Hastings Law Journal

Volume 36 | Issue 3 Article 3

1-1985

Liberalizing Summary Adjudication: A Proposal

Stuart R. Pollak

Liberalizing Summary Adjudication: A Proposal

By STUART R. POLLAK*

The Need For Reform

Attorneys and trial judges generally agree that summary judgments are not granted frequently enough in state court proceedings.[1] The advantages of the summary judgment procedure are many: if the facts are undisputed, summary adjudication permits earlier disposition of litigation, almost invariably resulting in the expenditure of less time by the court, the attorneys, the parties, and the witnesses. Prompt disposition of cases lacking genuine factual controversy reduces the heavy cost of litigation to the parties and conserves the scarce resources of the judicial system. Yet, motions for summary judgment are frequently denied although the party opposing the motion has no evidence to support its position and no chance of prevailing at trial. Indeed, counsel often conclude that the likelihood of prevailing on a summary judgment motion is so slight as not to warrant the expense of trying, however much they may feel entitled to such relief.

There is less agreement about why summary judgment motions are so rarely successful. Trial lawyers tend to place the responsibility on two factors: overly restrictive standards fashioned by appellate courts, zealous to protect the parties' right to trial, and the asserted timidity, if not laziness, on the part of trial court judges. Law and motion judges must

* Judge of the Superior Court in and for the County of San Francisco. A.B., 1959, Stanford University; LL.B, 1962, Harvard Law School. Judge Pollak presided over the Law and Motion Department of the San Francisco Superior Court from August 1982 to July 1984. The author wishes to express his thanks to Carol Opotow and Susan O'Neill for their assistance in doing research for this Commentary and to Sarah Hofstadter for a helpful, critical edit.

1. The focus of attention in this Commentary is section 437c of the California Code of Civil Procedure. The fundamental question concerning the allocation of the burden of producing evidence also arises under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974). A similar question also has arisen in federal administrative proceedings. *See* Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 CALIF. L. REV. 14, 31-39 (1976); Gellhorn & Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

review an ever-increasing bulk of moving and opposing papers which accompany these motions. Their efforts in granting summary adjudication often are rewarded with an abnormally high rate of reversals. Thus, the "safe" and "easy" way for a trial judge to deal with such motions has been simply to deny them.

Trial court judges tend to agree that appellate standards are inadvisedly and often unpredictably stringent. Those who have considered a number of summary adjudication motions also place some responsibility for their frequent denial on the careless manner in which the supporting papers too often are presented. Given the heavy burden that the moving party must meet to establish its right to summary relief, the proponent must exercise extraordinary care to ensure that the motion is supported by competent and admissible evidence of every element necessary to establish the party's right to a favorable determination.

The Legislature, in response to the criticism of several commentators,[2] on more than one occasion has revised the governing section of the Code of Civil Procedure in an attempt to increase the availability of summary adjudications. Section 437c was amended in 1973 to mandate that the summary judgment motion be granted if evidence tending to establish the necessary facts is presented and not contradicted, regardless of any doubt the trial court may have about the credibility of that evidence, with only two limited exceptions.[3] At the same time, a provision was added limiting the court's consideration to "admissible evidence," thus modifying the rule that allowed opposing affidavits and declarations to comply less strictly with the rules of evidence than the supporting papers.[4] The Legislature also added a subdivision that virtually invited use of the extraordinary writ procedure to challenge the denial of section 437c motions.[5]

Effective January 1, 1984, section 437c was again amended to ensure

2. *See, e.g.*, Bauman, *California Summary Judgment: A Search for a Standard*, 10 U.C.L.A. L. REV. 347 (1963); Zack, *California Summary Judgment: The Need for Legislative Reform*, 59 CALIF. L. REV. 439 (1971); *cf.* David, *The Summary Judgment in California: The Case for Judicial Reform*, 25 HASTINGS L.J. 119 (1973) (a judicial remedy by the California Supreme Court, rather than a legislative enactment, is the appropriate solution).

3. Act of Sept. 4, 1973, ch. 366, § 2, 1973 Cal. Stat. 807. These provisions are currently codified at CAL. CIV. PROC. CODE § 437c(c), (e) (West Supp. 1984). These exceptions occur when the only proof of a material fact either is an affidavit of a sole witness or involves an individual's state of mind. *See* Zack, *The 1973 Summary Judgment Act: New Teeth for an Old Tiger*, 48 CAL. B.J. 654, 655, 658 (1973).

4. Currently CAL. CIV. PROC. CODE § 437c(d) (West Supp. 1984). *See* People v. Rath Packing Co., 44 Cal. App. 3d 56, 62-64, 118 Cal. Rptr. 438, 441-42 (1974); Zack, *supra* note 3, at 656-57.

5. Currently CAL. CIV. PROC. CODE § 437c(l) (West Supp. 1984).

that summary adjudications are granted when there are no triable issues of material fact.[6] The amendment includes two principal innovations designed to accomplish this objective. The first is the requirement that the parties submit separate statements itemizing material facts which they contend are undisputed or disputed, as the case may be, supported by specific reference to the evidence which either establishes or contradicts each fact.[7] These separate statements facilitate review of the record by the court and, if properly prepared, should help prevent the moving party from overlooking any facts or evidence necessary to support its application.[8] The second important addition is the requirement that the court, if it denies the motion, specify at least one material fact it finds to be in dispute and cite the evidence that indicates the existence of such a triable controversy.[9] This requirement undoubtedly is designed to overcome the judicial temptation to deny summary judgment based simply on the rationalization that somewhere in the volume of materials filed in opposition there must be a triable issue. Indeed, under the new procedure it is easier for the court to grant than to deny the motion because no findings are required if the requested relief is afforded.[10]

Whether the new procedures will result in more summary adjudications remains to be seen.[11] But throughout the process of revising the

6. Act of July 2, 1983, Ch. 490, 1983 Cal. Legis. Serv. 3035 (West); *see* Kennedy, *California's Amended Summary Judgment Statute: Will New Dentures Provide a Better Bite?*, 1 LITIGATION BRIEF 1 (1984); Weil and Brown, *Braces for the Old Tiger's New Teeth: A Summary and Judgment of the New Summary Judgment Law*, 4 CAL. LAW. 20 (1984).

7. CAL. CIV. PROC. CODE § 437c(b) (West Supp. 1984).

8. If prepared correctly, the separate statement of the moving party should recite the assertedly uncontradicted facts from which it follows that the party is entitled to the requested adjudication. If the references contained in the separate statement do provide competent and admissible evidence of each of those facts, the moving party will be entitled to summary adjudication unless the separate statement of the opposing party cites competent and admissible evidence showing that the fact is disputed, or unless the opposing separate statement identifies an additional factual issue, supported by a reference to competent evidence, precluding the requested adjudication.

9. CAL. CIV. PROC. CODE § 437c(g) (West Supp. 1984).

10. In practice, however, if the statutory procedure has been properly followed by both parties, the court's task in specifying the issues and evidence upon a denial should be relatively simple, because it need do no more than incorporate those portions of the opposing party's separate statement which the court has concluded identify and substantiate a triable issue. On the other hand, a busy law and motion judge cannot be expected to make such a specification if the opposing party has not submitted a proper separate statement, and the opposing party in turn cannot possibly submit a proper separate statement responding to the separate statement of the moving party if the moving party itself has not properly set forth the facts it contends are undisputed. For this reason, the statute permits the court to grant or deny the motion on the sole ground of failure to comply with the requirement of a separate statement in proper form. CAL. CIV. PROC. CODE § 437c(b) (West Supp. 1984).

11. The new requirements undoubtedly have increased the difficulty and expense of pre-

California statute, a fundamental aspect of the summary adjudication procedure seems to have gone unquestioned. I suspect that by far the most common reason for the denial of meritorious summary adjudications is the manner in which the courts have allocated the burden of producing evidence in connection with the motion. This Commentary proposes a reallocation of that burden. After examining the effect that the allocation of the burden of producing evidence has on the likelihood of success on a motion for summary judgment, the Commentary presents a revision to section 437c. This revision would reallocate the burden in a manner that, while not impinging on the right to a trial of disputed factual issues, would make summary adjudication more readily obtainable when there is no evidence creating a triable issue to justify the denial of relief prior to trial.

The Burden of Producing Evidence and the Summary Judgment Motion

Underlying the reservations that many appellate decisions articulate concerning summary adjudication is the courts' desire to preserve the advantages of resolving factual issues at trial rather than upon a written record. At trial, the trier of fact, whether judge or jury, has the opportunity to observe the demeanor of the witnesses, both on direct examination and under cross-examination. The trier of fact can evaluate the credibility of the evidence more accurately by direct observation than on affidavits carefully crafted by counsel or in deposition transcripts, which reveal none of the expressions accompanying the words of the witnesses. One of the most formidable defenders of the right to jury trial, concurring in the reversal of a summary judgment under federal law because the moving defendant had failed to negate an imaginable but completely unsupported basis of recovery, argued: "The advantages of trial before a live jury and live witnesses, and all the possibilities of considering human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment."[12] These sentiments have found equally emphatic expression in the decisions of the California courts.[13]

The judicially developed rules for the construction of the evidence

paring a motion under California Civil Procedure Code § 437c. Some commentators suspect that the new requirements will increase the number of motions denied on procedural grounds for failure to submit papers conforming to the requirements of the statute. *See* Kennedy, *supra* note 6, at 3.

12. Adickes v. S.H. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J., concurring).

13. *E.g.*, Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 555-56, 122 P.2d 264, 266 (1942); McComsey v. Leaf, 36 Cal. App. 2d 132, 135-40, 97 P.2d 242, 244-47 (1939).

submitted in support of and in opposition to such motions reflect this concern for preservation of the right to trial. Although the Legislature has directed that summary adjudication ordinarily not be denied simply to provide an opportunity to evaluate the credibility of evidence that is not contradicted,[14] the courts persist in construing moving papers more strictly while interpreting those in opposition more liberally.[15] The evidence that supports a motion must be competent and admissible in all respects—conclusory statements, for example, will not suffice—while less exacting standards continue to be applied to the evidence submitted in opposition to the motion.[16]

These rules, directed to the *interpretation* of evidence tendered by one side or the other, do indeed further the objective of ensuring that litigants are not denied their right to have disputed factual issues resolved by trial. The documents tendered by the party seeking summary adjudication must prove, beyond doubt,[17] all of the facts which that party has the burden of establishing, by evidence that would satisfy the rigorous evidentiary standards applicable at trial. If the moving party's evidence is ambiguous, conclusory, or otherwise inadmissible, the court lacks assurance that the moving party can prove the facts that must be established for recovery. Similarly, if the uncontroverted facts give rise to varying inferences, the right to recover has not necessarily been established, and some liberality in drawing opposing inferences may be justi-

14. CAL. CIV. PROC. CODE § 437c(e) (West Supp. 1984).

15. *E.g.*, Brown v. Bleiberg, 32 Cal. 3d 426, 436 n.7, 651 P.2d 815, 820 n.7, 186 Cal. Rptr. 426, 436 n.7 (1982); Sprecher v. Adamson Co., 30 Cal. 3d 358, 372-73, 636 P.2d 1121, 1129, 178 Cal. Rptr. 783, 791 (1981); Chern v. Bank of Am., 15 Cal. 3d 866, 873, 544 P.2d 1310, 1314, 127 Cal. Rptr. 110, 114 (1976); Parsons Mfg. Corp. v. Superior Court, 156 Cal. App. 3d 1151, 1157, 203 Cal. Rptr. 419, 421 (1984); People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 129, 197 Cal. Rptr. 484, 488 (1983); Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 611-12 (1983); Matute v. Belco Indus., Inc., 142 Cal. App. 3d 433, 437-38 (1983); Gigax v. Ralston Purina Co., 136 Cal. App. 3d 591, 597, 186 Cal. Rptr. 395, 398 (1982); Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714, 717-18, 150 Cal. Rptr. 408, 410 (1978); Civic W. Corp. v. Zila Indus., Inc., 66 Cal. App. 3d 1, 11-12, 135 Cal. Rptr. 915, 922 (1977); Kelleher v. Empresa Hondurena de Vapores, S.A., 57 Cal. App. 3d 52, 56, 129 Cal. Rptr. 32, 34 (1976).

16. *See, e.g.*, Matute v. Belco Indus., Inc., 142 Cal. App. 3d 433, 439 (1983) (the opposing affidavits "need not necessarily be composed wholly of strictly evidentiary facts") (quoting Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 556, 122 P.2d 264, 266 (1942)); *see also* Mamola v. State of California *ex rel.* Dep't of Transp., 94 Cal. App. 3d 781, 788-89, 156 Cal. Rptr. 614, 619 (1979).

17. As frequently stated, summary judgment is a drastic remedy to be used with caution; all doubts are to be resolved against the moving party. Slobojan v. Western Travelers Life Ins. Co., 70 Cal. 2d 432, 437, 450 P.2d 271, 274, 74 Cal. Rptr. 895, 898 (1969); Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 556, 122 P.2d 264, 266 (1942); People v. Rath Packing Co., 44 Cal. App. 3d 56, 62, 118 Cal. Rptr. 438, 441 (1974).

fied when there is no opportunity to evaluate the credibility of the evidence establishing the underlying facts. Conversely, although the opposing declarations may include statements that might be subject to evidentiary objection, at trial there is an opportunity to overcome such objections—for example, by rephrasing a question. Thus, the liberal interpretation of opposing declarations ensures that summary adjudication will be denied if competent, conflicting evidence not properly presented in the opposing papers nonetheless may be anticipated at trial.[18]

The laudable objective of reserving the resolution of material factual disputes for trial is not advanced, however, when summary judgment is denied absent a showing that any of the evidence necessary for the resisting party to prevail at trial exists. Typically, summary adjudication is denied in such instances, not because denial is required by the canons of construction of tendered evidence, but because of the manner in which the courts have allocated the burden of producing evidence on a motion for summary adjudication.

Section 437c(a) provides that a party may move for summary judgment "if it is contended that the action has no merit or that there is no defense thereto."[19] From this simple formulation the rule has evolved that to prevail, the moving party must present evidence disproving the facts that are material to the adversary's claim or defense. To obtain summary judgment, a defendant must present evidence negating one or more elements of the plaintiff's claim or establishing every element of an affirmative defense.[20] For a plaintiff to win a summary judgment, it must not only establish every element of its own claim, but also must negate at

18. Alternatively, the trial court may sustain the moving party's objections to the defective evidence and give the opposing party an opportunity to submit revised declarations or additional evidence, especially when the defects appear remediable. In this way, the court may avoid accepting deficient declarations as sufficient to create a triable issue, but withhold summary adjudication until it is clear that competent evidence creating a triable issue of fact does not exist.

19. Subsection (c), CAL. CIV. PROC. CODE § 437c(c) (West Supp. 1984), further provides that "[t]he motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The alternative motion for summary adjudication of issues is to be granted "if it appears that the proof supports the granting of the motion as to some but not all of the issues involved in the action or that one or more of the issues is admitted." CAL. CIV. PROC. CODE § 437c(f) (West Supp. 1984). The proposal advanced in this Commentary would apply both to motions for summary judgment and to motions for the adjudication of issues.

20. *E.g.*, I.E. Assocs. v. Safeco Title Ins. Co., 158 Cal. App. 3d 52, 56, 204 Cal. Rptr. 340, 343 (1984); Parsons Mfg. Corp. v. Superior Court, 156 Cal. App. 3d 1151, 203 Cal. Rptr. 419 (1984); Los Angeles County v. Superior Court, 155 Cal. App. 3d 454, 459, 202 Cal. Rptr. 222, 224 (1984).

least one element of every pleaded affirmative defense.[21] The moving party carries this burden regardless of whether that party bears the burden of proof at trial. In contrast to a motion for nonsuit at the close of a party's evidence, on a summary judgment motion the moving party cannot point to the absence of evidence by the side that bears the burden of proof, but must come forward with its own evidence to disprove the facts in question.[22] This is true whether or not the disputed fact is a negative proposition, whether or not evidence of the fact presumptively is in the possession of the opposing party, and, indeed, whether or not the fact to be disproved is even intelligibly stated in the opposing party's pleadings.[23]

21. *E.g.*, Snider v. Snider, 200 Cal. App. 2d 741, 748, 19 Cal. Rptr. 709, 714 (1962).

22. Barnes v. Blue Haven Pools, 1 Cal. App. 3d 123, 127, 81 Cal. Rptr. 444, 447 (1969) ("There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial."); *see also* Matute v. Belco Indus., Inc., 142 Cal. App. 3d 433, 438, 191 Cal. Rptr. 85, 87-88 (1983); Segura v. Brundage, 91 Cal. App. 3d 19, 29, 153 Cal. Rptr. 777, 783 (1979); Fuller v. Goodyear Tire & Rubber Co., 7 Cal. App. 3d 690, 693, 86 Cal. Rptr. 705, 707 (1970).

The existence of a presumption affecting only the burden of proof under CAL. EVID. CODE §§ 605-606, 660-669.5 (West 1983) does not affect the burden of producing evidence to obtain summary judgment. People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 138, 197 Cal. Rptr. 484, 494 (1983); People v. Rath Packing Co., 44 Cal. App. 3d 56, 65, 118 Cal. Rptr. 438, 443 (1974). If, however, the facts giving rise to a presumption affecting the burden of producing evidence under CAL. EVID. CODE §§ 603-604, 630-647 are established, the moving party is entitled to rely on that presumption and will be entitled to summary adjudication unless the opposing party comes forward with evidence tending to negate the presumed fact. Security Pac. Nat'l Bank v. Associated Motor Sales, 106 Cal. App. 3d 171, 179-80, 165 Cal. Rptr. 38, 43 (1980). The latter result is in accord with federal decisions, *e.g.*, Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250 (9th Cir. 1982), which have been criticized. *See* Note, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 U.C.L.A. L. REV. 1101 (1984).

23. *See, e.g.*, Vesely v. Sager, 5 Cal. 3d 153, 169-70, 486 P.2d 151, 163, 95 Cal. Rptr. 623, 635 (1971); Conn v. National Can Corp., 124 Cal. App. 3d 630, 638-40, 177 Cal. Rptr. 445, 449-50 (1981); Segura v. Brundage, 91 Cal. App. 3d 19, 28-29, 153 Cal. Rptr. 777, 782-83 (1979); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 127-28, 109 Cal. Rptr. 724, 731 (1973); Hayward Union High School Dist. v. Madrid, 234 Cal. App. 2d 100, 120, 44 Cal. Rptr. 268, 280 (1965).

The only instance in which the burden of producing evidence on a summary judgment motion was shifted to the opposing party despite the moving party's failure to negate an essential element of the adversary's case arose when the plaintiff had sued the wrong party. Versa Technologies, Inc. v. Superior Court, 78 Cal. App. 3d 237, 240, 142 Cal. Rptr. 570, 572 (1978). In reversing the denial of defendant's summary judgment motion because of the plaintiff's failure to produce evidence that the moving defendant had manufactured the product alleged to be defective, despite the fact that the moving defendant's showing was deficient, the court stated:

[W]here a question of identity of one of the parties is raised in the form of a motion

The denial of summary judgment under such circumstances is a constant source of frustration to litigants and extends litigation with virtually no counterbalancing benefit. Defendants' summary judgment motions regularly are denied, often to the astonishment of counsel, even in the face of explicit admissions that the plaintiff has no evidence of an allegation critical to its claim.[24] Similarly, the plaintiffs' motions frequently are denied for failure to disprove an affirmative defense in support of which absolutely no evidence has been offered.

In many situations, the opposing party has had ample opportunity to obtain favorable evidence, and it may be painfully obvious that this party will fail at trial. Nonetheless, because the opposing party, although bearing the burden of proof at trial, is not obligated to tender any evidence to defeat the summary judgment motion, the motion must be denied because of the moving party's failure to *disprove* what the opposing party must prove at trial. This result, I submit, is inconsistent with the basic function of the summary judgment procedure: "to discover, through the media of affidavits, whether the parties possess evidence which demands the analysis of trial."[25] The consequence is that the parties must incur the additional expense of trial to reach the point at which the court may act upon the opposing party's failure to produce evidence to sustain its burden. Or, the opposing party may exact a settlement based not upon the likelihood of prevailing, but simply upon the cost to which it can put the other party before the point of disposition can be reached.[26] Neither result is acceptable.

---

for summary judgment, then the opposing party should be required, at the very least, to file a counteraffidavit under penalty of perjury setting forth the facts upon which he bases his good faith belief that the party is the actual manufacturer of the product involved.

Id. Although the significance of this decision undoubtedly is limited by plaintiff's tacit admission (in attempting to file a voluntary dismissal) that he had named the wrong party, the opinion nonetheless suggests that there is, and should be, some point at which it becomes reasonable to require a party to come forward with the evidence of facts it must prove whether or not its adversary has successfully negated those facts.

24. An admission which establishes that there is no conflicting evidence or that there is no factual issue to be tried may, of course, warrant summary adjudication. D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 20-22, 520 P.2d 10, 24-25, 112 Cal. Rptr. 786, 800-01 (1974); Cory v. Golden State Bank, 95 Cal. App. 3d 360, 366, 157 Cal. Rptr. 538, 541 (1979). Nevertheless, the acknowledgment frequently received in discovery that a party does not then know of any evidence establishing a fact critical to its case does not necessarily establish that such evidence does not exist or will not be located, and therefore may be insufficient to negate the fact in question.

25. Burke v. Hibernia Bank, 186 Cal. App. 2d 739, 744, 9 Cal. Rptr. 890, 893 (1960).

26. A third alternative, to which reference has been made in justifying the existing rule, is for the party seeking summary adjudication first to pin down the adversary by means of discovery. *See* Conn v. National Can Corp., 124 Cal. App. 3d 630, 639-40, 177 Cal. Rptr. 445,

Because the party carrying the burden of proving a material fact necessarily must lose on that issue at trial if it has no competent and admissible evidence to establish that fact, why should that party be permitted to proceed to trial if it cannot produce such evidence in opposition to a motion for summary adjudication? Certainly granting the motion in such a situation would not invade the valued right to trial because, lacking evidence to support the assertion of a party with the burden of proof, the trier of fact will have nothing to decide, and an adverse determination will be required as a matter of law.

There are only two possible reasons for failing to place the burden of producing evidence on an issue to defeat a motion for summary adjudication upon the party who will bear the burden of proof on that issue at trial. Neither is sufficient to justify the present approach.

The first possible reason is to avoid summary adjudication of factual issues before the party with the burden of proof has had the opportunity to obtain the evidence necessary to establish its claim or defense through discovery. That danger exists under the current statute and is addressed in subsection (h), which requires the court to deny or to continue the motion "if it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented." That provision is not necessarily sufficient, however, for if a party has not yet had the opportunity to complete its discovery, it may be unaware of evidence justifying denial of the summary adjudication motion and unable to submit a declaration entitling it to deferral of the motion under section 437c(h).[27] At present, the requirement that the moving party come forward with evidence tending to negate one or more elements of the adversary's claim or defense may preclude the filing of the motion until both sides have had a reasonable opportunity for discovery.

If the burden of producing evidence were shifted, this practical re-

450 (1981); Segura v. Brundage, 91 Cal. App. 3d 19, 29-30, 153 Cal. Rptr. 777, 783 (1979). While this is the only avenue available at present, it is frequently unsatisfactory. Ambiguous and evasive discovery responses can be furnished too easily and can be corrected only with great difficulty and considerable expense, if at all. Moreover, under the current standard, a truthful response that the party has no evidence of a fact essential to its case (normally coupled with the statement that discovery is continuing) will not entitle the adversary to a summary adjudication based upon the nonexistence of that fact. At best, a party's refusal to admit a fact in response to a request for admissions under Code of Civil Procedure § 2033 might entitle the adversary to a post-trial award of the expenses reasonably incurred "in making the proof" of that fact. CAL. CIV. PROC. CODE § 2034(c) (West 1983). Such awards are exceptionally rare and do not necessarily include all of the trial costs that would have been avoided if the fact in question had been deemed established and summary judgment granted.

27. *See* Scott v. Farrar, 139 Cal. App. 3d 462, 469, 188 Cal. Rptr. 823, 827 (1983).

straint would be removed. If no other limitation were imposed, a summary judgment motion might readily be filed at the outset of any action by the party who does not bear the burden of proof. Even if the court refused to entertain the motion until the opposing party had been given some opportunity to conduct discovery, the opponent would immediately be required to seek discretionary time extensions for the opportunity to assemble its case. Only after a party has had a reasonable opportunity to gather evidence, however, is it fair to require that party to show that evidence exists justifying trial, or that additional time for discovery is needed, to defeat summary judgment. Thus, if the burden of producing evidence were shifted, some limitation upon the stage of the proceedings when this can occur would be appropriate.

The second, and somewhat related, reason for maintaining the present standard is that a shift of the burden of coming forward with evidence to the opposing party could be used to harass one's adversary.[28] Even under the present standard, the filing of a summary judgment motion may serve strategic purposes whether or not there is a realistic prospect that the motion will be granted. For example, a summary judgment motion may flush out the opponent's case more quickly and effectively than extended discovery. At present the price of this practice is that the moving party must first disclose the evidence establishing its own prima facie entitlement to relief. If the burden of producing evidence were shifted, this quid pro quo would be eliminated. Hence, however obvious the existence of conflicting evidence, a party could file a summary judgment motion and thereby put its adversary to the burden of submitting competent evidence of its claims or defenses. Unless the moving party has a good faith basis to believe that the adversary has no competent evidence to support its position, such a practice would be a facile method to add unjustifiably to the opponent's cost of pursuing the litigation.

This problem, too, can be solved short of permitting a party to force a case to trial when that party unquestionably lacks any evidence to prove a fact essential to its case. Conceivably, limitations might be imposed on the types of factual issues for which the burden of producing evidence could be shifted, such as only those facts presumably within the knowledge of the opposing party. Such distinctions, however, are fraught with uncertainty and undoubtedly would produce additional grounds of contention in connection with many motions. Instead, the potential for abuse should be confronted directly by requiring that coun-

28. *Compare* Louis, *supra* note 1, at 749-50 *with* Currie, *supra* note 1, at 78-79. Professor Currie deems the fear of harassment to be unfounded: "[D]iscovery can require far more burdensome disclosure, and the evidence must in any event be prepared for trial." *Id.*

sel for the moving party, as a condition to shifting the burden of producing evidence, submit a sworn statement that he or she believes there is no competent evidence of the fact in question. The statute already contains authority for imposing sanctions on those who submit affidavits in bad faith.[29] However rarely this authority may be invoked at present, the courts probably would not be reluctant to impose adequate monetary sanctions if, in the face of obvious factual issues, a party nevertheless attested to the absence of any evidence supporting the adversary's position.

A Proposal

The burden of producing evidence in connection with a motion for summary adjudication could be shifted, with minimum potential for abuse, to the party bearing the burden of proof at trial by the addition of a new provision to section 437c, reading as follows:

> If the moving party asserts the nonexistence of a fact material to a claim or defense asserted against it with respect to which the party opposing the motion will bear the burden of proof at trial, and if the motion is supported by the declaration of counsel (or of the party if that party is appearing in propria persona) stating that diligent inquiry has disclosed no competent evidence of such fact and that the declarant believes that no such competent evidence exists, and if such motion is made at least one year after the commencement of the action or within 90 days of trial, then, subject to subdivision (h), the nonexistence of such fact shall be deemed established unless the party opposing the motion presents competent and admissible evidence of such fact.

Under such a provision, a plaintiff in a product liability case, for example, could be required to come forward with evidence of the product defect upon which its claim is based to defeat a summary judgment motion by the defendant. Similarly, a defendant who has alleged affirmative defenses—waiver, estoppel, or unclean hands, for example—could be compelled to present substantiating evidence to avoid an adverse summary adjudication.

The provision would shift the burden of producing evidence only after the action has been pending for at least one year, or within ninety days of trial.[30] This delay in the shift would ensure that a party had an

29. CAL. CIV. PROC. CODE § 437c(i) (West Supp. 1984); *cf.* CAL. CIV. PROC. CODE § 128.5 (West 1982).

30. The time limits of the proposed provision refer to the time at which the motion is "made", *i.e.*, filed and served. Thus, a party seeking to rely upon this procedure because of a forthcoming trial in a case which has been pending for less than one year could file the motion within 90 days of trial and have the motion considered 28 days later.

opportunity to discover evidence before confronting a motion shifting to it the burden of producing evidence. Moreover, the existing procedure would be unchanged in two important respects. Before one year or ninety days of trial, a party could still seek summary adjudication by carrying its present burden of presenting evidence tending to disprove the claim or defense asserted against it. And even after the point at which the section becomes applicable, subdivision (h) would continue to authorize continuance or denial of the motion upon a showing that more time is needed to complete essential discovery.

Although the proposed modification would facilitate summary adjudications when the opposing party has no evidence to offer in support of a position it must prove at trial, the provision would not radically alter summary judgment practice. If opposing evidence is tendered, that evidence would remain subject to liberal construction, and all of the cautionary canons would remain applicable. Moreover, a party seeking summary adjudication typically would still bear the burden of presenting evidence demonstrating its right to relief. A plaintiff seeking summary judgment still would be required to present evidence establishing every element of its affirmative case; by moving for summary judgment, it would place upon the defendant only the burden of coming forward with evidence to demonstrate the existence of triable issues to support its affirmative defenses. Defendants' motions under section 437c, on the other hand, commonly are based upon their affirmative defenses, as to which the defendant would continue to carry the burden of coming forward with supporting evidence before the plaintiff would have any obligation to respond with contrary evidence. Moreover, a party would shift the burden of producing evidence of facts establishing a claim or defense only if that party's attorney could state truthfully that he or she is aware of no evidence of those facts and believes that none exists—certainly something that counsel cannot do in most cases.

When such an assertion truthfully can be made, however, and when the opposing party has had a reasonable opportunity to gather its evidence, there is no justification for postponing the day of reckoning until the middle of the trial. If the party bearing the burden of proof has no evidence, it simply will not be able to prevail. If that party has no evidence to present to the trier of fact, it will lose no rights by incurring an adverse determination before trial, but only the ability to force an adversary to the substantial expense of trial preparation and trial in pursuit of a hopeless undertaking.[31] Neither the parties nor the judicial system

31. As worded above, the statutory revision would make summary adjudication mandatory if the opposing party failed to come forward with competent evidence of the facts

should be required to tolerate such fruitless endeavors.

that it has the burden of proving. Should doubts persist as to the consequences of such a revision, the provision could, of course, be made discretionary. This would permit the trial court to use its judgment in determining whether, despite the opposing party's failure to produce evidence of a fact not negated by the moving party, there is any basis to believe that there is nonetheless a triable issue which may be supported by evidence at trial.