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THE PETITION UNDER THE NEW PLEADING CODE

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In 1984 the Oklahoma legislature adopted a new pleading code that applies to civil actions in Oklahoma courts except where a statute prescribes a different procedure.¹ This code is based on Federal Rules 1 through 25, although there are some differences between the Federal Rules and the Oklahoma provisions. Provisions in the new code that are the same as a federal rule must be interpreted in the same manner as the federal courts have interpreted the federal rule because the Oklahoma Supreme Court has held that a statute that is copied from another jurisdiction must be interpreted the same as it was interpreted by the highest court of the jurisdiction from which it was copied.²

Stating a Right to Relief

It is often stated that the Federal Rules authorize notice pleading, but this phrase is misleading. The phrase "notice pleading" may be used to distinguish the federal system of pleading from the system that was authorized by the Field Code. Also, this phrase emphasizes that the Federal Rules do not require a plaintiff to plead ultimate facts, but it does not indicate what a plaintiff must plead. "This term [notice pleading], which was rejected by the rulemakers and never employed by them, is prejudicial to a proper operation of federal procedure,"³ because some litigants assume that a petition is sufficient if it notifies the adverse party that he is being sued. Such an assumption is incorrect because a petition in a federal court must do more. The summons notifies the defendant that he is being sued, but the petition must give the defendant notice of the circumstances, occurrences, and events that entitle the plaintiff to relief.⁴ Requiring the petition to contain this information should avoid the trial of frivolous claims, which outweighs the notice pleading function of the Federal Rules.⁵

The new Pleading Code provides that a petition shall contain a short and

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1. 12 OKLA. STAT. §§ 2001 through 2027 (Supp. 1984), which will be referred to as Code, with the section number.

2. *Atlantic Richfield Co. v. State*, 659 P.2d 930, 934 n.7 (Okla. 1983); *Knox v. McMillan*, 272 P.2d 1040, 1043 (Okla. 1954).

3. C. WRIGHT, FEDERAL COURTS § 68 at 443 (4th ed. 1983).

4. FEDERAL RULES ADVISORY COMM. REPORT, 1955; 2A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.01[3] [hereinafter cited as MOORE].

5. *Cardio-Medical Assoc., Ltd. v. Crozier-Chester Medical Ctr.*, 536 F.2d 1065, 1070-72

plain statement of the claim showing that the plaintiff is entitled to relief.⁶ Thus, it should disclose the existence of the necessary elements of a legally recognized claim or cause of action. In *Davis v. Passman* the United States Supreme Court stated:

While the rules have substituted "claim" or "claim for relief" in lieu of the older and troublesome term "cause of action," the pleading still must state a "cause of action" in the sense that it must show "that the pleader is entitled to relief." It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery.⁷

However, a plaintiff does not have to "set out in detail the facts upon which he bases his claim,"⁸ but his petition "must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial."⁹ Even conclusions of law that are informative are sufficient.¹⁰

Although plaintiff's allegations must show that he has a right to relief under some legal theory,¹¹ the plaintiff does not have to plead the law on which he relies. A plaintiff must show that he is the real party in interest, but he does not have to show the capacity or the legal existence of either party. However, if a party is suing or being sued in a representative capacity, this should be shown in the title of the action.¹²

It is not necessary to show that venue is properly laid or that the court can obtain jurisdiction over the defendant, but if a long-arm statute must be used to serve the defendant, the plaintiff should plead facts that show such service is proper.¹³

(E.D. Pa. 1982) ("[E]ven the liberality of notice pleading has its limits."); *City of Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1263 (S.D. Fla. 1980).

6. Code, § 2008(A)(1).

7. 442 U.S. 228, 237 n.15 (1979). *Accord*, *Hungate v. United States*, 626 F.2d 60, 62 (8th Cir. 1980) (the Federal Rules do not require fact pleading, but the plaintiff must show the prima facie elements of his claim). Judge Clark, the Reporter for the Federal Rules Advisory Committee, stated that "notice should be given of all the operative facts going to make up the plaintiff's cause of action." C. CLARK, *CODE PLEADING* 240 (2d ed. 1947).

8. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

9. C. WRIGHT & A. MILLER, 5 *FEDERAL PRACTICE AND PROCEDURE* § 121.6 (1969) [hereinafter cited as *WRIGHT & MILLER*]. See *Colon-Rivera v. Puerto Rico Dep't of Social Servs.*, 736 F.2d 804, 807 (1st Cir. 1984).

10. *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 188-89 (1954). In *Jones v. Community Redev. Agency*, 733 F.2d 646 (9th Cir. 1984), the court dismissed the action because the conclusions were unsupported by any facts.

11. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984).

12. Code, § 2009(A); § 2010(A).

13. See *Roberts v. Jack Richards Aircraft Co.*, 536 P.2d 353 (Okla. 1975) (such facts must appear in the record).

A Short, Concise, and Direct Statement

Section 2008 provides that a pleading shall contain a short and plain statement of the claim¹⁴ and that each averment shall be simple, concise, and direct.¹⁵ The Oklahoma Pleading Code forms illustrate the simplicity and brevity with which a claim or cause of action may be stated,¹⁶ although more complicated cases may require additional allegations. For instance, Oklahoma Form 8 contains the necessary allegations for an action for damages for the negligent injury to a person on a public way, but if the injury occurs on private property, more must be alleged to show a duty on the part of the defendant.¹⁷ "Where the injury and its cause are not obvious, the plaintiffs must plead their existence in their complaint with a fair degree of specificity."¹⁸

When ruling on an objection to a petition, the petition should not be dismissed or stricken merely because of its length; rather, the court should consider whether it is clear and not repetitious. Thus, although a plaintiff alleges evidence, a motion to dismiss should not be granted if the allegations provide a better understanding of the claim asserted. On the other hand, where the evidentiary allegations are tediously long or are prejudicial, the motion should be granted.¹⁹ Similarly, where a petition is so verbose or confusing that it is difficult to determine the plaintiff's contentions, it may be dismissed or stricken for failure to comply with section 2008(A) and (E) on motion of the defendant,²⁰ or on the court's own motion. "The law does not require nor does justice demand, that a judge must grope through two thousand pages of irrational, prolix and redundant pleadings, containing matters foreign to the issue involved. . . in order to determine the grounds of petitioner's complaint."²¹ However, the plaintiff should be given leave to amend.²² If he fails to amend his petition or if the amended petition fails to cure the defect, the action should be dismissed with prejudice.²³ A court may even

14. Code, § 2008(A)(1).

15. *Id.* § 2008(E)(1).

16. See Appendix of Forms, § 2027. One court complained that attorneys were not following the forms. "Attorneys, unable or unwilling to shed the influence of common law pleading still devote paragraphs to what could well be pleaded in words." *Johns-Mansville Sales Corp. v. Chicago Title & Trust Co.*, 261 F. Supp. 905, 908 (N.D. Ill. 1966).

17. CLARK, *supra* note 7, at 298.

18. *Biszko v. RIHT Fin. Corp.*, 102 F.R.D. 538, 541 (D.R.I. 1984).

19. *Mitchel v. Hart*, 41 F.R.D. 138 (S.D.N.Y. 1966).

20. *Temperato v. Rainbolt*, 22 F.R.D. 57 (E.D. Ill. 1958) (dismiss answer for gross violation of rule 8). In *Wallach v. City of Pagedale, Mo.*, 359 F.2d 57 (8th Cir. 1966), the action was dismissed for failure to state a claim, but the dismissal was affirmed on the ground that the complaint failed to comply with Federal Rule 8(a). In *Boruski v. Stewart*, 381 F. Supp. 529 (S.D.N.Y. 1974), the court dismissed the complaint on the ground that it was redundant and confusing although it was a *pro se* action.

21. *Passic v. State*, 98 F. Supp. 1015, 1016-17 (E.D. Mich. 1951). The report states: "No appearance for the defendant."

22. *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979); *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972); *Koll v. Wayzata State Bank*, 397 F.2d 124 (8th Cir. 1968); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964).

23. *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981); *Corcoran v. Yorty*,

dismiss an action with prejudice on its own motion where the complaint is incomprehensible and confusing and the plaintiff fails to comply with the court's order to clarify the legal issues involved.²⁴

Section 2011 provides that a petition containing scandalous or indecent material may be stricken. This is desirable where the whole petition contains objectionable allegations,²⁵ but where only certain phrases are objectionable the whole petition should not be stricken. Nothing in the Oklahoma Code authorizes the striking of redundant, immaterial, impertinent, or scandalous allegations from a pleading on motion of a party,²⁶ but neither does anything in the Code prevent a court from striking scandalous or indecent allegations on its own motion. Since the court could strike the whole pleading, the offending party should have no reason to object if the court prefers to strike certain allegations. However, the appropriate time to delete scandalous or indecent material would be at the pretrial conference where the court could strike such allegations on the suggestion of a party or on its own motion. A separate hearing before the pretrial conference is undesirable because it would delay the trial of the action. Even if the objectionable material is not deleted, neither party would be prejudiced because the pleadings should not be submitted to the jury and allegations in the pleadings should not be included in the instructions.²⁷

Separate Paragraphs or Counts

A plaintiff's averments should be set forth in numbered paragraphs, and each paragraph should be limited to a single set of circumstances.²⁸ Thus, facts that support alternative theories or grounds for relief should be stated in separate paragraphs.²⁹ "Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection."³⁰ Ordinarily, it is not necessary to state alternative

347 F.2d 222 (9th Cir. 1965) (amended complaint "is so verbose, confused and redundant that its substance, if any, is well disguised"); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964) (fail to amend); *Maddox v. Shroyer*, 302 F.2d 903 (D.C. Cir. 1962).

24. *Burgs v. Sissel*, 745 F.2d 526 (8th Cir. 1984) (pro se plaintiff).

25. In *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953), the court struck the complaint on its own motion because it contained libelous, scandalous, vituperative, and impertinent allegations.

26. The language in Federal Rule 12(f) authorizing a motion to strike such allegations is not included in section 2012(D). If redundant or irrelevant allegations make a pleading ambiguous or confusing, the pleading may be stricken on motion of a party or the court because it violates section 2008(A) and (E).

27. OKLA. DIST. CT. R. 28. See *Lambard-Hart Loan Co. v. Smiley*, 115 Okla. 202, 242 P. 212 (Okla. 1925).

28. Code, § 2010(B); *Foltz v. Moore McCormick Lines*, 189 F.2d 537 (2d Cir. 1951). See the Oklahoma forms in section 2027.

29. A plaintiff may plead and rely on inconsistent legal theories, and every theory that is supported by evidence must be submitted to the jury. Code, § 2008(E)(2).

30. *Vigor v. Chesapeake & Ohio Ry.*, 101 F.2d 865, 869 (7th Cir. 1939). In *Hutchinson v. Roman*, 44 F.R.D. 242 (W.D. Mich. 1968), the court denied a motion to separately state different theories because the complaint was not ambiguous.

legal theories in separate counts where the plaintiff has only one cause of action, but where separation would facilitate the presentation of the claim, such as where the law applicable to each theory is different, separate counts should be used.³¹ "Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts."³²

Separate claims or causes of action should be stated in separate counts whenever separation facilitates the clear presentation of the matter set forth.³³ It would seem that a clear presentation of an action would require that separate claims or causes of action should always be stated in separate counts.

Where a petition is ambiguous or where the presentation of the action would be difficult because alternative theories or separate claims have been commingled, the defendant should move to have them separately stated,³⁴ but motions to strike the petition or to dismiss the action have been used.³⁵ In *Porto Transport, Inc. v. Consolidated Diesel Electric Corp.*,³⁶ the court stated that a motion to strike defenses that were not separately stated, as required by Federal Rules 8(e) and 10(b), should be treated as a motion to separately state the defenses. The court then granted the motion. Regardless of the motion used, if granted, it should be granted with leave to amend, and the action should be dismissed only if the plaintiff fails to amend his petition.

Pleading Fraud or Mistake

Section 2009(B) of the Pleading Code provides that averments of fraud or mistake shall state with particularity the circumstances constituting the fraud or mistake, but malice, intent, knowledge, and other conditions of the mind of a person may be averred generally.³⁷ Conclusory allegations that defendant's conduct was fraudulent or deceptive are not enough.³⁸ Although fraud or mistake must be set out in more detail than is required for the rest of

31. *Barnard v. Pennsylvania Boiler Co.*, 32 F.R.D. 58 (E.D. Pa. 1962) (should separately state negligence and breach of warranty). In *Sherman v. Renth*, 22 F.R.D. 59 (E.D. Ill. 1957), the court stated that negligence and breach of warranty should be separately stated because they involve different legal principles. It said that there were two causes of action, but since there was only one wrongful act, they constituted alternative theories for relief, not two causes of action. However, requiring a separate statement of the different theories is proper.

32. *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 392 (1950).

33. Code, § 2010(B); *Moffett v. Commerce Trust Co.*, 75 F. Supp. 303 (W.D. Mo. 1947).

34. *Hutchinson v. Roman*, 44 F.R.D. 242 (W.D. Mich. 1968).

35. *Sherman v. Renth*, 22 F.R.D. 59 (E.D. Ill. 1957) (motion to strike); *Moffett v. Commerce Trust Co.*, 75 F. Supp. 303 (W.D. Mo. 1947).

36. 19 F.R.D. 256 (S.D.N.Y. 1956).

37. This requirement applies whether it is the plaintiff's or the defendant's conduct that is involved. See § 2027 Form 6. However, this provision does not apply if the fraudulent person is not a party to the action.

38. *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 114 (2d Cir. 1982). An averment that the defendant used the mails to defraud is not sufficient. *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1537 (W.D. Pa. 1984).

the petition, section 2009(B) and section 2008(A) and (E) must be read together.³⁹ Thus, a plaintiff should not plead his evidence.⁴⁰

What must be alleged will, of course, depend on the kind of fraud or mistake involved. However, it is generally stated that where misrepresentations are alleged the pleader must state the time and place that the statement was made, the identity of the maker, the contents of the statement, in what respect it was false or misleading, and the manner in which the statement was relied upon by the plaintiff.⁴¹ Where the plaintiff alleges fraud on the part of two or more defendants, he may not rely on blanket allegations that apply to all defendants, but he must specify the circumstances that apply to each defendant.⁴²

Allegations made on information and belief do not satisfy the specificity requirement unless the facts upon which the belief is based are also alleged.⁴³ In addition, allegations on information and belief are permitted as to matters that are within the opposing party's knowledge, but again, the allegations must be accompanied by a statement of the facts upon which the belief is founded.⁴⁴

The federal courts often state that the failure to plead fraud or mistake with specificity constitutes a failure to state a cause of action, but other cases have held that a defendant may move to have the petition dismissed on the ground that fraud is not alleged with specificity.⁴⁵ The name of the motion is unimportant provided that the grounds on which the defendant is relying are clear. If the court grants the defendant's motion, the petition should be dismissed with leave to amend.⁴⁶ Where the petition is amended but the defect has not been cured, the action may be dismissed with prejudice.⁴⁷ The failure to aver fraud with particularity is waived if the defendant does not object until after the trial is completed.⁴⁸ However, if the complaint states a claim

39. Carrigan v. California State Legislature, 263 F.2d 560 (9th Cir. 1959).

40. Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 377 (2d Cir. 1974).

41. St. Louis Home Insulators, Inc. v. Burroughs Corp., 597 F. Supp. 100 (E.D. Mo. 1984); Zuckerman v. Harnischfeger Corp., 591 F. Supp. 112 (S.D.N.Y. 1984); Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235 (S.D.N.Y. 1984). Where a plaintiff must show an intent to deceive, he must allege specific acts from which an intent to deceive or defraud may be inferred. *E.g.*, *In re Am Int'l, Inc. Securities Litigation*, 597 F. Supp. 1117 (S.D.N.Y. 1984); *Deutsch v. Flannery*, 597 F. Supp. 917 (S.D.N.Y. 1984). In *Fein v. Shearson Hayden Stone, Inc.*, 461 F. Supp. 137, 142 (S.D.N.Y. 1978), the court held that an allegation that the defendant entered into unauthorized trades was too vague, speculative, and conclusory. The plaintiff should show what transactions were unauthorized and why they were alleged to be unauthorized.

42. Antinore v. Alexander & Alexander Servs., Inc., 597 F. Supp. 1361 (D. Minn. 1984); *Currie v. Cayman Res. Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984).

43. Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 (2d Cir. 1974); *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972).

44. *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972).

45. *Christidis v. First Pa. Mort. Trust*, 717 F.2d 96 (3d Cir. 1983); *Deutsch v. Flannery*, 597 F. Supp. 917 (S.D.N.Y. 1984); *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 810 (D. Colo. 1983).

46. *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 13 (1st Cir. 1977).

47. *Decker v. Massey-Ferguson Ltd.*, 681 F.2d 111 (2d Cir. 1982); *St. Louis Home Insulators, Inc. v. Burroughs Corp.*, 597 F. Supp. 100 (E.D. Mo. 1984).

48. *Payne v. United States*, 247 F.2d 481 (8th Cir. 1957).

for relief independent of fraud, the court may adjudicate the controversy without considering acts of fraud that are not particularized.⁴⁹

Demand for Relief

A petition should contain a demand for the relief to which the plaintiff deems himself entitled,⁵⁰ but a separate prayer for relief for each count in a petition is not necessary.⁵¹ A plaintiff may demand relief in the alternative, or he may demand several different types of relief. Also, he should request costs and, where appropriate, interest and attorney fees.

The prayer for relief is not part of the statement of the plaintiff's claim or cause of action. Therefore, the petition should not be dismissed or stricken where a plaintiff demands the wrong relief or too much relief.⁵² Moreover, a court should not hear a motion to strike the prayer for relief or part thereof before the pretrial conference. Rather than delaying the trial of the action by hearing such a motion, the court should consider this issue at the pretrial conference.⁵³

A default judgment shall not be different in kind from or exceed in amount the relief prayed for in the demand for judgment, but where the defendant appears, the plaintiff is not limited by his demand for relief. He may recover the relief to which he is entitled.⁵⁴ Thus, if the action is for a money judgment, the plaintiff can recover more than he requested in his petition.⁵⁵

Section 2011 provides that the petition must be signed by the attorney of record if there is one. If the petition is not signed, it may be stricken,⁵⁶ although a court should permit a pleading to be signed rather than striking it.⁵⁷

Testing Plaintiff's Right to Relief

A defendant may object to a petition on the ground that it fails to state a claim upon which relief can be granted either in his answer or in a motion that is made before his answer is filed.⁵⁸ The motion performs the function of the Field Code demurrer,⁵⁹ although the test that is used to determine if

49. *Ruffin v. Nat'l R.R. Adj. Bd.*, 368 F. Supp. 990, 996 n.5 (E.D. Pa. 1973).

50. Code, § 2008(A)(2).

51. *Concerned Tenants Ass'n v. Indian Trails Apts.*, 496 F. Supp. 522, 525 (N.D. Ill. 1980).

52. *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945); *Rank v. Krug*, 90 F. Supp. 773, 784 (S.D. Cal. 1950).

53. *But see Lewis v. Local 100, Laborers' Int'l*, 750 F.2d 1368, 1381 n.19 (7th Cir. 1984); *Harvey Alum. v. International Longshoremen's & Warehousemen's Local 8*, 278 F.2d 63 (9th Cir. 1960).

54. Code, § 2004(B). This provision is copied from FED. R. CIV. P. 54(c). *See Dotschay v. National Mut. Ins. Co.*, 246 F.2d 221 (5th Cir. 1957).

55. *Riggs, Ferris & Geer v. Lillibridge*, 316 F.2d 60 (2d Cir. 1963).

56. *United States v. Philadelphia Health Mgt. Corp.*, 519 F. Supp. 818, 826 n.9 (E.D. Pa. 1981). Section 2011 is the same as Federal Rule 11 was before 1983.

57. *Holley Coal Co. v. Globe Indem. Co.*, 186 F.2d 291, 295 (4th Cir. 1950).

58. Code, § 2012(B)(6).

59. *Orwick v. City of Seattle*, 37 Wash. App. 594, 692 P.2d 793, 797 (1984). *See* 5 WRIGHT & MILLER, *supra* note 9, § 1196, at 49-50.

a petition is sufficient has been changed. Under the new Code, a plaintiff must show a right to relief rather than state facts sufficient to constitute a cause of action. A petition fails to show a right to relief where it fails to show either specifically or by implication all the essential elements of the plaintiff's claim or where it shows the existence of an affirmative defense.⁶⁰

If a defendant enters an appearance as authorized by section 2012(A), he waives his right to object to the sufficiency of the petition, but a defendant who does not enter an appearance can, in a pre-answer motion, move to dismiss the action on the ground that it fails to state a claim upon which relief can be granted. Should the defendant fail to include this ground in a pre-answer motion, he waives his right to test the sufficiency of the petition at a later time. However, if the defendant objects to the sufficiency of the petition in his answer, although he filed a motion which did not raise this issue, the untimeliness of defendant's objection is waived if the court considers the sufficiency of the petition without objection from the plaintiff.⁶¹

If the defendant does not file a pre-answer motion, he can object to the sufficiency of the petition in his answer. If this objection is not included in his answer, the defendant cannot thereafter object to the sufficiency of the petition.⁶² The sufficiency of the petition cannot be tested by a motion for judgment on the pleadings because the new Code does not authorize such a motion⁶³ and Oklahoma District Court Rule 4(1) prohibits the use of motions for judgment on the pleadings. Also, this rule prohibits parties from objecting at the commencement of the trial to the introduction of any evidence as a method of testing the sufficiency of the pleadings.

A motion for a summary judgment may not be used to test the sufficiency of a pleading; it may be used only to test the sufficiency of a claim or defense based on a consideration of the evidentiary-type materials that are available. Thus, if the evidentiary-type materials show that a plaintiff has a claim for relief, a motion for summary judgment should not be granted even though the petition is insufficient.⁶⁴ "[I]t will be feasible and desirable to treat the pleading as though it were amended to conform to the facts set forth in the affidavits."⁶⁵ Where no evidentiary-type materials are available, a motion for summary judgment should be dismissed without a hearing. In federal courts the motion would be treated as a motion for judgment on the pleadings, but this would be inappropriate in Oklahoma because motions for judgment on the pleadings are not available under the new Code. Thus, under the new Pleading Code, a defendant's ability to question the sufficiency of the petition is more limited than it is under the Federal Rules.⁶⁶ However, nothing

60. *E.g.*, *Duncan v. West Virginia*, 597 F. Supp. 1195 (S.D. W. Va. 1984).

61. *Cf.* *Beacon Enter., Inc. v. Menzies*, 715 F.2d 757, 768 (2d Cir. 1983).

62. Code, § 2012(F)(1).

63. FED. R. CIV. P. 12(c), which provides for motions for judgment on the pleadings, was not included in the Oklahoma Code.

64. *Freeman v. Marine Midland Bank-New York*, 494 F.2d 1334, 1338-39 (2d Cir. 1974).

65. 6 MOORE, *supra* note 4, ¶ 56.10.

66. FED. R. CIV. P. 12(h)(2) permits a defendant to test the sufficiency of a complaint before or during the trial on the merits.

in the Code precludes a defendant from questioning the sufficiency of the plaintiff's evidence at trial.

Although a defendant's ability to test the sufficiency of a petition is limited, a court may dismiss an action on its own motion at any time if the petition is insufficient.⁶⁷ However, the court should give the plaintiff a chance to be heard before the action is dismissed.⁶⁸ If the petition shows that the plaintiff does not have a right to relief and that the defect could not be cured by an amendment, the action should be dismissed with prejudice.⁶⁹ If the petition fails to aver an essential element of the plaintiff's claim and if it is possible that the defect could be cured, the dismissal should be with leave to amend. On the other hand, if an affirmative defense appears on the face of the petition, such as the fact that the statute of limitations has run, the court should not dismiss the petition because the defendant may wish to waive the defense. A court may dismiss an action on its own motion at the conclusion of the pretrial conference where there are no triable issues of fact.⁷⁰

A motion to dismiss on the ground that the petition fails to state a claim upon which relief can be granted shall state separately each omission or defect in the petition, and a notice of the hearing of the motion should be attached.⁷¹ A motion that does not specify the defects or omissions on which the defendant is relying shall be denied without a hearing, and the defendant is required to answer within twenty days after notice of the court's ruling.⁷² At the hearing on the motion a defendant can rely only on grounds stated in his motion, but the court may permit the defendant to assert additional grounds for dismissing the action if leave to amend the motion is sought at least five days before the date set to hear it.⁷³ However, if grounds for dismissing the action that are not included in the motion are heard by the court without objection by the adverse party, the adverse party cannot thereafter object.

Where a defendant moves to dismiss an action on the ground that the petition fails to state a claim upon which relief can be granted and matters outside the petition are presented to and not excluded by the court, the motion shall be treated as one for a summary judgment.⁷⁴ However, before the court rules on the motion, it should require the moving party to file a statement of the material facts that he believes are not in controversy, as required by Oklahoma District Court Rule 13(a). In addition, the court should notify the adverse party that the motion is being treated as a motion for a summary judgment so that he may file a statement showing the issues that are in dispute

67. *Shawnee Int'l, N.V. v. Hondo Drilling Co.*, 742 F.2d 234 (5th Cir. 1984); *Dahlberg v. Becker*, 581 F. Supp. 855, 863 (N.D.N.Y. 1984). See *Products Eng'r Co. v. OKC Corp.*, 590 F. Supp. 547 (E.D. La. 1981).

68. *Dodd v. City of Spokane*, 393 F.2d 330 (9th Cir. 1968).

69. See *Meyers v. Davis*, 467 F. Supp. 8 (E.D. Tenn. 1978) (municipality not liable on the theory of respondeat superior).

70. *Fidelity & Dep. Co. v. Southern Utils.*, 555 F. Supp. 206 (M.D. Ga. 1983).

71. Code, § 2012(C). See Okla. Form 14.

72. Code, § 2012(B). See also *id.* § 2007(B)(1), which provides that a motion shall state with particularity the grounds therefore and the relief sought.

73. *Id.* § 2012(E).

74. *Id.* § 2012(B).

and file materials that show that there is a genuine controversy as to these issues.⁷⁵ Since a defendant can file a motion for a summary judgment at any time after the action has been commenced, the defendant should file such a motion instead of a motion to dismiss when he is relying on a defense that is not on the face of the petition. By moving for a summary judgment, the court could not refuse to consider the evidentiary-type materials.

A defendant may assert in his answer that the petition fails to state a claim upon which relief can be granted, but the Code does not specifically provide that the answer shall state with particularity the omissions and defects on which the defendant is relying. However, Oklahoma Form 15 shows that a general objection is not sufficient and that the defects should be separately stated. The Code does not provide that the defendant can add additional defenses or objections to his answer before the hearing, but subsection E of section 2012 should be interpreted as applying whether the defendant raises his defenses and objections in a motion or in his answer. A notice of the hearing on defenses and objections that are raised in the answer should be attached to the answer.⁷⁶

An objection to the sufficiency of a petition, whether raised in a motion or in the answer, may be granted as to part of a petition and denied as to the rest.⁷⁷ One case holds that where two theories of recovery are stated in one count and the defendant believes that one theory is not sufficient, he may move to strike the allegations that relate to the insufficient theory.⁷⁸ However, it is immaterial whether the motion is called a motion to strike or a motion to dismiss so long as the grounds on which the party is relying are stated.

Where a defendant objects to the sufficiency of a petition either by a motion or in the answer, the well-pleaded allegations in the petition are deemed to be true and are construed liberally in favor of the plaintiff. All reasonable inferences that may be drawn from the allegations should be considered by the court,⁷⁹ and a court should not state that a petition is insufficient merely because it believes that the action is without merit. If a petition shows that the pleader is entitled to relief, the action should not be dismissed unless it is clear that the plaintiff cannot prove a right to recover. In *Scheuer v. Rhodes* the Supreme Court stated that:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plain-

75. *Court v. Hall County*, 725 F.2d 1170 (8th Cir. 1984); *Beacon Enter., Inc. v. Menzies*, 715 F.2d 757 (2d Cir. 1983). In *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852, 854 (C.D. Cal. 1984), no formal notice was necessary because the adverse party already had notice that the motion would be treated as a motion for a summary judgment.

76. See Code, § 2012(c).

77. *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111 (2d Cir. 1984). See Code, § 2008(E)(2). See also OKLA. DIST. CT. R. 4(j).

78. *Smith v. Pennsylvania Cent. Airlines Corp.*, 76 F. Supp. 940 (D.C. Cir. 1948).

79. *Davidson v. Brady*, 559 F. Supp. 456, 459 (W.D. Mich. 1983).

tiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.⁸⁰

In *Conley v. Gibson*, where the Court stated that the complaint was adequate, it also said that a “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁸¹ This statement does not indicate, and it was not intended to indicate, what should be alleged in a complaint or when a complaint should be deemed to be sufficient. In a subsequent part of the opinion, the Court indicated what should be alleged in a complaint when it stated that a complaint must show the grounds upon which the plaintiff’s claim rests. Because the above quotation from the *Conley* case has often been interpreted as indicating when a complaint is sufficient, its usefulness has been questioned.⁸²

80. 416 U.S. 232, 236 (1974).

81. 355 U.S. 41, 45-46 (1957).

82. *Sutliff, Inc. v. Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984). See WRIGHT, *supra* note 3, § 68 at 443.

