

# NOTICE PLEADING IN THE MASS TORT ARENA:

## What is Sufficient Notice?

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It is becoming increasingly common for a complaint to bring dozens of claims by dozens of plaintiffs against dozens—if not hundreds—of defendants. From the plaintiff's perspective, such pleading is often a necessary evil in complex matters, such as exposure cases, until the proper defendants are identified through the discovery process. However, from the defendant's perspective, such "shotgun" complaints make it nearly impossible to identify which, if any, of the causes of action apply to each defendant, and often result in an enormous waste of time and resources. The question arises: In Alabama, how much information must a plaintiff provide in his or her complaint to meet the requirements of the *Alabama Rules of Civil Procedure*?

*Alabama Rule of Civil Procedure* 8 provides that a complaint "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." *Ala. R. Civ. P.* 8. A continuous debate in the arena of mass tort cases is how specific a complaint must be to satisfy the requirements of *Alabama Rule of Civil Procedure* 8.

The Committee Comments to *Alabama Rule of Civil Procedure* 8 provide, "Although Rule 8(a) eliminates

many technical requirements of pleading, it is clear that it envisages the statement of *circumstances, occurrences, and events* in support of the claim presented." *Ala. R. Civ. P.* 8, committee's comments (emphasis added). As stated by the Alabama Supreme Court:

We cannot . . . ignore the ultimate goal of pleadings under the Alabama Rules of Civil Procedure: to provide fair notice to adverse parties of the claim against them and the grounds upon which it rests. The liberality with which the Rules are construed then must be balanced against the requisites of fair notice to adverse parties and strict adherence to statutorily prescribed procedures.

*Bullen v. Brown*, 535 So. 2d 76, 80 (Ala. 1988) (internal citations omitted); see also *Carter v. Calhoun County Bd. of Educ.*, 345 So. 2d 1351, 1352 (Ala. 1977). A complaint which fails to give a defendant fair notice fails to comply with Rule 8. *Bullen*, 535 So. 2d at 79.

Like the Alabama rule, *Federal Rule of Civil Procedure* 8 also requires "a short and plain statement of the claim showing that the pleader is entitled to relief, and [] a demand for judgment for the relief the pleader seeks." *Fed. R. Civ. P.* 8. Because

Alabama Rule 8 is "identical in relevant aspects to the corresponding *Federal Rule of Civil Procedure*," *Bruck v. Walter Corp.*, 470 So. 2d 1141, 1143 (Ala. 1985), "cases construing the *Federal Rules of Civil Procedure* are authority for construction of the *Alabama Rules of Civil Procedure*." *First Citizens Bank of Luverne v. Jack's Food Systems, Inc.*, 602 So. 2d 374, 376 (Ala. 1992); *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 103 (Ala. 1981).

As early as 1959, federal courts warned that even under the "notice" pleading standard, pleadings must be presented in adequate detail "so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery." *Hoshman v. Esso Standard Oil Co.*, 263 F.2d 499, 501 (5<sup>th</sup> Cir. 1959). "[I]t is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the Court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery." *Fullman v. Graddick*, 739 F.2d 553, 556 (11<sup>th</sup> Cir. 1984).

Recently, federal courts have been forced to address the propriety of "shotgun" complaints in the context of mass tort cases. In *Magluta v. Samples*, 256 F.3d 1282, 1284 (11<sup>th</sup> Cir. 2001), the Court

identified a shotgun complaint as one ignoring the “short and plain statement” requirement by identifying multiple defendants and charging all defendants in each count. As stated by the Court, a shotgun complaint “is replete with allegations that ‘the defendants’ engaged in certain conduct, making no distinction among the [various] defendants charged, though geographic and temporal realities make it plain that all of the defendants could not have participated in every act complained of.” *Id.* In such pleadings, “[t]he resulting difficulty in sorting through allegations almost drowns a meritorious claim in a sea of marginal ones.” *Beckwith v. City of Daytona Beach Shores, Florida*, 58 F.3d 1554 (Ala. 1995). As stated by the Southern District of Alabama,

“‘Shotgun’ pleadings, which are those pleadings that do not inform the Court or a Defendant of an intelligible claim, are deplored and are to be ordered to be repleaded as it is the Eleventh Circuit’s experience that ‘a civil case framed with shotgun pleadings, on close scrutiny . . . simply [falls] apart.’”

*Lucy v. Clarke County, Alabama*, 2000 WL 549983, \*2 (S.D. Ala. 2000), citing *Cramer v. Florida*, 117 F.3d 1258, 1263 (11<sup>th</sup> Cir. 1997); see also *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 903 (11<sup>th</sup> Cir. 1996) (shotgun complaint was “so muddled that it was difficult to discern what the appellants [were] alleging beyond the mere names of certain causes of action.”).

The Eleventh Circuit Court of Appeals has also addressed shotgun pleading in a number of recent opinions. See, e.g., *Byrne v. Nezhat*, 261 F.3d 1075 (11<sup>th</sup> Cir. 2001) (holding that shotgun complaints impede the efficiency of the court system and that monetary sanctions are valid when particularly egregious abuses are present in shotgun pleadings). In *Magluta*, 256 F.3d at 1284, the Court noted that shotgun pleadings have been repeatedly condemned by the court, and stated, “The toleration of complaints such as this one does great disservice to the administration of civil justice.” In *Ebrahimi v. City of Huntsville*, 114 F.3d 162 (11<sup>th</sup> Cir. 1997), the Court stated in a discussion of shotgun pleadings that it “is particularly important for district courts to undertake

the difficult, but essential, task of attempting to narrow and define the issues from the earliest stages of the litigation” in order to ensure “the orderly, efficient, and economic disposition of disputes.” *Id.* at 165. The Court went on to say, “Experience teaches that when district courts abdicate this responsibility, issues are not joined, discovery is not controlled, the trial court’s docket becomes unmanageable, the litigants suffer, and society loses confidence in the court’s ability to administer justice.” *Id.* As similarly stated by the Court in *Byrne*:

Such disjointed pleadings make it difficult, if not impossible, to set the boundaries for discovery. Hence, discovery disputes are inevitable. Resolving them can be time-consuming. If the court does not intervene and require the parties to narrow the issues, the discovery disputes continue unabated—until a motion for summary judgment or a pretrial conference brings them to a halt. At that point, the court is confronted with the time-consuming task it avoided earlier—rearranging the pleadings and discerning whether the plaintiff has stated a claim, or claims, for relief, and whether the defendant’s affirmative defenses are legally sufficient. If the court performs these tasks, it will have to strike all of the allegations of the complaint and answer that are insufficient, immaterial or impertinent—so that when the tasks are finished, the complaint consists of a “short and plain statement of the claim,” or claims, for relief, and the answer states “in short and plain terms the [defendant]’s defenses to each claim asserted.”

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Why, then, would a lawyer engage in shotgun pleading? Plaintiffs file shotgun complaints and include frivolous claims to extort the settlement of a meritorious claim; worse yet, they file shotgun complaints to extort the settlement of unmeritorious claims . . . .

\* \* \*

If use of an abusive tactic is deliberate and actually impedes the orderly litigation of the

case to-wit, obstructs justice, the perpetrator could be cited for criminal contempt.

*Byrne*, 261 F.3d 1129-30, 1131; see also *Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11<sup>th</sup> Cir. 1991). As stated succinctly by President Lincoln, “In law it is a good policy never to plead what you need not, lest you oblige yourself to prove what you cannot.” Abraham Lincoln, Letter to Usher F. Linder, February 20, 1848 in *The Quotable Lawyer* 241 (D. Shrager & D. Frost, eds. 1986), cited in *Beckwith*, 58 F.3d at 1567.

In at least two recent cases, the District Court for the Northern District of Alabama followed the Eleventh Circuit’s mandate and dismissed, *sua sponte*, such shotgun pleadings. In *Sidney Chancellor, et al. v. Air Liquide America Corp., et al.*, Case No. CV-04-BE-2554-S (N.D. Ala., Oct. 8, 2004), Judge Karon O. Bowdre *sua sponte* dismissed the plaintiffs’ complaint without prejudice, due to the plaintiffs’ failure to state a claim upon which relief could be granted and failure to plead with the required particularity. The Court stated that the complaint, “[a]t best . . . suggests only that plaintiffs have respiratory illnesses, that plaintiffs were exposed to silica ‘during all or part of [their] working lives . . . while working at various worksites in Alabama and other states,’ and that all seventy-five named defendants were in some way participants in the sand-blasting industry.” *Id.* at 2. Citing both *Hoshman* and *Byrne*, Judge Bowdre stated that the vague nature of the complaint “force[d] the defendants to guess what each may have done to injure the plaintiffs, and when, where, and how,” requiring “[a]ll seventy-five defendants [to] answer with abandon, pleading every conceivable affirmative defense, while simultaneously risking the possibility that they may inadvertently fail to plead the one good defense relevant to whatever as-yet-unknown specific claims against them discovery may reveal.” *Id.* In holding that dismissal was the correct approach, the Court stated:

[t]he court is acutely aware of its duty to dispose of shotgun complaints at the earliest opportunity . . . . Rather than wait until justice has been obstructed by the inadequacies of this complaint and “scarce judicial and parajudicial resources” are further wasted, the court *sua sponte* dismisses this case as to all defendants without prejudice and with leave to

refile a complaint that complies with all of the requirements of the *Federal Rules of Civil Procedure*.

*Id.* at 2-3.

Even more recently, Chief Judge U.W. Clemon in the Northern District of Alabama ordered the dismissal of *Skip Palmer, et al. v. Aero Corp., et al.*, Case No. 7:04-cv-3262-UWC (N.D. Ala., May 31, 2005) on similar grounds. The Court determined that the plaintiffs' complaint did not provide sufficient information for the 23 defendants to discern which causes of action applied to individual defendants because the complaint did not make clear "what Defendants produced which products, and the resulting causes of action related to those products." *Id.* at 2. Like Judge Bowdre, Chief Judge Clemon dismissed the case *sua sponte* with leave to refile a complaint in compliance with the *Federal Rules of Civil Procedure*. Chief Judge Clemon noted,

[a]lthough the liberal federal rules require only notice pleading, they still require a 'short and plain statement of the claim showing the pleader is entitled to relief' . . . The pleadings still must state a 'cause of action' in the sense that it must show 'that the pleader is entitled to relief; it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery.

*Id.*

## Rule 11

Beyond the havoc created as discussed above, shotgun pleadings also have the potential to subject the pleader and/or client to sanctions under Rule 11. *Alabama Rule of Civil Procedure* 11 states, in pertinent part:

The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay . . . For a willful violation of this rule an

attorney may be subjected to appropriate disciplinary action.

*Ala. R. Civ. P. 11.*

Shotgun pleadings have been found by federal courts to be violative of the substantively similar *Federal Rule of Civil Procedure* 11. As shown by the Fifth Circuit, shotgun allegations contained in a complaint are often "evidence a lack of inquiry by the plaintiffs' attorneys into the law and supporting facts." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 869 (5<sup>th</sup> Cir. 1988). An attorney has a professional responsibility to "perform a reasonably thorough and objective investigation of the facts before asserting them as the bas[is] for [a] cause[] of action." *Byrne*, 261 F.3d at 1115. As summarized by the Eleventh Circuit, sanctions are appropriate under Rule 11

(1) when a party files a pleading that has no reasonable factual basis; (2) when a party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) when a party files a pleading in bad faith for an improper purpose.

*Pelletier*, 921 F.2d at 1514 (awarding double costs and reasonable attorney fees where appeal was found to be frivolous). Simply put, Rule 11 sanctions are proper if a party "knew or should have known that the allegations in the complaint were frivolous." *Byrne*, 261 F.3d at 1117; see also *Mike Ousley Productions v. WJBF-TV*, 952 F.2d 380 (11<sup>th</sup> Cir. 1992) (imposing monetary sanctions in excess of \$4,700 for attorney's failure to make a reasonable investigation into plaintiff's claims); *Jones v. Int'l Riding Helmets, Ltd.*, 145 F.R.D. 120 (N.D. Ga. 1992) (awarding \$16,415.94 in fees and expenses to defendant where plaintiff's claims were frivolous and plaintiff's attorney failed to properly investigate those claims); *Miles v. State of Georgia Dep't. of Revenue*, 143 F.R.D. 302 (S.D. Ga. 1992) ("[I]f the attorney/party did not make a 'reasonable inquiry,' then the Court *must* impose sanctions—despite the attorney/party's good faith belief that the claims were sound.") (emphasis in original); *In re Sir John, Inc.*, 142 B.R. 524 (S.D. Fla. 1992) ("[lawyers] must *stop and think* before

filing [their papers].") (emphasis and alteration in original).

## Procedure for Challenging a Shotgun Pleading

In discouraging shotgun pleadings, the courts have outlined the methods by which an opponent should challenge such a pleading. As stated by the Eleventh Circuit:

If 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. If the motion is granted and the order of the court is not obeyed . . . the court may strike the pleading to which the motion was directed or make such order as it deems just.

*Byrne*, 261 F.3d at 1128; see also *Fikes v. City of Daphne*, 79 F.3d 1079, 1082-83 (11<sup>th</sup> Cir. 1996). Thus, "[u]nder the *Federal Rules of Civil Procedure*, a defendant faced with a [shotgun complaint] is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement." *Anderson v. District Board of Trustees of Central Florida Community College*, 77 F.3d 364, 366 (11<sup>th</sup> Cir. 1996). A defendant might style its opposition to such a shotgun pleading as a "Motion to Dismiss, or, in the Alternative, Motion for More Definite Statement." See, e.g., *Alexander v. Easy Finance of New Albany, Inc.*, 2005 WL 2674980, \*1 (N.D. Miss. 2005). The Eleventh Circuit has also instructed that a motion for summary judgment is an appropriate method to challenge a shotgun pleading:

[O]ne of the purposes of the summary judgment mechanism [] is[] to unmask frivolous claims and put a swift end to meritless litigation, which is especially pertinent where, as here, plaintiff employs a "shotgun" approach to litigation, leaving the court with the cumbersome task of sifting through myriad claims,

many of which are foreclosed by governmental immunities, statutes of limitations and similar defenses.

*Fullman v. Graddick*, 739 F.2d 553, 557 (11<sup>th</sup> Cir. 1984) (internal citations omitted).

## The Mississippi Supreme Court Takes a Stance Against Shotgun Pleadings

In 2004, the Mississippi Supreme Court decided *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004), and laid down a rule of law that is instructive to other courts struggling with the propriety of shotgun pleadings. In *Mangialardi*, an asbestos exposure case, the plaintiffs amended their complaint seven times, so that the final complaint pending before the trial court “involve[d] the claims of 264 plaintiffs against 137 named defendants who ha[d] identified approximately 600 different employers where asbestos exposure might have taken place.” *Id.* at 494. After criticizing the defendants for not filing a motion for a more definite statement or to dismiss, the court turned its attention to the plaintiffs:

Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action. Absent exigent circumstances, plaintiffs’ counsel should not file a complaint until sufficient information is obtained, and plaintiffs’ counsel believes in good faith that each plaintiff has an appropriate cause of action to assert against a defendant in the jurisdiction where the complaint is to be filed. To do otherwise is an abuse of the system, and is sanctionable.

*Id.* at 494. The court went on to say:

[The plaintiffs] don’t appear to know when they were exposed, where they were exposed, by whom they were exposed, or even if they were exposed. Presumably, when they learn this information, plaintiffs’ counsel intends to dismiss those who should not have been joined. *This is a perversion of the judicial system unknown prior to the filing of mass-tort cases.*

*Id.* at 495 (emphasis added). The Court directed the trial court to dismiss, without prejudice, the complaint of each plaintiff, unless within 45 days the plaintiff provided the defendants and trial court with “sufficient information . . . , includ[ing], at a minimum, the name of the defendant or defendants against whom each plaintiff makes a claim, and the time period and location of exposure.” *Id.* at 495.

The Mississippi Supreme Court has upheld its decision in *Mangialardi* time and again. In *Canadian National/Illinois Central Railroad Company v. Smith*, 2006 WL 416229 (Miss. 2006), the court refused to allow a complaint that treated the five plaintiffs “as a single entity, neither specif[ing] negligence or harm associated with any particular plaintiff nor explain[ing] when, where, how, or by what product any particular plaintiff was injured.” *Id.* at \*1. Similarly, the court in *3M Company v. Glass*, 917 So. 2d 90 (Miss. 2005) refused to allow a shotgun complaint, stating, “We think it reasonable to expect counsel to know *prior to filing suit* the identity of each client, the defendant each client proposes to sue, the alleged harm committed by the specific defendants against each client, and the location and period of time the harm was committed.” *Id.* at 92 (emphasis in original). The *Glass* court well summarized the *Mangialardi* “wakeup call” as a reminder to the bar that even though Mississippi is a notice-pleading jurisdiction, the rules of procedure require, at a minimum:

- (1) That each plaintiff provide “a short and plain statement of the claim” that discloses why that plaintiff “is entitled to relief,” and “a demand for judgment for the relief to which he deems himself entitled.” *Miss. R. Civ. P.* 8(a);
- (2) That “averments of time and place are material and shall be considered like all other averments of material matter.” *Miss. R. Civ. P.* 9(f);
- (3) That “each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . .” *Miss. R. Civ. P.* 10(b); and
- (4) That the “signature of an attorney [on the complaint] constitutes a certificate . . . that to the best of the attorney’s knowledge, information and belief there is good ground to support it.”

*Id.* at 93, 94.

In *3M Company v. Hinton*, 910 So. 2d 526 (Miss. 2005), the court halted the litigation before any depositions had even been taken, demanding that the 115 plaintiffs provide such minimal information in their complaints as against which of the 77 defendant(s) each plaintiff alleged a claim, the time and location of the plaintiff’s alleged asbestos exposure, and the medical condition caused by such exposure. *Id.* at 528; *see also Alexander v. Easy Finance of New Albany, Inc.*, 2005 WL 2674980 (N.D. Miss. 2005) (citing *Mangialardi*); *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563 (S.D. Tex. 2005) (same).

## Conclusion

When it comes to shotgun pleadings, appellate courts have given trial courts their marching orders: “to undertake the difficult, but essential, task of attempting to narrow and define the issues from the earliest stages of the litigation” in order to ensure “the orderly, efficient, and economic disposition of disputes.” *Ebrahimi*, 114 F.3d at 165. The Eleventh Circuit and the Mississippi Supreme Court have stated in no uncertain terms the courts’ intolerance for such pleadings. Thus, both plaintiff and defense counsel would do well to recognize the impropriety of shotgun pleadings and to do their part to put a stop to such pleadings. ■



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