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The Supreme Court Imposes Stricter Requirements for Pleading a Federal Case in *Iqbal* and *Twombly*

It was “[t]he most consequential decision of the Supreme Court’s last term.”¹ It “made it easier than ever for defendants to shut down lawsuits before they get to the costly discovery stage.”² It “messed up the federal rules.”³

“It” is *Iqbal*,⁴ the May 2009 decision in which the U.S. Supreme Court announced a new, stricter, standard for pleading a complaint in federal court, based on the Court’s 2007 decision *Bell Atlantic Corp. v. Twombly*.⁵

The new standard is a rejection of the familiar formula set forth in the Court’s 1957 decision *Conley v. Gibson*.⁶ Under the generous *Conley* standard, a complaint in federal court was to be dismissed for failure to state a claim only if “it appear[ed] beyond doubt” to the court “that the Plaintiff [could] prove *no* set of facts in support of his claim which would entitle him to relief.”⁷ *Conley* did not require that the facts that would support the claim appear in the complaint itself. Indeed, under *Conley*’s “no set of facts” test, a Plaintiff could “plead himself out of court” by pleading too many facts, foreclosing theories that otherwise would have been consistent with the allegations.⁸

In 2007, a half century after its issuance, *Conley*’s “no set of facts” standard was invariably cited in rulings on motions to dismiss under Fed. R. Civ. P. 12(b)(6).⁹ That year, though, in *Twombly*, the Supreme Court upheld the dismissal under Rule 12(b)(6) of a claim of conspiracy under the Federal antitrust laws, on the ground that Plaintiffs failed to plead “enough facts to state a claim to relief that is plausible on its face.”¹⁰ The Court explained that the federal rules require “[f] actual allegations” that “must be enough to raise a right to relief above the speculative level.”¹¹ Plaintiffs argued that dismissal at the 12(b)(6) stage for lack of a “plausible” claim would conflict with *Conley*. The Court responded by expressly rejecting *Conley*’s “no set of facts” standard. The Court did not exactly overrule *Conley*, but it did render *Conley*’s statement of the pleading standard, as a Presidential press secretary once famously said,¹² inoperative: “this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard ...”¹³

The Court in *Twombly* was frank in justifying its decision in part on the basis that “proceeding to antitrust discovery can be expensive,”¹⁴ and that the only hope of avoiding that “potentially enormous expense” is to “tak[e] care to require allegations” that plausibly suggest an agreement in violation of the antitrust laws.¹⁵ In light of these statements, and perhaps disbelief that the Court had really intended to undo fifty years of precedent, there was some speculation that the stricter standard for pleading would be confined to antitrust or other discovery-intensive types of cases.¹⁶

In 2009, though, in *Iqbal*, the Court confirmed that *Twombly* was no anomaly. The Court held that the plausibility standard set forth in *Twombly* applies to all complaints filed in Federal court,¹⁷ and

that the complaint in *Iqbal* failed to meet that standard. In *Iqbal*, Plaintiff, a Pakistani Muslim arrested after the September 11 attacks, sued numerous federal officers and officials alleging that each of them “knew of, condoned, and willfully agreed to subject” respondent to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin.”¹⁸ The Court held that, as to the petitioners before the Court (former Attorney General Ashcroft and FBI Director Mueller), the complaint was too conclusory¹⁹ and did not “contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind. [The] pleadings thus do not meet the standard necessary to comply with Rule 8.”²⁰

Iqbal also set forth a “two-pronged”²¹ analytical framework for applying the *Twombly* standard when a pleading is challenged: first, the court identifies and disregards conclusory allegations, since “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”²² Second, the court applies the plausibility test, by examining the factual allegations that remain after legal conclusions have been set aside to “determine whether they plausibly give rise to an entitlement to relief.”²³

As to the first part of the inquiry, a complaint “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”²⁴ Post-*Iqbal*, courts have on occasion found in their analyses that the pleading of extensive factual detail in support of the elements of the claim suffices,²⁵ which suggests that the safer course for drafters of complaints is to err on the side of length rather than the “short and plain statement”²⁶ enshrined as the ideal under the Federal Rules of Civil Procedure.²⁷

Critics of *Twombly* and *Iqbal* argue that requiring a plaintiff to plead facts prior to access to the opponent’s files is unfair, particularly as to employment discrimination claims²⁸ and other civil rights claims,²⁹ where plaintiffs may not have direct evidence and “need access to discovery to explore whether they can find needed factual support.”³⁰ An empirical study claims that the rate of dismissal for civil rights cases “spiked” in the immediate post-*Twombly* era.³¹ Defense counsel can counter that the standard is working just as intended if it weeds out, before expensive discovery occurs, claims that are unsupported by facts, and if it lessens the incentive to settle meritless claims solely due to the expense of discovery.³²

As to the second part of the *Iqbal* inquiry, the Court stated in *Iqbal* that plausibility exists when facts are pled that “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³³ The Court did not otherwise provide the lower courts with guidelines for the plausibility determination, since it “will

... be a context-specific task" requiring the court "to draw on its judicial experience and common sense."³⁴ *Twombly* and *Iqbal* also provide little guidance for calibrating the plausibility standard because the Court's applications of the standard in those cases are not easily analogized to other areas of law. The claim of illegal conspiracy under the antitrust laws in *Twombly* required plausible allegations of an actual agreement, which under the pertinent caselaw cannot be inferred from allegations of "parallel conduct" by the alleged conspirators.³⁵ Similarly, in *Iqbal*, the complaint had to allege plausibly that there was direct discriminatory intent by defendant officials, since under applicable law they could not be held vicariously liable for discriminatory actions by lower-level employees.³⁶ The claims in those cases thus faced, it could be argued, unique evidentiary hurdles. Nevertheless, some district courts have extracted from certain language in *Twombly* a rule of thumb that pleadings that fail to eliminate obvious alternative explanations for Defendant's conduct can be held to be implausible.³⁷

In any event, the Court has made clear that federal complaints will now be perused for factual details and plausibility before the plaintiff will be allowed to "unlock the doors of discovery."³⁸ ●

Endnotes

- 1 Adam Liptak, "9/11 Case Could Bring Broad Shift on Civil Suits," *New York Times*, July 21, 2009, p. A10 (retrieved Dec. 3, 2009 at nytimes.com/200907/21/us/21bar.html?_r=1&ref=us).
- 2 Tony Mauro, "Plaintiffs Groups Mount Effort to Undo 'Iqbal,'" *The National Law Journal* (Sept. 21, 2009) (retrieved December 3, 2009 at law.com/jsp/law/LawArticlefriendly.jsp?id=120243391370).
- 3 *Id.* (quoting Justice Ruth Bader Ginsburg).
- 4 *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009).
- 5 550 U.S. 544 (2007).
- 6 355 U.S. 41 (1957).
- 7 *Id.* at 45-46 (emphasis added).
- 8 *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7th Cir. 1986) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded").
- 9 A search of LEXISNEXIS' database for United States District Court decisions shows that courts invoked the "no set of facts" standard over 1,900 times in the six months immediately before *Twombly* was issued (on May 21, 2007).
- 10 550 U.S. at 570.


- 11 *Id.* at 555.
- 12 Tina Kelley, "Ron Ziegler, Press Secretary to Nixon, Is Dead at 63," *New York Times*, Feb. 11, 2003, p. B9 (retrieved Dec. 3, 2009 at nytimes.com/2003/02/11/us/ron-ziegler-press-secretary-to-nixon-is-dead-at-63.html).
- 13 *Twombly*, 550 U.S. at 563.
- 14 *Id.* at 558.
- 15 *Id.* at 559.
- 16 See *Hensley Mfg. v. Pro-Pride, Inc.*, 579 F.3d 603, 609 n.4 (6th Cir. 2009) (noting the speculation). See also Douglas C. Smith, *The Twombly Revolution?*, 36 *Pepp. L. Rev.* 1063, 1081-85 (2009) (rejecting the attempts to limit *Twombly*'s scope); Note: Much Ado About *Twombly?* A Study on the Impact of *Bell Atlantic Corp. v. Twombly* on 12(b)(6) Motions, 83 *Notre Dame L. Rev.* 1811, 1824-26 (2008) (summarizing views of various commentators).
- 17 129 S. Ct. at 1953.
- 18 *Id.* at 1944.
- 19 *Id.* at 1951.
- 20 *Id.* at 1952.
- 21 *Id.* at 1950.
- 22 *Id.* at 1949.
- 23 *Id.*
- 24 *Id.* In his dissent in *Twombly*, Justice Stevens argued that the drafters of Rule 8 rejected the fact/ conclusion dichotomy as unworkable. 550 U.S. at 574-75 (Stevens, J., dissenting).
- 25 *Griffin-El v. Beard*, 2009 U.S. Dist. LEXIS 92975, *7 (E.D. Pa. Oct. 5, 2009) ("highly detailed factual allegations"); *Dual-Temp of Ill., Inc. v. Hench Control Corp.*, 2009 U.S. Dist. LEXIS 89088, *17 (N.D. Ill. Sept. 28, 2009) ("Plaintiff provided extensive factual detail"); *Tyree v. Zenk*, 2009 U.S. Dist. LEXIS 43872, *20 (E.D.N.Y. May 22, 2009) ("detailed factual allegations about the incidents").
- 26 Fed. R. Civ. P. 8.
- 27 Few of the forms of complaints accompanying the Rules are more than four paragraphs long, and under Rule 84 those forms "suffice" and "illustrate the simplicity and brevity that these rules contemplate."
- 28 Mauro, cited at note 2 above.
- 29 A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 *How. L.J.* 99, 160 (2008).
- 30 *Id.*
- 31 Note: Much Ado About *Twombly?* A Study on the Impact of *Bell Atlantic Corp. v. Twombly* on 12(b)(6) Motions, 83 *Notre Dame L. Rev.* 1811, 1815 (2008).
- 32 See Smith, at 1067 (cited at note 16 above).
- 33 *Iqbal*, 129 S. Ct. at 1949.
- 34 *Id.* at 1950.
- 35 550 U.S. at 553-54.
- 36 129 S. Ct. at 1948.

- 37 *Haley v. CMS*, 2009 U.S. Dist. LEXIS 110839, *2 (E.D. Mo. Nov. 30, 2009) ("When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred."); *Patterson v. O'Neal*, 2009 U.S. Dist. LEXIS 110333, *19 (N.D. Cal. Nov. 25, 2009) ("This Court may evaluate conclusory allegations in light of 'obvious alternative explanation[s]' in order to determine whether they are, in fact, plausible."); *Willets Point Indus. & Realty Ass'n v. City of New York*, 2009 U.S. Dist. LEXIS 110181, *10 (E.D.N.Y. Nov. 25, 2009) ("where there is an 'obvious alternative explanation' that is more likely, the plaintiff's cause of action is not plausible and must be dismissed."); *Springs v. Mayer Brown, LLP*, 2009 U.S. Dist. LEXIS 97081 (W.D.N.C. Oct. 20, 2009), *9 ("if after taking the complaint's well-pleaded factual allegations as true, a lawful alternative explanation appears a 'more likely' cause of the complained of behavior, the claim for relief is not plausible").
- 38 *Iqbal*, 129 S. Ct. at 1949.

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