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pellate bench, and multiply requests for ordinary and extraordinary review beyond the capacity of appellate judges to consider them properly.⁵⁰

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Civil Procedure—Specificity in Pleading under North Carolina Rule 8(a)(1)

A problem now¹ facing the North Carolina practitioner desiring to bring an action is drafting a complaint² that will satisfy the requirements of rule 8(a)(1) of the North Carolina Rules of Civil Procedure³ (NCRCP). The drafter is no longer required to set out "[a] plain and concise statement of the facts constituting a cause of action . . ."⁴ but rather is supposed to draft "[a] short and plain statement of the claim sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . ."⁵

Since the new North Carolina rules are based almost entirely on the Federal Rules of Civil Procedure⁶ (FRCP), from which have developed a sizable body of case law, the North Carolina pleader could rapidly determine the standard that he is required to meet in his complaint were it not for the phrase "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions

⁵⁰ *Id.* at 779. The Second Circuit reiterated its limitation of the applicability of *Eisen in Carceres v. International Air Transport Ass'n*, Civil Nos. 33433-39 (2d Cir., Jan. 13, 1970), in which a similar appeal from a negative rule 23(c)(1) determination was dismissed. Upon the authority of *International Pipe*, Judge Hays reluctantly concurred.

¹ The North Carolina Rules of Civil Procedure were adopted by the General Assembly during the 1967 session and were to become effective July 1, 1969. Ch. 954, § 10, [1967] N.C. Sess. L. 1354. The 1969 session of the General Assembly postponed the effective date until January 1, 1970. Ch. 895, § 21, [1969] N.C. Sess. L. —.

² Throughout this note, in the interest of simplicity, the pleading alleging a claim will be called a complaint; the pleading party, plaintiff; and the party attacking the complaint, defendant.

³ N.C.R. CIV. P. 1-84, N.C. GEN. STAT. § 1A-1 (1969). The North Carolina rules are basically the same as the Federal Rules of Civil Procedure; most of the differences between the two sets of rules are discussed herein.

⁴ N.C. GEN. STAT. 1-122 (1953) (repealed Jan. 1, 1970). This statute was originally enacted August 18, 1868, as § 93 of the 1868 Code of Civil Procedure.

⁵ N.C.R. CIV. P. 8(a)(1).

⁶ FED. R. CIV. P. 1-86, 28 U.S.C., app., Rules of Civil Procedure for the United States District Courts (1964).

or occurrences intended to be proved”⁷ This language makes federal precedent construing the specificity requirement of FRCP 8(a)(2)⁸ inconclusive at best.

In attempting to determine the degree of specificity required by NCRCP 8(a)(1), the first step must be an analysis of the words used. It could be argued that the added language is merely surplusage since the federal rule also purports to give the court and parties notice of the transaction or occurrence that the plaintiff intends to prove.⁹ This argument ignores the simple fact that the drafters did in fact add the language to the North Carolina rule and must have had some reason in so doing: their only possible purpose would seem to be requiring a more specific complaint than is acceptable under the federal rule.¹⁰ However, use of the word “notice” leads to the conclusion that the plaintiff need not be as specific as was required when “facts” had to be included in the complaint.¹¹ The “notice” concept, at least under the federal rule, simply requires describing the event claimed as a wrong with enough particularity “to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought, so that it may be assigned to the proper form of trial.”¹² While the aim of the drafters of the North Carolina rules no doubt included these same ends, they presumably must be accomplished in a more specific manner than simply providing “a generalized summary of the case.”¹³ In sum, the complaint required by the new North Carolina rule need not be as specific as that under the former practice, but must be to some degree more specific than the federal complaint. The added degree of specificity is not readily determinable from the language of the rule itself.

Since the language of NCRCP 8(a)(1) is essentially the same as that of the New York statute controlling specificity in pleading, Civil Practice

⁷ N.C.R. Civ. P. 8(a)(1).

⁸ The federal rule requires only “a short and plain statement of the claim showing that the pleader is entitled to relief”

⁹ *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957); 2A J. MOORE, FEDERAL PRACTICE ¶ 8.02 (2d ed. 1968) [hereinafter cited as MOORE].

¹⁰ This conclusion is buttressed by noting that the negligence forms provided by the NCR are more specific than the corresponding federal forms. See pp. 642-43 & notes 42 & 44 *infra*.

¹¹ Phillips, *Pleading—Part I* in NORTH CAROLINA BAR ASSOCIATION, INSTITUTE ON JURISDICTION, JOINDER, AND PLEADING UNDER NORTH CAROLINA'S NEW RULES OF CIVIL PROCEDURE V-1, V-15 (1968).

¹² 2A MOORE ¶ 8.13.

¹³ *Id.* ¶ 8.03.

Law and Rules § 3013¹⁴ (CPLR), inquiry into the judicial gloss placed on the latter, at least before 1967, will be fruitful.¹⁵ However, there are three differences between the North Carolina and New York rules that must be noted.

First, CPLR 3013 requires the plaintiff to include "the material elements of each cause of action . . ." ¹⁶ in his complaint. Because neither the terms¹⁷ nor the judicial interpretation¹⁸ of FRCP 8(a)(2) requires that the "material elements" of the plaintiff's claim be pleaded, it can be argued that the North Carolina drafters, by leaving this phrase out of NCRCP 8(a)(1), intended to lean toward the federal result rather than

¹⁴ N.Y. CIV. PRAC. LAW § 3013 (McKinney 1963) states:

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense.

¹⁵ Although there is no legislative history so indicating, the language of NCRCP 8(a)(1) is probably taken from CPLR 3013. The words "notice of the transactions, occurrences, or series of transactions or occurrences . . ." appear in NCRCP 8(a)(1) and NCRCP 15(c) and in both cases this language represents a change from the corresponding federal rule. The comment following NCRCP 15 states that the new language in that rule is taken from CPLR 3025, the New York analogue to NCRCP 15(c). It seems very unlikely that the North Carolina drafters intended to use the language of a New York rule in NCRCP 15(c) while adopting language in NCRCP 8(a)(1) identical to that in CPLR 3013 without having meant to follow it as well. Thus it can be presumed that NCRCP 8(a)(1) is taken directly from CPLR 3013. Construction of CPLR 3013 by New York courts then becomes all important since the North Carolina Supreme Court has held that it would be bound by such interpretation. In *Ledford v. Western Union Tel. Co.*, 179 N.C. 63, 101 S.E. 533 (1919), in which construction of a North Carolina procedural statute adopted from New York was in question, the court said that "[w]here the legislature enacts a provision taken from a statute of another State . . . in which the language of the act has received a settled construction, it is presumed to have intended such provision should be understood and applied in accordance with that construction." *Id.* at 66, 101 S.E. at 534. See also *M'Kinnon v. M'Lean*, 19 N.C. 79, 84 (1836). This rule of statutory interpretation doubtless would include construction by courts in New York as of the time the North Carolina rules were adopted (1967) and probably should apply to decisions from New York prior to January 1, 1970.

¹⁶ N.Y. CIV. PRAC. LAW § 3013 (McKinney 1963).

¹⁷ See note 8 *supra*.

¹⁸ A claim under the federal rule will surely be dismissed (with leave to amend) if a major material element is totally omitted. *F. JAMES, CIVIL PROCEDURE* § 2.11 (1965). However, for purposes of a motion to dismiss, the federal courts will infer or assume some elements of a claim. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Garcia v. Hilton Hotels Int'l, Inc.*, 97 F. Supp. 5 (D.P.R. 1951). See also Siegel, *Introducing: A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 190, 207 (1963) [hereinafter cited as Siegel], in which the writer argues that the federal courts do find the "material elements" in such cases as those cited above.

risk a possible strict interpretation that could be obtained from the language of CPLR 3013. Even if this was not the intent of the drafters, there is no reasonable argument that the lack of a "material elements" requirement demands more specificity under NCRCP 8(a)(1) than under CPLR 3013.

CPLR 3013 retains the older "cause of action" language rather than adopting the federal term "claim for relief" as was done in the North Carolina rules. This variation in terms probably makes no difference in comparing the two rules since both the comments to the North Carolina rules¹⁹ and commentators on those of New York recognize that "the difference between 'cause of action' and 'claim for relief' is more semantic than real."²⁰ If any difference in result could accrue from the difference in terminology, it would again seem that CPLR 3013, by retaining the "cause of action" language, would require more specificity than the more modern terminology "claim for relief" in NCRCP 8(a)(1).

Finally, CPLR 3026 provides that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."²¹ Since this rule has been literally applied in New York to demand that defendant must show prejudice²² to a substantial right before he can successfully attack a complaint,²³ the New York judge has a more clearly-defined mandate upon which he can rely in denying a motion to dismiss than does his North Carolina counterpart. The closest thing to CPLR 3026 in the North Carolina rules is rule 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice."²⁴ Essentially the same result as that reached by the New York courts under CPLR 3026 should be reached by the North Carolina courts under NCRCP 8(f). The language of FRCP 8(f),²⁵ which is identical to NCRCP 8(f), was considered in *DeLoach v. Crowley's, Inc.*,²⁶ and the

¹⁹ N.C.R. Civ. P. 8, comment (a)(2).

²⁰ Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1439 (1960); Siegel 206.

²¹ N.Y. CIV. PRAC. LAW § 3026 (McKinney 1963).

²² The New York courts find the defendant to be prejudiced when the complaint fails to give him sufficient notice of the historical facts or the theory relied upon to enable him to intelligently answer and proceed with discovery. *E.g.*, *Meltzer v. Klien*, 29 App. Div. 2d 548, —, 285 N.Y.S.2d 920, 922 (1967); *Household Coal & Oil Distrib., Inc. v. Sage*, 57 Misc. 2d 428, —, 292 N.Y.S.2d 800, 802 (Civ. Ct. N.Y. City 1968).

²³ *Foley v. D'Agostino*, 12 App. Div. 2d 60, —, 248 N.Y.S.2d 121, 127 (1964).

²⁴ N.C.R. Civ. P. 8(f).

²⁵ FED. R. CIV. P. 8(f).

²⁶ 128 F.2d 378 (5th Cir. 1942). This case is cited in the comment to N.C.R. Civ. P. 12 as an example of the application of that rule in the federal courts.

court said, "[j]ust what this means is not clear, but it excludes requiring technical exactness, or the making of refined inferences against the pleader, and requires an effort to fairly understand what he attempts to set forth."²⁷

Although some commentators feared that New York courts could not reach even an approximation of the federal result under CPLR 3013 because of the inclusion of the phrase "sufficiently particular,"²⁸ these misgivings soon proved groundless. The trend toward liberal interpretation of pleadings under CPLR 3013 began with *Hewitt v. Maass*,²⁹ in which the court said:

The requirement now is "Statements . . . sufficiently particular to give the court and the parties notice . . ." (CPLR § 3013). This change is reflective of the decisional trend previously and points to not only less formalized pleadings but also to the elimination of obscure distinctions inherent in words such as "conclusions," "ultimate (and other kinds of) facts," and similar others. These classifications and their status and effect as or in pleadings have been eliminated. Now, if *notice*, or literally *comprehension*, can be had from a pleading the method of attaining the communicable pattern becomes secondary.³⁰

The Appellate Division rapidly followed with the decision in *Foley v. D'Agostino*,³¹ which has become the standard for measuring sufficiency of pleadings in New York.³² The complaint in *Foley*, which had been dismissed by the trial court, consisted of three causes of action alleging breach of fiduciary obligations and unfair competition by half of the stockholders and the officers of a family corporation. Reversing the dismissal below, the Appellate Division stated its position in the following manner:

Upon a Rule 3211(a)(7)³³ motion to dismiss a cause of action . . . we look to the substance rather than to the form. Such a motion is

²⁷ 128 F.2d at 380.

²⁸ Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 450 (1958); Siegel 198-202.

²⁹ 41 Misc. 2d 894, 246 N.Y.S.2d 670 (Sup. Ct. 1964).

³⁰ *Id.* at —, 246 N.Y.S.2d at 672.

³¹ 12 App. Div. 2d 60, 248 N.Y.S.2d 121 (1964).

³² The New York courts apparently view *Foley* and CPLR 3013 as synonymous in considering a motion to dismiss for failure to state a cause of action. *See, e.g.*, *Buljanovic v. Grace Lines, Inc.*, 31 App. Div. 2d 614, 295 N.Y.S.2d 552 (1968); *Richardson v. Coy*, 28 App. Div. 2d 640, 280 N.Y.S.2d 623 (1967); *Pope v. Zeckendorf Hotels Corp.*, 22 App. Div. 2d 647, 252 N.Y.S.2d 975 (1964); *Infusino v. Pelnik*, 45 Misc. 2d 333, 256 N.Y.S.2d 815 (Sup. Ct. 1965).

³³ N.Y. CIV. PRAC. LAW § 3211(a)(7) (McKinney 1963) is the New York analogue of N.C.R. CIV. P. 12(b)(6) (footnote added).

solely directed to the inquiry of whether or not the pleading, considered as a whole, "fails to state a cause of action." Looseness, verbosity and excursiveness, must be overlooked on such a motion, if any cause of action can be spelled out from the four corners of the pleading.³⁴

. . . .

The proper promotion of the general CPLR objective requires more than mere token observance of or lip service to its mandate for liberal construction of the pleadings. To achieve such objective, we must literally apply the mandate as directed and thus make the test of prejudice one of primary importance. Thereby, we would invariably disregard pleading irregularities, defects, or omissions which are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause of action or defense.³⁵

The court then considered the complaint in question and found that even though the first cause of action did not show with specificity the manner and extent of the competition, or to what extent the family corporation had been or would be damaged, the complaint nonetheless gave "notice of the plaintiffs' claims . . . and of the elements of plaintiffs' alleged cause of action; and furthermore, the defendants [were not] prejudiced in any manner by the alleged deficiencies therein."³⁶

Having established a liberal pleading rule, the New York courts then continued the trend by completely abandoning the "theory of the pleadings" standard in *Lane v. Mercury Record Corp.*,³⁷ an action for an accounting of royalties. On a motion to dismiss, the trial court found that the equitable cause of action was sufficiently stated, and the defendant appealed. The Appellate Division held that no equitable cause of action was stated, but affirmed the trial court's refusal to dismiss on the ground that a legal cause of action for breach of contract appeared in the com-

³⁴ 12 App. Div. 2d at —, 248 N.Y.S.2d at 126.

³⁵ *Id.* at —, 248 N.Y.S.2d at 127.

³⁶ *Id.* at —, 248 N.Y.S.2d at 129. Complaints will, however, be dismissed if they fail to meet the standard of *Foley*. *E.g.*, *Cushman & Wakefield, Inc. v. John David, Inc.*, 23 App. Div. 2d 827, 259 N.Y.S.2d 158 (1965) (allegations that defendant "wrongfully" and "maliciously" induced another to breach a contract are insufficient); *Shapolsky v. Shapolsky*, 22 App. Div. 2d 91, 253 N.Y.S.2d 816 (1964) (complaint jumbled actions in individual and representative capacities, demanded accounting without pleading the basis therefor, demanded delivery of stock certificates without pleading entitlement). *See also* *Loudin v. Mohawk Airlines, Inc.*, 24 App. Div. 2d 447, 260 N.Y.S.2d 899 (1965) (complaint alleging malicious interference with right to employment and conspiracy dismissed for failure to state "evidentiary facts" sufficient to support the claim).

³⁷ 21 App. Div. 2d 602, 252 N.Y.S.2d 1011 (1964).

plaint. *Lane* was affirmed unanimously by the Court of Appeals in a one line memorandum opinion,³⁸ and the "theory of the pleadings" rule disappeared from New York practice.³⁹ Thus, although the plaintiff always should and usually will clearly outline the theory he has selected and be correct in his selection, the court may not grant a motion to dismiss if any theory of recovery can be found in the pleading, regardless of the relief requested.⁴⁰

The dire predictions precipitated by the additional language in CPLR 3013 not found in the federal rules were averted by early and strong judicial action. Before an intent to reach the same or a more liberal result can be ascribed to the drafters of the North Carolina rules, however, additional features of those rules must be considered. In addition to the language of rule 8(a)(1), the North Carolina drafters retained pre-complaint discovery⁴¹ from the former practice and included specifications of negligent acts in the official forms⁴² accompanying the new rules.

The comments to the rules give no clue why the drafters thought that the retention of pre-complaint discovery in NCRCP 27(b) was necessary or desirable. Whatever the drafters intended, one possible effect of this provision is that a defendant attacking a complaint for insufficiency can argue that plaintiff had an opportunity through use of rule 27(b) to obtain enough information to plead in detail and that, having failed to take advantage of this provision, he should be dismissed without leave to amend, particularly when plaintiff asserts that he cannot amend without discovery.

³⁸ *Lane v. Mercury Record Corp.*, 18 N.Y.2d 889, 233 N.E.2d 35, 276 N.Y.S.2d 626 (1966).

³⁹ In a case such as *Lane*, if the parties have not previously sought a jury trial, CPLR 4103 allows the adverse party to request a jury when the issues appear. NCRCP 38 allows demand for jury trial of right until ten days after the service of the last pleading directed to the issue. Thus, if the court finds a legal issue when construing the complaint pursuant to a motion to dismiss, the defendant will not have answered; and, assuming the complaint is not dismissed, the plaintiff still has until ten days after the defendant's answer to demand jury trial. See 5 MOORE ¶ 38.39[2].

⁴⁰ *E.g.*, *Buljanovic v. Grace Lines, Inc.*, 31 App. Div. 2d 614, 295 N.Y.S.2d 552 (1968) (complaint alleging unseaworthiness should not have been dismissed by trial court in any case because it stated a cause of action for failure to provide a safe place to work); *Richardson v. Coy*, 28 App. Div. 2d 640, —, 280 N.Y.S.2d 623, 624 (1967); *Sheehan v. Amity Estates, Inc.*, 27 App. Div. 2d 594, 275 N.Y.S.2d 644 (1966) (allegation of fraud insufficient, but cause of action stated in unilateral mistake); *Barrick v. Barrick*, 24 App. Div. 2d 895, 264 N.Y.S.2d 888 (1965) (complaint requesting reformation insufficient, but cause of action stated in breach of contract).

⁴¹ Ch. 760, § 1, [1951] N.C. Sess. L. 734-41. (N.C. GEN. STAT. §§ 1-568.1 to -568.27, repealed Jan. 1, 1970).

⁴² N.C.R. Civ. P. 84, forms (3) & (4).

If this argument is attempted, the courts should immediately reject it because (1) if the complaint is interpreted liberally, there is no need for pre-complaint discovery; (2) pre-complaint discovery is more awkward than pre-trial discovery;⁴³ and (3) pre-trial discovery will satisfy any demand of defendant for facts without creating problems concerning statutes of limitations or the relation-back theory, which often result from dismissal and amendment.

The North Carolina drafters also altered the complaints for negligence from the conclusory style of the federal⁴⁴ and New York⁴⁵ forms to forms complete with specifications of negligent acts. Since NCRCP 84⁴⁶ states not only that the forms provided are sufficient, but are also guides to the simplicity and brevity intended in the rules, it may be, as one commentator suggests, that specific, factual complaints are limited to situations involving negligence in operation of automobiles.⁴⁷ It seems more plausible to assume that North Carolina forms (3) and (4) will become the standard and that the other forms will be limited to the particular claim for relief that they illustrate.⁴⁸ In any event, the drafters have indicated that at least in some cases the North Carolina rules require a more specific complaint than the rules of either federal or New York procedure.⁴⁹

Even granting, however, that more specific complaints are required in certain cases under the new rules, the North Carolina courts should still be very reluctant to grant a motion to dismiss for failure to state a claim upon which relief can be granted under rule 12(b)(6).⁵⁰ The 12(b)(6) motion—unlike a demurrer—when sustained is considered an adjudication on the merits and the plaintiff's claim, if leave to amend is requested and denied, is *res judicata*.⁵¹ This harsh result can be defended only if

⁴³ Compare N.C.R. Civ. P. 26(a) with N.C.R. Civ. P. 27(b).

⁴⁴ FED. R. CIV. P. forms 9 & 10.

⁴⁵ 2 MCKINNEY'S FORMS, CIVIL PRACTICE LAW & RULES §§ 4:48, 4:49 (Supp. 1969).

⁴⁶ N.C.R. Civ. P. 84.

⁴⁷ Sizemore, *Introduction in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON JURISDICTION, JOINDER AND PLEADING UNDER NORTH CAROLINA'S NEW RULES OF CIVIL PROCEDURE I-1, I-13* (1968).

⁴⁸ Since all the forms provided are copies of common law common counts except forms (3) and (4), it would appear that when the drafters had the opportunity to create their own forms, they opted for specificity.

⁴⁹ See N.C.R. Civ. P. 8, comment (a)(3).

⁵⁰ This motion is analogous to a demurrer for failure to state facts sufficient to constitute a cause of action. In application it is similar to the demurrer to a statement of a defective cause of action. See N.C.R. Civ. P. 12, comment.

⁵¹ The demurrer to a statement of a defective cause of action, when sustained, made plaintiff's claim *res judicata*. *Davis v. Anderson Indus.*, 266 N.C. 610, 146

the procedural system insures the plaintiff that he will not be dismissed when there is any possibility whatsoever that he can recover.⁵² The motion should only be granted when, as in the federal system, an affirmative defense appears on the face of the complaint,⁵³ the complaint itself negatives any right to recover,⁵⁴ or it is clear beyond doubt that "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."⁵⁵ Dismissal at the pleading stage, at least dismissal without leave to amend, for any other reason does not give the plaintiff adequate assurance that he will be afforded an opportunity to avoid the effect of *res judicata*.

That this analysis is correct can be seen by exploring the alternatives and their effects on the parties. If the motion to dismiss is denied, the defendant still has three options open to him: he may answer and take discovery;⁵⁶ he may answer, take discovery and move for summary judgment;⁵⁷ or, assuming that he includes the motion with his motion to dismiss, he may move for a more definite statement.⁵⁸ If defendant chooses the first course, he has presumably gathered all the information needed for trial preparation from discovery and has in no way been injured.

If it appears from the information obtained in discovery that plaintiff does not have a valid claim under any state of the facts, defendant can move for summary judgment and should prevail.⁵⁹ In this situation

S.E.2d 817 (1966); 1 McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1189 & n.5.7 (Supp. 1969). The demurrer to a defective statement of a good cause of action generally had no such effect. *Id.* § 1200 (2d ed. 1956) & § 1200 (Supp. 1969). Under the federal rules, the granting of a 12(b) (6) motion always results in the application of *res judicata*. *Arrowsmith v. U.P.I.*, 320 F.2d 219, 221 (2d Cir. 1963).

⁵² See Louis, *The Sufficiency of a Complaint, Res Judicata, and the Statute of Limitations—A Study Occasioned by Recent Changes in the North Carolina Code*, 45 N.C.L. REV. 659, 673 (1967).

⁵³ *L. Singer & Sons v. Union Pac. R.R.*, 109 F.2d 493 (8th Cir.), *aff'd*, 311 U.S. 295 (1940) (plaintiff's lack of capacity to sue evident on the face of the complaint).

⁵⁴ *Leggett v. Montgomery Ward*, 178 F.2d 436 (10th Cir. 1949) (in an action for malicious prosecution, plaintiff pleaded that probable cause was found).

⁵⁵ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

⁵⁶ N.C.R. CIV. P. 12(a) (1) & Article 5, Depositions and Discovery.

⁵⁷ N.C.R. CIV. P. 56. This motion may be made at any time.

⁵⁸ N.C.R. CIV. P. 12(e).

⁵⁹ Summary judgment is the device for determining whether there is any genuine issue as to a material fact. 6 MOORE ¶ 56.04. If plaintiff stated conclusory allegations in his complaint, discovery should inform defendant whether plaintiff has facts to support the conclusions. Obviously, a better determination as to the merits can be made following discovery than can be made at the pleading stage. Judgment on the pleadings is also available under N.C.R. CIV. P. 12(c); for the relationship of this rule to summary judgement *see* 6 MOORE ¶ 56.09.

defendant has not been prejudiced except to the extent of writing and mailing interrogatories or taking depositions; plaintiff has had an opportunity to establish the factual validity of his claim; and if the claim fails here, it can properly be dismissed on the merits.⁶⁰ It should be noted that summary judgment is the fact-interception device provided by the new rules, and there is no longer a necessity for fact-interception at the pleading stage as there was under prior practice.

Finally, defendant may press a motion for a more definite statement.⁶¹ This motion, because of the waiver provision of rule 12(g),⁶² must be included with the 12(b)(6) motion. If the court determines that the complaint is lacking in specificity, it can then grant the motion for a more definite statement⁶³ rather than the motion to dismiss and thus avoid problems of dismissal and relation back and possible res judicata consequences of dismissal while assuring that the defendant is provided with the specificity to which he is entitled. This course is preferable to dismissal, but still not always desirable because it will often violate the function of the motion for a more definite statement. Assuming that the defendant does not obtain all the facts that he would like from a complaint, he can still use the provision in rule 8(b) allowing denial without sufficient knowledge⁶⁴ and thus avoid being faced with a complaint "so vague and ambiguous" that he cannot respond.

The danger of the motion for a more definite statement under rule 12(e) is that it will become, in effect, a bill of particulars and a dilatory pleading.⁶⁵ If it is allowed to become a bill of particulars and plaintiff cannot satisfy the order, then his pleading may be struck or other action taken.⁶⁶ The argument could then be made that plaintiff is not prejudiced

⁶⁰ 6 MOORE ¶ 56.03.

⁶¹ N.C.R. CIV. P. 12(e).

⁶² N.C.R. CIV. P. 12(g) requires all motions, with a few exceptions, to be made together; otherwise they are waived.

⁶³ N.C.R. CIV. P. 12(e) refers to a compliant "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . ."

⁶⁴ N.C.R. CIV. P. 8(b) allows defendant to answer that "he is without knowledge or information sufficient to form a belief as to the truth of the averment . . ." and states that this form of answer will be treated as a denial. See 2A MOORE ¶ 8.22.

⁶⁵ See Comment, *The Revival of the Bill of Particulars under the Federal Civil Rules*, 71 HARV. L. REV. 1473 (1958); Comment, *Federal Rules of Civil Procedure—Federal Rule 12(e): Motion for More Definite Statement—History, Operation and Efficacy*, 61 MICH. L. REV. 1126 (1963).

⁶⁶ N.C.R. CIV. P. 12(e). Cf. Lodge 743, *International Ass'n of Machinists v. United Aircraft Corp.*, 30 F.R.D. 142 (D. Conn. 1962). The court in this case granted the 12(e) motion, but deferred plaintiff's addition to the pleading until after plaintiff's discovery. The case seems wrongly decided.

because he could have taken pre-complaint discovery and avoided the entire problem. But pleading under the new rules would thus become a mere extension of code practice. The only apparent method of avoiding this result is for the court to grant the 12(e) motion only when it would be granted in federal practice. An exception should be made for complaints following North Carolina forms (3) and (4). When these forms are used, the 12(e) motion should be granted in preference to a motion under 12(b)(6).

If a motion to dismiss is granted, there still exists the possibility of amendment (and relation back) under rule 15.⁶⁷ NCRCP 15(a) allows one amendment of right before service of the responsive pleading or, if there is no responsive pleading, within thirty days of service of the pleading to be amended.⁶⁸ Even though a motion to dismiss is not a responsive pleading,⁶⁹ amendment of right is generally cut off when the motion is granted.⁷⁰ The dismissed party must then request leave to amend from the court.⁷¹ The standard for granting leave to amend under NCRCP 15(a) is that it shall be "freely given when justice so requires."

In any case in which a complaint is dismissed because it lacks specificity under NCRCP 8(a)(1), justice does require that leave be granted; indeed, the federal courts interpret FRCP 15(a) to require the granting of leave to amend unless the plaintiff clearly can never amend to plead any state of facts upon which, if proven, relief might be granted.⁷² Even with free amendment, however, the best solution is to give the requirement of "notice" greater weight than the words "sufficiently particular" in new rule 8(a)(1). If this suggestion is followed, the complaint would not be dismissed in the first instance, and plaintiff would not be put to the uncertainty of requesting leave to amend and the expense of writing and filing the amendment. Yet dismissal with leave to amend is still preferable to the *res judicata* consequences of judgment of dismissal.

⁶⁷ N.C.R. Civ. P. 15.

⁶⁸ N.C.R. Civ. P. 15(a).

⁶⁹ 3 MOORE ¶ 15.07(2).

⁷⁰ *Swan v. Board of Higher Educ.*, 319 F.2d 56 (2d Cir. 1963); *Cassell v. Michaux*, 240 F.2d 406 (D.C. Cir. 1956). But some cases hold that plaintiff may amend as a matter of right after a motion to dismiss has been granted. *E.g.*, *Brieir v. Northern Calif. Bowling Proprietors Ass'n*, 316 F.2d 787 (9th Cir. 1963); *Fuhrer v. Fuhrer*, 292 F.2d 140 (7th Cir. 1961).

⁷¹ *Swan v. Board of Higher Educ.*, 319 F.2d 56, 61 (2d Cir. 1963).

⁷² *Foman v. Davis*, 371 U.S. 178, 182 (1962). The test is stated in *Alexander v. Pacific Maritime Ass'n*, 314 F.2d 690, 694 (9th Cir. 1963) to be whether "The complaint [can] under any conceivable state of facts be amended to state a claim."

If, however, a complaint is dismissed and leave to amend denied, the appellate courts should closely examine the trial judge's reasons for the denial⁷³ to determine if he has abused his discretion.⁷⁴ Only in this way can the appellate courts truly chart the course of the new North Carolina rules and insure that justice is done.

When plaintiff is granted leave to amend, the amendment will relate back to the time of the filing of the original pleading if the amended complaint gives "notice of the transactions, occurrences, or series of transactions or occurrences . . ." that are to be proved pursuant to the amended pleading.⁷⁵ This phraseology is intentionally designed to avoid distinctions between pleading a new cause of action and amplifying an old one.⁷⁶ Thus, even if the complaint is dismissed, but leave to amend is granted, plaintiff can amend with a new theory based on the same set of historical facts, and the amended complaint will relate back. Since defendant was already on notice from the first pleading as to what facts that the plaintiff was claiming as a wrong, he should not be surprised by the presentation of that same transaction or occurrence in a new form.⁷⁷

Since no reasons exist for not following the liberal precedent of the federal and New York courts, except in situations involving negligent operation of automobiles that are governed by specific forms in the new rules and since there is no compelling purpose in requiring specificity in pleading when other fact-interception and issue-formulation devices are provided, NCRCP 8(a)(1) should be interpreted to require no more specificity than FRCP 8(a)(2). Similarly, motions under 12(b)(6) should be granted in the same circumstances as they are in the federal

⁷³ North Carolina trial judges will be required to articulate reasons for refusing leave to amend under the amendment to N.C.R. Civ. P. 52(a). Ch. 895, § 12, [1969] N.C. Sess. L. —.

⁷⁴ Under North Carolina Code practice a trial judge has never been found to have abused his discretion in denying leave to amend. Louis, *The Sufficiency of a Complaint, Res Judicata and the Statute of Limitations—A Study Occasioned by Recent Changes in the North Carolina Code*, 45 N.C.L. Rev. 659, 674 & nn.83-84 (1967). The federal trial courts are closely regulated by the appellate courts on this point. The Supreme Court has stated:

Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion

Foman v. Davis, 371 U.S. 178, 182 (1962).

⁷⁵ N.C.R. Civ. P. 15(c).

⁷⁶ *Id.*, comment (c).

⁷⁷ *Id.*; see also F. JAMES, CIVIL PROCEDURE § 5.9 (1965).

courts. If, however, the courts of North Carolina determine that greater specificity is required by NCRCP 8(a)(1) than by FRCP 8(a)(2), the use of the 12(e) motion in place of the one under 12(b)(6) and the liberal allowance of amendments are recommended as methods of insuring a balanced and equitable system.

ROGER GROOT

Constitutional Law—Illegality of Police Program To Gather Information on Civil Disorders

In *Anderson v. Sils*¹ a New Jersey Superior Court held that a state-sponsored program of information-gathering about civil disorders and the participating groups and individuals was an unconstitutional infringement of the plaintiffs' rights of free speech and assembly. The state attorney general had ordered preparation of two forms for use by local police departments.

One, the "Security Incident Report Form," was designed to gather information on any "civil disturbance, riot, rally, protest, demonstration, march or confrontation," including "the names of organizations or groups involved, leaders, and the type of organization."² The "Security Sum-

¹ 106 N.J. Super. 545, 256 A.2d 298 (Super. Ct. 1969).

² *Id.* at 548, 256 A.2d at 300. An excerpt from the report's "instructions for preparation" illustrates its breadth:

9. TYPE OF INCIDENT—Enter the type of incident. EXAMPLES: Civil disturbance, riot, rally, protest, demonstration, march, confrontation, etc.
10. LOCATION—Type the location of the incident. If business or residence, the number and name of street, road, lane or avenue. If open area, give approximate distance to a known geographic location.
11. REASON OR PURPOSE OF INCIDENT—Enter reason for incident or alleged purpose.
12. NUMBER OF PARTICIPANTS—List estimated or announced number of participants or anticipated participants.
13. ORGANIZATIONS AND/OR GROUPS INVOLVED—Give full names and addresses of organizations and/or groups involved. If more space is needed, use Narrative.
14. LEADERS—Enter names, addresses and titles, if any, of leaders of organizations and/or groups involved. Include nicknames, aliases, and other identifying data.

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17. NARRATIVE

- a. Information previously included elsewhere on this report need not be repeated in the Narrative.