

# Federal notice pleading vs. state fact pleading

Today's case provides a helpful discussion illustrating the differences between federal court "notice" pleading under Rule 8 (Federal Rules of Civil Procedure Rule 8) and state court "fact" pleading under section 2-601 of the Illinois Code of Civil Procedure (735 ILCS 5/2-601). *Bahrenburg v. AT&T Broadband LLC*, 425 F.Supp.2d 912 (N.D.Ill. 2006).

Magistrate Judge Arlander Keys, in ruling on a third-party defendant's motion to dismiss the third-party complaint for contribution for failure to state a claim, ruled that the third-party complaint for contribution met the "notice" pleading test of Rule 8(a) (a "short plain statement of the claim"). He noted that it likely would not have passed muster in state court requiring "fact" pleading (section 2-601 requires "substantial allegations of fact necessary to state any cause of action").

Laura Bahrenburg, an independent contractor hired by Comcast Corporation to film a high school football game, sued Comcast Corporation for personal injuries she sustained when a football player ran into her as she stood near the end zone. In turn, Comcast filed a third-party complaint against School District U-46, owner of the football field, Memorial Field at Larkin High School in Elgin.

Bahrenburg's complaint said that when the football player collided with her, she fell to the ground and hit her head on the surface of the athletic track next to the football field and suffered a brain injury.

Comcast's third-party complaint seeking contribution charged that the district was guilty of willful and wanton conduct for: placing the football and track fields so close to one another; permitting Bahrenburg to stand near the end zone; and failing to warn Bahrenburg of the danger of a collision.

The district's motion to dismiss asserted section 3-109(a), hazardous recreational activity immunity of the Tort Immunity Act (745 ILCS 10/3-109(a)) and the lack of "willful and wanton" conduct which is an exception to the immunity.

Keys denied the district's motion to dismiss, holding the third-party complaint met the liberal pleading standard of Rule 8(a) because it contained a "short and plain statement of the claim" against the district.

Keys began his discussion of the district's motion to dismiss, setting out the test used to determine the sufficiency of a complaint in federal court:



## Federal Courts

By Jay S. Judge

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"The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. *Pelfresne v. Stephens*, 35 F.Supp.2d 1064 (N.D.Ill. 1999) (citing *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990)). In ruling on a motion to dismiss, the court construes the complaint's allegations in the light most favorable to the plaintiff, and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. The allegations of a complaint should not be dismissed for failure to state a claim 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Nonetheless, to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of a cause of action.

"A federal court sitting in diversity applies the substantive law of the state in which the suit is brought. Neither party disputes that Illinois substantive law and federal procedural law apply in this case."

The court then set forth the district's position for dismissal:

"The district argues that Comcast's third-party complaint is barred by Section 3-109(a) of the Tort Immunity Act, which provides that:

'Neither a local public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place

of risk, or having the ability to do so failed to leave, for any danger or injury to property or persons arising out of that hazardous recreational activity. (745 ILCS 10/3-109(a) (West 2006)).'

"The district contends that Bahrenburg's injury satisfies all of the criteria of the Tort Immunity Act: Bahrenburg was a spectator, and was injured while standing near the end zone at a football game, which she should have known created a substantial risk of injury. Notably, courts have recognized football as a hazardous recreational activity under the Tort Immunity Act. See, e.g., *McGurk v. Lincolnway Cmty. Sch. Dist.* No. 210, 287 Ill.App.3d 1059, 679 N.E.2d 71 (3d Dist. 1997)."

Noting that Comcast contended that it had pleaded willful and wanton conduct, an exception to section 3-109(a) immunity, Keys began his discussion of whether the third-party complaint's assertion of "willful and wanton conduct" was sufficient to state a claim:

"With regard to the 'willful and wanton' exception, the district argues that the Illinois courts have repeatedly directed that 'where there are no allegations that a public entity engaged in an intentional act or knew of other injuries caused by a purported dangerous condition, its conduct cannot be characterized as willful and wanton.' *Bialek v. Moraine Valley Cmty. Coll. Sch. Dist. No. 524*, 267 Ill.App.3d 857, 642 N.E.2d 825 (1st Dist. 1994). The district further argues that the Illinois appellate court's decision in *Ward v. Community Unit School District No. 220*, 243 Ill.App.3d 968, 614 N.E.2d 102 (1st Dist. 1993) — following a remand from the Illinois Supreme Court — forecloses any possibility that the district could be found to have engaged in willful and wanton misconduct, merely for locating two athletic fields in close proximity to one another."

Keys reviewed the *Ward* case relied upon by the district as illustrating that the closeness of two football fields to one another did not constitute willful and wanton conduct:

"In *Ward*, a minor student brought an action alleging willful and wanton misconduct on the part of a school district, stemming from injuries he suffered as a result of a collision during a supervised sporting event, in which two adjacent football fields were in use simultaneously. The plaintiff, eight years old at the time of the accident, was seated in the end zone of football

field (the 'plaintiff's field'), watching a flag football game being played as part of his physical education class. At the same time, a middle school class was playing football on a field situated end to end with the plaintiff's field. A student from the middle school ran through his end zone in an effort to catch a pass, and collided with the plaintiff, fracturing his skull. The plaintiff sued, alleging that the school district was guilty of willful and wanton misconduct when it designed the fields to be too close together.

"In reviewing the trial court's dismissal of this count of the plaintiff's complaint, the appellate court acknowledged that the question of whether misconduct is willful and wanton generally is reserved for the trier of fact. However, the court further stated that 'the court may determine the issue if a determination that the alleged acts constitute willful and wanton misconduct cannot stand.' The court explained that "[t]o support a cause of action for willful and wanton misconduct, plaintiffs must allege facts which if proven exhibit a deliberate intention to harm or an utter indifference or conscious disregard for [plaintiff's] safety." *Ward* at 106. (quoting *Gara v. Lomonaco*, 199 Ill.App.3d 633, 557 N.E.2d 483 (1990)). Because the court concluded that the misconduct alleged in the plaintiff's complaint could not be found to be of a 'degree necessary to state a cause of action for willful and wanton misconduct,' the appellate court upheld the dismissal."

Commenting that the dismissal of the Comcast third-party complaint might be warranted in state court, but federal "notice" pleading was different, the Court explained:

"This court agrees that dismissal would be appropriate if Comcast's third-party complaint were filed in Illinois state court, because Comcast clearly fails to allege facts demonstrating the requisite degree of intent and misconduct. The court can hardly imagine the clandestine conduct that the district would have to have engaged in if it turns out that the willful and wanton exception applies. But federal notice pleading does not require Comcast to reveal that level of detail at this stage of the proceedings.

Analyzing Comcast's third-party complaint and determining that it met the test for stating a claim under Rule 8 and relying upon the 7th U.S. Circuit

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Court of Appeals's recent decision in *Kolupa*, Keys set forth his analysis and denied the District's motion to dismiss:

"So, while Illinois state law imposes a heightened pleading standard upon plaintiffs alleging that a public entity acted willfully and wantonly, see *Spangenberg v. Verner*, 321 Ill.App.3d 429, 747 N.E.2d 359 (5th Dist. 2001) ('A complaint for willful and wanton misconduct must allege not only duty, breach, and proximate cause, but also that the defendant either intentionally injured the plaintiff or acted in reckless disregard for his safety.'), federal law does not. See Rule 8 Fed.R.Civ.P.

"Viewing Comcast's third-party complaint under federal notice pleading's broad lens, the court concludes that Comcast's bald allegation that the district's willful and wanton conduct gave rise to plaintiff's injury is sufficient to survive the district's motion to dismiss. As Judge [Frank H.] Easterbrook so succinctly explained in *Kolupa v. Roselle Park District*, 438 F.3d 713 (7th Cir. 2006), '[f]ederal complaints plead claims rather than facts.... It is enough to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate.'

"In *Kolupa*, Easterbrook took the trial court to task for dismissing a religious discrimination complaint that failed to allege facts corresponding to each aspect of a prima facie case. Easterbrook warned that "Any district judge (for that matter, any defendant)

tempted to write 'this complaint is deficient because it does not contain ...' should stop and think: What rule of law requires a complaint to contain that allegation?" (*Doe v. Smith*, 429 F.3d 706 (7th Cir. 2005)). The 7th Circuit also rejected the appellee's argument that the plaintiff had pleaded too much, negating his ability to prove discrimination. The court explained that a 'plaintiff only pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits.'

"In the instant case, Comcast has alleged that the district behaved willfully and wantonly. This allegation is sufficient — on a motion to dismiss — to defeat the district's claim of immunity, because the Tort Immunity Act specifically excepts willful and wanton conduct from its scope of protection. Neither Rule 8 nor Rule 9 of the Federal Rules of Civil Procedure, which identifies special pleading matters, require anything more in this case. Moreover, the district has not demonstrated, nor can this court see, that Comcast had pleaded itself out of court; there appears to be no need for Comcast to deny any of its allegations to prevail on its claim against the District.

"The Federal Rules of Civil Procedure dictate the level of specificity required in Comcast's third-party complaint. Rule 8(a) requires only a 'short and plain statement of the claim.' Because Comcast's allegations satisfy this liberal pleading standard, the district's motion to dismiss is denied."