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BigLaw On Notice After Judge Scolds Firms For Bad Writing

By **Gavin Broady**

Law360, New York (March 27, 2015, 6:45 PM ET) -- A New York federal judge's recent rebuke of two BigLaw firms over pleadings he found overly long and redundant was no doubt embarrassing, but experts say lawyers are risking more than just a judicial tongue-lashing when they fail to keep their filings short and sweet.

U.S. District Judge William H. Pauley called out Reed Smith LLP, Morrison & Foerster LLP and a pair of smaller firms on Tuesday over the submission of a 175-paragraph complaint that contained over 1,400 pages of exhibits and was met with a 210-page answer by the opposing side.

Judge Pauley said the filings, which came amid a trademark suit brought by UPS Stores Inc. against a franchisee, represented a "troubling trend toward prolixity in pleading" that was "infecting court dockets in this district and elsewhere."

While there are reasons both good and bad why attorneys may wind up filing doorstopper pleadings, experts say Judge Pauley's rant should serve as a reminder that turning in a kitchen-sink pleading can run the risk of sinking an entire case.

Edwin M. Baum, partner and head of Crowell & Moring's New York office, says that not only are gargantuan filings burdensome for all involved, but having more pages also means more opportunities for an attorney to make a mistake.

"One risk in unduly lengthy pleadings that include extraneous matters is that there is a greater chance the lawyer will get something wrong, or include something they may have thought was an accurate statement but is not," Baum says.

Baum says clients who have read the pleading and are later deposed may be called to task over any statements ultimately found to be false, and those clients' credibility may be impeached as a result.

Attorneys who submit pleadings with astronomical page counts also run the risk of stepping on the toes of the last person in the courtroom a lawyer wants to make angry, according to Irell & Manella LLP partner Andra B. Greene.

Greene notes that Judge Pauley's apparent exasperation didn't come out of nowhere, as he appears to have mentioned his displeasure over hefty filings to the parties on multiple occasions.

“This should remind attorneys to keep in mind that the audience for a pleading is not just the other side, it's the trier of fact,” Greene says. “You really have to know your audience, and when your audience indicates he doesn’t want lengthy pleadings, you run a serious risk of alienating the trier of fact by ignoring that.”

Greene adds that a lengthy pleading runs the risk of including allegations that are not only superfluous but also can undercut the primary position you’re trying to assert.

“You also lock yourself into a position,” Greene says. “It’s hard to back away from a position if the evidence doesn’t come out the way you thought it would at the time you filed the pleading.”

While courts tend to impose tight restrictions on page counts for briefings, few if any place such controls on pleadings, Baum says. Instead, lawyers are guided by Rule 8, which calls for such filings to include only “a short and plain statement of the claim” and requires that allegations be “simple, concise and direct.”

The lack of a bright-line page limit can make it easy for attorneys to succumb to the legal profession’s tendency toward a “more is better” mindset, according to Arnold & Porter LLP partner Robert J. Katerberg.

“There’s a natural temptation to think that the longer one’s work product is, the more impressive it’s going to be,” he says. “But we all have to resist that, because what it comes down to is that the longer a filing is, the more frustrated the judge is going to be, because he’s going to have to do the work of separating the wheat from the chaff.”

Katerberg says the proclivity toward longer filings has been exacerbated by recent Supreme Court decisions that have ratcheted up pleading standards, citing 2007’s Bell Atlantic Corp. v. Twombly and 2009’s Ashcroft v. Iqbal.

“Both of those rulings had the effect of increasing demands on the content of pleadings,” Katerberg says. “Despite Rule 8 saying you only need a short and plain statement, you actually have to put enough facts in to make a judge aware your complaint is plausible.”

“Those standards in no way demand the several-hundred page pleadings Judge Pauley is talking about,” he adds. “But they did probably nudge the profession in the direction of having longer pleadings than before.”

Attorneys may also feel compelled to pack their pleadings with extraneous material at the behest of the folks who are paying their legal bills, Baum says.

“Clients tend to get very emotionally involved in their case and want the chance to vent in the pleadings,” Baum says. “As a result, clients will occasionally push lawyers to include information that, if they sat back and looked at it, the lawyers would realize is ultimately unhelpful.”

Baum says lawyers should remember that their job is both to serve the best interest of their clients and to be good officers of the court, goals which are not inconsistent but may require measured conversations with a client about what goes in a filing and what doesn’t.

Lawyers can also be led astray by the desire to make a splash and get their complaint noticed by the

press by including all the juicy details available, according to Katerberg.

“That’s not actually necessary, and you’re really not supposed to plead evidence in complaints,” Katerberg says. “But if there are salacious details people are likely to find interesting, it can make a lawyer more likely to include that material.”

Lawyers may also occasionally pump up their pleadings for reasons having more to do with their own bottom line than the case at hand, Katerberg adds.

“Not to be too much of a cynic, but lawyers are typically paid by the hour, and it takes longer to draft a longer complaint that a shorter one,” Katerberg says. “It would be an interesting study to see if law firms working on a non-hourly fee structure filed less lengthy complaints.”

While Judge Pauley’s order suggests that bloated filings are a growing scourge in the legal system, experts say the temptation to push page counts is hardly a new development.

“I wish I could say it was a new problem, but it’s been evident as long as I’ve been practicing law, which goes back 30 years,” Baum says.

He notes that Judge Pauley’s intentions in calling out the firms are “laudable,” and suggests such judicial intervention is a far preferable means of addressing the problem than imposing the sort of strict page limits applied to the briefing process.

“I don’t think there can be a bright-line rule, because there’s such an enormous difference in the number and complexity of claims,” Baum says. “The general spirit of Rule 8 makes sense, and the challenge is how courts can police lawyer compliance with that rule.”

For those attorneys who fear winding up on the business end of a rant like the one dropped by Judge Pauley, however, the best solution is to start policing themselves, Katerberg says.

“Attorneys just need to remember that the most effective advocacy is to be concise and succinct and try to make what you’re drafting be easy to read,” he says. “If you want a judge to get the message and agree with you, you have to be user-friendly to the reader. You don’t want it to be a chore.”

UPS Stores Inc. is represented by Leonard E. Hudson, Peter M. Ellis and Peter Christopher Gourdine of Reed Smith LLP, and Mark R. McDonald and Mark David McPherson of Morrison & Foerster LLP.

The defendants are represented by Stephen J. Savva, as well as William Andrew Brewer III and Paul Vincent Miletic of Bickel & Brewer.

The case is The UPS Store Inc. et al. v. Hagan et al., case number 1:14-cv-01210, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Aebra Coe. Editing by Jeremy Barker and Mark Lebetkin.
