Summary Judgment and the Law of Unintended Consequences

Diane P. Wood

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Optimism permeates the 1937 comments of the Advisory Committee that introduced Rule 56 of the new Federal Rules of Civil Procedure to the world. The rule, which provided for a "[s]ummary judgment procedure," created "a method for promptly disposing of actions in which there is no genuine issue . . . [of] material fact." The very name of the device—summary judgment—promises simplicity and expedition. According to Webster's, the word "summary" means "done or occurring without delay or formality." Wright and Miller confirm that this is what is expected of a summary judgment motion: the rule opens the door to prompt adjudication; it allows a party to defeat unfounded claims or defenses with little expense; and it offers "expeditious justice" to the parties.

The only problem is that summary judgment today looks nothing like

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* Circuit Judge, United States Court of Appeals for the Seventh Circuit. Delivered as the Fifth Annual William J. Holloway, Jr. Lecture at the Oklahoma History Center, Oklahoma City, on September 27, 2010.
1. FED. R. CIV. P. 56 advisory committee’s note to the 1937 adoption.
2. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2289 (1993).
this Utopian picture. Enormous resources go into the preparation of summary judgment motions; courts labor over them for extended periods of time before issuing a ruling; and appellate courts are inundated with appeals from disappointed parties who insist that the trial court overlooked a critical disputed issue of fact or misapplied the law. What went wrong? Were the drafters of the rule naïve, or has something else changed to make summary judgment the complex, time-consuming vehicle it now so often is?

Perhaps the answer is a little of both. Recall that the drafters of the Civil Rules also thought that discovery would be quick and inexpensive. Bitter experience has shown us that neither is true. And, as Judge Brock Hornby of the District of Maine commented in a recent article in the Green Bag, the same appears to be the sad truth for summary judgment. Here’s what he had to say:

The term “summary judgment” suggests a judicial process that is simple, abbreviated, and inexpensive. But the federal summary judgment process is none of those. Lawyers say it’s complicated and that judges try to avoid it. Clients say it’s expensive and protracted. Judges say it’s tedious and time-consuming. The very name for the procedure is a near-oxymoron that creates confusion and frustrates expectations.4

Professor John Bronsteen of Loyola University Chicago School of Law had even harsher words for the present situation: summarizing his article, Against Summary Judgment, he wrote, “Summary judgment might be a wonderful procedure were it not inefficient, unfair, and unconstitutional.”5 With commentary like this around, we need to ask whether, by creating a mechanism to speed things up and reduce cost, we have inadvertently managed to slow things down and allow expenditures to balloon.

In this lecture, I would like to explore how and why people are increasingly worrying about these unintended consequences of summary judgment. We can begin with a look at the early history of summary judgment under the Federal Rules of Civil Procedure: how it worked,

how it related to other procedural mechanisms (discovery in particular), and how courts treated it. Next, I will consider when, why, and how rapidly things changed. Finally, I'll turn to a detailed look at the latest effort to reform Rule 56—the amendment that took effect on December 1, 2010—and I will conclude by considering whether this most recent change will restore some of the early promise of the summary judgment procedure or if it, too, will somehow wind up adding yet another layer of complexity to the litigation of civil suits in the federal courts.

I. SUMMARY JUDGMENT IN THE EARLY YEARS

A. The Development of Federal Rule of Civil Procedure 56

The historical development of summary judgment in the United States from the nineteenth century until the present day is complex and interesting in its own right. For our purposes, however, it will be enough to provide a brief survey. This will show how a procedure that was viewed at the start as a promising and simple mechanism for clearing crowded dockets, bringing down costs, and advancing the interests of justice morphed into something quite different. Today, there are few who would argue that summary judgment is living up to those expectations. As I have already suggested, more and more people are whispering that the Emperor has no clothes: that summary proceedings in the federal courts, in combination with modern pretrial discovery, have had an effect exactly opposite of that which was intended.

The American summary judgment procedure now embodied in Federal Rule of Civil Procedure 56 has its roots in mid-nineteenth-century England. Over the preceding centuries, English merchants had become increasingly reliant on the common law and chancery courts to settle debts. Other countries—our civilian friends—sent mercantile disputes to special courts established for that purpose. Merchants in England bemoaned the "'huge delays'" in the common law courts; those delays, they complained, "'withh[eld] petitioners from their right' and impose[d] 'an intolerable burden of expense.'"6 In 1855, Parliament devised a solution to the problem in Keating's Act, which was also called

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the Summary Procedure on Bills of Exchange Act.° The law created a summary procedure for judgment in cases that involved liquidated claims on commercial instruments. It entitled a party complaining of a debt to judgment in his favor unless the defending party filed an affidavit disputing the factual basis of the claim. Initially, the procedure applied only in disputes over commercial instruments, but over time it was expanded to actions to recover land and chattels, to claims for specific performance of contracts, and beyond. The novel mechanism provided a procedural sieve for removing sham claims and reducing delay when there was no factual dispute requiring a court’s attention.

Keating’s Act was copied in America. It became a primary basis for some of the proposals that emerged as the original Federal Rules of Civil Procedure were being drafted. There were other historical antecedents, too, however. As early as 1732, Virginia experimented with summary proceedings that required a party to file a motion for judgment in advance of trial. The availability of this procedure was initially limited to a narrow category of claims, but by 1919, Virginia had extended summary proceedings to all actions at law.°

Nonetheless, Virginia’s system was the exception, not the rule, among the American states.° Such widely available summary procedures remained rare elsewhere on our side of the pond until the Federal Rules emerged. During that era, this kind of procedure tended to be limited to contract cases and similar disputes. As in the English system, plaintiffs involved in summary proceedings in American state courts were entitled to judgment in their favor for the amount claimed unless a defendant responded with an affidavit of defense denying the right to collect.° The federal Conformity Act° automatically made this device available in actions at law brought in the federal courts, so long as the state in which the federal court sat provided for such a procedure.

Surveying the state of summary proceedings around the country for

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7. Summary Procedure on Bills of Exchange, 1855, 18 & 19 Vict., c. 67 (Eng.).
9. By the 1920s, only Indiana and Virginia made summary judgment procedures available in all types of actions. See id. at 470.
10. Id. at 442, 456-57.
12. See Dempsey v. Pink, 92 F.2d 572, 573 (2d Cir. 1937) (recognizing that summary procedures made applicable in federal court by the Conformity Act were not available in proceedings in equity).
an article in the *Yale Law Journal* in 1929, Charles E. Clark, who would go on to lead the effort to draft the Federal Rules, extolled the virtues of the summary procedure: “Except where a trial is necessary to settle an issue of fact,” he explained, “the whole judicial process is, by this procedure, made to function more quickly and with less complexity than in the ordinary long drawn out suit.” Many around that time shared his positive view of the relatively new procedure, seeing in it an answer for overburdened courts and a foil to disputes that had no factual basis. Speed to judgment was not the only benefit the rule was to provide. While “[t]he argument for the procedure most generally stressed is that it affords a means whereby judgments may be more speedily secured,” Clark explained:

its simplicity makes it more generally useful . . . . It also furnishes an easy and direct way of disposing of a large amount of important litigation and should therefore prove of great value to the courts and the judges, and to those defendants who are interested in the proper adjudication of their causes.

By all accounts, no one expected summary proceedings to cause much of a problem.

And so, when the Federal Rules of Civil Procedure took effect in 1938, they included a provision for summary judgment in Rule 56. But from the moment the Rules were enacted, Rule 56 was different from the state rules that preceded it in one critical respect: unlike the various state summary procedures, the federal rule was not limited to any particular type of action; it applied generally in all civil cases. At the time that the Rules took effect, the Advisory Committee noted that there had “been

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14. See, e.g., Mac Asbill & Willis B. Snell, *Summary Judgment Under the Federal Rules—When An Issue of Fact Is Presented*, 51 Mich. L. Rev. 1143, 1172 (1953) (arguing that with some care “the summary judgment procedure, without unjustly depriving a party of a trial, can effectively eliminate from crowded court calendars cases in which a trial would serve no useful purpose and cases in which the threat of a trial is used to coerce a settlement”) (footnote omitted).
16. FED. R. CIV. P. 56 advisory committee’s note to the 1937 adoption; see also MacDonald v. Du Maurier, 144 F.2d 696, 702 (2d Cir. 1944) (“[T]he rules, unlike all earlier procedural systems in this country or England, make the remedy of summary judgment available for all—not a select few—civil actions . . . .”); Boerner v. United States, 26 F. Supp. 769 (E.D.N.Y. 1939).
a steady enlargement of the scope of the remedy” over time, but Clark and others saw no good reason to limit the summary procedure to any particular type of action; they thought that all cases might benefit from its expected positive effect. And there we can pause to consider the consequence of that fateful decision to give Rule 56 the same transsubstantive effect that the drafters envisioned for the rules as a whole.

B. An Early Look at the Consequences of Universal Applicability

It is more than a truism to say that the wider availability of summary judgment meant that there was a greater potential for mischief under the new rule. Establishing a rule that could be used in all civil litigation was naturally a more difficult project than devising one that was limited, for example, to contract actions. As one commentator explained not long after the passage of Rule 56, the unrestrained nature of the new rule had the potential to cause—rather than alleviate—litigation delay: “[T]he problem,” the commentator described,

is the formulation of a workable standard for trial courts to apply in determining the existence of issues of fact for trial. When the summary judgment procedure was narrowly restricted to actions for liquidated debts, this need was minimized. The extension of the procedure to new classes of cases intensifies the need for a standard . . . . [and ]ailure to articulate intelligible standards in jurisdictions where a completely unlimited summary judgment procedure is permissible results in wasted judicial effort and added delay to litigants in settling disputes . . . .

The lack of intelligible standards in Rule 56 not only created the potential for delay in resolving motions under the rule; it also created the potential for misapplication of the rule. The wide scope of the rule, along with the vagueness of the standards for determining whether an issue of fact existed, meant that judges inevitably had more discretion to dismiss a lawsuit and that the dreaded and unconstitutional “trial by affidavit” was a real danger. Observers at the time stressed that “the function of the court is limited to the ascertainment of the existence of an

17. FED. R. CIV. P. 56 advisory committee’s note to the 1937 adoption.
18. Bauman, supra note 6, at 354.
issue of material fact, and . . . it is not to try the issue of fact whose existence has been so ascertained.\textsuperscript{19} Responding to these criticisms, Clark maintained his steadfast support of the procedure: "It is obvious that judges should be careful not to grant judgment against one who shows a genuine issue as to a material fact," he wrote in 1952.\textsuperscript{20}

Just as obvious is the obligation to examine a case . . . to see that a trial is not forced upon a litigant by one with no case at all. . . .

Properly and responsibly applied . . . the summary judgment procedure is an important and necessary part of the series of devices designed for the swift uncovering of the merits and either their effective immediate disposition or their advancement toward prompt resolution by trial.\textsuperscript{21}

Though Clark's comments about judicial responsibility did not answer the question whether the rule's broad application had opened the door to excessive judicial discretion, they reflected an attitude—or perhaps the assumption—that the negatives of the new rule did not outweigh the positives. In the absence of empirical evidence one way or the other, proponents continued to believe that the rule was a "highly operable" mechanism for resolving disputes.\textsuperscript{22} As time went on, however, it became apparent that the rule had created an environment in which summary judgment was becoming a procedure of huge importance to litigants. The existence of an opportunity to persuade the judge to exercise her discretion to end the case, looking only at affidavits and other papers, meant that litigants were well advised to focus their energies with that gateway in mind.

II. SHIFTING VIEWS IN THE SUPREME COURT

A. Summary Judgment as a Disfavored Device

For the first forty years after the adoption of the Federal Rules, the

\textsuperscript{21} \textit{Id.} at 578–79.
potential problems posed by judicial discretion did not materialize. This may have been for the same reason that the federal courts were approaching summary judgment cautiously. During this period, it was common to see statements to the effect that summary judgment was disfavored, and courts accordingly set quite a high bar for granting relief. A prime example is the Second Circuit’s 1946 decision in Arnstein v. Porter, which frames a debate over the standard for relief under Rule 56 between two giants: Judges Jerome Frank and Charles Clark. Frank, writing for the majority, held that the “slightest doubt” about an issue of fact was enough to make summary judgment inappropriate. Clark disagreed, accusing Frank of deciding the case based on “a belief in the efficacy of the jury to settle issues . . . and a dislike of [Rule 56]” itself.

The lower courts found other ways to avoid summary judgments as well. The Third Circuit, for example, developed a line of cases that permitted a party opposing summary judgment to survive such a motion by relying only on allegations in her own pleadings. This succeeded for a time, but it ultimately led, as we will see, to the 1963 amendments to the rule.

Over time, the Supreme Court settled on the idea that summary judgment was disfavored as a general matter. In Poller v. Columbia Broadcasting System, Inc., decided in 1962, the Court remarked:

This rule authorizes summary judgment “only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains

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23. See, e.g., Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 624 (1944) (“[A]t least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.”); Werner Ilsen, Recent Cases and New Developments in Federal Practice and Procedure, 16 St. John’s L. Rev. 1, 46 (1941) (collecting cases).


25. Id. at 468 (quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945)).

26. Id. at 479 (Clark, J., dissenting).

for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."\(^{28}\)

The Court’s attitude toward summary judgment is also on display in *Adickes v. S. H. Kress & Co.*, where it decided that summary judgment should not have been granted to a moving party who failed to demonstrate that there was a complete absence of material facts.\(^{29}\) In short, before 1986, the federal courts overwhelmingly took the position that Rule 56 was to be used sparingly.

**B. Revolution in the Supreme Court**

Then came the Revolution, in the form of the now-famous trilogy of cases decided in 1986—*Anderson v. Liberty Lobby, Inc.*, *Celotex Corp. v. Catrett*, and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*—in which the Supreme Court reversed course.\(^{30}\) We were just kidding before, the Court implied. Summary judgment was no second-class, disfavored procedural gimmick. Instead, the three cases cumulatively established, summary judgment was henceforth to be regarded as a useful and integral part of the pretrial process—a great tool not only for disposing of frivolous cases, but also for weeding out claims and defenses that no reasonable trier of fact could uphold. The standard to be used was the same as that for a directed verdict. In *Matsushita* the Court embraced the view that a party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.”\(^{31}\) That the dispute might be factually complex—as the dispute in *Matsushita* certainly was—did not benefit the nonmoving party. Oddly enough, the factual complexity intensified the burden on the opposing parties to “come forward with more persuasive evidence to support their claim than would otherwise be necessary.”\(^{32}\) *Anderson* underscored that a party resisting summary “must present affirmative evidence in order to defeat a properly supported motion for summary


\(^{32}\) *Id.* at 587.
judgment."³³ "This is true," said the Court, "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery."³⁴ And, on the same day as Anderson, the Court completed its endorsement of the liberal use of summary judgment, writing:

[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.³⁵

The Court explained that under Rule 56, "the mere existence of some alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."³⁶

The Court's 1986 trilogy, like the proverbial receding water that reveals previously hidden rocks, laid bare some of the problems that had been inherent in the rule from the start. Summary judgment became the focal point of litigation, rather than a rarely used device to dispose of particularly weak cases. Judges had broad discretion to decide whether disputed facts were really material or not, and to decide whether the paper record put forth by the opponent of summary judgment was good enough (maybe even persuasive enough) to reach a jury. The stakes soared for the litigants, who learned quickly that they had to redouble their investment in discovery so that they could present enough material to avert an untimely demise of their cases.

III. THE PERVERSE CONSEQUENCES OF RULE AMENDMENTS AND LOCAL REFINEMENT: MORE DELAY, MORE DISCOVERY

At the same time that the standards for summary judgment were changing as a result of judicial interpretation of Rule 56, the Rules Committee was tinkering with the text of the rule. Over the years, both

³³ Anderson, 477 U.S. at 257.
³⁴ Id.
³⁵ Celotex Corp., 477 U.S. at 322.
judges and litigants had adapted to a process in which the “pretrial” stage resolved 98% of cases and trials nearly vanished. Summary judgment played a major role in this evolution. Here we encounter another unintended consequence of summary judgment: as it became ever more urgent to amass, and then use, more supporting materials either to oppose or support summary judgment, both costs and delays kept growing. This happened almost imperceptibly, one step at a time.

The first set of amendments to Rule 56 came along in 1948. They permitted a plaintiff to move for summary judgment sooner in the litigation than the original rule had allowed, and they clarified that partial summary judgment was possible even in cases where damages had yet to be determined. While those changes may not have been earth-shattering, real change was just around the corner.

In 1963, the rule expanded the list of materials that could be introduced in support of or opposition to a motion for summary judgment, adding “answers to interrogatories” to the existing list. This change represented the continuation of a trend that began when the framers of the Federal Rules adopted the English summary procedure in 1938. Recall that in the English common-law courts, the introduction of the nonmoving party’s affidavit was sufficient to oppose a claim that summary relief was warranted. The 1938 Federal Rules added depositions and affidavits from people not parties to the litigation as materials that parties could use to establish a genuine issue of fact or lack thereof. But it was the addition of answers to interrogatories in 1963 that had the effect of putting significantly greater emphasis on discovery as an essential process leading up to the pivotal moment in the case: the motion for summary judgment. The second change to Rule 56 in 1963 had a similar effect. It made clear that the party opposing summary judgment had an obligation to respond to a properly supported motion for summary judgment with her own evidence of a genuine issue requiring trial. This change meant that the nonmoving party could no longer rest on her pleadings and survive summary judgment. Instead, active engagement was required of both sides.

As more and more materials were submitted in conjunction with the motion for summary judgment, the trial court had more to review, and delays inevitably followed. In addition, the judge had a more complete view of the case, and it became ever harder to respect the often subtle

37. See Wright, Miller & Kane, supra note 3, § 2711, at 194–95.
line between a case where genuine facts remained for trial (even though
the judge privately thought that one party had the stronger case) and a
case that rationally could be answered only one way.

In 2007, Rule 56 was amended again as part of the restyling of the
federal civil rules. The Rules Committee took the position that the word
"shall" is inherently ambiguous; it therefore purged that word from the
entire set of rules of civil procedure, including Rule 56. In each instance,
"shall" had to be replaced by either "must," "should," or "may." The
drafters thought that "should" was the proper word for Rule 56,
recognizing that the district court retained discretion to deny summary
judgment even when it seemed that there was no genuine issue of
material fact. At the time, the change went largely unnoticed, but all of
that changed when the Advisory Committee on Civil Rules first
presented the proposed overhaul of the rule that took effect in December
2010. In the end, the Committee opted to reinstate the word "shall," and
so the rule once again reads that the "court shall grant summary
judgment if the movant shows that there is no genuine dispute as to any
material fact and the movant is entitled to judgment as a matter of law."
I will return to the 2010 amendment to Rule 56 shortly.

Along with the amendments to the rules came changes to procedures
established by local district court rules. The procedure set out by Local
Rule 56.1 of the Northern District of Illinois, for example, requires the
moving party to provide "a statement of material facts as to which the
moving party contends there is no genuine issue" and a response from
the opposing party "to each numbered paragraph . . . including . . .
specific references to the affidavits, parts of the record, and other
supporting materials relied upon." That provision of the Northern
District's rules first appeared in a substantively similar form in the mid-
1980s, and district judges noted that it was intended to eliminate
"circumspection, whether purposeful or not," in responses to summary
judgment. Approximately a third of the districts around the country

39. WRIGHT, MILLER & KANE, supra note 3, § 2711, at 48 (Supp. 2010). The advisory
committee's notes to the 2007 amendments note that "[i]t is established that although
there is no discretion to enter summary judgment when there is a genuine issue as to any
material fact, there is discretion to deny summary judgment when it appears that there is
no genuine issue as to any material fact." FED. R. CIV. P. 56 advisory committee's note to
the 2007 amendments.
40. FED. R. CIV. P. 56(a).
41. N.D. ILL. Loc. R. 56.1(a)-(b).
42. Capitol Records, Inc. v. Progress Record Distrib., Inc., 106 F.R.D. 25, 27 (N.D.
Ill. 1985).
have local rules requiring a specific point-counterpoint exchange between the movant and the party opposing summary judgment; this explicit requirement may raise the stakes for both sides even more.

IV. THE DEVELOPMENT OF DISCOVERY TECHNIQUES AND SUMMARY JUDGMENT

At the same time as the changes in summary procedure in the federal courts had the effect of focusing discovery practice on the summary judgment phase of a civil action, discovery was also metastasizing. The two are inextricably linked given the fact that the immediate point of most discovery is for use in summary judgment motions; only if the case manages to survive beyond that point and only then if it is not settled would the discovery be required for a trial.

According to Professor Arthur Miller, "The contemporary perception of a crisis in the judicial system first became prominent in the 1970s." This may help to explain why the Supreme Court in the 1986 trilogy changed its view of summary judgment. The same might be said of other amendments to the rules that were designed to expand the utility of summary judgment. But at the same time that summary judgment was becoming more accessible, it was widely recognized that discovery was spinning out of control. Beginning in 1983, the Judicial Conference's Standing Committee on Rules introduced a series of amendments to the discovery rules that were designed to increase cooperation, to reduce costs, and to lessen the burden on litigants and third parties. In 1983, amendments to the discovery rules directed judges to limit redundant discovery and imposed good-faith requirements for attorneys seeking discovery materials. Ten years later, automatic disclosure rules were put in place, and presumptive limits on the number of depositions and interrogatories allowed by the parties were introduced to cabin the discovery process.

It is fair to say, from the vantage point of 2011, that the problems with discovery are far from solved. Indeed, the conference at Duke Law School held in May 2010 by the Advisory Committee on Civil Rules focused heavily on the problems of cost and delay, especially (but not

44. Id. at 1014.
only) problems caused by electronic discovery. *(Déjà vu all over again!)* Interestingly, however, not too many people have looked at the interaction between the summary judgment rule and discovery, and summary judgment was hardly touched upon at Duke.

Pessimists among us might be forgiven for concluding that, after three-quarters of a century, it is quite clear that the original hopes for summary judgment are not going to be realized. As my colleague Richard Posner observed in the first edition of his book, *The Federal Courts: Crisis and Reform*, the district courts faced a nearly 400% increase in civil cases filed between 1963 and 1983.45 Civil caseloads in district courts across the country continue to increase at a rate of 1% to 2% per year on average.46 In addition, even if the increase in caseload itself were not enough, the reporting requirements in the 1990 Civil Justice Reform Act (another effort to reduce cost and delay in the district courts) keep a substantial amount of pressure on district judges to resolve disputes as quickly as possible. All of this is unfolding as the federal judiciary suffers from extreme understaffing: at the beginning of December 2010, ninety judgeships on the U.S. district courts stood vacant.47

These pressures prompted then-Judge Patricia Wald to remark in 1998 that Rule 56 had serious potential to “develop . . . into a stealth weapon for clearing calendars.”48 There is some indication that her fears were warranted. Five years ago, Professor Stephen Burbank of the University of Pennsylvania wrote that, even with the serious limitations posed by existing data, “there is a reasonable basis to conclude that the rate of case termination by summary judgment in federal civil cases nationwide increased substantially . . . between 1960 and 2000, with one plausible (and perhaps conservative) range being from approximately 1.8 percent to approximately 7.7 percent.”49 Other scholars suggest that

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summary judgment may be catching up with settlement as a method of disposing of cases.\textsuperscript{50} There is also a bit of support for the proposition that summary judgment doesn’t actually prevent trials from happening at all.\textsuperscript{51}

According to a number of surveys, American lawyers believe that summary judgment is increasing in importance because of pressures on federal trial courts. A member survey of the American Bar Association, done in 2009, showed that 50\% of plaintiffs’ lawyers, 47\% of defense lawyers, and 44\% of all other lawyers believe that discovery’s primary use is to develop evidence for summary judgment, not to prepare for trial.\textsuperscript{52} Perhaps that is good; perhaps it is bad; or perhaps it is neutral. But it is certainly a change over the course of the rule’s history.

V. LESSONS FROM THE RECENT AMENDMENT TO RULE 56

Before turning to my final conclusions, I’d like to offer some thoughts on the latest—and first comprehensive—rewriting of the rule since its inception. Both the rule that took effect on December 1, 2010, and the reasons why it finally assumed that form reflect the kinds of problems that this lecture has been exploring.

There were two principal motivations behind the proposed amendment to Rule 56: the first was a desire to bring the text of the rule into line with actual practice around the country; and the second was the need to establish a greater degree of uniformity among the ninety-four federal districts. When the Advisory Committee on Civil Rules began to work on the rule, it assigned the responsibility for developing a proposed new rule to a subcommittee ably chaired by District Judge Michael Baylson of the Eastern District of Pennsylvania. The committee’s original proposal involved several key points:

- It recognized explicitly for the first time that a motion could seek either full or partial summary judgment.
- It set forth timing requirements that would apply unless local rules provided to the contrary.
- In subpart (c), it spelled out the procedures that had to be followed “unless the court orders otherwise in the case.”

\textsuperscript{50} See Bronsteen, supra note 5, at 522–23.
\textsuperscript{51} See id.
\textsuperscript{52} See Hornby, supra note 4, at 274.
Oklahoma City University Law Review described what came to be called the “point-counterpoint procedure” in the hearings and comments that followed. Following the example of many local rules, it would have required three separate filings: (1) a motion identifying each claim or defense on which summary judgment was sought; (2) a separate statement identifying in numbered paragraphs the material facts that could not be disputed; and (3) a brief covering the contentions on law or fact. The responsive brief, followed if need be by a reply brief, was to follow the same pattern.

- The proposal would have permitted a party to accept or dispute a fact either generally or solely for purposes of the motion.
- Supporting facts would have to be cited with particularity in the statement of material facts, and the sources of support included virtually everything: depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, answers to interrogatories, and anything else.
- Following the Supreme Court’s decision in Celotex, the proposal would allow someone to assert that the other side could not produce admissible evidence.
- Just as in the previous version of the rule, the proposal permitted a nonmovant to show the court that it needed more time for discovery and to ask the court to defer ruling on the motion.
- Finally, if a party failed to respond or failed to present proper material in opposition, the court would be permitted to deem admitted the facts that were not appropriately controverted.

That, in brief, was the version of the rule that went out for public comment.

During the comment period, contributors focused almost exclusively on two major points. The first, which I will not cover in any detail, was whether the rule should make it clear that the district court has an unwavering duty to grant summary judgment if the criteria in the rule are met, and if so, whether the “should grant” phrase contained in the restyled version of the rule captured that idea adequately. Commentator after commentator urged the Committee to change the word “should” to the word “must,” or at a minimum, to restore the former phrase “shall grant” to the rule. In the end, the Committee returned to the Prime Directive: do not make any substantive changes in the rule. Despite its
reservations about the word "shall," it decided that the only way to ensure that no substantive changes were being made, and thus the only way to return this issue to the case-by-case development it had been undergoing, was to return to the word "shall." And so, if you look at the language of the rule that has just taken effect, you will see in Rule 56(a) the phrase, "The court shall grant summary judgment . . . ." What came through during this discussion was how strongly people—especially the defense bar—felt about the importance of summary judgment and what an important role summary judgment has come to play in the litigation process.

The second focal point of the comment period concerned the procedures to be followed in adjudicating a motion for summary judgment. Coming from a circuit in which the largest district—the Northern District of Illinois—uses the point-counterpoint procedure that was part of the proposed rule, I was frankly surprised at the depth of opposition that this provision sparked. And the source of the opposition was also very interesting. First and foremost, it was the district judges who objected to the nationalization of the point-counterpoint procedure. Many of the opponents came from districts that had tried this procedure and had found it wanting. The testimony of Judge David Hamilton, then the Chief Judge of the Southern District of Indiana, and now my colleague on the Seventh Circuit, captures well their objections.

Judge Hamilton began by noting that his district had adopted a local rule in 1998 that looked very much like the Committee's proposed rule. Critically, lawyers had to file lists of disputed material facts in a separate document, just as the proposed rule was going to require. Judge Hamilton reported that this unfortunately "provided a new arena for unnecessary controversy." The Southern Indiana judges began seeing "huge, unwieldy, and especially expensive presentations of hundreds of factual assertions . . . [that] became the focus of lengthy debates over relevance and admissibility." And these were cases that he described as single-plaintiff, single-defendant, run-of-the-mill disputes. He recalled one such case in which a party submitted 489 paragraphs of facts, supplemented by a total of 300 pages of briefs. In another one, the

53. FED. R. CIV. P. 56(a) (emphasis added).
55. Id.
parties churned out 347 paragraphs of facts. In another, there were 548 pages of submissions on a routine summary judgment motion, where the defendant tried to dispute 582 of the plaintiff’s 675 assertions of disputed material facts.

This is the stuff of nightmare. And similar stories caused quite a few other district court judges to take time out of their busy schedules to come to the Committee’s hearings to plead that the new rule not adopt a point-counterpoint procedure. Another point, shared by some plaintiffs’ lawyers, was that a great deal of duplication is inevitable if the point-counterpoint system is used. The facts are set out in the separate statement, but then it is necessary to address them all over again in the briefing. It is hard to draw out inferences from facts in the separate statement, which again forces the parties over to the briefing. Finally, as Judge Hamilton and others noted, compelling the parties to highlight material disputed facts in the briefs rather than in a separate statement reintroduces the discipline of page limits to the process.

The Committee listened to these comments and amended the draft rule significantly. It abandoned the proposal to require point-counterpoint statements and simplified the rule so that it now reads as follows:

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, . . .

or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. 56

In other words, as a different district judge put it, the Committee decided that it was best to require a simple procedure and to allow a district judge in a particular case to require more, rather than to start with a complex procedure as the default rule and to back off to the simple when possible.

There may be a more general lesson in that shift. In a well-meaning effort to create rules that live up to Rule 1’s goal of the “just, speedy, and

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inexpensive determination of every action and proceeding,”57 the tendency has been to try to anticipate every problem and to create a rule for everything. The Duke Conference, to which I referred earlier, brought together a wealth of empirical information showing that Rule 1’s aspiration is far from being realized, and it might even be receding. Most of the work done in this area has focused on discovery, and now, in the wake of the Supreme Court’s Twombly and Iqbal decisions,58 some of it is now looking back at the pleadings. My point in this lecture is to suggest that what may be even more important is to look forward to the one moment in the litigation when all of that information collected in discovery is sure to be used: the motion for summary judgment. I once, in a careless moment in an opinion, called this the “put up or shut up” moment in a case, and as a descriptive matter, that is true.

But should it be true? Do we really need a summary judgment motion in virtually every case? What if better empirical research shows us that summary judgment is not saving any money, from a systemic point of view? As I indicated, one message that came through loud and clear from the Rule 56 hearings that the Civil Rules Committee held in 2008 and 2009 is that lawyers have developed a very strong sense of entitlement to this procedural vehicle, and that they would complain loudly if it were taken away from them.

For that reason, District Judge Brock Hornby took the position in his article in the Green Bag that it is pointless to approach this issue from the tabula rasa perspective. Summary judgment is here to stay, he thinks, and so all we can do is tinker at the edges. In that spirit, he proposes renaming it “judgment without trial,” which at least abolishes the idea that there is anything expeditious about it. He also suggests that there should be a public hearing before any judgment without trial is given. This at least would bring it back out into the open and away from the respective offices of the lawyers and the judges.59

Maybe he is right, and this is all we can do. But it seems a shame to leave matters in such an unsatisfactory state. Even if our earlier efforts both with respect to discovery and with respect to summary judgment have done little more than illustrate the law of unintended consequences, we should still ask whether the lessons we have learned might help us to

57. FED. R. CIV. P. 1.
59. See Hornby, supra note 4.
do better in the future.

One such lesson, reflected in the new Rule 56, is that simpler is better. The more we put details in the rules, the more fodder we give to lawyers who will contest every comma and adjective if they have the chance. Simple principles, clearly stated, can be managed by responsible trial judges. Another lesson that has prompted some amendments to Rule 23, on class actions, but has not yet been reflected in many other rules, relates to the economics of the legal profession. Discovery and summary judgment are the engines of a lot of billing. No one wants to be the lawyer who failed to ask one more question, to take one more deposition, or to review one more document that would have made the difference between success and failure. Yet it is well known that some scorched-earth tactics are far out of proportion to the stakes of the case.

Perhaps, to throw out a radical suggestion, a party who wants to move for full or partial summary judgment should be required to seek the district judge’s permission to file the motion. If the judge thought that the motion would advance the case, he or she could grant permission and proceed that way. But if the judge thought that the case could just as efficiently or even more efficiently be brought to trial, then the judge could deny the petition to file. It is no secret that from the standpoint of the appellate court, fully tried cases present fewer issues for review. Summary judgments, after all, are reviewed de novo, and if the appellate court finds that the trial judge slid too quickly over disputed issues of material fact, back the case goes to the district court. Findings of fact by a jury are sacrosanct under the Seventh Amendment; evidentiary rulings and jury instructions given at trial are reviewed deferentially; and if the trial is to the court, the findings of fact can be overturned only if they were clearly erroneous. All in all, the appellate task is easier after a trial than it is following summary judgment.

I am a realist, and I do not expect that anyone will want to go forward with my proposal. What I do hope, however, is that scholars will turn their attention to the economics of summary judgment and test the proposition that it is a money-saver. A few people have begun this task, and given the centrality of the motion to modern civil litigation, it

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60. Indeed it seems that at least one district court judge has adopted a procedure where parties must request permission before filing a motion for summary judgment in particular types of civil cases. See E-mail from Chambers of Hon. David Folsom, U.S. Dist. Court for the E. Dist. of Tex., to Chambers of Hon. Diane P. Wood, U.S. Court of Appeals for the Seventh Circuit (October 25, 2010) (on file with author) (discussing such a requirement in patent cases).
cries out for more work. Despite the many cases that are diverted to alternative dispute resolution mechanisms, civil cases continue to occupy an important place in both federal and state court dockets. If we have managed this time to come up with the perfect rule on summary judgment, then we can all breathe a sigh of relief. But if frustrations with the system continue, it may be time for a deeper look at summary judgment, asking whether it is part of the solution or part of the problem.