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EIN: 20-3845404

Tuesday, September 18, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Comment on Proposed Change to Rule 8.01

Dear Clerk:

Amen to everything Philip Elbert and Cythia Parson said two years ago.

Sincerely,

Henry S. Queener, III, Esq.
HSQ/dns

Enclosures// Philip Elbert and Cythia Parson October 6, 2005, letter and supporting memo.

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OCT 7 2005
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October 6, 2005

Michael W. Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

Dear Mr. Catalano:

We are writing this letter to oppose the proposed Amendment to Tennessee Rule of Civil Procedure 8.01.

The proposed amendment to Rule 8.01 to require a specific dollar sum sought to be stated in the complaint is a bad idea and contrary to the current state of the law in Tennessee. (See enclosed brief excerpt we recently filed.) Tennessee case law holds that a post trial amendment to increase the ad damnum will not be allowed. Indeed, an amendment close to trial is likely to be disallowed. In other words the recovery of a plaintiff who takes it upon themselves to plead a specific dollar amount is capped at the artificial dollar amount stated in the complaint. If the plaintiff is to be held estopped to recover more than whatever dollar sum is stuck in the complaint, their counsel is forced to put a big number down. The alternative is that you risk having to explain to your client why their judgment is for less than the value the jury puts on the case. It is one thing to have the court remit an award and quite another to have to explain to a client (and malpractice carrier) that you didn't sue for enough money to cover a jury verdict.

Thus, by making it a rule that the plaintiff must artificially cap with specificity the dollar amount of their pain, suffering and other unliquidated damages, the system forces inflated "cya" damages claims. Defendants don't assess their actual exposure according to such claims. They rely on discovery to assess exposure. The harm is to the system. The court and all the lawyers in a case understand that the ad damnum is a number picked out of the air, but to the public and later to the jury it looks like the system is out of control. Of course, in an ideal world, a prescient

Michael W. Catalano, Clerk

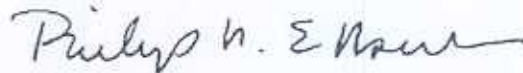
October 6, 2005

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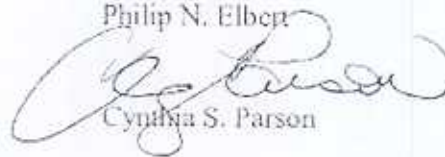
lawyer would plead the dollar amount that they plan to ask the jury to award in closing argument, but few of us can predict that number a year or two before trial. The alternative would be to start with a low number and amend up after the medical proof. The defense would often argue, however, that they would have defended the case quite differently if they had only known this was a case with so much money at issue.

Fundamentally, the problem is that it is unfair and inappropriate to ask a plaintiff to treat unliquidated damages as if they were liquidated. The present rule requires the plaintiff to state with specificity the nature of the relief sought (i.e. money, injunction, accounting). That is all that fairness requires. The rules of discovery are there to provide the other details about the plaintiff's injuries.

Sincerely,



Philip N. Elbert



Cynthia S. Parson

PNE/CSP/kae

Enclosure

A. Tennessee Law Does Not Require Plaintiff To Allege A Specific Ad Damnum.

Plaintiff is not required to allege a specific ad damnum. Tenn. R. Civ. P. 8.01 requires only that a complaint state: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." See Tenn. R. Civ. P. 8.01. The demand for judgment need not state a specific dollar amount of damages. By its plain language, Rule 8.01 requires only that the claimant specify the type of relief sought. Plaintiff's proposed Second Amended Complaint fulfills all of the rule's requirements by specifically requesting, compensatory damages, punitive damages, costs, and other general relief. See proposed Second Amended Complaint at Prayer for Relief ¶¶ 1-5.

Rule 8.01 of the Tennessee Rules of Civil Procedure is very similar to the comparable Rule 8(a) of the Federal Rules of Civil Procedure.¹ Authorities construing the federal pleading rule, Fed. R. Civ. P. 8, have said that the Federal Rules follow a system of "notice pleading" such that "the only function left exclusively to the pleadings ... is that of giving notice." See 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1202 (3d ed. 2002) (citing, *inter alia*, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855 (1st Cir. 1993); Barnhart v. Compugraphic Corp., 936 F.2d 131 (3rd Cir. 1991); Aquatherm Indus., Inc. v. Florida Power & Light Co., 971 F.Supp 1419 (M.D. Fla. 1997) *aff'd*, 145 F.3d 1258 (11th Cir. 1998)). "Notice pleading" is distinguishable from the "fact

¹ "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the ground upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim need no new ground of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded." Fed. R. Civ. P. 8(a).

pleading" required under the common law codes in that a notice pleading allows great generality when stating the circumstances "so long as the defendant is given fair notice of what is being asserted against him." See Wright & Miller at §1202.

Davidson County judges have properly declined to require that plaintiffs state a specific dollar amount in an ad damnum in their complaint. See, e.g., Exhibit A (Order of Chancellor Lyle, State Automobile Insur. Co. v. Jones Stone Co., Docket No. 04-1925-III, November 24, 2004); and Exhibit B (Order of Judge Kurtz, Mangrum v. Radde, Docket No. 00C-3605, February 12, 2001 (denying defendant Radde's motion asking the Court to order the plaintiff to indicate the particular numerical amount sought)). As Chancellor Lyle specifically held in her order: "Tennessee law does not require the statement of a specific dollar amount of damages and recovery." State Automobile Insur. Co., No. 04-19-25-III, at 1. As Chancellor Lyle correctly observed the "remedy to obtain information about the damages claimed by the defendant in its counterclaim is to request such information in discovery." Id.

The allegations in Plaintiff's proposed Second Amended Complaint are sufficient to apprise Defendants of the nature of the claims against them. Defendants are aware that they will have to defend themselves against a charge that they should compensate Plaintiff for multiple physical injuries, to include but not limited to head, neck, shoulder, back and leg; radiating pain and numbness; extreme fright and shock; permanent disfigurement; past, present, and future physical pain and suffering and mental anguish; past, present and future diminution in the enjoyment of life; past, present and future loss of earnings and earning capacity; permanent loss of earning capacity; permanent disability; property damage; medical bills incurred; and future medical bills. See

proposed Second Amended Complaint at ¶ 13 (a) - (k). The specific amount of damages Plaintiff seeks will not change the legal defense Defendants' are required to mount.

While a plaintiff who voluntarily chooses to plead a specific dollar amount may properly be held estopped to recover a judgment for more than they asked for, there is no reason in equity or requirement in the rules that a plaintiff arbitrarily assign a dollar cap to the damages the jury may properly award.

Thus, Plaintiff should not be required to state a specific ad damnum in his Second Amended Complaint.

THE LAW OFFICE OF
LARRY R. WILLIAMS, PLLC

LARRY R. WILLIAMS
RICHARD A. HOUSE
WAYNE CRIM

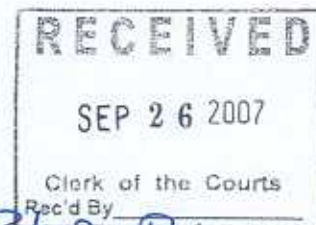
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September 25, 2007

Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407



M2007-02121-50 RLA-RL

RE: Amendment to the Tennessee Rules of Procedure and Evidence

To whom it may concern:

I am writing in response to the Advisory Commission on the Rules of Practice & Procedure's invitation for public comment on the proposed amendment to the Tennessee Rules of Procedure and Evidence. I am a 2007 graduate of the Nashville School of Law and a Law Clerk for Larry R. Williams, PLLC. Our firm primarily focuses on civil and personal injury litigation representing Plaintiffs throughout middle Tennessee. As the firm's clerk, I have assisted in preparing various pleadings, including complaints, to be filed for our clients.

I am writing in response to the proposed changes to Tenn. R. Civ. Proc. 8.01(2) requiring a specific dollar amount of damages sought in the original Complaint. Respectfully, this proposed change should be rejected.

It is often times extremely difficult to predict the appropriate damages at the outset of litigation. For example, in a personal injury matter, the extent of a client's injuries are often unknown until well into litigation. However, it is many times necessary to immediately file a complaint to protect the rights of the client, for example, to get access to med pay and property damage policies, to depose potential witnesses before memories fade and even to preserve a statute of limitation. The proposed Rule 8.01(2) will require Plaintiffs to file Motions to Amend as facts and circumstances change thereby increasing costs and unnecessarily clogging the Court's docket.

Furthermore, I fear that the proposed change could weaken the public's perception of our judicial process. Defense attorneys often read the *ad damnum* to the jury in an effort to discredit the Plaintiff for the amount they seek. Jurors may not understand the requirements of Rule 15.02 and that such a pleading may have been drafted only to protect the Plaintiff's case from a potential verdict in excess of the amount sought. Further, requiring Plaintiffs to state an *ad damnum* may confuse members of the press and public who too often focus on this one sentence when evaluating the judicial system. The headlines often read, "Man Sues Company X for 10 Million Dollars." Jurors read these headlines too; however, many do not understand such a pleading was probably drafted only as a ceiling to protect the client from a remittitur in the case of an excessive judgment.

Mike Catalano, Clerk

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September 25, 2007

RE: Amendment to the Tennessee Rules of Procedure and Evidence

I understand the motivation of the rule change to conform to Rule 15.02 and Rule 54.03. However, the same outcome can result from a rule requiring litigants to state an *ad damnum* at a set time before the trial. Furthermore, a Defendant can always inquire as to the amount of damages a Plaintiff seeks by simply posing this question to the Plaintiff in written discovery and/or depositions.

In light of the foregoing, I respectfully submit the proposed change to Rule 8.01 should be denied or, in the alternative, changed to require a Plaintiff state an *ad damnum* at a set time before the trial. I appreciate your invitation for public comment in this regard. If I can provide any further information or comment, please do not hesitate to contact me.

Sincerely,

LARRY R. WILLIAMS, PLLC

A handwritten signature in black ink, appearing to read 'Jonathan Williams', written in a cursive style.

Jonathan Williams
Law Clerk

JLW/tr

M2007-02121-SC-R42K4

Law Office

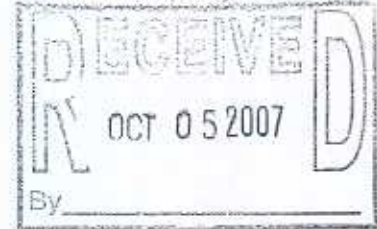
STANLEY A. DAVIS

Attorney at Law

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October 1, 2007



Honorable Cecil v. Crowson, Jr.
Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

RE: Amendment to the Tennessee Rules of Civil Procedure 8
General Rules of Pleading 8.01 – Claims for Relief

Dear Sir:

I have reviewed the Order requesting public comment as it relates to Rule 8.01 of the Tennessee Rules of Civil Procedure and wish to voice my opposition to this amendment requiring a specific amount sued for in the ad damnum clause.

My position as well as that of the American Association for Justice is that an ad damnum clause should specifically allege that the amount sued for in United States currency is that which a jury finds is just, fair and reasonable under the facts and circumstances of each case. Some members of the legal profession use a large ad damnum clause to grab headlines or inflame the public and in my opinion that is inappropriate. No adjuster uses an ad damnum to evaluate a case.

I have been a member of the American Association of Justice for ten (10) years and part of our position is that no specific amount should be stated in a complaint or ad damnum clause. We have discovery mechanisms that by the time plaintiff gets to trial a firm value range on a case can be ascertained. That value range fluctuates as discovery proceeds, facts are discovered, and the parties move forward to a trial. The true value of a case is to be decided by a jury and not by one side or the other.

The one year statute of limitations in Tennessee often does not allow sufficient time for a claimant to finish treating making it impossible to determine an appropriate ad damnum when a lawsuit is filed. To be required to do so creates an injustice to all parties concerned.

An ad damnum clause requiring the plaintiff to specify a specific amount upon filing the complaint would not further justice and would only inflame the public. The true valuation of damages is a jury question and a plaintiff should not be required to set out a specific amount in their complaint.

I appreciate your willingness to accept public comment in this matter. With warmest regards; I remain . . .

Sincerely,


Stanley A. Davis

SAD/ays

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October 10, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Tennessee Rules of Civil Procedure 8.01 Amendment

Dear Justices of the Tennessee Supreme Court:

I am writing this letter on behalf of all of the lawyers of Hill Boren Law Firm to express our opposition to the proposed amendment to Rule 8.01 of the Tennessee Rules of Civil Procedure.

Our opposition can be summarized as follows:

1. The proposed amendment appears to be a response to the insurance defense bar and not to a substantive problem with the Tennessee Rules of Civil Procedure.
2. The proposed amendment will encourage "frivolous" ad damnums calculated solely to grab headlines.
3. Equal judicial treatment of late motions to amend is rarely given.
4. Stating a "binding" ad damnum before any discovery is not realistic.
5. The defense bar will offensively use a high ad damnum estimate at trial to try and discredit the civil litigant claiming "jackpot justice" is only reason for lawsuit.
6. The proposed amendment should prohibit an ad damnum until 120 days before trial and should allow amendment of the ad damnum even as late as post jury verdict to conform to the verdict.

ARGUMENT

1.

Our lawyers have a combined legal experience of 100 years. Virtually all of our experience has been on the civil side. We always represent the plaintiff. Sometimes we "estimate" an ad damnum and sometimes we have insufficient information to make a reasonable estimate. In cases where we have insufficient information we demand an amount the "jury finds to be reasonable". Defendants have never complained that we did not state a specific ad damnum. For reasons known only to the Tennessee Legislature, an ad damnum is required in medical malpractice cases but an injured plaintiff is prohibited from arguing the total amount of the damages to the jury. These conflicting requirements do not make sense to our clients or to us. Therefore, our initial comment must awkwardly end with three questions: What's the problem? Who wants Rule 8.01 amended? And why?

2.

Rule 11.02 (Tennessee Rules of Civil Procedure) prohibits the filing of pleadings for improper purpose or a pleading where "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The proposed amendment to Rule 8.01 appears to ignore the requirements of Rule 11.02 encouraging a publicity seeking attorney to "jack up" the ad damnum just to capture the attention of the press. For example, a recent accident involving a dragster in Selmer, Tennessee generated a race to the courthouse by several lawyers to see who could get the biggest headline. Over a "Hundred Million Dollars" (\$100,000.00.00) of lawsuits were filed in the first couple of weeks following the tragic accident. The bigger the ad damnum the larger the headlines. The public comments (talk radio) about money grabbing lawyers were embarrassing and frankly the ad damnums were 5 to 10 times higher than they needed to be considering the primary defendant driver claims to be uninsured and has already filed bankruptcy. Plus, the ad damnums were not in keeping with the expected verdict potential in McNairy County, a historically low verdict county in West Tennessee. Why not "the plaintiff sues the defendant for reasonable compensatory damages for the wrongful death of Joe Blow?" Again, what is the problem being addressed? And is the proposed amendment necessary.

3.

Even though Rule 15 says that Motion to Amend a Complaint shall be freely given when justice requires, the application of this Rule is almost never applied when a plaintiff seeks to increase his/her ad damnum shortly before trial or during trial. And it is never allowed following a verdict that is in excess of the ad damnum. Now the Court is proposing to carve the advantage in stone at the beginning of the litigation. The interests of "non-party" should not control the litigation or the procedural rules.

4.

The carving of an ad damnum in stone as much as 2-4 years or longer before the trial requires that a lawyer be clairvoyant. Generally, damages in a civil case cannot be calculated until all the medical evidence is collected, experts deposed and permanent losses estimated .

5.

Requiring the plaintiff in a civil case to state in writing the amount of the lawsuit unnecessarily grants the defendant an additional advantage. Often, when the ad damnum is large and the claim is small, the defendant hammers the jury with arguments referring to "lottery or jackpot justice," pointing to the outlandish ad damnum as evidence of plaintiff's unreasonableness.

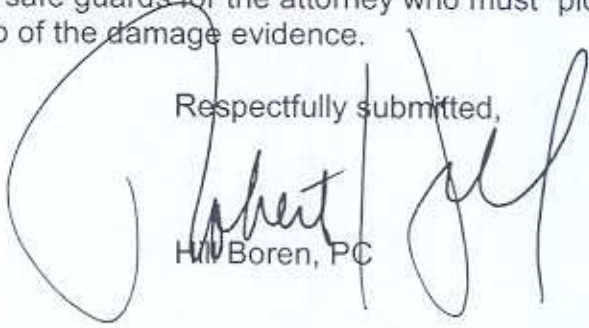
6.

If there's a valid reason for such an amendment, why not mandate that the ad damnum be set 120 days before trial when a more accurate estimate could be made of the damages. In addition, Rule 15 might be amended to guarantee plaintiff's right to amend his/her ad damnum at anytime before final judgment is entered upon a jury verdict.

CONCLUSION

Frankly, we fail to see the need for the proposed amendment to Rule 8.01 and oppose it's adoption without safe guards for the attorney who must "pick a number" long before he has any real grasp of the damage evidence.

Respectfully submitted,

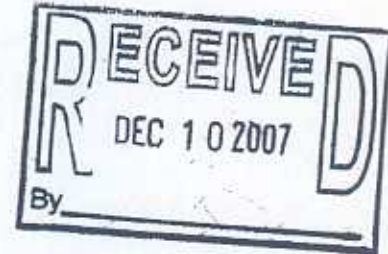

Robert Boren, PC



A PROFESSIONAL CORPORATION

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615.742.4881 FAX

December 10, 2007

**VIA FACSIMILE / 615-532-8757**

Mr. Michael W. Catalano
Appellate Court Clerk
407 7th Avenue North
Supreme Court Building
Nashville, TN 37219

Dear Mr. Catalano:

I write in opposition to the proposed change to Rule 8.01 of the Tennessee Rules of Civil Procedure that requires a specific *ad damnum* be stated in the original complaint.

I have two objections to the proposed rule. First, *ad damnums* are frequently used by plaintiff's lawyers to get publicity for the lawsuit or themselves. Unsophisticated reporters often grab and write about cases with large *ad damnums* as "newsworthy" cases, regardless of how ridiculous the case is on the facts or the law. (The D.C. judge lost pants case, for example.) As a profession we should discourage this practice; this rule does the exact opposite. Many states have dealt with issue by *prohibiting* lawyers from stating an *ad damnum* in the complaint and, indeed, that is the approach I favor.

The second objection I have to the proposed rule requires more explanation. Good lawyers know that the value of a case changes throughout a lawsuit. Numerous post-filing events impact the value of the case. For example, almost every deposition affects the value of a lawsuit; i.e., a poor deposition of a plaintiff can decrease the value of a case; and a poor deposition of a defendant can increase the value of a case. A subsequent injury by a plaintiff can decrease the value of a case. A plaintiff's mistake in answering interrogatories can decrease the value of a case. A defendant's errors in answering interrogatories can increase the value of the case. An eyewitness expected to testify one way but testifies differently at deposition impacts the value of the case.

A rule requiring that plaintiff to state the *ad damnum* at the time of the filing of the complaint (which under current law can probably be disclosed to the jury) will almost always result in a "high" number out of fear that using a "lower" number will be used against the plaintiff (unless the ultimate value of the case is higher at the time of trial than it is at the time of filing). A defendant uses the "high" number against the plaintiff in an effort to show greed. But

Mr. Michael W. Catalano
December 10, 2007
Page 2

if the ultimate value is higher than the value originally perceived the lower number is used against the plaintiff to show the "true value" of the case. (I have had this happen to me.) The plaintiff's lawyer is then in a classic Catch-22 situation and thus typically declares a larger *ad damnum* than he or she probably should. This raises the plaintiff's expectations and, as I said above, gives rise to the risk of the defense portraying the plaintiff as greedy.

My brothers and sisters of the defense bar state that they need to know the plaintiff's *ad damnum* to assist them in evaluating the case. I suggest that any defense lawyer who gives a plaintiff lawyer's *ad damnum* more than the weight of a feather when evaluating a case is making a substantial error. It is but one tidbit of information. I am not saying an *ad damnum* in the original complaint has no value - it says something about the sophistication and expectations of the plaintiff's lawyer. It says little about the merit or value of the case. I would note that the federal courts do not require an *ad damnum*. Nor is an *ad damnum* required in medical malpractice cases. Nevertheless, the world has not come to an end.

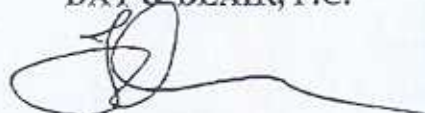
That being said, perhaps a compromise will serve the needs of all. One alternative is to prohibit a defendant from mentioning the amount of the *ad damnum* specified in the original complaint if it is later changed by amendment. That would give the defense bar the information they need but take away the use of that information as a hammer against the plaintiff.

Another alternative is not to require a complaint to state (or to prohibit a complaint from stating) an *ad damnum* and modify Rule 16 to give the trial judge the specific power to impose a deadline for the plaintiff to state an *ad damnum*. Finally, a rule could provide that a plaintiff state a specific *ad damnum* upon written request of defense counsel made no earlier than sixty days after the depositions of the parties. A rule of this type would allow for some discovery to occur before requiring that an *ad damnum* be stated.

In conclusion, I urge the Court to reject that proposed amendment to Rule 8.01. Since it is so close to Christmas, my wish list would include the addition of this statement at the end of current rule 8.01: "The complaint shall not state the amount of money sought." The goal of this change would be to reduce the publicity given to lawsuits with large *ad damnums*. Finally, I would ask that the Advisory Commission be charged with the task of examining the suggestions listed above (and others, as appropriate) with the goal of having the plaintiff advise the defendant about the amount sued for at a more appropriate time in the litigation.

Sincerely,

DAY & BLAIR, P.C.



John A. Day

JAD/kc

cc: Justice Cornelia A. Clark

WHITE, SCHUERMAN, RHODES & BURSON, PC

R. KREIS WHITE

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NATIONAL BOARD OF TRIAL ADVOCACY
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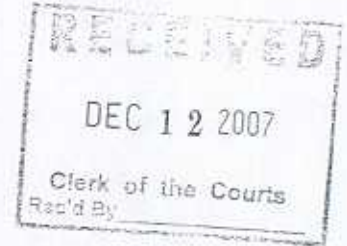
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December 7, 2007

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407



Re: TRCP 8.01 proposed amendment

Dear Justices:

Thank you for soliciting comments to the proposed amendment to TRCP 8.01. I have read the proposed rule as well as comments offered thus far and would urge adoption of the proposal.

An earlier committee comment accurately observed that this proposed rule makes explicit what is already clearly inferred by the entirety of our Rules of Civil Procedure. There must be a specific *ad damnum* required of persons seeking monetary judgment for TRCP 15.02 and 54.03 to make sense. Our body of law must be construed as a cohesive, unified work and interpretations of it that cause certain specific portions to be a nullity are greatly disfavored.

Arguments against this rule clarification (I would respectfully submit this is not a rule change--but is instead an explicit statement of what has always been the law) tend to revolve around the difficulty projecting an accurate *ad damnum* at the time suit is filed. This analysis ignores TRCP 15 which requires Courts to freely allow amendments where justice requires. Amendment is an easy--and typically consensual--process.

Underlying the opposition to a requirement of suing for a specific sum of money is a concern that opposing attorneys will make negative arguments against plaintiffs who seek (presumably large) sums of money. Is not an obvious solution to keep one's *ad damnum* set at a reasonable level? Only hopes for just the "jackpot justice" that opponents of this rule decry would require setting out an *ad damnum* that is embarrassingly large in lieu of a more reasonable sum.

Mike Catalano, Clerk
Tennessee Appellate Courts
December 7, 2007
Page Two

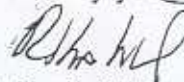
I would submit that concerns about flashy news reports of multimillion dollar suits are also misplaced in discussion of this rule. Note that plaintiffs could still state a newsy, flashy *ad damnum* even if not specifically required to do so. Absent from opposition to the rule proposal is a rule change that would prohibit seeking a specific sum in a Complaint and in fact, doing so would certainly require revision of more rules than just TRCP 8.01.

My practice largely (though not exclusively) involves defense of civil litigation. I move for declaration of a specific *ad damnum* in each case I defend if none is first stated. My reasoning is simple—my clients need to know what personal exposure they face in these cases. Most have some level of liability coverage, but need to be able to make an informed assessment of the personal exposure that each could face beyond insurance coverage.

At least one opponent of the rule proposal urges a response to an interrogatory asking what specific sum is sought as an alternative to an *ad damnum*. The problems with this approach are theoretical as well as practical. A discovery response does not meet the requirements of TRCP 15.02 or 54.03. On a more mundane level, when I do ask the question concerning what specific sum of money each plaintiff seeks in written discovery, I most often get little answer beyond a "whatever the jury thinks is fair" response.

I urge the adoption of amendments to TRCP 8.01 as proposed.

Sincerely yours,



R. Kreis White