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In Search of the First-Round Knockout

A Rule 12(b) Primer

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Boxing enthusiasts define success not just by wins and losses but also by knockouts. Many of the greatest fighters in the history of boxing—Rocky Marciano, Mike Tyson, Jack Dempsey, and Sugar Ray Robinson—were known for their knockout punching power. Within the category of knockouts, the gold standard is the first-round knockout, the moment when stunned fans watch a fighter take the opponent out of the contest before either of them has broken a sweat.

Some famous fights ended this way: Joe Louis’s knockout of Max Schmeling in 1938 and Mike Tyson’s knockouts of Marvis Frazier in 1986 and Michael Spinks in 1988. Indeed, Tyson made the first-round knockout into something of an art form, getting a technical knockout in 1989 over challenger Carl Williams after only 93 seconds. It takes longer for most people to brush their teeth.

In the same way, the gold standard for a defendant in a civil lawsuit is to win a case in the first round. A quick and decisive victory saves the client time, money, hassle, and worry. It avoids the burdens and risks of discovery, trial, and appeal. And it delivers a powerful cautionary message to anyone else thinking about picking a fight: Go ahead and hit us with a lawsuit; we hit back.

Get Ready to Rumble

The principal mechanism for achieving these much-sought-after first-round knockouts comes to us via Rule 12(b) of the Federal Rules of Civil Procedure and its state law counterparts. Manny Pacquiao, a champion across multiple weight divisions, said: “If you work hard in training, the fight is easy.” So let’s head to the gym, spend some time sparring with the text of Rule 12(b), and get ready to rumble.

To begin, a few general observations about Rule 12(b) are in order. The rule anticipates that most of the defenses listed there, specifically those brought under parts (2)–(5), will be raised early in the first round, either in a pre-answer motion or in the answer itself. See Fed. R. Civ. P. 12(b) and 12(h)(1)(B). That includes motions for lack of personal jurisdiction, improper venue, insufficient process, or insufficient service of process.

A close look at those motions confirms that they generally are not knockout punches. Indeed, most of them may amount to little more than glancing blows. A plaintiff can typically solve problems related to improper venue, insufficient process, or insufficient service of process without much difficulty. Sure, the plaintiff may...
wince at the hit, but the plaintiff will remain standing and the fight will go on. Like a boxer whose punch strikes his opponent’s raised gloves, a defendant may wonder whether it was worth the expenditure of energy.

Lack of Personal Jurisdiction

Rule 12(b)(2), lack of personal jurisdiction, has somewhat greater potential to send an opponent stumbling. A motion under this rule challenges the court’s authority to render judgment regarding the defendant. A court may have personal jurisdiction over the defendant either as a matter of general jurisdiction (for example, where a corporation has its principal place of business) or as a matter of specific jurisdiction (where the defendant has sufficient minimum contacts with the forum to make the exercise of jurisdiction fair). See Daimler AG v. Bauman, 571 U.S. 117 (2014); Int’l Shoe v. Washington, 326 U.S. 310 (1945).

A defendant who contests personal jurisdiction must take care to preserve rights under Rule 12(b)(2). The defendant must raise the issue promptly and must avoid implicitly waiving the objection by filing appearances or other submissions that reasonably suggest the defendant will defend against the suit on the merits or that “cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking.” Gerber v. Riordan, 649 F.3d 514, 515 (6th Cir. 2011).

If you have a meritorious motion under 12(b)(2), you’ll therefore need to bring it immediately and cautiously. The more complicated question is whether you should bring it at all. The answer to that question lies in the answers to two others.

The first question is, If you win, will the plaintiff refile? The answer to that question will typically be “yes,” and sometimes the plaintiff will have more than one option for where to do it. In rarer cases, however, the answer will be “no,” or at least “probably not.” As discussed later, a statute of limitations problem may have arisen while the case was pending in the wrong court. Or it may turn out that the only alternative forum is practically unworkable because of expense or inconvenience. If the plaintiff can’t—or probably won’t—refile, then the decision is easy: Go for the knockout.

The second question is, If you successfully challenge personal jurisdiction and the plaintiff does refile, then are you better off in the new forum than you were in the old one? It might seem
as though the answer to this will always be “yes” because the plaintiff has clear incentives to file in the court most favorable to the plaintiff. But things are not so simple.

Assume, for example, that the plaintiff files in a forum where the plaintiff likes the jury pool; the defendant successfully challenges personal jurisdiction; and the plaintiff refriles in a court that has personal jurisdiction over the defendant—but that also has a significantly more forgiving pleading standard or a bench made up mostly of judges hostile to defendants. The defendant may feel a bit like the heavyweight Tyson Fury, who in a 2009 fight managed to punch himself in the face.

It’s critical to think these things through and not just reflexively file a motion because it’s available. As with boxing, a one-move strategy in litigation is a seriously bad idea. It can put you on the canvas, dizzily trying to figure out how you got there.

In sum, Rule 12(b)(2) has greater knockout potential than its immediate neighbors, 12(b)(3)–(5). But not often. And usually not much.

**Lack of Subject Matter Jurisdiction**

The same generally holds true for motions brought under Rule 12(b)(1). This rule allows a defendant to file a motion to dismiss for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction, and subject matter jurisdiction relates to the foundational issue of the court’s power to hear the case at all. The right to bring the motion can’t be waived, as the text of Rule 12 reflects.

A defendant can accordingly bring a 12(b)(1) motion at any time, regardless of the stage of the litigation. See Fed. R. Civ. P. 12(h)(3). With that said, it’s almost always best for the defendant to move as soon as possible, even though the rule doesn’t require it. After all, the farther along the case gets, the more difficult and inefficient it becomes to stop everything, dismiss the lawsuit, allow the plaintiff to refile elsewhere (if that’s possible), and start over. The defendant should cut off the ring and put a quick end to things.

It might seem as if the defendant would have an incentive to delay filing a 12(b)(1) motion in one circumstance: where doing so would put the plaintiff’s date of refiling in state court beyond the applicable statute of limitations. If the plaintiff can’t refile as a result, that would add a lot of knockout power to the motion. That strategy doesn’t work in many states because of so-called “savings statutes” that under these circumstances toll the limitation period. Still, some states don’t have such statutes, and those that do have adopted very different terms and conditions, so it’s worth looking into in your particular case, in your particular state. See Betsy Chance, Diana Comes & Mac Plosser, *What Does Your Dismissal Without Prejudice Mean? A Fifty State Survey of Savings Statutes, Drug & Device Law* (Oct. 18, 2018).

It may feel ethically improper for a lawyer to delay in alerting a court to its lack of subject matter jurisdiction solely in order to gain a strategic advantage for the client. Perhaps strangely, however, many ethics codes don’t appear to prohibit it, at least explicitly. For example, the express terms of neither ABA Model Rule of Professional Conduct 3.2 (Expediting Litigation) nor 3.3 (Candor Toward the Tribunal) seem to forbid the strategy. With that said, most lawyers probably wouldn’t relish confessing to a judge who has grumpily discovered a failure of subject matter jurisdiction that they knew about it for some time but didn’t say anything.

**A factual attack, like a counterpunch, takes a little more time to develop.**

As a practical matter, most defendants don’t need to worry about when to file a 12(b)(1) motion because federal courts so aggressively police their own subject matter jurisdiction. The referee ended the Tyson-Williams fight by concluding that Williams couldn’t go on—even though he woozily managed to get back on his feet. In the same spirit, if reasons exist to think subject matter jurisdiction is absent, federal judges will usually step in on their own initiative and take a close look at things before allowing the fisticuffs to continue.

It should be noted that a defendant’s 12(b)(1) motion can raise either a “facial” or a “factual” challenge to federal subject matter jurisdiction. A facial attack asserts that the plaintiff’s allegations, even taken as true, don’t suffice to invoke the court’s jurisdiction. In contrast, a factual attack challenges the accuracy of the jurisdictional allegations in the complaint.

The difference resembles the one between a jab and a counterpunch. Like a jab, a facial attack is a quick and preemptive strike against the court’s jurisdiction, viewing the complaint in the light most favorable to the plaintiff. A factual attack, like a counterpunch, takes a little more time to develop. The plaintiff gets a swing in, alleging facts that would establish subject matter jurisdiction if true. But then the defendant comes back hard with a dispositive punch of its own, explaining why the alleged facts are wrong.

In the vast majority of cases, a motion brought under 12(b)(1) won’t give the defendant a knockout. It will just move the fight to a different venue. So, even though a successful motion under
these rules may start a 10 count, a persistent plaintiff with a viable venue in which to sue will be able to recover and may rally to win. Archie Moore ultimately prevailed in his 1958 fight with Yvon Durelle, even though Durelle had knocked Moore down repeatedly in the earlier rounds. Durelle was clearly winning. Until he wasn’t.

**Someone Necessary to the Litigation Has Not Been Joined**

Rule 12(b)(7) allows a party to argue that someone who is necessary to the litigation under Rule 19 has not been joined. The rule is invoked relatively infrequently. And it packs a pretty lightweight punch for three reasons.

First, 12(b)(7) applies to a narrow category of nonparties: those that Rule 19 deems indispensable. A nonparty isn’t indispensable just because it would be a good idea to have them as part of the case. Rather, a nonparty qualifies as indispensable only if (a) the court can’t provide comprehensive relief without the nonparty or (b) the nonparty claims an interest relating to the lawsuit’s subject and either there will be no complete relief for the existing parties without the nonparty or the court would be unable to protect the nonparty’s interest without the nonparty’s presence in the suit. See Fed. R. Civ. P. 19(a)(1). Given this definition, and given the likelihood that someone who fits it will already be part of the lawsuit, a truly indispensable nonparty is almost as rare as tea service at a pre-fight weigh-in.

A Motion for Failure to State a Claim

This leaves us with the true heavyweight champion of Rule 12—a motion for failure to state a claim under 12(b)(6). On its face, the rule doesn’t appear that formidable. It effectively enforces the pleading requirement of Rule 8, which demands only “a short and plain statement of the claim showing that the pleader is entitled to relief.” (A greater level of specificity is required by Rule 9, but it applies to only a narrow category of claims.)

A fighter can up his game by working with a great trainer. The legendary Constantine “Cus” D’Amato trained three fighters who were ultimately inducted into the Boxing Hall of Fame and mentored other trainers who oversaw the careers of still more great pugilists. In this connection, Rule 12(b)(6) built some serious muscle by working with two trainers named *Twombly* and *Iqbal*.

All litigators know the basic story of *Twombly* and *Iqbal*, just as all boxing fans know the story of Jack Dempsey coming back from retirement. For many years, the pleading standard under Rule 8 was set by *Conley v. Gibson*, 355 U.S. 41 (1957). That case interpreted Rule 12(b)(6) as standing for the proposition that a court should not dismiss a complaint unless it appeared beyond doubt that the plaintiff could prove no set of facts that would entitle the plaintiff to relief.

Then *Twombly* came along and, Firpo-like, knocked *Conley* out of the ring. When plaintiffs’ lawyers tried to read *Twombly* narrowly so that *Conley* could climb back in and resume the battle, *Iqbal* finished things off. The Supreme Court declared *Conley* retired. There was a new champion in town, and its name was plausibility.
Twombly and Iqbal introduced a standard that requires a court to put aside the legal allegations of a complaint as if they were just pre-fight trash talking, to focus on the factual allegations and to determine whether those factual allegations state a claim that is plausible on its face. Iqbal further clarified that these heightened pleading standards apply to all federal court cases under Rule 8. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

As with all heavyweights, debates have ensued as to just how much punching power Rule 12(b)(6) really has, even with all the bulk added by Twombly and Iqbal. Empirical attempts to determine the effects of those cases have reached mixed results. At least one early study found significantly higher rates of successful 12(b)(6) motions after these decisions, particularly in cases involving civil rights claims. Patricia W. Hatamyar, The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?, 59 Am. Univ. L. Rev. 553 (Feb. 2010). Such findings align with common sense, because (a) civil rights cases often turn on information the defendant has sought to conceal, (b) getting at that information requires discovery, and (c) discovery is usually unavailable to a plaintiff who hasn’t stated a claim.

Nevertheless, more recent studies have cast doubt on the impact of Twombly and Iqbal, finding no significant change in dismissal rates, settlement rates, or filings, though there has been a rise in pleading activity. See, e.g., William H. J. Hubbard, The Empirical Effects of Twombly and Iqbal (Coase-Sandor Working Paper Series in L. and Econ., Working Paper No. 773, 2016). These studies hypothesize that Twombly and Iqbal may merely have written into doctrine that which was already going on in practice: Plaintiffs rarely file lawsuits if they don’t have enough facts to state a plausible claim. Id. at 34–35.

Still other studies have shown that Twombly and Iqbal have had different consequences for different types of plaintiffs. Corporate and government plaintiffs have substantial resources at their disposal and so are better equipped to work around the obstacles posed by the elevated pleading standard. Individual plaintiffs, especially those representing themselves, not so much. Alexander A. Reinert, Measuring the Impact of Plausibility Pleading, 101 Va. L. Rev. 2117 (2015). Because there is no weight limit on how big a heavyweight can be, not everyone in that class brings the same heft into the ring: the same holds true for plaintiffs in civil cases.

Every boxer knows that the location of the fight can make a big difference, and so it goes with motions to dismiss under 12(b)(6) and its state equivalents. Variations in approach exist even among federal judges: Some adhere tightly to the demand for a showing of plausibility; others cite the Supreme Court’s observation that judges should draw on their experience in deciding these motions. For an example of the former, see Bradley v. ARIAD Pharmaceuticals, 842 F.3d 744 (1st Cir. 2016); for an example of the latter, see Ebner v. Fresh, Inc., 838 F.3d 958 (9th Cir. 2016). The first order of business for any defendant pondering a 12(b)(6) motion in federal court is to find out how the assigned judge thinks about such motions.

State courts remain divided in their approach to the issue. Before Twombly and Iqbal, there were 23 “replica” states (those that had adopted the Federal Rules of Civil Procedure for their state system), while four others and the District of Columbia also mirrored the language of Rule 8. Danielle Lusardo Schantz, Access to Justice: Impact of Twombly & Iqbal on State Court Systems, 51 Akron L. Rev. 951, 958–59. Within 10 years after the decisions, 12 state supreme courts of the 30 replica jurisdictions had considered the reinterpretation of their pleading standards. Id. at 964–65. Of those 12, five had decided to follow the federal court system in adopting plausibility pleading, while seven had asserted their commitment to notice pleading. Id. at 965. So, despite its disqualification from federal court contests, Conley remains a scrappy contender in some states.

Even where a court takes the most hostile approach to complaints anticipated by Twombly and Iqbal, it does not necessarily follow that the defendant should rush to get a motion to dismiss on file. A weak 12(b)(6) motion opens you up to attack, like a wild swing that drops your guard and offers up your face as a ready target. An effort to go on offense leaves you ducking and defending.

Consider: An unsuccessful motion under 12(b)(6) wastes precious time and resources. It may alert the plaintiff to flaws in the plaintiff’s case that are fixable in the early going and that the defendant can better exploit through a later summary judgment motion under Rule 56. It may make the case harder to settle. It may embolden the plaintiff. And why wouldn’t it? You’ve just given the plaintiff something to celebrate. “I’d like to start this fight by swinging hard, missing, and getting knocked down,” said no boxer, ever.

Conclusion

Boxing has been called “the sweet science,” a term that goes back to the 19th century but that was made famous by A. J. Liebling’s 1956 book of that title. It may seem like a puzzling nickname for a sport that is so gritty, unforgiving, brutal, and, well, unsweetened. But the phrase refers to the capacity of the fighter to remain calm, poised, detached, and strategic in the face of the opponent’s attacks. The sort of thing that Ernest Hemingway, a boxing aficionado, called “grace under pressure.” Litigators could do a lot worse than to strive for a similar show of that virtue.

Of course, in the heat of battle, such self-discipline is not always easy. Sometimes it may even feel impossible. But perhaps litigators can find additional inspiration in a favorite saying of Muhammad Ali’s: “Impossible is nothing.”