Campbell Law Review

Volume 15
Issue 2 *Spring 1993*

Article 1

2-29-2012

Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach

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Recommended Citation

Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 Campbell L. Rev. 119 (1993).

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Campbell Law Review

Volume 15 Spring, 1993 Number 2

ARTICLE

FUNCTIONS OF RULE 12(b)(6) IN THE FEDERAL RULES OF CIVIL PROCEDURE: A CATEGORIZATION APPROACH

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INTRODUCTION

Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the form and sufficiency of a statement of a claim under the liberalized pleading rule.[1] However, since the Federal Rules attempted to adopt the successes and avoid the failures of code pleading,[2] the purpose of Rule 12(b)(6) seems to conflict with the purpose of modern pleading.[3] Although the liberal pleading rule generally allows a plaintiff to set forth a claim in a short and plain statement,[4] Rule 12(b)(6) allows a court to dismiss a complaint before the development of the proceeding. The problem is when and how a Rule 12(b)(6) motion is to be granted. Although it has been said that a Rule 12(b)(6) motion is rarely granted,[5] the district court has granted a Rule 12(b)(6) motion and the court of appeals has reversed or vacated that grant in a considerable number of cases.[6] There are conflicting views on the interpretation of Rule 12(b)(6).

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1. FED. R. CIV. P. 12(b)(6).

2. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE, § 47, at 180 (1989).

3. It is said that only when the pleading fails to meet the liberal standard is it subject to dismissal under Rule 12(b)(6). 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356, at 296 (2d Ed. 1990). However, the notice pleading theory does not need a 12(b)(6) motion. At first, Judge Clark, a drafter of the Federal Rules, favored eliminating pleading motions altogether. Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L. J. 914, 927-28 (1976).

4. FED. R. CIV. P. 8 provides that a statement of a claim must be "simple, concise and direct, as positive, precise, and succinct as possible." See also 4 CEPLA AND PALMER, CYCLOPEDIA OF FEDERAL PROCEDURE, §14.160, at 248 (3d ed. 1986). Also, although Rule 9(b) provides that fraud must be pled with particularity, the courts have held that Rule 9(b) must be applied concurrently with Rule 8. *See, e.g.*, In re Longhorn Securities Litigation, 573 F. Supp. 255, 263 (W.D. Okla. 1983).

5. THOMAS E. WILLGING, USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS (Federal Judicial Center 1989).

6. *Id.* at 18.

First, the effect of a Rule 12(b)(6) motion is not clear. For example, it is not clear precisely what effect it has upon the application of res judicata.[7] Second, the standards and operation of Rule 12(b)(6) are not clear as to the determination of whether the motion should be granted or denied. In fact, commentators have observed that the semantic slipperiness of both the Rule and *Conley v. Gibson*[8] facilitated the revival of fact pleading.[9] Even the objective of Rule 12(b) (6) is not clear. The well-established doctrine has been, since *Conley*, that the objective of pleading is to give "notice." At the same time, the objective of Rule 12 is to expedite and simplify the pretrial procedures of federal litigation.[10] Can notice pleading allow the court to eliminate from consideration contentions that have no legal significance?[11] Arguing that the answer to this question is no, some commentators have suggested that the notice pleading rationale be abandoned.[12]

The Federal Rules and other statutes adopted various devices which have diminished the functions of Rule 12(b)(6).[13] Behind the policy there is a basic precept that "the primary objective of the law is to obtain a decision on the merits of any claim; and that a case should be tried substantially on the merits rather than technically on the pleading."[14] As actually occurs in many cases, the salvaged minutes that may accrue from circumventing these procedures can turn into wasted hours if the appellate court feels constrained to reverse the dismissal of an action.[15]

The conflict between liberalized pleading and these diminishing factors has generated two contrary directions; an attempt to use Rule 12(b)(6) more often, and an attempt to use Rule 12(b)(6) less often. Although both contrary directions might be rejected at the extremes, the problems they present remain to be resolved.

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7. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 369.

8. 355 U.S. 41 (1957).

9. David M. Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390, 419 (1980).

10. 5A WRIGHT & MILLER, *supra* note 3, § 1342, at 161.

11. JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE, § 5.2 at 239 (1985).

12. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 492 (1986).

13. *See, e.g.*, FED. R. CIV. P. 56 (summary judgment); 28 U.S.C. 1915(d)(1993)(allowing a court to dismiss a case if it is satisfied that the action is frivolous or malicious in a suit *in forma pauperis*).

14. Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 213 (9th Cir. 1957) (citing DeLoach v. Crowley's, Inc., 128 F.2d 378, 380 (5th Cir. 1942)).

15. *See, e.g.*, *Rennie & Laughlin Inc.*, 242 F.2d at 213.

One direction may be viewed as an attempt to maximize the functions of Rule 12(b)(6). This direction has sought to spur adoption of tougher pleading standards mainly in response to a perception of a litigation explosion in certain types of cases.[16] If this position prevails, the Rule 12(b)(6) motion will be used to dispose of an increasing number of cases, and its function will be strengthened. However, as some commentators suggest, the trend toward returning to fact pleading cannot be sustained in view of the notice theory of pleading.[17] Yet the fact remains that the content of modern pleading is questionable and, in addition, the language of the 1983 Amendment of Federal Rule of Civil Procedure 11 requires the pleading to show that it is "well grounded in fact."[18]

The other direction may be viewed as an attempt to minimize the function of Rule 12(b)(6). For example, Judge Clark advocated the ambitious objective of equating Rule 12 to Rule 56 or abolishing Rule 12 altogether.[19] Recently, a proposal to abrogate the current Rule 12(b) (6) motion appeared.[20] The Advisory Committee on Civil Rules considered the data in the Willging report at its April 1989 meeting and declined to abrogate the current Rule 12(b)(6).[21]

Should we view the Rule 12(b)(6) motion as an objectionable practice? More fundamentally, are there any significant functions of Rule 12(b)(6)? Although the current consensus is not clear, many commentators seem only to have confirmed liberalized pleading. Consequently, many commentators and courts appar-

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16. *See, e.g.*, Valley v. Maule, 297 F. Supp. 958, 960-61 (D. Conn. 1968). *See also infra* Part II-B-2.

17. *See, e.g.*, Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023 (1989); Marcus, *supra* note 12; Roberts, *supra* note 9; C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or A Step Back?*, 49 Mo. L. REV. 677 (1984).

18. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE, §3.13, at 163 (4th ed. 1992) and Wingate, *supra* note 17, at 690.

19. Smith, *supra* note 3, at 927.

20. In Advisory Committee on Civil Rules, Reporter's Discussion Draft, Rule 12 (Oct. 1988), Professor Carrington expressed that the purpose of the abrogation is to reduce the volume of motions practice that does not lead to termination of the case, and such practice is said to have experienced a revival that is associated with an increase in fact pleading. WILLGING, *supra* note 5, at 2.

21. WILLGING, *supra* note 5, at 3.

ently have given up analyzing the practices of Rule 12(b)(6). Instead, they see summary judgment as the mechanism by which unmeritorious cases should be disposed and Rule 11 as the device to prevent "sham" claims.[22] However, Rule 12(b)(6) may still have important functions. In fact, Rule 12(b)(6) is apparently used more than would be expected under the *Conley* standard.[23] Under Rule 12(b)(6), a plaintiff may not only lose the opportunity to participate in discovery, but also lose the right to present affidavits and reach the summary judgment stage if the complaint reveals an inadequate basis for the claim on its face.[24]

The purpose of this article is to clarify the function of Rule 12(b)(6) under liberalized pleading. To achieve this clarification, this article examines the functions of Rule 12(b)(6) by using a categorization approach. Before entering the categorization, the previous controversies over the two opposing directions should be also considered. Accordingly, the functions of Rule 12(b)(6) were researched by reviewing several fundamental questions concerning this obscure Rule. Under this theme, the following topics will be discussed:

(1) the objectives of pleading and Rule 12(b)(6),

(2) the current standards (including the so-called stricter view of pleading) and the desirable standards for a Rule 12(b)(6) motion under liberalized pleading,[25]

(3) the operation of Rule 12(b)(6),[26] and,

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22. FRIEDENTHAL ET AL., *supra* note 11, § 5.2, at 240-241 ("[T]he vast majority of American courts now operate under a flexible pleading system that relies heavily on other devices to aid in the delineation and control of litigation."). *See also* Preston G. Sutherland, *Fact Pleading v. Notice Pleading: The Eternal Debate*, 22 LOYOLA L. REV. 47 69-70 (1976); DeLoach v. Crowley's, Inc., 128 F.2d 378, 380 (5th Cir. 1942) ("expensive trials of meritless claims are sought to be avoided in the main by pretrial and summary judgment procedures").

23. Conley v. Gibson, 355 U.S. 41 (1957). *See also infra* notes 60-61 and accompanying text.

24. Jacob v. Curt, 898 F.2d 838, 839 (1st Cir. 1990).

25. The standards are applied at the final stage of Rule 12(b)(6) proceedings. The same standards are applied in the determination of Rule 12(c) motions for judgment on the pleadings. *See, e.g.*, United States v. Wood, 925 F.2d 1580, 1581 (7th Cir.1991); 2A JAMES WM. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 12.15, at 106 (2d ed. 1991); SHREVE & RAVEN-HANSEN, *supra* note 2, § 50 at 200 n.29. Therefore, the scope of this article generally covers the determination on the pleadings.

26. Although one important disposition of a Rule 12(b)(6) motion is conversion to a Rule 56 motion, the scope of this article is limited to pleading problems and as such it will not deal with the conversion.

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(4) the effects of Rule 12(b)(6) decisions on res judicata, amendment of the complaint, and appealability.

I. OBJECTIVES OF PLEADING AND RULE 12(B)(6)

A. *Modern Pleading Structure*

This chapter will briefly examine the objectives of modern pleading and Rule 12(b)(6). The Rule 12(b)(6) motion addresses itself solely to a failure to state a claim and is not designed to correct inartistic pleading or to force compliance with the Federal Rules.[27] Under modern pleading, issue narrowing, fact development and guidance, and screening of sham or insufficient claims or defenses are accomplished by discovery, pretrial conference, other screening motions, and other devices.[28] Professor Moore emphasized in his treatise that pleading need do little more than indicate generally the type of litigation.[29] Under this concept, to give "notice," in modern pleading, a plaintiff need only achieve two limited and simple objectives: to identify the matter in dispute, and to initiate the process of its solution.[30]

Under the Federal Rules, a pleading may simply be a general summary of the party's position which advises the other party and the court of the event being sued upon and provides some guidance[31] as to (i) what was decided for purposes of res judicata, (ii) whether the case should be tried to the court or to a jury,[32] and (iii) which statute of limitation is applicable to the action.[33] Also, a Rule 12(b)(6) motion may allow the defendant to postpone the an-

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27. 5A WRIGHT & MILLER, *supra* note 3, § 1356, at 296.

28. *See, e.g.*, SHREVE & RAVEN-HANSEN, *supra* note 2, § 47, at 180; FRIEDENTHAL ET AL., *supra* note 11, § 5.7, at 253; Blaze, *supra* note 17, at 942. *See also* 5A WRIGHT & MILLER, *supra* note 3, §§ 1201-1202 (regarding historical background); Sutherland, *supra* note 22, at 48-51; Fleming James, Jr., *The Objective and Function of the Complaint/Common Law-Codes-Federal Rules*, 14 VAND. L. REV. 899 (1961).

29. 2A MOORE & LUCAS, *supra* note 25, ¶ 8.03, at 8-10.

30. Blaze, *supra* note 17, at 944.

31. A litigant cannot prepare for trial and the court cannot control an action unless they know the nature of the parties' allegations. FRIEDENTHAL ET AL., *supra* note 11, § 5.2, at 239; JAMES ET AL., *supra* note 18, § 3.1, at 138.

32. 5A WRIGHT & MILLER, *supra* note 3, § 1202, at 69; 2A MOORE & LUCAS, *supra* note 29, ¶ 8.13, at 8-61.

33. SHREVE & RAVEN-HANSEN, *supra* note 2, §47[B], at 184. By commencing the action, pleading operates to toll the statute of limitations. Blaze, *supra* note 17, at 944.

swer to a complaint.[34] These are important functions, but they do not seem to be essential because they do not tend to affect the outcome of the dispute itself.

Labeling the objective of Rule 12(b)(6) as giving "notice" does not resolve various problems regarding Rule 12(b)(6).[35] Also, bare "notice" of a claim is too scant, cloudy, or irrelevant.[36] While one theory requires "full notice of all of factual particulars," another theory requires general notice of the claim to put the adversary on guard.[37] It has been said that the pleading should be only a general guide under the latter position,[38] but it is not clear what is meant by "general guide." In any event, the statement must be "more than a mere hint of a claim."[39]

As a drafter of the Federal Rules has suggested, a plaintiff is required to allege some factual details in order "to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it."[40] Mere emphasis of "notice" may encourage the defendant to delay answering; because if the defendant answers, the questionable complaint may be deemed to satisfy the notice requirement.[41] Accordingly, if the defendant answers, he may lose the right to a dismissal at the pleading stage. However, the defendant is allowed to file a motion for judgment on the pleadings after a responsive pleading.[42] Accordingly, the pleading must have objectives other

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34. *See, e.g.*, Brown v. Crawford County, 960 F.2d 1002, 1010 (11th Cir. 1992) (pointing out that a Rule 12(b)(6) motion preempts the necessity of a defendant's filing an answer until the motion is decided by the district court).

35. 5 WRIGHT & MILLER, *supra* note 3, § 1202, at 72; ("At best it leads to confusion . . . At worst it has caused unnecessary criticism of the rules . . . "); Blaze, *supra* note 17, at 943 ("Standing alone the term 'notice' is imprecise. Notice of what, to whom, and most importantly, for what purpose?").

36. 4 CEPLA & PALMER, *supra* note 4, § 14.164, at 254.

37. Sutherland, *supra* note 22, at 48.

38. FRIEDENTHAL ET AL., *supra* note 11, 5.2, at 240.

39. 4 CEPLA & PALMER, *supra* note 4, § 14.164, at 254.

40. Naglar v. Admiral Corp., 248 F.2d 319, 324 (2d Cir. 1957).

41. In denying a 12(b)(6) motion, courts have supported their decision with the fact that the defendant was able to answer. *See, e.g.*, In re Longhorn Securities Litigation, 573 F. Supp. 255, 264 (W.D. Okla. 1983)("[T]he complaints were specific enough to permit the defendants to frame their responsive pleading; indeed, they have already answered.").

42. Technically, a post-answer Rule 12(b)(6) motion is untimely and some other vehicle, such as a Rule 12 (c) motion, must be used to challenge the failure to state a claim for relief. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 300-301. However, since Rule 12(h)(2) provides that the defense of failure to state a claim

than "notice."

Originally, the de-emphasis of pleading and the postponement of fact development until after discovery had two important purposes. One was to deny defendants the tactical use of the demurrer.[43] The notice theory was designed to eliminate needless battles over form or technicalities which delayed a trial on the merits or in some cases resulted in the loss of a meritorious claim.[44] The other purpose was to provide pleaders with a reasonable opportunity to obtain proof of their allegations before confronting a challenge on the merits.[45] Thus, under simplified pleading, cases were expected to "turn on their substantive merits rather than on the lawyers, technical and tactical skills, as had been the case under the common law system."[46]

However, these purposes do not exclude other objectives, such as eliminating narrowing issues concerning substantive law or sufficiency of the complaint which would promote a resolution on the merits, or disposing of an unmeritorious claim. Some limited and fair requirements of pleading will not harm the purposes of liberalized pleading. And, since the policy of the 1983 Amendment of Rule 11 requires that the pleading be "well grounded in fact," Rule 11 might implicitly change the pleading rule.[47]

Generally speaking, the pleading process allows "the elimination from consideration of contentions that have no legal significance.[48] On the other hand, the purpose of a motion to dismiss "for failure to state a claim upon which relief can be granted" is to test the formality of a statement of a claim for relief, that is, the legal

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may be granted may be advanced in a motion for judgment on the pleadings under Rule 12 (c). The court may treat the motion after the answer as if it had been styled a Rule 12 (c) motion. *See, e.g.*, Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990).

43. Louis, *supra* note 17, at 1032.

44. See 2A Moore, *supra* note 25, ¶ 8.01, at 8-7.

The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. *Id.* (quoting Advisory Committee Report of October 1955).

45. Louis, *supra* note 17, at 1032.

46. FRIEDENTHAL ET AL., *supra* note 11, § 5.1, at 237-238.

47. *See infra* part II-B-6.

48. FRIEDENTHAL ET AL., *supra* note 12, § 5.2, at 239.

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sufficiency of the complaint.[49] At the least, Rule 12 attempts "to expedite and simplify the pretrial phase of federal litigation while at the same time promoting the just disposition of cases."[50] Early resolution on the merits is also an important objective of the Rule 12(b)(6) motion.[51] In other words, Rule 12(b) (6) is viewed as one of the basic pretrial interception/discouragement mechanisms in the Federal Rules.[52] Accordingly, the general purposes of pleading and Rule 12(b)(6) are not only to give "notice," but also to resolve or screen out some unmeritorious cases at the pleading stage.

The Federal Rules also adopted other means to accomplish functions similar to that of Rule 12(b)(6). For example, Rule 12(c) and 12(f) motions raise the same issues raised by a motion under Rule 12(b)(6),[53] and are dealt with by the courts in the same manner. An attempt to eliminate or strike improper or redundant matter from the complaint should be made under Rule 12(f). Also, if a party wishes to attack a defense, he should move under Rule 12(f), which provides for the striking of "any insufficient defense."[54] In this regard, Rule 12(b)(6) does not work solely against plaintiffs, but can work in conjunction with Rule 12(f) in favor of both parties. Thus, the policy behind Rule 12(b)(6) may be sustained. Insofar as the Federal Rules are designed to have Rule 12(b)(6) play an important role, the standards for its operation should be effectively and clearly articulated.

B. Balance of Interests

How can resolving certain cases at the pleading stage be justified? Rule 12(b)(6) is designed to test pure questions of law on the face of the complaint. The rules aspire to "doing justice as well as

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49. International Bank of Miami v. Banco de Economias y Prestamos, 55 F.R.D. 180, 185 (D.P.R. 1972).

50. 5A WRIGHT & MILLER, *supra* note 3, § 1342, at 161; *Cf.* SHREVE & RAVEN-HANSEN, *supra* note 2, § 47, at 181.

51. Marcus, *supra* note 12, at 492.

52. Louis, *supra* note 17, at 1033.

53. Although 28 U.S.C. § 1915(d) also seems to serve similar functions to Rule 12(b)(6) , the Supreme Court has held that the standard of §1915(d) is stricter than that of Rule 12(b)(6). Neitzke v. Williams, 490 U.S. 319, 330 (1989)("A complaint filed *in forma pauperis* is not automatically frivolous within the meaning of §1915(d) because it fails to state a claim.").

54. 5A WRIGHT & MILLER, *supra* note 3, § 1356, at 298 (citing FED. R. CIV. P. 12(f)).

fair notice."[55] Although Rule 12(b)(6) motions may be intended to do justice, the nature of this "justice" is not always clear. Moreover, if the court wishes to fully achieve this purpose, a "short and plain statement" may be too short.

Although all proceedings should be conducted in light of Rule 1, the notice pleading theory and Rule 12(b)(6) are ultimately designed to protect different interests. While notice theory allows broader access to trial for a plaintiff, Rule 12(b)(6) is designed to limit the use of civil procedure to protect judicial economy and defendants' interests. Insofar as the court can decide the case on the face of the complaint, pretrial disposition should be granted, because it may allow a speedier and less expensive resolution. On the other hand, the parties should be given enough opportunity to proceed with their own claims. Accordingly, doing justice requires balancing between speedy and inexpensive decisions and an adequate opportunity to present a claim.

From another point of view, "justice" can be broken down into "substantive justice" and "procedural justice." In "substantive justice," we must look to substantive laws or policy, and in "procedural justice," we must consider procedural laws or policy. Procedural policy supports fair, speedy and inexpensive measures.[56] Under this policy, the plaintiff must show good faith to seek legal relief. In this regard, the applicable standard is suggested in Rule 8(a), which requires that a pleading contain a statement of the claim showing that the pleader is entitled to relief.[57] There is some question as to what Rule 8(a) requires. Even if the plaintiff is substantively entitled to a legal remedy, he may lose his right if he misuses or abuses procedure, i.e. if he fails to comply with Rule 8(a) requirements.

Disputes raised by a plaintiff can be classified as follows:

(1) disputes in which the plaintiff is substantively entitled to a legal claim, (2) disputes in which it is not clear whether the plaintiff is substantively entitled to a claim due to legal or factual ambiguity, and (3) disputes in which the plaintiff is not legally entitled to any claim, but plaintiff sued because of an expectation for an unjust settlement, a misunderstanding of substantive laws, or other inappropriate reasons.

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55. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS, § 68, at 440 (1983).

56. FED. R. CIV. P. 1.

57. 27 FEDERAL PROCEDURE, L. ED., § 62:464 at 575 (THOMAS G. GOGER ed., 1984).

Even case (3) may not be dismissed under the modern notice pleading, if the plaintiff stated a claim sufficiently in the complaint. But if the statement of a claim was not sufficient, it is easy to understand dismissal of such cases. On the other hand, under modern civil procedure, cases (1) and (2) should not be dismissed at the pleading stage in accordance with the liberalized pleading concept. Yet, in some exceptional circumstances even cases (1) and (2) may be dismissed when the plaintiff misuses or abuses the procedures.

The standards for the operation of Rule 12(b)(6) must be articulated so as to disfavor dismissal of cases (1) and (2),[58] and to favor dismissal of type (3) cases. The objectives of pleading and Rule 12(b)(6) should include (i) eliminating some cases among (3), and (ii) guaranteeing an opportunity to reach further proceedings for certain cases in (1) and (2).

II. STANDARDS OF RULE 12(B)(6)

A. *Modern Pleading Standards*

In *Conley v. Gibson*,[59] the Supreme Court stated that the 12(b) (6) motion must not be granted "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."[60] Although many courts have cited the *Conley* standard, which appears to preclude dismissal in a close case, it is not clear whether a Rule 12(b)(6) motion is properly granted or not in a close case. Some commentators suggest several factors to be considered.[61] Relying upon these factors and the vague language in *Conley*, many courts and commentators have proposed various standards too numerous to list.

The standard is further obscured by the lack of any attempt in the Federal Rules to distinguish between "fact" and "legal conclusion,"[62] and the general philosophy of notice pleading rejecting as

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58. FRIEDENTHAL ET AL., *supra* note 11, § 5.8, at 255, present the question of how the courts can prevent meritorious claims and defenses from being lost through technical errors of procedure.

59. Conley v. Gibson, 355 U.S. 41 (1957).

60. *Id.* at 45-6.

61. *See, e.g.*, JAMES ET AL., *supra* note 18, § 3.9, at 153-154. Also, it should be considered whether Rule 84 and Appendix of Forms correspond to the standard. FRIEDENTHAL ET AL., *supra* note 11, § 5.7, at 254; WRIGHT, *supra* note 55, § 68, at 440; CEPLA & PALMER, *supra* note 4, §14.160, at 248.

62. *See, e.g.*, JAMES ET AL., *supra* note 18, § 3.6, at 145.

unworkable the distinction between "ultimate facts" and "legal conclusions."[63] Although facts can be supplemented by such reasonable inferences as may be drawn in plaintiff's favor,[64] the courts have distinguished between required "fact" and insufficient "legal conclusions" in deciding Rule 12(b)(6) motions.[65] This distinction might be made against the interests of a plaintiff. Thus, it is not clear what is required of well pleaded facts or allegations,[66] and how such reasonable inferences are drawn. As a result, modern pleading and code pleading have been afflicted with similar problems.[67]

The various and vague standards and the difficulty of distinguishing between required "fact" and insufficient "legal conclusions" have caused great confusion and ambiguity in Rule 12(b)(6) motion practice.[68] The existing pleading standards are "too ambiguous to prevent a creeping revival of fact pleading as the favored procedural device."[69] Even though the notice theory was a response to the technical rigidity and procedural manipulation which fact pleading had fostered,[70] colorable standards seem to allow procedural manipulation by lawyers.[71] Although dilatory tactics were in-

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63. WRIGHT, *supra* note 55, § 68, at 441.

64. *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 322 (1972); SHREVE & RAVEN-HANSEN, *supra* note 2, § 50, at 200; 2A MOORE & LUCAS, *supra* note 29, ¶ 12.07, at 12-63; Sutherland, *supra* note 22, at 67.

65. In deciding a 12(b)(6) motion, courts have said that they accept the truth of "facts," "material facts," "well-pleaded facts," and "well-pleaded allegations," but they do not accept "legal conclusions," "footless conclusions of laws" or "sweeping legal conclusions cast in the form of factual allegations." 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 311-318.

66. Some commentators contend that the distinction is not one between separate legal concepts; rather "the distinction is one between generality and particularity in stating the transaction sued upon." 2A MOORE & LUCAS, *supra* note 29, ¶ 8.12, at 1684. However, generality and particularity cause different legal effects.

67. Marcus, *supra* note 12, at 438("Under the Field Code, there were real problems with the codifier's reformation of pleading rules in that they invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusion (improper).").

68. The modern pleading rule had generated great confusion as to alleging the required "ultimate facts" while avoiding forbidden "conclusions" and "mere evidence." Marcus, *supra* note 12, at 433.

69. Roberts, *supra* note 9, at 420.

70. Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

71. For example, the fact manipulation of pleading principles might divert the courts from formulating a comprehensive and workable approach to standing. Roberts, *supra* note 9, at 436.

tended to be eradicated by Rule 12,[72] the ambiguous standards applied to 12(b)(6) motions have allowed some dilatory tactics. Similarly, this ambiguous standard might prevent efficient applications of Rule 11 sanctions.[73]

Another problem, perhaps the most controversial, is the requirement of particularized fact pleading in certain "disfavored" actions. Several courts of appeals have made it clear that the same liberal standard that applies in ordinary litigation should be applicable to the so-called "big case."[74] Nevertheless, in certain "disfavored" actions, many courts have tried to dispose of many cases, including "big cases," by using different standards.[75]

Additionally, some courts of appeals have used standards different from the district courts' standards. For example, according to Willging's research,[76] though a conceivable set of facts was alleged in support of each essential element in eight cases researched 1986 through 1988, the district courts granted Rule 12(b)(6) motions. The courts of appeals reversed or vacated that grant in all eight cases.[77] Moreover, the Second and Third Circuits have ex-

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72. 5A WRIGHT & MILLER, *supra* note 3, § 1342, at 163.

73. The current interpretations of the amended Rule 11 requirements may conflict with the liberalized pleading requirement of the Federal Rules by demanding greater specificity of allegations and by discouraging the pleading of a novel legal theory. Carl Tobias, *Rule 11 and Civil Rights Litigation,* 37 BUFF. L. REV. 485, 493-95 (1988/89); Georgene M. Vairo, *Rule 11: A Critical Analysis,* 118 F.R.D. 189, 197-232 (1988); Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions,* 100 HARV. L. REV. 630 (1987).

74. *See, e.g.,* Nagler v. Admiral Corp., 248 F.2d 319, 324 (2d Cir. 1957); WRIGHT, *supra* note 55, § 68, at 446.

75. *See, e.g.,* Associated General Contractors of California, Inc. v. California State Council of Carpenters, 495 U.S. 519, 529, n.17 (1987) (noting that a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed). Some commentators view this decision as a shift toward more particularized pleading in antitrust litigation. See, e.g., Edward Brunet and David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts,* 72 VA. L. REV. 1015, 107 (1986) ("The Supreme Court has yet to establish a general norm requiring fact-specific antitrust pleading, but there is every indication of evolution toward such a norm."). Brunet and Sweeney also point out that the Manual for Complex Litigation, Second (1985) seems inconsistent with the spirit of notice pleading. *Id.* at 1066-67.

76. WILLGING, *supra* note 6, at 18.

77. *Id.* Willging points out that these actions would represent a tendency on the part of district courts to require fact pleadings and a tendency on the part of circuit courts to resist that trend. *Id.*

pressed an exception to normal federal pleading standards, and this is recognized to varying degrees in most other circuits.[78] It has also been noted that in certain classes of cases a large segment of the federal judiciary now systematically applies very strict pleading standards which are at odds with the *Conley* standard and Rule 8(a).[79] Thus, the confusion about standards exists not only at the district court level but also at the appellate court level. Accordingly, the problem with the standard of Rule 12(b)(6) is how to remove the ambiguity of the standard, how to resolve the fact-conclusion distinction problem, and how to deal with the stricter views of pleading. In order to consider the first two questions, the stricter views of pleading will be briefly examined next.

B. *Stricter Views of Pleading*

It has been said that the apparent revival of special fact pleading requirements for disfavored actions suggests that 12(b)(6) motions may be effective in this significant subset of cases.[80] Traditionally disfavored causes of action include malicious prosecution, libel, and slander.[81] Additionally, many commentators have noted that civil rights cases, securities claims, conspiracy, and disfavored litigants (the repeat player, the disfavored lawyer, the poor) are subject to stricter standards.[82] These strict pleading rules have been criticized as a "revival of fact pleading,"[83] and a number of federal courts have refused to adopt a special pleading rule in civil rights cases.[84]

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78. See Roberts, *supra* note 9, at 418.

79. *Id.* at 419.

80. SHREVE & RAVEN-HANSEN, *supra* note 2, § 50, at 197.

81. In these cases some courts tend to construe the complaint by a somewhat stricter standard and are more inclined to grant a Rule 12(b)(6) motion to dismiss. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 359.

82. In certain matters, the Federal Rules require special pleading. Also, in other proceedings, some statutes necessitate fact pleading due to their own policy. However, the commentators have roundly rejected the formalistic argument that Rule 9(b) erects a special regime immune to the liberal pleading approach of Rule 8. Marcus, *supra* note 12, at 447. The courts have noted that Rule 9(b) requires only that the "circumstances" of the fraud be set forth; it does not revive the requirement that "fact" be pleaded. FRIEDENTHAL ET AL., *supra* note 12, § 5.9, at 257.

83. *See, e.g.*, Marcus, *supra* note 12; Wingate, *supra* note 17; Blaze *supra* note 17.

84. *See, e.g.*, U.S. v. Gustin-Bacon Div., 426 F.2d 539, 542 (10th Cir. 1970); Gobel v.Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989); Elliott v. Bronson,

Some courts have suggested that the stricter standard of pleading was merely an application of the fair notice standard to civil rights cases.[85] For example, in *United States v. City of Philadelphia*,[86] the Third Circuit stated "[t]he rule is well established in this circuit that a civil rights complaint that relies on vague and conclusory allegations does not provide 'fair notice', and will not survive a motion to dismiss."[87] Also, in *Colburn v. Upper Darby Township*,[88] the court stated "[tlhe heightened specificity requirement for § 1983 claims does not alter the general standard for ruling on motions to dismiss under Rule 12(b)(6)."[89]

However, piecemeal modification itself has various problems such as whether such strict pleadings are compatible with the rules[90] and in what kinds of cases?[91] Even Though pro se inmate civil rights complaints seem to be less likely to prevail than formal pleadings drafted by lawyers, the Supreme Court held, in *Haines v. Kerner*,[92] that pro se inmate civil rights complaints are to be measured against "less stringent standards than formal pleadings drafted by lawyers."[93] If pro se civil rights cases are to be judged less stringently, it is illogical for a court to use stringent standards in civil rights cases brought by lawyers simply because the claim is not likely to prevail. Commentators have put forth several rationalizations supporting strict pleading. Each will be dealt with in turn.

1. *Reasons From Substantive Law or Policy*

Although some substantive laws or policies might influence procedural laws,[94] procedural rules should not be changed without modification of the procedural laws. For example, the Ninth Cir-

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872 F.2d 20, 22 (2d Cir. 1989).

85. Wingate, *supra* note 17, at 687.

86. 644 F.2d 187 (3d Cir. 1980).

87. *Id.* at 204.

88. 838 F.2d 663 (3d Cir. 1988).

89. *Id.* at 666.

90. Piecemeal modification seems to violate the Federal Rules, which specifically adopt a few such special pleading requirements in Rule 9 and supposedly govern the rest of pleading through the liberalized standard of Rule 8. *See* Louis, *supra* note 17, at 1037.

91. *Id.* ("Such common-law implementation, however, would obviously be controversial, random and uncertain.").

92. 404 U.S. 519, (1972).

93. *Id.*, at 520,. *Cf. infra* notes 114-116 and accompanying text.

94. *See, e.g.*, JAMES ET AL., *supra* note 18, § 3.9, at 154.

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cuit has adopted a special pleading rule in cases involving activity arguably protected by the First Amendment.[95] However, as Marcus suggests, insistence on greater specificity in pleading to protect general first amendment interests is misguided.[96] Such interests should be protected by legislative laws, not by judicial modification of procedural laws, because issues relating to the First Amendment and other serious policies often involve sensitive conflicts with other interests. Since substantive law or policy is best addressed by the legislature, not by the judiciary. Specificity or particularity of pleading as a requirement for remedies should also be controlled by the legislature.[97] The judiciary is not the appropriate branch to decide to what degree a specific interest should be protected.

Some courts have suggested reasons that substantive laws may change the pleading rules. For example, in *Taylor v. Bear Stearns & Co.*,[98] the court stated "there are many sound reasons for requiring that, like fraud, [a claim under RICO] must be pled with particularity."[99] The court first reasoned that the mere invocation of RICO has such an in terrorem effect that it would be unconscionable to allow it to linger in a suit and generate suspicion and unfa-

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95. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1083-85 (9th Cir. 1976). In this case, the court stated that they would not adopt so-called "fact" pleading distinguished from "notice" pleading, but it also stated, "the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegation than would otherwise be required." *Id.* However, the requirement of a specific allegation amounts to "fact" pleading under modern pleading procedures.

96. Marcus, *supra* note 12, at 447.

97. *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989) ("RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court"). *Cf.* Wingate, *supra* note 18, at 692 ("[Nleither the Advisory Committee, the Supreme Court, nor Congress concluded that such [a strict] approach was required except in regard to allegations of fraud or mistake.").

98. 572 F. Supp. 667 (N.D. Ga. 1983).

99. *Id.* at 682. RICO generally makes it unlawful for any person employed by, or associated with, an enterprise to conduct or participate in the conduct of the enterprise's affairs through "a pattern of racketeering activity. 18 U.S.C. §§1961-1968 (1988). The statute defines a "pattern of racketeering activity" to be at least two acts of racketeering activity within ten years of each other. *Id.* "Racketeering activity," in turn, is defined to include offenses such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, drug dealing and obstruction of justice as well as mail fraud, wire fraud and fraud in the sale of securities. *Id. See generally* Marcus, *supra* note 12, at 460-462; Committee on Federal Courts of the New York State Bar Association, *The Pattern of Racketeering Element of RICO Liability*, 6 TOURO L. REV. 281, 283-284 (1990).

vorable opinions of the putative defendant unless there is some articulable factual basis.[100] The court secondly reasoned that the concepts within RICO are so nebulous that if the cause of action were only generally pled, a defendant would have no effective notice of a claim showing that the pleader is entitled to relief.[101] Therefore, the court concluded that a complaint alleging a RICO violation, like a complaint alleging fraud, should be filed only after a wrong is reasonably believed to have occurred, and that it is necessary that either a prior conviction or probable cause be alleged with reference to the predicate acts.[102] However, if these justifications for particularity are valid, the court would be able to use the stricter standards in many cases, because many civil disputes have some in terrorem effect, and any substantive law includes some nebulous areas. Since Rule 9(b) could be applied to allegations of fraud in a RICO claim,[103] additional special requirements were not necessary. Even a strict approach to pleading fraud under Rule 9 has been criticized because the particularity requirement inefficiently serves its underlying purposes, it impedes the litigation of legitimate claims, and it fails to comport with the policy and structure of the Federal Rules.[104]

In alleging misstatement for fraud, fairly precise allegations concerning the nature, time, place, manner and author of a misstatement are typically available to the plaintiff without need for discovery and are usually not subject to the claim that it is peculiarly within the defendant's knowledge.[105] However, in alleging the elements for a RICO claim, a plaintiff may not be able to know the facts adequately.[106] Accordingly, it is not appropriate to require more particularized allegations or other elements for a RICO claim. In summary, the legislature was free to adopt special pleading

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100. 572 F. Supp. at 682.

101. *Id.*

102. *Id.* at 682-683.

103. *See, e.g.*, Graue Mill Dev. Corp. v. Colonial Bank & Trust Co. of Chicago, 927 F.2d 988, 992 (7th Cir. 1991); Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989); Randy M. Mastro et al., *Private Plaintiff's Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J. L. REF. 571, 627-28 (1991).

104. Richard G. Himelrick, *Pleading Securities Fraud*, 43 MD. L. REV. 342, 345 (1984).

105. *Id.* at 353.

106. *See, e.g.*, Jennings v. Emry, 910 F.2d 1434, 1439-40 (7th Cir. 1990) (dismissing a RICO complaint because it did not adequately allege an enterprise of the defendants upon which the court's attention should be directed).

rules under RICO and did not. The court thus does not have legitimate reason to step in and impose a special pleading rule beyond the Federal Rules.

The Supreme Court has taken the position that substantive policy or law should not influence the pleading rules. For example, in *Sedima, S.P.R.L. v. Imrex Co.*,[107] the Supreme Court rejected the Second Circuit's efforts to construct new elements for a RICO claim.[108] Similarly, in *H.J. Inc. v. Northwestern Bell Tel. Co.*,[109] the Supreme Court reversed and remanded the dismissal decision of the court below by refusing to narrow the application of civil RICO.[110] Also, in *Haines v. Kerner*,[111] the Supreme Court reversed and remanded a dismissal decision[112] because allegations such as those asserted by the petitioner, however inartfully pleaded, were sufficient to call for the opportunity to offer supporting evidence, regardless of the disciplinary policy in prison.[113]

Therefore, unless there are specific pleading requirements contained in the relevant statute or the Federal Rules,[114] the courts should not impose special pleading rules. As Professor Marcus concluded, the substantive law often simply does not support development of the kind of separable issues that could be used to winnow

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107. 473 U.S. 479, (1985).

108. *Id.* at 496. A violation of §1962(C) of RICO requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Id.* The court required the plaintiff to allege each of these elements to state a claim.

109. 492 U.S. 229 (1989).

110. *Id.* at 249. *See also*, Committee on Federal Courts of the New York State Bar Association, *supra* note 99, at 290-94.

111. 404 U.S. 519 (1972) (*per curiam*).

112. The district court had dismissed the claim because only under exceptional circumstances should courts inquire into the internal operations of state penitentiaries, and the court of appeals affirmed by emphasizing that prison officials are vested with broad discretion in disciplinary matters. *Id.* at 521.

113. *Id.* at 520 ("Petitioner's *pro se* complaint included general allegations of physical injuries suffered while in disciplinary confinement and denial of due process in the steps leading to that confinement. The claimed physical suffering was aggravation of a preexisting foot injury and a circulatory ailment caused by forcing him to sleep on the floor of his cell with only blankets.").

114. *E.g.* FED. R. CIV. P. 9(b). FED. R. CIV. P. 23.1 also imposes special pleading requirements on derivative actions but Rule 23.1 is procedural only, and does not supply the substance of the demand requirement. *See* Kamen v. Kemper Fin Serv., Inc., 111 S. Ct. 1711, 1716 (1991); In re BankAmerica Securities Litigation, 636 F.Supp. 419, 421 (C.D. Cal. 1986)("[Tlhis sufficient particularity requirement is consistent with the analysis employed by federal courts under the analogous particularity requirements [of Rule 9(b)]").

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cases at the pleading stages.[115]

2. *Explosion of Litigation*

The recent explosion of litigation in the United States tends to encourage the stricter views of pleading procedure. Some commentators point out that the movement toward stricter pleading requirements started with the explosion of civil rights cases in the 1960s.[116] In *Valley v. Maule*,[117] the court cited the fact that there were "an increasingly large volume of cases brought under the Civil Rights Acts," to jusitfy an exceptional pleading rule for civil rights cases.[118] However, the explosion of litigation is not an evil phenomenon by itself. The real cause of civil rights actions may very well have been problems in prison practices. In fact, in 1960, there was concern about a decline in litigation.[119]

Although the explosion might be a motive to restrict access to courts, such a phenomenon cannot justify special pleading rules.[120] The notice theory of pleading might cause an increase in the amount of litigation.[121] However, objective evidence linking the explosion of litigation with notice pleading theory is problematic, because there are many other causes for increased litigation, such as the increased number of lawyers and the introduction of new statues. In fact, some commentators believe that the cause of the virtual explosion of civil RICO cases is substantive in nature - treble damages, attorneys' fees shifting and other factors favoring prospective plaintiffs.[122] Accordingly, whether notice pleading was the main cause of the explosion of litigation is questionable.

3. *Judicial Economy For Public Interests*

Stricter views of pleading may serve the public interest by preventing unnecessary litigation.[123] However, stricter views are

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115. Marcus, *supra* note 12, at 462.

116. Blaze, *supra* note 17, at 935-937.

117. 297 F. Supp. 958 (D.Conn. 1968).

118. *Id.* at 960-61.

119. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 9 (1983).

120. *See, e.g.*, Wingate, *supra* note 17, at 691.

121. Marcus, *supra* note 12, at 436, 450.

122. Committee on Federal Courts of the New York State Bar Association, *supra* note 99, at 284.

123. *Cf.* JAMES ET AL., *supra* note 18, §3.10, at 155.

not always useful in achieving these goals. Some commentators point out that efforts to use stricter views of pleading usually result only in a waste of time and much longer pleading, without any corresponding gain.[124] In *Nagler v. Admiral Corp.*,[125] Judge Clark expressed "fears that fact-specific antitrust pleading would lead to bulkier complaints and an unnecessary increase in pretrial motions directed at pleading technicalities."[126]

Also, administrative efficiency should not be bought at the cost of substantive injustice to the individual.[127] Rather, administrative efficiency should be achieved through legislative action.[128] Courts should be sensitive to public interests in judicial functions. However, since the interests of the public may impact upon the interests of plaintiffs as they are affected by pleading requirements, the balancing of these interests should be made by legislation, not by judicial modification of procedural laws.

4. *Constitutional Limitations on Judicial Functions*

Some limitations on the function of the judiciary lie in the Constitution. For instance, Article III cryptically restricts the federal judicial power to "cases" and "controversies."[129] Now known as the requirement of standing, this is the threshold question in every federal case, determining the power of the court to entertain the suit.[130] After *United States v. Student Challenging Regulatory Agency Procedures*,[131] the court began to move away from the liberal *Conley* rule in the pleading of standing.[132] However, Roberts

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124. WRIGHT, *supra* note 55, § 68, at 446.

125. 248 F.2d 319 (2d Cir. 1957).

126. Brunet and Sweeney, *supra* note 75, at 1068 (citing *Nagler*, 248 F.2d at 322-27).

127. JAMES ET AL., *supra* note 18, § 3.10, at 155.

128. *Id.* ("The Federal Rules are designed to ensure wider opportunity to develop a case by the adoption of general pleadings, and the contribution that detailed pleadings can make toward administrative efficiency is limited.").

129. Roberts, *supra* note 9, at 392.

130. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1974) (stating that it is within the court's powers to allow or to require the plaintiff to supply "further particularized allegation of fact deemed supportive of plaintiff's standing" by amendment to the complaint or affidavits).

131. 412 U.S. 669 (1973).

132. James E. Brown, Note, *Civil Procedure - Standing and Direct Review in Appellate Court* - Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1332 (D.C. Cir. 1986)., 60 TEMP. L.Q. 1045, 1056-57 (1987). *See also, Id.* at 1059, ("The Supreme Court's opinions reveal that to estab-

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concluded that no pleading standard, fact or notice, can effectively screen cases on standing grounds, because substantive standing doctrine is too convoluted, emphasizing ambiguous concepts whose resolution requires a fully developed evidentiary record.[133] Rather, the court is responsible for the resolution of civil disputes on the merits, and it is desirable to open the forum as much as possible. This was the original policy of modern pleading.

5. *Quick Resolution in the Interests of Defendants*

The judiciary may use more stringent pleading rules to prevent strike suits and protect the interests of defendants.[134] Certainly, the court may favor a policy of preventing strike suits. For instance, *Blue Chip Stamps v. Manor Drug Stores*,[135] the Supreme Court pointed out that the risk of strike suits is particularly high in cases that are difficult to prove at trial, and thus, are even more difficult to dispose of before trial.[136] In another example of a court acknowledging the possibility of a groundless "strike suit," the Second Circuit observed that, in the context of securities litigation, Rule 9(b) "operates to diminish the possibility that a plaintiff with a largely groundless claim [will be able] to simply take up the time of a number of other people [by extensive discovery], with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence."[137]

However, stricter views of pleading are not necessarily appropriate ways to protect defendants' interests. Instead, the resolution might better be achieved through a clearer Rule 12(b)(6) standard. Although there may exist "an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation,"[138] screening securities or civil rights cases by means of strict pleading rules is difficult.

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lish standing under Article III, a plaintiff must make factual allegations sufficient to establish injury in fact, causation, and redressibility.").

133. Roberts, *supra* note 9, at 430.

134. *See, e.g.*, JAMES ET AL., *supra* note 18, § 3.6, at 148-49.

135. 421 U.S. 723, (1975).

136. *Id.* at 740-41. *See also* Marcus, *supra* note 12, at 443, 479.

137. Ross v. A.H. Robins Co., 607 F.2d 545, 547 (2d Cir. 1979).

138. Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976)(citing Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968).

6. Rule 11

The language of the 1983 Amendment of Rule 11 requires the pleading to be well grounded in fact.[139] Rule 11 may be a good reason to support the stricter view of pleading rather than "notice" pleading, or it may facilitate the revival of fact pleading. The Advisory Committee's 1955 Report states:

> [T]hat Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated not only by the form appended to the rules showing what should be considered as sufficient compliance with the rule, but also by other intermeshing rules; see, inter alia, Rules 8(c) and (e), 9(b)-(g), 10(b), 12(b)(6), 12(h), 15(c), 20, and 54(b).[140]

If the amended Rule 11 had existed at the time of the report, it would have been added to this list of intermeshing rules, because Rule 11 became an intermeshing rule by the term "well grounded in fact," and Rule 8(e)(2) provides that all statements shall be made subject to the obligations set forth in Rule 11.

Some courts have reasoned that Rule 11 was not intended to not change the liberal notice pleading of the federal rules or the requirements of Rule 8 because the Advisory Committee Note specifies that the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.[141] However, whether the pleading rule is inappropriately chilling depends on how the pleading rule is interpreted. Courts have suggested different interpretations to ameliorate the possibility of chilling an attorney's creativity.[142]

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139. *See, e.g.*, JAMES ET AL., *supra* note 18, § 3.13, at 162-68; Wingate, *supra* note 17, at 690.

140. 5 WRIGHT & MILLER, *supra* note 3, § 1201, at 67 n. 11. This list does not include Rule 11 because the original text of Rule 11 was not directly connected with pleading rules and eliminated any requirement that pleadings be verified. *Id.* §1331 at 110.

141. *See, e.g.*, Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987).

142. *See, e.g.*, Colburn v. Upper Darby Township, 838 F.2d 663, 667 (3d Cir. 1988) (noting that Rule 11 equated the signature of an attorney or party signing a pleading with a certificate that the pleading "is well grounded in fact," and requires plaintiffs to make "some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the law")(citing Rule 11 Advisory Committee's Note concerning 1983 Amendment). However, court also cautioned that one of the circumstances to be considered is whether the plaintiff is in a position to know or acquire the relevant factual details. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986)(stating that the amended Rule 11 requires "more

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Some courts and commentators argue that notice pleading is replaced by fact pleading with the enactment of amended Rule 11, because a filing attorney's protection from sanctions depends upon the facts derived from specific prefiling investigation and research.[143] However, whether plaintiff must state all related facts in the complaint, at what stage plaintiff must complete investigation and research, and whether Rule 11 standards are the same as Rule 12(b)(6) standards are unanswered questions.[144] Rule 8 still requires only that a plaintiff state a claim in simple and concise allegations, and a plaintiff must still be given a fair opportunity of discovery. Rule 11 was amended to address the various problems with which the federal courts were faced,[145] but the basic concept of liberal pleading was not changed.

Though the amended Rule 11 may not support the stricter views of pleading, it is clearly inconsistent with a literal interpreta-

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careful investigation and consideration of claims before including them in a complaint, such boilerplate allegations are not only improper, but subject to an appropriate sanction").

143. *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. denied*, 485 U.S. 901 (1988) (the amended Rule 11 was to "add the requirement of adequate information before filing a complaint [so that] it is not permissible to file suit and use discovery as the sole means of finding out whether you have a case"); Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986); 5A WRIGHT & MILLER, *supra* note 3, § 1332, at 35-38; Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 365 (1987). *See also* Johnson v. United States, 788 F.2d 845, 856 (2d Cir. 1986)(Pratt, J., dissenting). Judge Pratt suggested in his dissent that using Rule 11 to effect reversion to detailed fact pleading requirements undermines both the language of the Federal Rules and the basic policy of notice pleading. *Id. Cf. supra* note 73 (various criticisms of Rule 11 collected).

144. Rule 11 standards are also unclear and ambiguous. 5A WRIGHT & MILLER, *supra* note 3, § 1332, at 24-27. *See also*, Westlake North Property Owners v. Thousand Oaks, 915 F.2d 1301, 1306 (9th Cir. 1990)(noting that the standard for dismissal under Rule 12(b)(6) and the standard for imposing sanctions pursuant to Rule 11 are not the same, and that claims which are insufficient to withstand a motion to dismiss may not warrant Rule 11 sanctions).

145. Before drafting the 1983 amendment, the Advisory Committee considered four factors: (1)the economic incentives to litigate, (2)the growth of federal substantive rights, (3)the proliferation of lawyers, and (4)the easy access to the federal courts in the procedural system established by the Federal Rules. 5A WRIGHT & MILLER, *supra* note 3, § 1331, at 13. (citing ARTHUR MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 2-11 (Federal Judicial Center 1984)).

tion of the *Conley* standard, or the restricted use of Rule 12(b)(6). Instead, the Federal Rules may suggest the flexible use of Rule 12(b)(6) with an appropriate balance between liberal pleading and the necessity of being well-grounded in fact.

C. *Categorization of Rule 12(b)(6) Motion Cases*

1. *Bases of Categorization*

Since Rule 12(b)(6) is used in various situations, it is difficult to set out an overarching and clear standard for assessing a 12(b)(6) motion.[146] Different issues may sometimes require different standards, and the standard may differ depending on the context. For example, there are various reasons why a plaintiff may state a claim in an other than particularized fashion. It is reasonable to establish the standard for a Rule 12(b)(6) motion in light of the major reasons behind the plaintiffs, claim.

Rule 12(b)(6) motions question the specificity of the allegations or the legality of the claim. Some commentators clarify that the specificity becomes an issue in factual allegations of pleading.[147] However, no satisfactory test of general application could be formulated to mark the degree of specificity required in pleading.[148] Also, it is not clear how legal questions are treated in Rule 12(b)(6) proceedings. Categorization may help to elucidate the degree of specificity required. Thus, it is worth separately examining how legal questions are treated and how factual allegations are tested. Moreover, categorization is desirable, and even necessary, to clarify related issues of dismissal sua sponte,[149] res judicata effects,[150] and leave to amend.[151]

However, it is not appropriate to distinguish between pro se complaints and complaints drafted by lawyers. Some courts and commentators observe that courts must construe a pro se complaint liberally, by applying less stringent standards than when a

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146. FRIEDENTHAL ET AL., *supra* note 11, § 5.7, at 254. ("No words are fully adequate to describe with precision the balance between simplicity and detail.").

147. The basic test is "whether the complaint, with all the well-pleaded material facts taken as true and construed in the light most favorable to the plaintiff, set forth facts sufficient to state a legal claim." 27 GOGER ET AL., *supra* note 57, § 62.468, at 578.

148. JAMES ET AL., *supra* note 18, § 3.9, at 153.

149. *See infra* part III-C.

150. *See infra* part IV-A.

151. *See infra* part IV-B.

plaintiff is represented by counsel.[152] Although this proposition may be generous to plaintiffs who do not want to use a lawyer, why such a generosity is necessary is not clear. Originally, both classes of complaints must be treated equally under the liberal pleading rule. The courts should not discourage plaintiffs from using lawyers, because that may cause undesirable confusion in courts. Accordingly, the rule for pro se complaints should be interpreted to mean that if the court can reasonably read pleadings to state a valid claim on which plaintiff may prevail, it should do so despite technical deficiencies such as failure to cite proper legal authorities and confusion of various legal theories.[153]

2. *Possibility of Categorization*

A "statement of a claim" must include legal and factual statements. Consequently, two issues arise in assessing every claim; an issue of legal statement and an issue of factual statement. The Federal Rules abandoned any attempt to distinguish between factual and legal statements. However, the two issues involving Rule 12(b)(6) on the face of a complaint can be distinguished. Since the plaintiff must have "some substantive legal theory" and "information about the facts going beyond pure conjecture," [154] we should consider separately the legal and factual issues.

One may argue that the Federal Rules do not require some substantive legal theory and information about the facts going beyond pure conjecture as did code fact pleading. A plaintiff can obtain facts by means of discovery, and discovery ensues after the complaint has been filed.[155] Thus, the Rules require of the pleading that there be "reason to believe that, upon evidence which may be disclosed by discovery, the pleader may be entitled to relief."[156] Standing alone Rule 12(b)(6) does not seem to call for separate factual and legal averments.

However, according to the Advisory Committee's 1955 Report, although Rule 12(b)(6) does away with the confusion resulting from attempting to distinguish between fact and cause of action, it requires the pleader to disclose adequate information as to the ba-

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152. 4 CEPLA & PALMER, *supra* note 4, §14.152, at 236. (citing Haines v. Kerner, 404 U.S. 519 (1972)).

153. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

154. JAMES ET AL., *supra* note 18, § 3.6, at 147.

155. *Id.*

156. *Id.*

sis of his claim for relief as distinguished from a "bare averment" that he wants relief and is entitled to it.[157] Therefore, the Federal Rules should be interpreted to require the plaintiff to have both "some substantive legal theory" and "information about the facts going beyond pure conjecture."[158] Thus, legal issues and those of "fact" are appropriately examined separately.

3. *Method of Categorization*

Each lawsuit involves unique problems. It is possible to categorize cases according to problems appearing on the face of a complaint. For example, the pleader may fail to state a claim with sufficient clarity and in such detail as to cause an issue to arise at the pleading stage of whether she has a legally valid claim on facts she supposes to be true. In other words, if a claim can be stated more specifically by the plaintiff, the complaint may be dismissed for insufficiency of the allegations. In such cases, the court will decide the Rule 12(b)(6) motion on the legal question.[159] However, plaintiffs do not have to plead with clarity and detail, as long as they pose valid legal questions. While lawyers may be inclined toward overpleading due to the threat of a malpractice suit,[160] plaintiffs may also have an incentive to plead vaguely in hopes that discovery will turn up material on which to base a more specific charge.[161] In such cases, pleaders may not evade the requirements of pleading by merely alleging bare legal conclusions[162] or other insufficient statements.

Finally, the court may dismiss a complaint on the basis of the insufficiency or informality of a statement of a claim in some contexts.[163] Such a claim states either an erroneous legal theory or no

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157. 5A WRIGHT & MILLER, *supra* note 3, § 1201, at 67 n.11.

158. JAMES ET AL., *supra* note 18, § 3.6, at 147.

159. *Id.* at 148.

160. *Id.* at 146. Although a plaintiff seems to be allowed to state facts in a general manner, it is risky for a plaintiff to rely on this liberality. The inclusion of superfluous claims would generally be harmless. *Id.*

161. Marcus, *supra* note 13, at 445.

162. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) ("[I]f the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.' ") (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)).

163. A pleading setting forth a claim for relief should not be dismissed for insufficiency or informality of the statement except where it appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts

legal theory at all. Willging characterizes factual allegations as either absent, conclusory, highly improbable, or conceivable.[164] By dividing Rule 12(b)(6) motions into motions based on legal and factual deficiences, and subdividing the factual deficiency cases using Willging's categories, Rule 12(6)(b) motions can be categorized as follows:

A. No legal theory whatsoever based upon well-settled rules (frivolous case) (hereinafter referred to as "*A* context");
B. Questionable legal ground to establish a claim (substantive law question) ("*B* context");
C. No factual allegation of an essential element of an established legal theory ("*C* context");
D. Conclusory or general allegation of an essential element of an established legal theory ("*D* context");
E. Highly improbable factual allegation of an essential element of an established legal theory ("*E* context");
F. Conceivable set of facts alleged in support of essential elements establishing legal grounds ("*F* context"); and
G. Excessive or other defective form of pleading[165] (*G* context").

It has been said that Rule 12(b)(6) was limited primarily to substantive defects, and performed virtually no factual interception function.[166] However, if "factual interception" includes a problem of specificity or sufficiency of presented facts in the complaint, Rule 12(b)(6) can perform a factual interception function. Substantive interception corresponds to *A* and *B* contexts, and factual interception corresponds to *C, D, E,* and *F* contexts. The context in which certain standards shall be applied has not been made clear by the courts.[167] The appropriate standards for application of

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which could be proved thereunder. 4 CEPLA & PALMER, *supra* note 4, §14.154, at 238. However, this standard does not explain how the courts should define "certainty."

164. WILLGING, *supra* note 5, at 16.

165. Modern pleading requires no "technical forms of pleading." SHREVE & RAVEN-HANSEN, *supra* note 2, § 47[C], at 185. However, under the federal rules, the defects of form that can be challenged are that the complaint is unintelligible or that it contains "result, immaterial, [or] impertinent" matter. A Rule 12(f) motion may be the correct vehicle, but a Rule 12(b)(6) motion should be equally effective because Rule 8(e)(1) abolished technical forms of motions. *Id.* § 50, at 200.

166. Louis, *supra* note 17, at 1033.

167. For example, "dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief or if the plaintiff fails to properly allege standing, . . . [or] if an affirmative defense or other bar to relief is

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Rule 12(b)(6) in each context will be examined in turn.

4. *Summary of Contexts of Categorization*

In the *A* context, no doubt exist that the complaint should be dismissed because the statement can establish no claim at all. For example, it is said, "a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief . . . The complaint also is subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense, but the defense clearly must appear on the face of the pleading."[168] This standard appears to be applied only in the *A* context.

In the *B* context, the courts will usually not have a procedural problem but a substantive law problem. Courts assessing complaints in the *B* context will dismiss the complaint if it appears that plaintiff cannot establish his claim as a matter of substantive law.[169] However, the courts must carefully consider not only all conceivable legal theories, but also the sufficiency of the allegations in the *F* context in the same case.[170]

In the *C* context,[171] as in the *A* context, there is no doubt the complaint should be dismissed because the statement cannot sup-

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apparent from the face of the complaint, such as the official immunity of a defendant, or the statute of limitation." 2A MOORE & LUCAS, *supra* note 25, ¶ 12.07 at 69. Although "a required element" is not clear, it may cover every context. Although the "standing" doctrine is not clear, it may show up in the *B* or *F* context. Other commentators do not refer to the standing doctrine to set out the general standard. On the contrary, Roberts concluded that no pleading standard, fact or notice, can effectively screen cases on standing grounds. Roberts, *supra* note 9, at 430. Moreover, affirmative defense or other bar,, appears to be applied in the *A* context. As this example illustrates, previous standards which did not pay attention to context might not work well in actual cases. In this regard, it may be possible to articulate clearer standards if the context is considered.

168. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 352.

169. *See infra* part II-D-1.

170. *See, e.g.*, Jackam v. Hospital Corp. of Am. Mideast, 800 F.2d 1577 (11th Cir. 1986). The district court had dismissed the case because the claims were disposed of only in the *B* context. However, the Eleventh Circuit found a conceivable set of facts on the same legal theory in the *F* context, and another legal theory in the *B* context.

171. According to Willging's report, 24% of the 42 claims in 38 circuit decisions involving Rule 12(b)(6) between 1986 and 1988 were classified in the c context. WILLGING, *supra* note 5, at 17.

port any legal ground to establish a claim. *C* context cases are dismissed based on a technical or procedural reason. When a plaintiff does not have a legal theory, the complaint may be dismissed because neither legal grounds nor facts are alleged.[172] Also, a plaintiff may fail to state an essential element of a claim by stating a legal conclusion only.[173] In the *C* context, since the complaint literally does not include any facts to support a claim at all, it can be automatically dismissed, unless it contains a question from another context. However, in the *C* context, as in the *D*, *E* and *F* contexts, a plaintiff may be substantively entitled to a claim; or it may be unclear whether the plaintiff is entitled to a claim, due to legal or factual ambiguity.

In the *D* context, mere conclusory or general allegations are insufficient and not taken as true, because a claim cannot be stated in the form of a legal conclusion, and because mere conclusions do not provide enough information to enable the adverse party to prepare his or her defense; nor do they sufficiently inform the court so that it can determine the questions sought to be presented.[174] However, in the *D* context, the court should not dismiss a claim solely because the statement of a claim includes general or conclusory allegations.[175] In this context it is important to examine the content of essential elements and which party has the burden of proof, rather than at the degree of specificity required.

In the *E* context, a claim containing a highly improbable factual allegation of an essential element of an established legal the-

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172. *See, e.g.*, Ochoa Realty Corp. v. Faria, 815 F.2d 812, 814 (1st Cir. 1987) (affirming the dismissal in an expropriation case because no facts and no legal grounds were alleged).

173. *See, e.g.*, Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988) (dismissing the claim for a violation of the Massachusetts Consumer Protection Act because there was no allegation of the essential elements that defendant had actual knowledge that a site was contaminated and engaged in a coverup).

174. 4 CEPLA & PALMER, *supra* note 4, §14.178, at 271.

175. *See, e.g.*, Shakman v. Democratic Org. of Cook County, 435 F.2d 267, 270 (7th Cir. 1970). A pleader's abstract assertion that one or another constitutional right has been violated does not require the court to decide that a claim had been adequately stated. *Id.* However, in this case, the court denied the motion to dismiss, because the averments concerning the operation of the patronage system and the disadvantage to candidates and voters who attempted to use the election process to change the direction of government were factual and gave adequate and fair notice of the claim asserted. *Id. See also* Revene v. Charles County Comm'r, 882 F.2d 870, 873-74 (4th Cir. 1989) (observing that conclusory allegations that were supported by pleaded facts should survive a Rule 12(b)(6) motion even if actual assertions are equally consistent with contrary conclusion).

ory should also be dismissed for insufficiency. Willging's report did not classify any case in this category.[176] Plaintiffs tend to resort to a highly improbable factual allegation of an essential element on established legal theory in only a few unusual cases. However, as one court put it, "the issue is not whether a plaintiff will ultimately prevail, . . . Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test."[177] Accordingly, the court should not evaluate the probability of the success of the claim, but should question "whether the claimant is entitled to offer evidence to support the claim."[178] When a plaintiff has resorted to highly improbable allegations without any reasonable grounds, he is not entitled to offer evidence to support the claim, and dismissal will be appropriate.

In the *F* context, if the complaint contains a conceivable set of facts alleged in support of essential elements establishing legal grounds, the claim shall not be dismissed. *Dioguardi v. Durning*[179] is offered by Willging as an example of a case in the *F* context.[180] The complaint revealed the basic nature of plaintiff's dispute with defendant and the specific incidents upon which the complaint was based.[181] A motion to dismiss may be granted only if it is clear that plaintiff would not be entitled to relief under "any reasonably conceivable set of facts which might be proven in a trial on the merits."[182] Accordingly, the issue will be whether a statement includes a reasonably conceivable set of facts.

In the *G* context, the complaint may be dismissed by operation of Rule 12(b)(6).[183] For example, in *Hartz v. Friedman*,[184] the

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176. WILLGING, *supra* note 5, at 17.

177. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

178. 128 *Id.*

179. 139 F.2d 774 (2d Cir. 1944).

180. The plaintiff did not prove his claim finally at trial because the defendant had an affirmative defense. Dioguardi v. Durning, 151 F.2d 501 (2d Cir. 1945). However, the complaint stated a conceivable set of facts which would establish a claim, if he could have proved the facts and the defendant did not have any affirmative defenses.

181. FRIEDENTHAL ET AL., *supra* note 11, § 5.8, at 254. Justice Clark stated, "however inartistically they may be stated, the plaintiff has disclosed his claim." *Dioguardi*, 139 F.2d at 775.

182. *See, e.g.*, R.I.T.A. Chem. Corp. v. Malmstrom Chem. Corp., 200 F. Supp. 954, 955 (N.D. Ill. 1962).

183. *See supra* note 165 (dismissal of complaint that includes impertinent matter is proper under 12(b)(6)).

184. 919 F.2d 469 (7th Cir. 1990).

court stated that a complaint of 125 pages (323 paragraphs) was an egregious violation of the procedural requirement that complaint set forth a short and plain statement of a claim.[185] Generally, repeated refusals by plaintiff to conform to the dictates of Rule 8 and Rule 10 as to the proper form or content of the pleading may also result in a dismissal for failure to state a claim.[186] However, the courts should use this approach sparingly. Although some courts may be impatient with long complaints,[187] the courts should be reluctant to dispose of the complaint on technical grounds, in view of the liberal pleading policy of determining actions on their merits.[188] In order to avoid the *G* context approach, the court, when possible, should use another context to dispose of appropriate cases. For example, in *Hartz v. Friedman*,[189] despite the defectiveness of the form of the complaint, the court treated the complaint on its merits, because the district court chose to do so, and because doing so would dispose of the claim.[190] Nevertheless, in *Prezzi v. Schelter*,[191] the court held that final dismissal was appropriate where an 88-page complaint was "a labyrinthian proximity of unrelated and vituperative charges that defied comprehension," and the amended complaint was "equally prolix and for the most part incomprehensible."[192]

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185. *Id.* at 471. A court has also granted a 12(b)(6) motion when the complaint exceeded 70 pages in length. Hatch v. Reliance Ins. Co., 758 F.2d 409 (9th Cir. 1985).

186. 5A WRIGHT & MILLER, *supra* note 3, § 1356, at 296-298; 4 CEPLA & PALMER *supra* note, §14.166, at 257.

187. *See, e.g.*, Salahuddin v. Cuomo, 861 F.2d 40, 41 (2d Cir. 1988). The district court had stated that a claim naming at least 22 defendants, setting forth 23 causes of action, numbering 15 pages and 88 paragraphs was clearly in violation of Rule 8 and may be dismissed for that reason alone. Although the Second Circuit modified to permit the plaintiff to file an amended complaint, it affirmed the order dismissing the complaint. *Id.* at 43.

188. 5A WRIGHT & MILLER, *supra* note 3 of Introduction,§ 1357, at 323-24.

189. 919 F.2d 469 (7th Cir. 1990).

190. *Id.* at 471, citing Jennings v. Emry, 910 F.2d 1434, 1436 (7th Cir. 1990). In *Jennings*, the court dismissed the case, not because the complaint was 55 pages long, containing 433 rhetorical paragraphs that were "prolix, disjointed, confusing, and at times unintelligible," but because the complaint did not adequately allege an enterprise which was required for a RICO claim. *Id.* at 1435, 1438-40.

191. 469 F.2d 691 (2d Cir. 1972).

192. *Id.* at 692. *See also* Gordon v. Green, 602 F.2d 743, 745-47 (5th Cir. 1979) (ruling that a 4000-page pleading should have been dismissed for lack of compliance with Rule 8, but that leave to file an amended complaint should be granted).

One claim may involve various contexts. Therefore, categories may often overlap in one case.[193] Without articulating that they were doing so, some judges have already used a categorization approach in analyzing Rule 12(b)(6) cases.[194] The value of categorization is to allow distinguishment between several potential flaws present in complaints thereby defining a clearer standard for assessing complaints. Having considered some of the problems and suggestions for their resolution in these matters generally, the discussion now turns to more specific points, beginning with the *B* context.

D. Substantive Interception

1. Reasonable Standard

A complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory she intends to pursue, and it need not appear that plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted.[195] This corresponds to the *Conley* standard and the liberal pleading alllowed in the *B* context. In other words, a court may dismiss a complaint only if it is clear that no relief could be granted under "any set of facts that could be proved consistent with the allegations."[196]

However, the courts do not accept "legal conclusions," "unsupported conclusions," "unwarranted inferences," "unwarranted deductions," "footless conclusions of law" or "sweeping legal con-

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193. *See* WILLGING, *supra* note 5, at 161. ("While the categories are not mutually exclusive, within the fact and law sides they can be applied exclusively."). *See also infra* part II-D-4.

194. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Justice Stewart's concurring opinion would have dismissed the case in the *B* context, because a conspiracy by railroads to influence legislative and executive action in order to destroy the competition of truckers in the longhaul freight business was wholly immune from antitrust laws. *Id.* at 516. However, he denied the dismissal in the *F* context, because the plaintiffs were entitled to a chance to prove that the real intent of the conspirators was not to invoke the processes of administrative agencies and courts, but to discourage and ultimately to prevent the plaintiffs from invoking those processes, according to the natures of the allegation. *Id.* at 518.

195. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 336-339. *See, e.g.*, Doe v. United States Dep't of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("It need not appear that the plaintiff can obtain the *specific* relief requested as long as the court can ascertain from the complaint that some relief can be granted.").

196. Hishon v. King & Spalding, 467 U.S. 69, 73, (1984).

clusions cast in the form of factual allegations."[197] For example, "standing, ripeness, subject matter jurisdiction and failure to investigate are legal conclusions."[198] These legal issues are tested by Rule 12(b)(6). On this proposition, the court will be responsible for its legal decision on these issues as follows.

First, if the court concludes at the pleading stage that a claim cannot be legally sustained, it is clear that a different legal conclusion will not be reached after additional proceedings. Since the court does not have to accept legal conclusions in the complaint as true in considering the complaint's sufficiency, the judge may and must consider whether its conclusions can be legally sustained. If the judge concludes that a claim is substantively defective, it will become a waste of time to continue the proceedings, whether or not the conclusion is correct.

Second, since Rule 12(b)(6) may test a matter of law, the court may have the duty to examine the legal theories for a claim in disposing of a motion to dismiss; unlike in a motion to strike by defendants, which the district court may dispose of with broad discretion.[199] In dismissing the claim in the *B* context, the court does not have to consider questions of fact, but concentrates on unclear and disputed questions of law. Accordingly, unlike the motion to strike by defendants,[200] the motion to dismiss can be flexible.

Third, the district court's decision at an early stage will facilitate an early appellate review. Therefore, even plaintiffs may benefit by receiving early appellate review. If the trial court eliminates a claim on the basis of a novel legal theory, or on one that previously had been rejected but that now, in light of technical or social developments, has substantial appeal, the appellate court may generate a new legal theory faster than the court in full trial process.[201] In this regard, fact pleading might have the advantage of

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197. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 311-318.

198. *See, e.g.*, United States v. Air Florida, Inc., 534 F. Supp. 17, 20 (S.D. Fla. 1982) (granting the motion to dismiss for insufficient conclusory allegation).

199. *See, e.g.*, United States v Union Gas Co., 743 F. Supp. 1144, 1150 (E.D. Pa. 1990) ("If there are either questions of fact or disputed questions of law, the motion to strike must be denied. For the plaintiff to succeed on this motion, the court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed.")(citing Smith, Kline & French Lab. v. A.H. Robins Co., 61 F.R.D. 24, 34 (E.D. Pa. 1973)).

200. However, in the *B* context, a motion to strike for insufficiency by plaintiffs will have the same functions as a Rule 12(b)(6) motion by defendants.

201. FRIEDENTHAL ET AL., *supra* note 11, § 5.2, at 239.

facilitating early appellate reviews of legal questions and avoiding useless investment of energy litigating on the merits.[202] Even under modern pleading standards, the courts are able to make new precedents without a full trial by using Rule 12(b)(6).[203]

To summarize, the courts should be allowed to decide a matter of law at early stages in order to facilitate early appellate review. This facilitation will not hinder the objectives of liberal pleading, because both parties will be given adequate opportunities to assert their positions. In this sense, Rule 12(b)(6) proceedings are "a clean, effective method of focussing attention on difficult questions of law and of aiding it to develop in accord with the needs of society." [204] Accordingly, the court should be allowed a flexible use of Rule 12(b)(6) in the *B* context.

The *B* context dispute is not a battle over technicalities or forms, but a substantive battle on the merits. For example, in *Beenken v. Chicago & Northwestern Railroad*,[205] the plaintiff alleged that the defendants were negligent in failing to equip a railroad boxcar with adequate warning devices such as reflectors, reflectorized tape or paint, or lights, and caused an accident between the plaintiff's car and the boxcar. The court granted a Rule 12(b)(6) motion, refusing to find negligence.[206] In *Beenken*, if the court had interpreted the law in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the court might have concluded that the defendant had been negligent. However, such a conclusion is clearly inappropriate.

Some commentators point out that the court should be especially reluctant to dismiss on the basis of an inadequate complaint when the asserted theory of liability is novel or extreme. The reason given is that it is important for new legal theories to be explored and assayed in the light of actual facts rather than in a

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202. Roberts, *supra* note 9, at 426.

203. *See, e.g.*, Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988). Although the district court had dismissed the claim, the court held that the imposition of a constructive trust on the fiduciary's alleged ill-gotten profits in favor of all plan participants and beneficiaries was an appropriate remedy and that the participants had standing to sue, even though they had already received their actuarially vested plan benefits. *Id.*

204. FRIEDENTHAL ET AL., *supra* note 11, § 5.2, at 239.

205. 367 F. Supp. 1337 (N.D. Iowa 1973).

206. The court stated, "the law *seems* clearly to negate any such duty." *Id.* at 1138 (emphasis added).

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pleader's suppositions.[207] However, the persuasiveness of the theory depends on the quality of presented facts rather than the quantity of actual allegations. Accordingly, a plaintiff who wishes to present a novel or an extreme theory can assert her justification with important facts and a well-articulated theory. If the plaintiff can show some substantive need for justice, the court may not grant the motion to dismiss.

If the *Conley* standard is applied to the *B* context, the substantive interception function would be lost; and the court and the parties would have to suffer the time consuming, aggravating, and expensive trial process. However, some judges have improperly advocated application of the *Conley* standard to the *B* context. For instance, in *Faulkner Advertising Associates, Inc. v. Nissan Motor Corp.*,[208] the Fourth Circuit finally granted a motion to dismiss because the plaintiff could not state a claim as a matter of law under the alleged situation.[209] In that case, the issue was whether or not there was a "tying agreement" under the Sherman Act. Nissan had increased the wholesale prices of its cars and trucks in order to pay for both increased advertising at the national level and new advertising to be developed by Nissan and its national advertising agency.[210] At the same time Nissan ceased making monetary distributions and contributions to the advertising efforts of the local dealer association.[211] Since the plaintiffs alleged all the related important facts, including damages and proximate cause, the question was not in a factual interception context, but in a substantive interception context. Although the legal question might have been difficult, it was appropriately decided in the majority opinion and the claim was dismissed. However, citing the *Conley* standard,the dissent disagreed with this conclusion.[212] Certainly, if the *Conley* standard was applied in the *B* context, the court could not avoid denying the motion to dismiss. However, this interpretation would mean that Rule 12(b)(6) would never play a role in substantive interception. Although the dissenters may argue different substantive views, the *Conley* standard should not be used to support their position, because its application is not appropriate in the *B* context.

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207. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 341-343.
208. 945 F.2d 694 (4th Cir. 1991).
209. *Id.*
210. *Id.*
211. 905 F.2d 769, 771 (4th Cir. 1990).
212. *Faulkner Advertising*, 945 F.2d at 696.

In the *B* context, the test for disposition of the motion depends on the jurisdiction's requirements for stating a claim or cause of action.[213] In particular, the burden of persuasion in a Rule 12(b)(6) motion should be carefully considered under the adversary system. The movant has the burden to show the nonexistence of legal relief in arguable issues. Unless the movant can adequately show that the claim cannot be legally sustained, the court should not grant the Rule 12(b)(6) motion. If the defendant successfully satisfies this burden within the short period of pleading, the court should grant the motion. Since Rule 12(b)(6) motions, summary judgments, and judgments as a matter of law are all used to eliminate claims which are not legally sustainable, the court may often postpone the decision. However, if the court reasonably concludes that the claim shall not be legally sustained, the judge may decide to dismiss the complaint.

2. *Suspicion Regarding Implementation of Substantive Law*

Commentators are suspicious of Rule 12(b)(6) substantive law dismissals for several reasons. First, a multitude of factors or factual matters cannot be adequately assessed at the pleading stage.[214] Second, using pleadings as a means to evaluate the whole of the plaintiff's allegations may tempt courts to question the factual conclusions on which the plaintiff has rested his claim.[215] Third, under the reasonable basis standard in the *B* context, bulkier allegations and an unnecessary increase in pretrial motions directed at legal arguments may result. Fourth, substantive interception by the district judge may be reversed, and this may prolong the process of reaching final decisions. Let us review these considerations.

First, deciding cases based on substantive law at the pleading stage is not the same as at summary judgement or at another stage in the proceedings. Deciding substantive law at pleading must be limited to the basis of the pleading. Although this decision does not always work, it can work well in some situations. If a pleader is concerned about legal issues, he may state particularly detailed allegations in the complaint, as long as the statement is not

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213. *See, e.g.*, SHREVE & RAVEN-HANSEN, *supra* note 2, § 50, at 200.

214. Marcus, *supra* note 12, at 459. Marcus argues that, even where a severable issue can be identified, a reliable decision on the merits at the outset may be impossible. *Id.* at 462.

215. Marcus, *supra* note 12, at 465.

excessive.

For example, in *Heart Disease Research Foundation v. General Motors Co.*[216] the court affirmed the dismissal of a complaint which alleged an antitrust violation; specifically, conspiring to suppress development of motor vehicle pollution control devices. The complaint did not allege any facts to support an antitrust conspiracy. This is a case in which the plaintiff should have alleged more detailed theories and facts. Unless the plaintiff specifically alleges some exceptional grounds, the court is correct in deciding the case on ordinary legal theories.[217]

Second, the courts might mistakenly attempt to question the factual conclusions on which the plaintiff has rested his claim by using pleadings as an opportunity to evaluate the whole of the plaintiff's allegations. However, this mistake occurs not because the court unfairly decides substantive law, but because the standards of Rule 12(b)(6) are unclear. The court may reasonably decide legal questions, but may not reach factual conclusions. The court may have to consider the *F* context after considering the *B* context.[218] Even when a decision on a 12(b)(6) motion is irrelevant to substantive law of the case, some courts inadvertently perform fact-finding in dismissing a case by relying on the defendant's factual affidavits.[219]

In the *B* context too, the court should be careful not to commit fact-finding. For example, in *Mescall v. Burrus*,[220] the district court's dismissal was reversed because certain findings of fact were made beyond the allegations of the complaint.[221] Although the district court could have tried substantive interception in the *B* context, it actually relied on its own fact-finding. In any context, the court must take factual allegations as true in deciding a Rule 12(b)(6) motion, and examine only the plaintiff's complaint.[222] If

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216. 463 F.2d 98 (2d Cir. 1972).

217. *But see* Marcus, *supra* note 12, at 435-36.

218. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)(Stewart, J., concurring)(concluding that dismissal was proper in the *B* context and improper in the *F* context).

219. *See, e.g.*, Carter v. Barry, 468 F.2d 821, 822 (2d Cir. 1972).

220. 603 F.2d 1266 (7th Cir. 1979).

221. *Id.* at 1269.

222. *See, e.g.*, Electrical Construction & Maintenance Co., Inc. v. Maeda Pacific Corp., 764 F.2d 619, 620 (9th Cir. 1985); Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991)(reversing the district court's dismissal of a claim because the district court reviewed the materials outside of the complaint in determining whether to grant defendant's motion to dismiss without converting to a summary

the movant wishes to test the factual underpinnings of the complaint, she may submit proper evidence and move for summary judgment under Rule 56 of the Federal Rules.[223] As long as the court requires this procedure, we need not worry about factual conclusions.

Although the court sometimes appears to reach factual conclusions, the real problem in this regard often lies in differences or interpretation of substantive laws. For example, in *Hishon v. King & Spalding*,[224] the court denied the motion to dismiss where a former associate sued a law firm alleging Title VII sex-based discrimination; but in *Cohen v. Illinois Institute of Technology*,[225] the court granted the motion in a similar case involving sex-based discrimination by stating "because of the timing of the alleged discrimination, she has no remedy under either Title VII of the Federal Civil Rights Act of 1964, as amended, or the Illinois Fair Employment Practices Act, although the victim of comparable discrimination occurring today would clearly have a remedy under either of those statutes."[226] Thus, as a result of attitudes on the interpretation of laws, the same pleading standard appears stringent at one time and mild at another time for plaintiffs.[227]

Third, although the "reasonable doubt" standard may encourage defendants to move under Rule 12(b)(6), it will not cause unnecessary proceedings insofar as Rule 11 works on a reasonable basis standard. In the *B* context, this standard should be used to prevent bulkier allegations and an unnecessary increase in pretrial motions directed at legal arguments. As long as reasonable legal arguments are presented by the case, the courts must examine them sooner or later. Additionally, such legal arguments may facilitate settlement at an early stage, because each party's position and relative strengths in the matter may be disclosed in the process.

Fourth, part of the suspicion over implementing substantive law may involve doubts that the trial judge is trustworthy. For example, in *Hishon v. King & Spalding*,[228] when a former associate sued a law firm alleging Title VII sex-based discrimination, the

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judgment motion and complying with Rule 56).

223. *See, e.g.*, LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991).

224. 469 U.S. 69 (1984).

225. 524 F.2d 818 (7th Cir. 1975).

226. *Id.* at 822.

227. *See supra* part II-B-1.

228. 469 U.S. 69 (1984).

district court dismissed the complaint on the ground that Title VII was inapplicable to the selection of partners by a partnership, and the appellate court affirmed.[229] However, the Supreme Court held that Title VII is applicable to the partnership of a law firm. From this case, the opponents of substantive interception may argue that the court should not have dismissed the claims due to incorrect legal interpretation. However, the courts below could not decide the case without reliable precedent, and could not control the case in accordance with specific conditions for the remedy which the Supreme Court might change later. Thus, this process is unavoidable, and each court must be left to its own interpretation.

3. *Mixed Question of Fact and Law?*

Some commentators and courts have presented the question of how a court should resolve mixed questions of fact and law in deciding Rule 12(b)(6) motions.[230] This question at bottom is whether certain facts fall within certain abstract legal norms, such as "negligence," "materiality," or "proximate cause." The answer is theoretically a legal decision on the basis of some legal theory. The answer is not a factual finding based on evidence. Therefore, this question must be ultimately viewed as a question of law. Nevertheless, when "reasonable people" would differ on an issue, the analysis has been to treat these issues as matters of fact.[231] Only if the concept is so obvious that reasonable minds cannot differ is the issue appropriately resolved as a matter of law.[232] Three examples of potential mixed questions of law and fact will be dealt with in turn.

(i) Materiality

The issue of materiality in securities fraud might be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts.[233] How-

229. *Id.*

230. *See, e.g.*, Tamari v. Bache & Co., 565 F.2d 1194, 1199 (7th Cir. 1977) (stating that mere unsupported conclusions of fact or mixed fact and law are not to be taken as admitted).

231. TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, (1976). One may inquire why judges are not trusted to possess "reasonable" minds.

232. *Id.* at 450. In this case, the court considered this issue at the summary judgment stage.

233. *Id.* Using this reasoning, the Second Circuit reversed dismissal of a se-

ever, the court may decide whether the "materiality" is so obvious that no reasonable mind would differ on the issue and, if so, is "material". These questions can be decided as a matter of law. When the court decides legal questions in proceedings, the court need not find any fact at all, unlike at the summary judgment stage. If the "materiality" is not so obvious, the question becomes a matter of fact. Therefore, the court can clearly distinguish whether it is a question of law or fact.

For example, in *Durning v. First Boston Corp.*,[234] although the court stated "whether an official statement adequately discloses callability of the bonds is a mixed question of law and fact" in a securities fraud action,[235] the court denied the motion to dismiss because it was not obvious to the court whether or not the official statement was ambiguous. In this case, the court reached the conclusion assuming that the plaintiff's factual allegations were true. The court did not examine any factual issues. The issue was whether the court could reasonably conclude that the official statement was obviously ambiguous or not. Since the court concluded that the answer to this issue was not obvious, the issue became a matter for fact-finding.

(ii) Proximate Cause

"Proximate cause" is another troublesome question of law. Plaintiff's allegations regarding proximate cause often cannot be divided into legal ones and factual ones because they are "mixed." The court may consider two questions: whether the plaintiff states a claim on the theory of proximate cause as a matter of law; and whether he sufficiently stated facts to support proximate cause.

For example, in *Hartford Accident & Indemnity Co. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*,[236] the plaintiff alleged that the defendant's negligent acts permitted the continued employment of an allegedly defalcating bank officer.[237] In this action one

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curities class action. Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

234. 815 F.2d 1265 (9th Cir.), *cert. denied*, 484 U.S. 944, (1987).

235. *Id.* at 1268. ("The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are particularly ones for the trier of fact. . . Only if the disclosure is so obvious that reasonable minds cannot differ, the issue is appropriately resolved as a matter of law.") (citing TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438 (1976)).

236. 74 F.R.D. 357 (W.D. Okla. 1976).

237. *Id.* at 358. The plaintiff alleged in the complaint that "the wrongful acts

of the elements the plaintiff had to show was proximate cause. If defendant's negligent acts could be the proximate cause of the continued employment of the bank officer, the defendant's motion to dismiss should be denied. Otherwise, the motion to dismiss should be granted. Accordingly, the issue is not the standard of a Rule 12(b)(6) motion, but the standard of proximate cause under the applicable substantive law.

The court ruled, in accordance with Oklahoma law, that as a general rule the proximate cause of injury is a question of fact, and only becomes a question of law where the evidence together with all inferences which may be properly deduced therefrom is insufficient to show a causal connection between the alleged wrong and the injury.[238] The court concluded that there was no causal connection between them, and granted the Rule 12(b)(6) motion as a matter of law, by ruling that the plaintiff only asserted a "condition" but not "proximate cause" between the alleged negligence and the injuries.[239]

Similarly, in *Herman v. C.O. Porter Machinery Co.*,[240] the court granted a motion to dismiss because there was no causal relationship between an allegedly defective saw and plaintiff's injuries.[241] In Herman, if the defective condition had not been clearly stated in the complaint, the court might have dismissed the case for failure to state a "defect." Assuming that the plaintiff did plead the defective condition well, the court seems to have denied causal relationship. However, it is not clear why there was not a

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of [the alleged defalcating bank officer], aided and abetted by the negligence and omission of the defendant Merrill Lynch, combined to permit the continued employment of defendant . . . by Oklahoma State Bank and to proximately cause the damage and loss sustained." Id.

238. Id. at 360. Assuming that proximate cause is a factual question, as long as the plaintiff asserts it in the complaint, the court should not grant a 12(b)(6) motion. However, if proximate cause is a legal issue, the plaintiff must assert facts enough to support it, and the court decides the case pursuant to the applicable laws. Since a question of law can be tested using a motion, the court may grant the motion to dismiss by finding that proximate cause did not exist.

239. *Id.* at 359. The court used the proximate cause versus mere condition doctrine. Id. Under the doctrine, where the negligence complained of only creates a condition which thereafter reacts with a subsequent, independent, unforeseeable, distinct agency and produces an injury, the original negligence is the remote rather than the proximate cause thereof. *Id.*

240. 333 F. Supp. 416 (M.D. Pa. 1971).

241. It was manufactured by a company insured by the defendant product liability insurer. *Id.*

finding of causal relationship between the defective condition and plaintiff's injures.

In both *Hartford Accident* and *Herman*, the courts flatly denied "causal connection" or "causal relationship", even though "negligence" or "defectiveness" appeared to be well pleaded.[242] It may be argued that the pleading standards influence the issue of whether "proximate cause" can be recognized. For example, if the complaint is construed favorably to the pleader, the causation requirement may not be so strict. Certainly, the court might not consider the claim together with all inferences which may be properly deduced therefrom at the stage of a pretrial motion. However, real problems sometimes lie somewhere other than in the "pleading standard," such as in interpretation of substantive law, burden of pleading, or selection of "essential" elements, each of which will be dealt with in turn.

First, whether causation could be reasonably denied as a matter of substantive law is questionable. If the substantive law strictly limited causation, the court could not have avoided dismissing the case. However, if the substantive law did not narrow the scope of causation so strictly, the court should not have modified the substantive law with a pleading rule. Rather, the court must construe all pleading so as to do substantial justice.[243]

Second, it is not clear whether the court paid attention to the burden of proof and the burden upon the movant in a Rule 12(b)(6) motion.[244] If the movant could not have successfully shown non-existence of proximate cause, the court should have denied the motion. Although a plaintiff must allege facts showing a causal relation in general,[245] the movant should essentially bear the burden of persuasion in the granting of a Rule 12(b)(6) motion as to both legal arguments and factual allegations. For a defendant to successfully deny proximate cause in pleading, unless the allegations

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242. In the two cases, the court considered the sufficiency of the factual allegations, but decided, as a matter of law, that the plaintiffs had not stated a claim for damages. *Id.*; *Herman*, 333 F. Supp. at 416.

243. FED. R. CIV. P. 8(f).

244. *See infra* part II-E-3. *See also* Leahy v. Board of Trustees of Community College District No. 508, 912 F.2d 917, 921-22 (7th Cir. 1990) (ruling that the plaintiff must allege the requisite causal connection between municipality's policy or custom and the plaintiff's injury).

245. JAMES ET AL., *supra* note 18, §3.11, at 157. Also, the burden of pleading often corresponds to burden of production at trial. SHREVE & RAVEN-HANSEN, *supra* note 2, § 49, at 194.

are highly improbable, is difficult.

Third, whether proximate cause is an essential element in liberal pleading is also questionable. Even though "negligence" or "defective condition" is clearly an essential element of the claim, proximate cause may not be an essential element.[246] Since Form 9 does not seem to require special allegations for "proximate cause," the plaintiff may not have to allege it. Even if Form 9 defines proximate cause by the phrase "[a]s a result,"[247] this does not state anything substantial. Although proximate cause is generally deemed an essential element,[248] the plaintiff may not need to plead it in detail, because it is difficult to objectively express proximate cause.

If substantive law provides that proximate cause is a matter of fact, the court may question whether a conceivable set of facts are alleged in support of proximate cause.[249] If the substantive law provides that "proximate cause" is not a matter of fact, the court has to decide it as a matter of law. In general, since the plaintiff should be given the opportunity to scrutinize the defendants' inside information within the scope of discovery, it is inappropriate to use an exceptionally strict standard to decide proximate cause. If the alleged facts reasonably support proximate cause, the court should not dismiss the case at the pleading stage. If it is not clear whether or not there are facts enough to establish proximate cause under the governing law, the court should not dismiss the case at the pleading stage. Because the movant could not successfully show nonexistence of proximate cause, the court must deny the Rule 12(b)(6) motion. However, since the court only postponed its final decision regarding proximate cause, it may become a question of whether the court should grant a motion for summary judgment or judgment as a matter of law after the plaintiff is allowed certain

246. In a civil rights case, when a causal connection must be established between the act or omission of a supervisory defendant and the alleged deprivation of plaintiff's constitutional rights, the Eleven Circuit ruled that the connection may be established where (i) a history of widespread prior abuse puts the official on notice of the need for improved training or supervision; or (ii) a single abuse occurs that is so outrageous as to give rise to an inference that a supervisor must have breached his duty of proper supervision. Wilson v. Attaway, 757 F.2d 1227, 1241-1242 (11th Cir. 1985). Under this standard, a plaintiff must plead only a history or an outrageous abuse as an essential element, but proximate cause itself does not seem to be an essential element.

247. JAMES ET AL., *supra* note 18, § 3.16, at 171.

248. *Id.*

249. This question can be viewed as a matter of factual interception.

discovery.

4. Overlapping A and B Contexts

In the *A* context, a claim does not have a legal ground. If a set of facts automatically calls for a dismissal, the claim can be dismissed in the *A* context. However, if there is any doubt whether the claim may be legally denied, the claim should be considered in the *B* context. For example, in *Abramson v. Brownstein,*[250] the court affirmed dismissal of a complaint on a statute of limitations ground. In reaching the conclusion, the court discussed whether the applicable state law violated the Commerce Clause, whether the statute of limitations was tolled by an agreement of the parties, and whether the statute was tolled by estoppel.[251] Accordingly, these three questions were decided in the *B* context, but the claim was dismissed under the statute of limitations in the *A* context.

E. Factual Interception

1. Interpretations of the Conley *Standard*

How is the *Conley* standard applied to the *D, E* and *F* contexts?[252] If the *Conley* standard is taken literally, "doubt" would be strictly construed, and might preclude dismissal would be precluded in any case in which the plaintiff invokes a valid legal theory.[253] Under the *Conley* standard, the issue is "whether the claimant is entitled to offer evidence to support the claims,"[254] or "whether, in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief."[255] Under this strict interpretation, the court may dismiss the complaint, unless it appears beyond every doubt that no facts exist to support the plaintiff's claim. The complaint's allegations are not only taken as true but also construed in the light

250. 897 F.2d 389 (9th Cir. 1990).

251. *Id.*

252. Willging points out that the last three categories are the troublesome ones. WILLGING, *supra* note 5, at 16. It appears that he views the *Conley* standard as a standard for the *F* context. *Id.* at 18.

253. Marcus, *supra* note 12, at 434.

254. Scheuer v. Rhodes, 416 U.S. 232 (1974). Since the *Scheuer* court cited the *Conley* standard and did not distinguish it, *Scheuer* and *Conley* apparently are decided under the same standard. Accordingly, whether the claimant is entitled to offer evidence to support the claim depends on the *Conley* standard.

255. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 332-36.

most favorable to plaintiff.[256] Thus, the notice theory of pleading requires "strict scrutiny" of the motion. Under this interpretation, Rule 12(b)(6) can perform virtually no factual interception function.[257]

However, some courts have suggested that the "doubt" in *Conley* can be limited doubt to some extent, or applied only to limited elements.[258] The *Conley* standard was articulated in the *F* context. Although some may interpret the *Conley* standard as not addressing the issue of whether the claim was adequately described,[259] it is ordinarily viewed to have been a determination of the sufficiency of a complaint.[260] In *Conley*, although the complaint might not have stated a "discriminatory intention" as an element of the cause of action, the plaintiff alleged an adequate and conceivable set of facts in support of a discrimination case.[261] It is unreasonable to extend the application of the *Conley* standard to every context, but it is desirable to apply it fully in the *F* context.

2. *Cause of Action and Essential Elements*

Rule 8(a) clearly requires a pleader to set forth only "a short plain statement of the claim showing that the pleader is entitled to relief." However short and plain, the complaint must still reveal the essential elements of a claim. What are the "essential elements"? It is often difficult to differentiate between the essential

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256. *Id.* at 304.

257. Louis, *supra* note 17, at 1033.

258. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) ("*Conley* has never been interpreted literally . . . a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."); American Nurses' Ass'n v. Illinois, 783 F.2d 716, 727 (7th Cir. 1986)(*Conley* language "should not be taken literally; for taken literally it would permit dismissal only in frivolous cases. If the plaintiff pleads facts, and the facts shows that he is entitled to no relief, the complaint should be dismissed.").

259. Himelrick, *supra* note 104, at 374.

260. *See, e.g.*, 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 325.

261. The plaintiffs alleged that a railroad purported to abolish 45 jobs held by plaintiffs or other African Americans all of whom were either discharged or demoted, though in truth the 45 jobs were not abolished but instead filled by whites as the African Americans were ousted. *Conley*, 355 U.S. at 43. Plaintiffs also alleged that they were rehired to fill their old jobs but with loss of seniority; and that despite repeated pleas by petitioners, the Union did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. *Id.*

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and nonessential elements of various claims.[262] It is meaningless to merely shift the issue from "cause of action" to "essential elements." Is there a distinction between stating a cause of action and stating a claim upon which relief can be granted?[263]

(i) Necessity of Essential Elements

The complaint should not be burdened "with possibly hundreds of specific instances; and if it were, it would be comparatively meaningless at trial where the parties could adduce further pertinent evidence if discovered."[264] There is no pleading requirement that a plaintiff state a cause of action upon peril of having his complaint dismissed.[265]

However, a plaintiff must present essential elements in the complaint, because he cannot state a claim without them. A claim should include operative or substantive elements, as long as these concepts are meaningful.[266] Logically, essential elements must be required as the minimum components of a claim.

Rule 12(b)(6) does not test whether plaintiffs may ultimately prevail, but examines whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove their allegation.[267] If the courts allow a plaintiff to keep her action alive on only the skimpiest statement of claim, "the defendant cannot get rid of the litigation without first undergoing discovery, which can be time consuming, aggravating, and expensive."[268] Also, "if a pleader cannot allege definitely and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expen-

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262. JAMES ET AL., *supra* note 18, §3.6, at 146.

263. *See, e.g.*, Garcia v. Hilton Hotel Int'l, 97 F. Supp. 5, 7 (D.P.R. 1951).

264. Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957).

265. *See, e.g.*, Garcia v. Hilton Hotel Int'l, 97 F. Supp. 5, 7 (D.P.R. 1951). *See also* FRIEDENTHAL ET AL., *supra* note 11, § 5.7, at 253.

266. *See, e.g.*, Fleming v. Lind-Waldock & Co., 922 F.2d 20, 23 (1st Cir. 1990) ("[T]he deference afforded to the plaintiff does not render the requirements meaningless."); Smith, Kline & French, Lab. v. A.H. Robins Co., 61 F.R.D. 24, 28 (E.D. Pa. 1973) (stating that a claim has been defined as "the aggregate of operative facts which give rise to a right enforceable in the courts.").

267. Haines v. Kerner, 404 U.S. 519 (1972); Jackam v. Hospital Corp. of Am. Mideast, 800 F.2d 1577, 1579-80 (11th Cir.1986) (stating that the issue is not whether the plaintiffs might ultimately prevail on the "piercing the corporate veil" theory, but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove their allegations).

268. JAMES ET AL., *supra* note 18, §3.6, at 148.

diture of time and money by the parties and the court."[269] Procedurally, essential elements should be required as the condition for discovery against defendants.

Even without the special or heightened pleading rule, a plaintiff may be required to state specific or particularized facts. Although this seems to be at odds with liberal pleading, some such requirements are appropriate, as long as essential elements are limited by appropriate allocation of the burden of pleading concerning the essential elements.[270] The Advisory Committee's 1955 Report appears to have endorsed this proposition.[271] Appendix forms and *Conley* can also be read to include "essential elements." In addition, since Rule 11 has require reasonable investigation and research,[272] a plaintiff should assert the outcome of this investigation and research concerning the essential elements. If a plaintiff cannot get any information about the facts going beyond pure conjecture, it is not unreasonable to conclude that the complaint cannot survive a Rule 12(b)(6) motion.[273]

Still, the Federal Rules allow plaintiffs at least two significant liberal pleading rules. First, since the Federal Rules do not require a plaintiff to set out the precise facts on which the claim is based,[274] the plaintiff's statement should not be examined strictly. Second, a plaintiff may state facts in a general or conclusory fashion concerning non-essential elements and essential elements for which the other parties have the burden of pleading. However, once a plaintiff has referred to essential elements, he knows that he must make some allegations about them.[275] In a case where a plaintiff can be reasonably expected to state an essential element,

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269. Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (D. Haw. 1953).

270. *See infra* part II-E-3.

271. *See supra* text accompanying note 157.

272. FED. R. CIV. P. 11.

273. *See, e.g.*, Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984).

274. *See, e.g.*, Sinclair v. Kleindienst, 711 F.2d 291, 293 (D.C. Cir. 1983); Municipal Util. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1492, 1501 (11th Cir. 1991) (stating that "the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent") (quoting Quality Foods de Centeo America v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983.)).

275. *See, e.g.*, Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984) (holding that the complaint stated a claim under RICO, but did not state a claim under the Sherman Act, even though it used antitrust language such as "predatory pricing" and "price fixing". Due to the fact that as long as the plaintiffs used antitrust language, they were aware of the necessity to allege them).

his case may be dismissed for failure to state it sufficiently.[276] Despite the necessity of essential elements, when a complaint omits facts that would clearly establish the case, it seems fair to assume that those facts do not exist.[277] Accordingly, it will be fair to require certain essential elements in a specific or particularized manner under the Federal Rules.

Based on the foregoing, a plaintiff should be required to set forth factual allegations, either direct or inferential, respecting all the material elements necessary to sustain a recovery under some viable or actionable legal theory.[278] The court is under no duty to "conjure up unpleaded facts to turn a frivolous claim into substantial one."[279] This minimum requirement has been equally applied not only to "disfavored" actions, but also to ordinary civil cases such as breach of contract cases.[280]

(ii) Basic Nature

If the plaintiff has clarified the basic kind, nature[281] or context of a law suit, the complaint should be deemed to have stated essential elements. The complaint in *Dioguardi v. Durning*[282] revealed the basic nature of the dispute.[283] When a complaint omits facts relating to the basic nature of the dispute which the plaintiff could easily state, if they existed, and which would clearly domi-

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276. *See, e.g.*, Donald v. Orfila, 618 F. Supp. 645 (D.C.D.C. 1985) (plaintiff stated only that defendant "acted in bad faith and beyond the scope of his authority by maliciously interfering with plaintiff's employment rights and intentionally causing plaintiff to suffer mental and emotional distress"). The court dismissed the claim because such a conclusory statement was not admitted on a Rule 12(b)(6) motion. *Id.*

277. *See, e.g.*, E.J. v. Hamilton County, 707 F. Supp. 314, 316 (S.D. Ohio 1989).

278. *See, e.g.*, Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984); In re Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981).

279. *See, e.g.*, 27 GOGER ET AL., *supra* note 57, § 62:468, at 580.

280. *See, e.g.*, Gooley v. Mobil Oil Corp., 851 F.2d 513 (1st Cir. 1988) (affirming a dismissal of franchisees action alleging breach of contract).

281. A jurisdiction adopted the term "true nature of the claim" under modern pleading. VA. CT. R. 1:4(d). It provides that every pleading shall state the facts on which the party relies, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim. Ian James Wilson & William Louis Payne, Note, *The Specificity of Pleading in Modern Civil Practice: Addressing Common Misconceptions*, 25 U. RICH. L. REV. 135 (1990).

282. 139 F.2d 774 (2d Cir. 1944).

283. FRIEDENTHAL ET AL., *supra* note 11, § 5.8, at 254.

nate the case, it seems fair to assume that those facts do not exist.[284]

In civil rights cases, some courts appear to hold a similar view. For example, in *Means v. City of Chicago*,[285] the court denied a motion to dismiss when the plaintiff alleged that two defendant police officers arrested a person without probable cause and shot him in the head without provocation, killing him.[286] Additionally, the plaintiff alleged that the City of Chicago proximately caused the victim's death by improperly hiring, screening, and training officers, by failing to discipline the officers for past misconduct, and by encouraging officers to use deadly or excessive force.[287] In *Means*, the plaintiff showed that the subject of the lawsuit was the policy of using guns because a formal policy or informal custom can specify the nature of the dispute.[288]

Accordingly, that decision, as well as *Dioguardi* and *Conley*, may be viewed to require only that the plaintiff clarify the basic kind, nature or context which will be the subject of the law suit. Thus, if the plaintiff shows the basic kind, nature or context, the complaint should not be dismissed. Although the plaintiff does not have to specify or narrow the issue to be litigated, it is not so burdensome for a plaintiff to show the basic subject of the suit.

(iii) Specificity of Important Occurrences

A plaintiff must state the subject of the suit. When a plaintiff does not show any important occurrences or circumstances, the court cannot understand what was wrong. If a plaintiff cannot state any important or essential occurrences, it may be fair to assume that those facts do not exist or that the claim is frivolous. A plaintiff can clarify important or essential occurrences in the complaint in order to show the specific incidents upon which the complaint is based.[289] Although a plaintiff does not have to allege

284. *See, e.g.*, O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st cir. 1976), *cert. denied*, 431 U.S. 914, (1977); Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988); E.J. v. Hamilton County, 707 F. Supp. 314, 316 (S.D. Ohio 1989).

285. 535 F. Supp. 455 (N.D. Ill. 1982).

286. *Id.*

287. *Id.*

288. *Id.*

289. *See, e.g.*, *Dioguardi*, 139 F.2d 774 (complaint revealed the specific incidents upon which the complaint was based). *See also*, FRIEDENTHAL ET AL., *supra* note 11, § 5.8, at 254.

when, where and how every relevant event occurred,[290] he should allege these concerning essential or important events which he surely knows. In order to avoid general or conclusory allegations, the court may require plaintiff to state such particularized facts.[291]

In *Rotolo v. Borough of Charleroi*,[292] the plaintiff alleged that he had been employed by the defendant municipal corporation and that the four individual defendants voted to terminate his employment "because the plaintiff had exercised his First Amendment privileges."[293] The court stated, in granting the motion to dismiss, that the allegations failed to indicate when, where, and how Rotolo had exercised his First Amendment privileges.[294] Although this decision can be criticized because it adopted a "strict standard" different from the ordinary standard, it is defensible insofar as it establishes that the plaintiff should state when, where and how some important fact occurred. In *Rotolo*, the plaintiff could have alleged some related facts describing the manner in which he himself exercised his First Amendment privileges. Yet, although the plaintiff did not have to allege detailed circumstances relating to the termination, the complaint should have made clear the relevant important circumstances relating to his First Amendment privileges. In contrast, since the defendant had knowledge of the facts relating to the real cause of the termination, perhaps more than the plaintiff,[295] the plaintiff should have been allowed to allege the cause of termination in a general or conclusory fashion.

Thus, the complaint need only outline a recognized legal or equitable claim which sufficiently pinpoints the time, place and circumstances of the alleged important or essential occurrences.[296]

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290. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 727 (7th Cir. 1986) ("[A] complaint is not required to allege all, or any, of the facts logically entailed by the claim.").

291. *See, e.g.*, Municipal Util. Bd. v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991) (stating that a plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified).

292. 532 F.2d 920 (3d Cir. 1976).

293. *Id.* at 921.

294. *Id.* at 923. This requirement is similar to special pleading under Rule 9. *See* Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985) (observing that the absence of particularity with respect to the alleged fraudulent participation of defendants in the coal venture scheme, and the absence of specification of any times, dates, places, or other details of that alleged fraudulent involvement was contrary to the fundamental purposes of Rule 9(b)).

295. Blaze, *supra* note 17, at 954.

296. *See, e.g.*, Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988); 27

The courts have routinely held that complaints comply with this standard if they allege the specific conduct violating the plaintiff's rights, the time and the place of that conduct, and the identity of the responsible persons.[297] Thus, courts have held that if a plaintiff identifies the time, place and nature of the misrepresentation or omissions, he has satisfied his pleading burden.[298]

(iv) Omitted Elements of A Cause of Action

The essential elements to be pleaded by the plaintiff cannot be omitted. However, some elements of causes of action whose burden of proof at trial is put on plaintiff may be omitted.[299] Although the definition of cause of action "varies",[300] a plaintiff must show a cause of action by the end of the pleading or the decision on a summary judgment motion. In contrast, only "essential elements" must be shown in the complaint. Accordingly, the liberal pleading standard will allow plaintiffs to omit certain elements of a cause of action as long as they are not "essential".[301]

Under liberal pleading, what elements of a cause of action may plaintiff omit in the complaint? First, a plaintiff should be allowed to omit the information which the defendant ordinarily has but the plaintiff does not have. For example, the exact description of the defendant's conduct may be an element of a cause of action, but should not be an essential element to state a claim in a complaint. Second, a plaintiff may omit some reasonably inferable facts because facts can be supplemented by such reasonable inferences as may be drawn in plaintiff's favor.[302] Third, of course, unimportant facts or unessential elements to support a basic nature or subject of the suit should be omitted, because the plaintiff is required to plead only essential elements. The pleader should be allowed to

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GOGER ET AL., *supra* note 57, §62:468, at 580.

297. Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988).

298. *See, e.g.*, In re Craftmatic Sec. Litig., 890 F.2d 628, 645 (3d Cir. 1989); Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987); Goldman v. Belden, 754 F.2d 1059, 1069-1070 (2d Cir. 1985).

299. FRIEDENTHAL ET AL., *supra* note 11, § 5.8, at 253-54.

300. 4 CEPLA & PALMER, *supra* note 4, §14.158, at 244. Some commentators think that the Federal Rules adopted Clark's concept of cause of action. *See, e.g.*, Wilson & Payne, Note, *supra note* 206, at 143. However, in this article, "cause of action" means the substantive elements establishing a claim under code pleading or common law pleading.

301. *See also* JAMES ET AL., *supra* note 18, §3.11, at 158.

302. *See supra* note 64 and accompanying text.

state a claim without these unnecessary allegations.

If a claim has been stated without some unnecessary elements of a cause of action, the pleader may state a claim by using general terms.[303] In such a case, the action will continue into the discovery stage, and determination of the legal sufficiency of the claim will be postponed until the entire cause of action is sufficiently clarified.[304]

(v) General Structure of Essential Elements

One noted authority describe the general structure of the substantive legal elements of a claim as follows: (1) a description of the relationship or situation of the parties; (2) a description of the conduct of the defendant, which the law proscribes as a violation of duty; (3) the consequences to plaintiff resulting from the defendant's conduct that the law recognizes as compensable or justifying other redress; and (4) a demand or prayer for relief.[305]

If the plaintiff must state these element clearly and precisely, these elements seem to be tantamount to the cause of action. However, unlike the cause of action, "essential elements" should not be strictly examined. For example, under the Federal Rules, negligence can be pleaded generally, without detailed specification, as indicated in Rule 8 (a) and in Form 9.[306] In Form 9, the plaintiff cannot obtain enough information about the negligence of the defendant, but the statement probably suggests some negligence in the stated situation. Form 9 certainly states a description of the conduct of the defendant which the law may proscribe as a violation of duty. From this view, the accident itself is an essential element, but the precise description of negligence should not be an essential element to state a claim. Similarly, the consequences to plaintiff resulting from the defendant's conduct should be those which the law may recognize as compensable or justifying other redress. In this regard, proximate causes should not be strictly required.

Accordingly, although a plaintiff should identify the time, place and nature of the important occurrences or events in order to

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303. JAMES ET AL., *supra* note 18, §3.6, at 148.

304. *Id.*

305. *Id.*, §3.15, at 169. Although the substantial legal elements of a claim may not be equal to the essential elements of pleading, it is definitely directed to the elements of a claim.

306. 4 CEPLA & PALMER, *supra* note 4, §14.250, at 368.

plead element (2), the other elements which plaintiffs cannot ordinarily access or plead should not be essential elements.

3. *Burden of Pleading and Burden of Movant*

In factual interception contexts, the courts should pay great attention to the burden of pleading and the burden of the movant in Rule 12(b)(6) proceedings. The burden of pleading an issue is usually assigned to the party who has the burden of producing evidence on that issue at trial.[307] Accordingly, plaintiff normally should not have the burden of pleading the elements on which defendant must introduce proof.[308] On the other hand, defendant generally has the burden of persuasion as the movant in Rule 12(b)(6) motion.[309] Since it is difficult to distinguish between sufficient pleadings and insufficient pleadings under Rule 8(a), the court should defer to the pleader's statements under the notice theory. From this view, even if the plaintiff has the burden of pleading an essential element, the defendant should meet the burden of persuasion regarding that essential element in order to be granted a Rule 12(b)(6) motion.[310]

However, no rule of universal and uniform application exists as to how the law allocates the burden of pleading.[311] Although the party typically has the burden of pleading the elements as to which she carries the burden of proof at trial, the burden of pleading need not coincide with the burden of producing evidence. For example, when a plaintiff sues a defendant on an overdue note, plaintiff must allege nonpayment to state a claim because an allegation of nonpayment to state a claim is essential. Also, in a slan-

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307. SHREVE & RAVEN-HANSEN, *supra* note 2, § 49, at 194.

308. FED. R. CIV. P. 8(c). JAMES ET AL., *supra* note 18, §3.11, at 157. In this regard, the courts should reconsider the practice of allowing motions to be based on affirmative defenses. *See* Rhynette Northcross Hurd, Note, *The Propriety of Permitting Affirmative Defenses to Be Raised by Motion to Dismiss*, 20 MEM. ST. U. L. REV. 411 (1990). However, "when all relevant facts are shown by the court's own records, of which the court takes notice, the defense may be upheld on a Rule 12(b)(6) motion without requiring an answer." Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992).

309. *See, e.g.*, Jackam v. Hospital Corp. of Am. Mideast, 800 F.2d 1577, 1579 (11th Cir. 1986); Currie v. Cayman Resources Corp., 595 F.2d 1364, 1370 (N.D. Ga. 1984).

310. *See, e.g.*, Collins v. Nagle, 892 F.2d 489, 493 (6th Cir. 1989) (noting that the moving party must establish that there is no genuine issue as to any material fact in both Rule 56 motion and Rule 12(b)(6) motion).

311. *See, e.g.*, JAMES ET AL., *supra* note 18, §3.11, at 157.

der context, while some courts consider the truth of remarks an absolute defense, falsity is an essential element that plaintiff must plead, even though defendant has the burden of introducing evidence of truth.

On the other hand, plaintiff may not have the burden of pleading facts when the burden of introducing evidence is on the plaintiff.[312] Even if plaintiff does have the initial burden of pleading an essential element, the court may impose the burden of persuasion on defendant as the movant for dismissal under Rule 12(b)(6).[313] Many commentators criticize the courts for adopting strict views of pleading in some civil rights actions from various viewpoints. Some commentators suggest that had the courts paid attention to the burden of pleading, they might have reached different conclusions. For example, in a civil rights action against a city, a plaintiff must demonstrate that a deprivation of his constitutional rights was caused by a formal policy or informal custom.[314] Under this substantive standard, in *La Plant v. Frazier*,[315] the court stated that the plaintiff must show an "affirmative link" between the occurrence of police misconduct and the city's policy or custom.[316] In *La Plant*, the court concluded that a complaint asserting in broad and conclusory fashion that the city did not train police officers to engage in lawful conduct and customarily refused to punish officers who engaged in unlawful conduct[317] was insuffi-

312. Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991). ("[Tlhe evidentiary burden on the non-movant in a summary judgment motion is significantly greater than in a motion to dismiss.") However, in Rule 12(b)(6) motions, the non-movant has no evidentiary burden. The burden of pleading on the non-movant in a summary judgment motion may be significantly greater than in a motion to dismiss.

313. The burden of pleading the necessary factual averments rests upon the pleader; initial failure to satisfy the burden in no way obligates an opportunity to offer matters outside the pleadings. Fleming v. Lind-Waldock & Co., 922 F.2d 20, 24 (1st Cir. 1990). However, the initial burden should be strictly limited to the essential elements, and the movant should have the burden of persuasion to show insufficiency of necessary factual averments to the essential elements.

314. Monell v. Department of Social Serv., 436 U.S. 658 (1978).

315. 564 F. Supp. 1095 (E.D. Pa. 1983).

316. *Id.* at 1098 (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)). However, *Rizzo* may only require a proximate cause. *See infra* note 321.

317. The plaintiff alleged that the City of Philadelphia did not train its police officers to engage in lawful conduct, and that it generally did not punish officers who engaged in unlawful conduct. The complaint then alleged that these practices caused the defendant police officers to engage in the misconduct which was the subject of the suit. *Id.* at 1096-97.

cient to state a cause of action under a civil rights statute.[318] The court required the plaintiff to provide specifics upon which the judge could weigh the substance of the claim by saying, "there is no allegation that Officers Frazier or Stroud previously engaged in misconduct but were not disciplined because of the alleged policy of the City." [319] However, ordinary victims cannot provide that information without discovery.

By contrast, in *Means v. City of Chicago*,[320] the court denied a motion to dismiss a claim against a city because the liability of a city must rest on the city's conduct, *i.e.*, an official policy, custom or practice which is "causally linked" to the conduct of the employee and resulting injury to the plaintiff.[321] Since plaintiffs cannot get full information about the inside policy or informal custom of the police, the court did not impose a burden of pleading an "affirmative link" between the occurrence of police misconduct and the city's policy or custom.[322]

The *La Plant* decision poses two problems. First, it is questionable whether the plaintiff should bear the burden of pleading the city's policy or custom and the "affirmative link." Even if the plaintiff had the burden of production at trial, the plaintiff might have met the initial burden by pleading the "casual link." Second, it is questionable whether the defendant met the burden of persuasion in the motion. Since the defendant can escape discovery and other proceedings, the court should have affirmative reasons for granting the Rule 12(b)(6) motion.

In *La Plant,* the court disposed of the claim in the *D* context. However, the court could have treated it in the *F* context. The test should be whether the burden of pleading the related element is placed on the plaintiff. Accordingly, in a factual interception context, the real test is not the *Conley* standard, but the question of the burden of pleading, and the burden of the movant. At the least, this question might be more clearly treated than the degree

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318. *See also, e.g.*, Revene v. Charles County Comm'rs, 882 F.2d 870, 875 (4th Cir. 1989)(observing that the pleader's allegations of a municipal policy of inadequate training were asserted entirely as legal conclusions).

319. *La Plant*, 564 F. Supp. at 1098.

320. 535 F. Supp. 455 (N.D. Ill. 1982).

321. *Id.* at 462 (citing Rizzo v. Goode, 423 U.S. 362, 375-76 (1976)). In *Means*, the court observed that it may be difficult to demonstrate that the city's conduct was a proximate cause of the injury where there is an intervening intentional act by another party. *Id.*

322. *Id.*

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of specificity.

4. *Reasonable Inferences and No Duty of Conjuration*

In the *C, D, E* and *F* contexts, all well-pleaded facts are taken as true for purposes of the motion, and all reasonable inferences are drawn in favor of the pleader. Although the facts must be supplemented by such reasonable inferences as may be drawn in plaintiff's favor,[323] it is sometimes difficult for the courts to supplement such reasonable inferences, because the court does not have to conjure up unpleaded facts to turn a frivolous claim into a substantial one.[324]

Generally, in the *C* and *E* contexts, the court does not have to conjure up unpleaded facts.[325] Also, when drawing a reasonable inference requires a leap in logic, the court does not have to conjure up unpleaded facts.[326] By contrast, when drawing a reasonable inference does not require a leap in logic, the court should use reasonable inferences.[327] Thus, in the *D* and *F* contexts, the court should avoid elimination of the case by using reasonable inferences as much as possible. For example, if a plaintiff asserts an important essential element such as "negligence," "defectiveness," or "outrageous abuse," other elements such as "causality" may be supplemented, even if the other elements are essential elements

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323. *See supra* note 66.

324. *See, e.g.*, Gooley v. Mobil Oil Co., 851 F.2d 513, 514 (1st Cir. 1988) ("[T]he court need not conjure up unpled allegations or contrive elaborately arcane scripts in order to carry the blushing bride through the portal.").

325. *See, e.g.*, Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 58 (1st Cir. 1990) (the court is not obligated to every conceivable inference); Gray v. New England Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986) (unreasonable and speculative inferences cannot be allowed to bottom a civil rights action).

326. *See, e.g.*, *Caldwell v. City of Elwood*, 959 F.2d 670, 673 (7th Cir. 1992) (stating that drawing a reasonable inference that a municipal custom or policy exists when he has only pled one incident of alleged retaliation for speech on matters of public concern requires a leap in logic that we are unwilling to take); *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (case dismissed because the plaintiff failed to allege any facts which would support an inference that the alleged actions by gas transmission companies would be contrary to their economic interests absent an agreement).

327. *See, e.g.*, *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989) ("It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes.").

under the substantive laws. Accordingly, the first test is whether making the inferences requires a leap in logic or not.

However, even in the *D* context, the court does not have to use reasonable inferences regarding the basic nature of the suit. Since reasonable inferences may be used to gain insight into what plaintiffs are basically talking about,[328] the court does not have to conjure up facts concerning the basic nature of the case. Also, when a plaintiff does not suggest factors supporting an important or material element, the court cannot use reasonable inferences.[329] The second test then is whether the plaintiff suggests some supporting factors or not.

Finally, Rule 8(f) discourages requiring technical precision or refined inferences and requires a fair effort to understand what the plaintiff attempts to set forth.[330] Reasonable inferences must be drawn from the documents submitted by plaintiffs at the pleading stage.[331] Thus, the third test is whether the court examined all the documents submitted by plaintiffs at the pleading stage.

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328. The courts have used nothing from these sources to contradict the factual allegations in the plaintiff's complaint or the reasonable inferences implied by those allegations, but have used the sources merely to give insight into what the plaintiff was talking about. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984); Jennings v. Emry, 910 F.2d 1434 (7th Cir. 1990).

329. *See, e.g.*, Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988) (plaintiff failed to allege, directly or inferentially, any facts in support of the material element of the cause of action and merely stated that she was wrongfully discharged by the defendant in violation of the law); Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985) ("Plaintiffs have done nothing more than set forth conclusory allegations of fraud, conspiracy to commit securities fraud, and aiding and abetting in securities fraud, punctuated by a handful of neutral facts.").

330. DeLoach v. Crowley's, Inc., 128 F.2d 378, 380 (5th Cir. 1942).

331. FED. R. CIV. P. 10(c) ("a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). *See, e.g.*, United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991) (stating that the court may take into consideration documents incorporated by reference to the pleadings)(citing Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985)); Gillihan v. Shillinger, 872 F.2d 935, 940 (10th Cir. 1989) (an inmate brought a civil rights action against prison officials; although the plaintiff did not expressly allege that the deprivation of his prison account funds was the result of an established state procedure, his allegations suggested that the deprivation was not the result of a random and unauthorized act, but an established policy, and the exhibits attached to the complaint supported this suggestion); Durning v First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

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5. *Defendant's Knowledge or Intent*

This sub-part examines how to deal with defendant's knowledge or intent. Even when plaintiff has the burden of producing evidence to prove defendant's knowledge or intent, the plaintiff should not necessarily have the burden of pleading the particularized allegations. However, many courts have assumed that plaintiffs owe the burden of pleading certain inside information of defendants. Indeed, many courts have paid great attention to "conclusory" allegations about defendants' knowledge or intent.[332] In addition, it is questionable whether the courts have properly used reasonable inferences in favor of plaintiffs.

Highly factual and subjective questions of intent and purpose should be resolved after discovery and trial.[333] Especially in cases of corporate fraud, where the plaintiff cannot be expected to have personal knowledge of the detail of internal corporate affairs, rigid application of special pleading could permit sophisticated defrauders to escape liability.[334] Even Rule 9(b) allows "malice, intent, knowledge, and other condition of mind of a person" to be averred generally.[335] Accordingly, in any case, pleading of malice, intent, knowledge, and other condition of mind of a person should not be an essential element whose burden of pleading is imposed on plaintiffs. Instead, plaintiffs should be allowed to allege such elements in a general or conclusory fashion.[336] In other words, the court should not dispose of a claim because of a failure to state malice, intent, knowledge, and other condition of mind of a person in the *D* context.

Nevertheless, the courts sometimes put the burden of pleading defendant's knowledge or intent in the *D* context on plaintiffs. For example, in *Ross v. A. H. Robins Co.*,[337] the Second Circuit found

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332. Marcus, *supra* note 12, at 448. *Cf.* JAMES ET AL., *supra* note 18, §3.1, at 140.

333. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)(citing Havoco of Amer. v. Shell Oil Co., 626 F.2d 549, 553 (7th Cir. 1980)).

334. In re Craftmatic Sec. Litig., 890 F.2d 628, 645 (3d Cir. 1989).

335. FED. R. CIV. P. 9(b).

336. *See, e.g.*, American Technical Mach. Corp. v. Masterpiece Enter., Inc., 235 F. Supp. 917 (M.D. Pa. 1964) (observing that all that is usually required in the complaint is a generalized statement of the facts from which the defendant may form a responsive pleading; thus, if a bona fide complaint is filed that charges every element necessary to recover, summary dismissal for failure to set out evidential facts is not justified).

337. 607 F.2d 545 (2d Cir. 1979).

that the complaint failed to "specifically plead those events which they assert give rise to a strong inference" that the defendants knew and recklessly disregarded the health risk of an intrauterine device.[338] Thus, the non movant seems to bear the burden of persuasion as well as the burden of pleading relevant facts to show the strong inferences.

However, defendant's knowledge or intent may be viewed as insufficient in the *E* context. For example, in *Hiland Dairy, Inc. v. Kroger Co.*,[339] the court affirmed dismissal of a complaint, holding that the mere construction of a processing plant by Kroger did not constitute an attempt to create a monopoly in violation of the Sherman Act.[340] The movant could show that the mere construction of the plant was a highly improbable way of establishing an attempt to monopolize.[341]

Reasonable inferences should be used as much as possible in light of the *Conley* standard. A plaintiff should not be thrown out of court for failing to plead facts in support of every arcane element of his claim.[342] Especially in civil rights cases,[343] a plaintiff is not required to provide either proof of the claim or proffer all available evidence, because much of the evidence can be developed only through discovery. The court should use reasonable inferences regarding the defendant's knowledge or intention, and the plaintiff should be allowed to allege those matters with only a few conceivable facts or very general terms.[344]

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338. *Id.* at 558.

339. 402 F.2d 968, 972 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

340. *Id.*

341. *Id.* Similarly, in Havoco of Am. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980), the court affirmed the dismissal because defendant's conspiracy could not be established only by the fact that the defendant did not acquire a company, and after that the plaintiff lost a single contract with a subsidiary of the company.

342. *See, e.g.*, E.J. v. Hamilton County 707 F. Supp. 314, 316 (S.D. Ohio 1989) ("A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim.").

343. *See, e.g.*, Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988); Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988) ("We are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading."); Marcus, *supra* note 13, at 468-471.

344. *See, e.g.*, American Technical Mach. Corp. v. Masterpiece Enter., Inc., 235 F. Supp. 917 (M.D. Pa. 1964). In *American Technical*, the court was satisfied that the complaint charging a defendant with knowingly inducing and conspiring with another defendant to infringe the patent was a sufficient foundation upon which further proof may be offered to show that he was organizer, president and

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In order to reconcile the *Conley* standard and the necessity of essential elements, the court should distinguish the burden of production and the burden of pleading. One desirable course to resolve this problem is to release plaintiff from the burden of pleading defendant's knowledge or intent. In other words, a plaintiff may have the burden of production regarding the defendant's knowledge or intent after discovery or amendments of pleadings, but he does not necessarily have the burden of pleading it. This modification can be made on the procedural law level. If "knowledge" or "intent" is broadly recognized as a matter of substantive law, it may be easier to allege the relevant facts. This resolution must be effected on the substantive law level. Under the substantive law that intent is not limited to consequences which are desired, for example, if the actor knows that the consequences are certain, or substantially certain, to result from his act and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.[345]

III. OPERATION OF RULE 12(B)(6)

It is generally said that the court has broad discretion in ruling on a motion to dismiss.[346] In order to clarify the functions of Rule 12(b)(6), we must clarify the scope of the court's discretion, as well as the standard for dismissal of a complaint. After examining the general Rule 12(b)(6) procedure, this part will examine how Rule 12(b)(6) proceedings affect settlement practice, whether dismissal *sua sponte* should be allowed in any case, and whether a Rule 12(b)(6) motion should be granted in a case in which the

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dominant spirit of an infringing company or that he otherwise acted as the moving, active, conscious force behind an infringement. *Id.* at 918-19. *See also*, Gomez v. Pima County, 426 F. Supp. 816 (D. Ariz. 1976) (denying a Rule 12(b)(6) motion because two specific alleged incidents provided reasonable evidence that the defendant's officials had "discriminatory purpose"). In *Gomez*, the plaintiff's statistics showed a very low percentage of Mexican-American employees of the sheriff's department and a pervasive pattern of discrimination in employment. *Id.* at 820.

345. RESTATEMENT (SECOND) OF TORTS, § 8A cmt. (1977); *See also*, Boudeloche v. Grow Chem. Coatings Corp., 728 F.2d 759, 761 (5th Cir. 1984) (reversing the dismissal because an employee's complaint which alleged that his supervisor ordered him to continue painting interior of tank despite fact that employee was made ill by toxic fumes, thus resulting in severe damage to his body was sufficient to state claim under "intentional act" exception to a state Workmen's Compensation statute).

346. *See, e.g.*, International Bank of Miami v. Banco de Economias y Prestamos, 55 F.R.D. 180, 185 (D.P.R. 1972).

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claim exists but the desired remedy is not available.

A. *Scope of Discretion and General Procedure*

What kind of discretion does the court have under Rule 12(b)(6)? Liberal pleading standards give the courts discretion in deciding when a complaint is formally insufficient and whether to permit leave to replead.[347] Accordingly, the district court has discretion to postpone deciding a motion to dismiss until some later stage in the proceeding,[348] or to grant the motion to dismiss with leave to amend the complaint.[349] In most cases, the action will be expected to continue into the discovery stage, and determination of the legal sufficiency of a claim will be postponed until that stage is sufficiently completed.[350]

If the court has too much discretion in using Rule 12(b)(6), this may lead to increased uncertainty in the proceeding. A typical answer to the question of a Rule 12(b)(6) standard might be that "the line between the totally unmeritorious claims and the others cannot be drawn by scientific instruments but must be carved out case by case by the sound judgment of trial judges."[351] That is why some commentators conclude that flexible use of summary judgment combined with selective cost-shifting through Rule 11 would provide a better system of pretrial management.[352] Certainly, summary judgment will serve a useful function in disposing of certain cases. Because the Supreme Court's 1986 trilogy of summary judgment opinions encouraged the use of summary judgments,[353] the courts do not have to use Rule 12(b)(6) to escape the difficulty of using summary judgments. Also, Rule 11 can play a significant role in protecting defendants and judicial resources from unmeritorious cases. However, these are not adequate responses to the confusion

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347. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 303-04. Discretion is viewed as "considerable leeway under the liberal pleading standards." *Id.*

348. *Id.* at 359.

349. *See, e.g.*, Salahuddin v. Cuomo, 861 F.2d 40, 43 (2d Cir. 1988); Moran Towing Corp. v. Hartford Accident & Indem. Co., 204 F. Supp. 353 (D.R.I. 1962). *See also infra* part IV-B.

350. JAMES ET AL., *supra* note 18, §3.6, at 148.

351. Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 213 (9th Cir. 1957).

352. Marcus, *supra* note 12, at 437; Louis, *supra* note 17, at 1041.

353. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

in Rule 12(b)(6). The motion serves quite different functions by allowing elimination of cases at the pleading stage and even before discovery. In order to streamline civil procedure and make it consistent with justice, the operation of Rule 12(b)(6) must become clearer.

First, "discretion" generally has two meanings. One meaning suggests that there is no wrong response to the issues presented. The other suggests that the trial judge has a right to be wrong without incurring reversal.[354] If the former meaning of discretion is accepted, the court may decide to postpone the dismissal to another stage, permit leave to replead, or dismiss the case without prejudice in a Rule 12(b)(6) proceeding.[355] However, the court may abuse its discretion in denying a Rule 12(b)(6) motion[356] or dismissing a claim with prejudice.[357] If the latter meaning of discretion is accepted, the court has no discretion to dismiss a complaint that it decides is formally sufficient or insufficient. Rather, the court must follow particular standards and procedural rules.[358] Because a Rule 12(b)(6) motion raises only an issue of law,[359] the appellate court reviews de novo a district court's interpretation and its dismissal of a complaint under Rule 12(b)(6).[360]

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354. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed Form Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

355. *See, e.g.*, Beenken v. Chicago & N.W. R.R. Co., 367 F. Supp. 1337 (N.D. Iowa 1973) ("In general, the court has broad discretion in ruling on a motion to dismiss. . . but dismissal should only be granted with care in order to avoid improperly denying plaintiff the opportunity to have his claim adjudicated on the merits.").

356. *See, e.g.*, Jackson v. City of Beaumont Police Dep't, 958 F.2d 616 (5th Cir. 1992) (reversing the district court's denial of a Rule 12(b)(6) motion because the plaintiffs did not meet heightened pleading requirement under §1983).

357. *See, e.g.*, Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 701-02 (9th Cir. 1990) (finding that "the district court abused its discretion in dismissing the claim with prejudice"); *but see* Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985) ("The district court did not abuse its discretion in concluding that appellants' complaints, [which] exceeded 70 pages in length, were confusing and conclusory and not in compliance with Rule 8.").

358. *See, e.g.*, Mescall v. Burrus, 603 F.2d 1266, 1269 (7th Cir. 1979) ("[T]he trial court did not strictly observe the limits of its discretion in allowing the motion to dismiss.").

359. *See, e.g.*, Gillihan v. Shillinger, 872 F.2d 935, 938 (10th Cir. 1989) ("We review the district court's dismissal of plaintiff's complaint *de novo*, since the sufficiency of a complaint is a question of law.").

360. *See* Salve Regina College v. Russell, 499 U.S. 225 (1991) (holding that a court of appeals should review *de novo* a district court's determination of state

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Second, an issue of law includes substantive law and technical or procedural law issues.[361] The substantive law issue is whether or not the claim is legally sustained in the *A* and *B* contexts. Assuming that the claim may be legally sustained, the procedural issue is whether the statement of a claim is sufficient or defective in the *C* to *G* contexts. In any context, if a claim is stated insufficiently or defectively, the complaint may be dismissed with or without leave to amend. Accordingly, the standards of Rule 12(b)(6) will be applied when the court decides the complaint is formally insufficient or defective in each context.

Based upon the foregoing, Rule 12(b)(6) works as follows: a complaint states a claim sufficiently or it does not; if the complaint is fatally insufficient or defective, it remains so when reviewed by court of appeals or the Supreme Court, even though an evidentiary hearing may produce additional information; and if a district court ignores insufficient allegations, Rule 12(b)(6) then grants discretion to waive the decision to dismiss the claim, and exercise of that discretion may be essentially unreviewable.[362]

B. Effects on Settlement Practice

It has been said that Rule 12(b)(6) affects settlement dynamics. Professor Marcus analyzed decisions along lines of the debate between the "public interest" model and the "dispute resolution" model of litigation. According to Professor Marcus, while the "public interest" model seems to favor pretrial disposition, dismissal on the pleading under the "dispute resolution" model would arguably not be a desirable alternative.[363] He argues that, under the "dispute resolution" model, less use of Rule 12(b)(6) facilitates a desirable settlement. However, it is questionable whether less use or even elimination of the current Rule 12(b)(6) would facilitate settlements.

Litigation has both public interest and dispute resolution functions. The public interest model derives from the public or

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law); Caldwell v. City of Elwood, 959 F.2d 670, 671 (7th Cir. 1992); Marcus, *supra* note 13, at 480 ("[A]ny dismissal for failure to state a claim is subject to full review.").

361. A legal controversy consists of issues of fact and issues of law. JAMES ET AL., *supra* note 18, §3.1, at 139. However, under Rule 12(b)(6), the court must not decide issues of fact.

362. *Cf.* Roberts, *supra* note 9, at 414.

363. Marcus, *supra* note 12, at 455-56.

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court's viewpoint, and the dispute resolution model derives from the parties' viewpoints. They must be concurrently considered. Similarly, Rule 12(b)(6) is connected with "public interest," and the notice pleading theory is connected with "dispute resolution" interest. Even under the "dispute resolution" model, dismissal on the pleading may be a desirable alternative in certain cases such as "strike suits."[364] Therefore, we cannot conclude that dismissal on the pleadings would always be an undesirable alternative, given the "dispute resolution" model.

Although optimal justice may usually be found somewhere between the polar positions of the litigants,[365] the court should make efforts to pursue the best resolution in each particular case. Sometimes pretrial disposition may be the best way to resolve a case; and strict standards to achieve fewer dismissals under Rule 12(b)(6) will not always facilitate desirable settlements.

Rather, a clear standard for operation of Rule 12(b)(6) may facilitate settlement, because each party can recognize the other party's positions and relative strengths. Since a full complaint helps educate the defendant about his potential exposure in the litigation, some pleading requirements facilitate the parties' preparation for settlement negotiations.[366] Winning a motion to dismiss will generally work in favor of the movant for settlement purposes. However, particularly in the *C* and *D* contexts, the non-movant may be able to file an amended complaint with more detailed allegations, and require the movant to answer these allegations. If a defendant is substantively weak, a dismissal decision does not necessarily work against the plaintiff who is substantively entitled to a claim. Thus, Rule 12(b)(6) proceedings will give the parties a good opportunity to consider and reach a fair settlement. Rule 12(b)(6) can appropriately affect settlement dynamics if the rule is applied according to clear standards.

C. *Dismissal Sua Sponte*

The court on its own initiative may dismiss a complaint for failure to state a claim as long as the procedure employed is fair, while "strict rules" must be applied against the dismissal of an action *sua sponte*.[367] However, given the adversary system, courts

364. *Cf.* JAMES ET AL., *supra* note 18, § 3.6, at 148-149.
365. Marcus, *supra* note 12, at 455.
366. *Cf.* SHREVE & RAVEN-HANSEN, *supra* note 2, § 54, at 216.
367. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 301.

should act on their own motion sparingly.[368] In *Doe v. St. Joseph's Hospital*,[369] the court stated, *sua sponte* dismissals "conflict with the traditional adversarial concepts of justice to the extent that they make the district court 'a proponent rather than an independent entity.' "[370] Also, dismissal *sua sponte* may prejudice plaintiffs by depriving them of an opportunity to amend their complaint.[371]

In light of the objectives of Rule 12(b)(6), the court should have the power to use dismissal *sua sponte*, insofar as it does not unfairly harm adversarial precepts. Since Rule 12(b)(6) is designed to protect some public interests, the court should be allowed some supervising power over the parties. However, when some argument is necessary for a decision, dismissal *sua sponte* will not be appropriate.

If the court may use dismissal *sua sponte*, how does the court decide the "fairness" in the procedure, *i.e.* what are the rules? In order to prevent arbitrary use of Rule 12(b)(6), the court should be allowed to use dismissal *sua sponte* only under certain strict rules. The "strict rules" should exist on both the procedural level and the substantive level.

1. *Strict Rules on the Procedural Level*

The court should not use dismissal *sua sponte* without allowing a plaintiff an opportunity to be heard.[372] In *Tingler v. Marshall*,[373] the Sixth Circuit ruled that before a complaint may be dismissed *sua sponte*, the court must require: (1) service of the complaint on defendants, (2) notice of the court's intent to dismiss the complaint, (3) an opportunity for plaintiff to amend his com-

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368. The Supreme Court expressly declined to rule on the propriety of *sua sponte* dismissals under Rule 12(b)(6) in Neitzke v. Williams, 490 U.S. 319, 329 n.8 (1989).

369. 788 F.2d 411 (7th Cir. 1986).

370. *Id.* at 415 (quoting Tingler v. Marshall, 716 F.2d 1109, 1111 (6th Cir. 1983).

371. *Id.* (pointing out that a dismissal of a complaint before service will deny the plaintiff the right to amend the complaint once as a matter of course under Rule 15(a)).

372. *See, e.g.*, Thomas v. Scully, 943 F.2d 259, 260 (2d Cir. 1991); Bayron v. Trudeau, 702 F.2d 43, 45-6 (2d Cir. 1983) (reversing and remanding *sua sponte* dismissals of *pro se* civil rights complaint prior to requiring the defendants to answer).

373. 716 F.2d 1109 (6th Cir. 1983).

plaint or respond to the reasons stated by the district court in its notice of intended *sua sponte* dismissal, (4) an opportunity for defendant to respond or file an answer or motions, and (5) a statement of the reasons for dismissal.[374] Although (1) and (4) among these requirements may be omitted,[375] other procedural requirements seem to be indispensable to protect plaintiffs' interests.

Some courts do not require such strict procedural rules. For example, the Eighth Circuit held that failure to give a plaintiff prior notice and opportunity to respond before dismissal *sua sponte* was not reversible error when it was patently obvious that the plaintiff could not prevail based on facts alleged in the complaint.[376] This rule is considered by some courts practical and fully consistent with plaintiff's rights and the efficient use of judicial resources.[377] However, this position may not only harm the adversarial process, but also render the strict rules for *sua sponte* motions meaningless. It is necessary to confirm by the strict rules whether it is patently obvious that the plaintiff could not prevail based on facts alleged in the complaint.[378] Accordingly, failure to comply with the strict rules should be reversible error.[379] Unless it is reversible error, the court may have discretion to refuse to comply with strict procedural rules. When a proposed amendment to

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374. *Id.* at 1112.

375. *See, e.g.*, Morrison v. Tomano, 755 F.2d 515, 517 (6th Cir. 1985) ("*sua sponte* dismissal is not necessarily rendered invalid because of lack of service on defendant or failure to provide defendant an opportunity to respond").

376. Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991); *See also,* Baker v. Director United States Parole Comm'n, 916 F.2d 725, 726-27 (D.C. Cir. 1990) (*per curiam*); Omar v. Sea-Land Serv., Inc., 813 F.2d. 986, 991 (9th Cir. 1987); and McKinney v. Oklahoma Dept. of Human Serv., 925 F.2d. 363, 365 (10th Cir. 1991).

377. *See, e.g.*, Baker v. Director United States Parole Comm'n, 916 F.2d 725, 726 (D.C. Cir. 1990).

378. In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court pointed out that notice of a pending motion alerts plaintiff to the legal theory underlying the defendant's challenge, and enables him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review by creating a more complete record of the case. *Id.* at 329-30.

379. *See, e.g.*, Perez v. Ortiz, 849 F.2d 793, 797-98 (2d Cir. 1988); Morrison v. Tomano, 755 F.2d 515, 516-17 (6th Cir. 1985); Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc., 695 F.2d 524, 526-27 (11th Cir. 1983); *Cf.* Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973)(failure to give plaintiff prior notice "might well justify reversal," but reversed on other grounds).

the complaint fails to state a claim, the court of appeals might decline to reverse a dismissal because a remand would be obviously futile.[380]

2. *Strict Rules on the Substantive Level*

Since dismissal at the pleading stage on the merits may seriously affect the plaintiffs' interests, the court should not dismiss *sua sponte* in cases involving questions about sufficiency of factual statements in the *D* to *F* contexts. In particular, in settlement practice, when the court dismisses a claim for whatever reason, the defendant is unfairly advantaged. Accordingly, the court must consider what impact such a decision would have on the parties.

Despite the need for "strict rules" for making motions *sua sponte*, some courts are not so strict. Nor have the courts presented adequately clear standards for dismissal *sua sponte*. The Seventh Circuit, for example, permits *sua sponte* dismissals based on Rule 12(b)(6) as long as a "sufficient basis" for the court's action is "apparent" from the plaintiff's pleading.[381] Although this standard seems to restrict the use of dismissal *sua sponte*, it is actually not different from the general standard for the defendant's motion.[382] Such a standard allows for uncertainty as to whether a sufficient basis for the court's action is apparent or not. Accordingly, some instances where *sua sponte* dismissal can be allowed should be clarified. The court should use dismissal *sua sponte* only when there is no doubt that the complaint should be dismissed.

This does not mean that the courts should refrain from using the dismissal *sua sponte* in a general sense. If the court has no discretion in certain situations, the court is forced to justify using

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380. *See, e.g.*, Shockley v. Jones, 823 F.2d 1068, 1073 (7th Cir. 1987).

381. *See, e.g.*, Apostol v. Landau, 957 F.2d 339, 343 (7th Cir. 1992); Shockley v. Jones, 823 F.2d 1068 (7th Cir. 1987); Tamari v. Bache & Co., 565 F.2d 1194, 1198 (7th Cir. 1977).

382. In *Apostol*, the Seventh Circuit explains that, in evaluating the propriety of a *sua sponte* dismissal, they take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiff, and that the claim should be dismissed only if it appears beyond doubt that he is unable to prove any set of facts that would entitle him to relief. *Apostol*, 957 F.2d, at 343, (citing Ellsworth v. City of Racine, 774 F.2d 182, 184 (7th Cir. 1985)). However, in *Ellsworth*, the court only held that the district court properly granted the defendant's motion to dismiss under Rule 12(b)(6). *Ellsworth*, 774 F.2d at 186.

it. In this regard, if a Rule 12(b)(6) motion gives rise to an automatic application of substantive law to bar a claim in the *A* context, the court has no discretion to dismiss a complaint when it decides it is legally defective. In such cases, the court can easily use dismissal *sua sponte*, and the dismissal for failure to state a claim will be subject to full review at an earlier stage.[383] Also, when some defendants file a Rule 12(b)(6) motion but others do not, the court may use *sua sponte* dismissal for the defendants who do not file the motion.

For example, in *Raitport v. Chemical Bank*,[384] the court granted dismissal *sua sponte* when the plaintiff, a self-styled entrepreneur and inventor, sued fifty-eight banks and several hundred unnamed foundations mainly because each defendant refused to loan money to the plaintiff.[385] The court dismissed the case because there were no facts, however favorably viewed, that supported his cause of action, and because the claims were barred by collateral estoppel.[386] In this case, since some defendants filed a Rule 12(b)(6) motion and others did not, the court could not avoid use of dismissal *sua sponte* for non-movant defendants in order to dismiss the case entirely.

On the other hand, when a case involves questions about the sufficiency of factual statements in the *D* to *F* contexts, the court does not have to use dismissal *sua sponte*. Rather, the court should avoid using it unilaterally in favor of defendants without their motion. For example, in *Tamari v. Bache & Co. (Lebanon) S.A.L.*,[387] the Seventh Circuit affirmed dismissal *sua sponte* when the plaintiff alleged that an agreement was induced by fraud and coercion which rendered an arbitration agreement invalid.[388] The court dismissed the case because the conclusionary and general allegations regarding fraud and coercion were insufficient.[389] Probably, since the plaintiff did not allege any particularized facts to support fraud or coercion, the court could have granted the motion to dismiss if the defendant had filed the motion. But the defendant not file the motion. More importantly, the court appears to have decided that the agreement was not induced by fraud or coer-

383. Marcus, *supra* note 12, at 480.
384. 74 F.R.D. 128 (S.D.N.Y. 1977).
385. *Id.*
386. *Id.*
387. 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).
388. *Id.*
389. *Id.*

cion. Since the court used Rule 12(b)(6) on its own initiative, there was no need for the defendant as a movant to meet the burden of showing that the statement of a claim was general or conclusory, or highly improbable. The plaintiff should have been given an opportunity to argue.

Similarly, when a case involves a dispute over an interpretation of law in the *B* context, the court should refrain from using dismissal *sua sponte*. Although a dismissal for failure to state a claim may be subject to full review at an earlier stage,[390] it is not appropriate to force plaintiffs out of court and reward defendants in settlement practice. Since the court should be disinterested in a dispute, it should avoid using its discretion unless defendants file the motion and both parties are allowed to argue.

Accordingly, the court should use dismissal *sua sponte* only when there is no doubt that the complaint should be dismissed. In other words, the court may grant dismissal *sua sponte* in the *A* or *C* context, but should not use it in other contexts. If the courts are reluctant to exercise the dismissal *sua sponte*, they can usually accomplish the same end by inviting the parties to file for the motion.[391] However, such practice can be viewed as "de facto" dismissal *sua sponte*, and the above approach may be applied to the court's invitation.

D. Desired Remedy

Should a Rule 12(b)(6) motion be granted in a case in which a claim exists but the desired remedy is not available? This is a problem of the operation of Rule 12(b)(6) in the B context.

Under the modern pleading system, the demand for relief has lost much of the significance it held at common law or in code pleading.[392] The court may grant the relief to which the prevailing party is entitled, even if the party has not demanded such relief in his pleading.[393] Accordingly, a plaintiff is entitled to a remedy not

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390. Marcus, *supra* note 12, at 480.

391. *Cf.* SHREVE & RAVEN-HANSEN, *supra* note 2, § 81, at 317.

392. *See, e.g.*, Bartholet v. Reishauer A.G.(Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992) ("Common law pleading required the advocate to match facts to a legal theory, the 'form of action.' "). Code pleading ended up in much the same place, as courts read the code formula 'facts constituting a cause of action' to require the pleader to state a legal theory." However, under the Federal Rules, "the complaint need not identify a legal theory and specifying an incorrect theory is no fatal.").

393. FED. R. CIV. P. 54(c); SHREVE & RAVEN-HANSEN, *supra* note 2, § 49, at

only on the stated grounds, but also on unstated grounds, which must be examined in the *B* context. For example, in *Electrical Construction & Maintenance Co. v. Maeda Pacific Corp.*,[394] the Ninth Circuit declined to consider whether the trial court erred in foreclosing relief on a promissory estoppel theory because the plaintiff did not plead this theory and because the trial court did not consider it.[395] However, the Ninth Circuit permitted assertion of a promissory estoppel claim at the time of trial, even if not specifically alleged in the complaint, because the basis for the promissory estoppel claim arose out of the same facts as the breach of contract claim.[396] Similarly, in *Dopico v. Goldschmidt*,[397] when the plaintiffs could not obtain the massive relief they sought involving extraordinary expenditures, the court denied a motion to dismiss as well as summary judgment. As the court put it, "the extreme result of dismissing the claim would be proper only if plaintiffs would not be entitled to any relief, even if they were to prevail on the merits."[398]

In practice, courts are generally reluctant to dispose of the complaint on technical grounds in view of the policy of the federal rules to determine actions on their merits.[399] Since there is no requirement of selection of remedies in the complaint,[400] the courts do not have to pinpoint the remedies. As long as we accept these propositions, the *Dopico* position is correct.

However, in certain cases, the court may dismiss a case when some claim probably exists but the desired remedy is not available. First, the plaintiff can limit the scope of remedies. Theoretically, some may argue that the plaintiff might have wanted only the massive relief in *Dopico*. Clearly, if a plaintiff wanted some relief in a claim similar in nature, the court should not dismiss the entire case because the claim is only partially granted. However, if the plaintiff wanted alternative relief different in nature from the original claim, they could have specified the alternative claim.[401] Since the courts should not waste their resources on claims which the

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394. 764 F.2d 619 (9th Cir. 1985).
395. *Id.*
396. *Id.* at 623.
397. 687 F.2d 644 (2d Cir. 1982).
398. *Id.* at 649.
399. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 323-24.
400. WRIGHT, *supra* note 55, § 68, at 442.
401. FED. R. CIV. P. 8(a).

plaintiffs do not seek, they might be correct in dismissing the claims. In this position, the *Dopico* court could have granted the motion to dismiss.However, it may be difficult for the court to distinguish differences of nature and differences of quantity. Thus, courts have held that a complaint should not be dismissed for legal insufficiency except where a plaintiff fails to state a claim on which some relief, not limited by the request in the complaint, can be granted.[402] Accordingly, when a plaintiff requests limited relief, the court may grant a Rule 12(b)(6) motion even if the desired remedy is not available.

Second, when the plaintiff cannot obtain the relief in a federal jurisdiction but may have a claim in a state jurisdiction, the federal court may dismiss the case. For example, in *Car Carriers, Inc. v. Ford Motor Co.*,[403] the Seventh Circuit granted a motion to dismiss when some claims for breach of contract might have been granted under the state laws but the desired remedy as provided by the Sherman Act was not available.[404] In that case, the federal court did not have to review other state claims.[405]

Third, some courts grant a motion to dismiss a claim for specific damages, with leave to file an amended complaint. For example, in *Moran Towing Corp. v. Hartford Accident & Indemnity Co.*,[406] the plaintiff, a subcontractor, had no remedy against a surety on a Miller Act bond for the recovery of damages caused by the negligence of the prime contractor, but the plaintiff could maintain an action against the surety on such a bond when the claim asserted was for the value of labor and materials furnished.[407] Although the plaintiff alleged it furnished labor and materials pursuant to the contract,[408] the court granted the motion to dismiss with leave to file an amended complaint.[409]

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402. *See, e.g.*, Doe v. United States Dep't of Justice, 757 F.2d 1092, 1104 (D.C. Cir. 1985).

403. 745 F.2d 1101 (7th Cir. 1984), *cert. denied,* 470 U.S. 1054 (1985).

404. *Id.*

405. *Id.* at 1105. Similarly, in Packer v. Yampol, 630 F. Supp. 1237 (S.D.N.Y. 1986), when shareholders sued the corporation's board of directors asserting violations of federal securities laws as well as various common law violations, the court dismissed the case by holding that the shareholders lacked standing in that they failed to allege requisite damage or injury and that the court could not exercise pendent jurisdiction over the derivative state law claims. *Id.*

406. F. Supp. 353 (D.R.I. 1962).

407. *Id.* at 356.

408. *Id.* at 355.

409. *Id.* at 356.

The first exception is based on the pleaders' intent, and the second on the limit of jurisdiction. The third exception is questionable because it is not clear why the court dismisses the case if they plan to allow amendment. In *Moran Towing Corp.*, the court stated, "[I]n passing upon a motion such as this, it is not for me to speculate as to the nature or the sufficiency of the proof which the plaintiff may present in support of its claim."[410] The nature or the sufficiency of the proof is irrelevant to Rule 12(b)(6) proceedings, and the court should have reasonable inferences to deny the motion.

No substantial harm may result from a dismissal with leave to amend, because the pleader will not lose the right to file an amended complaint and the dismissal does not have res judicata effect, as long as there is no statute of limitations problem. However, the plaintiff may not be able to appeal the dismissal, because such an order is normally interlocutory.[411] Also, the plaintiff may be barred from filing an amended complaint by a statute of limitations. Since the dismissal with leave to amend is often based on some technicalities, the court should use a pretrial order or other device unless such a dismissal is substantially needed.

IV. EFFECTS OF RULE 12(B)(6) DECISIONS

A. *Res Judicata*

A number of courts have indicated that a dismissal under Rule 12(b)(6) will be treated as a judgment on the merits, unless the court specifies that it is without prejudice.[412] Thus, a dismissal decision essentially has the effect of invoking the principles of res judicata.[413] However, it is not clear precisely what effect the application of res judicata has.[414]

Res judicata law has long consisted of "claim preclusion" and

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410. *Id.*

411. *See infra* part IV-C.

412. *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399, n.3 (1981); Hart v. Yamaha-Parts Distrib., Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); *See also*, FRIEDENTHAL ET AL., *supra* note 11, § 14.7, at 654.

413. *See, e.g.*, Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987) (stating that a ruling under Rule 12(b)(6) is a decision on the merits with full res judicata effect); 5A WRIGHT & MILLER, *supra* note 3, 1357, at 367; 2A MOORE & LUCAS, *supra* note 25, at 12-103.

414. 5A WRIGHT & MILLER, *supra* note 3, 1357, at 369.

"issue preclusion."[415] The essential concept of the modern rule of claim preclusion is that a final judgment precludes the same parties and those closely related to them from relitigating the same or a sufficiently similar claim in a subsequent lawsuit when the procedure in the first action afforded plaintiff a fair opportunity to get to the merits.[416] The basic rule of issue preclusion is that a final judgment precludes relitigation of the same issue of fact or law.[417] The doctrine applies so long as (1) the issue was actually litigated, determined, and necessary to the judgment in the prior adjudication, and (2) the circumstances of the particular case do not suggest any reason why it would be unfair to invoke the doctrine.[418]

Today, the courts generally apply the claim preclusion doctrine to the judgment of dismissal under Rule 12(b)(6).[419] Also, the courts often use specific language for issue preclusion in Rule 12(b)(6) decisions.[420] Since the Federal Rules gave plaintiffs abundant opportunities to develop all available pleading and evidence by amendment, discovery or other devices in the first action, the scope of what might have been litigated by the plaintiff in the first action was enlarged. In general, the scope of claim preclusion

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415. SHREVE & RAVEN-HANSEN, *supra* note 2, § 106, at 418. However, some courts do not seem to distinguish the two effects. *See, e.g.*, N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990).

416. JAMES ET AL., *supra* note 18, §11.16, at 607.

417. Issue preclusion is applied to issues of law as well as fact, subject to some special qualifications. JAMES ET AL., *supra* note 18, § 11.21, at 614.

418. SHREVE & RAVEN-HANSEN, *supra* note 2, § 106, at 420.

419. *See, e.g.*, Hall v. Tower Land & Inv. Co., 512 F.2d 481, 483 (5th Cir. 1975) (holding that suit was barred under doctrine of res judicata by dismissal of complaint in prior action under Rule 12(b)(6), where both actions were brought by same plaintiff against the same parties seeking the same remedy in regard to same property, regardless of whether the theories pleaded in the two actions were the,same); Teltronics Serv., Inc. v. L.M. Ericson Telecommunications, Inc., 642 F.2d 31 (2d Cir. 1981) (holding that the action was barred, by doctrine of res judicata, by dismissal, for failure to state a claim, of a prior suit involving the same parties, the same cause of action and the same facts). *See also*, 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, § 4339, at 354 (1981).

420. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1105 (7th Cir. 1984) (dismissing the claim under the Sherman Act "with prejudice" and the remaining claims "without prejudice"). In this case, the court granted the motion to dismiss because the claim under the Sherman Act was invalid, even though some claims for breach of contract might be granted under the state laws. Since the court did not review the other state claims, there was no res judicata effect on the other claims. *Id.*

should also be enlarged.[421]

However, a dismissal under Rule 12(b)(6) may occur before discovery. Also, the allowance of an amendment after defendant's answer lies within the discretion of the trial court.[422] Since Rule 12(b)(6) motions decide only the legality of a claim or the sufficiency of a statement of a claim, it is problematic whether every dismissal under Rule 12(b)(6) has a full claim preclusion effect. While it seems that each dismissal apparently has an issue preclusion effect as long as the requirements are satisfied,[423] it is not clear whether a Rule 12(b)(6) proceeding gives a plaintiff a fair opportunity to get to the merits. Claim preclusion is obviously harsher to a plaintiff than issue preclusion, and claim preclusion should be carefully examined.

1. *Specific Language*

At the threshold, it is necessary to clarify what generates the res judicata effect. Some courts strongly suggest that district courts should use the terms "with prejudice" or "without prejudice" only when making a determination as to the res judicata effect of a dismissal.[424] The question then arises whether the court has the discretionary power to generate the res judicata effect by using specific language in the decision.[425]

The Sixth Circuit has held that, absent specific language to the contrary by the district court, a Rule 12(b)(6) motion constitutes an adjudication on the merits and further actions on the same claim are barred.[426] If the specific language is the determina-

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421. JAMES ET AL., *supra* note 20, §11.16, at 606.

422. FED. R. CIV. P. 15(a); 3 J. Moore, *Moore's Federal Practice*, ¶ 15.10, at 15-106.

423. In a Rule 12(b)(6) proceeding, the issue is ordinarily litigated and determined actually, and necessary to the judgment in the Rule 12(b)(6) proceeding. The issue can be perceived in accordance with the categorization from the *A* to *G* contexts. *See* 18 WRIGHT ET AL., *supra* note 419, § 4439, at 354.

424. *See, e.g.*, Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 449 (2d Cir. 1978).

425. *See, e.g.*, Craighead v. E.F. Hutton & Co., 899 F.2d 485, 495 (6th Cir. 1990) (the decision to dismiss with prejudice is a harsh sanction, but the choice lies within the discretionary power of the district court); Holloway v. United States, 734 F.2d 506, 508 (10th Cir. 1984) (*per curiam*); Dynes v. Army Air Force Exch. Serv., 720 F.2d 1495, 1499 (11th Cir. 1983) (*per curiam*).

426. *See, e.g.*, Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 495 (6th Cir. 1990); Shaw v. Merritt-Chapman & Scott Corp., 554 F.2d 786, 789 (6th Cir. 1977), *cert. denied*, 434 U.S. 852 (1977).

tive factor as to whether the claim is barred by res judicata, the plaintiff must appeal when the trial court fails to use the specific language. The plaintiff may seek the specific language "without prejudice" by appealing the decision which granted the motion to dismiss. However, it is burdensome to require the plaintiff to get the specific language before commencing the procedure based on the amended complaint. The trial court may mistakenly fail to use specific language, and there must be some way to redress such a situation.

Whether principles of res judicata apply should not depend on the language used, but on the substantive content of the decision granting the motion to dismiss. The specific language can be one factor in determining whether the claim is barred by res judicata. Certainly, the court may give a judgment a res judicata effect by giving plaintiff a fair opportunity to get to the merits and by using specific language. However, the determinative test should be whether the procedure in the first action meets the requirements of res judicata, *i.e.* whether it is claim preclusion or issue preclusion.

2. *Claim Preclusion*

According to the general claim preclusion doctrine, claim preclusion must be allowed in a case only when the Rule 12(b)(6) procedure afforded plaintiff a fair opportunity to get to the merits. What then is the situation in which plaintiff is given a fair opportunity to get to the merits when the court rendered a judgment of dismissal under Rule 12(b)(6)?[427]

Dismissals in the *A* and *B* contexts are essentially rendered as a matter of law on the merits, unless the legal question is limited to presented questions and there may be other legal claims. Since the court must examine all conceivable legal theories on which relief could be granted on the basis of the alleged facts, the plaintiff is deemed to be given a fair opportunity to get to the merits. Dismissal in the *A* and *B* contexts may be viewed as a decision made because of an entire failure to state a cause of action.[428]

On the other hand, since the court should not dispose of a claim on only technical or procedural grounds,[429] dismissal in the *G*

427. Decisions denying the motion in the *B*, *F* and *G* contexts will not have a res judicata effect because it is not a final judgment.

428. 18 WRIGHT ET AL., *supra* note 419, § 4439, at 355.

429. *Id.* at 361-362.

context should not have a res judicata effect. If a court dismisses a complaint for deficiency in form in the *G* context, the plaintiff is not given an opportunity to get to the merits. If the court wishes to generate a res judicata effect, it should treat the complaint on the merits.[430]

When the issue is the sufficiency of the pleading, the matter is similar to the *G* context rather than the *A* and *B* context. Just granting a motion to dismiss for lack of subject matter jurisdiction is not a ruling on the merits,[431] a ruling under Rule 12(b)(6) for technical or procedural grounds should not be considered to be on the merits and its res judicata effect should be limited to issue preclusion. Since the claim is not substantively litigated and determinated, dismissals in the *C, D,* or *E* context should not have a claim preclusion effect.

In the *C* context, there should be no claim preclusion because, on the substantive level, a plaintiff may fail to rely on a reliable theory by relying on a wrong theory,[432] while on the procedural level, plaintiffs may believe that they do not have to allege some elements under liberal pleading.[433] In both cases, a dismissal in the *C* context may mean the elimination of the suit for only technical or procedural reasons.

In the *D* context, when essential elements are stated in mere conclusory or general fashion, it is likely that the plaintiff cannot get enough information about the element, or is intentionally ignoring it in order to avoid giving an unfavorable impression relating to the existence of the fact. Some may argue that, in the *D* context, the court should give attention to whether a plaintiff can

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430. *See supra* notes 189-90 and accompanying text.

431. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987) (its res judicata effect is limited to the question of jurisdiction).

432. *See, e.g.*, In re Longhorn Sec. Litig., 573 F. Supp. 255, 271 (W.D. Okla. 1983) (the court had to determine whether the plaintiffs' fiduciary duty claims were properly stated on any theory against the defendants who were not general partners. Although the only conceivable basis for the plaintiffs' claim was a joint venture theory, the plaintiffs did not state any facts on the theory).

433. *See, e.g.*, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir. 1989)(affirming a dismissal for failure to state a claim by holding that a stock holder did not have standing to claim damages based on violation of section prohibiting use or investment of income from racketeering activity, where the stock holder failed to allege any facts showing injury from use or investment of racketeering income because the plaintiff appeared to believed that he did not have to allege it).

ordinarily obtain enough information regarding the essential element. In other words, the court should not dismiss the claim with prejudice if it is unlikely that a plaintiff can obtain the information. But the court should dismiss the claim with prejudice when a plaintiff should know the elements. However, as it is difficult to discern the former case from the latter, and often difficult to discern whether a lower court intends a res judicata effect, attempting to distinguish cases on this basis is probably not a worthwhile endeavor.

In the *E* context however, it seems to be appropriate for the courts to give res judicata effect to a 12(b)(6) dismissal. Since plaintiffs in this context refer to the elements, they apparently know the necessity of alleging them. When a plaintiff tries to make a claim on the basis of a highly improbable allegation despite unnecessary particularized pleading in the *E* context, there is no reason for courts to allow the plaintiff another opportunity to state the same claim.

In summary, in a Rule 12(b)(6) proceeding, the court cannot always examine and determine adequately why the plaintiff failed to state a claim before the judgment. A plaintiff may very well have a substantive claim even though his complaint has been dismissed for insufficient allegations. Although a plaintiff should allege essential elements on a reliable legal theory, a failure to do so does not always mean that the element is not proveable or that another more apt legal theory does not exist. Accordingly, in the *C*, *D* and *E* contexts, the court should not assume that the plaintiff cannot state the essential element, even though the court may decide the complaint was defective.

Although some courts recognize claim preclusion,[434] a Rule 12(b)(6) decision which denies sufficiency of the pleading does not afford plaintiff a fair opportunity to get to specific merits, and should not be given claim preclusion effect. Unlike the *A* and *B* contexts, the allegations must be insufficient for there to be a claim preclusion effect, just as they are insufficient to state a claim in the

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434. *See, e.g.*, Hall v. Tower Land & Inv. Co., 512 F.2d 481, 483 (5th Cir. 1975) (stating that the appellate court will not go behind the order to determine precisely which issues the trial court decided); Teltronics Serv., Inc. v. L.M. Ericsson Telecommunications Inc., 642 F.2d 31, 35 (2d Cir. 1981) (stating that a final judgment is res judicata "not only to all matters pleaded, but to all that might have been" and "not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.") (quoting Heiser v. Woodruff, 327 U.S. 726, 735 (1946)).

C, D and *E* contexts. Since the allegations did not specify essential elements of a claim, it is impossible to specify what claim is barred. Without a clear distinction between the alleged claim and the claim not alleged, the scope of claim not alleged preclusion may be unfairly enlarged.

Many authorities have come to reject the distinction between the entire merits of the claim and the sufficiency of the pleading which was formerly made.[435] Today, dismissal for failure to state a claim generally precludes a second action on an improved pleading. However, this general rule does not reach all dismissals for inadequate pleading.[436] In other words, in the *C, D* and *E* contexts, dismissals for vague or incomprehensible pleading may not justify dismissal with claim preclusion. Some may argue that under this rule, dismissals in these contexts cannot end a dispute involving insufficient allegations. However, these dismissals have full issue preclusion effect. Also, the amended Rule 11 may effectively sanction against unreasonable attacks. Opponents of the distinction assert that very few meritorious claims will be precluded by the non-distinction rule.[437] However, under the distinction approach, no meritorious claim will be precluded, at least theoretically. Since the automatic application of res judicata should not allow any injustice, the distinction approach is better than the current non-distinction rule.

Therefore, dismissal in the *C, D, E* and *G* contexts should have issue preclusion effect but should not have claim preclusion effect. The court can adequately achieve the objectives of res judicata by issue preclusion in these contexts.

3. *Fairness in Rule 12(b)(6) Proceedings*

In granting a Rule 12(b)(6) motion, the court can avoid unfairness by granting leave to amend, and this is the prevailing practice.[438] When the court denies leave to amend with res judicata effect the considerations in a Rule 12(b)(6) proceeding should not involve any reason that would unfairly invoke issue preclusion. The court should first pay attention to the burden of pleading.[439] Also, in dismissing *sua sponte*, the court should follow the strict

435. 18 WRIGHT ET AL., *supra* note 419, § 4439, at 357.
436. *Id.* at 360-361.
437. *Id.* at 358.
438. FRIEDENTHAL ET AL., *supra* note 11, § 14.7, at 654.
439. *See supra* part II-E-3.

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procedural rules discussed *supra* in part III-C.

B. Amendment

If a district court finds the allegations of a complaint to be insufficient, it may dismiss the complaint under Rule 12(b)(6).[440] If a district court has dismissed the complaint, two courses of action are open to the plaintiff: (1) he may appeal the judgment, or (2) he may seek leave to amend under Rule 15(a) after having the judgment reopened under either Rule 59 or 60.[441] On the other hand, if the district court overlooks the defective allegations and allows plaintiff an evidentiary hearing, the complaint apparently can avoid re-examination on appeal because, once done, the evidentiary hearing cannot be ignored.[442]

After a dismissal decision under Rule 12(b)(6), can the plaintiff modify and refile the complaint? Generally, a pleading will not be dismissed for mere insufficiency or informality of a statement of a claim. Instead, the court ordinarily will give plaintiff leave to file an amended complaint following a dismissal order.[443] Thus, amendment of pleading is to be freely granted, even after trial, under Federal Rule of Civil Procedure 15(b), and the court is directed in any event to grant the parties whatever relief they are entitled to after trial, whether they have requested it or not, by Federal Rule of Civil Procedure 54(c).

The allowance of an amendment after dismissal lies within the sound discretion of the trial court.[444] However, there are circumstances where amendment will not be allowed. The court should deny leave to file a proposed amended complaint if it appears to a

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440. Generally, the court will not dismiss a pleading for mere insufficiency or informality of a statement of claim. Instead, the court should grant leave to amend unless the complaint is incurably defective. 4 CEPLA & PALMER, *supra* note 4, § 14.154, at 238.

441. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1111 (7th Cir. 1984).

442. See, e.g., Lasercorp America, Inc. v. Reynolds, 911 F.2d 970, 980 (4th Cir. 1990) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings"). *Cf.* Roberts, *supra* note 9, at 414.

443. *See, e.g.*, Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991).

444. FED. R. CIV. P. 15(a). *See, e.g.*, Foman v. Davis, 371 U.S. 178, 182, (1962); Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 982 (6th Cir. 1991) ("[W]e review those decisions under an abuse of discretion standard.") (citing Martin v. Associated Truck Lines, Inc., 801 F.2d 246, 248); 3 MOORE & LUCAS, *supra* note 422, ¶ 15.10, at 15-106.

certainty that plaintiff cannot state a claim.[445] Accordingly, if the court indicates that no curative amendment is possible, it will not allow further amendments after a motion to dismiss has been granted.[446] Even when leave to admend is granted, failure by the plaintiff to respond or an insufficient amendment can trigger dismissal of a complaint with prejudice under Rule 12(b)(6).[447]

Many courts and commentators have suggested several factors to be considered regarding the exercise of the court's discretion to grant leave to amend.[448] The categorization of Rule 12(b)(6) decisions provides an additional factor to be considered concerning leave to amend. For instance, when a dismissal is without prejudice, leave to amend is not automatically granted.[449] However, a dismissal with prejudice need not give further opportunity to argue the same claim because the court has already given a fair consideration to the merits. Under the categories explored *supra*, dismissal in the *A* and *B* contexts will tend not to allow amendment because the decision was on the merits.[450] On the other hand, dis-

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445. *See, e.g.*, *Ricciuti*, 941 F.2d at 123; Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1041 (6th Cir. 1991) (an amendment may not be allowed if the complaint as amended could not withstand a Rule 12(b)(6) motion); Cook, Perkiss & Liehe v. Northern California Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990); *see also*, 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 360-67; 4 CEPLA & PALMER, *supra* note 4, § 14.154, at 238.

446. SHREVE & RAVEN-HANSEN, *supra* note 2, § 50, at 200.

447. *See, e.g.*, Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1438 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 (1987) (stating that the district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint); Levitch v. CBS, Inc., 94 F.R.D. 292 (S.D.N.Y. 1982) (defendants entitled to dismissal with prejudice because the plaintiff's amendment to the first amended complaint neither met the pleading requirement of the Federal Rules nor constituted "amended pleading" as required by the prior order).

448. *See, e.g.*, Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (The *Ascon* court pointed out five factors to consider: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, (5) whether plaintiff has previously amended his complaint. *Id.* (citing DCD Program, Ltd. v. Leighton, 833 F.2d 183, 186-87 n.3 (9th Cir. 1987)). *See also* SHREVE & RAVEN-HANSEN, *supra* note 2, § 53, at 208-210.

449. The Second Circuit for example has clearly rejected the view that "without prejudice, means "with leave to amend." Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 448 (2d Cir. 1978) (stating that "without prejudice" and "with prejudice" are not substitutes for clear indications as to whether repleading will be allowed).

450. 3 MOORE, supra note 422, ¶ 15.11, at 15-109. ("When the pleader has stood upon his pleading and appealed from a judgment of dismissal, amendment

missal in the *C, D, E,* and *G* contexts should be amenable to allow amendment subject to Rule 15 requirements, because the decision does not have a res judicata effect, and does bind the parties.

Some technical problems arise with regard to the amendment of the complaint following a successful motion under Rule 12(b)(6).[451] For example, should the court deny the motion to dismiss for repleading or grant the motion to dismiss with leave to amend the complaint? Can the plaintiff amend once as a matter of right if no responsive pleading has been served? Must he obtain the court's permission for any amendment when the dismissal order does not expressly grant leave to replead, or expressly negates any right to amend?[452] If plaintiff opts to amend, is he deemed to waive his argument that the original complaint was sufficient?[453] Each question will be dealt with in turn.

1. *Dismissal with Leave to Amend*

When a complaint is insufficient but suggestive of a claim, it is not clear whether the court should deny the motion to dismiss for repleading[454] or grant the motion to dismiss with leave to amend the complaint.[455] There may be no difference between the two

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will not normally be permitted . . . if the order of dismissal is affirmed."). This proposition should be applied only to the dismissal in the *A* and *B* contexts.

451. 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 372.

452. *Id.*

453. Both state and federal courts are divided on this question. SHREVE & RAVEN-HANSEN, *supra* note 2, § 50, at 201.

454. *See* Festa v. Local 3 Int'l Brotherhood of Elec. Workers, 905 F.2d 35, 37 (2d Cir. 1990) (reversing a dismissal of the complaint against the labor union because nothing on the face of the complaint indicated that the plaintiff could not adequately replead a claim against the union); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 700-02 (9th Cir. 1990) (reversing the dismissal with prejudice of plaintiff's equal protection claim because the plaintiff was entitled to amend the complaint to clarify claim that police officers violated equal protection); Scott v. Eversole Mortuary, 522 F.2d 1110, 1116 (9th Cir. 1975) (reversing the dismissal of plaintiff's count insofar as it denied leave to amend because the court could conceive of facts that would render plaintiff's claim viable and discern from the record no reason why leave to amend should be denied).

455. *See* Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 622 (5th Cir. 1992) (reversing the district court's denial of a Rule 12(b)(6) motion, and instructing to replead further in accordance with heightened pleading requirement under § 1983); Buckey v. County of Los Angeles, 957 F.2d 652, 654 (9th Cir. 1992) (after affirming the dismissal of a complaint, the Ninth Circuit questioned whether it should remand to permit the plaintiff to amend her pleadings); Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991) (noting that dismissal of complaint

courses, because the plaintiff can replead his claim in either case. Accordingly, it may be good for the court to have some discretion to deny or grant the motion with leave to amend the complaint in this context. However, a district court's discretion to dismiss the complaint without leave to amend should be severely restricted by Rule 15(a).[456] Also, denying the motion might be favorable in view of a statue of limitations and appealability.[457]

2. *Right to Amend*

It is well-settled that cases should be decided on their merits, and that the plaintiff should be given a reasonable opportunity to cure the formal defects of the complaint. For this reason, some courts have held that upon dismissal under Rule 12(b)(6), the plaintiff may amend the complaint as a matter of right under Rule 15(a) if there has been no responsive pleading. However, others require the plaintiff to obtain leave to amend.

For example, the Seventh Circuit held that when the original complaint is dismissed, the litigation has not been terminated and the plaintiff still retains his right to amend once as a matter of course under Rule 15(a).[458] In this regard, the courts appear to distinguish dismissal of the complaint from dismissal of the action and to read Rule 15(a) literally to allow a plaintiff to amend once after dismissal of the complaint.[459] On the other hand, the First Circuit has held that the thrust of Rule 15(a) is aimed at the prejudgment phases of litigation, and that plaintiffs were not entitled to amend their complaint even though no responsive pleading had been served.[460] Also, the Second Circuit held that the right to amend without permission terminates unless the court explicitly

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under Rule 12(b)(6) should ordinarily be accompanied by leave to file amended complaint); Elliott v. Bronson, 872 F.2d 20 (2d Cir. 1989) (affirming the dismissal but remanding and directing the leave to amend); Salahuddin v. Cuomo, 861 F.2d 40, 43 (2d Cir. 1988).

456. *See, e.g.*, Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991), citing Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988).

457. *See supra* part III-D; *infra* part IV-C.

458. Peterson Steels, Inc. v. Seidmon, 188 F.2d 193 (7th Cir. 1951).

459. Accordingly, that right does not survive a dismissal of the entire action. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984).

460. *See, e.g.*, The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 22-23 (1st Cir. 1989) ("[L]eave to amend will be granted sparingly and only if justice requires further proceedings").

grants leave to amend in ruling on the motion,[461] because efficient judicial administration is lost after the court has already ruled by granting a motion to dismiss.[462]

Some commentators argue that the better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears.[463] Since the better rule is to limit the courts' discretion concerning technical matters, a plaintiff should be allowed his right to amend once as a matter of course. After one amendment has been allowed, the district court has "discretion whether or not to grant leave to amend, and its discretion is not subject to review on appeal except for abuse of discretion."[464] Otherwise, the effect of granting dismissal may be especially harsh for a plaintiff. After a plaintiff has exercised the right to amend a complaint, the court will have discretion whether to grant leave to amend under Rule 15(a).

3. *Question of Waiver*

If a plaintiff chooses to amend without arguing that the original complaint was sufficient, he may lose the opportunity to argue it.[465] Some commentators maintain that under the Federal Rules a plaintiff waives his objection to the court's dismissal order only insofar as it applies to technical defects in the original complaint, if the plaintiff asks leave to amend his complaint and the amendment is merely a technical one, most courts will not allow the plaintiff to argue on appeal that the dismissal of his earlier pleading was erroneous. However, a plaintiff may still argue on appeal from an unfavorable final judgment after a trial on the merits of the amended complaint, that the erroneous grant of the Rule 12(b)(6) motion against his original complaint struck a vital blow

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461. Although the other position basically requires leave to amend, some commentators view some circuits as taking an intermediate position that plaintiff may amend with leave of court after dismissal, unless the court either holds that no amendment is possible or that dismissal of the complaint also constitutes dismissal of the action. SHREVE & RAVEN-HANSEN, *supra* note 2, 53, at 209.

462. Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 448 n.1 (2d Cir. 1978).

463. *See, e.g.*, 5A WRIGHT & MILLER, *supra* note 3, § 1357, at 365-367.

464. 3 MOORE, *supra* note 422, ¶ 15.08, at 15-64.

465. *See, e.g.*, Leggett v. Montgomery Word & Co., 178 F.2d 436 (10th Cir. 1949) (overruled by Davis v. TXO Prod. Corp., 929 F.2d 1515 (10th Cir. 1991); FRIEDENTHAL ET AL., *supra* note 11, § 5.25, at 302.

to a substantial portion of his case.[466] In this regard, since the court may dismiss a claim for technical defects in the *C, D, E* and *G* contexts, the plaintiff is deemed to have waived his argument. On the other hand, the plaintiff may argue on appeal that the complaint sufficiently stated a claim in the *A* and *B* contexts.

C. Appealability

Generally, when the court grants the motion to dismiss, the plaintiff may appeal because the decision is final on the merits.[467] When the court denies the motion, neither party can appeal, unless the jurisdiction permits interlocutory appeals, because there is no final judgment from which to take an appeal.[468]

Similarly, an order dismissing a complaint with leave to amend is normally interlocutory and not appealable,[469] because the deficiency may be corrected by the plaintiff without affecting the cause of action.[470] Since it is not clear whether the court denies the motion to dismiss for repleading or grants the motion to dismiss with leave to amend the complaint, there should not be a substantial difference between them, and both decisions are not appealable. Also, it may be good for the court to have some discretion to deny or grant the motion.

However, just as the complaint should be tested in order to facilitate appellate review in the *B* context, the dismissal decision should also be reviewed at an early stage, if the plaintiff desires. In some jurisdictions, if the plaintiff cannot amend or declares his intention to stand on his complaint, the order does become final and appealable.[471] Also, if the court does not want an appeal, denying the motion for repleading might be simpler. However, plaintiff may

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466. 6 CHARLES A. WRIGHT ET AL., *Federal Practice & Procedure: Civil 2d*, § 1476, at 560-61 (2d. ed. 1990); SHREVE & RAVEN-HANSEN, *supra* note 2, § 50, at 201. *See, e.g.*, Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1238 (5th Cir. 1978) (citing Blazer v. Black, 196 F.2d 139, 143-44 (10th Cir. 1952)).

467. *See, e.g.*, 2A MOORE, *supra* note 422, ¶ 12.14, at 12-103.

468. *See, e.g.*, SHREVE & RAVEN-HANSEN, *supra* note 2, § 5O, at 201; Goetz v. Calppelen, 946 F.2d 511, 514 (7th Cir. 1991).

469. *See, e.g.*, Kozemchak v. Ukrainian Orthodox Church of America, 443 F.2d 401 (2d Cir. 1971) (*per curiam*).

470. Borelli v. City of Reading, 532 F.2d 950, 951 (3d Cir. 1976).

471. *See, e.g.*, DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987); Borelli v. City of Reading, 532 F.2d 950, 951-52 (3d Cir. 1976); Azar v. Conley, 480 F.2d 220 (6th Cir. 1973); Grantham v. McGraw-Edison Co., 444 F.2d 210 (7th Cir. 1971); Hurst v. California, 451 F.2d 350 (9th Cir. 1971).

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be deemed to have irrevocably waived the option to further amend the complaint.[472]

V. CONCLUSION

Under modern pleading, Rule 12(b)(6) will not serve the functions of issue narrowing, fact development and guidance, and full screening of sham or insufficient claims or defenses. Rule 12(b)(6) may, however, serve the functions of important issue identification and some screening of unmeritorious or insufficient claims or defenses. The function of Rule 12(b)(6) can be the disposition of certain cases as follows:

i) those which state no legal theory whatsoever, including frivolous cases (*A* context);
ii) those which state no legal ground to establish a claim (*B* context);
iii) those which contain no factual allegation of an essential element of established legal theory (*C* context);
iv) those which state only conclusory, general allegations without any description of the basic nature of the dispute (*D* context); or
v) those containing highly improbable allegations of an essential element of established legal theory (*E* context).

This function may also eliminate some marginal claims and parties. In an unusual case, a complaint which is defective in form (*G* context) may be dismissed under Rule 12(b)(6) as well as Rule 12(f). On the other hand, the court can tentatively confirm the validity of a claim (*B* context), or the sufficiency of allegations of a conceivable set of facts alleged in support of essential elements establishing legal grounds (*F* context).

Needless to say, Rule 12(b)(6) has many sub-functions, which were referred to in part I-A of this article. Although Rule 12(b)(6) motions may signal the defendant's determination to litigate, or affect settlement dynamics, these are merely by-products. The functions of Rule 12(b)(6), including issue identification and screening of unmeritorious or insufficient claims or defenses, must be finally accomplished through discovery, pretrial conference, other screening motions, and other devices. Courts should exercise discretion regarding application of Rule 12(b)(6) or dismissal *sua*

472. *See, e.g.*, DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987).

sponte under some clear standards. The desirable standards for Rule 12(b)(6) may be double or plural standards, depending on the issues on the face of the complaint. However, the standards should not vary upon whether the action is "disfavored" or not. Plural standards should be drawn from the objectives and effects of Rule 12(b)(6) proceedings. When the court must decide whether the plaintiff has legal grounds or not (*A* and *B* contexts), the *Conley* standard should not be applied. On the other hand, when the court decides whether the complaint sufficiently states allegations, the *Conley* standard should be fully applied. The real problem is not one of sufficiency or specificity of allegations, but rather concerns regarding the statement of essential elements, the burden of pleading, or the burden of the movant. Only when the movant successfully shows that the complaint has only conclusory, general, or highly improbable allegations of an essential element of established legal theory may the court grant a Rule 12(b)(6) motion. Additionally, dismissal *sua sponte* should be used subject to the strict procedural rules only in cases where the claim is not supported by any legal ground (*A* context), or factual allegation of an essential element is absent (*C* context). Finally, when the court decides the complaint is defective in form, the court should use Rule 12(b)(6) very sparingly (*G* context).

All dismissals have an issue preclusion effect. However, while dismissals in the *A* and *B* contexts should have a claim preclusion effect, dismissals in the *C, D, E* and *G* contexts should not. Accordingly, the court may use dismissal *sua sponte* with full res judicata effect only in the *A* context, which will rarely occur. In ordinary cases, the court will have to consider claims in other contexts. As a result, although the court may be able to dispose of fewer cases, each case may be treated more fairly by using Rule 12(b)(6).

Although it may be desirable to codify such standards in the Rules, the courts may have already used such standards to some extent. Without clarifying the standards, Rule 12(b)(6) will remain an obscure, flexible procedure which is easily manipulated by lawyers, and which will impede the justice the Federal Rules originally sought. However, if Rule 12(b)(6) is utilized in an appropriate manner and under relatively clear standards, it can appropriately influence settlement dynamics. Thus, as with so many other areas of the law, the future of Rule 12(b)(6) depends on the development of clear standards.