

# A Quarter-Century of Summary Judgment Practice in Six Federal District Courts

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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 recent commentators believe summary judgment activity has 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 25 years (1975–2000), extracting information on summary judgment practice from 15,000 docket sheets in random samples of terminated cases. We found that when we controlled for changes over time in the types of cases being filed, the likelihood that a case contained one or more motions for summary judgment increased *before* the Supreme Court trilogy, from approximately 12 percent in 1975 to 17 percent in 1986, and has remained fairly steady at approximately 19 percent since that time. The increase prior to the 1986 trilogy and the modest changes subsequent to the trilogy would be unexpected by many legal commentators. Although summary judgment motions

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have increased over this 25-year period, this increase reflects, at least in part, increased filings of civil rights cases, which 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, again 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 civil rules and federal case-management practices prior to 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. Prior to the Supreme Court's trilogy of decisions in 1986,<sup>1</sup> summary judgment was viewed as an underused and somewhat awkward tool that invited judicial distrust.<sup>2</sup> 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 without sufficient factual support. In recent years, summary judgment has been identified as a leading cause of the drop in trial rate in federal courts<sup>3</sup> and a threat to the Seventh Amendment's right to a jury trial.<sup>4</sup>

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<sup>1</sup>*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).

<sup>2</sup>*Infra* notes 5–11 and related text.

<sup>3</sup>Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 *Stan. L. Rev.* 1329–59, 1333 (2005) (“Whatever influence these factors have actually had in the reduction in the number of trials, however, it is not unreasonable to suspect that one of the primary contributors to this result, at least at the federal level, has been the Supreme Court’s substantial modification and expansion of the modern doctrine of summary judgment.”).

<sup>4</sup>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

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 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 types of cases. What changes have taken place in summary judgment practice when unpublished decisions are taken into account? How does summary judgment practice vary across federal district courts and across different types of cases? Are increases in summary judgment activity over time due to the trilogy or to the growth in filings of certain types of cases, such as civil rights cases, which have historically been especially susceptible to resolution by summary judgment?

This study examines summary judgment activity in six federal district courts, measured at six time periods over a span of 25 years. The resulting picture of summary judgment practice is more complex than is generally recognized, varying greatly in activity over time, across courts, and across types of cases. The current findings suggest that when different levels of summary judgment activity across courts and the changing nature of the federal caseload are taken into consideration, the likelihood of one or more summary judgment motions being filed began to increase *before* the trilogy.

## II. “COMMON KNOWLEDGE” REGARDING SUMMARY JUDGMENT

Overuse of summary judgment is a recent complaint. In fact, underuse of summary judgment has been a more common concern. In 1948, 10 years after the adoption of the Federal Rules of Civil Procedure, Judge Charles Clark noted that most of the new rules were “working their way quietly and

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N.Y.U. L. Rev. 982 (2003); Suja A. Thomas, Why Summary Judgment is Unconstitutional, 93 Va. L. Rev. 139 (2007); John Bronsteen, Against Summary Judgment, 75 Geo. Wash. L. Rev. 522 (2007).

unobtrusively into the settled experience and habits of the bar.”<sup>5</sup> An exception to this generally hospitable reception, in Judge Clark’s view, was the treatment afforded the increased right of summary judgment by some courts of appeals.<sup>6</sup> Some of these appellate courts, fearful of depriving a party of a full opportunity to prove a case at trial, objected to summary judgment as “trial by affidavits.”<sup>7</sup> The early appellate court decisions yielded a number of frequently quoted passages emphasizing the drastic nature of summary judgment and the extreme care that should be exercised in granting such a motion.<sup>8</sup> As a consequence, Judge Clark noted that “enough 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.”<sup>9</sup>

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<sup>5</sup>Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 *Law & Contemp. Probs.* 144, 152 (1948) (“... the universal chorus of approval is quite phenomenal”). Judge Clark served as a member of and reporter for the Advisory Committee on Civil Rules that drafted the Federal Rules of Civil Procedure. Judge Clark’s assessment of the success of the new civil rules was restrained, compared to some others. See, e.g., B.H. Carey, *In Favor of Uniformity*, 18 *Temple L.Q.* 146 (1943) (The rules represent “one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law.”).

<sup>6</sup>Summary judgment had been greatly expanded under the new federal civil rules and was no longer restricted to debt and contract claims as was the case in many of the state courts. Instead, both plaintiffs and defendants in all civil actions were permitted to move for summary judgment when there existed “no genuine issue as to any material fact.” Fed. R. Civ. P. 56(c). For a thorough history of the summary judgment rule, see Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1 *J. Empirical Legal Stud.* 591 (2004).

<sup>7</sup>Clark, *supra* note 5, at 158.

<sup>8</sup>A number of these passages were collected by R.N. Saylor, *Rule 56: Some Notes on a Decent Rule with a Shady Past 137* (Center for Public Resources, 1986). See, e.g., *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940) (“Summary judgment procedure is not a catch penny contrivance to take away unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer . . . in advance of trial by inquiring and determining whether such evidence exists.”); *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568, 571 (10th Cir. 1946) (“The power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification.”); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945) (“[T]rial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts.”).

<sup>9</sup>Clark, *supra* note 5, at 158.

This perception of summary judgment as an ineffective procedural device seems to have continued until the time of the Supreme Court's trilogy of decisions.<sup>10</sup> In an often-cited passage, 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

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<sup>10</sup>Reviews of summary judgment doctrines prior to the trilogy are found in Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 *Ohio St. L. Rev.* 95, 144–57 (1988); Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 *Geo. L.J.* 1065, 1113 (1986); Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *Yale L.J.* 745, 749–51 (1974); David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 *Nw. U. L. Rev.* 774, 779 (1984) (“Although courts currently are more willing to grant summary judgments than they were during the early history of Rule 56, their concern remains that trial by jury should not be replaced by ‘trial by affidavit.’ This concern may not extend so far as to embrace the views of Judge Jerome Frank, who apparently believed that summary judgment is only appropriate in cases that turn on documentary evidence, but it nevertheless operates frequently as an obstacle to the effective utilization of Rule 56 to enhance the efficient administration of justice.”). See also Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 *Am. J. Trial Advoc.* 433, 466 (1987) (“Summary judgment is an interesting illustration of a simple utilitarian procedure increasingly rendered ineffective as a result of appellate court dissection.”); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 *U. Chi. L. Rev.* 306, 320 (1986) (“The designers of the Rules also failed to appreciate that the primary technique they created for the involuntary narrowing of issues prior to trial—summary judgment—would prove largely inadequate to the task.”); Stuart R. Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 *Hastings L.J.* 419, 420 (1985) (“motions for summary judgment are frequently denied although the party opposing the motion has no evidence to support its position and no chance of prevailing at trial”). Concerns regarding the reception offered summary judgment were particularly notable in the Second Circuit. See Louis Brachtel, *Has Summary Judgment Been Eliminated in the Second Circuit?* 46 *Brook. L. Rev.* 565 (1980) (After examining cases in the 1978–1979 term, the author concludes: “The frequently encountered perception that summary judgment has been eliminated in the Second Circuit by restrictive interpretation of Rule 56 is a perception that appears to have long outlived the judicial behavior and pronouncements upon which it was founded.”); 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 Court of Appeals for the Second Circuit responded to this report in *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), indicating that the appellate court was open to summary judgments. See *infra* notes 79–81 and related text.

trial and appellate courts to define clearly what is a genuine issue of material fact.<sup>11</sup>

The Supreme Court seemed intent on overcoming any hesitancy in the use of summary judgment in its trilogy of decisions in 1986. In *Celotex Corp. v. Catrett*, the Court expanded the opportunity for a summary judgment motion by holding that the movant need not demonstrate the absence of a material factual dispute, thereby diminishing the burden on the movant.<sup>12</sup> In *Anderson v. Liberty Lobby, Inc.*, the Court indicated that the party responding to the summary judgment motion must meet the same standard of proof that is applicable to a motion for a directed verdict (now designated as “judgment as a matter of law”) under Federal Rule of Civil Procedure 50.<sup>13</sup> The third case in the trilogy, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, concerned a complex antitrust case involving an economic conspiracy claim that the Court viewed as implausible.<sup>14</sup> In such a circumstance, the Court held that the party possessing the burden of proof at trial must present a factual dispute that is reasonable, thereby exceeding the “slightest doubt” standard.<sup>15</sup> The three opinions, taken together, also urged greater openness and receptivity to summary judgment. Chief Justice Rehnquist’s majority decision in *Celotex* appeared to invite more summary judgment motions and encourage a greater willingness to grant such motions by noting that:

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<sup>11</sup>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.

<sup>12</sup>477 U.S. 317, 322–23 (1986) (“[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent’s claim.”).

<sup>13</sup>477 U.S. 242, 250–57 (1986).

<sup>14</sup> 475 U.S. 574, 587 (1986) (“[I]f the factual context renders [the plaintiffs’] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”).

<sup>15</sup> 475 Id. at 588.

[s]ummary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.” . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.<sup>16</sup>

The trilogy was regarded by many as an abrupt change in practice, leading the courts to be more open to resolving cases by summary judgment.<sup>17</sup> By lowering the burden on the movant, *Celotex* was thought to increase the likelihood of summary judgment motions. By eliminating the slightest doubt test, *Anderson* and *Matsushita* were thought to increase the likelihood that such a motion would be granted. These decisions, taken together, were thought to suggest that summary judgment motions would become more common and more likely to succeed.

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<sup>16</sup>477 U.S. at, 327. One commentator described this passage as an “ode to summary judgment.” Georgine M. Vairo, *Through the Prism: Summary Judgment After the Trilogy*, ALI-ABA Civil Practice and Litigation Techniques in Federal and State Courts 1063, 1068 (Mar. 7–9, 2007). This passage echoed the concerns of Judge Charles E. Clark. Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567, 578 (1952) (“It is obvious that judges should be careful not to grant judgment against one who shows a genuine issue as to a material fact. Just as obvious is the obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all. The very freedom permitted by the simplified pleadings of the modern practice is subject to abuse unless it is checked by the devices looking to the summary disclosure of the merits if the case is to continue to trial. Those are discovery, summary judgment, and pre-trial—all necessary correlatives of each other and of a system that may permit concealment of the weaknesses of a case in the generalized pleadings of the present day. Refusal of summary disposal of the case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal as it does from the grant, the penalties may be severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks’ duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.” (footnotes omitted)). For a fascinating account of the history of the case, see David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil Justice*, in *Civil Procedure Stories* 343–70 (Kevin M. Clermont ed., 2004).

<sup>17</sup>See, e.g., Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 Emory L.J. 171, 172 (1988) (“The significant departure noted in the 1986 cases is nothing more than the inauguration of a new ‘victor’ in the summary judgment debate, and it has taken more than forty years for that ‘victor’ to defeat its opposition.”); John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and Evidentiary Problems Under Rule 56*, 6 Rev. Litig. 227, 230 (1987) (noting that *Celotex* “signal[s] a significant change in attitude toward grants of summary judgment”).

Over the past two decades, some commentators have become concerned that courts now rely too heavily on summary judgment and other procedural means of disposing of cases prior to trial.<sup>18</sup> Recently, legal scholars have noted the drop in the federal trial rate,<sup>19</sup> perceived growing skepticism among the judiciary regarding civil rights cases,<sup>20</sup> and expressed concern about what they view as a more assertive use of a variety of case-management techniques.<sup>21</sup> In light of these concerns, many now regard summary judgment as the prime suspect in bringing about the declining trial rate and inviting judges to intrude into disputes that exceed their traditional authority.

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.<sup>22</sup> Professor Miller argues that courts too often slight litigants' right to their day in court by emphasizing efficient resolution of disputes and entering summary 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.<sup>23</sup>

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<sup>18</sup>Patricia M. Wald, Summary Judgment at Sixty, 76 Tex. L. Rev. 1897, 1935 (1998) ("Its flame lit by *Matsushita*, *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). Recently, the efficiency, fairness, and even the constitutionality of summary judgment have been challenged. See Thomas, *supra* note 4; Bronsteen, *Supra* note 4.

<sup>19</sup>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 of Empirical Legal Studies*.

<sup>20</sup>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).

<sup>21</sup>Resnik, *supra* note 18.

<sup>22</sup>Miller, *supra* note 4.

<sup>23</sup>*Id.* at 984. See also *id.* at 1016 ("Summary judgment, therefore, has moved to the center of the litigation stage as plaintiffs struggle to survive the motion in order to reach trial as defendants increasingly invoke it in an attempt to prevent them from doing so.").



Other commentators have also identified the trilogy as inviting federal judges to be more assertive in granting motions for summary judgment, thereby diminishing the opportunity for resolution of dispute by trial. Recently, Martin Redish noted that after the trilogy the number of civil trials began to decline from a high point in 1985. He concluded, “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.”<sup>24</sup> This study examines the empirical evidence for such a claim.

### III. EMPIRICAL RESEARCH ON SUMMARY JUDGMENT

Most legal scholars have attempted to assess summary judgment practice and the effect of the trilogy by reviewing published cases,<sup>25</sup> a technique that ignores the disposition of cases with summary judgment motions that are never recorded as formal opinions in the federal reporters nor 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 on only published opinions. As Lizotte demonstrated,<sup>26</sup> case-reporting systems vary greatly across districts

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<sup>24</sup>Redish, *supra* note 3, at 1333. 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), Shapiro, *supra* note 16, at 364 (“hard 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 Burbank, *supra* note 6, who relied in part on some of the data reported in this study.

<sup>25</sup>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*); Mollica, *supra* note 24, at 143 n.15 (2000) (relying on published appellate court opinions).

<sup>26</sup>Brian N. Lizotte, *Publication of Summary Judgment Motions*, 2007 *Wis. L. Rev.* 107 (attempting to identify published cases with motions for summary judgment from the samples used in this research). See also Peter Siegelman & John J. Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 *Law &*

in the extent to which they capture cases with summary judgment motions and do not provide a reliable means of assessing summary judgment practice. Burbank, in his review of empirical research on summary judgment, condemns such analyses as inherently misleading.<sup>27</sup>

Others have attempted to assess summary judgment practice by reviewing docket sheet entries, an approach used in the current study.<sup>28</sup> In one of the most influential, yet flawed, studies of summary judgment,<sup>29</sup> William McLauchlan found motions for summary judgment in only 4 percent of the cases<sup>30</sup> filed between July 1, 1969 and June 30, 1970, in the Northern District of Illinois. This finding continues to be cited as an indication of the extent

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Soc'y Rev. 1133, 1146 (1990) (noting that rulings on motions that dispose of a case are more likely to generate an opinion that is published); Issacharoff & Lowenstein, *supra* note 25, at 91 n.103 ("The use of published decisions to assess the impact of the trilogy in the district courts has limitations. Since only a small percentage of cases are litigated to judgment, and since not all of these result in published opinions, the sampling problems are readily apparent.").

<sup>27</sup>Burbank, *supra* note 6, 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. The distortion is likely to be particularly serious when published appellate decisions are used as a basis for inference about experience at first instance, and when, therefore, an appeal bias is added to a publication bias." (footnotes omitted)). Burbank lists studies of summary judgment relying on published opinions, dividing them into (1) articles written by those "with no reason to know better than to rely on published cases," (2) articles written by those "who, either because of their professional training or because they were writing at a time when the unreliability of published decisions as a basis of making inferences about litigation experience had become (or should have been) common knowledge, probably did know better but could not resist," and (3) articles written by "those who clearly did know better, could not resist, and evidently hoped to persuade their readers either that the use was benign (because not for a purpose that would implicate the biases to which such research is subject) or that, in the absence of reliable data, unreliable data are better than no data at all (particularly if they support the author's thesis)."

<sup>28</sup>Under Rule 79(a) of the Federal Rules of Civil Procedure, the clerk of the court is required to keep a docket for each civil action, upon which is recorded in chronological order "[a]ll papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts and judgments." Fed. R. Civ. P. 79(a). Under Rule 7(b)(1) of the Federal Rules of Civil Procedure, an application to the court for an order of the entry of summary judgment must be in writing and in the form of a motion. Fed. R. Civ. P. 7(b)(1).

<sup>29</sup>William P. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. Legal Stud. 427, 451 (1977).

<sup>30</sup>*Id.* at 451, tbl.14.

of summary judgment activity.<sup>31</sup> But McLauchlan's finding greatly underestimated the true extent of summary judgment in the sample. McLauchlan examined his sample of filed cases in mid-October of 1971, when only two-thirds of the cases in the sample had been concluded,<sup>32</sup> thereby missing the summary judgment motions filed in the one-third of cases that were still pending at the time of his assessment.

Prior to the study that is the focus of this article, we attempted to replicate McLauchlan's findings by examining docket sheets in a random sample of 300 cases filed in the Northern District of Illinois during the 12-month period used by McLauchlan.<sup>33</sup> Because all these cases had by then concluded, a more accurate assessment of the summary judgment activity is possible. We found that 11.6 percent of the cases contained one or more motions for summary judgment, almost three times the rate reported by McLauchlan. The difference lies mainly in the summary judgment activity in cases that remained open when McLauchlan gathered his data.<sup>34</sup>

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<sup>31</sup>See, e.g., Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 *Notre Dame L. Rev.* 1981, 1994 n.62 (2004) (citing McLauchlan for the proposition that approximately 1.5 percent of all federal cases were disposed of by summary judgment prior to *Celotex*); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 *Va. L. Rev.* 955, 995 n.148 (1998) (citing McLauchlan's study to indicate that prior to the trilogy, summary judgment motions were filed in 4 percent of the cases).

<sup>32</sup>Because the complete history of an active case cannot be known, samples of recently filed cases require assumptions about the kinds of activity that take place in the remainder of the life of the case. After examining the docket sheets of the open cases and finding no evidence of summary judgment activity, McLauchlan noted, "except for a few cases in which the parties had not gotten beyond the pleading stage, these cases had progressed beyond the stage at which the motion was most likely to have been made by the time the docket study was made. Thus, it is quite unlikely that this population of cases excludes a significant number of potential summary judgment cases because of considering only closed cases." *Id.* at 449–50. We found this assumption to be incorrect.

<sup>33</sup>An initial sample of 350 cases was selected. However, the docket sheets for 50 of the cases were missing from the archive at the Federal Record Center in Chicago, Illinois. It appeared that the folder containing these 50 docket sheets was misplaced when the records were stored.

<sup>34</sup>We found that motions for summary judgment in the third of the sample terminating latest were far more common (22 percent) than motions in the earlier terminating two-thirds of the sample (7 percent,  $p \leq 0.001$ ). Our figure of 11.6 percent of cases with summary judgment motions is significantly greater than the 4 percent figure found by McLauchlan ( $p \leq 0.001$ ). We remain concerned about the comparability of the two studies. Our replication study found motions for summary judgment in 7.4 percent of the early terminations, still nearly twice the

Some studies combine these methods in ways that invite misinterpretation. Professor Miller relies on an unpublished study by a former student that combined these methods in concluding that the trilogy sparked an increase in summary judgment activity.<sup>35</sup> That study compared, in select districts, posttrilogy dispositions in published cases with pretrilogy dispositions based on a separate docket sheet study that included both published and unpublished cases.<sup>36</sup> Of course, such a comparison ignores the posttrilogy cases that did not merit publication—cases that often involve summary judgment motions that were not granted. Such an awkward comparison is likely to show a higher percentage of granted summary judgment motions in the posttrilogy samples of only published cases even if there is no real change in practice.

Several recent studies are exceptions to this flawed record of research.<sup>37</sup> Hadfield coded docket sheets from a national sample of civil cases terminated in 2000 and, after adjusting the records of the Administrative Office of the U.S. Courts with estimates for errors in coding, determined that the drop in trial rate since 1970 is due mainly to a shift from bench trials to other forms of nontrial adjudication—such as summary judgment and

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4 percent figure reported by McLauchlan, a difference that fell just short of statistical significance ( $p = 0.076$ ). The reasons for this difference are unknown, but may be related to a missing set of 50 docket sheets that were not properly filed and that we were unable to locate and examine. Whatever the reasons may be, the difference in summary judgment activity in cases terminating early, which McLauchlan examined, and those terminating late, which he did not examine, explains a good deal of the underestimation in McLauchlan's findings.

<sup>35</sup>Miller, *supra* note 4.

<sup>36</sup>Professor Miller relies on the unpublished paper of Sean Berkowitz, *Summary Judgment After the Supreme Court Trilogy: Lower Courts' Responses to Celotex, Anderson, and Matsushita*, (1992) (unpublished manuscript, on file with *New York University Law Review* and the corresponding author) (reporting that rates of granting summary judgments increased from 45 percent in 1985–1986 to 75 percent in 1987–1990 in the Eastern District of Pennsylvania and from 37 percent to 82 percent in the District of Maryland). A review of this paper revealed that the posttrilogy summary judgment figures were based on published cases. Burbank describes this study as “a melange of reported district court and appellate decisions, . . . and comparing such data with data from actual docket samples.” Burbank, *supra* note 6, at 598 n.23.

<sup>37</sup>This report focuses on summary judgment practice across a wide range of cases. For examples of excellent empirical studies of summary judgment practice focusing on a narrower range of cases, see Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 232 *Hofstra Lab. & Emp. L.J.* 45 (2005); Elizabeth M. Schneider, *The Dangers of Summary Judgment*, 57 *Rutgers L. Rev.* (forthcoming 2007).

other contested dispositive motions.<sup>38</sup> Her research suggests that summary judgment is among several dispositive motions that are responsible for the shift, but her work offers no assessment of changes in summary judgment practice in particular, or in the variation in summary judgment practice across courts and types of cases.<sup>39</sup>

Stephen Burbank, who provides a thorough survey of the empirical research in this area,<sup>40</sup> examined data on summary judgment in cases terminated in the Eastern District of Pennsylvania in the years 2000 through 2003. Using information compiled by the court from its automated record system (one of the two techniques used in this study to identify summary judgment motions), Burbank found that 4.1 percent of the cases in 2000 were terminated by summary judgment,<sup>41</sup> 4.1 percent of the cases in 2001, 3.4 percent in 2002, and 4.7 percent in 2003. Burbank also notes that summary judgment may vary dramatically by court and type of case.<sup>42</sup> Of course, Burbank's study was limited to a single federal district court.

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 several specific types of cases. 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. The 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?

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<sup>38</sup>Hadfield, *supra* note 19, at 729–31.

<sup>39</sup>For a discussion of the importance of disaggregating data into individual courts and types of cases, see Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 *J. Disp. Resol.* 35–50.

<sup>40</sup>Burbank, *supra* note 6, at 603–18.

<sup>41</sup>Burbank's figure of 4.1 percent of cases terminated by summary judgment in 2000 is a bit lower than our measure of 5.1 percent. The difference is likely due to the fact that our study excluded Social Security cases and benefit repayment cases. See *infra* note 50.

<sup>42</sup>Burbank, *supra* note 6, at 618. Burbank also reviewed preliminary versions of this report.

- 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 these changes due to the Supreme Court trilogy?

## IV. 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.

### *A. Courts*

This study examined summary judgment practice in the federal district courts in the District of Maryland (Maryland), the Eastern District of Pennsylvania (Eastern Pennsylvania), the Southern District of New York (Southern New York), the Eastern District of Louisiana (Eastern Louisiana), the Central District of California (Central California), and the Northern District of Illinois (Northern Illinois). Three of the courts—Maryland, Eastern Pennsylvania, and Central California—were selected for this study because of our access to previously collected data concerning summary judgment activity from a broader study of case-management practice, described in detail below. The three remaining district courts—Eastern Louisiana, Southern New York, and Northern Illinois—were selected for their past reputations, earned or otherwise, for a restrictive application of summary judgment.<sup>43</sup> These three courts permit an assessment of summary judgment practice in courts that were most likely to respond to the Supreme Court

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<sup>43</sup>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 been perceived as pursuing restrictive standards for summary judgment. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). The infrequency of motions for summary judgment in the Northern District of Illinois was documented by McLauchlan, *supra* note 29. The Eastern District of Louisiana is in the Fifth Circuit, which offered a number of the most often quoted restrictive standards for summary judgment. According to Childress, 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. 183–84 (1987). Information on summary judgment practice

trilogy. Together, these six courts terminated 20 percent of the civil cases in federal district courts in 2000. The salient characteristics of these six federal district courts are presented in the Appendix.

*B. Time Periods*

Data for this study were taken from cases terminated during six time periods, each covering 12 consecutive months. The earliest sample was drawn from cases terminated between July 1, 1974 and June 30, 1975.<sup>44</sup> 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. A second sample of cases, drawn from those terminated between July 1, 1985 and June 30, 1986, is referred to as 1986 cases. Unfortunately, we do not have measures for the intervening years. The third sample was drawn from cases terminated between April 1, 1987 and March 31, 1988 and is designated as 1988 cases for consistency with the record system designation of the Administrative Office of the U.S. Courts, although the majority of the cases were terminated in calendar year 1987. 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 1986.<sup>45</sup> We expected that changes in summary judgment practice in response to the trilogy would be detected in cases terminated between approximately nine and 21 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. The sample drawn from cases terminated between January 1, 1989 and December 31, 1989 are designated as 1989 cases. This sample was drawn to determine if the effects of the trilogy might be detected in cases that terminated later than 1988. The sample drawn from cases terminated between July 1, 1994 and

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in the Eastern District of Louisiana during 1975 also was available from earlier studies by the Federal Judicial Center. *Infra* note 44.

<sup>44</sup>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 P. Connolly & P. Lombard, *Judicial Controls and the Civil Litigative Process: Motions* (Federal Judicial Center 1980).

<sup>45</sup>*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.

June 30, 1995 are designated as 1995 cases. The sample drawn from cases terminated between January 1, 2000 and December 31, 2000 are designated as 2000 cases.

### *C. District Court Data Collection*

Data regarding motions for summary judgment in district courts were collected by examining the docket sheets for random samples of cases from each of the six district courts.<sup>46</sup> Six distinct data-collection efforts were involved. The samples derived from these data-collection efforts are summarized in Table 1. Data regarding summary judgment practice in 1975 in the courts of Eastern Pennsylvania, Central California, Maryland, and Eastern

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<sup>46</sup>Docket sheets are intended to record filings by parties and actions by the court, and should include a specific notation of formal motions for summary judgment and actions taken on such motions. Under Rule 79(a) of the Federal Rules of Civil Procedure, the clerk of the court is required to keep a docket for each civil action, upon which is recorded in chronological order “[a]ll papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts and judgments.” Under Rule 7(b)(1) of the Federal Rules of Civil Procedure, an application to the court for an order, the entry of summary judgment, must be in writing and in the form of a motion. With the assistance of the clerks of each of the six district courts, all except 79 of the docket sheets were located. The subsequent samples all excluded Social Security cases and benefit repayment cases. Summary judgment practice in Social Security cases is unlike summary judgment practice generally. In most Social Security cases, the court’s role is limited to reviewing the record of an administrative proceeding in which an individual’s eligibility for benefits has been denied to determine if the findings of the administrative law judge are supported by substantial evidence and are free from serious procedural error. See Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 *Fordham Urb. L.J.* 305, 338 (2002) (noting high rate of dismissal and summary judgment in Social Security cases); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 *Stan. L. Rev.* 1275, 1326 (2005) (treating Social Security appeals as nontrial adjudications). In a sample of Social Security cases examined in 1986, summary judgment motions were filed in 31 of 36 cases, with the five remaining cases being dismissed before the answer was filed. Both parties filed summary judgment motions in 26 of the 31 cases with such motions. Summary judgment was granted in 12 of the 31 cases, with the remaining 19 cases being remanded to the agency, a disposition that may reasonably be considered the equivalent of a grant of a summary judgment motion by the plaintiff. The opposite situation explains the exclusion of benefit repayment cases. These are usually cases in which the United States files suit in district court to collect on defaulted student loans or overpayment of veteran’s benefits. See Marc S. Galanter, *The Life and Times of the Big Six; Or the Federal Courts Since the Good Old Days*, 1988 *Wis. L. Rev.* 921, 928–29. Such cases, which comprise approximately 25 percent of the terminations in Central California, are rarely contested and are often resolved by the entry of a default judgment against the defendant. In a sample of 42 such cases terminated in 1986, no summary judgment motions were identified.



Table 1: Number of Cases Sampled

<i>District</i>	<i>Year</i>						<i>Total</i>
	<i>1975</i>	<i>1986</i>	<i>1988</i>	<i>1989</i>	<i>1995</i>	<i>2000</i>	
E. Pennsylvania	490	221	336	340	629	628	2,644
C. California	532	185	346	340	630	629	2,662
Maryland	489	173	305	390	628	627	2,612
E. Louisiana	488	210	329	340	630	630	2,627
N. Illinois	228	197	308	339	629	629	2,630
S. New York	197	220	333	340	629	629	2,349
Total	2,424	1,206	1,957	2,089	3,775	3,773	15,224

NOTE: These samples include prisoner cases, which were excluded from the statistical analyses. See note 60.

Louisiana were collected as part of the Federal Judicial Center District Court Studies Project.<sup>47</sup> For the current study, data on summary judgment motions were extracted from the database created for this earlier study.<sup>48</sup> These early data offer a comparison point to see how summary judgment practice has changed over 25 years, using 1975 as a baseline.

The second round of data collection was commenced in 1986 as part of a preliminary study of summary judgment undertaken for the Advisory Committee on Civil Rules of the Judicial Conference of the United States. Docket sheets for 1986 cases were obtained from the courts of Eastern Pennsylvania, Central California, and Maryland.<sup>49</sup>

In 1988, a third round of data collection examined docket sheets in approximately 340 recently terminated cases in each of the six districts. Docket sheets in approximately 40 additional cases terminated in 1986 were examined for Eastern Pennsylvania, Central California, and Maryland (the

<sup>47</sup>Supra note 44.

<sup>48</sup>Pat Lombard, one of the original collaborators in the District Court Studies Project, transformed the data from that earlier study into a form that is compatible with this current study. These data were originally coded directly from docket sheet entries for cases in the study. Two additional courts included in the District Court Studies Project, the District of Massachusetts and the Southern District of Florida, were not included in this study due to difficulty in retrieving complete data from the earlier study.

<sup>49</sup>The researchers traveled to the districts and examined the docket sheets for cases included in the sample. Those docket sheets with summary judgment entries were photocopied and later coded. The findings of this earlier study are reported in Joe S. Cecil & C.R. Douglas, *Summary Judgment Practice in Three District Courts 1* (Federal Judicial Center 1987).

three courts included in the 1986 study) to round out the earlier samples.<sup>50</sup> In addition, docket sheets in 240 cases terminating in 1986 were examined in each of the three courts not included in the 1986 study—Eastern Louisiana, Southern New York, and Northern Illinois. Docket sheets in 200 cases terminated in 1975 also were examined for Northern Illinois and Southern New York courts. The result was a data set with approximately 340 cases terminated in 1988 for each of the six courts in this study, approximately 200 cases terminated in 1986 for each court, and between 200 and 500 cases terminated in 1975 for each court.<sup>51</sup>

The fourth round of district court data collection, undertaken in 1990, was intended to confirm the posttrilogy filing rate level of summary judgment motions found in the 1988 sample. Again, docket sheets in approximately 340 terminated cases were examined in each of the six courts.<sup>52</sup>

The fifth and sixth rounds of data collection took place in 1996 and 2001, respectively. Docket sheets from approximately 630 terminated cases were sampled for each of the six district courts. These last two rounds of data collection used a different technique than the earlier rounds. Electronic docket sheets for sampled cases were downloaded from each district court's PACER system<sup>53</sup> and searched electronically for evidence of summary

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<sup>50</sup>This supplemental data-collection effort was intended to restore the size of the sample for this period to approximately 200 cases per court. The effective size of this earlier study had been diminished when Social Security cases were excluded from the analysis. Summary judgment practice in Social Security cases is unlike summary judgment practice generally. See *supra* note 46.

<sup>51</sup>An additional sample of docket sheets in 300 cases filed in 1970 in Northern Illinois was examined to permit a reanalysis of the earlier separate study of summary judgments by McLaughlan, discussed *supra* notes 29–34 and related text.

<sup>52</sup>The original random sample of 340 cases from Maryland included 33 cases that were terminated the same week, each involving resolution of claims against A.H. Robbins for injuries arising from the use of the Dalkon Shield intrauterine contraceptive. These cases were consolidated and settled following the declaration of bankruptcy and establishment of a trust fund by the defendant. Since these cases did not offer independent instances of the opportunity for motions for summary judgment, they were excluded from this study and replacement cases were sampled.

<sup>53</sup>These dockets were downloaded from the Public Access to Court Electronic Records (PACER) at (<http://www.pacer.psc.uscourts.gov>). In 1996, some docket sheets were not available on PACER. We sought those in person. This round of data collection also included supplemental samples of 30 cases to serve as replacement cases if the need arose, a supplemental random sample of 200 civil rights cases, and all the remaining product liability cases that were not asbestos cases.

judgment activity in terminated cases.<sup>54</sup> In addition, the district courts' automated record systems<sup>55</sup> were searched for evidence of summary judgment activity and for evidence indicating the extent to which such systems were operational.

Evidence of summary judgment or partial summary judgment was coded, as were 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 with statistical information for each case gathered by the Administrative Office of the U.S. Courts.<sup>56</sup>

It should be noted that approximately 29 percent of the motions for summary judgment revealed no evidence of further action on the motion.<sup>57</sup> In such instances, each motion with no evidence of a disposition was

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<sup>54</sup>See discussion of selecting a sample of terminated cases, *infra* note 59. The docket sheets were searched for variations of entries indicating summary judgment activity. We searched for the following variations: "summary judgment," "summary adjudication," "sum jgm," "summ jgm," "sum adj," "summ adj," "s/j," "sj," "rule 56," "summary jgm," "summary adj," and "summary."

<sup>55</sup>The early version of these automated record systems was the Integrated Court Management System (ICMS). More recently, courts have used the Case Management and Electronic Case Files system (CM/ECF). Docket sheets that could not be retrieved from PACER were obtained through a request to the clerk's office. Seven cases with sealed docket sheets were replaced in the sample.

<sup>56</sup>The data set, 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 June 23, 2006).

<sup>57</sup>A variety of circumstances appear to account for such an absence. On occasion, such 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 seemed to result 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 only one motion and no action on the other. We initially believed that after 1990 motions with no indication of a disposition would drop sharply, likely due in part to the public reporting requirements for motions that remained unresolved for extended periods, required by the Civil Justice Reform Act, Pub. L. No. 101-650 (1990) (codified as amended at 28 U.S.C. §§ 471–482). However, examination of the resolution of motions over time did not

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. The analyses in this study attempt to distinguish between those motions granted in whole or in part, and those motions that were either denied or on which no action was taken.<sup>58</sup>

#### *D. Limitations*

This study examined a sample of terminated cases<sup>59</sup> to determine whether or not a motion for summary judgment was filed and, if filed, how the motion

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indicate such an effect, with the percent of unresolved motions ranging from 26–32 percent over time.

<sup>58</sup>A few other wrinkles in the coding warrant comment. On rare occasions, the disposition of a motion may be recorded although the initial motion is not recorded on the docket sheet. In such cases, we attributed the motion to the party indicated by the disposition. We regarded a motion joined by multiple parties as a single motion. We recorded motions by third parties to the litigation as motions by plaintiffs or defendants, depending on whether the purpose of the motion appeared to be to defend against a claim made by another party (recorded as a motion by a defendant), or to assert a claim against another party (recorded as a motion by a plaintiff). We recorded a motion that was initially denied and then reconsidered and granted as granted and we did not record the initial denial. Whether or not a case was terminated by a motion for summary judgment was not always clear. A case was considered terminated by summary judgment if a summary judgment motion was granted and there was no additional evidence on the docket sheet of further consideration by the court of the substance of any claim raised by the case. Such a case was recorded as terminated even though the docket sheet may have indicated motions for reconsideration, motions for attorney fees, motions for sanctions, and other forms of postjudgment relief.

<sup>59</sup>Selecting a sample of district court cases terminated during a specific period represents the best among a number of imperfect choices for identifying a sample frame that is likely to demonstrate changes in summary judgment practice. Because a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure may be made at virtually any point up to 10 days before the hearing (a schedule that is often modified under local rules or the Rule 16 scheduling conference), identifying a sample that will correspond to a sharp departure in summary judgment practice, such as might occur in reaction to the Supreme Court trilogy, is somewhat difficult. A sample of terminated cases, such as the sample used in this study, is likely to overrepresent cases in which the application of current standards of summary judgments favors granting such a motion, thereby terminating the case. Similarly, such a sample will underrepresent cases in which the application of prior standards results in the denial of such a motion, thereby permitting the case to continue and elude the sample. Although a sample of terminated cases may include some that were filed years earlier, even such older cases may be affected if a motion for summary judgment is still appropriate; the docket sheets revealed a number of cases in which the court, either on motion by the party or sua sponte, chose to

was resolved. The study did not examine the timing of motions for summary judgment, materials offered to support the motion, the relationship of summary judgment to other pretrial practices such as discovery, or the substantive legal issues that arose in the motion for summary judgment. These additional issues should not obscure the strengths of the data. Unlike previous studies, data collected for this study permit an assessment of summary judgment practice in cases that resulted in unpublished as well as published opinions, and permit a comparison of summary judgment practices in different types of cases across multiple federal district courts and across multiple time periods.

## V. RESULTS

### *A. Case-Level Analyses*

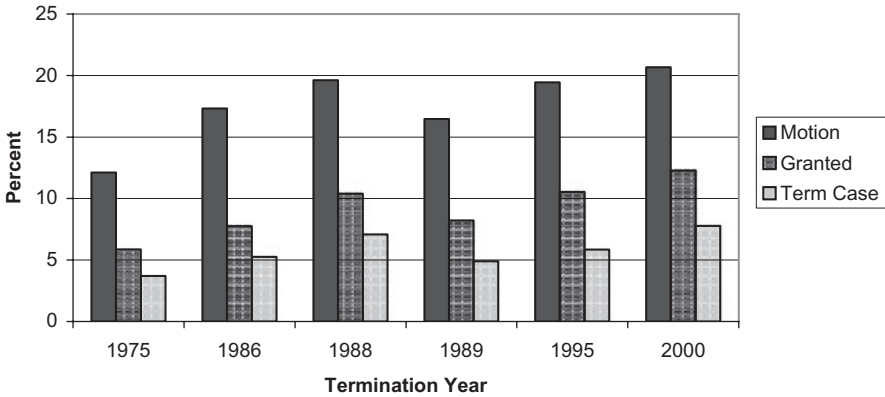
Figure 1 shows that when examining cases based on year of termination, the overall rate at which summary judgment motions are filed has increased since 1975, exclusive of prisoner cases.<sup>60</sup> For each year in our study, the figure indicates the percentage of cases with summary judgment motions filed, the percentage of cases with summary judgment motions granted in whole or in part, and the percentage of cases terminated by summary

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reconsider a summary judgment motion previously denied. Alternatively, a sample of recently filed cases poses problems in obtaining a fair representation of cases in which there has been an opportunity for consideration of a motion for summary judgment. Similarly, a sample of pending cases is likely to overlook cases terminated by the application of current standards for summary judgment.

<sup>60</sup>Prisoner cases were excluded from this analysis and all subsequent analyses reported in this article. Preliminary examination of the data indicated that summary judgment in prisoner cases exhibited a downward trend, declining from 33 percent of the cases terminated in 1975 to 19 percent in 1986, to 13 percent in 1988, then increasing slightly to 15 percent in 1989. The nature of prisoner cases also has changed over time. In 1975, habeas corpus cases were most common; recently, civil rights cases are most common. Since motions for summary judgment are more frequent in civil rights cases, recent increases in such cases have raised the level of summary judgment in prisoner cases. This is especially apparent in the cases terminated in 1989, when all the summary judgment activity by prisoners was found in civil rights cases. Prisoner cases also have been excluded from a number of 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 (1980–1981); Hadfield, *supra* note 19.

Figure 1: Changes in summary judgment activity over time.



NOTE: This figure represents data that are weighted to represent the average percentage for each district for each year. In this figure, “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, sanctions, and so forth.

judgment. These percentages are averaged across the six courts in the study.<sup>61</sup> The percentage of cases containing one or more summary judgment motions has increased from approximately 12 percent in 1975, to 17 percent in 1986, to 19 percent in 1988. The increase prior to the 1986 trilogy and the modest changes subsequent to 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 filing rate in 1988 following the trilogy in 1986, this increase may be explained by an unusual number of asbestos cases terminated by summary judgment in 1988.<sup>62</sup>

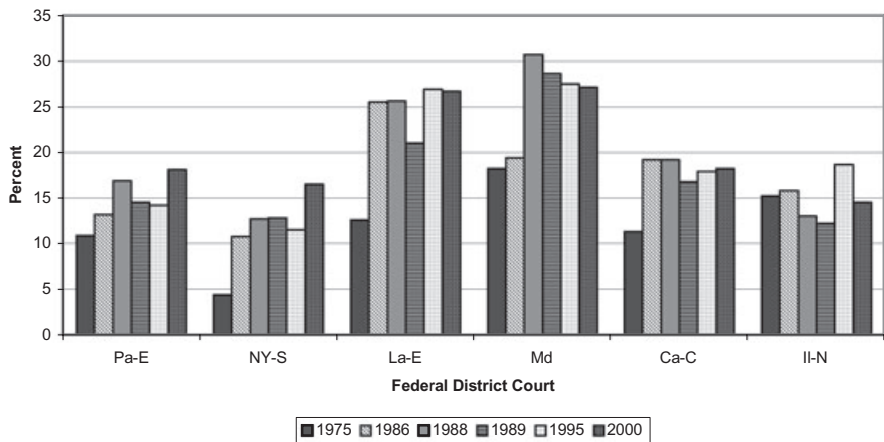
<sup>61</sup>The sampling strategy is reflected in the figures by using case weights chosen to permit the cases from each court/year combination to contribute equally to the analysis. Consequently, we wish to generalize the findings only to these six courts.

<sup>62</sup>The impact of asbestos litigation on the courts is discussed in Thomas E. Willging, *Trends in Asbestos Litigation* (Federal Judicial Center 1987); Linda Mullenix, *Mass Tort Litigation* 447–60 (1996).

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 25-year period, the percentage of cases with one or more summary judgment motions granted in whole or in part doubled from 6 percent to 12 percent. The percentage of cases terminated by summary judgment increased from 3.7 percent in 1975 to 7.8 percent in 2000. However, these changes over time mask great variation across courts and across types of cases. These changes are explored in greater detail in the sections that follow.

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 (Northern Illinois is the exception), the rate of filing motions for summary judgment increased during the time period from 1975 to 2000. In three courts—Southern New York, Central California, and Eastern Louisiana—the largest increase takes place from 1975 to 1986 (i.e., before the trilogy). In Maryland, the largest increase occurs between 1986 and 1988, but this may reflect a concentration of asbestos cases, which were

*Figure 2:* Cases with one or more summary judgment motions filed in six federal district courts.

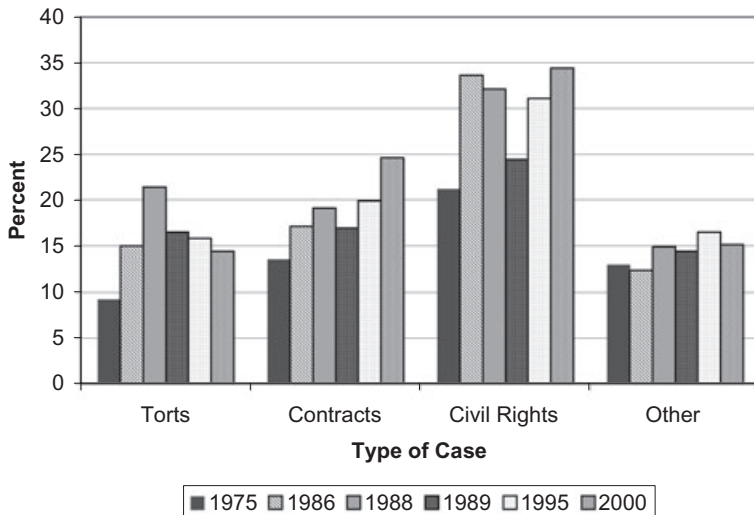


NOTE: This figure presents unweighted data, since the cases were sampled from each court by each year.

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 summary judgment activity remained essentially stable, then declined in 1988 and 1989. In 1995, summary judgment activity increased to 17 percent before returning to its previous level in 2000, which is the lowest level of summary judgment activity among the courts in 2000.

Differences in summary judgment activity across courts may also reflect differences in the types of cases terminated in the 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 percent of cases that contain one or more summary judgment motions. Torts cases reveal high rates of summary judgment motions in 1988 and 1989, perhaps related to the termination of asbestos cases. Civil rights cases show a surprising drop in motions in 1989, then return to previously

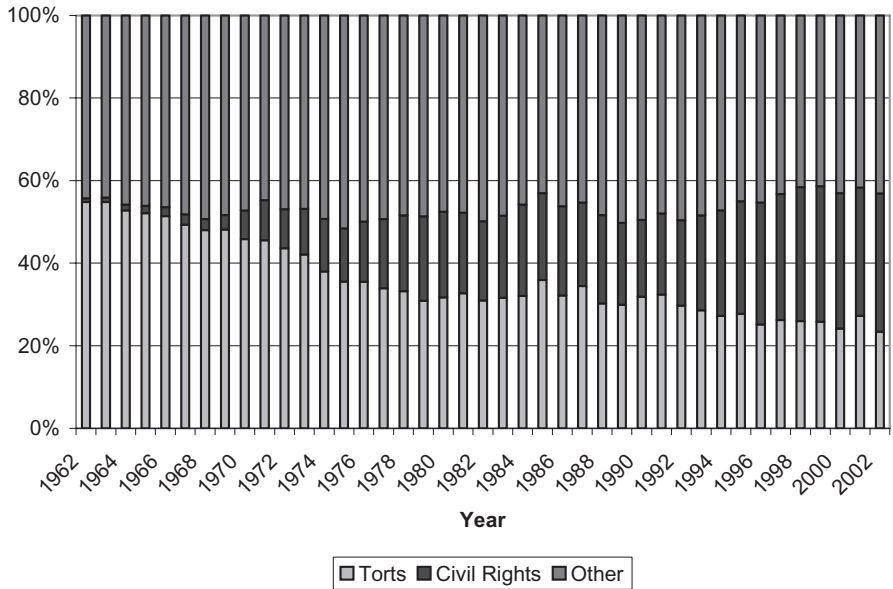
Figure 3: Changes over time in filing of summary judgment motions across types of cases.



NOTE: This figure represents data that are weighted to represent the average percentage for each district for each year. The “Other” category of cases was comprised of all the cases that could not be fairly characterized as contracts, torts, or civil rights cases.



Figure 4: Changes in torts and civil rights caseloads over time.

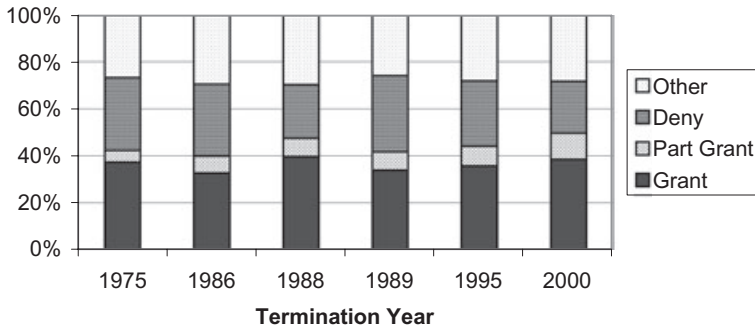


NOTE: The “Other” category of cases was comprised of all the cases that could not be fairly characterized as torts or civil rights cases. This figure was adapted from Figure 6 in Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” 1 *J. Empirical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

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.<sup>63</sup> 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”

<sup>63</sup>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.”).

Figure 5: Outcome of summary judgment motions by defendants over time.



NOTE: In this figure, “Grant” indicates that a motion was granted in full and “Part Grant” indicates that a motion was granted in part. This figure represents motions that are weighted to permit each district to contribute equally to the graph.

cases (comprised all of the remaining types of cases) remains steady over time.<sup>64</sup>

### B. Motions-Level Analyses

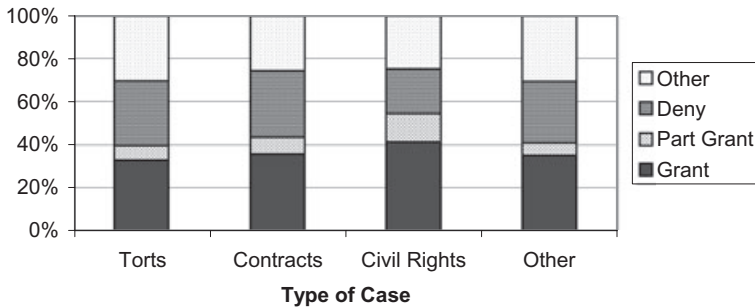
As mentioned above, the format of our data allowed us to perform analyses at both the cases level, and at the motions level. Each motion’s outcome was coded as either “granted,” “granted in part,” “denied,” or “no action or other” (a category that included those few instances in which the court accepted the report and recommendation of a magistrate judge without indicating whether the motion was granted or denied). Because motions made by defendants’ attorneys and by plaintiffs’ attorneys are likely to differ 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

<sup>64</sup>The most common types of cases coded as “other” were cases arising under the Employment Retirement Income Security Act (16 percent) and the not-too-helpful category “other statutory actions” (12 percent).

Figure 6: Outcome of summary judgment motions by defendants across case types.



NOTE: In this figure, “Grant” indicates that a motion was granted in full and “Part Grant” indicates that a motion was granted in part. The “Other” cases comprise 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.

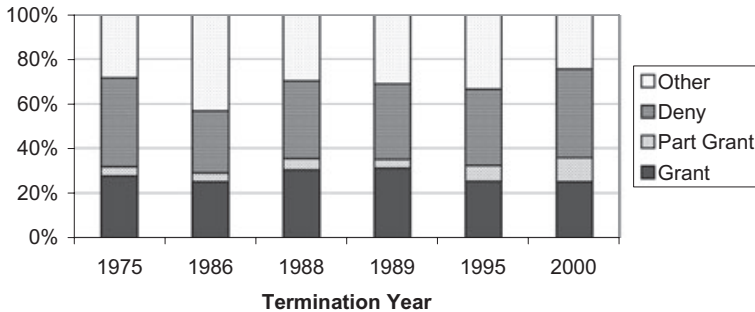
that a defendant’s motion would be granted in whole or in part varied little over time. In 1988, immediately following the trilogy, the likelihood of a successful motion by a defendant increased from 40 percent in 1986 to 47 percent, but then returned to the pretrilogy level in 1989 and 1995 before increasing to 49 percent in 2000.<sup>65</sup>

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 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 the other two categories.<sup>66</sup> Because civil

<sup>65</sup>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 defendants’ motions granted in whole or in part for every defendant’s motion denied. In 1986, this ratio dropped to 1.30. In 1988, following the trilogy, this ratio increased to 2.10, then dropped back to 1.29 in 1989, then increased to 1.58 in 1995 and to 2.24 in 2000.

<sup>66</sup>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 defendants’ motions granted in whole or in part for each defendant’s

Figure 7: Outcome of summary judgment motions by plaintiffs over time.



NOTE: In this figure, “Grant” indicates that a motion was granted in full and “Part Grant” indicates that a motion was granted in part. This figure represents motions that are weighted to permit each district to contribute equally to the graph.

rights cases have become an increasing proportion of the federal caseload and torts cases have become a decreasing proportion,<sup>67</sup> 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.

## 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, plaintiffs’ motions showed little change over time between 1975 and 2000, having been granted in between 29–36 percent of cases.<sup>68</sup> In addition, these motions were less likely to be successful than defendants’ motions.

The noteworthy outcome of weighted plaintiffs’ motions for summary judgment in contracts cases is displayed in Figure 8. Such motions are

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motion denied, compared with 1.33 motions in torts cases, 1.42 motions in contracts cases, and 1.45 motions in “other” cases.

<sup>67</sup>Supra note 65 and related text.

<sup>68</sup>Note that the extent of “other” dispositions of plaintiffs’ motions varies greatly, and is especially large in 1986. If we consider only weighted 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 in 1975, to 1.05 in 1986, 1.02 in 1988, to 1.04 in 1989, then falls to 0.95 in 1995 and 0.91 in 2000.

Figure 8: Outcome of summary judgment motions by plaintiffs across case types.



NOTE: In this figure, “Grant” indicates that a motion was granted in full and “Part Grant” indicates that a motion was granted in part. The “Other” category of cases is comprised of 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.

granted in whole or in part more often in contracts cases (35 percent) than in torts cases (25 percent) or civil rights cases (13 percent). Plaintiffs’ motions are especially successful in the “other” group of cases (39 percent), which involves a number of statutory actions and may involve cross-motions for summary judgment on disputed interpretations of statutory requirements.<sup>69</sup>

### C. Logistic Regression Models of Summary Judgment Activity

Variation in summary judgment across courts and across case types complicates any assessment of change over time. We used statistical modeling to control for differences in courts and case types while assessing changes in summary judgment practice over time. Because both the filing of a motion and the action taken on a motion (i.e., grant in whole or in part) can be interpreted as dichotomous variables—that is, the only possible outcomes are “occurred” or “did not occur”—logistic regressions are an appropriate method of statistical analyses. In each analysis, we defined the model to explain the likelihood of the event occurring—that is, the likelihood that a summary judgment motion was filed, or that a summary judgment motion was

<sup>69</sup>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 varied from 0.28 in civil rights cases, to 0.60 in torts cases, to 1.00 in contracts cases, to 1.31 in “other” cases.

granted in whole or in part, or that a case was terminated by summary judgment. Analyses were first 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. Then, 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.

### 1. Estimating 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 and case termination year. To investigate any differences across areas of law, this analysis was performed separately for each of four broad areas of law<sup>70</sup>—torts, contracts, civil rights, and all other types of cases.<sup>71</sup> Court districts and case termination years were entered into the model. Southern New York was designated as the reference district because, of the six courts, it recorded the lowest levels of summary judgment activity, and 1986, the year that included cases terminated just prior to the Supreme Court trilogy, was designated as the reference year. This analysis investigated whether the likelihood of cases containing one or more motions increased, decreased, or remained statistically unchanged as a function of termination year and court district, across each of the four areas of law.

As indicated in Table 2, although this analysis revealed differences across courts and increases in summary judgment activity prior to the trilogy, it failed to demonstrate an increase in motions filed following the Supreme Court trilogy. 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), but there were few significant coefficients for termination year. Statistically significant increases in summary judgment motions over time took place almost exclusively between 1975 and 1986, prior to the trilogy. Specifically, in three of the four areas of law, 1975 possessed a significant, negative coefficient (or, a significantly decreased likelihood of motions, relative to 1986). The only other significant change relative to 1986 was an increase in the likelihood of

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<sup>70</sup>A preliminary analysis turned up several four-way interactions. Analyzing the data separately for each area of law avoided these higher-order interactions.

<sup>71</sup>The “other” category of cases was comprised of all the cases that could not be fairly characterized as contracts, torts, or civil rights cases.

Table 2: Logistic Regression Models of Whether a Summary Judgment Motion Was Filed

<i>Explanatory Variables</i>	<i>Dependent Variable = Summary Judgment Motion Filed</i>			
	<i>Torts</i>	<i>Contracts</i>	<i>Civil Rights</i>	<i>Other</i>
E. Pennsylvania	0.627** (0.249)	0.004 (0.167)	0.235 (0.198)	0.360* (0.171)
C. California	0.737** (0.284)	0.134 (0.164)	0.416* (0.203)	0.471** (0.144)
Maryland	1.488*** (0.245)	0.786*** (0.159)	1.027*** (0.189)	0.676*** (0.154)
E. Louisiana	1.232*** (0.239)	0.457** (0.167)	1.029*** (0.207)	1.005*** (0.150)
N. Illinois	0.753** (0.303)	0.271 (0.175)	-0.031 (0.198)	0.230 (0.146)
S. New York (reference category)				
1975	-0.567** (0.210)	-0.433* (0.199)	-0.711** (0.259)	-0.033 (0.210)
1988	0.372 (0.208)	0.099 (0.192)	-0.100 (0.246)	0.190 (0.205)
1989	0.113 (0.218)	-0.021 (0.195)	-0.425 (0.260)	0.070 (0.200)
1995	0.067 (0.205)	0.189 (0.181)	-0.141 (0.209)	0.224 (0.186)
2000	0.019 (0.207)	0.427* (0.180)	0.009 (0.203)	0.131 (0.188)
1986 (reference category)				
Constant	-2.684*** (0.277)	-1.832*** (0.179)	-1.136*** (0.234)	-2.328*** (0.199)
<i>N</i>	3,042	2,934	1,830	4,857

NOTE: \*indicates  $p \leq 0.05$ , \*\*indicates  $p \leq 0.01$ , \*\*\*indicates  $p \leq 0.001$ ; standard errors are in parentheses. Table 2 reports logistic regression models of the presence of a summary judgment motion in a case for the indicated federal districts and years. The “Other” category includes all cases that could not be fairly characterized as torts, contracts, or civil rights cases.

a motion in contracts cases in 2000. Aside from the increased rate of summary judgment motions between 1975 and 1986, this analysis reveals no meaningful change in motion rates in the termination years immediately following the summary judgment trilogy in 1986.<sup>72</sup>

<sup>72</sup>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). Logistic regression models of the presence of

## 2. Estimating Cases with Motions Granting Summary Judgment

The trilogy was expected by some not only to increase the likelihood of motions for summary judgment, but also to increase the likelihood that summary judgment motions would be granted.<sup>73</sup> An additional analysis 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. Again, termination year and court district were entered into the model, with 1986 and the Southern District of New York as the reference groups. The analysis was performed separately across the four coded areas of law.

As indicated in Table 3, there were a number of significant effects across courts for all four areas of law. The model indicated 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 model also indicated an increased likelihood of summary judgment motions in contracts cases to be granted in whole or in part in 2000, relative to 1986.<sup>74</sup> 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 (not also those

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a summary judgment motion were also run with the sample limited to those cases that terminated at or after a point at which a summary judgment motion could have been filed. Specifically, excluded from these subsequent analyses were all cases that were disposed of before an issue was joined (i.e., cases in the Integrated Data Base (IDB), *supra* note 56, 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 IDB having Procedural Progress code of 3), and cases that were transferred to another federal court or remanded to state court or agency (i.e., cases in the IDB having Disposition codes of 0, 1, 10, or 11). These analyses were run separately for each area of law and identified only one significant change over time: the likelihood of one or more summary judgment motions in contracts cases increased between 1975 and 1986 ( $p = 0.016$ ).

<sup>73</sup>Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 103 (2002) (“Since 1986, when the Court decided the trilogy, lower federal courts appear much more willing to grant summary judgment.”).

<sup>74</sup>Logistic regression models of the presence of a summary judgment grant were also run with the sample limited to those cases that terminated at or after a point at which a summary judgment motion could have been filed. *Supra* note 72. The analyses were run separately for each area of law and identified two significant changes over time: the likelihood of a summary judgment grant in torts cases increased in 1988 relative to 1986 ( $p = 0.036$ ) and the likelihood of a grant in contracts cases increased between 1975 and 1986 ( $p = 0.052$ ). There was also a marginally significant increased likelihood of a grant in contracts cases in 2000 relative to 1986 ( $p = 0.059$ ).



Table 3: Logistic Regression Models of Whether a Summary Judgment Motion was Granted (in Whole or in Part)

<i>Explanatory Variables</i>	<i>Dependent Variable = Summary Judgment Motion Granted (Whole or Part)</i>			
	<i>Torts</i>	<i>Contracts</i>	<i>Civil Rights</i>	<i>Other</i>
E. Pennsylvania	1.295** (0.480)	0.082 (0.229)	-0.101 (0.246)	0.172 (0.252)
C. California	0.851 (0.555)	0.455* (0.214)	0.185 (0.247)	0.614** (0.200)
Maryland	2.038*** (0.475)	0.655** (0.218)	1.025*** (0.218)	0.803*** (0.211)
E. Louisiana	1.961*** (0.467)	0.739** (0.218)	0.906*** (0.238)	1.114*** (0.203)
N. Illinois	1.556** (0.529)	0.471* (0.231)	-0.264 (0.245)	0.507** (0.199)
S. New York (reference category)				
1975	-0.267 (0.322)	-0.462 (0.284)	-0.405 (0.323)	0.085 (0.289)
1988	0.708* (0.311)	0.323 (0.260)	0.007 (0.308)	0.262 (0.283)
1989	0.223 (0.337)	0.074 (0.270)	0.040 (0.316)	0.110 (0.278)
1995	0.368 (0.312)	0.365 (0.249)	-0.011 (0.263)	0.410 (0.257)
2000	0.248 (0.318)	0.825** (0.240)	0.3408 (0.252)	0.249 (0.260)
1986 (reference category)				
Constant	-4.461*** (0.523)	-2.870*** (0.253)	-1.928*** (0.290)	-3.268*** (0.281)
N	3,042	2,934	1,830	4,857

NOTE: \*indicates  $p \leq 0.05$ , \*\*indicates  $p \leq 0.01$ , \*\*\*indicates  $p \leq 0.001$ ; standard errors are in parentheses. Table 3 reports logistic regression models of the presence of a summary judgment grant in a case for the indicated federal districts and years. The “Other” category includes all cases that could not be fairly characterized as torts, contracts, or civil rights cases.

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 in 2000, but failed to replicate the increase in motions granted in torts cases in 1988 relative to 1986.<sup>75</sup>

<sup>75</sup>This analysis of grant likelihood is not conditional on the presence of a motion for summary judgment, nor is the analysis of termination likelihood reported below conditional on the presence of a grant of summary judgment. We conducted the analyses in this way for at least two reasons. First, policy discussions about changing litigation trends in general, and summary

### 3. Estimating Case Terminations by Summary Judgment

Those concerned about declining trial rates suggest that there is an increased likelihood following the 1986 trilogy that litigation will be terminated by summary judgment. We used logistic regression to estimate the likelihood of a case's termination by summary judgment, with 1986 and Southern New York again used as the reference groups. The analyses were performed separately across the four coded areas of law.

As indicated in Table 4, we found significant effects only in torts cases for termination by summary judgment following the trilogy.<sup>76</sup> The analysis also indicated a significant increase in the likelihood of summary judgment terminations in contracts cases between 1975 and 1986. 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.<sup>77</sup>

To summarize these findings, once different levels of summary judgment activity across courts are accounted for, it appears that motions for

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judgment activity specifically, tend not to be couched in conditionals; rather, changes (such as an increasing or decreasing termination rate) are spoken of as individual effects in what is understood to be a complex system. Second, we knew that reducing the sample size for each analysis through conditionals would limit the power of the analyses and increase the chances that meaningful results would be masked—although we did not anticipate substantial differences. In fact, when we did run a logistic regression estimating the likelihood of a summary judgment grant, conditional on there being a motion for summary judgment, the results were generally the same. As expected, some districts' previously significant coefficients became marginally significant or nonsignificant (Maryland, Eastern Louisiana, and Northern Illinois each experienced reductions in significance across the four case types). However, the sample years that possessed significant coefficients in the nonconditional analysis also did so in the conditional analysis. A similar analysis of terminations conditional on grants could not be run because the sample size in many cells was too small, often zero. For a discussion of the benefits of a nonconditional analysis over a conditional analysis, see A.N. Pettitt & S. Low Choy, *Bivariate Binary Data with Missing Values: Analysis of a Field Experiment to Investigate Chemical Attractants of Wild Dogs*, 4 *J. Agric. Biological & Envtl. Stat.* 57 (1999).

<sup>76</sup>The beta coefficient for termination by summary judgment in torts cases in 1989 also approached statistical significance ( $p = 0.069$ ).

<sup>77</sup>We found the same general pattern of results when the data were restricted to exclude those cases in which disposition did not occur at or after a point at which a summary judgment motion could have been filed. *Supra* note 72. These analyses were run separately for each area of law and yielded the same pattern of results over time as is displayed in Table 4, with one addition: the likelihood of a case termination as a result of a summary judgment grant in civil rights cases increased in 2000 relative to 1986 ( $p = 0.053$ ).

Table 4: Logistic Regression Models of Whether a Case Was Terminated by a Summary Judgment Grant

<i>Explanatory Variables</i>	<i>Dependent Variable = Case Terminated by Summary Judgment Grant</i>			
	<i>Torts</i>	<i>Contracts</i>	<i>Civil Rights</i>	<i>Other</i>
E. Pennsylvania	0.969 (0.632)	-0.020 (0.286)	-0.140 (0.310)	-0.124 (0.309)
C. California	0.874 (0.714)	0.464 (0.259)	0.280 (0.302)	0.446* (0.231)
Maryland	2.137** (0.608)	0.609* (0.266)	1.154*** (0.264)	0.671** (0.244)
E. Louisiana	1.653** (0.608)	0.733** (0.262)	0.622* (0.299)	0.434 (0.260)
N. Illinois	1.339* (0.697)	0.396 (0.285)	-0.057 (0.297)	0.396 (0.229)
S. New York (reference category)				
1975	0.417 (0.646)	-0.659* (0.323)	-0.229 (0.375)	-0.194 (0.320)
1988	1.738** (0.616)	0.057 (0.293)	0.028 (0.364)	0.158 (0.302)
1989	1.169 (0.642)	-0.225 (0.310)	0.112 (0.371)	-0.302 (0.312)
1995	1.328* (0.621)	0.020 (0.282)	-0.257 (0.319)	-0.036 (0.280)
2000	1.310* (0.621)	0.381 (0.272)	0.342 (0.299)	-0.069 (0.282)
1986 (reference category)				
Constant	-5.923*** (0.821)	-3.032*** (0.285)	-2.463*** (0.352)	-3.227*** (0.302)
N	3,042	2,934	1,830	4,857

NOTE: \*indicates  $p \leq 0.05$ , \*\*indicates  $p \leq 0.01$ , \*\*\*indicates  $p \leq 0.001$ ; standard errors are in parentheses. Table 4 reports logistic regression models of the presence of a case termination as a result of a summary judgment grant in a case for the indicated federal districts and years. The “Other” category includes all cases that could not be fairly characterized as torts, contracts, or civil rights cases.

summary judgment increased prior to the trilogy in torts, contracts, and civil rights cases. The data also reveal an increase in summary judgment motions in contracts cases in 2000, as compared to the 1986 rate. In addition, summary judgment motions were more likely to be granted in whole or in part, relative to 1986, in torts cases in 1988 and in contracts cases in 2000. Torts cases showed a statistically significant increased likelihood of cases terminated by summary judgment in 1988, 1995, and 2000, compared to 1986. Contracts cases show a statistically significant increased likelihood of terminations from 1975 to 1986—prior to the trilogy.

We also sought to assess changes in disposition of individual summary judgment motions (as opposed to cases) by plaintiffs and defendants over time, while accounting for differences in case composition and summary judgment practices across courts. A hierarchical linear model, implementing maximum likelihood estimation, was used to estimate the likelihood of a grant in whole or in part, based on court district and case termination year for each of the four areas of law.<sup>78</sup> These analyses found 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.

## VI. DISCUSSION OF RESULTS

Summary judgment has become 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 are filed has increased during this period by three-quarters (from 12 percent to 21 percent), while the rate of cases with motions granted in whole or in part, and the rate at which cases are terminated by summary judgment, have doubled (from 6 percent to 12 percent and 4 percent to 8 percent, respectively). 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

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<sup>78</sup> Because this data set contained only a small sample of summary judgment motions for Southern New York, for this analyses Eastern Pennsylvania was used as the reference category. In fact, there were relatively few motions in many of the court districts, years, and areas of law, which may reduce the reliability of these analyses.

it is not receptive to summary judgment. Shortly after the trilogy, Chief Judge Feinberg of the Second Circuit, writing for the unanimous panel in *Knight v. U.S. Fire Insurance Co.*,<sup>79</sup> noted the “perception that this court is unsympathetic to [summary judgment] motions and frequently reverses grants of summary judgment.”<sup>80</sup> The Chief Judge 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.”<sup>81</sup> 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.<sup>82</sup> If disputes that would otherwise be raised as summary judgment motions are being handled informally at the 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.<sup>83</sup> Two other possible explanations merit consideration:

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<sup>79</sup>804 F.2d 9 (2d Cir. 1986).

<sup>80</sup>*Id.* at 12 (“It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time . . .”). See also *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (“Conclusory allegations will not suffice to create a genuine issue. There must be more than a ‘scintilla of evidence,’ [citing to *Anderson v. Liberty Lobby, Inc.*], and more than ‘some metaphysical doubt as to the material facts.’ [citing to *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*].”).

<sup>81</sup>804 F.2d at 12.

<sup>82</sup>See, e.g., the Individual Practices of Judge John G. Koeltl, § 2(A) (“For motions other than discovery motions, a premotion conference with the court is required before making a motion for summary judgment.”)([http://www1.nysd.uscourts.gov/cases/show.php?db=judge\\_info&id=56](http://www1.nysd.uscourts.gov/cases/show.php?db=judge_info&id=56)) (visited June 3, 2006).

<sup>83</sup>See, e.g., *Brouschi 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 *Whetstone v. Gates Rubber Co.*, 895 F.2d 388, 392 (7th Cir. 1990) (discussing burden of production).

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.<sup>84</sup> Northern Illinois has a reputation, dating back to the 1980s, as being forceful in the use of sanctions under Rule 11.<sup>85</sup> Northern Illinois and the Seventh Circuit Court of Appeals are among the very few courts with reported decisions imposing sanctions on a party moving for summary judgment during the period of the trilogy.<sup>86</sup> In *SFM Corp. v. Sundstrand Corp.*,<sup>87</sup> the court

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<sup>84</sup>The summary judgment trilogy was decided at a time of growing emphasis on the role of sanctions under Rule 11 as a means of penalizing the filing of groundless claims and motions, raising a question concerning the manner in which these two changing practices would interact. The 1983 amendments to Rule 11 require attorneys to inquire into the factual and legal basis for a filing, and to certify that each pleading, motion, and other paper filed with the court is “well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, . . .” Fed. R. Civ. P. 11. If this standard is violated, the court may award as a sanction reasonable expenses, including attorney fees, incurred by the responding party. The manner in which the standard for Rule 11 sanctions and the standard for summary judgment interact remains unclear. The Rule 11 inquiry should inform the party of facts that will support the primary elements of the case. Such an inquiry should deter the filing of some cases that, if they were to survive a motion to dismiss, would become candidates for a motion for summary judgment. For a discussion of the relationship between sanctions under Rule 11 and summary judgment, see *Fontenot v. Upjohn*, 780 F.2d 1190 (5th Cir. 1986) (a case decided before the trilogy, suggesting that the amendments to Rule 11 may alter the burden imposed on the moving party in summary judgment cases). For empirical research into the manner in which sanctions are imposed, see generally Thomas E. Willging, *The Rule 11 Sanctioning Process* (Federal Judicial Center 1988); Stephen Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicature Society 1989).

<sup>85</sup>Northern Illinois has been identified as having a high rate of sanctioning behavior in three recent surveys of Rule 11 activity. See Willging, *supra* note 84, at 179–80; 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); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 *F.R.D.* 189, 200 (1988). 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 summary judgment activity in Southern New York, since it was also identified as having a high rate of sanctioning behavior.

<sup>86</sup>It is common for those who move for sanctions to have prevailed on an earlier motion for summary judgment, claiming that the opposition to the summary judgment motion was in bad faith or taken for reasons for delay. See, e.g., *Taylor v. Belger Cartage*, 102 *F.R.D.* 172, 180 (W.D. Mo. 1984); *Rand v. Anaconda-Ericsson, Inc.*, 623 *F. Supp.* 176, 179, 184 (E.D.N.Y. 1985); *Dardanell Co. Trust v. United States*, 634 *F. Supp.* 186, 190 (D. Minn. 1986).

awarded the defendant attorney fees after finding that the plaintiff's motion had no reasonable basis given the disputed material facts. Furthermore, in *Frazier v. Cast*,<sup>88</sup> a case also arising in Northern Illinois, the Seventh Circuit Court of Appeals upheld sanctions imposed against defendant's counsel for filing a motion for summary judgment that was not well grounded in fact. These cases were decided prior to the trilogy when the doctrines governing the imposition of sanctions were developing.<sup>89</sup> 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.<sup>90</sup>

A less compelling possibility is that motions for summary judgment in Northern Illinois were being restrained by strict standards in the local rules. Prior to 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.<sup>91</sup>

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

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<sup>87</sup>102 F.R.D. 555, 556 (N.D. Ill. 1984).

<sup>88</sup>771 F.2d 259 (7th Cir. 1985).

<sup>89</sup>Willging, *supra* note 84.

<sup>90</sup>Our data are inconclusive, but somewhat inconsistent with this theory. If there were a general suppression of motions activity in Northern Illinois, one would expect fear of sanctions to deter motions for summary judgment that are less likely to succeed, resulting in a greater percentage of successful motions, relative to nonsanctioning districts. Such a pattern was not found.

<sup>91</sup>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.

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.”<sup>92</sup> The opposing party was to respond following the numbered paragraph system as well.

Although many courts require that motions for summary judgment be accompanied by a statement of undisputed material facts, the local rules of Northern Illinois dictate an especially structured presentation (e.g., numbered paragraphs with specific references to supporting materials).<sup>93</sup> These standards, developed after a series of increasingly demanding changes in the local rule, may convey to the bar a 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.<sup>94</sup>

Much of the variation across courts may be due to differences in the types of cases filed in the courts and over time. Civil rights cases have always had a higher-than-normal rate of summary judgment activity, and some of the courts in this study may have experienced increasing proportions of such cases.<sup>95</sup> This, too, would have resulted in different overall levels of summary judgment across courts.

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<sup>92</sup>General Order Amending Rule 12 of the General Rules of the Northern District of Illinois (Sept. 25, 1987. Recodified Sept. 25, 1988).

<sup>93</sup>Local Rule 56.1, Motions for Summary Judgment, of the Northern District of Illinois (<http://www.ilnd.uscourts.gov/LEGAL/NewRules/locrules.htm>) (last viewed June 28, 2006).

<sup>94</sup>Conversations in 1992 with the former Clerk of the Northern District of Illinois, H. Stuart Cunningham, led to exploration of a number of other possible explanations for this unusual pattern of findings. For example, the possibility that heavy filings of mortgage foreclosure cases resulted in a suppressed level of summary judgment activity was considered and rejected. No increases in summary judgment were detected even after these cases were removed from the analysis. The possibility that the lower rate of summary judgment activity was due to frequent transfer of cases between judges, thereby impeding the orderly consideration of issues appropriate for summary judgment, also was considered. Accurate information concerning transfers of cases for the 1975 cases was not available. During the years 1986 and 1988, however, the rate of transfer of cases in the Northern District of Illinois was similar to other districts in the study.

<sup>95</sup>The percentage of civil rights cases in the district’s caseload varied from 12 percent in Southern New York to 18 percent in Northern Illinois.



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.<sup>96</sup> 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."<sup>97</sup> The Fourth Circuit also noted that the movant failed to meet his burden of production,<sup>98</sup> an issue that some contend has divided the courts of appeals following the trilogy.<sup>99</sup> Given these somewhat restrictive interpretations of

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<sup>96</sup>Compare the tone of the pretrilogy 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 posttrilogy 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).

<sup>97</sup>*Higgins v. Scherr*, 837 F.2d 155 (4th Cir. 1988).

<sup>98</sup>*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 non-moving 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 Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1996).

<sup>99</sup>See *Petition for Writ of Certiorari, Daubert II* (95–198) 1995 WL 17035597 (1995) (arguing that the Fifth, Seventh, Tenth, and Eleventh Circuits have interpreted *Celotex* to place no burden on the movant, while the remaining circuits have retained some form of burden on the movant). See also Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78

*Celotex* by the Fourth Circuit Court of Appeals, the extent of summary judgment activity in Maryland is surprising. Apparently, the law of the circuit is not a sensitive predictor of the level of summary judgment, at least in this instance.

In this analysis we have used the district in which the court resides as a proxy for the great many characteristics that define the context in which the judges sitting in that district consider a motion for summary judgment. Most obviously, the district designation encompasses the circuit law, local rules, and case-management practices that provide guidance to judges when considering such a motion. The district designation may also serve as a proxy for varying workloads and differing judicial philosophies that exist across the districts. District designations also represent the specific population demographics and economic characteristics that define the context of the cases that are filed in the district. Each of these factors may affect the manner in which the courts respond to motions for summary judgment. Future research will attempt to sort through such issues and determine which factors are most influential.

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 prior to the trilogy and generally changed very little after the trilogy (after accounting for differences across courts).<sup>100</sup> 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

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Minn. L. Rev. 1345, 1377 (1994) (“Current law is far from clear on the precise nature of the standard of proof that applies to the defendant’s initial burden of production in moving for summary judgment.”); Linda S. Mullenix, Summary Judgment: Taming the Beast of Burdens, 10 Am. J. Trial Advoc. 413, 462 (1987) (“Remarkably, after almost fifty years of experience with the Federal Rules of Civil Procedure, it is still difficult to summarize burdens of production and persuasion under Rule 56.”); Martin B. Louis, Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure, 67 N.C. L. Rev. 1023, 1048 (1989) (noting “the fundamental, unresolved question of summary judgment: What is the burden of production on the moving party, particularly the defendant, when this party will not have the burden at trial?”).

<sup>100</sup>Motions in contracts cases did increase in 2000 relative to the pretrilogy 1986 rate, but there were no significant changes in 1988, 1989, or 1995. Unfortunately, we do not have data for the interval from 1975 to 1986.

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.<sup>101</sup> Such a narrow effect would also cast doubt on the trans-substantive nature of Supreme Court precedents concerning rules of procedure.<sup>102</sup> 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 filing of motions 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 combine motions granted in whole with motions granted in part. Lastly, tort litigation has been the focus of various reform efforts intended to limit the opportunity for such cases to be presented to a jury.<sup>103</sup> Such changes

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<sup>101</sup>See Miller, *supra* note 4, at 1055 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, § 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).

<sup>102</sup>See Brunet & Redish, *supra* note 1, § 9:1 (discussing the trans-substantive interpretation of summary judgment); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237 (1989); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925 (1989).

<sup>103</sup>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); 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); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093 (1996).

also may reflect a judicial response to increases in product liability litigation that presents especially demanding issues of scientific evidence.<sup>104</sup> Since 1993, cases involving expert testimony must meet the admissibility standard set by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>105</sup> a standard that has been especially burdensome in torts cases that rely on expert testimony to survive a summary judgment motion.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> 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

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<sup>104</sup>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 analysis.

<sup>105</sup>509 U.S. 579 (1993).

<sup>106</sup>See Margaret A. Berger, Carnegie Comm'n Sci. Tech. & Gov', 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."); 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.").

<sup>107</sup>An exception is Mollica, *supra* note 24, at 163, who suggests that the trilogy may simply have "consolidate[d] a movement already underway."

<sup>108</sup>Resnik, *supra* note 18; 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").

37 were amended to strengthen the authority of judges to respond to problems that arise in discovery. Judges were encouraged to identify instances of discovery abuse and discourage the overuse of discovery,<sup>109</sup> place limits on interrogatories<sup>110</sup> and the production of documents,<sup>111</sup> and strengthen the sanctions for abuses of discovery.<sup>112</sup> In 1983, additional amendments strengthened sanctions for discovery abuse<sup>113</sup> and for abuses in pleading and motion practice.<sup>114</sup> 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.<sup>115</sup> Among the issues to be considered at the scheduling conference were “frivolous claims” and the “disposition of pending motions.”<sup>116</sup> This increasing 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.<sup>117</sup> We found that this was true in civil rights cases before the trilogy, and we found no evidence that the likelihood of a

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<sup>109</sup>Amendments to Fed. R. Civ. P. 26(b).

<sup>110</sup>Amendments to Fed. R. Civ. P. 33.

<sup>111</sup>Amendments to Fed. R. Civ. P. 34.

<sup>112</sup>Amendments to Fed. R. Civ. P. 37.

<sup>113</sup>Amendments to Fed. R. Civ. P. 26(g).

<sup>114</sup>Amendments to Fed. R. Civ. P. 11. *Supra* notes 86–92 and related text.

<sup>115</sup>Amendments to Fed. R. Civ. P. 16.

<sup>116</sup>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).

<sup>117</sup>See Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits, 232 *Hofstra Lab. & Emp. 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

summary judgment motion or termination by summary judgment has increased since that time. Such civil rights cases comprise 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 a traditional 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 data set 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.

## VII. CONCLUSION

Criticism of summary judgment rarely takes into account the widely varying incidence of motions across various types of cases and the marked differences in summary judgment practices across individual federal district courts. In fact, after we controlled for differences across courts and the changing mix of cases, we found few changes in summary judgment activity after the Supreme Court trilogy. The appearance of higher rates of summary judgment in general may be due to increased filings of civil rights cases, which have always had a higher-than-average rate of summary judgment motions and dispositions. Although increases in summary judgment may be part of the reason for the decrease in trial rates, the decline in trials reflects far broader changes in litigation practice than simply a response to the Supreme Court's affirmation of summary judgment practice.

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Employment Discrimination Cases in the Eastern District of New York, 16 *Touro L. Rev.* 1403, 1403 (2000); Siegelman & Donohue, *supra* note 26.

## APPENDIX: CHARACTERISTICS OF THE SIX FEDERAL DISTRICT COURTS IN THIS STUDY

	<i>Total Judgeships</i>	<i>Terminated Cases/Judgeship (Rank)</i>	<i>Pending Cases/Judgeship (Rank)</i>	<i>Months Filing to Disposition (Rank)</i>	<i>Weighted Case Filings per Judgeship</i>
<b>E. Pennsylvania</b>					
1975	19	230 (83)	209 (81)	18 (68)	242
1986	19	439 (69)	321 (76)	7 (37)	542
1988	19	496 (37)	425 (57)	6 (11)	724
1989	19	503 (30)	490 (37)	6 (4)	688
1995	23	370 (58)	253 (77)	12 (9)	405
2000	22	352 (71)	394 (40)	8 (16)	371
<b>C. California</b>					
1975	16	363 (48)	303 (54)	12 (41)	414
1986	22	474 (57)	473 (42)	6 (19)	518
1988	22	604 (5)	505 (33)	5 (4)	553
1989	22	490 (37)	519 (29)	7 (7)	535
1995	27	398 (48)	323 (60)	6 (7)	431
2000	27	518 (24)	654 (7)	9 (13)	504
<b>Maryland</b>					
1975	7	332 (59)	274 (68)	9 (41)	377
1986	10	519 (46)	462 (45)	6 (19)	447
1988	10	437 (55)	405 (59)	8 (26)	399
1989	10	426 (63)	427 (54)	8 (16)	451
1995	10	522 (12)	341 (55)	11 (75)	436
2000	10	466 (38)	323 (68)	7 (10)	449
<b>E. Louisiana</b>					
1975	9	453 (6)	473 (14)	13 (48)	449
1986	13	534 (38)	434 (49)	9 (73)	454
1988	13	530 (23)	397 (61)	9 (44)	417
1989	13	484 (39)	388 (62)	9 (30)	436
1995	13	312 (71)	250 (79)	15 (16)	320
2000	12	344 (73)	245 (83)	9 (41)	341
<b>S. New York</b>					
1975	27	294 (74)	336 (40)	15 (90)	282
1986	27	442 (76)	442 (48)	7 (37)	476
1988	27	371 (76)	462 (47)	8 (26)	446
1989	27	353 (81)	501 (34)	8 (16)	479
1995	28	359 (62)	527 (12)	9 (43)	443
2000	28	523 (23)	510 (12)	5 (6)	500
<b>N. Illinois</b>					
1975	13	337 (56)	306 (52)	9 (20)	449
1986	21	590 (22)	384 (63)	6 (19)	587
1988	21	516 (27)	405 (59)	4 (1)	614
1989	21	533 (23)	382 (63)	4 (1)	603
1995	22	365 (61)	317 (63)	5 (1)	387
2000	22	445 (49)	351 (56)	5 (5)	437

NOTE: These data are taken from the Administrative Office of the U.S. Courts, Federal Court Management Statistics—1975, 1986, 1988, 1989, 1995, and 2000. The numbers in parentheses indicate the rank of the court in relation to the other 93 district courts, with the lowest rankings indicating the greatest number of terminated cases, the fewest number of pending cases, and the briefest time from filing to disposition. Weighted case filing statistics account for the different amounts of time district judges require to resolve various types of civil and criminal actions. In this circumstance, the weighted case filings can be interpreted as the workload per judgeship, taking into account the time required to resolve different types of cases.