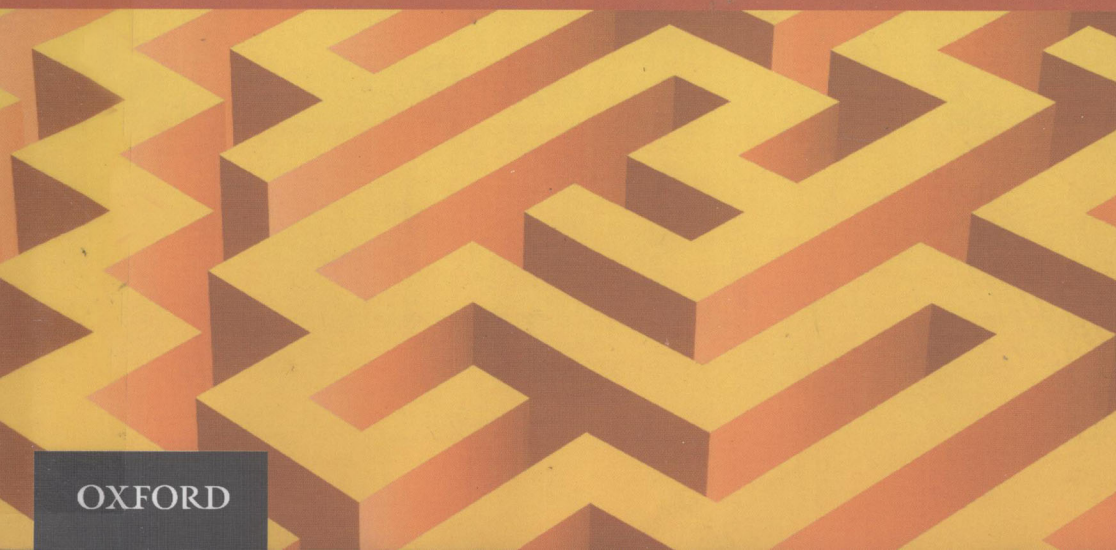
SCOTT DODSON

NEW PLEADING *in the* TWENTY-FIRST CENTURY

SLAMMING THE FEDERAL COURTHOUSE DOORS?



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ABOUT THE AUTHOR

Scott Dodson is a Professor of Law at University of California Hastings College of the Law, where he teaches Civil Procedure and Federal Courts. He has authored more than thirty articles that have appeared in *Stanford Law Review*, *Michigan Law Review*, *California Law Review*, *University of Pennsylvania Law Review*, *Virginia Law Review*, *Northwestern University Law Review*, and *Vanderbilt Law Review*, among others. This is his second book.

PREFACE

When the Supreme Court announced its opinion in *Bell Atlantic Corp. v. Twombly* in 2006, most people probably yawned. The decision was not about health care or the First Amendment or executive wartime powers or race discrimination. It was no *Bush v. Gore*. It was an antitrust-pleadings case—convoluted, technical, and, well, *bland*.

But litigators and procedure scholars knew immediately that the case had the potential to alter the balance of power in civil litigation—to put the thumb on the defendant's side of the ledger—by making it more difficult for plaintiffs to obtain discovery from defendants in a wide swath of cases. The decision was, to many in that circle, nothing short of revolutionary. By at least one measure, early predictions have been proven right. In *Twombly*'s wake, thousands of law-review articles have reflected upon it, and tens of thousands of court opinions have cited to it. *Twombly* and its companion *Ashcroft v. Iqbal* are on pace to be the most-cited decisions of all time.

With all this ink spilled on such a dry topic, why write a book about it?

I have two aims in mind. The first is to advance a fairly complex and technical normative argument to a schooled and highly critical audience. In my view, the New Pleading regime is wrong, and we should return to old pleading. Recognizing the improbability of that return, however, I also believe that New Pleading must be accompanied by discovery reforms to negate its harsher effects. Making that twofold argument, especially to the audience that is willing to listen, requires more than the length a typical law-review article allows.

My second aim is to amass and analyze some important descriptive material—historical, doctrinal, and empirical—in a single place. The volume of articles and cases referencing *Twombly* and its progeny is daunting. Some of it is outdated; some, still forming. With this book, I hope to collect the sharpest needles in that haystack and set the record straight on a number of fronts relevant to modern civil pleading. In that vein, the book is designed to be broadly accessible and fundamentally *useful*.

The result of combining these two aims is a bit unusual in form. Instead of being wide-scoped and theoretical like many monographs, this book is discrete and analytical. It strives to be both argument and resource. It probably has more footnotes than customary. It is pitched to procedural scholars, of course, but its practicality is designed also to speak to lawyers, judges, rulemakers, and perhaps even students.

In whichever camp you cast yourself, I hope you find the book thought-provoking and illuminating.

Scott Dodson
San Francisco, CA
December 1, 2012

ACKNOWLEDGMENTS

Although this book is unique as a stand-alone, comprehensive treatment of New Pleading, some discussion is based upon previously published articles. Portions of chapter 3 were derived or excerpted from material first published and copyrighted by the American Judicature Society in Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, 96 JUDICATURE 127 (2012). Portions of chapter 5 were derived or excerpted from material first published in Scott Dodson, *Federal Pleading and Presuit Discovery*, 14 LEWIS & CLARK LAW REVIEW 43 (2010), and Scott Dodson, *New Pleading, New Discovery*, 109 MICHIGAN LAW REVIEW 55 (2010). Portions of chapter 6 derive from material first published in Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 441 (2010), and *Presuit Discovery in a Comparative Context*, 6:2 JOURNAL OF COMPARATIVE LAW 51 (2012). I thank those publishers for their permission to use portions of those articles here.

I owe debts to many. The work of countless scholars has laid fertile ground that enables others to sprout. I could not do the work that I do without their influences. I could not name them all if I tried, so I will remain silently grateful.

I am thankful to those who have read and commented on draft chapters or have otherwise helped crystallize my thinking through conversation, including Joe Cecil, Kevin Clermont, Lonny Hoffman, Eric Kades, Sarah Stafford, and Steve Subrin. I am particularly grateful for the comments of the anonymous peer reviewers of my proposal, and for the comments of an anonymous reviewer of my article *New Pleading, New Discovery*, which proved invaluable for focusing and deepening my thinking on my proposal. I workshopped or presented the ideas in several of the chapters at a number of law schools and conferences, and I benefited from the conversations and discussions generated there.

I extend a special thanks to the many research assistants who have assisted with the researching, editing, proofreading, and cite-checking of this book: Matt Beard, Andrew Grindrod, Travis Gunn, Alden Hinds, Antonia Miller,

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CONTENTS

INTRODUCTION

In almost every modern legal system, civil pleading serves the important function of initiating a lawsuit. The initial pleading, called a "complaint" in the United States federal courts, sets forth the allegations of the complaining party and announces to the defendant and the court that the complainant wishes to pursue a legal claim. Often, the defending party can (or must) file its own pleading, called an "answer" in the United States, which responds to the initial pleading and may set forth the defendant's allegations. Depending upon the particular legal system, additional rounds of responsive pleadings may be required or allowed. Together, these filings are collectively called "pleadings." Pleadings may serve a number of goals, including notice giving, issue formulation, fact revelation, and merits screening.

The initial pleading is arguably the most important pleading because it begins the lawsuit. The law governing that initial pleading thus controls the access of complaining litigants to the courthouse. Absent a proper complaint, a plaintiff may never have her claims heard on their merits. Pleading's connection to court access is one of the most fundamental tensions in civil procedure. On the one hand, meritorious claims need broad access to courts for civil justice. On the other hand, meritless claims clog judicial dockets, impose costs on defendants, and raise the price of civil justice for everyone. The price is high on both sides, and so the law governing pleading must attempt to strike a balance.

In an ideal world, the law would create a threshold pleading rule that allows in all meritorious claims and dismisses out all meritless claims. There are two principal reasons why such a grail is unattainable. The first is that evaluating merit can be difficult. Evaluating merit can be immensely difficult for the court, which knows only what the parties disclose about the facts of the case. It is often difficult for the plaintiff, particularly if the claim requires the plaintiff

to prove facts that are hard for the plaintiff to obtain. It can even be difficult for the defendant in rare circumstances. The difficulty of assessing merit then creates problems for screening meritless cases because often neither the plaintiff (who is solely responsible for filing the complaint) nor the court (which is solely responsible for determining whether to allow the complaint to proceed) can be sure about the case's worth.

There are some exceptions to this general difficulty. A court can resolve immediately a claim whose merit depends upon a pure question of law. Say, for example, a plaintiff comes to court with a claim under Title VII, which is the federal statute that prohibits employment discrimination. She alleges that she was fired because she has red hair. She therefore sues for hair-color discrimination.

Even assuming all of her allegations are true, the plaintiff must lose. Why? Because, as a matter of law, Title VII does not make hair-color discrimination unlawful. It makes unlawful other kinds of discrimination—such as on the basis of race or gender—but not hair-color discrimination. So, the law allows and encourages the court to dismiss such legally nonactionable claims quickly.

Note that this kind of a dismissal—for legal insufficiency—is quite different from a dismissal for factual insufficiency. The plaintiff's hair-color claim is resolvable even if all of the plaintiff's facts are conceded. But what if the plaintiff also alleged that her employer discriminates against women, and therefore she asserted a claim for gender discrimination? Such a claim, assuming the other requirements of Title VII are properly alleged, would be legally sufficient. Any question of merit then would depend upon whether the plaintiff could prove the *facts* supporting her claim. She would have to prove, among other things, that the employer was motivated by her gender. And that fact can be a very tricky one to prove indeed. The plaintiff may not know what motivated her employer (the employer is unlikely to confess openly to unlawful conduct), and the court will have little basis for evaluating the likelihood of that fact. Setting a rule that resolves whether such a claim should proceed, and under what circumstances, is likely to be grossly imperfect.

The second reason why a perfect pleading rule is unattainable is that different cases demand different rules. Some cases, such as many breach-of-contract cases, involve purely private interests, sophisticated parties with equal bargaining power, low litigation cost, and documentary proof. Other cases, such as certain civil-rights cases, involve public interests, unequal parties, and high litigation costs. The same pleading rule, all things being equal, ought not apply to both cases.

All things are not equal. A system of claim-specific rules has its own costs. And those costs are so worrisome that the United States has opted for a

procedural system founded upon *transsubstantivity*—the idea that rules of procedure should be basically uniform regardless of the substantive legal claim or factual circumstances. Thus, in U.S. federal court, the pleading rules that apply to a breach-of-contract claim are generally the same as those that apply to a civil-rights claim (or an employment-discrimination claim, or a negligence claim, or any other claim). As a result, the system realizes many virtues of uniformity, but it also suffers the costs of insisting upon general rules for different cases.

Nevertheless, pleading rules must be set, despite their imperfections. For decades, the U.S. legal system has opted for a system of "notice pleading," in which the complaint need only give the defendant "fair notice" of the claim and its grounds, and in which a claim may be dismissed only for legal insufficiency. Factual insufficiency beyond mere notice, by contrast, has been relegated to a stage of the lawsuit that allows some opportunity for discovery to flesh out those facts. Notice pleading tips the pleading balance in favor of court access for plaintiffs and away from protecting defendants and the courts from the costs of dealing with meritless claims. In essence, notice pleading assumes that allowing some meritless cases into discovery is more important than screening out some meritorious cases erroneously. And, it appeared, the U.S. Supreme Court embraced this ethos for fifty years.

Then, in 2007, the Court issued a decision in *Bell Atlantic Corp. v. Twombly* that seemed abruptly to change course. The case involved a class action of telecommunications consumers against several telecommunications providers for antitrust conspiracies violating federal law. The plaintiffs' complaint was clearly *legally* sufficient because federal law prohibited the antitrust conspiracies that the plaintiffs were alleging. And the plaintiffs' complaint gave adequate notice of the claim. However, the Court held that the supporting allegations in the complaint did not create "plausible" grounds to infer that a conspiracy had, in fact, occurred. The Court's express motivation for imposing a new "plausibility" requirement of factual sufficiency was to protect defendants and the civil system from the high costs of defending against legally sufficient but factually implausible claims. Accordingly, the Court held that the complaint should have been dismissed.

Confusion ensued. Was *Twombly* a change in pleading rules? If so, how much of a change? Was it restricted to antitrust claims? To high-discovery suits? For two years, the lower courts and commentators grappled with and wrangled over these questions.

In 2009, the Court answered some of them in a case called *Ashcroft v. Iqbal*. There, a detainee sued U.S. governmental officials for imposing disparate conditions of confinement on him because of his race, religion, and national

origin. As in *Twombly*, Iqbal's claims were legally sufficient because federal law prohibited the conduct he alleged. However, following *Twombly*, the Court held that his claims were not factually sufficient because his allegations did not supply "plausible" grounds for inferring unlawful discrimination. The Court also added a new twist, instructing lower courts to disregard "conclusory" allegations. As in *Twombly*, the Court was motivated by the desire to protect defendants from the high costs (this time, in the form of the disruption to government officials' duties) of defending implausible claims. However, the Court clarified that the new standard is, like federal pleading rules generally, transsubstantive.

Lower courts, lawyers, and academics quickly got the memo. SCOTUSblog's Tom Goldstein anointed *Iqbal* as the most significant case in a decade for day-to-day civil litigation. The great Arthur Miller was quoted as reflecting: "I have spent my whole life with the federal rules, and this is one of the biggest deals I have ever seen."[1] As of December 1, 2012, *Iqbal* has been cited more than 100,000 times, putting it on pace to be the most-cited decision ever.

It is no wonder, with such doctrinal upheaval after at least fifty years of relative stasis, that the Court's decisions would generate deep and provocative questions. How does New Pleading fit with the history of U.S. pleading? Does it mark a significant break or a minor adjustment in pleading doctrine? How sound is the theory behind New Pleading? What practical effects is it having? How should rulemakers respond? And what role might New Pleading play on the global stage?

Many, including myself, have attempted to address some of these questions piecemeal. Recent studies have produced some data of what effects the decisions are having. Proposals abound. The commentary is becoming voluminous and unwieldy.

This book supplies a one-stop shop. It positions *Twombly* and *Iqbal* within the historical and doctrinal development of pleading. It offers a comprehensive theoretical account of New Pleading. It synthesizes and adds new data on the effects New Pleading is having. It surveys and comments upon the most prominent reform proposals made in response. And it situates New Pleading in a broader international comparative context. These components of the book are designed in part to be a resource for anyone interested or touched by federal pleading.

These parts also set the stage for the book's normative and prescriptive agendas. I argue that the costs of New Pleading—particularly the justice costs and increased motions-practice costs—outweigh its benefits. Based on this

1. Tony Mauro, *Groups Unite to Keep Cases on Docket*, NAT. L.J. 1, 32 (Sept. 21, 2009).

calculus, my primary commitment is a return to Old Pleading. However, crediting some of the concerns animating New Pleading, I argue that a return to Old Pleading should be accompanied by a renewed focus on discovery-cost control and cooperative management. The system of Old Pleading already had the tools available to manage high-cost but low-merit cases. Judges, lawyers, and litigants just need to use those tools more often.

Recognizing that a return to Old Pleading is unlikely, however, my secondary commitment is that if New Pleading is to stay, it must be accompanied by New Discovery. New Discovery is a structured, controlled, presuit-discovery mechanism. By providing information access to plaintiffs, it alleviates much of the justice concerns of New Pleading. By incorporating a presumption of one-way cost shifting on the plaintiff, it protects innocent defendants from unwarranted costs. By allowing the parties a quick and cheap peek at the critical facts, it encourages early resolution of both meritless and meritorious lawsuits, thereby benefitting the system as a whole. In short, New Discovery aspires to offer something for everybody.

Judge, professor, and rulemaker Charles E. Clark once said, "I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings."[2] Perhaps it is time to learn that lesson once again.

2. Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46 (1957).

1 FEDERAL PLEADING THROUGH 2007

Introduction

Pleading in U.S. federal courts has a storied history. Because that history colors present-day pleading, some background of where pleading has been is essential to understanding where pleading is today. This chapter is a descriptive and evaluative look back into the pleading of eras gone by. It traces the punctuated evolution of the roles, standards, and testing mechanisms of civil pleading. In the process, this chapter clarifies several components of modern pleading doctrine that will become important in later chapters to understanding the motivations, implications, and solutions to the problematic "New Pleading" that the Supreme Court adopted in 2007.

The story of civil procedure in the United States is undoubtedly coupled to larger and richer stories of society, context, and politics. I could not possibly do it justice in a single chapter. My strictly proceduralist perspective should not be construed to deny those broader strands. Perhaps readers will forgive my artificial limitations for the sake of brevity and background.

Overview

Because this chapter describes pleading mechanisms and their evolution in some detail, it begins with this brief overview. Pleading has two primary, and historically opposing, traditions: law and equity. The law tradition featured rigidity and technicality, but its virtues were simplicity and certainty. By contrast, the equity tradition focused on justice, with sensitivity to public interests, but its vices were inefficiency, uncertainty, and delay.

Prior to 2007, pleading in the United States underwent three temporal and mechanistic experiments. The first was common-law pleading, which was inherited from England and was comprised of both common law and equity. In the 1800s, pleading underwent

a reform to attempt to make it more flexible and accommodating. The result was the Field Code, which spawned numerous code variations in the state courts. Finally, 1938 marked the beginning of rule pleading under the Federal Rules of Civil Procedure, a flexible, deemphasized, and uniform system of pleading in the U.S. federal courts. As I will argue, 2007 ushered in a fourth era, what I call "New Pleading."

Pleading is intimately connected to discovery, particularly under the Federal Rules. Pleading typically precedes discovery and functions to help frame it. Thus, as pleading has evolved, so has discovery, from the extremely restricted discovery of the common law to the extremely wide-ranging and costly discovery of the Rules.

The details that follow explain how procedure has developed, how different normative theories have driven that development, and how different mechanisms have attempted to implement those theories. This is well-trodden ground,[3] but the history helps situate current pleading norms and practice within a broader temporal scope and in the context of modern discovery. That background is essential to understanding what current practice means, to evaluating its success, and to considering what changes to make in the future. With that in mind, the rest of this chapter lays out that background in detail.

English Common Law

In medieval times, English civil litigation was divided into common-law courts and equity courts. Each court system followed a different set of procedural rules. At English common law, a prospective plaintiff initiated a suit by obtaining a writ from the King's Chancellor. A writ summoned the defendant before the court and specified a "form of action," which directed the procedural and substantive rules governing the particular claim, such as trespass, trover, or assumpsit. The requirements of each form of action were unique and inflexible.

Once the writ was served on the defendant, pleading ensued. Common-law pleading was a back-and-forth colloquy, often done orally in medieval times. The plaintiff began by setting out the facts, guided by the dictates of the writ's form of action. The defendant could respond in one of several ways. She could

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3. For seminal overviews in article form, see Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

(1) deny everything, thereby creating a "general issue" for resolution by a jury; (2) deny a particular fact, thereby creating a "specific issue" for resolution by a jury; (3) demur, thereby conceding the facts but challenging the legal sufficiency of the claim; or (4) confess and avoid, thereby admitting the facts as stated but alleging new facts that defeated the claim. Confession and avoidance required the plaintiff to respond with a pleading akin to the defendant's options. This back-and-forth continued until it had reduced the dispute to a single issue of law or fact.

Goals of common-law pleading included the following: to produce predictability and uniformity in the law among specific claims, to streamline litigation after pleadings had closed, and to narrow the case to a single disputed issue of law or fact. Those goals put pressure on pleadings to accomplish all this, and, as a result, pleadings practice by the 1500s had become technical, complicated, and stylized. In addition, because a writ's procedures were tied to a particular form of action, procedures governing a claim varied widely among the different substantive claims, creating a non-transsubstantive law of formulaic pleading requirements unique to each form of action. Discovery, however, was sharply limited in almost all cases. Indeed, the common law provided no way to compel disclosure of facts and evidence from an opponent, and it proscribed party testimony as inherently incredible.[4]

The rigidity of the common law's pleading system demanded strict compliance with its technicalities. In addition, the insistence on single-issue resolution forced parties to choose among potential viable factual and legal theories, thus forgoing valid claims or defenses. Consequently, parties often lost on these technicalities and choices rather than on the merits of the claim. Further, because the pleadings in effect became the crucial part of the case, litigation concerning only the technical requirements of the pleadings consumed the courts, delaying the merits and causing, at times, unjust results. As Jonathan Swift remarked of pleading attorneys at the time, "In pleading they studiously avoid entering into the *Merits* of the Cause; but are loud, violent and tedious in dwelling upon *Circumstances* which are not to the Purpose."[5]

English equity courts were quite different. Equity courts offered an alternative to the common-law system for exceptional cases, such as fraud and breach of fiduciary duty, that did not appear to fit into the rigid forms of action. Instead of a writ, the petitioner sought a bill in equity. Presiding over an exceptional proceeding unconfined by the rigidity of the common law, Chancellors

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4. Fleming James, Jr., *Discovery*, 38 YALE L.J. 746, 746 (1929); Subrin, *supra* note 3, at 919.

5. JONATHAN SWIFT, GULLIVER'S TRAVELS 352–53 (Harold Williams ed. 1926) (1st ed. 1726).