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Integrated Pretrial Attack on a Pleading: A Critical Evaluation of Michigan's New Summary Judgement Rule

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INTEGRATED PRETRIAL ATTACK ON A PLEADING: A CRITICAL EVALUATION OF MICHIGAN'S NEW SUMMARY JUDGMENT RULE

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I. Introduction

Modern procedural reforms reflect diminished confidence in the demurrer or "no cause" motion as a device to dispose of non-meritorious claims before trial.[1] The Federal Rules of Civil Procedure, setting the pattern of reform for many states,[2] abolished the demurrer. Although a preliminary attack upon the legal sufficiency of the complaint is still permitted by a motion to dismiss under Federal Rule 12 (b) (6),[3] the challenged pleading may be amended as a matter of course,[4] to minimize the risk that a good claim might be lost because it was poorly pleaded.[5] The risk that sham amendments might then be used to forestall dismissal of a claim lacking factual support[6] is offset by the motion for summary judgment under Federal Rule 56, which enables the movant to penetrate

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[1] *See* F. JAMES, CIVIL PROCEDURE 127-33 (1965); Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure*, 47 YALE L.J. 50 (1937); Weinstein, *Proposed Revision of New York Practice*, 60 COLUM. L. REV. 50, 74-75 (1960); Note, *The Pleading and Demurrer Problems Re-Examined—New Proposals in New York*, 60 COLUM.L.REV. 1015 (1960).

[2] *See* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §§9-9.53 (Wright Ed. 1960). The authors point out that Alaska, Arizona, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Kentucky, Maine, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Utah, Washington, West Virginia, and Wyoming have rules of civil procedure substantially the same as the Federal Rules. Florida, Iowa, Missouri, Pennsylvania, Texas, and South Dakota all draw heavily on the Federal Rules.

[3] A study made in 1962 indicated that motions under FED. R. CIV. P. 12(b) were made in only about five per cent of all cases and resulted in a final termination of the action in only two per cent of all cases. C. WRIGHT, FEDERAL COURTS 242 (1963).

[4] FED. R. CIV. P. 15(a).

[5] *See* C. WRIGHT, FEDERAL COURTS §66 at 234 (1963).

[6] F. JAMES, CIVIL PROCEDURE §4.1 at 128:

> But all too often lawyers are willing to keep cases alive hopefully by adding allegations to the pleadings which may turn out not to be provable at trial. They will do this at least where the alternative is sudden death to their case through a ruling on demurrer.

the formal allegations of the pleading by resort to affidavits, documents, and other extrinsic proof.[7] This shift toward reliance on summary judgment to dispose of unworthy claims was furthered by a 1948 amendment to Federal Rule 12, which provides that a motion to dismiss may be converted into a motion for summary judgment, if matters outside the pleadings are presented to and not excluded by the court.[8]

This trend was carried one step further in the Michigan General Court Rules, adopted in 1963.[9] Under the name of a motion for summary judgment, Rule 117[10] combines (1) the former motion to dismiss for

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See also id. at 230 (1965). Provisions such as FED. R. CIV. P. 11 and MICH. GEN. CT. R. 114.2 (1963) which make the lawyer's signature a certificate of good faith, with disciplinary action for willful violation, have apparently never been an adequate deterrent to unfounded pleading. *See* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §332.1 at 268 (Wright ed. 1960); VERIFICATION & CERTIFICATION OF PLEADINGS, 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS 269, 284 (N.Y. Legis. Doc. 6b). Since 1931, Michigan has had a provision authorizing imposition of costs of proof, including attorneys' fees, as a penalty for unwarranted denials in a pleading. MICH. CT. R. 17 §10 (1931); *See* Sunderland, *The New Michigan Court Rules,* 29 MICH. L. REV. 586, 590 (1931). Yet there has been no reported instance of the imposition of sanctions under the rule. In 1963, the provision was expanded to authorize the same sanction for unwarranted allegations in a complaint. MICH. GEN. CT. R. 111.6 (1963). In one recent case the court of appeals upheld the allowance of attorney fees incurred in defending an allegation of conspiracy which was made without any basis in fact. Fredal v. Forster, 9 Mich. App. 215, 156 N.W.2d 606 (1967).

[7] *See* C. WRIGHT, FEDERAL COURTS §99 at 385 (1963).

[8] FED. R. CIV. P. 12(b):

> . . . [i]f, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(c) contains an identical provision as to a motion for judgment on the pleadings.

[9] MICH. G. CT. R. (1963) [hereinafter cited as GCR 1963].

[10] GCR 1963, Rule 117, Motion for Summary Judgment

* * *

> .2 Grounds. The motion for summary judgment shall state that the moving party is entitled to judgment in his favor because of any one of the following grounds:
> (1) the opposing party has failed to state a claim upon which relief can be granted.
> (2) the opposing party has failed to state a valid defense to the claim asserted against him.
> (3) that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is therefore entitled to judgment as a matter of law.

failure to state a cause of action,[11] (2) the former motion for judgment on the pleadings or to strike an invalid defense,[12] and (3) the traditional motion for summary judgment based upon the absence of a genuine issue of fact.[13] As explained in the official Committee Comments, the purpose of this provision was to make available

> ... a motion procedure by which to obtain early dismissal of actions brought without merit, while precluding misuse of the procedure for purely dilatory purposes.... These rules allow affidavits to be filed with the motion so that the court at the hearing may delve beneath mere pleading allegations and determine the motion on the basis of the actual facts. Submitting matter outside the pleadings in this way has been referred to as the 'speaking demurrer,' and the procedure is a departure from the old demurrer at common law. Proper use of the speaking demurrer prevents the plaintiff who has no cause of action from being kept alive by an evasively worded amendment which technically covers up the defect objected to. The affidavits will show in such a case that there exist no facts upon which to base an action. It is felt that more use ought to be made of the affidavit hearing on a motion to dismiss and less use made of the motion as a dilatory tactic, pure and simple.... If it is wise to provide that the submission of affidavits will convert a motion to dismiss or for judgment on the pleadings into a motion for summary judgment, [as in

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> .3 Motions and Proceedings Thereon. A motion based upon sub-rule 117.2(3) shall be supported by affidavits, and the opposing party prior to the day of hearing may serve opposing affidavits.... Such affidavits together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties shall be considered by the court at the hearing. Each party shall be given an opportunity to amend his pleadings ... unless the evidence then before the court shows amendment would not be justified. ....

[11] MICH. C. R. 17 §7 (1945): "... whenever any pleading ... is deemed to be insufficient in substance, a motion to dismiss, or to strike, or for judgment on the pleading, may be made...."

[12] *Id.*

[13] *Id.* at 30 §7. GCR 1963 Rule 117 makes some changes as to when the motion for summary judgment may be made, the necessity for affidavits, and procedure when partial summary judgment is granted. *See* 1 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED Rule 117, Authors' Comments at 357-58 (1962).

> the Federal Rules] then why not combine all three motions in one rule and call it a summary judgment rule?[14]

This statement of purpose overlooks potential difficulties arising from the significantly different function of the several grounds which are combined under the single rule. The "no cause" and "no valid defense" grounds are addressed to the legal sufficiency of the pleadings on their face, whereas the traditional motion for summary judgment assumes the legal sufficiency of a pleading and challenges its factual support by resort to extrinsic proof. Our study[15] indicates that confusion has in fact resulted from the attempt to integrate these functions under Michigan's new summary judgment rule, and that clarifying amendments are needed, if the rule is to achieve its intended purpose.

II. Experience Under the New Michigan Rule

> It is quite apparent from the many appeals involving the grant or denial of motions for summary judgment which this Court has received in recent months, and is receiving, that there is a disturbing misapprehension among members of the bench and bar concerning the propriety of preemptory disposition of cases by summary judgment prior to trial as provided by our recently adopted rule, GCR 1963, 117.[16]

From 1963 through 1967, appeals involving some issue under the new summary judgment rule were reported in more than seventy-five cases.[17] Most of these appeals concern issues which would have arisen even if the motion to dismiss and the motion for summary judgment had been

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[14] FINAL REPORT, JOINT COMMITTEE ON MICHIGAN PROCEDURAL REVISION, PART III, PROPOSED COURT RULES AND COMMENTS 54 (1960); *reprinted in* 1 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED Rule 117, Committee Comment, at 354 (1962).

[15] This study was limited to an appraisal of how the rule is working, as measured by reported appellate decisions. It would also be useful to know how the rule is actually working at the trial court level, but we do not presently have data available to support any such analysis.

[16] Durant v. Stahlin, 375 Mich. 628, 642, 135 N.W.2d 392, 396 (1965) (concurring opinion).

[17] Most of the cases are digested in the 1967 pocket part of 1 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED Rule 117, Michigan decisions (1962); *see also* cases cited in note 18 *infra*.

separated, as in former Michigan practice.[18] But a few of the cases indicate serious dfficulty attributable to the integrating feature of the new rule.[19]

A. Confusion over Function of Motion

The apparent source of difficulty is confusion over which function of the rule has been invoked by an ambiguous motion. Sub-rule 117.2[20] requires that,"The motion for summary judgment *shall state*" on which of the three grounds "the moving party is entitled to judgment". Sub-rule 117.3[21] further prescribes that supporting and opposing affidavits are to be used only in connection with a motion grounded on sub-rule 117.2 (3), to show the absence of a genuine issue of fact. Despite these provisions, motions have been filed, with supporting affidavits tending to challenge the factual genuineness of a pleading, when the only stated ground in the motion itself is that of sub-rule 117.2 (1) or (2), the failure to state a legally valid claim or defense.[22]

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[18] Many of the cases involve only the "demurrer" or "no cause" facet of the rule. *E.g.*, Blades v. Genesee County Drain Dist. No. 2, 375 Mich. 683, 135 N.W.2d 420 (1965); Boden v. Thompson-Brown Co., 373 Mich. 243, 129 N.W.2d 872 (1964); Professional Facilities Corp. v. Marks, 373 Mich. 673, 131 N.W.2d 60 (1964); Flynn v. Brownell, 371 Mich. 19, 123 N.W.2d 153 (1963); Joseph v. Township of Grand Blanc, 5 Mich.App. 566, 147 N.W. 2d 458 (1967); Goodar Inv. Co. v. Detroit Bank & Trust Co., 4 Mich.App. 218, 144 N.W.2d 649 (1966). Legal sufficiency of defense: Minor-Dietiker v. Mary Jane Stores of Mich., Inc., 2 Mich.App. 585, 141 N.W.2d 342 (1966); Lee v. Fidelity Life & Income Mut. Ins. Co., 2 Mich.App. 82, 138 N.W.2d 545 (1965).

Another group involve traditional summary judgment questions, such as the *sufficiency of affidavits: E.g.*, Durant v. Stahlin, 375 Mich. 628, 135 N.W.2d 392 (1965); Durant v. Stahlin, 374 Mich. 82, 130 N.W.2d 910 (1964); Hirych v. State Fair Comm'n., 376 Mich. 384, 136 N.W.2d 910 (1965); People *ex rel.* F. Yeager Bridge & Culvert Co. v. Cooke Contracting Co., 372 Mich. 563, 127 N.W.2d 308 (1964); Hoehner v. Western Cas. & Sur. Co., 8 Mich.App. 708, 155 N.W.2d 231 (1967); Weiler v. Heuple, 4 Mich.App. 654, 145 N.W.2d 352 (1966); Christy v. Detroit Edison Co., 2 Mich.App. 730, 141 N.W.2d 368 (1966); Green v. Lundquist Agency, Inc., 2 Mich.App. 488, 140 N.W.2d 575 (1966); Dionne v. Pierson Contacting Co., 2 Mich.App. 134, 138 N.W.2d 555 (1965); the *fact-law distinction: E.g.*, Green v. Wallace, 376 Mich. 113, 135 N.W.2d 408 (1965); Miller v. Miller, 373 Mich. 519, 129 N.W.2d 885 (1964); Beardsley v. R. J. Manning Co., 2 Mich.App. 172, 139 N.W.2d 129 (1966); and whether there is a *genuinely disputed issue of fact: E.g.*, McCoy v. De Liefde, 376 Mich. 198, 135 N.W.2d 916 (1965); Brooks v. Fields, 375 Mich. 667, 135 N.W.2d 346 (1965); Zamler v. Smith, 375 Mich. 675, 135 N.W.2d 349 (1965); Tripp v. Dziwankoski, 375 Mich. 619, 134 N.W.2d 671 (1965); Ross Indus. Chem. Co. v. Smith, 5 Mich.App. 422, 146 N.W.2d 816 (1966); Bielski v. Wolverine Ins. Co., 2 Mich.App. 501, 140 N.W.2d 772 (1966).

[19] *See* notes 24-35 *infra*.

[20] *See* note 10 *supra*.

[21] *Id.*

[22] *See* notes 24-28 *infra*.

If the opposing party takes the motion at face value, as attacking only the legal sufficiency of his pleading, he risks having summary judgment entered against him for failing to counter the mover's supporting affidavits.[23] On the other hand, if he counters with affidavits out of an abundance of caution, when only a challenge to his legal theory was intended, effort and money have been wasted.

In one case[24] to recover past rent, plaintiff moved for summary judgment on the ground that

> . . . defendants' answer *fails to state a valid defense,* and the defendants have not denied any of the material matters alleged in the complaint, but only such immaterial matters not pertinent to the issues and *not constituting a defense* to the plaintiff's claim. [Emphasis from cited source].[25]

The motion was supported by affidavits. Defendant offered to amend his answer but did not file opposing affidavits, in consequence of which summary judgment was granted against him. The court of appeals affirmed. Judge Levine dissented, stating that, "In my opinion the ground stated in plaintiff's motion is that expressed in GCR 1963, 117.2(2)—failure to state a valid defense, and not (3)—absence of a genuine issue as to any material fact."[26] It may be that the defendant in fact had no defense to the plaintiff's claim, but it is also possible that he lost the opportunity to prove a meritorious defense because he was misled as to the function of plaintiff's motion.

Another recent decision[27] makes it clear that the opposing party cannot safely rely on the ground expressly stated in the text of a motion for summary judgment. Retired policemen and firemen suing to recover deficiencies in pension benefits were met with a motion for summary judgment, "on the ground that the complaint failed to state a claim upon which relief could be granted."[28] The motion was supported by affidavits purporting to show that the alleged deficiencies were accounted for by a change in the method of computing benefits authorized by a 1957 amendment in the law. Plaintiffs responded by filing an amended complaint which itemized their claimed deficiencies in greater detail, but

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[23] *See* Justice Souris' concurring opinion in Durant v. Stahlin, 375 Mich. 628, 643-45, 135 N.W.2d 392 404-07 (1965), for an authoritative statement on the need to file opposing affidavits.

[24] Jefferson Maintenance Co. v. Detroit Electrotype Co., 7 Mich.App. 619, 152 N.W.2d 699 (1967).

[25] *Id.* at 625-26, 152 N.W.2d at 702.

[26] *Id.* at 625, 152 N.W.2d at 701.

[27] Retired Policemen and Firemen v. City of Lincoln Park, 6 Mich.App. 372, 149 N.W.2d 206 (1967).

[28] *Id.* at 375, 149 N.W.2d at 207.

they were dismissed for failure to counter the defendant's affidavits. The court may have been right in concluding that the defendant's affidavits were intended to show that the only real dispute was an issue of law as to the applicability of the 1957 amendment. But there remains a nagging concern that the plaintiffs might have taken the *motion* at face value, as attacking only the formal sufficiency of their pleading, and failed to substantiate a fact issue because they assumed that they were not yet required to do so.

Thus the present application of Rule 117 has led to situations in which a meritorious claim or defense might have been lost due to procedural confusion.[29] Admittedly there is some reason to be suspicious about the factual merit of the defeated claim or defense in the cases discussed. But summary judgment should be based upon more than suspicion and a supporting affidavit. It should be granted only when the opposing party has failed to substantiate an issue in response to a motion clearly invoking that provision of the rule which requires him to do so.

Losing a meritorious claim or defense by procedural mistake is not the only hazard in an ambiguous motion for summary judgment. Even if the ultimate merits are saved, time and court resources may be wasted over the confusing motion, as illustrated in two recent court of appeals cases.[30] In one case,[31] where the defendants moved for summary judgment on the ground that plaintiffs failed to state a claim upon which relief could be granted, the apparent confusion of the litigants was reflected in a stipulation that the court could consider "all of the pleadings, interrogatories and depositions presently on file... in making their [sic] determination as to whether the plaintiffs have stated their cause of action."[32] The trial judge accepted the invitation, resolved factual issues in favor of the defendants, and summarily dismissed the complaint. The court of appeals reversed, stating that the judge should not have gone beyond the pleadings. "Interrogatories and depositions are relevant only

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[29] *See also* Zimmerman v. Stahlin, 374 Mich. 93, 130 N.W.2d 915 (1964). The complaint alleged publication of a defamatory letter by the defendants. One defendant moved for summary judgment for failure to state a cause of action and added that plaintiff's statements were conclusions of law and did not allege any overt act by the defendant in connection with the alleged publication. Defendant's affidavit filed with the motion specifically denied any involvement in connection with the publication. Plaintiff requested leave to amend and filed an unsworn response to the motion, in which he reasserted generally the truth of his pleaded allegations. The supreme court affirmed summary judgment for the defendant because of plaintiff's failure to counter defendant's affidavits. It is impossible to tell from the reported decision whether plaintiff failed to file supporting affidavits because he thought he was facing a "no cause" motion only, or whether he failed because he did not have any proof to support his claim. His motion to amend may have been a ploy to perpetuate an unfounded claim, but it is also possible that he was dismissed because of procedural confusion.

[30] *See* notes 31 and 34 *infra*.

[31] Drouilliard v. City of Roseville, 9 Mich.App. 239, 156 N.W.2d 628, (1967).

[32] *Id.* at 242, 156 N.W.2d at 630.

if the ground stated for summary judgment is that there is no genuine issue of material fact—not if it is asserted that the pleading fails to state a claim or defense."[33] However, in another case[34] the same year, where it was urged that the trial judge erred in considering more than the pleadings in granting summary judgment for failure to state a claim, the court of appeals reversed but "decline[d] to pass on what a trial court is to consider in ruling on a motion for summary judgment under GCR 1963, 117.2 (1) beyond stating that the entire rule 117 controls."[35] In the former case,[36] an appeal was needed to correct the trial judge's error in going beyond the pleadings on a "no cause" motion. The same problem produced an appeal in the latter case,[37] and, because of the appellate court's refusal to resolve the confusion, the motion might still have capacity for mischief on remand.

B. Failure to Utilize Advantages of Rule

One advantage of Michigan's integrated summary judgment rule is its potential for dealing with conclusory pleadings. Yet it appears that this potential has not been fully utilized.

For example, two cases were recently dismissed on motions for summary judgment because necessary elements of the claims were pleaded in conclusory terms. In the one complaint for malicious prosecution, lack of "probable cause" was alleged only as a bare conclusion.[38] In the other action, an injunction was claimed on the conclusory assertion of "arbitrary" administrative action.[39] Since defendant's motions for summary judgment were not supported by affidavits, they were necessarily grounded on failure to state a cause of action, and the complaints were dismissed because of defective pleading.

Conclusory allegations might be used to conceal the absence of specific facts needed to support a valid claim or defense.[40] However, summary dismissal of a conclusory or vague pleading risks injustice to a litigant who has a good claim or defense in fact, but whose lawyer has failed to

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[33] *Id.* at 244, 156 N.W.2d at 631.

[34] Dunnan & Jeffery, Inc. v. Gross Telecasting, Inc., 7 Mich.App. 113, 151 N.W.2d 194, (1967).

[35] *Id.* at 118, 151 N.W.2d at 197.

[36] *See* note 31 *supra.*

[37] *See* note 34 *supra.*

[38] Harris v. Federal Asphalt Prod. Co., 1 Mich.App. 316, 136 N.W.2d 43 (1965).

[39] Hiers v. Brownell, 376 Mich. 225, 136 N.W.2d 10 (1965).

[40] F. JAMES, CIVIL PROCEDURE §2.13 at 95 (1965).

> The pleader may wish to conceal weaknesses in his case behind the generality of his allegations and thus to prevent dismissal at an early stage, so as to prolong the period when the case will have a nuisance value for settlement.

state it artfully.[41] The latter concern should clearly outweigh whatever annoyance is caused by tolerating conclusory pleadings.[42] If such a pleading fails "reasonably to inform the adverse party of the nature of the cause he is called upon to defend,"[43] it can be quickly remedied by use of expedient discovery devices,[44] or by a motion for a more definite statement.[45] If an unsupportable claim is made, it is best exposed by a motion for summary judgment which demands a showing of proof.[46] Therefore, it would be better for the court to overrule a motion which challenges only the legal sufficiency of such a pleading,[47] thereby inducing defendants to use the integrated summary judgment procedure. Then if the plaintiff in fact has a case, he will have the opportunity to redeem it by showing factual support for his conclusory allegations. If he

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[41] *See id.* at 94-99; 2A J. MOORE, FEDERAL PRACTICE ¶812 at 1687 *et seq.* (1960); C. WRIGHT, FEDERAL COURTS §68 at 248-49 (1963); C. CLARK, CODE PLEADING 226, 233-36, 244-45 (1947).

[42] F. JAMES, CIVIL PROCEDURE §2.13 at 98 (1965).

> There are other devices for promoting administrative efficiency which probably do so better than special pleading can and which do not carry the same threat to substantive justice. The full discovery provisions of modern procedural systems make possible a nearly complete interchange of relevant information from those who actually have had it at first hand. The summary judgment device enables an adversary to pierce the pleader's allegations (whether general or detailed) and thus dispose of a nuisance suit which the pleader cannot back with sworn statements.

[43] This is the standard by which the sufficiency of a complaint is to be judged in Michigan. GCR 1963, 111.1(1). For a perceptive explanation of this provision as intended to shift Michigan pleading from the "formulary" standard of code pleading to a more liberal "notice" standard, *see* Sunderland, *The Michigan Judicature Act of 1915*, 14 MICH. L. REV. 441, 551-53 (1916). It is doubtful that the *Harris* and *Hiers* cases, *supra* notes 37 and 38, were really deficient by this standard. Their dismissal is an example of the unfortunate tendency to regress to stricter rules of pleading "in actions which are disfavored for real or supposed reasons of policy."

[44] GCR 1963, 309 (interrogatories to parties); GCR 1963, 312 (requests for admission). *See* 2 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED Rule 309, Authors' Comments at 157 (1963).

[45] GCR 1963, 115.1. *See* 1 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED Rule 115, Authors' Comments at 283-85.

[46] GCR 1963, 117.2(3).

[47] Ortiz v. Travelers Ins. Co., 2 Mich.App. 548, 140 N.W.2d 791 (1966) was an action on a settlement agreement, in which it was alleged that the adjuster who made the oral offer was an "agent" of the defendant insurer. Although this was a "conclusory" allegation, the court properly held that it was good enough and had to be taken as true in denying defendant's motion for summary judgment, which was based only on GCR 1963, 117.2(1), the "no cause" facet of the rule, with no supporting affidavits. If the claim was factually vulnerable on the agency allegation, the defendant could have quickly exposed that defect by affidavits supporting a motion for summary judgment under GCR 1963, 117.2(3).

cannot do so, summary judgment will be granted with confidence that the pleader has not been dismissed for errors of form.[48]

III. Resolution of the Problem

A. Comparison with Federal and New York Rules

The confusion and difficulty encountered with the Michigan rule invites comparison with analagous integrating provisions of the Federal and New York rules.

The Federal Rules guard against confusion by placing under different provisions the traditional motion for summary judgment[49] and the motion to dismiss for failure to state a claim[50] or for judgment on the pleadings.[51] The latter motions may be converted into a motion for summary judgment, if the court admits matter outside the pleadings,[52] thereby clearly signalling the shift in function.

By comparison with the Michigan rule, the only apparent disadvantage in the federal scheme is its failure to make an integrated attack available as a matter of right.[53] In practice, however, it appears that the federal courts have freely converted the motion to dismiss into a motion for summary judgment when there was any advantage to be gained.[54] Therefore, Michigan's difficulties might be remedied by reverting to the Federal Rules, except that adoption of Federal Rule 12 would upset other features of Michigan's pre-trial motion pattern which

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[48] GCR 1963, 13: "These rules are to be construed to secure the just, speedy, and inexpensive determination of every action so as to avoid the consequences of any error or defect in the proceedings which does not affect substantial rights of the parties."

GCR 1963, 110.3: "...[T]he form and sufficiency of all...pleadings shall be determined by these rules, construed and enforced to secure a just, speedy, and inexpensive determination of all controversies on their merits."

[49] FED. R. CIV. P. 56.

[50] *Id.* 12(b)(6).

[51] *Id.* 12(c).

[52] *See* note 8 *supra*.

[53] The motion to dismiss or for judgment on the pleadings may be converted into a motion for summary judgment only if "matters outside the pleading are presented to *and not excluded by the court.*" FED. R. CIV. P. 12(b) [Emphasis added]. This implies the exercise of discretion by the court, at least in those cases where the opposing party objects to the submission of matters outside the pleadings.

[54] 1 A. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §349 at 314–16 (Wright ed. 1960).

> This convenient practice has been followed in innumerable cases. Perhaps there is an occasional case where the court will refuse to consider affidavits and other such materials presented to it, and will insist on considering the motion on the face of the pleadings, but such cases are rare indeed.

differ from federal practice.[55] Such disrupting changes should be unnecessary, if the clarity of the Federal Rule can be attained within the framework of Michigan's existing rule, as we believe it can.

The New York rules of civil procedure attempt to resolve the delaying amendment problem in two ways. First, under New York Civ. Prac. § 3211,[56] either party may submit evidence on a motion to dismiss a legally deficient claim or defense, but the court still retains discretion, as under Federal Rule 12 (b) (6), to treat the motion as one for summary judgment. It is, therefore, not entirely clear whether the moving party can fully invoke the advantage of an integrated attack as a matter of right.[57]

Secondly, if the court grants the motion challenging the legal sufficiency of a pleading only, the New York rule permits it to require the opposing party to submit evidence to show "good ground to support" his amendment, before any further pleading will be allowed.[58]

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[55] A much wider range of defenses can be raised preliminarily by motion under GCR 1963, 116.1 and 117.2 than under FED R. CIV. P. 12(b). There are also differences in the "waiver" provisions. *See* GCR 1963, 116.2, and *compare* FED. R. CIV. P. 12(g)-(h). Nothing in the present study indicates the need for revising these features of Michigan practice to conform with the Federal Rules.

[56] N.Y. CIV. PRAC. §3211 (McKinny 1968). Motion to Dismiss.

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> * * *
> 7. The pleading fails to state a cause of action; . . .
> * * *
> (b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.
> (c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. . . .

[57] It has been suggested that it may make no difference whether the court treats it as a motion for summary judgment, since it will have substantially the same effect as a speaking motion under Rule 3211. 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶3211.50 (1967).

[58] N.Y. CIV. PRAC. §3211 (McKinney 1968). Motion to Dismiss.

> (e) . . . [M]otion to plead over . . . . [W]here a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered in a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the

While this provision was aimed directly at the delaying amendment problem,[59] that salutary objective is still left to the court's discretion and may not be achieved if supporting proof is not required. On the other hand, if outside proof is required when the successful motion to dismiss attacks only the legal sufficiency of the pleading, the amending process is made unduly restrictive. If the factual support for a pleading has not been challenged, why should a showing of factual support be required to justify an amendment repairing a legal defect? Legal defects in the other party's pleading may be corrected by amendment without any such restriction.[60]

There is the further disadvantage under the New York rule that an additional hearing may be necessary to determine whether leave to amend should be granted. If the moving party submits outside proof, but the opposing party does not, the court may grant the motion to dismiss and then require the opposing party to submit evidence in support of his offered amendments.[61] This may, in effect, require the same number of hearings as would have been required if the moving party had proceeded in the traditional way – *i.e.*, if he had first challenged successfully the legal sufficiency of the pleading and was then required to counter a delaying amendment with a motion for summary judgment. In other words, the requirement for substantiation of the amendment prior to leave to amend may cause the same delay as if there were no integrated motion available and the factual sufficiency had to be tested by a separate summary judgment motion. The rule may even require a third hearing, for if leave to amend is granted, the original party may still move for summary judgment under New York Civ. Prac. §3212.[62] Since court time is a precious commodity, we prefer the Michigan approach, which points toward the disposition of an integrated attack on a single hearing.

B. Proposed Amendment of the Michigan Rule

Ideally the procedure for allowing an integrated challenge to the legal and factual merit of a pleading should have the following features:

> opposing party had good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.

[59] 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE, ¶3211.01 (1967).
[60] N.Y. CIV. PRAC. §3025 (McKinney 1968).
[61] *Id.* §3211(e).
[62] It is doubtful that a party would move for summary judgment under Rule 3212 at this point, since the court has for all intents and purposes ruled that the complaint has factual sufficiency. However, the possibility is not necessarily precluded.

(1) The moving party should be required to make sufficiently clear which function or combination of functions he is invoking. This is essential to avoid:

(a) the possible injustice of ruling against a party who fails to respond to outside proof, believing that only a legal attack was intended; or

(b) the waste of responding to outside proof when only a legal attack is intended.

(2) The rule should make it clear that, (a) if only a legal attack is involved, no greater specificity is required of the pleading than is prescribed by the general rules of pleading; whereas, (b) if an integrated attack is invoked, specific factual support for the pleading must be shown to avoid summary judgment.

(3) An integrated attack or combination motion should be expressly authorized, so as to invite attention to its advantages and permit its use as a matter of right.

(4) The prescribed procedure should aim for disposition of an integrated attack on a single hearing, and should avoid involving the court preliminarily in determining the function of a motion.

We believe these objectives can be achieved by amendments to the existing Michigan rule, as set forth below:[63]

Rule 117 Motion for Summary Judgment

.1 [Unchanged]

.2 Grounds. The motion for summary judgment shall state that the moving party is entitled to judgment in his favor because of any ~~*one*~~ *of the following grounds:*

(1) the opposing party has failed to state a claim upon which relief can be granted,

(2) the opposing party has failed to state a valid defense to the claim asserted against him,

(3) that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is therefore entitled to judgment as a matter of law.

A MOTION BASED UPON CLAUSE (1) OR (2) OF THIS SUB-RULE MAY ALSO INCLUDE A DEMAND FOR JUDGMENT BASED UPON CLAUSE (3), PRO-

[63] The italicized portions contain the present language of Rule 117. The crossed-out words are the proposed deletions, and the words printed in all capitals are the proposed additions to the Rule.

VIDED THAT THE MOTION CLEARLY SPECIFIES EACH GROUND SEPARATELY.

.3 Motion and Proceedings Thereon. A motion based upon sub-rule 117.2(3) shall be supported by affidavits, and the opposing party prior to the day of hearing may serve opposing affidavits. The affidavits submitted by either party shall be governed by the provisions of sub-rules 116.4, 116.5, and 116.6. Such affidavits, together with the pleadings, depositions, admissions, and documentary evidences then filed in the action or submitted by the parties shall be considered by the court at the hearing. HOWEVER, IF THE MOTION IS BASED ONLY UPON CLAUSE (1) OR (2) OF SUB-RULE 117.2, OR IF IT FAILS TO SPECIFY CLEARLY THAT IT IS ALSO BASED UPON CLAUSE (3) THEREOF, AFFIDAVITS OR OTHER MATERIAL OUTSIDE PLEADINGS SHALL NOT BE CONSIDERED BY THE COURT. IN RESPONSE TO A MOTION BASED ONLY UPON CLAUSE (1) OR (2) OF SUB-RULE 117.2, THE COURT SHALL NOT REQUIRE GREATER SPECIFICITY OF THE PLEADINGS THAN IS PRESCRIBED BY RULE 111, AND (e)ach party shall be given opportunity to amend his pleadings as provided by Rule 118 ~~unless the evidence then before the court shows amendment would not be justified~~. IN RESPONSE TO A MOTION EXPLICITLY BASED UPON CLAUSE (3) OF SUB-RULE 117.2, LEAVE TO AMEND THE PLEADING ATTACKED SHALL BE ALLOWED ONLY IF THE COURT IS SATISFIED, FROM CONSIDERATION OF ALL MATERIALS PRESENTED IN SUPPORT OF AND IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, THAT THE PROFFERED AMENDMENT WOULD HAVE SUFFICIENT FACTUAL SUPPORT SO AS TO RAISE A GENUINE ISSUE OF FACT. Judgment

> *shall be rendered forthwith if the pleadings show that any party is entitled to judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact. If it appears that the opposing party rather than the moving party is entitled to judgment, the court may render summary judgment in his favor without necessity of a motion therefor.*
> *.4 [Unchanged]*

The word "one" is stricken from the first sentence of sub-rule 117.2, prefacing the grounds for the motion, and a new sentence is added to make perfectly clear that combination motions are authorized. The frequently ignored mandate of the present rule, that the "motion. . . *shall state*" its ground, is emphasized by a new proviso, that a combination motion is permitted only if it "clearly specifies each ground separately." This requirement is then enforced by adding to sub-rule 117.3 a directive that outside proof will not be considered if the motion does not clearly specify a challenge to the pleading's factual support. In combination, these provisions should adequately guard against surprise or waste resulting from confusion over the function of a motion.

The proposed amendment to sub-rule 117.3 emphasizes the potential advantages of a combination motion. A motion attacking only the legal sufficiency of a pleading will not generally penetrate conclusory allegations.[64] And while amendments will continue to be allowed freely in response to a motion challenging only the legal sufficiency of a pleading, an integrated attack will be avoided by amendment only if the court is satisfied that the proffered amendment has factual support and will raise a genuine issue.

It is hoped that amendments such as those proposed will be adopted to alleviate the problems discussed in this article and thus better achieve the potential advantages of an integrated attack upon the legal and factual merit of a pleading.

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[64] This is the aim of the proposed amendment which provides that, in response to a demurrer-type motion, "the court shall not require greater specificity of the pleadings than is prescribed by Rule 111." Subrule 111.1(1) requires only "such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend." Hopefully this will remind judges that a motion for summary judgment based only on legal insufficiency should not result in dismissal of a complaint whose only fault lies in the conclusory statement of some necessary element of the claim. *See* text accompanying notes 37-47 *supra*.