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JUDICIAL DISCRETION TO DENY SUMMARY JUDGMENT IN THE ERA OF MANAGERIAL JUDGING

Jack H. Friedenthal* & Joshua E. Gardner**

As summary judgment passes its sixty-third anniversary as embodied in Rule 56 of the Federal Rules of Civil Procedure,1 ("Rule 56") one may have the perception that its function in litigation is relatively established. This perception would seem even more reasonable in light of the 1986 trilogy of Supreme Court cases clarifying the parties' burdens, both in seeking and defending against summary judgment motions and regarding applicable evidentiary standards.2 Yet one of the most basic and fundamental questions concerning summary judgment remains unresolved: whether judges may deny summary judgment even though the parties' submissions would, on their face, justify the granting of the motion. Neither commentators3 nor courts4 have explored the issue in any depth.

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3. One commentator has noted a divergence of opinion, but has not articulated a reason why one position is correct over the other position. See Jonathan T. Molot, How Changes in the Legal Profession Reflect Changes in Civil Procedure, 84 VA. L. REV. 955, 993 n.145 (1998) (citing cases holding that "a district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before full trial."). Another group of commentators engages in a comprehensive analysis of a federal trial court’s expanded power to grant summary judgment, but fails to touch on the question of whether the court has discretion to deny summary judgment if it
The resolution of this issue is important from a practical, as well as from an academic, standpoint. To begin with, of course, is the fact that trial judges need to be certain as to their obligations when called upon to rule on summary judgment motions. And a uniform standard should apply in all federal courts throughout the country to avoid forum shopping by plaintiffs' attorneys who have limited information to support their cases. The need for firm guidance on the matter is particularly important because a denial of summary judgment is virtually unappealable. Such a decision is interlocutory in nature and, in the federal system, with rare exceptions, only a final judgment can be

could otherwise be granted (other than on a motion of a party under Rule 56(f) for time to further develop the facts). See Edward Brunet et al., Summary Judgment: Federal Law and Practice §§ 6.01-06 (2d ed. 2000). Many other commentators merely state either that judges do or do not have discretion to deny an otherwise proper motion for summary judgment, without recognizing the existence of an opposing position. See Davidson, supra note 2, at 147 & n.16 (citing Celotex for the proposition that "the 'plain language of [Rule 56] mandates the entry of summary judgment"); Charles M. Yablon, Justifying the Judge's Hunch: An Essay on Discretion, 41 Hastings L.J. 231, 275 (1990) (explaining that it is "doctrinally recognized that a judge always has discretion to deny [a technically appropriate motion for] summary judgment"); John F. Lapham, Note, Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f), 24 U. Mich. J.L. Reform 253, 267 (1990) (relying on the plain language of Rule 56(c) for the proposition that if a motion for summary judgment is properly supported and the nonmovant cannot demonstrate a genuine issue for trial, summary judgment must be granted; "it is not a matter of judicial discretion"); Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. Rev. 993, 1040-41 (1986) (noting that the denial of summary judgment is discretionary); David A. Sonenshein, State of Mind and Credibility in the Summary Judgment Context: A Better Approach, 78 Nw. U. L. Rev. 774, 781 (1983) (noting that "the Rule mandates that the court 'shall' grant summary judgment"); 10A Charles Alan Wright et al., Federal Practice & Procedure § 2728 (3d ed. 1998) (explaining that situations may exist where a court must grant summary judgment, but ordinarily it has discretion to deny summary judgment even when technically appropriate).

4. Interestingly, courts either proclaim that judges have or do not have discretion, never recognizing the other position, and rarely considering the competing policies upon which the existence of discretion should be based. See infra Part II.


6. Immediate appeal of the denial of an interlocutory order may occur in certain limited circumstances, however. For example, a litigant may petition the district court that has denied its summary judgment motion to certify the decision for immediate appellate review pursuant to 28 U.S.C. § 1292(b). See Davidson, supra note 2, at 196. Additionally, a litigant may seek an immediate order of mandamus to challenge the denial of summary judgment. See id. at 198. Courts also may permit immediate appeal of a denied summary judgment motion when a party appeals an order granting a cross-motion for summary judgment for her opponent. See id. at 195. Finally, a litigant may immediately appeal a denial of summary judgment if the case falls within the collateral order doctrine. See id. at 204-05. Yet the collateral order doctrine covers only a small number of cases, such as qualified immunity. See id. at 204. For the collateral order exception to apply, a court's order must satisfy three elements: (1) it must conclusively determine the disputed question; (2) it must resolve an important issue completely separate from the merits of the action; and (3) it
appealed. Once a case has proceeded to trial and final decision, the preliminary ruling denying summary judgment is unlikely to be given serious consideration on appeal. 8

If such a denial were to fall within one of the rare exceptions to the final judgment requirement, the nature of the review by the court of appeals would itself depend on the question of whether a denial is within the trial court’s discretion. 9 If the denial were within the trial court’s discretion, then, in a case in which the denial was based on the trial court’s discretion, the standard of review would be whether the trial judge has abused that discretion. 10 If, however, summary judgment must be granted in all cases where it is technically appropriate, the appellate courts would review the decision de novo. 11 Moreover, if discretion can play a role in the denial of a motion for summary judgment, that fact could impact an appeal even when a trial court has granted the motion. In an extremely rare case, the appellate court could conceivably hold that a trial court abused its discretion by not denying the motion.

Another significant need for a firm determination as to when a court may properly deny summary judgment involves the question of what, if any, preclusive effect such a denial will have in subsequent litigation. The situation arises when, following a ruling on summary judgment, the plaintiff has dropped the case or the parties have settled.

must be effectively unreviewable on appeal from a final judgment. See id. at 202-03 (citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981)). Thus, except in rare instances such as qualified immunity, denial of summary judgment would not fall within the collateral order doctrine, because the only orders the Supreme Court has found to satisfy the doctrine are those that implicate an “irretrievably lost” right. See id. at 204. Because an expenditure of time and resources does not rise to the level of an irretrievably lost right, a denial of summary judgment may not be appealed until after a judgment on the merits. See id. at 204-05.

7. See Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440, 442 (7th Cir. 1984).
8. Technically speaking, a party whose motion was denied and who loses the case at trial can raise the issue on appeal. See Wright et al., supra note 3, § 2715. Arguably an appellate court could hold that the trial court should have granted summary judgment and enter judgment on that basis despite the result of trial. See id. § 3915.5 (explaining that if a new trial is erroneously granted and reaches a decision different than that of the original trial, the appellate court may enter judgment based on the original trial decision). Such a result would be more feasible if it is held that summary judgment is mandatory when the submissions justify it. If the granting of the motion is discretionary, however, an appellate court would not likely find an abuse of discretion in any such situation. Case law is sparse and unclear as to whether an appeal will ever be permitted. See Bonilla v. Trebol Motors Corp., 150 F.3d 77, 81 n.2 (1st Cir. 1998). It would appear to be a perversion of justice to ignore the results of a trial wherein the evidence introduced cured any flaws in the information presented on the motion for summary judgment. A party can test the sufficiency of the evidence presented at trial by a motion for judgment as a matter of law. See Fed. R. Civ. P. 50(a).

10. See Hanover, 33 F.3d at 730.
11. See id.
One can argue that a denial of summary judgment in such a case, whatever the standard, should never be considered as determinative of an issue so as to invoke issue estoppel. Because the case remains open before the court, the trial judge might well reconsider the matter and change the decision or the reasons for it. This is particularly true if denial is within the discretion of the court. In that case, even if the motion is directed towards a specific issue, the judge cannot be said to have firmly decided anything other than the fact that the matter should not have been decided at that time. Nevertheless, at least one recent case has held that a denial of summary judgment in one suit had a preclusive effect on subsequent litigation. This case, *Chevron U.S.A., Inc. v. Oxy U.S.A., Inc.*\(^\text{12}\) is discussed in detail in Part VI below.

In deciding whether judicial discretion to deny summary judgment is appropriate, one must consider the history and text of Rule 56, the fundamental justifications for summary judgment, and its current use in modern litigation. Furthermore, one also must consider the effect of Rule 56(f), that allows the court, in its discretion, to deny relief if a party needs additional time to develop facts to support its case. Finally, it is important to assess issues of judicial activism and the cost of litigation upon the litigants and the court itself.

Part I of this Article briefly describes the evolution of summary judgment from a disfavored procedural shortcut to its current role as a prominent tool to discard unsupported claims. In this Part, we note that allowing judicial discretion to deny summary judgment when it is technically appropriate is consistent with the original intent of the Federal Rules, the 1986 Supreme Court trilogy of cases, and current summary judgment practice. We contend that judicial discretion in denying summary judgment was widely understood and accepted in the pre-trilogy era, and that the trilogy, perhaps through the use of imprecise language, has created confusion as to a judge’s ability to deny an otherwise appropriate summary judgment motion. Part II explores the current split among federal courts concerning whether judges must grant summary judgment if the movant satisfies its burden. Part III considers the use of Rule 56(f) in providing judges discretion to delay or deny a motion for summary judgment based on a showing by affidavit that particular facts are currently unavailable. In Part III, we note that although Rule 56(f) clearly provides judges some discretion to deny summary judgment, the Rule is inconsistently applied and fails to take into account efficiency concerns unrelated to material factual disputes.

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Part IV discusses the current confusion surrounding the standard of review appellate courts must apply in reviewing denials for summary judgment. In this section, we note that although many appellate courts appear to sanction district court discretion in denying an otherwise technically appropriate motion for summary judgment, these same courts utilize a *de novo* standard of reviewing these denials. In this section, we contend that if, in fact, district courts do have discretion to deny summary judgment, then, in those circumstances when a denial is based upon discretionary reasons, the appellate courts should review those denials under an abuse of discretion standard.

Part V discusses the policy reasons for and against allowing judicial discretion to deny summary judgment when it is otherwise technically appropriate. This section particularly focuses on concerns of judicial activism and litigation costs suffered by the parties, as well as the burdens and benefits placed upon the judiciary. Part VI discusses what preclusive effect, if any, a denial of summary judgment should have on subsequent litigation. Part VII proposes an amendment to Rule 56 that is consistent with the need for judicial discretion. Yet as Part V recognizes, this discretion should not be unbridled; judges should be given guidelines for deciding when a denial of summary judgment is appropriate. Therefore, in Part VII we propose such guidelines, suggesting a middle ground between mandatory grants of summary judgment and unbridled discretion. In deciding whether to deny summary judgment, judges should conduct a balancing test, taking into account the interests of both the plaintiff and the defendant relative to the efficiency concerns of the federal judiciary. If the burden on the court in deciding summary judgment would be substantially greater than the adverse effect of a denial on the movant, then a denial may be appropriate, without determining the existence of a factual dispute. In evaluating the costs and benefits of denying summary judgment, courts should consider such factors as whether the claim involves motive, state of mind, or credibility, whether the matter is particularly complex, and whether issues ripe for summary judgment are intertwined with issues not proper for summary adjudication. Ultimately, the judge should be given the discretion to deny summary judgment, when in her judgment, the matter is better suited to adjudication by trial rather than through summary procedures. Finally, Part VIII presents a hypothetical situation illustrating the utility of allowing judicial discretion in denying summary judgment even when it is technically appropriate.
I. A BRIEF HISTORY OF SUMMARY JUDGMENT

In determining whether judges should have discretion to deny technically appropriate motions for summary judgment, it is important to look at the historical practice of granting (and more importantly, denying) such motions. Much scholarship has been devoted to outlining the history of summary judgment practice, and particularly to the impact of the Supreme Court’s 1986 trilogy of cases. A brief examination of this history demonstrates that judicial discretion is not inconsistent with past practice. Rather, the notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinions since the earliest decisions regarding summary judgment under the Federal Rules. Yet, as we have noted, the propriety of the use of discretion is still uncertain today. The most significant sources of the confusion stem from the text of Rule 56 itself and from language in two of the three opinions in the Court’s summary judgment trilogy. As discussed in Part V, however, the confusion also arises from broader policy concerns about the proper role of both judges and summary judgment in our legal system.


14. Again, an in-depth treatment of the Supreme Court’s 1986 trilogy and its impact are beyond the scope of this article. For commentary on the trilogy, see Paul J. Cleary, Summary Judgment in Oklahoma: Suggestions for Improving a “Disfavored” Procedure, 19 OKLA. CITY U. L. REV. 251, 271 (1994) (claiming that the trilogy provided clear standards that favor judicial economy at the expense of the right to a jury trial); see also Bratton, supra note 13, at 461-79 (predicting the future impact of the trilogy); Gordillo, supra note 13, at 275-90, 298 (arguing that the trilogy created confusion and that judges struggle with an “impractical standard”); Stempel, supra note 13, at 108-44 (asserting that the trilogy is contrary to the intent and history of summary judgment practice and violates the Rules Enabling Act).


16. See id.

A. The Advent of the Federal Rules in 1938

Modern summary judgment has its root in nineteenth century English law. Both the 1855 Summary Procedure on Bills of Exchange Act, more commonly known as Keating's Act, and the Judicature Act of 1873 allowed plaintiffs summary adjudication in their collection of liquidated claims when they demonstrated no dispute as to the terms of an agreement to provide goods or services, the actual provision of those goods or services, and nonpayment. The purpose of these acts was to "reduce delay and expense resulting from frivolous defenses." Although forms of summary proceedings existed in the United States as early as 1769, several states enacted summary judgment statutes based on the English model in the late 1800s. These American statutes were similar to the English Acts in that they were limited to use by plaintiffs and could only be used for claims appropriately resolved by documentary proof. Initially, judges expressed reluctance in granting summary judgment motions, viewing summary judgment as a drastic remedy. Yet by the mid-1920s, judges granted more than half of such motions before them.

On June 19, 1934, President Franklin Roosevelt signed the Rules Enabling Act, which conferred upon the Supreme Court the power to establish federal rules of civil procedure. The Supreme Court appointed an advisory committee to draft a set of rules, and in 1938, when the Federal Rules of Civil Procedure were promulgated, they included Rule 56 providing for summary judgment. Apparently, both the bar and the bench understood that the purpose of summary judgment was to enable a

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18. See Fed. R. Civ. P. 56 advisory committee's note. Although summary proceedings have occurred as far back as ninth century Germany, the modern summary judgment procedure is a descendent of nineteenth century English law. See Bratton, supra note 13, at 446 & n.7.


20. Schwarzer et al., supra note 19, at 1.

21. See id.

22. See id. New York, Michigan and Illinois each had summary judgment statutes prior to the enactment of Rule 56. See Fed. R. Civ. P. 56 advisory committee's notes. These statutes were much broader in subject matter than their English counterpart. See id.

23. See Schwarzer et al., supra note 19, at 1.


26. See Bratton, supra note 13, at 447.

27. See id. at 447-48 & n.14.
party who has an undeniable cause of action or defense to be freed from
the delays involved in sham claims or defenses presented by his
adversary and from the expense and inconveniences of a trial. Rule 56’s
effect was to allow the court to find in advance that there exists no issue
of fact that would necessitate a trial. 28

Rule 56 provided a much broader notion of summary judgment
than the pre-codified version. 29 Under the Rule, both plaintiffs and
defendants could move for summary judgment. 30 Moreover, in order to
survive a motion for summary judgment, Rule 56 required the
nonmovant to do more than merely introduce a sworn statement
opposing the motion; the nonmovant had to introduce affidavits and
discovery responses to demonstrate the existence of material factual
disputes. 31

By the 1960s, the judicial attitude towards summary judgment was
mixed, with some judges aggressively utilizing Rule 56 and other judges
acting much more cautiously. 32 The hesitancy in granting summary
judgment was attributable, in part, to concerns over preserving parties’
rights, particularly given that summary judgment occurred relatively
early in the litigation. 33 Specifically, some judges expressed concern over
conducting “trials by affidavit” and thus undermining the role of the
factfinder. 34 This concern led trial courts to err on the side of allowing
cases to go to trial. 35

In part then, the judiciary’s perception that it could deny summary
judgment whenever it seemed appropriate to do so appears to be a direct
offshoot of a general hesitancy to grant summary judgment in the first
place. Such a view is evidenced in the writings of Judge Harry J.

28. See id. at 449.
29. See SCHWARZER ET AL., supra note 19, at 2.
30. See id.
31. See id. at 2-3. A 1963 Amendment to Rule 56(e) made explicit that nonmovants could not
rest on their pleadings in opposing a motion for summary judgment. See id. at 3.
32. See id. at 3; see also Bratton, supra note 13, at 449 (noting that Rule 56 suffered from
“neglect, misuse, restriction, confusion and inconsistency during the first forty-eight years of its
existence”).
33. See SCHWARZER ET AL., supra note 19, at 3.
34. See Towns, supra note 15, at 1020.
35. See SCHWARZER ET AL., supra note 19, at 4. Trial courts perceived that the appellate
courts would rarely affirm a grant of summary judgment, and consequently feared reversal if they
decided to grant a summary judgment motion. See id. Instead, trial courts would let questionable
claims and defenses go to the jury, allowing the appellate court to correct improper verdicts during
or after trial pursuant to Rule 50. See Sinclair & Hanes, supra note 19, at 1651. Interestingly, this
perception was incorrect, as appellate court affirmance of summary judgment was roughly
equivalent to the overall rate of affirmance in all civil cases. See, e.g., Joe S. Cecil, Trends in
Lemley, District Court Judge for the Eastern and Western Districts of Arkansas.\textsuperscript{36} In 1957, Judge Lemley noted that: “Even where the court is satisfied that there is no factual dispute in the case before him, he must also be satisfied that the undisputed facts are sufficiently developed by the record to justify entry of judgment.”\textsuperscript{37} Judge Lemley discussed several instances when summary judgment would be inappropriate, even absent a factual dispute.\textsuperscript{38} These included cases in which the party had not properly established the record, where confusion as to the legal standard existed, where doubt existed as to the facts themselves, where the issues concerned “doubtful” questions of local law, and where such a ruling would result in the unnecessary determination of a constitutional question.\textsuperscript{39} Although some of Judge Lemley’s analysis has been called into question,\textsuperscript{40} the belief that judges retain an equitable power to deny motions for summary judgment that technically are proper has been stated in many modern decisions.\textsuperscript{41}

One area in which a majority of federal judges have been particularly willing to exercise discretion to deny summary judgment is in complex cases, such as antitrust litigation, although a few courts view the procedure as a useful case management tool in such actions.\textsuperscript{42} The Supreme Court’s 1962 decision in \textit{Poller v. Columbia Broadcasting System, Inc.}\textsuperscript{43} helped foster judicial reluctance to grant summary judgment in these cases.\textsuperscript{44} In \textit{Poller}, the Court explained that judges should use summary judgment sparingly in complex antitrust actions, particularly “where motive and intent play leading roles, the proof is

\begin{itemize}
\item \textsuperscript{37} Id. at 140.
\item \textsuperscript{38} See id.
\item \textsuperscript{39} See id. at 140-41.
\item \textsuperscript{40} For example, the notion that judges should avoid deciding constitutional questions on summary judgment where no material issue of fact exists has been questioned. See J.P. Ludington, Annotation, \textit{Raising Constitutionality of Legislation By Motion for Summary Judgment}, 83 A.L.R. 2d 838, 839 (1962).
\item \textsuperscript{41} See infra Part II.
\item \textsuperscript{42} In his often cited article, Professor Schwarzer noted:
\textquote{[t]he courts have . . . been uniquely ambivalent toward Rule 56; their attitudes range from enthusiastic support for the economy and efficiency of summary judgment to hostility based on the suspicion that judges, intent on controlling their dockets, may use summary judgment as a "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial."}
\item \textsuperscript{43} 368 U.S. 464 (1962).
\item \textsuperscript{44} See id. at 473.
\end{itemize}
largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." 45

Confusion concerning Rule 56's internal vagueness likely also played a role in the judicial reluctance to grant summary judgment. 46 Courts found it difficult to reconcile Rule 56's procedural requirements contained in subparagraphs (c), (e), and (f) with the substantive requirement contained in subparagraph (c) that the court must "determine whether a 'genuine issue as to any material fact' exists." 47 This confusion was only exacerbated by the uncertainty concerning who bore the burden of proof on the motion, how that burden corresponded to the burden at trial, and how a party satisfied its burden. 48

As one might expect, courts responded to this uncertainty by taking a restrictive view of summary judgment. 49 Some courts adopted a rule that summary judgment was inappropriate so long as the "slightest doubt as to facts" existed, as this established "a genuine issue of material fact." 50 Other courts explained that even if the evidence presented by the nonmovant was insufficient for surviving a directed verdict, the evidence was sufficient to create a "genuine issue of material fact" under Rule 56. 51 Courts restricted the use of Rule 56 even further in the wake of the Court's 1970 holding in Adickes v. S. H. Kress & Co. 52 There, the Court reversed the grant of summary judgment in a civil rights action on the basis that the defendant failed to prove the nonexistence of an essential element of the plaintiff's case, even though the plaintiff, who would have the burden of proof at trial, could not provide affidavits as to the existence of that element. 53 Thus, under

45. Id.; see also Bratton, supra note 13, at 454 (noting that the Poller decision "had a chilling effect on the use of summary judgment as an effective procedural tool").
46. See SCHWARZER ET AL., supra note 19, at 4.
47. Id. Rule 56(c) requires that a court grant summary judgment if the "pleadings, depositions, [answers to interrogatories,] and admissions on file, together with the affidavits, if any" demonstrate that no genuine issue of material facts remains for trial and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Rule 56(e) requires that when a movant makes a motion for summary judgment, the opposing party may not rest upon mere allegations or denials of the movant's pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial. See FED. R. CIV. P. 56(e). Yet Rule 56(f) provides that if the one opposing summary judgment sets forth in a sworn affidavit reasons why she cannot present sufficient facts to overcome a motion for summary judgment, the court may either refuse summary judgment or order a continuance to allow discovery to be had. See FED. R. CIV. P. 56(f).
48. See SCHWARZER ET AL., supra note 19, at 4-5.
49. See id.
50. Id. This view found prominence in Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946). See also Towns, supra note 15, at 1021.
51. SCHWARZER ET AL., supra note 19, at 5.
53. See id. at 157-61.
Adickes, a defendant had the burden of negating every possible basis of recovery within the plaintiff’s complaint. In the absence of such negative evidence, summary judgment was inappropriate even though the plaintiff produced nothing to indicate its claims had any factual support.

By the early 1980s, summary judgment in the federal courts had become a disfavored motion due to onerous burdens of proof and judicial confusion and indifference concerning Rule 56. Yet this reluctance by parties to move for, and courts to grant, summary judgment changed dramatically with the Supreme Court’s trilogy of cases in 1986, which clarified the requirements of Rule 56 and reinvigorated the use of summary judgment to resolve cases.

B. The 1986 Trilogy

The upshot of the Supreme Court’s 1986 trilogy is that it appeared to signal a greater judicial acceptance of summary judgment to resolve cases. Although these decisions did not alter the fundamental substance of summary judgment, they did provide judges with significant latitude in determining which factual questions should reach the jury. The trilogy reflects concerns for efficiency and fairness and seeks to allow the district courts flexibility in controlling their dockets by dismissing meritless claims. Unfortunately, however, as we shall see, contradictory language in two of these decisions concerning the role of judicial discretion to deny summary judgment has resulted in confusion among lower courts.

In Celotex Corp. v. Catrett, the Court reduced the movant’s initial evidentiary burden, holding that a party moving for summary judgment

54. See Bratton, supra note 13, at 460.
55. See id.
57. See SCHWARZER ET AL., supra note 19, at 8; BRUNET ET AL., supra note 3, §§ 6.02, 6.06.
58. See Friedenthal, supra note 1, at 771.
59. See Towns, supra note 15, at 1027-28. For the view that the trilogy did in fact change the substance of Rule 56, see Stempel, supra note 13, at 99.
60. See Towns, supra note 15, at 1028.
61. This Article foregoes a discussion of Matsushita Electrical Industries, Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Although Matsushita is an important case in clarifying the nonmovant’s burden for summary judgment, it does not mention the role of judicial discretion in denying an otherwise proper motion.
that does not bear the burden of proof at trial need not negate the other
party’s case.63 Instead, the moving party may discharge its burden by
demonstrating that the opponent, who bears the burden of proof at trial,
will be unable to present any evidence to satisfy that burden.64 The
movant could make this demonstration without submission of affidavits,
by reliance on the opposing party’s pleadings, depositions, answers to
interrogatories, and admissions on file.65 The Court urged lower courts
not to view summary judgment “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.’”66 Notably, the Court addressed the issue of judicial
discretion in denying summary judgment, explaining:

[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.67

The Court’s apparent position limiting judicial discretion would
thus seem crystal clear were it not for another case in the trilogy,
Anderson v. Liberty Lobby Inc.68 decided on the same day as Celotex,
that included language completely contrary to that quoted above.69

In Anderson, the Court stated that a judge may exercise discretion
in denying summary judgment when she has “reason to believe that the
better course would be to proceed to a full trial.”70 In so concluding, the
Court relied upon its earlier decision in Kennedy v. Silas Mason Co.71
Yet the Kennedy decision itself is somewhat contradictory. In one
footnote of the decision, the Court states that “Rule 56 requires that
summary judgment shall be rendered if ‘there is no genuine issue as to
any material fact.’”72 In making this conclusion, the Court in Kennedy
cites its own earlier footnote which states: “Rule 56 provides that the
trial court may award summary judgment after motion . . . provided the

63. See id. at 331.
64. See id. at 331-33.
65. In Celotex, the defendant produced the plaintiff’s answers to interrogatories in which the
plaintiff failed to identify any witness who could testify for the plaintiff. See id. at 320.
66. Id. at 327 (quoting FED. R. CIV. P. 1).
67. Id. at 322.
69. See id. at 255.
70. Id.
71. 334 U.S. 249 (1948); Anderson, 477 U.S. at 255 (citing Kennedy, 334 U.S. 249 (1948)).
pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

One could possibly explain this internal conflict in *Kennedy*, and the difference between *Celotex* and *Anderson*, as merely a product of sloppy or imprecise language. But whatever the reason, the cases provide little help in answering the question of how the inconsistency should be resolved. The *Celotex* opinion is surely correct that the "plain language" of Rule 56 mandates that courts enter summary judgment when the movant has demonstrated that no disputed issues of material fact exist. Yet as a matter of sound policy, as well as historical practice and understanding, the *Anderson* Court’s notion that judges may at times deny an otherwise appropriate summary judgment motion seems eminently reasonable and sensible.

C. Modern Summary Judgment Practice

Since 1986, when the Court decided the trilogy, lower federal courts appear much more willing to grant summary judgment. Although significant empirical evidence is lacking, at least one study has concluded that the proportion of summary judgment motions that are granted has increased significantly and that approximately as many cases are disposed of by summary judgment as go to full trial. This has been especially helpful to defendants, who bring some three-fourths of all summary judgment motions and whose motions are more often granted than those brought by plaintiffs.

73. *Id.* at 252 n.4 (emphasis added).
75. The policy reasons for and against judicial discretion will be discussed later in the article. *See infra Part V.*
76. *See Brunet et al., supra* note 3, § 6.04; *Towns,* supra note 15, at 1026 n.183 ("Lower courts have read the 1986 trilogy to signal an expansive judicial approach in granting summary judgment motions and greater deference to their decisions."); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments,* 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 313-15 (1999) (noting that the trilogy spawned the aggressive use of summary judgment to resolve fact intensive sexual harassment cases, which frustrates enforcement of Title VII and prevents parties from obtaining a trial by jury).
77. *See Sinclair & Hanes,* supra note 19, at 1661-63; *see also* Patricia M. Wald, *Summary Judgment at Sixty,* 76 TEX. L. REV. 1897, 1917 (1998) (arguing that as a result of the trilogy, summary judgment is in danger of "being stretched far beyond its originally intended or proper limits").
78. *See Stempel,* supra note 13, at 159. Professor Stempel argues that aggressive use of summary judgment after the trilogy will result in an inappropriately high "percentage of erroneous dismissals of claims" based on an incomplete factual record. *Id.* at 181; *see also* Wald, *supra* note 77, at 1941 ("[S]ummary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes.").
In an atmosphere in which summary judgment is favored, it appears increasingly important to allow courts discretion to deny motions that they believe are inappropriate under all of the circumstances, lest meritorious cases be “automatically” eliminated when they should have gone to trial.

II. THE CURRENT SPLIT AMONG FEDERAL COURTS

Federal courts of appeals are currently split over whether judges must grant summary judgment if it is technically appropriate. Astonishingly, federal courts often do not provide a policy rationale for their positions and have failed to recognize that a contrary position exists. The majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties’ submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view. Moreover, various district courts in these and other circuits also have accepted this position. These courts recognize that certain cases are just not ripe for

79. See Buenrostro v. Collazo, 973 F.2d 39, 42 n.2 (1st Cir. 1992) (recognizing “rare instances” when a trial court may exercise discretion in allowing a case to more fully develop even when faced with a technically proper motion for summary judgment); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 35 (1st Cir. 1970) (stating that a court has discretion to deny an otherwise justified motion for summary judgment “if the arguments of the parties have failed to clarify the underlying facts” or “if the motion is tainted with procedural unfairness”); Forest Hills Early Learning Ctr., Inc. v. Lukhard, 728 F.2d 230, 245 (4th Cir. 1984) (noting that even when summary judgment is appropriate on the record, a trial court can decline to grant it for a variety of reasons); Williams v. Howard Johnson’s Inc., 323 F.2d 102, 105 (4th Cir. 1963) (stating that where trial judge is in doubt as to whether genuine issues of fact exist, he may postpone consideration of summary judgment until after a trial on the merits); Veillon v. Exploration Servs., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989) (same); Marcus v. St. Paul Fire & Marine Ins. Co., 651 F.2d 379, 382 (5th Cir. 1981) (explaining that the judge may exercise discretion in denying summary judgment “to give the parties an opportunity to fully develop the case.”); Nat’l Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647, 651 (5th Cir. 1962); McLain v. Meier, 612 F.2d 349, 356 (8th Cir. 1979) (same); Confederate Tribes of the Colville Reservation v. United States, 964 F.2d 1102, 1109 (Fed. Cir. 1992) (stating that “courts have discretion to deny summary judgment”) in otherwise appropriate circumstances, particularly “in fact-intensive takings jurisprudence seeking just compensation”’).

summary relief. For example, in John Blair & Co. v. Walton, the court explained that it could exercise discretion to deny summary judgment in an action to remove a cloud on title to stock because the facts were complicated and the court was faced with “lengthy affidavits,” numerous documents and “voluminous depositions.” Similarly, in Fine v. City of New York, the court ruled that in a suit against the police for an illegal search, the court had discretion to deny summary judgment—based on the fact that the issues were complex and involved a legal issue of first impression.

Related to the issue of complexity, some courts have exercised discretion to deny partial summary judgment on issues technically ripe for summary disposition when the issues presented in the motion were intertwined with issues not proper for summary adjudication. For example, in Flores v. Kelley, the plaintiffs sought a summary judgment declaring that particular Indiana statutes and chapters of the Indiana State Welfare manual were unconstitutional. The defendants had answered the plaintiffs’ complaint, creating a factual dispute as to several different issues, e.g., whether class certification was proper and whether the defendants were obligated to make retroactive payments. The court denied plaintiff’s motion for summary judgment, stating:


82. 47 F.R.D. at 196.
83. Id. at 198.
85. See id. at 375. Here, the complex issue involved when the statute of limitations tolled. See id. When the complex issue involved is one of constitutional dimension, several courts have urged careful consideration of whether to employ summary judgment, particularly on a “potentially inadequate factual presentation.” Williams v. Howard Johnson’s Inc., 323 F.2d 102, 105 (4th Cir. 1963) (citing Pacific Am. Fisheries v. Mullaney, 191 F.2d 137, 141 (9th Cir. 1951)). But see Ludington, supra note 40, at 839 (noting that “although there are dicta that the weighty question of the constitutionality of legislation should not be decided on motion for summary judgment, it seems a justifiable inference that motions for summary judgment which raise a question concerning the constitutionality of legislation are decided under the same rules which apply to all motions for summary judgment”). Although courts should not blindly deny summary judgment whenever a constitutional question is presented before the court, courts should have the discretion to weigh, as a factor, the type of issue before them in deciding to grant or deny summary judgment.
86. 61 F.R.D. 442 (N.D. Ind. 1973).
87. See id. at 444. The summary judgment motion also sought a permanent injunction against state employees from enforcing the statute, restitution of allegedly withheld benefits, and an order requiring the defendant to send the court’s decision to each County Department of Welfare in Indiana. See id.
88. See id.
Even where a motion for summary judgment meets the technical requirements for the granting of a motion the court may in its discretion deny the motion in favor of a full hearing on the merits. Where a case involves complex issues of fact or unsettled questions of law a [court] may properly exercise its discretion in denying summary judgment.

The court concluded that because two issues not ripe for summary adjudication were intertwined with other factual and legal issues for which summary judgment otherwise might be appropriate, it should exercise discretion and conduct a full hearing on all of the issues so that "all of the parties will have the advantages of the truth seeking procedures of a civil trial."

Some courts in exercising judicial discretion to deny summary judgment have specifically rejected a literalist interpretation of Rule 56 in favor of the underlying policies behind summary judgment. For example, in In re Franklin National Bank Securities Litigation, the court noted that although Rule 56 is steeped in mandatory terms, "the rule is not mandatory in operation: 'a motion for summary judgment is always addressed to the discretion of the court.'" The court justified its nontextual reading of Rule 56 by relying on Rule 1's admonition that the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Thus, the court explained that the decision to deny summary judgment is a pragmatic one, and that if summary judgment would not expedite the proceeding, then the judge may deny the motion.

In Franklin, the court applied a "common sense" approach in denying defendant's motion for summary judgment in a complex multi-district bond dispute. The court explained that the "slight unfairness" to the defendant in denying summary judgment would be "more than overbalanced by advantages to all of the other litigants and the court system itself in more expeditious and fairer disposition of the whole dispute." This concern for "expediting" the litigation was again

89. Id. at 445 (citations omitted).
90. Id. at 446-47. The court also stated that "justice can best be done [in this case] by a full trial on the merits." Id. at 447.
94. See id.
95. See id.
96. Id. The court considered the following balancing factors in deciding to deny summary judgment: (1) summary judgment would not shorten the trial because although the issues presented
evidenced in *Toyoshima Corp. v. General Footwear, Inc.* The *Toyoshima* involved thirteen causes of action against four defendants based on an overdue payment for a commercial account. The plaintiffs sought partial summary judgment on seven of the causes of action, as well as the dismissal of twenty-nine affirmative defenses and three counterclaims. In support of its motion, the plaintiffs introduced affidavits and deposition testimony. The court denied plaintiffs' motion, explaining that even if it granted the motion, the plaintiffs would still have to appear at trial for the remaining claims. Moreover, because the parties had completed discovery, neither side would be prejudiced by delay, as the trial could begin as scheduled. The court noted that, if at trial it found no disputed facts, it could grant either a directed verdict or a judgment notwithstanding the verdict. The court expressed its refusal to grant summary judgment because, “on the basis of the cold record, a considerable expenditure of judicial time and effort will be required ‘to sift out and piece together the undisputed facts essential to a summary judgment.’”

Several other courts have denied summary judgment due to concerns over the efficacy of summary judgment in the particular case at

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98. See id.
99. See id.
100. See id. at 561.
101. See id. The court stated that the exercise of discretion in denying summary judgment is appropriate where matters ripe for summary judgment are intertwined with claims that must await trial to resolve. See id. at 560.
102. See id. at 561.
103. See id.
104. Id. at 560. The Federal Circuit also has expressed concerns about judicial expediency, noting that in fact-intensive Indian takings cases, summary judgment may be inappropriate. See Confederate Tribes of Colville Reservation v. United States, 964 F.2d 1102, 1109 (Fed. Cir. 1992).
hand. For example, in Forest Hills Early Learning Center, Inc. v. Lukhard,105 the Fourth Circuit tentatively upheld the trial court's denial of the plaintiffs' cross-motion for summary judgment in a case brought by operators of nonsectarian child care centers challenging the constitutionality, under the Establishment Clause, of an exception of religious-affiliated day care centers from licensing requirements.106 The court explained that, on the existing record, summary judgment would have been justified on the ground that the challenged exception was "facially overbroad."107 However, because of "critical inadequacies" in the record and the absence of the religious-affiliated operators as parties, the court declined to reverse.108 It noted that the grant of summary judgment for the plaintiffs would result in an inconclusive disposition of conflicting First Amendment constitutional claims of both religious-affiliated and nonsectarian operators; such a decision would not preclude the religious-affiliated operators from challenging the result in subsequent litigation.109 Therefore the appellate court remanded the case to permit the religious-affiliated operators to intervene, but directed the trial court to enter summary judgment for the plaintiffs if the religious-affiliated operators failed to join the suit.110

Moreover, jurisdictions allowing for discretion in denying summary judgment note that judges may deny such motions in order to consider further pleadings.111 In First American Bank, N.A. v. United Equity Corp.,112 the Court denied plaintiffs motion for summary judgment, explaining that because the defendants had not yet filed an answer to plaintiff's complaint, the entry of summary judgment would be tantamount to a default judgment.113 The court noted that granting summary judgment before the defendants answered could result in overlooking potential material issues of facts.114 Thus, the court deferred

105. 728 F.2d 230 (4th Cir. 1984).
106. The nonsectarian operators also claimed that the exemption constituted a denial of equal protection. See id. at 233.
107. See id.
108. See id.
109. See id. at 245.
110. See id. at 247. The court noted that intervention by the religious-affiliated operators would allow the parties the opportunity to develop their legal and factual positions and ultimately would result in a definitive resolution of the religion clause claims. See id. at 245-47.
112. See id.
113. See id. at 87.
114. See id.
deciding whether summary judgment would be appropriate until after the defendants filed a responsive pleading.\textsuperscript{115}

The Seventh and Eleventh Circuits,\textsuperscript{116} on the other hand, as well as at least one district court in the Ninth Circuit,\textsuperscript{117} have adopted the view that judges must grant summary judgment whenever technically appropriate. And in several recent opinions, the Third Circuit appears to be taking a similar position.\textsuperscript{118} These courts, without a discussion of policy, rely upon a strict interpretation of the text of Rule 56 and on language in \textit{Celotex},\textsuperscript{119} and to a lesser extent \textit{Anderson},\textsuperscript{120} to support their

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{115} \textit{See id.}
\item\textsuperscript{117} \textit{See Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1366 (N.D. Cal. 1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986), for the proposition that "entry of summary judgment is mandated against a party" that 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").}
\item\textsuperscript{118} \textit{See Watson v. Eastman Kodak Co., 235 F.3d 851, 857-58 (3d Cir. 2000) (arguing Celotex "mandates the entry of summary judgment"); Witkowski v. Welch, 173 F.3d 192, 198 (3d Cir. 1999) (stating appropriate standard requires summary judgment). Earlier Third Circuit cases, however, appear inconsistent. See, e.g., Kelley v. TYK Refractories Co., 860 F.2d 1188, 1192 (3d Cir. 1988) (stating that a trial court may enter summary judgment if there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law) (emphasis supplied).}
\item\textsuperscript{119} As discussed in Part I, \textit{supra}, courts mandating summary judgment rely upon the following statement from \textit{Celotex}: "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, . . . against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. 317. 322 (1986) \textit{cited in Real Estate Fin.}, 950 F.2d at 1543; McCollough, 929 F. Supp. at 1494; \textit{Allstate}, 795 F. Supp. at 274; \textit{Kauffman}, 815 F. Supp. at 1081.
\end{enumerate}
\end{footnotesize}
position. Although the text of Rules 56(c) and (d) does appear strongly to support their position, we believe that reliance on these precedents is unpersuasive. Yet before concluding which side has the better argument, consideration should be given to the role of Rule 56(f) as an alternative source of judicial discretion.

III. RULE 56(F) AS A TOOL FOR PROVIDING JUDICIAL DISCRETION IN SUMMARY JUDGMENT DENIALS

Even under a strict reading of Rule 56, judges are not completely prohibited from utilizing discretion in denying summary judgment. Rule 56(f) allows a judge to deny or continue a summary judgment motion to allow the parties to conduct further discovery. Rule 56(f) is theoretically triggered when the party opposing summary judgment submits an affidavit explaining why that party cannot present any facts essential to the creation of a material issue in dispute. At first blush,
then, Rule 56(f) appears adequate to permit judicial discretion in denying motions for summary judgment.

Yet upon closer inspection, Rule 56(f) falls far short of achieving the breadth of discretion necessary to balance the interests of the parties and to promote judicial efficiency. The reason for this is twofold. First, federal courts have not applied Rule 56(f) consistently, leaving parties without clear guidance as to what is sufficient to satisfy (or oppose) a Rule 56(f) claim. Second, Rule 56(f) does not take into account efficiency concerns the court may have even absent a factual dispute.

There are several bases for confusion as to the application of Rule 56(f). First, courts are divided over whether a party moving under Rule 56(f) must submit an affidavit in support thereof or whether an in-court statement is sufficient. Second, courts are split over whether the party presenting the Rule 56(f) affidavit must present facts supporting its claim. Note that the language of the Rule does not require a factual showing in conjunction with a Rule 56(f) affidavit.

Regardless of how this confusion over the proper application of 56(f) is resolved, no interpretation of the Rule would justify denial of summary judgment in some of the instances described in Part II. For example, Rule 56(f) clearly does not cover the circumstances in Franklin National Bank and Toyoshima, when, although no material factual dispute existed, the courts denied summary judgment in part because of efficiency concerns. As discussed above, the Franklin National Bank court ruled that denying the defendant's motion for summary judgment would allow for a fuller and fairer development of the evidence, particularly where nonsummary judgment issues were closely tied to issues included in the motion. The Toyoshima court denied plaintiffs' motion for summary judgment because it recognized the "considerable expenditure of judicial time and effort" it would take to "sift out and piece together the undisputed facts essential to a summary judgment."
Because such efficiency concerns are at the heart of summary adjudication, Rule 56(f), by itself, does not satisfy the need for a court’s discretion when ruling on summary judgment motions.

IV. STANDARD OF APPELLATE REVIEW

As noted in the Introduction, the resolution of the question of whether district courts have discretion to deny an otherwise technically appropriate motion for summary judgment has important consequences in determining the standard of appellate review when summary judgment has been denied. The law is well-settled that an appellate court will review the grant of a motion for summary judgment de novo. The reason for a de novo standard of review of a grant of summary judgment is obvious. In order to obtain summary judgment, the movant must make two distinct showings. First, the movant must show that there is no genuine issue as to any material fact. Second, the movant must demonstrate that he or she is entitled to judgment as a matter of law. If the movant does not satisfy his or her burden on both of these points, then the district court does not have the power to grant summary judgment; obviously there can be no discretion to grant summary judgment. The appellate court is in the same position as was the trial court in determining whether the motion is appropriate. Therefore, a

138. See Hodgens v. General Dynamics Corp., 144 F.3d 151, 158 (1st Cir. 1998) (“We review grants of summary judgment de novo.”) (emphasis added); Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 149 (2d Cir. 1998) (same); Ingram v. County of Bucks, 144 F.3d 265, 267 (3d Cir. 1998) (“A district court’s grant of summary judgment is subject to plenary review.”); Motor Club of Am. Ins. Co. v. Hanifi, 145 F.3d 170, 174 (4th Cir. 1998) (stating that standard of review of grants of summary judgment is de novo); Liberty Mut. Ins. Co. v. Pine Bluff Sand & Gravel Co., 89 F.3d 243, 246 (5th Cir. 1996) (discussing “independent review of the record” for grants of summary judgment); Trustees for Mich. Laborers’ Health Care Fund v. Seaboard Sur. Co., 137 F.3d 427, 428 (6th Cir. 1998) (stating that review of summary judgment is de novo, and the appellate court applies “the same test as the district court to determine whether summary judgment is appropriate”); Lindemann v. Mobil Oil Corp., 141 F.3d 290, 294 (7th Cir. 1998) (stating that standard of review of grants of summary judgment is de novo); Christopher v. Adam’s Mark Hotels, 137 F.3d 1069, 1071 (8th Cir. 1998) (same); Vision Air Flight Serv., Inc. v. M/V Nat’l Pride, 155 F.3d 1165, 1168 (9th Cir. 1998) (same); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998) (same); Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 1400 (11th Cir. 1998) (stating that standard of review is plenary); Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc., 145 F.3d 1303, 1307 (Fed. Cir. 1998) (stating that review is de novo).

139. See FED. R. CIV. P. 56(c).

140. See id.

141. As the Fifth Circuit explained in Marcus v. St. Paul Fire & Marine Insurance Co., 651 F.2d 379, 382 (5th Cir. 1981), “[t]here is no discretion to award summary judgment if this standard is not met.”

de novo review of a district court’s grant of summary judgment is entirely justified.

Similarly, if district courts do not have discretion to deny an otherwise appropriate motion for summary judgment, then the de novo standard of review appears equally appropriate for denials as it is for grants. In fact, those courts that appear not to recognize the district court’s discretion have expressly stated that the standard of review for denials of summary judgment is de novo.1

However, if in fact district courts do have discretion to deny an otherwise appropriate motion for summary judgment, then, in the rare case in which meaningful review is available,144 the determination of the appropriate standard of review is more complex. To the extent that the denial is based solely on a determination that the moving party has not demonstrated its two burdens as set forth above, then de novo review is appropriate.145 However, if the denial results, all or in part, from the

143. See Jackson v. University of Pittsburgh, 826 F.2d 230, 232 (3d Cir. 1987) (“We review grants and denials of summary judgment by applying the same test a district court should employ.”); Ayres v. General Motors Corp., 234 F.3d 514, 520 (11th Cir. 2000) (“The district court’s denial of summary judgment is reviewed de novo, with all facts and reasonable inferences therefrom reviewed in the light most favorable to the nonmoving parties.”).

144. As we have noted, see pp. 2-3, supra, the denial of summary judgment does not result in a final judgment. Thus, to “be immediately appealable, the matter must fall within one of the special exceptions to the final judgment requirement.” See supra note 6 and accompanying text. Of course, a party who loses at trial can appeal the denial of its summary judgment motion, but that will rarely be a basis for reversal once a trial has taken place. See supra note 8.

145. This is illustrated by cases involving denials of summary judgment when a qualified immunity defense has been raised. As the Tenth Circuit recently explained:

In qualified immunity cases, there are also considerations specific to an examination of our appellate jurisdiction over a denial of summary judgment. A district court’s denial of a defendant’s summary judgment motion based on qualified immunity is an immediately appealable collateral order when the issue appealed concerns whether certain facts demonstrate a violation of clearly established law ... [N]ot every denial of summary judgment following the assertion of qualified immunity, however, is immediately appealable. Courts of appeals clearly lack jurisdiction to review summary judgment orders deciding qualified immunity questions solely on the basis of evidence sufficiency—which facts a party may, or may not, be able to prove at trial. Consequently, an order will not be immediately appealable unless it presents more abstract issues of law ... We need not, however, decline review of a pretrial order denying summary judgment solely because the district court says genuine issues of material fact remain; instead, we lack jurisdiction only if our review would require second-guessing the district court’s determinations of evidentiary sufficiency. An order denying summary judgment based on qualified immunity necessarily involves a legal determination that certain alleged actions violate clearly established law. Defendants may therefore assert on appeal that all of the conduct which the District court deemed sufficiently supported for purposes of summary judgment meets the applicable legal standards.

Teague v. Overton, No. 00-7070, 2001 WL 668141, at *2 (10th Cir. Jun. 14, 2001) (quoting Gross v. Pirtle, 245 F.3d 1151 (10th Cir. 2001)). Moreover, as the Eleventh Circuit has noted, although
exercise of the trial court’s discretion, then, to that extent, the standard of review cannot be de novo. Logically the decision must be reviewed under an abuse of discretion standard. In fact, at least one appellate court that has recognized this discretion has reviewed and upheld a denial of summary judgment under the abuse of discretion standard.\footnote{146}

Yet somewhat confusingly, even those appellate courts that purport to sanction district court discretion in denying an otherwise appropriate motion for summary judgment flatly state that they review a denial de novo without distinguishing cases in which the denial may be based all or in part on the judge’s exercise of discretion.\footnote{147} In a number of these cases, the statements are dicta and have less force because the appeal is actually from a grant of summary judgment rather than a denial.\footnote{148} In a few cases, however, such statements have been made when the appeal is from the denial of summary judgment.\footnote{149} But even in these latter cases, the courts did not actually face the issue because a careful review of the facts reveals that the decisions were not the product of the judge’s

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\footnote{146}{See Veillon v. Exploration Servs., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989).}
\footnote{148}{See University Emergency, 197 F.3d at 20; Cohen, 2 Fed. Appx. at 374; Webb, 139 F.3d at 536.}
\footnote{149}{See, e.g., Downs East Energy Corp. v. Niagara Fire Ins. Co., 176 F.3d 7, 13 (1st Cir. 1999) (applying the statute of limitations); National Elec. Mfrs. Assoc. v. Gulf Underwriters Ins. Co., 162 F.3d 821, 823-24 (4th Cir. 1998) (regarding the legal effect of clause in insurance policy); Solano v. Gulf King 55, Inc., 212 F.3d 902, 904 (5th Cir. 2000) (making a decision as to what law applies under conflict-of-law principals); Cearley, 186 F.3d at 889 (regarding federal law preemption of state law).}
exercise of discretion. Instead, the trial court's decision in each case turned on a precise question of law.

The appearance of a possible conflict between those appellate decisions that sanction the district court's use of discretion to deny summary judgment and cases in the same courts that flatly say they apply a de novo standard of review needs to be recognized and addressed. Trial judges, as well as counsel for parties, should not face ambiguity regarding the power of a trial court to use its discretion to deny technically appropriate motions for summary judgment. If such power exists, appellate courts need to be clear as to how that fact will affect the nature of their review. Despite the fact that Federal Rule 52(a) exempts decisions under Rule 56 from the requirement of making judicial findings of fact and conclusions of law, trial courts must recognize the need to reveal the basis for their decisions whenever the exercise of discretion plays a part in the denial of summary judgment. Otherwise, the appellate court may not know that discretion played a role in the decision below or may not have sufficient information to assess whether or not the exercise of discretion was abused.

V. POLICY REASONS FOR AND AGAINST JUDICIAL DISCRETION

In considering whether judges should have discretion to deny an otherwise appropriate motion for summary judgment, consideration must be given to the policies and purposes served by summary judgment, concerns of judicial activism, and the costs and benefits to plaintiffs, defendants, and the judiciary. In this Part, we argue that the underlying purpose of summary judgment—litigation efficiency—may in fact be enhanced by allowing judges discretion to deny summary judgment when it would be more costly to decide the motion than to deny it. Moreover, fears that providing discretion would materially increase the potential for judicial activism are unfounded, as judicial discretion currently exists in the roughly analogous Rule 50 judgment as a matter of law, the Rule 59 motion for new trial, and the Rule 65 motion for a temporary restraining order. Finally, while

150. See Downs East Energy Corp., 176 F.3d at 13-14; Nat'l Elec. Mfrs. Assoc., 162 F.3d at 323-24; Solano, 212 F.3d at 904-05; Cearley, 186 F.3d at 889.

151. See Downs East Energy Corp., 176 F.3d at 13-14; Nat'l Elec. Mfrs. Assoc., 162 F.3d at 323-24; Solano, 212 F.3d at 904-05; Cearley, 186 F.3d at 889.

152. The requirement that district courts provide written reasons for the denial of summary judgment has other benefits aside from assisting the appellate court in determining the standard of review. These additional benefits are discussed in Part VII, infra.

153. Note that in the criminal context, judges also exercise discretion in deciding the appropriate sentencing of defendants. See Yablon, supra note 3, at 262 (arguing that discretion in
acknowledging the costs to parties in terms of money and time if the court denies an otherwise appropriate motion for summary judgment, we argue that these costs may be outweighed by the court's need to deny such a motion in a particular case for reasons of efficiency.

A. General Purposes of Summary Judgment

The primary purpose of summary judgment is to avoid or limit the expense of trial when no genuine issue of fact exists to be decided as to all or a portion of a case.\footnote{154} Thus, summary judgment serves the practical purpose of screening out doomed cases.\footnote{155} Summary judgment promotes litigation efficiency in two critical ways.\footnote{156} First, it narrows the scope of discovery by disposing of frivolous claims before discovery takes place.\footnote{157} Second, it eliminates factually insufficient claims before trial.\footnote{158} Moreover, the very existence of summary judgment may serve to lessen
the filing of coercive and harassing litigation.159 Finally, after the trilogy, courts have recognized an additional, more controversial, use for summary judgment as a tool to "ease docket pressures by enhancing the case management power of the federal courts."160 On the other hand, aggressive use of Rule 56 may unduly burden both the court and the parties to the case.161 Preparing, arguing, and ruling upon summary judgment motions increase litigation costs and consume judicial resources.162 Thus, as Professor John Bauman once noted, "the incorrect use of the summary judgment procedure obviously increases delay and expense in the final disposition of litigation and thus aggravates the very problem the procedure was devised to solve."163

B. Judicial Activism

One obvious concern in allowing judges discretion to deny an otherwise appropriate summary judgment motion is that it increases the opportunity for judges to base their decisions on personal biases or other impermissible reasons rather than on the merits of the motion.164 As one commentator has noted, "[m]any trial judges have transformed their role from that of a passive arbiter resolving legal disputes based on legal principle into that of an active case manager who influences outcomes by controlling discovery and participating in settlement conferences."165 The fear is that allowing judges the discretion to deny technically appropriate motions for summary judgment would further enhance this ability to manage cases.166 Such a movement, critics may argue, would diminish certainty and increase litigation costs.167

161. See BRUNET ET AL., supra note 3, § 6.02.
162. See id. at 100 (citing John A. Bauman, A Rationale of Summary Judgment, 33 Ind. L. J. 467, 467 (1958)); Schwarzer, supra note 42, at 483.
163. See Bauman, supra note 162, at 467, noted in BRUNET ET AL., supra note 3, § 6.02.
164. See, e.g., Wald, supra note 77, at 1927 (claiming that judges may grant summary judgment "more on the basis of their predilections about the worthiness of the case than on the principles encompassed in Rule 56").
165. Molot, supra note 3, at 1003-04; see Sinclair & Hanes, supra note 19, at 1640 (noting that "[s]ummary judgment enhances judicial control over the litigation, promotes resolution of meritless claims at an early stage, and encourages judges to obviate unnecessary or protracted trials, sparing a heavily burdened court system from needless extra proceedings").
166. Interestingly, some commentators argue that current summary judgment practice already involves too much judicial discretion, because, after the trilogy, judges must weigh the credibility of evidence in order to determine its sufficiency. See Gordillo, supra note 13, at 282. But see Sinclair
Furthermore, critics may argue that even if such management resulted in the promotion of substantive justice, it would do so in a haphazard way, because the ultimate outcome would depend upon the individual judge’s skill as a case manager rather than the judicial application of substantive rules of law.168

Yet fears of an increase in judicial activism seem overstated. As Professor Charles Yablon noted, allowing the trial court discretion to deny summary judgment constitutes “discretion as creativity,” a “form of institutionally recognized discretion justifying appellate court deference.”169 Such discretion is permissible, Professor Yablon explained, because it is treated as an “exercise of equitable discretion in the individual case,” and therefore does not threaten the preexisting rule structure.170 This notion of equitable discretion is consistent with the intentions of the committee that designed the Federal Rules in 1938, and consciously chose “to leave much to the intelligence, wisdom, and professionalism of those who would apply [the Rules].”171

Moreover, allowing judges discretion in denying summary judgment seems no more threatening than the discretion judges already exercise in denying an otherwise proper motion for judgment as a matter of law, new trial, or temporary restraining order. For example, Rule 50(a), which governs judgments as a matter of law, states, in pertinent part, that “[i]f... a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonably jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party.”172 The judge also may exercise discretion in deciding a renewed judgment as a matter of law after a verdict has been entered.173

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166. See Molot, supra note 3, at 1024 (arguing that the problem with managerial judging is that it relies upon discretion rather than rules of law, consequently resulting in litigation uncertainty). For the view that the development of managerial judging was the result of the failure of Rule 56, see Carrington, supra note 56, at 2091.

167. See Molot, supra note 3, at 1023.

168. Yablon, supra note 3, at 275.

169. Id. at 276.

170. Id. at 276.

171. Carrington, supra note 56, at 2082.

172. FED. R. CIV. P. 50(a) (emphasis added); see WRIGHT ET AL. supra note 3, § 2533 (noting that “the trial judge is not required to grant judgment as a matter of law even in a case in which it has the power to do so.”) (emphasis added) (citations omitted).

173. See FED. R. CIV. P. 50(b). Rule 50(b) is also steeped in permissive terms, stating in part, that “[i]n ruling on a renewed motion, the court may” either “allow the verdict to stand, order a new trial, or direct judgment as a matter of law” once a verdict is returned. Id. (emphasis added).
Moreover, as the Court in Anderson made clear, the standard for directed verdict mirrors that for summary judgment. Yet if directed verdict and summary judgment share a common standard, it makes little sense to allow judges discretion in denying motions in the former category and not the latter.

Judges also exercise exceedingly broad discretion in deciding whether to grant or deny a motion for a new trial. Yet because the decision to grant a new trial is costly to both the parties and the judicial system, judges must exercise such discretion cautiously. Similarly, judges routinely exercise discretion in deciding whether to grant or deny a motion for a temporary restraining order. Rule 65(b) states, in part, that “a temporary restraining order may be granted ... only if ... immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party ... can be heard in opposition ....” As with the decision to deny or grant a new trial, it is hard to see how the exercise of judicial discretion in denying an otherwise proper temporary restraining order is more appropriate than denying an otherwise appropriate motion for summary judgment.

Concerns of inappropriate judicial activism in denying summary judgment may be alleviated by recognition of the actual practice of federal courts that have allowed denials of technically appropriate motions. As indicated in Part II, it appears that only in a handful of cases have trial judges actually denied summary judgment when it was otherwise appropriate. It is doubtful that specifically providing for judicial discretion in Rule 56 would substantially increase the number of denials. Fears that judges will refuse summary judgment in deserving

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119.


175. See Jack H. Friedenthal et al., Civil Procedure § 12.4, at 573 (3d ed. 1999). The Federal Rules embody the new trial standard in Rule 59, which states, in part, that “[a] new trial may be granted to any of the parties and on all or part of the issues ....” Fed. R. Civ. P. 59(a) (emphasis added); see also 58 Am. Jur. 2d New Trial § 549 (1989) (“Ordinarily a motion ... for new trial is directed to the sound discretion of the trial court ....”). Moreover, like the denial of summary judgment, the denial of a new trial is not immediately appealable, but must wait until the entry of a final judgment. See Wright et al., supra note 3, § 2818 (“Ordinarily an order denying a motion for a new trial is not appealable as such. An appeal should be taken from the final judgment ....”).

176. See Friedenthal et al., supra note 175, § 12.4, at 574.

177. See Yablon, supra note 3, at 268. Yablon refers to this sort of discretion as “discretion as expediency,” explaining that the legitimacy of discretion under these circumstances stems, in part, from the tentativeness of the decision and the fact that these decisions are made under conditions of uncertainty. See id. at 269.

cases are ameliorated by the structural incentives against denying such a motion unless good reason exists. Judges have an increasingly large docket to manage. By denying summary judgment in a particular case, a judge would be forced to oversee a case that she could have otherwise thrown out, thereby contributing to her overburdened docket. Thus, a judge would be unlikely to deny an otherwise appropriate summary judgment motion unless she has a significant reason for doing so.179

C. Litigation Costs

Allowing judges discretion to deny summary judgment when it would technically be appropriate does not come without a price. Parties will be required to continue with a case that otherwise would have ended or have been limited in scope. Moreover, it may burden the courts' already overcrowded dockets. Yet, as we discuss in this section, the costs associated with discretionary denials of summary judgment can be outweighed by the benefits to the administration of justice.

1. Costs to the Party Who Would Not Have to Bear the Burden of Proof at Trial

In general, the greatest costs of permitting a judge discretion to deny summary judgment when otherwise appropriate would fall upon a movant who does not have the burden of proof at trial. Usually that will be the defendant, although it could be the plaintiff if the issue in question is an affirmative defense. The most obvious of these costs would be the monetary and time expenses the moving party would suffer by being forced to remain in a suit or handle issues that properly could have been dismissed.181 Parties have a reasonable expectation that, absent a material disputed issue of fact, they are entitled to summary judgment. Because a denial of summary judgment is not a final decision, and in most circumstances not subject to immediate interlocutory appeal,182 the

179. Professor Jonathan Molot argues that based on their overburdened dockets, judges often give short shift to motions for partial summary judgment, as granting the motion would not decrease the size of the judges' dockets. See Molot, supra note 3, at 993. Yet as mentioned above, denying partial summary judgment may be appropriate in a given case, particularly when the expense of adjudicating such a motion would require substantial judicial resources and result in little change in the movant's status in the case. See infra notes 189-96 and accompanying text.


181. See Davidson, supra note 2, at 205; see also Sonenshein, supra note 3, at 785 (arguing that denial of summary judgment when otherwise appropriate would force the movant "to incur needless litigation expenses").

182. See supra note 6 and accompanying text (discussing the limited situations when interlocutory appeals are permitted).
denial of such a motion deprives the moving party of its right not to engage in a trial when it has otherwise satisfied the requirements of Rule 56.  

2. Costs to the Party Who Must Carry the Burden of Proof at Trial

On rare occasions even a party with the burden of proof at trial may be able to present what appears to be conclusive information entitling it to summary judgment on all or a portion of the case. Moreover, a party in good faith may rely upon a new and novel claim or defense. If the court finds that the facts and the law will not support such a claim or defense, the pleader, as well as the opposing party, would be interested in being spared a worthless trial that ultimately would result in a judgment as a matter of law. A denial of summary judgment in such a case simply puts off the inevitable appealable decision on the matter.

3. Costs to the Judiciary

Providing judges the discretion to deny technically appropriate motions for summary judgment would impose both costs and benefits upon the judiciary. Nevertheless, as discussed, denial of summary judgment could “force one party to incur needless litigation expenses, and [would] force society to bear the burden of ever-increasing delay in the administration of justice.” In our proposal in Part VII, below, clearly to allow courts to exercise discretion when ruling on summary judgment, we recommend steps to ensure that any additional costs imposed upon the judiciary are clearly outweighed by the benefits. For example, judges would be able to forego investing scarce time and resources into cases that are particularly complicated or complex, or intertwined with issues not appropriate for summary judgment.

183. See Davidson, supra note 2, at 209; see also Sonenshein, supra note 3, at 785 (arguing that denial of summary judgment when otherwise appropriate would force the movant “to incur needless litigation expenses, and [would] force society to bear the burden of ever-increasing delay in the administration of justice”).

184. See Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting). This may not be as difficult as it might appear, e.g., when a defendant, who bears the burden of proof, seeks to establish that the applicable statute of limitations bars plaintiff’s recovery.


186. Sonenshein, supra note 3, at 785.

187. We are by no means saying that judges should always deny summary judgment in these circumstances. But if the complexity of a case would require the investment of substantially more time and resources than proceeding to trial, the judge should be able to decide that summary judgment is inappropriate in a particular case. Moreover, we recognize that judges will have to invest some resources in every case to decide whether or not a motion is worth granting. Yet this is
Yet as we state below in Part VII, our proposal includes a requirement that judges provide a written explanation for their denials of technically appropriate motions for summary judgment. This requirement would clearly contribute to the workloads of the already overburdened judiciary. As we note, however, the “cost” of a written decision would ultimately result in a “benefit” to litigants in terms of guidance on their case and in a “benefit” to the judiciary itself in terms of legitimacy.

VI. A BRIEF DETOUR: THE PRECLUSIVE EFFECT OF A COURT’S DENIAL OF SUMMARY JUDGMENT

Another reason why it is important to clarify a judge’s discretionary power to deny an otherwise appropriate motion for summary judgment is that this determination will inform the propriety of giving preclusive effect to such denials in subsequent litigation. In *Chevron U.S.A. Inc. v. Oxy U.S.A. Inc.*, the Oklahoma Supreme Court held that preclusive effect was properly given to an order denying summary judgment, even though the order did not merge into a final judgment. In *Chevron*, Gulf Oil Corp. (“Gulf,” now Chevron U.S.A.) entered into a merger agreement with Cities Service Corp. (“Cities,” now Oxy U.S.A.). The Federal Trade Commission (“FTC”) subsequently objected to the agreement and sued to block the merger. In order for the FTC to agree to the deal, it demanded that Cities divest itself of a particular refinery. In response, Gulf unilaterally terminated the contract, invoking a “litigation out” clause allowing for termination if “action taken ... by any United States federal ... governmental authority ... in the sole judgment of the Purchaser ... would require the divestiture ... of a material portion of the business ... of the [Cities] Company.” Cities’ shareholders brought suit for damages against both Gulf and various officers and directors in the Southern District of New York. Gulf

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188. 980 P.2d 116 (Okla.), cert. dismissed, 528 U.S. 1014 (1999).
189. See id. at 128.
190. See id. at 120.
192. See id.
193. Id.
194. See id. Specifically, Cities’ shareholders claimed that Gulf soured the deal before the FTC brought suit, and that it negotiated in bad faith with the FTC so that it would enjoin the transaction and Gulf could invoke the “litigation out” clause. See id. Once the FTC sued, Gulf then allegedly in
defended its withdrawal based on the “litigation out” provision and moved for summary judgment. The district court denied the motion, on the ground that “significant facts remain in dispute.” After the court denied summary judgment, Gulf and some of Cities’ shareholders entered into a settlement agreement that was final and resulted in a dismissal with prejudice. The remaining shareholders, disputing certain issues of liability and damages, submitted to final, binding, nonappealable arbitration. The arbitrator applied the trial court’s determination that the “litigation out” provision was unavailable, and found that Gulf’s board failed to determine whether the refinery was “material” before it terminated the agreement.

Cities subsequently sued Gulf in a separate action in Oklahoma state court for breach of contract, malicious breach, and fraud. Gulf again claimed that it was justified in breaching under the terms of the agreement because it had properly invoked the “litigation out” clause. Cities argued that Gulf was precluded from raising the FTC’s action as a defense based on the Cities’ shareholder suit in federal court and the arbitration conducted ancillary to the federal suit. The trial court agreed with Cities, ruling that Gulf was precluded from raising the FTC defense based on the prior decisions of the federal district court and the arbitration. Consequently, the jury found that Gulf was liable for breach of the merger agreement in the amount of $229,621,400 plus certain interest based on Cities’ repurchase of its own stock in reliance on bad faith, refused Cities’ divestiture of the refinery, even though the refinery was not important to Gulf and consequently not “material” as defined by the contract. See id.

195. See id.
196. Id. at 742. The trial court judge ruled that after the FTC requested divestiture of Cities’ refinery, the “litigation out” clause, by itself, could not justify Gulf’s unilateral withdrawal whether or not the refinery was “material” presented an unresolved material issue of fact. See id.
198. See id. Of importance to the Oklahoma Supreme Court in giving preclusive effect to the order denying summary judgment was Gulf’s failure to move to vacate the order before the court approved of the settlement. See id.
199. See id.
200. See id. at 120.
201. See id. Gulf also claimed that Cities’ overstatement of its proven oil reserves violated the contract’s warranty agreement and consequently caused the failure of a condition precedent to Gulf’s performance. See id. at 121.
202. See id. Cities also asserted that Gulf had not determined that Cities’ overstatement of its reserves was material as mandated under the agreement. See id.
203. See id.
on the merger contract. Gulf appealed the decision to the Oklahoma Supreme Court.

The Oklahoma Supreme Court affirmed, holding that the district court’s decision denying summary judgment should be given preclusive effect, even though the denial never merged into a final judgment. Although the court recognized that previous federal cases had refused to give preclusive effect to an order denying summary judgment, it noted that application of Parklane Hosiery Co. v. Shore mandated a case-by-case approach rather than a bright-line rule. The court distinguished the finality requirement in regards to collateral estoppel and res judicata, noting that for collateral estoppel purposes, finality is achieved if the “conclusion in question is procedurally definite.” The court explained that the district court’s decision was final because its decision was not intended to be tentative, as the judge concluded “as a matter of law [that] the [ ] [FTC] defense was not available to Gulf after . . . the FTC requested divestiture of the . . . refinery.” Thus, because the defense was fully litigated and the case was dismissed with prejudice and could not be susceptible to reversal or modification, the Oklahoma Supreme Court ruled that collateral estoppel effect should be given to the district court’s order denying summary judgment.

This decision highlights the need for clarity concerning whether a judge has discretion to deny an otherwise appropriate summary judgment.

204. See id. at 122.
205. See id.
206. See id. at 128.
207. See, e.g., Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994). Note that federal courts of appeal are currently divided on whether offensive estoppel applies to nonfinal, nonappealable orders generally. Both the Fifth and Ninth Circuits have held that orders that are not appealable because they lack finality are not entitled to preclusive effect. See Avondale Shipyards, Inc. v. Insured Lloyd’s, 786 F.2d 1265, 1270 (5th Cir. 1986) (holding that partial summary judgment rulings are not entitled to preclusive effect because they lack finality); Luben Indus., Inc. v. United States, 707 F.2d 1037, 1040 (9th Cir. 1983) (ruling that interlocutory order did not have preclusive effect because of inability to appeal). By stark contrast, both the Second and Third Circuits have given nonappealable nonfinal orders preclusive effect. See Burlington N. R.R. Co. v. Hyundai Merch. Marine Co., 63 F.3d 1227, 1229 (3d Cir. 1995) (giving a partial summary judgment order preclusive effect); Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961) (ruling that interlocutory order may be given preclusive effect).
210. Id. at 127. The court explained that for res judicata purposes, finality requires a judgment that ends the litigation and leaves nothing more for the court to do except enter judgment. See id.
211. Id. at 128.
212. See id. The Oklahoma Supreme Court explained that because the Oklahoma litigation was foreseeable and Gulf had actual knowledge as to the case’s pendency, Gulf’s failure to make a motion vacating the district court’s decision prior to settlement barred it from subsequently raising the “litigation out” defense. See id.
judgment motion and, if so, whether such discretion played a role in the decision. If a trial court’s denial of summary judgment can be said to be tentative and subject to change at a later time, such a determination cannot be held to have received the depth of analysis as would a determination intended to be final and binding. More important, however, is the fact that a denial of summary judgment may not resolve any issues. This is particularly true if judges have discretion in denying summary judgment. In those instances, a judge may deny summary judgment entirely or in part for reasons wholly unrelated to the merits of the motion. Giving preclusive effect under these circumstances would be inappropriate. And this would be true even in those instances where the appellate court affirms the trial judge’s ruling on the ground that it is not an abuse of discretion.

An analogy may be drawn to the situation under Federal Rule 50(b). That rule provides that if “for any reason” a federal trial court refuses to grant a judgment as a matter of law at the end of the close of evidence, the matter is deemed reserved for a ruling after the verdict. Surely, a court’s decision to deny a directed verdict, followed by a settlement, should not be given preclusive effect in a subsequent case. Similarly, a court’s decision to deny summary judgment when otherwise appropriate should not be given preclusive effect. Yet given the uncertainty concerning what preclusive effect, if any, a denial of summary judgment has, Rule 56 should be amended to clarify this issue.

VII. A PROPOSAL

Given the disconnect between the mandatory language of Rules 56(c) and (d) and the understanding of a number of federal courts that judges have discretion to deny otherwise appropriate motions for summary judgment, one of two courses of action must take place. First, district courts could strictly abide by the language of Rules 56(c) and (d) and thus grant summary judgment whenever there are no material issues of fact in dispute. Moreover, appellate courts could carefully couch their discussion of the district court’s obligation in denying summary judgment in mandatory terms, thereby clarifying the lower court’s duty.

Although such a course of action may be consistent with the text of Rule 56, it may tie the hands of judges and limit their ability to use their judgment in deciding whether granting summary judgment is in the best interest of the parties, the judiciary, and the legal system. Therefore, a better course for rectifying this conflict between the text of Rule 56 and

federal court practice is to modify the text of Rule 56 to reflect the
majority of the judiciary's understanding concerning summary
judgment. This may be achieved simply by substituting the word “shall”
for the word “may.” As we mentioned above, however, judges should
not be given unlimited discretion in denying an otherwise appropriate
summary judgment motion. Instead, Rule 56 should include a
nonexclusive list of factors that judges should consider in deciding
whether to deny summary judgment, and require that judges provide a
written reason for a denial.

One factor that judges should consider is whether the cost upon the
nonmovant in meeting a Rule 56 motion would be too high to justify
granting summary judgment.\footnote{214} Although this is admittedly a rare
occurrence, when the cost is very high and it would be just as efficient to
conduct the trial itself, a judge should have the discretion to deny
summary judgment.\footnote{215} Of course, in making its decision, the court should
balance the economic burden on the moving party if the court denies
summary judgment. As the Court in \textit{Celotex} explained,

\begin{quote}
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.\footnote{216}
\end{quote}

Another factor judges should consider is whether the matter
concerns questions of motive, intent, or credibility.\footnote{217} We do not suggest

\footnotesize
\begin{itemize}
\item \textit{See} Friedenthal, \textit{supra} note 1, at 781.
\item \textit{See id.}
\item \textit{See id.}
\item \textit{See Petro v. McCullough,} 385 N.E.2d 1195, 1196 (Ind. Ct. App. 1979) ("Where the
question of a person's state of mind is subject to dispute and is material to the case, summary
judgment is improper."); \textit{Cross v. United States,} 336 F.2d 431, 433 (2d Cir. 1964); \textit{see also} \textit{Martin
(1974) (arguing that a motion for summary judgment should be denied "if the credibility of a
witness is inherently suspect because he is interested in the outcome of the case, his motives or state
of mind are material, or he has exclusive access to the facts in question."); Gregory, \textit{supra} note 160,
at 690 (noting that in theory, courts still adhere to the view that summary judgment should be
applied cautiously when state of mind is a decisive element of a claim or defense). \textit{But see}
Sonenshein, \textit{supra} note 3, at 792-93 (arguing that state of mind cases should be treated no
differently than any other summary judgment case). A good model for a summary judgment rule
that accounts for considerations of state of mind can be found in California. California's summary
judgment rule allows judges discretion in denying summary judgment when either (1) the motion is
based solely on an individual who was a sole witness to the fact; or (2) a material fact is based upon
an individual's state of mind. \textit{See CAL. CIV. PROC. CODE} § 437c(e). California Civil Procedure
Code § 437c(e) provides:
\end{itemize}
that judges should be precluded from granting summary judgment in instances where the nonmovant has failed to demonstrate a genuine issue of material fact as to an individual’s motive, intent, or credibility. But as the Court in Anderson made clear, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.” Therefore, a judge should be permitted to deny summary judgment when issues of motive or state of mind are present in a particular case, and these issues lead the judge to believe that the better course of action is to deny the motion.

The Second Circuit decision in Cross v. United States provides an excellent example of why, in a particular case, judges should have the discretion to deny summary judgment when questions of motive and intent are present, even if no disputed genuine issues of material fact exists. In Cross, the district court awarded summary judgment to a foreign language college professor who tried to write off a trip to Europe as a business expense. The district court concluded that there was no dispute as to any material facts based on affidavits from other professors and the professor’s own pretrial deposition. The government claimed the district court erred in granting summary judgment, because the government needed a chance at a trial to cross-examine the professor. The Second Circuit reversed, holding that the government was “entitled to a trial at which all the circumstances may be developed for the consideration of the trier of fact.” The court explained that the reason no material issues of fact existed was that only the professor had knowledge concerning whether his trip to Europe was for business or pleasure. Thus, because the entire case turned on the motive and credibility of the professor, the Second Circuit ruled that the district court erred in granting summary judgment. Although the Second

If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment shall not be denied on the grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual’s state of mind, or lack thereof, and that fact is sought to be established solely by the individual’s affirmation thereof.

219. 336 F.2d 431.
220. See id. at 431-32.
221. See id.
222. See id. at 432.
223. Id. at 432.
224. See id.
225. See id. at 434.
Circuit's result seems just, under a strict textual interpretation of Rule 56, the court should have affirmed the district court, as there were no material issues of fact in dispute. Thus, to account for circumstances like those in Cross, Rule 56 should be amended to permit the district court the latitude to deny summary judgment when issues of motive and state of mind are in issue.

The Cross case also raises the broader issue of when a motion for summary judgment can successfully be brought by the party with the burden of persuasion at trial. Theoretically, it should not be possible for a party with the burden to obtain summary judgment if any part of its case depends upon the testimony of a witness. A trier of fact could conceivably disbelieve the witness solely on the basis of demeanor. In that case, the trier of fact would have to find in favor of the opposing party because the movant would not have met his burden of persuasion. Arguably, then, a court should hold a trial in any such situation. However, courts have not been so strict, allowing the party with the burden of persuasion to obtain summary judgment in the absence of some contravening information. Indeed it was Justice Brennan, in his dissent in Celotex, who went out of his way to state:

If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a “genuine issue” for trial or to submit an affidavit requesting additional time for discovery.

Here, especially, the circumstances call for a rule that permits flexibility on the part of the trial judge when ruling on a summary judgment motion. Although, on its face, the situation may justify the grant of summary judgment, the court, looking at all the factors, may think it best to allow the case to proceed to trial. For example, when the court may fear that the relationship between a sole affiant and the moving party may mask doubt about the true state of affairs—doubt that, if revealed at trial, alone could appropriately justify a trier of fact to

226. See Bias v. Advantage Int'l, Inc., 905 F.2d 1558, 1562 (D.C. Cir. 1990) (stating that a party cannot avoid summary judgment “merely on the supposition that the jury might not believe the [moving party's] witnesses”); FRIEDENTHAL ET AL., supra note 175, § 9.3, at 462-64.

227. Under Federal Rule 56(c), such materials may consist of “pleadings, depositions, [answers to interrogatories,] and admissions on file, together with affidavits, if any.” FED. R. CIV. P. 56(c).

render a verdict against the moving party who, under the applicable law, bears the burden of persuasion.

Courts also should consider the complexity of the cases before them and whether issues ripe for summary judgment are intertwined with issues not proper for summary adjudication. These considerations can best be considered "efficiency factors." By no means should the mere existence of these factors constitute a per se bar to granting summary judgment. In fact, in most instances, these factors, by themselves, should not prevent a judge from granting summary judgment. Yet when the court determines that investing the time and resources into deciding the motion would not materially effect the case because the movant would remain in the case, the court should have the discretion to choose to proceed to trial rather than waste resources deciding the motion. Furthermore, when a case is particularly complex and would require the court, in essence, to conduct a mini-trial in deciding a motion for summary judgment, the judge should be able to conclude that the better course of action is to proceed to a trial, rather than make determinations without the benefit of a complete record. Thus, these considerations seek to preserve the scarce resources of the court and enhance its efficiency.

In addition to enumerating specific factors judges may consider in denying summary judgment, Rule 56 should be amended to require judges to provide written reasons for the denial. This will, of course, impose a limited burden on the judiciary. Nevertheless, requiring written reasons for the denial of summary judgment would be justified for several reasons. First, it would serve as a disincentive to a cavalier denial of summary judgment based on the whims of the judge. Instead, the judge would be forced to justify her decision in writing to the parties. Thus, the written explanation may serve to legitimize the exercise of judicial discretion and the parties would have a better understanding of why the judge ruled the way she did. This requirement would also serve to "reorient attorney incentives with respect to weak positions that survive summary judgment." In other words, a written justification for the denial of summary judgment would allow litigants to assess the strengths and weakness of their claims before trial, possibly effectuating settlement.

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229. In many cases the elimination of issues about which there is no dispute will focus the parties' attention on those matters that need to be tried and will thus result in greater efficiency.

230. See Molot, supra note 3, at 1031 (arguing that when the district court partially denies summary judgment, it should provide an explanation for the denial).

231. See id. at 1033.
Thus, our proposal to amend Rule 56 would allow judges the discretion to deny summary judgment in circumstances where it would be cost-efficient for both the parties and the court. Moreover, requiring judges to provide a written explanation for the denial will enhance accountability and inform the parties as to the judge’s perceptions of the case. Finally, as explained in Part IV, requiring written reasons when a district court denies summary judgment would assist the appellate courts in applying the appropriate standard of review.

VIII. A BRIEF HYPOTHETICAL

A simple hypothetical may illuminate the practical justification for providing judges with discretion to deny an otherwise appropriate motion for summary judgment. Suppose that two drivers, A and B, are involved in an auto collision in which both are killed. A’s executor, P, brings a wrongful death suit against D, the City that is B’s employer, alleging B’s negligence and that B was driving a car owned by D. D answers, admitting it owned the car, but denying B’s negligence. Under a state statute, an automobile owner is liable up to $100,000 for damages negligently caused by anyone driving the vehicle with the owner’s permission. D includes in its answer an affirmative defense based on the following new state statute that has not as yet been subject to interpretation in the courts:

A municipality of this state shall not be civilly liable for injuries to persons or property caused by an employee’s operation of a vehicle owned by the municipality if the municipality establishes by a preponderance of the evidence that at the time the injuries were incurred, the vehicle was being operated for the business of the municipality.

In addition, D counterclaims against P for damages to the City-owned vehicle that B was driving, alleging A’s negligence. P has the burden of proof on his claim whereas D has the burden of proof on the counterclaim.

P moves for summary judgment as to both the claim and the counterclaim on the basis of an affidavit of an eyewitness, M, admittedly the only person who can give any direct information as to what occurred. M’s affidavit reads as follows: “The accident occurred at the intersection of Bay and Elm Streets, which is controlled by a traffic light. I was crossing Bay Street, a wide four-lane road. The light was green for traffic along Elm. The light turned yellow for the traffic along Elm when I was exactly half way across Bay. I hurried to finish crossing. In doing
so, I walked directly in front of A’s vehicle which had been proceeding along Bay Street and had stopped at the red light. As I reached the curb, the light turned red for traffic along Elm Street and I heard A start his car. At the same time, out of the corner of my eye, I noticed B’s vehicle coming toward me along Elm Street about to enter the intersection. Immediately thereafter I heard the crash behind me.”

D introduced no counter-affidavits as to the cause of the accident, admitting that D knows of no other witnesses and that it has no information that would lead to an inference that M had misstated the facts or had any motive to do so. D does file the following deposition of O, B’s supervisor at work, in which O states: A few minutes prior to the accident B left work in the City-owned car. He was on his way home. B does not own his own vehicle and was provided a car to be used during working hours for his job as a safety inspector. B has been given permission to use the vehicle for transportation back and forth between work and his home.

P argues that the court must grant summary judgment on his claim. The evidence clearly establishes that B entered the intersection against the red light and that A had been stopped when the light changed. Furthermore, P claims that D’s affidavit makes clear that the statutory defense is inapplicable because B was on his way home. In any event, P argues summary judgment must be granted on the counterclaim since D is unable to come up with any evidence whatsoever to establish its burden of proof of A’s negligence.

The trial court may very well want to deny summary judgment for P on his claim. Although there is no reason to suspect the credibility of M, auto accidents occur within a few seconds and perception and memory of what occurred can be faulty. During examination and cross-examination of a witness, particularly a sole witness, a trier of fact can become doubtful as to what in fact occurred. Because P has the burden of proof on B’s negligence, such doubt could lead to a verdict for D. In addition the court may wish to hear evidence regarding D’s work requirements before deciding under what circumstances, if any, the new statute should be interpreted to cover travel between work and home.

Suppose the court decides to deny summary judgment on P’s claim. Shouldn’t the judge grant summary judgment on the counterclaim since D was unable to come up with any evidence whatsoever to support it? Again the court may well want to deny the motion. Little is to be gained by granting summary judgment. The witness, M, who will be called to support the claim at trial will, of course, give the sole information regarding the counterclaim. If M should give a substantially different
version of the facts than that which appears in his or her affidavit, it could possibly justify a verdict in favor of D on its counterclaim.

The court might also consider the fact that at most it could grant summary judgment for P as to liability; a trial as to damages would still be necessary. Of course evidence of D’s damages would be eliminated if P’s motion is granted on the counterclaim. In this case, however, that would not be a strong incentive to grant summary judgment because evidence as to D’s damages would not be extensive. The judge knows that if in fact the testimony is identical to that in the affidavits and there is no reason to suspect that a witness might not be telling the truth, she can grant a directed verdict as to liability on both the claim and the counterclaim.

IX. CONCLUSION

Redefining Rule 56 clearly to allow discretion in particular circumstances would not materially change current summary judgment practice. For one thing, most courts that currently allow judicial discretion in denying summary judgment overwhelmingly grant summary judgment when there are no material issues of facts in dispute. It is in the rare or unique situation when providing discretion to deny an otherwise appropriate motion for summary judgment would have any impact. Moreover, as discussed above, given the burden on the judiciary to control their overcrowded dockets, judges have an incentive not to exercise this discretion unless they truly believe it is necessary to effectuate the interests of the parties or the legal system. Thus, modification of Rule 56 to correspond with the understanding of many federal courts concerning judicial discretion in denying summary judgment would have a limited real-world effect on summary judgment practice, yet would allow those federal judges now operating under the rule that prohibits the use of discretion the ability to deny a motion in those rare situations when the circumstances clearly so dictate.