Trends in Summary Judgment Practice: 1975–2000

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Executive Summary

Summary judgment in federal courts has been widely regarded as an initially underused procedural device that was revitalized by the 1986 Supreme Court trilogy of Celotex, Anderson, and Matsushita. Some commentators believe summary judgment activity has recently expanded to the point that it threatens the right to trial. We examined summary judgment practice in six federal district courts during six time periods over twenty-five years (1975–2000), extracting information on summary judgment practice from 15,000 docket sheets in random samples of terminated cases. We found that the likelihood of a case containing one or more motions for summary judgment increased *before* the Supreme Court trilogy, from approximately 12% in 1975 to 17% in 1986, and has remained fairly steady at approximately 19% since that time. Although the number of summary judgment motions has increased over this twenty-five year period, this increase reflects, at least in part, an increase in filings of civil rights cases that have always experienced a high rate of summary judgment motions. Surprisingly, no statistically significant changes over time were found in the outcome of defendants' or plaintiffs' summary judgment motions, after controlling for differences across courts and types of cases. These findings call into question the interpretation that the trilogy led to expansive increases in summary judgment. Our analysis suggests, instead, that changes in federal civil rules and case management practices before the trilogy may have been more important in bringing about changes in summary judgment practice.

I. Introduction

Common perceptions regarding summary judgment have undergone a remarkable transformation in the past two decades. Before the Supreme Court's trilogy of decisions in 1986,¹ summary judgment was seen as an underused and somewhat awkward tool that invited judicial distrust.² The trilogy has been widely viewed as a turning point in the use of summary judgment, signaling a greater emphasis on summary judgment as a necessary means to respond to claims and defenses that lack sufficient factual support. Over the past two decades some commentators have worried that courts now rely too heavily on summary judgment and other procedural methods of disposing of cases before trial.³

A recent article by Arthur Miller brought into focus a number of concerns arising from changes in federal case dispositions that have emerged since 1986.⁴ Professor Miller argues that courts too often slight litigants' right to their day in court by emphasizing efficient resolution of disputes and entering summary

3. Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1935 (1998) ("Its flame lit by *Matshusita, Anderson* and *Celotex* in 1986, and fueled by overloaded dockets of the last two decades, summary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes."). *See also* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 378–80 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 512, 530 (1986).

^{1.} Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (clarifying the burden placed on the party moving for summary judgment); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (holding that a motion for summary judgment must be measured against the standard of proof at trial, and making the standard of proof for summary judgment the equivalent of the standard for a directed verdict); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (holding that a plaintiff with an inherently implausible claim must support it with more persuasive evidence than would otherwise be necessary to defeat a motion for summary judgment). A thorough consideration of federal summary judgment practice is found in Edward Brunet & Martin H. Redish, Summary Judgment: Federal Law and Practice (3d. ed. 2006).

^{2.} Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 Law & Contemp. Probs. 144, 158 (1948) ("[E]nough doubt has been developed about the practice—beyond the motions involving relatively clear questions of law alone—to deprive it of its fullest utility as yet."). In an often-cited passage written before the trilogy, Judge William Schwarzer noted that summary judgment "is plagued by confusion and uncertainty. It suffers from misuse by those lawyers who insist on making a motion in the face of obvious fact issues; from neglect by others who, fearful of judicial hostility to the procedure, refrain from moving even where summary judgment would be appropriate; and from the failure of trial and appellate courts to define clearly what is a genuine issue of material fact." William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). (Judge Schwarzer was director of the Federal Judicial Center from 1990 to 1995.)

^{4.} Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003).

judgment in disputes that are better left for resolution by trial. He attributes the increased use of summary judgment to the Supreme Court trilogy, which

transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation. Since then, federal courts have employed summary judgment, and more recently the motion to dismiss for failure to state a claim, in cases that before the trilogy would have proceeded to trial, or at least through discovery.⁵

Legal scholars have noted the drop in the federal trial rate,⁶ perceived growing skepticism among the judiciary regarding civil rights cases,⁷ and expressed concern about what they view as a more assertive use of a variety of case management techniques.⁸ In light of these concerns, many now regard summary judgment as the prime suspect in bringing about the declining trial rate⁹ and inviting judges to intrude into disputes that exceed their traditional authority, even to the point of threatening the right to jury trial under the Seventh Amendment.¹⁰ Much of this concern is traced back to the Supreme Court trilogy. Recently Martin Redish noted that after the trilogy the number of civil trials began to decline from a high point in 1985. He concludes,

it is not unreasonable to suspect that one of the primary contributors to [the decline in civil trials], at least at the federal level, has been the Supreme Court's substantial modification and expansion of the modern doctrine of summary judgment.¹¹

In fact, little is known about the manner in which summary judgment functions and the extent to which it has contributed to the recent decline in civil trials. Published opinions involving summary judgment appear to have increased in recent

^{5.} Id. at 984.

^{6.} See, e.g., Gillian Hadfield, *Where Have All the Trials Gone?*, 1 J. Empirical Legal Stud. 705 (2004), and other articles in that special issue of the journal.

^{7.} Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988) (finding that plaintiffs in civil rights cases were sanctioned under Rule 11 more frequently than defendants).

^{8.} Supra note 3.

^{9.} Martin H. Redish, Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix, 57 Stan. L. Rev. 1329, 1333 (2005).

^{10.} Miller, *supra* note 4. See also Suja A. Thomas, Why Summary Judgment Is Unconstitutional, 93 Va. L. Rev. 139 (2007); and John Bronsteen, Against Summary Judgment, 75 Geo. Wash. L. Rev. 522 (2007).

^{11.} Redish, *supra* note 9. Exceptions to this general view are Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 163 (2000) (suggesting that the trend toward greater reliance may have been underway at the time of the trilogy); David L. Shapiro, *The Story of* Celotex: *The Role of Summary Judgment in the Administration of Civil Justice, in* Civil Procedure Stories 343, 364 (Kevin M. Clermont ed., 2004) ("[H]ard data to support the view that the trilogy has dramatically increased the availability and use of summary judgment in the lower courts are difficult to come by."); and Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591 (2004) (relying, in part, on some of the data reported in this study).

years, but analyses based only on published opinions are unreliable indicators of overall activity because denials of summary judgment motions are unlikely to be published. Such analyses may also misinterpret changes in incidence of summary judgment that arise as a consequence of shifts in the composition of caseloads with no change in incidence of summary judgment within case types. For example, an increase in summary judgment activity over time may be due to a growth in filings of certain types of cases, such as civil rights cases, which have an unusually high level of summary judgment activity.

Our study is the first to examine summary judgment practice and outcomes based on a review of docket sheet entries across multiple courts and multiple time periods for specific types of cases. Most legal scholars have attempted to assess summary judgment practice and the effect of the trilogy by reviewing published cases.¹² However, relying only on published cases ignores the disposition of cases with summary judgment motions that are never recorded as formal opinions in the federal reporters or included in computerized legal reference systems. Because the denial of a summary judgment motion may not generate a formal opinion that meets standards for publication or inclusion in a computerized legal reference system, these instances escape the notice of scholars who rely only on published opinions. Burbank, in his review of empirical research on summary judgment,¹³ condemns such analyses as inherently misleading.¹⁴

This study examines summary judgment practice in six federal district courts across six time periods from 1975 to 2000, including four time periods that follow the Supreme Court trilogy. This study addresses the following questions:

- Have motions for summary judgment increased since 1975?
- Are motions for summary judgment more likely to be granted since 1975?
- Are cases more likely to be terminated by summary judgment since 1975?
- If summary judgment practice has changed over time, are changes in summary judgment practice limited to certain courts or to certain types of cases?

If summary judgment practice has changed over time, to what extent are the changes due to the Supreme Court trilogy?

^{12.} See, e.g., Gregory A. Gordillo, Note, Summary Judgment and Problems in Applying the Celotex Trilogy Standard, 42 Clev. St. L. Rev. 263, 278–79 (1994) (relying on district court decisions published in WESTLAW); Samuel Issacharoff & George Lowenstein, Second Thoughts about Summary Judgment, 100 Yale L.J. 73, 91 (1990) (relying on published district court opinions that refer to Celotex); and Mollica, supra note 11, at 143 n.15 (relying on published appellate court opinions).

^{13.} Burbank, *supra* note 11, at 604 ("Both my own empirical work and that of many other scholars long ago persuaded me that the picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted, that, in other words, the law in the books is not a reliable guide to the law in action."

^{14.} Exceptions to this pattern of relying on published cases are found in Burbank, *supra* note 11, Hadfield, *supra* note 6, and Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 232 Hofstra Lab. & Emp. L.J. 45 (2005).

II. Design of the Study

Data on motions for summary judgment were collected as parts of several separate studies and were then combined for this analysis. The district courts and the time periods from which cases were sampled are briefly described below, along with a description of the individual data collection efforts.¹⁵

A. Courts

This study examined summary judgment practice in the federal district courts in the District of Maryland, the Eastern District of Pennsylvania, the Southern District of New York, the Eastern District of Louisiana, the Central District of California, and the Northern District of Illinois. Three of the courts—Maryland, Eastern Pennsylvania, and Central California—were selected for this study because of our access to data concerning summary judgment activity that were previously collected for an earlier, broader study of case management practice. The three remaining district courts—Eastern Louisiana, Southern New York, and Northern Illinois—were selected for their past reputations, earned or not, for restrictive application of summary judgment.¹⁶ These three courts permit an assessment of summary judgment practice in courts that were most likely to respond to the Supreme Court trilogy. Together these six courts terminated 20% of the civil cases in federal district courts in 2000.

^{15.} For a more detailed discussion of the design of this study, see Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. Empirical Legal Stud. (forthcoming 2007).

^{16.} The Southern District of New York is located in the Second Circuit, which was instrumental in developing the "slightest doubt" standard for summary judgment and has historically been perceived as pursuing restrictive standards for summary judgment. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986) (noting the "perception that this court is unsympathetic to [summary judgment] motions and frequently reverses grants of summary judgment," and arguing that after the trilogy summary judgment is not a disfavored motion in the Second Circuit.) See also Second Circuit Committee on the Pretrial Phase of Civil Litigation, Final Report of the Committee on the Pretrial Phase of Civil Cases (June 1986) ("Steps should be taken to dispel the prevalent misconception that summary judgments are disfavored in this Circuit and to clarify the standards of appellate review of summary judgment rulings, with the aim of making accelerated dispositions more readily available in appropriate cases."). The infrequency of motions for summary judgment in the Northern District of Illinois was documented in William P. McLauchlan, An Empirical Study of the Federal Summary Judgment Rule, 6 J. Legal Stud. 427 (1977). The Eastern District of Louisiana is in the Fifth Circuit, which has offered a number of the most often quoted restrictive standards for summary judgment. According to one author, the Fifth Circuit has been so inclined to reverse summary judgments that "one district judge in New Orleans posted the sign, 'No Spitting, No Summary Judgments.'" Steven A. Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183-4 (1987). Information on summary judgment practice in the Eastern District of Louisiana during 1975 also was available from earlier studies by the Federal Judicial Center. See Flanders, infra note 17.

B. Time Periods

Data for this study were taken from random samples of cases terminated during six time periods, each covering twelve consecutive months. The earliest sample was drawn from cases terminated between July 1, 1974, and June 30, 1975.¹⁷ For convenience these are referred to as 1975 cases, consistent with the designation of the year used by the record system of the Administrative Office of the U.S. Courts, from which the sample was drawn. We also drew random samples of cases terminated in 1986, 1988, 1989, 1995 and 2000. Table 1 shows the number of cases sampled and examined for summary judgment activity across the six time periods. The comparison of summary judgment activity in the 1986 cases and the 1988 cases is of particular importance because two of the three Supreme Court summary judgment decisions were handed down in June of 1986.¹⁸ We expected that changes in summary judgment practice in response to the trilogy would be detected in cases terminated between approximately nine and twenty-one months after the Supreme Court decisions. Such a time period would permit judges and attorneys to become aware of the decisions and rely on these standards in their summary judgment motions practice.¹⁹

C. Data Collected

Evidence of motions for summary judgment and partial summary judgment was coded from civil docket sheets, as was the moving party (i.e., plaintiff or defendant), whether the motion was granted in whole or in part, whether the motion terminated the case, whether there was an appeal from motions that were granted, and the outcome of any appeal. To permit a richer description of summary judgment practice, the information taken from the docket sheets was combined, for each case, with statistical information gathered by the Administrative Office of the U.S. Courts.²⁰ The study did not examine the timing of motions for summary judgment, materials offered to support the motion, the relationship of summary

^{17.} This data collection effort is described in Steven Flanders, Case Management and Court Management in United States District Courts (Federal Judicial Center 1977), and in Paul R.J. Connolly & Patricia A. Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980).

^{18.} Anderson v. Liberty Lobby and Celotex v. Catrett were decided on June 25, 1986. Matsushita v. Zenith Radio Corp. was decided on March 26, 1986.

^{19.} The data collection strategy is discussed in greater detail in Joe S. Cecil et al., *supra* note 15.

^{20.} The dataset, Federal Judicial Center Federal Court Cases: Integrated Data Base (IDB) (1970–2000), is available through the Inter-University Consortium for Political and Social Research at the Institute for Social Research at the University of Michigan (http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/08429.xml) (last visited August 30, 2007).

judgment to other pretrial practices such as discovery, or the substantive legal issues that arose in the motion for summary judgment.²¹

District197519861988198919952000TotalE.D. Pa.4902213363406296282644C.D. Cal.5321853463406306292662D. Md.4891733053906286272612E.D. La.4882103293406306302627N.D. Ill.2281973083396296292630S.D.N.Y.1972203333406296292349		Termination Year						
C.D. Cal.5321853463406306292662D. Md.4891733053906286272612E.D. La.4882103293406306302627N.D. Ill.2281973083396296292630S.D.N.Y.1972203333406296292349	District	1975	1986	1988	1989	1995	2000	Total
D. Md.4891733053906286272612E.D. La.4882103293406306302627N.D. Ill.2281973083396296292630S.D.N.Y.1972203333406296292349	E.D. Pa.	490	221	336	340	629	628	2644
E.D. La.4882103293406306302627N.D. Ill.2281973083396296292630S.D.N.Y.1972203333406296292349	C.D. Cal.	532	185	346	340	630	629	2662
N.D. Ill.2281973083396296292630S.D.N.Y.1972203333406296292349	D. Md.	489	173	305	390	628	627	2612
S.D.N.Y. 197 220 333 340 629 629 2349	E.D. La.	488	210	329	340	630	630	2627
	N.D. Ill.	228	197	308	339	629	629	2630
T + 1 0404 1006 1057 0000 0775 0770 15004	S.D.N.Y.	197	220	333	340	629	629	2349
<u>1 otal</u> 2424 1206 1957 2089 3775 3773 15224	Total	2424	1206	1957	2089	3775	3773	15224

Table 1: Number of Cases Sampled

Note: These counts include prisoner cases, which were excluded from the analyses reported below.

III. Results

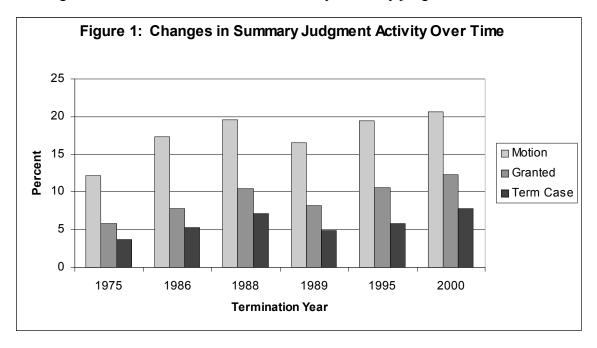
A. Case Level Analyses

Figure 1 shows that the overall rate at which summary judgment motions are filed has increased since 1975, exclusive of prisoner cases.²² For each year in our

22. Prisoner cases were excluded from this analysis and all subsequent analyses reported in this paper. Preliminary examination of the data indicated that summary judgment in prisoner cases exhibited a downward trend, declining from 33% of the cases terminated in 1975 to 19% in 1986, to 13% in 1988, then increasing slightly to 15% in 1989. The decline in summary judgment is likely due to procedural changes in the consideration of such cases. Prisoner cases also have been excluded from a number of other studies of federal district court cases. See, e.g., Herbert M. Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 Law & Soc'y Rev. 503, 512 (1980-81); Hadfield, *supra* note 6.

^{21.} It should be noted that approximately 29% of the motions for summary judgment revealed no evidence of further action on the motion. A variety of circumstances appear to account for such an absence. On occasion these cases were dismissed for failure to state a claim after a motion for summary judgment was filed. More frequently, it appeared from the docket sheets that the absence of court action on a summary judgment motion resulted from settlement or withdrawal of the case before action on the motion was appropriate. Sometimes the docket sheet noted that the case was dismissed, either with or without prejudice, and that no action was taken on the motion. In some instances the case proceeded to trial with no indication that the court denied the outstanding motion for summary judgment. In a few instances there were cross-motions for summary judgment, and the judge took action on one motion and not on the other. In such instances, each motion with no evidence of a disposition was recorded as unresolved, although one may assume that the motion would have been denied if the court had acted on it. As a result, there is some ambiguity regarding these motions in which there is no evidence of further action. All that can be said is that the court did not explicitly resolve the motion.

study, the figure indicates the percentage of cases with summary judgment motions filed, the percentage of cases with summary judgment motions granted in whole or in part, and the percentage of cases terminated by summary judgment. These percentages are averaged across the six courts in the study. The percentage of cases containing one or more summary judgment motions has increased from approximately 12% in 1975, to 17% in 1986, to 19% in 1988. The increase before the 1986 trilogy and the modest changes after the trilogy would be unexpected by many legal commentators. Summary judgment filing rates have remained fairly steady since 1986. Even though there appears to be an increase in the filing rate in 1988 following the trilogy, this increase may have been driven by an unusually high number of asbestos cases terminated by summary judgment in 1988.²³



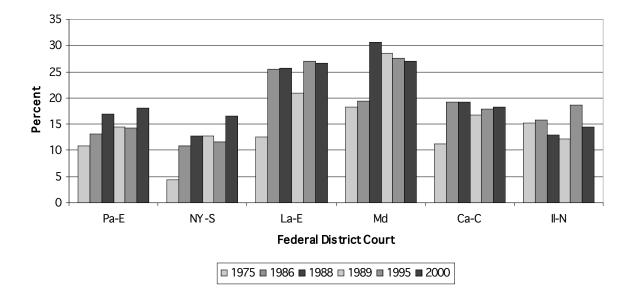
Note: This figure represents data that are weighted to represent the average percentage for each district for each year. In this figure "Motion" indicates that a motion was made and "Granted" indicates that a motion was granted in whole or in part. "Term Case" indicates that a final order was entered, the case terminated, and no litigation continued on the merits following the grant of the motion. In such cases there may have been additional proceedings to consider auxiliary issues such as award of attorney fees or sanctions.

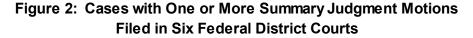
Figure 1 also shows an increase between 1975 and 2000 in the percentage of cases in which summary judgment motions were granted in whole or in part, as well as in the percentage of cases terminated by summary judgment. Over the twenty-five year period, the percentage of cases with one or more summary

^{23.} The impact of asbestos litigation on the courts is discussed in Thomas E. Willging, Trends in Asbestos Litigation (Federal Judicial Center 1987), and Linda Mullenix, Mass Tort Litigation: Cases & Materials 447–60 (1996).

judgment motions granted in whole or in part doubled from 6% to 12%. The percentage of cases terminated by summary judgment increased from 3.7% in 1975 to 7.8% in 2000. However, these changes over time mask great variation across courts and across types of cases.

Figure 2 shows that the filing rate for summary judgment motions varies greatly across the six districts studied. Southern New York generally displays a lower level of summary judgment activity than the other courts, and Maryland generally has the highest level of activity. In five of the six courts, the rate of filing motions for summary judgment increased between 1975 and 2000 (Northern Illinois is the exception). In three courts-Southern New York, Central California, and Eastern Louisiana-the largest increase took place between 1975 and 1986 (i.e., before the trilogy). In Maryland, the largest increase occurred between 1986 and 1988, but this may reflect a concentration of asbestos cases, which were often terminated by summary judgment during that period. In Eastern Pennsylvania, activity has for the most part increased at a modest rate over time. Northern Illinois follows a different pattern from the other five courts: Between 1975 and 1986 the rate of summary judgment motions remained essentially stable, then declined in 1988 and 1989. In 1995 summary judgment activity in Northern Illinois increased to 17% before returning to its previous level in 2000, which is the lowest level of summary judgment activity among the courts in 2000.





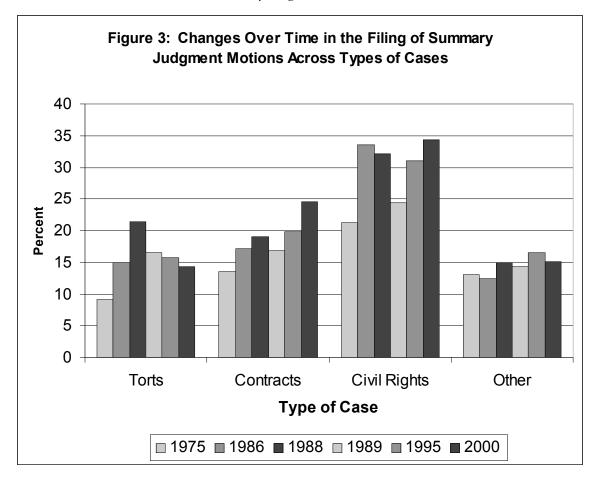
Note: This figure presents unweighted data, because the cases were sampled from each court by each year.

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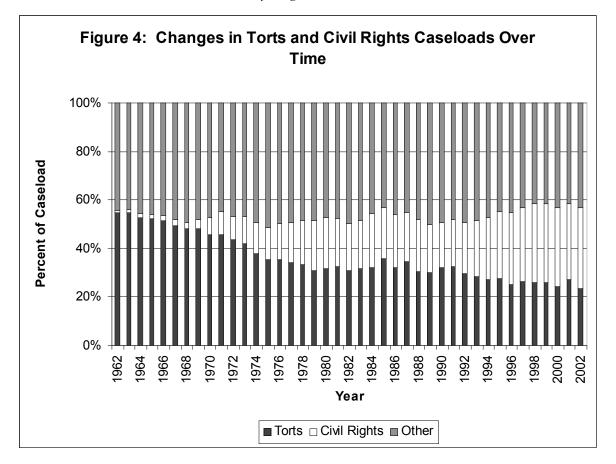
Differences in summary judgment activity across courts may also reflect differences in the types of cases terminated in these courts. Figure 3 indicates that the frequency of summary judgment motions varies greatly across types of cases, with notably higher rates in civil rights cases. Changes over time also seem to vary by type of case. Contracts cases show a fairly steady increase over time in the percentage of cases that contain one or more summary judgment motions. Torts cases reveal high rates of summary judgment motions in 1988, which is perhaps related to the termination of asbestos cases. Civil rights cases show a surprising drop in motions in 1989, then return to previously high levels in the following years. As indicated in Figure 4, the composition of federal case types has changed over time, resulting in reduced proportions of torts cases and increased proportions of civil rights cases.²⁴ This raises the possibility that increases in summary judgment activity overall may reflect the growing proportion of cases in which summary judgment has always been common, such as civil rights cases, rather than a broad shift in summary judgment practice across all cases. Summary judgment in "other" cases (a category that contains all of the remaining types of cases) remained steady over time.²⁵

^{24.} Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 468 (2004) ("As contract and tort trials fell from comprising 74 percent of all trials in 1962 to 38 percent in 2002, what replaced them? Largely, it was civil rights: in 1962, there were only 317 civil rights dispositions; in 2002, there were 40,881.")

^{25.} The most common types of cases coded as "other" were cases arising under the Employment Retirement Income Security Act (16%) and the less-than-helpful category "other statutory actions" (12%).



Note: This figure represents data that are weighted to represent the average percentage for each district for each year. The "other" category of cases comprises all cases that could not be fairly characterized as contracts, torts, or civil rights cases.



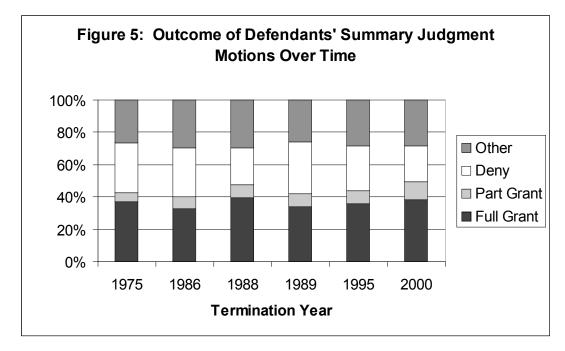
Note: The "other" category of cases comprises all cases that could not be fairly characterized as torts or civil rights cases. This figure was adapted from Figure 6 appearing in Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004).

B. Motions Level Analyses

The format of our data allowed us to perform analyses at both the cases level, presented above, and at the motions level. Each motion's outcome was coded as either "granted," "granted in part," "denied," or "no action or other" (a category that included those few instances in which the court accepted the report and recommendation of a magistrate judge without indicating whether the motion was granted or denied). Because motions made by defendants' attorneys are likely to differ from those made by plaintiffs' attorneys in several important ways, we performed each analysis separately for defendants' motions and for plaintiffs' motions.

1. Defendants' Motions for Summary Judgment

Defendants' motions for summary judgment are far more common than plaintiffs' motions. In these data there were 2,526 motions by defendants, and only 967 motions by plaintiffs. As indicated in Figure 5, the likelihood that a defendant's motion would be granted in whole or in part varied little over time. In 1988, immediately following the trilogy, the likelihood of a successful motion by a defendant increased to 47% from 40% in 1986, but then returned to pre-trilogy levels in 1989 and 1995 before increasing to 49% in 2000.²⁶

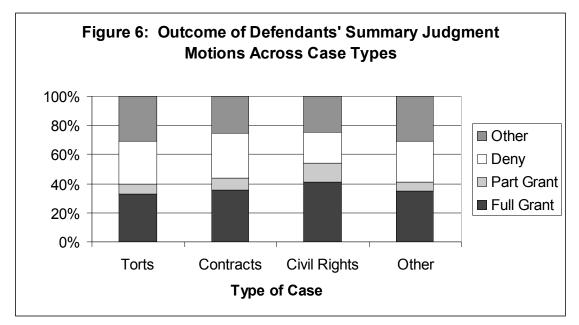


Note: "Full Grant" indicates that a motion was granted in full and "Part Grant" indicates that a motion was granted in part. "Deny" indicates that a motion was denied and an "Other" outcome indicates there was no action by the court on the motion or the motion was dismissed as moot. This figure represents motions that are weighted to permit each district to contribute equally to the graph.

Again, such changes need to be considered in the context of a shift in the composition of case types filed and differences across the courts. As indicated in

^{26.} Figures 5–8 include "other" dispositions of summary judgment motions, which are typically motions with no action by the court or motions dismissed as moot. Such cases often settle after the motion is filed, but on occasion the case will go to trial with no explicit indication in the docket that the motion has been denied. If we consider only defendants' motions in which the court took some action, then the ratio of defendants' motions granted in whole or in part to defendants' motions denied shows the same pattern. In 1975 there were 1.37:1 defendants' motions granted in whole or in part for every defendant's motion denied. In 1986 this ratio dropped to 1.30:1. In 1988, following the trilogy, this ratio increased to 2.10:1, then dropped back to 1.29:1 in 1989, then increased to 1.58:1 in 1995 and to 2.24:1 in 2000.

Figure 6, defendants' motions in civil rights cases are relatively more likely to succeed, and defendants' motions in torts cases are relatively less likely to succeed, as compared to motions in contracts and "other" cases.²⁷ Because civil rights cases have become an increasing proportion of the federal caseload and torts cases have become a decreasing proportion,²⁸ any recent overall increase in the likelihood that a defendant's motion would be granted may be explained by this shift toward civil rights cases and away from torts cases.



Note: "Full Grant" indicates that a motion was granted in full and "Part Grant" indicates that a motion was granted in part. "Deny" indicates that a motion was denied and an "Other" outcome indicates there was no action by the court on the motion or the motion was dismissed as moot. The "Other" type of cases comprises all cases that could not be fairly characterized as contracts, torts, or civil rights cases. This figure represents motions that are weighted to permit each district to contribute equally to the graph.

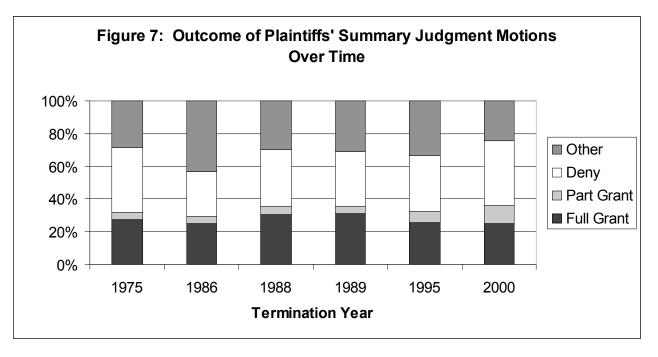
2. Plaintiffs' Motions for Summary Judgment

Plaintiffs' motions for summary judgment are far less frequent than defendants' motions and follow a different pattern of resolution. As illustrated in Figure 7, the likelihood that a plaintiff's motion would be granted changed little between 1975

^{27.} If we consider only defendants' motions in which the court took some action, then the distinctive nature of summary judgment in civil rights cases becomes even more clear. In civil rights cases there are 2.59:1 defendants' motions granted in whole or in part for each defendant's motion denied, compared with 1.33:1 motions in torts cases, 1.42:1 motions in contracts cases, and 1.45:1 motions in "other" cases.

^{28.} Supra note 22 and related text.

and 2000, occurring in between 29% and 36% of cases.²⁹ In addition, these motions were less likely to be successful than defendants' motions.

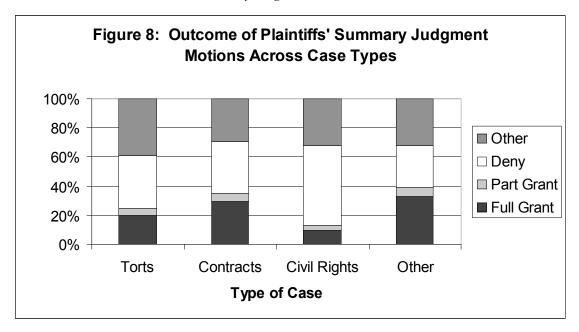


Note: "Full Grant" indicates that a motion was granted in full and "Part Grant" indicates that a motion was granted in part. "Deny" indicates that a motion was denied and "Other" indicates there was no action by the court on the motion or the motion was dismissed as moot. This figure represents motions that are weighted to permit each district to contribute equally to the graph.

The noteworthy outcome of plaintiffs' motions for summary judgment in contracts cases is displayed in Figure 8. Such motions are granted in whole or in part more often in contracts cases (35%) than in torts cases (25%) or civil rights cases (13%). Plaintiffs' motions are especially successful in the "other" group of cases (39%), which includes a number of statutory actions and may involve crossmotions for summary judgment on disputed interpretations of statutory requirements.³⁰

^{29.} Note that the extent of "other" dispositions of plaintiffs' motions varies greatly, and is especially large in 1986. If we consider only plaintiffs' motions in which the court took some action, then the ratio of plaintiffs' motions granted in whole or in part to plaintiffs' motions denied increases from 0.80:1 in 1975, to 1.05:1 in 1986, to 1.02:1 in 1988, to 1.04:1 in 1989, then falls to 0.95:1 in 1995 and 0.91:1 in 2000.

^{30.} If we consider only plaintiffs' motions in which the court took some action, then the ratio of plaintiffs' motions granted in whole or in part to plaintiffs' motions denied varies from 0.28:1 in civil rights cases, to 0.60:1 in torts cases, to 1.00:1 in contracts cases, to 1.31:1 in "other" cases.



Note: "Full Grant" indicates that a motion was granted in full and "Part Grant" indicates that a motion was granted in part. "Deny" indicates that a motion was denied and "Other" indicates there was no action by the court on the motion or the motion was dismissed as moot. The "Other" category of cases comprises all the cases that could not be fairly characterized as contracts, torts, or civil rights cases. This figure represents motions that are weighted to permit each district to contribute equally to the graph.

C. Statistical Models of Summary Judgment Activity

Variation in summary judgment practice across courts and across case types complicates an assessment of change over time. To better reveal summary judgment variation over time, we used statistical modeling to control for differences in courts and case types.³¹ In the following analyses, we assessed the likelihood that a summary judgment motion was filed, or that a summary judgment motion was granted in whole or in part, or that a case was terminated by summary judgment. Most analyses were performed at the cases level, in which cases with one or more motions for summary judgment were compared with cases with no motions for summary judgment. The final two analyses were performed at the motions level, in which motions that were granted in whole or in part were compared with motions that were denied or in which no action was taken.

In brief, the statistical models confirmed that great variation exists across courts and types of cases, even when controlling for other factors. We found that the likelihood that a case contained one or more motions for summary judgment increased *before* the Supreme Court trilogy in torts, contracts, and civil rights

^{31.} The statistical models are discussed in detail in Joe S. Cecil et al., supra note 15.

cases, and has remained fairly steady since that time. In addition, summary judgment motions were more likely to be granted in whole or in part, relative to 1986, only in torts cases in 1988 and in contracts cases in 2000. Finally, case terminations by summary judgment increased before the trilogy in contracts cases, and after the trilogy in torts cases. Surprisingly, no statistically significant changes over time were found in the outcome of defendants' or plaintiffs' summary judgment motions, again after controlling for differences across courts and types of cases.

1. Cases with Motions for Summary Judgment

A logistic regression was conducted to investigate the likelihood of one or more summary judgment motions being filed in a case, as a function of court district, type of case, and case termination year. In order to identify possible differences across case types, the analyses were performed separately for torts, contracts, civil rights, and all other types of cases.³²

The analyses summarized in Table 2 revealed differences in summary judgment activity across courts and increases in activity *before* the trilogy.³³ The analyses did not, however, reveal any consequential increases in motions filed following the Supreme Court trilogy. Statistically significant increases in summary judgment motions over time took place almost exclusively between 1975 and 1986. Specifically, three of the four case types showed a significantly increased likelihood of motions in 1975 relative to 1986. The only other significant change relative to 1986 was an increase in the likelihood of a motion in contracts cases in 2000. These analyses reveal no meaningful change in motion rates in the termination years immediately following the summary judgment trilogy.³⁴

^{32.} A preliminary analysis that included a variable for type of case turned up several fourway interactions. Analyzing the data separately for each type of case avoided these higher order interactions. The "other" category of cases comprised all the cases that could not be fairly characterized as contracts, torts, or civil rights cases.

^{33.} Every court possessed a significant, positive coefficient in some or all areas of law (indicating significantly increased likelihood of summary judgment motions being filed, relative to Southern New York, which was designated as the reference point), but there were few significant coefficients for termination year.

^{34.} The results described in Table 2 include cases without regard to the nature of their disposition, including some cases in which one would not expect to see summary judgment activity (e.g., cases that terminated with no court action at all). For a more refined analysis, a logistic regression predicting the filing of one or more summary judgment motions was executed using only those cases in which the case was terminated at or after a point at which a summary judgment motion could have been filed. Specifically, all cases that were disposed of before an issue was joined (i.e., cases in the Integrated Data Base having Procedural Progress codes of 1, 2, 11, or 12), those in which there was no court action after the issue was joined (i.e., cases in the Integrated Data Base having Procedural Progress codes of 3), and cases that were transferred to another federal court or remanded to a state court or U.S. agency (i.e., cases in the Integrated Data Base having Disposition codes of 0, 1, 10, or 11) were excluded from the analysis. This second analysis also was conducted separately for each area of law, and identified only one difference over time: The

	T (Civil	0.1
	Torts	Contracts	Rights	Others
Parameter v. Contrast				
E.D. Pa. v. S.D.N.Y.	+			+
C. Cal. v. S.D.N.Y.	+		+	+
D. Md. v. S.D.N.Y.	+	+	+	+
E.D. La. v. S.D.N.Y.	+	+	+	+
N.D. Ill. v. S.D.N.Y.	+			
1975 v. 1986	-	-	-	
1988 v. 1986				
1989 v. 1986				
1995 v. 1986				
2000 v. 1986		+		

Table 2: Relative Filings of Summary Judgment Motions

Note: "+" indicates a statistically significant ($p \le .05$) positive coefficient for a given parameter. Similarly, "-" indicates a statistically significant negative coefficient. The comparison district is Southern New York and the comparison year is 1986.

2. Cases with Motions That Resulted in a Grant of Summary Judgment

Additional analyses explored whether the likelihood that one or more motions for summary judgment were granted, in whole or in part, differed across case types, termination years, or court districts. The analyses, summarized in Table 3, revealed a pattern of significant effects that differed across courts for all four areas of law. We found a significant increase in summary judgment motions granted in whole or in part in torts cases between 1986 and 1988, an increase that was not sustained in subsequent years. The analyses also indicated an increased likelihood of summary judgment motions in contracts cases granted in whole or in part in 2000, relative to 1986. No significant changes over time were found for civil rights or "other" types of cases. A separate analysis considering only cases in which summary judgment motions were granted in whole (excluding those granted in part) found many of the same differences across courts. This subsequent analysis again revealed an increase in summary judgment motions granted in contracts cases between 1986 and 2000, but failed to replicate the increase in motions granted in torts cases in 1988.

likelihood of one or more summary judgment motions in contracts cases increased between 1975 and 1986.

	Torts	Contracts	Civil Rights	Others
Parameter v. Contrast			U	
E.D. Pa. v. S.D.N.Y.	+			
C.D. Cal. v. S.D.N.Y.		+		+
D. Md. v. S.D.N.Y.	+	+	+	+
E.D. La. v. S.D.N.Y.	+	+	+	+
N.D. Ill. v. S.D.N.Y.	+	+		+
1975 v. 1986				
1988 v. 1986	+			
1989 v. 1986				
1995 v. 1986				
2000 v. 1986		+		

Table 3: Relative Grants (in whole or in part) of Summary Judgment
Motions

Note: "+" indicates a statistically significant ($p \le .05$) positive coefficient for a given parameter. Similarly, "-" indicates a statistically significant negative coefficient. The comparison district is Southern New York and the comparison year is 1986.

3. Case Terminations by Summary Judgment

As indicated above, many commentators concerned about declining trial rates suggest that there is an increased likelihood following the 1986 trilogy that litigation will be terminated by summary judgment. The analyses summarized in Table 4 revealed that only torts cases were more likely to be terminated by summary judgment following the trilogy. The analyses also indicated a significant increase in the likelihood of summary judgment terminations in contracts cases between 1975 and 1986, before the trilogy. Although there were some significant effects for courts in all four areas of law, neither civil rights nor "other" cases showed any statistically significant increase in terminations over time after we control for differences across courts.

	Torts	Contracts	Civil Rights	Others
Parameter v. Contrast			0	
E.D. Pa. v. S.D.N.Y.				
C.D. Cal. v. S.D.N.Y.				+
D. Md. v. S.D.N.Y.	+	+	+	+
E.D. La. v. S.D.N.Y.	+	+	+	
N.D. Ill. v. S.D.N.Y.	+			
1975 v. 1986		-		
1988 v. 1986	+			
1989 v. 1986				
1995 v. 1986	+			
2000 v. 1986	+			

Table 4: Relative Case Terminations by Summary Judgment

Note: "+" indicates a statistically significant ($p \le .05$) positive coefficient for a given parameter. Similarly, "-" indicates a statistically significant negative coefficient. The comparison district is Southern New York and the comparison year is 1986.

We also sought to assess changes in disposition of individual summary judgment motions by plaintiffs and defendants over time. Controlling for differences across courts, these analyses revealed no statistically significant changes over time in the disposition of either plaintiffs' or defendants' summary judgment motions in any of the four types of cases.

IV. Discussion of Results

Summary judgment became a more prominent part of civil litigation in the years between 1975 and 2000. In the six federal district courts in this study (some selected because of a reputation for restrictive summary judgment practices) the rate at which summary judgment motions were filed increased during this time by three-quarters (from 12% to 21%), while the rate of cases with motions granted in whole or in part, and the rate at which cases were terminated by summary judgment, doubled (from 6% to 12% and 4% to 8%, respectively).³⁵

^{35.} Some may be surprised to learn that the percentage of cases with summary judgment activity is not higher. However, recall that these figures are based on random samples of cases, many of which may have terminated with little or no judicial involvement. Unfortunately, the data do not permit a precise assessment of summary judgment practice only in those cases that were ripe for such a motion.

The overall pattern of change in summary judgment practice is more complex than initially expected. The six district courts in this study vary greatly in their levels of summary judgment activity. One of these courts—Southern New York appears to have a consistently lower rate of summary judgment activity than the other five courts. This low rate is a surprise in view of the efforts of the Second Circuit Court of Appeals to dispel the notion that it is not receptive to summary judgment.³⁶ One possible reason for the low rate of motions filed is the common practice in the Southern District of New York of requiring a pretrial conference before a motion for summary judgment can be made.³⁷ If disputes that would otherwise be raised as summary judgment motions are being handled informally at a pretrial conference, the docket would not include a record of such activity and it would not be detected by this study.

The generally low rate of summary judgment activity in Northern Illinois also is surprising. We found no evidence of a restrictive interpretation of summary judgment in the Seventh Circuit Court of Appeals immediately following the trilogy.³⁸ Two other possible explanations merit consideration: concern over sanctions under Rule 11 of the Federal Rules of Civil Procedure, and changes in local rules regarding summary judgment motion practice.

Perhaps motions for summary judgment in the Northern District of Illinois were suppressed as an incidental effect of increases in sanctioning. Northern Illinois has a reputation, dating back to the 1980s, as being forceful in the use of sanctions under Rule 11.³⁹ Northern Illinois and the Seventh Circuit Court of Ap-

37. See, for example, the Individual Practices of Judge John G. Koeltl, §2(A) ("For motions other than discovery motions, a pre-motion conference with the court is required before making a motion for summary judgment."), at http://www1.nysd.uscourts.gov/cases/show.php?db=judge info&id=56 (last visited August 30, 2007).

38. See, e.g., Brouski v. United States, 803 F.2d 1421 (7th Cir. 1986); DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 329 (7th Cir. 1987) ("We first determine whether there are any genuine issues of material fact. In making this determination, we draw all inferences in the light most favorable to the non-movant. But in so doing, we draw only reasonable inferences, not every conceivable inference." (citations omitted)). See also Whetstine v. Gates Rubber Co., 895 F.2d. 388, 392 (7th Cir. 1990) (discussing burden of production).

39. Northern Illinois has been identified as having a high rate of sanctioning behavior in at least three surveys of Rule 11 activity. *See* Thomas E. Willging, The Rule 11 Sanctioning Process (Federal Judicial Center 1988); Melissa L. Nelkin, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L. J. 1313, 1316 (1986), *and* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1987). *See also* Comment, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 Marq. L. Rev. 91, 112 (1988). Patterns of sanctioning behavior also may explain the low level of sum-

^{36.} Shortly after the trilogy, Chief Judge Feinberg of the Second Circuit, writing for the unanimous panel in *Knight v. U.S. Fire Insurance Co.*, noted the "perception that this court is unsympathetic to [summary judgment] motions and frequently reverses grants of summary judgment." 804 F.2d 9, 12 (2d Cir. 1986). He then sought to dispel this view, quoting a passage in *Celotex* indicating that summary judgment is not a disfavored motion, and stating that "[p]roperly used, summary judgment permits a court to streamline the process for terminating frivolous claims and to concentrate its resources on meritorious litigation." *Id.*

peals are among the very few courts with reported decisions imposing sanctions on a party moving for summary judgment during the time of the trilogy.⁴⁰ If members of the bar in Northern Illinois perceived that an unsuccessful motion for summary judgment would invite a motion for sanctions under Rule 11, summary judgment activity may have been suppressed.

Another possibility is that motions for summary judgment in Northern Illinois were being restrained by strict standards in the local rules. Before 1984, the Northern Illinois local rules contained no specific instructions regarding motions for summary judgment. In 1984 the local rules were amended to require parties moving for summary judgment to include, along with affidavits (if any) and supporting memorandum,

a statement of the material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to judgment as a matter of law, including with that statement references to the affidavits, parts of the record and other supporting materials relied upon to support such statement.⁴¹

In 1987 the local rules were again amended to require a "description of the parties and all facts supporting venue and jurisdiction," and to require that the statement be in the form of "short numbered paragraphs, including with each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph."⁴² The opposing party was to respond following the numbered paragraph system as well.

Although many courts require that a statement of undisputed material facts accompany a motion for summary judgment, the local rules of Northern Illinois dictate an especially structured presentation (e.g., numbered paragraphs with specific references to supporting materials).⁴³ These standards, developed after a series of increasingly demanding changes in the local rules, may convey to the bar a

41. General Order amending Rule 12 of the General Rules of the Northern District of Illinois (June 29, 1984). Similarly, the opposing party is required to specify those disputed material facts that present a genuine issue for litigation, with reference to the affidavits, record, and other materials that support the opposition to the motion.

42. General Order amending Rule 12 of the General Rules of the Northern District of Illinois (Sept. 25, 1987. Recodified Sept. 25, 1988).

43. Local Rule 56.1, Motions for Summary Judgment, of the Northern District of Illinois, at http://www.ilnd.uscourts.gov/LEGAL/NewRules/locrules.htm (last visited August 30, 2007).

mary judgment activity in Southern New York, since it was also identified as having a high rate of sanctioning behavior.

^{40.} In SFM Corporation v. Sundstrand Corporation, 102 F.R.D. 555, 556 (N.D. Ill. 1984), the court awarded the defendant attorney's fees after finding that the plaintiff's motion had no reasonable basis given the disputed material facts. Furthermore, in Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985), a case also arising in Northern Illinois, the Seventh Circuit Court of Appeals upheld sanctions imposed against defendant's coursel for filing a motion for summary judgment that was not well grounded in fact. These cases were decided before the trilogy when the doctrines governing the imposition of sanctions were developing. Willging, *supra* note 39.

sense of exasperation with summary judgment as it has been practiced in the district. Such a perception could discourage increases in motion practice. Presently, it is not clear why motions for summary judgment remained stable in this court while increasing elsewhere.

The analyses indicate that the Eastern District of Louisiana and the District of Maryland are consistently the two districts highest in summary judgment activity, both within and across case types. This is perhaps understandable for Eastern Louisiana, because the U.S. Court of Appeals for the Fifth Circuit appears to have established a fairly receptive standard for summary judgment following the trilogy.⁴⁴ The consistently high level of summary judgment activity in Maryland across the four types of cases is less easy to understand in light of the more restrictive interpretation of *Celotex* by the U.S. Court of Appeals for the Fourth Circuit. Soon after the trilogy, the Fourth Circuit reversed a district court's award of summary judgment, believing the district court had given *Celotex* "more weight than it is entitled to."⁴⁵ The Fourth Circuit, also noted that the movant failed to meet his burden of production.⁴⁶ Given these somewhat restrictive interpretations of *Celotex* by the law of the circuit is not a sensitive predictor of the level of summary judgment, at least in this instance.

We were particularly interested in assessing the effect of the 1986 Supreme Court summary judgment trilogy on litigation practice, and were surprised to find that filing of summary judgment motions increased in the years before the trilogy and generally changed very little after the trilogy (after accounting for differences

^{44.} Compare the tone of the pre-trilogy case Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979) ("In reviewing a summary judgment we must view all evidence and the inferences to be drawn from the evidence in the light most favorable to the party opposing the motion." (citation omitted)) with the post-trilogy case McCallum Highlands, Ltd. v. Washington Capital Dus, Inc., 66 F.3d 89, 92 (5th Cir. 1995) ("[W]e resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. [citation omitted] We do not, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. Moreover, unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment.") *See also* Professional Managers, Inc., v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d. 218, 223 (5th Cir. 1986) (regarding movant's burden of production).

^{45.} Higgins v. Scherr, 837 F.2d. 155 (4th Cir. 1988).

^{46.} *Id.* at 156–57 ("The Supreme Court [in *Celotex*] indicated that the opponent of a summary judgment motion has a burden of showing, by proper affidavits or other evidence, the existence of a genuine dispute of material effect and cannot simply rest upon his unverified complaint. However, this is true as to what must be shown only after the movant for summary judgment has met the burden of production by showing that there is an absence of evidence to support the nonmoving party's complaint. Scherr simply did not satisfy the burden of production as to Higgins' claim for compensation for services other than those connected with the horse farm purchase. Higgins, as the non-movant, was not required to prove his entire case upon the mere incantation by Scherr of 'summary judgment' as to but one aspect."). *See also* Smith v. Virginia Common-wealth University, 84 F.3d 672 (4th Cir. 1996).

across courts). Our findings regarding torts cases somewhat depart from this general pattern. Although we found no differences in the rate at which summary judgment motions in torts cases were filed, we found an increase in the likelihood that summary judgment motions in torts cases would be granted soon after the trilogy, an increase that was not sustained in subsequent years. We found that torts cases were more likely to be terminated by summary judgment immediately after the trilogy, an increase that was sustained in the years following the trilogy.

It is tempting to conclude that the lasting effect of the trilogy is limited to torts cases, which would be a departure from the traditional notion of judicial restraint in granting summary judgment motions in torts cases, where factual disputes are common and the jury is generally regarded as the proper arbiter of negligent conduct under the reasonable person standard.⁴⁷ We are reluctant to attribute changes in summary judgment activity in torts cases to the trilogy for several reasons. First, we found no change in the likelihood of a motion being filed after the trilogy. Second, the increased likelihood of such a motion being granted appeared only in 1988 and not in subsequent years. Third, the change in 1988 was found only when we combined motions granted in whole with motions granted in part. Last, tort litigation has been the focus of various reform efforts intended to limit the opportunity for such cases to be presented to a jury.⁴⁸ Such changes also may reflect a judicial response to increases in product liability litigation that presents especially demanding issues of scientific evidence.⁴⁹ Since 1993, cases involving expert testimony must meet the admissibility standard set by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.,⁵⁰ a standard that has been especially burdensome in torts cases that rely on expert testimony to survive a sum-

^{47.} See Miller, supra note 4, at n.386 ("One area in which there is little evidence that summary judgment has increased is negligence cases, at least outside the products liability or mass torts contexts. Many courts express a reluctance to grant summary judgment in negligence actions because of the general belief that the jury is better equipped to determine whether or not given conduct conforms to the reasonable-person standard."). But see Brunet & Redish, supra note 1, at § 9:2 (arguing that Supreme Court's decision in *Celotex*, which involved a negligence claim of wrongful death, suggests that negligence cases should be treated no differently for purposes of summary judgment).

^{48.} See generally Peter W. Huber, Liability: The Legal Revolution and Its Consequences (1988), Walter K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991), and Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 Harv. J.L. & Pub. Pol'y 953, (2002). Empirical research suggests that the problems in tort litigation have been exaggerated. *See* Stephen Daniels, Civil Juries and The Politics of Reform (1995), and Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093 (1996).

^{49.} Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking* Daubert, 104 Mich. L. Rev. 257 (2005). We limited the impact of this effect in product liability cases by excluding multidistrict litigation transfer cases from the dataset.

^{50. 509} U.S. 579 (1993).

mary judgment motion.⁵¹ Future studies should examine separately product liability cases and other forms of tort litigation to determine if the pattern of findings is consistent across all types of torts cases.

The increased likelihood of summary judgment motions between 1975 and 1986 across diverse case types also was a surprise. Scholarly commentary during that period did not indicate that summary judgment motions were on the rise.⁵² The increase may be related to the trend beginning in the late 1970s of greater judicial involvement in civil case management, and the growing focus on motion practice.⁵³ During the 1980s, the Federal Rules of Civil Procedure were amended on two occasions in ways that strengthened the authority of federal district court judges to exercise control over their dockets in order to reduce the time to disposition and control the cost of litigation. In 1980, Rules 26, 33, 34, and 37 were amended to strengthen the authority of judges to respond to problems that may arise in discovery. Judges were encouraged to identify instances of discovery abuse and discourage the overuse of discovery,⁵⁴ place limits on interrogatories⁵⁵ and the production of documents,⁵⁶ and strengthen the sanctions for abuses of discovery.⁵⁷ In 1983 additional amendments strengthened sanctions for discovery abuse⁵⁸ and for abuses in pleading and motion practice.⁵⁹ That same year, an amendment to Rule 16 required the development of a pretrial scheduling order and encouraged judges to convene a scheduling conference early in the case in order to exercise greater case management control over the pretrial stage of the case.⁶⁰ Among the issues to be considered at the scheduling conference were

^{51.} See Margaret A. Berger, Carnegie Comm. On Science, Technology, and Government, Procedural and Evidentiary Mechanisms for Dealing with Experts in Toxic Tort Litigation: A Critique and Proposal 43 (1991) ("Recent cases in which defendants were awarded summary judgment in toxic tort cases suggest that the granting, and perhaps the incidence of motions for summary judgment has increased in this type of litigation."), and Margaret A. Berger, Complex Litigation at the Millennium: Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation, 64 Law & Contemp. Probs. 289, 316–17 (2001) ("When a court excludes the plaintiff's proffered expert testimony on the basis of a policy-based rule and then grants summary judgment, the result is outcome determinative.").

^{52.} An exception is Mollica, *supra* note 11, at 163, who suggests that the trilogy may simply have "consolidate[d] a movement already underway."

^{53.} Resnik, Failing Faith, *supra* note 3. Miller, *supra* note 4, at 1028 ("possible existence of a receptive trend is not surprising given the increasingly management-oriented approach of the federal judiciary in the years preceding the trilogy and the 1983 amendments").

^{54.} Amendments to Fed. R. Civ. P. 26(b).

^{55.} Amendments to Fed. R. Civ. P.33.

^{56.} Amendments to Fed. R. Civ. P.34.

^{57.} Amendments to Fed. R. Civ. P.37.

^{58.} Amendments to Fed. R. Civ. P. 26(g).

^{59.} Amendments to Fed. R. Civ. P. 11. Supra notes 37-38 and related text.

^{60.} Amendments to Fed. R. Civ. P.16.

"frivolous claims" and the "disposition of pending motions."⁶¹ This increased focus on the management of the pretrial stage of the case, avoiding frivolous claims, and resolving motions to achieve greater efficiency may have resulted in greater openness by judges to summary judgment motions even before the trilogy.

We expected but did not find changes in summary judgment practice in civil rights cases. Others have noted that summary judgment is a common means of disposing of such cases.⁶² We found that this was true in civil rights cases before the trilogy, and we found no evidence that the likelihood of a summary judgment motion or termination by summary judgment has increased since that time. Such civil rights cases make up an increasing proportion of the federal district caseload, and the impression of increasing summary judgments may be due to increasing numbers of civil rights cases, which have traditionally experienced a high rate of termination by summary judgment. Of course, we examined civil rights cases as a whole and did not focus on the narrower category of employment discrimination cases, which may follow a different pattern.

Our analysis of summary judgment does not address the broader context of whether or how often a case will proceed to trial. Summary judgment is but one of several dispositive motions that may result in the drop in trial rate. Subsequent studies using an expanded dataset will also examine the effect of motions to dismiss under Federal Rule of Civil Procedure 12(b), motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), motions for a default judgment, and motions to dismiss for failure to prosecute.

^{61.} Amendments to Fed. R. Civ. P.16(c)(1), (11). This rule was again amended in 1993 to explicitly consider "the appropriateness and timing of summary adjudication under Rule 56." Amendments to Fed. R. Civ. P. 16(c)(5).

^{62.} See Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits, 232 Hofstra Labor & Empl. L.J. 45–67 (2005); Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Cases Fare in Federal Court, 1 J. Empirical Legal Stud. 429 (2004); Peter J. Ausili, Summary Judgment in Employment Discrimination Cases in the Eastern District of New York, 16 Touro L. Rev. 1403, 1403 (2000); Peter Siegelman & John J. Donohue, Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc'y Rev. 1133 (1990).

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