Something Borrowed

Author : Brooke D. Coleman

Date : April 23, 2021

Marcus Alexander Gadson, *Stolen Plausibility*, __ **Geo. L. J.** __ (forthcoming, 2021).

I often explain to my brilliant first-year law students that, unlike most of their education before law school, originality is not required, nor is it always rewarded. Creativity is certainly key to being a successful lawyer but hewing to convention is critical too. I recall my discomfort as a law clerk when I first copied and pasted a summary judgment rule paragraph from my judge's prior order into the order I was drafting. It feels odd, but it is something we do in the legal profession. We borrow language, ideas, and arguments all the time.

Which is why Marcus Gadson's *Stolen Plausibility* is so striking. Examining post-*Twombly* and *Iqbal* decisions, Gadson finds that plaintiffs have adapted by using other parties' complaints and investigations to fill in the facts required for plausibility. This makes sense. In discrimination cases, for example, a plaintiff who cannot make it to discovery is unlikely to obtain the facts required to plead a plausible claim. Yet if other parties have already established key facts through an investigation, it makes sense for the aggrieved plaintiff to borrow those facts. There seems no good reason to re-invent facts just as there was no good reason for me to rewrite my judge's standard summary judgment rule paragraph.

But Gadson finds that courts are suspicious of, and sometimes downright hostile to, plaintiffs' efforts to "borrow" plausibility. Relying on Rule 12(f)'s authorization to strike immaterial language, courts have stricken what they believe are "stolen" facts, and then determined that the remaining facts fail to plead a plausible claim. Under Rule 11, some courts have determined that plaintiffs' "stolen" facts are not reasonable, leading courts to issue sanctions.

Gadson challenges this response. First, lawyers and judges constantly borrow from each other. Singling out this borrowing as different is suspect. For example, courts allow parties to cite a reputable investigation by a newspaper or think tank in their complaints. Why not allow the same when the investigation is done by a government agency or similarly situated plaintiff? Second, courts justify using Rule 12(f) to strike borrowed facts because they would not be admissible as evidence and are therefore immaterial. But the admissibility of evidence does not matter on summary judgment (as long as the evidence can be distilled into admissible form by trial), so it should not matter on a motion to dismiss or a motion to strike. Finally, in many cases plaintiffs borrow the fruits of a government agency investigation (e.g., the EEOC); those investigations and the resulting facts belong to the public and should be available to individual plaintiffs.

Gadson acknowledges that judges have policy reasons for thwarting the use of "stolen" plausibility. Judicial economy is the primary concern. Judges may worry that if plaintiffs can simply ride other plaintiffs' coattails, the cost of filing a lawsuit will become too low, the floodgates will open, and courts will be overwhelmed. The corollary to this concern is that it will be too easy for plaintiffs to file suits for the sole purpose of extracting settlements. But tools such as Rules 12(f) and 11 are hardly going to increase judicial economy. To the contrary, they will increase satellite litigation. Gadson acknowledges that "figuring out the optimal balance between discouraging unmeritorious litigation and encouraging meritorious litigation is difficult," but argues that treating borrowed plausibility as stolen is a step too far. The system should deter "unscrupulous plaintiffs," but it should also guard against "unscrupulous defendants" who use Rule 12(f) and Rule 11 to delay and defeat meritorious lawsuits.

A related policy concern is the legal profession's fidelity to the notion that the smartest lawyer in the room deserves the win. This recalls Justice Jackson's concurrence in *Hickman v. Taylor*, where he fretted about the less-bright lawyer

stealing the wits (a.k.a. work product) of the brighter opposing counsel. It is a gunners-unite principle of law practice. But Gadson refutes that policy concern in this context. First, in many cases, the plausible facts are borrowed from a government investigation. These investigations are—by design—intended to benefit the public at large and not some paid, private interest. Second, the purpose of the justice system is not to assess who worked harder or better, but to assess who is right on the law. If the facts—no matter the source—are applied to the law and demonstrate the plaintiff is entitled to relief, justice is served.

Finally, Gadson concedes that some defendants may be less likely to settle cases if they understand that those facts can be used against them in follow-on litigation, a valid concern even if the settlement is generally not admissible before a jury. The public benefit of avoiding lengthy government litigation is significant. But Gadson wonders if this concern might be overblown. After all, not all courts prevent the use of borrowed plausibility, so defendants already take that risk. To better understand this policy implication, Gadson calls for further study.

Overall, this article is a great read about what is happening on the ground in the wake of *Twombly* and *Iqbal*. It is thoughtful and thorough, and it is fun to dig into Rules 12(f) and 11 in this context. The big takeaway for me though is that Gadson eloquently reminds us that judicial economy sits in tension with access to justice. Borrowing from one will often look like stealing to the other. It reminds us that justice is in the eye of the beholder. When those with power see a steal, I tend to see a borrow. But be sure to read the paper and decide for yourself.

Cite as: Brooke D. Coleman, *Something Borrowed*, JOTWELL (April 23, 2021) (reviewing Marcus Alexander Gadson, *Stolen Plausibility*, __ **Geo. L. J.** __ (forthcoming, 2021)), https://courtslaw.jotwell.com/something-borrowed/.