

KEY SAFEGUARD AGAINST MERITLESS SUITS UNDER ATTACK IN CALIFORNIA

by

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To many lawyers practicing in California, the state's laws seem to whipsaw between those that help level the playing field in tort litigation and those that punish and deter free enterprise. California's experience with the standard for granting summary judgment is a case in point.

Summary judgment is a procedural device that allows courts to dispose of lawsuits before trial, if investigation of the claims made in the lawsuit reveals them to be without merit. When summary judgment standards are appropriately defined, the procedure serves several important interests, the most important of which is efficiency. Summary judgment frees the courts, juries, and defendants from the time and expense of trying cases that are patently meritless. Yet properly-structured summary judgment rules also contain procedural safeguards to ensure that plaintiffs with potentially meritorious claims will not be thrown out of court before they have had time to investigate and try to substantiate their claims. In other words, summary judgment does nothing less than ensure the proper and efficient administration of justice in civil litigation.

While California's present summary judgment standard is an appropriate one, plaintiffs' lawyers are promoting a proposal that would make summary judgment unobtainable in all but the rarest of circumstances.

The History of California's Summary Judgment Rule. California's summary judgment rule is found at section 437c of the Code of Civil Procedure. Before 1992, California's courts had long held that a party moving for summary judgment under section 437c had to affirmatively negate an essential element of the plaintiff's case, even when the plaintiff would bear the burden of persuasion on that issue at trial. *See Barnes v. Blue Haven Pools*, 1 Cal. App. 3d 123, 127 (1969).

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In lay terms, this meant that the defendant had to disprove *all* of the plaintiff's allegations — even though at trial, it would be the plaintiff's responsibility to introduce evidence sufficient to prove those same allegations. Under this old standard, the summary judgment procedure was so biased against defendants that sometimes, a court would be required to deny summary judgment even when the plaintiff's case was so deficient that an opening statement repeating what was in his or her opposition to a motion for summary judgment required a judgment for the defendant.

California Moves Closer to the Federal Standard. Amendments to section 437c introduced in 1992 and 1993 overturned this old standard from the *Barnes* case, and moved California closer to the more liberal federal standard of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Union Bank v. Superior Court*, 31 Cal. App. 4th 573, 590 (1995), a California appellate court explained that all these 1992 and 1993 amendments did was level the playing field: if a plaintiff wants the privilege of getting a trial at considerable cost to the state and the defendant, he or she must come forward in opposition to a motion for summary judgment with *some* admissible evidence in support of the elements of his or her claim. The standard is not an onerous one, but it does require the plaintiff to establish that his or her lawsuit is based on more than speculation and wishful thinking.

California's courts recognized in cases like *Union Bank* that the 1992 and 1993 changes to section 437c allow them to use summary judgment as a case-management tool to dispose of lawsuits demonstrated to lack merit. As the United States Supreme Court explained in describing the similar federal standard, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut" but instead is an "integral part" of civil procedure as a whole because it assists in securing "the just, speedy and inexpensive determination of every action." *Celotex Corp.*, 477 U.S. at 327 (quoting Fed. R. Civ. Proc. 1); *see also Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 856 (2001) (purpose of California summary judgment statute same as federal summary judgment statute). Most importantly, this type of standard recognizes the rights of all litigants, and as a result, summary judgment

[m]ust 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 right of persons opposing such claims and defenses to demonstrate in the manner provided by the [summary judgment rule], prior to trial, that the claims and defenses have no factual basis. Celotex Corp., 477 U.S. at 327 (emphasis added).

Numerous cases besides *Celotex* and *Aguilar* also have recognized the important role summary judgment plays in sorting the wheat from the chaff in litigation. *See 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1208 (1998) ("The policy behind summary judgment scheme 'is to promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials.'") (quoting *Lilienthal & Fowler v. Superior Court*, 12 Cal. App. 4th 1848, 1854 (1993)); *Juge v. County of Sacramento*, 12 Cal. App. 4th 59, 69-70 (1993) (a summary judgment motion allows a court "to weed the judicial system of an unmeritorious case which otherwise could consume scarce judicial resources and burden the parties with the economic and emotional costs of protracted litigation because the lack of merit is not apparent from the face of the complaint or answer").

Significantly, the 1992 and 1993 amendments were so beneficial to the administration of justice that they were implemented with the support of *all* interested parties — plaintiffs' lawyers, defendants, the California Judges' Association, the State Bar, and other interests.

Recent California Supreme Court Cases Confirm the Standard. Though some interest groups are supporting a measure — SB476 — to turn back the clock on the summary judgment rule in California, the California Supreme Court recently affirmed the vitality and importance of the new summary judgment

standard. In *Aguilar v. Atlantic Richfield Co.*, a unanimous California Supreme Court recognized that the procedure created by the 1992 and 1993 amendments properly allows courts to "cut through the parties' pleadings" and determine whether a "trial is in fact necessary to resolve their dispute." 107 Cal. Rptr. 2d at 856. In *Aguilar*, the entire California Supreme Court affirmed the propriety of the present summary judgment standard and the dismissal of frivolous lawsuits before trial.

Another recent California Supreme Court case, *Saelzler v. Advanced Group 400*, 25 Cal. 4th 763 (2001), brings the summary judgment rule to life. In *Saelzler*, the plaintiff was hurt when assaulted by criminals at an apartment complex. The plaintiff could not identify the assailants, and did not have any evidence about whether they were trespassers or tenants or invited guests. The assault occurred despite extensive security measures at the apartments, including nighttime security guards, with varied hours and occasional 24-hour patrols on a random basis to make the guards' schedules unpredictable to criminals; nighttime curfews for resident juveniles; regularly and carefully maintained gates and locks; eviction of tenants involved in criminal activity; and expulsion of aggressively-behaving tenants and trespassers.

Even though unidentified criminals had committed the assault, the plaintiff sued the apartment owner, contending that it was at fault for not hiring daytime security guards in addition to the security measures they did employ.

The apartment owner moved for summary judgment, noting that the plaintiff had no evidence suggesting that the failure to hire daytime security guards caused the crime to occur. The California Supreme Court agreed. After all, the plaintiff's theory was based on pure speculation — since the criminals never were identified, they might well have been tenants or invited guests that a daytime security guard would have no reason to expel. And even if the criminals had been trespassers, there was no way for the apartment owner to predict how many daytime security guards were necessary in order for one to be in the right place at the right time should a crime ever occur.

Because the plaintiff could not support the claim with evidence, despite having an ample amount of time to discover that evidence, the California Supreme Court concluded that summary judgment was appropriate. There simply was no way the plaintiff could win at trial without evidence of causation, and the plaintiff's response established that such evidence did not exist — the only "proof" of causation was plaintiff's speculation and unsupported theory.

In addition to explaining how well present summary judgment law works, the *Saelzler* opinion also explains the irrational effect of California's old standard — the one to which the plaintiffs' bar wishes to return. In *Saelzler*, the court of appeal had applied a standard similar to the old standard and SB 476 — it required the defendant to "conclusively establish the absence of a causal relationship" between its failure to hire daytime security guards and the assault. *Id.* at 779. In other words, the court of appeal — like SB 476 — said that a plaintiff has to be allowed a full jury trial — with all the court costs and juror burdens that entails — even if the claims are based on an entirely speculative theory unsupported by facts, and that nothing will avoid that wasteful result short of a summary judgment burden that is nearly insurmountable.

The logic of *Saelzler* is undeniable: when a party has had plenty of time to develop his or her case, it is appropriate for that party to be called upon to substantiate that the case has some merit and is based on some evidence, not merely on wishful thinking. That is all that current law does. By contrast, *Saelzler* also explains why a summary judgment standard like SB 476 — one that would require full-blown jury trials even when a party has *no* evidence supporting their claim — is unwise.

Plaintiffs' Lawyers' Proposal Would Create an Inequitable Standard. The proposal would return the state to the old, rejected standard. In fact, it has expressly been *designed* to allow meritless cases to evade summary judgment and get to trial, and actually might impose a standard even more lenient than the

pre-1992 *Barnes v. Blue Haven* standard. Under the bill, a *defendant* must support a summary judgment motion with admissible evidence, but a plaintiff apparently can defeat the summary judgment with the mere argument that his or her claims simply have "merit."

This proposed standard of granting summary judgment has at least four serious flaws:

A waste of judicial resources. The present standard allows judges to weed out those select cases or claims that are frivolous and meritless, but under the standard proposed in SB 476, courts and litigants will have to litigate those cases through to trial — or at least until the plaintiff presents his or her case to the jury and is nonsuited due to the lack of factual basis for the claims. This will do nothing except bog the courts down with cases and claims that, *by definition under the current test*, are without merit and do not belong in court.

Out of step with federal law and other jurisdictions. Allowing a plaintiff to defeat summary judgment with a claim of "merit" will leave California with a summary judgment standard that can only be said to encourage litigation and drive up the cost of settlements in a way which will compare unfavorably to most other states.

One-sided reform. The proposal would impose new burdens on moving defendants and gives opposing plaintiffs new ways to defeat a motion — but still holds defendants to traditional summary judgment standards if a plaintiff is moving for summary judgment.

Unwise standard of appellate review. It would also impose a unique and wasteful standard of review on appeal: even if summary judgment somehow is properly granted under the new rules, the plaintiff will get a second bite at the apple, in the form of a further opportunity to present evidence to the appellate court. This unprecedented standard of review would reverse the longstanding and very practical rule that appeals are limited by the record presented to the trial court. This ensures that each side presents their full and best arguments to the trial judge and prevents the duplication of effort SB 476 would inevitably promote.

Conclusion. Despite these overwhelming flaws, no one has demonstrated that these changes are even necessary. Even if one were to assume the existence of the problems the plaintiffs' bar has hypothesized — for example, that multiple summary judgment motions sometimes are filed solely as a harassing or delaying tactic — the law already provides a remedy in the form of sanctions. *See, e.g., CAL. CODE CIV. PROC. § 128.5* (allowing award of sanctions, including attorney's fees, for expenses incurred as a result of any action or tactic — including the filing of motions — that is frivolous or solely intended to cause delay).

"Justice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one." *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 11 (1989)(citation omitted). Californians need a fair legal system that appropriately balances the prosecution of potentially meritorious claims with the just and speedy disposition of those that are frivolous. Present law does that, but the proposed changes will not. It would be bad law based on an unsound policy. It would swamp California courts with meritless trials, burdening jurors without reason, and creating a needless disincentive for the conducting of business in the state.