



Responding To A Motion To Dismiss

The motion to dismiss is a defendant's request that the case be thrown out, usually because of a deficiency in the complaint or the way the complaint was served on the defendant. Failure to state a claim is the most common grounds for dismissal.

A judge can dismiss a claim with or without prejudice. A dismissal *without* prejudice is one where the plaintiff is allowed to amend the complaint or refile it. A dismissal *with* prejudice kills the claim. Dismissal of all the claims with prejudice ends the case. The plaintiff cannot refile the lawsuit. The only thing left for him to do is to appeal.

To successfully defeat the motion to dismiss, a pro se litigant must address the following potential responses.

1. The plaintiff's allegations don't fit the facts of the case.
2. There is a missing element of the claim.
3. There are no factual allegations in the complaint, only conclusions.
4. The plaintiff is suing for claims not recognized by law or statute.
5. The plaintiff alleges no injury or damages.

Example– Cammie

Cammie, a clothing designer, contracted with Fitting Flair, a clothing store, to sell a set number of pocket pants per month to Fitting Flair. At the time of the contract, Fitting Flair and its competitor, Shirley Girl, were the largest local distributors of upscale clothing for plus-sized women. Cammie had decided to go with Shirley Girl, the older and more established of the two companies, when Fitting Flair offered exclusive distributorship of her pocket pants design. Having an exclusive contract meant that Cammie's pants would be the only pocket pants sold at Fitting Flair. Pleased with this arrangement, she signed a 5-year contract with Fitting Flair.

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For a year, all went well. Then Cammie's sales started to nosedive. She went to Fitting Flair to determine what the problem was and saw pocket pants that she hadn't made. Eventually, Cammie came to believe that the cheap pocket pants she'd found in the store were the reason for her slump in sales. She sued Fitting Flair for breach of contract and tortious interference with prospective economic advantage.

Failure to state a claim assertion

Cammie has asserted two claims, breach of contract and tortious interference with prospective economic advantage. To allege failure to state a claim, the defendant, Fitting Flair, will try to defeat these. It might say any of the following:

1. The plaintiff's allegations don't fit the facts of the case.

2. There is a missing element of the claim.
3. There are no factual allegations in the complaint, only conclusions.
4. The plaintiff is suing for claims not recognized by law or statute.
5. The plaintiff alleges no injury or damages.

Defeating the Motion to Dismiss for Failure to State a Claim

To save her case, Cammie has to review her complaint and address each of the defects above. She must cure each of them.

Allegations don't fit the facts of the case. Fitting Flair can say that Cammie's allegations don't fit the facts of the case. Unfortunately for Fitting Flair, courts will deem the facts in the complaint as true. It will be up to Fitting Flair to prove the facts are not true.

If Cammie determines that Fitting Flair doesn't have a point, she'll respond to the motion by pointing to cases that say that courts are required to deem allegations in the complaint as true. If she guessed on some of the facts or exaggerated others, she can clear that up in discovery—or not. It depends on how Fitting Flair does with its case.

1. Missing elements of a claim

Fitting Flair can say that Cammie is missing at least one element of a claim. To address this, Cammie must understand the elements in each of her claims and match those elements with the facts.

Elements of breach of contract in Cammie's case

(1) the contract; (2) plaintiff's performance under the contract; (3) defendant's breach, and (4) damage to the plaintiff.

Elements of tortious interference

(1) An economic relationship that was likely to benefit the plaintiff; (2) The defendant's knowledge of this relationship; (3) Wrongful conduct by the defendant; (4) Defendant's intent to disrupt the

economic relationship; (5) Disruption of the relationship; (6) Harm to the plaintiff; and (7) A causal connection between the wrongful act and the harm.

For a full dismissal, Fitting Flair needs only to knock out one element for each claim. Let's say that in its motion to dismiss, Fitting Flair asserts that Cammie has not claimed damages. That's element 4 of the breach of contract claim. If Fitting Flair proves this, it wins a motion to dismiss on that claim.

What if Fitting Flair goes on to prove that the complaint failed to allege facts showing "wrongful conduct by the defendant" and "intent to disrupt the economic relationship" between Cammie and Shirley Girl? It would get a dismissal of the entire case because elements 2 and 3 of the tortious interference count would be gone.

The best news for Cammie is that even if Fitting Flair can knock out one or more elements of the complaint, she may be able to amend or refile it. If she feels Fitting Flair has no point, she'll respond with a line-by-line matching of the elements with the facts. Below is an example of that using the elements for breach of contract.

Element 1 – There must be a contract.

Cammie's facts. "The plaintiff and defendant had a written agreement to..."

Element 2– The plaintiff performed her end of the contract.

Cammie's facts. "The plaintiff consistently brought the allotted number of pieces to Fitting Flair on time by the terms of the contract."

Element 3– The defendant breached the contract.

Cammie's facts. "The plaintiff and defendant had an exclusive contract whereby the only pocket pants the defendant sold would be ones made by the plaintiff. Despite this, the defendant sold pocket pants made by other designers."

Element 4– The plaintiff suffered damages.

Cammie's facts. "By ignoring the exclusivity clause in the contract, the defendant caused sales of the plaintiff's pocket pants to plummet. The steep decline in sales was due to the sales of other

cheaper pocket pants of lesser quality.”

No factual allegations in the complaint. Fitting Flair can say that there are no factual allegations in the complaint, only conclusions. Cammie first must understand the difference between facts and conclusions. Then, if after her review of the complaint, she believes Fitting Flair has a point, she should amend her complaint to state the facts clearly. Then, she should make sure that each fact addresses at least one of the elements in the claim and does not draw conclusions.

Conclusion–“Defendant’s behavior constituted a breach of contract”.

Fact–“The plaintiff and defendant had an exclusive contract in which the plaintiff’s pocket pants would be the only ones of its kind sold by the defendant. Yet, the defendant sold pocket pants made by other designers.”

If Cammie disagrees with Fitting Flair, she can reiterate her allegations line by line and explain why each is a fact rather than a conclusion.

The claims are not recognized by law. In its motion to dismiss for failure to state a claim, Fitting Flair can allege that the plaintiff is suing for claims that are not recognized by law or statute. If true, this is probably the most harmful of allegations for failure to state a claim. The case can’t move forward. If the law doesn’t support the claim, Cammie can’t amend it. She must find another claim.

To prove Fitting Flair is incorrect, Cammie must find support for her claim in the laws of her jurisdiction. When she does this, she’ll insert the law(s) into her opposition to the motion and argue it at the hearing.

No injuries or damages. Finally, fitting Flair can allege that Cammie claimed no injury or damages in the complaint. If the allegation is true, Cammie should amend her complaint. If the accusation is not true, Cammie might have to be clearer about her damages and still amend her complaint.

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MELISSA MCALLISTER

FEBRUARY 27, 2023 AT 4:59 PM

This helped me tremendously today! I have a hearing tomorrow and this definitely helps me write up my argument. Thank you!!!

[Reply](#)

GEORGE

APRIL 12, 2023 AT 3:17 PM

Can I get a attorney to do my response to motion to dismiss??

[Reply](#)**HEIDI WOOD**

FEBRUARY 28, 2023 AT 11:58 PM

Yeah it helps me too, opposing counsel filed this, in an addition to a request for attorney fees. It's a custody modification request and I used the state forms 🙄🙄🙄

[Reply](#)**JS**

APRIL 15, 2023 AT 2:10 AM

Many, many THANKS for this...

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