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Less Is More: A Case for A Simpler Pleading

Shakespeare wrote, "The lady doth protest too much, methinks."[1] If he ever read a complaint arising out of a commercial dispute, he would likely say, "Thou doth *plead* too much, methinks."

Rarely does a complaint in a commercial lawsuit contain only one cause of action. This was not taught in law school, but somewhere along the way attorneys decided to cram as many causes of action as they can into a pleading. For example, in situations where a breach-of-contract claim will suffice, litigators often include claims for breach of the implied covenant of good faith and fair dealing, unjust enrichment, *quantum meruit*, or some other cause of action to make the complaint longer and seemingly more intimidating. Perhaps this is done out of fear that there will be an unsuccessful result if every possible cause of action is omitted, or worse, that omission of a claim would lead to a charge of malpractice. Perhaps this is done to impress a client—as if a lengthy pleading asserting multiple claims is a sign of effective lawyering.

Such conventional thinking should be questioned and rejected, because this approach to pleading is not helpful at all. More often than not, it is counterproductive. Judges are not impressed by the number of causes of action asserted in a pleading. As one jurist wrote, "The court is not a place to throw claims against a wall just to see what sticks."[2]

Focus on the Client and His or Her Needs and Goals

While it is not surprising that judges are skeptical of tangential claims, clients who understand the problems such unnecessary claims bring are not interested in them either. Clients are interested in a positive result, not the path that leads them there. No client asks his or her lawyer for a protracted legal proceeding, months of motion practice, and hefty billing. But that is exactly what happens when one asserts unnecessary claims in a pleading.

Additional claims lead to additional legal fees. Although the extra time expended to draft fall-back causes of action may not itself be significant, each additional cause of action is fodder for a defense counsel to attack. Where a breach-of-contract dispute is accompanied by claims of fraud and/or quasi-contractual claims such as unjust enrichment or *quantum meruit*, a defendant's attorney will likely challenge those secondary claims immediately *via* a motion to dismiss. Cases are legion where courts dismiss fraud claims as duplicative of a breach-of-contract claim.[3] Likewise, where a contract exists that governs the subject matter of the dispute, courts will reject the quasi-contractual claims.[4] So why bother with them in the first place?

The creatively pled, multi-claim complaint may just result in thousands (or tens of thousands) of dollars in motion practice right at the inception of the case. Except in rare cases where attrition is part of the strategy, little is gained for the client by inviting and engaging in motion practice that tests the adequacy of the initial pleading, even if the pleading withstands the challenge. For clients on a limited budget, resources are better deployed on thorough research prior to drafting or in prosecuting other aspects of the case.

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The psychological effects of early motion practice should not be overlooked either. For a plaintiff hoping to shock and awe a defendant, losing a motion to dismiss one or more causes of action may create tension in the attorney-client relationship, embolden the defendant, and permit the defendant to establish an impression for the Court that the entire case lacks merit. The plaintiff may also be surprised at how long it takes for the motion to be fully briefed and decided. A client's energy and enthusiasm does not stay the same throughout a case. While enthusiasm and attention to the dispute may be at a high level at the start of the action, they often diminish as time goes on. A lawyer must recognize that the client's enthusiasm and attention are not perpetually renewable resources. He or she should discuss with the client the process and timing of a lawsuit and why certain claims are included or omitted.

A Risk of Not Electing a Remedy

Besides the economic and tactical consequences of asserting multiple, and perhaps unnecessary, causes of action, a litigator must be careful that he or she does not include claims that negate other causes of action contained in the same pleading. That is more likely to occur if the litigator's focus is on asserting as many claims as possible, instead of thoroughly researching worthwhile causes of action.

A physician's assistant learned this the hard way when he sued his former employer, alleging violations of New York's Labor Law Section 740(7), breach of contract, and *quantum meruit*. Labor Law §740 prohibits employers from terminating an employee's employment in retaliation for the employee disclosing, or threatening to disclose, an employer's pattern or practice of violating a statute, rule or regulation. Labor Law §740 provides a discharged employee with a whistleblower cause of action, and potent remedies, including reinstatement, lost wages and attorney's fees.

The remedies afforded by Labor Law §740 come with a litigation cost, as the physician's assistant learned. Under Labor Law §740(7), assertion of a whistleblower claim waives the discharged employee's rights and remedies under any contract, a collective bargaining agreement, or any other rule or regulation including the common law.[5] By asserting the Labor Law claim, the physician's assistant waived his contract and *quantum meruit* claims, and was forced to withdraw them or they would have been dismissed since courts routinely enforce the waiver.[6] He was ultimately unsuccessful in his Labor Law claim and will never know if his contract claim might have succeeded. This is an example of one of the risks of asserting all possible claims, rather than pleading a single cause of action.

Tips for an Effective Pleading

The acronym KISS[7] is often cited but not frequently applied. Almost always, it should be employed when drafting pleadings. Think long and hard about the facts and what *bona fide* causes of action arise out of them. Research case law and review jury instructions to see the elements of each cause of action being contemplated. Then imagine being defense counsel and think how the identified claims can be attacked. Once these steps have been performed, one can begin drafting.

After the initial draft, take some time before looking at it again and making changes. Facts will probably need to be added, and perhaps additional claims. More likely, one will identify and remove unnecessary or unhelpful items, whether they are adjectives or adverbs, facts, or entire causes of actions. Writing well entails re-writing. One must go through the review and editing stage several times to produce a suitable pleading.

The Art of Litigation

Litigation is hard and full of competing concerns. A litigator must advocate zealously for a client. That includes asserting claims that seem to have merit based on the version of the facts the lawyer hears from a client, and which cannot be fully investigated without discovery. But at the same time, the litigator must be wary of asserting unnecessary claims that create no added value, or may even operate to waive otherwise legitimate claims. That is why litigation is an art, not a science, and a litigator must constantly question why he or she is asserting or advocating a particular claim. As Shakespeare might say, "To plead or not to plead. That is the question."

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1. Hamlet, Act III, Scene II.
2. *East Village Re Holdings, LLC v. McGowan*, 53 Misc.3d 1201(A) (Civ. Ct., New York Co. 2016).
3. *See, e.g., 34-35th Corp. v. 1-10 Indus. Assoc., LLC*, 2 A.D.3d 711 (2d Dept. 2003).
4. *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388 (1987)("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasicontract for events arising out of the same subject matter").
5. Labor Law §740(7) states, in pertinent part, that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law."
6. *See, e.g. Charite v. Duane Reade, Inc.*, 120 A.D.3d 1378 (2d Dept. 2014); *Maccagno v. Prior*, 78 A.D.3d 549 (1st Dept. 2010); *Pipas v. Syracuse Home Ass'n*, 226 A.D.2d 1097 (4th Dept. 1996); *McGrane v. Reader's Digest Ass'n, Inc.*, 863 F. Supp. 183 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995).
7. Keep It Simple, Stupid.