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Summary Judgment After *Eastman Kodak*

*by*  
**William W Schwarzer* & Alan Hirsch**

**Introduction**

During its 1992 term, the United States Supreme Court decided *Eastman Kodak v. Image Technical Services*,¹ its first important summary judgment decision since the 1986 Supreme Court trilogy.² The trilogy clarified the respective burdens on a party moving for summary judgment and the party opposing the motion. This Article discusses three issues: whether *Kodak* alters those burdens; whether those burdens are properly understood by lower courts;³ and how the decision in *Kodak* will affect discovery management in summary judgment cases.

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3. This Article focuses on the situation presented when the motion for summary judgment is made by the party not having the burden of persuasion at trial. When the party having the trial burden makes a motion, its burden on summary judgment is equivalent to the burden it would bear at trial.
II. Kodak Case Background

To assess the significance of Kodak, its facts and procedural setting must be understood. Kodak manufactures and sells copiers in competition with a number of other manufacturers. It also sells service and replacement parts for its copiers. In the early 1980s, independent service organizations (ISOs) began servicing Kodak copiers in competition with Kodak. Beginning in about 1985, Kodak refused to sell parts to ISOs, limiting its sales to customers who performed their own service. Kodak also limited the ability of ISOs to buy parts directly from the manufacturers. As a result, many customers using Kodak equipment who did not perform their own service had to switch from ISOs to Kodak to obtain service and parts. Because they considered their access to the market for servicing Kodak equipment to have been restricted, the ISOs sued Kodak, charging violation of Sections 1 and 2 of the Sherman Act.

Kodak moved for summary judgment, arguing principally that because competition undisputedly exists in the market in which Kodak sells original equipment, Kodak must be presumed to lack the requisite market power in the derivative markets for service and parts to support a violation of the antitrust laws. Kodak supported its position by arguing that prospective purchasers of new equipment would be influenced by the cost of service and replacement parts for the equipment; as a result, any increase in profits from higher prices for parts and service would be offset by lost profits from sales as consumers purchased new equipment from other manufacturers with more attractive service costs. Because a finding of market power in the derivative service and parts markets absent power in the equipment market "simply makes no economic sense," Kodak, invoking Matsushita Electric Industrial v. Zenith Radio, maintained that it had established the absence of a genuine issue of material fact.

4. The following account is based on the district court opinion, Image Technical Servs., Inc. v. Eastman Kodak Co., 1989-1 Trade Cas. (CCH) ¶ 68,402 (N.D. Cal. Apr. 18, 1988), as well as on the personal observations of the trial judge, who is one of the authors of this Article.
7. See Matsushita, 475 U.S. at 587, in which the Court, in the course of granting summary judgment, observed that plaintiff's economic theory "simply makes no economic sense." Kodak supported its argument by relying on what it took to be plaintiffs' concession that customers take into account the cost of service in making decisions about purchasing new equipment. See Daniel M. Wall, Kodak: A Personal Perspective, Antitrust, Fall/Winter 1992, at 4, 5.
The trial court granted summary judgment for defendant Kodak. Recognizing that Kodak may have a monopoly in the market for its replacement parts and service, the court found that the ISOs had offered no facts reflecting an attempt by Kodak to use that position to gain power in another market. The district court implicitly found that the existence of competition in the market for new copiers precluded Kodak from having market power in the parts and service market.

On appeal, a divided panel of the Ninth Circuit reversed. The court held that a reasonable trier of fact could find that competition in the equipment market did not curb Kodak's power in the parts and service markets. In so holding, the court referred to evidence that Kodak had charged twice as much as ISOs for lower quality service, that competition from ISOs had driven down Kodak prices for service, and that customers had been willing to pay higher prices for Kodak equipment packages rather than switch to competitors.

The Supreme Court affirmed the Ninth Circuit decision in an opinion written by Justice Blackmun joined by five Justices. The opinion states the principal issue as "whether [Kodak's] lack of market power in the primary equipment market precludes—as a matter of law—the possibility of market power in derivative aftermarkets." The Court rejected Kodak's argument that it necessarily lacked market power in the service market because competition existed in the equipment market. Pointing to evidence of a rise in service prices without a corresponding decline in equipment sales, the Court observed that actual experience did not support Kodak's theory. Evidence of switching costs and information costs incurred by equipment owners raised a question of fact about whether markets behaved in accordance with Kodak's theory; the Court was unwilling to assume that equipment purchase decisions were necessarily based on accurate assessments of the total costs of equipment, service, and parts over the

8. Kodak, 1989-1 Trade Cas. (CCH), ¶ 68,402, at 60,212.
9. Id. at 60,212-13.
11. The Court also held that Kodak was not entitled to summary judgment on plaintiffs' § 2 claim, finding issues of fact with respect to the relevant market and Kodak's business justification. Only the § 1 aspect of the case, however, is relevant to the procedural analysis.
13. Id. at 2076.
equipment's life. The Court also rejected Kodak's contention, based on Matsushita, that presuming an absence of market power was necessary to avoid a significant risk of deterring procompetitive conduct. Unlike the price cutting at issue in Matsushita, Kodak's restrictive arrangements were regarded by the Court as facially anticompetitive. Ultimately, the Court concluded that Kodak had not satisfied the burden for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure because Kodak failed to demonstrate that an inference of power over the markets for parts and service is unreasonable.

II. Summary Judgment Burdens

To examine Kodak's impact, if any, on the parties' summary judgment burdens, we begin with a brief review of the pre-Kodak law. Celotex v. Catrett established that the moving party bears the burden of demonstrating the absence of any genuine issue of material fact, but need not produce evidence to disprove the opponent's claim. If that burden is met, the burden shifts to the opponent to produce evidence establishing a genuine issue of material fact. The opponent may not rely on the allegations of the pleadings, but must set forth "specific facts showing that there is a genuine issue for trial." Both Celotex and Anderson v. Liberty Lobby direct courts to measure the sufficiency of the opposition against the standard governing motions for judgment as a matter of law: whether the facts are sufficient to permit a reasonable jury to find for the opponent of the motion.

How does Kodak fit into this template for summary judgment?

14. Id. at 2086-87.
15. Id. at 2088.
16. Id. at 2089. Rule 56(c) provides that summary judgment shall be granted if "the pleadings [and discovery and affidavits, if any] show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).
19. Id. (quoting Fed. R. Civ. P. 56(e)).
21. Under the recently amended Rule 50, judgment as a matter of law is the term encompassing what had previously been directed verdicts and judgments notwithstanding the verdict. Fed. R. Civ. P. 50.
The Court held that Kodak had failed to meet the requirements of Rule 56(c)—that is, to "show that there is no genuine issue as to any material fact and that [it] . . . is entitled to a judgment as a matter of law." It did so, in essence, because it rejected Kodak's contention that the existence of competition in the equipment market precludes the trier of fact, as a matter of law, from finding market power in the aftermarket for parts and service. Nothing in the Court's reasoning suggests an intention to alter the burden on the moving party. In fact, the Court's opinion does not address this question; it makes no reference to the operative language of Celotex or Anderson, and does not say or imply that Kodak had the burden of disproving plaintiffs' case. The Court simply declined Kodak's invitation to decide the issue of antitrust liability as a matter of law, holding that the record before it raised questions about the validity of the theory underlying Kodak's contention that it necessarily lacked market power.

While nothing in Kodak suggests impairment of the authority of Celotex and Anderson, the case does raise questions about the proper interpretation of Matsushita. In Matsushita, the Court held that a reasonable jury could not infer the existence of a price-fixing conspiracy from evidence that the defendants, who had been parties to agreements that restrained competition in various respects other than the sale of their products in the United States, cut prices to divert business from plaintiffs. The Court upheld a summary judgment for defendants on the ground that their price cutting was "as consistent with permissible competition as with illegal conspiracy," and that evidence of

23. Kodak, 112 S. Ct. at 2076.
24. The Court's reasoning does not rule out disposition by summary judgment of similar antitrust cases. A determination of the relevant market and the existence of market power does not necessarily raise an issue for a jury. When the determination is made on a record in which the evidentiary or historical facts are uncontroverted and the question concerns the conclusions to be drawn from undisputed evidence, the question may be one of ultimate fact appropriate for summary judgment. This is because such questions may involve policy rather than ad hoc factual determinations. See Summary Judgment Motions, supra note 2, at 454-63. In Kodak, however, the record had not been adequately developed in the trial court to sustain such a determination. The evidence offered by plaintiffs, consisting largely of reports from consumers who had switched to Kodak for service though they preferred ISOs (which charged lower prices for higher quality service), and the Supreme Court's own views of market imperfections, persuaded the Court that the question of market power could not be decided as a pure question of law on the record before it. The Court left open what kind of evidence would be necessary to establish market imperfections sufficient to sustain a finding of market power. It clearly did not decide that the existence of any market imperfections suffices to raise a triable issue as to market power. See Areeda & Hovenkamp, supra note 17, § 1709.2b.
such conduct "does not, standing alone, support an inference of antitrust conspiracy." 26 Kodak argued that, like the defendants in *Matsushita*, it had no incentive to exploit market power over parts and service because doing so would cause it to sustain losses on equipment sales with no foreseeable gains.

But the Court rejected this reasoning. Though it acknowledged that "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted," 27 the Court went on to say that Kodak "must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable." 28 As the *Kodak* Court observed, defendants' conduct in *Matsushita* was procompetitive, since price cutting to increase business is "the very essence of competition." 29 In contrast, Kodak's restriction on the sale of parts, which lead to higher service prices and market foreclosure, created no presumption of lawful motive. Noting that Kodak's policy could not be assumed to always or almost always enhance competition, and weighing "the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished," the Court concluded that "the balance tips against summary judgment." 30

One lesson of *Kodak*, which perhaps should have been apparent all along, is that summary judgment motions based on the "implausibility" of the opponent's claim will rarely succeed. As we explained in an earlier piece:

Some language in *Matsushita* suggests that summary judgment is appropriate where a plaintiff's case rests on "implausible" inferences. Courts should use care in accepting this language at face value when ruling on summary judgment motions. In the context of the case, the *Matsushita* Court was addressing not the credibility of disputed historical evidence but whether it was plausible to infer a conspiracy from normal business conduct. 31

*Matsushita*, we observed, rather than making a statement about implausible inferences in summary judgment motions generally, rests on a specific point of antitrust law: Plaintiffs cannot prevail if their case requires inferring a price-fixing conspiracy from normal business ac-

26. *Id.* at 588.
28. *Id.* As the earlier discussion shows, that statement cannot be interpreted as indicating a change in the rules governing the burden on the moving party.
tivity (specifically, price cutting) that, standing alone, is consistent with lawful competition.32

It is reasonable to conclude from Kodak that, once an antitrust defendant moves beyond established substantive law principles that limit the range of permissible inferences and seeks summary judgment based on economic theory, the defendant "bears a substantial burden in showing that . . . despite evidence of increased prices and excluded competition, [plaintiff's inference] of market power [drawn from defendant's conduct] is unreasonable."33 If defendant's theory rests on an asserted risk of deterring procompetitive behavior, and the procompetitive effects of the conduct do not on their face outweigh any possible anticompetitive effects, the burden rests on the defendant to show that the risks of deterring procompetitive behavior by forcing defendant to trial outweigh the risks that illegal conduct will go unpunished.34 As discussed in the next section, Kodak certainly rejects the view that Matsushita affords an across-the-board defense for antitrust defendants whenever the conduct complained of can be considered economically justified business conduct.

Nevertheless, substantive law may limit the range of permissible inferences to be drawn from particular evidence, and thus define the moving party's burden. This principle underlies Anderson's holding that in defamation actions by public figures substantive First Amendment law forbids an inference of malice from negligently prepared stories.35 Kodak does not repudiate this principle,36 but does remind

32. Id. at 491-92. That is not to say that substantive antitrust law might not have supported summary judgment in Kodak. As Justice Scalia points out in dissent, when a manufacturer lacks power in the interbrand market for that equipment, there are compelling arguments against the imposition of per se liability for tying arrangements on, and against the application of the strictures against monopolization to, a manufacturer's restrictions on sales of parts for equipment it manufactures. Kodak, 112 S. Ct. at 2093-2101 (Scalia, J., dissenting). (Kodak came before the Supreme Court as a per se case under § 1 of the Sherman Act and raised no issue concerning application of the rule of reason to defendant's conduct.) But in the face of evidence suggesting the possibility of adverse effects on competition in the market (i.e., higher prices for lower quality service), the majority declined to adopt such a substantive rule that limits the range of permissible inferences from the alleged conduct. That, of course, was a decision concerning substantive antitrust law, not summary judgment procedure.

33. Kodak, 112 S. Ct. at 2083.
34. Id. at 2088-89; see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 438 (9th Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991) (adopting this interpretation of Matsushita).
36. See Kodak, 112 S. Ct. at 2083 n.14. The court cited Anderson, 477 U.S. at 248, as well as Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984), which held that no inference of conspiracy is permissible when evidence showed only that defendant termi-
us that its application depends upon a record sufficient to assure a court that applying the principle to the facts of the case is appropriate.\textsuperscript{37} 

* * *

While there is no reason to believe the Kodak Court intended to alter the burden on the party moving for summary judgment, the question arises whether it intended to lighten the burden on the opponent of the motion. The Court’s rejection of summary judgment rested on plaintiffs’ sparse evidence of supracompetitive prices charged by Kodak. Could Kodak be read as a retreat from the standard announced in Celotex and Anderson requiring the opponent of the motion to come forward with evidence sufficient to sustain a jury verdict?

The Ninth Circuit opinion, reversing summary judgment, recites that “ISOs offered service for as little as half of Kodak’s price. . . . Kodak in some cases cut its price for service. Some customers found ISO service superior to Kodak service.”\textsuperscript{38} It goes on to say:

While [plaintiffs] have not conducted a market analysis and pinpointed specific imperfections in the . . . markets . . . it is enough that [they] . . . have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak’s power in the parts market.\textsuperscript{39}

Without discussion of the standard governing the sufficiency of the opposition to summary judgment, the court held that the evidence offered by plaintiffs was sufficient to raise a material issue of fact about market power.\textsuperscript{40}

There is, however, reason to doubt that the anecdotal and fragmentary evidence of market power (based on “actual events” but devoid of market analysis) recited in the Ninth Circuit’s opinion is sufficient to defeat summary judgment under the standard established by Anderson.\textsuperscript{41} One commentary on Kodak expresses this view:

\textsuperscript{37} See infra Part IV for a discussion of the impact of the limited record on the Court’s decision.
\textsuperscript{38} Kodak, 903 F.2d at 614.
\textsuperscript{39} Id. at 617.
\textsuperscript{40} Id. at 618.
\textsuperscript{41} See Anderson, 477 U.S. at 251 (holding that a “scintilla” of evidence is insufficient to defeat a summary judgment motion; rather, the nonmoving party needs evidence that would support a verdict at trial) (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872)).
[I]n the absence of a showing of non-episodic anticompetitive effects probative of market power, summary judgment should still be granted if a defendant shows that no reasonable trier of fact viewing the record as a whole could accept a plaintiff’s contention that aftermarket are non-responsive to foremarket competition. For instance, if price discrimination is the alleged mechanism by which informational imperfections are manifested, plaintiffs should be compelled to adduce evidence of costs. Similarly, to sustain a lock-in theory, plaintiffs should be required to establish the relative unimportance of new buyers. . . . [T]he Kodak Court . . . cited no evidence on this question . . . .

This criticism is more appropriately directed at the Ninth Circuit’s opinion than the Supreme Court’s, which is properly read as passing on a proposed rule of law, not on the sufficiency of evidence to sustain a verdict. Had the Court simply adopted the Ninth Circuit’s analysis, questions about the viability of Anderson, at least in the antitrust context, might have been implicated. By neither adopting the Ninth Circuit’s analysis nor casting its discussion of market power in terms of the sufficiency of the evidence to raise a triable issue, the Court demonstrated that it did not intend to alter the opponent’s burden under Anderson. Rather than concerning itself with the application of Rule 56’s requirement that “an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial,” the Court simply laid to rest any notion that plaintiffs in antitrust cases bear a special burden to defeat a summary judgment motion:

[Matsushita] did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases . . . Matsushita demands only that the nonmoving party’s inferences be reasonable in order to


43. See supra text accompanying notes 23-24.

44. The difference between the Ninth Circuit’s analysis and the Supreme Court’s, though subtle, is critical to understanding Kodak. Both the Ninth Circuit and the Supreme Court rejected the contention that a competitive primary market necessarily precludes market power in a derivative market. 903 F.2d at 617; 112 S. Ct. at 2084. And both courts took note of the evidence of market imperfections adduced by plaintiffs. 903 F.2d at 617; 112 S. Ct. at 2081. However, the Ninth Circuit explicitly found that this limited evidence sufficed to raise a triable issue. 903 F.2d at 617. The Supreme Court made no such finding. It held only that, on the limited record before it (based on truncated discovery), the possibility of a triable issue could not be ruled out. 112 S. Ct. at 2087. The significance of the limited nature of the record is discussed infra Part IV.

reach the jury, a requirement that was not invented, but merely ar-ticulated, in that decision.\textsuperscript{46}

It is therefore reasonable to conclude that, insofar as it was con-cerned with summary judgment procedure at all, the Court intended not to raise new barriers to summary judgment (and thus tacitly de-part from its prior rulings), but merely to clarify the application of Matsushita.\textsuperscript{47} The Court’s denial of summary judgment was based pri-marily on its interpretation of antitrust law; it involved no tinkering with Celotex and Anderson.\textsuperscript{48}

III. The Understanding of Summary Judgment Burdens
Among the Lower Courts

While Kodak does not impair the continuing precedential vitality of Celotex and Anderson, confusion about the parties’ burdens under Rule 56 occasionally arises in lower courts, creating a risk that Kodak will be misconstrued. The decision by a panel of the Eleventh Circuit in Clark v. Coats & Clark, Inc.,\textsuperscript{49} though predating Kodak, is a trou-bling illustration of the problem.

In Clark, plaintiffs alleged they were terminated in order to de-prive them of pension and retirement benefits in violation of federal statutes.\textsuperscript{50} Defendant moved for and was granted summary judgment. As described in the court of appeals’ opinion, the trial court ruled: with respect to one claim, plaintiffs failed to “establish even a prima facie case that the defendant was motivated by a specific intent to deprive the plaintiffs of pension benefits”\textsuperscript{51}; with respect to a second, the facts did not “rise to the level of “extreme and outrageous” con-duct required to constitute an intentional infliction of emotional distress”\textsuperscript{52}; with respect to the third claim, defendant had presented

\textsuperscript{46} Kodak, 112 S. Ct. at 2083.
\textsuperscript{47} Subsequent courts have not read Kodak as announcing a change in the law. See, e.g., Big Apple BMW, Inc. v. BMW of North Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490, 1495 (8th Cir. 1992). It is also signifi-cant that the Court’s opinion nowhere cites Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), or Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962), cases represent-ing the restrictive view of summary judgment prior to the trilogy.
\textsuperscript{48} The Court was also influenced by the incomplete state of the record. See infra Part IV.
\textsuperscript{49} 929 F.2d 604 (11th Cir. 1991).
\textsuperscript{50} For a complete factual and procedural background of the case, see id. at 605-06.
\textsuperscript{51} Id. at 606 (quoting the district court opinion).
\textsuperscript{52} Id.
valid reasons for the termination and plaintiffs had not and could not "'establish that the reasons . . . were simply pretextual.'"\textsuperscript{53}

Plaintiffs appealed, and the Eleventh Circuit reversed. However, its opinion provides little by way of context: The court describes neither the factual showing made in support of the motion nor the opposition, contenting itself with brief quotes from the trial court’s order.\textsuperscript{54}

The court of appeals saw the district court’s determination as reflecting an improper view of the burden on the moving party, and devoted almost its entire opinion to a discussion of that burden. In reversing the summary judgment, the court relied principally on \textit{Adickes v. S.H. Kress & Co.}\textsuperscript{55} and the notion that the moving party must disprove an essential element of the nonmoving party’s case. Though the Supreme Court rejected such a rule in \textit{Celotex}, the Eleventh Circuit held that \textit{Adickes} “remained the generally applicable rule,”\textsuperscript{56} while \textit{Celotex} was an exceptional case, limited to “the unusual situation . . . where neither party could prove either the affirmative or the negative of an essential element of the claim.”\textsuperscript{57} Testing the validity of such a view requires a brief look at \textit{Adickes} as well as \textit{Celotex}.

In \textit{Adickes}, a chain store had refused to serve a white schoolteacher and her black students at its lunch counter, and the teacher was arrested for vagrancy upon leaving the store.\textsuperscript{58} She brought suit alleging that the police had conspired with the storeowner to violate her civil rights. Defendant moved for summary judgment, arguing that “‘uncontested facts’ established that no conspiracy existed.”\textsuperscript{59} Plaintiff opposed defendant’s motion with no direct evidence of a conspiracy, arguing only that defendant failed to refute the allegation that the policeman who later arrested her was present in the store at the time of the incident, and that this sufficed for a jury to infer a conspiracy.\textsuperscript{60} The district court granted defendant’s motion for summary judgment, but was reversed by the Supreme Court on the ground that defendant, having failed “to foreclose the possibility that there was a

\begin{footnotes}
\item[53.] \textit{Id.}
\item[54.] \textit{See supra} text accompanying notes 51-53.
\item[55.] 398 U.S. 144 (1970).
\item[56.] \textit{Clark}, 929 F.2d at 608.
\item[57.] \textit{Id.} at 607. The court added that “[e]ven after \textit{Celotex} it is never enough simply to state that the nonmoving party cannot meet its burden at trial.” \textit{Id.} at 608. This statement is unexceptionable, but it is not possible to ascertain from the court’s opinion whether that was all the moving party had done in that case.
\item[58.] \textit{Adickes}, 398 U.S. at 146-47.
\item[59.] \textit{Id.} at 153.
\item[60.] \textit{Id.} at 156-57.
\end{footnotes}
policeman in the . . . store while [plaintiff] was awaiting service, and that this policeman reached an understanding with some Kress employee that [plaintiff] not be served,”61 had “failed to carry its burden of showing the absence of any genuine issue of fact.”62

Prior to Celotex, most courts and commentators had read Adickes as requiring a moving party to disprove the opponent’s claim in order to obtain summary judgment, even if the nonmoving party would have the burden of proof at trial. In Celotex, however, the Court rejected that interpretation. It explained Adickes as resting not on defendant’s failure to disprove plaintiff’s case, but rather on plaintiff’s having adduced sufficient evidence—the presence of the policeman in the store—from which a jury could infer a conspiracy.63 The Celotex Court made clear that a moving defendant need not affirmatively disprove plaintiff’s case:

[W]e do not think the Adickes language . . . should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by “showing”—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.64

That showing may be made without submission of affidavits, simply by pointing to relevant pleadings or other materials on file.65

Returning to Clark v. Coats & Clark, the Eleventh Circuit may have reached the correct result in reversing summary judgment,66 but its analysis of the burden on the moving party seems contrary to the letter and spirit of Celotex and Anderson. The Eleventh Circuit im-

61. Id. at 157.
62. Id. at 153.
63. Celotex, 477 U.S. at 325.
64. Id. While dissenting on other grounds, Justice Brennan agreed that the party not having the burden of persuasion at trial may satisfy Rule 56’s burden of production in either of two ways. First, [it] may submit affirmative evidence that negates an essential element of the nonmoving party’s claim. Second, the moving party may demonstrate to the Court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. Id. at 331 (Brennan, J., dissenting).
65. Id. at 323.
66. It is impossible to evaluate this result since the court did not describe the factual showings of the parties. Similarly, the court may have been correct in stating that summary judgment motions too often are filed without supporting materials sufficient to demonstrate the absence of a triable issue, 929 F.2d at 608-09 n.8, though data on this point are lacking.
plies that the moving party must, except in "unusual situations," come forward with evidence disproving the opponent's case. Moreover, the court by implication rejected the Supreme Court's clearly stated view that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" The panel's willingness to write off Celotex as an unusual case, and its reversal of summary judgment without reference to the relevant facts of the case, recall the wariness (if not downright hostility) toward summary judgment common prior to the trilogy. The Eleventh Circuit's analysis also illustrates the obstacles summary judgment continues to encounter in lower courts.

IV. Discovery Management After Kodak

There remains the question of Kodak's impact on discovery management in summary judgment proceedings. Even putting Matsushita aside, the Court might still have affirmed summary judgment for Kodak on the ground that plaintiffs' fragmentary and anecdotal evidence of market power offered in opposition to the motion was insufficient to sustain a jury verdict. As noted above, the Supreme Court did not say that plaintiffs had met their burden as opponents of the motion.

67. Id. at 607. In addition, the court's view of the nonmovant's burden may conflict with Anderson and Celotex. The court rejected as erroneous the statement in appellant's brief that "in attempting to withstand summary judgment, not only does the non-moving party have the burden of proving the existence of every element essential to his or her case, but the non-moving party must produce sufficiently probative evidence upon which a jury could reasonably find in its favor." Id. at 609 (quoting Appellant's Brief). It is impossible to determine from the opinion whether the court meant to reject this standard generally or only its application in circumstances where the moving party had failed to meet its burden.


69. See Summary Judgment Motions, supra note 2, at 446-52.

70. The impact of Clark may be attenuated by a subsequent Eleventh Circuit en banc opinion that accurately summarizes the governing law and quotes the majority in Celotex stating that the moving party, to meet its burden, need only "show[ ]"—that is, point[ ] out to the district court—that there is an absence of evidence to support the nonmoving party's case." United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (quoting Celotex, 477 U.S. at 324). Outside the Eleventh Circuit, Clark was cited with approval in Russ v. International Paper Co., 943 F.2d 589, 591 (5th Cir. 1991), which, however, affirmed a summary judgment. One commentator described Clark as "a positive step toward explaining the commonly misunderstood and misapplied holding of Celotex," which "also may help to ensure that summary judgment will be cautiously invoked." James V. Chin, Note, Clark v. Coats & Clark, Inc.: The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment, 26 Ga. L. Rev. 1009, 1023 (1992).
The most reasonable interpretation of the Court's decision is that the evidence produced by plaintiffs was sufficient to raise doubts about Kodak's theory, making the Court unwilling to accept that theory as a matter of law on a record based on only truncated discovery.\footnote{See Areeda & Hovenkamp, supra note 17, § 1709.2; Calkins, supra note 17, at 297; supra text accompanying notes 23-24.}

Kodak filed its summary judgment motion before plaintiffs had initiated discovery. Following a status conference, the district court limited plaintiffs to one set each of interrogatories and requests for production and not more than four depositions (later increased to six) of persons with information pertaining to the issues raised by and material to the summary judgment motion. Not until plaintiffs filed their opposition to the motion did they request leave to conduct additional discovery. Rule 56(f) permits the nonmoving party to obtain more time for discovery by submitting an affidavit stating why it "cannot for reasons stated present by affidavit facts essential to justify the party's opposition."\footnote{Fed. R. Civ. P. 56(f).} However, since plaintiffs did not specify how additional discovery they sought would help them oppose the motion in light of the issues as they appeared in the district court, the court denied the request.\footnote{Image Technical Servs., Inc. v. Eastman Kodak Co., 1989-1 Trade Cas. (CCH) ¶ 68,402, at 60,213 (N.D. Cal. Apr. 18, 1988).}

These limitations on discovery played a major part in plaintiffs' briefing on appeal,\footnote{See Mark E. Weber, Summary Judgment after Kodak, ANTITRUST, Fall/Winter 1992, at 11.} and not without effect. The Ninth Circuit emphasized that the record on the issue of market power was "not fully developed"\footnote{Image Technical Servs., Inc. v. Eastman Kodak Co., 903 F.2d 612, 617 (9th Cir. 1990).} because "only very limited discovery" had been permitted on that issue.\footnote{Id. at 617 n.4.} At oral argument before the Supreme Court, some Justices expressed concern about making a decision on the limited factual record.\footnote{Wall, supra note 7, at 5-6.} The Court's opinion, like that of the Ninth Circuit, noted the limitations on discovery and the insufficiently developed record,\footnote{Eastman Kodak v. Image Technical Servs., 112 S. Ct. 2072, 2079 & n.4 (1992).} and concluded summary judgment was inappropriate "on a record this sparse."\footnote{Id. at 2092.} It is quite likely, then, that some Justices joined the majority opinion not because plaintiffs had

\footnote{Id. at 617 n.4.}
presented strong evidence, but rather because they had been precluded from developing more.  

So viewed, *Kodak* illustrates the dilemma that frequently confronts district courts faced with summary judgment motions. Limiting discovery can, on the one hand, lead to reversal of a summary judgment on appeal. Failure to limit discovery, on the other hand, defeats the purpose of summary judgment—to help bring about the expeditious and economical resolution of cases that do not require a trial. In *Celotex* the Court described summary judgment as “an integral part of the Federal Rules . . . which are designed ‘to secure the just, speedy, and inexpensive determination of every action.’” The demand for reducing the cost and delay of litigation is more insistent than ever. The Civil Justice Reform Act is only the most prominent manifestation of a strong public policy to bring cost and delay under control, and discovery is the major cause of that cost and delay. Controlling the scope and volume of discovery is an integral part of judicial case management; failure to do so is now regarded as an avoidance of judicial responsibility.

*Kodak* cannot be taken to imply that summary judgment is premature unless all discovery has been completed. In *Celotex*, the Court said that “the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish

80. An attorney in the case speculates that this is exactly what happened, noting that two of the Justices who expressed concern about the state of the record at oral argument, the Chief Justice and Justice Kennedy, both joined the majority opinion although their previously expressed views on antitrust suggested they might do otherwise. Wall, supra note 7, at 5-6.


84. See, e.g., *Fed. R. Civ. P.* P. 26(b)(1) (“The frequency or extent of use of the discovery methods . . . shall be limited by the court . . . .”) (emphasis added).

85. See, e.g., Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 113 S. Ct. 1920 (1993) (holding that trial court correctly restricted discovery and granted summary judgment because factors concerning a plaintiff’s economic motivation for filing suit were irrelevant to the legal reasonableness of the litigation).
the existence of an element essential to [its] case." 86 In Anderson, the Court noted that summary judgment should be refused "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." 87 Inevitably district judges must use their discretion to determine what is "adequate time" and "essential to [the] opposition." Summary judgment usually turns on specific isolable issues that can be dispositive. To require, in every case, that all discovery relevant to all issues in the case be completed before a motion may be entertained would undermine the purpose of Rule 56 and frustrate Rule 1's goal of "securing the just, speedy, and inexpensive determination" of litigation. Thus, the settled practice is to permit the parties to conduct only discovery material to the issues raised by the motion. 88

Rule 56(f) helps implement this approach. It permits the opponent to obtain time for additional discovery "[s]hould it appear from [its] affidavits . . . that [it] cannot for reasons stated present . . . facts essential to justify [its] opposition" to the motion. 89 Courts have consistently required the party seeking a continuance to specify the discovery it proposes to take, the evidence likely to be uncovered, and the issues of material fact the evidence will support. 90 There is good reason for such a requirement for, as explained below, in its absence the trial court could be held hostage to the losing party's whims on appeal.

Although the practice under Rule 56(f) is settled and generally serves well, it is not free of problems. Kodak illustrates how the management of discovery in the face of a summary judgment motion can become a trap for the trial judge. The case appeared to the district court to be governed by a straightforward legal proposition—that an undisputedly competitive equipment market precluded the existence in the parts and service market of the requisite market power for an antitrust violation 91—which obviated the need for further discovery. In addition, plaintiffs did not explain how or what particular discovery

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86. *Celotex*, 477 U.S. at 322 (emphasis added).
88. *See id.* at 248 ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").
90. *See, e.g., Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1388-90 (Fed.Cir. 1989); *Dowling v. City of Phila.*, 855 F.2d 136, 139-40 (3d Cir. 1988); *VISA Int'l Serv. Assn. v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).
91. As noted, one Ninth Circuit judge and three Supreme Court Justices agreed with this view. *See supra* notes 10 & 12.
would enable them to raise a material issue of fact. But as the posture of the case changed on appeal, and the focus shifted to the alleged tying of service to parts, new factual issues became material and a need for a record arose that did not exist before.

Had plaintiffs in the trial court focused on the contention that prevailed on appeal and made a particularized showing under Rule 56(f) of the need for specific discovery, the district court might have interpreted the applicable antitrust law differently. As a result, the record on market issues that the Supreme Court found lacking might have been made. Instead, the case experienced a not-uncommon metamorphosis on appeal: The association of new counsel, combined with additional time for reflection on the adverse ruling below, led to a refinement of theory, a change of emphasis, and ultimately the rejection of the trial court's view of the substantive law. The unsurprising result was to render the trial court's summary judgment record inadequate for the appellate court.

It would be an unfortunate overreaction, however, to conclude that the trial judge should never restrict discovery, regardless of how reasonable this may be in light of the contentions of the parties and the judge's view of the law. That a judge may on appeal turn out to have been in error is not reason enough to abandon enlightened case management. The obligation remains to balance the cost and delay proposed discovery would inflict against the likelihood that it would have a material bearing on the case. The challenge is to discharge that obligation well—to serve the purposes of efficiency and economy, as well as fairness, while minimizing the risk of reversal.

The most important tool available to the judge, and useful protection against error, is the diligent and effective use of the issue identifi-

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92. See Kodak, 903 F.2d at 617 n.4.
93. As the appellate court recognized, "Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this [discovery] request." Id.
94. In theory, at least, a claim not raised in the trial court is barred on appeal, but courts tend to apply waiver rules flexibly. See, e.g., Claudio v. Scully, 982 F.2d 798, 802 n.3 (2d Cir. 1992) (rejecting waiver argument because the theory advanced for the first time on appeal was "an additional argument relating to a point already under dispute," rather than a new claim), cert. denied, 113 S. Ct. 2347 (1993).
95. The pending proposed amendment of Rule 26(b)(2) states that the "frequency or extent of use of the discovery methods ... shall be limited by the court if it determines that ... the burden or expense of the proposed discovery outweighs its likely benefit, taking into account ... the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2) (Proposed Amend. 1993) (emphasis added).
cation process. Rule 16 conferences\textsuperscript{96} serve this purpose, but only when the parties are thoroughly prepared and the judge presses for the full disclosure of theories and facts that will allow an informed determination of what discovery is needed to make an adequate record for decision. Permitting the case to proceed in the trial court on legal theories and factual analyses that are inadequately developed and disclosed invites reversal on appeal.

Before a motion for summary judgment is entertained, the positions of the parties should be clearly set out. However, the pleadings will often be insufficient to accomplish this goal. In a case of any complexity, the judge may need to question counsel and press them to commit themselves clearly and unambiguously to their theories of the case. This approach may seem an unnatural tack to take. Judges—burdened with more work than they have time to do—are inclined to take the case as presented on the papers and let the parties suffer the consequences of their ambiguities or oversights. But \textit{Kodak} suggests that taking time for a more active and searching inquiry into the basis for the motion and the opposition—particularly in complex cases—may in the long run make summary judgment more cost-effective.

Confronted with an inadequately supported Rule 56(f) request for further discovery, the judge might consider questioning counsel about the purpose and expected product of the requested discovery to determine whether a reasonable though undisclosed basis for the request exists.\textsuperscript{97} Other innovative approaches may be considered, such as a preliminary hearing, perhaps held in an informal setting somewhat resembling a seminar. This approach could be useful in any complex litigation. In an antitrust case, for example, the court could use an informal hearing to obtain clarification on such matters as market definition and the nature of the alleged restraint, in order to gain a more informed basis for procedural rulings.

Pleadings are not the most effective means for communication. Cases are not always what they seem. Though the pressure of heavy dockets causes judges to speed their cases to conclusion, it is well from time to time to stop, look, and listen, to let the wheels spin a bit longer, and to hope that a slight delay might cause additional light to appear.

\textsuperscript{96} Rule 16 allows a judge to call one or more pretrial conferences in order to discuss, among other things, \textit{"the formulation and simplification of the issues."} \textit{Fed. R. Civ. P. 16(c)(1).}

So far we have considered discovery by the opponent of the motion. But the Eleventh Circuit’s resurrection of Adickes raises a further question concerning the moving party’s discovery. While controversy over discovery, as in Kodak, generally concerns whether the nonmoving party was given an adequate opportunity, debate over the moving party’s burden raises a related question: whether the moving party should be required to conduct certain discovery before filing its motion. In his Celotex dissent, Justice Brennan points out that showing the nonmoving party’s lack of evidence “may require the moving party to depose the nonmoving party’s witnesses.”

It is, of course, not remarkable for the moving party to conduct discovery to determine whether the opponent can support a particular claim or defense. The product of such discovery is commonly produced in support of the motion.

One commentator, however, has read a much broader obligation into Justice Brennan’s language. She warns that parties must be prevented from using summary judgment to circumvent the normal discovery process and “force an opponent to reveal his case.” She reads the concurrence and dissent in Celotex as clarifying that the party seeking to rely on the absence of record evidence as a basis for summary judgment has an obligation to pursue leads obtained in discovery. Any other rule would vitiate the incentive to do thorough discovery before moving for summary judgment and would encourage the use of summary judgment to harass the nonmoving party or to force him to disclose his case prematurely.

The notion that parties are unfairly disadvantaged by having to reveal their case “prematurely” is obsolete under modern case management regimes, especially as the courts move toward early, mandatory disclosure. Forcing parties to conduct comprehensive discovery that may turn out to be unnecessary is equally out of step with the times. Requiring the movant to “pursue leads obtained in discovery” in order to learn whether the opponent might have a case would, in effect, reinstate the burden that courts had read into Adickes (that the movant disprove the opponent’s case) and would be inconsistent with the time and cost saving purposes of Rule 56 and the reasoning underlying Celotex. The extent of discovery by the movant,

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100. Id. at 68.
therefore, should be determined in light of what, in the circumstances of the case, is necessary to demonstrate the absence of a triable issue. As Justice Brennan pointed out, making such a determination may sometimes require allowing the movant to depose adverse witnesses, call for the production of documents, and seek other information. But if the movant can carry its burden without resort to such measures, there is no reason to require them.

Discovery should be treated as a case management concern rather than a conceptual matter. Although discovery tends to avoid surprise at trial and promote early settlement, it also increases costs and breeds other vices. The initial decisions about discovery are for counsel, but the court has a well-settled responsibility to provide judicial supervision and control in order to avoid unnecessary cost and delay. As discussed above, the decisions the court must make are often complicated by uncertainty surrounding the parties' theories and the controlling law. Abdication of the judge's responsibility, however, is not a desirable way of finessing these difficulties. Instead, the judge should make wise use of the available case management devices and techniques.

Conclusion

Summary judgment is a case management tool. Like any tool, it should be used with care and only in the appropriate circumstances. There are few clear and firm guidelines for its use, and Kodak suggests some of the hazards that courts need to anticipate. But that is not reason to put summary judgment at the bottom of the judge's tool chest. Properly used, summary judgment offers substantial benefits for the parties and the courts, but such use entails thought, planning, and an understanding of its place in the system of procedural rules.