PUT UP OR SHUT UP: FLAVORS OF SUMMARY JUDGMENT

Summary judgment ("SJ") is the "PUT UP OR SHUT UP" rule. (See here for other mnemonics, such as "SO WHAT?" for Rule 12(b)(6)).

With summary judgment, the parties have had an opportunity to get affidavits or to take discovery. Now the question becomes whether there is a need for trial. If the material facts are undisputed, then trial is unnecessary and the court can resolve the case as a matter of law.

See below for SJ scenarios. I've taken Glannon's terminology and updated it somewhat. Here are four flavors of summary judgment.

	Movant	**How to obtain summary judgment**
1. Proof of all of my own (the movant's) elements • Glannon calls this "Proof-of-the-Elements" SJ. • This is the hardest way of getting SJ. • See to the right for why.	The movant might be a claimant or a defending party. Or the parties might file cross-motions! • Claimant seeks SJ on its own claim. Note that at trial, claimant would have the burden of persuasion on its own claim. • Defending party seeks SJ on its own defense. Note that at trial, defendant would have the burden of persuasion on its own defense.	Initial burden: The movant would bear the burden of persuasion at trial, and also bears the initial burden of production in summary judgment. The movant must show that a reasonable fact-finder **must** find it its favor. It must be shown that: 1. Movant has materials for all necessary elements of its own claim or defense. This could be in the form of affidavits or

etc.), so long as the materials are either admissible or can be reduced to admissible form.
2. There is no genuine issue of material fact (GIMF) regarding any element; and
3. Movant is entitled to JMOL.

Example: In some cases, this can be difficult to do.

> Here's a difficult case. The movant would have to provide undisputed materials for every element of its claim. For example, in a car-crash case, suppose the undisputed materials of record showed that defendant was drinking while driving at the time he hit plaintiff, and that these events caused physical harm to the plaintiff, that might suffice. In other words, the movant must show that the jury must find in its favor. If the jury must find for the movant, then there is no need for a jury at all. In other cases, the plaintiff can more easily seek SJ.

lawsuit regarding a loan or a mortgage, the undisputed documents may easily show that the defendant has defaulted on a loan.

Shifted burden: If movant meets its initial burden, then the non-movant can defeat summary judgment only by putting forth materials from which a reasonable fact-finder could (not must, but could) find in its favor, i.e., that there is a GIMF for at least one element of the opposing party's claim or defense. This could be affidavits or other materials (such as admissions, depositions, etc.), so long as the materials are either admissible or can be reduced to admissible form.

> Example: The non-moving party needs to show that a jury is needed. What might suffice?
>
> > Regarding the negligence case, how about an affidavit stating that the car at issue was not driven by defendant! Now there's a dispute regarding whether defendant was or wasn't driving the car. Now we need a jury. But defendant just can't lie simply to

		Affidavits are made under penalty of perjury, and perjury is a crime. Serious sanctions can also ensue from fraudulent affidavits or declarations. See, e.g., FRCP 56(h). Regarding the loan or mortgage, the defendant may have a harder time putting forth materials showing a need for a trial, unless there are additional materials that would show that the loan was satisfied or otherwise not in default.
2. Disproof of <u>one or more</u> of my opponent's (non-movant's) elements • Glannon calls this "Disproof-of-an-Element" SJ. • This is an often-used method. • It is less difficult than method # 1. Why? • Which case that we read uses this method?	The movant might be a claimant or a defending party. Or the parties might file cross-motions! • Defending party seeks SJ on a claim <u>against it</u> (i.e., seeking dismissal of that claim). Note that at trial, the defendant would <u>not</u> bear the burden of persuasion on the plaintiff's claim. • Claimant seeks SJ regarding an affirmative defense put forth <u>against it</u> (i.e., claimant argues defendant cannot prevail on its defense). Note that at trial, the claimant would <u>not</u> bear	<u>Initial burden</u>: Although the non-movant would have the burden of persuasion at trial, here the <u>other</u> side seeks SJ! So here, the movant bears the initial burden of production for SJ. The movant can prevail by <u>putting forth</u> undisputed materials negating one or more of the necessary elements of the opposing party's claim or defense. This could be affidavits or other materials (such as admissions, depositions, etc.), so long as the materials are either admissible or can be reduced to admissible form.

negligence might put forth an uncontroverted affidavit denying that he was driving the truck that was alleged to have struck the plaintiff. This would negate the plaintiff's necessary element of a breach by defendant.

Shifted burden: If movant meets its initial burden, then the non-movant can defeat summary judgment only by putting forth materials from which a reasonable fact-finder could (not must, but could) find in its favor, i.e., that there is a GIMF that requires a jury. This could be affidavits or other materials (such as admissions, depositions, etc.), so long as the materials are either admissible or can be reduced to admissible form.

> Example: For example, the plaintiff could put forth an affidavit stating that he saw the defendant driving the truck. Because the parties' competing affidavits conflict on a material issue of fact, summary judgment should be denied. Keep in mind, however, that an affidavit or declaration must be made on personal knowledge, set out facts that would be admissible in evidence, and show

		testify on the matters stated.
3. Absence of proof of <u>one or more</u> of my opponent's (non-movant's) elements. • Glannon calls this "Absence-of-Proof" SJ. • This is the *Celotex* method. • This is the easiest way to obtain SJ. • Question: if a plaintiff seeks SJ on its own claim, can it use the *Celotex* method? Why or why not?	Same as # 2.	<u>Initial burden</u>: The movant need <u>not</u> put forth its own materials to prove or disprove an element of a claim or defense. Instead, the movant can meet its burden "by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." However, a conclusory assertion that the non-moving party lacks evidence is likely not enough to meet the burden. Instead, the movant should *show* the court by pointing to materials of record, such as depositions, interrogatory answers, etc. to show that the non-moving party had an opportunity to obtain evidence but still lacks such evidence. <u>Example</u>: For example, think of an asbestos lawsuit. Defendant might argue in its summary judgment brief that the depositions taken by the plaintiff, along with the documents produced in discovery, provide no evidence that the plaintiff was exposed to the <u>defendant's</u> asbestos. In other words, after an opportunity for discovery, plaintiff has no admissible

		prove the plaintiff's claim that the defendant's asbestos harmed him. Shifted burden: If the movant meets its initial burden, then the non-movant must put forth affidavits or other materials to "plug the hole" in its evidence; otherwise, summary judgment should be granted. Example: For example, if the defendant uses the Celotex method noted above, the plaintiff now has to provide something that creates a GIMF regarding whether the defendant's asbestos harmed him. What might suffice? How about an affidavit from somebody with personal knowledge regarding the asbestos at issue, stating that defendant's asbestos was used by plaintiff's employer at the relevant time.
4. The Combo Plate: combining methods# 2 and # 3 • This is probably the most common method. • The movant combines methods # 2 and # 3.	Same as # 2 or # 3.	See above. • The movant might put forth its own materials, such as an affidavit by the defendant stating that he wasn't driving the car alleged to have struck the plaintiff. This uses method # 2, "Disproof of one or more elements."

		the plaintiff had deposed the defendant and other witnesses and that none of these materials supported plaintiff's allegation that defendant struck plaintiff. This uses the *Celotex* method # 3, "Absence of proof of one or more elements."

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