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ONE TOO MANY RIVERS TO CROSS: RULE 50 PRACTICE IN THE MODERN ERA OF SUMMARY JUDGMENT

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I. INTRODUCTION

The summary judgment procedure has undergone a significant transformation in recent years. Historically, summary judgment was a rarely used procedural device, designed "to preserve the court from frivolous defenses and to defeat attempts to use formal pleading as means to delay the recovery of just demands."[1] Even after adoption of the Federal Rules of Civil Procedure, which extended summary judgment to all cases and parties,[2] courts remained wary of summary disposition because they "perceiv[ed] it as threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and determinations of credibility, and the right to have one's cause advocated by counsel before a jury."[3] The standard formulation was that summary judgment should be denied whenever there was the "slightest doubt as to the facts."[4]

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1. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902) (quoted in Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 76 (1990)).

2. *See* Issacharoff & Loewenstein, *supra* note 1, at 76 (discussing adoption of the Federal Rules and their impact on summary judgment).

3. Issacharoff & Loewenstein, *supra* note 1, at 77 (citing Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949)).

4. Armco Steel Corp. v. Realty Inv. Co., 273 F.2d 483, 484 (8th Cir. 1960) (cited in 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2532, at 307 (1995)).

In recent years, summary judgment has been recast as a primary mechanism for disposing of litigation.[5] The strong presumption against the use of summary judgment has given way to a vigorous employment of the procedure.[6] In theory, courts still adhere to the view that summary judgment should be granted with caution, particularly in cases where state of mind is a decisive element of a claim or defense.[7] In practice, the granting of summary judgment has become a routine part of federal practice.[8]

The Supreme Court provided the legal impetus for the change in the approach to summary judgment in a trilogy of cases decided in the mid-1980s, wherein the Court restructured the respective burdens of plaintiffs and defendants in the summary judgment process.[9] Of particular note, the Court held that the governing standard of persuasion applied at the summary judgment stage; this meant that the plaintiff was typically required to proffer affirmative evidence to defeat a motion for summary judgment, while the defendant was required to adduce little proof in support of its motion.[10] The Court equated its role in ruling on a motion for summary judgment with its role in ruling on a directed verdict[11] and suggested that a court could properly use the summary procedure to assess the plaintiff's chances of prevailing at trial. The Court's decisions had the effect of re-

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5. *See* Issacharoff & Loewenstein, *supra* note 1, at 89 (asserting that "summary judgment has moved beyond its originally intended role as a guarantor of the existence of material issues to be resolved at trial and has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial"); Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 319-20 nn.313-14 (1995) (citing to a pronounced increase in the use of the summary judgment procedure).

6. There are strong indications in many recent decisions that courts have essentially collapsed the fact-finding function into the summary judgment procedure and have thereby converted summary judgment into a "mini-trial" on the merits. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229 (1993) (stressing that the summary judgment procedure has been interpreted "to permit courts to draw inferences in defendants' favor, to weigh evidence, to decide the credibility of witnesses, and to require plaintiffs to prove their cases at the summary judgment stage") (citations omitted).

7. Miller v. Federal Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990).

8. This is true even in civil rights cases, which typically involve "subtle questions of credibility and intent that only a factfinder faced with a live witness should decide." McGinley, *supra* note 6, at 208 n.19 (citing to cases demonstrating a tendency on the part of courts to grant summary judgment "more aggressively in civil rights cases"); *see also* Issacharoff & Loewenstein, *supra* note 1, at 88-89 n.84 (citing to several employment discrimination cases in asserting that "[c]ourts have shown a new willingness to resolve issues of intent or motive at the summary judgment stage").

9. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986), *cert. denied*, 484 U.S. 1066 (1988); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

10. *Compare Anderson*, 477 U.S. at 252 (discussing plaintiff's burden as nonmoving party) *with Celotex Corp.*, 477 U.S. at 323 (discussing defendant's burden as moving party).

11. *Anderson*, 477 U.S. at 250-52.

quiring a plaintiff to try her case in response to a motion for summary judgment, while they afforded courts a much broader role in assessing the merits of a plaintiff's case at the summary judgment stage.[12]

The Supreme Court's decisions on summary judgment corresponded with broader concerns about the ability of courts to manage an increasingly burdensome caseload. The 1983 amendments to the Federal Rules of Civil Procedure facilitated changes in the summary judgment procedure by granting district courts unprecedented case management powers.[13] Even before the Supreme Court trilogy, there were signs that lower courts were moving toward a more expansive use of the summary judgment procedure.[14] Some courts and commentators "thought the time [was] ripe for recognizing the potential of summary judgments to deal with increasingly crowded dockets and rising litigation costs."[15] The trilogy solidified this trend and paved the way for the "modern era" of summary judgment practice.[16]

While the changes in the summary judgment procedure have been widely documented, less attention has been paid to the impact of these changes on other procedural devices, most notably the impact on judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.[17] In a system in which summary judgment is rarely employed, the Rule 50 procedures exist as a legitimate mechanism by which courts can

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12. *See* Issacharoff & Loewenstein, *supra* note 1, at 87 ("As a consequence of the trilogy, the Court appears to have transformed summary judgment from a mechanism for assuring a modicum of genuine dispute in cases set for trial to a full dress rehearsal for trial with legal burdens and evidentiary standards to match those that would apply at trial."); McGinley, *supra* note 6, at 222-23 (arguing that the trilogy "encourages, if not requires, judges to weigh the evidence," while it forces plaintiffs to "present concrete evidence of the defendants' lack of credibility in response to summary judgment motions").

13. Issacharoff & Loewenstein, *supra* note 1, at 78-79; *see* Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983).

14. *See* McGinley, *supra* note 6, at 208 n.19 (stressing that "even before the trilogy, a number of courts seemed headed toward the improper use of summary judgment").

15. *See, e.g.*, William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 450 (1991).

16. Frank J. Cavaliere, *The Recent "Respectability" of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment "Prism,"* 41 CLEV. ST. L. REV. 103, 107 (1993) (trilogy "placed courts in an era where summary judgments have become respectable"); McGinley, *supra* note 6, at 221 (referring to the "new summary judgment").

17. Rule 50(a) provides that a court may grant "judgment as a matter of law" against a party "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a). Rule 50(b) provides that the motion may be renewed and granted after a jury has returned a verdict. Historically, motions under these provisions were described as a motion for directed verdict—in the case of Rule 50(a)—and a motion for judgment notwithstanding the verdict—in the case of Rule 50(b). FED. R. CIV. P. 50(b). The 1991 amendments to Rule 50 eliminated the dual terminology and opted for the single label of "judgment as a matter of law" to describe motions made under both provisions. *See* 5A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 50.07(2) (2d ed. 1995).

ensure that juries do not impermissibly stray from the facts or law. In a system, however, where summary judgment is commonplace, the use of such procedures, as a second trump on the jury's decisionmaking role, is harder to defend. In the modern era of summary judgment, the plaintiff is effectively required to put forth her entire case at summary judgment and persuade the court that a reasonable fact finder could rule in the plaintiff's favor. Summary judgment is very close to a "dress-rehearsal" of the ultimate trial,[18] with the same standard applied at summary judgment as would be applied in ruling on a Rule 50 motion.[19] Given these parallel standards, what justification exists for dismissing a case, at or after trial, where the plaintiff has survived summary judgment?[20]

This Article explores the relationship between the rise of summary judgment and the nature of Rule 50 practice. The Rule 50 procedures remain in common use, despite the substantial change in the operation of summary judgment. The Article argues that the indiscriminate use of these procedures is increasingly suspect in light of the changes in the approach to summary judgment. Certainly, where a defendant has been denied summary judgment, the granting of relief under Rule 50, based on the same arguments advanced in support of summary judgment, is a troubling result. In fact, the law of the case doctrine strongly suggests that a court should adhere to its previous denial of summary judgment once a case goes to trial, absent a pertinent change in the governing legal standards or a substantial unraveling, at trial, of the plaintiff's case. As the Article discusses more fully below, the significant increase in the use of summary judgment, under the Supreme Court trilogy, should result in a concomitant reduction in the use of the Rule 50 procedures.

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18. Issacharoff & Loewenstein, *supra* note 1, at 87.

19. *See infra* notes 96-100 and accompanying text (discussing standard). It should be noted that the standard for granting judgment as a matter of law under Rule 50 is not the same standard that applies to a motion for a new trial under Rule 59. *See* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2806, at 63 (1995). In considering a Rule 59 motion, "the judge is free to weigh the evidence for himself." *Id.* at 67. The judge may set aside the verdict and order a new trial "even though there is substantial evidence to support [the verdict]." *Id.* at 65. This Article focuses solely on the relationship between the summary judgment and Rule 50 procedures.

20. Summary judgment and judgment as a matter of law under Rule 50 are legally available to both plaintiffs and defendants. Plaintiffs, however, rarely obtain summary judgment and are rarely granted judgment under Rule 50. FED. R. CIV. P. 50. In practice, these are devices by which defendants can circumvent or trump the fact-finding process. *See* Issacharoff & Loewenstein, *supra* note 1, at 75, 92 (noting that summary judgment is rarely sought or obtained by plaintiffs and that "liberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class"); 5A MOORE, *supra* note 17, ¶ 50.02(1), at 50-36 ("The courts are reluctant to grant a judgment as a matter of law in favor of the party having the burden of persuasion.").

II. SUMMARY JUDGMENT AND THE RULE 50 PROCEDURES: THEIR ORIGINS AND HISTORICAL RELATIONSHIP

Rule 50 of the Federal Rules of Civil Procedure has its origins in the common law principle that when no evidence proves a particular fact, the court is obligated, upon request, to instruct the jury.[21] As historically applied, the "directed verdict," as it came to be known, was literally an instruction to the jury. The jury was instructed that, as a matter of law, they would be permitted to deliberate the case even if the party having the burden of proving certain facts had no evidence to prove these facts.[22] Over time, the directed verdict evolved into a device by which a court could enter judgment in its own right where the evidence was so insubstantial that it did not justify submission of the case to the jury.[23]

As initially adopted, Rule 50 provided two distinct procedures. Subsection (a) allowed the granting of a directed verdict on a motion made any time before submission of the case to the jury.[24] Subsection (b) permitted the motion to be renewed after trial and authorized a court to enter a judgment notwithstanding the verdict if it believed that the winning party's case was not sustained by the evidence.[25] The thrust of both procedures was to permit a court "to take away from the jury's consideration cases or issues when the facts [were] sufficiently clear that the law required a particular result."[26]

In contrast to the directed verdict, "[s]ummary judgment is a relative newcomer to the Anglo-American legal scene."[27] Initially, the procedure was a mechanism "to combat the 'law's delay' by allowing courts to strike 'any frivolous or sham defense to the whole or to any part of the complaint.' "[28] The procedure provided plaintiffs with "a motion somewhat akin to a post-pleading default judgment."[29] In the beginning of this century, summary judgment began to emerge as a device by which both parties could obtain judgment in certain categories of cases.[30] By the time of adoption of the Federal Rules, several state systems permitted the granting

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21. Greenleaf v. Birth, 34 U.S. (9 Pet.) 292, 299 (1835).

22. William W. Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 589 (1950).

23. Southern Ry. Co. v. Walters, 284 U.S. 190, 194 (1931). For a thorough history of the development of the directed verdict, see Blume, *supra* note 22.

24. 9A WRIGHT & MILLER, *supra* note 4, § 2521, at 240.

25. *Id.*

26. *Id.* As stated *supra* note 17, the current rule uses the term "judgment as a matter of law" to refer to motions under both subsections (a) and (b). It is firmly established that the same standards apply to the granting of motions under the respective provisions. *See id.* § 2524, at 249-50.

27. Issacharoff & Loewenstein, *supra* note 1, at 76.

28. *Id.* (quoting An Act To Regulate the Practice of Courts of Law, ch. 231, 1912 N.J. Laws 377, 380; 2 N.J. COMP. STAT. §§ 15, 16 (Supp. 1915)).

29. Issacharoff & Loewenstein, *supra* note 1, at 76.

30. *See* 10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2711, at 557 (1995).

of summary judgment, although the procedure remained an "exceptional practice."[31]

In its adoption, Rule 56 of the Federal Rules of Civil Procedure was made "applicable to all actions."[32] The Rule was fashioned as a "method for promptly disposing of actions in which there is no genuine issue as to any material fact."[33] The Rule made summary judgment available, "at least in principle, as a broad-scale tool for the entry of a final decree on the merits of all claims before the federal courts."[34]

Summary judgment, as adopted in the Federal Rules, shared a common purpose with Rule 50. Motions under both rules invited the court to make the same determination—that there was no genuine issue of fact and that the moving party was entitled to judgment as a matter of law.[35] Both rules provided methods for facilitating the speedy resolution of litigation.[36] As one court explained, "In the final analysis," both procedures "turn[ed] on whether any genuine issue of fact survive[d] the pleadings and depositions or evidence, requiring fact-findings. . . . [I]n both instances the trial court [was] empowered and enjoined to look through transparency to substance."[37]

However, courts took substantially different views of the use of these procedural devices. In the context of Rule 50 motions, they showed little hesitancy in granting relief in favor of a defendant in a case where the plaintiff's evidence, as fully developed at trial, was insufficient to sustain the plaintiff's case.[38] A common formulation of the test required the court to enter a directed verdict unless there was "substantial evidence" in opposition to the motion.[39] Courts repeatedly rejected the view that a "scintilla" of evidence was

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31. Issacharoff & Loewenstein, *supra* note 1, at 76.

32. FED. R. CIV. P. 56 advisory committee notes, 1937 adoption.

33. *Id.*

34. Issacharoff & Loewenstein, *supra* note 1, at 76.

35. 10 WRIGHT ET AL., *supra* note 30, § 2713.1, at 613-14.

36. *Compare* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250 (1940) ("[Rule 50] was adopted for the purpose of speeding litigation and preventing unnecessary retrials.") *with* Bland v. Norfolk & S. R.R., 406 F.2d 863, 866 (4th Cir. 1969) ("[T]he function of a motion for summary judgment is . . . to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.").

37. Fischer Constr. Co. v. Firemen's Fund Ins. Co., 420 F.2d 271, 275-76 (10th Cir. 1969).

38. There were concerns raised as to whether the granting of a directed verdict contravened the right to a jury trial under the Seventh Amendment. Those concerns were put to rest by the Supreme Court's decision in Galloway v. United States, 319 U.S. 372 (1943). Courts fully embraced the view that "no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination." Manaia v. Potomac Elec. Power Co., 268 F.2d 793, 799 (4th Cir.) (stressing that the power of the court to withdraw such cases from the jury "is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury"), *cert. denied*, 361 U.S. 913 (1959) (quoted in 9A WRIGHT & MILLER, *supra* note 4, § 2522, at 246).

39. *See* Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 920-21 (1971); Blume, *supra* note 22, at 581; 9A WRIGHT & MILLER, *supra* note 4, § 2524.

enough to avoid a directed verdict and emphasized that a stricter standard was necessary to maintain the court's control over the jury's decisionmaking role.[40] A directed verdict was not merely "a device to save time and trouble involved in lengthy jury determination" but a "method for protecting neutral principles of law from powerful forces outside the scope of law—compassion and prejudice."[41]

By contrast, there was enormous reluctance to dismiss cases at the summary judgment stage even when the plaintiff's case appeared weak.[42] The Second Circuit, in particular, adopted a standard which precluded the granting of summary judgment where there was the "slightest doubt" as to whether the plaintiff could prevail at trial.[43] The court stressed that where the ascertainment of the facts turns on credibility, a triable issue of fact is present, and the granting of summary judgment is improper.[44] In the court's view:

> That one reasonably may surmise that the plaintiff is unlikely to prevail upon a trial, is not a sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them.[45]

Other courts adopted similar formulations of the summary judgment standard. The Fourth Circuit ruled that summary judgment could be granted only when it was "perfectly clear that no issue of fact [was] involved."[46] The court stressed that the purpose of Rule 56 was to provide "a prompt disposition of cases which have no possible merit."[47] The Eighth Circuit agreed that summary judgment was appropriate only in those "extreme situations" where a party was entitled to relief "beyond all doubt, without room for controversy."[48] Courts commonly ruled that summary judgment was to be denied anytime there was "doubt whether an issue of fact [had] been raised"[49] or "a reasonable indication that a

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40. *See, e.g.*, Pennsylvania R.R. v. Chamberlain, 288 U.S. 333, 343 (1933).

41. Rutherford v. Illinois Cent. R.R., 278 F.2d 310, 312 (5th Cir.), *cert. denied*, 364 U.S. 922 (1960).

42. Issacharoff & Loewenstein, *supra* note 1, at 77 (stressing that "[f]rom its inception, federal judges treated summary judgment warily"); Schwarzer et al., *supra* note 15, at 450 (noting that the "[p]erceived judicial hostility to summary judgment motions and the onerous burdens of proof imposed on a moving party discouraged use of the summary judgment procedure, even in cases in which it might have been appropriate").

43. *E.g.*, Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970).

44. Colby v. Klune, 178 F.2d 872, 873 (2nd Cir. 1949).

45. Arnstein v. Porter, 154 F.2d 464, 475 n.34 (2d Cir. 1946) (quoting Sprague v. Vogt, 150 F.2d 795 (8th Cir. 1945)). For a discussion of the Second Circuit's standard, see Issacharoff & Loewenstein, *supra* note 1, at 77.

46. Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950).

47. *Id.*

48. Williams v. Chick, 373 F.2d 330, 331 (8th Cir. 1967) (adding that "[r]ecovery must be barred beyond any discernible circumstances").

49. *See, e.g.*, Washington Post Co. v. Keogh, 365 F.2d 965, 967 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

material fact [was] in dispute."[50] The Supreme Court itself cautioned against the use of summary judgment and adopted standards that were widely interpreted as imposing a substantial evidentiary burden on the movant to disprove the plaintiff's case.[51]

Judicial hostility toward the summary judgment procedure appeared to stem primarily from the timing of the motion. Summary judgment permitted disposition of the case prior to trial. Historically, courts were reluctant to dispose of a case without giving the plaintiff the opportunity to develop fully the evidentiary basis for her case and contest the defendant's proofs at trial.[52] They emphasized that the court's role at summary judgment was not to "explore all the factual ramifications of the case"[53] but to "eliminate the frivolous lawsuits which might occasionally arise."[54] Once the case had proceeded to trial, judges felt better positioned to assess the plaintiff's evidence and to make the determination as to whether the case was jury submissible.[55]

This view of the judiciary's approach to the summary judgment and Rule 50 procedures is confirmed by a line of cases specifically discussing the standard for granting summary judgment in relation to a later ruling under Rule 50. In a widely followed case, *Pierce v. Ford Motor Co.*,[56] the Fourth Circuit held that the district court had improperly granted summary judgment in favor of the defendant.[57] The court ruled that a court could deny summary judgment even if the court were convinced that the plaintiff's case would not survive a motion for directed verdict at trial.[58] As the court explained:

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50. *See, e.g.*, Aetna Ins. Co. v. Cooper Wells & Co., 234 F.2d 342, 344 (6th Cir. 1956).

51. Schwarzer et al., *supra* note 15, at 450 (discussing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)).

52. *See, e.g.*, Poller v. CBS, Inc., 368 U.S. 464, 464 (1962).

> We believe that summary procedures should be used sparingly in complex . . . litigation where motive and intent play leading roles. . . . It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice.

Id. at 473.

53. *See, e.g.*, Ayala v. Secretary of Health, Educ., & Welfare, 51 F.R.D. 505, 507 (D. Puerto Rico 1971).

54. *See, e.g.*, Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137, 1141 (D.C. Cir. 1970); *see also* New Home Appliance Ctr., Inc. v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957) ("[S]ummary judgment is available to avoid expensive trials of frivolous claims.").

55. *See, e.g.*, Kim v. Coppin State College, 662 F.2d 1055, 1059 (4th Cir. 1981) (stressing that the legal standards for summary judgment and directed verdict were different in that, at the summary judgment stage, "the district court must give the benefit of the doubt to the party who asserts he can prove a dubious proposition at trial" while, in considering a motion for a directed verdict, "the district court has had the benefit of seeing what the parties alleged they could prove prior to trial tested in the crucible of open court").

56. 190 F.2d 910 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951).

57. *Id.* at 910.

58. *Id.*

> From what we have said, it is clear that there were issues in the cases for a jury to decide, and it was error to enter summary judgments for defendant for that reason. It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh the evidence in advance of its being presented.[59]

Other courts expressed similar views concerning the relationship between the two procedures. The Eighth Circuit, for example, agreed that a court should " 'ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment.' "[60] The court stressed that a court may not enter judgment as a matter of law—at the summary judgment stage—in a manner similar to a directed verdict at trial pursuant to Federal Rule of Civil Procedure 50(a).[61] As the court explained, even if a court feels that summary judgment in a given case is technically proper, "sound judicial policy and the proper exercise of judicial discretion may prompt him to deny the motion and permit the case to be developed fully at trial. The ultimate legal rights of the movant can always be protected in the course of or even after trial."[62]

In *Davidson v. Stanadyne, Inc.*,[63] the Fifth Circuit also advanced the view that summary judgment could be denied even where a directed verdict, on the same record, might be appropriate.[64] The court noted that forcing a party to present her entire case before the court during pretrial motions was not the purpose of the summary judgment motion.[65] It cautioned that courts should exercise "[r]estraint in the use of [the summary judgment] procedure" in light of the "difference in the burdens which a plaintiff faces in opposing a motion for summary judgment and in opposing a motion for directed verdict."[66]

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59. *Id.* at 915.

60. Williams v. Chick, 373 F.2d 330, 331-32 (8th Cir. 1967) (quoting *Pierce*, 190 F.2d at 915).

61. Hughes v. American Jawa, Ltd., 529 F.2d 21, 25 (8th Cir. 1976) (stressing that "[t]he District Court must deny the motion for summary judgment after finding a genuine factual dispute even if it is convinced that the party opposing the motion is unlikely to prevail at trial").

62. Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979).

63. 718 F.2d 1334 (5th Cir. 1983).

64. *Id.* at 1341.

65. *Id.* at 1340.

66. *Id.* at 1341. *See also* United Rubber, Cork, Linoleum & Plastic Workers v. Lee Nat'l Corp., 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971) (denying summary judgment while acknowledging that "[i]f the record before [the court] at trial were the same as that before [the court] on this motion, judgment would be entered in favor of the [defendant]"); Curto's, Inc. v. Krich-New Jersey, Inc., 193 F. Supp. 235, 238 (D.N.J. 1961) (stating that "[i]t is only where there

In 1985, on the eve of the Supreme Court trilogy, the Fourth Circuit revisited the standards for granting summary judgment.[67] The court reiterated its view that summary judgment was proper "[o]nly where it [was] 'perfectly clear that there [were] no issues in the case.' "[68] The court emphasized that "the district court should not try the case in advance by summary judgment [even] where a directed verdict would be proper after hearing the evidence."[69]

As these cases make clear, there was a marked difference, historically, between the use of summary judgment and Rule 50 procedures. Courts would permit a case to go forward at the summary judgment stage if there was any doubt as to whether the plaintiff could present a viable case at trial. They would then employ Rule 50 procedures to ensure that the jury did not stray beyond its permissible role. In essence, there was a two-track system for passing on the evidentiary sufficiency of a plaintiff's case. Cases that were wholly without evidentiary support were weeded out at the summary judgment stage. Cases that could survive summary judgment but could not ultimately be sustained were handled under Rule 50. It was the Rule 50 procedures, not summary judgment, that provided the primary method by which courts exercised case management control over litigation.

III. GRANTING JUDGMENT UNDER RULE 50 WHEN SUMMARY JUDGMENT HAS BEEN DENIED: THE PRE-TRILOGY VIEW

Given these historical views, judicial response was predictable regarding an argument that the denial of summary judgment limited the court's ability later to enter judgment in favor of the moving party under Rule 50. Because stricter rules apply to a motion for summary judgment than to those on a motion for directed verdict, the fact that the district court had previously denied summary judgment was of no moment.[70] Indeed, as discussed above, the historical standards for summary judgment contemplated that the plaintiff could survive summary judgment and ultimately fail to take her case to a jury.

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clearly are no issues in the case that a summary judgment is proper" and that "[e]ven in an instance where the Court may feel it will have to direct a verdict on the issues which have been raised, it should ordinarily hear the evidence, rather than attempt to dispose of the case summarily"); Arkansas v. Central Surety & Ins. Corp., 102 F. Supp. 444, 447 (W.D. Ark. 1952) (stressing that "only in a rare case can it be determined by affidavit that the evidence available will be such as to entitle the movant, if the case were tried on its merits to a jury, to a directed verdict because there has been no opportunity to cross-examine the witnesses").

67. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

68. *Id.* at 364 (quoting Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951)).

69. *Id.*

70. *See, e.g.*, Farrell v. Hollingsworth, 43 F.R.D. 362, 365 (D.S.C. 1968).

A long line of pre-trilogy cases addressed the question of whether the denial of summary judgment had any preclusive effect on the subsequent granting of a Rule 50 motion. In some cases, a court was confronted with a defendant's Rule 50 motion after having denied summary judgment. In other cases, a trial court was confronted with the motion after an appellate court had reversed the grant of summary judgment and permitted the case to proceed to trial. In both contexts, judges uniformly rejected the view that the denial of summary judgment had any effect on the granting of relief under Rule 50.

The Fifth Circuit developed the most extensive body of law on the relationship between summary judgment and Rule 50 procedures. In several cases, the court made clear that a reversal of a district court's grant of summary judgment did not foreclose the district court, on remand, from entering a directed verdict in favor of the defendant. In *Robbins v. Milner Enterprises, Inc.*,[71] the court ruled that a denial of summary judgment did not foreclose a directed verdict since the evidence that is ultimately adduced at trial may convince the court that the defendant is entitled to judgment as a matter of law.[72] The court stressed that "the issues may be such that only after the agony of a full-blown trial may it authoritatively be determined that there was never really the decisive issue of fact at all."[73] In the court's view, the denial of summary judgment meant only that there existed a " 'reasonable doubt'. . . about the existence of a genuine controversy" as the record existed at that time.[74]

Similarly, in *Braniff v. Jackson Avenue-Gretna Ferry, Inc.*,[75] the court ruled that the reversal of summary judgment did not "foreclose the right and the imperative duty of the District Judge to test the case against the actual evidence adduced at every stage of the trial."[76] Nor did it "forecast that on remand the case must go to the jury."[77] According to the court, that depended upon the actual proof made, and that proof might fall short.[78]

In *Gleason v. Title Guarantee Co.*,[79] the court rejected the argument that since the evidence before the district court at the summary judgment stage was substantially the same as the evidence produced at trial, the motion for a directed verdict should have been denied.[80] The court noted

71. 278 F.2d 492 (5th Cir. 1960).
72. *Id.* at 496.
73. *Id.* at 497.
74. *Id.* at 496 (citation omitted).
75. 280 F.2d 523 (5th Cir. 1960).
76. *Id.* at 529.
77. *Id.*
78. *Id.*; *accord* Sheets v. Burman, 322 F.2d 277, 281 (5th Cir. 1963); Stanley v. Guy Scroggins Constr. Co., 297 F.2d 374, 378 (5th Cir. 1961).
79. 317 F.2d 56 (5th Cir. 1963).
80. *Id.* at 58.

that "[a] motion for summary judgment is similar to a motion for a directed verdict in the sense that both motions function in the interest of saving money, time, and effort when there is no genuine issue of material fact," but it stressed that "the motions operate differently and produce different results."[81] Specifically, a court may deny summary judgment on the ground that it is better to afford the nonmoving party the opportunity to develop her case and adduce the evidence at trial. After the court has "heard testimony at a live trial," it can then determine whether the party's evidence is sufficient to present a jury question.[82] In short, "[s]ound practical reasons [] may justify a trial judge's denying a motion for summary judgment even on the identical evidence supporting his granting a directed verdict."[83]

In subsequent cases, the Fifth Circuit reiterated its position on the nonpreclusive effect of a denial of summary judgment. In *Gross v. Southern Railway Co.*,[84] the court ruled that its previous reversal of the district court's grant of summary judgment did not preclude the district court from giving "due consideration" to the defendant's motion for a directed verdict.[85] The court stated that its prior opinion "could not, of course, foreclose the issues which were the subject of the full-dress trial on the merits, insofar as possible directed verdicts were concerned."[86] In a later case, it again ruled that the district court's denial of summary judgment did not preclude a directed verdict even though the evidence presented at trial was essentially the same as the evidence submitted at the summary judgment stage.[87] The argument for preclusion "erroneously assume[d] that the standards for a summary judgment denial and for a directed verdict ruling are the same."[88] As the court explained: "At the summary judgment stage, the court focuses on whether there exists a genuine issue of material fact; once the evidence is all in, the trial court is entitled to examine the actual proof and determine if the proof falls short of presenting a jury question."[89]

Other courts echoed these sentiments. The Eighth Circuit, for example, postulated that a court's denial of summary judgment did not affect its grant of a directed verdict because the court's review of the evidence differed once the case proceeded to trial.[90] The court noted that

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81. *Id.*
82. *Id.* (quoting JAMES WM. MOORE, 6 MOORE'S FEDERAL PRACTICE ¶ 56.02(10), at 56-46 (2d ed. 1995)).
83. *Id.*
84. 446 F.2d 1057 (5th Cir. 1971).
85. *Id.* at 1060.
86. *Id.* at 1061 n.1.
87. Pruet Prod. Co. v. Ayles, 784 F.2d 1275, 1278 (5th Cir. 1986).
88. *Id.*
89. *Id.*
90. *See* Armco Steel Corp. v. Realty Inv. Co., 273 F.2d 483, 484-85 (8th Cir. 1960).

> [a] genuine issue of fact exists for the purpose of avoiding a summary judgment whenever there is the slightest doubt as to the facts. . . . When, however, both parties have had an opportunity to adduce all relevant, available evidence so that the trial court is no longer uncertain as to the circumstances of the case, then slight doubt as to the facts is insufficient to avert a directed verdict or a judgment notwithstanding the verdict.[91]

The First Circuit reached a similar conclusion in *Voutour v. Vitale*.[92] The court ruled that the denial of summary judgment did not foreclose a defendant's right at the close of evidence to seek the district court's review of the legal sufficiency of the evidence.[93] It reasoned that "[b]y then, especially after examination and cross-examination of witnesses, the parties may well have presented a far more complete and meaningful picture."[94]

Clearly, judges were unsympathetic to the view that the denial of summary judgment in any way circumscribed a trial court's role in ruling on a subsequent motion under Rule 50.[95] When a defendant renewed a challenge to the sufficiency of a plaintiff's case at trial, the court reviewed the defendant's challenge without reference to any previous ruling on summary judgment. The Rule 50 procedures may have had some relation to summary judgment, but they provided an independent mechanism for testing the sufficiency of a plaintiff's case.

IV. GRANTING JUDGMENT UNDER RULE 50 WHEN SUMMARY JUDGMENT HAS BEEN DENIED: THE EFFECT OF THE TRILOGY

While judges accorded no presumptive significance to the denial of summary judgment, their views on this subject were inextricably tied to the existing standards for granting summary judgment. Where summary judgment was a rarely used procedural device, it was perfectly logical to permit independent review of a Rule 50 motion even in the wake of a previous challenge to the plaintiff's case at the summary judgment stage. Indeed, to do otherwise would leave the court without any meaningful control over jury decisionmaking, given the lax standards that governed at summary judgment. What happens, however, when summary judgment undergoes the type of transformation that has occurred under the Supreme Court trilogy? Can the historical view on this point withstand the fundamental change in the judiciary's use of summary judgment?

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91. *Id.* (citations omitted).

92. 761 F.2d 812 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986).

93. *Id.* at 827.

94. *Id.* (citation omitted).

95. In addition to the above cases, see, e.g., Catts Co. v. Gulf Ins. Co., 723 F.2d 1494, 1502 (10th Cir. 1983); Sandoval v. United States Smelting, Refining & Mining Co., 544 F.2d 463, 464-65 (10th Cir. 1976).

As the above discussion suggests, courts offered several grounds to explain why an unsuccessful challenge to plaintiff's case at summary judgment had no impact on a renewed challenge to the plaintiff's case at trial. Primarily, different legal standards applied to summary judgment and Rule 50 motions; the differences made the denial of summary judgment of no legal consequence once the case proceeded to trial. More broadly, courts stressed that because plaintiffs were not required to put forth all their supporting evidence at summary judgment, it was better for the court to delay ruling on the sufficiency of a case until the plaintiff had a full opportunity to develop it. Under that view, the denial of summary judgment meant only that the plaintiff might be able to withstand a directed verdict—once she had fully developed her proofs—not that she had sufficient evidence to submit the case to a jury. In a similar vein, courts opined that a judge could more readily assess the credibility and weight of the plaintiff's evidence after listening to the evidence at trial; the need to assess the evidence severely limited the use of the summary judgment procedure and enhanced the necessity for Rule 50 procedures as a second test of evidentiary sufficiency. Finally, courts intimated that policy considerations favored giving the plaintiff her day in court if there were any doubt as to the facts.

The trilogy wreaks havoc with each of these propositions. First, it is now settled law that the same standard applies in ruling on a motion for summary judgment as applies in ruling on a Rule 50 motion. In *Anderson v. Liberty Lobby, Inc.*,[96] the Supreme Court noted that the standard for the granting of summary judgment mirrored the standard for a directed verdict under Rule 50(a).[97] Describing the difference between the two devices as "procedural" only, the Court ruled that "the inquiry under each is the same: whether 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."[98] Hence, the summary judgment inquiry "unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."[99] After *Anderson*, a ruling on summary judgment reflects the same inquiry that pertains under Rule 50.[100]

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96. 477 U.S. 242 (1986).

97. *Id.* at 250.

98. *Id.* at 251-52.

99. *Id.* at 252.

100. *See* Issacharoff & Loewenstein, *supra* note 1, at 85 (noting that *Anderson* "recast summary judgment into the mold of a motion for a directed verdict"). This point is also underscored by the 1991 amendments to Rule 50(a), which articulated the standard for granting judgment as a matter of law. The Advisory Committee Notes state that "[b]ecause [the articulated] standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions." FED. R. CIV. P. 50 advisory committee notes.

The trilogy also makes clear that the plaintiff is expected to set forth all her supporting proofs in opposition to a motion for summary judgment. In *Anderson*, the Court held that the governing burden of proof, under substantive law, applied at the summary judgment stage.[101] This meant that the plaintiff was required to adduce affirmative evidence in order to defeat a motion for summary judgment once the defendant satisfied its threshold burden as the moving party.[102] This was true, the Court observed, "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery."[103] As the Court stated in another trilogy decision: "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[104]

In this regard, the trilogy fundamentally altered the summary judgment landscape. Historically, summary judgment was a perfunctory procedural mechanism that permitted a court to weed out the frivolous or sham claim.[105] It was not expected that the plaintiff would present all supporting evidence at the summary judgment stage; the plaintiff could survive summary judgment so long as there was the "slightest doubt" as to whether she could develop the necessary facts at trial.[106] By contrast, the trilogy effectively requires a plaintiff to lay out her entire case in response to a motion for summary judgment and thereby converts summary judgment into a "full-dress-rehearsal" for the actual trial.[107] The plaintiff is not required to prove her case to the reviewing judge but is required to establish that she has sufficient evidence to present the case to a jury. The era in which a plaintiff could survive summary judgment by pointing to what the evidence might eventually show at trial is long gone.

The argument that the court is better positioned to assess the sufficiency of the plaintiff's case—on the basis of "live" evidence—is also undermined by the trilogy. As an initial matter, it is noteworthy that a

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101. *See Anderson*, 477 U.S. at 252-55.

102. *Id*. at 257.

103. *Id*. The assumption that the plaintiff has had a full opportunity to develop her case through discovery is an important qualifier. Under Rule 56(f), a court is authorized to "order a continuance" to permit additional discovery "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." FED. R. CIV. P. 56(f). Obviously, summary judgment should not be granted when the plaintiff can plausibly assert that additional, material proof could be developed through further discovery. On the other hand, the availability of discovery rights, as a prerequisite to granting summary judgment, is a double-edged sword. The fact that the plaintiff has had a full opportunity to develop the facts supporting her case weakens the complaint that the granting of summary judgment has unfairly deprived her of the ability to prove her case.

104. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

105. *See supra* notes 42-55 and accompanying text.

106. *See supra* notes 43-51 and accompanying text.

107. Issacharoff & Loewenstein, *supra* note 1, at 87.

court's role in weighing evidence or assaying credibility in the context of a Rule 50 motion is highly circumscribed. As the Supreme Court stated: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."[108] While there may be limited circumstances in which a court may, in passing on a Rule 50 motion, determine issues of credibility and weight,[109] such questions are generally reserved for the jury.

In any event, the trilogy makes clear that, to the extent courts are permitted to weigh evidence under Rule 50, they are permitted to do so at the summary judgment stage. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[110] the Court held that summary judgment could be granted in a case even though the plaintiff had produced expert reports that supported the plaintiff's theory.[111] The Court ruled that the district court had properly viewed these reports as "both implausible and inconsistent with record evidence."[112] In the view of one commentator, "By examining the plausibility of the plaintiff's theory, the Court seemed to instruct the lower courts to weigh the evidence and to decide which inference was more reasonable in light of the evidence."[113] At the very least, the Court authorized the trial court to conduct at summary judgment the same inquiry—concerning the plausibility of the plaintiff's case—that it would make in ruling on a Rule 50 motion.[114]

Finally, any policy argument for delaying the resolution of the sufficiency question until trial has surely been torpedoed by the trilogy. The rise in the use of summary judgment corresponds with a broader campaign to ease docket pressures by enhancing the case management power of the federal courts.[115] The trilogy gave legal force to the view that summary judgment could be an effective weapon for dealing with "increasingly crowded dockets and rising litigation costs."[116] Virtually

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108. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

109. *See* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2527, at 285 (1995) (noting that "it is well settled that no weight is to be given to testimony that is opposed to the laws of nature or undisputed physical facts").

110. 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1020 (1987).

111. 481 U.S. at 1020.

112. 475 U.S. at 594 n.19.

113. McGinley, *supra* note 6, at 227; *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 600 (1986) (White, J., dissenting) (majority opinion suggesting that trial judge "should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff").

114. *See* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 468 (1992) (stating that *Matsushita* demands "that the nonmoving party's inferences be reasonable in order to reach the jury").

115. *See* Issacharoff & Loewenstein, *supra* note 1, at 73.

116. Schwarzer et al., *supra* note 15, at 450.

every facet of federal practice and procedure now points toward the speedy disposition of claims.

The trilogy has assigned a central role to the summary judgment procedure. Summary judgment has evolved from a rarely used procedural mechanism into a major gatekeeping device by which courts resolve large numbers of cases.[117] The net result of these changes is that surviving summary judgment is now an event of substantial consequence. When a case survives a sufficiency test at summary judgment, the plaintiff has, by definition, presented evidence from which a jury could find in her favor.

Given these changes, the historical view of the relationship between summary judgment and the Rule 50 procedures is surely at peril. None of the justifications for ignoring a previous decision at the summary judgment stage survive the Supreme Court trilogy. Refusing to accord at least some preclusive significance to a denial of summary judgment is now at odds with the letter and spirit of summary judgment procedure and federal practice.

V. THE JUDICIAL RESPONSE: NO APPARENT CHANGE IN RULE 50 PRACTICE

In light of the above discussion, one might assume that the approach to the granting of relief under Rule 50 would have undergone a substantial transformation, concomitant with the change in summary judgment practice. In fact, there is little evidence that courts have modified their approach to the granting of relief under Rule 50. While the use of summary judgment has grown exponentially, courts appear to have given little thought to how this growth impacts Rule 50 practice. Indeed, if anything, courts have continued to adhere to the historical view that the denial of summary judgment has no impact on a subsequent Rule 50 motion.

One area of law that illustrates these developments concerns litigation under the Age Discrimination in Employment Act of 1967 (ADEA).[118] The ADEA prohibits discrimination against workers over the age of forty.[119] ADEA litigation has been prolific, both before and after the trilogy. Under the ADEA, plaintiffs are entitled to a jury trial.[120]

There is little doubt that the trilogy has had a profound impact on the granting of summary judgment in ADEA cases. As documented in one recent article, the sheer number of reported ADEA decisions involving the

117. *See* McGinley, *supra* note 6, at 228 n.111 (arguing on the basis of a statistical sample of cases that the granting of summary judgment has substantially increased under the trilogy); Issacharoff & Loewenstein, *supra* note 1, at 92 (concluding on the basis of a statistical sample of cases that "the unmistakable message to the bar is that district courts are highly receptive to summary judgment motions and, indeed, that such motions are being freely granted").

118. 29 U.S.C. § 621 (1988).

119. *See id.* § 631(a).

120. *See* Lorillard v. Pons, 434 U.S. 575, 585 (1978).

granting of summary judgment has risen sharply.[121] Of the ADEA decisions sampled in that article, the courts of appeal affirmed the grant of summary judgment in over ninety percent of the cases.[122] There are strong indications that courts have interpreted the trilogy "to permit courts to draw inferences in defendants' favor, to weigh evidence, to decide the credibility of witnesses, and to require plaintiffs to prove their cases at the summary judgment stage."[123]

On the other hand, there is very little indication that these changes in the summary procedure have in any way impacted Rule 50 practice. In a number of recent ADEA cases, courts have trumped a jury's verdict in favor of the plaintiff and granted judgment as a matter of law under Rule 50.[124] In at least some of these cases, the defendant had previously moved for summary judgment on grounds of evidentiary insufficiency.[125] There is no indication that the courts in question accorded any legal significance to the previous denial of summary judgment. A case that typifies this phenomenon is *Futrell v. J.I. Case.*[126] In *Futrell*, the plaintiff alleged that he

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121. McGinley, *supra* note 6, at 228 n.111. The author notes that "[b]etween January and June 1992, the courts of appeals reviewed 53 ADEA and Title VII cases in which the lower courts had granted summary judgment." *Id*. By contrast, "[b]efore the trilogy, from January to June 1983, the courts of appeals reviewed only two ADEA and two Title VII cases on appeal from grants of summary judgment for the defendant." *Id*. There also is evidence of a pronounced increase in the use of the summary judgment procedure in other areas of federal law. *See* Issacharoff & Loewenstein, *supra* note 1, at 92 (citing to statistics that evidence a substantial increase in the use of the summary judgment procedure).

122. McGinley, *supra* note 6, at 228 n.111.

123. *Id*. at 229 (citations omitted).

124. *See, e.g.*, Walker v. Nationsbank of Florida N.A., 53 F.3d 1548 (11th Cir. 1995); Hayman v. National Academy of Sciences, 23 F.3d 535 (D.C. Cir. 1994); Grizzle v. Travelers Health Network, Inc., 14 F.3d 261 (5th Cir. 1994); Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950 (5th Cir. 1993); Atkin v. Lincoln Property Co., 991 F.2d 268 (5th Cir. 1993); Perfetti v. First Nat'l Bank, 950 F.2d 449 (7th Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992); Billet v. Cigna Corp., 940 F.2d 812 (3d Cir. 1991); Danielson v. City of Lorain, 938 F.2d 681 (6th Cir. 1991); Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216 (7th Cir. 1991); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 856 F. Supp. 1561 (S.D. Fla. 1994); Binder v. Long Island Lighting Co., 847 F. Supp. 1007 (E.D.N.Y. 1994), *rev'd in part*, 57 F.3d 193 (2d Cir. 1995); Futrell v. J.I. Case, 838 F. Supp. 401 (E.D. Wis. 1993), *rev'd*, 38 F.3d 342 (7th Cir. 1994); *see* Cavaliere, *supra* note 16, at 144 (stating that "affirmances of summary judgment and directed verdicts in ADEA cases have been found in virtually all of the circuits"); Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 615 (1987) (urging that courts "have too frequently set aside verdicts that juries have returned for ADEA plaintiffs").

125. *See, e.g.*, *Walker*, 53 F.3d at 1552; *Perfetti*, 950 F.2d at 450; *Isenbergh*, 856 F. Supp. at 1564; *Binder*, 847 F. Supp. at 737 (on remand from reversal of summary judgment, 933 F.2d 187 (2d Cir. 1991)); *Futrell*, 838 F. Supp. at 401 (discussed *infra* notes 126-33 and accompanying text).

126. 838 F. Supp. 401 (E.D. Wis. 1993), *rev'd*, 38 F.3d 342 (7th Cir. 1994). As indicated, the district court's decision in *Futrell* was reversed by the Seventh Circuit. The court of appeal ruled that the plaintiff had presented sufficient evidence to sustain the jury's verdict in his favor. 38 F.3d at 346-47. The court did not address the issue of whether the district court's grant of judgment as a matter of law, on grounds of evidentiary insufficiency, was inconsistent

had been discharged because of his age, in violation of the ADEA. The defendant responded that the plaintiff had been fired because of his belligerent and uncooperative attitude.

Prior to trial, the defendant moved for summary judgment on the ground that the evidence was insufficient as a matter law to sustain a finding of age discrimination. In a sixteen-page opinion, the district court denied summary judgment.[127] The court carefully surveyed the evidence and concluded that there was sufficient evidence to support a finding that the defendant willfully violated the ADEA.[128]

The case was tried by a jury, which found in favor of the plaintiff and awarded more than $265,000 in damages.[129] The defendant had moved for judgment as a matter of law under Rule 50 and claimed that the evidence was insufficient to support a finding of age discrimination.[130] The Seventh Circuit ruled in favor of the defendant and threw out the jury verdict.[131]

In granting the defendant's postjudgment motion, the court made no reference to its previous decision on summary judgment.[132] The court rejected, on an item-by-item basis, the various proofs offered by the plaintiff and stated that the evidence did not, "on balance," support the jury's verdict.[133] The court offered no explanation as to why the evidence, which had been sufficient to present a jury issue prior to trial, was no longer sufficient to sustain the jury's verdict.

While cases such as *Futrell* suggest that courts have not modified their approach to Rule 50 practice in response to changes in the summary judgment procedure, a few courts have expressly considered the issue post-trilogy.[134] Surprisingly, these courts have continued to adhere to the historical view and have relied on many of the same grounds advanced prior to the trilogy.[135]

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with the court's previous denial of the defendant's motion for summary judgment made on the same grounds.

127. *See* Decision and Order, Case No. 88-C-1028, at 15 (E.D. Wis. Apr. 8, 1992).

128. *Id*.

129. 38 F.3d 342, 344 (7th Cir. 1994).

130. *Id*.

131. *Id*.

132. *See Futrell*, 838 F. Supp. at 401.

133. *Id*. at 410.

134. The fact that courts have not modified their approach to Rule 50 practice also is evidenced by decisions outside the context of the ADEA. Rule 50 judgments on evidentiary grounds continue to be a commonplace feature of federal practice. *See, e.g.*, Clark v. Brien, 59 F.3d 1082, 1086-89 (10th Cir. 1995); Favorito v. Pannell, 27 F.3d 716, 719-22 (1st Cir. 1994); Bankers Trust Co. v. Lee Keeling & Assocs., Inc., 20 F.3d 1092, 1099-1101 (10th Cir. 1994); Peus v. Allstate Ins. Co., 15 F.3d 506, 513-19 (5th Cir.), *cert. denied*, 115 U.S. 573 (1994); Jordan-Milton Mach. v. F/V Teresa Marie, II, 978 F.2d 32, 34-36 (1st Cir. 1992); Garrett v. Barnes, 961 F.2d 629, 631-35 (7th Cir. 1992); PPM Am., Inc. v. Marriott Corp., 875 F. Supp. 289, 293-304 (D. Md. 1995); Jones v. Lederle Lab., 785 F. Supp. 1123, 1125-27 (E.D.N.Y. 1992), *aff'd*, 982 F.2d 63 (2d Cir. 1992).

135. *See infra* notes 136-54 and accompanying text.

In *Thorpe v. Mutual of Omaha Insurance Co.*,[136] for example, the First Circuit rejected the plaintiff's argument that it was improper for the district court to have granted the defendant's Rule 50 motion in light of the court's previous denial of summary judgment.[137] The plaintiff stressed that in denying summary judgment, the court had suggested that " 'reasonable minds could differ' and the jury should therefore decide the matter."[138] Citing a pre-trilogy decision, the court of appeal refused to accord any presumptive significance to the summary judgment denial and ruled that a denial of summary judgment does not foreclose the entry of a directed verdict on the same claim.[139] As the court explained: "Evidence adduced at trial will almost always differ in degree, force, and quantity from that submitted on a motion for summary judgment. The earlier denial of summary judgment standing alone in no way impeaches the later directed verdict."[140]

Similarly, in *Bienkowski v. American Airlines, Inc.*,[141] the Fifth Circuit expressed the view that its reversal of the district court's grant of summary judgment would not preclude the district court from issuing a directed verdict at the time of trial.[142] Again, the court drew support from a pre-trilogy case.[143] The court stated that there were "disturbing inconsistencies" in the plaintiff's case that "could well melt away under the heat of trial and the bright light of cross-examination."[144] While noting that "the legal standards for summary judgment and directed verdict are the same," the court emphasized that "after trial, the district court will be faced with a different set of facts to be weighed under that standard."[145]

The views expressed in these cases are puzzling. If the point is that the "force" of the plaintiff's evidence can differ at trial, in the sense that the *jury* can disbelieve the plaintiff's witnesses or reject the inferences suggested by the plaintiff's evidence, one would have to agree.[146] It is the dif-

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136. 984 F.2d 541 (1st Cir. 1993).

137. *Id.* at 545.

138. *Id.*

139. *Id.* (citing Voutour v. Vitale, 761 F.2d 812, 822-23 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986)).

140. *Id.*

141. 851 F.2d 1503 (5th Cir. 1988).

142. *Id.* at 1508.

143. *Id.* (citing Pruet Prod. Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986)).

144. *Id.*

145. *Id.*; *see also* Newharbor Partners, Inc. v. F.D. Rich Co., 961 F.2d 294, 297 (1st Cir. 1992) (stressing that "[t]here is nothing unorthodox . . . about denying a motion for summary judgment because of a doubt whether triable facts existed and later granting a directed verdict after the critical facts had been developed, even if both motions were made on the same grounds"); Jones v. Lederle Lab., 785 F. Supp. 1123, 1125 (E.D.N.Y.) ("Denial of a motion for summary judgment does not prevent a court from granting a subsequent Rule 50 motion by the same party with respect to the same claim."), *aff'd*, 982 F.2d 63 (2d Cir. 1992).

146. This seemed to be the principal focus of the court in *Bienkowski*, which emphasized the ways in which the "jury" or the "fact finder" could reject the theories suggested by the

ferent nature of the jury's fact-finding role that militates against the granting of *either* summary judgment or judgment as a matter of law under Rule 50 in cases in which there are genuine issues of disputed fact. The argument, however, that a "live" trial will put the court in a better position to resolve the issue of evidentiary sufficiency, as a matter of law, does not hold up. Courts do not generally weigh the evidence or resolve issues of credibility in ruling upon a Rule 50 motion.[147] The "bright lights of cross-examination" may lead the jury to reject the plaintiff's case, but the judge's role in passing upon the legal sufficiency of evidence is not generally affected by the give-and-take of a trial.[148]

Further, the trilogy strongly suggests that there is substantial parity between the court's roles at the summary judgment and Rule 50 stages.[149] Contrary to the First Circuit's suggestion in *Thorpe*,[150] plaintiffs are expected to put forth their entire case at the summary judgment stage.[151] To the extent the weighing of evidence is in any way permitted in the context of a Rule 50 motion, it is equally permitted, indeed required, at the summary judgment stage.[152] The Supreme Court has not simply stated that the same standards apply in ruling on a summary judgment or Rule 50 motion; it has transformed the summary judgment procedure into a "mini-trial" on the merits.[153] One of the clear lessons of the trilogy—or at least one of its effects—is that courts can fully judge evidentiary sufficiency, as a legal matter, on the basis of the documentary evidence advanced in response to a summary judgment motion.[154] After the trilogy, the category of cases that can survive summary judgment, yet be tossed out under Rule 50, should be narrow indeed.

The unfairness of the dual approach suggested by the above cases is manifest. On one hand, plaintiffs are told that they are expected to put on their entire case in order to avoid summary judgment. The point of the summary judgment procedure, they are told, is to test the evidence under the same standard that applies in determining evidentiary sufficiency under Rule 50. Courts fully assess the plaintiff's evidence and permit the

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plaintiff's evidence. 851 F.2d at 1508. A denial of summary judgment does not entitle the plaintiff to a favorable reception by the jury. The fact, however, that a plaintiff's case may not withstand the rigors of the adversarial system—when the case is tested in open court—does not speak to the court's role in ruling on a Rule 50 motion.

147. *See supra* notes 108-09 and accompanying text.

148. One can conceive of circumstances in which a plaintiff's case would become so unraveled at trial that a judge could grant relief as a matter of law. However, this should be the exception, not the rule. *See infra* notes 163-65 and accompanying text (discussing circumstances under which courts could properly grant a Rule 50 motion after having denied summary judgment).

149. *See supra* notes 96-114 and accompanying text.

150. *See supra* notes 136-40 and accompanying text.

151. *See supra* notes 101-07 and accompanying text.

152. *See supra* notes 110-14 and accompanying text.

153. *See supra* note 107 and accompanying text.

154. *Supra* notes 110-14 and accompanying text.

plaintiff's case to go forward only if "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."[155]

Once the plaintiff survives summary judgment, the rules suddenly change. Plaintiffs are told that surviving summary judgment was really of no importance at all because the evidence at trial can differ in "degree, force, and quantity from that submitted on a motion for summary judgment."[156] The law cannot have it both ways. The changes in the summary judgment procedure necessitate some corresponding modification in the Rule 50 procedures.

VI. PROPOSED STANDARD

Based on the foregoing, Rule 50 practice must be modified. Where a defendant's motion for summary judgment—on grounds of evidentiary insufficiency—has been denied, that denial should have residual meaning once the case proceeds to trial. The fundamental change in the nature of the summary judgment procedure must have some legal impact on the use of the Rule 50 procedures as a second test of evidentiary sufficiency.

The legal doctrine that is most relevant to the issue addressed in this Article is the law of the case doctrine. "Under the doctrine of the 'law of the case,' a decision on an issue of law made by the court at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation except in unusual circumstances."[157] The law of the case doctrine can apply in two circumstances. First, the doctrine precludes a court from reconsidering its own decision made at an earlier stage of the proceeding, absent clear and convincing reasons to reexamine the prior ruling.[158] Additionally, the doctrine requires that a lower court must adhere to the decision of a superior appellate tribunal on remand.[159] Law of the case rules "have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit."[160]

There are two ways in which the law of the case doctrine could be used in the context of Rule 50 motions. The most obvious case would be one in which an appellate court has reversed a district court's grant of summary judgment on grounds of evidentiary insufficiency. Under the law of the case theory, the appellate court's ruling on summary judgment

155. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

156. *See, e.g.*, Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 545 (1st Cir. 1993).

157. Abbadessa v. Moore Business Forms, Inc., 987 F.2d 18, 22 (1st Cir. 1993).

158. Gertz v. Robert Welch, Inc., 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

159. *Id.*

160. 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478, at 788 (1995); for an example of how courts have applied the law of the case doctrine, see *infra* notes 177-83 and accompanying text (applying doctrine to successive motions for summary judgment).

would establish the legal proposition that the plaintiff's case is sufficiently strong to present a factual question for the jury's resolution. Because the legal standard for summary judgment is now identical to the standard applied under Rule 50, the appellate court's reversal would dictate rejection of a defendant's renewed challenge to evidentiary sufficiency at the Rule 50 stage.

The doctrine also could be employed in circumstances in which the district court itself has denied summary judgment and is then presented with a Rule 50 motion. Under the law of the case approach, the district court would be presumptively bound by its previous ruling on summary judgment. While the district court's reliance on the law of the case would not preclude review of the issue by the court of appeal,[161] the appellate court could insist on adherence to the previous order absent circumstances that would justify reconsideration.[162]

There are some important caveats to the law of the case approach. First, the law of the case doctrine would apply only where the issues presented in the context of the Rule 50 motion are the same as those previously raised at summary judgment. Thus, the mere fact that a defendant has unsuccessfully moved for summary judgment on the ground of evidentiary insufficiency would not bar the use of a Rule 50 motion to raise other issues that might arise in the course of a trial. The law of the case doctrine would apply in cases where the defendant mounts an attack on the sufficiency of the plaintiff's case at summary judgment and then seeks to renew the argument of evidentiary insufficiency at trial.

Second, the law of the case doctrine does not impose an absolute legal bar to consideration of previously resolved issues. The doctrine simply expresses the courts' practice of refusing to reopen what has been decided; it does not impose a limit on judicial power.[163] The doctrine does not apply where "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."[164] If a plaintiff's case substantially unravels at

161. *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988); Cohen v. Bucci, 905 F.2d 1111, 1112 (7th Cir. 1990); Cardwell v. Kurtz, 765 F.2d 776, 778 (9th Cir. 1985); 1B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.404 (4.-1), at II-12-13 (2d ed. 1995).

162. *See, e.g.*, Virgin Atl. Airways v. National Mediation Bd., 956 F.2d 1245, 1254-55 (2d Cir. 1992), *cert. denied*, 506 U.S. 820 (1992); Wzorek v. City of Chicago, 906 F.2d 1180, 1185 (7th Cir. 1990); United States v. City of Chicago, 853 F.2d 572, 576-77 (7th Cir. 1988).

163. *See, e.g.*, Messinger v. Anderson, 225 U.S. 436, 444 (1912).

164. White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967); *accord* United States v. Rivera-Martinez, 931 F.2d 148, 151 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991); Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 803 F.2d 454, 459 (9th Cir. 1986); *In re* Korean Air Lines Disaster of Sept. 1, 1983, 798 F. Supp. 755, 759 (E.D.N.Y. 1992); Pincus v. Pabst Brewing Co., 752 F. Supp. 871, 873 (E.D. Wis. 1990).

trial or there is an intervening change in the governing law that affects the outcome, a court can set aside a previous ruling. The doctrine accords legal significance to the previous decision but does not tie the court's hands where the circumstances justify reconsideration.[165]

With these caveats in mind, use of the law of the case doctrine in this context seems well-grounded in the existing legal framework. First, employing the law of the case doctrine would not be inconsistent with the procedural rules themselves. While Rule 50 authorizes motions for judgment as a matter of law, it in no way implies that the court is to conduct its inquiry without regard to a previous ruling on evidentiary sufficiency. Indeed, the 1991 amendments to the rule were designed, in part, to suggest the "link" between Rule 50 and Rule 56.[166] In particular, the Rule's use of the term "judgment as a matter of law" called "attention to the relationship between the two rules."[167] It is precisely this close relationship that supports application of the law of the case doctrine.

Nor is the law of the case approach, as applied to a district court's previous denial of summary judgment, inconsistent with the rule of nonfinality concerning pretrial orders.[168] The law of the case doctrine does not mean that a previous decision of a court takes on the character of a final, binding judgment. It simply means that, as a matter of sound practice, courts should not reopen issues that have been fully aired and resolved. A court's denial of summary judgment would not be final in the sense that the court would be deprived of the legal authority to revisit the issue of evidentiary sufficiency.

Further, application of the law of the case doctrine to issues of evidentiary sufficiency is well-grounded in the law. Courts have long recognized that the law of the case doctrine applies to a court's determination of evidentiary sufficiency.[169] Thus, they have applied the doctrine to bar entry of judgment under Rule 50 in cases where a previous grant of judgment under Rule 50, on grounds of evidentiary insufficiency, was reversed by the court of appeal.[170] Issues of fact are especially unsuited for reconsideration when there is no new significant evidence presented in the case.[171]

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165. 1B MOORE, *supra* note 161, ¶ 0.404(1), at II-9 ("The doctrine of the law of the case is, then, a heavy deterrent to vacillation on arguable issues, but not designed to prevent the correction of plain error or injustice.").

166. 18 WRIGHT ET AL., *supra* note 160, § 4478, at 799-800.

167. FED. R. CIV. P. 50 advisory committee notes, 1991 Amendment. It is also of note that Rule 16(e) substantially limits the authority of courts to modify orders made after a final pretrial conference. FED. R. CIV. P. 16(e) (stating that such orders "shall be modified only to prevent manifest injustice"). Applying the law of the case doctrine to issues of evidentiary sufficiency previously litigated at the summary judgment stage is consistent with the case management policies reflected in Rule 16(e).

168. *E.g.*, FED. R. CIV. P. 54(b).

169. 18 WRIGHT ET AL., *supra* note 160, § 4478, at 800 n.33.

170. *See e.g.*, Gates v. Shell Offshore, Inc., 881 F.2d 215, 216-17 (5th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); Fadhl v. City & County of San Francisco, 804 F.2d 1097, 1099 (9th

In fact, at least one court has applied the law of the case doctrine to bar consideration of the issue of evidentiary sufficiency at the Rule 50 stage in a case in which the appeals court had previously reversed a denial of summary judgment. In *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*,[172] the Ninth Circuit held that a district court had erred in directing a verdict in favor of the defendant on the ground that the plaintiff's evidence was insufficient to establish the elements of her claim.[173] The Ninth Circuit noted that the court of appeal had specifically held that the "facts before the court were sufficient to raise factual questions as to defendant's state of mind and the factors determinative of the duty owed the plaintiff" when it reversed a previous grant of summary judgment.[174] The Ninth Circuit opined that because the court of appeal had found in the first appeal "that there were disputed issues of material fact, it followed that the plaintiff was entitled to have those issues resolved by the jury if her evidence held up at trial and if no other issues foreclosed her claim."[175] Noting that a review of the record confirmed that the requisite evidence was produced at trial, the court held that the law of the case doctrine required the district court to submit the case to the jury.[176]

The law of the case approach also is supported by the judicial treatment of successive motions for summary judgment on issues of evidentiary sufficiency. As mentioned above, the law of the case doctrine can apply even as to the previous orders of the same district court.[177] Courts have long rejected the view that a district court's denial of summary judgment precludes the court, as a matter of law, from entertaining a renewed motion for summary judgment by the same party. Thus, they have held, consistent with the law of the case doctrine, that a court may revisit the issue of evidentiary sufficiency at the summary judgment stage when the subsequent motion is based on new evidence or an expanded evidentiary record.[178]

Cir. 1986); Otten v. Stonewall Ins. Co., 538 F.2d 210, 212-13 (8th Cir. 1976); Lincoln Nat'l Life Ins. Co. v. Roosth, 306 F.2d 110, 112-15 (5th Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

171. 18 WRIGHT ET AL., *supra* note 160, § 4478, at 799-800.

172. 803 F.2d 454 (9th Cir. 1986).

173. *Id.* at 458-60.

174. *Id.* at 459.

175. *Id.*

176. *Id.*

177. *See supra* note 158 and accompanying text.

178. *See e.g.*, Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 251 (D.C. Cir. 1987); Shearer v. Homestake Mining Co., 727 F.2d 707, 709 (8th Cir. 1984); United States v. Horton, 622 F.2d 144, 148 (5th Cir. 1980); Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1121 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979); Kirby v. P.R. Mallory & Co., 489 F.2d 904, 913 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *see also* Abbadessa v. Moore Business Forms, Inc., 987 F.2d 18, 22 (1st Cir. 1993) (observing that law of the case doctrine did not bar court from entertaining a second motion for summary judgment where the issue raised in the second motion had not been decided by the district court); Cale v. Johnson, 861 F.2d 943, 948 (6th Cir. 1988) (stating that court could reconsider previous denial of summary judgment where required by the "demands of justice").

On the other hand, courts have recognized that the policies behind the law of the case doctrine are implicated by permitting reconsideration of successive motions for summary judgment.[179] A court should not reconsider a previous denial of summary judgment unless "good reason is shown why a prior denial of a motion for summary judgment is no longer applicable or should be departed from."[180] The law of the case doctrine generally bars consideration of a successive summary judgment motion in cases where none of the exceptions to the doctrine apply.[181] While the law does not in all circumstances immunize the first ruling from reconsideration,[182] it does require the district court to "balance the need for finality against the forcefulness of any new evidence and the demands of justice."[183]

In any event, while there are grounds for applying the law of the case doctrine to successive motions for summary judgment, the argument for applying the doctrine is much stronger once the action proceeds to trial. As one commentator noted, application of the law of the case doctrine may well turn on "distinctions that rest on the stage that the proceeding has reached."[184] As a case progresses toward trial, often early pretrial rulings may be subject to reconsideration.[185] Yet, as a trial comes closer to its final disposition, the need for stability becomes paramount.[186] Where a case is still in the preliminary stages, reconsideration of a court's ruling

179. *See e.g.*, Wright v. Cayan, 817 F.2d 999, 1002 n.3 (2d Cir.) (reconsidering denial of summary judgment offends "general practice of refusing to reopen what has been decided"), *cert. denied*, 484 U.S. 853 (1987); Allstate Fin. Corp. v. Zimmerman, 296 F.2d 797, 799 (5th Cir. 1961) (expressing general disapproval of "piecemeal consideration of successive motions for summary judgment, since defendants might well normally be held to the requirement that they present their strongest case for summary judgment when the matter is first raised") (cited in Fernandez v. Bankers Nat. Life Ins. Co., 906 F.2d 559, 569 (11th Cir. 1990)).

180. *Kirby*, 489 F.2d at 913; *see also Abbadessa*, 987 F.2d at 22 (suggesting that the law of the case doctrine would apply to the subsequent motion "except in unusual circumstances"); Federal Ins. Co. v. Scarsella Bros., 931 F.2d 599, 601-02 n.4 (9th Cir. 1991) (suggesting that there are circumstances where a district court "establish[es] law of the case when it denies a summary judgment motion"); Marvin v. King, 734 F. Supp. 346, 351 (S.D. Ind. 1990) (stating that a court should not "set aside the law of the case lightly" by reconsidering a previous denial of summary judgment).

181. *See e.g.*, Cardwell v. Kurtz, 765 F.2d 776, 778 (9th Cir. 1985); Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665-66 (E.D. Cal. 1986), *rev'd in part*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988); Erie Conduit Corp. v. Metropolitan Asphalt Paving Ass'n, 560 F. Supp. 305, 307-08 (E.D.N.Y. 1983).

182. *See, e.g.*, Dictograph Prod. Co. v. Sonotone Corp., 230 F.2d 131, 135 (2d Cir.), *cert. dismissed*, 352 U.S. 883 (1956).

183. *See, e.g.*, Corporacion De Mercadeo Agricola v. Mellon Bank Int'l, 608 F.2d 43, 48 (2d Cir. 1979).

184. 18 WRIGHT ET AL., *supra* note 160, § 4478, at 791.

185. *Id.*

186. *Id.*

on evidentiary sufficiency can be more readily supported.[187] However, when a case survives the summary judgment stage and proceeds to trial—and certainly where an appellate court has reversed a grant of summary judgment—there is a strong argument that the system's interest in stability dictates adherence to a previous ruling on evidentiary sufficiency absent the kinds of factors that would permit reconsideration of the sufficiency question under the law of the case doctrine.[188]

If barring reconsideration of a court's ruling on evidentiary sufficiency appears too extreme a measure, it is important to reemphasize that the law of the case approach would not preclude courts, in all cases, from taking a second look at the plaintiff's evidence. As noted above, some courts have suggested that a denial of summary judgment should have no effect on a Rule 50 ruling because the character of the plaintiff's evidence, at trial, is invariably different.[189] It may be true that a plaintiff's case so deteriorates at trial that a court could properly grant judgment as a matter of law under Rule 50 even where it has previously ruled in the plaintiff's favor at summary judgment. It is also true, however, that differences between the summary judgment and Rule 50 procedures have narrowed over time and that, in many cases, there will be no significant change in the essential proofs put forth by the plaintiff. If there is a substantial deterioration of the plaintiff's case, a court may have grounds for setting aside a previous ruling on evidentiary sufficiency and entering judgment under Rule 50. However, absent such a documented change, the court should not be permitted to stop the plaintiff's case merely because, on further reflection, the plaintiff's case appears weak.

While there are grounds for applying the law of the case approach where a court has ruled on a motion for summary judgment, what about cases in which summary judgment has not been sought? Obviously, in any technical sense, the law of the case approach would not apply. Yet, there may still be grounds for drawing significance from the defendant's failure to seek summary judgment. A failure to move for summary judgment could be seen as pregnant in the sense that the relatively generous standards for summary judgment now in vogue invite the filing of summary judgment motions in any case in which there is a plausible argument that the plaintiff's evidence is deficient as a matter of law. Moreover, to the extent that summary judgment is viewed as a device by which the system identifies the cases worthy of substantial resource commitment, a court

187. *See, e.g.*, Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 184-85 (5th Cir. 1990), *cert. denied*, 114 S. Ct. 171 (1993) (suggesting that courts should be free to reconsider a denial of summary judgment at the preliminary stages of the case).

188. This is particularly true given the extent to which summary judgment has emerged as a major gatekeeping device in federal litigation. *See infra* notes 190-92 and accompanying text (discussing policy arguments in favor of treating a previous denial of summary judgment as law of the case).

189. *See supra* notes 134-45.

may be inclined to sanction the defendant who could have raised the sufficiency question at an earlier stage. While there may be no legal ground for enforcing adherence to such an approach, the fundamental changes in the summary judgment procedure may justify a skeptical judicial response to claims of evidentiary insufficiency raised, for the first time, at trial.

VII. BROADER CONSIDERATIONS

For the reasons discussed above, there are substantial legal grounds for subjecting Rule 50 challenges to evidentiary sufficiency to the law of the case doctrine. Such an approach also is supported by broader policy considerations.

The strongest policy argument in favor of the law of the case approach is that it best serves the emerging role of summary judgment in federal practice. The changes in the summary judgment procedure are undesirable. Yet, for better or worse, summary judgment has been transformed from a rarely used procedural tool into a major gatekeeping device in federal litigation.[190] Clearing the hurdle of summary judgment is now a significant event in federal practice.

This gatekeeping function is compromised by permitting the defendant to have a second bite at the sufficiency apple.[191] The increased use of summary judgment is tied to broader case management concerns.[192] The granting of summary judgment enforces these concerns by weeding out the unworthy claims. So too, however, does the *denial* of summary judgment by identifying the cases that are worthy of trial and, thus, the expenditure of scarce judicial resources. Permitting a defendant to relitigate the issue of evidentiary sufficiency defeats the case management functions of the revitalized summary judgment procedure.

In addition, giving a court free rein to reconsider its ruling on evidentiary sufficiency blunts the extent to which a denial of summary judgment facilitates settlement. In a system in which summary judgment is rarely granted, a decision to deny summary judgment may have little residual consequence. In the current legal milieu, however, the denial should have the effect of signaling that the plaintiff has a substantial case that can prevail before a jury. If the defendant knows that her opportunities for relitigating the sufficiency question are limited, she may be inclined to settle the case. She may be less willing to entertain settlement, on the other hand, when she knows that she can continue, with impunity, to press the sufficiency point.

By the same token, a rule which accords legal significance to a denial of summary judgment may also inject some well-needed discipline into the

190. *See supra* notes 5-12 and accompanying text.

191. The argument in this section of the Article tracks, in some respects, the "Economic Analysis of Summary Judgment" in Issacharoff & Loewenstein, *supra* note 1, at 94-118.

192. *See supra* notes 13-16 and accompanying text.

summary judgment procedure. There are indications that defendants are almost routinely seeking summary judgment.[193] This has disturbing consequences, particularly given the propensity of at least some courts to weigh the evidence at the summary judgment stage and assume the role of fact finder.[194] Even when a grant of summary judgment is reversed on appeal, there is a substantial waste of judicial resources at the preliminary stage of the case. Ironically, the current system may actually have the effect of increasing unnecessary litigation by encouraging the improvident use of the summary judgment procedure. If defendants know that there is a significant cost associated with defeat at the summary judgment stage, they may limit their resort to the summary judgment procedure to more appropriate cases.[195]

The law of the case approach also would provide some much needed balancing to the summary judgment procedure. The changes in summary judgment have imposed an enormous burden on plaintiffs. Plaintiffs are forced to put forth their entire case at the summary judgment stage and withstand substantial judicial scrutiny of their proofs. Yet, plaintiffs must then face the additional hurdle of surviving sufficiency challenges at the Rule 50 stage. Having survived the severe sufficiency test now imposed at summary judgment, plaintiffs deserve to receive some commensurate benefit once the case proceeds to trial.

It might be argued that this approach would solidify the existing tendency on the part of courts to misuse the summary judgment procedure. If a court knows that its ruling on summary judgment can be freely revisited, it may be more inclined to give the benefit of the doubt to the plaintiff's case.[196] The plaintiff might lose that benefit if the court knows that its ruling will carry forward to the Rule 50 stage.

If there were any realistic hope that courts would turn back the clock and adopt more restrictive standards for granting summary judgment, this argument might be persuasive. A preferable system would be a system that limited the use of summary judgment and deferred challenges to evidentiary sufficiency for disposition under Rule 50. However, that is not

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193. *See* Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 EMPLOYEE REL. L.J. 245, 254 (1992) ("In today's litigation climate, . . . [defendants] must view every case as one in which a motion for summary judgment will be filed and from day one begin developing a record that maximizes the chance of success of such a motion.").

194. *See* McGinley, *supra* note 6, at 228-29.

195. This point may appear to be inconsistent with the assertion above that courts should look skeptically upon sufficiency challenges raised for the first time at the Rule 50 stage. However, that point was made in the context of current conditions concerning the use of the summary judgment procedure. My strong preference is for approaches which would reduce the use of summary judgment.

196. This is evident from the cases, cited above (*supra* notes 56-69 and accompanying text), in which courts willingly passed on the issue of evidentiary sufficiency at the summary judgment stage precisely because the issue could be taken up anew at the Rule 50 stage.

the system we have. The heightened use of the summary judgment procedure seems well-engrained in the law. If summary judgment is to play the case management role now envisioned by courts, it is only fair that the change in summary judgment be reflected in how courts respond to Rule 50 motions.

It might also be argued that this approach places too much reliance on the court's initial parsing of the evidence at the summary judgment stage. A court, after all, might make a mistake in judging evidentiary sufficiency that could be corrected at the Rule 50 stage. This is always a risk when applying the law of the case doctrine. However, it is a risk that is substantially reduced by the degree to which courts now view summary judgment as a significant procedural event and take care to make the appropriate determination of evidentiary sufficiency. On balance, the risk of being saddled with a mistaken denial of summary judgment is outweighed by the costs to the system in permitting relitigation of the sufficiency question.

The more serious concern is that judges will use the opportunity of a Rule 50 motion to interpose their own views of the evidence. A court that denies summary judgment may well have made the correct determination with respect to the legal sufficiency of the plaintiff's evidence. That same court, however, may have second thoughts about the plaintiff's case, not because of any mistake in its previous decision, but because the "live" case seems less persuasive. It is for the jury, not the judge, to assess the persuasive force of the plaintiff's evidence. If summary judgment is to assume the central role marked out by the trilogy, it may well be that the legal question of evidentiary sufficiency is best assessed under the more sterile conditions that exist at that stage of the case.

VIII. CONCLUSION

The substantial change in the summary judgment procedure has had a profound impact on federal practice. Courts have reconstructed summary judgment as a vital case management tool. While they once denied summary judgment on the slightest possibility that the plaintiff could eventually advance a jury-submissible case, courts now insist upon proof that affirmatively establishes the plaintiff's entitlement to jury consideration.

Given the substantial changes in the summary judgment procedure, the historical justifications for permitting reconsideration of the sufficiency question, at the Rule 50 stage, no longer hold true. The plaintiff is expected to put forth all her evidence in response to a summary judgment motion; the standard for granting summary judgment is identical to the standard for granting judgment under Rule 50. A court's decision on evidentiary sufficiency at summary judgment should bar reconsideration of the sufficiency question absent the types of intervening changes that would justify reconsideration under the law of the case doctrine.