THE ARKIN

LAW FIRM

08-CV-133

January 26, 2009

*Delivered electronically to Rules_Comments@ao.uscourts.gov*

Hon. Mark R. Kravitz
Hon. Michael Baylson
Co-Chairs, Advisory Committee on Civil Rules
Judicial Conference of the United States
c/o Rules Committee Support Office
Thurgood Marshall Building
1 Columbus Circle, N E.
Washington, D.C. 20544

Re: Proposed amendments to Fed. R. Civ. P. 56
Publication version August 2008
*Written Testimony of Sharon J. Arkin, to appear February 2, 2009*

Dear Judges Kravitz and Baylson:

Thank you for the opportunity to testify before you.

## Background

First, I'd like to provide some background about myself. I have been a plaintiff attorney since passing the bar in 1991 after graduating as valedictorian and *summa cum laude* from Western State University School of Law while working full time as a paralegal in a plaintiff firm. Most of my experience has been in insurance bad faith cases, but I also have extensive experience in mass tort cases and some experience in other areas of plaintiff litigation, including civil rights cases, premises liability, construction defect, and product liability. I am certified by the California State Bar as an appellate specialist. I am a former president of the Consumer Attorneys of California, California's statewide trial lawyers association. I have received numerous awards and distinctions, including the Pursuit of Justice Award from the America Bar Association.

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In the course of my practice as a paralegal and as a plaintiff attorney, I have opposed literally hundreds of summary judgment motions and have appealed the grant of such motions dozens of times.

**General Comments**

The Advisory Committee has been provided with valuable historical and empirical information through the testimony of other witnesses that supports the conclusion that the proposed changes to Rule 56 are not only unnecessary but actually destructive to the fundamental purpose of the civil justice system: Fair and just resolution of disputes. I will not repeat or reiterate that information. Rather, I would like to provide you with my personal perspective, gleaned from my years of experience in both the trial courts and the appellate courts.

Like our founding fathers, I am a strong supporter of the jury system I have both served on juries and presented cases to juries. Although juries are not infallible, my experience has been that most jurors are conscientious, well-meaning and hard-working. Their collective community experience and wisdom is an excellent tool for sifting the wheat from the chaff, for assessing credibility, divining intent and sorting out the facts.

Perhaps the most important characteristic of the jury system is that the jurors are the only people in the courtroom without a vested interest in the outcome Unquestionably, jurors come into the courtroom with their own biases and prejudices. But because most juries have a cross-section of the community, one juror's biases are often balanced by the experiences of another. This distinguishes decision-making by juries from decision-making by judges. A lone judicial officer – no matter how sincere in his or her effort to be fair and independent – cannot but help be influenced by their own personal background and perspective. There is no balancing effect from the input of others with different views.

The ever-growing prevalence of summary judgment motions is having a very negative impact on the justice system. One of the most significant negative impacts is on the public's perception of

justice itself. When a party who believes they have been treated unfairly by an insurance company, a pharmaceutical company, a manufacturer or an employer files suit, they are expressing their confidence in the jury system, believing that if a jury of their peers hears the evidence, fairness will result. And at the end of the jury trial, plaintiffs who lose their case often feel that, even if they disagree with the jury's assessment, they got their day in court and that the process was fair.

But when I have to tell a client that the judge, determining the case solely on the basis of paperwork submitted by the lawyers, has granted summary judgment and they have lost their case, they are confused and appalled. They cannot understand why they are not allowed to have their "day in court," meaning a chance to tell their story to a jury. They feel cheated and angry. They feel that the civil justice system is a misnomer, that justice is not dispensed And that feeling is exacerbated when they are forced to spend two or more years waiting for the case to be reversed on appeal. They feel that the whole process is a perversion and a travesty This is not they way we want litigants in our justice system to feel, and this is not the way we want the public to perceive the system to be

If the grant of summary judgment were merely an occasional circumstance, perhaps the sense of injustice by a few litigants could be tolerated. But it is not occasional. There has been a summary judgment motion filed in virtually every single case that I have been involved in since starting as a paralegal in 1984. I know that sounds ludicrous or like a hyperbolic exaggeration, but it is not There are only a handful of cases that I have litigated that have gone to trial or been settled without the filing of a summary judgment motion.

I believe there are several reasons for this:

- Defense counsel hope to flush out the plaintiff's theories,
- Defense counsel hope to flush out the plaintiff's experts;
- Defense counsel want to increase their billings on the case before settling it;
- Defendants and their counsel hope that a judge, interested in clearing the docket, will grant the motion;

- Defendants and their counsel hope that the plaintiff counsel won't do an adequate job opposing the motion and that the motion will be granted;
- Defendants and their counsel hope against hope that, even though the case has merit, the judge will grant the motion anyway.

There are unquestionably times when filing a summary judgment motion is proper and warranted. For example, where the case involves the interpretation of a contract or a statute, based on undisputed facts. But, in my experience, the areas of litigation in which summary judgments are often granted are complex, involving issues of credibility, intent and reasonable inferences from the submitted the evidence that warrant denial. Despite this, it is becoming increasingly common that summary judgment motions brought by defendants are granted in these situations.

The proposed changes to Rule 56 will not only make the entire summary judgment process more complex and resource-intensive, but the "must" language also encourages the granting of such motions and the resulting deprivation of the jury trial rights of plaintiffs. More specifically, I have concerns about the following issues.

## Time for filing responses to summary judgment motions

The current version of Rule 56 permits the plaintiff only 10 days in which to respond to a defendant's summary judgment motion – despite the fact that the defendant has typically had months within which to prepare the motion. While the proposal to change that timeframe to 14 days is a move in the right direction, it is not enough. In California, the Legislature amended the state summary judgment statute in 2004 to expand the time for opposition from 14 days to 75 days. (See California Code of Civil Procedure section 437c) This change was made so that a party faced with a summary judgment motion has a reasonable opportunity to conduct discovery *on the issues actually raised by the motion.* If the goal of the summary judgment process is truly to weed out meritless cases rather than to simply clear the docket, fairness demands that a party (almost always a plaintiff) facing

such a motion have the time necessary to gather the evidence needed to address the specific issues raised in the motion.

This is particularly true in light of Rule 56(a), which permits a defendant to move for summary judgment immediately. The consequence is that a plaintiff may be required to oppose a motion before discovery is even propounded, let alone responded to. Not only should Rule 56 provide a longer time within which to oppose a summary judgment motion, a defendant should not be permitted to file a motion for at least 60 days after its answer has been filed, in order to permit the plaintiff a reasonable opportunity to conduct necessary discovery.

Another issue that arises in this context is the strong push in federal courts to get cases through the system and off the docket. Judges set very short timelines for discovery and trial. Efficiency is obviously a worthy goal, but not if it comes at the sacrifice of fairness and justice. Close supervision of the progress of the case can assure that the plaintiff is actively litigating the case in a timely manner, but still permit flexibility in the event that an uncooperative or recalcitrant defendant makes discovery – and thus opposition to summary judgment – difficult, if not impossible.

These timing issues are critical. They can make the difference between a properly litigated and resolved case and a case that results in injustice because of external circumstances having nothing to do with the merits of the case.

**Point-Counterpoint**

This proposal is a very disturbing one, because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking, piecemeal way It has been common in my experience in California's state court practice –which has a procedure similar to that proposed - that summary judgment "facts" proposed by the defendant often exceed 100 in number. Responding to these individual facts is daunting, tedious, time-consuming and resource-intensive.

I have been fortunate to work in very reputable and well-resourced firms and there has never been a situation in which every care was not taken in opposing summary judgment. But that is a rare circumstance in the plaintiff law firm context. Most plaintiff firms are small: There are typically very small, and often consist of sole practitioners. (See, e g., Galanter, A Little Jousting About the Big Law Firm Tournament, 84 Va. Law. R. 1683, 1685.) I am convinced that defendants deliberately utilize this process in the hope that plaintiff's counsel will simply be overwhelmed and unable to adequately respond, thus giving the defendant an unwarranted victory.

One factor that exacerbates the potential harm of this proposal is the very common circumstance that trial court judges – probably because of workload issues – simply do not consider the effect of reasonable inferences from the facts set forth in the point-counterpoint. Oftentimes it is impossible to provide directly contrary evidence on the "fact" set forth by the defendant. But even assuming the "fact" as stated is supported by adequate evidence, that does not mean the defendant should prevail. If a reasonable inference can be derived from that "fact," it is for the jury to determine the effect of that "fact," not the trial judge. But I have found it common that judges ignore the reasonable inferences and simply grant summary judgment if the plaintiff cannot cite to directly contrary evidence.

Let me provide you with an example In one case, the issue was whether an employee was in the course and scope of his employment at the time he injured a highway patrol officer in a traffic accident. The employee was on his way home from work at the time of the accident and the employer would not normally be liable for that accident under the "going and coming" rule. But an exception exists under California law to the application of that rule: If the employer expects the employee to use his or her car during the course of their job duties, then the provision of the personal car is for the benefit of the employer and driving the car to and from the job is part of the employment requirements In such a case, California case law provides that accidents occurring during the commute occur during the course and scope of the employment.

In the case I was involved with, there was only one company truck available for the use of between 15 and 17 employees (including the defendant employee), who needed to travel to and from approximately 13 work sites. Most employees (including the defendant employee) took their own cars and/or carpooled with other employees in their personal cars. The employer argued that because the defendant employee was a supervisor, he could have demanded the use of the company truck every day and that he, therefore, was not required to use his personal car. The trial court granted summary judgment.

Fortunately, the appellate court reversed. (See *Holsome v. Exel, Inc.*, 2007 WL 2697309.) Although there was a reasonable inference that the supervisor did not need to use his personal car during his work hours, there was a conflicting reasonable inference that he, in fact, did provide his personal car for the benefit of his employer. This was a conflict that should have been resolved by a jury, not a judge on summary judgment.

This example illustrates the concern that the inability to provide directly conflicting evidence does not always mean that summary judgment is proper. The proposed changes will only exacerbate this problem and make it more likely that summary judgment will be granted when it should not be.

## ***Sua sponte* summary judgment**

One of the most frightening changes proposed is to permit judges to initiate summary judgment proceedings *sua sponte* While it may seem sensible to provide a trial judge with the flexibility to initiate such proceedings where interpretation of contractual terms or statutory provisions on undisputed facts are at issue, it is my experience that the parties themselves virtually always initiate cross-motions on the issue in order to resolve it and move on to appeal or other proceedings. Because the parties know their case best, it is for them to determine whether a summary judgment motion is appropriate.

## Conclusion

Jury trials are important Any proposal that makes a jury trial less likely should be viewed with suspicion. The proposed changes to Rule 56 make summary judgments more likely, and thus jury trials less likely. Although summary judgment reform may be advisable, these proposals are not the solution. I respectfully request that these changes not be implemented

If the Committee has any other questions or concerns, I would be happy to address them in my testimony at the hearing on

Sincerely,

THE ARKIN LAW FIRM

SHARON J. ARKIN