Developments in Federal Civil Practice Affecting Indiana Practitioners: Survey of Supreme Court, Seventh Circuit, and Indiana District Court Opinions

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Introduction

Indiana practitioners attempting to discern the trends of the federal courts in which they practice have traditionally encountered a common problem, namely, a lack of any organized, succinct evaluation of the more significant decisions rendered by the local federal courts. The national treatises on federal civil practice such as *Moore's*[1] and *Wright and Miller*[2] are certainly excellent research tools, but they offer the local attorney only sparse insight into the holdings of the Seventh Circuit Court of Appeals and the Indiana District Courts. Because the thirteen federal circuits often differ in their specific interpretation and application of the rules governing federal practice, and because the Supreme Court rarely steps in to clarify such areas, it is important for the Indiana federal practitioner to have some source to consult on local federal practice.[3] This Article, as the first of an annual section of the Survey Issue devoted to federal civil practice and procedure,[4] attempts to help fill this void.

In doing so, this Article will concentrate on procedural and jurisdictional matters addressed by the United States Supreme Court, the Seventh Circuit Court of Appeals, and the Indiana District Courts. Primary attention will be given to newly developing trends or unusual holdings that have a high propensity to affect Indiana practitioners. No

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1. *See* J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice (2d ed. 1985).

2. *See* C. Wright, A. Miller & M. Kane, Federal Practice and Procedure (2d ed. 1983) [hereinafter Wright & Miller]. Also helpful is West's Federal Practice Manual (2d ed. 1970), as well as West's Federal Practice Digest (3d ed. 1984).

3. One useful research tool that Indiana practitioners might not be aware of is the Seventh Circuit Digest. This looseleaf binder, which is updated monthly by the Staff Attorneys of the Seventh Circuit Court of Appeals, is available on reserve at each of the federal court libraries of the Indiana district courts.

4. Criminal procedure will not be discussed so that more attention can be given to civil matters that likely affect a broader range of practitioners.

attempt will be made to discuss substantive, non-procedural matters as such areas are better left to other forums.

During the Survey period,[5] several important developments occurred in the area of summary judgment practice. On a single day in June of 1986, the United States Supreme Court issued two opinions that signaled a sudden and dramatic shift in philosophy towards this pre-trial procedure. In one case, *Celotex Corp. v. Catrett*,[6] the Court clarified the moving party's burdens of production and persuasion, an issue that had been the source of some consternation in the lower courts.[7] In an unrelated case, *Anderson v. Liberty Lobby, Inc.*,[8] the Court held that the burden of proof to be used at the trial stage, *i.e.*, clear and convincing evidence in a public figure defamation case, should be applied in ruling on the pre-trial summary judgment motion.[9] Perhaps more important than the specific holdings, the majority in each case used powerful language welcoming the lower courts to more readily dispose of cases prior to trial by way of summary judgment.

Although the cases were immediately praised by the defense bar and feared by plaintiff's lawyers, the true impact of the decisions was unclear because the Court remanded each case for application of the new standards. Thus, despite the attempt to clarify this important area, the lower courts were once again left with the task of trying to interpret and comply with the Supreme Court's directives.[10] In order to discern how

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5. As this is the first such Survey Article on federal practice, the survey period will be longer than with other articles, covering developments from 1986 through August, 1988.

6. 477 U.S. 317 (1986).

7. *Compare* Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985) *with In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983).

8. 477 U.S. 242 (1986).

9. During the same term, the Supreme Court handed down a third case signaling a shift in attitude towards summary judgment. In Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court "first began its retooling of summary judgment practice." Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 185 (1987). While *Matsushita* is an important summary judgment decision, its greatest impact will likely be on antitrust cases. This Article will thus only refer to *Matsushita* in passing. For an example of the effect of *Matsushita* on summary judgment practice in antitrust cases, see Indiana Grocery Co. v. Super Valu Stores, Inc., 648 F. Supp. 561 (S.D. Ind. 1988).

10. As one commentator noted,

> Although the Court expounded the methods for reviewing a summary judgment motion in *Celotex* and *Anderson*, it did not apply these methods to the facts of each case. Instead, the Court remanded both cases for application of the new standards. The dissenters criticized this failure to apply theory to fact and warned that the Court's decisions could cause trial and appellate level confusion. Therefore, an unclear issue is whether the lower courts are correctly interpreting the *Celotex* and *Anderson* standards.

Comment, *Federal Summary Judgment: The "New" Workhorse for an Overburdened Federal Court System*, 20 U.C. Davis L. Rev. 955, 968 (1987).

the local United States Court of Appeals is responding to the Supreme Court's new attitude towards summary judgment, this Article will evaluate some of the more significant Seventh Circuit summary judgment decisions rendered since *Celotex* and *Anderson*. Part I of the Article will address the specific holding of *Celotex* and its reception in the Seventh Circuit.[11] It will similarly discuss the decision in *Anderson* and evaluate its specific impact on the Seventh Circuit.[12] Part II will then look more generally at how the Seventh Circuit and Indiana District Courts have responded to the drastic shift in attitude towards summary judgment reflected in *Celotex* and *Anderson*.[13] Finally, Part III will discuss how the decisions could influence Indiana civil procedure, and will argue that the Indiana courts should be wary of rushing to adopt either the new attitude toward federal summary judgment or the specific holding of *Anderson*.[14]

The Article will then discuss an unusual and important issue concerning the effect of loan receipt agreements on federal diversity jurisdiction. In a recent case decided by an Indiana District Court,[15] a negligence and products liability action against several in-state and out-of-state defendants was held properly removed from state court to federal court because of the existence of a loan receipt agreement with the non-diverse Indiana defendants. The court ruled that the loan receipt agreement, under which the Indiana defendants "loaned" funds to the plaintiff pending the outcome of the litigation, destroyed any hostility between the Indiana defendants and the Indiana plaintiff. Accordingly, the court held that the non-diverse Indiana defendants were properly realigned as plaintiffs for purposes of determining the existence of diversity jurisdiction, thereby creating complete diversity between the Indiana plaintiff and the other out-of-state defendants. Part IV of this Article will discuss this unique jurisdictional issue, pointing out how both plaintiff and defendant may be able to benefit from its holding.[16]

I. The Specific Procedural Holdings of the Summary Judgment Decisions and Their Reception in the Seventh Circuit

A. Celotex Corp. v. Catrett:[17] *Clarifying the Movant's Burden*

In *Celotex*, the plaintiff brought a wrongful death action alleging that her husband's death resulted from exposure to asbestos products

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11. *See infra* text accompanying notes 17-60.
12. *See infra* text accompanying notes 61-114.
13. *See infra* text accompanying notes 115-32.
14. *See infra* text accompanying notes 133-54.
15. O'Connor v. Sears, Roebuck and Co., No. TH 85-261-C (S.D. Ind. Apr. 10, 1986)(order denying motion to remand action to state court). *See infra* app. for text of order, at p. 139-49.
16. *See infra* text accompanying notes 155-93.
17. 477 U.S. 317 (1986).

manufactured by fifteen named corporations, one of them being the Celotex Corporation. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Celotex later filed a motion for summary judgment arguing that the plaintiff had "'failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged . . . .' In particular, [Celotex] noted that [plaintiff] had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to [Celotex's] asbestos products."[18] Thus, rather than affirmatively coming forward with evidence tending to negate or refute the plaintiff's claim, Celotex simply attempted to demonstrate to the court the failure of an essential element of the plaintiff's claim (here exposure to the defendant's product).

In response to the motion for summary judgment, Mrs. Catrett "produced three documents which she claimed 'demonstrate that there is a genuine material factual dispute' as to whether the decedent had ever been exposed to [Celotex's] asbestos products."[19] The documents, which would arguably have been inadmissible at trial under hearsay rules, included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers, and a letter from an insurance company to the plaintiff's attorney. All three documents tended to establish that Mr. Catrett had been exposed to Celotex's asbestos products during 1970-1971. The District Court for the District of Columbia, however, granted defendant's motion for summary judgment on the grounds that there was no showing the decedent was ever exposed to Celotex asbestos products.[20]

On appeal to the District of Columbia Circuit Court of Appeals, a divided panel reversed the entry of summary judgment.[21] The majority ruled that Celotex's Rule 56 motion was rendered "'fatally defective' by the fact that [Celotex] 'made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion.'"[22] Under the reasoning of the D.C. Circuit, "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact."[23] Because the Court of Appeals determined that the movant had not yet satisfied its burden of proof, it was, of course, unnecessary for the court to even address the sufficiency of Mrs. Catrett's response. Thus, the court did not need to consider

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18. *Id.* at 319-20.
19. *Id.* at 320.
20. *Id.*
21. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985).
22. *Celotex*, 477 U.S. at 321 (quoting *Catrett*, 756 F.2d at 184) (emphasis in original).
23. *Catrett*, 756 F.2d at 184 (emphasis in original).

Celotex's contention that the documents produced by plaintiff should not be accorded any weight because they would arguably be inadmissible at trial, a separate issue in and of itself.[24]

Judge Bork dissented, arguing that the court was mistaken "in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute."[25] In Judge Bork's view, the Court of Appeals' majority opinion interpreted Rule 56 to mean that the moving party had to "prove a negative"[26] by somehow bringing forth affirmative evidence showing the absence of an essential element of the plaintiff's *prima facie* case.[27]

In order to resolve a split among the circuits concerning the movant's burden of production,[28] the Supreme Court granted certiorari and reversed the decision of the Court of Appeals. In a 5-4 decision which produced one concurring opinion and two separate dissents,[29] the majority ruled that the Court of Appeals had misread the standard for summary judgment set forth in the federal rules. Writing for the majority, Justice Rehnquist explained that

> the plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion,

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24. Rule 56(e) of the Federal Rules of Civil Procedure provides that "Supporting and opposing affidavits shall . . . set forth such facts as would be admissible in evidence . . . ." Despite this language, though, the courts do not require the evidence submitted at summary judgment to be in perfect trial form. For instance, Judge Barker recently noted that "the rule does not require an unequivocal conclusion that the evidence will be admissible at trial as a condition precedent to its consideration on a summary judgment motion. . . ." Reed v. Ford Motor Co., 679 F. Supp. 873, 874 (S.D. Ind. 1988). A court "will not exclude evidence at this stage on grounds of hearsay, irrelevance, or undue prejudice. The court must make those types of determination at trial because '[a]dmissibility of testimony sometimes depends upon the form in which it is offered, the background which is laid for it, and perhaps on other factors as well.'" *Id.* at 875 (citation omitted).

25. *Catrett*, 756 F.2d at 188 (Bork, J., dissenting). Judge Bork's excellent analysis was essentially adopted later by the Supreme Court majority.

26. One commentator coined this phrase, writing, "[T]he Court of Appeals required the defendant to 'prove a negative,' by showing the absence of any genuine issue of material fact, in order to sustain its motion." Kennedy, *Federal Summary Judgment: Reconciling* Celotex v. Catrett *with* Adickes v. Kress *and the Evidentiary Problems Under Rule 56*, 6 Rev. Litig. 227, 238 (1987).

27. For the sake of simplicity, this Article will consistently use the "defendant" as the movant for summary judgment. The same principles, of course, would apply in those instances where the plaintiff is moving for summary judgment on an affirmative defense or other issue on which the defendant bears the burden of proof.

28. *See supra* note 7.

29. *Celotex*, 477 U.S. 317. Justice Rehnquist wrote for the majority and was joined by Justices Marshall, O'Connor, Powell, and White. Justice White authored a concurring opinion. Justice Brennan filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined. Justice Stevens also filed a dissenting opinion.

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[30]

In such a situation, the nonmoving party has simply failed to make a sufficient showing on an essential element of the *prima facie* case, and the movant's duty is merely to point this out to the court.

"Of course," the majority explained, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion. . . ."[31] The moving party does this by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of any genuine issue of material fact. But," the Court continued, "unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim."[32] Rather, under *Celotex* it is enough for the moving party to simply demonstrate to the district court that the moving party raises "factually unsupported claims or defenses" such that the burden then shifts to the non-movant to demonstrate the existence of a genuine issue of material fact.[33] Once the moving party has satisfied this burden, the non-movant must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"[34]

Having decided that a moving party may satisfy its burden by merely demonstrating that an essential element of the non-movant's claim or defense is devoid of proof, the Court reversed and remanded the case to the Court of Appeals to determine the adequacy of the non-movant's response to the defendant's motion.[35]

Restated, then, the precise holding of *Celotex* is that a moving party need not initially bring forth its own independent evidence negating the non-moving party's claim or defense; rather, the movant satisfies its initial burden of production by demonstrating to the district court that there is a complete failure of evidence on an essential element. The moving party accomplishes this by pointing out that the record to date, which

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30. *Id.* at 322 (emphasis added).
31. *Id.* at 323.
32. *Id.* (emphasis in original).
33. *Id.* at 323-24.
34. *Celotex*, 477 U.S. at 324.
35. Justice Brennan, however, noted in his dissent that it was not immediately apparent what the Court of Appeals was to do on remand. *Id.* at 329 n.1 (Brennan, J., dissenting).

may include pleadings, discovery responses, and affidavits, is devoid of evidence tending to prove an element of the non-movant's claim or defense. If the moving party has not fully discharged this initial burden, its motion for summary judgment must be denied.[36] If the movant satisfies this burden, the non-movant must then go beyond the pleadings and demonstrate the existence of a genuine issue for trial.

Although this holding would, at first glance, seem to be a natural interpretation of Rule 56 that would merit little comment,[37] the awkward posture of the case and the debate raised by the concurring and dissenting opinions left the lower courts with a somewhat muddied picture of the *Celotex* standard. Accordingly, it is important to analyze several decisions from the Seventh Circuit discussing *Celotex* to guide the Indiana practitioner in this area.

B. Application of Celotex *in the Seventh Circuit*

Although the Seventh Circuit Court of Appeals and the local district courts have cited *Celotex* repeatedly in the short time since the Supreme Court clarified the parties' burdens of production,[38] only a few cases serve to illustrate the application of the *Celotex* burden-shifting standard. The greater effect of Celotex, as discussed in detail in Part II of this Article, has been an apparent warming towards disposition of cases by summary judgment.[39] Nonetheless, three cases from the survey period serve to illustrate the burden of production principles that were clarified by the Supreme Court.

The 1987 case of *Nur v. Blake Development Corp.*,[40] decided by Judge Miller of the Northern District of Indiana, serves as a prime example of how a movant may satisfy its burden of production without having to "prove a negative." In *Nur*, two non-minorities brought suit under the Fair Housing Act and the Civil Rights Act alleging that Blake Development engaged in discriminatory housing practices.[41] These non-

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36. Justice Brennan's dissent serves as an excellent analysis of these principles. *See* 477 U.S. at 329-37 (Brennan, J., dissenting).

37. Justice Stevens called the majority opinion an "abstract exercise in Rule construction," *Id.* at 339 (Stevens, J., dissenting), while Justice Brennan disagreed not with the majority's pronouncements but with "the application of these principles to the facts of this case." *Id.* at 334 (Brennan, J., dissenting). *See also infra* text accompanying notes 63-65.

38. Through August, 1988, the Seventh Circuit has cited *Celotex* in 22 reported appeals from district court entries of summary judgment. *See infra* text accompanying notes 115-16.

39. *See infra* text accompanying notes 115-32.

40. 655 F. Supp. 158 (N.D. Ind. 1987).

41. *Id.* at 160-61.

minority plaintiffs, however, did not allege that such practices were directed against them; rather, they complained of "subjective pain and suffering upon discovering that other members of their own race were engaging in the prohibited discriminatory conduct . . . ."[42] After taking the depositions of the non-minority plaintiffs, the defense moved for summary judgment contending that the plaintiffs lacked standing to bring such an action. In essence, the thrust of the defense motion was that, even assuming the existence of discriminatory practices, the plaintiffs did not receive a direct, palpable injury from such action. Because of the difficulty of coming forward with affirmative independent evidence tending to disprove this negative, the defense merely relied on the depositions of the plaintiffs to show the failure of an essential element of the claim.[43]

In granting summary judgment for the defense, Judge Miller first cited to *Celotex* and discussed the standards under Rule 56, writing, "In a summary judgment motion, the movant must first demonstrate, by way of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, that (1) no genuine issues of material fact exist for trial, and (2) the movant is entitled to judgment as a matter of law."[44] Then, if the non-movant

> would bear the burden of proof at trial on the matter that forms the basis of the summary judgment motion, the burden of proof shifts to the [non-movant] if the movant makes its initial showing, and the [non-movant] must come forth and produce affidavits, depositions, or other admissible documentation to show what facts are actually in dispute.[45]

The court then ruled that "defendants had met their initial burden under *Celotex Corp. v. Catrett*."[46] Accordingly, the burden then shifted to the plaintiffs "to produce proper documentary evidence to support their contentions."[47] Plaintiffs, by relying on "the mere allegations of their complaint" and "conclusory statements in their affidavits,"[48] failed to meet this burden. Thus, summary judgment was proper under *Celotex* because the defense had adequately demonstrated the failure of evidence on an essential element of the plaintiffs' claim, and the plaintiffs then failed to come forth with any proof of that element.

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42. *Id.* at 161.
43. *Id.*
44. *Id.* at 159 (citations omitted).
45. *Id.* (citations omitted). Note again that the admissibility requirement is looser than this language might suggest. *See supra* note 24.
46. 655 F. Supp. at 162.
47. *Id.* (citations omitted).
48. *Id.* (citations omitted).

Similarly, the bankruptcy case of *In re Klein*[49] illustrates proper application of the *Celotex* principles. In *Klein*, the creditor sought a declaratory judgment that it possessed a valid security interest in collateral which the Chapter 11 debtor had pledged. The parties did not dispute the validity of the various contracts involved, but rather disagreed as to their interpretation. After discovery, the creditor moved for summary judgment relying solely on the documents already in the record.

In granting the creditor's motion, the court discussed at some length the importance of the *Celotex* holding and how the case had been misread by the trustee. In response to the creditor's motion, the trustee had contended that "the Supreme Court [in *Celotex*] has interpreted Fed. R. Civ. P. 56 as imposing upon the moving party the burden of presenting 'evidence (which is) not merely colorable, but which is *significantly probative* and which *precludes the rendering of a contrary verdict.*'"[50] The *Klein* court, however, rejected this interpretation, explaining instead that "under *Celotex*, all Rule 56 requires [the movant] to do is 'show'—i.e., 'point out'—to this Court that there is no genuine issue of material fact."[51] The court found that the creditor had met this burden, and therefore, "the burden of proof shift[ed] to the adverse party . . . to set forth 'specific facts showing that there is a genuine issue for trial.'"[52] The court found the trustee had not met this burden and accordingly entered summary judgment for the creditor.

To the same effect is *Valentine v. Joliet Township High School District No. 204*,[53] in which the Seventh Circuit expounded the proper application of the *Celotex* burden-shifting principles. In *Valentine*, a dismissed high school guidance counselor appealed the district court's entry of summary judgment on his Section 1983 suit that sought reinstatement and damages.[54] The district court had entered judgment for the school based on (1) the affidavits and documentary evidence filed by the school and (2) the plaintiff's failure to thereafter show the existence of some proof of an essential element of his claim.

In affirming summary judgment, the Seventh Circuit relied extensively on *Celotex*, writing:

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49. 83 Bankr. 968 (N.D. Ill. 1988). Although the *Klein* case was not decided by the Seventh Circuit nor an Indiana district court, this opinion from the Northern District of Illinois is nonetheless valuable to Indiana practitioners because of its excellent interpretation of *Celotex*, coupled with the fact that the court is within the jurisdiction of the Seventh Circuit.

50. *Id.* at 970-71 (emphasis in original).

51. *Id.* at 971.

52. *Id.* (citation omitted).

53. 802 F.2d 981 (7th Cir. 1986).

54. *Id.* at 982.

> In *Celotex* . . . the Supreme Court determined that Rule 56 does not require the moving party to support its . . . motion with affidavits. Instead, the moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, if any,' which it believes demonstrate the absence of a genuine issue of material fact." The moving party, however, need not support its motion with affidavits or other evidence negating the nonmoving party's claim. Once the moving party files such a properly supported motion, the non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), except merely the pleadings themselves.[55]

"In this case," the Seventh Circuit explained, "plaintiff failed to present any affirmative evidence" of an element of his claim.[56] "In response to defendants' motion, plaintiff filed a brief, but did not file an affidavit or any other evidence establishing a genuine issue of fact for trial."[57] Thus, after the defense had properly met its initial burden under *Celotex*, the burden had shifted to the plaintiff. Because plaintiff failed to do anything more than rely on the "conclusory allegations" in his complaint, the district court had acted properly in entering summary judgment.[58]

Thus, *Valentine*, *Klein*, and *Nur* demonstrate that both the Seventh Circuit and the lower courts it governs have grasped the burden-shifting principles that were clarified in *Celotex*. In light of these teachings, defendants seeking summary judgment will find it easier to meet their initial burden in those cases in which it is often difficult to obtain affirmative independent evidence tending to "prove a negative." Counsel in such cases should be able to merely demonstrate to the court that the plaintiff has failed to produce even some evidence establishing an element of the *prima facie* case. Plaintiffs, on the other hand, will need to be prepared to respond to these motions by producing some evidence on each element of their case. Thus, plaintiffs will likely find it necessary to vigorously investigate their cases and conduct substantial discovery soon after filing their actions in order to fend off summary judgment motions.

Should plaintiffs need more time to investigate and respond to such a motion, they should seek relief under Rule 56(f) which allows the court

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55. *Id.* at 986 (citations omitted).
56. *Id.*
57. *Id.* at 986-87.
58. *Id.* at 987.

to refuse to rule on the motion or alternatively grant a continuance.[59] So long as both sides adequately apprise themselves of the importance of *Celotex*, it seems that neither the plaintiff nor defense bars will suffer any detriment in representing their clients in federal litigation.[60]

C. Anderson v. Liberty Lobby, Inc.:[61] *The Non-Movant's Burden—Incorporating Trial Stage Burdens of Proof Into the Summary Judgment Process*

Despite the wealth of commentary that the *Celotex* decision produced,[62] the specific holding did not drastically alter summary judgment practice. To be sure, the *Celotex* clarification was necessary and will continue to have an impact on federal civil procedure. However, as Judge Conover of the Indiana Court of Appeals recently noted in *Hinkle v. Niehaus Lumber Co.*,[63] the Indiana courts had already announced, for *Indiana* procedural purposes, the same rule which was clarified by the *Celotex* court.[64] Similarly, three Justices in *Celotex* declared that "the principles governing a movant's burden of proof are straightforward and well-established, and deciding the case . . . does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case."[65]

The landmark Supreme Court decision in *Anderson v. Liberty Lobby, Inc.*,[66] however, does *not* involve "straightforward and well-established"

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59. Rule 56(f) of the Federal Rules of Civil Procedure provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

For an exhaustive analysis of Rule 56(f), see WRIGHT & MILLER, *supra* note 2, at §§ 2740-41 (1983).

60. Plaintiffs can also take advantage of the *Celotex* holding by scrutinizing the defendants' evidence supporting affirmative defenses and moving for partial summary judgment where appropriate. For an insightful discussion of plaintiff and defense tactics after the summary judgment decisions, see Kennedy, *supra* note 26, at 253-57 (1987).

61. 477 U.S. 242 (1986).

62. *See, e.g.*, Fromme, Celotex *Lightens Movant's Burden for Summary Judgment*, 56 J. KAN. BAR. 10 (1987); Kennedy, *supra* note 26; Note, Celotex Corp. v. Catrett: *Lessening the Moving Party's Burden for Summary Judgment?*, 17 MEM. S.L. REV. 293 (1987); Note, *The Movant's Burden in a Motion for Summary Judgment*, 3 UTAH L. REV. 731 (1987).

63. 510 N.E.2d 198 (Ind. Ct. App. 1987), *rev'd on other grounds*, 525 N.E.2d 1243 (Ind. 1988).

64. *Id.* at 201.

65. 477 U.S. at 335 (Brennan, J. dissenting).

66. 477 U.S. 242 (1986).

principles. To the contrary, the *Anderson* case is extraordinary, causing civil procedure scholars such as Professor Harvey to remark that the "essence of the Court's holding . . . is open to serious challenge."[67] Indeed, *Anderson* mandates a complete re-casting of the non-movant's burden of proof at the pre-trial summary judgment stage to take account of the higher burden of proof at trial. In order to fully grasp the potential impact of the decision, it is first necessary to examine the precise holding itself.

In *Anderson*, the plaintiffs filed a libel action alleging that certain statements and illustrations published by the defendants were defamatory. Following discovery, the defense moved for summary judgment asserting that actual malice was absent as a matter of law. In support of this contention, the publishers submitted the affidavit of the author stating that all facts in the articles were believed to be truthful and that the sources had been thoroughly researched. The affidavit included an appendix which detailed the sources for each of the statements alleged to be libelous.[68]

In response to the defendants' motion, plaintiffs asserted there were numerous inaccuracies in the articles and claimed that many of the author's sources were unreliable. The plaintiffs also presented evidence that prior to publication an editor of the magazine had told one of the defendants the articles were "terrible" and "ridiculous."[69] The plaintiffs generally charged that the petitioners had failed to adequately verify their information before publishing.

The district court entered judgment for the defendants, finding that under *New York Times*[70] and its progeny the plaintiffs were limited-purpose public figures and that they had to prove the presence of actual malice by clear and convincing evidence. The court reasoned that the author's thorough investigation and research, coupled with his reliance on numerous sources, precluded a finding of such malice.[71]

On appeal, the D.C. Circuit Court of Appeals affirmed as to twenty-one and reversed as to nine of the allegedly defamatory statements.[72] The crux of the district court's error, according to Judge (now Justice) Scalia, was that application of the heightened clear and convincing evidence standard was incompatible with the preliminary nature of the summary judgment inquiry. Judge Scalia reasoned that use of the clear and convincing standard at the summary judgment stage would transform

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67. 3 HARVEY, INDIANA PRACTICE § 56.4 at 167 (Supp. 1988).
68. 477 U.S. at 245.
69. 477 U.S. at 246.
70. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
71. *Id.*
72. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

the motion from "a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts."[73] Moreover, Scalia feared that "paper trials" would result such that "summary judgment . . . would rarely be the relatively quick process it is supposed to be."[74] The Court of Appeals then reevaluated the parties' submissions without applying the heightened standard and determined that "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice."[75] Accordingly, the Court of Appeals reversed the entry of summary judgment.

In an opinion authored by Justice White, a six-member majority of the Supreme Court vacated the decision of the Court of Appeals and remanded the case for further proceedings.[76] In so doing, the Court held that the heightened evidentiary standards that apply to proof of actual malice in *New York Times* cases are to be considered by the federal district courts in ruling on motions for summary judgment. Beyond this specific holding, though, the Court made it clear that, for purposes of all federal civil procedure, the "inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[77] "Thus," Justice White wrote, "in ruling on a motion for summary judgment, the judge *must* view the evidence presented through the prism of the substantive evidentiary burden."[78]

Indeed, although some state courts have erroneously interpreted *Anderson* as only applying to First Amendment cases,[79] a careful reading of the opinion confirms that the new directive covers *all* types of federal litigation to which Rule 56 applies. Justice Brennan confirmed this in his sharply-worded dissent, writing:

> The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that 'in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.' Accordingly, I simply do not understand why Justice Rehnquist, dissenting, feels

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73. *Id.* at 1570.

74. *Id.*

75. *Id.* at 1577.

76. 477 U.S. 242. Justice White was joined by Justices Marshall, Blackmun, Powell, Stevens, and O'Connor. Justice Brennan filed a dissenting opinion, as did Justice Rehnquist with Chief Justice Burger joining him.

77. 477 U.S. at 252.

78. *Id.* at 254 (emphasis added).

79. *See infra* notes 135-37 and accompanying text.

> it appropriate . . . to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. *It changes summary judgment procedure for all litigants, regardless of the substantive nature of the underlying litigation.*[80]

Thus, the *Anderson* holding clearly applies to all issues, "irrespective of the burden of proof required and the subject matter of the suit."[81] This new standard for summary judgment, the majority declared, "mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."[82]

While this new standard may appear straightforward at first glance, the majority failed to explain how the lower courts are to apply it in everyday practice. By remanding the case to the Court of Appeals to apply the new rule,[83] the Court side-stepped the opportunity to demonstrate its proper application. This was a common theme of the dissenters. Justice Brennan, for instance, after noting that the majority's analysis was "deeply flawed" and rested on "shaky foundations of unconnected and unsupported observations, assertions and conclusions," wrote that he was "unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment."[84] In Brennan's view,

> [T]he Court's result is the product of an exercise akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted.[85]

Similar criticism came from Justice Rehnquist, who wrote, "Instead of . . . illustrating how the rule works, [the majority] contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds

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80. 477 U.S. at 257-58 n.1 (Brennan, J., dissenting) (emphasis added).

81. *Id.*

82. *Id.* at 250 (citations omitted).

83. According to the majority, remand was necessary because the Court of Appeals "did not apply the correct standard in reviewing the District Court's grant of summary judgment . . . ." *Id.* at 257.

84. *Id.* at 257-58 (Brennan, J., dissenting) (emphasis in original).

85. *Id.* at 264-65 (Brennan, J., dissenting).

much like a treatise about cooking by someone who has never cooked before and has no intention of starting now."[86] Moreover, both dissenting opinions questioned whether the new standard could really be outcome-determinative in any case.[87]

Notwithstanding this and other such criticisms,[88] *Anderson* is the law of the land for federal practice, and it must be dealt with by both federal practitioners and the courts in which they practice. Because of the nature of the majority opinion and the fact that the new rule was not applied, it is necessary to evaluate several decisions from the Seventh Circuit to guide the Indiana practitioner in this important area.

D. Application of Anderson *in the Seventh Circuit*

Undoubtedly, *Anderson* has had a greater impact in the Seventh Circuit to date than *Celotex*. The Seventh Circuit and the local district courts have attempted to follow the mandate of *Anderson*, and, not surprisingly, occasionally to the detriment of the plaintiff attempting to counter a defense motion for summary judgment. Three Seventh Circuit decisions and a local district court case serve as prime examples of the effect of *Anderson* on defamation suits as well as other types of civil actions.

For instance, in *Saenz v. Playboy Enterprises*,[89] the Seventh Circuit affirmed the entry of summary judgment against a libel plaintiff by relying heavily on the *Anderson* rule. In *Saenz*, a former government official brought an action for defamation against *Playboy* magazine alleging that one of its articles falsely accused him of complicity in the torture of political dissidents in Uruguay and Panama. One of the paragraphs of which Saenz complained read:

> What no one in the Statehouse knew, or acknowledged [when they hired Saenz], was that [Saenz] had spent 17 years in the

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86. *Id.* at 269 (Rehnquist, J., dissenting).

87. That is, it may be a legitimate question to ask if there are really any cases in which summary judgment will be granted under the new standard where it would not have been under the traditional one. As Justice Rehnquist noted in his dissent:

> [t]here may be more merit than the Court is willing to admit to Judge Learned Hand's observation . . . that "while at times it may be practicable" to "distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt, . . . in the long run the line between them is too thin for day to day use."

Id. at 271 (Rehnquist, J., dissenting) (citation omitted). It must be noted that the D.C. Circuit Court of Appeals obviously found that the burden of proof could be outcome-determinative. Liberty Lobby Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

88. *See infra* notes 146-47 and accompanying text.

89. 841 F.2d 1309 (7th Cir. 1988).

> U.S. Office of Public Safety (OPS), a CIA-inspired program established in the late Fifties to advise foreign police in suppressing political dissent in Latin America and elsewhere—and then abolished by bipartisan Congressional action 20 years later amid well-documented charges of U.S. complicity in torture and political terror.[90]

The author then detailed some of the grotesque forms of torture that were said to have occurred, writing, "Stripped, beaten, sexually abused, tortured under water and on racks, burned with electric needles under fingernails, shocked with electrical wires on the breasts of women and testes of men, the victims described their agonies in accounts that repeatedly implicated the OPS."[91] The basis of the plaintiff's claim, then, was that "the plain and obvious import of these statements, as understood by an ordinary reader, is that Adolph Saenz personally advised foreign police in suppressing political dissent and was an accomplice to torture and political terror."[92]

After discovery, *Playboy* moved for summary judgment on the grounds that the passages complained of were not published with actual malice. The district court found for the defense on this issue and entered judgment accordingly.[93]

In affirming the judgment of the trial court, the Seventh Circuit first noted that Saenz, as a public figure, could not succeed by merely proving that the defamatory statements were false; rather, he had to show actual malice with convincing clarity.[94] The court then confirmed that *Anderson v. Liberty Lobby* makes the *New York Times* burden of proving actual malice with convincing clarity applicable at the summary judgment stage.

> Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."[95]

The court then applied this standard to the parties' submissions and found that Saenz had failed to meet the clear and convincing evidence burden. Rather, in the words of the Seventh Circuit, "the bulk of [Saenz's]

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90. *Id.* at 1312.
91. *Id.*
92. *Id.* at 1312-13.
93. *Id.* at 1313.
94. *Id.* at 1317.
95. *Id.* (quoting *Anderson*, 477 U.S. at 255-56).

evidence merely indicates that the defendants could not reasonably have concluded that he was a torturer."[96] In so ruling, the court examined several separate items of evidence that Saenz had produced in response to the motion for summary judgment.

For example, Saenz had submitted deposition testimony in which the author of the *Playboy* article admitted he had "no evidence that Mr. Saenz was involved personally in the torture in Uruguay."[97] Saenz argued that "because the defendants admittedly lacked evidence of his participation in torture, 'they *knew* their statements, either directly or in their implications and innuendo were false.' "[98] The Seventh Circuit, however, found this evidence insufficient under *Anderson*, writing, "At most, the plaintiff's proof shows that the article is capable of supporting false and defamatory implications of which [the defendants], according to their uncontradicted affidavits, were unaware."[99] This illustrates the power of *Anderson*, for as the court itself noted, the plaintiff had responded to the motion for summary judgment by producing "[evidence] of defamatory meaning and recklessness regarding potential falsity. . . ."[100] And, as the court further acknowledged, one of the allowable interpretations of the statements was that Saenz "has been accused of being a torturer."[101] Despite such acknowledgement, the court nonetheless affirmed the entry of summary judgment.

After *Anderson* and *Saenz*, a plaintiff in such a case is obviously between a rock and a hard place when trying to refute the defendants' uncontradicted affidavits that they lacked actual malice. The *Saenz* court admitted that at least *some* issue as to the defendant's state of mind was raised by the plaintiff's pre-trial proof, but simply refused to find the proof sufficient to meet the clear and convincing evidence burden.[102] The case thus illustrates that *Anderson* can make it much more difficult

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96. *Saenz*, 841 F.2d at 1318.
97. *Id.*
98. *Id.* (emphasis in original).
99. *Id.* at 1318-19.
100. *Id.* at 1318.
101. *Id.* at 1318 n.3.
102. *Id.* at 1318. Saenz also produced a letter wherein the author described Saenz as a "'State of Seige character, with his career in Latin torture chambers . . . .'" *Id.* at 1319. The court, however, dismissed this as "indirect evidence from which no more than a mere suggestion of culpability may be drawn." The court added, "Though relevant to the issue of malice, when considered in light of the clear and convincing evidence Saenz must ultimately produce, this one letter, standing alone, is insufficient to require a jury to resolve the plaintiff's claimed factual dispute." *Id.* at 1319. The court thus seems to acknowledge the probative value of this evidence, but then weighs it and, apparently because of the *Anderson* standard, finds it insufficient to carry the day. The Seventh Circuit, then, apparently believes that the *Anderson* standard *can* be outcome determinative.

to survive a properly supported motion for summary judgment when the non-movant must establish an element by clear and convincing evidence. Without the opportunity for live examination at trial, many plaintiffs may be unable to meet this new burden because of a failure of proof.

Two other cases demonstrate the Seventh Circuit's awareness that *Anderson* does not just apply to defamation cases but is instead applicable to all types of issues. For instance, in *Teamsters Local 282 Pension Trust Fund v. Angelos*,[103] the court applied the trial level burden of proof in disposing of a fraud action at the pre-trial stage. In *Angelos*, a pension trust fund sued a bank, its officers, and its counsel alleging the fund was fraudulently induced into making a two million dollar loan to the bank. In affirming the entry of summary judgment, the Seventh Circuit first noted that under the applicable local law the plaintiff had to show justifiable reliance by clear and convincing evidence. Then, relying on *Anderson*, the court considered "the relevant standard of proof in determining whether the nonmoving party has met its burden . . . ."[104] "Thus," the Seventh Circuit held, "in order to avoid summary judgment, the Fund must set forth enough facts from which a jury could find by clear and convincing evidence that it was justified in relying on the defendant's alleged misrepresentations."[105] Applying this standard, the court found the Fund's evidence insufficient on the issue of justifiable reliance.

Similarly, in *Scully v. United States*,[106] the Seventh Circuit applied *Anderson* to a federal tax case in affirming an entry of summary judgment. In *Scully*, the plaintiffs sought a refund of income taxes arguing that a bona fide loss had been sustained and should have been allowed as a deduction under the Internal Revenue Code. After noting that the plaintiffs had the burden to prove the bona fide nature of the loss, the court followed *Anderson*, writing, "To determine whether the trustees have met their burden, we must measure their evidentiary submissions against the governing legal standard."[107] The court then applied the trial stage burden of proof to the pre-trial Rule 56 context and affirmed the entry of summary judgment. Thus, both *Angelos* and *Scully* demonstrate the Seventh Circuit's application of *Anderson* to a wide variety of substantive issues beyond the *New York Times* defamation cases.

Finally, one of the best examples of the potential effect of *Anderson* on the Indiana federal practitioner is illustrated by a recent decision by Judge Barker of the Southern District of Indiana. In *Reed v. Ford Motor*

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103. 839 F.2d 366 (7th Cir. 1988).
104. *Id.* at 369.
105. *Id.* at 370.
106. 840 F.2d 478 (7th Cir. 1988).
107. *Id.* at 485.

Co.,[108] the plaintiff brought a products liability action against a truck manufacturer seeking both compensatory and punitive damages. Ford moved for partial summary judgment on the punitive damages claim, supporting its motion with the deposition testimony of the supervisor of Ford's steering column and linkage division and another Ford engineer. Both deponents testified that extensive investigative and remedial efforts had been undertaken by the manufacturer to correct the alleged design deficiencies.[109] In response to the motion, and perhaps as a result of an early awareness of the new burdens a non-movant faces under *Anderson*, Reed submitted "several affidavits, numerous documents, and excerpts of various depositions."[110]

In *denying* the defense motion for summary judgment, Judge Barker first looked to the substantive standard governing an award of punitive damages in Indiana and then incorporated this elevated trial level burden of proof at the summary judgment stage. The court wrote:

> Despite the avalanche of paper filed in support of and in opposition to Ford's motion, the question for the court to resolve at the summary judgment stage remains relatively uncomplicated. The court will therefore set out the substantive standard governing punitive damage awards in Indiana, as that standard was articulated in the Indiana Supreme Court's most recent pronouncement, *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (1986). The court will then apply that standard to the evidence now before the court in light of the procedural standard for summary judgment motion mandated by *Anderson v. Liberty Lobby, Inc.* . . . .[111]

The court then noted the defendant's misconception of this higher burden of proof at the pre-trial stage. Ford had argued "that the plaintiff's evidence at this stage must affirmatively exclude, by clear and convincing evidence, every reasonable hypothesis that Ford's conduct was the result of 'mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing.'"[112] The proper application of *Orkin*, according to the court, articulated in the context of "*overturning a jury verdict*, could be stated as follows: Was there some evidence which a reasonable juror could have found, by a clear and convincing standard, to be inconsistent with a hypothesis that the defendant's conduct was merely the result of noniniquitous human

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108. 679 F. Supp. 873 (S.D. Ind. 1988).
109. *Id.* at 876-77.
110. *Id.* at 874.
111. *Id.* at 876 (citation omitted).
112. *Id.* at 876-77.

failing?"[113] To grant summary judgment on this issue, the answer would have to be "no."

"[M]indful of the impact of the United States Supreme Court's ruling in *Anderson* . . .," the court nonetheless found the plaintiff's proof sufficient to withstand the summary judgment motion.[114] Thus, *Reed v. Ford Motor* demonstrates that the local district courts are well aware of the mandate of *Anderson*. Also, even though summary judgment was not obtained in this instance, the case shows the potential application of *Anderson* to important issues such as punitive damages. Finally, the "avalanche of paper filed" in *Reed* illustrates the extent to which non-movants may have to go to withstand an *Anderson* motion, and may also serve as ammunition for opponents of the new standard who fear that trial by jury will be replaced with trial by affidavit.

II. The More Important Teaching of *Celotex* and *Anderson*: A New Attitude Towards Summary Judgment

Beyond the impact of the specific holdings, the *Celotex* and *Anderson* decisions have had an even greater effect on the federal courts' basic attitude towards summary judgment. Once treated as a narrow device to be used in limited instances, Rule 56 has suddenly become the favorite son of federal civil practice. For instance, in a two-year time frame since the Supreme Court decisions were handed down, the Seventh Circuit cited *Celotex* in twenty-two different appeals from summary judgment. Of those twenty-two cases, seventeen entries of summary judgment were affirmed while only five were reversed. Similarly, *Anderson* has been cited in thirty appeals from summary judgment, with twenty-one affirmances and nine reversals.[115] While such figures are admittedly of limited use,[116] they do help illustrate that the Seventh Circuit has followed the Supreme Court's lead into a new era for summary judgment.

The genesis for this enhancement of Rule 56 practice does not come from the *Celotex* and *Anderson* holdings alone, but rather from the extraordinary language of the summary judgment decisions. Both opinions contain a strong message, dicta though it may be, that the lower courts

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113. *Id.* at 877 (emphasis in original).

114. *Id.* at 878.

115. These figures include published opinions reported up to August, 1988.

116. It is, of course, difficult to accurately track trends in summary judgment practice. As one commentator has noted, "Empirical data as to the degree of success of summary judgment motions is deceptive, depending on the type of case, issue and moving party." *See* Kennedy, *supra* note 26, at 254. The Seventh Circuit percentages from this small sample, however, appear to be greater than that revealed by former studies. ("[O]ne could make a general estimate that the motion is made in 5% of cases; that over 50% are granted; and of those appealed, that over 50% are affirmed.") *Id.*

are to change their attitude towards disposing of cases at the pre-trial stage. For instance, in *Celotex* the Court declared, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."[117] Then, in closing, the Court expounded on the virtues of summary judgment, writing:

> The Federal Rules of Civil Procedure have for more than 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[118]

Such language is indeed a drastic shift from the "fairly harsh view" of summary judgment revealed by prior decisions of the Supreme Court.[119]

Similar language, of course, is found in the companion case to *Celotex*. The *Anderson* majority, for instance, analogized the summary judgment standard to that of the directed verdict, writing, "[T]his standard mirrors the standard for a directed verdict under Federal Rules of Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."[120] "In essence," the Court wrote, "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is *so one-sided* that one party must prevail as a matter of law."[121] This is remarkable language, for it clearly implies that the lower courts are to do more than search for "genuine issues"; instead they are apparently called on to do at least some weighing of the evidence in search of "one-sidedness." Indeed, the Court goes so far as to say that "a trial judge must bear in mind the

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117. 477 U.S. 317, 323-24 (1986).

118. *Id.* at 327.

119. *See* Childress, *A New Era For Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 183-84 (1987) (tracing some of the prior forms of discouragement).

120. 477 U.S. at 250.

121. *Id.* at 251-52 (emphasis added).

actual quantum and quality of proof" as well.[122] Despite the subsequent caution that the holding "does not denigrate the role of the jury,"[123] the other language welcoming an enhanced use of Rule 56 has not been overlooked by the Seventh Circuit.

Examples of the warm reception accorded *Celotex* and *Anderson* in the Seventh Circuit are plentiful. For instance, in *Valley Liquors, Inc. v. Renfield Importers, Ltd.*,[124] the Seventh Circuit cited *Anderson* writing:

> A genuine issue for trial only exists when there is sufficient evidence favoring the nonmovant for a jury to return a verdict for that party. As the Supreme Court has stated, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." We must not weigh the evidence. Instead, we must see if the nonmovant's evidence is sufficient. In determining whether evidence is sufficient, we must of necessity consider the substantive evidentiary standard of proof, for example, preponderance of the evidence, that would apply at a trial on the merits.[125]

Despite the disclaimer against weighing the evidence, it is apparent from such language that the trial judge is being directed to perform some "weighing," by whatever name, to determine whether the evidence is "significantly probative." This is necessary because the prescribed act, by its very nature, entails more than a superficial evaluation of the nonmovant's submissions.

Other Seventh Circuit opinions seem to go even further in their language than that used by the Supreme Court. In both *Anderson* and *Celotex*, the Court wrote that Rule 56 "mirrors" the standard for a directed verdict; the Court did not go so far as to completely equate the two. The Seventh Circuit, however, has expressly equated the standards on several occasions, writing that "the standards for granting either are the same,"[126] that the directed verdict is "equivalent procedurally [to] a summary judgment,"[127] and that summary judgment is mandated where the nonmovant "has failed to obtain enough evidence to defeat (if it were a trial) a motion for directed verdict. . . ."[128]

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122. *Id.* at 254.

123. *Id.*

124. 822 F.2d 656 (7th Cir. 1987), *reh'g* and *reh'g en banc denied.*

125. *Id.* at 659 (citations omitted).

126. Hartford Accident & Indem. Co. v. Gulf Ins. Co., 837 F.2d 767, 774 (7th Cir. 1988).

127. Wilson v. Chicago, Mil., St. P. & Pac. R.R., 841 F.2d 1347, 1353 (7th Cir. 1988).

128. Spellman v. Commissioner, 845 F.2d 148, 151 (7th Cir. 1988).

One of the best examples of the Seventh Circuit's reception of the summary judgment decisions is *Collins v. Associated Pathologists, Ltd.*[129] In affirming an entry of summary judgment in an antitrust action, the court noted that "the Supreme Court [has] made clear that, contrary to the emphasis of some prior precedent, the use of summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases."[130] After citing the summary judgment trilogy, the *Collins* court explained the change in attitude toward Rule 56 at length, writing:

> This language [from the summary judgment cases] indicates that a summary judgment motion is like a trial motion for a directed verdict and that "genuine" allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions. The existence of a triable issue is no longer sufficient to survive a motion for summary judgment. Instead, the triable issue must be evaluated in its factual context, which suggests that the test for summary judgment is whether sufficient evidence exists in the pre-trial record to allow the non-moving party to survive a motion for directed verdict.[131]

The *Collins* case thus clearly demonstrates the Seventh Circuit's new attitude towards this procedure.

Finally, the strongest language used by the Seventh Circuit comes from Judge Posner, who recently declared, "When it is plain that a trial could have but one outcome, summary judgment is properly granted to spare the parties and the court the time, the bother, the expense, the tedium, the pain, and the uncertainties of trial."[132] While such language may be unsettling to some at first glance, the important teaching is that the Supreme Court and the Seventh Circuit are walking hand-in-hand into the new era of summary judgment practice.

Although the jury is still out, so to speak, on what the ultimate effect of this shift will be, it is clear that federal summary judgment practice has changed. In this writer's opinion, the greatest effect will be seen in cases that district courts formerly thought should have been disposed of on summary judgment, but where the courts nonetheless let the matter go to trial instead because of the general hostility towards Rule 56. From this point on, that hostility will be absent, and otherwise

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129. 844 F.2d 473 (7th Cir. 1988).
130. *Id.* at 475.
131. *Id.* at 476 (citation omitted).
132. *Spellman*, 845 F.2d at 152.

factually unsupported claims will no doubt be disposed of with dispatch as the Rule contemplates.

III. The Potential Effect on Indiana Civil Procedure: Indiana Courts Should Be Cautious in Following the Leader

Whatever the outcome of the debate over the merits of the shift in federal summary judgment practice, it is clear that the change is here for the foreseeable future. Absent some model case testing the holdings on a right to jury trial basis,[133] summary judgment will remain more available in federal practice. Another important issue for Indiana practitioners, though, is whether the federal procedural changes will spillover to Indiana civil procedure. Although some of the federal changes may be for the better, the Indiana courts should be cautious and hesitant to adopt the *Anderson* holding and the new attitude towards summary judgment.

To date, only one reported Indiana appellate decision has cited the *Celotex* decision, and, it must be noted, without any true import. As noted previously, Judge Conover of the Indiana Court of Appeals recently declared that the burden-shifting principles clarified in *Celotex* have long been a part of Indiana summary judgment practice.[134] The greater potential for change comes from the *Anderson* holding and the new attitude reflected in the Supreme Court's sweeping language. No Indiana case has yet cited to *Anderson* nor taken account of the new era in federal summary judgment practice. It seems likely, though, that astute Indiana state court practitioners will soon be relying on these cases on behalf of their clients in order to dispose of claims and defenses before trial. As the Indiana courts receive the anticipated barrage, they must keep several factors in mind.

First, despite what some appellate courts from other states have said, the rule in *Anderson* was based on an interpretation of the Federal Rules of Civil Procedure, *not* on the Constitution. A careful reading of the opinion as well as a review of some of the lower federal court decisions interpreting *Anderson* confirms that this is, in fact, the case. Several state courts ruling on *New York Times* defamation cases, though, including

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133. The Seventh Amendment to the United States Constitution guarantees the right to a jury trial in federal cases, but that right is not applied to the states by the due process clause of the fourteenth amendment. *See generally* Tribe, American Constitutional Law 568 (1978). In his *Anderson* dissent, Justice Brennan wrote, "[I]f the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial." *Anderson*, 477 U.S. 242, 267 (1986) (Brennan, J., dissenting).

134. Hinkle v. Niehaus Lumber Co., 510 N.E.2d 198, 201 (Ind. Ct. App. 1987) *rev'd on other grounds*, 525 N.E.2d 1243 (Ind. 1988).

our neighbor to the west, Illinois, summarily write things such as, "In ruling on this particular motion, we '*must* be guided by the *New York Times*' clear and convincing 'evidentiary standard . . . .'"[135] The West Virginia Supreme Court of Appeals recently made a similar oversight, writing:

> In *Anderson v. Liberty Lobby, Inc.*, the United States Supreme Court recently addressed what standard a court *must* apply in evaluating a motion for summary judgment in a libel action filed by a public figure and concluded: "Thus, in ruling on a motion for a summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden . . . ."
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> We believe that the First Amendment to the United States Constitution and . . . the West Virginia Constitution require that trial courts apply a stricter standard in appraising defamation actions filed by public officials or public figures under a motion to dismiss . . . .[136]

It is clear, however, that the *Anderson* summary judgment decision did not turn on an interpretation of the First Amendment.

Other state courts have avoided this error by adopting the *Anderson* holding for all purposes of their state's Rule 56, but in doing so have displayed what could be called intellectual laziness by not carefully analyzing the arguments for and against changing their state's summary judgment practice. The Mississippi Supreme Court, for instance, recently applied *Anderson* to a fraud action without analysis, writing, "We think *Anderson* . . . is applicable to the case sub judice. . . ."[137] Thus, in a single stroke of the pen, the Mississippi Supreme Court radically changed Mississippi summary judgment practice, apparently without realizing (or at least disclosing to the Mississippi bar) the extent of its action. The citizens of Indiana deserve and will no doubt receive more from their state jurists.

Should an Indiana court need a role model to turn to in this instance, it need look no further than an excellent opinion handed down on the subject in 1988 by the Alaska Supreme Court. In *Moffatt v. Brown*,[138] the Alaska Supreme Court carefully traced the *Anderson* ruling, deter-

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135. Davis v. Keystone Printing Serv., Inc., 507 N.E.2d 1358, 1367 (Ill. App. 1987) (emphasis added).

136. Long v. Egnor, 346 S.E.2d 778, 785-86 (W. Va. 1986) (emphasis added) (citations omitted).

137. Haygood v. First Nat'l Bank of New Albany, 517 So. 2d 553, 556 (Miss. 1988).

138. 751 P.2d 939 (Alaska 1988).

mined that it is a matter of federal procedural interpretation rather than First Amendment principles, and, then, after careful consideration, chose not to adopt *Anderson* as part of Alaska civil procedure. The court first explained that "in *Anderson* the Court did not set out a constitutional standard for ruling on summary judgment motions in libel cases. Instead, the Court interpreted Fed. R. Civ. P. 56 and federal summary judgment practice."[139] The Alaska court demonstrated this at length, writing:

> The [*Anderson*] Court framed the issue . . . as a federal procedural question rather than a constitutional question . . . . The Court then analyzed federal directed verdict practice for the purpose of comparison with federal summary judgment practice. The opinion is not a detailed analysis of free speech law. Instead, it only cursorily mentions *N.Y. Times* and its progeny, and only for purposes of setting out the "clear and convincing evidence" standard applicable to actual malice issues. The Court then arrived at its general holding that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." From this general holding, the Court then set down the specific rule to apply to the libel case before it . . . .[140]

Then, in one of the most obvious yet most important statements, the Alaska court wrote, "Since *Anderson* is a case about federal procedure, the summary judgment standard enunciated therein is *not* binding on state courts which follow their own state summary judgment procedures."[141] The importance of this proposition cannot be overlooked by the Indiana courts, for Alaska's Rule 56,[142] just like the Indiana version of Rule 56,[143] is almost identical to the federal counterpart from which both were derived. The language is the same; its interpretation is the key.

Despite the similarities in language, the Alaska court declined the opportunity to adopt the summary judgment standard articulated in *Anderson*, choosing instead "to continue our long-standing interpretation of our summary judgment standard as contained in [Alaska] Civil Rule 56(c).[144] The court noted the reasoning of the New Jersey Supreme Court which similarly refused to apply *Anderson*, writing, "In retaining the 'genuine issue of material fact' test for summary judgment determinations,

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139. *Id.* at 942.
140. *Id.* at 943 (citation omitted).
141. *Id.* (emphasis added).
142. *See* ALASKA RULE CIV. P. 56.
143. *See* IND. RULE CIV. P. 56.
144. 751 P.2d at 943.

the New Jersey court explained 'that the clear-and-convincing test inevitably implicates a weighing of the evidence, an exercise that intrudes into the province of the jury.' We agree."[145] Other jurists and scholars have similarly concluded that the only possible result of adopting *Anderson* would be to force the trial judge to weigh evidence at the pre-trial stage.[146] As Professor Harvey noted, the "Court no longer seems concerned about 'trial by affidavit' as a substitute for trial by jury . . . ."[147] Before the Indiana courts consider the possibility of adopting the holding and attitude of *Anderson*, they must first determine whether there is any just cause for change, and then analyze whether the results of such a shift would be in the interests of the citizenry.

Additionally, the Indiana courts must be aware of the types of cases that such a change would impact. While *Anderson* in its fullest sense would apply to all types of issues and substantive burdens of proof, including proof by a preponderance as well as the clear and convincing standard, it is certain that the greatest effect of adopting *Anderson* would be on issues involving the latter elevated burden of proof. In Indiana, this higher evidentiary standard applies to a number of different civil issues, including awards of punitive damages,[148] attempts to override a patient's statutory right to refuse treatment,[149] efforts to impose a constructive trust,[150] actions seeking to terminate parental rights,[151] and claims by convicts alleging ineffective assistance of counsel.[152] If the courts choose

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145. *Id.* at 944 (citing Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 156-57, 516 A.2d 220, 235-36 (1986)).

146. For instance, Justice Brennan's dissent explained:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quality" to meet that "quantum." I would have thought that a determination of the "caliber and quality," *i.e.*, the importance and value, of the evidence in light of the "quantum," *i.e.*, amount "required" could *only* be performed by weighing the evidence.

Anderson, 477 U.S. 242, 266 (1986) (Brennan, J., dissenting) (emphasis in original). As one commentator noted, "This emerging trend signals a new era for summary judgments, one in which the old presumptions are giving way to a policy of balancing and efficiency, and the mechanism is more appropriate to double as a sufficiency motion—allowing some sort of trial itself on the paper record." Childress, *supra* note 119, at 194. Such a trial on "the paper record," of course, necessarily implicates some weighing of the evidence.

147. 3 HARVEY, INDIANA PRACTICE § 56.4 at 164 (Supp. 1988).

148. *See* IND. CODE § 34-4-34-2 (Supp. 1988); Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019, 1022-23 (Ind. 1986).

149. *In re* Mental Commitment of M.P., 510 N.E.2d 645, 647 (Ind. 1986).

150. Reiss v. Reiss, 500 N.E.2d 1223, 1226 (Ind. Ct. App. 1986).

151. *In re* Danforth, 512 N.E.2d 228, 230 (Ind. Ct. App. 1987); *see also In re* Meyer, 471 N.E.2d 718, 720-21 (Ind. App. 1984).

152. Robinson v. State, 424 N.E.2d 119, 121 (Ind. 1981).

to alter the summary judgment standard, they would immediately make these types of claims more difficult.[153]

Finally, while the courts are admittedly not without power to so construe Rule 56 as the Supreme Court did in *Anderson*, one would hope that such a drastic change would not be undertaken without at least some type of investigation and fact-finding into the state of summary judgment practice in Indiana. Should the Indiana Supreme Court find *Anderson* appetizing, it should first seek to discover what the Indiana practitioners, trial judges, and legal scholars would put on the table. While it is conceded that some warming towards summary judgment is needed in Indiana, this author is not convinced that *Anderson* is the proper route. A decision to fully embrace *Anderson* is necessarily a partial erosion of the value of the jury trial; Indiana should proceed cautiously in such a vital area.[154] The courts owe it to the people to at least ensure that an informed decision is made in this regard. Should a re-writing of summary judgment be deemed best for Indiana, it should occur through the proper rule-making procedure.

IV. The Intended and Unintended Effects of Loan Receipt Agreements on Diversity Jurisdiction

A recent case decided by the United States District Court for the Southern District of Indiana raises important and novel issues about the interrelationship among loan receipt agreements, diversity jurisdiction, and forum shopping. The case of *O'Connor v. Sears, Roebuck and Co.*,[155] in which diversity jurisdiction was found solely because of the realignment effects of a loan receipt agreement, is important to Indiana practitioners

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153. In light of this, plaintiffs bringing such claims may want to consider the availability of forum shopping. At present, only the federal district courts in Indiana, not the state courts, will be applying *Anderson* to state law claims that involve higher burdens of proof (*i.e.*, in diversity actions or pendent claims). Thus, if a plaintiff has a choice of a state or federal forum in an action, say, involving punitive damages, the plaintiff should consider the potential effect that *Anderson* might have if the claim were brought in federal court. Assuming all other forum shopping variables were equal, a plaintiff would want to select the state forum in a punitive damages case that may be subject to summary judgment under *Anderson* for want of proof. The converse would be true for defendants who may be able to avail themselves of removal to a federal court from a state court under 28 U.S.C. § 1441.

154. Although the Seventh Amendment right to jury trial is not implicated in Indiana civil actions, the Indiana Constitution, Article I, Section 20, preserves the right of trial by jury. *See generally* Marsh, *Survey of Recent Constitutional Law*, 10 Ind. L. Rev. 124, 129 (1976); Twomley, *Right of Jury Trial Under Indiana Bill of Rights*, 20 Ind. L.J. 211 (1945). Another consideration is that "trial by affidavit" precludes live examination of witnesses, one of the benchmarks of American jurisprudence.

155. No. TH 85-261-C, slip. op. (S.D. Ind. Apr. 16, 1986).

for several reasons. First, loan receipts are widely used in Indiana tort litigation and have a high propensity to enter into cases where federal diversity jurisdiction may be proper.[156] Second, the case is the first of its kind in that it addresses significant issues that no reported decision has covered.[157] Finally, the principles of *O'Connor* can be utilized by plaintiff and defendant alike in an attempt to obtain the most desirable forum, whether state or federal in the given instance.

This section of the Article will discuss *O'Connor* and its potential effect on the alignment of parties for purposes of creating or destroying diversity jurisdiction. In so doing, a brief summary of both the status of loan receipt agreements and diversity jurisdiction will be included for background purposes. And, because the *O'Connor* decision was unpublished, the full text of the eleven page opinion is reprinted at the end of this Article.[158]

A. Status of Loan Receipt Agreements in Indiana

Loan receipt agreements have long been accepted and even encouraged by Indiana courts as a legitimate settlement device in actions involving multiple tortfeasors.[159] The Indiana Court of Appeals recently described loan receipt agreements as:

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156. A number of reported Indiana appellate decisions have dealt with loan receipt agreements. *See infra* notes 159-66 and accompanying text. Such agreements are commonly used in multiple defendant cases. Even with the advent of Indiana's Comparative Fault Act, *see* IND. CODE § 34-4-33-4 (1988 Supp.), "[i]t is expected that the use of loan receipt agreements will continue to flourish, although they will no longer be effective to shift liability for damages, as they were under the doctrine of joint and several liability." Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 910 (1984) (assuming Comparative Fault Act abolishes doctrine of joint and several liability). Another commentator concludes that the Comparative Fault Act "eliminates the special status of loan receipt agreements by limiting the plaintiff's recovery against the nonsettling defendants to their individual percentages of fault." Smith & Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 984 n.90 (1984). Whatever the actual effect of the Act on the doctrine of joint and several liability (an issue that is not yet resolved by the courts nor entirely clear on its face), it nevertheless is likely that loan receipt agreements will remain commonplace in Indiana litigation practice.

157. Other reported opinions have discussed loan receipt agreements in the context of whether a party is indispensable to the action, *see* Peoples Loan & Fin. Corp. v. Lawson, 271 F.2d 529 (5th Cir. 1959), and whether a borrower is a real party in interest. *See* Northern Assurance Co. v. Associated Indep. Dealers, 313 F. Supp. 816 (D. Minn. 1970). No reported decisions have been located dealing with loan receipt agreements and realignment in diversity cases.

158. *See infra* app. pp. 139-49.

159. *See, e.g.*, State v. Ingram, 427 N.E.2d 444, 446 (Ind. 1981); American Transport Co. v. Central Indiana Ry. Co., 255 Ind. 319, 322-23, 264 N.E.2d 64, 66 (1970); Ohio Valley Gas, Inc., v. Blackburn, 445 N.E.2d 1378, 1382 (Ind. Ct. App. 1983).

> devices through which a defendant who is potentially liable to a claimant advances funds in the form of a non-interest loan in return for a promise not to pursue the claim or not to enforce any judgment rendered against the lender/defendant. In exchange for limiting the liability of the agreeing defendant, the plaintiff immediately receives a guaranteed sum rather than awaiting the uncertain outcome of protracted litigation.[160]

Another district of the Indiana Court of Appeals has explained the policy behind these devices, writing: "We not only approve of, we encourage loan receipt agreements because 1) they provide immediate funds to those who need them, circumventing the delay inherent in a prolonged trial and appeal, and 2) they tend to settle litigation."[161] Unlike funds received pursuant to a covenant not to sue and/or execute, "Indiana courts have consistently held that amounts received by an injured party pursuant to a loan receipt agreement do not, *under any circumstances*, constitute partial satisfaction of any judgment which might be rendered against the remaining tortfeasors and are not to be credited against the judgment."[162]

This is true despite Judge Garrard's recent concurring opinion in *Sanders v. Cole Municipal Finance*,[163] in which he called for certain amounts paid under loan receipt agreements to be credited against the judgment secured from other co-tortfeasors. Judge Garrard explained his argument, writing:

> Of course, whatever actual amounts [the plaintiffs] were obligated to repay [under the loan receipt agreement] were not and should not be treated as "satisfaction". On the other hand it seems inescapable to me that to the extent there was no obligation to repay in fact, there was a partial satisfaction and the law should recognize it.
>
> The court in *American Transport Co.* recognized the desirability of permitting loan receipt agreements. That desirability does not appear to me to be hindered by enforcing the rule that amounts received which under the terms of the agreement need not be repaid, constitute a partial satisfaction of a plaintiff's claim.[164]

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160. Fullenkamp v. Newcomer, 508 N.E.2d 37, 39 (Ind. Ct. App. 1987).

161. Ohio Valley Gas, Inc., v. Blackburn, 445 N.E.2d 1378, 1382 (Ind. Ct. App. 1983).

162. Strohmeyer, *Loan Receipt Agreements Revisited: Recognizing Substance Over Form*, 21 IND. L. REV. 439, 441 (1988) (emphasis in original).

163. 489 N.E.2d 117, 124 (Ind. Ct. App. 1986).

164. *Id.* at 126 (Garrard, J., concurring).

Much the same argument was recently made by a commentator in last year's Survey issue of the *Indiana Law Review*.[165] However, despite these calls for modest reform of the legal effect of loan receipt agreements, it remains settled law in Indiana that such agreements do not constitute releases, and amounts received pursuant to such instruments do not constitute partial satisfaction.[166]

B. Possibility of Creating Federal Diversity Jurisdiction by Way of a Loan Receipt Agreement (Whether Intentionally or Otherwise)

In order to invoke federal diversity jurisdiction under 28 U.S.C. 1332, there must be complete diversity among the parties.[167] Diversity is determined as of the commencement of the plaintiff's cause of action.[168] "In determining whether diversity jurisdiction exists, the court is not bound by the way the plaintiff formally aligns the parties in his original pleading. It is the court's duty to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute.' "[169] "Realignment of the parties usually will have the effect of defeating jurisdiction; the rule works both ways, however, and jurisdiction will be sustained if diversity exists when the parties are aligned properly, even though it is lacking on the face of the pleadings."[170]

Realignment is proper when the court finds that no actual controversy exists between parties on one side of the dispute and their formal opponents.[171] "In conducting its inquiry, the court may look beyond the

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165. *See* Strohmeyer, *supra* note 162.

166. Practitioners must use extreme care in drafting such agreements to ensure that the document cannot be construed as a release. For examples of different loan receipt agreements, see 10 *West's Forms* § 13.82- 13.84 (2d ed. 1984); *Releases Covenants, & Settlements*, § 3 (Indiana Continuing Legal Education Forum 1984); Ohio Valley Gas, Inc. v. Blackburn, 445 N.E.2d 1378 (Ind. Ct. App. 1983); O'Connor v. Sears, Roebuck and Co., No. TH 85-261-C slip. op. (S.D. Ind. Apr. 16, 1986).

167. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978); 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3605 (2d ed. 1987) [hereinafter WRIGHT, MILLER & COOPER].

168. *See, e.g.*, Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543 (7th Cir. 1975). Thus, changes immediately prior or subsequent to the date of filing the action have no effect on diversity jurisdiction. This rule is not attributable to any specific statutory language, but is rather a policy decision intended to provide stability and certainty in resolving issues of subject matter jurisdiction. *See generally* 13B WRIGHT, MILLER & COOPER, *supra* note 167, at § 3608.

169. 13B WRIGHT, MILLER & COOPER, *supra* note 167, § 3607, at 430 (quoting City of Dawson v. Columbia Avenue Savings Fund, 197 U.S. 178, 180 (1905)).

170. 13B WRIGHT, MILLER & COOPER, *supra* note 167, § 3607, at 430.

171. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941). *See generally* 13B WRIGHT, MILLER & COOPER, *supra* note 167, at § 3607.

pleadings and consider the nature of the dispute in order to assess the parties' real interests."[172] "The propriety of alignment is a matter not determined by mechanical rules, but rather by pragmatic review of the principal purpose of the action and the controlling matter in dispute."[173] Moreover, "it is the points of substantial antagonism, not agreement, on which the realignment must turn."[174] Accordingly, "a mere mutuality of interest . . . is not of itself sufficient to justify realignment. Realignment is proper where there is no actual, substantial conflict between the parties that would justify placing them on opposite sides of the lawsuit."[175]

Given the flexible nature of these principles, each case presented to the federal courts turns on its own facts and the "principal purpose" of the plaintiff's action. Although the great majority of realignment cases stem from removal actions (where the action, originally brought in state court, appears non-diverse on its face), there is nothing to prevent a plaintiff from originally filing the facially non-diverse action in federal court and then seeking realignment. Nor is it improper to fashion the action in such a way that realignment is warranted, for 28 U.S.C. 1359 only forbids jurisdiction over actions "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." This provision has been narrowly construed and generally applies to instances in which residents of other states are somehow improperly joined to manufacture diversity.[176]

It is, then, theoretically possible to enter into a loan receipt agreement with a non-diverse defendant that removes all "actual, substantial conflict" between the non-diverse parties (with or without the intention to have this effect on diversity). This is so because loan receipt agreements can be fashioned (and usually are so fashioned) in such a way that the non-diverse defendant actually favors a progressively larger recovery from the other co-tortfeasors. For instance, in the simplest agreement the recipient of the non-interest loan agrees to repay the funds

> solely from and out of any judgment I obtain against defendant which exceeds ____ dollars. I further agree that I will use and pursue any reasonable and legal means which are available to me to collect any judgment I obtain against defendant.[177]

Thus, the defendant who enters into this agreement will benefit only if recovery is obtained from the other tortfeasor.

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172. American Motorists Ins. v. Trane Co., 657 F.2d 146, 149 (7th Cir. 1981).
173. *Id.* at 151.
174. *Id.*
175. *Id.*
176. *See generally* 14 WRIGHT, MILLER & COOPER, *supra* note 167, at § 3637.
177. 10 WEST'S FORMS § 13.84 (1987).

Interestingly enough, one commentator discussing loan receipt agreements, though not their effects on realignment, seemed to anticipate the potential realignment effects of loan receipts:

> Once the loaning defendant has advanced funds to the plaintiff, the defendant's interest in the trial has shifted because now the defendant has become *aligned with the plaintiff* in that the defendant would benefit through repayment of the loan should the plaintiff recover from the nonsettling defendant. Since no litigable issue remains between the plaintiff and the loaning defendant, the loaning defendant's only purpose for continuing to participate in the trial is to assist the plaintiff in recovering from the nonsettling defendant. For this reason, [Indiana] courts have held that if the loaning defendant is not dismissed from the lawsuit, once the loan receipt agreement is made known, the nonsettling defendant may move for a separate trial and/or introduce the loan receipt agreement into evidence [for impeachment purposes].[178]

Surprisingly, no reported decisions have been found dealing with the effects of loan receipts on diversity jurisdiction. However, an unpublished 1986 order from Judge Brooks of the Southern District of Indiana would serve as substantial precedent in this area. In *O'Connor v. Sears, Roebuck and Co.*,[179] an Indiana youth was seriously injured while operating a Sears log splitter. O'Connor brought a products liability action against the manufacturers, as well as a negligence action against the owner of the machine, Ralph Key, an Indiana domiciliary. Prior to initiating his lawsuit, O'Connor entered into a loan receipt with Key providing the plaintiff with $25,000 of immediate funds.[180] This agreement also provided that $10,000 more would be paid by Key if O'Connor did not recover anything from Sears. However, progressively larger amounts would be repaid to Key (up to the full $25,000) as the recovery from Sears increased. After entering this agreement, the plaintiff then filed his action in state court, naming Sears and Key as defendants.[181]

Sears, an Illinois and New York resident for diversity purposes,[182] removed the action to federal court on the grounds that complete diversity

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178. Strohmeyer, *supra* note 162, at 441 n.11 (emphasis added).

179. No. TH 85-261-C slip. op. (S.D. Ind. Apr. 16, 1986).

180. A loan receipt agreement was also entered into with defendant Howard, an Indiana domiciliary upon whose land the injury occurred. For simplicity sake this Article will only discuss defendant Key.

181. O'Connor v. Sears, Roebuck and Co., No. TH 85-261-C slip. op. at 1-3.

182. For purposes of determining diversity, corporations are treated as citizens of their place of incorporation and their principal place of business. 28 U.S.C. § 1332(c).

existed because of the loan receipt agreement. That is, Sears argued that Key (who, as an Indiana resident, was formerly non-diverse to the Indiana plaintiff, thereby precluding diversity) should be realigned as a plaintiff because his ultimate interests were with the plaintiff due to the loan receipt.

In an eleven page unpublished opinion, Judge Brooks agreed with Sears, holding realignment proper because no collision of interests existed between the plaintiff and the non-diverse defendants. The court wrote:

> The only conceivable scenario for Key and Howard to incur a further loss is if judgment is entered against them in their individual capacities with all remaining co-defendants found not liable. This contingency, as evidenced by the loan receipt agreement, is remote at best because the plaintiffs are looking to secure judgment against Sears and Didier only. Finally, although Key and Howard may have to tender additional monies, such position does not merit a collision of interest, for throughout litigation of this cause Key and Howard will continually hope for judgment against Sears and Didier. The bigger the judgment against Sears and Didier, the more delighted Key and Howard.[183]

The *O'Connor* court simply found that under the terms of the loan receipt, the Indiana defendants' interests "lie with the plaintiffs, for it is in [the Indiana defendants'] best interest for the plaintiffs to secure a judgment against Sears and Didier."[184] Accordingly, it was difficult for the court "to contemplate a collision of interests" sufficient to preclude realignment of the Indiana defendants as plaintiffs for diversity purposes.[185]

Thus, *O'Connor* initially illustrates that plaintiffs must be extremely cautious in entering loan receipt agreements, for if a state court forum is desired, counsel should ensure that such an agreement will not unintentionally create diversity. Defendants seeking a federal forum, on the other hand, may be able to use *O'Connor* to their advantage by removing the state action to federal court under 28 U.S.C. 1441.

The tables can apparently also be turned even further. Although the *O'Connor* case found its way to federal court by way of removal, the diversity principles for original and removal actions are identical.[186] Although a court may be more reluctant to find diversity jurisdiction where

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183. O'Connor v. Sears, Roebuck and Co., No. TH 85-261-C slip. op. at 10.
184. *Id.* at 11.
185. *Id.*
186. *See supra* note 170 and accompanying text.

the plaintiffs have sought to create it themselves,[187] a federal court would be hard pressed to distinguish away the general principles announced by the Supreme Court and the Seventh Circuit, and the specific application of these maxims by the *O'Connor* court in the loan receipt context.

The fact that the *O'Connor* decision was unpublished does not mean it is without precedential value. Unlike the rules governing Indiana state court practice,[188] there is no federal rule prohibiting counsel from citing to unpublished opinions. To the contrary, the federal courts often find precedential value in unpublished opinions, recognizing that the district court judges in particular seldom publish their decisions. Indeed Rule 12 of the Local Rules for the Southern District of Indiana was recently amended to provide that parties relying on unpublished authority must furnish the court with a copy of such authority.[189] And, the Local Rules for the Seventh Circuit similarly allow unpublished opinions to be cited so long as a copy of the opinion is served on the court and the parties.[190] Although the Local Rules for the Northern District of Indiana do not speak to this matter, there is nothing prohibiting counsel from following the suggestion of the Southern District rule.[191]

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187. The burden to establish subject matter jurisdiction is always on the party asserting it. *See generally* 13B WRIGHT, MILLER, & COOPER, *supra* note 168, § 3602, at 375. Whether logical or not, courts are naturally more skeptical about the existence of diversity when the party attempting to manufacture diversity has the burden of proof. A more appealing case is presented where the party seeking diversity jurisdiction (*i.e.*, the removing party) does so as a result of the opponent's activities.

188. Rule 15(A)(3) of the Indiana Rules of Appellate Procedure provides that "memorandum decisions shall not be published nor shall they be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case." No such rule governs federal practice.

189. An addition made to Local Rule 12 effective April 22, 1988, provides:

> If a party relies upon a legal decision not published in the Federal Supplement, Federal Rules decisions, Federal Reporter, Federal Reporter 2d, The United States Reports, Bankruptcy Reporter, North Eastern Reporter, North Eastern Reporter 2d, or on a statute or regulation not found in the current publication of the United States Code, the United States Patent Quarterly, the Code of Federal Regulations, the Indiana Code, or the Indiana Administrative Code, then the party shall furnish the Court with a copy of the relied-upon decision, statute or regulation. With respect to decisions of the Supreme Court of the United States not yet available in United States Reports, citation should be made both to the Supreme Court Reporter and to Lawyers Edition Second.

General Rule 12 of the Rules of the United States District Court for the Southern District of Indiana, *reprinted in* 31 RES GESTAE 575 (June 1988). Although the primary aim of this rule appears to be reported decisions from regional reporters other than the *Northeastern Reporter*, the Rule certainly is applicable to unpublished decisions in general.

190. *See* Seventh Circuit Rule 28(d).

191. There is no magical reason why a published opinion should be of any greater precendential value than an unpublished opinion that is brought to the attention of the court and the parties.

Thus, practitioners in multiple party litigation considering loan receipt agreements must determine whether the agreement will create or destroy the possibility of diversity jurisdiction. If a party has a particular desire to be heard in either a state or federal forum, the use of a loan receipt agreement may help or impede that cause in certain situations.[192] The *O'Connor* decision demonstrates that both plaintiffs and defendants may gain some flexibility in selecting their desired forum through loan receipt agreements.[193]

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192. Ultimately, the decision whether to proceed in state or federal court must be determined under the particular circumstances of each individual client and case. Some writers contend that there is no longer much reason to have any great preference for one forum over the other. *See, e.g.*, 14 WRIGHT, MILLER & COOPER, *supra* note 167, § 3637, at 90-91 (outlining the arguments for and against forum shopping). Some practitioners may simply desire the less formal environment of most state courts, while others may seek the resources of the federal forum. Some more substantive reasons may remain, however, for as discussed in the first section of this Article, an Indiana practitioner will encounter different standards for summary judgments in federal court than in the Indiana state courts. For an excellent discussion of the hows and whys of forum shopping among state and federal courts, see RAEDER, FEDERAL PRETRIAL PRACTICE, ch. 1 (1988).

193. It should be noted that a savings clause in Indiana's statute of limitations has been interpreted to allow plaintiffs whose claims are dismissed from federal court to renew their claims in state court at any time within five years of the dismissal. *See* IND. CODE 34-1-2-8 (1982); Torres v. Parkview Foods, 468 N.E.2d 580, 582-83 (Ind. Ct. App. 1984); Huffman v. Anderson, 118 F.R.D. 97, 100 (N.D. Ind. 1987). Thus, if the above strategy is unsuccessful, the dismissed action could be re-filed in state court.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES D. O'CONNOR and DAVIN C. O'CONNOR Plaintiffs	)	
vs.	)	CAUSE NO. TH 85-261-C
SEARS, ROEBUCK AND CO., DIDIER MANUFACTURING COMPANY, PAUL E. HOWARD and RALPH KEY, Jointly and Severally Defendants	)	

ORDER

This matter is before the Court upon the motion of the plaintiffs, James D. O'Connor and Davin C. O'Connor, and the defendants, Paul E. Howard and Ralph Key, to remand this cause to state court. Defendants Sears, Roebuck and Co. ("Sears") and Didier Manufacturing Company ("Didier") having heretofore filed a verified petition for removal, the Court finds the matter ripe for decisions.

This cause was originally filed in the Owen County Circuit Court, State of Indiana, on August 12, 1985, and subsequently removed to this Court on September 12, 1985. The verified petition for removal shows that plaintiffs and defendants, Howard and Key, are residents of Indiana. Sears is a corporation formed under the laws of the State of New

York, with its principal-place of business at Chicago, Illinois; Didier is a corporation formed under the laws of the State of Wisconsin, with its principal place of business at Milwaukee, Wisconsin.

FACTUAL SUMMARY

Ralph Key purchased a log splitter from Sears that was manufactured by Didier. The log splitter was in the custody of Paul E. Howard when the accident occurred. Plaintiff, Davin O'Connor, a minor, was operating the log splitter when the accident occurred. The minor and his parents bring this products liability and strict liability tort case against the defendants.

On February 8, 1985, Howard and his insured entered into a loan receipt agreement with the plaintiffs whereby Howard and his insured would contribute $50,000.00 to the plaintiffs. The loan agreement provides that if the settlement or verdict is less than $50,000.00, the plaintiffs have no obligation to repay the loan. The agreement provides for other contingencies as well, but the pertinent part here is that in the event plaintiffs are unable to recover against the other defendants, then Howard may be liable for an additional $20,000.00 depending on the relevant contingency. Defendant Key also entered into a loan receipt agreement

with similar contingencies with the only difference being that Key and his insured contributed $25,000.00, and any additional liability is limited to $10,000.00.

ISSUE

Where two nondiverse defendants and their insureds have entered into loan receipt agreements with the plaintiffs, may diversity jurisdiction exist where there is no longer a collision of interests between the plaintiffs and the two nondiverse defendants.

MEMORANDUM

Title 28 U.S.C. § 1441(a) reads as follows:

§ 1441. Actions removable generally

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

In the instant case, Didier and Sears seek removal based on diversity of citizenship, pursuant to 28 U.S.C. 1332 with the amount in controversy exceeding $10,000.00, exclusive of interest and cost.

Since lack of jurisdiction would make any decree void, the removal statute should be strictly construed and all doubts should be resolved in favor of remand. 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3642 at 149 (2d ed. 1985). The defendant's right to removal is determined at the time the removal petition is filed by looking at plaintiffs' pleading, and it is the defendant's burden to show the existence of federal jurisdiction. Pullman Company v. Jenkins, 305 U.S. 534, 537, 540, 59 S.Ct. 347, 348, 350, 83 L.Ed. 334 (1939).

It has long been held that diversity of citizenship between plaintiffs and defendants must be complete. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed. 2d 274 (1978). Moreover, when determining whether complete diversity exists, the federal courts are "to disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." Navarro Savings Ass'n v. Lee, 446 U.S. 458, 461, 100 S.Ct. 1779, 1782, 64 L.Ed. 2d 425 (1980).

In determining whether diversity jurisdiction exists, the alignment of the parties as plaintiffs and defendants in the pleadings is not conclusive. The Court must "look beyond the pleadings and arrange the parties according to their sides

in the dispute." City of Dawson v. Columbia Ave. Sav. Fund Safe Deposit, Title & Trust Co., 197 U.S. 178, 180, 25 S.Ct. 420, 421, 49 L.Ed. 713 (1905). Realignment is proper when the Court finds that no actual substantial controversy exists between parties on one side of the dispute and their opponents. Indianapolis v. Chase National Bank, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941). Hence, in alignment cases, the proper focus by the Court is on the collision of interests among the nondivergent parties. American Mutual Liability Insurance Co. v. Flintkote Co., 565 F.Supp. 843 (S.D.N.Y. 1983). Finally the ultimate decision of whether to realign the parties is left to a pragmatic review of the principal purpose of the action and the controlling matter in dispute. American Motorists Ins. C. v. Trane Co., 657 F.2d 146, 151 (7th Cir. 1981).

The record before the Court reveals that defendants, Key and Howard, have both entered into loan receipt agreements. Although this Court has given such agreements considerable cerebration, Indiana courts have continually upheld loan receipt agreements. Klukas v. Yount, 121 Ind. App. 160, 98 N.E.2d 227 (1951); State v. Thompson, 385 N.E.2d 198 (Ind. App. 1st Dist. 1979). Each loan receipt agreement provides that Key and Howard, along with their respective insureds, have tendered a sum of $75,000.00 to the plaintiffs.

(Although Howard's loan agreement is the only one on file, there is an uncontroverted affidavit that Key has entered into a loan receipt agreement as well.) The loan is controlled by the loan receipt agreement, and the agreement provides for several contingencies. The agreements place a cap on the recovery that the plaintiffs may recover against Key and Howard.

For Howard there are basically four contingencies in the loan receipt agreement which, in pertinent part, read as follows:

> "2. In the event the total amount received by the O'Connors by way of judgment, settlement, or otherwise from Sears, Didier, and Keys (sic), or any one or more of them, is less than Two Hundred Thousand Dollars ($200,000.00) or its equivalent in annuities, contracts, or other structured settlements, then the entire Fifty Thousand Dollars ($50,000.00) debt shall be forgiven and the O'Connors shall be entitled to retain forever the amounts lent to them under paragraph 1 above, and O'Connors promise and covenant never to execute or attempt to collect any further sums from Paul E. Howard or his insurers, regardless of the size of any judgment or judgments that may hereafter be rendered against Paul E. Howard."

> "3. In the event the total amount received by the O'Connors by way of judgment, settlement, or otherwise from Sears, Didier, and Keys (sic), or any one or more of them, is equal to or greater than Two Hundred Thousand Dollars ($200,000.00) or its equivalent in annuities, contracts, or other structured settlements, but less than Five Hundred Thousand Dollars ($500,000.00) or its equivalent in annuities, contracts, or other structured settlements,

then the O'Connors shall be jointly and severally liable to repay to Indiana Farmers Group the sum of Twenty Thousand Dollars ($20,000.00), and the remaining Thirty Thousand ($30,000.00) of the debt shall be forgiven and the O'Connors shall be entitled to retain forever the remaining Thirty Thousand Dollars ($30,000.00) lent to them under paragraph 1 above, and O'Connors promise and covenant never to execute or attempt to collect any further sums from Paul E. Howard or his insurers, regardless of the size of any judgment or judgments that may hereafter be rendered against Paul E. Howard."

"4. In the event the total amount received by the O'connors by way of judgment, settlement, or otherwise from Sears, Didier, and Keys (sic), or any one or more of them, is equal to or greater than Five Hundred Thousand Dollars ($500,000.00) or its equivalent in annuities, contracts, or other structured settlements, then the O'Connors shall be jointly and severally liable to repay to Indiana Farmers Group the entire sum of Fifty Thousand Dollars ($50,000.00) lent to them under paragraph 1 above, and O'Connors promise and covenant never to execute or attempt to collect any sums from Paul E. Howard or his insurers, regardless of the size of any judgment or judgments that may hereafter be rendered against Paul E. Howard."

"5. In the event that after all legal remedies have been exhausted, the O'Connors can recover nothing by way of judgment, settlement, or otherwise from Sears, Didier, Keys (sic), or their insurers, and one or more enforceable judgments are rendered against Paul E. Howard only, and in favor of one or more of the O'Connors, then

(a) in the event the total of said judgment or judgments is for an amount less than or equal to Fifty Thousand Dollars ($50,000.00), the entire Fifty

> Thousand Dollars ($50,000.00) debt shall be forgiven as full payment of said judgment, and O'Connors promise and covenant never to execute on or attempt to enforce or collect said judgment or judgments against Paul E. Howard or his heirs, successors, or insurers; or,
>
> (b) in the event the total of said judgment or judgments is for an amount greater than Fifty Thousand Dollars ($50,000.00), but less than or equal to Seventy Thousand Dollars ($70,000.00), the entire Fifty Thousand Dollars ($50,000.00) debt shall be forgiven as payment of Fifty Thousand Dollars ($50,000.00) toward said judgment or judgments, and the O'Connors shall be entitled to collect the remaining unpaid total amount of said judgment or judgments, but no more; or,
>
> (c) in the event the total of said judgment or judgments is for an amount greater than Seventy Thousand Dollars ($70,000.00), the entire Fifty Thousand Dollars ($50,000.00) debt shall be forgiven as payment of Fifty Thousand Dollars ($50,000.00) toward said judgment or judgments, and the O'Connors shall be entitled to collect only an additional Twenty Thousand Dollars ($20,000.00) on said judgment or judgments in the aggregate and O'Connors promise and covenant never to execute on or attempt to enforce or collect, except to the extent of said Twenty Thousand Dollars ($20,000.00), said judgment or judgments against Paul E. Howard or his heirs, successors, or insurers."

Key's loan receipt agreement is substantially the same, but with the dollar amount not being as large.

Sears and Didier, in their brief in support of removal, contend that Key and Howard are no longer real parties in interest, for they no longer have a stake in the outcome of this cause by virtue of their signing the loan agreements. In furtherance of this position, Sears and Didier point to the loan agreement and the language therein. For example, the loan receipt agreements characterize the present cause as a complaint for products liability and strict liability against Sears and Didier. The agreement also states that chances of recovery against Key and Howard are "remote, because the real and primary parties at fault and liable for the O'Connors' injuries and damages are Didier and/or Sears." Moreover, as noted in the agreement, the only prospect of additional liability of Key and Howard to the plaintiffs would occur only if judgment is secured against them individually. Even if this contingency occurs, the liability is limited to a sum certain as found in the loan receipt agreement. Hence, Sears and Didier are contending that no collision of interests exists between Key and Howard with Sears and Didier

The plaintiffs, along with Key and Howard, maintain that Key and Howard do have a stake in the outcome of this cause by the contingency of additional liability in the event plaintiffs do not recover against the co-defendants. Thus, their argument is that a collision of interests does exist,

and, therefore, diversity jurisdiction is destroyed by having citizens of the same state on opposite sides.

After careful review of the loan receipt agreement and the relevant case law, the Court finds that Key and Howard do not have a collision of interests with the plaintiffs for the reasons stated above and hereinbelow.

Pursuant to the loan receipt agreements, Key's and Howard's interest lie with the plaintiffs, for it is in Key's and Howard's best interest for the plaintiffs to secure a judgment against Sears and Didier. There exist contingencies for plaintiffs to repay all or a portion of the loan to Key and Howard depending who is adjudged liable and the size of the damage award. The only conceivable scenario for Key and Howard to incur a further loss is if judgment is entered against them in their individual capacities with all remaining co-defendants found not liable. This contingency, as evidenced by the loan receipt agreement, is remote at best because the plaintiffs are looking to secure judgment against Sears and Didier only. Finally, although Key and Howard may have to tender additional monies, such position does not merit a collision of interest, for throughout litigation of this cause Key and Howard will continually hope for judgment against Sears and Didier. The bigger the judgment against

Sears and Didier, the more delighted Key and Howard. Consequently, it is difficult to contemplate a collision of interests. With proper alignment of parties, diversity jurisdiction is found to exist.

Accordingly, the motion to remand filed by the plaintiffs, Key and Howard, is hereby ORDERED DENIED.

IT IS SO ORDERED this [10th] day of April, 1986.

[signature on original][194]
Gene E. Brooks, Judge
United States District Court

cc: Distribution to all counsel of record

[194]A copy of the original, signed opinion is available from the Clerk, United States District Court, Southern District of Indiana, Terre Haute Division, Terre Haute, Indiana.