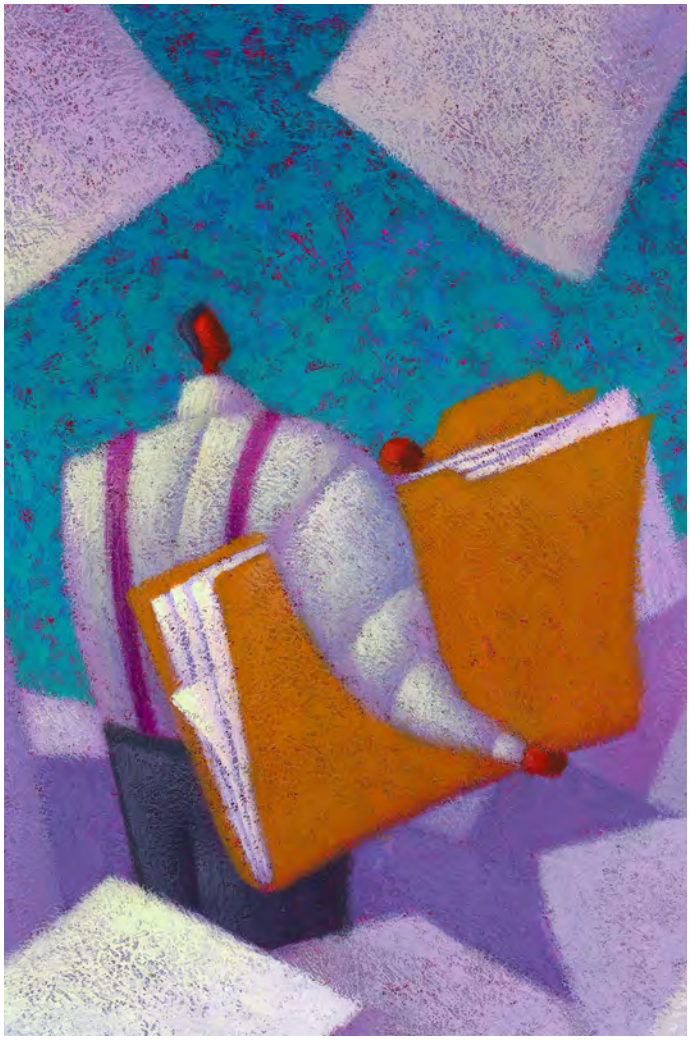
Using Standards of Review as a Guide to Filing Pretrial Motions in Federal Court

By Regina Stone-Harris



The Federal Rules of Civil Procedure provide for the use of pretrial motions to narrow and clarify the scope of litigation. Most clients, however, do not have financial resources to file every available motion, nor is every motion practically feasible. As a practical matter, attorneys must consider whether a motion's potential for adding value to the case as a whole is worth the expense to the client. This article recommends using standards of review as a guide in deciding which pretrial motions to file in a federal civil case. Although the article references case law from the Fifth Circuit, the underlying recommendations are appropriate for all jurisdictions.

What is a Standard of Review?

"At its clearest level, a standard of review prescribes the degree of deference given by the reviewing court to the actions or decisions under review."[1] "[T]he applicable standard of review tends to reflect the appellate courts' accumulated wisdom as to which issues deserve their attention and which issues should be left primarily to front-line trial courts and agencies."[2] As a general rule, the more discretion a trial judge has, the more deferential the applicable appellate standard of review.

Abuse of discretion is one of the most deferential standards of review. A reviewing court uses this standard to review rulings for which the law gives the trial judge discretion to decide. When reviewing for abuse of discretion, the appellate court does not ask whether it would have made the same ruling as an original matter, but, instead, whether the district court abused its discretion under the applicable standards of determination of any motion.[3] Thus, the district court need not have been "right" to be upheld by the appellate court;[4] instead, the lower court needs only to remain within its discretion. For this reason, an abuse of discretion is difficult to show on appeal.

In contrast, "de novo review requires an appellate court to review the case anew, without any formal deference to the decision below … .[5] De novo review is typically applied to conclusions of law as opposed to factual determinations."[6] Under this standard, the appellate court reviews the district court's legal conclusions de novo, giving no deference to the lower court's decision while taking the facts in the light most favorable to the nonmoving party.[7] Although the appellate court owes the district court no deference, "[i]ndependent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review."[8]

Why Consider Standards of Review?

As a trial attorney, your familiarity with standards of review may seem of little benefit or import to your practice. However, knowing and understanding standards of review can be valuable guideposts to determining the value and probable success of a certain action. In addition, because standards of review serve as important guides to seasoned trial judges who consider how their decisions will be reviewed if challenged, knowing the applicable standard of review can help a trial attorney frame argu-

ments and approaches to certain issues. As specialists have noted, "Counsel can bet that the district judge is thinking about how [the] case will be reviewed. If the judge is keeping in mind the rules and realities of review, it is only good strategy for counsel to anticipate at least the real concerns of the judge right in front of him. To ignore at trial the reality of review is to ignore the direct decision makers and to tempt Murphy's Law."[9]

For these reasons, knowing the applicable appellate standard of review and its implications and understanding the degree of discretion given to the trial judge's ruling can help you decide which motions are worth the time and expense of filing. The scenarios discussed below illustrate the value of taking standards of review into account when it comes to filing a motion.

Motion for More Definite Statement

Rule 12(e) of the Federal Rules of Civil Procedure permits a defendant to ask for "a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response"[10]—that is, a defendant may ask the district judge to compel the plaintiff to amend his or her complaint to plead matters more specifically. At the trial level, however, courts do not favor motions for more definite statement. The reason is logical: Federal Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[11] The rule does not require detailed factual allegations; however, the complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[12] Because specific facts are not necessary, the complaint need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'"[13] Thus, if the plaintiff pleads a short and plain statement of the claim sufficient to show that he or she is entitled to relief, the district judge will probably deny the motion.

The appellate court's standard of review flows logically from the same reasoning. The Fifth Circuit reviews a ruling on a motion for more definite statement for abuse of discretion.[14] Under this liberal standard, as long as the district judge's ruling reflects enforcement of Rule 8(a)'s requirement for a "short and plain statement of the claim," the reviewing court will find that the district court did not abuse its discretion and will uphold the ruling. Thus, when it comes to filing a motion for more definite statement, at the trial level, there is little chance of success and probably little value to be gained. At the appellate level, there is an even slimmer chance of overturning a district judge's ruling on such a motion.

In light of the difficulty of showing an abuse of discretion, an attorney considering filing a motion for more definite statement should question whether the motion offers any potential for added value to the client or progression of the case. A motion may result in added value if a complaint is so vague and ambiguous that the defendant is unable to answer,[15] but ambiguity may also be resolved by a less expensive phone call to opposing counsel and agreement to amend the complaint. Otherwise, the motion offers little value, because the likelihood of denial is high. If opposing counsel is not amenable to amending the complaint, advising the court about your effort to avoid asking for a more definite statement may persuade the court to exercise its discretion and grant your motion.[16]

Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) permits a party to ask the court to dismiss a case for failure to state a claim upon which relief can be granted. Like a motion for more definite statement, a motion to dismiss for failure to state a claim is disfavored at the trial level,[17] because granting the motion summarily terminates the case on its merits. But, unlike a motion for a more definite statement, the applicable standard of review is not deferential to the district judge. The Fifth Circuit reviews a dismissal under Rule 12(b)(6) de novo.[18] In light of the lack of deference, a district judge will carefully apply the applicable standards in deciding the merits of the motion.

In considering a motion to dismiss for failure to state a claim, the district court must accept all well-pleaded facts as true, viewing the facts in the light most favorable to the plaintiff.[19] The court, however, is not required "to accept as true a legal conclusion couched as a factual allegation."[20] "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[21] In light of these standards, a district judge will not grant a motion to dismiss hastily. In addition, when considering a motion to dismiss, if the motion appears meritorious and a more carefully drafted complaint might cure any deficiencies, the district court must first "give the plaintiff an opportunity to amend his complaint, rather than dismiss it ... ."[22]

The trial court's narrow standard for granting a motion to dismiss can minimize the potential value of the motion. Because the district court must first permit the plaintiff to amend his or her complaint unless the court has a substantial reason for denying the request to amend,[23] such a motion may be an unnecessary expenditure of a client's resources that has no potential for substantial gain.

A lawyer considering a motion to dismiss for failure to state a claim should question the utility of the motion before filing it. The motion may offer no value to the case if you seek dismissal of the case, but the motion may offer value if you seek a clarification of claims to narrow the scope of discovery. If a pleading deficiency can be remedied by an amended complaint, consulting with opposing counsel may be a less expensive way to achieve the same result. Even though conferring will not work in all cases, it is worth a try when opposing counsel is sophisticated enough to understand that a motion to dismiss will require a response and perhaps an amended pleading.

The standard of review can also guide you in deciding whether you are pursuing a motion to dismiss for an appropriate reason as well as the appropriate time to file a motion. With regard to the appropriate basis for a motion, it should not be pursued simply because your client insists the allegations are untrue. Under the district court's standard of determination, even if factual allegations are

untrue, the court must view the allegations in the light most favorable to the nonmovant.[24]

You also should not file a motion because your client thinks the case is weak. The U.S. Supreme Court recently imposed a "plausibility" standard for complaints but did not impose a "probability" requirement.[25] Instead, the Court required enough facts to raise a reasonable expectation that discovery will produce enough evidence to indicate that a claim exists.[26]

The trial court's determination standard can also help you decide the appropriate time to move to dismiss for failure to state a claim. Filing too early places the plaintiff on notice of a weakness in the case and can cause the plaintiff to rethink his or her case and then plead a stronger one. If that occurs, "your motion would have backfired because you end up having to defend a more difficult case."[27] Of course, your motion may cause the plaintiff to realize that his or her case is weak and motivate the plaintiff to dismiss or settle the case. If you file early enough, the plaintiff may even be able to render your motion moot by amending his or her complaint.[28]

On the other hand, a well-thought-out motion to dismiss can narrow the scope of discovery, thereby decreasing the cost of discovery. However, unless you are confident you can prevail, your best bet may be to wait until discovery is complete and move for summary judgment. At that point, it will probably be too late for the plaintiff to amend the complaint and the district court can grant summary judgment if there is no evidence to support the elements of a claim.

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Sometimes the applicable standard gives the trial judge extra leeway in deciding a pretrial motion. For example, the standard that applies to a motion to dismiss for lack of subject-matter jurisdiction permits the trial judge to review material outside of the pleadings,[29] recognizing that subject-matter jurisdiction is a fundamental principle governing a federal court's power.[30] Because federal courts are courts of limited jurisdiction—possessing only that power authorized by the Constitution and federal statute—a presumption exists that a claim lies outside the court's limited jurisdiction.[31] A "party may neither consent to nor waive federal subject matter jurisdiction."[32] Subject-matter jurisdiction is so fundamental that a court must consider its jurisdiction even if the parties do not.[33]

Based upon this standard, Federal Rule of Civil Procedure 12(b)(1) permits a defendant to move to dismiss a claim for lack of subject-matter jurisdiction.[34] The presumption against subject-matter jurisdiction works in favor of a defendant because the plaintiff has the burden of demonstrating subject-matter jurisdiction.[35] The applicable standards favor the defendant even more if the defendant makes a factual challenge.

Unlike a facial challenge, which requires the district court to view the factual allegations as true, a presumption of truthfulness does not apply when the defendant challenges the existence of subject-matter jurisdiction in fact—a factual attack. In a factual attack, the district court may consider matters outside the pleadings, such as testimony and affidavits.[36] "A court may base its disposition of a factual challenge on (1) the complaint alone, (2) the complaint supplemented by undisputed facts, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[37] "[T]he trial court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case."[38]

The applicable standards favor the defendant for at least three reasons: (1) the nonmovant, rather than the movant, bears the burden of proving subject-matter jurisdiction; (2) the usual presumption of truthfulness for motions to dismiss does not apply to disputed factual allegations; and (3) the movant may submit evidence to rebut factual allegations. As a result, a movant has a greater probability of prevailing in a factual attack (subject-matter jurisdiction) rather than a facial attack (more definite statement or failure to state a claim).

An order granting a motion to dismiss for lack of subject-matter jurisdiction and dismissing a case is a final appealable order because it disposes of all parties and all claims. The reviewing court reviews a dismissal order de novo,[39] using the same standards as the district court uses. Although the de novo standard owes the district court no deference, the appellate standard still favors the movant because the reviewing court will not set aside the district court's factual findings unless they are clearly erroneous.[40] "A district court's factual findings are clearly erroneous only if, after reviewing the record, [the reviewing court] is firmly convinced that a mistake has been made."[41] This principle requires substantial deference—though not blind adherence—to the court's findings.[42]

Although the standards should not dissuade you from moving to dismiss when subject-matter jurisdiction does not exist, understanding the applicable standards can help you decide when to file a motion. If you do not have the evidence to convince the district court that subject-matter jurisdiction is lacking, the court will deny the motion. A client who reads the order denying the motion may not be amenable to paying you for your time. It may be wise to first ask the court to limit initial discovery to the issue of subject-matter jurisdiction.[43] Because the question of subject-matter jurisdiction can be raised at any time, waiting until you obtain some appropriate discovery may place you in a better position to decide whether to challenge subject-matter jurisdiction.

Conclusion

Given the costs associated with filing any motion, the foregoing illustrations show how standards of review can be used as a guide in deciding whether and when to file a motion in federal court. Faced with knowing that their decisions may be reviewed, district judges will consider appellate standards of review in deciding motions. As a result, counsel should also consider the applicable standards.

It is unlikely that a client will be amenable to paying an attorney for work that promises little or no benefit and would appreciate a frank discussion about the potential benefit of any motion and the associated costs before the

motion is filed. A client who feels involved in making decisions affecting the cost of legal services may be one of your best marketing resources.

Regina Stone-Harris has served as a law clerk for a justice on the Texas Court of Appeals, a U.S. magistrate judge, a U.S. district judge, and a U.S. circuit judge. She served as a Fellow for the Supreme Court of the United States during the 2005–2006 fellowship year; she was assigned to the U.S. Sentencing Commission. The views expressed in this article represent the views of the author and should not be interpreted as representing federal court policy. Stone-Harris thanks her friend and former colleague, Leah Missy Kauffman, for her editorial assistance with this paper.

Endnotes

[1]Steven Alan Childress and Martha Davis, FED. STANDARDS OF REV. 1–2 (3d ed. 1999).

[2]Mayer Brown LLP, FED. APP. PRAC. 358 (Philip Allen Lacovara, ed. in chief, BNA Books, 2008).

[3]*See Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 642 (1976).

[4]Martha S. Davis, *Standards of Rev.: Jud. Rev. of Discretionary Decisionmaking*, J. APP. PRAC. & PROCESS 55 (Fall 2000) (discussing Professor Maurice Rosenberg's article on judicial discretion).

[5]Brown, *supra* note 2, at 359.

[6]*Id*.

[7]*Id*.

[8]*Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991).

[9]Childress and Davis, *supra* note 1, at 1–25.

[10]FED. R. CIV. P. 12(e).

[11]FED. R. CIV. P. 8(a)(2).

[12]*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

[13]*Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (*Twombly*'s citations omitted).

[14]*Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) ("Rule 12(e) orders are reviewed under an abuse of discretion standard.").

[15]FED. R. CIV. P. 12(e).

[16]Hon. David Hittner, Fed. Civ. Proc. Before Trial, 5th Cir. ed. § 9.353.

[17]*Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) ("A motion to dismiss under rule 12(b)(6) 'is viewed with disfavor and is rarely granted.'") (citation omitted).

[18]*Carroll v. Fort James Corp.*, 470 F.3d 1171, 1173 (5th Cir. 2006).

[19]*In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

[20]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). *See Iqbal*, *supra* note 12, at 1949–1950 (making it clear that *Twombly*'s standards apply beyond antitrust cases).

[21]*Twombly*, *supra* note 20, at 55–56 (internal citations omitted and original emphasis omitted).

[22]*Fuller v. Rich*, 925 F. Supp. 459, 461 (N.D. Tex. 1995).

[23]*Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) ("A decision to grant leave is within the discretion of the court, although if the court lacks a substantial reason to deny leave, its discretion is not broad enough to permit denial.").

[24]*Jebaco Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 318 (5th Cir. 2009) ("Viewing the facts as pled in the light most favorable to the nonmovant, a motion to dismiss or for a judgment on the pleadings should not be granted if a complaint provides 'enough facts to state a claim to relief that is plausible on its face.'") (internal citation omitted).

[25]*Twombly*, *supra* note 20, at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level ... .").

[26]*Lormand v. US Unwired*, 565 F.3d 228, 257 (5th Cir. 2009).

[27]Hittner, *supra* note 16, § 9.182.

[28]FED. R. CIV. P. 15 states that the right to amend without leave of court expires 21 days after service of a motion to dismiss.

[29]Unlike a motion to dismiss for failure to state a claim, considering evidence outside the pleadings does not convert a motion to dismiss for lack of subject-matter jurisdiction into a motion for summary judgment.

[30]*MD Physicians & Associates v. St. Bd. of Ins.*, 957 F.2d 178, 180–181 (5th Cir. 1992) (characterizing subject-matter jurisdiction as the court's power to hear the case).

[31]*See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[32]*Simon v. WalMart Stores*, 193 F.3d 848, 850 (5th Cir. 1999).

[33]*Id.* at 850 ("Federal courts may examine the basis of jurisdiction sua sponte, even on appeal.").

[34]FED. R. CIV. P. 12(b)(1).

[35]*Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 566 (N.D. Tex. 1997). The burden is opposite when the plaintiff moves to remand a case and challenges the court's subject-matter jurisdiction. If the defendant contends that the court has subject-matter jurisdiction, the defendant bears the burden of proving subject-matter jurisdiction. *See Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001) (addressing the burden when the case has been removed to federal court).

[36]*See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

[37]*Robinson v. TCI/US West Communications*, 117 F.3d 900, 904 (5th Cir. 1997).

[38]*Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

[39]*Corfield v. Dallas Glen Hills LLP*, 355 F.3d 853, 857 (5th Cir. 2003) ("We therefore review the district court's dismissal for lack of subject matter jurisdiction de novo.").

[40]*MD Physicians*, *supra* note 30, at 181.

[41]*United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009).

[42]Childress and Davis, *supra* note 1, at 2–28.

[43]*Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994).