Pleading Standards, Affirmative Defenses and Motions to Dismiss in Federal Court
Navigating Rule 8 Pleadings, 12(b)(6) and (f) Motions to Dismiss, and Standards in Removal Cases

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Jonathan Evan Goldberg

Jonathan Evan Goldberg is a member of Dentons’ Litigation and Arbitration practice, where he focuses on all aspects of complex commercial litigation, employment law and litigation, and ERISA litigation.

Jonathan, an experienced litigator, trial lawyer, and public speaker, has successfully represented numerous clients in federal and state courts throughout the United States in matters involving claims of retaliation, discrimination, wrongful termination, fraud, breach of fiduciary duty and breach of contract. Jonathan also routinely represents corporations and individuals in trade secrets and restrictive covenant litigation, assists clients in understanding and addressing the various legal issues raised in connection with the failure of Bernard L. Madoff Securities, Inc., and has defended corporate and individual clients in connection with investigations by the US Department of Labor (DOL) and the US Department of Justice (DOJ), Antitrust Division.

Jonathan also concentrates on and advises US and multinational companies and executives in all aspects of employment law, including drafting and negotiating employment and separation agreements, corporate restructurings and reductions in force, employment advice related to corporate transactions, internal corporate investigations, handbooks and policy manuals, sexual harassment and other sensitivity training, protecting against employee raiding and theft of confidential information, and compliance with all federal, state, and local discrimination laws.

Prior to joining SNR Denton, Jonathan gained significant litigation and trial experience working at several major law firms and served as a federal law clerk for the Honorable Harvey E. Schlesinger, US District Court for the Middle District of Florida, Jacksonville, Florida.

Jonathan is also a trained and skilled mediator.
Rule 8 Pleading Standards

TEXT OF RULE 8(a):

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
Rule 8 Pleading Standards (continued)

TEXT OF RULE 8(d), (e)

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.
Rule 9 Pleading Standards

Rule 9. Pleading Special Matters

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
Rule 12(b)(6) Motions to Dismiss

Text of Rule 12(b)(6):

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.
Twombly, Iqbal, and the Aftermath

• Bell Atlantic v. Twombly
• Ashcroft v. Iqbal
• Subsequent cases
Best Practices in Pleading

- Carefully Consider, Budget, and Discuss Costs of Preparing Complaint (and Litigation) with Client
- Conduct Pre-suit Investigation
- Avoid Cookie Cutter Complaints
- Research/confirm the law
- Avoid Overreaching Legal Claims
- Credibility: Don’t Lose It.
- Know the Court, the Judge, and the Rules
- To the extent possible, plead with specifics and particularity
- Anticipate Possible Bases for Dismissal (and discuss substance and costs with client in responding to a dismissal motion)
Removal Based on Diversity

• Applicability of *Iqbal/Twombly* pleading standards to cases removed to federal court based on diversity jurisdiction:
  - The issue
  - The cases
Thank you

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I. Fed. R. Civ. P. 8 Pleading Standards

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
Traditional Fed. R. Civ. P. 8 Pleading Standard under Conley v. Gibson

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Heightened Fed. R. Civ. P. 8 Pleading Standard under Bell Atlantic Corp. v. Twombly

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... a plaintiff's obligation to provide the “grounds” of his “entitle[ment] to relief” requires **more than labels and conclusions**, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be **enough to raise a right to relief above the speculative level** on the assumption that all of the complaint's allegations are true.

Further Heightened Fed. R. Civ. P. 8 Pleading Standard under *Ashcroft v. Iqbal*

First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. … Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. … A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

II. Rule 12(b)(6) Motions to Dismiss

New standard for evaluating a 12(b)(6) motion to dismiss under Twombly and Iqbal:

1. Reject threadbare allegations that are conclusory and not entitled to an assumption of truth; and

2. Identify well-pleaded factual allegations supporting the legal conclusions and determine whether, if taken as true, “they plausibly give rise to an entitlement to relief.”
III. Fed. R. Civ. P. 12(f) Motions to Strike Affirmative Defenses

Rule 8. General Rules of Pleading
...
(1) In General. In responding to a pleading, a party must:
(A) state in short and plain terms its defenses to each claim asserted against it;
...

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings;
...
(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.
Arguments **IN FAVOR OF** applying *Twombly/Iqbal* pleading standard to affirmative defenses:

1. Fairness to the Parties  
2. Textural Consistency  
3. Preservation of Resources  
4. If Claims Meritless, Result Not Harsh
Arguments **AGAINST** applying *Twombly/Iqbal* pleading standard to affirmative defenses

1. Motions to Strike are Disfavored
2. Textual Support
3. Fair Notice, Not Plausibility
4. Concerns of *Twombly/Iqbal* Not Implicated
5. Plaintiffs and Defendants Not Similarly Situated
6. No Prejudice to Plaintiffs
7. Harshness of the result
Applicability of Twombly/Iqbal Pleading Standards to Cases Removed from State Court on Diversity Grounds

Rule 8. General Rules of Pleading
(c) Affirmative Defenses.
(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

• accord and satisfaction;
• arbitration and award;
• assumption of risk;
• contributory negligence;
• duress;
• estoppel;
...
V. Concluding Comments

1. On balance, the arguments in opposition to applying Twombly/Iqbal to affirmative defenses are more persuasive.

2. The “fair notice” standard is the traditional test for challenges to affirmative defenses in federal court.
Fending Off the Use of a Rule 12(f) Motion to Strike Affirmative Defenses


(Co-authored by Jonathan P. Michaud)