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**FEATURING**

***Aguilar v Atlantic Richfield Co.:* The Definitive  
 Analysis of California Summary Judgment Law**

The California Supreme Court granted review in *Aguilar v Atlantic Richfield Co.* in order to clarify California summary judgment law. It has done that and more. The opinion stands as the supreme court's first comprehensive analysis of state summary judgment law. Further, the court resolved the leading summary judgment issue of the day by firmly endorsing a liberalized summary judgment procedure, akin to that adopted by the U.S. Supreme Court in *Celotex Corp v Catrett*.



**Thomas R. Freeman**

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PAGE 137

**THOMAS R. FREEMAN**

The California Supreme Court granted review in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841, modified at 2001 Daily Journal DAR 7197, in order to clarify California summary judgment law. 25 C4th at 837, 843. It has done that and more. The opinion stands as the supreme court's first comprehensive analysis of state summary judgment law. Further, the court resolved the leading summary judgment issue of the day by firmly endorsing a liberalized summary judgment procedure, akin to that adopted by the U.S. Supreme Court in *Celotex Corp v Catrett* (1986) 477 US 317, 91 L Ed 2d 265, 106 S Ct 2548.

This landmark opinion was authored by Justice Stanley Mosk, one of the country's most highly esteemed progressive jurists, shortly before his death. Justice Mosk's stature is significant because the *Aguilar* opinion describes and justifies the state's newly liberalized summary judgment law. By doing so in such a compre-

**THOMAS R. FREEMAN** is a partner at Bird, Marella, Boxer and Wolpert, Los Angeles.

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hensive manner, Justice Mosk's opinion may well depoliticize the long-simmering dispute over the fairness of this standard, *i.e.*, the argument by some plaintiffs' bar groups that the liberalization of summary judgment law improperly favors the interests of big business and insurance companies at the expense of consumers.

Also significant is the court's restrained interpretation of the liberalized summary judgment standard, which eschews a more aggressive, prodefense interpretation that has been adopted by a minority of federal courts. See Freeman, *Summary Judgment: Untangling the Moving Party's Initial Burden of Production in Federal and California Courts*, 22 CEB Civ LR 230 (Nov. 2000). Indeed, as will be discussed below, the more restrained standard articulated in *Aguilar* is identical to that described by the late U.S. Supreme Court Associate Justice William Brennan. It is difficult to characterize Justice Mosk's and Justice Brennan's uniform view of summary judgment law as biased in favor of big business.

In any event, absent substantial legislative amendment, the *Aguilar* opinion will surely become the Rosetta stone of California summary judgment law. As such, it is essential reading for all state court litigators.

### The Purpose and Justification of Summary Judgment

The *Aguilar* opinion recognizes that the salutary purpose of state summary judgment law is identical to that of federal summary judgment law: "[T]o provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." 25 C4th at 843.

Summary judgment must be granted whenever the moving party establishes that it is entitled to judgment as a matter of law based on material facts that are not genuinely disputed. 25 C4th at 843. In these limited circumstances, the court should grant summary judgment to avoid a trial that would otherwise be rendered "useless" by nonsuit, directed verdict, or other similar device. 25 C4th at 855, quoting *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 374, 100 CR2d 352 (concurring opinion of Justice Chin). In that manner, the summary judgment procedure is justified by a clear principle: Summary disposition is proper whenever the nonmoving party lacks evidence sufficient to sustain a trial verdict in its favor. 25 C4th at 855.

This principle conforms well to federal summary judgment law—but not to California law as interpreted before legislative amendments to CCP §437c that were enacted in 1992 and 1993. But the supreme court in *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 767, 107 CR2d 617, held that the 1992 and 1993 amendments to §437c closed that gap between federal

and state summary judgment law. The *Aguilar* opinion, however, explains in far greater detail that §437c, like Fed R Civ P 56, now requires courts to grant summary judgment when the moving party establishes that the nonmovant's claim or defense would otherwise be properly disposed of by nonsuit or directed verdict. *Aguilar v Atlantic Richfield Co.*, *supra*. In doing so, *Aguilar* provides essential guidance to courts and litigators.

### The Conflict Between Federal and California Law Before 1992–93

The significance of the 1992–93 amendments to CCP §437c can be understood only in light of the conflict between state and federal summary judgment law before 1992. As the court in *Aguilar* noted, a trilogy of U.S. Supreme Court cases decided in 1986 both clarified federal summary judgment law and liberalized the granting of such motions. 25 C4th at 843, citing *Celotex Corp. v Catrett* (1986) 477 US 317, 91 L Ed 2d 265, 106 S Ct 2548; *Anderson v Liberty Lobby, Inc.* (1986) 477 US 242, 91 L Ed 2d 202, 106 S Ct 2505; *Matsushita Elec. Indus. Co. v Zenith Radio* (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348. There were two significant differences between the liberalized federal law and California summary judgment law before the 1992–93 amendments to §437c—making California law significantly more restrictive than federal law. 25 C4th at 847.

First, a *plaintiff* moving for summary judgment in California had to (1) affirmatively establish each element of its claim, as required under federal law as well, and (2) affirmatively negate an essential element of every defense pleaded by the defendant, a burden not imposed under federal summary judgment law. 25 C4th at 847, citing *Hayward v Union High Sch. Dist. v Madrid* (1965) 234 CA2d 100, 44 CR 268. It makes sense to require plaintiffs seeking summary judgment to affirmatively establish each element of their claim because they bear that same burden at trial. It makes little sense, however, to require plaintiffs affirmatively to negate defenses that defendants bear the burden of proving at trial. By that harsh rule, defendants often avoided summary judgment, even when they lacked evidence sufficient to present to a jury, simply because the plaintiff could not affirmatively negate all their defenses—a common problem given the difficulty of "proving a negative." *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 373, 100 CR2d 352 (concurring opinion of Justice Chin).

Second, a *defendant* moving for summary judgment on an issue for which the plaintiff bears the burden of proof at trial was likewise required to affirmatively negate an essential element of the plaintiff's claim. To meet that affirmative-negation burden, the defendant could not rely on evidence (such as discovery responses) establishing that the plaintiff lacked evidence sufficient

to prevail at trial. Rather, the defendant had to independently disprove the claim with affirmative, negating evidence. That is significant because it is often impossible for a defendant to obtain evidence that affirmatively negates a plaintiff's claim, *i.e.*, evidence that proves a negative. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841, modified at 2001 Daily Journal DAR 7197. See also *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 768, 107 CR2d 617; *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 373, 100 CR2d 352 (concurring opinion of Chin, J). By contrast, a defendant seeking summary judgment in *federal* court has a choice of methods in moving for summary judgment on a claim for which the nonmoving plaintiff bears the burden of proof at trial: The defendant may properly rely on affirmative-negating evidence, as under California law, *or* the defendant may establish that the plaintiff's evidence is insufficient to meet its burden of proof at trial.

These two distinctions highlighted a loophole in California summary judgment law before the 1992–93 amendments: Summary judgment is supposed to promote efficiency by permitting courts to dispose of factually unsupported claims and defenses before the parties and the system are put to the expense of trial, but the affirmative-negation requirement precluded courts from disposing of factually unsupported claims and defenses unless the moving party happened to have affirmative-negating evidence, which is often not available. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 853, 107 CR2d 841, modified at 2001 Daily Journal DAR 7197. This loophole permitted parties with baseless claims to force such claims to trial—or extract blackmail settlements from those seeking to avoid such trial-related costs.

### The 1992–93 Amendments: Closing the Summary Judgment Loophole

The court in *Aguilar* recognized that the 1992 and 1993 amendments to §437c moved California summary judgment law “closer” to its federal counterpart as clarified in *Celotex*, *Anderson*, and *Matsushita*. 25 C4th at 848. In particular, the amendments closed the state's summary judgment loophole.

A plaintiff moving for summary judgment in California is no longer required to affirmatively negate all defenses asserted by the defendant. As under federal law, the moving plaintiff need only prove each element of its own claim. 25 C4th at 853. Similarly, a defendant moving for summary judgment is no longer required to affirmatively negate an essential element of the plaintiff's claim. Instead, a defendant may choose to demonstrate that the plaintiff lacks evidence sufficient to prove an essential element of its claim, typically by producing discovery responses and establishing that the plaintiff's

relied-on evidence is insufficient to raise a triable issue. 25 C4th at 853. Thus, defendants now have a choice of methods for obtaining summary judgment. Defendants may support the motion with (1) evidence that affirmatively negates an element of the plaintiff's claim or (2) evidence (including discovery materials) demonstrating that the plaintiff lacks evidence sufficient to prevail at trial.

By closing the summary judgment loophole, the new California law, like its federal counterpart, requires trial courts to grant summary judgment whenever the moving party demonstrates that the nonmovant lacks evidence sufficient to prevail at trial. Summary judgment is properly granted even when the movant lacks affirmative-negating evidence if the movant can demonstrate that the nonmovant's evidence is too weak to support a trial verdict.

Justice Mosk recognized that this new flexibility is justified because it terminates factually unsupported claims and defenses before the parties and the court system commit to the expense of a trial. 25 C4th at 855.

### Four General Principles of Summary Judgment Law

The *Aguilar* court emphasized and explained four general points about the new summary judgment law—a discussion designed to prevent confusion and clarify the law.

**First**, the court noted that the party moving for summary judgment always bears the burden of “persuasion,” *i.e.*, the burden of demonstrating that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. This burden is properly characterized as one of persuasion, not proof, because the movant's task is to persuade the trial court that there is no material fact for the trier of fact to find, not to prove any such fact to the satisfaction of the trial court itself, as if it were sitting as a trier of fact. 25 C4th at 850 n11. This burden of persuasion never shifts to the nonmoving party. 25 C4th at 850.

**Second**, summary judgment procedure provides a system of shifting burdens of production. The moving party always bears an initial burden of production, *i.e.*, a burden to produce evidence sufficient to make a *prima facie* showing that there is no triable issue of material fact. A *prima facie* showing is one that is sufficient to support the producing party's position, but need not *conclusively* establish the point. *Aguilar v Atlantic Richfield Co.*, *supra*.

**Third**, summary judgment burdens are shaped by the applicable burdens of proof at trial: “[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial.” 25 C4th at 851. This is critical to closing the

loophole under prior law. A plaintiff who bears the burden of proof by a preponderance of evidence at trial can meet its *prima facie* burden of production on summary judgment by producing evidence that a reasonable jury could rely on in finding for plaintiff on its claims, given the burden of proof applied at trial. By contrast, a defendant moving for summary judgment against a plaintiff bearing the burden of proof at trial can meet its burden by producing evidence (1) affirmatively negating an essential element of the plaintiff's claim, or (2) demonstrating that the plaintiff lacks evidence sufficient to sustain its burden of proof at trial.

Significantly, this initial burden requires only the production of *prima facie* evidence—the movant is not required to prove its position definitively. Thus, if the initial burden is met, the nonmovant has the opportunity and obligation to produce evidence demonstrating the existence of a triable issue of material fact. 25 C4th at 851.

There is language in prior California decisions stating that, when a defendant moves for summary judgment under the affirmative-negation method, it must “conclusively” negate an essential element of the plaintiff's claim. *Aguilar* recognized that the phrase “conclusively negate” (which was used in *Molko v Holy Spirit Ass'n* (1988) 46 C3d 1092, 1107, 252 CR 122, an opinion written by Justice Mosk) is potentially misleading even under the prior summary judgment law. 25 C4th at 847, 853 n19. However, the court explicitly noted that whatever (questionable) validity the conclusive-negation concept had under the old summary judgment law, it has no continued validity in light of the 1992–93 amendments. 25 C4th at 853 n19. Under the new law, a defendant moving for summary judgment under the affirmative-negation method is merely required to produce *prima facie* (not conclusively negating) evidence. If conclusively negating evidence were required, then there would be no need to provide the nonmoving plaintiff with an opportunity to present evidence in opposition because by definition the movant's “conclusive” evidence could not be rebutted. Thus, the invalidity of the conclusive-negation concept is inherent in the new law's shifting-burdens framework. 25 C4th at 851, 853.

**Fourth**, assuming the moving defendant has met its initial burden of production, a plaintiff opposing summary judgment on an issue for which it bears the burden of proof at trial must produce evidence sufficient to make a *prima facie* showing that there is a triable issue of material fact. Thus, when the plaintiff's trial burden is to prove its claim by a preponderance of the evidence, that plaintiff's evidence must be sufficient to support a jury finding in its favor under that standard. 25 C4th at 851.

The court emphasized, however, that the trial court on summary judgment cannot properly weigh the plaintiff's evidence or inferences as though it were sitting as the

trier of fact. All evidence must be viewed in a light most favorable to the nonmovant, and all reasonable inferences must be drawn in favor of the nonmovant. Thus, if the evidence would *permit* a trier of fact to find for the plaintiff—under the standard of proof applicable at trial—then summary judgment must be denied, even if the trial court believes that the nonmovant would probably lose at trial. 25 C4th at 856.

That does not mean that the trial court cannot assess the sufficiency of the nonmovant's evidence. Under §437c, the trial court must determine whether the plaintiff's evidence is sufficient to support a verdict in its favor, in light of the standard of proof applied at trial. That judicial assessment does not usurp the jury's role. Rather, the court's task is akin to the assessment made on a nonsuit or directed verdict motion, when the court asks: Is the plaintiff's evidence legally sufficient to support a verdict in its favor? Determining the legal sufficiency of evidence is a traditional judicial function, far different than weighing evidence as a trier of fact. 25 C4th at 856 and n26.

The court applied the fourth factor in the context of an antitrust action based on an alleged unlawful conspiracy among competitors, which, if proven, would violate both the federal Sherman Act and its analogue under state law, the Cartwright Act. Assuming that the moving defendant has met its initial burden, the plaintiff opposing summary judgment bears the burden of producing evidence that would allow a reasonable trier of fact to find an unlawful conspiracy by a preponderance of the evidence, “that is, to find an unlawful conspiracy more likely than not.” 25 C4th at 852.

Thus, in the antitrust-conspiracy context, substantive antitrust law limits the range of permissible inferences. A plaintiff making such a claim must produce more than ambiguous evidence showing or implying conduct that is just as consistent with permissible, noncollusive conduct as it is with unlawful, collusive conduct. Otherwise, the antitrust laws could be used to chill procompetitive conduct—the very thing that the antitrust laws were designed to encourage. Antitrust law therefore requires plaintiffs to produce evidence on summary judgment (as at trial) that “tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively.” 25 C4th at 852. This illustrates the manner in which the underlying substantive law limits the range of permissible inferences, and how such substantive-law limitations affect rulings on summary judgment. 25 C4th at 852; see *Saetzler v Advanced Group 400* (2001) 25 C4th 763, 776, 107 CR2d 617 (defense summary judgment motion properly granted in case involving claim of landlord's negligent failure to provide adequate security because plaintiff failed to produce evidence that would support finding that it was “more probable than not” that additional security would have prevented attack).

## Rejection of Mere-Assertion Burden

*Aguilar* calls attention to one *significant* difference between federal law, as interpreted by some courts, and California's new summary judgment law. By doing so, the court makes clear that, although California has significantly liberalized summary judgment law, it has not adopted the most aggressive, prodefense interpretation of federal summary judgment law employed by some federal courts.

There is some authority that, under federal law, a defendant moving for summary judgment meets its initial burden of production merely by "pointing out through argument" that the plaintiff lacks evidence sufficient to meet its trial burden. 25 C4th at 855, quoting *Fairbank v Wunderman Cato Johnson* (9th Cir 2000) 212 F3d 528, 532. By that standard, a defendant can meet its initial burden of production merely by asserting that the plaintiff lacks supporting evidence. Some have argued that any such mere-assertion standard would "permit summary judgment procedure to be converted into a tool for harassment." *Celotex Corp. v Catrett* (1986) 477 US 317, 332, 91 L Ed 2d 265, 106 S Ct 2548 (dissenting opinion of Brennan, J). Indeed, as recognized in a modification to the *Aguilar* opinion, there is substantial authority that this type of mere-assertion burden is *not* a correct interpretation of federal law. See modification to *Aguilar v Atlantic Richfield Co.* (July 11, 2001) 2001 Daily Journal DAR 7197, citing Schwarzer, *Cal Practice Guide: Federal Civil Procedure Before Trial* ¶14:137 (Rutter 2001). See also Freeman, *Summary Judgment: Untangling the Moving Party's Initial Burden of Production in Federal and California Courts*, 22 CEB Civ LR 230 (Nov. 2000) (citing federal authorities and concluding that mere-assertion burden is improper under federal law).

Whatever the proper standard under *federal* law, the court in *Aguilar* makes it clear that parties moving for summary judgment in California courts must do more than merely "point[] out through argument." 25 C4th at 855. The moving defendant must always produce *evidence* (not mere argument or assertion) demonstrating that the nonmovant lacks evidence sufficient to prevail at trial. 25 C4th at 854. That "evidence" may include discovery materials, which are often relied on to demonstrate that the nonmoving plaintiff's evidence is insufficient to support its claims at trial. 25 C4th at 854 n22. See also *Scheidig v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 70, 81 CR2d 360.

## Aguilar Adopts Justice Brennan's View of Summary Judgment

In recognizing that the 1992-93 amendments moved California closer to federal summary judgment law, the court in *Aguilar* adopted a version of summary judgment

law remarkably similar to that articulated by the late Justice William Brennan. In Justice Brennan's *Celotex* dissent, he agreed with the majority that, if the burden of persuasion at trial lies with the nonmoving party, the moving party may meet its initial burden on summary judgment by the same two methods authorized in *Aguilar*: "First, the moving party 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." *Celotex Corp. v Catrett* (1986) 477 US 317, 331, 91 L Ed 2d 265, 106 S Ct 2548 (dissenting opinion of Brennan, J).

Further, as the California Supreme Court did in *Aguilar*, Justice Brennan recognized that the second method for obtaining summary judgment, which was *Celotex's* key innovation, was justified because it would prevent "useless" trials: "If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Celotex Corp. v Catrett, supra*; see also *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 885, 107 CR2d 841, modified at 2001 Daily Journal DAR 7197.

Justice Brennan, however, cautioned that the *Celotex* framework, which he fully endorsed, could not properly be read to authorize moving defendants to meet their initial burden of production merely by asserting that the nonmoving party lacks sufficient evidence. *Celotex Corp. v Catrett* (1986) 477 US 317, 332, 91 L Ed 2d 265, 106 S Ct 2548 (dissenting opinion of Brennan, J). Instead, the moving defendant must affirmatively demonstrate that the plaintiff lacks evidence to support its claims, in light of the standard of proof applicable at trial. To meet that standard, the defendant must do more than merely argue that the plaintiff lacks supporting evidence.

This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record.

*Celotex Corp. v Catrett, supra.*

The *Aguilar* opinion adopts this view. A defendant seeking summary judgment by demonstrating that the nonmoving plaintiff lacks sufficient evidence must "present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 855, 107 CR2d 841, modified at 2001 Daily Journal DAR 7197.

By requiring moving defendants to demonstrate—not merely assert—that the nonmoving plaintiff lacks supporting evidence, the court in *Aguilar* addresses Justice Brennan's only concern about *Celotex's* liberalized summary judgment standard. That protection, now clearly enshrined as California law, should end any criticism that California's new summary judgment law is unfair to plaintiffs.