed verdict or its equivalent at trial.<sup>4</sup> The importance of summary judgment to the defendant has been enhanced by a specialization of function within the pretrial system as a consequence of the Federal Rules of Civil Procedure. Common law and to a lesser extent code pleading standards required that the complaint contain a factual allegation of each essential element

† Associate Professor of Law, University of North Carolina School of Law.

1. Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67.

2. See Bauman, *The Evolution of the Summary Judgment Procedure*, 31 *IND. L.J.* 329 (1956).

3. See *id.*

4. The federal district court decisions listed in 28 U.S.C.A. under FED. R. CIV. P. 56, at 35-66 (West Supp. 1973), involved a total of 243 motions for summary judgment. In 75 of the motions (about 31 percent of the total), plaintiffs were the moving parties; in 168 of the motions (about 69 percent), defendants were the moving parties.

Defendants were successful in obtaining summary judgment in 75 of 168 instances (about 45 percent). Plaintiffs obtained summary judgment in 32 of 75 instances (about 43 percent).

In 52 instances defendants sought summary judgment on the basis of an affirmative defense. This represents approximately 31 percent of the total number of motions by defendants. When asserting affirmative defenses, defendants prevailed in 22 of 52 instances, a success rate of about 42 percent.

In 116 defense motions (about 69 percent of the total), defendants sought to establish the nonexistence of an essential element of the plaintiff's claim. They succeeded in 53 instances, a success rate of about 46 percent. See statistical research on file with the *Yale Law Journal*.

It should be noted that many summary judgment decisions are not reported and thus are not reflected in the above statistics.

The current practice undoubtedly reflects the fact that claimants must prove all essential unadmitted elements of a claim to succeed whereas the defendant need only disprove one essential element of the claim in order to prevail. Persons asserting affirmative defenses also confront the burden of proving all essential elements and consequently fall into the same analytical category as claimants when such defenses are challenged on motion for summary judgment. The more inclusive phrase, the party with the burden of proof, is thus more precise than "claimant." Since persons asserting affirmative defenses ordinarily also deny one or more of the claimant's material allegations and will not suffer adverse judgments as a consequence of a plaintiff's motion for summary judgment which is successful only with respect to affirmative defenses, they face such motions much less frequently.

of the cause of action.<sup>5</sup> Complaints which did not meet these standards were often defeated by demurrer, the implicit assumption for the court's action being that the claimant could not prove what he did not allege and would not allege, ordinarily under oath, what he could not prove. This dubious assumption is not made under the Federal Rules and complaints omitting essential allegations of fact will often survive motions to dismiss.<sup>6</sup> Thus the motion for summary judgment has become the first real opportunity for identifying factually deficient claims or defenses.

Not surprisingly, most contemporary summary judgment decisions involve challenges to the claimant, who is normally the party with the burden of proof. Few, however, set forth a useful rationale for deciding whether to grant the motion. Most simply draw from the available clichés, which are selected in classic cut-and-paste style to support whatever result the court feels is proper. In reality most judges are simply muddling through and denying the motion whenever they are in doubt. This timorous approach obviously reduces the danger of unjust dismissals, but it does so at the cost of permitting at least some useless trials to be conducted.<sup>7</sup>

This article will attempt to isolate the factors which account for the inadequacy of present federal summary judgment procedure, illustrate its incongruous features, and advocate a modest reform.

## I. Federal Rule 56

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered when the papers offered in support of and in opposition to the motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>8</sup> A "material fact" must be a part of a

5. See F. JAMES, JR., CIVIL PROCEDURE §§ 2.5-9 (1965) [hereinafter cited as JAMES].

6. See, e.g., *Garcia v. Hilton Hotels Int'l*, 97 F. Supp. 5 (D.P.R. 1951); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 120-21 (1969) [hereinafter cited as WRIGHT & MILLER].

7. See, e.g., *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971) ("On these facts we would be inclined to grant summary judgment. But, in this Circuit at least, District Courts may not rely to any substantial extent on summary judgment predicated upon testimonial proof to avoid a full trial even though a recovery seems hopeless . . . . Since courts are composed of mere mortals, they can decide matters only on the basis of probability, never on certainty. The 'slightest doubt' test, if it is taken seriously, means that summary judgment is almost never to be used—a pity in this critical time of overstrained legal resources") (Weinstein, J.); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971) (denying motion despite "the apparent flimsiness of plaintiff's claim" and with the assertion that the claim would be dismissed at trial on the same record).

8. FED. R. CIV. P. 56(c).

## Federal Summary Judgment Doctrine: A Critical Analysis

claim or defense in issue, the establishment of which requires proof of each unadmitted essential element, as defined by the substantive law. A "material fact" is thus an essential element of a claim or affirmative defense for purposes of Rule 56(c).

The principal function of the motion for summary judgment is to show that one or more of the essential elements of a claim or defense before the court is not in doubt and that, as a result, judgment can be rendered as a matter of law.<sup>9</sup> With minor exceptions, Rule 56 contemplates the granting of a final judgment.<sup>10</sup> When the movant seeks a final judgment, he must seek to establish the existence or nonexistence of enough essential elements of a claim and its related defenses and avoidances to permit full disposition of the claim as a matter of law, as the Rule provides. If the movant bears the burden of proof—either because he is the plaintiff or because he is asserting an affirmative defense—then he must establish all essential elements of the claim or defense.<sup>11</sup> If the movant does not bear the burden of proof, then he can obtain summary judgment simply by showing the nonexistence of any essential element of the opposing party's claim or affirmative defense. Of course when the movant is a plaintiff he must ordinarily do more than defeat the opposing party's affirmative defenses in order

9. See *Andersen v. Schulman*, 337 F. Supp. 177, 182 (N.D. Ill. 1971). A motion for summary judgment may raise only a question of law. This use parallels the function of other motions designed to challenge the validity of a legal theory, such as the motion to dismiss for failure to state a claim for relief (FED. R. CIV. P. 12(b)(6)), the motion to strike (FED. R. CIV. P. 12(f)), and the motion for judgment on the pleadings (FED. R. CIV. P. 12(c)). These other motions may sometimes be used to challenge the omission of an essential element from the opposing party's pleading or establish one admitted therein. None of them, however, can be used to show that the existence of an essential element, though properly placed in issue by the pleadings, is in fact not in doubt.

10. The term "judgment" is defined by the Rules as follows: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." FED. R. CIV. P. 54(a). For a discussion of the conflict between the terminology of Rule 56 and the explicit allowance in Rule 56(a) of partial summary adjudication, from which there is no appeal, see 6 J. MOORE, FEDERAL PRACTICE § 56.20[3.0] (2d ed. 1972) [hereinafter cited as MOORE]. Where multiple claims or parties are involved, summary judgment may be granted for or against less than all the parties and on less than all the claims. The judgment granted is not final, however, unless the requirements of FED. R. CIV. P. 54(b) are also satisfied. Rule 54(b) allows final judgment as to fewer than all the claims only when the court expressly determines that there is no just reason for delay.

11. If the movant is seeking to establish an affirmative defense, then it is arguable that he must go on to establish the nonexistence of at least one essential element of every avoidance of the affirmative defense which the claimant has asserted. This approach seems to put an undue burden on the movant. Although an affirmative defense is deemed avoided automatically by FED. R. CIV. P. 8(d), the establishment of such a defense should entitle the moving party to summary judgment if the claimant fails to respond with affidavits or other acceptable supporting materials establishing the prima facie existence of an avoidance. See FED. R. CIV. P. 56(e). If the claimant had no obligation to support his avoidance in such circumstances and could simply rely on FED. R. CIV. P. 8(d), the moving party would have to offer evidence negating every possible avoidance. See *Boulware v. Parker*, 457 F.2d 450, 452 (3d Cir. 1972); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948-49 (3d Cir. 1971).

to obtain a final judgment. Since the opposing party will probably have denied the allegations in the claim in addition to advancing an affirmative defense, the movant-plaintiff must go on to establish the existence of all unadmitted elements of his claim.<sup>12</sup>

If a motion for summary judgment is otherwise in order, the court must then decide the critical, final question of whether there is a "genuine issue" of fact with respect to the existence of the essential elements the motion has questioned or sought to establish. Commentators generally agree that under existing law the movant has the burden of clearly establishing the absence of any issue of material fact, even if his opponent would bear the burden of proof on that issue at trial.<sup>13</sup>

It is the contention of this article that a better approach would be to coordinate summary judgment proof requirements with the allocation of the burden of proof at trial. The way in which the question regarding any "genuine issue [of] . . . fact"<sup>14</sup> is resolved should depend primarily upon the nature of the moving party's trial proof burden: Courts should grant such motions less readily when the moving party is seeking to establish the existence of an essential element of a claim or defense that he has asserted and with respect to which he bears the burden of proof at trial than when he is seeking to establish the non-existence of an essential element of a claim or defense asserted against him and with respect to which the opposing party bears the burden of proof at trial (or, more precisely, the burden of production or of coming forward).

The present summary judgment evidentiary standard, which requires the movant to "establish clearly" the absence of issues of material fact,<sup>15</sup> seems appropriate when applied in the context of a motion by the party with the trial proof burden. Such a motion is closely analogous to the party's motion at trial for a directed verdict on the same issue.<sup>16</sup> In both situations the moving party must present such proof of the existence of the element that no fact-finder could reasonably find against him.<sup>17</sup> As in the directed verdict context, the motion for summary judgment will ordinarily be denied whenever the opposing party responds with affidavits or other supporting materials<sup>18</sup>

12. See note 4 *supra*.

13. See, e.g., 6 MOORE ¶ 56.15[3], at 2336-43; 10 WRIGHT & MILLER, *supra* note 6, § 2727, at 524-25.

14. FED. R. CIV. P. 56(c).

15. See p. 752 *infra*.

16. See 6 MOORE ¶ 56.15[3], at 2341.

17. See *Mihalchak v. American Dredging Co.*, 266 F.2d 875, 877 (3d Cir.), *cert. denied*, 361 U.S. 901 (1959); 9 WRIGHT & MILLER § 2535, at 591.

18. The response may include or rely upon helpful parts of the moving party's own supporting materials. See 6 MOORE ¶ 56.15[3], at 2340.

## Federal Summary Judgment Doctrine: A Critical Analysis

which contradict the moving party's proof or otherwise create a reasonable doubt as to the existence of an essential element or which substantially impeach the credibility of a material witness when the moving party's proof is testimonial.<sup>19</sup>

The close correspondence between trial proof burden and the summary judgment evidentiary standard is limited to situations in which the movant is the party with the trial burden of proof. When he would not have that burden, it is the contention of this article that the summary judgment evidentiary standard should be relaxed.<sup>20</sup>

### II. Establishing the Nonexistence of an Essential Element of a Claim or Defense Asserted by the Opposing Party

#### A. *The Moving Party's Initial Burden*

A movant who would not have the trial proof burden clearly must support his motion with some affidavits or other materials showing or at least suggesting the nonexistence of an essential element of the op-

19. See 10 WRIGHT & MILLER § 2726, at 521. The directed verdict analogy remains applicable even if the opposing party fails to submit counteraffidavits or other supporting materials or those he proffers are rejected as clearly inadequate. In such circumstances the movant can obtain a "default" summary judgment under Rule 56(e) only "if [it would be] appropriate." For the party with the burden of proof this means in effect that he must still succeed on the strength of his own evidence. Just as in the directed verdict context, the motion should ordinarily be denied, notwithstanding the inadequacy of the opposing party's response, in certain circumstances. First, it should be denied if the moving party's supporting evidence is self-contradictory or circumstantially suspicious. See, e.g., *Ferdinand v. Agricultural Ins. Co.*, 22 N.J. 482, 499, 126 A.2d 323, 333 (1956) (claim under an insurance policy for property stolen under suspicious circumstances; directed verdict denied); *Bobbe, The Uncontradicted Testimony of an Interested Witness*, 20 CORNELL L.Q. 33, 35 (1934); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 946 (1971) [hereinafter cited as Cooper].

Second, the motion should be denied if the credibility of a witness is inherently suspect because he is interested in the outcome of the case, his motives or state of mind are material, or he has exclusive access to the facts in question. A typical "exclusive access" case involves testimony by taxpayers seeking refunds. See *Wood v. Commissioner*, 338 F.2d 602 (9th Cir. 1964). But cf. *Jones v. Borden Co.*, 430 F.2d 568, 571 (5th Cir. 1970) (successfully establishing the defense of "good faith meeting of competition" in a Robinson-Patman Act private action).

Third, denial is appropriate if there are significant gaps in the movant's evidence or if it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970) (barring summary judgment for the party without the burden of proof because of evidentiary gaps); 5A MOORE, *supra* note 10, ¶ 50.02[1] (directed verdicts).

Finally, the motion should be denied if there remains, after all the evidentiary or historical facts are established, the need to apply some legal principle, e.g., the prudent man standard in negligence cases, generally entrusted to the jury. See, e.g., *Croley v. Matson Navigation Co.*, 434 F.2d 73, 76 (5th Cir. 1970); 6 MOORE ¶ 56.17[42], at 2583. Even in this situation, summary judgment may be granted if a "reasonable" jury could reach but one result. See *Jones v. Borden Co.*, *supra*; *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949).

20. See pp. 753-59 *infra*.

posing party's case.<sup>21</sup> A more lenient requirement would permit him to harass the opposing party too easily. The degree of persuasiveness with which he must show or suggest this nonexistence in order to compel the opposing party to respond at his peril is the crucial issue. Before that question is reached, however, several important corollaries can be derived simply from the conclusion that the moving party faces some burden. First, if he fails to discharge the burden, his motion fails, even though the opposing party makes no response.<sup>22</sup> Second, if he discharges this burden, he should be deemed to have established the nonexistence of the essential element in question unless the opposing party responds adequately.<sup>23</sup> Ordinarily the motion must then be granted. Third, the opposing party will be required to respond only with respect to those essential elements of the claim upon which the moving party has discharged his burden.<sup>24</sup> These three principles are not specifically stated in Rule 56, but they are consistent with its text if it is assumed that summary judgment is "appropriate" under Rule 56(e)<sup>25</sup> whenever the moving party discharges his burden and the opposing party responds inadequately.<sup>26</sup>

There are essentially two methods by which the moving party can discharge his burden. First, through discovery he can obtain a preview of his opponent's evidence on an essential element and contend, in support of his motion, that the evidence is insufficient to discharge the opponent's production burden. If his contention is correct he discharges his own burden and shifts to the opposing party the onus of producing additional evidence or excusing his failure to do so under Rule 56(f).<sup>27</sup> Second, by previewing his own proof he can attempt to show the nonexistence of an essential element asserted by the opposing party. He can, of course, combine these two approaches.<sup>28</sup>

21. The accepted rule is that the moving party bears the burden of showing there is no genuine issue of fact. *See, e.g.,* Franklin National Bank v. L. B. Meadows & Co., 318 F. Supp. 1339, 1343 (S.D.N.Y. 1970); 6 MOORE ¶ 56.15[3], at 2335.

22. *See, e.g.,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 160-61 (1970).

23. *See, e.g.,* Boulware v. Parker, 457 F.2d 450, 452 (3d Cir. 1972); Andersen v. Schulman, 337 F. Supp. 177, 181-82 (N.D. Ill. 1971); Scott v. Dollahite, 54 F.R.D. 430, 433 (N.D. Miss. 1972); 6 MOORE ¶ 56.15[3].

24. *See* 6 MOORE ¶ 56.15[3].

25. FED. R. CIV. P. 56(e) provides, *inter alia*, "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

26. *See* Scott v. Dollahite, 54 F.R.D. 430, 433 (N.D. Miss. 1972).

27. *See, e.g.,* Burke v. Gateway Clipper, Inc., 441 F.2d 946, 948 (3d Cir. 1971); Avery v. Norfolk & Western R.R., 52 F.R.D. 356, 359 (N.D. Ohio 1971).

28. In Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952), plaintiff admitted in discovery his exclusive reliance upon several eyewitnesses. Defendant obtained from each an affidavit or deposition denying the plaintiff's allegation and successfully moved for summary judgment.

## Federal Summary Judgment Doctrine: A Critical Analysis

The first approach is necessary when direct proof is generally lacking<sup>29</sup> and commends itself whenever the opposing party's witnesses are few and can be deposed without undue effort or expense. On the other hand, this approach is burdensome and costly when the opposing party will rely upon a large number of witnesses or documents. In such a situation the second approach may be more attractive. Furthermore, under the first approach a defendant-movant would assume the onus of showing that the plaintiff lacks a prima facie case in order to compel him to respond at his peril, even though at trial the plaintiff must present a prima facie case before the defendant must decide whether and how to respond.

### 1. *Present Standard for Movant's Evidence*

For the reasons mentioned above, the moving party will often attempt to discharge his burden primarily through a preview of his own proof. It is in this context that the question of sufficiency of the movant's evidence arises. If his proof will not even support a jury finding that the essential element does not exist (that is, it would not establish prima facie the nonexistence of the element), the moving party has obviously failed to discharge his burden.<sup>30</sup> On the other hand, if the moving party's proof is so strong that reasonable minds cannot reject it (that is, it would meet even the standard imposed upon the party with the burden of proof when he moves for summary judgment), the moving party has obviously discharged his burden. But will something

29. For instance, in a case arising out of a fatal auto collision with no survivors or other eyewitnesses, plaintiff must rely upon such circumstantial evidence as skid marks. Here defendant may discover plaintiff's evidence and move for summary judgment if it is insufficient.

30. See *Bridges v. Internal Revenue Service*, 433 F.2d 299, 300 (5th Cir. 1970). (Though the affidavits of defendant-movants here "tended to show" the existence of executive immunity and summary judgment was therefore proper since plaintiff filed no counter-affidavit, the defendant officers could not have obtained summary judgment in this situation by merely relying on "bare conclusory allegations.") The *Bridges* court may have applied an inappropriately loose standard in evaluating the initial adequacy of the movant's evidence. While the court applied a "tended to show" test, the traditional "clearly establish" test would have been proper, particularly since executive immunity is an affirmative defense, see *Green v. James*, 473 F.2d 660, 661 (9th Cir. 1973), on which the movant would have borne the proof burden at trial. Nonetheless the validity of the dicta—which suggest that a bare allegation will not discharge the burden of a movant without the trial burden—remains unimpaired.

A similar principle governs in the summary judgment procedures of many state court systems. In *First Federal Savings & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 57, 191 S.E.2d 683, 692 (1972), plaintiff alleged that defendant had unreasonably delayed charging back a draft after learning of a forged endorsement thereon. Defendant moved for summary judgment supported by an affidavit stating that it had, upon receiving notice of the forgery, charged back the draft pursuant to normal banking procedures. But this conclusory statement was not supported by specific facts, such as the date the payee learned of the forgery, and was, therefore, arguably insufficient to support a finding on the nonexistence of the unreasonable delay plaintiff alleged. The court held summary judgment should be denied.

less than the overwhelming proof required of the party with the burden of proof suffice? Some opinions<sup>31</sup> and treatise writers suggest it will not.

Professor Moore, for instance, implies that the movant must satisfy a uniform proof burden, regardless of whether he would have the burden of proof at trial.<sup>32</sup> Imposing such a requirement on the movant makes it extremely difficult for him to compel the opposing party to preview his proof, even though the latter will bear the production burden at trial and even though it appears doubtful that he could discharge it. Thus the opposing party could sometimes defeat a motion for summary judgment simply by withholding proof, the inadequacy of which, if disclosed, would probably lead to his defeat.

Such a requirement also conflicts with the assigned function of summary judgment within the pretrial system of the Federal Rules of Civil Procedure. The task of intercepting factually insufficient claims or defenses has been taken from the motion to dismiss—the successor to the demurrer—and given to the motion for summary judgment.<sup>33</sup> A conclusory, factually deficient pleading will usually survive a motion to dismiss. If the party moving for summary judgment must discharge a rigorous proof burden regardless of whether he would bear the burden of proof at trial, he could almost never compel the pleader to demonstrate that he can prove the essential elements which he was in the past required to allege in detail. As a result the movant could rarely intercept a factually deficient claim or defense. Given the severe congestion of most court dockets,<sup>34</sup> such an interpretation of the Federal Rules of Civil Procedure is most unfortunate.

Admittedly a moving party who could not satisfy so stringent a proof requirement could still resort to the first approach of discovering the opposing party's evidence. That alternative would not be very helpful, however, if the prohibitive cost of the first had already driven him to the second. Furthermore, this interpretation does not explain away the incongruity of a rule that virtually shifts the burden of proof away from the party who will bear it at trial.

31. See *James v. Atchison, T. & S.F. R.R.*, 464 F.2d 173, 175 (10th Cir. 1972) (moving party must demonstrate entitlement beyond a reasonable doubt); *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971) (no summary judgment on testimonial proof, even though recovery seems hopeless, if there is the slightest doubt); *Franklin Nat'l Bank v. L.B. Meadows & Co.*, 318 F. Supp. 1339, 1344 (E.D.N.Y. 1970) (interested eyewitness affidavits may fail to discharge moving party's burden where credibility is important); *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 470 (S.D.N.Y. 1961) (where there is the slightest doubt as to the facts the motion for summary judgment should be denied).

32. See 6 MOORE, *supra* note 10, ¶ 56.15[3], at 2342.

33. See C. WRIGHT, *FEDERAL COURTS* § 68 (2d ed. 1970).

34. See note 7 *supra*.



For these reasons some courts might concede that the moving party should be able to discharge his burden if he makes a strong showing on both approaches, though he fails to perfect either. In other words, he should be able to discharge his burden if he demonstrates merely the probability, rather than the near certainty, that the opposing party could not or would not get to the jury at trial.<sup>35</sup>

Unfortunately a probability test is imprecise and finds no analogue in directed verdict practice to assist in its application. Consequently it would resist uniform application and virtually invite ad hoc responses. Such an infirmity would seem to inhere in any “middle ground” approach, regardless of how articulated.

## 2. *A Proposed Evidentiary Standard*

One solution to this problem would be to put only a minimal initial burden on the movant who would not have the trial proof burden. A possible “minimal burden” formulation is as follows: The moving party discharges his initial burden whenever he presents enough evidence to support a jury finding that the essential element does not exist. This test understandably raises the fear that the moving party will be able to harass the opposing party too easily or succeed unfairly too frequently. It also raises the fundamental question of whether a few wrongful dismissals constitute a greater evil than many unnecessary trials.

### a. *Derivation of Standard*

To evaluate these issues a simple hypothetical will be considered. A complaint alleges on information and belief that defendant slandered plaintiff in the presence of four persons. If defendant moves for summary judgment, supporting his motion with the affidavits of the four witnesses and himself denying the slander, he can clearly discharge his burden.<sup>36</sup> If he produces the affidavits of only two of the four and those two are interested witnesses, the issue requires closer examination. Does his failure to obtain affidavits from the other two suggest

35. No discovered opinion articulates the test in these terms. Opinions holding that a moving party has discharged his burden with the affidavits of interested witnesses, when the opposing party lacks equal access to the facts, arguably embrace this test, since such evidence will not discharge the summary judgment evidentiary burden of a party with the trial proof burden. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970) (apparent finding that defendant might have discharged its burden as to a preexisting conspiracy through interested affidavits denying the same) (dictum).

36. *See Dyer v. MacDougall*, 201 F.2d 265, 268 (2d Cir. 1952). Since defendant showed that plaintiff could find no witness to support him, defendant perfected the first approach. Whether he also perfected the second would probably depend upon whether any of the witnesses was disinterested, since plaintiff personally lacked access to the facts.

that their testimony would be unfavorable to him? A court might so conclude if those two had refused to give affidavits to the plaintiff. The court's reluctance to grant the movant's motion in this circumstance might be based as well on economic considerations. It would be wasteful to compel the opposing party to depose the two witnesses when he can subpoena them for trial at virtually no cost. Thus, even though the opposing party needs their testimony to succeed at trial, and even though the movant has already produced enough evidence to support a jury finding that no slander occurred, a court might hold here that the movant had failed to discharge his burden.<sup>37</sup>

Such a result should not necessarily obtain when the movant's potential witnesses are more numerous. The inference that missing affidavits would be unfavorable to him obviously diminishes as the cost and bother of collecting them increases and as more and more favorable affidavits are submitted. Thus a reasonable sampling of many witnesses should suffice to discharge the movant's burden.<sup>38</sup> In addition, the inference is not compelling if the movant fails to go to the expense of deposing unfriendly witnesses who refused to give him affidavits. In fact, the opposite conclusion might follow if they were friends of the opposing party, who had failed to obtain counter-affidavits from them.

But where neither party can obtain affidavits from important witnesses, the question of who should bear the burden of deposing them is somewhat difficult to answer. The movant is the party seeking to disturb the status quo. However, he has already previewed in his affidavits testimony that would support a jury finding in his favor. This would seem to be a sufficient showing to compel the opposing party to break his silence. The opposing party's principal excuse is economic. The cost of depositions may be so great in some cases that he could be forced into an unfair settlement,<sup>39</sup> whereas, without this obligation, he could merely interview witnesses now and subpoena them later for trial.<sup>40</sup>

37. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970) (noting moving party's failure to submit affidavit of a key eyewitness).

38. See *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 472-73 (S.D.N.Y. 1961) (acceptable sampling of persons who manage defendant department store's advertising and have denied its participation in an alleged advertising boycott of plaintiff).

39. The seriousness of the problem would mount as the ratio of the deposition costs to the amount in controversy increased. The plaintiff's plight seems most serious when the affidavit of one disinterested witness can bring him to this point. See, e.g., *Lundeen v. Cordner*, 354 F.2d 401 (8th Cir. 1966) (granting motion for summary judgment for party *with* the burden of proof when the motion is supported by one disinterested affiant).

40. Such a contention by plaintiff was seemingly rejected in *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468 (S.D.N.Y. 1961), but there plaintiff failed to make a clear showing under Rule 56(f) that affidavits were unavailable from the numerous witnesses it was reluctant to depose.

## Federal Summary Judgment Doctrine: A Critical Analysis

Although the opposing party's fears have some validity, they can be accommodated in other ways.<sup>41</sup> Given such accommodation, it seems persuasive that if the movant establishes the prima facie nonexistence of an essential element of the opposing party's claim through the affidavits of all witnesses from whom he can get them—or a fair sample if the number is large—he should succeed in discharging his burden even though all the affiants are interested.<sup>42</sup>

Such a result seems irresistible when the opposing party has other access to the facts in question.<sup>43</sup> But even if the movant alone has first-hand access, some showing by the opposing party before trial of evidence or prospects for obtaining it should be required once the movant has previewed interested testimony that would support a jury finding in his favor. If so, it follows that the sole eyewitness testimony of a party adverse to the opposing party<sup>44</sup> or some other equally unreliable witness can discharge the movant's burden. For example, in a conspiracy case the affidavits of the defendants denying the conspiracy would be sufficient to put plaintiff to his proof, even though he has no eyewitnesses and may have to build an elaborate case based on documentary and circumstantial evidence.<sup>45</sup> Confronted with such an argu-

41. See pp. 768-69 *infra*.

42. See p. 764 *infra*. Lower courts have indicated an unwillingness to allow the movant to discharge his evidentiary burden with interested testimonial evidence, at least when he would bear the trial proof burden. See, e.g., *Block v. Biddle*, 36 F.R.D. 426, 429 (W.D. Pa. 1965) (summary judgment should be denied even where testimonial evidence is uncontradicted if (a) credibility is an issue, (b) movant has the burden of proving his case by a preponderance of credible evidence, and (c) the uncontradicted witness has an interest in the case which requires the jury to weigh his credibility) (dictum). See generally 10 WRIGHT & MILLER, *supra* note 6, § 2726, at 521. ("A problem arises . . . when there only are latent doubts as to credibility, as when some of the evidence necessary to establish that no genuine issue exists is presented by an 'interested' person . . .")

43. See *Continental Casualty Co. v. American Security Corp.*, 443 F.2d 649 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 907 (1971) (summary judgment for party with burden of proof where opposing party with access to the facts failed to contradict the testimony of an interested affiant); *Anderson v. Ford Motor Co.*, 319 F. Supp. 134 (E.D. Mich. 1970).

44. See *Weymann v. Wilson*, 320 F. Supp. 980, 988 (M.D. Fla. 1970) (defendant's own uncontradicted affidavit denying conspiracy accepted as true for purposes of her successful motion for summary judgment even though she was the only surviving witness). *But cf. Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971) (suggesting that summary judgment is unavailable in the Second Circuit when moving party relies on testimonial evidence).

45. The Supreme Court has stated on several occasions that summary judgment should be used sparingly for defendants in antitrust conspiracy cases. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 303 (1968) (Black, J., dissenting); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Lower courts, however, continue to grant summary judgment for defendants in conspiracy cases on the basis of their affidavits denying the conspiracy. See, e.g., *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972) (noting plaintiff's failure to use discovery to obtain evidence). In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Court seemed to find that defendants had discharged their burden through their own affidavits denying the alleged conspiracy, but reversed the grant of summary judgment because defendants had not denied the existence of a subsequent conspiracy.

ment, plaintiff might contend that minimal effort on the part of defendant would compel him to develop a prima facie case before trial, reduce it to affidavits or other supporting materials satisfying the requirements of Rule 56(e), and disclose it all to defendant.<sup>46</sup>

Of course the opposing party is not necessarily compelled to disclose his entire case. His response would be adequate if it contained enough evidence to reach the jury on each of the essential elements upon which the movant has discharged his burden. With respect to his fear of premature disclosure of his case, the opposing party can in any event be compelled to disclose his evidence on discovery. Is partial disclosure through a motion for summary judgment analytically different simply because it provides a simpler mechanism for discovery?

Requiring the opposing party to respond in this situation does not place a special or unusual onus upon him. In the absence of the requirement, the movant can still discover the opposing party's evidence and discharge his burden by showing its insufficiency.<sup>47</sup> The opposing party must then invoke Rule 56(f) and petition the court for a delay while he gathers additional evidence or for a dispensation allowing him to go to trial without it. Why shouldn't the movant be able to obtain the same functional result by previewing evidence that establishes the prima facie nonexistence of an essential element of the opposing party's case?

The tentative answer is that the two alternatives differ significantly. With one, the movant bears the onus and the cost of discovery. With the other, the opposing party bears those burdens unless he is able to use the prohibitive cost of discovery as the basis for a Rule 56(f) excuse.<sup>48</sup>

At first glance, it might seem that by accepting such an excuse the court has returned the movant to square one. But some progress has been made. The court will at least have examined the opposing party's excuse and evaluated his prospects for obtaining sufficient evidence for trial. Admittedly this approach can raise the cost of litigation to a level that would sometimes force the opposing party into an unfair

46. See, e.g., *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 475-76 (S.D.N.Y. 1961) (the court rejected the excuse because, *inter alia*, defendant had already taken discovery).

47. See p. 750 *supra*. For a discussion approving the use of summary judgment as a discovery device, see C. CLARK, CODE PLEADING § 88, at 566 (2d ed. 1947).

48. See *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 476 (S.D.N.Y. 1961) (rejecting such an excuse because, *inter alia*, plaintiff was seeking \$18 million in damages).

## Federal Summary Judgment Doctrine: A Critical Analysis

settlement.<sup>49</sup> On the other hand, if the movant can prevent a lengthy trial only by exposing the insufficiency of the opposing party's case, he can sometimes be forced into an unfair settlement by an opposing party who lacks a real case. It thus appears inevitable that in many circumstances one of the parties will face an economic burden which will induce settlement. If so, the movant who seeks summary judgment arguably should have to shoulder the initial expense burden. Still the opposing party, assuming he is the plaintiff, has merely filed a complaint, while the movant has at least presented evidence that would justify a jury finding in his favor. If this *prima facie* evidence is not sufficient to compel the opposing party to offer some evidence in response, the movant must then bear the further financial burden of discovering the insufficiency of the opposing party's evidence.

Factors other than economic cost bear on the issue of whether the opposing party should be required to assemble and proffer, in effect, a *prima facie* case in response to a motion for summary judgment.<sup>50</sup> The opposing party may doubt that he will be able to satisfy this requirement at any cost. For example, in conspiracy cases and others where access to the evidence is unequal, depositions will often be an inadequate substitute for the examination as on cross-examination of hostile witnesses at trial. But in this situation the very inadequacy of pretrial depositions may excuse the opposing party, who in this case would be the plaintiff, from compliance with the requirement since such a peculiar need for cross-examination at trial would seem to fall squarely within the ambit of a Rule 56(f) excuse.<sup>51</sup>

The possibility exists, of course, that trial judges may not give fair consideration to the opposing party's excuses. But that is a risk inherent in any motion directed to the merits and unfair determinations may be cured by appellate courts. Surely the efficacy of the summary judg-

49. It does not follow that the proposal offered in text will automatically expose plaintiff to the harassment of frivolous motions. If the court believes that defendant's intent is to harass, it can always accept as sufficient a response by plaintiff containing some evidence and a demonstration of prospects for obtaining more. In an extreme case it could deny the motion as frivolous. Conceivably it could also impose upon defendant the cost of transforming more of plaintiff's potential evidence to depositions or other acceptable supporting materials. FED. R. CIV. P. 56(f) permits the court to "make such other order as is just" when the opposing party cannot "for reasons stated present by affidavit facts essential to justify his opposition." See *Mackay v. American Potash & Chem. Co.*, 268 F.2d 512, 517 (9th Cir. 1959) (court notes trial judge's willingness to have plaintiff reimburse one of defendants for services of attorney and cost of attorney's travel to appear at hearing).

FED. R. CIV. P. 11, which provides that an attorney's signature on a pleading constitutes his certification that it is not frivolous, may offer some additional protection.

50. For a discussion of the *prima facie* response requirement see p. 759 *infra*.

51. See p. 766 *infra*.

ment procedure should not be emasculated because trial courts sometimes err.

b. *Formulation of Standard*

The conclusion which emerges from this discussion is that a moving party who seeks to show the nonexistence of an essential element of a claim or defense asserted against him discharges his burden whenever his supporting materials, from which there are no glaring omissions of evidence to which he has apparent access, (1) show that the opposing party lacks or cannot obtain evidence sufficient to discharge his production burden, or (2) contain a preview of evidence that would support a finding that the essential element does not exist.

The second half of the test represents something of an innovation. If courts allowed the movant who would not have the burden of proof at trial to sustain his summary judgment burden by making a mere *prima facie* showing with respect to the nonexistence of an essential element of the opposing party's case, then surely the movant's chances for success would be enhanced. Thus, while few courts would quarrel with the first part of the test,<sup>52</sup> many would probably question the second. In truth it is hard to know where many courts stand because they often confuse the present question of what is sufficient to compel the opposing party to respond with the separate questions of what is a sufficient response and what is an adequate excuse for an insufficient response.<sup>53</sup>

The functional implications of the second portion of the proposed test are admittedly significant. If the movant makes the requisite *prima facie* showing, the opposing party has, in effect, the burden of going forward. After such a showing by the movant, the opposing party would not ordinarily be permitted to go to trial without a *prima facie* case in hand or an excuse acceptable to the court.<sup>54</sup> This is clearly a radical change from pre-Federal Rules practice. Furthermore, it is not specifically required by the text of Rule 56.

Yet the second element of the proposed test has a significant advantage over present doctrine: It eliminates the incongruous shift of the evidentiary burden in a summary judgment proceeding away from the party who will bear it at trial. And it permits the court to reach the real question of whether the opposing party has a *prima facie* case or reasonable prospects for obtaining one by or at trial.

52. See 10 WRIGHT & MILLER, *supra* note 6, § 2727, at 531.

53. See note 30 *supra*.

54. See p. 759 *infra*.

The proposed standard would require some modification of the existing credibility rule. At present the movant cannot succeed if the opposing party challenges the credibility of the movant's witnesses and makes a preliminary showing of the possibility of impeachment.<sup>55</sup> But if the movant is only required to make a prima facie showing this rule is inappropriate. The opposing party should not be able to evade the response requirement by attacking the credibility of the movant's evidence except in instances where the attack is sufficiently strong to render the prima facie evidence incredible as a matter of law.<sup>56</sup>

### B. *The Opposing Party's Response*

When the moving party discharges his burden, he is ordinarily entitled to summary judgment if the opposing party fails to respond or presents an inadequate response or excuse.<sup>57</sup> A response is clearly inadequate if it contains only unsupported denials or general allegations.<sup>58</sup> It is clearly adequate if it contains a preview of evidence sufficient to support a jury finding that each successfully challenged essential element of the opposing party's case exists.<sup>59</sup> In judging the adequacy of the response, the court may not consider the credibility of the supporting witnesses<sup>60</sup> or the weight of the evidence<sup>61</sup> and may not reject any favorable inferences that might reasonably be drawn,<sup>62</sup> even though jury trial has been waived.<sup>63</sup>

55. See 10 WRIGHT & MILLER § 2726, at 521.

56. See 6 MOORE, *supra* note 10, ¶ 56.15[4], at 2369.

57. See, e.g., *Scott v. Dollahite*, 54 F.R.D. 430, 433 (N.D. Miss. 1972) (dictum); 10 WRIGHT & MILLER § 2740, at 723-24.

58. See, e.g., *Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141 (3d Cir. 1972); *Dawn v. Sterling Drug, Inc.*, 319 F. Supp. 358, 361 (C.D. Cal. 1970); *Franklin Nat'l Bank v. L.B. Meadows & Co.*, 318 F. Supp. 1339, 1344 (S.D.N.Y. 1970). This result seems to be required by FED. R. Civ. P. 56(e), which provides that the response "must set forth specific facts showing that there is a genuine issue for trial."

59. "All courts agree . . . that summary judgment should be denied whenever a directed verdict would be denied if the evidence at trial stood in the same posture as the material on file upon the motion." JAMES, *supra* note 5, § 6.18 at 235.

60. Neither summary judgment nor directed verdict can be granted when contradictions in opposing testimony can be resolved only by evaluating the credibility of the witnesses. See *id.* § 6.18, at 232. Hence the opposing party's affidants are assigned credibility for the purposes of the motion.

61. Where the opposing party has responded with evidence sufficient to reach the jury, he cannot suffer a directed verdict or summary judgment in the federal courts even if the weight of the moving party's evidence is so much greater that the court would set aside a jury verdict for the opposing party. See *id.* § 6.18, at 231, § 7.20, at 314.

62. See, e.g., *Franklin Nat'l Bank v. L.B. Meadows & Co.*, 318 F. Supp. 1339 (S.D.N.Y. 1970); 10 WRIGHT & MILLER, *supra* note 6, § 2727.

63. In cases tried to the court without a jury, the judge as trier of fact is empowered to find against plaintiff at the close of his evidence even if he has presented a prima facie case. FED. R. Civ. P. 41(b). If the court so finds, it must make findings of fact and conclusions of law. It has been suggested that the trial judge might exercise the same power in nonjury cases if both parties move for summary judgment.

The effect of not allowing the judge to weigh the evidence is that the moving party's evidence is usually ignored in evaluating the sufficiency of the opposing party's response. There are important exceptions to this practice, however. For example, the moving party's evidence may always be used by the opposing party to bolster his case.<sup>64</sup> Conversely it may be used sometimes to defeat the opposing party, even though he has established a prima facie case. If, for example, the moving party's evidence establishes incontrovertible physical facts that render the opposing party's testimonial evidence incredible as a matter of law<sup>65</sup> or if the opposing party's case relies upon a presumption or inference drawn from circumstantial evidence and the moving party's evidence contains direct proof of the nonexistence of the fact presumed or inferred, then the movant's evidence may be taken into account.<sup>66</sup> In order to grant the motion in the teeth of the opposing party's prima facie case, the court must be satisfied that the movant's evidence is so strong that no reasonable fact-finder can reject it. If the evidence is testimonial, it should also be disinterested, uncontradicted, and unimpeached.<sup>67</sup> In other words, if the opposing party presents a prima facie response, the movant's evidence should be treated as if it were offered in support of a motion for summary judgment by the party with the burden of proof.

Most courts and commentators adopt this rationale in the analogous directed verdict context in order to take into account evidence undercutting the opposing party's response.<sup>68</sup> Dictum in a Supreme Court opinion, rendered in this context, which would limit the trial court's consideration to evidence favoring the opposing party,<sup>69</sup> has generally been restricted by lower federal courts to F.E.L.A. cases.<sup>70</sup>

### 1. *The "Slightest Doubt" Test*

Despite near unanimity on the issue of what evidence can be taken into account in evaluating the opposing party's response, the standard

If he were to do so, the judge would have transformed the proceeding from a summary judgment hearing to a trial. See 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 1239, at 178 (1958). Some courts have been unwilling to countenance such a transformation. See *American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967).

64. See 6 MOORE, *supra* note 10, ¶ 56.15[3], at 2340 n.17.

65. See JAMES, *supra* note 5, § 7.13, at 285; cf. Cooper, *supra* note 19, at 951 (directed verdict).

66. See, e.g., *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 277 (1968).

67. See generally 6 MOORE § 56.15[4], at 2369; cf. 5A *id.* ¶ 50.02[1], at 2321-22 (directed verdict); Cooper, *supra* note 19, at 948-50 (directed verdict).

68. See 5A MOORE ¶ 50.02[1], at 2321-22; Cooper 948-50.

69. *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949).

70. See 5A MOORE ¶ 50.02[1], at 2329.



## Federal Summary Judgment Doctrine: A Critical Analysis

of evaluation remains unclear. Some opinions, especially those originating from courts within the Second Circuit, seem to hold that a response evidencing much less than a prima facie case will suffice to defeat the motion. These opinions frequently hold that the motion must be denied whenever there is the "slightest doubt" as to whether the opposing party will fail to reach the jury at trial.<sup>71</sup> The "doubt" in this connection is apparently not with respect to whether the opposing party's response discloses a prima facie case. To deny summary judgment in light of such a doubt would be unobjectionable.<sup>72</sup> The "slightest doubt" test employed by the Second Circuit, though, seems to ask whether the opposing party could conceivably develop a prima facie case at trial, notwithstanding the strength of the moving party's proof.<sup>73</sup> Thus, the movant seemingly cannot succeed unless he shows the *non-existence* of the challenged essential element with evidence so strong no reasonable fact-finder can reject it.<sup>74</sup> This standard thus treats the motion by a party who would not have the trial proof burden in precisely the same manner as a motion for summary judgment by a party with the burden of proof. As a district judge in the Second Circuit commented, it means that summary judgment would have to be denied on facts requiring the grant of a motion for directed verdict.<sup>75</sup>

If the Second Circuit's approach were generally adopted, Rule 56(f)

71. See, e.g., *Dolgow v. Anderson*, 438 F.2d 825, 830 (2d Cir. 1970); *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971); 10 WRIGHT & MILLER, *supra* note 6, § 2725, at 508 n.18.

72. It has been suggested that the "slightest doubt" test is merely a misleading gloss on the words "genuine issue" in Rule 56(c) and expresses little more than the notion that the opposing party should be given the benefit of all reasonable doubts in the evaluation of his response. See 10 WRIGHT & MILLER § 2727.

73. See, e.g., *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971) ("Plaintiff's papers show that it has enough evidence to preclude our holding that plaintiff could not possibly prove its case"). In this decision the court denied summary judgment even though "[i]f the record before us at trial were the same as that before us on this motion, judgment would be entered in favor of the Company." *Id.*

74. See *James v. Atchison, T. & S.F. R.R.*, 464 F.2d 173, 175 (10th Cir. 1972) (moving party must demonstrate entitlement to summary judgment beyond reasonable doubt). The "slightest doubt" or "reasonable doubt" test has been employed when the opposing party had failed to respond and the apparent question was whether the moving party had discharged his burden. But in most of these cases the doubt was created by some of the moving party's own evidence, which the opposing party may always appropriate. See, e.g., *Franklin Nat'l Bank v. L.B. Meadows & Co.*, 318 F. Supp. 1339 (S.D.N.Y. 1970). Thus the same result should occur if the opposing party actually responds with this evidence.

75. *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971) (Mansfield, J.). See note 74 *supra*; *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971). (In the Second Circuit, district courts may not place substantial reliance on testimonial proof in granting summary judgment even when recovery seems hopeless.)

and the 1963 additions to Rule 56(e)<sup>76</sup> would be virtual nullities. Indeed the opposing party could even withhold his evidence whenever the movant's supporting materials gave rise to some doubt or uncertainty favoring the opposing party, even though that doubt or uncertainty would not be sufficient to support a jury finding for the opposing party that the essential element existed. It would mean, in short, the virtual emasculation of the summary judgment procedure.<sup>77</sup>

Fortunately the "slightest doubt" test may not be intended for general application. In most of the decisions employing it the opposing party had obviously suffered a wrong or injury, but he could not recover unless he showed it was the product of defendant's participation in a conspiracy or his improper state of mind. In such cases the requisite evidence is peculiarly available to the opposing party.<sup>78</sup> Interestingly, the Supreme Court has tended to limit its grant of certiorari to this kind of case.<sup>79</sup> Furthermore, its customary reversal of a lower court's grant of the motion in these circumstances has provided the direction, if not the doctrinal justification, for the Second Circuit's use of the "slightest doubt" test.<sup>80</sup>

## 2. Proposed Standard

A more flexible approach exists for dealing with such "peculiar access" cases. If the opposing party cannot prove the conspiracy or improper state of mind directly, he must rely upon circumstantial evidence. If this evidence, or any found in the movant's supporting materials, establishes a prima facie case, the motion for summary judgment

76. The last two sentences of Rule 56(e), added by amendment of Jan. 21, 1963, effective July 1, 1963, read as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Advisory Committee's Notes, reprinted in 28 U.S.C.A. after the text of Rule 56, indicates that the amendment was made to overcome a line of cases permitting the opposing party to rest on the well-pleaded averments of his pleading.

77. See *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971); note 7 *supra*.

78. See, e.g., *Broadcast Music, Inc. v. C.B.S., Inc.*, 55 F.R.D. 292, 296 (S.D.N.Y. 1972). Courts have evidenced the same kind of response, and for the same reason, in cases where a discharged teacher seeks reinstatement because the discharge allegedly infringed First Amendment freedoms. See, e.g., *Hayes v. Cape Henlopen School Dist.*, 341 F. Supp. 823, 837 (D. Del. 1972).

79. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253 (1968); *Poller v. C.B.S., Inc.*, 368 U.S. 464 (1962).

80. See, e.g., *Broadcast Music, Inc. v. C.B.S., Inc.*, 55 F.R.D. 292, 296 (S.D.N.Y. 1972), citing *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969), and *Poller v. C.B.S., Inc.*, 368 U.S. 464 (1962).

ment should be denied,<sup>81</sup> unless the movant's evidence establishes to a certainty the nonexistence of the essential fact which the opposing party's evidence implies.<sup>82</sup> If the evidence favorable to the opposing party is insufficient to establish a prima facie case, the court might simply require that he present an adequate excuse and show prospects for obtaining more. This approach would allow opposing parties who have a reasonable chance of success to get to trial but would not impose an inflexible and highly stringent evidentiary requirement on the movant.

Unfortunately, the decisional law fails to deal with the problem in these terms. Most opinions simply state that the grant of the motion is inappropriate or that the movant has not discharged his initial burden because the available evidence gives rise to, or fails to exclude to a certainty, inferences favorable to the opposing party.<sup>83</sup> Furthermore, the opinions typically fail to deal with the distinct question of whether a jury would be permitted to find the fact for the opposing party on the basis of the available evidence.

Evaluating the sufficiency of circumstantial evidence in the analogous context of a motion for directed verdict has proved to be an extremely difficult task.<sup>84</sup> Consequently, it is scarcely objectionable if an opinion concludes that the question is close and denies the motion because the opposing party might present a better case at trial. But the question is not always close. If, for example, the opposing party has failed to employ discovery or has employed it extensively and failed utterly to obtain adequate evidence,<sup>85</sup> the movant's motion should probably be granted, especially if the critical evidence is not peculiarly within the movant's control.<sup>86</sup>

Needless to say, the opposing party may occasionally succeed at trial in eliciting the necessary evidence from the movant. When his chances

81. See, e.g., *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969) (plaintiff's circumstantial and testimonial evidence of conspiracy impliedly held sufficient to reach the jury).

82. Cf. *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 278-80 (1968) (plaintiff-opposing party's evidence of conspiracy rebutted by showing that movant-defendant's refusal to handle Iranian oil resulted from fear of retaliation by the Anglo-Iranian Oil Co., whose property had been nationalized by Iran, and from fear that, if the nationalization proved successful, other oil-producing countries would follow suit).

83. See, e.g., *Broadcast Music, Inc. v. C.B.S., Inc.*, 55 F.R.D. 292 (S.D.N.Y. 1972).

84. See Cooper, *supra* note 19, at 955-68.

85. See, e.g., *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972); *Chitwood v. Feaster*, 54 F.R.D. 204, 216 (N.D. W. Va.), *vacated and remanded in part*, 468 F.2d 359 (4th Cir. 1972); Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 COLUM. L. REV. 780, 782 (1948).

86. Peculiar access or exclusive control might constitute a valid excuse under Fed. R. Civ. P. 56(f). See pp. 768-69 *infra*.

for success are slim and the attendant imposition upon the movant and the court's calendar is great, the question is whether the judicial system should automatically provide him with this opportunity simply because his access to the evidence is limited. Given the substantial backlog of cases in the federal courts, some effort should be made to minimize the number of apparently futile trials.

A formulary approach for accomplishing this goal would be as follows: After the movant has presented evidence which would support a finding of the nonexistence of an essential element of the opposing party's case, the opposing party should be required to present evidence sufficient to support an affirmative finding on his case. If he cannot do so, he may offer an excuse showing reasonable prospects for obtaining more evidence. Viewing the opposing party's prospects with increasing optimism as his proof approaches sufficiency would provide an extra element of flexibility.

### 3. *Prior Decisions Reconsidered*

These principles, while offering clearer guidelines to lower courts, would in general produce few changes if applied to the decided cases. In *Adickes v. S. H. Kress & Co.*,<sup>87</sup> for instance, the proposed standard would produce the same result as that which actually occurred. There plaintiff charged that the defendant, in conspiracy with the police, refused her lunch counter service. Defendant moved for summary judgment, relying upon the deposition of the store manager and the affidavits of several policemen—all denying the conspiracy—and plaintiff's admission that she had no direct evidence thereof. The trial court granted the motion.<sup>88</sup> The Supreme Court appeared to find that defendant had discharged its burden with respect to the conspiracy that was alleged to have arisen before plaintiff entered the store.<sup>89</sup> It reversed, however, because defendant had failed to deny that such an understanding arose after she entered the store. Since defendant presented no evidence on this point, it had failed to discharge its burden.<sup>90</sup> Defendant's motion would have to be denied under the proposed rationale, which specifies that the movant must initially present evidence which would support a finding of nonexistence of an essential element of the opposing party's case.

Similarly, application of the proposed rationale to summary judg-

87. 398 U.S. 144 (1970).

88. 252 F. Supp. 140, 144 (S.D.N.Y. 1966).

89. 398 U.S. at 157-58.

90. *Id.* at 160. It was thus irrelevant that the plaintiff had failed to submit an affidavit locating a policeman in the store at the time the alleged conspiracy arose. *Id.*

## Federal Summary Judgment Doctrine: A Critical Analysis

ment decisions in the antitrust area would not necessitate different results. Yet because of a crucial difference in focus, the likelihood of convergence of outcomes is somewhat problematic. Present antitrust summary judgment doctrine is well illustrated in the Supreme Court's 1962 holding in *Poller v. Columbia Broadcasting System, Inc.*<sup>91</sup> In that case, CBS, anticipating an amended Federal Communications Commission (FCC) regulation permitting networks to own additional UHF stations, acquired through a straw man an option on an unsuccessful UHF station in Milwaukee. The acquisition was made despite the fact that CBS had an existing network agreement with another Milwaukee UHF station, plaintiff's assignor in the case. When the FCC amendment became effective, CBS exercised the option and terminated the network agreement with the plaintiff's assignor. Lacking network affiliation, this station was compelled to sell its facilities and equipment to CBS at a bargain price. Thereafter the disaffiliated station's assignor sued CBS to recover treble damages for the lost value of the business. After extensive discovery, CBS successfully moved for summary judgment. The Court of Appeals affirmed<sup>92</sup> and certiorari was granted.<sup>93</sup>

In reversing the grant of summary judgment by the trial court, the Court held:

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.<sup>94</sup>

The notions expressed in this opinion have come to dominate summary judgment decisions in the antitrust area,<sup>95</sup> even though they are not found in Rule 56, which makes no special provision for antitrust cases. Rather they arise from the fact that such litigation nearly always

91. 368 U.S. 464 (1962).

92. 284 F.2d 599 (D.C. Cir. 1960).

93. 365 U.S. 840 (1961).

94. 368 U.S. at 473. The *Poller* language emphasized the fact that credibility and demeanor are important in resolving state of mind issues and that a trial and jury determination are thus desirable. Certainly that is true when the party with the burden of proof seeks summary judgment on the basis of his own interested testimony with respect to his own state of mind. But where plaintiff must establish defendant's improper state of mind, he cannot reach the jury without affirmative evidence, even though no one believes his opponent's denials. See *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). Thus credibility and demeanor are irrelevant unless plaintiff has such evidence.

95. See 10 WRIGHT & MILLER, *supra* note 6, § 2730, at 587 n.10.

involves state of mind questions and complicated factual issues. In complex cases the cost and difficulty of assembling a prima facie case and reducing it to acceptable supporting materials is magnified. Furthermore, the evidence previewed by the parties is less likely to be either complete or accurate than in simpler cases.

Under the proposed rationale, a technique would exist for taking these special factors into account. Assuming the plaintiff is the opposing party, the court might, without relieving him of his basic obligation to tender an adequate response, excuse an otherwise insufficient response on the grounds of exorbitant expense or unusual difficulty. The crucial factor differentiating this approach from present procedure is that the opposing party would be required to justify his failure to respond adequately. As a result, the proposed scheme would tend to prevent plaintiffs with neither proof nor reasonable prospects for finding it from extracting costly settlements.

This difference in approach takes account of cases in which the defendant's state of mind is an essential element of the plaintiff's case. Under present doctrine, typified by the *Poller v. Columbia Broadcasting System* decision, the mere presence of such issues may result in a failure to inquire into the sufficiency of the opposing party's response or his excuse. Under the proposed standard, intent, motive, and other state of mind issues would be treated initially like other factual questions.<sup>96</sup> That is to say, the plaintiff will have an obligation to respond adequately to a prima facie showing by defendant of the nonexistence of a crucial mental state. The plaintiff may well contend that the direct proof is in the hands of those charged with the wrong, that discovery has been, or would be, futile, and that he must be permitted to examine these hostile witnesses at trial. But such contentions go primarily to establish an excuse under Rule 56(f) and are adequately embraced by the proposed rationale.

Needless to say, courts should not permit every plaintiff claiming a need for such examination to go to trial automatically. Those who fail to employ discovery<sup>97</sup> or who have employed extensive discovery to no avail, for instance, would not be permitted to continue the litigation.<sup>98</sup>

96. Some courts already recognize that state of mind issues are not generically different from other fact questions. In granting summary judgment on the issue of malice against the party with the production burden, one court, while noting the general caveat concerning the advisability of granting summary judgment where state of mind is an issue, said, "This is, of course, true as a general rule, but generalizations of this sort do not relieve the courts of their responsibility to decide whether a genuine issue of fact exists." *Buckley v. Vidal*, 327 F. Supp. 1051, 1054 (S.D.N.Y. 1971).

97. See, e.g., *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321, 1324 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972); *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 476 (S.D.N.Y. 1961).

98. Cf. *Poller v. C.B.S., Inc.*, 368 U.S. 464, 478 (1962) (Harlan, J., dissenting).

## Federal Summary Judgment Doctrine: A Critical Analysis

Such litigants ordinarily would not succeed at trial. On the other hand, litigants who have some evidence and can show that important witnesses were hostile and evasive during their depositions obviously have a chance.<sup>99</sup>

Under the proposed standard the fact that intent, motive, and other conditions of the mind are in issue would not automatically impair a defendant's chances for obtaining summary judgment. But the difficulty of proving such facts would enter into a court's determination of whether the opposing party's failure is excusable under Rule 56(f).

### C. *Excusing an Insufficient Response*

Sometimes the opposing party cannot make a sufficient response because the affidavits and other supporting materials available to him do not represent a realistic preview of the evidence he will be able to present at trial. He must inform the court of this problem by means of an affidavit, as provided by Rule 56(f). The court's reaction to such an affidavit will turn upon the special facts of each case. Nevertheless, certain patterns do recur and some guidelines can be identified. For example, the opposing party ordinarily must be permitted on request to complete his basic investigation and discovery before he is compelled to respond.<sup>100</sup> If he makes such a request, he will usually be accorded a continuance automatically.<sup>101</sup>

The problems in this connection generally arise when an opposing party who has apparently completed whatever discovery he intends to undertake, or who has declined to initiate discovery, seeks to excuse an insufficient response or a failure to respond. The attempted excuse may take two forms. The opposing party may seek a continuance to gather additional evidence or he may simply attempt to persuade the court to deny the motion for summary judgment.<sup>102</sup> While a continuance will be granted more readily than a denial of the motion, the court considers similar factors in both situations. The opposing party must show that he has a realistic chance of acquiring enough evidence to avoid a directed verdict or its equivalent at trial.<sup>103</sup> He must also

99. See *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952).

100. See 10 WRIGHT & MILLER, *supra* note 6, § 2741, at 731-33.

101. See *id.*

102. See FED. R. CIV. P. 56(f). Sometimes the court will deny the motion without prejudice to its reassertion at some later time. Such an order is functionally equivalent to a continuance. See 6 MOORE, *supra* note 10, ¶ 56.24, at 2877.

103. See, e.g., *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952). The party not having the burden of proof sometimes needs very little proof to avoid a directed verdict. Consequently, he should need as little to avoid a motion for summary judgment when he is the opposing party. Nevertheless, he must show more than mere hope or speculation that something may turn up at trial. See, e.g., *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943).

show that his failure to have the evidence in hand in the form of acceptable supporting materials is excusable.<sup>104</sup>

In preparing a Rule 56(f) affidavit the opposing party must ordinarily go beyond the simple allegation that additional proof is or will be available to him.<sup>105</sup> He should identify the sources of this anticipated proof,<sup>106</sup> indicate why and how he hopes they will be fruitful, and explain why they are as yet untapped.<sup>107</sup> In a few cases where courts have had serious doubts about the opposing party's diligence or prospects, they have demanded in advance a detailed statement of the sources of evidence the opposing party sought to explore and the reasons why he thought they would be productive.<sup>108</sup>

When the opposing party seeks to defeat the motion for summary judgment altogether he must make a stronger showing than when he merely seeks a continuance.<sup>109</sup> In essence he must show that sufficient evidence will not be available prior to trial and that additional discovery cannot complete his case. Claims of financial hardship have generally been rejected,<sup>110</sup> although they would seem to acquire increasing validity as the complexity or size of the case increases.<sup>111</sup>

A successful claim that additional discovery will be inadequate usually occurs only in a situation in which the facts are peculiarly within the knowledge of the moving party.<sup>112</sup> If the moving party in such a case bears the burden of proof, he could rarely obtain a directed verdict at trial because his evidence, though uncontradicted and un-

104. See, e.g., *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932, 937 (5th Cir.), cert. denied, 389 U.S. 832 (1967); *Englehard Industries, Inc. v. Research Instrument Corp.*, 324 F.2d 347, 352 (9th Cir. 1963).

105. See, e.g., *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943).

106. See, e.g., *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943).

107. See, e.g., *School Board v. Richardson*, 332 F. Supp. 1263, 1269 (N.D. Fla. 1971); *Hartmann v. Time, Inc.*, 64 F. Supp. 671, 678 (E.D. Pa. 1946), vacated on other grounds, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948). Ordinarily a statement by the opposing party that he was initially unaware of the existence of a potential source of evidence is not an adequate excuse. Once the source is disclosed or identified, the opposing party must immediately initiate investigation or discovery or seek a continuance to do so. See, e.g., *Robin Construction Co. v. United States*, 345 F.2d 610, 613-14 (3d Cir. 1965).

108. See, e.g., *School Board v. Richardson*, 332 F. Supp. 1263, 1269 (N.D. Fla. 1971).

109. It has been noted that few courts have actually allowed the opposing party to defeat the motion in this fashion and that, by and large, it is a possibility merely recognized in dictum. 10 WRIGHT & MILLER, *supra* note 6, § 2740, at 727-28 nn.20-22.

110. See, e.g., *Grimm v. Westinghouse Electric Corp.*, 300 F. Supp. 984, 991 (N.D. Cal. 1969).

111. Counterbalancing this consideration is the fact that, in complicated litigation, the cost to the moving party and the system of a useless trial, see *Topp-Cola Co. v. Coca-Cola Co.*, 185 F. Supp. 700, 708 (S.D.N.Y. 1960), as well as the size of opposing party's potential recovery, see *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 475-76 (S.D.N.Y. 1961), also tend to increase. Thus, such financial excuses should properly be rejected unless they are accompanied by evidence showing some effort to obtain additional information and some prospects for obtaining more.

112. See 6 MOORE, *supra* note 10, ¶ 56.24, at 2875; 10 WRIGHT & MILLER, *supra* note 6, § 2741, at 735, 737.



## Federal Summary Judgment Doctrine: A Critical Analysis

impeached, is interested.<sup>113</sup> His motion for summary judgment should similarly be denied, particularly if he seeks to establish his own intent or state of mind through his own interested testimony; in such a case his credibility and demeanor would be appropriate objects for scrutiny at trial.<sup>114</sup>

The problem is more complex if the opposing party has the burden of proof. He could not get to the jury on the mere possibility that the jurors might disbelieve the denials made by the moving party and his allies when called as hostile witnesses as on cross-examination.<sup>115</sup> He would have to introduce affirmative evidence. Should summary judgment be granted if the moving party in such a case offers the denials in support of his motion? The opposing party would argue that cross-examination of these hostile witnesses at trial may be productive in the sense of eliciting damaging admissions and that he is at least entitled to try. Some judges agree, especially if the witnesses when deposed were hostile and evasive; such witnesses might behave differently before a judge at trial.<sup>116</sup>

A different result is likely, however, if the witnesses were cooperative and unevasive on deposition,<sup>117</sup> or if the opposing party chose not to depose them.<sup>118</sup> In the latter circumstance some courts have held that Rule 56(f) should not afford relief.<sup>119</sup>

### Conclusion

The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial. But the present procedure is unsatisfactory in that it fails to differentiate between movants who would have the trial proof burden and those who would not. A better approach would be to harmonize the initial summary judgment evidentiary burden with the burden of proof at trial. While movants with the trial burden should be held to a strict standard, movants not having that burden should be able to sustain their initial evidentiary burden by a *prima facie* showing.

113. See Cooper, *supra* note 19, at 941-46.

114. See Cross v. United States, 336 F.2d 431, 433 (2d Cir. 1964). (Summary judgment should be denied where factual issues of motive, intent, and subjective feeling turn exclusively on the credibility of the movant's witnesses.)

115. See Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

116. See *id.* (dictum).

117. See generally *id.*; 3 W. BARRON & A. HOLTZOFF, *supra* note 63, § 1232.2, at 113-14.

118. See, e.g., Lundeen v. Cordner, 354 F.2d 401, 407-09 (8th Cir. 1966); Orvis v. Brickman, 95 F. Supp. 605, 608 (D.D.C. 1951), *aff'd*, 196 F.2d 762 (D.C. Cir. 1952); 10 WRIGHT & MILLER, *supra* note 6, § 2740, at 726 n.16.

119. See, e.g., Hartmann v. Time, Inc., 64 F. Supp. 671, 678 (E.D. Pa. 1946), *rev'd on other grounds*, 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948). See generally 10 WRIGHT & MILLER § 2741 nn.50 & 65.

# The Yale Law Journal

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Mark I. Levy, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*

Owen E. MacBride, *Restrictive Licensing of Dental Paraprofessionals*

Wallace D. Loh, *Pretrial Diversion from the Criminal Process*