Wisconsin's Pleading Standard: Sea Change or "Same Old/Same Old?"

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In *Cattau v. National Insurance Services of Wisconsin, Inc.,* decided on April 30, 2019, the Wisconsin Supreme Court unanimously declared the pleading standard articulated in 1983 in *Strid v.* Converse was unchanged by its 2014 decision in *Data Key Partners v. Permira Advisers,* LLC. This declaration may surprise many practitioners, who viewed the decision in *Data Key* as adopting in Wisconsin the heightened federal pleading standard articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal.*

On a case specific level, the 2019 decision in *Cattau* ends the litigation of the plaintiffs' claims against the administrators of certain retirement plans established by Neenah Joint School District ("Neenah"). However, the decision does not address all issues in the lawsuit, and the action will be remanded to the trial court for further proceedings on the plaintiffs' remaining claim. On a more general level, *Cattau* illustrates the complex (translation – lengthy and expensive) legal issues that may arise in litigation.

1. <u>Wisconsin's Pleading Standard.</u>

Wisconsin has long been a notice pleading state, meaning a motion to dismiss for failure to state a claim upon which relief may be granted "usually will be granted only when it is quite clear that under no conditions can the plaintiff recover." The Wisconsin Supreme Court restated this standard in 1983 in *Strid* as, "the complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations."

In 2014, the Wisconsin Supreme Court decided *Data Key Partners v. Permira Advisers, LLC.* The *Data Key* Court ruled "the sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." Similarly, "[b]are legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss." Instead, *Data Key* found, a plaintiff must "allege facts that, if true, plausibly suggest a violation of the applicable law." The factual assertions must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. "Factual assertions are evidenced by statements that describe: who, what, where, when, why, and how."

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Practitioners viewed *Data Key* as an adaptation of the heightened pleading standard articulated in the federal decisions of *Twombly* and *Iqbal.* The Court of Appeals agreed and, in a June 2018 unpublished decision in the *Cattau* litigation, held that under *Data Key* Wisconsin had adopted the plausibility standard and rejected the standard articulated in *Conley v. Gibson* and reiterated in *Strid.*

It is generally agreed that *Twombly* established a heightened pleading standard in federal motion practice, and some have observed that this heightened standard has led to more cases being dismissed than before. *Twombly* was a move away from mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action." The short and plain statement required by the federal rules, the Court explained, demands more than just the possibility of a claim. The mere possibility of a claim could allow "a plaintiff with a largely groundless claim … to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." In other words, broad-based legal impleading where only a possible, but not plausible, factual basis is stated for claims against each defendant is not consistent with Fed. R. Civ. P. 8(a)(2)—the federal analog to our own Wis. Stat. § 802.02(1). This same approach is now the law in Wisconsin.

Not all states have chosen to follow the United States Supreme Court's lead. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Calif. L. Rev. 411 (2018). But Wisconsin has. And in adopting the plausibility standard, the Wisconsin Supreme Court joined the United States Supreme Court in rejecting the old adage that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," a statement taken from *Conley v. Gibson*, and reiterated in this state under *Strid*. …. The correct standard now mandates that "Plaintiffs must allege facts that plausibly suggest they are entitled to relief."

Not so fast, said the Wisconsin Supreme Court in its 2019 *Cattau* decision. "We . . . unanimously conclude that our decision in *Data Key* did not change Wisconsin's pleading standard as previously articulated in *Strid v. Converse."*

To explain further, the pleading standard we set out in *Data Key* is consistent with the pleading standard in *Strid,* and is grounded in Wis. Stat. § 802.02(1)(a)'s (2017-18) requirement that a complaint contain "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief."

The *Cattau* Court went on to further reconcile *Data Key* and *Strid,* pointing to the decision in *Data Key* for the proposition that *Twombly* was consistent with *Strid.* The *Cattau* Court concluded, "[t]herefore, *Data Key* controls Wisconsin's pleading standard and it reaffirmed *Strid.*"

1. *Cattau* Litigation.

The *Cattau* decision did not result in the relief requested by the plaintiffs, however. Although the Wisconsin Supreme Court was unanimous in its conclusion that *Data Key* did not change Wisconsin's pleading standard, the Court was equally divided as to whether the plaintiffs stated a claim upon which relief could be granted against the Plan Administrators. Accordingly, the dismissal of the plaintiffs' claims against these two defendants was affirmed. A brief review of the *Cattau* litigation demonstrates how complex the procedural disputes can become – before the substantive issues are addressed.

a. Facts.

The *Cattau* plaintiffs are former Neenah teachers or administrators who retired in years 2006 through 2011 and received post-employment compensation under a Retirement Plan. After an audit during the years 2010 through 2012, the IRS determined that certain payments under the Plan were not entitled to deferred tax treatment. Neenah entered into a Closing Agreement with the IRS pursuant to which Neenah paid the employer and employee share of the FICA tax due on ineligible payments and a separate penalty to the IRS. In the *Cattau* litigation, the plaintiffs alleged they individually were assessed additional income tax plus interest on certain payments deemed to have been "constructively received" by the retirees in the year of retirement. The plaintiffs sought to recover these payments from Neenah and the Plan Administrators.

b. Procedural History.

The *Cattau* plaintiffs described this case as one which ". . . wades into *Bleak House* territory with its length and complexity." Plaintiffs filed suit in September 2013, alleging numerous claims against Neenah, its insurer and the two Plan Administrators. The defendants each filed a motion to dismiss the complaint in November 2013 on the grounds that the claims were pre-empted by federal law. The plaintiffs filed an amended complaint in January 2014 in an effort to address the pre-emption argument. Each defendant again moved to dismiss the amended complaint, renewing the argument that the plaintiffs' claims were pre-empted by federal law and must be brought in federal tax court. The circuit court agreed and granted the motions to dismiss in May 2014.

The *Cattau* plaintiffs appealed, and in April 2015, the Court of Appeals reversed and remanded the case to the trial court. The defendants renewed their motions to dismiss, on different procedural grounds, and in December 2015, the trial court dismissed all claims against the Plan Administrators on the grounds that the plaintiffs failed to state a claim upon which relief could be granted. The trial court also dismissed the tort claims alleged against Neenah, but did not dismiss the sole breach of contract claim. Consequently, the 2015 trial court decision was final as to the Plan Administrators, such that the plaintiffs could appeal that aspect of the decision as a matter of right. The Court of Appeals affirmed the

dismissal in June 2018, and the plaintiffs asked the Wisconsin Supreme Court to review, arguing that Wisconsin had not specifically adopted a heightened pleading standard or overruled *Strid.*

In April 2019, the Wisconsin Supreme Court reversed the Court of Appeals, in part, but affirmed the dismissal of the Plan Administrators (because an equally divided court could not agree as to whether the plaintiffs met the articulated standard). The lawsuit will continue, into its sixth year, against Neenah on the remaining breach of contract claim.

1. Conclusion.

In its attempt to reconcile *Data Key* and *Strid,* the Wisconsin Supreme Court, in *Cattau,* declared that *Strid* is consistent with *Twombly* and that *Data Key* reaffirmed *Strid.* The *Cattau* Court identified the key aspects of the pleading standard in Wisconsin as:

- A complaint must contain a short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.
- When determining whether a complaint states a claim upon which relief may be granted, courts must accept as true all facts well-pleaded in the complaint and reasonable inferences therefrom.
- If the facts reveal an apparent right to recover under any legal theory, they are sufficient as a cause of action.
- Courts cannot add facts to a complaint and do not accept as true legal conclusions that are stated in the complaint.
- A formulaic recitation of the elements of a cause of action is not enough to state a claim upon which relief may be granted.
- The sufficiency of a complaint depends on the substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled.
- If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted.

The end result is a pleading standard that directs the lower courts to scrutinize conclusory statements, while encouraging an expansive view of factual allegations. It remains to be seen whether *Cattau* ends the dispute over the pleading standard in Wisconsin or spawns additional questions in the future.