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INTRODUCTION

Rule 50 of the Federal Rules of Civil Procedure[1] allows a trial judge to grant judgment as a matter of law[2] against a party, during or after a trial, on any claim lacking a legally sufficient evidentiary basis.[3] The first sentence of rule 50(b) states:

> Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.[4]

Section (b) therefore requires that in order to move for judgment as a matter of law after a jury verdict has been returned, the movant must

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1. Rule 50, as amended in 1991, reads in relevant part:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, crossclaim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.
>
> (b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

FED. R. CIV. P. 50.

2. Rule 50 was amended in 1991. Among the amendments was the elimination of the familiar terms "directed verdict" and "judgment notwithstanding the verdict" from the text, in favor of "judgment as a matter of law." The reasons given for the change include: (1) to eliminate the anachronisms associated with the older terms; (2) to draw the connection between rule 50 and rule 56, where the new language appears; and (3) to demonstrate the common identity of the pre- and postverdict motions for judgment as a matter of law. FED. R. CIV. P. 50 advisory committee's note (1991 amendments). This Note will use "judgment as a matter of law" in its discussion; however, due to the recency of the amendment, most of the cases discussed refer to the older terms. Although the terms have changed, the standard for granting a motion under rule 50 has remained the same. *Id.; see also infra* note 24 and accompanying text.

3. FED. R. CIV. P. 50.

4. FED. R. CIV. P. 50(b).

first have moved for judgment as a matter of law on the issue in question at the close of all the evidence.[5] Despite this explicit language, when the purposes underlying the "close of all the evidence" requirement have been served,[6] a majority of the circuits have not strictly enforced its terms, thereby creating a "flourishing body of case law on the subject of when a motion for judgment [as a matter of law] may be entertained despite failure to move for a directed verdict at the close of the case."[7] Even those circuits that take a liberal approach to rule 50 use a variety of standards in determining whether excusal is appropriate.[8]

To understand better the controversial application of rule 50(b) at issue here, consider the case of *DeMarines v. KLM Royal Dutch Airlines.*[9] In *DeMarines,* the plaintiff boarded an airplane traveling from

5. FED. R. CIV. P. 50(b). The language of the rule is arguably somewhat ambiguous, in that the rule itself does not actually state that a motion for judgment as a matter of law at the close of all the evidence *must* precede a postverdict motion. Rather, it merely provides that such a motion is subject to renewal following a verdict. Thus, it does not specifically prohibit the granting of postverdict judgment as a matter of law where a party has not so moved at the close of all the evidence; it merely does not provide for such a situation. *See* FED. R. CIV. P. 50(b). *But see infra* note 24 and accompanying text.

This Note does not focus on the requirement that a party state the specific grounds on which it seeks judgment as a matter of law or on the rule that a postverdict motion for judgment as a matter of law is limited to the specific issues raised in the corresponding preverdict motion. At one time there was a great deal of debate as to whether "inartful" requests for preverdict judgment as a matter of law satisfied this requirement. *See, e.g.,* Villanueva v. McInnes, 723 F.2d 414, 416-18 (5th Cir. 1984) (defendant's objection to proposed instructions approximated motion for judgment as a matter of law); Ebker v. Tan Jay Intl., Ltd., 739 F.2d 812, 822-23 (2d Cir. 1984) (motion to dismiss functioned as motion for judgment as a matter of law), *cert. denied,* 112 S. Ct. 161 (1991); Jefferson Realty, Inc. v. Fidelity & Deposit Co., 410 F.2d 847, 849 (5th Cir. 1969) (motion to strike not equivalent to motion for judgment as a matter of law); Gilmore v. Lake Shore Motor Freight Co., 331 F. Supp. 1171, 1171 (W.D. Pa. 1971) (request for binding jury instructions not treated as motion for judgment as a matter of law). This debate has seemingly been foreclosed by the language of rule 50(a)(2), as amended in 1991, and the corresponding advisory committee note:

> The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict.

FED. R. CIV. P. 50(a)(2) advisory committee's note (1991 amendments) (citations omitted). This amendment does not affect the requirement at issue here. *See infra* notes 174-80 and accompanying text.

6. *See, e.g.,* Bohrer v. Hanes Corp., 715 F.2d 213, 217 (5th Cir. 1983) ("We excuse defendants' technical noncompliance with Rule 50(b) under the congruence of circumstances extant in this case because we are convinced that the purposes of the rule have been served."); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 576 (7th Cir. 1976) (stating that the application of rule 50(b) "should be examined in the light of the accomplishment of [its] particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for the truth").

7. *Ebker,* 739 F.2d at 823. For a discussion of *Ebker,* see *infra* notes 97-104 and accompanying text.

8. *See infra* notes 77-124 and accompanying text.

9. 580 F.2d 1193 (3d Cir. 1978).

Zurich to Amsterdam, and ultimately to the United States. During the flight to Amsterdam, he experienced discomfort in his head, apparently due to changes in cabin pressure, causing numbness, garbled speech, and a persistent loss of equilibrium. DeMarines filed suit against the airline under the Warsaw Convention.[10] To prevail under the Convention, a plaintiff must present evidence that he or she suffered bodily injury on board an aircraft as the result of an "accident,"[11] defined by relevant case law as "an unusual or unexpected happening."[12]

In his case-in-chief, DeMarines introduced evidence that six of the 191 passengers on board had experienced aural discomfort, and that an unidentified flight attendant informed another passenger that there was a problem with the air pressure. This constituted his only evidence on the question of whether an accident had occurred.[13] The airline moved for a directed verdict at the close of DeMarines' case-in-chief, arguing that the passenger had not demonstrated the existence of "unusual or unexpected events" sufficient to constitute an accident.[14] The trial judge denied KLM's motion. Although this motion arguably put DeMarines on notice that the airline contended that he had not introduced sufficient evidence to demonstrate the occurrence of an accident, he presented no additional evidence.[15]

In its case-in-chief, the airline introduced the testimony of six crew members, all of whom refuted the plaintiff's claim of insufficient cabin pressurization.[16] The defense then introduced evidence on unrelated issues and rested, but failed to move again for a directed verdict.[17] After the jury returned a verdict for DeMarines, the airline moved for judgment notwithstanding the verdict. The trial court denied the motion and KLM appealed, again arguing that DeMarines did not prove

10. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1934, 49 Stat. 3000.

11. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1934, ch. III, art. 17, 49 Stat. 3000, 3018.

12. *DeMarines,* 580 F.2d at 1196-97 (citations omitted).

13. 580 F.2d at 1197.

14. 580 F.2d at 1195 & n.4.

15. The purpose of rule 50 is to provide the nonmovant an opportunity to cure any defect which the movant sees in the nonmovant's case, *see infra* notes 50-61 and accompanying text, but the judge's denial of the motion is not necessarily indicative of the judge's feelings about the merit of the motion. *See, e.g.,* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 (1969) ("[I]t has been said to be 'the better and safer practice . . . to defer a ruling upon the motion for a directed verdict until both sides have finally rested.'" (quoting Guess v. Baltimore & Ohio Ry., 191 F.2d 976, 980 (8th Cir. 1951))).

16. 580 F.2d at 1197.

17. In *DeMarines,* KLM actually handed a written motion to the trial judge's law clerk, but the clerk apparently failed to pass the motion on to the judge. As a result, the Third Circuit on appeal treated KLM as if it had simply failed to renew its motion, since it had not followed the proper procedure for filing papers with the court under FED. R. CIV. P. 5(e). 580 F.2d at 1195 n.4.

the existence of an accident.[18]

In its opinion, the Third Circuit noted the paucity of evidence on the "accident" question and strongly suggested that DeMarines had failed to establish an element necessary to recover under the Warsaw Convention.[19] Despite this fact, the court refused to reverse the district court's denial of judgment notwithstanding the verdict, in accordance with the Third Circuit's strict approach to rule 50(b).[20] The airline's failure to renew its motion for a directed verdict at the close of all the evidence precluded it from obtaining judgment notwithstanding the verdict, or appealing its denial. Although the court found that the airline likely deserved judgment as a matter of law, the airline's procedural error limited its remedy to a costly and time-consuming new trial.[21]

DeMarines well illustrates the importance of rule 50 interpretation. Under a strict reading of rule 50, a party that fails to move for judgment as a matter of law at the close of all the evidence may not challenge the verdict or appeal the judgment based on insufficient evidence. Some circuits, including the Third Circuit, have taken this approach.[22] Others, however, have adopted a more liberal view of rule 50, and excuse noncompliance with the "close of all the evidence requirement" under certain circumstances.[23] In those circuits, the airline's initial motion in *DeMarines,* which arguably served to inform DeMarines of the deficiencies in his case, might have adequately preserved the airline's right to obtain a postverdict judgment as a matter of law, or to challenge its denial on appeal.

This Note examines the language and purposes of rule 50 to determine if and when a relaxed application of its requirements is appropriate. Part I considers the terms and goal of the rule and concludes that its purpose is to put the party opposing the motion for judgment as a matter of law on notice of the movant's assertion that the evidence is insufficient as a matter of law, and to provide the opposing party an opportunity to "cure." Part II discusses courts' varying application of the requirement that a motion for judgment as a matter of law made at the close of all the evidence precede a renewal of such a motion after

18. 580 F.2d at 1195.

19. For example, the court noted, "We do have a serious question . . . whether the plaintiff produced sufficient evidence from which a jury could reasonably infer that an 'accident' did in fact occur." 580 F.2d at 1197. It later added, "[W]e have grave doubts that a finding that an accident occurred in this case is legally supportable." 580 F.2d at 1198.

20. *See infra* notes 42-49 and accompanying text.

21. Under FED. R. CIV. P. 59, a motion for judgment as a matter of law at trial is not a predicate for a post-verdict motion for a new trial. Therefore, even those circuits employing a strict approach to rule 50(b) may grant a new trial in the absence of a motion for judgment as a matter of law at the close of all the evidence. *See infra* note 154.

22. *See infra* notes 62-76 and accompanying text.

23. *See infra* notes 77-124 and accompanying text.

the jury has returned its verdict. Part III analyzes the approaches and argues that, given the purpose behind rule 50(b) and the spirit of the Federal Rules, a liberal interpretation of this requirement is appropriate. This last Part proposes an amendment to the rule which alters its language to reflect better the purposes the rule is intended to serve.

I. THE LANGUAGE AND PURPOSE OF RULE 50(B)

The advisory committee's note to the 1963 amendments to rule 50 makes clear that "[a] motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence."[24] Many courts, however, have looked to the rule's purposes to determine when its terms should be enforced strictly.[25] This Part therefore considers the reasons behind the rule's enactment.

A. *The Seventh Amendment*

An original purpose of the "close of all the evidence" requirement was to comply with the Seventh Amendment's jury trial guarantee.[26]

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24. FED. R. CIV. P. 50(b) advisory committee's note (1963 amendments). Although the language of the rule has changed, its substance, and particularly the "close of all the evidence" requirement, has not. *See* Windsor Shirt Co. v. New Jersey Natl. Bank, 793 F. Supp. 589, 594 n.4 (E.D. Pa. 1992) ("On December 31, 1991, Fed.R.Civ.P. 50(b) was amended. . . . [T]he amendment did not change the substance of the rule."). In fact, the new language makes the "close of all the evidence" requirement clearer than the pre-1991 language. Prior to the most recent amendments, rule 50(b) read:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict.

The second sentence of the prior section states that the right to move for judgment notwithstanding the verdict is preserved by "a party who has moved for a directed verdict," but makes no mention that the directed verdict motion must have been made at the close of all the evidence. The advisory committee note was thus necessary to confirm that the directed verdict motion in the second sentence referred back to that in the first sentence, which included the requirement that it be made at "the close of all the evidence." *See* Benson v. Allphin, 786 F.2d 268, 273 (7th Cir.) ("Rule 50(b) is not a model of perspicuity . . . . Thus, one learns from the notes of the Advisory Committee on the 1963 amendments to the rule that '[a] motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.' "), *cert. denied*, 479 U.S. 848 (1986); McKinnon v. City of Berwyn, 750 F.2d 1383, 1390 (7th Cir. 1984) ("Rule 50(b) is not clearly drafted (one might have thought that after 46 years something would have been done about this)."). The commentators and case law, however, generally accepted, without exception, the requirement that a motion for a directed verdict be made at the close of all the evidence in order to preserve the right to challenge the sufficiency of the evidence later. *See* WRIGHT & MILLER, *supra* note 15, § 2537 and cases cited therein; 5A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 50.08 (2d ed. 1992) and cases cited therein. The revised rule 50(b) arguably eliminates the confusion engendered by its predecessor, but the advisory committee note remains.

25. *See infra* notes 62-124 and accompanying text.

26. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise

Although the directed verdict motion existed when the Seventh Amendment was ratified, judgment notwithstanding the verdict did not.[27] As a result, the Supreme Court in 1913 held that the Seventh Amendment prohibited a court from entering judgment in favor of one party when a jury had returned a verdict for the other.[28] Twenty-two years later, however, in *Baltimore & Carolina Line, Inc. v. Redman,*[29] the Supreme Court undermined this absolutist interpretation. There, the Court stated that when the trial judge had expressly reserved ruling on a motion for a directed verdict at trial, the judge could then legitimately grant judgment notwithstanding the verdict, because the latter action was technically a grant of the constitutionally acceptable directed verdict which the judge had reserved.[30] The Federal Rules of Civil Procedure, originally promulgated two years after *Redman* in 1937, eliminated the need for an express reservation. Then, as now, rule 50(b) provided that a court is "deemed" to have reserved the determination of legal issues whenever a motion for judgment as a matter of law made at the close of all the evidence "is denied or for any reason is not granted."[31]

Although the Third Circuit continues to rely upon the constitutional rationale in strictly enforcing the "close of all the evidence" requirement of rule 50(b),[32] the continuing viability of this particular constitutional concern is questionable. This Note argues that when a court applies the proper standard for the granting of a postverdict motion for judgment as a matter of law, it does not deny a litigant's Seventh Amendment rights, even when the court does not strictly enforce the "close of all the evidence" requirement, because the court does not

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reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

27. *See* Slocum v. New York Life Ins. Co., 228 U.S. 364, 381-82 (1913). *But see* Leo Carlin, *Judgment Non Obstante Veredicto,* 51 W. VA. L.Q. 14, 19, 22 (1948) (noting that in fact a similar practice did exist under English common law, and that the ignorance of the *Slocum* court of the practice created a great furor in the legal community). The actual jury control devices that existed at the time of ratification of the Constitution varied significantly from their modern counterparts. For a discussion of the early devices utilized, see Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts,* 55 MINN. L. REV. 903, 909-16 (1971).

28. *Slocum,* 228 U.S. at 364. *Slocum* was a five-to-four decision. The dissent argued that means similar to those employed by the parties to the action existed to some extent at common law, and that the majority, "in now condemning this practice, long followed in the courts below, . . . is departing from, instead of applying, the principles of the common law, and is extending rather than enforcing the constitutional provision." 228 U.S. at 428.

29. 295 U.S. 654 (1935).

30. 295 U.S. at 658-59.

31. FED. R. CIV. P. 50(b); *see also* Edith G. Henderson, *The Background of the Seventh Amendment,* 80 HARV. L. REV. 289, 337 n.211 (1966) ("Rule 50(b), passed in [1937], converted the reservation into a fiction by 'deeming' it to have been made whenever a directed verdict motion was denied.").

32. *See, e.g.,* Mallick v. International Bhd. of Elec. Workers, 644 F.2d 228, 234 (3d Cir. 1981) ("We, however, do not deem a rule whose underpinnings rest in the United States Constitution to be a mere technicality that should be readily dispensed with.").

reexamine the facts found by the jury. Rather, the court merely considers whether a sufficient *legal* basis exists for a party's verdict.[33] The advisory committee notes to the Federal Rules, as well as most courts and commentators, support this view.

1. *The Advisory Committee View*

The constitutional basis for the "close of all the evidence" requirement has long been considered suspect. In 1946, the advisory committee noted that the automatic reservation provision of rule 50(b) was likely unnecessary:

> The provision in the original rule that the court "is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion" to direct, resulted from an over-meticulous effort to stay within the limits of *Baltimore & Carolina Line Inc. v. Redman* and *Slocum v. New York Life Ins. Co.* It is an awkward fiction. The Advisory Committee thinks it should be eliminated and that it is not a denial of the constitutional right to jury trial to grant a judgment, notwithstanding a verdict, whether or not the trial court reserved or may be "deemed" to have reserved the question of law raised by a motion to direct.[34]

The advisory committee's note to the 1991 amendments similarly downplays this "constitutional" basis of rule 50(b). The 1991 note states, "*At one time,* this [fictional reservation] requirement was held to be of constitutional stature, being compelled by the Seventh Amendment."[35] In the note accompanying section (b) of the rule, the advisory committee states, "One purpose of this concept *was* to avoid any question arising under the Seventh Amendment. It *remains useful* as a means of defining the appropriate issue posed by the post-verdict motion."[36] In addition, the advisory committee's report, which accompanied the proposed amendments sent to Congress, noted that some had argued to eliminate the requirement that a motion for judgment as a matter of law at trial generally precede a post-trial motion. In explaining its reasoning for maintaining the requirement, the committee completely ignored the constitutional rationale.[37] The note to the recent amendments to rule 50 further illustrate the anachronistic nature of the constitutional justification for the requirement:

> The expressed standard makes clear that action taken under the rule is a

33. *See* MOORE, *supra* note 24, ¶ 50.09.

34. FED. R. CIV. P. 50(b) advisory committee's note (unadopted 1946 amendments) *quoted in* MOORE, *supra* note 24, ¶ 50.01[4] (citations omitted). Although the proposed amendments were not adopted, the advisory committee's note indicates a skepticism toward the constitutional argument.

35. FED. R. CIV. P. 50 advisory committee's note (1991 amendments) (emphasis added).

36. *Id.* (emphasis added).

37. H.R. DOC. NO. 77, 102d Cong., 1st Sess. 58 (1991). The advisory committee's report (which is distinct from the advisory committee's note) focused solely upon the cure rationale discussed *infra* notes 50-61 and accompanying text.

> performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law.[38]

In other words, the drafters of the amended rule 50 meant that when a court merely considers whether a sufficient *legal* basis exists for a party's claim, but does not reexamine the facts found by the jury, there is no violation of the Seventh Amendment.[39]

2. *The Federal Courts*

As noted above, only a motion for judgment as a matter of law made at the close of all the evidence will fall within the constitutional guidelines set by *Redman,* as adopted by rule 50(b). A party that fails to move for judgment as a matter of law at the close of all the evidence therefore falls outside the scope of rule 50(b), because the party has presented no motion upon which the court's decision can be "deemed" reserved. Even if the party moved earlier for judgment as a matter of law and the court reserved its decision at that time, the party does not technically fall within the *Redman* standard of constitutionality because a motion for judgment as a matter of law expires upon the introduction of new evidence.[40]

Despite this fact, most lower federal courts have allowed a party to challenge the sufficiency of the evidence after a jury returns the verdict or on appeal, even if the party did not satisfy the "close of all the evidence" requirement at trial.[41] In doing so, they generally do not even acknowledge that such actions are outside the scope of the Supreme Court's articulated constitutional limits. Indeed, to the extent that any of these courts recognize any constitutional concern whatsoever, it is generally in passing. For example, in *McKinnon v. City of Berwyn,*[42] the Seventh Circuit acknowledged with skepticism the traditional constitutional argument[43] and noted, "[W]hether or not there was a reason [to require parties to move for judgment as a matter of law during trial in 1791], there is a pretty good reason today." The court then went on to discuss the curative purpose of the rule.[44] Only the Third Circuit continues to cite the Seventh Amend-

38. FED. R. CIV. P. 50 advisory committee's note (1991 amendments).

39. *See infra* notes 77-124 and accompanying text. *But see infra* notes 62-69 and accompanying text.

40. *See* Bogk v. Gassert, 149 U.S. 17, 23 (1893); MOORE, *supra* note 24, ¶ 50.05[1] & nn.4-5 (discussing relevant cases); WRIGHT & MILLER, *supra* note 15, § 2534 & n.2 (discussing relevant cases).

41. *See infra* notes 77-124 and accompanying text.

42. 750 F.2d 1383 (7th Cir. 1984); *see infra* notes 110-17 and accompanying text.

43. *See supra* notes 26-31 and accompanying text.

44. *McKinnon,* 750 F.2d at 1388; *see also* Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 576 (7th Cir. 1976) ("There is a better reason for establishing the motion for directed verdict as a condition precedent to a motion for judgment n.o.v. [than

ment as a reason for strictly enforcing the rule.[45]

Even the Supreme Court has retreated somewhat from the strict historical and constitutional considerations which gave rise to the "close of all the evidence" requirement. As early as 1940, the Supreme Court upheld without comment the constitutionality of the fictional reservation provided in rule 50(b).[46] The Court thereby implicitly recognized that a judge need not actually reserve a question of law in order to reverse a jury's verdict. In accepting this "fictional reservation," the Supreme Court departed from the historical basis underlying the decisions in *Slocum* and *Redman,*[47] which required an *actual reservation* in order to preserve the right to renew a motion for judgment as a matter of law after the jury returned its verdict.[48] Scholars commenting on the cases likewise dismiss the importance of the constitutional considerations.[49] For these reasons, the Seventh Amendment concern underlying the "close of all the evidence" requirement of rule 50(b) has been all but abandoned.

B. *The "Cure" Rationale*

The second and more significant purpose for the rule 50 "close of all the evidence" requirement is to "assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment."[50] A party must therefore make a motion for judgment as a matter of law prior to the submission of the case to the jury to "avoid making a trap" by offering such a motion for the first time following the return of the verdict.[51] Indeed, when rule 50 was amended in 1991, the cure rationale actually preserved the general requirement that a party first move for judgment at trial as a predicate for a postverdict motion for judgment. In its report, the advisory com-

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that raised by Seventh Amendment concerns]." (quoting 5A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 50.08 (1975))).

45. *See infra* notes 62-69. Although the Eleventh Circuit, like the Third Circuit, construes rule 50(b)'s requirements strictly, the Eleventh Circuit does not base its decision upon the Seventh Amendment. *See infra* notes 70-76.

46. *See* Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).

47. *See supra* notes 26-31 and accompanying text.

48. *See supra* notes 26-31 and accompanying text.

49. Foremost among these is Professor Moore: "[S]ince motions under rule 50 present only questions of law, a court's reconsideration of its decision on the sufficiency of the evidence, after the jury has returned a verdict, is not a denial of the right to jury trial, nor a reexamination of any fact tried by the jury." MOORE, *supra* note 24, ¶ 50.09. Professors Wright and Miller also acknowledge that there is no Seventh Amendment violation when the court "withdraws from the jury a case in which there is no issue of fact requiring the jury's determination." WRIGHT & MILLER, *supra* note 15, § 2522 (quoting Manaia v. Potomac Elec. Power Co., 268 F.2d 793, 799 (4th Cir.), *cert. denied,* 361 U.S. 913 (1959)); *see also* Carlin, *supra* note 27, at 22-25.

50. FED. R. CIV. P. 50(a) advisory committee's note.

51. *See* MOORE, *supra* note 24, ¶ 50.08 and cases cited therein.

mittee noted that "some persons have argued for [the] deletion [of this requirement]."[52] The committee concluded, however, that the protection against unfair surprise to the opposing party justified its retention.[53]

The advisory committee's note to the 1991 amendments also placed great importance on the cure rationale. In the note to paragraph (a)(1) of rule 50, the committee stated, "In no event . . . should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact."[54] The advisory committee reiterated the importance of providing the opposing party an opportunity to remedy its case in the note accompanying paragraph (a)(2).[55]

To understand the importance of the "cure" rationale in practice, recall *DeMarines v. KLM Royal Dutch Airlines.*[56] The initial motion provided DeMarines with notice that KLM challenged the sufficiency of his evidence. Alerted to this potential deficiency, DeMarines could have attempted to "cure" by any of a number of approaches. He might have tried to elicit favorable cross-examination testimony from one of KLM's witnesses that would have established the occurrence of an "accident."[57] Or he perhaps could have submitted additional evidence on the accident issue, either on surrebuttal or by reopening his case-in-chief.[58] When put on notice of a deficiency in its proof, there-

52. H.R. Doc. No. 77, 102d Cong., 1st Sess. 58 (1991).

53. *Id.* ("The Civil Rules Committee determined that there was sufficient reason to retain that requirement . . . ; the requirement does protect against possible surprise.").

54. Fed. R. Civ. P. 50(a)(1) advisory committee's note (1991 amendments).

55. *See* Fed. R. Civ. P. 50(a)(2) advisory committee's note (1991 amendments) ("The purpose of [requiring a motion prior to the close of the trial] is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment."); *see also infra* notes 135-42 and accompanying text.

56. 580 F.2d 1193 (3d Cir. 1978); *see supra* notes 9-21 and accompanying text.

57. As noted *supra* note 16 and accompanying text, this approach was unsuccessful in *DeMarines.* The defendant's witnesses all refuted the plaintiff's claim that there was a problem with cabin pressurization. 580 F.2d at 1197. Courts, however, regularly recognize the possibility that a defendant will in fact provide the missing element of a plaintiff's case. *See, e.g.,* Della Grotta v. Rhode Island, 781 F.2d 343, 350 (1st Cir. 1986) (Following an unsuccessful directed verdict motion, the defendants presented their case, after which all parties rested; the court noted, in refusing to excuse defendants' failure to renew motion, that "it can hardly be disputed that plaintiff's case . . . was far stronger at the close of all evidence than it was at the time the original motion for directed verdict was made."); Moran v. Raymond Corp., 484 F.2d 1008, 1012 (7th Cir. 1973) ("It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link.") (quoting Bogk v. Gassert, 149 U.S. 17, 23 (1893)), *cert. denied,* 415 U.S. 932 (1974).

58. On surrebuttal, the party with the burden of proof has the opportunity to address issues which were raised by an opponent on rebuttal. The permitted scope of surrebuttal, however, is narrow. "[It is] not an opportunity to present again those weak aspects of your case in chief but rather, it is an opportunity narrowly limited to addressing issues that were raised on rebuttal and which reasonably could not have been anticipated and presented during plaintiff's case in chief." T.H. Oehmke, The Civil Litigation Manual 10-3 (1980). A court may, in its discretion,

fore, a party does have available avenues by which to cure.[59]

When a party first moves for judgment as a matter of law after the jury has returned its verdict, however, it is too late for the opposing party to remedy the faults in his or her case and the movant may achieve a "tactical victor[y] at the expense of substantive interests."[60] Even those courts that excuse noncompliance with the technical mandates of rule 50 therefore require that, at a minimum, the curative purpose of the rule be satisfied.[61]

II. THE DIVISION IN THE COURTS OF APPEALS ON THE "CLOSE OF ALL THE EVIDENCE" REQUIREMENT

Litigants who have moved for judgment as a matter of law before

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allow a party to reopen its case-in-chief where the party has "omitted evidence of a legally essential element by accident, inadvertence, or even because of a mistake." *Id.* Still, courts generally dislike reopening a case once the party has rested and it is therefore not best to rely upon a court to do so. *Id.* ("Most judges feel that there should be some conclusion to the presentation of evidence and, consequently, they are reluctant to reopen a case once a party has rested.").

Although it is theoretically possible that this process could repeat ad infinitum, as a realistic matter this does not occur, because of the narrow scope of surrebuttal evidence and the disinclination of judges to allow parties to submit additional evidence. *Id.*

59. For example, in *DeMarines,* the court noted that the plaintiff's failure to provide competent medical or expert testimony connecting the plaintiff's injury to an *unusual* change in cabin pressure significantly contributed to its "grave doubts" about the legal sufficiency of the evidence submitted on the accident issue. *See* 580 F.2d at 1197-98. For another example of curing by providing additional evidence, see McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984):

> If the defendants' counsel had moved for a directed verdict on behalf of the City of Berwyn, explaining that no evidence had been presented that the city's policy-making organs had been involved in the illegalities of the defendant [police] officers, [the plaintiff's] counsel might have taken steps to repair this omission, for example by renewing his offer . . . to introduce evidence of a previous lawsuit against one of the defendant officers, evidence that might help show that there had been a pattern, perhaps amounting to a policy or custom, of similar violations of Fourth Amendment rights by the Berwyn police force.

McKinnon, 750 F.2d at 1389.

60. MOORE, *supra* note 24, ¶ 50.08.

61. *See infra* notes 77-124 and accompanying text. Another basic purpose of rule 50 as a whole is to promote efficiency by allowing a court to enter judgment as a matter of law at trial, if appropriate, and thus not waste judicial resources and jury time on useless jury deliberations. *See* FED. R. CIV. P. 50(a)(1) advisory committee's note (1991 amendment). Excusing parties from satisfying the close of all the evidence requirement does not, however, affect this efficiency concern for two reasons. First, judges are strongly encouraged to allow a case to go to the jury, rather than risk the strict appellate review of a preverdict judgment as a matter of law. *See* FED. R. CIV. P. 50(b) advisory committee's note (1991 amendments) (noting the concerns about strict review and concluding, "For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence . . . ."); *see also* WRIGHT & MILLER, *supra* note 15, § 2533; Note, *Rule 50(b): Judgment Notwithstanding the Verdict,* 58 COLUM. L. REV. 517, 519 (1958).

Second, judges who wish to grant a motion for judgment as a matter of law before sending a case to the jury, but have no motion before the court, may order such judgments sua sponte. *See* Spence v. Board of Educ., 806 F.2d 1198, 1204 n.2 (3d Cir. 1986) (Higginbotham, J., concurring) (quoting Aetna Casualty & Sur. Co. v. L.K. Comstock & Co., 488 F. Supp. 732, 734 (D. Nev. 1980)). Furthermore, when a trial court is hesitant to grant a preverdict motion for judgment as a matter of law sua sponte, the court may suggest to the defendant that the defendant move for such a judgment. *See* Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279, 1281 (5th Cir.), *cert. denied,* 409 U.S. 845 (1972).

the "close of all the evidence" and then attempted to challenge on appeal the sufficiency of evidence have had mixed success in federal appellate courts. This Part details the courts' reactions. Section II.A discusses those courts that demand strict compliance with the terms of rule 50(b) and refuse to consider on appeal the sufficiency of the evidence unless the movant satisfied the proper procedural predicate. Section II.B discusses the approaches of courts that take a relaxed view of the requirement. Such cases arise when a party moves for judgment as a matter of law before the close of all the evidence, but the court excuses the party's failure to renew the motion at the close of all the evidence because the purposes of rule 50 nonetheless are met. The case law, which is not always consistent even within a given circuit, reveals the various approaches.

A. *A Strict Application: The Third and Eleventh Circuits*

Two circuits have adopted a strict approach to the requirements of rule 50. In *Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken,*[62] successors in interest to Booth Bottling Company, Inc. brought an antitrust action, alleging that Pepsi-Cola Bottling Company of Pennsauken had violated the Sherman Act.[63] Pepsi moved for a directed verdict at the close of Lowenstein's case-in-chief. The judge denied the motion, and Pepsi presented its case. It then failed to renew its motion at the close of all the evidence, and the case went to the jury. The jury returned a verdict for Lowenstein, prompting Pepsi to move for judgment notwithstanding the verdict, which the district judge granted.[64]

On appeal, the Third Circuit reversed the judgment, holding that Pepsi's failure to renew the motion for a directed verdict at the close of all the evidence, as required by rule 50(b), precluded it from obtaining judgment notwithstanding the verdict.[65] Although Pepsi argued that the initial directed verdict motion provided Lowenstein with the opportunity to cure and thus satisfied the purposes of the "close of all the evidence" requirement, the court disagreed. It focused on both the cure and the constitutional concerns traditionally offered to justify the rule,[66] and noted that such concerns required careful consideration of the reasons for taking an issue from the jury. The court concluded that, particularly in a complex and lengthy trial, such "careful scrutiny" should occur after the presentation of all the evidence.[67] The court added:

62. 536 F.2d 9 (3d Cir.), *cert. denied,* 429 U.S. 966 (1976).

63. 15 U.S.C. § 1 (1988).

64. *Lowenstein,* 536 F.2d at 10.

65. 536 F.2d at 11-12.

66. 536 F.2d at 11-12.

67. 536 F.2d at 12 n.6.

> The provisions of the rule are clear. The lock has a large visible keyhole and the key to turn the lock is as plainly described as we believe to be possible. The rule has been in effect for a very considerable length of time. We do not see any reason to obfuscate a plain rule by adding a gloss to it to aid those who, for reasons unknown to us, have not seen fit to follow it.[68]

The Third Circuit has consistently applied this interpretation to the requirements of rule 50(b).[69]

The Eleventh Circuit espouses a similarly strict approach to rule 50. In *Mark Seitman & Associates, Inc. v. R.J. Reynolds Tobacco Co.*,[70] Seitman and R.J. Reynolds had entered into a contract, whereby Seitman would publish a weekly sports tabloid during the football and basketball seasons with R.J. Reynolds as the sponsor and sole advertiser. Halfway through the contract term, the sponsor terminated the contract. Seitman brought an action for breach of contract. At trial, R.J. Reynolds moved for a directed verdict at the close of Seitman's case, which the court denied. Reynolds then failed to renew the motion at the close of all the evidence and allowed the case to proceed to the jury, which returned a verdict for Seitman. Despite the procedural omission, the district court allowed Reynolds to move for judgment notwithstanding the verdict, which it denied on the merits.[71] On appeal, the Eleventh Circuit simply stated that, because of the inadequacy of Reynolds' procedural predicate, neither the district court nor the circuit court had the authority to consider whether the evidence was sufficient to support the jury's verdict.[72]

The Eleventh Circuit recently reconsidered the issue in *Redd v.*

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68. 536 F.2d at 12. The court undercut its own "plain meaning" approach, however, in acknowledging that a directed verdict motion at the close of all the evidence may be substituted by a request for a binding jury instruction, where the trial court treats the request as if it were a directed verdict motion, and does so with the knowledge of all of the parties. 536 F.2d at 11 n.5. The legitimacy of this position is now questionable, given the 1991 amendments to rule 50. Under the new requirements of the rule, a motion for judgment as a matter of law "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." FED. R. CIV. P. 50(a)(2). The advisory committee note to the 1991 amendments states that the requirement "thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict." FED. R. CIV. P. 50 advisory committee's note (1991 amendments) (citations omitted). Thus, a request for a binding instruction will no longer suffice to meet the requirements of rule 50(a)(2). *See also supra* note 5; *infra* notes 174-76 and accompanying text. This amendment to the rule, however, does not affect the "close of all the evidence" requirement. *See infra* notes 174-76 and accompanying text.

69. 536 F.2d at 11-12. The Third Circuit affirmed the "firmly entrenched" rule espoused in *Lowenstein* in Mallick v. International Bhd. of Elec. Workers, 644 F.2d 228, 233 (3d Cir. 1981). In response to the defendant's argument that the court was "exalting an overly rigid and technical application of Rule 50(b) over interest in judicial efficiency," the *Mallick* court emphasized the constitutional basis for the requirements, arguing that "judicial efficiency may be better served when jury verdicts receive the respect to which they are entitled under the Seventh Amendment." 644 F.2d at 234.

70. 837 F.2d 1527 (11th Cir. 1988).

71. *Seitman*, 837 F.2d at 1530.

72. 837 F.2d at 1531. The court listed the rule as its authority, and did not consider any

City of Phenix City.[73] Redd, a black police lieutenant, sued the city for discrimination in not promoting him to police chief, and in discharging him. As in *Seitman,* the *Redd* trial court denied the city's motion for a directed verdict at the close of Redd's case. The city failed to renew the motion at the close of all the evidence, and the jury returned a verdict for Redd.[74] The trial judge apparently ignored *Seitman* and held that the requirements of rule 50(b) were "purely technical," excused the city's failure to renew the motion at the close of all the evidence because a proper motion had been made earlier in the trial, and granted judgment notwithstanding the verdict in favor of the city.[75] The Eleventh Circuit reversed, stating: "We are presented with a particularly clear and mechanical rule of law; the [city] did not comply and the district judge may not waive his magic wand dismissing a procedural requirement as a technicality."[76] The Eleventh Circuit reads the language of the rule strictly and focuses on absolute compliance with its technical requirements, rather than on the substantive injustices such an approach might engender.

B. *A Liberal Application: Five Variations*

1. *The Plurality Test*

The First Circuit considered the "close of all the evidence" requirement of rule 50(b) in *Bayamon Thom McAn, Inc. v. Miranda.*[77] In *Bayamon,* the plaintiffs were a fifteen month-old minor who had fallen from a hobbyhorse and her parents. They sued Kiddielane Florida Corp., which owned the horse, Bayamon Thom McAn, the owner of the store where the accident occurred, and Melville Shoe Corp., which had leased the hobbyhorse to Bayamon. The plaintiffs claimed that the defendants were negligent in failing to provide warning signs and safety features on or around the horse and in distracting the mother while she was supervising her infant daughter.

The defendants moved for a directed verdict at the end of the plaintiffs' case. When asked if he had granted the motion, the judge responded, "No. However, I have not denied it. I am following the usual federal practice of reserving ruling on it; if the verdict is against you, you can still argue it anyway."[78] The defendants then presented their case-in-chief, which lasted a few minutes and "held no sur-

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exceptions. The circuit had previously refused to adopt liberal standards. *See* Coker v. Amoco Oil Co., 709 F.2d 1433, 1437-38 (11th Cir. 1983).

73. 934 F.2d 1211 (11th Cir. 1991).

74. *Redd,* 934 F.2d at 1214.

75. 934 F.2d at 1214.

76. 934 F.2d at 1214.

77. 409 F.2d 968 (1st Cir. 1969).

78. *Bayamon,* 409 F.2d at 970. The appellate court noted that the trial judge's reservation was technically in error. 409 F.2d at 971; *see supra* text accompanying note 40.

prises."[79] They failed to renew their motion for a directed verdict. Counsel made their closing arguments, and the jury was excused to deliberate. Following a jury verdict for the plaintiffs, the judge invited the defendants to make their motions for judgment notwithstanding the verdict, which he subsequently denied.[80]

The defendants appealed the denial of judgment notwithstanding the verdict. The First Circuit initially considered whether the right to challenge the sufficiency of the evidence on appeal had been preserved at trial. The court noted that the trial court, through its statements following the initial motion for a directed verdict, "preliminarily indicated its disposition to let the case go to the jury and instructed counsel to plan accordingly."[81] The court then concluded that defendants' counsel may have therefore been led to believe that they had adequately preserved their right to move for judgment notwithstanding the verdict.[82]

The First Circuit went on to state that the evidence submitted following the directed verdict motion was extremely limited and did not bear on the issue of the defendants' negligence, which was the focus of the directed verdict motion.[83] Thus, a renewed motion for a directed verdict at the close of all the evidence would have been futile because the evidence introduced following the initial motion could not have changed the trial court's mind about submitting the case to the jury.[84] Based upon these facts, the court held: "[I]n a case combining the kind of judicial assurance concerning preservation of rights at the time of motion and the brief and inconsequential evidence following the motion, we deem that this is a proper case for the liberal construction commended by [rule] 1 in the interest of justice."[85] The First Circuit

79. 409 F.2d at 972. The defendants' evidence consisted of the submission of eight exhibits into evidence, all of which had been identified in the pretrial order, and none of which went to the issue of negligence. In addition, counsel for two of the defendants read to the jury a portion of the mother's deposition testimony, including a statement she made to her husband that she "let the girl fall." The counsel for the other defendant unsuccessfully attempted to admit other portions of the deposition, and had the marshal operate the hobbyhorse in the courtroom. 409 F.2d at 971. This portion of the trial lasted "no more than a few minutes" and "occup[ied] only two pages of transcript." 409 F.2d at 972.

80. 409 F.2d at 971. At the time the defendants moved for judgment notwithstanding the verdict, the trial judge noted in passing the defendants' failure to move for a directed verdict at the close of all the evidence, and that the motions for judgment notwithstanding the verdict might therefore be improper. He nonetheless ruled on the motions on the merits. 409 F.2d at 971.

81. 409 F.2d at 971.

82. 409 F.2d at 971.

83. 409 F.2d at 971-72.

84. 409 F.2d at 972.

85. 409 F.2d at 972. The court also noted, however, the generally "stringent" nature of the requirement that a party move for a directed verdict at the close of all the evidence, and warned that "procedural wrangles would multiply if the requirement could be deemed nonessential upon a mere showing of a court's continuing disinclination to grant [a motion for directed verdict made prior to the close of all the evidence]." 409 F.2d at 971. Subsequent First Circuit decisions

thus concluded that the trial court properly considered the motion for judgment notwithstanding the verdict.[86]

Under the First Circuit test, a party moving for judgment as a matter of law before the close of all the evidence nonetheless satisfies the requirements of rule 50(b) when (1) the judge gives some assurance that failure to renew the motion will not result in a waiver of the movant's right to argue for judgment as a matter of law following the jury's verdict; and (2) the evidence introduced following the initial motion for judgment as a matter of law is extremely limited in both amount and value. The Sixth, Eighth, and Tenth Circuits have also adopted this "two-prong" test,[87] making it the plurality standard.

2. *The Fifth Circuit Variation*

The Fifth Circuit has also declined to apply the technical requirements of rule 50(b) strictly but has taken a slightly different approach than that embodied by the two-prong plurality test. In *Miller v. Rowan Companies, Inc.*,[88] Miller, a fishing tool supervisor, brought a claim against his employer under the Jones Act.[89] At trial, Rowan moved for a directed verdict at the close of the Miller's case-in-chief, asserting that he had not established that he was a seaman for the purposes of the Jones Act. The court took the motion under submission, apparently without further comment, and ordered that the trial continue. The employer presented no evidence, and an additional defendant presented only three witnesses, none of whom testified as to Miller's status as a seaman. At the close of all the evidence, the employer failed to renew its motion. The jury returned a verdict for

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have emphasized the rarity with which the "*Bayamon* exception" should be applied. *See, e.g.*, Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 810 n.7 (1st Cir. 1988) ("Under very rare circumstances, [a directed verdict] motion need not be repeated at the close of all evidence if such a repetition is clearly superfluous or futile."); Javelin Inv. v. Municipality of Ponce, 645 F.2d 92, 95 (1st Cir. 1981) ("[W]e do not find this to be . . . that type of 'exceptional' case where noncompliance with Rule 50(b) should be overlooked.").

86. 409 F.2d at 972. The court then affirmed the judgment notwithstanding the verdict against Bayamon Thom McAn, but reversed the judgment notwithstanding the verdict against Kiddielane and Melville. 409 F.2d at 973.

87. *See, e.g.*, Boynton v. TRW, Inc., 858 F.2d 1178, 1186 (6th Cir. 1988) (quoting and adopting plurality formulation); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983). The *Halsell* court identified the general rule requiring that a party first move for judgment as a matter of law at the close of all the evidence but acknowledged the "liberal view" of the rule and concluded that

> [a]lthough the movant fails to renew its motion for a directed verdict at the conclusion of all the evidence, a court may nevertheless grant judgement n.o.v. if the evidence introduced after the motion for directed verdict was brief, and the court somehow indicated that renewal of the motion would not be necessary to preserve the right to move for judgment n.o.v.

683 F.2d at 294; *see also* Armstrong v. Federal Natl. Mortgage Assn., 796 F.2d 366, 370 (10th Cir. 1986) (quoting and adopting test from *Halsell*).

88. 815 F.2d 1021 (5th Cir. 1987).

89. 46 U.S.C. § 13 (1940).

Miller, and, upon the employer's motion, the judge entered judgment notwithstanding the verdict in favor of the employer.[90]

On appeal, Miller argued that the trial court erred in entering judgment for the employer, because the employer had not renewed its motion for a directed verdict at the close of all the evidence. The court noted that it had adopted a liberal approach to the requirements of rule 50,[91] and articulated its test: "[W]hen the trial court reserves its ruling on the defendant's motion for a directed verdict and the only evidence introduced after the motion is not related to the motion, the defendant's failure to renew his motion should not preclude a judgment n.o.v. in his favor."[92] The court concluded that the employer had therefore preserved the right to move for a postverdict judgment as a matter of law.

Although *Miller* cites *Bayamon* among the cases supporting its test, *Miller* differs from the plurality test. The cases *Miller* relies upon do not suggest that a mere reservation of an earlier motion for judgment as a matter of law will preserve the right to challenge the sufficiency of the evidence after the verdict is returned. Rather, those cases suggest that the judge must affirmatively indicate that the movant preserves the right to move for judgment notwithstanding the verdict.[93] *Miller* seems to depart from this affirmative act requirement. Moreover, when such an indication is present, the cases on which *Miller* relies allow a party to move for judgment notwithstanding the verdict when a judge has denied *or* reserved — and not only reserved — a previous directed verdict motion.[94] Finally, the plurality test considers both the amount and relevance of the evidence introduced after the initial motion, while the test stated in *Miller* is concerned solely with the relevance of such evidence.[95]

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90. *Miller*, 815 F.2d at 1023-24.

91. *See, e.g.*, Merwine v. Board of Trustees for State Insts. of Higher Learning, 754 F.2d 631, 634-35 (5th Cir. 1985); Bohrer v. Hanes Corp., 715 F.2d 213, 216-17 (5th Cir. 1983).

92. 815 F.2d at 1025.

93. *See, e.g.*, Armstrong v. Federal Natl. Mortgage Assn., 796 F.2d 366, 370 (10th Cir. 1986) (acknowledging that defendant's motion for directed verdict at the close of plaintiff's case "may just well be a good motion," but denying the motion "without prejudice to reverse myself," so that the court had an opportunity to study the parties' briefs); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 294 (8th Cir. 1982) (when defendant attempted to renew earlier motion for directed verdict at instruction conference, which occurred in the afternoon on the last day of trial but before the close of all the evidence, judge told him that proper time to renew would be at the close of all of the evidence, but that at the same time the court considered the motion renewed), *cert. denied*, 459 U.S. 1205 (1983); Bayamon Thom McAn v. Miranda, 409 F.2d 968, 970 (1st Cir. 1969) (reserving defendants' motion for directed verdict made at the close of the plaintiffs' case, but stating, "[I]f the verdict is against you, you can still argue it anyway.").

94. *See, e.g., Armstrong*, 796 F.2d at 370 (denying defendant's motion at the close of the plaintiff's case).

95. *Compare Miller*, 815 F.2d at 1025 (stating that lenience is appropriate when "the only evidence introduced after the motion is not related to the motion") *with Bayamon*, 409 F.2d at 972 (requiring that the evidence following the initial motion be both "*brief and* inconsequential") (emphasis added).

The Fifth Circuit test, as expressed in *Miller,* is thus both broader and narrower than that in the cases upon which it relies. It is broader because it requires merely a reservation of the initial motion for judgment as a matter of law by the trial judge, and not some judicial assurance of preservation of rights.[96] It is also broader because it allows lenience when the initial motion is followed by a significant amount of evidence, as long as that evidence is unrelated to the motion. The test, however, is narrower because it is lenient only when a judge has reserved decision on a directed verdict motion, and not when the judge has denied the motion but indicates that the movant has preserved the right to move for judgment notwithstanding the verdict.

3. *The Second Circuit Variation*

The Second Circuit adopted a modified version of the plurality test in *Ebker v. Tan Jay International, Ltd.*[97] Ebker was a designer of women's clothing who had entered into a joint venture with Tan Jay, to produce two lines of clothing. Ebker claimed that Tan Jay wrongfully repudiated the agreement. At trial, Tan Jay moved for a directed verdict following the presentation of Ebker's case-in-chief. The court reserved its decision on the motion, stating, "I will let [Ebker's counsel] argue to the jury."[98] Tan Jay introduced substantial evidence that weakened Ebker's case and then allowed the case to go to the jury without renewing its motion for a directed verdict. Following a jury verdict for Ebker, Tan Jay moved for and received a judgment notwithstanding the verdict.[99]

On appeal, Ebker argued that the trial court improperly granted judgment notwithstanding the verdict because Tan Jay failed to follow the procedural dictates of rule 50(b). Faced with this issue for the first time, the Second Circuit considered the plurality formulation but ultimately opted for a modified version.[100] The court retained the first branch of the plurality test and reformulated the second.[101]

The *Ebker* court reasoned that it was possible for a defendant, following an unsuccessful directed verdict motion at the close of the plaintiff's case, to introduce extensive evidence that would achieve the defendant's desired objective: to strengthen the defendant's case without in any way strengthening the plaintiff's. In such a case, the court stated, "little justification would seem to exist for finding significance

96. *But see Bohrer,* 715 F.2d at 216-17 (emphasizing judicial assurances in allowing consideration of defendant's motion for judgment notwithstanding the verdict despite defendant's failure to move for directed verdict at the close of all the evidence).

97. 739 F.2d 812 (2d Cir. 1984), *cert. denied,* 112 S. Ct. 161 (1991).

98. *Ebker,* 739 F.2d at 819.

99. 739 F.2d at 819-20.

100. 739 F.2d at 823-24.

101. 739 F.2d at 823-24.

in the quantitative aspect" of the evidence following the failed directed verdict motion.[102] *Ebker* thus reformulated the second prong of the plurality test, focusing solely upon the effect on the nonmoving party. A court could consider the motion for judgment notwithstanding the verdict, despite the lack of a proper procedural foundation, under the following circumstances: (1) the court indicated that the movant's rights were preserved; and (2) the evidence introduced after the unsuccessful directed verdict motion was of such a nature that the opposing party could not "reasonably have thought that the moving party's initial view of the insufficiency of the evidence had been overcome and there was no need to produce anything more in order to avoid the risk of judgment n.o.v."[103] For example, under the facts of *Ebker,* because the defendant's case "in no way added to [the plaintiff's] case . . . [but instead] seriously detracted from it," the court held that the second prong had been met.[104] The Second Circuit's approach is therefore broader than the plurality approach, because it focuses on the substance of the evidence introduced following the initial motion, rather than merely the quantity of such evidence.

4. *The Ninth Circuit and the* Farley *Exception*

The Ninth Circuit takes a unique approach to rule 50. It applies the mechanical test of the Third and Eleventh Circuits in those cases where the trial judge *denies* an initial motion for judgment as a matter of law, but adopts a liberal approach when the judge instead *reserves* its decision on such a motion. *Farley Transportation Co. v. Santa Fe*

102. 739 F.2d at 824 (quoting Moran v. Raymond Corp., 484 F.2d 1008, 1012 (7th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974)). The court noted that this was true "at least in a case where no objection was made to the court's entertaining the post-verdict motion." 739 F.2d at 823-24. The court did not address how the test might be applied in a case where the nonmoving party opposed the motion for judgment notwithstanding the verdict at the time it was proffered.

103. 739 F.2d at 824. The actual text of the decision, however, contains an unfortunate error. The court's opinion as written allows for the postverdict motion where "the opposing party . . . could reasonably have thought that the moving party's initial view of the insufficiency of the evidence had been overcome," omitting the word "not" between "could" and "reasonably". 739 F.2d at 824. Subsequent decisions, however, have made it clear that the second prong, to make sense, must necessarily include the word "not." *See, e.g.,* Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 587 n.3 (2d Cir. 1987) ("That an omission has occurred is evident from the overall argument in which this passage is included and from the opinion's quotation, immediately following this passage, of a passage from *Moran v. Raymond Corp.* . . . which supports the argument only if the *Ebker* passage is read with the word "not" inserted.").

104. 739 F.2d at 824. The court also found that the defendant had met the first prong. When Tan Jay moved for a directed verdict at the close of Ebker's case, the trial court said, "I will reserve on your motion and I will let [plaintiff's counsel] argue to the jury." The reviewing court held that because the defendant could have interpreted this to mean that a subsequent directed verdict motion would not be necessary, and possibly not even entertained, the motion met the first prong. 739 F.2d at 823. As a result, the Second Circuit found that the trial court had properly considered Tan Jay's motion for judgment notwithstanding the verdict. The court ultimately concluded, however, that the trial judge erred in granting Tan Jay's motion. 739 F.2d at 827-28.

Trail Transportation Co.,[105] for example, has a procedural history similar to most of the cases in this area. *Farley* was an antitrust action brought by Farley Transportation Company, which claimed that the defendant, the Santa Fe Trail Transportation Company, conspired with the Atchison, Topeka & Santa Fe Railway Company and various shipper's agents and associations to evade the rates of a regional branch of the Interstate Commerce Commission. Santa Fe unsuccessfully moved for a directed verdict at the close of Farley's case and then failed to renew the motion at the close of all the evidence. The court suggested that allowing such a defendant to challenge the sufficiency of the evidence on a motion for judgment notwithstanding the verdict without first moving for a directed verdict could prejudice the opposing party:

> Failure to renew an earlier motion for a directed verdict may lull the opposing party into believing that the moving party has abandoned any challenge to the sufficiency of the evidence once all of the evidence had been presented. . . . A strict application of rule 50(b) obviates the necessity for a court to engage in a difficult and subjective case-by-case determination of whether a failure to renew a motion for directed verdict at the close of all the evidence has resulted in such prejudice to the opposing party under the particular circumstances of that case.[106]

Thus, the court appeared simply to adopt the mechanical approach toward the rule employed by the Third and Eleventh Circuits.

The *Farley* court went on, however, to recognize one exception to the requirements of rule 50. It held that when the trial court took an earlier motion for a directed verdict under advisement, it would excuse procedural imperfection.[107] Under the Ninth Circuit's reasoning, the simple reservation of a directed verdict motion prior to the close of all the evidence accomplished three necessary purposes: it "maintains the motion as a continuing objection to the sufficiency of the evidence, provides notice to the opposing party of the challenge, and constitutes a judicial indication that renewal of the motion is not necessary to preserve the moving party's rights."[108] The Ninth Circuit thus adopted a test similar to the first prong of the Fifth Circuit *Miller*

105. 786 F.2d 1342 (9th Cir. 1985).

106. 786 F.2d at 1346. The court specifically rejected the approach of the Seventh Circuit, as embodied in McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984). *Farley* suggested that requiring the trial judge to determine whether the party opposing judgment as a matter of law had been prejudiced would "invit[e] confusion," and concluded that

> [i]t is precisely such a difficult examination that a uniform application of Rule 50(b) is designed to avoid. We decline to adopt an interpretation of Rule 50(b), even assuming the language of the rule would so permit, that requires us to engage in a subjective analysis of the strength or weakness of the evidentiary foundation of one party's case, before we even determine whether we may review the sufficiency of the evidence on appeal.

786 F.2d at 1346 n.2.

107. 786 F.2d at 1346.

108. 786 F.2d at 1346-47.

test,[109] requiring that the court reserve its ruling on the motion, but without the accompanying prong relating to the amount and relevance of the evidence submitted following the motion.

5. *The Seventh Circuit's "Prejudice" Test*

The Seventh Circuit has taken an approach that hinges on prejudice to the opposing party. *McKinnon v. City of Berwyn*[110] involved a civil rights action against four policemen and the city. At trial, one of the defendants moved for a directed verdict at the close of the plaintiff's case-in-chief, which the judge denied. The defendant failed to renew the motion at the close of all the evidence, and the jury returned a verdict for the plaintiff. The judge granted the defendant judgment notwithstanding the verdict and the plaintiff appealed, citing the procedural error.[111]

The Seventh Circuit noted that it had adopted a liberal view toward the requirements of rule 50(b):[112] when the party opposing a procedurally defective motion has not been unfairly prejudiced, the rule's requirements need not be strictly enforced.[113] The court measured prejudice against a party with the same test incorporated in the second prong of the Second Circuit's *Ebker* test.[114] The court explained this prong as follows:

> If none of the evidence put in as part of the defendant's case weakens the defendant's motion for directed verdict, the plaintiff cannot argue that he thought that the defendant, by not renewing the motion, had abandoned it because its evidentiary foundations had been weakened, and thinking this had therefore not put in rebuttal evidence that might have repaired the evidentiary deficiencies exposed by the initial motion.[115]

Unlike the various two-prong tests, however, the Seventh Circuit's application of this exception to rule 50(b) does not require any action or statement on the part of the judge. As the court in *McKinnon* observed:

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109. *See supra* notes 88-96 and accompanying text.

110. 750 F.2d 1383, 1390 (7th Cir. 1984).

111. *McKinnon*, 750 F.2d at 1387-88.

112. *See, e.g.*, Benson v. Allphin, 786 F.2d 268, 274 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 459 U.S. 943 (1982); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 577 (7th Cir. 1976).

113. 750 F.2d at 1388. Although the Seventh Circuit looks to whether the plaintiff was "prejudiced," it is actually concerned with whether the plaintiff was *unfairly* prejudiced. That is, a plaintiff who has a jury verdict taken away is always prejudiced in some sense. However, where the plaintiff has been given the opportunity to cure deficiencies in his proof but the case remains legally insufficient, the plaintiff is not unfairly prejudiced when a court enters judgment for the defendant. *See, e.g., Benson*, 786 F.2d at 274 (excusing failure to renew a directed verdict motion at the close of all the evidence where the defendant's failure "did not *unduly* prejudice his opponent" (emphasis added)).

114. *See supra* notes 97-104 and accompanying text.

115. 750 F.2d at 1390.

> Although in most of the cases we have cited the judge had said he would reserve action on the motion for directed verdict, there was no reservation in [earlier Seventh Circuit cases,] and we do not think it should be a rigid precondition for leniency, at least in a case such as this where there is not even a smidgen of prejudice to the opponent.[116]

As a result, the Seventh Circuit merely looks to the potential prejudice which a failure to renew might have had on the opposing party. Where none exists — that is, where the plaintiff should assume that the defendant's motion stands — the failure is excused, and both the trial court and the reviewing court may consider the sufficiency of the evidence after a verdict is returned.[117]

In sum, all of the circuits that employ a liberal approach to the "close of all the evidence" requirement of rule 50(b)[118] have essentially the same goal: to excuse noncompliance in the absence of unfair prejudice to the opposing party. Most of these courts have developed proxies to determine when, based upon this general principle, excusal is appropriate. A plurality of the circuits look to the statements of the judge and the quantity and quality of evidence introduced following the initial motion in their consideration of this issue.[119] The Second Circuit also deems judicial indication of preservation of rights important, but focuses on the relevance, rather than the quantity, of evidence following the motion.[120] The Fifth Circuit looks only at the relevance of subsequently introduced evidence, and apparently does not consider a judge's statements dispositive; it takes a liberal approach only when a judge reserves decision on, rather than denies, the initial motion.[121] The Ninth Circuit is lenient only when the judge reserves decision on the initial motion, with no regard to the evidence introduced following the motion.[122] Finally, the Seventh Circuit takes a liberal approach to the rule when the opposing party is not unfairly prejudiced. In doing so, it focuses on whether the opposing party could reasonably have believed that the movant had abandoned its

116. 750 F.2d at 1390. With respect to cases in which there was "slight prejudice," the court suggested that "a lulling remark by the judge might be necessary to tip the balance in favor of leniency," but where the prejudice was more than slight, "the motion for judgment notwithstanding the verdict should be dismissed." The court concluded that "it would be excessively strict to confine the policy of leniency to cases where the judge happens to have reserved action on the motion for directed verdict when it was made (and never renewed)." 750 F.2d at 1390.

117. *See, e.g.*, Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 825-26 (7th Cir. 1978) ("Any additional proof which [the plaintiff] could properly introduce on rebuttal was in no way foreclosed, and no suggestion is made that the motion for judgment n. o. v. hinged in any material way on Ohio's lack of rebuttal evidence or Sealy's surrebuttal proof. . . . [The defendant is therefore] entitled to have its attack on the sufficiency of [the plaintiff's] evidence heard on the merits."), *cert. denied*, 459 U.S. 943 (1982).

118. *See supra* notes 77-117 and accompanying text.

119. *See supra* notes 77-87 and accompanying text.

120. *See supra* notes 97-104 and accompanying text.

121. *See supra* notes 88-96 and accompanying text.

122. *See supra* notes 105-09 and accompanying text.

motion.[123] Thus, each approach attempts to protect the errant movant, without prejudicing its opponent, in a significantly different manner. Figure 1 approximates the situations in which each circuit is likely to take a liberal approach to the "close of all the evidence" requirement of rule 50(b).[124]

III. An Analysis of Approaches

This Part considers the various approaches discussed in Part II and concludes that a liberal approach to the "close of all the evidence" requirement best serves the purposes of rule 50 and the Federal Rules of Civil Procedure. Section III.A argues that the best approach is that adopted by the Seventh Circuit. Section III.B considers the weakness of the other circuits' interpretations. This Part concludes in section III.C by proposing an amendment to rule 50(b) which better reflects the purposes the rule is designed to serve.

A. *The Preferred Approach: The Seventh Circuit Test*

Rule 50(b) requires a party to move for judgment as a matter of law at the close of all the evidence in order to preserve the right to renew the motion after a jury returns its verdict.[125] However, rule 50(b) does not exist in a vacuum. Rule 1 of the Federal Rules of Civil Procedure states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[126] Indeed, rule 1 has been called the most important of the Federal Rules.[127] An application of one of the rules that results in inefficiency contravenes "the liberal spirit imbuing the Federal Rules of Procedure."[128] In view of the rules' overriding purposes, this section concludes that the Seventh Circuit's approach to rule 50(b) best serves both that rule's and the Federal Rules' overall spirit. That approach focuses upon whether the procedural omission unfairly prejudiced the party opposing the postverdict motion for judgment as a matter of law.[129]

As discussed above, the requirements of rule 50 are intended to give the opposing party notice that the movant deems the evidence presented insufficient as a matter of law, and to provide an opportu-

123. *See supra* notes 110-17 and accompanying text.

124. *See supra* notes 62-117 and accompanying text.

125. *See* FED. R. CIV. P. 50(b). *But see supra* note 5 (noting arguable ambiguity).

126. FED. R. CIV. P. 1.

127. *See* 4 WRIGHT & MILLER, *supra* note 15, § 1029 ("[The rule] reflects the spirit in which the rules were conceived and written, and in which they should be . . . interpreted. The primary purpose of procedural rules is to promote the ends of justice . . . .").

128. Bohrer v. Hanes Corp., 715 F.2d 213, 217 (5th Cir. 1983); *see also* Pittsburg-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) (The rules "in any case should be examined in the light of the accomplishment of their particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for the truth.").

129. The Seventh Circuit approach is discussed *supra* notes 110-17 and accompanying text.

FIGURE 1

		Judge Denies Initial Motion								Judge Reserves Decision on Initial Motion							
		Judge Makes Explicit Assurances of Preservation of Rights				Judge Does Not Make Explicit Assurances of Preservation of Rights				Judge Makes Explicit Assurances of Preservation of Rights				Judge Does Not Make Explicit Assurances of Preservation of Rights			
Nature of Evidence After Motion		Relevant		Unrelated		Relevant		Unrelated		Relevant		Unrelated		Relevant		Unrelated	
		Brief	Long	Brief	Long	Brief	Long	Brief	Long	Brief	Long	Brief	Long	Brief	Long	Brief	Long
CIRCUIT (S)	3, 11	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No
	1,6, 8,10	No	No	Yes	No	No	No	No	No	No	No	Yes	No	No	No	No	No
	2	No	No	Yes	Yes	No	No	No	No	No	No	Yes	Yes	No	No	No	No
	5	No	No	No	No	No	No	No	No	No	No	Yes	Yes	No	No	Yes	Yes
	9	No	No	No	No	No	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	7	No	No	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes

nity to cure any deficiency exposed by the motion.[130] A motion for judgment as a matter of law which occurs at the completion of the plaintiff's[131] case-in-chief, at the earliest, provides such notice. Under section (a)(2), the movant is required to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."[132] The plaintiff is thus made aware of the defendant's objection to the sufficiency of the evidence and has the opportunity to cure.[133] The plaintiff may affirmatively present additional evidence, or may allow the defendant to present its case and attempt to fill in the gaps in his or her case through cross-examination of the defendant's witnesses.[134]

A satisfactory motion for judgment as a matter of law at trial, whether it occurs at the close of all the evidence or not, should therefore fulfill the curative justification for rule 50. This much has been acknowledged, at least impliedly, by the advisory committee to the Federal Rules. It discusses the cure rationale for the requirements of rule 50 in its notes to paragraphs 50(a)(1)[135] and 50(a)(2)[136] rather than the notes to paragraph 50(b).[137] This placement is interesting because courts typically cite the cure rationale as one purpose of the "close of all the evidence" requirement of 50(b).[138] By including the cure rationale in the notes relating to motions that are made at "any time before submission of the case to the jury,"[139] the advisory com-

130. *See supra* notes 50-61 and accompanying text. As noted in Part I, although there was at one time a constitutional rationale for the requirements of this rule, this rationale has been all but abandoned. *See supra* notes 26-49 and accompanying text.

131. Although the text of rule 50 is facially neutral and either party may move for judgment as a matter of law, the defendant is the moving party in the overwhelming majority of cases in which the issue has arisen. For simplicity and relevancy's sake, this discussion will assume the moving party to be the defendant. *See* RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 679:

> In the typical case it is the defendant who moves for [judgment as a matter of law] on the ground that the plaintiff has not sustained the burden of proof. At times, however, as when the sole issue is one on which the defendant has the burden of proof, the plaintiff will move for [judgment as a matter of law].

132. FED. R. CIV. P. 50(a)(2).

133. *See* 5A MOORE, *supra* note 24, ¶ 50.08 and cases cited therein.

134. *See supra* notes 57-58 and accompanying text.

135. If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. FED. R. CIV. P. 50(a)(1); *see also supra* note 54 and accompanying text.

136. "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." FED. R. CIV. P. 50(a)(2); *see also supra* note 55 and accompanying text.

137. *See* FED. R. CIV. P. 50(b) advisory committee's note (1991 amendments); *infra* note 140 and accompanying text.

138. *See supra* notes 50-61 and accompanying text.

139. FED. R. CIV. P. 50(a)(2).

mittee implicitly recognized that even a motion for judgment as a matter of law that occurs prior to the close of all the evidence, and that is not renewed at the close of all the evidence, nonetheless can fulfill the curative purpose of rule 50.

Indeed, the only rationale the most recent advisory committee notes give for the "close of all the evidence" requirement is that it is "a means of defining the appropriate issue posed by the post-verdict motion."[140] A party, however, can presumably fulfill this purpose with any motion for judgment as a matter of law. Paragraph (a)(2) requires that such a motion, regardless of when it occurs, must identify the contested issue and the specific legal and factual basis for the motion.[141] The necessity of the requirement, at least based upon the most recent explanation of the drafters,[142] thus remains somewhat questionable, because a motion for judgment before the close of all the evidence both defines the appropriate issue for consideration, and provides the plaintiff with the opportunity to cure its deficient case.

If the plaintiff's case is no stronger at the close of all the evidence than at the time of the original motion, the plaintiff "cannot argue that he thought that the defendant, by not renewing the motion, had abandoned it because its evidentiary foundations had been weakened."[143] No unfair prejudice to the plaintiff then results if the court examines the legal sufficiency of the plaintiff's evidence following the return of the verdict. The plaintiff has notice that the defendant believes itself entitled to judgment as a matter of law, and has the time and opportunity to cure any defects exposed by the defendant's motion.

Indeed, the only time a plaintiff will be unfairly prejudiced is when additional evidence comes forward after the initial motion, either in the defendant's case or introduced by the plaintiff, which partially strengthens the plaintiff's case. The plaintiff may believe that it has responded to the defendant's initial objection to the sufficiency of the evidence, and therefore does not need to introduce further evidence to support its case. The defendant then has the obligation, consistent with the purposes of rule 50, to renew its motion for judgment as a matter of law at the close of all the evidence. This motion would indicate to the plaintiff that the defendant continues to assert that the plaintiff's evidence is insufficient as a matter of law. That is, unfair

140. FED. R. CIV. P. 50(b) advisory committee's note (1991 amendments).

141. *See supra* text accompanying note 132.

142. It is generally the courts that have extended the cure rationale to explain the "close of all the evidence" requirement. *See, e.g.*, Benson v. Allphin, 786 F.2d 268, 273-74 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9, 12 n.6 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976).

143. McKinnon v. City of Berwyn, 750 F.2d 1383, 1390 (7th Cir. 1984). This test necessarily vests discretion in the trial judge to determine whether this standard is met. Although the standard itself appears somewhat vague, it has been applied with apparent success in the Second and Seventh Circuits. *See supra* notes 97-104 and 110-17, respectively, and accompanying text.

prejudice occurs when, based upon the evidence adduced following the initial motion, the plaintiff "reasonably [believes] that the moving party's initial view of the insufficiency of the evidence [has] been overcome and there [is] no need to produce anything more in order to avoid the risk of [postverdict] judgment [as a matter of law]."[144] When, however, neither the defendant's evidence nor any further evidence introduced by the plaintiff adds to or strengthens the plaintiff's evidentiary foundation, the plaintiff cannot complain that it was prejudiced by the defendant's failure to renew.[145] Professor Moore has adopted this "prejudice" standard in the most recent version of his treatise.[146]

Although this approach to rule 50(b) requires a court to engage in the "case-by-case determination" criticized by the Ninth Circuit in *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*,[147] trial judges routinely make such case-specific determinations. As with virtually every motion that comes before a trial court, the judge has participated in the entire trial and thus is well situated to decide whether a party opposing a postverdict motion has been prejudiced.[148] In the

144. Ebker v. Tan Jay Intl., Ltd., 739 F.2d 812, 823-24 (2d Cir. 1984), *cert. denied*, 112 S. Ct. 161 (1991).

145. The lack of unfair prejudice manifests when the plaintiff fails to produce any additional evidence which would refute the issues raised by the defendant's motion. *See, e.g.*, American Protein Corp. v. AB Volvo, 844 F.2d 56, 62 (2d Cir. 1988) ("More importantly, [the plaintiff] claimed neither that it would have nor that it could have presented any additional evidence to compensate for deficiencies in its proof."). Where a party claims that the movant's failure to renew an earlier motion for judgment as a matter of law prejudiced its case, that party's inability to demonstrate that it would or could have introduced evidence to combat the movant's objection to the sufficiency of the evidence strongly indicates a lack of prejudice.

146. Professor Moore notes:

> [S]ome courts have held that a motion for judgment under Rule 50(b) may be granted, despite the movant's failure to renew a previous motion under Rule 50(a) at the close of all the evidence, where the purposes of Rule 50 have been met in that both the adverse party and the court are aware that the movant continues to believe that the evidence presented does not present an issue for the jury.

MOORE, *supra* note 24, ¶ 50.08. Professor Moore argues that this is the correct rule. He observes that where a motion clearly notifies a party of the movant's objections to the party's case, the cure rationale of the requirement is met and the movant has not created a trap by failing to renew the motion at the close of all the evidence. *Id.* In such a situation, he argues, a denial of judgment as a matter of law solely for procedural reasons would be a waste of judicial resources. *Id.*

Professor Moore goes on to observe, however, that the most common situations in which this issue would be presented are those in which "(1) the court indicated that renewal of the motion was unnecessary; and/or (2) the evidence following the party's unrenewed motion under Rule 50(a) was either nonexistent or . . . brief enough to be obviously inconsequential . . . ." *Id.* This latter statement clearly reflects the two prongs of the plurality test listed in the alternative. Indeed, Professor Moore had articulated only the plurality test in prior versions of his treatise, and had all but ignored the many variations. *See, e.g.*, 5A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 50.08 (2d ed. 1985). Although this Note agrees with Professor Moore's general prejudice standard for the reasons articulated in section III.B, it does not support the subsequently listed elements of the two-prong test.

147. 786 F.2d 1342, 1346 (9th Cir. 1985); *see supra* notes 105-08 and accompanying text.

148. In the event a party disagrees with a trial court's determination of prejudice, the party may appeal the court's ruling on the motion for judgment as a matter of law. Indeed, all of the

cases this Note discusses,[149] this determination has been quite straightforward. For example, in *Bayamon Thom McAn, Inc. v. Miranda,*[150] the court noted that the evidence following the initial motion lasted only a few minutes and "held no surprises."[151] Similarly, in *Ebker v. Tan Jay International, Ltd.,*[152] the court noted that the defendant's case, which constituted the sole evidence following the defendant's motion for judgment as a matter of law, "in no way added to [the plaintiff's] case."[153] A failure to renew the earlier motion does not trap the plaintiff in such cases.

Where the opposing party is not unfairly prejudiced, rule 1 supports the conclusion that a court may legitimately excuse the failure to renew the motion at the close of all the evidence. In these circumstances, it would be both unjust and inefficient to limit the remedy under rule 50 to a new trial. The movant in such cases has necessarily demonstrated that he is entitled to judgment as a matter of law; a new trial would therefore waste the time, money, and effort of the parties, court, and jury on a meritless case.[154] Such a waste of judicial resources clearly runs contrary to rule 1.

Furthermore, many commentators have observed that the formalistic requirements of the rule create a procedural trap for litigants. Even Paul Carrington, the Reporter of the Advisory Committee on the Civil Rules, notes the concern that the rule is "anachronistic, too complex, and a trap for the unwary."[155] In suggesting a possible revi-

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cases discussed *supra* notes 62-124 and accompanying text arose in this context. Because the appeals court would have a transcript of the trial, that court would also be able to judge whether a plaintiff was unfairly prejudiced by the defendant's failure to renew. Furthermore, appellate review of this issue should not be particularly time consuming, since excusal would only be appropriate where the evidence adduced following the initial motion was minimal or did not bear significantly on the issue presented by the motion.

149. *See supra* notes 77-124 and accompanying text.

150. 409 F.2d 968 (1st Cir. 1969); *see supra* notes 77-87 and accompanying text. Although *Bayamon* does not embrace the prejudice test, the second prong of the *Bayamon* or plurality test requiring evidence adduced following the motion to be brief and inconsequential provides a common example of nonprejudicial failure to renew. *See* MOORE, *supra* note 24, ¶ 50.08.

151. *Bayamon,* 409 F.2d at 972.

152. 739 F.2d 812 (2d Cir. 1984), *cert. denied,* 112 S. Ct. 161 (1991); *see supra* notes 97-104 and accompanying text.

153. *Ebker,* 739 F.2d at 824.

154. A party may move for a new trial without having moved for judgment as a matter of law at trial. *See* FED. R. CIV. P. 59. The standard for granting a new trial is considerably more lenient than that for awarding judgment as a matter of law. A motion for judgment as a matter of law may be granted only where "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the opposing party]." FED. R. CIV. P. 50(a). On the other hand, a trial court may, in its discretion, order a new trial where "the verdict is against the weight of the evidence, . . . the damages awarded are excessive or inadequate, . . . newly discovered evidence warrants a new trial, or . . . a trial error was committed, such as an improper charge to the jury or improper admission or exclusion of evidence." MOORE, *supra* note 24, ¶ 50.03[2].

155. *See* Paul D. Carrington, *The Federal Rulemaking Process — The Reporters Speak: Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure,* 137 U. PA. L. REV. 2067, 2110 (1989); *see also*

sion to rule 56 which would eliminate the need for, and the relevant requirements of, rule 50, Professor Carrington argues:

> [R]equiring a formal motion for directed verdict has several unfortunate consequences. It is a trap: Failing to make a timely motion that a judge very likely would have denied could force a party to undergo a new trial. The refusal to consider a motion for judgment notwithstanding the verdict on the sole ground that the party did not make a motion for directed verdict is an empty formalism out of keeping with the Rules.[156]

Indeed, the cases this Note discusses confirm this observation. The defendants in *Bayamon Thom McAn, Inc. v. Miranda,*[157] *Miller v. Rowan Cos., Inc.,*[158] and *Ebker v. Tan Jay International, Ltd.*[159] were all "trapped" by the requirement. Significantly, the circuits in which each of these cases were brought had not at the time adopted any position with respect to the interpretation of the "close of all the evidence" requirement. The defendants in these cases had no reason to believe that the courts would excuse their failure to renew a motion for judgment as a matter of law; it is thus unlikely that they failed to comply with rule 50(b) for tactical reasons. More probably, these defendants' failure to renew their earlier motions was accidental.[160]

Franklin A. Nachman, *Posttrial Alchemy: Judgments Notwithstanding the Verdict,* LITIG., Spring 1989, at 13, 14 ("It is particularly easy to forget renewal of a directed verdict motion at the close of evidence. . . . Do not fall into that trap."); John P. Frank, *The Rules of Civil Procedure — Agenda for Reform,* 137 U. PA. L. REV. 1883, 1892 (1989) ("I do not know how many attorneys lose the right to make a motion for judgment n.o.v. because they have failed to make a motion for directed verdict . . . [b]ut if this provision of the Rule simply operates as a trap for the ignorant or the unwary, it should go.").

156. Carrington, *supra* note 155, at 2110. Professor Carrington went on to identify another objection to the requirements of rule 50: a party must make a motion for judgment at trial when it may be against the party's "tactical interests" to do so. *Id.* For example, a party may not wish to run the risk that a motion for judgment during trial be granted, and thus become subject to heightened scrutiny on review, when the jury may simply return a verdict in the movant's favor. *Id.* at 2110-11; *see Ebker,* 739 F.2d at 824 n.15 ("[W]e recognize that in many cases the failure of a defendant's counsel to renew the motion at the close of the case may be not an inadvertence but a preference for what is deemed a probable jury verdict in favor of the defendant rather than a directed verdict with the inherent risk that such a verdict may be overturned by an appellate court."). This problem prompted California to eliminate its requirement that a motion for judgment notwithstanding the verdict be preceded by a directed verdict motion at trial. *See* 7 B.E. WITKIN, CALIFORNIA PROCEDURE § 436 (3d ed. 1985) ("The use of a motion for directed verdict has steadily declined, for most counsel and trial judges prefer to let the jury initially decide the case. The condition of a prior motion for directed verdict was therefore criticized as a useless and annoying formality, and in 1963, a State Bar sponsored amendment of C.C.P. 629 eliminated it.") (citation omitted).

The advisory committee's note to the 1991 amendment to rule 50(b) obviates this concern, however. The note acknowledges the danger, and adds:

> For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

FED. R. CIV. P. 50(b) advisory committee's note (1991 amendments).

157. 409 F.2d 968 (1st Cir. 1969); *see supra* notes 77-87 and accompanying text.

158. 815 F.2d 1021 (5th Cir. 1987); *see supra* notes 88-96 and accompanying text.

159. 739 F.2d 812 (2d Cir. 1984), *cert. denied,* 112 S. Ct. 161 (1991); *see supra* notes 97-104 and accompanying text.

160. *See supra* note 155.

Because most courts have now "weighed in" on the proper interpretation of rule 50(b), some defendants may not renew earlier motions for judgment as a matter of law for "tactical" reasons: by not renewing at the close of all the evidence, the defendant does not remind the plaintiff of deficiencies in the plaintiff's proof and thus provide another opportunity for the plaintiff to cure. This situation, however, seems quite unlikely. First, even in those circuits that employ a liberal approach to rule 50(b), excusal is generally thought to apply very rarely; assuming that a court will excuse a failure to renew at the close of all the evidence is therefore risky.[161] Moreover, although this Note argues that the recent amendments to rule 50 do not affect the authority of courts to continue with a liberal approach to the rule, some circuits may rethink their positions on this issue, and therefore a party should not rely strongly on preamendment cases. Even if defendants engage in this tactical behavior, however, it does not affect the conclusion of this Note, because plaintiffs have already been put on notice and given an opportunity to cure by the *initial* motion for judgment as a matter of law.[162]

Further, when first drafted, the Federal Rules sought precisely to avoid problems like those currently created by a strict reading of rule 50(b). At the time, those who contributed to their formulation stressed that the purpose of the rules was to facilitate, and not to encumber, substantive rights.[163] In the years that have followed, courts and commentators alike have reiterated this primary intent of the Federal Rules, and have called for the elimination of "the technicalities of the law, the subtleties of practice and the involvements of procedure."[164] A liberal approach to rule 50(b) supports substantive interests over procedural technicalities.[165]

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161. *See, e.g., supra* note 85.

162. *See supra* notes 136-42 and accompanying text. Failure to renew merely deprives the plaintiff of an *additional* reminder that his or her case is legally insufficient, which would not constitute unfair prejudice under this Note's approach.

163. *See* H. Church Ford, *More Expeditious Determination of Actions Under the New Federal Rules of Civil Procedure,* 1 F.R.D. 223, 228 (1939).

164. United Press Assoc. v. Charles, 245 F.2d 21, 26 (9th Cir.) (quoting Glaspell v. Davis, 2 F.R.D. 301, 304 (D. Or. 1942)), *cert. denied,* 354 U.S. 925 (1957). *See* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?,* 137 U. PA. L. REV. 1901, 1910 (1989) ("An original impetus for the Rules was the belief that by reducing unnecessary litigation over procedural points, they would reduce court congestion."); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact,* 137 U. PA. L. REV. 2197, 2197 (1989) (noting that one of the "central themes and aims" of the rules was "[t]o make things simple for the litigants .... No longer would technicalities trap the unskilled or unwary litigant."); *see also* Builders Corp. of Am. v. United States, 259 F.2d 766, 771 (9th Cir. 1958) ("The spirit of the Rules is that technical requirements are abolished and that judgments be found on facts and not on formalistic defects."); Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir. 1955) ("The rules have for their primary purpose the securing of speedy and inexpensive justice in a uniform and well ordered manner; they were not adopted to set traps and pitfalls by way of technicalities for unwary litigants.").

165. This approach to rule 50(b) is supported by principles of statutory construction. *See* 2A

In analogous situations courts regularly invoke rule 1 to prevent injustices caused by overly strict applications of the Federal Rules. For example, in *White v. McGinnis,*[166] the plaintiff made a timely demand for a jury trial. The trial court nonetheless scheduled and held a bench trial, all without the plaintiff's objection. In appealing from the court's verdict for the defendant, the plaintiff argued that he had never made the written or oral stipulation required by rule 39(a) to waive a trial by jury,[167] and he therefore deserved a new trial.[168]

The Ninth Circuit, sitting en banc, disagreed. Although the court acknowledged that the plain meaning of the rule required a written or oral stipulation waiving a jury trial, it noted that such an approach to the facts before it "would act as an instrument of delay and frustrate the purposes of the Federal Rules of Civil Procedure."[169] The court stated that the purpose of the rule was to protect litigants from inadvertently waiving their rights to a jury trial through some "careless statement or ambiguous document."[170] The plaintiff in the case at hand, however, had participated in a bench trial without objection; the totality of his conduct therefore implied his waiver of a jury trial. Rather than force the parties to sacrifice the time and money necessary for a new trial, the court rejected a plain meaning approach to the rule in favor of the mandate of rule 1.[171] Every other circuit considering this issue has similarly rejected a formalistic application of rule

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SUTHERLAND STATUTORY CONSTRUCTION § 46.07 (Norman J. Singer ed., 5th ed. 1992) ("[I]t is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent . . . the words of the statute will be modified to agree with the intention of the legislature."). Indeed, in his historic article on statutory interpretation, Karl Llewellyn identifies similar canons of construction: "To effect its purpose a statute may be implemented beyond its text." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395, 401 (1950). He also notes that plain language need not be given effect "when literal interpretation would . . . thwart manifest purpose." *Id.* at 403. Finally, "The letter is only the 'bark.' Whatever is within the reason of the law is within the law itself." *Id.* at 404. Of course, Llewellyn's purpose in listing the canons of statutory construction was to explain that for every principle of construction, there exists an equal and opposite counterprinciple. *Id.* at 401; *see also supra* note 5. *But see infra* note 203 (noting Supreme Court's reluctance to adopt lenient approach to statutory interpretation).

166. 903 F.2d 699 (9th Cir. 1990). White was an Arizona State Prison inmate who filed a § 1983 suit against a Department of Corrections employee, claiming that the employee assaulted him while searching his cellblock. 903 F.2d at 700.

167. Rule 39 states, in relevant part:

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury . . . .

FED. R. CIV. P. 39(a).

168. 903 F.2d at 700.

169. 903 F.2d at 701 (citing Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1305 (9th Cir.), *cert. denied,* 464 U.S. 916 (1983)).

170. 903 F.2d at 703.

171. 903 F.2d at 700-03. In so doing, the Ninth Circuit overruled its earlier decision in Palmer v. United States, 652 F.2d 893 (9th Cir. 1981).

39(a).[172] Federal courts have also refused to apply other rules strictly where such an application would achieve an unjust or inefficient result.[173]

Furthermore, although it may be argued that reenactment of the "close of all the evidence" language in fact indicates the desire of the advisory committee and Congress that such language be followed literally, in fact the opposite is equally plausible. First, the advisory committee to the Federal Rules of Civil Procedure, in amending rule 50(b) in 1991, did not make an affirmative effort to reverse the liberal interpretation given the "close of all the evidence" requirement, either in the rule itself or in the accompanying advisory committee's note. The committee clearly could have done so, because it sought to reverse judicial interpretations of other elements of the rule. For example, the committee amended (a)(2) to require that a party "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment,"[174] where section (a) had previously required merely that a motion "state the specific grounds therefor."[175] In the advisory committee's note to the 1991 Amendments, the committee states that it made the change to "alter[ ] the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict."[176]

This advisory committee's note does not, however, alter the liberal approach to the "close of all the evidence" requirement; it merely reiterates that a party must specifically move for judgment as a matter of law at trial if it is to make the same motion after the verdict is returned. The advisory committee's note deals with *how* to make a motion for judgment as a matter of law, rather than *when.* If the advisory committee had wanted to stress that a party must move for judgment

172. *See* Royal Am. Managers., Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018 (2d Cir. 1989); Lovelace v. Dall, 820 F.2d 223, 227-29 (7th Cir. 1987) (per curiam); United States v. 1966 Beechcraft Aircraft Model King Air A90, 777 F.2d 947, 950-51 (4th Cir. 1985); Allen v. Barnes Hosp., 721 F.2d 643, 644 (8th Cir. 1983); Southland Reship, Inc. v. Flegel, 534 F.2d 639, 643-45 (5th Cir. 1976); Wool v. Real Estate Exch., 179 F.2d 62, 63 (D.C. Cir. 1949) (per curiam).

173. *See, e.g.,* Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir. 1955) (finding satisfactory "substantial compliance" with requirements of then FED. R. CIV. P. 73(a), which required that notice of appeal be filed within thirty days from the entry of the final judgment, when party filed motion for leave to appeal in forma pauperis within the thirty days; court noted that rules "were not adopted to set traps and pitfalls by way of technicalities for unwary litigants"); Alexander v. Hall, 64 F.R.D. 152, 156 (D.S.C. 1974) (citing rule 1 and refusing to apply a "strict interpretation" of FED. R. CIV. P. 24(c), which requires that a prospective intervenor file a pleading stating the claim for which intervention is sought, when the intervenor stated simply "we would adopt the plaintiffs' Complaint as our Complaint in intervention"); *see also* Somlyo v. J. Lu-Rob Enters., 932 F.2d 1043, 1049 (2d Cir. 1991) (excusing failure to comply with District's Local Rules based upon FED. R. CIV. P. 1).

174. FED. R. CIV. P. 50 (as amended).

175. FED. R. CIV. P. 50 (prior to 1991 amendments).

176. FED. R. CIV. P. 50 advisory committee's note (1991 amendments).

at the close of all the evidence in order to preserve the right to move for judgment as a matter of law after the jury returned its verdict, it certainly could have done so.

Second, rather than stressing the importance of the "close of all the evidence" requirement, the advisory committee deemphasized it. The advisory committee note observes that the rule requires "that a motion for judgment be made *prior to the close of the trial,* subject to renewal after a jury verdict has been rendered."[177] Although technically only a motion made at the close of all the evidence is subject to renewal following the return of the jury's verdict, the advisory committee's note downplays the requirement by simply referring to a motion "prior to the close of the trial."[178] In addition, the advisory committee's note favorably cites cases which had employed or advocated a liberal approach to rule 50(b), for the proposition that a motion for judgment as a matter of law at trial provides the opposing party an opportunity to cure.[179] Finally, the advisory committee to the Federal Rules of Civil Procedure, perhaps due to the procedural snares created by the current rule, arguably has acquiesced in the various liberal interpretations given the requirements of rule 50(b).[180]

B. *A Criticism of Other Alternatives*

Besides satisfying the purposes of rule 50(b) and the Federal Rules of Civil Procedure in general, the approach endorsed in section III.A

177. FED. R. CIV. P. 50 advisory committee's note (1991 amendments) (emphasis added).

178. FED. R. CIV. P. 50 advisory committee's note (1991 amendments). The advisory committee's note does later provide that the rule "retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence." *Id.* Even this, however, is far less stringent than the language of the advisory committee on the 1963 amendments: "A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence." FED. R. CIV. P. 50 advisory committee's note (1963 amendments).

179. The advisory committee's note cites Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1985), discussed *supra* notes 105-09 and accompanying text, and Benson v. Allphin, 786 F.2d 268 (7th Cir.) (excusing failure of defendant to move for directed verdict at the close of all the evidence where opposing party was not unduly prejudiced), *cert. denied,* 479 U.S. 848 (1986), for the proposition that a motion for judgment as a matter of law made at some time prior to the close of the trial provides the nonmovant an opportunity to cure. FED. R. CIV. P. 50 advisory committee's note (1991 amendments).

180. *See* 2B SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 165, at § 49.09 ("Where reenactment of a statute includes a contemporaneous and practical interpretation, the practical interpretation is accorded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law. . . . Legislative adoption is presumed conclusive when repeated reenactments follow a notorious practical interpretation.") (citations omitted); *cf.* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Although these maxims of statutory interpretation applied with more force when the interpretation of the statute was unanimous, *see* Pierce v. Underwood, 487 U.S. 552, 567-68 (1988), reenactment of the "close of all the evidence" requirement without change or a supplemental advisory committee note indicates passive acquiescence to the variety of approaches taken to rule 50(b).

is more just than those offered by the other circuits. As noted in section II.A, the circuits advocating a strict approach argue that excusing the requirements of the rule could allow for "tactical victories at the expense of substantive interests."[181] When a party receives notice of perceived deficiencies, however, the failure to renew does not create a trap. Moreover, this argument is a double-edged sword. The party that avoids postverdict judgment as a matter of law, simply because of lack of a proper procedural predicate, has itself obtained a " 'tactical victor[y]' " at the " 'expense of substantive interests.' "[182] Finally, the liberal approach to the Federal Rules advocated by rule 1, as discussed above, provides the justification for allowing technical noncompliance with rule 50(b) when its purposes are otherwise met. The strict approach to rule 50(b), while loyal to the language of the rule, betrays its spirit.

The plurality test articulated in *Bayamon*[183] fails in two regards. The first prong, which also appears in the Second Circuit's *Ebker*[184] test, requires that the trial court give the moving party some indication that the movant has preserved his right to mount a postverdict challenge to the sufficiency of the evidence.[185] The language of *Bayamon* suggests that this factor explains why the moving party failed to renew its motion, by placing the onus for failing to comply with the dictates of rule 50 on the trial judge.[186] The same is true of the "reservation" requirement found in the Ninth Circuit and the first prong of the Fifth Circuit tests.[187] While the actions of the trial judge may in fact explain a party's failure to renew, such actions should not be a prerequisite to a liberal approach to rule 50(b). As noted in *McKinnon,* "it would be excessively strict to confine the policy of leniency to cases where the judge happens to have reserved action on the motion for directed verdict when it was made (and never renewed)."[188] Such an approach arbitrarily grants a procedural victory to plaintiffs in cases where the trial judge opted to deny, rather than "reserve decision" on, an early motion for judgment as a matter of law. This in turn leads to

181. Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9, 11 (3d Cir.) (quoting 5A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 50.08 (1975)), *cert. denied,* 429 U.S. 966 (1976).

182. *Lowenstein,* 536 F.2d at 11 (quoting MOORE ET AL., *supra* note 181).

183. Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969).

184. Ebker v. Tan Jay Intl., Ltd., 739 F.2d 812 (2d Cir. 1984), *cert. denied,* 112 S. Ct. 161 (1991).

185. *See supra* notes 77-87 and accompanying text.

186. *See, e.g., Bayamon,* 409 F.2d at 971 ("In a sense the court may well have led counsel reasonably to believe that all had been done that was necessary."); Gillentine v. McKeand, 426 F.2d 717, 722 (1st Cir. 1970) (in considering the *Bayamon* decision, noting that "we felt that the defendants there could be relieved of the consequences of the trial court's misleading statements without doing violence to the policy of [rule 50].").

187. *See supra* notes 105-09 and 88-96, respectively, and accompanying text.

188. McKinnon v. City of Berwyn, 750 F.2d 1383, 1390 (7th Cir. 1984).

different results in cases with identical claims, depending upon whether the judge reserves or denies the initial motion.

The second prong of the plurality test is also problematic. This prong states that lenience is appropriate where the evidence introduced following the motion is brief and inconsequential.[189] Either or both of the parties could introduce a substantial amount of evidence following an unsuccessful motion for judgment as a matter of law.[190] Where none of the subsequently introduced evidence relates to the issue raised in the motion or where it merely strengthens the movant's case, the fact that the amount of evidence was substantial should have no effect on deciding whether to excuse the movant's failure to renew the motion. As noted by the court in *Ebker*, in rejecting *Bayamon*'s second prong: "[I]f on analysis the additional evidence, even though extensive, accomplishes what the defendant intended it should, i.e., strengthening his case without simultaneously exposing a flaw, little justification would seem to exist for finding significance in the quantitative aspect . . . ."[191]

The Ninth Circuit's test is also troublesome. It excuses failure to renew an initial motion for judgment at the close of all the evidence whenever the judge has reserved her decision on the motion, even if the plaintiff submits additional relevant information following the motion.[192] A plaintiff may believe at the close of all the evidence that she filled the gaps in her case through the additional evidence. The defendant, if he continues to believe that the plaintiff's case is insufficient, should then move again for judgment as a matter of law to indicate this belief. Under the Ninth Circuit approach, the judge's reservation of the initial motion is presumed to indicate a continuing challenge to the sufficiency of the evidence. When the plaintiff may reasonably believe that she has met the challenge, the defendant should be obligated to renew the challenge through a motion for judgment as a matter of law at the close of all the evidence. Under the Ninth Circuit's approach, however, this is not required, and such a plaintiff is therefore unfairly prejudiced.

Finally, although litigants whose attorneys fail to follow the rule's strict requirements may find redress in a legal malpractice action, forcing them to such a remedy is clearly not consistent with the goal of rule 1.[193] Malpractice actions are particularly onerous because the liti-

189. For a discussion of this element, see *supra* notes 83-87 and accompanying text.

190. *See supra* text accompanying note 102.

191. Ebker v. Tan Jay Intl., Ltd., 739 F.2d 812, 824 (2d Cir. 1984) (quoting Moran v. Raymond Corp., 484 F.2d 1008, 1012 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974)), *cert. denied*, 112 S. Ct. 161 (1991).

192. *See supra* notes 105-09 and accompanying text.

193. *See supra* note 126 and accompanying text.

gant must generally prove a "case within a case."[194] That is, a defendant who is precluded from seeking a postverdict judgment as a matter of law because defense counsel failed to comply with rule 50(b) must prove both that the lawyer's omission created a viable cause of action and also that this omission damaged the defendant. In order to prove the latter point, the defendant must prove that the court would have, or should have, granted the postverdict motion.[195] Although there may be clear indications of the court's intent in some cases,[196] oftentimes there are not.[197] Because of this difficulty, legal malpractice cannot fully remedy dismissal after procedural error.[198]

For these reasons, some courts and commentators have specifically rejected the notion of malpractice suits in favor of more efficient and just alternatives.[199] For example, in *Poulis v. State Farm Fire & Casualty Co.*,[200] the trial court dismissed the complaint with prejudice after plaintiff's counsel failed to meet certain discovery deadlines and procedural requisites, and suggested that the plaintiffs pursue a malpractice suit against their lawyer.[201] In considering the statement, the Third Circuit noted that malpractice suits hinder "the goal of a court system, that of delivering evenhanded justice to litigants, . . . since [such suits]

194. Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 LITIG., Winter 1989, at 13, 13.

195. *See id.*

196. *See, e.g.*, DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978).

197. *See, e.g.*, Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983) (no indication of whether judgment as a matter of law would have been granted if proper procedural predicate had been met).

198. *Cf.* Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1308 (1963) (noting that a malpractice plaintiff must prove that the dismissed suit would have succeeded). For example, in ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER 40 (1989), the Center reported that only 6.16% of all legal malpractice cases that went through a complete trial resulted in a judgment and payment for the plaintiff. In contrast, however, plaintiffs generally win judgment in approximately 50% of all trials. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 31-34 (1984) (data from Cook County, Ill. showing that 48.47% of all jury trials resulted in verdicts for plaintiffs, and 51.53% resulted in verdicts for defendants); *see also* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 333-35 (1991) (agreeing generally with Priest and Klein that approximately 50% of all trials result in plaintiff judgments, but noting that plaintiff success varies significantly depending upon the type of claim).

199. *See, e.g.*, Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987):

> [P]ublic confidence in the legal system is undermined when a litigant's claim is dismissed due to the blameworthy actions of their counsel. . . . The litigant does have recourse in such a case — a malpractice action — but that approach may not result in a hearing on the merits of the plaintiff's case.

813 F.2d at 1304 (citation omitted); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 867 (3d Cir. 1984); *see also* Note, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. CHI. L. REV. 922, 929-34 (1967).

200. 747 F.2d 863 (3d Cir. 1984).

201. *Poulis*, 747 F.2d at 867.

would only multiply rather than dispose of litigation."[202] The same logic applies to the issue here, particularly because the liberal approach to rule 50(b) does not unfairly prejudice either party.

C. *A Proposed Revision to Rule 50(b)*

This Note has argued for a liberal interpretation of the current rule 50(b). However, given conflicting doctrines of statutory interpretation,[203] the rule should be amended to reflect its true purpose better. One possible amendment to the current rule, which would be added following the first sentence, is as follows:

> Whenever a motion for judgment as a matter of law made prior to the close of all the evidence is denied or for any reason is not granted, and where the opposing party is not unfairly prejudiced by the movant's failure to renew the motion at the close of all the evidence, the court is deemed to have submitted the action to a jury subject to a later determination of the legal questions raised by the motion.

This approach both incorporates the current liberal interpretation of the rule and allows those courts that have previously felt constrained by the language of the current version to grant judgment as a matter of law in appropriate cases.[204]

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202. 747 F.2d at 867. The court ultimately concluded that, although it would likely not have dismissed the plaintiff's complaint, the trial court did not abuse its discretion in doing so. 747 F.2d at 870.

203. *See, e.g.*, Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). The merits, or lack thereof, of a "plain meaning" approach to statutory interpretation are beyond the scope of this Note, except to the extent that the approach is rejected in favor of a "purpose" approach to rule 50(b) for the reasons stated in section III.A. For further discussion of competing norms of statutory interpretation, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687 (1992); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715 (1992); Daniel J. Capra, *Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632 (1991); William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Llewellyn, *supra* note 165, at 401-04. *See generally* SUTHERLAND, *supra* note 165. This Note also proposes an amendment to rule 50(b) in light of the Supreme Court's tendency, despite its recognition of FED. R. CIV. P. 1, to read the Federal Rules of Civil Procedure strictly. *See, e.g.*, Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 49-51 (1952) (holding that a party who had moved to have a verdict set aside because it was contrary to the law could not be granted judgment notwithstanding the verdict because "it did not as [rule 50] requires move . . . 'to have judgment entered in accordance with [its] motion for a directed verdict' ").

204. This amendment would meet *Redman's* standard and create a fictional reservation of the initial motion, identical to that contained in the first sentence of the current rule 50(b). As a result, postverdict consideration of a motion for judgment as a matter of law would be a consideration of an earlier, reserved motion, and thus would not violate the Seventh Amendment under the Court's reasoning.

CONCLUSION

The conflict between the language of rule 50 of the Federal Rules of Civil Procedure and its underlying purpose has created a division within the courts as to the proper application of the rule. While two circuits have strictly interpreted the rule, a majority of the circuits have looked beyond the text of the rule to its purposes and have, under various tests, attempted to apply the rule according to those purposes.

The latter approach better fulfills the liberal spirit of the Federal Rules of Civil Procedure and the mandate of rule 1, which directs courts to apply the rules in a just and efficient manner.[205] When a party makes a motion for judgment as a matter of law with sufficient specificity at some point in the trial, and the opposing party is not unfairly prejudiced by a failure to renew the motion, courts should not strictly enforce the requirement that the motion be renewed at the close of all the evidence. This approach embodies the rules' ultimate goals: the triumph of substantive interests over tactical victories and the "just, speedy, and inexpensive determination of every action."[206]

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205. FED. R. CIV. P. 1.

206. FED. R. CIV. P. 1.