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Conformity and the Rules of Civil Procedure: Lessons From Tennessee

Matthew Lyon

CONFORMITY AND THE RULES OF CIVIL PROCEDURE: LESSONS FROM TENNESSEE

Matthew R. Lyon*

Pennsylvania's judges and lawyers are considering whether to make changes to their complicated system of conflicting local civil rules, which has its vestiges in the scheme that existed prior to the adoption of the 1968 Pennsylvania Constitution and its complete revisions to Article V.[1] At the heart of this debate is the question of whether conformity between the rules of civil procedure at the different levels of our federalist system—local, state, and federal—is desirable. In deciding whether a change is necessary to the local rules in the commonwealth, decision makers in the Keystone State should seek guidance from other jurisdictions that have sought to improve consistency and reduce forum-shopping by adopting unified civil rules systems or by enacting rules in one level of the judiciary that mirror the rules in another.

This essay seeks to inform the debate in Pennsylvania through an analysis of Tennessee's experiences since its decision, forty-five years ago, to overhaul the Tennessee Rules of Civil Procedure and adopt a set of rules that was, at the time, identical to the Federal Rules of Civil Procedure. That Tennessee's experience might be instructive to Pennsylvania makes some sense. Tennessee's first state constitution, adopted in 1796, was described by none other than Thomas Jefferson as "the least imperfect and most republican of the state constitutions."[2] The 1796 Tennessee Constitution was based in large part on the Constitution of North Carolina, one of the original thirteen states and the state from which Tennessee

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* Associate Dean for Academic Affairs and Associate Professor of Law, Lincoln Memorial University Duncan School of Law. The author is grateful to the staff of the Widener Law Journal for the opportunity to participate in this Symposium and for their suggestions in editing this essay.

[1] *See generally* PA. CONST. OF 1968, art. V (pertaining to the judicial branch).

[2] J.G.M. RAMSEY, THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY 657 (1853).

emerged.[3] North Carolina's first state constitution, in turn, derived a number of its provisions on individual rights, taxes, and legislative authority from the Pennsylvania Constitution of 1776.[4]

Part I of this essay provides background information on Tennessee's civil court system, including the adoption of the Tennessee Rules of Civil Procedure in 1971. Part II highlights several significant amendments to the Federal Rules of Civil Procedure since the early 1970s, some of which have been made through the formal rulemaking process and others of which have occurred, more suddenly, through United States Supreme Court decisions shifting well-established interpretations of the Federal Rules. Part III documents how the Federal and Tennessee Rules have grown increasingly dissimilar since 1971, through both inaction at the state level and affirmative decisions by the Tennessee General Assembly or Tennessee Supreme Court not to adopt rules changes that were made in the federal system. Part IV concludes the essay by considering lessons learned from Tennessee's effort to conform to the Federal Rules.

I. BACKGROUND ON TENNESSEE'S CIVIL COURT SYSTEM

A. Structure

Pennsylvania's sixty-seven counties are organized into sixty judicial districts for the court of common pleas, with fifty-three of the districts comprising a single county and seven of the districts combining two counties.[5] By way of comparison, Tennessee has almost fifty percent more counties than Pennsylvania (ninety-five)

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[3] LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 2 (1990).

[4] JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 5-6 (1993). According to Orth, the sections of the Pennsylvania Constitution from which the North Carolina Constitution "borrowed" included the Declaration of Rights, PA. CONST. OF 1776, Declaration of Rights, § 2, and a provision requiring the regulation of entails so as to prevent perpetuities, PA. CONST. OF 1776, § 37.

[5] *See Learn*, The Unified Judicial System of Pennsylvania, http://www.pacourts.us/learn (last accessed Oct. 20, 2016).

and about half the number of judicial districts (thirty-one).[6] The largest counties in Tennessee, including Shelby (Memphis), Davidson (Nashville), Knox (Knoxville), and Hamilton (Chattanooga) constitute their own judicial districts, while in rural areas of the state, as many as five or six counties might be combined to form one judicial district.[7]

Article VI of the Tennessee Constitution, which establishes the judicial branch, provides for both circuit courts and chancery courts.[8] The separate circuit and chancery courts trace their origins back to the courts of law and equity in England. The Federal Rules of Civil Procedure, adopted in 1938, did away with the distinction between legal and equitable actions in the federal courts.[9] Although Tennessee adopted its own version of the Federal Rules in 1971, which also combined actions at law and equity into one form of action known as a "civil action,"[10] the state has retained its distinctive circuit and chancery courts. In fact, the two courts have concurrent jurisdiction in all but a very small category of cases.[11] More specifically, the circuit courts are courts of general jurisdiction,[12] while chancery courts have "all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity."[13] This means that the chancery courts typically

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[6] Tennessee Judicial DistrictMap, http://tncourts.gov/administration /judicial-resources/judicial-district-map (last accessed Oct. 20, 2016).

[7] *Id.*

[8] TENN. CONST., art. VI, § 1 ("The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace.").

[9] *Equity Jurisdiction in the Federal* Courts, Federal Judicial Center, http:// www.fjc.gov/history/home.nsf/page/jurisdiction_equity.html (last accessed Oct. 20, 2016); *see also* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

[10] TENN. R. CIV. P. 2.

[11] TENN. CODE ANN. § 16-11-102 (2016).

[12] TENN. CODE ANN. § 16-10-101 (2016). Many, but not all, judicial districts have a separate criminal court. In less-populated districts with lighter caseloads, circuit courts hear both criminal and civil cases. *About the Trial Courts*, http://tncourts.gov/courts/circuit-criminal-chancery-courts/about (last accessed Oct. 20, 2016).

[13] TENN. CODE ANN. § 16-11-101 (2016).

handle more complicated contract disputes and other business matters, particularly those seeking injunctive relief.[14]

As in Pennsylvania, Tennessee's judicial districts have local rules that are particular to the trial courts in each district. Indeed, the Tennessee Supreme Court mandates that:

> The judges in each judicial district shall adopt written uniform local rules prescribing procedures for setting cases for trial; obtaining continuances; disposition of pre-trial motions; settlement or plea bargaining deadlines for criminal cases; preparation, submission and entry of orders and judgments[;] and other uniform rules not inconsistent with state rules/statutes.[15]

For example, an attorney who lives in Knoxville and practices throughout the nine counties in the Knoxville Metropolitan Statistical Area (MSA)[16] might encounter six different judicial

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[14] In 2015, the Tennessee Supreme Court created a specialized business court to handle complex commercial litigation, despite the presence of chancery courts that seem to be well-suited to handle such cases. Centrally located in Davidson County, home to the state capital of Nashville, the jurisdiction of the business court naturally overlaps that of the chancery courts. However, the business court was particularly designed: (1) "to provide expedited resolution of business cases"; (2) to employ the skills of a judge with expertise in commercial litigation "who will provide proactive, hands-on case management"; (3) to develop precedent to make the outcomes of business cases more predictable for lawyers and litigants; and (4) to remove "complex and time-consuming business cases from the general docket." Order Establishing the Davidson County Business Court Pilot Project, No. ADM2015-00467 (Mar. 16, 2015), at 5, *available at* http://www.tsc.state.tn.us/sites/default/files/docs/order_est._davidson_county_business_court_pilot_project_3-16-2015.pdf. In October 2016, the Supreme Court announced that, although the business court had been "[b]y all measures . . . a tremendous success," it would suspend assigning any additional cases to the business court while it "stud[ied] how to build on the success of the pilot." Tennessee Administrative Office of the Courts, *Business Court Pilot Marks 100 Case Requests as Supreme Court Studies How to Build on Success* (Oct. 21, 2016), *available at* http://tncourts.gov/press/2016/10/21/business-docket-pilot-marks-100-case-requests-supreme-court-studies-how-build.

[15] TENN. SUP. CT. R. 18(a).

[16] As of 2013, the nine counties in the Knoxville MSA, which had a population of 837,571 according to the 2010 Census, were Anderson, Blount, Campbell, Grainger, Knox, Loudon, Morgan, Roane, and Union. Josh Flory,

districts with six corresponding sets of local rules.[17] Anecdotal evidence suggests, however, that while knowledge of local rules can provide a tactical advantage to the local attorney who is familiar with them, distinctions between the local rules across judicial districts do not create obstacles to practicing across the state.

B. Adoption of the Tennessee Rules of Civil Procedure

For much of their history, Tennessee's civil courts operated under a system of common law practice and pleading.[18] This ended when Tennessee passed its own version of the Rules Enabling Act in 1965[19] and adopted the Tennessee Rules of Civil Procedure, with only slight variations in style and numbering from the Federal Rules, in 1971. Like the Federal Rules, the new Tennessee Rules created a uniform system of procedure in circuit and chancery courts (subject, of course, to variances in local rules). The rules Tennessee adopted in 1971 also incorporated the many revisions to the Federal Rules that had occurred since their adoption in 1938. Both sets of rules have continued to evolve, but as Parts II and III will discuss, this evolution has not occurred in harmony. Indeed, it has resulted in the Federal Rules and Tennessee Rules steadily growing apart.

II. SIGNIFICANT AMENDMENTS TO THE FEDERAL RULES SINCE 1971

The Federal Rules of Civil Procedure have undergone many changes over the past forty-five years. As a result, two sets of rules that were once virtually identical now look markedly different. Amendments to the Federal Rules over the past few decades have come in two forms: formal amendments through the federal rulemaking process and informal "amendments" through ad hoc decisions of the United States Supreme Court.

OMB Shifts Boundaries, Boosting Census, KNOXVILLE NEWS SENTINEL (Mar. 20, 2013), *available at* http://archive.knoxnews.com/business/knoxville-area-gets-bigger-by-definition-ep-358572944-356029601.html.

[17] *See* Tennessee Judicial District map, *supra* note 6.

[18] *See* Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After* Hannan v. Alltel Publishing Co., 77 TENN. L. REV. 305, 309 (2010).

[19] TENN. CODE ANN. § 16-3-403 (2016).

A. Amendment Through the Rulemaking Process

Although the Federal Rules of Civil Procedure were enacted in 1938, the current process for amending the rules dates back to 1958.[20] Revisions to the Federal Rules of Civil Procedure generally begin with the Committee on Rules of Practice and Procedure, known as the Standing Committee, and its Advisory Committee on Civil Rules.[21] The Standing Committee is appointed by the Judicial Conference, a group of influential federal judges headed by the Chief Justice of the United States Supreme Court, which meets regularly.[22] After a lengthy public comment period (typically six months) and subsequent reconsideration by the Advisory Committee, the Standing Committee, and the Judicial Conference, the amendments are submitted to the U.S. Supreme Court.[23] If the Court approves of the changes, it submits the rules package to Congress by May 1 of the year in which the amendments are to take effect.[24] Barring action by Congress, the changes become law on December 1 of that same year.[25] This formal rulemaking process ensures that any changes to the Federal Rules are carefully considered and receive feedback from all interested stakeholders.[26]

The Federal Rules have been amended through the rulemaking process over a dozen times since 1971. Some of the changes have been merely technical or related to form, such as the restyling

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[20] Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 324 (1991). The federal rulemaking process is helpfully laid out in plain language for the public on the website of the United States Courts. U.S. Courts, *Overview for the Bench, Bar, and Public*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rule making-process-works/overview-bench-bar-and-public (last accessed Oct. 26, 2016).

[21] 28 U.S.C. § 2073(b) (2016).

[22] *Id.* § 2073(a)(2); *see also id.* § 331 (2016).

[23] *Overview for the Bench, Bar, and Public*, *supra* note 20.

[24] 28 U.S.C. § 2074(a) (2016).

[25] *Id.*

[26] *Overview for the Bench, Bar, and Public, supra* note 20 (describing the more than 10,000 persons and entities who receive notice of the public comment period, including "federal judges and other federal court officers, United States attorneys, other federal government agencies and officials, state chief justices, state attorneys general, legal publications, law schools, bar associations, and interested lawyers, individuals, and organizations requesting distribution").

project in 2007 and the simplification of time periods in 2009. However, several of the changes—those related to filing truthful allegations, case management by the trial court judge, and discovery—have been substantive in nature. All of these substantive amendments have been made with an eye towards increasing judicial efficiency and reducing the costs and other burdens of litigation. In other words, each of these changes has been designed to further the purposes set forth in Federal Rule of Civil Procedure 1: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[27]

In 1983, Federal Rule of Civil Procedure 11 was substantially amended to "put teeth into"[28] its provisions and make it more "effective in deterring abuses."[29] Under the revised rule, attorneys could no longer simply read the pleadings before filing them; rather, the person signing the filing had a duty to make a reasonable investigation into all allegations and certify that the representations contained therein were "well grounded in fact."[30] Also, when a court determined that Rule 11 had been violated, the imposition of sanctions became mandatory.[31] The purpose of this change was "to eliminate any doubt as to the propriety of assessing sanctions against the attorney."[32] Accompanying the amendments to Rule 11 in 1983 were major changes to Rule 16, including the

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[27] FED. R. CIV. P. 1.

[28] Robert L. Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 4 (1985); *see also* Nancy H. Wilder, *1983 Amendments to Rule 11: Answering the Critics' Concern with Judicial Self-Restraint*, 61 NOTRE DAME L. REV. 798 (1986).

[29] FED. R. CIV. P. 11 advisory committee's note to 1983 amendment ("The new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions . . . . Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." (citations omitted)).

[30] American Bar Association Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 118 (1988).

[31] *Id.* at 122.

[32] FED. R. CIV. P. 11 advisory committee's note, *supra* note 29.

imposition of a mandatory scheduling order requirement[33] that gave federal judges a far more active role in case management.[34] The result of the 1983 amendments was a substantial increase in motions for sanctions for violations of Rule 11 by opposing counsel.[35] Ultimately, many felt that the 1983 Amendments to Rule 11 were too punitive and did not have the intended efficiency benefits,[36] so the Rule was revised again ten years later. The 1993 amendments specifically were "intended to remedy problems that ha[d] arisen in the interpretation and application of the 1983 revision of the rule."[37] Key changes adopted in 1993 included: (1) making the imposition of sanctions discretionary;[38] (2) establishing the 21-day safe harbor;[39] (3) directing that sanctions be calibrated for deterrence rather than compensation;[40] and (4) removing discovery requests and responses from the rule.[41]

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[33] FED. R. CIV. P. 16(b).

[34] *See* Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 602 (1989) ("[T]he 1983 amendments were directed toward two general goals: extending the scope of the rule so as to cover the entirety of the pretrial process, including discovery and motions, and providing judges with greater flexibility to tailor Rule 16 activities to the needs of a specific case.").

[35] *See* Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (citing empirical studies regarding the volume of sanctions litigation that arose after the 1983 amendments to Rule 11).

[36] *See, e.g.*, Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 795 (1993) ("No Rule amendment has aroused more ire recently than this one."); John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1886-87 (1989) ("The 1983 amendment to [Rule 11] should be repealed. It is the most unfortunate exercise in rulemaking at least of the last twenty years . . . . The law of the subject is chaotic, the invitation to judicial dictatorship is unlimited, and we should dump it.").

[37] FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[38] FED R. CIV. P. 11(c)(1) ("If . . . the court determines that Rule 11(b) has been violated, the court *may* impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." (emphasis added)).

[39] FED R. CIV. P. 11(c)(2).

[40] FED R. CIV. P. 11(c)(4).

[41] FED R. CIV. P. 11(d).

Even more groundbreaking than the changes to Rule 11 and Rule 16 have been the repeated efforts to overhaul the discovery provisions of the Federal Rules.[42] In 1993, Rule 26 was amended in order to require parties to disclose certain essential information at the outset of discovery without first receiving discovery requests from the other party.[43] This movement towards mandatory initial disclosures, like all of the other revisions made through the rulemaking process in the last few decades, had the primary goal of limiting the burdens of litigation on the parties and the courts. This, of course, meant limiting discovery.[44] The introduction of mandatory initial disclosures was one of the most fundamental changes to the discovery rules since they were originally enacted, given that the requirement seems to be at odds with the adversarial process by which discovery practice has evolved. While concerns were raised at the time regarding a regime of mandatory disclosures,[45] they have become an accepted part of practicing in federal court. Further revisions were made to the mandatory initial disclosure requirement in 2000, most notably the removal of the "opt-out" provision in the 1993 version of Rule 26 that had allowed federal district courts to establish local rules modifying or completely avoiding the mandatory initial disclosure rules.[46]

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[42] Chief Justice John Roberts laid out a passionate defense of the most recent changes to the Federal Rules in his 2015 annual report on the state of the federal judiciary. 2015 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[43] FED. R. CIV. P. 26(a)(1).

[44] FED. R. CIV. P. 26 advisory committee's note to 1993 amendment ("A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.").

[45] *See generally* Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that have Transpired Since its Adoption*, 21 SETON HALL LEGIS. J. 425, 445-52 (1997) (examining five objections to mandatory disclosure of discovery information).

[46] FED. R. CIV. P. 26 advisory committee's note to 2000 amendment; *see also* Richard L. Marcus, *The 2000 Amendments to the Discovery Rules*, 2001 FED. CTS. L. REV. 1, 6 (2001) (characterizing the removal of the opt-out provisions as "probably the most important change" adopted in 2000, "particularly for the practicing bar").

In further reaction to concerns about burdensome discovery requests, the 2000 rules package also included a limitation on the scope of discovery. Prior to 2000, Rule 26(b) permitted discovery as to "matter relevant to the subject matter involved in the pending action." The 2000 amendments limited the scope of discovery to information that is "relevant to the claim or defense of any party," although the new rule still permitted courts to allow discovery to the "subject matter" limit upon good cause shown by the parties.[47] The 2000 amendments also made explicit, for the first time, that all discovery is subject to the "proportionality" limitations of Rule 26(b)(2).[48] A new set of revisions to Rule 26 in 2015 limited the scope of discovery even further. The primary rule with regard to discovery now states that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*."[49] The ability to obtain further discovery up to the "subject matter" of the case has been eliminated because it was "rarely invoked" and because "[p]roportional discovery relevant to any party's claim or defense" should suffice.[50] Another set of substantive amendments related to discovery are those incorporating definitions of and limitations on electronically stored information (ESI) in 2006 and 2015. While the modernization of the discovery provisions has received its fair share of criticism, there is no doubt that the new rules went through an exhaustive rulemaking process in which all sides had the opportunity to be heard.

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[47] Marcus, *supra* note 46, at 15; *see also* FED. R. CIV. P. 26 advisory committee's note to 2000 amendment ("The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.").

[48] This change was in response to information gathered by the Advisory Committee that "courts have not implemented these limitations with the vigor that was contemplated." FED. R. CIV. P. 26 advisory committee's note to 2000 amendment.

[49] FED. R. CIV. P. 26(b)(1) (emphasis added).

[50] FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

B. "Amendment" Through U.S. Supreme Court Decisions

In contrast to the statutory rulemaking process, the United States Supreme Court has also changed the meaning of certain Federal Rules through its opinions interpreting those rules. Undoubtedly, the power to promulgate rules of procedure that is granted to the Supreme Court under the Rules Enabling Act includes the authority to interpret those rules. On occasion, however, such interpretations effectively bypass the rulemaking process by revising the legal standard by which a particular rule is applied. Two major sets of decisions stand out over the past thirty years as sending a clear signal to the lower federal courts that the plain meaning of the related rules had changed: (1) the *Celotex* trilogy,[51] in 1986, strengthening the use of summary judgment in Rule 56 to dismiss cases as a matter of law prior to trial, and (2) a pair of cases in 2007 and 2009 recalibrating Rule 8(a)(2) and introducing the "plausibility" pleading requirement. Both sets of decisions have been cited, praised, and criticized at great length.

In his *Celotex* opinion, Justice William Rehnquist wrote that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[52] Justice Rehnquist was writing for a plurality of the Court, and the precedent set by *Celotex*—the burden-shifting standard actually adopted by a majority of the Court—was less-than-clear. The decision sent a clear signal to the lower federal courts, however, most of which have interpreted *Celotex* to mean that the party moving for summary judgment lacks any burden of production at the summary judgment phase, but instead can merely point to a

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[51] The "*Celotex* trilogy" is three opinions decided on the same day that are now "viewed as a 'celebration of summary judgment' and a mandate for federal courts to embrace the use of summary judgment to dispose of cases before trial." Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 82-83 (2006). They are *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986), and *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986).

[52] *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

lack of evidence on the part of the nonmoving party.[53] This interpretation makes summary judgment the "put up or shut up" moment in the civil case,[54] where the burden of proof falls entirely on the non-moving party who will bear that burden at trial.

While summary judgment typically comes after the parties have had the chance for discovery, the U.S. Supreme Court has also used its power to interpret the Federal Rules to raise the bar on plaintiffs earlier in the litigation: prior to discovery, at the pleading stage. Specifically, the Court has used a pair of decisions to heighten what plaintiffs must plead to make "a short and plain statement of the claim showing that the pleader is entitled to relief."[55] In *Twombly v. Bell Atlantic Corp.*,[56] the Court "retire[d]" the fifty-year-old "no set of facts" language from *Conley v. Gibson*[57] and held that, in order for a complaint to survive a motion to dismiss for failure to state a claim upon which relief can be granted,[58] it must include "enough facts to state a claim to relief that is plausible on its face."[59] Two years later, in *Ashcroft v. Iqbal*,[60] the Court reaffirmed *Twombly* and established a two-part analysis for courts to use when determining whether a complaint is sufficient: first, disregard those allegations that are merely bare, unsupported legal conclusions; and second, look at the remaining "well-pleaded, nonconclusory factual allegation[s]" to determine whether they give rise to a plausible claim for relief.[61] While commentators may differ on the propriety of "rulemaking by decision,"[62] there can be no argument that both the *Celotex* trilogy

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[53] *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1345 (2005) ("Since *Celotex*, the majority of lower federal courts have wisely read that decision to impose virtually no burden at all on the movant where she would have no burden of proof at trial.").

[54] *See* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

[55] FED. R. CIV. P. 8(a)(2).

[56] *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544 (2007).

[57] *Conley v. Gibson*, 355 U.S. 41 (1957).

[58] *See* FED. R. CIV. P. 12(b)(6).

[59] *Twombly*, 550 U.S. at 570.

[60] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[61] *Id.* at 680.

[62] *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84 (2010) ("The

and "*Twiqbal*" have become flashpoints in the recent history of civil litigation in the federal courts.[63]

III. DIVERGENCE BETWEEN FEDERAL AND TENNESSEE RULES

Over time, as the Federal Rules or the interpretation of those Rules have changed, the Federal and Tennessee Rules have gradually become more dissimilar. While a number of major amendments to the Federal Rules have been made over the past forty-five years, few of those have been adopted in Tennessee. In some cases, there is simply a lack of action at the state level; less commonly, the Tennessee General Assembly or Tennessee Supreme Court has openly considered, but rejected, the rules changes.

A. Inertia

One reason that the Federal Rules and the Tennessee Rules have diverged over time is inaction on the part of Tennessee's judicial and legislative branches to respond to changes in the Federal Rules. Unlike in the federal system, where Congress plays a passive role in amendments to the Federal Rules of Civil Procedure, the Tennessee General Assembly has an active role in the rulemaking process. The relevant rulemaking provisions make clear that the Tennessee Supreme Court plays the lead role in

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Supreme Court's legislative-like decisions in *Twombly* and *Iqbal* and the 1986 trilogy have caused many to question the continuing role of the rulemaking process and its current statutory structure."); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (arguing that the Court should take an activist role in interpreting the Federal Rules).

[63] One could also argue that, more recently, the Court has engaged in ad hoc rulemaking in a third area: class action litigation under Rule 23. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (narrowing definition of commonality in Rule 23(a)(2)); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (narrowing definition of predominance in Rule 23(b)(3)). Justice Scalia, who passed away in February 2016, wrote the majority opinion in both of these cases. It remains to be seen whether the Court will continue to aggressively limit the scope of the class action in his absence.

rulemaking.[64] There is also a statutorily-created Rules Advisory Commission to assist the Tennessee Supreme Court in developing rules governing practice and procedure in the courts.[65] And as in the federal system,[66] any rules promulgated by the Tennessee Supreme Court "shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and Tennessee."[67]

After a rules amendment package receives the approval of the advisory commission and the Tennessee Supreme Court, it faces another step prior to approval. Unlike in the federal system, where the rules amendments become law if Congress does not act against them, the Tennessee General Assembly must affirmatively enact every proposed change to the rules of practice and procedure.[68] Courts and commentators have long debated the precise amount of authority that the state legislature holds in rulemaking,[69] but suffice it to say that the Tennessee General Assembly is more active in the state process than Congress is in the federal process, and its power far exceeds that of the Pennsylvania legislature, which is shut out

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[64] TENN. CODE ANN. § 16-3-401 (2016) ("The supreme court may make rules of practice for the better disposal of business before it."); *see also* State v. Best, 614 S.W.2d 791, 793 (Tenn. 1981).

[65] TENN. CODE ANN. § 16-3-601(a) (2016).

[66] *See* 28 U.S.C. 2072 (2016).

[67] TENN. CODE ANN. § 16-3-403 (2016).

[68] TENN. CODE ANN. § 16-3-404(a) (2016) ("The supreme court shall fix the effective date of all its rules; provided, that the rules shall not take effect . . . until they have been approved by resolutions of both the house of representatives and the senate.").

[69] *Compare* Tennessee Dept. of Human Servs. v. Vaughn, 595 S.W.2d 62, 63 (Tenn. 1980) (stating that the Tennessee Rules of Civil Procedure "are 'laws' of this state, in full force and effect, until such time as they are superseded by legislative enactment") *and* Lady v. Kregger, 747 S.W.2d 342, 345 (Tenn. Ct. App. 1987) ("The Tennessee Rules of Civil Procedure are 'laws' and are subject to being superseded in the same manner as statutes.") *with* Donald F. Paine, *Can the General Assembly Overrule Supreme Court Rules?*, 47 TENN. B.J., Dec. 2011, at 37 (characterizing the statement in *Vaughn* as "dictum" and "mistaken[]") *and* Judy M. Cornett & Matthew R. Lyon, *Contested Elections as Secret Weapon: Legislative Control Over Judicial Decision-Making*, 75 ALBANY L. R. 2095, 2127-29 (2011-2012) (arguing that while the General Assembly does retain some rulemaking authority, it likely does not have the power to legislatively overrule an existing rule of practice or procedure that was enacted through the statutory rulemaking process).

of the rulemaking process entirely.[70] It stands to reason that where more entities are required to consent to the process, the state legislative and judicial branches are less likely to be proactive in responding to changes in the Federal Rules.

One other possible reason for a failure to act when changes are made to the Federal Rules is a lack of an obvious constituency in the state bar to push for uniformity, as there might be for substantive areas of the law. State bar associations play an essential role in informing their state legislatures of the need for legal reform. By way of example, the Tennessee Bar Association has thirty-two different sections, the vast majority of which are focused on some substantive area of the law (i.e., business law, health law, entertainment and sports law), and are filled with practitioners in those areas.[71] Although there is a Litigation Section of the TBA, its primary responsibility is to "provide[] the trial attorney with information on the most recent trends in trial techniques through annual seminars and its newsletter."[72] In other words, there does not appear to be an entity within the bench and bar to lobby for (or against) conformity with federal law. The Tennessee Supreme Court must rely on its own initiative and that of its advisory commission, as well as individual litigants who observe changes in the rules happening by way of judicial decision in the federal courts and seek the same amendments via the courts in Tennessee.

B. Open Disagreement

In several areas, the Tennessee General Assembly or Tennessee Supreme Court has explicitly considered federal rules revisions and rejected them as inconsistent with Tennessee practice. Three areas stand out: (1) mandatory initial disclosures,

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[70] PA. CONST. art. V, § 10(c); *see also* Commonwealth v. McMullen, 961 A.2d 842, 847 (Pa. 2008) ("This Court retains exclusive rule-making authority to establish rules of procedure.").

[71] *Sections*, Tennessee Bar Association, http://www.tba.org/sections (last accessed Oct. 20, 2016).

[72] *Litigation Section*, Tennessee Bar Association, http://www.tba.org /section/litigation-section (last accessed Oct. 20, 2016).

specifically of defendants' insurance coverage; (2) summary judgment; and (3) notice pleading.

The Tennessee General Assembly's stubborn refusal to adopt the Federal Rules with regard to discovery of defendants' insurance information was discussed at length in a 2009 Tennessee Supreme Court decision.[73] At the time when Tennessee adopted its Rules of Civil Procedure, both the lower federal courts and the various state courts were split as to whether defendants' insurance information was discoverable, and the Federal Rules were silent as to the issue.[74] However, Rule 26(b) of the Federal Rules of Civil Procedure was modified shortly thereafter to allow plaintiffs to discover information pertaining to defendants' insurance coverage.[75] Of course, this permissive discovery was later made mandatory in the 1993 amendments.[76] In subsequent years, Tennessee not only has refused to require discovery of defendants' insurance coverage, but also has continued to prohibit discovery of this information, even as nearly every other state has done so and even as Tennessee Rule of Civil Procedure 26.02 has been revised in nearly every other respect to conform to revisions to Federal Rule of Civil Procedure 26(b).[77]

In the 2009 case considering the issue of discoverability of defendants' insurance coverage, the plaintiff in a wrongful death suit sent interrogatories and requests for production to defendants seeking "information concerning the extent and amount of liability insurance coverage for the claims forming the basis of this

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[73] Thomas v. Oldfield, 279 S.W.3d 259 (Tenn. 2009).

[74] *Id.* at 262-63.

[75] *Id.* at 263. The Advisory Comment to Rule 26 observed that "[b]oth the cases and commentators [we]re sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case." "The amendment resolve[d] this issue in favor of disclosure" in order to "enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

[76] *See* discussion, *supra* Part II. A.

[77] *Thomas*, 279 S.W.3d at 263-64. Tennessee Rule 26.02 has not yet been revised to incorporate the significant changes to Federal Rule 26(b) regarding scope of discovery and proportionality, discussed *supra* Part II. A.

lawsuit."[78] When the defendants balked, the plaintiff filed a motion to compel discovery that eventually made it all the way up to the state supreme court.[79] The Tennessee Supreme Court agreed with the plaintiffs that Tennessee was "in the extreme minority of jurisdictions" disallowing production of insurance coverage and even advocated for a change in the rule,[80] but ultimately deferred to the rulemaking process.[81] Several months after deciding *Thomas v. Oldfield*, the Tennessee Supreme Court sent a proposed rules amendment to the General Assembly that would have added a new Tenn. R. Civ. P. 26.02(2) that was similar to, but less severe than, Fed. R. Civ. P. 26(a)(1)(A)(iv), in that it would have made information regarding the defendants' insurance coverage information merely discoverable, not part of a mandatory disclosure. That amendment never got out of the House or Senate Judiciary Committees, so Tennessee remains unique today in prohibiting discovery of this information.

Summary judgment was, for many years, the clearest example of non-conformity between the Federal Rules and Tennessee Rules, despite the fact that the language of Federal Rule 56 and Tennessee Rule 56 is virtually identical.[82] The confusion started with a 1993 Tennessee Supreme Court opinion that purported to "embrace" the *Celotex* standard,[83] yet also made clear that "[a] conclusory assertion that the nonmoving party has no evidence is

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[78] *Thomas*, 279 S.W.3d at 260.

[79] *Id.*

[80] *Id.* at 264-65.

[81] *Id.* at 264 ("[W]e are constrained by both the language and the history of current Rule 26.02 from holding that

information concerning the defendants' liability insurance coverage is subject to discovery[.]").

[82] For voluminous analysis of Tennessee's summary judgment saga since *Celotex*, see Judy M. Cornett, *The Legacy of* Byrd v. Hall*: Gossiping About Summary Judgment in Tennessee*, 69 TENN. L. REV. 175, 184 (2001); Cornett, *supra* note 18; Cornett & Lyon, *supra* note 69; Judy M. Cornett & Matthew R. Lyon, *Redefining Summary Judgment by Statute: The Legislative History of Tennessee Code Annotated Section 20-16-101*, 8.1 TENN. J.L. & POL'Y 100 (2012); Judy M. Cornett, T. Mitchell Panter, & Matthew R. Lyon, *Comin' Through the* Rye*: A Requiem for the Tennessee Summary Judgment Standard*, 85 TENN. L. REV. __ (forthcoming 2016) (manuscript on file with author).

[83] Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993).

clearly insufficient"[84] and that a moving party can only shift the burden of production to the nonmoving party by "affirmatively negat[ing] an essential element of the nonmoving party's claim" or by "conclusively establish[ing] an affirmative defense that defeats the nonmoving party's claim."[85] This standard fomented confusion and appeared to differ from the "put up or shut up" gloss that the lower federal courts had put on the *Celotex* decision. In 2008, the Court clarified the "affirmative defense" language it had used previously, stating that to "conclusively establish an affirmatively defense," the moving party must show "that the nonmoving party cannot prove an essential element of the claim at trial."[86] Tennessee was not the only state to reject the *Celotex* burden-shifting standard;[87] however, the Tennessee Supreme Court's 2008 *Hannan* decision was viewed as a bridge too far by defense lawyers in Tennessee. A statute passed by a GOP-majority legislature and signed into law by a Republican Governor,[88] and later a decision by a newly constituted Tennessee Supreme Court with a majority of Republican appointees, ended this era of distinction with regard to summary judgment in Tennessee.[89] The conformity to the federal judgment standard in Tennessee appears to be rooted more in politics than philosophy.

A third area in which Tennessee has been—and, for now at least, remains—distinct from the federal standard is notice pleading. Like Tennessee, the majority of states are so-called

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[84] *Byrd*, 847 S.W.2d at 215.

[85] *Id.* at 215 n.5.

[86] Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8-9 (Tenn. 2008), *overruled by* Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235 (Tenn. 2015).

[87] *See* Matthew R. Lyon, Shady Grove, *The Rules Enabling Act, and the Application of State Summary Judgment Standards in Diversity Cases*, 85 ST. JOHN'S L. REV. 1011, 1038-41 (2011) (setting forth a list of several states, in addition to Tennessee, that have disavowed *Celotex*).

[88] TENN. CODE ANN. § 20-16-101 (2011). This statute had the stated purpose of overruling the Tennessee Supreme Court's 2008 *Hannan* decision and to impose on to the Tennessee courts the federal burden-shifting standard on summary judgment motions.

[89] *Rye*, 477 S.W.3d at 264 (determining that *Hannan* had "shifted the balance too far" and the time had come "to correct course, overrule *Hannan*, and fully embrace the standards articulated in the *Celotex* trilogy").

"federal replica" jurisdictions, having substantially adopted the language of the Federal Rules of Civil Procedure, as then interpreted, as their state rules of procedure in civil actions.[90] It was this similarity between federal and state procedural rules that likely led Justice John Paul Stevens to express concern in his *Twombly* dissent, not only that the majority's decision might "rewrite the Nation's civil procedure textbooks" (which it most certainly has), but also that it would "call into doubt the pleading rules of most of its States."[91] Indeed, just a couple of years after the U.S. Supreme Court decided *Iqbal*, the Tennessee Supreme Court granted permission to appeal in a case that challenged them to adopt plausibility as the pleading standard in Tennessee.[92] The Tennessee Supreme Court's rejection of the "*Twiqbal*" plausibility standard was unanimous and complete. It cited four state-specific reasons why Tennessee would continue to follow notice pleading rather than the plausibility standard that had been adopted in the federal courts: (1) *Twombly* and *Iqbal* mark "a substantial departure" from, and have resulted in "a loss of clarity, stability, and predictability in[,] federal pleadings practice";[93] (2) the new federal standard "incorporates an evaluation and determination of likelihood of success on the merits . . . at the earliest stage of the proceedings," a procedure that "conflicts with the strong preference embodied in the Tennessee Rules of Civil Procedure that cases stating a valid legal claim brought by Tennessee citizens be decided on their merits";[94] (3) the plausibility standard is unworkable because "the distinction between whether an allegation is a 'fact' or a 'conclusion' is fine, blurry, and hard to detect";[95] and (4) the federal standard is likely to result in an "information assymetry" problem, under which certain types of cases (i.e., civil rights, employment discrimination, antitrust, conspiracy) are more

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[90] *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

[91] *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting).

[92] Webb v. Nashville Habitat for Humanity, 346 S.W.3d 422 (Tenn. 2011).

[93] *Id.* at 430-31.

[94] *Id.* at 431-32.

[95] *Id.* at 432-33.

likely to be dismissed because it is difficult to plead factual sufficiency in such cases without some limited discovery.[96] Tennessee is one of several state courts of last resort to have rejected the plausibility standard.[97]

IV. CONCLUSION

A number of lessons can be learned from Tennessee's attempt at rules conformity that may inform the ongoing discussion in Pennsylvania. First, rules of practice and procedure are not frozen in time. There may be a brief period during which the rules of different courts line up, but each level of government will continue to act to further its own policies and political interests. Second, this divergence is likely because state legislatures and court have their own constituencies. Similarly, local judges like shaping their own courts and local lawyers enjoy having "home field" advantage.

As Pennsylvania considers changes to its venerated system of local rules, the members of the bench and bar should remember that variances between federal, state, and local rules are simply the cost of our federalist system. Moreover, those differences could just as well be considered a benefit. There may, in fact, be comfort in nonconformity.

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[96] *Webb*, 346 S.W.3d at 434-35.

[97] Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600 (Iowa 2012); Walsh v. U.S. Bank, N.A., 851 N.W.2d 598 (Minn. 2014); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861 (Wash. 2010); *but see* Warne v. Hall, 373 P.3d 588 (Colo. 2016); Doe v. Bd. of Regents, 788 N.W.2d 264 (Neb. 2010).