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How 'Purely Legal' Issues Ruling Applies To Rule 12 Motions

By **Blaine Evanson and Jeremy Christiansen** (August 30, 2023, 4:49 PM EDT)


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This past term, the U.S. Supreme Court resolved a decadeslong circuit conflict in Dupree v. Younger, holding that purely legal issues resolved on summary judgment need not be reraised in post-trial motions under Federal Rules of Civil Procedure 50(a) and (b) in order to preserve those issues for appellate review.[1]

The case provided much-needed uniformity on an important issue of trial and appellate practice, giving significant comfort to litigators about when they need to preserve certain arguments in order to have them reviewed on appeal.

But, as with many of the high court's decisions, the case leaves open some important questions. This article provides analysis regarding such a question: What impact does Dupree have on the denial of Rule 12(b) and (c) motions?

Understanding the follow-on impact of Dupree will be important for both trial and appellate counsel facing the question of what steps need to be taken to preserve certain arguments for appeal.

Dupree's Background, Holding and Reasoning

The petitioner in Dupree was a corrections officer who, along with other officials, was sued by the respondent, an inmate, under Title 42 of the U.S. Code, Section 1983.[2] As an affirmative defense, the petitioner pled that respondent failed to exhaust all administrative remedies.[3] Following discovery, the petitioner moved for summary judgment on this defense.

Although the U.S. District Court for the District of Maryland noted "factual disagreements between the parties about whether [respondent] had adhered" to the state's required administrative remedies statute, the district court concluded it "need not resolve [those] disputes," because it was undisputed that the state prison system "had internally investigated" the respondent's claim, and "that this inquiry satisfied [respondent's] exhaustion obligation" as a matter of law.[4]

The case proceeded to a jury trial, in which the petitioner did not present any evidence relating to the exhaustion defense, nor did he raise the defense in his Rule 50(a) motion or, following a verdict against him, in his Rule 50(b) motion.[5]

The petitioner appealed the district court's summary judgment ruling, but, following circuit precedent,

the U.S. Court of Appeals for the Fourth Circuit held that the defense was "not preserved for appellate review unless it was renewed in a post-trial motion — even when the issue is a purely legal one."[6]

In an opinion authored by Justice Amy Coney Barrett, the Supreme Court unanimously reversed, explaining that:

> While factual issues addressed in summary-judgment denials are unreviewable on appeal, the same is not true of purely legal issues — that is, issues that can be resolved without reference to any disputed facts.[7]

The court declined to decide whether the petitioner's particular issue was purely legal or not, leaving that for the court of appeals on remand, but the justices held that ultimately the "Fourth Circuit was wrong to hold that purely legal issues resolved at summary judgment must be renewed in a post-trial motion."[8]

Dupree's Impact on Rule 12 Motions

An issue not directly resolved by Dupree is what to do with other kinds of interlocutory rulings before summary judgment, and in particular, the denial of motions to dismiss for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6), and motions for judgment on the pleadings under Rule 12(c).[9]

Dupree's reasoning strongly suggests that at least some kinds of denials of Rule 12(b)(6) and 12(c) motions would fall within its rule. The key here is Justice Barrett's definition of the phrase "purely legal": "issues that can be resolved without reference to any disputed facts."[10] Not "were," or "must be," but "can."

During oral argument in Dupree, the respondent argued that it was not "well established that 12(b)(6) denials" for example, "are reviewable on appeal."[11]

Justice Barrett pointed out "that's a purely legal question," and asked whether additional steps were required to preserve the issue when denied on that basis.[12]

The respondent answered that 12(b)(6) motions "deal with the sufficiency of the pleadings," and that "by the time a case has gone to trial, the evidence overtakes those pleadings."[13]

But the respondent's point is true only for some kinds of Rule 12 decisions, ones that are indeed grounded in whether the plaintiff's factual allegations were sufficient.

If a purely legal issue — that is, one that can be resolved solely by reference to law — need only be denied once in order to preserve it for appeal, then it would seem to follow that many Rule 12(b) and (c) motions should similarly not require further action to preserve the issues for appeal.

The connection between those kinds of Rule 12 motions and purely legal summary judgment rulings is strong. In explaining the merger and final judgment rules, the Dupree court explained that interlocutory orders, like denials of summary judgment, are "typically not immediately appealable" until final judgment when all previous interlocutory orders "merge into the final judgment."[14]

At this stage, "claims of district court error at any stage of the litigation may be ventilated,"[15] including rulings from Rule 12 motions.[16] Indeed, Rule 12(d) explicitly permits a district court to convert Rule

12(b)(6) and Rule 12(c) motions into motions for summary judgment in certain circumstances, making the connection between these procedural devices even clearer.[17]

Importantly, when describing what might count as purely legal, the court cited a number of cases that support the conclusion that Dupree applies to at least some kinds of Rule 12 motion denials, for instance:

- Whether the relevant state law on malicious prosecution contained a rebuttable presumption based on the return of a grand jury indictment;[18]
- Whether a contractual term was ambiguous;[19]
- The proper interpretation of an unambiguous contract;[20] and
- Whether D.C. law permitted a condominium owner to use reasonable force in ejecting a trespasser from the common areas of the building.[21]

While these particular cases were decided on summary judgment, consider the kind of claims they represent: ones readily litigated on the pleadings in many instances. The examples fall into to two categories, broadly speaking.

First, there are decisions involving abstract legal questions about the availability of claims or defenses. Second, there is a decision about the application of the law to a stipulated set of facts. And all of these would be reviewed de novo on appeal. Other examples, even though not provided by the court, come readily to mind.

For instance, the meaning of a particular phrase in a statute or regulation, or whether an agency has been delegated particular regulatory authority, all seem to fit comfortably in the "purely legal" box.

If the district court decides these issues on purely legal grounds at the pleading stage, then counsel should generally feel comfortable that the issue has been preserved and there is no need to put the district court through "the tedium of saying no twice," something the Supreme Court called an empty exercise.[22]

The U.S. Court of Appeals for the Tenth Circuit has ruled that generally "a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a Rule 12(b)(6) motion to dismiss, but must instead challenge the legal sufficiency of the plaintiff's claim through a motion for judgment as a matter of law."[23]

But the Tenth Circuit, in line with Dupree, noted that it had created an exception "when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question."[24]

If the pleadings challenge raises federal preemption of the plaintiff's state cause of action, and the district court denies the motion on squarely legal grounds holding that there is no preemption under Dupree, counsel should not have to ask the district court to rule on that preemption argument again, either at summary judgment or post-trial.

Further factual development is irrelevant. The same could be said for the denial of a motion to dismiss in

a breach of contract claim if the court rejects defendant's proposed reading of the contract as a matter of law — but not if the interpretation turns on parol evidence.

By contrast, a Rule 12 argument that acknowledges the existence of a viable claim, but challenges the sufficiency of the facts pleaded in the complaint would likely need to be reraised at summary judgment, during trial and in post-trial motions in order to be properly preserved for appellate review.

Conclusion

Dupree has provided much needed uniformity regarding preservation of issues resolved on summary judgment, and its ruling should extend easily to the Rule 12 context.

That means that a purely legal argument raised and rejected on the pleadings need not be reraised throughout the case simply to preserve appellate review.

But the precise line between "purely legal" and mixed questions of fact and law is — as in the summary judgment context — not crystal clear, and counsel should carefully err on the side of asserting the argument before, during and after trial, so it is properly preserved for appeal.

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[1] Dupree v. Younger, No. 22-210, 2023 WL 3632755 (U.S. May 25, 2023).

[2]Id. at *2.

[3] Id.

[4] Ibid.

[5] Id. at *3.

[6] Ibid.

[7] Dupree, 2023 WL 3632755, at *4.

[8] Id. at *6.

[9] We are excluding from this analysis Rule 12(b)(1) motions, because lack of subject-matter jurisdiction is an argument that can be raised at any time in the proceedings, and cannot be waived, and we focus on Rule 12(b)(6) and Rule 12(c) because they are extremely common motions for pretrial resolution of legal issues.

[10] Id. at *6.

[11] Transcript.

[12] Id.

[13] Id.

[14] Dupree, 2023 WL 3632755, at *3-4.

[15] Id. at *3.

[16] Id. at *2.

[17] See Fed. R. Civ. P. 12(d).

[18] Rothstein v. Carriere, 373 F. 3d 275, 284 (2d Cir. 2004).

[19] In re AmTrust Financial Corp., 694 F. 3d 741, 750-751 (6th Cir. 2012).

[20] Chemetall GMBH v. ZR Energy Inc., 320 F. 3d 714, 719-720 (7th Cir. 2003).

[21] Feld v. Feld, 688 F. 3d 779, 783 (D.C. Cir. 2012).

[22] Dupree, 2023 WL 3632755, at *5.

[23] ClearOne Communications Inc. v. Biamp Systems, 653 F.3d 1163, 1172 (10th Cir. 2011).

[24] Ibid. (quoting Haberman v. Hartford Ins. Grp., 443 F.3d 1257, 1264 (10th Cir. 2006)).