

State Farm Insurance Companies®

ONE STATE FARM PLAZA, E-11
BLOOMINGTON, ILLINOIS 61710-0001

JEFFREY W. JACKSON
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
jeffrey.w.jackson.cb81@statefarm.com
PHONE 309-766-7090
FAX 309-735-8648

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Via email Rules_Comments@ao.uscourts.gov

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Comment on the Proposed Amendments to Civil Rule 56

Dear Mr. McCabe:

As requested, please consider this a summary of the testimony I plan to present to the Advisory Committee on Civil Rules at the Hearing in San Francisco on February 2, 2009. My comments relate solely to the issue of whether a court “should,” “must” or “shall” grant summary judgment when the record shows the moving party is entitled to judgment as a matter of law.

My opinion is Rule 56(c) ought to require summary judgment when the record establishes the moving party is entitled to judgment as a matter of law. Hence, I join the many commentators asking that “should” be replaced with “must” or “shall.” Here’s why.

As General Counsel of the largest personal lines insurance company in the United States, I see a broad landscape of litigated matters and procedures. Our experience with summary judgment procedures supports what other’s empirical data suggests – summary judgments are rarely granted. The Federal Judicial Center’s August 13, 2008 report reveals only five percent of the federal court cases in its study were resolved by summary judgment.¹ State Farm’s experience in state and federal courts is consistent with this finding. In the last three years, approximately 3.5 percent of lawsuits against the company were fully resolved by summary judgment.² Of these cases, roughly 18 percent

¹ THE FEDERAL JUDICIAL CENTER, REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES, August 13, 2008

² State Farm Mutual and its affiliates handled over 36 million claims for the three-year period of 2006-2008. Our study examined the 6,469 lawsuits closed in a three-year period (November 20, 2005-November 20,

were in federal court and about 82 percent were in state court. If only five percent of cases are resolved by summary judgment when Rule 56 contained "shall" as found in the Federal Judicial Center's study, logic dictates courts will grant fewer, not more, summary judgments if the rule remains discretionary and utilizes "should."

Second, whether contained in statutes or in rules, the summary judgment procedure in the states is based on Rule 56 of the Federal Rules of Civil Procedure. All states' summary judgment rule, with the lone exception of Pennsylvania, utilizes "shall."³ If Federal Rule 56 retains "should," state rules are likely to change over time. As a result, we would expect to observe fewer summary judgments in state courts in the future. The granting of fewer summary judgments in federal and state courts will add congestion to the dockets of many venues already burdened with heavy case loads and slow the administration of justice in pending matters.

Third, viewing civil litigation along a continuum, at the margin are cases warranting summary judgment. These cases devour resources of the litigants and consume an inordinate amount of time, thereby increasing the cost of litigation. Litigation costs are factored into the ratemaking process of an insurance company, and can result in higher premiums. Considering the vital role insurance plays in society in general, and litigation specifically, our policyholders benefit when cases having no genuine issue about any material fact are resolved by summary judgment.⁴ Our own survey reveals the obvious. the cost to defend a case resolved by summary judgment is significantly lower than the cost of taking a case to verdict

2008) These cases were lawsuits against State Farm in both state and federal courts and contained an array of allegations such as breach of contract, bad faith, and unlawful termination. The numbers and percentages cited refer to cases totally resolved by summary judgment. Automobile and premises liability lawsuits against State Farm policyholders were not included in the study because they are primarily litigated in state courts. State Farm Mutual Automobile Insurance Company is the largest automobile insurance company in the United States, insuring over 42 million vehicles. State Farm Fire and Casualty Company is America's largest homeowner's insurer, providing coverage to over 17 million households.³ See, 50 STATE STATUTORY SURVEYS, CIVIL LAWS, CIVIL PROCEDURE, 50 STATE SURVEY RULES ON MOTIONS FOR SUMMARY JUDGMENTS, July 2008 Thomson/Reuters West.

Pennsylvania's rule (Pa.R.C.P. No. 1035.2) provides

- After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
- (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
 - (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury


⁴ At any point in time, approximately 100,000 of our policyholders are parties in lawsuits arising out of the use of a motor vehicle or residence

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Fourth, a review of State Farm's cases shows that of the 20 cases in which an appeal was taken following summary judgment in State Farm's favor, 17 were affirmed. This high affirmance rate confirms that courts are judicious in granting summary judgment motions, doing so when they are appropriately supported by the evidence. Consequently, a summary judgment rule containing "shall" does not deny deserving litigants their day in court, and at the same time promotes a more streamlined, efficient procedural framework.

Thank you for the opportunity to express my views on Rule 56.

Very truly yours,


Jeffrey W. Jackson
Senior Vice President and General Counsel

JWJ/LCB

c: John K. Rabiej
via email: john_rabiej@ao.uscourts.gov