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Pleading with the Bench and Bar: It's Time to Take Fact Pleading Seriously

Expressing apparent frustration in 2006, the Fifth District Court of Appeal stated: "As we wearily continue to point out, Florida is a fact-pleading jurisdiction, not a notice-pleading jurisdiction."[1] Fourteen years later, it is unclear whether this oft-repeated message is getting through to the bench and bar.

Many of us have been there. A complaint is filed that contains minimal to no *factual* allegations. It is full of generic statements and legal conclusions. It is unclear exactly what is being claimed. Hoping to force compliance with Florida's fact pleading rule, you file a motion to dismiss. But these motions seem more frequently than not to be met with a typical refrain: "at this stage, there's enough to move on to discovery." Perhaps it is a natural impetus to just move on and get the case rolling. After all, the facts can be sorted out in discovery, right?

But the pleading stage is critical. The pleading stage is the stage that frames the issues for discovery and trial. The pleading stage focuses the issues for the parties and the court. Without proper factual pleadings, parties and the court do not know what facts need to be sorted out at discovery and trial. It's time to take fact pleading seriously. Doing so will make litigation more focused, less expensive, and ultimately more just.

What exactly is fact pleading? Fact pleading, also referred to as code pleading, was adopted in many states as a reform to common law pleading. Common law pleading was "the system of pleading historically used in the three common-law courts of England" and adopted by early American courts.[2] Common law pleading, and all its intricacies, is beyond the scope of this article. It's enough for present purposes to know that common law pleading was quite technical and formalistic.[3] Reform of common law pleading in America first came to New York in 1848 with the adoption of fact pleading in the Field Code, so named for David Dudley Field – one of the commissioners that designed the code.[4] Florida adopted code pleading during reconstruction in 1870, but shortly after returned to a modified common law pleading system.[5] It was not until the 1950s that Florida fully did away with common law pleading in favor of fact pleading.[6]

Fact pleading is a higher standard than its contemporary competitor – notice pleading. The Federal Rules of Civil Procedure first introduced notice pleading in 1938.[7] Notice pleading was a reform and further liberalization of code pleading. It is a "procedural system requiring that the pleader give only a short and plain statement of the claim showing that the pleader is entitled to relief, and not a complete detailing of all the facts."[8] As its name suggests, notice is the most important component of notice pleading. Notice pleading places the primary burden of narrowing the issues on pretrial procedure such as discovery as opposed to the pleadings.

Understanding fact pleading in relation to the other forms of pleading helps to elucidate the requirements and aims of fact pleading. We are all familiar with the fact pleading standard in the abstract. Indeed, it's usually included in motions to dismiss and often glanced over. Pleadings must include "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."[9] Fact pleading "forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to litigants and unnecessary judicial effort."[10] The idea is to require litigants at the outset to "state their pleadings with sufficient particularity for a defense to be prepared."[11] "Craftmanship in pleadings frame the issues between the parties so they can 'know what they've got to meet and get ready to meet it.'"[12] At its core, fact pleading requires a plaintiff to allege the facts that establish each element of the claim.

One critique of fact pleading that led many to turn to notice pleading is the position that "it is virtually impossible to logically distinguish among 'ultimate facts,' 'evidence' and 'conclusions.'"[13] But is that right? What's so hard about recognizing a fact from a legal conclusion? As the Fifth DCA succinctly explained in *Beckler v. Hoffman*:

> To allege that A murdered B is to allege a conclusion; to allege that A killed B deliberately and intentionally without legal justification or excuse, is to allege ultimate facts; to allege that at a certain time and place A hated B and lay in wait for B and aimed and fired a pistol at B and that the bullet fired from A's pistol struck B and caused B to die, is to allege evidence.[14]

Beckler is a useful example. There, the Fifth DCA concluded that an allegation that a "convenience store and the surrounding vicinity were the scene of violent and dangerous criminal activities" several months before the plaintiff's abduction and rape was insufficient to allege the defendants' constructive knowledge that the convenience store was an unsafe.[15] The court held "that the words 'vicinity' and the phrase 'violent and criminal activities' are conclusions" not ultimate facts.[16] Similarly, the Fifth DCA has explained that the phrases "'not lawful' and 'not properly payable' are conclusions, not facts."[17] What it comes down to is whether or not the complaint alleges what happened plainly in a factual manner or whether it utilizes sweeping legal conclusions without factual support. That assessment can and must be made to ensure the aims of fact pleading are met.

There is a sense amongst lawyers that federal standards are generally stricter than their Florida counterparts. Historically, that has been the case for the summary judgment standard.[18] But not so for the pleading standard. The Fifth DCA explained in 1994 in *Continental Baking*:

> The pleading standard in federal court and the pleading standard in our state courts differ radically. The federal courts only require notice pleading; Florida is a fact-pleading jurisdiction. The quality of pleading that is acceptable in federal court and which will routinely survive a motion

> to dismiss …will commonly not approach the minimum pleading threshold required in our state courts. Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort.[19]

This statement is somewhat dated following the United States Supreme Court's decisions in *Twombly*[20] and *Iqbal*[21] which strengthened federal pleading requirements to something more resembling fact pleading. That is, the Supreme Court required "enough facts to state a claim to relief that is plausible on its face."[22]

But it remains the case that Florida's pleading requirements are more rigorous than federal requirements. For example, in a recent Southern District of Florida decision, Judge Darrin Gayles explained that "[i]n contrast to Florida's heightened fact-pleading standard, a well-pleaded complaint under [federal] Rule 8(a)(2) requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief.'"[23] To this day, Florida law ostensibly places stricter requirements on pleading than federal courts.

Even in federal court with a standard admittedly lower than Florida's, a "plaintiff is not allowed to use [generic and amorphous] allegations to haul an entity into federal court and then use discovery procedures to sort out the facts."[24] That's "not the way it works."[25] If that's not the way it works in federal court, it certainly should not be the way it works in Florida courts with our "heightened pleading requirement."[26]

But is this heightened standard borne out in practice? Everyone involved in our civil justice system should take fact pleading seriously to make sure that it is. To the plaintiff's bar, allege *facts* that support the elements of your claim. Avoid the temptation to allege generic and conclusory statements. You may not want to allege facts in a plain manner for fear that you're leaving something out. But if discovery reveals additional information about your claims, you can always amend under Florida's liberal amendment rules.[27] And sometimes, you may just not have enough facts to meet the elements of your claim. In that case, you have several options. You can do more investigation to see if you can establish the facts necessary to state a claim. You can file a pure bill of discovery which remains "an appropriate remedy to obtain information such as the identity of a proper party defendant or the appropriate legal theory for relief."[28] Or maybe, just maybe, you choose not to file the lawsuit.

To the defense bar, recognize facts when you see them. Taking the fact pleading standard seriously also means you have to answer when facts are alleged. Do not utilize the motion to dismiss as an opportunity to delay. That said, do not let conclusory allegations go unchallenged. Force plaintiffs to state their ultimate facts upfront. Waiting to do so will only cause confusion and unnecessary discovery disputes.

To the bench, enforce the fact pleading standard. Hold parties' feet to the fire so that the benefits of fact pleading can be realized. Sure, deciding what is a fact or a conclusion is a continuum that will involve close calls. But to pretend that there is no meaningful distinction between a fact and a conclusion is to give up on pleading altogether as an important procedural requirement to aid in the efficient application of substantive law.

And for all, remember the pleadings throughout the course of the suit. Don't think that those formulaic documents filed at the out-

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set have no meaning. On the contrary, they remain the lodestar guiding the litigation through the murky waters of discovery and trial. We all must strive to comply with fact pleading and honestly enforce it. Otherwise, its promised benefits are illusory.

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[1]*Deloitte & Touche v. Gencor Industries*, 929 So. 2d 678, 681 (Fla. 5th DCA 2006).

[2]Pleading, *Black's Law Dictionary* (11th ed. 2019).

[3]Illustrating the complexity of common law pleading is this passage from a nineteenth century treatise:

> "The [common-law] pleadings in a cause are commenced, on the part of the plaintiff, with the *declaration*, which is a statement in writing of his cause of action, in legal form. This declaration, as every other pleading in the cause, is required to be framed agreeably to the established rules and forms of pleading, and if defective in any particular, either in substance or form, may be objected to, as insufficient in law, by *demurrer*, on the part of defendant; or he may allege some matter in abatement of the action, or may deny the declaration to be true in point of fact, or may set up matter in avoidance of it — such answer on the part of the defendant being technically denominated his *plea.* To the defense thus made, the plaintiff may again, in his turn, *reply*, either, in case of a demurrer, by reasserting his declaration to be sufficient in law to support his action, and referring that question to the judgment of the court, which is termed a *joinder in demurrer*; or, in case of a special plea, he may on his part demur to such plea, as insufficient in law to constitute a defense; or he may deny it to be true in point of fact, or allege some new matter in avoidance of it, according to the circumstances — such answer being styled a *replication.* To the replication the defendant may either *demur* upon the law, or oppose a *rejoinder* as to the fact; and to the rejoinder the plaintiff may demur, or oppose a *surrejoinder*; and so the parties may proceed, by a system of alternate *allegation* and *objection*, *denial* or *evasion*, technically termed the pleadings, until they arrive at an issue, that is, some specific point of law, or fact, affirmed on one side and denied on the other, and presenting the exact question for the court or jury to determine."

Sabin D. Puterbaugh, *Puterbaugh's Common Law Pleading and Practice* 36-37 (3d ed. 1873).

[4]Charles E. Clark, *History, Systems and Functions of Pleading*, 11 Va. L.Rev. 517, 533 (1925).

[5]*Id.* at 535.

[6]*See Fletcher v. Williams*, 153 So. 2d 759, 762 (Fla. 1st DCA 1963) (disapproved on other grounds) ("In 1949, effective January 1, 1950, the Supreme Court adopted our present rules of civil procedure which now control the practice and pleading in causes of action both at common law and in equity."); *Williams v. Smelt*, 83 So. 2d 1, 2 (Fla. 1955) ("On [January 1, 1950], The Florida Bar rejected its allegiance to the old common-law forms of pleading and practice and announced its alignment with those who subscribe to more liberal rules of pleading in the interest of expediting the administration of justice and bringing causes to a quicker and less expensive conclusion.").

[7]*See Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004) ("The federal rules replaced fact pleading with notice pleading.").

[8]Pleading, *Black's Law Dictionary* (11th ed. 2019).

[9]Fla. R. Civ. P. 1.110(b)(2)

[10]*Horowitz v. Laske*, 855 So. 2d 169, 172 (Fla. Th DCA 2003)

[11]*Id.* at 173.

[12]*Nguyen v. Roth Realty, Inc.*, 550 So. 2d 490, 491 (Fla. 5th DCA 1989). This sentiment is expressed in other fact pleading jurisdictions. *See e.g., State ex rel. Harvey v. Wells*, 955 S.W.2d 546, 547 (Mo. 1997) ("Fact pleading identifies, narrows and defines the issues so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial.").

[13]Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 Colum. L.Rev. 518, 520-21 (1957)

[14]*Beckler v. Hoffman*, 550 So. 2d 68, 70 n. 1 (Fla. 5th DCA 1989)

[15]*Id.* at 70

[16]*Id.*

[17]*Berrios v. Deuk Spine*, 76 So. 3d 967, 970 n. 1 (Fla. 5th DCA 2011)

[18]However, the historical distinctions between the summary judgment standard applied in Florida courts and that applied in federal courts appears to be coming to an end this year. The Florida Supreme Court recently amended Florida Rule of Civil Procedure 1.510 to bring Florida's standard in line with the federal standard. *See In re Amendments to Fla. Rule of Civil Procedure 1.510*, No. SC20-1490, 2020 WL 7778179 (Fla. Dec. 31, 2020). The amended rule is set to take effect on May 1, 2021. *Id.*

[19]*Continental Baking Co. v. Vincent*, 634 So. 2d 242, 244 (Fla. 5th DCA 1994).

[20]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

[21]*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)

[22]*Twombly*, 550 U.S. at 570.

[23]*Malhotra v. Aggarwal*, 2019 WL 3425161, at *1 (S.D. Fla. July 30, 2019)

[24]*S.K. v. Lutheran Servs. Fla., Inc.*, 2018 WL 2100122, *3 (M.D. Fla. May 7, 2018)

[25]*Id.*

[26]*See Borden v. Allen*, 646 F. 3d 785, 810 (11th Cir. 2011) (describing fact pleading as a "heightened pleading requirement.").

[27]*See* Fla. R. Civ. P. 1.190(a)

28*Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998); *see also Adventist Health Sys./Sunbelt, Inc. v. Hegwood*, 569 So. 2d 1295 (Fla. 5th DCA 1990) ("One of the functions of a bill of discovery filed against a possible or putative defendant is . . . 'to ascertain, as a matter of equity, who an injured party may sue *and under what theory*.'").