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## FEATURING

Despite the perceived differences, the summary judgment movant's initial burden of production in federal courts is the same as it is in California courts, not because the state standard is just as lax as the federal standard, but because the federal standard is as exacting as that of California. Although there is conflicting authority, as a practical matter, those making summary judgment motions under existing law should not base their motions on unsupported assertions, but should conduct discovery and obtain responses to support any motion, thus avoiding the risk that victory will be overturned on appeal.



Thomas R. Freeman

### Summary Judgment: Untangling the Moving Party's Initial Burden of Production in Federal and California Courts

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#### Introduction

The similarities between federal and California summary judgment laws have been much emphasized by California's lower appellate courts over the past five years. The resulting "move toward the federal standard governing burden of proof on summary judgment motions" (*Hunter v Pacific Mechanical Corp.* (1995) 37 CA4th 1282, 1286, 44 CR2d 335) represents a "dramatic change" in state law. *Certain Underwriters at Lloyd's of London v Superior Court* (1997) 56 CA4th 952, 958, 65 CR2d 821. The federal standard is of particular importance now that the California Supreme Court has the opportunity to approve or reject this movement. See

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Freeman, *Aguilar v Atlantic Richfield Corp.*: Summary Judgment Issues in an Antitrust Case, 22 CEB Civ LR 160 (Aug. 2000), discussing *Aguilar v Atlantic Richfield Corp.* (review granted May 17, 2000, S086738; CAVEAT: Cal Rules of Ct 977 restricts citing superseded opinion at 78 CA4th 79 (advance reports), 92 CR2d 351), reported at 22 CEB Civ LR 52 (Mar. 2000).

Just as important as the similarities, however, are the perceived differences. The most significant of these is the movant's initial burden of production when the nonmovant bears the burden of proof at trial, an initial burden that some federal and California courts have concluded is less exacting in federal court and more stringent in California courts. See *Fairbank v Wunderman Cato Johnson* (9th Cir 2000) 212 F3d 528, 532; *Certain Underwriters at Lloyd's of London v Superior Court*, *supra*.

As this article argues, however, the movant's initial burden of production in federal court is identical to that in California, not because California's standard is just as lax as the federal standard, but because the federal standard, properly interpreted, is just as exacting as the California standard. The assumption that the federal courts apply a lax mere-assertion burden (requiring the movant merely to suggest the possibility "that plaintiff cannot prove its case" (see *Addy v Bliss & Glennon* (1996) 44 CA4th 205, 214, 51 CR2d 642), while the state standard is stricter, is simply wrong.

The vast majority of federal appellate courts reject the mere-assertion burden. See, e.g., *Nissan Fire & Marine Ins. Co. v Fritz Cos., Inc.* (9th Cir 2000) 210 F3d 1099, 1102. Although there is some conflicting authority (including *Fairbank v Wunderman Cato Johnson*, *supra*, in which a Ninth Circuit panel ignored *Nissan* and held that the federal and California burdens differ in precisely that manner), counsel moving for summary judgment are well advised to meet the stricter burden.

### **Celotex: The "Nonmovant Has Insufficient Evidence" Method of Prevailing on Summary Judgment**

Before *Celotex Corp. v Catrett* (1986) 477 US 317, 91 L Ed 2d 265, 106 S Ct 2548, most federal courts and all California state courts recognized only one method for prevailing on summary judgment: The moving party was required to present affirmative evidence negating an essential element of the nonmovant's claim, even when the burden of persuasion at trial was on the nonmovant. See *Catrett v Johns-Manville Sales Corp.* (DC Cir 1985) 756 F2d 181, 184 n10, rev'd *Celotex Corp. v Catrett* (1986) 477 US 317, 91 L Ed 265, 106 S Ct 2548; *Barnes v Blue Haven Pools* (1969) 1 CA3d 123, 127, 81 CR 444. If the moving party could not affirmatively negate

the nonmovant's claim, the nonmovant was not required to produce evidence supporting its claims. *Adickes v S.H. Kress & Co.* (1970) 398 US 144, 160, 26 L Ed 2d 142, 90 S Ct 1598; *Barnes v Blue Haven Pools*, *supra*. By virtue of that affirmative-negation standard, nonmovants, usually plaintiffs, could force defendants to trial on issues for which they lacked evidence sufficient to sustain a rational jury verdict.

In *Celotex*, however, the U.S. Supreme Court recognized that the party moving for summary judgment has a second, alternative method for meeting its initial burden of production on issues for which the nonmovant bears the burden of persuasion at trial. Instead of producing evidence negating the nonmovant's claim (an affirmative-negation motion), the movant has the option of showing that the nonmovant lacks evidence sufficient to support its claims (an insufficient-evidence motion). See *Celotex Corp. v Catrett* (1986) 477 US 317, 322, 91 L Ed 265, 273, 106 S Ct 2548. Responding to the 1992-93 amendments to CCP §437c, the lower appellate courts in California have uniformly concluded that the same alternative method is now available in state court. See *Union Bank v Superior Court* (1995) 31 CA4th 573, 590, 37 CR2d 653; *Scheidig v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 76, 81 CR2d 360. As any state-court practitioner can testify, the creation of this new method for obtaining summary judgment represents a "dramatic change" in summary judgment law. *Certain Underwriters at Lloyd's of London v Superior Court* (1997) 56 CA4th 952, 958, 65 CR2d 821.

### **What Is the Movant's Burden on an Insufficient Evidence Summary Judgment Motion?**

In recognizing that a summary judgment motion can be based on the nonmovant's lack of evidence, however, *Celotex* affirmed the general rule that, unless the movant meets its initial burden of production, the nonmovant need not produce evidence establishing a genuine issue of material fact. *Celotex Corp. v Catrett* (1986) 477 US 317, 323, 91 L Ed 265, 273, 106 S Ct 2548. But *Celotex* did not clearly resolve this important question: What must a party moving for summary judgment do to show that the nonmovant lacks evidence sufficient to support its claims?

### **The Mere-Assertion Burden: An Incorrect Minority View**

#### **Federal Courts**

The Fourth Circuit has concluded that, under *Celotex*, the moving party need only argue that the movant lacks evidence sufficient to support its claims—it need not support that argument by citation to discovery responses or evidence demonstrating that the nonmovant actually

lacks sufficient evidence to support a trial verdict. See *Cray Communications, Inc. v Novatel Computer Sys., Inc.* (4th Cir 1994) 33 F3d 390, 394. This is the mere-assertion burden, which requires the moving defendant only to suggest “the possibility that the plaintiff cannot prove his case.” See *Addy v Bliss & Glennon* (1996) 44 CA4th 205, 214, 51 CR2d 642 (rejecting this lax “federal” standard in favor of more exacting California standard). But six of the seven federal circuits that have considered the issue have expressly rejected the mere-assertion burden, as has one of the most influential summary judgment commentators, Judge William W. Schwarzer. Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 FRD 441 (1991).

The *Cray* decision demonstrates just how lax this standard is. The defendant in *Cray* moved for summary judgment on the grounds that the plaintiff lacked evidence sufficient to support its claims and stated in its moving papers that plaintiff

deposed no less than thirteen [defendant] employees and [defendant] produced thousands of pages of documents, yet not one piece of [defendant] deposition testimony nor one single [defendant] document supports [plaintiff’s] fraud claim.

*Cray Communications, Inc. v Novatel Computer Sys., Inc.*, *supra*. The Fourth Circuit held that “[t]hose statements alone sufficed to support [defendant’s] motion for summary judgment and to shift the burden of production to [plaintiff].” 33 F3d at 394. Significantly, the moving defendant was not required to support its assertion that the plaintiff lacked evidence with any citation to discovery responses or evidence. In essence, the defendant simply challenged the plaintiff to produce evidence supporting its claims—after merely stating, but not demonstrating, that the plaintiff had no such evidence. The Fourth Circuit thereby concluded that the defendant’s “statements alone” were sufficient to meet its initial burden of production and force the plaintiff to produce its evidence.

#### California Courts

California courts, like the Fourth Circuit in *Cray*, have also interpreted the *federal* standard to require only that the movant assert that the nonmovant lacks evidence without supporting the assertion with citation to record testimony or discovery responses establishing that absence of evidence. See *Certain Underwriters at Lloyd’s of London v Superior Court* (1997) 56 CA4th 952, 957, 65 CR2d 821. Indeed, Justice Paul Turner, author of the ground breaking opinion in *Union Bank v Superior Court*, *supra*, has interpreted the federal standard to require that the moving defendant merely suggest the possibility that the nonmovant lacks adequate

evidence. *Union Bank v Superior Court* (1995) 31 CA4th 573, 37 CR2d 653; see also Turner, *California’s Summary Judgment Law*, 19 CEB Civ LR 198, 206 (Aug. 1997). On the basis of that interpretation, most California courts have concluded that the state and federal standards differ because California places a higher burden on the movant, requiring it to demonstrate the lack of supporting evidence by reference to the nonmovant’s inadequate discovery responses or evidence. *Certain Underwriters at Lloyd’s of London v Superior Court* (1997) 56 CA4th 952, 960, 65 CR2d 821; *Addy v Bliss & Glennon* (1996) 44 CA4th 205, 214, 51 CR2d 642.

The California state court rejection of the “federal” mere-assertion burden may not be uniform, however. In *Hunter v Pacific Mechanical Corp.* (1995) 37 CA4th 1282, 1287, 44 CR2d 335, the court arguably adopted as a matter of state law the same lax “federal” standard rejected by other California courts. See *Addy v Bliss & Glennon* (1996) 44 CA4th 205, 214, 51 CR2d 642 (interpreting *Hunter*); but see *Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 78, 81 CR2d 360 (interpreting *Hunter* as requiring showing that nonmovant lacks evidence). In that manner, confusion about the proper federal standard arguably led the *Hunter* court virtually to eliminate the moving party’s burden of production.

#### Wright & Miller and the Federal Court’s Power To Grant Summary Judgment Sua Sponte

The basis for the mere-assertion standard is dubious. The courts that have interpreted *Celotex* as authorizing such a burden have relied almost exclusively on a single passage from the Wright & Miller treatise that states:

[T]he Supreme Court implicitly recognized the power of the court to render summary judgment *sua sponte* in *Celotex Corporation v. Catrett*, when Justice Rehnquist, writing for a majority of the Supreme Court, suggested that the power of the court to enter summary judgment *sua sponte* supports the conclusion that the moving party on a summary-judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case.

10A Wright, Miller & Kane, *Federal Practice & Procedure* §2720 at p 345 (3d ed 1998). See *Cray Communications, Inc. v Novatel Computer Sys., Inc.* (4th Cir 1994) 33 F3d 390, 394 (citing Wright & Miller §2720); *Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 75, 81 CR2d 360 (same); *Certain Underwriters at Lloyd’s of London v Superior Court* (1997) 56 CA4th 952, 957, 65 CR2d 821 (same).

The passage appears to conclude that the supreme court’s recognition in *Celotex* of the federal court’s power to grant summary judgment *sua sponte* suggests the existence of a mere-assertion burden. See *Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 75, 81

CR2d 360 (interpreting Wright & Miller §2720). Federal district court judges do have authority to grant summary judgment sua sponte, without the filing of a properly supported motion, as long as the party against whom judgment is entered was provided an adequate opportunity to demonstrate the existence of a genuine issue of material fact. See *O'Keefe v Van Boeing* (9th Cir 1996) 82 F3d 322, 324. California courts apparently lack that sua sponte power. See *Certain Underwriters at Lloyd's of London v Superior Court* (1997) 56 CA4th 952, 958, 65 CR2d 821.

The logic of the Wright & Miller passage appears to be that if the district court can require the party with the burden of persuasion at trial to demonstrate that it has evidence sufficient to sustain a jury verdict, then the opposing party should likewise be able to do so. But logic does not require that courts and litigants bear the same burden (or lack of burden) when putting a party to the insufficient-evidence test. Although courts may be trusted to invoke their sua sponte powers for legitimate case-management reasons, there is a risk that litigants given the same discretionary power might use summary judgment for discovery or harassment purposes. This risk is minimized by requiring a party to support its claim that the nonmovant lacks evidence to refer to discovery materials or evidence that demonstrates an actual absence of evidence. See *Celotex Corp. v Catrett* (1986) 477 US 317, 332, 91 L Ed 2d 265, 106 S Ct 2548 (Brennan, J., dissenting). Thus, to the extent that the Wright & Miller treatise suggests that a mere-assertion burden is logically compelled by the court's sua sponte powers, it is incorrect.

Following Wright & Miller, California courts have interpreted Justice Rehnquist's reference to the power of the district court to grant summary judgment sua sponte to mean that *Celotex* implies a mere-assertion burden. See *Certain Underwriters at Lloyd's of London v Superior Court* (1997) 56 CA4th 952, 958, 65 CR2d 821. But Justice Rehnquist's point was that if the district court has authority sua sponte to grant summary judgment based on a party's lack of sufficient evidence, then a party should be permitted to move for summary judgment on that same basis. That does not imply, however, that the movant, like the district court, may put the nonmovant to the test of producing supporting evidence merely by challenging it to do so. Such a conclusion is inconsistent with Fed R Civ P 56 because it would eviscerate the movant's initial burden when making an insufficient evidence motion. See *Adickes v S.H. Kress & Co.* (1970) 398 US 144, 157, 160, 26 L Ed 2d 142, 90 S Ct 1598.

### ***The True Federal Burden: Demonstrating the Absence of Sufficient Evidence***

The vast majority of federal appellate courts that have addressed this issue have held that Fed R Civ P 56 and *Adickes v S.H. Kress & Co.*, *supra*, firmly place on the movant the initial burden of demonstrating that there is no genuine issue for trial, no matter which method the moving party uses. An insufficient-evidence showing must be demonstrated, not merely asserted, just as an affirmative-negation showing must be supported. See *Clark v Coates & Clark, Inc.* (11th Cir 1991) 929 F2d 604, 607 (citing *Adickes v S.H. Kress & Co.*, *supra*).

Almost all the federal circuits that have considered the issue have expressly rejected the mere-assertion burden in favor of a requirement that the movant support a summary judgment motion by reference to the nonmovant's inadequate discovery responses or evidence, *i.e.*, the movant must demonstrate that the nonmovant lacks the necessary evidence to prevail at trial. See Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 FRD 441 (1991). A "close reading" of the opinion in *Celotex* is consistent with this more stringent burden. *Beatty v Washington Metro Area Transit Auth.* (DC Cir 1988) 860 F2d 1117, 1120.

#### ***Celotex***

The wrongful death plaintiff in *Celotex* alleged that the decedent died as a result of exposure to defendant's asbestos products. Defendant moved for summary judgment on the grounds that plaintiff lacked evidence sufficient to prove any such exposure and supported its motion by specific reference to plaintiff's interrogatory responses that demonstrated that plaintiff had no evidence showing that decedent had been exposed to defendant's products.

Justice Rehnquist's plurality opinion announced the court's decision, answering in the affirmative the sole and limited (although significant) question before it, *i.e.*, whether a summary judgment motion may be based on the insufficiency of plaintiff's evidence. Because the moving defendant in *Celotex* pointed to discovery materials demonstrating that plaintiff lacked evidence to support his claims, the court was not even asked to consider a mere-assertion burden.

Justice Rehnquist's opinion is consistent with Fed R Civ P 56, which imposes on the movant the burden to demonstrate the propriety of summary judgment:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

*Celotex Corp. v Catrett* (1986) 477 US 317, 323, 91 L Ed 2d 265, 106 S Ct 2548, quoting Fed R Civ P 56(c). Although *Celotex* holds that affirmative *negating* evidence is not required, the motion must be supported at least by "the 'pleadings, depositions, answers to interrogatories, and admissions on file,'" showing the absence of a genuine issue for trial. 477 US at 324.

The *Celotex* opinion must be read in light of *Adickes v S.H. Kress & Co.* (1970) 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598, in which the high court held that Rule 56 requires that the moving party always bear the initial burden of demonstrating the absence of a genuine issue for trial. In *Adickes*, the moving defendant used the affirmative-negation method and was required to produce admissible evidence that negated the nonmovant's claim. The court in *Celotex* did not overrule *Adickes*—it simply authorized the insufficient-evidence motion as an alternative method for obtaining summary judgment. Indeed, the Court in *Celotex* expressly reaffirmed *Adickes*' holding that the movant always bears the initial burden of showing that there is no genuine issue for trial. *Celotex Corp. v Catrett* (1986) 477 US 317, 325, 91 L Ed 2d 265, 106 S Ct 2548. The movant meets that burden by referring to affidavits, if any, or to discovery materials. 477 US at 323. Just as the movant using the affirmative-negation method must produce admissible evidence negating the nonmovant's claim, the movant using the insufficient-evidence method must produce discovery materials or evidence demonstrating that the nonmovant lacks evidence sufficient to meet its trial burden.

#### The White *Celotex* Concurrence

Justice White, who cast the deciding fifth vote in *Celotex*, emphasized what was implicit in Justice Rehnquist's opinion: "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." 477 US at 328 (White, J., concurring). Before filing a motion, the moving party bears the discovery burden of eliciting record evidence sufficient to demonstrate that the nonmovant lacks adequate evidence. The movant's motion, if based on this absence of evidence, must be supported by references to discovery materials demonstrating that lack of evidence. *Celotex Corp. v Catrett, supra*.

#### Other Federal Circuit Courts

The D.C. Circuit Court of Appeal, relying on Justice Rehnquist's opinion as illuminated by Justice White's concurrence, concluded that, in assessing the movant's initial showing, the crucial question is always whether

the movant has *shown* an absence of evidence supporting the nonmovant's claim—not whether the movant has *asserted* an absence of evidence. *Beatty v Washington Metro Area Transit Auth.* (DC Cir 1988) 860 F2d 1117, 1120.

The Eleventh Circuit, in *Clark v Coates & Clark, Inc.* (11th Cir 1991) 929 F2d 604, 607, recognized that the *Celotex* discussion of the movant's initial burden of production is "commonly misunderstood and misapplied." Although *Celotex* held that a party may move for summary judgment on the grounds that the nonmovant lacks evidence sufficient to meet its burden of persuasion at trial, it did not change the "general rule" that the moving party always bears the initial burden of demonstrating the propriety of summary judgment by pointing to "materials on file" that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. 929 F2d at 608; see also *Adickes v S.H. Kress & Co.* (1970) 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598. Thus, "[e]ven after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial." 929 F2d at 608. See also *Russ v International Paper Co.* (5th Cir 1991) 943 F2d 589, 591 (characterizing mere-assertion burden as a "common misinterpretation" of *Celotex*, definitively rejected in *Clark*).

More recently, the Seventh Circuit, in *Logan v Commercial Union Ins. Co.* (7th Cir 1996) 96 F3d 971, 978, rejected the type of mere-assertion burden approved in *Cray*, stating:

even after *Celotex*, an unsupported—or "naked"—motion for summary judgment does not require the nonmovant to come forward with evidence to support each and every element of its claims. Only after the movant has articulated *with references to the record* and to the law specific reasons why it believes there is no genuine issue of material fact must the nonmovant present evidence sufficient to demonstrate an issue for trial.

96 F3d at 979 (emphasis added). See also *Carmona v Toledo* (1st Cir 2000) 215 F3d 124, 132 ("[t]he moving party may *point to evidentiary materials already on file*—such as answers to interrogatories, affidavits, or portions of depositions—that demonstrate that the non-moving party will be unable to carry its burden of persuasion at trial"). *St. Paul Mercury Ins. Co. v Williamson* (5th Cir, Aug. 17, 2000) 224 F3d 425, 440, quoting *Ashe v Corley* (5th Cir 1993) 992 F2d 540, 543 ("[i]t is not enough for the moving party to merely make a conclusory statement that the other party has no evidence to prove his case").

#### A Split in the Ninth Circuit

The Ninth Circuit has addressed the nature of the movant's initial burden twice in 2000, with one panel rejecting the mere-assertion burden and another em-

bracing it 10 days later. See *Nissan Fire & Marine Ins. Co. v Fritz Cos.* (9th Cir 2000) 210 F3d 1099; *Fairbank v Wunderman Cato Johnson* (9th Cir 2000) 212 F3d 528.

### **Nissan Fire & Marine**

Justice William Fletcher, a former Boalt Hall federal civil procedure professor, wrote in *Nissan Fire & Marine Ins. Co. v Fritz Cos.* (9th Cir 2000) 210 F3d 1099 that the innovation of *Celotex* was the recognition that summary judgment could be based on the nonmovant's lack of adequate evidence. By demonstrating that plaintiff "failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to [defendant's] asbestos products," the moving defendant directed "the district court's attention to Catrett's answer to interrogatories admitting that she had no witnesses who could testify that her husband had been exposed during the statutory period to asbestos manufactured by [defendant] Celotex, and to the absence of any other evidence of exposure in the materials compiled during discovery." 210 F3d at 1105, quoting *Celotex Corp. v Catrett* (1986) 477 US 317, 320, 91 L Ed 2d 265, 106 S Ct 2548.

Justice Fletcher cautioned that "*Celotex* did not hold that a moving party without the ultimate burden of persuasion at trial may use a summary judgment motion as a substitute for discovery." 210 F3d at 1105. That is, the movant "may not require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence." 210 F3d at 1105. Relying on *Clark v Coates & Clark, Inc.* (11th Cir 1991) 929 F2d 604, 608, Justice Fletcher said:

[I]n order to carry its initial burden of production by pointing to the absence of evidence to support the nonmoving party's claim or defense, the moving party will have made reasonable effort, using the normal tools of discovery, to discover whether the nonmoving party has enough evidence to carry its burden of persuasion at trial.

210 F3d at 1105. The *Nissan* court stated that the motion is properly supported if the movant points to those discovery materials demonstrating the inadequacy of the nonmovant's evidence, thus rejecting the type of mere-assertion burden approved in *Cray* and described in *Certain Underwriters* and other California cases as the "federal" burden.

### **Fairbank**

The clarification provided by *Nissan* was undermined just 10 days later by *Fairbank v Wunderman Cato Johnson* (9th Cir 2000) 212 F3d 528. There, a different panel of the Ninth Circuit held that the movant's burden

under California law (movant must demonstrate the nonmovant's lack of evidence by reference to evidence or discovery materials) is more exacting than under federal law, which it concluded requires only that the movant argue that the nonmovant lacks evidence. 212 F3d at 532.

*Fairbank* is unique because it posed the direct question of whether California and federal summary judgment laws differ in terms of the movant's initial burden of production. The *Fairbank* defendant's summary judgment motion in California state court was granted as to a party whose presence had initially defeated diversity jurisdiction, but denied as to other parties. After the state court ruling, the case was removed to federal court, where the remaining defendant made the same summary judgment motion that had failed in state court. The district court granted the motion. On appeal, the panel noted that principles of comity limit the district court's discretion to consider a motion previously denied in state court, but concluded that if federal and state summary judgment laws differ in some material respect, then the court could properly consider and grant the previously denied summary judgment motion.

In considering whether state and federal summary judgment laws differed, the panel focused on the movant's initial burden of production. It concluded that, under federal law, the movant meets its initial burden merely by "pointing out through argument" that the nonmovant lacks sufficient evidence. 212 F3d at 532. Unlike state law, the "argument" need not be supported by reference to evidence or discovery materials demonstrating the absence of evidence; "argument alone" is sufficient to meet the movant's initial burden. 212 F3d at 532. As authority, the court cited only the passage from *Wright & Miller*, discussed above, and several California decisions that likewise presume that *Celotex* authorizes a mere-assertion burden in federal court. The *Fairbank* panel did not cite or consider *Nissan Fire & Marine Ins. Co.* It concluded that because *Celotex* authorizes a mere-assertion burden, but California law does not, the district court's grant of the previously denied summary judgment motion did not offend principles of comity.

## **Is There a Difference Between the Federal and California Burdens?**

Under California law, the summary judgment movant must support its assertion that the nonmovant lacks sufficient evidence by referring to evidence or discovery materials demonstrating that lack of evidence. See *Scheidung v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 81, 81 CR2d 360. The initial burden in federal court as described in *Nissan Fire & Marine Ins. Co.* is identical. *Fairbank*, on the other hand, is authority for the proposition that federal and state summary judgment laws dif-

fer in terms of the moving party's initial burden of production and plainly supports a mere-assertion burden under federal law.

*Fairbank* is inconsistent with *Adickes* and is not supported by *Celotex*. Not only does it conflict with the Ninth Circuit's prior decision in *Nissan*, it also conflicts with almost all federal circuit opinions that have addressed the issue. The safest course for litigants and courts is thus to recognize that, until the U.S. Supreme Court provides further guidance, the best course is to acknowledge that there is no difference between federal and California burdens of production on summary judgment.

This is not to say that the mere-assertion burden has nothing to recommend it. The discovery burden imposed under the *Adickes/Celotex* standard may be expensive in many cases, and there is the risk that courts will assess the movant's burden so strictly that meritless cases will proceed to trial. Indeed some California courts appear to have adopted this severe approach, maintaining a hostility to summary judgment that is inconsistent with *Celotex* and the 1992–93 amendments to CCP 437c. See, e.g., *Brantley v Pisaro* (1996) 42 CA4th 1591, 1605, 50 CR2d 431. On the other hand, the mere-assertion burden raises the substantial risk that litigants will misuse summary judgment for discovery or harassment purposes, as Justice Brennan feared. See *Celotex Corp. v Catrett* (1986) 477 US 317, 332, 91 L Ed 2d 265, 106 S Ct 2548.

As I have argued in this article, however, the best interpretation of existing federal law does not support the mere-assertion burden, which California courts have also rejected.

### **As a Practical Matter: Meeting the Initial Burden**

To recap, if a party moves for summary judgment on an issue for which it does *not* bear the burden of persuasion at trial, then it may either affirmatively negate an essential element of the nonmovant's claim or defense, or demonstrate that the nonmovant lacks evidence suffi-

cient to support its claims at trial. A party proceeding under the affirmative-negation method must support its motion with admissible evidence negating an essential element of the nonmovant's claim or defense. See *High Tech Gays v Defense Indus. Sec. Clearance Office* (9th Cir 1990) 895 F2d 563, 574; *Brantley v Pisaro* (1996) 42 CA4th 1591, 1598, 50 CR2d 431.

A party proceeding on the grounds that the nonmovant lacks evidence sufficient to support its claims must submit evidence or discovery materials demonstrating that lack of adequate supporting evidence. Such a demonstration can be based on, e.g.:

- discovery materials that identify the evidence on which the nonmovant relies to support its claims, in conjunction with legal argument establishing that the evidence is either inadmissible or otherwise insufficient to support a rational jury verdict;
- discovery responses demonstrating that the nonmovant has no evidence supporting an essential element of its claim (*Celotex Corp. v Catrett* (1986) 477 US 317, 320, 91 L Ed 2d 265, 106 S Ct 2548 (nonmoving plaintiff's interrogatory responses failed to identify any witness to support claim that decedent was exposed to moving defendant's asbestos products));
- discovery responses that fail to identify or describe evidence sufficient to support the nonmovant's claim (*Union Bank v Superior Court* (1995) 31 CA4th 573, 592, 37 CR2d 653); or
- affirmative evidence that, in conjunction with the nonmovant's deficient evidence as referenced in the discovery materials, establishes the insufficiency of the nonmovant's claim.

As a practical matter, those making summary judgment motions under existing federal and California law should not base their motions on unsupported assertions no matter which summary judgment method they use. Given the shaky support for the mere-assertion standard, the best course is to conduct discovery and obtain responses to support any insufficient-evidence motion, thus avoiding the risk that victory will be overturned on appeal.