MCLE Article and Self-Assessment Test

By reading this article and answering the accompanying test, you can earn up to one hour of continuing legal education credit. To apply for credit, please follow the instructions on the test answer form on page 25.

Sponsored by BANCROFT-WHITNEY

Kurt L. Schmalz

SUMMARY JUDGMENT: A Dress Rehearsal for Trial

New Section 437c amendments and two recent court of appeal decisions suggest a more favorable attitude toward summary judgment and summary adjudication in California

For years the California courts have approached summary judgment motions with hesitancy, if not hostility.[1] Numerous appellate decisions characterize summary judgment proceedings as "drastic measure[s] which should be used with caution."[2] These cases generally hold where there is any doubt about a motion for summary judgment, the motion should be denied.[3] Indeed, the message suggested in many opinions is that summary judgment motions are not favored and should only be used to attack clearly frivolous causes of action and defenses.[4] ● In recent years, legal commentators and even the business community have criticized the judiciary's reluctance to use the summary judgment procedure to weed from the already overcrowded judicial system cases of questionable merit.[5] These critics have pointed to the federal courts where the summary judgment motion has become a favored, rather than disfavored, procedure ever since 1986, when the United States Supreme Court liberalized the standards for granting summary judgment motions in the now-famous trilogy of *Anderson* v. *Liberty Lobby, Inc.*,[6] *Celotex Corp.* v. *Catrett*,[7] and *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*[8]

(Continued on page 26)

SUMMARY JUDGMENT

(Continued from page 23)

However, the reluctance of California courts to grant summary judgment and summary adjudication motions may be at an end. With surprisingly little fanfare or commentary, state lawmakers amended this state's summary judgment and summary adjudication law to lighten the moving party's burden in bringing these motions.[9] The new amendments to Code of Civil Procedure Section 437c, which took effect on January 1, 1993, make summary judgment and summary adjudication motions subject to essentially the same liberal standard which the U.S. Supreme Court adopted for the federal courts in the *Celotex/Anderson/Matsushita* trilogy.[10]

The result of these new amendments will probably make summary judgment proceedings a dress rehearsal for trial, because to defeat the motions the opposing party may have to showcase its best legal arguments and evidence. Under prior law, a responding party could hold back key evidence for strategic reasons with some confidence that the court would deny the motion if it found a hypothetical triable issue of fact. However, such a strategy under the present law will be risky and potentially disastrous.

Moreover, other recent developments suggest that Section 437c motions may be getting a more favorable reception in the courts. Independent of the legislative changes to Section 437c, two 1993 court of appeal decisions strongly suggest a willingness to give trial courts greater leeway to make decisions. In *Juge* v. *County of Sacramento*[11] and *Lilienthal & Fowler* v. *Superior Court*,[12] the justices went to great lengths to point out the importance of Section 437c motions to the economical resolution of litigants' cases. Gone from these opinions is the language of many earlier decisions that characterized summary judgments as "drastic" and disfavored proceedings.[13]

EASING THE MOVING PARTY'S BURDEN

Under the prior law, the plaintiff making a summary judgment or summary adjudication motion was required to produce admissible evidence to prove each element of the cause of action entitling it to judgment *and* to disprove every affirmative defense and every cross-complaint asserted by the defendant.[14]

Now Section 437c(n)(1) provides that in a motion for summary judgment or summary adjudication:

> *A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists to that cause of action.*

Section 437c(n)(2), which pertains to the defendant's summary judgment or summary adjudication motions, provides that:

> *A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action.*

Under the old interpretations of Section 437c, a defendant making a summary judgment or summary adjudication motion was required to negate conclusively a necessary element of the plaintiff's case *and* to demonstrate that under *no hypothesis* was there a material issue of fact requiring a trial.[15] In essence, until now a defendant had to prove a negative in order to prevail on its motion for summary judgment.[16]

The new amendments to Section 437c should go a long way toward changing the courts' reluctance to grant summary judgment and summary adjudication motions. Although it is too early to tell how these new procedures will be applied, Section 437c(n) ought to force a judge to grant a summary judgment motion where the opposing party fails to present any evidence to support its claim. Under the new law, the moving party would not have to disprove all aspects of the opposing party's claim. This change alone in the way the courts are to evaluate and decide Section 437c motions should result in the courts granting motions that were normally denied under prior law.

TRIABLE ISSUE OF FACT

A more difficult question comes when the opposing party presents some evidence to support its claim but that evidence is so weak that it would not survive a motion at trial for a nonsuit, directed verdict or judgment notwithstanding the verdict (JNOV). If the appellate courts fairly interpret Section 437c(n), then summary judgments should be granted where the opposing party's evidentiary showing would not survive a motion for nonsuit, directed verdict or JNOV.[17] Under Section 437c(n), the opposing party must present evidence sufficient to show that "a triable issue of one or more material facts exists as to that cause of action."

Certainly, an opposition that presents evidence that is stricken by the court because it is inadmissible would not raise a triable issue of material fact. Similarly, if the court finds that the evidence presented by the opposing party is so minimal that it would not survive a motion at trial for nonsuit, directed verdict or JNOV, then the summary judgment motion should be successful because the opposing party's insubstantial evidence would not raise a triable issue of material fact. However, under earlier law, many California courts interpreted the phrase "triable issue of fact" so broadly that a triable issue of fact could be raised to defeat a summary judgment motion with evidence that would not survive a motion for nonsuit, directed verdict or JNOV.[18]

Since *Celotex/Anderson/Matsushita*, a party opposing a summary judgment motion in the federal courts must present more than a scintilla of evidence to defeat the motion.[19] Section 437c(n) indicates that the California courts should follow suit and grant, rather than deny, summary judgment and summary adjudication motions when the opposing party fails to present admissible evidence sufficient to overcome a motion at trial for nonsuit, directed verdict or JNOV. Indeed, if Section 437c(n) is interpreted in this way, then there should be a dramatic increase in the number of summary judgment motions that are granted.

The new amendments also raise an interesting issue about how the courts will approach summary judgment motions where an element of a cause of action requires evidence of a party's state of mind. Section 437c(e), which was left unchanged by the new amendments, provides that the court may, in its discretion, deny a motion for summary judgment "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." Section 437c(e) appears to give the trial court discretion to deny a summary judgment motion of a defendant in, for example, a fraud action where the defendant's only supporting evidence is his declaration in which he states that he had no fraudulent intent. However, where the plaintiff opposes the motion and presents no substantial evidence of the defendant's fraudulent intent, the motion should be granted because the plaintiff has failed to meet its burden of opposing the motion as set forth in new Section 437c(n)(2).[20] The current practice in the federal courts supports this result.[21]

In essence, summary judgment proceedings in the California courts will require both sides to present their strongest legal arguments and evidence so that the court may determine whether the case deserves a full trial on the merits. Under

(Continued on page 66)

Kurt L. Schmalz is a partner in the Beverly Hills firm of Lurie & Zepeda, where he specializes in business litigation in the state and federal courts.

SUMMARY JUDGMENT

(Continued from page 26)

the new law, the party opposing a summary judgment motion should be prepared to put its best possible case forward to make sure the motion is denied. Cases such as *Chevron U.S.A., Inc.* v. *Superior Court*[22] and *Biljac Associates* v. *First Interstate Bank*,[23] among others,[24] which emphasize that a party making a summary judgment motion in California has a heavier burden than in the federal courts, are now probably of questionable value. A responding party who holds back his or her strongest evidence to save it for trial may never get a chance to use it at trial. Opposition papers that do not set forth admissible and substantial evidence sufficient to raise a triable issue of fact should not be sufficient to defeat a properly made motion for summary judgment. Additionally, the use of well-focused and effective written objections to either the moving or opposing parties' evidence will take on even greater significance under the new standard.[25]

It could take a year or more before cases decided under Section 437c(n) make their way through the appellate process. On paper, the changes to the summary judgment law should result in more successful summary judgment or summary adjudication motions. However, old habits die hard. If the appellate courts interpret the term "triable issue of fact" broadly to deny summary judgment in cases in which the opposition evidence could not survive a nonsuit, directed verdict or JNOV motion, then the effect of the new amendments will be diminished.

RECENT SIGNS FROM THE APPELLATE COURTS

Whether the California judiciary embraces the summary judgment procedure as the federal courts did in 1986 after *Celotex*/*Anderson*/*Matsushita* is subject to speculation. Nonetheless, there are recent signs that the appellate courts are warming up to summary judgment and summary adjudication motions. The *Juge* and *Lilienthal* cases, decided in early 1993 under the prior Section 437c, indicate a more favorable attitude toward these motions.

For example, in *Juge*,[26] the Third District Court of Appeal held that the trial court may base a summary judgment on a ground not explicitly raised by the moving party. According to *Juge*, the trial court could grant the motion, so long as the legal rationale was supported by undisputed material facts included in the parties' separate statement of undisputed material facts.[27]

In *Juge*, the plaintiff was rendered a quadriplegic in a bicycle accident. He sued the County of Sacramento for: 1) negligent design of the bike path curve where he was injured, and 2) premises liability on a dangerous condition theory. The county moved for summary judgment on the

grounds that its design of the bike path was protected by statutory design immunity and that the California Bikeways Act was not in effect when the bike path was designed and did not apply retroactively. In its moving papers, the county presented uncontroverted evidence that the plaintiff was traveling at a speed of between 10 to 12 miles per hour at the time of the accident. A traffic engineer's declaration stated that a speed of 13 miles per hour or less was a proper and safe design speed for the curve where the accident occurred. The trial court granted the motion for summary judgment based on its own reasoning that the defendant's evidence negated the essential element of causation in the plaintiff's two actions. According to the court, the design of the bike path did not proximately cause plaintiff's accident.

In affirming the trial court's decision, the court of appeal closely examined the requirements of California's summary judgment statute and discussed at length the importance of the summary judgment procedure to provide "the court and parties with a vehicle to weed the judicial system of an unmeritorious case which otherwise would consume scarce judicial resources and burden the parties with the economic and emotional costs of protracted litigation . . . ."[28]

In commentary that should find its way into every moving party's summary judgment motion, the court in *Juge* pronounced that:

> *It is in the public interest, including the court's interest in the efficient and economical administration of justice and the parties' interest in the prompt and affordable resolution of unmeritorious cases, to expeditiously rid the judicial system of a case in which a party is entitled to judgment as a matter of law, without requiring protracted litigation and a trial on the matter.*[29]

GREEN LIGHT TO TRIAL JUDGES

Juge contradicts the view held by many trial and appellate courts that anything less than a flawless summary judgment should be denied. The decision gives the green light to trial judges to become more active in eliminating those weaker cases from their dockets, even when the moving party's summary judgment motion is made on the wrong legal grounds.

In *Lilienthal*,[30] another 1993 decision, the First District Court of Appeal analyzed the effect of a 1990 amendment to Code of Civil Procedure Section 437c(f), which appeared to restrict the trial court's ability to summarily adjudicate claims or issues that did not completely dispose of an entire cause of action, affirmative defense, damage claim or issue of duty. The *Lilienthal* decision arose out of a legal malpractice case involving the defendants' representation of the plaintiff in two sepa-

rate legal matters referred to as the "Murillo matter" and the "Barton matter." The plaintiff joined its two distinct malpractice claims in a cause of action for negligence and another cause of action for breach of contract. The defendants moved for summary adjudication under Section 437c(f) on the grounds that all of the claims pertaining to the Murillo matter were barred by the statute of limitations.

The trial court refused to rule on the merits of the issues for adjudication presented by the defendants in their motion because, according to the court's interpretation of Section 437c(f), dismissal of the claims arising from the Murillo matter would not completely dispose of either the negligence or the breach of contract cause of action. That is, even if the claims pertaining to the Murillo matter were dismissed, the claims relating to the Barton matter were still a part of each cause of action.

The court of appeal issued a writ of mandate directing the trial court to rule on the merits of the defendants' summary adjudication motion, even though the adjudication of the issues presented by the defendants would not dispose of an entire cause of action. The appellate court closely examined the legislative history behind the 1990 amendment to Section 437c(f) and found that the purpose behind the amendment was to eliminate summary adjudication motions that did not reduce the costs and length of litigation. The court held that:

> *[T]he clearly articulated legislative intent of [S]ection 437c, subdivision (f), is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and cost saving purposes of the amendment and allow a cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication.*[31]

Many trial courts interpreted Section 437c(f) to preclude a party from moving for summary adjudication of any issue or claim, no matter how important or potentially time-consuming to try, if an adjudication of that issue or claim did not completely dispose of a cause of action. The result of this interpretation was to make multiple-claim causes of action, which were really a composition of numerous distinct claims or alleged wrongful acts, immune from summary adjudication. A clever plaintiff could virtually ensure the defeat of a summary adjudication motion by combining in one cause of action an arguably meritorious claim with numerous meritless or frivolous claims, all of which would be subject to summary adjudication if separately stated as

separate "causes of action."

If the moving party did not have grounds to adjudicate in its favor each and every claim or wrongful act in the cause of action, then the trial court could deny the summary adjudication motion. *Lilienthal* rejected this "all or nothing" approach to summary adjudication motions and adopted a more practical standard that would permit the trial court to dispose of any distinct claims or wrongful acts within a cause of action.

The *Lilienthal* decision benefits trial judges as much as litigants. The clarification of Section 437c(f) gives the trial court greater control over the nature and scope of litigation as it progresses toward trial. The court's power to eliminate by summary adjudication distinct claims combined in the same cause of action constitutes a valuable tool for streamlining cases and reducing, if not eliminating, trial time.

The message to practitioners from the new Section 437c(n) and the *Lilienthal* and *Juge* cases is that summary judgment and summary adjudication motions are increasingly being seen by the legislature and at least some appellate courts as important and beneficial procedures. Such motions further the court's interest in the efficient and economical administration of justice and the litigants' interest in prompt and economical resolution of cases of questionable merits. In retrospect, litigators may mark 1993 as a red-letter year when California finally embraced the summary judgment motion as a tool for efficient litigation management. ◆

[1] *See* Ernest J. Zack, *California Summary Judgment: The Need for Legislative Reform*, 59 CAL. L. REV. 439 (1971) (superior court judge writes that the California courts' attitude toward summary judgment has been "reluctant, if not hostile"). *See also* 6 B.E. WITKIN, CALIFORNIA PROCEDURE §275, at 575 (3d ed. 1985); *and* JUDGE ROBERT I. WEIL AND JUDGE IRA A. BROWN, JR., CIVIL PROCEDURE BEFORE TRIAL §10:278, at 10-67 (1992) (trial judges have a "cautious attitude" toward summary judgments).

[2] *E.g.*, Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603, 610 (1992); Biljac Associates v. First Interstate Bank, 218 Cal. App. 3d 1410, 1420, 1421-22 (1990) (federal "Celotex" summary judgment standard "represents a rule of federal civil procedure that is not binding on state courts and which conflicts with current California law").

[3] Albermont Petroleum, Ltd. v. Cunningham, 186 Cal. App. 2d 84, 91 (1960); Travelers Indem. Co. v. McIntosh, 112 Cal. App. 2d 177, 182 (1952). *See also* Marketing West, 6 Cal. App. 4th at 610.

[4] *See, e.g.*, Chevron U.S.A., Inc. v. Superior Court, 4 Cal. App. 4th 544, 548 (1992); Twain Harte Associates, Ltd. v. County of Tuolumne, 217 Cal. App. 3d 71, 80 (1990); Miles Lab. Inc. v. Superior Court, 133 Cal. App. 3d 587, 593 (1982); Barnes v. Blue Haven Pools, 1 Cal. App. 3d 123, 127 (1969).

[5] *See, e.g.*, Brian Nielson Mitchell, *Summary Judgment: A Solution to Court Congestion?*, LOS ANGELES LAWYER, Dec. 1990, at 29, 32. *See also* Council on California Competitiveness, California's Jobs and Future, at 86, 89 (1992) (report from business leaders recommends that California appellate courts adopt the federal standard for summary judgment motions to rid the judicial system of frivolous and marginal litigation); WEIL AND BROWN, *supra* n. 1, §10:227, at 10-56 (1992) (federal summary judgment standard may be better than California's procedure).

[6] 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[7] 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).
[8] 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).
[9] In amending CODE CIV. PROC. §437c, the legislature added, among other things, subsections 437c(n)(1) and (2), discussed *infra.*
[10] The "trilogy," as these cases are often called, clarified the procedures the federal courts use for deciding summary judgment motions under Rule 56 of the FED. R. CIV. P. These decisions are significant because they permitted a trial court to grant summary judgment in cases where the party opposing the motion failed to present admissible evidence to support a verdict in its favor. In essence, after the "trilogy," the federal standard for summary judgment became coextensive with the standard the district court uses for deciding motions for directed verdict (now called judgment as a matter of law) or judgment notwithstanding the verdict (JNOV). In the trilogy, the U.S. Supreme Court expressly endorsed the summary judgment procedure as a favored, rather than disfavored, method of eliminating weak and frivolous cases from a congested judicial system. Celotex, 477 U.S. at 327.
[11] 12 Cal. App. 4th 59 (1993).
[12] 12 Cal. App. 4th 1848 (1993).
[13] *See supra* n. 2.
[14] Hayward Union High School Dist. v. Madrid, 234 Cal. App. 2d 100, 120 (1965).
[15] Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603, 610 (1992) (emphasis in original) (quoting Homestead Savings v. Darmiento, 230 Cal. App. 3d 424, 430 (1991)).
[16] As one recent appellate decision proclaimed in affirming denial of a §437c motion, "We concede it is ofttimes difficult, usually time consuming, normally expensive—and, in some instances, even impossible—for a defendant to meet the demands of the statute." Chevron U.S.A., Inc., 4 Cal. App. 4th 544, 553 (1992).
[17] In California the standard for granting a motion for nonsuit, directed verdict or JNOV is whether, as a matter of law, the evidence presented is sufficient to permit a jury to find in the nonmoving party's favor. A "scintilla of evidence" is not sufficient to survive such a motion; rather, there must be substantial evidence to support a verdict. 7 B. E. WITKIN, CALIFORNIA PROCEDURE §410, at 413; §435, at 433 (3rd ed. 1985). *See also* Nally v. Grace Community Church, 47 Cal.3d 278, 291 (1988), *cert. denied,* 490 U.S. 1007 (1989).
[18] *See* Chevron U.S.A., Inc., 4 Cal. App. 4th 544, 553 (1992) ("[T]he fact that the plaintiff may have 'no evidence' with which to prove its case, and is therefore likely to be nonsuited at trial, does not warrant entry of summary judgment in favor of the defendant."). See also Barnes, 1 Cal. App. 3d 123, 127 (1969).
[19] Anderson, 477 U.S. 242, 252 (1986); Matsushita Electric Industrial Co., Ltd., 475 U.S. 574, 586 (1986).
[20] §437c(e) limits the court's discretion to deny summary judgments in "state of mind" cases by providing that "summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations . . ."
[21] Anderson, 477 U.S. at 256-57.
[22] 4 Cal. App. 4th 544, 552-53 (1992).
[23] 218 Cal. App. 3d 1410, 1420 (1990).
[24] *See supra* nn. 4 and 16. Arguably new §437(n)(2) would have mandated a different result in some, if not all, of these cases.
[25] Section 437c(d) provides that a failure to object to the affidavits or declarations at or before the hearing results in waiver of the objection. CAL. R. OF CT. 345 provides the format for these written objections and requires that all written objections to evidence in connection with a motion for summary judgment be filed and served no later than 4:30 PM on the third day before the hearing.
[26] 12 Cal. App. 4th 59 (1993).
[27] The appellate court added, however, that due process required that the party opposing the motion be given the opportunity to respond to the ground of law raised by the court and be given a chance to show that there was a triable issue of fact material to the legal ground raised by the court. *Id.* at 70.
[28] *Id.* at 69-70.
[29] *Id.* at 70.
[30] 12 Cal. App. 4th 1848 (1993).
[31] *Id.* at 1854.