1998

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Recommended Citation
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Summary Adjudication Methods in United States Civil Procedure

The civil judicial system in the United States is increasingly characterized not as a claim adjudication system—where the rights and obligations of competing parties are evaluated factually and legally and, thereafter, determined conclusively—but as a claim management system—where the court acts as administrator of the dispute, resolving it through managerial methods that promote compromise and settlement.¹ Statistics exist which reflect that somewhere between eighty-five and ninety-five percent of the cases filed in the American federal court system are settled by the parties without an adjudication of the merits of the claim.²

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2. See, e.g., Galanter, “Real World Torts: An Antidote to Anecdote,” 55 Md. L. Rev. 1093, 1100, n. 17 (1996). Professor Galanter does a thorough job studying the data on tort claim filings, which have caused most of the uproar regarding the inefficiency and unfairness of the American judicial system, and concludes that the “data,” which can be characterized as meager, results in “a picture of the litigation system built of little more than imagination.” Id. at 1098. Nonetheless, the data which does exist shows that most cases that are filed are settled. Id. at 1100. Professor Galanter’s review of the data suggests as well that of the 85% to 95% of cases that do not go to trial, as many as 25% are terminated through some other form of “adjudication” which he defines as arbitration, dismissal on the merits or a ruling on a significant motion that led to settlement. In addition, 3.5% of civil cases filed in federal court ended “during or after trial,” including those settled after commencement of trial. Id. at 1101, n. 22 (citing 1994 Admin. Office of the U.S. Courts, Annual Report tbl. C-4). While the data are certainly incomplete, and subject to different interpretation, these numbers are commonly considered substantially accurate. See also, Galanter & Ca-
The American civil justice system has come under increasing attack over the last several decades on a variety of fronts, primarily because of its perceived inefficiency, uncertainty and, thus, unfairness to the parties. The widespread public perception, in both the United States and elsewhere, is of a system in need of reform.\(^3\) Much of the reform effort stems from a concern for the expense and delay that appears inherent in the system.\(^4\) The General Reporter for the XVth International Congress on Comparative Law on the topic of summary adjudication, for whom this article is prepared, inquires “What procedures exist in your system to minimize delay, and how might they be improved?” In the American system, certain procedures tend to get blamed for the apparent inefficiency of the system—other than, of course, the lawyers who bear the brunt of the criticism.\(^5\) Discovery mechanisms, by which information is obtained to prepare a case for litigation, can prolong the preparation of claims for ultimate resolution and a lack of aggressive case management methods by the courts to keep cases on a timely schedule are often singled out as troublemakers. The dual concerns for timeliness and expense form the backdrop for the subject of this article, a review of summary adjudication methods in the United States.\(^6\) This article explains many of the summary procedures currently available in this

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3. Much has been written on the need in the United States for civil justice reform. The breadth of these issues is well beyond the scope of the article. For a discussion of the scope of the issues requiring reform and the history of reform efforts, see Stiefel & Maxeiner, “Civil Justice Reform in the United States—Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?,” 42 Am. J. Comp. L. 147, 151-55 (1994)(summarizing the pressure for reform in the 1990's and identifying various proposals toward that end); Walpin, “America's Failing Civil Justice System: Can We Learn from Other Countries,” 41 N.Y.L. Sch. L. Rev 647 (1997).

4. See Steifel and Maxeiner, supra n. 3 at 151-52 (referencing, among others, a Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America (1991) and U.S. Congress, Report of the Federal Courts Study Committee (1990)).


6. The workload of courts in the United States is divided between the two parallel court systems—those in the federal system and those in each of the fifty states. Because many of the state systems use procedural rules modeled after those used in the federal system, based on the Federal Rules of Civil Procedure, this article will focus on summary adjudication methods in the federal courts. As stated in the 1994 National Report to the XIVth International Congress of Comparative Law, on mass torts in the United States, “[a]ny report on American law is in a very real sense itself a comparative law study, and is further complicated by the nature of the federal political structure of the United States.” Peterson & Zekoll, “Mass Torts,” 42 Am. J. Comp. L. 79, 80 (Supplement 1994). Where possible, any important state law variations will be identified.
country that are intended to promote a fair and efficient resolution of disputes in advance of, or in lieu of, a full-blown adjudication on the merits. This article addresses whether these procedures are adequate to the task of promoting an efficient and fair judicial system.

Adjudication of claims under the American judicial system is widely recognized to be more complex than its European and international counterparts for a variety of reasons, not the least of which is this legal system’s dedication to party autonomy in the investigation and control of the dispute resolution process. Our use of the jury trial in civil cases, our contingency fee system for the payment of lawyers who press personal injury claims and our constitutional due process of law requirements all contribute to the procedural complexity of the American system. Personal injury claims are the most subject to criticism by civil justice reformers because of the occasional exorbitant verdicts rendered under our trial-by-jury system, and the significant compensation for the lawyers that results from the contingency fee system of lawyer compensation. Further, the potential for the filing of unmeritorious claims because of the high rate of settlement causes concern to observers of the American judicial system because of the undue pressure to settle such claims that

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8. The vastly different procedures used in the American judicial system as compared to continental systems have been explained in a variety of articles and books which include Alan Farnsworth, An Introduction to the Legal System of the United States 97-109 (2d ed. 1983). On judicial process generally see Mauro Cappelletti, The Judicial Process in Comparative Perspective (1989). The many areas of difference are beyond the scope of this article but two very important ones must be identified. The first stems from the very nature of the American judicial system which includes two parallel judicial systems, federal and state, as mentioned supra n. 6. The second is in the manner by which claims are proved through the offering of oral witness testimony whose presentation is controlled by the parties and not the judge. See Herzog, “The Probative Value of Testimony in Private Law,” 42 Am J. Comp. L. 275 (1994).

9. The United States Constitution, amendment VII, provides for a trial by jury as of right in all civil cases at law.

stems from the expense of litigating in a costly, slow court system. These factors combine to make personal injury claims appropriate to use for the framework by which to explain the present summary adjudication procedures available.

This article uses one of the high profile mass tort cases of recent decades, the complex silicone gel-filled breast implant products liability litigation, to evaluate summary adjudication measures. Recognizing that not all claims filed are complex tort claims (just the most interesting ones), where commercial claims present the opportunity for use of summary proceedings, those will be discussed as well, particularly regarding mechanisms by which security for a creditor-plaintiff's claim can be obtained prior to a favorable verdict.11

While preparing this Report, it became clear that the author has a particular view of what constitutes a "summary adjudication" procedure, but that others, with different backgrounds and experiences, may have an entirely different view.12 For example, alternative dispute resolution mechanisms like arbitration and mediation, so popular in this country, are not "summary adjudication" procedures to many because they do not "adjudicate," in a judicial sense, the rights and obligations of the parties; they, instead, resolve the dispute without a legal imprimatur on the result.13 Similarly, many trial-annexed procedures like summary jury trials and discovery hearings are not adjudications because they are mechanisms which enable the parties to prepare and evaluate the claims, not dispose of them, though they do impact the ultimate disposition of the claims. A full and complete report, however, needs to include a broad range of summary procedures that not only adjudicate the rights and obligations of the parties, but that also significantly affect the relative positions of the parties in other critical, though tangential, ways.

11. See infra nn. 46-53 and accompanying text.
12. I admit to a certain tort focus on what constitutes a "summary adjudication" procedure as a result of other scholarship in the mass tort and products liability fields. See, e.g., Davis, "Toward the Proper Role for Mass Tort Class Actions," 77 Ore. L. Rev. No. 1 (forthcoming 1998). The original co-Reporter on this topic, Professor Peter Hay, kindly reminded me that not all actions are tort actions and that it would be beneficial to open up my view of what constitutes a "summary procedure" for the benefit of the readers of this Report. I am indebted to Professor Hay for his observations generally, but particularly for this point.
13. Arbitration is the resolution of a dispute through the binding decision of a person or panel designated by the parties and is typically agreed to in advance by the parties, through contract, as the preferred dispute resolution mechanism. See, James et al., Civil Procedure supra n. 7, § 5.21, at 288-90. The topic of arbitration mechanisms is well beyond this article's scope for many reasons but, in this author's view, primarily because such procedures are often not "summary" in either duration or expense, and because they act as a parallel adjudication mechanism and not as an abbreviated one within the judicial system. Even though in many arbitrations the result is a judicially enforceable judgment on the merits, just like a court-rendered judgment, such an "adjudication" is not before a judicial officer of the court and is unlikely to be summary. On arbitration generally, see Edward Brunet & Charles Graver, Alternative Dispute Resolution: The Advocate's Perspective, ch. 8 (1997).
SUMMARY ADJUDICATION METHODS

Consequently, this Report explains a broad range of available procedures that either (1) affect a party's rights prior to a full-blown adjudication by jury trial, including obtaining preliminary orders which affect a party's conduct or which provide security for payment of any ultimate judgment that might be awarded; (2) provide a strategic advantage that significantly affects the rights involved in the dispute, through pre-trial investigation and discovery; or (3) summarily disposes of the claim as a final determination of the legal rights and obligations involved.

Consistent with this definition of the summary proceedings to be explored, the article will proceed as follows. Part I will set out the mass tort framework for discussing the procedures and explain briefly the typical full-blown trial process by which to compare the summary proceedings to be explained. Part II will elaborate upon the pre-claim, or provisional, mechanisms by which claimants can obtain either (1) security for the claims in issue or (2) prevent another party, typically a defendant, from engaging in conduct which is the subject of the claim. Part III will discuss the pre- and post-filing mechanisms by which parties obtain information to aid in prosecuting their claims and defenses and thereby obtain a possible strategic advantage at later adjudication proceedings. Part IV discusses post-filing procedures used to test the legal sufficiency of the plaintiff's claims. These are the "Rule 12(b) motions" found in the Federal Rules of Civil Procedure (the "Federal Rules") which govern the civil process in all United States federal courts. Finally, the summary judgment proceeding under Rule 56 of the Federal Rules, which


The Rule 12 motions are lack of jurisdiction over the subject matter, Fed. R. Civ. P. 12(b)(1); lack of jurisdiction over the person, Fed. R. Civ. P. 12(b)(2); improper venue, Fed. R. Civ. P. 12(b)(3); insufficiency of process, Fed. R. Civ. P. 12(b)(4); insufficiency of service of process, Fed. R. Civ. P. 12(b)(5); failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6); and failure to join a party under Rule 19, Fed. R. Civ. P. 12(b)(7). These motions are summary in nature in that they are decided on the contents of the pleadings. If in a Rule 12(b)(6) motion the court accepts matters outside the pleadings, the motion is converted to a motion under Rule 56 for summary judgment and treated accordingly.

15. Fed. R. Civ. P. 56. In addition to traditional summary judgment motions that test the sufficiency of the plaintiff's factual case, evidentiary hearings routinely precede such motions in an effort by one of the parties to keep from jury consideration evidence that may support a claim or defense, usually a claim, but that is, for evidentiary reasons, not relevant or helpful to the jury. In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the United States Supreme Court defined the
tests the legal basis of plaintiff's claims after full development of the facts has taken place through pre-trial discovery, is discussed in Part V. Additional non-traditional mechanisms to manage the claims process are discussed in Part VI.

I. MASS TORTS AND THE COMPELLING NEED FOR SUMMARY ADJUDICATION

The rise of instances of mass torts provides perhaps the most compelling reason for the use of summary adjudicatory procedures. While summary adjudication methods significantly impact all cases to which applied, their greatest impact is very likely in the mass tort case. While the summary proceedings available in federal courts are quite varied in scope, they fit uneasily with the large number of personal injury claims which present themselves in the context of wide geographical and temporal dispersal of harms that characterize the mass tort.\(^{16}\) The criticisms of delay and expense that barrage the civil justice system in America speak especially loudly to the mass tort case in which prolonged discovery disputes prevent many plaintiffs from living long enough to obtain a judgment. Further, defendants find the relitigation of issues of culpability takes an enormous amount of court and counsel time and effort, as does the expensive, repetitive American discovery process used to obtain information with which to pursue the claim.\(^{17}\) The judicial management task of handling thousands of cases creates large burdens on the court personnel as well. Without some summary adjudication mechanisms, justice would rarely be dispensed.

Yet, the summary adjudication mechanisms in the federal courts were created for a different time and respond to the dedication to party autonomy that permeates so much of the American legal tradition.\(^{18}\) Without such procedures, however, the mass of litigants seeking redress through the courts would soon overwhelm the capac-

\(^{16}\) For a discussion of the characteristics of mass torts, see Peterson & Zekoll, supra n. 6; Hensler & Peterson, supra n. 1.

\(^{17}\) Cortese & Blaner, supra n. 7, at 13-15 (discussing American evidence gathering process, known as discovery, and identifying possible reforms).

\(^{18}\) Aggregation methods have been proposed to deal with the thousands of cases presented by mass tort claims. A full discussion of these methods is beyond the scope of this article, though on this topic see Davis, supra n. 12; Symposium, “Summing up Procedural Justice: Exploring the Tension Between Collective Processes and Individual Rights in the Context of Settlement and Litigating Cases,” 30 U.C. Davis L. Rev. 785 (1997); Symposium, “National Mass Torts Conference,” 78 Tex. L. Rev. passim (1995).
ity of the federal courts to dispense justice in all cases, not just mass
torts.\textsuperscript{19}

\textbf{A. The Silicone Gel Breast Implant Litigation}

In 1992, United States Food and Drug Administration (FDA) Commissioner David Kessler banned silicone-gel-filled breast im-
plants.\textsuperscript{20} The banned implants had been available for over thirty
years, with an estimated one to two million American women having the
implants.\textsuperscript{21}

The ban by the FDA precipitated a flood of litigation in both fed-
eral and state courts on the same scale as previous mass tort litigation
such as Agent Orange,\textsuperscript{22} asbestos,\textsuperscript{23} Bendectin,\textsuperscript{24} and DES.\textsuperscript{25} The breast implant litigation encompasses every issue involved in
complex litigation from judicial administration difficulties, under the

\textsuperscript{19} Examples of the significant numbers of mass tort claims in the last decades
are easily found. Over 325,000 claims were filed in federal bankruptcy court against
A. H. Robins Pharmaceuticals arising out of the Dalkon Shield intrauterine device by
1986. Deborah R. Hensler et al., \textit{Trends in Tort Litigation: The Story Behind The
Statistics} 10 (1988). In addition, the asbestos-related personal injury lawsuits con-
tinue to plague the federal courts. See Amchem Products, Inc. v. Windsor, 117 S.Ct.
2231 (1997)(discussion of history of asbestos claims in federal courts; striking down a
settlement class intended to deal finally with all remaining such claims).

\textsuperscript{20} Marcia Angell, \textit{Science on Trial: The Clash of Medical Evidence and the Law

\textsuperscript{21} Id. at 19.

\textsuperscript{22} For the history of the Agent Orange litigation, which arose out of alleged inju-
ries to United States servicemen exposed to the exfoliant Agent Orange used in the
Viet Nam war, see \textit{"A Cover-up on Agent Orange?"}, \textit{Time}, July 23, 1990, at 27; and
\textit{"Agent Orange Redux"}, \textit{Time}, August 9, 1993, at 51. On the proof of causation of
Agent Orange Related illness, see \textit{In re Agent Orange Product Liability Litigation,
597 F.Supp. 740 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987)}.

\textsuperscript{23} The asbestos personal injury litigation is legendary in the United States be-
cause of the sheer number of cases over the last thirty years, estimated at over several
million, and because of the classic mass tort profile it suggests—widespread temporal
and geographical dispersement of claims with injuries that have a long latency period
and a large number of possible tortfeasors responsible for the harm. On the asbestos
litigation generally see Amchem Products, Inc. v. Windsor, 117 S.Ct. 2293 (1997)(pro-
viding history of litigation in context of decertifying a class action of all future injury
claimants). Numerous articles and texts have been written on the subject. The litiga-
tion is summarized in David Owen, John Montgomery & W. Page Keeton, \textit{Products

\textsuperscript{24} On the Bendectin litigation, which stems from the use in the 1970s and 1980s
by pregnant women of the anti-miscarriage drug Bendectin and allegations of birth
defects in the offspring of such women, see Michael D. Green, \textit{Bendectin and Birth

\textsuperscript{25} DES, or diethylstilbestrol, was an anti-morning sickness drug used by many
women in the 1950s through 1970s and which allegedly caused a variety of illnesses
in the children of such women, particularly cancers. DES has spawned thousands of
cases but because of the difficulty in identifying the manufacturer of the DES taken
by particular women, most cases have had to use innovative, and often unacceptable,
thories of causation. See Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal.
1980)(recognizing market share liability upon which plaintiffs could proceed) and
Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990)(rejecting market share liability
and summarizing its reception in other jurisdictions).
Federal Multidistrict Litigation statute which authorizes consolidation of many similar cases for coordinated discovery,\textsuperscript{26} to joinder mechanisms like class actions under Federal Rule 23\textsuperscript{27} to aggregate the claims for a single resolution, to simple negligence actions in state courts by individual plaintiffs. By mid-1995 when a settlement was being negotiated to resolve a class action in federal court over the breast implant litigation, approximately 440,000 women had filed claims, almost 20% of the total population of women with breast implants.\textsuperscript{28} The breast implants were made by only a handful of companies, primarily Dow Corning Corp. which in May 1995 filed for protection from its creditors under the federal bankruptcy laws as a result of the large number of breast implant claims filed against it.\textsuperscript{29}

After the Dow Corning bankruptcy, cases continued to be filed against the remaining manufacturers and against Dow Corning's parent company, Dow Chemical. The companies have had a number of recent successes by obtaining summary adjudications in their favor on the issue of a lack of general causation between the implants and the injuries complained of.\textsuperscript{30} Further, Dow Chemical has obtained dismissal of approximately 4,000 claims in three states because of an insufficient legal connection between that company and the product's manufacturer.\textsuperscript{31} The summary adjudication mechanisms have been


\textsuperscript{28} Angell, supra n. 20, at 192-93.

\textsuperscript{29} Many commentators have suggested that bankruptcy is a preferable mechanism for resolving a large number of mass torts in an abbreviated manner, through the determination of creditor preferences in bankruptcy, personal injury claimants being considered unsecured creditors. See Coffee, "Class Wars: The Dilemma of the Mass Tort Class Action," 95 Colum. L. Rev. 1343, 1457 (1995)(advocating bankruptcy over judicial process for resolution of mass torts).

The most recent settlement offer to the personal injury claimants, in August 1997 met with significant opposition from company creditors and the claimants. The proposed $3.7 billion plan of reorganization was designed, according to Dow Corning, to resolve all claims through several flexible settlement options. Dow Corning offered to set aside $2.4 billion to resolve breast implant claims over a 16-year period. The Company, continuing to deny liability, offered the settlement "in an effort to bring closure to the breast implant controversy and obtain overwhelming support for the plan." Further, the company said, it intended to litigate "aggressively" the merits of claims brought by women who rejected the latest plan. See, "Dow Corning Bankruptcy Settlement," 6 No. 1 Mealey's Litig. Rep.: Breast Implants 3, Nov. 6, 1997.

\textsuperscript{30} Nocera, "The Reversal of Fortune on Breast Implants," Fortune (Sept. 29, 1997)(chronicling recent defense successes and favorable scientific studies regarding a lack of causation, leading to summary judgments on that issue).

\textsuperscript{31} Id. See also, Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387 (D. Ore. 1996)(expert testimony failed to establish causation; summary judgment granted under Federal Rule 56; effective date deferred pending report of panel in federal mul-
effective only in small part, and the judicial system largely seems to have failed those involved—the injured plaintiffs and the company which may or may not have caused a large portion of the alleged harm.

For the purpose of this article the exact medical claims of the plaintiffs and the specific defenses offered by the defendants are largely irrelevant.32 Many thousands of claimants are alleging defective design and marketing of the implants and defendants hotly contest that their products are capable of causing the variety of injuries alleged, which include connective tissue diseases accompanied by a variety of harms including extreme fatigue, pain, weakness and arthritis. The scientific evidence is in controversy and the size of the claims can be quite large given the high medical expenses and the pain and suffering, recoverable as damages in this country, which is often difficult to evaluate. The following summary of the typical trial process will aid in appreciating the benefits and burdens of the summary adjudication procedures available.

B. The Typical Full Trial Process33

Before a complaint is filed in a personal injury action, much investigation should have been conducted by the claimant and her lawyer. It is against the Federal Rules, as well as rules of professional responsibility, to file a complaint that is not well-grounded in fact or law.34 To that end, plaintiffs must investigate the basis for any claims and conduct informal, limited pre-filing investigations. Defendants who are not yet parties to a claim are not under any obligation to open their doors to a potential claimant under normal district litigation in the Northern District of Alabama); In re Breast Implant Cases, 942 F. Supp. 958 (E.D. & S.D.N.Y. 1996)(summary judgment denied with leave to renew pending additional evidence from panel appointed to study breast implant evidence).

32. For a discussion of the medical claims see, Angell, supra n. 20, at 21-22, 90-110.
33. See generally, James et. al, Civil Procedure, supra n. 7, § 1.16, Life History of a Lawsuit.
34. Fed. R. Civ. P. 11. The grounds for violation of this Rule include filing pleadings or making representations for an improper purpose, such as to harass or cause delay in the litigation, and making frivolous legal or factual arguments. Rule 11(b)(1)-(4). If an attorney violates Rule 11, severe sanctions can be assessed such as monetary sanctions, including attorneys fees of the opposing party, or nonmonetary directives “sufficient to deter repetition of such conduct or comparable conduct.” Rule 11(c)(2). Further, Rule 11 imposes on represented parties an objective standard of reasonableness inquiry in assessing the factual representations made in pleadings or other papers signed by the party, whether the signature is voluntary or mandatory. Business Guides, Inc. v. Chromatic Commun. Enterprise, Inc., 498 U.S. 533 (1991). Before the 1993 amendments to the Federal Rules, Rule 11 motion practice had become, to many observers, excessive and unfounded. The 1993 amendments limited Rule 11 to non-discovery pleadings. See Advisory Committee Note. To the extent Rule 11 serves to challenge the sufficiency of a pleading, particularly a complaint or answer, it is also a summary adjudication procedure.
circumstances and plaintiffs typically must obtain their information through other means, including interviewing available witnesses and other attorneys who may be pursuing claims against the same company for the same types of claims.\footnote{35}{Formal mechanisms by which to obtain information from potential parties to a lawsuit are limited. For a discussion of such pre-filing measures in the Federal Rules, see infra Part III.}

Once a claim is filed, through a complaint, the formal litigation process begins. The defendant must provide a response through an answer, or under the Federal Rules it has the option of also filing a Rule 12 motion which tests a variety of legal requirements of the complaint, including jurisdiction over the parties and subject matter, service of process, and the legal sufficiency of the allegations themselves.\footnote{36}{Fed. R. Civ. P. 12 (b)(motions testing jurisdiction, service of process, joinder, claim basis); 12(c) (motion for judgment on the pleadings); 12(e)(motion for a more definite statement).} The discovery process also begins and under Federal Rules 16 and 26 the parties create a discovery plan to govern the lawsuit and prepare automatic disclosures of documents and other information required under Rule 26. The court may require a scheduling conference for the parties to come together to endorse a plan for the conduct and conclusion of discovery.\footnote{37}{Fed. R. Civ. P. 16 on “Pretrial Conferences; Scheduling; Management” calls for a discovery conference to enable the trial judge to enter a scheduling order to limit the time for joinder of parties, dates for conferences and any other appropriate matters. Rule 16(b). The conference can consider simplification of the issues, possibility of obtaining admissions of fact and of documents to avoid unnecessary proof, timing of summary adjudication motions under Rule 56, the identification of witnesses and documents, the need for special procedures for managing potentially difficult or protracted actions that involve complex issues, and other matters to facilitate the just, speedy and inexpensive disposition of the action. Rule 16(c). The trial judge has wide discretion under Rule 16 in managing a case.} Part III will discuss fully the pre-trial discovery measures that protect a party from potential discovery abuses and require a party to deal with documents and information in its possession in a way consistent with its obligations in the lawsuit.

Upon the completion of discovery, or upon the completion of discovery on certain crucial issues, the parties may move for summary judgment under Rule 56 to obtain judgment as a matter of law on an

\footnote{35}{Formal mechanisms by which to obtain information from potential parties to a lawsuit are limited. For a discussion of such pre-filing measures in the Federal Rules, see infra Part III.}

\footnote{36}{Fed. R. Civ. P. 12 (b)(motions testing jurisdiction, service of process, joinder, claim basis); 12(c) (motion for judgment on the pleadings); 12(e)(motion for a more definite statement).}

\footnote{37}{Fed. R. Civ. P. 16 on “Pretrial Conferences; Scheduling; Management” calls for a discovery conference to enable the trial judge to enter a scheduling order to limit the time for joinder of parties, dates for conferences and any other appropriate matters. Rule 16(b). The conference can consider simplification of the issues, possibility of obtaining admissions of fact and of documents to avoid unnecessary proof, timing of summary adjudication motions under Rule 56, the identification of witnesses and documents, the need for special procedures for managing potentially difficult or protracted actions that involve complex issues, and other matters to facilitate the just, speedy and inexpensive disposition of the action. Rule 16(c). The trial judge has wide discretion under Rule 16 in managing a case.}

\footnote{}
issue as to which there is no genuine issue of material fact. Rule 56 motions are the main vehicle in the federal judicial system for testing the legal adequacy of the claims or defenses presented and constitute the paradigm "summary adjudication" procedure.

After the summary judgment proceeding stage has been passed, the parties continue to complete the pre-trial schedule and conclude the necessary discovery and other administrative matters to be resolved to prepare for trial. Part VI of the Federal Rules contains rules for the conduct of trials, including explanation of (1) the right to jury trial, (2) the availability of consolidated or separated trials, (3) certain matters regarding the taking of testimony and (4) the selection of jurors and the rendering of verdicts.

Throughout the process outlined above, opportunities exist to resolve critical issues that may dispose of the claim or may provide sufficient tactical advantage that the claim will be disposed of as a result. In addition, federal judges have worked over the last several decades at creating alternative mechanisms to increase the efficiency of the court system particularly regarding mass tort claims, consistent with the federal court's equity powers to do justice. Many such alternative mechanisms act as summary proceedings because they facilitate the resolution process, though they do not conclusively adjudicate an issue. Such procedures, especially useful in mass tort cases, are discussed in Part VI.

II. PRELIMINARY ORDERS FOR SECURITY OR RESTRAINT

A. Pre-filing Security Measures

Unlike the typical personal injury case, creditors claims seeking payment of a debt or the turning over of property used to secure a debt typically do not involve the thorny issues of determining culpability and causation that cause the judicial system to bog down. In-

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39. Fed. R. Civ. P. 16(d), (e) govern the content of pre-trial orders.
41. Fed. R. Civ. P. 42. In many tort cases, the liability phase is often separated from the damages phase and this is accomplished under Rule 42. Such a separation of phases of a trial often has the effect of being a "summary-like" proceeding because if liability is found, cases often are settled before the damages phase begins. Such "bi-furcated" trials will not be discussed as true summary proceedings in this article, however.
42. Fed. R. Civ. P. 43 (Taking of Testimony); 44 (Proof of Official Record—including proof of official foreign records); 44.1 (determination of foreign law) and 45 (issuance of subpoenas for witnesses and documents). Rule 45 is also a mechanism by which documents can be obtained from a non-party before the filing of a possible complaint against that entity and will be discussed infra at Part III.
43. Fed. R. Civ. P. 47 and 48 (jurors); 49 and 50 (verdicts on the facts and as a matter of law).
44. Fed. R. Civ. P. 1 ("They [the Rules] shall be construed and administered to secure the just, speedy, and inexpensive administration of every action.")
deed, a personal injury claimant has no mechanism by which to secure a future judgment and often the first-claimant-in-time receives full satisfaction of an award while those later in the queue often come up empty handed because the judicial system and earlier verdicts have exhausted the resources of the defendant. A perfect example is the breast implant litigation where the first successful plaintiffs who recovered millions in judgment were compensated, but those who came after the bankruptcy of the principal defendant, Dow Corning Corporation, will receive considerably less in compensation because of the other demands on the assets of the company in bankruptcy. Similar tales are told in the Johns-Manville bankruptcy in the asbestos litigation as well as in the A.H. Robins Pharmaceutical bankruptcy over the Dalkon Shield intrauterine device. Many personal injury claimants in mass tort cases will recover nothing at all because their injuries were not manifested early enough in the life of the litigation to receive an enforceable judgment—the recent settlement class action in the asbestos cases sought to provide a pool of funds for such future claimants but it was struck down.\(^4\)

Similar fates are not suffered by creditor claimants. Indeed, though the debtor may have already exhausted the available funds or disposed of the property and a judgment may go unenforced, pre-judgment security mechanisms are widely available to creditors to place a legal restraint on certain of the debtor’s property, and thereby on the defendant’s manipulation of the property, to insure its availability to satisfy a judgment when/if one is obtained. Virtually every state has such procedures.\(^4\) The attachment mechanism in particular is available based generally on the potential that the defendant will attempt to avoid payment of the debt if judgment is secured.\(^4\) Attachment will issue typically if the defendant is a non-resident, is absent from the jurisdiction for a length of time, several months usually, has attempted to avoid service of summons, is about to remove

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or has already removed property from the state, or has sold or conveyed property with the fraudulent intent to prevent payment to creditors.\textsuperscript{48}

These statutes usually require some combination of the following procedures: a demand in writing at or after the time the suit is filed, accompanied by a copy of the complaint and summons, stating that the defendant has a time certain within which to pay the debt or request a hearing, typically seven to ten days.\textsuperscript{49} The creditor also typically can obtain security before a debt matures if the debtor is about to depart with intent to defraud the creditors.\textsuperscript{50} As well, an ex parte order can issue in favor of a creditor even absent the requisite notice to the debtor if irreparable injury would result to the creditor if the order were delayed.\textsuperscript{51} A procedure to garnish a debtor's wages, either pre- or post-judgment, is also available in most states by statute and such garnishment procedures typically involve similar procedures of notice and hearing.\textsuperscript{52}

The United States Supreme Court has outlined certain requirements, based on the United States Constitution's Fifth and Fourteenth Amendments, to provide that a debtor's property rights are protected with due process of law during these procedures.\textsuperscript{53} These cases involved challenges to a variety of state procedures which sought to deprive a debtor of property without protecting the debtor's right to a fair and impartial process. The constitutional requirements primarily include adequate notice and an opportunity to be

\textsuperscript{48} Ky. Rev. Stat. § 425.301(1)(a)-(h). A similar practice in English courts is the "Mareva" injunction which enjoins a defendant from removing assets from the jurisdiction while an action is pending against it. Mareva Cia Naviera, SA v. International Bulk Carriers, SA, [1980] 1 All E.R. 213 (C.A.). See generally Collins, "The Territorial Reach of Mareva Injunctions," 105 L.Q. Rev. 262 (1989); Maurice Rosenberg, Peter Hay & Russell Weintraub, Conflict of Laws 147 (10th ed. 1996) (hereafter Rosenberg et al., Conflict of Laws). The Mareva Injunction is also similar to a temporary restraining order, or TRO, which will be discussed infra nn. 54-61 and accompanying text.

\textsuperscript{49} Ky. Rev. Stat. at § 425.301(3). The debtor may quash an attachment motion and request an immediate hearing. Id. at § 425.302.

\textsuperscript{50} Id. at § 425.306.

\textsuperscript{51} Id. at § 425.308. The creditor has to post a bond in double the amount of the claim and if a debtor posts a bond equal to the creditor's claim, including court costs and attorney's fees, the attachment must be dissolved and property returned to the debtor. Id. § 425.309.

\textsuperscript{52} Garnishment, whether pre- or post-judgment, is limited by one part of the United States Consumer Credit Protection Act, found at 15 U.S.C §§ 1671 et seq.

heard on the merits of the creditors claim in a timely fashion.\textsuperscript{54} Other than the federal constitutional limitations on the attachment procedure which govern in all fifty states, the applicable state statute where the action, or attachment proceeding, is pending must be conformed with. Because of the primacy of state law in this area, generalities, other than the above brief description of the typical process, are difficult to make.

B. Pre-filing Restraint Orders

Occasionally, a party will desire not a money judgment but an order preventing another from continuing with a course of conduct that either violates the rights of others or has that potential. Such an order, known either as a preliminary injunction or a temporary restraining order, or TRO, is available in federal courts, and most state courts, under very limited circumstances. It would not likely be used in a mass tort or personal injury action for reasons to be made clear.

Federal Rule 65 provides for the issuance of such preliminary restraint devices.\textsuperscript{55} A preliminary injunction seeks to enjoin a party's conduct and can only issue after notice to the adverse party.\textsuperscript{56} A TRO, on the other hand, is an ex parte proceeding in which the order can issue without written or oral notice to the adverse party only if (1) immediate and irreparable harm is likely to result, based on the affidavit of the applicant, and (2) the attorney certifies the efforts made to give notice or reasons supporting why notice should not be required.\textsuperscript{57} Any such order expires by its terms within a specified number of days not to exceed ten. A preliminary injunction hearing must be scheduled to take place at the earliest possible time after issuance of the TRO. In addition, security must be given by the applicant.\textsuperscript{58}

Because of the potentially drastic consequences which may stem from the issuance of a TRO, judges are quite reluctant to issue such an order absent notice. According to the Advisory Committee Notes to Federal Rule 65, “Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for

\textsuperscript{54} Connecticut v. Doehr, 501 U.S. at 15.
\textsuperscript{55} Fed. R. Civ. P. 65(a)(preliminary injunctions) and 65(b)(TRO's).
\textsuperscript{56} Id. at R. 65(a)(1). The preliminary injunction is often the primary remedy sought by a party and once it issues the dispute is often considered resolved. Consequently, the federal trial judge has the power to consolidate the trial of the action on the merits with the preliminary injunction hearing and resolve the matter. Preliminary injunction motions, therefore, frequently turn into adjudications of entitlement to permanent injunctions. On the remedy of injunction generally, see James et. al., \textit{Civil Procedure} supra n. 7, at § 5.16.
\textsuperscript{57} Id. at R. 65(b).
\textsuperscript{58} Id. at R. 65(c).
Because of the equitable nature of the remedy, the grounds upon which a TRO will be issued vary, but are all intended to prevent an alleged irreparable harm from occurring. The established standards for allowing preliminary injunctive relief apply in the TRO context as well. Those considerations are: (1) the likelihood that plaintiff will prevail on the merits; (2) the threat of irreparable injury to plaintiff if no injunction is issued; (3) the degree of harm that an injunction would cause to the defendant; and (4) the public interest.

A wide variety of conduct may be subject to a TRO including (1) the defendant's violation of a trademark by marketing protected goods, (2) the defendant's marketing of goods in a geographic area or under circumstances which violate an exclusive right in the claimant, or (3) the defendant's violation of a covenant not to compete in the employment context.

Some questions about whether a court can order a TRO to prevent the defendant from dealing with its assets in the jurisdiction, to protect a judgment that may subsequently be obtained, have been raised. Most federal circuits consider such an injunction, like the English Mareva Injunction, to be consistent with Rule 65, and have permitted such an injunction.

59. Id. Advisory committee note. The informal notice requirement may be constitutionally compelled in some circumstances, as when the adverse party's First Amendment right to freedom of speech is implicated. Carroll v. President and Commissiones of Princess Anne, 393 U.S. 175 (1968).


pines v. Marcos, the Second Circuit Court of Appeals upheld a preliminary injunction forbidding the Marcoses, former first family of the Philippines, from encumbering real property located in New York which allegedly had been purchased with funds improperly taken from the Philippines. The injunction was intended to aid in the Philippines government's attempt to recover monies wrongfully taken during the Marcos' reign of power. In a related case, a preliminary injunction was granted by a California federal court against the Marcoses personally to prevent them from transferring assets wherever located, including assets in banks in foreign countries. Jurisdiction over either the defendant or his/her property is sufficient to permit such an injunction to issue.

III. PRELIMINARY DISCOVERY MECHANISMS

In the silicone gel breast implant litigation, as in most mass tort cases, the claim will frequently be successful or not depending on the information obtained through the discovery mechanisms available to obtain information to substantiate the plaintiffs claims. Indeed, when allegations of product defect have such serious consequences of huge potential liability to hundreds of thousands of claimants, whether a particular plaintiff can prove her case impacts every subsequent case. The information obtained in discovery will likely be made available to other claimants through both attorney cooperation and because any given plaintiff's attorney is likely to have a large number of clients. It is too expensive to take one such case and prepare it for trial. Many plaintiffs' law firms try to handle a large number of cases of the same type of injury against the same defendant or group of defendants to create economies of scale. Consequently, the documents that are disclosed in discovery in any case take on great significance.

One of the many complaints about the judicial machinery's inefficiency comes from the protracted battles over discovery. The 1993 amendments to the Federal Rules sought to simplify discovery by re-
quiring certain items to be disclosed automatically.\textsuperscript{67} In addition, the parties are required to meet to form a discovery plan to anticipate the areas that may prove troublesome and plan for them.\textsuperscript{68}

In product liability-based mass tort actions, the plaintiffs case on liability may depend on the discovery of information contained in the records of the defendant manufacturer which displays proof of a disregard for the health and welfare of the consumer of the product or which suggests other culpability regarding the product’s design and manufacture. Such documents will only be found in the defendant’s possession and the plaintiffs will necessarily seek to review all documents remotely likely to produce such information. There are several mechanisms by which documents, tangible things and real property can be inspected of both a party and a non-party.

Federal Rules 34 and 45(a) provide for the production of documents and things or permission to enter upon land or other property of both parties and non-parties.\textsuperscript{69} Typically, the party seeking to review documents must wait for the discovery conference required in Rule 26(d) unless a party seeks a court order to proceed before that conference.\textsuperscript{70} The trial judge has wide discretion to deal with discovery issues and if it appears that a defendant is about to destroy documents that may be discoverable, it would be appropriate for a trial judge to order an earlier inspection though it would be highly unusual for an order to issue ex parte.\textsuperscript{71} Plaintiffs must itemize the information sought to prevent a “fishing expedition” of defendant's records.\textsuperscript{72}

Non-parties are subject to document and premises inspection requests under Rule 45 which authorizes a subpoena duces tecum to issue for the production or inspection of documents or tangible things

\textsuperscript{67} Fed. R. Civ. P. 26(a). These items are described supra n. 37.

\textsuperscript{68} Id. Rule 16.

\textsuperscript{69} Id. Rules 34, 45.

\textsuperscript{70} Id. Rule 26(d). In English practice, a similar device is the Anton Piller Order, which takes its name from Anton Piller KG v. Manufacturing Process, Ltd., [1976] Ch. 55, [1976] 1 All E.R. 779 (C.A.), which issues ex parte and permits the successful movant to search the opponent's premises to secure and safeguard evidence in danger of destruction or loss. I am indebted to Professor Hay who acquainted me with the Anton Piller Order. More on these Orders can be found in Dockray & Laddie, “Piller Problems,” 106 L.Q. Rev. 601 (1990). See also, Rosenberg et. al., Conflict of Laws, supra n. 48, at 147.

\textsuperscript{71} Interestingly, the Anton Piller order, discussed supra n. 70, issues ex parte and can produce documents which may then become the basis of a Mareva injunction prohibiting the defendant from dealing with assets. Such a result is very unlikely to result in this country given the very stringent notice requirements in both our discovery and injunction practice.

\textsuperscript{72} Id. Rule 34(b). Failure to comply with a discovery request or order can lead to the sanctions provided in Rule 37 which include dismissal of claims or defenses, the assessment of fines and costs, a finding of fact unfavorable to the noncomplying party regarding the subject matter of the request and others in the trial judge's discretion.
or to permit inspection of premises.\textsuperscript{73} Persons subject to such subpoenas are protected under Rule 45(c) which defines the method by which objections can be raised to the subpoena. Typical objections are that a reasonable time for compliance was not provided, the subpoena requires excessive travel, requires disclosure of otherwise protected matter or subjects the person to an undue burden.\textsuperscript{74}

Parties who must comply with the broad discovery permitted by Rule 26 often seek to limit the use of discoverable material or to prevent its subsequent disclosure. For example, trade secrets or other commercially sensitive information may have to be disclosed in discovery but its widespread dissemination might harm the defendant financially or competitively. Consequently, Federal Rule 26(c) permits the court to enter a protective order to limit the use of certain discoverable material and to prevent its dissemination to non-parties or others.\textsuperscript{75} The grounds for such protection include annoyance, embarrassment, oppression, or undue burden or expense.\textsuperscript{76}

It should be clear that significant protections exist for parties who want to delay and even prevent the disclosure of damaging information. Further, the cost of discovery can be significant but the costs are balanced against the benefit of greater information availability. One commentator has described the balance this way:

Most of the modern law of discovery is an accommodation between affording full and open discovery and safeguarding against unrestrained rummaging through an opponent’s files, imposition of oppressive expense, or invasion of the opponent’s preparation for adversarial trial. On the whole, a satisfactory balance is struck, but the scope of discovery remains a dilemma in two types of litigation: “big” cases (involving millions of dollars in damages), in which the stakes are so large that the parties have incentive to exhaust every possibility of unearthing or withholding additional evidence; and “little” cases (involving say $50,000 or less) in which one party has an incentive to overpower the other by protracted discovery beyond the value of the case and thereby deterring similarly situated persons from maintaining similar litigation.\textsuperscript{77}

\textsuperscript{73} Id. Rule 45(a)(1)(C). The procedures are outlined in Rule 45(a)(2), (3) and 45(b).
\textsuperscript{74} Id. Rule 45(c). A court can modify or quash a subpoena under these conditions or can create special conditions under which the subpoena is to be fulfilled. Rule 45(c)(3)(B). See generally James et. al., \textit{Civil Procedure}, supra n. 7, § 5.14.
\textsuperscript{75} Id. Rule 26(c).
\textsuperscript{76} Id. The Rule provides a trial court with several mechanisms by which to protect a party. The disclosure can be prevented entirely, limited to specified terms and conditions, limited to certain subjects, conducted by court-selected persons, or sealed by the court. Id.
\textsuperscript{77} James et. al., \textit{Civil Procedure}, supra n. 7, § 5.2, at 236-37.
Discovery mechanisms can have a powerful summary adjudication effect.

IV. PRELIMINARY MOTIONS THAT CHALLENGE THE LEGAL SUFFICIENCY OF THE CLAIMS

A. Rule 12(b) Motions

The Federal Rules permit an early challenge to the legal sufficiency of the allegations of a claim under Rule 12(b)(6) and (c). When a defendant challenges the plaintiff's legal entitlement to the relief demanded, even if all well-pleaded facts are taken in the light most favorable to the plaintiff, Rule 12(b)(6) permits a judgment as a matter of law in favor of the defendant. Such motions challenge the plaintiffs pleading of the required legal elements of the claim—as one court recently put it, “Like a battlefield surgeon sorting the hopeful from the hopeless, a motion to dismiss invokes a form of legal triage, a paring of viable claims from those doomed by law.” If any legal requirement of the claim is not plead, the motion should be granted. For example, if a plaintiff seeks to recover on a tort theory but fails to allege that the defendant's actions were the cause of the plaintiffs harm, a Rule 12(b)(6) motion would be appropriate. As one might assume, leave to amend the complaint is routinely granted in such circumstances.

Of greater importance as a true summary adjudication method, is the Rule 12(b)(6) motion which challenges the plaintiffs entitlement to relief upon the legal theory pleaded. For example, a plaintiff seeking recovery under a theory of negligent infliction of emotional distress under circumstances in which the governing law would not recognize the cause of action under the facts as pleaded may suffer

78. Fed. R. Civ. P. 12(b)(6) and (c). Additional matters in response may be plead by motion under Rule 12 as discussed supra n. 36 and accompanying text. The Rule 12(b) motions replace demurrers in common law pleading practice.

79. Iacampo v. Hasbro, Inc., 929 F.Supp. 562 (D.R.I. 1996). Additional descriptions of the rule follow. "The purpose of Rule 12(b)(6) and summary judgment motions is to conserve judicial resources by screening out at the earliest possible time those actions in which it can be determined readily that the plaintiff has no chance of prevailing." Wright & Miller, Federal Practice & Procedure § 1356 (Supp. 1997).

"The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity." Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., 988 F.2d 1157, 1160 (Fed. Cir. 1993); see also Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993).


81. See Wright & Miller, supra n. 79, at § 1357.
judgment as a matter of law because recovery simply cannot be had as alleged. 82

Rule 12(c) similarly permits an adjudication based purely on the allegations of the pleadings, the complaint and answer. This motion is useful when the answer admits the allegations of the complaint, for example that a debt is owed as claimed, but raises an affirmative defense that is insufficient in law. 83 In other words, "the court should not dismiss the complaint unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief." 84

Both Rule 12 motions are summary proceedings on the merits because they deal directly with the existence of a meritorious claim or defense. 85 When such motions are supported by affidavits or other evidence outside the allegations in the pleadings, as they typically are either from deposition testimony or answers to other discovery, Rule 12(b)(6) and (c) motions are converted into motions for summary judgment under Rule 56 and are resolved under the standards applicable to that Rule. 86 This article addresses Rule 56 motions in full in Part V.

B. Involuntary Dismissals for Failure to Prosecute

A challenge to the legal sufficiency of the allegations of the claim or defense is not the only preliminary motion which can result in an adjudication on the merits. Rule 41 permits a defendant to move for dismissal of an action for failure of a plaintiff to prosecute the claim. 87 A dismissal for such failure operates as an involuntary dismissal on the merits preventing the plaintiff from re-filing the claim later.

82. See, e.g., Dillon v. Legg, 441 P.2d 912 (Cal. 1968).
83. See James et al., Civil Procedure supra n. 7, § 4.17, at 219-20.
86. Fed. R. Civ. P. 12(b), (c).
87. Id. Rule 41. Subsection (a) permits a plaintiff to take a voluntary dismissal for any reason, without prejudice to refile later unless the plaintiff has already dismissed the matter voluntarily once before. Subsection (b) authorizes the involuntary dismissal which the plaintiff suffers at the defendant's motion or if the plaintiff has failed to comply with other of the Federal Rules, such as discovery rules for which a sanction is dismissal. See Rule 37(c).

A defendant can certainly suffer a similar fate, though an "involuntary dismissal" as to a defendant is termed a default judgment. Defendants who have not answered the complaint within the required number of days from filing can suffer a default for such failure to respond. See Fed. R. Civ. P. 55. A default judgment may be set aside for "good cause shown." Id. Rule 55(c).
The types of failures to prosecute which result in such a harsh sanction are quite varied. A decision to dismiss is within the trial judge’s discretion because he or she most familiar with the history of the prosecution of the claim. The factors upon which an involuntary dismissal are to be judged include (1) the duration of the plaintiff’s failures, (2) whether plaintiff had received notice that further delays would result in dismissal, (3) whether the defendant is likely to be prejudiced by further delay, (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party’s right to due process and a fair chance to be heard, and (5) whether the judge has adequately assessed the efficacy of lesser sanctions.

Typically, the attorneys for the plaintiff are to blame for the delay in prosecution. Should a claimant be responsible for his attorneys lack of diligence by suffering a dismissal on the merits? The courts have taken very different approaches, perhaps reflecting the very case specific nature of the involuntary dismissal motion. For example, in *Jackson v. Washington Monthly Co.*, the court observed that “Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free... When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of appropriate action against the lawyer as the medium for vindication of the judicial process and protection of the citizenry from future imposition.” State court procedures are generally similar but some state legislatures have tried to give guidance on the outside time period within which a claim must be prosecuted or suffer dismissal.

The combination of the wide scope of discovery, and the potentially lengthy time period necessary to conduct discovery in all but the most simple cases, with the latitude the American court’s give to the parties to investigate, prepare and litigate their own cases based

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89. Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988). See also Jackson v. City of New York, 22 F.3d. 71 (2d Cir. 1994)(reversing trial court's dismissal as abuse of discretion in action involving allegations of abuse by police officers); Harris v. Callwood, 844 F.2d 1254, 1256 (6th Cir. 1988)("in the absence of notice that dismissal is contemplated a district court should impose a penalty short of dismissal unless the derelict party has engaged in "bad faith or contumacious conduct."); GCIU Employer Retirement Fund v. Chicago Tribune Co., 8 F.3d 1195 (7th Cir. 1994)(district court's dismissal must be "fundamentally wrong" to be reversed on appeal).
90. 569 F.2d 119 (D.C. Cir. 1977).
91. Id. at 123-24. But see, Kung v. Fom Investment Corp., 563 F.2d 1316, 1318 (9th Cir. 1977)(litigants bound by conduct of attorneys absent egregious circumstances).
on our principles of party autonomy, make the dismissal of cases under Federal Rule 41(b) a rare occurrence.\textsuperscript{93} The trial judges in this country are products of the adversarial system and are, therefore, not unsympathetic audiences for the delaying tactics that might be used to prolong litigation such as (1) motions for extensions of time to complete discovery, (2) pleas for extra time to prepare dispositive motions or for trial because of the complexity of the claims in issue, or (3) the difficulty in obtaining compliance by the other parties in discovery or in settlement negotiation. The reasons for failures to "prosecute" are innumerable and thus Rule 41 is largely unsuccessful in encouraging the prompt litigation of claims. Such is the case especially in the mass tort, or "big," case that presents a large number of claims, defendants, controversial discovery and contested substantive issues not likely to be dismissed for failure to prosecute in spite of charges of delay and lack of diligence.

V. SUMMARY JUDGMENT UNDER FEDERAL RULE 56

The Federal Rules provide for a summary judgment proceeding under Rule 56. Rule 56 allows a party to the litigation to move, with or without supporting affidavits, for summary judgment on all of or a portion of the issues.\textsuperscript{94} Summary judgment is appropriate under Rule 56 when there is no genuine issue of material fact on which a fact-finding by a jury is needed and thus the trial judge can determine the legal issues as a matter of law. This motion, like the Rule 12(b) motions, tests the legal sufficiency of the allegations but, unlike the Rule 12(b) motions, facts are presented to support the motion by which the trial judge can be more fully informed about the nature of the allegations.

Summary judgment is intended for use when facts can be established conclusively without resort to a trial, thereby avoiding useless trials while still achieving a final determination on the merits.\textsuperscript{95} Rule 56 allows for a motion for summary judgment to be made on the entire complaint or counterclaims, any single claim or counterclaim and any single issue contained in a complaint or counterclaim.\textsuperscript{96} Summary judgment is accomplished by allowing the parties to introduce evidence by way of affidavits and items referred to in the affidavits.\textsuperscript{97} It is within the discretion of the court to allow affidavits to be opposed

\textsuperscript{93} For cases discussing the standard of dismissal under Rule 41(b) see Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992); annot., 20 A.L.R. Fed 488 (1974 & Supp. 1997).
\textsuperscript{94} Fed. R. Civ. P. 56(a).
\textsuperscript{96} Fed. R. Civ. P. 56(d), 56(a).
\textsuperscript{97} Fed. R. Civ. P. 56(e)(affidavits shall be made on personal knowledge and show the affiant is competent to testify as to the contents and copies of all papers referred to which shall be attached.)
by affidavits, depositions, interrogatories or further affidavits. In some cases, at the discretion of the district court, oral testimony is allowed to respond to a motion for summary judgment.

The key, then, to the granting of a summary judgment motion is that the record discloses that there is no genuine issue of material fact left for determination by a jury. The standards by which that aspect of the decision is made are critical and have been explored by the Supreme Court in a trilogy of 1986 cases, Celotex Corp. v. Catrett, Anderson v. Liberty Lobby, Inc., and Matsushita Elec. Industrial Co. v. Zenith Radio Corp. In these cases, the Supreme Court fully explored the grounds for summary judgment and the quality, availability, and evaluation of the evidence which supports such motions.

The basic requirements are that the movant, typically the defendant since it is challenging the plaintiffs ability to meet her burden of proof, must meet the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant’s case. This burden may be met by pointing out to the court that the non-movant, having had sufficient time for discovery, has no evidence to support an essential element of her case. Not every issue of fact or conflicting inference presents a genuine issue of material fact that requires a denial of summary judgment and the non-movant must present more than “a scintilla” of evidence to overcome the motion; there must be evidence on which the jury could reasonably find for the non-movant. The non-movant cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion. The ultimate inquiry is: whether

99. This is accomplished by utilizing Fed. R. Civ. P. 43(e) which authorizes oral testimony in motions. Thompson v. Mahre, 110 F.3d 716, 720 (9th Cir. 1997)(citing 10A Charles A. Wright et al., Federal Practice and Procedure §2723, at 62 (2d ed. 1983)).
100. 477 U.S. 317 (1986). Celotex Corp. involved the availability of summary judgment in an asbestos personal injury action, a mass tort case, and the issue on which summary judgment was based was whether the plaintiff had been exposed sufficiently to the defendant’s product to permit a finding of causation. Id. at 320.
102. 477 U.S. 574 (1986). Matsushita was a complex anti-trust action.
103. On the relation of the summary judgment motion and the burden of proof, see James et. al., Civil Procedure § 4.14
104. Anderson, 477 U.S. at 245 (essential elements are defined by the underlying substantive law in issue, including evidentiary standard required); see also Lujan v. National Wildlife Fed’n, 497 U.S. 871 (1990)(federal environmental statutes governed essential elements; summary judgment appropriate on affidavits as to applicability of statutory definitions giving plaintiff no right to pursue action under statute).
105. Anderson, 477 U.S. at 255 (weighing of evidence is a jury function; summary judgment motions do not weigh the evidence).
the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.\textsuperscript{106}

The \textit{Celotex} case provides an excellent example of the circumstances supporting summary judgment, particularly in the mass tort context. The plaintiff's decedent had worked with asbestos during his lifetime and died allegedly of an asbestos-related illness.\textsuperscript{107} He claimed exposure to products of 15 named defendants; Celotex moved for summary judgment based on plaintiff's failure through discovery to identify the particular Celotex product(s) to which plaintiff claimed exposure.\textsuperscript{108} Plaintiff had failed, in answer to interrogatories addressed to the issue, to identify any specific Celotex products but the decedent, in deposition before his death, had identified Celotex as a manufacturer of products with which he had worked for a time in 1970-71.\textsuperscript{109} Celotex moved for summary judgment based on plaintiff's failure to raise a genuine issue of fact regarding Celotex' products causing decedent's asbestos-related illness.\textsuperscript{110}

The Court clarified the standard for granting summary judgment, on which there had been some disagreement in the lower courts, and made it clear that the moving party need do no more than point out to the trial court that there is an absence of evidence to support the non-moving party's case.\textsuperscript{111} The non-moving party, then, must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"\textsuperscript{112} It is clear that the non-moving party cannot rest, in defense of summary judgment, on the laurels of the pleadings and the trial court's imagination to create factual disputes.

The Supreme Court has been said, in these cases, to have strengthened the use of the summary judgment motion and made it easier to obtain for defendants.\textsuperscript{113} Indeed, in \textit{Celotex} the Court states:

\begin{quote}
The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon
\end{quote}

\begin{itemize}
\item \textsuperscript{106} Celotex Corp., 477 U.S. at 322.
\item \textsuperscript{107} Id. at 319.
\item \textsuperscript{108} Id. at 319-20.
\item \textsuperscript{109} Id. at 320. Plaintiff also produced a letter from an official of one of the decedent's former employers that identified Celotex and a letter from an insurance company to Celotex's attorney's. Id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. at 325.
\item \textsuperscript{112} Id. at 324. The Court made it clear that the non-moving party need not produce evidence in an admissible form for trial. Id.
\item \textsuperscript{113} James et. al., \textit{Civil Procedure}, supra n. 7, § 4.15, at 218. See also Issacharoff & Loewenstein, "Second Thoughts about Summary Judgment," 100 \textit{Yale L.J.} 73 (1990).
\end{itemize}
Summary adjudication is appropriate in any case where an undisputed issue of fact suggests a legal conclusion. Partial summary judgment also is often obtained on single issue matters that can be resolved, simplifying the issues to be dealt with at the trial level.

An excellent example of a case where summary judgment is peculiarly appropriate is a patent case where determination of whether a patent exists or not, and if so, on what matter, is a matter law. Other types of complex litigation, such as antitrust suits, many types of employment and civil rights litigation, and financial transactions litigation of various character are well suited to mo-

1.477 U.S. at 327.

115. Fed. R. Civ. P. 56(c). The Supreme Court has since elaborated on what it considers to be a factual controversy and has stated that “In ruling on a Rule 56 motion, a District Court must resolve any factual issues of controversy in favor of the non-moving party” only in the sense that, where the facts specifically averred by that party contradicts facts specifically averred by the movant, the motion must be denied. . . . The purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side’s case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.” Lujan, 497 U.S. at 884.


118. Poller v. Columbia Broadcasting System, Inc. 365 U.S. 464, 473 (1962) (“summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles”). But see, of course, Matsushita Electronic Industrial Co., 475 U.S. 574, which involved an antitrust action, in which the Court stated: “If the factual context renders respondent’s claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.” Id. at 587.

119. See, e.g., Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997)(wage and hour statute (Fair Labor Standards Act) violation appropriate for summary judgment on coverage of statute to marketing representatives); Rankin v. Wyatt Co., 125 F.3d 55 (7th Cir. 1997)(federal age discrimination action; summary judgment affirmed).

120. First United Finan. Corp. v. United States Fidelity and Guaranty Co., 96 F.3d 135 (5th Cir. 1996)(insurance coverage dispute appropriate for summary judgment); Slamans v. First Nat’l Bank & Trust Co., 69 F.3d 468 (10th Cir. 1995)(oil supplier under distributor agreement with bankruptcy debtor filed action to determine entitlement to proceeds of credit card transactions; summary judgment appropriate on enti-
tions for summary judgment in spite of their complexity. Any issue as to which there is no factual controversy, and which therefore requires a certain legal conclusion, suggests summary judgment regardless of the otherwise complex nature of the litigation.

Summary judgment motions are frequently used in mass tort actions. Indeed, *Celotex Corp.* was an asbestos personal injury action. Because of the potential for prolonged litigation in such cases, defendants have often sought to use the summary judgment motion to test a critical substantive element of the plaintiff's case and, therefore, obtain dismissal because of the plaintiff's inability to prove her case. For example, in the Bendectin cases involving allegations of birth defect as a result of the ingestion by mothers of the anti-miscarriage drug Bendectin, the defendant Merrell Dow Pharmaceuticals has used summary judgment very successfully based on plaintiffs' failure to produce genuine proof of scientific evidence of causation. If there is no evidence of general causation, as the defendant claims, plaintiffs are not permitted to recover as a matter of substantive tort law.121 Consequently, the hearings on admissibility of evidence can have a dispositive effect even before the summary judgment proceeding begins. If there is no admissible evidence on which a claimant

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121. See generally, DeLuca v. Merrell Dow Pharmaceuticals, 911 F.2d 941 (3d Cir. 1990); In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig., 857 F.2d 290 (6th Cir. 1988); Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311 (9th Cir. 1995). All of these cases permitted summary judgment based on a lack of scientific evidence of causation. The crucial issue in these cases was whether plaintiff's evidence of causation was admissible under the Federal Rules of Evidence as expert opinion testimony. The Supreme Court resolved the evidentiary issue in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), in which the Supreme Court found that the Federal Rules of Evidence required only that the testimony be both reliable—i.e., scientific—and relevant—or helpful to the trier of fact. The admissibility of such evidence is decided on a case-by-case basis. The Supreme Court recently made summary judgment motions more likely to withstand appellate review in a case which upheld a trial court's ruling on the inadmissibility of expert testimony, adopting the abuse of discretion standard of review of the trial court's determination. See, Joiner v. General Electric Co., 118 S.Ct. 512 (1997).

Other examples of cases in which summary judgment has been granted in tort cases are Lager v. Chicago Northwestern Transp. Co., 122 F.3d 523 (8th Cir. 1997)(Employee brought personal injury claim against his employer under the Federal Employers' Liability Act (FELA), for injuries sustained in attack by coworker; employer's motion for summary judgment granted because employee's evidence insufficient to show that employer knew of coworker's alleged violent tendencies before coworker assaulted employee); Knoblauch v. Dee Express Corp., 86 F.3d 684 (7th Cir. 1996)(plaintiff sued owners and drivers of trucks involved in initial collision arguing that drivers' negligence was proximate cause of her decedent's death when he collided with one of trucks; summary judgment improper because (1) material fact issues existed as to whether initial collision was proximate cause of plaintiff's decedent's death, and whether one truck was operative after initial collision and whether driver of that truck breached duty by failing to remove it from lane of traffic, but (2) one driver had no duty to warn other drivers of second driver's disabled truck).
can prove a fact in issue, and on which she has the burden of proof, then there is no genuine issue of material fact left to resolve and judgment as a matter of law can, and should, be entered.

VI. ALTERNATIVE PRE-TRIAL MANAGEMENT DEVICES AS SUMMARY PROCEDURES

A. Consolidation by Use of the Federal Multidistrict Litigation Statute

Congress created the Judicial Panel on Multidistrict Litigation to coordinate or consolidate pretrial proceedings when "civil actions involving one or more common questions of fact are pending in different districts." This device is intended to create efficiencies in cases with similar issues on discovery and motions. The Multidistrict Litigation statute has been used successfully in several mass torts in the 1990s including the silicone gel breast implant litigation which began as individual cases consolidated in one district for discovery and pretrial management. The use of this device is within the discretion of the Multidistrict Panel which is comprised of seven court of appeal and district court judges appointed by the Chief Justice of the United States. Proof of the fallibility of the Multidistrict Panel can be found in early efforts to consolidate federal asbestos cases. The judges in several federal circuits in which thousands of asbestos cases were pending sought for years consolidation for discovery and pre-trial management. The Judicial Panel refused for years in the face of the compelling need for procedural assistance to increase the efficiency of the judicial system as well as to preserve limited party resources. The Panel ultimately approved consolidation in 1991, from which a settlement was reached, but which was ultimately struck down by the Supreme Court. Examples of other consolidated actions include cases involving allegations of product defectiveness and resulting injury from the use of temporomandibular joints (TMJ) in which, after consolidation, the trial judge granted motions for summary judgment on all

123. In re Silicone Gel Breast Implant Liab. Litig., 793 F.Supp. 1098 (J.P.M.L. 1992). That litigation ultimately was certified as a class, then decertified after the extremely high number of class participants was known, and after Dow Corning Corp. filed for bankruptcy protection under federal bankruptcy statutes.
counts against two of the defendants. After the asbestos cases, more and more mass torts are being managed through consolidation for discovery and pre-trial procedures.

B. Class Actions as a Form of Summary Proceeding

Class actions are provided for in Federal Rule 23. Class actions provide a joinder mechanism, which did not exist prior to the Federal Rules, which helps solve some of the inefficiencies inherent in the federal system that comes from the dedication to individual autonomy in litigation. When large numbers of cases involve largely the same allegations of tortious conduct by the same parties regarding the same types of injuries from the same product, the cases cry out for some mechanism of judicial management and resolution that does not require one-on-one issue resolution. The class action permits the combination of such claims in one proceeding with one discovery and pre-trial management process and one resolution of common issues. However, while attractive from a theoretical perspective as a summary proceeding in that large numbers of claims are resolved, the class action for purposes of litigation is by no means an abbreviated proceeding. Its impact as a “summary” proceeding may be in the encouragement of settlement that results from the handling of such large numbers of claims in one proceeding.

Class actions are attractive to both plaintiffs and defendants and their counsel. Allowing the global settlement of large numbers of claims against a defendant and preventing the exhaustion of limited resources to litigate such claims limits the defendant’s ultimate exposure to the costs of the settlement. At the same time, class actions

128. Fed. R. Civ. P. 23. There are three types of class action; the Rule 23(b)(1) limited fund class action where parties assert competing claims to a fund; the Rule 23(b)(2) class action where equitable relief is the goal; and the Rule 23(b)(3) common issues class where questions of fact or law common to the class predominate over individual issues and the class action is a superior method of adjudication. The Rule 23(b)(3) class is the one most often sought in mass tort actions.
129. On this use of class actions for mass torts for which it is not generally upheld, see Davis, supra n. 12. See also, Peterson & Zekoll, supra n. 6, at 96-99; Cappalli & Consolo, supra n. 27, at 248-55 (excellent survey of the American class action and forecasting its cool reception in European countries).
130. A fuller discussion of the class action is beyond the scope of this article and this description of the procedure is meant more as an aid for contrast than for full explanation. Several treatises exist which discuss the procedure in detail. See Herbert Newberg & Alba Conte, Newberg on Class Actions (3d ed. 1996). The Supreme Court’s recent decision on the settlement class is also instructive on the difficulties which present themselves in the mass tort class action. See Amchem Products, Inc., 117 S.Ct. at 2245-2247.
may permit more claimants to recover than would happen if individualized trials were required. There is much debate over whether this result is a positive one. Class actions also prevent plaintiffs from spending excessively on the litigation by permitting the spreading of the costs over a large group of claimants instead of just one. The high costs inherent in preparing an individual case for trial are thereby reduced by the class action device's combination of the claims, but plaintiffs' counsel's fees are increased accordingly as well.\textsuperscript{131} For the most part, to the extent class actions are permitted in mass tort cases, they typically lead to settlements, and as such act as, at most, an \textit{accelerated} procedure to encourage settlement rather than a summary adjudication.\textsuperscript{132}

C. \textit{Summary Jury Trials}

A summary jury trial is, strictly speaking, an alternative dispute resolution tool\textsuperscript{133} first proposed and used by Judge Thomas Lambros of the United States District Court for the Northern District of Ohio.\textsuperscript{134} The summary jury trial, in its simplest incarnation is an abbreviated "jury trial", administered by the district court,\textsuperscript{135} in which the litigants present their respective cases to a mock jury. The summary trial is presided over by a magistrate or a district judge\textsuperscript{136} and is heard by a six-person jury.\textsuperscript{137} The proceeding consists of both sides presenting their views of the case to the jury.\textsuperscript{138} Each party's

\footnotesize{\textsuperscript{131} One of the complaints about the use of the mass tort class action is that the cases settle with little or no effort by the plaintiffs' counsel and they earn exorbitant fees under the contingency fee system. See the discussion of the fees in the Amchem Products case, 117 S.Ct. at 2239, 2251 and in Coffee, supra n. 29.\textsuperscript{132} Notable class actions in which settlements, not trial, have occurred are the silicone gel breast implant litigation against Dow Corning and a few other defendants, though the settlement was ultimately unsuccessful after the Dow Corning bankruptcy. See generally Angell, supra n. 20. An example of another such settlement is the class action litigation over the pedicle screw bone-implant which had been consolidated for pre-trial proceedings and was recently settlement for $100 million for about 3,200 claimants. "Acromed Settlement Ok'd, Creates $100 Million Fund," 12 No. 5 Mealey's Litig. Rep.: Ins. (Dec. 2, 1997).\textsuperscript{133} "[Summary Jury Trial] is a flexible pretrial procedure that aids appreciably in the settlement of trial-bound cases." Lambros, "The Summary Jury Trial and Other Alternative Methods of Dispute Resolution," 103 \textit{F.R.D.} 461, 468 (1984).\textsuperscript{134} The purpose of the summary jury trial is to remove roadblocks to settlement, thus freeing up scarce judicial resources. Id.\textsuperscript{135} William D. Quarles et al., \textit{Summary Adjudication: Dispositive Motions and Summary Trials} 223 (1991).\textsuperscript{136} Id.\textsuperscript{137} Id.\textsuperscript{138} 103 \textit{F.R.D.} at 483.}
presentation is made solely by counsel and may best be described as a combination of opening and closing statements with expected evidence mixed in.\textsuperscript{139} No testimony is taken from witnesses; physical evidence, however, including documents, may be presented.\textsuperscript{140} Objections during the proceeding are not encouraged unless a particularly egregious action takes place.\textsuperscript{141} After hearing both parties' presentations the jury deliberates and offers an advisory verdict that is not binding upon the parties. The hope is that this studied estimate of the value of the claims by an impartial group will encourage a settlement. If after the summary jury trial a settlement is still not reached, the case is scheduled for trial on the merits within 60 days of the completion of the summary jury trial.\textsuperscript{142}

The summary jury trial was developed to deal with cases in which the parties to the litigation adopted strategic positions, most likely with the mistaken belief that the position counsel is advocating has greater strength or merit than a neutral observer assigns to it.\textsuperscript{143} The cases selected must be in a posture to go to trial, i.e., discovery must be completed and no motions should be pending.\textsuperscript{144}

The rationale for the summary jury trial procedure is found in the Federal Rules of Civil Procedure and the court's inherent power to manage its own docket.\textsuperscript{145} It is a tool within the trial judge's discretion to employ or not and cannot be demanded by the parties as of right. It has been most frequently used in the asbestos litigation than anywhere else.

\textbf{VII. Conclusion}

Numerous summary adjudication measures in the American federal judicial system provide opportunities for parties to obtain preliminary relief on a variety of bases absent a full-blown trial by jury on the merits. It appears, however, from a review of the procedures that the system is very much still governed by the historical, traditional American philosophy of individualism which, when all other things are equal, leans in favor of a full, not a summary, adjudication of the merits at the direction of the parties involved. Summary, or

\textsuperscript{139} Id. at 483.
\textsuperscript{140} Id. at 483-84.
\textsuperscript{141} Id. at 484.
\textsuperscript{142} Id. at 484.
\textsuperscript{143} Id. at 486.
\textsuperscript{144} Id. at 470.
\textsuperscript{145} The specific justification is Fed R. Civ. P. 16(a)(1), (5), (c)(11), viewed through Fed. R. Civ. P. 1. Federal Rule of Civil Procedure 1 grants a broad scope to the Rules as a whole, stating that the Rules are to be construed to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (emphasis added). Rule 16 grants the court the power to direct the litigant parties to participate in pretrial conferences in order to expedite the disposition of the action, Fed. R. Civ. P. 16(a)(1), while "facilitating the settlement of the case." Fed. R. Civ. P. 16(a)(5).
provisional, proceedings are full of protections for the adverse party, to insure the opportunity to be heard, fully fairly and impartially, rather than to accomplish a goal of judicial efficiency which promotes the public's interest in an efficient, cost-sensitive judicial system, over the individual's interests in full adjudication of specific claims. The Federal Rules of Civil Procedure attempt to balance the need for "just, speedy and inexpensive" determination of justice with the fairness to the individual that the United States Constitution commands, however, and thus the summary adjudication measures discussed have been guardedly successful in separating the "wheat"—cases needing individualized treatment—and the "chaff"—cases that do not.

The mass tort action has been used as a paradigm complex case by which to judge the summary adjudication measures in place in the United States. The summary adjudication measures fail in most respects to accommodate the particular problems of the mass tort case, indeed of the complex case generally. Methods of summary adjudication and aggregation have been unsuccessful in effecting the efficient resolution of cases involving similar issues and large numbers of similarly situated claimants and defendants. The procedures which exist to minimize delay in the American system might be improved by a widespread recognition that the dedication to party autonomy, in many cases to the exclusion of other legitimate goals of a judicial system, is a nineteenth century notion for a soon-to-be twenty-first century judicial system.