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The Motion to Make More Definite and the Motion to Strike

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Blank v. Bitker[10] dealt with this problem. The court held that the taking of depositions by the defendant did not constitute a general appearance; however, the court refused to lay down a general rule, and limited its decisions to the specific fact situation by saying that the depositions in the case were necessary in order for the defendant to answer. As a consequence of this decision the defendant is faced with uncertainty whether or not to take a deposition that he feels is necessary in order to answer the complaint. If the defendant decides to take depositions, then the court with the advantage of hindsight, may rule that the depositions were not necessary, thereby depriving the defendant of possible jurisdictional defenses. This result with its lack of certainty is not justifiable under the rules which were adopted for the purpose of providing an easier and simpler procedure,[11] and it should not be engrafted on the Wyoming rules.[12]

It has been pointed out that under the former practice in Wyoming the defendant had to appear, at least in the first instance, for the sole purpose of objecting to the court's jurisdiction. Under the rules the defendant is able to combine his objections without waiving any of them, and as a result appearing specially is no longer necessary. The desirability of this change is expressed well by Barron & Holzoff in their work on procedure where they say, "[this] simplication of procedure is a major step forward. It enables counsel to incorporate in one answer all his objections to the proceeding as well as defenses to the merits without fear that he may waive any valid objection."[13] Undoubtedly Wyoming practice will benefit from the change and the express purpose of the rules, to simplify the procedure and to bring about a more just, speedy, and inexpensive determination of the action, will be carried out.[14]

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THE MOTION TO MAKE MORE DEFINITE AND THE MOTION TO STRIKE

When the Wyoming Rules of Civil Procedure became effective on December 1, 1957, Wyoming entered into the modern phase of procedural development which has a philosophy of liberality and an objective of substantive justice. Although our new rules retain many features found in our recent Code of Civil Procedure, the operation of the rules will necessitate a change in the interpretation and usage of these features.

10. 135 F.2d 962 (7th Cir. 1943).
11. Wyo. Rules of Civil Procedure, Rule 1.
12. Another problem deserves to be mentioned in passing, i.e., the situation where both parties have filed their pleadings before adoption of the rules and the case is to be tried at a date when the rules are effective. Schaeffer v. Schlaeffer, 112 F.2d 177 (D.C.Cir. 1940), held that the question of appearances would be determined under the old practice because jurisdiction had been perfected under the former practice and, further, under rule 86, rules are not effective for further proceedings if there would be prejudice.
13. 1 Barron & Holzoff, § 343 at 592 (Rules ed. 1950).
14. Wyo. Rules of Civil Procedure, Rule 1.

The two provisions with which we are concerned here are the motion to make more definite[1] and the motion to strike.[2] Both of the motions are found in both systems. They were found previously in the Wyoming statutes in the provisions that the court might require the pleadings to be made definite and certain[3] and that certain matter might be stricken from the pleadings.[4] The federal courts have been operating under a system after which the Wyoming Rules have been patterned; their treatment indicates that the procedure in this state will be changed.

The annotations in the Wyoming Compiled Statutes following the former provisions indicate no Wyoming supreme court decisions on these provisions; but the court has clarified its policy on these motions by dicta in other cases. In 1905[5] it stated that a disclosure of facts could be accomplished through a motion to make more definite and certain. Later the court implied that even if a complaint was sufficient to withstand a general demurrer a motion for definiteness directed at a general allegation of negligence would be granted.[6] Still later the court decided that any information the defendant was entitled to know could be obtained by a motion to make more definite and certain.[7]

The former statutory provision was that if the allegations in a pleading were so indefinite and uncertain that the precise nature of the charge was not apparent the court could require more definiteness by amendment. Thus it can be seen that the court in Wyoming granted motions for definiteness rather freely, particularly if the motion was used to obtain information. It is unlikely that such a policy substantially changed the outcome of the cases, but it is likely that it increased the time and expense of litigation by allowing the harassment of an impecunious party. The adverse party was permitted to throw up a series of legal obstacles by the use of these motions which would delay an adjudication of the controversy on the merits.

The rules discourage this type of delaying tactic. Pleadings under the rules are only to inform the defendant reasonably of the claim[8] so that he can frame an answer. The only circumstances in which the federal courts have consistently granted the motion for a more definite statement have been those in which the pleadings have been such that a responsive pleading could not be framed. Therefore only when an attorney is confronted with a pleading which is so vague or ambiguous that he cannot reasonably be expected to frame an answer[9] can he be at all certain that

1. Wyo. Rules of Civil Procedure, Rule 12(e).
2. Wyo. Rules of Civil Procedure, Rule 12(f).
3. Wyo. Comp. Stat. § 3-1410 (1945).
4. Wyo. Comp. Stat. § 3-1409 (1945).
5. Butler v. Boswell, 14 Wyo. 166, 82 Pac. 950 (1905).
6. Garner v. Brown, 31 Wyo. 77, 223 Pac. 217 (1924).
7. State v. Scott, 35 Wyo. 108, 247 Pac. 699 (1926).
8. United States v. American Linen Supply Co., 141 F.Supp. 105 (N.D.Ill. 1956).
9. Kuenzell v. United States, 20 F.R.D. 96 (N.D.Cal. 1957); Carlo Bianchi and Co. v. New York, 20 F.R.D. 165 (S.D.NY. 1957).

his motion for a more definite statement will be granted, but the determination that such vagueness or ambiguity exists is made by the court, not by the lawyer. Otherwise, the granting of the motion is narrowly restricted[10] and it is held in general disfavor.[11]

There are forms which are appended to the rules and which the rules provide are sufficient.[12] The federal cases show that a complaint which contains all the allegations found in the corresponding appended form is sufficient and a motion for a more definite statement directed at such a complaint will be denied. The decisions have primarily been concerned with complaints for negligence drawn in a manner similar to that of Form 9,[13] but in view of Rule 84 any complaint drawn in the terms of the corresponding form is sufficient, and, therefore, should withstand a motion for a more definite statement.

There have been many attempts in the federal cases to use the motion for a more definite statement for purposes other than to enable the movant to prepare a responsive pleading; usually that purpose has been to gain information concerning the case, as in the Wyoming cases discussed earlier, or evidentiary matter. However the rules make available many devices to enable a party to prepare for trial. The use of these devices to obtain information is easier and in many cases less expensive than the use of the motion for a more definite statement. Included are depositions upon oral examination,[14] depositions by written interrogatories,[15] interrogatories to the parties,[16] discovery on court order[17] and without court order,[18] physical and mental examinations,[19] requests for admissions,[20] and the pre-trial conference.[21] Since the complaint does not primarily assist the defendant in preparing for trial,[22] the great majority of the courts have held that the use of the deposition-discovery methods and pre-trial is preferable to the use of the motion for a more definite statement during preparation for trial.[23] By these methods a party may inspect, copy, or photograph a variety of items, including documents, papers, books, accounts, letters, photographs, objects, or other

10. United States v. United Shoe Machinery Corp., 76 F.Supp. 315 (D.Mass. 1948).
11. Hathaway Motors, Inc. v. General Motors Corp., 19 F.R.D. 359 (D.Conn. 1955); Boerstler v. American Medical Association, 16 F.R.D. 437 (N.D.Ill. 1954).
12. Wyo. Rules of Civil Procedure, Rule 84.
13. Northwest Airlines, Inc. v. Glenn L. Martin Co., 9 F.R.D. 551 (N.D.Ohio 1949); Showtz v. Torrey, 8 F.R.D. 576 (W.D.Mo. 1948); Ruvolo v. Automobile Transport, Inc., 8 F.R.D. 414 (N.D.Ohio 1948).
14. Wyo. Rules of Civil Procedure, Rule 30.
15. Wyo. Rules of Civil Procedure, Rule 31.
16. Wyo. Rules of Civil Procedure, Rule 33.
17. Wyo. Rules of Civil Procedure, Rule 34(a).
18. Wyo. Rules of Civil Procedure, Rule 34(b).
19. Wyo. Rules of Civil Procedure, Rule 35.
20. Wyo. Rules of Civil Procedure, Rule 36.
21. Wyo. Rules of Civil Procedure, Rule 16.
22. Wilson v. Ill. Central R.R., 147 F.Supp. 513 (N.D.Ill. 1957).
23. Turkish State Railways Administration v. Vulcan Iron Works, 153 F.Supp. 616 (M.D.Pa. 1957); Kuenzell v. United States, 20 F.R.D. 96 (N.D. Cal. 1957); Carlo Bianchi and Co. v. New York, 20 F.R.D. 165 (S.D.N.Y. 1957); MacDonald v. Astor, 21 F.R.D. 159 (S.D.N.Y. 1957).

tangible things which are not privileged. In 1950, a federal court said that there is no need to cite authorities because it is well settled that a motion under Rule 12 (e) should not be granted if the desired information can be obtained by admissions, interrogatories or depositions.[24] Judge Irving R. Kaufmann, of the United States District Court, Southern District, New York, aptly stated the status in which the federal courts hold the motion for a more definite statement when he said:

> What is unfortunate is that motions of this character continue to appear regularly on our crowded motion calendars. If less time were spent on these dilatory motions serving no useful purpose and more of an effort were made to proceed with the discovery and other phases of litigation which really aid in the ascertainment of facts, litigants would see a more expeditious disposition of their cases.[25]

The motion to strike, like the motion for a more definite statement, will have only restricted use under the rules. It, too, is held in general disfavor,[26] and the federal cases indicate it is not to be freely granted, as it is not to test the legal sufficiency of the complaint.[27] While the federal courts have in some instances granted the motion to strike if the pleading to which the motion was directed contained material which was redundant, immaterial, or impertinent, the majority of the courts have decided that such matter will be stricken from the pleadings only if its presence is prejudicial to the moving party.[28]

A finding of prejudice to the moving party is improbable. For example, *Wanecke v. Northwest Airlines, Inc.*[29] involved a wrongful death action in which the operator of the airline and the manufacturer of the airplane were joined as defendants. The manufacturer moved to strike from the compalint allegations of negligence in the manufacture of other airplanes of the same type as the one involved in the case. Overruling the motion, the court stated that if proposed evidence pursuant to the allegation were excluded, then prejudice to the defendant from the presence of the allegations in the complaint could be prevented by proper instructions to the jury to disregard the allegations or by a refusal to submit the pleadings to the jury.

However there are two excepitons which must be considered. The first is that plaintiff's counsel may incorporate the allegations of the complaint in his opening statement. The complaint may contain statements the mere mention of which would be grounds for a mistrial. In such a situation the effect of a failure to strike would be to get the allegations to which the defendant has objection before the jury, possibly

24. Milsap v. Lotz, 10 F.R.D. 612 (W.D.Mo. 1950).
25. MacDonald v. Astor, supra note 23, at 161.
26. United States v. Crown Zellerbach Corp., 141 F.Supp. 118 (N.D.Ill. 1950); Hathaway Motors, Inc. v. General Motors Corp., 19 F.R.D. 359 (D.Conn. 1955).
27. United States v. Crown Zellerbach Corp., supra note 26.
28. Wyatt v. Penn. R.R., 154 F.Supp. 143 (D.Del. 1957); Schreiber v .Loew's Inc., 147 F.Supp. 319 (W.D.Mich 1957)
29 10 F.R.D. 403 (N.D.Ohio 1950).

resulting in a new trial which could have been prevented by granting the motion to strike. The second exception is the use of the motion to strike to eliminate allegations in the complaint which are not legally relevant and thus prevent a waste of time and effort by the defense in preparation to meet those allegations. Here, then, are two reasons for the motion to strike.

The rules also provide that an insufficient defense shall be the ground for the motion to strike. This ground is here considered separately as it is a replacement for a use of the extinct demurrer. Demurrers, including the demurrer to an answer, have been abolished.[30] The effect of such an abolition was to deprive the plaintiff of a means with which to test the legal sufficiency of a defense. The provision that the motion to strike may be used to have insufficient defenses stricken cures this deprivation.

Therefore, the established practice of the courts operating under a system of rules from which the new Wyoming Rules have been formed, shows that there is to be much less reliance on these "dilatory" motions and that they are generally disfavored. True, they are still available to the Wyoming lawyer, but they are to be used only in a narrow and restricted sense. A great deal of time and expense involved in litigation may be saved if these motions are not used unnecessarily but are kept within the established limits. The number of decisions on these motions in the federal courts began decreasing greatly after the rules had been in use for a decade, and there are now considerably fewer decisions on these motions. The Wyoming lawyer will be very much ahead if he looks to the later federal decisions on these motions and plans his course of action in the light of these decisions and the interest of his client in obtaining less expensive and speedier litigation.

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COUNTERCLAIMS

One of the changes in pleading procedure that has resulted from the adoption of the new rules of civil procedure is in the handling of counterclaims.

Prior to the adoption of the new rules, the pleading of counterclaims posed few problems to the Wyoming practitioner. Since 1939, the Wyoming code[1] has provided in effect that the defendant could plead as a counterclaim any cause of action existing in his favor against the plaintiff. There are two things to note about this statute: there were no restrictions as to the kind of relief that could be sought in a counterclaim, and the

30. Wyo. Rules of Civil Procedure, Rule 7 (a).

1. Wyo. Comp. Stat. § 3-1313 (1945).