SMU | Dedman School of Law

SMU Law Review

Volume 37 | Issue 4 Article 2

January 1984

# Reexamining the Special Exception

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# REEXAMINING THE SPECIAL EXCEPTION

*by*

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TWO lawyers appeared in court to argue special exceptions.[1] Notwithstanding that the parties had already undertaken extensive discovery, including scores of interrogatories and requests for admissions, numerous depositions, and several document production requests, each attorney complained vigorously that he knew little about the other side's case because his opponent's pleadings were vague, duplicative, and failed to give fair notice of his claim or defense. Some of the exceptions, in fact, were leveled at amended pleadings that had been filed as a result of special exceptions previously sustained. The hearing consumed almost one hour of court time.[2]

Texas trial courts are overcrowded;[3] the judges who preside in them are hard-pressed to dispose of numerous cases on file.[4] Generally trial judges cannot afford to devote substantive attention to preliminary matters that do not dispose of a lawsuit or substantially promote the final, just adjudication of a case. Court appearances for preliminary matters likewise burden busy trial practitioners and generate additional legal costs for litigants. The special exception is a procedural device that can consume substantial

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1. The special exception is a procedural device by which a party can question the sufficiency in law of his opponent's claim, raise dilatory matters shown on the face of the pleadings, and point out formal defects in particular allegations. The mechanics of the special exception are set forth in Texas Rules of Civil Procedure 90 and 91. For the text of these rules, see *infra* note 10.

2. This story is in part apocryphal, but the scenario is often replayed, to greater or lesser degrees, in Texas trial courts.

3. *Docket Backlog Threatens Judicial System: Texas Chief Justice Recommends Legislation to Speed Up Court Proceedings*, Houston Chron., Jan. 18, 1983, § 1, at 7, col. 1; *see also* Bottinelli v. Robinson, 594 S.W.2d 112, 118 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) ("this [is an] era of crowded dockets").

4. *See* TEXAS OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT OF STATISTICAL AND OTHER DATA FOR CALENDAR YEAR 1982, at 154 (1983). That report noted:

> Another way to view the volume of cases pending [in Texas district courts] on December 31, 1982, is to assume that no new cases are filed in 1983 and that all the present district judges dispose of cases at the same rate as during 1982. At that rate, it would take an average of 485.6 days per court to dispose of the cases pending at the end of 1982.

*Id.*

court and attorney time[5] while infrequently playing a major role in a lawsuit's resolution.[6] Existing procedural devices can not only perform functions equivalent to the special exception but can also promote just and expeditious adjudication of a controversy without imposing undue cost and time burdens upon the bench and bar.

As a matter of policy, moreover, one may question whether Texas trial courts should continue to referee the adequacy of the form of pleadings in light of the liberalized pleading standards set forth in the Texas Rules of Civil Procedure. Special exceptions are utilized most frequently to identify defects and force clarification and specification in pleadings.[7] The Texas rules, however, are essentially antithetical to this function because they require only a plain and concise statement sufficient to give fair notice of a plaintiff's cause of action and of what he relies upon as a ground for recovery.[8]

This Article examines the foregoing utilitarian and policy arguments for abrogating use of the special exception and considers whether the special exception practice is sufficiently flawed to warrant reexamination by the Subcommittee on Rules and Statutes of the State Bar Committee on Administration of Justice and the Supreme Court Advisory Committee on Rules of Civil Procedure.[9] The Article then proposes alternate procedural measures for study and debate by these two distinguished committees.

## I. ORIGIN AND FUNCTIONS OF THE SPECIAL EXCEPTION

The Texas Supreme Court promulgated the special exception[10] in 1940[11]

5. Special exceptions must be brought to the attention of the trial court so that they may be heard and ruled upon. Castilleja v. Camero, 402 S.W.2d 265, 268 (Tex. Civ. App.—Corpus Christi 1966), *aff'd on other grounds*, 414 S.W.2d 424 (Tex. 1967).

6. The special exception would play a major role in the resolution of a lawsuit in the limited instance where a plaintiff "pleads himself out of court"; that is, he pleads facts that affirmatively negate his cause of action. *See, e.g.*, Morris v. Hargrove, 351 S.W.2d 666 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.). In Salcedo v. Diaz, 647 S.W.2d 51, 54 (Tex. App.—El Paso), *writ ref'd n.r.e. as to Diaz and writ granted as to Salcedo per curiam sub nom.* Salcedo v. El Paso Hosp. Dist., 650 S.W.2d 67 (Tex. 1983), the court of appeals affirmed the trial court's sustaining a special exception and consequent dismissal of one party to a lawsuit brought under the Texas Tort Claims Act where the pleadings affirmatively revealed that the defendant had not undertaken an action that was exempt from the immunity established by the Act.

7. 2 R. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 7.21 (rev. ed. 1982).

8. TEX. R. CIV. P. 45, 47; 2 R. MCDONALD, *supra* note 7, § 5.02.2. For the text of rules 45 and 47, *see infra* notes 61, 62.

9. These two bodies study, debate, draft, and recommend rule changes to the Supreme Court of Texas. Their workings are discussed in detail in Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 17-20 (1978).

10. The mechanics of the special exception are outlined in Texas Rules of Civil Procedure 90 and 91. TEX. R. CIV. P. 90 provides:

> General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial

as a salutary replacement for the general demurrer, a boilerplate assertion addressed to the plaintiff's pleadings as a whole that contended "the plaintiff's petition is wholly insufficient in law to state any cause of action against the defendant."[12] The general demurrer called into question the legal sufficiency of the facts alleged with respect to either the entire pleading or one of several causes of action.[13] By using this "venerable weapon"[14] the defendant triggered a search of all plaintiff's prior pleadings to locate the first fundamental error contained therein.[15] This outmoded practice was a vestige of old common law ideas according to which substance often yielded to form; it required the trial court, frequently without any explication more specific than the standard language of the demurrer, to determine whether a petition was in some manner legally insufficient.[16]

The function of the special exception, on the other hand, is to furnish parties with a medium by which to force clarification of and specification in their opponents' pleadings.[17] In contrast to the demurrer, the special exception must be framed as a particularized, intelligible attack on the sufficiency of a plaintiff's pleadings.[18] Accordingly, every defect, omission, or fault of either form or substance not brought to the attention of the trial court specifically and in writing before the instruction or charge to the jury, or in a nonjury case before the judgment is signed, is deemed waived.[19] The drafters designed the rule to simplify trial procedures by requiring that one who complains of a defect in the other party's allega-

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court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

*Id.* 91 provides:

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

11. *See generally* McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229 (1941) (discussion of origin and background of Texas Rules of Civil Procedure at time of their promulgation).

12. 2 R. MCDONALD, *supra* note 7, § 7.17.

13. 45 TEX. JUR. 2D *Pleading* § 113 (1963).

14. 2 R. MCDONALD, *supra* note 7, § 7.17.

15. State v. Williams, 8 Tex. 128, 133 (1852).

16. 2 R. MCDONALD, *supra* note 7, § 7.17.

17. Yeager Elec. & Plumbing Co. v. Ingleside Cove Lumber & Builders, Inc., 526 S.W.2d 738, 742 (Tex. Civ. App.—Corpus Christi 1975, no writ); McFarland v. Reynolds, 513 S.W.2d 620, 626 (Tex. Civ. App.—Corpus Christi 1974, no writ).

18. Throughout this Article special exceptions are treated as if addressed by a defendant to plaintiff's pleadings. Such exceptions, of course, may be lodged by a plaintiff in his supplemental petition to a pleading of defendant, TEX. R. CIV. P. 80, and by a counter-defendant to the counterclaim of a counter-plaintiff, *id.* 81. Likewise, the special exception is the proper device to be used by a plaintiff to test the sufficiency of an answer. Terehkov v. Cruz, 648 S.W.2d 441, 443 (Tex. App.—San Antonio 1983, no writ).

19. TEX. R. CIV. P. 90; Westchester Fire Ins. Co. v. Alvarez, 576 S.W.2d 771, 773 (Tex. 1978); Rose v. Burton, 614 S.W.2d 651, 652 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.).

tions point out the defect in writing.[20] A defendant cannot "lie behind the log" as with a general demurrer and then, if he suffers an adverse result, urge reversal on a ground not specifically presented to the trial court.[21]

The special exception is currently used to perform three particular functions:[22] (1) to question the sufficiency in law of a plaintiff's alleged claim;[23] (2) to raise dilatory matters shown on the face of the pleadings;[24] and (3) to point out formal defects in particular allegations, that is, to supply omissions,[25] to force clarification of unclear or unspecific pleadings,[26] or to strike improper allegations.[27]

While the special exception indisputably improved upon the general demurrer as a device for testing the sufficiency of a plaintiff's pleadings and evidenced considerable foresight when promulgated as one of the new Rules of Civil Procedure, Texas courts and litigants should use procedures that, unlike the special exception, are designed to promote the resolution of causes rather than to engender additional waves of pleadings that must be drafted by attorneys, funded by litigants, and ruled upon by judges. Further, in light of liberalized Texas notice pleading standards, it is debatable whether, as a matter of policy, pleadings should be subject to challenge on the basis of form.

## II. THE SPECIAL EXCEPTION AND AVAILABLE FUNCTIONAL EQUIVALENTS

### *A. To Question the Sufficiency in Law of Plaintiff's Claim*

A party may lodge a special exception to question the sufficiency in law of a plaintiff's claim; that is, a special exception may be used to allege that

20. Employers Casualty Co. v. Wilson, 495 S.W.2d 361, 364 (Tex. Civ. App.—Fort Worth 1973, no writ).

21. Insufficiency of pleading cannot be raised for the first time on appeal. Lowther v. Lowther, 578 S.W.2d 560, 562 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); Tolson v. Carroll, 313 S.W.2d 131, 134 (Tex. Civ. App.—Waco 1958, no writ).

22. In addition to the functions discussed, which are direct in nature, the special exception indirectly affects the admissibility of evidence and the submission of special issues to the jury because it can shape the contents of the pleadings. Trial courts, of course, are to determine admissibility of evidence and entitlement to submission of special issues, in part, by referring to the pleadings. *See, e.g.*, Kissman v. Bendix Home Syss., 587 S.W.2d 675, 677 (Tex. 1979); Kainer v. Walker, 377 S.W.2d 613, 615 (Tex. 1964); Gonzales v. Orsak, 205 S.W.2d 793, 796 (Tex. Civ. App.—Galveston 1947, no writ). Thus, to the extent a special exception brings about additions to or deletions from the pleadings it affects the evidence and the charge. For a brief discussion of available functional equivalents for these uses of the special exception, see *infra* note 57.

23. 2 R. MCDONALD, *supra* note 7, § 7.19.

24. *Id.* § 7.20.

25. *Id.* § 7.21.

26. Anderson Dev. Corp. v. Coastal States Crude Gathering Co., 543 S.W.2d 402, 405 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

27. 2 R. MCDONALD, *supra* note 7, § 7.21.

no legal rule justifies a recovery on a claim of the type presented,[28] or to allege that, although there is a legal rule that may be applicable, the petition omits one or more allegations essential to bring plaintiff's claim within its scope,[29] or to allege that there is a legal rule that may be applicable but the petition on its face shows facts that negate its application.[30] Rarely, however, does such an exception dispose of a lawsuit,[31] and it never does so unless the trial court first gives the plaintiff an opportunity to cure the defect.[32] A second round of pleading is thus built into the practice because a party receives an opportunity to amend as a matter of right. An exception may preclude a claim only where the plaintiff fails to replead a cause of action,[33] which is an infrequent occurrence.[34] The reported cases, in fact, appear limited to those in which a plaintiff has simply refused to replead.[35] Notwithstanding this important functional limitation, in Texas practice a party usually raises by special exception the contention that the plaintiff has failed to allege a cause of action.[36]

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28. *See, e.g.*, Ryan v. Holcombe, 170 S.W.2d 838, 839 (Tex. Civ. App.—Texarkana 1943, no writ).

29. *See, e.g.*, Covington v. Associated Employers Lloyds, 195 S.W.2d 209, 211 (Tex. Civ. App.—Eastland 1946, writ ref'd); Glazier v. Tilton, 81 S.W.2d 145, 147 (Tex. Civ. App.—Fort Worth 1934, writ dism'd) (special exception may be used for allegation that suit was brought prematurely because essential element of cause of action had not yet occurred). Overruling a special exception that points out the failure to allege essential elements of a claim is error. Union Producing Co. v. Allen, 297 S.W.2d 867, 869-70 (Tex. Civ. App.—Beaumont 1957, no writ).

30. *See, e.g.*, Hubler v. City of Corpus Christi, 564 S.W.2d 816, 823 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (language of petition brought claim within two-year statute of limitation, thus requiring dismissal); Williams v. Muse, 369 S.W.2d 467, 470-71 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.) (allegation in petition of oral contract barred by statute of frauds).

31. *See, e.g.*, Salcedo v. Diaz, 647 S.W.2d 51 (Tex. App.—El Paso), *writ ref'd n.r.e. as to Diaz and writ granted as to Salcedo per curiam sub nom.* Salcedo v. El Paso Hosp. Dist., 650 S.W.2d 67 (Tex. 1983).

32. Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974); Ainsworth v. Homes of St. Mark, 530 S.W.2d 877, 878 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

33. Powers v. Smith, 627 S.W.2d 811, 812 (Tex. App.—Waco 1982, writ ref'd n.r.e.); Atkinson v. Reid, 625 S.W.2d 64, 66 (Tex. App.—San Antonio 1981, no writ).

34. 2 R. McDONALD, *supra* note 7, § 7.19.

35. *See, e.g.*, Rodriguez v. Yenawine, 556 S.W.2d 410, 413 (Tex. Civ. App.—Austin 1977, no writ) (plaintiff may refuse to amend and test special exception on appeal); Townsend v. Memorial Medical Center, 529 S.W.2d 264, 267 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (trial court properly entered final order of dismissal after plaintiff's refusal to amend pleadings); Farias v. Besteiro, 453 S.W.2d 314, 317 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.) (dismissal with prejudice is proper when special exceptions going to existence of cause of action are sustained and plaintiff refuses to amend); Rutledge v. Valley Evening Monitor, 289 S.W.2d 952, 953 (Tex. Civ. App.—San Antonio 1956, no writ) (court can properly dismiss when portion of petition remaining after special exception has been sustained fails to state cause of action and plaintiff declines to amend).

36. Mac's Old Plantation Cracklings, Inc. v. Lucas, No. 05-82-00270-CV, slip op. at 2 (Tex. App.—Dallas Mar. 1, 1983, no writ) (not yet reported); *accord* McFarland v. Reynolds, 513 S.W.2d 620, 626 (Tex. Civ. App.—Corpus Christi 1974, no writ). The Texas Supreme Court recently held that the special exception must be used to raise the issue of failure to state a cause of action. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) (citing Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 10 (1974)).

The better practice, which could promote a just resolution of litigation rather than merely precipitate successive waves of pleadings and the attendant delay thereby engendered,[37] would replace the special exception that contends plaintiff's petition is insufficient in law with a motion for summary judgment predicated on such reasoning and filed after discovery[38] has been undertaken.[39] One may easily raise the contention that no legal rule justifies recovery on a claim, as well as the argument that the petition reveals facts that defeat a right of recovery, by means of a summary judgment motion. A contention that the allegations omit essential elements is better resolved after discovery on the ground that there is no evidence to support the omitted components than before discovery on the ground that the plaintiff has simply failed to plead those elements. A claim that is so unmeritorious that it would fail when tested by special exception a fortiori should be capable of disposition by motion for summary judgment.

Replacement of the special exception with the motion for summary judgment, moreover, would promote use by the trial court and litigants of a process specifically designed to determine whether or not a litigant has stated a claim that warrants a trial. The summary judgment process con-

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37. Elimination of delay is a compelling reason for dispensing with interim procedural devices such as the special exception. The federal pleading rules, for example, are designed to eliminate delay and reduce pleading requirements to a minimum. 2A J. MOORE, FEDERAL PRACTICE ¶ 8.02, at 8-20 (rev. ed. 1983).

38. Such discovery need not be extensive. In many cases it might consist merely of the following interrogatory: "State all the facts upon which you rely in support of the allegation in paragraph __ of your petition that [here repeat allegation inquired about]."

39. Texas flatly rejects use of the summary judgment motion for this purpose. In Massey v. Armco Steel Co., 652 S.W.2d 932 (Tex. 1983), the trial court granted defendant's motion for summary judgment on the ground that the plaintiff had failed to state a cause of action. The court of appeals affirmed the trial court, but the supreme court reversed, stating:

> The court of appeals, however, erred in affirming the summary judgment of the trial court. The issue whether the pleadings fail to state a cause of action may not be resolved by summary judgment. In *Texas Department of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974), we wrote:
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> > [O]nly after a party has been given an opportunity to amend after special exceptions have been sustained may the case be dismissed for failure to state a cause of action. . . . This court believes that the protective features of special exception procedures should not be circumvented by a motion for summary judgment on the pleadings where plaintiff's pleadings . . . fail to state a cause of action.

*Id.* at 934. Rejecting use of the summary judgment motion to attack a plaintiff's failure to allege a cause of action is unjustified. The rationale for *Massey* and *Herring* appears to be that a plaintiff should be afforded an opportunity to amend his pleadings before his case is dismissed for failure to state a cause of action. The coordinate interests of using a superior procedural device like the summary judgment motion and permitting a plaintiff reasonable opportunity to amend, however, are easily accommodated by the trial court's granting plaintiff leave to amend his petition after a summary judgment motion is filed. If the plaintiff successfully alleges a cause of action, the summary judgment motion is denied; if he cannot, or if discovery reveals no factual support for the cause of action alleged, the motion is granted. Indeed, one jurist has observed: "[Simplified notice pleading rules] fit in naturally with and are supplemented by, rules for discovery, pre-trial, *and summary judgment*." C. CLARK, SIMPLIFIED PLEADING (ABA Judicial Administration Monograph, Series A, No. 18) (emphasis added), *quoted in* 6 FED. R. SERV. 819, 831 (1943).

tains numerous procedural and substantive safeguards designed to ensure that only patently unmeritorious lawsuits and those that may be resolved on undisputed facts and as a matter of law are eliminated short of trial.[40] By focusing the attention of the parties and the trial court upon summary judgment issues rather than upon pleading issues, the judicial system could more facilely advance the status of the litigation, eliminate potential time and cost encumbrances upon the court, attorneys, and litigants in dealing with intermediate pleading skirmishes, and use procedures intentionally geared to test the sufficiency of claims.

### *B. To Raise Dilatory Matters*

Litigants may also employ the special exception to contend that a petition on its face reveals grounds that compel suspension or abatement of the lawsuit.[41] The special exception urging abatement, however, is limited solely to matters shown by the plaintiff's pleadings.[42] If a defendant must rely upon extrinsic facts, he may raise the issue by plea in abatement but not by special exception.[43] Because the plea in abatement may be predicated upon any matter shown to the trial court, whether or not revealed in the pleadings,[44] it is a more versatile device for raising dilatory matters than is the special exception. Moreover, because a party may replead as a matter of right to a special exception sustained by the trial court, the judge would commit error if he abated an action in response to an exception without affording the plaintiff an opportunity to amend.[45] Inefficient, successive rounds of repleading, rather than a definitive ruling on the issue of abatement, are the likely result of this procedure. The better practice would be to use the plea in abatement rather than the special exception to raise dilatory matters.[46]

### *C. To Point Out Defects in Particular Allegations*

Special exceptions commonly allege formal defects in a plaintiff's allegations.[47] These exceptions can generally be classified in four categories,

40. Discussion in detail of the applicable Texas law of summary judgments is beyond the scope of this Article. *See generally* TEX. R. CIV. P. 166-A (procedural safeguards). For applicable substantive standards, see City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979); Gulbenkian v. Penn, 252 S.W.2d 929 (Tex. 1952).

41. 2 R. MCDONALD, *supra* note 7, § 7.20.

42. When the grounds for abatement are not reflected on the face of the pleadings, a plea in abatement must be used. Jay-Lor Textiles, Inc. v. Pacific Compress Warehouse Co., 547 S.W.2d 738, 740 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

43. Salcedo v. Diaz, 647 S.W.2d 51, 53 (Tex. App.—El Paso), *writ ref'd n.r.e. as to Diaz and writ granted as to Salcedo per curiam sub nom.* Salcedo v. El Paso Hosp. Dist., 650 S.W.2d 67 (Tex. 1983).

44. Ragsdale v. Ragsdale, 520 S.W.2d 839, 843 (Tex. Civ. App.—Fort Worth 1975, no writ).

45. Cozad v. Roman, 570 S.W.2d 558, 562 (Tex. Civ. App.—Corpus Christi 1978, no writ).

46. 2 R. MCDONALD, *supra* note 7, § 7.20. "To avoid question, Townes recommended a plea in abatement even when the nonjoinder or misjoinder was evident on the face of the pleadings." *Id.* § 7.20 n.1.

47. *Id.* § 7.21.

which contend that the pleadings: (1) contain omissions;[48] (2) contain obscurities;[49] (3) fail to give fair notice of the claim;[50] or (4) contain improper allegations, surplusage, and matters that are evidentiary, argumentative, impertinent, scandalous, inflammatory, irrelevant, immaterial, frivolous, or are improperly framed so as to prejudice the defendant before the jury.[51] The third category contains the most frequently alleged defects, such as where the excepting party contends he has not been provided with sufficient, particular details of his opponent's claim to conduct a defense.[52] Exceptions from the first and second categories, alleging that the pleadings omit essential allegations or are obscure, are used to a lesser extent. Elimination of the practice of reading the pleadings to the jury has minimized use of the last category of exception.[53]

This discussion focuses upon the most frequent special exception, which alleges that the petition fails to set out sufficient details of the plaintiff's claim. As with the other special exception functions previously analyzed, there is a more effective procedural option than the special exception for the purpose of gaining fair notice of the opponent's claim. Parties may use discovery in the form of depositions, interrogatories, requests for admissions, and requests for production of documents to accomplish this function of the special exception. As the United States Supreme Court noted in *Conley v. Gibson*,[54] "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."[55]

The framers of the Texas Rules of Civil Procedure envisioned reliance on discovery as part of an integrated procedure intended to determine before trial the issues genuinely in dispute.[56] Discovery is designed, by carefully crafted rules of procedure, to enable a party to ferret out the underlying basis for another party's claims and defenses. The Texas Rules of Civil Procedure define the scope of discovery, set out the duty to supplement, prescribe sanctions for failure to make discovery, and detail the procedures for conducting discovery. Oftentimes, discovery is already under

48. *See supra* note 25 and accompanying text.

49. *See supra* note 26 and accompanying text.

50. Johnson v. Willis, 596 S.W.2d 256, 260 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.). "The special exception is properly used to demand particularity in pleadings if pleadings do not properly apprise a party of his opponent's contentions." *Id.*

51. *See supra* note 27 and accompanying text.

52. W. DORSANEO, TEXAS LITIGATION GUIDE § 70.110[1][b], at 70-31 (rev. ed. 1983).

53. TEX. R. CIV. P. 265(a) was amended effective Jan. 1, 1978, to eliminate the option of reading the pleadings to the jury in opening statement. Rule 265(a) now provides:

> The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

TEX. R. CIV. P. 265(a).

54. 355 U.S. 41 (1957).

55. *Id.* at 47-48.

56. 2 R. MCDONALD, *supra* note 7, § 5.02.2.

way when a defendant makes an exception claiming that he cannot ascertain from the pleadings the true nature of the plaintiff's claims. This discovery may already have supplied, or likely will supply, a factual basis for clarification of omitted, obscure, or conclusory allegations, thus obviating the need for more specific pleadings.

The better practice would be to require litigants to rely upon discovery to provide the details of a claim and abrogate use of the special exception for this purpose.[57] In *McCamey v. Kinnear*[58] the Beaumont court of civil appeals articulated the reasoning that underlies this proposal:

> The object and purpose of pleading is to give fair and adequate notice to a party being sued of the nature of the cause of action asserted against him so that he may adequately prepare his defense thereto . . . . The plaintiff was not required to plead his evidence in detail and *if the defendant desired more factual detail as to the basis of the claim, he had but to invoke the discovery process authorized by the rules*.[59]

As a matter of judicial economy, courts and attorneys could better devote their time to examining the evidentiary foundation for a claim rather than resolving the phrasing of each allegation. For example, a pleading that contends the defendant is "indebted" to the plaintiff or that the defendant has been "negligent" is presently subject to special exception because, standing alone, it does not give fair notice or furnish adequate information so as to permit the court to determine the necessity and range of trial on the merits.[60] The parties should subject such allegations to trenchant discovery calculated to disclose the underlying factual predicate for the claims rather than make them the basis of a pleading squabble. Even if a party files a special exception and the trial court requires the plaintiff to replead, in all likelihood the defendant will thereafter direct the same or similar discovery inquiries to any such amended pleading and procure from such discovery the information he would have received by proceeding to discovery without urging the special exception. Pragmatically, such intermediate pleading steps should be omitted altogether.

If an instance should arise, however, where the petition is intrinsically inadequate and varies so far from the standards for proper pleading pre-

57. The special exception is also a device that can shape the admission of evidence and the submission of special issues. *See supra* note 22. The function of regulating admissibility of evidence can likewise be fulfilled by the trial court's examination of each party's discovery responses as well as its pleadings to determine whether they disclose the matters about which evidence is offered. The function of shaping special issues can be accomplished by the trial court's examination of discovery responses, pleadings, and evidence to determine if an issue has been raised or tried by consent such that a special issue may be submitted to the jury.

58. 484 S.W.2d 150 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

59. *Id.* at 154 (emphasis added).

60. 2 R. McDONALD, *supra* note 7, § 5.06.1.

scribed by Texas Rules of Civil Procedure 45[61] and 47[62] that the opposing party cannot frame a response, prepare a defense, or commence meaningful discovery, the trial court can employ its authority under Texas Rule of Civil Procedure 68 to order a repleader.[63] Rule 68 provides that "[t]he court, when deemed necessary in any case, may order a repleader on the part of one or both parties, in order to make their pleadings substantially conform to the rules."[64] By virtue of this rule, the trial court possesses the authority to direct a repleader to make the pleadings conform substantially to the rulings of the court and has the inherent power to enforce compliance with such an order.[65] Alternatively, Rules 68 and 91[66] could be modified to give express authority to the trial court to order a repleader on the motion of a party where the court determines that the pleadings are so inadequate that meaningful discovery cannot be commenced.[67]

## III. APPLICABILITY OF THE SPECIAL EXCEPTION TO A "NOTICE PLEADING" SYSTEM

Use of a procedural device like the special exception is arguably inimical to a system designed for the use of notice pleadings coupled with liberal opportunities for discovery. The fundamental rationale supporting such a system provides that the technical fullness of the allegations in the petition is unimportant so long as the pleading as a whole conveys fair

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61. TEX. R. CIV. P. 45 provides:

> Pleadings in the district and county courts shall
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> (a) Be by petition and answer.
>
> (b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole.
>
> (c) Contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.
>
> (d) Be in writing, signed by the party or his attorney, and be filed with the clerk. All pleadings shall be so construed as to do substantial justice.

62. TEX. R. CIV. P. 47 provides:

> An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain
>
> (a) a short statement of the cause of action sufficient to give fair notice of the claim involved,
>
> (b) in all claims for unliquidated damages only the statement that the damages sought exceed the minimum jurisdictional limits of the court, and
>
> (c) a demand for judgment for all the other relief to which the party deems himself entitled.
>
> Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

63. *See* Shaw v. Universal Life & Accident Ins. Co., 123 S.W.2d 738 (Tex. Civ. App.—Dallas 1938, writ dism'd).

64. TEX. R. CIV. P. 68.

65. Shaw v. Universal Life & Accident Ins. Co., 123 S.W.2d 738, 739 (Tex. Civ. App.—Dallas 1938, writ dism'd).

66. *See supra* note 10 (text of TEX. R. CIV. P. 91).

67. *See infra* notes 124-26 and accompanying text (proposal for modifying rules 68 and 91).

notice of plaintiff's claim[68]—that is, that the petition alleges enough concerning the time, place, and circumstances of the basic transaction or occurrence to permit identification of the area of dispute[69]—and that liberal discovery practices exist to remove any uncertainties about the claims of the parties.[70] Implicit in such a system are the notions that a party should not be tested by how well he can articulate a claim but rather by whether he can prove it at trial, and that there is a vital distinction between having a claim and alleging it with technical accuracy.[71]

Texas courts follow notice pleading standards in civil cases, having made a "timid yet controversial"[72] step toward acceptance of this modern philosophy in 1941 with the adoption of Rules of Civil Procedure 45 and 47. Rule 45 provides:

> Pleadings in the district and county courts shall
>
> . . . .
>
> (b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole.
>
> (c) Contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.[73]

Rule 47 provides: "An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved . . . ."[74] Texas pleadings are sufficient under these rules if they give fair and adequate notice to the adversary.[75] They need not be instruments of precision[76] and a party need not plead his case with exactness.[77] Relaxation of the restrictive rules applicable to the form of pleadings is calculated to minimize the number of cases determined upon technicalities instead of upon their merits.[78]

One can more easily answer the question whether the special exception is applicable to, or even viable in, a system of notice pleading after examining how devices of similar function, such as the motions for bill of particulars and for more definite statement, fared when used in the federal

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68. Newitt v. Camden Drilling Co., 552 S.W.2d 928, 933 (Tex. Civ. App.—Corpus Christi 1977, no writ).
69. 2 R. McDONALD, *supra* note 7, § 5.06.1.
70. *Id.* § 5.02.2.
71. *Id.* § 6.12.
72. *Id.* § 5.02.2.
73. TEX. R. CIV. P. 45; *see supra* note 61 (full text of rule 45).
74. TEX. R. CIV. P. 47; *see supra* note 62 (full text of rule 47).
75. Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 186 (Tex. 1977); Osteen v. Crumpton, 519 S.W.2d 263, 265 (Tex. Civ. App.—Dallas 1975, writ ref'd).
76. Newitt v. Camden Drilling Co., 552 S.W.2d 928, 933 (Tex. Civ. App.—Corpus Christi 1977, no writ).
77. Rodriguez v. Yenawine, 556 S.W.2d 410, 414 (Tex. Civ. App.—Austin 1977, no writ).
78. 2 R. McDONALD, *supra* note 7, § 5.02.2.

system between 1938 and 1946.[79] This empirical predicate provides both a body of case law from which to ascertain the success in practice of these particular pleading devices as well as a body of commentary that explains the rationale for ultimately jettisoning them from the Federal Rules of Civil Procedure.

The federal rules do not countenance squabbles over the form of pleadings; rather, they embody the philosophy that "[l]awsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not averments in the paper pleadings have been artfully drawn."[80] Federal Rule of Civil Procedure 8(a)(2) requires that a complaint set out "a short and plain statement of the claim showing that the pleader is entitled to relief."[81] What constitutes a short, plain statement of a claim depends upon the circumstances of the case,[82] but the standards generally applicable to notice pleadings require little specificity.[83] The federal rules are designed to assure fair notice of the facts and legal theories of the pleader[84] yet reflect the philosophy that litigation seldom can or should be settled on the merits at the pleading stage[85] and that pleadings do little more than indicate generally the type of litigation that is involved. This policy rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome; it accepts the prin-

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79. The federal rules of pleading are, of course, different from the Texas rules. In particular the federal rules require only that plaintiff plead a *claim* showing he is entitled to relief. FED. R. CIV. P. 8(a)(2); *see* Schaedler v. Reading Eagle Publication, Inc., 370 F.2d 795, 798 (3d Cir. 1967). By contrast, the Texas rules prescribe that plaintiff shall plead a *cause of action*. TEX. R. CIV. P. 45, 47. Some federal courts have interpreted claim as substantially synonymous with cause of action, and others have given it a much more relaxed significance. 2 R. MCDONALD, *supra* note 7, § 6.11. Notwithstanding this distinction, the yardstick for measuring compliance with each system's standards is whether they afford the opposing party fair notice of the contentions made.

80. C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1286 (1969).

81. FED. R. CIV. P. 8(a)(2). Rule 8(a) provides in full:

> 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 grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

*Id.* 8(a).

82. Atwood v. Humble Oil & Ref. Co., 243 F.2d 885, 889 (5th Cir. 1957), *cert. denied*, 355 U.S. 829 (1958). This is also so in Texas pleading practice. 2 R. MCDONALD, *supra* note 7, § 5.02.2. McDonald states:

> Where fair notice requires full and detailed allegations, these are required. In complex controversies, lengthy pleadings may be essential to plead concisely a legally enforceable claim.
>
> But it also may be recognized that the case is relatively rare wherein the plaintiff and the defendant do not know, even before the petition is filed, the bounds of their main areas of difference.

*Id.*

83. McGuire v. Sadler, 337 F.2d 902, 905 (5th Cir. 1964). The notable exception is that a claim based upon fraud must be supported by specific allegations. *Id.*

84. K. SINCLAIR, FEDERAL CIVIL PRACTICE 217 (1980).

85. Topping v. Fry, 147 F.2d 715, 719 (7th Cir. 1945).

ciple that the purpose of pleading is to facilitate a proper decision on the merits.[86] The intent of rule 8(a), according to the United States Supreme Court Advisory Committee,[87] is to permit the plaintiff's claim to be stated in general terms. The committee report states that "the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement."[88]

The federal rule 12(e) motions for bill of particulars and for more definite statement were adopted in 1937 together with the notice pleading rules. Rule 12(e), as so promulgated, provided that such motions could be filed with respect to any matter not averred with sufficient definiteness or particularity to enable a defendant to prepare his responsive pleadings or to prepare for trial.[89] The motions were used much as the special exception is used today in Texas; they were leveled against an opponent whose complaint was so vague or ambiguous or contained such broad generalizations that the defendant could not frame an answer or understand the nature and extent of the charges so as to prepare for trial.[90] Their use was short-lived, however. By 1946 rule 12(e) as originally drawn had been the subject of more judicial rulings than any other part of the federal rules and had received much criticism from commentators, judges, and members of the bar.[91]

Many rule 12(e) motions focused on the provision in the rule that a party could file a motion where the other party did not aver the complaint

86. 2A J. MOORE, *supra* note 37, ¶ 8.03, at 8-21. Common law pleading, on the other hand, was not primarily concerned about fair notice; it was concerned only with how the parties had formulated issues and rested on the untenable ground that the parties knew nothing of the matter in litigation except that which had been stated in the pleadings. *Id.* ¶ 8.03, at 8-22. Lawyers and laymen alike grew restless under practices that permitted cases to be resolved on pleading points unrelated to the merits of the suit. *Id.* ¶ 8.01[4], at 8-8. This dissatisfaction precipitated promulgation of FED. R. CIV. P. 8(a), which originated from Federal Equity Rule 25. 2A J. MOORE, *supra* note 37, ¶ 8.01[2], at 8-6.

87. 2A J. MOORE, *supra* note 37, ¶ 8.01[3], at 8-8 (quoting ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, REPORT OF 1955).

88. *Id.*

89. Rule 12(e), as originally promulgated in the 1938 rules, provided:

> Motion for More Definite Statement or for Bill of Particulars. Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such other order as it deems just. A bill of particulars becomes part of the pleading which it supplements.

Fed. R. Civ. P. 12(e) (1938) (amended 1946).

90. Brinley v. Lewis, 27 F. Supp. 313, 314 (M.D. Pa. 1939).

91. FED. R. CIV. P. 12(e) advisory committee note accompanying 1946 amendments, *quoted in* 2A J. MOORE, *supra* note 37, ¶ 12.01, at 2218.

with sufficient definiteness or particularity to enable the defendant to prepare for trial.[92] Some judges interpreted these words in the rule "more or less in accordance with their plain meaning"[93] and held that a party could use the motions for more definite statement and for bill of particulars to require his adversary to define the issues he wished to raise and to provide, with considerable particularity, the facts underlying the allegations[94] even though the particulars sought could be obtained readily through discovery.[95]

A majority of federal courts, however, implicitly disapproved of these devices and took a hardened view toward their use.[96] These courts virtually read the words "prepare for trial" out of the rule;[97] most granted the motions only where the pleadings to which they were addressed failed to meet the minimal pleading requirements of rule 8, or did not give the movant sufficient notice of the claim made against him, or were not clear enough to enable the movant to prepare a responsive pleading.[98]

After only a few years of use, strong sentiment sprang up to alter rule 12(e). Under the federal rules, advocates of change argued, the pleadings were intended to put a defendant on notice of the basic nature of the plaintiff's case; discovery and pretrial conferences would bear the primary burden of information exchange and issue delineation.[99] Rule 12(e) was thus almost useless in light of the relation between rules 16 on pretrial conference and 8 on notice pleading, and rules 26 through 37 on discovery.[100]

The liberal granting of the motion for bill of particulars, moreover, was

92. C. WRIGHT & A. MILLER, *supra* note 80, § 1375.

93. *Id.* § 1374; *see e.g.*, Bowles v. Flotill Prods., Inc., 4 F.R.D. 499, 501-02 (N.D. Cal. 1945); Walling v. West Va. Pulp & Paper Co., 2 F.R.D. 416, 419 (E.D.S.C. 1942) (not within trial court's discretion to modify plain meaning of rule).

94. C. WRIGHT & A. MILLER, *supra* note 80, § 1374; *see, e.g.*, Kentucky-Tennessee Light & Power Co. v. Fitch, 63 F. Supp. 989, 992 (W.D. Ky. 1946) (exact date of transaction required); Raylite Elec. Corp. v. Noma Elec. Corp., 7 F.R.D. 239, 240 (S.D.N.Y. 1946) (party entitled to information available from inspection of disputed device); Bowles v. Deep Vein Connellsville Coke Co., 5 F.R.D. 140, 142 (W.D. Pa. 1946) (facts enabling party to prepare case without undue expense required); United States v. United States Alkali Export Ass'n, Inc., 7 F.R.D. 254, 254 (S.D.N.Y. 1945) (rule only requires facts to make responsive pleading); Maryland Casualty Co. v. Kelly, 3 F.R.D. 28, 29 (E.D. Pa. 1943) (names and dates relevant to contract default must be provided); Fleming v. Enterprise Box Co., 36 F. Supp. 606, 607 (S.D. Fla. 1940) (specific facts of transaction required if known by party); Louisiana Farmers' Protective Union, Inc. v. Great Atl. & Pac. Tea Co., 31 F. Supp. 483, 489 (E.D. Ark. 1940) (facts required if they will facilitate trial preparation); Sweeney v. United Feature Syndicate, Inc., 29 F. Supp. 419, 420 (S.D.N.Y. 1939) (party entitled to know what parts of document are contested).

95. C. WRIGHT & A. MILLER, *supra* note 80, § 1374; *see, e.g.*, Bowles v. John F. Casey Co., 5 F.R.D. 143, 145 (W.D. Pa. 1946); Fleming v. Southern Kraft Corp., 37 F. Supp. 232, 235 (S.D.N.Y. 1940).

96. C. WRIGHT & A. MILLER, *supra* note 80, § 1374; *see, e.g.*, United States v. United Shoe Mach. Corp., 76 F. Supp. 315, 316 (D. Mass. 1948); United States v. Association of Am. R.Rs., 4 F.R.D. 510, 529 (D. Neb. 1945).

97. C. WRIGHT & A. MILLER, *supra* note 80, § 1374; *see, e.g.*, Canuso v. City of Niagara Falls, 3 F.R.D. 374, 375 (W.D.N.Y. 1944); Mitchell v. Brown, 2 F.R.D. 325, 326 (D. Neb. 1942); Graziano v. Michigan Assoc. Express, Inc., 1 F.R.D. 530, 531 (N.D. Ill. 1940).

98. C. WRIGHT & A. MILLER, *supra* note 80, § 1374.

99. *Id.* § 1375.

100. 2A J. MOORE, *supra* note 37, ¶ 12.17, at 2362.

inconsistent with the scheme and spirit of the federal rules. As the court noted in *Braden v. Callaway*:[101] "It is quite obvious that the beneficial and progressive method of pleading provided by Rule 8(a)(2) wherein a claim for relief must be a short and plain statement would be entirely defeated by a liberal construction of Rule 12(e)."[102] The motions for more definite statement and for bill of particulars, with their procedural focus upon the pleadings as the source for deriving information about the plaintiff's claim, played practical and theoretical havoc with the grand scheme of notice pleading and liberal discovery.[103] They served to neutralize any helpful benefits derived from rule 8 and overlooked the intended use of the rules on depositions and discovery.[104] Moreover, critics of the motions argued, compliance with rule 8 was not intended to expose a party to rule 12(e) attacks.[105]

Accordingly, the motions for more definite statement and for bill of particulars, when actually used between 1938 and 1946 to test the sufficiency of a federal plaintiff's complaint, were generally recognized as wholly inconsonant with a system designed for notice pleading coupled with liberal discovery opportunities. As one federal court observed:

> The reason for the abolition of the bill of particulars and for the limitation upon the motion for a more definite statement is that the rules of discovery are available to elicit details. To maintain the rule for a bill of particulars would have the effect to nullify Rule 8(a), Rules of Civil Procedure, by expanding pleadings rather than condensing them.[106]

In addition to this rather glaring conceptual inconsistency, actual use of rule 12(e) motions revealed further defects. The motions led to expense and delay,[107] unduly taxed the time of the court in deciding the motions,[108] and occasionally placed a premium upon strategic maneuvering of counsel rather than upon the merits of the issues involved.[109] Expense, delay, harassment, and drain on judicial time and energy were constant features of these practices.[110] One respected jurist disparagingly characterized them as a nuisance.[111]

In place of the motions for more definite statement and bill of particulars, the federal rules as amended now provide a narrower form of motion for more definite statement that is currently used in the federal courts.[112]

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101. 4 F.R.D. 147 (E.D. Tenn. 1943).
102. *Id.* at 148.
103. C. WRIGHT & A. MILLER, *supra* note 80, § 1375.
104. FED. R. CIV. P. 12(e) advisory committee note accompanying 1946 amendment, *quoted in* 2A J. MOORE, *supra* note 37, ¶ 12.01, at 2218.
105. 2A J. MOORE, *supra* note 37, ¶ 12.17, at 2362.
106. Shafir v. Wabash R.R., 7 F.R.D. 467, 468 (W.D. Mo. 1947).
107. E.I. Du Pont de Nemours & Co. v. DuPont Textile Mills, Inc., 26 F. Supp. 236, 236-37 (M.D. Pa. 1939).
108. 2A J. MOORE, *supra* note 37, ¶ 21.17, at 2362.
109. *Id.*
110. C. WRIGHT & A. MILLER, *supra* note 80, § 1375.
111. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 54 (2d ed. 1947).
112. FED. R. CIV. P. 12(e) now reads:

The availability of this motion, however, is quite restricted.[113] Numerous decisions discussing the motion for more definite statement under amended rule 12(e) repeat the warning that such motions are disfavored[114] and adhere to the policy that the motion should not be granted to require evidentiary detail normally the subject of discovery.[115] Many courts have denied rule 12(e) motions on the ground that the information requested was properly the subject of discovery.[116] The amended rule, moreover, is designed to strike at unintelligibility rather than want of detail. If the pleadings meet the requirements of rule 8 and fairly notify the opposing party of the nature of the claims, the court will deny a motion for more definite statement.[117]

The policy and utilitarian arguments that supported abolition of the motion for bill of particulars and the broad-form motion for more definite statement equally support the contention that the special exception is neither viable in nor appropriate for the integrated system of notice pleading and liberalized discovery used in Texas. The pleading/discovery scheme adopted in Texas in 1941 was designed so that pleadings are no longer the single source for determining all the nuances of a plaintiff's claim and with the view that probing, artful discovery should place flesh upon skeletal allegations. One commentator stated:

> [T]he uncertainties of the parties frequently can be removed more efficiently by liberal discovery practice and by effective pretrial conferences than by an exchange of formal legal correspondence decked out in the trappings of written pleadings. . . . The availability of discovery procedures relieves the pleader of the burden of alleging the details of the claim or defense as meticulously as may be sought in preparation for trial.[118]

The special exception, which serves the same functions as did the motions for bill of particulars and for more definite statement, seeks evidentiary

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> Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

113. C. WRIGHT & A. MILLER, *supra* note 80, § 1376.

114. *See, e.g.*, Thrasher v. Missouri State Highway Comm'n, 534 F. Supp. 103, 106 (E.D. Mo. 1981); Boothe v. TRW Credit Data, 523 F. Supp. 631, 635 (S.D.N.Y. 1981); Choat v. Rome Indus., Inc., 480 F. Supp. 387, 391 (N.D. Ga. 1979); Bazal v. Belford Trucking Co., 442 F. Supp. 1089, 1101 (S.D. Fla. 1977); Gawn v. Norfolk & W. Ry., 254 F. Supp. 1005, 1006 (N.D. Ohio 1966).

115. 2A J. MOORE, *supra* note 37, ¶ 12.18, at 2395-96; *see, e.g.*, Famolare, Inc. v. Edison Bros. Stores, Inc., 525 F. Supp. 940, 949 (E.D. Cal. 1981); Donovan v. American Leader Newspapers, Inc., 524 F. Supp. 1144, 1146 (M.D. Fla. 1981); Gilbert v. Bagley, 492 F. Supp. 714, 719 (M.D.N.C. 1980).

116. C. WRIGHT & A. MILLER, *supra* note 80, § 1376.

117. 2A J. MOORE, *supra* note 37, ¶ 12.19[1], at 2389.

118. 2 R. MCDONALD, *supra* note 7, §§ 5.02.2, 5.05.

detail from pleadings rather than from discovery; it focuses attention upon allegations rather than upon proof. In practice, moreover, the special exception suffers from the same pragmatic deficiencies as did the motions for more definite statement and for bill of particulars. As discussed above, the special exception practice leads to expense and delay and acts as a drain upon judicial time and energy.

As with the federal rules, the Texas Rules of Civil Procedure place the primary burden of information exchange and issue delineation on the discovery process. Rule 47 requires a short statement sufficient to give fair notice of the claim involved;[119] rule 186a, on the other hand, permits discovery of any matter not privileged that is relevant to the subject matter involved or is reasonably calculated to relate to the discovery of evidence admissible at trial.[120] The former rule is designed to elicit cursory allegations; the latter is geared to adduce the evidentiary foundation for plaintiff's case.

The Second Circuit Court of Appeals, writing in the context of pleading challenges raised under amended rule 12(e), a more limited pleading challenge than the special exception but nevertheless an instigator of pleading skirmishes, expressed sentiments that Texas trial judges weary of supervising repeated pleading battles could easily echo:

> A great deal of time has been spent in this case in a struggle to get the plaintiff's pleadings in better shape. As this court has often remarked, time spent this way is usually wasted. A better procedure than the so-called "trial" of "preliminary issues" would have been to proceed at once to a consideration of the merits either by means of a motion for summary judgment or of a full trial of the factual issues presented by the pleadings.[121]

The special exception, as a device to require more detailed pleadings, appears just as inapplicable to Texas practice, both as a practical matter and as a matter of policy, as were the motions for more definite statement and bill of particulars under the former federal practice.

## IV. PROPOSED RULE CHANGES

Before proposing curative rule changes, one must address the contention that no rule changes are necessary. The argument against rule changes reasons that in the face of superior procedural alternatives and in an environment of liberalized pleading standards the special exception will simply fall into disuse as lawyers increasingly turn to such alternatives and trial judges more frequently overrule special exceptions in deference to the liberalized pleading standards. Although the special exception could conceivably wither away, that result is not likely. Even setting aside the verity that habits are not easily broken, the special exception is an indispensable part of current Texas procedure because pleadings in Texas are construed

119. TEX. R. CIV. P. 47.
120. *Id.* 186a.
121. Michael v. Clark Equip. Co., 380 F.2d 351, 352 (2d Cir. 1967).

liberally in the *absence* of a special exception.[122] It is somewhat incongruous in a system that ostensibly embraces the maxims of liberalized pleading for failure to allege a pleading defect to entitle a petition to an even more liberal construction than already provided by the rules. Nevertheless, the continued vitality of this doctrine necessarily prolongs the life of the special exception because the careful practitioner must give it due regard.

The special exception, moreover, can function usefully as a tool to delay prosecution of a claim and will likely be used for dilatory purposes. Commentators have observed, in the analogous context of federal rule 12(e), that even when the motion for a bill of particulars was filed and denied, its pendency postponed the defendant's obligation to answer and consequently delayed progression of the case past the pleadings.[123] The zealous Texas advocate will certainly not voluntarily relinquish use of a potentially effective tactical device like the special exception.

Accordingly, the best method for eliminating the negative attributes of special exception practice is to change the applicable Texas Rules of Civil Procedure. Rule 68 should be amended as follows:[124]

> The court, when deemed necessary in any case, or on the motion of any party, may order a repleader on the part of one or both of the parties, in order to make their pleadings substantially conform to the rules or to give a party fair notice of the claims or defenses of the opposing party such that discovery can be commenced by the moving party.

Rule 90 should be amended to read as follows:

> General demurrers shall not be used. ~~[Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom a default judgment is rendered.]~~

In addition, rule 91 should be repealed in its entirety, and all references to special exceptions contained in other procedural rules should be likewise eliminated.[125] This proposal will abrogate use of the special exception and

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122. *See* TEX. R. CIV. P. 90; *see also* L & B Oil Co. v. Arnold, 620 S.W.2d 191, 193 (Tex. Civ. App.—Waco 1981, writ dism'd); Citizens Nat'l Bank v. Cattleman's Prod. Credit Ass'n, 617 S.W.2d 731, 736 (Tex. Civ. App.—Waco 1981, no writ); Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907, 925 (Tex. Civ. App.—Waco 1979, no writ).

123. Zimmerman v. Fillah, 5 F.R.D. 80, 81 (D.D.C. 1946); C. WRIGHT & A. MILLER, *supra* note 80, § 1375.

124. The text of the proposed rule is set forth here in the form recommended for submission of proposed rule changes. *See* Pope & McConnico, *supra* note 9, at 21-22, 22 n.87.

125. In order to achieve conformity with this proposal, TEX. R. CIV. P. 47 should be amended so that a trial court could require a plaintiff to amend his petition to state the

substitute instead a motion that recognizes and focuses upon the salutary role that discovery plays in the Texas system of notice pleading.

If, however, complete elimination of the role of the special exception is deemed too drastic, Texas could retain the special exception while altering its functions. Rules 68 and 90 could be maintained in their present form and rule 91 amended to read as follows:

> A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to. A special exception shall not be made when the information sought or the defect, omission, obscurity, duplicity, generality, or other insufficiency alleged can reasonably be obtained or cured by discovery.

The rule changes propounded are closely analogous in purpose and function to the modified form of the federal rule 12(e) motion for more definite statement now used in the United States District Court for the Northern District of Texas. Although under the express terms of rule 12(e) a party may use such a motion when the movant cannot reasonably be required to frame an answer or other responsive pleading,[126] local rule 5.2(d)[127] of the Northern District of Texas has modified the rule so that a party generally[128] may not file the motion "when the information sought can be obtained by discovery."[129] This rule recognizes the interrelationship between pleading and discovery that exists in the federal system. Texas should likewise adopt rules of procedure that are consonant with its integrated notice pleading/liberalized discovery system.

## V. CONCLUSION

The process of change is always difficult and time-consuming.[130] Yet as Chief Justice Pope has observed: "Study and revision of the rules of civil procedure will never be completed. Procedural rules will need to be continually reexamined to determine whether they expedite or retard the administration of justice."[131] The process of questioning the efficacy of well-entrenched practices when the burden they place upon the judicial system

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maximum amount of unliquidated damages claimed on motion of the defendant rather than upon special exception. To raise other defects in a plaintiff's petition, such as failure to plead special damages as required by TEX. R. CIV. P. 56, a defendant would be entitled to move for repleader under rule 68 as amended.

126. 2A J. MOORE, *supra* note 37, ¶ 12.01[20], at 2218.

127. N.D. TEX. R. 5.2(d), *reprinted in* TEXAS RULES OF COURT 489 (Desk Copy 1982).

128. The sole exception is for matters required to be pled specifically by FED. R. CIV. P. 9(b).

129. This rule codifies the notion expressed by one federal judge: "Now the pleadings are restricted to the task of general notice giving and details such as those sought by the motion for more definite statement are to be obtained by the deposition-discovery processes, Rule 26 et seq., F.R.C.P., so amply available." Redfern v. Collins, 113 F. Supp. 892, 897 (E.D. Tex 1953) (Sheehy, J.).

130. *See* Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

131. Pope & McConnico, *supra* note 9, at 22.

exceeds the benefit to be derived is not a novel one. Texas courts, for example, have relied upon such reasoning to level effective criticism at the practice of appealing interlocutory rulings on temporary injunction applications,[132] although such appeals are expressly allowed by statute.[133] Neither should courts avoid reexamination of rudimentary practices when they no longer promote the just and fair resolution of lawsuits. The adherence in Texas to liberalized notice pleading standards raises serious questions about the necessity for devices that test the form of pleadings.

"The ultimate criterion for adoption of a rule change is whether the change will promote a better administration of justice."[134] Rightfully, those on whom our supreme court relies to investigate, debate, and propose procedural reforms actively solicit suggested improvements in Texas procedure.[135] In this spirit, the author suggests that the Texas Supreme Court and its advisors reexamine the viability of the special exception practice in light of the policy and practical questions raised in this Article and consider promulgating salutary alternatives.

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132. *See* Reeder v. Intercontinental Plastics Mfg. Co., 581 S.W.2d 497, 499 (Tex. Civ. App.—Dallas 1979, no writ); Town Plaza Fabrics, Inc. v. Monumental Properties of Texas, Inc., 544 S.W.2d 775, 776 (Tex. Civ. App.—Dallas 1976, no writ); Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684, 689 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). In Charter Medical Corp. v. Miller, 547 S.W.2d 77 (Tex. Civ. App.—Dallas 1977, no writ), Justice Robertson observed:

> [T]his appeal, like many other temporary injunction appeals, appears to be entirely unnecessary . . . . We see no reason why the case could not have been prosecuted to final judgment in less time than that required by this interim interlocutory appeal, which decides nothing except whether the status quo should be preserved pending trial on the merits.

*Id.* at 79. Indeed, Chief Justice Pope has characterized two particular rules of civil procedure promulgated in 1941, TEX. R. CIV. P. 383 and 474, as being "uninstructive" and affording "little guidance to the bench and bar." Pope & McConnico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 521 (1980).

133. TEX. REV. CIV. STAT. ANN. art. 4662 (Vernon Supp. 1982-1983).

134. O'Connor, *How You Can Change a Texas Rule of Civil Procedure*, 41 TEX. B.J. 1073, 1075 (1978).

135. *Id.*