

## Essay

### The Efficiency of Summary Judgment

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*Summary judgment provides several efficiencies essential to a smoothly running litigation system. Perhaps the most important feature of summary judgment is the “settlement premium” set forth in this Essay. When a motion for summary judgment is denied, the nonmoving party achieves a form of premium that enables a case to settle for an additional amount. Put simply, the settlement value of a case increases when a motion for summary judgment is denied. Thus, denials of summary judgment up the ante in the litigation game. This dynamic is underappreciated by summary judgment critics who over-focus on grants of summary judgment. The summary judgment premium would disappear if a Rule 56 device was discouraged or eliminated and possesses additional positive features. The possible denial of the motion discourages weak or frivolous requests. The substantial cost of a summary judgment motion supplements the efficient deterrent value of the summary judgment premium. A party will be reluctant to file a Rule 56 motion if the risk of loss is unacceptable. Other efficiencies make summary judgment the single most useful pretrial device. Rule 56 efficiencies produce both clarification of the factual dispute and the legal issues presented. Without summary judgment a case would appear to be less certain, making settlement less likely. Summary judgment motions also help jump start the involvement of the trial judge, who until the motion might be the prototypical uninvolved “umpire,” a relatively passive participant in the litigation process and one awaiting a call to a more active role in the case. A similar “premium” should deter frivolous motions to dismiss. Once the motion to dismiss is denied, the plaintiff should demand a premium in the form of enhanced consideration if the case is settled.*

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## I. INTRODUCTION

Critics argue that summary judgment is unconstitutional,<sup>1</sup> that summary judgment is granted too frequently,<sup>2</sup> and that the civil litigation system could survive without a dispositive motion like summary judgment.<sup>3</sup> These negative voices appear to be gaining new supporters<sup>4</sup> and are forcing proceduralists to reassess the inherent value of summary judgment. This Essay evaluates the utility of the summary judgment process. It identifies and explains the efficiencies triggered by the filing of a Rule 56 motion, and, in so doing, it emphasizes numerous positive features associated with the summary judgment procedure.<sup>5</sup> Summary judgment *is* efficient.

To be sure, summary judgment motions are costly and must be linked to the information needed to decide them. No discussion of summary judgment costs and benefits can ignore the costs of discovery, an expensive process necessary in the evaluation of summary judgment. Nonetheless, the fear of losing a motion for summary judgment causes an efficient “summary judgment premium,” a sum added to the settlement value of the case that is created by losing Rule 56 motions. This premium acts as a helpful deterrent to the filing of frivolous or baseless (and costly) summary judgment motions. Loss of a marginal summary judgment motion essentially means that the tactical position of the movant has been discounted or, put more crudely, that the loss has “upped the ante.”<sup>6</sup>

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1. Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007). *But see* Edward Brunet, *Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625, 1627 (2008) (asserting that trial by inspection satisfies the right to jury trial because it pre-dated 1791).

2. *See, e.g.*, Elizabeth Schneider, *The Changing Shape of Federal Pre-Trial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010) (lamenting the alleged overuse of summary judgment in civil rights cases); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1898 (1998) (warning that summary judgment can develop “into a stealth weapon for clearing calendars”).

3. *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 530 (2007) (asserting that eliminating summary judgment would have no impact on either the speed of litigation or the rate of settlement).

4. *See, e.g.*, Diane Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 243–44, 250 (2011) (arguing that summary judgment causes overinvestment in discovery and the trial judge should use discretion to discourage it).

5. For the rare academic article praising summary judgment and advocating that the motion become mandatory, see Randy J. Kozel & David Rosenberg, *Solving the Nuisance Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (advocating mandatory summary judgment, especially in class actions, to avoid inaccurate and premature settlements).

6. I am indebted to Michael Kaufman, Professor of Law and Associate Dean for Academic Affairs at Loyola University Chicago School of Law, for his insight that the process set forth here

Summary judgment is capable of achieving other efficiencies. A quick, introductory look at the impact of the opportunity to move for summary judgment demonstrates that summary judgment critics have overlooked the costs of making summary judgment unavailable and have underrated the fairness and utility of the summary judgment ethos.

*Summary Judgment's Fact Clarification Effect*

Summary judgment produces valuable fact clarification well before a plenary trial, a significant efficiency. The nonmovant is essentially forced to identify facts in the record that demonstrate issues of fact that need to be tried. This “put up or shut up”<sup>7</sup> feature forces the nonmovant and movant to advance cogent facts that either support or oppose summary judgment. The Rule 56 motion essentially mandates the pretrial production of facts by the party assigned the burden of persuasion at trial.<sup>8</sup>

*Summary Judgment's Law Clarification Effect*

Similarly, the availability of a summary judgment motion serves to focus the lens upon pending legal issues. The motion can be granted only where the movant is “entitled” to prevail under applicable legal principles.<sup>9</sup> Unlike settlement, which operates in the “shadow of the law,” summary judgment is based upon application of strict rules of law to a certain and settled set of facts.<sup>10</sup> As nicely put by Randy J. Kozel and David Rosenberg, the motion for summary judgment serves to prevent the hearing of untenable legal claims.<sup>11</sup>

This efficiency is not to be confused with the motion to dismiss for failure to state a claim or Federal Rule of Civil Procedure 12(b)(6). The motion operates upon a notion that decides pure legal issues that involve no disputed facts whatsoever. The presence of any disputed facts in a

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can be viewed as a discount.

7. My research assistant reports that this “put up” phrase has been used by federal courts 1235 times and by state court opinions 40 times. *See, e.g.,* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

8. *See generally* Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (creating a burden shifting dynamic by requiring a minimal showing by the movant who lacks the burden of persuasion and, in contrast, imposing on the nonmovant who lacks the persuasion burden, usually the plaintiff, the heavier burden of identifying proof that shows there are issues of fact for trial).

9. *See* FED. R. CIV. P. 56(a).

10. *See* EDWARD BRUNET & MARTIN REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 22–28 (3d ed. 2006) (discussing and providing examples of “law summary judgment” such as the statute of limitations or applicability of state action in constitutional litigation).

11. *See* Kozel & Rosenberg, *supra* note 5, at 1902.

Rule 12(b)(6) context requires a speedy conversion of the motion to dismiss into a Rule 56 motion for summary judgment.<sup>12</sup>

*The “Summary Judgment Premium”*

Critics focus on the grants of a motion for summary judgment and wrongly fail to assess a potentially efficient denial of summary judgment.<sup>13</sup> However, attention must be given to denials of summary judgment in order to fully appreciate the positive impact of Rule 56.

The motion is often denied, and, when this occurs, the case becomes more expensive to settle. In a very real sense, a summary judgment premium arises at the time a Rule 56 motion is denied. When a motion for summary judgment is denied, the settlement value of a claim increases. This dynamic benefits the nonmovant, normally the plaintiff, and should be more fully appreciated.

*The Summary Judgment Premium Deters Frivolous Motions*

The possibility of denial of the summary judgment motion and the creation of a summary judgment premium play a valuable role in deterring the filing of frivolous summary judgment motions. Filing the motion activates the movant’s risk of triggering a settlement premium. Awareness of this possibility serves a useful function of deterring frivolous costs.

The filing of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is likely to create a similar settlement premium. There appears little chance that the ante will not increase following the denial of a motion to dismiss. Essentially, the denial of this motion means the plaintiff’s claim is theoretically possible. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.”<sup>14</sup> A claim

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12. See, e.g., *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215–16 (10th Cir. 2007) (affirming conversion of motion to dismiss into a motion for summary judgment); BRUNET & REDISH, *supra* note 10, at 63–68 (discussing conversion of Rule 12(b)(6) motions to motions for summary judgment). *Celotex* appropriately connected the dots between the nature and quantum of proof needed to get to trial and the burden of persuasion. This connection is good policy and was urged in leading articles by David Currie and Martin Louis. See Martin Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 753–54 (1974) (proposing reform for a party’s burden of persuasion); David Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 72–79 (1977) (clarifying the relationship between summary judgment and directed verdicts).

13. See, e.g., D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 875 (2006) (“[A]voiding trials reduces costs, but that savings is only realized when the motion is granted.”).

14. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.<sup>15</sup> The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.<sup>16</sup> Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility of ‘entitle[ment] to relief.’”<sup>17</sup>

*Summary Judgment Activates the Trial Judge By Creating A Major Event That Requires Focused Attention*

Other efficiencies spin from the maligned motion for summary judgment. The prototypical passive judge<sup>18</sup> is awakened and thrown into heavy action by the filing of a Rule 56 motion. This characteristic requires engagement of the assigned trial judge and, in so doing, introduces an entity, the trial judge, who is capable of efficient judicial action.

Related efficiencies associated with Rule 56 include holding a pretrial event. This “event”-creation capability serves to drive or propel a civil case. Cases need action as well as a call to action. The motion for summary judgment is often the initial major event in a case. In a very real sense, a summary judgment motion serves as a wake-up “marker.” The judge who might be passively avoiding total commitment to an assigned case can instantly find herself thrust into the active phase of litigation.<sup>19</sup> The nature of the claims and defenses asserted by the disputants fail to emerge without the filing and consideration of a motion for summary judgment. Once the motion is filed, the litigation is transformed into a real dispute that is connected to the parties.<sup>20</sup>

The remainder of this Essay explores in more detail the efficiencies described in the Introduction. Some of these procedures appear more valuable and effective than others. On balance, Rule 56 represents a

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15. *Id.* at 556.

16. *Id.*

17. *Id.* at 557.

18. See generally Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975) (setting forth a model judge as a passive individual unwilling to take charge of the case).

19. *Id.*

20. See generally Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2665 (1995) (analyzing the circumstances under which cases should be settled).

valuable norm that advances disputes in a manner essential to case management.

## II. SUMMARY JUDGMENT PRODUCES INVALUABLE CLARIFICATION OF THE FACTS

Modern litigators live in the era of *Ashcroft v. Iqbal*<sup>21</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>22</sup> These cases have cast a sea of doubt around the Rule 12(b)(6) motion to dismiss and caused commentators to reexamine summary judgment in the context of the major changes created by these landmark pleading cases.<sup>23</sup> I stress the word “pleading” whenever focusing on these cases. These are mere pleading cases that should be narrowly limited and only applied to the pleading stage and should not be broadly read as changing summary judgment’s focus on the facts. Summary judgment should involve focus on mature facts, often garnered in discovery. Once discovery has concluded, the facts become close to settled, and the opportunity to file a motion for summary judgment becomes tempting.

Only a full dress trial finds facts. Only summary judgment succeeds in achieving a degree of factual clarification in the dominant pretrial phase of litigation. These oversimplifications establish summary judgment as a trial-like mechanism with the power to dismiss a case where no factual issues exist and the substantive law supports the moving party.

The beauty and efficiency of summary judgment lies in its flexibility of timing.<sup>24</sup> Rule 56 procedure allows the movant a major dose of discretion to file a summary judgment request when the facts become clear. This open, textured attitude helps create a norm that sweeps the

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21. 556 U.S. 662 (2009) (reaffirming the new “plausibility standard” to be used to assess pleadings in Rule 12(b)(6) motions in all types of civil cases). For a view critical of this standard see Edward Brunet, *The Substantive Origins of Plausible Pleadings*, 14 LEWIS & CLARK L. REV. 1, 1 (2010) (tracing the history of the word “plausible” and finding that the word appears to have a substantive historical meaning that an antitrust claim “makes no economic sense”).

22. 550 U.S. 544 (2007) (rejecting the *Conley* “beyond doubt” test, retaining the *Conley* notice pleading standard, and mandating that a claim must be “plausible” to survive a motion to dismiss under Rule 12(b)(6)).

23. See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH U. J.L. & POL’Y 61, 62 (2007) (arguing that *Twombly* involved a disguised summary judgment motion); Suja Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 17 (2010) (emphasizing similar standards to assess summary judgment and motions to dismiss).

24. See generally Edward Brunet, *The Timing of Summary Judgment*, 198 F.R.D. 679, 680 (2001).

various fruits of discovery into play and permits discovery to effectively become fact, assuming no major factual issues are presented.

Judge Diane Wood has described summary judgment's requirement that the nonmovant advance facts as a "put up or shut up moment" in a lawsuit, the time "when a [nonmoving] party must show what evidence it has" to enable it to convince the trier of fact.<sup>25</sup> The "put up" reference in this time-worn cliché clearly refers to a need to advance facts in order to merit a trial, a mandate that seems reasonable. Without additional proof backing one's case—the "put up" mandate—a party faces a "shut up" procedure in the form of a dismissal of the case.

Of course, no procedure is cost-free, and summary judgment motions, like all civil procedure norms, need to be assessed from a cost-benefit point of view. In an important article, Judge Wood recently connected the "put up or shut up" concept with investment in discovery.<sup>26</sup> She reads the trilogy<sup>27</sup> as requiring the nonmoving party to (over)invest in discovery in order to avoid summary judgment.<sup>28</sup> She also stresses that summary judgment motions have excessive costs to both the parties and the courts, and challenges the generally accepted wisdom that paints Rule 56 as a cost-saving mechanism. In a surprisingly negative assessment of summary judgment, Judge Wood concludes by urging that counsel seek trial-judge approval before filing a summary judgment motion, a seemingly radical idea that amounts to seeking permission to evaluate whether a trial is really needed.<sup>29</sup>

Judge Wood's provocative and thoughtful analysis of summary judgment merits careful reflection. Her specific suggestion requires the moving party for summary judgment to seek prior judicial approval as a condition of judicial consideration of a Rule 56 motion. This change would, of course, add yet another layer of procedure to the costly and complicated litigation process. This reform is not unlike a procedure urged by the Manual for Complex Litigation, which grants the assigned judge the discretion to hold a pretrial conference "to ascertain whether

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25. See *Koszola v. Bd. of Educ. of Chi.*, 385 F.3d 1104, 1111 (7th Cir. 2003). This phrase appears to have been used first in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). See *supra* note 7 and accompanying text (discussing usage of the phrase "put up or shut up").

26. Wood, *supra* note 4, at 243–44 (noting that the connection between discovery costs and discovery were "hardly touched upon at [a] Duke" University conference).

27. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

28. See Wood, *supra* note 4, at 240 ("[T]he 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.").

29. *Id.* at 250.

issues are appropriate for summary judgment” and to decide whether summary judgment would aid case termination.<sup>30</sup>

Because summary judgment motions frequently have excessive costs, Judge Wood’s idea has value. Her concern for some means to counter the rising costs of discovery seems accurate. Her new theory would surely deter some summary judgment motions that should never see the light of day. Nonetheless, it would surely be capable of over-detering Rule 56 requests that might otherwise be granted. The free-wheeling, unpredictable nature of a plan to seek approval of a summary judgment request seems problematic. The procedure advocated for this Rule 56 approval seems vague and difficult to implement with any degree of precision.<sup>31</sup> Due process concerns appear legitimate in such an undefined setting.<sup>32</sup> The effort to talk the court into receiving a summary judgment motion seems bound to involve submissions of proof. Careful counsel will likely request that these early conferences be more formal than may be desirable; it is not unlikely that the (putative) moving party will want a court reporter present to memorialize the position of a judge and other informed adversaries. It is ironic that the proposal advanced by a very respected judge should be rejected because of its intentionally informal nature. I stress that the cost of this procedure appears excessive and the risk of inaccurate conclusions seems troubling.

### III. SUMMARY JUDGMENT PROCEDURE CLARIFIES QUESTIONS OF LAW AND PROVIDES CRUCIAL PRETRIAL FOCUS ON THE LEGAL ISSUES PRESENTED BY THE LITIGATION

Just as a Rule 56 motion helps to clarify facts, summary judgment also aids clarification of the law. The nonexistence of factual issues will not, of course, dispose of a case. A pending civil suit can be terminated only if legal principles demonstrate that a party should prevail. In other words, summary judgment, like plenary trial itself, involves a dual emphasis on facts and law. The phrase “entitled to judgment as a matter of law” is not a mantra and strictly mandates the denial of the motion unless the law unambiguously supports the moving party.<sup>33</sup>

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30. MANUAL FOR COMPLEX LITIGATION § 11.34 (4th ed. 2008).

31. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (requiring a form of due process that leads to precise and accurate results).

32. *See id.* at 345–46 (connecting accuracy values and due process fairness).

33. *See, e.g.*, BRUNET & REDISH, *supra* note 10, § 2.2(a).

Summary judgment can represent a battle that exclusively regards facts. The import of legal norms is sometimes overlooked in this effort to determine if issues of fact are presented. My point is straightforward: the requirement that the movant be entitled to judgment as a matter of law provides a reality check to the disputants and a valuable message to the judge.

While the need for clarification of legal issues by more particular pleadings has clearly been enhanced by the “plausible pleading” requirement of *Twombly* and its progeny, a motion for summary judgment provides a superior and more accurate post-pleading inquiry into whether a claim is supported by substantive law. This look at the law seems far more advanced than that provided by the motion to dismiss for failure to state a claim and suggests that summary judgment’s requirement for legal support enhances a productive examination of whether the claim or the defense is legally supported. In essence, the summary judgment assessment should determine whether the legal claim challenged is legally tenable.<sup>34</sup>

#### IV. SUMMARY JUDGMENT CONSIDERATION FACILITATES SETTLEMENT BY CREATING A “SETTLEMENT PREMIUM” AND ADVANCING CERTAINTY

The motion for summary judgment also aids settlement in several different ways. Its production of both facts and relevant legal norms increases decisional certainty. As certainty increases, the parties are able to more accurately assess the risks of trial. Settlements tend to occur when the disputants see the handwriting on the wall and are guided by a clear sense of what will likely happen at a full trial.<sup>35</sup> Discovery, of course, promotes gathering of facts that will contribute to certainty.

Many commentators note that uncertainty deters settlement.<sup>36</sup> A quick look at this axiom from the perspective of both contingent-fee plaintiffs’ attorneys and insurance defense counsel provides useful insights. The work environment of the plaintiffs’ attorney can be characterized as “a world of contingency or the likely,” where a quantum of uncertainty exists.<sup>37</sup> These litigators would “refer out” or

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34. See Kozel & Rosenberg, *supra* note 5, at 1902.

35. See, e.g., EDWARD BRUNET, CHARLES B. CRAVER & ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE* 76–77 (4th ed. 2011).

36. See, e.g., ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 85–87 (2003) (explaining how the parties’ divergent expectations regarding the risks of trial will frustrate settlement and how similar expectations of results will normally lead to settlement).

37. See Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers: Dealing With the Possible But Not Certain*, 60 DEPAUL L. REV. 337, 344 (2011) (asserting that plaintiffs’ attorneys work in a

decline representation in the context of a “truly uncertain or random” dispute with excessive risk of loss.<sup>38</sup> Put differently, Stephen Daniels and Joanne Martin term this scenario as “contingent” and define this world as “knowable but not predictable.”<sup>39</sup>

The calculus of assessing a case from the defending party’s perspective is not dissimilar. Counsel for the defendant assesses risk carefully but often with the potential advantage of possessing asymmetric information, particularly when the representation is financed by an insurance company, a firm usually data-rich and in the business of collecting and analyzing information. Like plaintiffs’ attorneys, the presence of a modest amount of risk may lead a defense attorney to a decision to settle, but I acknowledge that “uncertainty can be a prime driver of settlements.”<sup>40</sup>

Consider the task of a mediator assigned to help resolve a complex case without the motion for summary judgment. Without Rule 56, the parties neglect to point to or prepare for a significant event in the case, a consideration of a motion for summary judgment. The mediator has very little material to prepare and inform him regarding the nature of the case. The presence of both *Iqbal* and contrasting Rule 12(b)(6) cases fail to satisfy the judge’s desire for additional information. Mediation briefs might help inject useful information into the case but are often capable of creating further factual uncertainty. A litigating universe lacking summary judgment makes the mediator’s job harder by forcing the mediator to prepare and assess the case in a way not that different from summary judgment. Because the assessment is prepared by the mediator—someone unfamiliar with the legal and factual questions presented in the case—the cost of the mediation will increase substantially. Put differently, the incentives and information advantages held by the disputing parties would be lost in a summary-judgment-free world.

Failure to have a summary judgment process has a different cost: the lack of a “settlement premium.” The denial of a summary judgment request seems to set up a real probability that the case will proceed to a risky and costly trial. What this effectively does is to help the plaintiff collect a greater dollar amount than would be possible without the motion.

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world of contingency where results are uncertain but provide enough chance that a plaintiff’s representative will take a case and the accompanying risk of loss).

38. *Id.* at 337–38.

39. *Id.*

40. Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627, 643 (2011).

The flip side of a summary judgment process is that the parties should avoid filing a likely-to-lose Rule 56 motion. Losing activates the “settlement premium” described above. The prudent defendant has the incentive to file only Rule 56 motions that are probable winners to avoid paying this premium. These dynamics efficiently deter the filing of any low-quality summary judgment motions and make attorneys appropriately cautious regarding the filing of a summary judgment request. The availability of a Rule 12(b)(6) motion to dismiss for failure to state a claim merits consideration and comparison regarding a possible “premium.” If the motion to dismiss is denied, will a “premium” similar to the summary judgment premium be created? This question appears speculative and rests upon an uncertain foundation. The denial of a motion to dismiss often validates that the claimant possesses a valid legal theory, which means that the mere presence of some or even one issue of fact will prevent pretrial dismissal of the case. Yet, the impact of the outright denial of a Rule 12(b)(6) motion is surely less than a summary judgment motion because of the disability of the former to decide issues of fact and the ability of a summary judgment to provide a measure of factual certainty.

#### V. SUMMARY JUDGMENT FACILITATES SETTLEMENT BY PROVIDING A HELPFUL MARKER TO “HOLD AN EVENT”

Throughout the United States, numerous courts hold events to provide the parties with an opportunity to settle a case. Sometimes called “settlement days,” these events force the parties to at least meet and confer about possible alternatives to trial. Typically, these events are the primary focus of the judge who sponsors the chosen settlement effort, and trials are placed on hold during the period dominated by the peacemaking opportunity. Some courts hold “Mediation Week” by deputizing many lawyers and judges as alleged “mediators” in an effort to clear dockets using mass-production techniques.

Heavy reliance on summary judgment’s “killer motion” character has led some judges and commentators to question the fairness of Rule 56. Summary judgment is assumed by these critics to be too common and frequent, particularly in civil rights cases.<sup>41</sup> While it is true that the Rule 56 motion acts to rid the docket of many civil rights cases, the prevailing data commissioned by the Federal Judicial Center fails to

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41. See, e.g., Elizabeth Schneider, *The Dangers of Summary Judgment: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519 (2010) (arguing that changes to federal pretrial practice stemming from recent Supreme Court decisions have led to a disproportionate number of dismissals in cases dealing with civil rights and employment discrimination).

support the mythology that summary judgment grants or motions are a routine feature of every case. A respected Federal Judicial Center empirical study of summary judgment activity found that the motion is only made in 17 of every 100 cases terminated, hardly a filing rate descriptive of procedural overuse.<sup>42</sup>

#### VI. SUMMARY JUDGMENT INSERTS THE PASSIVE TRIAL JUDGE INTO THE LITIGATION

Commentators assert that the typical adversary-model trial judge is passive and similar to an umpire.<sup>43</sup> Judge Marvin Frankel describes the typical judge as “ignorant and unprepared” and describes these words as “axioms of the system.”<sup>44</sup> Rather than taking charge of a case and aggressively administering the litigation, the mythological adversary-model trial judge waits for the parties to provide a spur to action.<sup>45</sup>

This characterization of a judge as lacking information while also passive appears structurally sound. The adversary parties “own” their dispute and the judge is a latecomer to the dispute and the relevant information surrounding it. Until there is motion activity in a civil case, the judge may not have any reason to become familiar with the facts or circumstances relevant to the case and is positioned far behind the parties and their attorneys in the knowledge of the factual issues.

The trial judge is essentially “out of it” and is distanced from the parties and the core of the dispute. I have theorized about this problem of the passive and comparatively under-informed judge and even graphed the court’s position as outside the “triangle of negotiation,” a situs desired by litigation protagonists.

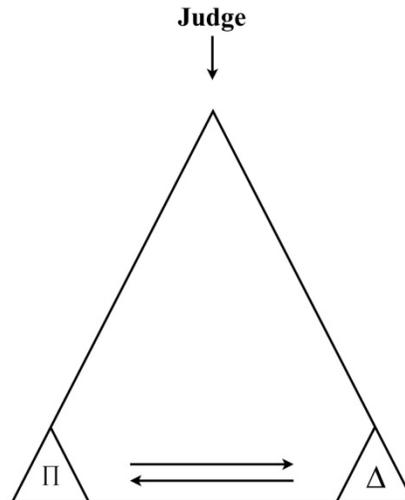
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42. JOE S. CECIL, DEAN P. MILETICH & GEORGE CORT, FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS 3 (2001), available at [http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Sources\\_Datasets\\_American\\_Trial\\_Trends/Trends\\_Summary\\_Judgment\\_Practice\\_Preliminary\\_Analysis.pdf](http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Sources_Datasets_American_Trial_Trends/Trends_Summary_Judgment_Practice_Preliminary_Analysis.pdf).

43. See, e.g., Frankel, *supra* note 18, at 1042–43 (1975) (asserting that the adversary system fails to permit effective judicial intervention regarding factual issues).

44. *Id.* at 1042.

45. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 400–02 (1982) (asserting that federal judges in the adversary model often do take charge of a dispute assigned to them in a fashion both authorized by Rule 16 and in a manner consistent with the investigative model of adjudication).

**Graph #1: The Typical Judge**

Consider this graph depicting the negotiation between the parties  $\Pi$  and  $\Delta$ . Note the structural position of the trial judge who is distant from the fray and in a weak position to aid the settlement process. Something needs to happen to activate the court that supposedly is a “judicial manager.”

The weakness of the Rule 12(b)(6) motion to dismiss and the Rule 12(e) motion for a more definite statement has helped create a powerful version of summary judgment. These motions have been so difficult to grant that litigators are deterred when considering filing either a motion to dismiss for failure to state a claim or a motion for a more definite statement. Today’s judges understand these truths quite well and have understandably turned to summary judgment as a potentially utilitarian, dispositive tool.

The landmark *Celotex Corp. v. Catrett* decision clearly authorized a degree of summary judgment activism by its burden shifting mechanic and its unambiguous and gratuitous blessing of *sua sponte* summary judgment.<sup>46</sup> The latter procedure arms the trial judge with the unbridled discretion to raise the propriety of summary judgment in a manner that resembles the inquisition model of judging rather than the adversary

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46. 477 U.S. 317, 323–26 (1986).

model.<sup>47</sup> Yet, the discretion to entertain and suggest Rule 56 motions *sua sponte* has clear limits.

The success of and respect afforded the Manual of Complex Litigation provides further evidence that today's judge is not typically passive and, instead, is now authorized to assert control over the disputants and their attorneys. The Manual is popular with federal judges because it sets forth a roadmap guide to facilitating administration of a so-called complex case. Summary judgment procedure plays a major role in the Manual's treatment of complex litigation. The text of the current Manual extols the ability of summary judgment to eliminate factual issues and "reduce the scope of discovery and trial."<sup>48</sup> The Manual also appropriately quotes the *Celotex* opinion's effort to rehabilitate the motion for summary judgment by asserting that a Rule 56 motion is "not . . . a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules."<sup>49</sup>

## VII. CONCLUSION

Summary judgment, like any litigation procedure, possesses both benefits and costs. Recent evaluation of the summary judgment device sets forth a long litany of worries concerning modern Rule 56 usage. Critics of the summary judgment mechanism emphasize the relationship between the high costs of discovery and the need to use discovery when filing a Rule 56 motion. Judge Wood has recently written that summary judgment is to blame for the rise of discovery costs and now is on record as questioning the efficiency of summary judgment. Other summary judgment critics opine that summary judgment is granted too often, which denies access to justice. Alternatively, others assert that efficient case processing could exist without summary judgment and offer a litigation landscape that they think could operate just as well without the motion.

This Essay highlights several positive features of summary judgment that critics appear to have overlooked. The list of efficient effects that derive from summary judgment is impressive. Summary judgment provides fact clarification, an important feature of any decision making context, including case adjudication. Without clear information, adversaries cannot make rational decisions. The "put up or shut up" nature of the burden-shifting responsibility achieves a useful dose of

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47. See W. Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 85 AUSTL. L.J. 390, 394-96 (1981).

48. MANUAL FOR COMPLEX LITIGATION, *supra* note 30, § 11.34.

49. *Id.*; *Celotex*, 477 U.S. at 327.

facts essential to case evaluation. Similarly, summary judgment also injects legal analysis through its requirement that the moving party show that it is entitled to judgment as a matter of law. The ability of the parties or court to assess law as well as fact prior to a plenary trial is central to all of litigation and an indispensable characteristic of procedure theory. Summary judgment motions provide a means for a party to achieve a pretrial look at a dispute to ensure that the law supports the claim or defense pleaded.

Without summary judgment, the pretrial assessment of a case would be highly unpredictable and haphazard. A litigant would lack the means to formalize a judge's pretrial evaluation of the strength of a case. While case assessment can occur unilaterally by the client and the attorney, the evaluation of a case by a judge has far greater impact and formal value. Elimination of a means to provide a potentially dispositive case assessment before trial comes at a very high cost and runs counter to settlement theory.

Perhaps the most important feature of summary judgment is the "settlement premium" set forth in this Essay. When a motion for summary judgment is denied, the nonmoving party achieves a form of premium that enables a case to settle for an additional amount. Put simply, the settlement value of a case increases when a motion for summary judgment is denied. Denial of summary judgment motions up the ante in the litigation game. Summary judgment critics would likely disappear if a Rule 56 device is discouraged or eliminated.

The summary judgment premium has additional positive features. The possible denial of the motion discourages weak or frivolous requests. The cost of a summary judgment motion supplements the deterrent value of the summary judgment premium. A party will be reluctant to file a Rule 56 motion if the risk of loss is unacceptable.

I conclude on a quantitative note. Numerous critics of summary judgment overemphasize the grant of a rule 56 motion and contend that the grant rate of summary judgment is somehow too high. These summary judgment hawks ignore the powerful impact of a denial of a motion for summary judgment. The deterrence impact of the risk of losing the motion causes weak or risky summary judgment requests to be placed on the cutting-room floor. A focus on only motion grants distorts the story. Rational defendants and their counsel are likely to file only high-quality Rule 56 motions. This may explain why grant rates are higher than anticipated. Failure to prevail when moving for summary judgment carries a high price: the summary judgment premium, which is payment owed to the nonmoving party because of exposure to the risk of trial.