Dupree Decision Blurs Lines Between Issues Of Law And Fact

By **Francis Morrison and Jarod Taylor** (August 11, 2023)

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Every first-year law student has fumbled with the nuances of distinguishing between "issues of law" and "issues of fact" in Civil Procedure fact patterns.

The U.S. Supreme Court's May decision in Dupree v. Younger gives this question renewed and even greater importance for trial lawyers in federal practice to consider how to best represent clients while still ensuring the preservation of their clients' appellate rights.[1]

In April, the Supreme Court heard oral argument in Dupree v. Younger, where the issue before the court was whether a post-trial Rule 50 motion is required to preserve for appeal a purely legal claim that was previously rejected at summary judgment. Previously, this question created a split of legal authority among federal courts, which the Supreme Court aimed to resolve by hearing this case.

On May 25, the court unanimously held, with Justice Amy Coney Barrett writing the opinion, that "[a] post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment" because, unlike factual issues, purely legal issues "are not 'supersede[d]' by later developments in the litigation."

In this decision, the court declined to determine whether the underlying issue raised in the case — the "exhaustion of remedies" defense under the Prison Litigation Reform Act — was factual or legal in nature, and vacated and remanded this question to the U.S. Court of Appeals for the Fourth Circuit to decide.

The Dupree decision openly acknowledged that in its past cases, such as Pullman-Standard v. Swint, the court "has previously noted the vexing nature of the distinction between questions of fact and questions of law."

To respond to this concern, Justice Barrett declined to adopt a bright-line rule for separating issues of law and fact, and instead raised the court's 2015 decision in Teva Pharmaceuticals USA Inc. v. Sandoz Inc., which stated that "[c]ourts of appeals have long found it possible to separate factual from legal matters."

Ultimately, the Dupree decision found that "[t]hough there will be edge cases, the experience of the majority of circuits demonstrates that the Courts of Appeals are up to the task" and noted that "prudent counsel" may be apt to renew issues on appeal in post-trial Rule 50 motions "out of an abundance of caution" to ensure that the issues are preserved for appeal.

With little guidance from the court on how to proceed, the Dupree decision has resolved one circuit split in exchange for a new swarm of potentially divisive determinations for federal practice: whether a given issue in a case is a question of fact or law.

Case law illustrates how these differences in separating issues of law and fact may manifest

across federal courts over time in the wake of this decision.

Distinguishing Factual vs. Legal Issues in Context

Case law that discusses the resolution of issues at the summary judgment stage is demonstrative of potential post-Dupree legal developments because, while not determined based on the Rule 50 standard, the Rule 56 standard — granting summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" — makes the inquiry of a certain issue being a question of law or fact similarly relevant.

To provide a broad overview, in the petitioner's brief for Dupree v. Younger, Dupree highlighted several cases where courts resolved "purely legal questions" at summary judgment, including on the following issues: (1) res judicata, (2) collateral estoppel, (3) choice of law, (4) preemption, (5) governmental immunity, (6) admissibility of evidence outside the administrative record, (7) the continuing vitality of past precedent, (8) interpretation of a contract's plain terms, and (9) the elements and scope of innumerable statutes and common-law doctrines.

However, these categories only make up purely legal questions when there is no genuine dispute of fact, per the Rule 56 standard.

Looking at various issues in antitrust and intellectual property cases further demonstrates the blurred lines between questions of fact and law, both from court to court and case to case.

Diving Deeper in Context

Antitrust Cases

A review of antitrust case law shows how different federal courts make different determinations on what constitutes an issue of law or fact in a given case.

Statutory interpretation may be a major area for variation among courts to separate factual and legal issues.

In its 1988 decision in Mt. Pleasant v. Associated Electric Cooperative Inc., the U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment for defendants, holding that the issue of whether the transfer of products from a parent company to a wholly owned subsidiary was a "sale" under the Robinson-Patman Act was a question of law.[2]

In antitrust law, the definition of a "relevant product market" in a case easily generates disputes between parties, making both its determination and the preservation of the issue on appeal extremely important for antitrust lawyers.

Many courts, including the U.S. Courts of Appeals for the Sixth Circuit,[3] Eighth Circuit,[4] and Ninth Circuit,[5] have stated that the definition of the relevant product market is an issue of fact that must be determined by a jury.

In contrast, the U.S. Court of Appeals for the Second Circuit held in its 1987 decision Belfiore v. N.Y. Times Co., that, where the dispute is over matters of policy rather than a genuine dispute of historical facts, the definition of a relevant product market may be a legal issue resolvable by summary judgment.[6]

To put a further wrinkle in these conclusions, the Ninth Circuit held in its 1989 decision in R.C. Dick Geothermal Corp. v. Thermogenics Inc., that, despite the definition of a relevant product market being a factual inquiry, the geographical boundaries of a market may instead present a question of law.[7]

"Capacity to conspire" can be another gray area between questions of fact and questions of law.

For example, the Second Circuit in Belfiore v. N.Y. Times Co. in 1987, has treated the issue of whether defendants had the capacity to conspire as a mixed question of law and fact which "requires a thorough application of the [legal] principles to the facts." And thus, because there was not enough evidence to create a genuine factual dispute in the case, summary judgment was affirmed.[8]

Similarly, the U.S. Court of Appeals for the Third Circuit has stated that capacity to conspire is a mixed question of law and fact where the court must resolve legal questions in its charge to the jury and the jury must resolve any remaining factual inquiries.

Intellectual Property Cases

The intellectual property case law reviewed below demonstrates how a single court, the U.S. Court of Appeals for the Federal Circuit, may come out differently on whether a particular issue is a question of law or fact based on the particular circumstances of the case before the court.

Patent claim construction is often a foundational question in intellectual property cases.

In Tillotson Ltd. v. Walbro Corp., the Federal Circuit stated in 1987 that claim construction was a mixed question that "is ultimately a question of law, but resolution of that question turns in significant part on underlying facts."[9]

This statement means that based on the variations in the underlying facts of specific cases, claim construction in one case may be a question of law resolvable by summary judgment, while in other cases depends on factual determinations.

The court ultimately found that summary judgment was inappropriate here where there were factual disputes over "the specification, the prosecution history, and the alleged industry practice[s]."

Finally, patent validity is another area where case-specific circumstances may change whether the question is one of law or fact.

In its 1986 decision in Custom Accessories Inc. v. Jeffrey-Allan Industries, the Federal Circuit found patent validity to be a mixed question of law and fact where "the ultimate question is one of law" but relies on "factual inquiries."[10]

Circling Back to Dupree and What Comes Next For Trial Lawyers

The case law reviewed above exemplifies the types of disputes and nuances that may arise for trial lawyers when separating issues of fact and law.

First, considerations may vary from court to court, resulting in an issue being ruled a

question of law in one federal jurisdiction and a question of fact in another.

Second, where a court determines an issue to be a mixed question of law and fact, differences in underlying facts may result in case-by-case determinations of the same issue in certain cases being legal or factual in nature.

Despite concerns raised and acknowledged in the Dupree opinion, Justice Barrett rejects creating a bright-line rule to separate issues of law and fact because of faith in the courts of appeals to make such determinations and because such a bright-line rule "would come at a steep cost: the loss of appellate review for unwary litigants who think it futile to relitigate an already-rejected legal argument."

Whatever its result, the court's decision in Dupree underlines considerations of factual and legal issues for trial lawyers as they navigate federal practice and subsequent legal developments across federal courts in the coming years.

As Justice Barrett noted, prudent trial counsel will be careful to preserve summary judgment rulings through the use of Rule 50(a) and (b) motions to preserve appellate rights in situations where there are mixed questions of law and fact.

Failure to do so may risk an appellate court ruling that an issue that counsel thought was a pure question of law was not a pure question of law, and therefore that issue would not be preserved for appeal, resulting in the loss of a client's appellate rights.

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[1] Dupree v. Younger, No. 22-210, slip op. (May 25, 2023).

[2] Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 270 (8th Cir. 1988).

[3] Stone v. William Beaumont Hosp., 782 F.2d 609 (6th Cir. 1986).

[4] Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987).

[5] Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989).

[6] Belfiore v. N.Y. Times Co., 826 F.2d 177 (2d Cir. 1987).

[7] R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139 (9th Cir. 1989).

[8] Belfiore v. N.Y. Times Co., 826 F.2d 177 (2d Cir. 1987).

[9] Tillotson, Ltd. v. Walbro Corp., 831 F.2d 1033, 1034 (Fed. Cir. 1987).

[10] Custom Accessories, Inc. v. Jeffrey-Allan Indus., 807 F.2d 955, 956 (Fed. Cir. 1986).