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Notes

KEEP ON PLEADING: THE CO-EXISTENCE OF NOTICE PLEADING AND THE NEW SCOPE OF DISCOVERY STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 26(b)(1)

*The Civil Rules Advisory Committee cannot, in any practical way, now attempt to undo the 1938 experiment of notice pleading coupled with broad discovery because that formula has become embedded in the infrastructure of American civil procedure.*¹

I. INTRODUCTION

Courtney Grier, a citizen of Indiana, was shopping at a West Virginia grocery store during a visit to the state.² She arrived approximately one-half hour after the store opened. While in the meat aisle, Ms. Grier slipped on a pinkish liquid substance and fell to the ground, sustaining serious injuries to her left knee and back. Ms. Grier noticed that a butcher was nearby, pushing a meat cart and restocking the meat cases. She therefore assumed that the pinkish liquid, which resembled meat juices, had leaked from the cart. The pinkish liquid substance was actually residue from the wax and materials used by store personnel while cleaning the floor just before the store opened. This fact was discovered by store personnel upon inspection of the area where Ms. Grier fell and identified in a "confidential" report prepared by the store manager and provided to the insurance company and its attorney.

As a result of her injuries, Ms. Grier had several knee surgeries and incurred medical expenses and lost wages in an amount in excess of \$75,000. She filed a complaint in Federal District Court against the grocery store. The complaint, modeled on Form 9 of the Appendix of Forms included in the Federal Rules of Civil Procedure (FRCP), alleged that the defendant was negligent in that the butcher allowed liquid to leak from the meat cart and onto the floor, leading to Ms. Grier's slip and

¹ Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520 (1998). Judge Niemeyer is a United States Circuit Judge in the Fourth Circuit and serves as the Chair of the Civil Rules Advisory Committee. *Id.* at 517.

² This hypothetical was conceived by the author and contains fictitious names and events.

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fall and resultant injuries.³ In its answer, the defendant denied the allegations of Ms. Grier's complaint and further raised as an affirmative defense the absence of notice as to the presence of the liquid on the floor.

During discovery, Ms. Grier requested information in an effort to determine when the floor was last inspected prior to her fall and next inspected after her fall. She also requested information concerning the last and next cleaning of the floor and an identification of the materials used. The defendant provided the sweep sheets in response to the first request but objected to the additional requests, indicating that the information regarding the cleaning of the floor and the materials used was not within the scope of proper discovery under Rule 26(b)(1). The defendant argued that the information was not relevant to any claim or defense because Ms. Grier's complaint alleged that she fell as a result of leaking meat juices, which had nothing to do with the cleaning and waxing of the floors, much less the materials used. Ms. Grier filed a motion to compel production of the requested discovery.⁴ The recent amendment to Rule 26(b)(1), and its interaction with the rules of pleading, may impact the court's decision regarding Ms. Grier's request for discovery.

Since the adoption of the FRCP in 1938, pleadings and discovery have been intricately interwoven. Together, these two devices perform significant pretrial functions. The pleadings provide notice to the parties of each party's claims and defenses.⁵ The discovery procedures are designed to ferret out the facts, narrow the issues, and dispose of baseless claims and defenses.⁶ The coordinated effort of the pleadings

³ See FED. R. CIV. P. app. Form 9 (2000). Ms. Grier's complaint, following Form 9, would state:

1. Allegation of jurisdiction.
2. On December 31, 2000, in Jones' Grocery Store, in Wheeling, West Virginia, defendant negligently allowed meat juices to leak from a meat cart onto the floor of the meat aisle.
3. As a result, plaintiff stepped in the meat juices and slipped and fell sustaining serious injuries to her left knee and back, was prevented from transacting her business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$100,000 and costs.

⁴ FRCP Rule 37 allows a party to seek an order compelling a non-responsive or evasive party to respond to a discovery request. See FED. R. CIV. P. 37.

⁵ See *infra* text accompanying note 31.

⁶ See *infra* notes 56-59 and accompanying text.

and discovery has become a basic principle of trial procedure in the federal courts.⁷

When the Civil Rules Advisory Committee (Advisory Committee) began its task of drafting the 2000 amendments to the discovery rules, it began with the assumption that the pleadings and discovery must continue to work together as they had since the inception of the FRCP.⁸ The Advisory Committee attempted to amend the scope of discovery standard to respond to problems with overbroad discovery and increasing costs, without changing the significant pretrial functions performed by the pleadings and discovery, as well as the open disclosure of information.⁹

⁷ See Niemeyer, *supra* note 1, at 520.

⁸ See *id.* Amendment of the Federal Rules of Civil Procedure usually takes two to three years and follows a very formal process, comprising of a minimum of seven stages of comment and review:

1. Initial consideration by the Advisory Committee
2. Publication and public comment
3. Consideration of the public comments and final approval
4. Approval by the Standing Committee
5. Approval by the Judicial Conference
6. Approval by the Supreme Court
7. Congressional Review

See <http://www.uscourts.gov/rules/proceduresum.htm> (last visited May 9, 2002) (providing a summary of the federal rule making process). The process leading to the amendment to Rule 26 began in the fall of 1996, when the Advisory Committee reexamined the rules to determine whether the procedure for full disclosure was too expansive to justify its contribution to the civil process and whether amendments could make the process more efficient and satisfying. See Niemeyer, *supra* note 1, at 520-21. The Committee then held a meeting of experienced lawyers, judges, and academics in January 1997, and a conference at the Boston College of Law in September 1997 to discuss proposed amendments. *Id.* at 521. Additionally, the Committee engaged the Federal Judicial Center to study the expense of discovery, which conducted a survey of 2000 attorneys, receiving almost 1200 responses. *Id.* Further, the Committee involved the RAND Institute for Civil Justice, using its database of information collected in connection with the Civil Justice Reform Act, which considered how well discovery worked and how it might be improved. *Id.* at 522. The Committee also received and reviewed 300 written comments and heard the testimony of 70 witnesses at three public hearings held in Baltimore, San Francisco, and Chicago. See <http://www.uscourts.gov/rules/summary.pdf> (last visited May 9, 2002).

⁹ See Civil Rules Advisory Comm. Meeting Minutes (November 12-13, 1998), available at <http://www.uscourts.gov/civil/Minutes/1198civilminutes.htm> (last visited May 9, 2002); Civil Rules Advisory Comm. Meeting Minutes (March 16-17, 1998), available at <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited May 9, 2002); Comm. on Rules of Practice and Procedure Meeting Minutes (June 18-19, 1998), available at www.uscourts.gov/rules/Minutes/0698standingminutes.htm (last visited May 9, 2002).

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On December 1, 2000, several amendments to FRCP 26 and the other discovery rules became effective.¹⁰ Although these changes raise numerous issues, this Note is devoted specifically to the amended scope of Rule 26(b)(1)'s discovery standard and how it will, or will not, affect notice pleading. Part II presents the history and development of pleading and discovery from the common law to the FRCP.¹¹ Part II also discusses the current amendment to Rule 26(b)(1) and the difference from the previous version of that rule.¹² Part III explores the alleged ramifications of the new Rule 26(b)(1) to notice pleading.¹³ Part IV examines how Mississippi, a notice pleading jurisdiction operating under a similar scope of discovery standard, has succeeded in the co-existence of notice pleading and its similar scope standard.¹⁴ Part V provides guidelines, based upon judicial reasoning gathered and synthesized from cases in Mississippi,¹⁵ to be followed in interpreting the new federal scope of discovery standard in discovery matters.¹⁶ The discovery dispute in Ms. Grier's case is analyzed and the discovery allowed is determined by application of the guidelines created for the new standard.¹⁷ Part VI concludes that the new Rule 26(b)(1) scope of

¹⁰ See FED. R. CIV. P. 26, 30, and 37.

¹¹ See *infra* Part II.

¹² *Id.*

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ See *infra* Part IV.B. Mississippi's rule with respect to pleadings provides:

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and, . . .

MISS. R. CIV. P. 8(a)(1) (emphasis added). Mississippi's rule with respect to the permissible scope of discovery provides:

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

MISS. R. CIV. P. 26(b)(1) (emphasis added).

¹⁶ See *infra* Part V.A.

¹⁷ See *infra* Part V.B.

discovery standard will not negate notice pleading and that the two can co-exist in the federal procedural system.¹⁸

II. HISTORY AND DEVELOPMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE: PLEADING AND DISCOVERY

Prior to 1938, in the federal courts there existed minimal uniform rules dedicated to practice and procedure. Instead, each court operated according to the rules of procedure for the state in which it was located.¹⁹ Passage of the Rules Enabling Act of 1934 finally allowed substantial changes to occur.²⁰ The act authorized the Supreme Court to prescribe general rules of pleading and practice in civil actions and to unite the rules for equity and law into a single form of procedure.²¹ Two basic

¹⁸ See *infra* Part VI.

¹⁹ CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 61, at 423-24 (5th ed. 1994) [hereinafter WRIGHT, LAW OF FEDERAL COURTS]. Prior to 1872, temporary process acts mandated that the federal courts follow the state's practice and procedure as it existed on September 29, 1789. *Id.* (citing Act of September 29, 1789, ch. 21, § 2, 1 Stat. 93). This resulted in "static conformity" because as a state changed its procedural laws, the federal court sitting in that state could not follow, but instead had to continue to follow the state's discarded laws. *Id.* The Conformity Act of 1872 changed this by providing that the federal courts were to conform to the existing "practice, pleadings, and forms and modes of proceeding in civil causes" of the state courts of the state in which the federal court sat. *Id.* at 425 (citing Act of June 1, 1872, ch. 255, 17 Stat. 197; Rev. Stat. § 914). This resulted in a "continuing or dynamic conformity," the essence of which was to require lawyers to only have to know one set of rules for state and federal court practice. *Id.* Given the adoption of several exceptions to conformity, this was better in theory than in practice. *Id.* at 425-26. During this time, law and equity were still separate; however, the situation in the equity courts was preferable because the Supreme Court had adopted rules relative to procedure in the equity courts. *Id.* at 426. It was evident that change was necessary because of the "erratic conformity to state procedure, [the] anachronistic survival of the separation between law and equity, and [the] failure to take advantage of the possibilities of judicial rulemaking." *Id.* § 62, at 426. See generally CHARLES E. CLARK, HANDBOOK OF THE LAW ON CODE PLEADING 31-34 (2d ed. 1947) (relating the historical background to federal pleading) [hereinafter CLARK, CODE PLEADING]; Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L. REV. 387, 394-409 (1935) (discussing the history and development of law and equity procedures and the Conformity Act); 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, 351-54 (1987).

²⁰ See Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified at 28 U.S.C. § 723 (1934)) (sections consolidated in 28 U.S.C. § 2072 (1982)).

²¹ See WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 62, at 426-27; see also *id.* § 67, at 465-66; Goodman, *supra* note 19, at 355. The Supreme Court did not take any action for almost one year after passage of the Act. WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 62, at 428. Then, Chief Justice Hughes, at the behest of a letter from Attorney General William D. Mitchell, stirred by an article calling for reform through merger of law and equity written by Charles E. Clark and James William Moore, announced to the American Law Institute that the new rules would unify the procedure for actions at law and cases in

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principles for procedural reform were advocated by Charles E. Clark, the reporter of the fourteen-member Advisory Committee assigned with drafting the FRCP.²² First, Clark advocated that all cases should be decided on their merits rather than on procedural maneuverings.²³ Second, he advocated that a basic goal in litigation should be economy of time and resources.²⁴ Evidence that the Advisory Committee adopted these principles when drafting the Rules is provided by the requirement that the Rules be construed to secure the "just, speedy, and inexpensive determination of every action"²⁵ together with a simplified form of pleading²⁶ and liberalized discovery.²⁷ The FRCP provided the needed reform in federal court practice, particularly through two key features: the adoption of notice pleading and the vitalization of discovery.²⁸ The following sections of this Part discuss the history and development of these two features.²⁹

A. Pleadings: The Rise of Notice Pleading

Historically, pleadings served four functions.³⁰ First, they gave notice of the nature of a claim or defense.³¹ Second, they stated the facts,

equity. *Id.*; Goodman, *supra* note 19, at 355-56. Finally, an Advisory Committee was appointed and, after the circulation of three drafts for comment and criticism, a final draft of the rules was submitted to the Supreme Court in November 1937, and the Court adopted the proposed rules on December 20, 1937. WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 62, at 428. The rules were submitted to Congress and, given no adverse legislation, became effective on September 16, 1938. *Id.*; see also CLARK, CODE PLEADING, *supra* note 19, at 34-38 (relating the process of enactment of the original Federal Rules); James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1180-86 (1938).

²² Goodman, *supra* note 19, at 356-57 (citing Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297-320 (1938)) (discussing new rules and necessity of regularized procedure). Charles Clark has been called the operational force on the Advisory Committee. *Id.* He taught for twenty years and served as Dean for ten years at Yale Law School and was later appointed to the United States Court of Appeals for the Second Circuit, where he served for twenty-four years. *Rewriting the Rules*, AM. LAW., Dec. 1999, at 51. The Federal Rules of Civil Procedure have been described as "Clark's lasting monument." *Id.*

²³ Goodman, *supra* note 19, at 357.

²⁴ *Id.*

²⁵ See FED. R. CIV. P. 1.

²⁶ See FED. R. CIV. P. 8(a)(2).

²⁷ See FED. R. CIV. P. 26-37.

²⁸ See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.7, at 258 (3d ed. 1999); see also *id.* § 7.1, at 386; WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 81, at 577-78 (referring to discovery as the "Cinderella of the changes in procedure made by the Civil Rules").

²⁹ See *infra* Parts I.A.-B.

³⁰ WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468. Pleading under the common law placed special emphasis upon the issue formulating function of pleadings,

as believed to exist, on which the claim was brought.³² Third, they narrowed the issues.³³ Fourth, they provided a means for speedy disposition of non-meritorious claims and defenses.³⁴ Given these functions, at common law the pleadings were a very important, if not the most important, element in a lawsuit and could continue indefinitely until a single issue of law or fact was produced for trial.³⁵ Strict rules developed because of the importance of the pleadings.³⁶ As a result, defects in the pleadings led to an early disposition of the lawsuit, not based upon the merits of the claims, but instead based on their failure to perform the required functions.³⁷

In response to the injustice of common law pleading practice and the movement for reform, New York adopted the Field Code (the code) in 1948, that was later imitated by many other states.³⁸ Under the code, the pleadings were limited to three types: a complaint, an answer, and a

and thus is referred to as "issue pleading." CLARK, CODE PLEADING, *supra* note 19, at 3, 56. Pleading under the code placed special emphasis upon the fact stating function of pleadings and thus is referred to as "fact pleading." *Id.* at 3-4, 56. Modern pleading places special emphasis upon the notice giving function of pleadings and thus is referred to as "notice pleading." *Id.*

³¹ WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* § 66, at 456; see also *id.* § 68, at 468. In a slow, expensive, and unworkable, scientific fashion, the pleadings continued by rigid stages of denial, avoidance and demurrer until a single issue of law or fact, dispositive of the case, emerged. *Id.* § 68, at 468; see also CLARK, CODE PLEADING, *supra* note 19, at 12-15 (relating the history and process of common law pleading); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 695 (1998) [hereinafter Subrin, *Fishing Expeditions*] (stating that the assumption of such a critical role by the pleadings meant that there was not much need for discovery); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914-21 (1987) [hereinafter Subrin, *Historical Perspective*] (relating the process of common law and equity procedure). For an example of the process, see R. ROSS PERRY, COMMON LAW PLEADING: ITS HISTORY AND PRINCIPLES 227-28 (1897).

³⁶ See WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468. If an essential allegation were left out of the pleadings, the claim would likely have been disposed of by way of a demurrer or a motion to dismiss. 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1202, at 69 (2d ed. 1994) [hereinafter WRIGHT, PRACTICE AND PROCEDURE]. See generally PERRY, *supra* note 35, at 231-433 (discussing Stephen's Rules of Pleading).

³⁷ See WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468.

³⁸ See CLARK, CODE PLEADING, *supra* note 19, at 21-23. The New York Code of 1848 is generally referred to as the "Field Code" because it was largely the work of David Dudley Field. *Id.* at 22. The Field Code has served as the model of all succeeding codes in the United States. *Id.*

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reply.³⁹ The most important characteristics of the code were its marriage of law and equity into one form of action and its system of pleading the facts.⁴⁰ This system called for a simple and concise statement of the facts, commonly referred to as "fact pleading."⁴¹ The difficulty in this system of pleading arose from the distinction between facts and conclusions, because a pleader was only to plead the facts.⁴² As such, reform continued since the fact pleading system under the code, like common law pleading practice, had its own inherent problems.⁴³

The adoption of the FRCP in 1938 established a uniform system of pleading in the federal courts.⁴⁴ The FRCP specifically impacted the pleading process by both limiting the number and type of pleadings while simplifying the form of those pleadings.⁴⁵ One of the keystones of this system of procedure is included in Rule 8(a)(2), which provides that

³⁹ WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 66, at 456. The two most important features of the code were the abolition of the common law forms of action and the union of law and equity. *Id.* § 67, at 465. These two features were recognized as essential by Chief Justice Taft, and later by Chief Justice Hughes in his charge to the committee responsible for drafting the federal rules with these tasks. *Id.* at 465-66; *see id.* § 62, at 428 & n.11 (citing Address of Chief Justice Hughes, 21 A.B.A. J. 340, 12 A.L.I. PROCEEDINGS 54 (1935)); *see also* Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 243 (1922) (stating in an opinion by Mr. Chief Justice Taft that Congress was looking toward the union of law and equity when it allowed transfer of cases between the law side and the equity side). *See generally* Subrin, *Fishing Expeditions*, *supra* note 35, at 696-97 (explaining the role of discovery under the Field Code and indicating Field's belief that precise and verified pleadings should be used to eliminate legal and factual issues and to focus the controversy).

⁴⁰ *See* CLARK, CODE PLEADING, *supra* note 19, at 22-23, 56.

⁴¹ *Id.* at 23.

⁴² The pleader would plead the facts, while at the same time attempting to avoid the pitfalls of stating conclusions and pleading evidence. 5 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 1202, at 71.

⁴³ CLARK, CODE PLEADING, *supra* note 19, at 23 (stating that fact pleading was least successful because of a failure to recognize the difference between statements of fact and statements of law, which is almost entirely one of degree). *See generally id.* at 225-45 (discussing code pleading and the distinction between fact, law, and evidence while comparing the goals of pleading under the Federal Rules); 5 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 1202, at 71-72 (discussing code pleading and its failure to perceive the distinctions between facts and conclusions as one of degree only).

⁴⁴ *See* FRIEDENTHAL, *supra* note 28, § 5.1, at 245. Although a majority of the states had followed New York's lead by the late 1930s, many states still followed common law pleading practice. *Id.* As a result of the Conformity Act, the federal courts were required to apply the rules of practice of the states in which they sat. *Id.*; *see also supra* note 19 (explaining the Conformity Act). Although the Equity Rules of 1912 had developed a simplified system of pleading practice for suits in equity, cases at law did not enjoy that same simplification until the adoption of the Federal Rules of Civil Procedure. *See* FRIEDENTHAL, *supra* note 28, § 5.1, at 245.

⁴⁵ *See generally* FED. R. CIV. P. 7-12 (providing the rules relative to complaints, answers, counterclaims, cross-claims, third-party complaints, and replies).

pleadings need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁴⁶ Rule 8(a)(2) has not undergone any substantive changes since its enactment.⁴⁷

However, the new federal system of pleading practice, commonly referred to as "notice pleading,"⁴⁸ was not embraced without resistance, and criticisms and suggestions for amendment to Rule 8 soon arose.⁴⁹ In 1955, the Advisory Committee responded by expressing that Rule 8 was succeeding in its original intent by allowing a statement of the claim in general terms, discouraging battles over the form of pleading, and discarding needless controversies that persisted under the codes.⁵⁰

⁴⁶ FED. R. CIV. P. 8(a)(2); WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 467; *see also* Conley v. Gibson, 355 U.S. 41, 47 (1957) (stating that the Federal Rules of Civil Procedure do not require detailed facts, but only a short and plain statement of the claim to give fair notice and state the grounds upon which the claim rests). Rule 8 was derived from a number of sources and preexisting practices: the federal Equity Rules, particularly Rules 25 and 30; various state codes, especially those of New York and Connecticut; and the English practice under the Judicature Act. 5 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 1201, at 65-66.

⁴⁷ *See generally* 2 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8App.01 (3d ed. 2000) [hereinafter MOORE'S FEDERAL PRACTICE].

⁴⁸ At least one commentator believes that this label is unfortunate because it leads to confusion and unnecessary criticism of the rules. 5 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 1202, at 72-73. He suggests that "modern pleading" or "simplified pleading" would be a more appropriate label. *Id.*; *see also* Padovani v. Bruchhausen, 293 F.2d 546, 550-51 (2d Cir. 1961) (stating that federal pleading is still issue pleading and that the use of the term notice pleading is prejudicial to a proper operation of the federal system). Regarding the Supreme Court's reference to the system as one of "notice pleading" in *Conley v. Gibson*, Wright suggests that it was a statement of aim and not of definition because the Court emphasized that the federal rules require the complaint to give a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." 5 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 1202, at 73 (quoting *Conley v. Gibson*, 355 U.S. 41, 58 (1957)). Thus, the pleader cannot simply make a bare averment that he wants relief and is entitled to it. *Id.* However, great generality is allowed as long as fair notice is given. *Id.*

⁴⁹ *See* Nancy J. Bladich, *The Revitalization of Notice Pleading in Civil Rights Cases*, 65 CORNELL L. REV. 390, 416-17 (1980). Practitioners and judges were shocked that Rule 8 had abandoned the pleading's focus upon facts. *Id.* at 416. They believed that a more detailed complaint than the notice pleading called for by Rule 8 was necessary in order to accomplish precise issue-identification. *Id.* After a controversial opinion in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), wherein the court upheld an inarticulately drawn complaint as meeting the requirements of notice pleading, the Ninth Circuit Judicial Conference recommended that Rule 8 be amended, adding the language that the statement of the claim should also contain "the facts constituting a cause of action." *Id.* at 416-17 (citing *Claim or Cause of Action*, 13 F.R.D. 253, 253 (1951)).

⁵⁰ *See* 2 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 8App.01[03]. There had been criticism about the functioning of Rule 8(a)(2), and the Advisory Committee, in refusing to amend the rule in 1955, stated that it is clearly indicated by the forms appended to the rules and Rule 8's interaction with other rules that Rule 8(a) intuitively requires the statement of

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Accordingly, the Advisory Committee rejected suggestions for amendment.⁵¹

In 1957, when the Supreme Court decided *Conley v. Gibson*,⁵² it affirmed and extended its commitment to notice pleading.⁵³ The Court rejected an argument that the plaintiff's complaint should be dismissed, relying on the notion that Rule 8 did not require the plaintiff to set out in detail the facts upon which his claim was based, but rather required the plaintiff to give fair notice to the defendant by way of a "short and plain statement of the claim."⁵⁴ With this decision, challenges to notice pleading subsided.⁵⁵

Notice had become the sole function of the pleadings given the simplified pleading requirements of the FRCP.⁵⁶ No longer were the pleadings required to state the facts, narrow the issues, or provide a means for the speedy disposition of non-meritorious claims and defenses.⁵⁷ Under the current system of pleading practice, techniques more efficient than the pleadings are provided for performing these three of the four common law functions.⁵⁸ The FRCP removed the exclusive responsibility for these functions from the province of the

circumstances, occurrences, and events in support of the claim presented. *Id.* A pleader cannot simply make a bare averment but must disclose adequate information as a basis of the claim or defense. *Id.*

⁵¹ *Id.*

⁵² 355 U.S. 41 (1957).

⁵³ Blaidich, *supra* note 49, at 417.

⁵⁴ *Conley*, 355 U.S. at 47. The Court embraced the intent of Rule 8 by stating that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48.

⁵⁵ Blaidich, *supra* note 49, at 417.

⁵⁶ WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468. Pleading practice under the federal rules has been referred to as "notice pleading." FRIEDENTHAL, *supra* note 28, § 5.7, at 258-59. This term is considered objectionable by many commentators because it connotes that no more is required of a pleading than a mere statement that a suit has been filed and damages are desired. *Id.* at 259. These commentators have suggested instead the use of "modern pleading" or "simplified pleading" because more is required of a pleading than mere notice, including a reference to the circumstances and events upon which the claim or defense is based. *Id.* What the rules actually require is that the opposing party and the court obtain a basic understanding of the claim being made. *Id.* (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993); *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976); *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)); see also *supra* note 48.

⁵⁷ See *supra* text accompanying notes 30-34.

⁵⁸ See FED. R. CIV. P. 16, 26-37, 56; see also *Conley*, 355 U.S. at 47-48; *Hickman v. Taylor*, 329 U.S. 495, 500 (1947); WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468.

pleadings and allowed for facts to be determined and issues to be narrowed by discovery, an area that was also significantly impacted and changed by the enactment of the FRCP.⁵⁹

B. Discovery: The Rise of an Important Pre-Trial Mechanism

1. From the Common Law to December 1, 2000

At common law, discovery was virtually non-existent.⁶⁰ Trial by surprise was the norm because at the time of trial many litigants did not know what their adversary's position or evidence would be.⁶¹ The adoption of the discovery provisions of the FRCP revolutionized the practice of law in the United States.⁶² The FRCP made discovery a vital part of the litigation process.⁶³ In fact, nine years after adoption of the FRCP, the Supreme Court decided in *Hickman v. Taylor*⁶⁴ that one of the most significant innovations of the rules were the mechanisms for pre-trial deposition-discovery.⁶⁵ The *Hickman* Court explained that the new rules invested the pre-trial functions of issue-formulation and fact-revelation, once performed by the pleadings, to the deposition-discovery process and left only the function of notice-giving to the pleadings.⁶⁶ Making clear the function of discovery, the *Hickman* Court declared that the rules would allow the parties to obtain the fullest possible

⁵⁹ WRIGHT, LAW OF FEDERAL COURTS, *supra* note 19, § 68, at 468. The rules also provided for issue narrowing by pretrial conference or partial summary judgment and disposal of cases with no real controversy by summary judgment. *Id.*

⁶⁰ See FRIEDENTHAL, *supra* note 28, § 7.1, at 386. At common law, discovery was limited and depositions could be taken only under court order and only for the preservation of testimony as provided by statute. Goodman, *supra* note 19, at 360. The federal statutes allowing depositions were aimed at preserving the testimony of a witness who would be unavailable for trial, or obtaining critical evidence for trial, or completing a pleading that was otherwise unobtainable. Subrin, *Fishing Expeditions*, *supra* note 35, at 699. Any discovery that resulted from the depositions was only accidental and incidental. 8 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 2002, at 52. The common law statutes allowing discovery were not aimed at goals similar to that of present-day, pretrial discovery. See Subrin, *Fishing Expeditions*, *supra* note 35, at 698-701 (describing discovery in the federal courts prior to the federal rules); see also 28 U.S.C. §§ 636, 639-48 (1934); 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.100 (describing the discovery procedures at common law).

⁶¹ FRIEDENTHAL, *supra* note 28, § 7.1, at 386. At common law, a trial was probably more similar to the typical episode of *Perry Mason* or *Matlock*, where a vital piece of evidence is entered in the final moments before the trial concludes.

⁶² *Id.* (citing *Developments in the Law - Discovery*, 74 HARV. L. REV. 940, 950 (1961)).

⁶³ *Id.*

⁶⁴ 329 U.S. 495 (1947).

⁶⁵ *Id.* at 500.

⁶⁶ *Id.* at 501.

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knowledge of the issues and facts before trial so that trial by surprise would no longer occur.⁶⁷ Because mutual knowledge of all relevant facts was essential to proper litigation, the Court also declared that the rules were to be accorded a broad and liberal treatment.⁶⁸

The drafter of the federal discovery rules, Edson Sunderland, advocated several benefits of expanded discovery.⁶⁹ First, discovery would eliminate surprise.⁷⁰ Second, it would allow for the preservation of testimony in the case of the death or unavailability of a witness.⁷¹ Third, discovery would diminish the importance of pleadings.⁷² Fourth, it would permit more effective use of summary judgment procedures.⁷³ Fifth, discovery would help focus the trial on the main points in controversy.⁷⁴ Sixth, it would permit each side to assess the strengths and weaknesses of its case, promoting informed settlement and making some trials unnecessary.⁷⁵ While most of Sunderland's ideas were engrafted into the rules, the Advisory Committee did not adopt the broad scope of discovery that Sunderland sought.⁷⁶ Provisions for wide-open discovery were either deleted from initial drafts or did not make it into a draft.⁷⁷ However, most of the provisions Sunderland sought permitting liberalized discovery were incorporated in the FRCP by later amendments.⁷⁸

As originally adopted, Rule 26(b)(1) only applied to depositions and allowed examination regarding "any matter, not privileged, which [was]

⁶⁷ *Id.*

⁶⁸ *Id.* at 507; see also *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.").

⁶⁹ See Subrin, *Fishing Expeditions*, *supra* note 35, at 716. Sunderland was a well-established scholar at Michigan Law School, whose "disdain for formalistic limitations and desire for a more common sense all-encompassing procedure" had been revealed in his articles about discovery. *Id.* at 715. Most of Sunderland's ideas were engrafted into drafts of the rules that became and still remain part of the current Federal Rules. *Id.* at 718-19.

⁷⁰ *Id.* at 716.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Subrin, *Fishing Expeditions*, *supra* note 35, at 716.

⁷⁶ *Id.* at 720.

⁷⁷ *Id.* For an explanation of the drafting process of the original Federal Rules, including the Advisory Committee's concerns about discovery, see *id.* at 717-29.

⁷⁸ *Id.* at 720. The momentum begun by Sunderland for more liberalized discovery gained additional momentum during the decade after passage of the Rules and, in 1946, amendments resulted in even greater liberalization. *Id.* at 720 n.165.

relevant to the subject matter involved in the pending action whether relating to the claim or defense of the examining party or the claim or defense of any other party.”⁷⁹ The purpose of the chosen phraseology for the relevance standard was to minimize discovery arguments.⁸⁰

A little under a decade later, the discovery rules were amended and the broad scope of discovery allowed by the rule was made clear in the new Rule 26(b)(1). This amendment instilled in Rule 26(b)(1) an overarching scope of discovery standard by adding into all other discovery rules a reference back to the scope standard of Rule 26(b)(1).⁸¹ Equally important was the addition of language indicating that the information sought did not have to be admissible at trial as long as it was reasonably calculated to lead to the discovery of admissible evidence.⁸² Thus, the 1946 amendments to Rule 26 began to make broad and far-reaching discovery possible under the FRCP.⁸³

The first major revision to Rule 26(b)(1), and the discovery rules in general, came in 1970 when Rule 26’s title was changed, and the substance of Rule 26 was revised to cover discovery in general instead of solely depositions.⁸⁴ The new rule allowed the parties to obtain

⁷⁹ 6 MOORE’S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.01[1] (citing FED. R. CIV. P. 26(b)(1) (1938) (amended 1970)); *see also* MATTHEW BENDER, MOORE’S FEDERAL RULES PAMPHLET 2001, PART 1: FEDERAL RULES OF CIVIL PROCEDURE ¶ 26.2 (2000) [hereinafter MOORE’S FEDERAL RULES PAMPHLET]. The original rule was entitled “Depositions Pending Action.” 6 MOORE’S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.01[1]. *See generally* Pike & Willis, *supra* note 21, at 1186-88.

⁸⁰ Subrin, *Fishing Expeditions*, *supra* note 35, at 723. Sunderland attempted to broaden the scope of discovery in his initial draft by allowing discovery of “any matter, not privileged, which is relevant to the pending cause as shown in the pleadings on file therein.” *Id.* at 722 n.174 (citing Rule 49, Tentative Draft No. 1, Oct. 18, 1933, in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1938, at CI-804-16).

⁸¹ 6 MOORE’S FEDERAL PRACTICE, *supra* note 47, ¶¶ 26App.02[1]-[2] (citing FED. R. CIV. P. 26(b)(1) (1946) (amended 1970)); Subrin, *Fishing Expeditions*, *supra* note 35, at 736.

⁸² FED. R. CIV. P. 26(b)(1) (2000); 6 MOORE’S FEDERAL PRACTICE, *supra* note 47, ¶¶ 26App.02[1]-[2]. Another amendment to Rule 26(b)(1), which also occurred in 1946, was the change of the word “relating” to “it relates” in the scope standard. FED. R. CIV. P. 26(b)(1) (2000). After 1946, there were two more amendments to Rule 26, but neither affected Rule 26(b)(1). 6 MOORE’S FEDERAL PRACTICE, *supra* note 47, ¶¶ 26App.03[1], 26App.04[1]; *see also* Subrin, *Fishing Expeditions*, *supra* note 35, at 736 (indicating that the 1946 amendments “went a long way toward completing the discovery revolution”).

⁸³ *Hickman v. Taylor*, 153 F.2d 212, 216-17 (3d Cir. 1945); *see also* Subrin, *Fishing Expeditions*, *supra* note 35, at 738 (“By the end of the first decade after the Federal Rules became law, many courts were routinely giving the discovery provisions the full scope the drafters had intended.”).

⁸⁴ *See* 6 MOORE’S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.05[1] (citing FED. R. CIV. P. 26 (1970) (amended 1983)). The title was amended to “General Provisions Governing

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discovery of any non-privileged matter that was "relevant to the subject matter involved in the pending action, whether it relate[d] to the claim or defense of the party seeking discovery or to the claim or defense of any other party."⁸⁵ The Advisory Committee intended to allow Rule 26 to regulate discovery that was obtainable through any of the discovery techniques.⁸⁶ With the 1970 amendment, the extensive nature of discovery became evident not only in depositions but in all forms of discovery.⁸⁷

As a result of allowing extensive discovery, problems began to occur in the form of over-discovery and redundant or disproportionate discovery.⁸⁸ In response, the next major revision to Rule 26(b)(1) occurred in 1983.⁸⁹ The amendment gave courts the authority to reduce the amount of discovery allowed.⁹⁰ As a result of the 1983 amendments, many scholars and practitioners believed that pleading practice in the federal courts would be returned to pre-1938 fact pleading.⁹¹ However,

Discovery" and section (b) was changed to "Scope of Discovery." *Id.* The other discovery rules underwent a limited rearrangement in order to establish Rule 26 as the rule that governed discovery in general. 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.05[2]; 8 WRIGHT, PRACTICE & PROCEDURE, *supra* note 36, § 2003, at 53-54.

⁸⁵ See 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.05[1] (citing FED. R. CIV. P. 26(b) (1970) (amended 1983)). Rule 26(b)(1) specifically provided: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." *Id.* (emphasis added).

⁸⁶ FED. R. CIV. P. 26 advisory committee's note.

⁸⁷ See generally *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 657 (6th Cir. 1976) (recognizing that the federal rules authorize extremely broad discovery); *Nat'l Org. for Women, Inc. v. Minn. Mining & Mfg. Co.*, 73 F.R.D. 467 (D. Minn. 1977); *Bowman v. Gen. Motors Corp.*, 64 F.R.D. 62, 69 (E.D. Pa. 1974). The scope of discovery standard virtually remained unchanged until the most recent amendment. See *infra* notes 88-95 and accompanying text.

⁸⁸ See 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶¶ 26App.07[1]-[2].

⁸⁹ *Id.*

⁹⁰ *Id.* The amendment contemplated greater judicial involvement and was intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. See FED. R. CIV. P. 26 advisory committee's note; 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.07[2]. The next amendment occurred in 1987, thus eliminating all gender-specific language in Rule 26. See FED. R. CIV. P. 26 advisory committee's note; 1 MOORE'S FEDERAL RULES PAMPHLET, *supra* note 79, ¶ 26.2, at 278.

⁹¹ Goodman, *supra* note 19, at 352. The most significant amendment, which resulted in the fear of a return to pre-1938 fact pleading, was that made to Rule 11. *Id.* at 352, 365. It was argued that the amendment sought to curb discovery abuses by requiring a reasonable inquiry into the facts prior to filing. *Id.* at 365. Goodman argued that, although the amendments would not require attorneys to resort to fact pleading, attorneys would have to "be prepared to present the level of documentation on the merits that used to be called fact pleading." *Id.* at 367. See generally Stephen N. Subrin, *The New Era in American Civil*

fact pleading did not return, and discovery proceeded as it had been since adoption of the rules, although with the broader scope made possible by the 1946 amendments.⁹²

One of the most controversial amendments was made to the discovery rules in 1993.⁹³ The amendment provided for automatic disclosure of certain materials that, prior to the amendment, had to be specifically requested through discovery.⁹⁴ This amendment did not specifically address the scope of discovery standard, which actually remained unchanged until the 2000 amendment.⁹⁵

Unlike the 1993 amendments, the new amendments effective on December 1, 2000, go to the very heart of the scope of discovery standard.⁹⁶ The previous rule provided for discovery of "any matter, not privileged, which [was] relevant to the subject matter."⁹⁷ The new rule provides for discovery of "any matter, not privileged, that is relevant to the claim or defense of any party."⁹⁸ Rule 26(b)(1) now allows automatic discovery of non-privileged information that is relevant to any party's claims or defenses, instead of discovery that is relevant to the subject matter.⁹⁹ The rule continues to allow discovery of information relevant

Procedure, 67 A.B.A. J. 1648 (1981) (discussing how the proposals to amend the rules would rid the system of its simplicity).

⁹² See generally *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 103-04 (D. N.J. 1989) (finding that broad scope of discovery allowed discovery of drafting history of insurance policies, insurers participation in organizations, and insurers adoption of standard form policy language in a declaratory judgment action concerning insurance coverage); *Cutler v. Lewiston Daily Sun*, 105 F.R.D. 137, 140 (D. Me. 1985) (recognizing the broad scope of discovery and requiring the defendant to respond to discovery requests); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 103 F.R.D. 635, 637 (D. Mass. 1984) (stating that the broad mandates of discovery demand that the scope of discovery be liberally construed in order to provide both attorneys with information essential to proper litigation on all facts); *Weddington v. Consol. Rail Corp.*, 101 F.R.D. 71, 73, 76 (N.D. Ind. 1984) (stating that the rules are interpreted liberally to allow maximum discovery and to require discovery).

⁹³ See FED. R. CIV. P. 26 advisory committee's note.

⁹⁴ See FED. R. CIV. P. 26(a)(1) (1999) (amended 2000); 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶¶ 26App.09[1]-[2]. In 1993, Rule 26 was substantially rewritten and fundamentally changed the discovery process through its provisions for mandatory disclosures. See 1 MOORE'S FEDERAL RULES PAMPHLET, *supra* note 79, ¶ 26.2, at 278-79. The saving grace for many jurisdictions was the opt-out provision included within the Rule. See FED. R. CIV. P. 26(a)(1) (1999) (amended 2000). So many jurisdictions exercised this option that uniform discovery practice was virtually eliminated in the federal courts. FRIEDENTHAL, *supra* note 28, § 7.18, at 440.

⁹⁵ See FED. R. CIV. P. 26 advisory committee's note.

⁹⁶ See *infra* Part II.B.2.

⁹⁷ FED. R. CIV. P. 26(b)(1) (1999) (amended 2000).

⁹⁸ FED. R. CIV. P. 26(b)(1).

⁹⁹ *Id.* Rule 26(b)(1) provides:

(b) Discovery Scope and Limits. . .

- (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense of any party*, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.* Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

Id. (emphasis added). In 1977, language similar to the new Rule's language was proposed by the American Bar Association's Section of Litigation of the Special Committee on Abuse of Discovery following its review of the federal discovery rules: "Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the issues raised by the claims or defenses of any party.*" Second Report of the Special Committee for the Study of Discovery Abuse, Report to the Bench and Bar, 92 F.R.D. 137, app. at 157 (1980) (emphasis added); see also Weyman I. Lundquist & H. Stephen Schechter, *The New Relevancy: An End to Trial by Ordeal*, 64 A.B.A. J. 59, 59-60 (1978) (discussing the ABA's proposed amendment to Rule 26(b)(1)'s scope of discovery standard); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 753-57 & n.38 (1998) (discussing the Advisory Committee's flirtation with changing the scope of discovery standard in the 1980 amendments). See generally DANIEL SEGAL, SURVEY OF LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS 17 (1978); Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 237-38 (1999) (detailing the ABA's attempts to effect changes in the scope of discovery standard as a precursor to the 1998 proposals and 2000 amendments). The purpose of the ABA's proposed language was to "direct courts not to continue the present practice of erring on the side of expansive discovery," which the ABA believed might have been the result of the reference to "subject matter" in the rule. Second Report of the Special Committee for the Study of Discovery Abuse, Report to the Bench and Bar, 92 F.R.D. 137, app. at 158. The Advisory Committee, which met in 1978 to discuss amendments to the federal discovery rules, considered the ABA's recommendation on narrowing the scope of discovery, but instead proposed for public comment the following language: "Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved in the pending action whether it relates to claim or defense of the party seeking discovery or the claim or defense of any other party.*" Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 623-24 & n.54 (1978) (emphasis added); see also Marcus, *supra*, at 756. The Advisory Committee rejected the ABA's proposed language because it doubted that the replacement of a general term, "subject matter," with another general term, "issues," would prevent abuse, and that the introduction of a new term in the place of a familiar term would invite unnecessary litigation. SEGAL, *supra*, at 19-20; Marcus, *supra*, at 757. In 1979, after receiving public comments to the proposed amendment, the Advisory Committee withdrew the recommended change, explaining that it believed "that abuse of discovery, while very serious in certain cases, [was] not so general as to require such basic changes." Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323, 332 (1979); see also Marcus, *supra*, at 759. The ABA maintained its position that the scope of discovery standard should be narrowed. Marcus, *supra*, at 760 & n.69. The proposal did not die and was resurrected in 1989 by a section of the New York Bar Association but was again rejected by the Advisory Committee.

to the subject matter if good cause is shown.¹⁰⁰ This amendment is the Advisory Committee's response to concerns about the costs and delay of discovery.¹⁰¹ The broad scope of discovery is not entirely removed from the Rule; rather, discovery is divided into two levels: attorney-managed discovery and court-managed discovery.¹⁰² Given what appears to be a mere division of responsibilities, it is questionable as to what the difference is between the old and the new standard.¹⁰³

2. The "Old" Versus the "New" Scope of Discovery Standard: Just What Is the Difference?¹⁰⁴

Since the adoption of the discovery rules, the purpose of discovery has been the definition and clarification of issues and ascertainment of the facts.¹⁰⁵ Under the pre-2000 Rule 26(b)(1) standard, the scope of

Thornburg, *supra*, at 238. The Committee's rejection stemmed from opinions that the change would make no real difference and would require a return to fact pleading. *Id.*

¹⁰⁰ FED. R. CIV. P. 26(b)(1).

¹⁰¹ FED. R. CIV. P. 26 advisory committee's note. The Advisory Committee also addressed the fact that this amendment was originally proposed in 1978 by the American Bar Association and had been proposed by other bar groups since then. *Id.* Although similar to the 1978 proposal, the Committee explained that the 2000 amendment differs significantly in that while the scope of discovery is defined as matter relevant to the claims or defenses of any party, this only describes party-controlled discovery. *Id.* The new amendment leaves intact discovery of matter relevant to the subject matter but gives control of allowing such discovery on a showing of good cause to the court so that the court manages cases involving sweeping or contentious discovery. *Id.* The Committee also placed reliance for the amendment and its purposes upon a 1997 survey of lawyers that revealed that about one-third of the lawyers surveyed endorsed a narrowing of the scope of discovery. *Id.* (citing FEDERAL JUDICIAL CENTER, DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 44-45 (1997)).

¹⁰² John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 539 (2000); Kathleen L. Blamer et al., *Federal Discovery: Crown Jewel or Curse?*, 24 LITIG. SUMMER 1998, at 8, 10 (explaining that attorney-managed discovery is limited to information relevant to the claims or defenses and court-managed discovery involves information relevant to the subject matter which the court orders for good cause shown); Gregory P. Joseph, P.L.I. LITIG., *The 2000 Amendments to the Federal Civil Rules: A Preliminary Analysis*, 628 LITIG. 379, 388 (2000).

¹⁰³ See Beckerman, *supra* note 102, at 510-11 (advocating that the change in language is merely a semantic change unlikely to have much effect, except to generate more discovery disputes and greater need for judicial involvement).

¹⁰⁴ For a hypothetical case example describing how the old and the new standards differ, see *infra* part V.B.

¹⁰⁵ See *supra* notes 56-59 and accompanying text; see also Hickman v. Taylor, 329 U.S. 495, 501 (1947); St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Group, 198 F.R.D. 508, 511 (N.D. Iowa 2000) (citing Jochims v. Isuzu Motors, Ltd., 145 F.R.D. 507, 509 (S.D. Iowa 1992)) (stating that the discovery rules mandate a liberality in the scope of discovery in order to

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discovery was very broad and liberally construed.¹⁰⁶ Information that was relevant to the subject matter involved in the pending action was generally discoverable.¹⁰⁷ As such, the reach of discovery extended to any matter that had a bearing upon, or to any matter that reasonably could lead to other matter that had a bearing upon, any issue in the case.¹⁰⁸

Given the broad definitional reach, a general rule of relevancy has never been developed.¹⁰⁹ Discovery has neither been limited to the issues raised by the pleadings nor to the merits of the case.¹¹⁰ On the other hand, the scope of discovery standard has never been interpreted

carry out discovery's purposes of providing the parties with essential facts, eliminating surprise and promoting settlement).

¹⁰⁶ *Hickman*, 329 U.S. at 507 ("The way is now clear, . . . , for the parties to obtain the fullest possible knowledge of the issues and facts before trial."). The Supreme Court affirmed the broad reach of discovery when it indicated that the "fishing expedition" objection could not be used to preclude a party from obtaining discovery. *Id.*; see also *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978); *Harris v. Nelson*, 394 U.S. 286, 297 (1969); *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964). To understand the reason for the broad scope of discovery, it is helpful to understand that the right to obtain information through discovery does not necessarily mean that there is a right under the Federal Rules of Evidence to use the information at trial. 8 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 2007, at 95. In fact, the question of relevance in the discovery stage is more liberally construed than it is in the trial stage. *Id.* § 2008, at 99-100; see *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981); *Kerr v. United States Dist. Court*, 511 F.2d 192, 196 (9th Cir. 1975); *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499 (6th Cir. 1970); *Bowman v. Consol. Rail Corp.*, 110 F.R.D. 525, 527 (N.D. Ind. 1986).

¹⁰⁷ Prior to the recent amendment, FRCP 26(b)(1) provided:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1) (1999) (amended 2000) (emphasis added); see *Gagne v. Reddy*, 104 F.R.D. 454, 456 (D. Mass. 1984); *Cox v. McClellan*, 174 F.R.D. 32, 34 (W.D.N.Y. 1997); *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296 (E.D. Pa. 1980).

¹⁰⁸ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)); see also *Jones v. Commander, Kan. Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D. Kan. 1993).

¹⁰⁹ 8 WRIGHT, PRACTICE AND PROCEDURE, *supra* note 36, § 2008, at 107.

¹¹⁰ See *Oppenheimer*, 437 U.S. at 351. The Court explained that jurisdiction or venue might arise during the litigation and that discovery to ascertain the facts bearing on those issues would be appropriate. *Id.* at 351 n.13; see also *Hickman*, 329 U.S. at 501 (stating that discovery serves to narrow and clarify the issues and ascertain the facts).

to allow unbridled discovery either.¹¹¹ The courts have always required some threshold showing of relevance.¹¹² Yet, the outer limit of discovery has afforded the allowance of discovery that is reasonably calculated to lead to the discovery of admissible evidence.¹¹³ In consequence, courts have always been afforded broad discretion in matters of discovery.¹¹⁴ In exercising their discretion, courts have been required to adhere to the liberal spirit of discovery intended by the rules.¹¹⁵ Yet, Rule 26 recognizes that limitations are properly placed upon discovery by the court.¹¹⁶

¹¹¹ See *Hickman*, 329 U.S. at 507; see also FED. R. CIV. P. 26(c) (allowing protective orders, upon good cause shown, in order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense); *In re Surety Ass'n of America*, 388 F.2d 412, 414 (2d Cir. 1967) (stating that parties cannot explore matter that does not appear truly relevant merely on the theory that it might become so).

¹¹² See *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) (stating that "some threshold showing of relevance must be made before parties are required to open wide the doors of discovery"); *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2d Cir. 1991) (denying discovery in an action to confirm an arbitration award where the defendant was engaging in a fishing expedition to find some basis for arguing that the arbitrator was biased). It is beyond the scope of this Note to discuss how the courts have interpreted the scope of discovery standard in individual areas of the law. It should be noted, however, that it has been interpreted more broadly in some areas than in others. See generally 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26.46 (discussing the relevance standard as applied in actions including antitrust, attorney's fees, civil rights, contract, copyright, defamation, employment, environmental, fraud, insurance, negligence and product liability, patent, receivership, securities, tax, trade secrets, and trademark).

¹¹³ See FED. R. CIV. P. 26(b)(1); see also 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26.41[1].

¹¹⁴ See FED. R. CIV. P. 26(c); *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Watson v. Low County Red Cross*, 974 F.2d 482 (4th Cir. 1992); *Todd v. Merrell Dow Pharm., Inc.*, 942 F.2d 1173, 1178 (7th Cir. 1991).

¹¹⁵ See *Coughlin v. Lee*, 946 F.2d 1152, 1158-60 (5th Cir. 1991) (concluding that the district court failed to adhere to the liberal spirit of Rule 26(b)); *Williams v. City of Dothan*, 745 F.2d 1406, 1415-16 (11th Cir. 1984) (vacating the court's protective order limiting discovery because the court considered the information requested to be clearly relevant); *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-45 (2d Cir. 1983) (stating that Rule 26 "is not blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so").

¹¹⁶ See FED. R. CIV. P. 26(b)(2). The rule sets out certain matters for the court to consider when setting limitations upon discovery, including the cumulative or duplicative nature of the discovery, the party's ability to obtain the information requested from some other, more convenient, less burdensome or less expensive source, and whether the benefit is outweighed by the burden or expense of the discovery requested through consideration of the needs of the case, the amount in controversy, the parties' resources, the importance of the issues, and the importance of the requested discovery in resolving the issues. *Id.*; see, e.g., *Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 336 (M.D. Ala. 1991) (restricting depositions in a products liability case such that all 18 people who had received a memorandum describing the prototype vehicles' seat belt restraint system that had

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The 2000 amendment to the scope of discovery standard does not abandon the purpose of discovery; rather, it refocuses the parties and realigns their respective responsibilities.¹¹⁷ Under the new Rule 26(b)(1), the scope of discovery remains as broad as it was prior to the amendment.¹¹⁸ As before, parties are entitled to discover information that is relevant to the claim or defense of any party.¹¹⁹ Now, however, the parties must make a showing of good cause to the court before they can access information that is relevant to the subject matter.¹²⁰

The amendment forces the parties to focus on discovering information that is relevant to their case's claims and defenses.¹²¹ It also removes the ability to develop new claims and defenses not already identified in the pleadings by engaging in a broad search for information.¹²² Now, the parties are only entitled to non-privileged information that is relevant to any party's claim or defense.¹²³ The

allegedly failed could not be deposed); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1444 (D. Kan. 1995) (restricting discovery requested by employee so as not to require employer to gather information from 1700 personnel files when the information already provided by the employer should have been sufficient for the employee to make a preliminary determination as to whether the company treated employee's ethnic group differently); see also FED. R. CIV. P. 26(c); *Herbert*, 441 U.S. at 177 (indicating that courts should not neglect their power to restrict discovery when necessary to avoid annoyance, embarrassment, oppression, or undue burden or expense). *But see, e.g.*, *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 145 (M.D. N.C. 1989) (allowing depositions of automobile manufacturer executives even though somewhat duplicative and cumulative).

¹¹⁷ See FED. R. CIV. P. 26(b)(1) advisory committee's note.

¹¹⁸ FRCP 26(b)(1), as amended, provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by subdivision (b)(2)(i), (ii), and (iii).

FED. R. CIV. P. 26(b)(1) (emphasis added).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ FED. R. CIV. P. 26 advisory committee's note.

¹²² *Id.*

¹²³ FED. R. CIV. P. 26(b)(1).

purpose in this initial narrowed discovery scope is to address the rising costs of litigation related to broad discovery.¹²⁴

The amendment also realigns the parties' responsibilities in the discovery process.¹²⁵ First, parties are free to engage in 'party-controlled' or 'attorney-managed' discovery, which involves the discovery of information relevant to the claims or defenses of the parties.¹²⁶ If the parties are unable to agree as to whether a discovery request meets this relevancy standard, the responsibility shifts to the court.¹²⁷ The court must then decide if the discovery sought is relevant to the claims or defenses of the parties.¹²⁸ If it is not, the court must next determine whether it is relevant to the subject matter of the pending action, and, if so, whether there is good cause to permit the broader discovery sought.¹²⁹ This realignment of responsibilities in the amendment is designed to address the need for court involvement, which is believed to be an important method in controlling the persistent problems of over-broad discovery.¹³⁰

The Advisory Committee conceded that the dividing line between the new standard for attorney-managed discovery and the new standard for court-managed discovery cannot be precisely defined.¹³¹ It was the

¹²⁴ See FED. R. CIV. P. 26 advisory committee's note; see also Niemeyer, *supra* note 1, at 520 (stating that the persistence of complaints about the expense of broad discovery caused the Committee to address amendments to the discovery rules).

¹²⁵ See FED. R. CIV. P. 26 advisory committee's note. The Advisory Committee stated that it intended more action by the court to regulate the extent of discovery in cases involving contentious or sweeping discovery. *Id.* Some commentators have long argued that the court needed to take a more active role in the discovery process. See generally Mark A. Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 592-99 (1980) (discussing the similar proposals made by the American Bar Association's Special Committee for the Study of Discovery Abuse and the Advisory Committee on Civil Rules that the rules be amended to provide for early judicial control of discovery).

¹²⁶ See FED. R. CIV. P. 26(b)(1).

¹²⁷ See *id.*; FED. R. CIV. P. 26 advisory committee's note.

¹²⁸ See FED. R. CIV. P. 26 advisory committee's note. The Committee noted that the rule "signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* Under the new standard for attorney-managed discovery, discovery of information relevant to the parties' claims and defenses is allowed. See FED. R. CIV. P. 26(b)(1). Under both the old standard and the new standard for court-managed discovery, parties are

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Advisory Committee's expressed hope that reasonable lawyers will cooperate at the attorney-managed discovery level so that the court does not have to become involved.¹³² However, if the court is required to become involved, the Advisory Committee's advice to the courts is to decide what discovery to allow according to the reasonable needs of the claims by considering the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.¹³³ All of this aside, however, one of the main concerns with the amendment is that pleading practice in the federal courts will return to pre-1938 fact pleading.¹³⁴ Accordingly, this is where one of the controversies lies in the amendment to Rule 26(b)(1).¹³⁵ Next, this Note examines the alleged ramification of the amendment to the scope of discovery standard upon notice pleading.

III. AN ANALYSIS OF THE ALLEGED EFFECT OF THE NEW RULE 26(b)(1) UPON NOTICE PLEADING

The re-examination of the discovery rules by the Advisory Committee involved an endeavor to determine if the full disclosure required by discovery was too expansive, as well as to determine whether amendment to the discovery rules could make discovery more efficient and satisfying to the parties.¹³⁶ The overriding question facing

allowed to obtain information relevant to the subject matter. *See id.*; FED. R. CIV. P. 26(b)(1) (1999).

¹³² FED. R. CIV. P. 26 advisory committee's note.

¹³³ *Id.*

¹³⁴ *See* Beckerman, *supra* note 102, at 541; Lisa Gelhaus, *Proposed Rule Changes Narrow Discovery, Limit Depositions, and Restrict Expert Testimony*, TRIAL, Jan. 2000, at 14; Joseph, *supra* note 102, at 391; Pearl Zuchlewski, *Proposed Amendments May Transform Federal Civil Discovery Rules*, N.Y. L.J., Aug. 1999, at 1. According to Judge Niemeyer, the combination of notice pleading and broad discovery cannot be undone because it has become "embedded in the infrastructure of American civil procedure." Niemeyer, *supra* note 1, at 520. Judge Niemeyer was the chair of the Civil Rules Advisory Committee that drafted the 2000 amendments. *Id.*

¹³⁵ There have been many other ramifications raised by those concerned with the new amendment, including the effect upon the many years of caselaw and the effect upon the judiciary because of increased judicial involvement. *See generally* Beckerman, *supra* note 102, at 540-41 (arguing that the amendment is a "radical, pro-defendant novelty" that will result in stonewalling and discovery disputes); Thornburg, *supra* note 99, at 249-59 (arguing that the amendment will decrease information exchange, increase costs and make many years of case law obsolete); Zuchlewski, *supra* note 134, at 1 (arguing that the amendment will engender massive motion practice). A thorough discussion of these and other ramifications, however, is beyond the scope of this Note.

¹³⁶ Niemeyer, *supra* note 1, at 518. A report issued in 1991 claimed that "over 80 percent of the time and cost of a typical lawsuit involve[d] pre-trial examination of facts through discovery." *Id.* (quoting PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL

the Advisory Committee was whether the same full disclosure and discovery exchange that had become so common in federal practice could be accomplished at a lower cost.¹³⁷ As such, the Advisory Committee embarked upon its task of amending the scope of discovery standard with two assumptions.¹³⁸ First, it recognized that notice pleading had to be maintained.¹³⁹ Second, it acknowledged that full disclosure through discovery was an accepted and essential element of litigation.¹⁴⁰

At first glance, Rule 26(b)(1)'s amendment only appears to involve a change in wording and a realignment of discovery responsibilities.¹⁴¹

REFORM IN AMERICA (1991)). Additionally, a 1997 survey of lawyers conducted by the Federal Judicial Center revealed that eighty-three percent of the respondents thought that changes to the discovery rules were required. *Id.* at 520 (citing Thomas E. Willing et al., Federal Judicial Center, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 B.C. L. REV. 525, 543 (1998)). This same survey revealed that discovery costs represented about fifty percent of litigation costs. *Id.* at 521-22. In contrast, a study conducted by the RAND Institute for Civil Justice revealed that the cost of discovery was not a problem in the "typical" case but appeared only in a minority of cases. *Id.* at 522 (citing JAMES E. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA § II(B) (1998), reprinted in 39 B.C. L. REV. 613 (1998)). The committee did not embark upon its task of drafting amendments to the discovery rules without first seeking the advice and opinions of many well-respected experts in the field of civil rules and discovery. *Id.* at 521; see also *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 809 n.1 (1998). In 1997, a conference was held at Boston College Law School for the committee to gather data, opinions, ideas, and proposals for its reexamination of the discovery rules. Niemeyer, *supra* note 1, at 521; see also *Transcript of the "Alumni" Panel on Discovery Reform*, *supra*, at 809-40. After the conference, which allowed the committee to hear from academic experts, judges and plaintiffs' and defendants' lawyers, Judge Niemeyer concluded that first, the elimination of full disclosure of relevant information was not advocated; second, discovery worked effectively in routine cases; third, active use of discovery was thought to be unnecessarily expensive and burdensome; fourth, there was a universal belief that greater judicial involvement would reduce the cost of discovery disputes; and fifth, discovery costs could be reduced by limiting the scope of discovery. Niemeyer, *supra* note 1, at 523; see also *Transcript of the "Alumni" Panel on Discovery Reform*, *supra*, at 839-40.

¹³⁷ Civil Rules Advisory Committee Meeting Minutes (November 12-13, 1998), available at <http://www.uscourts.gov/rules/Minutes/1198civilminutes.htm> (last visited May 9, 2002); Civil Rules Advisory Committee Meeting Minutes (March 16-17, 1998), available at <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited May 9, 2002); Committee on Rules of Practice and Procedure Meeting Minutes (June 18-19, 1998), available at <http://www.uscourts.gov/rules/Minutes/0698standingminutes.htm> (last visited May 9, 2002).

¹³⁸ Niemeyer, *supra* note 1, at 520.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *supra* Part II.C; cf. Beckerman, *supra* note 102, at 510-11 (stating that the change in the relevance language "is basically a semantic change unlikely to have much salutary effect on the conduct of discovery in the hurly-burly world of litigation," but that it will generate

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However, it is argued that the ramifications of the new Rule 26(b)(1) may go well beyond refocusing the parties and shifting the responsibilities.¹⁴² The amendment to Rule 26(b)(1) may even undo the current notice pleading requirements of the FRCP.¹⁴³

In effect, critics argue that the new "claim or defense" language will force plaintiffs to draft fact-specific, particularized pleadings in order to have access to needed discovery.¹⁴⁴ Since its inception, the FRCP

more discovery disputes and the greater need for judicial intervention); *ALI-ABA Panel Gives Mostly Favorable Assessment to Proposed Rules Changes*, FED. DISCOVERY NEWS, Oct. 11, 1999 (citing a prominent San Francisco trial lawyer as indicating that the change to the scope of discovery standard is a matter of form rather than substance, and that the amendment will likely fail to have the desired effect).

¹⁴² Numerous groups have presented arguments for a decrease in allowable discovery for many years. See generally Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rule Making*, 46 STAN. L. REV. 1393, 1400-24 (1994) (tracing sources and history of groups urging curtailment of discovery). With respect to the 2000 amendment, there were both proponents for and against change. In making the amendment, the Civil Rules Advisory Committee was influenced by defendants, especially those in products liability, securities and antitrust cases, corporate constituents, the plaintiff-based Association of Trial Lawyers of America, the Trial Lawyers for Public Justice, the American College of Trial Lawyers, and the Defense Research Institute. Thornburg, *supra* note 99, at 244-45. See generally *Transcript of "Alumni" Panel*, *supra* note 136, at 809.

¹⁴³ Beckerman, *supra* note 102, at 541; Joseph, *supra* note 102, at 391; Zuchlewski, *supra* note 134, at 1. This argument was made in letters of public comment to and hearings before the Advisory Committee by organizations including the Association of Trial Lawyers of America, the United States Department of Justice, the Eastern District of New York Commission on Civil Litigation, the Chicago Council of Lawyers Federal Courts Committee, the Federal Practice Section of the Connecticut Bar Association, the Nebraska Association of Trial Attorneys, the New Mexico Trial Lawyers, and the Federal Bar Association for the Western District of Washington. See Summary of Public Comments 76-81, 85-86, 97-98, available at <http://www.uscourts.gov/rules/summary.pdf> (last visited May 9, 2002). Other individuals, including attorneys, academics, and judges, have also made this argument. *Id.*; see also Mimi Azrael, *New Federal Discovery Rules to Take Effect December 1*, 33 MD. BAR J., Nov.-Dec. 2000, at 56 (stating that under the new rule plaintiffs are encouraged to file multi-count complaints in order to "level the discovery playing field").

¹⁴⁴ See Beckerman, *supra* note 102, at 541; Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Litigation*, 74 TEMP. L. REV. 27, 51-52 (2001); Joseph, *supra* note 102, at 391; Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 83 (2000); Zuchlewski, *supra* note 134, at 1. *But see* Cloud, *supra*, at 51 (2001) (indicating that the amendment may provide an incentive for attorneys to plead more broadly by including all possible claims and defenses in their pleadings in order to expand the issues raised); Tobias, *supra*, at 83 (indicating that the amendment may encourage plaintiffs to draft broader pleadings in order to secure increased discovery).

replaced the need for fact or code pleading with notice pleading.¹⁴⁵ After significant resistance, notice pleading finally became imbedded in federal court practice and procedure.¹⁴⁶ It has been argued that in order for notice pleading to work, there must be liberal discovery so that the pleadings need only contain a "generalized statement" giving notice of the claims or defenses.¹⁴⁷ Support for this argument is specifically found in *Conley v. Gibson*,¹⁴⁸ wherein the Supreme Court indicated that liberal discovery allows for the simplified pleading required by the FRCP.¹⁴⁹ The counter-argument is found in the Advisory Committee's intentions.¹⁵⁰ The Advisory Committee did not intend to discard the requirement of notice pleading; instead, the Advisory Committee specifically assumed that notice pleading had to be maintained.¹⁵¹ In

¹⁴⁵ See *supra* Part II.A. Notice pleading is a system of pleading practice wherein a party need only provide notice of claims through "a short and plain statement of the claim showing that the pleader is entitled to relief." See FED. R. CIV. P. 8(a)(2). It also requires that a party notify other parties of defenses by using "short and plain terms." See FED. R. CIV. P. 8(b).

¹⁴⁶ See *supra* notes 48-55 and accompanying text. Notice pleading has also become imbedded in the pleading rules of many state courts. See generally ALA. R. CIV. P. 8; ALASKA R. CIV. P. 8; ARIZ. R. CIV. P. 8; COLO. R. CIV. P. 8; DEL. SUPER. CT. CIV. R. 8; DEL. CH. CT. R. 8; DEL. COM. P. CT. CIV. R. 8; DEL. FAM. CT. CIV. R. 8; HAW. R. CIV. P. 8; IDAHO R. CIV. P. 8(a)(1); IND. T. R. 8; IOWA R. CIV. P. 70(a); KAN. STAT. ANN. 60-208(a) (1999); KY. R. CIV. P. 8.01; ME. R. CIV. P. 8; MASS. R. CIV. P. 8; MINN. DIST. CT. GEN. R. 8.01; MISS. R. CIV. P. 8; MONT. R. CIV. P. 8(a); NEV. R. CIV. P. 8; N.M. DIST. CT. R. CIV. P. 1-008; N.D. R. CIV. P. 8; OHIO R. CIV. P. 8; R.I. R. CIV. P. 8; S.D. CODIFIED LAWS § 15-6-8(a) (2001); TENN. CIV. P. R. 8; UTAH R. CIV. P. 8; VT. R. CIV. P. 8; WASH. CIV. R. 8; W. VA. R. CIV. P. 8; WYO. R. CIV. P. 8. The FRCP have separately established particularity in pleading fraud or mistake. FED. R. CIV. P. 9(b). Additionally, heightened pleading requirements have been developed by the courts in several specific areas of litigation, such as in cases involving civil rights, securities, and antitrust. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992), *rev'd* 507 U.S. 163 (1993) (involving a civil rights case); *Letica Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702 (E.D. Mich. 1992) (involving an antitrust case); *Kahn v. Chase Manhattan Bank, N.A.*, 760 F. Supp. 369 (S.D.N.Y. 1991) (involving a securities case). In *Leatherman*, the Supreme Court reaffirmed notice pleading and effectively ended the ability of the lower courts to require heightened pleading requirements. *Leatherman*, 507 U.S. at 167-69. The Court indicated that heightened pleading could not be required without specific amendment to the FRCP. *Id.* Clearly, notice pleading is embedded in our system of civil procedure. See also Erwin Chemerinsky, *Reaffirmation of Notice Pleading*, TRIAL, June 1993, at 73 (discussing the implication of the *Leatherman* decision upon heightened pleading requirements).

¹⁴⁷ Beckerman, *supra* note 102, at 535.

¹⁴⁸ 355 U.S. 41, 47-48 (1955).

¹⁴⁹ *Id.* ("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."); see also *supra* notes 53-55 and accompanying text.

¹⁵⁰ See FED. R. CIV. P. 26 advisory committee's note.

¹⁵¹ See Niemeyer, *supra* note 1, at 520.

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drafting the new scope of discovery standard, the Advisory Committee did not discard the liberal scope of discovery formerly recognized under the FRCP.¹⁵² All that the rule does is realign the responsibilities for discovery.¹⁵³

The Advisory Committee's practical intention was to encourage judicial control by expanding the occasions for seeking it.¹⁵⁴ In allowing for attorney-managed and court-managed tiers of discovery, the Advisory Committee intended that reasonable attorneys would be able to cooperate and appropriately manage discovery without the need for judicial involvement.¹⁵⁵ It concluded that discovery under the old system was working well in the majority of routine civil cases.¹⁵⁶ As such, it is inferred that the Advisory Committee found that with a pleading sufficient under the requirements of notice pleading, the attorneys would be capable of determining the content of the claims and defenses and what discovery and disclosure would be relevant to those claims and defenses without the need for either fact-specific pleading or judicial involvement.¹⁵⁷ Therefore, responsible and cooperative involvement of the lawyers should require nothing more than notice pleading in order to obtain discovery related to the claims and defenses of the parties.

Critics have also argued that the "claim or defense" language will force more specific pleading, especially from plaintiffs, so that attorneys cannot resist obvious discovery at the attorney-managed level of the two-tiered discovery system.¹⁵⁸ The discovery rules themselves provide

¹⁵² The broad "subject matter" discovery is still allowed under the rule. See FED. R. CIV. P. 26(b)(1). The only difference is that now, without a stipulation between the parties, the parties must request the permission of the court to obtain this broad scope of discovery. *Id.*

¹⁵³ See *supra* notes 125-30 and accompanying text.

¹⁵⁴ Civil Rules Advisory Committee Meeting Minutes (March 16-17, 1998), available at <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited May 9, 2002).

¹⁵⁵ FED. R. CIV. P. 26 advisory committee's note.

¹⁵⁶ See Niemeyer, *supra* note 1, at 523; see also Committee on Rules of Practice and Procedure Meeting Minutes (January 8-9, 1999), available at <http://www.uscourts.gov/rules/Minutes/st1-98.htm> (last visited May 9, 2002); Committee on Rules of Practice and Procedure Meeting Minutes (June 18-19, 1998), available at <http://www.uscourts.gov/rules/Minutes/0698standingminutes.htm> (last visited May 9, 2002). Given that discovery works well in the majority of routine civil cases, instead of amending the scope of discovery standard relative to all cases, maybe the Advisory Committee should have considered creating discovery rules for the non-routine cases. A discussion of this alternative is, however, beyond the scope of this Note.

¹⁵⁷ See FED. R. CIV. P. 26 advisory committee's note.

¹⁵⁸ Joseph, *supra* note 102, at 391.

the counter-argument.¹⁵⁹ The discovery rules are organized to deal with obvious discovery resistance.¹⁶⁰ Pursuant to the FRCP, a party can bring a motion to compel disclosure or responses to discovery, which would certainly be granted in favor of the party requesting discovery if the requested information is related to a claim or defense or, if related to the subject matter, good cause is shown.¹⁶¹ Therefore, notice pleading should not be replaced by more fact specific pleading in order to avoid discovery resistance because the rules are already equipped to handle this problem.¹⁶²

Unfortunately, the cooperation among the attorneys and the functioning of the discovery rules would only solve the identified problem in a perfect world. The world of discovery is not, and never has been, perfect.¹⁶³ Problems will arise under the new scope of discovery

¹⁵⁹ See FED. R. CIV. P. 26-37.

¹⁶⁰ See generally FED. R. CIV. P. 37. Rule 37 allows a party to seek an order compelling disclosure or discovery from a party who is resisting disclosure or discovery or providing evasive or incomplete answers. FED. R. CIV. P. 37(a)(2)-(3). If the motion is granted, the opposing party may be required to pay reasonable expenses incurred in bringing the motion. FED. R. CIV. P. 37(a)(4). The rule also provides for sanctions to be imposed upon parties who fail to comply with the court's order regarding disclosure or discovery. FED. R. CIV. P. 37(b).

¹⁶¹ See FED. R. CIV. P. 37. Increased discovery motion practice, requiring increased judicial involvement, is, to many opponents, another disfavored ramification of the amendment. Beckerman, *supra* note 102, at 541 (indicating that there will be an increase in the number of discovery disputes because defense lawyers would use the amended scope provisions to an even greater extent to resist discovery); Joseph, *supra* note 102, at 391 (suggesting that Rule 12 motion practice will increase); Zuchlewski, *supra* note 134, at 1 (indicating that the amendment will "spawn massive motion practice" to determine whether discovery requests are permissibly relevant).

¹⁶² See FED. R. CIV. P. 37. In fact, the court has broad discretion in fashioning sanctions under Rule 37 for a party's failure to make disclosures or cooperate in discovery. See, e.g., *United States v. Big D. Enters.*, 184 F.3d 924, 936 (8th Cir. 1999); *Langley v. Union Elec. Co.*, 107 F.3d 510 (7th Cir. 1997). See generally *Spain v. Bd. of Educ.*, 214 F.3d 925 (7th Cir. 2000) (upholding dismissal of principal's civil rights suit for principal's failure to attend pretrial conference, provide initial disclosures, answer interrogatories, pay previously ordered sanctions, prepare for pretrial conference, and attend another pretrial conference).

¹⁶³ See generally *Harlem River Consumers Coop., Inc. v. Assoc'd Growers of Harlem, Inc.*, 54 F.R.D. 551, 553 (S.D.N.Y. 1972) (stating that the vision that discovery will be conducted by "skilled gentlemen of the bar, without wrangling and without the intervention of the court," is an "unreal dream"). One reason for the imperfect world of discovery arises from what have been identified as the five primary objectives of litigating lawyers: "(1) to win; (2) to make money; (3) to avoid being sued for malpractice; (4) to earn the admiration of the professional community; and (5) to develop self-esteem for the quality of their performance." Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1311 (1978). Brazil maintains that it is the pursuit of victory; however, that naturally dominates all of the other objectives because the

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standard as litigants attempt to determine the impact of the rule.¹⁶⁴ As such, the next Part of this Note introduces Mississippi's similar scope of discovery standard and reviews the judiciary's interpretation of that standard.

IV. IT CAN BE DONE: A LOOK AT THE CO-EXISTENCE OF NOTICE PLEADING AND A SIMILAR SCOPE OF DISCOVERY STANDARD IN MISSISSIPPI

A. *Comparison Between the Federal and Mississippi's Notice Pleading Requirements and Scope of Discovery Standards*

The Mississippi Rules of Civil Procedure (MRCP) are modeled after the FRCP.¹⁶⁵ Like the FRCP, the MRCP require that the pleadings set forth a "short and plain statement of the claim showing that the pleader is entitled to relief."¹⁶⁶ Additionally, in Mississippi as in the federal courts, the role of pleadings is diminished and relatively unimportant.¹⁶⁷ Like the federal pleading rule, the purpose of Mississippi's pleading rule is to require the pleadings to give notice of the underlying claims.¹⁶⁸ Also like the FRCP, the MRCP provide practitioners with an appendix of forms that are virtually identical to those provided in the FRCP.¹⁶⁹ Thus, the MRCP call for a system of notice pleading that is very similar to that of the FRCP.¹⁷⁰

others flow from victory. *Id.* As such, Brazil postulates that the "adversary pressures and competitive economic impulses inevitably work to impair significantly, if not to frustrate completely, the attainment of the discovery system's primary objective." *Id.* at 1303.

¹⁶⁴ See Civil Rules Advisory Committee Meeting Minutes (March 16-17, 1998), available at <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited May 9, 2002) ("[T]he very fact of change will lead to a transitional period in which contending parties seek to attribute unintended meanings to the change.").

¹⁶⁵ See, e.g., *Stanton & Assoc., Inc. v. Bryant Constr. Co.*, 464 So. 2d 499, 505 n.5 (Miss. 1985) (stating that Mississippi's rules are patterned after the federal rules).

¹⁶⁶ Compare FED. R. CIV. P. 8(a)(2), with MISS. R. CIV. P. 8(a)(1).

¹⁶⁷ *Stanton*, 464 So. 2d at 505 n.6; see also *Witt v. Mitchell*, 437 So. 2d 63, 67 (Miss. 1983) (Robertson, J., concurring). As to the diminished importance of the pleadings in the federal courts, see *supra* text accompanying notes 56-59, 66.

¹⁶⁸ MISS. R. CIV. P. 8(a)(1) advisory committee's comment. The old practice in Mississippi of requiring the pleadings to state the facts and narrow the issues was defeated by adoption of Mississippi Rule of Civil Procedure 8. *Id.*; see also *Stanton*, 464 So. 2d at 505 n.6.

¹⁶⁹ See MISS. R. CIV. P. app. (2000); cf. FED. R. CIV. P. app. (2000).

¹⁷⁰ See MISS. R. CIV. P. 8(a)(1). But see *Stanton*, 464 So. 2d at 505 n.6 (declining to address whether Mississippi Rule of Civil Procedure 8 actually adopts the theory of "notice pleading").

Likewise, the scope of discovery standard of the MRCP is similar to that under the new FRCP.¹⁷¹ Rule 26(b)(1) of the MRCP allows discovery of "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party."¹⁷² The new FRCP Rule 26(b)(1) allows discovery of "any matter, not privileged, that is relevant to the claim or defense of any party."¹⁷³ Both allow discovery of information related to the claims or defenses of the parties and, clearly, an "issue" is related to a claim or defense. Also like the new FRCP Rule 26(b)(1), MRCP Rule 26(b)(1) replaced Mississippi's former statute that allowed discovery of information relevant to the "subject matter" of the suit.¹⁷⁴

Finally, like the drafters of FRCP Rule 26(b)(1), the drafters of MRCP Rule 26(b)(1) realized the difficulty in determining the difference between information related to "issues" and information related to "subject matter."¹⁷⁵ However, the drafters of MRCP Rule 26 offered a little more guidance by indicating that MRCP Rule 26(b)(1) favors discovery limitations rather than expansions because the amendment was intended to deter sweeping and abusive discovery practices.¹⁷⁶ The drafters also explained that discovery should be limited to the specific practices or acts in issue in a claim.¹⁷⁷

Mississippi has been operating in a system where notice pleading and a scope of discovery standard like that of the new FRCP Rule 26(b)(1) have co-existed since 1982.¹⁷⁸ A review of Mississippi caselaw reveals how this has succeeded and demonstrates that it can succeed in

¹⁷¹ See MISS. R. CIV. P. 26(b)(1). Mississippi's old discovery rule modeled the old FRCP 26(b)(1). MISS. CODE ANN. § 13-1-226(b) (1972); cf. FED. R. CIV. P. 26(b)(1) (1999); see also MISS. R. CIV. P. 26 advisory committee's comment. The old discovery rule was amended and the new discovery rule, MRCP 26(b)(1), became effective in 1982. See MISS. R. CIV. P. 26.

¹⁷² MISS. R. CIV. P. 26(b)(1).

¹⁷³ FED. R. CIV. P. 26(b)(1).

¹⁷⁴ MISS. R. CIV. P. 26 advisory committee's comment (citing Miss. Code Ann. § 13-1-226 (1972)). The Committee recognized that the former statute allowed sweeping and abusive discovery and decided that "discovery should be limited to the specific practices or acts that are in issue." *Id.*

¹⁷⁵ *Id.* The federal Civil Rules Advisory Committee has also commented regarding the difficulty in determining the difference. See FED. R. CIV. P. 26 advisory committee's note; see also *supra* text accompanying note 131.

¹⁷⁶ MISS. R. CIV. P. 26 advisory committee's comment.

¹⁷⁷ *Id.*

¹⁷⁸ See MISS. R. CIV. P. 26.

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the federal procedural system.¹⁷⁹ Next, this Note reviews the judicial interpretation of this similar standard by the Mississippi courts.

B. Review of Judicial Interpretation of Mississippi's Scope of Discovery Standard

The Mississippi Supreme Court has addressed Mississippi's scope of discovery standard on a few occasions, providing guidance to interpretation of the scope of discovery standard of MRCPP Rule 26(b)(1). In *American Tobacco Co. v. Evans*,¹⁸⁰ the Mississippi Supreme Court addressed the scope of discovery as it relates to the discoverability of a manufacturer's trade secrets and other confidential research development or commercial information.¹⁸¹ In *American Tobacco*, the widow and father of Nathan Horton filed a wrongful death action against American Tobacco and a distributor of its tobacco products alleging that Nathan developed and died from lung cancer by smoking "Pall Mall" cigarettes.¹⁸² The complaint alleged a strict liability tort, claiming that American Tobacco sold and distributed to Nathan an unreasonably dangerous or defective product and that Nathan's use of the product resulted in his death.¹⁸³ During discovery, the Hortons served written interrogatories on American Tobacco requesting American Tobacco to identify all additives in Pall Mall cigarettes and its wrapping paper.¹⁸⁴ American Tobacco objected to the interrogatory on several grounds, which included an allegation that the information was irrelevant to the issues raised by the Hortons' claims.¹⁸⁵ In an effort to

¹⁷⁹ See *infra* Part IV.B.

¹⁸⁰ 508 So. 2d 1057 (Miss. 1987).

¹⁸¹ *Id.* at 1057.

¹⁸² *Id.*

¹⁸³ *Id.* at 1060.

¹⁸⁴ *Id.* at 1058. The interrogatory specifically read:

8. Please identify, by scientific name, generic name and chemical formula, all additives, chemical or otherwise, in Pall Mall cigarettes and its wrapping paper, and:

(a) State whether or not each additive or material has ever been determined or suspected to be carcinogenic, cocarcinogenic, a tumor initiator, or to yield nitrosamines;

(b) Identify tests, analyses, or research you have conducted, or had conducted on your behalf, to determine the properties and/or health hazards of each additive or material.

Id.

¹⁸⁵ *Id.* at 1058. The Hortons filed a motion to compel and American Tobacco opposed the motion, indicating that revelation of such information would materially damage its marketability as a competitive tobacco product. *Id.* The lower court ordered American Tobacco to disclose the additives, subject to a protective order. *Id.* at 1058-59. American

show that the information requested was irrelevant and to avoid disclosure, American Tobacco attempted to redefine the Hortons' claims by asserting that it was actually the smoke that caused Nathan's death, not the additives in the cigarettes.¹⁸⁶

The court held that, in the context of the facts and circumstances of the Hortons' case, a party opponent is entitled to discovery of the requested information.¹⁸⁷ The court reasoned that the nature of the claims asserted by the Hortons made the information regarding additives both relevant to the issues raised by the claims or defenses and reasonably calculated to lead to the discovery of admissible evidence.¹⁸⁸ The court admonished that a party cannot attempt to redefine the contours of an adversary's claim or defense and thus limit discovery, because mischief would result and it is the plaintiffs' prerogative to define their own claim.¹⁸⁹

Specifically addressing discovery of information in similar cases, the court noted that the judiciary is ill-equipped to determine whether plaintiffs need access to the chemical components of cigarettes or the contents of their smoke.¹⁹⁰ The court indicated that it should be left to the plaintiffs and their counsel, who carry the burden of proving all of the elements of their product liability claims, to competently make such a determination.¹⁹¹ The court further noted that allowing the decision to be made by those best equipped to make it was a matter of institutional fairness and practical necessity.¹⁹²

Finally, responding to the Hortons' claim that disclosure of the information was necessary, the court emphasized that MRCP Rule

Tobacco sought a writ of prohibition from the Mississippi Supreme Court to reverse the order of disclosure. *Id.* at 1059.

¹⁸⁶ *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 1060 (Miss. 1987). The court found this attempt to redefine the claim to be species and restrictive. *Id.*

¹⁸⁷ *Id.* at 1057. The court indicated that such discoverability was subject to a carefully drawn protective order. *Id.* The court further indicated that there is no trade secrets exception to the general scope of discovery as defined by Miss. R. Civ. P. 26(b)(1). *Id.* The court did, however, uphold the protective order since the information being disclosed involved American Tobacco's trade secrets. *Id.* at 1061-62.

¹⁸⁸ *Id.* at 1061. The Hortons claimed that in order to establish the defective product claim, they had to have access to the components of the cigarettes. *Id.* The Hortons also claimed that discovery of the information was necessary to determine whether any other ingredients were carcinogenic or toxic. *Id.*

¹⁸⁹ *Id.* at 1060.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 1060 (Miss. 1987).

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26(b)(1) does not include an element of necessity as a prerequisite to discoverability.¹⁹³ The court further emphasized that such a judicial determination before allowing discovery is both legally inappropriate and practically impossible.¹⁹⁴ The court stressed that all that a party needs to show for discoverability is that the information sought lies within the scope of discovery allowed by MRCP Rule 26(b)(1); that is, that the information is "relevant to the issues raised by the claims or defenses of any party."¹⁹⁵ The Hortons met this burden and, therefore, were entitled to the information without the need for a showing of necessity.¹⁹⁶

The Mississippi Supreme Court next addressed the scope of discovery standard of MRCP Rule 26(b)(1) in *Dawkins v. Redd Pest Control Co.*¹⁹⁷ In *Dawkins*, the plaintiffs purchased a home that they later found to be termite infested, even though they had received a pre-sale certificate from Redd indicating that it was not.¹⁹⁸ A complaint filed against Redd alleged that Redd either fraudulently or with gross negligence provided the Dawkinses with a written certificate that indicated that Redd had inspected the house and had observed no visible evidence of infestation.¹⁹⁹ The Dawkinses also claimed that Redd never performed the inspection, thereby failing to discover the readily visible infestation.²⁰⁰ The Dawkinses further alleged that Redd knew that the representations were false and that the Dawkinses would rely on those representations.²⁰¹

In discovery, the Dawkinses requested information relating to all persons for whom the particular inspector had performed a pre-sale termite inspection for approximately five years prior to the sale.²⁰² Redd

¹⁹³ *Id.* at 1061.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*; see also MISS. R. CIV. P. 26(b)(1).

¹⁹⁶ *American Tobacco*, 508 So. 2d at 1061.

¹⁹⁷ 607 So. 2d 1232 (Miss. 1992).

¹⁹⁸ *Id.* at 1233.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1234. Interrogatory number 4 read:

Please provide the name, last known address and telephone number of each and every person for whom Murray Strickland (acting as an employee of Defendant) has performed or purportedly performed at any time since January 1, 1985, a pre-sale termite inspection or has filled out a form similar to the form attached to the Complaint herein as Exhibit "A."

Id.

objected to the request as being, among other things, irrelevant.²⁰³ A motion to compel responses to discovery was filed and the request was found by the trial court to be beyond the scope of permissible discovery.²⁰⁴ The case proceeded to trial and the evidence regarding Redd's prior inspections, which may have established the plaintiffs' claims, was excluded during the trial.²⁰⁵

The appeal filed by the Dawkinses involved the propriety of the underlying court's pre-trial discovery ruling and questioned its effect on the presentation of evidence at the trial.²⁰⁶ The Dawkinses argued that the information sought was relevant to the issue of fraudulent intent, stating that they were "casting their nets for evidence of other fraudulent acts."²⁰⁷ Redd argued that the reports were irrelevant because the plaintiffs were attempting an improper fishing expedition under the MRCP.²⁰⁸ Redd also argued that the intent of the MRCP was to prevent fishing expeditions and limit the scope of discovery to issues in the case.²⁰⁹ The court held that evidence of similar occurrences is relevant for purposes of discovery and that the Dawkinses were entitled to the information.²¹⁰

²⁰³ Dawkins v. Redd Pest Control Co., 607 So. 2d 1232, 1234 (Miss. 1992). The other objections raised by Redd included that the interrogatory request was overreaching and unduly burdensome. *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* The trial court would not allow the plaintiffs' claims for fraud, gross negligence and punitive damages to be submitted to the jury, and instead the jury considered only the issue of negligence. *Id.* at 1234-35.

²⁰⁶ *Id.* at 1235.

²⁰⁷ *Id.*

²⁰⁸ *Id.* As to fishing expeditions and the FRCP, the United States Supreme Court has indicated that the "fishing expedition" objection cannot be used to preclude a party from obtaining discovery. *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978); *Harris v. Nelson*, 394 U.S. 286, 297 (1969); *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964); see also *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991). Some courts have denied discovery, however, when a party appeared to be attempting a fishing expedition. See *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2d Cir. 1991) (denying discovery in an action to confirm an arbitration award where the defendant was engaging in a fishing expedition to find some basis for arguing that the arbitrator was biased); *MacKnight v. Leonard Morse Hosp.*, 828 F.2d 48, 52 (1st Cir. 1987) (refusing the subject parties to a fishing expedition when the plaintiff did not suggest any reasonable basis that discovery would uncover what plaintiff was looking for).

²⁰⁹ Dawkins v. Redd Pest Control Co., 607 So. 2d 1232, 1235 (Miss. 1992).

²¹⁰ *Id.* at 1236. The court concluded that the lower court abused its discretion in failing to compel a response to the discovery. *Id.* The court reversed and remanded the case for further proceedings wherein the Dawkinses would be allowed to obtain the requested discovery. *Id.*

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The court reviewed guidelines to be utilized in applying the court's discretion in matters of discovery.²¹¹ First, courts should follow the general policy that discovery be encouraged.²¹² Second, disputed facts should be construed in favor of allowing discovery.²¹³ Third, after consideration of the importance of the information as weighed against the hardship and costs of production and availability through other means, it is preferable that limitations on discovery be partial rather than an outright denial.²¹⁴

Finally, although it is a case involving attorney misconduct, the Mississippi Supreme Court addressed MRCP Rule 26(b)(1) and made some interesting insights related to the scope of discovery standard in *Mississippi Bar v. Land*.²¹⁵ Attorney Land was charged with misconduct in a civil action wherein the plaintiff brought a personal injury claim against a homeowner for an eye injury he sustained while driving by the home.²¹⁶ The plaintiff believed his injury occurred as a result of a rock being thrown from a lawn mower.²¹⁷ In fact, the homeowner's son shot a BB gun toward the road at the time of the injury and believed that he shot the plaintiff.²¹⁸ This fact was known to the homeowner, was revealed to the insurance company and attorney Land, and was

²¹¹ *Id.* (citing 23 AM. JUR. 2D *Depositions and Discovery* § 5 (1983) (citations omitted)).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*; see also *Swan v. I.P., Inc.*, 613 So. 2d 846 (Miss. 1993) (addressing the Miss. R. Civ. P. 26(b)(1) scope of discovery standard). In *Swan*, a school teacher filed a claim alleging injury as a result of exposure to fumes and spray of roofing materials used to re-roof the school where she taught. *Swan*, 613 So. 2d at 847. Her claims were based on negligence, strict liability and breach of warranty. *Id.* at 848. During discovery, the defendants noticed the depositions of the plaintiff and sixteen school children, who were also allegedly exposed to the chemicals. *Id.* at 857. Four of the depositions were taken, but the plaintiff and the other schoolchildren sought protective orders on the grounds of relevance and cumulativeness. *Id.* The trial court overruled the protective order but strictly limited the extent to which the defendants could inquire about the physical conditions of the deponents by confining inquiry to symptoms and treatment during a three-day period only. *Id.* On appeal, the court held that the physical condition of the students after the time period was relevant to the plaintiff's claim. *Id.* at 858. The court reasoned that the plaintiff's contention that she suffered many adverse effects long after the limited time period rendered the students' conditions relevant since they were exposed to the same chemicals for a similar period of time. *Id.*

²¹⁵ 653 So. 2d 899 (Miss. 1994). For an analysis regarding the effect of the case as it relates to the rules of professional conduct in Mississippi, see Katherine A. Smith, *Truth or Dare: The Rules of Professional Conduct and Stretching the Discovery Boundaries*, 16 MISS. C. L. REV. 455 (1996).

²¹⁶ *Land*, 653 So. 2d at 900.

²¹⁷ *Id.*

²¹⁸ *Id.* at 900-02.

contained within a report prepared by an insurance representative.²¹⁹ Attorney Land was aware of the report regarding the BB gun incident, as well as a photograph of the gun.²²⁰ Attorney Land decided that the information regarding the BB gun did not relate to the civil action and would not be disclosed.²²¹

The plaintiff's complaint alleged that the injury occurred as a result of the lawn mower and did not assert any alternative theories of causation.²²² Through discovery, the plaintiff sought certain information that should have prompted attorney Land to disclose the information about the BB gun incident or to submit the matter to the court for decision, for instance by way of a protective order.²²³ Instead, attorney Land withheld information and gave misleading, deceptive, and false responses.²²⁴ The plaintiff's inadvertent discovery of the information through a mistaken delivery of the file to his counsel's office culminated in the misconduct proceedings against attorney Land.²²⁵

During the attorney misconduct proceedings, Land argued that the information about the BB gun was irrelevant, relying upon the comment to MRCP Rule 26(b)(1) that indicates that discovery should be limited to the specific practice or acts in issue.²²⁶ It was Land's position that because the complaint did not allege anything about a BB gun, the information about the BB gun did not have to be disclosed.²²⁷ It was further Land's position that the report was privileged as work product material and involved information subject to the attorney-client privilege.²²⁸ The court found that the report and photograph were relevant and material to the issue of causation.²²⁹ The court noted that the proper procedure that attorney Land should have followed was to

²¹⁹ *Id.*

²²⁰ *Id.* at 900.

²²¹ *Id.* Attorney Land specifically noted in his file: "Gun does not relate to civil action as worded in the Complaint! Do not produce." *Id.* at 903.

²²² *Mississippi Bar v. Land*, 653 So. 2d 899, 906 (Miss. 1994).

²²³ *Id.* at 907-09.

²²⁴ *Id.*

²²⁵ *Id.* at 904. After plaintiff discovered the information when it was mistakenly delivered to his counsel's office, the plaintiff sought to amend the complaint to allege negligent use of a BB gun, as well as claims against attorney Land and the insurance company. *Id.* at 903.

²²⁶ *Id.* at 906; see also *MISS. R. CIV. P. 26(b)(1) advisory committee's comment*.

²²⁷ *Land*, 653 So. 2d at 908.

²²⁸ *Id.* at 909.

²²⁹ *Id.* at 908.

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allow the court to determine the discoverability of the report rather than providing deceptive responses.²³⁰

Through the aforementioned cases, the Mississippi Supreme Court set helpful parameters in interpreting its scope of discovery standard, which provides guidance for establishing just how the federal judiciary should interpret the new language of FRCP Rule 26(b)(1). Next, this Note outlines those parameters and provides guidelines for the federal judiciary to follow in its interpretation of the new scope of discovery standard in order to maintain notice pleading.

V. GUIDELINES FOR INTERPRETATION OF FRCP 26(b)(1): MAINTAINING NOTICE PLEADING AND THE NEW SCOPE OF DISCOVERY STANDARD IN THE FEDERAL PROCEDURAL SYSTEM

A. *Guidelines for Interpretation of the New Scope of Discovery Standard*

The Advisory Committee did not set out to rid the federal procedural system of notice pleading and, in fact, it realized that notice pleading is here to stay.²³¹ The Advisory Committee's goal in drafting the amendment was to reduce the costs of discovery while maintaining the open disclosure of relevant information.²³² Its hope was that attorneys will cooperate to manage discovery.²³³ However, the Advisory Committee has provided a means for active judicial involvement in the discovery process, if necessary, to regulate the breadth of sweeping or contentious discovery.²³⁴ The Advisory Committee indicated that the judiciary should determine the actual scope of discovery by considering the reasonable needs of the action.²³⁵ It gave examples of discovery that could be considered related to the claims or defenses, depending on the circumstances of the pending action: other incidents of the same type, other incidents involving the same product, information about a party's organizational arrangements or filing systems, and information to impeach a likely witness.²³⁶ The Advisory Committee also indicated that the good cause standard warranting broader discovery is meant to be

²³⁰ *Id.* at 909.

²³¹ See Niemeyer, *supra* note 1, at 520.

²³² See Report of the Advisory Committee on Civil Rules (June 18-19, 1998), available at <http://www.uscourts.gov/rules/Minutes/0698standingminutes.htm> (last visited May 8, 2002).

²³³ See FED. R. CIV. P. 26(b)(1) advisory committee's note.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

flexible.²³⁷ Finally, the Advisory Committee advised that broader discovery could be permitted if warranted after consideration of the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.²³⁸

While this advice is certainly helpful, it falls short of providing the federal judiciary, litigants, or practitioners with a concrete idea of the difference between subject matter relevancy and claim or defense relevancy, and additional guidance is necessary.²³⁹ Therefore, in interpreting the new scope of discovery standard of FRCP Rule 26(b)(1), the federal judiciary should adopt and expand the reasoning and rules employed by the Mississippi Supreme Court in interpretation of its similar scope of discovery standard.

First and foremost, as a general policy, discovery should be encouraged.²⁴⁰ This will uphold the purpose of discovery, which under the FRCP has been, and should continue to be, definition and clarification of the issues and ascertainment of the facts.²⁴¹ This parallels the Advisory Committee's desire in the amendment process to maintain full disclosure of information as an important element of the American discovery system.²⁴²

Second, the judiciary should limit its involvement in deciding what discovery is needed by the parties to prove their claims or defenses. As such, the party with the burden of proving the elements of a claim should be allowed to make the decision regarding what discovery is necessary to prove the claim because that party is best equipped to make such a decision.²⁴³ In *American Tobacco*, when dealing with the issue of whether the plaintiffs with a claim against a tobacco company required knowledge of the additives of a cigarette, the Mississippi Supreme Court supported leaving this decision to the plaintiffs.²⁴⁴ This can, of course, be extended to other types of cases as well.²⁴⁵ The federal courts, on the

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See Azrael, *supra* note 143, at 56.

²⁴⁰ See *Dawkins v. Redd Pest Control Co.*, 607 So. 2d 1232, 1236 (Miss. 1992).

²⁴¹ See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

²⁴² See Report of the Advisory Committee on Civil Rules (June 18-19, 1998), available at <http://www.uscourts.gov/rules/Minutes/0698standingminutes.htm> (last visited May 8, 2002) (stating that "[t]he central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information").

²⁴³ See *American Tobacco v. Evans*, 508 So. 2d 1057, 1060 (Miss. 1987).

²⁴⁴ *Id.*

²⁴⁵ See *supra* notes 2-4 and accompanying text.

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other hand, are ill-equipped to determine whether particular information or some other information might be better suited to prove a claim because it does not even fully know what information is available.²⁴⁶ Requiring the court to make these types of decisions would only frustrate the functioning of discovery. Allowing the parties to make these decisions will heed the instructive warning of the Advisory Committee, in 1983, that courts should be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.²⁴⁷

Third, courts should not make a determination of, or require a showing of, necessity. Once a party establishes that the requested information is within the scope of discovery standard, that is, that the information requested is not privileged and is relevant to the claims or defenses of any party, the discovery should be allowed.²⁴⁸ In *American Tobacco*, the Mississippi Supreme Court recognized this concept in indicating that such a determination by a court is legally inappropriate and practically impossible.²⁴⁹ In effect, the judiciary should continue to allow the parties to manage and control discovery by only requiring that the relevance standard be met or good cause be shown to, in effect, broaden that standard. This furthers the goal of the Advisory Committee that attorneys cooperate for the effective functioning of discovery.²⁵⁰ Additionally, there is not a necessity requirement in the rules, only a requirement that the requested discovery be reasonably calculated to lead to the discovery of admissible evidence.²⁵¹ Furthermore, once a party meets the discovery scope standard, it seems obvious that because the information requested is relevant to the parties' claims or defenses, it is likely necessary for that party's case. By not requiring a showing of necessity, the court encourages discovery and allows discovery to fulfill its purposes.

Fourth, the judiciary should only allow the party asserting the claim or defense to define the contours of the claim or defense. As such, a party should not be allowed to redefine an opponent's claim or defense in an attempt to make otherwise discoverable information undiscoverable.²⁵² The Mississippi Supreme Court applied this concept

²⁴⁶ See *American Tobacco*, 508 So. 2d at 1060.

²⁴⁷ See 6 MOORE'S FEDERAL PRACTICE, *supra* note 47, ¶ 26App.41.

²⁴⁸ See *American Tobacco*, 508 So. 2d at 1061.

²⁴⁹ *Id.*

²⁵⁰ See FED. R. CIV. P. 26 advisory committee's note.

²⁵¹ See FED. R. CIV. P. 26.

²⁵² See *American Tobacco*, 508 So. 2d at 1060.

in *American Tobacco* when it did not allow the defendant to make certain discovery irrelevant by indicating that something else caused the plaintiff's death.²⁵³ This concept is easily expandable to cases beyond the type of case involved in *American Tobacco*.²⁵⁴ By only allowing the party asserting the claim or defense to define its contours, the court will ensure that notice pleading is maintained. In this way, a party need only notify the other party that its claim or defense is based on a particular cause of action. For example, in *Land*, it was clear that the plaintiff's claim was based on negligence, which includes the element of causation.²⁵⁵ It seems that the Mississippi Supreme Court determined that the plaintiff's pleading of negligence, combined with the request for the report that contained the alternative theory of causation, should have alerted the attorney that disclosure was required or at least an issue for the court to determine.²⁵⁶ So, as long as a party gives notice of his claim or defense, and, in discovery, requests information that might contain alternative theories, he is entitled to the discovery and notice pleading is maintained.²⁵⁷

Fifth, any limitations placed on discovery by the judiciary should be partial rather than outright denials of discovery. As such, the court should become involved in crafting appropriate protective orders so that discovery can still occur. In *Dawkins*, the Mississippi Supreme Court recognized the importance of allowing the plaintiffs to discover certain information in order to attempt to prove their claims, instead of merely denying the plaintiffs the opportunity to obtain the information at all.²⁵⁸ By allowing partial discovery, courts will uphold the goal of open discovery while at the same time ensuring that notice pleading is not replaced by fact-specific pleading. This will occur because a party will know that it need only give notice of its claims or defenses and that it can still obtain at least some discovery, which may then lead to allowances of additional discovery. Otherwise, a party might be forced to plead specifically so that certain information can be obtained.

²⁵³ *Id.*

²⁵⁴ See *supra* notes 2-4 and accompanying text; see also *supra* Part V.B.

²⁵⁵ See PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164-65 (W. Page Keeton ed., 5th ed. 1984).

²⁵⁶ See *Mississippi Bar v. Land*, 653 So. 2d 899, 909 (Miss. 1995).

²⁵⁷ See generally Smith, *supra* note 215, at 455 (stating that when evaluating discovery requests under Mississippi Rule of Civil Procedure 26(b), an attorney should resolve uncertainties in favor of disclosure or the claim of privilege).

²⁵⁸ See *Dawkins v. Redd Pest Control Co.*, 607 So. 2d 1232, 1236 (Miss. 1992).

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In summary, the federal courts should approach discovery disputes under the new scope of discovery standard of Rule 26(b)(1) based on the following guidelines. First, discovery should be encouraged. Second, the judiciary should limit its involvement in deciding what discovery is needed by the parties to prove their claims or defenses. Third, courts should not make a determination of, or require a showing of, necessity. Fourth, only the party asserting the claim or defense should be allowed to define the contours of the claim or defense. Finally, any limitations placed on discovery by the judiciary should be partial rather than outright denials of discovery. By following these guidelines, along with those set out by the Advisory Committee in its comments, the federal judiciary will ensure that notice pleading is maintained in the federal procedural system. Next, this Note applies these guidelines to the discovery dispute in the hypothetical case involving Ms. Grier.

B. Hypothetical Case: Analysis of a Discovery Dispute

Ms. Grier's case has reached the point where the attorneys are not cooperating at the attorney-managed level to determine what discovery should be allowed.²⁵⁹ As such, the court must step in and first determine whether Ms. Grier's request for information concerning the last and next cleaning of the floor and an identification of the materials used falls within the initial scope standard by being relevant to the parties' claims and defenses.²⁶⁰ If not, the court's next task is to determine whether the requested information is relevant to the subject matter and, if so, whether there is good cause to expand the scope of discovery standard to allow discovery of the information.²⁶¹ The defendant objected to provision of the requested information because Ms. Grier's complaint, following the notice pleading requirements of the rules, alleged that she fell as a result of leaking meat juices, which had nothing to do with the cleaning and waxing of the floors, much less the materials used.

Under the old scope of discovery standard it seems clear that Ms. Grier would likely be entitled to the discovery because the cleaning of the floors and the materials used would be considered related to the subject matter, a concept construed very broadly by the courts.²⁶² However, under the new scope of discovery standard it is more difficult to determine whether she is entitled to the requested information. Ms.

²⁵⁹ See *supra* Part I.

²⁶⁰ See FED. R. CIV. P. 26.

²⁶¹ *Id.*

²⁶² See *supra* notes 106-16 and accompanying text.

Grier did not allege in her complaint that the cleaning and waxing of the floors was somehow involved in causing her to slip and fall. Rather, she claimed that the defendant was negligent but alleged only that the leaking meat juice was the source of this negligence and the cause of her injuries. Regardless, the condition of the floor is certainly related to her claim, as well as potentially related to the notice defense.

Consideration of the guidelines elicited from the cases decided by the Mississippi Supreme Court reveals that the requested discovery should be allowed. By allowing Ms. Grier to obtain the requested information, the court will certainly encourage discovery. Next, by making the request, Ms. Grier indicates that she has decided that she needs the information to prove her claims or disprove the defendant's defenses. As such, the judiciary should limit its involvement to deciding whether this discovery is actually needed and should not require Ms. Grier to show necessity. Additionally, Ms. Grier has defined the contours of her claim to include all negligence by the defendant by asserting that the defendant was "negligent." The fact that the defendant's negligence actually arose out of another set of circumstances than those pleaded by Ms. Grier should not stall any efforts at discovery of information that would lead to discovery of the defendant's actual negligence because by her complaint the defendant was placed on notice of her claim of negligence. Finally, if any limitations are to be placed on the discovery, these limitations should be partial rather than outright denials.

The judge could begin by allowing discovery of the information regarding the last and next time the floor was cleaned and not allowing identification of the materials used. Once Ms. Grier receives that information and determines that the floor was cleaned within one-half hour of the time of her fall, she could then ask the court to find that there is good cause to require disclosure of the materials used. Of course, if the information regarding the cleaning of the floor did not reveal that the floor was cleaned in such close proximity to the time of Ms. Grier's fall, then the court would not have to allow further discovery. By adhering to these guidelines, the court upholds the purposes of discovery while at the same time ensuring that a plaintiff who has followed the rules of pleading practice and gives notice of her claim obtains the discovery needed to prove her claim under the new scope of discovery standard.

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VI. CONCLUSION

The amendment to Rule 26(b)(1) merely refocuses the parties and realigns their responsibilities. The concern that it may require parties, especially plaintiffs, to file more fact-specific pleadings in order to obtain necessary discovery is a fallacy. As revealed by Ms. Grier's hypothetical, the new scope of discovery standard still allows the same discovery allowed under the old scope standard, it just may require an additional step in the process: court involvement. However, as revealed by the hypothetical, if the courts follow the suggested guidelines, the same types of information will ultimately have to be disclosed by the parties.

On the other hand, the amendment may not even have an effect upon notice pleading. It is questionable whether true notice pleading in fact actually occurs in practice. As such, the alleged effect of the amendment to Rule 26(b)(1) upon notice pleading may be merely an academic, rather than a practical, concern. If this is true, the federal courts will likely not experience an increase in discovery-related practice. However, if true notice pleading does occur in all or certain areas of pleading practice, then the federal judiciary's adherence to the flexibility intended for the good cause standard, coupled with the guidelines synthesized from the cases decided by the Mississippi Supreme Court with respect to its similar scope of discovery standard, will ensure that notice pleading is maintained in the federal procedural system despite the new amendment to the scope of discovery standard.

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