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Fact-Based Pleading: A Solution Hidden in Plain Sight

Whether filing a lawsuit or defending one, almost every person who becomes mired in the American civil justice system today agrees that it does not work as well as it should. Cases frequently take too long and cost too much to resolve, and too often resolution comes not from a jury or a judge, but rather from the grudging recognition that one or more parties cannot afford to continue a case even if their position has merit. In federal courts, the Rules of Civil Procedure – especially those concerning the parties' exchange of information during the discovery period – have been amended time and time again in an attempt to alleviate the problems, but without real success. Litigation is pricing out meritorious claims and defenses, and the civil jury trial has virtually disappeared.

In light of the failed efforts to fix these problems, it is tempting to assume that they are intractable. Yet a number of promising solutions have yet to be seriously explored at the federal level. In particular, consider fact-based pleading, the setting out of material facts to support a party's claims and defenses at the earliest stages of the case. While fact-based pleading has not been a part of the federal civil process since the 1930s, it remains alive and well in many of the country's biggest and busiest state courts, including California, New York, Pennsylvania, Florida, Texas, Missouri, Virginia, Illinois, New Jersey, Connecticut and Louisiana. These are courts that collectively handle millions of civil cases every year. Attorneys who practice in state courts with fact-based pleading have reported that their cases are often more focused, and ultimately less expensive and less time-consuming, than what they would encounter in federal court.

It is time to bring fact-based pleading out of the shadows and into the debate over constructive changes to the Federal Rules of Civil Procedure. Why have these states so steadfastly retained their fact-based pleading requirements over the years, especially in light of pressure to conform to the more general requirements of the Federal Rules of Civil Procedure? And what lessons can the federal system draw from their continued commitment to fact-based pleading? In this short paper, we explain how fact-based pleading increases access to the civil justice system, helps control cost and delay by narrowing the parties' issues in dispute, and is flexible enough to allow all meritorious cases to be presented for the court's consideration.

THE ACCESS PROBLEM

When one thinks of "access" to an institution, usually the first thing that comes to mind is the ability to get in the front door. This is an important first step, of course, but real access means not only getting in the building but being able to take full advantage of what is being offered inside. For example, meaningful access to a restaurant means not just walking in the front door, but also being able to sit down and enjoy a meal. Access to customer service by telephone means not just dialing and having someone pick up, but also getting a question or problem resolved completely and efficiently. Access to an education means not just walking into a school building, but being able to participate fully in a quality learning environment.

The American civil justice system struggles with the same facets of access. For more than 70 years the focus for the federal courts has been "front door access" – that is, giving potential litigants the ability to get into court in the first place. Both procedural rules and substantive laws were introduced to make it easier for plaintiffs to bring their claims in court. Procedurally, the most important innovation was "notice pleading," which (especially after the Supreme Court's 1957 decision in *Conley v. Gibson*) was generally understood to allow a claim to go forward unless no set of facts could possibly be uncovered to support it.

To guarantee "front door access," the federal civil justice system punted the difficult questions on the underlying merits of the case until later in the litigation process. Rather than determining whether a claim had any real merit at the outset of the case, and rather than working to narrow the issues that were really in dispute at the earliest possible stage in the case, the system left that work to other pretrial processes such as discovery and summary judgment. This approach, however, unwittingly closed off access to the later stages of the civil justice process, as many litigants found that they could not afford the time or money necessary to resolve their legitimate claims and defenses through the courts. As a result, plaintiffs and defendants today can get in the door, but often have to give up on meritorious claims and defenses halfway through the process because it does not make economic sense to see those claims and defenses through to judicial resolution.

The lack of long-term access is not just conjecture. Several recent survey have confirmed that most lawyers feel that litigation costs have subsumed the actual value of a case. In a new survey of the ABA Section on Litigation, 78% of plaintiffs' attorneys, 91% of defense attorneys, and 94% of attorneys who represent both plaintiffs and defendants agreed or strongly agreed that litigation costs are not proportional to the value of a small case. Moreover, the lack of proportional cost that hinders long-term

access comes around to limit "front door" access as well: more than 75% of attorneys in the ABA survey reported that their law firms are likely to turn away cases that are not cost-effective, with the most common threshold value necessary for taking a case being $100,000. These figures were similar to those in a 2008 survey of the Fellows of the American College of Trial Lawyers (ACTL). In that survey, 69% of all respondents agreed or strongly agreed that litigation costs are not proportional to the value of a case, and over 85% of respondents agreed or strongly agreed that litigation is too expensive. Moreover, 81% of the ACTL respondents reported that their firms are likely to turn away cases when it is not cost-effective to handle them, with the most common threshold value necessary for taking a case again being $100,000.

THE FAILURE OF EXISTING RULES

How did we get to this stage? It seems clear that the framers of the original Federal Rules of Civil Procedure never expected that the system would become hopelessly clogged and drawn out during the pretrial phase. Indeed, discovery and summary judgment were intended to ferret out questionable claims and defenses quickly and cleanly, leaving only real disputes for trial. Where the rules themselves could not focus the issues, judges would step in and move the parties toward resolution.

These expectations may have been legitimate and sensible in the 1930s and 1940s, when American society, business, and technology were all vastly different than they are today. Notice pleading was introduced in an era without (among other things) computers, cell phones, e-mail, interstate highways, deregulated commercial airlines, long-distance dialing, fax machines, copy machines, overnight delivery services, videoconferencing, and PDAs – all the trappings of modern America. Litigation and legal services were primarily local matters. It therefore made sense that discovery could be relatively quick and cost-effective, because there simply was not that much information to discover. It similarly made sense that summary judgment motions would be used carefully and relatively infrequently, because such motions took considerable time to draft and most litigation attorneys were more comfortable arguing disputed issues to a jury.

Not so in 2010. Far from being quick and cost-effective, discovery is now the hobgoblin of the entire pretrial process. A contract case that may have required two local depositions and the exchange of a file folder of documents in 1940 now may require depositions around the country, responses to dozens of interrogatories, and the exchange of hundreds of thousands – or even millions – of old e-mails. Summary judgment, which was originally seen as a simple way of resolving purely legal issues

when all of the material facts were undisputed, now is a familiar, time-consuming, and expensive aspect of many civil cases. This development has taken place even though the formal standard for summary judgment has not changed. For a generation of litigators, summary judgment or settlement – not trial – is the expected end game.

This is not to say that discovery and summary judgment have no role in modern litigation. They still can play a necessary and important part in narrowing disputed issues and focusing the parties and the court on the real merits of the case. But the evidence is painfully clear that discovery and summary judgment cannot do that job by themselves. Issues must be narrowed and focused ahead of time, so that the disputes that remain can be tested by discovery (the collection of evidence) and summary judgment (the application of law). In other words, rather than using discovery and summary judgment to refine disputes, we need a way to refine those disputes before the discovery and summary judgment phases ever begin.

THE SUPREME COURT STEPS IN

In 1957, the U.S. Supreme Court decided the case of *Conley v. Gibson*, holding that under the federal notice pleading standard, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Some people took the Court at its word, to mean that a case should be allowed to proceed as long as there is any conceivable set of facts that might allow the plaintiff to prevail on his or her claim. Many others, however, concluded that the "no set of facts" language could not possibly be taken literally. Over the next fifty years, several courts – including on occasion the Supreme Court itself[1] – expressed doubt that *Conley* really meant exactly what it said.

In the meantime, developments in the law and technology were opening the door to increased risk of lengthy and expensive discovery in a wide range of civil cases. A steady stream of amendments to the Federal Rules to control discovery since the 1970s failed to ensure reasonable and proportional discovery in every civil case. Furthermore, much of the discovery that was being conducted was not leading to the narrowing of issues or faster resolution of the case.

In 2007, the Supreme Court re-examined notice pleading standards in *Bell Atlantic Corporation v. Twombly*. The plaintiffs in that case had filed a class action against regional phone monopolies

[1] *See* Associated Gen. Contractors of Calif. v. California State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983) (acknowledging that "potentially massive factual controvers[ies]" were likely to result from broad notice pleading – controversies that could be expensive and time-consuming).

(known as the "Baby Bells"), alleging a conspiracy in violation of the Sherman Antitrust Act. The trial court dismissed the complaint, concluding that the allegations stated at most knowing parallel business conduct, which by itself did not violate the Sherman Act. The Supreme Court agreed with the trial court, holding that parties must include enough facts in the complaint to create "plausible grounds" that a claim is true. In so holding, the Court concluded that only narrowing the issues at the pleading stage through the inclusion of sufficient facts could prevent the extraordinary costs of advancing with non-meritorious lawsuits. In 2009, the court reiterated its "plausibility" standard in *Ashcroft v. Iqbal*, a civil rights case. Once again, the Court emphasized the disruptive nature of discovery in explaining why it was working to narrow issues at the pleading stage.

Whether or not one agrees with the Supreme Court's specific "plausibility" approach, it is hard to deny that the Court was on to something in recognizing the relationship between pleadings and discovery. If the scope of discovery depends on the pleadings, and the pleadings themselves set virtually no parameters for the dispute, the discovery of any information – at any cost – is fair game. If discovery cannot be controlled on its own, narrowing the issues at the pleading stage is a sensible approach that allows discovery to function better.

LEARNING FROM THE STATE COURTS

The Supreme Court's approach is one way to narrow claims through the early introduction of salient facts. Some state courts go further, explicitly requiring parties to plead material or "ultimate" facts in support of their claims, with positive results for both accessibility and efficiency. Indeed, state court systems that employ fact-based pleading tend to see an earlier narrowing of issues and a resulting drop in the amount of discovery, according to the judges and lawyers who use those courts every day. Take Oregon, which has always has a fact-based pleading system in its state courts. In a recent IAALS survey of the Oregon bench and bar, 65% of respondents agreed or strongly agreed with the statement, "Fact pleading helps narrow the issues early in the case." In the same survey, respondents were three times as likely to say both that fact-based pleading increases the efficiency of the litigation process (50% increases efficiency, 17% decreases) and increases the fairness of the litigation process (40% increases fairness, 13% decreases). In addition, 55% of respondents said that fact-based pleading increases counsel's ability to prepare for trial, and only 6% said that it decreases that ability.

Open-ended comments to the Oregon survey fleshed out some of the reasons why attorneys there are so supportive of fact-based pleading:

- "I generally like Oregon fact pleading requirements. Forces both sides to refine their cases/claims, and defines 'relevance' of issues for both discovery and trial better than discovery mechanisms alone."
- "Fact pleading also cleans up the process and makes the parties focus on what the case is really about."
- "[P]leadings actually mean something…"
- "The material point about fact pleading is that you rarely see 'kitchen sink' lawsuits, where every claim plus fraud is trotted out and given its day in the sun."

Importantly, fact-based pleading in Oregon manages to contribute to more efficient litigation without compromising parties' access to the courts. In fact, complaints in Oregon state court are more likely to survive a motion to dismiss than are complaints in Oregon federal courts, which do not use fact-based pleading. IAALS recently did an extensive review of closed contract and tort cases in both federal and state court in Oregon. All the cases in the study closed in the same one-year period. In state court, only 11.5 motions to dismiss, strike, or issue judgment on the pleadings were filed per 100 cases, and 57% of those motions were granted.[2] In federal court, 28.7 motions to dismiss, strike, or issue judgment on the pleadings were filed per 100 cases, and 63% of them were granted.[3] At least in Oregon, the fact-based pleading system saw a much lower filing rate of motions to dismiss than the federal system, and fewer such motions were granted. In other words, claimants were more likely to maintain "front door access" to the courts under the fact-based pleading regime.

Oregon is not alone in recognizing fact-based pleading's benefits. A leading treatise in civil procedure in Virginia details how the federal notice pleading system only serves to delay the contentiousness that the Federal Rules architects sought to eliminate, while also nullifying the benefits of narrowing the issues early on. By contrast, Virginia courts retained the expectation that parties streamline the dispute from the outset by pleading facts:

> The purpose of pleading is to produce the issues that the court is being called upon to adjudicate. The basic concepts of due process require that the defendant know what the plaintiff is suing him about and what the court is being asked to determine, and the defendant is entitled to know this as clearly as possible. This can be accomplished by full and explicit pleading enforced by motions for bills of particulars and demurrers, which are much cheaper than the discovery devices.

[2] Out of a random sample of 505 cases, there were 58 applicable motions, and 33 were granted.
[3] Out of 655 contract and tort cases logged (including civil rights and employment discrimination cases as rough parallels to the state "discrimination" action), there were 188 applicable motions, and 118 were granted in whole or part.

(Discovery should be used for, among other things, fine-tuning the pleadings after the basic pleading process has been completed.)

Similarly, in Pennsylvania, a state judge explained to us that the state requirements of fact-based pleading and demurrer force the parties to sort through the claims, counterclaims, and defenses before discovery starts, weeding out those that are not viable or are especially weak. The inclusion of particularly weak claims and defenses at the outset of litigation is commonplace: for example, a party asserting a breach of contract might be tempted (depending on the nature of the claims) to also include claims of breach of fiduciary duty, unfair competition, breach of the duty of good faith and fair dealing, tortious interference with a contractual relationship, and so on. Some of these claims may have clear merit, and some may be much more tenuous. Requiring a party to allege facts to support each of its claims both encourages a party to think more carefully about asserting weak claims in the first place, and tests the viability of the claims at an early stage before the expense and challenge of discovery begins.

In recent years, some states have explicitly rejected attempts to move from fact-based pleading to notice pleading. In Arkansas, for example, a move was proposed in the mid-1970s to conform the state rules of civil procedure to the language of the Federal Rules. The state Supreme Court accepted most of the recommended new language governing pleadings, but deliberately reintroduced the word "facts" into the pleading requirements. In a case shortly thereafter, the Court expressly stated that Arkansas had rejected notice pleading.[4] A similar move was made in Maryland in 1984, where a substantial package of reforms was introduced that were designed to make the Maryland state rules of procedure more closely resemble their federal counterparts. While the changes to the Maryland pleading rules were intended to "embod[y] the spirit of federal pleading," the state nevertheless retained the requirement that parties plead facts.

The state court experience also provides useful guidance for situations in which potential claimants may not have access to detailed facts about their claims prior to filing a complaint. Typically, these cases involve an asymmetry of information between the potential plaintiff and potential defendants – cases such as medical malpractice claims, employment termination disputes, and civil rights claims. Critics of fact-based pleading usually cite to these cases as the reason why the requirement to plead material facts necessarily cuts off access to potential plaintiffs. But these criticisms are not well-founded. Several state courts have developed an innovative and entirely

[4] Harvey v. Eastman Kodak Co., 610 S.W.2d 582 (Ark. 1981).

workable solution to this problem: pre-complaint or pre-suit discovery. If a potential plaintiff is unable to plead certain facts because they lie exclusively in the hands of a potential defendant or a third party, a judge may permit the potential plaintiff to obtain focused discovery related to those facts.

In Pennsylvania, for example, a plaintiff who does not possess all the facts needed to craft a complaint may commence the action by filing a writ of summons – in lieu of a complaint – and then seek discovery to obtain facts sufficient to support the complaint. Trial courts have discretion whether to allow the requested discovery, taking into consideration whether it will cause "unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party." A potential claimant seeking this form of discovery is required to demonstrate to the court good faith as well as probable cause that the information sought is both material and necessary to the filing of the complaint. In order to keep the discovery limited and focused, the party seeking discovery "should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading." According to a Pennsylvania judge, attorneys have largely internalized this rule, meaning that in many situations focused preliminary information will be exchanged before a complaint is filed, even without having to go to the judge. No attorney wants to be admonished by a judge that a pre-suit discovery request is overreaching and unnecessary, or that a request was entirely appropriate and focused and should have been addressed immediately.

Connecticut similarly authorizes potential parties to file a bill of discovery to seek information necessary to file a complaint. Like Pennsylvania, the party seeking the discovery must show good faith and probable cause for seeking the discovery. Moving parties must also be specific about the information they are seeking; the materials sought must be described with as much detail as available, and should pre-suit discovery be granted, it will be limited to the specific necessary for the filing of the complaint.

These forms of pre-suit discovery represent a sensible balance between the needs of potential plaintiffs who cannot ordinarily access relevant information, and the needs of potential defendants and third parties, who deserve to be protected from fishing expeditions if a claim is particularly tenuous. A fact-based pleading system that allows narrow pre-suit discovery upon a showing of good faith and probable cause would promote effective, issue-narrowing complaints in a relatively cost-effective way.

CONCLUDING THOUGHTS

Americans deserve a court system that provides access to all litigants, from the initial filing of a complaint until the close of a jury trial. To achieve that goal, issues must be clearly identified and narrowed at the earliest stage of the litigation, consistent with the search for truth. Fact-based pleading serves that goal in the states in which it has been implemented. Changing the federal pleading rules to require fact-based pleading would serve the same goal, and bring us closer to an accessible, efficient and effective civil justice system for all.