

**O Pedido no Sistema da Common Law e o
Princípio da Adstrição**

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2004

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RESUMO

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O autor analisa o pedido no Direito Norte-Americano e no Direito Inglês, que, apesar de suas tradições próprias da *commom-law*, passam a adotar métodos característicos dos países filiados à *civil-law*. A partir dos modelos apresentados em ambos sistemas, inclusive com a possibilidade de formulação simplificada do pedido. Diante destas características próprias dos sistemas, onde há possibilidade de mais de uma forma de pedido, o autor se limitou, no sistema americano, a analisar a *modern pleading*, enquanto no sistema inglês o *personal injury*. Assim sendo, com características distintas do processo civil brasileiro, é importante destacar se há vinculação do juiz ao pedido, no momento do julgamento.

Palavras-chave: processo civil; pedido; julgamento.

[?] Orientador: Prof. Dr. Leonardo Greco – UGF/RJ.

ABSTRACT

ALMEIDA FILHO, José Carlos de Araújo. **O Pedido no Sistema da Common Law e o Princípio da Adstrição.** RIO DE JANEIRO: UGF, 2003. p. (O Pedido no Sistema da Common Law e o Princípio da Adstrição)[?]

The author analyses the request in the North-American and in the English Laws and inspite their own traditions of Common Law they adopted specific methods of countries affiliated to the Common Law. Based on models presented in both systems, including the possibility of a simplified request. Based on their peculiar characteristics of the systems, when there is the possibility of more than one request model, the author limited himself to analyse the modern pleading of the North American system and the personal injury of the English system. With different characteristics of the Brazilian Civil Procedure, it is important to point out whether there is any connection of the Judge with the request at the moment of the trial.

Key words : civil procedure; pleading; judge trial.

[?] Orientador: Prof. Dr. Leonardo Greco – UGF/RJ.

1 INTRODUÇÃO

O presente trabalho é fruto de extensa pesquisa realizada pelo Prof. Dr. Leonardo Greco, juntamente com os alunos do Mestrado e Doutorado em Direito, Estado e Cidadania, na Universidade Gama Filho, do Rio de Janeiro.

Sendo objeto da matéria o *Processo Civil e Acesso à Justiça*, importante destacar o estudo do direito comparado, sob pena de pouco - ou quase nada - conseguirmos entender sobre os grandes sistemas processuais.

Se, por um lado, o Brasil, paulatinamente, absorve algumas regras da *common law*, como é o caso da adoção *abrasileirada* das *class action's*, das *small claim's courts* e de alguns *writ's*, é certo, também, que o sistema anglo-saxônico vem sentindo a necessidade de inserir normas escritas em seus ordenamentos.

Analisando o sistema processual anglo-saxônico podemos observar que seria prudente nosso legislador estar atento aos movimentos de acesso à justiça, desmistificando a figura do pedido, como algo imutável e, raramente, pacificando os conflitos – que é o objetivo maior do processo.

Um pedido estático, impossível de ser modificado, raramente alcança uma sentença que atinja o direito material da parte e satisfaça-lhe a pretensão deduzida em juízo.

Através das normas – hoje codificadas – dos sistemas americano e inglês, podemos chegar a pensar em um pedido mais flexível, a fim de possibilitar uma sentença que atenda aos anseios dos litigantes.

Assim é que o presente trabalho tem por objetivo analisar a diferença entre a *common law* e a *civil law*, a forma do pedido nos países de origem anglo-saxônica e, por fim, como os juízes decidem, com base no princípio da adstrição.

No Brasil a bibliografia é escassa e pouco se discute acerca dos procedimentos próprios da *common law*. Por esta razão, as fontes bibliográficas, em sua grande maioria, foram obtidas através da Internet, em *sites* confiáveis, como os dos governos norte-americano e do Reino Unido, do *American Law Institute* e da *American Bar Association*, além de centros universitários que disponibilizam textos de seus docentes.

Finalmente, em pesquisa realizada pela Internet, em *sites* de diversas Cortes, faremos uma análise dos casos julgados e como funcionam as *pleadings*.

2 BREVE DISTINÇÃO ENTRE *CIVIL LAW* E *COMMON LAW*

A pesquisa desenvolvida no campo do direito comparado não se apresenta tão simples como alguns *positivistas* pensam, ou seja, que basta a análise dos textos legais para se chegar a uma conclusão. É importante a análise de textos doutrinários e busca, sempre que possível, da jurisprudência local.

Tendo em vista a natureza do trabalho ora apresentado, é importante que se faça uma distinção entre o processo na *common law* e o processo na *civil law*, ainda que a temática a ser desenvolvida seja baseada, apenas, no pedido e na sentença da *common law*. A distinção aqui elaborada, em verdade, é de pequena monta, já que este não é o cerne do problema apresentado.

Importante, contudo, definir os ordenamentos jurídicos sob análise. Segundo Steven H. Gifis¹, “*Roman law*² embodied in the Justinian Code (*Codex Justinianus*) and presently prevailing in most Western European States. It is also the foundation of tja law of Loisiaania. Civil law is based on statutes as opposed to court decisions.”

Para a *common law*, GIFIS define como “*the system of jurisprudence, wich originated in England and was later applied in the United States, which is based on judicial precedent rather than statutory laws, which are legislative enactments: it is to be contrasted with civil law.*”

Ainda que o processo da *common law* seja baseado nos precedentes, possuindo grande força as decisões judiciais, a Inglaterra passou a adotar um Código de Processo Civil, enquanto os Estados Unidos passaram a adotar as *Federal Rules of Civil*

¹ GIFIS, Setevn H. *Law Dictionary*. Barron’s, 1996: USA

² N.A. Sistema romano-germânico, ou *civil law*.

Procedure, que não pode ser visualizado como um Código de Processo Civil, propriamente dito.

Uma tendência comum, ainda, é admitir que o processo da *common law* seja todo baseado no julgamento por um Júri, através do sistema do *adversary system*³, o que não era uma verdade absoluta e, agora, com as normas de Processo, tanto na Inglaterra, quanto nos Estados Unidos, menos verdade ainda.

Apesar da Inglaterra ter adotado um código de Processo Civil – *Rules of Civil Procedure* –, o Prof. Dr. José Carlos Barbosa Moreira⁴ afirma ser “*quase irresistível a inclinação para pensar que a Inglaterra, com a adoção de um código uno e abrangente, haja repudiado a tradição do common law e aderido à linhagem européia continental – que se prolongou, ocioso acrescentar, nos países latino-americanos.*”

A grande diferença, pois, a fim de servir de norte ao problema do pedido e a forma como a sentença será prolatada – se sujeita ou não ao princípio da adstrição – é que na *common law* há, evidentemente, um forte desapego às normas escritas ou aos códigos napoleônicos⁵, próprios da Europa Continental e com grande influência e aplicação nos países latino-americanos. Conclusão lógica, tendo em vista as discrepâncias dos ordenamentos jurídicos, na *civil law* o apego à norma escrita é marcante.

Para a Professora Harriet Christiane Zitscher⁶, “*o direito inglês é o ordenamento-mãe de toda a família common law, e o ordenamento jurídico alemão é um dos representantes da família romano-germânica, mais precisamente, o representante principal da subfamília romano-germânica.*”

³ N.A. ou *adversarial system*

⁴ MOREIRA, José Carlos. *Temas de Direito Processual, Sétima Série*. Ed. Saraiva, 2001:SP

⁵ N.A. O Estado da Louisiana, pela influência napoleônica, adota o sistema da *civil law*.

⁶ ZITSCHER, Harriet Christiane. *Introdução ao Direito Civil Alemão e Inglês*. Del Rey, 1999:MG

O ordenamento jurídico da *common law* é baseado, notadamente quando se está diante do processo civil, nos denominados *precedentes*. Contudo, a partir de 1999, com a implantação das *Rules of Civil Procedure*, assemelha-se o procedimento consuetudinário àquele por nós conhecido, ou seja, o da codificação sistemática, baseada na era napoleônica. E, neste ponto, reside a grande problemática quando se está diante do pedido no sistema da *common law*.

A sentença está adstrita ao pedido, ou servirão os precedentes das Cortes, pelo casuísmo, determinar o direito material a ser aplicado? Há total liberdade do magistrado?

A resposta nos parece ser respondida, em parte, pelo processualista Italiano Prof. Michele Taruffo⁷, ao afirmar que entre os sistemas, apesar das influências recíprocas, estas *‘não visam a sustentar que haja desaparecido toda e qualquer diferença entre os sistemas processuais de common law e os de civil law: conclusão desse gênero seria evidentemente absurda, ante as numerosas e relevantes discrepâncias que ainda subsistem.’*

Sustentando uma base dos princípios norteadores dos procedimentos – e que serão melhores analisados quanto ao pedido, logo em seguida -, as principais distinções entre os ordenamentos jurídicos são:

COMMON LAW	CIVIL LAW
Processo adversarial ⁸	Processo inquisitório

⁷ in Revista de Processo, nº 110, ano 28, abril/junho de 2003, Ed. Revista dos Tribunais, SP, p.141/158

⁸ Conforme leciona o Prof. Michel Taruffo, *ob. cit.*, a distinção criou uma vasta literatura. E, continua: *“vou permitir-me contudo uma observação desrespeitosa: muitas dessas páginas*

Menos poder instrutório do juiz	Mais poder instrutório
Mais pragmático e menos formal	Grande formalidade ⁹
Existência do Júri em matéria cível	Inexistência do Júri em matéria cível
Dois fases – <i>pré-trial</i> e <i>trial</i>	Concentração das provas em audiência

Ainda que estejamos diante de dois modelos processuais distintos, algumas diferenças vêm desaparecendo. A adoção, como afirmado linhas acima, de regras de processo civil no direito inglês e, ainda, a adoção, no Brasil, de procedimentos

constituem uma propaganda ideológica a favor de um ou do outro sistema, e nenhuma atenção merecem do ponto de vista científico.”

⁹ N.A. – ainda que a doutrina moderna venha defendendo o princípio da instrumentalidade das formas, com o fim de se aproveitar ao máximo os atos processuais, desformalizando-o. Contudo, esta desformalização encontra grande oposição em alguns processualistas, dentre eles no Prof. José Carlos Barbosa Moreira, *cf. A Justiça no Limiar do Novo Século*, recebida por meio eletrônico, que afirma: “e, por maior relevância que possam assumir outros meios de solução de conflitos (1), seria perigoso apostar muito na perspectiva de um desvio de fluxo suficiente para aliviar de modo considerável a pressão sobre os congestionados canais judiciários. Somem-se a isso fatores como a crescente complexidade da vida econômica e social, o incremento dos contactos e das relações internacionais, a multiplicação de litígios com feição nova e desafiadora, a fazer aguda a exigência de especialização e de emprego de instrumentos diversos dos que nos são familiares, e ficará evidente que não há como fugir à necessidade de mudanças sem correr o risco de empurrar para níveis explosivos a crise atual, em certos ângulos já tão assustadora. (1) Vem merecendo grande atenção, nos últimos anos, o tema dos meios "alternativos" de composição de litígios (que não se confunde com o do chamado "direito alternativo"). Dele se cuidou, por exemplo, no Congresso da Associação Internacional de Direito Processual de 1987, em Utrecht (*vide* o relatório brasileiro, de ADA PELLEGRINI GRINOVER, denominado "Deformalização do processo e deformalização das controvérsias", *in Novas Tendências do Direito Processual*, Rio de Janeiro, 1990, pp. 1275 e segs., e o relatório geral de BLANKENBURG e TANIGUCHI, intitulado "*Informal Alternatives to and within For-mal Procedures*", no vol. *Justice and Efficiency*, editado por WEDEKIND, Deventer - Antuérpia - Boston, 1989, pp. 335 e segs.), e o simpósio realizado em Tóquio, em agosto deste ano, cujo temário, subordinado ao título geral *Civil Justice in the Era of Globalization*, compreendia um tópico dedicado ao assunto e designado como *Dispute Resolutions and Legal Culture*.”

característicos da *common law*, como o exemplo dos Juizados Especiais (*small claim's courts*), das Ações Coletivas (*class actions*) e a adoção presentes dos meios alternativos de solução de conflitos (*ADR's*) aproximam os sistemas em questão.

Diante desta aproximação entre a *common law* e a *civil law*, o *American Law Institute* vem trabalhando no modelo de *Princípios e Regras do Processo Civil Transnacional* (*Principles and Rules of Transnational Civil Procedure*).

Ao prefaciarem o resultado da quarta *rodada* de discussões acerca do modelo acima proposto, em 18 de abril de 2003, os professores Geoffrey C. Hazard, Jr., Michele Taruffo, Rolf Stürmer e Antonio Gidi, assentam a dificuldade da aplicação de um código transnacional, pelo ceticismo e, ainda, pelas peculiaridades do processo civil americano.

Desta forma já se pode admitir, pelas próprias conclusões dos professores envolvidos em tamanha pesquisa, que o direito norte-americano se apresenta diferente dos demais sistemas da *common law*. E, concluem:

“The worldwide reception given to the project geerally has been very positive, but there has been strong dissent. Part of the dissent evidently reflects some irritation at “American cultural imperialism.”

Conclui-se, de antemão, que os procedimentos quanto aos pedidos nos Estados Unidos e na Inglaterra, ainda que sejam ambos do ordenamento anglo-saxônico, possuem diferenças sensíveis.

As mesmas serão analisadas de per si.

3 NATUREZA DO PEDIDO NO DIREITO AMERICANO

Ainda que o direito americano seja filiado à família anglo-saxônica, no modelo da *common law*, é importante destacar, de início, que o Estado da Louisiana adota o sistema da *civil law*¹⁰. E a afirmação contida na Enciclopédia *Wikipedia* é a seguinte:

“There are still remnants of its former status as a possession of France, including: the use of a civil law legal system, the Napoleonic Code (like France, and unlike the rest of the United States, which uses a common law legal system derived from England), the term “parishes” being used to describe the state’s sub-divisions as opposed to “countries”, French as an official language (the only state that has French as an official language).

Law and Government

Louisiana is the only state whose legal system is based on Roman civil law as opposed to British common law. Technically, it is known as “Code Napoleon” or The Napoleonic Code. It is simply the aforementioned Roman civil law in written form, in order to be applied uniformly, and understood by everyone.”

A ressalva se faz oportuna, uma vez que o sistema judicial americano é por demais complexo, sendo resumido, neste ponto, da seguinte forma:

Tribunais Federais	-	Cortes Distritais
	-	Tribunais de Apelação
	-	Suprema Corte
Tribunais Estaduais	-	Juízes de Primeira Instância
	-	Tribunais de Apelação
Fatores complicadores	-	Múltiplas soberanias

¹⁰ Cf. *Wikipedia* – *The Free Encyclopedia*. Disponível em <<http://en2.wikipedia.org/wiki/Louisiana>>. Acesso em 22 dezembro 2003.

- Coexistência de Tribunais Federais e Estaduais de Primeira Instância

Os sistemas jurisdicionais não serão apreciados no presente trabalho, mas servem de referência ao estudo, uma vez que há uma ressalva em todo o sistema americano, que é, exatamente, o da Louisiana.

Ao tratarem, por exemplo, do *jury trial*, Jack H Friedenthal *et al*¹¹, fazem uma remissão aos estados do Colorado, Louisiana e Wyoming:

“Colorado, Louisiana and Wyoming have no constitutional guarantee to jury trial in civil cases.”

Trata-se, evidentemente, de uma regra geral aplicada a todo o sistema americano.

O sistema norte-americano se apresenta muito diferente do nosso, seja em termos do pedido, seja no que diz respeito à própria jurisdição, já que os modelos podem se apresentar de maneira diversa – federal, estaduais e municipais.

Em nosso sistema, será o pedido o delineador da sentença, já que subsiste o princípio da inércia judicante. Segundo o Prof. Dr. Leonardo Greco¹², “o pedido é o objeto da jurisdição.”

A análise do pedido – e suas diversas formas – e do princípio da adstrição, em um sistema complexo como o americano, são por demais importante, uma vez que

¹¹ FRIEDENTHAL, Jack H. KANE, Mary Kay and MILLER, Arthur R. *Civil Procedure*. West Group, St. Paul: 1999

¹² GRECO, Leonardo. *A Teoria da Ação no Processo Civil*. Dialética, SP:2003

haverá necessidade de verificação do alcance da coisa julgada. Não nos parece diverso o conceito de coisa julgada no sistema americano, conforme leciona Friedenthal *et al*¹³:

“In order for a judgment to be given former adjudication effect, the court must find that it meets three requirements: The judgment must be valid, final, and on the merits.”

A fim de analisar a validade do julgamento, é importante verificar o pedido e suas formas.

3.1.1 FORMAS DO PEDIDO NO SISTEMA AMERICANO

Antes de averiguarmos as formas do pedido no sistema americano, é importante analisarmos o texto do Prof. Charles D. Dole¹⁴, intitulado *Precedente Judicial – A Experiência Americana*.

Sendo o pedido o objeto da jurisdição, observamos no texto a seguir excertado que no sistema americano o juiz deverá julgar de acordo com o mesmo, ainda que se valha dos precedentes. E, neste ponto, nos parece que os precedentes concorrem para uma estabilidade jurídica:

“Em suma, o uso do precedente na cultura jurídica americana cria uma estabilidade para os propósitos do processo decisório e, além disso, provê uma base para que o militante do direito possa prever a decisão que a Corte proferirá com relação aos casos que o militante traga à Corte para uma decisão. Além disso, em alguns casos um novo precedente indicará que os fatos apresentados ao advogado para revisão não servem de base para uma causa de pedir na jurisdição em questão. Então, a capacidade de prever a ação que a Corte de primeira instância e as Cortes superiores teriam em relação a uma determinada situação fática pode evitar a necessidade de

¹³ *Ob.cit.*

¹⁴ *in Revista de Processo*, 92, ano 23 – outubro a dezembro de 1998, RT, SP:1998, pp. 71-86

litígios sobre situações fáticas repetitivas que não constituem uma base para o remédio judicial.”

Emoldura-se, assim, que o juiz está adstrito ao pedido, ainda que os julgamentos possam se dar com os precedentes das Cortes – o que seria, para nós, o efeito da súmula vinculante.

Veremos, pois, as formas de pedido no sistema americano¹⁵, destacando-se que não serão analisadas, neste trabalho, as *Class Actions*, *Derivative Suites* e o *Interpleader*, assim como qualquer forma de intervenção de terceiro. Tendo em vista a complexidade do tema, a análise será restrita à *Modern Pleading*.

3.1.1.1 Modern Pleading

Analisando a história do *common law pleading*, Mary Kay Kane¹⁶ leciona que se trata de forma antecedente ao moderno código federal. E afirma que:

“Pleading in common law courts was characterized by rigid formality and precision; its object was to procedure through the pleadings a single issue for trial.”

É importante destacar que no Estado da Louisiana, apesar de não haver aplicação da *common law*, segundo se depreende do texto legal - RULES OF PRACTICES AND

¹⁵ Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims.

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances.

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.

¹⁶ KANE, Mary Kay. *Civil Procedure*. 4th.ed., West Group, 1996, St. Paul: USA

PROCEDURES OF THE LOUISIANA PUBLIC SERVICE COMMISSION –, regras 12 a 17, o sistema relativo às *pleadings* é o mesmo que das *Federal Rules*.

Seja no sistema próprio da *common law*, ou no sistema da *civil law* – aqui analisado no caso específico do Estado da Louisiana -, as regras não se modificam e são complexas, conforme ressaltado por Mary Kay Kane. Trata-se, evidentemente, de formalismo excessivo. Contudo, se comparado ao nosso pedido, verificar-se-á que o sistema da *common law* vai abranger o direito material de forma mais completa, dada a natureza deste sistema pouco conhecido por nós.

É importante destacar que na Inglaterra medieval os pedidos eram realizados de forma oral e perdurou por mais de 675 anos. Atualmente o pedido, nos moldes dos *writs* assume no séc. XIX a forma de *code pleading*.

A análise circunstancial da *modern pleading* será objeto de estudo no próximo item.

3.1.2 O PEDIDO E A CAUSA DE PEDIR

A causa de pedir, no sistema americano, assim como no nosso sistema, é de grande importância. Ainda que o pedido não seja completamente correto, ou haja inconsistência ou mesmo seja indefinido ou alternativo, o que determinará sua apreciação ou denegação, é a *causa de pedir*, ou *cause of action*.

Inicialmente é importante definir *pleading*¹⁷ como sendo os fatos que constituem o pedido, baseado na causa de pedir. Segundo Steven H. Gifis¹⁸, “*at common law, pleadings*

¹⁷ Rule 7. Pleadings Allowed; Form of Motions

(a) Pleadings.

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original

were a rigorous process of successive statements¹⁹ the aim of which was to progressively narrow the issue.”

No sistema americano atual existem três tipos de *pleadings*, quais sejam:

- *fact pleading*
- *notice pleading*
- *code pleading*

Quanto à *fact pleading*, a mesma existe desde a reforma de 1848 no sistema americano, por certo que a *notice pleading* foi introduzida com as normas federais de processo – *Federal Rules of Civil Procedure*. O método mais adotado, atualmente, é o da *notice pleading*.

Segundo o Prof. Aaron D. Lindstron²⁰, na *notice pleading* basta uma pequena descrição do caso a ser levado à Corte. Ressalta, contudo, que há necessidade de conexão

party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

(c) Demurrers, Pleas, etc.,

Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

¹⁸ *Ob.cit.*

¹⁹ **N.A.** A declaração do fato

²⁰ LINDSTRON, Aaron D. *Civil Procedure according to Baird*. Obtido por meio eletrônico, em <<http://www.blsa.chicago.edu/first%20year/baird-civilpro/-toc532095798>>, acessado em 15/12/2003

entre os fatos e a lei, citando dois casos: *People ex rel. DOT v. Superior Court* e *Haddle v. Garrison*.

Contudo, é necessária a causa de pedir, de forma complexa, encontrada nos textos americanos como *cause of action*²¹. Trata-se, evidentemente, da causa de pedir e refletirá quando da ocorrência da coisa julgada.

Desta forma, a *cause of action* deve ter relação com a pretensão alegada e, antecipando o estudo em questão, já se pode adiantar que a complexidade das *pleadings* no sistema da *common law* induzirá no princípio da adstrição, ainda que estejamos diante de um sistema onde o precedente ainda tem grande influência e haja certa discricionariedade dos juízes.

Trata-se, pois, de pedido escrito – sem que se possa concluir que o princípio da oralidade tenha sido relevado – e no *code pleading* é que se verifica, em verdade, a *causa de pedir*, ou *causes of action*.

O grande problema envolvendo o pedido nos Estados Unidos é o relativo à diversidade de jurisdições, mas o estudo deve ser restrito à *Federal Pleading*, deixando para a análise de casos a forma como os julgamentos se dão, notadamente com a finalidade de verificar a aplicação do princípio da adstrição. O certo, contudo, é que a maioria dos Estados não encontra resistência em aplicar as normas federais.

Segundo Mary Kay Kane (1996), a maioria das cortes estaduais adotou as regras federais. No sistema federal prevalece a *notice pleading* com a possibilidade do requerente – *plaintiff* – requerer alternativamente ou, mesmo, inconsistentemente.

²¹ “A claim in law and fact sufficient to demand judicial attention.” Cf. Gifis, *Ob.cit.*

Analisando o sistema americano se pode constatar haver uma flexibilidade quanto ao pedido na fase do *pre-trial*, o que significa dizer que a preocupação é a de fixação do objeto litigioso, sem a preocupação de, inicialmente, estancar o direito material por qualquer vício na formulação do pedido.

Assim, a tendência das cortes, conforme Friedenthal *et al*²² .:

“Although some courts have treated a conclusion of law as a nonexistent allegation, many modern courts have taken the position that such as allegation can be considered in determining whether the complaint gives notice of the existence of a cause of action. If it does, a challenge to the sufficiency the complaint will be denied.”

Em verdade, para que o pedido seja considerado, é importante que a causa de pedir esteja definida. O que se ataca no *pleading* é a forma, conforme se pode constatar no julgamento *Campbell v. Genshlea*²³. Contudo, conforme analisado no caso *Ramsey v. Myers* mas não se o defeito for considerado como forma, apenas²⁴.

²² *Ob. cit.*

²³ As a practical matter, in determining whether to demur or answer, counsel should analyze what advantage a demurrer will have to the client's case. Because of California's liberal pleading and amendment policy, it generally makes little sense to demur where the defects in the plaintiff's complaint are correctable. The judge hearing the demurrer will almost always grant leave to amend in such a case, and where the plaintiff can eventually overcome the defects, the ultimate result of the demurrer is unnecessary cost and delay for all concerned. Demurrers also tend to educate the opponents as to weaknesses or problems with their case. There are also several alternatives to demurring which may achieve the same objective: (1) answer and assert appropriate affirmative defenses; (2) clarify or narrow the complaint through discovery; (3) a motion to strike; (4) a motion for judgment on the pleadings; (5) a motion to dismiss; and (6) a motion for summary judgment or summary adjudication of issues.

Where a complaint or cross-complaint alleges multiple causes of action, a party may demur to the entire pleading or to separate causes of action set forth in the pleading. [CCP §430.50(a)] Thus, a demurrer to a cause of action may be filed without answering the other causes of action, and the defendant will be allowed time to respond to the complaint or other causes of action once the court has made a decision on the demurrer. [CRC 325(g); for discussion of the procedure and time limits in such cases, see §9:5] A party may not, however, demur generally to only part of a cause of action. [*Campbell v Genshlea* (1919) 180 Cal 213, 180 P 336; *Financial Corp. of America v Wilburn* (1987, 6th Dist) 189 Cal App 3d 764, 234 Cal Rptr 653] Also, the prayer for damages is not a part of a complaint that is subject to demurrer. [*Moropoulos v C. H. & O. B. Fuller Co.* (1921) 186 Cal 679, 200 P 601; Witkin, 5 *Cal. Proc.* 3d, *Pleading*, §907]. Obtido por meio eletrônico, em <<http://www.vcsun.org/~djordan/demur.htm>>, Prof. David Jordan, Law Department of Los Angeles Mission College. Acesso: 01/01/2004

²⁴ O presente caso consta do anexo.

3.1.2.1 REQUISITOS BÁSICOS DA *NOTICE PLEADING*

Requisito básico da *notice pleading* é a exposição dos fatos e da causa de pedir. Relativamente ao termo em si – *notice pleading* – há diversos autores que não o consideram, descrevendo a regra nº 08 como *modern pleading* ou *simplified pleading*.

Em verdade, diante do requisito maior da *modern pleading*, ao se estruturarem os fatos e a causa de pedir, chega-se à conclusão que há uma certa liberalidade quanto ao pedido em si. Tratando-se de notícia da contenda, conforme já analisado, o pedido pode ser incerto e indeterminado.

Aprofundado-se no estudo do sistema americano, o que se verifica é a necessidade de expor com clareza os fatos e, desta forma, conseguir atingir o direito material. A inconsistência ou alternatividade do pedido pode ser suprida após a resposta do réu. Importante destacar a assertiva de Friedenthal *et al*²⁵, de que “*all pleadings shall be so construed as to do substantial justice.*”

Em suma, no sistema federal da *notice pleading*, a parte autora notifica o réu demonstrando o fato, sua pretensão e a causa de pedir. Esta notificação é feita diretamente à parte e existem sistemas, como o disposto no *site MegaLaw*²⁶, em que este serviço é prestado pelo mesmo.

Tendo em vista, pois, a celeridade que se impõe, e é importante destacar que o juiz sempre aconselha as partes a chegarem a uma composição amigável, as cortes americanas dispõem de formulários próprios a fim de que o pedido seja feito. Tais formulários podem ser encontrados, com facilidade, na Internet.

²⁵ *Ob. cit.*

²⁶ <http://www.megalaw.com>

Uma vez haver honestidade²⁷ na inconsistência do pedido ou em sua alternativa, as cortes federais admitem o mesmo, sendo, contudo, uma questão conflituosa no sistema americano, já que o direito ao contraditório é garantido e, como tal, o réu deve saber exatamente o que pretende o autor.

Assim sendo, desde que haja causa de pedir, o pedido inconsistente não pode determinar sua total impropriedade, por certo que a corte determinará, sendo necessário, o aditamento do mesmo.

Tendo em vista a necessidade do contraditório, em *Article III Judges Division, Administrative Office of the United States Courts*²⁸, depreende-se que:

“Durante la fase preparatoria del juicio oral y publico, los litigantes pueden llevar a cabo la exhibición cuando los litigantes tienen que dar a conocer a la parte contraria los puntos litigiosos y las armas procesales, como por ejemplo la identidad de los testigos y el testimonio que se espera que presenten y copias de los documentos relacionados con la causa.”.

Após a análise da resposta do réu, com maior propriedade se poderá entender o sistema da *modern pleading*, inclusive no que se refere a possibilidade de modificação do pedido. Posteriormente, será feita uma análise acerca do princípio da adstrição.

²⁷ *Friedenthal et al.*, p. 274

²⁸ <http://www.uscourts.gov>

4 A RESPOSTA DO RÉU

No sistema americano há algumas possibilidades de defesa do réu, estando as mesmas inseridas nas regras.

Conforme se infere do texto já analisado, produzido pelo *Federal Judiciary Building*, no que se refere ao sistema judicial nos Estados Unidos, há sempre uma tendência a aconselhar às partes que cheguem a uma composição extrajudicial. O mesmo se verifica no sistema do Direito Inglês. Esta postura visa evitar delongas e custas nos procedimentos.

Quando não é o próprio juiz quem consegue mediar as partes, geralmente as mesmas são indicadas a um árbitro ou mediador.

Contudo, acaso as partes não queiram submeter-se às ADR's, será necessária a resposta do réu.

Nos termos das *Federal Rules of Civil Procedure*, regra 08, item b, poderá o réu se utilizar das seguintes defesas:

- *claim asserted* ou *shall admit*
- *deny the averments*

Mary Kay Kane²⁹ leciona que há diferenças nas formas de defesa, podendo as mesmas serem do tipo *denial*, que pode consistir em aceitar o pedido, inserir uma *affirmative deffense*³⁰ ou afirmar que o pedido não se encontra corretamente formulado.

Na *affirmative deffense* o réu admite o pedido, contudo, apresenta impedimentos ao seu conhecimento, como, por exemplo, coisa julgada.

²⁹ *Ob. cit.*

³⁰ Regra nº 08, d

Importante, contudo, para a análise da pesquisa ora realizada, é a postura do réu quando ele ataca o mérito do pedido, na fase do *pre-trial*. Neste caso, poderá haver mudança do pedido – e este ponto é importante para a análise do princípio da adstrição.

4.1.1 MUDANÇA DO PEDIDO

4.1.1.1 Métodos de Mudança do Pedido

Há possibilidade de modificação do pedido quando o réu, ao se defender, procura desistir do julgamento (*trial*) ou afirma que o pedido não se condiz com o mérito.

Em geral, a modificação do pedido visa estabilizar a demanda, já que o narrado na inicial pode ser diverso do que o réu apresentou em sua defesa. Importante, contudo, destacar, que esta possibilidade somente ocorre no *pre-trial*.

Por toda uma análise feita no que diz respeito ao pedido no sistema norte-americano – e é importante destacar que não conseguimos identificar esta possibilidade no sistema inglês -, a modificação do pedido não se configura em alteração da *cause of action*. Induz, contudo, à uma segurança jurídica e à verdadeira prestação da tutela jurisdicional, já que há grande preocupação quanto ao direito material da parte.

4.1.1.2 Aditamento da Inicial

É possível o aditamento à inicial, nos casos já analisados, como inconsistência do pedido etc. Contudo, nos termos da regra 15, b, dependendo do pedido, o aditamento dependerá da concordância da parte ré.

É importante asseverar que o tema relativo ao pedido não se esgota com este trabalho, que possui limitações diante do que se pretende.

5 O PEDIDO NO DIREITO INGLÊS

O Código de Processo Civil Inglês – *Civil Procedure Rules* – conforme alguns autores afirmam, dentre eles Patrick P. Sherrington e Lovell White Durrant³¹, inseriu diversas e substanciais modificações no sistema processual inglês, chegando o mesmos a afirmarem que *‘the new procedural rules will result in radical changes in the way in which cases are handled and will be a challenge for judges and lawyers alike in the early days of their implementation’*.

Inversamente do que ocorre no Brasil, pelos próprios procedimentos inseridos no Código de Processo Civil inglês, as Cortes aconselham as partes a se valerem das ADR’s – *Alternative Dispute Resolution* – e há casos em que os feitos são encaminhados às mesmas dada sua especificidade.

E assim relata William Aylmer³², Associado do Departamento de Mediação:

“Em consequência do advento do Código de Processo civil que governa a Inglaterra e o País de Gales, houve um aumento dramático no número de mediações. Isto pode ser atribuído à exigência legal de tentar as ADR’s como meio de resolver a demanda. Pode-se discutir que até que agora, como não há uma exigência legal, na Irlanda não haverá nenhum aumento significativo em termos de mediação³³.”

É interessante assentar que o CPC inglês apresenta distinção entre formas de pedido, como por exemplo nas causas relativas a erros médicos e outras. Há, assim, a uma primeira vista, tripartição de pedidos: *personal injury*, *clinical negligence claims* e *house disrepair*.

³¹ SHERRINGTON, Patrick P.; DURRANT, Lovell White. *The new Civil Procedure Rules in England*. London

³² Obtido por meio eletrônico: <<http://www.efc.ie/publications/dispatch/issue09/litigation.html>>, acessado em 04/01/2004.

³³ N.A. Em tradução livre do autor.

Analisaremos o *personal injury*, dada sua similitude ao *modern pleading*.

5.1.1 PERSONAL INJURY

O sistema inglês, ainda que inseridas normas de processo civil através de um código, apresentam o pedido de forma simples. Admitimos, até, que de forma mais simples que àquela analisada no pedido norte-americano, da *notice pleading*.

Ainda que seja de grande simplicidade o pedido no sistema inglês, as cortes oferecem serviços onde contêm os dados a serem inseridos no mesmo. Trata-se do *pre-action protocol* que pode ser acessado, pela Internet, no endereço eletrônico: http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_pic.htm.

A fim de demonstrar a simplicidade do *personal injury* e da forma como se procede ao *pre-action*³⁴, o modelo seguido na Inglaterra é o seguinte:

To

Defendant

Dear Sirs

Re: Claimant's full name

Claimant's full address

³⁴ Outras formas de protocolo podem ser adquiridas em: < <http://www.courtservice.gov.uk> >

Claimant's Clock or Works Number

Claimant's Employer (*name and address*)

We are instructed by the above named to claim damages in connection with *an accident at work/road traffic accident/tripping accident* on day of (*year*) at (*place of accident which must be sufficiently detailed to establish location*)

Please confirm the identity of your insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your insurance cover and/or the conduct of any subsequent legal proceedings if you do not send this letter to them.

The circumstances of the accident are:-

(brief outline)

The reason why we are alleging fault is:

(simple explanation e.g. defective machine, broken ground)

A description of our clients' injuries is as follows:-

(brief outline)

(In cases of road traffic accidents)

Our client (state hospital reference number) received treatment for the injuries at (name and address of hospital).

He is employed as (*occupation*) and has had the following time off work (*dates of absence*) . His approximate weekly income is (*insert if known*)

If you are our client's employers, please provide us with the usual earnings details which will enable us to calculate his financial loss.

We are obtaining a police report and will let you have a copy of the same upon your undertaking to meet half the fee.

We have also sent a letter of claim to (*name and address*) and a copy of that letter is attached. We understand their insurers are (*name, address and claims number if known*).

At this stage of our enquiries we would expect the documents contained in parts (*insert appropriate parts of standard disclosure list*) to be relevant to this action.

A copy of this letter is attached for you to send to your insurers. Finally we expect an acknowledgment of this letter within 21 days by yourselves or your insurers.

Yours faithfully

Diversamente do sistema americano, não se visualiza no sistema inglês a necessidade de inserir a *cause of action*. Poderíamos afirmar que no direito inglês há a *cauda de pedir remota*, ou seja, na lição de Leonardo Greco (2003), onde “*se incluem os fatos violadores do direito subjetivo material*”³⁵.

Verificamos, assim, que o sistema inglês, apesar de ser diverso do americano, já que aquele adotou, verdadeiramente, um Código de Processo, é mais flexível que o americano. As fórmulas propostas pelas Cortes também facilitam – e simplificam – o pedido.

É importante destacar o texto doutrinário de Lord Chancellor³⁶, quando apresenta os requisitos no *personal injury*:

- “(a) set out a short description of the claim and a succinct statement of the facts relied on;
- (b) certify that the claimant believes the contents to be true;
- (c) indicate the remedy claimed;
- (d) specify any document on which the case depends;
- (e) certify the claimant's belief, where he is claiming money, that he reasonably expects to recover:
 - (i) up to £3,000;
 - (ii) between £3,000 and £10,000;
 - (iii) over £10,000.”

Conclui-se, pois, quanto ao pedido inglês, que o mesmo é mais simples que o americano, apesar de encontrar crítica na doutrina, dada a modificação com a implantação

³⁵ *Cf. op .cit.*

³⁶ ACCESS TO JUSTICE, Final Report to the Lord Chancellor on the civil justice system in England and Wales. Obtido por meio eletrônico:< <http://www.dca.gov.uk/civil/final/contents.htm>>, acessado em 04/01/2004.

do CPC inglês. Mas, como ressalta José Carlos Barbosa Moreira, a adoção do CPC na Inglaterra não modifica o sistema legal anglo-saxônico. E assim concluímos, porque não há, evidentemente, mudança do direito afiliado à família da *common law* para a família da *civil law*.

5.1.2 RESPOSTA DO RÉU

A resposta do réu, conforme lecionam Tamara Goriley *et al*³⁷., encontra limite.

Segundo os autores, há um limite substantivo para a resposta do réu e, desta forma, problemas vêm sendo enfrentados no novo modelo inglês. Neste caso, os protocolos de resposta não se apresentam suficientes para a explanação da defesa do réu e, ainda, conforme indicam os professores ingleses, há um certo agravamento quando se está diante de causas envolvendo acidentes de trânsito.

Apesar da liberalidade e da simplicidade do modelo inglês, não nos parece tão maleável e mais afeito ao encontro do direito material da parte. Admitimos que o sistema da *modern pleading*, desta forma, se apresenta mais completo e satisfatório, notadamente em termos de acesso à justiça, que o modelo inglês.

Este pensamento ressalta a possibilidade de acordos na fase *pre-action*, além, é claro, como analisado linhas acima, a necessidade de aplicação das ADR's, notadamente a mediação.

Outra dificuldade encontrada pelos autores diz respeito à estabilização do pedido, que se estabiliza, *prima facie*, diante do *claim*. Contudo, admitem que a cooperação entre as partes poderá resolver o problema.

³⁷ *Ob. cit.*

Concluí-se, pois, que o sistema americano, apesar de não adotar um modelo napoleônico, em termos de pedido, se apresenta de forma mais consistente e atenta ao acesso à justiça que o modelo inglês.

Contudo, as pesquisas não podem cessar, já que o modelo inglês é novo e depende, ainda, ser assimilado pela literatura inglesa, a fim de melhor se estudar o sistema em questão.

6 DECISÃO E PRINCÍPIO DA ADSTRIÇÃO

Tendo em vista o presente trabalho ter sido elaborado sem adentrar no *trial by jury*, a decisão em análise será aquela proferida por juiz em casos onde não há formação do mesmo, ou *trial judge*. E a decisão aqui analisada será a final, não se cogitando de decisões interlocutórias – *interlocutory injunction*.

Assim, a análise do que venha a ser o princípio da adstrição como por nós conhecido, se apresenta relevante, dada a diferença entre os sistemas estudados.

Nos termos do art. 128 do CPC brasileiro, o juiz julgará a lide nos termos em que ela foi proposta. O Prof. Dr. Leonardo Greco³⁸, ao analisar os fatos e o direito identificadores da demanda, leciona:

“ARRUDA ALVIM esclarece, a meu ver corretamente, que o art. 131 do CPC refere-se aos fatos simples, considerados na linha do fato jurídico e que o juiz fica adstrito aos fatos jurídicos aduzidos pelo autor, não aos fatos simples.”

A ementa do Tribunal de Justiça do Distrito Federal e Território, ora excertada, bem demonstra o princípio da adstrição:

³⁸ *Ob. cit.*

“REINTEGRAÇÃO DE POSSE. TERRAS PÚBLICAS. INVASÃO. INEXISTÊNCIA DE DIREITO DE RETENÇÃO POR BENFEITORIAS. FALTA DE PEDIDO.

1- Se o ocupante não tinha autorização para ocupar o imóvel, do domínio público, entrando nesse clandestinamente, sequer há que falar em posse, muito menos de boa-fé, inexistindo, por conseguinte, direito à indenização pelas benfeitorias necessárias e úteis, assim como exercer o direito de retenção, quanto a essas, e levantar as voluptárias (CC, art. 516).

2- Inexistindo pedido específico de indenização por benfeitorias, inviável assegurar esse direito face o princípio da adstrição do juiz ao pedido (CPC, arts. 459 e 460).

3- Apelo provido.

(APC nº 2000015003425-3, Acórdão nº 132401, Rel. Des. LÉCIO RESENDE, DJ 06.12.2000).”

Assim sendo, como entender o princípio da adstrição em face da possibilidade de mudança do pedido, na *modern pleading*?

Quando se está diante das regras federais, o juiz deverá julgar de acordo com os fatos e não se pode estar distante da lei. Esta norma, contudo, não se encontra presente em todos os estados americanos.

Por todo o analisado, verifica-se que de alguma forma há o princípio da adstrição no sistema americano, ainda que haja a possibilidade de modificação do pedido após a resposta do réu, para que o mesmo esteja de acordo com os fatos apresentados.

Assim sendo, para que haja um julgamento de acordo com as normas federais, o juiz deverá estar adstrito ao pedido das partes – princípio da adstrição. Melhor será analisado o princípio através da análise de cada decisão eleita.

7 ANÁLISE DE DECISÕES

7.1 DISTRITO DE COLUMBIA

7.1.1.1 Argued November 15, 1999 Decided December 21, 1999 - No. 98-1558 - Chiron Corporation and PerSeptive Biosystems, Inc., Petitioners v. National Transportation Safety Board, et al.

Análise: A sentença proferida, conforme se pode visualizar logo após as análises aqui formuladas, é completa, apresentando todos os fatos necessários ao deslinde da causa.

Da análise contida no relatório da sentença, o autor relata os fatos, aplicando-os à lei em abstrato. Trata-se da narrativa dos fatos e fundamentos jurídicos do pedido, na *cause of action*, conforme analisado no item relativo ao pedido. A sentença do juiz singular, contudo, conclui que: *“this claim fails, however, because there is no statute, regulation, or any other source of law that secures for parties to an NTSB investigation unfettered access to all information garnered by the Board. In short, petitioners have no legal basis for the alleged rights that they seek to enforce. Because petitioners lack standing to bring this suit, their petition for review is dismissed.”*

Diante do analisado quanto ao pedido no sistema da *modern pleading*, ainda que pareça simples, é necessário que o autor peça de acordo com a lei. Em verdade, o sistema norte-americano preza pela aplicação do direito material, mas não refuga algumas regras de procedimento.

Por esta razão, a Corte de Apelação negou provimento ao recurso do autor.

Quanto ao princípio da adstrição, concluímos que o mesmo tenha sido respeitado no que diz respeito ao presente caso.

7.2 IN THE SUPREME COURT - STATE OF NORTH DAKOTA

7.2.1.1 J. Malcolm Thompson, Plaintiff and Appellant v. Larry R. Peterson, David B. Danbom, Yur-Bok Lee, Gerald Anderson, Thomas Isern, Harriette McCaul, Rick D. Johnson, all of whom are and/or were persons employed within the teaching faculty and/or administration at North Dakota State University, being named herein as having acted in both their individual and official capacities, and North Dakota State University, a publicly supported institution of higher learning under the control of the North Dakota State Board of Higher Education, Defendants and Appellees Civil No. 950276

Análise: Assim como nos demais casos analisados, o que se verifica no sistema americano é uma grande força vinculante dos precedentes. É certo afirmar que apesar de inserir um Código de Processo Civil na Inglaterra e que haja a existência de regras federais de Processo Civil não afastam as características próprias do sistema da *common law*.

Os precedentes, respeitando-se o princípio da adstrição, que já vimos presente quando se está diante das regras federais e de algumas cortes estaduais, servem de auxílio para a prolação da sentença.

O caso em análise diz respeito à forma. Em verdade, com mais propriedade, se pode afirmar que os apelantes erraram no que diz respeito à jurisdição e, por esta razão, o pedido não foi apreciado pelo juiz, nem tampouco pela Corte de Apelação.

Contudo, chama a atenção o relatório circunstanciado nas decisões e, ainda, como os precedentes auxiliam os julgados.

7.3 UNITED STATES COURT OF APPEALS - FOR THE THIRD CIRCUIT

7.3.1.1 THOMAS H. TAYLOR, Appellant v. THE PEOPLES NATURAL GAS COMPANY, a subsidiary of Consolidated Natural Gas Company; SYSTEM PENSION PLAN OF CONSOLIDATED NATURAL GAS COMPANY, Number 001; THE ANNUITIES AND BENEFITS COMMITTEE, the plan administrator, Appellees

Análise: No caso em questão o réu optou pela *affirmative deffense*, o que foi rechaçado pelo autor:

“We answer this question in the affirmative, and conclude that the defendants are responsible for any material misstatements made by Burgunder to Taylor regarding possible changes in PNG's pension plan since, in counseling Taylor, Burgunder was acting, at a minimum, within his apparent authority as an agent of the defendants. We will, however, affirm the judgment because the statements allegedly made by Burgunder do not, as a matter of law, constitute a misrepresentation of a material fact.”

Durante o processo, ao que tudo indica pela análise da decisão, o apelante (autor), não conseguiu bem demonstrar os fatos que justificavam seu pedido. A *affirmative deffense*, desta forma, rebatida pelo autor, prejudicou o pedido inicial e a Corte de Apelação manteve a decisão.

Concluí-se, aqui também, que se encontra respeitado o princípio da adstrição.

8 DECISÕES ESTUDADAS

8.1 DISTRITO DE COLUMBIA

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Argued November 15, 1999 Decided December 21, 1999
No. 98-1558
Chiron Corporation and
PerSeptive Biosystems, Inc.,
Petitioners
v.
National Transportation Safety Board, et al.,

Respondents

On Petition for Review of an Order of the United States Department of Transportation Jerry W. Cox argued the cause for petitioners. With him on the briefs were Richard S. Odom and Martin Shulman Peter R. Maier, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were David W. Ogden, Acting Assistant Attorney General, Leonard Schaitman, Attorney, and Wilma A. Lewis, U.S.

Attorney. Mark E. Nagle, Assistant U.S. Attorney, entered an appearance.

Before: Edwards, Chief Judge, Silberman and Henderson, Circuit Judges.

Opinion for the Court filed by Chief Judge Edwards.

Edwards, Chief Judge: The National Transportation Safety Board ("NTSB" or "Board") is an independent federal agency charged with investigating airplane accidents. The agency does not function as a traditional regulatory or adjudicatory body; rather, its principal missions are to determine the probable cause of accidents and make recommendations that

will help prevent future accidents. Private parties who are involved in an accident (other than just as victims) may be designated to participate in an NTSB investigation, but their involvement is voluntary and it does not include an adjudication of individual claims.

In the instant case, petitioners, Chiron Corporation ("Chiron") and PerSeptive Biosystems, Inc. ("PerSeptive"), participated as parties in an NTSB investigation of an accident involving Federal Express Flight 1406. Concerned that they might be found responsible for the accident and eventually face claims of liability in a civil suit, petitioners asked NTSB for a copy of the cargo list for Flight 1406. The Board refused to disclose the cargo list, in part because Federal Express viewed the data as privileged, business information.

Petitioners then filed this law suit, claiming injury from NTSB's refusal to release the requested information and seeking an order requiring its production. We dismiss the petition for review, because petitioners lack standing.

Petitioners first argue that NTSB's denial of information injures them, because it may disadvantage them as defendants in a civil suit that Federal Express has filed against them. However, any possible injury to petitioners as defendants in a civil law suit is not legally cognizable here, because it is not an injury that petitioners will suffer as a consequence of their participation in the NTSB investigation. In other words, in order to have standing to bring this law suit, petitioners must have suffered an injury related to their involvement as parties to the NTSB investigation. They cannot show this.

Furthermore, there is little likelihood that petitioners will suffer any injury of the sort that they claim. Petitioners are concerned that NTSB's report may be admitted as evidence in a lawsuit that Federal Express has filed against them.

They hope that the information they seek will reveal new evidence that they can use to convince NTSB to change its report so that it will not adversely affect them in the pending lawsuit. This is an idle concern, for Congress has made it clear that NTSB reports, including probable cause determinations, are not admissible as evidence in a civil lawsuit. Thus, the Board's report will not control the results in any civil litigation over Flight 1406.

Petitioners also argue that, as parties to the investigation, they have a legal right to the plane's cargo information.

Petitioners contend that such a right may be found in the Board's regulations and in a written Guidance given to them as parties to the investigation. Thus, according to petitioners, NTSB's denial of their request for the cargo list caused them an informational injury. This claim fails, however, because there is no statute, regulation, or any other source of law that secures for parties to an NTSB investigation unfettered access to all information garnered by the Board. In short, petitioners have no legal basis for the alleged rights that they seek to enforce. Because petitioners lack standing to bring this suit, their petition for review is dismissed.

I. Background

A. NTSB Investigations NTSB is a uniquely independent federal agency responsible for investigating airplane accidents, determining the probable cause of accidents, and making recommendations to help protect against future accidents. See 49 U.S.C. ss 1131, 1132, 1135 (1994). NTSB neither promulgates nor enforces any air safety regulations. Nor does the agency adjudicate claims over liability for accidents. Rather, it simply analyzes accidents and recommends ways to prevent similar accidents in the future.

Congress has endowed NTSB with broad powers to accomplish its missions, because the work of the agency is viewed as extremely important. See S. Rep. No. 101-450, at 2 (1990) ("The NTSB's mission ... is critical."). An officer or employee of the Board can enter a site where an accident has occurred and "do anything necessary to conduct an investigation." 49 U.S.C. s 1134(a)(1) (1994). The Board may inspect and test any aircraft, aircraft engine, or property on an aircraft that has been involved in an accident, and the Board has sole discretion to determine how those tests are to be conducted. See 49 U.S.C. s 1134(b), (d) (1994). Most importantly, the Board's investigations have "priority over any investigation by another department, agency, or instrumentality of the United States Government." 49 U.S.C. s 1131(a)(2) (1994). The Board has used these broad powers wisely, achieving notable successes in its work and receiving high praise for the integrity of its investigative

processes. See S. Rep. No. 104-324, at 2 (1996) ("The Safety Board's reputation for impartiality and thoroughness has enabled it to achieve such success in shaping transportation safety improvements that more than 80 percent of its recommendations have been implemented.").

Although NTSB investigations are conducted by agency staff, outside individuals may be designated to participate as well. Only the Federal Aviation Administration ("FAA") has a right to participate in an investigation; however, the Board's regulations allow the individual in charge of an investigation to designate private parties to participate if their involvement would assist the investigation. See 49 C.F.R. s 831.11 (1998). The regulations specify that "parties shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident."

Id. It is often the case that corporations or individuals suspected of causing an accident will be invited to participate in an investigation, whereas victims of the accident will not. The rationale for this approach is that parties who may have caused an accident will provide investigators with valuable information; they may also learn how to improve the safety of their products or activities to avoid future accidents. The same cannot be said of accident victims. See John W. Simpson, *Use of Aircraft Accident Investigation Information in Actions for Damages*, 17 J. Air L. & Com. 283, 290 (1950) ("[R]epresentatives of industry and employee groups are often permitted to participate in the investigation and thus have access to much information, while the representatives of the victims seldom participate in the investigation. These procedures are absolutely necessary in order to determine the probable cause of an accident.").

Moreover, an NTSB investigation is a "fact-finding proceeding[] with no formal issues and no adverse parties. [It is] ... not conducted for the purpose of determining the rights or liabilities of any person." 49 C.F.R. s 831.4 (1998).

Board regulations and policies are explicit in providing that parties participating in an investigation are involved in NTSB processes only to assist the safety mission and not to

prepare for litigation. Parties are required to sign a "Statement of Party Representatives to NTSB Investigation," which requires them to agree that their "participation is not for the purposes of preparing for litigation," but, rather, "for the purpose of providing technical assistance to the [NTSB]."

Statement of Party Representatives to NTSB Investigators reprinted in 1 Deferred Appendix, at 435; see also 49 C.F.R. s 831.11(b) (requiring parties to sign the "Statement of Party Representatives to NTSB Investigation" in order to participate in the investigation).

Parties assist the investigation in a variety of ways. See "Information for the Guidance of Parties to Safety Board Investigations of Accidents" ("Guidance"), reprinted in Br. for Respondents at 1c; see also "Guidance for Party Coordinators and Other Participants in the Investigation of Aircraft Accidents," 2 National Transportation Safety Board Aviation Investigation Manual, app. D (containing much of the same information). They provide information about their products or activities. They may also join various groups organized for the investigation, such as a group organized to investigate hazardous materials. They report to the investigator in charge, who, in turn, provides the groups and parties with information about any developments in the investigation.

These groups may then write a report at the end of the investigation detailing their findings and suggestions. Parties may also submit their own report at the end of the investigation suggesting the probable cause of the accident.

In addition to the reports submitted by the investigation groups and the parties, NTSB investigators also prepare factual accident reports that are submitted to the Board.

Public hearings are sometimes held. From this information, the Board compiles and publishes a final accident report that contains factual findings, a probable cause finding, and safety recommendations.

B. The Investigation of Flight 1406 On September 5, 1996, Federal Express Flight 1406's cargo caught fire. Unable to control it, the crew made an emergency landing, but smoke and fire destroyed the plane and most of its cargo. NTSB immediately began an investigation,

which quickly focused on a DNA synthesizer as the possible source of the fire's ignition. Chiron, who owns the synthesizer, and PerSeptive, who manufactures it, were invited to participate in the investigation. Both Chiron and PerSeptive were actively involved in the investigation, but neither was happy with its progress.

Chiron and PerSeptive have maintained that something other than the DNA synthesizer may have started the fire on Flight 1406. When they were unable to convince NTSB investigators to focus on other possibilities, Chiron and PerSeptive resolved to explore these possibilities on their own.

To that end, they sought to discover what else Federal Express was carrying on Flight 1406. NTSB, however, refused to disclose the cargo list. Chiron and PerSeptive then filed formal petitions requesting the cargo information.

Their petitions were denied. The Board explained that party status did not grant parties a right to information and that it was withholding the information because Federal Express considered the information to be a trade secret. See Letter from Daniel D. Campbell, General Counsel, National Transportation Safety Board, to Jay E. Grover, Director, Environmental Health and Safety, Chiron Corp. (Oct. 31, 1997), reprinted in Respondent's Appendix at 139-40; Letter from Daniel D. Campbell, General Counsel, National Transportation Safety Board, to Jerry W. Cox (May 4, 1998), reprinted in Respondent's Appendix at 151. This petition for review followed.

II. Analysis

The first and, as it turns out here, only issue before the court is a question of standing. If, as we hold, petitioners lack standing, then this court is without jurisdiction to decide the merits of their claims. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). In order to establish their standing, petitioners must show that they have suffered a particularized injury to a cognizable interest, which is fairly traceable to the Board's actions, and that a favorable judicial decision will redress the injury. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The problem facing petitioners in this case is that they have suffered no injury.

Petitioners argue that they are injured in two ways by the Board's refusal to give them a copy of the cargo list. First, they argue that the denial of information injures them, because they need the information to correct the Board's faulty report, which may be used against them in a civil suit.

Second, they contend that they have suffered an informational injury, because, they claim, they have a legal right to obtain the cargo list. These arguments are meritless.

A. Injury By Virtue of Civil Litigation

Petitioners apparently are afraid that the factual portion of NTSB's report may be admitted as evidence in a lawsuit that Federal Express has filed against them. See Joint Br. for Petitioners at 21 ("[S]ome day a judge and/or a jury may be asked to rely on supposedly 'factual' evidence from an NTSB investigation that did not include all pertinent material.").

Petitioners object to the report as written, and they hope that the information they seek will reveal new evidence that they can employ to convince the NTSB to change its report so that it will not be so damaging to them in the pending lawsuit.

This alleged injury is not cognizable, because petitioners bring this petition for review as parties to an NTSB investigation, and, as parties, they cannot claim injuries that they might suffer as defendants in an entirely separate civil law-suit.

As an initial matter, we reject the premise that NTSB's report itself is admissible in a civil lawsuit. Congress has quite explicitly provided that, [n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report. 49 U.S.C. s 1154(b) (1994). The simple truth here is that NTSB investigatory procedures are not designed to facilitate litigation, and Congress has made it clear that the Board and its reports should not be used to the advantage or disadvantage of any party in a civil lawsuit. In our view, this congressional mandate could not be clearer.

Petitioners point out that, despite the statute's clear language, some early circuit court opinions held that NTSB "factual findings" were admissible in civil litigation. Joint Br. for Petitioners at 20 (citing authority). A careful review of these opinions, however, shows that

these early cases actually focused only on the admissibility of investigators' reports which were mislabeled by the courts as "report[s] of the Board." See, e.g., *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969) (allowing admission of graphs that were based on information from a safety committee's report); *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 631-32 (3d Cir. 1963) (allowing testimony of witness based on investigator's report); *Lobel v. American Airlines, Inc.*, 192 F.2d 217, 220 (2d Cir. 1951) (allowing admission of an investigator's report of his examination of the plane wreckage). Because of this judicial mislabeling, these circuits

created what they supposed was an "exception" to s 1154(b) for factual data from NTSB investigations in order to protect the interests of alleged victims. See, e.g., *Berguido*, 317 F.2d at 631-32 (finding testimony based on an investigator's report admissible, despite the statute, because of the need to "compromise between the interests of those who would adopt a policy of absolute privilege ... and the countervailing policy of making available all accident information to litigants in a civil suit"). In short, the need to insure that victims had access to investigators' factual data surrounding an accident prompted the courts in the early years to allow admission of what they labeled as a "report of the Board."

When faced with the judiciary's literal distortion of the statute, the Board, in 1975, responded by amending its regulations to make clear that investigators' reports--the very reports that some courts were already admitting--are not "reports of the Board" for the purpose of s 1154(b). Section 835.2 defines the Board's accident report as "the report containing the Board's determinations, including the probable cause of an accident." 49 C.F.R. s 835.2 (1998). No part of this report "may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports." *Id.* (using almost the exact language of 49 U.S.C. s 1154(b)). A "factual accident report," on the other hand, is "an investigator's report of his investigation of the accident." *Id.* Because this report is not a "report of the Board," it is not barred by the statute and is therefore admissible. As counsel for NTSB made clear during oral argument, the only reports that are admissible "are the factual reports that investigators do, not the Board's findings, either

factual or probable cause, but what individual investigators find... [T]hose reports of these factual developments are made part of the record and parties can get that."

Audio-tape of Oral Arguments (Nov. 15, 1999). Thus, because investigators' reports are now plainly admissible under agency regulations, victims have access to necessary factual information. Therefore, courts no longer need to employ an "exception" to the statute to protect parties in litigation.

Our research indicates that, since the promulgation of the Board's 1975 rule, only two circuit court opinions have failed to recognize that the admissibility of investigators' reports obviates the need for a judicial exception to the statute. See *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 848 (10th Cir. 1986) ("[E]xpert witness properly relied on the factual portions of the NTSB report."); *Curry v. Chevron, USA* 779 F.2d 272, 274 (5th Cir. 1985) (acknowledging judicial gloss of the statute "that allow[s] factual portions of the report to be admitted"). In each case, the courts distinguished between the "factual portions" of Board reports and "parts of NTSB reports which contain agency conclusions on the probable cause of accidents." *Mullan*, 797 F.2d at 848. However, neither opinion is weighty authority, even for the limited rule enunciated, because there are later decisions from both circuits that adhere to the strict terms of the statute. Subsequent to *Mullan*, the Tenth Circuit has held that, "[c]onsistent with its fact-finding mission that is litigation neutral, NTSB reports are barred as evidence in court." *Thomas Brooks v. Burnett*, 920 F.2d 634, 639 (10th Cir. 1990); accord *Jetcraft Corp. v. Flight Safety Int'l*, 16 F.3d 362, 366 (10th Cir. 1993). And even more recently, in 1998, the Fifth Circuit has noted that:

Federal law flatly prohibits the NTSB accident report from being admitted into evidence in any suit for damages arising out of accidents investigated by the NTSB.

Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996, 1001 (5th Cir. 1998).

We agree with these recent decisions from the Fifth and Tenth Circuits, and also a decision from the Ninth Circuit, see *Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 271 (9th Cir. 1978), holding that, under the plain terms of the statute, NTSB reports are inadmissible in civil litigation. When the statute was interpreted broadly to include investigators' reports,

there may have been a public policy justification for admitting factual information. However, once the statute was interpreted more narrowly, no justification remained for any exception to s 1154(b).

Moreover, as this case demonstrates, admitting Board reports into civil litigation can have the unsavory affect of embroiling NTSB in the interests of civil litigants. Thus, the statute means what it says: No part of the Board's actual report is admissible as evidence in a civil suit. See *Universal Airline, Inc. v. Eastern Air Lines, Inc.*, 188 F.2d 993, 1000 (D.C. Cir. 1951) (noting that the Board should not be compelled to produce its reports). Because it is the Board's actual report that petitioners hope to change, they are not injured by their inability to change it, because it is not admissible in a civil suit.

Even if the report were admissible, however, petitioners' injury as civil litigants is simply not cognizable in this case.

Petitioners bring this suit as parties to an NTSB investigation. As parties, they signed a statement agreeing that their participation would be for the purpose of assisting NTSB's investigation and would not be for the purpose of preparing for litigation. See *Statement of Party Representatives to NTSB Investigation*, reprinted in 1 *Deferred Appendix* at 435. Furthermore, NTSB's investigations are fact-finding proceedings; they are not conducted for the purpose of determining the rights or liabilities of any party. Therefore, the injuries petitioners might suffer as civil defendants are not relevant to their status as parties. Accordingly, because petitioners bring this suit as parties to an NTSB investigation, their injuries as civil litigants are not legally cognizable. Whatever data they may require in litigation, apart from the Board's report, may be obtained through the normal course of discovery.

B. Informational Injury

Petitioners also argue that NTSB's denial of information has caused them an informational injury. Petitioners rely principally on *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), which held that, as a member of a committee regulated by the Federal Advisory Committee Act ("FACA"), Cummock had a right of participation that created a right to information,

and that "she suffered an injury under FACA insofar as the Commission denied her requests for information that it was required to produce." 180 F.3d at 290. Petitioners argue that, "as parties to an NTSB investigation," they have "judicially-enforceable Cummock rights" that entitle them to the information they seek. Joint Br. for Petitioners at 26.

Petitioners' argument fails, however, because, unlike FACA, nothing in NTSB's statute, regulations, or other sources of law requires NTSB to produce this information to petitioners.

Therefore, the denial of information does not give rise to an informational injury.

Unlike FACA, NTSB's organic statute does not grant parties to an NTSB investigation rights of participation.

FACA provides that federal advisory committees are "to be fairly balanced" and structured to insure that the advice of the committee reflects its "independent judgment." 5 U.S.C.A. app. 2 s 5(b)(2) (1996); *id.* at s (b)(3). In *Cummock*, this court held that, "to give meaning to FACA's fair balance and independent judgment provisions, the Act must be read to confer on a committee member the right to fully participate in the work of the committee to which he or she is appointed." *Id.* at 291. The right of participation, the court held, endowed committee members with a right to information. See *id.* at 292. NTSB's statute does not confer any such rights on a party to an investigation. Congress, quite simply, provided that "[t]he National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of--(A) an aircraft accident..." 49 U.S.C. s 1131(a)(1). The statute does not require the investigation either to be balanced or even to involve any outside persons; it places the responsibility of investigating the accident solely within NTSB's hands. Thus, nothing in the statute gives petitioners the *Cummock* rights of participation and information that they seek to enforce.

In addition, there is legislative history showing that Congress did not want the interests of private parties to constrain an NTSB investigation. The Senate Committee on Com-

merce, Science, and Transportation noted that "[c]ourts typically have recognized and appreciated the important public purpose served by the NTSB's ability to conduct prompt investigations without the burdens and interference that would stem from injecting the civil litigation interests into the NTSB's accident investigation process." S. Rep. No. 101-450, at 5. The Committee continued, adding that [t]he time devoted by NTSB investigations in defending their decisions diverts the energies that they should be directing to investigating the accidents.... [T]he committee strongly believes that the ability of the NTSB to conduct investigations independently, thoroughly, and in a timely manner for the benefit of the public, should not be compromised.

Id. Equipping parties with a right to information would "inject[] the civil litigation interests into the NTSB investigation process" and compromise the investigation, a prospect against which Congress admonished. Thus, not only does the statute fail to endow parties with a right to information, legislative history admonishes against reading such a right into the statute.

Neither can the right be found, as petitioners argue, in either NTSB's regulations or a Guidance that NTSB gave petitioners as parties to the investigation. Nothing in the regulations speaks to the rights petitioners seek to enforce, and the Guidance is not a source of law enforceable against NTSB. Petitioners point to a handful of regulations that they argue create a right to information, but they are grabbing at straws. 49 C.F.R. s 831.11(a), which states that NTSB shall only appoint parties who "can provide suitable qualified technical personnel actively to assist in the investigation," does not, as petitioners argue, require NTSB to provide parties with all the facts of an investigation. Rather, the regulation speaks only to qualifications necessary to become a party: The corporation or individual must provide someone who has the time and expertise to assist the investigation. Likewise, s 831.11(a)(4), which provides that the FAA and other qualified entities will have "the same rights and privileges ... as other parties" does not itself provide rights to any party.

Finally, s 831.14(a) cannot, as petitioners argue, endow parties with any rights, because it merely says that "[a]ny person ... may submit to the Board written proposed findings to be drawn from the evidence produced during the course of the investigation." 49 C.F.R. s 831.14(a) (1998) (emphasis added).

Petitioners' most noteworthy argument rests on part four of the NTSB Guidance that is given to all parties to an investigation. The Guidance says that "[a]ll factual information and developments of the investigation that are made known to the [Investigator in Charge] will be passed to each party spokesman." Guidance, reprinted in Br. for Respondents at 2c. Petitioners maintain that, pursuant to this statement in the agency's Guidance, they have a legal right to information. Petitioners' problem, however, is that the Guidance does not establish a binding legal norm.

Petitioners argue that the Guidance is binding on the Board, because it is incorporated into the Board's regulations.

Petitioners' attempt to demonstrate this incorporation at oral argument was, as they acknowledged, convoluted. Counsel argued that s 831.11(b) requires parties to sign a "Statement of Party Representatives to NTSB Investigation," and the Statement then connects to the Guidance, which contains the sentence endowing them with a right to the information. In their brief, petitioners simplified the route and argued instead that the Party Statement itself "spells out Petitioners' rights and the procedures NTSB would follow, and promised Petitioners full participation and sharing in all pertinent factual developments and deliberations." Joint Br. for Petitioners at 11. Both versions are wrong.

The Party Statement gives petitioners no rights. It is a one-page document that discusses their duties as parties and requires them to waive their right to assert privilege in litigation with respect to information or documents obtained during the course of the investigation. It does not discuss their rights as parties, let alone "promise[] Petitioners full participation and sharing in all pertinent factual developments." It entitles petitioners to nothing. Neither does the Party Statement incorporate the Guidance. The Party Statement makes no

reference--either explicitly or implicitly--to the Guidance. Thus, there is no link between the Board's regulations and the Guidance.

Without that link, the Guidance is not a source of law; rather it is exactly what it appears to be, a hand-out that gives information, not rights, to parties in an NTSB investigation. While some unpublished agency pronouncements can be binding, not every "piece of paper emanating from a Department or Independent Agency is a regulation." *Piccone v. United States*, 407 F.2d 866, 877 (Ct. Cl. 1969) (Nichols, J., concurring). The general test is whether the agency intended to bind itself with the pronouncement. See *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). Agency intent is "ascertained by an examination of the provision's language, its context, and any available extrinsic evidence."

Doe v. Hampton, 566 F.2d 265, 281 (D.C. Cir. 1977). Here, petitioners make no showing, and we can find none, that NTSB intended the Guidance to be binding.

NTSB certainly never has stated an intention to be bound by the Guidance. See *Service v. Dulles*, 354 U.S. 363, 373-74, 377-82 (1957) (finding departmental regulations to be binding where the agency explicitly adopted the regulations to bind its discretion). Indeed, we cannot imagine why NTSB would ever limit its ability to collect and digest information as it sees fit. The agency is not in the business of facilitating private investigations by private parties, so it would make no sense for NTSB to bind itself to serve as a repository of information for private parties who are angling to protect their interests in litigation. The Guidance simply indicates that, during an investigation, parties may share in some information gathered by the Board; however, the Guidance guarantees nothing.

Manuals or procedures may be binding on an agency when they affect individuals' rights. See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (holding that an agency is bound by procedures in its manual where an individual's entitlement to government benefits was affected by procedures); *Massachusetts Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) (holding that an agency is bound by regulations in its manual delineating procedures for grant-funding). But see *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (declining to find internal rules set forth in a handbook binding where

relief would have been inconsistent with a published regulation). Because an NTSB investigation does not itself determine the rights of the parties, see 49 C.F.R. s 831.4 ("Accident/incident investigations are fact-finding proceedings.... [They] are not conducted for the purpose of determining the rights or liabilities of any person."), however, the Guidance cannot be viewed as a binding rule on these terms.

In sum, because NTSB has never indicated an intention to be bound by the Guidance and because the investigation does not affect petitioners' rights, the Guidance does not endow petitioners with any rights to seek the information at issue.

Accordingly, they have not suffered any informational injury.

III. Conclusion

Petitioners cannot demonstrate that NTSB's denial of the information they seek has injured them. Without injury, petitioners have no standing to bring this suit. Therefore, the petition for review is dismissed.

8.2 IN THE SUPREME COURT - STATE OF NORTH DAKOTA

**J. Malcolm Thompson, Plaintiff and Appellant
v. Larry R. Peterson, David B. Danbom, Yur-Bok Lee, Gerald Anderson, Thomas Isern, Harriette McCaul, Rick D. Johnson, all of whom are and/or were persons employed within the teaching faculty and/or administration at North Dakota State University, being named herein as having acted in both their individual and official capacities, and North Dakota State University, a publicly supported institution of higher learning under the control of the North Dakota State Board of Higher Education, Defendants and Appellees Civil No. 950276**

Appeal from the District Court for Cass County, East Central Judicial District, the Honorable Norman J. Backes, Judge.

AFFIRMED.

Opinion of the Court by Meschke, Justice.

David C. Thompson (argued), of David C. Thompson, P.C., P.O. Box 5235, Grand Forks, ND 58206-5235, for plaintiff and appellant.

Douglas A. Bahr (argued), Assistant Attorney General, Attorney General's Office, 900 East Boulevard Ave., Bismarck, ND 58505-0041, and Sara Beth Gullickson (no appearance), Assistant Attorney General, P.O. Box 1077, Moorhead, MN 56561-1077, for defendants and appellees.

Thompson v. Peterson

Civil No. 950276

Meschke, Justice.

J. Malcolm Thompson appealed from a judgment dismissing his lawsuit against North Dakota State University (NDSU), and Larry Peterson, David Danbom, Yur-Bok Lee, Gerald Anderson, Thomas Isern, Harriette McCaul, and Rick Johnson in their official capacities as members of the faculty and administration of NDSU and in their individual capacities (collectively referred to as defendants). Thompson sought damages and injunctive relief to remedy termination of his nontenured position as an assistant history professor. We affirm.

I

In 1991 Thompson accepted a nontenured, probationary appointment with NDSU as an assistant professor of history. Thompson's employment agreement with NDSU was expressly governed by the State Board of Higher Education Regulations on Academic Freedom, Tenure, and Due Process and by the NDSU University Senate Policy Implementing Procedural Regulations. NDSU renewed Thompson's probationary appointment for the 1992-93 and 1993-94 academic years.

On April 22, 1994, Peterson, the chair of the history department, notified Thompson that the tenured faculty in the history department had "concluded that [Thompson was] not making satisfactory progress toward successful promotion and tenure, especially in the area of teaching," and had "voted to recommend to the Dean of the College of Humanities and Social Sciences and Vice President for Academic Affairs that [his] probationary

appointment should not be renewed." On April 28, Thompson made a written request to Peterson for a statement of "reasons that contributed to the decision for non-renewal of my probationary, tenure-track appointment." On April 29, Peterson informed Thompson that Section 351C.2 of the NDSU Policy Manual directed that nonrenewal decisions "shall be made in every instance by the University President," and that a nonrenewal decision had not yet been made in his case.

Meanwhile, Isern, the Dean of the College of Humanities and Social Sciences, and Sharon Wallace, Vice President for Academic Affairs, accepted the history department's recommendation for nonrenewal and forwarded it to NDSU President Jim Ozbun. On May 13, 1994, Ozbun notified Thompson that his faculty appointment at NDSU would not be renewed beyond the 1994-95 academic year and invited Thompson to "consult NDSU Policies 350 and 351 for your further procedural rights." Thompson did not pursue any further internal administrative remedies, and he received a "terminal contract" for the 1994-95 academic year.

Thompson sued the defendants in Grand Forks County in the Northeast Central Judicial District, alleging, in substance, a breach of his employment contract; an infringement of his state constitutional rights to substantive and procedural due process, freedom of speech, and protection of his reputation; and a violation of the "secret personnel file" provisions of N.D.C.C. Ch. 15-38.2. The district court in Grand Forks County, the Honorable Kirk Smith, granted an ex parte temporary restraining order that prohibited NDSU from terminating Thompson and from hiring a replacement.

The defendants demanded a change of venue to Cass County in the East Central Judicial District. The defendants also moved to vacate the temporary restraining order and to dismiss Thompson's complaint. Judge Smith granted the defendants' motion to change venue to Cass County, but declined to rule on the remaining motions.

The action was then venued in Cass County, and eventually assigned to the Honorable Norman J. Backes. Judge Backes dismissed Thompson's complaint, concluding that the decision not to renew Thompson's teaching contract was made by NDSU President Ozbun

on May 13, 1994, and that Thompson did not make a written request to Ozbun for the reasons for the nonrenewal decision as required by Section 605(c) of the State Board Regulations. Judge Backes ruled that Thompson's April 28, 1994 request to Peterson was misdirected and premature, and because Thompson had failed to exhaust his administrative remedies, the court lacked jurisdiction to hear his lawsuit. Thompson appealed.

II

Thompson contends Judge Smith should have remained the presiding judge in this lawsuit, and Judge Backes's dismissal was without jurisdiction and was null and void. Thompson asserts a change of venue and the designation of a presiding judge are two different subjects. He argues that, although the defendants had a threshold statutory right to have this lawsuit tried in Cass County, they waived their right to file a demand for change of judge by requesting a change of venue from Grand Forks County to Cass County. Thompson's argument mistakes the effect of a change of venue from one judicial district to another.

Jurisdiction is the power and authority of a court to hear and decide a case, Rudnick v. City of Jamestown, 463 N.W.2d 632 (N.D. 1990), while venue means the place where the power to decide a case is to be exercised. Selland v. Selland, 494 N.W.2d 367 (N.D. 1992). Under N.D. Const., Art. VI, 8 and NDCC 27-05-06, district courts in North Dakota have authority to hear and determine civil actions. See Rudnick (district court had jurisdiction to hear claim that employee's demotion violated due process). The district court in Cass County had authority to hear this lawsuit, and the question here is the effect of the change of venue on the assignment of the judge.

Subject to other specific exceptions in NDCC Ch. 28-04, venue for a civil action is generally "in the county in which the defendant or one of the defendants resides at the time of the commencement of the action." NDCC 28-04-05; Varriano v. Bang, 541 N.W.2d 707 (N.D. 1996). An action may be tried in an improper venue "unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county." NDCC 28-04-06; Varriano. If the county designated for trial in a complaint is an improper venue, the court may change the place of trial. NDCC 28-04-07(1). Under NDCC 27-05-26,

a change of venue may be taken from "one judge to another in the same district or in another district, or from one county to another, or from one district to another in the manner provided by law." When venue is changed, NDCC 28-04-08 directs that all further proceedings must be had in the county where the place of trial is changed to. With exceptions not relevant here, NDCC 27-05-22 declares that no judge of a district court may hear any action in a judicial district where the judge was not elected.

When a change of venue has been granted, our civil venue statutes do not explicitly allow the judge granting the change to follow the case from one judicial district to another judicial district. Compare NDRCrimP 21(c) ("Whenever the place of trial is change as provided in this Rule . . . the judge ordering the transfer shall preside at the trial.") When our venue statutes are construed together to give meaning to each provision, the effect of a change of venue transfers the case from "one judge to another . . . in another district," and precludes a judge who grants a change of venue in one judicial district from following the case to a judicial district where the judge was not elected.

To hold otherwise would permit a claimant to begin his lawsuit in a county in the wrong judicial district, but retain the "wrong" judge when the defendant exercises the virtually automatic transfer of venue to the proper county. See NDCC 28-04-06 and 28-04-07. The selection of the judge sought by Thompson, and the sweeping disqualification of the judges in the proper judicial district would contravene the correct procedures for changing a judge detailed in NDCC 29-15-21, and would permit judge-shopping in its worst sense.

Here, Judge Smith, a duly-elected judge in the Northeast Central Judicial District, granted a change of venue to Cass County in the East Central Judicial District. Under NDCC 27-05-22 and 27-05-26, the change of venue precluded Judge Smith from presiding over the case outside of the judicial district where he was elected after he transferred the case to a county in another district. Judge Backes, a duly-elected judge in the East Central Judicial District, had jurisdiction to decide this lawsuit.

III

Thompson asserts the trial court erred in dismissing his lawsuit for failure to exhaust his internal administrative remedies at NDSU. He contends he substantially complied with NDSU's procedures for exhausting his administrative remedies, and argues those remedies were precluded under circumstances analogous to Hom v. State, 459 N.W.2d 823 (N.D. 1990). We disagree.

In describing our standard of review, the parties have relied upon cases involving dismissals for failure to state a claim upon which relief can be granted under NDR CivP 12(b)(v). See Williams v. State, 405 N.W.2d 615 (N.D. 1987); Johnson & Maxwell, Ltd. v. Lind, 288 N.W.2d 763 (N.D. 1980). However, the defendants' motion to dismiss cited both NDR CivP 12(b)(i) and (v), and the trial court explicitly declined to decide whether Thompson's complaint failed to state a claim under NDR CivP 12(b)(v). Instead, the court dismissed under NDR CivP 12(b)(i) for lack of jurisdiction.

Although not binding, federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing our rule. E.g., Larson v. Unlimited Business Exchange of North Dakota, 330 N.W.2d 518 (N.D. 1983). See NDR CivP 1, explanatory note. In deciding jurisdiction under FRCivP 12(b)(1), a trial court may consider matters outside the pleadings without converting the proceedings to summary judgment. Osborn v. United States, 918 F.2d 724 (8th Cir. 1990); Crawford v. United States, 796 F.2d 924 (7th Cir. 1986); 2A Moore's Federal Practice 12.07 [2.-1] (1995); 5A Wright and Miller, Federal Practice and Procedure 1350 (1990). Compare NDR CivP 12(b) ("[i]f . . . matters outside the pleading are presented to and not excluded by the court, [a 12(b)(v)] motion must be treated as one for summary judgment and disposed of as provided in Rule 56"). If the jurisdictional facts are not in dispute, appellate review of a jurisdictional decision is de novo. Osborn; Crawford; 2A Moore's at 12.07 [2.-1]. We review this jurisdictional challenge in that context.

Under FRCivP 12(b)(1), federal courts have generally held that dismissal for lack of subject matter jurisdiction is appropriate if the plaintiff has failed to exhaust remedies before an administrative agency. Komminos v. Upper Saddle River Bd. of Ed., 13 F.3d 775 (3rd Cir.

1994); Bueford v. Resolution Trust Corp., 991 F.2d 481 (8th Cir. 1993); DiLaura v. Power Authority of State of New York, 982 F.2d 73 (2nd Cir. 1992). See 5A Wright and Miller, at 1350. Our decisions have also consistently required exhaustion of remedies before the appropriate administrative agency as a prerequisite to making a claim in court. Lapp v. Reeder Public School Dist. No. 3, 544 N.W.2d 164 (N.D. 1996); Medical Arts Clinic v. Franciscan Initiatives, 531 N.W.2d 289 (N.D. 1995); Tooley v. Alm, 515 N.W.2d 137 (N.D. 1994); Transportation Division v. Sandstrom, 337 N.W.2d 160 (N.D. 1983); Shark Bros., Inc. v. Cass County, 256 N.W.2d 701 (N.D. 1977). Failure to exhaust administrative remedies generally precludes making a claim in court.

We have also applied the doctrine of exhaustion of administrative remedies to employment cases. In Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73 (N.D. 1991), a doctor failed to exhaust her internal administrative remedies at a hospital, and, instead, sued the hospital for wrongful discharge. We observed that the doctor's wrongful discharge claim could have been resolved at a hearing under the hospital's internal administrative procedures. Because the doctor had failed to exhaust her internal administrative remedies at the hospital, we affirmed the dismissal of her wrongful discharge claim against the hospital.

IV

Here, Thompson's employment agreement with NDSU was specifically governed by the NDSU University Senate Policy Implementing Procedural Regulations and by the State Board Regulations. Hom (regulations are part of teacher's employment contract). Section 605(c) of the State Board Regulations outlines specific internal procedures for nontenured, probationary faculty to seek review of a university's nonrenewal decision.

Section 605(c)(2) directs that a nonrenewed faculty member "shall be informed of [the nonrenewal] decision in writing by the individual or chair of the body making the decision." Within seven days after receipt of the notice of nonrenewal, the faculty member may request written reasons for the decision to terminate, and the institution must supply the reasons that contributed to the nonrenewal decision within seven days of receipt of the request. The faculty member then has fifteen days to request reconsideration of the

nonrenewal decision, and the institution must respond within fifteen days after receipt of the request for reconsideration.

Section 605(c)(3) says that, within sixty days after receipt of notice of a nonrenewal decision, the faculty member may request review by a Special Review Committee to determine if the nonrenewal decision was the result of "inadequate consideration." Under this subsection, "inadequate consideration" is confined to a procedural meaning, and it is not given a substantive meaning. The Special Review Committee is expressly prohibited from substituting its judgment on the merits of whether a faculty member should be reappointed or given tenure.

Section 605(c)(4) declares that, if within sixty days after receipt of notice of a nonrenewal decision, a faculty member alleges the nonrenewal decision violated academic freedoms, constitutional rights, or contractual rights, a Special Review Committee shall consider the allegation by informal methods. If the allegation is not resolved by the Special Review Committee, the matter shall be heard by a Standing Committee on Faculty Rights, and the faculty member must prove by clear and convincing evidence that the allegation was based significantly on the alleged improper consideration. If the faculty member establishes a prima facie case before the Standing Committee on Faculty Rights, those making the nonrenewal decision must produce evidence to support the nonrenewal.

In Hom, we considered whether a university had substantially complied with Section 605(c)(2) in terminating a non-tenured, probationary professor. In Hom, the professor requested written reasons for a nonrenewal decision within seven days after receipt of a nonrenewal notice, and the university delayed furnishing the professor with the termination reasons for more than seven months. We explained that the purpose of the regulation's well-delineated timetable for expedited review of the reasons for nonrenewal was to guarantee prompt resolution of the matter. We concluded the university's violation of the seven-day requirement for furnishing the professor with reasons for nonrenewal was more than a technical violation. Compare Stensrud v. Mayville State College, 368 N.W.2d 519 (N.D. 1985) (timely notification by different method than specified in regulation was substantial

compliance). In Hom we held that the seven-month delay was not substantial compliance with the nonrenewal procedure.

Here, Peterson, the chair of the history department, notified Thompson that the tenured faculty of the history department had "voted to recommend" that his probationary appointment should not be renewed. Thompson asked Peterson for a statement of reasons for his nonrenewal. Thompson contends that his request was properly directed to the "chair of the body making the decision" under Section 605(c)(2). He also argues that, at a minimum, he substantially complied with Section 605(c)(2), because his request to Peterson was part of the record before NDSU President Ozbun. We reject Thompson's arguments.

The tenured faculty of the history department did not make the final decision for nonrenewal of Thompson's nontenured employment; instead, the tenured faculty "voted to recommend" nonrenewal. Section 351C.2 of the NDSU University Senate Policy Implementing Procedural Regulations, incorporated in Thompson's employment agreement with NDSU, directs that "[n]onrenewal decisions shall be made in every instance by the University President, following recommendations by the dean or director, and the promotion, tenure and evaluation committee of the college or equivalent unit." That regulation, when read together with Section 605(c)(2) of the State Board Regulations, unambiguously declares that, at NDSU, the university president makes all nonrenewal decisions. The obvious purpose of those regulations is to apprise the decision maker, the NDSU president, that reasons for the nonrenewal are necessary. A premature request directed to someone other than the actual decision maker does not fulfill that purpose, nor does it serve to trigger the well-delineated timetable for expedited review of the decision maker's reasons for nonrenewal. The regulations do not require a decision maker to search the "record" for a premature request for reasons for nonrenewal.

When Thompson asked Peterson for reasons for the nonrenewal, NDSU President Ozbun had not made a nonrenewal decision. Peterson specifically informed Thompson that nonrenewal decisions were made by the university president and that the president had not

yet made a decision in his case. NDSU President Ozbun notified Thompson on May 13, 1994, that his contract was not being renewed and specifically invited Thompson to consult NDSU policies regarding his further procedural rights. However, Thompson did not pursue any further administrative procedure at NDSU and, instead, sued the defendants. Unlike the professor in Hom, Thompson failed to trigger the administrative review process by requesting reasons for the nonrenewal from NDSU President Ozbun--the "individual . . . making the [nonrenewal] decision." We hold, as a matter of law, that Thompson's premature request for reasons for nonrenewal, directed to Peterson rather than to NDSU President Ozbun, did not substantially comply with NDSU's administrative procedures.

V

Thompson asserts that the doctrine of exhaustion of remedies does not apply to his constitutional claims. He relies upon Froysland v. North Dakota Workers Compensation Bureau, 432 N.W.2d 883 (N.D. 1988); Johnson v. Elkin, 263 N.W.2d 123 (N.D. 1978); and Family Center Drug Store, Inc. v. North Dakota State Board of Pharmacy, 181 N.W.2d 738 (N.D. 1970). Those precedents generally hold that the constitutionality of an act administered by an agency may be raised for the first time on appeal to the district court.

Those decisions do not abolish the requirement for exhaustion of administrative remedies. Section 605(c)(4) of the State Board Regulations specifically contemplates administrative consideration of constitutional claims. There is no indication Thompson could not have developed his constitutional claims in the administrative process. We decline to speculate on the resolution of those claims if Thompson had raised them in the designated administrative forum. Cf. Southeast Human Service Center v. Eiseman, 525 N.W.2d 664 (N.D. 1994) (declining to speculate on result if employee had complied with employer's reasonable request for employee to submit to doctor's examination).

Moreover, as a nontenured, probationary teacher, Thompson had no right to continued employment beyond the duration of his contract, and he possessed no constitutionally protected property interest in continued employment. Stensrud. Compare Morris v. Clifford, 903 F.2d 574 (8th Cir. 1990) (tenured faculty member can be dismissed only for

adequate cause and has constitutionally protected property interest in continued employment). Thompson's failure to exhaust the administrative remedies in his contract with NDSU precludes him from now raising those constitutional claims.

VI

We hold that the trial court properly dismissed Thompson's lawsuit for lack of jurisdiction.

We therefore affirm the judgment.

Herbert L. Meschke

Dale V. Sandstrom

William A. Neumann

Beryl J. Levine, S.J.

Gerald W. VandeWalle, C.J.

The Honorable Mary Muehlen Maring was not a member of the Court when this case was heard and did not participate in this decision.

8.3 UNITED STATES COURT OF APPEALS - FOR THE THIRD CIRCUIT

NO. 94-3109

THOMAS H. TAYLOR,

Appellant

v.

THE PEOPLES NATURAL GAS COMPANY, a subsidiary of Consolidated Natural Gas Company; SYSTEM PENSION PLAN OF CONSOLIDATED NATURAL GAS COMPANY, Number 001; THE ANNUITIES AND BENEFITS COMMITTEE, the plan administrator,

Appellees

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 92-cv-00394)

Argued: September 19, 1994
Before: BECKER, COWEN, Circuit Judges, and
POLLAK, District Judge.*

(Filed: March 9, 1995)

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OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal arises out of an ERISA action brought by Thomas H. Taylor, a former employee of Peoples Natural Gas Company ("PNG"), against the members of the Annuities and Benefits Committee ("the defendants"), which is the plan administrator of PNG's pension plan. The district court granted summary judgment for the defendants. The gravamen of Taylor's claim is that statements regarding the retroactivity of the pension plan's early retirement incentive program, made to him by PNG's Supervisor of Employee Benefits, John Burgunder, who was not a member of the Annuities and Benefits Committee, constituted a breach of the defendants' fiduciary obligation to communicate complete and correct material information to plan participants regarding their status and options under an employee benefit plan. The Equal Employment Advisory Council has filed an amicus curiae brief in support of the defendants.

Because Burgunder's statements form the basis of Taylor's suit against the defendants and Taylor has not sued Burgunder, we first, as a matter of logic, address the important question presented -- whether a plan administrator is liable for statements made by

individuals who have been selected as non-fiduciary agents by the plan administrator to assist it in discharging its fiduciary obligation to administer a plan, even though such individuals are formally employees of the plan sponsor, who is not a fiduciary. We answer this question in the affirmative, and conclude that the defendants are responsible for any material misstatements made by Burgunder to Taylor regarding possible changes in PNG's pension plan since, in counseling Taylor, Burgunder was acting, at a minimum, within his apparent authority as an agent of the defendants. We will, however, affirm the judgment because the statements allegedly made by Burgunder do not, as a matter of law, constitute a misrepresentation of a material fact.

I.

PNG sponsors a pension plan along with its parent corporation, Consolidated Natural Gas Company ("CNG"). The named fiduciary and plan administrator of the pension plan is the Annuities and Benefits Committee, which is made up of employees of both CNG and PNG. The members of this committee are the relevant defendants in this action.¹ Burgunder was not a member of the Annuities and Benefits Committee.

During 1988, PNG hired several outside consulting firms to conduct efficiency studies to examine ways to decrease costs and increase the efficiency of the company's operations. In connection with these studies, PNG considered several downsizing options, including the offer of an early retirement incentive program through the company's pension plan. Taylor, who was employed during this period as a general manager in PNG's Information System department, participated in the efficiency studies and submitted a report to his boss, Scotty Amos, in which he concluded that, if certain changes were implemented, Taylor's department could operate with six fewer employees. In his report Taylor suggested an early retirement incentive plan as a possible method to reduce his department's manpower. During the latter portion of 1988, Taylor, who started work at PNG in 1959, began to consider retirement, while he was aware that PNG was, consistent with his suggestion, considering an early retirement incentive program as a downsizing option.

During the first two months of 1989, Taylor spoke to Burgunder about whether PNG would adopt an early retirement incentive program and, if such a plan were enacted, whether it would be made retroactive to encompass employees retiring before the announcement of the program. While, as we have noted, Burgunder was not a member of the Annuities and Benefits Committee, the defendants concede that he was authorized "to advise employees of their rights and options under the Pension Plan." Appellees Br. at 21. Moreover, it was generally understood by PNG employees that Burgunder was the person with whom plan participants should speak regarding possible changes to the pension plan. Taylor represents that during one particular discussion, Burgunder told him that he believed that, should an early retirement program be offered, it might apply retroactively. More specifically, Taylor stated:

During and prior to the March 1st date I had had discussions with Mr. Burgunder relative to rumors and possible studies that may have been going on that could lead to an early retirement program, and it was during one of those discussion points where I talked with Mr. Burgunder about other people that were retiring, and he gave me the -- he told me at that time that he believed that if there would be any early retirement programs offered in 1989, that they would make it retroactive to people retired from January 1st, until such time as they might offer the program.

App. at 8b-9b. Taylor continued:

I can't recall exactly what his conversations were about the retroactivity other than he believed that if an early retirement program was announced or it was offered -- that might be a better word -- it might be retroactive to these people that we were talking about.

App. at 33b.

Following these conversations, on November 30, 1988, Taylor tendered a written announcement of his intention to retire:

Please accept my request for permission to retire from active employment effective March 1, 1989. . . . I would also like to change my retirement date should a special retirement package be proposed or planned on or before 3-1-89.

App. at 34a. Taylor in fact retired on March 1, 1989. On August 10, roughly five months later, the Annuities and Benefits Committee announced that an early retirement program had been adopted by PNG's Board of Directors and would be available for employees retiring between September 1, 1989 and November 1, 1989. This program was not made retroactive to employees -- such as Taylor -- retiring prior to September 1, 1989.

Following this announcement, Taylor brought suit against the plan administrator contending that the statements made to him by Burgunder regarding the possible retroactive application of the early retirement program constituted a misrepresentation by an ERISA plan fiduciary. The parties consented to have this case adjudicated by a Magistrate Judge, 28 U.S.C.A. § 636(c) (1993), who concluded that the statements made by Burgunder to Taylor did not constitute a misrepresentation, and hence the defendants had not breached their fiduciary obligation. He therefore granted the defendants' motion for summary judgment.

On this appeal of the Magistrate Judge's order, authorized by 28 U.S.C.A. § 636(c)(3) (1993), the defendants ask us to affirm on the ground that Burgunder was not acting on behalf of the plan administrator when speaking with Taylor about possible changes in the pension plan or, alternatively, on the basis of the Magistrate Judge's reasoning that there was no misrepresentation as a matter of law. In reviewing an order granting summary judgment we exercise plenary review, applying the same standard that governed the district court. That standard provides that summary judgment should be rendered if the evidence is such that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

II.

A.

The members of the Annuities and Benefits Committee, the plan administrator of PNG's pension plan, are fiduciaries, required to "discharge [their] duties with respect to [the] plan solely in the interest of the participants and beneficiaries."² ERISA § 404(a)(1), 29

U.S.C.A. §1104(a)(1) (1986). We addressed the scope of this fiduciary obligation under a similar set of circumstances in *Fischer v. Philadelphia Electric Co.*, 994 F.2d at 130. There, employees of the Philadelphia Electric Company ("PECO") had approached PECO's benefits counselors and questioned them about whether any early retirement incentive plan was being considered. Although PECO was considering an early retirement incentive plan, the benefits counselors, acting pursuant to explicit instructions from PECO's senior management, informed the plan participants that they had no knowledge of any such plan. The plaintiffs, plan participants who retired before the announcement of the early retirement incentive pension plan, alleged that PECO had breached its fiduciary duties under ERISA by making affirmative material misrepresentations regarding PECO's pension plan. The action against PECO was grounded on its alleged violation of fiduciary obligations in its capacity as plan administrator.³ The district court granted summary judgment for PECO and the plaintiffs appealed.

The Fischer panel began its analysis by recognizing that well established case law provides that plan administrators have a fiduciary obligation not to affirmatively misrepresent material facts to plan participants. *Fischer*, 994 F.2d at 135 (citing *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990) ("This duty to communicate complete and correct material information about a beneficiary's status and options is not a novel idea.")); see also *Bixler v. Central Penn. Teamsters Health-Welfare Program*, 12 F.3d 1292, 1300 (3d Cir. 1993) (recognizing that plan administrators have "an obligation to convey complete and accurate information material to the beneficiary's circumstances"). The panel restated this obligation in the context of fiduciaries who counsel plan participants regarding the possible adoption of amendments to a plan:

we hasten to add that ERISA does not impose a "duty of clairvoyance" on fiduciaries. An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process. A plan administrator may not

make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must speak truthfully.

Fischer, 994 F.2d at 135 (internal quotation marks and citations omitted).

Given this obligation, PECO contended that the statements made by the benefits counselors were not affirmative misrepresentations, since company officials had not told them of the discussions taking place among senior management regarding the contemplated adoption of an early retirement incentive program. The Fischer panel rejected this argument and reversed the district court's grant of summary judgment, concluding that, given the facts alleged, the plan administrator was responsible for statements made by the benefits counselors, and that PECO, which was plan administrator as well as plan sponsor, had therefore breached its fiduciary obligation to not affirmatively misrepresent material information to plan participants:

PECO argues that these communications cannot be characterized as "affirmative misrepresentations" because "when the benefits counselors . . . stated that they knew of no [early retirement] plan, their representations were correct." . . . This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECO as plan administrator. These obligations cannot be circumvented by building a "Chinese wall" around those employees on whom plan participants reasonably rely for important information and guidance about retirement.

Fischer, 994 F.2d at 135 (emphasis omitted).

B.

While acknowledging that they had a fiduciary obligation as plan administrator not to materially misrepresent information regarding possible changes in PNG's pension plan, the present defendants contend that they have not violated this obligation since Burgunder was not a member of the Annuities and Benefits Committee and was not otherwise a fiduciary. The defendants attempt to distinguish this case from Fischer, where the misrepresentations were allegedly made by benefits counselors who were the employees of the plan

administrator, PECO. In this action, the Annuities and Benefits Committee, and not PNG, is the named fiduciary, and hence, the defendants assert, they cannot be liable for any affirmative misrepresentations made to plan participants by Burgunder, PNG's employee, about possible changes to PNG's pension plan. While we agree that Burgunder was not a member of the Annuities and Benefit Committee, and otherwise not a fiduciary of the plan, we cannot agree with the defendants that Burgunder was not acting on their behalf when speaking with Taylor.

The defendants concede that Burgunder had actual authority, as Supervisor of Employee Benefits, to advise employees of their rights and options under the plan, prepare reports concerning participants' benefits, and calculate the costs of alternative plan amendments on behalf of the plan administrator. Appellees Br. at 21. Given that Burgunder's activities are limited to these administrative ministerial functions, we agree with the defendants that Burgunder is not a fiduciary. Department of Labor Regulation § 2509.75-8, 29 C.F.R. § 2509.75-8, Q & A D-2 provides that such individuals, whose activities are limited "within a framework of policies, interpretations, rules, practices, and procedures made by other persons, fiduciaries with respect to the plan," cannot be individually liable as fiduciaries under ERISA, since they fail to exercise "the discretionary authority or discretionary control" over the plan required for the direct imposition of fiduciary liability. See ERISA § 3(21)(A), 29 U.S.C.A. § 1002(21)(A) (West Supp. 1993).

While Burgunder is not himself a fiduciary with respect to the plan (and he is not a defendant in this action), he did function, under the regulations, as a non-fiduciary agent of the defendants, assisting them in discharging their authority and responsibility, as plan administrator, to "control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C.A. § 1102(a)(1) (1986). While Burgunder is formally the employee of plan sponsor PNG, he performed his activities for the plan on behalf of the plan administrator defendants, and not on behalf of the plan sponsor. The conclusion that Burgunder performed these tasks on behalf of the plan administrator, the named fiduciary

with respect to the plan, is clear from the regulations. These provide that "[i]n discharging fiduciary responsibilities, a fiduciary with respect to a plan may rely on . . . persons who perform purely ministerial functions for such plan," such as "advising participants of their rights and options under the plan." DOL Reg. § 2509.75-8, 29 C.F.R. § 2509.75-8, Q & A D-2 & FR-11 (emphasis added); see also 2 Jeffrey D. Mamorsky, *Employee Benefits Law: ERISA and Beyond* §12.06[4] (1993) (recognizing that, pursuant to DOL Reg. §2509.75-8, a committee, acting as plan administrator, can "select[] agents to perform ministerial functions").

The defendants concede, as we have noted, that Burgunder is governed by this regulation, and that he had actual authority as the Supervisor of Employee Benefits to "advise employees of their rights and options under the Pension Plan." Appellees Br. at 21. This authority originates from the defendants, the plan administrator, and not from the plan sponsor, for the plan administrator is the entity with the fiduciary obligation to "control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C.A. § 1102(a)(1) (1986). In contrast, PNG, the plan sponsor, is not a fiduciary and correspondingly has no duty to administer the plan. Thus, under the applicable regulations, Burgunder was acting as a non-fiduciary agent of the defendants (the plan administrator) and not PNG (the plan sponsor) in "advising participants of their rights and options under the plan." Department of Labor Regulation §2509.75-8, 29 C.F.R. § 2509.75-8, Q & A D-2.

This conclusion is consistent with our reasoning in *Fischer*, where we held that a plan administrator violates its "fiduciary obligations owed to the plan participants" when "those employees on whom plan participants reasonably rely for important information and guidance about retirement" make material misstatements regarding possible changes to a company's pension plan. *Fischer*, 994 F.2d at 135. The fact that the benefits counselors who made the misrepresentation in *Fischer* were the employees of PECO does not distinguish that case from ours. The employees in *Fischer* were acting as the agents of PECO in its capacity as plan administrator, not as employer/plan sponsor. See *id.* at 133

("As an employer, neither PECO nor its business decision to offer an early retirement program were subject to ERISA's fiduciary duties." (internal quotation marks omitted)). Like the benefits counselors in Fischer, Burgunder was acting to assist the plan administrator, not the plan sponsor, in discharging its fiduciary obligation to "control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C.A. § 1102(a)(1) (1986).

C.

Having concluded that Burgunder was acting on behalf of the defendants, and not PNG, in performing the functions outlined above, we must consider whether Burgunder was acting within the scope of his authority as an agent of the defendants in making representations to Taylor regarding the possible retroactive application of plan amendments under consideration by PNG, the plan sponsor. In making this determination, we are governed by the law of agency, as developed and interpreted as a matter of federal common law. See *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 99, 110, 109 S. Ct. 948, 954 (1989) ("[C]ourts are to develop a federal common law of rights and obligations under ERISA-regulated plans."); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25, 103 S. Ct. 2841, 2854, n.26 (1983) ("[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." (quoting remarks of Sen. Javits at 129 Cong. Rec. 29942)); *National Football Scouting, Inc. v. Continental Assurance Co.*, 931 F.2d 646, 648 (10th Cir. 1991) (examining whether "under the federal common law of agency" an agent of a plan fiduciary was acting within his actual or apparent authority).

In this regard, we recognize that implicit in our holding in Fischer is the assumption that in counseling the plan participants about possible amendments to the plan, the PECO benefits counselors were acting within their authority as agents of the plan administrator. In particular, we read our limitation of fiduciary liability to "those employees on whom plan participants reasonably rely for important information and guidance about retirement" as a legal conclusion that such individuals operate, at a minimum, within their apparent

authority to provide such information and guidance to plan participants, on behalf of the plan administrator. The defendants here admit that Burgunder had actual authority to "advise[] employees of their rights and options under the Pension Plan." Appellees Br. at 21. Moreover, it is uncontested that plan participants reasonably relied on Burgunder for important information and guidance about retirement. Considering these facts in light of the entire record, we conclude that, like the benefits counselors in *Fischer*, Burgunder was acting within his authority as an agent of the plan administrator, the members of the Annuities and Benefits Committee, in counseling plan participants regarding possible changes in the plan.

Our conclusion also accords with established principles of apparent authority. It is well settled that apparent authority (1) "results from a manifestation by a person that another is his agent" and (2) "exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." Restatement (Second) of Agency § 8 cmts. a & c (1958). In our recent opinion in *American Telephone & Telegraph v. Winback & Conserve Program*, ___ F.3d ___, 1994 U.S. App. LEXIS 34398, 1994 WL 685911 (3d Cir. Dec. 9, 1994), applying the concept of apparent authority under the federal common law of agency, we held that "[a]pparent authority arises in those situations where the principal causes persons with whom the agent deals to reasonably believe that the agent has authority. . . ." *Id.* at *64, 1994 WL 685911 at *18 (internal quotation marks omitted).

It is uncontroverted that both elements necessary for the existence of apparent authority are present in this case. First, the defendants' undisputed vesting of Burgunder with the authority to "advise employees of their rights and options under the Pension Plan" clearly constitutes a manifestation that he was their agent.

Second, the plan participants, such as Taylor, reasonably believed that Burgunder specifically had the authority to counsel plan participants about possible amendments to the plan. Taylor actually believed that Burgunder had the authority to counsel plan participants about possible changes in the plan. App. at 41b ("I accepted his comments because he's the key person in the retirement process at Peoples Natural Gas at the time I retired.").

Moreover, this belief was reasonable in that the evidence demonstrates that plan participants generally considered Burgunder the person to speak with regarding possible changes in retirement benefits. In light of this reasonable belief about what information Burgunder was able to provide, the defendants' authorization of Burgunder to be their representative to plan participants, and the defendants' lack of effort to announce any limits to the scope of Burgunder's authority, it was a short and reasonable step for plan participants, such as Taylor, to believe that Burgunder not only was able, but indeed possessed the specific authority, to counsel them about possible amendments to the plan.

We conclude, therefore, that Burgunder was acting, at a minimum, with apparent authority as agent of the defendants in counseling Taylor regarding possible changes in the company's pension plan. Given this authority, the defendants will be liable for any affirmative material misrepresentations made by Burgunder concerning the possible retroactive application of the plan's early retirement incentive plan.

D.

We therefore are presented with the question whether Burgunder's alleged statement to Taylor that "he believed that if an early retirement program was . . . offered . . . it might be retroactive," app. at 33b (emphasis supplied), constituted a material misrepresentation. We agree with the Magistrate Judge that, as a matter of law, no reasonable fact-finder could conclude that Burgunder's statement constituted a misrepresentation.⁴

It is uncontested that at the time of Burgunder's statement to Taylor, the questions whether PNG would enact an early retirement incentive plan, and whether it would apply retroactively, were both yet undecided by PNG. Given that the plan sponsor, PNG, had yet to make a final decision regarding the prospective amendment, we conclude that the defendants did not violate their fiduciary obligation by merely confirming to Taylor that the adoption of such an amendment was under consideration and by expressing a reasonable opinion as to the scope of the possible amendment. The record clearly reflects that Burgunder's prediction was by all accounts reasonable. Burgunder based his prediction on two grounds: (1) an outside consultant had suggested a retroactive early retirement

program; and (2) a member of PNG's board of directors, Mr. Flinn, to whom Burgunder had talked about the amendment's possible scope, had stated that he supported making the program retroactive.

Burgunder's alleged statement is a far cry from the statements made by the benefits counselors in Fischer that "there was definitely nothing in the planning," when in fact such an amendment was under serious consideration by company officials. In contrast, Burgunder's attempt to counsel Taylor by offering his prediction based on his discussions with a member of PNG's board of directors was not a misrepresentation.

Taylor conceded that Burgunder's statement was nothing more than his "best guess as to what may occur should an early retirement package be adopted." App. at 13a. An honest statement of belief reasonably grounded in fact does not constitute a misrepresentation. As Justice Holmes recognized in another context, "[t]he rule of law is hardly to be regretted, when it is considered how easily and insensibly word of hope or expectation are converted by an interested memory into statements of quality or value when the expectation has been disappointed." *Deming v. Darling*, 20 N.E. 107, 148 Mass. 504, 506 (1889).

III.

In sum, we conclude that although the defendants are responsible for any material misstatements made by Burgunder to Taylor regarding possible changes in PNG's pension plan, the statements allegedly made by Burgunder do not, as a matter of law, constitute a misrepresentation. We will, therefore, affirm the order of the Magistrate Judge granting the defendants' request for summary judgment.

Thomas H. Taylor v. The Peoples Natural Gas Company

No. 94-3109

Cowen, Circuit Judge, concurring.

I join in Parts I and IID of the majority opinion and therefore concur as to the judgment in this case. I am unable to join in Parts IIA-C, however, because I believe that the majority's opinion sweeps more broadly than is justified under the facts presented here.

At issue in this case is a statement made by John Burgunder, The Peoples National Gas Company's Supervisor of Employee Benefits, to Thomas Taylor, a former employee of The Peoples National Gas Company ("PNG"), concerning the retroactivity of a potential amendment to PNG's pension plan. According to Taylor, Burgunder misrepresented to him that if PNG offered an early retirement incentive plan, Taylor would get its benefits even if Burgunder retired before the incentive plan was enacted. Specifically, Taylor alleged that:

During and prior to the March 1st date, I had had discussions with Mr. Burgunder relative to rumors and possible studies that may have been going on that could lead to an early retirement program, and it was during one of those discussion points where I talked with Mr. Burgunder about other people that were retiring, and he gave me the -- he told me at that time that he believed that if there would be any early retirement programs offered in 1989, that they would make it retroactive to people retired from January 1st, until such time as they might offer the program.

App. at 8b-9b (emphasis added). He continued:

I can't recall exactly what his conversations were about the retroactivity other than he believed that if an early retirement program was announced or it was offered -- that might be a better word -- it might be retroactive to these people that we were talking about.

App. at 33b (emphasis added).

As the majority correctly recognizes, the magistrate judge who adjudicated this case concluded that the statement made by Burgunder to Taylor that he believed the early retirement program would be retroactive did not constitute misrepresentation. *Taylor v. Peoples Natural Gas Co.*, No. 92-394, slip op. at 4-5 (W.D. Pa. January 27, 1994). Agreeing with the magistrate judge, the majority holds in Part IID that as a matter of law, no reasonable fact-finder could conclude that Burgunder's statement constituted a misrepresentation. *Maj. Op.* at [typescript at 18]. Inexplicably, however, before disposing of this case on the unassailable grounds aptly set out by the magistrate judge, the majority chooses in Parts IIA-C to pose and answer its own questions about the relationship between ERISA fiduciaries and their agents in cases, unlike the case at hand, where a party

demonstrates a misrepresentation. The majority concludes that a plan administrator can be held liable for a breach of a fiduciary duty for misrepresentations by the plan administrator's non-fiduciary agents. Because the majority reaches out to decide an issue that is not squarely before us, I am unable to join in Parts IIA-C of the majority opinion.

It is well settled law that in general "[c]ases are to be decided on the narrowest legal grounds available, and relief is to be tailored carefully to the nature of the dispute before the court." *United States v. Rias*, 524 F.2d 118, 120 n.2 (5th Cir. 1975) (quoting *Korioth v. Briscoe*, 523 F.2d 1271, 1275 (5th Cir. 1975)); see also *In re Chicago, Rock Island and Pac. R.R.*, 772 F.2d 299, 303 (7th Cir. 1985) (it is an "elementary maxim of our legal system" that a court should decide "only the case before it"), cert. denied, 475 U.S. 1047, 106 S. Ct. 1265; *Shamloo v. Mississippi State Bd. of Trustees of Insts. of Higher Learning*, 620 F.2d 516, 524 (5th Cir. 1980) (expressing concern that cases be decided on the narrowest legal grounds available); *Finley v. Hampton*, 473 F.2d 180, 189 (D.C. Cir. 1972) (explaining that courts do not decide hypothetical controversies). This proposition is a corollary to the rule that federal courts are not to render advisory opinions, but rather are to decide specific issues for parties with real disputes. See, e.g., *Korioth*, 523 F.2d at 1274-75; see also *United States v. Leon*, 468 U.S. 897, 963, 104 S. Ct. 3430, 3447 (1984) (Stevens, J., concurring) ("[W]hen the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role.").

The statements the majority makes concerning the possible liability of ERISA fiduciaries due to misrepresentations of their non-fiduciary agents run afoul of this rule because the majority's holding that there was no misrepresentation here is sufficient to put this case to rest. Moreover, the majority's choice to explore agency law is particularly ill-advised because (1) we have not had the benefit of the magistrate judge's thinking and findings on these important matters, (2) these issues were neither argued nor briefed by counsel, and (3) the majority breaks considerable new ground in the area of ERISA fiduciary liability.

The majority's opinion states that the Annuities and Benefits Committee of the System Pension Plan, the plan administrator and co-defendant in this matter, can be held liable for statements by Burgunder because Burgunder was acting within the scope of his apparent authority as an agent of the plan administrator in making representations to Taylor. The opinion of the magistrate judge disposing of this case, however, is completely devoid of any references to the question of whether an ERISA fiduciary can be held liable for statements of its non-fiduciary agents acting within the scope of their apparent authority. Indeed, in his opinion, the magistrate judge reaches only two conclusions of law. First, he concludes that there is no general duty on the part of an employer to inform its employees of any action it is considering taking in the future. As he states, "[t]he fact that PNG was considering an early retirement package for 1989 is not information which ERISA requires an employer to disclose." Taylor, slip op. at 3 (emphasis added). Second, he concludes that since "[p]laintiff concedes that he was not informed that a decision had been made to offer any early retirement program at all, and that this was simply Mr. Burgunder's best guess as to what may occur should an early retirement program be adopted," there was "no misrepresentation, and thus no breach of fiduciary duty." Id. at 4-5. There is absolutely no discussion of the position now advanced by the majority that the plan administrator could be held liable for statements of the plan administrator's non-fiduciary agents.⁵

Even more importantly, the magistrate judge's factual recitation and the record before us are insufficient to establish the precise nature of the relationship between the System Pension plan administrator and Burgunder, a failing that makes it extremely difficult to perform a careful analysis of the possible applicability of the apparent authority doctrine. PNG asserts that Burgunder was merely an employee of PNG and was not a member of the "separate and distinct plan administrator." Appellee's Brief at 21. The magistrate judge's factual recitation does not even touch on the relationship between Burgunder and the plan administrator. As the majority recognizes, "apparent authority arises in those situations where the principal causes persons with whom the agent deals to reasonably believe that the agent has authority." Maj. Op. at [typescript at 16] (citing American Telephone &

Telegraph v. Winback & Conserve Program, No. 94-5305, 1994 U.S. App. Lexis 34398, at *64, 1994 WL 685911, at *18 (3d Cir. Dec. 9, 1994)). The majority, however, fails to adduce a single fact which convincingly demonstrates that the plan administrator caused employees of PNG to conclude that Burgunder was authorized to make representations to employees concerning potential plan amendments.⁶ Accordingly, I am troubled by the majority's analysis and concerned with the logic of deciding a question without relevant facts.

Equally disturbing in this case is the majority's willingness to advance arguments that were not put forward by the appellant in the first instance and that were not briefed by the parties. We have repeatedly recognized the impropriety of reaching issues that are not properly briefed before us. *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1057 n.10 (3d Cir. 1993), cert. denied, U.S. , 114 S. Ct. 699 (1994); *Francesconi v. Kardon Chevrolet, Inc.*, 888 F.2d 18, 19 n.1 (3d Cir. 1989); **H. Prang Trucking Co. v. Local Union** No. 469, 613 F.2d 1235, 1239 (3d Cir. 1980); see also *United States v. Crawley*, 837 F.2d 291, 293 (7th Cir. 1988) (expressing concern over decisions based on issues not refined by the fires of adversary presentation). In his opening brief, Taylor simply argued that a fiduciary may not materially mislead a plan participant. Appellant's Brief at 11.7 Moreover, in his reply brief, Taylor makes it clear that his argument is that PNG is a fiduciary and it owed the fiduciary duty of conveying complete and accurate information to him. Appellant's Reply Brief at 2. Taylor states, "PNG continues to assert its status as employer only, to which the Appellant disagrees. [sic]." *Id.* at 1. Since the majority apparently agrees that PNG is not a fiduciary, see *Maj. Op.* at n.1 [typescript at 4 n.1], it is difficult to see how Taylor's arguments make it necessary to discuss the plan administrator's possible liability due to statements by non-fiduciary agents. Taylor never specifically pressed on appeal the claim that because the plan administrator is a fiduciary, it should be liable for statements of its non-fiduciary agents. Accordingly, counsel for PNG and the Annuities and Benefits Committee had no occasion to evaluate this issue in their

briefs.⁸ Without proper argument and discussion of this issue, it is ill-advised to reach such claims.

Finally, the majority's decision to reach the issue of a plan administrator's liability for non-fiduciary agents is ill-advised because the majority's conclusion is not firmly dictated by our previous precedents. The majority states that the conclusion it reaches is consistent with our reasoning in *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), cert. denied, U.S. , 114 S. Ct. 622 (1993). In *Fischer*, however, we merely held that "[a] plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan." *Fischer*, 994 F.2d at 135. We did not comment on the possible liability of a plan administrator for statements by its non-fiduciary agents. While the majority's position may be a logical extension of *Fischer*, I would have left our decision as to whether such an extension is justified to another day when the issue is more squarely presented. Accordingly, relying simply on the fact that Taylor failed to demonstrate misrepresentation in this case, I would affirm the decision of the magistrate.

9 CONCLUSÕES

Os sistemas americano e inglês, em matéria de Direito Processual Civil, ainda que sejam ambos da família anglo-saxônica, possuem características diversas. No sistema americano, por exemplo, até mesmo porque estudo mais à fundo, a liberdade no que diz respeito ao pedido é de certa forma grande.

Não significa dizer que seja liberal a ponto de ser mudado a qualquer momento, mas na fase anterior à do julgamento, ou seja, do *pre-trial*, poderá haver adaptação do pedido dependendo da resposta do réu.

Esta forma, contudo, não se encontra presente em todos os estados americanos. Ressalte-se, todavia, a diferença do sistema empregado pelo Estado da Louisiana, adepto da *civil law*.

No que se refere ao princípio da adstrição, quando se está diante de julgamento por juiz – e não pelo júri -, se pode concluir que o mesmo se encontra presente nas regras federais.

A fim de concluir este trabalho, é importante destacar a pesquisa em termos de direito comparado, já que determinadas formas existentes em países com princípios diversos do nosso podem ser muito bem explorados pelos legisladores.

Não tornar o pedido tão rígido, a ponto de inviabilizar um julgamento de mérito é um ponto que se deixa para o pensamento dos profissionais do Direito.

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