To plead or not to plead?

Federal court's shift from conceivable to plausible

BY ADAM THAMES

Typically, pleadings unlock the door of the judicial system for aggrieved persons looking to have their day in court. While getting through the courthouse door is a necessary step, one's day will be short lived if the initial pleading does not meet the requirements of the chosen venue. Rule 8 of the Federal Rules of Procedure sets the tone for those filing a complaint in federal court, requiring, among other things, "a short and plain statement of the claim showing that the pleader is entitled to relief."

For more than half a century, federal courts were content that under Rule 8, a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[1] This pleading standard, which the Supreme Court first enunciated in *Conley v. Gibson* in 1957, essentially endorsed notice pleading as opposed to fact pleading.[2] The *Conley* court declared that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."[3]

The Supreme Court's interpretation of Rule 8, and particularly the concept of notice pleading, changed in 2007 with *Bell Atlantic Corp. v. Twombly*, an antitrust case alleging conspiracy to restrict competition among telecommunication providers.[4] For the first time in more than 50 years, *Twombly* heightened the federal pleading standard, requiring that a complaint include "only enough facts to state a claim to relief that is plausible on its face."[5] In so holding, the Court recognized the tension between the new "plausibility" requirement and a literal interpretation of *Conley's* "no set of facts" standard, and unequivocally stated that the latter had "earned its retirement" and "is best forgotten."[6] Dissenting Supreme Court Justices Stevens and Ginsburg lamented *Conley's* demise, stating that "[i]f Conley's 'no set of facts' language is to be interred, let it not be without eulogy."[7]

Despite the express holding of *Twombly*, uncertainty remained as to whether the "plausibility" requirement should apply to all civil claims, or instead to only antitrust claims—the claims at issue in *Twombly*.[8] Notably, just two weeks after *Twombly*, the Supreme Court ruled on another motion to dismiss in *Erickson v. Pardus*.[9] There, in finding for the plaintiff, the Court reiterated that Rule 8 requires only a "short and plain statement" and held that "[s]pecific facts are not necessary; the statement need 'only give the defendant fair notice of what the … claim is and the grounds upon which it rests.'"[10] For many, *Pardus* seemed to suggest that the heightened standard set forth in *Twombly* was limited solely to antitrust claims.

Any question as to the scope of *Twombly's* reach, however, was necessarily put to rest by *Ashcroft v. Iqbal*.[11] The Supreme Court's decision in *Iqbal* made it clear that the *Twombly* "plausibility" standard applied to all cases in federal court, explaining that *Conley's* "no set of facts" standard was no longer the law of the land.[12] Instead, per *Iqbal*, a plaintiff must now demonstrate to the Court that

his complaint possesses "facial plausibility" and must plead enough "factual content that allows the court to draw reasonable inference that the defendant is liable."[13]

Iqbal concerned the federal government's allegedly discriminatory detention of Muslim men following the infamous Sept. 11, 2001, terrorist attacks on U.S. soil. In dismissing the action, the Court, pursuant to *Twombly*, held that *Iqbal's* accusations that he was confined because of race, religion, or national origin had "not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[14] In particular, the Court found the allegations to be too "conclusory."[15]

Under *Iqbal*, the facts pleaded must now represent more than a "mere possibility" of wrongdoing.[16] To determine whether the plaintiff's claims are "plausible," the Court encouraged jurists to draw on their "judicial experience and common sense."[17] Because experience and common sense are certainly relative, such a subjective standard could be difficult to apply uniformly across the judiciary. For example, in *Boykin v. KeyCorp*, the Second Circuit stated that the Court intended to "make some alteration in the regime of pure notice pleading" but "does not offer much guidance to plaintiffs regarding when factual 'amplification [is] needed to render [a] claim plausible.'"[18] Similarly, in *Courie v. Alcoa Wheel & Forged Products*, the Sixth Circuit recognized the new pleading standard set forth by *Iqbal* and explained that "[e]xactly how implausible is 'implausible' remains to be seen."[19]

Despite the initial uncertainty following *Iqbal*, appellate courts have since settled into the post-*Twombly/Iqbal* framework, and extended discussions of the "plausibility" standard are becoming less common in judicial opinions.[20] Nonetheless, the heightened pleading standard of *Twombly/Iqbal* has undoubtedly made it more difficult to bring claims in federal court. According to Stephen B. Burbank, an authority on federal civil procedure at the University of Pennsylvania Law School, *Twombly/Iqbal* serves as "a blank check for federal judges to get rid of cases they disfavor."[21] Judge Posner of the United States Court of Appeals for the Seventh Circuit wrote in August 2009 that *Twombly* was "fast becoming the citations *du jour* in Rule 12(b)(6) cases, as authority for the dismissal of the suit."[22]

At least one scholar found that there has been a statistically significant increase in the likelihood that a motion to dismiss will be granted under *Twombly/Iqbal*. Specifically, Professor Hatamyar, Associate Professor at St. Thomas Law, found that under *Twombly/Iqbal,* the odds of a 12(b)(6) motion being granted rather than denied were greater than under *Conley*, holding all other variables constant.[23] Admittedly, this increase could be due to the fact that the heightened standard encourages

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the filing of 12(b)(6) motions that likely would not have been filed under *Conley*. Thus, even though *Twombly/Iqbal* may make it easier to win a 12(b)(6) motion, there may be more long shot motions filed, leaving the overall likelihood of success unchanged.[24]

The debate on the Court's major departure from the established precedent of *Conley* and the proper role of pleadings and pretrial motions continues to rage on among those advocating for plaintiffs and defendants, respectively.[25] The defense bar, along with the large entities it typically represents, believe that a heightened pleading standard is necessary to reduce the cost of litigation, weed out abusive lawsuits and protect American business interests.[26] The plaintiffs' bar, supported by various civil rights, consumer and environmental protection groups, believes that heightened pleading will prohibit meritorious claims before ample discovery, undermine various state and national policies, and increase the burden on under-resourced plaintiffs.[27]

Despite ongoing debate over *Twombly's* and *Iqbal's* implications, advocates and critics alike can agree that preparing a complaint in federal court that will withstand a Rule 12(b)(6) motion to dismiss is now far more demanding than it once was under *Conley*. In his dissent in *Iqbal*, Justice Souter wrote that judges should accept the accusations in a complaint as true, "no matter how skeptical the court may be."[28]

"The sole exception to this rule," at least according to Justice Souter, "lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[29] That, however, is arguably no longer the law. Under the *Twombly/Iqbal* framework, federal judges will now decide at the genesis of litigation whether a plaintiff's allegations ring true, and they will effectively close the courthouse door if they do not.[30]

[1] *Conley v. Gibson*, 78 S.Ct. 99, 102 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007).
[2] Lori Andrus, *In the Wake of* Iqbal, Trial Magazine, March 2010.
[3] See *id*.; *Conley*, 78 S.Ct. at 103.
[4] 127 S.Ct. 1955 (2007).
[5] *Id.* at 1960.
[6] *Id.* at 1969.
[7] *Id.* at 1978 (Stevens, J., dissenting).
[8] *See* John S. Summers & Michael D. Gadarian, *Imagine The Plausibilities: Life after* Twombly *and* Iqbal, 37 Litigation Magazine 36 (Winter 2011).
[9] 127 S.Ct. 2197 (2007).
[10] *Id.* at 2200 (quoting *Twombly*, 127 S.Ct. at 1955).
[11] 129 S.Ct. 1937 (2009).
[12] *Id.* at 1953.
[13] *Id.* at 1949.
[14] *Id.* at 1950-51.
[15] *Id.* at 1951.
[16] *Id.* at 1950.