TIPS *from the Trenches*

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Remember the Controlling Principles of "Notice" Pleading

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How often are we confronted with motions to dismiss/motions for more definite statement contending plaintiff's complaint is fatally defective due to an absence of factual averments, an absence of the circumstances imposing the duties owed by defendant, or some precise recitation of plaintiff's injuries and damages? Relatedly, how often do we face removals to federal court premised upon the contention that a party was fraudulently joined because plaintiff's complaint fails to state a *plausible* claim against that defendant?

Remembering basic principles about Alabama's notice pleading rules will help you defend the adequacy of your complaint.

The Plain Language of Rule 8(a) Requires Only a "Short and Plain Statement of the Claim Showing That the Pleader is Entitled to Relief

Always remember the controlling force of the plain language of a rule of civil procedure. Here, Ala. R. Civ. P. 8(a)(1) requires only that a complaint "sets forth [...] a short and plain statement of the claim showing that the pleader is entitled to relief[.]" The Supreme Court construed this rule in *Ex parte Burr & Forman, LLP*, 5 So. 3d 557, 564, n. 1 (Ala. 2008), stating "Rule 8 of the Alabama Rules of Civil Procedure implemented modern rules of notice pleadings, and the comments to the rule recognize that there is no technical pleading requirement other than describing in general the events that transpired, coupled with a demand for judgment." More recently, the Court stated "the touchstone in determining if a claim has been sufficiently asserted in a complaint is whether the complaint puts the defendant on notice of the claim or action against which it must defend." *Gilley v. Southern Research Inst.*, 176 So. 3d 1214, 1222 (Ala. 2015).

The Plain Language of Rules 8(e)(1) and 8(f) Require No Technical Forms of Pleading and That Complaints Are to be Construed to do Substantive Justice

Remember, too, the admonitions contained within Ala. R. Civ. P. 8(e)(1) that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading ... are required,"[1] and Rule 8(f) ["all pleadings shall be so construed as to do substantial justice."[2] As explained by Othni Lathram and Anil A. Mujumdar in their treatise, *Alabama Civil Procedure*, prior to the adoption of the Alabama Rules of Civil Procedure, "courts construed a challenged pleading most strongly against the pleader." Othni Lathram & Anil A. Mujumdar, *LexisNexis Practice Guide: Alabama Civil Procedure*, § 4.10 (2019), citing Hoffman, *Pretrial Motion Practice Under the Alabama Rules of Civil Procedure*, 25 Ala. L. Rev. 709, 714-15 (1973). However, adoption of Rules 8(a) and (f) mandate construing a challenged pleading most strongly in favor of the pleader. See Alabama Civil Procedure, § 4.10, n. 43, citing, e.g., *Waters v. Jolly*, 582 So. 2d 1048, 1055 (Ala. 1991) ("In order to do substantial justice, pleadings are to be construed liberally in favor of the pleader."); *Fontenot v. Bramlett*, 470 So. 2d 669, 671 (Ala. 1985) ("resolve all doubts concerning the sufficiency of the complaint in favor of the plaintiff"); *Calvin Reid Constr. Co., Inc. v. Coleman*, 397 So. 2d 145, 147 (Ala. Civ. App.), *cert denied* 397 So. 2d 149 (Ala. 1981) ("construed liberally in favor of the pleader").

The Approved Forms of Pleadings Appended to the Rules of Civil Procedure Exemplify "Short and Plain Statements"

The "Supreme Court Note" at the beginning of Appendix I to the Rules of Civil Procedure states "[a]ll of the following

forms have been approved by the supreme court. Unless otherwise designated, each of the forms was approved by the court on January 3, 1973." Further, Ala. R. Civ. P. 84 states "[t]he forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." The Committee Comments on the 1973 adoption of Rule 84 states:

> [B]y express provision of the rule, the forms contained in the Appendix of Forms are 'sufficient.' A pleading ... which follows one of those forms cannot be successfully attacked for pleading defects by a motion to dismiss for failure to state a claim upon which relief can be granted.

Id. Examples of opinions rejecting challenges to "form" pleadings include *Henson v. McDonald*, 413 So. 2d 1135, 1137 (Ala. 1982), and *Access Capital Co., Inc. v. Uptown, Inc.*, 863 So. 2d 1127, 1128-29 (Ala. Civ. App. 2003).

Dismissal for Failure to State a Claim Is Rarely Appropriate at the Pleading Stage Because Alabama Courts Do Not Consider the Plausibility of the Allegations of the Complaint

Alabama's notice pleading principles originated in *Bowling v. Pow*, 301 So. 2d 55, 63 (Ala. 1973), when our Supreme Court adopted the "no-set-of-facts" rule of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) ("In appraising the sufficiency of the complaint, we follow ... the accepted rule that a complaint should not be dismissed 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."). In *Bowling*, the Court explained that "[the] adoption of the Alabama Rules of Civil Procedure precludes us from testing the sufficiency of the complaint by a rule that formerly governed, that a complaint challenged by demurrer should be construed against the plaintiff, if the complaint is reasonably subject to such a construction." *Bowling v. Pow*, 301 So. 2d at 62-63. Under Ala. R. Civ. P. 8, "the opposite principle of construction obtains...." *Id.* at 63.

Since *Bowling v. Pow*, numerous opinions have stated the Rule 12(b)(6) standard of review substantially as follows:

> It is a well-established principle of law in this state that a complaint, like all other pleadings, should be liberally construed, Rule 8(f), ... and that a dismissal for failure to state a claim is properly granted only when it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief. ... Stated another way, if under a provable set of facts, upon any cognizable theory of law, a complaint states a claim upon which relief could be granted, the complaint should not be dismissed....
>
> Where a [Rule] 12(b)(6) motion has been granted and this Court is called upon to review the dismissal of the complaint, we must examine the allegations contained therein and construe them so as to resolve all doubts concerning the sufficiency of the complaint in favor of the plaintiff.... In so doing, this Court does not consider whether the plaintiff will ultimately prevail, only whether he has stated a claim under which he *may* possibly prevail."

See, e.g., *S. & T. Leasing Corp. v. Alabama Highway Express, Inc.*, 335 So. 2d 384, 386 (Ala. 1976) (partial recitation); *Franklin v. City of Huntsville*, 670 So. 2d 848, 849 (Ala. 1995) (emphasis in the original); *Anderson v. Clark*, 775 So. 2d 749, 750 (Ala. 2000) (emphasis in the original); and *Burch v. Birdsong*, 181 So. 3d 343 (Ala. Civ. App. 2015) (partial recitation).

The Rule 12(b)(6) standard of review was recently restated in *Ex parte Austal. USA, LLC*, 233 So. 3d 975, 981 (Ala. 2017), reh'g denied (Apr. 21, 2017), as follows:

> At the motion-to-dismiss stage, ..., a court's ability to pick and choose which allegations of the complaint to accept as true is constrained by Alabama's broad and well-settled standard for the dismissal of claims under Rule 12(b)(6). ... [O]ur standard of review does not permit this Court to [c]onsider the plausibility of the allegations. Rather, in considering whether a complaint is sufficient to withstand a motion to dismiss, we must take the allegations of the complaint as true, *Ussery v. Terry*, 201 So. 3d 544, 546 (Ala. 2016); we do not consider "'whether the pleader will ultimately prevail but whether the pleader may possibly prevail,'" *Daniel v. Moye*, 224 So. 3d 115, 127 (Ala. 2016) (quoting *Newman v. Savas*, 878 So. 2d 1147, 1149 (Ala. 2003) (emphasis added)); and "[w]e construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff." *Daniel*, 224 So. 3d at 127. Furthermore, a Rule 12(b)(6) dismissal is proper "'only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" *Knox v. Western World Ins. Co.*, 893 So. 2d 321, 322 (Ala. 2004) (quoting *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993)).

Ex parte Austal USA, LLC, 233 So. 3d 975, 981 (Ala. 2017), reh'g denied (Apr. 21, 2017) (emphasis in the original).

The most recent expression of the standard of review for ruling on a Rule 12(b)(6) motion to dismiss is found in *Bell v. Smith*, [Ms. 1171108, Mar. 22, 2019] __ So. 3d __ (Ala. 2019):

> "' On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'"

Id., Ms. *10-11 (quoting *Lloyd Noland Found., Inc. v. HealthSouth Corp.*, 979 So. 2d 784, 791 (Ala. 2007) (quoting, in turn, *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993)).

In the Removal Context, Plaintiff's Complaint is Tested Under Alabama's Traditional Notice Pleading Principles, *Not* the New Federal Plausibility Standard

The United States Supreme Court abandoned the *Conley v. Gibson* "any-set-of-facts" standard in two separate decisions, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2997). Under *Iqbal/Twombly*, a pleader must meet a "plausibility standard," not a "possibility" standard.

However, in the removal/remand context, courts considering whether plaintiff's complaint sufficiently states a cause of action must continue to evaluate sufficiency *under the Alabama notice pleading "possibility" standard, not the Iqbal/Twombly plausibility standard.* See *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1334 (11th Cir. 2011) ("To determine whether it is possible that a state court would find that the complaint states a cause of action, [federal courts] must necessarily look to the pleading standards applicable in state court, not the plausibility pleading standards prevailing in federal court."). See, also, *Davis v. Hillman Group, Inc.*, 2017 WL 3313999, *4 (S.D. Ala. Aug. 2, 2017) (not reported in Fed. Supp.) ("[The court's] task is not to gauge the sufficiency of the pleadings, 'in the fraudulent joinder context, inasmuch as the decision as to the sufficiency of the pleadings is for the state courts, and for a federal court to interpose its judgment would fall far short of the scrupulous respect for the institutional equilibrium between the federal and state judiciaries that our federal system demands.'") (quoting *Grady Bros. Investments, LLC v. General Motors Acceptance Corp.*, 2007 WL 4577701 (S.D. Ala., Dec. 27, 2007) (not reported in Fed. Supp.) (quoting, in turn, *Henderson v. Washington National Ins. Co.*, 454 F.3d 1278, 1284 (11th Cir. 2006)).

In *Hampton v. Georgia-Pacific LLC*, 2011 WL 5037403 (S.D. Ala. 2011) (not reported in Fed. Supp.), United States District Court Judge Kristi DuBose held:

> The majority of courts addressing this matter have held that a federal court should not look to the federal standard for sufficient pleadings under Rule 8 and 12(b)(6) to determine whether the state-court petition provides a reasonable basis for predicting that the plaintiff could recover against the in-state defendant at least when, as here, the state pleading standard is more lenient. See, e.g., *Henderson v. Washington Nat'l Ins. Co.*, 454 F.3d 1278, 1284 (11th Cir. 2006) ("[T]he decision as to the sufficiency of the pleadings is for the state courts, and for a federal court to interpose its judgment would fall short of the scrupulous respect for the institutional equilibrium between the federal and state judiciaries that our federal system demands.").

Id. At *4. To like effect is *Mahone v. R.R. Dawson Bridge Co., LLC*, 2014 WL 2154223, at *2 (M.D. Ala. 2014) (citing *Crum v. Johns Manville, Inc.*, 19 So. 3d 208, 212, n. 2 (Ala. Civ. App. 2009) ("Our supreme court has adopted the standard set forth in *Conley v. Gibson* ... for the dismissal of claims under Rule 12(b)(6), Ala. R. Civ. P., until such time as our supreme court decides to alter or abrogate this standard, we are bound to apply it, the United States Supreme Court's decision in *Twombly* ... notwithstanding.").

Other Principles to Remember

Notice pleading does not require a complaint to assert the legal basis for any duty owed. See, e.g., *Knight v. Burns, Kirkley & Williams Const. Co., Inc.*, 331 So. 3d 651, 655 (Ala. 1976) (complaint alleging defendant negligently caused plaintiff's death deemed sufficient though not alleging duty breached); *McKelvin v. Smith*, 85 So. 3d 386, 390 (Ala. Civ. App. 2010) (homeowners' complaint provided sufficient notice of negligence and wantonness claims against a city inspector to survive dismissal over inspector's contention that homeowners did not allege facts to show inspector owed any particular duty).

Notice pleading does not require a complaint to spell out all the evidence necessary to support the conclusion that the defendant's conduct was wanton or willful. See, e.g., *Birmingham Ry. Light & Power Co. v. Johnson*, 183 Ala. 352, 354, 61 So. 79 (1912) (complaint properly alleged wanton or willful conduct, as it is not essential that the complaint set out the evidence necessary to show that a given act was in fact wanton or willful).

Notice pleading does not require a complaint to allege intent with specificity. On the contrary, Ala. R. Civ. P. 9(b) provides "intent ... may be averred generally." The corresponding Committee Comment states that "Rule 9(b) ... provides that conditions of the mind, such as malice, intent or knowledge, may be averred generally since further specification in such cases is possible only by pleading the evidence."

Notice pleading permits plaintiffs to plead legal conclusions. See, e.g., *Mitchell v. Mitchell*, 506 So. 2d 1009, 1010 (Ala. Civ. App. 1987) (allowing the pleading of legal conclusions so long as they put the defendant on notice of the claim).

A special common law rule or statute may qualify Alabama's generalized rules of notice pleading. See, e.g., *Childers v. Darby*, 163 So. 3d 323, 327 (Ala. 2014) ("Rule 8, Ala. R. Civ. P., provides that a complaint is sufficient if it puts a defendant on notice of the claims asserted against him or her. A rule or statute, however, may qualify the rule of generalized notice pleading."). An example is Ala. Code § 6-5-551 (1975), a part of the Medical Liability Act which states "[t]he plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the healthcare provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts."

Conclusion

Alabama's notice pleading principles may be boiled down to this: "The pleading does not have to state with precision all elements which form the legal basis for a recovery, so long as fair notice of the action is provided. The complaint must 'contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" Gregory C. Cook, *Alabama Rules of Civil Procedure Annotated*, § 8.1 (5th Ed. Dec. 2018). Remembering these basic principles will help you defend the adequacy of your complaint.

1 The Committee Comments on the 1973 adoption of Rule 8 state:

> Under this rule, the prime purpose of pleadings is to give notice. Such common law concepts as stating the facts each party believes to exist and narrowing the issues that must be litigated are completely abandoned. The distinctions between "ultimate facts" and "evidence" or conclusions of law are no longer important since the ... new rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties."

Id., citing 5 Wright & Miller, *Federal Practice and Procedure, Civil*, §§ 1202, 1218 (1969); 2A *Moore's Federal Practice*, §§ 8.12, 8.13 (2d Ed. 1968); *First Nat. Bank of Hennaing v. Olson*, 246 Minn. 28, 74, 74 N.W.2d 123 (1955).

2 The Committee Comments to Rule 8(f) likewise state "Rule 8(f) ... provides that the pleadings are to be construed liberally in favor of the pleader."