

New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 234—NO. 110

THURSDAY, DECEMBER 8, 2005

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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

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Rule 12(e)—New Life for the Motion for a More-Definite Statement

The near-dormant motion for a more definite statement under Federal Rule of Civil Procedure 12(e) may be experiencing a renaissance of sorts.

Judges in the U.S. District Court for the Southern District of New York have frequently referred to this tool for clarifying ambiguous pleadings as “generally disfavored” because of its “dilatatory effect,”¹ and some recent decisions from courts in the Southern District have persisted in this characterization.²

But other courts have recently been more receptive to Rule 12(e) motions, and have read the rule more expansively, offering the prospect of a potentially useful tool for defendants seeking to find greater meaning in skeletal complaints.

‘Swierkiewicz’ and Rule 12(e)

The re-emergence of the motion for a more definite statement can be traced to the Supreme Court’s 2002 decision in *Swierkiewicz v. Sorema N.A.*,³ which held that Rule 8 means what it says when it calls for “a short and plain statement of the claim” and eschews any requirement for “technical forms of pleading.” The court noted that the simplified pleading

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requirements of Rule 8 rely on the correspondingly liberal scope of discovery and on the availability of summary judgment to identify facts and issues in dispute, and to weed out meritless claims. It further observed that “[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.” That rule provides in pertinent part that “[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more-definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.”

The ‘Pelman’ Trilogy

The recent appellate and district court decisions in *Pelman v. McDonald’s Corp.* illustrate the newly expanded role of the

motion for a more definite statement and the degree to which such motions go hand-in-glove with Rule 12(b)(6) motions challenging the sufficiency of the allegations in a complaint. The plaintiffs in *Pelman*, two minors suing on behalf of a putative class, claimed that their obesity and other health problems resulted from their consumption of McDonald’s food. They asserted claims against the fast-food chain under New York’s Consumer Protection Act for false advertising and deceptive trade practices.

Southern District Judge Robert W. Sweet initially dismissed the plaintiffs’ amended complaint, finding that, among other defects, the plaintiffs had failed to draw an adequate causal connection between their consumption of McDonald’s food and their injuries, because they had not alleged what other food they had eaten; how much they had exercised; and whether they had a family history of the illnesses they attributed to their consumption of McDonald’s food. He also held that their allegation that McDonald’s engaged in a “long-term deceptive [advertising] campaign” to create the false impression that its food was nutritious, was fatally vague and conclusory.⁴

On appeal, the U.S. Court of Appeals for the Second Circuit reversed Judge Sweet’s dismissal of plaintiffs’ deceptive trade practices claim. It held that the district court had exceeded the limited scope of Rule 8(a) in requiring the plaintiffs to supply information about

their non-McDonald's eating habits, exercise and family health history, noting that such information would be more appropriately sought through discovery. It also held that the district court had erred in dismissing the plaintiffs' claims concerning the advertising campaign for being vague and conclusory. Relying directly on *Swierkiewicz*, the appellate court observed that for claims such as these, which need not be pleaded with particularity under Rule 9(b), "the cure for such deficiencies...is a motion for a more definite statement under Rule 12(e)...rather than dismissal."⁵

McDonald's Motion

Taking its cue from the Second Circuit, McDonald's promptly followed the remand to the district court with a motion for a more-definite statement pursuant to Rule 12(e). Specifically, McDonald's sought an order directing plaintiffs to: (1) identify each advertisement or statement about which they were complaining; (2) explain why each was materially deceptive; (3) confirm that they saw or heard each advertisement or statement; and (4) describe how it injured each plaintiff. Judge Sweet granted that motion in part, directing the plaintiffs to supply a more definite statement as to which of McDonald's advertisements were deceptive and what that deception was, how they learned of the allegedly deceptive advertising schemes, and the nature of the injuries they suffered "by reason of" the deceptive schemes.

Judge Sweet began his analysis with the observation that Rule 12(e) applies only in the limited circumstances where a complaint is sufficient to survive a motion to dismiss but is so vague and ambiguous that the answering party cannot respond with even the simple denial authorized by Rule 8(b).⁶ He further cautioned against permitting a motion for a more definite statement to superimpose the heightened pleading requirements of Rule 9(b) on

claims subject only to the notice pleading standards of Rule 8(a), concluding that it is appropriate to require additional detail regarding such claims only where the absence of those details renders the claim unintelligible. He explained that the questions before the court were: whether the allegations were so unintelligible that McDonald's could not reasonably respond to them; and, if so, what additional details would permit McDonald's to answer.

Under that framework, Judge Sweet determined that the complaint's lack of specificity concerning the allegedly deceptive advertisements or statements rendered the complaint vague and conclusory. He held that "[w]ithout information as to which of McDonald's representations comprised the nutritional schemes alleged to have injured the plaintiffs, McDonald's can neither admit, nor in good faith deny," the alleged violations. Accordingly, he ordered that the plaintiffs identify those advertisements that "collectively amount to the alleged deceptive nutritional scheme."⁷ Judge Sweet also ordered the plaintiffs to explain how the advertisements were deceptive, accepting McDonald's argument that it could not respond to the allegation of deceptiveness without notice of why the plaintiffs claimed the advertisements were deceptive.

Judge Sweet denied that aspect of McDonald's motion demanding that the plaintiffs confirm that they had seen or heard each of the allegedly deceptive advertisements or statements, observing that the Second Circuit had already found the complaint legally sufficient without such an allegation, and that the absence of this information did not impair McDonald's ability to interpose a good faith response. He did, however, order plaintiffs to specify how it was that they became aware of the allegedly deceptive nutritional schemes in recognition of the statutory requirement that their injuries be "by reason of" such a scheme. Finally, he ordered that the plaintiffs outline the

injuries they had suffered, although he declined to order that they describe how each of the advertisements caused those injuries, again because this information was neither statutorily required nor necessary for McDonald's to formulate a response.

Other 12(e) Cases

Although Judge Sweet's decision in *Pelman* constitutes the most robust recent interpretation of the relief available under a motion for a more definite statement, Rule 12(e) has been used successfully in other recent cases to compel plaintiffs to flesh out their claims, particularly where a dispositive motion has been unsuccessful.

For example, in *Nina Industries, Ltd. v. Target Corp.*,⁸ an action in which the plaintiffs claimed that defendants had breached various contracts for the purchase of textiles manufactured by the plaintiffs, defendants moved for summary judgment arguing that the complaint identified only purchase orders rather than the actual contracts that plaintiffs claimed had been breached. Defendants asserted that they had unsuccessfully sought that information through document requests, a deposition and contention interrogatories (which the court pointed out had been served without authorization).

Southern District Judge Jed S. Rakoff (who authored the Second Circuit opinion in *Pelman*) observed that the remedy for this lack of specificity was neither a motion for summary judgment nor a motion to dismiss, but rather a motion for a more definite statement. At oral argument on the summary judgment motion, he directed the plaintiffs to specify a complete set of the contract terms they claimed defendants had breached. After plaintiffs did so, and following additional argument on the summary judgment motion, Judge Rakoff determined that they had provided adequate notice to the defendants of the

contract claims at issue, and denied the summary judgment motion to the extent that it was predicated on the absence of such notice.⁹

'Agilent Tech. v. Micromuse'

The defendant in *Agilent Technologies, Inc. v. Micromuse, Inc.*,¹⁰ brought its motion for a more-definite statement as an alternative to a motion to dismiss the patent infringement claims asserted against it in that suit. The only allegations in the complaint that pertained to defendant's liability consisted of allegations that the defendant has "directly infringed and continues to infringe, has induced and continues to induce, and/or has committed and continues to commit acts of contributory infringement of" each of two patents identified by the plaintiff. Defendant sought dismissal of the complaint, arguing that the complaint failed to specify any infringing product or conduct.

Acknowledging that "it would be difficult to frame a more skeletal pleading," Judge Sweet nevertheless declined to dismiss the complaint. He reasoned that the absence of detail was not such that it could be said that the plaintiff could prove no set of facts that would entitle it to relief, nor was the complaint so vague and ambiguous as to be unintelligible. Rather, he held that, in a case such as this, where the complaint contains legally sufficient notice of a claim so as to pass muster under Rule 8, but does not contain sufficient information to allow defendant to frame a responsive pleading without risk of prejudice, the proper remedy is a motion for a more-definite statement. Noting that courts have made particular use of Rule 12(e) in patent infringement cases where the complaint does not specify the allegedly infringing products, Judge Sweet held that the defendant was entitled to know which of its products or services were alleged to have infringed the plaintiff's patents, and ordered that plaintiff set forth a more definite state-

ment of that information.

To the extent that these cases indicate a shift toward a more-active role for Rule 12(e) motions in the pretrial litigation process, that trend is far from universal. Much of the longstanding hesitance to encourage motions for a more definite statement is still evident even following *Swierkiewicz*. For example, Southern District Judge Shira A. Scheindlin issued a decision last year in *Asip v. Nielsen Media Research Inc.*, in which she held that if a "complaint complies with the liberal pleading requirements of [Rule 8(a)], then the Rule 12(e) motion should be denied."¹¹

More recently, in *Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*,¹² Judge Scheindlin demonstrated a greater willingness to entertain Rule 12(e) motions. There, in denying a motion to dismiss in that products liability litigation, she observed that a motion for a more-definite statement was the proper vehicle for the moving defendants if they wished to learn which plaintiffs had been exposed to MTBE, when and where they were exposed, and whether they had developed any physical manifestation of MTBE contamination. But many courts, including those that have granted motions for a more-definite statement, still caution that the purpose of Rule 12(e) is to "remedy unintelligible pleadings, not merely to correct for lack of detail"¹³ and that "allegations that are unclear due to lack of specificity are more appropriately clarified by discovery."¹⁴

Conclusion

Despite the current lack of consensus regarding the appropriate use of the motion for a more definite statement, some courts are increasingly inclined to grant such motions. The liberal pleading requirements of Rule 8, coupled with the presumption against early use of contention interrogatories in the Southern District of New York,¹⁵ make the motion for a more-definite statement a potential-

ly useful tool in fleshing out bare-bones allegations in a complaint early in the process. Defendants faced with such sparsely worded complaints should consider including a motion for a more-definite statement under Rule 12(e) as an alternative grounds for relief when moving for dismissal under Rule 12(b)(6). Such motions should list the additional details sought and should explain why it is that the defendant cannot formulate an answer to the allegations in the complaint as drafted.



1. See, e.g., *Markovic v. New York City Sch. Constr. Auth.*, 2000 WL 1290604, at *3 (SDNY Sept. 13, 2000) (Schwartz, J.); *Federal Home Loan Mortgage Corp. v. Portnoy*, 1992 WL 320813, at *4 (SDNY Oct. 27, 1992) (Patterson, J.).

2. See, e.g., *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 2005 WL 1500893, at *2 (SDNY June 24, 2005) (Scheindlin, J.).

3. 534 US 506 (2002).

4. 2003 WL 22052778, at *8 (SDNY Sept. 3, 2003).

5. 396 F3d 508, 512 n.5 (2d Cir. 2005).

6. 2005 WL 2739251, at *2 (SDNY Oct. 24, 2005) (quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1376 at 311 (3d ed. 2004)).

7. *Id.* at *4.

8. 2005 WL 323745 (SDNY Feb. 8, 2005) (Rakoff, J.).

9. *Id.* at *1. The court did grant defendants summary judgment on plaintiffs' claim for consequential damages, which were both too speculative to stand and not recoverable under New York law.

10. 2004 WL 2346152 (SDNY Oct. 19, 2004) (Sweet, J.).

11. 2004 WL 315269, at *2 (SDNY Feb. 18, 2004) (quotation marks and citations omitted). See also *Home & Nature Inc. v. Sherman Specialty Co.*, 322 FSupp2d 260, 265 (EDNY 2004) (Spatt, J.) ("[A] Rule 12(e) motion should be denied if a complaint comports with the liberal pleading requirements of Rule 8(a).")

12. 379 FSupp2d 348, 431 (SDNY 2005).

13. *Pelman*, 2005 WL 2739251, at *2 (quotation marks and citation omitted).

14. *In re Natural Gas Commodity Litig.*, 358 FSupp2d 336, 346 (SDNY 2005) (Marrero, J.) (quotation marks and citations omitted).

15. See SDNY Local Civ. R. 33.3.