

Studien zum vergleichenden Privatrecht

Studies in Comparative Private Law

Band / Volume 26

**Pleading and Cooperation
in Private-Law Litigation**

Comparing Germany and the United States

Von

Philippe Matthew Roy



Duncker & Humblot · Berlin

PHILIPPE MATTHEW ROY

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To Mom, Dad and Lauren

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Cologne, June 2024

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Abbreviations

1 st Cir.	First Circuit, U.S. Court of Appeals
2d Cir.	Second Circuit, U.S. Court of Appeals
3d Cir.	Third Circuit, U.S. Court of Appeals
4 th Cir.	Fourth Circuit, U.S. Court of Appeals
5 th Cir.	Fifth Circuit, U.S. Court of Appeals
6 th Cir.	Sixth Circuit, U.S. Court of Appeals
7 th Cir.	Seventh Circuit, U.S. Court of Appeals
8 th Cir.	Eighth Circuit, U.S. Court of Appeals
9 th Cir.	Ninth Circuit, U.S. Court of Appeals
10 th Cir.	Tenth Circuit, U.S. Court of Appeals
11 th Cir.	Eleventh Circuit, U.S. Court of Appeals
A.2d	Atlantic Reporter, Second Series
ABA	American Bar Association
Abs.	Absatz (paragraph)
A.L.I.	American Law Institute
App. Div.	Appellate Division
Art.	Artikel (article)
Ass'n	Association
Assoc., Assocs.	Associate, -s
B.C. L. Rev.	Boston College Law Review
B.U. Int'l L.J.	Boston University International Law Journal
B.U.L. Rev.	Boston University Law Review
C.A.D.C.	Court of Appeals of the District of Columbia
Cal.	California, Supreme Court of California
Cal. 3d	California Reports, Third Series
Cal. 4 th	California Reports, Fourth Series
Cal. App.	California Court of Appeal
Cal. App. 3d	California Appellate Reports, Third Series
Cal. App. 4 th	California Appellate Reports, Fourth Series
Cal. App. 1 st Dist.	California Court of Appeal, First District
Cal. App. 2d Dist.	California Court of Appeal, Second District
Cal. App. 4 th Dist.	California Court of Appeal, Fourth District
Cal. App. 5 th Dist.	California Court of Appeal, Fifth District
Cal. App. 6 th Dist.	California Court of Appeal, Sixth District
Cal. Civ. Code	California Civil Code
Cal. L. Rev.	California Law Review
C.D. Cal.	Central District of California, U.S. District Court
Colo.	Colorado, Supreme Court of Colorado
Colo. App.	Colorado Court of Appeals
Colum. L. Rev.	Columbia Law Review
Conn.	Connecticut, Supreme Court of Connecticut

Cornell L. Rev.	Cornell Law Review
Corp.	Corporation
Ct.	Court
Ctr./Ctrs.	Center, -s
D. Colo.	District of Colorado, U.S. District Court
D. Conn.	District of Connecticut, U.S. District Court
D.D.C.	District of Columbia, U.S. District Court
D. Del.	District of Delaware, U.S. District Court
Del.	Delaware, Delaware Supreme Court
Del. Super.	Superior Court of Delaware
Dep.	Department
D. Idaho	District of Idaho, U.S. District Court
D. Kan.	District of Kansas, U.S. District Court
D. Mass.	District of Massachusetts, U.S. District Court
D. Md.	District of Maryland, U.S. District Court
D. Me.	District of Maine, U.S. District Court
D. Minn.	District of Minnesota, U.S. District Court
D. Neb.	District of Nebraska, U.S. District Court
D. Nev.	District of Nevada, U.S. District Court
D.N.H.	District of New Hampshire, U.S. District Court
D.N.J.	District of New Jersey, U.S. District Court
D.S.C.	District of South Carolina, U.S. District Court
Duke J. Comp. & Int'l L.	Duke Journal of Comparative & International Law
D. Utah	District of Utah, U.S. District Court
D.V.I.	District of the Virgin Islands, U.S. District Court
D. Vt.	District of Vermont, U.S. District Court
E.D. Cal.	Eastern District of California, U.S. District Court
E.D. La.	Eastern District of Louisiana, U.S. District Court
E.D. Mich.	Eastern District of Michigan, U.S. District Court
E.D. Mo.	Eastern District of Missouri, U.S. District Court
E.D.N.Y.	Eastern District of New York, U.S. District Court
E.D. Pa.	Eastern District of Pennsylvania, U.S. District Court
E.D. Wis.	Eastern District of Wisconsin, U.S. District Court
F.	Federal Reporter
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
Fed. Appx.	Federal Appendix
Fed. Cir.	Federal Circuit, U.S. Court of Appeals
Fed. Cts. L. Rev.	Federal Courts Law Review
Fla.	Florida, Supreme Court of Florida
Fla. DCA	Florida District Court of Appeal
Fn.	Fußnote (footnote)
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
F.Supp.	Federal Supplement
F.Supp. 2d	Federal Supplement, Second Series

Ga.	Georgia, Supreme Court of Georgia
Geo. J. Legal Ethics	Georgetown Journal of Legal Ethics
Geo. L.J.	Georgetown Law Journal
Harv. L. Rev.	Harvard Law Review
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
Hastings L. J.	Hastings Law Journal
Hofstra Lab. & Emp. L. J.	Hofstra Labor & Employment Law Journal
Hrsg.	Herausgeber (editor)
Ill.	Illinois, Supreme Court of Illinois
Inc.	Incorporated
Ind.	Indiana, Supreme Court of Indiana
Ind. App.	Court of Appeals of Indiana
Indep.	Independent
Ind. L. Rev.	Indiana Law Review
Ins.	Insurance
Int'l	International
Iowa L. Rev.	Iowa Law Review
i. V. m.	in Verbindung mit (in conjunction with)
J. Corp. L.	Journal of Corporation Law
J. Inst. Stud. Leg. Eth.	Journal of the Institute for the Study of Legal Ethics
J. L. & Pol'y	Journal of Law and Policy
Loy. L.A. L. Rev.	Loyola of Los Angeles Law Review
LP, L.P.	Limited Partnership
L.R.	Local Rules
Ltd.	Limited
Mass.	Massachusetts, Supreme Court of Massachusetts
M.D. Fla	Middle District of Florida, U.S. District Court
M.D. N.C.	Middle District of North Carolina, U.S. District Court
M.D. Pa.	Middle District of Pennsylvania, U.S. District Court
Mfg.	Manufacturing
Minn.	Minnesota, Supreme Court of Minnesota
Mut.	Mutual
m. w. N.	mit weiteren Nachweisen (with additional sources)
Nat'l	National
N.D. Cal.	Northern District of California, U.S. District Court
N.D. Ga.	Northern District of Georgia, U.S. District Court
N.D. Ill.	Northern District of Illinois, U.S. District Court
N.D. Ind.	Northern District of Indiana, U.S. District Court
N.D. N.Y.	Northern District of New York, U.S. District Court
N.D. Tex.	Northern District of Texas, U.S. District Court
N.D. W.Va.	Northern District of West Virginia, U.S. District Court
N.E.	North Eastern Reporter
N.E. 2d	North Eastern Reporter, Second Series
N.J. Super.	New Jersey Superior Court Reports
No.	Number
Notre Dame L. Rev.	Notre Dame Law Review
Nr.	Nummer (number)

N.W.	Northwestern Reporter
N.W. 2d	Northwestern Reporter, Second Series
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
Nw. J. of Tech. & Intell. Prop.	The Northwestern Journal of Technology and Intellectual Property
N.Y.	New York
N.Y. App. Div.	Supreme Court of New York, Appellate Division
N.Y.L.J.	New York Law Journal
N.Y.S. 2d	New York Supplement Reporter, Second Series
N.Y.U.L. Rev.	New York University Law Review
Ohio App.	Ohio Court of Appeals
Ohio App.2d	Ohio Appellate Reports, Second Series
Or.	Oregon, Supreme Court of Oregon
P.	Pacific Reporter
P.3d	Pacific Reporter Third
Pa. R. Civ. Pro.	Pennsylvania Rules of Civil Procedure
Pub. L.	Public Law
Rev. Code Wash.	Revised Code of Washington
Rich. J. Global L. & Bus.	Richmond Journal of Global Law an Business
Rich. J. L. & Tech	Richmond Journal of Law & Technology
Rn.	Randnummer (margin number)
Rutgers L. J.	Rutgers Law Journal
S.	Seite
S.A.	Société Anonyme
San Diego Int'l L.J.	San Diego International Law Journal
S.C. App.	Court of Appeals of South Carolina
S.Ct.	U.S. Supreme Court
S.D. Cal.	Southern District of California, U.S. District Court
S.D. Fla.	Southern District of Florida, U.S. District Court
S.D. Ill.	Southern District of Illinois, U.S. District Court
S.D. Ind.	Southern District of Indiana, U.S. District Court
S.D. Iowa	Southern District of Iowa, U.S. District Court
S.D. Tex.	Southern District of Texas, U.S. District Court
S.D. N.Y.	Southern District of New York, U.S. District Court
S.E.	South Eastern Reporter
S.E.2d	South Eastern Reporter, Second Series
Seattle Univ. L. R.	Seattle University Law Review
Sec.	Section, Securities
SEC	Securities and Exchange Commission
Serv.	Service
So.	Southern Reporter
So.2d	Southern Reporter, Second Series
Stan. L. Rev.	Stanford Law Review
Stat.	Statute
S.W.	Southwestern Reporter
S.W.2d	South Western Reporter Second
Temp. L. Rev.	Temple Law Review
Tenn. L. Rev.	Tennessee Law Review

Tex.	Texas, Texas Supreme Court
Tex. App.	Texas Court of Appeals
Tex. Int'l L. J.	Texas International Law Journal
Tex. L. Rev.	Texas Law Review
Tex. R. Civ. P.	Texas Rules of Civil Procedure
T.I.A.S.	Treaties and Other International Acts Series
Tul. J. Int'l & Comp.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
U. Chi. L. Rev.	The University of Chicago Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.S., U.S.	United States, United States Reports
U.S.A	United States of America
U.S. App.	United States Court of Appeals
U.S.C	United States Code
v.	versus
Va. Code Ann.	Code of Virginia Annotated
Val. U. L. Rev.	Valparaiso University Law Review
Vand. L. Rev.	Vanderbilt Law Review
Var.	Variante
vgl.	vergleiche (see)
Wash.	Washington, Supreme Court of Washington
Wash. & Lee L. Rev.	Washington and Lee Law Review
Wash. L. Rev.	Washington Law Review
W.D. Mo.	Western District of Missouri, U.S. District Court
W.D. N.Y.	Western District of New York, U.S. District Court
W.D. Pa.	Western District of Pennsylvania, U.S. District Court
W.D. Tenn.	Western District of Tennessee, U.S. District Court
W.D. Tex.	Western District of Texas, U.S. District Court
WL	Westlaw
Wn.2d	Washington Reports, Second Series
WP	Working Paper
Yale L. J.	Yale Law Journal

Introduction

The purpose of civil procedure is to guide the adjudication of cases and implement substantive law in the courts. When a plaintiff files a lawsuit, the plaintiff comes to the court with a plea and allegations, seeking from the court an order of some type for legal relief. To ultimately prevail on her claim, the plaintiff must allege facts and convince the trier-of-fact upon the strength of competent evidence that what she claims happened in the past is true according to the applicable evidentiary standard. Before a case proceeds to evaluating evidence, however, the plaintiff must first convince the court that the allegations in his complaint, assuming them to be true, would entitle him to legal relief in the first place.

Addressing this *threshold question* first primarily serves the interest in orderly and efficient civil adjudication. The examination of the allegations and defenses in this manner, however, is also a matter of good legal reasoning. After all, why should the court take its time to evaluate and rule not only on the plaintiff's evidence, but that of the defendant as well, if no legal relief can be granted even if what the plaintiff claims turns out to be true? Moreover, the court must ensure that the allegations and responses by both parties are factually sufficient to justify the court's eventual order. For the court to move the case forward, one must understand how the parties, and in particular the plaintiff, need to plead its allegations to the court at the outset of the proceedings. In other words, the question arises concerning the quality and content of the allegations which the court requires of the plaintiff – the pleading burden imposed on the plaintiff – to determine the plaintiff has stated a legally cognizable claim.

A significant reason for pursuing this dissertation stems from the author's legal practice in the field of discovery in U.S. civil litigation. An early and particularly impressionable insight from working with German clients and German attorneys on civil cases was their almost instinctual contempt for U.S. discovery procedures. For Americans, as well, the cost to the parties and to society at large dominates criticism of discovery and liberal pleading standards. Beyond the cost issue, however, many Germans express dismay more generally at broad discovery obligations that they perceive unfairly burden defendants in civil proceedings. This criticism is all the more understandable when one learns that German attitudes toward compelling the defendant to participate in civil proceedings are guided by legal principles and a legal culture that gives more weight to considerations such as legal peace (*Rechtsfrieden*) and privacy than to pursuing the objective truth of a plaintiff's civil claim. This, coupled with increased legal protections related to privacy – from the German Data Protection Act to express protection of privacy in the German constitution – explains

heightened German circumspection when it comes to obligating the defendant to participate in civil proceedings.

This dissertation examines how civil courts in both Germany and the United States balance the standard applied to the plaintiff's complaint against imposing cooperation and information-disclosure obligations on the defendant in the evidentiary evaluation stage (*Beweisaufnahme bzw. Beweiswürdigung*) in Germany and *discovery* in U.S. federal courts. A civil court must test whether the plaintiff's pleaded allegations (*das Klägervorbringen*) sets forth enough facts to make out a legally cognizable case. This analysis is particularly important for the purpose of balancing the plaintiff's burden to plead sufficient facts and information with the ensuing obligation imposed on the defendant to cooperate in the case, specifically in cases in which the plaintiff brings forward allegations but does not have access to all of the facts and evidence or is limited to pleading suppositions or facts on information and belief. The dissertation thus compares the stage at which civil courts in both countries examine, in particular, the plaintiff's submission to determine whether she is justified in triggering evidentiary-disclosure obligations.

The underlying normative position of this work is that it is preferable in civil adjudication to erect fewer barriers for plaintiffs at the initial pleading stage of the proceedings that comes before the opportunity to discover evidence, examine witnesses on the record and review documentation from the other party and third parties. This means that, to the extent possible, plaintiffs should have their cases adjudicated on the merits rather than be impeded by formal procedural technicalities. Empirical evidence suggests, though equivocally, that in the aftermath of two important pronouncements by the United States Supreme Court introducing the so-called "plausibility" standard applicable to the plaintiff's complaint, federal courts have dismissed more cases before discovery because plaintiff complaints have failed to comply with the new standard. This development surely pleases critics of discovery, both in Germany and the United States. But one ought not lose sight of the fact that in both countries an important aim of civil procedure is to implement substantive rights.

In Germany it has been said that the purpose of civil procedure and adjudication is the *Verwirklichung des Rechts*, formally translated as the "realization of the law," though one could also say this means making the law a reality and giving life to legal rules through adjudication.¹ In the United States civil adjudication on the merits has been the fundamental notion behind all of modern procedural reform there.² To be sure, formal procedural technicalities are necessary to filter reasonable claims from frivolous ones. As part of this stage in the court's adjudicative function, a formal

¹ Alexander Bruns, *Rechtsverwirklichung als Primärzweck des Zivilprozesses*, ZZPInt 22, 387 (2017); Oskar Bülow, *Gemeines Deutsches Zivilprozeßrecht* 61 (ed. Johann Braun, Mohr Siebeck, 2003) (Bülow goes further in his lecture by saying, "Erst durch die Tätigkeit der Gerichte erhalten die Rechtsregeln Leben").

² § 1220 Statement of the Claim – *Dioguardi v. Durning*, 5 Fed. Prac. & Proc. Civ. § 1220 (4th ed.).

standard applies to the parties' allegations at the outset of a civil case and is the standard by which the parties' pleadings are evaluated.

Both German and U.S. federal civil procedure share the desire (i) to avoid unreasonably overburdening the defendant and (ii) to spare the resources of the judicial system, with the aim of increased efficiency. A balance must therefore be struck between these interests and fairness to the plaintiff. This balance is one of the principal reasons for testing the complaint's sufficiency in terms of both the facts alleged and the applicable legal rules the parties argue the judge must apply based on the parties' respective understandings of the events that transpired. When confronting a defendant with allegations in a formal legal proceeding, it stands to reason that the plaintiff's pleaded allegations must satisfy the judge to a degree of confidence that the cost and expense to the defendant (in both time and money) are reasonable in light of the quality and nature of the plaintiff's initial allegations. For this reason, one must expect from the plaintiff that when she files the complaint she is in possession of facts and evidence of a specific kind, both in terms of quality and quantity, to justify burdening the defendant and upsetting the *status quo*.

With respect to the United States, Congress and the Supreme Court have modified their interpretation of what the complaint's "short and plain statement of the claim showing that the pleader is entitled to relief" means. These changes were meant to address the excesses of burdening the defendant through discovery, as well as the perception of an increase in frivolous claims. It is in part for this reason that comparison below looks to Germany to understand how the standards by which German civil courts examine the plaintiff's initial pleadings to the court and the obligations of the parties to the litigation to cooperate.

The reasonableness of requiring the defendant to disclose information is a concern that significantly motivates the standard by which the plaintiff's complaint is tested as a threshold question in both German civil courts and U.S. federal courts hearing civil claims. Reforms to the German Code of Civil Procedure (hereinafter "Code" or "ZPO") in 2002, such as restricting appellate court de novo review of courts of first instance and a heightened obligation to advise the parties early on of insufficient pleadings, reflect concerns about efficiency and the burdens placed on the courts. The same can be said of a number of efforts since 1995, in particular, to reform the Federal Rules of Civil Procedure ("Federal Rules," "FRCP," "Rules" or "Fed. R. Civ. P."). Further to the former concern, the avoidance of *Ausforschung* – that is, probing or going on a fishing expedition, in Germany supplies the principal reason for requiring the plaintiff's complaint to be legally coherent – that is, that the complaint be *schlüssig*. Allegations made "*ins Blaue hinein*" or "*aufs Geratewohl*"³ are routinely cited in the literature and decisional law as insufficient. If such an allegation is insufficient, the court will not oblige the defendant to disclose information and evi-

³ These idioms can be roughly translated as allegations "out of the blue" or "random, try-your-luck allegations."