Michigan Law Review

Volume 61 | Issue 6

1963

Federal Civil Procedure-Federal Rule 12(E): Motion for More Definite Statement- History, Operation and Efficacy

Stefan F. Tucker S.Ed.
University of Michigan Law School

COMMENTS

FEDERAL CIVIL PROCEDURE—FEDERAL RULE 12(E): MOTION FOR MORE DEFINITE STATEMENT—HISTORY, OPERATION AND EFFICACY—In 1938 the Supreme Court, pursuant to congressional authorization, promulgated the Federal Rules of Civil Procedure,[1] a general revision of the various procedural rules governing the conduct of litigation in the federal courts.[2] Underlying this revision was the philosophy that every individual should be assured the opportunity to obtain justice under the law. This aim was sought to be achieved primarily in two ways: first, by reducing procedural technicalities to a minimum, so that cases might be adjudicated on their merits regardless of attorneys' errors;[3] and, secondly, by relieving congested court dockets, so that cases might reach trial before funds were exhausted and memories had faded.[4] The basic philosophy is summarized in the admonition that the Rules "shall be construed to secure a just, speedy, and inexpensive determination of every action."[5]

Pursuant to the underlying philosophy of the Rules, the detail required to be stated in a complaint was greatly diminished.[6] Because a rather simple statement will fulfill the pleading requirements, in drafting a response to a complaint or preparing for trial it may be difficult to ascertain, by reference to the pleadings alone, precisely what issues have been raised or what allegations must be met. Consequently, the drafters of the Rules provided various techniques, including discovery devices,[7] the pre-trial conference,[8] and the motion for more definite statement, to aid in the determination of these matters. While discovery and pre-trial conferences are generally considered effective means for reducing

1 Since then a number of states have revised their procedural codes along the lines of the Federal Rules. See, *e.g.*, ARIZ. R. CIV. P.; COLO. R. CIV. P.; DEL. R. CIV. P.; KY. R. CIV. P.; UTAH R. CIV. P.

2 One body of rules under which the courts formerly operated was the Federal Equity Rules. The Equity Rules of 1912 are found in HOPKINS, FEDERAL EQUITY RULES ANNOTATED (7th ed. 1930).

3 See Holtzoff, *The New Civil Procedure in West Virginia*, 26 F.R.D. 79, 81 (1960); 36 IND. L.J. 360 (1961).

4 See Chandler, *Discovery and Pre-Trial Procedure in Federal Courts*, 12 OKLA. L. REV. 321, 328 (1959).

5 FED. R. CIV. P. 1.

6 FED. R. CIV. P. 8(a): "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." See the interpretation given Rule 8(a) by Judge Clark in Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

7 FED. R. CIV. P. 26-37.

8 FED. R. CIV. P. 16.

technicalities and helping to relieve congested dockets, the motion for more definite statement is commonly regarded as being used only by those wishing to delay or conceal their own knowledge.[9] Because of this view, many judges have adopted something akin to an a priori presumption against granting this motion which, if it does not cause an attorney to forego its use, even when his motive is valid, usually foretells the motion's judicial disposition.

The purpose of this comment is to trace the history of the motion for more definite statement as provided for in the Federal Rules, analyze the reasons for granting or denying the motion, and propose an answer to the question of whether Rule 12(e) is necessary, or superfluous, as part of modern federal pleading procedure.

I. HISTORY

The pleading system originated by the New York Code of Civil Procedure[10] in 1848 requires a plain statement of facts in language enabling an adversary to understand what is alleged.[11] When the allegations are so indefinite and uncertain that the precise meaning is not apparent, the court may, in a code pleading jurisdiction, order that the pleading be made more definite and certain when an appropriate motion is made.[12] However, it is only where the exact nature of the cause of action is not apparent that the motion will be granted.[13] Particulars of time and place may not be obtained through the device of a motion to make more definite and certain; rather, the answering party is relegated to use of the bill of particulars.

At common law, the bill of particulars was a document setting forth and attacking the pleader's allegations which the answering party considered to be stated with insufficient definiteness. It was the proper recourse where the claim or defense set out in the pleading was sufficient as far as general allegations were concerned, but specific facts leading to the general conclusions alleged were

9 See Chandler, *supra* note 4, at 328.

10 Commonly referred to as the "Field Code." See generally Coe & Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

11 See N.Y. CIV. PRAC. ACT § 241.

12 See N.Y. RULES CIV. PRAC. § 102: "If any matter contained in a pleading is so indefinite, uncertain or obscure that the precise meaning or application thereof is not apparent, the court may order the party to serve such amended pleading as the case may require."

13 Tilton v. Beecher, 59 N.Y. 176 (1874). See generally 2 ABBOTT, TRIAL BRIEF 1923 (1904); POMEROY, CODE REMEDIES §§ 442-43 (5th ed. 1929). The New York concept carried over to the other code states. See, *e.g.*, Chicago & E.R.R. v. Lawrence, 169 Ind. 319, 79 N.E. 363 (1906); Pierson v. Green, 69 S.C. 559, 48 S.E. 624 (1903).

being sought.[14] A response to the bill of particulars could be required of a pleader in any type of action. In most code pleading states, the bill of particulars is the same as the common-law bill;[15] however, in some states, particulars may be obtained only in an action involving an account or money demands arising upon contract.[16] While the motion to make more definite and certain may be filed before the answer, the code bill of particulars may be filed only after the answer has been made.[17]

As originally promulgated, Federal Rule 12(e) read:

> "Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired . . . . A bill of particulars when filed becomes a part of the pleading which it supplements."

The committee formulating the Rules apparently failed to anticipate some difficult problems which subsequently arose as a consequence of including the motion for a bill of particulars in Rule 12(e) as originally drafted. Use of the bill of particulars had been regarded as efficacious in preventing surprise and limiting the issues, and, since resulting in the inclusion of more detail in the pleadings, it thereby enabled defendants to prepare for trial with the least expense.[18] However, this was inconsistent with the generality in pleading permitted by the Federal Rules. Furthermore, the discovery and pre-trial conference devices performed the same functions more effectively. Accordingly, there was frequent abuse of Rule 12(e)'s provisions, as originally promulgated: first, by those who desired additional facts in complaints simply because they refused to accept the basic philosophy of generalized pleading; second, by those who wanted to embarrass their adver-

14 See 2 ABBOTT, *op. cit. supra* note 13, at 1943. See generally CLARK, CODE PLEADING § 54 (2d ed. 1947).

15 See, *e.g.*, N.Y. RULES CIV. PRAC. § 115: "Any party may require any other party to give a bill of particulars of his claim . . . by serving a written notice stating the items concerning which such particulars are desired."

16 See, *e.g.*, Price v. Bouteiller, 79 Conn. 255, 64 Atl. 227 (1906); Board of County Comm'rs v. American Loan & Trust Co., 75 Minn. 489, 78 N.W. 113 (1899).

17 Updike v. Mace, 156 App. Div. 381, 141 N.Y. Supp. 587 (1913).

18 See Caskey & Young, *The Bill of Particulars—A Brief for the Defendant*, 27 VA. L. REV. 472, 474 (1941).

saries or to delay;[19] and, third, by those who desired more information, without resorting to discovery, than that which they alleged had been pleaded "ambiguously or indefinitely" in the complaint. In response to the overwhelming number of such motions made,[20] some courts refused to grant the motion when the movant's sole motive was to acquire additional information "to prepare for trial."[21] Others equated the filing of a bill of particulars to the making of a motion for more definite statement, and refused to grant the motion where it was made solely to elicit facts not pleaded, irrespective of the purpose for which the information was desired.[22] Finally, in 1948, on the recommendation of the Advisory Committee,[23] Rule 12(e) was amended to read:

> "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired . . . ."

Thus, the bill of particulars was finally deleted from the Federal Rules of Civil Procedure, to the chagrin of only a few.[24]

With the demise of the bill of particulars there has also been a diminution in the judicially reported use of the motion for more definite statement. A ruling on such motion is interlocutory in nature and cannot be immediately appealed, but usually must await the final decree.[25] If it does survive trial, the party wishing to appeal the determination on the motion will have to shoulder

19 See Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155 (1953).

20 In Stayton & Boner, *The Plastic Code in Operation*, 36 TEXAS L. REV. 561, 572 (1958), the authors note that in 1943 alone twenty-one pages of the Federal Rules Service were required merely to index cases deciding what particulars would or would not justify granting of the motion.

21 See James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1476 (1958).

22 See 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 412 (1960).

23 See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 9 (1946).

24 A vigorous dissent to any elimination of the bill of particulars had been presented at an earlier date by Caskey & Young, *supra* note 18. They presented the side of the defendant's attorney to whom, they argued, the bill of particulars was an "invaluable aid." *Id.* at 472.

25 See Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5th Cir. 1959); 1A BARRON & HOLTZOFF, *op. cit. supra* note 22, at 462. However, it is possible that an interlocutory appeal might be granted under 28 U.S.C. § 1292 (1958), where "an immediate appeal . . . may materially advance the ultimate termination of the litigation."

the heavy burden of showing an abuse of judicial discretion.[26] These factors account for the paucity of federal circuit court of appeals and Supreme Court decisions construing the Rule. Motions for more definite statement arise in the federal district courts much more frequently than the published decisions indicate, and are not reported because of the rather perfunctory treatment accorded them by district court judges.[27] Only forty-one decisions on Rule 12(e) motions have been published during the period from 1957 through 1962.[28] In approximately one-third of the cases —fourteen—the motion was granted; the remaining twenty-seven cases involved orders denying the motion. This particular period of time was selected for concentration in this comment because it presumably is sufficiently removed from the date of amendment to ensure that the new motion for more definite statement was not confused with the old bill of particulars. Moreover, these recent cases should provide a fairly accurate indication of what may be expected in the future.

II. Appropriate Grounds for Granting or Denying a Rule 12(e) Motion

To grant a Rule 12(e) motion properly, the court must decide that the pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."[29] Literally interpreted, the phrase "vague or ambiguous" obviously applies to a pleading the terminology of which is capable of having two or more possible meanings. Usually, however, the phrase is interpreted to include also the pleading which, on the whole, is so indefinite and uncertain that the opposing party cannot be expected to understand the "nature of the claim."[30] As used here, "nature of the claim" refers to the legal wrong for which the

26 That the disposition of the motion does rest in the trial court's discretion has been stated in several cases. See, *e.g.*, Etablissements Neyrpic v. Elmer C. Gardner, Inc., 175 F. Supp. 355 (S.D. Tex. 1959).

27 The writer's personal research in the United States District Court for the Eastern District of Michigan discloses that motions for more definite statement arise with much more frequency than is revealed by written opinions in reported cases. This was verified in a discussion with Judge Talbot Smith, of the Federal District Court for the Eastern District of Michigan, Oct. 6, 1962. Judge Smith also noted that a major reason for the large volume of such motions is "the carryover into the federal system of a practice commonly employed in state courts not having a discovery practice as liberal as that of the federal courts."

28 See Appendix at end of this comment for a complete listing of the cases.

29 FED. R. CIV. P. 12(e).

30 *Cf.* Hartman Elec. Mfg. Co. v. Prime Mfg. Co., 9 F.R.D. 510 (E.D. Wis. 1949); Walling v. American S.S. Co., 4 F.R.D. 355 (W.D.N.Y. 1945).

plaintiff is seeking redress—for example, a claim for personal injury based upon defendant's negligence, the elements of which would be duty, breach, causation and resulting injury. Whether the court can understand the "nature of the claim" by reference to the pleading will probably be a key determinant in deciding if a particular pleading is so defective that the 12(e) motion should be granted.

In most federal courts, the requirement of stating the "nature of the claim" is satisfied when the claimant sets out the elements showing that a legal wrong has been committed and that he is entitled to relief.[31] These courts interpret the Federal Rules as doing away with the narrow "theory of the pleadings" doctrine which requires, in part, that the pleader clearly designate each separate legal theory that he intends to rely upon.[32] Judge Clark has stated:

> "A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety; and even the demand for judgment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not."[33]

Once the elements of the claim are clearly set forth, the question then arises as to whether the motion for more definite statement might nevertheless be granted if the movant claims that insufficient facts are stated in the pleading. Code pleading rules require that a complaint contain a "statement of *facts* constituting a cause of action."[34] Some federal courts, having read this requirement into the Federal Rules, expect the plaintiff to plead the particular facts upon which the claim is based. Thus, when a

31 See Conley v. Gibson, 355 U.S. 41 (1957), in which the Court noted that the Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim. The Court stated: "To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. See also the various federal forms which are sufficient for use in pleadings under the Rules. Form 6, for example, which is a complaint for money lent, requires no more than: "Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1936."

32 See CLARK, *op. cit. supra* note 14, § 43.

33 Gins v. Mauser Plumbing Supply Co., 148 F.2d 974 (2d Cir. 1945).

34 See, *e.g.*, N.Y. CIV. PRAC. ACT § 241. (Emphasis added.) See CLARK, *op. cit. supra* note 14, § 19, for an explanation of the various interpretations given the term "cause of action."

12(e) motion is made for the purpose of eliciting further information, it is usually granted, the rationale being that the opposing party has not received sufficient notice. But these courts appear to be incorrectly granting the motion when all the elements of a legal wrong have been pleaded, and they are in effect thereby enabling the movant to secure additional facts which can properly be obtained through discovery.[35] This approach emphasizes fact pleading and improperly detracts from the concept of notice pleading which the drafters of the Rules sought to effectuate. Thus, there has been a tendency, on the part of some federal courts, to bring the bill of particulars back into the Federal Rules.[36] Illustratively, the motion for more definite statement has been granted—incorrectly—to enable the responding party to ascertain the date or dates on which the allegedly illegal acts took place[37] and to allow the defendant to educe which of plaintiff's numerous trademarks, patents, or copyrights he allegedly infringed.[38] Furthermore, the motion has been granted to allow the movant to determine with whom it allegedly conspired to violate the law,[39] to ascertain the names of employees who allegedly acted on its behalf,[40] and to learn which statutes it allegedly violated.[41] In all of these cases, the movant seems to have had notice of the "nature of the claim," since the elements of a legal wrong had adequately been pleaded. Moreover, the additional facts being sought were not necessary to permit the movant to frame an adequate response.

Therefore, it is seemingly erroneous to interpret the phrase "nature of the claim" to mean anything more than, for example, the elements of a claim for negligence or breach of contract.

35 See, *e.g.*, United States v. Schofield, 152 F. Supp. 529 (E.D. Pa. 1957). Plaintiff, in an attempt to collect unpaid income taxes, sued to recover the alleged cost of improvements made by the deceased taxpayer on land in which he had a life estate. Although defendant's motion for summary judgment was denied, it was treated as a motion for more definite statement and granted for the purpose of obtaining a more adequate description of the alleged improvements.

36 See text accompanying note 48 *infra*, as to the denial of a motion for more definite statement because movant is actually seeking a bill of particulars.

37 See Buchholtz v. Renard, 188 F. Supp. 888 (S.D.N.Y. 1960); Kuenzell v. United States, 20 F.R.D. 96 (N.D. Cal. 1957).

38 See Lincoln Labs., Inc. v. Savage Labs., Inc., 26 F.R.D. 141 (D. Del. 1960); Marvel Slide Fastener Corp. v. Klozo Fastener Corp., 80 F. Supp. 366 (S.D.N.Y. 1948).

39 See, *e.g.*, George W. Warner & Co. v. Black & Decker Mfg. Co., 167 F. Supp. 860 (E.D. Pa. 1958).

40 See Syan Holding Corp. v. Fidelity-Philadelphia Trust Co., 20 F.R.D. 154 (E.D. Pa. 1957).

41 See, *e.g.*, Sanitized, Inc. v. S. C. Johnson & Sons, Inc., 23 F.R.D. 230 (S.D.N.Y. 1959).

"Vague or ambiguous" should be construed to mean so mixed up, so incoherent, that, although the complaint might well state a claim, it is practicably impossible to discern the "nature of the claim." The pleading of a party appearing pro se would, in some instances, probably provide a good illustration of such a confused complaint.[42] However, so long as the answering party has sufficient notice of the claim to enable him to respond, the motion should be denied. The responding party is not required to deny or admit all allegations, but can state that he is "without knowledge or information sufficient to form a belief as to the truth of an averment."[43] Moreover, the Rules do not call for a perfect answer or one that will precisely frame the issues. It was stated in regard to the complaint in *Wilson v. Illinois Cent. R.R.*:

> "Want of detail in a pleading is not a fatal vice so long as the complaint is not so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . . . The complaint here attacked, while not a model of verbal precision, is sufficient to apprise the defendant of enough to permit it to file an answer."[44]

Of course, the defendant may still need additional details to enable him to prepare for trial. The proper procedure to be used is discovery,[45] rather than the motion for more definite statement.[46] This conclusion flows principally from the fact that the phrase "or to prepare for trial" was deleted from the wording of Rule 12(e) as amended in 1948.[47] Furthermore, if it appears to the court that the motion is being used in substance as a bill of par-

42 An example may be Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944), where Judge Clark held the complaint good as against a motion to dismiss for failure to state a claim upon which relief could be granted. It seems that, if a motion for more definite statement had been made, it might well have been granted. Concerning the complaint, the court stated: "We may pass certain of his claims as either inadequate or inadequately stated and consider only these two: (1) that on the auction day, October 9, 1940, when defendant sold the merchandise at 'public custom,' 'he sold my merchandise to another bidder with my price of $110, and not of his price of $120,' and (2) 'that three weeks before the sale, two cases, of 19 bottles each case, disappeared.' Plaintiff does not make wholly clear how these goods came into the collector's hands, since he alleges compliance with the revenue laws; but he does say he made a claim for 'refund of merchandise which was two-thirds paid in Milano, Italy' and the collector denied the claim."

43 FED. R. CIV. P. 8(b).

44 147 F. Supp. 513, 516 (N.D. Ill. 1957).

45 FED. R. CIV. P. 26-37.

46 See, *e.g.*, Hamilton v. Baltimore & O.R.R., 23 F.R.D. 101 (S.D. Ind. 1958); Mitchell v. Independent Stave Co., 159 F. Supp. 829 (W.D. Mo. 1957).

47 Contrast Rule 12(e) as originally enacted with the amended Rule, as discussed in the text at notes 23-24 *supra*.

ticulars to secure additional information, the motion will be denied and the movant advised to resort to discovery.[48]

A few courts,[49] in requiring the complainant to plead additional facts, have done so on the ground that he has failed to meet the requirement of Rule 8(a) that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[50] These courts find some "residual meaning" in Rule 8(a) which seemingly indicates that more facts than are necessary for a general statement of the elements of the claim must be pleaded in order to convey a "plain statement of the claim." Such an interpretation seems tenuous at best, for Rule 8(a) conveys the theory, implicit throughout the Federal Rules and illustrated in Form 8,[51] that a bare statement of the elements of the claim is all the notice that is required to be given in the complaint.[52] In fact, other courts have frequently—and correctly—referred to Rule 8(a) in determining that the motion for more definite statement should be denied where defendant has received sufficient notice. A court may actually cite Rule 8 and hold that the pleading is sufficient to comply with its standards;[53] or, without specifically citing 8(a), it may state that more particularity than the complaint contains is not required by the Rules.[54] Rules 8(a) and 12(e) are so interrelated that any time the 12(e) motion is denied it seems apparent that the pleader has met the requirements of Rule 8(a).[55]

On the other hand, the Federal Rules require that certain

48 See, *e.g.*, Acoustica Associates, Inc. v. Powertron Ultrasonics Corp., 28 F.R.D. 16 (E.D.N.Y. 1961); Cmax, Inc. v. Hall, 290 F.2d 736 (9th Cir. 1961) (dictum).

49 See, *e.g.*, Fennell v. Svenska Amerika Linien A/B, 23 F.R.D. 116 (D. Mass. 1958); Westland Oil Co. v. Firestone Tire & Rubber Co., 3 F.R.D. 55 (D.N.D. 1943).

50 FED. R. CIV. P. 8(a).

51 FED. FORM 8: "Defendant owes plaintiff ten thousand dollars for money had and received from one G.H. on June 1, 1936, to be paid by defendants to plaintiff."

52 See Re v. Fullop, 22 F.R.D. 52 (E.D. Ill. 1958); 1A BARRON & HOLTZOFF, *op. cit. supra* note 22, at 53.

53 See, *e.g.*, Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959), where the court asserted: "In view of the great liberality of Federal Rule . . . 8, permitting notice pleading, it is clearly the policy of the Rules that Rule 12(e) should not be used to frustrate this policy by lightly requiring a plaintiff to amend his complaint which under Rule 8 is sufficient to withstand a motion to dismiss."

54 See, *e.g.*, Colton v. Wonder Drug Corp., 21 F.R.D. 235 (S.D.N.Y. 1957); MacDonald v. Astor, 21 F.R.D. 159 (S.D.N.Y. 1957).

55 This is accomplished by saying that the complaint is not "vague or ambiguous" within Rule 12(e) if it includes a "plain statement of the claim" within Rule 8(a); and, conversely, if the complaint is "vague or ambiguous," then it does not contain a "plain statement of the claim."

matters be pleaded with particularity.[56] For instance, Rule 9(b)[57] demands that "all averments of fraud or mistake shall be stated with particularity." Thus, in *Freedman v. Philadelphia Terminals Auction Co.*[58] the plaintiff's second count was essentially an allegation of fraudulent misrepresentation. As to this count, defendant moved for a more definite statement, and, because the allegation did not comply with Rule 9(b), the court granted the motion. Although utilization of the 12(e) motion appears to be a valid method for obtaining the missing details, it seems that a court, in granting it, may be allowing a misuse of the motion. The purpose of the motion is to enable defendant to understand what has been included in the complaint, not to give plaintiff the chance to supply particulars necessary to a claim. If a court finds that the pleading is not vague or ambiguous, it should deny the motion and suggest that the plaintiff supply the missing essentials,[59] or that the defendant file a motion to dismiss for "failure to state a claim upon which relief can be granted."[60]

III. Additional Considerations in Ruling on the Motion

Additional considerations may be important in arriving at a decision on the granting or denying of a 12(e) motion. These factors alone may be sufficient as a basis for a ruling on such a motion, but often they are only auxiliary to the court's main rationale. If the particular information being sought is within the movant's own knowledge, a 12(e) motion would probably be denied.[61] Although such a reason is rarely the sole basis for denying the motion, it is still a significant factor. In *Etablissements Neyrpic v. Elmer C. Gardner, Inc.*,[62] although the 12(e) motion was denied primarily because discovery was available, the court made it clear that it was unnecessary to include the requested information in the complaint since it was within the defendant's own knowledge. Such reasoning appears to be readily justifiable. The complainant has given notice of the claim, and the opposing party is aware of the allegations which must be answered. There-

56 Thus, there are a few, but very few, exceptions to the requirement of the Federal Rules that the pleader need give only notice of the nature of his claim.

57 Fed. R. Civ. P. 9(b).

58 145 F. Supp. 820 (E.D. Pa. 1956).

59 See Fed. R. Civ. P. 15.

60 Fed. R. Civ. P. 12(b)(6).

61 See, *e.g.*, Philadelphia Retail Jewelers Ass'n v. L. & C. Mayers, 1 F.R.D. 606 (E.D. Pa. 1941).

62 175 F. Supp. 355 (S.D. Tex. 1959).

fore, the movant should be made to draw from his own knowledge in responding and not be allowed to impose a burden on the complainant to amplify his pleading with matters already known.

Another factor frequently considered relevant is the existence of an intention on the part of the movant to follow the 12(e) motion with a motion for dismissal or judgment on the pleadings, once the nature of the claim is determinable. Thus, the 12(e) motion has been denied on the ground that to grant it "would be a misuse of the rule. Its function is to enable the movant to prepare a responsive pleading and not to serve as a forerunner for a motion to dismiss."[63] Such reasoning seems questionable. If the pleading to be answered is so "vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," why should the moving party's motive determine whether the motion should be granted? Any complaint which fails to "state a claim upon which relief can be granted" is subject to dismissal. The method by which it is ascertained that there is no claim upon which relief can be granted should be irrelevant.[64]

Finally, a 12(e) motion, which was unopposed by the pleader, has been granted in two different types of situations. On the one hand, when the plaintiff conceded that the complaint should be more definite, the court was clearly justified in granting the motion.[65] But, where the court's sole reason for granting the motion was the lack of opposition by the plaintiff,[66] the result seems less justifiable. The burden is imposed upon the court to determine, in its sound discretion,[67] whether the complaint is vague or ambiguous. The motion should not be granted unless the complaint is so indefinite that defendant cannot reasonably be expected to formulate a responsive pleading. Whether plaintiff has opposed the motion should have no bearing on the court's decision.

IV. CONCLUSION

The reasons advanced by federal courts for granting or denying the motion for more definite statement have encompassed a

63 Harrington v. Yellin, 158 F. Supp. 456, 459 (E.D. Pa. 1958); *accord*, Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp., 30 F.R.D. 142 (D. Conn. 1962); Cather v. Ocean Acc. & Guar. Corp., 10 F.R.D. 437 (D. Neb. 1950).

64 Perhaps what these courts are really saying is that the complaint is sufficient and the movant is just trying to get more facts.

65 See Mil-Hall Textile Co. v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S.D.N.Y. 1958).

66 See, *e.g.*, Zachman v. Erwin, 186 F. Supp. 681 (S.D. Tex. 1959).

67 See note 26 *supra*.

range far greater than was intended when Rule 12(e) was adopted.[68] Rule 12(e) was modeled after the Field Code motion to make more definite and certain, which was granted when the pleading was so incoherent that the moving party could not reasonably understand that to which he must respond. If only the word "ambiguous" had been used in Rule 12(e), then perhaps the courts would have granted the motion only when the pleading to be answered was so confusing that a response could not reasonably be made. The word "vague" connotes the idea of a lack of sufficient detail and specificity. Perhaps the inclusion of this alternative standard—vagueness—has provided the basis for granting the 12(e) motion to allow the moving party to obtain additional facts. This usage, however, goes beyond the purpose for which the motion was intended. It probably reads the old bill of particulars into the "more definite statement" concept; and, at the very least, it creates a substitute for discovery.[69] Whether this usage brings back the bill of particulars or creates an alternative to discovery, it seems incorrect and, as such, should not be allowed.

The motion for more definite statement, nevertheless, may have a usefulness beyond clearing up the mixed-up pleading. In the so-called "big case," such as extended antitrust litigation, an order made pursuant to a 12(e) motion requiring the pleader to include specific details in his allegations may save the movant both time and expense which might be lost if he were forced to rely entirely upon discovery and pre-trial conferences. For example, in a suit charging conspiracy to monopolize part of a trade or business,[70] such an allegation alone may be construed as giving defendant sufficient notice of the "nature of the claim." The defendant cannot always be expected to be cognizant of what act or acts, performed at what times, and with what parties, the plaintiff is complaining. In these circumstances the 12(e) motion could provide an economical means for the defendant to ascertain the particular acts referred to by the plaintiff in his complaint. Thus, such use should be allowed even though technically incorrect.[71] However, the great majority of cases arising in the federal

68 See PROCEEDINGS OF THE AMERICAN BAR ASS'N INSTITUTE, FEDERAL RULES OF CIVIL PROCEDURE, at 41, 242 (Wash. and N.Y. 1938).

69 In James, *supra* note 21, at 1473-76, the point is made that through the wide range of information afforded to the person obtaining discovery today, we are perhaps bringing the bills of particulars into the Federal Rules all over again.

70 See Sherman Antitrust Act § 2, 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

71 *But see* the opinion of Judge Clark in Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957).

courts are not the "big cases," and so, ordinarily, no such justifiable misuse of the motion should be permitted.

In view of the fact that the use of the motion for more definite statement has been so significantly diverted from its original purpose of clearing up pleadings to which a response could not reasonably be required, it is now questionable whether the motion should be retained in the Federal Rules. As has been noted, the granting of the motion creates delay. Furthermore, alternative means are available for accomplishing results presently being achieved through the improper use of Rule 12(e). Discovery is available for the elicitation of facts; and discovery may be obtained prior to the filing of a responsive pleading,[72] although it has thus far been infrequently used in such a manner. The motion to dismiss for failure to state a claim upon which relief can be granted[73] should be used where it appears that the pleader has not actually stated a claim. If a claim is found not to have been stated, the pleader should be given leave to amend,[74] with the claim being dismissed if he does not do so.

It would thus appear that the motion for more definite statement, as frequently used in contemporary federal pleading and practice, is superfluous and unnecessary. There are two possible methods of dealing with it. The first, and least satisfactory, would be to delete the motion entirely from the provisions of the Federal Rules. This would eliminate any possibility of misuse of the motion, but, on the other hand, it would also prevent any use of the motion to assist the responding party by facilitating his understanding of the truly mixed-up, or incoherent, pleading. And under the Federal Rules it seems to be the only motion which could be used to clear up such a pleading. It might also result in an unnecessary rash of motions to dismiss for failure to state a claim,[75] which could become as misused as the motion for more definite statement now is. The second method, here proposed, is to eliminate the words "vague or" from the wording of the Rule. This should eliminate the use of the motion to obtain facts or evidence from the complainant and would properly relegate the responding party to the use of discovery procedures for such in-

72 Rule 26 allows the taking of a deposition any time "after commencement of an action." Rule 3 states: "A civil action is commenced by filing a complaint with the court." Thus, discovery is available any time after the complaint is filed. Furthermore, a deposition may be available, even before an action is commenced, under Rule 27.

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

74 See FED. R. CIV. P. 15(a).

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

formation. With only the word "ambiguous" remaining, the courts would be more likely to constrain themselves to granting the motion only where the pleading appears to be so confusing that the adverse party could not reasonably be expected to frame a responsive pleading, and the motion for more definite statement would have an added potency and usefulness in litigation under the Federal Rules of Civil Procedure.

Stefan F. Tucker, S.Ed.

APPENDIX

Motion granted:

1. Krulikowsky v. Metropolitan Dist. Council, 30 F.R.D. 24 (E.D. Pa. 1962).
2. Dayton Tire & Rubber Co. v. Berman, 31 F.R.D. 210 (E.D. Pa. 1962).
3. Buchholtz v. Renard, 188 F. Supp. 888 (S.D.N.Y. 1960).
4. Lincoln Labs., Inc. v. Savage Labs., Inc., 26 F.R.D. 141 (D. Del. 1960).
5. Zachman v. Erwin, 186 F. Supp. 681 (S.D. Tex. 1959).
6. Sanitized, Inc. v. S. C. Johnson & Sons, Inc., 23 F.R.D. 230 (S.D.N.Y. 1959).
7. Mil-Hall Textile Co. v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S.D.N.Y. 1958).
8. George W. Warner & Co. v. Black & Decker Mfg. Co., 167 F. Supp. 860 (E.D.N.Y. 1958).
9. Fennell v. Svenska Amerika Linien A/B, 23 F.R.D. 116 (D. Mass. 1958).
10. United States v. Schofield, 152 F. Supp. 529 (E.D. Pa. 1957).
11. Turkish State Rys. Administration v. Vulcan Iron Works, 153 F. Supp. 616 (M.D. Pa. 1957).
12. Kuenzell v. United States, 20 F.R.D. 96 (N.D. Cal. 1957).
13. Syan Holding Corp. v. Fidelity-Philadelphia Trust Co., 20 F.R.D. 154 (E.D. Pa. 1957).
14. Greater Valley Terminal Corp. v. Peltz St. Terminals, Inc., 21 F.R.D. 167 (E.D. Pa. 1957).

Motion denied:

1. Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962).
2. Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp., 30 F.R.D. 142 (D. Conn. 1962).
3. Cmax, Inc. v. Hall, 290 F.2d 736 (9th Cir. 1961).
4. Acoustica Associates, Inc. v. Powertron Ultrasonics Corp., 28 F.R.D. 16 (E.D.N.Y. 1961).
5. United States *ex rel.* Tennessee Valley Authority v. An easement and right of way in DeKalb County, Tenn., 182 F. Supp. 899 (M.D. Tenn. 1960).
6. Leon v. Hotel & Club Employees Union, 26 F.R.D. 158 (S.D.N.Y. 1960).
7. Maquinarias Bolivar, C.A. v. Link-Belt Co., 25 F.R.D. 476 (E.D. Pa. 1960).
8. Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5th Cir. 1959).
9. Healing v. Jones, 174 F. Supp. 211 (D. Ariz. 1959).
10. Etablissements Neyrpic v. Elmer C. Gardner, Inc., 175 F. Supp. 355 (S.D. Tex. 1959).
11. California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co., 179 F. Supp. 65 (N.D. Cal. 1959).
12. Canuel v. Oskoian, 23 F.R.D. 307 (D.R.I. 1959).
13. National Cold Storage Co. v. Port of N.Y. Authority, 24 F.R.D. 404 (S.D.N.Y. 1959).
14. Harrington v. Yellin, 158 F. Supp. 456 (E.D. Pa. 1958).
15. Rosen v. Texas Co., 161 F. Supp. 55 (S.D.N.Y. 1958).
16. United States Aluminum Siding Corp. v. Dun & Bradstreet, Inc., 163 F. Supp. 906 (S.D.N.Y. 1958).
17. McNeil v. American Export Lines, 166 F. Supp. 427 (E.D. Pa. 1958).
18. Mayo v. McCloskey & Co., 168 F. Supp. 241 (E.D. Pa. 1958).
19. Re v. Fullop, 22 F.R.D. 52 (E.D. Ill. 1958).
20. Hamilton v. Baltimore & O.R.R., 23 F.R.D. 101 (S.D. Ind. 1958).
21. Franklin v. Shelton, 250 F.2d 92 (10th Cir. 1957), *cert. denied*, 355 U.S. 959 (1958).
22. Wilson v. Illinois Cent. R.R., 147 F. Supp. 513 (N.D. Ill. 1957).

23. Mitchell v. Independent Stave Co., 159 F. Supp. 829 (W.D. Mo. 1957).
24. Carlo Bianchi & Co. v. City of New York, 20 F.R.D. 165 (S.D.N.Y. 1957).
25. MacDonald v. Astor, 21 F.R.D. 159 (S.D.N.Y. 1957).
26. Colton v. Wonder Drug Corp., 21 F.R.D. 235 (S.D.N.Y. 1957).
27. Angel Creek Logging Co. v. Atlas Plywood Corp., 22 F.R.D. 1 (N.D. Cal. 1957).