

**JUST SAY “NO FISHING”:
THE LURE OF METAPHOR**

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Abstract

The phrase “fishing expedition” is widely used in popular culture and in the law. In the case of metaphorical “fishing” in the law, reliance on the metaphor can act as a substitute for rigorous analysis, disguising the factors that influence a result. When used by the court, it is uninformative. Worse, the fishing metaphor may itself shape the way the court thinks about the kind of issue or claim involved. Accusations of “fishing” also affect the language and position of the litigants. Parties arguing against pleadings or discovery use the metaphor as a rhetorical weapon, stigmatizing their opponents, instead of addressing and proving the merits of their objections to the cost of discovery.

This article begins by tracing the development of the fishing expedition metaphor in civil cases, demonstrating the way its changing uses reflect and contribute to the legal controversies of each era. For most of its life, the metaphor has been used to condemn “fishing.” During the period of the New Deal, and for several years afterward, “fishing” was acceptable. Recent cases, however, have gone back to a more skeptical view of certain types of discovery and litigation, so cases decrying “fishing expeditions” have returned with a vengeance.

Part II of this article examines the impact of the fishing metaphor. Calling something a “fishing expedition” makes the court’s decision sound easy and obvious. Facile use of the metaphor can thereby obscure the policy tradeoffs underlying decisions about pleadings and discovery. In an overwhelming proportion of modern cases, it is plaintiffs who are said to be “fishing,” and the metaphor’s concentration in certain kinds of cases reflects and reinforces a kind of anti-plaintiff bias. The article concludes by suggesting that we reject the fishing metaphor. It has been trite for more than two hundred years. It leads to mangled thoughts like “the trial court [should not] allow plaintiffs to embark on a wide-ranging fishing expedition in hopes that there may be gold out there somewhere.” More important, the “fishing” metaphor can provide cover for rulings that if fully explained would be seen to violate the letter or spirit of the Federal Rules of Civil Procedure.

JUST SAY “NO FISHING”: THE LURE OF METAPHOR

- “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying the opponent’s case.” (1947)¹
- “Plaintiffs may not conduct a fishing expedition.” (2002)²

Someone speaking to the news media declares an inquiry to be a “fishing expedition” just about every day.”³ This legal metaphor has become a cultural cliché, so often repeated that many people no longer recognize it as a metaphor at all. It nevertheless remains a staple of judicial opinions that condemn a discovery request or a lawsuit as a “fishing expedition.” In civil cases, the fishing metaphor is far from new; it dates at least as far back as the eighteenth century.⁴ Through years of procedural change, the metaphor clings tenaciously to legal discourse. Its meaning has changed, and the policy behind it has changed, but it has stood as an iconic symbol of ‘now you’ve gone too far’ for more than two hundred and fifty years.

This would be interesting, but not important, if metaphors were merely pretty figures of speech. Metaphors, however, are far more fundamental; they influence the way people think.⁵

¹ Hickman v. Taylor, 329 U.S. 495, 507 (1947).

² In re Ski Train Fire, 230 F. Supp. 2d 392, 400 (S.D.N.Y. 2002).

³ See, e.g., Louis P. Sheldon, *Judge John Roberts Deserves Up or Down Vote in Senate*, Traditional Values Coalition Press Release, July 26, 2005, at <http://www.traditionalvalues.org/print.php?sid=2358>; Reuters, *Librarians Assail Record ‘Fishing Expeditions’*, MSNBC News, June 21, 2005, available at <http://msnbc.msn.com/id/8304018>.

⁴ Buden v. Dore, 28 Eng. Rep. 284 (Ch. 1752).

⁵ GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3 (1980); HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 38 (1992); SUSAN SONTAG, *AIDS AND ITS METAPHORS* 5 (1988) (“Of course, one cannot think without metaphors.”); Linda L. Berger, *What Is the Sound of a Corporation Speaking? How Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASSOC. LEGAL WRITING DIR. 169, 170 (2004) (“In cognitive theory, metaphor is not only a way of seeing or saying; it is a way of thinking and knowing, the method by which we structure and reason, and it is fundamental, not ornamental.”)

Legal language and thought, not surprisingly, are full of metaphors: lawyers speak of a “wall of separation” between church and state; of litigants having “standing”; of a “marketplace of ideas.” Lawyers live in a world in which “liens float, corporations reside, minds hold meetings, and promises run with the land.”⁶ Such metaphors help to illuminate the nature of abstract legal concepts by associating them with something more familiar and concrete, but they also shape the way we think about those concepts.⁷ For example, the war and sports metaphors used to describe the adversary system emphasize the competitive win-lose aspect of litigation and hide the opportunities for cooperation.⁸ The metaphor that treats a corporation as a “person” makes it easier to accord it attorney-client privilege, and to look for its “nerve center.”⁹ When a metaphor comes to dominate the discussion of an area of law, it structures the way we perceive reality.¹⁰ As Lord Mansfield wrote, “nothing in law is so apt to mislead as a metaphor.”¹¹

In the case of “fishing,” reliance on the metaphor can act as a substitute for rigorous analysis, disguising the factors that influence a result. When used by the court, it is

⁶Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1053 (1989).

⁷Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Orality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 226, 234 (1994).

⁸Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225 (1995).

⁹*Upjohn Co. v. United States*, 449 U.S. 83 (1981) (corporate person); *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004) (nerve center).

¹⁰GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHORS* 63 (1989). “Anything we rely on constantly, unconsciously, and automatically is so much part of us that it cannot be easily resisted, in large measure because it is barely even noticed. To the extent that we use a . . . conceptual metaphor, we accept its validity. Consequently, when someone else uses it, we are predisposed to accept its validity. For this reason, conventionalized . . . metaphors have persuasive power over us.”

¹¹*Knox v. Gye*, 5 L.R.-E. & I. App. 656, 676 (H.L. 1871) (attributing error in a case to the metaphoric use of the word “trustee”). *See also Engel v. Vitale*, 370 U.S. 421, 445 (1962) (“the Court’s task is not responsibly aided by the uncritical invocation of metaphors like the ‘wall of separation.’”) (Stewart, J.).

uninformative. Worse, the fishing metaphor may itself shape the way the court thinks about the kind of issue or claim involved. Accusations of “fishing” also affect the language and position of the litigants. Parties arguing against pleadings or discovery use the metaphor as a rhetorical weapon, stigmatizing their opponents, instead of addressing and proving the merits of burden, or harassment, or cost.

This article traces the development of the fishing expedition metaphor in civil cases, demonstrating the way its changing uses reflect and contribute to the legal controversies of each era.¹² After surveying the use of fishing as a metaphor in culture generally, part I examines the shifting legal uses of the “fishing” label in six time periods: (1) in eighteenth century England; (2) in the pre-Civil War U.S.; (3) in the U.S. shortly before the advent of the Federal Rules of Civil Procedure; (4) during the drafting of the Rules; (5) during the early implementation of the Rules; and (6) in contemporary cases. For most of its life, the metaphor has been used to condemn “fishing.” During the period of the New Deal, and for several years afterward, “fishing” was acceptable.¹³ Recent cases, however, have gone back to a more skeptical view of certain types of discovery and litigation, so cases decrying “fishing expeditions” have returned with a vengeance.

Part II of this article examines the impact of the fishing metaphor. Calling something a “fishing expedition” makes the court’s decision sound easy and obvious; the ‘no fishing’ sign purports to be encrusted with generations of accrued legal wisdom. Facile use of the metaphor can thereby obscure the policy tradeoffs underlying decisions about pleadings and discovery. In

¹²While the metaphor is also used in criminal cases, and in cases involving administrative subpoenas, they are beyond the scope of this article.

¹³“Fishing” may have had a more narrow technical meaning in this context than one

an overwhelming proportion of modern cases, it is plaintiffs who are said to be “fishing,” and the metaphor’s concentration in certain kinds of cases reflects a kind of anti-plaintiff bias. The article concludes by suggesting that the legal profession reconsider and reject the fishing metaphor. It has been trite for more than two hundred years.¹⁴ It leads to mangled thoughts like “the trial court [should not] allow plaintiffs to embark on a wide-ranging fishing expedition in hopes that there may be gold out there somewhere.”¹⁵ More important, the “fishing” metaphor can provide cover for rulings that if fully explained would be seen to violate the letter or spirit of the Federal Rules of Civil Procedure.

I. A History of the Fishing Metaphor

A. The Fishing Metaphor in its Non-Legal Context

Literally, “fishing” means going to some body of water to try to somehow catch the fish that live there. The history of fishing goes back to ancient times, when people began fishing for food using bones as hooks and lengths of vine as line.¹⁶ Plato discussed fishing, noting that one could fish with nets, baskets, hooks, or spears.¹⁷ Sport fishing is documented in a late fifteenth

would suppose, however. See text accompanying notes – *infra*.

¹⁴*Renison v. Ashley*, 30 E.R. 724 (1794) (Loughborough, L.C.) (“This is *another* of the fishing bills, which I do not like to see in this Court.”) (emphasis added).

¹⁵*Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1365 (Fed. Cir. 2001) (allowing limited further discovery regarding plaintiff’s claim that it loaned money to a secret agent of the United States to support a clandestine CIA operation, but that it was never repaid). See also Report, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 818 (2003) (“This allows a product liability plaintiff to go on a ‘fishing expedition’ in the defendant’s records in the mere hope of finding a ‘smoking gun.’”); *Forthmann v. Boyer*, 118 Cal. Rptr. 2d 715, 721 (Cal. App. 2002) (“The trial court cannot be faulted for slamming the door on this transparent fishing expedition.”).

¹⁶Jay H. Cassell, *History of Fishing*, at <http://www.activeangler.com/articles/beginners/articles/history/> (last visited Feb. 2, 2006).

¹⁷WILHELM H. WUELLNER, *THE MEANING OF “FISHERS OF MEN”* 13 (1967) (quoting THE

century treatise written by the prioress of an English abbey,¹⁸ and in 1653 Izaak Walton published his famous work, *The Compleat Angler, or the Contemplative Man's Recreation*. Whether for food or for sport, “fishing” in culture has generally positive associations. The phrase “fishing expedition,” typed into Google, will retrieve advertisements for companies offering to take people on exotic fishing expeditions.¹⁹ Literal references to fishing often have a sort of reverent quality, whether they come from journalists, philosophers, or presidents. “If fishing is a religion, fly fishing is high church.”²⁰ “Shall I go to heaven or a-fishing?”²¹ “Fishing is much more than fish. . . . It is the great occasion when we may return to the fine simplicity of our forefathers.”²² Further, fishing (at least at its best) is not a random, baseless toss of hook into water, but an activity requiring knowledge and hard work: “My father was very sure about certain matters pertaining to the universe. To him all good things – trout as well as eternal salvation – come by grace, and grace comes by art, and art does not come easy.”²³

How, then, did the metaphoric use of fishing come to be so negative? It appears that from ancient times fishing was seen as having a potential dark side. Oppian, the second century

SOPHIST) (noting that some types of fishing were considered morally superior to others).

¹⁸DAME JULIANA BERNERS, *A TREATYSE OF FYSSHYNGE WYTH AN ANGLE* (1496) (cited in Cassell, *supra* note –).

¹⁹See, e.g., *Louisiana Fishing Expeditions*, at <http://louisiana-fishing-expeditions.com> (last visited Feb. 2, 2006); *Belize Flats Fishing Expeditions*, at <http://www.belizeflatsfishing.com> (last visited Feb. 2, 2006).

²⁰Tom Brokaw, *INTERNATIONAL HERALD TRIBUNE*, Sep. 10, 1991, *reprinted in* THE COLUMBIA WORLD OF QUOTATIONS (1996), *available at* <http://www.bartleby.com/66/47/8347.html>.

²¹HENRY DAVID THOREAU, *WALDEN* (1854), *reprinted in id.*, *available at* <http://www.bartleby.com/63/55/8855.html>.

²²Herbert Hoover, *NEW YORK TIMES*, August 9, 1964 (on the occasion of his 90th birthday), *reprinted in* SIMPSON'S CONTEMPORARY QUOTATIONS (1988), *available at* <http://www.bartleby.com/63/55/8855.html>.

²³NORMAN MACLEAN, *A RIVER RUNS THROUGH IT* 4 (1976) (“In our family, there was no

Greek poet, wrote of the “crafty devices of the cunning fisher’s art.”²⁴ Ancient Near East literature distinguished between good and bad “fishers,” with undesirable fishing associated with images like the “net of Hades” or the “four evil fishers of men.”²⁵ Writers in the Middle Ages continued to see a danger of sneaky indirection in metaphorical fishing. The Middle English Dictionary defines “fishen” as:

(a) To lure or win (souls); to catch as with bait or in a net, to hunt (for something); (b) to seek or find (an excuse, etc.). [Ex:] “Hem that . . . preche us povert and distresse, And fisshen hemsilf gret richesse With wily nettis that they caste” [and] “Anon thei can .. Fisshe and fynde out in their entencioun A couert cloude to shadwe ther tresoun.”²⁶

Such metaphorical references to fishing continued in popular literature. In Shakespeare’s *Merchant of Venice*, one character chides another for trying to pry speech from him by saying, “fish not.”²⁷ In fact, by Shakespeare’s time the fishing metaphor was so well established that it could be employed without actually using the word “fishing.” In *Hamlet*, for example, Polonius gives advice about how a man can “worm” out information about his son in Paris by making false statements. Polonius says:

Your bait of falsehood takes this carp of truth:
And thus do we of wisdom and of reach,
With windlasses and with assays of bias,
By indirections find directions out²⁸

clear line between religion and fly fishing.” *Id.* at 1).

²⁴OPPIAN, HALIEUTICA (“On Fishing”), lines 7f (quoted in WUELLNER, *supra* note – at 16).

²⁵WUELLNER, *supra* note – at 64-88.

²⁶MIDDLE ENGLISH DICTIONARY (HANS KURATH, ED.) 594 (1954) (quotes are from the early fifteenth century).

²⁷WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, Act I, scene 1, line 101. *See also* MUCH ADO ABOUT NOTHING, Act II, scene iii, line 100 (“Bait the hook well, this fish will bite.”). For a contemporary example, see SARA PARETSKY, FIRE SALE 289 (2005) (“You have nothing on me, not one goddamn thing. You’re fishing without worms.”).

²⁸WILLIAM SHAKESPEARE, HAMLET, Act II, scene 1, lines 62-65.

Samuel Richardson's *Pamela*, written in 1741, has a character ask, "Why . . . is all this fishing about for something when there is nothing?"²⁹ Small wonder, then, that the Oxford English Dictionary lists as a figurative meaning of fishing: "of an accusation, inquiry, etc.: Preferred or put forward in order to elicit information which cannot be gained directly."³⁰ It is the negative rather than the positive version of fishing that worked its way into legal thought.

B. The Fishing Metaphor in the Law

1. Eighteenth Century England and Bills of Discovery

a. The Courts

Historically, discovery was not permitted in common law actions. At law, pleadings were a vehicle intended to prepare cases for trial by narrowing the issues, a process that involved lawyers characterizing the legal effect of allegations rather than revealing facts.³¹ Because the pleadings revealed so little information, litigants resorted to equity courts, which permitted an equitable bill of discovery.³² The bill of discovery was seen as a way to provide access to evidence that would not otherwise be available at trial.³³ The plaintiff's equity pleadings were required to be quite detailed,³⁴ and the defendant was supposed to respond to the pleadings and

²⁹OXFORD ENGLISH DICTIONARY ONLINE, at <http://dictionary.oed.com>, last visited July 26, 2005 (fishing, vbl. n (1)(c)). In 1608, "to go fishing" could also mean "to rob on the highways." *Id.* ("Soldiers, that have no means to thrive by plain dealing . . . go a-fishing on Salisbury Plain."). *Id.* (fishing vbl. n.(2)).

³⁰*Id.* (fishing, ppl. a (2)).

³¹C. C. LANGDELL, A SUMMARY OF EQUITY PLEADING § 34, at 24-25 (1883); Fleming James, Jr., *Discovery*, 38 YALE L.J. 746, 746-47 (1929); GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 1-17 (1932).

³²This practice dates back to at least the mid fifteenth century. RAGLAND, *supra* note – at 12.

³³THOMAS HARE, A TREATISE ON DISCOVERY OF EVIDENCE BY BILL AND ANSWER IN EQUITY vii-viii (1836).

³⁴RAGLAND, *supra* note – at 6 ("Pleadings were supposed to present the facts of the case

attached questions.³⁵ As equity jurisdiction developed, interrogatories came to assume a separate status from the pleadings, but they still required the same kind of factual specificity as equity pleadings.³⁶

There were a number of limitations on the kind of information that could be acquired through an equitable bill of discovery. The bill could be filed only against parties, not “mere witnesses.”³⁷ It could not seek information that would incriminate the interrogated party.³⁸ And a party could be required to disclose “facts” but not “evidence.”³⁹ Documents could not be discovered unless the discovering party described the document with particularity and the interrogated party admitted to having the document.⁴⁰ Nevertheless, the bill of discovery was far superior to the limited utility of the bill of particulars in the action at law.⁴¹

Cases regarding bills of discovery are the first civil cases in which I have been able to find the fishing metaphor. The earliest ones involve disputes about ownership of real property.

in so complete a fashion that the court would be able to render its decision thereon.”).

³⁵*Id.* at 15.

³⁶*Id.* at 16; J AMES, *supra* note – at 747. See also Robert Wyness Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 437-42 (1937-38) (tracing development of discovery in chancery pleadings).

³⁷ EDWARD BRAY, *THE PRINCIPLES AND PRACTICE OF DISCOVERY* 39 (1885), *reprinted in* 1985 by Legal Books Pty, Sydney). Discovery was needed to get evidence from parties, because parties were not allowed to testify at trial at this time, based on a belief that their bias made them unreliable witnesses. Non-party witnesses, on the other hand, could testify.

³⁸*Id.* at 104. Because of the early overlap between criminal and tort liability, there was “some doubt as to the extent to which a court of equity would interfere to give discovery in aid either of the prosecution of or the defense to actions for tort.” *Id.* at 346-47.

³⁹*Id.* at 444-48.

⁴⁰*Id.* at 151-53.

⁴¹ Edson Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 865 (1933) (arguing that the bill of particulars fell short of forcing real disclosure of evidence and was a “feeble and restricted” contribution to discovery).

In the first, *Buden v. Dore*,⁴² the plaintiff claimed title to land. The defendant relied on a title inconsistent with the plaintiff's. The plaintiff complained that the defendant's answer did not set out the deeds and writings that the *defendant* relied on to prove his title. The Lord Chancellor ruled that the defendant did not have to disclose them, saying "you cannot come by a fishing bill in this court, and pray a discovery of the deeds and writings of defendant's title." If, on the other hand, the defendant had in his possession deeds and writings showing the *plaintiff's* title, those would have had to be disclosed.⁴³ The label "fishing bill" thus represented what came to be known as the "own case" rule – a party could get discovery of information that would support his own case, but not information that would support his opponent's case.⁴⁴

"Fishing bill" continued to appear in land title disputes. In *Renison v. Ashley*,⁴⁵ the plaintiffs were the great-grand-daughters of one John Izzard, and they claimed to have inherited certain of his properties. They brought suit against the woman in possession of that property, the step-daughter of one of their deceased cousins. The plaintiffs sought to discover the deeds and other documents under which the step-daughter claimed title. She offered to produce a deed showing her own title, but denied having any documents that would show the plaintiffs' title. The Lord Chancellor declined to order pretrial production. "This is another of the fishing bills, that I do not like to see in this Court. A spirit of prying into titles has got into the Court, that is highly dangerous to the title of every man in England."⁴⁶

⁴²28 Eng. Rep. 284 (Ch. 1752) (Hardwicke, L.C.).

⁴³*Id.* at 284.

⁴⁴*See also* JULIUS BYRON LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* 76 and 141 n.14 (1982) (arguing that the "fishing" objection is synonymous with the "own case" rule).

⁴⁵30 Eng. Rep. 724 (1794)(Loughborough, L.C.).

⁴⁶30 Eng. Rep. at 724.

The next year brought another condemnation of a “fishing bill,” again enforcing the “own case” limitation on discovery. In *Ivy v. Kekewick*,⁴⁷ the plaintiff claimed title to an estate by descent from the mother (*ex parte materna*) and that there was no heir from the father (*ex parte paterna*). The defendant, on the other hand, claimed title by descent from the father. The plaintiff prayed that the defendant “might set forth, in what manner he is heir *ex parte paterna*, and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths or burials, of all the persons who shall be therein named.” The Lord Chancellor firmly rejected this request for pre-trial disclosure: “This is a fishing bill to know, how a man makes out his title as heir. He is to make it out: but he has no business to tell the Plaintiff, how he is to make it out.”⁴⁸

Other “fishing bill” cases show that discovery opponents were already using the “fishing” label to fight discovery. For example, *Ryves v. Ryves*⁴⁹ was a title dispute between the son of a first marriage and his step-mother and half brother. His bill alleged the sources of his title and the extent of his estate. He prayed that the defendants “be compelled to produce all such settlements, deeds, indentures, wills, instruments, and writings, or such settlement, deed, &c., as they or either of them may have in their, his or her, custody or power.” The defendants argued in opposition to the request that “this is one of those vexatious fishing bills, which have always received the disapprobation of the Court.”⁵⁰

To a certain extent, the cases also protect the lawyer’s privacy in trial preparation – hence *Ivy*’s insistence that the defendant’s evidence was not subject to pretrial discovery and the

⁴⁷30 Eng. Rep. 839 (1795)(Loughborough, L.C.).

⁴⁸*Id.*

⁴⁹30 Eng. Rep. 1044 (1797).

defendant need not “tell the Plaintiff, how he is to make [his case] out.”⁵¹ Another early case rejected an interrogatory asking “[w]hat case do you intend to set up at the trial of this action as entitling you to recover against the defendants herein?” as improper because “a party is not to make a fishing application as to the manner in which his adversary intends to shape his case, and as to the evidence by which he intends to support it.”⁵²

b. The Commentators

Early treatises reflecting on this case law note the fishing metaphor as a limit on the bill of discovery. In 1836, Story reported that

no discovery will be compelled, except of facts material to the case stated by the plaintiff; for otherwise, he might file a bill, and insist upon a knowledge of facts wholly impertinent to his case . . . In such a case his bill would most aptly be denominated a mere fishing bill.⁵³

An influential nineteenth century treatise on discovery identifies “fishing actions” primarily with these land title fights. It also suggests that the condemnation of “fishing” rests on concerns about invasion of privacy, the sanctity of property, and a concern that parties suing those in possession may have improper motives:

Allusion has already . . . been made to fishing actions . . . It is mainly in connection with the title to land that actions of this kind have been instituted. So great is the temptation to a person with some fancied claim to another person’s land to get an opportunity of ransacking his title deeds in the hope of discovering some defect in the title that the most shadowy cases have frequently been launched with the view of finding out something about the title through the machinery of discovery.⁵⁴

⁵⁰*Id.* at 1046.

⁵¹*Ivy*, 30 E.R. at 839.

⁵²*Edwards v. Wakefield*, 199 E.R. 937 (QB 1856).

⁵³ 2 JOSEPH STORY, EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 1497, at 712 (1836).

⁵⁴BRAY, *supra* note – at 516. Bray notes that the “mischief of the exposure of documents of title extends beyond the particular action: for though the title might not be defective as against the particular adversary in the action, the documents might reveal defects of which other persons

While it might seem strange to us now to think of property records as private, England did not have a general public title registration system until the twentieth century. Deeds and other documents reflecting title were “handed from purchaser to purchaser and were usually kept in boxes in the office of the owner’s solicitor.”⁵⁵ Disputes of this kind could also have the effect of airing the family’s secrets.

2. Pre-Civil War U.S. Cases

a. The Courts

The fishing metaphor traveled to the United States with the common law.⁵⁶ Its earliest expression in this country came in collection cases, usually suits on notes or attempts by creditors to reach assets through an allegation of a fraudulent conveyance.⁵⁷ Discovery was still

might take advantage.” *Id.* He cites *Buden*, *Renison*, and *Ryves* to support his observation that in “early times the judges frequently expressed their strong disapprobation of actions of a fishing character.” *Id.* at 517. *See also* HARE, *supra* note – at 184-85.

⁵⁵JESSE DUKEMINIER & JAMES KRIER, PROPERTY 687-88 (3d ed. 1993).

⁵⁶The metaphor is alive and well in other common law countries, too. *See, e.g.*, ARCHIBALD MACSPORRAN & ANDREW R.W. YOUNG, COMMISSION AND DILIGENCE 53 (1995) (“Indeed, it is seldom that the courts hear an opposed motion for commission and diligence in which the phrase [‘fishing diligence’] does not feature.”)(Scotland); DAVID STOCKWOOD, CIVIL LITIGATION 71 (4th ed. 1997)(regarding production of documents from non-parties: “The courts will not allow the rule to be used to permit a ‘fishing expedition’.”)(Canada); B.C. CAIRNS, AUSTRALIAN CIVIL PROCEDURE (5th ed. 2002)(“A fishing interrogatory inquires after a cause of action or defence not pleaded in the hope of discovering something that can then be alleged as a claim or defence. It is an attempt to drag a party’s files to seek out what is there without any ground for believing that they contain relevant information.”)(Australia). Other countries may have a concept of limits on discovery, but it seems to be metaphor free. *See, e.g.*, KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW 48 n.32 (2003) (“The principle of the prohibition of probing, *Verbot des Ausforschungsbeweises*, in German, is clearly established under German civil procedure.”)

⁵⁷English bill of discovery cases also began expanding into cases involving creditors. *See, e.g.*, *Lush v. Wilkinson*, 34 Eng. Rep. 899 (Ch. 1800)(Lord Alvaney, Master of the Rolls) (“It is very extraordinary for a subsequent creditor to come with a fishing bill, in order to prove antecedent debts.”)

governed by the limits in the equity rules.⁵⁸ These cases identify “fishing” with the “own case” rule, and they also began to criticize a perceived speculation in the plaintiffs’ requests. In these cases, the limits on discovery are closely intertwined with requirements for particularized pleadings.

The earliest case is *Newkirk v. Willett*,⁵⁹ in which a widow filed a bill of discovery against a creditor who had sued her in a law court for money the creditor claimed that her late husband had owed. The widow said she had no personal knowledge of the debt, and believed it to be unjust because the creditor had never tried to collect his claim during her husband’s lifetime and he did not have written proof of the debt. The widow asked that the creditor give her all the facts regarding the origin of the debt so that she could “safely proceed to a trial” of the action at law. The court found that she was not entitled to that information and that her request was a “mere fishing bill” because it did not seek to substantiate her own defense.⁶⁰

The plaintiff in *Spence v. Duren*⁶¹ had a similar problem. He had paid two men for some land, and the men were supposed to convey good title to him. After he had purchased the land, however, it turned out that those two men were not the sole owners of the land. The plaintiff sued in equity to compel the other alleged owners to disclose whether they claimed an interest in the land and, if so, what their interest was. The plaintiff did not personally know what the

⁵⁸Some states, like Alabama, had passed a statute allowing interrogatories to be used in law cases rather than having to bring a separate suit in equity, but this did not expand the scope of discovery. *The Branch Bank at Montgomery v. Parker*, 5 Ala. 731, 1843 Ala. LEXIS 450 (Ala. 1843). Mississippi (1828), Missouri (1835), Arkansas (1837), Connecticut (1836), Virginia (1831), Georgia (1847), and Massachusetts (1851) all enacted measures allowing at least some use of interrogatories in actions at law. Millar, *supra* note –, at 446-47.

⁵⁹2 Johns. Cas. 413, 1800 N.Y. LEXIS 168 (N.Y. 1800).

⁶⁰2 Johns. Cas. at 416.

⁶¹3 Ala. 251, 1841 Ala. LEXIS 277 (Ala. 1841).

interests of the two other men might be, and he admitted that in his bill. The court refused to grant relief to the plaintiff because:

the bill deals in suspicions and conjectures, and on belief founded in rumor and hearsay. Bills of this vague and uncertain character, which call for a disclosure without positive and certain allegations, have been denominated fishing bills; such is the character of this. The rules of chancery practice require, that the facts, as to which a discovery is sought . . . should be stated with reasonable certainty and precision; that the allegations should be direct and positive, and not uncertain and inconclusive, before the defendant can be called on to answer.⁶²

In both of these cases, the plaintiff's lack of information about the defendant's claims left them without recourse in equity. Their pleadings were rejected as insufficiently specific, and they were not allowed to inquire into the facts supporting the claims against them.⁶³

A number of the early nineteenth century cases involve creditors' attempts to reach assets by claiming that the debtor transferred those assets fraudulently. Under the substantive law during that period, indebtedness in any amount at the time of a transfer would render the transfer void both as to existing and subsequent creditors (even though the subsequent creditors could not possibly have relied on the asset, which was gone before they extended credit). Based on this law, unpaid creditors would try to discover any and all amounts that the debtor might have owed at the time a valuable asset was transferred. The courts referred to these attempts as "fishing bills," and they were generally rejected unless the creditor could identify some specific

⁶²*Id.* at 253.

⁶³See also *Goodwin v. Wood*, 5 Ala. 152, 1843 Ala. LEXIS 308 (Ala. 1843), an action on a promissory note in which defendant sent interrogatories asking plaintiff about payments on the note. The trial court said the interrogatories did not need to be answered since defendant did not state the precise amount of the several payments. The same argument was used as an argument by a litigant in *Smith v. Ramsey*, 6 Ill. 373, 1844 Ill. LEXIS 40 at **4 (Ill. 1844), a suit by a partner against the heir of two other former partners for his share of land that was conveyed to the partnership. The lawyer for the heir argued: "This bill is wholly uncertain as to what he claimed . . . This does not even rise to the dignity of a fishing bill."

antecedent debt.⁶⁴

b. The Commentators

When explaining cases such as these, nineteenth century treatises focused on the inadequacy of the pleadings. Story's *Commentaries on Equity Pleadings*, for example, discusses *Newkirk v. Willett* to illustrate that "the Bill [of discovery] should set forth in particular the matters, to which the discovery is sought; for the other party is not bound to make answer to vague and loose surmises."⁶⁵ Similarly, Bray's treatise ties the right to discovery to the sufficiency of the discovering party's allegations. He makes it clear that a discovering party is expected to already have enough evidence to state a case with particularity before equity will help out:

There is a class of actions which stand, to a certain extent, by themselves, namely, what are called fishing actions. Discovery is given in courts of equity to assist a plaintiff in proving a known case, and not to assist him in a mere roving speculation, the object of which is to see whether he can fish out a case.⁶⁶

Otherwise, according to Bray, anyone

might get discovery of all the particulars of any transaction however secret and important with which he had no matter of concern merely by introducing into his pleadings the false allegation that he had an interest therein. . . It would be a monstrous thing that a man

⁶⁴See, e.g., *Hoke v. Henderson*, 14 N.C. 12, 1831 N.C. LEXIS 41 at **4 (N.C. 1831) ("It is upon this foundation, that what are called fishing bills are filed in Equity, to find out a creditor at the time of the conveyance, and to bring the whole fund into subjection to general creditors, including subsequent creditors, and a fortiori, other creditors at the time."); *Parks v. Jewlett*, 36 Va. 511, 1838 Va. LEXIS 39 at **19 (Va. 1838) (discussing the problem of creditors going after emancipated slaves by a "fishing bill"); *Fisk v. Slack*, 38 Mass. 361, 1838 Mass. LEXIS 167 at **6 (Mass. 1838)(bill in equity to get an accounting of certain transactions called a "fishing bill" by the party opposing discovery); *Toole v. Stancill*, 41 N.C. 501, 1849 N.C. LEXIS 256 at **5 (N.C. 1849) ("This bill is in the nature of what are called fishing bills, which are filed to find out a creditor, whose debt existed at the time of the execution of the conveyance, to subject the fund to all the creditors, as well those subsequent as antecedent.")

⁶⁵JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §325, at 263 (1st ed. 1838).

⁶⁶BRAY, *supra* note – at 16.

merely by alleging that he had a share in a concern . . . could get the accounts of a defendant's private business and of his dealings with other people.”⁶⁷

The fishing metaphor was used to label both the “own case” limits and particularized pleading limits on discovery, both in order to protect rights to property and privacy.⁶⁸

Nineteenth century commentators added another policy argument for the prohibition on fishing to find out an opponent's evidence: fear of perjury. Writers (but not courts) expressed a concern that if a litigant were allowed to find out his opponent's evidence in advance, a dishonest person would procure evidence to undermine it. “If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage: he may then be able although he has no evidence in support of his own case to shape his case and his evidence in such a way as to defeat entirely the ends of justice.”⁶⁹ Others suggested that mutual discovery might actually be beneficial, but regarded the “own case” rule as too well established to change.⁷⁰ This ‘fear of perjury’ explanation for the prohibition on fishing was a precursor of what became an argument that the work product of attorneys should be protected from discovery.⁷¹

⁶⁷*Id.* at 25.

⁶⁸Fleming James' survey of discovery in 1927 confirmed this two-pronged version of the fishing metaphor. He referred first to the prohibition of “fishing expeditions” which pry into an adversary's case. He then added that “there are other . . . types of ‘fishing expeditions.’ The scope of an examination, an interrogation, or an order for inspection of documents may be so broad as to amount to what some courts call a ‘roving commission.’” James, *supra* note – at 759.

⁶⁹*Id.* at 445.

⁷⁰JAMES WIGRAM, POINTS IN THE LAW OF DISCOVERY 263 (1842) (“If it were now, for the first time, to be determined, whether, in the investigation of disputed facts, truth would best be elicited by allowing each of the contending parties to know, before the trial, in what manner, and by what evidence, his adversary proposed to establish his own case; arguments of some weight might *á priori* be adduced in support of the affirmative of this important question.”)

⁷¹Hickman v. Taylor, 329 U.S. 495, 511 (1947) (“Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases

3. Pre-FRCP State and Federal Cases

a. Fishing is still Forbidden

The late nineteenth and early twentieth centuries were a time of considerable procedural ferment, especially in the areas of pleadings and discovery.⁷² The most significant set of changes began in New York in 1848 with the adoption of the Field Code. The Field Code merged law and equity, eliminated the forms of action, and directed that parties should plead “facts constituting the cause of action” in “ordinary and concise language.” The Code also eliminated equitable bills of discovery and interrogatories as part of the equitable bill. Instead, the Code provided for more informative pleadings, some limited document production, and depositions of parties (but only in lieu of calling them as witnesses at trial).⁷³ Changes modeled on the Field Code were adopted in about half the states by the turn of the century.⁷⁴ At the same time, states began to introduce more discovery devices, and to broaden somewhat the scope of discovery. For example, by 1932 seven states allowed depositions from witnesses as well as parties. Forty two states made some provision for the production of documents, and ten allowed written interrogatories.⁷⁵

The federal courts maintained a more conservative approach to discovery.⁷⁶ While two

for trial.”).

⁷²This was also a time of significant procedural reform in English courts, particularly with the Judicature Acts of 1873 and 1875, which merged law and equity, clearly separated interrogatories from pleadings, and provided sanctions for failure to comply with discovery. *See* Millar, *supra* note – at 444-445.

⁷³Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 932-39 (1987).

⁷⁴*Id.* at 939 (noting that 27 states had adopted similar procedures by 1897).

⁷⁵RAGLAND, *supra* note – at 51, 88, 92.

⁷⁶*See* James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1190 (1938). During this period, the federal courts were

statutes permitted depositions in cases at law, they did so only to provide testimony for trial when the witness was likely to be absent.⁷⁷ In equity cases, Equity Rule 58 provided for limited discovery. A party could send interrogatories to opposing parties to discover “facts and documents material to the support or defense of the cause.” Production and inspection of documents was possible on judicial order. In law cases, on the other hand, production would be ordered only at trial.⁷⁸ In addition, although federal courts in common law matters generally followed state procedural rules under the Conformity Act, the Supreme Court interpreted the Act to prohibit federal courts from adopting the discovery devices of the states in which they sat.⁷⁹

Federal courts and most state courts during this period continued to condemn “fishing.” Many cases used “fishing bill” to mean that a party could not discover information supporting its opponent’s case. This was seen both as an invasion of privacy and property rights, and as interference in opposing counsel’s trial strategy. The Supreme Court cleared up any doubt about the continued vitality of the “own case” rule in 1911, in *Carpenter v. Winn*.⁸⁰ Plaintiff Winn had obtained an order from the trial court requiring defendant Carpenter to produce certain books and papers regarding a particular brokerage transaction in cotton in 1905 and 1906. The Court found this discovery to be improper: “[A] bill of discovery cannot be used merely for the purpose of enabling the plaintiff . . . to pry into the case of his adversary to learn its strength or weakness. A

generally seen as protective of corporate interests. *See generally* Edward A. Purcell, Jr., *The Story of Erie*, in *CIVIL PROCEDURE STORIES* 24-32 (KEVIN CLERMONT, ED. 2004).

⁷⁷28 U.S.C. § 639 (permitting depositions “when the witness lived more than one hundred miles from the place of trial, or was on a voyage at sea, or about to go out of the United States, or when the witness was aged and infirm”); 28 U.S.C. § 644 (allowing depositions by a commission out of chancery only when “necessary to prevent a failure or delay of justice”).

⁷⁸*Carpenter v. Winn*, 221 U.S. 533 (1911).

⁷⁹*Ex parte Fisk*, 113 U.S. 713 (1885).

⁸⁰221 U.S. 533 (1911).

discovery sought upon suspicion, surmise, or vague guesses is called a ‘fishing bill,’ and will be dismissed. . . Such a bill must seek only evidence which is material to the support of the complainant’s own case, and prying into the nature of his adversary’s case will not be tolerated.”⁸¹

Federal courts also used the term “fishing expedition” to criticize plaintiffs who sued before having a sufficiently detailed case. After discussing the “own case” limit, the court in *Goodrich Zinc Corp. v. Carlin*⁸² went on to condemn speculative litigation as fishing: “[E]ven in an inquiry as to your own case, the questions asked must not be ‘fishing’; that is, they must refer to some definite and existing state of circumstances, and not be put merely in the hopes of discovering something which may help the party interrogating to make out some case.”⁸³ The Supreme Court had earlier criticized a creditor’s attempt to get a wife’s assets to pay her husband’s debts in a fraudulent transfer case. The creditor had failed to describe the assets with particularity “because all particular information is refused by the [husband] and his wife and the persons managing the property for them, and because the same has been invested for income, and often changed in form by reinvestment and in pursuance of devices for more effectual concealment.”⁸⁴ Rather than taking pity on the creditor, the Court called his suit a “fishing bill”

⁸¹*Id.* at 540.

⁸²4 F.2d 568 (W.D. Mo. 1925).

⁸³*Id.* at 569 . *See also* Stokes Bros. Manuf’g Co. v. Heller, 56 F. 297 (C.C.D.N.J. 1893) (In a patent infringement case, court refused to allow plaintiff to inspect defendant’s manufacturing plant since plaintiff had not produced “a particle of evidence” to sustain its claims. “Under these circumstances, to compel the defendants to open their manufactory to hostile inspection of rivals in business, and to disclose the character of the machines and the process by which for so many years they have made a successful article of merchandise, would be unjust and inequitable. The motion is too obviously the excuse for a ‘fishing excursion.’” *Id.* at 298).

⁸⁴*Huntington v. Saunders*, 120 U.S. 78 (1886) .

because “the substance of what they say is, that they have received certain information which excites their suspicion; and this information is . . . vague, . . . uncertain and indefinite.”⁸⁵

State cases during the period were mostly to the same effect. Some referred to discovery requests seeking information about an adversary’s case as fishing bills.⁸⁶ Others rejected discovery requests from plaintiffs they believed to be suing without a sufficient factual basis. In one New York case, the plaintiffs alleged that the defendants entered into an agreement to secure a monopoly of the business of selling calves in certain stockyards in New York City. The defendants admitted to an agreement, but denied that it was designed to monopolize. The plaintiffs tried to discover a copy of the agreement, the defendants objected, and the court refused to order discovery:

[T]his application is a mere expedient for the purpose of seeing whether they may or may not have a cause of action . . . They desire to make amongst the private papers of these defendants an experimental voyage of discovery in the hope that, perhaps, they may be able to fish out something they may turn to their advantage. It does not seem to us that such a mere fishing expedition should be countenanced by the court.”⁸⁷

The creditor in *George v. Solomon*⁸⁸ lost because he lacked sufficient pre-suit information. He alleged that he had paid his rent twice, once to Mr. Ragsdale and then to Mrs. Ragsdale, because there was a dispute as to whether Mr. Ragsdale had been acting as his wife’s agent when

⁸⁵*Id.* at 80. The court went on to explain that this policy was needed to protect wives’ separate estates.

⁸⁶*See, e.g.,* DeLacy v. Walcott, 13 N.Y.S. 800, 802-03, 1891 N.Y. Misc. LEXIS 1685 (Superior Ct. 1891).

⁸⁷Phillips v. Curtis, 75 N.Y.S. 551, 554, 1902 N.Y. App. Div. LEXIS 745 (1902). *See also* McCleod v. Griffis, 8 S.W. 837, 841 (Ark. 1888) (bill in chancery to impeach the settlement of an administrator in probate court, a kind of collateral attack on the probate court judgment requiring a showing of fraud, accident, or mistake. The plaintiffs had identified certain frauds and mistakes and sought to inspect the books to find others. The court refused to allow it: “In the language of ancient jurisprudence, ‘the court of chancery will not entertain a fishing bill.’”).

⁸⁸14 So. 531, 533 (Miss. 1893).

collecting the \$1,000 rent. He asked that personal representatives of the husband and wife be required to show which of them should repay the amount. The court found his case to be “a pure and simple fishing bill, and complainant angles in the broadest water.”⁸⁹ Since the unhappy payor could not plead which defendant owed him the money, he was entitled to no help from the court.

An example may help to make clear the degree of specificity, and consequent limits on the scope of discovery, that were common during this period:

[I]t may be part of a party’s case to prove that his adversary’s title is defective, so that an interrogatory such as “Is there not an outstanding mortgage to A on this land?” would be proper. Yet to allow a party to require his adversary simply to set out his title might be undesirable. At any rate, the courts evince a strong tendency to discountenance such broad interrogation.⁹⁰

Discovery, then, was permitted only to allow a party to access – from the opponent – otherwise unavailable but known evidence to support its own case, information exchange took place primarily at trial, and no one was supposed to file suit unless he already had enough evidence to prove a prima facie case. Attempts to deviate from these principles were unacceptable fishing.

b. Fishing Allowed

A few state decisions during this period, however, declared that “fishing” could be a good

⁸⁹*Id.* at 533. The court suggested that if equity afforded relief in this situation, “we see no reason why the owner of lost or stolen property might not implead in one suit the residents of a city or county, upon the averment that some one of them – which one the complainant is not informed – has converted his property, and is liable for its value.”

⁹⁰James, *supra* note – at 759. *See also* Terry v. Stull, 169 A. 739, 741 (Del. Ch. 1933) (in a case alleging fraud on the deceased, rejecting as a “fishing expedition” interrogatories “calling on Philip B. Stull to say whether he ever turned over any money to his father, asking for the amounts, if paid by check the names of the banks, the nature of the transactions, whether he ever received any power of attorney from his father of any kind, whether he ever acted in any way as agent for his father, and things of that sort. . . Interrogatories of that type appear to me to be shots in the dark fired in the hope that they may hit a mark.”)

thing. The Kansas Supreme Court in 1874 was asked to decide whether a party could compel a witness to give his deposition prior to trial for discovery purposes. The court approved of the practice: “It is . . . said that this permits one to go on a ‘fishing expedition’ to ascertain his adversary’s testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary’s testimony.”⁹¹ A later Kansas case reached the same result, and ran with the metaphor: “Even if they were fishing – for it is permissible in a case of this kind – they must exercise as much cunning and circumspection as if whipping the trout streams, while trying to establish their alleged commercial frauds. We think this case presents a justifiable fishing expedition.”⁹²

New York courts were split on the issue, but one trial court rejected a complaint about fishing in 1899. “It is said in decisions, and is now said by counsel for the defendant, that [depositions] must not be ‘fishing excursions.’ If a party wants to use the testimony of an opposite party to prove a certain fact within his knowledge, I do not know why he should not be permitted to probe his conscience for it, or ‘fish’ for it if the phraseology of certain decisions must be followed. What the courts are after is the truth, and a system of technicalities and pit falls should not be put in the way.”⁹³

Despite this occasional acceptance of “fishing,” the own case rule persisted (although it

⁹¹In re Abeles, 12 Kan. 451, 453, 1874 Kan. LEXIS 89 (Kan. 1874). Justice David Brewer, who wrote this opinion, later became a Justice of the United States Supreme Court. Sunderland, *supra* note – at 871.

⁹²In re Merkle, 19 P. 401, 402 (Kan. 1888). Kansas later changed its mind, forbidding the use of deposition procedures for “fishing expeditions.” In re Davis, 16 P. 790 (Kan. 1888).

⁹³Hay v. Zeiger, 61 N.Y.S. 647, 647 (Sup. Ct. 1899). *See also* Pike & Willis, I, *supra* note – at 1194 (“The objection to pre-action discovery on the ground that it will allow ‘fishing out a case’ is not particularly sound (if the plaintiff *has* a case he should be aided in fishing it out).”).

was sometimes liberalized so that one's "own case" included negating the opponent's case).⁹⁴

Professor Sunderland suggested that the chancery bar did not try very hard to change the rule, for reasons of their own. First, the restrictions on discovery "produced an enormous amount of lucrative litigation over the application of the rules." Second, the discovery limits produced enough uncertainty at trial that "a lawyer might always feel confident of having a fighting chance of success no matter what side of any case he might be employed to represent."⁹⁵

4. Drafting the Federal Rules of Civil Procedure

During the end of this time period, the Advisory Committee on the Federal Rules of Civil Procedure was engaged in drafting what would become the new pleading and discovery rules.⁹⁶ They did this against a background of scholarly work calling for liberalization of pleading rules and expansion of discovery rights. Charles Clark, the Dean of Yale Law School and Reporter to the Advisory Committee, had written about the wastefulness of detailed pleadings and pleading disputes.⁹⁷ Edson Sunderland, who would become the drafter of the federal discovery rules, had also explained why pleadings were not sufficient to reveal the facts that lawyers needed to prepare cases and advise their clients regarding settlement.⁹⁸ As to discovery, Fleming James of

⁹⁴Sunderland noted in 1933 that twelve states "make discovery available not only for attack but for defense – not merely to aid parties in assembling their own proof but to protect them from surprise and to relieve them from taking unnecessary and useless precautions to meet evidence that will never be offered." Sunderland, *supra* note – at 870 (listing Alabama, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, New Hampshire, Ohio, Texas, and Wisconsin).

⁹⁵Sunderland, *Scope*, *supra* note – at 868.

⁹⁶For a far more complete account of the historical background of the drafting of the federal discovery rules, see Subrin, *Fishing*, *supra* note – .

⁹⁷CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (1928); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291 (1935).

⁹⁸Edson Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 863-

Yale had written in 1929 to recommend eliminating the “own case” rule, allowing depositions and more expansive document production, and leaving the issue of the overbreadth version of “fishing” to be dealt with at the trial court’s discretion.⁹⁹ Robert Millar of Northwestern also wrote shortly before the adoption of the federal rules, comparing numerous systems of civil procedure and recommending the adoption of the oral deposition.¹⁰⁰

Criticism of the pre-FRCP limits on discovery included criticism of the “fishing expedition” metaphor. Sunderland, for example, wrote:

False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial . . . All this is well recognized by the profession, and yet there is a wide-spread fear of liberalizing discovery. Hostility to ‘fishing expeditions’ before trial is a traditional and powerful taboo.¹⁰¹

Pike and Willis complained in 1938 of the “shibboleth – repeated to the point of nausea – that the court would not sanction ‘fishing expeditions.’”¹⁰² George Ragland, a student of Sunderland’s, wrote an influential book promoting the expansion of discovery, with examples from contemporary state practices. He noted that “the epithet ‘fishing excursion for the adverse party’s evidence’ has been employed against the taking of depositions for discovery in every state where it has been attempted. . . . Judicial opinion, however, has been opposed to

65 (1932-33).

⁹⁹James, *supra* note – at 759, 773-74.

¹⁰⁰Millar, *supra* note – at 455.

¹⁰¹Edson R. Sunderland, *Foreword* to RAGLAND, *supra* note – at iii (1932).

¹⁰²James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: II*, 38 COLUM. L. REV. 1436, 1437 (1938). The Biblical use of “shibboleth” is found in *Judges* 12:5-6, literally a difference in pronunciation used to tell whether one was a member of the favored tribe. In modern usage a shibboleth is an arbitrary test to prove membership in a group. See Answers.com, *Shibboleth*, at <http://www.answers.com/topic/shibboleth> (last visited June 30, 2005). It is not unusual to find the metaphor associated (by its critics) with such quasi-religious language. Cf. text accompanying notes – *supra* (noting religious language used to describe

restriction.”¹⁰³

The fishing expedition metaphor appears in the Advisory Committee’s discussion of the discovery rules. Members seemed more concerned about the potential for speculative litigation than about the “own case” rule, and to be more worried about protecting defendants than plaintiffs.¹⁰⁴ It is not always clear just what they meant by the metaphor, however. Committee Chairman William De Witt Mitchell warned, “I feel very strongly . . . We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.”¹⁰⁵ A member of the legal staff of the Advisory Committee told the Fourth Circuit Judicial Conference that the proposed discovery rules had been amended to “be a protection to defendants against fishing expeditions, in that an unscrupulous plaintiff cannot file a complaint alleging any sort of claim which occurs to him, take a deposition of the defendant, as a result of which he discovers a claim which he thinks he might sustain, and then amend his complaint asserting the claim.”¹⁰⁶ On the other hand, committee member Senator

actual fishing).

¹⁰³RAGLAND, *supra* note – at 120. Ragland quotes William Howard Taft, when he was on the Ohio Supreme Court, as opposing this ‘own case’ version of the prohibition on fishing: “There is no objection that I know why each party should not know the other’s case.” *Shaw v. Ohio Edison Co.*, 9 O. Dec. Reprint 809, 812 (Super. Ct. 1887).

¹⁰⁴A number of jurisdictions (including New York) retained the most restrictive version of the own case rule – a party could discover information only about issues on which they had the burden of proof under the pleadings. This tended to restrict defendants’ discovery unless they filed affirmative defenses, while plaintiffs could do discovery to get information supporting their claims. Eliminating the own case rule in these jurisdictions actually helped defendants more than plaintiffs. *See* RAGLAND, *supra* note – at 32.

¹⁰⁵Proceedings of the Meeting of the Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (Feb. 22, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, at CI-209-60-CI-209-61, *cited in* Subrin, *Fishing*, *supra* note – at 722.

¹⁰⁶Edward H. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A.B.A.J. 629, 631 (1937). Hammond was referring to the

George Wharton Pepper at one point said, “Mr. Chairman, I am not worried about the fishing-expedition aspect of this thing, but, in the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff [referring to depositions] is simply going to be used as a means of ruining the reputation of responsible people.”¹⁰⁷ Pepper, then, seems to refer to “fishing expedition” as something other than the danger of litigation brought only for its settlement value.

5. Reactions to Procedural Reform

a. Fishing Allowed

Whatever they meant, those who admired the new federal discovery rules had no use for the discovery objections articulated as “I object; this is fishing.” For this group of the legal elite, fishing was an acceptable practice. They hoped that the norm under the new rules would be determination of cases on the merits, not on the pleadings, and that information exchange would come through the discovery process. Writing a year after the rules went into effect, Pike and Willis emphasized (in a section titled “Fishing Expeditions”) that it was permissible to fish. “When the new rules went into effect it was assumed that an end was put to the time-honored stricture on ‘fishing expeditions’ imposed by the rule that a party might not discover facts

provision that depositions could not normally be taken until after an answer had been filed. He also mentioned a provision that enabled the court to make an order confining the examination to matters that relate to the issues as raised by the pleadings.

¹⁰⁷Proceedings of the Advisory Committee (Feb. 22, 1935), *supra* note – , at CI-209-59-CI-209-60. Pepper expanded on his concerns: “You bring a suit against a man, without any ground whatever – the president of some important company . . . You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or a murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.” (Chairman Mitchell responded: “It is too much like some of these Senate committees you used to sit on.”). *Id.*

concerning his opponent's case."¹⁰⁸ Similarly, Holtzoff wrote, "That the proceeding may constitute a 'fishing expedition' is not a valid objection to interrogatories. As a matter of fairness, if there appears to be a reasonable probability or even possibility that there may be fish in the pond, there is no reason why the litigant should not be permitted to endeavor to catch them."¹⁰⁹

Most of the earliest post-Rule cases embraced broad discovery¹¹⁰ and rejected the fishing expedition objection. Judge Moskowitz of the Eastern District of New York immediately became famous for holding that "[I]mitations which have been placed upon deposition-taking by state courts, such as the necessity of having the affirmative upon the issue on which examination is sought, find no basis in the new Rules. It will not avail a party to raise the familiar cry of 'fishing expedition.'"¹¹¹

b. Fishing Still Forbidden

Some areas of concern remained, however, and continued to receive the pejorative label

¹⁰⁸James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 301 (1939-40).

¹⁰⁹Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 215 (1942-43).

¹¹⁰Two weeks after the rules went into effect, a court ruled that the discovery provisions had done away with many of the old limitations on discovery: "the distinction between discovery of 'evidentiary' facts and 'ultimate or material' facts is abolished, as is the holding . . . that discovery could be obtained only of matters exclusively . . . within the knowledge . . . of the adverse party . . . and further, it is now established that parties also may be interrogated as to the identity and location of persons having knowledge of relevant facts. . . . Under the present rule discovery may be had now to ascertain facts relating not only to the party's own case but his adversary's also." *Nichols v. Sanborn Co.*, 24 F. Supp. 908, 910 (D. Mass. 1938).

¹¹¹*Laverett v. Cont'l Briar Pipe Co.*, 25 F. Supp. 80, 81 (E.D.N.Y. 1938). *See also* *Glick v. McKesson*, 10 F.R.D. 477, 479 (W.D. Mo. 1950) ("'Fishing expeditions' for evidentiary facts are permitted under the Federal Rules of Civil Procedure."); *Gutowitz v. Pa. R. Co.*, 7 F.R.D. 144, 146 (E.D. Pa. 1945) (same); *Pezza v. Williams-Bauer Corp.*, 3 F.R.D. 355, 355-56 (S.D.N.Y. 1942) ("examinations before trial frequently are permissible 'fishing expeditions'")

“fishing expedition.” The metaphor often signaled that plaintiffs needed more evidence before they could file suit. General pleading, particularly in cases tinged with fraud allegations, were rejected by some courts.¹¹² In *Cohen v. Beneficial Industrial Loan Corporation*,¹¹³ a stockholder sued for an accounting of funds that were allegedly fraudulently diverted for the personal gain of members of the board of directors. He alleged that the corporation improperly paid an affiliate substantial sums of money unsupported by proper documentation. The court dismissed those allegations:

The plaintiff’s charge that many payments were illegal and improperly made, without further enlargement, is insufficient to meet even the bare requirements of the rules of pleading. The further averment by plaintiff that “an examination of officers and directors” will disclose which payments were illegal and ultra vires, stamps this alleged cause of action as one disclosing an aspiration rather than a claim upon which recovery may be had . . . I do not understand that the Federal Rules of Civil Procedure . . . will . . . permit the plaintiff to call witnesses in a fishing expedition, with the hope that somewhere or somehow it may develop that a defendant has some liability.¹¹⁴

Similarly, in a case involving an insolvent bank, the court rejected depositors’ claims that the Comptroller had paid out unreasonably large amounts. “The allegations of the complaint . . . conclude with the revelation that the appellant does not even know the amounts and details of such fees and expenses. The conclusion is obvious that the preceding allegations upon information are pure guesswork and the suit a fishing expedition.”¹¹⁵

under the federal practice”).

¹¹²Even under the Federal Rules, allegations of the circumstances constituting fraud must be plead with particularity. Fed. R. Civ. P. 9(b).

¹¹³69 F. Supp. 297 (D.N.J. 1946).

¹¹⁴*Id.* at 301. The opinion quoted *Mebco Realty Holding Co. v. Warner Bros. Pictures*, 44 F. Supp. 591, 592 (D.N.J. 1942), for the “fishing” language. *Mebco* was an antitrust case regarding movie theaters in which the defendant in question was the bank that loaned the money to construct a new, competing theater, and the court expressed considerable skepticism about the plaintiff’s claim, granting summary judgment.

¹¹⁵*Lucking v. Delano*, 122 F.2d 21, 26 (D.C. Cir. 1941) (dismissing class action). *See*

Discovery cases also found a home for the metaphor, still used to set limits on discovery. Sometimes it was a generalized feeling that the requested discovery was unlikely to yield relevant information. One court terminated the deposition of corporate officers:

[T]he court has examined the depositions so far as taken. The transcript so far contains about 1,000 pages. His examination progressed from interest to boredom, and thence to a certain amount of shock. . . . Granting that Rule No. 26 has a tendency somewhat to encourage fishing expeditions, still the fishing is subject to some license and limit, and should not be continued day after day when the catch is composed of minnows.¹¹⁶

Other courts used “fishing” to criticize the language of document production requests. One much-cited case denied a motion to produce documents, saying that the words “any and all” documents were not sufficiently descriptive. “Undoubtedly the rules are to be liberally construed (Rule 1), but it was never intended by these Rules to revolutionize the practice by allowing fishing excursions.”¹¹⁷

The fishing metaphor also had a more technical use, distinguishing the amount of probing allowed by the various discovery devices. In the most common version of this, depositions and interrogatories could be used to fish,¹¹⁸ but requests for document production could not.¹¹⁹ Some

also United States *ex rel* Schiff v. Atlantic Basin Iron Works, 53 F. Supp. 268, 271 (E.D.N.Y. 1943) (granting motion for bill of particulars).

¹¹⁶Heiner v. N. Am. Coal Corp., 3 F.R.D. 64, 65 (W.D. Pa. 1942).

¹¹⁷Thomas French & Sons v. Carleton Venetian Blind Co., 30 F. Supp. 903, 905 (E.D.N.Y. 1939). *See also* Ft. Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., 4 F.R.D. 328, 330 (W.D. Pa. 1940) (“the use of the word ‘all’ in connection with these minutes and this correspondence would seem to indicate that the plaintiff is engaged in a fishing excursion rather than the production of specified documents”).

¹¹⁸Byers Theaters v. Murphy, 1 F.R.D. 286, 288 (W.D. Va. 1940) (“A general objection, that the interrogatories constitute a ‘fishing expedition,’ is of no avail.”). *But see* The J.L. Jr., 64 F. Supp. 185, 185-86 (E.D.N.Y. 1945) (quoting a 1917 Learned Hand opinion to support the conclusion that the Federal Rules of Civil Procedure had not broadened the scope and use of interrogatories, and thus they could not be used to “pry into [the] adversary’s case”).

¹¹⁹This belief was not surprising, since at this time document production still required a motion and showing of good cause, and because old equity cases had placed particular limits on

courts thus rejected requests as insufficiently specific in designating the desired documents. *Welty v. Clute*,¹²⁰ for example, required the discovering party to begin by taking depositions to identify such documents as existed, and only then to request the documents themselves. “[T]he motion seems to partake much of the nature of a ‘fishing expedition.’ This was not the intent of [Rule 34].”¹²¹ A few years later, another court maintained that “[f]rom Rule 34 . . . there has evolved the frequent repeated legal holding that roving and fishing expeditions into an adversary’s files will not be permitted.”¹²² Holtzoff, although he approved of fishing with depositions and interrogatories, thought that document requests were more limited and could be used only to get documents that constitute or contain material evidence. “A roving inspection or a dragnet, or a fishing excursion is not permitted under Rule 34.”¹²³ Other courts disagreed, finding fishing to be appropriate for document production. The most quoted, *Golden Arcadia Mutual Casualty Co.*, rejected the defendant’s “fishing” argument, saying that the discovery rules, including Rule 34, “permit ‘fishing’ for evidence, as they should. If documents in defendant’s possession tend to sustain plaintiff’s claim, plaintiff is entitled to inspect them and have the use of them as evidence.”¹²⁴

c. Fishing for Trial Preparation Materials

document production. See BRAY, *supra* note – at 151 (equity courts less inclined to order documents produced than interrogatories answered).

¹²⁰29 F. Supp. 2 (W.D.N.Y. 1939).

¹²¹*Id.* at 2.

¹²²*H-P-M Dev. Corp. v. Watson-Stillman Co.*, 71 F. Supp. 906, 914 (D.N.J. 1947). Interestingly, the court cited no cases to demonstrate the “frequent repeated legal holding.” See *also* *Archer v. Cornillaud*, 41 F. Supp. 435, 436 (D. Ky. 1941) (plaintiff must designate particular books and records and also state facts showing that the information contained is relevant to the case).

¹²³Holtzoff, *supra* note – at 219.

¹²⁴*Golden Arcadia Mut. Cas. Co.*, 3 F.R.D. 26, 26 (N.D. Ill. 1942). See *also* Olson

The greatest split of authority was that over trial preparation materials.¹²⁵ Was it improper fishing to request copies of statements taken by an opponent in preparation for trial? Under the old equity practice, this issue did not tend to arise as such. Discovery of that kind of information was prohibited by the “own case” rule, as well as by the notion that one could discover “facts” but not “evidence” and the requirement that documents be admissible in order to be discoverable. Under the new discovery rules, however, such information was potentially discoverable unless protected under the rubric of “privilege.” This issue, of course, reached its climax in the Supreme Court’s opinion in *Hickman v. Taylor*¹²⁶ and, not surprisingly, included references to “fishing.”

The Third Circuit, in creating a new protection of the “work product of the lawyer” rejected arguments that would have returned to pre-Rule sensibilities. “As we approach this question we must discard some favorite craft notions of the advocate. . . . We must . . . discard the notion that questions from the other side can be fended off on the ground that the opponent’s lawyer is simply engaged in a fishing expedition.”¹²⁷

Justice Murphy’s majority opinion for the Supreme Court contains what is undoubtedly the best-known example of the metaphor. He noted the splits in the case law, discussed the roles of pleadings and discovery in the new rules, and affirmed the importance of disclosure:

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of “fishing expedition” serve to

Transp. Co. v. Socony-Vacuum Oil Co., 7 F.R.D. 134, 136 (D. Wis. 1944).

¹²⁵Advisory Committee on Rules of Civil Procedure, Report of Proposed Amendments (June, 1946), 5 F.R.D. 433, 457-60 (citing cases); Holtzoff, *supra* note – at 211- 12 (citing cases); Pike & Willis, *Operation, supra* note – at 303-07 (citing cases); *Hickman v. Taylor*, 153 F.2d 212, 216 n.6 (3d Cir. 1946), *aff’d*, 329 U.S. 495 (1947) (citing cases).

¹²⁶329 U.S. 495 (1947).

¹²⁷153 F.2d at 216.

preclude a party from inquiring into the *facts underlying his opponent's case* Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.¹²⁸

In dismissing the “time honored cry,” Justice Murphy cited Pike and Willis’s article about discovery in operation which, as noted earlier, identified the “fishing expedition” objection with the “own case” rule.¹²⁹ He was also cribbing language from Judge Moskowitz’s 1938 opinion (“It will not avail a party to raise the familiar cry of ‘fishing expedition’”), which also referred to the “own case” rule.¹³⁰ The Court was, in effect, overruling its former decision in *Carpenter v. Winn*, which itself had embodied the own case limit on discovery.¹³¹ What, then, was the Supreme Court rejecting as an objection to discovery? In the context of *Hickman* itself, the issue was not a claim that the suit itself was speculative, or that the interrogatories were too generally worded. It was, though, an attempt to discover the basis of an opponent’s case, as the statements in question were taken from tug company employees by the tug company’s lawyer. Perhaps this much-quoted endorsement of liberal discovery had a narrower meaning than we thought.¹³²

d. The Federal Courts React to *Hickman*

Whatever Justice Murphy’s intent, federal courts in the period following *Hickman* latched

¹²⁸329 U.S. at 507 (emphasis added).

¹²⁹Pike & Willis, *Operation*, *supra* note – at 301.

¹³⁰See text accompanying notes – *supra*.

¹³¹*Carpenter v. Winn*, 221 U.S. 533, 540 (1911).

¹³²Even if *Hickman* referred only to the “own case” rule, however, it is clear that the drafters of the federal rules intended for “fishing” – in the sense of downplaying the role of pleadings and using discovery to gather information about a case – to be proper. See, e.g., Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 157 (1948) (repudiating the objection to “fishing expeditions” allows discovery by all litigants of all features of a case); Charles E. Clark, *Experience Under the Amendment to the Federal Rules of Civil Procedure*, 8 F.R.D. 497 (1948) (1946 discovery rule revisions allowed discovery of information “reasonably calculated to lead to the discovery of admissible evidence” in order to clarify that the Rules intended to eliminate complaints about fishing).

onto his language, and the propriety of fishing expeditions was noted in a number of cases at that time. It was cited to show that the scope of discovery was measured by “subject matter” rather than pleadings,¹³³ that there was good cause for production of documents,¹³⁴ that a party must provide factual answers, even if the information came through his attorneys,¹³⁵ that a party need not depose witnesses before requesting production of documents,¹³⁶ that a party may do discovery even of information within its own knowledge,¹³⁷ and that designation of documents was sufficiently specific.¹³⁸ In short, federal courts used *Hickman*’s rejection of “fishing expedition” as an objection to support decisions that refused to carry the limitations of the old equitable bill of discovery forward into the new federal discovery rules, and to endorse the policy that cases were best decided based on mutual sharing of relevant information.

e. State Courts Remain Mostly Hostile to Fishing

Meanwhile, state court discovery reform came later, and so the “fishing expedition” metaphor was still used to reinforce traditional limits on pleading and discovery. Judges employed a prohibition on fishing to limit the discovering party to information about its own

¹³³*Chem. Specialties Co. v. CIBA Pharm. Prod., Inc.*, 10 F.R.D. 500, 501-02 (D.N.J. 1950); *Dusha v. Pa. R.R. Co.*, 10 F.R.D. 150, 151 (N.D. Ohio 1950).

¹³⁴*Paramount Film Dist. Corp. v. RAM*, 91 F. Supp. 778, 780 (E.D.S.C. 1950); *Michel v. Meier*, 8 F.R.D. 464, 476 (W.D. Pa. 1948); *Lindsay v. Prince*, 8 F.R.D. 233, 235 (N.D. Ohio 1948); *Hirshhorn v. Mine Safety Appliances Co.*, 8 F.R.D. 11, 21 (W.D. Pa. 1948); *Dulansky v. Iowa & Illinois Gas & Elec. Co.*, 10 F.R.D. 146 (S.D. Iowa 1950) (also holding that other document requests were insufficiently specific).

¹³⁵*O’Donnell v. Breuninger*, 9 F.R.D. 245, 247 (D.D.C. 1949) (holding, in an alienation of affections case, that plaintiff husband was required to answer a question as to what knowledge he had of his wife and defendant sharing a hotel room).

¹³⁶*Hawaiian Airlines v. Trans-Pacific Airlines*, 8 F.R.D. 449, 450-51 (D. Haw. 1948); *Lindsay v. Prince*, 8 F.R.D. 233 (N.D. Ohio 1948).

¹³⁷*Brown v. Dunbar & Sullivan Dredging Co.*, 8 F.R.D. 107, 108 (W. D. N.Y. 1948).

¹³⁸*Henz v. United States*, 9 F.R.D. 291 (N.D. Cal. 1949).

case,¹³⁹ to refuse to allow discovery to try to identify additional parties,¹⁴⁰ to refuse to allow depositions to be used except to perpetuate testimony from a witness who would be unavailable at trial,¹⁴¹ or to conclude that a request for documents did not plead enough facts to demonstrate that the documents contained material evidence.¹⁴² “Fishing expedition” was also used in granting a motion for more definite statement.¹⁴³ The fishing metaphor was common in election contests,¹⁴⁴ business owners’ requests to inspect books and records,¹⁴⁵ attempts by creditors to find assets,¹⁴⁶ and requests to question jurors to try to prove jury misconduct.¹⁴⁷

The Alabama case of *Ex parte Brooks* illustrates the gap between discovery theory then and now.¹⁴⁸ Alabama law at the time allowed deposition of women before trial to spare them the embarrassment of appearing in court. The issue in *Brooks* was whether this law could be used to force a female litigant to give pre-trial deposition testimony in place of the normal interrogatory

¹³⁹*See, e.g.,* Chandler v. Taylor, 12 N.W.2d 590 (Iowa 1944); Tremblay v. Lyon, 29 N.Y.S.2d 336 (Sup. Ct. 1941); State *ex rel* Laughoin v. Sartorius, 119 S.W.2d 471 (Mo. Ct. App. 1938).

¹⁴⁰Rost v. Kessler, 39 N.Y.S.2d 863 (Sup. Ct. 1943) (holding that plaintiff could not examine defendant regarding whether he was acting in scope of employment at time of accident); Monroe v. Superior Court, 218 P.2d 136 (Cal. Ct. App. 1950) (holding that wife could not compel husband to divulge names of adultery “accomplices”).

¹⁴¹State *ex rel* Westerheide v. Shilling, 123 P.2d 674 (Okla. 1942).

¹⁴²Marietta Mfg. Co. v. Hedges-Walsh-Weidner Co., 2 A.2d 922 (Del. Sup. Ct. 1938); Eastern States Corp. v. Eisler, 30 A.2d 867 (Md. App. 1943).

¹⁴³Flintosh v. Elko, 48 Pa. D. & C. 72 (Ct. Comm. Pl. 1943).

¹⁴⁴Colorado *ex rel* Harper v. City of Pueblo, 126 P.2d 339 (Colo. 1942); Landry v. Ozenne, 195 So. 14 (La. 1940).

¹⁴⁵Chandler v. Taylor, 12 N.W.2d 590 (Iowa 1944) (partner); Dandini v. Superior Court, 100 P.2d 535 (Cal. Ct. App. 1940) (director); News-Journal Corp. v. Florida, 187 So. 271 (Fla. 1939) (shareholder); Eastern States Corp. v. Eisler, 30 A.2d 867 (Md. App. 1943) (shareholder).

¹⁴⁶Bilrite Bldg. Co. v. Adams, 7 S.E.2d 857 (S.C. 1940); Missouri *ex rel* Bostelmann v. Aronson, 235 S.W. 2d 384 (Mo. 1950).

¹⁴⁷Christesen v. Boucher, 24 N.W.2d 782 (Iowa 1946); Thompson v. Ry. Express Agency, 206 S.W.2d 134 (Tex. Civ. App. 1947).

¹⁴⁸32 So.2d 534 (Ala. 1947).

replies. The court said no: “Can we imagine that the legislature meant to authorize the practice of allowing a woman to be harassed with experimental fishing expeditions in anticipation of the trial, and to make the statute an instrument of annoyance to her or even of oppression when such right does not exist when the opposing party sought to be examined is a man?”¹⁴⁹

As states began to amend their pleading and discovery rules in line with the federal rules, commentators on those changes tended to comment that the fishing expedition objection was no longer valid. An Arizona lawyer, urging a modern mindset to go with the modern rules, noted that the scope of depositions was “practically unlimited and the old cry of ‘fishing expedition’ is no longer a valid objection – fishing expeditions are encouraged for they tend to bring out the facts.”¹⁵⁰ The Chair of Alabama’s Commission for Judicial Reform in 1957 described the problems posed by the old rules. “Any effort by interrogatories, or otherwise, to obtain a clear picture of the factual situation in any case was met with the ancient hue and cry of ‘fishing expedition’ with the result that each party and the court were required to enter upon the trial of the case without any knowledge of the factual contentions of the parties.”¹⁵¹

6. Contemporary Cases

Given the early enthusiasm for notice pleading and wider discovery, and for less technicality in both, application of the “fishing expedition” metaphor was for a time on the decline, or used for issues on the margins. As Professor Marcus has so ably demonstrated, however, by the 1970s there was a swing in the other direction in both pleading particularity and

¹⁴⁹*Id.* at 536.

¹⁵⁰Lyle Roger Allen, *The New Rules in Arizona*, 16 F.R.D. 183 (1955).

¹⁵¹Thomas E. Skinner, *Alabama’s Approach to a Modern System of Pleading and Practice*, 20 F.R.D. 119 (1957).

scope of discovery.¹⁵² For example, a legal commission appointed by then-Chief Justice Warren Burger claimed, “Wild fishing expeditions . . . seem to be the norm.”¹⁵³ Along with this swing came the broader use of the negative invocation of the “fishing expedition” metaphor. *Hickman* is still cited as supporting liberal discovery, but it is immediately followed by a qualifier that prohibits fishing.¹⁵⁴

In terms of subject matter, the largest clusters of the state cases using the fishing metaphor involve personal injury claims,¹⁵⁵ shareholder disputes,¹⁵⁶ disputes with insurance companies,¹⁵⁷ and employment discrimination.¹⁵⁸ State cases use “fishing expedition”

¹⁵²See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

¹⁵³William H. Erikson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

¹⁵⁴See, e.g., *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192-93 (1st Cir. 2001); *Martinez v. Cornell Corr. of Texas*, No. CIV 04-0255 JB/RLP, 2005 U.S. Dist. LEXIS 14618, at *6 (D.N.M. Feb. 15, 2005).

¹⁵⁵See, e.g., *Rehm v. Pence*, No. G028059, 2002 Cal. App. Unpub. LEXIS 11699, at *18-19 (Cal. Ct. App. Dec. 17, 2002); *Kaplan v. Allen*, 837 So. 2d 1174, 1176 (Fla. Dist. Ct. App. 2003); *McPherson v. Church of Scientology Flag Serv. Org., Inc.*, 813 So.2d 1032, 1034 (Fla. Dist. Ct. App. 2002); *Scottsdale Ins. Co. v. Camara de Comercio Latino-Americana de Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. Dist. Ct. App. 2002); *Vermette v. Bridges*, No. CV-99-187, 2000 Me. Super. LEXIS 2, at *6 (Me. 2000); *Hiller v. Volkman*, No. CX-00-2035, 2001 Minn. App. LEXIS 796, at *7 (Minn. Ct. App. July 17, 2001); *Price v. County of Suffolk*, 756 N.Y.S.2d 758, 759 (N.Y. App. Div. 2003); *Jerome v. A-Best Prods. Co.*, No. 79139, 2002 Ohio App. LEXIS1879, at *21 (Ohio Ct. App. April 18, 2002); *In re Whiteley*, 79 S.W.3d 729, 735 (Tex. Ct. App. 2002); *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003).

¹⁵⁶See, e.g., *Cal. Pub. Employees’ Ret. Sys. v. Coulter*, No. 19191-NC, 2004 Del. Ch. LEXIS 64, at *3 (Del. Ch. May 26, 2004); *Oliver v. Boston Univ.*, No. 16570-NC, 2004 Del. Ch. LEXIS 51, at *10 (Del. Ch. Apr. 26, 2004); *In re Fuqua Indus. Inc. Shareholder Litig.*, No. 11974, 2002 Del. Ch. LEXIS 52, at *18-19 (Del. Ch. May 2, 2002); *In re Best Lock Corp. Shareholder Litig.*, No. 16281, 2000 Del. Ch. LEXIS 175, at *15 (Del. Ch. Dec. 18, 2000); *Marsalis v. Wilson*, 778 N.E.2d 612, 618 (Ohio Ct. App. 2002); *Wolfington v. Wolfington Body Co.*, 47 Pa. D. & C.4th 225, 242 (Phil. Co. C.P. 2000); *In re Ernst & Young*, No. 05-02-00352-CV, 2002 Tex. App. LEXIS 2986 at *3 (Tex. Ct. App. 2002)

¹⁵⁷See, e.g., *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 2000);

procedurally to criticize discovery requests that the court believes to be broader than the allegations of the complaint.¹⁵⁹ It also appears when a court overrules a request for more time for discovery in opposition to a motion for summary judgment.¹⁶⁰ Occasionally, the metaphor is also used to distinguish the allowable breadth of discovery under different devices.¹⁶¹

Federal fishing metaphors also occur more frequently in certain types of cases. The most common are actions governed by the Private Securities Litigation Reform Act [PSLRA], particularly since the legislative history of that Act claims that securities fraud actions often “resemble[] a fishing expedition.”¹⁶² Some of these cases challenge the sufficiency of the pleadings, while others consider a request that the Act’s discovery stay be lifted.¹⁶³ Cases

Reusswig v. Erie Ins., 49 Pa. D. & C.4th 338, 346 (Monroe Co. C.P. 2000); In re United Serv. Auto. Ass’n, 76 S.W.3d 112, 116 (Tex. Ct. App. 2002).

¹⁵⁸See, e.g., Everts v. Salvation Army Harbor Light Multi-Services Ctr., No. C8-02-1728, 2003 Minn. App. LEXIS 696, at *17-18 (Minn. Ct. App. June 10, 2003); Samide v. Roman Catholic Diocese, 773 N.Y.S.2d 116, 118 (N.Y. App. Div. 2004)

¹⁵⁹See, e.g., Vanvorous v. Burmeister, No. 248450, 2004 Mich. App. LEXIS 1495, at *14 (Mich. Ct. App. June 15, 2004); Saratoga Harness Racing, Inc. v. Roemer, 711 N.Y.S. 2d 603, 605 (N.Y. App. Div. 2000); In re United Serv. Auto Ins. Ass’n, 76 S.W.3d 112, 116 (Tex. Ct. App. 2002); Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995).

¹⁶⁰See, e.g., Vanvorous, 2004 Mich. App. LEXIS at *14; Rowlette & Assoc. v. Calphalon Corp., No. C8-99-1667, 2000 Minn. App. LEXIS 364 at *28 (Minn. App. April 18, 2000).

¹⁶¹Biloff v. Biloff, No. A-99-033, 2000 Neb. App. LEXIS 185 at *17 (Neb. App. June 20, 2000) (can fish with interrogatories and depositions but not with document production requests); Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989) (same). *But see* K-Mart Corp. v. Sanderson, 937 S.W. 2d 429, 431 (Tex. 1996) (rejecting the “notion that any discovery device can be used to fish”).

¹⁶²See, e.g., In re Carnegie Internat’l Corp. Sec. Litig., 107 F. Supp. 2d 676, 679 (D. Md. 2000), *citing* S. Rep. 104-98, U.S. Code Cong. & Admin. News 679, 683 at 14 (1995).

¹⁶³See also In re Campbell Soup Co. Sec. Litig., 145 F. Supp. 2d 574, 595 (D.N.J. 2001); In re AOL Time Warner, Inc. Sec. & ERISA Litig., MDL Docket No. 1500 All Cases, 2003 U.S. Dist. LEXIS 2731 at *1 (S.D.N.Y. Feb. 28, 2003); In re Enron Corp. Sec., Derivative & ERISA Litig., No. MDL-1446, 2002 U.S. Dist. LEXIS 26261 at *30 (S.D. Tex. Aug. 16, 2002); Fazio v. Lehman Bros., Inc., No. 1:02CV157, 2002 U.S. Dist. LEXIS 15157 at *1-2 (N.D. Ohio May 16, 2002); In re Worldcom, Inc. Sec. Master File Litig., 234 F. Supp. 2d 301, 301-02 (S.D.N.Y. 2002).

alleging employment discrimination are also home to cries of “fishing expedition.”¹⁶⁴ Cases challenging the factual specificity of antitrust allegations produce a number of claims of “fishing,”¹⁶⁵ as do discovery requests in intellectual property cases.¹⁶⁶

In terms of procedural posture, “fishing” claims were most apt to appear in motions demanding more detail in pleadings,¹⁶⁷ disputes about discovery,¹⁶⁸ and in cases involving Rule

¹⁶⁴*See, e.g.*, *Adams v. Giant Foods, Inc.*, 225 F. Supp. 2d 600 (D. Md. 2002) (race discrimination); *Boyd v. American Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937 (N.D. Tex. Oct. 17, 2002)(race discrimination); *Cooper v. John D. Brush & Co.*, 242 F. Supp. 2d 261 (W.D.N.Y. 2003)(race discrimination); *Garcia-Vazquez v. Frito Lay Snacks Caribbean, Inc.*, No. 97-1313(SEC), 2001 U.S. Dist. LEXIS 1699 (D. P.R. Feb. 16, 2001)(hostile work environment); *Grayson v. O’Neill*, 308 F.3d 808 (7th Cir. 2002)(race discrimination); *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001)(age discrimination); *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160 (10th Cir. 2000)(age and national origin discrimination); *Pedraza v. Holiday Housewares, Inc.*, 203 F.R.D. 40 (D. Mass. 2001)(national origin and perceived sexual orientation); *Torres v. White*, No. 00-4146, 2002 U.S. App. LEXIS 17953 (6th Cir. Aug. 22, 2002)(national origin discrimination); *Treat v. Garrett County Mem. Hosp.*, No. AMD 03-1937, 2004 U.S. Dist. LEXIS 25869, at *15 (D. Md. Dec. 23, 2004).

¹⁶⁵*See, e.g.*, *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 42 (N.D. Cal. 1977) (often cited for its colorful statement that even if entitled to embark on a fishing expedition, one must at least use “rod and reel, or even a reasonably sized net [; not] drain the pond and collect the fish from the bottom”); *Network Computing Servs v. Cisco Sys.*, 223 F.R.D. 392, 395 (D.S.C. 2004); *DJ Mfg. Corp. v. Tex-Shield, Inc.*, No. 97-1457 (JAG), 2002 U.S. Dist. LEXIS 25329 (D.P.R. June 28, 2002); *DM Research v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002). RICO cases, also disfavored, find similar uses for the fishing metaphor when requiring heightened pleading specificity. *See, e.g.*, *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327 (7th Cir. 1994) (RICO predicate act of mail fraud).

¹⁶⁶*See, e.g.*, *Automated Tech., Inc. v. Eller*, 160 F. Supp. 2d 915 (N.D. Ill. 2001)(theft of trade secrets); *Moore U.S.A., Inc. v. Standard Register Co.*, 229 F.3d 1091 (Fed. Cir. 2001)(patent infringement); *Ronald A. Katz Tech. Licensing, L.P. v. Verizon Commun., Inc.*, No. 01-5627, 2002 U.S. Dist. LEXIS 19691 (E.D. Pa. Oct. 16, 2002)(patent infringement); *Spring Windows Fashions LP v. Novo Indus.*, 249 F. Supp. 2d 1111 (W.D. Wis. 2002)(patent infringement); *Transclean Corp. v. MotorVac Tech., Inc.*, No. 01-287 (JRT/FLN) 2002 U.S. Dist. LEXIS 19312 (D. Minn. Sep. 30, 2002)(patent infringement).

¹⁶⁷*See, e.g.*, *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 275 F. Supp. 2d 109 (D.P.R. 2002); *DM Research v. College of Am. Path.*, 170 F.3d 53, 55 (1st Cir. 1999); *Duggan v. Terzakis*, 275 F. Supp. 2d 968 (N.D. Ill. 2003).

¹⁶⁸*See, e.g.*, *Abram v. Cargill*, No. 01-CV-1656 (JMR/FLN), 2003 U.S. Dist. LEXIS 7027

56(f) motions to allow more discovery before ruling on a motion for summary judgment.¹⁶⁹ In addition, plaintiffs seeking discovery to find forum contacts that might establish personal jurisdiction over defendants, especially foreign nationals, were periodically accused of “fishing.”¹⁷⁰

Occasionally a contemporary judge will buck the trend and recognize a limited but legitimate role for fishing. Judge Scheindlin, for example, discussed at length the reasons for requiring that fraud be pleaded with particularity. Nevertheless she went on to note:

So-called ‘fishing expeditions’ may not be all bad, however. For one thing, the threat of being sued, even if the plaintiff is still digging for facts, may serve to deter fraud.

(D. Minn. Feb. 10, 2003); *Automated Technologies, Inc. v. Eller*, 160 F. Supp. 2d 915 (N.D. Ill. 2001); *Bowen v. Parking Auth. of the City of Camden*, 214 F.R.D. 188 (D.N.J. 2003); *Boyd v. American Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937 (N.D. Tex. Oct. 17, 2002); *Catskill Dev., L.L.C. v. Park Place Entm’t Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002); *Garcel, Inc. v. Hibernia Nat’l Bank*, No. 01-0772, 2002 U.S. Dist. LEXIS 2390 (E.D. La. Jan. 24, 2002); *Higgason v. Hanks*, No. 01-4022, 2002 U.S. App. LEXIS 26263 (7th Cir. Dec. 17, 2002); *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001); *Ignatiev v. United States*, 238 F.3d 464 (D.C. Cir. 2001); *Livingston v. Assoc. Fin. Inc.*, 2001 U.S. Dist. LEXIS 86778 (S.D. Ill. June 25, 2001); *McGee v. Hayes*, No. 01-7113, 2002 U.S. App. LEXIS 14803 (10th Cir. July 22, 2002); *McGrath v. Nassau Health Care Corp.*, 209 F.R.D. 55 (E.D.N.Y. 2002); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001); *One Thousand Friends of Iowa v. Mineta*, 250 F. Supp. 2d 1075 (S.D. Iowa 2002); *Orleman v. Jumpking Inc.*, No. 99-2522-CM, 2000 U.S. Dist. LEXIS 11081 (D. Kan. July 22, 2000); *Pedraza v. Holiday Housewares, Inc.*, 203 F.R.D. 40 (D. Mass. 2001).

¹⁶⁹*See, e.g.*, *Butler Corp. v. General Motors Acceptance Corp.*, No. 00-30003-MAP, 2002 U.S. Dist. LEXIS 25012 (D. Mass. Dec. 27, 2002); *Cooper v. John D. Brush & Co.*, 242 F. Supp. 2d 261 (W.D.N.Y. 2003); *Dunkin’ Donuts Inc. v. N.A.S.T., Inc.*, No. 02 C 1272, 2003 U.S. Dist. LEXIS 6179 (N.D. Ill. Apr. 9, 2003); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002); *Grayson v. O’Neill*, 308 F.3d 808 (7th Cir. 2002); *Moore U.S.A. v. Standard Registr Co.*, 229 F.3d 1091 (Fed. Cir. 2001); *Spring Windows Fashions LP v. Novo Industries*, 249 F. Supp. 2d 1111 (W.D. Wis. 2002).

¹⁷⁰*See, e.g.*, *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 2003 US. App. LEXIS 13443 (4th Cir. July 2, 2003); *Metropolitan Antiques & Gems, Inc. v. Beaumont*, No. 02 CIV. 3937 (DLC), 2002 U.S. Dist. LEXIS 24679 (S.D.N.Y. Dec. 27, 2002); *In re Ski Train Fire*, 230 F. Supp. 2d 392 (S.D.N.Y. 2002); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45 (D.D.C. 2000); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,”* 283 F.3d 208 (4th Cir. 2002).

Moreover, the balance of harms may tip in favor of a fishing expedition rather than an undisclosed fraud. This may be so, even though the victim of a fishing expedition who has not committed any harm is forced to serve as the unwilling fish.¹⁷¹

Judges will also signal acceptance of using discovery in order to fish. “In short, fishing expeditions *are* permissible, and the discovery statutes must be liberally construed.”¹⁷²

Despite such occasional holdings, the metaphorical prohibition of fishing expeditions is very much alive. Its original meaning – the limit on discovery to facts supporting one’s own case – is dead, although it survives to some extent in the protection of trial preparation materials from discovery.¹⁷³ The types of discovery once rejected as fishing would be accepted without controversy under even the narrowest current concepts of discovery. Pleadings once dismissed for fishing would satisfy modern notice pleading requirements. The concept remains, but the line has moved.

The primary function of the fishing metaphor is to express disapproval of a party who is thought to have insufficient information to bring, or continue with, a lawsuit. The fishing expedition metaphor now inhabits the center of a crucial policy decision about civil litigation:

¹⁷¹In re Initial Public Offering Sec. Litig., 241 F. Supp. 2d 281, 326 n.46 (S.D.N.Y. 2003).

¹⁷²FSR Brokerage, Inc. v. Superior Court, No. B156982, 2002 Cal. App. Unpub. LEXIS 94, at *11 (Cal. Ct. App. Apr. 16, 2002). *See also* Garamendi v. Golden Eagle Ins. Co., 10 Cal. Rptr. 3d 724, 741 (Cal. Ct. App. 2004); United States v. Dentsply Int’l, Inc., No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6925 (D. Del. May 10, 2000) (“Liberal discovery is particularly appropriate in a government antitrust suit because of the important public interest involved.”); Illinois Coalition Against Handgun Violence v. Illinois Council Against Handgun Violence, No. 02 C 4130, 2003 U.S. Dist. LEXIS 3945, at *5 (N.D. Ill. March 18, 2003) (“I allowed the Coalition to go on a brief fishing expedition.”). *Accord*, 8A CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2206 (19##) (“An objection that a request for inspection is a fishing expedition should be given short shrift. It is true that the party seeking discovery must still designate what it wishes to inspect, but all this obstacle means is that the would-be angler must have a generalized idea of what kind of fish he or she is hoping to catch.”)

¹⁷³Fed. R. Civ. P. 26(b)(3).

where will courts draw the line between rectifying informational imbalance and protecting defendants from non-meritorious lawsuits. The condemnation of fishing has morphed from a way of protecting a party's privacy¹⁷⁴ and property rights to protecting parties from the costs of litigation. In an overwhelming majority of cases, the fishing metaphor is used on behalf of defendants to limit claims by plaintiffs.

II. "Fishing Expedition" As Strategy: *The Impact of Metaphor*

A. "Fishing" as a Verbal Attack

One study of ancient metaphorical uses of fishing observes that "the fishing metaphor in the prophetic understanding is interchangeable with accounts of literal warfare."¹⁷⁵ Perhaps it should not be surprising, then, that it worked its way into the war and sports metaphors used to describe the adversary system. Nor should it be surprising that the metaphor has consistently been used as a kind of verbal weapon by those litigants who were opposing litigation or discovery. This tradition goes back to the earliest days of the legal metaphor, where a defendant in 1797 was already able to argue that "this is one of those vexatious fishing bills."¹⁷⁶

Instead of just addressing the merits of the dispute (e.g. the discovery request is overbroad, compliance would be burdensome, the requested information is not logically relevant), the opponent calls it a "fishing expedition." In some cases, one can almost hear the sneer in the tone of the argument:

- "If a party, at the instance of his adversary, can be compelled to give his deposition . . .

¹⁷⁴Some "fishing expedition" cases still do concern privacy or property rights. *See, e.g.,* *Garcia-Vazquez v. Frito Lay Snacks Caribbean, Inc.*, No. Civil No. 97-1313(SEC) 2001 U.S. Dist. LEXIS 1699 (D.P.R. Feb. 16, 2001) (protecting certain of plaintiff's psychiatric records); *Automated Tech., Inc. v. Eller*, 160 F. Supp. 2d 915, 926 (N.D. Ill. 2001) (trade secrets).

¹⁷⁵WUELLNER, *supra* note – at 94.

¹⁷⁶*Ryves v. Ryves*, 30 ER 1044 (1797).

such a method of preparing for the trial would be tantamount to a fishing expedition for evidence to support a doubtful cause.”¹⁷⁷

- “This does not even rise to the dignity of a fishing bill.”¹⁷⁸
- “[D]espite a massive fishing expedition regarding [defendant’s] alleged ‘patterns and practices’ concerning the sale of credit life insurance policies, [plaintiff] ultimately failed to disclose any pattern or practice witnesses.”¹⁷⁹
- “Plaintiff is attempting to engage in an expensive fishing expedition under the guise of further discovery, as Plaintiff has failed to state what facts beyond mere speculation that she intends to discover.”¹⁸⁰
- “The plaintiffs Nike and Adidas . . . have extended their deep-pocketed tentacles on a fishing expedition in hopes of catching violators.”¹⁸¹
- “[P]laintiffs are ‘attempting . . . to use discovery as a fishing expedition . . . in the desperate hope of finding something to justify their unfounded claim.’”¹⁸²

Courts are sometimes well aware of the almost-scripted nature of these barbs, noting the “familiar designation of professedly indignant respondents, ‘a fishing expedition’”¹⁸³ or referring to the metaphor as “hackneyed and meaningless.”¹⁸⁴ Nor does the name-calling always work.¹⁸⁵

¹⁷⁷Wheeler v. Burckhardt, 56 P. 644, 645 (Ore. 1899) (defendant opposing discovery depositions).

¹⁷⁸Smith v. Ramsey, 6 Ill. 373, 1844 Ill. LEXIS 40 at **4 (Ill. 1844) (defendant objecting to bill of discovery).

¹⁷⁹Bostic v. American General Finance, Inc., 87 F. Supp. 2d 611, 613 (S.D.W. Va. 2000) (defendant opposing plaintiff’s fee request).

¹⁸⁰Madrid v. Chronicle Books, 209 F. Supp. 2d 1227, 1236 (D. Wyoming 2002) (defendant opposing discovery).

¹⁸¹Nike, Inc. v. Top Brand Company Ltd., 216 F.R.D. 259, 263 (S.D.N.Y. July 3, 2003) (defendant opposing sanctions).

¹⁸²Vacold LLC v. Cerami, 00 Civ. 4024 (AGS), 2001 U.S. Dist. LEXIS 1589, at *24 (S.D.N.Y. Feb. 16, 2001) (defendant opposing plaintiff’s motion to lift discovery stay).

¹⁸³In re Kevill, 2 N.Y.S.2d 191, 193 (N.Y. Surrogate Ct. 1938). *See also* McClatchy Newspapers Corp. v. Superior Court, 159 P.2d 944, 950 (Cal. 1945) (referring to the “familiar contention that the object is a mere ‘fishing expedition’ through his private papers”).

¹⁸⁴SEC v. Oakford Corp., No. 00 Civ. 2426 (JSR)(HBP), 2001 U.S. Dist. LEXIS 2818, at *5 (S.D.N.Y. Feb. 26, 2001).

In such cases the metaphor may have served only as a distraction, re-routing the discussion from the applicable legal test to the question of whether someone is trying to fish.

In other cases, however, the fishing objection, which is tantamount to an accusation of bad faith, puts the accused party on the defensive. If the case is about pleading specificity, it is the party seeking heightened detail who should have to show why a departure from Rule 8's notice pleading regime is required. If the case is about discovery, the party opposing discovery has the burden to substantiate its objection by introducing evidence of burden, or privilege, or immateriality.¹⁸⁶ Instead the rhetorical impact of the cry of "fishing expedition" is to push the pleading or discovering party (usually the plaintiff) to justify its actions. Courts' words in earlier cases, in this context, become ammunition for the verbal attack.¹⁸⁷

B. Weak Individual Cases

1. Bad Facts

Some cases, assuming the court's opinion fairly describes uncontested facts, seemed destined to lose with or without being criticized for "fishing." Putting these cases in the "fishing" category does not help the resolution of the case itself, and adds weight to the

¹⁸⁵See, e.g., *Boutvis v. Risk Mgmt. Alternatives, Inc.*, No. CIVIL 3:01 CV 1933 (DJS), 2002 U.S. Dist. LEXIS 8521, at *4 n.2 (D. Conn. May 3, 2002) ("The court further finds that defendant's dismissive description of plaintiff's discovery requests as an 'improper fishing expedition' is factually and legally incorrect."); *Rhythm & Hues, Inc. v. Terminal Mktg. Co.*, No. 01 Civ. 4697 (AGS), 2002 U.S. Dist. LEXIS 10908, at *23 (S.D.N.Y. June 18, 2002); *Sorensen v. City of New York*, No. 98 Civ. 3356 (HB), 2003 U.S. Dist. LEXIS 962 (S.D.N.Y. Jan. 22, 2003).

¹⁸⁶This is true to some extent even in Rule 56(f) cases, in which plaintiffs would have the burden to demonstrate how the additional requested discovery would disclose a genuine issue of material fact. In responding to a "fishing" objection they are defending against a claim of wrongdoing, not just pointing out the link between the discovery and the issues in the case.

¹⁸⁷See text accompanying notes – *infra*.

pejorative nature of the metaphor. One such case is *Grayson v. O'Neill*,¹⁸⁸ a race discrimination case brought against the Secret Service by the first African-American to be Special Agent in Charge of the Chicago office. The court began its opinion by noting that the Service “received in excess of 100 complaints” against plaintiff Grayson, and that an investigation “revealed that Grayson not only intimidated and harassed his own employees, but also solicited favors from the public he was charged to protect.”¹⁸⁹ In addition, the opinion details numerous specific accusations, prefacing them with: “The extent of Grayson’s improprieties cannot be fully appreciated without a sampling of his numerous condemnable behaviors.”¹⁹⁰

It is not surprising, then, that both trial and appellate courts found that summary judgment was proper despite the denial of the plaintiff’s request for discovery regarding Service members’ participation in “Good Ole’ Boy Roundups,” which included extremely racist conduct. Grayson argued that white Special Agents in Charge who had participated in such events were not disciplined, thus demonstrating that his discipline for misconduct was discriminatory. “Without any evidentiary support, his request amounts to nothing more than a fishing expedition and we decline to rule that the trial judge abused her discretion in denying Grayson the opportunity to extend discovery a fifth time.”¹⁹¹

Does “fishing” add anything to the clarity of the court’s analysis? No. The court’s ruling turns on a decision that the requested information was not legally relevant. The court held that even if the Roundups could justify an inference of racism in some employees who did not supervise Grayson, or even systemic racism on the part of the Secret Service, that evidence

¹⁸⁸308 F.3d 808 (7th Cir. 2002).

¹⁸⁹*Id.* at 811.

¹⁹⁰*Id.* at 812.

would not be enough to show that race-neutral reasons for Grayson's treatment were a pretext.¹⁹²

2. Bad Lawyering

In a few of the cases in which the fishing metaphor appears, there are indications that the result was influenced by poor lawyering on behalf of the losing party. Using the "fishing" label, though, adds an accusation of bad behavior to help justify the court's belief about the merits.

Often the problem is failure to aggressively pursue the claim. One patent case, for example, faulted the defendant's counterclaim:

[D]efendant's pursuit of these counterclaims has been halfhearted and dilatory. It amended its complaint to add the counterclaims although it could readily have asserted them in its original answer. It has not proceeded promptly to pursue discovery of the issue. . . . If defendant wants to justify a fishing expedition it should at least have baited its hooks."¹⁹³

In another case, several kinds of failure led to the "fishing" complaint. Whether this was poor advocacy, or a lawyer who lacked a good case to argue, is not clear. In this Title VII hostile work environment case, the court considered the plaintiff's opposition to summary judgment:

Here, plaintiff's Rule 56(f) affidavit is deficient for several reasons. First, plaintiff makes no attempt to show how the facts sought are reasonably expected to create a genuine issue of material fact. Instead, he states in a conclusory fashion that obtaining the sworn statements [of two other African-American employees] is 'necessary to prove [his] case, to show discrimination and an issue of material fact.' Second, plaintiff has not offered a

¹⁹¹*Id.* at 817. One of the discovery extensions was at the request of the Service.

¹⁹²The court recited Seventh Circuit law that "[e]vidence of generalized racism directed at others is not relevant unless it has some relationship with the employment decision in question." *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997).

¹⁹³*Spring Windows Fashions LP v. Novo Industries*, 249 F. Supp. 2d 1111, 1113 (W.D. Wis. 2002). *See also* *Metropolitan Antiques & Gems, Inc. v. Beaumont*, No. 02 CIV. 3937 (DLC), 2002 U.S. Dist. LEXIS 24679, at *12 (S.D.N.Y. Dec. 27, 2002) ("Nor is Metropolitan entitled to discovery to try to develop a factual showing [of personal jurisdiction]. During the months between the filing of the motion to dismiss and the plaintiff's opposition paper, the plaintiff did not request the opportunity to take discovery. Given the inadequate factual and legal presentation in Metropolitan's papers, it would appear that any discovery would be little more than a fishing expedition.").

reasonable explanation for his failure to obtain this discovery sooner.¹⁹⁴

The plaintiff also failed to file a memorandum of law or any other written response in opposition to the motion for summary judgment.¹⁹⁵ Cumulatively, this convinced the court that plaintiff was merely fishing. Quoting an earlier case, the court stated, “Rule 56(f) discovery is specifically designed to enable a plaintiff to fill material evidentiary gaps in its case [I]t does not permit a plaintiff to engage in a ‘fishing expedition.’”¹⁹⁶

3. Lack of Evidence

Other weak individual cases that use the “fishing” metaphor rely on the plaintiff’s concession that he lacks evidence. A California appellate case affirmed the dismissal of the plaintiff’s discrimination complaint, after discovery, because he “admitted that no one at the Bureau or the Department ever made any comments or statements to him about his race, national origin, religion, ethnicity, color, or any other category of group bias. He testified that his claims and actions were founded on nothing other than *speculation* that statistical evidence *might* prove that the Bureau *tended* to discriminate in its hiring selections. To the extent plaintiff was permitted by the charade of this meritless action to fish in the lake of discovery, his speculations were disappointed.”¹⁹⁷

¹⁹⁴Cooper v. John D. Brush & Co., 242 F. Supp. 2d 261, 266 (W.D.N.Y. 2003) (race discrimination hostile work environment case) (noting also that the court had already given plaintiff an extension to do this discovery, and plaintiff had failed to do so).

¹⁹⁵*Id.* at 265.

¹⁹⁶*Id.* at 266, *quoting* Waldron v. Cities Service Co., 361 F.2d 671, 673 (2d Cir. 1966) (Clayton Act case granting summary judgment and refusing continuance for discovery).

¹⁹⁷Singh v. Bureau for Private and Post Secondary and Vocational Education, No. E030056, 2003 Cal. App. Unpub. LEXIS 502, at *13-14 (Cal. Ct. App. Jan. 16, 2003) (noting that plaintiff Singh had not been hired due to his past serious misconduct as the director of a school under defendant Bureau’s jurisdiction). *See also* Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1169 (10th Cir. 2000) (pointing out that plaintiff doctor had received extensive

Other cases are labeled as “fishing” because the court simply doubts that the information needed by the plaintiff exists, and therefore denies requests to try to find it. For example, employees sued to recover on an alleged oral promise of additional pay for sales that exceeded a quota. After ruling that the oral contract was unenforceable under the statute of frauds, the court dismissed the case despite the plaintiffs’ request try to find letters evidencing the promise in company files. “It is improbable that the files of the defendant contain memoranda or letters subscribed by defendant. It would seem that plaintiffs have no knowledge of any such memoranda, but are merely indulging in wishful expectations and are hoping to stave off the dismissal of their complaint by applying for an examination and inspection of the defendant’s files which would be in the nature of a ‘fishing expedition.’”¹⁹⁸ If no signed memorandum exists, the court has saved the defendant from the expense of continued litigation. If it does exist, the court has barred the plaintiffs from access to evidence crucial to prove their case. In neither event does use of the fishing metaphor make it more appropriate to cut off discovery.¹⁹⁹

negative reviews as an intern that would justify the defendant hospitals’ decision and refusing plaintiff’s request for discovery of negative reviews of others over a five year period) (“When, as is apparent here, a plaintiff brings an initial action without any factual basis evincing specific misconduct by the defendants and then bases extensive discovery requests upon conclusory allegations in the hope of finding the necessary evidence of misconduct, that plaintiff abuses the judicial process. Therefore, the magistrate judge appropriately recognized that defendants’ compliance was sufficient and the likely benefit of any further attempted fishing expedition would be negligible.”)

¹⁹⁸*McCants v. Emerol Mfg. Co.*, 81 N.Y.S.2d 770, 771 (Sup. Ct. 1948). *See also* *Keaggy v. Lightcap*, 181 A. 474, 475 1935 Pa. LEXIS 736 at ***4 (Pa. 1935) (refusing to order discovery and an accounting); *Addison v. Allstate Ins. Co.*, 97 F. Supp. 2d 771, 775 (S.D. Miss. 2000) (refusing to allow discovery from competitors’ customers to try to show improper steering by Allstate).

¹⁹⁹*See also* *Higgason v. Hanks*, No. 01-4022, 2002 U.S. App. LEXIS 26263 (7th Cir. Dec. 17, 2002) (rejecting plaintiff’s challenge to prison discipline, the court began by characterizing plaintiff Higgason as “a frequent litigant in this court,” and refers to the “shopworn arguments that we have rejected repeatedly in Higgason’s previous appeals.” *Id.* at

C. Disfavored Cases – Pleading Facts in Detail

“Fishing expedition” isn’t a form of analysis; it’s code language. And the code has the potential to throw the court’s analysis off track. Whether headed that way on its own, or directed there by a party, courts can end up following lines of “fishing” cases that cast a whole area of law in a negative light. Used often enough, the “fishing” metaphor can affect (or reinforce) the bench and bar’s attitude toward certain types of litigation sufficiently to tilt resolution on the merits.

1. Early Cases Threatening Family Privacy and Property Rights

In the earliest uses of the metaphor, certain kinds of equity cases were actually labeled as “fishing bills.” The eighteenth century land title cases depicted the plaintiffs as threatening property, invading privacy, and disturbing the status quo. Recall that Lord Chancellor Loughborough lamented that “[a] spirit of prying into titles has got into the Court, that is highly dangerous to the title of every man in England.”²⁰⁰ Similarly, the fraudulent transfer cases involved the somewhat unappealing principle that allowed subsequent creditors to benefit from an insolvency that had not affected them – so unappealing that the law would later change to include a requirement of actual fraud.²⁰¹ These “fishing bills” of discovery again threatened the party in possession of property and required the disclosure of private information, often to the

*5).

²⁰⁰*Renison v. Ashley*, 30 E.R. 724 (1794). *See also* BRAY, *supra* note – at 521 (“Rules are laid down for the protection of persons who are in possession of estates to protect them against attacks from persons who, hoping to find some blot in their title, sometimes bring actions against them without reasonable cause.”); HARE, *supra* note – at 184 (“It is often of the highest importance to the defendant that he be not compelled to disclose documents which relate to the property in dispute, for the effect of such a disclosure may be detrimental to that beneficial enjoyment of the property to which, as the party in possession, he is entitled.”)

²⁰¹*See, e.g.,* *Clement v. Cozart*, 17 S.E. 486 (N.C. 1893) (tracing the development of the

detriment of widows and orphans. The courts were more solicitous of the holders of the assets than of the creditors.²⁰² In one case involving an allegation that an insolvent husband had wrongfully transferred property to his wife, the court noted the danger involved in allowing such inquiries:

Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband. In receiving favors at his hands, which she supposes to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant.²⁰³

In the early days, then, the fishing metaphor was used for certain types of litigation, and that litigation was openly limited for policy reasons. The same is true in contemporary cases, but the link is often less open. Nevertheless, “fishing expedition” claims cluster in certain types of controversial cases.

2. Statutory Heightened Pleading Requirements

Sometimes increased judicial scrutiny is statutorily mandated. Securities fraud actions falling under the PSLRA, for example, require heightened pleading, and discovery is stayed during the pendency of a motion to dismiss.²⁰⁴ The Act was designed to discourage litigation

law regarding subsequent creditors and fraudulent conveyances).

²⁰²*Cf.* Bankr. R. 2004 (allowing examination of any entity regarding “the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge”).

Bankruptcy courts regularly hold that Rule 2004 examinations may properly be used as “fishing expeditions.” *See, e.g.,* In re Fearn, 96 B.R. 135, 137 (Bankr. S.D. Ohio 1989).

²⁰³Huntington v. Saunders, 120 U.S. 78, 81 (1886), *quoting* Phipps v. Sedgwick, 95 U.S. 3, 9 (1877).

²⁰⁴In addition, fraud claims have long required that the circumstances of fraud be pleaded with particularity. Fed. R. Civ. P. 9(b). At least in theory, the defendant’s condition of mind can be pleaded generally in a fraud case. *Id. But see* Ross v. A.H. Robbins Co., 607 F.2d 545 (2d Cir. 1979) (requiring heightened pleading of facts showing Robbins knew its statements were

that was seen as speculative, and so the “fishing expedition” metaphor pops up repeatedly.²⁰⁵ Sometimes the courts find the plaintiffs to be fishing, and so dismiss the cases before any discovery is allowed. Other times, particularly when the government has preceded the private plaintiffs in investigating the defendant, the courts allow the cases and discovery to proceed.²⁰⁶ But in either case, the metaphor marks “fishing” as the unwanted norm in securities fraud litigation. As the Ninth Circuit noted in approving of one case’s particularized pleadings, “this complaint contains sufficient ‘particularity’ and ‘incriminating facts’ to distinguish the allegations from the countless ‘fishing expeditions’ which the PSLRA was designed to deter.”²⁰⁷

In disfavored types of litigation, the “fishing expedition” cases feed on each other. Courts weave chains of citation to other cases accusing plaintiffs of fishing, so that a kind of presumption of bad faith settles over the cause of action generally. For example, *In re Campbell Soup Company Securities Litigation*²⁰⁸ quotes *In re Theragenics Corporation Securities Litigation*²⁰⁹ for a prohibition on fishing, which in turn cites *Parnes v. Gateway 2000*²¹⁰ for its

false).

²⁰⁵Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 600 (assumption that securities fraud cases frivolous). Determining whether most cases are in fact frivolous empirically is very difficult because very few private securities class actions proceed to trial. See Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and Private Securities Litigation*, 94 NW. U. L. REV. 567, 572 (2000).

²⁰⁶For example, the court in *In re AOL Time Warner, Inc. Securities & “ERISA” Litigation*, No. MDL Docket No. 1500, 2003 U.S. Dist. LEXIS 2731 at *3 (S.D.N.Y. Feb. 28, 2003), quotes *In re WorldCom Inc. Securities Litigation*, 234 F. Supp. 2d 301, 306 (S.D.N.Y. 2002), and in both the plaintiffs secured a partial lifting of the discovery stay to permit access to documents already turned over to the executive and legislative branches of government. Both can therefore be absolved: they are *not* “fishing expeditions.” See also *In re Enron Corp. Sec. Litig.*, No. MDL-1446, 2002 U.S. Dist. LEXIS 26261, at *31 (S.D.N.Y. Aug. 15, 2002).

²⁰⁷*In re Daou Sys. Inc. Sec. Litig.*, 411 F.3d 1006, 1024 (9th Cir. 2005).

²⁰⁸145 F. Supp. 2d 574, 594 (D.N.J. 2001).

²⁰⁹105 F. Supp. 2d 1342, 1349 (N.D. Ga. 2000).

²¹⁰122 F.3d 539, 549 (8th Cir. 1996).

suspicion of fishing, all in securities fraud cases. Sometimes the string cites pull in additional kinds of disfavored cases. *Fishman v. Meinen*, a securities fraud case,²¹¹ quotes *Vicom, Inc. v. Harbridge Merchant Services, Inc.*,²¹² a RICO case, which in turn quotes securities cases that express fear of strike suits (but not of “fishing”).²¹³

Courts dismissing cases for “fishing” do more than indicate that the plaintiffs lacked sufficient factual foundation to meet the pleading requirements. The metaphor implies that the plaintiffs acted irresponsibly and with impure motive.²¹⁴ Countless PSLRA lawsuits begin by having to rebut the “fishing expedition” label, and careful judges have to consciously note that the Act “was not enacted to raise the pleading burdens . . . to such a level that facially valid claims, which are not brought for nuisance value or as leverage to obtain a favorable or inflated settlement, must be routinely dismissed on Rule 9(b) and 12(b)(6) motions.”²¹⁵

²¹¹No. 02 C 3433, 2003 U.S. Dist. LEXIS 2527 at *12 (N.D. Ill. Feb. 21, 2003).

²¹²20 F.3d 771, 777 (7th Cir. 1994). *See also* Migdal v. Rowe Price-Fleming Int’l, 248 F.3d 321, 325 (4th Cir. 2001), a suit brought under the Investment Company Act, *quoting* DM Research, Inc. v. College of American Pathologists, 170 F.3d 53, 55 (1st Cir. 1999), a much-cited antitrust “fishing” case.

²¹³RICO cases, also disfavored, often use the fishing metaphor when requiring heightened pleading specificity. *See, e.g.,* Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1327 (7th Cir. 1994) (RICO predicate act of mail fraud).

²¹⁴This implication in securities fraud cases seems particularly unfortunate given the courts’ serious splits regarding what degree of detail is required and the fact that in many cases evidence of intent is in the sole hands of defendant and available only after at least limited discovery. *See* Fairman, *Heightened Pleading*, *supra* note – at 600-612. *See also* Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 634, 674-80 (2002) (arguing that the theoretically procedural heightened pleading standard in the PSLRA actually has the substantive result of increasing the scienter requirement).

²¹⁵ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336, 354 (5th Cir. 2002) (noting with a “cf.” citation the observation in *In re Campbell’s Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 595 (D.N.J. 2001), that “the PSLRA’s goal [is to] flush[] out suits which are built on mere speculation and conclusory allegation and which aim to use discovery as a fishing expedition to substantiate frivolous claims”).

3. Judge-Made Heightened Pleading Requirements

Other kinds of disfavor are judge-made, and they too find their expression in heightened pleading requirements despite the lack of statutory or rule-based justification for requiring particularized pleading. These cases frequently use fishing metaphors. Private antitrust claims, for example, fall into this category.²¹⁶ Like the securities fraud cases, they often support the provenance of their fishing metaphors with reliance on earlier “fishing” cases. For example, *DJ Manufacturing Corporation. v. Tex-Shield, Inc.*,²¹⁷ quotes *DM Research v. College of American Pathologists*.²¹⁸ Similarly, *Network Computing Services v. Cisco Systems*,²¹⁹ quotes *In re IBM Peripheral EDP Devices Antitrust Litigation* for its extended fishing metaphor: “Even if one is entitled to embark on a fishing expedition, one must at least use ‘rod and reel, or even a reasonably sized net [; not] drain the pond and collect the fish from the bottom.’”²²⁰ As with the securities fraud cases, the fishing label marks antitrust claims as suspect, this time with little support for the heightened pleading requirement.

In antitrust cases, courts requiring great factual specificity believed they were authorized to do so by a Supreme Court footnote in *Associated General Contractors of California v.*

²¹⁶*See, e.g., In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 42 (N.D. Cal. 1977); *Network Computing Servs v. Cisco Sys.*, 223 F.R.D. 392, 395 (D.S.C. 2004); *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 275 F. Supp. 2d 109 (D.P.R. 2002); *DM Research v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002).

²¹⁷275 F. Supp.2d 109, 120 (D.P.R. June 28, 2002).

²¹⁸170 F.3d 53, 55 (1st Cir. 1999).

²¹⁹223 F.R.D. 392, 395 n.5 (D.S.C. 2004).

²²⁰77 F.R.D. 39, 42 (N.D. Cal. 1977). *See also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 138 F. Supp.2d, 25, 28 (D. Me. 2001), also quoting *DM Research*, 170 F.3d at 55.

California State Council of Carpenters.²²¹ Even after the Supreme Court generally rejected judicially-created heightened pleading rules in *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*²²² and again in *Swierkiewicz v. Sorema N.A.*,²²³ heightened pleading practice continues to thrive in antitrust cases, aided by the fishing expedition metaphor.²²⁴

D. Disfavored Cases – Limiting Discovery Relevance

The “fishing expedition” metaphor in the preceding section reinforced decisions requiring greater specificity in pleading. In other cases, ‘no fishing’ appears as a reason to limit or deny discovery. This is particularly true when the plaintiff’s burden of proof includes establishing some level of knowledge or intent by the defendant. Lacking a ‘smoking gun,’ the plaintiffs in these cases seek broad background information to try to establish a pattern of behavior, and defendants see such requests as excessive. Two of the best examples are employment discrimination cases and product liability cases.

1. Employment Discrimination

The discovery-related fishing cases often present themselves as issues of discovery relevance. More specifically, they tend to raise issues regarding how similar the object of discovery must be to the plaintiff’s claims before the requested information will be discoverable. For example, in *Pedraza v. Holiday Housewares, Inc.*, the plaintiff sued his employer, Holiday Housewares, for discrimination based on national origin and perceived sexual orientation. Holiday Housewares shared a president and management employees with a related company,

²²¹459 U.S. 519, 528 n.17 (1983).

²²²507 U.S. 163 (1993).

²²³534 U.S. 506 (2002).

²²⁴See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-21 (2003).

Plastican. The plaintiff learned during a deposition that at least five lawsuits had been filed against Plastican based on national origin or sexual harassment, and asked to take additional depositions in order to discover whether those claims were similar to his, either in the identity of the accused wrongdoers or in the nature of the allegations, in order to try to establish a pattern and practice of discrimination. The court denied this request, remarking that the plaintiff's motion "bespeaks of a possible fishing expedition into what appear to be largely irrelevant issues of discrimination complaints made against a third party."²²⁵

Plaintiffs making claims of discriminatory treatment, as opposed to disparate impact, often find their discovery requests rejected as fishing. In *Hill v. Motel 6*,²²⁶ an age discrimination case, the plaintiff was fired from his position as an area manager. He asked to discover the personnel files of all of Motel 6's area managers and all complaints or charges of age discrimination filed with the government or other agencies. The court limited discovery to employees supervised by the plaintiff's immediate supervisor. Otherwise, the court believed it would be disturbing "the balance struck between a party's right to discovery with the need to prevent 'fishing expeditions.'"²²⁷ Likewise, the court in *Boyd v. American Airlines, Inc.*²²⁸ limited discovery in a racial harassment and discrimination suit. The plaintiff requested discovery of complaints of racial harassment or racially hostile work environment throughout the continental United States, but the court allowed only discovery of the places where the plaintiff's alleged harassment occurred. The plaintiffs sought the information to rebut the defense that American used reasonable care to prevent and correct harassing behavior, by showing the

²²⁵203 F.R.D. 40, 42 (D. Mass. 2001).

²²⁶205 F.R.D. 490, 493 (S.D. Ohio 2001).

²²⁷*Id.* at 492, quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998).

company's responses in other parts of the country. The court, however, held that "[p]laintiff's request in the instant matter is merely a fishing expedition."²²⁹

As was true with the securities fraud and antitrust cases, "fishing" citations in employment discrimination cases build on each other. In addition to the examples noted above, *Adams v. Giant Food, Inc.*²³⁰ quotes an earlier employment case, *Morrow v. Farrell*.²³¹ The case of *Pleasants v. Allbaugh*,²³² which alleged race discrimination in federal employment, quotes *Hardrick v. Legal Services Corporation*, another race discrimination case.²³³ Decisions in cases alleging other types of discrimination also use the strings of "fishing" cases to go beyond discussing relevance and imply bad faith.²³⁴

2. Products Liability

Products liability cases have similar patterns regarding the types of discovery requests that result in accusations of "fishing." As in the employment setting, they are relevance issues.

²²⁸2002 U.S. Dist. LEXIS 19937 (N.D. Tex. Oct. 17, 2002).

²²⁹*Id.* at *4, quoting *Spina v. Our Lady of Mercy Medical Center*, 2001 U.S. Dist. LEXIS 7338, at *2 (S.D.N.Y. June 7, 2001). *See also Adams v. Giant Foods, Inc.*, 225 F. Supp. 2d 600, 607 (D. Md. 2002). In that case, plaintiffs claimed they were discharged on the basis of race, and the employer's defense was that they had improperly included on their time cards time when they were on break or sleeping. Plaintiffs requested discovery regarding white female employees who also falsified time cards, but the court held that it was not discoverable, since the female employees – unlike the plaintiffs – were on day rather than night shift and were supervised rather than unsupervised. The court explained that "the purpose of rule 56(f) is not to allow the non-moving party to engage in a fishing expedition." *Id.*

²³⁰225 F. Supp. at 607.

²³¹187 F. Supp. 2d 548, 551 (D. Md. 2002).

²³²208 F.R.D. 7, 9 (D.D.C. 2002).

²³³96 F.R.D. 617, 618 (D.D.C. 1983).

²³⁴*See, e.g., McGee v. Hayes*, 2002 U.S. App. LEXIS 1480, at *8 (10th Cir. July 22, 2002) (alleging discrimination in the denial of a building permit), *quoting Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1169 (10th Cir. 2000) (employment discrimination), *quoting Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1423 n. 4 (10th Cir. 1993) (breach of duty of fair representation).

Here they tend to involve disputes about which products are sufficiently similar to the one that allegedly injured the plaintiff, or of what time period would be sufficiently material to justify the burden of compliance. The plaintiff in *Orleman v. Jumpking*²³⁵ suffered a spinal cord injury while using a Jumpking trampoline, and sued for negligence, strict liability, and breach of warranty. He sought to discover previous lawsuits or claims brought against the defendant as a result of trampoline injuries during the past 15 years. The court narrowed the scope of discovery to the make of trampoline on which the plaintiff was injured and “substantially similar” models, and to a shorter time period, noting that the generally broad scope of discovery “should not be misapplied to allow a fishing expedition in discovery.”²³⁶

In the same manner, the Texas Supreme Court narrows discovery in tort cases. In one, it held that a document production request in a workplace toxic tort case for “all documents written by defendant’s safety director concerning ‘safety, toxicology, and industrial hygiene, epidemiology, fire protection and training’” was too broad, characterizing the original request as “an effort to dredge the lake in hopes of finding a fish.”²³⁷ Another Texas mass tort case, in which 140 plaintiffs claimed asbestos-related injuries, included discovery requests for documents about all of defendant’s products. Because the request included products that the plaintiffs had not yet claimed to have used, and locations at which the plaintiffs had not worked, the court concluded that the plaintiffs’ request “constitute[d] the type of fishing expedition prohibited” by

²³⁵2000 U.S. Dist. LEXIS 11081 (D. Kan. July 22, 2000).

²³⁶*Id.* at *6, quoting *Hofer v. Mack Trucks Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). *See also* *Anderson v. Farmland Indus.*, 136 F. Supp. 2d 1192, 1195 (D. Kan. 2001).

²³⁷*Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). *See also* *American Medical Sys. v. Osborne*, 651 So.2d 209, 211 (Fla. Ct. App. 1995).

its earlier cases.²³⁸

In essence, the courts are deciding, without knowing what discovery would disclose, that no reasonable fact finder could rely on the information sought to support the inference the plaintiff needs, nor could the discovery reasonably be expected to lead to such evidence.²³⁹ Given this presumed low degree of materiality, the court may also be concluding that the burden of complying with the discovery request outweighs its probable importance.²⁴⁰ Through the use of the fishing metaphor, the court avoids having to explain its reasoning more clearly. The metaphor indicates not only that it finds the logical materiality of the information weak, but also that the requests are frivolous or ethically questionable.²⁴¹ The cases thus become precautionary tales warning off those who might argue that the corporate culture of an employer is relevant to a claim of discrimination, that a company's awareness of potential defects in one product might be relevant to those in a similar one, or that a company's knowledge and behavior in one location might be relevant to others.

III. Conclusion

The time-honored cry of "fishing expedition" is still more than capable of preventing

²³⁸In re Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998). Texas is especially enamored of the "fishing expedition" metaphor, and the courts' string cites reinforce each other. *American Optical*, for example, quotes *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (premises liability), *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (1995) (false arrest); and *Texaco*, 898 S.W.2d at 815 (toxic tort).

²³⁹*Cf.* Fed. R. Evid. 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Fed. R. Civ. P. 26(b)(1).

²⁴⁰*Cf.* Fed. R. Civ. P. 26(b)(3)(proportionality considerations).

²⁴¹Two of the employment cases also accuse plaintiffs of trying to "roam in the shadow zones of relevancy." *See Hill v. Motel 6*, 205 F.R.D. 490, 493 (S.D. Ohio 2001); *Boyd v. American Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937, at *4 (N.D. Tex. Oct. 17, 2002).

discovery and heading off lawsuits. Metaphorically speaking, fishing expeditions can be vexatious,²⁴² massive,²⁴³ burdensome,²⁴⁴ expensive,²⁴⁵ classic,²⁴⁶ invasive,²⁴⁷ spurious,²⁴⁸ wide-ranging,²⁴⁹ transparent,²⁵⁰ blind,²⁵¹ old-fashioned,²⁵² unbridled,²⁵³ or experimental,²⁵⁴ and there is the ever-popular “mere fishing expedition.”²⁵⁵ The adjectives serve to highlight, in a colorful or dramatic way, the unacceptable behavior of those who fish. In addition, the metaphor is understood to make the objecting parties (and not the information sought) into the hapless fish. “[W]hen the fish objects . . . the fisherman is called upon to justify his pursuit.”²⁵⁶ Fishing is clearly a Bad Thing.

²⁴²Ryves v. Ryves, 30 E.R. 1044 (1797).

²⁴³Bostic v. American Gen’l Finance, Inc., 87 F. Supp. 2d 611, 613 (S.D.W. Va. 2000).

²⁴⁴EEOC v. Autozone, Inc., 258 F. Supp. 2d 822, 830 (W.D. Tenn. 2003).

²⁴⁵Madrid v. Chronicle Books, 209 F. Supp. 2d 1227, 1236 (D. Wyo. 2002).

²⁴⁶Sorensen v. City of New York, No. 98 Civ. 3356 (HB) 2003 U.S. Dist. LEXIS 962 at *12 (S.D.N.Y. Jan. 22, 2003).

²⁴⁷Wyoming v. U.S.D.A., 208 F.R.D. 449, 453 (D.D.C. 2002).

²⁴⁸Fare Deals, Ltd. v. Glorioso, 217 F. Supp. 2d 670, 671 (D. Md. 2002).

²⁴⁹Monarch Assurance P.L.C. v. United States, 244 F.3d 1356, 1365 (Fed. Cir. 2001).

²⁵⁰Forthmann v. Boyer, 118 Cal. Rptr. 715, 721 (Cal. Ct. App. 2002).

²⁵¹Smith v. State Farm Mut. Auto Ins. Co., 113 Cal. Rptr. 399, 418 (Cal. Ct. App. 2001); In re Fuqua Indus., Inc. Shareholder Litig., No. 11974, 2002 Del. Ch. LEXIS 52, at *18-19 (Del. Ch. May 2, 2002).

²⁵²In re Best Lock Corp. Shareholder Litig., No. 16281, 2000 Del. Ch. LEXIS 175, at *15 (Del. Ch. Dec. 18, 2000).

²⁵³Saratoga Harness Racing, Inc. v. Romero, 711 N.Y.S.2d 603, 605 (N.Y. App. Div. 2000).

²⁵⁴Ex parte Brooks, 32 So.2d 534, 608 (Ala. 1947).

²⁵⁵Kelly v. Ingersoll, 1878 Ohio Misc. LEXIS 116 at *2 (Ohio Ct. C.P. 1878); Phalen v. Roberts, 21 A.D. 603, 604 (N.Y. App. Div. 1897); Newkirk v. Willett, 2 Johns. Cas. 413, 1800 N.Y. LEXIS 168 (1800); Phillips v. Curtis, 75 N.Y.S. 551, 554 (1902); Continental Bank of N.Y. v. Myerle, 29 A.D. 282, 285 (N.Y. App. Div. 1898); Terry v. Stull, 169 A. 739, 741 (Del. Ch. 1933); Landry v. Ozenne, 195 So. 14, 19 (La. 1940); State *ex rel* Laughoin v. Sartorius, 119 S.W.2d 471, 473 (Mo. Ct. App. 1938); Addison v. Allstate Ins. Co., 97 F. Supp. 2d 771, 774, 775 (S.D. Miss. 2000).

²⁵⁶Patterson v. Burge, 2005 U.S. Dist. LEXIS 1331 at *5 (N.D. Ill. Jan. 5, 2005), *quoting* Northwestern Mem. Hosp. v. Ashcroft, 362 F.3d 923, 931 (7th Cir. 2004). *See also* In re Initial

On those rare occasions in which courts let fishing go forward, their tone is one of permission, not praise. A fishing expedition can be “permissible,” or “justifiable,”²⁵⁷ or “appropriate.”²⁵⁸ Even the drafters of the federal discovery rules did not create a linguistic system in which fishing is desirable. Instead they criticized the former use of the metaphor.²⁵⁹ Nowhere do we find cases praising “skillful fishing expeditions” or “thorough fishing expeditions” or “creative fishing expeditions” or “laudable fishing expeditions.”

Over the centuries, the fishing metaphor in law has both changed and stayed the same. The kinds of acts condemned as fishing have changed dramatically. Lawsuits no longer require detailed fact pleading demonstrating that the pleader already has all necessary evidence. Discovery is no longer limited to a party’s own case, or to the admission of specific information, or to the production of identified documents. Yet the image of the overreaching or unscrupulous possibility of fishing remains, harking back to an older way of looking at pleadings and discovery.

The fishing metaphor is at best a distraction. Its uses are too tired and formulaic to add new insight in judicial opinions or commentary. Describing the U.S. civil litigation system as one that foolishly allows “fishing” is a harmful caricature.²⁶⁰ As a pervasive legal metaphor, though, it structures the way we think when we consider what it means to file a lawsuit and to request information needed to prove the claims in a lawsuit. Can the legal system instead reclaim

Public Offering Sec. Litig., 241 F. Supp. 2d 281, 326 n.46 (S.D.N.Y. 2003).

²⁵⁷In re Merkle, 19 P. 401, 401, 1888 Kan. LEXIS 223 at ***2 (Kan. 1888).

²⁵⁸U.S. v. Dentsply Int’l, Inc., No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6925, at * 13-14 (D. Del. May 10, 2000).

²⁵⁹See text accompanying notes – *supra*.

²⁶⁰See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301-09 (2002).

the positive side of fishing?

Such an effort might begin by getting more serious about the nature of literal fishing. Whether one fishes for a living or for sport, fishing is a targeted activity. Those who fish go to places known to have fish, use bait tailored to the expected fish, and techniques designed to maximize the quality and quantity of the catch. People fish for a living, and the ones who succeed blend knowledge, hard work, and skill. Devotees of fly fishing would go further, and claim that fishing blends skill and art, involving “a sixth sense that takes human effort to a higher plane. To Think Like a Fish (and therefore know where to find one) is a gift of cultivated instinct . . . The mind is like a computer crammed with so many fish facts that it suddenly produces an insight that depends on those facts but leaps beyond them.”²⁶¹ Perhaps a focus on the informed targeting, talent, and art involved in fishing could help to neutralize the metaphor.

Even speaking metaphorically, the concept of fishing is not invariably negative outside the legal context. Christian scriptures describe Jesus as instructing his followers to become “fishers of people.”²⁶² Literature contains positive uses of metaphorical fishing. For example, John Donne in *The Bait* portrays his lover as a skilled fisher:

Let others freeze with angling reeds,
And cut their legs with shells and weeds,
Or treacherously poor fish beset,
With strangling snare, or windowy net . . .

For thee, thou need'st no such deceit,
For thou thyself art thine own bait:
That fish, that is not catch'd thereby,

²⁶¹Holly Morris, *Fumbling After Grace: Fishing and Writing*, N.Y. TIMES, June 8, 1997, available at <http://www.nytimes.com/books/97/06/08/bookends/bookend.html>.

²⁶²Matthew 4:19; Mark 1:17; Luke 5:10 (“halieis anthropon” in Greek). Consider also T.S. Eliot’s complex use of the figure of the Fisher King in *The Wasteland*.

Alas! is wiser far than I.²⁶³

Virginia Woolf in *A Room of One's Own* used fishing as a metaphor for thinking.²⁶⁴ A recent popular novel used fishing (along with hunting) to represent the heroine's "spiced search for true love, self-understanding, and a fulfilling career."²⁶⁵

Everyday speech is also more neutral than the legal uses. Metaphorical fishing belongs to a larger metaphoric system which portrays a problem as a body of water, and trying to solve the problem is looking for an object in water. So, for example, investigating a problem is exploring water ("He dived right into the problem"); the solution is an object in water ("The answer's just floating around out there"); and difficulty in solving is difficulty in exploring water ("The murky waters of the investigation frustrated him").²⁶⁶ Fishing, in this system, is just an attempt to solve the problem: "He'd been fishing for the answer for weeks." This usage appears in many contexts. For example, job hunting or dating is described as "fishing," with a good result being a "good catch" or "landing" a good job.²⁶⁷ "The one that got away" is generally seen as a desirable and legitimate object of pursuit. Seen in this light, fishing is not subversive or underhanded, but the process of finding an answer. A few of the legal metaphors, when describing the activities of lawyers, have this more neutral tone. Lawyers attempt to fill

²⁶³ John Donne, *The Bait*, I POEMS OF JOHN DONNE 47 (E.K. Chambers, ed. 1896).

²⁶⁴ Virginia Woolf, *A ROOM OF ONE'S OWN* 5 (1929) ("Thought . . . had let its line down into the stream.").

²⁶⁵ MELISSA BANKS, *THE GIRLS' GUIDE TO HUNTING AND FISHING* (1999), reviewed by ReadingGroupGuides.com, at http://www.readinggroupguides.com/guides/girls_guide_to_hunting_and_fishing.asp (last visited Feb. 2, 2006).

²⁶⁶ George Lakoff, *A Problem is a Body of Water*, at http://cogsci.berkeley.edu/lakoff/metaphors/A_Problem_Is_A_Body_Of_Water (1994), last visited Feb. 2, 2006.

²⁶⁷ Tamera Guide for Writers, *Figurative Speech*, at

their baskets,²⁶⁸ bait their hooks,²⁶⁹ and cast their lines.²⁷⁰

It takes a collective act of will to change the impact of metaphor, if in fact change is possible.²⁷¹ If we continue to think of certain litigative acts as fishing, we need the image of the skilled, artful, efficient fisher, looking for the right things in the right places. The image would be not a “dragnet”²⁷² but a skillful cast, and the issue not *whether* parties are fishing but *how well* they fish. “Catching” information demonstrating that a cause of action exists would be a beneficial way of enforcing legal norms rather than a disfavored transaction cost. Stripped of its pejorative slant, fishing would become a neutral concept rather than a prohibited act. In this way it might become a fairer arbiter in the difficult task of deciding which cases go forward.

Far better, though, would be the removal of the “No Fishing” sign from the shores of legal discourse. As *Hickman* noted back in 1947, it is a “time-honored cry” and too deeply planted in our collective consciousness to be easily transformed to “Fisherfolk Welcome.” While the metaphor may have started “as a device to liberate thought,” it has ended by “enslaving it.”²⁷³ It’s time for the fishing metaphor – with its uncatchable fish – to swim away to inaccessible waters, never to be heard from again.

<http://www.tameri.com/edit/figurative.html> (last visited Feb. 2, 2006)

²⁶⁸Phalen v. Roberts, 21 A.D. 603, 604 (N.Y. App. Div. 1897).

²⁶⁹Spring Windows Fashions LP v. Novo Industries, 249 F.Supp. 2d 1111, 1113 (W.D. Wis. 2002).

²⁷⁰Marsalis v. Wilson, 778 N.E.2d 612, 618 (Ohio Ct. App. 2002). *Cf.* Walter v. Walter, 127 S.W.3d 396, 398 (Tex. App. 2004) (“Although appellant is a licensed attorney, a law license is not a fishing license.”).

²⁷¹“Rather than a wholly new metaphor, cognitive theory . . . suggests ways to re-view a current metaphor.” Berger, *supra* note – at 207.

²⁷²Benbow v. Aspen Tech., Inc., No. 02-2881, 2003 U.S. Dist. LEXIS 17936, at *11 (E.D. La. Oct. 7, 2003).

²⁷³Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J., rejecting the metaphor of a “parent” corporation’s liability due to acting through an “alias” or “dummy”

subsidiary).